

It may also be helpful to note that I pointed out to the students that discussion of this topic is often cast in terms of simplex statements or hypothetical questions with seemingly simple fact patterns. One point I made was that the issues surrounding this topic are normally more complex than the hypothetical questions suggest, and that many statements regarding these matters will be subject to debate.

175. Did \_\_\_\_\_ prepare materials other than the required reading materials? If so, please provide a copy of this material or access to it. No.
176. Did \_\_\_\_\_ prepare notes, a PowerPoint presentation, or any other kind of materials for his own use or for presentation to the Conference? If so, please provide a copy of this material or access to it. Attached.
177. Did \_\_\_\_\_ make any statement regarding the circumstances under which torture might appropriately be used? If so, what were these statements? No.
178. Please would \_\_\_\_\_ acknowledge that he is willing for the organizers of the Conference to discuss and share any aspect of his participation with counsel for Mr. Hicks or their agents? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

#### Other Presentations (1987-present)

179. Please list all other programs that are similar in any way to this program (i.e., that deal with issues involving terrorism, torture, security or related areas) where \_\_\_\_\_ has made presentations since 1987. Please provide details of these programs, including dates, locations, the contact details of organizers, lists of attendants (if available), all presentation materials (of the types discussed above), all preparation notes (of the types discussed above), etc. N/A.
180. Please list all other programs that are similar in any way to this program (i.e., that deal with issues involving terrorism or torture or security) which \_\_\_\_\_ has attended since 1987. Please provide details of these programs, including dates, locations, the contact details of organizers, lists of attendants (if available), all presentation materials (of the types discussed above), all preparation notes (of the types discussed above), etc. N/A.
181. Is there anything else about presentations that \_\_\_\_\_ has made that he feels should, in good faith, be revealed to Mr. Hicks? No.

#### Publications

Mr. Hicks is aware of the following publications by \_\_\_\_\_ of each are publicly available):

(and copies

- a. Major \_\_\_\_\_, The Army Lawyer, Department of Army Pamphlet 27-50-285 August 1996  
<https://134.11.61.26/CD1/Publications/JA/TAL/TAL%2027-50285%2019960801.pdf>
  - b. Major \_\_\_\_\_, Are You Ready for Some Changes? Five Fresh Views of the Fifth Amendment, ARMY LAW, Mar. 1996
  - c. Major \_\_\_\_\_, *Tales from the CAAF: The Continuing Burial of Article 31(b) and the Brooding Omnipresence of the Voluntariness Doctrine*, ARMY LAW, May 1997,  
<http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset>
  - d. Col \_\_\_\_\_, “Forum Shoppers Beware: The Mismatch between the Military Tribunal Option and United States National Security Strategy”, March 2002
182. Please list, and provide means of access to, any other publications by Col \_\_\_\_\_ that he has published on any legal issue since he began law school.

Item “d” listed above is not a published article.

Other publications:

*The Presumption of Innocence: Patching the Tattered Cloak After Maryland v. Craig*, 27 ST. MARY’S LAW JOURNAL 389 (1996)

*Davis v. United States: Clarification Regarding Ambiguous Counsel Requests, and an Invitation to Revisit Miranda!* ARMY LAW., March 1995

*Practice Note, United States v. McLaren, Reinitiation of Conversation by Accused May Constitute Implied Waiver of Previously Asserted Counsel Right*, ARMY LAW., August 1994

\_\_\_\_\_’s Article Entitled “Forum Shoppers Beware: The Mismatch between the Military Tribunal Option and United States National Security Strategy” (March 2002)

183. Is there any opinion expressed in \_\_\_\_\_’s article regarding forum shopping that he now disagrees with? See Q.136.
184. \_\_\_\_\_’s article focused on the “potential defendants held by the United States forces in Guantanamo Bay, Cuba”. On what factual basis did he refer to the potential defendants as “al Qaeda terrorists”? See Q.136.

185. In \_\_\_\_\_'s article, he refers to "the nature of the likely defendants' al Qaeda connections . . .". What was his factual basis for this statement? See Q.136.
186. In \_\_\_\_\_'s article, he uses the term "international terrorism". What was his source for the definition of this term? Was this being used as a legal, or merely descriptive, term? The paper does not deal with a precise definition of the term "international terrorism".
187. In \_\_\_\_\_'s article at footnote 25, he states that the International Criminal Court only has jurisdiction over war crimes, not "acts classified as terrorism". What did he consider to be acts of terrorism, and what defines these acts as terrorism? The paper does not deal with a precise definition of the term "acts of terrorism".
188. When \_\_\_\_\_ wrote this article, did he believe that the people detained at Guantanamo Bay were actually involved in planning or carrying out the attacks on 11 September 2001? I did not have any knowledge or preconceived notions regarding this topic.

#### **\_\_\_\_\_ 's Experience as a Military Lawyer**

189. It is Mr. Hicks' understanding that \_\_\_\_\_ was designated Judge Advocate in 1987. What experience has \_\_\_\_\_ had as a Judge Advocate that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.
190. When \_\_\_\_\_ was in the SJA role, who was/were the Deputy SJA(s) who served with him? I did not use a deputy SJA.
191. When \_\_\_\_\_ was in the SJA role, who was/were the Military Justice Officer(s) he dealt with for courts-martial under Commanding General's cognizance? Maj Brubaker, Capt Jordan, Major Hunting Horse, Capt Palmer, Maj Hennessy.
192. When \_\_\_\_\_ was in the SJA role, who served as his staff? Personnel assigned to the Joint Law Center, MCAS Cherry Point.
193. It is Mr. Hicks' understanding that \_\_\_\_\_ served as a trial counsel at some point. When was this and for how long? See Q.124.
194. How many cases did \_\_\_\_\_ prosecute or defend while serving as trial counsel and trial defense counsel? This question does not address matters reasonably concerning impartiality or bias relevant to a possible challenge for cause of the military judge.

195. What experience did \_\_\_\_\_ have in his role as trial counsel that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.
196. It is Mr. Hicks' understanding that \_\_\_\_\_ served as Senior Defense Counsel. When was this, for how long, and how many cases did he defend? See Qs.124 and 195.
197. What experience did \_\_\_\_\_ have in this role as a defense counsel that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.
198. It is Mr. Hicks' understanding that \_\_\_\_\_ was designated Deputy Branch Head (Military Law Branch, Headquarter Marine Corps). When was this, for how long, and what was his function? June 1990 – June 1993. Worked as a staff attorney on military justice matters to include congressional inquiries, special interest inquiries, Board for Correction of Naval Records petitions and tracking of officer misconduct and high visibility cases.
199. What experience did \_\_\_\_\_ have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.
200. It is Mr. Hicks' understanding that \_\_\_\_\_ was designated Executive Secretary and USMC Working Group member for Joint Service Committee on Military Justice. When was this, for how long, and what was his role? June 1990 – June 1993. Review, development and coordination of proposals for change to the UCMJ and Manual for Courts-Marital.
201. What experience did \_\_\_\_\_ have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.
202. It is Mr. Hicks' understanding that \_\_\_\_\_ was designated Faculty Member (Criminal Law Department, The Judge Advocate General's School, U.S. Army). When was this, and for how long? June 1994 – June 1997.
203. What courses did \_\_\_\_\_ teach? Please provide all documents used in these courses. Fifth Amendment and Article 31 Issues; Trial Advocacy; Analysis of the Military Justice System; Sentencing in the Military Justice System. I no longer have the requested documents.
204. What experience did \_\_\_\_\_ have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.
205. It is Mr. Hicks' understanding that \_\_\_\_\_ was designated Law Center Director. When was this, and for how long? July 2002 – June 2005.

206. What was \_\_\_\_\_'s function in this Billet? Lead and manage Joint Law Center (JLC) at MCAS Cherry Point. The JLC was staffed by approximately 17 attorneys and 35 support personnel who provided prosecution, defense, legal assistance, and civil and operational law support to the 2d MAW and MCAS Cherry Point community.
207. What experience did \_\_\_\_\_ have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.
208. It is Mr. Hicks' understanding that \_\_\_\_\_ was worked as a Staff Judge Advocate. When was this, and for how long? Which officers did he advise? July 1997 - July 1998 (CG, 3<sup>rd</sup> MarDiv & CG, III MEF); July 2002 - June 2005 (CG, 2d MAW).
209. What was \_\_\_\_\_'s function as Staff Judge Advocate? Legal Advisor to the Commanders and their staffs.
210. What experience did \_\_\_\_\_ have in this role that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? None.

#### **\_\_\_\_\_ 's Experience as a Military Judge**

211. It is Mr. Hicks' understanding that \_\_\_\_\_ was designated Military Judge from 1998-2001 & July 2005-present. Please provide a complete listing of all General courts-martial for which \_\_\_\_\_ was the military judge. To date, I have presided over in excess of 405 completed special and general courts-martial. Further information regarding these cases may be available through the Navy-Marine Corps Appellate Review Division.
212. Of the cases in which \_\_\_\_\_ sat as military judge, how many involved an accused who was not a member of the U.S. armed services? None.
213. Of the cases in which \_\_\_\_\_ sat as military judge alone, involving U.S. armed service personnel, how many, if any, resulted in a finding of not guilty? See Q. 211.
214. Of the cases in which \_\_\_\_\_ sat as military judge alone, involving non-U.S. armed service personnel, how many, if any, resulted in a finding of not guilty? N/A.
215. Of the cases in which \_\_\_\_\_ presided, how many involved serious felony charges that could be considered to rise to the nature and seriousness of the current charges before the commission? See Q. 211.

216. Of the cases over which \_\_\_\_\_ presided, how many involved the filing of motions, in which he had to make a ruling on the admissibility of evidence and other rules of law? See Q. 211.
217. What is \_\_\_\_\_'s best estimate of the proportion of motions in which he ruled favorably for the defense? Please provide the name of the case and the motion in which he ruled favorably for the defense. See Q. 211.
218. What experience did \_\_\_\_\_ have as a military judge that a reasonable person would believe, in good faith, should be revealed to Mr. Hicks? See Q. 211.

### **'s Involvement with the Military Commission Process**

219. Did \_\_\_\_\_ play any role whatsoever, including a consultation role, in the development or criticism of any version of the military commission process? If so, please provide details. None.
220. How did \_\_\_\_\_ come to be a Presiding Officer in the previous military commission process? See Q. 135.
221. Did \_\_\_\_\_ apply for the position of Presiding Officer in the previous military commission process? If so, please describe why, and provide a copy of the application. See Q.135.
222. Was \_\_\_\_\_ solicited for the position of Presiding Officer? If so, by whom? Please provide a copy of the solicitation. See Q. 135.
223. Did \_\_\_\_\_ have to fill out any kind of form or questionnaire related to the position? Please provide a copy of any such document. See Q. 135.
224. Was \_\_\_\_\_ interviewed for the position? Please provide a copy of all recordings of any kind of this interview, including any memoranda created that bear any relationship to the interview whatsoever. No.
225. Who decided that \_\_\_\_\_ was fit for the position? See Q. 135.
226. What criteria were used to make this decision? Unknown.
227. Did \_\_\_\_\_ receive any training whatsoever relating to his position as Presiding Officer? If so, what did it consist of and who conducted the training. No specific training.
228. Who was the Presiding Officer's superior officer? N/A. I remained assigned to the Navy-Marine Corps Trial Judiciary. The Chief Judge of the Navy-Marine Corps Trial Judiciary was and is my reporting senior.
229. How did \_\_\_\_\_ come to be a judge for the current military commission process? See Q. 141.

230. Did \_\_\_\_\_ apply for the position of military judge in the current military commission process? If so, please describe why, and provide a copy of the application. See Q. 141.
231. Was \_\_\_\_\_ solicited for the position of military judge with the current military commission process? If so, by whom? Please provide a copy of the solicitation. See Q. 141.
232. Did \_\_\_\_\_ have to fill out any kind of form or questionnaire related to the position of military judge with the current military commission process? Please provide a copy of any such document See Q. 141.
233. Was \_\_\_\_\_ interviewed for the position? Please provide a copy of all recordings of any kind of this interview, including any memoranda created that bear any relationship to the interview whatsoever. No.
234. Who decided that \_\_\_\_\_ was fit for the position? See R.M.C. 503.
235. What criteria were used to make this decision? See R.M.C. 503.
236. How was \_\_\_\_\_ selected as the Chief Military Judge? See R.M.C. 503.
237. Please list all people with whom \_\_\_\_\_ communication in any manner regarding his selection or potential selection as the Chief Military Judge and describe those communications. See Q. 141.

**'s Contacts with**

238. Please identify any contact whatsoever of any kind between \_\_\_\_\_ and Appointing Authority \_\_\_\_\_ I met then sometime between 1994 and 1997 when I was a faculty member at the U.S. Army JAG School. He stopped in the Criminal Law Department office spaces and I believe I was introduced as the Marine Corps officer on the staff. We had no conversation beyond a basic introduction. I also met and shook hands with then \_\_\_\_\_ U.S.A. (ret) when he was a guest at the Eastern Area Counsel Office Mess Night at Camp Lejeune in March of 2005 and March of 2007. We had no conversation beyond cordial small talk.

**'s Contacts with any other Official of the Bush Administration**

239. Please identify any contact whatsoever between \_\_\_\_\_ and any member of the executive branch who has any role whatsoever in the military commission process. None.

**'s Contacts with those Associated with the Case**

## The Accused and Witnesses

240. Did \_\_\_\_\_ know Mr. Hicks or anything about him prior to being assigned to this case? If so, please describe his knowledge. I am aware that this case has been the subject of litigation in various forums for several years. I have not followed the particulars of that litigation.
241. Does \_\_\_\_\_ know anybody who he believes may reasonably be called as a witness in these proceedings? If so, please list the potential witnesses and state how he knows them. No.

## The Prosecution Branch

242. Does \_\_\_\_\_ know anybody associated with the Office of Military Commissions in the prosecution branch? If so, please list the people and describe how he came to know them and his contact with them. Not that I know of.
243. What contact has \_\_\_\_\_ had with any current members of the prosecution branch? Official contact in conjunction with U.S. v Mohammed and this case.
244. What contact has \_\_\_\_\_ had with any former members of the prosecution branch? See Q. 136 re Col \_\_\_\_\_. LtCol \_\_\_\_\_ was serving as a trial counsel at MCAS Cherry Point when I was a military judge between 1998 and 2001. I met him several times in the course of traveling to MCAS Cherry Point. I don't recall his involvement in any cases.
245. What does \_\_\_\_\_ know about LtCol \_\_\_\_\_, USMC? He is a USMC judge advocate.
246. What does \_\_\_\_\_ know about Maj \_\_\_\_\_, USMC? He is a USMC judge advocate.
247. Has \_\_\_\_\_, personally or through an agent, had any communications with anyone in the Prosecution Office regarding Mr. Hicks? If so, please describe the communications in detail. Official e-mail contact regarding this case. Defense was CC'd on all email.
248. Has \_\_\_\_\_, personally or through an agent, had any communications with anyone in the Prosecution Office regarding the status or content of any draft of the pending implementing regulations for the military commissions? If so, please describe the communications in detail. No.

## The Defense Branch

249. What contact has \_\_\_\_\_ had with any member of the defense



branch? Official contact in U.S. v Mohammed and this case. Col [redacted] and I were classmates at the Naval Justice School from August – October in 1987 and again at the Army JAG School from 1993 – 1994. I have had sporadic contact with him over the years in the course of our military service.

250. What does [redacted] know about Col [redacted], USMC, Chief Defense Counsel? See Q. 249.
251. What does [redacted] know about Maj Michael Mori, USMC? He is a USMC judge advocate.
252. Does [redacted] know any of the other lawyers assigned to the Office of the Chief Defense Counsel? If so, how? See Q. 249.
253. What contact, if any, has [redacted] had with any former member of the defense branch? See Q. 249.

#### The Military Judges

254. Does [redacted] know any of the other Military Judges associated with the Office of Military Commissions? If so, describe how he came to know them and his contact with them. I have had various levels of contact with other nominated judges over the years in various professional capacities.
255. What, if anything, does [redacted] know about any of the other military judges selected for the current military commissions? I assume they were nominated for service by their respective Judge Advocates General.

#### The Convening Authority

256. What contact, if any, has [redacted] ever had with the Convening Authority, Susan Crawford? None.
257. What contact, if any, has [redacted] ever had with the Legal Advisor to the Convening Authority, [redacted]? We spoke briefly on the telephone once in mid-March 2007. [redacted] called me to confirm a report he had heard that I had ordered a hearing in this case for 20 March 2007. I confirmed that information as being correct.
258. What contact, if any, has [redacted] ever had with any other member of the Convening Authority's office? See Q. 135. I have also communicated with Col [redacted] on a number of occasions concerning administrative matters unrelated to any particular case.
259. Has [redacted], personally or through an agent, had any communications with anyone in the Convening Authority's Office regarding Mr. Hicks? If so, please describe the communications in detail. No.

260. Has \_\_\_\_\_, personally or through an agent, had any communications with anyone in the Convening Authority's Office regarding the status or content of any draft of the pending implementing regulations for the military commissions? If so, please describe the communications in detail. In mid-March 2007, LTC \_\_\_\_\_ inquired about whether publication of any regulation was imminent such that it might be taken into account with regard to my preliminary instructions to counsel in this case. We were advised that publication was not imminent at that time.

#### Members

261. What contact, if any, has \_\_\_\_\_ ever had with any members detailed to the military commission for Mr. Hicks? None.

262. What contact, if any, have any members of the military judge's office ever had with the members detailed to the military commission for Mr. Hicks? None that I know of.

263. Who will contact the members detailed to the military commission for Mr. Hicks to coordinate any military commission proceedings? We have not yet addressed that issue.

#### **'s Training for Military Commissions**

264. What, if any, training has \_\_\_\_\_ had or does he expect to have relating in any way to his role as Military Judge in the military commissions? Who conducted or will conduct the training? I do not anticipate any commission specific training with the exception of that having to do with equipment and systems in use in the courtroom.

265. Has \_\_\_\_\_ sought any opinion, advice or guidance on the law of war from any individual or expert after considering becoming a Military Judge for the military commission, applying for the role, or assuming the position? What was the opinion, advice or guidance sought and received? No.

266. Has \_\_\_\_\_ attended any conferences or meetings addressing policy and/or procedures with regard to the conduct of the military commissions? If so, provide details of any such meeting, and provide all the written materials that were distributed at such a meeting. No.

267. What independent research (including any internet research), if any, has Col \_\_\_\_\_ conducted concerning the general facts of this case, specific to Mr. Hicks? None.

268. What independent research (including any internet research), if any, has Col \_\_\_\_\_ conducted concerning the general facts of this case and any of the other prisoners currently charged in the military commission process? None.

269. What independent research (including any internet research) has Col conducted concerning the general facts of this case and the broader 'Al Qaeda' conspiracy alleged in the "charge sheet"? None.
270. What books has chosen to read since September 11, 2001, concerning terrorism and/or Al Qaeda? None.
271. Has written any policy, guidelines, material, rules, regulations, or instructions outlining the role, responsibilities, duties of the Presiding Officer and/or the military commission? If so, precisely what has he written and has any of the material been used as a Presiding Officer's Memorandum, Military Commission Instruction or any other military commission document? In my capacity as a Presiding Officer, I participated in the development of a number of the POMs used in some of the cases initiated under the PMO of November 2001.

**'s Contacts with the Victims of the 'War on Terror' Charged in this Case**

272. Who, if anyone, does know who was killed or injured in the September 11, 2001, attacks? N/A.
273. What opinions has expressed publicly (i.e., not in the privacy of his own home) concerning the September 11, 2001 attacks, or what should be done to those associated with the perpetrators? None.
274. What opinions have expressed privately concerning the September 11, 2001 attacks, or what should be done to those associated with the perpetrators? I have developed or expressed no opinions regarding those associated with the perpetrators.
275. Who does know in the military services who was killed or injured in a 'terrorist' attack prior to September 11, 2001? (This should include, but not be limited to, the Beirut bombing, the first World Trade Center attack in 1993, the USS Cole, the Embassy attacks and their fall-out, Somalia, etc.) Please provide details, including names, relationships, and a brief discussion of the mental and emotional impact on him in each case. A Naval Academy Classmate of mine named was killed in the Beirut bombing. Although I did not know him well, I was saddened by his death. I cannot say whether the bombing was a "terrorist attack."
276. What civilians does know who have been killed or received any injuries associated with a 'terrorist' attack prior to September 11, 2001? Please provide details, including names, relationships, and a brief discussion of the mental and emotional impact on in each case. None.
277. Who does know who has been killed or injured in military service during or since the September 11, 2001 attacks? (This should

include, but not be limited to, the 9/11 attacks, Afghanistan, Iraq, etc.) Please provide details, including names, relationships, and a brief discussion of the mental and emotional impact on \_\_\_\_\_ in each case. A Naval War College Classmate named Colonel \_\_\_\_\_ was killed in a training accident in Texas in November 2004. I was saddened by his death. A Marine Corps Judge Advocate contemporary named Colonel \_\_\_\_\_ was injured during an ambush in Iraq during Operation Iraqi Freedom. I was glad he survived and recovered. A parent of one of my son's classmates was injured by an IED in November 2005. I was glad he survived with a good prognosis for full recovery.

278. What civilians does \_\_\_\_\_ know who have been killed or injured in any way associated with the 'War on Terror' during or since the September 11, 2001, attacks? Please provide details, including names, relationships, and a brief discussion of the mental and emotional impact on \_\_\_\_\_ in each case. None.
279. What role has \_\_\_\_\_ played in the Afghanistan war? Please provide details of his involvement. One Marine assigned to the Cherry Point Law Center deployed to Afghanistan as an individual augmentee of the US forces in that region. My role was limited to identifying an available member of my staff.
280. Was \_\_\_\_\_ deployed to Afghanistan? If so, please provide the dates and his duties. No.
281. What role has \_\_\_\_\_ played in the Iraq (II) war? Please provide details. As SJA for 2d MAW and Director of the Cherry point JLC I supervised and directed legal support associated with the pre-deployment phase of 2d MAW units deploying to Iraq. This support entailed ensuring deploying service members had completed necessary documents concerning wills and powers of attorney, and providing basic law of war and rules of engagement training to deploying service members. I did not participate in any actual operational planning beyond ensuring that sufficient legal support was provided to the deploying units. Additionally, one of the military judges I now supervise in my capacity as Circuit Military Judge, \_\_\_\_\_ is pending deployment to Iraq to provide judicial support to II MEF.
282. Was \_\_\_\_\_ deployed to Iraq (II)? If so, please provide the dates and his duties. No.
283. Does \_\_\_\_\_ know any person who was deployed to Afghanistan closely enough for him to have significant emotional concern for that person's well-being while in a combat zone at the same time as those charged in the conspiracy in this case were allegedly in combat in Afghanistan? If so, please provide details. No.

284. Does \_\_\_\_\_ know any person who was deployed to Iraq (II) closely enough for him to have significant emotional concern for person's well-being while in a combat zone at the same time as those charged in the conspiracy in this case were allegedly in combat in Iraq? If so, please provide details. No.

**'s knowledge of the prosecutors who quit the military commission system.**

285. In publicized reports about the previous military commission, it was disclosed that three prosecutors resigned from the process because they viewed the process as "rigged" to convict.<sup>1</sup> Does \_\_\_\_\_ have any knowledge regarding the prosecutors who quit the prosecutors office No.

**'s Contact with Other Individuals**

286. Has \_\_\_\_\_, personally or through an agent, had any communications with anyone regarding Mr. Hicks, his prior military commission or his current military commission other than of an administrative nature? If so, please describe the communications in detail. No.

287. Has \_\_\_\_\_, personally or through an agent, had any communications with anyone in the Prosecution Office regarding the status or content of any draft of the pending implementing regulations for the military commissions? If so, please describe the communications in detail. No.

288. Is there anything else that, in fairness to Mr. Hicks, \_\_\_\_\_ should reveal on the subject of other personnel involved in the military commission process? No.

289. Please provide details of any relationship (of any kind) that has ever had with Colonel \_\_\_\_\_, USA. See Q. 137.

290. Please provide details of any relationship (of any kind) that has ever had with Major \_\_\_\_\_, USA. I do not recognize the name.

291. In particular, has \_\_\_\_\_ sought any advice, guidance on the law of war and/or the military commissions process from a Major \_\_\_\_\_? If so, please provide details. See Q. 290.

292. Is there anything else that, in fairness to Mr. Hicks, \_\_\_\_\_ should reveal on the subject of commissions for other detainees in the current

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<sup>1</sup> See, e.g., Neil A. Lewis, *Two Prosecutors Faulted Trials for Detainees*, New York Times (August 1, 2005); Leigh Sales, *Third Prosecutor Critical of Guantanamo Trials*, Australian Broadcasting Corporation (Aug. 3, 2005), available at: <http://www.abc.net.au/news/newsitems/200508/s1428749.htm>.

military commission process or in previous military commission processes?  
No.

293. Please identify any relationship (of any kind) that \_\_\_\_\_ has with any member of the Court of Military Commission Review. I do not know who is in that group.

Respectfully submitted this the 12<sup>th</sup> Day of March, 2007, subject to Mr. Hicks' request for on-the-record oral voir dire and the reservation to submit supplemental questions or seek clarification of any answers provided. Counsel hereby certifies that the foregoing motion has been served, by electronic mail, upon counsel for the prosecution.

/s/ \_\_\_\_\_

M.D. MORI  
Major USMC  
Detailed Defense Counsel

## Torture/Ethics Seminar

Welcome and thanks for joining today's discussion on torture and national security. Hopefully you won't leave saying things like man that class really lived up to it's billing ,,,

For those of you that were hoping for pictures, I am afraid you will be disappointed.

I do hope, however, is Shepard us through a discussion that will provide you with a frame work with which you can properly assess the several conflicting viewpoints that exist regarding the use of what I will initially call aggressive interrogation techniques in the pursuit of intelligence from suspected terrorists. Additionally I hope we will have a lively discussion to bat around some of the ethical dilemmas presented by this issue and let the group be enlightened by the awesome power of your collective intellect.

In the way of background...

Annapolis ... combat engineer.... Lawyer

Prosecutor... defense ,,,,,, worked in DC on legislation re military law,,,, done a few other things that would take too long to explain and am currently serving as a judge for courts-martials prosecuted at the several USMC bases and stations in NC and SC.

In case you are interested, although I have participated in a fair number of investigations, I have never conducted or witnessed what any acts that anyone would describe as torture.

In dealing w/ litigation concerning police interrogations, however, I have had the opportunity to deal with a number of the concepts that come into play in assessing the possible usefulness and pitfalls of aggressive interrogation techniques.

Alright, let's get started with basic concepts.

## **What is torture?**

What besides things like listening to your parents tell stories about the good old days is torture?

### **Definition?**

Rack,  
Whipping  
Beating  
Cigarette burns  
Hanging from ceiling

Threats (of harm)(against family)(prosecution)(turnover to ?)  
Yelling  
Scaring (how far) (waterboarding) (dogs)

Humiliation (Forced nakedness)

Sleep deprivation  
Bright lights  
Isolation

Yelling?  
Insulting?  
Lying about harm to family?

White House Memo: Infliction of pain akin to that accompanying death or organ failure or serious impairment of bodily functions



Psychological Pain only if it causes lasting damage.

UN CAT: Extreme Form of cruelty and unusual punishment committed under the color of law.

CAT also seeks to prevent “ other acts of cruel, inhumane or degrading punishment which do not amount to torture.

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### Why do people torture?

**Five general categories** under where torture occurs under the color of law:

Just talk about under color of law and not get into the purely criminal scenarios or the sado masochistic pain for pleasure scene

**Victors Pleasure:** Celebrate win (very close to the criminal)

**Terror** (To subjugate) (Fate worse than death or jail) (Gengas Khan/Saddam Hussain)

**Punishment** \_future deterrence (specific/general) (8<sup>th</sup> Amendment – but death OK??)

How many people think torture for these purposes are always bad?  
Most will agree these are bad,,,,, on basis of cruelty.

**Extracting Confessions** – we prohibit re 5<sup>th</sup> Amendment/14<sup>th</sup> Amendment w/ concepts re PASI/ Due Process and lack of reliability

## **Intelligence Gathering**

How many people think torture for these purposes are always bad?

Why?

Some might suggest that torture,,, intentional cruelty is always wrong, because it is unethical or morally wrong:

What do we mean by Morally wrong or unethical?

**Ethics: -Of or relating to moral action, conduct, motive, or character; also pertaining to moral feelings, duties or conduct.**

**Moral Law: The law of conscience, the aggregate of those rules which relate to right and wrong conduct. The prescription of the standards to which the actions of men should conform in their dealings w/ each other.**

Based on these definitions it would seem that extreme physical or mental cruelty should always be wrong.

**But**

**Can't the ends sometimes justify the means?**

Consequentialist rationality.

Is it always wrong to bash someone in the head w/ a baseball bat?  
Self defense example

WRT Intell gathering, can't the use of aggressive interrogation techniques be compared to self-defense?

Dirty Harry shooting scenario.

### **Ticking Bomb Scenario from reading.**

This sort of scenario places torture in almost a heroic light,,, we saved the little girl,,, or saved metropolis.

If accepted, we have cut through the absolute prohibitionist position,,, and are merely haggling over the limits

### **Problems w/ Ticking Bomb scenario:**

What if you are not sure the suspect really knows anything?  
How much do we torture him? Water board? Beat? Electric shocks? Threat to kill? Family? Torture his family in front of him?  
How long do we do this?

W/ or W/out torture, This is a real concern in Gitmo,,, who do we keep? For how long?

### **What amounts to an emergency for which torture is justified?**

Destruction of NY?/ Durham? Vanceboro? Location of a valuable target in Iraq?

Who decides when and how much torture?

President? (Is that reasonable of appropriate?)

If not the pres,,, then who? Congress make law?

Authorization from a Fed judge? Alan Dershowitz advocates this position,, based on necessity.

Problem that in all likihood any policy will lead to stretches in application.

Problem w/ mistaken torture of innocents.

**Would Japanese be justified in torturing American captive to find out about the enola Gay plans?**

**Arguments against Torture for intelligence gathering:**

Cruelty is wrong under any circumstance

Long term Political cost outweighs most situational benefits

Unreliable info

Hardens enemy's will to fight

Worse treatment for our captives (could it be any worse?)

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NAVAL WAR COLLEGE  
Newport, R.I.

FORUM SHOPPERS BEWARE: THE MISMATCH BETWEEN THE  
MILITARY TRIBUNAL OPTION AND UNITED STATES NATIONAL  
SECURITY STRATEGY

by

Lieutenant Colonel, United States Marine Corps

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

1 March 2002

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## Introduction

Americans reacted to the events of September 11, 2001 in true American fashion. First, individuals on the scenes of the attacks at the World Trade Center and the Pentagon engaged in heroic and selfless rescue efforts on behalf of those injured or in harm's way. Next, as the dust settled, and as lifetimes of mourning began, we started planning and acting to prevent further acts of international terrorism, to identify the wrongdoers and administer justice. On November 13, 2001 President Bush surprised most observers by announcing the authorization of military tribunals for the trial of crimes associated with terrorism against the United States by members, aiders or abettors, or coconspirators of the organization known as al Qaeda.<sup>1</sup> Support for the president's overall handling of the terrorist crisis has been extremely high. The executive order regarding the tribunal option, however, has engendered ongoing criticism.<sup>2</sup> Immediate concerns were raised by domestic experts from a variety of disciplines concerning the constitutionality of the prospective tribunals and their implications with regard to civil liberties in the United States. Subsequently, the debate expanded to include international concerns about both the fairness of the prospective proceedings, and the treatment of potential defendants held by United States forces in Guantanamo Bay, Cuba.<sup>3</sup>

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<sup>1</sup> President Issues Military Order: *Detention, Treatment, and Trial of Certain Non-Citizens in War Against Terrorism*, White House News Release, ([www.whitehouse.gov/news/releases/2001/11/20011113-27.html](http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html)) January 17, 2002

<sup>2</sup> The criticism has transcended traditional party and ideological lines. See generally, Walter Shapiro, *Bush's Military Tribunal Order Needs More Polish*, ([www.USAToday.com/news/e98/shapiro](http://www.USAToday.com/news/e98/shapiro)) January 17, 2002). Former President Carter also added his voice to those criticizing the executive order, stating that he was "deeply concerned" the United States could weaken its international reputation and its ability to work for peace following the Afghanistan conflict. Ben Fox, *Former President Carter Criticizes Military Tribunal Plan*, *The Sacramento Bee*, December 6, 2001.

<sup>3</sup> Mackubin Thomas Owens, *Consider the Latrunculi: Detainees or Prisoners of War?* *The Providence Journal*, January 25, 2002.

Since announcing the tribunal authorization, the White House has campaigned steadily on behalf of the operational necessity of the tribunal option, and the Department of Defense has described evolving tribunal rules that will provide substantially more procedural safeguards than were originally envisioned by tribunal critics. Considerable effort has also been expended to convince onlookers that the treatment of detained suspects is appropriate in light of practical security concerns. Unfortunately, the procedural fairness of the prospective tribunals and the precise conditions of the suspects' "pretrial confinement" are transient concerns that may be obscuring policymakers view of matters of more enduring importance. With all the fuss about matters ranging from rules of evidence to curtains for jail cells, little discussion has been afforded to the fundamental mismatch between the proposed *ad hoc* nationalistic proceedings and the United States' broader National Security Strategy.

One cause of this "non-discussion" is the fact that the Bush Administration has not clearly defined its national security strategy in classical terms. Analysis of the United States' method of operation in the international arena in the recent past, however, describes a *de facto* strategy of cooperative selective engagement. In accordance with this pattern, President Bush's call for international unity against terrorism implies an intent to both help and depend on other nations to address a long-term transnational problem. A unilateral decision to employ nationalistic military tribunals on the other hand is more reflective of a national security strategy of primacy. And while the United States can surely do as it wishes with regard to the impending prosecution of al Qaeda terrorists, American policy makers should more fully consider whether the benefits of self-interest in this case will justify jeopardizing the potential for international cooperation in the

difficult times ahead.

*National Security Strategy and the War Against Terrorism*

The decision concerning the proper forum for prosecuting allegations of misconduct associated with international terrorism is simultaneously driven by specific circumstances and broader questions of national security affairs. If the campaign against international terrorism is viewed as a war effort, then several fundamental concepts of military theory are relevant to the analysis. Foremost is the precept that in wartime decision making, furtherance of policy aims must dominate over expedience in the realm of operational strategy.<sup>4</sup> Stated differently, plans for dealing with specific situations, even extraordinary situations, must be in accord with broader concepts of war aims that transcend the factual boundaries of any single operation or campaign. This is especially true if the war aims are extensive, or if the war is expected to be lengthy in nature, or if the war involves collaboration with other nations who enter a coalition with their own varied sets of political expectations and pressures. History provides ready examples of arguably good strategic decisions that proved disastrous to war efforts because of a mismatch between the effects of situational strategic action and the broader aims of the implementing nation

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<sup>4</sup> Carl von Clausewitz, one of the founders of modern strategic studies wrote: "Strategy is the use of the engagement for the purpose of the war. The strategist must therefore define an aim for the entire operational side of the war that will be in accordance with its purpose. In other words, he will draft the plan of the war, and the aim will determine the series of actions intended to achieve it: in fact, shape the individual campaign and, within these, decide on the individual engagements." Carl von Clausewitz, *On War*, translated and edited by Michael Howard and Peter Paret, Princeton, Princeton University Press, 1976, p.177. See generally, Mackubin Thomas Owens, "Thinking About Strategy," Chapter 28 of *Strategy and Force Planning*, 3d ed., Newport, Naval War College Press, 2000.



or coalition.

For example, the Japanese decision to bomb Pearl Harbor reasonably furthered Japan's strategic interest in severely damaging the American battle fleet. By late 1941, military officials in Japan had determined that war with the United States was inevitable. Japanese leaders assumed that their program of expansion in order to secure the resources of Southeast Asian territories would soon prompt a military response in defense of Anglo-American interest in that same area. Japan had previously defeated a nation of superior size and resources in the Russo-Japanese war following a surprise attack of the Russian fleet at Port Arthur. That surprise attack was followed by a relatively short war, of limited effort, that led to a negotiated peace on terms very favorable to Japan. With this blueprint for success apparently validated, the Japanese decided that a strong first strike at Pearl Harbor could lead to a similarly short war and negotiated settlement with the United States.

Unfortunately for the Japanese, they failed to recognize that several factors made a limited engagement and negotiated settlement with the United States a fanciful outcome. First, the Japanese had allied themselves with the Nazi regime that was pursuing a war of unlimited aims against the United States and its allies. Additionally, well before Pearl Harbor, the United States had agreed with the British at the ABC Conference that in the event of war with both Germany and Japan, the Anglo-American alliance would pursue complete defeat of their enemies before agreeing to termination of hostilities.<sup>5</sup>

The same historical setting also provides an example of how subordination of

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<sup>5</sup> See generally, Richard Overy, *Why the Allies Won*, New York, W. W. Norton & Company, 1995, pp. 248-55.

immediate strategic preferences in the name of adherence to collective war aims has redounded to the benefit of the United States. Following the bombing of Pearl Harbor there was significant interest in military, political and popular circles for an immediate and full effort against the Japanese in the Pacific theater. Despite these pressures, however, President Roosevelt abided by the agreements previously made with the British at the ABC Conference to work together to "defeat Germany first" before engaging in full scale offensive operations in the Pacific. Adherence to this larger war aim, despite the shock and resulting anger occasioned by the Pearl Harbor attack, is credited by historians as being a key factor in the Grand Alliance's ability to prevail over the combined forces and considerable momentum of the axis of evil in World War II.<sup>6</sup>

Regardless of the forum choice, the trial of alleged terrorists is not an end unto itself. Any prosecution of Osama Bin Laden, or any number of his associates or followers, should be considered for what it would be, that is, one small part of a larger war against the phenomena of international terrorism. In the grand scheme of things, al Qaeda is the current symptom, and international terrorism is the disease. At this point, al Qaeda may be an essentially vanquished foe. The threat to national security posed by international terrorism, however, persists.<sup>7</sup> As such, any decisions for dealing with the prosecution of al Qaeda members should not be dealt with as an end unto themselves, but rather as a small piece of the larger problem. Additionally, actions with regard to the terrorists as an immediate concern must be in accord with the national security strategy for dealing with

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<sup>6</sup> *Id* at 314-25.

<sup>7</sup> Although al Qaeda is not a typical participant in a classical war scenario, concern for the post war implications of the victor's actions should still exist. We should recall Carl Von Clausewitz's observation that the results of war are never final. See Clausewitz, *On War*, *supra* note 4 at 80.

the terror threat in the long term.

Four generally recognized grand strategies compete in the public discourse to describe the United States approach to international security issues: neo-isolationism; selective engagement; cooperative security; and primacy.<sup>8</sup> None of these grand strategies provide a template for determination of subsequent strategic choices in the face of unfolding world events. Identification of a national grand strategy does, however, provide a helpful compass bearing to facilitate unity of effort between military, diplomatic and economic instruments of state and prevent counterproductive action in the name of situational expedience. Without reference to an identified grand strategy, security matters are more likely to be dealt with sequentially, incrementally and, alas, inconsistently.<sup>9</sup>

As was the case with the Clinton administration and his father's administration, the current President Bush has avoided articulation of a national security strategy in classic grand strategy terms. Positive "spinmeisters" for the administration might argue this non-policy allows for appropriate strategic flexibility in a complex world. Unfortunately, such deliberate ambiguity provides little in the way of a guiding principle for real life matters such as military procurement decisions, or when to employ the use of military forces, or whether to conduct *ad hoc* nationalistic tribunals for alleged acts of criminal misconduct associated with international terrorism.

The words of the past several administrations do not provide a clear description of the

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<sup>8</sup> Barry R. Posen and Andrew L. Ross, "Competing Visions for U.S. Strategy," *International Security*, 21:3, Winter 1997, reprinted in *Strategy and Force Planning*, 3d Edition, Naval War College Press, Newport Rhode Island, 2000, p. 137. Professors Posen and Ross provide a full description of these four classic grand strategies and suggest that selective engagement is the proper choice for the United States in the post cold war era.

<sup>9</sup> *Id.* at 138.

United States' grand strategy. Analysis of the United States' method of operation in the international arena over the past several years, however, describes a *de facto* national security strategy of cooperative selective engagement. In cases ranging from Iraq's invasion of Kuwait to ethnic and nationalistic wars in the former Yugoslavia and Kosovo, to the current operations in Afghanistan, the United States has chosen to use military force only in cases affecting United States national interest and only within the framework of a coalition of nations. Given the vast disparity in resources between the United States and most of its coalition partners, often the United States' most significant gain in a coalition agreement comes in the form of international legitimization for its course of planned operations. For while the United States may have sufficient resources to periodically conduct a wide range of limited operations, we have apparently been unwilling to risk the cost of major regional confrontations that might result if we acted without proper political isolation of our chosen adversaries.

Selective engagement strategy is realist in nature in that it recognizes that defense resources are scarce. As a practical matter, it is not economically feasible for the United States to muster sufficient power to unilaterally maintain international stability for a sustained period of time.<sup>10</sup> Pursuing a selective engagement strategy in a collaborative fashion recognizes that that Americans would be unwilling to sufficiently increase contributions in terms of lives or money such that the United States could assume global police duties or single-handedly dominate the world to force acceptance of sustained

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<sup>10</sup> *Id.* at 145.

United States primacy.<sup>11</sup> Accordingly, the United States has chosen to conduct military operations by coalition as a matter of routine.

By design, the modern coalition system is more responsive and flexible than earlier generations of cooperative alliance systems. And while movement away from a structured set of alliances arguably lessens the possibility of a nation being dragged into an unwanted conflict,<sup>12</sup> the flexibility of *ad hoc* coalition politics carries with it the need to remain sensitive to the concerns of potential coalition partners. This is especially true in the case of the looming long-term effort against international terrorism wherein the list of potential coalition partners spans a broad range of political, cultural and religious fault lines.<sup>13</sup>

Noted political scientist James N. Rosenau's "funnel of causality" theory described five general categories of factors that influence a nation's foreign policy decision making. They are: the external (global) environment; the societal environment of the nation; the governmental setting; the roles played by the central decision-makers; and the individual characteristics of the foreign policy making elites.<sup>14</sup> The external environment category draws attention to the reality that United States behavior will be viewed by other nations through different lenses than through those which it is perceived by members of the American society. This theory also recognizes, and should remind us, that policy decisions in the international realm affect a variety of stakeholders whose interests *and*

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<sup>11</sup> *Id.*

<sup>12</sup> See generally World War I.

<sup>13</sup> Samuel Huntington has argued that international politics will increasingly be dominated by conflicts between civilizations instead of between nations or political ideologies. See generally Samuel P. Huntington, *The Clash of Civilizations?* *Foreign Affairs*, Vol. 72, No. 3, Summer 1993, pp. 22-49.

<sup>14</sup> Charles W. Kegley Jr. & Eugene R. Wittkopf, *American Foreign Policy: Pattern and Process*, St. Martin's Press, New York, 1987, pp. 11-31.

*responses* often extend well beyond the apparent boundaries of a current policy issue.

The foreign policy decision making process operates best when the combination of societal, governmental role and individual sources bring a full range of viewpoints into a debate that are considered along with the predicted responses of external actors. The emotionally charged events of September 11th have created an extraordinary level of political unity within the United States. Unfortunately, what may be described as a powerful blend of domestic anger, urgency, solidarity and determination have also introduced a damaging measure of group think and narrow-sightedness into the decision making process. Reasonable concerns that should exist about international disapproval of an *ad hoc* military tribunal process have been swept aside or lost in less valid debates over the legality of such proceedings under United States law or the classification of the potential defendants during their pretrial detention in Cuba.

*It Is Better to Look Good Than to Feel Good*

The United States operates effective criminal and military justice systems that have been constructed and improved over the course of hundreds of years. Yet at a time when international credibility is a valuable commodity, the Bush administration has directed creation of an *ad hoc* trial process whose results will certainly be criticized regardless of their actual efficacy. Putting the relatively ancient cases of Nazi saboteurs and Lincoln assassins aside, the idea of trying alleged terrorists at military tribunals was first raised by then Attorney General William Barr following the 1988 bombing of Pan Am Flight 103

over Lockerbie, Scotland.<sup>15</sup> At that time, however, prospect of military tribunals was never a realistic possibility. Even when the suspects were identified as Libyan intelligence agents, they remained under Libyan protection for years until an agreement was reached that the trial be conducted by a panel of Scottish judges at a neutral national site in the Netherlands. Importantly, however, a negotiated international agreement on a trial forum was reached and ultimately a joint trial was concluded in January, 2001 with one of the suspects being found guilty of charges related to the bombing and one suspect being found not guilty.<sup>16</sup> The convicted terrorist received a 20-year prison sentence.

The military tribunal option was also not employed for the prosecution of the first World Trade Center bombing suspects. Following the February, 1993 truck bomb attack, six co-conspirators hailing from several middle eastern nations were prosecuted in New York's Federal District Court. All six were convicted of charges stemming from the conspiracy, and all received the same 240-year prison term and \$10 million dollar fine.<sup>17</sup>

In the wake of the September 11th attacks, the Former Attorney General again floated the military tribunal option through his contacts in the younger President Bush's administration.<sup>18</sup> The tribunal option was seen as a vehicle to address several concerns associated with possible prosecution of alleged terrorists in the forthcoming campaign against international terrorism. Given the nature of the likely defendants' al Qaeda connections, it was feared that a federal district court trial would place judges and civilian

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<sup>15</sup> Michael Isikoff & Stuart Taylor Jr., *Justice in the Shadows*, Newsweek, November 26 2001, p. 39.

<sup>16</sup> Raju Chebium, *From Lockerbie to Camp Zeist: The Pan Am 103 Trial*, CNN.com ([www.europe.cnn.com/LAW/trials.and.cases](http://www.europe.cnn.com/LAW/trials.and.cases)), 4 February 2002

<sup>17</sup> *Last World Trade Center Bombing Conspirator Sentenced*, CNN.com ([www.europe.cnn.com/US](http://www.europe.cnn.com/US)), 4 February 2002

<sup>18</sup> Isikoff & Taylor, *supra* note 15.

jurors at too great a risk.<sup>19</sup> Concerns were also raised about the admissibility of evidence gathered by the intelligence community and the ability of Federal Prosecutors to secure convictions within the framework of the Federal Rules of Evidence.<sup>20</sup> Finally, there was a concern that disclosure of intelligence information in an open court would compromise the long-term anti-terrorism campaign.<sup>21</sup>

It is unclear what level of staffing preceded the adoption of the tribunal executive order. It is clear, however, that the administration rushed to get the initial announcement of the option in place. By the beginning of November 2001, President Bush was pressing his staff to get the tribunal process rolling "before things started going well [in Afghanistan.]"<sup>22</sup> Although it is reportedly the final product of 18 preliminary drafts, the tribunal authorization order displays a striking lack of concern for the appearance of propriety in the contemplated trial process. After a brief restatement of the obvious that international terrorism poses a continuing threat to the United States and its allies, the President simply states "that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."<sup>23</sup> This is not a measured proclamation that certain rules of law and practice will have to give way to unusual concerns that may be presented in the trial of alleged terrorists. To the contrary, the order essentially states that even basic notions of due process (the legal word for fundamental fairness) will not be a required element in the tribunal process.

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<sup>19</sup> *Id.*

<sup>20</sup> Josh Tyrangiel, *And Justice For . . .*, *Time*, November 26, 2001

<sup>21</sup> Isikoff & Taylor, *supra* note 15.

<sup>22</sup> Tyrangiel, *supra* note 20.

<sup>23</sup> Presidential Order Section 1(f)



In a special report issued shortly after the announcement of the tribunal option, David Scheffer critiqued what he viewed as the eight viable options for prosecuting international terrorists.<sup>24</sup> The options include: U.S. Federal Court; U.S. Military Court (Courts-Martial); U.S. Military Commission (the tribunal option); Foreign National Court (like the use of the Scottish courts for the Pan Am Flight 103 cases); United Nations Security Council *Ad Hoc* International Criminal Tribunal (like the on-going proceedings arising from events in the former Yugoslavia and Rwanda); a coalition treaty-based criminal tribunal (like the Nuremberg or Tokyo tribunals following World War II); a special Islamic Court; or UN administered courts in Afghanistan.<sup>25</sup>

Scheffer's report describes the benefits and difficulties associated with each of the forum options. He properly points out that an analysis of a forum option includes not only an assessment of the effectiveness of a trial system, but also a determination of the political implications of its use. For example, although there is great appeal in extending the jurisdiction of the existing United Nations war crime tribunals to encompass the prosecution of alleged al Qaeda terrorists, there would be "enormous pressure from certain governments to [then] extend jurisdiction of the terrorist tribunal to all coalition

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<sup>24</sup> David Scheffer, *Options for Prosecuting International Terrorists*, United States Institute of Peace: Special Report, (www.usip.org) November 14, 2001. David Scheffer is a senior fellow at the United States Institute of Peace and formerly U.S. Ambassador at large for war crimes issues (1997-2001). Scheffer was deeply engaged in the negotiation and establishment of international criminal tribunals for the former Yugoslavia, Rwanda, and Sierra Leone. He also led the U.S. delegation to United Nations talks on the permanent International Criminal Court.

<sup>25</sup> It is worthy of note that what may be the ideal forum, a permanent International Criminal Court (ICC), is not a option for the near term prosecution of international terrorists. The forthcoming ICC's jurisdiction applies only with respect to crimes committed after the effective date of its treaty-based statute, which has not yet occurred. Additionally, the current provisions of the ICC statute apply only to war crimes, and not to acts classified as terrorism. See generally Jerry Fowler, *Not Fade Away: The International Criminal Court and the State of Sovereignty*, 2 San Diego International Law Journal, 125 (2001). See also Rome Statute of the International Court, Rome, 17 July 1998.

military actions in the campaign against terrorism and to the conduct of Israel in the Middle East."<sup>26</sup> Similarly, even if a special Islamic court could provide reliable assurances of effective prosecutions in the current situation, United States acceptance of such a forum could prove problematic if that court then sought to apply its jurisdiction to United States or Israeli citizens for alleged terrorist activities.

A full discussion of the various forum options is beyond the scope of this essay. Scheffer's report concludes that the practical and political problems associated with the United Nations, coalition and foreign court options leave the United States national court options as the most viable alternatives for potential prosecutions.<sup>27</sup> While that conclusion may be happily in accord with United States policy makers wishes to retain as much control over the proceedings as possible, the political implication screening discussed above should still be applied to the selection of a particular United States national trial process. In this regard, debates about the ultimate or actual fairness of these proceedings largely miss the point.<sup>28</sup> The current campaign against terrorism is not about any single case or set of cases that may be prosecuted in the days to come. Instead, the issue at hand is a contest between the world's civilized societies and lawless organizations who seek to disrupt the coalescence of different cultures into a peaceful and productive world community. Accordingly, it is not sufficient that the guilty are convicted in a relatively

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<sup>26</sup> Scheffer *supra* note 24 at 10.

<sup>27</sup> *Id.* at 13-14.

<sup>28</sup> Another less relevant point that consumes much public debate is whether the alleged terrorist "deserve" the level of procedural due process afforded defendant's in the U.S criminal justice system. Vice President Cheney has flatly stated "They don't deserve the same guarantees and safeguards that we use for an American citizen." Bryan Robinson, *Due Process or Star Chamber?* (ABCNEWS.go.com/sections/us/DailyNews/military-tribunals) January 17, 2002. In the midst of trying to develop a unified world effort against international terrorism, it seems counterproductive to declare a flat double standard for the trial of United States and foreign citizens.

fair trial. In order for a long-term victory over terrorists to be achieved, the trial process must appear to be fair and not simply the result of the United States' obvious ability to have its way.

*Even a Good Military Tribunal is a Bad Idea*

Whether alleged terrorists are tried in U.S. military courts, or military commissions, or U.S. Federal District Court, claims of "hometown" or "victors" justice are sure to be attached to the proceedings. That being said, the platform of likely critics of American action in this regard can be significantly weakened by selecting the national forum least susceptible to serious jurisprudential criticism. The United States Federal District Courts are the best option emerging from this sort of analysis.

The Bush Administration argument in favor of the tribunal option appears to be most firmly rooted in an understandable desire to secure the conviction of people who really are guilty of serious crimes and a concurrent desire to safeguard classified information. Any lawyer would agree that there is a "risk of litigation" inherent in any trial process. Assuming, however, that each of the established United States justice systems conduct effective trials, the results of prosecutions in the several national forum options should be largely the same. As a practical matter, the military rules of evidence used in court-martial practice are a near verbatim reflection of the federal rules of evidence used in federal district courts. In turn, notwithstanding the tribunal executive order's ill-advised repudiation of the applicability of principles of law and generally recognized rules of evidence, it is likely that the rules finally adopted for the conduct of any U.S. military

tribunal will be largely in accord with fundamental jurisprudential principles.<sup>29</sup> For example, preliminary reports about draft tribunal rules indicate that: defendant's will have the right to counsel, defendants will have the right to appeal; the presumption of innocence will apply until an accused is proven guilty beyond a reasonable doubt; and that except for portions wherein classified material will be discussed, tribunal sessions will be open to the public.<sup>30</sup> The "public trial" aspect of civilian proceedings also gives way in the case of classified material. Classified information is already protected from disclosure in civilian trials by the Classified Information Procedures Act.<sup>31</sup>

One specific concern voiced about conducting the al Qaeda prosecutions in federal district court has to do with the admissibility of evidence gathered by intelligence agencies. The argument suggests that much intelligence information is "inadmissible hearsay" and that the government might have a hard time proving its case in an established national court forum.<sup>32</sup> As a practical matter however, the application of the hearsay rule in United States courts has become increasingly flexible. There are numerous longstanding exceptions to the rule's general prohibition against the use of out of court statements. Additionally the now codified residual hearsay exception common to both the Federal Rules of Evidence and the Military Rules of Evidence provides for the admission of evidence that would have at one time been considered hearsay but is: (A)

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<sup>29</sup> *Tribunals Might Offer the Right to Appeal*, The Providence Journal, December 28, 2001. In this article, Eugene Fidell, President of the National Institute of Military Justice (and periodic critic of the United States Military Justice system) is quoted as saying that the then current drafts of tribunal procedures "go a considerable distance toward meeting the concerns that have been voiced [about the tribunal process]." The procedures are being developed by the Defense Department's General Counsel's office, in consultation with the White House, the State Department, the Justice Department and outside experts.

<sup>30</sup> *Id.*

<sup>31</sup> Title 18 U.S. Code, section 798.

<sup>32</sup> Isikoff and Taylor, *supra* note 15.

offered as evidence of a material fact; (B) more probative on point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and (C) the interests of justice will be best served by admission of the statement into evidence.<sup>33</sup> Given the increasingly open nature of United States trial practice in this regard, one former federal prosecutor has commented: "It's almost inconceivable that a military tribunal could allow evidence to be admitted more easily and still claim to be fair."<sup>34</sup>

Beyond the rules issue, tribunal advocates also suggest that civilian judges and juries should not be endangered by participation in a trial process involving international terrorists. This sort of argument cannot survive even superficial scrutiny. The successful use of civilian judges and juries in years of organized crimes prosecutions, not to mention the first World Trade Center bombing case, suggests that the existing United States criminal justice system does not have to be put aside simply because the potential defendants have scary friends. For when the Executive Branch substitutes a panel of military officers in the civilian judge or jury's role as trier of fact, a number of irrefutable appearance issues are created.

If one is unsure about whether military tribunals will have credibility problems in the international community, one need only consider the plight of traditional military justice practice in our own country. The United States court martial system is a virtual mirror of federal district court in terms of its rules of evidence and burden of proof. The rules of

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<sup>33</sup> Federal Rule of Evidence 807, Residual Exception.

<sup>34</sup> James Orenstein, *Rooting Out Terrorists Just Became Harder*, New York Times, December 6, 2001. James Orenstein is a former federal prosecutor and was associate deputy attorney general from 1999 to 2001.

procedure governing United States courts-martial are created by the Congress and have been regularly validated during appeals of courts-martial cases to the United States Supreme Court. However, despite the sound institutional foundation and certification of the United States courts-martial practice, the system is still subject to chronic criticism and mistrust within our own country because of the lack of clear systemic independence for military judges.<sup>35</sup> Military judges are appointed by the judge advocates general of the respective armed service and operate outside normal military chains of command during their judicial assignments. However, all military judges are subject to return to duty under the authority of the same commanders against whom some of their rulings may have been rendered. Not insignificantly, these commanders also comprise much of the pool of senior officers who sit on promotion boards that will consider the military judges' records for promotion during or after the officers' judicial assignments have been completed. This same apparent lack of independence will exist for any military officers appointed as judges or panel members for the prospective military tribunals.

In reality, there is no evidence that the military judge appointment and evaluation system has any actual effect on the fairness of military trials or the decision making process of military judges. However, despite the Department of Defense's own confidence in the integrity and professionalism of its military judges, this aspect of the military justice system is repeatedly attacked by critics of the system.<sup>36</sup> Once this discussion is taken beyond the friendly confines of the United States, this sort of criticism

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<sup>35</sup> See generally Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 Wake Forest L. Rev. 1213, (Winter, 1997); Fredric I. Lederer and Barbara S. Hundley, *Needed: An Independent Military Judiciary - A Proposal To Amend The Uniform Code Of Military Justice*, 3 Wm. & Mary Bill of Rts. J. 629, (Winter, 1994)

<sup>36</sup> *Id.*

will only increase. On the other hand, although it is still a national trial process, the Federal District Court system has a significant leg up on any sort of military adjudication system in that Federal District Court judges have lifetime tenure. Similarly, civilian juries who are selected from and return to private lives are immune from claim of working for the same company as the prosecutor. It should be stressed that none of this suggests that Federal District Court proceedings are any fairer, or better than a military court-martial. But in the world of international politics and coalition building, improper perceptions and appearances are a reality that cannot be dismissed simply due to a lack of evidence.

*Just Because You Can, Doesn't Mean You Should*

Unnecessary use of military tribunals in the face of reasonable international criticism is an ill-advised move toward unilateralism at a time when the long term campaign against international terrorism requires more than United States leadership. The shock of September 11th may reasonably cause policymakers to view international terrorism through a lens of temporal urgency. But the solution is not as simple as finding and punishing, or even killing, Osama Bin Laden and all the people associated with perpetration of the events of September 11th. In dealing with the terrorists *de jure*, we must not allow current operations to compromise our ability to deal with a broad range of international partners in the cases of other existing or future terrorist entities.

Although not clearly defined by the Bush administration, America's *de facto* grand strategy for crisis resolution of national security issues is one of selective engagement

supported and legitimized by formation of *ad hoc* international coalitions. Our continuing ability to attract support from nations across a wide cultural and political spectrum rests on the credibility of the United States as a fair and benign super power. Commentators have noted that part of the reason why a remarkable trans-cultural international coalition was able to be quickly constructed in the wake of September 11th was the perceived integrity of the United States in its stated intention to bring suspects to justice in courts of law.<sup>37</sup> This sort of credibility should be neither squandered, nor taken for granted.

Given the inextricable linkage between the war against terrorism and the prosecution of captured suspects, the forum choice for the trial of alleged terrorists should not be discussed as an issue unto itself. Credibility in international politics is often premised upon a series of apparently unrelated policy choices. For example one may reasonably argue that America's ability to gain the cooperation of moderate Islamic States such as Pakistan in the current anti-terror campaign was in large measure due to the elder President Bush's adherence to the limited Desert Storm coalition goals of expelling Iraqi forces from Kuwait. From an operational perspective, it is clear that on 27 February 1991, Gulf War coalition forces were well positioned to pursue fleeing enemy forces into Iraq and possibly even to occupy Baghdad and attempt to force the removal of Saddam Hussein from power. Instead, the hostilities were halted on what some authorities perceive to be unnecessarily favorable terms for Iraq that allowed Saddam Hussein to remain in power as a continuing threat to stability in the region. After the war, the elder

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<sup>37</sup> Scheffer, *supra* note 24 at 2.



President Bush himself stated that he had miscalculated in thinking that the crushing defeat suffered by Iraqi forces and the domestic upheaval within Iraq would lead to the toppling of Saddam's government without further action by the United States. However, this sort of Monday morning quarterbacking overlooks a number of points that made the Gulf War a successful limited war and a stable foundation for other limited actions by the United States in cooperation with Muslim nations.

As will hopefully be the case in the terror war, a significant aspect of the United States' success in the Gulf War was the formation and maintenance of a coalition that spanned a broad political, religious and ideological spectrum. The Gulf War coalition was an unlikely collaboration of effort, based on pursuit of limited objectives that did not include the removal of Saddam Hussein from power or the invasion of Iraqi territory.<sup>38</sup> Even though the United States may have wished for more, agreement on these objectives obtained world-wide political legitimacy for the coalition's efforts and isolation of Iraq from its hoped for supporters.

On 27 February 1991, Saddam Hussein agreed to the demands issued by the relevant United Nations Security Council Resolutions.<sup>39</sup> The Iraqi's had been evicted from Kuwait and the sovereignty, independence and territorial integrity of Kuwait had been restored. If the United States had decided to unilaterally proceed into Iraq in March of 1991, it would have moved beyond its well formed plan of limited war in response to Iraqi aggression, and away from its well constructed scheme of United States led friends

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<sup>38</sup> See United State National Objectives declared 3 Aug 90; United Nations Security Council Resolutions 660 & 661.

<sup>39</sup> Michael R. Gordon & General Bernard E. Trainor, *The Generals' War*, Little, Brown and Company, 1995, p. 415.

versus an isolated Iraq.<sup>40</sup> The elder President Bush correctly resisted the temptation of operationally logical pursuit of retreating Iraqi forces in order to adhere to the limits of the Desert Storm coalition's stated war aim of expelling Iraqi forces from Kuwait. Shortsighted critics may persist in describing that decision as a missed opportunity. A longer view of events, however, suggests that United States restraint in that instance established a measure of credibility in the Islamic world that has proved valuable in attracting the support of moderate regimes in nations such as Pakistan in Operation Enduring Freedom. It is likely that moderate Muslim State cooperation would have been less forthcoming if the United States had undertaken unilateral pursuit into Iraq at the end of Operation Desert Storm.

#### *Conclusion*

*Careful students of world politics know that hegemony has never proven to be a winning strategy. . . . Until recently, American policymakers have acted as if the United States is somehow exempt from this pattern. But if recent events are any indication, this is wishful thinking.<sup>41</sup>*

Just as the United States had the power to proceed into Iraq in March of 1991, it now has the power to prosecute suspected terrorists in *ad hoc* military tribunals. And just as there was potential benefit in a unilateral offensive into Iraq, convictions might be more

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<sup>40</sup> In the subsequent Desert Fox operations, the thirty-four partner Desert Storm coalition was reduced to a two party US-UK partnership.

<sup>41</sup> Christopher Layne, *The Problem With Being No. 1*, The Washington Post, November 22, 1999.

easily secured and secrets more easily guarded in trials conducted by military tribunals. However, if we view international terrorism as a world issue in which we expect the assistance of others, we should resist the easy solution of conducting *ad hoc* proceedings just because we can. If we elect to conduct national trials instead of seeking an international forum, we should seek to maximize the appearance of fairness so as to limit avenues for complaint of victor's justice. The appearance of fairness may best be achieved by prosecution of terrorist suspects in United States Federal District Courts.

The members of al-Qaeda may or may not "deserve"<sup>42</sup> trials in a time-tested and jurisprudentially sound forum. However, the world-respected reputation of United States criminal courts has not been built nor maintained for the benefit of any evil person. For the benefit of rigorous due process is reaped not only by those that stand accused in our courts, but also by the larger portion of our society that never stand accused, but have trust and confidence in the fact that the government is both protecting them and being as fair as possible. The use of an established court system at this critical time should not be viewed as an action on behalf of accused terrorists, but rather as a representation to needed international partners that the course of our ship of state is steady, and properly charted for the rough waters ahead.

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<sup>42</sup> See *supra* note 28.



DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF DEFENSE COUNSEL  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620

February 5, 2007

MEMORANDUM FOR Maj M. D. Mori, USMC

Subject: Detailing as Defense Counsel in the Military Commission Case of *United States v. David Hicks*

Pursuant to Rule for Military Commissions 503(c), I hereby detail you as Defense Counsel in the military commission case of *United States v. David Hicks*.

A handwritten signature in black ink, appearing to read "D. H. Sullivan".

D. H. Sullivan  
Col, USMCR  
Chief Defense Counsel





DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF DEFENSE COUNSEL  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620

February 5, 2007

MEMORANDUM FOR Ms. Rebecca Snyder

Subject: Detailing as Assistant Defense Counsel in the Military Commission Case  
of *United States v. David Hicks*

Pursuant to Rule for Military Commissions 503(c), I hereby detail you as  
Assistant Defense Counsel in the military commission case of *United States v. David  
Hicks*.

A handwritten signature in black ink, appearing to read "D. H. Sullivan".

D. H. Sullivan  
Col, USMCR  
Chief Defense Counsel

Copy to:  
Maj M. D. Mori, USMC



UNITED STATES OF AMERICA

v.

DAVID MATTHEW HICKS

**Defense Motion**  
for Appropriate Relief

Prosecutorial Misconduct

19 Mar 2007

1. **Timeliness:** This motion is filed within the timeframe established by R.M.C. 905.
2. **Relief Sought:** Mr. Hicks requests this Court to Disqualify Colonel (“Col”) \_\_\_\_\_, Chief Prosecutor, Military Commissions, from exercising any prosecutorial or supervisory responsibilities with respect to Mr. Hicks’ case.
3. **Overview:** The Chief Prosecutor violated Section 949b(a)(2)(C) of the Military Commissions Act and Rule 3.4 of the Air Force Rules of Professional Conduct by attempting to “coerce or, by any unauthorized means, influence . . . the exercise of” Major (“Maj”) Mori’s “professional judgment” in the representation of his client. The Chief Prosecutor did so by alleging to a newspaper reporter and later to the Convening Authority that Maj Mori committed misconduct amounting to a violation of Article 88 of the Uniform Code of Military Justice and Department of Defense regulations. This conduct violates a “legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon” and is, therefore, prosecutorial misconduct.
4. **Burden of Proof:** The Defense, as the moving party, bears the burden of proof for factual issues by a preponderance of the evidence. Rule for Military Commissions (“R.M.C.”) 905(c)(2).
5. **Facts:**
  - a. On 3 March 2007, an Australian newspaper reported that Col \_\_\_\_\_, Chief Prosecutor for the military commissions, accused Maj Mori of violating Article 88 of the Uniform Code of

Military Justice (“UCMJ”) in the course of Maj Mori’s defense of Mr. Hicks.<sup>1</sup> To support this allegation, Col [redacted] told reporters:

“Certainly in the US it would not be tolerated having a US marine in uniform actively inserting himself into the political process. It is very disappointing to see that happening in Australia and if that was any of my prosecutors, they would be held accountable.”<sup>2</sup>

“Go back and look at some of the things he (Major Mori) has said. He’s on the defence side and he doesn’t seem to be held to the same standards of his brother officers.”<sup>3</sup>

b. The article also reported that “Col [redacted] said it would be up to the US Marine Corps to decide if charges should be laid.”<sup>4</sup> Another newspaper reported that Col [redacted] said “Major Mori was not playing by the rules and criticized his regular trips to Australia. He said he would not tolerate such behavior from his own prosecutors.”<sup>5</sup>

c. Two days later, on 5 March, Col [redacted] denied threatening Maj Mori with charges, incorrectly stating he did not have the power to charge Maj Mori.<sup>6</sup> At the same time, he implied Maj Mori had violated rules, stating “I would expect that of [Major Mori] or any defence counsel, to fight as hard as possible but I expect the fight to be within the rules.” The next day, “Col [redacted] stood by his allegation that Maj Mori had gone ‘too far’ in his campaign to free

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<sup>1</sup> See, e.g., David Nason, *Mori charges could be laid after trial*, THE AUSTRALIAN, Mar. 3, 2007 available at: <http://www.news.com.au/story/0,23599,21315542-2,00.html> (attachment A).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Tom Allard, *Hicks trial at risk if Mori taken off case*, THE AGE, Mar. 5, 2007, available at: <http://www.theage.com.au/articles/2007/03/04/1172943276209.html> (attachment B).

<sup>6</sup> Peter Veness, *Hicks facing another possible delay to trial*, AUSTRALIAN AP, Mar. 5, 2007, available at: [http://moora.yourguide.com.au/detail.asp?class=national%20news&subclass=general&story\\_id=562995&category=General&m=&y=](http://moora.yourguide.com.au/detail.asp?class=national%20news&subclass=general&story_id=562995&category=General&m=&y=) (attachment C); RULE FOR COURTS-MARTIAL 307, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) (“Any person subject to the code may prefer charges.”).

Hicks . . . ‘I certainly wouldn’t permit that from my folks,’ Col [redacted] said. ‘But, he’s not one of my folks.’”<sup>7</sup>

d. More than a week later, on 13 March 2007, Col [redacted] wrote a detailed email to the convening authority arguing that Maj Mori has repeatedly violated Article 88, UCMJ, and Department of Defense Directive 1325.6 since at least 19 November 2005.<sup>8</sup> Col [redacted] provided a dozen quotes from newspapers, which either quoted Maj Mori or attributed statements to him, that Col [redacted] claims violate Article 88.<sup>9</sup>

## 6. Law and Argument:

A unanimous Court of Appeals for the Armed Forces has found that “[p]rosecutorial misconduct is generally defined as ‘action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.’”<sup>10</sup> The Military Commission Act (“MCA”) sets forth the following standard: “No person may attempt to coerce or, by any unauthorized means, influence . . . the exercise of professional judgment by trial counsel or defense counsel.”<sup>11</sup> Rule 3.4 of the Air Force Rules of Professional Conduct provides that “A lawyer shall not knowingly disobey an obligation under the rules of a tribunal . . .”<sup>12</sup> An Air Force policy memorandum also explains that a lawyer should not “degrade the intelligence, ethics, morals, integrity or personal behavior of others, unless such matters are legitimately at issue in the proceeding.”<sup>13</sup> More generally, it is

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<sup>7</sup> *Mori won't be charged: Davis*, AUSTRALIAN AP, Mar. 6, 2007, available at: <http://www.worldnewsaustralia.com.au/region.php?id=135270&region=7> (attachment D).

<sup>8</sup> Email from Col [redacted] dtd 13 Mar 07 (attachment E).

<sup>9</sup> *Id.*

<sup>10</sup> *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)) (denying relief for claim of prosecutorial misconduct on basis that military judge’s curative action “secured the fairness and impartiality of the trial”); see also *Berger v. United States*, 295 U.S. 78, 84 (1935) (explaining prosecutorial misconduct occurs when the “prosecuting attorney oversteps the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense”).

<sup>11</sup> 10 U.S.C. § 949b(a)(2)(C).

<sup>12</sup> TSJ-2, AF Rule 3.4 of Professional Conduct (attachment F).

<sup>13</sup> TJAG Policy Memorandum, TJAGD Standards – 2, Air Force Rules of Professional Conduct and Standards for Civility, attachment 2, para. 28 (Aug. 17, 2005) (attachment G); cf. *United States v.*



the duty of a prosecutor “to refrain from improper methods calculated to produce a wrongful conviction.”<sup>14</sup> Accordingly, “[t]he government, which represents us all, should strive to be beyond reproach in the conduct of a prosecution; to expect less damages the sinews of our legal structure.”<sup>15</sup>

Col [redacted] has committed prosecutorial misconduct by violating the legal standard set forth in Section 949b(a)(2)(C) of the MCA. He attempted “to coerce or, by any unauthorized means, influence” Major Mori’s “exercise of professional judgment” in representing Mr. Hicks.<sup>16</sup> Col [redacted] did so by repeatedly accusing Maj Mori in the media of violating applicable rules.<sup>17</sup> He also attempted to exert command influence on Major Mori by suggesting the Marine Corps would decide whether Maj Mori would be court-martialed and by raising his allegations with the Convening Authority.

Furthermore, the curious timing of Col [redacted]’ initial accusations – the day after charges were referred – is revealing, particularly given that Col [redacted] alleges misconduct going back as far as November 2005. It suggests Col [redacted] made the allegations to chill and hinder Maj Mori’s representation of Mr. Hicks and to derail the defense shortly before the arraignment. These allegations diverted the defense team from preparing for Mr. Hicks’ trial, forcing them to focus instead on assessing the potential conflict of interest between Maj Mori and Mr. Hicks. They also required Maj Mori to refrain from making public comments on behalf of Mr. Hicks until he could obtain legal advice on the issue.

Col [redacted]’ conduct is even more appalling when one examines the merits of his claims. For example, “[i]f not personally contemptuous, adverse criticism of one of the officials or legislatures named in . . . [A]rticle [88] in the course of a political discussion, even though

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*Fletcher*, 62 M.J. 175, 181 (C.A.A.F. 2005) (finding prosecutorial misconduct where trial counsel made disparaging remarks regarding defense counsel in front of the members).

<sup>14</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>15</sup> *United States v. Horn*, 811 F. Supp. 739, 750 (D.N.H. 1992) (quoting *United States v. Ariza-Ibarra*, 651 F.2d 2, 17 (1<sup>st</sup> Cir. 1981)).

<sup>16</sup> See 10 U.S.C. § 949b(a)(2)(C).

<sup>17</sup> Cf. *United States v. Vavages*, 151 F.3d 1185, 1189 (9<sup>th</sup> Cir. 1998) (concluding it may be prosecutorial misconduct if “the prosecutor or trial judge employs coercive or intimidating language or tactics that substantially interfere with a defense witness’ decision whether to testify”).

emphatically expressed, may not be charged as a violation of the article.”<sup>18</sup> Nothing Maj Mori said was personally contemptuous – not to mention otherwise contemptuous -- of the President, Vice President or the Secretary of Defense. And Maj Mori’s statements are consistent with his obligation to exercise judgment “solely for the benefit of the client and free of compromising influences and loyalties.”<sup>19</sup> Col \_\_\_\_\_ doesn’t come close to alleging conduct that violates Article 88.<sup>20</sup> Additionally, the “particular facts” of Maj Mori’s mission and conduct show that he did not violate Department of Defense Directive 1325.6 as Col \_\_\_\_\_ alleges.<sup>21</sup>

One of Col \_\_\_\_\_’ statements to the Convening Authority reveals his motivation for attempting to quiet Maj Mori and it relates to the effectiveness of his representation, rather than the words he spoke: “MAJ Mori’s campaign is having a direct impact on the elected government of one of our closest allies in an election year and while they are supporting us in a war. An article in today’s Sydney Morning Herald notes that Prime Minister Howard is trailing in the polls and that David Hicks is a factor.”<sup>22</sup> Obviously, the effectiveness of Maj Mori’s representation of Mr. Hicks prompted Col \_\_\_\_\_’ attempt to chill that representation.

In addressing prosecutorial misconduct courts have considered disqualifying the prosecutor among other sanctions.<sup>23</sup> To remedy Col \_\_\_\_\_’ prosecutorial misconduct, this Court should relieve him of all prosecutorial and supervisory responsibilities with respect to Mr. Hicks’ case. Mr. Hicks should not be punished by (1) having to waive any conflict of interest that Col \_\_\_\_\_ created between Mr. Hicks and Maj Mori and proceed with Col \_\_\_\_\_ still involved in and

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<sup>18</sup> Manual for Courts-Martial, United States, Pt. IV, ¶12.c (2005 ed.).

<sup>19</sup> JAGINST 5803.1C, Rule 5.4(d) (comment), 9 Nov 04 (attachment H).

<sup>20</sup> Cf. *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967) (affirming conviction of contempt where the accused carries a sign at a demonstration calling the President a “facist” was personally contemptuous).

<sup>21</sup> DoDD 1325.6 ¶ 1 (1-Oct 96).

<sup>22</sup> App. E at 2-3.

<sup>23</sup> See, e.g., *United States v. Horn*, 811 F. Supp. 739, 752 (D.N.H. 1992) (“Courts faced with prosecutorial misconduct or violations of discovery rules have considered sanctions including granting a continuance, granting a new trial, disqualifying the prosecutor, imposing disciplinary sanctions on the offender, holding the offender in contempt, publicly chastising the offender and excluding evidence.”) (citations omitted).