

having influence over the process,²⁴ or (2) by having Maj Mori, who has represented Mr. Hicks for approximately three years, replaced with a brand new military counsel within months of trial whose representation may also be chilled by Col ' allegations regarding Maj Mori. "[J]ustice must satisfy the appearance of justice."²⁵ Any lesser remedy will deprive Mr. Hicks' trial of the appearance of fairness.

7. **Request for Oral Argument:** The defense requests oral argument. Oral argument is necessary to analyze the facts elicited from the witnesses requested. Furthermore, as provided by R.M.C. 905(h), "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."

8. **Request for Witnesses:** The defense requests the following witnesses:

Col , Chief Prosecutor, Military Commissions
David Nason

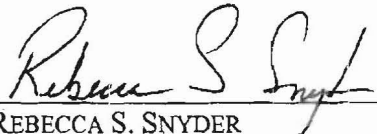
²⁴ Cf. *United States v. Ramos*, 350 F. Supp. 2d 413 (S.D.N.Y. 2004) (disqualifying defense counsel where the conflict was of the attorney's own making as opposed to prosecutorial misconduct).

²⁵ *Offutt v. United States*, 348 U.S. 11, 14 (1954).

9. **Attachments:**

- A) David Nason, *Mori charges could be laid after trial*, THE AUSTRALIAN, Mar. 3, 2007
- B) Tom Allard, *Hicks trial at risk if Mori taken off case*, THE AGE, Mar. 5, 2007
- C) Peter Veness, *Hicks facing another possible delay to trial*, AUSTRALIAN AP, Mar. 5, 2007
- D) *Mori won't be charged: Davis*, AUSTRALIAN AP, Mar. 6, 2007
- E) Email from Col dated 13 March 2007\
- F) TSJ-2, AF Rule 3.4 of Professional Conduct
- G) TJAG Policy Memorandum, TJAGD Standards – 2, Air Force Rules of Professional Conduct and Standards for Civility, attachment 2, para. 28 (Aug. 17, 2005)
- H) JAGINST 5803.1C, Rule 5.4(d) (comment)

By:


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Civilian Defense Counsel for David M. Hicks

Mori charges could be laid after trial

By David Nason
March 03, 2007 12:00am

Article from THE AUSTRALIAN

THE chief prosecutor of the US military has warned David Hicks's military lawyer, Michael Mori, that "politicking" on behalf of his client could result in charges under the Uniform Code of Military Justice.

"I don't know what Major Mori's plans are right now but if he wants to come back home and represent his client, that would be helpful," Colonel [redacted] said.

"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."

Colonel [redacted] said it would be up to the US Marine Corps to decide if charges should be laid.

He cited Article 88 of the code, which prohibits the use of contemptuous language against the President, Vice-President, Secretary of Defence and Congress.

"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," Colonel [redacted] said.

Major Mori would not discuss his comments regarding the military commission.

But he said the dropping of all original charges against Hicks was an admission by the US he had been held without justification for five years.

"The material support charge has never existed in the laws of war," Major Mori said.

"It was created in October 2006 and the US is applying this offence to David retrospectively, even though Australian ministers have said that is inappropriate.

"After five years, the US has not charged David with a single war crime. David has no hope of facing a fair trial, which would have been provided to an American a long time ago."

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Attachment A

Hicks trial at risk if Mori taken off case

Tom Allard
March 5, 2007

MAJOR Michael Mori, the defence lawyer for terror suspect David Hicks, could be removed from the case after threats from the chief US prosecutor to charge him under the Uniform Code of Military Justice.

The intervention may derail Hicks' trial and possibly prompt his return to Australia.

It would take months for a new lawyer to get to grips with the case and the new military commission process.

Prime Minister John Howard has told Washington that any action leading to further delays would be unacceptable and would prompt him to demand the return of Hicks, 31, after being held for five years at the US base at Guantanamo Bay.

Colonel [redacted] has accused Major Mori of breaching article 88 of the US military code, which relates to using contemptuous language towards the President, Vice-President or Secretary of Defence.

Penalties for breaching the code include jail and the loss of employment and entitlements.

Major Mori denied he had done anything improper, but said the accusations left him with an inherent conflict of interest.

"It can't help but raise an issue of whether any further representation of David and his wellbeing could be tainted by a concern for my own legal wellbeing," Major Mori told *The Age*. "David Hicks needs counsel who is not tainted by these allegations."

Major Mori, who has been to Australia seven times, will seek legal advice.

The issue will also have to be raised with Hicks when his legal team next sees him.

The Federal Government has highlighted Major Mori's work as proof of the fairness of the much-criticised US military commission system.

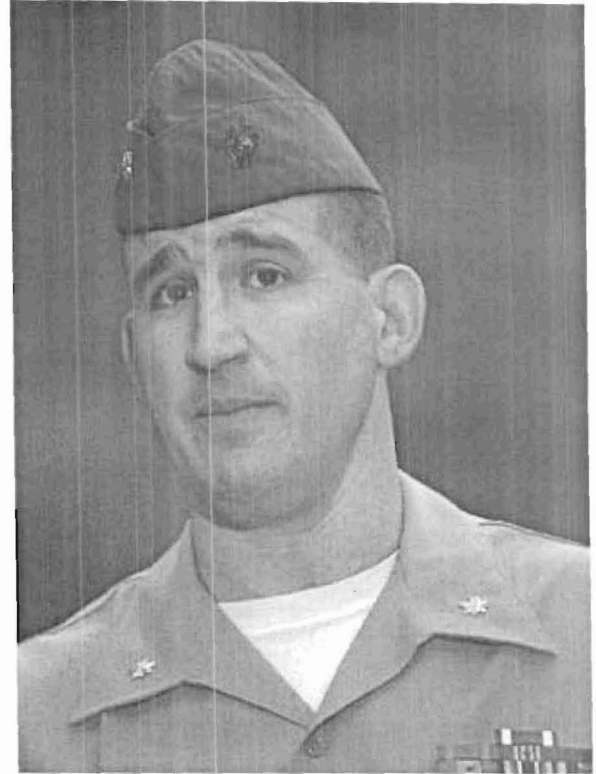
However, Colonel [redacted] said Major Mori was not playing by the rules and criticised his regular trips to Australia. He said he would not tolerate such behaviour from his own prosecutors.

"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," he reportedly said.

"He doesn't seem to be held to the same standards as his brother officers."

Hicks' lead defence counsel, Joshua Dratel, a New York attorney, said Colonel [redacted]'s threats were the latest

Attachment B



Mori: Accused of breaching military rules.

Photo: Craig Abraham

AE 15 (Hicks)
Page 9 of 26

example of the "corrupt" system that will try Hicks.

Mr Dratel pointed to the former senior Pentagon official in charge of detainee affairs, Cully Stimson, who resigned last month after urging businesses not to hire law firms that had worked for Guantanamo prisoners.

US prosecutors are under intense pressure to offer Hicks, a former kangaroo skinner and father of two, a plea bargain deal by the end of the month.

Senior Australian Government members want Hicks to come home a free man, provided he agrees to a pre-trial plea of guilty.

Amid rising public anger in Australia about Hicks' long wait for justice and alleged mistreatment, any Hicks trial risks becoming a public relations disaster. He is to be the first person to appear before a military commission.

The world's media will be focused on the case, including al-Jazeera and other Middle Eastern outlets.

They will hear graphic testimony of abuses and torture by US guards and interrogators. It will involve a man, Hicks, whose alleged offence pales alongside the serious accusations made against alleged senior al-Qaeda leaders at Guantanamo Bay.

Prosecutors have dropped three charges against Hicks — attempted murder, aiding the enemy and conspiracy to commit war crimes. There is now only the lesser charge of providing material support to a terrorist group. That charge did not exist for non-US citizens when Hicks was arrested.

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Attachment B

AE 15 (Hicks)
Page 10 of 26

Monday, 5 March 2007

Print | Close

Hicks faces another possible trial delay

By Peter Veness

Australian terror suspect David Hicks faces the prospect of yet another delay to his trial because his US lawyer has been threatened with court martial.

Last week Hicks was formally charged by the US with providing material support for terrorism and is due to face trial before a US military commission within four months.

But Hicks' outspoken military lawyer Major Michael Mori has said he could be pulled from the case for being too political and that could cause a further delay.

The chief US prosecutor, Colonel [redacted], has accused Major Mori of breaching Article 88 of the US military code by actively inserting himself into the political process.

That section relates to using contemptuous language towards the US president, vice-president, and secretary of defence.

Labor has called on the government to defend Major Mori or face the possibility of Hicks' trial being delayed again.

"If the Howard government does not intervene at this point, we face the prospect that Major Mori will not be able to continue to represent David Hicks in future," opposition legal affairs spokesman Kelvin Thomson told reporters.

"This will simply damage the defence case and the search for a replacement lawyer will add more delays to a situation where David Hicks has already been at Guantanamo Bay for over five years without a trial."

Prime Minister John Howard said any delay would be unacceptable.

"We would not regard a further significant delay as being acceptable," Mr Howard told the Nine Network.

However, Mr Howard refused to comment on the threat to Major Mori.

In the past, Attorney-General Philip Ruddock has strongly backed the vigorous defence of Hicks offered by Major Mori as proof the military commission system the US is using to prosecute suspected terrorists is appropriate.

"Extensive safeguards are in place for a fair trial, and of course, Major Mori is part of that process," Mr Ruddock said.

"I presume that other members of that process will bring the same diligent approach to their roles as Major Mori."

The Adelaide-born Hicks has been held in the US prison at Guantanamo Bay for five years without trial since his capture in Afghanistan in late 2001.

The Australian Lawyers Alliance said any charges against Major Mori would delay a trial.

"News that ... Major Mori could face charges ... for inserting himself into the political process would do nothing but create further delays for Hicks," alliance president Simon Morrison said.

Brought to you by AAP



Attachment C

CENTRAL MIDLANDS & COASTAL ADVOCATE
ADVOCATE
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Mori won't be charged: Davis

6.3.2007. 15:00:32

The US chief military prosecutor has denied reports he is moving to charge David Hicks' defence lawyer, Major Michael Mori, for being outspoken.

Colonel says he would be "dumbfounded" if the Australian terror suspect's lawyer was court-martialled for his comments.

Col said he had no power to charge him for contemptuous comments made against US President George W Bush, the US Secretary of Defence or Congress.



RELATED LINKS

- PM won't comment on Mori delay
- Hicks' trial possibly delayed
- Father may incriminate Hicks

The prosecutor also said he was not aware of any moves by US officials with that power to bring charges against Maj Mori.

There were fears that if he was court-martialled it would delay Hicks' long-awaited military commission trial.

"I'm not aware of anybody, anywhere that has any intention of charging Maj Mori with anything," Col said.

Col created headlines on the weekend when he suggested Maj Mori may have breached Article 88 of the US Uniform Code of Military Justice (UCMJ).

Article 88 prohibits military officers from using "contemptuous words" against the president, vice president, US secretary of defence or Congress.

Maj Mori, during numerous trips to Australia and in interviews in the US, has been a staunch critic of the military commission system to prosecute Hicks and other Guantanamo Bay inmates.

Mori has gone 'too far'

Col stood by his allegation that Maj Mori had gone "too far" in his campaign to free Hicks, including attending rallies dressed in US military uniform.

"I certainly wouldn't permit that from my folks," Col said.

"But, he's not one of my folks."

Asked if he believed Maj Mori should be court-martialled for breaching Article 88 of the UCMJ, Col said "it's not my decision".

"He's not in my chain of command," Col continued.

"I have no authority over him.

"I'm in the Air Force, he's in the Marine Corps.

"I'm not responsible for Major Mori."

Col said the origin of Article 88 can be traced back more than 200 years to the British Articles of War of 1769.

He said it was extremely rare for a military officer to be prosecuted for an alleged Article 88 violation.

Attachment D

"You can count the number of court martials for Article 88 violations on one hand," Col said.

"They are very uncommon.

"I would be absolutely dumbfounded if this kind of thing rose to that level."

Adelaide-born Hicks, 31, was charged last Thursday with providing material support for terrorism.

It is expected he will make his first appearance before the military commission at the US naval base at Guantanamo Bay, Cuba, in late March.

Hicks has been in US custody for more than five years after being picked up on the Afghanistan battlefield in December, 2001.

It is alleged Hicks trained and fought with al-Qaeda against US and coalition troops in Afghanistan.

SOURCE: AAP

<http://www.worldnewsaustralia.com.au/region.php?id=135270®ion=7>

Attachment D

From: , COL, DoD OGC
To: , DoD OGC
CC: DoD OGC ; Sullivan, Dwight, COL, DoD OGC
Sent: Tue Mar 13 10:25:59 2007
Subject: Criticism of Statements Made by Colonel

Ms

I do not want to prolong this, but now is as good a time as any to bring some clarity to this area of confusion. Let me also state that it is not now, nor has it been in the past, my intent to seek disciplinary action against any member of the defense team. My intent is to ensure we all understand what the law is and that we all abide by the law. This is admittedly a confusing area and my sole intent is to seek clarification.

I believe MAJ Mori's words and actions exceed what the law allows. Specifically, Article 88 of the UCMJ prohibits using contemptuous language against certain civilian officials and DoDD 1325.6 prohibits service members from participating in demonstrations while on duty, in uniform, or in a foreign country. There are no defense counsel exemptions in either case and I believe COL Sullivan's reliance on the Rules of Professional Conduct to absolve MAJ Mori's conduct is misplaced.

Taking those points in reverse order. The underlying principles upon which the Rules of Professional Conduct are based (set out on page 12 of Navy JAGINST 5803.1B, which apply to COL Sullivan and MAJ Mori) state: "Ethical rules should be consistent with the law. If law and ethics conflict, the law prevails unless an ethical rule is constitutionally based."

The law, as expressed by statute in Article 88, is that officers may not use contemptuous language against the President, Secretary of Defense, the Congress, and others. The military judge's benchbook defines contemptuous language as language that is insulting, rude, or disrespectfully attributes qualities of meanness, disreputableness, or worthlessness. The truth or falsity of the language is immaterial. The basis for the law is that permitting officers to disparage the civilian leadership erodes good order and discipline, and promotes insubordination. That is particularly true when, as now, we have troops engaged in armed conflict. I will not list every instance where I believe MAJ Mori's language exceeds what the law allows, but here is a sampling:

"The military commissions have been set up by the civilian administration to deliver political verdicts to justify their prior actions in Afghanistan and their PR statements that they have war criminals at Guantanamo." (Audio available at: <http://www.theage.com.au/multimedia/hicks/interviews.html>)

"This is a process designed by the President and the Vice-President and the imperative is to get convictions," (Mori) says. "This process is nothing like a court martial, nothing like it. I'm still not an expert on international law, but I know enough to know this is not justice." (Sydney Morning Herald, November 19, 2005)

"It was a political stunt. The Administration clearly didn't know anything about military law or the laws of war. I think they were clueless that there was a U.C.M.J. and a Manual for Courts-Martial! The fundamental problem is that the rules were constructed by people with a vested interest in convictions." (The New Yorker, July 3, 2006, Vol. 82, No. 20, at Pg. 44)

They don't want the Supreme Court coming in and finding this new system illegal before this administration can be out of office. (Australian Broadcasting Corp. Transcript, January 19, 2007)

Attachment E

Still, the biggest problem for Mori - and for Hicks - is that the US administration simply can't afford to back down. "They need concrete results to prove what they did was right," Mori said. It isn't an option for Hicks to be found not guilty, Mori said, which is exactly why the US is reluctant to give the Australian his day in court. "The US doesn't care how long the litigation takes," he said.

Although there is now limited dissent in Congress, where legislation for the new military commission is currently being discussed, the majority view amongst congressmen is that no matter the system, Hicks must be convicted, Mori said. The military commission system was the administration's attempt to achieve guaranteed results without risking judicial scrutiny in the form of a properly constituted court or court-martial, Mori said.

When asked, Mori said that he doesn't "believe in conspiracy from the [US] government unless you first rule out incompetence."

(Lawyers Weekly, August 25, 2006)

Major Mori said he was now waiting for US Defense Secretary Donald Rumsfeld to "write the rules" of the new commissions, which he believed would be a "rigged system." (Australian Associated Press, November 3, 2006)

"Because right now [Hicks] has been a victim of a war crime far greater than he's ever done to anybody else. ... There would be a cause of action to prosecute the people who participated in the unlawful system." (Transcript of Enough Rope with Andrew Denton, August 14, 2006)

Hicks faces new military commissions set up in the US that Major Mori said are rigged for convictions only. (Australian Associated Press, August 13, 2006)

Michael Mori: "The system has to be written by the Secretary of Defence for the United States, which is another serious problem, that all the power sits in the Secretary of Defense's hands, and they need, the Secretary of Defence needs, a system that will guarantee convictions to justify what they've done to David [Hicks]." (Australian Broadcasting Corp. Transcripts, December 14, 2006)

"The reality is David Hicks is being left to be done over in another unfair system that is not good enough for anyone else so politicians don't have to admit they made mistakes." (Mori editorial, The Age, January 14, 2007)

I wholeheartedly support the right of defense counsel to forcefully and publicly criticize alleged defects in military commissions, but to go well beyond arguing where the system is flawed and attribute bad motives or incompetence as the basis for a deliberate design by the President, Vice President, Secretary of Defense, and Congress to justify their alleged mistakes is, in my opinion, the type of language Article 88 prohibits. (See U.S. v. Howe, 37 C.M.R. 165, USCMA 1967).

Additionally, DoDD 1325.6 prohibits service members from participating in demonstration on duty, in uniform, or in a foreign country, and it contains no exceptions for judge advocates. The photograph linked above shows MAJ Mori at a demonstration in Adelaide, Australia, last August doing all three: in uniform (minus hat), on orders (I believe), and in a foreign country. Below is a link to a video of the event. The event ended with a march in the streets to the foreign ministry office.

<http://www.youtube.com/watch?v=1MJMp9ZKpts> The prohibitions in the DoDD balance free expression against military effectiveness, morale and discipline, and foreign relations. 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
<http://www.smh.com.au/news/national/qantas-sale-adds-to-voter-turbulence/2007/03/12/1173548109818.html>

Again, I support zealous defense representation, but within the bounds of the law. Using contemptuous language against the SECDEF, tampering with evidence, bribing a juror, or kidnapping an adverse witness are all effective and are all in an accused's interest, but all four exceed what the law allows.

Respectfully,

Colonel, USAF
Chief Prosecutor
Office of Military Commissions

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

From: Sullivan, Dwight, COL, DoD OGC

Sent: Monday, March 12, 2007 09:33

To: Lt Col AF/JAU

Cc: Hon, DoD OGC;

OGC; LtCol AF/JA

Subject: Re: Criticism of Statements Made by Colonel Morris Davis

Colonel

BG, DoD OGC;

, COL, DoD

Attachment E

Thank you for sharing your analysis with me. Please note that my reference to the Rules of Professional Conduct was not intended to suggest that the statements attributed to Colonel [redacted] had run afoul of those rules. Rather, the reference was intended to demonstrate that when assigned to represent an individual client, a judge advocate has unique responsibilities. The statements attributed to Colonel [redacted] appeared to suggest that Major Mori acted improperly by purportedly making statements that would be impermissible for commission prosecutors or other military officers to make. Rule 5.4 refutes any such suggestion. Thus, my point was not to imply that anyone had violated the rules of professional conduct; rather, my point was that Major Mori had not.

Respectfully,
Dwight Sullivan
Col, USMCR
Chief Defense Counsel
Office of Military Commissions

CAUTION: Information contained in this message may be protected by the attorney/client, attorney work product, deliberative process or other privileges. Do not disseminate further without approval from the Office of the DoD General Counsel.

Sent from my BlackBerry Wireless Handheld

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

From: Lt Col AF/JAU
To: Sullivan, Dwight, COL, DoD OGC
CC: Hon, DoD OGC ; [redacted] ; BG, DoD OGC
[redacted] COL, DoD OGC ;

LtCol AF/JA
Sent: Mon Mar 12 08:46:40 2007
Subject: Criticism of Statements Made by Colonel

Col Sullivan-- I am the Chief of Professional Responsibility the Air Force JAG Corps. (We met at last October's Air Force "Keystone Conference" in Orlando, Florida, as I was assisting with travel arrangements.) I recently received a copy of an email you sent to the Appointing Authority for the Office of Military Commissions regarding statements made by Air Force Col [redacted], Chief Prosecutor, in connection with the Hicks prosecution. I considered your email under the Air Force Rules of Professional Conduct. Please see the attached letter for my analysis. Thank you for sharing your concerns and please let me know if I can be of any assistance. I will send the original directly.
<<Sullivan Letter - Complaint.pdf>> V/R

[redacted], Lt Col, USAF
Chief, Professional Responsibility Division (AF/JAU)

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Attachment E

that right does not extend to perjury (see also Rule 1.2). Counsel must know his or her client has been untruthful. Suspicion is not enough. See *Nix v. Scurr*, 744 F.2d 1323,1328 (8th Cir. 1984), rev'd on other grounds, *Nix v. Whiteside*, supra. See *United States v Polk*, 32 M.J. 150 (C.M.A. 1991). Situations where a client commits perjury in court are relatively rare. Lawyers should make full use of the hierarchy of methods to dissuade the client from lying before the extreme dilemma of perjury and the obligation to disclose arises. (See Rule 1.16, Standard 4-7.7, and Standard 6-2.5.)

The term "legal authority in the controlling jurisdiction" in (a)(3) refers to Air Force or Department of Defense regulations or directives, the MCM, opinions by military appellate courts, or similar authorities.

Rule 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

DISCUSSION

Rule 3.4(f) permits Air Force lawyers to advise officials, members, and employees of the Air Force to refrain from giving information to another party, especially when the individual's interests coincide with those of the Air Force. (See Rule 1.13 and Rule 4.2.)

Rule 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) [Modified] seek to influence a judge, court or board member, prospective court or board member, or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

Attachment F



**Air Force Rules of Professional Conduct and Standards for
Civility in Professional Conduct**

17 Aug 05

1. **Summary.** This policy memorandum transmits the *Air Force Rules of Professional Conduct* (AFRPC or the *Rules*) and the *Air Force Standards for Civility in Professional Conduct* (*Standards for Civility*).

2. **Background.**

a. ***Air Force Rules of Professional Conduct.*** The *Rules* have been specifically adapted to the unique needs and demands of Air Force legal practice. Although counsel are still obligated to their licensing bar authorities, the *Rules* govern Air Force practice. They were adapted from the *American Bar Association Model Rules of Professional Conduct* in order to minimize inconsistent ethical requirements. However, when there is a difference between state rules and the Air Force *Rules*, the Air Force provisions will control.

b. ***Air Force Standards for Civility in Professional Conduct.*** Along with our obligation to represent clients zealously, we must also fulfill our responsibilities to the administration of justice. Civility—treating others with courtesy, consideration, and mutual respect, regardless of the cause they espouse—enhances the dignity of the profession of law and the satisfaction of all who are affected by it. Incivility to counsel, adverse parties, judges, administrative personnel, and other participants in the legal process, undermines the administration of justice, diminishes respect for the legal profession and for the results of our judicial system, and can delay or deny justice. We are indebted to the Federal Bar Association and the District of Columbia Bar for their work on these standards.

3. **Applicability.** The *Rules* and the *Standards for Civility* apply to all military and civilian lawyers, paralegals, and nonlawyer assistants in The Judge Advocate General's Corps (TJAGC). This includes host nation lawyers, paralegals, and other personnel employed overseas by the Department of the Air Force, to the extent the *Rules* and the *Standards for Civility* are not inconsistent with their domestic law and professional standards. They also apply to all lawyers, paralegals and nonlawyer assistants who practice in Air Force courts and other proceedings, including civilian defense counsel (and their assistants) with no other connection to the Air Force. Staff judge advocates and Air Force military defense counsel working with defense counsel from outside the Air Force should ensure outside counsel are aware of the *Rules* and the *Standards for Civility* and have ready access to them.

Approved 17 August 2005 by:

, Major General, USAF
Deputy Judge Advocate General
Performing Duties of The Judge Advocate General
10 U.S.C. §8037

2 Attachments:

1. *Air Force Rules of Professional Conduct*
2. *Air Force Standards for Civility in Professional Conduct*

Attachment G

AIR FORCE STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT¹

17 August 2005

PRINCIPLES OF GENERAL APPLICABILITY: LAWYERS' DUTIES TO OTHER COUNSEL, PARTIES, AND THE JUDICIARY

General Principles:

1. In carrying out our professional responsibilities, we will treat all participants in the legal process, including counsel and their staffs, parties, witnesses, judges, court personnel, and other staff, in a civil, professional, and courteous manner, at all times and in all communications, whether oral or written. We will refrain from acting upon or manifesting racial, gender, or other bias or prejudice toward any participant in the legal process. We will treat all participants in the legal process with respect.

2. Except within the bounds of fair argument in pleadings or in formal proceedings, we will not reflect in our conduct, attitude, or demeanor, our clients' ill feelings, if any, towards other participants in the legal process.

3. We will not, even if called upon by a client to do so, engage in offensive conduct directed toward other participants in the legal process; nor will we abuse other such participants in the legal process. Except within the bounds of fair argument in pleadings or in formal proceedings, we will abstain from directing disparaging personal remarks or acrimony toward such participants and treat adverse witnesses and parties with fair consideration. We will encourage our clients to act civilly and respectfully to all participants in the legal process.

4. We will not encourage or authorize any person under our control to engage in conduct that would be inappropriate under these standards if we were to engage in such conduct.

5. We will not bring the profession into disrepute by making unfounded accusations of impropriety or making ad hominem attacks on counsel, and, absent good cause, we will not attribute bad motives or improper conduct to other counsel.

6. While we owe our highest loyalty to our clients, we will discharge that obligation in the framework of the judicial system in which we apply our learning, skill, and industry, in accordance with professional norms. In this context, we will strive for orderly, efficient, ethical, fair, and just disposition of litigation, as well as disputed matters that are not, or are not yet, the subject of litigation, and for the efficient, ethical, and fair negotiation and consummation of all transactions.

7. The foregoing General Principles apply to all aspects of legal proceedings, both in the presence and outside the presence of a court or tribunal.

Scheduling Matters:

8. We will endeavor to schedule dates for trials, hearings, depositions, meetings, negotiations, conferences, vacations, seminars, and other functions to avoid creating calendar conflicts for other participants in the legal process, provided our clients' interests will not be adversely affected.

9. We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings, or conferences need to be canceled or postponed. Early notice avoids unnecessary travel and expense and may enable the court and the other participants in the legal process to use the previously reserved time for other matters.

¹ Adapted with the consent of the Federal Bar Association, in conjunction with the District of Columbia Bar, from standards published in 1996

10. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' interests will not be adversely affected.

11. We will not request an extension of time for the purpose of unjustified delay.

PRINCIPLES PARTICULARLY APPLICABLE TO LITIGATION

Procedural Agreements:

12. We will confer with opposing counsel about procedural issues that arise during the course of litigation, such as requests for extensions of time, discovery matters, pre-trial matters, and the scheduling of meetings, depositions, hearings, and trial. We will seek to resolve by agreement such procedural issues that do not require court order. For those that do, we will seek to reach agreement with opposing counsel before presenting the matter to the court.

13. We accept primary responsibility, after consultation with the client, for making decisions about procedural agreements. We will explain to our clients that cooperation between counsel in such matters is the professional norm and may be in the client's interest. We will explain the nature of the matter at issue in any such proposed agreements and explain how such agreements do not compromise the client's interests.

Discovery:

14. We will not use any form of discovery or discovery scheduling to harass, create unjustified delay, increase litigation expenses, or for any other improper purpose.

15. We will make good faith efforts to resolve by agreement any disputes with respect to matters contained in pleadings, discovery requests, and objections.

16. We will not engage in any conduct during a deposition that would not be appropriate if a judge were present. Accordingly, we will not obstruct questioning during a deposition or object to deposition questions, unless permitted by the applicable rules to preserve an objection or privilege, and we will ask only those questions we reasonably believe are appropriate in discovery under the applicable rules.

17. We will carefully craft document production requests so they are limited to those documents we reasonably believe are appropriate under the applicable rules. We will not design production requests for the purpose of placing an undue burden or expense on a party.

18. We will respond to document requests reasonably and in accordance with what the applicable rules require. We will not interpret a request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents.

19. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are appropriate under the applicable rules, and we will not design them for the purpose of placing an undue burden or expense on a party.

20. We will respond to interrogatories reasonably and in accordance with what the applicable rules require. We will not interpret interrogatories in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.

21. We will base our discovery objections on a good faith belief in their merit. We will not object solely for the purpose of withholding or delaying the disclosure of properly discoverable information.

22. During discovery, we will not engage in acrimonious conversations or exchanges with opposing counsel, parties, or witnesses. We will advise our clients to conduct themselves in accordance with these provisions. We will not engage in undignified or discourteous conduct that degrades the legal proceeding.

Sanctions:

23. We will not seek court sanctions or disqualification of counsel unless reasonably justified by the circumstances determined after conducting a reasonable investigation, which includes attempting to confer with opposing counsel.

Lawyers' Duties to the Court:

24. We recognize that the public's perception of our system of justice is influenced by the relationship between lawyers and judges, and that judges perform a symbolic role. At the same time, lawyers have the right and, at times, the duty to be critical of judges and their rulings. Thus, in all communications with the court, we will speak and write civilly. In expressing criticism of the court to any tribunal, we shall use language that is respectful of courts or tribunals, the system of justice, and the symbolism that these represent.

25. We will not engage in conduct that offends the dignity or decorum of judicial or administrative proceedings, brings disorder or disruption to the courtroom or tribunal, or undermines the image of the legal profession.

26. We will advise clients and witnesses to act civilly and respectfully toward the court, educate them about proper courtroom decorum, and, to the best of our ability, prevent them from creating disorder or disruption in the courtroom.

27. We will not knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities and will immediately make any clarifications and corrections as these become known to us.

28. We will not degrade the intelligence, ethics, morals, integrity, or personal behavior of others, unless such matters are legitimately at issue in the proceeding.

29. We will act and speak civilly and respectfully to the judge's staff, the courtroom and tribunal staff, and other court or tribunal personnel, with an awareness that they, too, are an integral part of the judicial system. We will also advise clients and witnesses to act civilly and respectfully toward these participants in the legal process.

30. We recognize that judicial resources are scarce, that court dockets are crowded, and that justice is undermined when cases are delayed and/or disputes remain unresolved. Therefore, we will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.

31. We recognize that tardiness and neglect show disrespect to the court and the judicial system. Therefore, we will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time and proceed efficiently. We will also educate clients and witnesses concerning the need to be punctual and prepared. If delayed, we will promptly notify the court and counsel, if at all possible.

32. Before dates for hearings or trials are set, or, if that is not feasible, immediately after such a date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.

33. We will avoid ex parte communications with the court or tribunal, including the judge's staff, on pending matters, in person (whether in social, professional, or other contexts), by telephone, or in letters or other forms of written communication, unless such communications relate solely to scheduling or other non-substantive administrative matters, or are made with the consent of all parties, or are otherwise expressly authorized by law or court rule.

Judges' Duties to Lawyers and Others:

34. We will be courteous, respectful, and civil to lawyers, parties, agency personnel, and witnesses. We will maintain control of the proceedings, recognizing that we have both the obligation and the authority to ensure that judicial proceedings are conducted with dignity, decorum, and courtesy.

35. We will not employ hostile, demeaning, or humiliating words in opinions or written or oral communications with lawyers, parties, or witnesses.

36. We will be punctual in convening hearings, meetings, and conferences; if delayed, we will notify counsel as promptly as possible.

37. In scheduling hearings, meetings, and conferences, we will be considerate of time schedules of lawyers, parties, witnesses, and of other courts. We will inform counsel promptly of any rescheduling, postponement, or cancellation of hearings, meetings, or conferences.

38. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice. We will make all reasonable efforts to decide promptly any matters presented to us for decision.

39. We recognize that a lawyer has a right and duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments, to make a complete and accurate record, and to present a case free from unreasonable or unnecessary judicial interruption.

40. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom, or the causes which, a lawyer represents.

41. We will do our best to ensure that court personnel act civilly towards lawyers, parties, and witnesses.

42. At an appropriate time and in an appropriate manner, we will bring to a lawyer's attention conduct which we observe that is inconsistent with these standards.

Judges' Duties to Each Other:

43. We will treat other judges with courtesy and respect.

44. In written opinions and oral remarks, we will refrain from personally attacking, disparaging, or demeaning other judges.

45. We will endeavor to work cooperatively with other judges with respect to the availability of lawyers, witnesses, parties, and court resources.

OTHER GENERAL PRINCIPLES

46. We will not knowingly misrepresent or mischaracterize facts or authorities or affirmatively mislead another party or its counsel in negotiations, and will immediately make any clarifications and corrections as these become known to us.

47. We will not engage in personal vilification or other abusive or discourteous conduct in negotiations. We will not engage in acrimonious exchanges with opposing counsel or parties at the negotiating table. We will encourage our clients to conduct themselves in accordance with these principles.

48. We will honor all understandings with, and commitments we have made to, other lawyers. We will stand by proposals we have made in negotiations, unless newly received information or unforeseen circumstances provide a good faith basis for rescinding them, and we will encourage our clients to conduct themselves in accordance with this principle.

49. We will not make changes to written documents under negotiation in a manner calculated to cause the opposing party or counsel to overlook or fail to appreciate the changes. We will clearly and accurately identify for other counsel and parties all changes that we have made in documents submitted to us for review.

50. In memorializing oral agreements the parties have reached, we will do so without making changes in substance and will strive in good faith to state the oral understandings accurately and completely. In drafting proposed agreements based on letters of intent, we will strive to draft documents that fairly reflect the agreements of the parties.

c. CROSS REFERENCES

- (1) Rule 1.6 Confidentiality of Information
- (2) Rule 3.8 Special Responsibilities of a Trial Counsel and Other Government Counsel
- (3) Rule 4.1 Truthfulness in Statements to Others
- (4) Rule 4.4 Respect for Rights of Third Persons
- (5) Rule 5.5 Unauthorized Practice of Law

4. RULE 5.4 PROFESSIONAL INDEPENDENCE OF A COVERED USG ATTORNEY

a. Notwithstanding a judge advocate's status as a commissioned officer subject, generally, to the authority of superiors, a judge advocate detailed or assigned to represent an individual member or employee of the Department of the Navy is expected to exercise unfettered loyalty and professional independence during the representation consistent with these Rules and remains ultimately responsible for acting in the best interest of the individual client.

b. Notwithstanding a civilian USG attorney's status as a Federal employee subject, generally, to the authority of superiors, a civilian USG attorney detailed or assigned to represent an individual member or employee of the Department of the Navy is expected to exercise unfettered loyalty and professional independence during the representation consistent with these Rules and remains ultimately responsible for acting in the best interest of the individual client.

c. The exercise of professional judgment in accordance with subsections (a) or (b) above shall not, standing alone, be a basis for an adverse evaluation or other prejudicial action.

d. COMMENT

(1) This Rule recognizes that a judge advocate is a military officer required by law to obey the lawful orders of superior officers. It also recognizes the similar status of a civilian USG attorney. Nevertheless, the practice of law requires the exercise of judgment solely for the benefit of the client and free of compromising influences and loyalties. Thus, when a covered USG attorney is assigned to represent an individual client, neither the attorney's personal interests, the interests of other clients, nor the interests of third persons should affect loyalty to the individual client.

(2) Not all direction given to a subordinate covered attorney is an attempt to influence improperly the covered

Enclosure (1)

attorney's professional judgment. Each situation must be evaluated by the facts and circumstances, giving due consideration to the subordinate's training, experience, and skill. A covered attorney subjected to outside pressures should make full disclosure of them to the client. If the covered attorney or the client believes the effectiveness of the representation has been or will be impaired thereby, the covered attorney should take proper steps to withdraw from representation of the client.

(3) Additionally, a judge advocate has a responsibility to report any instances of unlawful command influence. See R.C.M. 104, MCM, 1984.

e. CROSS REFERENCES

- (1) Rule 1.1 Competence
- (2) Rule 1.2 Establishment and Scope of Representation
- (3) Rule 1.3 Diligence
- (4) Rule 1.7 Conflict of Interest: General Rule
- (5) Rule 1.13 Department of the Navy as Client
- (6) Rule 5.1 Responsibilities of the Judge Advocate
General and Supervisory Attorneys

5. RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

a. A covered USG attorney shall not:

(1) except as authorized by an appropriate military department, practice law in a jurisdiction where doing so is prohibited by the regulations of the legal profession in that jurisdiction;

(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law; or

(3) engage in the outside practice of law without receiving proper authorization from the Judge Advocate General.

b. COMMENT.

(1) Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. A covered USG attorney's performance of legal duties pursuant to a military department's authorization, however, is considered a Federal function and not subject to regulation by the states. Thus, a covered USG attorney may

Enclosure (1)

DoD OGC

From: Mori, Michael, MAJ, DoD OGC
Sent: Wednesday, March 21, 2007 6:53 PM
To:

Cc:

Subject: RE: HICKS RESPONSE TO MJ EMAIL OF R.M.C. 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Sir,

1. The defense objects to any 802 conference where Mr. Hicks is prohibited from being present. R.M.C. 802(d) provides that the accused's presence at an 802 conference is not prohibited. The defense objects to the SJA's decision and the Military Judge's apparent ruling that Mr. Hicks will not be present at the 802 conference. This prohibits Mr. Hicks' appearance at an 802 conference in violation of R.M.C. 802(d).
2. Prohibiting Mr. Hicks from attending 802 conferences deprives him of the right to be present for his commission as guaranteed by the MCA and to materially participate in his defense. See 10 U.S.C. § 949a(b)(1)(B) ("The accused shall be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title.").
3. The defense also objects to the 802 on the basis that it has been scheduled when lead counsel for Mr. Hicks cannot attend.
4. Maj Mori and Ms. Snyder will attend the conference. Please be advised that we will not be in a position to speak. See R.M.C. 802, Discussion ("Normally, the defense counsel may be presumed to speak for the accused").
5. Finally, please be advised the defense intends to tape record the conference.

v/r
Maj Mori

Major Michael D. Mori
United States Marine Corps
Defense Counsel
Office of the Chief Defense Counsel, Office of the Military Commissions
morim@dodgc.osd.mil

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

From: LTC, DoD OGC
Sent: Wednesday, March 21, 2007 17:58
To:

Subject: FW: HICKS RESPONSE TO MJ EMAIL OF R.M.C. 802 Conference and Initial Session Trial Guide: U.S. v Hicks

has directed that I send the email below to the parties.

v/r,

USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

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

From:
Sent: Wednesday, March 21, 2007 14:22
To: DoD OGC
Subject: FW: HICKS RESPONSE TO MJ EMAIL OF R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Please forward this message to the counsel in subject case.

Counsel:

1. The R.M.C. 802 conference will go @ 1400 on 25 March 2007 as previously ordered. The time was not chosen at random and I am not seeking to frustrate anyone. The conference is intended to enable me to ensure that the arraignment hearing is conducted in as efficient and professional a fashion as possible. The requested change in the meeting time does not further my intentions in that regard.

2. I previously asked that counsel from both sides work together to develop a recommended litigation schedule that works as well as possible for both sides. Hopefully you have been doing this, and hopefully the defense has already taken Mr. Dratel's concerns into account. In any event, I expect that Maj Mori will be able to provide scheduling input from the defense side at the 802 conference.

3. No disputed matters will be resolved at the 802 conference.

4. With regard to Mr. Dratel, I would also note that this court has not yet received his notice of appearance and agreement as required by the preliminary procedural instructions. A signed copy of enclosure 4 to the preliminary procedural instructions must be submitted to the court prior to his participation in this case.

5. Mr. Hicks will not be present at the 802 conference on 25 March 2007.

6. Arrangements with regard to any visit with or movement of Mr. Hicks should be coordinated with appropriate personnel on the JTF-GTMO staff.

V/R,

Colonel, U.S. Marine Corps

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

From: LtCol, DoD OGC
Sent: Tuesday, March 20, 2007 16:35
To:

Subject: RE: HICKS RESPONSE TO MJ EMAIL OF R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

-- sir:

1. Per my phoncon today o/a 1530 with the SJA, JTF-GTMO (CAPT ; copied in this e-mail chain), the Prosecution objects to the presence of the accused at the 802 conference -- to include the accused being moved to any location other than to the courtroom for a session on the record.
2. For security and related logistical reasons, JTF-GTMO is prepared to move the accused only for purposes of the military commission session on the record and in the courtroom.
3. Defense will be provided adequate access to consult with their client throughout the day, to include after 1800 upon good cause being shown (e.g., to discuss the results of the 802 conference).

V/r-- LtCol

, LtCol, USMC
Prosecutor, Office of Military Commissions

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

From: Mori, Michael, MAJ, DoD OGC
Sent: Tuesday, March 20, 2007 15:19
To:

Subject: HICKS RESPONSE TO MJ EMAIL OF R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Sir,

Mr. Dratel is not due to arrive until approx. 1630. As Mr. Dratel is lead counsel for Mr. Hicks, it is requested that the RMC 802 conference be scheduled after 1800. This will provide sufficient time for Mr. Dratel to get over from Leeward.

Ms. Snyder and I can work on getting the AEs formalized outside of an 802 conference but any discussion on the listed items will require Mr. Dratel's presence.

Additionally, pursuant to RMC 802(d), the defense would request that Mr. Hicks be made available at the Commission building at 0900 until the conclusion of any 802 conference on 25 March.

Mr. Hicks' presence will permit him to participate in the 802 conference, should he choose to as well as permit counsel to consult with Mr. Hicks in a timely manner. Additionally, Mr. Hicks' presence at the commission building will permit adequate time for preparation between Mr. Hicks and his counsel for the arraignment session scheduled on the 26th while facilitating counsel availability for the scheduled 802 conference or any subsequent conference that day.

v/r
Maj Mori

Major Michael D. Mori
United States Marine Corps
Defense Counsel
Office of the Chief Defense Counsel, Office of the Military Commissions
morim@dodgc.osd.mil

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

From: LTC, DoD OGC
Sent: Tuesday, March 20, 2007 15:00
To:

Subject: FW: R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

has directed that I send the email below to the parties.

v/r,

, USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

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

From:
Sent: Tuesday, March 20, 2007 12:11
To: LTC, DoD OGC
Subject: R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Please send this message and the initial session trial guide to the counsel in subject case.

Counsel,

1. Attached is the trial guide we will use for the arraignment session. Please note the items referred to therein that you should be providing to marking as AEs. for

2. I am hereby directing a R.M.C. 802 conference re this case to be held in the conference room next to the GTMO court room @ 1400 on 25 March 2007. All counsel assigned to this case are directed to attend. (has been pr eviously excused from the arraignment session by me. I also understand that Mr. Dratel's travel schedule may not be able to facilitate his attendance.)

3. At this 802 session we will:

- a. Ensure we have all items to be referenced in court marked as AEs.
- b. Provide me an opportunity to receive input from both sides on the litigation schedule.
- c. Have a preliminary discussion re Ms. Snyder's status as a civilian counsel in this case vis a vis the provisions of the M.C.A. and the M.M.C.

V/R,

Colonel, U.S. Marine Corps

DoD OGC

From: LTC, DoD OGC
Sent: Thursday, March 22, 2007 3:27 PM
To: SFC, DoD OGC
Cc: Ms, DoD OGC
Subject: FW: HICKS: SPECIAL REQUEST FOR RELIEF: TELEPHONIC TESTIMONY OF WITNESS FOR PROSECUTORIAL MISCONDUCT MOTION

From: Mori, Michael, MAJ, DoD OGC
Sent: Tuesday, March 20, 2007 15:02
To:

Subject: HICKS: SPECIAL REQUEST FOR RELIEF: TELEPHONIC TESTIMONY OF WITNESS FOR PROSECUTORIAL MISCONDUCT MOTION

Sir,

Pursuant to RMC 703(c)(3), I request that [REDACTED], a witness on an interlocutory issue, be permitted to testify via telephone, should his testimony become necessary for the Defense's prosecutorial misconduct motion.

While Mr. Nason works in New York, he is currently on vacation in Australia. He is willing to testify via telephone. He is not scheduled to return to the United States until April.

v/r
Maj Mori

Major Michael D. Mori
United States Marine Corps
Defense Counsel
Office of the Chief Defense Counsel, Office of the Military Commissions
morim@dodgc.osd.mil

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**Filings Inventory – US v. Hicks
(Version 2)**

As of 2100 hours, 30 March 2007

This Filings Inventory includes only those matters filed since 1 March 2007.

Dates in red indicate due dates

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	AE
P 001: Special Request for Relief to permit the absence of	14 Mar 07			<ul style="list-style-type: none">request filedgranted by MJ 14 Mar 07	OR - 009 A - 009
P 002:					

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes OR = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 001: Motion for Appropriate Relief - Prosecutorial Misconduct	19 Mar 07	26 Mar 07		<ul style="list-style-type: none"> • motion filed • A. Pros response 26 Mar 07 (at GTMO) 	OR - 015
D 002: Special Request for Relief to permit telephonic testimony for Motion D001	20 Mar 07			<ul style="list-style-type: none"> • request filed • 	OR - 017
				<ul style="list-style-type: none"> • 	
				<ul style="list-style-type: none"> • 	
				<ul style="list-style-type: none"> • 	
				<ul style="list-style-type: none"> • 	
				<ul style="list-style-type: none"> • 	

MJ Designations

Designation Name (MJ)	Status /Disposition/Notes OR = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
MJ 001: Detail of Military Judge, and Scheduling of First Session	<ul style="list-style-type: none"> sent to all parties 6 Mar 07 w/arraignment date of 20 Mar A. DC request continuance on 8 Mar to 27 Mar B. Pros request on 9 Mar for 26 Mar date C. MJ ruling on 9 Mar - arraignment on 26 Mar 	OR - 003 A - 005 B - 005 C - 005
MJ 002: Preliminary Procedural Instructions	<ul style="list-style-type: none"> sent to all parties 9 Mar 07 	007
MJ 003 – Voir Dire	<ul style="list-style-type: none"> MJ bio sent 6 Mar 07 A. voir dire submitted by defense B. voir dire submitted by prosecution C. MJ responses to voir dire submitted by prosecution and defense 	OR -006 A - 010 B - 012 C - 013
MJ 004: Notice of RMC 802 Hearing	<ul style="list-style-type: none"> sent to all parties 20 Mar 07 w/hearing date of 25 Mar (follow-on email included) 	016
	<ul style="list-style-type: none"> . 	

Inactive Section

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes OR = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
				•	

Defense (D Designations)

[illegible]

Inactive Section

MJ Designations

Designation Name (PO)	Status /Disposition/Notes OR = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE

UNITED STATES MILITARY COMMISSIONS
GUANTANAMO BAY

UNITED STATES OF AMERICA

- v. -

DAVID HICKS,

Defendant

CIVILIAN DEFENSE COUNSEL
NOTICE OF APPEARANCE
AND AGREEMENT

MARCH 21, 2007

1. Pursuant to instructions by the military judge for counsel, I, JOSHUA L. DRATEL, hereby provide notice to the military judge of my appearance on behalf of DAVID HICKS. My office address, phone numbers, and e-mail address are: 2 Wall Street, 3rd Floor, New York, New York 10005, telephone: (212) 732-0707, facsimile: (212) 571-3792, and e-mail address: jdratel@joshuadratel.com. I am an active member in good standing licensed to practice in the following jurisdictions: New York State, United States Supreme Court, United States District Courts for the Southern, Eastern, Western, and Northern Districts of New York United States Courts of Appeals for the First, Second, Third, Fourth, and Eighth Circuits.

2. I understand and agree that I must comply with all presently existing applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings. I further agree to protect any classified information received during the course of the representation of the accused in accordance with all applicable law governing the protection of classified information, and shall not divulge such information to any person not authorized to receive it.


JOSHUA L. DRATEL

SFC OMC

From: LTC OMC
Sent: Sunday, March 25, 2007 6:46 PM
To:
Cc:

Subject: RE: HICKS DEFENSE INPUT FOR SCHEDULING

has directed me to inform the parties that, pursuant to Maj Mori's request, there will be a brief R.M.C. 802 conference tomorrow, 26 Mar 07, at 0930 in the conference room.

, USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

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

From: Mori, Michael D. MAJ OMC
Sent: Sunday, March 25, 2007 4:22 PM
To:

Subject: HICKS DEFENSE INPUT FOR SCHEDULING

Sir,

During the 802 today, the defense was requested to provide input to the Military Judge on scheduling of the trial. I am doing so, but would ask for an 802 tomorrow morning when lead counsel, Joshua Dratel and Mr. Hicks are present in the building. It is appropriate for the military Judge to hear from Mr. Dratel before setting any schedule.

Lead Counsel, Joshua Dratel, has a US Federal criminal trial set to commence on 23 April. It is expected to run until mid-June.

The defense has identified approximately 45 motions addressing legal issues which we are in the process of preparing for the first motions hearing.

The defense proposes the following schedule for the initial legal motion session:

Defense legal motions due to Prosecution NLT 21 May.
Prosecution responses due to Defense NLT 4 June.
Defense replies due to Prosecution NLT 11 June.
Motion hearing 20 to 24 June.

Mr. Dratel has a US Federal criminal trial set to begin the week of 9 July. This trial is expected to run until November.

As such, we would propose the following schedule for the evidentiary, witness,

and discovery motions.

Defense evidentiary, witness and discovery motions due to Prosecution NLT 24 September.

Prosecution responses due to Defense 8 October.

Defense replies due to Prosecution 15 October.

Motion hearing in November as soon as Mr. Dratel's trial finishes.

Trial to commence 3 December. (Please note. Mr. Dratel may have some religious commitments during December that I do not have the specifics on yet.)

The defense recognizes that scheduling the trial beyond the 120-day clock will result in delay attributable to the defense.

v/r

Maj Mori

OMC

From: LTC
Sent: Sunday, March 25, 2007 4:41 PM
To:

Cc:
Subject: HICKS: Prosecution Proposed MC Litigation Schedule

-- sir:

1. Per the RMC 802 of 25 Mar 07, the Prosecution proposed litigation schedule is the following:

- a. 26 March: Arraignment;
- b. 09 April: Defense legal motions due;
- c. 18 April: Government responses due;
- d. 25 April: Defense replies due;
- e. 27-30 April: Hearing to litigate legal motions;
- f. 11 May: Defense evidentiary motions due;
- g. 23 May: Government responses due;
- h. 30 May: Defense replies due;

- i. 1-4 June: Hearing to litigate evidentiary motions;
- j. 14 June: Voir Dire members panel;
- k. 28 June - 9 July: Government case-in-chief;
- l. 10-17 July: Defense case-in-chief;
- m. 18-20 July: Government rebuttal; and if necessary,
- n. 23-24 July: Sentencing.

2. The above reflects the same Pros. proposed dates as contained in an e-mail of 23 Mar 07 in response to the Def. proposed, in part, litigation schedule.

V/r--

LtCol, U.S. Marine Corps

Prosecutor, Office of Military Commissions

MJ Preliminary Draft Trial Schedule: US v Hicks

The following draft trial schedule is provided:

Law motions due on 4 April. Law Motions due to the military judge and opposing counsel. In general, law motions are those which require no evidentiary hearing to determine. If counsel intend to submit more than ten (10) law motions, counsel will tell the military judge and opposing counsel the total number of law motions which counsel intend to present NLT 1200 hours, 2 April. The military judge will advise counsel of a revised schedule to present the motions

Evidentiary motions due on 11 April. Evidentiary motions due to the military judge and opposing counsel. In general, evidentiary motions are those which deal with the admission or exclusion of specific or general items or classes of evidence. If counsel intend to submit more than ten (10) evidentiary motions, counsel will tell the military judge and opposing counsel the total number of evidentiary motions which counsel intend to present NLT 1200 hours, 9 April.

A 23 April hearing in Gitmo on law motions and other matters.

A 7 May hearing in Gitmo on evidentiary motions.

Note: Defense witness requests associated with any motions should be submitted to the trial counsel in accordance with R.M.C. 703 simultaneously with the filing of the motion (or Defense response in the case of a Government motion) in question. The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

16 May - Submission of proposed group voir dire questions.

Note: The military judge intends to conduct all group voir dire questioning of the members per R.M.C. 912. The military judge's group voir dire will take counsel's requested questions into account as appropriate. The military judge will also conduct the initial follow-up individual voir dire based on responses to the group questions. Counsel will be permitted to conduct additional follow-up voir dire.

17 May - Defense requests for government assistance in obtaining witnesses.

Note: The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

18 June – Hearing in Gitmo re Witness Production.

20 June 2007 - Assembly and Voir Dire of the panel.

UNITED STATES
OF
AMERICA

v

DAVID MATTHEW HICKS

a/k/a "David Michael Hicks"
a/k/a "Abu Muslim Australia"
a/k/a "Abu Muslim Austraili"
a/k/a "Abu Muslim Philippine"
a/k/a "Muhammad Dawood"

Schedule for Trial

26 March 2007

I. The following trial schedule is ordered.

a. 4 April 2007: Law Motions due to the military judge and opposing counsel. In general, law motions are those which require no evidentiary hearing to determine. If counsel intend to submit more than ten (10) law motions, counsel will tell the military judge and opposing counsel the total number of law motions which counsel intend to present NLT 1200 hours, 2 April. The military judge will advise counsel of a revised schedule to present the motions

b. 11 April 2007: Evidentiary Motions. Evidentiary motions due to the military judge and opposing counsel. In general, evidentiary motions are those which deal with the admission or exclusion of specific or general items or classes of evidence. If counsel intend to submit more than ten (10) evidentiary motions, counsel will tell the military judge and opposing counsel the total number of evidentiary motions which counsel intend to present NLT 1200 hours, 9 April.

Note: Defense witness requests associated with any motions should be submitted to the trial counsel in accordance with R.M.C. 703 simultaneously with the filing of the motion (or Defense response in the case of a Government motion) in question. The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

c. 23 April 2007: Hearing in GTMO re Law Motions and Witness Production issues re evidentiary motions.

d. 7 May 2007: Hearing in GTMO re Evidentiary Motions.

e. 16 May 2007: Submission of requested group voir dire questions for the Military Commission Members.

Note: The military judge intends to conduct all group voir dire questioning of the members per R.M.C. 912. The military judge's group voir dire will take counsel's requested questions into account as appropriate. The military judge will also conduct the initial follow-up individual voir dire based on responses to the group questions. Counsel will be permitted to conduct additional follow-up voir dire.

f. 17 May 2007: Defense Requests for Government Assistance in Obtaining Witnesses for use on the merits. See R.M.C. 703.

Note: The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

g. 18 June 2007: Hearing re Witness Production Motions and any unresolved matters.

h. 20 June 2007: Assembly and Voir Dire for Panel Members.

i. Beginning of trial on the merits: To be determined.

2. Counsel should direct their attention to the Preliminary Procedural Instructions (P.P.I.), Part III, Motions Practice, and specifically Enclosures 1-3, for the procedures I have established for this trial. All motions, responses and replies shall comport with the terms of P.P.I., para 5 in terms of format and timeliness. Any request for continuance of any hearing associated with this schedule must be submitted 7 days prior to said hearing. Any request for extension of any response or reply deadline associated with this hearing will be submitted before the deadline for the reply or response.

Colonel, U.S. Marine Corps
Military Judge

Defense Summary of 802 Conference held at 1400 on 25 March 2007
United States v. Hicks

1. Your Honor stated that with regard to Defense Counsel's stated intention of taping the 802 session in light of Mr. Dratel's and Mr. Hicks' absence, it would not be permitted. Your Honor further stated that any future requests for permission to tape any conferences or conversations with Your Honor would always be denied. Your Honor also stated that counsel should never tape record him without Your Honor's knowledge.
2. Your Honor addressed the Inventory of Papers, specifically the Appellate Exhibits List and the Filings Inventory. Your Honor announced that the parties would be required to verify that the Filings Inventory was complete during the hearing today. Lt. Col. maintains the Inventory and would like documents submitted in Word Perfect format as opposed to PDF.
3. Your Honor stated that all Appellate Exhibits should be marked before the hearing and because Your Honor wants to avoid marking any exhibits in court.
4. The government raised the issue of the Protective Orders. The government has drafted an Order for consideration as a "Special Request" and not a Motion since the government believes the Protective Order issued in the last military commission system is still in effect. Your Honor requested that the government submit their draft Order along with a motion, rather than a "Special Request", in electronic form and in hard copy as soon as possible.
5. Your Honor stated he has not received Mr. Dratel's Notice of Appearance as of the last time Your Honor was able to check email on Thursday. Maj Mori will provide the Notice of Appearance immediately after the 802 session.
6. Your Honor asked what Your Honor described as the "\$64,000 question": have the parties discussed among one another and with each other a litigation schedule? And, have they reached any agreement. LtCol stated that the parties did discuss the schedule, but had not reached an agreement. Your Honor stated that Your Honor would draft a schedule tonight or tomorrow and urged the parties to submit their input as quickly as possible as he was more amenable to consider their input ahead of time than to change his draft schedule based later input.
7. Your Honor stated that Your Honor was unaware of what rules permitted Ms. Snyder to be detailed as assistant defense counsel and that the matter could be addressed on the record. Your Honor invited counsel to bring Your Honor's attention to relevant rules and regulations.

Defense Summary of 802 Conference held at 0930 on 26 March 2007
United States v. Hicks

1. Major Mori raised the issue of the court rejecting Mr. Dratel's Notice of Appearance and Agreement on the basis that it states that Mr. Dratel will "comply with all presently existing applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings" as opposed to "comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings." Mr. Dratel expressed the concern that agreeing to the court's language would require him to agree to comply with regulations that don't yet exist. He stated that he was not trying to be defiant, but that the military judge's rules puts him in the position of buying a pig in a poke. Mr. Dratel offered to accept any compromise that the military judge could propose that would enable the process to move forward and allow Mr. Dratel to participate. The military judge stated that Mr. Dratel could either comply with the court's rules or not and that he wasn't going to force Mr. Dratel to do anything. Mr. Dratel provided an example from the prior military commission system. He explained that the original affidavit that civilian counsel were required to sign had unacceptable provisions in it, such as requiring conversations between the attorney and the client to be monitored. This provision and others would have required Mr. Dratel to violate ethical rules by which he is bound as an attorney licensed to practice law. As a result, the original affidavit was modified and Mr. Dratel was able to sign it. The military judge then explained to Mr. Dratel that whether he participates in the proceedings is up to him. The military judge said that Mr. Dratel can either comply with his instructions or not. The military judge stated that he would not change his instructions with regard to that point and that it was very simple. Mr. Dratel said that there was nothing he could do since the military judge was making it a question of authority, which the military judge has and Mr. Dratel does not.
2. Major Mori raised the issue of the trial schedule. The military judge provided a copy of his preliminary draft schedule. He said that objections could be heard on the record.
3. Major Mori raised the issue of security sitting directly behind Mr. Hicks in the courtroom within ear shot of counsel and Mr. Hicks. Major Mori said he has asked Col _____, who is in charge of security, if the security personnel could be moved out of earshot. The military judge told the defense to file a motion on the issue. The military judge also told the defense that they could request a recess to talk with the client.
4. Major Mori raised the issue of counsel not being able to sit on both sides of Mr. Hicks at counsel table. The military judge told the defense to make a motion.
5. Major Mori raised the issue of whether the military judge would allow the defense to reserve pleas or whether he expected the defense to enter a plea today. The military judge stated that it would be just like court-martial practice and he anticipated that the defense would reserve pleas and motions.

Defense Summary of 802 Conference held at 0930 on 26 March 2007
United States v. Hicks

6. The defense requested a short break. After returning from the break, Mr. Dratel told the military judge that upon reviewing the court's schedule and knowing that the court is aware of Mr. Dratel's trial schedule, it is clear that the court's schedule is designed to prevent Mr. Dratel from participating in the proceedings. Mr. Dratel explained that he came to Guantanamo Bay at his own expense, that he takes time away from his practice to come here and that he does not appreciate this now after he is already in Guantanamo Bay.
7. The military judge stated that four seats are available at each counsel table and that it was fine to change who is sitting at counsel table, but that it should be noted on the record when that happens.
8. The military judge stated that his modus operandi is to be as adversarial as counsel want to be to allow for orderly litigation.

OMC

From: Sullivan, Dwight H COL USSOUTHCOM JTFGTMO
Sent: Monday, March 26, 2007 10:31 AM
To: Snyder, Rebecca CIV USSOUTHCOM JTFGTMO; Mori, Michael D. MAJ OMC
Subject: Court Dates e-mail from Chief Defense Counsel to SFC Diaz

From: Sullivan, Dwight, COL, DoD OGC
Sent: Friday, March 02, 2007 3:41 PM
To: DoD OGC
Cc: DoD OGC
Subject: Court Dates

SFC

Sorry I missed your call! Both Maj Mori -- Hicks' detailed defense counsel -- and Ms. Snyder -- Hick's assistant detailed defense counsel -- currently have orders overseas from 14-23 March. Among other purposes, this long-planned trip is for purposes of interviewing witnesses and conducting factual investigation of their case.

Please let me know if any additional information would be helpful.

Semper Fi,
DHS

Colonel Dwight H. Sullivan, USMCR
Chief Defense Counsel
Office of Military Commissions

OMC

From: LTC OMC
Sent: Tuesday, March 27, 2007 7:05 PM
To: USSOUTHCOM JTFGTMO; CIV USSOUTHCOM
Cc: SFC OMC
Subject: FW: Initial Members Order
Attachments: Initial Members Order.pdf



Initial Members
Order.pdf (17 ...)

-- , USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

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

From:
Sent: Tuesday, March 27, 2007 5:02 PM
To:

Subject: FW: Initial Members Order

PLEASE IMMEDIATELY VERIFY RECEIPT OF THIS E-MAIL.

Ladies and Gentlemen,

Please read the Military Judges instructions below. Also, please read the Military Judges Order at the attachment.

Thank you.

V/R

Executive Administrative Assistant
Office of Military Commissions
Office of the Convening Authority

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

From: LTC OMC

Sent: Tuesday, March 27, 2007 15:34

To:

Cc:

Subject: FW: Initial Members Order

Mr. ,

Pursuant to 's request, please forward this email and the attachment to the Military Commission Members. (Also, please CC me.) Thank you.

USAR, JA

Senior Attorney Advisor

Military Commissions Trial Judiciary

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

From: USSOUTHCOM JTFGTMO

Sent: Tuesday, March 27, 2007 3:28 PM

To: LTC OMC

Subject: FW: Initial Members Order

LTC Chappell: Please have the Initial Members Instruction sent to the Members.

Instructions for Military Commission Members

You have been detailed to be members on a Military Commission concerning the trial of certain individuals now being detained at US Naval Station, Guantanamo Bay, Cuba (GTMO). You are directed to read the contents of this Order immediately and adhere to the requirements contained herein.

1. Due to the publicity which these cases may have already received, and recognizing the probability of further publicity, each of you is instructed as follows:

a. Your determination as matters given to you to decide must be based solely upon the matters you receive in court and the law as I will instruct you. Thus, it is important that you keep an open mind and not form or express any opinions on the case until all of the evidence and the applicable law has been presented to you.

b. A trial by Military Commission includes the determination of the ability of each member to sit as a member. As a prospective member, you may be questioned in open session by counsel for either side or by me to determine whether or not you should serve. You may also receive a questionnaire and other documents from me to prepare prior to trial.

c. Due to the previous publicity about this case and the probability of further publicity, you are instructed that you must not listen to, look at, or read any accounts of alleged incidents involving these cases. You may not consult any source, written or otherwise, as to matters involved in such alleged incidents. You may not listen to, look at, or read any accounts of any proceedings in these cases. You may not discuss these cases with anyone, and if anyone attempts to discuss these cases with you, you must forbid them to do so and report the occurrence to me. You may not discuss, other than as required to inform your military superiors of your duty status, your detail to this Commission as a prospective member with anyone.

2. Your duty as a potential Commission member will not begin before Friday morning, 30 March 2007, at the earliest. The necessary logistical arrangements to bring members of the Commission, the prosecution, the defense, the prosecution, and support personnel to GTMO may bring them into close proximity while traveling to Guantanamo and in-processing there. Until such time as you are advised by me that you may discuss matters involved in this case, you may not discuss with anyone – not even among yourselves – anything about the Commission trials or the cases that may come before it.

3. After you arrive at GTMO, there will be in-processing and you will be taken to your billets. An assigned escort or bailiff will be your driver. You will be given all necessary information regarding meals, etc. On your free time, you may use or visit the NEX, the varied eating establishments, and the available fitness and MWR activities.

4. Do not at any time visit or attempt to visit any of the detainee areas. The escort/bailiff has been instructed not to take you in the area where those facilities are located. Should you see members of the media, avoid them. If approached by the media, walk away and do not even listen to questions they may ask. If confronted by the media, refuse to speak to them and refer them to a Public Affairs representative. The same rules apply to official Public Affairs representatives, except that they should be referred to me or my staff.

5. Members of my staff include

. They are responsible to me for making logistical and administrative arrangements. The Commission will also be assigned a bailiff. My staff and the bailiff will work with you on strictly administrative and logistical matters. Because members of my staff and the bailiff are not members of the Commission, you must strictly observe the following rules:

a. You may not discuss any case, or the evidence offered in any case, with my staff or the bailiff.

b. You may not discuss any case, or the evidence offered in any case, in the presence of the bailiff or my staff.

c. You may not seek from, or express an opinion to, my staff or the bailiff concerning any case or the evidence offered in a case at any time.

b. Neither the bailiff nor my staff may enter the deliberation room when closed sessions are in progress. The exception to this rule is that either members of my staff or the bailiff may need to enter the deliberation room during a closed session on an administrative mission – such as to provide paper and pens. In such a case, they will knock at the deliberation room door and announce their presence. Before being allowed to enter, all discussions must stop.

6. Be cautious about any contact you have with members of the prosecution, defense, security personnel, or the administrative staff of any office as any such contact could be misinterpreted. Do not go into the defense area or prosecution area or upstairs in the Commissions building. If you are outside the Commissions building and you see any detainee or detainee security personnel, immediately return to the building. The best advice I can give you is to stay together as a group or by yourself while at GTMO and do not think about or discuss the Commission or any of the cases until instructed you may do so.