RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
DAVID M. HICKS

ALSO KNOWN AS:

ABU MUSLIM AL AUSTRAILI
MUHAMMED DAWOOD

NO. 040001

VOLUME ___ OF ___ VOLUMES

TRANSCRIPT
AUG. 25 AND NOV. 1-3, 2004 SESSIONS
(REDACTED VERSION)

United States v. David M. Hicks

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UNITED STATES v. DAVID MATTHEW HICKS a/k/a Abu Muslim al Austraili a/k/a Muhammed Dawood	COMMISSIONS HEARING

held at

Guantanamo Bay, Cuba

on

25 August 2004

PERSONS PRESENT:

PRESIDING OFFICER:	Colonel Peter E. Brownback III, USA
PROSECUTION COUNSEL:	Lieutenant Colonel [redacted] USMC
ASST PROSECUTOR:	Major [redacted] USA
DEFENSE COUNSEL:	Mr. Joshua Dratell
ASST DEFENSE COUNSEL:	Major Michael Mori, USMC Major Jeffrey Lippert, USA
MEMBERS:	Colonel [redacted] USMC Colonel [redacted] USMC Colonel [redacted] USAF Lieutenant Colonel [redacted] USAF
ALTERNATE MBR:	Lieutenant Colonel [redacted] USA
COURT REPORTERS:	Gunnery Sergeant [redacted] Sr., USMC Sergeant [redacted] USMC

The Commissions Hearing was called to order at 0931, 25 August 2004.

PO: The military commission is called to order.

AP (Maj [redacted]): This military commission is convened by Appointing Order Number 04-0001 dated 25 June 2004; copies of which have been furnished to the members of this commission, counsel, and the accused and which have been marked as Review Exhibit 1 for attachment to the record.

The presidential determination that the accused may be subject to trial by military commission has been marked as Review Exhibit 2 for inclusion in the record. At this time, I am providing Review Exhibits 1 and 2 to the bailiff to be provided to the court reporter.

The charges have been properly approved by the appointing authority and referred to this commission for trial. The prosecution has caused a copy of the charges in English to be served on counsel for the accused on 10 June 2004 in accordance with counsel request to personally serve the accused.

The prosecution is ready to proceed in the commission trial of United States v. David Matthew Hicks. The accused, all commission members and the alternate commission member named in the appointing order and detailed to this commission are present. All detailed counsel are present and civilian counsel is also present.

Gunnery Sergeant [redacted] and Sergeant [redacted] have been detailed reporters for this commission and have been previously sworn. Security personnel have also been detailed for this commission and have also been previously sworn.

PO: I have been designated as the presiding officer of this military commission by the appointing authority and have previously been sworn. The other members of the commission and the alternate member will now be sworn. All persons in the courtroom please rise.

The members were sworn.

PO: The commission is now assembled.

Trial, please state who detailed you and your qualifications.

P (LtCol [redacted]): Sir, all members of the prosecution have been detailed to this military commission by the chief prosecutor. All members of the prosecution are qualified under Military Commission Order Number 1, Paragraph 4(b) and have previously been sworn. No member of the prosecution has acted in any manner which might tend to disqualify us in this proceeding. The detailing document is now being marked as Review Exhibit 3 for inclusion in the record, and now providing that to the bailiff.

PO: Mr. Hicks, pursuant to MCO Number 1 you are currently represented by your detailed defense counsel, Major Mori and Major Lippert. They are provided to you at no expense. You can also request a different military lawyer to represent you. Now, if that person is reasonably available, they would be appointed to represent you. If you request another military lawyer and that lawyer is made available then your detailed counsel would normally be excused because usually you are only entitled to detailed or selected counsel.

However, you could request that the appointing authority or the general counsel allow your detailed counsel to stay on the case. You may also be represented by civilian counsel. A civilian lawyer would represent you at no expense to the government and must be a U.S. citizen certified to practice law in a state of the United States, or in the federal court, be eligible for secret clearance, and agree in writing to comply with the rules and orders of the commission. If a civilian counsel comes on the case, your detailed counsel will remain on.

Do you understand what I just told you?

ACC: Yes, sir.

PO: Do you have any questions about your rights as to representation in this commission?

ACC: No, sir.

PO: Okay. By whom do you wish to be represented?

ACC: By the lawyers present, sir.

PO: Okay. Have you made a request prior to this date for individual counsel, for selected counsel?

ACC: Yes, sir.

PO: Major Mori, can you tell me about the request?

ADC (Maj Mori): Yes, sir. Mr. Hicks requested selected military counsel previously; that request was denied.

Review Exhibit 4 was marked for the record.

PO: Do you have the paperwork on all that?

ADC (Maj Mori): Yes, sir. The defense counsel has previously provided it to the court reporter for attachment to the record as the next review exhibit, sir.

PO: Mr. Hicks, absent the IMC request which was denied, are you satisfied with the counsel who are now representing you?

ACC: Yes, sir.

PO: Okay. Defense, please announce your qualifications and detailing.

ADC (Maj Mori): Yes, sir. All detailed members of the defense team have been detailed to the military commission by the chief defense counsel. All detailed members are qualified under Military Commission Order Number 1, Paragraph 4(C) and we have previously been sworn, sir. No member of the defense team has acted in any manner which might tend to disqualify us from participating in this commission, sir. The detailing letters have been previously provided to the court reporter and asked that it be marked as the next review exhibit, sir.

Sir, now handing the court reporter the extra exhibit.

Review Exhibit 5 was marked for the record.

PO: Mr. Dratell is present in the courtroom. Please rise.

DC (Mr. Dratell): Thank you, Colonel. I am Joshua Dratell, civilian defense counsel, who has been determined to be

qualified for membership in the pool of qualified civilian defense counsel in accordance with section 4(C)(3) of Military Commission Order Number 1. I have transmitted my notice of appearance through the chief defense counsel. I have signed the civilian defense counsel agreement to practice before military commission and I have not acted in any manner that may tend to disqualify me to practice in this proceeding.

PO: Have you provided the notice of appearance to the gunny for inclusion in the record?

DC (Mr. Dratell): Yes, it has, Your Honor.

PO: Can you mark that as next in line, Gunny. RE 6.

Civilian defense counsel will now be sworn. Please rise, Mr. Dratell.

The civilian defense counsel was sworn.

PO: All personnel appear to have the requisite qualifications. All personnel are required to be sworn before we proceed. I received this morning a defense objection to placement of security personnel dated the 23rd of August, which was Monday. Is this still a valid something or another?

ADC (Maj Mori): Yes, sir. We would like to note the objection for the record.

PO: You want to argue it, or just note it?

ADC (Maj Mori): Just note it, sir.

PO: Please pass this to the Gunny and this will be the next review exhibit in line.

Trial, have the charge sheet marked as the next review exhibit and attach it to the record please.

P (LtCol [redacted]): Yes, sir. I believe we are up to RE 8.

Review Exhibits 7 and 8 were marked for the record.

PO: Defense, have you gotten a copy of the charges already?

DC (Mr. Dratell): Yes we have, Your Honor.

PO: All parties of the trial have been furnished a copy of the charges. Prosecutor, announce the general nature of the charges please.

P (LtCol [redacted]): Yes, sir. The general nature of the charges in this case are: Charge I, conspiracy to attack civilians, to attack civilian objectives, to commit murder by unprivileged belligerent, to commit the offense of the destruction of property by an unprivileged belligerent, and to commit the offense of terrorism; Charge II, attempted murder by an unprivileged belligerent; and Charge III, aiding the enemy.

PO: Members, please turn to the package in front of you. You got a copy of charge sheet in there. Take a moment to review the charge sheet and also the appointing order.

The members did as directed.

PO: While reviewing, trial, was the security officer previously sworn? I didn't note that.

P (LtCol [redacted]): Yes, sir.

PO: Thank you. All members had a chance to review the charge sheet? Apparently so.

Is the name, rank, and other identifying data of each member listed correctly on the appointing order? Apparently so.

Either party want the charges read? Trial?

P (LtCol [redacted]): Prosecution does not, sir.

PO: Defense?

DC (Mr. Dratell): Mr. Hicks does not wish it read here, sir.

PO: Thank you. The reading of the charges may be omitted.

Okay. Members of the commission, and alternate member, the appointing authority who detailed you has the ability to remove you from this commission for good cause. Is any member, or the alternate, aware of any matter that you feel might affect your impartiality, or ability to sit as a commission member? When you answer

that question keep in mind you don't want to bias other members? Any member? Apparently not.

Okay. I previously filled out a commission member questionnaire, provided counsel for both sides with a summarized biography, a list of matters that normally would be asked during voir dire, a document about how I know the appointing authority, and other personnel, and answers to questions suggested by defense counsel. That packet will now be marked as the next RE in line.

Review Exhibit 9 was marked for the record.

Those documents are true to the best of my knowledge and belief.

We had basically two pretrial conferences, present which were defense and trial and myself; and during the course of these proceedings I will be referring to them. If something happened during one of those conferences that I don't cover or you want covered, trial, defense, speak up. Okay.

During one of those, Major Mori, you and I had a discussion on the standard for challenge in the commission proceedings, and you wanted me to articulate what I, as the presiding officer, believed the standard for challenge is; is that correct?

ADC (Maj Mori): Yes, sir.

PO: Referring to MCO Number 1, Paragraph 4(A)(3) which states the qualifications for a member, and then referring to MCO 1, Paragraph 6(B)(1) and (2), I believe that the standard is whether there is good cause to believe that the member cannot impartially and expeditiously provide a full and fair trial to Mr. Hicks. Do you wish, not perhaps at this time, to articulate a different standard to the person who will make the decision in this case?

ADC (Maj Mori): Yes, sir.

PO: At a later time if we have challenges, I will tell you when you have to provide that standard. If I fail to tell you at that time, please remind me.

ADC (Maj Mori): Yes, sir.

PO: Okay. I will, however, permit you latitude in your questioning going towards the area that you want. You are looking for what we commonly called 912(N); right?

DC: Yes, sir.

PO: Okay. Thank you. Does either side want to voir dire me outside the presence of the other members?

P (LtCol [redacted]): No, sir.

DC (Mr. Dratell): Yes, sir.

PO: Thank you. Members, please return to the deliberation room.

Be seated. Let the record reflect the members, except for the presiding officer, have left the courtroom.

I noted yesterday that we have a joint problem here. In the Army when a single member walks into the courtroom except for the judge, no one rises. Apparently in the Naval services you all rise. Individual members of the defense and prosecution team may rise or not as they wish when the single member walks in or leaves. It is up to you, but the only requirement is when all the members come in, or I come in, you rise.

I have got a copy of the PE that was just marked -- or RE that was just marked, Number 9 which was my voir dire packet. This morning in that latest conference counsel for both sides were handed a copy of the voir dire up to where we broke for closed session yesterday. Counsel for both sides you both stated you intend to focus the voir dire on the questionnaires, and this is not just for me, it is for the other members too, in what was said in voir dire yesterday and you wish to have appended to the record of trial as RE 10 all portions of the Hamdan record of trial that were -- don't get excited yet -- that were held during the open sessions concerning voir dire. Which includes -- just a second, Major Mori -- which includes all the voir dire, all the challenges, and then at the end of the day there was a further reopening of voir dire of the presiding officer. That will be RE 10. RE 11 will be the closed session voir dire from Hamdan. I am not going to mix closed and none closed if I don't have to.

Is that what you all wanted, trial?

P (LtCol [redacted]): Yes, sir. Except for that it was our understanding that counsel voir dire of the whole panel would also not be --

PO: I said all the voir dire. Everyone's.

P (LtCol [redacted]): Yes, sir.

PO: Everything that had to do with the voir dire. You understood what I meant didn't you, Gunny? Yeah, the Gunny knew. We will look at the RE before it is finalized, okay. Is that what you want, defense?

DC (Mr. Dratell): Yes, sir.

PO: Mr. Hicks, you weren't present yesterday during the voir dire; right?

ACC: Yes, sir.

PO: Okay. Your counsel got a copy of the voir dire, somewhere on their thing. They intend to refer to it in questioning me and the other members today to what happened yesterday. You got any objection to that?

ACC: No, sir.

PO: Okay. Trial, voir dire?

P (LtCol [redacted]): None, sir.

PO: Defense, go on.

DC (Mr. Dratell): Yes, sir. Colonel, I want to focus first on something that was brought up yesterday with respect to your intention to advise the other members on the law, in addition to also then receiving law from either side. And in your experience as a military judge, would you ever let an attorney sitting on a military jury express an opinion as a lawyer on the law to a jury that is supposed to be made up of equal members?

PO: I have never seen an occasion to have an attorney sit on a jury panel, but no I wouldn't.

DC (Mr. Dratell): Is that what we have here, in essence, a jury

of equal members, none of whom should be superior to the other with respect to understanding or expression of the law.

PO: Okay. I will answer your question, but let me say that I believe, and I direct Major Mori to provide a brief on this, Major Mori.

ADC (Maj Mori): Yes, sir.

PO: Because there are two parts to it. The SECDEF has said there is going to be a lawyer on this panel; right?

DC (Mr. Dratell): Yes.

PO: Okay. So you're objecting or Major Mori is writing a motion objecting to the structure of the panel.

DC (Mr. Dratell): That's true.

PO: Okay. That's the structure of the panel. So it doesn't matter in many ways what I think about that because that is a structure that you can bounce me off and I believe that the appointing authority will say, okay, he's bounced and let's put another lawyer on there. Can we just let that portion of this voir dire sit as a motion to the structure, and now you can ask me what I will do.

DC (Mr. Dratell): And it is not -- it's not simply the structure but it is also your intention to advise the panel on the law, that's part of it. So it's not just that there is a lawyer because there are lawyers that sit on civilian juries all the time, they are just not permitted to advise other jurors as to the law. And that is the province of the judge, and in this situation we don't have a judge. But and in the sense that you have instructed the members that they are not required to follow your expression of the law and they are free to adopt either side's expression of the law, or yours, or their own, but do you acknowledge the possibility, and really the distinct possibility that the members, or any member, all of whom are non-lawyers will give your expression of the law more deference than they will to either counsel, or to their own?

PO: When I see Major Mori's motion, if it is made to me I will be glad to answer the structural question. Now, I will, if you want to say, Brownback, will you tell us that you

are not going to provide advice to the panel other than what you do while you are sitting here, that's a different matter. Is that what want, I mean --

DC (Mr. Dratell): No. No, my question is -- and if you consider this a structural question then you do; but my question is really do you acknowledge the possibility that a member or all of the members who are non-lawyers will give your expression of the law more deference than they will to either side's or their own?

PO: If you ask me that, I say yes. I will, however, follow up by saying there is a chance they might give Colonel [redacted] because he is Marine, or Major Mori's, because he is a Marine, or Major Lippert or Major [redacted] because they are Army, more deference. I don't know the answer to that.

DC (Mr. Dratell): Can you put a civilian on that for me?

PO: That's a structure. Major Mori, make a note, that goes into your brief. Okay. I can't go any farther than that.

DC (Mr. Dratell): You have combat experience from Vietnam; correct?

PO: Yes.

DC (Mr. Dratell): And did you have occasion to engage in combat with the North Vietnamese Army?

PO: At the time I was not worried about where they came from.

DC (Mr. Dratell): But were they regulars from the North Vietnamese Army?

PO: The intelligence reports that we gathered had them classified as both NVA and VC. And when they hit us we didn't stop them to try to figure it out; we just fired back.

DC (Mr. Dratell): But when they were taken prisoner, regardless of whether they were NVA or VC were they treated according to the Geneva Convention?

PO: Yeah.

DC (Mr. Dratell): Now, I want to explore your relationship with the appointing authority.

PO: Okay.

DC (Mr. Dratell): You have known Mr. Altenburg 1977, 1978?

PO: Yes, sometime in that frame.

DC (Mr. Dratell): And you had a professional affiliation for a period of time?

PO: As I said before my knowledge of Mr. Altenburg up until 1992 was minimal, I mean, really. Now he was the SJA of the 1AD, the 1st Armored Division, and I was over on the other side of Germany. We were at Bragg at the same time, but like I said I maybe talked to him once, I think. You see people on post, but that is about it.

He and I were on the same promotion list to major, but he had already left Bragg by then. In 92 he came to Bragg as the SJA and I was the chief circuit judge with my offices right there at Bragg in his building, and my wife was his chief of adlaw. So from 92 to 96 you could say that we had a close professional relationship and within, I don't know, a couple months it became a personal relationship.

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

PO: Right, at the JAG school.

DC (Mr. Dratell): And he was also the primary speaker at a roast in your honor that evening?

PO: Yes.

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

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

DC (Mr. Dratell): And you also attended his son's wedding in sometime in the fall of 2002?

PO: In Orlando, yeah.

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

PO: Right, I did.

DC (Mr. Dratell): And you are aware that there were other candidates for the position of presiding officer?

PO: Yeah, uh-huh.

DC (Mr. Dratell): Thirty-three others, in fact?

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

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

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

DC (Mr. Dratell): I would like to move on and explore your relationship with Mr. [redacted] and his role in the

commission.

PO: Okay.

DC (Mr. Dratell): He is presently an employee of the [redacted]

PO: Right.

DC (Mr. Dratell): He is [redacted]

PO: Right.

DC (Mr. Dratell): And his long-term career goals is to remain with the [redacted] in that position?

PO: I don't know.

DC (Mr. Dratell): Have you seen the detailing memorandum?

PO: Yes -- but I didn't -- I mean it was a detailing memorandum. I don't know if those are his long-term goals. Do you mean does he intend to return there after the detail is over?

DC (Mr. Dratell): Yes.

PO: Yes. [redacted] hasn't made enough money to leave yet.

DC (Mr. Dratell): But, in fact, arrangements have been made so that he is still an employee and he is essentially on loan here part-time.

PO: He is on a detail. Right, they are offering various positions, you know, for GS-14s and 15s but he didn't want to do that, right.

DC (Mr. Dratell): So how would you answer concerns of reasonable person that the [redacted] is acting as a legal advisor or the assistant to the presiding officer of this commission?

PO: He is an [redacted] to the best of my knowledge. He has never had anything to do with operational activities. He [redacted]

application -- and you would have to look at whatever he wrote. I believe -- he does a lot of Fourth Amendment law and probably some Fifth Amendment law and maybe procedures. Both of which, or all of which, has nothing to do with operational activities. It is how to keep activities within the bounds of the constitution, none of which has he applied in doing what he is doing for me. So I don't see any harm. I mean you are characterizing him correctly as a [redacted] however, I believe when he took the job [redacted] the [redacted] didn't belong to [redacted] because there wasn't a [redacted]. I think it was a DoJ, but it may have been something else. I don't believe there is any concern there. He is not knocking down doors or searching people out. He is in [redacted]

DC (Mr. Dratell): But he is still affiliated with a law enforcement and [redacted] which is essentially tasked with terrorists -- terrorism enforcement activities.

P (LtCol [redacted]): Sir, I am going to object to this line of questioning at this point. This does not go toward any potential bias on your part or anything that might lead to that.

PO: That's okay. Thank you. Go on. I hear what you are saying, Mr. Dratell. I don't believe that a reasonable person who heard that a person who instructs in the law at a law enforcement -- [redacted] kicking down doors. But that is -- reasonable people can differ. That's my opinion.

DC (Mr. Dratell): With respect to his role in the commissions, in the August 19th memorandum from the appointing authority it says that he is to provide advice in the performance of presiding officer adjudicative functions. Can you tell us what that means, adjudicative functions?

PO: Would you do me a favor. Who signed that? Mr. Altenburg, right?

DC (Mr. Dratell): Yes.

PO: Did I sign it?

DC (Mr. Dratell): No.

PO: Okay. I don't know what that means and I am exploring with you as we go what that means. I tell you, if you want to know what he does for me I will be glad to tell you.

DC (Mr. Dratell): I am just more interested in what the interpretation of this phrase is.

PO: I don't know what it means. If it means does he -- this morning you know, Mr. [redacted] would you go find counsel for both sides and tell them I am ready to see them. Because that -- that is not adjudicative. He has not provide -- I will tell you this, he has not provided me any piece of advice on any item of substantive law. Now there are those who would say that writing up motions, you know, the presiding officer memorandum and stuff like that is substantive; I don't believe they are. The things that he has done have nothing to do with substance and I have not yet gotten to an adjudicative function as far as I can tell.

DC (Mr. Dratell): Well, will he? The question is under this memoranda will he be involved, and particularly in light of what you are saying is his experience in what he teaches and whether that is going to have an impact on the rest of the members, that is the questions now.

PO: Was the question then to make Colonel [redacted] happier? Am I going to take improper advice in my role as a member from someone who is not a member?

DC (Mr. Dratell): Advice.

PO: That's what I say advice.

DC (Mr. Dratell): But you said improper and I say any advice or any advice that any of the members get either from you or directly from Mr. [redacted] --

PO: No, they are not.

DC (Mr. Dratell): Now with respect to -- well, if that role changes, or is there -- are we ever going to get a definition of those terms adjudicated function in a matter that we can at least get our hands around, or for you to get your hands around so that we know what it

means?

PO: Probably on Tuesday after I get home, after I finish up this week's session, I will inquire from Mr. Altenburg what he means by that.

DC (Mr. Dratell): And will we be --

PO: I haven't sent anything to Mr. Altenburg, nor has Mr. [redacted] or anyone else that hasn't been furnished in voluminous copies to every counsel; right?

DC (Mr. Dratell): And so in your questionnaire you own a Koran.

PO: Yes, I do.

DC (Mr. Dratell): Have you studied it?

PO: I wrote in there also that I would not call myself a student of the Koran. I have looked at it. It was given to me in Saudi by one of the Saudis with whom I worked, and he referred me to some verses, and I looked at them. If you have ever been in Dhahran at night there is not a lot to do on the air base there.

DC (Mr. Dratell): And I assume it is in English?

PO: It is a --

DC (Mr. Dratell): Combination.

PO: One side is English and one side is Arabic.

DC (Mr. Dratell): And you obviously read the English side and not the Arabic side.

PO: Yes. Obviously, I read the English side, not the Arabic.

DC (Mr. Dratell): Thank you, sir. I have nothing further.

PO: Thank you. Trial?

P (LtCol [redacted]): Yes, sir. First of all on the advising the members on the law, do you -- will you be able to give all the members equal voice regardless of rank or their legal background they may or may not have?

PO: In the military order the President said that the

commission is to be the triers of fact and law. That's what he wants and that is what we are going to give him. Yes.

P (LtCol [redacted]): Regarding the relationship with Mr. Altenburg, first of all if you are looking at your record he would note that you had combat experience as an infantry officer in Vietnam. Is that right, sir?

PO: Yes.

P (LtCol [redacted]: You have five bronze stars; is that right, sir?

PO: Yeah.

P (LtCol [redacted]: He would also note that you had ten years experience as a military judge?

PO: Right.

P (LtCol [redacted]: Sir, as a military judge did you have occasion to know the convening authority?

PO: Yeah, right.

P (LtCol [redacted]: Did you ever have the occasion to be friends with the convening authority?

PO: I say the only friend I was with was a guy who ran a special court once down in Vincenza. We aren't friends really with three star and two star generals when you are a light colonel or colonel, but if you are talking about a personal acquaintance where I knew them, yeah. I wouldn't call myself and General Luck or General Keene, or -- I wouldn't call us friends, you know.

P (LtCol [redacted]: They were acquaintances like that?

PO: Right.

P (LtCol [redacted]: How did you handle that situation? I am sure that you were impartial and fair?

PO: I never worried about it. I just did my job, my duty.

P (LtCol [redacted]) Sir, do you care what Mr. Altenburg thinks about any ruling or decision you might make?

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

P (LtCol [redacted]): Do you know, sir?

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

P (LtCol [redacted] Yes, sir.

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

P (LtCol [redacted] Do you think there would be any repercussions for you if he disagreed with a ruling of yours or a vote of yours?

PO: You all went to law school; right?

P (LtCol [redacted] Yes, sir.

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

P (LtCol [redacted] Yes, sir.

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

P (LtCol [redacted]): Yes, sir. Nothing further, sir.

DC (Mr. Dratell): Just one thing, sir.

PO: Sure.

DC (Mr. Dratell): With respect to -- I don't know where this was part of the packet --

PO: That's all right.

DC (Mr. Dratell): This is the list of the nominees for presiding officer. I don't know if it is already in the packet, but if not we could just mark this as an RE.

PO: I haven't seen it, but you may mark it as an RE.

DC (Mr. Dratell): Okay, and that would be RE -- is that 13 that we are up to?

AP (Maj [redacted]: Colonel Brownback, I just note that that is an attachment to our defense filed motion that is presently before the court.

PO: We will just do this and we can put it in the next one.

Review Exhibit 12 was marked for the record.

ADC (Maj Mori): Defense counsel has provided the court reporter with the two sheets of the list of selection for the presiding officers.

PO: Okay.

DC (Mr. Dratell): I have nothing further, sir, thank you.

PO: Prosecution, challenge?

P (LtCol [redacted]: No, sir.

PO: Defense?

DC (Mr. Dratell): Yes, sir, on the same grounds basically yesterday that we explored again today which is the relationship with the appointing authority and also on the -- also on the advice to the commission members on the law and also --

PO: Okay. Just a second.

DC (Mr. Dratell): And also the lack of definition of Mr. [redacted] role and impact that that would have on both on the presiding officer and the commission as a whole, the other members here individually who are in combination.

PO: Okay.

DC (Mr. Dratell): And also the ground that was raised yesterday with respect to the speedy trial issue and comments either were or were not made I was not at the meeting so it was impossible for me to say --

PO: Predisposition?

DC (Mr. Dratell): Yes, exactly.

PO: Okay, what else?

DC (Mr. Dratell): That's it.

P (LtCol [redacted]): Yes, sir, the government opposes that challenge. First of all, the role of Mr. [redacted] we believe is just an objection to Mr. [redacted] role. There's no evidence that affects your impartiality and in fact throughout this it's clear that we have gotten a very independent presiding officer who is not swayed, certainly would not be swayed by Mr. [redacted] and he does not and has not provided legal advice, is not providing legal advice. We do not believe that is any real basis for challenge of you, sir.

The relationship with Mr. Altenburg we believe that is not problematic. Again, we have a very independent presiding officer. Mr. Altenburg is looking at various people as candidates and he comes across somebody who happens to know his reputation, sterling reputation as a military judge. He is looking at a military record and has seen combat experience in Vietnam, he has seen five bronze stars, heroism in Vietnam, somebody that can stand and not be afraid to say no to Mr. Altenburg or anybody else.

PO: I appreciate the comment, but I would have the gunny note that I don't agree with heroism in Vietnam, but go on.

P (LtCol [redacted]): Yes, sir. We would also note ten years as a military judge. That makes a presiding officer stand out with somebody who has an exceptional amount of experience as the military judge and that's somebody who knows how to maintain integrity and independence. And we believe that there is no grounds for your challenge, sir.

DC (Mr. Dratell): Thank you, just so I can articulate two subsets of the challenges. One is that with respect to the

relationship with Mr. Altenburg. It is also with respect to the perception of the public, the panel.

PO: Major Mori's 912(N?

DC (Mr. Dratell): Yes, that's correct.

PO: He is writing a motion on that.

DC (Mr. Dratell): And the same with respect with Mr. [redacted] as a result of his employment with the [redacted] and his position there and so those are in conjunction with the substantive.

PO: Okay.

P (LtCol [redacted] Well, sir, first we don't accept that as the standard and second of all we don't see how that is such a bad appearance. Someone who has been a district attorney becomes a judge. Does that mean that he is biased? So somebody who works at [redacted] who is now helping administrative matters now for the commission. How is that a bad appearance. And your appearance with your background and experience as a presiding officer we do not feel that there is any bad appearance on that.

DC (Mr. Dratell): Just that -- we don't have a situation where someone was a district attorney and is now a judge, we have someone who is still a district attorney and is now the assistant to a judge who may have adjudicated functions in a commission process.

PO: Okay. I have considered the challenges made by the defense. I am going to forward a transcript of voir dire which contains a reference to RE 12, so that will go along with it. The transcript -- that will include the transcript of the challenge and the prosecution's response. In addition, Major Mori, that motion on the 912(N) matters and your motion on the adjudicative function advice and your motion on the impropriety of the presiding officer providing legal advice -- you understand what I am saying?

ADC (Maj Mori): Yes, sir.

PO: Can you have those to opposing counsel by the 7th? You notice how much time I am giving you, for me that is a heck of a long time. And that way they can comment --

no, so this will get up to Mr. Altenburg all at the same time so he can consider your request for a different standard -- for a standard so he can consider your motion concerning whether or not I should provide advice and your motion concerning the adjudicative advice all at the same time. You get it on the 7th, trial, and you have it back to, your comments ready by the 10th and I will try to get all of this stuff in to Mr. Altenburg on the 10th because he is the one that makes the decision.

ADC (Maj Mori): Yes, sir.

PO: Okay.

P (LtCol [redacted]: Yes, sir.

PO: Okay. Under the provisions of MCI 8(3)(A)(3), I am not going to hold the proceedings in abeyance. Now, before I call the members in I am going to ask this question; who is lead?

DC (Mr. Dratell): I am lead.

PO: Okay. I am going to tell the members that when they come back in. Okay?

DC (Mr. Dratell): Yes, sir.

PO: I am going to call the members in and then we will go through voir dire with them generally, okay? Ready? Call the members.

Please be seated. The commission will come to order. Let the record reflect that all the parties present when the commissioned recessed are once again present.

The members are present.

Mr. Dratell, you are the lead attorney for Mr. Hicks; correct?

DC (Mr. Dratell): That's correct, sir.

PO: That means, members, generally when I call on the defense, generally he will be speaking for the defense. However, if Major Mori or Major Lippert have been cast they may pop up too.

Have all members completed a member questionnaire? Apparently so.

Both sides have been provided a copy of those questionnaires?

P (LtCol [redacted]: Yes, sir.

DC (Mr. Dratell): Yes, sir.

PO: Apparently so. Trial, please have the a questionnaires marked as the next RE.

P (LtCol [redacted] These will be marked 13 Alpha through Echo at this time.

PO: Those questionnaires will be sealed.

Members, there has been an objection to my instructing you that I will instruct you and advise you on the law. I have not granted that objection, but I am telling you that a motion will be forthcoming on that objection that you all will be seeing at some later time. Keep it in mind. Right, defense?

DC (Mr. Dratell): That's correct, sir.

PO: Okay, members, several of you indicated in your questionnaires that you had some apprehension for the safety of your families because of your participation in this military commission and the release of your names to the public. I can't go back and unbell that cat. But do all members recognize that it wasn't the trial or defense that released your name? Apparently all members recognize that.

Will the release of the names, of your names, affect in any way your ability to listen to the arguments of trial and defense and serve as a member in according to your duty in this case? Apparently not.

Counsel, you both stated that you intend to refer the voir dire in case of U.S. v. Hamdan and focus question to the members based on that voir dire. This is the same, this is RE 10 and 11. You all still going with that?

P (LtCol [redacted] Yes, sir.

DC (Mr. Dratell): Yes, sir.

PO: Mr. Hicks, once again this is the exhibit that counsel have in front of you. You weren't here, but Mr. Dratell -- some member of the defense team was here for all voir dire; right?

DC (Mr. Dratell): That's correct, sir.

PO: Do you object to them basing their questions on this?

ACC: No, sir.

PO: Okay. Okay, Members, I asked you all several general questions yesterday. Any member want to change the answer to any of those general questions I asked about your participation? Apparently not.

Members, right now I do ask you this, probably the most important question of all of the voir dire: Does each member understand that he must disregard anything that he may have been exposed to in any way and decide the case of the United States v. Mr. Hicks solely on the evidence and the law presented to you in this courtroom? Apparently all members understand that.

Members, if counsel ask you a question and it is going to take you into a classified area -- you all know where that is, they don't, so it is on you to say can I hold that for a closed session. They aren't going to keep reminding you of that. Apparently all members understand that.

General voir dire, trial?

P (LtCol [redacted] Thank you, sir. Gentlemen, I am Lieutenant Colonel [redacted] U.S. Marine Corps. At the table with me is my co-counsel, Major [redacted] and my paralegal, Staff Sergeant [redacted] Together we represent the United States of America in this case.

Just a couple questions. First of all, since arriving here at Guantanamo Bay and up to the present has any member been contacted by the media, any contact with any media?

PO: Apparently not.

P (LtCol [redacted]: Anticipating the trial date may be in January and there may be further trips to Guantanamo Bay, is there anything in any member's professional or personal life that may impact their ability to act as a member?

PO: Apparently not.

P (LtCol [redacted] Does any member receive, have any specific briefs, information of, have any knowledge specifically about the facts in this case?

PO: Other than what you received in the packet before you? Apparently not.

P (LtCol [redacted] Each side in this matter is entitled to a fair trial and this of course will require your focused attention. Now, is there anything at all in anybody's background or life or otherwise that may interfere with your ability to give each side a fair trial?

PO: Apparently not.

P (LtCol [redacted]: That's all I have, sir.

PO: Mr. Dratell?

DC (Mr. Dratell): Good morning, I am Joshua Dratell. I am civilian defense counsel for Mr. Hicks seated here next to me. Also are detailed defense counsel Major Michael D. Mori, United States Marine Corps, and Major Jeffrey Lippert, United States Army. Major Mori will conduct the joint voir dire of the commission members. Thank you.

ADC (Maj Mori): Good morning, members. Do all members agree that the President has ordered that Mr. Hicks be provided a full and fair trial?

PO: Apparently so.

ADC (Maj Mori): Colonel [redacted] in your opinion what would be required for a fair trial?

CM (Col [redacted]: I believe first and foremost a fair trial must be transparent and understandable to both the public and the defense and the prosecution. I think a fair trial must also include members of this commission to be fair and open minded and judge this case on the merits that

are presented before us and not any external information that may have been gathered by the commission by some other means.

ADC (Maj Mori): Do you think it is important to have live witnesses here so that the defense can confront witnesses against Mr. Hicks?

CM (Col [redacted] I think that would be your choice on that and if you choose to do that we will listen to that openly, with an open mind and understanding, to try to understand it.

ADC (Maj Mori): Do you think to be a fair trial it would be fairer if witnesses were brought here to testify against Mr. Hicks vice --

PO: Yes, Colonel [redacted]

P (LtCol [redacted] I am going to object, sir, this is argumentative.

PO: Let's let him argue just for a second. Okay?

ADC (Maj Mori): -- vice just a piece of paper that the defense couldn't ask questions of?

CM (Col [redacted] My personal opinion, the ability to look at somebody and hear their answers is probably advantageous for me to better understand the facts in the case. Whether that's the case or not because of the logistics I can't say. I will just -- I will judge the facts as they are presented to me in either way.

ADC (Maj Mori): Do all members agree with what Colonel [redacted] expressed?

PO: Apparently so.

ADC (Maj Mori): Would all members agree that it is important for a fair trial for both sides to have access to the same evidence?

PO: Apparently so.

ADC (Maj Mori): Would all members agree to have a fair trial, it is important to have both sides to have sufficient time to prepare and investigate the case?

PO: Apparently so.

ADC (Maj Mori): Do all members understand that it is more difficult to go back and investigate things that have occurred after a substantial period of time from that event?

PO: Apparently so.

ADC (Maj Mori): And that delay, that time period may cause the need to conduct more work and investigation?

PO: Apparently so.

ADC (Maj Mori): Does every member agree that to have a fair trial and hold someone responsible for their conduct that it is only fair that that person know, before they do something, that it is a crime?

PO: We have a question from Colonel [redacted]

CM (Col [redacted] Sir, I believe that you are asking me to interpret whether the law is valid or not and I don't think in this forum right now that we should answer that question.

ADC (Maj Mori): Sir, I am not asking to interpret the law. I am asking -- looking more to judge and to look at the members' individual views and how their individual view would be. That's really what I am asking right now to determine --

CM (Col [redacted] Sir, in my person opinion, ignorance of the law is not a defense.

ADC (Maj Mori): Does any other -- does any member believe that it wouldn't be fair to hold someone responsible for doing something when they had no idea that it wasn't criminal.

PO: You got the panel -- at least you got the presiding officer confused on that one. Members, do all members agree that if the legislature of Florida if I was hula-hooping in Orlando on the 1st of July 2001 and on the 1st of January 2002 the legislature of Florida passed a law saying that hula-hooping as of January 1, 2000 was unlawful, would you all agree that's bad, makes it an ex pos facto law? Apparently all members agree with that. There, can you state --

ADC (Maj Mori): Yes, sir. I should have put it simply, sir. Do you think that the principles or does any member believe that the principles of freedom of speech, racial equality, liberty, and justice are principles that only belong to America or do they belong to all of mankind?

PO: What do you mean by that? I am really asking, what do you mean?

ADC (Maj Mori): Are those principles that in the individual members' views apply only to Americans or to all people in the world?

PO: You mean do the members -- do you mean does Brownback wish that everyone in the world had all those freedoms that you just talked about?

ADC (Maj Mori): Yes, sir.

PO: Yes, I do wish that everyone in the world had all those freedoms that you talked about.

ADC (Maj Mori): All members agree?

PO: Apparently so.

ADC (Maj Mori): And do you think it would be fair to hold conduct committed by a non U.S. citizen not of the United States and condemn that conduct when U.S. citizens could do that conduct in the United States and would not be condemned.

P (LtCol [redacted]: Sir, I am going to object again. This is just not narrowly focused to determine whether there is any bias on any part of the member.

PO: Go on. If you can make them understand that question, then you can ask it.

ADC (Maj Mori): In conduct, is it fair for conduct committed by a non-U.S. citizen in another country, for the U.S. to condemn that conduct; yet, if a U.S. citizen did it within United States it would not be a crime. Do you think that is fair?

PO: I cannot answer that question. Members, can you all answer it?

CM (Col [redacted] Not yet.

CM (Col [redacted] I don't understand the question. Give me an example.

ADC (Maj Mori): Yes, sir. Sir, if I may --

PO: Excuse me, that is Colonel [redacted] and Colonel [redacted] said, not yet.

ADC (Maj Mori): Whatever it was that a U.S. citizen in the United States could do something and would not be a crime, do you think it would be unfair for the United States to say that if a non-U.S. citizen did it in another country to say that that conduct was criminal even though for a U.S. citizen to do it in the United States it was legal? To impose higher standards on non-U.S. citizens and not in the U.S?

PO: Who are you asking the question of, Colonel [redacted]

ADC (Maj Mori): Yes, sir.

CM (Col [redacted] Make sure I understand your question. You are saying if a law did not cover a U.S. citizen and he did something in the United States clearly he would not be held accountable for that action; correct?

ADC (Maj Mori): Yes, sir.

CM (Col [redacted] I am dissecting your question. So if that same person was not a U.S. citizen, conducted that same act in another country, be it his own or some other country other than the United States, should the United States hold that individual accountable for that action?

ADC (Maj Mori): Yes, sir.

CM (Col [redacted] Is that a fair representation of your question?

ADC (Maj Mori): Yes, sir.

CM (Col [redacted] As far as U.S. law do I think it would be fair to hold them accountable, no, I don't think that would be fair. Would I -- if he fell under the jurisdiction of international law or for whatever reason fell under the jurisdiction of the U.S. then clearly because he is outside of the continental United States, then yes, I do

think it would be fair to hold him accountable.

ADC (Maj Mori): Do all members agree with Colonel [redacted] interpretation? (Indicating) Thank you, sir.

CM (Col [redacted] You're welcome.

ADC (Maj Mori): Do all members agree that it is important for soldiers to distinguish themselves from civilians in combat zones?

PO: Apparently so.

ADC (Maj Mori): Lieutenant Colonel [redacted] how would you expect a soldier to distinguish themselves from civilians?

CM (LtCol [redacted] I only speak for the United States, but the distinct uniforms, for example American flag patch, something that separates you as an American soldier.

ADC (Maj Mori): Would you expect different countries to have different ways to distinguish themselves?

CM (LtCol [redacted] Different countries, yes.

ADC (Maj Mori): And different cultures?

CM (LtCol [redacted] Well, that wasn't the original question.

ADC (Maj Mori): I know. I am just adding to that. Would you expect different cultures to have different ways to distinguish themselves, cultural differences?

CM (LtCol [redacted] Cultural differences, yes.

ADC (Maj Mori): Do you think a soldier can distinguish themselves from civilians by what their actual conduct they are engaged in could distinguish them, sir?

CM (LtCol [redacted] Yes.

ADC (Maj Mori): Such as flying a plane would be obvious that you are in a military marked plane?

CM (LtCol [redacted] Correct.

ADC (Maj Mori): Do you think being in a trench, front-line area would distinguish --

P (LtCol [redacted] Sir, I am going to object again. I mean the proper way to litigate this case is to put on the evidence, argue what we think the law says and then make argument at the end of the case. The defense counsel is attempting to argue his case, his entire case to the panel and trying to get -- trying to elicit an opinion on something that they have heard no evidence on, not seen the law on, and it is the unfair way to hold these proceedings.

PO: Thank you. Members, you all are being asked an opinion. Does any member believe that they are as they sit here right now an expert on the law of war, law of armed conflict, international law or whatever law you are going to be looking at? Apparently not. Go on.

ADC (Maj Mori): Yes, sir. Would all members agree with the principle that actions speak louder than words?

PO: Speaking for myself I agree with that as a general rule.

ADC (Maj Mori): As a general rule, is there any member who disagrees with that as a general rule?

PO: Apparently not.

ADC (Maj Mori): Does any member have any knowledge regarding the conflict in Kosovo in the late 1990s?

PO: Generalizing knowledge, I was stationed in Germany at the time. We had troops there in Germany.

ADC (Maj Mori): What period of time, sir?

PO: I got to Germany in '96 and I left Germany on the 23rd of May 1999.

ADC (Maj Mori): You had no knowledge, actual involvement of support of operations or --

PO: I sent a judge there.

ADC (Maj Mori): Any other member have any knowledge about any conflict in Kosovo?

Negative response from all members except the presiding officer.

Does any member have any knowledge about the conflicts in Kashmir between Pakistan and the government and the Indian government?

PO: Are you talking about any knowledge other than generalized?

ADC (Maj Mori): Just general knowledge, any knowledge at all?

CM (Col [redacted]): You mean do we know what had happened?

ADC (Maj Mori): It exists, yes, sir.

CM (Col [redacted]: Yes.

PO: Does any member not know that there is conflict in Kashmir? Apparently all members have read some records of it.

ADC (Maj Mori): Beyond just generalized specialized knowledge, has any member received any specialized reports, briefs, read any articles or any boks on it?

PO: Apparently not.

ADC (Maj Mori): Are all members aware that they are appointed to four military commissions that are occurring at the same time?

PO: All members know you are here. You have been appointed to four military commissions. They are occurring seriatim, not at the same time. I am not holding a joint military commission.

ADC (Maj Mori): Yes, sir. One after the other?

PO: Right.

ADC (Maj Mori): As you are deciding issues of law for the first times, do you believe it will be difficult to keep legal issues separated from the different commissions?

PO: Apparently not.

ADC (Maj Mori): Colonel [redacted] you say no. Why do you feel confident in that?

CM (Col [redacted] I work in the acquisition career field and I run

an organization for 300 people and spend about 800 million dollars a year. I have many, many, many issues on my table at one time in any given day. I can keep those separate and believe me these four cases I can keep the facts separated.

PO: And the law?

CM (Col [redacted] And the law.

ADC (Maj Mori): Do you think it makes it difficult when you have to hear the cases if the cases are heard right one after the other the one day to the next day versus if there were breaks in between?

PO: Are you asking Colonel [redacted] or the panel?

ADC (Maj Mori): Yes, sir. I'm sorry.

CM (Col [redacted] It won't make a difference to me.

ADC (Maj Mori): Does any member feel it might be difficult to keep the facts or legal issues separate from the four different commissions?

PO: Apparently not.

ADC (Maj Mori): Does any member believe that having members, different members sit on four -- the four different commissions would be fairer?

PO: Does any member believe that that's their decision to make?

Apparently no member believes that's their decision to make.

ADC (Maj Mori): Yes, sir. Sir, one second please.

PO: (Indicating)

ADC (Maj Mori): Sir, no further general voir dire questions.

PO: Colonel [redacted]?

P (LtCol [redacted]): Yes, just one question. Will all members be able to keep an open mind and consider evidence as presented and consider the law as it is presented and

make that fair determination?

PO: Apparently so from all members.

I intend to allow and conduct question of members outside the presence of other members. Does any member or any counsel object?

P (LtCol [redacted] No, sir.

DC (Mr. Dratell): No, sir.

PO: Members, we are about to go into individual voir dire. Under the rules I am required to determine what matters to consider concerning a challenge if one were to be made against any member, including myself, should be forwarded to the appointing authority for his decision. I am also required to determine if the proceedings should be held in abeyance while challenge is being ruled upon and also require to determine to keep the voir dire in proper bounds. That's why I will be remaining in the courtroom for individual voir dire.

We are going to recess for 15 minutes and start up in 15 minutes. I will come in and we will bring in the first individual member. Okay?

P (LtCol [redacted]: Yes, sir.

DC (Mr. Dratell): Yes, sir.

PO: The court is in recess.

The Commission Hearing recessed at 1051, 25 August 2004.

The Commissions Hearing was called to order at 1114, 25 August 2004.

PO: Please be seated. The commission will come to order. Let the record reflect that all parties present when the commission recessed are once again present. We have a new court reporter, Sergeant [redacted] who's been previously sworn. The commission members, other than myself and Colonel [redacted] are not in the courtroom.

Trial, individual voir dire of -- oh, I'm providing Colonel [redacted] a copy of his questionnaire which was previously marked as an RE. Trial.

P (LtCol [redacted]): Sir, we have none other than that which was already asked yesterday.

PO: Defense?

DC (Mr. Dratell): Yes, we do, sir, if I may. Good morning, Colonel [redacted]

CM (Col [redacted]): Good morning.

DC (Mr. Dratell): Yesterday there was some discussion. I am sure if it was with you specifically, but it was certainly with all the members and it was again this morning about limiting your consideration to what the evidence is in this case with respect to Mr. Hicks. You also understand that the charge sheet has no evidentiary value at all?

CM (Col [redacted]): Yes, of course.

DC (Mr. Dratell): And you give it no weight?

CM (Col [redacted]): Correct.

DC (Mr. Dratell): And with respect to the facts, in terms of the President's order declaring Mr. Hicks eligible for this commission, as a factual matter, has no weight whatsoever in this proceeding?

CM (Col [redacted]): Correct.

PO: Would you -- let me just -- it has weight as to whether or not he was jurisdictionally brought here correctly under the requirements.

DC (Mr. Dratell): But I mean as a matter of evidentiary fact in the context of the elements of the offenses.

PO: Yeah.

DC (Mr. Dratell): And you have been involved in courts-martial in your career in the military?

CM (Col [redacted]): Yes.

DC (Mr. Dratell): As a member of the court-martial -- as a juror rather?

CM (Col [redacted]): I've been a juror. I've been a witness. I've been a special court-martial convening authority on two different periods.

DC (Mr. Dratell): And you've never acted as judge though?

CM (Col [redacted]): No.

DC (Mr. Dratell): And have you ever been involved in more than one court-martial at a time with a similar set of facts or a similar set of legal issues.

CM (Col [redacted]): As a convening authority, yes.

DC (Mr. Dratell): But have you had to make determinations of fact or law about separate courts-martial at the same time, the way you will in this case?

CM (Col [redacted]): That's -- as a captain, I ran numerous summary courts-martial, where as the summery court-martial officer you are making determinations of fact and law. I would -- it's been a long time, but I'm almost positive that I ran more than one summary courts-martial at the same time.

DC (Mr. Dratell): Can you tell us how -- and Colonel [redacted] did during the group voir dire, but could you tell us how for yourself you will keep all of these cases and all of the facts and legal issues separate so that you can make an individualized determination as to each person before you?

CM (Col [redacted]): The same way that I keep other important matters in my duties as a commissioned officer separate.

DC (Mr. Dratell): And do you also understand that these proceedings may last longer than the average court-martial, the trials of these cases may go well beyond what an ordinary court-martial may last in a day or two days that these may go on for several weeks?

CM (Col [redacted]): Yes.

DC (Mr. Dratell): And you understand that that may make it more difficult to compartmentalize, properly?

CM (Col [redacted]): I think that's a matter of opinion. If I have to just concentrate on four separate things over an

extended period of time it is probably less than what I do on a daily basis than duties right now.

DC (Mr. Dratell): And I know you've read MCO Number 1 -- and you have, I assume?

CM (Col [redacted]: Yes.

DC (Mr. Dratell): Because I know it's part of the package that you have been given. And you don't have to worry about it and I'll read you the section it talks about the admissibility of evidence. It's 6(D)(1), Military Commission Order Number 1, and it says evidence shall be admitted if in the opinion of the presiding officer, parentheses, or instead if any other member of the commission so request at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of that commission, close parentheses, the evidence would have a probative value to a reasonable person.

Now, that section essentially leaves to the presiding officer the question of admissibility unless a member requests a vote of the entire commission on that piece of evidence. Is that the way you understand it?

CM (Col [redacted] Can I see it?

DC (Mr. Dratell): Sure.

PO: I'm passing it to him.

Colonel [redacted] *viewed the document.*

CM (Col [redacted]: Yes, sir.

DC (Mr. Dratell): And essentially, what that does it gives the commission at the request of a single member of the commission to override the decision of the presiding officer on a question of admissibility of evidence.

CM (Col [redacted] Yes.

DC (Mr. Dratell): And are you prepared to exercise that responsibility when you deem it appropriate?

CM (Col [redacted] Yes.

DC (Mr. Dratell): And are you prepared to do that in an affirmative way and not necessarily to wait and look around for the other commissioners to see whether they are all in agreement to do that when you feel it is appropriate to do so?

CM (Col [redacted] Of course.

DC (Mr. Dratell): Now, we've also had discussed -- and the presiding officer mentioned it this morning -- that he will from time to time advise the remaining commission members on legal issues. He also said you're free to accept it, to accept that of counsel, to accept your own opinion as to legal issues. You recall that obviously?

CM (Col [redacted] Yes.

DC (Mr. Dratell): And you're not a lawyer?

CM (Col [redacted] No.

DC (Mr. Dratell): Have you had any kind of specialized legal training of any kind?

CM (Col [redacted] Military.

DC (Mr. Dratell): And what would that be?

CM (Col [redacted] Senior Officer's Legal Courses, things of that line.

DC (Mr. Dratell): Now, as part as the presiding officer's instruction to you, he said that you would not be required to accept his version of the law. But would it be fair to say that because he's a lawyer and a former military judge for a significant period of time that it would have influence on you?

CM (Col [redacted] No more influence than yours or the prosecutor's. I mean, I can read, and so I will read it. If I don't understand it, I will ask enough people until I am sure I understand what it is.

DC (Mr. Dratell): Well, that raises another question, how do you foresee getting the assistance you need to make the independent analysis, that is your responsibility as a commissioner to decide whether it is the presiding officer's version, the defense's version or the

prosecution's version or some combination of that, that that is going to be what your position is?

CM (Col [redacted] Well, I'm sure we'll be in here, and if I have a question, I'll ask.

DC (Mr. Dratell): Now, have you ever made legal determinations before of the type that we're anticipating in this case?

CM (Col [redacted] Of the type that we're anticipating in this case, no.

DC (Mr. Dratell): Are you comfortable or uncomfortable with that responsibility, not having necessarily the training or experience doing it?

CM (Col [redacted] I'm not uncomfortable with it.

DC (Mr. Dratell): But it's not the usual court-martial experience that you've had?

CM (Col [redacted] It's the same type of thing in the sense that you determine law. It's just different laws.

DC (Mr. Dratell): Now, I want to turn to something else that was brought up yesterday, just focussing on one part of it. You talked about brief things that you had received in the course of your duties with respect to al Qaida and other related issues and with respect to whether or not you remember them now, if something in evidence jolts your memory so that you do recall something in a briefing. Do you understand that you must disregard what you heard in that briefing?

CM (Col [redacted] Yes.

DC (Mr. Dratell): And will you -- how will you keep it from corroborating for you the credibility of a particular piece of evidence if it matches something that you heard in the briefing and that makes you recall it. How will you go about that?

CM (Col [redacted] Well, I understand the importance of the responsibilities that I have along with the other commission members. I understand that that's the requirements and I can make that distinction.

DC (Mr. Dratell): We talked also yesterday about your visit to

the World Trade Center two weeks after September 11th 2001, and you were asked a question of how it made you feel -- and I don't have the transcript right in front of me -- but by my recollection is that your answer, said that you thought -- I think you were asked whether it made you angry, and you said that you thought it would make any American angry or any person angry, I don't remember the precise part of that answer; but you didn't answer really as to yourself, so I would just ask you again. If you could tell us how it made you feel, specifically?

CM (Col [redacted] It did not make my angry. Did you go there?

DC (Mr. Dratell): I actually live, yes --

PO: Colonel [redacted] please. It is the other way around.

DC (Mr. Dratell): I know very well. Believe me, I live there.

CM (Col [redacted] I would imagine it did not make me angry. It made me sad. It was a lot of destruction and loss of life.

DC (Mr. Dratell): Yes. And it was an intense scene, was it not, even two weeks after. It was still smoking?

CM (Col [redacted] Yes.

DC (Mr. Dratell): Debris?

CM (Col [redacted] Yes.

DC (Mr. Dratell): The facade, broken?

CM (Col [redacted] Yes.

DC (Mr. Dratell): How were you going to separate that experience and those feeling that you had, not necessarily anger, but the feelings that you did have from your consideration of the evidence in the case against Mr. Hicks?

CM (Col [redacted] It's separate things.

DC (Mr. Dratell): Can you just explain for us how you go about doing that. Because we -- you understand that we need to know and be confident that you can be a fair

commissioner, separate those things out, and give Mr. Hicks the fair trial that he's due and that we understand that you understand is your responsibility.

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

DC (Mr. Dratell): Nothing further, thank you.

P (LtCol [redacted] Nothing, sir.

PO: Thank you, please return to the deliberation room and tell Colonel [redacted] to come in.

Let the record reflect that Colonel [redacted] has left the courtroom and Colonel [redacted] has entered the courtroom. Please be seated. Let the record reflect that I'm handing Colonel [redacted] his questionnaire.

Trial?

P (LtCol [redacted] Nothing, sir.

PO: Defense?

ADC (Maj Mori): Good morning, sir.

CM (Col [redacted]: Good morning.

ADC (Maj Mori): Sir, following up on yesterday's voir dire of you what legal, specific legal training have you had?

CM (Col [redacted] None.

ADC (Maj Mori): Have you -- do you have any relatives or close acquaintances that are attorneys?

CM (Col [redacted]: No.

ADC (Maj Mori): How do you see this new opportunity to be involved in deciding issues of law and the criminal consequences?

CM (Col [redacted]: What do I think about it, feel about it?

ADC (Maj Mori): Yes, sir.

CM (Col [redacted]: Well, I've been ordered to it. I'm ordered to do it so it doesn't matter what I think or feel about it. I have been ordered to do it so I take it seriously.

ADC (Maj Mori): Yes, but that is a different type of challenge that you haven't had training for.

CM (Col [redacted]: You're a Marine so you will understand my answer to that. In 25 years I've been forced into a lot of different circumstances that I had little training for. Specifically, this particular situation, but as training as an officer, I rose to the occasion.

ADC (Maj Mori): Yes, sir. Now, you know Colonel Brownback is an experienced judge advocate from the Army. Do you feel that you may be looking to him to see what area he might be looking at on the law, or what his opinion on an issue might be?

CM (Col [redacted]: If I don't understand the law as it is written it would be purely because there's a language I'm unfamiliar with and I would certainly ask him to explain that.

ADC (Maj Mori): Sir, if we're getting specifically into your billet with CENTCOM, just in general, in your questionnaire, Question 19 you mentioned that a reasonable person might think there was an appearance of impartiality. Was that just based solely on your role with CENTCOM, is that what you're dealing with, sir?

CM (Col [redacted]: Yes.

ADC (Maj Mori): When did you first get involved and get tasked to deal with Operation Enduring Freedom?

CM (Col [redacted]: On 9/11.

ADC (Maj Mori): On 9/11. And your main focus was to deal with the detainee operations or the whole war plan, sir?

CM (Col [redacted]: In my billet as the Chief of Operations at Central Command, in joint operations center, I focussed on a broader plane --

ADC (Maj Mori): Sir, I am going to ask -- if I get into areas that -- how did you know who the enemy was in Afghanistan?

CM (Col [redacted] You're really asking me a question that's down at the tactical level. I really didn't get involved in having to make that determination because that's not where I focused my energy.

ADC (Maj Mori): Was there any targeting regulations, or discussions, ROE type thing that helped identify who the enemy was that you are aware of?

CM (Col [redacted] Yes, ROE certainly helps you describe that. And I can't go into the detail with that in this session.

ADC (Maj Mori): Yes, sir.

CM (Col [redacted] Happy to in the closed session.

ADC (Maj Mori): Did you get reports back from -- obviously the conduct of operations in Afghanistan, did you get to read reports of engagements?

CM (Col [redacted] Sure.

ADC (Maj Mori): What was the general description of the type of reports you read?

CM (Col [redacted] You mean what was the content or what were the reports referring to?

ADC (Maj Mori): Yes, sir, what the reports referred to.

CM (Col [redacted] Well, there were situation reports as typical of what we were seeing from our components. There are different components: The air component, the land component, the naval component, and the Marine component. Beyond that, I won't discuss in this forum.

ADC (Maj Mori): Sir, is it fair focusing on the first --

AP (Maj [redacted] Colonel Brownback, could we ask Colonel [redacted] to speak up. I believe the court reporter and counsel are having trouble hearing him.

PO: Please speak a little bit louder.

ADC (Maj Mori): Sir, focussing on the first three months of the conflict from October 7th, forward. First three months that was mostly -- not too many bodies on the ground?

CM (Col [redacted]): Correct. That's correct.

ADC (Maj Mori): Special forces.

CM (Col [redacted]: That's common knowledge.

ADC (Maj Mori): Were you intimately involved on how those units were operating and where and what they were doing?

CM (Col [redacted]: Not really. That was not -- the mission was given to the land competent commander and how he distributed those forces, and how he tasked those forces was up to him.

ADC (Maj Mori): Were you involved in planning or anticipating what type of resistance would be met by U.S. forces?

CM (Col [redacted] Say that again.

ADC (Maj Mori): Were you involved in anticipating what type of resistance the U.S. forces might meet?

CM (Col [redacted] [redacted]

ADC (Maj Mori): And do you recall what the basic sense of what resistance would be from the Taliban? I guess I could ask -- rephrase the question, sir?

CM (Col [redacted] [redacted]

ADC (Maj Mori): At October 7th, prior to us actually starting with war, what was the sort of situation in Afghanistan that was going on between the Taliban and the northern alliance. Were you aware of that?

CM (Col [redacted] I was, but for me to recall that without going back to the records, I mean that would be difficult. I mean clearly there was contact between the two. I don't recall how much or how little. For me to describe that in any sense of, you know, putting a metric against it would be difficult.

ADC (Maj Mori): Yes, sir. There was a sort of conflict going on between these two forces, the Taliban and the northern

alliance?

CM (Col [redacted] Sure.

ADC (Maj Mori): And there were front lines, sir?

CM (Col [redacted] Some might describe them as front lines, and others would say it is not a linear battlefield.

ADC (Maj Mori): Yes, sir. In your opinion, did the Taliban have the right to resist attacks upon its country?

CM (Col [redacted] You're asking me to make a policy decision and that is not for me to make that decision.

ADC (Maj Mori): Just generally do you feel a country has the right to defend itself against attacks?

CM (Col [redacted] A sovereign country has a right to defend itself from an outside attack, yes.

ADC (Maj Mori): Sir, do you -- what is your understanding of what the Taliban, whether it was, or was not, the legitimate government of Afghanistan.

CM (Col [redacted] My understanding is that it was not recognized as a sovereign government. It did not really have a government -- a governing authority one would expect.

ADC (Maj Mori): Now, focussing on your involvement with the detainee operations, sir. Do you recall -- can you recall any names of individuals [redacted]

CM (Col [redacted] No.

ADC (Maj Mori): [redacted]

CM (Col [redacted]

ADC (Maj Mori): And I obviously asked -- and seeing -- and --

CM (Col [redacted] You could name --

ADC (Maj Mori): But naming him.

CM (Col [redacted]

that. That I recognized their name from day in and day out; did I focus in on that name, day in and day out, no, I did not.

ADC (Maj Mori): At the very beginning, were you involved with the very first -- would you be, I guess, be put in the loop if someone was initially captured or how long would it take to get back to you, [redacted]

CM (Col [redacted]: It depends on whether it was a single individual or a group of individuals and sometimes we'd get it instantaneously and other times it might take a week, sometimes even longer for that information to flow up just depending on where the individual was captured and the reporting cycle.

ADC (Maj Mori): And is that something that would have gone right here or to just [redacted] and you?

CM (Col [redacted] It would have come through the [redacted] but it would have come through whatever component was responsible; and in our case for the most part, it was the responsibility of the land component commander.

ADC (Maj Mori): Yes, sir. So you do recall John Walker Lyndh's name?

CM (Col [redacted] That's a common name so, yes, I recognize it. [redacted] Ask me the other names that obviously I couldn't even pronounce if I wanted to, would I recall them, no.

ADC (Maj Mori): Do you recall anything else that was just generally about him that you got information from Australia?

CM (Col [redacted] Yes, I would have known that.

ADC (Maj Mori): Would you know who the U.S. forces were that captured him?

CM (Col [redacted] At the time I probably did know that. Right now, I could not recall.

ADC (Maj Mori): There would be records of that?

CM (Col [redacted] I suspect there is, yes, I am sure.

ADC (Maj Mori): Now did -- you mentioned yesterday about the operation of the Geneva Convention and the conflict in Afghanistan. Initially you said it applied or you saw some documents saying that it did apply, sir?

CM (Col [redacted] There was a lot of discussion on that as you could probably well imagine and it is centered principally around rules of engagement. And again, that is one of many, many conversations that I was privileged too, but was not in a position to make decisions towards Mr. H?amdan **** 11:40:35***. I had a very close relationship with the SJA down in [redacted]

ADC (Maj Mori): Yes, sir.

CM (Col [redacted] In the end, once the rules of engagement were blessed, then I was in a position to have to work in the confines of those rules of engagement.

ADC (Maj Mori): Yes, sir.

CM (Col [redacted] So specifically, the question about rules of engagement and the Geneva Convention -- you know, again, this is something that I would have to look back through and take a look at the records to find out how all that was discussed; but it is more of a policy issue not a military decision.

ADC (Maj Mori): And you mentioned policy and military. Do think there's a distinction between a legal decision that you may have to make and a policy decision, sir?

CM (Col [redacted]: Now you're talking about as my role on the commission?

ADC (Maj Mori): Yes, sir.

CM (Col [redacted] I don't make policy decisions and I don't make law decisions. I have to -- I am going to be faced with looking at the law and applying to this particular unique situation.

ADC (Maj Mori): And there's a difference with somebody that has the motivation, people who make policy decisions is different then what your job is here?

CM (Col [redacted]: Absolutely.

ADC (Maj Mori): Is there more for me to cover in the Geneva Convention I will reiterate in a different session, classified session?

CM (Col [redacted]: I don't think so. But I'll leave that up to you to make that determination, so.

ADC (Maj Mori): Yes, sir. What was your knowledge of the northern alliance and the U.S.'s interaction with them during the conflict I guess?

CM (Col [redacted]: I would prefer to do that in the closed session.

ADC (Maj Mori): What was your knowledge of the Taliban before September 11th, sir?

CM (Col [redacted]: None.

ADC (Maj Mori): What was your knowledge of al Qaida before September 11th?

CM (Col [redacted]: None. With exception of obviously the general stuff. I mean -- I did not focus in on it.

ADC (Maj Mori): You had some basically in [redacted]

CM (Col [redacted]: Yeah, exactly.

ADC (Maj Mori): If loss of life occurred in [redacted] when it did for U.S. forces, was that something that was reported to you as well, sir?

CM (Col [redacted]: Yes.

ADC (Maj Mori): Do you recall when the first hostile casualty occurred?

CM (Col [redacted]: Specifically the date?

ADC (Maj Mori): Just generally, sir.

CM (Col [redacted]: No, I don't know. No, I couldn't tell you when it occurred. I really can't.

ADC (Maj Mori): Did you interact at all with any coalition forces besides the north alliance, any other countries forces?

CM (Col [redacted]): Yes, well -- did I interact with them? [redacted] so I interacted with the [redacted]. Those that were in the [redacted] But as far as those that were on the ground, did I interact with them, no. And that is because once again they reported through a land component commander.

ADC (Maj Mori): Yes, sir. But, were you aware on operational order of plans on when coalition forces would be on the ground, when they were on the ground in [redacted]

CM (Col [redacted]: Yes.

ADC (Maj Mori): Do you -- is that something you can answer here, sir?

CM (Col [redacted] No.

ADC (Maj Mori): Sir, you mentioned you had limited knowledge of Islam from briefings. Briefings in [redacted] sir?

CM (Col [redacted] No. Really it had to do with -- through my [redacted] experience prior to going to Central Command and then what limited discussion of it while at C[redacted] but I mean nothing in excruciating detail.

ADC (Maj Mori): Sir, obviously being around [redacted] and a combatant commander, policy decisions would impact that combatant commander's decision?

CM (Col [redacted]: Certainly.

ADC (Maj Mori): And in policy decisions that come down involve some politics. Would you agree with that, sir?

CM (Col [redacted] I am sure that there were policies that are established that had politics involved. Does every single policy have politics involved? Your guess is as good as mine.

ADC (Maj Mori): Yes, sir. But here the decisions you have to make as a member, between policy and political impact has nothing to do with it?

CM (Col [redacted] That is correct.

ADC (Maj Mori): And I'd like to go back to the knowledge of the Taliban. If the defense were to offer evidence either through written documents or expert testimony that the Taliban in fact was the legitimate government under international standards. Is that something that you would be open to consider?

CM (Col [redacted] Absolutely.

ADC (Maj Mori): Thank you, sir. I have no further questions.

PO: Trial?

P (LtCol [redacted] Thank you, sir. Sir, your involvement with the accused being [redacted] -- just to make sure, we're clear. Your involvement with that was essentially made [redacted] Is that correct, sir, or was it further than that?

CM (Col [redacted] Nothing further.

P (LtCol [redacted] And did you receive any further specific information about the accused prior to being involved with this commission proceeding?

CM (Col [redacted] No.

P (LtCol [redacted] Any knowledge that you may have acquired while at Central Command either about the Taliban or otherwise would you be able to set that aside and consider the evidence that is presented by both sides in this proceeding?

CM (Col [redacted] Yes.

P (LtCol [redacted] Nothing further, sir.

PO: Defense?

ADC (Maj Mori): No, sir.

PO: Thank you. You may return to the deliberation room. Please send Colonel [redacted] in.

Let the record reflect that Colonel [redacted] has entered the courtroom.

Trial?

P (LtCol [redacted] None, sir.

PO: Defense?

ADC (Maj Mori): Yes, sir. Good afternoon, sir. Sir, following up on yesterday's voir dire.

PO: I apologize, I handed Colonel [redacted] the copy of his questionnaire.

ADC (Maj Mori): Sir, you were actually deployed to Operation Enduring Freedom; is that correct?

CM (Col [redacted] That is not correct. Just some individuals from my unit who were.

ADC (Maj Mori): And did any of those airmen ever get injured or killed in action in [redacted]

CM (Col [redacted] No.

ADC (Maj Mori): I'm assuming to go farther into the issue without the required authorization, do we need to go into closed session; is that correct?

CM (Col [redacted] We can do that if you like, but I can tell you right here I was not involved with any of the operational tactical level details of those operations. So what I tell you in closed session is what I am going to tell you here. I don't know very much.

ADC (Maj Mori): Obviously, that is your unit so it had a big impact in the war.

CM (Col [redacted] That is your opinion. What I would say is that I provided forces to another government agency and that other government agency may or may not, in your opinion, have had a big influence in that war.

ADC (Maj Mori): Had a big impact on killing Taliban and al Qaida members?

CM (Col [redacted] I don't know that for a fact, sir.

ADC (Maj Mori): Your evaluation, sir, are you aware of that?

CM (Col [redacted] I'm aware of what I wrote.

ADC (Maj Mori): I have a fitness report of officer service performance report 22 May 2001 to 21 May 2002, sir. I can provide you so you can --

CM (Col [redacted] I'm well aware of what my fitness report says.

ADC (Maj Mori): Yes, sir. And so it talked about fantastic results tracking and killing Taliban.

CM (Col [redacted] Yes. If you'll notice that I did not write that. That was written and signed by my superiors and what I'm telling you is I have no specific knowledge of any individual that was or was not killed by my organization.

ADC (Maj Mori): Did you ever get -- you got daily briefings on the -- at all?

CM (Col [redacted] I did not get daily briefings. I got briefings probably once a week on merely the status of my people in term of administratively how they were doing, when they were going to rotate back. And I also need to let you know when I say my people that also included civilian contractors who were under contract to me to perform certain duties.

ADC (Maj Mori): That's fine, sir. Okay, sir. Now did -- what is the EC-130 info war system?

CM (Col [redacted] An EC-130 is a compass call airplane. It is a modified C-130 that is in a general sense used to pick up electronic signals.

ADC (Maj Mori): And --

CM (Col [redacted] And to jam.

ADC (Maj Mori): And to jam. And that was to -- that was utilized in the conflict in [redacted] sir?

CM (Col [redacted] I believe it was. My role there, to get to the point here, was I was the force sustainer for those airplanes. Meaning that when those airplanes rotated back and came in from the field, from operational units, I made sure that they were maintained properly. If there was depot level maintenance, which means taking wings off and engines off, we did that. If there was any new equipment that needed to be put on those

airplanes, those airplanes would be flown and given to me and my team would put that equipment on the airplane, test it, and then give it back to what we common refer to as the warfighters.

ADC (Maj Mori): Did you ever talk with any of your, the individuals that worked with you, when they returned about what they did?

CM (Col [redacted] Which individuals would you be talking about, sir?

ADC (Maj Mori): Dealing with the Predator, sir.

CM (Col [redacted] Dealing with the Predator? I did have discussions with them about some of their operations with none of the tactical details; things such as how long were you gone, did they take good care of you, always make sure that we got all your paperwork in for getting proper pay, administrative type details. It was only at one point in time that I was ever given information about the details of any operations, we can't talk about that here and what I can tell you is all I was told was where some of my folks were going to be.

ADC (Maj Mori): Okay, sir.

CM (Col [redacted] And that was it.

ADC (Maj Mori): Did some of your people -- were they part of Task Force Sword?

CM (Col [redacted] They were not, as far as I know. That term is not familiar with me.

ADC (Maj Mori): In Question Number 41 on your questionnaire, sir, you mentioned again, standing tall with the threat of terrorism. Can you explain to me again what that means to you, sir?

CM (Col [redacted] What I intended to say there -- and I apologize to the court for not expanding on it so that we could avoid some of these questions -- is that much like many of the threats that have faced this country throughout its history the American people have found a way to sacrifice and do what it needed to do to endure. I would hope that the American people would do the same in

this case and I'm proud to be part of the Department of Defense and the Air Force during this time when our country needs us to do that.

ADC (Maj Mori): Thank you, sir. And part of that standing tall would be to maintain our values?

CM (Col [redacted]): Absolutely.

ADC (Maj Mori): And a fair trial is one of our inherent values in this country?

CM (Col [redacted]): Absolutely.

ADC (Maj Mori): Sir, I know that we talked a little bit before I asked you about the legal making -- legal decisions and being involved with multiple commissions, I would like to ask you some more of the following. But you've had no legal training; is correct, sir?

CM (Col [redacted]): None.

ADC (Maj Mori): And --

CM (Col [redacted]): None other than the annual briefings that we get on the laws, on the conflict and those kinds of things.

ADC (Maj Mori): Yes, sir. Have you been a member in a court-martial before?

CM (Col [redacted]): I have not.

ADC (Maj Mori): Have you been a convening authority for a court-martial?

CM (Col [redacted]): I have not although I have been a commander with UCMJ authority. I have never had to do that.

ADC (Maj Mori): Do you have any close friends or any relatives that are attorneys?

CM (Col [redacted]): No.

ADC (Maj Mori): And you don't think it will be a challenge to deal with legal issues in the commissions?

CM (Col [redacted]): I believe that there will be legal issues that will have to be discussed and understood, but I also

understand my role on this commission is to both judge the law and the facts. Which means that if I had a question about the law, I would look to various resources including the defense counsel, prosecution, and Colonel Brownback to help me answer those questions. If I don't get a sufficient answer on that, then I will seek help through the court in other ways. I am not going to be shy about asking those kinds of questions because I am not a lawyer.

ADC (Maj Mori): Yes, sir. And you're not concerned being involved with four different commissions that are going on? Well not on the same day, but are occurring in sequence that you might confuse issues of law or issues of fact?

CM (Col [redacted]: Major, I can honestly tell you I don't think that is going to be a problem.

ADC (Maj Mori): You don't think it would be an issue if you decide an issue of law in one commission that that decision in that commission won't flow over into your decision in another commission?

CM (Col [redacted] If the evidence presented in one case brings into a question of law in that case and that same question of law may or may not pertain to the next case, and that evidence has not been presented, then I'll ask the question in that second case.

ADC (Maj Mori): So you would rely on your knowledge from other cases --

CM (Col [redacted] I wouldn't say that --

ADC (Maj Mori): -- on how you would operate in the next commission?

PO: Okay. Thank you for being argumentative. Come on, move on.

ADC (Maj Mori): Okay. Yes, sir.

PO: No. Thank you, Colonel [redacted]

ADC (Maj Mori): I understand, sir, but -- sir, you are expressing concern in the questionnaire about concern to your families due to publicity. As you were instructed

earlier today, that release of your names was not the fault of the defense or the prosecution.

CM (Col [redacted] I understand that.

ADC (Maj Mori): You lost a professional acquaintance in the World Trade Center?

CM (Col [redacted] Yes, Colonel [redacted]

ADC (Maj Mori): And do you think that will impact you at all on your ability to sit in this commission?

CM (Col [redacted] While that was a very sad incident and while my heart goes out to his family, I can tell you that my duty here is to be fair and objective.

ADC (Maj Mori): It's the noon tone, sir, they are testing the base.

CM (Col [redacted] My duty here is to be fair and objective and I will carry out that duty.

ADC (Maj Mori): Thank you, sir. One minute, sir. Sir, no further questions, thank you.

PO: Trial?

P (LtCol [redacted] None, sir.

PO: Thank you, Colonel [redacted] please leave the courtroom.

CM (Col [redacted] So I can send in the next person?

PO: Okay. Trial and defense, it is a -- according to Major Mori you just heard the noon tone, which I haven't heard since I've been here. The gally closes at 1300 which is where most people are going to eat. I would rather continue on, but I recognize that you all want to eat. We'll continue with individual voir dire at 1310, giving everyone a full hour to eat. Any problem with that, trial?

P (LtCol [redacted] No, sir.

PO: Defense?

DC (Mr. Dratell): No, sir.

PO: Court is in recess.

The Commissions Hearing recessed at 1201, 25 August 2004.

The Commission Hearing was called to order at 1312, 25 August 2004.

PO: The Commission is called to order. All parties present when we recessed are once again present. The presiding officer and Lieutenant Colonel [redacted] are present.

I'm passing to Lieutenant Colonel [redacted] his questionnaire for his use if we need it during this.

Trial, voir dire?

P (LtCol [redacted]: None, sir.

PO: Defense, voir dire?

ADC (Maj Mori): Yes, sir. Good afternoon, sir.

CM (LtCol [redacted] Good afternoon.

ADC (Maj Mori): Sir, I'd like to ask you some questions directly dealing with your participation in Operation Enduring Freedom.

CM (LtCol [redacted]: I understand.

ADC (Maj Mori): Can you -- when did you first get notified that you would be going over to [redacted]

CM (LtCol [redacted] My notification -- this is going to be a ballpark figure -- probably middle of October 01.

ADC (Maj Mori): After or before the bombing campaign had started in [redacted] do you recall?

CM (LtCol [redacted] I believe it was after.

ADC (Maj Mori): And now, you were working directly -- you were at Fort Bragg; is that right?

CM (LtCol [redacted] This is correct.

ADC (Maj Mori): So you were working directly with the special forces units from Fort Bragg; is that correct?

CM (LtCol [redacted]: Yes.

ADC (Maj Mori): Are you part of that -- are you part of the special forces unit there?

CM (LtCol [redacted] I am not special forces, no.

ADC (Maj Mori): Okay. But were you directly attached to them?

CM (LtCol [redacted] I was not attached to a special forces unit. I was attached to a special operations unit.

ADC (Maj Mori): Okay. And which ultimately became Task Force Sword; is that correct, sir?

CM (LtCol [redacted] Yes. U.S. Central Command stood up various task forces over in the gulf, and I was attached to one of them.

ADC (Maj Mori): And that was under General Dale (ph), Task Force Sword?

CM (LtCol [redacted] If we're going to go further than that we'll need to go into closed session.

ADC (Maj Mori): Okay. Can you tell me where on the ground you were located in [redacted]

CM (LtCol [redacted] I'd like to discuss that in closed session.

ADC (Maj Mori): Okay. Same if I asked the question when you were there?

CM (LtCol [redacted] Yes, I'm sorry -- well, I can give you the ballpark when I was deployed. That was roughly 15 November 01 through roughly 15 February 02, and that's give or take a week or two.

ADC (Maj Mori): Yes, sir. And what was your role in [redacted]

CM (LtCol [redacted] I was an [redacted] officer.

ADC (Maj Mori): Can you explain to me what --

CM (LtCol [redacted] Closed session. I apologize, but we'll have to go into closed session.

ADC (Maj Mori): Okay. Were you involved with -- can I -- were you involved with obtaining information that had come from captured personnel?

CM (LtCol [redacted]): We're going to have to go into closed session, I'm sorry.

ADC (Maj Mori): Okay, sir. You've have no legal training; is that correct?

CM (LtCol [redacted]): That's correct.

ADC (Maj Mori): Ever sat as a court-martial member?

CM (LtCol [redacted]): No, I have not.

ADC (Maj Mori): Civilian jury duty ever?

CM (LtCol [redacted]): Never been called.

ADC (Maj Mori): Okay. Any close friends that are attorneys or relatives that are attorneys?

CM (LtCol [redacted]): No.

PO: You've noticed the common response to all the members about friends who are attorneys? It's sort of scary, isn't it?

CM (LtCol [redacted]): I was implying nothing, sir.

ADC (Maj Mori): Yet you are now in a role where you have to actually make legal decisions and determinations?

CM (LtCol [redacted]): Yes.

ADC (Maj Mori): And you're familiar that typically would be done, at least in the American judicial system, either military or civilian, by an independent judge?

CM (LtCol [redacted]): Yes.

ADC (Maj Mori): Do you have any hesitations about filling the role of the judge without legal experience?

CM (LtCol [redacted]): No, I do not.

ADC (Maj Mori): Can you explain why not, sir?

CM (LtCol [redacted] Why not? Because the commission is based upon the documents that have been provided to us. That is our role. That has been determined by authorities higher than myself. I believe that I am perfectly competent as a military officer and professional to carry out those duties.

ADC (Maj Mori): Now, you mentioned in your questionnaire that you're slightly concerned about your family might get contacted because of the notoriety and you're aware that neither the defense nor the prosecution were responsible for your name being released in the media?

CM (LtCol [redacted] Yes, I understand.

ADC (Maj Mori): Now, you describe in your questionnaire kind of a self-study on al Qaida, Taliban, and Islamic fundamentalism?

CM (LtCol [redacted] Yes.

ADC (Maj Mori): Can you -- I guess, in a nutshell, dealing with al Qaida, what is your understanding of who that is?

CM (LtCol [redacted] That is the -- you mean specifically what is al Qaida as I understand it?

ADC (Maj Mori): Yes, sir.

CM (LtCol [redacted] It is an organization set up under Usama bin Laden, Islamic fundamentalists, and that is my understanding of al Qaida.

ADC (Maj Mori): And prior to 9/11, did you have any knowledge of al Qaida, sir?

CM (LtCol [redacted] Very general.

ADC (Maj Mori): Very general? And what do you believe to be the goal of al Qaida?

CM (LtCol [redacted] Honestly, I do not have a good answer for that.

ADC (Maj Mori): The Taliban, when did you first start learning anything about the Taliban? Prior to 9/11 or after 9/11?

CM (LtCol [redacted] I do not recall hearing about the Taliban other than in extremely general terms prior to 9/11. I knew that the northern alliance and the Taliban were at war, and that's about the extent of my knowledge.

ADC (Maj Mori): Sir, do you feel that the Taliban had the right to be defending its country from an attack?

CM (LtCol [redacted] Defending its country against an attack? Well, I think that was the whole reason for contest, is whose country was it.

ADC (Maj Mori): But would you agree with the principle that whether it's a good government or a bad government, that government in power has the right to try -- an inherent right to try and keep itself in power?

CM (LtCol [redacted] The government in general, yes, I would.

ADC (Maj Mori): What is your, again, your understanding of Islamic fundamentalism as you described? What do you -- how do you distinguish that from just other Islam?

CM (LtCol [redacted] That's a good question. Islamic fundamentalism, as I understand it, is very focussed on Islam, specifically to the, I guess, the deletion of other followings, other faiths.

ADC (Maj Mori): Is that an area of knowledge that you would be open to hearing evidence on to help educate you in the area of Islam or Islamic fundamentalism?

CM (LtCol [redacted] Certainly.

ADC (Maj Mori): Sir, in Question 41, you talked about September 11th, driving home, the idea that freedom isn't free, and that our military is vital to defend it; is that correct?

CM (LtCol [redacted] That is correct.

ADC (Maj Mori): Do you think that the military is also vital for them to defend our core values as Americans?

CM (LtCol [redacted] Yes, I do.

ADC (Maj Mori): And would you agree that one of those values is fairness and equality?

CM (LtCol [redacted] Yes.

ADC (Maj Mori): Kind of going back to the questions I asked you about the legal experience and filling this new role as a finder of law or a decider of law, as an intel officer you obviously are the person in the know in the unit you're working with because of your role as an intel officer and your experience; correct, sir?

CM (LtCol [redacted] Yes, that is correct.

ADC (Maj Mori): And you might have senior people in rank to you looking to you for information and advice because of your job and your experience?

CM (LtCol [redacted] That's correct.

ADC (Maj Mori): Is it fair to say that during this commission process that you may, as well, look towards Colonel Brownback for his experience in his legal background and knowledge to help you in dealing with issues in this commission?

CM (LtCol [redacted] In understanding legal terminology and things like that, yes, I do.

ADC (Maj Mori): Do you think if he expressed an opinion on a legal issue in the deliberation room, do you think that might impact on your decisions that you make on the issues?

CM (LtCol [redacted] I believe it would carry as much weight as any other member of the panel based upon the rules that have been set before us.

ADC (Maj Mori): And so, sir, you recognize that there could be a sort of appearance that he might have influence over other members but for the rules that say he shouldn't.

PO: What does that have to do with Colonel [redacted]

ADC (Maj Mori): I'm just asking on his perception, sir. It's the last question on this area. I'm moving on.

CM (LtCol [redacted] I'm sorry. Could you restate that?

ADC (Maj Mori): You're basing that you won't let it influence you based on the rule, but the influence would still be

there. But you would have to try to remember, okay, the rule says I can't let their influence impact me; is that what you're saying, sir?

CM (LtCol [redacted] It would not be a matter of having -- or trying to remember. I would remember.

ADC (Maj Mori): Yes, sir. Do you -- during any of your units that you participated with in [redacted] or individuals you met, was there any loss of life, U.S. casualties?

CM (LtCol [redacted] Yes, there was loss of life.

ADC (Maj Mori): Do you remember when the first hostile U.S. casualty occurred?

CM (LtCol [redacted] No, I do not.

ADC (Maj Mori): Did it occur while you were in country or after you departed, sir; do you recall?

CM (LtCol [redacted] Well, I'm pretty confident it happened before I ever got in country.

ADC (Maj Mori): As an intel officer, you have to collect information and determine whether it's reliable or not; correct, sir?

CM (LtCol [redacted] That's correct.

ADC (Maj Mori): How do you think your experience as an [redacted] officer will impact your ability here to determine the credibility of either what witnesses may say, or documentary evidence, or any type of [redacted] that you might receive during this commission process?

CM (LtCol [redacted] I'm not sure as an [redacted] officer that's necessarily a correct statement; but certainly all the information is going to have to be weighed against the rest of the information, and you base your decision upon that.

ADC (Maj Mori): And you're aware that the standard that applies here to find David Hicks guilty of any charge is beyond a reasonable doubt. Do you understand that, sir?

CM (LtCol [redacted] I do understand that.

ADC (Maj Mori): And is that a standard higher than what you may use as an [redacted] officer to put into one of your [redacted] guess, if you received information from -- during your role as an [redacted] officer, what standard do you use to screen it to determine whether you would pass it on as valuable [redacted]

CM (LtCol [redacted] Ideally, you're going to have multiple sources of information to corroborate or not. I don't know if that answers your question.

ADC (Maj Mori): No, that does, sir. So would you say that beyond a reasonable doubt proof would be higher than that?

PO: Would you like to propose an instruction for him on beyond a reasonable doubt, Major Mori? I mean, that's a matter of law. Do you want to tell him what you think it is and ask him if he understands that?

ADC (Maj Mori): Well, sir, I'm just trying to explore his performance of his [redacted] duties where he is making credibility calls.

PO: Well, then you may do that, but don't use a legal term to do that.

ADC (Maj Mori): Yes, sir. Multiple sources is something you would require before giving [redacted] or determining if it's credible?

CM (LtCol [redacted] I would not say it's required, certainly not. But that's -- the more information you have, the better.

ADC (Maj Mori): And would it also be important to hear how far removed the person is from the source that provides it to you? The person that you got the information from, did they actually observe the event versus someone who heard it from someone else?

CM (LtCol [redacted] Certainly.

ADC (Maj Mori): Now, during your time in Operation Desert Storm, did you have any interaction with prisoners there?

CM (LtCol [redacted] No, I did not.

ADC (Maj Mori): What was your knowledge of the northern alliance?

CM (LtCol [redacted]) Very general based upon news reports or reports from documentary-type things.

ADC (Maj Mori): And did you interact with any [redacted] forces in [redacted]

CM (LtCol [redacted]) No, I did not.

ADC (Maj Mori): Did some of the service members you work with interact with northern alliance forces?

CM (LtCol [redacted]) Yes, they did.

ADC (Maj Mori): Did you interact with any coalition partners outside the northern alliance forces, service members from other countries?

CM (LtCol [redacted]) We'll need to discuss that in closed session.

ADC (Maj Mori): Have you ever heard of the name Saif al Adel?

CM (LtCol [redacted]) I don't believe I have.

ADC (Maj Mori): Ibn Sheikh al Libi?

CM (LtCol [redacted]) No, I have not.

ADC (Maj Mori): Muhammad Atf, also known as Abu Hafs al Masri?

CM (LtCol [redacted]) No, I have not.

ADC (Maj Mori): During your time in [redacted] did you ever hear David Hicks' name?

CM (LtCol [redacted]) I did hear his name in the media.

ADC (Maj Mori): Did you -- anything from the course of your actual operations that you were conducting?

CM (LtCol [redacted]) No.

ADC (Maj Mori): Did you ever hear any information about an Australian who had been captured through your --

CM (LtCol [redacted]) No.

ADC (Maj Mori): Did you, again, during your actual operations there, did you learn about John Walker Lyndh at all?

CM (LtCol [redacted]) Again, only through the media.

ADC (Maj Mori): Only through the media. Sir, one moment, please.

The assistant defense counsel conferred with his co-counsel.

ADC (Maj Mori): Sir, what did you learn from the media about David Hicks?

CM (LtCol [redacted]) I just recall that an Australian had been captured, and that's really about the extent of it, just one more little tidbit of information.

ADC (Maj Mori): Did you form any opinion or have any thoughts when you heard that?

CM (LtCol [redacted]) No, I was too busy.

ADC (Maj Mori): Did anyone else ever talk to you about what was going on there and who they were capturing -- the U.S. was capturing?

CM (LtCol [redacted]) I'm not sure I understand.

ADC (Maj Mori): In relation to David Hicks, other people that you captured, not in your operational aspects of it, but just in the social?

CM (LtCol [redacted]): No.

ADC (Maj Mori): You -- someone answered, sir, before you, had answered that the order tells you that it's this way, and so you're going to abide by the order. And all of us as military officers have a sort of instinct to follow the order. Do you feel that you would consider either the lawfulness of orders or whether those orders provide what would be required for a fair trial?

CM (LtCol [redacted]): Yes.

ADC (Maj Mori): And if those orders didn't provide our standard of justice, you would be able to say that that order is improper, even if was issued by the Secretary of Defense?

CM (LtCol [redacted] Would I understand or would I be able to comment whether or not the order was lawful? Is that the question?

ADC (Maj Mori): Not just lawful in the typical sense that you would say, Marine do this, Marine do this; but in the sense that an order written that creates a justice system, and you as a decider of law, would you be able to decide whether or not that system met certain standards that are required outside of the Department of Defense.

PO: Are you going try to provide a brief to educate him on what you think on this?

ADC (Maj Mori): Yes, I --

PO: Would you like to wait until he gets that brief?

CM (LtCol [redacted] I believe I would because I'm not sure I'm tracking where he's going.

ADC (Maj Mori): Are you open to information and arguments that might ask you to say the Department of Defense was wrong?

CM (LtCol [redacted] Certainly.

ADC (Maj Mori): And if you saw the evidence and the legal arguments and agree with them, you wouldn't hesitate to find that it was wrong.

CM (LtCol [redacted]: No.

ADC (Maj Mori): As an intelligence officer, do you have any opinion what techniques can be utilized on an individual to gain information from them?

CM (LtCol [redacted]: No, I do not.

ADC (Maj Mori): Have you received any training in that area?

CM (LtCol [redacted]: No, I have not.

ADC (Maj Mori): You don't deal with the collection of human intel?

CM (LtCol [redacted]: No, I don't.

ADC (Maj Mori): Do you work with or have been associated with others that that was part of their job?

CM (LtCol [redacted] I've been associated with them, yes.

ADC (Maj Mori): Have they ever discussed with you what type of techniques they may use too?

CM (LtCol [redacted] No, they have not.

ADC (Maj Mori): Do you think that the techniques employed on a person to gain information would be important to know to weigh the credibility of that information obtained?

CM (LtCol [redacted] Yes, I do.

ADC (Maj Mori): Sir, I have no more questions.

PO: Trial?

P (LtCol [redacted] None, sir.

PO: Thank you. You may return to the deliberation room. Please tell Colonel [redacted] to come in.

Let the record reflect that Colonel [redacted] has left the courtroom and that Colonel [redacted] has entered it.

I just provided Colonel [redacted] his copy of the questionnaire.

Trial?

P (LtCol [redacted] None, sir.

PO: Defense?

DC (Mr. Dratell): Yes, sir, thank you. Good afternoon, Colonel [redacted] Lieutenant Colonel [redacted]

CM (LtCol [redacted] Yes. Good afternoon, sir.

DC (Mr. Dratell): I want to take you back yesterday just to explore a little further some of the answers from yesterday. And the first is, with respect to what you've conceded were strong emotions about September 11th, that you would take your emotion out of it, with respect to your duties with the commission. And I just

want to know how you intend to do that?

CM (LtCol [redacted] Sir, the way I intend to do that is to look at the case objectively and try to put my emotions aside, which I will.

DC (Mr. Dratell): But without knowing what the evidence is in advance and without knowing what the legal issues that you're going to decide -- without knowing them now in advance, how can you assure us that something will not rekindle this emotion and interfere with your ability to be objective?

CM (LtCol [redacted] I can only give you my word, sir.

DC (Mr. Dratell): Well, you want to do your duty in this case; correct?

CM (LtCol [redacted] That is correct, sir.

DC (Mr. Dratell): And you don't want to refuse an assignment that you consider an important one in the context of not only -- not necessarily your career, what you consider in the context of the military.

CM (LtCol [redacted] That is correct, sir.

DC (Mr. Dratell): So you're trying to overcome this emotional issue that you have by trying to stay objective?

CM (LtCol [redacted] That is a correct statement, sir.

DC (Mr. Dratell): But you've never been in this position before, I take it?

CM (LtCol [redacted] No, not at this level, sir.

DC (Mr. Dratell): And that has to do not only with facts, but also with respect to making legal decisions?

CM (LtCol [redacted] I've made legal decisions under UCMJ only, sir.

DC (Mr. Dratell): But not as a judge.

CM (LtCol [redacted] Never as a judge, sir.

DC (Mr. Dratell): And are you familiar with what are called mixed

questions of law and fact that involve a particular application of a legal principle to a set of facts that may be different from one case to another case and how the law is applied?

CM (LtCol [redacted] No, I cannot say I'm an expert at that, sir.

DC (Mr. Dratell): Well, what we're concerned obviously with is the ability to get an objective panel that can give Mr. Hicks a fair trial. And as you sit here now in advance, I just -- I'm concerned about how you can assure us that your emotions will not intrude. And I'll just give you an example, and it may have something -- even if it has to do with Mr. Hicks, I think we agree that it would be inappropriate to let the emotions get in the way; correct?

CM (LtCol [redacted] Yes, emotions will not get in the way, sir.

DC (Mr. Dratell): But even things that have nothing to do with Mr. Hicks may raise emotions with you that would interfere with your ability to do the job which you can't even anticipate now because you're not in the situation. I want to just give you an example. The charge sheet, looking at the charge sheet, it talks about the history of al Qaida; and it talks about that al Qaida was formed in 1989, a time when Mr. Hicks was 13 years old. Yet something in the presentation of evidence with respect to that could trigger an emotional response for you. And I just want to know how you can assure us that that's not going to interfere when you say you have these strong emotions?

CM (LtCol [redacted] Sir, I'm a very passionate person, and I believe in justice. It's probably one of my moral absolutes, that I believe in justice; and everyone should receive a fair trial. That's one of the foundations of my life and I believe justice under the law should be served both ways for Mr. Hicks and yourself. And that is my -- probably, my strongest belief, one of my core values that I like to identify myself with, sir.

DC (Mr. Dratell): You understand with respect to the charge sheet that I just read from, that as a matter of evidence, this has no value whatsoever?

CM (LtCol [redacted] I understand, sir. It's just a charge sheet.

DC (Mr. Dratell): And with respect to the President's determination that Mr. Hicks is eligible to be charged as a matter of what's in that determination as a matter of fact also is to be given no weight by you?

CM (LtCol [redacted] I understand that, sir.

DC (Mr. Dratell): Now, you'll be hearing multiple cases, and we want to be sure about whether or not you feel comfortable with deciding different issues and different cases, seeing witnesses perhaps in one case, seeing the same witness in other cases, and being able to judge that witness or that issue solely on what is before you with respect to that particular person. And I want to get your thoughts on that process, if you've ever had it before, if it makes you feel comfortable, uncomfortable, confident, how you feel about that?

CM (LtCol [redacted] I'm very comfortable that I can compartmentalize those issues, sir. One case being one case, another case being another case. Based on the duties that I've performed in the past -- I'm a deputy brigade commander for an aviation unit, multiple issues over multiple times and multiple things that I have to do; and I do them fairly well, sir. So I think I can do the same in this setting and commission.

DC (Mr. Dratell): It's not just multitasking. Understand what you're going to be facing. It's not just multitasking. It's taking almost the same information or the same types of issues with respect to one person, and then eliminating that from your deliberation with respect to another person with almost, maybe the same facts, maybe the same witness, maybe the same legal issue. Different facts, different persons, so it's not the same as being able to handle more than one task at a time.

CM (LtCol [redacted] Understood, sir.

DC (Mr. Dratell): And do you have experience with that in the context of what we're talking about?

CM (LtCol [redacted] In a legal setting, no, sir.

DC (Mr. Dratell): If the presiding officer might provide Lieutenant Colonel [redacted] the MCO Number 1, please.

The presiding officer handed MCO-1 to Lieutenant Colonel [redacted]

DC (Mr. Dratell): If you could look at section 6(D)(1) -- and unfortunately, the copy that I have is not numbered, there are no page numbers -- but it's about half-way through the document; and toward the bottom, it's a section marked "admissibility." And if you could just read that to yourself, and then I'll just ask you a couple of questions, please.

The member did as instructed.

CM (LtCol [redacted]): Okay, sir.

DC (Mr. Dratell): Now, do you understand that that gives you the authority to call for a vote of the entire commission if you disagree with a decision of the presiding officer with respect to the admissibility of any piece of evidence?

CM (LtCol [redacted]): Yes, I do understand that, sir.

DC (Mr. Dratell): Are you prepared to exercise that authority?

CM (LtCol [redacted]): Yes, sir, I am prepared to execute my duty.

DC (Mr. Dratell): And are you prepared to exercise it in an affirmative way and not necessarily look for an alliance, look for somebody else to do it first?

CM (LtCol [redacted]): No, sir, I'll come forward as an individual.

DC (Mr. Dratell): Now, with respect to the presiding officer's instruction earlier, in which he also noted that we object to, which is that the presiding officer will, at times, provide advice on the law to the other commission members. And the question is how are you going to keep that from having more influence being who the presiding officer is and his background, and the influence that counsel such as myself, or any of the other defense counsel or the prosecution, and how are you going to make that determination on an independent basis. So if you could explain to us, if you can?

CM (LtCol [redacted]): It is a very difficult orchestry (sic), yes, it is. I will take the facts as you present them, apply them to what is written in front of me as to the law with my interpretation, how you will present it as a counsel, also as the defense and if there's further questions, I will ask Colonel Brownback for any further

clarifications, what I hope to do from the defense and also yourselves is helping me with that information as I read the law.

DC (Mr. Dratell): And are you comfortable or uncomfortable with that position for the first time, I assume, in your career?

CM (LtCol [redacted] I'm comfortable, sir.

DC (Mr. Dratell): But this is the first time in your career you'll be doing that?

CM (LtCol [redacted] Yes, sir.

DC (Mr. Dratell): Now, when you said yesterday, and in your questionnaire, that you were concerned about reprisals from al Qaida, in particular, I think was mentioned; but with respect to your role in the commission process -- and I want to ask you if that's not an assumption -- isn't that an assumption that someone like Mr. Hicks has something to do with al Qaida? Isn't that just prejudging him as to his connection or with respect to some of the issues in the case?

CM (LtCol [redacted] I wouldn't say that, sir. I would just say -- when I said "reprisals," I was trying to give an example of what I would be saying. I don't know who would give me reprisals. It's a feeling, sir.

DC (Mr. Dratell): Also in your questionnaire, as was discussed yesterday, at some point you expressed an opinion to someone in some forum that all of the detainees at Guantanamo were terrorists. And I'm curious what the basis was for that opinion.

CM (LtCol [redacted]: What it asked was had I ever stated that opinion prior. I'm trying to be totally honest within the questionnaire. When the Guantanamo situation was going on a long time ago and, yes, in the past I probably said that. I wanted to be totally honest. Yes, I have been in conversations because I come from Fort Bragg. A lot of soldiers, we've been in Afghanistan, not myself personally. And those conversation have come up, yeah, there was a lot of terrorists taken, and they were taken to Guantanamo Bay. And I've been in those discussions, sir, and that was the context of what it was, nothing specific.

DC (Mr. Dratell): But I'm just curious what the basis was. How did you form that opinion? What information did you have to form that opinion?

CM (LtCol [redacted] I actually took the opinion from the conversations themselves. They were defined as terrorists in the conversations, and I used the same term, sir.

DC (Mr. Dratell): And when you say it was just general, I mean you understand that you can't generalize in this process?

CM (LtCol [redacted] Yes, sir, I understand that.

DC (Mr. Dratell): And you express it as an opinion that you expressed as one time, and I'm getting the sense that it's not your opinion now.

CM (LtCol [redacted] In retrospect, no.

DC (Mr. Dratell): And what changed your mind?

CM (LtCol [redacted] It's a fair term to use, sir. Because there's no one -- there's been no due process that's been done here, and that's not a fair statement to say.

DC (Mr. Dratell): And you mentioned due process yesterday. So it leads -- actually, it's my next question, which is: How would you define "due process"?

CM (LtCol [redacted] I see it as justice, I guess, what you would say is justice in and under the law in a setting of some sort, such as a courtroom.

DC (Mr. Dratell): And in the context of that definition, does it meet your definition of due process if the prosecution puts on a witness who reads a statement that was made to that witness, but not the person who made the statement --

P (LtCol [redacted] Sir, I'm going to object.

PO: Go on.

DC (Mr. Dratell): -- and the defense does not have an opportunity to cross-examine the person who actually said it, the conditions under which it was made or any potential

motive for the statement, but only the person, for example a law enforcement agent would come in?

PO: Before you answer the question, let's listen to Colonel [redacted] objection.

P (LtCol [redacted] Well, sir, not only was that kind of a long question, but it asks for a lot of speculation, if this happens, if that happens. We don't feel that that's tailored to find out whether this witness possesses any kind of bias. So it's an argumentative question and it's based on speculation.

PO: Well, I know, but I let Major Mori argue. I might as well let Mr. Dratell argue. Presume as a fact that someone sits on the stand and reads you a statement. The statement is made by a third -- by another party. The other party is not here in the courtroom and will never be here in the courtroom. The person who's reading it said and you ask him, what do you know about that and the making of it and the taking of it, and he says, I don't know nothing.

I believe the question is in two parts. First of all, would you be willing to listen to arguments that that statement should not be given much weight because you don't know how it was made, how it was taken or whatever? That's the first part.

CM (LtCol [redacted] And the answer to that is, yes, sir.

PO: Okay. The second part was your individual opinion, and if you don't feel comfortable rendering it until you've been educated in the law by the defense and the trial -- they'll certainly understand that -- do you think that's fair, using the term as Mr. Dratell has used it as "fair" and if you want to wait until they educate you, you can wait.

CM (LtCol [redacted] I'd like to know more about it, sir, before I answer that question.

DC (Mr. Dratell): Well, I'll add another element. If the defense wanted to call the person that made the statement, we couldn't because he was either -- we couldn't have access to him because he was being detained here or had already been released to another country and we couldn't bring him back, so all we have was a piece of paper, and

we couldn't cross-examine a piece of paper. Does that meet your definition of due process?

PO: If that were to occur, would you once again listen to arguments as to how that should affect the weight?

CM (LtCol [redacted] Yes, I would listen to all arguments.

DC (Mr. Dratell): So may I ask the alternate question, which is --

PO: Sure, go on.

DC (Mr. Dratell): -- does that meet your definition of due process as you've defined it for us?

CM (LtCol [redacted] At the time of the example you've given me, I'd have to at that time make my decision on argument.

DC (Mr. Dratell): And would that be the same answer with respect to questions of whether or not certain evidence should come in because of the way it was obtained? In other words, an interrogation technique or questions about the applicability of the Geneva Convention, are you saying that you would want to wait to see more about that as to whether that meets your definition of due process?

CM (LtCol [redacted] Yes, sir.

DC (Mr. Dratell): I have nothing further. Thank you.

PO: Trial?

P (LtCol [redacted] Sir, would you agree to keep an open mind and just consider each piece evidence as it comes in, as it is presented to you?

CM (LtCol [redacted] Yes, I would.

P (LtCol [redacted] Do you understand the questions of counsel at this point about what might happen are speculative and not necessarily an indication of what may or may not occur in this trial?

CM (LtCol [redacted] I understand, sir.

P (LtCol [redacted] Thank you.

PO: Mr. Dratell?

DC (Mr. Dratell): Nothing. Thank you, Lieutenant Colonel.

PO: Please toss me your questionnaire and leave the courtroom.

CM (LtCol [redacted]: Yes, sir.

PO: Let the record reflect that Colonel [redacted] has left the courtroom.

Who do you want back for closed, trial?

P (LtCol [redacted] Sir, we're not asking for anybody on closed.

PO: Okay.

DC (Mr. Dratell): We would like Colonel [redacted] please, Colonel [redacted] and Colonel [redacted] please.

PO: How long is it going take you to clear the courtroom, trial?

P (LtCol [redacted] Ten minutes, sir?

PO: I don't know, I'm asking.

P (LtCol [redacted] I'm not sure either, sir. Ten minutes would suffice.

PO: Okay. We'll meet -- what we're going to do is -- what's the matter, Major Mori?

ADC (Maj Mori): Nothing, sir.

PO: Okay. We're going to meet at 1400. We'll hear those, and we'll hear the challenges in the closed session, then we'll open up. If counsel ask lots of questions, we won't open up for a while. If they don't ask lots of questions, we'll open up sooner. I can't say when we'll open.

Court's in recess.

The Commission Hearing recessed at 1351, 25 August 2004.

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. DAVID MATTHEW HICKS

a/k/a Abu Muslim al Austraili
a/k/a Muhammaed Dawood

This is to certify that Pages 1 through 78 are an accurate and verbatim transcript of the foregoing proceedings.

Peter E. Brownback III
Colonel, U.S. Army
Presiding Officer

26 August 2004
Date

THE NEXT SESSION WAS A CLOSED SESSION AND SEALED WITH A CLASSIFICATION OF **SECRET**. THIS SESSION CONSISTS OF PAGES 79 TO 104 AND CONTAINS THE INDIVIDUAL VOIR DIRE OF COMMMISSION MEMBERS: COLONEL [redacted] COLONEL [redacted] AND LIEUTENANT COLONEL [redacted]

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. DAVID MATTHEW HICKS

a/k/a Abu Muslim al Austraili
a/k/a Muhammaed Dawood

This is to certify that Pages 79 through 105 are an accurate and verbatim transcript of the foregoing proceedings.

Peter E. Brownback III
Colonel, U.S. Army
Presiding Officer

26 August 2004
Date

The Commissions Hearing was called to order at 1514, 25 August 2004.

PO: This commission will come to order. Let the record reflect that all parties present when the commission recessed are once again present. I am the only member present.

During the closed session defense you made two challenges, I'm going to paraphrase them. They are on the record but this is just so people sitting here will know. The first challenge was a challenge for cause against Colonel [redacted] You feel that his knowledge of the operations in [redacted] of the detainees is such that he would be better suited to be a witness than to be a member, and further that his links with personnel in theater were such that he could been characterized as a victim. Is that correct, generally?

DC (Mr. Dratell): Yes.

PO: Second, you challenged Lieutenant Colonel [redacted] for cause first because of his activities in the [redacted] during the time period in question and his knowledge of various activities and locations that may come up later in the trial, and additionally because he was on the ground and the locations he was in were such that he could well have been a victim if the allegations were to be believed. Is that a fair characterization?

DC (Mr. Dratell): Yes, it is.

PO: Okay.

DC (Mr. Dratell): And also we adopted the objections yesterday the challenges yesterday from Mr. Hamdan's attorney.

PO: Okay. Those are the closed challenges. Based on the open sessions you got any challenges, trial?

P (LtCol [redacted] No, sir.

PO: Defense?

DC (Mr. Dratell): Yes, sir, and if I may just put on the record in the open session so we don't have to resort to a classified session -- just to brief to put in the open

session our objection to holding proceedings without Mr. Hicks present, which we will brief in a motion with respect to any evidentiary matters, but we also object to it in the voir dire process. And our challenges, first just to restate the challenges made by Mr. Hamdan's attorney yesterday. In addition, we believe that two of the commissioners are in a position --

PO: Hold on a second. Let's just start with [redacted] Do you challenge him?

DC (Mr. Dratell): Yes.

PO: Why do you challenge Colonel [redacted]?

DC (Mr. Dratell): Same reason as Mr. Hamdan based on the September 11th visit, the emotions that raised, and the ability to segregate that from the issues in the case.

PO: Okay, that's [redacted] right? You already have a closed challenge. You have an open challenge against him?

DC (Mr. Dratell): Yes, sir. Essentially that even from his open session his knowledge of the specific facts is too much knowledge of the specific facts for him to be a -- essentially a juror, he is more suitable as a witness. And also just his involvement suggests bias and I would analogize it to a situation here where you have a -- someone who was in charge of prisoner movement for the Bureau of Prisons and was involved in transporting defendants from one to another according to certain criteria and according to certain standards and did that, then you are asking that person to be a jury for a specific person whom he remembers, and he said that in open session.

PO: Okay. That is [redacted] [redacted]

DC (Mr. Dratell): Not with respect to [redacted] Not with respect to Colonel [redacted]

PO: No challenge to [redacted]?

DC (Mr. Dratell): Colonel [redacted] --

PO: Just a second. [redacted]

DC (Mr. Dratell): Again with respect to his -- too much knowledge.

PO: Practically the same thing as the closed challenge?

DC (Mr. Dratell): That is correct.

PO: Okay.

DC (Mr. Dratell): On both grounds and also -- I should say also with Colonel [redacted] with the victim part and the context of the command structure, we would add as an open -- based on the open record as well.

PO: Okay.

DC (Mr. Dratell): And with respect to Colonel [redacted] his involvement in the theater and in the operations it is like having someone who is assigned to a task force to investigate a situation and he doesn't personally arrest or target a particular defendant, but we worked on the whole investigation, and now you are asking him to come in and sit on a jury to determine whether that person is guilty or not guilty.

PO: That's [redacted] and now we get [redacted] You have a challenge on him?

DC (Mr. Dratell): Yes. With Lieutenant Colonel [redacted] is the same as yesterday essentially with respect to the motions and I think that this is a situation that he and -- and I appreciate his honesty, and I appreciate his effort, and his notable desire to do his duty, but I just do not believe that he is correctly anticipating what is going to be required of him in terms of the emotional aspect of it. And I don't believe that he can give an adequate assurance based on his lack of experience in so many of these areas, in making so many of these determinations that he cannot adequately give an assurance that he can avoid letting that emotion intrude upon his duty in this commission.

PO: Okay. Trial?

DC (Mr. Dratell): I also have -- I just have one other -- I have another challenge as to -- well, I grouped them differently, but I enumerate the particular commissioners. With respect to [redacted] -- Colonel [redacted]

and Colonel [redacted] specifically that what we are asking them to do at this stage is to essentially override things that they did for either months or years in the context of what they were doing. Colonel [redacted] specifically said this morning in open session about once the question of the Geneva Convention applying even though it wasn't his decision once that had been blessed he carried it out. And what we are asking now to a certain extent is that it was all wrong, and he was wrong, and his superiors were wrong, and we are asking him to do something that you can ask a juror to do legitimately.

The same with are Colonel [redacted] with respect to same types of issues, ROEs, things like that. I just don't see how you could put them in the position of having to sort of -- it is a referendum on their conduct and the conduct of their chain of command during a period of time when they were actively involved in this, and I think it is just too close for it to be objective.

And we have two challenges that go to all -- that go to the entire panel. One, is that the panel should be disqualified because of lack of legal training. We think it creates --

PO: I am not going to accept that challenge. You may brief it. Okay. That is not a challenge. No. I not am going to listen. Move on.

DC (Mr. Dratell): You said you wanted us to brief it; we will brief it. I think that we can make it part of the context of how we brief the question of the presiding officer providing legal advice to the non-lawyers to the other non-lawyers.

PO: Great. Put it in.

DC (Mr. Dratell): We will include it in that context. Another across the board challenge is we believe that no panel of commissioners should hear more than one case, and we think that by having them here and making determinations runs which trial first, second or third. The motions will be proceeding simultaneously and we think that it is inappropriate given the experience, and given what is involved in questions of law and questions of fact, mixed questions of law and fact, that they should not be required, and we think that it is inappropriate, and

will be unfair, and beyond the scope of their capability. Without any disparagement to them, I think it is beyond the scope of anyone's capability to be a juror in two cases like this.

PO: Okay. Brief that.

DC (Mr. Dratell): Okay.

PO: No, I mean that's the motion on the structure. Once again that has nothing to do with the challenge to the jurors. It just doesn't. Go on.

P (LtCol [redacted] Yes, sir. Sir, the attacks of September 11th 2001 had a huge impact on the United States military. To try to find a panel that is not impacted by those attacks of September 11th is just not the appropriate standard. It affects many, many people in the United States military. The standard should come back to what it is. Whether there is good cause to believe that the member cannot perform fairly and impartially in according a full and fair trial. All of these members have demonstrated very clearly that what we have is a very experienced, a very knowledgeable and very fair panel, that they can be independent; and we believe that none of the challenges for cause should be granted.

As to Colonel [redacted] who visited the world trade center site once, on questioning about it, he does not equate that to this trial. He will consider the accused's guilt or innocence based on the evidence that is put before him. He does not feel any anger towards the accused because of those events. He does not equate the two.

Colonel [redacted] served in Tampa, Florida as a senior military officer. And in picking the best military officers there are, the best and the brightest, you find some that do have jobs that put them in positions to know about operations and who have been involved in operations. That does not disqualify him or any of these members. The fact is that he does not know the accused. He was not in the same area where the accused was when his alleged activities where taking place. In fact, the only extent to which he knows him, quote, unquote, would be that his name was on list of people who were being moved; and simply his role was logistical. He does not answer to ROEs or the success

or failure of operations that were going on. He was the logistics person who was seeing a manifest as it moved on. That does not disqualify him.

Sir, the same we would say for Lieutenant Colonel [redacted] that he was not in the direct area of the accused. He does not know the accused. The fact that he knows generally about operations in [redacted] would put him in a category with a lot of military officers. Sir, Lieutenant Colonel [redacted] we believe as he answered the questions demonstrates that the emotions he has are natural emotions to an attack such as September 11th; but that he is a professional and that he can set those aside and be fair. Thank you, sir.

PO: Mr. Dratell, you want to say anything?

DC (Mr. Dratell): Just that with respect to -- I think that -- it is inconceivable to me that the United States military cannot find a panel of five that does not include two persons so intimately involved that that's what the prosecution is suggesting. I think that it is inconceivable that there can't be two others who are not so intimately involved in the specific facts and [redacted] officers with that kind of specialized knowledge to sit on this case and be objective and fair. I think it would be impartial or fair otherwise; and with respect to Colonel [redacted] obviously, as I noted before, we adopted the record from yesterday. And sir, you have already referred that to the appointing authority based on that record so --

PO: No, no. I have -- yesterday, I said I would refer the challenges made in the case of Hamdan. Today we incorporated -- whatever -- and we go back, whatever I told Gunny to put in the record. You then said you wanted to adopt Commander Swift's challenge against Colonel [redacted] I didn't say you adopted it, you did.

DC (Mr. Dratell): No, no -- yes.

PO: Okay.

DC (Mr. Dratell): I know what I am saying, but I think if you refer to yesterday there is no basis not to refer it today. It is the same situation.

PO: Okay. Well, I am going to refer it.

DC (Mr. Dratell): Okay. I am just answering the argument of the prosecution.

PO: Thank you. Okay. Major Mori, how many things I told you to brief now -- well, no, I mean we started off and you got to brief the standard that the appointing authority should use; right?

ADC (Maj Mori): Yes, sir.

PO: And then you are going to brief whether there should be a lawyer on the panel at all; right?

ADC (Maj Mori): Yes, sir.

PO: And then you are going to brief the two motions that -- well, the two challenges that Mr. Dratell made; right? Remember those last two?

ADC (Maj Mori): Yes, sir.

PO: And that is all part of the stuff that's going to go up to the appointing authority because all those things are things you want considered; right?

ADC (Maj Mori): Yes, sir.

PO: And do you remember what the dates are for those.

ADC (Maj Mori): Those are --

PO: Have you forgotten?

ADC (Maj Mori): No, sir. Those are 1 October --

PO: No, no. This is 7 September for the motions. You give them to the trial or the prosecution. The prosecution will respond to you and send them up to Mr. Altenburg. The reason is because if he is going to make -- you are challenging the structure of the selection process; and he is going to need your informed views on those things.

DC (Mr. Dratell): I have no problem with that. I just think that because we have multiplied the responsibilities here and some of us are going to be getting back to our offices at certain times by the end of the week, I just ask for a day or two more since we have added to --

PO: Well, that's why I gave you -- I mean, no. I was going to write down the week from today, but I didn't. I wrote down two weeks from today.

DC (Mr. Dratell): Okay.

ADC (Maj Mori): Sir, if we could leave off the structural challenges because that would probably be an issue we could deal with the actual members?

PO: So you are going dump the thing that there is -- which ones are you going --

ADC (Maj Mori): We would save that to brief along with our regular motions when we attack the whole structure of the commission.

PO: That's fine. You all understood what they are going to be providing by the 7th?

P (LtCol [redacted] Yes, sir.

PO: Good.

Okay. I considered the challenges. Like I told you before I am going to forward a transcript of voir dire, the transcript of yesterday's voir dire, the challenge procedure, the members questionnaire, my information, all up to Mr. Altenburg for his action. I hope to get all that stuff to him by the 10th so you all can get action moving. Under the provisions of the MCI I am not going to hold the proceeding in abeyance. Please call the members.

Please be seated.

The commission will come to order. Let the record reflect all parties present when the commission recessed are once again present. The members are present.

Members, you received both by e-mail and by my handing it to you, or someone else handing you, certain written instructions concerning administrative matters which are now being marked as the next RE in sequence, 14.

Objections to those preliminary instructions, defense?

DC (Mr. Dratell): No, sir.

P (LtCol [redacted] No, sir.

PO: Okay. Members, I have been appointed as the presiding officer. On Monday you got all the commission orders, the directives, the instructions, except for MCI Number 8. Those instructions and references apply to all the cases in which you may be a commission member. I am charged with certain duties. I preside over the commission proceeding during open and closed sessions. As the only lawyer appointed to the commission, I will instruct you on the law.

However, the President has decided that the commission will decide all questions of law and fact. You are not bound to accept the laws as given to you by me. You can accept the law as argued to you by counsel, whether by briefs, or in motions, or attachments. It is also given to you by me in instructions. If you have questions on the law when we are sitting in the commission hearing, you may ask counsel questions about whatever it is they are arguing.

We are not going to discuss the cases with anyone including ourselves, including recesses or adjournments. When we are meeting in closed conference, then we will discuss it. We will only consider evidence properly admitted before the commission. You are not going to consider any other accounts or anything you may have learned in a past life.

You may not discuss the proceedings of this commission with anyone who is not a member of the panel. If anyone attempts to do it, tell them to stop, notify me; and I will make sure appropriate action is taken. When we are closed to deliberate, we alone will be present. Each of us has an equal voice and vote in deciding and discussing all issues submitted to us. As presiding officer, I will preside over the closed conference deliberations and I will speak for the commission in announcing results.

Outside influence from superiors in the governmental chain will not be tolerated. If anyone tries to influence you in any way, notify me immediately and appropriate action will be taken. No one in your chain, or in any other chain, can reprimand you or do anything to you for your actions on this commission. Some of you may serve as members, or alternate member, on more than

one case. If you do so, each case is separate. You have got to keep the facts and the law of each case separate. We are giving you binders to keep the notes in different cases, mark the notes. You all also have a security arrangement around the courtroom, around the building rather, within the building, and in the courtroom. The operational commander made those decisions. We are required to follow those decisions because he owns the building. You may not infer or conclude from the security arrangements that the accused is guilty of any offense or that he is dangerous. Security arrangements are not part of evidence.

Colonel [redacted], you have been designated an alternate member; and you will become a member if there is a vacancy that needs to be filled. You will attend all open sessions, but you will not be present for closed conferences or deliberations and you may not vote on any matter. You will attend all opened and closed sessions -- excuse me, but you will not be present for any closed conferences or deliberations. You may not vote on any matter unless you become a member.

Members, you are not authorized to reveal your vote or the factors that led to your vote or reveal the vote or comments of another member when it comes to deliberation on findings or, if necessary, on sentence. This is a lawful order from me to you. You may only reveal such matters if required to do so by a superior competent authority in the military commission process or by a U.S. federal court. This order is continuing and does not expire.

It is important that you all keep up your appearance and demeanor. If you have got a problem, you need a break, let me know and we will take care of it. All members understand those instructions? Apparently so.

Counsel for both sides understand the provisions of the MCO Number 1 concerning protected information?

DC (Mr. Dratell): Sir, if I may? I was confused before about the particular place where we were in the instruction. It is not a surprise, I don't think, to the presiding officer but we did have an objection to one sentence that is going to be subject of our brief to that particular instruction about the advice --

MJ: Well, make it.

DC (Mr. Dratell): -- well, about the advice -- about the advice -- giving advice to the commission.

PO: You already made the objection.

DC (Mr. Dratell): No, I understand; but since you are giving the instruction again, I just wanted to make sure that it was clear.

PO: Okay. You all remember this morning I advised you that they had made an objection and that they are going to file a brief; right? Okay, there.

DC (Mr. Dratell): Thank you.

PO: Yes, that's fine. I just thought I covered it this morning.

Okay. Counsel for both sides understand the provisions of MCO-1 covering protected information. Trial?

P (LtCol [redacted]: Yes, sir.

PO: Defense?

DC (Mr. Dratell): Yes, sir.

PO: As soon as practical, notify me of any intent to offer evidence involving protective information so we may need to close the courtroom; right?

P (LtCol [redacted]: Yes, sir.

DC (Mr. Dratell): Yes, sir.

PO: Right. Okay, right now is there any issue relating to the protection of witnesses that we got to take up?

P (LtCol [redacted]: No, sir.

DC (Mr. Dratell): No, sir.

PO: If there are any protective order issues or things like that, we will solve them before the counsel in this case leave the island, won't we?

P (LtCol [redacted]): Yes, sir.

DC (Mr. Dratell): Yes, sir.

PO: Good. I will be on a plane; you all will be here. We will solve them.

Okay. I am required by MCO-1 to consider the safety of witnesses and others of these proceedings. Both counsel, you got a duty to notify me if you got any issues about witness safety.

Both last night and this morning, counsel for both sides and I met and we had a couple conferences in which we discussed various matters that are going to go on today. We are going to go into them today, right now; and I am going to cover what I thought was important. If I don't cover something that you all think is important, tell me.

Major Mori, do you have any notice of motions you would like to advise the panel on?

ADC (Maj Mori): Yes, sir, I do.

PO: Okay. Well then, speak slowly please.

ADC (Maj Mori): Yes, sir. The defense would give notice of motions jurisdictional style and motions to dismiss for lack of jurisdiction and that the appointing authority is not authorized to appoint or convene a military commission and the military commission lacks jurisdiction to convene at Guantanamo Bay.

PO: Okay.

ADC (Maj Mori): That the lack of jurisdiction, that the President's military order creating this military commission is invalid.

PO: Okay.

ADC (Maj Mori): Lack of jurisdiction because the charges against Mr. Hicks are not law of war violations or other crimes triable by a military commission.

PO: Okay.

ADC (Maj Mori): Lack of jurisdiction because the commission fails to provide the required protections for an accused's individual in a criminal trial under international law.

PO: Because of the commission process?

ADC (Maj Mori): Commission process, that is correct, yes, sir. Not the commission members, but the commission process.

PO: Okay.

ADC (Maj Mori): The motion to dismiss lacks jurisdiction because the commission violates equal protection under the U.S. Constitution and international law and that it applies -- the commission process only applies to non-U.S. citizens.

PO: Okay.

ADC (Maj Mori): The commission lacks jurisdiction because the commission is not an independent tribunal. It is not a structural challenge, sir. The motion to dismiss all charges as they fail to state an offense. Lack of jurisdiction over conduct occurring before the beginning of the armed conflict into -- in Afghanistan as the commission would only have jurisdiction when an armed conflict in violation of the laws of war.

PO: Okay.

ADC (Maj Mori): That the commission lacks personal jurisdiction over Mr. Hicks, an Australian citizen, who resided outside of the U.S. and whose conduct has no nexus to the U.S. Motion to dismiss for lack of speedy trial. Motion to dismiss for imposition of pretrial punishment. Motion to dismiss for lack of jurisdiction because Mr. Hicks is entitled to the presumption, status and prisoner of war and must be tried for any crime he may have committed in a system equal to a court-martial. Motion to dismiss for unlawful command influence. Motion addressing the presiding officer's role in providing legal advice to the other members and the role of an attorney on the commission. Motion to dismiss for improper referral of the charges as members below the pay grade of O-4 are systematically excluded from the selection process to serve on the commission. A motion for a bill of particulars. We also would ask, sir, that the ability to amend or add any motion or withdraw any

motion prior to the due date set by the commission, sir, for motions.

PO: Okay. Are you going to give a copy -- just a written copy of that to the trial and us?

ADC (Maj Mori): Yes, sir, I can.

PO: I would appreciate that.

Okay. On your motion for a bill of particulars, with that motion alone, you are going to provide the motion to trial by the 15th of September. Trial is going to give you a response by the 29th of September and you are going to file your reply, if any, by the 6th of October; right?

ADC (Maj Mori): Yes, sir.

PO: Okay.

ADC (Maj Mori): We can meet those deadlines, sir.

PO: It's what you agreed to yesterday.

ADC (Maj Mori): That's fine, that's fine.

PO: Okay. On the other motions you named, two of them specifically are going to go up now on the times I gave you earlier because it is going to get to Mr. Altenburg so he can do the challenges; right?

ADC (Maj Mori): Okay.

PO: So we got rid of the BoP and we got rid of the challenge questions. On the other motions, you are going to provide motions by the 1st of October. Trial, respond by the 15th of October and defense will then reply if necessary by the 22nd of October; right?

ADC (Maj Mori): Yes, sir.

PO: Okay. Defense, you made a motion for a continuance in which you requested that the court hold proceedings in abeyance pending various diplomatic discussions between the United States and Great Britain which might have an affect upon your client. Without going any further, did you make that motion?

ADC (Maj Mori): Yes, sir. The defense did and provided it to the --

PO: Did you make the motion?

ADC (Maj Mori): Yes, sir.

PO: Thank you. However, you are willing to -- despite that, you are willing to proceed on the stuff we have already talked about as long as we don't get into the actual trial on the merits; right?

ADC (Maj Mori): Yes, sir.

PO: With that caveat, do you feel compelled to argue about a motion for continuance at this time?

P (LtCol [redacted]: No, sir.

PO: Thank you, I appreciate that. In that case we won't rule until necessary on the motion for continuance. In connection with -- what?

ADC (Maj Mori): Sir, I was just going to say that motion -- that request for continuance has been provided to the court reporter and should be marked as the next review exhibit, sir.

PO: Do you have your response up there?

P (LtCol [redacted] We do have a response, sir.

PO: Okay. Well, give them to the court reporter and we can mark them both as the next two.

Review Exhibits 15 and 16 were marked for the record.

P (LtCol [redacted] Yes, sir.

PO: In connection with these motions that are going to be addressed to the commission, not the ones -- the briefs that are going to Mr. Altenburg by the -- how about the 1st of October? The commission would like you to, both sides to file briefs with the commission on the issue of do all these motions have to be certified to Mr. Altenburg? To the appointing authority? Just on the jurisdictional ones and specifically on the provision of MCO-1 Section 4(A)(5)(D), do all

interlocutory questions that could or really could terminate the proceedings have to be certified or just ones in which our ruling is about to terminate proceedings?

Got any questions on that, trial?

P (LtCol [redacted]: None.

PO: Defense?

ADC (Maj Mori): None from the defense, sir.

PO: Okay. Either side got any objections to the POMs?

P (LtCol [redacted]: No, sir.

DC (Mr. Dratell): Not at this time. We will submit those in writing if we have them, sir.

PO: By when?

DC (Mr. Dratell): This 1 October.

PO: I would like to use them to get the motion practice and the things done. We are not talking about a motion to -- I want an objection -- 15 September?

DC (Mr. Dratell): 15 September is great.

PO: Through motions and discussions, I have learned that there are concerns about the communications with the office of the appointing authority. Does either counsel or either side object if the presiding officer requests interpretations of the MCO or the MCIs in the appointing authority's area of interest directly by e-mail from the presiding officer to the appointing authority after notice to counsel and providing counsel with the opportunity to brief the issue?

P (LtCol [redacted]: No, sir.

DC (Mr. Dratell): No, sir.

PO: We set last night -- well, we agreed last night on a trial date in this case of the 10th of January; correct, trial?

P (LtCol [redacted] Yes, sir.

PO: Before I go, do you want a chance to stand up and argue that I should sooner?

P (LtCol [redacted] Sir, we have discussed it.

PO: Well, no. No, we are right here. Do you want to argue? You can argue.

P (LtCol [redacted] We don't need to argue, sir.

PO: Okay, 10th of January; right?

DC (Mr. Dratell): Correct, sir.

PO: Okay. Recognizing that we have your motion of continuance and we will have other things coming on and things that may happen.

Now, we got a lot of motions here. So we set a motions hearing for the 2nd of November right here; right?

DC (Mr. Dratell): Correct, sir.

ADC (Maj Mori): Yes, sir.

PO: Major Mori had that thousand yard stare. I was making sure he was looking at me. Okay, 2nd of November here for motions hearing. Did I forget to cover anything?

AP (Maj [redacted] No, sir.

DC (Mr. Dratell): Nothing that I can see, Your Honor.

PO: Accused and counsel, please rise.

Mr. David Hicks, I now ask you how do you plead?

ACC: Sir,

To all the charges, not guilty.

PO: Thank you, please be seated. Nothing further from either side. This court is in recess and are to meet on the 2nd of November or on call.

The Commission Hearing recessed at 1549, 25 August 2004.

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. DAVID MATTHEW HICKS

a/k/a Abu Muslim al Austraili
a/k/a Muhammaed Dawood

This is to certify that Pages 106 through 123 are an accurate and verbatim transcript of the foregoing proceedings.

Peter E. Brownback III
Colonel, U.S. Army
Presiding Officer

26 August 2004
Date

The Commission Hearing was called to order at 1301, 1 November 2004.

PO: The Commission is called to order.

P (LtCol [redacted]) All parties present when the Commission recessed on 25 August 2004 are once again present with the following exceptions: Colonel [redacted] Lieutenant Colonel [redacted] Lieutenant Colonel [redacted] have all been permanently excused by the Appointing Authority.

The court reporter is Sergeant [redacted] U.S. Marine Corps, who has previously been sworn. Bailiff, Sergeant [redacted] has previously been sworn. Security officer, Mr. [redacted] has previously been sworn.

PO: The absent members and alternate member were permanently excused by the Appointing Authority during his action on challenges. Their permanent excusal is reflected in RE --

P (LtCol [redacted]) Fifty, sir.

PO: -- fifty. The three remaining members fulfill the requirements of MCO 1 Section 4(a).

Okay. Mr. Dratel, before you say anything, prior to the start of this session, we had an MCI 8-5 conference, present which were the defense counsel, trial counsel, and the Presiding Officer. At that session we covered a lot of things which we're going to handle during the course of the sessions this week. If either side believes that we went over things that we don't handle, please advise the Commission.

Okay. Now on the -- among the many matters we covered, the first thing was the burden of persuasion and motions practice. As a general rule, the burden of persuasion is on the moving party. If, during this case, any moving party believes that the burden of persuasion will shift or has shifted to the opposing side, the moving party has an obligation to so advise the Commission. Any questions on that, trial?

P (LtCol [redacted]) No, sir.

PO: Defense?

DC (Mr. Dratel): No, Colonel.

PO: Counsel may wish, but are neither encouraged, nor required to provide the Commission with draft findings of fact and conclusions of law for any particular motion. If counsel so intend, they'll advise the Commission

during their portion of the argument. Such matters will be provided to opposing counsel within 24 hours of the argument. Opposing counsel will have 48 hours from the time of receipt to comment thereon prior to the matters being submitted to the Commission unless I grant a delay. All counsel should note the Commission is not required to wait for any such matters prior to making a decision or issuing a ruling.

Comments, trial, defense?

P (LtCol [redacted]) No, sir.

DC (Mr. Dratel): Just that the defense takes the position that we just want to make clear that we -- we think that the findings of fact and conclusion of law that are submitted by either side should not impair the Commission's independent review and its independent reaching of findings of fact in conclusions of law. It's not going to be a contest between one and the other, but the Commission needs to make its decision based on its own review and not necessarily choose between one of the other.

PO: Okay. Now, Mr. Dratel, now that I've said that, you can proceed with your motion. You got a Defense Motion 37 that's been marked as RE?

DC (Mr. Dratel): I'm not sure of the RE number, Your Honor.

PO: Just a second, Mr. Dratel.

DC (Mr. Dratel): Yes, sir.

PO: Okay. Thirty-seven has been marked as 54-A.

DC (Mr. Dratel): Thank you, Colonel. Our motion is to dismiss the charges, and to essentially refer this matter to the Appointing Authority, and I'll get to the second part later when we address that. But the failure to appoint an alternate upon the elimination of the members from the panel, including the alternate, is a clear violation of MCO -- Military Commission Order number 1, section 4(A), capital A, 2. And that section says that the Appointing Authority shall appoint an alternate and that is mandatory and not discretionary. In this instance, the alternate has been excused.

There has not been an alternate appointed to replace the alternate that was excused. And I -- it's obviously imperative that the Commission follow it's own rules in something so fundamental as the composition of the panel, and there is a tremendous practical importance as well and potential prejudice with respect to the failure to follow this rule, which is that we could embark on -- on proceedings and deliberations and even decisions, and then find that we have a problem with a specific member, whether it be some

1 incapacity, either in one form or another, that could then reduce the panel
2 below three, and then we would have to put someone on in the middle. And
3 I think that would taint and essentially disqualify and undermine the
4 integrity of the whole panel if we had to do that.
5
6 So I think there's a great practical importance for -- in adhering to these
7 rules in addition to the simple procedural fact that this is a very, very clear
8 and unambiguous statement of the rule in 4(A)2, and has not been complied
9 with in this instance, and needs to be complied with.
10
11 The second part of D 37, our motion, is that by excusing two members --
12 leaving out the alternate at this point -- but of the original four members
13 plus the Presiding Officer, two members have been excused. So now -- we
14 now have, instead of a five-member Commission, it is only a three-member
15 Commission, and that works to the significant detriment of Mr. Hicks.
16
17 And -- and just as a threshold matter, that number, while it is permitted in
18 the MCO, is not consistent. In fact, it is contrary to the UCMJ and the
19 enabling legislation that permits these Commissions to operate, and cannot
20 be contrary or inconsistent -- contrary to or inconsistent with the UCMJ.
21
22 And inconsistent with the UCMJ, Section 816, which is Article 16 and it
23 conflicts with a general court-martial, which is one in the military which
24 would expose the defendant to at least a year of confinement, requires a
25 five-member Commission. And in this case what we have is a potential life
26 sentence for Mr. Hicks. So just as a matter of compliance with the UCMJ,
27 this Commission is out of compliance as a three-member Commission as
28 opposed to a five-member Commission.
29
30 In addition, another part of enabling legislation says that the rules for
31 Commission must be uniform, and I will get to that in a minute as to why
32 this particular Commission, as a three-member Commission, is not a
33 uniform application of the rules.
34
35 The additional Commission being constituted as -- with five commissioners,
36 I think, is a more than tacit -- I think it is an explicit acknowledgement that
37 five is the appropriate number -- the appropriate minimum number for a
38 case of this magnitude, where the defendant faces a potential life sentence.
39 And to now reduce that is not only against -- it's not only against the rules
40 and contrary to UCMJ, but it's also inherently unfair. And if the purpose, as
41 the President's military order sets forth, is to provide a full and fair
42 proceeding for Mr. Hicks, this Commission, as a three-member
43 Commission, does not provide that. And I think that's found not only with
44 respect to the UCMJ, but also the factors that I am going to lay out right
45 now that the UCMJ recognizes that a case of this magnitude, where the
46 defendant is exposed to more than a year sentence, requires a five-member

1 Commission.
2
3 But just to look at some other factors, in terms of -- first, the numerical
4 advantage that the prosecution gains from the reduction from a five-member
5 Commission to a three-member Commission. First is that, the number of
6 votes required to acquit from a three-member Commission is exactly the
7 same votes required to acquit in a five-member Commission: two votes.
8 Since it is a two-thirds majority that controls and require for a verdict in a
9 five-member Commission, two votes would be more be more than
10 one-third, therefore there would be an acquittal. It would be three to two.
11
12 In a three-person Commission, you're still required to have two votes to
13 acquit, but let's look at the burden on the prosecution. The burden on the
14 prosecution is half in a three-member Commission. Rather than four votes
15 to convict, which you need -- which prosecution would need to overcome
16 the two-thirds threshold -- in a five-member Commission here, the
17 prosecution would only need two members. So the prosecution's burden is
18 half. The defense remains the same, inequitable. And I think that is
19 implicit in the -- in why the five-member Commission, again, was
20 constituted in the first place, why it's required under the UCMJ.
21
22 Second, and in terms -- in this context of the uniform part of it, this 836(b)
23 of the UCMJ, in failing to replace the other two members, and in failing to
24 appoint an alternate, what you have is a three-member Commission for this
25 case. But in the same opinion, the Appointing Authority stated that
26 replacement members for two other defendants facing Commissions will be
27 appointed, al Qosi and al Bahlul. Those two defendants will have
28 replacement Commissions, they will have the five person Commission.
29
30 That is not a uniform application of these rules. That is inequitable for Mr.
31 Hicks. He is facing the same punishment and penalties, and essentially the
32 same charged offenses as they are. Is he not being afforded the same rights
33 that he has under the UCMJ and rights that would give him full and fair
34 proceeding?
35
36 The Appointing Authority does not state a reason or rationale for making
37 this distinction, making any of the distinctions. Why three instead of five?
38 Why three instead of the five in the UCMJ? Why three instead of the five
39 that we had initially? Why three for Mr. Hicks and five for the other two
40 defendants? There is no rationale in the Appointing Authority's decision.
41
42 If the basis -- if the only basis is haste and expedition to get these processes
43 moving, then I think that is unfair, because it is not a full and fair
44 proceeding. It's merely a swift proceeding. And those are not the same
45 thing, and what we need here is a full and fair proceeding. The net result of
46 a three-member Commission as opposed to a five-member Commission, is

to penalize Mr. Hicks for exercising his rights to challenge Commission members who ought not serve. And even the prosecution agrees to a certain extent, with respect to some of the members excused. The Presiding Officer agreed in his recommendation to the Appointing Authority.

So what is happening now is Mr. Hicks has been penalized. In the ways that I've described, he has been penalized for exercising that right. So he had this Hobson's choice which he didn't even realize at the time; which is, have a Commission with five members, some of whom ought not serve, or go with a Commission that is below the standard for cases of this magnitude. And I submit that is not a full a fair proceeding if he is penalized that way.

And another aspect of it, I think, which has to be addressed and considered is that with a five-member Commission, with four nonlawyers and one lawyer -- the lawyer being the Presiding Officer, also a retired military judge -- the influence of one person in a five-member Commission with four nonlawyers is less than in a three-member Commission with two nonlawyers. All it takes now is one person to be influenced by the Presiding Officer's opinion, experience, expertise, and matters of law. Previously it required three. So what you have done is reduced the prosecution's burden, amplified the potential undue influence of the Presiding Officer creating a nonuniform system that is in conflict with and contrary to the expressed provisions of the UCMJ and violation of the UCMJ as a result.

So we would ask for a dismissal based on that ground. However, subsequently based on the 8-5 meeting that we had, I will address the context of the remedy in terms of whether the Commission should institute that remedy of whether it should be certified to the Appointing Authority as a case dispositive motion. But I'm going to wait for the Presiding Officer to get to that particular part of the proceeding before I address that part. Thank you.

PO: Trial?

P (LtCol [redacted] Sir, the defense is entitled to three members, not five. Five is a court-martial standard, and simply put, this is not a general court-martial. Article 21 of the Uniform Code of Military Justice expressly says that jurisdiction in a court-martial does not deprive a military Commission of jurisdiction.

In Article 36, Congress gives the President the authority to prescribe rules, and what Congress says is that it cannot be inconsistent with the Uniform Code of Military Justice. Well, the Uniform Code of Military Justice expressly makes certain provisions applicable to military Commissions.

Congress is clear when there's a provision that applies. Nowhere in the Uniform Code of Military Justice does it say, in a military Commission you have to have at least five members. The President has prescribed rules, the rules that are -- that have been prescribed pursuant to that say that quorum, the minimum number that we need to proceed is three. The defense is not entitled to five members.

Now, it was the Appointing Authority's -- within his discretion and authority to make a decision on this and he did it. That is within his role as the Appointing Authority. Why he did it, he doesn't necessarily have to tell us every reason why. But why he said five initially, to speculate, that's because he thought that's how many we needed is spurious.

The defense made challenges. They exercised their ability to challenge certain members. They could have and should have thought at that time whether they wanted those to be granted. If they didn't want challenges to be granted, then they could have elected not to make challenges. The fact that challenges they made ultimately were granted and now they are complaining about that because of the numbers, that's something that they can take into account as part of trial strategy.

Now, second issue, an alternate. You have to read both the provisions in MCO 1, Military Commission Order number 1, 4(a). The first provision, subparagraph 1, says the Appointing Authority shall appoint the members and the alternate members of each Commission. It goes on to say, the absence of an alternate member shall not preclude the Commission from conducting proceedings.

Any vacancy among the members or alternate members occurring after trial has begun may be filled by the Appointing Authority. May be filled. The Appointing Authority is required under Commission Law to appoint an alternate, he did. Once he is excused, he may fill it with another alternate. He chose not to, that is his discretion. Gentlemen, we have quorum, we may proceed.

DC (Mr. Dratel): May I, Colonel?

PO: Yes.

DC (Mr. Dratel): Just to take the last point first. It does not say maybe. It says any vacancy among the members or alternate members -- sorry, the case of -- I'm sorry, the case of incapacity or resignation or removal of any member, an alternate member shall take the place of that member. And so any vacancy among the members or alternate members occurring after trial has begun -- and we're not after trial has begun -- may be filled by the Appointing Authority. We are before that. We are constituting the panel

here. We are constituting a lawful appropriate panel under the rules, not only of the MCOs, but of the UCMJ as well.

So it's clear that an alternate -- and B is very clear and cannot be read, and the prosecution did not address B, because B is simply completely unambiguous, shall appoint an alternate. There really can't be any argument as to that. With respect to the issue of the number of members on the Commission, to say three because the rules say three is to beg to question, why not one? Would one be fair? No. And three is not fair either for the same reason that the UCMJ prescribed that a general court-martial has a minimum of five for a case where a defendant can face more than a year. Here we are talking about a potential life sentence.

So I think that to say that three is okay just because it says it, begs the question for what this Commission needs to do, which is to determine how to have a full and fair Commission process going forward. The prescribe -- and prescription for rules, it cannot be contrary to the UCMJ. This particular provision that permits three is contrary to a provision of the UCMJ that obviously is well considered for obvious reasons. Because that's what's fair for a case of this magnitude. Thank you -- oh, I'm sorry, may I just add one?

PO: Yes.

DC (Mr. Dratel): To suggest that Mr. Hicks had to choose as I mentioned before -- the prosecution raised this issue, so I have to reply to it. To suggest that Mr. Hicks had to choose whether to retain members on a Commission who should not serve or to suffer the diminution of the number to an unfair number, I think is unconscionable. And I think that that is completely contrary to any notion of full or fair. Thanks.

PO: Before the other members ask, Mr. Altenburg's decision came out on the 19th of October. Why didn't we get your motion earlier?

DC (Mr. Dratel): We had have been working on the other motions. We were preparing for the hearings. We have filed, I think -- some of them are a little redundant, because they are recast in other ways. But I think 30 motions for prosecution's responses needed reply. And we've been working on this and researching this, and we were ready to present it. We presented it as soon as we were ready to present it in the form that it was presented. And we apologize for it coming on the eve of this proceeding.

PO: I would direct the attention to everyone to MCI 8-6. Okay. Do you have any questions, Colonel [redacted]?

CM (Col [redacted] No.

PO: Go on, Colonel [redacted]

CM (Col [redacted] Mr. Dratel, why is relief for your motion to dismiss? It doesn't seem that is consistent with your argument that this panel should proceed with at least five and an alternate. So why do you make a leap of faith that we ought to dismiss all charges here? I don't understand that.

DC (Mr. Dratel): Well, I think it's just a formal -- it's a formal request in the sense that, sir, that we not go forward. I think the motion also states that until -- unless an alternate is provided and the number of Commission members reaches the appropriate level, which is at least five, that it should not proceed. But I think that -- it also has to do with -- I think -- I am getting ahead of myself in terms of where we are going forward from here. So in sense -- in terms of for the panel to hear additional motions, deliberate, and decide, we believe we taint the entire proceeding and the panel, everything that it does going forward if it is done in an improperly constituted panel.

So I understand the question and I hope I've answered -- I haven't answered it. I think the relief -- yes, the relief would be to put an alternate on and to add the two panel -- and add two more panel members. That is a form of relief. I guess when we say "dismissal," we mean that the panel as present -- is improperly constituted and would require the relief of making a properly constituted panel.

CM (Col [redacted] I understand, but that's not what you wrote.

DC (Mr. Dratel): I understand that and it's inarticulate in that regard, and I appreciate you bringing that to our attention so that we could articulate it for you properly.

CM (Col [redacted] Okay.

DC (Mr. Dratel): Thank you.

PO: Okay. We'll issue a decision on that in due course. We're going to proceed with today's schedule.

Now, Mr. Dratel, you want to address the Commission on the requirement for the Commission to -- for me to certify, under the provisions of the MCI, interlocutory questions on all case dispositive motions including D 37; is that right?

DC (Mr. Dratel): That's correct.

PO: Okay. Address away.

DC (Mr. Dratel): 4(a), 5(d) is again, plain and unambiguous. The Presiding Officer shall certify all the interlocutory questions, the disposition of which would affect the determination of proceedings with respect to a charge for decision by the Appointing Authority. That does not provide discretion to determine which of those case dispositive motions get referred, and it does not provide for a decision by the Commission initially before they are certified.

So it's our position that the Commission -- that the Presiding Officer, who has this authority in the MCO, has to certify these case dispositive issues to the Appointing Authority in the first instance. And I think part of the reason is because this is particularly important since we are talking about a jurisdictional issue, which is really the issue. And I guess that's the best way to answer Colonel [redacted] question from before, which is why it's couched as a motion to dismiss. It's a question of whether this Commission has jurisdiction to hear this particular case. And so the Commission will be without jurisdiction even to decide an issue like this if it's case dispositive in order to be certified.

In addition, going forward from here would essentially taint the entirety of the rest of the proceedings and you would have to start all over again. And I think that that would be counter-productive, inefficient, and prejudicial at the same time. We -- and just so that's clear that we make our position crystal clear with respect to what we consider the consequences of going forward without having this certified to the Appointing Authority as a threshold matter, is that it would essentially delegitimize the remainder of the proceedings that we are going to have today, if we do indeed go forward into tomorrow and this week; because it would be in front of an improperly constituted Commission and it would have no value. And it would be completely void, as a result, once the Appointing Authority makes the decision --

PO: Wait a second, wait a second. That only works if you're right.

DC (Mr. Dratel): I think it works if we're right in two ways.

PO: It only works if you are right.

DC (Mr. Dratel): But if we could be right in either way.

PO: It only works if you are right.

DC (Mr. Dratel): But in either way. In other words if you were right --

PO: It doesn't work if you're wrong. If you're wrong, then it doesn't work.

DC (Mr. Dratel): But there are two questions. One is the question of whether we are right

on the underlying motion as to whether the -- either the failure to appoint the alternate and the failure to reconstitute the panel as five is improper.

But there's also the question whether matters in each -- whether case dispositive matters need to be referred -- need to be certified to the Appointing Authority in the first instance prior to a decision by the Commission. If the Commission decides --

PO: And that paragraph -- that paragraph, Mr. Dratel, gives who the decision on whether to abate?

DC (Mr. Dratel): The Presiding Officer.

PO: Thank you.

DC (Mr. Dratel): I'm just stating our position.

PO: That's fine. I just want to make sure we understand.

DC (Mr. Dratel): Right, but there are two separate questions. Thank you.

PO: Trial?

P (LtCol [redacted] Yes, sir.

PO: Go on.

P (LtCol [redacted] First gentlemen, the Appointing Authority has issued guidance where he has made it clear that he desires for the Commission -- he expects that the Commission first rule, rule on a question before it is certified and sent up. Now, in light of that, we agree with the same language, of course, with Military Commission Order number 1, the Presiding Officer shall certify all interlocutory questions. The disposition of which would effect a termination of proceedings.

If the ruling is that something would not be dismissed then that would not terminate the proceedings with regard to a charge. That seems like a simple reading. It says that if it's not case dispositive, by the ruling that the Commission makes, it does not have to be certified by the Presiding Officer although it could be in his discretion.

PO: Yes, go on.

DC (Mr. Dratel): That would be a completely asymmetrical system where the prosecution gets two bites of the apple and you don't. And I think that doesn't matter whether a motion would be granted or not. If it's a case dispositive motion,

it is referable and that's also whether it's before or after. That is another -- that's a separate question which the prosecution did not address, but the question, which motions are up, I think it clearly -- well, case dispositive motions. You have to go up to the Appointing Authority.

P (LtCol [redacted] If I may, sir?

PO: Sure.

P (LtCol [redacted] It's not asymmetrical. If a charge does not get dismissed and it goes forward, and if the accused gets convicted of it, it gets reviewed. If a charge, on the other hand, is dismissed, that is the opportunity for the government to get review. It makes it symmetrical so that the government can get review as well as the defense on that issue.

PO: Okay. We'll give you a decision, once again, in due course.

Okay. Since we recessed in August, we've had a significant amount of work done, and we've had a lot of filings exchanged amongst counsel and other people. The sessions this week are designed to address the issues those filings either revealed or created. Before we start, we have a filings inventory. It's labeled in this case RE 51. It contains all the filings as of today's date. When you hear us refer to D 8, that is the defense eighth motion or eighth filing; and P 6 is the prosecution sixth filing. We'll attach a new inventory to the record as necessary.

Okay. Defense, you want to make a motion that's listed as D 15 on the filing inventory; right?

ADC (Maj Lippert): That's correct, sir.

PO: Okay.

ADC (Maj Lippert): Sir, in accordance with your directive earlier, this is a motion in which the defense believes that the burden shifts in this case. The motion is regarding improper panel selection under the case of the *United States versus Kirkland* which is a CAAF case.

The defense bears the burden of establishing the improper exclusion of certain personnel from the selection process. Once the defense establishes such exclusion, the government would make sure, by competent evidence, that no impropriety occurred when selecting the appellate court-martial members. And you'll see in a moment, as I argue here, that that case and all of the other cases under Article 25 and 37; UCMJ Article 25 and UCMJ Article 37 apply. So I just wanted to give you a heads up if this is a burden shifting motion. The members have read our briefs on this motion.

1
2 So I want to try and keep it brief as far as the facts go, but in this case, the
3 government, through the Appointing Authority in selecting the panel
4 improperly, excluded an entire class of individuals who were eligible to sit
5 on this panel. The President's Military Order has one criteria for
6 members -- personnel who can sit on the panel; that's that they be
7 commissioned officers, and sort of following the theme of Mr. Dratel's prior
8 motion, the government needs to follow its own rules. If it doesn't, it often
9 ends up in a situation that has either the appearance of or actual unlawful
10 command influence. And unlawful command influence is the gravamen of
11 this problem -- of improper exclusion of a class of individuals.
12
13 The President's Military Order says commissioned officers can be
14 considered to sit on the panel. The general counsel's office sent out a
15 memorandum that said, don't listen to the President's Military Order, only
16 select people in the grade of 0-4. That is an improper exclusion. In doing
17 so, everybody -- every officer, commissioned officer, eligible to sit on the
18 Commission was excluded in the grade of 0-3 and below. The majority of
19 all officers in the military.
20
21 Whether the government likes it or not, those officers were eligible. And
22 now, because of somebody doing something that they shouldn't have done,
23 which is to give a directive undermining the President's Military Order,
24 those people were excluded. The government has stated that had Article 25,
25 which is the rule in the UCMJ which covers panel selection. It doesn't
26 apply here. Well, I don't think that is true. The defense doesn't think that is
27 true and there are several reasons for that.
28
29 First of all, I'm sure that all of you have been exposed to the panel selection
30 process for courts-martial in the past. You send up nominations for your
31 officers, they get sent up to the convening authority, and the convening
32 authority looks at those nominations and everyone else is eligible and
33 decides under the Article 25 criteria who he or she is going to put on the
34 court-martial.
35
36 When you look at the panel selection criteria or procedures for the
37 Commission, they were undoubtedly derived from Article 25. They did it
38 exactly -- they did it under the UCMJ, exactly, except that, unfortunately,
39 there was an improper exclusion. Article 25 is set there to ensure that there
40 is not an unlawful command influence so that everybody -- so that there is
41 no court stacking, so that people are not selected for -- to gain a particular
42 result.
43
44 When the case law under Article 25 has stated that when there is improper
45 court stacking, when there is improper exclusion, that it is unlawful
46 command influence and that is where we diverge from Article 25 and get

into Commission Law. Now, terms have been used a lot, and I am not sure it means a whole lot, but certainly it means Article 37 of the Uniform Code of Military Justice. Article 37 of the Uniform Code of Military Justice applies to military commissions. How do I know that? Well I didn't know it until not too long ago when I read the Appointing Authority's decision deciding on the challenges in this case. Article 37 of the Uniform Code of Military Justice is directly applicable to military commissions. This -- do you want me to mark this, sir?

PO: I don't know what it is.

ADC (Maj Lippert): This is a page -- page five of the Appointing Authority's decision 2004-001 which --

PO: Well, why don't you read to it me, because we have already got the --

ADC (Maj Lippert): I will in a minute, sir. I want to show it to make --

PO: Okay.

ADC (Maj Lippert): -- it easier. I am not sure so this may be a little bit --

CM (Col [redacted] What page?

ADC (Maj Lippert): Page five, sir, the Appointing Authority's decision, the highlighted portion. Is that when the bill gets stopped? Right there it talks about -- excuse me, sir, if you would. Second, any such rule or regulation may not be contrary or inconsistent with the Uniform Code of Military Justice. For example. Article 21, yada, yada, 37; unlawful command influence expressly applied in military commissions. Article 37 deals with unlawful command influence.

You can mark that. It is already in the record, sir, that is page five. The case law from the Court of Appeals for the Armed Forces and formerly -- now CAAF -- used to be Court of Appeals for the Military, COMA.

In several cases, has stated that improper exclusion of eligible members results in unlawful command influence. When there is unlawful command influence in a selection process, it strikes at the very heart of the fairness and legitimacy of the court, in this case, the Commission. In this case, an improper exclusion of an entire class of individuals who were eligible for the Commission have been excluded, and that robs this Commission of its jurisdiction and the charges should be dismissed. Thank you, sir.

PO: Go.

P (Maj[redacted] Members, we have some slides, if you'd give us a moment, please?

PO: Are you going to mark these as an appellate -- as a review exhibit eventually?

P (Maj[redacted] Yes, sir. A review exhibit attachment to the motion.

PO: Okay. It is going to be Review Exhibit 54 B, it's a series of charts that the trial is putting on, I think -- not 54 B -- I'm sorry, it is going to be 26 D, I'm sorry, court reporter.

AP (Maj[redacted] Colonel Brownback, we will submit a six-pack of slides for substitution into the record vice the --

PO: Okay. Great, that will be 26 D any way.

AP (Maj[redacted] Gentlemen, you've just heard the defense's argument. That is incorrect. The bottom line is the nomination and selection process was a lawful process and it is a lawful process. Article 25 of the UCMJ does not apply to military commissions. As you heard the defense state, the defense does not disagree that Article 25 of the UCMJ is not applied to military commissions.

The standard is found in Military Commission Order number 1. Now, gentlemen, this is the standard. It is found in Military Commission Order number 1, and it states that the Appointing Authority selects the members. And that membership is from many officers in the different service components. The number one criteria is that they must be competent to perform the duties as Military Commission members.

Now, let's look into the nomination process. There was a mandatory criteria for officers in the grade of 0-4 and above. And this specifically requests what it takes to have competent nominees. Members who can perform the duties that you members will have to perform, quasi-judicial functions. That means those with experience, education, and judicial temperament. Now that is important -- very important with respect to quasi-judicial functions.

This quasi-judicial role is something that you can find with command experience. Commander's experience with the military justice process is one that affords a senior officer to have experience looking at issues such as these; the Article 15 proceedings, courts-martial actions, all actions with both questions of law and fact have to be taken into account. Bullets two, three, and four, are functions which officers perform and in the instructions and regulations surrounding investigations, summary courts, and administrative separation duty, there is a preference for officers in the grade

of 0-4 and above.

Now, members, Congress has already told us (pointing to the slide on the projection screen), specifically under the UCMJ, which rules apply to military commissions. These are the Articles that apply specifically based on what Congress has told us. They said that the President may not prescribe rules that are inconsistent with what they say. Now, the Military Commission Order number 1 process is not inconsistent with that of the UCMJ. Article 25 of the Uniform Code of Military Justice applies to courts-martial, the Military Commission Order number 1, is the process for Military Commissions.

In conclusion members, Military Commission Order number 1 is the proper standard. The argument to use *United States v. Kirkland*, or any other rule that the defense is arguing that applies here, is not the proper standard. The process in Military Commission Order number 1 was followed, and it was a lawful process. The prosecution will submit the proposed findings of facts and law on this issue for your consideration.

PO: Okay. Defense?

ADC (Maj Lippert): Yes, sir, I do. Major [redacted] discussed about having that the Appointing Authority wants to pick most competent people. Well, how can he know who's competent if he didn't consider the majority of the people in the armed -- the commissioned officers in the armed forces to sit on the panel when he was instructed to? But because of his military order, which was undermined by an exercise of unlawful command influence, by any person Article 37(a), which was surprisingly absent from the government's slide which mentioned what Articles of the Uniform Code of Military Justice are applicable to: Commissions.

When an exercise of unlawful command influence by some person, in the office of general counsel undermines the process, what's the reason for that? Well, improper motive. The defense doesn't have to show you that. The defense has to show you that there was an improper exclusion before the burden shifts to the government to show you that it wasn't. In this case, we've done that. There's been an improper exclusion of an entire class of people who were eligible.

At this point, that's unlawful command influence and requires that the Commission examine that and determine the appropriate remedy. We believe that the appropriate remedy is dismissal. Thank you.

PO: Colonel [redacted]

CM (Col [redacted] Prosecution, can you explain again why you believe that Article 25 is

not one of the Articles.

AP (Maj[redacted] Yes, sir, I can. Sir, if you look at Article 36 of the Uniform Code of Military Justice, that's the rule where Congress gives the President the authority to prescribe rules for a military commission. Right in there it says, the President has that authority. It also says that he can prescribe rules as long as they are not inconsistent. Well the rules of statutory construction are the rules that we use in meeting Congress' intent.

The first stop there is the plain language reading. And what the rule states for statutory construction is, to determine Congress' intent, Congress will tell you, right in the law.

Now, here in UCMJ what Congress did was, specifically wrote what are the rules of Military Commissions and the rules that it wanted to apply. For those saying -- it's only saying courts-martial -- specifically, only states courts-martial, but here we are talking about "military commissions". It only gives those eight rules where it says, military commissions, these rules apply to them. In Article of 25 there is no mention of military commissions. In fact, the title of Article 25 is "who may serve on courts-martial". It doesn't say who may serve on military commissions and what the defense wants you to do is just ignore what Congress intended when it created the UCMJ rules. It gave a limitation to the President and said he can prescribe rules as long as they are not inconsistent.

Did I answer your question, sir?

PO: Any questions? Okay, thank you. We'll issue a ruling in due course on that. Since the August recess, I've issued POMs 2-1, 4-2, 6-1, 9, 10, and 12. A complete copy of all the current POMs is being marked as -- has been marked as RE 52. All counsel were given opportunity to object to POMs; however, I now ask if there are any objections to these POMs?

P (LtCol[redacted] We have none, sir.

DC (Mr. Dratel): Yes, we do, Colonel. I'll just list them quickly with respect to all of the POMs. We object on the ground of that the Presiding Officer does not have ad hoc rule-making authority, and that violates the Administrative Procedures Act.

With respect to POM 9 -- and these go to specific POMs now -- POM 9, while the Presiding Officer does have authority under the MCOs and MCIs, with respect to protective orders, it is our position that in some instances, not as related to protective orders, become issues of law to the entire Commission to decide and those would go to substantive issues such as, for example, the denial of access -- excuse me, the denying the defendant

access to certain information and certain evidence based on a protective order. As denial of access of different counsel, perhaps based on a protective order, which is contemplated by the MCOs and MCIs, and any other protective order that would impair the ability of the defense to prepare and present matters, such as an inability and incapacity to discuss certain information with witnesses and other persons who are members of the defense team.

Also, within that POM, POM 9 section 4(b), in that it permits the prosecution to eliminate a CC to civilian defense counsel or the foreign attorney consulting on certain information that is communicated to the Presiding Officer and to detail counsel. Again, we would object to that as being contrary to a full and fair proceeding in which the defendant would have the right to have all his counsel, all his counsel representing him have access to --

PO: I'm missing something, Mr. Dratel? Isn't that in the MCO?

DC (Mr. Dratel): Yes, it is. But we challenge the MCO as well. We did that last time we were here when we broke for classified, but we haven't had an occasion to challenge it with respect to counsel. It has not come up yet with respect to any specific issue that has been -- for which civilian counsel or foreign attorney consultant has been denied access. So it is not right in that context. With respect to the POM obviously, we are just interposing our objection with respect to that. And with respect to POM 2-1, we object to the --

CM (Col[redacted] Can you slow down just a little bit?

DC (Mr. Dratel): I'm sorry, I'm sorry, Colonel. With respect to POM 2-1, we object to the assistant to the Presiding Officer -- I'll wait for you.

PO: Okay.

DC (Mr. Dratel): Oh --

CM (Col[redacted] Go ahead.

DC (Mr. Dratel): Oh. We object to the assistant to the Presiding Officer providing legal advice on court procedural or closed court matters, or matters with respect to the Presiding Officer's court adjudicative function, because those terms are not defined with sufficient precision to preclude intrusion into the substantive affairs of the Commission. And again, notwithstanding other parts of that POM to address that. Nevertheless, those particular terms are not defined and as a result they do provide the possibility that the assistant to the Presiding Officer will, in fact, perform functions that are related to the substance of the issue. And that is what we have. Thank you.

PO: Any reason you all didn't object to these when they were issued?

DC (Mr. Dratel): Again, we focused on other items and we focused on this in preparation to these proceedings. We apologize for any delay.

PO: The issues that are coming before this Commission are difficult enough without people not following what are fairly simple guidelines. I wish that all people would, and that is not addressed just to the defense, it is addressed to the prosecution also.

Okay. Members, you all had an opportunity to review the POMs, didn't you?

CM (Col[redacted] Yes.

CM (Col[redacted] Yes.

PO: Do you all believe the issuance of those POMs and the subject matters obtained therein is within my province under the Commission Law?

CM (Col[redacted] I do.

CM (Col[redacted] I do, too.

PO: Okay. Under the provision of the MCO, I forwarded certain interlocutory questions to the Appointing Authority. Interlocutory questions 1 through 5 with counsel comments to 1, 2, 3, and 5, and the responses by the Appointing Authority are attached to the record as RE 41 through 49, respectively. In connection with the response to interlocutory question 4, I provided a memorandum to all counsel concerning my interpretation of the term "necessary instructions" in MCI 8.

Basically, I will issue those instructions which any military officer designated to preside over a commission or board might be required to issue. Have both members had an opportunity to review the decision memorandum which is marked as RE 53?

CM (Col[redacted] Yes.

CM (Col[redacted] I have.

PO: Do you all agree with my interpretation of necessary instructions?

CM (Col[redacted] I do.

CM (Col[redacted] I also do.

PO: Trial, you got any comments on RE 53?

P (LtCol[redacted] No, sir.

PO: Defense?

DC (Mr. Dratel): No, sir.

PO: Members, prior to our session on 25 August, I gave you all certain admin instruction on publicity and transportation and such things. Neither side objected to those instructions on the record and I don't intend to revoke those now.

However, after voir dire on 25 August, I stated the following: "As the only lawyer appointed to the Commission, I will instruct you on the law". My interpretation of Commission Law at that time was overbroad, and that instruction, namely that I will instruct you on the law, is hereby withdrawn. Instead, members, I advise you that all the members of the Commission have an equal say on what the law is and that I will not instruct you on the law. I will participate in all discussions and deliberations by the Commission on all questions of law and fact. During all the discussions and deliberations, I will certainly use my knowledge, skill, and training, as well as other members of the Commission. But ultimately, your position or vote on what the law is, is no lesser or greater than any other member, including myself. Each of you all understand that and agree with it?

CM (Col[redacted] Yes.

CM (Col[redacted] Yes.

PO: Comments, counsel?

P (LtCol[redacted] No, sir.

DC (Mr. Dratel): Based on the Colonel's statements in court and also with respect to RE 53 itself, the defense offers RE 14-C which consists of defense motion 2 -- D-2. The motion and the response and RE 14-C, which is a one-page withdrawal of that motion.

PO: Okay. RE 14 is A, a motion; B, a response. And then C is the withdrawal. Thank you.

Okay. The defense submitted a request for continuance, D 28, based generally on anticipated U.S., Great Britain negotiations which the defense

believe would inure to the benefit of Mr. Hicks. I denied that request for continuance. The request, denial, and associated documents are 33-A through C.

The defense submitted another request for continuance, D 29, based on its desire to have an expert consultant in international law present during the sessions. This consultant would not be available until after 15 December. I denied that request. The request, denial, and associated documents are RE 34-A through C.

The defense then requested that I present the denials for the full Commission for its action. Since scheduling is clearly within the province of the providing officer under the provisions of MCI 8, I have declined to do so.

However, I did present the question to the Commission as to whether the denial of a continuance by the Presiding Officer could or should be reviewed by the Commission.

Based on Commission Law, the Commission holds that the scheduling on the time and place of convening of sessions in the Commission is clearly within the sole providence of the Presiding Officer subject to the directions of the Appointing Authority under the provisions of MCO 1. However, the Commission may review a request for continuance denied by the Presiding Officer to determine if failure to grant the continuance would result in the denial of a full and fair trial.

You all agree with that statement of the Commission Law?

CM (Col[redacted] I do.

CM (Col[redacted] Yes.

PO: Comments, trial?

P (LtCol[redacted] No, sir.

ADC (Maj Mori): No, sir.

PO: Okay. Members you all will make a decision on D 28 and 29 now. Do you want to do it now or after we review it further and have more discussions?

CM (Col[redacted] I'd like to review it further.

PO: Okay. We'll give you a decision in due course.

Okay. Now, defense, you resubmitted or submitted the substance of D 28.

ADC (Maj Mori): Sir, you apparently you skipped the section on dealing with comments regarding the D 29.

PO: I did? I don't think so.

ADC (Maj Mori): I could just briefly address it to the members. The denial for continuance for Mr. Schmitt.

PO: I thought you had submitted. Okay. Go on, sure.

ADC (Maj Mori): Just briefly.

PO: Fine.

ADC (Maj Mori): Members, we submitted a request for an expert consultant in International Ministry of Law. The Appointing Authority's office approved that request, finding it necessary for us to have the assistance of an expert consultant in that area to represent Mr. Hicks before this Commission. We sought to have that expert consultant here today to assist us during the motions session.

That motion session obviously focuses primarily in areas that are within his expertise and to allow him to consult with us regarding if the defense for Mr. Hicks. His not being here interferes with our ability to consult, obviously, directly with him and to provide an adequate defense for Mr. Hicks. With the assistance of a consultant, which the Appointing Authority already found was necessary to have in our representation of Mr. Hicks, to not grant the continuance would deprive Mr. Hicks of a consultant already found necessary to represent him. We would ask that the continuance be granted when Mr. Schmitt is available on December 15. Thank you, members.

CM (Col[redacted] I have a question. Why is it you waited 10 days from the time that the Appointing Authority said you could have this guy until you e-mailed him to see if he was available for this session?

ADC (Maj Mori): Sir, we had talked to him working through his chain of command. And he was told that it looked like he could come. In turns out that he didn't have his -- he could not come. His dean said, no, I can't spare you right now. We went through our Boss--

CM (Col[redacted] That wasn't the question I asked you, really, I asked I think. From the time that the Appointing Authority said that he approved this request, you waited 10 days to contact him according to the paperwork that you filed that

I read.

ADC (Maj Mori): Mr. Schmitt, sir, or the dean referring to Colonel Gunn's e-mail? We went first to Colonel Gunn to ask about getting the Appointing Authority to obtain his presence. The Appointing Authority didn't do any -- take any action to assist getting his presence here. He just replied to Colonel Gunn.

At that point, we contacted his -- sent the e-mail to him working through his chain of command. And then, finally, Colonel Gunn, when he said, no -- the dean said, no, he can only be available in December, went back to Colonel Gunn. Colonel Gunn then sent an e-mail directly to the dean again asking if it was possible to bring him up for this one week. He is a Department of Defense employee, he is in Germany. Yes, sir?

CM (Col[redacted] Defense, would you agree that these proceedings are somewhat important?

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] Would you also agree that the individual that you wish to retain for his consulting services as a department of defense employee could also be told that whatever else he is doing is not as important as this?

ADC (Maj Mori): Yes, sir. I agree one hundred percent with you on that, sir.

CM (Col[redacted] So why has the defense not asked to go above the dean of the school, because it seems to me that the appointing authorities and those folks that are responsible for this Commission could clearly make that judgment.

ADC (Maj Mori): Sir, you clearly saw the e-mail that the -- we went through our chain of command, Colonel Gunn. He sent correspondence to the Appointing Authority who chose, instead of taking any active role, to get Mr. Schmitt here and resolve the issue for the first commission in 60 years. Instead he just sent a letter back saying he can come, but it shouldn't interfere with the school's schedule.

I agree with you one hundred percent, sir, this is the most important thing. I don't have the power. I wish I had the power, because he should be here. This is the first military commission in 60 years, and it would just take the Appointing Authority, because the Military Commission Order requires other agencies and the Department of Defense to cooperate and facilitate these commissions. And there are instructors willing and ready to teach and cover for him this week, and they chose not to do that.

CM (Col[redacted] Okay. Let me ask you the whole question. I'm not a big believer in the one-man theory.

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] Are there not other folks beside this single individual?

ADC (Maj Mori): Yes, sir. I actually had another consultant before Mr. Schmitt who was taken away from me because he got PCSed. This was actually our second one due to rotations. I obviously distinguished between a consultant and a witness, because the person is a consultant, they actually do get kind of assigned and attached to the team and covered under confidentiality. I don't want to impose on everyone by trying to get many people involved, but that one was sufficient for our representation of Mr. Hicks.

P (LtCol[redacted] Sir, if I may have an opportunity to respond?

PO: Well, I am waiting to see if the members have any more questions first.

P (LtCol[redacted] Yes, sir.

CM (Col[redacted] I'm good.

PO: Yes, now you can.

P (LtCol[redacted] Sir, first we'd like to clarify one thing. You have before you the letter from the Appointing Authority regarding this consultant. It does not say that he is necessary for this proceeding. It basically is a grant. Yes, the government will pay for this individual to go there; your request is approved for that to have happened. But the Appointing Authority also has made it clear that he does not deem this necessary by saying, if this will interfere with his duties there with his mission, then you can't do it.

So it's misleading to say that the Appointing Authority said that it was necessary to have him here. Well, if the government, prosecutors, we don't have a consultant and we are on the same boat as the defense as far as background experience. We have attorneys on both sides. We don't have some highly-paid consultant. Our side, we prepare through reading and pretrial -- pretrial motions preparation. We are here, we are prepared. We believe the defense can be and should be as well, so we do not feel that the Presiding Officer's decision to deny it in any way denies the accused of a full and fair trial.

ADC (Maj Mori): Sir, can I just be brief for a moment?

PO: Go on.

ADC (Maj Mori): Sir, part of the question back in September, I started trying to obtain his

presence here when I went through Colonel Gunn and began that official process. Whether the government has an expert or not is irrelevant. The government has the Department of Justice assisting them, the FBI, the entire investigative task force, any Department of Defense employee they want to reach out and touch. We have one, Mr. Schmitt. We asked for him, we got him assigned, it is the most important thing going on right now, I think, in military justice, this Commission, the first one in 60 years, that he could have been excused from his teaching duties. His dean felt not, the Appointing Authority did not feel that it was that important to stress, and that is why I am at the Commission asking you gentlemen to recognize that it is that important. And to allow us to schedule so that he can be here, or to have the Presiding Officer order that he be brought here sooner.

PO: Okay. We will still issue a decision on 28 and 29 in due course.

Okay. Defense, you resubmitted 28, the substance of it as D 38, characterizing it as a motion to dismiss for improper referral of charges. D 38 will be marked the next review exhibit in line.

Defense?

ADC (Maj Lippert): Yes, sir. I do not want to belabor this particular motion. I'm not sure whether the members are able to read that or not, I am not sure if they saw the continuance requests for --

PO: The members have seen both continuance requests, and the members have read D 38.

ADC (Maj Lippert): Thank you, sir. Briefly, the Australian government and the United States government entered into negotiations regarding whether Mr. Hicks would be brought to trial before military commission. And if so, under what conditions he would be brought to trial.

At the same time, and ongoing, although I believe they are beginning to be resolved right now, the United States government and the government of Great Britain entered into negotiations regarding how their citizens held at Guantanamo were going to be -- whether and when and how they were going to be tried, or if they were going to be tried before a military commission.

Part of the Australian agreement -- the agreement the United States has with the Australians was that any benefit that flows to the British Guantanamo detainees as a result of the British/United States negotiations, would also flow to Mr. Hicks. The substance of our motion is that this case was improperly referred to the Commission because, to date, one, no British citizen has been designated and will ever be tried at a military commission

if the British have anything to do with it. And two, if that is the case, then that benefit of not coming before a military commission under the agreement between the United States of America and the Australian government should flow to Mr. Hicks. If that hasn't been resolved and nobody -- and/or if no British citizen held in Guantanamo is going to be tried before a military commission, neither should Mr. Hicks.

And the Appointing Authority in making a decision to forward the charges to this Commission and refer them here, before that whole issue was resolved, makes the referral improper, premature, and perhaps unnecessary. And therefore, we believe that the case should be -- we filed a continuance motion, or request for continuance to at least halt it until that was resolved, but we also feel that it is improperly referred and that there is no jurisdiction because of that. That is the basis of the motion. Thank you.

P (LtCol[redacted] Gentlemen, once the Military Commission has been convened and once charges have been referred to this Military Commission, it is your duty to proceed to a full and fair trial, but expeditiously. An in indefinite continuance or trying to hold these proceedings off, whatever the defense tries to cast this as, they want to hold these things off to see how things go. Well, that is not a cognizable -- that's not consistent --

PO: It's not a date certain.

P (LtCol[redacted] Yes, sir.

CM (Col[redacted] What did you say?

PO: It's not a date certain.

P (LtCol[redacted] An indefinite continuance is just in direct contradiction with the duty to proceed expeditiously. The defense has statements in this, not only are they unsupported, but they demonstrate a doctrine that is known as the political question doctrine annunciated by the U.S. Supreme Court, *Baker versus Carr*, a case that we have cited in our response here.

The point of that is there is a branch of the government that deals with diplomatic matters dealing with Great Britain, dealing with Australia. It's not lawyers, it's not this Military Commission, it's not a court. That's left to the diplomats to decide diplomatic matters. It would impinge on that for this Military Commission to decide what is or is not required as a matter of diplomacy between the United States and Australia.

And the statements of the defense highlight this, because a military commission or a court is essentially not competent to decide these matters, what is required by these diplomatic negotiations. They are not even

talking about a treaty or something that has some kind of effect like that. We are talking about some kind of negotiations that the defense feels entitles them to an indefinite continuance.

The defense is wrong about what it's asserted. Australia has indicated that they desire for these proceedings to proceed expeditiously, which is precisely the language of MCO number 1.

And furthermore, the statement that no British citizen will ever go to trial before the military commission is simply unsupported and so that just has to be completely discounted from the defense. Gentlemen, bottom line is that this defense request to hold these proceedings in abeyance is subordinate to the political question and should be denied.

ADC (Maj Lippert): Yes, sir. It is not about continuance -- I'm sorry, sir.

CM (Col[redacted] He used the word "abeyance".

PO: In abeyance, what do you mean by "abeyance"?

CM (Col[redacted] And the motion is for continuance.

P (LtCol[redacted] Sir, when he says he wants a continuance but he doesn't give that date certain, and instead he said he wants it for an indefinite period of time, I am casting that more as a holding in abeyance then some kind of continuance.

ADC (Maj Lippert): Sir, maybe perhaps I can clear up your question. We put in a motion for a continuance originally. The Presiding Officer ruled on that motion said, no, there is not going to be a continuance we are going to drive on.

We then submitted a motion to dismiss based on an improper referral. And the reason we have an improper referral is because of these negotiations, these agreements, or whatever will inure, or may inure to the benefit of Mr. Hicks. And if that is the case, it is incumbent upon the Appointing Authority before referring this case to a military commission to ensure that all of those things are resolved. In this case, they have not. They sent him here knowing that the negotiations with the British are ongoing, and knowing that the benefits given to the British detainees will flow to Mr. Hicks.

Nonetheless, they referred the case. That doesn't make any sense. The referral is improper because it is done prematurely and may not be necessary at all once the agreements between -- actually not diplomats, but the Department of Defense, who is negotiating these arrangements, not the diplomats. So the Secretary of Defense is entering into agreements as to disposition of cases, some which might benefit our client and the

Appointing Authority's ignored that and driven on. And that is improper, and that is why it should be dismissed. Thank you, sir.

PO: Thank you. D 38 was marked previously as RE 55.

Okay. Let's take about a 20 minute break -- how much time do -- 25 minute break while we think some of this stuff over.

Court is in recess.

The Commission Hearing recessed at 1414, 1 November 2004.

The Commission Hearing was called to order at 1443, 1 November 2004.

PO: The Commission will come to order.

P (LtCol[redacted] Sir, we would like to note for the record that Sergeant[redacted] has replaced Sergeant[redacted] as court reporter.

Also, at the prosecution table with us is Commander[redacted] as you know, the lead prosecutor in the Hamdan, al Bahlul cases. With your leave he will later be arguing two motions that are common to the Hamdan and Hicks cases.

A detailing letter detailing Commander[redacted] as well as one other individual has previously been marked as RE 57 and has been provided to the court reporter.

PO: Okay. Let's talk witnesses.

The defense submitted a request for certain persons as expert witness on the law in this case. I denied those requests because I did not find the witnesses were necessary. The defense has submitted those requests to the full Commission for consideration. The name of the witness and the RE which contains the initial request, associated documents, the denial, and the request to the full Commission are: Cherif Bassiouni, D 31, which is RE 35; Jordan Paust, D 32, which is RE 36; Antonio Cassese, D 33, which is RE 37; Tim McCormack, D 34, which is RE 38; George Edwards, D 35, which is RE 39; and Michael Schmitt, D 36, which is RE 40.

Members, have you both had the opportunity to review all the matters contained in RE 35 through 40?

CM (Col[redacted] Yes.

CM (Col[redacted] Yes.

PO: Counsel, either side feel compelled to say anything about these requests that is not contained in the filings?

ADC (Maj Mori): Sir, just briefly. We have obviously asked for the six witnesses. By reviewing their CV's in the request, you can obviously see they're qualified. And their qualifications certainly impacts the probative value of their testimony. After getting a chance to obviously review the motions that are involved in this case, each witness will testify on issues directly relevant to all the motions before the Commission. Having the witness here will allow us to present evidence, the government to cross-examine that witness, allow yourself to ask questions of that witness in that particular expertise and area so that we can become educated in the international law, international humanitarian law, law of war. I don't believe myself or anybody within this room is a -- has extensive experience in international law, practicing in it, or advanced education, masters in law from international law; it's a very specialized area, very complex area. And having individuals testify regarding those subject matters that we have requested, especially, individuals with the experience that we have asked for.

Professor Cassese, former judge from the International Criminal Tribunal of Yugoslavia; Professor Bassiouni, who has been a professor and consultant for the Department of State, Department of Justice, and International Law; Michael Schmitt, who we have addressed, who is a DoD employee, employed over in Germany for the Department of Defense in European Center, George Marshall Center; we have Mr. Tim McCormack, who is the Foundation Australian Red Cross Professor of International Military Law for Melbourne. He is also the Foundation Director for the Asian/Pacific Center for Military Law. Another one of his experiences, which directly relates to this obviously, is his role as an amicus curiae for the international tribunal regarding the trial of Milosovich, where he is an amicus curiae for the trial chamber.

I think the defense has requested witnesses that are -- their testimony is admissible, where the -- it would provide probative value and it should be admitted.

PO: Before you sit down --

ADC (Maj Mori): Yes, sir.

PO: Okay, Bassiouni, which motion is he going to be testifying on?

ADC (Maj Mori): Professor Bassiouni would testify, specifically, for the most weighted area, I would say, in the area of conspiracy.

PO: Can you do me a favor and talk about the motions listing?

ADC (Maj Mori): Yes, sir.

PO: Thanks.

ADC (Maj Mori): Sir, he would testify, going through, mainly on conspiracy, D 11.

PO: Okay.

ADC (Maj Mori): He would address also -- touch on probably D 17 and D 3, slightly.

PO: Okay. Mr. Paust?

ADC (Maj Mori): Mr. Paust, would hit on D 5, D 10.

PO: Okay.

ADC (Maj Mori): And also, I am giving the main areas they may have --

PO: -- that is fine, I understand that. Mr. Cassese?

ADC (Maj Mori): Mr. Cassese would also hit on the conspiracy, as well as testify regarding D 3 and D 17.

PO: Mr. McCormack?

ADC (Maj Mori): Mr. McCormack would deal with D 12, D 13 primarily.

PO: And Mr. Edwards?

ADC (Maj Mori): Mr. Edwards would deal with D 8, D 4.

PO: I am not holding you -- I am just asking you what's the primary one. How about Mr. Schmitt?

ADC (Maj Mori): Mr. Schmitt -- Mr. Schmitt would testify regarding D 20, D 11, D 12, and D 13, and D 3, and D 17, the international armed conflicts.

PO: Okay. You got anything else you want to say?

ADC (Maj Mori): No, sir, thank you.

PO: Any questions of defense counsel?

No audible response

CM (Col[redacted]) If I understood you right, and I copied these down, why wouldn't you consider when you have, like, two -- at least two, and in some cases three, testifying on the same thing; wouldn't that be cumulative?

ADC (Maj Mori): Sir, I think -- when you get to about three on the subject area, I would agree it is probably cumulative. But the issue is with these areas of law that we need to be able to bring in, obviously, eminently qualified experts, and to show by having at least two or three testify, that our position is the correct position, and is what is accepted in international law across the broad spectrum in the international community. So I would think at least three would be necessary for that before I would say that is cumulative in witnesses, sir.

CM (Col[redacted]) Can you articulate to me why these individuals physically need to be here, and that their knowledge and their expertise cannot be passed to you guys or to us in another manner, and then you present it since you are the defense counsel?

ADC (Maj Mori): Well, sir, I cannot provide evidence personally, myself.

CM (Col[redacted]) But you can argue and make --

ADC (Maj Mori): I can argue, yes, sir. But it is from the evidence that I would argue and --

CM (Col[redacted]) So my question is: Why is it necessary for me to get the evidence directly from him in person and not from some other medium?

ADC (Maj Mori): Sir, you can judge the witness' demeanor, his credibility, so that you can have the opportunity to ask him questions, the prosecutor can ask him questions, we can ask him questions right here, and we can get to the heart of his testimony and ensure that what is contained in a written document or what was written in an article is in context for this case because that is what is very important. This is the first time military commissions have happened in such a long time that there is not much written specifically on this issue and the importance of these issues. There is no book out there about military commissions because there just hasn't been any in such a long time.

CM (Col[redacted]) Isn't pretty unusual to have witnesses present evidence to a panel when it is that panel's responsibility to interpret the law, to have someone come up here and give me their opinion of the law when it is my job to interpret that law?

ADC (Maj Mori): Sir, Mr. Dratel was set up to answer that next, if I could let him answer

1 that question.
2
3 PO: Actually -- okay. Go on, I'm sorry.
4
5 DC (Mr. Dratel): In the context of this particular Commission and in this particular case, it
6 is a unique situation, it is unique for several reasons. One, is that we have a
7 panel that finds the facts and the law but is not made up of lawyers. We
8 have two Commission members who aren't lawyers. There is no judge who
9 would make a finding, who would be someone who had experience in
10 adjudicating these types of issues and would have expertise in the context
11 and could consult the law in a way that there was training already in place
12 to make a certain type of determination.
13
14 So I think in one context, in this type of case, it is important to have that
15 type of expert testimony so that the Commission members can feel satisfied,
16 and that this is, in fact, the state of the law and not a paragraph from a book
17 that you can't cross-examine, and you can't ask questions, and you can't
18 determine whether it applies to this case, or it is something in the abstract,
19 or something that applies to something that was written years 25, 30, ten,
20 three, years ago.
21
22 The second part of that, and I think they are closely related to each other, is
23 that we are not addressing in this Commission offenses that are written out
24 in some international, or law of war book as existing before the
25 President's -- before the MCO or the MCI that created them. So part in
26 parcel of our argument is, you're not going to find these particular offenses
27 discussed as they as they exist here because they did not exist. So you have
28 to have the people who know what they are talking about, these preeminent
29 authorities in the field, come in and tell you what state is with respect to this
30 particular new type of offense that the government is seeking to create in
31 this Commission. And what would be the harm of getting the maximum out
32 of the these witnesses? Not the minimum, something on a piece of paper,
33 but getting the maximum. Getting in to explain to you from the witness
34 stand what the state of the law is. You can satisfy yourself that you are
35 fully educated that you don't have a question hanging out there that you
36 can't ask a piece of paper, but you can ask a human being, an expert,
37 someone who is not going to come in here and risk their reputation on a
38 particular side. Someone who is going to come in and give you the state of
39 the law. They have the expertise. They have the knowledge and the
40 experience in international tribunals, in military law, in law of war. And
41 that is what we are trying to do, is to get the panel the maximum so that we
42 have a full and fair proceeding. Thank you.
43
44 PO: Do you want to say anything? On the witnesses not on the P 6 thing that we
45 are going to hit later; okay?
46

P (LtCol[redacted]) Yes, sir. Primarily, the reason that we believe that these witnesses are not necessary is what we stated in P-6.

PO: Fine, thank you. We are supposed to hear next in order 12, 13, 11, 9, 20; right? That's what you all told me you want to do; right?

P (LtCol[redacted]) Yes, sir.

PO: Major Mori?

ADC (Maj. Mori): Yes, sir.

PO: Thank you. Okay. So you are telling the panel that you can't argue these motions without these people; right? No, you are telling the panel that you would be a lot better off with them; right?

DC (Mr. Dratel): The whole system would be a lot better off, sir.

PO: I imagine that the prosecution would argue that, but that is okay.

Okay. Members, do you want to address that here or do you want to go back and take a short deliberation on this?

CM (Col[redacted]) Deliberation.

CM (Col[redacted]) Deliberation.

PO: Court is in recess for ten minutes.

The Commission Hearing recessed at 1458, 1 November 2004.

The Commission Hearing was called to order at 1507, 1 November 2004.

PO: The Commission will come to order. Let the record reflect that all parties present when the Commission recessed are once again present.

The Commission has considered the witness request, RE 35 through 40, and the Commission does not find that they are necessary at this time; therefore, the requests are not granted.

Prosecution, you got a motion to exclude legal expert testimony, P 6, which is attached to the record as RE 13 A through C.

Members, have y'all had a chance to look at this motion?

CM (Col[redacted]) Yes.

CM (Col[redacted] Yes.

PO: You got anything you want to say about it?

P (LtCol[redacted] Thank you, sir. Gentleman, the request from the defense illustrates very nicely why the prosecution brought this motion. Because this type of a witness, a law professor, to explicate the law, in essence to give a lecture on what the law is, that is not evidence at all. That is why we brought this motion to exclude this type of testimony. Although, the defense would attempt to make it seem so, it is neither a normal mode of establishing what the law is before a Commission, nor is it required of you to allow this type of evidence.

Evidence goes to establishing facts. What the law is simply put is a different matter.

No, counsel would not need evidence to say, this is what the law says. This was against law, this was not against the law. When we do that we present legal briefs and we go to sources law. Neither the prosecution, nor the defense needs to have someone to have somebody on the stand to tell you that for us to point to the law. Does the prosecution have to get someone on the stand to say, Military Commission Instruction number 2 says X, Y, Z and what I meant by that was A, B, C. No, you are expected to go to the source of the law and to study it and go to other sources of the law to give that meaning as needed.

Another important reason to exclude this type of testimony is that it is the province of this Military Commission to determine what the law is. Bringing in a law professor, an expert, invades that province because, again, you interpret those sources. If a purported expert came in, and told you, this is what the law says, it says that this charge must go, the only way -- the only thing that gives that any weight would be the source of that opinion. And that is what you must go to, the source of that opinion. Now, that is not to say that these legal scholars' opinions carry no weight, or do not come in here at all. Counsel for both sides are free to, and have freely used the opinions of legal scholars, and those come in. Now, we've provided a couple of cases in our brief that some of them are kind of lengthy, but the portion that talks about the use of legal scholars, very informative and very important. Now, the two cases that are worth reading are the U.S. Supreme Court case of *Paquete Habana* and a federal appellate decision by the name of *Yousef.*

And pursuant to these cases -- and they are talking about exactly this issue -- when we go outside of statutes and we look to international law and what the sources of international law are. Of course, this is military

commission, it is a United States military commission. The first place we look is to United States law, U.S. orders, regulations, statutes, Supreme Court decisions. We look to those as a source of law.

U.S. law at times incorporates international law. For instance Congress has said that a person can be charged under the law of war, the law of armed conflict; that is incorporating something. To understand what those charges can be and who may be charged, it is saying you look to the law of armed conflict, and to determine that you have to go to some international sources.

After U.S. law, we look at treaties. We can also look to customary international law in some instances. But as *Yousef* said, for customary international law, you look at the practice of states and court decisions, in some instances, you look to court decisions. The works of commentaries of jurists are not primary sources of international law and over-reliance to them -- on them can lead to confusion and error.

Now as the *Yousef* court said, while jurists, meaning legal scholars offering their opinions, can be useful in explicating or explaining a point of law, they -- both those cases talk about the works of jurists. We think that's significant that we look to the works of jurists. To have someone come in here and give a lecture essentially would lead to a temptation not just to say what the law really is, but what they think the law should be or the temptation to apply the law as they would like to see it. Prior works that these people have published, works that at least has some more reliability because that is in a more general setting, it is where they are attempting to interpret, and they would -- to make it persuasive -- they would cite. They would say, where are these sources of law, and not just what they think the law ought be.

As the *Yousef* court said, the claim of scholars to speak for the "international community," loosely so called, however, common place in our time, should be regarded with skepticism. So the *Yousef* court laid out a hierarchy, if you will. The first place look to it -- to find it in the source law, and at the bottom of that hierarchy would be the works of jurists.

Again, we are not trying to keep the works of these individuals out, they can be presented. Your ruling here will set a precedent; and we think a precedent that says each case can start with a battle of legal experts, because, let's face it, that is what it would start off as. They want to present somebody who would say that their view of the law is right, and that is what Major Mori is essentially said when he made his argument about some of those witnesses. He wants to show that his view of the law is right. Well, of course, we believe our view of the law is right, we call experts. The Military Commission, while full and fair, is also supposed to be efficient and conducted expeditiously. And starting off with a battle of legal experts,

1 would be bad precedent because it would be very inefficient and create a
2 legal side show.
3
4 Counsel should be held to the burden of submitting articulate legal briefs
5 that point to legitimate sources of law to support their position. Gentlemen,
6 we will be offering proposed essential findings for your consideration.
7 Thank you.
8
9 PO: Defense?
10
11 DC (Mr. Dratel): I am a little unsure of what the nature of this motion is at this point since
12 the request for these specific witnesses has been denied to the extent that it
13 is a blanket categorical request that the panel exclude a whole category of
14 evidence before you've even heard what it is, I think that would be
15 extraordinary. Asking the Commission in the blind to have a blanket
16 prohibition on a certain type of witness, so that going forward you deny
17 yourselves the right to hear testimony that's relevant and necessary before
18 you've even been asked to hear testimony and why it's relevant and
19 necessary. So I think the motion should be denied out of hand for that
20 reason alone, because it is not in any context at all other than these specific
21 witnesses which the Commission has already denied.
22
23 It would be neither full nor fair to prejudge before you even know a request
24 for particular type of witness to say that witness cannot be called. This
25 should be evaluated on a witness-by-witness basis, on a subject
26 matter-by-subject matter basis. And again, otherwise, it would deprive the
27 Commission of relevant and necessary testimony.
28
29 Now, the government wants to pick and choose rights that it thinks should
30 be transferred, ordinary jurisprudence to this Commission. To pick and
31 choose statutes, to pick and choose principles; and only those that make it
32 less fair, only those that provide less information to the panel, only those
33 that give you less of a foundation to make the decisions that you need to
34 make.
35
36 When we were here in August and had voir dire, because of this
37 extraordinary situation where we have lay members of the Commission as
38 finders of the law, we ask: Are you comfortable in that role? Do you think
39 you can do it? Do you understand the complexities of the issues that you
40 are going to face. And we got affirmative answers. And part of the reason
41 that we got affirmative answers was that we were going to be given the
42 opportunity to educate the panel, to give the panel the tools it needed to
43 make the right decision.
44
45 That is what these types of witnesses are designed to do. We are not in a
46 federal court with a judge sitting, who's had experience in training as a

1 judge, has been through law school, has been through judge school, has
2 been sitting on the bench as a context for making these kinds of decisions.
3 We are not there. And even if we were there, some of this testimony would
4 be appropriate, because what is expert testimony appropriate for? To give a
5 layperson a foundation and a discipline for which they do not have
6 experience or access in their ordinary lives. That is everything from an FBI
7 agent talking about drug codes, to questions of securities law. And all of
8 those are appropriate subjects of expert testimony in the federal courts.
9 This is an appropriate subject, and there are appropriate subjects even going
10 beyond the witnesses that have already been denied. But you can't even
11 know because we haven't even gotten there yet.
12
13 With respect to talking about the government said they can put on
14 witnesses, we want them to put on witnesses. They won't be able to in this
15 context. They will not be able to put on witnesses who will get up there and
16 defy the witnesses that we can put on, the six witnesses, the preeminent
17 authorities. We are all for giving you the maximum amount of information.
18 We are all for you being an informed panel, not a deprived panel.
19
20 In the *Yousef* case it did not say it was invalid; it said there is a place for it
21 and there was a hierarchy of it. But also in *Yousef*, you're talking about
22 traditional practices.
23
24 Again, this is not traditional practice. We are being deprived of the
25 opportunity to provide to you the proof in the context of what is the practice
26 in international law that these offenses do not exist. They haven't existed,
27 and they did not exist until MCI 2 created them. And saying that MCI 2
28 was created based on the Presidential Military Order is not an answer to the
29 question of whether these offense existed under the law of war, under
30 international law, by Congressional authorization -- and we will go into that
31 later in the argument on the charges themselves -- but that is just us. When
32 I left here in August, I was confident that we could come in and provide to
33 you the ultimate foundation for you to make the decision as if you were
34 experts. Because that is what you need to be to make these decisions
35 properly.
36
37 I submit that they don't want experts because they are afraid of the answers
38 that the experts will give and their inability to give you contrary answers.
39
40 We have talked about the importance of these Commissions, the first in 60
41 years in this country; and I think it is of the utmost importance that when we
42 proceed with these Commissions, that the Commission not do it with
43 blinders on, not do it in a way that the Commission remains uninformed, but
44 in a way that the Commission becomes most informed, because that is what
45 Mr. Hicks' liberty depends on, and the future of military justice in this
46 Commission and in this country.

So I think the motion should be denied for all those reasons. Thank you.

P (LtCol [redacted]) First, that's nonsense. The government can bring witnesses, could bring witnesses, and we could turn this into a battle of experts. In our briefs we lay out the well-established principles of international law. We lay out the cases that are precedent; and to say that we could not bring one is some kind of attempt to double dare the government or something into saying okay, fine, bring on the witnesses and turn it into a macho fight or something. That is nonsense.

The defense has expressed concern about a fellow Colonel. We have three Colonels on this panel, three career military officers. And they have expressed a lot of concern because one is a lawyer, he is going to have undue influence. And yet they want to bring a parade of law professors to wag their fingers at you and tell you what the law is. You should look at the law that they would look at to determine what the law is. They do not make the law. That is what *Yousef* says. Law professors do not make the law. It would be misleading, it would inappropriate, it would be inefficient, and that is why we brought the motion.

The context is, the defense clearly indicated by bringing witness requests that they intended to put this type of evidence on. That is the context. We think law professors lecturing on the law is not evidence, it's inadmissible. To explain our views on the law, it should be through the traditional methods which can include the works of jurists. Thank you.

PO: You got any questions?

CM (Col [redacted]) Nothing.

CM (Col [redacted]) None.

PO: Members, I propose we deny the government's motion to exclude all expert legal testimony and rule on any witness request on a case-by-case basis. Do you agree?

CM (Col [redacted]) Yes.

CM (Col [redacted]) Agreed.

PO: Prosecution 6 is denied. The Commission will entertain all witness requests and grant or deny the requests on an individual basis. This decision will not be further reduced to writing.

CM (Col [redacted]) Can I make comment? Should the Commission choose to hear

evidence presented by legal experts, I am going to ask that this Commission make those recommendations on who it should be, not the defense or the prosecution. I feel it is important that we do understand the law. But I can't decide who I need to hear from yet until you present the motions and we discuss the laws. I don't presume to know enough to bring the right people in until I know what I don't know.

PO: Okay. Defense, the way I understand it, you want to present your motions in the following order: D-12, D-13, D-11, D-9, and D-20. Prosecution will go along with it, although, I would like to do it a little bit differently.

Before we start on your motions -- on those motions, there is an issue of conclusive notice Major Mori and Colonel [redacted] are working on. It is going to be handled before the Commission finishes up its session here at Guantanamo.

Y'all work together; if you can't get something worked out, we will be ready to look at the first thing Wednesday morning. So y'all got that.

Okay. You ready to start with D -- what are you on -- D-12, defense?

ADC (Maj Mori): Sir, is it possible to have a 15-minute recess? We have some with the Commissions ruling --

PO: Okay. I don't think we can get your client in and out in 15 minutes, 25 is what is going to have to be.

The Commission is in recess.

The Commission Hearing recessed at 1526, 1 November 2004.
The Commission Hearing was called to order at 1551, 1 November 2004.

PO: The Commission will come to order. Let the record reflect all parties present when the Commission recessed are once again present. Okay, defense?

ADC (Maj Mori): Yes, sir. Since the defense witnesses were denied, the defense would offer what's been marked as Review Exhibit 59-63. Fifty nine is a statement by Mr. McCormack; Sixty, Mr. Cassese; Sixty one, Mr. Edwards; Sixty two is Bassiouni; Sixty three is Michael Schmitt.

PO: That's only five, isn't it?

ADC (Maj Mori): Yes, sir.

PO: Okay. Pass them to the record and . . .

ADC (Maj Mori): They've been previously supplied to the court reporter, sir.

PO: Okay, great.

ADC (Maj Mori): Ready for our first motion, sir?

PO: Yes, we're waiting here.

P (LtCol[redacted] Sir, just if - we haven't seen these yet, we would like to - once we've had a chance to read them we would like the opportunity or potential to object to some portion - additionally we would like to notify you by tomorrow morning based on reading those.

PO: Okay, we won't, members we won't issue a decision on this until prosecution has had a chance to talk, right?

CM (Col[redacted] Correct

CM (Col[redacted] Agreed.

PO: Okay, there you got it.

ADC (Maj Mori): Sir, just for the record I think these attachments obviously represent a file provided by defense that this is what they would testify to. Sir, the first motion deals with the charge of murder by an unprivileged belligerent. Mr. Hicks is charged under an attempt theory but what it focuses on, is there a charge of murder by an unprivileged belligerent under the law of war. It's our Motion D12 and you've had both our motion, the government's response, and our reply.

It focuses on two main issues; first, is this offense an offense that existed under the law of war prior to the creation of the Military Commission Instruction Number 2. The defense's position is it did not because it didn't. The next issue is what does exactly the law of war protect and regulate? Because to commit a war crime to violate the law of war you have to actually violate something specifically restricted within the law of war. The law of war is not meant to be a criminal code regulating or restricting any possible type of offense that occurs within an international armed conflict. And for the purpose of this motion we can assume that the individual involved that's charged with this under the hypothetical murder by an unprivileged belligerent doesn't qualify for combatant immunity, wouldn't qualify for POW status.

But the individual status isn't relevant to determine whether something was a war crime. And why is that? It's because the law of war protects certain people and certain places, only. It doesn't protect everyone. And one of the people the law of war doesn't protect is a service member unless that person is wounded, surrenders, or is somehow out of combat. It's important to note that it protects, and the government did a great job of this in their reply, in their response to my motion, it said that numerous charters and conventions it talked about war and every one of them talked about willfully killing of protected persons, killing persons taking an active part in hostilities, members of the civilian population, treating inhumane acts committed against the

civilian population. Because that is who, one of the classes of people the law of war protects. It does not protect everyone.

The law of war is not in effect until there's an armed conflict and once it's in effect it only protects certain people and certain places. And you'll notice in MCI number 2 on page 4 under the war crime section, it talks and it has an offense willful killing of protected persons, valid offense under the law of war triable by military commissions.

The next one, attacking civilians, valid offense under the law of war to be tried by military commission. And those you will find contained in the Geneva Conventions, the ICTY, the ICTR, the IC – International Criminal Court. The definition of war crimes, those are exactly what is meant and who's protected. The International Criminal Court is part of the latest definition of war crimes. And again it specifically talks about grave breaches, inhumane acts, against persons or property protected under the provisions of the relevant Geneva Conventions. Unless you're protected by the law of war it's not a crime to murder to steal from to give someone a bad check it's not a violation of the law of war. It must violate the law of war.

I would like to use a hypothetical to explain. The US has invaded Canada and our lines move up near south of Montreal and a Vermonter decides he wants to help the US military. He is not a soldier, he does not qualify for POW status. He takes his hunting rifle, gets in his pickup and he is driving to the Canadian border. He crosses over the Canadian border and he is there, he gets to where the US troops are and he gets a cup of coffee. At that point in time has he committed a law of war violation? No, he hasn't. But there are consequences for his conduct. By being a civilian who takes, begins to take part in the hostile activities, he gives up the ability not to be targeted by the opposing force. He is now a lawful target.

Typically the law of war protects civilians, they cannot be lawfully targeted, unless they take part in the hostilities. He loses that protection. So our Vermonter up there, when he gets to the front lines with US forces he can now be lawfully targeted by the Canadian forces. What else are the consequences of his actions? Well, if the Canadian forces were to surprise attack that night and capture him he would not be entitled to Prisoner of War status and the protections under the Geneva Convention 3 regarding prisoners of war. It's not a war crime because he hasn't done anything yet contrary to the law of war. If that Vermonter went up to the front line and shot a civilian who was walking in a town and he shot him, that is a war crime because it is prohibited. You cannot kill protected people and that is a war crime. Now a soldier - yes, sir.

CM (Col[redacted] What if he shoots an American soldier? What's your opinion there?

ADC (Maj Mori): If he shoots an American soldier and he's an American citizen on the same side?

CM (Col[redacted] In your example he was a Vermonter.

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] I'm assuming that . . .

ADC (Maj Mori): He's on our US side.

CM (Col[redacted] Okay.

ADC (Maj Mori): He is on the US side.

CM (Col[redacted] Well, my question is . . .

ADC (Maj Mori): Yes, sir. I understand exactly what you're saying. He is – he is on the US side and he's fighting the Canadians and he shoots a Canadian soldier. That is not a law of war violation because the soldier that is participating in hostile activities on either side is not protected by the law of war. If they are wounded and if they are surrendered that would be a war crime. If that Vermonter shot a wounded - found a wounded Canadian soldier and shot him; war crime. If he saw a Canadian pull up the flag to surrender, shot him; war crime. If he had violated Canadian prisoners and abused them; war crime. Because once a soldier is captured, once a soldier is wounded, or anyway out of the fight, they - law of war then comes in and protects them.

CM (Col[redacted] What do you classify this Vermonter on the battlefield as?

ADC (Maj Mori): I would – I would briefly – this motion - he is a civilian participating in hostilities and who does not qualify for POW status.

CM (Col[redacted] So you're calling him a civilian?

ADC (Maj Mori): Well, technically, under the Geneva conventions – the Geneva Convention uses the term civilian who participates in hostilities for someone who loses the protection of civil – civil protections under the Geneva Convention. They distinguish between a civilian who participates in hostilities, loses their protections under Geneva Convention IV. You can use whatever term-

CM (Col[redacted] No, you can't use whatever term.

ADC (Maj Mori): Well the problem . . .

CM (Col[redacted] Is he a combatant or is he a noncombatant at that point in time whether he's lawful or unlawful.

ADC (Maj Mori): He's a combatant. He's a combatant.

CM (Col[redacted] Terms matter.

ADC (Maj Mori): Exactly.

CM (Col[redacted] Terms matter.

ADC (Maj Mori): Yes, sir. He's a combatant. And he could be – if we use the term lawful or unlawful to distinguish whether or not he would be entitled to prison of war status if captured. And that's the way I believe it's being utilized in this commission. So an individual who would not be entitled to prisoner of war status but has just been in the hostilities is an unlawful combatant. It's not the status of the individual that's committing the act that determines if it is a law of war offense. It's who the target was because that's how the law of war operates.

I'm not saying that that Vermonter in Canada who shoots a Canadian citizen could not be tried for a crime. It may be a crime under Canadian law but it wouldn't be a violation of the law of war. Because the law of war doesn't criminalize his conduct. It just removes the protection of immunity. And I provided as an exhibit, Exhibit 58, the court reporter has that and it should be provided.

PO: Yes.

ADC (Maj Mori): It is from the conduct of international armed conflict, Dinstein. And his close – I highlighted certain portions of it - it's very specific, and he used to be on the staff as a professor of International Law at the US Naval War College, he's now a professor at Tel Aviv. He has sections in the chapters of what would be lawful and unlawful combatants and what's important is the distinction between them. Well, to read a paragraph, "There are several differences between the prosecution of war criminals and that of unlawful combatants. The principle distinction is derived from the active or passive role in the law of international armed conflict. War criminals are brought to trial for serious violations of the law of international armed conflict. They have to violate the law of armed conflict. With unlawful combatants the law of international armed conflict refrains from stigmatizing their act as criminal. It merely takes off the mantle of immunity from the defendant who is thereby accessible to penal charges for an offense committed against the domestic legal system."

So the – our Vermonter who is in Canada and shoots a Canadian soldier didn't violate the law of war because that soldier wasn't protected but he may have violated Canadian law and Canada can prosecute him for that in their domestic courts. But if they – if it was a person who was entitled to prisoner of war status, a lawful combatant, he could be tried but then his defense would be "I was a lawful combatant. I was entitled to prisoner of war status, I have immunity, combatant immunity." So it's an interesting distinction and it's also sort of counter-intuitive, if a person's not a - wouldn't be entitled to prisoner of war status they shouldn't be out there fighting but that's not how the law of war operates. The law of war protects people. And until you get into a protected status you can – you could violate the law of war by attacking a soldier by using a means that's prohibited, by using blinding lasers or glass bullets. That would be a law of war violation but that's not because of who he is, it's the means and methods that he utilizes.

When the law of international armed conflict negates the status of lawful combatancy (sic) it exposes the culture of appeals sanctions of acts criminalized by the domestic legal system. In other words, international law merely removes the shield otherwise available to lawful combatants as a means of protection. Conversely when the law of international armed conflict directly labels an act of war crime, a prohibited act, whether it's capturing a civilian or place, in

short is provided by international law against the enemies. And a war criminal is tried by virtue of the international law where there's an international armed conflict while an unlawful combatant is prosecuted under domestic law.

So this charge, as it's written, in MCI 2 is not an offense under the law of war. It is an attempt to make a status offense of somebody who was not entitled to prisoner of war protections. It is, as I mentioned in the beginning, a war crime is attacking – civilians attacking civilian populations that's contained in killing of protected persons and civilians. Those are war crimes. This second charge has been made up and it's trying to make a status offense – just basically if you have not don't meet prisoner of war status.

CM (Col[redacted] Can I ask a question?

PO: Sure, yeah, go ahead.

CM (Col[redacted] Major Mori, in the beginning of your story you said the guy was fighting with the US?

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] When he joins the US forces then what's the law of war say? Who's responsible for his conduct according to the law of war when he joins and that US commander accepts him?

ADC (Maj Mori): Well, I'm not saying he even was accepted, sir.

CM (Col[redacted] That's not what you said. You said he was fighting with the US side, drinking coffee with them. So none of your story then flushes, if I understand the law of war, if the US said, "You're fighting with us now."

ADC (Maj Mori): No, it would – because for the purpose of hypothetical he would not be entitled to prisoner of war status, he wouldn't have joined their-

CM (Col[redacted] My question -

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] My question is when Colonel[redacted] asked you, "What if he shot a US guy" and you said, "No, he's on their side".

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] Okay. You started your story and said he went up with the US guys and had a cup of coffee.

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] I'm asking you what's the law of war say when the US takes that guy on?

ADC (Maj Mori): If by him – if he were to join the US forces? What does the law say whether he is then a privileged combatant entitled to prisoner of war protection or not? I would say if he's not wearing the proper uniform or distinctive symbol, he wouldn't be entitled to prisoner of war protection. But it wouldn't make him that a war crime in and of itself. He still would have to either attack a protected person or place.

CM (Col[redacted] So you're implying here that someone running around a battlefield, who is not necessarily on one side or the other, is the moral equivalent of someone in my neighborhood walking around with a gun and he shoots somebody?

ADC (Maj Mori): Yes, sir. I mean what law would apply to him? Yes, sir. The domestic law of the area. And what's important is how the law of war also compensates because it says that he can be targeted and he doesn't get the prisoner of war protection. So he allows – at that point that person running around can be targeted by the enemy and shot without any worry, without anything because it's just like another soldier in that he can be targeted, he's lost the protection of being in a civilian status. But he has to violate the law of war to commit a law of war violation, sir.

CM (Col[redacted] The other question I have for you, Major Mori, is the reply that you filed on 26 October 2004, paragraph 2 says "Facts: Mr. Hicks never fired a weapon or assisted in firing a weapon at US or any other force during international armed conflict in Afghanistan."

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] On what basis do you say that is a fact?

ADC (Maj Mori): Well, I say that is a fact because of my knowledge of the case, sir.

CM (Col[redacted] That's your assertion that it's a fact – we have yet to determine what the facts in this case are.

ADC (Maj Mori): Well, yes, sir, and that's -

CM (Col[redacted] So your motion is resting on facts that we have yet to determine –

ADC (Maj Mori): No, sir, that's why I started – when I started I said, "Assuming for the motion" on whether it's a valid offense under the law of war in this MCI 2. Just assume, assume for the sake of determining whether it's a valid offense or not you can just look at the evidence and assume that the acts actually occurred. But not Mr. Hicks, but in a legal sense. That someone killed someone. That that person who did the killing was not entitled to prisoner of war status. And that the person they killed, and when we look at the charges of Mr. Hicks they say the target was – they say the target was coalition forces only. He is not charged with shooting at civilians, he's only charged with intending to kill American, British, NATO, Australian, Afghan

and other coalition forces. He is not charged with any attack on any civilians nor was he charged with shooting at a soldier who had been wounded, nor was he charged with shooting at – using improper means to attack a soldier. Fairly technical area but it doesn't violate the law of war.

PO: To shoot-

ADC (Maj Mori): To shoot a soldier. The answer is counter-intuitive

CM (Col[redacted] You never answered my question. If I look at this piece of paper, on 26 October 2004 –

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] The second paragraph says exactly what I read, "Facts: Mr. Hicks never fired a weapon or assisted in firing at weapon at US or any other force during the international armed conflict in Afghanistan." Now –

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] As I read that, I'm not saying he did or didn't.

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] Okay. Why do you say that is a fact? That's the only question I want you to answer. Why do you say that is a fact?

ADC (Maj Mori): Because it's no – it's not –

PO: Would you prefer, Major Mori, to withdraw that fact from your motion?

ADC (Maj Mori): That's fine, yes, sir. Yes, sir.

PO: Okay.

ADC (Maj Mori): Yes, sir.

PO The commission will disregard paragraph 2 of the reply. Okay. You were about to say something, Col[redacted] I think before?

CM (Col[redacted] No, I'm fine.

PO: Okay. Prosecution?

P (LtCol[redacted] Sir, terms certainly do matter because under valid, binding, still relevant US law an unlawful combatant can be prosecuted by military commission for the acts that render him an unlawful belligerent. That is *Ex Parte Quirin*. It is a US Supreme Court case that exact

proposition is very recently cited just months ago. The defense attempts to make this seem like MCI 2 just made this up, that's their assertion. This offense, and we laid it out in our brief, we didn't just lay out the part about murder and the treatment of murder under Geneva Conventions and things like that, we laid out going all the way back to 1795 and the defense ignores that. They ignore *Quirin*, they ignore *Rasul vs. Bush*, they ignore precedent, they just want to try to sidestep.

The fact is that under US law and specifically the US Supreme Court has said for US Military Commissions we can prosecute people for unlawful belligerence. And we have demonstrated that in1795 a Justice acknowledged that hostility committed without public authority is a violation of, he said not only domestic law, but of the law of nations. In 1795 a Justice said that and yet the defense wants you to believe that somebody made this up in 2003. This offense – this offense existed long before the Geneva Conventions even came into existence or the Hague Conventions back in 1899.

You see not only from the 1795 case but from the Winthrop treatise that we cite in our brief that prior to those conventions ever coming into existence there was this problem of people being on the battlefield and acting like combatants when in fact they didn't have that lawful status. They didn't have that privilege. Killing people without a privilege to do so was a crime long before MCI 2 was signed and it was long before the Geneva Conventions back to that point. The Geneva Conventions tried to ameliorate some of the harsh effects of war. It did not take somebody like an unprivileged belligerent and say okay now you can't be prosecuted, now you cannot be prosecuted. People like that were prosecuted at Military Commissions during the US Civil War. People did not have the privilege who were acting as belligerents either through murder or destruction of property.

So I'll try to avoid some of the same arguments later when I talk about the destruction of property because it's the same thing. These acts of belligerency, without the privilege to do so, were punished by Military Commissions in the 1800s and the 1700s and the 1900s. And the Geneva Conventions that say we want to ameliorate some of these effects and we want to take some people and want to put them into a protected class, well it didn't do anything for those people because people on the battlefield who do not have the privilege to be there, people who are not there for a nations' stake, people who are there without distinctive emblems, people who are otherwise violating the laws of war, they are a problem under international law, they are a problem and before the modern era we're in now, they were summarily executed.

That's why we don't have too many cases that we can point to because we see from *Winthrop* that that's - and that was considered essentially acceptable under international law. When you picked up an unlawful combatant that they were executed. And you see that from the *List* case where they – where because the prosecution couldn't prove that in fact they were lawful combatants, the Germans executing them was considered not a problem. Maybe the wrong thing to do but, in other words, this is what happened to unlawful belligerents before. And again, military commissions were done in the Civil War of unlawful belligerents, *Ex Parte Quirin* stands for the proposition that continues to be part of the law and the Geneva Conventions didn't change that and they are still cited as part of the law.

PO: Go.

ADC (Maj Mori): If there are all these prosecutions and this charge is a valid offense under the law of war where is one of the statutes? Where is one of – look here's the statute from the Civil War where we charged someone for killing someone, for not being a privileged belligerent. The law of war evolved a lot since 19 – 1795. Things that were illegal then might be legal now. Things that were legal then are illegal now and vice versa. What is the present day state of the law of war? So much changed in 1949 with the Geneva Convention. *Quirin* predated that. *Quirin* stands for nothing more than you can prosecute someone who commits an act against the law of war.

But to charge what the government is attempting to use against Mr. Hicks, by claiming that he violated the law of war because of shooting at some another soldier is not a violation of the law of war. It's that simple. We may not like it. We may not – we may wish that the person should be held accountable, and they should be under the domestic law that applies, but it doesn't violate the law of war. The law of war is not there to regulate everyone's conduct in a geographical area where the conflict is occurring. It's there to protect certain people; civilians and service members that are out of combat either because they're wounded or surrendered or captured. That's who it protects.

When you get an opportunity to read the affidavits of Mr. Schmitt, Mr. McCormack, they articulate the law better than I can because they are experts in this area. And when you read the pages from Dinstein who talks about it there is a distinction between status and what the conduct is that violates the law of war. To violate the law of war you must attack a person or place that is protected by the law of war when the attack occurs. And soldiers, whether we like it or not, are not protected unless they're wounded or out of combat.

PO: So your contention, Major Mori, is that if you substitute for Mr. Hicks the name John Jones all those facts are true in Charge II? The only people – the only person who could try him for those acts would be the domestic courts of Afghanistan, is that correct?

ADC (Maj Mori): Yes, sir.

PO: That's your contention?

ADC (Maj Mori): Yes, sir. And I guess there are also arguments as well, that if there were someone who was actually killed –

PO: Yeah?

ADC (Maj Mori): Then potentially the foreign extra territorial obligation like federal court so there's that possibility. But that – in this case that's why I'm saying is that there is no – does that make sense or did I just confuse you?

PO: That's alright, that's your answer. Go on please.

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] If I read the President's Military Order that stood this Commission up and I go to Section 1E and I read the last part of the sentence – and I'll quote here, "and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals". What is your impression of what other applicable laws means there?

ADC (Maj Mori): Sir, Article 21 of the UCMJ provides the jurisdiction for military commissions. They can try law of war violations or those authorized by statute. There's only two authorized by statute; aiding the enemy and spying. Otherwise there's the law of war. There is no others under Article 21 and that is from where – and if you notice in the President's Military Order he cites the section 821 which is Article 21 of the Uniform Code of Military Justice. And that's what it says offenders or offenses against the law of war or statute. That – there is no other offenses. Now I would say if we were – if we were a military commission, if we were occupying an area – you could - an occupying military commission could regulate the domestic and have regulations and things like that but that's not what we are, that's not what this commission is about. And that's where you saw some of the other prosecutions in past military commissions where they were regulating sort of regular domestic crime. But that's not the case here, this is a war court to hear law of war violations only or those two statutes. And you can't violate the law of war unless you attack a protected person or place or use improper means.

PO: Colonel[redacted]

CM (Col[redacted] No.

PO: You got anything else?

CM (Col[redacted] The charge here is attempted murder –

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] Which under federal statutes and US law is a crime. A crime doesn't have to be committed, the murder doesn't have to be committed to have the crime be punishable if the person is found guilty of that crime.

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] Explain to me again why that does not constitute the commission of a crime on the battlefield then and the only way that the commission of a crime is if he kills someone who is not protected.

ADC (Maj Mori): To violate the law of war, sir, you have to do something that's prohibited by the law of war.

CM (Col[redacted] So in effect I have to wait for him to kill somebody before I can charge him with anything?

ADC (Maj Mori): Even better, you can shoot him. And that's, sir, because that is the consequence under the law of war, if you are not entitled to prisoner of war status and you participate in hostilities, you are a lawful target. That is the consequence. Now if I shoot, if I shoot a soldier I'm not violating the law of war. That's just the state of how it's developed over time. I know it seems – when I first started looking at it, getting educated because I didn't know any of it, it seemed counter-intuitive to me because it shouldn't be that way –

CM (Col[redacted] What does the word "unlawful combatant" mean?

ADC (Maj Mori): An unlawful combatant is a person participating in hostilities who when captured would not be entitled to prisoner of war status. It doesn't mean every act they do is unlawful. If the status – it's the status versus conduct. Just because you're an unlawful enemy combatant doesn't mean you're a war criminal. If an unlawful enemy combatant writes a bad check to a US soldier, is that a law of war violation? No, because the law of war doesn't cover all types of offenses. It only covers specific things and provides protection of certain people at certain times.

PO: Colonel[redacted]

CM (Col[redacted] No.

PO: Okay. Thirteen? Oh you weren't done there, Major Mori? I thought you were.

ADC (Maj Mori): No, I'm done. Yes, sir.

PO: Yes, he's done.

ADC (Maj Mori): Did I answer your question, sir?

CM (Col[redacted] Maybe.

ADC (Maj Lippert): Sir, I want to switch gears on you, if I can, completely. D13 deals with aiding the enemy. Aiding the enemy is undoubtedly an offense triable by military commission. Undoubtedly. Why? Because the Congress of the United States made it so. Aiding the enemy and spying are the only two non law of armed conflict, law of war offenses that this commission has the authority to try. This one is - aiding the enemy can be tried by this commission.

Unfortunately, it can't be – it cannot be charged against Mr. Hicks and here's why. The government has alleged, in its charge sheet, which you've all read, that either Mr. Hicks was fighting with the Taliban or was associated with al Qaida and that they picked Mr. Hicks up during an armed conflict that was taking place in Afghanistan in 2001. If Mr. Hicks was fighting with the Taliban or was a member of al Qaida, he is the definition of the enemy. They've alleged that he is the enemy. In fact the President has designated that he is an enemy combatant. This is not a difficult concept. If you are an enemy – if you are the enemy you cannot be charged with aiding the enemy unless – there are two very narrow exceptions applied.

One of these narrow exceptions was demonstrated in *US v. Quirin* which the prosecution cites. In *Quirin*, eight saboteurs, one of whom was an American citizen, came onto our soil and they were then charged with aiding the enemy. If you come onto a – the soil of the United States and you are an enemy you can be charged with aiding the enemy because when you come onto our soil you have an allegiance to the United States. During that time you have to abide by the laws of the United States and you gain a temporary allegiance to the United States. Accordingly, you can be charged with aiding the enemy.

The second very narrow exception is if you are a POW. If you were a POW and you aided the enemy, you have an allegiance to the United States and you can be charged with aiding the enemy.

Mr. Hicks, as the prosecution has conceded, is an Australian citizen. He has no allegiance to the United States. If you're a US citizen you have an allegiance to the United States. If you're a member of our forces, you have an allegiance to the United States. If you are an Australian citizen in a foreign country, such as Afghanistan, you don't have an allegiance to the United States that you can betray by aiding the enemy. That is the gravamen of the offense, betrayal of an allegiance.

Prosecution and the defense can show you no other case in the history of the United States jurisprudence where a non US citizen who has never set foot on US soil was charged with aiding the enemy. Why? Because it doesn't exist, it just doesn't happen. Because if you are the enemy, you can't aid the enemy. It's nonsensical. It's an expansion of a concept that the government wishes were the case. There's been a lot of rhetoric about a global war on terrorism that we will come and get you if you aid or harbor or abet a terrorist, we're going to get you, and that's fine. But unless you have an allegiance to the United States you're not aiding the enemy if you do that. If we would follow what the government wants as aiding the enemy, every enemy that we capture could be tried for aiding the enemy.

Conversely let's say we're in Iraq and the United States invades Iraq. And the Iraqis miraculously won or miraculously succeeded in keeping us from our achieving our objective and captured some of our soldiers and they applied this theory. The Iraqis could try American soldiers for aiding the enemy. Because who is Iraq's enemy? The United States of America. That makes no sense. We wouldn't stand for it. It doesn't happen because this offense does not exist or does not apply to Mr. Hicks because he has no allegiance or had no allegiance to the United States of America. It's that simple.

MCI 2, which the government cites as its source of law for this, is written by the government for the government after this offense – or after these this alleged conduct occurred. It's hardly authoritative on what the state of the law is. They cite it in their response. They cite – they state in fact that MCI 2 is declarative of existing law on this. My response to that is if it's declarative of existing law then why don't you just write down the existing law, cite me to the existing law instead of writing a new MCI 2 regulation that creates it out of full cloth. They can't do that because it never existed. This concept of your enemy – of being the enemy is aiding the enemy has never existed before. Accordingly, while it's an offense triable by military commission, it

doesn't state an offense against Mr. Hicks because as the government alleges – if as the government alleges he was the enemy he can't be tried for aiding the enemy. Thank you.

CM (Col[redacted] We don't get to ask questions here?

PO: You can ask questions any time you want.

ADC (Maj Lippert): Yes, sir.

CM (Col[redacted] Let's go back to this duty of allegiance –

ADC (Maj Lippert): Yes, sir.

CM (Col[redacted]: - issue. We heard a motion earlier today for continuance from the defense –

ADC (Maj Lippert): Yes, sir.

CM (Col[redacted] - that the Australians and the United States were going to come to some kind of agreement that was going to provide Mr. Hicks with some sort of favorable status in front of this military commission or some diplomatic settlement. Would that not imply that the United States and Australia are allies?

ADC (Maj Lippert): Well, I think it's fairly obvious that Australia had soldiers in the - in Afghanistan at this time maybe one or two –

CM (Col[redacted] Okay, so let's take that one step further now – who do you think the Australians were fighting against? Was it the United States?

ADC (Maj Lippert): No, sir, they were not.

CM (Col[redacted] Okay. So why wouldn't Mr. Hicks' allegiance to Australia not transfer to the United States if on the battlefield both countries were allies?

ADC (Maj Lippert): The transfer of allegiance, right, that we can I guess you want to call it standing – who has standing to accuse Mr. Hicks of being treacherous or betraying them? Is that basically what you're saying, that the United States has standing to assert Australia's right to try him for betraying Australia while - because he was fighting with the Taliban against Australia during 2001.

CM (Col[redacted] What I'm saying is you made a distinction in your argument that he is the enemy.

ADC (Maj Lippert): That's what is alleged, yes, sir.

CM (Col[redacted] That's what is alleged. Then is he the enemy of only the United States?

ADC (Maj Lippert): He's the enemy of the Coalition I think at that point. But –

CM (Col[redacted] But then - so his allegiance is to –

ADC (Maj Lippert): To Australia. He still doesn't have any allegiance to the United States of America. If it was an occupied situation where the United States was controlling that territory yes, he would have an allegiance to the United States. But the United States didn't control any territory in Afghanistan. The – if that was the case, sir, Australia would be entitled to take action against Mr. Hicks. But Australia has said he didn't violate any Australian law. I would believe that Australia would vindicate its own rights, not the United States, that's never been done before either. This theory of a Coalition partner – that one Coalition partner vindicating the rights of another Coalition partner has not been done before under the auspices of aiding the enemy either. It just doesn't happen. Australia – if Australia was upset about it they could have tried it. Unfortunately they – he didn't violate any Australian law according to the Australians. I think now Australia has changed their laws – I think that's cited in our brief, that in fact his conduct might have been criminal would be if he did it now would be criminal now, but it wasn't then. The United States has no standing to assert its – assert a – to vindicate a betrayal of Australia. Why would we care? It's not – we don't have any standing to do that. The United States doesn't have any standing to do that. The government is trying to make it so but that's an expansion of what aiding the enemy is all about. And that's why the offense doesn't stick to Mr. Hicks.

PO: Trial?

P (LtCol[redacted]: *Ex Parte Quirin* is the case that you all will have before you and the Supreme Court case will be one thing we ask you to read in the transcript. There are some relevant portions of that lengthy transcript. This phantom element of allegiance to the United States – apparently the defense continues to confuse treason with aiding the enemy because in its brief it points to a treason statute and treason case law. That's betrayal of a country that a country itself wants to vindicate. Aiding the enemy as an offense has existed since the beginning of the US military and the defense did a nice job of tracing this all the way back, aiding the enemy. But what the defense then does is try to mingle that in with treason because they want to import an element with treason. They want to import allegiance to the United States. If you read the *Quirin* case you'll see these were German Nazi saboteurs, members of the German military who came to the United States. They were convicted of aiding the enemy. Nowhere in that opinion does it say that allegiance is an element. The defense comes up with these two narrow exceptions but we don't read that in a case anywhere. That's why we talk about sources of law – look to cases, look to treaties. This is a theory the defense has. The *Quirin* case – what are we talking about here? We're talking about a German soldier, an enemy of the United States at that time. He was convicted of aiding the enemy, and the other Nazi saboteurs, a clear case. As the defense notes this offense is clearly triable by military commission so we agree on that. That Congress has said okay anything that can be triable under the law of armed conflict and these statutes; spying and aiding the enemy. And Congress lays out what aiding the enemy is. Where's allegiance to the United States in the Congressional Statute? It's not there. And in the case law that the defense cites you look at it and it talks about the broad nature of aiding the enemy and a broad category of people who can be guilty of aiding the enemy. Now where allegiance may come in is that MCI 2 correctly notes that in order for any offense to be a crime it

has to be a wrongful; that's accepted jurisprudence: it has to be wrongful. So what it says is in the case of a lawful combatant, okay, a United States soldier fighting in Iraq, he couldn't just be picked up and tried, his conduct has to be wrongful. And what MCI 2 is laying out in its comment, is that to be wrongful for a lawful combatant at that point you may have to go toward, did that person have an allegiance toward the entity or country they were fighting. That's when you go forward. But otherwise, MCI lays out the elements, it is declarative. We've done our best to show you the underpinnings for that, which includes *US v. Quirin*, and the fact that an enemy was convicted of this. It is an offense, it does not have allegiance to United States as an element, it never did, and so it should not be dismissed.

ADC (Maj Lippert): Sir, the prosecution points to part of the transcript in *US v. Quirin*, they did it in their use that – transcript citing the actual charge from *Quirin* from their brief and it says – and I'm reading from the prosecutions' brief here – that when the enemies of the United States using the German side of the coin enter into the territorial limits of the United States that's on page 11 of the prosecution's brief, it's in the *Quirin* transcript at – they don't really cite the page, I can't find it.

PO: We can find page 11 of their response.

ADC (Maj Lippert): Yes, sir. That is the reason why the eight Nazi saboteurs were tried for aiding the enemy because they came into the United States. *US v. Gillars*, which is cited in our brief makes it clear that if you come into the United States you have a temporary allegiance to the United States. That's how you get the nexus that allows – that allowed the *Quirin* court to try those eight Nazi saboteurs for aiding the enemy.

CM (Col[redacted] So if the eight saboteurs were spying or doing whatever a saboteur does in World World II and they were doing it in Canada what then?

ADC (Maj Lippert): Well –

CM (Col[redacted] Who then – who then has the right or the responsibility to protect the United States from those saboteurs?

ADC (Maj Lippert): Well, let's parse it up. *Quirin* is a very complicated case. Those eight saboteurs came into the United States of America. If they had been wearing their uniforms, and carrying guns and got off the boat and ran up the dock and started shooting everybody, what would we call it? That would be called an invasion, right, sir? What made those eight saboteurs unlawful combatants and rendered their belligerency unlawful, which is what we talked about in a prior motion, is that they took off their uniforms. At that point they became unlawful combatants. What else did they become? They became spies. The fact that they were in the United States doing it made them – made them liable for aiding the enemy. If they were doing the same thing in Canada, right, sir, they would have been invading Canada if they had their uniforms on, they would have been spying on Canada at that point and Canada could have done something about it and they would have had a temporary allegiance to Canada and Canada could have tried them for aiding the enemy because Canada was at war with Germany as well.

CM (Col[redacted]) Whoa, you just made an assumption there. Let's not assume Canada is at war with Germany.

ADC (Maj Lippert): Okay.

CM (Col[redacted]) Let's assume Canada is a neutral country -

ADC (Maj Lippert): Okay.

CM (Col[redacted]) And they really don't care what the saboteurs are necessarily doing in their country because they're not breaking any Canadian laws. Who then has the right and/or the responsibility to hold those people accountable for the acts against the United States?

ADC (Maj Lippert): If they were acting against the United States and they were not wearing uniforms they could be tried for spying or tried for sabotage but they couldn't be tried with aiding the enemy because at that point in time they were the enemy, whether it be in Canada or Timbuktu. They're still the enemy. This is the same exact situation you're talking about with Mr. Hicks. They're not liable for aiding the enemy, because, sir, they were the enemy. There has to be an allegiance, that is the crux of the offense.

PO: Major Lippert -

ADC (Maj Lippert): Thank you, sir.

PO: Can you do me a favor?

ADC (Maj Lippert): Yes, sir.

PO: Can you show me in Article 104 where it says anything about allegiance?

ADC (Maj Lippert): No, sir, I can't but –

PO: Thank you, please. I've heard it. I've heard it. Thank you, Major Lippert.

ADC (Maj Lippert): Thank you, sir.

ADC (Maj Mori): Can I comment with one point?

PO: Yeah, I just didn't want to hear Major Lippert tell me he can't – stand up – and I'm not mad at Major Lippert, I mean he's arguing his case but it's not in 104 and neither side put 104 into their briefs in whole so that the members could look at this stuff. And if you're going to cite a spec then perhaps it'd be a good idea to put it into the brief especially when it's a really crummy small spec which says any person who aids or attempts to aid the enemy with arms, ammunition, supplies, money or other things shall be punished by, shall suffer death or other such punishment as a courts-martial or military commission directs. That's all it says.

Okay. So, yes, you can say whatever you want to, Major Mori, and then you can tag team with Major Lippert. Because I'm not mad at him, I just want you all to pay attention to the law.

ADC (Maj Mori): Yes, sir. I just wanted to address first for 104 as you look at the cases that we have prosecuted prior in the military system most of the majority of our prisoners of war collaborated with the capture. In *Quirin* is the only other case where there were actually civilians who were these unlawful combatants tried and you do have, where someone is a civilian and not an actual combatant, that's where treason was utilized. So we have to look at where does US law apply. Right now are we governed by – are we governed by Brazil law?

PO: I'm getting very confused, Major Mori.

ADC (Maj Mori): What I'm trying to say is what law does David Hicks have to abide by in Afghanistan? Afghanistan and the country he is a citizen of, Australia. That's who he has to respect and until it comes into an area that's under control of the United States, that's when US law applies.

PO: Okay. You got anything?

CM (Col[redacted] No.

PO: Colonel[redacted]

CM (Col[redacted] I'm okay.

PO: Okay, let's hear eleven. No, let's take a – want a break – 20 minute break. Court's in recess.

The Commission Hearing recessed at 1647, 1 November 2004.

The Commission Hearing was called to order at 1707, 1 November 2004.

PO: The Commission will come to order. Let the record reflect we've got a new court reporter.

P (LtCol[redacted] Yes, sir. Sergeant[redacted]has returned to the courtroom.

PO: Okay. Everyone else is still here. Defense?

DC (Mr. Dratel): Major Mori is prepared to argue D 11, which is the conspiracy. After that would be D 9, which also relates to the conspiracy charge, count one; and then D 20 which has to do with the word "terrorism" in count one as well, also related to the conspiracy. So the next three motions are all of the same piece with respect to conspiracy. And we're at a little bit of a dilemma here because we do not want to break them up, but we also, know that we have gone on for a while, and there's been a lot for the Commission to

absorb, particularly after reading so much material.

We think -- the defense thinks, I know the government does not agree. We have asked the prosecution, they don't agree -- we think this would be an appropriate place to break, let the panel absorb what has gone on already, which is quite dense to begin with, come back in the morning fresh with these three that really ought to go together rather than extend it to the point -- beyond the point where it has the appropriate level of impact as we get further into the day. And it's not just question of fatigue, it's also a question of just -- I know from terms and concepts that you come to on one day, and then the next day, and the next day, it's just impossible to absorb them all appropriately on one day or two days. It's better to spread them over time, get a chance to sleep on it, let that sink in, come back.

We will still finish tomorrow with all the motions. I think we're all confident of that. I don't have any doubt that we will finish tomorrow.

PO: What do you say. You talking?

P (LtCol[redacted] Yes, sir. Well, as stated, we would prefer and suggest that we do a couple more tonight, just because it's 1700, we've been going for four hours, we think it would be fruitful to maybe consider the conspiracy. We've had Commander[redacted] sitting waiting for this one, and we'd like to get that one done. If we need to do the three together --

PO: No offense, Commander[redacted] but your personal sitting there waiting isn't really going weigh too heavily.

ATC (CDR[redacted] No offense taken, sir.

P (LtCol[redacted] So we would prefer to --

CM (Col[redacted] The prosecution wants to bundle the three together, and that's understandable. But if you think it's going to take longer than you're going to be here, are there other motions that you're prepared to state today that are individual that we can stop?

DC (Mr. Dratel): We've structured them so that they flow and there's a real logical flow that one gives you foundation for the ones after it. And the conspiracy one is a complicated -- is the most complicated of the charges, and it is, in my opinion, having litigated conspiracy, which is very common in the civilian courts, in the criminal courts, not so common in the military courts -- to me is a very, very difficult concept for lay people to get their minds around because it is a concept that in ordinary law is difficult, and in the law of war is -- adds another layer of complication. I think it's going to being the longest argument, and then you're going to have two after it that we're going

to want to do together so as not to break them up, and then we're going to get into a situation where I think we're going to be in overload for everybody.

PO: The Commission, looking around, doesn't want to, but since you tell us that that's what you need, we'll do it for you. Court's in recess until 0930.

The Commission Hearing recessed at 1711, 1 November 2004.

The Commission Hearing was called to order at 0931, 2 November 2004.

PO: The Commission is called to order. All parties present when the Commission recessed are once again -- on 1 November are once again present with the exception of the court reporter.

P (LtCol[redacted] Sir, Sergeant[redacted] I believe, was the court reporter when we recessed, and is again the court reporter.

PO: Well, she's here now at any rate.

Okay. For everyone's general information, POM 1-1 defines what this Commission means by "Commission Law". It applies collectively to the President's Military Order DoD Directive 5105.70, the Military Commission Orders, the MCIs, Appointing Authority regulations, and any changes to the foregoing. When we use it, we use it as a shorthand reference to those above hand matters.

The Commission carefully considered D 37, a defense motion to declare the Commission improperly constituted. The motion is denied, neither party having stated that it would furnished proposed findings of fact and conclusions of law. Our written decision will be appended to the record of trial prior to authentication.

The Commission has carefully considered the defense request that the Commission interpret MCO 1, section 4(A)5(d) to require the Presiding Officer to certify all interlocutory questions which, if granted, would terminate the proceedings with respect to a charge. The Commission does not so interpret that section. The Presiding Officer will certify interlocutory questions when the disposition thereof does effect the termination of proceedings with respect to a charge. The Presiding Officer may certify interlocutory question which he deems appropriate. Counsel for both sides are free to request that the Presiding Officer certify any interlocutory question. The Commission will not issue a written opinion on this subject.

The Commission has carefully considered D 15, a defense motion to dismiss the charges for improper panel selection procedures. The defense motion is denied. If the government still intends to furnish proposed findings of fact and conclusions of law, the Commission will not enter a written decision prior to 1700 hours on 5 November.

So y'all don't bust your fingers taking notes, after this session, you can get copies of what I'm reading from Mr.[redacted] the assistant.

The Commission heard the on the record objection to the POMs. If the defense wants the Commission to take any action on those objections, the

defense will provide a motion to the Commission no later than 1700 hours on the 4th of November. Prosecution response, if any, will be filed no later than 0900 hours on the 5th of November. In setting these time lines, the Commission has taken note that all parties were given the opportunity to comment on the POMs when they were issued.

The Commission draws the attention of all parties to MCI 8, paragraphs five and six. The parties must comply with the dates set, or they must request a delay. Failure to answer is not acceptable. The Commission is not aware of any occasion in which the Commission has not granted a request for delay.

Okay. The Commission has carefully considered D 28 and 29, the defense request for continuances which were denied by the Presiding Officer. The Commission does not find that the required continuances are necessary to provide Mr. Hicks a full and fair trial.

The Commission has carefully considered D 38, a defense motion to dismiss for improper referral. The motion is denied, neither party having stated that it would furnish proposed findings of fact and conclusions of law. A written decision will be appended to the record of trial prior to authentication.

I said yesterday -- and I realized it's the first time we've discussed it -- please, if you intend to attach or to submit proposed findings of fact and conclusions of law, tell us when you're arguing. The Commission is working very hard on these things, and a late-submitted findings might be too late.

Be that as it may, the Commission has carefully considered D 12, a motion to dismiss Charge II for failure to state an offense triable by military Commission. This morning, entered as 24 D are proposed essential findings from the defense.

P (LtCol[redacted] No, sir, that's --

PO: From the prosecution. Okay. Defense, you have the times I stated yesterday. If you choose to submit anything, the Commission defers decision on this motion until a later time.

The Commission has carefully considered D 13, a motion to dismiss Charge III for a failure to state an offense. The Commission received this morning prosecution proposed essential findings. Defense, once again, you've got the time I said you have to respond thereto. The Commission defers decision on this motion until a later time.

Okay. Counsel -- this is for all counsel -- before we hear arguments, the

Commission has read the motions and the attachments. The Commission would request that counsel keep their arguments focused on the main points. The Commission doesn't need a recitation of the entire brief. The members of the Commission are prepared to ask questions in the areas in which the filings do not appear logical or provide enough information. Enough said. Okay. Defense, you're up.

ADC (Maj Mori): Yes, sir. First motion is D 12, defense motion to dismiss Charge I for failure to state an offense triable by a military commission. It is a charge based on conspiracy.

PO: Okay. You're talking D 11?

ADC (Maj Mori): Yes, sir. Did I say D 12? D 11, sir. It's a charge based on conspiracy in the Military Instruction number 2. The charge itself, as we've stated in our papers contained in military Commission number two, does not exist in international law. It is actually a merger, or creation of the U.S. or civil common law jurisdiction's crime of conspiracy connected with the concept of joint criminal enterprise, or common criminal purposes as it's also called. And I'd like to provide, if every member doesn't have a copy of Military Instruction number 2 handy, I have extra copies, because I'd like to address the specific charge contained therein on page 19. May I approach, sir, if any member needs a copy?

PO: We all got them.

ADC (Maj Mori): Yes, sir. If you look at the elements as they're contained, on page 19, Military Commission Instruction number 2, on the very bottom paragraph it begins the elements that the government alleges. And there's a first sentence, "the accused entered into an agreement with one or more persons to commit one or more sets of offenses, or", and that connects the two elements. The first one is what you would find in a sort of conspiracy charge. The second half of that is what you would find in similar to a joint criminal enterprise. And in each element, on the next page, two, they have that same "or", where they've joined -- in both two and three -- where they have joined this conspiracy -- typical conspiracy charge with joint criminal enterprise.

Nowhere has that been done or exists in international criminal law or under the law of war. And that is why this, on itself -- the charge itself, is flawed. The affidavits that we submitted from Professor Bassiouni addresses specifically that this is inappropriate and has no foundation.

I'd like to address each area, the conspiracy and the joint criminal enterprise to understand why each side does not have the support and how the government is trying to use it.

First, conspiracy. Conspiracy is only utilized in the crime of genocide. It's only applied there, and it's not applied anywhere else. I'd like to provide the members Review Exhibit 65, if I could approach, sir.

PO: Yes.

ADC (Maj Mori): It is a copy of the International Criminal Tribunal for Yugoslavia statute. And as the statute covers, Article II, grave breaches; Article III, violations of law or war. Article IV, Genocide. Genocide is a totally different category of offense separate from the law of war. And specifically mentioned is the theory, conspiracy to commit genocide. You have that within this realm of genocide offenses which is separate from the law of war. And that is the exception which proves the rule that there is not conspiracy in any of those other areas. And in both of the government's and the defense briefs and motions, you see where the ICTY, International Criminal Tribunal of Yugoslavia, or the International Criminal Tribunal for Rwanda have used the charge of conspiracy relating solely to the genocide. Nowhere else is conspiracy used.

The government seeks support from the Nuremberg trials, which were conducted prior to the creation of the Geneva Conventions and many different advances in international law, and I'd like to approach, sir, and provide the members Review Exhibit 66, which is a copy of a specific page out of the International Military Tribunal transcript volumes which we cite in our briefs. But it's the court's decision specifically geared for the first part I've highlighted. Count 1, however, charges not only the conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity. And in the next section I've highlighted, it talks -- the tribunal will therefore disregard the charges in Count 1 that defendants conspired to commit war crimes and crimes against humanity.

Why? They explained because the charter doesn't define conspiracy to commit war crimes as a separate offense. So even in the area of law of war violations back in Nuremberg, they rejected the use of conspiracy because they have -- law of war is internationally based, it has to be accepted around the world. Conspiracy is only utilized in a small portion of countries.

Now, there is a theory of liability that's been utilized -- sort of group participation in a crime. And we see that in the area of joint criminal enterprise, or common criminal purpose. But the difference between that and conspiracy is conspiracy is an offense itself. Someone could be charged with conspiracy. Someone could be charged with rape, whatever the offense is. Joint criminal enterprise is not an offense; it is a theory under which you hold people responsible for a crime that has been committed, like aiding and abetting. It's not a charge in and unto itself. It's

kind of a complicated -- and that's what the government is using to try and hopefully confuse people by merging in this joint criminal enterprise to rescue the fact that conspiracy is not accepted in international law except for genocide. So they throw in this joint criminal enterprise, but no one has ever been charged with joint criminal enterprise. It's just a way that -- an area of the law that you would apply to look at people's participation in an offense to see whether or not they're criminally liable. And I mention that, too, because back in the ICTY -- that's seven -- they talk and the individual criminal liability responsibility. And they talk about the different ways that people are individually, criminally responsible, and they do not mention conspiracy.

It's well settled that conspiracy, except for genocide, is not accepted. So that first half of each of that element in MCI 1 -- I mean, MCI 2 is invalid. And the way they're trying to use joint criminal enterprise, the second part is invalid. The prosecution seeks to find support for the conspiracy charge, and they cite very thoroughly this law review article by Mr. Barrett, "Lessons of Yugoslav Rape Trials, The Role of Conspiracy Law in International Tribunals" written in November of 2003. And when you read this, you see exactly what he's doing. And he concludes it in his last section: "For these reasons, one would expect joint enterprise liability and command responsibility to provide the limited use for prosecutors pursuing rape convictions". That's what he's writing about. The ICC, International Criminal Court would likely benefit from a supplemental theory such as conspiracy.

Now, why is he writing an Article in 2003 advocating that conspiracy should be allowed to be used in the International Criminal Court unless -- because it's not being used. It doesn't exist. And we're talking about what is the state of the law, international criminal law, international humanitarian law in 2001 during charged offenses? There was no offense of conspiracy. The government tries to rely on U.S. law. That's -- this is not an offense that occurred within U.S. territory. We're talking about internationally accepted law of war.

CM (Col[redacted] In the Nuremberg trials, how did the charge of conspiracy to commit genocide appear?

ADC (Maj Mori): See, in Nuremberg, they didn't use conspiracy and terms like that. What I was referring to was the ICTY statute.

CM (Col[redacted] Okay. How did that come about? Where did that element of law --

ADC (Maj Mori): Where did the common conspiracy and the common purpose come from, where they start using that terminology? Remember there's only four countries that were involved in creating the statute, and it came solely from

1 those four countries, working out how to create different offenses and
2 different theories of liability. And obviously the U.S. was -- we talk about
3 it a little bit in our moving papers and also our experts talk about the
4 historical and those very meetings -- the London conference, I believe -- on
5 how these four countries worked and thought about which theories and
6 which crimes could be accepted, because there's different judicial systems
7 in the countries across the world. And so the American influence was to
8 push this conspiracy theory, and yet it was rejected by the tribunal because
9 it's not internationally accepted. They only dealt with the conspiracy to
10 commit aggressive war, not war crimes. And that, sir, really is --
11
12 CM (Col[redacted] Did I read it wrong that some of the accused in the Nuremberg trials
13 were, indeed, at one point charged with conspiracy to commit war crimes?
14
15 ADC (Maj Mori): Yes, sir.
16
17 CM (Col[redacted] Where did the Nuremberg jurists come up with the idea that they could
18 charge those folks with conspiracy to commit war crimes?
19
20 ADC (Maj Mori): It wasn't the jurists, sir.
21
22 CM (Col[redacted] Who was it?
23
24 ADC (Maj Mori): It was the prosecutors -- the American prosecutor who was the lead on
25 that, borrowing from his experience in the U.S. trying to advocate this very
26 flexible, expansive criminal tool to try to bring many people into
27 culpability, and that is a theory that is, I think, it's 43 -- less than 43
28 countries, 36 countries that utilize some sort of conspiracy; 140 don't.
29 That's why it's not recognized under international law as something that's
30 customary on international law, except for genocide which began with the
31 genocide convention, which was signed off by all of the countries. So
32 Nuremberg was originally from the prosecution putting forth this theory. It
33 was rejected by the actual tribunal. And the statute itself was written by
34 only four countries, the U.S., England, France, and Russia.
35
36 CM (Col[redacted] Your underlying assumption in your argument here, is that this
37 Commission is bound by only international law.
38
39 ADC (Maj Mori): Yes, sir, by the laws of war recognized.
40
41 CM (Col[redacted] But the laws of war are defined in many different ways by many
42 different countries. So who do you suppose we ought to listen to when it
43 comes to deciding which interpretation of the laws of war we should use?
44
45 ADC (Maj Mori): Well, sir, for one, I would like you to bring -- let us bring experts in to
46 educate, because the --

CM (Col[redacted]) Well, I want you to educate me now.

ADC (Maj Mori): Well, sir, I think, on that we follow things like the International Criminal Tribunal of Yugoslavia, the International Criminal Tribunal of Rwanda, the International Criminal Court, things that have -- especially the International Criminal Tribunal of Yugoslavia, which is accepted and supported and is participated in by both the U.S. and many countries around the world, and has been in existence for many years, has cases that have gone through, gone through their appeal process, and has been subject to scrutiny by the international community. So they have created a system in focusing on law of war crimes that's part of it. And this is how it's practiced internationally and how it's accepted. And if we're looking at holding people accountable for conduct outside of the U.S., we've got to have a standard that's internationally accepted.

CM (Col[redacted]) I'll let you continue you now. I have another question with your line of reasoning, but I need to give you a chance to continue on because I kind of broke you up there.

ADC (Maj Mori): I was actually near the end, sir.

CM (Col[redacted]) Okay. I'll wait until you finish, and then I'll ask.

ADC (Maj Mori): The government's reliance on the *Quirin* case, specifically in the Supreme Court's decision, the Supreme Court did not review whether conspiracy was an appropriate charge under the laws of war. The Court looked solely at the first specification and found that it was. And really, reliance on *Quirin*, which occurred -- which was conduct occurring within the U.S, where U.S. law applies, is totally different than applying what law applies to an individual in a country outside of the U.S. And I think that's an important distinction with what's going on in this case.

Sir, that's all I have.

CM (Col[redacted]) You're familiar with it (holding up a copy of Field Manual 27-10)?

ADC (Maj Mori): Yes, sir.

CM (Col[redacted]) Law of land warfare?

ADC (Maj Mori): Yes, sir.

CM (Col[redacted]) Does it not state that conspiracy to commit certain crimes is indeed a crime in and of itself in this book?

ADC (Maj Mori): 27-10.

CM (Col [redacted]) Yes.

ADC (Maj Mori): Written by in 1956 by the U.S. solely, sir. The U.S. has always felt that conspiracy was a proper charge. It's been rejected by the international community. We have to apply standards, and I know it's -- and plus that's an Army pub; that's not an authoritarian pub. It's one word and in one sentence. I'm talking about -- and that's why I say, going to the ICTY which is an entire justice system that has had cases that have been reviewed, and has an acceptance of the worldwide community. 27-10 is one sentence; that is not authoritarian in this area. We have to look at the practice of states, and many of the affidavits we submitted talk about how something becomes customary law. And that one word certainly reflects the U.S.'s position on how we would like the state of the law to be. But applying a full and fair trial to David Hicks in conduct that occurred in Afghanistan outside the U.S., to what law applied there is either Afghan law or international law. And the theories we use here must be internationally recognized to have a legitimate process.

CM (Col [redacted]) What if the international laws haven't caught up with the times? The international laws are based on things that happened in the past.

ADC (Maj Mori): Yes, sir.

CM (Col [redacted]) Okay. In 1946 we did not have nonstate actors necessarily. We had them, but we didn't have them the same way with do today. So where and when do the laws evolve to cover situations that when you look back, the folks back then just didn't have the wherewithal to understand that this is what the world was going to look like?

ADC (Maj Mori): Sir, actually we had nonstate actors, as far back as pirates, because that is probably the first nonstate actors that we dealt with in criminal matters and sent our military out to attack them.

I agree with you and I understand your concept. An event occurs which may initiate the changing of the laws or the perspectives. But we have to look that we're talking about, what was the state of the law within 2001? Because if we change the law after the conduct occurred, we're violating the basic principle, the ex post facto, prohibition of creating a crime after the conduct. And I have no -- I think times are changing, and would it be surprising to see different changes in international law evolving over the next five, ten years. That may very well happen, and the cause or the impetus for that may be the events that have taken place in 2003. But that law hasn't changed yet. It is unfair to hold someone accountable for an offense that wasn't in existence at the time the conduct occurs. Thank you,

sir.

PO: Prosecution?

AP (CDR[redacted] Thank you, sir. What you have to ask yourself is what's more binding on this Commission? The ICTY Yugoslavian court, or what we've already got as established United States military commission case law? The defense waited until the end to talk about the *Quirin* case. Where do you start assessing this issue? You start with Military Commission Instruction number 2. That, in essence, is your charter. If Nuremberg proved anything it was, you look to your charter first. In the international criminal tribunal of Yugoslavia, used when they were trying to determine if this common criminal enterprise existed, they looked to their charter first, they looked to Article VII. Read Article VII. Major Mori provided you a copy of it. The words "common criminal enterprise" do not appear in Article VII. It was implicit, according to the judges of the ICTY, and that gets to what Colonel [redacted] brought up. It evolves with each of these international tribunals, with things like Nuremberg and the ICTY, they are evolving in response to what's going on at the time.

Nuremberg. They convicted eight people, eight people of conspiring to commit aggressive war. Eight people got convicted of conspiracy. Contrary to what the defense asserts, that you can only convict somebody of conspiracy to commit genocide, Nuremberg tells us that's not the case. Where did that conspiracy to commit aggressive war come from? With the times. They came up with that charge because they needed to reach back to 1937 when the Germans started in their planning and their preparation phase. That's where this charge came from; with the ICTY as well, the common criminal enterprise. You had massive killings that are being prosecuted by the ICTY. The ICTY takes that very seriously, and they don't want to just get the guy who pulled the trigger. If you signed on to the enterprise, you knew the intent of the enterprise. you knew the kind of stuff they were going to do, they want to call you a perpetrator of the offense. That's how that evolved.

Now, we don't have to evolve here. Because we've got *Quirin*. Contrary to what the defense says, they try to push that off. That's United States law, that's U.S. domestic law. No, what they were applying in *Quirin* is the law of war. The statute in *Quirin* was Article 15 of the Articles of War. That was a precursor to what we know now as the Uniform Code of Military Justice. Article 15 of the Articles of War said, you can try offenders and offenses in violation of the law of war. Article 21 of the UCMJ, the one that exists for this Commission, says the very same thing: You can try offenders and offenses in violation of the law of war. This was not pure U.S. domestic law that was going on; this was law of war violations. The statutes remained the same.

See the UCMJ gets enacted in 1950, effective 1951. Why did they keep Article 15 the same when they did Article 21? Because of *Quirin*. You look at the Senate report, you look at the House report, they write in those reports, we're keeping it the same because we've already been up before the Supreme Court in *Quirin*, referenced right in the reports. Your statute today is the same as the one that existed in *Quirin*. So any talk about things going upon before the Geneva Conventions, that's just not applicable because we knew it got confirmed again in 1950.

Now, what was going on in *Quirin*? Specifically, *Quirin* is charged with conspiracy to commit a law of war violation, giving intelligence to the enemy, and spying, and it all shows up in Charge IV, similar to our charge that has [sic] one conspiracy charge with several offenses he was alleged to have conspired to commit.

Now, this case, *Quirin*, goes all the way up to the United States Supreme Court. Just like Major Mori is doing now, Colonel Royal in 1942 presented the very same arguments. He said conspiracy is not a law of war violation. And when we're at the end of my argument, I'm going to give you the transcript from *Quirin* and just ask, insert Major Mori's name where Colonel Royal's name was. Because the argument's the same and it's been ruled upon. Conspiracy is an offense under the law of war. And your best reference for that is the United States interpreting what the law of war is. That argument went up before the Supreme Court. If you read the *Quirin* opinion, they start it with saying, what did the defense argue? What things are they putting forward? And the Supreme Court said they're arguing that conspiracy is not an offense under the law of war.

Now, when addressing it, they do what supreme courts do, and they look at narrowing their opinion to whatever it takes to get the job done. So they said, hey, Charge I, that's a triable offense by the Military Commission; we'll stop with that. But, did they say conspiracy was not an offense? No, they didn't. Did those individuals get convicted of conspiracy? Yes, they did. Were they put to death in part because of their conviction for that conspiracy? Yes, they were.

How did others interpret what was going on with this conspiracy? That takes us to the 10th Circuit in *Colepaugh v. Looney*. Again, a guy, just like Major Mori, stood up and said, conspiracy to commit a violation of the law of war, not a violation. Again, he got convicted of conspiracy, it went up the 10th Circuit, it was upheld. The Department of the Army in their field manual, which, I know it was down played by the defense, but if you look at the recent decision in *Hamdi*, we have Supreme Court justices citing that field manual. That field manual, they read *Quirin*, they read *Colepaugh*, they put in that field manual in 1956, 1957, that is an offense. We can

punish conspiracy to commit law of war violations.

Why weren't these cases in the defense filings? You look at their initial motion, they say nothing about these two cases. They don't mention the Department of the Army field manual. We raised the cases in our response. They come back with a reply, and they don't say anything again. Kind of reminds me of a time when I was in high school, there was a best friend that had a '57 T-bird convertible. His dad had worked on this thing for ten years getting it ready for when he got his license. We took it out the day after he got his license; he banged it up, it got damaged. Put it back in his garage that night, threw the tarp over it the cover for the car, and for a week, he didn't drive it again, didn't tell his dad, told his dad he didn't feel like driving. Just like here and just like those cases, the damage is done, the damage isn't going away. Those cases damage the defense's argument. You can't just ignore them and blow them off and throw a tarp over it and pretend like they're going to go away. That's the most binding thing we have.

Now, yesterday, we got handed a bunch of affidavits from experts. And it was somewhat disconcerting because we were asked to make our arguments within about 45 seconds of being handed those affidavits. But if you notice, at the end of yesterday, the prosecution team was saying, we're still ready to argue. We're ready to go. Why? Because none of their experts in those affidavits mention *Quirin*, mention *Colepaugh*, mention the Army field manual, the most binding thing you've got.

Let's talk Nuremberg. Nuremberg tells us a few things. First, you can convict a conspiracy and it doesn't have to be genocide. Second thing Nuremberg tells us is, look at your charter. And I want to seize on one thing with Nuremberg and exactly what happened there, because I think that's going to play in some other arguments that have been made. And if you'll indulge me while I try to put this on the ELMO, sir.

PO: Please state for the court reporter what you're showing us.

AP (CDR [redacted]) This is Article 6 of the Nuremberg charter.

PO: Has that been marked as an appellate exhibit, review exhibit?

AP (CDR [redacted]) Not yet, sir.

PO: You will.

AP (CDR [redacted]) Yes, sir.

PO: Thank you.

AP (CDR[redacted] And I don't know how well that's coming up, but it's important because it plays on a rule of statutory construction, one that was argued yesterday. The defense is saying when it came to law -- war crimes, you couldn't convict of conspiracy. Well, why is that? Because they followed their charter. If you look at 6(a), where it says "aggressive war", that kind of thing, they put the word "conspiracy" in there. When you go to (b) and they're talking about war crimes, they don't put the word "conspiracy" in there. What they held in Nuremberg was, we're bound by our charter. That's why they didn't convict of war crimes, because they had to follow their charter. Because they applied the rule of statutory construction that the government is arguing you need to apply in both the Article 25 motion from yesterday, and an Article 10 UCMJ motion that will most likely come up today. When they want it to apply to a certain offense and they say it, then it's there. But if they conspicuously don't put those words in the other statutes, then you don't apply it. So applying those rules, if they wanted conspiracy to commit war crimes, they would have put the word "conspiracy" in (b). Article 10, the speedy trial statute, doesn't have the word "military commission" in it. Same rules, 60 years apart being applied.

Now, there are two theories of conspiracy liability contained in MCI number 2. You have the traditional conspiracy of an agreement; you have a second theory which is the common -- I'll call the common criminal enterprise. The government has put both of these theories within the charge. If either one is proven beyond a reasonable doubt, you're entitled to convict. Now, if you look at the ICTY and what they did, we will concede up front that the ICTY, one, targeted specific international criminals when they convict under common criminal enterprise, they convict of the substantive offense. And we draw your attention to the *Tadic* decision. What was very important to the ICTY -- and I'm going to ask you to read the paragraphs roughly 190 through 193 when you go to deliberate on this. What was important for them was the label they attached to the guy who got convicted. To them, even if you were just a member of the common enterprise, they didn't want to call you an aider and abettor. They didn't want to call you an accomplice. If your enterprise had guys who went out there and committed murder, they wanted to call you a murderer. Because to quote them, "at the time depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility".

If anything, we are probably taking a lesser stance that than the ICTY. If this accused gets convicted, he walks away with a conspiracy conviction. He will not be labeled a murderer. But the gist of what they were trying to do with the ICTY is very similar to what we're trying to do here. Paragraph 190, all those who engaged in serious violations of the law, whatever manner in which they may have perpetrated or participated in the

perpetration of those violations must be brought to justice. That's what MCI number 2 does for us. It allows us to bring people to justice.

Now, under our system we've got the traditional agreement conspiracy firmly established. And when you look at the common criminal enterprise theory of conspiracy and compare it to the agreement kind of conspiracy, they are very, very similar. It is not a large stretch to have this other theory in there.

Now, the ICC was brought up. We didn't sign off on the ICC. The United States is not a party to the ICC. Colonel [redacted] asked where did this genocide conspiracy theory come from. First, that's not the only we convict [sic] on conspiracy of. We convict on conspiracy to commit aggressive war, conspiracy to commit apartheid, conspiracy to commit on various drug conventions. Genocide came up in 1948 with the Genocide Convention. Ex post facto came up in the defense's argument. How can that be? We've already convicted two guys of conspiracy alone, just in *Colepaugh* and *Quirin*. We've convicted conspirators with the assassination of Lincoln back in the 1860's. You're not on notice that conspiracy is considered to be an offense in violation of the law of war? It's in our Department of the Army field manual for the last 30, 40 years.

The bottom line is you start with MCI number 2. That's your charter, conspiracy is an offense under MCI number 2. Secondly, the United States, in interpreting the law of war, has conspiracy as an offense. And as I promised, at this point, we would like to distribute to the members what's previously been marked as a review exhibit with the court reporter; and that's the particular transcript part from the *Quirin* case.

PO: Sergeant [redacted] you've got this as marked?

AP (CDR [redacted] One other thing, sir, we would state that we do intend to file essential findings in conjunction with this argument.

PO: Trial -- or defense, I'm sorry?

ADC (Maj Mori): The government wants to live in the past in 1942. There were a lot of things in 1942 that aren't the same now. There were a lot of different legal theories, and there's been a lot of advancements, both in our country and around the world since 1942.

We have, in this Military Commission Instruction number 2, not an authoritative document. Why? Because it says so itself. It says this is just reflective of existing law. If that means anything in here, you should be able to find in some other source document; some other convention, some other charter from another court. This is declarative of existing law. So we

1 don't need this. Every charge, the government should be able to say, look,
2 this is declarative, existing law, and we can prove it because we have the
3 charter, we have the convention. But it doesn't because it's not declarative
4 existing law. And the government subtly concedes, well, we do have this
5 two-theory approach. No one else has done this two-theory approach.
6 We're not here to make stuff up after the fact. The fact is conspiracy is not
7 used, internationally accepted, except for the offense of genocide and the
8 other conventions. We're not talking about drug distribution in this case.
9
10 And we see how it's been recognized -- the ICTY, we have U.S.
11 practitioners that serve as judges, that serve as prosecutors, that participate
12 in that international criminal tribunal. We recognize it. But the
13 government's only -- is to go back to 1942, when segregation was legal in
14 this country, and it was the same Supreme Court that found segregation
15 legal. And they also hit -- remember, the government tried to make, well,
16 the Supreme Court didn't have to determine whether conspiracy is a valid
17 charge. And that's the support for showing it's a valid offense; the Supreme
18 Court didn't rule on it.
19
20 *Quirin* and the other offenses occurred in the other cite [sic], occurred in the
21 U.S. We cannot turn a blind eye to the advancements in international law
22 and how it has been codified and practiced in these international tribunals
23 for years, which we participate and support. We must recognize, and that is
24 the challenge. Is this reflective? Is MCI number 2 reflective of existing
25 law? We say it's not; the government says it is. We bring you experts, we
26 want to bring you experts, I want this Commission to ask Professor Schmitt
27 about *Quirin*. I wanted that. The prosecutors didn't want that, and they
28 have the audacity to stand up here and say, oh, these affidavits. You could
29 have asked any one of them. And you know what? They could have. They
30 could have stood here and said, Mr. Schmitt, you tell this Commission
31 about *Quirin*. But they didn't want to do that because they know they'd
32 lose.
33
34 Conspiracy as contained in Military Commission Instruction number 2 does
35 not represent existing international law in 2001. And joint criminal
36 enterprise is not just a quaint thing that we can throw in with U.S.
37 conspiracy, because there's a broad distinction between them. U.S.
38 conspiracy law, you don't have to commit the offense. No offense must be
39 committed for there to be a crime. Joint criminal enterprise, an offense
40 must occur. Conspiracy to commit robbery? Hey, let's rob a bank, I'll buy a
41 mask. Crime. Joint criminal enterprise to commit robbery, let's rob a bank.
42 Okay, let's go. If we're going to do it, somebody has to actually rob the
43 bank. There is a huge distinction. And what the government is doing by
44 sliding joint criminal enterprise into conspiracy is trying to say, we can use
45 joint criminal enterprise theory, and no offense has to be committed. And
46 that is not the standard of the law; it's perfectly clear in the ICTY and the

ICTR. It's not a valid offense. MCI 2 is not reflective, and it should be struck because it's not reflective. Thank you.

PO: Okay. Any questions?

Okay. Within the time lines we set for getting the findings, we'll issue an opinion in due course.

Okay. What do we have now? Nine?

DC (Mr. Dratel): Excuse me, Your Honor?

PO: Yes.

DC (Mr. Dratel): I didn't hear the last --

PO: Nine?

ADC (Maj Mori): Sir, we'll make proposed findings as well, sir.

PO: Well you've got the opportunity. Read what I said yesterday.

Okay.

DC (Mr. Dratel): May I proceed, Colonel?

PO: Go on.

DC (Mr. Dratel): Thank you, good morning. First, I would ask the Presiding Officer to refer or to certify D 37 to the Appointing Authority for decision.

PO: Okay.

DC (Mr. Dratel): D 9 is a defense motion to dismiss from Charge I, the conspiracy charge. The aspect of it that charges destruction of property by an unprivileged belligerent, because, in fact, that offense does not exist under the law of war or a congressional authorization, which are the only two sources that this Commission has jurisdiction over, defined offenses.

I want to start out with some principles that I think bear repeating, because they're very important in the context of this motion. And the first is what we've been determining ex post facto. And if I go swimming and them make swimming a crime tomorrow, they can not prosecute me on Thursday for swimming today. And I understand about the need for a law to evolve, and the whole purpose of that, and frustration perhaps with the ex post facto principle. But if you can't accept that as a fundamental principle of United

States Constitutional law, international law, common law, then you're not doing your duty here.

Now, another issue is what exactly is the Commission looking at in making a determination with respect to the sufficiency of these charges. And you have to focus on the charge sheet, because the charge sheet is the limit of what you can consider with respect to sufficiency. So for example, if someone's charged with automobile theft, and even though it says automobile theft is the charge, if what's pled in the accusatory instrument, the indictment, the information, the complaint, if what's pled says Mr. Smith was apprehended behind the wheel of a yellow Ferrari, that's not sufficient. Even if it pleads somewhere else that Mr. Smith doesn't have the money to afford a Ferrari; even if it pleads a dozen other things, it has to plead what the offense is, which is that without the authority of the owner. It's insufficient. You cannot include other aspects into the charge sheet regardless of what you may believe, what you may believe is commonly understood. This is very specific, and this is what is involved in a challenge to the sufficiency, and it's very important to the context of this motion.

The phrase "unprivileged belligerent" in this context, as it was in the context of the attempted murder charge, Charge II, is a red herring. It is a complete distraction. It is irrelevant to the conduct charged. There is nothing that a soldier does that is a war crime or not a war crime that an unlawful or unprivileged belligerent does that is a war crime or not a war crime. There is no distinction in their conduct. This goes back to questions yesterday that both Colone[redacted] and Colonel[redacted] asked, and I think it's important because it's really important in the context of this discussion about destruction of property.

The focus is not on who the actor is. The focus is on who the target is or what the target is. So for example, you're trying to determine whether -- and I think, Colonel[redacted] you asked yesterday, so you have to wait for the murder to occur before you can prosecute it? As a law of war crime, even if an unlawful combatant kills a soldier, it is still not a war crime; it is an ordinary crime, it is not a war crime. There is no distinction between a soldier killing a soldier, other than the exceptions that Major Mori noted. There's no distinction between a soldier killing a soldier, and an unlawful combatant, or an unprivileged belligerent killing a soldier. There is no distinction, neither is a war crime. Colone[redacted] asked, what if the person, the unprivileged belligerent joins the U.S. forces in Canada? No distinction.

CM (Col[redacted] That's not why I asked that question.

DC (Mr. Dratel): But I'm just saying, that there's really no distinction in context of these charges. It's as if in my Ferrari example, you said he was driving down the

street in a Ferrari wearing a blue hat. It has about as much significance as that in the context of what we're talking about. And we're not asking you to take our word for it. We were looking to bring in witnesses because I -- you know, maybe you don't hear it from your side, but I hear it from here, which is the sort of unspoken preface to some of the questions, which is a challenge, a sense, somewhat, of incredulity. And that's what we have to overcome, and that's why these witnesses are necessary is to overcome that. The unspoken preface to each question is, are you telling me that, or is it possible that? And we're telling you that, yes, that's what the state of the law is. And I won't go over -- Major Mori spoke eloquently about that. I don't need to repeat it.

And the affidavits for us are really a poor substitute for what we think is necessary, an interactive presentation that involves the Commission and involves the prosecution as well.

CM (Col[redacted] I need to make a statement here, comment. It is my opinion that testimony from expert witnesses, in and of itself, may be a good thing for this Commission. But it is my contention that you, the defense, and you, the prosecution, should not tell me who I need to listen to. I should be able to, and this Commission should be able to pick who we want to hear from in terms of expertise on the law of war. That is the problem I have with your motions to bring expert witnesses in. I don't have a problem with the concept in general. I have a problem with you picking, and you picking who you tell me I should listen to.

DC (Mr. Dratel): Well, we certainly don't have a problem with the Commission choosing witnesses that it seeks from, but I would also say that if you look at the credentials of the people that we have presented, it would be an insurmountable challenge to find a better equipped, a better educated group of experts to discuss the subject that we're discussing.

CM (Col[redacted] I will take that on as a challenge for the Commission.

DC (Mr. Dratel): In the context of what we're talking about, the northern alliance stands in no different position than Mr. Hicks in terms of combatant status. Special forces not wearing uniforms stand in no different position than Mr. Hicks. And we're not conceding that Mr. Hicks is an unprivileged combatant, but for the purposes of the charge we are, because it's alleged in the charge that he is an unprivileged belligerent. So that's why we're going from the four corners of the document. But there's no distinction there. I just want to make that clear, because it's not a magic word that transforms something that's legal into something that's illegal.

Now, the destruction of property by an unprivileged belligerent is not a violation of the law of war; it is mere vandalism or destruction of property

under a domestic prosecution of the country, or the jurisdiction that has jurisdiction over that conduct or over that person.

CM (Col[redacted]) Mr. Dratel, would you assert that if that property had special protections under the law of war, that it would be then a crime?

DC (Mr. Dratel): That was my next statement. It does not enumerate any protected property, which is what is protected under the law.

CM (Col[redacted]) And I agree with that. But how am I to rule on your motion if I have not determined whether the facts prove that the property was protected or not?

DC (Mr. Dratel): Because that's why you have to -- you're limited to the charge sheet, and it's not there. This charge is not supported in the charge sheet. It's like my Ferrari example. That's what you're limited to. You don't have a factual hearing to determine. That's the trial. But first, they have to charge it sufficiently, and it's not an unimportant distinction; it is the difference between a fair proceeding and an unfair proceeding.

And I'd also -- and to go back to MCI number 2, which is not where you begin, because you begin with the authority for what's in MCI number 2, and the authority is law of war or other designated offenses spying, which we've already said: Aiding the enemy, spying. So law of war offenses is what it's limited to. So what you have in MCI number 2 is you have law of war offenses, and they talk about protected property. In MCI number 2, then you have a whole "other crimes" section which is the set of crimes, which is swimming is illegal as of Wednesday; that's what that is. And this one, destruction of property by an unprivileged belligerent is there because really, what they're saying, is destruction of property. That's my point. Unprivileged belligerent has no meaning in the context of a war crime, a law of war violation. There is no distinction between a soldier destroying a hospital, and an unprivileged belligerent destroying a hospital in terms of a war crime. If it is a military necessity, they have combatant immunity from any prosecution. It's a military necessity for the lawful combatant, it's not a war crime. It's just crime, an ordinary crime punishable in that jurisdiction.

And going back to yesterday again, I appreciate the frustration with the notion that our jurisdiction is not universal, but it is not. There are some things that the United States cannot do, regardless of whether we have the military or diplomatic capacity to pull people off the street anywhere in the world and bring them here, either in Guantanamo or to the United States. Doesn't mean we have the lawful right to do it, doesn't mean we have jurisdiction. Just as we don't acknowledge the jurisdiction, for example, the prosecution talks about the ICC. We don't acknowledge it. We would not permit the imposition of those standards on citizens here, regardless of

whether they violated those standards. The same thing applies. Jurisdiction is not a universal concept all the time.

But you had a question?

CM (Col[redacted] No. Keep going.

DC (Mr. Dratel): What this really is, by this intrusion of this red herring of unprivileged belligerent is an attempt to convert status into an offense; and status is not an offense. Status of unprivileged belligerent is not an offense. It is the conduct, the target that makes it an offense, and it's true regardless of whether it's an unprivileged belligerent or a privileged belligerent. There would not be any distinction between a privileged belligerent or an unprivileged belligerent destroying protected property for purposes of war crimes.

CM (Col[redacted] You're discussion with me a minute ago about the actual words in the charge, not using the words "protected property". Would you not assume that the word "property" would be encompassing of both protected and unprotected property?

DC (Mr. Dratel): No, and I'll tell you why: Because the two -- protected property already is an offense under the law of war, and that's not what they've charged. They've charged this new, swimming on Wednesday charge. That's what they've charged. And you can't assume it. They wrote it, they're responsible for it, they're held to it. You can't read into it, you can't rewrite it. And in addition, having that --

CM (Col[redacted] I'm not asking to rewrite it. I'm asking what your interpretation of it is. I'm going to ask them the same thing in a minute, because it would seem to me that without adjective of "protected" on the word "property", that this Commission could look at all property, whether protected or not and then decide.

DC (Mr. Dratel): But that wouldn't be a law of war violation as it exists on the date that the conduct allegedly occurred. And we're talking about swimming on Wednesday. Swimming's illegal.

CM (Col[redacted] My question is: You're telling me that the charge as written and the word used, "property", without the adjective "protected" in front of it, precludes me from interpreting that charge as destruction of protected and/or unprotected property.

DC (Mr.[redacted] Well, you've just added three words that aren't there. You can't. That's right you can't -- just like the Ferrari, you can't say, I assume it was stolen. You can't. I assume it was without the authority of the owner. No, you

can't. It's an essential element, it is the essential element.

CM (Col[redacted] But "property" has no adjective in front of it right now.

DC (Mr. Dratel): That's why it's not an offense under the law of war.

CM (Col[redacted] I believe there's no adjective there because the Commission should be allowed to decide protected or unprotected based on the facts.

DC (Mr. Dratel): If they thought it was protected property, they would have charged it under the --

PO: Okay. If you two would please slow down so the court reporter can keep up, and we can focus more on what we're on here.

CM (Col[redacted] I am.

DC (Mr. Dratel): They would have charged it under the preexisting -- and you can't assume that. No, you can't. That's not a decision for fact. That's not a decision for facts. You can't charge someone with a vague offense that doesn't assert the elements, and then fill in the elements later; that is lack of notice, that is vagueness, that is due process, that is just simply not acceptable as a proposition in law, and in a full and fair proceeding. It's just not. I mean, those are principles that we either have to abide by. And if we abandon them, then we abandon the notion that this is full and fair.

And the government's reasoning is perfectly circular. MCI 2 says it, so it's binding; and it's binding because MCI 2 says it. You have to go outside MCI 2, because MCI 2 can't say swimming is illegal on Wednesday. And if it said it, and it's binding, then it's biding because it said it. That doesn't make it so.

The government cites cases. All these cases have these little phrases in them, like violations of the law of war, or things like they lose their protected status. That's different, those are different issues. Also they say they would be treated like highway robbers or pirates. What does that mean? Like common criminals, not like war criminals. Prosecutable by the domestic law of the jurisdiction that has jurisdiction, or by the sovereign that has jurisdiction over that conduct or that person. Instead, again, this is an attempt to create a status offense out of what is a law of war -- conduct offense of protected property. And it doesn't exist under the law of war. Obviously, it hasn't been authorized by Congress. Those are the two sources of jurisdiction for this Commission for offenses. It is found under neither. There is a real offense that they obviously chose not to use for obvious reasons. They're stuck with what they charged, it's insufficient, and it should be dismissed. Thank you.

P (LtCol[redacted]) Gentlemen, under U.S. law, a U.S. military commission can try an unlawful combatant, or an unprivileged belligerent for the acts that rendered his belligerency unlawful. That little phrase is from *Ex Parte Quirin.* And recently the Supreme Court said in *Rasul v. Bush*, that that case law is not to be brushed aside; it is still vital case law.

The United States is not charging a status offense. The accused is not charged just with being an unprivileged belligerent. He is charged with conspiring to destroy property while an unprivileged belligerent. Destroying property when you have no combatant privilege to do so is not swimming on Wednesday. It was a crime long before January 1—st of 2001, when the government alleges that the accused signed on with Al Qaida, started training with them.

There is an opinion cited by the government in our response, and we won't go into great detail about it, but we would ask that you do look up this opinion. It's by Attorney General Speed in 1865. And in 1865, Attorney General Speed says there's a difference between a soldier and someone who is not a soldier, someone who is an unlawful combatant. And in 1865, Attorney General Speed is drawing that distinction, and somebody who doesn't have that combatant privilege, who conducts acts like destroying property, like conspiring, like murder, they can be taken before a military commission. The laws of war can be invoked. That's what they did in 1865.

In the 1940s is when *Quirin* was decided. This is no ex post facto. And again, going back to the FM 27-10, we just remind you that that was a 1956 manual, and is a manual that continues to be considered by all the services as a source. And it says, individuals who take up arms and commit hostile acts without having complied with the conditions prescribed 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.

1956, now today in 2004, the defense says they weren't on notice that this was unlawful conduct, laid out quite clearly in 1956. So by Attorney General Speed's opinion in 1865, by other precedent that we've laid out, which includes the Lieber Code in the 1860's, it lays out the distinction between combatants and noncombatants. Not just the status, but when those people try to destroy things and kill people, they've committed a violation that may be tried by this Military Commission. Thank you.

DC (Mr. Dratel): Well that's not what they say. That last part was now in terms of what crimes are crimes under the law of war.

And I'll -- first, conspiracy. I'm going to get into a little bit of conspiracy here. Just because you have a conspiracy doesn't mean that you can conspire to do things that aren't crimes and be punished. The object of a conspiracy must be unlawful. Therefore, a conspiracy to swim on Tuesday when it's not a crime until Wednesday is not a conspiracy, it's not a crime. The object has to be illegal at the time that the conduct committed, that the agreement is made for the conspiracy. So that doesn't change it. It's not -- and again, another magic bullet, conspiracy, when you shove everything that's inappropriate inside it and make it appropriate. You can't do it.

It is a status. Because what all these citations are to is not a question of saying that destruction of any property is a law of war crime. These citations are to the treatment of the person. Because as Colonel [redacted] said yesterday, you can take them out and shoot them, as we've acknowledged. If you lose your privilege status, you're not entitled to prisoner of war treatment. That is what the status means; not that one set of conduct by one is a war crime, and not a war crime by somebody else. There is no distinction in that context. If you look at it from the context of what occurs, it becomes apparent. A soldier has no more right to destroy protected property than an unprivileged belligerent. They're both prosecuted as war criminals if they violate the law of war.

CM (Col [redacted] Say that last thing again.

DC (Mr. Dratel): They have no -- if they violate the law of war, each of them --

CM (Col [redacted] About the soldier and the unprivileged belligerent. Military necessity.

DC (Mr. Dratel): But that's only a war crime. It's not a war crime for the unprivileged belligerent to do it; it's an ordinary crime. It doesn't make it a war crime because they are an unprivileged belligerent. There is nothing in that distinction. It's a red herring. That's why they keep coming back to it, because it clouds the issue; it doesn't crystallize it.

And he said that destruction of property was a crime long before; it's not a war crime, it's never been a war crime. They made it up in MCI number 2, that's why it's not in the section of the law or war, that's why it's in a new section. Thanks.

PO: Colonel [redacted]?

CM (Col [redacted] Under whose laws would an unprivileged belligerent who does, indeed, destroy property be tried?

DC (Mr. Dratel): Under whose laws? It would be the sovereign who has jurisdiction over the conduct or the person. But it's not a war crime under any circumstances,

it's not a war crime.

CM (Col[redacted] What if it's not the sovereign state's property? What if that property is someone else's property in that sovereign state?

DC (Mr. Dratel): Private property? It's still the sovereign's --

CM (Col[redacted] Some other government's property.

DC (Mr. Dratel): Well, that government could prosecute them as a criminal offense, not as a war crime before a military commission. This Commission does not have jurisdiction for those offenses. I'll give you a good example. In 1998, the United States embassies were bombed. We couldn't bring them before a military commission, they were prosecuted in federal court for crimes against the United States property occurring overseas. Federal offense, not a war crime, not triable by military commission. There's as plain of a distinction as you could have.

PO: Okay. It's 1047. We'll break until 1115. Court's in recess.

The Commission Hearing recessed at 1047, 2 November 2004.

The Commission Hearing was called to order at 1115, 2 November 2004.

PO: The court will come to order. Let the record reflect that Commander[redacted] is no longer with us, and we have a new court reporter.

P (LtCol[redacted] Yes, sir. Sergeant[redacted] has replaced Sergeant[redacted]

PO: Okay. Neither side advised the court as far as -- the Commission, as far as I can tell, that they were going to submit findings on D 9; is that correct?

DC (Mr. Dratel): That's correct, Your Honor.

PO: I am not asking for them. I am just saying, I didn't hear anybody say anything.

P (LtCol[redacted] That is correct, sir.

PO: Okay great. What do you got next, Major Mori?

ADC (Maj Mori): Yes, sir. D 20, sir the motion to strike the word "terrorism".

Sir, the defense moves the Commission to strike the word "terrorism" from Charge I. It's basic proposition is that, again, under MCI number 2, the offense of terrorism that is created in that it is not reflective of prior

international criminal law. Specifically, not an offense under the law of war.

And where is the source document showing, reflecting the offense of terrorism as contained in Military Commission Instruction number 2? There isn't any. There are some conventions dealing under the descriptive word of "terrorism conventions" to do with specific acts, hijacking, attacking oil platforms. Because that is the focus, it as to be specific acts.

The term "terrorism offenses" as we talk about, is a sort of descriptive term. It's not an actual crime in and of itself. The charters -- I mean, the conventions deal with specific types of crimes; whereas the offense in Military Commissions number 2 doesn't deal with -- is not reflective of any of those conventions. So those conventions don't serve as a declarative law prior to Military Commission Instruction number 2 being published.

The government seeks support in the word -- where the word "terrorism" is used in several sources. It seeks it from -- mentions the Australian War Crimes Act of 1945 where you said he used the word "systematic terrorism". Well, that is not all it said. It said -- it was listing certain offenses to be investigated. It said murders and massacre-systematic terrorism.

There, and of course, the government doesn't say it was ever used for any prosecutions. Again -- and then it looks at these other cases, another case from very early on, where again, when you look at the case *Motomura*, it is not actually for an offense of terrorism, it is for his brutality treated unspecific people for actually the torture and the abuse that occurred, which are specific acts. It's not -- it's not an all encompassing charge of terrorism. Most revealing is the *Galic* case that the government cites to. And if you read it and if you look at the section where it really address the history of the case, you look at -- it's paragraph -- it starts at paragraph -- it's probably about paragraph 91 where it starts getting into that, even a little bit sooner, but it is very broad. But around 115 it talks about that court, and it's kind of giving a little history itself on where this sort of terrorism -- again, they use this "systemic-terrorism" as a descriptive term. It talks about in that the government used this court from 1919, this Commission where it mentioned it. It talks about -- and the government mentions in the brief that in '45, the British Delegation tried get it in, but that was rejected. It doesn't support that there was a offense terrorism under the law of war.

And so we look at offenses, how is the international tribunals, and that's *Galic*. Now, they didn't find that there was an offense of terrorism; they found there was the specific offense of attacking civilians, which is a violation of the law of war; and that there was really an aggravating element of with an intent to inflict terror. That is really all *Galic* found. When you

look at the holding, that's saying, we are not talking if this offense is found in customary international law. We are looking, is it an offense within our special charter, because they have jurisdiction of things beyond just the law of war, they have problems against humanities, and they can expand it, and did the offense as drafted in the *Galic* case. *Galic* was charged with sniping and shelling civilians with the intent to inflict terror. Did that specification meet an offense under the rule of law, and so they had the facts. In our case there -- and the charge doesn't reflect what was found in *Galic*. *Galic* really shows no more support for anything that a aggravating factor to Military Commission Instruction number 2, charged attacking civilians. *Galic* would stand for the support that they could have an aggravating element of with the intent to inflict terror. That is really what *Galic* stands for. It is interesting because the government seeks *Galic* as their support. And if you look at the very first sheet, it says "Prosecutor Darrell Mundes" is the prosecutor. And that is whose article the defense cites and provided who talks about how difficult it is. He says, it's challenging to prosecute terrorist-type offenses. Why? Because not the least of which is the fact that there is no internationally recognized definition of terrorism per se. And he is writing this at the same time that he is working and experiencing it, and he is reflecting the accurate reflection of *Galic*; that there is not a terrorism offense. It is -- *Galic* just stood for the aggravating factor.

He talks in the article about the struggle dealing with prosecuting this terrorism. He talks about -- and we cite it, I don't need to read the whole thing, we have provide that too -- because that was -- this presentation that he gave was in 2003, again, because we are focusing on what was the law in 2001? That's where the same thing with the *Galic* decision comes out in 2003. So you have to think about it, consider it how it supports what was the state of the law. But I think even in 2003, again, the same prosecutor who worked on this was explaining that it doesn't.

And he makes a very interesting point, which is exactly what I am trying to say. Several international treaties cover acts that fall under the general category of terrorism. The general practice is to prosecute individuals for the underlying criminal acts; not for the undefined crime of terrorism.

And there is no source document for Military Commission Instruction number 2's offense of terrorism that they have created.

P (LtCol [redacted] Thank you, sir. Terrorism is an offense under international law, and has been a offense under international law prior to the acts of the accused, starting January 1st 2001.

The prosecution relies not just on the use of the word "terrorism" in its brief; instead it relies on the well-founded principle that acts designed to inflict terror on a civilian population are a violation of international law.

And we go back to 1919 to show that the allegation that this was made up with MCI 2 it's just simply not true. That that principle has been true ever since 1919, and before that. 1919 they were recognizing that terrorizing a civilian population is an offense.

The *Galic* decision, now, this is international court for the International Criminal Tribunal for the former Yugoslavia, and we cite that because this Commission -- while that is not binding on you, this tribunal went through an analysis of terrorism. And they go back to 1919 to determine whether General Galic could be convicted of a separate offense, terrorism. It should be noted that this tribunal, specifically, considered the question of whether General Galic could be convicted of this offense when his acts occurred in 1993. So while the tribunal was considering this in 2003, they looked at it to see whether this was a violation of international law prior to 1993, and they found it was. They found that it was a violation. Acts that the primary purpose of which is to terrorize a civilian population. And this was a separate offense from attacks on a civilian population. So these are two separate offenses. The *Galic* tribunal found that it was permissible to charge these separately.

Gentleman, we are not going to go through, ad nauseam, the citations that we cited in our brief. We will just note that the issue with terrorism has been an evolving one, and it has been one where the principle exists that terrorizing civilians is a crime.

Now, the defense raised the issue of piracy and pirates, and that's interesting because pirates posed a problem from outside our shores. And international law and the principles of international law allowed the United States to deal with this in international law, and applying laws of armed conflict. We will acknowledge up front that the precise situation we find today, a potent terrorist organization known as al Qaida that has about every attribute of a state except for territory it calls its own, attacking, waging war against this nation. As a primary purpose, this organization is trying to coerce this government and terrorize its people. The principles undergird the offense. The question for you is not an international standard. There is a U. S. standard for terrorism, well-established and well-founded. The question is, are the principles of international law in conflict with that, and they are not.

Definition, the *Galic* court goes through and says what terrorism is. And again, it is quite clear. The purpose of this -- I will say it one more time just for emphasis -- acts or threats. They didn't, specifically, address the threats because that wasn't addressed in *Galic*. Acts or threats, the primary purpose of which are to terrorize a civilian population, are prohibited under international law. Thank you.

ADC (Maj Mori): The government goes again, mentioning going back to 1919. And if

you read *Galic* in 116, it talks about, the Commissions list of war crimes, murders, massacres, systematic terrorism of civilians is one item. The few trials held in 1921 and 1922 and Leipzig, pursuant to the Treaty of Versailles, are generally considered to have been a failure. In any event they do not advance --

CM (Col[redacted] I want you to start reading that again and slow down.

ADC (Maj Mori): Yes, sir. The Commission's list of war crimes had murders and massacres, systematic terrorism as one offense -- of civilians as one item. The few trials held in 1921 and 1922 of Leipzig, pursuant to the Treaty of Versailles, are generally considered to be a failure. In any event, they do not advance the concept of systematic terrorism created by that Commission. And in '45 the prosecution relies on this British delegation. And again, the court addresses that they didn't use it. And again, the main issue here is the underlying acts not being confused with the descriptive term of terrorism, like we talk about white-collar crime talks about financial crime. Could be embezzlement, could be money laundering; it's specific acts, and offenses must be geared at that. There is no internationally accepted definition as we talked about in our papers, there is no one definition because we -- partially because the U. S. influence has chosen to deal with specific conventions aimed at specific acts. That can deal with a specific type of conduct and deal with the -- you create an offense and there it is.

Galic was not charged with terrorism, he was charged with attacking civilians, or the intent to. And it is important when you read in 138, they found that the offense constituted acts of violence willfully directed against civilian populations or individual civilians causing death or serious bodily injury or the health, with a primary purpose of spreading terror among the civilian population, and they say "name me the crime of terror as a violation of the law of war".

So that proposition is, that is an offense to attack civilians which is in the Military Commission Instruction number 2, which is a valid offense, and they have added an extra element, basically, if it's with the intent to commit terror, that would fall in there. But it is based on a violation of the law of war, attacking civilians.

In the paragraph -- in that same paragraph at the bottom the court noted "whether the crime of terror also is a foundation in customary law is not a question which they answer".

So they didn't say whether it applied to any other courts outside of their own charter and statue. But I think *Galic* does talk about a valid offense in the sense of attacking civilians, and they create an aggravating element. It has

nothing to do -- nothing to do, whatsoever, with political motivation. It has nothing to do that, and I would ask the members to look at Professor Schmitt's affidavit where he discussed that and does a much better job than I. Thank you.

PO: Refresh my memory, Major Mori. Genocide was a crime made up with -- was recognized as a crime when?

ADC (Maj Mori): I believe it is the 1948 convention.

PO: There wasn't a crime before that?

ADC (Maj Mori): Well, in -- there was -- well, it wasn't a crime. You see, that's -- what do you mean, sir, it wasn't a crime? Was it a specific act --

PO: I mean just what you know I mean. I mean, it wasn't a crime until Nuremberg; right? Where they tried people for it; right?

ADC (Maj Mori): Yes, sir.

PO: I mean, we are arguing -- we are arguing from analogies here a lot of it; right?

ADC (Maj Mori): Some of it, but what your analogy to genocide has, and the further application of that, has its formation in the convention. Nuremberg, one of the problems were, and the criticisms of it that is still allowed today is that people were tried for a lot of offenses that were created after the conduct. And the international community, and we being one, recognize that doesn't lend support to the creditability of that tribunal; and so we thought proactive in trying to get international law up to date. But I agree, at certain times conventions reflect after prosecutions. But has there been a prosecution for terrorism as drafted in Military Commission Instruction number 2? No, not in the law of war.

PO: That's what this is.

ADC (Maj Mori): This would be the first one.

PO: Nuremberg was the first one for genocide; right?

ADC (Maj Mori): Not really, sir.

PO: Okay. I mean we just --

P (LtCol [redacted]) Sir, we would just like to say, we would like to give you the *Galic* decision so you can read -- we will give you a hard copy. It's already in the

--

PO: Is it in the Commission Library?

P (LtCol[redacted] The electronic copy. We will provide a hard copy, because that decision itself -- you should read it for yourself -- and he was charged separately with terrorism.

PO: Okay. So there is no question for me when watching -- there is a collection of documents that both sides had a chance to put in, and *Galic*, I thought, was in the thing. But, yes, you can circulate a hard copy, electronic, we read them the same. We are in the 21st century here.

Okay. What you got next there, defense. You are going to put in findings, either side?

P (LtCol[redacted] Yes, sir, we would like to.

PO: Okay. We'll issue a decision after the time lines that we have established already. Go on.

ADC (Maj Lippert): Sir, we are embarking now on a series of motions D 17, D 3, D 4, and D 7, which all kind of copy, or cover some of the same ground as far as the substance of the legal augments involved. I am going to cover D 17, which is a motion to strike parts of the charges that dealt with matters that occurred before the armed conflict in Afghanistan began. Major Mori is going to talk about the aspects of that regarding when the armed conflict ended, and then I am going to talk about some remedy of the -- potential remedies that we believe should be afforded to Mr. Hicks because of the government's conduct regarding his detention.

CM (Col[redacted] Could you hold on one second.

ADC (Maj Lippert): Yes, sir. This will be three separate little arguments here, but we don't want to --

PO: You're going to do D 17. What's Major Mori going to do?

ADC (Maj Lippert): He is going to do D 3, sir.

PO: And then you are going to do --

ADC (Maj Lippert): -- D 4 and 7. And we will try not to cover the same ground too many times over and over again, but they are somewhat similar.

Defense motion to modify the charges because the court has no jurisdiction

of events that occurred prior to an armed conflict occurring in Afghanistan is what I am going to talk about now.

The jurisdiction of this Commission is limited to offenses of violations of the law of armed conflict, violations to the law of war, and offenses that are triable by military commission. And sir, I think that's critical to your last question to Major Mori. Offenses that are triable by military commission, and that would be offenses that were in existence before this the Military Commission; not offenses that this Military Commission may choose to find that the government has invented.

PO: That is a nice move around there.

CM (Col[redacted] Good choice of words, Major Lippert.

ADC (Maj Lippert): Thank you, sir. Be that as it may --

CM (Col[redacted] No, I'm serious. That was a good choice of words.

ADC (Maj Lippert): Well, thank you, sir. Be that as it may, in this case this jurisdiction is limited to, since it is a law of war court -- a law of armed conflict court, that is what your jurisdiction is limited to, the charge sheet should be limited to events that occurred when an armed conflict was ongoing. If you read the charge sheet, which you all have, you will see that it starts talking about stuff that happened in the 90's, some of which Mr. Hicks -- most of which Mr. Hicks was not even involved in, never knew about.

The armed conflict in Afghanistan, it is our contention, began on October 7th 2001, when the United States began bombing Afghanistan. An armed conflict, an international armed conflict is the only armed conflict, or the only type of armed conflict which triggers the imposition of the law of armed conflict. I will caveat that by saying an internal armed conflict triggers the application of Common Article 3 of Geneva Conventions but that is not the full law of armed conflict. When an international armed conflict is ongoing, you either have -- you apply all of the law of armed conflict; and when it ends, you stop applying the law of armed conflict and you go into the law of peace or domestic law. Or if an internal armed conflict is still going on, Common Article 3.

On October 7th, the United States started bombing Afghanistan, after the Taliban refused to surrender Usama bin Laden and other members of al Qaida pursuant to our request. On that date, that is when the international armed conflict began. It didn't happen before that, it wasn't ongoing before that. That's when an international armed conflict under the definition of the law of armed conflict in the Geneva Conventions began. Why? Because Afghanistan is a high contracting party to the Geneva Conventions, as is the

United States. They are a state entity. The government is going to stand up here and say that we were involved in a armed conflict with al Qaida, a non-state entity, a loosely organized group of terrorists around the world, not a state, not even close to a state, not a part of the Geneva Conventions. By definition, under the law of war, as a legal matter, you cannot -- the United States cannot and never will be engaged in a armed conflict as that term is defined by the law of armed conflict, the Geneva Conventions, with al Qaida. Can't happen, hasn't happened. Now, that is not to say that the United States cannot engage in military operations or use military force against al Qaida. We certainly can. The United States has been attacked by forces or members of al Qaida on several occasions, they are cited in our brief. Including September 11th, according to the government. That was an armed attack against our territory. That and other armed attacks by al Qaida initiated the right under the U.N. charter Article 51 for the United States to engage in self-defense against al Qaida. However, the right of self-defense is not from the law of armed conflict. It is given to us under the U.N. charter Article 51. It allows us to take all necessary means and use all necessary force to defend ourselves and we have been doing so. Nonetheless, that self-defense is not an armed conflict, as defined under the law of armed conflict. You can call it what you will. You can call counter-terrorist operations, you can call it military operations against al Qaida. But it is certainly not an armed conflict as that term is defined in the law of armed conflict. That is a matter of law. It is not a matter of conjecture. You can read the Geneva Conventions and see when and who we can be engaged in an armed conflict with. Al Qaida is not one of them; Afghanistan is. October 7, 2001, we engaged in a international armed conflict with Afghanistan. That is when the law of armed conflict was triggered, and anything before that -- any events that happened before that are not a matter for this court, for this Commission. It's simply not part of your jurisdiction. As such, the defense would ask that any reference to events that occurred prior to October 7, 2001 be stricken from the charge sheet because they are not a matter for this Commission. Thank you.

PO: You want to address seriatim or do you want to wait until he finishes?

P (LtCol[redacted]): We can do it when they finish, sir.

PO: Okay, come on, Major Mori.

CM (Col[redacted] I have a question.

PO: Okay, before you start, I am sorry.

CM (Col[redacted]): Are you implying that the laws of armed conflict can never be applied unless there are two state actors engaged?

DC (Mr. Dratel): Sir, if you would excuse me, I need to get a drink of water real quick. Will you hand me that?

Can never be applied, sir?

CM (Col[redacted] Your implication or what you want us to believe is that the laws of armed conflict and the definition of an armed conflict can only take place if there is a state actor on both sides.

DC (Mr. Dratel): I will say yes, sir, that is true except in very limited circumstance. You can have the law of armed conflict triggered in what is called a belligerency. A belligerency is a very special type of internal armed conflict similar -- let's talk about the--

CM (Col[redacted] The Civil War.

DC (Mr. Dratel): The civil war, exactly, sir, that was a belligerency when the two sides had the same aspect of nation states and therefore, the law of armed conflict would kick in that way. But other then a belligerency, unless you have a state actor you cannot have an international armed conflict for purposes of the Geneva Conventions, which is the law of war, which is what we are talking about here in this Commission. That is the short answer for your question.

PO: I have marked --

CM (Col[redacted] I have one question. Major Lippert, do you know when U. S. or coalition special operations forces first arrived in Afghanistan?

ADC (Maj Lippert): Sir, I believe that is classified information.

CM (Col[redacted] The question is: Do you know?

ADC (Maj Lippert): No, sir, I do not know personally.

CM (Col[redacted] Okay, does the defense know?

ADC (Maj Lippert): I don't think so. I am not sure, I cannot answer for them.

CM (Col[redacted] Okay, but your bottom line, is it didn't start until the bombs dropped?

ADC (Maj Mori): Yes, sir. One or --

CM (Col[redacted] It doesn't matter who else was deployed prior to that to ensure that they went to the right place?

ADC (Maj Mori): Yes, sir, because it is a definition of under facts, what are the facts. Is there an actual -- two states utilizing military force at that time against each other and when does it begin? The initiation of hostilities, the bombing. Not the preparatory stage, sir.

CM (Col [redacted] That's your position?

ADC (Maj Mori): Yes, sir.

CM (Col [redacted] Did the United States recognize the Taliban as the legal government of Afghanistan?

ADC (Maj Lippert): That doesn't matter. I am sorry, sir. The answer to that questions is: I don't believe so, but that doesn't matter for purposes of the law of armed conflict. The law of armed conflict looks at the factual circumstances and in the factual circumstances it was a matter of the Taliban was in control of the territory of -- or most of territory of Afghanistan and we engaged in armed conflict with them and under the law of armed conflict, Geneva Conventions that would be considered an international armed conflict.

ADC (Maj Mori): Sir, if I could just add one also, the Taliban government was the government which the U. S. government Department of State was working with in the late 90's to set the pipelines. It was also the Taliban government that the U. S. -- was over here in the United States visiting with the Department of State in 2001. It was also the government that the U. S. talked to and tried to work diplomatic relations with to obtain Usama bin Laden. So in fact we were recognizing them as the government of Afghanistan, sir.

PO: Your shot, Major Mori.

ADC (Maj Mori): Yes, sir. If I could just have one moment to get an item marked. Sir, I have marked the war crime section from the international criminal tribunals Review Exhibit 69, if I could approach and provide to the members?

PO: Sorry, what?

ADC (Maj Mori): RE 69, sir.

PO: Okay. We are on D 3?

ADC (Maj Mori): D 3, sir. Sir, I provided this section of the ICC to you because it does a good job of breaking up and showing what offenses are available, both in an international armed conflict or an internal armed conflict. And then of course it supports the fact that unless you have one of these two types of armed conflicts, there is no law of war violations. That is both supported --

in the first section it talks about the Geneva Convention, Grave Breaches, and in each paragraph applicable to international armed conflict. Page 7, it gets into offenses that are applicable in armed conflict, not of an international character or, which is referred to sometimes as an internal armed conflict.

The law of armed conflict is not applicable until you either have a state by state conflict or an internal struggle between the government and a group, already identified as a group or those two groups within its own territory. There is no armed conflict against al Qaida. There was -- there cannot be under law of war and the definitions accepted. Now, what is the ramifications of that? It doesn't mean that the U. S. cannot attack an organization we have the right to, under Article 51 of the U.N. charter, the right to utilize force in self defense. It just means when that attack occurs, the full range of the law of war is not restricting us.

It is not restricting us and it is not providing any protections to the people who are attacking. If we choose to just attack a camp in Afghanistan instead of having a northern -- you know, assisting the northern alliance to invade the whole country, we wouldn't have been at war with Afghanistan. In Yemen, when we sent missiles in and we got permission by the government, that wasn't -- we weren't at war with Yemen. We just sent missiles in. That did not begin an armed conflict in which the laws of war became applicable. And there has to be a date on the front end when the laws of war become applicable and there is a date on the back end when the laws of war stop. We put in our motion -- we put forth that it's when the Karzai -- initial Karzai government took over and in the Professor Schmitt affidavit he says, No, maybe later. At least by June when the full government is in power. It has to be over at least by then. It is not a matter that there may still be some armed -- rounds being fired in Afghanistan against whomever. Because in international armed conflict requires two states. We can still be there, shooting at -- if we believe it's terrorist --

PO: So in Vietnam in 1970. That wasn't an armed conflict?

ADC (Maj Mori): Well, 1970, at that point --

PO: The Viet Cong -- that wasn't, I mean, is that what you're telling me?

ADC (Maj Mori): It was a internal armed conflict within South Vietnam. Now --

PO: No, sunshine, it wasn't. Look here -- are you saying the law of war wasn't applicable there?

ADC (Maj Mori): Certain parts of it. With a internal --

PO: So when we captured a VC we couldn't do nothing to him; is that what you saying?

ADC (Maj Mori): You could turn him over to South Vietnamese for prosecution.

PO: Amazing. Okay. It wasn't a law of war though?

ADC (Maj Mori): No, it was not an international armed conflict. The same way when the United States was helping the Contras fight against their established government, we were not in international armed conflict in Nicaragua.

PO: Okay.

ADC (Maj Mori): Right, we weren't. Now, we may have been funding the Contras and directing what they did, but it didn't rise to a level of international armed conflict because there weren't two states and in that definition erred to the United States' benefit. Now, that is what we are talking about here. What is the objective definition? It is not whether there is a war or whether it's whatever descriptive word -- we are in a conflict. But it is not the legal definition. There is a distinction. There is a legal distinction on what an armed conflict -- international armed conflict starts and the law of war begins applying to when the international armed conflicts ends and the law of war stop applying. It also -- there is a distinction versus what is required in the law of war and what we may do as policy.

There is a distinction. And when this war ended, the international armed conflict ended; so did the right to retain individuals pursuant to the Geneva Convention allows you to detain people to the end of hostilities. And those hostilities ended and the international armed conflict ended. And when it ended, the U. S. could have prosecuted Mr. Hicks or had to release him. And even if we used -- the day from Mr. Schmitt, June 2002 is the end of the conflict. The government did not began prosecuting him for almost a year later when they finally had charges against him, almost 2003, 2004 when they finally brought charges against Mr. Hicks. The conflict had ended. The law of war stopped becoming operable and the government should have either prosecuted him or released him; not waited two years. Sir, do you have a question?

CM (Col[redacted] Are you done with this argument?

ADC (Maj Mori): Yes, sir, that's fine. I can end it, sir.

CM (Col[redacted] It appears that your fundamental assumption here is U. S. involvement in hostilities with the Taliban is what you are using to define when the international armed conflict was occurring.

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] All your dates are based on the United States going into Afghanistan and the Karzai government standing --

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] So your fundamental assumption is you are using Taliban and the Afghan conflict to define when this international armed conflict occurred.

ADC (Maj Mori): Yes, sir, because there cannot be an international armed conflict unless there are two states. The U.S. --

CM (Col[redacted] Okay. Go down that line of reasoning and tell me then under what conditions an international armed conflict could occur without two states?

ADC (Maj Mori): It can't. That is what the Geneva Convention says. Article 2 -- Common Article 2. It requires -- to have an international armed conflict, it requires two state parties. So you can have two states and that becomes an international armed conflict. You can --

CM (Col[redacted] What did we have before we had states? Before the Westphalian system came in and created states, what did we have? Because states are a creation of modern times, right?

ADC (Maj Mori): Yes, sir, and so is the Geneva Convention, I mean, this is in '49. This is when we vote the laws and we sat down and we said this rule will govern armed conflict. And we had definitions of what an international conflict and what an internal -- we had outside renegades, like pirates and what we did was sent our military forces out and killed them. You know what? We can still do that now.

CM (Col[redacted] What laws protected the military that went out to kill those pirates? What laws?

ADC (Maj Mori): The laws of force. That might made right. That they -- there was no laws to protect them, until we got a convention on piracy. Yes, sir, we finally -- there was a convention. But I am talking about when the *USS Constitution* went over to Tripoli --

CM (Col[redacted] So what you are saying -- what you are telling me is that U. S. forces engaged in hostilities against a non-state actor are not protected under the laws of war?

ADC (Maj Mori): Under the laws of war. Now, let me use the example of Tripoli, sir. There is a pirate ship that we are after, that we are attacking. That's fine,

that just our -- which I would call now, under today's state of the law, our right to use -- under Article 51 of the U.N. charter to use self defense against that threat, right? We can destroy that pirate ship. If we then went on to Tripoli as we found out that Tripoli was supporting those pirates, and then, once we attacked Tripoli, an international conflict would begin and the full range of the law of war would apply.

Now, if we captured one of those pirates who had robbed a U.S. vessel we would take him back -- we could try him in our courts. If -- now, this is, obviously, hundreds of years ago, how it was done. How it was done is totally different. But using it as a factual scenario, the law of war, what protects me now? What protects us right now. Does the law of war protect us? Does -- is it a violation of law of war if a U. S. service member kills another U. S. service member? No, it's not. It's just a crime that's not tried by military commission because it didn't violate the law of war. This court has a special jurisdiction of charges and offenses. It's not a worldwide court that has -- that can try all different type of offenses. It can try offense against the law of war. To have the law of war apply, the conflict that we are in began October 7th when we invaded Afghanistan and started bombing and it ended either at the initial empowerment of Karzai -- released in June 2002, when Karzai fully took over. But you got to have a violation within that time period to be against the law of war, sir. It's just like, sort of, crimes against humanity are not in this Commission's jurisdiction. It is a total different section of crimes. Just like anti-trust violations aren't in here. It is a different bodies of law that don't provide jurisdiction and if Mr. Hicks, during an armed conflict, injured a civilian then that would be a violation. It would be an acceptable charge, attacking civilians during an armed conflict. No problem. But we can't, after the conduct, try to bend the rules to try to make the conduct fit offenses that don't exist.

PO: Okay. So now, we are going to listen to Major --

CM (Col[redacted] I have one question, sir.

PO: Okay.

CM (Col[redacted] Major Mori, do you think that the U. S. forces and coalition forces that are currently deployed to Afghanistan are subject to and protected by the law of land warfare; yes or no? You can give answers to both questions. Are they subject to them?

ADC (Maj Mori): Are they subject to them?

CM (Col[redacted] Yes.

ADC (Maj Mori): The full range of law of war, no.

CM (Col[redacted] All right. So you don't think they are subject to them. Do you think they are protected by them?

ADC (Maj Mori): No, sir. Can I --

CM (Col[redacted] So you think the same thing would apply to the forces that are deployed to Iraq right now that are conducting SASO operations?

ADC (Maj Mori): Iraq is a different situation, sir. It is very fact specific. I just briefly addressed Afghanistan and Iraq. I will compare and contrast. When we invaded Afghanistan and we invaded Iraq, we were involved in a international armed conflict. When the Karzai government put into power --

CM (Col[redacted] I am not talking about then, I am talking about now.

ADC (Maj Mori): Now it is --

CM (Col[redacted] Now in Afghanistan.

ADC (Maj Mori): Now in Afghanistan it is whether we would be --

CM (Col[redacted] The U.S. troops --

ADC (Maj Mori): -- probably still internal armed conflict ongoing and it would be protected internal armed conflict because we are assisting the Iraqi government with its internal armed conflict.

CM (Col[redacted] You don't think the U. S. forces, currently deployed to Afghanistan are subject to the law of land warfare? You said no.

ADC (Maj Mori): Sir, you said -- yes, under internal. The laws that apply to an internal. Obviously, there is a distinction as well of what is required under the law of war and what is directed by policy.

CM (Col[redacted] Okay.

ADC (Maj Mori): What is -- there is a distinction there, sir, and what is governed -- and certainly in how we conduct operations. We can choose how to conduct an operations and we can have our own rules of engagement that modify or might be more restrictive then the laws of war, but that is sort of policy decisions versus what is the actual law of war. And the law of war doesn't control that much. It is very limited. The ICC gives a good example of conduct that it would find to violate the law of war. And it's not that much,

only a couple pages there.

CM (Col[redacted] So American forces in Afghanistan right now are not protected by the full blanket of the laws of armed conflict?

ADC (Maj Mori): Protected from by what, sir, if I can ask because I want to make sure focus the answer on?

PO: Perhaps, what Colonel[redacted] made -- you don't mind me interjecting, do you?

CM (Col[redacted] We talked about this, go ahead.

PO: Perhaps, Colonel[redacted] might be referring to is if a solider in Afghanistan were to shoot up a house for fun and grins, he is a criminal; right? Would you agree with that?

ADC (Maj Mori): Yes, sir.

PO: Thank you.

ADC (Maj Mori): Yes, sir.

PO: If a solider in Afghanistan were to shoot up a house because there were people bringing fire upon him, then as a belligerent, which is what you say we have to be under the law of war, he would have the right to do that; right?

ADC (Maj Mori): Yes, sir.

PO: And he is not a criminal?

ADC (Maj Mori): Correct, sir.

PO: Is that were you going, Colonel[redacted]

No audible response.

PO: And I believe what you have told Colonel[redacted] or perhaps we heard wrong, was that he doesn't have the protections of being a belligerent.

ADC (Maj Mori): We have, right now, if we knew that there was some terrorist building -- and I don't want to bring up Canada, again -- but in Canada, we could use our right, and we knew they were going to attack us, we could use, under the right of Article 51, self-defense right, to attack that threat. We have the right. We're employing force in self-defense, which is a defense in of itself

from combat immunity. Is that what the --

CM (Col[redacted] It's a little bit off the beaten path.

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] But it goes to the heart of the issue that has been bothering me since I started reading this stuff, weeks, days ago.

Let me give you a hypothetical situation and ask you to give your opinion about this particular situation. State A and state B are in international armed conflict by your own definition.

ADC (Maj Mori): Yes, sir.

CM (Col[redacted] An illegal combatant enters the battlefield, and this conflict is taking place in state B's territory. An illegal joins the battlefield and attempts to shoot soldiers from state A. You are telling me that that individual who entered the battlefield and is an unlawful combatant is subject only to the laws -- domestic laws of country B, as I understand you argument from yesterday.

ADC (Maj Mori): They would be --

CM (Col[redacted] Treaties not withstanding.

ADC (Maj Mori): Yes, sir. Not withstanding. He would be subject to the laws in country B.

CM (Col[redacted] Okay. What if --

ADC (Maj Mori): Okay. Sir, let me ask -- let me throw a little bit back. Let's say that unlawful combatant came to country B and shot some one from country B. He still would be subject to that law because that is were the offense occurred --

PO: Why don't we stick with Colonel[redacted]question's first?

CM (Col[redacted] Fair enough, and I understand that.

ADC (Maj Mori): Yes, sir.

CM (Col[redacted]: What if country B has no law that says it is illegal to shoot country A's soldiers. Who protects country A's soldiers? What law protects country A's soldiers?

ADC (Maj Mori): Yes, sir. I mean, there could be federal law.

CM (Col[redacted]): What laws?

ADC (Maj Mori): The law of country A. The federal law, criminal, statutes that apply extraterritorially.

CM (Col[redacted] Not the laws of armed conflict? There is an armed conflict going on. State A's forces --

ADC (Maj Mori): Yes, sir, I --

CM (Col[redacted]): -- are engaged in a international conflict.

ADC (Maj Mori): There is nothing wrong with shooting -- there is not a law in violation of shooting a solider. It is not a violation of law of war. It's only -- now if I use --

CM (Col[redacted]): If you're an unprivileged belligerent?

ADC (Maj Mori): That's not a violation of law of war, sir. I know it seems counterintuitive, but you have to -- sir, look at the statue --

CM (Col[redacted]): So who --

ADC (Maj Mori): Can I --

CM (Col[redacted] So, again, who is responsible for trying this unlawful combatant, and under what laws?

ADC (Maj Mori): It could be country A under it's federal laws --

PO: There are no federal laws in existence.

ADC (Maj Mori): There is no federal laws in it. What country does the unlawful combatant come from? Country C?

PO: They don't care.

ADC (Maj Mori): Then --

CM (Col[redacted] Then there is a loophole, and literally he can get away with murder.

ADC (Maj Mori): No, sir.

CM (Col[redacted] Literally.

ADC (Maj Mori): No, sir.

CM (Col[redacted] And figuratively.

ADC (Maj Mori): No, sir. Okay. The point is, first of all, the law of war doesn't criminalize shooting a solider. And I didn't really understand until I started reading the documents. Because everything in the ICC statute that I just gave you, sir, really highlights the terminology used and why. What war crimes means --

PO: Are we a signatory to ICC?

ADC (Maj Mori): No, sir, it is just a good comprehensive. I could find the same -- I could find the same language in the other documents just not all in one part.

CM (Col[redacted] Well, if you are going to make your case, then I ought to apply that law. You ought to make sure that we are signatory to it. Otherwise, to me it is just an opinion from an expert on some other body of international law, if the U.S. is not signatory.

ADC (Maj Mori): Okay. I will get that.

CM (Col[redacted] Because this is a U.S. Military Commission, this is not an International Military Commission.

DC (Mr. Dratel): Which limits its jurisdiction, not expands it.

CM (Col[redacted]: I understand that.

DC (Mr. Dratel): And when you talk about loopholes in the law, that doesn't mean make one up later to penalize someone. If a U.S. citizen -- forget a solider -- if any U.S. citizen is in a country that does not punish a certain type of offense against them and they are the victim of that offense, the only recourse they have is if United States law were to apply extraterritorially to that conduct. That is very limited concept. The general rule of extraterritoriality is that Congress must make it express in the law. There are other aspects of extraterritorial jurisdiction that are policy. And again, that goes to certain aspects of nationality. So for example, if one is attacked as an American, because they're American, that may confer jurisdiction on a U.S. court; not, a U.S. Military Commission, a U.S. court and that is the basis for the jurisdiction in the embassy bombing case for the killing of United States citizens in and around the embassy. Because that conduct occurred in entirely in another state.

It could have been prosecuted in Kenya or Tanzania -- or not in Tanzania,

because no U.S. citizens died in Tanzania -- but it could of been prosecuted in Kenya. The only basis for United States jurisdiction was the concept passive personality jurisdiction; which is that because they were United States citizens and attacked for that reason, United States criminal law could assert jurisdiction over them. We do not have universal jurisdiction. That is a concept that does not exist. And think of it in the context of symmetry and reciprocity. That protects us here from other people's laws that we don't like. We cannot go around the world asserting our laws wherever we feel like it because we don't like what they do, because they don't have the same law set of laws that we do. Just as we reject the notion that someone is going to come here and impose on us a standard that we do not believe. And that is why laws are confined to jurisdiction, to sovereigns. And in the context of what occurred before states, that is why there is the concept of the Geneva Convention, was to codify this among states. In the international law there is no stateless place. The only people who say there is a stateless place is the United States government, which said Guantanamo was a stateless place, was a place without law. And that was rejected by the United States Supreme Court. That is why Mr. Hicks has rights. It's only the government that would say that there is a lawless place in the world; there is no lawless place in the world. There are sovereigns that exercise jurisdiction. And whether we like it or not, they have their own set of laws --

PO: Okay --

DC (Mr. Dratel): And if we can assert jurisdiction we do, but it is limited.

PO: Okay. Are you prepare to argue on 17 and 3, now?

ADC (Maj Mori): Sir, if I could just answer Colonel [redacted] real quick question on that. Sir, the whole issue, again, with why it is not a violation of the law of war, is most of the documents, or all the documents written talk about acts -- prohibits acts committed against a protected person under the conventions. Soldiers, military officers, whoever it is, is not a protected person until they are either wounded, surrender, become a prisoner of war, or somehow, lay down their weapons and surrender. That is when the law of war then kicks in and provides protection. That is just the state of the law under the law of war. It offers them no protection, it does provide them with immunity from the hostile acts they commit. When they shoot someone, it's murder, because it deprives them of a defense, immunity from prosecution. But it doesn't protect them from being targeted for attack --

CM (Col [redacted]): By an unlawful combatant? By an unlawful combatant who doesn't know the difference between protected and unprotected because you have already told me that the laws of war do not apply to him?

ADC (Maj Mori): I know it seems odd, sir, but that is how it is. We can try to rewrite it, but that is exactly what it is. And I am -- sir, I'm not coming up with this novel theory. Yoram Dinstein did. He used to be the Stockton professor at the Naval War College. He's written books about it. It's not me, I couldn't come up with this if my life depended on it -- I have to read and try to learn. I know it seems counterintuitive, but if you look at every -- every convention it talks about attacking civilians, or attacking protected people. There is no restriction. The only restrictions against military officers or soldiers is you can't use treachery which is perfidy, which is dressing up like the Red Cross, jumping out of the back and attacking them. And an unlawful combatant did that, law of war violation --

CM (Col[redacted] Or the methods.

ADC (Maj Mori): Or the methods.

CM (Col[redacted] I understand that.

DC (Mr. Dratel): We are not saying that the law of war does not apply to an unprivileged belligerent, however that is defined; the problem is, it is the same law of war that applies to protected belligerents. It is the conduct, not the status of the person doing it. And we are turning again to this concept of unprivileged belligerency, being something unlawful in itself is not. What it does is it affects what someone can do with them on the field of battle, and once they capture them with respect to treatment under the Geneva Convention. Not a question of whether there conduct violates the law of war. It is the same law of war that governs a soldier as an unprivileged belligerent. The violations are both the same.

PO: Okay. Are you prepared to argue -- no. Are you prepared to respond to 17 and 3?

P (LtCol[redacted] Yes, sir.

PO: Okay. Well do that.

P (LtCol[redacted] Well, gentlemen, the defense proposition seems counterintuitive because it is wrong. The law of armed conflict does not ignore factual circumstances. We agree with the statement by the defense that LOAC, the Law of Armed Conflict, looks to factual circumstances. Does armed conflict exist? You look at reality, you open the eyes to the real world and determine whether what you see amounts to armed conflict.

Tadic, the International Criminal Tribunal for former Yugoslavia decision, laid out a definition that even in the defense briefs that's acknowledged that that's an authoritative definition of when armed conflict exists. Now, that's

1 the question of law that we have here, what definition you are going to
2 apply. And you are going to see different arguments and different
3 definitions of that. But what the case, *Tadic*, says is an armed conflict
4 exists whenever there is resort to armed force between states, or protracted
5 armed violence between states, or protracted armed violence between
6 governmental authorities and organized armed groups. International
7 humanitarian law applies from initiation of such armed conflicts, extends
8 beyond the cessation of hostilities until a general conclusion of peace is
9 reached, or in the case of internal conflict where a peaceful settlement is
10 achieved. So there is a *Tadic* decision there for you.
11
12 That *Galic* decision, which we talked about it, it talks about that definition,
13 it applies it. And it is interesting because in *Tadic*, they had to apply a
14 situation that was a little bit different here because we had different nations
15 that were in conflict with one another. Former Yugoslavia breaks up, and
16 now there are these different little places, and they're fighting one another,
17 and they have to decide do we let this be a law of war situation, or do we try
18 to apply international humanitarian law or some kind of humanitarian law to
19 this situation. And that's where they're struggling with the definition. They
20 come up with one, they define it. They say, in fact, the reality on the
21 ground is we've got a war. The reality will be presented to you at trial.
22
23 The defense, in a page-and-a-half brief, attempts to leap to a conclusion that
24 armed conflict does not exist. But that is part of the problem we have with
25 some of these experts. Not only do they try to tell you what they think the
26 definition is, but they attempt to apply that definition to the facts of this
27 case, and that is wrong. You should be taking a definition, you should hear
28 evidence, and it is within your province then to apply law to the facts that
29 have been presented to you, and you come to a conclusion. Professor
30 Schmitt, nor anybody else should be deciding for you that armed conflict
31 started on date X and ended on date Y.
32
33 These are law professors, they can give you their opinions on the law, but
34 that is all they are, their opinions on the law. And be careful with the
35 proposition that Professor Schmitt gives you. What he says is, you can have
36 a situation where there is self-defense. We can call this "self defense".
37 Okay. We agree the United States can defend itself against terrorists. But
38 he says that is a different situation where the laws of war don't apply. So
39 we can send people out to locations to track al Qaida, and we can be in a
40 shooting match with them, and this can be protracted violence, but the laws
41 of war do not apply. And one of the people he cites for this proposition, in
42 a foot note, is himself, an article he wrote himself. So that is why we say be
43 careful on how you view the views of law professors. They don't make law.
44 Professor Schmitt telling you, October 7th is when this started. That is not
45 a valid source. What he can do is he can give his opinion, and then he can
46 say this is why I think this is so under the sources. Read that, that's fine, but

take it for what it's worth. Look to the sources of international law.

Armed conflict existed long before the conventions. The law of nations existed before the conventions. That is why in the 1795 opinion, a Supreme Court Justice is speaking of the law of nations and how an unpriliveged belligerent committing acts of hostility is violating that law of nations.

It is important to understand the role of these conventions. We have the emergence of nation states. We, throughout that time, have customs of law that say what belligerents can and can't do, and that unprivileged belligerants cannot participate, and that they can be punished if they do participate. At some point a group of nations gets together, and this group of nations says things have gone too far. Reality says there will still be war. But let's us nations sit down and put some limitations, some self-imposed limitations on armed conflict. And so what they say -- and you can read the Geneva Conventions for yourselves, you can read what it says about when it applies -- but what these nations are saying is when states, when we signatories are involved in an armed conflict, we won't do these certain things. We will act within certain norms. They are not denying that there cannot be armed conflict outside of that. Nowhere in the Geneva Conventions can one find that it says this is the definition of armed conflict - anything outside of that definition is not armed conflict, and the laws of armed conflict don't apply.

1865, we have talked about this before. Attorney General Speed, talks specifically on this point. And that is where that quote that we cite comes in, when impudent wretches become so powerful that the normal civil tribunals cannot handle the situation. Armies are called out. The laws of war are invoked. What he is saying is that a group can pose such a threat. And to try to put that in a box and say well that was internal, but if it's external we can't do that. Well, that ignores piracy where, again, the laws of war are invoked and they do apply.

What the defense has told you is that on the battlefield, when the accused was there as an unlawful belligerent, that we could have shot him and killed him. That option was available, and it was. The laws of humanity dictate that instead of doing that, we can capture him, we can detain him, and we can try him under the laws of war. And the defense, in all of their arguments that they just had with you, continue to try to throw that tarp over those cases. *Quirin, Rasul v. Bush*, in which the accused was a petitioner, where they affirmed the right of the United States to capture an unlawful enemy combatant, to detain him as an unlawful enemy combatant, and for a military commission to try him as an unlawful enemy combatant.

So, gentlemen, the question of the definition of armed conflict is one that you will have to continue to grapple with and understand. We will point

you toward *Tadic*. And during trial, when you hear evidence we will demonstrate that the armed conflict, in fact, is broader than the box the defense tries to put it into; that it can be with a non-state actor because it is with a non-state actor. That when an organization becomes so powerful that it starts to act like a state, and is waging war, and it has branches of it like a military -- has a military branch, and political branch, and a fundraising branch, and when that gets to the point where our civil processes can no longer deal with this, it is armed conflict. And we say, that back in 1993 or so, when this organization began to state that it was waging war against the United States, and when they started to act in consonance with that in a protracted campaign, that that is armed conflict, international law does not ask you to turn a blind eye to that. International law is flexible enough that you have the principles that you can apply that you can find that there was armed conflict. We ask that, on the issue, the final issue of when armed conflict began and when armed conflict ended, you wait until you have heard the evidence.

PO: Thank you. Are you going to split or are you --

DC (Mr. Dratel): Split.

PO: I am talking about Major Lippert and Major Mori. They are the ones that argued.

ADC (Maj Lippert): I am going to refer to Major Mori for this.

PO: Okay. Great so you are not going to split.

ADC (Maj Mori): Members, the government argues the absence of evidence supports their position. This smoke and mirrors the government was trying to utilize here is to distract you from the reality that the law of armed conflict, the law of war, the definitions of what -- when an international armed conflict and an internal armed conflict are defined in the Geneva Convention. Common Article 2, deals with the definition for international armed conflict, armed conflict which arises between two or more high contracting parties even if the state of war is not recognized. Common Article 3, in a case of armed conflict, not of international character, occurring in territory of one high contracting party.

And you can look at *Tadic*, and it explains the same thing. It talks about this armed conflict in Yugoslavia. But if you read the whole opinion you see that a lot of the parties had signed the agreement applying both different bodies of law from the international armed conflict and from internal. It is not very supportive, it just talks about the one huge definition. And the government provides that to you trying to mislead you, like there is just one definition. There's not, there's two definitions; one for international and one

for internal, and that is why we got the part from the -- Judge Cassese, who was there. There is not and cannot be an international armed conflict unless there is an opposing state. That is the state of the law, embodied in the Geneva Convention.

Any foundation built on this new theory, that the government got this professor, you see in the brief, came up with in 2004 when he wrote his article, three years after the alleged offenses, this new theory that we have now been in war since 1993 or whatever, why does the government have to do that? Because with out it, they don't have any cases. They don't have any cases. And they have to come up with a novel theory because David Hicks did not violate the laws of war. No matter how much the government gets up here and tries to convince you what a noble cause it would be to bend the law, that the end justifies the means, that is not your duty. Your duty is to follow the law and determine the law, not through passion or prejudice, but through reason and common sense. And the government's position is contrary to the Geneva Convention's, it is contrary to the state of the law for the past 50 years, and it's a nice, novel theory; but we're talking about people's lives, and we're talking about providing David Hicks a full and fair trial.

There's consequences for people if they violate the law of war, and that is what this Commission is about. It is not about changing the law to fit someone into a peg so that we can have some sort of satisfaction. No matter how noble the cause we say, it doesn't justify changing the rules and bending the law to achieve some end.

PO: Commission will be in recess until 1310.

The Commission Hearing recessed at 1231, 2 November 2004.

The Commission Hearing was called to order at 1329, 2 November 2004.

PO: Commission will come to order. Let the record reflect that all parties present when the court recessed are once again present, except we have got a new trial counsel it looks like, and a new court reporter.

P (LtCol [redacted] Yes, sir, Sergeant [redacted] is now back on the record as court reporter, and Lieutenant Colonel [redacted] has joined us at the prosecution table. He is prepared to state his qualifications if that's necessary.

PO: Wasn't he listed on the one that listed Commander [redacted]

P (LtCol [redacted] He was, yes, sir.

PO: Whatever, he already was, okay.

P (LtCol[redacted]) Yes, sir.

PO: But he can state his qualifications if he wants to.

P (LtCol[redacted]) Not unless it is necessary, sir.

PO: Okay. You ready to go to what, D 4?

ADC (Maj Lippert): D 4 and D 7 are combined because they both have --

PO: Okay. Is this going to be you, or you and Mori, or what?

ADC (Maj Lippert): Sir, that will be -- this will be me. It shouldn't be that long. I know that you are interested in moving things along.

PO: No, that's not correct. I just want to know who's doing it.

ADC (Maj Lippert): Nevertheless, we should not be that long.

PO: Okay.

ADC (Maj Lippert): Because the substance is much the same as the prior two arguments regarding when the conflict in Afghanistan has ended. But before I get into that, I think it's important to note that both of these motions deal with Mr. Hicks' rights to be afforded procedures leading to a tribunal of some sort in a timely manner. Speedy trial motion under Article 10, a speedy trial perhaps in federal court, speedy trial in front of the military commission. And it matters not one whit what kind of tribunal we're talking about, whether it be Article 10, which the defense contends -- excuse me the government contends does not apply, or be it a military commission, or it be under international trial. Mr. Hicks' rights to a speedy trial, to a speedy process, to have charges presented to a court to be adjudicated have been utterly violated.

He's been sitting for the past almost three years here in Guantanamo, 18 months of that inside a small box not much larger than the court reporter's table there. Up until eighteen months ago -- excuse me -- up until a year ago, June 30th 2003, he had never before seen a charge sheet. He had never before been presented with charges. He didn't know what he was there for. He was never informed of it, as would be his right under any tribunal whether it be a military commission, whether it be international law, whether it be the federal law, whether it be the Uniform Code of Military Justice. It doesn't matter which tribunal or what law the government says applies or doesn't apply.

If we were in front of a court-martial, a defendant or an accused who sat inside -- in pretrial confinement for three years without being tried would be released. Charges would be dropped and he would be released -- for sitting in federal court the same thing would happen. If we're sitting in front of any international court, we wouldn't have even gotten here. Before, if it took almost three years, or two years to get charges to the accused, it would have been dismissed out of hand for failure to provide speedy process. It's a fundamental right.

The only excuse that the government has for holding Mr. Hicks for three years -- almost three years -- without any process is that under the law of armed conflict they say they can hold any enemy combatant, unlawful or otherwise, until the end of the conflict. And then they can do what they want with him. The end of the conflict. They've said the conflict started in 1993, they said it continues to go on now. They have not set a closing date for the conflict. Indeed, the government contends that it will go on as long as it takes to get rid of al Qaida. It could go on forever.

It took 50 years -- the President has talked about it, this is a long protracted struggle. It took 50 years to defeat communism and have the Berlin wall come down. Are we talking 50 years for Mr. Hicks, for the other several hundred people in Guantanamo? They could be held. Is this a death sentence because of a protracted conflict? No, it has to come to an end, there has to be some check on the government's power to hold someone forever. And that check comes from the law of armed conflict.

When a conflict is over, you either release, repatriate, or try someone for a crime. In this case, the government's going to say that they're trying him for a crime. Well, it took three years to get here. That is unacceptable. It violates his rights, it violates his rights in any forum. It especially violates his rights in this forum. Three years to get to this point.

Defense's position is that this -- there is no armed conflict there -- international armed conflict with Al Qaida. It is the defense's position and that there will never be an international armed conflict with al Qaida and that the laws of armed conflict do not apply. Therefore, he should have either been tried by the TISA [ph], the interim authority in Afghanistan or under U.S. law, in a U.S. court and given appropriate process; not sat in a cell for two-and-a-half years before being shown a charge sheet. The law of armed conflict does not apply, therefore the domestic law applies.

It's interesting to note that in the prosecution response to D 8, on page two -- D 8 is the motion to dismiss for denial of fundamental rights. In the prosecution response, on page two, at paragraph G, the government states as a fact, paragraph 3 is facts, number G is, on February 7-th 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 Qaida in Afghanistan, or elsewhere throughout the world because, among other things, are the reasons al Qaida is not a high contracting party to the Geneva Conventions". The President's memorandum, dated February 7th 2002 attached. That is the government's position -- or the defense's position in toto for this motion.

CM (Col[redacted] What paragraph are you reading from?

CM (Col[redacted] There's two Gs.

CM (Col[redacted] Golf?

ADC (Maj Lippert): Yes, sir.

CM (Col[redacted] It is mismarked. There are two Gs on that page.

CM (Col[redacted] Okay. The bottom of page 2.

ADC (Maj Lippert): Excuse me, it would be the second G, yes, sir. Thank you, sir, G, H, G.

The President of the United States himself had said that the Geneva Conventions do not apply here. If the Geneva Conventions do not apply, the law of war does not apply. The law of war is the only excuse -- the law of armed conflict is the only excuse for keeping Mr. Hicks in prison for three years. If it does not apply, he should have been processed under domestic law, or at least in compliance with international human rights which say you get a trial, you get processed, you get a charge sheet within days of being held.

If an American citizen was held by a foreign country for three years without charges, we'd be up in arms. We'd be screaming to have that person back, and yet we are doing that to a citizen of Australia right now. He's been denied his fundamental right to process, and it is up to this Commission to remedy it. And any jurisdiction, in any form, in any tribunal, the remedy for such flagrant violation to his rights to process under whatever law you choose to apply would be dismissal. And that's what the government -- or the defense asks for today. Thank you.

P (LtCol[redacted] Sir, we'd like to start off with the Geneva Conventions because we believe the defense is misconstruing the Geneva Conventions. The United States is bound by the Geneva Conventions; al Qaida is not protected by them. There's a difference. Remember there was a law of nations and a law of armed conflict before the Geneva Conventions came into effect. The

Geneva Conventions took certain categories and protected them. They left unlawful belligerents out on their own to be dealt with the way they've always been dealt with. So al Qaida, by its very nature, cannot be protected as if they were lawful belligerents.

When the accused was captured on the battle field in Afghanistan, he wasn't in pretrial detention. There were no charges because he was being detained as an unlawful enemy combatant. The fact that the defense cites these rights, quote unquote, only demonstrates that they are going to the wrong basket to look for these rights.

The Supreme Court of the United States has said the United States has the right to capture, detain, and to try an unlawful enemy combatant. The defense talks about process. The defense talks about lawlessness. They ignore the fact that this has been the law since there was war, that you can capture enemy combatants, lawful or unlawful, and detain them until the end of hostilities and past the end of hostilities if they're being lawfully prosecuted.

They ignore that *Quirin* case and holding that and they ignore that the accused was the petitioner, was one of the petitioners, in *Rasul v. Bush* where, in fact, he is exercising his right to bring this to a federal court. And the fact that the Supreme Court has ruled that, statutorily, the accused may have his detention looked at by a federal court, and it is being looked at. They ignore the fact that his detention status has been reviewed administratively, is being reviewed in federal court.

So the accused's detention is pursuant to the law of armed conflict as an enemy combatant, unlawful enemy combatant. He does not then have the right to be notified of the charges right before a magistrate. Those rights simply do not apply; and, in fact, they illustrate very nicely that they are going to the wrong body of law. Thank you.

ADC (Maj Lippert): Members of the panel --

PO: Wait a second. Are you going to do seven in response?

AP (Maj[redacted] Yes, sir.

PO: Okay. I apologize, Major Lippert.

ADC (Maj Lippert): Thank you, sir.

PO: He's doing the speedy trial.

AP (Maj[redacted] Gentlemen, the accused does not enjoy a right to speedy trial under the

Article 10 of the Uniform Code of Military Justice because, as we stated in our panel selection motion, certain Articles of the Uniform Code of Military Justice don't apply to military commissions. And that is the case here. Where Congress intended, they said military commissions. In Article 10 there was no mention of military commissions.

Now, not applying the Article 10 speedy trial rule to military commissions just makes perfect sense. By this, I mean when nations are at war or in an armed conflict, there is a preference for detention against hostilities until the end of hostilities. When nations are not in armed conflict, which is the normal court-martial military justice process, there is a preference against detention. That's not the case here.

In the present case the accused was captured and is an unlawful enemy combatant. He's never been in a pretrial confinement context to even begin an Article 10 analysis or speedy trial analysis. Footnoted in the defense's brief, or in their argument, is reference to the ICCPR. The U.S. Supreme Court has already stated in the U.S. -- in the *Sosa v. Alvarez* case, that that law does not bind the U.S. In fact, it noted that that was a nonself-executing statue and does not create rights or obligations in U.S. federal courts.

Gentlemen, the bottom line is, Article 10 of the Uniform Code of Military Justice does not apply here. There is no speedy trial right that applies to the accused. We can't even begin a speedy trial analysis because he's never been detained as such. Thank you.

PO: Now you can have both of them.

ADC (Maj Lippert): Thank you, sir, I am not going to address them, Major [redacted] remarks, because they are adequately discussed in my brief regarding the application of the ICCPR. The bottom line is that the government cannot pick and choose which aspects of the law of war it wants to apply. It's either all of it or none of it. The law of war, the law of armed conflict is espoused in the Geneva Conventions; it is right there. It says when things start, it says when things end. Presidential proclamations are political rhetoric. They do not make law. The President of the United States cannot declare when an armed conflict exists for purposes of the law of war. For purposes of domestic law, he can; but not for purposes of the law of armed conflict. That is governed by international convention which is the law of the land, which is the law that governs this court. The law of armed conflict says when a conflict is over, you release, repatriate, or try. And if you're going to try him, you need to try them with process. Speedy process designed to get to a tribunal.

The United States Supreme Court in *Rasul v. Bush* – to which Mr. Hicks is

a party to by the way -- has nothing to do with whether a conflict exists or not in Afghanistan or with al Qaida. It specifically does not rule on whether there actually exists a conflict. It says if a conflict exists, then such things happen, the government can do certain things. It doesn't rule on whether a conflict exists. It's part of the *Rasul v. Bush*, it is part of the library. You can read it. It is very, very clear what it says and what it doesn't say.

This issue is governed by the Geneva Convention. It's governed by -- well, I guess the President agrees that the Geneva Conventions do not apply, therefore they should be given process under domestic law. Domestic law or international law demands speedy process. He's been denied that, the charges should be dismissed. Thank you.

CM (Col[redacted] Major Lippert?

ADC (Maj Lippert): Yes, sir.

CM (Col[redacted] On page six of nine -- or actually I guess I should ask Lieutenant Colonel[redacted] On page six of nine of your response --

PO: To what, D 4, Colonel?

CM (Col[redacted] Yes, to D 4. In paragraph -- whatever the subparagraph is -- 3(a) it says the CRST was done on Mr. Hicks on September 2004. Can we get a copy of that?

P (LtCol[redacted] Sir, we just received a copy of that today and we haven't yet provided that to the defense. We could provide it to the defense and then submit it.

DC (Mr. Dratel): I would object -- I would object strenuously to any proceedings to which he does not have counsel, which he wasn't even present at that was introduced in this court to poison this panel. I think that would be outrageous.

P (LtCol[redacted] We would disagree.

DC (Mr. Dratel): I think it has no bearing on. I am not --

PO: Okay, stop. Stop both of you. One talk, one listen. I don't care which one. You start first, Mr. Dratel. Let's talk, whatever you want to say.

DC (Mr. Dratel): First of all, that proceeding is -- if you put that in this proceeding, what you have done is make a prejudgment before we've even had day one of any trial in this case. That is the problem with letting proceedings like that go forward is because they prejudice the outcome of this case. They will prejudice your opinion even though, you know, we wanted to be there and

we asked to be there. They wouldn't let us be there. We weren't even allowed at Guantanamo. They specifically forbade the defense from coming down that way for the first time since we started coming down.

Mysteriously, all of a sudden that week was off limits. You know what that week was, that's the week that they did the CSRT panels for the four defendants before a Commission. That's fair, that should be in front of you. What happened to a proceeding like that? And Mr. Hicks asked to talk to his lawyers. No, no protection against self-incrimination, no protection or attorney/client privileges. Neither an attorney, a representative of the adversary, of the military to come in and state his case. It's preposterous.

PO: Okay. What do you want to say?

DC (Mr. Dratel): It is --

PO: No, that's enough. What do you want to say?

P (LtCol [redacted]) Well, first we think that the defense has raised the issue that there's not been some process. The defense has specifically raised that his status is in question as an unlawful enemy combatant, which is a separate question of whether he's guilty of crimes triable by a military commission, when, in fact, there have been processes, and this is one of them.

Now, the issue is that a process has occurred and it was found that he is an unlawful enemy combatant. If we could stipulate to that, then maybe you don't need to see the documents. But the fact is that the process has occurred and/or has taken place. And just to address the issue of counsel, administrative process --

PO: Okay. Thank you. Okay. But, Mr. Dratel, you and Colonel [redacted] are good to go. If you want to stipulate that there was, in fact -- whatever, I don't care about what the rights are right now. Yesterday one of you all said that he hadn't had a status review. Someone said that. If you want to stipulate that there was, in fact, a CSRT and that he was found to be whatever it is, that is fine. And we won't look at it. So you all can talk after this session is over.

Okay. You all deal with that. Now, go on, I'm sorry.

CM (Col [redacted]) Okay. Major Lippert, I have just one more question.

ADC (Maj Lippert): Yes, sir.

CM (Col [redacted]) I didn't think that would cause that -- this one I think is much simpler. In your motion you said that habeas corpus is pending in federal court?

ADC (Maj Lippert): Yes, sir.

CM (Col[redacted] When do we think that is going to happen?

DC (Mr. Dratel): Right now, and again, the disingenuousness of the government's argument is somewhat breathtaking. And I will say -- and I say that carefully considered because the government has moved in the federal court to dismiss the habeas petition saying that Mr. Hicks has no rights and no basis for the habeas petition; not withstanding the decision in *Rasul*, and not withstanding the decision here that he is getting all he needs in habeas petition, they're moving to dismiss it, saying you have no right to bring it.

It is now pending -- Mr. Hicks filed -- we filed our response to the motion to dismiss yesterday and a motion for summary judgment. We do not know when it will be heard by the court. We just don't know. It would be impossible for me to say for a federal judge when they want to hear it.

CM (Col[redacted] Thanks.

CM (Col[redacted] When Mr. Hicks was transferred to Guantanamo Bay, what, in your opinion, was his status, defense? What was he?

DC (Maj Mori): From what was -- we -- from what I can understand, from publicly released documents and sources, from his position a public statement was that he was supposedly an enemy combatant captured in Afghanistan.

CM (Col[redacted] Okay. That wasn't quite my question. What would you, the defense, have considered his status at that time?

PO: Okay. Before he got on the plane, he was in Afghanistan. We can all agree on that; right? Right?

DC (Maj Mori): Yes, sir.

PO: Thank you. And then he got on a plane; right? And then he was here; right?

DC (Maj Mori): Actually there was a boat in between.

PO: Well, he got on a plane. Okay. In Afghanistan, I believe what Colonel [redacted] is asking you is what do you think his status was there, before he got on the plane?

DC (Maj Mori): I would basically say first, there needed to be an Article 5 tribunal to determine his status. Are you asking what the defense's position is at this

point on what we believe his status is under the Geneva Convention? You want us to -- I think --

CM (Col[redacted] Yes.

DC (Maj Mori): Yes. I would say at this point, sir.

CM (Col[redacted] The reason for my question is you're implying that somehow his rights were violated throughout this whole period. Tell me what you think his status was so we can determine what rights and from what body of law those rights evolved.

DC (Maj Mori): Yes, sir. I will argue this way, sir: Without actually -- I will argue from both positions. If he was a prisoner of war governed, protected by the Third Geneva Convention, then he could be detained during the international armed conflict. At that the close of that international armed conflict, he should have been repatriated or prosecuted if he committed a law of war violation.

CM (Col[redacted] Okay.

DC (Maj Mori): So that is one. If he's a civilian governed under the Fourth Geneva Convention, which includes civilians who such -- who are suspected of or engage in activities hostile to the security of the other state, that is detain them. They must be, they can be detained, but they need to be provided -- treated humanely, and in the case of trials, should not be deprived of the rights of regular, fair, trial prescribed at a present convention.

And they must receive the full privileges and rights under the Fourth Geneva Convention as soon as -- an earliest date consistent with the security of the state. And if you read that, the commentary, it's basically interpreting that the security of the state cannot conceive or be put forth for a reason of depriving such persons of their benefit of other provisions. Such as, they are being treated -- they need to be treated humanely or their right to pending proceedings before a Commission in the sense that they need to -- it needs to occur.

There is no right to detain. If you detain a civilian suspected of committing a hostile act, they need to be tried or they can be, in turn, within the country of the conflict. Under the Geneva Convention, you cannot remove civilians, individuals that are not thought to have prisoner of war status from the country. To do so, as is listed in the -- let's cite it correctly. To do so, to release -- sir, I just want to make sure I say -- quote it correctly for you. Just one moment, sir.

To the transfer, directly or indirectly, by the occupying power, its own

civilian population into a territory it occupies, or the deportation or transfer of all or parts of the population within an area or territory is a war crime. So an individual who falls under the Fourth Geneva Convention should not have been removed from the territory. The only people that can be removed from a territory without it being a war crime are people that are held in prisoner of war status.

CM (Col[redacted] Would you say that -- did the beginning of that say the occupying power?

DC (Maj Mori): Yes, sir.

PO: To accept your view then, we're going to have to find as a fact that Mr. Hicks took no active part in the hostilities; right?

DC (Maj Mori): No, sir. No, sir, because the Fourth Geneva Convention allows people who would be in a protected status, civilians, the Fourth Geneva Convention says right there in Article 5 --

PO: Well, I'm looking at 3, sunshine.

DC (Maj Mori): Yes, sir, Article 3.

PO: Yes, 3-1. It reads persons taking no active part in hostilities; okay? These conventions are written to protect people; okay? What are the four conventions, Major Mori?

DC (Maj Mori): One, two, and three, four. Shipwrecked, sea, prisoner of war, and civilians.

PO: Okay. And so what this convention says is if he's a civilian, then this would protect him; right?

DC (Maj Mori): Yes, sir.

PO: Okay. Who is it defined as not being a civilian there in Article 3-1? It says persons taking no active part in hostilities.

DC (Maj Mori): Sir --

PO: Go on. I am listening.

DC (Maj Mori): Can I --

PO: Yes, sure you can.

DC (Maj Mori): You just hit on our exact point.

PO: Right.

DC (Maj Mori): Common Article 3 -- that is common Article 3, meaning that is identical in each of the Geneva Conventions -- common Article 3 applies to conflicts of a non-international character.

PO: Common Article 3 tells you when the Geneva Conventions apply; right?

DC (Maj Mori): No, sir.

PO: It doesn't?

DC (Maj Mori): No, sir.

PO: That is amazing.

DC (Maj Mori): It talks about -- sir, what I am saying is that is talking about the following provisions. This talks about who it protects, persons taking no active part in hostilities.

PO: Okay. So this doesn't -- if Mr. Hicks was a civilian and he took active part in hostilities, it wouldn't protect him; right?

DC (Maj Mori): You would turn to Article 5, which would talk --

PO: It wouldn't protect him. Go on. Go on.

DC (Maj Mori): You would turn to Article 5 --

PO: Yes, okay.

DC (Maj Mori): And Article 5 is the degradation section.

PO: Mm-hmm.

DC (Maj Mori): It says within a territory, a party to the conflict, the latter assessed by the individual protected person, is definitely suspected --

PO: Hey, wait a second. He is not a protected person if you read Article -- okay. I want you to go back and read Article 3 and 5 together. Okay. We are not going to exchange meaning of it.

DC (Maj Mori): Yes, sir. I understand what you're saying, sir.

PO: Yes, that is a good idea. I took Colonel[redacted]-- I apologize for taking your place.

DC (Maj Mori): Again, sir, it doesn't allow you to be completely stripped of it. They can degrade from protections, but what it specifically says it cannot degrade from is treating them humanely in the case of trial providing them the full rights of fair and regular trial. Also, the war crime is removing civilian population from the territory.

So if you are a part of that civilian population, Geneva Convention 3 allows you to remove prisoners of war outside of the territory. The other conventions don't allow it for the civilian population, even if they are suspected of committing an offense. They can be tried.

CM (Col[redacted] Now we're back to the original question.

PO: Well, ask him.

CM (Col[redacted] So as he steps on to the airplane to come to Guantanamo Bay, it is your contention that his status is as a, and you fill in the blank.

DC (Maj Mori): Honestly, at this point, sir, I think at this point that is a situation that's an entire issue that will be litigated as part of --

CM (Col[redacted] You have just made my point. Why are we arguing this motion now then, if you cannot answer that question?

DC (Maj Mori): Because under either -- because under either category --

CM (Col[redacted] Okay. I won't.

DC (Maj Mori): No, no, no.

CM (Col[redacted] I withdraw my question.

PO: He's withdrawn it. He has withdrawn it.

DC (Maj Mori): Because he's under either category it'd be a violation, sir.

PO: Okay. I didn't ask. On 17 and 3, any side going to put in findings? Yes, no, I don't care.

ADC (Maj Lippert): No, sir.

P (LtCol[redacted] No, sir.

PO: How about on 4 and 7?

ADC (Maj Lippert): No, sir.

P (LtCol [redacted]) No, sir.

PO: Okay. What you got next?

DC (Mr. Dratel): D 19.

PO: Okay.

DC (Mr. Dratel): Equal protection.

P (LtCol [redacted]) First, if I could just note, sir, we did provide copies to the defense and had marked as exhibits our proposed essential findings regarding --

PO: The ones this morning.

P (LtCol [redacted]) Regarding terrorism, yes, sir. Just give me a second, I will find this.

PO: That's the question I just asked you and you said you weren't going to give them me.

P (LtCol [redacted]) I thought we were talking about the ones we were talking about today. We gave you D 9 and D 20, sir.

PO: Pardon?

P (LtCol [redacted]) D 11 and D 20.

PO: Okay.

DC (Mr. Dratel): I did not hear those numbers.

P (LtCol [redacted]) D 11 and D 20.

DC (Mr. Dratel): D 11 and D 20. We were provided those; right? But those have not been provided to the panel.

P (LtCol [redacted]) They were provided to the court reporter for insertions.

DC (Mr. Dratel): The court reporter?

P (LtCol [redacted]) I provided those to the court reporter who, I believe, has taken them for the record.

DC (Mr. Dratel): Right. But the Commission does not have them. May I proceed, Colonel?

PO: Yes.

DC (Mr. Dratel): This is D 19, Mr. Hicks' motion to dismiss because the Commission violates equal protection clause of the U.S. Constitution and various statutory and international provisions. Finally, we get to the point where *Rasul* is actually relevant.

The government cited *Rasul* for everything, but, in fact, it does not authorize these Commissions. It does not endorse this Commission. It says nothing about this Commission. Here is the first sentence from *Rasul*. Again, Mr. Hicks is a plaintiff in *Rasul*. The Supreme Court decision.

The first sentence; these two cases present the narrow but important question whether the United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba, period. That's what they decided, and they decided in Mr. Hicks' favor. We didn't reach any issues, but the prosecution has alleged in motion after motion -- it does not address, there's no discussion here of commissions. There's no discussion here of law of war.

There's no discussion here of any of those offenses. What it does say, though, is that he has a right, because he is within territory controlled by the United States, he has a right to invoke constitutional protections. And all of the cases the government cites in the equal protection brief, which ironically excludes *Rasul* entirely, their papers on equal protection.

They don't want to talk about that. They want to talk *Eisentrager*, which *Rasul* expressly supersedes in the opinion. They want to talk about *Verdugo-Urquidez*, which is a case that occurs outside U.S. jurisdiction, in a completely foreign territory without U.S. jurisdiction. What *Rasul* decided was that, in fact, we are in U.S. jurisdiction. So equal protection applies. All the Constitutional provisions apply, but in this motion it's equal protection.

Let's go back to yesterday. Again, to me an irony is that the government opposed the motion with respect to Australia and the United Kingdom and the negotiations that are ongoing as -- they opposed it because they said it is a political question. And the irony there is that this entire system has been made a completely political question by the government.

The distinction in the Commission order -- in the President's Military Order

between citizen and noncitizen is a -- is one that creates a distinction that cannot survive equal protection scrutiny. The distinction that the government has made between citizens of one nation and citizens of another nation with respect to detainees here in Guantanamo. It can not survive equal protection distinction, the scrutiny.

It also violates, as we talked about yesterday in 816 -- or rather 836, that the requirements that Commission Law be applied uniformly. When the government seeks to punish and impose criminal sanctions, it cannot distinguish between aliens and citizens. Now, I am going to cite a case from 1896, *Wong Wing*, but that's not all there is. There's an unbroken line all the way through 2003 in the *Zadvydas v. Davis* case in the Supreme Court. It is a completely active doctrine.

You cannot distinguish between the citizen and the noncitizen when it comes to penal or criminal sanctions and that is what this Commission is constituted to determine with respect to Mr. Hicks. And yet citizens are not available; and rather citizens are not accountable to the Commission. You have John Walker Lindh, you have Yasser Hamdi, U.S. Citizens. Were they tried by commission? No. One was prosecuted in federal court, received all of the protections that the Constitution imposes and provides to defendants. The other, Yasser Hamdi, won another case in the Supreme Court where the government, again, and the government decided that he couldn't have any rights, and the Supreme Court said, no. He has his constitutional rights. And the government, rather than giving Mr. Hamdi due process and his day in court, sent him to Saudi Arabia. That was their solution. David Hicks, is distinguished by what? Because he's an Australian? That does not survive equal protection analysis.

The nation versus nation. Forty Saudis were released last week. Why? Because their government negotiated with the United States in some fashion to gain a release. Thirty-five Pakistanis last month. Why? Because their government negotiated. Britains are not charged here, because their government refuses to permit it under these Commission conditions. It is simply not fair. It is not a full and fair proceeding. And I don't think that it is a mystery as to why there are no Britains among those charged.

That cannot withstand equal protection analysis. Fortuity of citizenship, it does not determine who is prosecuted and who gets sent somewhere else. It does not determine who gets bargained for and who gets prosecuted, whose life is at stake, and who gets set free.

The government has turned this whole process into a political lottery starting with citizenship and then on a nation-by-nation basis rather than a system of justice, and that cannot withstand equal protection analysis. Thank you.

PO: Colonel[redacted]

CM (Col[redacted] I'm going to finish writing this down first. I don't have anything.

P (LtCol[redacted] Sir, first, we would like to clarify for the record about something the defense has pointed out, something to clarify this -- there was a decision, *Hamdi v. Rumsfeld.* I believe I misspoke and talked about *Rasul v. Bush* and was confusing that with the *Hamdi v. Rumsfeld.* They both came out about the same time. *Hamdi v. Rumsfeld* is where our Justice O'Connor stated that *Quirin* continues to be vital law, and that unlawful enemy combatants may be captured, detained, and tried. So I'd appreciate the opportunity to correct that.

Equal protection clause. The President of the United States may well have good and valid reasons for treating U.S. citizens differently from non-U.S. citizens. We don't need to go there, we do not need to get into that because there is Supreme Court case law that says that the 5th Amendment does not apply. The 5th Amendment protections do not apply to non-resident aliens, and those are the two cases mentioned by the defense.

Rasul v. Bush, if you look at it and read it, all it says, it acknowledges those two cases. If they wanted to overturn it, they would have said we overturn that case law; instead they said, we acknowledge that case law, and all we're saying -- the issue here is whether there is a statutory right. In other words, a statute that creates a right for the accused to get access to a federal court for habeas corpus. That is under a statue. And they say we don't find that *Eisentrager* and *Verdugo* do anything that can say that we cannot apply this statue.

You can read through that case and you can find that nowhere does it overrule those two cases or does it say that the petitioners have 5th Amendment rights now, because that would be something new, very new. Thank you.

DC (Mr. Dratel): Again, the two cases have to do with people not under United States control outside the jurisdiction of the United States courts. The 5th Amendment does not apply to aliens outside the jurisdiction of the United States. *Rasul* resolves that in this case, Mr. Hicks was the named plaintiff. The courts have jurisdiction, the United States has jurisdiction here. Here is what the court said in the footnote, footnote 15 in *Rasul.* "Petitioners allegations, that although they have engaged neither in combat, nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territories subject to the long-term exclusive jurisdiction and control of the United States without access to counsel and without being charged with any wrongdoing, unquestionably

described custody in violation of the Constitution or laws or treaties of the United States".

Courts have jurisdiction, equal protection applies, *Eisentrager* specifically distinguished in this case because it was outside the jurisdiction. *Verdugo-Urquidez*, not even applicable. Not even necessary because it, on its own terms, talks about outside the United States. What you have -- what applies is equal protection analysis with the imposition of penal sanctions. Something that is very clear, unbroken, and unchallenged in this case by the prosecution. We cannot make a distinction, the distinction has been made, it is invalid, the Commission is invalid, the charges must be dismissed. Thank you.

PO: Colonel [redacted] Okay. Findings, either side?

DC (Mr. Dratel): No.

P (LtCol [redacted] No, sir.

PO: We'll issue a decision in due course. Okay. Who's doing D 8?

DC (Mr. Dratel): D 8, I am. D 8.

PO: Okay. Is that what we are doing next?

DC (Mr. Dratel): Well, we will do four together. Eight, 18, 21, and 22. And that's fundamental rights.

PO: Okay. Staff Sergeant [redacted] [sic], you want a break?

Before we start four, we're going to do it.

DC (Mr. Dratel): Yes, sir.

PO: If it was just one we would go. Court's in recess for 20 minutes.

The Commission Hearing recessed at 1417, 2 November 2004.

The Commission Hearing was called to order at 1429, 2 November 2004.

PO: Be seated. The Commission will come to order. Let the record reflect we have got a new prosecutor. Commander [redacted] s back with us. And we have a new court reporter.

P (LtCol [redacted] Sergeant [redacted] is back on the record, sir.

PO: Okay. During the last recess we had an MCI 8-5 conference and both sides semi agreed -- enough for the purposes of this Commission -- that what we are going to do is hear all the motions up through BOP and we will do BOP and the Commission will take conclusive notice tomorrow starting at 1300 assuming we finish these things up tonight. If we don't, it'll be looked at. Is that right?

P (LtCol[redacted] Yes, sir.

DC (Mr. Dratel): Yes, sir.

P (LtCol[redacted]: Sir, before we get started, we have something we would like to address, if we may.

PO: Okay.

P (LtCol[redacted] We had a chance to review this footnote 15 and we would like to address that since we have had a chance to look at it and review it. We believe that the defense has misconstrued it and over relied upon it.

PO: Don't you think we could -- can we read it?

P (LtCol[redacted]: Yes, sir. We just ask that you pay attention to what it does say and does not say.

PO: Thank you. We'll read it.

CM (Col[redacted] Where is it?

P (LtCol[redacted] Sir, it is footnote 15 of the case *Rasul v. Bush*. Give me second and I'll find where it is.

PO: That's fine.

CM (Col[redacted] Okay.

PO: So now we are going to hear eight, 18, 21, and 22; right?

DC (Mr. Dratel): Yes, sir.

PO: Start up.

DC (Mr. Dratel): The reason we put them together, and these are -- D 8 is fundamental rights -- that the Commission denies fundamental rights; D 22 is the structural defects in the Commission. D 21, that it fails to provide a full and fair proceeding and the President's Military Order -- I may have

1 misnumbered one of them.
2
3 No. That's D 19 is the President's -- I'm sorry, that's equal protection. D --
4
5 PO: Eight is the fundamental rights. You are good.
6
7 DC (Mr. Dratel): Eighteen is the President's military order is invalid. So those four are
8 bundled together because in many ways they touch upon the same subject
9 matter and they do overlap considerably and it is more efficient to treat
10 them all together.
11
12 With respect to the issue of fundamental rights, full and fair proceedings,
13 and the structure of the Commission, there is one question that is pertinent,
14 which is: What is wrong with the court-martial system described by the
15 UCMJ? Why the need to return to an archaic and discredited system
16 abandoned 50 years ago?
17
18 The law is an evolving process and the evolution of military law in the
19 United States from the enactment of the UCMJ in 1950 through profound
20 changes through the '60s, particularly 1968 in the terms of the composition
21 of a panel, has resulted each time in making the system fair, more likely to
22 produce a just result. Less likely to produce an inaccurate or arbitrary or
23 unjust result. Yet that is what the government did not want in this case.
24
25 What's wrong with the court-martial system? I submit that the government
26 felt it was too full and too fair and it is really in the government's own
27 statements -- not the prosecution here but there is a December 28 2001
28 memorandum from the office of legal counsel to the department of justice.
29 John Yoo is the author. Y-O-O. And it is a short memorandum which
30 explains essentially that Guantanamo Bay is an appropriate place to put
31 detainees because they are beyond the reach of any court. Beyond the reach
32 of law. It was wrong.
33
34 The analysis was rejected by the Supreme Court in *Rasul*, but at the time it
35 was done, that was the analysis. So I ask the question: Why the need to put
36 Mr. Hicks beyond the reach of any court, beyond the reach of any law? Is it
37 so that the process can be full and fair? Is it so that the process can afford
38 him the fundamental rights to which he is entitled? Is it so that you can
39 have a process that is structurally sound?
40
41 The questions answer themselves. And *Hamdi*, by the way, was a case that
42 the Commission should read because it does not go to the lengths that the
43 government suggests. What it says is that Mr. Hamdi, detained as an enemy
44 combatant, had a right to contest that in court. Just the fact of his detention.
45 It does not talk about military commissions in the way that -- it talks about
46 enemy combatant status determinations, and the court is split on that issue.

1
2 There are justices who were part of the majority and very clearly would
3 have afforded -- I think it is very clear from there that they would have
4 afforded Article 5 protection to Mr. Hamdi, but that wasn't an issue they had
5 to reach. That was a side issue. One issue was, was he entitled to challenge
6 in the courts his detention?
7
8 The Court said yes. That is the fundamental question in *Hamdi*. It does not
9 vindicate these Commissions in the slightest.
10
11 Let's look at the Commissions here. Are they full? Last time we were here
12 we had five members. Now we have three. We don't have an alternate.
13 Just that on its face is not -- that's not the totality of fullness but it is a
14 striking example of how this isn't full. General court-martial, five. Here,
15 now we are down to three -- and something that I did not mention yesterday
16 as part of D 37 which I realize is denied but -- has been denied -- but this
17 goes to this motion as well, is that the Korean War commissions had two
18 types of commissions. They were regular and special, and those for which
19 the defendant was exposed to more than a year of confinement, minimum of
20 five.
21
22 Why? Because of the UCMJ. The lack of rules and protections here is
23 striking. There are no rules of evidence. There are no rules to protect
24 against hearsay. There are no rules to protect against the way evidence is
25 obtained. You will be working on a clean slate. Really for lack of rules and
26 protections. Access to evidence. Not only with respect to rules but also
27 with respect to keeping the defendant incommunicado, without counsel,
28 without contact with the outside world for over two years and then
29 expecting him to make up that time so he can prepare and present a defense
30 to the charges. Not tolerable in any court. Intolerable in any system of
31 justice with respect to fundamental rights. Presumption of innocence. It
32 exists on paper but it doesn't exist in practice. It has been so thoroughly
33 impaired in the -- you can characterize as unfair command influence from
34 the President, from the Secretary of State, to the Under Secretary -- I mean,
35 Secretary of Defense, Under Secretary of Defense, over and over again.
36 Commenting on the status of Mr. Hicks generally, specifically.
37
38 Access to counsel, again, not only with respect to preparing a defense but
39 also detain a defendant, subject him to conditions, denying him counsel,
40 exhaust whatever information you can from him by whatever means
41 necessary, deny him a lawyer, deny him everything in terms of contact with
42 the outside world during that entire period, then two and a half years later
43 when you have decided that you have exhausted it, now he can have a
44 lawyer and we are going to introduce his statements against him. That is
45 not fundamental rights. The right to be present at proceedings. The right to
46 confront evidence. The Commission proceedings permit that to be violated

1 as well. They permit even counsel to be excluded. Civilian defense counsel
2 to be excluded.
3
4 With respect to structural defects -- and I didn't think that I would go back
5 into this, but I think I must, just in light of the experiment that we are
6 proceeding with here -- it is -- I think I have to conclude my opinion, it is
7 going to be impossible to funnel the necessary legal training and legal
8 knowledge sufficient to give you the tools you need decide to these issues.
9 I feel it is just an extraordinarily uphill battle to communicate some of these
10 concepts that underlie so many of the issues that we are talking about here.
11
12 You first have to convince the Commission that they apply and then to
13 apply them to specific issues that we are approaching here and to the extent
14 we are still wrestling over them, I think is a significant problem. And I
15 think it undermines the structural integrity of the Commission process. It is
16 not an individual problem. It is a systemic problem.
17
18 What is wrong with the UCMJ? What is wrong with the court-martial
19 system? What is wrong with the system that we think is okay to try
20 ourselves but we don't want to use it to try someone else? An Australian.
21 He is not good enough to have rights. Maybe it just is too fair and too full
22 to give the rights that we give everyone else. No one in this room would
23 want to be in the position that Mr. Hicks is in, in front of a Commission in a
24 system that we have here. I can say that with confidence because I just
25 know it. And everyone would be up in arms if they were subjected to a
26 system like this.
27
28 Now, this Commission is an attempt to borrow facets that help the
29 prosecution and dispense with those that don't. That is not a system. That
30 is a stacked deck. Why not take the system in its entirety? It was a whole
31 system. That's the way it was designed. It was not designed to be
32 cannibalized in specific situations so that it could achieve a result before we
33 ever got to the finding of any fact so that it could vindicate a political
34 program to say that these are terrorists. These are people who are guilty
35 from the top down. The words full and fair appear in the President's order
36 but they are just words and it's on a piece of paper.
37
38 The system that has been devised is not and it is the military justice version
39 of the emperor's new clothes. This system does not have clothes. It is my
40 obligation to bring that to your attention but it is also your duty to find it. It
41 is your duty to second guess even the President's Military Order which, as
42 we lay out in our papers, is not authorized by Congress in contrast with
43 prior military commissions. You go back to *Quirin*, *Yamashita*, you go all
44 the way back you will find in all those instances -- and we appended the
45 materials so I won't go into them -- but you will find congressional
46 authorization. Here, it is absent. The authority to use military force is just

that. The authority to use military force, not an authority to hold a commission and to try people.

The government -- the prosecution has cited time and again an attorney general's opinion from 1865. If the attorney general today issued an opinion, it would have no value before this Commission. The attorney general's opinion has no authority whatsoever. It is an opinion of a law enforcement officer with a vested interest in prosecution. What value does it have for you to decide whether something is full and fair and conforms with law as it exists? That is not a statement of the law.

We go all the way back to 1795. We go back and -- when they go back that way, I go back too. And I go back to things that have been, for this country, a stain on our honor. I go back to slavery, Native Americans, I go back to *Korematsu* and the internment of Japanese and I say they were very carefully, very carefully orchestrated legal rationales that validated all of those. They were not unlawful at the time that they occurred. But they were wrong, just as this is wrong and unlawful.

This time, let's be ahead of the curve on this and not deprive people of their liberty, deprive them of their rights, deprive them of a fair system, deprive us of our honor and reputation in the international community. Let's stop it now. And what's at stake is not just military justice. It is not just the treatment of U.S. soldiers abroad, which is very much at stake here when you talk about reciprocity and symmetry of how law is applied. The law of war, military commissions and all of that.

But there is also a human being at stake. David Hicks. He is not a scapegoat and he is not an example. He is a human being entitled to the application of the rule of law in a country that calls itself a country of laws, not of men, and I submit that it is the duty of the Commission which has the power. The Commission has the authority and, I submit, the duty to apply the law to Mr. Hicks and dismiss the charges. Thank you.

PO: What are you going to address here, Colonel [redacted]

AP (LTC [redacted] I am going to address all four of those arguments.

PO: Okay.

AP (LTC [redacted] Gentlemen, what is remarkable about the argument you just heard and indeed, all four briefs in support of those arguments from the defense is that you don't see one clear reference in Mr. Dratel's argument or in those briefs to Commission Law. You don't see a single reference. He didn't mention clearly Commission Law one time in the course of his argument, even to criticize it. Even to hold up a rule, turn its various facets for the

Commission and talk about it. The defense has great difficulty on these four motions keeping its eye on the ball. They talk about court-martial rules, they talk about international law. They talk about the -- or cite to the European court for human rights. They even talk about international military tribunals from the Korean War. But not once do they talk about Commission Law.

Mr. Dratel says the question that you have to ask is: What is wrong with the court-martial system? No. That is not the question that you are called upon to ask. You are called upon to apply the rules of Commission Law to ensure that this accused in this case gets a full and fair trial. The accused doesn't get to pick the forum in which he is tried. But in this case, the accused gets a forum that the President, Congress and the Supreme Court have all said repeatedly is the appropriate forum for the trial of unlawful combatants for the violation of the law of war.

Reminds me of my daughter who was recently invited to the senior dance. She wasn't invited by the boy that she wanted to be invited by and so she went along to the dance but the whole night she didn't have a good time because she was always looking at the other guy that she wished had invited her to the dance. That is the defense in this case. They are not paying attention to Commission Law. And that's what has to be applied in this case. The grass is always greener on the other side of the fence.

But if they were to look at Commission Law, gentlemen, what they would find is that with respect to each fundamental right that they drew your attention to here in this argument and in their briefs, Commission Law gives the accused equal or greater protection than the sources of law to which they point. In that sense, all of those other sources of law that they cited for analogy and other purposes are irrelevant. But aside from being irrelevant, gentlemen, because Commission Law gives them everything that they need in terms of protecting this accused's rights, aside from being irrelevant, it's inapplicable. In his argument on speedy trial, Major Lippert made the amazing statement, "It doesn't matter what law applies". Do you remember him saying that? He said, "It doesn't matter what law applies", because all of these different sources have standards that are similar on the subject of speedy trial.

Gentlemen, it does matter what law applies. Whenever the government or the defense comes before this Commission, and asks you to apply a standard outside of Commission Law, obviously you are aware you have to ask: How does this apply? Does it even apply in this Commission?

Defense has submitted extensive affidavits from law professors and they have brought up numerous references here in these briefs and this argument the various sources of international law. From listening to the Commission

1 this morning, it is apparent to me that you all do have a template in your
2 minds about analyzing this question of when various sources of
3 international law apply. If it is a treaty, you are going to first -- the first part
4 of the template is: Is this a treaty law or is it derived from customary
5 international law? But if it is a treaty, the first question is: Has it been
6 ratified? Has it been signed and ratified? Because if it hasn't, it doesn't
7 apply here. It doesn't bind the U. S. in any sense. But the second question
8 you are going to always have to look at is, Okay, assuming it is ratified,
9 assuming it is a binding treaty on the United States, what does the treaty
10 itself say about the limitations on its application?
11
12 Earlier this afternoon we had a colloquy about the question of Geneva
13 Convention IV pertaining to civilians, and the question there was: Who
14 does it apply to, right? On the second question, you look to the convention
15 or the treaty itself to see where does it apply. In Common Article 2 -- it's
16 called "Common" because it is the same Article in all four conventions -- it
17 talks about international armed conflicts. Common Article 3 of all four
18 conventions says these that conventions -- the provisions of that particular
19 Article -- apply only in the case of conflicts of non-international character.
20 Common Article 3 is a separate, small body of law within all the
21 conventions. But those are some examples of jurisdictional limitations in
22 the treaty itself about how it applies, whether it applies to the type of armed
23 conflict in this case or whether it doesn't. Article 4 of Geneva Convention
24 IV pertaining to civilians talks about who the convention applies to and
25 defines those persons to whom the convention applies, just as Geneva
26 Convention pertaining to prisoners of war as in Article 4 which defines who
27 qualifies for the protections under that convention.
28
29 So as you can see, gentlemen, the second part of that template, look to the
30 convention itself. The third part is: Is there something in U. S. law which
31 would prevent this Commission from applying the source of international
32 law here in these proceedings? And that's where we get this
33 sometimes-complicated question of self-executing treaties.
34
35 What that simply means is, if a treaty is self-executing, a U. S. court can
36 look directly to the treaty, take provisions from that treaty and apply it in
37 court. If it is not self-executing, a U. S. court and this Commission can't do
38 that. Okay? You are not allowed to look to the treaty itself, pull a piece out
39 and apply it here if it is not a self-executing treaty. Instead you have to wait
40 upon, you have to depend upon implementing legislation, executive orders
41 and regulations to make those provisions of those nonself-executing treaties
42 applicable in this proceeding.
43
44 So in this set of arguments the defense relies repeatedly on two principle
45 sources on international law: The International Covenant on Civil and
46 Political Rights, the ICCPR, and also Protocol 1 to the Geneva

Conventions. The ICCPR is a treaty. It is a treaty that the U. S. has signed and ratified, so it might apply here; correct?

But this treaty does not apply to this set of issues nor to any issues that will arise in the course of these proceedings because the ICCPR is not self-executing. How do we know that? In our brief we cite the Supreme Court's case of *Sosa v. Martinez* where the Supreme Court said that the ICCPR is not self-executing and they declined to apply it in that case. But if you look at the convention itself, the covenant itself, in Article 2 it says that each state party to the present covenant commits to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present covenant. So on its face the ICCPR doesn't apply. It is not supposed to be self-executing. There is no implementing legislation except Commission Law. You look to Commission Law because the President has interposed that layer of law between our international obligations toward other states and what this Commission will do in this court of law. The second source that the defense looks to is Protocol 1. Protocol 1 and particularly Article 75. Does Protocol 1 to the Geneva Conventions apply in these proceedings?

Well, the United States has not signed and ratified Protocol 1, dated 1977. To this date it has not been ratified. We are not a state party to that convention so it does not apply as a treaty.

Nonetheless, the United States generally recognizes that the provisions of Article 75 have gained the status of customary international law. They are reflective of customary international law. And so the next question is: Is there something in U. S. law that prevents the application directly of Protocol 1 to this Commission? The question of whether customary international law -- and that is a critical point that will rise again and again throughout these proceedings -- the question of whether customary international law should be applied by this Commission and these proceedings has been addressed by numerous courts, and generally the courts have found that customary international law is not self-executing. It is not automatically incorporated and adopted by courts. But there is some split of authority on that. However, the best statement of this, the most useful and illuminating discussion of how customary international law applies is found in a case in the Commission library, *U. S. v. Yousef*, decided by the second circuit in 2003. In Part 1(b)(1), in that case, I commend that to your reading on the subject because this is foundational to your understanding of how we apply international law, but here is their summary. Citing to the famous Supreme Court case of *Paquete Habana*, which is the fountainhead for the proposition that customary international law is part of U. S. law, they said it has long been established that customary international law is part of the law of the United States to the limited extent that where there is no treaty and no controlling executive or

legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. So it is a gap filler. Courts will apply it when there is no applicable statute, there is no applicable regulation or executive act.

Gentlemen, for purposes of the procedures and the rights that apply to this accused, there is a statute. There is an executive act to which this Commission is bound to apply and so this Commission should not look beyond that statute, which is Article 36 of the UCMJ. Executive act is Commission Law in the presence of military order and subsequent rules and regulation and orders issued pursuant to that order. That is the body of law that governs this Commission. Not customary international law. Now, you are probably confused because we spent a lot of time this morning talking about customary international law with respect and in relation to the definition of offenses.

There is no inconsistency here. Article 21 and Commission Law invite you to look to customary international law for that purpose, for the purpose of defining the offenses which are triable by military commission. Because Article 21 says that military commissions will have jurisdiction to try violations of the law of nations. But Congress did not go on to define and provide us a list of law of nations and then of course the Military Commission Instruction Number 2 states what is declarative of customary international law and it says on its face it is not a complete statement. So you are invited to look for purposes of defining offenses, but for purposes of procedures you have a complete, fully comprehensive set of regulations and Commission Law that would govern here.

Let's turn -- I promise, briefly. Those were foundational matters that I wanted to address, in particular, because of the affidavits that were filed last night. But let's turn to the three alleged violations of the accused's fundamental rights that are asserted by the defense in their briefs and by Mr. Dratel.

Does the accused enjoy a presumption of innocence in this trial? Yes, he does. You bet he does. It says it in Commission Law. MCO 1(5)(b) says the accused shall be presumed innocent until proven guilty and then 5(c) goes on and puts that in concrete terms and says if and only if a member is convinced beyond a reasonable doubt based on evidence submitted at trial that the accused is guilty of that offence, then only in that case will you vote for a finding of guilty. This is exactly the same presumption of innocence that an American citizen gets in courts-martial, that he gets in state or federal court. Exactly the same.

The accused says he was deprived of this presumption because of certain pretrial statements made by the President, the Secretary of Defense, the

Vice-President and others. Gentlemen, none of those statements pertain particularly to this accused. None of them pertain to Commission proceedings. They were offered generally in defense of the policy of detention. They have not spoken to this case or the guilt or innocence of this accused. And even if these statements were construed that way, Commission Law does not leave him without a remedy or without a way of protecting his interests in the presumption, because Commission Law gives him the opportunity to voir dire this panel and to challenge those who it believes were improperly influenced by this pretrial publicity and these pretrial statements.

They exercised those rights and in the course of voir dire you all clearly and affirmatively expressed your commitment to the presumption of innocence, your understanding of the presumption of innocence and your commitment to perform your duty to apply that presumption of innocence and consider only evidence in this case throughout these proceedings.

Secondly, the accused jumps up and down and declares they have been denied rights to counsel. They have been denied adequate facilities to prepare a defense. Actually, Commission Law provides for generous counsel rights for the accused. MCO 1, Paragraph 4(c) states that the accused is entitled to a detailed defense counsel, an individual defense counsel of his choice and even a civilian defense counsel if he is willing to pay for him. And sitting here in this Commission and arguing vigorously are all three categories of counsel. He has been provided adequate counsel. All American-trained practitioners in the law. He has all three.

This meets or exceeds any requirements for counsel under international law. They complained that he wasn't provided these counsel in a timely manner. Commission Law says in MCO 1, Paragraph 5(d) that defense counsel be detailed to the accused sufficiently in advance of trial to prepare a defense. In this case that detailing occurred nearly a year ago in November '03. And since that time, two additional counsel have been added to the defense. How does that stack up against the rights that we find in these other sources of law that the defense continually wants you to look to? Under the U. S. Constitution, the right to counsel attaches under the Sixth Amendment at the time of charging. In this case, the accused was given counsel long before he was charged in July of '04. Under the Geneva Conventions, counsel has to be appointed to defend the accused at least -- and these are for prisoner of war purposes -- at least two weeks before trial under Article 105 of the GPW. Two weeks. It is clear, gentlemen, that the accused has been given the right to counsel in a way that far exceeds what the conventions require and meets or exceeds anything the U. S. Constitution or U. S. law requires. But again, the defense chooses to disregard Commission Law and the rights he has actually had and actually exercised before this Commission, and instead looks longingly to various sources of international

law that don't apply to this Commission.

Instead they look to the human rights committee and the UN, applying the ICCPR, which made the statement that all persons who are arrested must immediately have access to counsel and they said this has been violated in this case.

Gentlemen, this accused was not arrested. It is clear from that statement, the context of the ICCPR, the normal police investigations and relation between a citizen and their own government. This accused was not arrested. He was captured on a foreign battlefield. He was interrogated for intelligence purposes. The defense claimed that the right to capture -- the right to counsel must attach upon capture is not only untrue but it defies common sense. Under the defense approach there would be no such thing as a battlefield interrogation. When an enemy combatant is captured, soldiers would be required to give rights advisements under fire. We would have to deploy defense counsel to the far-flung regions of the world with full battle armor to protect them in order to fulfill this imaginary right that Mr. Dratel has created.

Thirdly, the defense says that the accused is denied his fundamental right because he isn't permitted under Commission Law to be present at all sessions, but again, he fails to support the rule, cite the rule or discuss it at all. Under Commission Law, the default rule is open sessions with presence of the accused. Commission Law gives to the Appointing Authority or the Presiding Officer the authority to determine that it is necessary to close the proceedings for the protection of those involved or to protect classified national security information, and in some cases the accused may be excluded in those circumstances but under no circumstances will the accused be unrepresented in court by counsel.

Please note that these rules make an accommodation there that every system makes. Every system has to protect classified information in some manner. Commission Law has given guidelines for how that is to occur here. It contemplates a procedure, an adversarial procedure in which, when this issue arises, defense and government counsel will be heard and some measures may be taken to minimize the impact of excluding the accused from access to classified information, such as unclassified summaries, perhaps another way of presenting the evidence, et cetera.

And also note that the presence of the accused at trial is not an absolute right under any system. Under Commission Law, the accused can be removed from trial if he is disruptive. That's true in the ICTY, the ICTR, federal courts, state court and court-martial.

The accused can be tried in absentia in many systems if he flees justice after

arraignment. But even in those circumstances a full and fair trial is possible. If you look to Commission Law, which the defense does not want to do, the following rights will be found: The right to counsel, which we have already discussed, both detailed and civilian counsel. The right to get a copy of the charges in his language. Access to evidence that the prosecution intends to present in trial. Access to evidence and documents and witnesses that they intend to present at trial. Access to exculpatory evidence and use of it. The right to obtain witnesses as evidence. The right to present evidence at trial. The right to cross-examine witnesses. The right to argue facts and law. The presumption of innocence and the prosecution has the burden to prove beyond a reasonable doubt on each element. The right to remain silent without an adverse inference. The right to an open trial except for closure as necessary. The right to be present except in specific circumstances. Protection against double jeopardy. The right to a review process et cetera, et cetera, et cetera.

Instead, he looks to the Korean rules for Korean military commissions which were never used and doesn't explain to us why or how those might be relevant here. But even if they were, they don't appear to have read them, because Rule 1 of those rules says that these rules shall govern all military commissions of the UN command conducting trials of prisoners of war. That is, those entitled to the protections of the Geneva Conventions charged with post capture offenses. This guy is charged with precapture war crimes. So even those rules that they cite to and put in your appendix don't even apply to this case had they been read.

As to the structure and composition of the Military Commission, the defense says it is invalid because it doesn't follow any existing military, civilian or international model. Again, that is not the relevant question. Doesn't have to. The question is: Does it fulfill the President's mandate for a full and fair trial? Commission rules clearly permit that. However, the Commission is based on existing models. I'm not going to go through a historic survey, but if you did, you would find that it is quite typical to have three to five panel members, all functioning as judges and fact finders. You find that in the thousands of commissions conducted by the U. S. military in the Far East and European theater after World War II. It was true of the international military tribunal at Nuremberg. And you also find many similarities between this system and the court-martial system that are apparent to you as experienced military officers and I don't need to go into.

As for any suggestion that the Military Commission is not capable of performing its adjudicative function because it doesn't consist of three lawyers, I think the high level exchanges that we have had these last couple of days should dispel any notion that the law of war is beyond the ken of lay jurists. In fact, what is the purpose of the law of war? Its purpose is to be applied by military commanders and line officers in the field. That is where

it has its principle application. That is who is expected, on a routine basis, to understand and apply the law of war. Infantrymen. Military intelligence officers. Combat pilots are supposed to understand and apply it. That's its primary field of application. You don't need law professors in the backseat of the cockpit to help make decisions in combat. You don't need law professors in the TOC, because the law of war can be read and understood as proceedings in this Commission has already made quite clear up to this point.

I want to turn briefly then to the last motion here, D 18 concerning lack of legislative authority or military commission. It is refreshing to hear the defense counsel finally acknowledge *Ex parte Quirin*, *In re Yamashita*, and *Johnson v. Eisentrager*.

It is refreshing that they will finally mention -- why didn't they mention any of those precedents in their brief? And they didn't. Go back and look. They didn't mention any of them in their brief because they are and have been in full retreat from those precedents, which remain good law.

And the reason they have not mentioned them and didn't mention them in their brief is because the exact same arguments they make on this point, that the President's military order is not well founded in American law, those same arguments were advanced in *Ex parte Quirin* and rejected by the U.S. Supreme Court. That's why the defense fails to argue *Quirin*. That's why they don't mention it.

This question comes down to two simple questions: Has Congress authorized the President to establish military commissions to try war crimes? The answer is clearly yes in both the Uniform Code and in the *Authorization for Use of Military Force*. And you don't need to speculate because the President identifies the authority for his order right at the outset of the order itself.

The second question is: Are the Supreme Court precedents upholding the use of military commissions in World War II still good law? Do they apply to support this President's Military Order of November 13, 2001? The answer is yes. Those precedents remain good law. Yes, they support the President's Military Order.

As for *Quirin*, what you didn't hear Mr. Dratel say in the argument here today is that case was overruled. Because it never has been overruled. In fact, it has been cited approvingly by the Supreme Court continuously since it was decided. It is cited in *Yamashita*. It is cited in *Eisentrager*. It is cited in *Madsen v. Kinsella*. It is cited in cases through the 60s, '70s, '80s and '90s and it is cited in *Hamdi v. Rumsfeld* where the Supreme Court says -- and contrary to what Mr. Dratel says, they weren't talking about

Article 5 tribunals because *Quirin* had nothing to do with Article 5 tribunals. The Supreme Court cited to *Quirin* because they meant what they said. The capture and detention of lawful combatants and the capture, detention and trial of the unlawful combatants by universal agreement and practice are important incidents of war, citing to *Quirin.*

Commander [redacted] referred this morning to the legislative history behind Article 21 of the UCMJ. When Article 21 was enacted nearly ten years after *Quirin* was originally decided, both the House and Senate committee reports accompanying that legislation cited to *Quirin* and said, We are adopting Article 21 on the basis and understanding *of Quirin* with the expectation that Article 21 would apply in the UCMJ era, that is, today, and prospectively on the basis of *U. S. v. Quirin.* Congress clearly intended for *Quirin* to have continuing validity and vitality.

So has Congress authorized this Commission? Of course they have. Article 21 and Article 36 clearly do so. The commissions are mentioned in five other articles of the UCMJ which have been referred to here. A survey of the U. S. Code and many different Titles show this Commission that Congress has had a long-standing and continuing intention that commissions will be part of American military law.

For example, the Administrative Procedures Act, mentioned by the defense the other day, clearly states in Section 551 that courts-martial and military commissions are not agencies for purposes of the Administrative Procedures Act. They are not within the scope of the Act. That was in 1966. In 1975, in defining what an offense meant under Title 18 for purposes of pretrial confinement, Congress again made note that those offenses would not include any offense triable by military commission, and then most recently in the Military Extra-territorial Jurisdiction Act enacted in 2000 -- it is a very brief law -- it extends federal court jurisdiction over civilians accompanying the force overseas.

The second paragraph, or Paragraph C of the MEJA states in language that tracks Article 21 almost exactly, that nothing in this Act will deprive military commissions of the jurisdiction. Congress, even as recently as 2000 had in mind the use of military commissions in context of trying criminals in violation of the law of war.

One final point about Article 21 and then I am done. The defense says Article 21 is not a statutory basis. Article 21 of the UCMJ. It is not a statutory basis for military commissions.

How did it get to that? They say all it does, if you read it, is preserve the jurisdiction of military commissions and that Congress will have to -- and fully anticipated having to -- enact special legislation subsequent to Article

21 to authorize commissions in a given context. That is their interpretation of Article 21.

Sounds plausible, right? Perhaps, but it was rejected specifically, *Ex parte Quirin*. *Quirin* rejected that interpretation of Article 21 and said that Article 21's precursor in the articles of war, which read exactly the same as Article 21, constitutes sanction and approval for the use of military commissions.

Gentlemen, what you have is clear authority from the President, the Supreme Court and Congress for the use of this Military Commission. When all three coordinate branches under our Constitution say a practice is well-founded in law, you can be fairly certain that it will withstand any such analysis or attack as the defense has attempted to mount against it here today. That is the case with respect to the legal authority or legal basis for the presence of military authority. Thank you.

PO: Mr. Dratel.

DC (Mr. Dratel): Thank you. The notion that the Commission Law affords the rights greater or equal to that which Mr. Hicks could receive in other systems is an affront to the United States Constitution and the UCMJ. I could take a vote with utter confidence in this room that not a single hand would be raised, even at the prosecution table, that if they were held for two and a half years not on the battlefield but here at Guantanamo Bay without a lawyer, interrogated over and over again under conditions designed to and capable of breaking anyone, starting in Afghanistan and through here -- two and a half years -- but that is what they would get under the UCMJ and the Fourth, Fifth and Sixth Amendments to the Constitution. That is a joke. It is laughable. It is an affront to the Constitution and the UCMJ and all of the values of this country.

To hear it is astounding. And they full well know that we are not talking about battlefield interrogations. They full well know we are not talking about a battlefield capture. The government -- and it said in its papers -- full well knows -- they have said this in their papers in Washington -- full well knows Mr. Hicks was not even captured by the United States. He was sold; he was turned over by the northern alliance. They haven't the faintest idea how he was apprehended. That is a shell game and a sleight of hand. We are talking about someone who is in detention for two and a half years without a single right being afforded him. He would have to go to the Supreme Court to get his rights.

Hamdi. That quote from *Hamdi* -- of *Quirin*. That establishes the validity of this Commission? That trying enemy combatants is an incident of war? That says you can try him under whatever rules you want? No rules at all? Rules that violate the Constitution? Rules that violate the UCMJ? Rules

that violate the rules of the Commission itself?

And I don't understand the notion of everything he talked about but Commission Law, I mentioned. I didn't go into detail because it is in our papers and you have heard it all already and we have been here a long time. But I will say it again. Evidentiary rules and lack thereof. Hearsay. Coerced evidence. Lack of access to evidence. Where is our access to the detainees? Where is our access to the people who were let go who have exculpatory information about Mr. Hicks who are now beyond our control, beyond our capacity to get here? Do you think they are coming back, people who were released here? Do you think they are coming back to testify for Mr. Hicks, that there is a chance in the world that we can get them here? This is fair, three years later? This is what we get in a court in the United States. This is what they get under the UCMJ. How many people here want that for themselves?

You know, presumption of innocence. We lost panel members because of that. We are at three instead of five. We would have at least an alternate if the atmosphere had not been poisoned by those statements by those in charge. And now, we have suffered for it. Mr. Hicks has suffered. Not the prosecution, because they have poisoned the well -- and we lost Lieutenant Colonel [redacted] But that's what he'd get in the civilian sector, right? You would just have a jury of eleven. You won't go for a twelfth one who is unbiased. You just knock it down until it was real easy to convict.

Just one more thing I want to say. This is not some kid going to a dance. This a guy on trial for his life. That shows how they do not get it. They do not understand what we are here for. For a full and fair hearing. Not to compare this to a 12-year-old. I know you understand that and I submit that for all the reasons in the paper and we have stuff in there on *Quirin* and *Yamashita*. It is in the attachments to our briefs. Quite clear on that. I submit, for all those reasons, that these charges need to be dismissed. Thank you.

PO: First of all, is each side going put findings in on eight, eighteen, twenty-one, and twenty-two?

DC (Mr. Dratel): We do not intend to, sir.

P (LtCol [redacted] No, sir.

PO: We are going to go into recess shortly. I didn't say we are in recess. We are going to go into recess shortly for about ten minutes and the counsel are going to come up and see the court reporter and they are going tell her where she can find the spelling for the names you all have been citing. Perhaps next time we do this you all give her the names ahead of time.

Okay. Court is in recess until -- what the heck -- make it 1600.

The Commission Hearing recessed at 1543, 2 November 2004.

The Commission Hearing was called to order at 1601, 2 November 2004.

PO: Please be seated.

The Commission will come to order. Let the record reflect that all parties present when the Commission recessed are once again present. If I didn't say so, I should have. We will give a decision on eight, 18, 21, and 22 in due course. Okay. So now we are up to five and ten, right?

ADC (Maj Mori): Yes, sir. And I am going to start with D 10, sir.

Sir, very briefly, addressing this motion by the defense is that the Appointing Authority doesn't have the power to appoint the military Commission and I am going to quote from Attorney General James Speed as well. Not as authoritarian, but just I think he encapsulates the precise issue. The commander of an army in time of war has the same power to organize military tribunals and execute their judgments he has to send squadrons in the field and to fight battles. His authority in each case is from the laws and usages of war.

That is because the military commission is an exercise of military jurisdiction to be exercised by military commanders, not civilians. And *Yamashita* addressed this specifically and if you look at *Yamashita* it has a heading, the authority to create a commission and it talks about, such a commission may be appointed by any field commander or any commander competent to appoint a general court-martial, as in that case it was General Stire. That is who has the power, not a DOD civilian employee. We explained in our paper as well, analogizing the power to appoint a general court-martial under our system today. Mr. Altenberg does not have the -- does not command a unit to wage war. He is not a combatant commander. He is not a commander who could exercise general court-martial convening power. He lacks the power to convene and appoint this Commission.

AP (LTC [redacted] Sir, this motion should be denied purely as a factual matter. It is incorrect to say that Mr. Altenberg doesn't have the power to convene this Commission. The power to convene the Commission is set forth in orders and regulation that form part of Commission Law. It is directly delegated to him by the Secretary of Defense acting on the order of the President's military order.

In defining the office of the Appointing Authority and defining the powers of that office, the Secretary in MCO 1 and in the Departmental Directive

5105-70, the Secretary expressly relies on 10 USC, Section 113(d) and Sections 131(B)(8)(b) as statutory authority for the delegation to the Appointing Authority and for creating the office of Appointing Authority. 113 is cited in our brief. The relevant provision is that unless specifically prohibited by law, the Secretary may perform any of its functions or exercise any of its powers through or with the aid of such persons or organizations of the Department of Defense as he may designate. The defense has failed to cite any law that prohibits the Secretary of Defense from making this delegation and delegating this power to the Appointing Authority.

We are happy that the defense once again recognizes and embraces the opinions of the attorney general. However, that opinion has no bearing here. What does the defense cite in their brief to deny this lawful power of the Appointing Authority? They cite Article 22, UCMJ, which defines who is authorized to convene a general court-martial. But military commissions are not courts-martial and they are not bound by those rules. It is clear from the structure of the UCMJ that courts-martial are subject to extensive regulation by Congress, but military commissions are not.

Congress gave the President flexibility to establish rules and adapt the military commissions to circumstances and call them forth as it says in *Madsen v. Kinsella.*

Secondly, the defense offers Mr. Winthrop's 19th century treatise on military law and precedents to show that Mr. Rumsfeld could not make the delegation that he did the Appointing Authority here but again, that treatise only collects and reviews practice up to 1896 and does not in any way bind the President or the Secretary of Defense under conditions of modern war under the 1947 Defense Reorganization Act and Amendments thereto and under Title 10 in the present circumstances.

The defense offers *In re Yamashita* for the proposition that military commissions have jurisdiction over war crimes only when the commission is created by appropriate military command. That is what their brief says. But of course, gentlemen, *Yamashita*, if you read that, it doesn't say any such thing. Doesn't say only when appointed by military command. The Court was asked to decide whether General Stire, as commander of U. S. Forces Western Pacific, had authority to appoint a military commission. That was questioned in that case and the Court said yes, he does. But the Court did not address, they were not asked to address whether other types of authorities appointed by the Secretary or the President would have the authority to appoint military commissions.

Most on point and finally, *Madsen v. Kinsella* is instructive here. In that case, the Supreme Court upheld the trial by military commission of a

military dependent in occupied Germany in 1952. In that case, the commission was appointed, not by military commander as the defense says is essential under military law, but was appointed by the Department of State civilian governor of occupied Germany at the time. The Fourth Circuit in the case of *Madsen* which reviewed the case on its way to the Supreme Court noted, "We think it entirely immaterial that the President, at the time of the trial of appellant, was carrying on military government in the occupied zone of Germany through the State Department instead of through the Army and was using civilians instead of Army personnel as judges on the courts".

It was for the President, as commander in chief, to use such governmental department or agency as he thought proper in governing the conquered territory. Similarly here, it was up to the President to decide who would appoint these Commissions. He had lawful authority to delegate the matter to the Secretary of Defense as he did in the presence of military order and in the presence of military order he specifically contemplates the kind of delegation that occurred here, because in the President's military order, the President cites 10 USC, Section 113(d), the very authority that the Secretary relied on in appointing Mr. Altenberg.

Gentlemen, on the basis of all these authorities, it is clear that the Appointing Authority does not have to be a military commander. The UCMJ doesn't require it. Congress doesn't require it anywhere. In fact, Congress empowers the Secretary in view of the awesome responsibilities and broad responsibilities of the Secretary of Defense to create offices such as these for this purpose. *Madsen v. Kinsella* in 1952, the Supreme Court reviewed a case where the civilian appointed military commission and found no objection on that basis. Thank you.

ADC (Maj Mori): Brief response, sir. *Madsen v. Kinsella* is totally irrelevant. It is talking about an occupied commission, military commission based on the powers of occupancy. This is a war court military commission based on violations of the law of war. No authority for my position? I guess the Supreme Court decision *Yamashita*, that sounds like authority for me. Read it. It spells it out. It goes through and it identifies who has the power to appoint a military commission and why. And it explains the rationale, that it is an exercise of military jurisdiction. It is a military -- it derives from the same ability for a commander, a military commander to send his troops into battle and it comes from that same authority. Our soldiers, sailors and Marines aren't led into combat by civilians. They are led by military commanders in the field of battle and in that field of battle that military commander can exercise as part of his war fighting powers inherent under the law of war is to also utilize military commissions. Not for some civilian sitting in DC to be appointed and deprive the military of the precedent on how it has been done.

The government doesn't say, look, there was a military commission that tried these law of war violations, you know, in Japan or in Germany. Just like this. The absence of it they try to use in support. Again, read *Yamashita*. It is based on sanctioned -- their creation by military command and conforming to established American precedent. When the precedent is on the defense side, that's when they didn't address this issue.

This is how we have done military commissions. It has always been appointed by the military commander of that area in zone, theater of war. Would it have been difficult for the CENTCOM commander or the forward commander to appoint military commissions to deal with law of war violations within that theater of war? It would have been simple, but that wasn't the purpose of these Commissions, to deal with law of war violations in the theater of operations.

It was to try to set up a system so far removed from the actual theater of operations and to remove it from under the power of the actual military commander under CENTCOM and move it to somewhere else to achieve a different purpose and this is not part of CENTCOM's battle fighting powers being employed.

PO: Either side going to put in findings on ten?

P (LtCol[redacted] No, sir.

ADC (Maj Mori): No, sir.

PO: Five?

ADC (Maj Mori): Yes, sir. Members, D 5 piggybacks right on with the Appointing Authority's lack of power. It deals with the location and where a military commission can sit. Where can they sit? We look at precedent. We look at where they have sat. We talk about *Yamashita*. We talk about *Quirin*. We talk about *Eisentrager*. And they all sat in the theater of operations in the same area where the conduct occurred, under the same military command. *Eisentrager* occurred in China. The commission occurred there. *Quirin* occurred on the east coast under the east coast command. *Yamashita* in Japan. Exercise of military jurisdiction within the theater of war. It is not a court of convenience because it is attached to, it is part of our war fighting powers and options.

To fight and to try is connected. It is not a court of convenience that can be done and picked and chosen wherever to put it that makes it most convenient. Because when that happens it stops becoming a court that is being utilized as part of the war fighting powers. The connection to the

theater of war is essential for this Commission to have jurisdiction to hear violations within that theater. Thank you.

AP (CDR[redacted] Let's start by looking at the statutes. Article 21 of the UCMJ says nothing about where a commission has to be conducted. Article 36 of the UCMJ gives the President the latitude for pretrial, trial and post-trial procedures which he has already determined he will not and it is not too practical to apply the rules of a federal district court. Nothing there says it has to occur in the theater of war. Where do we look first? Commission Law. Commission Law says this is a call for the Appointing Authority. You are to hold each session at such time and place as may be directed by the Appointing Authority. MCO Number 1. Has the Appointing Authority spoken? Yes. In his October 5, 2004 memorandum he stated all sessions of the Commission shall be conducted at Guantanamo Bay. Let's look at the international community. Is it customary that you have got to do it in a theater of war?

Well, you have got the Yugoslavia war tribunals, ICTY. They meet in the Hague. They don't meet in Kosovo. They meet in the Hague. You have got the Rwanda international criminal tribunals. Do they meet in Rwanda? No, they are usually over in Tanzania. So if the defense's lead-in, which if you read there, their motion is Winthrop, those guys must not have that book or they are consciously disregarding it. One or the other, but they are not following the passage from Winthrop.

Now, practical common sense. Afghanistan is still a hot area. We have troops there. It is dangerous. You have to be concerned for the Commission members, the counsel, the accused, the participants and everyone else involved in this Commission process. Article 19 of the Geneva Convention binding? No, but what does it say? Prisoners of war shall be evacuated as soon as possible after their capture to camps situated in an area far enough from the combat zone for them to be out of danger. In this case we would argue it is almost an obligation to get them further away from the theater of war, assuming that they have properly defined the theater of war. The conflict is with al Qaida. The conflict and the theater of war is in Afghanistan, Yemen, Spain, United States, you sit in danger here today at Guantanamo Bay. Your theater of war is the world.

Now, Winthrop in 1896, he didn't envision that when he wrote his book. Plane wasn't around then. Automobiles were not around then. We can not blame Winthrop for not envisioning that someone would have global reach in an armed conflict so easily as it is today.

Now, the defense, they lead with Winthrop in their motion and they gave you -- they attached a page to their motion saying how Winthrop opined back in 1896, Let's do it theater of war. Blowing the dust off Winthrop, got

out the book, turned the page. They gave you page 836. I'm going to give you page 837 now, because if you go on and you read Winthrop, he says we got to go further than that and it is not so binding on us because on page 837, he talks about an exception.

Well, you know, it is there but in actual existence it hasn't always been strictly regarded in our practice. And then he gives you an instance where the theater of war was Panama and they moved him to San Francisco for trial. So if you turn the page you get a little more enlightenment on that. The other thing to realize when you are reading the passage from Winthrop and when you look at *Quirin* and what they were addressing, we got to go back a little historically to a case called *Milligan*, Civil War time. That's what they were addressing because, you see, in the *Milligan* case, the government lost. They weren't able to use a military commission to get at *Milligan*. *Milligan*, for context, was a U. S. citizen sitting in Indiana during the Civil War and he gets arrested and they tried to take him to a commission. And they said, if you are a United States citizen, if you are in a state in the United States not invaded, not engaged in rebellion in which federal courts are open and the citizens neither are resident of a rebellious state nor a prisoner of war, can't take him to a military commission.

That's what Winthrop was worried about when he was writing in 1896. *Quirin* put it in perspective. What were they arguing, why did they talk about the theater of war? If you look at the *Quirin* case, they lay out the defense counsel arguments right at the start of the opinion. What is the defense saying is the problem here? That the acts alleged to have been committed by the petitioners in violation of the Article were not in the zone of military operations and that would preclude the jurisdiction of a military commission.

The weren't complaining about place of trial. They were saying we didn't commit an offense in a zone of military operations; we committed an offense in the Continental United States, you have got a federal district court, you have got to haul us into federal district court. Not that you have to hold a commission in the theater of operations. They are saying a federal court is available. Not really a war theater. You got to yank me into federal district court. Apples and oranges. That's not what they were getting at in those opinions.

Finally, even with all those arguments, if they are right, the remedy is not to dismiss the charges. The biggest problem we have got is my sea bag doesn't have winter clothes, because we would have to go to Afghanistan. It is a venue issue. The remedy for them, if we are required to be in the theater of operation is to go to the theater of operation, not dismiss the charges. That's almost laughable and for the reasons I have said cited, this motion should be denied.

ADC (Maj Mori): We should go to Afghanistan. If I'm in the theater of operations as I sit here in Guantanamo in danger, I should be getting my combat pay first of all. Wherever I am in this world, if it is now the zone of operations I should get my combat pay. We can either do it right or we can just ignore how it has been done before in the rules because it is inconvenient. It would be inconvenient to make a ruling that would stop this proceeding in its tracks. It would be inconvenient for the government, might be inconvenient for all the participants that put time and effort in it. But that is sometimes what judicial bodies do because that is what is right. The government argues, look at Commission Law for precedent. Commission Law was created 60 years ago, a little bit less, and the last time we have done military commissions.

So you have to look at the ancient precedent because that's all there is in military commissions. You look at Winthrop, and yes, Winthrop has one example where the offense was committed on the high seas, on a ship. Read *Yamashita*. Look at who ordered -- the President actually ordered the commission directly in *Quirin* himself. *Yamashita*, you had the military commander down to the chain of command as being delegated but it is always being delegated to a military commander who has the power to appoint a general court-martial or is the theater combatant commander. Look at *Eisentrager*. It is the same thing. There is no convenience excuse or difficulty excuse from doing it right.

The government's smoke and mirrors say look at the ICTY, ICTR. Wait a minute, those aren't tribunals established under the law of war as part of the law of war powers. That is the theory that we are doing this, rights? The President's order. That's a war court. As a specific jurisdiction of defense, a specific area in which it can sit, and who it can try. The ICTY and ICTR are not war courts. Is the location that day dangerous? You know, we have an obligation. I'll agree with the government and thank them for saying that David Hicks is entitled to the protections of POW status. Can we stipulate to that? Because if we can, I'm fine with doing that because that is what they argued, right? They protected him and should move him. Well, if they want to give their protections to the POW we can do that. And I would accept the ruling from the court with the government's concession that he is entitled to protections of POW. We don't object.

How many courts-martial were done in Vietnam? Thousands? I can't think of a more dangerous area. Just because there is hazard, that is part of -- incident to being in the theater of operation and conducting a war and utilizing a jurisdiction to hold people accountable for violations. That is how it's done. And the government argues again the lack of support and precedent for their position is support for doing it a different way and I say look at how it has been done in the past by the military, by all the Supreme

Court cases that they say relies and shows and proves we can do this all the Supreme Court cases say is to support the fact that it was done properly when it is convened by military commanders who can appoint general court-martial.

That's the rules, that's our precedent which we base these military commissions on. I'm sorry that it is old. Thank you.

AP (CDR[redacted] Sir, we don't intend to submit essential findings, however we would want to give you both pages of Winthrop. I have had that previously marked as a review exhibit with the court reporter.

AP (LTC[redacted] Sir, we will probably submit findings of facts, sir.

PO: You will?

ADC (Maj Mori): Yes, sir.

PO: Commander[redacted] as a matter of law, is the President authorized to convene the Military Commission?

AP (CDR[redacted] Yes, sir, he is, as Commander-in-Chief.

PO: Thank you. Major Mori, is the President authorized to convene the Military Commission?

ADC (Maj Mori): Yes, sir.

PO: Thank you.

CM (Col[redacted] Is the President given the authority to delegate that down in your opinion?

ADC (Maj Mori): He could delegate it, yes, sir, as he has done in past cases. As we see, he can, exercising his commander-in-chief function through orders to the military and he could delegate that down to a commander or the authority to exercise general court-martial convening power or as a theater commander, which usually nowadays is typically one and the same. And the interesting thing is --

CM (Col[redacted] The interesting thing is you keep using court-martials and this is not a court-martial.

ADC (Maj Mori): Well, that's right. But the Supreme Court is the one who is empowered to use -- remember, a court-martial is an exercise of military jurisdiction as well, sir. And in this exercise of military jurisdiction, it is still the military

that does it. The military. And it comes from our inherent -- the military commander's right to fight the fight and to exercise military jurisdiction, a military commander who can exercise general court-martial jurisdiction, has the same power to exercise military commission jurisdiction under the Supreme Court cases.

They couldn't just pick anybody. They couldn't just be -- we are very particular in the military. You can't just have your XO convene. Who is designated special court-martial convening authority or general court-martial convening authority? It is given -- it is something that is regarded in Article 22 of the UCMJ, if I'm quoting it right, designates who can convene general courts-martial. The President, Secretary of Defense, Secretaries of different services, commanding officers and certain specially designated. But they can only delegate it to a commanding officer who is a commissioned officer. That is a restriction within the Uniform Code of Military Justice for general court-martial, sir.

PO: Okay. If either party said findings are going to be attached, the Commission won't rule prior to receipt of those findings and opposing findings under the established times. If findings are not to be attached, the Commission will issue a ruling in due course. Anything further before we break until, did we say 1300 tomorrow?

AP (LTC[redacted] Yes, sir.

PO: Colonel[redacted] did we say 1300?

P (LtCol[redacted] Yes, sir.

PO: Anything further from either side?

P (LtCol[redacted] No, sir.

DC (Mr. Dratel): No, sir.

PO: The Commission is in recess.

The Commission Hearing recessed at 1628, 2 November 2004.

The Commission Hearing was called to order at 1400, 3 November 2004.

PO: The Commission will come to order.

P (LtCol[redacted] Sir, Sergeant[redacted] is back on the record as court reporter.

PO: All parties present when the Commission recessed are once again present except for Colonel[redacted] and Commander[redacted]

Okay. First, when the Commission uses the term "prior to authentication" in connection with the time at which a ruling will be issued in writing, the term refers to authentication of the record of trial -- you don't have to write so fast because you will get this -- you can go see Mr.[redacted] or you can write it down if you want to. The term refers to authentication of the record of trial under the provisions of MCO 6H(1).

Authentication of the portions of the record of trial for purposes of providing the transcript to counsel is not included in the term "prior to authentication". In other words, if Sergeant[redacted] finishes this thing up today or tomorrow and you all want to see what happened and I authenticate that portion, that is not authentication of the record of trial. In terms of what we say about giving rulings.

I've considered the defense request that I certify an interlocutory question to the Appointing Authority concerning the correctness of the Commissions ruling on D 37. I decline to do so. Prior to the start of this session we had an MCI 8-5 meeting, present which were government counsel, defense counsel, and myself. We discussed various things in that meeting we're going to be going over some of those things right now. Major Mori, do you have something to address the Commission?

ADC (Maj Mori): Yes, sir. May I approach, sir?

PO: Do you have a stip of fact?

ADC (Maj Mori): Yes, sir, I have a copy for each member, sir.

PO: Before you say anything, let me cover this with your client. Do you have a copy of it there?

ADC (Maj Mori): Yes, sir.

PO: Mr. Hicks, do you have a copy of what has been marked as RE 72, a stipulation of fact at your desk?

ACC: I don't have a copy, sir, but I've seen it. I do now, sir.

PO: Okay. Be seated, Major Mori. And you can be seated too, Mr. Hicks. In our system we don't have you stand. Okay. Is that -- did you sign this above your signature block?

ACC: Yes, I did, sir.

PO: What a stipulation of fact is, it's an agreement between the prosecution and your counsel only with your express consent that the contents of this document are true. That's all this is. If this is admitted, then it becomes binding on both sides -- the stuff in here is a fact. Do you understand that?

ACC: Yes. Yes, sir.

PO: You discussed this with your counsel before you signed it?

ACC: Yes, I did.

PO: Do you consent to this?

ACC: I do, sir.

PO: The court receives RE 72 as a stipulation of fact. Now, Major Mori, do you want to say anything else?

ADC (Maj Mori): Yes, sir, address the Commission that yesterday in reference to Article 5 tribunal and one was done for Mr. Hicks in response to your question, sir, we want to provide this so that you could see when the CSRT was accomplished on what date.

PO: Is that satisfactory?

Apparently so.

The Commission has carefully considering D 11 the defense motion to dismiss Charge I. The Commission has deferred ruling on the motion.

The Commission has carefully considered D 9, the defense motion to strike those portions of Charge I relating to destruction of property by an unprivileged belligerent. The Commission has deferred ruling on this motion.

The Commission has carefully considered D 17, defense motion to exclude from the charges against Mr. Hicks all events occurring prior to 7 October 2001. The Commission has deferred ruling on this motion.

The Commission has carefully considered D 3, the motion to dismiss all charges because the armed conflict in Afghanistan has ended. The Commission has deferred ruling on this motion.

The Commission has carefully considered D 4, the defense motion to dismiss all charges against Mr. Hicks for improper pretrial detention. The Commission has deferred ruling on this motion.

The Commission has carefully considered D 7, the defense motion to dismiss for denial of right to a speedy trial. The Commission has deferred ruling on this motion.

The Commission has carefully considered D 19, the defense motion to dismiss due to equal protection violations. The Commission has deferred ruling on this motion.

The Commission has carefully considered D 8, the defense motion to dismiss for denial of various fundamental rights in the criminal proceeding. The Commission has deferred ruling on this motion.

The Commission has carefully considered D 18, the defense motion to dismiss because the President did not have authority to create a military Commission. The Commission has deferred ruling on this motion.

The Commission has carefully considered D 21, the defense motion to dismiss because the system instituted under the Military Commission Order will not provide a full and fair trial. The Commission has deferred ruling on this motion.

The Commission has carefully considered D 22, the defense motion to replace all current members of the Commission with legal professionals. The Commission has deferred ruling on this motion.

I have received D 39, a defense request for delay in the trial of this case on the merits until 15 March 2005, which is marked as RE 71. The prosecution objects to this delay, but in the interest of a full and fair trial I've granted the delay.

Mr. Dratel, D 6, a request for a bill of particulars is being withdrawn at this time with leave to reinstate it if the discovery under the discovery order I sign today is not sufficient; is that correct?

DC (Mr. Dratel): That is correct, sir.

PO: Is that your view?

P (LtCol[redacted] Yes, sir.

PO: Thank you. The discovery order has been given both sides and is RE 73. Go on.

DC (Mr. Dratel): Did you cover D 20? I did not hear D 20, which would have been right after D 9, in terms of the order of argument.

PO: I intentionally did not say anything about D 20.

D 20 is still before the Commission. All of these are still before the Commission.

Okay. Absent anything further from counsel the Commission does not intend to hold any further sessions in this case during this trial term. Counsel for both sides agreed in that MCI 8-5 meeting that there may be a need for an evidentiary motion session in mid-January. That is not a firm trial date; is that correct, trial?

P (LtCol[redacted] Yes, sir.

DC (Mr. Dratel): Yes, sir.

PO: Okay. Anything further before the Commission goes into recess?

P (LtCol[redacted] No, sir.

DC (Mr. Dratel): Nothing from the defense, Your Honor.

PO: Commission is in recess.

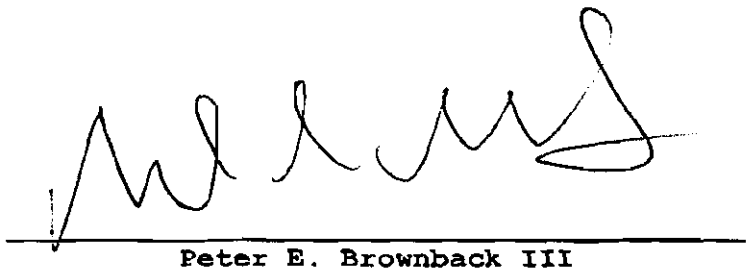
The Commission Hearing recessed at 1409, 3 November 2004.

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. DAVID MATTHEW HICKS
a/k/a Abu Muslim al Austraili
a/k/a Muhammaed Dawood

This is to certify that Pages 124 through 275 are an accurate and verbatim transcript of the foregoing proceedings.



Peter E. Brownback III
Colonel, Judge Advocate
Presiding Officer

18 August 2005

Date

RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
DAVID M. HICKS

ALSO KNOWN AS:

ABU MUSLIM AL AUSTRAILI
MUHAMMED DAWOOD

NO. 040001

VOLUME ___ OF ___ VOLUMES

1ST VOLUME OF REVIEW EXHIBITS (RE): RE 1-16*

AUGUST 25, 2004 SESSION

(REDACTED VERSION)

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* Review Exhibits 13 to 16 were issued at both the August and November 2004 sessions.

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No. 040001

UNITED STATES v. DAVID MATTHEW HICKS a/k/a Abu Muslim al Austraili a/k/a Muhammed Dawood	)))))))))	**Military Commission Members** JUN 2 5 [illegible]

The following officers are appointed to serve as a Military Commission for the purpose trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member of the Military Commission will serve until relieved by proper authority.

In the event of incapacity, resignation, or removal of a member who has not been designated as the Presiding Officer, the alternate member is automatically appointed as a member.

Colonel Peter E. Brownback, III, USA (Retired), Presiding Officer
Colonel Jack K[redacted] USMC, Member
Colonel [redacted] USMC, Member
Colonel [redacted] USAF, Member
Lieutenant Colonel [redacted] USAF, Member
Lieutenant Colonel [redacted] USA, Alternate Member

John D. Altenburg Jr.

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

Review Exhibit 1

Page 1 Of 1

ENCL 1

[redacted]

THE WHITE HOUSE

WASHINGTON

OFFICE OF THE SECRETARY OF DEFENSE

2003 JUL 14 PM 5:12

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources, including the factual summary from the Department of Defense Criminal Investigation Task Force dated June 24, 2003 and forwarded to me by the Deputy Secretary of Defense by letter dated July 1, 2003;

Pursuant to the Military Order of November 13, 2001 on "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism";

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the Armed Forces of the United States, hereby DETERMINE for the United States of America that in relation to David Matthew Hicks, Department of Defense Internment Serial No. US9AS-000002DP, who is not a United States citizen:

(1) There is reason to believe that he, at the relevant times:
- (a) is or was a member of the organization known as al Qaida;
- (b) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- (c) has knowingly harbored one or more individuals described in subparagraphs (a) or (b) above.

(2) It is in the interest of the United States that he be subject to the Military Order of November 13, 2001.

Accordingly, it is hereby ordered that, effective this day, David Matthew Hicks shall be subject to the Military Order of November 13, 2001.

DATE: July 3, 2003

White House Office-controlled Document

DECLASSIFIED IAW JTF-GTMO-J2 SCG, 10JUN2004
DECLASSIFIED ON: 25 AUG 2004
Review Exhibit 2

[redacted]

Page 1 of 1

X02375 /03

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

July 28, 2004

MEMORANDUM FOR COMMANDER [redacted] USN
LIEUTENANT COLONEL [redacted] USMC
LIEUTENANT COLONEL [redacted] USMC
MAJOR [redacted] USA
CAPTAIN [redacted] USA
LIEUTENA [redacted] JR. USNR
CAPTAIN [redacted] USAFR

SUBJECT: Detailed Prosecutors

Consistent with my authority as Chief Prosecutor and the provisions of Sections 4B(2) of Military Commission Order No. 1, dated March 21, 2002, and Section 3B(9) of Military Commission Instruction No. 3, dated April 30, 2003, the above named counsel are detailed and designated as follows:

United States v. al Bahlul
Detailed Prosecutor: Commander [redacted]
Detailed Assistant Prosecutors: Lieutenant Colonel [redacted] Captain [redacted]

United States v. al Qosi
Detailed Prosecutor: Lieutenant Colonel [redacted]
Detailed Assistant Prosecutors: Lieutenant [redacted] Captain [redacted]

United States v. Hamdan
Detailed Prosecutor: Commander [redacted]
Detailed Assistant Prosecutors: Captain [redacted]

United States v. Hicks
Detailed Prosecutor: Lieutenant Colonel [redacted]
Detailed Assistant Prosecutors: Major [redacted]

Colonel, U.S. Army
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor
Mr. [redacted]

Review Exhibit 3

Page 1 Of 1

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

August 13, 2004

From: Colonel Will A. Gunn, Chief Defense Counsel
To: Mr. David Hicks

Subj: REQUEST FOR SELECTED DETAILED DEFENSE COUNSEL

1. Your request dated 5 August 2004 to have LtCol William K. Lietzau serve as your Selected Detailed Defense Counsel is denied. I have determined that LtCol Lietzau is not available.

2. In accordance with paragraph 3E of Military Commission Instruction Number 4, I consulted with LtCol Lietzau's Judge Advocate General, Rear Admiral Michael F. Lohr. Admiral Lohr has determined that LtCol Lietzau is not available due to his assigned duties and responsibilities as Director of the Navy-Marine Corps Appellate Government Division.

3. Please notify me if you have other requests.

Will A. Gunn

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

Copy to:
Mr. Joshua L. Dratel
Major Michael D. Mori
Major Jeffrey D. Lippert
MSgt [redacted]

Review Exhibit 4
Page 1 Of 2

05 August 2004

From: David Hicks, Detainee, Naval Base Guantanamo Bay
To: Col Gunn, Chief Defense Counsel, Office of Military Commissions

Subj: REQUEST FOR SELECTED DETAILED DEFENSE COUNSEL

1. I am currently facing charges before a military commission. I am aware I have the ability to ask for a Selected Detailed Defense Counsel under Military Commission Order No. 1.

2. I request LtCol William K. Lietzau, USMC, be detailed to represent me as my Selected Detailed Defense Counsel.

3. LtCol Lietzau is currently serving as Director of Appellate Government, Office of the Judge Advocate General of the Navy. I am aware that in his current billet, he represents the U.S. Government in Appellate review of courts-martial case. Knowing this, I still request he be detailed.

4. I request that Major Michael D. Mori, my Detailed Defense Counsel be permitted to continue his representation of me as authorized under Military Commission Order No. 1. I understand that Maj Lippert, USA, will be assigned to my defense team on 09 August 2004. I understand that if this request is granted, Maj Lippert may be removed from my defense team.

DHicks
DAVID HICKS

RE 4

Page 2 of 2

C551

to cor Gunn 9 Aug 04

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

23 July 2004

MEMORANDUM DETAILING DEFENSE COUNSEL

TO: Lieutenant Colonel Sharon Shaffer, Major Mark Bridges, Major Michael Mori, LCDR Philip L. Sundel, LCDR Charles D. Swift

SUBJECT: Detailed Defense Counsel

Consistent with my authority as Chief Defense Counsel and the provisions of sections 4C and 5D of Military Order No. 1, dated March 21, 2002, and section 3B of Military Commission Instruction # 4, dated 15 April 2004, the above named counsel are detailed and designated as follows:

United States v. Al Bahlul
Detailed Defense Counsel: LCDR Philip Sundel
Assistant Detailed Defense Counsel: Major Mark Bridges

United States v. Al Oosi
Detailed Defense Counsel: Lieutenant Colonel Sharon Shaffer

United States v. Hamdan:
Detailed Defense Counsel: LCDR Charles Swift

Unted States v. Hicks:
Detailed Defense Counsel: Major Michael Mori

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

Review Exhibit 5

Page 1 Of 4

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

28 November 2003

MEMORANDUM DETAILING DEFENSE COUNSEL

TO: Major Michael D. Mori, USMC
SUBJECT: Detailing Letter re Military Commission Proceedings of Mr. David Hicks

Pursuant to the authority granted to me by my appointment as Acting Chief Defense Counsel and Sections 4C and 5D of Military Order No. 1, dated March 21, 2002, you are hereby detailed as Military Counsel for all matters relating to Military Commission proceedings involving Mr. David Hicks. Your appointment exists until such time any findings and sentence become final as defined in Section 6(H)(2) unless you are excused from representing Mr. Hicks by me or my successor. I deem your detailing to be appropriate based on the government's assertion in enclosure (1) that on July 3, 2003, the President determined that Mr. Hicks is subject to the Military Order of November 13, 2001 and as such "shall when tried, be tried by military commission for any and all offenses triable by military commission that [he] is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."

In your representation of Mr. Hicks, you are directed to review and comply with Presidential Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (66 FR 57833); Military Commission Orders No. 1 and 2 and Military Commission Instructions 1 through 8 and all Supplementary Regulations and Instructions issued in accordance therewith. Specifically, you are directed to ensure that your conduct and activities are consistent with the prescriptions and proscriptions specified in Section II of the Affidavit And Agreement By Civilian Defense Counsel at Appendix B to Military Instruction No. 5.

You are directed to inform Mr. Hicks of his rights before a Military Commission. In the event that Mr. Hicks chooses to exercise his rights to Selected Military Counsel or his right to Civilian Defense Counsel at his own expense, you shall inform me as soon as possible. Consistent with paragraph 3B(8) of Military Instruction No. 4, I am detailing Master Sergean[redacted] as a member of the defense team to assist you in representing Mr. Hicks.

In the event that you become aware of a conflict of interest arising from the representation of Mr. Hicks before a Military Commission, you shall immediately inform me of the nature and facts concerning such conflict. You should be aware that in addition to your State Bar and Service Rules of Professional Conduct that by virtue of your appointment to the Office of Military Commissions you will be attached to the Defense Legal Services Agency and will be subject to professional supervision by Department of Defense General Counsel.

RE 5

You are directed to inform me of all requirements for personnel, office space, equipment, and supplies necessary for preparation of the defense of Mr. Hicks.

Will A. Gunn

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

Enclosure:
Target Letter re Mr. David Hicks dated November 28, 2003

cc:
MSgt [redacted]
Lt Col [redacted]
Co [redacted]
General Hemingway
Mr. Koffsky

RE 5

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

28 July 2004

MEMORANDUM DETAILING DEFENSE COUNSEL

TO: Major Jeffrey D. Lippert, USA

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

Pursuant to the authority granted to me by my appointment as Chief Defense Counsel, Sections 4C and 5D of Military Commission Order No. 1, dated March 21, 2002, and Section 3B(8) of Military Commission Instruction No. 4, you are hereby detailed and designated as Assistant Detailed Defense Counsel for all matters relating to Military Commission proceedings involving Mr. David Hicks. Your appointment is effective 9 August 2004 and exists until such time any findings and sentence become final as defined in Section 6(H)(2) of Military Commission Order No. 1 unless you are excused from representing Mr. Hicks by me or my successor.

Will A. Gunn

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

RE 5

Gen Hemmingway

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

January 12, 2004

Joshua L. Dratel
14 Wall Street, 28th Floor
New York, NY 10005

Dear Mr. Dratel,

I am pleased to inform you that, based on the information provided and the determination by Defense Security Service, you have been qualified to represent Mr. David Hicks before Military Commissions.

Prior to beginning representation of Mr. Hicks you are required to furnish my office with a notice of appearance on behalf of Mr. Hicks and a signed copy of the enclosed Standard Form 312 (Non-Disclosure Agreement for Confidential Material). If you have any questions regarding your status or the requested/required documents please do not hesitate to contact my office at (703) 607-1521.

Sincerely,

Will A. Gunn

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

Review Exhibit 6

Page 1 Of 1

UNITED STATES OF AMERICA	)	
	)	**Defense Objection to Placement of Security Personnel in the Commission Room**
v.	)	
	)	23 August 2004
DAVID M. HICKS	)	

The Defense in the case of the *United States v. David M. Hicks* objects to the positioning of security personnel directly behind the Defense table during the Commission proceedings and states in support of this objection:

1. On 22August 2004, the Assistant to the Presiding Officer held an administrative meeting for all counsel. During this meeting he informed the Defense that two (2) uniformed MPs, wearing MP brassards, would be positioned directly behind the Defense table within "arm's reach" of Mr. Hicks.

2. Notwithstanding the proposed instruction regarding Security Precautions set forth in the Trial Guide for Military Commissions (Draft of 21 August 2004), page 14, the Defense objects to the positioning of these security personnel in the Commission room.

3. Having security personnel in such close proximity to the accused has the potential of misleading the Commission members into thinking or believing Mr. Hicks either intends to or has a tendency to become violent or unruly, or otherwise needs security personnel watching him closely and ready, at a moments notice to subdue him.

4. Mr. Hicks has been in U.S. custody at Guantanamo Bay for approximately 2 years and 9 months. In that time he has been a model detainee. He has not engaged in any violent or aggressive behavior. He has adjusted well to his long detention, and is completely compliant to the directions of security personnel at all times.

5. There is no reason to believe he will behave differently during the Commission. Placing security personnel in such close proximity to Mr. Hicks and the defense team during the Commission sessions creates an appearance or perception that Mr. Hicks is a dangerous person. Such an appearance or perception is insidious and could, notwithstanding the proposed instruction, unfairly prejudice the accused.

6. In addition, the placement of security personnel in such close proximity to the accused will serve to chill the activities of the defense team at the counsel table during the Commission. With security personnel less than four (4) feet behind the backs of the defense team, there can be no private conversations between counsel or between counsel and the accused.

7. Such interference in the attorney-client relationship is prejudicial to Mr. Hick's receiving a full and fair trial.

8. The commander's operational considerations must be balanced against the right of Mr. Hick's to receive a full and fair trial. Here, there is no objective basis for placing security personnel in such close proximity to Mr. Hicks and the defense team. There is however a threat to Mr. Hicks receiving a full and fair trial. Accordingly, the security concerns of the commander must give way to the rights of Mr. Hicks.

9. Relief Requested: The Defense requests the security personnel be placed in a different position in the commission room so that Mr. Hicks' rights are not infringed upon.

10. Oral Argument: The Defense requests oral argument on this objection.

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

Review Exhibit 7

Page 2 of 2

UNITED STATES v. DAVID MATTHEW HICKS a/k/a Abu Muslim al Austraili a/k/a Muhammed Dawood	)	**CHARGES:** **CONSPIRACY;** **ATTEMPTED MURDER BY AN UNPRIVILEGED BELLIGERENT;** **AIDING THE ENEMY**

David Matthew Hicks (a/k/a Abu Muslim al Austraili, a/k/a Muhammed Dawood) is a person subject to trial by Military Commission. At all times material to the charges:

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 3, 2003 that David Matthew Hicks (a/k/a Abu Muslim al Austraili, a/k/a Muhammed Dawood, hereinafter "Hicks") is subject to his Military Order of November 13, 2001.

2. Hicks' charged conduct is triable by a military commission.

BACKGROUND

3. Hicks was born on August 7, 1975 in Adelaide, Australia.

4. On or about May 1999, Hicks traveled to Tirana, Albania and joined the Kosovo Liberation Army (KLA), a paramilitary organization fighting on behalf of Albanian Muslims. Hicks completed basic military training at a KLA camp and engaged in hostile action before returning to Australia.

5. While in Australia, Hicks converted from Christianity to Islam. On or about November 1999, he traveled to Pakistan where, in early 2000, he joined a terrorist organization known as Lashkar e Tayyiba (LET), or "Army of the Righteous."

    a. LET is the armed wing of Markaz Dawa al Irshad (a/k/a Markaz Jamat al Dawa), a group formed by Hafiz Mohammed Saeed and others.

    b. LET's known goals include violent attacks against property and nationals (both military and civilian) of India and other countries in order to seize control of Indian-held Kashmir and violent opposition of Hindus, Jews, Americans, and other Westerners.

    c. Starting around 1990, LET established training camps and guest houses, schools, and other operations primarily in Pakistan and Afghanistan for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of India and other countries.

d. Since 1990, members and associates of LET have conducted numerous attacks on military and civilian personnel and property in Indian-controlled Kashmir and India.

e. In 1998, Saeed called for holy war against the United States after U.S. missile attacks against terrorist training facilities in Afghanistan killed LET members.

f. On April 23, 2000, in a bulletin posted on the internet, LET claimed that it recently killed Indian soldiers and destroyed an Indian government building, both in Indian Kashmir.

6. After joining LET, Hicks trained for two months at LET's Mosqua Aqsa camp in Pakistan. His training included weapons familiarization and firing, map reading and land navigation, and troop movements.

7. Following training at Mosqua Aqsa, Hicks, along with LET associates, traveled to a border region between Pakistani-controlled Kashmir and Indian-controlled Kashmir, where he engaged in hostile action against Indian forces.

8. On or about January 2001, Hicks, with funding and a letter of introduction provided by LET, traveled to Afghanistan to attend al Qaida terrorist training camps.

9. On or about early December 2001, Hicks was captured near Baghlan, Afghanistan.

GENERAL ALLEGATIONS (AL QAIDA)

10. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

11. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.

12. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.

13. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

14. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

15. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.

16. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

17. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

18. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE 1: CONSPIRACY

19. David Matthew Hicks (a/k/a Abu Muslim al Austraili, a/k/a Muhammed Dawood, hereinafter "Hicks"), in Afghanistan, from on or about January 1, 2001 to on or about December 2001, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al Adel, Usama bin Laden, and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

20. In furtherance of this enterprise and conspiracy, Hicks and other members of al Qaida committed the following overt acts:

    a. On or about January 2001, Hicks, with funding and a letter of introduction provided by LET, traveled to Afghanistan to attend al Qaida terrorist training camps. Upon arriving in Afghanistan, Hicks went to an al Qaida guest house, where he met Ibn Sheikh al Libi, a top-ranking al Qaida member, and others. Hicks turned in his passport and indicated that he would use the *kunya*, or alias, "Muhammed Dawood."

    b. Hicks then traveled to and trained at al Qaida's al Farouq camp located outside Qandahar, Afghanistan. In al Qaida's eight-week basic training course, Hicks trained in weapons familiarization and firing, land mines, tactics, topography, field movements, and basic explosives.

c. On or about April 2001, Hicks returned to al Farouq and trained in al Qaida's guerilla warfare and mountain tactics training course. This seven-week course included: marksmanship; small team tactics; ambush; camouflage; rendezvous techniques; and techniques to pass intelligence to al Qaida operatives.

d. While Hicks was training at al Farouq, Usama bin Laden visited the camp on several occasions. During one visit, Hicks questioned bin Laden regarding the lack of English al Qaida training material; accepting bin Laden's advice, Hicks began to translate the training camp materials from Arabic to English.

e. After Hicks completed his first two al Qaida training courses, Muhammad Atef (a/k/a Abu Hafs al Masri), then the military commander of al Qaida, summoned and interviewed Hicks about his background and the travel habits of Australians. Saif al Adel, then the deputy military commander of al Qaida, was also present at this interview. At the conclusion of this meeting, Muhammed Atef recommended Hicks for attendance at al Qaida's urban tactics training course at Tarnak Farm.

f. On or about June 2001, Hicks traveled to Tarnak Farm and participated in this course. A mock city was located inside the camp, where trainees were taught how to fight in an urban environment. Training also included: marksmanship; use of assault and sniper rifles; rappelling; kidnapping techniques; and assassination methods.

g. On or about August 2001, Hicks participated in an advanced al Qaida course on information collection and surveillance in an apartment in Kabul, Afghanistan. This course included "practical application" where Hicks and others conducted surveillance of various targets in Kabul, including the U.S. and British embassies, and submitted reports.

h. Following the information collection and surveillance course, Muhammed Atef again interviewed Hicks, and asked if he would be willing to undertake a "martyr mission," meaning an attack wherein Hicks would kill himself as well as the targets of the attack.

i. At an al Qaida guest house in Qandahar, as well as at al Qaida training camps and other locations in Afghanistan, Hicks received instruction from al Qaida associates on their interpretation of Islam, the meaning and obligations of *jihad*, and other topics.

j. On or about early September 2001, Hicks traveled to Pakistan to visit a friend. After watching television footage of the September 11, 2001 attacks on the United States, Hicks returned to Afghanistan to rejoin his al Qaida associates.

k. Arriving in Qandahar, Afghanistan, Hicks reported to Saif al Adel, who was assigning individuals to locations where they were to fight alongside other al Qaida associates against U. S. and Coalition forces. Given a choice of three

different locations, Hicks chose to join a group of al Qaida fighters near the Qandahar Airport. Armed with an AK-47 automatic rifle, ammunition, and grenades, Hicks traveled with his al Qaida associates to the Qandahar Airport.

l. On or about October 2001, after Coalition bombing operations commenced, Hicks joined an armed group outside the airport, where they guarded a Taliban tank.

m. After guarding the tank for approximately one week, Hicks, still armed with the AK-47 rifle, ammunition, and grenades, traveled with an LET acquaintance to Konduz, Afghanistan, arriving around November 9, 2001. There, he joined others, including John Walker Lindh, who were engaged in combat against Coalition forces.

CHARGE 2: ATTEMPTED MURDER BY AN UNPRIVILEGED BELLIGERENT

21. David Matthew Hicks (a/k/a Abu Muslim al Austraili, a/k/a Muhammed Dawood), in Afghanistan between on or about September 11, 2001 and December 1, 2001, as a perpetrator, co-conspirator, member of an enterprise of persons who shared a common criminal purpose, an aider or abettor, or some combination thereof, attempted to murder divers persons by directing small arms fire, explosives, and other means intended to kill American, British, Canadian, Australian, Afghan, and other Coalition forces, while he did not enjoy combatant immunity and such conduct taking place in the context of and associated with armed conflict.

CHARGE 3: AIDING THE ENEMY

22. David Matthew Hicks (a/k/a Abu Muslim al Austraili, a/k/a Muhammed Dawood), in Afghanistan between on or about January 1, 2001, and December 1, 2001, intentionally aided the enemy, to wit: al Qaida and the Taliban, such conduct taking place in the context of and associated with armed conflict.

Biographical Summary

Peter E. Brownback III

[redacted] with a Bachelors of Arts in International Affairs.

Received a Regular Army commission as an infantry officer in June 1969. After initial officer training, assigned as a platoon leader in 3/325 PIR, 82d Abn Div, Fort Bragg, NC from October 1969 to February 1970.

Vietnam service from June 1970 - June 1971 as an infantry platoon leader, armored cavalry platoon leader, and battalion S-1, all with the 173d Airborne Brigade.

Served with 5th Special Forces Group at FBNC from June 71 to February 1973 as an A Detachment Commander and Battalion S-3.

Infantry Officer Advanced Course -- June 1973 - May 1974.

Funded Legal Education Program student at [redacted] Summers at Fort Lee working as assistant trial and assistant defense counsel. Admitted to Virginia Bar, June 1977.

Assigned to Office of the Staff Judge Advocate, 82d Airborne Division, FBNC, 1977-1980. Trial Counsel, Chief Administrative Law, Chief Military Justice.

Senior Defense Counsel, Fort Meade, MD. 1980-81.

Operations Officer, US Army Trial Defense Service, Falls Church, VA. 1981-84.

Legal Advisor/Legal Instructor, USAJFK Center for Special Warfare, FBNC, 1984-85.

Legal Advisor, Joint Special Operations Command, FBNC, 1985-88.

Senior Military Judge, Mannheim, FRG, 1988-1991.

Director of Legal Operations, JSOC, FBNC, Jan 91 - Apr 91.

Staff Judge Advocate, 22d SUPCOM/ARCENT Forward, Dhahran, KSA, May 91 - May 92.

Chief Circuit Judge, 2d Judicial Circuit, FBNC, 1992 - 1996.

Chief Circuit Judge, 5th Judicial Circuit, Mannheim, FRG, 1996 - 1999.

Entered on the retired rolls on 1 July 1999.

Recalled to active duty on 14 July 2004.

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AWARDS: Combat Infantryman's Badge, Special Forces Tab, Ranger Tab, Master Parachutist Badge, DSM, LOM x 3, BSM x 5, MSM x 2, JSCM x 2, ARCOM x 2, AAM, JMUA x 2, NDSM, VSM, SWABS, HSM, RVNGCUC, RVNCAMU, KUKULISM

PERSONAL: Married to [redacted]

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Voir Dire Question Prepared by Presiding Officer, COL Peter E. Brownback (Taken from the Draft Trial Guide.)

1. I do not know any accused whose case has been referred to the Commission.

2. I do not know any person named in any of the charges.

3. Of the names of witness I have seen so far, I do not recognize any of their names.

4. I do not have any prior knowledge of the facts or events in this case that will make me unable to serve impartially.

5. I do not know, and have no command relationship with, any other member.

6 .I believe that I can vote fairly and impartially notwithstanding a difference in rank with other member. I will not use my rank to influence any other member.

7. I have not had any dealings with any of the parties to the trial, to include counsel for both sides, that might affect my performance of duty as a Commission member in any way.

8. I have not had any prior experience, either personal or related to my military duties, that I believe that would interfere with my ability to fairly and justly decide this case.

9. No family member, relative, or close friend that I am aware of was the victim of the events of 9-11, and has not been the victim of any alleged terrorist act. I have been told that a former Judge Advocate General's Corps officer was on one of the planes which hit the World Trade Center. This officer was assigned to Fort Bragg at some time during the period 1984 to 1988, while I was assigned there. I do not recall the last time I saw the officer, nor do I recall his name. He was not assigned to the same unit(s) to which I was assigned, although we met, I feel certain, at one or more of the judge advocate functions on base. [redacted]

10. I have seen and heard general media reporting about the events of 9-11, al Qaida, Usama Bin Laden, and terrorism on broadcast TV and the various newspapers. Nothing I have seen or read will have any effect on my ability to perform the duties as a Commission member fairly and impartially.

11. I promise as a Commission Member that I will keep an open mind regarding the verdict until all the evidence is in.

12. I know and respect that the accused is presumed innocent and this presumption remains unless his guilt is established beyond a reasonable doubt. I know and respect that the burden to establish the guilt of the accused is on the prosecution. I agree to be guided by and follow these principles in deciding this case.

13. I have nothing of either a personal or professional nature that would cause me to be unable to give my full attention to these proceedings throughout the trial.

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14. I am not aware of any matter that might raise a question concerning my participation in this trial as a Commission member.

Peter E. Brownback III
Colonel, USA

Presiding Officer Voir Dire Addendum - Relationship with Other Personnel

a. Mr. Haynes: I believe that I once met the General Counsel at the Army's Judge Advocate General's School in 1996 or 1997 as part of an organized run. We exchanged perhaps ten minutes worth of casual chit-chat during the run. Other than that, I have had no contact with Mr. Haynes.

b. Mr. Altenburg:

1. I first met (then) CPT Altenburg in the period 1977-78, while he was assigned to Fort Bragg. My only specific recollection of talking to him was when we discussed utilization of courtrooms to try cases.

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

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

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

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

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

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

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

c. BG Hemingway: I had never met, talked to, or otherwise communicated with BG Hemingway until I reported on 14 July 2004.

d. Members: I have never met or talked to any of the other members of the commission. I have emailed instructions to all of them and received email receipts from all of them. A copy of what I sent to the members was provided to all counsel.

Memorandum for All Counsel 18 August 2004

Subject: Questionnaire #2 - Presiding Officer Voir Dire

1. I have received questions from counsel in Al Bahlul, Hamden, and Hicks. Many of the questions are the same or so nearly the same as to make no difference. I am answering these questions by this memorandum.

2. I refer all counsel to MCO #1, para 6B(1) and (2) - the commission is to provide a full and fair trial, impartially and expeditiously. Further, MCI # 8, para 3A(2), states that questioning of the members, to include the Presiding Officer, shall be narrowly focused on issues pertaining to whether good cause may exist for removal of any member.

3. Professional Background --

a. I have served in close ground combat only in Vietnam - where I was a rifle platoon leader and an armored cavalry platoon leader. I do not remember having any occasion to deal with enemy prisoners - either by capturing them or being involved in trying them or questioning them. However, I did work with former Viet Cong who had come over to the ARVN.

b. During my time as an infantry officer and a judge advocate, I attended many courses - some of which focused on the law of war and international law. I do not recall the where/when's for these courses. I taught various aspects of international law and law of war at the JFK Special Warfare Center for a year. To the best of my knowledge, I have not attended any courses focusing on LOAC or IL since 1984/85. However, during various presentations at general courses, I may have had some exposure to these subjects.

c. I have not received any specialized training, formal or informal, on Al Qaeda, the Taliban, Islamic Fundamentalism, or detainee operations. I have had the occasion to read newspaper and news magazine accounts of various aspects of the topics above. I also have read some articles published in the Army War College journal and the Military Law Review. Additionally, I have read numerous articles on various topics while surfing the web.

d. I am generally aware of the conduct of operations in Afghanistan and Iraq. I am interested in such operations. I have had occasion to look at the DOD website on Military Commissions. I have not seen any of the data or articles on detainee operations.

e. I have not written for publication or spoken publicly about any of the topics in paragraph 3c above.

f. I am and have been an associate member of the Virginia State Bar since 1977. I have never practiced law in the civilian sector.

4. Personal Background:

a. I was raised as a Christian. I do not attend church regularly. I have no antipathy towards Islam, or any of the other major religions. My knowledge of Islam is based primarily upon my readings and my dealings with Saudis, Kuwaitis, and others during my tour in Saudi Arabia in 1991-92. I am not an expert in the area of Islam, although I have some knowledge. I do own a Qur-An, but I do not profess to be a student of the Qur-An.

b. I entered onto the retired rolls on 1 July 1999. I intended to be retired. However, I soon discovered that I was slightly bored. Consequently, at the urging of my wife, I took several part-time jobs. These included being an enumerator for the 2000 Census, a safety person for beach renewal operations, an instructor for an SAT prep course, and an instructor at a local college. I enjoyed all of the jobs and I regretted having to quit two of them upon my recall to active duty.

c. My hearing is within deployment standards. I do not like to have people mumble - I prefer that they speak with a command voice. There is no impairment.

d. **Caveat - see 4e, below.** I belong to several military professional organizations and to various social organizations. None of them is political in nature. I do not attend meetings.

e. I do belong to a local community organization which supports various propositions involving local city management and zoning. It is political only in the sense that it wants voters to vote in accordance with its recommendations - most of which are simply anti-over-development. I have attended at least three of its meetings when the topic was one of interest to me.

f. I am registered to vote. My Voter Registration Card shows NPA in the Party block. I have not campaigned for anyone.

5. Effect of 9/11 and other events:

a. See Questionnaire #1 for the only person I knew who was killed on 9/11.

b. I knew and know many people in the Pentagon. I did not have any personal friends who were killed or injured there; however, I did have friends who were in the building when the plane hit.

c. I have many friends and others who have been stationed in Afghanistan and Iraq. I am aware of the impact of war upon soldiers and their families.

d. There was no specific impact of 9/11 and related events upon me or my family.

6. Mr.[redacted]

a. I first became aware of Keith[redacted]in 1980-81. I was the Senior Defense Counsel at Fort Meade, MD. The post stockade served many posts along the east coast. One of those posts was Fort Eustis, VA, where CPT[redacted]was a prosecutor. He was the lead prosecutor on a murder case - I became involved in the case through my dealings with the DC at Eustis.

b. I next saw LTC[redacted]when he was the Regional Defense Counsel in Stuttgart, Germany and I was one of the military judges at Mannheim. We had numerous professional contacts and we may have been at two or three social functions together.

c. In 1992, I became the Chief Circuit Judge, 2d Judicial Circuit, Fort Bragg, NC. One of the Circuit Judges who worked for me was LTC (later COL)[redacted] We worked closely together - via telephone and electronic bulletin board (precursor to email) - until his departure for Fort Hood in 1995. During this period, I only saw him at judicial training functions and on one occasion when I promoted him to Colonel.

d. From 1995 to 1996, COL[redacted]and I talked and exchanged emails routinely on various matters. We worked on the Benchbook together and we helped each other with various case-related problems. I saw COL[redacted]once, during a judicial training function.

e. From 1996 until my retirement in 1999, COL[redacted]and I continued to exchange ideas, suggestions, instructions, and the like by email. I saw him three times at judicial training functions.

f. Upon my retirement in 1999, COL[redacted]and I had few occasions to exchange email or telephone calls while he was at Fort Hood. [redacted] On one occasion, he[redacted]went deep sea fishing together. When Mr.[redacted]would come across a criminal law case which he thought would interest me, he would forward it to me.

g. During the period after the announcement of the Military Commissions in 2001, Mr.[redacted]and I discussed the commissions on at least one occasion. He knew that I had put my name in for consideration. On 29 June 2004, I received an email from LTC[redacted]at OMC. In it he stated that the Appointing Authority was considering hiring a Legal Advisor to the Presiding Officer and asked if I had any recommendations. I immediately gave him Mr.[redacted]name, because:

1) I was personally familiar with Mr.[redacted]work and work ethic.
2) I was personally familiar with Mr.[redacted]knowledge of criminal law and procedure.
3) I was personally familiar with Mr.[redacted]ability to write, edit, and publish procedural matters.

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4) I was aware of Mr. [redacted] performance as a military judge, both the highs and the lows.

LTC [redacted] asked me for Mr. [redacted] contact information and I gave it to him. Subsequently, the Appointing Authority, UP MCO #1, executed a detailing agreement with the [redacted] - whereby Mr. [redacted] would be detailed to OMC for a year. While Mr. [redacted] is paid by [redacted] his employer is OMC. During the period of the detail, Mr. [redacted] primary focus is OMC. Mr. [redacted] has distributed a copy of the detailing agreement to all counsel.

h. Once LTC [redacted] and Mr. [redacted] talked, I talked to Mr. [redacted] and pointed out some of the problem areas in working with the commissions. He eventually decided to accept the detail.

i. Since 15 July 2004, Mr. [redacted] has been part of the procedural preparation for the proceedings before the commissions. He has written procedures, written emails, written memoranda, and prepared various drafts. All of this has been done under my supervision. Mr. [redacted] has also prepared memoranda and drafts which he forwarded to the Appointing Authority concerning procedural aspects of the commissions. He did this with my knowledge and consent, but acting for the Appointing Authority. To my knowledge, Mr. [redacted] has had many communications with OMC personnel - most by email. I am not aware of any communications between Mr. [redacted] and any members of OGC. All of Mr. [redacted] communications with OMC personnel were in the area of procedural and logistic preparation for commission proceedings. I believe that it is entirely appropriate for Mr. [redacted] to discuss and make recommendations for procedural changes or structure so that the commission process may function efficiently and expeditiously.

j. Mr. [redacted] and I have never discussed the substance of any of the cases currently referred to the commission for trial. We have never discussed MCI #2. All of our discussions, efforts, and work have been focused on the procedural requirements to get cases before the commission.

k. I have never had an *ex parte* discussion with Mr. [redacted] concerning any of the cases referred to the commission.

7. Selection as Presiding Officer:

a. Sometime in the spring of 2002, I was told by someone that the Presiding Officers of the Military Commissions could be retired officers who were recalled to active duty. I discussed this with COL [redacted] Chief Trial Judge.

b. In January 2003, I got a call from OCTJ, informing that if I wanted to put my name in for PO, I had to send in a statement. I did and I did.

c. In December 2003, I read that MG (Ret.) Altenburg had been named the Appointing Authority. In January I received a call from OCTJ wanting to know if I, among others, was still interested. I was.

d. On 24 or 25 June 2004, I got a call from LTC[redacted] at OMC. He wanted to know if I was still interested. I was. He told me that an announcement would be made quickly. On 28 June I got four phone messages that some PAO wanted to read me a press release so that I could okay it. I never found the PAO. On 29 June 2004, the announcement was made.

e. MG (Ret.) Altenburg knew that I was interested in being on one of the commissions.

e. That is all I know about the selection process.

8. Military Commissions:

a. The Presiding Officer has specifically designated roles and duties under MCO #1 and the MCI's. Those roles and duties are different, in many ways, from those of the other members of the commission. In some areas, MCO #1 and the MCI's give the Presiding Officer the authority to act for the commission without the formal assembly of the full commission. UP the President's Military Orde, the Presiding Officer can be overruled by a majority of the commission in certain areas. For a full explanation of the Presiding Officer's powers, see MCO #1 and the MCI's. As the only member of the commission who is a judge advocate, I will tell the commission what I believe the law to be. However, the President's Military Order states that the commission will decide all questions of law and fact. As with all matters of law, I invite counsel to provide motions and briefs so that I may become better informed - I note that there have been no motions or notice of motions to date on any legal topics.

b. Addressing a specific question, I did in fact state: "Perhaps a better way of looking at the matter is to say that I have authority to order those things which I order done." I then went on to say that this was based on my interpretation of the law and that my interpretation would be the one that counted "until superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing Authority) issues directives stating that what I am doing is incorrect." Based on a directive from the Appointing Authority, I did not and will not hold commission sessions without the full commission. This directive did change my opinion concerning my ability to hold sessions without the full commission.

c. Based on my interpretation of the MCO and MCI's, the standard for whether or not a member should sit is whether there is good cause to believe that the member can not be fair and impartial and provide a full and fair trial. The determination as to whether there is good cause to relieve a member is made by the Appointing Authority. If I believe that there is good cause to relieve me or any other member, I am required to forward that information to the Appointing Authority for his decision.

d. I have had the occasion to review various material about military commissions. The commentary on commissions and the legality thereof is about what one would expect - a lot pro, a lot con. The commentary ranges from the legality of the commissions to the structure of the commissions to the law governing the establishment and operation of the commissions. Until these areas have been thoroughly briefed by counsel, I reserve my opinion.

e. Any service member has the right and duty to disobey an unlawful order or general order or regulation However, the standard under Article 92 is quite high. Obviously, if the order or regulation is patently illegal, the source of the order or regulation does not mitigate the illegality.

f. Counsel are encouraged to provide briefs on the issue of "declaring an order or regulation" unlawful by the Presiding Officer of a commission. I am not prepared to address the issue at this time.

9. Personal Knowledge of Cases:

a. I have read the charge sheets in all four cases which are presently referred to the commission for trial. That is all that I have read or know about any of the cases. I have not seen the Presidential Determinations in the cases. I have not discussed the facts of the cases with anyone - either in my personal or professional capacity. Until I received the charge sheets, I had never heard the names of any of the defendants.

b. If the Prosecution proves all of the elements of an offense beyond a reasonable doubt, then a vote for a guilty finding would be appropriate. If not, then a vote for a not guilty finding would be appropriate.

c. As to the responsibility for the acts of 9/11 and others, the only knowledge I have of the acts and the perpetrators is open news media. If one were to believe what one reads, then it would appear that members of Al Qaeda were responsible for the attacks. I have no opinion as to the actions of specific individuals.

10. General:

a. My participation as a member and Presiding Officer in this commission will have an impact on my personal life. It will have no impact on my professional life - I do not have a professional life. Once these proceedings are finished, I will retire again.

b. Media interest in the case will not have an impact on how I perform my duties.

c. Other than memoranda and emails from OMC - on which counsel were cc'd, I have received no instructions, hints, suggestions, or any other form of communication from anyone in any governmental position (to include OMC and OGC) concerning what I should do as a Presiding Officer in these proceedings. Based on my personal and

professional knowledge of Mr. Altenburg, my belief is that he wants to have these cases tried fully and fairly. I have not discussed my role as Presiding Officer with Mr. Altenburg at all.

d. I am not aware of any matter which might cause a reasonable person to believe that I could not act in a fair and impartial manner in these proceedings.

Peter E. Brownback III
COL, JA
Presiding Officer

P (CDR [redacted] Prosecution does not.

DC (LCDR Swift): One moment, sir. We waive reading of the charges, sir.

PO: The reading of the charges may be omitted.

Okay. Members of the commission and alternate member, the appointing authority who detailed you to this commission has the ability to remove you from service on this commission for good cause. Is any member, or alternate, aware of any matter that you feel might affect your impartiality, or ability to sit as a commission member, which you have not identified previously in the questionnaire you [redacted] out? Before you answer please keep in mind that any statement you might make should be in general terms.

CM (LtCol [redacted] No, sir.

CM (Col [redacted] No, sir.

CM (Col [redacted] No, sir.

CM (Col [redacted] No, sir.

CM (LtCol [redacted] No, sir.

PO: Apparently not. Okay.

I have previously filled out a commission member questionnaire. I previously provided counsel for both sides a summarized biography, a list of matters that one would ordinarily expect counsel to ask during a voir dire process, and a document concerning my knowledge of the appointing authority and other persons. I also provided all counsel with answers to other questions suggested by defense counsel. These documents will now be marked as the next RE in order. The documents are true to the best of my knowledge and belief. That document will be RE 8.

Does either side wish to voir dire me outside the presence of other members?

P (CDR [redacted] No, sir.

DC (LCDR Swift): Yes, sir.

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PO: The other members will retire to the deliberation room.

The panel members exited the hearing room.

PO: Please be seated. Let the record reflect the other members have left the deliberation room.

I intend to keep a copy of RE 8 with me during voir dire so counsel may direct me to a specific question. Objection?

P (CDR [redacted] No, sir.

DC (LCDR Swift): No, sir.

PO: Prosecution, voir dire?

P (CDR [redacted] Sir, I believe Commander Swift requested to question you, so --

PO: No, he requested voir dire outside the presence of other members.

P (CDR [redacted] Aye, sir.

PO: They are gone.

Do you want to voir dire me?

P (CDR [redacted] Not at this time, sir.

PO: Commander Swift?

DC (LCDR Swift): We don't have a podium, sir. Permission to move to the court table.

PO: (Indicating)

DC (LCDR Swift): Sir, I would like to start by clarifying your membership in the Virginia bar. You indicated that you had been admitted to practice in the Virginia bar, I believe since the 1970s; is that correct?

PO: Yes.

P (CDR [redacted] What? I didn't understand.

DC (LCDR Swift): I will restate the question. I would like

you -- what -- as a member of the Virginia bar what is your current position in the bar?

PO: I am an associate member of the Virginia bar.

DC (LCDR Swift): What does associate member mean?

PO: You would have to ask the Virginia bar. I have never practiced law in the civilian sector.

DC (LCDR Swift): Are you eligible to practice law in Virginia currently?

PO: I am an associate member of the Virginia bar. I am eligible to practice in Virginia if I change my status to active member.

DC (LCDR Swift): What would be required to do that?

PO: I would have to take some -- a CLE.

DC (LCDR Swift): So at this time you are not eligible to practice there?

PO: At this time I am not an active member of the Virginia bar.

DC (LCDR Swift): Are you a member in good standing --

PO: Go on.

DC (LCDR Swift): Are you a member in good standing of any other U.S. court.

PO: We have got a problem, Commander Swift. The audience cannot hear you. We are going to have to do something. I don't know if you could remove the microphone. I don't know if you can move the microphone.

DC (LCDR Swift): I will stay back here, sir.

MJ: I am only a member of the Virginia bar. That's the only bar I am a member of.

DC (LCDR Swift): Sir, would you be eligible to serve as a civilian defense counsel for this commission proceedings?

PO: I don't know. I haven't examined that.

DC (LCDR Swift): It requires you to be in good standing and a member of a court.

PO: I don't know. I haven't examined that. That question has been addressed in a CAAF case I believe.

DC (LCDR Swift): I am aware of the CAAF case, sir.

PO: Okay. Go on.

DC (LCDR Swift): You indicated that you volunteered?

PO: Yes, I did.

DC (LCDR Swift): Why?

PO: I retired in 1999 and I had no desire to do anything particularly. I had ten years of experience as a military judge, and I thought I was good at it. As a matter of fact, I still think I was good at it; and knowing the stresses and strains brought upon our military by the current operational environment and recognizing that retired people could serve, I volunteered.

DC (LCDR Swift): You in that question indicated you had been in a former military judge. Did you view when you were volunteering that you were volunteering to be a judge here?

PO: No. I viewed that I was volunteering to be a presiding officer.

DC (LCDR Swift): What did you think the presiding officer would do?

PO: At the time that I initially volunteered, the only document that had been written was MCO Number 1 -- excuse me, as well as the president's military order. I went to a dictionary and looked up presiding, and I thought that a presiding officer would preside. If you are asking me if I was aware of all of the differences between a military judge and a presiding officer, I couldn't say that I was. However, I knew that I was not volunteering to be a military judge.

DC (LCDR Swift): You mentioned that the military order and the Presidential's order had been written at the time that you volunteered. Did you read both of those documents before you volunteered?

PO: I scanned them.

DC (LCDR Swift): After scanning them, did you believe that the process was lawful?

PO: I choose not answer that question at this time. Thank you.

DC (LCDR Swift): Understand that you won't answer the question. You have an open mind now to the question of the lawfulness of the process?

PO: That's a good question. Yes, I believe that the lawfulness of establishing the commission process by the President, the lawfulness, the delegation to the Secretary and to the general counsel are all matters which may be addressed by motion. And, I believe that it is the duty of counsel to educate all members of the commission on the law.

DC (LCDR Swift): As part of your assignment or as part of being assigned as presiding officer, you have been detailed an assistant to the presiding officer?

PO: Yes.

DC (LCDR Swift): Can you describe how that happened?

PO: I believe I put the dates in my questionnaire, but basically on the 29th of June, I believe, Lieutenant Colonel [redacted] who works in the office of the military commissions, e-mailed me and said words to the effect of we are looking for someone to be an assistant to the presiding officer. Do you have any suggestions? Immediately and without giving the person in question a chance to comment I said, yes, [redacted] And I pointed out that I was aware of [redacted] and his good sides and his bad sides. After that, Colonel [redacted] e-mailed me back for his e-mail address and they talked.

DC (LCDR Swift): Was he appointed as your assistant?

PO: There was a detailing agreement. There is a detailing

agreement between Mr. [redacted] and -- no, between the [redacted]

DC (LCDR Swift): Can you explain what his duties are?

P (CDR [redacted] Sir, at this time I am going to object. What we are trying to determine is whether you are qualified to preside over this proceeding. Mr. [redacted] is not a voting member and we feel this line of questioning is unwarranted.

PO: Thank you. Go on. Just tell me, ask me your question.

DC (LCDR Swift): I will get quickly to it, sir.

PO: That is fine.

DC (LCDR Swift): You supervise Mr. [redacted] is that correct?

PO: Yes.

DC (LCDR Swift): Mr. [redacted] has had contact with the appointing authority; is that correct?

PO: Yes.

DC (LCDR Swift): Did he do so at your direction?

PO: He has done many -- he has had many contacts with the appointing authority at my direction. He has had many contacts with the appointing authority at my consent. He has had many contacts with the appointing authority that I didn't hear about until after he talked to him. His duties are divided into various ranges. For instance, he has been here since the 9th of August arranging to get things done. When the CCTV broke down this morning, he was the one who arranged to get it fixed. When your interpreter couldn't get a head set, he was the one to whom you came to get a head set. That's one set. He also is the best person I have ever known for drafting, writing, coordinating, and publishing procedures; and he works in that area. He also functions to work out the procedural aspects of the cases. For instance, he has provided to all counsel on this case a listing of all the motions and responses and

whatever. Okay, those are three general areas.

DC (LCDR Swift): I want to address, second, the publishing and drawing of scripts, et cetera.

PO: Okay. Go on.

DC (LCDR Swift): Does he work exclusively for you in that capacity or has he worked exclusively for you in that capacity?

PO: On the 19th of August I believe, I could be wrong, the appointing authority published a memorandum stating that [redacted] exclusively for me. So there you know -- just a second, we know from the 19th he works for me; right?

DC (LCDR Swift): Yes, sir.

PO: Okay. Before that he provided, and you have got copies of all of this, various suggestions to the office of military commissions on how to write or create procedural changes and the procedures for these commissions. There.

DC (LCDR Swift): Was that after charges had been referred against Mr. Hamdan?

PO: Right.

DC (LCDR Swift): So he was writing how to change the procedures after the charges had been referred?

PO: Right.

DC (LCDR Swift): And you viewed that as appropriate?

PO: Yeah, I did.

DC (LCDR Swift): It didn't concern you that it would be expos facto changes after we had established a commission and charges had been referred to it?

PO: I didn't consider that the changes would come into effect in any time to affect anyone. These were changes to the commission procedures as a whole, not changes necessarily affecting Mr. Hamdan and if you believe that they would then I would have expected you to file some

motion saying that these procedures can't be changed because they would affect Mr. Hamdan adversely.

DC (LCDR Swift): To date, I don't know that any have; but I know communication has occurred.

PO: Thank you.

DC (LCDR Swift): So I would respond that until they actually are changed there is no expos facto issue.

PO: Thank you. I agree.

DC (LCDR Swift): What I am concerned about though is that there is conversations about changing and applying them to expos facto.

PO: Okay, that's that concern. Go on.

DC (LCDR Swift): Other than the meetings that we put on the record earlier, have you met with military counsel regarding those proceedings in the past?

PO: I had that meeting with all the counsel on or about, all the counsel who were in D.C. on or about the 15th of July. And I had a meeting with all the counsel who showed up yesterday on the 23rd of August.

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

PO: No, I didn't.

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

PO: Thank you.

DC (LCDR Swift): Did you mention speedy trial at all?

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

DC (LCDR Swift): But you didn't expect -- while those things were

mentioned, you don't recall expressing an opinion yourself?

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

DC (LCDR Swift): Now, based on the trial script that we have been provided, you intend to instruct the members on the law; is that correct?

PO: Yes.

DC (LCDR Swift): How are you going to avoid having an inordinate influence in respect to each of their opinions while doing that?

PO: I don't understand your question.

DC (LCDR Swift): Well, historically and certainly barring from the judge's bench book, it says that each member should have an equal weight in deciding any opinion. Here they are deciding both fact and law. How, after you have instructed them, will they have the opportunity to have an equal opinion as to what the law is?

PO: You refer to the trial script. Did you read farther what I said there?

DC (LCDR Swift): I did.

PO: What did I say?

DC (LCDR Swift): In that portion, you said that they were free to disagree with you.

PO: And?

DC (LCDR Swift): I also read --

PO: Come on.

DC (LCDR Swift): -- in the trial script where you say to them, "I am the only lawyer; and therefore, I will instruct you on the law." Don't you agree that that gives you positional authority?

PO: Commander Swift, if you are going to read something let's read it all.

DC (LCDR Swift): Yes, sir.

PO: As I am the only lawyer appointed to the commission. Now that is a fact; right?

DC (LCDR Swift): That is true, sir.

PO: I will instruct and advise on the law. However, the President has directed that the commission will decide all questions of law and fact, so you are not bound to accept the law as given to you by me. So what have I told them, okay -- I am not going to argue the point. The point is that they are all military officers. They have all sworn to do their duty and I will advise them on the law as I have been required to do. And, I don't see how you can get around that.

DC (LCDR Swift): My concern comes in their ability after being instructed that you are a lawyer, and you know the law, that you will have an unequal voice in any deliberations. That is something to be avoided, looked at ranks, looked at procedures, that's not happening, and how would we avoid that with the current instruction that we have? It says you are free to disagree, but I am a lawyer and I am probably right.

PO: Whoa, whoa, it does not say that. But that -- okay, so you object to the instruction?

DC (LCDR Swift): Yes, sir. In determining not only on the instruction also concerned is in your ability to sit as the senior member or as the presiding officer that you will ensure that each member has an equal voice in every decision.

PO: I will.

DC (LCDR Swift): Lastly, influence -- yesterday, during the meeting -- during our meeting yesterday, it was discussed whether we would hold up these proceedings pending the appointment of a security officer. Do you recall that, sir?

PO: Yes.

DC (LCDR Swift): During that, you mentioned that holding it up would have an impact vis-a-vis the media. Do you agree with that?

PO: If you say I did. I believe what you say, but go on.

DC (LCDR Swift): At least by that statement, it sounds like the media is having an impact on how you are making decisions.

PO: No. I think what that statement meant was that having been the floor person who had to orchestrate getting hundreds of people to various places at various times, that I sympathize and that we would do what we could to handle it. For instance, this morning with the CCTV broke down, we delayed -- we have delayed the start of these proceedings --

DC (LCDR Swift): We have a translation issue, sir. When we switched translators, he is no longer understanding anything being said.

PO: Can we switch to another translator? The court is addressing the table of translators -- the commission is addressing -- I am addressing the table of translators. Can we switch to another translator?

The translators changed positions.

PO: For instance, this morning when he we had that CCTV break, we delayed the proceeding for 30 minutes to start so that the feed to the off-site viewing location could be established. If you mean am I concerned about what the media says or writes about me, no.

DC (LCDR Swift): Understand, sir. I don't have any further questions.

PO: Challenge?

P (CDR [redacted] I have some additional questions, sir.

PO: Go on.

P (CDR [redacted] Sir, Military Commission Order Number 1 states that a presiding officer needs to be a military officer whose a judge advocate of any United States armed force. As you sit here today, do you meet that criteria, sir?

PO: Yes.

P (CDR [redacted] Sir, you received some questions from Commander

Swift about whether the establishment of commissions was lawful and the executive order was lawful. As you sit here today, have you made any predeterminations with respect to those questions?

PO: All of the counsel in the courtroom are familiar with the Uniform Code of Military Justice. If an order is patently illegal, that is one thing. However, if an order is questionable, which apparently some people thinks it is, then an officer or any member of the service has a duty to comply while determining whether or not it is illegal.

P (CDR [redacted] Now, sir, the notice of motions for the defense was due on the 19th of August. Have they filed any such notice of motion challenging the legality of those orders?

PO: That -- please sit down, Commander Swift. You look like you are about to jump. Don't jump. Don't worry about that.

P (CDR [redacted] Sir, will the role of the assistant to the presiding officer in any way impact your ability to fairly decide matters in this case?

PO: In so far as he takes so much off my back, yes, it will because I don't have to worry about all the admin stuff that he has been sucking up. But in terms of his impacting my vote, my voice, no.

P (CDR [redacted] Now you say that there have been several contacts between Mr. [redacted] and, you used the term, appointing authority.

PO: I thought I said OMC, but maybe I didn't. I meant the circle around Mr. Altenburg?

P (CDR [redacted] So that doesn't necessarily mean he is speaking with Mr. Altenburg directly, but could be speaking to the staff person of Mr. Altenburg?

PO: Right.

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

decide those motions?

PO: No.

P (CDR [redacted] As far as your interaction with the other members, do you consider them to have equal votes in this case?

PO: Yes.

P (CDR [redacted] Do you consider them to be on equal footing with respect to votes as to what the law is?

PO: Yes.

P (CDR [redacted] If they need or request assistance, not being legally trained as you are, in trying to determine what the law is will you take steps to get them that assistance?

PO: To get them what?

P (CDR [redacted] Assistance to help them understand the law?

PO: Yes.

P (CDR [redacted] Sir, are you aware of any actions or are underway to hire court clerks to assist the other commission members?

PO: I received -- and I forget when it was -- in the last month a draft, I believe, of a hiring of someone, a position nomination for someone to work in the office of the presiding officers. Where that is I don't know.

P (CDR [redacted] Sir, is the media in any way going to impact your ability to fairly decide this case?

PO: No.

P (CDR [redacted] If it is a question to providing the accused a fair trial and accommodating the media, where will that decision lie?

PO: We have spent a lot of money to get six people here to look at Mr. Hamdan across this table. We are here so that these six people can carry out to President's order to provide a full and fair trial for Mr. Hamdan.

P (CDR [redacted] I have no further questions, sir.

PO: Thank you.

DC (LCDR Swift): May I have a moment?

PO: Yes.

DC (LCDR Swift): Sir, in your answers to Commander [redacted] you indicate that you take steps to assist the other members understanding the law. What steps would those be?

PO: Well, since I don't know -- I am not being sarcastic -- I don't know what the situation would be. The first step is that counsel will provide motions on the law and the second step is that counsel will be allowed to argue what the law is. If the commission members decide that they need any more instruction on the law, then I will decide that then. I don't know. I don't know what they are going to need. I can't tell you what the steps are right now.

Now, some -- you can't predict something about a situation that hasn't arisen yet, Commander Swift. I'm sorry. If your concern is this -- and I don't know why you have been walking around it -- sir, are you going go back in there and say, okay, y'all, I am a lawyer and you are not and this is the law and you got to listen to me. Is that your concern basically?

DC (LCDR Swift): I do not believe you would be, sir. I am more concerned, not that you would intentionally do such a thing, I don't think you would. My concern is how a lawyer is inevitably viewed by other staff officers. It is the equivalent of my wife, who is a pilot, and I sitting in the cockpit seat and today we are going to fly an airplane and I look over and she says put the throttles forward.

PO: Okay. So is your compliant about me or about any lawyer?

DC (LCDR Swift): My concern is how we can minimize this position and how those steps would be taken to prevent it.

PO: I can't tell you what I will do in an unspecified situation. I can tell you that I am not going to say, I have been a judge for ten years and a JAG for 27 years and you got to tell -- you got to do what I tell you

about the law. That's the first thing I can tell you. The second thing is that if they need more assistance on the law I imagine and I don't know, Commander Swift, because it hasn't arisen, that if they need more instruction on the law, I will call you and Commander [redacted] back into court and say -- I am using his name in vain -- Colonel [redacted] is your question the application say of IN RE Sierra to 42 U.S.C. 1933, and he will say, yes. And I will say, Commander [redacted] would you explain your views on that; and he will say, whatever. And I will say, does that answer your question; and you will say something, I don't know.

DC (LCDR Swift): I understand, sir.

PO: Okay. However if you feel the urge, I always welcome briefs on any matter. That's not an order for a brief. If you want to put it in, feel free. Okay, what else, what other follow up do you have, Commander Swift?

DC (LCDR Swift): No other follow up.

PO: Challenge?

P (CDR [redacted] Prosecution has no challenge.

DC (LCDR Swift): I would like to recess to consult with my client regarding --

PO: Well, I understand that, but I mean I am asking really what sort of recess do you need? Five minutes in place or fifteen minutes in the office?

DC (LCDR Swift): Fifteen minutes in the office, sir.

PO: Court is in recess.

The Commission Hearing recessed at 1115, 24 August 2004.

The Commission Hearing was called to order at 1142, 24 August 2004.

PO: The commission will come to order. Let the record reflect that only the Presiding Officer is in the commission room. The other members are not present. Defense?

P (CDR [redacted] Sir, before we go further, we have a new court reporter, Sergeant [redacted] and she has previously been

sworn.

PO: Thank you.

DC (LCDR Swift): Yes, sir. Before entering challenges, would you permit me one more question, sir?

PO: Yeah.

DC (LCDR Swift): When you said that you are a judge advocate, were you recertified when you came back off of active -- off of retirement, or do you base that on you previously being a judge advocate?

PO: To the best of my knowledge and belief, Major General Tom Rummy -- Thomas Rummy, who is the Judge Advocate General, personally approved my retirement recall, and he is the one who certifies people as judge advocates.

DC (LCDR Swift): And you base that on your belief -- on that belief?

PO: Yeah.

DC (LCDR Swift): Notwithstanding, sir, we do challenge the Presiding Officer for cause. We have three -- excuse me, four areas.

One, we challenge the qualifications of the Presiding Officer as a judge advocate based on being recalled from retired service and not being an active member of any Bar association at the time he was recalled.

Two, despite, we understand that this is almost necessarily by the position you've been placed in, we challenge the Presiding Officer based on that the fact that he will exercise improper influence over the other members.

PO: Okay. I want to make sure you clarify this. Are you challenging the system, or are you challenging me? Because the standard is good cause that I will not perform my duties.

DC (LCDR Swift): We're challenging you, sir.

PO: Okay.

DC (LCDR Swift): We are also challenging based on the multiple contacts that you have had, either through your assistant, or through yourself with the appointing authority. I understand that you said that this is not going to influence you in any way. We believe that it creates the appearance of unfairness, and at least at that level, we challenge on that.

Additionally, based on -- although I did not attend the meeting of 15 July -- based on consultation with counsel that did, we challenge you based on having formed opinions prior to court regarding the accused's right in this trial -- the accused's right to a speedy trial in this case.

PO: Anything else?

DC (LCDR Swift): No, sir.

PO: What do you say?

P (CDR [redacted] Sir, defense counsel said they're not challenging the system, they're challenging you personally. But they also said during voir dire, I don't think you would ever do anything intentionally unfair. So if it's a challenge to the individual, the prosecution doesn't believe we can do any better than a person who the defense concedes would never intentionally do anything unfair.

The defense has stated many things about conversations between the appointing authority and Mr. [redacted] and the appointing authority and yourself. Specifically, during those conversations between you and defense counsel on voir dire, he stated there's been no prejudice. So as we sit here today, you are not tainted, there has been no prejudice to the defense, and we have had recent changes with respected to the August 19th memo, which should preclude any appearance of this happening in the future.

Sir, we have no challenge and do not feel that there is any cause to challenge you as the Presiding Officer.

PO: I've considered your challenges for cause, Commander Swift. Under the provisions of MCI 8, I'll forward to the appointing authority for his decision and action, a transcript of the voir dire, which will include your

challenge and the reasons therefore, and the comments made by counsel. I will also forward the Presiding Officer's voir dire packet, which I believe is RE 8.

Are there any other matters that you would wish to be forwarded to him for his decision?

DC (LCDR Swift): I would wish to be able to brief, as it did come up during the course of this, the issue of qualifications.

PO: When do you think you could have that prepared?

DC (LCDR Swift): Certainly no later than next Monday.

PO: Okay. Well?

DC (LCDR Swift): I'm somewhat at a loss while down here to do that type of thing. But I can complete it by next Monday.

PO: If you will forward that to [redacted] and he will provide you with any cross-whatever this is to this matter, and then forward it to me, and I will get it to the appointing authority.

Anything else that should go up with this?

DC (LCDR Swift): The defense has nothing else, sir.

PO: Well, I mean the packet to the appointing authority.

P (CDR [redacted] Nothing from the prosecution.

PO: Okay. Under the provisions of MCI 8 paragraph 3(a)(3), I will not hold the proceedings in abeyance.

Okay. Please recall the other members.

The members entered the courtroom.

Please be seated. The commission will come to order. Let the record reflect that all of the members of the commission are present.

Have all the commission members completed a member questionnaire?

Apparently so.

Have both counsel been provided copies of the member questionnaires?

DC (LCDR Swift): Yes, sir.

P (CDR [redacted]: Yes, sir, I have.

PO: Prosecutor, please have the members questionnaires marked as the next RE in order.

P (CDR [redacted]: Sir, I've marked them Review Exhibits 9A through 9E. 9A would be Colonel [redacted] 9B, Colonel [redacted] 9C, Colonel [redacted] 9D, Lieutenant Colonel [redacted] and 9E, Lieutenant Colonel [redacted] And I'm handing to the bailiff for delivery to the court reporter.

PO: Those questionnaires will be under seal.

Okay. Members, I'm now going to ask you a few preliminary questions. If any member has an affirmative response to any question, please raise your hand. As I ask these questions and make reference to the members, this refers to both the Commission Members and the alternate. And if I failed to state it, the alternate came in with the other members.

Does any member know the accused?

Apparently not.

Does any member know any person named in the charges?

Apparently not.

Does any member know any of the counsel -- Captain [redacted] Commander [redacted] Commander Swift -- involved in this case?

Apparently not.

Members, having seen the accused, having read the charges, do any of you feel that you cannot give the accused a fair trial for any reason?

Apparently not.

Do any of you have any prior knowledge of the facts or events in this case that will make you unable to serve impartially?

Apparently not.

Do any of you feel that you cannot vote fairly and impartially because of a difference in rank, or because of a command relationship with any other member?

Apparently not.

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

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

Apparently so.

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

Apparently not.

Have any of you had any dealings with any of the parties to the trial, to include counsel for either side, other members, including myself, which might affect your performance of duty as a commission member in any way?

Apparently not.

Do any of you feel that you cannot fairly and justly decide this case because of any prior experiences related to previous military assignments or duties?

Apparently not.

Do any of you feel that you cannot fairly and justly decide this case because of something you have read,

heard, or seen in the media concerning the events of 9/11, al Qaida, Usama bin Laden, or terrorism generally?

Apparently not.

Have any of you been a victim of an alleged terrorist attack, or had a close friend or family member who was a victim of an alleged terrorist attack?

Apparently not.

Okay. As commission members, we've got to keep open minds regarding the verdict until all of the evidence is in. The verdict can only be based on evidence received during the proceedings, and you may not rely upon prior knowledge of the facts or events no matter how you got this knowledge. Is there any member who cannot follow this instruction?

Apparently not.

Mr. Hamdan is presumed innocent. This presumption remains unless or until his guilt is established beyond reasonable doubt. The burden to establish Mr. Hamdan's guilt is upon the prosecutor. Does each member understand and agree with this principle, and further agree to follow this principle in deciding this case?

Apparently so.

Does any member know of anything of either a personal or a professional nature which would cause you to be unable to give your full attention to these proceedings throughout the trial?

Apparently not.

Are any of you aware of any matter that might raise a substantial question concerning your participation in this trial as a commission member?

Apparently not.

Any general voir dire of the members, trial? Not individual, general.

P (CDR [redacted] Yes, sir. May I proceed, sir?

PO: Pardon?

P (CDR [redacted] May I proceed, sir?

PO: Yes, I'm sorry.

P (CDR [redacted] Good afternoon, gentlemen. My name is Commander [redacted] Captain [redacted] and I represent the prosecution in this case. As all members participating before this commission, we're here to ensure a full and fair trial, and we have a few general questions we'd like to ask of all of you.

Since arriving in Guantanamo Bay, has anyone from the media attempted to talk to you or discuss this case with you?

PO: Apparently not.

P (CDR [redacted] This trial will most likely require your full attention and may play out over several months. Does anyone have anything of a personal or professional nature that would limit your ability to participate over the next several months.

PO: Apparently not.

P (CDR [redacted] Can all members set aside any feelings generated by the attacks of 9/11, and render a verdict in this case that's based solely on the evidence presented?

PO: Apparently so.

P (CDR [redacted] All of you expressed in the questionnaires you filled out previously some concerns for your families as a result of your service on this commission. Do all members feel they can remain impartial towards all parties, and despite those concerns, fairly decide this case?

PO: Apparently, so.

P (CDR [redacted] Also reviewing your previously filled out questionnaires --

PO: Let me note for the record that those questionnaires will be appended at sometime to the record, or they were.

P (CDR [redacted]: They were, 9A through E, sir.

PO: Yeah, 9A through E. Okay.

P (CDR [redacted]: All of you have naturally seen some news reports on Afghanistan, al Qaida, and other pertinent topics. Can you set aside the generalized information from those reports and decide this case based on the facts presented here?

PO: Apparently, so.

P (CDR [redacted]: We thank you. We have no further questions.

PO: General?

DC (LCDR Swift): Good morning, sirs. My name is Lieutenant Commander Charles Swift, and -- I'm too far from the microphone -- and I represent Salim Ahmed Hamdan in this case, and I also have some questions.

Start with, does every member understand what the term "jurisdiction" means in the context of judicial proceedings? Do you understand what that means? They're going to be doing this a lot.

PO: Okay. Members, I'll instruct you on jurisdiction. Basically -- and I, of course will be glad to receive instructions from counsel -- jurisdiction means the authority of a court to hear a case.

DC (LCDR Swift): We would agree with that.

In this case, now having understood what jurisdiction means, in this case, you've been provided with a finding being by the President of the United States that Mr. Hamdan is a person subject to the jurisdiction of this tribunal. The defense challenges --

PO: For the record, I keep waiving my hand at Commander [redacted] at Commander Swift, I even do it to myself. It's because we have a translator here who needs to have us talk slowly. It is not trial, it's not defense, it's not just me, it's all three of us. Go on. I apologize for interrupting you.

DC (LCDR Swift): No problem, sir. It's going to take some getting used to.

I'll start the question again. In this case, you've been provided with a finding by the President of the United States that Mr. Hamdan is a person subject to the jurisdiction of this tribunal. The defense challenges this finding.

Is each of you willing to consider whether the President's finding is, in fact, lawful?

PO: Apparently so.

DC (LCDR Swift): Apparently so? All are willing to consider that?

PO: Apparently so.

DC (LCDR Swift): Does any member believe that the President's finding is evidence that Mr. Hamdan committed a crime?

PO: Apparently not.

DC (LCDR Swift): That's a negative response from all members.

Does any member believe that the President, in making his findings -- let me restate that. Does any member believe that the President's findings are evidence that Mr. Hamdan has committed a crime?

PO: Will defense agree that a prerequisite to getting this case before this commission was that the President made such a determination?

DC (LCDR Swift): The defense agrees to that, sir.

PO: The Presidential determination was provided to you to show that this -- these charges were properly brought to this court. The determination is not evidence. Everybody understand that?

Apparently so.

DC (LCDR Swift): And to go back, it was -- in saying that it was lawfully brought, that means that that was a step necessary; it does not necessarily mean that the decision itself was lawful.

PO: Could you rephrase?

DC (LCDR Swift): One of my previous questions -- one of my previous questions was, whether every member was willing to consider whether the President had lawfully brought Mr. Hamdan to this -- before this trial, whether he was within the jurisdiction of the commission.

PO: They did agree to that.

DC (LCDR Swift): Yes. I want to clarify that it is a step, but it is not in and of itself evidence that it is lawful.

PO: Okay.

DC (LCDR Swift): Every member agree with that?

PO: Apparently so.

DC (LCDR Swift): Additionally, Mr. Altenburg, who was the appointing authority for this commission, he approved and referred the charges that you have before you. Does any member believe that because Mr. Altenburg approved that charge, that it states a valid offense against the law of war?

PO: Okay. All members understand that the charges were referred to this commission by Mr. John Altenburg who was delegated that duty under the order, the MCO, and the MCIs. All members understand that?

And all members understand that by the document you got, the approval of the charge and the referral, Mr. Altenburg decided that this case should come before this commission. Do you all understand that?

I believe that Commander Swift's question, and he will correct me, is, do you all understand that whether or not Mr. Hamdan is guilty of anything is solely for this commission to determine after hearing all the evidence; and that what Mr. Altenburg did was just a step to get the charges here? Do you all understand that?

Apparently so.

DC (LCDR Swift): All of that is true, but my question wasn't exactly that.

PO: Well, that's why I said you could clarify.

DC (LCDR Swift): Yes, sir. In addition, one of the things the defense is challenging is that the offense stated is, in fact, a violation of the law of war; that is does it fall within the violations as recognized in international and national law as a law of war violation? To use a lawyer's term, does it even state an offense? What I'm asking is whether you all are willing to listen with an open mind as to whether or not that is true or not?

PO: As to whether or not the offense states a violation of the law of war?

DC (LCDR Swift): That's correct.

PO: Is each member willing to consider, based on submissions by counsel, and the evidence that comes before the commission whether or not the offense as charged does, in fact, violate law of war?

Apparently so.

P (CDR [redacted] Sir, we're going to object to the way that was phrased. We do not desire to argue this during voir dire, but we do think there's a legal issue as to what he characterized --

PO: Thank you.

P (CDR [redacted] -- someone can be convicted of before this commission.

PO: Okay. Members, you're all willing to listen to the arguments from both sides and the evidence; correct? And what the President did in referring this, and what -- or making a determination, and what Mr. Altenburg did in referring this is not going to affect your decision on findings of guilt; right?

Apparently so.

I can't go any farther than that.

DC (LCDR Swift): Yes, sir.

PO: Go on.

DC (LCDR Swift): In order to decide issues of law, which you were

previously instructed you were going to do, you'll be required to consider the meaning of international treaties, the custom and practice as established by military regulations, handbooks, and international cases throughout the world, as well as the Constitution of the United States, federal judicial opinions, and federal statutes. This will require considerable study on your part. Is each of you able to devote the necessary time to gain a complete and independent understanding of the issues of law raised in the case?

Affirmative response from all members.

As Colonel Brownback previously told you, he is the only lawyer on the panel. In this case, do any of you believe that Colonel Brownback's opinion of the law carries a greater weight than your own? His opinion of -- or what he tells you the law is, is it more valid than what you think?

PO: Okay. Are you going to name the members who are giving you responses?

DC (LCDR Swift): I've received a response from Colonel [redacted] that's negative, he doesn't believe that the opinion will sway him; Colonel [redacted] has responded that the law is the law.

Colonel [redacted] do you agree that your opinion is equal?

CM (LtCol [redacted] Yes.

DC (LCDR Swift): Colonel [redacted]

CM (Col [redacted] Yes, sir.

DC (LCDR Swift): And thank you. It's also going to, of course, be your duty as commission members to weigh the evidence and resolve controverted questions of fact. In so doing, if the evidence is in conflict, you will necessarily be required to give more weight to some evidence than others. It is, of course, your discretion to decide how much weight to give any piece of evidence. However, it is expected that you will use the same standards in weighing evidence -- in weighing and evaluating all of the evidence with that in mind. Is any member less likely to believe the testimony of a Yemeni citizen because of their country of origin,

religious or political beliefs, or their relationship to Mr. Hamdan?

Negative response from all members.

Does any member believe that the testimony of a U.S. law enforcement agent is more likely to be true solely because of the agent's position in law enforcement?

Negative response from all members. Thank you.

Does any member believe that the testimony of a U.S. service member is more likely to be true solely because of the agent's position in law enforcement?

Negative response from all members. Thank you.

In weighing and evaluating the evidence, you're expected to use your common sense and your knowledge of human nature and the ways of the world. Does every member agree that the ways of the world are different in Yemen than they are in the United States?

PO: Apparently so.

DC (LCDR Swift): Does any member have any more than a passing knowledge of Yemen?

Negative response from all members.

The defense is going to present you experts regarding the social customs and practice, living conditions in Yemen. Is each of you willing to consider this testimony, if you find it credible, in evaluating the evidence?

Affirmative response from all members.

This case will also involve as we're seeing right now --

P (CDR [redacted] Sir, at this point I'm going to object. It appears he's arguing the facts of his case rather than finding out if these individuals are qualified to sit for this command.

PO: Thank you, Commander [redacted] Go on.

DC (LCDR Swift): Thank you, sir. This case will also involve

issues of translation; that is, statements that have been translated from either Arabic to English, or English to Arabic. Does any member speak Arabic? I didn't think you did from your questionnaires.

PO: Apparently not.

DC (LCDR Swift): No member here speaks Arabic.

Does every member agree that translation is not an exact science?

PO: Apparently so.

DC (LCDR Swift): The quality of translation depends largely on the skill of an individual translator. Is every member willing to consider translation errors in considering the reliability of evidence that will be presented to them?

PO: Apparently so.

DC (LCDR Swift): Thank you. The next questions -- the next group of questions that I'm going to ask you has to do with sentencing. This is difficult because, of course, Mr. Hamdan has not been convicted of any crime, and these questions should not be taken by you as to indicate a belief on my part that Mr. Hamdan is guilty of any crime.

PO: Counsel only have one opportunity to voir dire you, and that's why counsel is asking you questions about sentencing now, because there won't be an opportunity later. Go on.

DC (LCDR Swift): Thank you, sir. And I'll skip the next part because the Presiding Officer just said it.

The range of punishment available to you is anywhere from no time -- no time in confinement to a maximum of life imprisonment. You must be able to consider the entire range. Is every member willing to give the entire range of punishments due consideration?

PO: Apparently so.

DC (LCDR Swift): In deciding what punishment, if any, again, if convicted, to award, is each member willing to consider

Mr. Hamdan's educational level, his background, his rehabilitative potential, his role in any crime for which he's convicted?

PO: Might be. For any crime that he might be convicted.

DC (LCDR Swift): Might be convicted, and the fact that he is not a U.S. citizen or resident; and as such is not under an affirmative duty to obey U.S. law?

PO: Are y'all willing to consider all those matters if we get to sentencing and determining a proper sentence?

CM (Col [redacted] Explain the last part, the very last phrase.

PO: That's from Colonel [redacted]

DC (LCDR Swift): Yes, sir. The last phrase in it, sir, is that Mr. Hamdan is not a citizen, nor a resident of the United States. As such, he would not expect to have an affirmative knowledge of U.S. law or U.S. customs and social practices. So he doesn't have -- generally, we all have a duty to obey international law; but in deciding a punishment, looking at equivalent U.S. punishments may not be appropriate. And I just ask that you consider that.

P (CDR [redacted] Objection. That's in direct violation of a rule, sir.

PO: Thank you, Commander [redacted].

Anything else, Commander Swift?

DC (LCDR Swift): Yes, sir. In deciding -- does any member, having read the charges and specifications, believe that you would be compelled to vote for any particular punishment?

PO: Apparently not.

DC (LCDR Swift): Negative response from all members.

Whether you're aware of it or not, you will soon be aware that in April of this year, I instituted a civil law suit against the President of the United States, Secretary for Defense, Mr. Altenburg, and General Hood on behalf of Mr. Hamdan regarding the legality of these

commissions and his detention. Does any member believe that I acted improperly in doing so?

PO: Okay. Members, do all members understand the role of defense counsel, in that they have a duty -- and especially military counsel, have a duty zealously to defend their clients. All members understand that; right?

Apparently so.

Does any member have any complaint or objection to counsel performing that role zealously?

Apparently not.

DC (LCDR Swift): But I would still like the reaction if anybody believes that in my zealous representation hearing that, that I somehow stepped over the bounds.

PO: Apparently not.

DC (LCDR Swift): Does any member believe that I acted unprofessionally?

PO: I don't believe the members are capable of answering that question at this time.

DC (LCDR Swift): I meant it not so much as an attorney, but as an officer, sir.

PO: Okay. As I pointed out earlier, military defense counsel are detailed, they're ordered to perform they're tasks, like being ordered to jump out of a plane or fly an airplane or take a hill, it's a duty. Go on.

DC (LCDR Swift): I have no further questions of the members in individual -- in group voir dire, sir.

PO: Okay. Members, we're now going to have various segments of individual voir dire.

Okay. Under the rules, and y'all read this stuff yesterday, I am required to determine if a challenge for cause is made what matters should be forwarded to the appointing authority for his action on that challenge for cause, whether it's against one of y'all or against myself. I'm also required to determine if physically

the proceedings should be held in abeyance, whether we should just stop while action is being taken. And I am required to ensure that voir dire remains focussed on the proper subject. That's why I'm going to be remaining in the courtroom during your all's individual voir dire. Any questions?

No, don't stand up yet. I intend to start individual voir dire and drive on. Objection?

P (CDR [redacted]: No objection, sir.

DC (LCDR Swift): One moment, sir.

PO: Okay.

DC (LCDR Swift): Sir, could we have a 15-minute recess before starting individual voir dire? Bathroom break.

PO: Okay. Counsel, it appears to me, and this is not your fault --

DC (LCDR Swift): Yes, sir.

PO: -- it appears to me that there's no such thing as a 15-minute recess. Just the logistics involved aren't going to permit it. If you want a recess now, and that's fine with me, let's make it what, 30 minutes, Commander [redacted] or 45 minutes so that y'all can bring in -- is there going to be -- does someone -- has someone gotten food for Mr. Hamdan? Yes, someone's gotten food for Mr. Hamdan, he can eat his lunch, and we can come back at 1300 and start on individual voir dire.

Is that okay with you, Commander [redacted]

P (CDR [redacted]: Yes, sir.

PO: Okay with you?

DC (LCDR Swift): Yes, sir.

PO: Okay. And what they'll be doing -- well, we'll discuss that after the members leave the courtroom. So we will be prepared to start individual voir dire at, say, 1305; okay?

Okay. The members will retire and we will call the

first of you at 1305.

All rise.

The members exited the courtroom.

Please be seated. The commission will come to order. Let the record reflect that the members and the alternate members -- and if I forget to name the alternate member, please advise me if I have neglected to do it -- having left the courtroom. You got any questions on individual voir dire for any members?

P (CDR [redacted] All of them, sir.

PO: We don't have to worry about you telling me, Commander. They're coming in. I'm going to bring them in in order of rank, [redacted] and [redacted] I intend to make available to each member and the alternate member a copy of their questionnaire they prepared just so they can look at. You have it if you want to focus them on Question Number 63; all right?

Okay. Now, does it appear likely, Commander [redacted] that your questioning of any member or alternate member will go into an area which will require a closed session?

P (CDR [redacted] No, sir.

PO: Commander Swift?

DC (LCDR Swift): It does appear likely, but I'd like to ask each of them if they believe we'll be going into a closed -- into an area of --

PO: Okay. Well, let me --

DC (LCDR Swift): I'd like to ask the question to the member, give them a chance to say that that would be secret. They know best, they were there.

PO: Okay. We will then, unless there's objection from counsel, proceed like this: We will go through individual, nonclosed voir dire. We will then determine in seriatum -- in sequence, I'm sorry, if any of the members need to be recalled to a closed session. If they do, we will hold a closed session for all of the closed session individual voir dire. And if you have

challenges for cause, based on closed session voir dire responses, you will make those challenges during the closed session. At which point, we will then open the proceedings, and you may make challenges on nonclosed session matters. Did I say that correctly?

DC (LCDR Swift): I understood it, sir.

P (CDR [redacted]: Got it, sir.

PO: I must have said it correctly. Okay. No objections?

P (CDR [redacted]: Nothing further.

DC (LCDR Swift): Nothing further, sir.

PO: Commission's in recess until 1300.

The Commission Hearing recessed at 1229, 24 August 2004.

The Commission Hearing was called to order at 1317, 24 August 2004.

PO: The commission will come to order. Let the record reflect that the presiding officer, Colonel [redacted] are present for individual voir dire. We have a new court reporter. Gunny again, right?

P (CDR [redacted]: Gunnery Sergeant [redacted] yes, sir.

PO: Thank you.

Individual voir dire, trial?

P (CDR [redacted]: Thank you, sir. Good afternoon, Colonel.

CM (Col [redacted]: Good afternoon.

P (CDR [redacted]: Colonel, I would like to follow up on some issues that came up when you were being questioned as a group. When the defense counsel was questioning he stated what he believed the sources of law that you are to apply in deciding this case are, and we don't intend to argue right now whether he was correct or not. Although, I will raise that we disagree with what he told you. Do you agree, that as you were instructed you are to determine what law to apply in this case?

CM (Col [redacted] Yes.

P (CDR [redacted] Now, sir, there are orders -- orders and instructions applicable to these military commissions. Have you had the opportunity to review those?

CM (Col [redacted] Yes, I have.

P (CDR [redacted] Assuming that you find these orders and instructions have been lawfully issued, you agree to follow those orders and instructions?

CM (Col [redacted] Yes.

P (CDR [redacted] Now, the defense counsel, when discussing whether he had jurisdiction in the case and the presiding officer explained the meaning of the term jurisdiction, the defense only referred to violations of the law of war. Now, do you understand the jurisdiction of military commissions applies both over violations of the laws of war, as well as other crimes triable by military commission, and that you will get briefs from the parties on this issue?

CM (Col [redacted] Yes.

P (CDR [redacted] Now, during the group questioning the defense counsel, mentioned a civil lawsuit that he filed on behalf of his client. Do you understand that that lawsuit will only be relevant before this commission if it has some link to a legal, or factual, question that you must determine?

CM (Col [redacted] Yes.

P (CDR [redacted] Now, sir, getting into your questionnaire that I have reviewed and that you previously filled out.

PO: Let the record reflect that I am handing Colonel [redacted] a copy, as I stated before, the questionnaire that he prepared in case you wish to focus him on some particular area.

P (CDR [redacted] Thank you, sir. Sir, focussing on Question 1 appears to disclose a professional relationship between you and Colonel [redacted] Could you elaborate on that?

CM (Col [redacted] Yes. My current duty as chief of staff of

[redacted]

P (CDR [redacted] Is there any kind of reporting relationship between the two of you involving raters of fitreps, or anything of that nature?

CM (Col [redacted] No, our common -- his rater is the base Commanding Officer; my rater is the commanding general of the Marine Corps Combat Development Command.

P (CDR [redacted] Do you feel there is anything involved in this professional relationship with Colonel [redacted] that would impact your ability to independently decide the facts of law related to this case?

CM (Col [redacted] None at all.

P (CDR [redacted] Thank you, sir. Now, in response to Question 17 of your questionnaire, you indicated you thought that the publicity associated with this case might impact your family. Do you have any specific concerns of that nature, sir?

CM (Colonel [redacted] None, specific, but I'm sure it is not very hard as I put in my question for people to find out where you live; and I am sure that if anybody should determine that they want to take action that they would know where I live and of course my family lives there.

P (CDR [redacted] And, sir, in view of those concerns can you fairly and impartially perform your duty as a commission member?

CM (Col [redacted] Yes.

P (CDR [redacted] Now, sir, in response to Question 35 you wrote that your regiment in Desert Storm captured thousands of prisoners?

CM (Col [redacted] Yes.

P (CDR [redacted] Were you involved in any interrogations of captured personnel?

CM (Col [redacted] No, I was the -- it wasn't my regiment, of course; [redacted] And I wasn't personally involved in the capture of any of the prisoners, nor was I involved in the interrogation of any of them.

P (CDR [redacted] So is it fair to say nothing involved with your Desert Storm experience would impact your ability to sit as a commission member?

CM (Col [redacted] That is a fair statement.

P (CDR [redacted] Thank you for your time, sir.

DC (LCDR Swift): Good afternoon, sir.

CM (Col [redacted] Good afternoon.

PO: Once again I notice to the participants that when I waive my hand at Colonel [redacted] I am doing so -- or any other member -- solely to try to get them to slow down because the translators are being agonizing at length.

DC (LCDR Swift): My client would also like to thank you for that.

Colonel, first I would like to address to the questions regarding the instructions. You have had an opportunity to read over the instructions and orders in this case?

CM (Col [redacted] Yes, I have.

DC (LCDR Swift): Did you note when you read over that the instructions, for instance, were issued by the General Counsel of the Department of Defense?

CM (Col [redacted] Yes.

DC (LCDR Swift): Did you note that they were issued, I believe, in 2003?

CM (Col [redacted] I don't know the specific dates, but I did note the dates on the documents as I read them.

DC (LCDR Swift): Do you believe that the general counsel, because an instruction is issued by the general counsel, that it is necessarily indicative for instance of what are the crimes chargeable by a military commission?

P (CDR [redacted] Sir, I don't understand.

PO: Could you tell me what you mean by that?

DC (LCDR Swift): Yes, sir.

PO: Or tell Colonel [redacted] actually?

DC (LCDR Swift): Yes, sir. The general counsel is of course is to provide legal advice to the Secretary of Defense. Do you believe that solely because his -- I am going to use for an example Instruction 2 that outlined the crimes that he believed were triable by military commission. Do you believe that that instruction constitutes the law as -- constitutes the crimes triable by military commission, or do you believes that it is your responsibility to determine what are crimes triable by military commission?

PO: Colonel [redacted] you have received a copy of the charge sheet in this case?

CM (Col [redacted] Yes, I have.

PO: You have already said that you understand that the charge has been referred to this commission to determine if an offense was committed; correct?

CM (Col [redacted] Correct.

PO: You have also stated that the fact that the charge is written and signed and sent here does not indicate to you that a crime has been committed?

CM (Col [redacted] Correct.

PO: Now, does it matter to you as you are sitting here whether the general counsel of the Secretary of Defense or some Captain JAG is the one who wrote those offenses that are before you?

CM (Col [redacted] No.

PO: You are going to determine whether an offense was committed based on the evidence brought before you?

CM (Col [redacted] Correct.

DC (LCDR Swift): I am not sure and this comes from my inartful phrasing of the question, and I would like to try again. Do you believe that the general counsel by virtue of his role and delegation from the President is the authoritative source for what are violations of the law of war?

PO: Colonel [redacted] have you already agreed to listen to what the counsel tell you what the law of war is?

CM (Col [redacted] Yes. I guess another way to answer your question is do I think they made a mistake?

DC (LCDR Swift): Or could have made a mistake?

CM (Col [redacted] Anybody can make a mistake.

DC (LCDR Swift): So you are willing to listen --

CM (Col [redacted] Anybody can make a mistake.

DC (LCDR Swift): Thank you, sir. You know Colonel [redacted] you indicated that on your questionnaire; is that correct?

CM (Col [redacted] Yes, I did.

DC (LCDR Swift): How long have you known him?

CM (Col [redacted] Since April -- well, probably about April the 19th.

DC (LCDR Swift): Prior to coming down did you discuss with him you have been both assigned to this commission?

CM (Col [redacted] That we were both assigned, yes.

DC (LCDR Swift): When was that?

CM (Col [redacted] I think we were notified on June the 29th.

DC (LCDR Swift): Briefly, can you describe that discussion?

CM (Col [redacted] I received a phonecall from the commission that

told me I was selected to do this. The person that called me said there was another Marine. I asked them if they were at liberty to say that. They said he was at the same base and told me it was Colonel [redacted] I don't know what day of the week that was, but the next time I saw Colonel [redacted] either he or I said I guess we are both on that commission.

DC (LCDR Swift): Did you have any discussion beyond that?

CM (Col [redacted]: No.

DC (LCDR Swift): If both you and Colonel [redacted] ultimately end up sitting on the commission, would you be more likely to give any weight to his arguments, or his opinions, over the other commission members because you know him?

CM (Col [redacted]: No.

DC (LCDR Swift): Are you likely to give less argument or less weight to his arguments or opinions because you know him?

CM (Col [redacted]: No.

DC (LCDR Swift): I notice also that you have been involved in military justice as a member before; correct?

CM (Col [redacted]: Yes.

DC (LCDR Swift): You understand, obviously, that this is a completely different process than a court-martial?

CM (Col [redacted]: Yes.

DC (LCDR Swift): And that as such there is no judge, in fact, you are one of the judges?

CM (Col [redacted]: Yes.

DC (LCDR Swift): You also, I notice, administered nonjudicial punishment as a commanding officer?

CM (Col [redacted]: Yes.

DC (LCDR Swift): You understand that the standard of proof here is much higher than at NJP?

CM (Col [redacted] Yes. The rules of evidence apply here and the elements of the charge, unlike NJP.

DC (LCDR Swift): Also I believe that NJP is a preponderance of the evidence where here it is beyond a reasonable doubt?

CM (Col [redacted] Right.

DC (LCDR Swift): I would correct one part, the rules of evidence are not exactly in play here, sir.

CM (Col [redacted] Right, but I mean like the elements of proof like in the court-martial that don't apply in an NJP.

DC (LCDR Swift): I understand. You indicated that you were a CO of several reserve Marines. Do I have that right?

[redacted]

DC (LCDR Swift): As CO did you go to his funeral?

CM (Col [redacted] Yes, I did.

DC (LCDR Swift): Did you meet with his family?

CM (Col [redacted] Yes, I did.

DC (LCDR Swift): What were your impressions?

CM (Col [redacted] Of what?

DC (LCDR Swift): During the course of that meeting did it affect you?

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

DC (LCDR Swift): Did you go to the site, to the former site of the World Trade Centers as the CO with your people down there?

CM (Col [redacted] Yes, I did.

DC (LCDR Swift): When was that?

CM (Col [redacted] I don't know the exact date. I would estimate it was probably two weeks after the bombing.

DC (LCDR Swift): What affect, if any, did that have on you, personally? Describe how you felt?

CM (Col [redacted] It is a sad sight. A lot of destruction there. Hard to fathom what was there and what was left.

DC (LCDR Swift): Were you angry, sir?

CM (Col [redacted] I would imagine everybody that saw it was angry.

DC (LCDR Swift): Do you still think about it, sir?

CM (Col [redacted] That visit to there?

DC (LCDR Swift): Yes, sir.

CM (Col [redacted] No.

DC (LCDR Swift): You said that you have received multiple information briefs regarding al Qaida, Taliban, et cetera. Is anything in those briefs classified?

CM (Col [redacted] Yes.

DC (LCDR Swift): Well, obviously we shouldn't -- I do want to know more about the briefs that you received, but can you give me a general overview of the briefings without going into the classified, or should we just wait for a closed session?

CM (Col [redacted] I can give you a general overview.

DC (LCDR Swift): Then if we could go to that. What types of briefings have you received regarding -- what types of briefings have you received regarding al Qaida, generally?

CM (Col [redacted] Mainly briefings about the organization, its history, origin, and their activities. And these were not specific briefings for me, but briefings that the staff received as part of weekly, or bi-weekly intelligence updates.

DC (LCDR Swift): Unless it's classified, who gave the briefings?

CM (Col [redacted] I don't know the Marine's names, but they are the Marines in the building from where I am from, the Marine Corps Intelligence Activity.

DC (LCDR Swift): I inartfully raised that question. I was more interested in the organization than the individual.

CM (Col [redacted] The organization?

DC (LCDR Swift): That gave the briefing?

CM (Col [redacted] The Marine Corps Intelligence Activity.

DC (LCDR Swift): Did anyone else give you briefings beyond the Marine Corps Intelligence Activity?

CM (Col [redacted] No.

DC (LCDR Swift): When did the briefings occur?

CM (Col [redacted] Well, let me back up. I am sure although I don't know who specifically gave them that I received briefings somewhere between January of 99 and July of 2000 at the 2d Marine Division at Camp Lejeune, North Carolina. But the other briefings from the Marine Corps intelligence activity occurred between August of 2002 and probably for eight months off and on.

DC (LCDR Swift): Yes, sir. Without again, unless it is classified, let's talk about organization of al Qaida that you were briefed on. Were you -- in the organization were you shown how -- did this briefing explain how al Qaida had and currently functions?

CM (Col [redacted] These weren't detailed briefs specifically on that subject. These were intelligence updates, okay. Sometimes weekly, more often twice a month. So regardless of the subject there might have been three slides in that portion of the brief and the briefer might have said two or three sentences about that subject because these were update briefs.

DC (LCDR Swift): I understand.

CM (Col [redacted] So I am not sure I have the recollection to answer your question and be real sure of the answer.

DC (LCDR Swift): Well that in itself answered the question because the next one was anything in that brief had an impact on your ability to determine the facts in this case independent of what you have already been briefed on?

CM (Col [redacted] No.

DC (LCDR Swift): And I understand you really don't have a strong recollection of any particular detail?

CM (Col [redacted] No.

DC (LCDR Swift): I don't have any further questions at this time.

PO: Thank you. You may return to the deliberation room. Please ask Colonel [redacted] to come in.

There is some problems with joint procedures here. In the Army we don't stand when it is a single member coming in. You all can stand if you wish, but in the Army we don't do it. Please be seated.

Let the record reflect that Colonel [redacted] has left the courtroom and Colonel [redacted] has entered the courtroom.

Let the record reflect that I am handing Colonel [redacted] a copy of his questionnaire in case you want to refer to it as discussed previously. Trial?

P (CDR [redacted] Thank you, sir. Good afternoon, Colonel [redacted]

CM (Col [redacted] Good afternoon.

P (CDR [redacted] Sir, in reviewing your questionnaire, there appears to be a professional relationship between you and Colonel [redacted] Could you describe that?

CM (Col [redacted]

P (CDR [redacted] Sir, based on that relationship there is no fitness report or rate of relationship involved?

CM (Col [redacted] With Colonel [redacted] no there is not.

P (CDR [redacted] Sir, anything involved with your relationship with Colonel [redacted] that would cause you to not vote independently or decide issues on your own?

CM (Col [redacted] Not at all.

P (CDR [redacted] Sir, getting back to some of the issues that got brought up when you were being questioned as a group, the defense counsel in one of their questions stated what they thought the sources of law were with respect to this commission. That is not something we want to argue right now, but it is a characterization that the prosecution disagreed with. Do you agree, as you were instructed before, that you're the determiner of the law and the fact involved in this case?

CM (Col [redacted] I believe that will be the case.

PO: Carry on.

P (CDR [redacted] Thank you, sir. Colonel [redacted] another thing brought up was the discussion of jurisdiction and the presiding officer defined what that was for you. The defense counsel portrayed the jurisdiction exists for violations of the law of war where it is the prosecution's contention that it also exists for other offenses triable by military commission. Do you agree that counsel will brief these issues and you will have

to make a determination of what that law is?

CM (Col [redacted] Yes, I do.

P (CDR [redacted] Also during the group questioning, the defense counsel mentioned a civil suit initially filed in the State of Washington. Sir, do you agree that unless that civil suit has a bearing on an issue of fact or law, that you are required to deal with as the military commission member that suit does not impact our commission trial here?

CM (Col [redacted] I would agree with that.

P (CDR [redacted] Thank you, sir. Sir, getting back to your questionnaire, Questions 8 and 47, you stated that at one time you were responsible for coordinating movement of detainees. Could you elaborate on that, please?

CM (Col [redacted]

P (CDR [redacted] Where were you physically located when you performed that duty?

CM (Col [redacted]

P (CDR [redacted] Sir, were you in any way involved in making the determination of what detainees were eligible for transfer to Guantanamo?

CM (Col [redacted] No, I was not.

P (CDR [redacted]

CM (Col [redacted]

P (CDR [redacted]

CM (Col [redacted]

whatsoever.

PO: I am confused by that answer. Sitting here today, do you have an independent recollection of seeing the name Salim Ahmed Hamdan before?

CM (Col [redacted]: No.

PO: Okay.

P (CDR [redacted] Thank you, sir.

PO: [redacted]

CM (Col [redacted]

PO: Thank you.

P (CDR [redacted] Colonel [redacted] do you understand that just because someone was transported to Guantanamo does not mean that they are guilty of an offense?

CM (Col [redacted] I do.

P (CDR [redacted] Sir, in Question 17, you stated that you thought the publicity associated with this case might impact your family. Do you have any specific concerns?

CM (Col [redacted]: No, that's a general comment.

P (CDR [redacted] Will that in any way impact your ability to fairly sit as a member at this trial?

CM (Col [redacted]: No, it will not.

P (CDR [redacted] In Question 19, you indicated that your position [redacted] might lead one to believe that you are biassed in this matter. I will start simply; do you feel you are biassed in this matter?

CM (Col [redacted]: No, I do not.

P (CDR [redacted] Do you feel you can fairly try this case?

CM (Col [redacted]: I do.

PO: I am just saying this so it won't look like I am

whispering. Please everyone give a chance for a question to be translated and enough time for a response to be caught so that the translator can translate.

P (CDR [redacted] Thank you, sir. [redacted] Is there anything that you did in that capacity that would interfere with you being a fair and impartial member?

CM (Col [redacted] I don't believe so.

P (CDR [redacted] You also stated on your questionnaire that -- and obviously from your position, you have had briefings concerning [redacted]

CM (Col [redacted] Yes.

P (CDR [redacted] Do you understand that those briefings are not evidence with respect to this commission.

CM (Col [redacted] I do.

P (CDR [redacted] And do you understand that whatever knowledge you gain from those briefings cannot generally be imparted to your fellow commission members?

CM (Col [redacted] I do.

P (CDR [redacted] Thank you, sir. I have no further questions.

PO: Defense?

DC (LCDR Swift): Yes, sir. Sir, as far as the questions on the law I think I after much stumbling, settled it down to a single question. Do you agree that you can't make up the crime -- that you can't make up the criminal statute after a crime has been committed and punish someone for it?

PO: Do you understand the question, colonel?

CM (Col [redacted] I am going to -- not entirely. I don't understand the question, sir. Say it again.

DC (LCDR Swift): Yes, sir. Do you agree that you cannot -- that you cannot -- that in our jurisprudence system you

cannot write a criminal statute after an action has occurred and punish something that occurred before that criminal statute was established?

CM (Col [redacted] To restate it, do I believe that you cannot fabricate something to cover something that occurred in the past and use that against the accused?

PO: An accused.

CM (Col [redacted] An accused. Is that what you are asking me?

DC (LCDR Swift): When you say fabricate something, I mean create a criminal charge after the fact.

CM (Col [redacted] Yeah.

DC (LCDR Swift): Do you believe you can do that or not?

CM (Col [redacted] It does not make sense to me that you could do that. No, I don't think you could.

DC (LCDR Swift): Thank you. You indicated in your questionnaire [redacted]

CM (Col [redacted] That is incorrect.

DC (LCDR Swift): That's incorrect? I'm sorry. Is all of your answers regarding -- I just want to be sure here, sir -- Question 47 unclassified, sir?

CM (Col [redacted] You are asking me is that information classified?

DC (LCDR Swift): Yes, that is exactly what I am asking you, sir.

CM (Col [redacted] Okay. [redacted]

DC (LCDR Swift): Yes, sir.

PO: So there is no confusion, you are not saying that what you wrote in answer to Question 47 on the paper that your writing is classified, are you?

CM (Col [redacted] No.

PO: Thank you.

DC (LCDR Swift): Well, what I wanted to make sure was that I wasn't going to refer to anything in your writing that was classified. So, sir, certainly if you believe that at the time the question requires you to indicate classified, please let me know and we will stop.

CM (Col [redacted] Let me clarify if I may. The details of what is in this writing is clearly classified.

DC (LCDR Swift): Yes, sir.

PO: Details of what the writing refers to?

CM (Col [redacted] Yes.

PO: Thank you.

DC (LCDR Swift): You said you were involved in putting together a [redacted]

CM (Col [redacted] That's correct.

DC (LCDR Swift): Did you simply assemble the list or did you have any evaluation in who should be on the list.

CM (Col [redacted]

DC (LCDR Swift): And you did not evaluate any of the personnel [redacted]

CM (Col [redacted] No.

DC (LCDR Swift): Did you send other information along with the list of names, in other words, files or intelligence area that OSD would evaluate?

CM (Col [redacted] I did not. No, I didn't. Let me elaborate on that if I may.

DC (LCDR Swift): Yes, sir.

CM (Col [redacted] The list when I would get it would come with a series of names. My job was to ensure that it was in the proper format; then I handed that [redacted]

[redacted]

DC (LCDR Swift): Did you -- were you involved after the preparation of the list with the [redacted] itself, after such people had been approved. Do you know who had been approved and who had not and make it happen?

CM (Col [redacted] Yes.

DC (LCDR Swift): Were you aware of what the OSD screening criteria were?

CM (Col [redacted] Yes, I was.

DC (LCDR Swift): I presume those are classified; is that correct, sir?

CM (Col [redacted] Yes, they are.

DC (LCDR Swift): We will ask about it in closed session. While you were with [redacted]

CM (Col [redacted] Command?

DC (LCDR Swift): [redacted] I am sorry, sir. Where you -- did you [redacted]

CM (Col [redacted] Every day we received [redacted] briefings. I was not privileged to any of the information that came out as a result [redacted] And I was not involved in any of the activities that took place at [redacted]

DC (LCDR Swift): Were you aware of the agencies that were participating in [redacted]

CM (Col [redacted] No. And I only hesitate because I could only speculate who was here. And let me elaborate on that. I do know that we had established a JTF. The components of that JTF and its organization, I was not involved with.

DC (LCDR Swift): You indicated, sir, that you also helped [redacted] is that

correct, sir?

CM (Col [redacted] I was involved primarily in the execution in my role. I was obviously surrounded [redacted]

DC (LCDR Swift): Were you aware -- at any time was there any position of discussing ROE or other parts as to whether the Geneva Convention was applicable to [redacted]

CM (Col [redacted] [redacted] [redacted]

DC (LCDR Swift): Are those opinions or the discussions of it classified?

CM (Col [redacted] Yes, they are.

DC (LCDR Swift): We will discuss them in cross session, sir.

You have attended the [redacted] sir?

CM (Col [redacted] Yes, I did.

DC (LCDR Swift): You indicated that you received significant amount of training while at the [redacted] on terrorism.

CM (Col [redacted] I don't know if I would use the term significant, but it was part of the curriculum. And to put it in perspective, I went to the [redacted] prior to my [redacted] assignment.

DC (LCDR Swift): Much of it, in other words, has sort of been overcome by events?

CM (Col [redacted] Exactly.

DC (LCDR Swift): Yes, sir. While there, did you read prior to -- while at the [redacted] -- any books about al Qaida or Usama bin Laden?

CM (Col [redacted]): No.

DC (LCDR Swift): While at the [redacted] was it ever discussed in these terrorism classes that the operations that have gone on in the 90's amounted to a war or were actually ongoing conflict?

PO: What does that have to do with anything?

DC (LCDR Swift): It would be an opinion as to the law, sir. I just want to know if there were such discussions.

PO: Prior to being called here, had you sat down and tried to determine in your mind whether on your own or based on information that you got in briefings, the relevance of the law of war and other things to trying people for acts committed in Afghanistan or Iraq or anywhere else?

CM (Col [redacted]: No.

DC (LCDR Swift): You mentioned that you received briefings almost daily while at [redacted] What portion of those briefings were regarding [redacted]

CM (Col [redacted] No, that's not classified. But keep in mind that the focus at C[redacted] for sake of [redacted] So to answer your question more specifically, was it specifically oriented to [redacted] and what percentage of my time in those briefings were discussing al Qaida? The term itself was rarely used, frankly. [redacted]

DC (LCDR Swift): Is it fair to say, sir, that to really go beyond that because I do have some questions, I am going to start having DAS classified questions?

CM (Col [redacted]: Yes.

DC (LCDR Swift): Yes, sir, I will hold on. You indicated that you had friends in the Pentagon?

CM (Col [redacted] I did not indicate that.

DC (LCDR Swift): Sorry, sir. That is a note taking error on my part. I don't have any further questions, sir.

PO: Trial?

P (CDR [redacted] No, sir.

PO: Thank you, Colonel [redacted] You may return to the deliberations room.

How long is it going take -- you all can rise, but I am not going to tell you to rise.

How long is it going to take to have a recess? Everything being equal, the translators need a break. Can we have a recess for 15 minutes by any wild chance? We can do it?

The counsel indicated.

The court is in recess.

The Commission Hearing recessed at 1410, 24 August 2004.

The Commission Hearing was called to order at 1431, 24 August 2004.

PO: Proceedings will come to order. Let the record reflect that all parties present when we left are once again present. Colonel [redacted] is in the courtroom. The other members are not present. I am handing Colonel [redacted] his individual questionnaire for reference during the voir dire. Trial?

P (CDR [redacted] Thank you, sir. Good afternoon, Colonel [redacted]

CM (Col [redacted] Afternoon.

P (CDR [redacted] Sir, getting right to the questionnaire, in Question 15 you indicated that you thought the publicity associated with this case might impact your family. Do you have any specific concerns in that regard?

CM (Col [redacted] No, I don't have any specific concerns. I was a little concerned back in June when my name showed up in the newspaper about being a part of this commission. I was mostly concerned about the affect it would have on my family. However, given the reality that this was going to be in the papers and was going to have high publicity both in the United States and everywhere else, I recognized the fact that all of us in these proceedings are in a similar situation having to do with the publicity and having folks know who you are. Given that, I discussed it with my family and I only have general concerns for their safety; but either way it is

not going to alter my ability to carry out my duties here.

P (CDR [redacted] Thank you, sir. Sir, in response to Question 37 you stated that you knew a retired [redacted] who was a victim of the 9/11 attacks?

CM (Col [redacted] Correct.

P (CDR [redacted] Sir, what was your relationship with him?

CM (Col [redacted]

P (CDR [redacted] So is there anything involved in this professional acquaintance relationship that would impact your ability to fairly decide this case?

CM (Col [redacted] Not at all. I did not know he was a victim of the 9/11 attacks until about a month after them when I was speaking to some friends of ours who were also stationed at Hanscom at that time.

P (CDR [redacted] Now, sir, in Question 45 you wrote that you had read a book entitled a *Crisis of Islam*. Do you understand that whatever you read or remember from reading in that book is not evidence in this case?

CM (Col [redacted] Absolutely.

P (CDR [redacted] And you will judge this case based on the evidence presented to the commission?

CM (Col [redacted] Yes, I will.

P (CDR [redacted] I want to touch on a few things that occurred when the group was being questioned. During that questioning

the defense counsel stated to you the sources of law that he felt applied to this commission. He mentioned treaties, statutes, other things. Not getting into both sides of the argument on that issue, I think it was evident that we did not agree with his statement. Do you agree that you are the determiner as a commission member of the law, issues that will happen in this case?

CM (Col [redacted] As I understand the orders that have been given to us on this commission, we will both determine the law and the facts in this case. So yes, the answer is yes.

P (CDR [redacted] Also during that group questioning there was mention of jurisdiction which had been explained to you by the presiding officer. In that discussion the defense counsel stated that there was jurisdiction of law of war violations. Now, we will contend that there is also jurisdiction over crimes triable by military commission in accordance with the orders and instructions. Do you understand that this is potentially a point of issue and that you will receive briefing from counsel on such issues and you will be required to decide it?

CM (Col [redacted] I understand that defense and the prosecution have a difference of opinion as to what laws apply and how they apply, and that will be the commission's job to determine whether the motions that you set forth in front of us are valid or not and we will judge that.

P (CDR [redacted] Yes, sir. Sir, also brought up was a lawsuit brought by defense counsel in civilian court initially in the State of Washington. Do you understand that that is a separate and distinct proceeding, and that unless it impacts a question of law or fact in this proceeding it has no impact on what we are doing here?

CM (Col [redacted] I understand that.

P (CDR [redacted] I just want to clarify one particular phrase you used in filling out your questionnaire on Question 41. When discussing how 9/11 affected you, one of your comments was that we must stand tall. Could you please explain that to us.

CM (Col [redacted] I believe I also wrote and I can refer here that the threat of terrorism, in my opinion, is much like many of the other threats throughout the course of

history of our country we have faced. I won't get into any specifics, but that threat much like the historical threats we have faced must be met with the same resolve as those previous threats to our country and that was my intention when I said we must stand tall.

P (CDR [redacted] When we apply things to the specifics of this particular accused and his right to a fair trial you see nothing in your background to impact your ability to serve on this commission?

CM (Col [redacted] Absolutely none.

P (CDR [redacted] Thank you very much, sir.

DC (LCDR Swift): I have only a few questions, sir.

PO: Pardon?

DC (LCDR Swift): I have only a few questions.

PO: Okay.

DC (LCDR Swift): I know that comes as a surprise, sir.

One -- before I begin, is anything in your questionnaire, just reviewing it again, classified in any way? I know you intended it not to be, but I don't want to refer to something classified.

CM (Col [redacted] There is nothing that I wrote in there that is classified.

DC (LCDR Swift): You were involved with the [redacted] is that correct, sir.

CM (Col [redacted] Yes. You are making a slight mistake in terminology there. [redacted]

DC (LCDR Swift): Yes, sir.

CM (Col [redacted] The missile you are referring to is the Hell Fire Missile.

DC (LCDR Swift): Yes, sir.

CM (Col [redacted] And, yes, I was involved in this program.

PO: Which program? I am sorry.

CM (Col [redacted] The program to arm the [redacted] with the [redacted]

PO: Thank you.

CM (Col [redacted] I was the [redacted]

DC (LCDR Swift): Yes, sir. In the course of doing that did you have any operations or was a [redacted] was used to fire a [redacted] that is a documented fact. Were you in anyway involved in that operation, sir?

CM (Col [redacted] I was in no way involved in operations of that [redacted] to operate them to other [redacted] And I had no knowledge of the tactical or mission details, really just to provide to the forces, sir.

DC (LCDR Swift): I have no other questions at this point.

PO: Thank you. Any other follow?

Sir, could you return to the deliberation room and please ask Colonel [redacted] to come in.

CM (Col [redacted] I will.

PO: Thank you. Let the record reflect that Colonel [redacted] has left the courtroom and that Lieutenant Colonel [redacted] has entered it, and that I have handed him his questionnaire.

Trial?

P (CDR [redacted] Thank you, sir. Good afternoon, Lieutenant Colonel [redacted]

CM (LtCol [redacted] Good afternoon.

P (CDR [redacted] Lieutenant Colonel [redacted] you previously expressed that you were involved in the [redacted]

CM (LtCol [redacted] That's correct.

P (CDR [redacted] Obviously, I don't want us to get into classified information, but could you generally describe what your role, or what your duties were.

CM (LtCol [redacted] Yes, I am an [redacted]

P (CDR [redacted] Were you ever specifically involved with or provided information concerning the capture of the accused?

CM (LtCol [redacted] No, I was not.

P (CDR [redacted] Do you have any knowledge concerning the circumstances of the accused's capture?

CM (LtCol [redacted] No, I do not.

P (CDR [redacted] Do you have any information concerning his detention after being captured?

CM (LtCol [redacted] No, I do not.

P (CDR [redacted] Now, as an [redacted] officer have you ever received specialized training on the al Qaida organization or the Taliban?

CM (LtCol [redacted] Specialized training, no I have not.

P (CDR [redacted] Is there anything involved in training you received or your exposure as an [redacted] officer that you feel would impact your ability to fairly try this case?

CM (LtCol [redacted] No, there is not.

P (CDR [redacted] Just want to touch on a couple of things raised when the entire group was being questioned. During defense counsel's questioning he stated what he felt the sources of law were applicable to this case. It was probably evident that the prosecution did not feel the same way on that issue. Do you understand that as a commission member it is for you to determine what the applicable law is with respect to this case?

CM (LtCol [redacted] Yes, I do.

P (CDR [redacted] Also in the defense counsel's questioning there was discussion of jurisdiction and the presiding officer assisted in defining what jurisdiction was. The defense counsel mentioned violations of the law of war in order to determine jurisdiction, and have jurisdiction, where the prosecution would also contend that offenses triable by military commission also generate jurisdiction. This is obviously a tough time for those terms but the point I am getting at is do you understand that you will get briefed on those issues by both sides and you will have to make a determination?

CM (LtCol [redacted] Yes, I do.

P (CDR [redacted] Also mentioned during the group questioning was defense counsel filing a lawsuit at least then in the State of Washington.

Do you understand that that lawsuit is separate and distinct from this commission?

CM (LtCol [redacted] Yes, I do.

P (CDR [redacted] And do you understand that unless a question of fact or a law question comes up in this commission that makes that lawsuit relevant these are two separate entities, if you will?

CM (LtCol [redacted] Yes, I do.

P (CDR [redacted] Thank you, very much.

PO: Commander Swift?

DC (LCDR Swift): Yes, sir. Good afternoon, Colonel.

CM (LtCol [redacted] Good afternoon.

DC (LCDR Swift): Let me begin with the same warning, or caveat, that Colonel [redacted] used, please in my questions if I even tread towards classified information alert me.

Were you ever physically located in [redacted] in these duties?

CM (LtCol [redacted] Yes, I was.

DC (LCDR Swift): During what periods of time?

CM (LtCol [redacted] Multiple times between the middle of [redacted]

DC (LCDR Swift): And you worked with which organizations?

CM (LtCol [redacted] A[redacted]

DC (LCDR Swift): What was your role inside that task force?

CM (LtCol [redacted]

DC (LCDR Swift): Were you one of the officers or the officer in charge?

CM (LtCol [redacted] I was -- when we went forward?

DC (LCDR Swift): Yes.

CM (LtCol [redacted] At times I was the officer in charge of the J-2 portion.

DC (LCDR Swift): [redacted] Will it require you to go into classified information to talk about who you provided [redacted] to?

CM (LtCol [redacted] Yes, it would.

DC (LCDR Swift): We will save that. In order to provide this [redacted] -- well, will it require you to go into classified information to tell me any of the sources of the [redacted] you used?

CM (LtCol [redacted]

DC (LCDR Swift): You stated earlier that you do not know or did not know Salim Ahmed Hamdan?

CM (LtCol [redacted]

DC (LCDR Swift): In your experience there were people who were being referred to by their full names who were being detained?

CM (LtCol [redacted] Yes, yes, sir, they were.

DC (LCDR Swift): Were all those names correct at the time that they were being referred to?

CM (LtCol [redacted]: To the best of my knowledge.

DC (LCDR Swift): [redacted]

CM (LtCol [redacted]: Yes, it is possible.

DC (LCDR Swift): Probably, again, to get into more of the type of [redacted]

CM (LtCol [redacted] That's correct?

DC (LCDR Swift): Yes, sir. As an [redacted] are you more likely to put stock in an [redacted] having experience in how they are developed?

CM (LtCol [redacted] As opposed to?

DC (LCDR Swift): As opposed to other evidence?

CM (LtCol [redacted] I would weigh the evidence that is put before me. If you are saying the [redacted] would be the evidence?

DC (LCDR Swift): Did you believe that the i[redacted] you were obtaining [redacted] was accurate?

CM (LtCol [redacted]: At times yes, at times not.

DC (LCDR Swift): To be more specific, does it require you to go into classified information?

CM (LtCol [redacted] I am not sure. It will depend on the question itself.

DC (LCDR Swift): Okay. I will try another couple then. When you say at times not, can you elaborate on those occasions when it wasn't accurate?

CM (LtCol [redacted] It might be best if we just do that in closed session.

DC (LCDR Swift): Yes, sir. You indicated that you did self-study

on al Qaida, can you describe that?

CM (LtCol [redacted] As an [redacted] of course we are reviewing the information that is coming in, the [redacted] reports, and that's what I refer to as self-study.

DC (LCDR Swift): So you are basing that primarily on the [redacted] reports that you received?

CM (LtCol [redacted] Correct.

DC (LCDR Swift): You didn't do additional study by reading books?

CM (LtCol [redacted] Yes.

DC (LCDR Swift): Is that the same as Taliban and Islamic fundamentalism?

CM (LtCol [redacted] Correct.

DC (LCDR Swift): You indicated that you've seen some media coverage on military commission proceedings. Can you elaborate?

CM (LtCol [redacted] Just that they were forming the commissions in Guantanamo Bay and it would be the first time since World War II.

DC (LCDR Swift): Do you remember where you received that from?

CM (LtCol [redacted] CNN and Fox most likely.

DC (LCDR Swift): As an [redacted] officer when you prepared briefs -- and you prepared briefs for use by [redacted] is that correct, sir?

CM (LtCol [redacted] Yes, I have.

DC (LCDR Swift): You have during your career?

CM (LtCol [redacted] Yes.

DC (LCDR Swift): You are required to put faith in the sources and material that's being provided to you; is that correct, sir?

CM (LtCol [redacted] That's correct -- well, and you have to weigh

the evidence.

DC (LCDR Swift): Are you more -- because of your experience is it fair to say that you are more inclined toward believing an [redacted] that's been put together by a competent [redacted] officer?

CM (LtCol [redacted] Just depends on the information.

DC (LCDR Swift): In addition to your tour in [redacted] have you had any other support or operational roles in [redacted]

CM (LtCol [redacted] I was [redacted] officer to [redacted]

DC (LCDR Swift): Were you -- without again -- if it requires us go into classified let me know. What exactly did you do as that liaison officer?

CM (LtCol [redacted] We would have to discuss that elsewhere.

DC (LCDR Swift): Classified information, okay.

The rest of my questions are going to go into the same area and we will need to do this in closed session.

P (CDR [redacted] Nothing additional, sir.

PO: Sir, would you please return to the deliberation room and ask Colonel [redacted] to come in.

Let the record reflect that Colonel [redacted] has entered the courtroom and Colonel [redacted] has left the courtroom. I have provided Colonel [redacted] with a copy of his questionnaire. Trial?

P (CDR [redacted] Thank you, sir. Good afternoon, Lieutenant Colonel [redacted]

CM (LtCol [redacted] Good afternoon.

P (CDR [redacted] I would like to address your questionnaire. Particularly, I want to focus on Questions 15 through 18. You expressed concern about the safety for your family as a result of your service on this commission. Are there any specific concerns that you have?

CM (LtCol [redacted] No, there are no specifics. It is all generalized comments about the concern and safety of my family.

P (CDR [redacted] Do you feel that you can, as hard as it may be, put aside those concerns and give this commission your undivided attention and provide the fair trial if called upon to do so?

CM (LtCol [redacted] If called upon to do so, yes, sir, I can.

P (CDR [redacted] And for purposes of my questioning, I understand you are an alternate at this point, but I will couch my questions as if you are selected to sit.

CM (LtCol [redacted] Understood.

P (CDR [redacted] As a voting member, you put in your questionnaire that the events of 9/11 in general aroused strong emotions as they have in most Americans. Do any of those emotions impact your ability to judge this particular accused?

CM (LtCol [redacted] No, sir, they do not.

P (CDR [redacted] Would you agree that any emotional response should not sway your judgment in assessing the facts and law in this case?

CM (LtCol [redacted] Very much so, sir, they must stay out.

P (CDR [redacted] On your questionnaire you put that, as of right now, you don't feel influenced by the high media interest in this case, but that possibly you might. Could you explain to us what you foresee might occur in the future?

CM (LtCol [redacted] What I believe is that possibly if it comes very high media and attention that they will find out that where I live, things like that. And the press will be bothering my family, my myself when we are not in these proceedings and that is how I see the media could possibly affect me.

P (CDR [redacted] Will you be able to set aside that concern and conduct business and provide a fair trial while in this courtroom?

CM (LtCol [redacted] Yes, sir, I can.

P (CDR [redacted] You also put in your questionnaire that you desire to seek justice for those who have perished at the hands of terrorists.

CM (LtCol [redacted] That is part of the emotional response that I had. That probably goes with how I feel, strong emotionally towards this case. Understanding that what I said in my prior answer that I will take the emotion out of that, but I want to be forthright in my questionnaire in how I responded.

P (CDR [redacted] And in seeking justice, do you understand that involved in seeking justice is ensuring a fair trial and holding us to our obligation to prove this case beyond a reasonable doubt?

CM (LtCol [redacted] That is exactly part of my answer, sir. I think that it is on both sides that this must have an end state at some point in time and I think justice has to be served for all individuals involved.

P (CDR [redacted] On your questionnaire in Question 45, you indicated you have read media reports about conditions of detention in Afghanistan and Guantanamo. Roughly, how many articles have you seen on this subject?

CM (LtCol [redacted] I would probably say two to three, sir.

P (CDR [redacted] Did you come across them just as the normal reading of the paper or watching TV or did you specifically seek them out?

CM (LtCol [redacted] No, I came across them just by strictly accident, sir.

P (CDR [redacted] Have you ever personally visited any of the detention facilities in Afghanistan or here at GTMO?

CM (LtCol [redacted] No, sir, I have not.

P (CDR [redacted] Do you have any way as you sit here right now to judge the accuracy of these articles that you may have read?

CM (LtCol [redacted] No. I have no basis for the judge of those articles, sir.

P (CDR [redacted] And you understand that your basis to judge these type of items is based on what you will see presented before this commission?

CM (LtCol [redacted] That is correct, I understand that.

PO: Could counsel and Colonel [redacted] please let a little time elapse between questions and answers, please?

P (CDR [redacted] Yes, sir. In looking at Question 47, you say that at least at some point you express an opinion that at least some detainees at Guantanamo Bay are terrorists. Do you recall when or the context of expressing that opinion?

CM (LtCol [redacted] No, I do not recall the premise of that. I think the most influential piece I saw was from 20/20, but I may not be right about that.

P (CDR [redacted] Is that what the opinion was based on a 20/20 --

CM (LtCol [redacted] Yes, and that opinion at the time.

P (CDR [redacted] When you made that statement were you referring to any particular detainee?

CM (LtCol [redacted] No, sir. That was just a general statement.

P (CDR [redacted] So that had nothing to do with the status of this particular accused?

CM (LtCol [redacted] No, sir.

P (CDR [redacted] No further questions, sir.

DC (LCDR Swift): I must confess, Colonel, on Question 18 I really didn't understand your answer. So, I am going to ask the question again. Do you believe that your participation in these proceedings will have any effect on you? Any affect on how you are viewed or perceived either in your personal or professional life?

CM (LtCol [redacted] What that means is if -- I will try to slow down some.

DC (LCDR Swift): Thank you, sir.

CM (LtCol [redacted] What I meant by that is it comes out as a

negative reaction in the United States, knowing that I was part of these commissions. I may be perceived negatively also based on the way the question was worded to me at the time.

DC (LCDR Swift): Let get more specific then. What would a negative reaction be in the United States? Can use -- is that to a finding of not guilty, a negative, or angry reaction or to the proceedings themselves?

CM (LtCol [redacted] To the proceedings themselves, more in general to me.

DC (LCDR Swift): Are you concerned at all professionally about how being a member of this panel can affect you?

CM (LtCol [redacted] No, sir, I do not.

DC (LCDR Swift): In Question 41, you did answer to the events of 9/11 has made you very angry. And it is important that we be forthright and I certainly understand that you will do your absolute best to divorce emotion, but you do have strong emotions, don't you?

CM (LtCol [redacted] Yes, I do have strong emotions, sir.

DC (LCDR Swift): You indicated that you knew you had professional friends in the Pentagon and you wrote down two names and I don't think it is relevant to put their names down. Were they killed, injured, or were just there?

CM (LtCol [redacted] They were just there, sir.

DC (LCDR Swift): Did you talk to them about what happened?

CM (LtCol [redacted] No, I had never talked to either one of those about that.

DC (LCDR Swift): You indicated in Question 42 that you believed that if your identity or membership in this commission is exposed or broadcast to the public that you believe that they will seek me out, seek me and my family out for revenge. First of all, who is they?

CM (LtCol [redacted] Terrorist organizations, sir.

DC (LCDR Swift): Do you believe they will do that whether you find Mr. Hamdan guilty or not guilty. Does it matter

what you find if you participate?

CM (LtCol [redacted] I think my participation alone would be the reason, sir.

DC (LCDR Swift): Is this a strong feeling or -- well you stated it as a strong feeling. Do you still stand by that?

CM (LtCol [redacted] Yes, it is a strong apprehension to better describe it for you, sir.

DC (LCDR Swift): You indicated on Question 44 that you have done self-study regarding al Qaida on the Internet. Can you briefly describe what sites you have gone to and how much time you have spent on them.

CM (LtCol [redacted] Numerous sites I have gone to, whatever I could find on the search. *The Class of Civilizations* was probably the best book I have read. I just wanted to understand.

PO: I state for the record, once again, that when I make motions towards counsel or a member I am not doing anything other than trying to keep them to speak slowly so that the translators can translate. I apologize for interrupting.

CM (LtCol [redacted] I'm sorry. I'll slow down. Sir, to get back to your question I want to understand both sides how Islamic, also United States, also the Taliban what their values were, what they wanted, their goals, things like this. I wanted an understanding. I think I can better my life, know the reasons of the things that have happened.

DC (LCDR Swift): How much time did you spend on that?

CM (LtCol [redacted] That is difficult to say. I wouldn't say I was obsessed, but I have probably spent probably a month's of research.

DC (LCDR Swift): A month?

CM (LtCol [redacted] Yes. And that's over four to five years.

DC (LCDR Swift): Over four to five years. So you began this study before 9/11?

CM (LtCol [redacted] No, sir. Only the book *Class of Civilizations* was before.

DC (LCDR Swift): In Islamic fundamentalism you indicated self-study, but you also indicated S-2 briefings, were those classified?

CM (LtCol [redacted] Yes, sir, they were.

DC (LCDR Swift): Then we will discuss those briefings in closed session.

CM (LtCol [redacted] Yes, sir.

DC (LCDR Swift): You also indicated that you had seen news media on the military commissions. Do you recall what the sources of that media was? Was it paper or was it television broadcasts?

CM (LtCol [redacted] It was on the internet. Every morning I would check the internet and it would say the military commissions were forming and that is all I saw on that.

DC (LCDR Swift): Do you -- well the Department of Defense has several websites, do you use them?

CM (LtCol [redacted] No, sir, I did not.

DC (LCDR Swift): They also have the early bird. Is that where you saw these?

CM (LtCol [redacted] Yes, sir, that is where I saw those.

DC (LCDR Swift): And so did you go ahead and click on the article and read the entire article or just read the banner so to speak?

CM (LtCol [redacted] I would click on the article. I probably would read a few lines that interest me in the beginning and then delete it. I think there was only one article that I ever read.

DC (LCDR Swift): Now, you realize that you met me at the time that you filled this questionnaire out. Do you recall whether I happened to be in that article? I was in several.

CM (LtCol [redacted] No, I do not remember your name until today,

sir.

DC (LCDR Swift): Now, on your opinion in 47 you indicated that, yes, you believed that the persons in Guantanamo Bay were terrorists; is that correct?

CM (LtCol [redacted] At one time, yes, because it asked if I ever expressed an opinion.

DC (LCDR Swift): But you don't recall who you expressed it to?

CM (LtCol [redacted] No, I do not, sir. And like I said before, sir, it was a very general statement and a general conversation.

DC (LCDR Swift): Then you answered B and said that detainees at Guantanamo are guilty of any criminal offense and you answered that, no.

CM (LtCol [redacted] Right. As we go to the underlying question, have I ever expressed an opinion and it is like when I got to whether the detainee was guilty of any criminal charges, what I was trying to say is I don't know. So I said no. I didn't express the opinion either way.

DC (LCDR Swift): I understand. You don't associate then a terrorist and a criminal?

CM (LtCol [redacted] That's what I am saying, sir.

DC (LCDR Swift): So you saw those to be two separate things?

CM (LtCol [redacted] That's correct. I take the word guilty as a due process, sir, someone who would have to go through a due process and then a determination of guilty or not guilty, sir.

DC (LCDR Swift): Was the 20/20 special that you watched critical of Guantanamo Bay or generally supportive of it; or was it simply information?

CM (LtCol [redacted] It was more information.

DC (LCDR Swift): How did you feel when you watched it?

CM (LtCol [redacted] How did I feel? I feel that -- I felt it was -- it is like it has been a long time. That's what I remember, it has been a long time that they have been

down here and so when is this due process going to happen. I remember that.

DC (LCDR Swift): You answered 52, which basically was you believed members of the United States are obligated to abide by the Geneva Convention during armed conflict. You indicated that you're not sure about that.

CM (LtCol [redacted] It was a question at the time that I was not sure about, at least not quite sure.

DC (LCDR Swift): Okay. Do you know what the Geneva Convention is then?

CM (LtCol [redacted] Not specifically, no. That's being honest and I wanted to review it before I could formulate an opinion before that question, sir. What I was trying to do was, I know it is very specific and there is three different articles, I wanted to put not sure because I couldn't specifically say yes and formulate an opinion and give a full answer to that question.

DC (LCDR Swift): Actually there are four articles, sir, but that's fine. Is it fair to say that you would be willing to listen to both counsel's arguments regarding its application to these proceedings?

CM (LtCol [redacted] Yes, sir.

DC (LCDR Swift): I don't have any further questions.

PO: Trial?

DC (LCDR Swift): In open session, sir.

P (CDR [redacted] Nothing further, sir.

PO: Thank you, Colonel [redacted] If you will return to the deliberation room.

CM (LtCol [redacted] Yes, sir.

PO: Let the record reflect that Colonel [redacted] has left the deliberation room. Okay, who do you want back for classified, trial? Closed, excuse me -- I apologize, for closed. No one?

P (CDR [redacted] No one, sir.

PO: Okay.

DC (LCDR Swift): I need a moment to consult.

PO: That's fine.

DC (LCDR Swift): In reviewing my notes, I believe all of the members indicated at least one area that required classified information, sir.

PO: Realizing that I can't hold you to this and you can't -- it is hard for you. How long do you think your combined questioning will take? I mean seriously, thirty minutes?

DC (LCDR Swift): I doubt that seriously, sir.

PO: An hour?

DC (LCDR Swift): For each one or --

PO: No, for all five of them.

DC (LCDR Swift): For all five of them, sir?

PO: Yeah?

DC (LCDR Swift): Given two of the members had [redacted] I have no way of knowing because of course I haven't been provided any classified information regarding that. So it is impossible to estimate, sir. The rest of them, they are going to be fairly short. Those -- but specifically Colonel --

PO: Okay. That's all right.

DC (LCDR Swift): Colonel [redacted] and --

PO: For those who are interested, I do not anticipate holding the next open session until 1730.

DC (LCDR Swift): Yes, sir. I would like to enter argument and make a request regarding whether my client will be present. I understand the rest of the public will not, but I would like to talk about my client being present for the next session.

Review Exhibit 10

PO: Okay. Go on?

DC (LCDR Swift): I understand under the security policy that one must go to the originating authority to classify the material to determine whether it be released to my client. I request that a summation be prepared of each of these persons where they believe they are going to talk and that we go to such a classifying authority to see if my client will be present. Nothing is more fundamental in my client's faith in the process -- in fact faith in the process that believes that he has full and fair members who are able to hear his case without any other prejudice to exclude him at that point without even trying to include him is not in keeping with the full and fair trial as dictated by the President, sir.

P (CDR [redacted] Yes, sir. Lieutenant Commander Swift himself had said repeatedly he is going to get into classified information. This is a nondiscretionary call. We are going to talk about classified information and the accused does not have the clearance to be exposed to that information. Now, it is true that potentially when we are done this information can be reviewed and summaries, redacted portions can be provided; but as of right now to ask someone to make a call that we can expose the accused to this information without knowing what the information is, that's just not feasible, sir.

PO: Your request is denied, Commander Swift. How long is that going to take you to be ready to start the closed session, clear the courtroom, and do the things?

P (CDR [redacted] Twenty minutes, sir.

PO: We will start at 1535. The court is in recess.

The Commission Hearing recessed at 1524, 24 August 2004.

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. SALIM AHMED HAMDAN
a/k/a Salim Ahmad Hamdan
a/k/a Salem Ahmed Salem Hamdan
a/k/a Saqr al Jadawy
a/k/a Saqr al Jaddawi
a/k/a Khalid bin Abdallah
a/k/a Khalid wl'd Abdallah

This is to certify that Pages _____ through _____ are an accurate and verbatim transcript of the foregoing proceedings.

_____
Peter E. Brownback III
Colonel, U.S. Army (Retired)
Presiding Officer

_____
Date

THE NEXT SESSION WAS A CLOSED SESSION AND SEALED WITH A CLASSIFICATION OF **S E C R E T**. THIS SESSION CONSISTS OF PAGES 84 TO 110 AND CONTAINS THE INDIVIDUAL VOIR DIRE OF COMMMISSION MEMBERS: COLONEL [redacted] COLONEL [redacted] LIEUTENANT COLONEL [redacted] AND LIEUTENANT COLONEL [redacted]

Review Exhibit 10

Page 76 Of 101

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. SALIM AHMED HAMDAN
a/k/a Salim Ahmad Hamdan
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a/k/a Saqr al Jadawy
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a/k/a Khalid bin Abdallah
a/k/a Khalid wl'd Abdallah

This is to certify that Pages _____ through _____ are an accurate and verbatim transcript of the foregoing proceedings.

_____
Peter E. Brownback III
Colonel, U.S. Army (Retired)
Presiding Officer

_____
Date

The Commission Hearing opened at 1733, 24 August 2004.

PO: Be seated. Let the record reflect that all parties present when the court recessed are again present. The members other than myself are not present. The proceedings from the time I walked in are no longer under seal.

During the closed the session, I received challenges for cause. One against Colonel [redacted] for his [redacted] Trial, right?

P (CDR [redacted] Yes, sir.

PO: Defense?

DC (LCDR Swift): That's correct, sir.

PO: I received a second -- another challenge for cause against Lieutenant Colonel [redacted] as his role as an [redacted] is that correct?

P (CDR [redacted] Yes, sir.

DC (LCDR Swift): Yes, sir.

PO: Okay. Trial, challenges?

P (CDR [redacted] We have no challenges, sir.

PO: Okay. Defense?

DC (LCDR Swift): We have four challenges, sir.

PO: Okay.

CC: I am going to start based on the open session challenges, Colonel [redacted] and Colonel [redacted]

PO: Okay. The only challenges -- I have already covered all the closed session challenges.

DC (LCDR Swift): Yes, sir.

PO: Okay. Good.

DC (LCDR Swift): Colonel [redacted] as you just indicated, I previously entered a challenge regarding the information in the closed session. In the open session I'd like to challenge Colonel [redacted] based on good cause on appearance, that is Military Commission Instruction Number 8 permits the removal of members for good cause. Good cause can be the members inability to sit, that we discussed earlier, and the appearance of unfairness of a member's ability to sit.

It's the defense's position that Colonel [redacted] placed on this panel as a person who supervised detainee movement does not give the appearance of fairness to this proceeding; that Colonel [redacted] whatever his good intentions and his abilities as an officer, and his desire to follow the law, and to be fair in the proceedings played someone who was intimately involved in detainee operations or moving persons onto this panel does not pass an appearance test. It does not give confidence to the accused, and it does not give confidence to the public at large that this proceeding will be fair.

Likewise, Lieutenant Colonel [redacted] plays an [redacted] officer who was actually working -- senior in Afghanistan during the period of time Mr. Hamdan was captured and held. It does not give the appearance of fairness for the proceedings. Again, that constitutes good cause shown. It's important that these proceedings not only be fair but they appear fair to the world, and the continuation of both of these members does not meet that test.

As to Colonel [redacted] Colonel [redacted] -- we also challenge Colonel [redacted] Colonel [redacted] visited the Trade Center two weeks after the attack. Records document the state that it was in. Persons that he had in command responsibility were involved in the rescue effort and were -- he went to the funeral. If we move to sentencing -- that is an important, if -- we fully expect the prosecution to put on evidence of the impact on victims. That impact will be particular for Colonel [redacted] because he has personal experience with those victims. It won't be a detached evaluation for him. It will be the memories of 9/11. It will be memories of the funeral that he attended. While I am sure that he intends good intent to keep an open mind, to try and consider all ranges, this experience makes him

unsuitable for this panel.

Finally, we challenge Lieutenant Colonel [redacted] Lieutenant Colonel [redacted] very candidly said that he has very strong emotions, that he is very angry. He did say that he understood that he should accept those emotions, but when asked again he said, yes, I have very strong emotions. Also, Colonel [redacted] has indicated that he has a real and present apprehension that he will be harmed, or his family will be harmed by his participation. He certainly said, I know my duty. I'm a soldier, I should do my duty. But with that type of apprehension sitting, with his very strong feelings, both in the merits and at sentencing, he's not an appropriate person to sit on this panel. And, again, we believe that good cause exists for his removal based on his strong personal beliefs, and a real apprehension, not a speculative one, a real apprehension that he has in his participation.

Thank you. Well, I'll address it at the end of it. I am sure that Commander [redacted] has rebuttal.

PO: Go on, Commander [redacted]

P (CDR [redacted] Thank you, sir. Sir, the prosecution will address these in order of rank and seniority. We will begin with Colonel [redacted]

It appears the only issue the defense has with Colonel [redacted] is his interaction with a Marine reserve who was killed in the World Trade Center attacks. A reality of military life, a reality of being a Marine is that in the course of his 28 years, he has known of his fellow Marines to pass away. He told us all that this is something he is accustomed to, that he may not get used to it, but that he is treating this death no different than the deaths of those other Marines who have perished. He stated he has no individual knowledge of this accused. He stated that he will judge this case based on the evidence presented in this courtroom. We oppose the defense's challenge for cause.

With respect to Colonel [redacted] Colonel [redacted] handled logistics. His job was when he was told what detainees were to be moved, his job was to get them from Afghanistan to Guantanamo Bay. It was not his job to determine who met the screening criteria for movement.

Those decisions were made elsewhere, and he was not in a position to question those decisions. In his limited capacity of being a logistics planner, he had no knowledge of this accused; he had no knowledge of this accused's transfer; he had no knowledge of the facts surrounding this accused's capture. Once this accused arrives at Guantanamo, Colonel [redacted] job is over. He has no interaction with what is going on in Guantanamo. While he knows that a joint task force is established in Guantanamo, he is not even aware of the units that make up that joint task force. We oppose the defense challenge to Colonel [redacted]

With respect to Lieutenant Colonel [redacted] while he was an [redacted] for the very limited period of three months, he has no knowledge of this accused, he has no knowledge of how he was captured, and he has agreed to judge this case based on the evidence that's been presented. There's simply no basis to challenge Lieutenant Colonel [redacted]

With respect to Lieutenant Colonel [redacted] he was obviously deeply impacted by the events of 9/11, as many Americans were. This is not necessarily an unreasonable reaction to what occurred that would require his disqualification.

Thank you, sir.

DC (LCDR Swift): To address, briefly, in counter, Commander [redacted] did not address in either of his arguments what I addressed here, and that is the appearance. Nothing that he said took away any of the appearance of any military tribunal -- especially both forms of justice are concerned both when -- are they administering justice and does it appear that they are administering -- appear that they are meting out, administering justice.

At a military commission one has to be particularly careful that what you're meting out is not victor's justice. By placing an [redacted] by placing a person who was in charge of the detainees, by placing a person who had close relationship with a victim, who went to the funeral, went to the site, and placing someone who to this day says that he is very angry and has a real apprehension on this panel, we appear to be meting out victor's justice. Thank you, sir.

PO: Okay. Yes, go on.

DC (LCDR Swift): I would also like to be heard on the question of abeyance after you've --

PO: Okay. I've considered your challenges, and I am going to forward a transcript of the voir dire, the members questionnaires for Colonels [redacted] -- [redacted] [redacted] Lieutenant Colonel [redacted] and Lieutenant Colonel [redacted] to Mr. Altenburg, the appointing authority, for his action. I offer counsel for both sides, since you're apparently using a different standard for challenge, referring perhaps to the military justice standard under RCM 912(N), an opportunity to send up with that matter any other matters you want; specifically, if you wish to focus on what the standard for challenge should be. Today is the whatever it is -- the 24th. By Tuesday, the 7th, provide opposing counsel anything you want to send so they can comment on it and then get it to me by -- would the 10th give you enough time?

P (CDR [redacted] Yes, sir.

DC (LCDR Swift): Yes, sir.

PO: Give it to me by the 10th and I will -- we got to get the record transcribed and all that anyway. I will get it to Mr. Altenburg to see what he wants to do.

Okay. Now, I have the authority to either abate or not abate, and you want to be heard, Commander Swift?

DC (LCDR Swift): Yes,I do, sir. Sir, I've entered challenges for cause on five members at this point, including yourself. It's our position that to go further with motions with so many challenges where an alternate could not even sit in, if more than two are granted, that we would need to bring in more members.

PO: If more than two are granted? If three are granted.

DC (LCDR Swift): Yes, sir.

PO: If three are granted we have three members left; right?

DC (LCDR Swift): Yes, sir.

PO: That is all we need; right?

DC (LCDR Swift): Yes, sir. Excuse me, if four of those --

PO: Okay. We've got five challenges, and you want an 80 percent success rate?

DC (LCDR Swift): Well, in this sense, and I would point out, sir, what you're saying is that in the consideration of this, in the consideration of the motions, you're going to have necessary discussion by members, and input, notes, hearing all of that will involve persons who may not be here when all of the challenges are done again. Gestured that we have another motion to date following the continuance, that we go through arraignment at this point and enter pleas, but that motions be deferred after that point when we have an answer on these continuances -- or, excuse me, on these challenges.

P (CDR [redacted]): Sir, first off, to state the obvious, we do not believe that the defense will be successful in their challenges. Even if they meet a moderate amount of success, it will not impact our ability to have a quorum and go forward. Even if they had the potential success that they may be banking on, there are mechanisms within the system to take care of that if so required. Other new members can be brought up to speed, and that's in our system.

PO: Okay. My question though is, what does it hurt you? Okay. Before we get to the question of abeyance, which I'm sure you'll bring me back to, we've got some matters involving notices of motion, and we only have two motions that either side is ready to talk about anyway; right?

P (CDR [redacted]): We have two motions, well actually, three, sir. One brought by the prosecution.

PO: Protective order?

P (CDR [redacted]): Yes, sir.

PO: Okay. That is in chambers.

DC (LCDR Swift): I see that as off line, sir.

PO: Well it's not off line.

DC (LCDR Swift): In chambers.

PO: Okay. What I'm asking you is, what does it hurt you -- meaning the government -- if you've already done all the work? And I can look at Captain [redacted] and he's ready to stand up and argue right now. So what does it hurt you if I say fine, we'll wait and see whether these challenges are granted or not. Do you lose anything by not having those two motions heard tonight?

P (CDR [redacted] Is it imperative that those two motions get heard tonight?

PO: Do you lose something, Commander [redacted]

P (CDR [redacted] Just from a practical standpoint, we lose logistics. It may be difficult to get us together as a group again, and we don't know the timing. I also don't know what timing you're proposing for when we can get together again. I don't know the individual members' schedules. If you're telling me that it's two months down the line before we are able to regroup, then I would say the entire system is prejudiced because that's -- we need to keep this moving forward.

We have a December 11th trial date proposed by the defense that we've agreed to. If we're going to keep that schedule, then we need to begin resolving the issues that we can. Sir, what it comes down to is a determination by you in making this decision as to whether you think that there is a reasonable probability that we're going to drop below quorum. Our position is, actually, that is just not there. We don't think that is a reliable process.

PO: Okay. Let me ask you, Commander Swift: You have two motions?

DC (LCDR Swift): Yes, sir.

PO: Do those motions have any evidentiary matters attached thereto that the members have to hear evidence on? I haven't heard any notice of witnesses or anything for tonight.

DC (LCDR Swift): For tonight, no, sir.

PO: Well, you've got two motions.

DC (LCDR Swift): Yes, sir.

PO: Do you have to have evidence for those?

DC (LCDR Swift): No, I don't believe so, sir.

PO: No, this is a --

DC (LCDR Swift): May I have a moment, sir?

PO: Yeah.

DC (LCDR Swift): No, we don't need that.

PO: You're telling me that you will not need any evidence for these motions, period?

DC (LCDR Swift): Beyond what's already been furnished as attachments, sir.

PO: Okay. Thank you.

DC (LCDR Swift): Sir, I'd like to address Commander [redacted] logistics issue.

PO: Okay.

DC (LCDR Swift): Yes, sir. We also have noticed seven other motions that have to be developed and argued. Obviously we're all going to have to get back together again. I would have no objection during the continuance to furnish to the motion to all of the members, to allow them to read it, to have that period of time when they get back, and some of them may well become over the status review area. It is quite possible they might have one, although in the meantime he is scheduled for 3 December, it could be moved up. I don't know. That would change our posture at this point.

PO: Thank you, Commander Swift.

DC (LCDR Swift): So what I would --

PO: Thank you, Commander Swift.

P (CDR [redacted] Sir, the only other issue I would bring up is since Commander Swift brought up his notice of motions, some of those notice of motions are his own motions for a speedy trial. So when you ask if there's anything that impacts us, that prejudices us, the defense has said

that they want a speedy trial, so it seems tough to coordinate those two items.

PO: There's never been a requirement that an attorney argue only one of 63 points of view, and I'm not being sarcastic, that is the way it goes. I believe that this is now a matter of record that he wants a continuance, and that can obviously be brought to whoever is going to make a decision, if a decision is going to be made. You're requesting a continuance on those motions solely; right? That's it?

DC (LCDR Swift): Yes, sir. On those motions, yes, sir.

PO: Okay. Well, there's a difference -- there's a difference between proceeding -- holding the proceedings in abeyance and the continuance. You're requesting a continuance on those motions?

DC (LCDR Swift): Yes, sir.

PO: Thank you. Okay. Please call the members.

The members entered the hearing room.

PO: Please be seated. The commission will come to order. Let the record reflect that all members are present and all other parties present are still in the courtroom.

Members, I have received challenges for cause against various members. I am going to forward the transcript of the challenges of the voir dire, each member's questionnaire, which includes mine, the challenges made by counsel, the opposition by opposing counsel, and the various talk that went on about it to the appointing authority for his decision under MCI. I am not going to hold the proceedings in abeyance. In other words, we're going to continue on; however, we are going to get to a point where we have a continuance. Any question on what I just said?

Apparently not.

Okay. Members, I'm now going to give you some instructions on the procedures we're going to be using. Each of you received earlier some preliminary administrative-type instructions which are now being marked as the next review exhibit in order, 10. If you

think there is a conflict between the instructions that you got previously, and the ones I'm about to give you, the ones you get now control.

Either side have any objection to the instructions -- the preliminary ones that have just been marked?

P (CDR [redacted]: No, sir.

DC (LCDR Swift): No, sir.

PO: I have been appointed as the presiding officer. On the 24th -- on the 23rd you were given the President's military order, the military commission orders, DoD Directive 5105.7, and Military Commission Instructions, except instruction Number 8. Those references will apply to all cases in which you may be a commission member. In the references in establishing the commission, the presiding officer is charged with certain duties. Among these is that I will preside over the commission proceedings during open and closed sessions. As I am the only lawyer appointed to the commission, I will instruct and advise you on the law. However, the President has directed that the commission will decide all questions of law and fact. So you are not bound to accept the law as given to you by me. You are free to accept the law as argued to you by counsel either in court, or in motions, or attachments thereto.

In closed conferences, my voice and vote will count the same as any other member. During any recess or adjournment, we will not discuss the case with anyone, not even among ourselves. We will hold our discussions of the issues in closed conference when all members are present. In this case, we will consider only evidence properly admitted before this commission. We will not consider other accounts of the trial, or information from other sources, and we will limit our contact with counsel, the accused, and potential witnesses.

During the course of the proceedings, you may not discuss the proceedings with anyone who is not a member of the panel. If anyone who is not a member attempts to discuss the proceedings with you, notify me immediately and appropriate action will be taken. When we're in closed conference deliberations, we alone will be present. We'll remain together and allow no unauthorized intrusion into our deliberations.

Each of us has an equal voice and vote in discussing and deciding all issues submitted to us. I'll act as presiding officer during closed conference deliberations, and I'll speak for the commission in announcing results. The issue submitted will be decided based upon matters properly presented before this commission. Outside influence from superiors, other government officials, the media, or any other source will not be tolerated. If any attempt is made to influence you in the performance of your official commission duties, you shall notify me immediately. It is impermissible for the appointing authority, a military commander, or any other government official who may have influence over your career to reprimand or admonish you because of the way you perform your duties. If any such action takes place, notify me immediately.

Okay. Look, you all may serve as members and alternate on more than one case. Each case is separate. You can't consider evidence or motions from one case on another, unless I explicitly advise you that you can. Please mark any notes so that you can indicate this.

Okay. You all have seen the security arrangements around the building, in the building, and in the courtroom. Those arrangements are made by the local commander. We're required to follow the arrangements that he made because we're within his AO. You may not infer or conclude from the security arrangements that the accused is guilty of any offense, or that he presents a danger. Operational requirements of the local command have nothing to do with this accused in this courtroom. The only evidence you may consider on the determination of the guilt or innocence, or on a sentence, is evidence presented to you during proceedings. Security arrangements are not part of that evidence.

Colonel [redacted] you've been designated an alternate member of this commission. You may become a member should there be a vacancy that needs to be filled. As an alternate member, you will attend all open and closed sessions, but you will not be present for any closed conferences, or deliberations, unless your status changes from alternate to member. Should it change you'll get more instructions; okay?

Members, you are not authorized to reveal your vote, or

the factors that led to your vote, or the vote or comments of another member when it comes to deliberations on findings or on sentencing if we get to sentencing. This is a lawful order from me to you. You may only reveal such matters if you're required to do so by superior competent authority in the military commission process, namely the appointing authority, the general counsel, the review panel for Military Commissions, the Secretary of Defense, or the President of the United States, or by a federal district court -- a U.S. federal court. That order is continuing and does not expire. The appearance and demeanor of all of us should reflect the seriousness with which we view the trial. So pay careful attention. If you all need a break let me know. Any questions about those instructions?

Apparently not.

Objections, trial?

P (CDR [redacted]: No, sir.

DC (LCDR Swift): No, sir.

PO: Counsel for both sides understand the provisions of MCO-1, governing protected information?

P (CDR [redacted]: Yes, sir.

DC (LCDR Swift): Yes, sir.

PO: You understand that as soon as practicable, you got to notify me of any attempt to offer evidence involving protected information?

P (CDR [redacted]: Yes, sir.

DC (LCDR Swift): Yes, sir.

PO: Other than the protective order, which we've discussed before, is there any issue relating to the protection of witnesses that we have to take up at this time?

P (CDR [redacted]: No, sir.

DC (LCDR Swift): No, sir.

PO: Okay. You all know that if you got any issues on that sort of thing, you have got to let me know immediately; right?

P (CDR [redacted] Aye, sir.

DC (LCDR Swift): Aye, sir.

PO: Okay. As noted on the record earlier, we've had a couple of meetings between counsel and myself, and we've also talked on the record here.

Commander Swift, on the 31st of July, you provided four notices of motion. One was a request for extension, it was granted. One was to keep me from holding sessions without members, which is O.B.E.'d (ph). One which had to do with the assistant to the presiding officer and one which had to do with keeping me from unilaterally ruling on motions law and fact; right? The only one that is still absent to any degree is the one about the assistant to the presiding officer; is that correct?

DC (LCDR Swift): It's somewhat involved in the UCI motion.

PO: Extent to some degree?

DC (LCDR Swift): Yes, sir.

PO: Okay. You also prepared -- you provide the court, what, nine motions on the 19th of August? And in each of those motions, you requested a continuance until a federal district court ruled on them; is that correct?

DC (LCDR Swift): Yes, sir.

PO: Not on them, but on your motion for habeas corpus on your writ?

DC (LCDR Swift): And mandamus, yes, sir.

PO: Okay. Are you prepared at this time to offer me any law that says I am required to give you a continuance on those motions?

DC (LCDR Swift): I would like a 15-minute recess to get the cases, sir.

PO: Do you have cases that say that?

DC (LCDR Swift): I have cases that I argue by implication.

PO: Okay. So thank you. Are you prepared to offer me a law that says I can't give him a continuance on those, Commander [redacted] I can't say, I can't.

P (CDR [redacted] Sir, we have a memorandum of law that puts out our position on why you should not, and that the defense is required to exhaust the remedies available. So, yes, sir, I would say that we do.

PO: Is required to what the remedies available?

P (CDR [redacted] He has to exhaust his available remedies before he can even get to the federal court. The exhaustion is this military commission and the processes that follow. So our position is until he has gone through this system, he cannot even have it litigated in federal court.

PO: Okay. Do you have -- have you prepared those motions?

DC (LCDR Swift): Have I prepared the motions?

PO: The motions?

DC (LCDR Swift): No, sir. I have not.

PO: Okay. Forgetting the law on the subject, Commander [redacted] what harm will you suffer if I grant him a continuance? Not until the federal court district rules, but until a more reason -- until a more reasonable time to present those motions? And I'm asking.

P (CDR [redacted] Sir, we don't object to you granting a continuance to a reasonable time. When I argued before it was arguing the abeyance issue, not necessarily a continuance request. We do not want to be tied to the proceedings in the federal court. Certainly, we want to be reasonable, and if the defense is asking for time to prepare, we're certainly willing to be reasonable on that matter. I would again raise the issue, though, that we are put in a difficult position because of his request and demand for a speedy trial. So as long as Commander Swift is the one requesting the continuance and that is understood by all parties involved --

PO: Well, he just said it.

P (CDR [redacted] -- and the implications of that, sir. I'm sure he can say that, but for the commission as a whole I want to make sure the implications of that are understood. It is not the government, the prosecution, slowing down the process.

PO: So you have no direct harm if I grant him the continuance on those nine motions; right?

P (CDR [redacted] A reasonable continuance, no, sir.

PO: Commander Swift, in connection with those nine motions, if you are not given until -- do you have any idea when the federal district court is going to rule?

DC (LCDR Swift): I should be able to give a better idea. At this time, no, sir. I expect scheduling this week transferred from Washington State to Washington District Court, and arrive while we are down here. So they have not been scheduled yet. However, we are through -- for the Presiding Officer's knowledge, we are through the position of having petition and answer and prior to transfer, we were days from argument. So if it's picked up at the same level, it could be quite quick. We are petitioning, we have an answer, and in habeas petition, it is argument and a decision and mandamus.

PO: Could you prepare those motions, say, by the 1st of October? The 1st of October is a long time from now.

DC (LCDR Swift): If -- I -- what I would like to -- yes, I can. Physically, I can write them by the 1st of October. I would hope to have some help, physically I can do that.

PO: I haven't forgotten your assistant defense counsel. We are going to address that.

DC (LCDR Swift): Yes, sir. Physically, I believe that, yes, I could write them by the 1st of October. In that portion, and I would like to be able to address the question of whether this -- in writing those motions, readdress the question of abeyance by this -- or by this panel until the federal court rules. We are basically going to be in two courts at one time. I believe the proper place to take that up would be in the motions themselves. I don't object to scheduling them, but I will again --

PO: How can I schedule the motions and listen to you argue the motions if I -- I'm missing something here.

DC (LCDR Swift): I'm requesting an abeyance on rulings -- so that if -- this happens in federal court or other courts all the time. I would give you an example, sir.

PO: Okay. Wait a second. You are requesting that we not -- that the commission not rule on the motions?

DC (LCDR Swift): Yes, sir.

PO: But you're prepared to argue them and present them?

DC (LCDR Swift): Yes, sir.

PO: Okay. And you just don't want us to present -- to rule on them?

DC (LCDR Swift): Yes, sir. I think -- can I give an example?

PO: No, because, I mean that's fine. On the 1st of October, if you give me the motions, then we can see what happens. I mean, heck, you told me they got the thing right there in D.C. They'll probably have it done by next week.

Okay. Do you object to me setting a date of the 1st of October for the motions on the nine motions that we are talking about to be received?

P (CDR [redacted] No, sir.

PO: Thank you. In your motion, you may include whatever you want, because by that time you'll know more about what is going on about whatever the abeyance issue was. Abeyance -- okay. So we've got your nine motions due on the 1st.

You have seen his notices. Can you have your responses, when can you have your responses to him?

DC (LCDR Swift): I'd would like two weeks, sir.

PO: What is that, the 15th? You are writing all this down; right?

P (CDR [redacted] I've got it, sir.

PO: Okay. And will a week be enough for you to do a reply?

DC (LCDR Swift): Yes, sir.

PO: Okay. I thought so. There, that's your nine motions, and somewhere buried in there is the notice of motion that you're still doing about the assistant to the presiding officer. Can you -- no, by the 1st of October, advise counsel, advise the prosecution and the commission whether or not you intend to go forward on that issue; okay?

DC (LCDR Swift): I will, sir.

PO: Thanks.

P (CDR [redacted] Sir, I would just ask that if he does intend to go forward on that issue, we ask that his actual motion for that issue be due on the 1st of October.

DC (LCDR Swift): It will be possible.

PO: Look at that, he is ready.

P (CDR [redacted] We're Navy guys, we cooperate, sir.

PO: Okay. Now, Commander Swift, you've provided two motions to me and opposing counsel yesterday?

DC (LCDR Swift): Yes, sir, I did.

PO: At 2130 last night, Captain [redacted] caught me and said, here is our response.

DC (LCDR Swift): It's wonderful to have assets, sir.

PO: Right. I agree. Okay. You have requested a continuance in the argument, the oral argument by counsel on those motions?

DC (LCDR Swift): Yes, sir, I have.

PO: And you say, okay, judge, because he also said that when those motions are now complete they can go to the commission members, and all we have to do is argue there's going to be no evidence called on them whatsoever except what has been put in. So you don't object to a continuance, other than a standard

objection?

P (CDR [redacted] Let's be careful on that, sir. We don't anticipate, and I don't believe the defense anticipates any witnesses. We also attached evidence to our motion response, and we would like the evidence we attach to our response and --

PO: Perhaps I said it incorrectly. I have here in my hot little hand, his motions and your responses. That is all that is going to be going to the members. And when we meet to discuss this, all I am going to hear from you all is argument?

P (CDR [redacted] Correct, sir.

PO: Right?

DC (LCDR Swift): Yes, sir.

PO: Okay. Now, would you agree that when we come back to hear the motions, the nine motions, and perhaps the one motion we could also hear these two motions?

DC (LCDR Swift): Yes, sir.

P (CDR [redacted] Yes, sir.

PO: Thank you. I'm going to look at a date -- what date were we up to now by his reply? Was it --

P (CDR [redacted] He has 11 -- okay his reply takes us to the 22nd of October.

PO: My birthday. I am going to talk to the members and see if we can schedule a session the first week in November. I'm not talking to them right now, I am just sort of looking at them. Is there anything impossible for counsel about the first week in November?

P (CDR [redacted] No, sir.

DC (LCDR Swift): There is only one consideration and I would like to talk to my client about it. It is that I believe that the first week in November we'll be in Ramadan, and I am going to ask him whether he will be fasting for the period of time. If -- I hadn't consulted with him on that, if I could have a moment?

The defense counsel and accused conferred.

DC (LCDR Swift): My client does not have an objection during the periods of Ramadan, so I have no objection.

PO: Okay. Bailiff, please grab those motions from the court reporter and bring them over here. RE next, which is 11, will be defense motion for dismissal based on unlawful command influence. 12 will be the prosecution response. 13, dismissal for failure to accord the accused a status review hearing; and 14 the prosecution response.

I intend, counsel, to give members copies of both motions, and they will review them so they will be prepared to listen to counsel argument when we come back. Any problems with that?

P (CDR [redacted] No objection, sir.

DC (LCDR Swift): No objection, sir.

PO: I direct counsel to file with me by the 11th -- the 10th of September, briefs. These briefs will address the meaning of the provision of MCO Number 1, section 4(A)5(D). Specifically, these briefs will focus on whether these two motions, RE 11 and 13, are interlocutory questions which must be certified to the appointing authority for his decision because the disposition of the motion would affect a termination of the proceedings. In other words, am I required to certify these motions, or am I only required to certify the motions if the commission is prepared to issue a ruling granting those motions.

Any questions about what I'm talking about?

P (CDR [redacted] No, sir.

DC (LCDR Swift): No, sir.

PO: Okay. Counsel for both sides, I've issued various presiding officer memoranda. If you have objections, state them now or provide them to me in writing by next Tuesday. Got it?

Okay. Through motions and discussions, I have learned that there's concerns about communication with the

office of the appointing authority. Does counsel for either side object to me requesting interpretations of the MCO or MCIs and the appointing authority's area of interest directly by mail, or e-mail from me to Mr. Altenburg after notice to counsel and providing counsel the opportunity to brief the issue?

P (CDR [redacted]): No, sir, we would not. Although obviously we want what occurs to be made a matter of record formally.

DC (LCDR Swift): Yes, sir. We don't object, sir. We understand that it will be a part of the record.

PO: Accused and counsel, please rise.

Salim Ahmed Hamdan, how do you plead?

DC (LCDR Swift): Salim Ahmed Hamdan through counsel defers pleas until the resolution of motions.

PO: Request referral, please?

DC (LCDR Swift): We request referral of resolution of motions.

PO: Be seated. Do you have any objection to the referral of entry of pleas?

P (CDR [redacted]): No objection, sir.

PO: Okay. Does counsel for either side have anything further at this time? [Negative response]

Members, anything further at this time? [Negative response]

The court is in recess to meet upon further call, or as scheduled on the record.

DC (LCDR Swift): Sir, actually, I'm sorry. Sorry.

PO: The court is called to order. Let the record reflect that all parties present when the court recessed are still present in the courtroom.

Yes, Commander Swift?

DC (LCDR Swift): I'm sorry. Sir, I have one administrative note not requiring the other members that I would like to

take up with yourself outside, on the record. It has to do with your voir dire of the presiding officer.

PO: All rise.

Members, you are in recess.

The members departed the courtroom.

Be seated. The court will come to order and let the record reflect all the members except for myself have left the courtroom. All the other parties are present.

Yes, Commander?

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

PO: And why would you like that?

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

PO: On the questions of?

DC (LCDR Swift): Speedy trial, sir.

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

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

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

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

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

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

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

DC (LCDR Swift): Are you predisposed towards those issues, sir?

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

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

PO: I don't want to see it.

DC (LCDR Swift): Yes, sir.

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

DC (LCDR Swift): No, sir.

PO: How about you?

P (CDR [redacted] No objection to the tape being sent, sir.

PO: Okay. Before I call -- I put the court in recess, Commander Swift, do you have anything else?

DC (LCDR Swift): No, sir, I don't; I really don't, we really don't, sir.

PO: Trial?

P (CDR [redacted] We really, really don't, sir.

PO: Court is in recess.

The Commission Hearing recessed at 1835, 24 August 2004.

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. SALIM AHMED HAMDAN
a/k/a Salim Ahmad Hamdan
a/k/a Salem Ahmed Salem Hamdan
a/k/a Saqr al Jadawy
a/k/a Saqr al Jaddawi
a/k/a Khalid bin Abdallah
a/k/a Khalid wl'd Abdallah

This is to certify that Pages _____ through _____ are an accurate and verbatim transcript of the foregoing proceedings.

_____
Peter E. Brownback III
Colonel, U.S. Army (Retired)
Presiding Officer

_____
Date

Review Exhibit 10

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Review Exhibit 11

The Classified, Unauthenticated Transcript from United States v. Hamdan, is RE 11. The bottom of RE 11's pages are numbered R. 84-110. It is the voir dire held at Guantanamo Bay, Cuba on 25 August 2004. It is classified Secret. RE 11 was discussed at R. 7 and 23. Because of its classification, it has not been electronically copied.

MILITARY COMMISSION PANEL MEMBER NOMINEES
WHO ARE ART 29(c) AND (e) CERTIFIED

	A	B	C	D	E	F	G	H	I	J	K	L	M
1	INDICATE SELECTION HERE	RANK/DOR	NAME (LAST)	NAME (FIRST)	GENDER	BRANCH/ MOS	DUTY POSITION	UNIT	CLEARANCE	COMMAND DEP	LITIGATION EXP	DATE OF ART 29(B) AND (C) CERT	
2		COL/1 DEC 87	CLERVI	FERDINAND D	M	USA-RET	RET 1 FEB 90	CURRENTLY A MUNICIPAL COURT JUDGE, AUSTIN TX	TS	CHIEF CIRCUIT JUDGE, 3RD CIRCUIT, 99-0; CHIEF TRIAL JUDGE, FALLS CHURCH, 93-94; CHIEF JUDGE, 6TH CIR, 91-93; CIR JUDGE 84-90	TC/DC 89-70	6-Jun-94	
3	JA	COL/5 JUL 90	BROWNBACK II	PETER E	M	USA-RET	RET 1 JUL 99		TS SCI UPON RET	CHIEF CIRCUIT JUDGE, 2ND AND 5TH JUDICIAL DISTRICT, 92-99	SOC 90-91	19-Jun-98	
4		COL/16 DEC 90	BARBER	KELVIN D	M	USAR	JA	105TH JAG DET (LSO), ALEXANDRIA VA	CONF; TS PENDING		(CIV) ASST DA; DA 84-PRES; MILITARY JUDGE SINCE 1999	May 99	
5		COL/1 JUL 81	SMITH	JAMES J	M	USA-RET	RET SEP 0	CURRENTLY A GENERAL ATTY AT USA MANEUVER SUPPORT CENTER, MISSOURI	TS	ML JUDGE, FT BRAGG AND KOREA, 06-0; TC/DC 74-77	31-May-99		
6		COL/1 AUG 92	KELLER JR	ALVIN W	M	USMC	CHIEF CIRCUIT CT JUDGE	PIEDMONT JUD CIRCUIT, CAMP LEJEUNE	TS	PRESENT, 99 TO PRES; CHIEF CIRCUIT CT JUDGE, OKINAWA 97-99; CIC, USSS, 92-94	CHIEF CIR ML JUDGE 99-PRES; SOC/STC/CID OKINAWA 76-77; TC/DC MCB QUANTICO 76-78;	1 JUN 81; 20 JUN 99	SKED TO RETIRE 1 SEP 04; TRYING TO STAY ON UNTIL MAR 09
7		CAPT/1 SEP 93	HINKLEY	DEAN M	M	USN	CIRCUIT ML JUDGE	ISLAND JUDICIAL CIRCUIT, 02-PRES	TS	COR, USRACFLY, FLEET JA 00-02; CIR ML JUDGE YOKOSUKA 97-00; CO NLSO YOKOSUKA 94-97	TC SUBIC 76-80	MAY 97; 30 SEP 97	LLM IN INTERNATIONAL LAW, UVA
8		COL/30 DEC 03	TRUDO	MARTHA J	F	USAR-RET	RET 3 JAN 03	JUDGE, 26TH JUDICIAL DISTRICT CT	SECRET	NO INFO PROVIDED	NOT PROVIDED		
9		CAPT/1 AUG 96	BRYANT	KENNETH R	M	USN	DEP ASST JAG (CRIM LAW)	OJAG, WNY, WASH DC	SECRET	APPELLATE JUDGE NMCC CT APPEALS 00-PRES	GCM/SPCM TRIAL JUDGE 00-01, TRDC 77-80	MAY 00; MAY 00	
10		COL/1 MAR 97	BWANN	ROBERT L	M	USA	CIRCUIT JUDGE	3D JUDICIAL CIRCUIT, FT CAMPBELL	SECRET	CHIEF, STANDARDS OF CONDUCT OFFICE, OTJAG 99/00	DEFENSE 79-81; SENIOR DEFENSE 81-83; GOVT APPELLATE ATTY, 83-86; DEPUTY CHIEF CRIM LAW 87-90; PRESENT, ML JUDGE	19-May-00	
11		COL/1 JUN 97	PARRISH	PATRICK J	M	USA	CIRCUIT JUDGE	3D JUDICIAL CIRCUIT, FT BRAGG	TS SCI		ML JUDGE 97-PRES; DEFENSE COUNSEL; DEPUTY SJA; ADMIN LAW ATTY; TRIAL COUNSEL	May 97	
12		COL/1 MAY 88	TRIMBLE	DAN	M	USA	CIRCUIT JUDGE	2D JUDICIAL CIRCUIT, FT BENNING	TS SCI		ML JUDGE 91-PRES; HODA CH LEG LIAISON; EXEC, USA LSA; STANDARDS OF CONDUCT OFFICE, HODA; SJA	23-May-91	
13		COL/1 OCT 98	BRUNSON	JAMES A	M	USAR	STATE JUDGE ADVOCATE	HHD, STARC, MARYD	TS		TRIAL COUNSEL; STAFF JA; COMMAND JA; STATE JA (CIV) AUSA 17 YRS	6-Jun-02	
14		COL/1 OCT 96	GANT	JON L	M	USMCR	DEP DIR RESERVE AFFAIRS	HQTS, MARINE CORPS	SECRET (TS CURRENT AS OF JUN 01)		AUSA 10 YRS; DOD BANK FRAUD TF, 90-94; SEB-6, DEP ASST SEC, HUD	1993	
15		COL/1 JUL 99	CHESTER	ROBERT S	M	USMC	CIRCUIT MILITARY JUDGE	MCB CAMP PENDLETON	TS SCI	CIB, LSSS, 96-98	ML JUDGE 98-00; TC/DC 88-94; OVER 500 CASES TRIED AND HEARD AS JUDGE	1992; 2002	
16		CAPT/1 SEP 99	ROLPH	JOHN W	M	USN	CHIEF CIRCUIT ML JUDGE	TIDEWATER JUD CIRCUIT, NORFOLK	TS (SCI PENDING)	APPELLATE JUDGE, NMCC CT APPEALS, 96-00; CO NLSO MIDLANT 96-98; ML JUDGE ROTA 93-96	STC 83-86; TC/DC 90-92	May 93	
17		COL/7 JUL 00	CANDEE	ROLAND L	M	USAR	STAFF JUDGE ADVOCATE	HQ, STARC, CA ARMY NG	TS		MILITARY JUDGE 92-00; SJA; TRIAL AND DEFENSE COUNSEL	10-Jul-96	
18		COL/1 AUG 00	ORR JR	WILLIAM E	M	USAF	APPELLATE JUDGE	USAF CT OF CRIMINAL APPEALS; SOLI NG	TS SCI (DCID 1/14 ELIGIBLE)	MILITARY JUDGE 96-00	TRIAL COUNSEL, 86-88; TC AND DEFENSE COUNSEL, 92-96	2-Jun-99	

Review Exhibit 12

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001878

ENCL 2

MILITARY COMMISSION PANEL MEMBER NOMINEES
WHO ARE ART 16(b) AND (c) CERTIFIED

	A	B	C	D	E	F	G	H	I	J	K	L	M
19		Col/1 SEP 99	BURMAN	ANNE L	F	USAF	DEPUTY CHIEF MILITARY JUDGE	USAF TRIAL JUDICIARY, TRAVIS AFB CA	SECRET	AF JAG SCHOOL, CHIEF OF JUSTICE DIV, 96-98; BRANCH CHIEF ENVIR LAW & LITIGATION, 93-96	USAF TRIAL JUDICIARY, AREA DEFENSE COUNSEL, 86-88; CHIEF CIRCUIT TRIAL COUNSEL, 90-92	1-Mar-02	
20		COL/1 OCT 99	FISHER, JR	MARC W	M	USMC	SJA	PARRIS ISL SC	TS SCI	DIR, APPELLATE GOV DIV, 99-01; NO, ML JUSTICE BRANCH, HQMC; SPCM ML JUDGE 91-94	TCDC SUBIC BAY 87-90; 93-94	Oct-02	
21		COL/17 JUN 91	UMBERG	THOMAS J	M	USAR	COMMANDER	79TH LSO	TS SCI	PRESENT POSITION FM 91	CMD JA, JPK SPEC WAR CENTER, 89-97; ML JUDGE 91-92; TCDC 91-99	1-Jun-91	
22		Col/1 JAN 92	ANDERSON	JACK L	M	USAF	MILITARY JUDGE	USAF WESTERN CIRCUIT, TRAVIS AFB CA	TS SCI	CHIEF, INTERNATIONAL AND OPERATIONAL LAW, STRATCOM, 99-01; CHIEF ADVERSE ACTIONS, STRATCOM 92-94	MILITARY JUDGE 87-90; LITIGATION ATTY, 90-87; AREA DEFENSE COUNSEL, 86-88; TRIAL COUNSEL 83-86, 88-91	1-Jan-02	
23		COL/ 1 APR 92	WRIGHT	DONNA M	F	USA	CIRCUIT JUDGE	3D JUDICIAL CIRCUIT, FT CARSON	SECRET (TS RESUB)		TRIAL COUNSEL 88-90; SENIOR DEFENSE COUNSEL, 91-94; CRIMINAL LIT INST, TJAGSA, 94-97; ML JUDGE TO PRESENT	Initial cert 1997; recert 2002	
24		COL/1 OCT 02	KOHLMANN	RALPH H	M	USMC	SJA, CHERRY PT	2D MAW AND DIR OF JOINT LAW CENTER	TS SCI	ML JUDGE, 96-01 (111 GCM AND SPCM TRIAL 8)	TCDC 87-90 (78 TRIALS); SUP LITIGATION AT LAW CENTER NOW	May-98	
25		COL/17 OCT 02	DAVID	STEVEN H	M	USAR	SENIOR MILITARY JUDGE	150TH JAG DET, ALEX VA	SECRET (TS APP IN)		CIRCUIT COURT JUDGE, 26TH JUD CIRCUIT, IN (CIV). SENIOR ML JUDGE FT CAMPBELL; PRESIDING JUDGE; TRIAL AND DEFENSE COUNSEL	Dec-92	
26		COR/1 DEC 92	CLEMMONS	BYARD Q	M	USN	CIC	NLSO MEMPHIS	TS SCI	PRES FOB 98-PRES; ML JUDGE MIDSOUTH 94-98; CO MLTC CHARLESTON 91-94	DC 90-92; LIT ATTY, OJAG 89-91	YES; NO DATE PROVIDED	
27		COR/1 JAN 94	PRICE	CLARKA	M	USN	APPELLATE JUDGE	NAMC CT APPEALS	SECRET (SUBMITTING PAPERWORK FOR TS)	GCM JUDGE, TIDEWATER 98-00; FORCE JA, NORFOLK 98-00; GCM JUDGE CHAS 90-94	STO BREMERTON 86-87; SOC PENSACOLA 92-93	JUN 90; MAR 92	
28		LTC/1 MAR 97	SPOSATO	MARK P	M	USA	CIRCUIT JUDGE	3D JUDICIAL CIRCUIT, FORT BLISS	TS SCI		TRIAL DEFENSE COUNSEL; APPELLATE ATTORNEY, USA; CHIEF, CRIMINAL LAW, PANAMA 89-92; REGIONAL DEFENSE COUNSEL; ML JUDGE, 01 TO PRESENT	28-Mar-01	
29		LTC/10 OCT 97	LIPPINCOTT	WALTER E	M	USAR	SJA	HQ STARC, STATE ARMORY, HARTFORD CT	TS	COMMAND JA, 01-02	TRIAL COUNSEL; DETACHMENT ODR; PROF ML SCIENCE	Apr-99	
30		LTC/12 MAY 98	JAQUITH	GRANT C	M	USAR	MILITARY JUDGE	150TH JAG DET, ALEX VA	TS		JUDGE ADVOCATE; POST JA; TRIAL COUNSEL; LEGAL ASST	19 MAY 96; 30 AUG 98	
31		LTC/27 APR 99	ROSENFELD	ALAN S	M	USAR	SJA ASST COUNSEL	DCMA WEST	SECRET		LSO; SJA	6-Jun-01	
32		LtCol/1 JAN 01	EPLEIN	DAWN R	F	USAF	MILITARY JUDGE	USAF JUDICIARY, YOKOTA JAPAN	TS	HQ USAFE CHIEF FOREIGN CRIM JURISDICTION, RAMSTEIN, 97-99	AREA DEFENSE COUNSEL, LACKLAND AFB, 94-96	1-May-02	
33		LtCol/1 APR 01	DREW, JR	RODGER A	M	USAF	DEPUTY CHIEF TRIAL JUDGE	AFLSA/JAJT BOLLING AFB	TS	CIRCUIT MILITARY JUDGE, RAMSTEIN, 99-01; LEGISLATIVE FELLOW FOR REP HENRY HYDE, 97	CIVIL LITIGATION ATTY, 94-97; CIRCUIT DEFENSE COUNSEL, 91-94; AREA DEFENSE COUNSEL, 89-91; TC 87-89	1-May-99	
34		LTC (P) NOV 02	ALTERI	MICHELE H	F	USAR	DEPUTY SJA	SYRACUSE NY	TS SCI		TRIAL COUNSEL; ENVIRONMENTAL ATTY, FT DRUM, 92-94 (CIV)	1-Mar-99	
35													
36													
37													

Review Exhibit 12

Page 2 of 2

001879

REVIEW EXHIBIT 13

Each commission member provided a questionnaire to the prosecution and defense counsel. These questionnaires were marked Review Exhibits 13A-D. They were used for voir dire and challenges.

In the original record of trial Review Exhibits 13A-D are numbered pages 135 to 200 (inclusive).

These 65 pages were not included in the record to be released to the general public out of concern for the privacy of the individuals nominated to be commission members.

The Presiding Officer sealed these records pursuant to Department of Defense Military Commission Order No. 1, paragraph 6D(5)(d).

Throughout the record, the names of the commission members have been redacted.

Instructions given to members prior to arriving at GTMO listed in order given.

All instructions sent to members by COL Brownback.

Page 1: Sent by email.

Pages 2 and 3: All members except [redacted] Printed and given to members at Andrews AFB and returned to COL Brownback.

Pages 4 and 5: Printed and given to [redacted] by LN1 [redacted] at Andrews. (Same as above except noting the signed document to go to LN1 [redacted] and not COL Brownback.)

Page 6: Email to all members.

[redacted]
Assistant to the Presiding Officers

Review Exhibit 14

Page 1 Of 7

Instructions to Prospective Commission Members

I am Colonel Peter E. Brownback, III. You and I have been detailed to be members on a Military Commission concerning the trial of certain individuals now being detained at US Naval Station, Guantanamo Bay, Cuba. I have also been detailed as the Presiding Officer of the Military Commission.

1. Each of you will respond by email to the undersigned acknowledging receipt of these instructions. If you prefer to use a different email address for future communications among us, please so advise me at the email address above.

2. Due to the publicity which these cases may have already received, and recognizing the probability of further publicity, each of you is instructed as follows:

a. As a prospective member of the Military Commission which will try a case, it will be your duty to determine the guilt or innocence of the accused as to the charges which have been referred to the Commission for trial. Under the law, the accused is presumed to be innocent of the charges against him. Neither the fact that the charges have been prepared by the government nor the fact that they have been referred to the Commission for trial warrants any inference of his guilt. Your determination as to his guilt or innocence must be based upon the entire evidence in the case as presented to you in open court and upon the law as you will be instructed. Thus, it is important that you keep an open mind and not form or express any opinions on the ease until all of the evidence and the applicable law has been presented to you.

b. A trial by Military Commission includes the determination of the ability of each member to sit as a member. As a prospective member, you may be questioned in open session by counsel for either side or by myself to determine whether or not you should serve. You may also receive a questionnaire and other documents from me to prepare prior to trial. Trial by Military Commission requires members who approach the case with an open mind and keep an open mind until all of the evidence and law has been presented and the Commission closes to deliberate. A Commission member should be as free as humanly possible from any preconceived ideas as to the facts or the law. From the date of receipt of these instructions, you will keep a completely open mind and wait until all of the evidence is presented in open session and the Commission has retired to deliberate before you discuss the facts of this case with anyone, including other Commission members.

c. Due to the previous publicity about this case and the probability of further publicity, you are instructed that you must not listen to, look at, or read any accounts of alleged incidents involving these cases. You may not consult any source, written or otherwise, as to matters involved in such alleged incidents. You may not listen to, look at, or read any accounts of any proceedings in these cases. You may not discuss these cases with anyone, and if anyone attempts to discuss these cases with you, you must forbid them to do so and report the occurrence to me. You may not discuss, other than as required to inform your military superiors of your duty status, your detail to this Commission as a prospective member with anyone.

3. I do not expect that you will be involved in any proceedings until September at the very earliest.

Peter E. Brownback III
COL, JA
Presiding Officer

Review Exhibit 14

Page 2 **Of** 7

Fellow members of the Commission. Please read these instructions immediately, sign the bottom, and return the signed copy to me.

Your duty as a potential Commission member does not begin until Monday morning at the earliest. The necessary logistical arrangements to bring members of the Commission, the prosecution, the defense, and support personnel to Guantanamo will bring us into close proximity while traveling to Guantanamo and in-processing there. Until such time as you are advised by me that you may discuss matters involved in this case, you may not discuss with anyone – not even among yourselves – anything about the Commission trials or the cases that may come before it.

After we arrive later today, there will be in-processing and you will be taken to your billets. An assigned bailiff will be your driver. On Saturday, we have arranged a private fence line tour. On Sunday, we have arranged a private boat cruise. Enjoy the NEX, the sites, the varied eating establishments, and the broad variety of MWR activities. You will also note that each of your rooms has cable TV.

Do not at any time visit or attempt to visit any of the detainee areas. The bailiff has been instructed not to take you in the area where those facilities are located. Should you see members of the media, avoid them. If approached by the media, walk away and do not even listen to question they may ask. If confronted by the media, refuse to speak to them and refer them to a Public Affairs representative. The same rules apply to official Public Affairs representatives, except that they should be referred to Mr.[redacted]

Mr.[redacted] is the Assistant to the Presiding Officer and is responsible to me for making logistical and administrative arrangements. You may think of him as a Clerk of the Commission. The Commission will also be assigned a bailiff. Mr.[redacted] and the bailiff will work with you on strictly administrative and logistical matters. Because Mr. [redacted] and the Bailiff are not members of the Commission, you must strictly observe the following rules:

a. You may not ever discuss any case, or the evidence offered in any case, with Mr.[redacted] or the bailiff.

b. You may not ever discuss any case, or the evidence offered in any case, in the presence of the bailiff or Mr.[redacted]

c. You may never seek from, or express an opinion to, Mr.[redacted] or the bailiff concerning any case or the evidence offered in a case at any time.

b. Neither the bailiff nor Mr.[redacted] may enter the deliberation room when closed sessions are in progress. The exception to this rule is that either Mr.[redacted] or the bailiff may need to enter the deliberation room during a closed session on an administrative mission – such as to provide paper and pens. In such a case, they will knock at the deliberation room door and announce their presence. Before being allowed to enter, all discussions must stop.

Review Exhibit 14

Be cautious about any contact you have with members of the prosecution, defense, security personnel, or the administrative staff, as any such contact could be misinterpreted. Do not go into the defense area or the prosecution area or upstairs in the Commissions building. If outside the building and you see any detainee or detainee security personnel, immediately return to the building. The best advice I can give you is to stay together as a group, or by yourself, while at Guantanamo and do not discuss the Commission or any of the cases until you are instructed that you may do so.

You are reminded of the instructions I provided you before by email, and a copy of those instructions are attached if you wish to refresh your memory.

The bailiff will pick you up and drive you to breakfast at on Monday morning at a time to be determined later. The uniform is Class B - in Army terminology. For Marines, it is Summer Service C. For other services, I will be wearing a short-sleeve open neck green shirt with no tie and with badges but not decorations. Choose your uniform accordingly.

I have received and read the above instructions:

Rank and Last Name: _____

_____ _____ _____ _____
Signature Date

Review Exhibit 14

Fellow members of the Commission. Please read these instructions immediately, sign the bottom, and return the signed copy to me.

Your duty as a potential Commission member does not begin until Monday morning at the earliest. The necessary logistical arrangements to bring members of the Commission, the prosecution, the defense, the prosecution, and support personnel to Guantanamo will bring us into close proximity while traveling to Guantanamo and in-processing there. Until such time as you are advised by me that you may discuss matters involved in this case, you may not discuss with anyone – not even among yourselves – anything about the Commission trials or the cases that may come before it.

After we arrive later today, there will be in-processing and you will be taken to your billets. An assigned bailiff will be your driver. On Saturday, we have arranged a private fence line tour. On Sunday, we have arranged a private boat cruise. Enjoy the NEX, the sites, the varied eating establishments, and the broad variety of MWR activities. You will also note that each of your rooms have cable TV.

Do not at any time visit or attempt to visit any of the detainee areas. The bailiff has been instructed not to take you in the area where those facilities are located. Should you see members of the media, avoid them. If approached by the media, walk away and do not even listen to question they may ask. If confronted by the media, refuse to speak to them and refer them to a Public Affairs representative. The same rules apply to official Public Affairs representatives, except that they should be referred to Mr.[redacted]

Mr. Keith[redacted]is the Assistant to the Presiding Officer and is responsible to me for making logistical and administrative arrangements. You may think of him as a Clerk of the Commission. The Commission will also be assigned a bailiff. Mr.[redacted]and the bailiff will work with you on strictly administrative and logistical matters. Because Mr. [redacted]and the Bailiff are not members of the Commission, you must strictly observe the following rules:

a. You may not ever discuss any case, or the evidence offered in any case, with Mr.[redacted]or the bailiff.

b. You may not ever discuss any case, or the evidence offered in any case, in the presence of the bailiff or Mr.[redacted]

c. You may never seek from, or express an opinion to, Mr.[redacted]or the bailiff concerning any case or the evidence offered in a case at any time.

b. Neither the bailiff nor Mr.[redacted]may enter the deliberation room when closed sessions are in progress. The exception to this rule is that either Mr.[redacted]or the bailiff may need to enter the deliberation room during a closed session on an administrative mission – such as to provide paper and pens. In such a case, they will knock at the deliberation room door and announce their presence. Before being allowed to enter, all discussions must stop.

Review Exhibit 14

Be cautious about any contact you have with members of the prosecution, defense, security personnel, or the administrative staff as any such contact could be misinterpreted. Do not go into the defense area or upstairs in the Commissions building. If outside the building and you see any detainee or detainee security personnel, immediately return to the building. The best advice I can give you is to stay together as a group, or by yourself, while at Guantanamo and do not think about or discuss the Commission or any of the cases until instructed you may do so.

You are reminded of the instructions I provided you before by email, and a copy of those instructions are attached if you wish to refresh your memory.

The bailiff will pick you up and drive you to breakfast at on Monday morning at a time to be determined later. The uniform is Class B.

Original Signed:

Peter E. Brownback
COL, JA, USA
Presiding Officer

I have received and read the above instructions: (After you sign, please return this document to LN1 [redacted]

Rank and Last Name: _____ _____

_____ _____
Signature Date

Review Exhibit 14

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5

Administrative items for members.

1. It is hot in GTMO, and on Saturday, Sunday, during travel, and in the evenings, casual clothing (to include shorts at GTMO) is welcome and expected. There are plenty of swimming and MWR activities (bathing suit, running gear, etc.)

2. You will probably be in court 4 days, so bring sufficient class Bs. A washer, dryer, and iron are available in the hooches you are billeted in.

3. A full base exchange and ATMs are available, and there are many different places to eat. But, if you have a favorite snack or brand of something, bring it.

4. Your cell phone will not work here. There is a class A (commercial) line in the deliberation room for your use. There is also a large fridge there as well as, of course, a coffee pot.

5. When you arrive to catch the aircraft to GTMO on Friday, please avoid talking to the other passengers until you are given some special instructions to read.

6. In the deliberation room, we have set up a computer so you can check web-based email. (You will not be able to connect to your organization's email.) However, we have also established email accounts for each of you with a 25 MB storage limit. Those account names are below, and have been activated. You will get the passwords when you in-process the Commissions building on Monday. If you wish, you may have email forwarded to the account, or another web base account. NOTE: The chances are that your military email network will NOT allow you to forward email outside their network unless you make special arrangements. Mr. [redacted] advises this CAN be done, it is a matter of talking the LAN administrator into doing it. Otherwise, you will have to have a proxy send emails to your new GTMO account.

(Email addresses of members redacted)

Review Exhibit 14

Page 7 **Of** 7

L

UNITED STATES OF AMERICA	)	
	)	**DEFENSE REQUEST**
v.	)	**FOR CONTINUANCE**
	)	20 August 2004
DAVID HICKS	)	

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).

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).

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.

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

United States Department of Defense

News Release

On the web: http://www.defenselink.mil/releases/2003/nr20030723-0222.html
Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

No. 541-03
July 23, 2003

IMMEDIATE RELEASE

DOD STATEMENT ON BRITISH DETAINEE MEETINGS

The General Counsel of the Department of Defense, Hon. William J. Haynes II, met Monday and Tuesday with the Attorney General of the United Kingdom, Lord Peter Goldsmith, to discuss and review potential options for the disposition of British detainee cases.

The discussions were productive and led to a number of assurances from the U.S. about the military commission process.

Among other things, the U.S. assured the U.K. that the prosecution had reviewed the evidence against Feroz Abbasi and Moazzem Begg, and that based on the evidence, if charged, the prosecution would not seek the death penalty in either case. Additionally, the circumstances of their cases are such that they would not warrant monitoring of conversations between them and their defense counsels.

Yesterday's visit follows a July 18 decision by President Bush to discuss and review potential options for the disposition of British detainee cases and not to commence any military commission proceedings against British nationals pending the outcome of those meetings.

Individual enemy combatants held by the U.S. in the war on terrorism will continue to be assessed on a case-by-case basis based on their specific circumstances for an appropriate disposition of their case. To date, no enemy combatants have been charged for trial before a military commission. No military commission proceedings will begin against any British nationals until after further discussions planned for next week.

Discussions with Australian legal representatives are ongoing and no military commission proceedings will begin against any Australian nationals until completion of those discussions.

United States Department of Defense

News Release

On the web: http://www.defenselink.mil/releases/2003/nr20030723-0220.html
Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

No. 540-03
July 23, 2003

IMMEDIATE RELEASE

DOD STATEMENT ON AUSTRALIAN DETAINEE MEETINGS

The General Counsel of the Department of Defense, Hon. William J. Haynes II, met Monday through Wednesday with an Australian legal delegation, led by Minister of Justice Chris Ellison, to discuss and review potential options for the disposition of Australian detainee cases.

The discussions were productive and led to a number of assurances from the U.S. about the military commission process based on the principles of fairness contained in President Bush's Military Order of November 13, 2001, and Military Commission Order No. 1. Those principles include the presumption of innocence, proof of guilt beyond a reasonable doubt, representation by defense counsel, no adverse inference for choosing to remain silent, and the overall requirement that any commission proceedings be full and fair.

Among other things, the U.S. assured Australia that the prosecution had reviewed the evidence against David Hicks, and that based on the evidence, if that detainee is charged, the prosecution would not seek the death penalty. Additionally, the circumstances of his case are such that it would not warrant monitoring of conversations between him and his defense counsel.

This week's visits follow a July 18 decision by President Bush to discuss and review potential options for the disposition of Australian detainee cases and not to commence any military commission proceedings against Australian nationals pending the outcome of those meetings.

Individual enemy combatants held by the U.S. in the war on terrorism will continue to be assessed on a case-by-case basis based on their specific circumstances for an appropriate disposition of their case. To date, no enemy combatant has been charged for trial before a military commission. No military commission proceedings will begin against any Australian nationals until after further discussions planned for the near future.

Discussions with British legal representatives are ongoing and no military commission proceedings will begin against any British nationals until completion of those discussions.

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United States Department of Defense

News Release

On the web: http://www.defenselink.mil/releases/2003/nr20031125-0702.html
Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

IMMEDIATE RELEASE No. 892-03
November 25, 2003

U.S. AND AUSTRALIA ANNOUNCE AGREEMENTS ON GUANTANAMO DETAINEES

WASHINGTON, D.C. -- The United States and Australian governments announced today that they agree the military commission process provides for a full and fair trial for any charged Australian detainees held at Guantanamo Bay Naval Station.

Following discussions between the two governments concerning the military commission process, and specifics of the Australian detainees' cases, the U.S. government provided significant assurances, clarifications and modifications that benefited the military commission process.

After examining the specific facts and circumstances surrounding each Australian detainee case, the Department of Defense was able to provide the following assurances, which are case specific:

The prosecution has reviewed the evidence against the Australian detainees, and based on that evidence, the prosecution would not seek the death penalty;

The security and intelligence circumstances of Mr Hick's case are such that it would not warrant monitoring of conversations between him and his counsel;

If David Hicks is charged, the prosecution does not intend to rely on evidence in its case-in-chief requiring closed proceedings from which the accused could be excluded; and

The U.S. and Australian government will continue to work towards putting arrangements in place to transfer Hicks, if convicted, to Australia to serve any penal sentence in accordance with Australian and U.S. law.

Subject to any necessary security restrictions, military commissions will be open,

the media present and appropriately cleared representatives of the accused's government may observe the proceedings;

If an accused is convicted, the accused's government may make submissions to the Review Panel;

If eligible for trial, and subject to security requirements and restrictions, an accused may be permitted to talk to appropriately cleared family members via telephone, and two appropriately cleared family members would be able to attend their trial; and,

An accused may choose to have an appropriately cleared foreign attorney as a consultant to the Defense Team. Foreign attorney consultant access to attorney-client information, case material or the accused will be subject to appropriate security clearances and restrictions and determined on a case-by-case basis.

The assurances are in addition to other military commission procedures which already provide for the presumption of innocence, proof of guilt beyond a reasonable doubt, representation by a competent and zealous defense counsel free of charge, no adverse inference for choosing to remain silent and the overall requirement that any commission proceedings be full and fair.

The Department of Defense is in the process of drafting clarifications and additional military commission rules that will incorporate the assurances where appropriate.

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DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

December 8, 2003

TO: Major M. D. Mori, USMC, Detailed Defense Counsel of David Hicks

FROM: Brigadier General Thomas Hemingway, USAF, Legal Advisor to the Appointing Authority, Office of Military Commissions

SUBJECT: Request for Information dated December 3, 2003

I am in receipt of your December 3, 2003 request for information related to the assurances that the Department of Defense made to the Australian government regarding David Matthew Hicks, an Australian national detained by the Department of Defense.

Tabs A and B are the July 23, 2003 and November 25, 2003 Department of Defense New Releases detailing the publicly announced assurances that resulted from discussions between the General Counsel of the Department of Defense and senior officials of the Australian Government.

The following additional assurances provided to the Australian Government by the Department of Defense are provided for your information:

- David Hicks may be represented by an appropriately qualified U.S. civilian defense counsel of his own choosing, subject to an appropriate security clearance, and he may choose which of his defense counsel shall serve as lead counsel.
- The acting Chief Defense Counsel will ensure the detailed military defense counsel advises David Hicks of his option to retain a civilian defense counsel and a foreign defense counsel consultant, and also of the identity of any lawyer hired by David Hicks' family.
- In the event of plea negotiations, David Hicks will be provided detailed defense counsel prior to the start of plea negotiations and detailed defense counsel will be provided access to all discoverable evidence possessed by the Office of the Chief Prosecutor.

If you have any questions regarding this memorandum, my point of contact is Major Thomas Dukes, USAF, Deputy Legal Advisor to the Appointing Authority, Office of Military Commissions, (703) 614-9722.

Attachments: As stated

Thomas Hemingway
Brigadier General, USAF
Legal Advisor to the Appointing Authority
Office of Military Commissions

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 5 to RE 15, page 11 of 21

Mr Cornall—No, we stress physical condition, Senator, because we appreciate that an untrained person would not necessarily be able to make that assessment.

Senator BOLKUS—Have we asked for an outside medical person to monitor their situation—their condition—and make an assessment as to how they really are?

Mr Holland—What we do know is that Mr Hicks needed some sort of medical treatment and has been very positive in his references to the medical treatment that they are receiving at the facilities. In fact, as reported in the newspaper last year, he sent a letter to his family in which he referred to the medical treatment that he was receiving as being first-class, or words to that effect. So the medical facilities at the camp are first-rate. Mr Hicks' has spoken to quite a few people now—his defence team and of course his parents—and I think there have been some reports from those people on his condition as well.

Senator BOLKUS—You mentioned mail services. What access to mail services does he have? You said there was some communication from his parents.

Mr Holland—He phoned his parents.

Senator BOLKUS—So there is no access to mail?

Mr Holland—Yes, he has access to mail. He can write to his parents and his parents can write to him, and they have done so.

Senator BOLKUS—Can Habib?

Mr Holland—Yes, certainly.

Senator BOLKUS—We dwelt on Hicks there for a moment, but is there any indication of Habib having any continuing health problems?

Mr Cornall—We have said before that he has an underlying medical condition that he was being treated for to the extent that he would accept the treatment. That position remains the same now.

Senator BOLKUS—Do we know if it has deteriorated or improved?

Mr Cornall—I do not know whether we know the answer to that. The issue has been raised with the Americans and we understand that it is very much at the forefront of the minds of the medical team there. That is as far as we can take it.

Senator BOLKUS—Have we contemplated asking the Americans for access to be given to an independent medical assessor, either psychological or physical?

Mr Cornall—I do not believe we have asked that, on the basis that it has been reasonably clear in all of our discussions with them that that sort of access would not be permitted.

Senator BOLKUS—Would there be a problem in asking for that, given that they have been there for quite a long time now and their nerves must be pretty well tested?

Mr Cornall—We can take that on notice and see what can be done.

Senator BOLKUS—On 25 November the Attorney announced in a press release that there was an agreement between the governments as to prosecution of Hicks and Habib. Can we get a copy of that agreement?

Attachment 5 to RE 15 page 12 of 21

Mr Holland—It is a confidential agreement between the United States and Australia, but the key elements of that agreement as it relates to Mr Hicks and Mr Habib and how the process will deal with them in the course of any military commission have been made public. We have ourselves prepared a document that sets out the key elements of the agreement and the guarantees of rights that they have under the military commission order as well as under the terms of the agreement between the United States and Australia. We are more than happy to make that document available.

Senator BOLKUS—I would like to see that, but as for the broader document I am sure we all agree that any agreement by government as to how a person is prosecuted would be seen by any court in this country as something that the defence would need to have full knowledge of. Why is that not the case here?

Mr Holland—To the extent to which that agreement directly relates to the trial and the prosecution—if there is one—of those people, those details have been made public.

Senator BOLKUS—So what are you telling us the rest of the agreement says? I think the Attorney announced that it was an agreement as to the prosecution, and there are obviously parts of that agreement you are not going to tell us about. How, for instance, if you were Hicks' lawyers, could you be assured that the parts of the agreement that have not been released do not impact on any aspect of the conduct of the trial?

Mr Cornall—The rules for the military commission are set out in a number of military commission rules, which are widely available. The qualifications or the understandings about how those rules might apply in relation to Mr Hicks are all made known to the defence attorneys—for example, an assurance that the death penalty would not apply to Mr Hicks and so forth. So those arrangements in relation to the particular circumstances of Mr Hicks have all been made known to the relevant defence attorneys.

Senator BOLKUS—I suppose my question still stands though: how can the US and Australian lawyers be sure that anything that is being held may not impact on the conduct of the trial? How can they be sure, for instance, that it does not relate to judicial officers that might be appointed or whatever? How can you have an agreement as to prosecution and keep it secret from the defence?

Mr Cornall—I do not think we are keeping it secret from the defence. The essence of all of the matters that have been agreed over a period of time is publicly known and well known to the defence attorneys.

Senator BOLKUS—Did the US ask for the agreement not be released?

Mr Holland—At the time that the discussions took place and this agreement was entered into, it was certainly seen as applying only to the case of Mr Hicks. The United States government was certainly of the view that it should be seen as that and not as setting any precedent. I think that things have moved on since then. We are happy to take this question on notice and see what can be done. But, reinforcing what the secretary has said, although the documents that govern the conduct of the commissions have been publicly available for quite some period of time, it is clear that all of the guarantees that are included in them have not really been reported on. Therefore we decided to put a document together which summarised

all of those as well as the details of the agreement between the United States and Australia as it governed the conduct of the proceedings. We are happy to make that document available.

Senator BOLKUS—Thank you, I will be glad to see that. Have similar agreements been entered into with other countries whose nationals may be involved?

Mr Holland—Not that I am aware of.

Mr Cornall—You are aware that only six people have so far been designated as possible for prosecution. So at this juncture only those six people and their countries would be considering these sorts of issues.

Senator BOLKUS—Some people have been sent back to their country for trial, I gather, in recent days.

Mr Cornall—Not that I am aware. People have been released on the basis that they are no longer of intelligence or security interest. I am not aware of anyone being sent back to their home country for prosecution.

Mr Holland—The secretary may not be aware that this past weekend there was a report that a Spanish national was being returned to be prosecuted in their home country, which is consistent with what the United States has told us—that is, they are prepared to repatriate people where those people can be prosecuted in their home country or are no longer of law enforcement or intelligence interest to US authorities. The person that I think you have in mind is the Spanish national who is being returned to his country to be prosecuted under the laws of his country in relation to terrorism offences. That is only from newspaper reports—I have not seen anything other than that.

Senator BOLKUS—So we are still of an opinion that Hicks and Habib, on return to Australia, could not be charged with any offence here? Is that our view?

Mr Holland—That is correct.

Senator BOLKUS—To have come to that view we must have had some access to the evidence against them.

Mr Holland—On the basis of the evidence that was available to Australian law enforcement authorities, the Australian law enforcement authorities and prosecuting authorities have advised that no prosecution can be mounted in Australia against either of these individuals.

Senator BOLKUS—When did they come to that conclusion?

Mr Holland—I would have to check on that.

Senator BOLKUS—My concern is that maybe things have moved on and that, with a better testing of evidence, information and so on, there may be a need for reappraisal.

Mr Holland—No, in terms of the activities of Mr Hicks there were investigations continuing during last year. There was certainly a brief of evidence that went to the DPP and they concluded that there were no grounds for prosecution in Australia. I think that evidence was reviewed again recently and a similar decision was reached.

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

Attachment 5 to RE15 page 15 of 26

and we do not know the full strength of their case. As Mr Holland has said, the American process is different to the Australian process inasmuch as, if for example they go into plea negotiations, they do so without necessarily laying charges first -that is part of the negotiation.

Senator BOLKUS—Sure. I suppose we can go around in circles on this for some time. My point is one I would like you to consider—to see what the AFP have had access to and whether we are in a position to make an assessment as to both Hicks and Habib and whether there is an avenue for us to go back to the Americans on the basis of that assessment.

Mr Holland—Certainly during the course of the discussions that we have had with the Americans we have seen some of the brief of evidence that they have but, as the secretary said, we have not seen everything that they might have. In terms of the decision that was going to be made, and that was a decision for them whether or not they had sufficient evidence to undertake the prosecution, we had clearly and obviously agencies here that had focused on what they had available on the basis of the laws that existed at that time.

Senator BOLKUS—Have we taken advice on the legality of Hicks's or Habib's detention?

Mr Holland—I am sorry, Senator, what do you mean?

Senator BOLKUS—On the actual legality of it, factoring in the facts and the evidence that may be there against them. Have we taken advice on whether they are being legally held in Guantanamo Bay?

Mr Holland—I think the Office of International Law may have looked at the issue. Have we had occasion to revisit that? I think the answer, as far as I am aware, is no.

Senator BOLKUS—Would you take on notice whether advice was taken, whether it was from the Office of International Law or elsewhere. I know we have constraints here but I will put a request in anyway to see if we can get a copy of that advice or you can give us some assurance that the detention is legal. Going back to the agreement between governments, I gather the UK are trying to get an agreement as well, as are other countries.

Mr Holland—Yes, as I understand it. I understand they are having discussions with the United States authorities.

Senator BOLKUS—I think there was some discussion towards the end of January that some UK prisoners may go back to the UK for trial. Is that the case? Would you like to take that on notice?

Mr Cornall—There have been reports in the paper. I do not know that we can take it much further than the newspaper reports.

Senator BOLKUS—Please take that on notice. I suppose what I am leading up to is this: what if you get to a situation where the UK or Spain or any other country, but particularly the UK, gets, through their agreement and negotiations with the United States, a better outcome for their citizens? Do we have a capacity to revisit this after this agreement has been signed?

Mr Cornall—We have an agreement with the United States that, if the outcome negotiated by the British in respect of their detainees is more favourable than the outcome we have

Attachment 5 to RE 15 page 16 of 21

6

negotiated, then the benefit of those additional negotiations should flow through to the Australian detainees as well.

Senator BOLKUS—Is that part of the agreement that has been made public, or is that part of the agreement that is not?

Mr Holland—We have said that from the very beginning in the public documents that have been released.

Senator BOLKUS—A final request I have is to see if we can get some independent medical assessment of both of them. I think there is particular concern about Habib's condition, so if you like you can take that on notice.

Mr Holland—Certainly.

Mr Cornall—Senator, just before we leave this issue, one of the points that the government pressed very strongly for was for an Australian legal consultant to be part of David Hicks's defence team. We have been successful in that. Mr Kenny has been to Guantanamo Bay twice and has had extensive discussions and no doubt will be bringing all of his relevant defence expertise to the advice given to Mr Hicks, along with that of Major Mori, who is the defence counsel, and Mr Dratel, who is the US civilian counsel now involved in the matter.

Senator BOLKUS—Do Kenny and the other lawyers have a capacity to negotiate with the administration before Hicks is charged?

Mr Cornall—Yes, that is what they have been doing, I understand.

Senator BOLKUS—Don't we think it is important for Habib to have the same legal capacity to do so?

Mr Cornall—Yes, I do, but before you get to that stage he has got to be designated as eligible for a military commission trial. He has not been put in that category yet. So there is an initial step that has to be taken before that situation arises. That is why we have asked for Mr Habib's situation or his status to be resolved as quickly as possible.

Senator BOLKUS—But in any pretrial assessment isn't it really important, if not critical, to have lawyers, especially in someone like Habib's case where he may have all sorts of problems communicating, to be able to help him get through the morass of evidence and misinformation and information that might be against him?

Mr Cornall—As I understand the American process, that is when the lawyers are involved.

Senator BOLKUS—All right, I will leave my request as I put it earlier.

CHAIR—We are still on output 2.2, Legal services and policy advice on security law. Are there any further questions on that area? Senator Kirk, do you have questions on 2.2?

Senator KIRK—I have a couple. Last year the Attorney-General announced that he had asked the department to review the antiterrorism legislation that was passed by parliament in the middle of last year, in particular the questioning powers, and to identify any changes that might be necessary. Could you confirm that that did occur and what the terms of the Attorney-General's request were?

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Five British detainees held at Guantanamo Bay to go home 'in weeks'

AFP

Thu Feb 19, 2:41 PM ET

LONDON (AFP) - Five of the nine British prisoners being held at a United States military base in Guantanamo Bay, Cuba, are to be returned to Britain "in the next few weeks", Foreign Secretary Jack Straw said.

Straw said that discussions were continuing with Washington over the other four Britons who are being held at the military base after they were picked up during the US-led "war on terror".

British police will consider whether those sent back should be arrested under anti-terrorist legislation when they arrive in Britain, Straw added.

"These men will be flown home to the United Kingdom in the next few weeks," Straw told reporters in London.

His announcement followed months of intensive discussions between the British and US authorities over the British detainees, who are among 660 prisoners controversially held at the base without prisoner of war status.

British Prime Minister Tony Blair (news - web sites) has come under mounting political pressure to resolve the fates of the British detainees, and apologised earlier this month in parliament for the length of time this has taken.

Straw said Thursday: "There have been many complex issues of law and security which both governments have had to consider."

Last year, the US authorities decided that two of the detained Britons were eligible for trial by US military commissions.

However, the British government's top legal advisor took the view that

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- US lawyer sues over terror cases at The Guardian (UK). (Feb 19, 2004)
- Guantanamo Britons to Go Home, May Walk Free Reuters via Yahoo! News (Feb 19, 2004)
- Guantanamo Bay captives to be returned to UK Financial Times via Yahoo! News (Feb 19, 2004)

Opinion & Editorials

- Better late than never at Cincinnati Post (Feb 17, 2004)
- Prisoners of war become pretext for a police state at Wilmington News Journal (Feb 17, 2004)
- 'Terrorism': A world ensnared by a word at International Herald Tribune (Feb 17, 2004)

Feature Articles

- Couples Shy Away From 9/11 Wedding Date AP via Yahoo! News (Feb 19, 2004)
- War on terror is also a war on drug traffic at Christian Science Monitor (Feb 18, 2004)

Related Web Sites

- Terrorism: Questions & Answers
- Department of Homeland Security

the commissions "would not provide the type of process we would afford British nationals," Straw said.

"Our discussions are continuing. In the meantime, we have agreed with the United States authorities that five of the British detainees will return to the United Kingdom."

Britain believed the four men still held by the US "should be tried in accordance with international standards or returned to the UK."

Straw added: "There are a range of security and other issues which we and the Americans need to consider in respect of these four men."

There are about 660 detainees from some 40 countries being held at the Guantanamo base. Most were captured in Afghanistan (news - web sites) as part of the American-led "war on terror" following the September 11, 2001 attacks in the United States.

Washington has classified the prisoners as "enemy combatants" rather than as prisoners of war.

Their blurred legal status has kept them outside the realm of the Geneva Conventions on treatment of prisoners of war, and allowed the US authorities to hold them indefinitely beyond the reach of courts either in the United States or elsewhere.

Straw said that when the five detainees returned home, it would be a matter for the British police and state prosecutors to decide what, if any, further action they should face.

Asked whether he was confident he could deal with any security threat posed by the returning prisoners, Home Secretary David Blunkett said: "I think you will find that no one who is returned (as a result of) the announcement today will actually be a threat to the security of the British people."

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June 24, 2004

British Official Rips U.S. Guantanamo Plan

By THE ASSOCIATED PRESS

Filed at 9:49 p.m. ET

LONDON (AP) -- U.S. plans to use a military tribunal to prosecute terror suspects at Guantanamo Bay, Cuba, is unacceptable because it would not provide a fair trial by international standards, Britain's attorney general said.

``There are certain principles on which there can be no compromise," Lord Goldsmith said in copy of a speech he planned to make to the International Criminal Law Association on Friday.

``Fair trial is one of those, which is the reason we in the UK have been unable to accept that the U.S. military tribunals proposed for those detained at Guantanamo Bay offer sufficient guarantees of a fair trial in accordance with international standards."

The prepared speech was released to the media Thursday night.

President Bush has unveiled plans for a system of military commissions to try 600 detainees at the Cuban base.

Two of the four British nationals still held at Camp Delta -- Feroz Abbasi of London, and Moazzam Begg of Birmingham -- were among Bush's initial list of six people to be tried by the tribunal.

Five other Britons who spent up to two years in U.S. custody at the base were released to British officials in March, and were soon freed without charge.

In the past, Goldsmith and Foreign Secretary Jack Straw have said the United States should either try the British detainees at Guantanamo in accordance with international standards or return them to their homeland.

Straw has said ``the military commissions as presently constituted would not provide the process which we would afford British nationals."

The United States says the prisoners are ``enemy combatants" not prisoners of war, and can be tried by military tribunals. But human rights groups have called the detentions is unlawful, and have criticized the United States for holding the prisoners without charges or access to legal representation.

"PA" NEWS
Wed 30 Jun 2004

Blair Says Talks Continuing over Guantanamo Britons

By Joe Churcher, Chief Parliamentary Reporter, PA News

Discussions are ongoing with the US over the fate of the four Britons still held at Guantanamo Bay, Prime Minister Tony Blair said today.

He repeated the UK's opinion that military tribunals set up to hear the cases would not give the suspects a fair trial.

Mr Blair faced a call to help pay for any appeal by the men to the American Supreme Court, which ruled this week that they could challenge their detention.

Labour's Kevin McNamara (Hull N) also urged the Government to make a submission to any court challenge.

Mr Blair told him: "The British detainees should either be tried fairly in accordance with international standards or return to the UK.

"We have concluded that the military commissions process does not provide guarantees to the standards that we require.

"Five of the detainees were returned to the UK in March. We continue to work to resolve the situation of the remaining four and discussions with the United States are continuing."

Mr Blair also rejected claims that Britain had helped provide the US with a possible location for another Guantanamo-style prison camp.

Earlier this month the Government blocked thousands of Indian Ocean islanders from returning to Diego Garcia – overturning a High Court judgment – which was cleared more than 30 years ago to make way for a US air and naval base.

Scottish National Party leader at Westminster Alex Salmond said the decision had been taken because the US wanted to keep the base – leased from the UK – "perhaps to use it as another Guantanamo Bay.

"How is any of this compatible with natural justice to these 2,000 islanders and their descendants?

"And how can you pursue a shoulder-to shoulder relationship with George Bush when you seem to spend most of your time on your knees?" he asked.

Mr Blair there was "no question" of using the island for that reason.

"I am sorry that you exhibit your usual lack of judgement in thinking it is a bad thing for this country to be a key ally of the United States of America.

"That may be something the Scottish National Party resents but I think it is something the vast majority of people in this country realises is an important part of our security."

UNITED STATES OF AMERICA	)	
	)	
	)	**Prosecution Response to Defense Request for Continuance**
v.	)	
	)	
	)	24 August 2004
DAVID MATTHEW HICKS	)	
	)	

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

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).

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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.

Lieutenant Colonel, U.S. Marine Corps
Prosecutor

RE 16

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Monday August 23, 02:29 AM

Prime Minister says he's satisfied Guantanamo Bay offers Australian-style justice

Prime Minister John Howard said Sunday he remains satisfied that the U.S. military trial awaiting Australian terror suspect David Hicks at Guantanamo Bay, Cuba, will be consistent with Australian criminal justice.

Hicks is among four suspected terrorists who face preliminary hearings at the naval base at the U.S. enclave in Cuba this week.

Howard has not been swayed by legal groups, opposition parties and Hicks' own lawyers who have condemned the system of military commission trials as unjust.

"We are satisfied that the rules that have been established for the military commission will deliver a process which is consistent with the criminal justice system in our country," Howard told reporters. "I hope it is dealt with in a very expeditious fashion."

Howard, a staunch ally of the U.S.-led war on terror, has pressed his friend, U.S. President George W. Bush, to quickly try 29-year-old Hicks and fellow Australian Mamdouh Habib who have been held as prisoners at Guantanamo for more than two years. Habib is yet to be charged but is expected to be included in the second tranche of prisoners nominated for trial.

Hicks is charged with conspiracy to commit war crimes, aiding the enemy and attempted murder for allegedly helping al-Qaida fight U.S. and coalition forces in Afghanistan. He faces a sentence of life imprisonment if convicted.

Hicks' father Terry Hicks and stepmother Bev Hicks will fly from their home in the South Australia state capital Adelaide Monday to attend their son's pretrial hearing Wednesday.

"We're looking forward to seeing David and seeing what condition he's in, it's going to be interesting," Terry Hicks said.

Father and son have been allowed to talk by telephone only twice since David Hicks' capture in Afghanistan in December 2001.

RE 16

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RE 16

TALKING POINTS - General Protective Order

- The prosecution requests protective orders be issues in accordance with Military Commission Order No. 1, para 6(D)(5)(a).

- On July 30 2004, we filed a motion requesting protective orders to protect sensitive and classified information & documents provided to the defense.

- Certain USG agencies have provided information and documents and have given permission for the Prosecution to provide it to the defense on the condition that appropriate protection of information will be provided. Therefore, as per POM #4 prosecution provided notice that certain facts, docs and source identities are classified or protected.

- The reason for protecting the information - release of information during terrorism prosecutions has aided al Qaida and UBL. For example- *Knowledge of UBL's phone number from the East Africa bombing transcript- resulted in UBL not using his satellite phone and the US intelligence unable to track his whereabouts.*

- **Law Supports the request for relief** - Commission Law contemplates and provides for issuance of protective orders
    - MCO No. 1 gives the PO authority to issue Protective orders to safeguard protected information.[1]
    - PMO Section 1(f)- Presidential Determination that it is not applicable to apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the US district courts.
    - Much of the discovery provided to the defense involves "for official use only" and "law enforcement sensitive" information. Therefore, it is appropriate to place various restrictions on the release and ability to access this information as these docs contain information that may impact ongoing investigations.
    - US Constitution, US Code, UCMJ, the RCM, Federal rules and case law are not binding on military commissions. However, persuasive- US Sup Ct-*Waller v. Georgia*[2], MRE 505,[3] 506[4]; Classified Information Procedures Act (CIPA)[5], 18 USC App; Rule 16(d) Fed rules of Criminal Procedure[6] authorize the judge to issue protective orders.
    - International Law also supports protective orders- ICTR[7] and ICTY.[8]
- Present evidence provided by 2 victims that have been victims of a terrorist attack
- **Unlass Sensitive Material i.e. for official use only**- releasable to defense team, the accused; individuals who have an official need to know and the information is to assist the defense in the representation of the accused before a military commission and MC panel and parties to the case.
- **Classified** – cleared defense team, MC panel
- **Books, Articles, or speeches**: defense team shall not divulge, publish or reveal, either by word, conduct, or any other means, any docs or information protected by this order unless specifically authorized to do so. This restriction till the conclusion of proceedings.
- **Breach:** Disciplinary action or sanctions

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[1] **Protected Information is** – classified or classifiable info, info protected by law or rule from unauthorized disclosure; information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses; info concerning intelligence and law enforcement sources, methods or activities; or info concerning other national security interests.

[2] Waller v. Georgia, 467 U.S. 39 (1984): right to a open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the govt's interest in inhibiting disclosure of sensitive information.

[3] **MRE 505**-mandatory burden on the military judge to issue protective orders to safeguard against the compromise of classified info disclosed to the accused.

[4] **MRE 506**- unclassified sensitive information- requires the military judge to issue protective orders upon the request of the govt to preclude the compromise of this type of information disclosed to the accused

[5] **CIPA Sec 3**- upon motion of the US, the court shall issue an order to protect against the disclosure of classified info disclosed by the US to any defendant in any criminal case in a district court of the US.

[6] **16(d) Fed Rules of Criminal Procedure**: for good cause, to deny, restrict, or defer discovery or inspection, or grant other appropriate relief

[7] **ICTR**- Rule of Procedure and Evidence 66 allows for protection of info in the possession of the prosecutor, the disclosure of which may prejudice further ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any state.

[8] **ICTY**-Art 22 requires creation of rules of procedure and evidence for protection of victims and witnesses, Rule 75- closed session IAW Rule 79, Rule 66- permits the prosecutor to withhold disclosure when disclosure would prejudice other investigations, or affect the security interests of any state.