Guantanamo Bay Fair Trial Manual for U.S. Military Commissions:

An Independent & Objective Guide for Assessing Human Rights Protections and Interests of the Prosecution, the Defense, Victims & Victims’ Families, Witnesses, the Press, the Court, JTF-GTMO Detention Personnel, Other Detainees, NGO Observers and Other Military Commission Stakeholders

Volume II: Appendices
(pages 345 – 612)

by

The Gitmo Observer*
(George E. Edwards, Principal Author)

26 February 2017 (5:30 a.m.)
(Preliminary Draft!!)
(All comments & suggestions welcome!!
Please e-mail to GitmoObserver@yahoo.com)

* “The Gitmo Observer” is the name given to the U.S. Military Commission Observation Project (MCOP) of the Program in International Human Rights Law (PIHRL) of Indiana University McKinney School of Law, operating with our Guantanamo Bay Periodic Review Board (PRB) Project.

The Gitmo Observer / MCOP was founded by Professor George Edwards, who is Special Assistant to the Dean for Inter-Governmental and Non-Governmental Organizations and is The C.M. Gray Professor of Law at the Indiana University McKinney School of Law.

Professor Edwards is also Faculty Director (Founding) of the Indiana University McKinney Law School’s Program in International Human Rights Law.
“Before I discuss the particulars of evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and of the defendant that might discredit our work if we should falter, in even minor matters, in being fair and temperate . . . . We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice.”

Mr. Justice Robert H. Jackson
Chief Prosecutor, International Military Tribunal, Nuremberg
21 November 1945

Guantanamo Bay Fair Trial Manual for U.S. Military Commissions

An Independent & Objective Guide for Assessing Human Rights Protections and Interests of the Prosecution, the Defense, Victims & Victims’ Families, Witnesses, the Press, the Court, JTF-GTMO Detention Personnel, Other Detainees, NGO Observers and Other Military Commission Stakeholders

By: The Gitmo Observer
(George E. Edwards, Principal Author)

Table of Contents (Draft)  (Volumes I and II)

Volume I – Main Manual (pages 1 – 344)

I.  Preface .......................................................................................................................... 7
II. How to Use this Guantanamo Bay Fair Trial Manual ................................................... 11
III. Acknowledgements ...................................................................................................... 17
IV. Abbreviations ................................................................................................................ 19
V. What is the Right to a Fair Trial? .................................................................................. 23
   A. “Rights” v. “Interests” ............................................................................................... 23
   B. Briefing on this chapter of the Guantanamo Bay Fair Trial Manual ...................... 23
   C. Who are the Military Commission stakeholders? Who is entitled to a fair trial? ....... 24
   D. International law as binding source in US Courts (including the Military
      Commissions) ........................................................................................................ 24
   E. Substantive areas of law binding on the U.S ............................................................ 25
   F. International Humanitarian Law as a source of law for fair trials ......................... 26
      i. Treaty Law – International Humanitarian Law ................................................ 27
      ii. Customary International Law – International Humanitarian Law .................. 28
   G. International Human Rights Law as a source of law for fair trials ................. 30
      i. Treaty Law – International Human Rights Law ............................................. 30
      ii. Customary International Law – International Human Rights Law ............. 27
   H. Domestic U.S. law & the right to a fair trial ............................................................ 31
   I. Rights not covered in this Guantanamo Bay Fair Trial Manual ............................... 32

VI. Roles & Responsibilities of NGO Observers ............................................................... 33
   A. The why and how of NGO Observers .................................................................... 35
   B. Responsibilities of NGO Observers ...................................................................... 36
   C. NGOs should be true to yourselves! ...................................................................... 39
   D. NGO Observers serve an extremely important role for all stakeholders ............. 40

VII. Background & Brief History of U.S. Military Commissions at Guantanamo Bay, Cuba .... 41
   a. The 9-11 attacks and the immediate aftermath .................................................... 41
   b. Law governing U.S. Military Commissions ............................................................. 43
c. Who can be tried at a Guantanamo Bay Military Commission?.................................43
d. Active Guantanamo Bay Military Cases........................................................................44
e. U.S. Military Commissions are “War Crimes Tribunals” not “Terrorism Tribunals”……54
f. Torture............................................................................................................................46
g. Periodic Review Boards (PRBs)....................................................................................46
h. Closing Guantanamo Bay...............................................................................................48

VIII. General Information About the Case to Be Observed...........................................51

IX. General Categories of Rights of Guantanamo Bay, Cuba, Military Commission
Stakeholders.....................................................................................................................57
   A. Right to be Presumed Innocent; Right to Have the Burden of Proof on the Prosecution...59
   B. Freedom from Retroactive Application of Criminal Laws (No Ex Post Facto Laws)……..59
   C. Freedom from Double Jeopardy (Ne Bis in Idem).......................................................67
   D. Right to Trial by Competent, Independent and Impartial Tribunal............................71
   E. Right to Effective Assistance of Counsel....................................................................73
   F. Right to Information & Access to Information.............................................................89
   G. Rights Related to Classified Information....................................................................101
   H. Rights to Adequate Time & Facilities to Prepare a Defense.........................................97
   I. Right to Prompt Judicial Proceedings..........................................................................107
   J. Right to Trial Without Undue Delay, Within a Reasonable Time, or to Release; Right to
      Speedy Trial....................................................................................................................133
   K. Right to Liberty and Security of Person, including Freedom from Arbitrary Detention and
      Right to Review of Lawfulness of Detention.................................................................137
   L. Freedom from Torture, and Cruel and Inhuman Treatment or Punishment................145
   M. Right to Humane Treatment & Humane Conditions of Detention.............................165
   N. Freedom from Incommunicado & Solitary Confinement; Right to Access to the Outside
      World..................................................................................................................................167
   O. Rights to Interpreter / Translator................................................................................177
   P. Right to Public Proceedings..........................................................................................189
   Q. Freedom from Self-Incrimination; Right Not to be Compelled to Testify Against Oneself
      or to Confess Guilt..........................................................................................................199
   R. Right to Equality of Arms; Equality Before the Courts; Equal Protection of the Law.....207
   S. Right to be Present at or Absent From Pre-Trial Hearings............................................213
   T. Right to be Defend Oneself in Person or Through Counsel of His Own Choosing..........221
   U. Right to Examine and Cross-Examine Witnesses.........................................................227
   V. Right to Exclusion of Illegally Obtained Evidence.......................................................233
   W. Right to Exclusion of Hearsay.......................................................................................235
   X. Rights of Detainees Who Were Juveniles When Taken to Guantanamo Bay..................239
   Y. Right to Appeal (Interlocutory, Conviction, Sentence).................................................241
   Z. Rights to a Remedy (Victims, Detainees, Defendants)..................................................245

X. Rights of Victims & Victims’ Families.......................................................................247

XI. Rights / Interests of the Prosecution...........................................................................257

XII. Rights of the Press.....................................................................................................265

XIII. Rights Related to Witnesses (Expert and Fact Witnesses).......................................277
XIV. Rights / Interests of Joint Task Force-GTMO………………………………………………281
XV. Rights / Interests of the U.S. public…………………………………………………………289
XVI. Rights / Interests of the international community………………………………291
XVII. Rights / Interests of NGO Observers……………………………………………………293
XVIII. Conclusion (forthcoming)……………………………………………………………302

Glossary…………………………………………………………………………………………………303
Bibliography ……………………………………………………………………………………………329
Index………………………………………………………………………………………………………341
Observation / Monitoring Note Pages…………………………………………………………..343

Volume II – Appendices (pages 345 – 612)

Preliminary pages for Vol II (Cover, Table of Contents, etc.)…………………………..…….345
XIX. Appendices…………………………………………………………………………………………351

Appendix A: Sources of International Law……………………………………………………..353
1. International Humanitarian Law Treaties…………………………………………………355
   a. Geneva Conventions of 1949, Common Article 3……………………………………357
   b. Protocol Additional I to the Geneva Conventions of 1949, article 75………………559
   c. Protocol Additional II to the Geneva Conventions of 1949, article 6………………361
   d. Third Geneva Convention (Prisoners of War) (Excerpt)……………………………363
2. International Human Rights Law Instruments……………………………………………365
   a. Universal Declaration of Human Rights…………………………………………………367
   b. International Covenant on Civil & Political Rights, Article 14………………………369
   c. United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (excerpts)………………………………………371
   d. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law………………………………………373
   e. List of Additional Non-Treaty International Instruments that Incorporate Rules of Customary International Law……………………………………………………377
3. International Criminal Law Instruments (forthcoming)…………………………………379

Appendix B: Sources of Domestic U.S. Law………………………………………………………381
1. U.S. Non-Military Instruments…………………………………………………………………383
   a. United States Constitution (excerpts)…………………………………………………385
2. U.S. Military & Military Commission Law…………………………………………………387
   a. Uniform Code of Military Justice (UCMJ) (Excerpts)…………………………….…389

[Eds—The Military Commission sources of law below will be re-arranged]
   a. Uniform Code of Military Justice (UCMJ) (Excerpts)…………………………….…389

Not to be Quoted or Reproduced Without Permission — This is a Preliminary Draft. © 2017
E-mail - GitmoObserver@yahoo.com  @GitmoObserver The Gitmo Observer (of Indiana U McKinney School of Law)
b. Military Commissions Act of 2009 (excerpts)........................................391
c. Rules of the Military Commission (United States) (14 August 1012) (excerpts)...395
e. Military Commissions Trial Judiciary Rules of Court (24 April 2012, as amended 4 June 2013)(excerpts)......................................................................................405
f. Military Commission Rules of Evidence (MCRE).................................407
g. Department of Defense Media Ground Rules for Guantanamo Bay, Cuba (GTMO) (10 September 2010) (excerpt).................................................................409

Appendix C: Charts of Fair Trial Provisions from International & Domestic Law Instruments.................................................................413

a. International Human Rights Law Treaties..............................................415
c. Historical and Other International Humanitarian Law, International Criminal Law Instruments.................................................................418
d. U.S. Federal Law (U.S. Constitution).........................................................420
e. U.S. Military Commission Law; International Humanitarian Law Instruments..421

Appendix D: What You Need To Know Before You Travel to Guantanamo Bay or Ft. Meade on an NGO Observer Mission (forthcoming)........................................423

Schematic of Guantanamo Bay Courtroom # 2..........................................425

Appendix E: Al Nashiri case (U.S.S. Cole case) (Referred Charges of 28 September 2011)........427
Appendix F: Khalid Shaik Mohammad, et al (9/11 case) (Referred Charges of 2011 / 2012)....471
Appendix G: Hadi al Iraqi Case (Referred Charges of 4 February 2014)..................489

Appendix H: Executive Order – Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities (22 January 2009) (President Barack Obama).................................................495

Appendix I: Statement of Hon. Brian P. McKeon, Principal Deputy Under Secretary of Defense for Policy (Testimony of Before the Senate Committee on Armed Services February 2015).........501

Appendix J: Excerpt from Military Commission Website..................................505

Appendix K: White House Fact Sheet: New Actions on Guantánamo and Detainee Policy......509
Appendix L: Guantanamo: Why the U.S. Has a Naval Base in Cuba (By Professor Christopher Jenks).................................................................513


Appendix N: Ruling on Defense Motion to Dismiss for Unlawful Influence on Trial Judiciary (9/11 Case) (Judge Pohl) (25 February 2015)..................................................................543

Appendix O: Ruling on Defense Motion to Dismiss for Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015).................................................................543

Appendix P: Periodic Review Board Executive Order (7 March 2011) and Materials........575

Appendix Q: President Obama’s Plan to Close Guantanamo Bay (23 February 2016)........585

Observation / Monitoring Note Pages........................................................................................................609
Volume II-- Appendices
[Page Intentionally Blank]
Sources of International Law

[Additional Sources of International Law Will Be Added.]

Appendix A: Sources of International Law.................................353

1. International Humanitarian Law Treaties.................................355
   a. Geneva Conventions of 1949, Common Article 3..........................357
   b. Protocol Additional I to the Geneva Conventions of 1949, article 75........359
   c. Protocol Additional II to the Geneva Conventions of 1949, article 6..........361
   d. Third Geneva Convention (Prisoners of War) (Excerpt)........................363

2. International Human Rights Law Instruments............................365
   a. Universal Declaration of Human Rights.......................................367
   b. International Covenant on Civil & Political Rights, Article 14................369
   c. United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (excerpts).................................371
   d. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law........................................373
   e. List of Additional Non-Treaty International Instruments that Incorporate Rules of Customary International Law.............................................377

3. International Criminal Law Instruments (forthcoming)..................379
International Humanitarian Law Treaties
Common Article 3 of the Geneva Conventions of 1949

[Emphasis added]

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

b) taking of hostages;

c) outrages upon personal dignity, in particular humiliating and degrading treatment;

d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

….
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Excerpt)²

Article 75 -- Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

   a) violence to the life, health, or physical or mental well-being of persons, in particular:
      i) murder;
      ii) torture of all kinds, whether physical or mental;
      iii) corporal punishment; and
      iv) mutilation;
   b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
   c) the taking of hostages;
   d) collective punishments; and
   e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

² Though the U.S. has not ratified Protocol Additional I of the Geneva Conventions, the U.S. has concluded that article 75 of Protocol Additional I has risen to the status of customary international law, and thus binds the U.S.

In a 1986 memorandum to Mr. John H. McNeill, Assistant General Counsel (International), OSD, several high-ranking military officers concluded that article 75, entitled “Fundamental guarantees”, has risen to the level of customary international law. They noted that “[w]e view the following provisions as already part of customary international law”, and then listed numerous Protocol provisions, including “Fundamental guarantees: Article 75”. (Memorandum to Mr. John H. McNeill, Assistant General Counsel (International), OSD, responding to 26 March 1986 memorandum from Mr. McNeill asking “our views on which articles of the Protocol are currently recognized as customary international law”).
a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
d) anyone charged with an offence is presumed innocent until proved guilty according to law;
e) anyone charged with an offence shall have the right to be tried in his presence;
f) no one shall be compelled to testify against himself or to confess guilt;
g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men’s quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Excerpt)³

Article 6 — Penal prosecutions

1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:

   a. the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
   b. no one shall be convicted of an offence except on the basis of individual penal responsibility;
   c. no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
   d. anyone charged with an offence is presumed innocent until proved guilty according to law;
   e. anyone charged with an offence shall have the right to be tried in his presence;
   f. no one shall be compelled to testify against himself or to confess guilt.

3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

³ The U.S. has not ratified Protocol Additional 2 of the Geneva Conventions.
Third Geneva Convention (Prisoners of War) (Excerpt)4

ART. 99. — No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

ART. 100. — Prisoners of war and the Protecting Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power.

Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power upon which the prisoners of war depend.

The death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.

ART. 101. — If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives, at an indicated address, the detailed communication provided for in Article 107.

ART. 102. — A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

ART. 103. — Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.

Any period spent by a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty.

The provisions of Articles 97 and 98 of this Chapter shall apply to a prisoner of war whilst in confinement awaiting trial.

ART. 105. — The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial.

Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The Detaining Power shall deliver to the said Power, on request, a list of persons qualified to present the defence. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defence.

The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at

---

his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defence, including prisoners of war. He shall have the benefit of these facilities until the term of appeal or petition has expired.

Particulars of the charge or charges on which the prisoner of war is to be arraigned, as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the Detaining Power, shall be communicated to the accused prisoner of war in a language which he understands, and in good time before the opening of the trial. The same communication in the same circumstances shall be made to the advocate or counsel conducting the defence on behalf of the prisoner of war.

The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held in camera in the interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.

ART. 106. — Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

ART. 107. — Any judgment and sentence pronounced upon a prisoner of war shall be immediately reported to the Protecting Power in the form of a summary communication, which shall also indicate whether he has the right of appeal with a view to the quashing or revising of the sentence or the reopening of the trial. This communication shall likewise be sent to the prisoners’ representative concerned. It shall also be sent to the accused prisoner of war in a language he understands, if the sentence was not pronounced in his presence. The Detaining Power shall also immediately communicate to the Protecting Power the decision of the prisoner of war to use or to waive his right of appeal.

Furthermore, if a prisoner of war is finally convicted or if a sentence pronounced on a prisoner of war in the first instance is a death sentence, the Detaining Power shall as soon as possible address to the Protecting Power a detailed communication containing:

1) the precise wording of the finding and sentence;
2) a summarized report of any preliminary investigation and of the trial, emphasizing in particular the elements of the prosecution and the defence;
3) notification, where applicable, of the establishment where the sentence will be served.

The communications provided for in the foregoing sub-paragraphs shall be sent to the Protecting Power at the address previously made known to the Detaining Power.

ART. 108. — Sentence pronounced on prisoners of war after a conviction has become duly enforceable shall be served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power. These conditions shall in all cases conform to the requirements of health and humanity.

In any case, prisoners of war sentenced to a penalty depriving them of their liberty shall retain the benefit of the provisions of Articles 78 and 126 of the present Convention. Furthermore, they shall be entitled to receive and despatch correspondence, to receive at least one relief parcel monthly, to take regular exercise in the open air, to have the medical care required by their state of health, and the spiritual assistance they may desire. Penalties to which they may be subjected shall be in accordance with the provisions of Article 87, third paragraph.
International Human Rights Law Instruments (Treaty & Non-Treaty)
Universal Declaration of Human Rights

Preamble
Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1
All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2
Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3
Everyone has the right to life, liberty and security of person.
Article 5
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6
Everyone has the right to recognition everywhere as a person before the law.

Article 7
All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8
Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9
No one shall be subjected to arbitrary arrest, detention or exile.

Article 10
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11
1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 18
Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19
Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 30
Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.
International Covenant on Civil and Political Rights (ICCPR)\(^6\)

**Article 14**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   
   a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   
   b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
   
   c. To be tried without undue delay;
   
   d. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
   
   e. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   
   f. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
   
   g. Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the

---

\(^6\) The United States signed and ratified the ICCPR and is thus bound to comply with the terms of this treaty.
person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

**Article 15**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

**Article 19**

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

   a. For respect of the rights or reputations of others;

   b. For the protection of national security or of public order (ordre public), or of public health or morals.

   ———
United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Excerpts)

(signed & ratified by the U.S., thus binding the U.S.)

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

**Article 12**

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

**Article 13**

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

**Article 14**

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

**Article 15**

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

**Article 16**

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

...
Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

(Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005)

Preamble

The General Assembly,

Adopts the following Basic Principles and Guidelines:

I. Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:

(a) Treaties to which a State is a party;
(b) Customary international law;
(c) The domestic law of each State.

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations.

II. Scope of the obligation

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

(a) …;
(b) …
(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
(d) Provide effective remedies to victims, including reparation, as described below.

V. Victims of gross violations of international human rights law and serious violations of international humanitarian law

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

8 These Basic Principles and Guidelines on Victims’ Rights are not treaty, and do not bind the U.S. However, important rules contained within the instruments have risen to the level of customary international law and thus bind all states, including the U.S.

Not to be Quoted or Reproduced Without Permission — This is a Preliminary Draft.

© 2017

E-mail - GitmoObserver@yahoo.com Twitter @GitmoObserver The Gitmo Observer (of Indiana U McKinney School of Law)
9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

VI. Treatment of victims
10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. Victims’ right to remedies
11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law:

(a) Equal and effective access to justice;
(b) Adequate, effective and prompt reparation for harm suffered;
(c) Access to relevant information concerning violations and reparation mechanisms.

VIII. Access to justice
12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

(a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
(b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
(c) Provide proper assistance to victims seeking access to justice;
(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

IX. Reparation for harm suffered
15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of
international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

(\(a\)) Physical or mental harm;
(\(b\)) Lost opportunities, including employment, education and social benefits;
(\(c\)) Material damages and loss of earnings, including loss of earning potential;
(\(d\)) Moral damage;
\(e\)) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.

22. *Satisfaction* should include, where applicable, any or all of the following:

(\(a\)) Effective measures aimed at the cessation of continuing violations;
(\(b\)) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
(\(c\)) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
(\(d\)) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
(f) Judicial and administrative sanctions against persons liable for the violations;
(g) Commemorations and tributes to the victims;
(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

23. **Guarantees of non-repetition** should include, where applicable, any or all of the following measures, which will also contribute to prevention:

(a) Ensuring effective civilian control of military and security forces;
(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
(c) Strengthening the independence of the judiciary;
(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

**X. Access to relevant information concerning violations and reparation mechanisms**

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

…

**XII. Non-derogation**

26. Nothing in these Basic Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Basic Principles and Guidelines are without prejudice to special rules of international law.

**XIII. Rights of others**

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.
List of Additional Non-Treaty International Instruments\textsuperscript{10} that Incorporate Rules of Customary International Law\textsuperscript{11}

- **Basic Principles for the Treatment of Prisoners** (Adopted by United Nations General Assembly Resolution 45/111 of 14 December 1990)


- **Code of Conduct for Law Enforcement Officials**, UN General Assembly resolution 34/169, December 17, 1979;


\textsuperscript{10} All of these instruments can be found on www.GitmoObserver.com.

\textsuperscript{11} Many of the principles in these non-binding instruments incorporate binding norms of customary international law. Though the instruments themselves are not binding on any state, the customary international law norms incorporated into the instruments are binding on all states.


- **Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**, adopted by United Nations General Assembly Resolution 37/194 of 18 December 1982


- **UN Rules for the Protection of Juveniles Deprived of Their Liberty**, UN General Assembly resolution 45/113, December 14, 1990

- **UN Standard Minimum Rules for the Administration of Juvenile Justice**, UN General Assembly resolution 40/33, November 29, 1985
International Criminal Law Instruments

[Forthcoming]
[Page Intentionally Blank]
Appendix B:  Sources of Domestic U.S. Law……………………………………..381

1. U.S. Non-Military Instruments…………………………………………………..383
   a. United States Constitution (excerpts)……………………………………….385

2. U.S. Military & Military Commission Law……………………………………..387
   [Eds--The Military Commission sources of law below will be re-arranged]
      a. Uniform Code of Military Justice (UCMJ) (Excerpts)…………………..389
      b. Military Commissions Act of 2009 (excerpts)…………………………….391
      c. Rules of the Military Commission (United States) (14 August 1012) (excerpts)...395
      d. Regulations for Trial by Military Commissions (2011 Edition)(excerpts)……399
      e. Military Commissions Trial Judiciary Rules of Court (24 April 2012, as amended 4 June 2013)(excerpts)…………………………………………………….405
      f. Military Commission Rules of Evidence (MCRE)……………………………407
      g. Department of Defense Media Ground Rules for Guantanamo Bay, Cuba (GTMO) (10 September 2010) (excerpt)……………………………………………409
[Page Intentionally Blank]
U.S. Non-Military Law Instruments
U.S. Constitution (Excerpts)

Article 1, Section 1.

“… .

*The privilege of the writ of habeas corpus shall not be suspended*, unless when in cases of rebellion or invasion the public safety may require it.

*No bill of attainder or ex post facto Law shall be passed.* [Emphasis added]

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation. [Emphasis added]

Amendment 6

“*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and *to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*” [Emphasis added]

8th Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

14th Amendment, Section 1.

“… . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”
U.S. Military Law &
Military Commission Law
Uniform Code of Military Justice (Excerpts)

Article 38. Duties of trial counsel and defense counsel

07. Trial Procedure

(a) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.

(b)

(1) The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.

(2) The accused may be represented by civilian counsel if provided by him.

(3) The accused may be represented—

(A) by military counsel detailed under section 827 of this title (article 27); or

(B) by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed under paragraph (7)).

(4) If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused.

(5) Except as provided under paragraph (6), if the accused is represented by military counsel of his own selection under paragraph (3)(B), any military counsel detailed under paragraph (3)(A) shall be excused.

(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 827 of this title (article 27) to detail counsel, in his sole discretion—

(A) may detail additional military counsel as assistant defense counsel; and

(B) if the accused is represented by military counsel of his own selection under paragraph (3)(B), may approve a request from the accused that military counsel detailed under paragraph (3)(A) act as associate defense counsel.

(7) The Secretary concerned shall, by regulation, define “reasonably available” for the purpose of paragraph (3)(B) and establish procedures for determining whether the military counsel selected by an accused under that paragraph is reasonably available. Such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member. To the maximum extent practicable, such regulations shall establish uniform policies among the armed forces while recognizing the differences in the circumstances and needs of the various armed forces. The Secretary concerned shall submit copies of regulations prescribed under this paragraph to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

(c) In any court-martial proceeding resulting in a conviction, the defense counsel—

(1) may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate);

(2) may assist the accused in the submission of any matter under section 860 of this title (article 60); and

(3) may take other action authorized by this chapter.
(d) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.
Military Commission Act of 2009 (Excerpts)


“(d) INAPPLICABILITY OF CERTAIN PROVISIONS.—
(1) The following provisions of this title shall not apply to trial by military commission under this chapter:
‘(A) Section 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courts martial relating to speedy trial.
‘(B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the Uniform Code of Military Justice), relating to compulsory self-incrimination.
‘(C) Section 832 (article 32 of the Uniform Code of Military Justice), relating to pretrial investigation.

10 U.S.C. § 948r. Exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment; prohibition of self-incrimination; admission of other statements of the accused

(a) EXCLUSION OF STATEMENTS OBTAIN BY TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT.—No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

(b) SELF-INCRIMINATION PROHIBITED.—No person shall be required to testify against himself or herself at a proceeding of a military commission under this chapter.

(c) OTHER STATEMENTS OF THE ACCUSED.—A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds—

(1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

(2) that—
(A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or
(B) the statement was voluntarily given.

(d) DETERMINATION OF VOLUNTARINESS.—In determining for purposes of subsection (c) (2) (B) whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:
(1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities.
(2) The characteristics of the accused, such as military training, age, and education level.
(3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

10 U.S. Code § 949b - Unlawfully influencing action of military commission and United States Court of Military Commission Review

(a) Military Commissions.—
(1) No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or their functions in the conduct of the proceedings.
(2) No person may attempt to coerce or, by any unauthorized means, influence—
(A) the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case;
(B) the action of any convening, approving, or reviewing authority with respect to their judicial acts; or
(C) the exercise of professional judgment by trial counsel or defense counsel.

(3) The provisions of this subsection shall not apply with respect to—
(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or
(B) statements and instructions given in open proceedings by a military judge or counsel.

(b) United States Court of Military Commission Review.—

(1) No person may attempt to coerce or, by any unauthorized means, influence—
(A) the action of a judge on the United States Court of Military Commissions Review in reaching a decision on the findings or sentence on appeal in any case; or
(B) the exercise of professional judgment by trial counsel or defense counsel appearing before the United States Court of Military Commission Review.

(2) No person may censure, reprimand, or admonish a judge on the United States Court of Military Commission Review, or counsel thereof, with respect to any exercise of their functions in the conduct of proceedings under this chapter.

(3) The provisions of this subsection shall not apply with respect to—
(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or
(B) statements and instructions given in open proceedings by a judge on the United States Court of Military Commission Review, or counsel.

(4) No appellate military judge on the United States Court of Military Commission Review may be reassigned to other duties, except under circumstances as follows:
(A) The appellate military judge voluntarily requests to be reassigned to other duties and the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, approves such reassignment.
(B) The appellate military judge retires or otherwise separates from the armed forces.
(C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).
(D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause consistent with applicable procedures under chapter 47 of this title (the Uniform Code of Military Justice).

10 U.S. Code § 949c - Duties of trial counsel and defense counsel

(a) TRIAL COUNSEL.—The trial counsel of a military commission under this chapter shall prosecute in the name of the United States.
(b) DEFENSE COUNSEL.—(1) The accused shall be represented in the accused's defense before a military commission under this chapter as provided in this subsection.
(2) The accused may be represented by military counsel detailed under section 948k of this title or by military counsel of the accused's own selection, if reasonably available.
(3) The accused may be represented by civilian counsel if retained by the accused, provided that such civilian counsel—
(A) is a United States citizen;
(B) is admitted to the practice of law in a State, district, or possession of the United States, or before a Federal court;
(C) has not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct;
(D) has been determined to be eligible for access to information classified at the level Secret or higher; and
(E) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings.
(4) If the accused is represented by civilian counsel, military counsel shall act as associate counsel.
(5) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 948k of this title to detail counsel, in such person's sole discretion, may detail additional military counsel to represent the accused.

(6) Defense counsel may cross-examine each witness for the prosecution who testifies before a military commission under this chapter.

(7) Civilian defense counsel shall protect any classified information received during the course of representation of the accused in accordance with all applicable law governing the protection of classified information, and may not divulge such information to any person not authorized to receive it.

10 U.S. Code § 949j - Opportunity to obtain witnesses and other evidence

(a) IN GENERAL.—

(1) Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution.

(2) Process issued in military commissions under this chapter to compel witnesses to appear and testify and to compel the production of other evidence—

(A) shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and

(B) shall run to any place where the United States shall have jurisdiction thereof.
Rules for Military Commissions (United States)

(14 August 2012) (Excerpts)

RMC Rule 506(a)—Counsel
(a) In general. The accused has the right to be represented before a military commission by civilian counsel if provided at no expense to the Government, by military counsel detailed under R.M.C. 503, or by military counsel of the accused’s own selection, if reasonably available. Except as otherwise provided by section (b) of this rule, the accused is not entitled to be represented by more than one military counsel; however, the person authorized under regulations prescribed by R.M.C. 503 to detail counsel, in such person’s sole discretion, may detail additional military counsel to represent the accused.

RMC Rule 701—Examination of documents, tangible objects, reports
(c) Examination of documents, tangible objects, reports. After service of charges, upon a request of the defense, the Government shall permit the defense counsel to examine the following materials:

(1) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

(2) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

(3) The contents of all relevant statements—oral, written or recorded—made or adopted by the accused, that are within the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial.

Discussion
For the definition of “material to the preparation of the defense” in subsections (1), (2), and (3), see United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989). Evidence introduced by the Government at trial must be disclosed to the accused. See 10 U.S.C. § 949a(b) (A).

RMC Rule 701(e)—Exculpatory evidence.
(1) Subject to section (f), the trial counsel shall, as soon as practicable after referral of charges, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused with respect to an offense charged; or

(C) Reduce the punishment.

In this section, the term “evidence known to trial counsel,” as it relates to exculpatory evidence, means exculpatory evidence that the prosecution would be required to disclose in a trial by general court-martial under chapter 47 of title 10.
(2) The trial counsel shall, as soon as practicable after referral of charges, disclose to the defense the existence of evidence that reasonably tends to impeach the credibility of a witness whom the government intends to call at trial.

(3) The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence that is not subject to paragraph (1) or paragraph (2) but that reasonably may be viewed as mitigation evidence at sentencing.

(4) The disclosure obligations under this subsection encompass evidence that is known or reasonably should be known to any government officials who participated in the investigation and prosecution of the case against the accused.

RMC Rule 701(g)—Disclosure by the defense.

(g) Disclosure by the defense. Except as otherwise provided in sections (k) and (l)(2) of this rule, the defense shall provide the following information to the trial counsel:

(1) Names of witnesses and statements.

(A) Before the beginning of trial on the merits, the defense shall notify the trial counsel of the names of all witnesses, other than the accused, whom the defense intends to call during the defense case-in-chief and provide sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of the trial counsel, the defense shall also:

(i) Provide the trial counsel with the names of any witnesses whom the defense intends to call at the presentencing proceedings; and

(ii) Permit the trial counsel to examine any written material that will be presented by the defense at the presentencing proceeding.

(2) Notice of certain defenses. The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi or lack of mental responsibility, or its intent to introduce expert testimony as to the accused’s mental condition.

Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense.

Discussion
Such notice shall be in writing unless impracticable. See R.M.C. 916(k) concerning the defense of lack of mental responsibility. See R.M.C. 706 concerning inquiries into the mental responsibility of the accused. See Mil. Comm. R. Evid. 302 concerning statements by the accused during such inquiries. If the defense needs more detail as to the time, date, or place of the offense to comply with this rule, it should request a bill of particulars (see R.M.C. 906(b) (6)).

RMC Rule 703. Production of witnesses and evidence

(a) In general. The defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules.
(b) Right to witnesses.

(1) On the merits or on interlocutory questions. Each party is entitled to the production of any available witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary. See R.M.C. 701(j).

(2) On sentencing. Each party is entitled to the production of a witness whose testimony on sentencing is required under R.M.C. 1001(e).

(3) Unavailable witness.

(A) In general. A party is not entitled to the presence of a witness who is deemed “unavailable” in the discretion of the military judge.

Discussion

In determining whether a witness is “unavailable,” the military judge shall consider the factors in Mil. R. Evid. 804(a).

(B) Exceptions. Notwithstanding paragraph (A), if the testimony of a witness determined to be unavailable is of central importance to the resolution of an issue essential to a fair trial, and there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness’ presence, or shall abate the proceedings, if the military judge finds that the reason for the witness’ unavailability is within the control of the United States.

Discussion

This rule departs from the R.C.M. 703(b)(3), which would permit the abatement of the proceedings even when the absence of the witness is not the fault of the United States. That rule provides a broader standard than that existing in the federal civilian courts, and it is particularly impracticable for military commissions. Chapter 47A of title 10, United States Code, recognizes that witnesses located in foreign countries may be unavailable for many reasons outside the control of the United States, and Congress provided for the broad admissibility of hearsay precisely to allow for the introduction of evidence where the witnesses are not subject to the jurisdiction of the military commission or are otherwise unavailable.

(c) Determining which witnesses will be produced.

(1) Witnesses for the prosecution. The trial counsel shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution.

(2) Witnesses for the defense.

(A) Request. The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests.

(B) Contents of request.

(i) Witnesses on merits or interlocutory questions. A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

(ii) Witnesses on sentencing. A list of witnesses wanted for presentencing proceedings shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence, a synopsis of the testimony that it is expected the witness will give, and the
reasons why the witness’ personal appearance will be necessary under the standards set forth in R.M.C. 1001(c).

(C) Time of request. A list of witnesses under this subsection shall be submitted in time reasonably to allow production of each witness on the date when the witness’ presence will be necessary. The military judge may set a specific date by which such lists must be submitted.

Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown.

(D) Determination. The trial counsel shall arrange for the presence of witnesses listed by the defense unless the trial counsel contends that the witness’ production is not required under this rule, classified under 10 U.S.C. § 948a, or government information as defined by Mil. Comm. R. Evid. 506(b). If the trial counsel contends that the witness’ production is not required or protected, the matter may be submitted to the military judge, or if prior to referral, the convening authority. If, after consideration of the matter and an in camera review of any trial counsel submissions asserting that the material is subject to such provisions, the trial judge grants a motion for a witness, the trial counsel shall produce the witness, or the military judge shall issue such order as the interests of justice may require.

Discussion

*When significant or unusual costs would be involved in producing witnesses, the trial counsel should inform the convening authority, as the convening authority may elect to dispose of the matter by means other than military commission (see R.M.C. 905(j)).*
Regulations for Trial by Military Commissions (2011 Edition) (Excerpts)

1-4. Unlawful Influence in Military Commissions Proceedings
10 U.S.C. § 949b, prohibits unlawful influence in military commissions proceedings. All persons involved in the administration of military commissions must avoid the appearance or actuality of unlawful influence and otherwise ensure that the military commission system is free of unlawful influence. In addition, all persons, even those not officially involved in the commissions process, should be sensitive to the existence, or appearance, of unlawful influence, and should be vigilant and vigorous in their efforts to prevent it.

8-7. Communications with the Media
Personnel assigned to the OMC-P may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Convening Authority.

9-1. Detail of Defense Counsel
Every accused shall have a qualified military defense counsel detailed to the accused at government expense during every stage of the proceedings. Should the military judge approve the request of an accused to represent himself, detailed defense counsel may act as standby counsel at the direction of the military judge. Should the accused retain civilian counsel, a military defense counsel shall remain detailed to the accused.

9-1(a) 6. Learned Counsel.
In any case in which trial counsel makes a recommendation to the Convening Authority pursuant to R.M.C. 307(d) that a charge be referred to a capital military commission, the accused has the right to be represented by at least one additional counsel who is learned in applicable law relating to capital cases. See R.M.C. 506(b). If a charge transmitted by trial counsel to the convening authority is a charge for which the death penalty is authorized, the Convening Authority may not refer the charge as a capital offense unless the provisions regarding learned counsel in Rule 506(b) have been met. See R.M.C. 601(d)(2).

9-2. Request For Individual Military Counsel
An accused may be represented by a military counsel of his own selection, if reasonably available. See 10 U.S.C. § 949a(b)(2)(C)(i).

a. An accused must request, either through detailed defense counsel, on the record, or directly to the Chief Defense Counsel, the desire to be represented by a specific military counsel. To be a valid request, the accused must provide the name of a specific military attorney at the time of the request, and acknowledge his understanding of the requirements for requests for individual military counsel (IMC).

9-6. Consultants
a. Pursuant to R.M.C. 506(e), an accused before a military commission may have present and seated at the counsel table, for purpose of consultation, persons who are not qualified to serve as counsel under R.M.C. 502. These consultants may or may not be United States citizens.

b. The detailed defense counsel shall provide written notice to the Convening Authority of any request by the accused to have a consultant present at any stage of the proceedings. The notice shall include the name, address and, if known, the phone number and email address of the requested consultant. If the consultant is approved by the Convening Authority or military judge, the Convening Authority will coordinate the travel arrangements necessary to bring the consultant to Guantanamo Bay or other designated location for the proceedings.

Chapter 13: Witnesses, Funding, Travel, Compulsory Process, And Expert Witnesses

13-1. Funding Authority
The funding for all witness travel will be approved by the Convening Authority and arranged by the Office of Military Commissions. Witness travel for the purpose of testifying at hearings held in military commission proceedings shall be arranged by the Victim Witness Assistance Program within the Office of the Chief Prosecutor, Office of Military Commissions.

13-2. Requesting Travel Funds
R.M.C. 703(c) governs the initial determination of whether to produce a witness. Once the trial counsel decides to produce a witness, including a witness submitted by defense counsel, the trial counsel requests travel funds by letter sent by electronic transmission to the Office of the Convening Authority, who determines whether to approve funding. This request for funds must be accompanied by the — Witness Information – Office of
Military Commissions (Figure 13.1). Prosecution and defense witnesses who have been approved for production by trial counsel must submit an OMC Witness Travel Request to the designated contact in the Victim Witness Assistance Program (Figure 13.2). All requests for witnesses to testify in military commissions convened outside the United States should include area clearance information. See DoD Directive 4500.54E, —Foreign Clearance Program and the Electronic Foreign Clearance Guide at https://www.fcg.pentagon.mil.

13-6. Assistance To Witnesses

…

c. If the witness is fearful for his or her physical safety as a result of a request for the witness to testify before the commission, the trial or defense counsel shall ensure that the military judge is made aware of this fact. The trial or defense counsel, or their designee, shall implement any measures ordered by the military judge to ensure the safety of the witness and/or the witness’s family.
d. The Office of Military Commissions shall, when directed by the Convening Authority or the military judge, be responsible for the procurement of security measures for witnesses and victims testifying in the courtroom. This shall include, but not necessarily be limited to, voice distortion equipment, screens that are capable of physically shielding the victim/witness from the public, modifications to the witness box, and the entry and exit of protected witnesses in and out of the courtroom.
e. If requested by the witness, the trial or defense counsel, or their designee, shall take reasonable steps to inform the witness’s employer of the reasons for the witness’s absence from work.

…

Chapter 16: Victim And Witness Assistance

16-1. General
This chapter describes the Military Commissions Victim and Witness Assistance Program (VWAP), and is consistent with the intent of DoD Directive 1030.1, Victim and Witness Assistance, April 13, 2004, and DoD Instruction 1030.2, Victim and Witness Assistance Procedures, June 4, 2004.

16-2. Purpose
This chapter identifies the role of the VWAP and provides guidance for the treatment of victims of offenses under the M.C.A. These provisions create no cause of action or defense in favor of any person arising out of a failure to comply with the VWAP.

16-3. Definitions
a. Victim. A victim is a person who has suffered direct physical, emotional or pecuniary harm or loss as a result of the commission of an offense as defined in chapter 47A of title 10, United States Code, or the law of war. See R.M.C. 103(a)(31). Victims may include:
   1. Military members, civilians and citizens of foreign countries;
   2. A person who is an immediate family member of the victim of a crime, if so designated by the Convening Authority or her designee. Examples of immediate family members are spouses, children, parents and siblings; and
   3. Any person can make an application to the VWAP Director to be designated as a victim in a particular case. The VWAP Director shall forward the request to the Convening Authority with a recommendation for approval or disapproval. The decision of the Convening Authority is not appealable.
b. Witness. A witness is a person who has information or evidence about a criminal offense within the jurisdiction of the M.C.A. The term does not include a defense witness or an individual involved in the crime as a perpetrator or accomplice.

16-4. Policy
It is the policy of the DoD that:
a. The role of crime victims and witnesses in the military commission process should be protected; and
b. Each crime victim should:
   1. Be treated with fairness and respect for the victim’s privacy and dignity;
   2. Be reasonably protected from the accused offender;
   3. Be notified of commission proceedings;
   4. Be present at all public commission proceedings related to the offense to the extent permitted by available resources, unless the military judge determines that testimony by the victim would be materially affected if the victim heard other testimony at trial;
5. Confer with the attorney for the Government in the case;
6. Receive available restitution;
7. Be provided information about the conviction, sentencing, imprisonment, transfer or release of the offender; and
8. Be allowed to provide information, in writing, to any authority considering the offender’s potential release or transfer from custody of the United States.

16-6. Victim/Witness Liaison Duties
a. The Victim/Witness Liaison should obtain from the Chief Prosecutor or trial counsel a list of all victims as soon as possible. The trial counsel will identify and designate those victims who will testify in some form as a witness for the prosecution in a military commission. This includes victims who will testify in person, by videotape or any other means authorized under commission law.

b. Initial Information and Services. The Victim/Witness Liaison shall provide the following information and services, either by direct communication or by referring the victim to an information website:
1. Information about available military and civilian emergency medical and social services, victim advocacy services for victims of sexual assault, and, when necessary, assistance in securing such services;
2. Information about restitution or other relief a victim may be entitled to under applicable laws, and the manner in which such relief may be obtained;
3. Information about public and private programs which are available to provide counseling, treatment, and other support, including available compensation through Federal, State, and local agencies;
4. Information about the prohibition against intimidation and harassment of victims and witnesses, and arrangements for the victim or witness to receive reasonable protection from threat, harm, or intimidation from a suspected offender and from people acting in concert with or under the control of the suspected offender;
5. Information concerning military and civilian protective orders, as appropriate;
6. Information about the military commission process, the role of the victim or witness in the process, and how the victim or witness can obtain additional information concerning the process and the case; and
7. If necessary, assistance in contacting the people responsible for providing victim and witness services and relief.

c. Information to be Provided During Investigation of a Crime. The Victim/Witness Liaison, law enforcement investigators and criminal investigators shall inform all victims and witnesses, as appropriate, of:
1. The status of the investigation of the crime, to the extent providing such information does not interfere with the investigation;
2. The apprehension or detention of the suspected offender; and
3. A decision not to pursue further investigation.

Chapter 19: Public Access To Commission Proceedings And Documents
19-1. General
Section 949d(c)(2) of the Military Commissions Act of 2009 provides that “[t]he military judge may close to the public all or a portion of the proceedings . . . only upon making a specific finding that such closure is necessary to— (A) protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods or activities; or (B) ensure the physical safety of individuals.” Consistent with this statutory requirement, the goal of the DoD is to make military commissions accessible to the public to the maximum extent possible, consistent with the interests of national security, the rights of the accused, and other interests protected by law. Making military commissions accessible to the public includes providing access to military commission proceedings, transcripts, pleadings, filings, rulings, orders and other materials used at military commission proceedings, to the extent that these materials are not classified, covered by a protective order, or otherwise protected by law, including the rules and regulations governing military commissions.

19-3. Protected Information
a. Pursuant to RMC 806, the military judge may issue protective orders limiting the public disclosure of “protected information.”

b. Protected information, for purposes of commission proceedings, is non-classified information subject to a properly issued protective order by an official authorized to issue such an order to prevent public dissemination of such information.

c. The military judge may resolve any dispute raised by the parties or by members of the public, including news media representatives (or their counsel), regarding whether material presented at trial, at a hearing or in
a filing, ruling, order or transcript, may be released to the public or is not appropriately designated as “protected.” See Chapter 17-4. These disputes, once properly raised, shall be resolved promptly. Classification decisions by the DoD Security Classification/Declassification Review Team and the original classification authorities of other non-DoD federal departments and agencies are not subject to review by the military judge.

d. A non-party’s request to challenge the applicability of a protective order to the military judge’s designation of information as protected information shall be submitted in writing to the Chief Clerk with a copy to the attorneys of record. Written challenges must identify with specificity (i) the protected information at issue (ii) the reason(s) for believing the “protected” designation is not valid, and (iii) any supporting documentation relevant to substantiating that claim. The attorneys of record may, at their discretion, file a written document in support of, or in opposition to, a non-party’s challenge. The military judge may request the views of counsel of record, if not otherwise provided. The military judge need not hear oral arguments on any such motions. If the military judge concludes that the information must be protected in order to prevent damage to national security or ensure the physical safety of individuals, the military judge shall issue a finding that protective measures are necessary. See 10 U.S.C. § 949d(c).

19-4. Public Release Of Transcripts, Filings, Rulings, Orders And Other Materials

19-4(c)(1) Filings and orders that do not require classification security review under Chapter 17-1 shall be posted within one business day of filing with the military commission;

... .

d. Within one business day of a military judge’s decision on a motion not containing classified or protected information, the Chief Clerk shall coordinate with the custodian of the OMC website to ensure the filings inventory on the OMC website is updated by the custodian to reflect the disposition of the motion, and, if written, the Chief Clerk shall provide the unclassified opinion to the custodian for posting on the OMC website.

19-6. Spectators At Military Commission Sessions

The proceedings of military commissions shall be public to the maximum extent practicable. In general, all persons granted permission to attend a session, except those who may be required to give evidence, shall be admitted as spectators. The Office of Military Commissions shall coordinate travel and attendance of all spectators except news media representatives. The Office of the Assistant Secretary of Defense for Public Affairs shall coordinate all matters involving media attendance at military commission sessions, subject to the authority of the military judge. The military judge may close proceedings of military commissions to the public only upon making the findings required by M.C.A. § 949d(c) and R.M.C. 806.

20-8. Appeals By The United States Of Adverse Rulings

a. The United States may take an interlocutory appeal pursuant to 10 U.S.C. § 950d and R.M.C. 908. See also Chapter 25-5. Trial counsel may file a notice of appeal by the United States under R.M.C. 908 only after consultation with the Chief Prosecutor, or a Deputy Chief Prosecutor for Military Commissions.

20-10. Appellate Rights Advice

a. Prior to adjournment, the defense counsel will inform the accused orally and in writing of:
   1. The right to submit matters to the Convening Authority to consider before taking action;
   2. The right to appellate review and the effect of waiver or withdrawal of such right;
   3. The right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

b. The written advice to the accused concerning the post-trial and appellate rights shall be signed by the accused and the defense counsel and the accused will make an election concerning representation by military or civilian counsel before the USCMCR. The form will be inserted in the record of trial as an appellate exhibit.

23-2. Post-Trial Advice

a. In accordance with R.M.C. 1010, prior to adjournment, the military judge will ensure that the defense counsel has informed the accused orally and in writing of the following post-trial and appellate rights:

   1. The right to submit matters to the Convening Authority to consider before taking action;
   2. The right to appellate review and the effect of waiver or withdrawal of such right; and
3. The right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

This advice will be signed by the accused and the defense counsel and inserted in the record of trial as an appellate exhibit.

b. If the accused is represented by more than one counsel at trial, the accused will designate which counsel (detailed or civilian) will be served with the post-trial recommendation. If there is no designation, the Legal Advisor will cause the recommendation to be served in the following order of precedence as applicable: (1) civilian defense counsel or (2) detailed defense counsel. If the accused has not retained civilian counsel and the detailed defense counsel has been relieved or is not reasonably available to represent the accused, substitute military counsel to represent the accused shall be detailed by an appropriate authority. Substitute counsel shall attempt to enter into an attorney client relationship with the accused before examining the recommendation and preparing any response. See R.M.C. 1106(e)(2).


a. Records to the USCMCR. After the Convening Authority’s action in each case in which the Convening Authority approved a finding of guilty, the Convening Authority will forward the complete and original record of trial, as well as four copies of that record of trial, to the Clerk of Court, USCMCR. The record of any post-trial session or rehearing will be appended to the original record of trial. Those records will be accompanied by a transmittal letter containing the identifying data for the accused, the dates of trial and the date of the Convening Authority’s action, as well as any subsequent action.

24-5. Appellate Counsel

a. Appellate trial counsel may represent the United States before the D.C. Circuit and the Supreme Court of the United States, if requested to do so by the Attorney General of the United States.

b. The Government shall be represented before the USCMCR by counsel appointed for that purpose by the Chief Prosecutor. The Chief Prosecutor may appoint one or more counsel who prosecuted the case before a military commission. Instead of or in addition to such counsel, the Chief Prosecutor may appoint, in his sole discretion, any other counsel assigned or available to the OMC-P. If no counsel are available for assignment as appellate counsel, the Chief Prosecutor shall transmit via the General Counsel, DoD, a request for nominations from the service Judge Advocates General for appellate military attorneys to represent the government. Individuals nominated must possess the qualifications set forth in the R.M.C. and Chapter 8 of this regulation.

c. The accused will be represented by defense counsel appointed by the Chief Defense Counsel at all levels of appeal. Except in those cases in which ineffective assistance or another representational impediment is claimed by the accused, the Chief Defense Counsel may appoint the trial defense counsel to represent the accused on appeal. Instead of or in addition to such counsel, the Chief Defense Counsel may appoint, in his sole discretion, any other counsel assigned or available to the OCDC. The accused may elect to retain properly cleared civilian defense counsel at no expense to the government to represent him on appeal; however, detailed counsel must also be appointed.

d. For cases in which the Convening Authority has approved a sentence of death, the accused shall have, in addition to a detailed counsel, at least one additional counsel who is learned in capital cases, qualified, selected and compensated in accordance with Chapter 9.
Military Commissions Trial Judiciary  Military Commissions Rules of Court (Excerpt)

RULE 6. PUBLIC ACCESS AND RELEASE OF RECORDS

1. Judicial Policy: The Military Judge has the responsibility to ensure a Commission is conducted in an impartial and orderly manner that reflects the gravity of the proceeding and the independence of the Commission. Trials must be held in a manner that enable calm, deliberate, and detached decision-making on the issues presented whether by the judge or panel. The rights of all parties must be protected while affording public access and adhering to the requirements of national security. Consistent with these responsibilities and competing interests, the Military Judge will ensure all Commission proceedings are as open and transparent as possible.

2. Public Access:

   a. Within limitations imposed by the DoD, the media and public are encouraged to attend Commission proceedings and shall be permitted to observe all trial proceedings, unless the Military Judge determines the requirements of national security require a closed courtroom. No one will be permitted to disrupt the judicial atmosphere of a Commission. Commission security personnel and the bailiff will ensure that those watching a trial are aware of, and adhere to, proper decorum throughout the proceedings.

   b. Unless otherwise directed by the Military Judge, or security requirements mandate, spectators may enter and leave the courtroom during open sessions but will not be permitted to disturb or interrupt Commission proceedings by their conduct. Spectators will not indicate or demonstrate in any manner agreement or disagreement with testimony or procedures at a trial, nor will their appearance or attire be permitted to detract from the dignity of the proceedings, create a disruption, or prejudice the rights of any party. Any spectator who disrupts the Commission or fails to demonstrate appropriate demeanor for a judicial proceeding will be escorted from the courtroom and not be allowed to return without the judge's permission.

   c. R.M.C 806 (c) does not allow Commission proceedings to be broadcast, televised, recorded, or photographed for the purpose of public dissemination except as set out in paragraph 2d below.

   d. Contemporaneous closed-circuit television or audio transmissions are authorized under the provisions of R.M.C 806(c) for all proceedings subject to the provisions set out below. This will permit viewing and hearing by victims, the media, and other spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

      (1) Notification: If contemporaneous video or audio transmissions are anticipated, Government counsel will petition the Military Judge by a motion before arraignment (see Rule 3).

      (2) Security: This motion will set out for the judge the locations to which the transmissions are requested to be made and the security oversight at each site to ensure compliance with any directives of the judge.

      (3) Notice of the transmission will be placed on the record by the Government at the start of each individual session that is to be the subject of contemporaneous video or audio transmissions.

      (4) The Government will ensure no potential witness on the merits observes the trial from a remote location unless, IAW paragraph 16-4b4 of DoD Regulation for Trial by
Military Commission, the Government notifies the Military Judge of that witnesses’ potential observation. If a potential witness on the merits inadvertently observes a trial, the prosecution will promptly notify the Military Judge and defense counsel.

e. No one other than a trial participant, identified on the record, court personnel, or security personnel are allowed inside the bar of the courtroom without the Military Judge’s permission when a Commission is in session.

f. If a Military Judge is requested by either party to close part or all of a proceeding, the judge may do so IAW the provisions of 10 U.S.C. § 949d. The burden of establishing the need to close a session is on the moving party. The Military Judge will announce the decision, and the basis for it, prior to closing the courtroom.

3. Release of Records

a. Judicial Policy: All motions, responses, replies, supplemental filings, and judicial orders shall be released to the public, subject to any security restrictions imposed by the Department of Defense unless such documents are filed under seal (for purposes other than security review) or ex parte, are classified, or are otherwise ordered by the Military Judge not to be released.
MCRE Rule 806—Public trial

(a) In general. Except as otherwise provided in chapter 47A of title 10, United States Code, and this Manual, military commissions shall be publicly held. For purposes of this rule, “public” includes representatives of the press, representatives of national and international organizations, as determined by the Office of the Secretary of Defense, and certain members of both the military and civilian communities. Access to military commissions may be constrained by location, the size of the facility, physical security requirements, and national security concerns.

(b) Control of spectators and closure.

(1) Control of spectators.

(A) In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, and exclude specific persons from the courtroom.

(B) Any limitations imposed by the military judge under paragraph (b)(1)(A) shall be supported by essential findings of fact appended to the record of trial.

Discussion

The military judge must ensure that the dignity and decorum of the proceedings are maintained and that the other rights and interests of the parties and society are protected. Public access to a session may be limited, specific persons excluded from the courtroom, and, under unusual circumstances, a session may be closed.

(2) Closure.

(A) The military judge may close to the public all or part of the proceedings of a military commission under chapter 47A of title 10, United States Code.

(B) The military judge may close to the public all or a portion of the proceedings under paragraph (A) only upon making a specific finding that such closure is necessary to—

(i) protect information the disclosure of which could reasonably be expected to damage national security, including intelligence or law enforcement sources, methods, or activities; or

(ii) ensure the physical safety of individuals.

(C) A finding under paragraph (B) may be based upon a presentation, including a presentation ex parte or in camera, by either trial or defense counsel.

Discussion

See 10 U.S.C. § 949d(c). Absent a need to close the proceedings, the military judge may take other lesser measures (such as the use of delayed broadcast technologies as a substitute for live testimony) to protect information and ensure the physical safety of individuals. Any closure under this subsection should be supported by the findings described in paragraph (b)(1)(B). In determining whether to close a proceeding pursuant to paragraphs (b)(2)(A) or (B), the military judge does not conduct a de novo review of the classification of sources, methods, or activities information in its original form or as it might possibly be reconstituted in a summarized form. Rather, the
military judge should verify that appropriate officials within the agency concerned conducted an authorized review in accordance with governing regulations and determined that such a disclosure of information, in either original or summarized form would or would not be detrimental to national security. The review is to verify the existence of a legal basis for the agency official’s determination that the information is classified and that no summary of such information can be provided consistent with national security. This initial review by the trial judge is not for the purpose of conducting a de novo review of the propriety of the agency official’s determination(s). All that must be determined is that the material in question has been classified by the proper authorities in accordance with the appropriate regulations. See United States v. Grunden, 2 M.J. 116 (C.M.A. 1977).

Note that there may be other sources of authority to close the hearing, such as Mil. Comm. R. Evid. 412, or the authority of a military judge to close a hearing in “unusual circumstances” warranting an ex parte session. See United States v. Kaspers, 47 M.J. 176 (1997)

(c) Photography and broadcasting prohibited. Except as otherwise expressly authorized by the Secretary of Defense, video and audio recording and the taking of photographs—except for the purpose of preparing the record of trial—in the court room during the proceedings and radio or television broadcasting of proceedings from the courtroom shall not be permitted. However, the military judge may, as a matter of discretion permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed under R.M.C. 804 or by spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

(d) Protective orders. The military judge may, upon request of any party or sua sponte, issue an appropriate protective order, in writing, to prevent parties and witnesses from making extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial by impartial members.

**Discussion**

A protective order may proscribe extrajudicial statements by counsel, parties, and witnesses that might divulge prejudicial matter not of public record in the case. Other appropriate matters may also be addressed by such a protective order. Before issuing a protective order, the military judge must consider whether other available remedies would effectively mitigate the adverse effects that any publicity might create, and consider such an order’s likely effectiveness in ensuring an impartial military commission panel. A military judge should not issue a protective order without first providing notice to the parties and an opportunity to be heard. The military judge must state on the record the reasons for issuing the protective order. If the reasons for issuing the order change, the military judge may reconsider the continued necessity for a protective order.
C. Protected Information

1. Protected Information necessarily includes classified information. Protected Information also includes (i) information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities, or jeopardize the physical safety of individuals, and (ii) information subject to a properly-issued protective order by an official authorized to issue such orders by law or regulation.

2. NMRs shall not publish, release, publicly discuss, or share information gathered at GTMO, or in transit to or from GTMO on transportation provided by DoD (or other U.S. government entities), that is Protected Information for purposes of these ground rules.

3. A NMR will not be considered in violation of these ground rules for re-publishing what otherwise would be considered Protected Information, where that information was legitimately obtained in the course of newsgathering independent of any receipt of information while at GTMO, or while transiting to or from GTMO on transportation provided by DoD (or other U.S. government entities).

 aspects of detention and base operations the disclosure of which must be avoided for reasons of national security, force protection and compliance with international treaty obligations. These operations are part of the base operations that the general public is not invited or permitted to view. As a result, JTF-GTMO has designated aspects of these operations whose disclosure is not permitted, and NMRs at GTMO will be required, as a condition of their visits, to safeguard this information, which will be deemed Operational Protected Information. Operational Protected Information, as determined by JTF-GTMO, is identified in these ground rules.

D. General Photography and Video Limitations

1. At no time during a media visit is communication (verbal, written or other) with a detainee allowed. Attempting to communicate with a detainee and photographing or taking video of a detainee’s attempts to communicate with members of the media are prohibited. If detainees become agitated at the presence of media, the media may be asked to leave for the safety and security of the detainees, NMR and the guard force.

2. Photographs or video shall not be taken of the following:
   a. Frontal facial views, profiles, ¾ views, or any view revealing a detainee’s identity.
   b. Identifiable JTF-GTMO personnel, without their consent.
   c. Deliberate views of security protocols including security cameras, metal detectors, locks, keys, gates, reinforced doors or other security measures.
   d. The JTF-GTMO coastline between the Windmill Beach entry gate, east to Kittery Beach; this restriction includes views of Camp Iguana and the security gate from Windmill Beach and views of the tactical observation post from Kittery Beach.
   e. Panoramic views (an unobstructed or complete view of an area) of JTF-GTMO camp facilities and Office of Military Commissions (OMC) facilities that reveal access roads, facilities layout, security borders or locations of security checkpoints.
   f. Views of Checkpoint Roosevelt and Checkpoint Houston or observation post “New York”.

---

© 2017

E-mail - GitmoObserver@yahoo.com  @GitmoObserver The Gitmo Observer (of Indiana U McKinney School of Law)
g. Deliberate views of fuel, water, electrical power or ammunition processing or storage facilities from within their enclosed boundaries including close-up views of valves, electrical power panels, fuel or water distribution pipes or fittings.

h. Deliberate views of antennas, RADAR or communications facilities or equipment from within their marked boundaries.

i. Bunker facilities on either side of AV-34/Courtroom One.

j. Military Convoys arriving or departing OMC facilities or JTF-GTMO operational area.

E. Operational Security Review

1. NMRs will submit all still and video imagery taken at JTF-GTMO to a security review. (Daily review, editing, cropping, deletion).

F.

3. In each military commission proceeding, the military judge will specify in advance what information is considered Protected Information for purposes of that proceeding. Such information, in the absence of an inadvertent disclosure, shall not be released to the media. Protected Information necessarily includes classified information.

Protected Information, for purposes of commission proceedings, also includes (i) information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities, or jeopardize the physical safety of individuals, and (ii) information subject to a properly-issued protective order by an official authorized to issue such orders by law or regulation.

5. While at GTMO to attend military commission proceedings, and in transit to and from GTMO for that purpose, NMRs may be exposed to aspects of detention and base operations the disclosure of which must be avoided for reasons of national security, force protection and compliance with international treaty obligations. These operations are not an inherent part of the public proceedings that occur in the military commissions, but rather are part of the base operations that the general public is not invited or permitted to view. As a result, JTF-GTMO has designated aspects of these operations whose disclosure is not permitted, and NMRs at GTMO will be required, as a condition of their visits, to safeguard this information, which will be deemed Operational Protected Information.

6. The GTMO Media Operation Center (GTMO MOC) is a place to conduct business. Alcohol will not be stored or consumed in the GTMO MOC or in and around the Hangar Conference Room. Media can use B18 which has a large refrigerator, chairs and TV as a social area. Media are free to store alcohol in their tent refrigerator or the in B18 refrigerator.

7. Media may conduct interviews in the Hangar Conference Room with prior coordination with the OASD (PA) representative.

8. JTF-GTMO tours: Tours of the current detention facilities, Camp X-Ray, and other facilities, are arranged through JTF-GTMO PA staff on a not-to-interfere basis with military commissions. These tours involve a significant amount of coordination and generally cannot be done during commissions proceeding.

G. Media Viewing of Sessions

1. As ordered by the military judge, sessions will be open for media observation to the maximum extent practical given the constraints of courtroom size and the requirement to safeguard protected information.
Media unable to view from within the courtroom will be allowed to view proceedings via Closed Circuit TV (CCTV) feed to the GTMO MOC.

2. The level of access allowed for a given session is at the discretion of the military judge and is subject to change as the situation dictates. In an effort to balance the need to safeguard protected information with the principle of openness, a three-tiered system will be used to determine the level of access allowed.

H. Additional Information

1. NMRs may request interviews of DoD personnel by submitting requests to the OASD (PA) representative at GTMO. Interviews with JTF-GTMO personnel, including senior commanders, support staff and detention camp personnel may be permitted and these individuals may be identified with their consent and the approval of the JTF-GTMO Commander.

2. Interviews with others not associated with JTF-GTMO or the military commissions proceedings, including with any Cuban, Haitian, or other migrant personnel, is expressly prohibited, unless specifically approved by the Commanding Officer, U.S. Naval Station Guantanamo Bay, Cuba.

Courtroom sketches may include the features of the defendant, judges, attorneys, witnesses and spectators, unless they have been declared "protected" by the judge. Sketch artists are requested to respect the wishes of victims’ family members before sketching them and before using any such sketch in any publication. Courtroom sketches may not include the features of the members of the commission panel.

6. NMRs may conduct interviews with prosecutors and defense counsel participating in the commission proceedings, and with OASD (PA) and OMC personnel, with their consent, and these individuals may be identified by name, with their consent.

No fewer than eleven (11) seats shall be reserved in the courtroom for NMRs, including one designated for the sketch artist (if present).

2. Courtroom seating will be decided by media pool. If the media cannot reach an agreement, the following rules will apply:

a. Courtroom seating will be allocated each day, by media category, and then by lottery with the sketch artist (if present) always having a seat. For allocation purposes, five media categories will be used to divide those seats: (3) print, (3) television, (3) wire and news service, (1) radio and (1) sketch artist. Lots will be drawn among participating outlets to assign courtroom seating. If a proceeding lasts more than one day, a new lottery will be conducted for each day.

J. Procedures for Enforcement of Ground Rules

1. An NMR may seek to raise with a military judge that judge’s designation of Protected Information, and, to the extent permitted by applicable law and military commissions rules, regulations, procedures and practice, the military judge may allow the NMR to be heard on the matter, in the event the NMR believes the Protected Information was in fact information that was legitimately obtained by the NMR in the course of newsgathering independent of any receipt of information at GTMO, or while transiting to or from GTMO on transportation provided by DoD (or other U.S. government entities).

In the event the military judge undertakes to resolve the issue, OASD (PA) will defer to the military judge’s ruling. In the event the military judge declines to rule on the issue after an opportunity to do so, the NMR is encouraged to bring the issue to OASD (PA) for appropriate consideration and disposition within the framework of these ground rules.

2. NMRs have an opportunity to challenge the designation of information as “Protected” where JTF-GTMO security personnel have so designated the information. A challenge to JTF-GTMO’s designation of information as Protected shall be submitted in writing to the JTF-GTMO commander.
a. A challenge may also be submitted to the JTF-GTMO commander by OASD (PA) in order to resolve an issue raised by an NMR.

b. Written challenges must identify with specificity (i) the protected information at issue, (ii) the reason(s) for believing the protected designation is not (or is no longer) valid, and (iii) any supporting documentation relevant to substantiating that claim. A decision on the NMR’s challenge will be rendered promptly.
Appendix C: Charts of Fair Trial Provisions from International & Domestic Law Instruments

a. International Human Rights Law Treaties .......................................................... 415
c. Historical and Other International Humanitarian Law, International Criminal Law Instruments ........................................................................................................... 418
e. U.S. Military Commission Law; International Humanitarian Law Instruments .... 421
[Page Intentionally Blank]
a. International Human Rights Law Treaties

<table>
<thead>
<tr>
<th>Right</th>
<th>ICCPR</th>
<th>ACHR</th>
<th>ECHR</th>
<th>ARABCHR</th>
<th>ACHPR</th>
<th>CAT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to a Fair Hearing</td>
<td>14(1)</td>
<td>8(1)</td>
<td>6(1)</td>
<td>---</td>
<td>7(1)</td>
<td>7(3)</td>
</tr>
<tr>
<td>Right to be presumed innocent</td>
<td>14(2)</td>
<td>8(2)</td>
<td>6(2)</td>
<td>7</td>
<td>7(1)(b)</td>
<td>----</td>
</tr>
<tr>
<td>Right to Have the Burden of Proof on the Prosecution</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Freedom from Retrospective Application of Criminal Laws (No Ex Post Facto Laws; Nullum Crimen Sine Lege; No Crime Without Law)</td>
<td>15(1)</td>
<td>9</td>
<td>7(1)</td>
<td>6</td>
<td>7(2)</td>
<td>----</td>
</tr>
<tr>
<td>Freedom from Double Jeopardy</td>
<td>14(7)</td>
<td>8(4)</td>
<td>4(1), Protocol 7</td>
<td>16</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>Right to Trial by a Competent, Independent, and Impartial Tribunal</td>
<td>14(1)</td>
<td>8(1)</td>
<td>6(1)</td>
<td>---</td>
<td>7(1)</td>
<td>7(1)(d)</td>
</tr>
<tr>
<td>Rights During Pre-Trial Hearing Stage (Post-Charges)</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Right to Counsel</td>
<td>14(3)(d)</td>
<td>8(2)(d)</td>
<td>6(3)(c)</td>
<td>---</td>
<td>7(1)(c)</td>
<td>---</td>
</tr>
<tr>
<td>Right to Information &amp; Access to Information</td>
<td>---</td>
<td>8(2)(d), 8(2)(e)</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Right to adequate Time &amp; Facilities to Prepare a Defense</td>
<td>14(3)(b)</td>
<td>8(2)(c)</td>
<td>6(3)(b)</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Right to Prompt Judicial Proceedings</td>
<td>14</td>
<td>8</td>
<td>6(3)</td>
<td>---</td>
<td>7</td>
<td>7(3)</td>
</tr>
<tr>
<td>Right to Trial Without Undue Delay, Within a Reasonable Time, or to Release; Right to Speedy Trial</td>
<td>14(3)(c), 9(3)</td>
<td>7(5)</td>
<td>6(1), 5(3), 5(4)</td>
<td>8</td>
<td>7(1)(d)</td>
<td>----</td>
</tr>
<tr>
<td>Right to Liberty and Security of Person, including Freedom from Arbitrary Detention; Right to Review of Lawfulness of Detention</td>
<td>9(1)(4), 9(4), 7(3), 7(5), 7(6)</td>
<td>5(1), 5(3), 5(4)</td>
<td>5, 8</td>
<td>6</td>
<td>----</td>
<td></td>
</tr>
<tr>
<td>Right to Humane Treatment &amp; Humane Conditions of Detention</td>
<td>10(1)</td>
<td>5(1)</td>
<td>3</td>
<td>15</td>
<td>4, 5</td>
<td>2</td>
</tr>
<tr>
<td>Freedom from Torture, and Cruel and Inhuman Treatment or Punishment</td>
<td>7, 10(1)</td>
<td>5(2)</td>
<td>3</td>
<td>13</td>
<td>4, 5</td>
<td>2</td>
</tr>
<tr>
<td>Freedom from Incommunicado &amp; Solitary Confinement; Right to Access to the Outside World</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Rights to Interpreter / Translator</td>
<td>14(3)(f)</td>
<td>8(2)(a)</td>
<td>6(3)(c)</td>
<td>---</td>
<td>8(2)(a)</td>
<td>----</td>
</tr>
<tr>
<td>Right to Public Proceedings</td>
<td>14(1)</td>
<td>8(5)</td>
<td>6(1)</td>
<td>---</td>
<td>8(5)</td>
<td>----</td>
</tr>
<tr>
<td>Right to Call &amp; Examine Witnesses</td>
<td>14(3)(e)</td>
<td>8(2)(f)</td>
<td>6(3)(d)</td>
<td>---</td>
<td>8(2)(f)</td>
<td>----</td>
</tr>
<tr>
<td>Right to Cross- Examine Witnesses</td>
<td>14(3)(e)</td>
<td>8(2)(f)</td>
<td>6(3)(d)</td>
<td>---</td>
<td>8(2)(f)</td>
<td>----</td>
</tr>
<tr>
<td>Freedom from Self-Incrimination</td>
<td>14(3)(g)</td>
<td>8(2)(a)</td>
<td>8(2)(a)</td>
<td>---</td>
<td>8(2)(a)</td>
<td>----</td>
</tr>
<tr>
<td>Rights related to Classified Information</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Right to Equality of Arms</td>
<td>14(3), 14(3)(e)</td>
<td>8(2)</td>
<td>6(3)</td>
<td>9</td>
<td>8(2)</td>
<td>----</td>
</tr>
<tr>
<td>Right to Non-Discrimination</td>
<td>2(1), 3, 26</td>
<td>1(1), 8(1)</td>
<td>14</td>
<td>2, 9</td>
<td>2, 3, 19</td>
<td>----</td>
</tr>
<tr>
<td>Right to Interlocutory Appeal</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Right to Appeal of Verdict</td>
<td>14(5)</td>
<td>8(2)(b)</td>
<td>2, Protocol 7</td>
<td>---</td>
<td>---</td>
<td>----</td>
</tr>
<tr>
<td>Right to Appeal of Sentence</td>
<td>14(5)</td>
<td>8(2)(b)</td>
<td>2, Protocol 7</td>
<td>---</td>
<td>---</td>
<td>----</td>
</tr>
<tr>
<td>Right to Reasoned Judgment</td>
<td>14(1)</td>
<td>8(1)</td>
<td>6(1)</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Right to be Present at Pre-Trial Hearings</td>
<td>14(3)(d)</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Right to be Defend Oneself in Person or Through Counsel of His Own Choosing</td>
<td>14(3)(d)</td>
<td>8(2)(d)</td>
<td>6(3)(c)</td>
<td>---</td>
<td>7(1)(c)</td>
<td>----</td>
</tr>
<tr>
<td>Rights of Victims &amp; Victims’ Families</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Rights of the Prosecution</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Rights of Witnesses (Expert and Fact Witnesses)</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>----</td>
</tr>
<tr>
<td>NGO Observers</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>----</td>
</tr>
</tbody>
</table>
UDHR = Universal Declaration of Human Rights  
ADHR = American Declaration of the Rights and Duties of Man  
Prosecutor Guidelines = United Nations Guidelines on the Role of Prosecutors  
Basic Principles Lawyers = United Nations Basic Principles on the Role of Lawyers  
SMR = Standard Minimum Rules for the Treatment of Prisoners  

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to a Fair Hearing</td>
<td>10, 11</td>
<td>26</td>
<td>A(1)(2)</td>
<td>5, 6</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>Right to be presumed innocent</td>
<td>11(1)</td>
<td>26</td>
<td>N(4)(e)</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>84(2)</td>
</tr>
<tr>
<td>Right to Have the Burden of Proof on the Prosecution</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>Freedom from Retroactive Application of Criminal Laws (No Ex Post Facto Laws; Nullem Crime Sine Lege; No Crime Without Law)</td>
<td>11(2)</td>
<td>25, 26</td>
<td>N(7)</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>Freedom from Double Jeopardy</td>
<td>----</td>
<td>----</td>
<td>N(8)</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>Right to Trial by a Competent, Independent, and Impartial Tribunal</td>
<td>8, 10</td>
<td>26</td>
<td>A(1), A(4), A(5), I.</td>
<td>1, 2, 3</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>Rights During Pre-Trial Hearing Stage (Post-Charges)</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>Right to Counsel</td>
<td>----</td>
<td>----</td>
<td>M(2)</td>
<td>----</td>
<td>----</td>
<td>2, 3, 6, 7, 8</td>
<td>----</td>
</tr>
<tr>
<td>Right to Information &amp; Access to Information</td>
<td>----</td>
<td>----</td>
<td>M(2)</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>7 (1)</td>
</tr>
<tr>
<td>Right to adequate Time &amp; Facilities to Prepare a Defense</td>
<td>----</td>
<td>----</td>
<td>A(2)(e), M(2), N(3)</td>
<td>----</td>
<td>8</td>
<td>----</td>
<td>93</td>
</tr>
<tr>
<td>Right to Prompt Judicial Proceedings</td>
<td>10, 11</td>
<td>18, 25, 26</td>
<td>M(3), M(4)</td>
<td>5, 6</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>Right to Trial Without Undue Delay, Within a Reasonable Time, or to Release; Right to Speedy Trial</td>
<td>----</td>
<td>25</td>
<td>A(2)(i), M(3), N(5)</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>Right to Liberty and Security of Person, including Freedom from Arbitrary Detention; Right to Review of Lawfulness of Detention</td>
<td>3, 9</td>
<td>1, 25</td>
<td>M(1)</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>Right to Humane Treatment &amp; Humane Conditions of Detention</td>
<td>5</td>
<td>25</td>
<td>M(7)</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>9-55</td>
</tr>
<tr>
<td>Freedom from Torture, and Cruel and Inhuman Treatment or Punishment</td>
<td>5</td>
<td>25</td>
<td>M(7)</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>31</td>
</tr>
<tr>
<td>Freedom from Incommunicado &amp; Solitary Confinement; Right</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>37, 38, 39, 92</td>
</tr>
<tr>
<td>Rights to Access to the Outside World</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---------------------------------------</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Rights to Interpreter / Translator</td>
<td></td>
<td></td>
<td>A(2)(g), N(4)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Public Proceedings</td>
<td>10, 11</td>
<td>26</td>
<td>A(1), A(3)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Call &amp; Examine Witnesses</td>
<td></td>
<td></td>
<td>N(6)(f)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Cross-Examine Witnesses</td>
<td></td>
<td></td>
<td>N(6)(f)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Freedom from Self-Incrimination</td>
<td></td>
<td></td>
<td>N(6)(d)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rights related to Classified Information</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Equality of Arms</td>
<td>1, 2, 7, 10</td>
<td>2, 18</td>
<td>A(2)(a), N(6)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Non-Discrimination</td>
<td>2, 7</td>
<td>2</td>
<td>A(2)(b), A(2)(c), G, K</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Interlocutory Appeal</td>
<td>8</td>
<td></td>
<td>N(10)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Appeal of Verdict</td>
<td></td>
<td></td>
<td>N(10)(a)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Appeal of Sentence</td>
<td></td>
<td></td>
<td>N(10)(a)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Reasoned Judgment</td>
<td>10, 11</td>
<td></td>
<td>A(3)(1)(d)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to be Present at Pre-Trial Hearings</td>
<td></td>
<td></td>
<td>N(6)(c)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to be Defend Oneself in Person or Through Counsel of His Own Choosing</td>
<td></td>
<td></td>
<td>A(2)(f), G, H, N(2)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rights of Victims &amp; Victims’ Families</td>
<td></td>
<td></td>
<td>A(2)(d), P</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rights of the Prosecution</td>
<td></td>
<td></td>
<td>F</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rights of the Press</td>
<td></td>
<td></td>
<td>A(3)(e), A(3)(f)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rights of Witnesses (Expert and Fact Witnesses)</td>
<td></td>
<td></td>
<td>A(2)(d)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NGO Observers</td>
<td></td>
<td></td>
<td>A(3)—public, D</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Nuremberg Charter = Charter of the International Military Tribunal at Nuremberg (8 August 1945)
Nuremberg Rules of Procedure (29 October 1945)
Control Council Law = Control Council Law
Tokyo Charter = International Military Tribunal for the Far East Charter (19 January 1945)
ICTY = Statute of the UN International Criminal Tribunal on the former Yugoslavia
ICTR = Statute of the UN International Criminal Tribunal on Rwanda

### c. Historical and Other International Humanitarian Law, International Criminal Law Instruments

<table>
<thead>
<tr>
<th>Right</th>
<th>Nuremberg Charter</th>
<th>Nuremberg Rules of Procedure</th>
<th>Control Council Law No. 10</th>
<th>Tokyo Charter</th>
<th>ICTY Statute</th>
<th>ICTR Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to a Fair Hearing</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>21(2)</td>
<td>20(2)</td>
<td></td>
</tr>
<tr>
<td>Right to be presumed innocent</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>21(3)</td>
<td>20(3)</td>
<td></td>
</tr>
<tr>
<td>Right to Have the Burden of Proof on the Prosecution</td>
<td>14</td>
<td>----</td>
<td>8</td>
<td>8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Freedom from Retrospective Application of Criminal Laws (No Ex Post Facts Laws; Nullem Crime Sine Lege; No Crime Without Law)</td>
<td>----</td>
<td>----</td>
<td>8</td>
<td>8</td>
<td>----</td>
<td></td>
</tr>
<tr>
<td>Freedom from Double Jeopardy</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>10</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>Right to Trial by a Competent, Independent, and Impartial Tribunal</td>
<td>1, 6, 10</td>
<td>3(1)(d)</td>
<td>1, 5</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Rights During Pre-Trial Hearing Stage (Post-Charges)</td>
<td>----</td>
<td>----</td>
<td>21</td>
<td>20</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Counsel</td>
<td>16</td>
<td>3</td>
<td>9</td>
<td>18(3)</td>
<td>17(3)</td>
<td></td>
</tr>
<tr>
<td>Right to Information &amp; Access to Information</td>
<td>----</td>
<td>----</td>
<td>21(4)(e)</td>
<td>20(4)(a)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to adequate Time &amp; Facilities to Prepare a Defense</td>
<td>----</td>
<td>----</td>
<td>9</td>
<td>21(4)(b)</td>
<td>20(4)(b)</td>
<td></td>
</tr>
<tr>
<td>Right to Prompt Judicial Proceedings</td>
<td>----</td>
<td>----</td>
<td>20(1)</td>
<td>19(1)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Trial Without Undue Delay, Within a Reasonable Time, or to Release; Right to Speedy Trial</td>
<td>18</td>
<td>5</td>
<td>12</td>
<td>21(4)(c)</td>
<td>20(4)(c)</td>
<td></td>
</tr>
<tr>
<td>Right to Liberty and Security of Person, including Freedom from Arbitrary Detention; Right to Review of Lawfulness of Detention</td>
<td>----</td>
<td>----</td>
<td>3(1)</td>
<td>----</td>
<td>----</td>
<td></td>
</tr>
<tr>
<td>Right to Humane Treatment &amp; Humane Conditions of Detention</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td></td>
</tr>
<tr>
<td>Freedom from Torture, and Cruel and Inhuman Treatment or Punishment</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td></td>
</tr>
<tr>
<td>Freedom from Incommunicado &amp; Solitary Confinement; Right to Access to the Outside World</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td></td>
</tr>
<tr>
<td>Rights to Interpreter / Translator</td>
<td>----</td>
<td>----</td>
<td>21(4)(f)</td>
<td>20(4)(f)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Public Proceedings</td>
<td>----</td>
<td>5</td>
<td>20(4), 21(2)</td>
<td>19(4), 20(2)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Call &amp; Examine Witnesses</td>
<td>16(e)</td>
<td>4</td>
<td>3(1)(C), 3(3)</td>
<td>9(d), 15</td>
<td>21(4)(e)</td>
<td>20(4)(e)</td>
</tr>
<tr>
<td>Right to Cross-Examine Witnesses</td>
<td>16(e)</td>
<td>----</td>
<td>3(1)(C), 3(3)</td>
<td>9(d), 15</td>
<td>21(4)(e)</td>
<td>20(4)(e)</td>
</tr>
<tr>
<td>Freedom from Self-Incrimination</td>
<td>----</td>
<td>----</td>
<td>21(4)(g)</td>
<td>20(4)(g)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rights related to Classified Information</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td></td>
</tr>
<tr>
<td>Right to Equality of Arms</td>
<td>----</td>
<td>----</td>
<td>21(4)(e)</td>
<td>20(4)(e)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Non-Discrimination</td>
<td>----</td>
<td>----</td>
<td>21(1)</td>
<td>20(1)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Interlocutory Appeal</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td></td>
</tr>
<tr>
<td>Right to Appeal of Verdict</td>
<td>----</td>
<td>----</td>
<td>25</td>
<td>24</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Appeal of Sentence</td>
<td>----</td>
<td>----</td>
<td>25</td>
<td>24</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Reasoned Judgment</td>
<td>26</td>
<td>----</td>
<td>17</td>
<td>23</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>Right to be Present at Pre-Trial Hearings</td>
<td>----</td>
<td>----</td>
<td>21(4)(d)</td>
<td>20(4)(d)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to be Defend Oneself in Person or Through Counsel of His Own Choosing</td>
<td>16(d), 16(e)</td>
<td>2</td>
<td>9(e)</td>
<td>18(3), 21(4)(d)</td>
<td>17(3), 20(4)(b), 20(4)(d)</td>
<td></td>
</tr>
<tr>
<td>Rights of Victims &amp; Victims' Families</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>20(1), 22</td>
<td>19(1), 21</td>
</tr>
<tr>
<td>Rights of the Prosecution</td>
<td>14, 15</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>8</td>
<td>16, 18(1), 18(2), 18(4)</td>
</tr>
<tr>
<td>Rights of the Press</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>Rights of Witnesses (Expert and Fact Witnesses)</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>20(1), 22</td>
<td>19(1), 21</td>
</tr>
<tr>
<td>NGO Observers</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Right</th>
<th>U.S. Constitution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to a Fair Hearing</td>
<td>Art. 3 §1, 6th Amendment</td>
</tr>
<tr>
<td>Right to be presumed innocent</td>
<td>Art. 3 §2 cl. 3</td>
</tr>
<tr>
<td>Right to have the Burden of Proof on the Prosecution</td>
<td>5th Amendment, 14th Amendment</td>
</tr>
<tr>
<td>Freedom from Retroactive Application of Criminal Laws (No Ex Post Facto Laws; Nullem Crime Sine Lege; No Crime Without Law)</td>
<td>Art. 1 §9 cl. 3</td>
</tr>
<tr>
<td>Freedom from Double Jeopardy</td>
<td>5th Amendment</td>
</tr>
<tr>
<td>Right to Trial by a Competent, Independent, and Impartial Tribunal</td>
<td>Art. 3 §1, Art. 3 §2 cl. 3, 6th Amendment</td>
</tr>
<tr>
<td>Rights During Pre-Trial Hearing Stage (Post-Charges)</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Right to Counsel</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Right to Information &amp; Access to Information</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Right to adequate Time &amp; Facilities to Prepare a Defense</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Right to Prompt Judicial Proceedings</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Right to Trial Without Undue Delay, Within a Reasonable Time, or to Release; Right to Speedy Trial</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Right to Liberty and Security of Person, including Freedom from Arbitrary Detention; Right to Review of Lawfulness of Detention</td>
<td>4th Amendment</td>
</tr>
<tr>
<td>Right to Humane Treatment &amp; Humane Conditions of Detention</td>
<td>8th Amendment</td>
</tr>
<tr>
<td>Freedom from Torture, and Cruel and Inhuman Treatment or Punishment</td>
<td>8th Amendment</td>
</tr>
<tr>
<td>Freedom from Incommunicado &amp; Solitary Confinement; Right to Access to the Outside World</td>
<td>8th Amendment</td>
</tr>
<tr>
<td>Rights to Interpreter / Translator</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Right to Public Proceedings</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Right to Call &amp; Examine Witnesses</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Right to Cross-Examine Witnesses</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Freedom from Self-Incrimination</td>
<td>5th Amendment</td>
</tr>
<tr>
<td>Rights related to Classified Information</td>
<td>5th Amendment</td>
</tr>
<tr>
<td>Right to Equality of Arms</td>
<td>5th Amendment</td>
</tr>
<tr>
<td>Right to Non-Discrimination</td>
<td>5th Amendment</td>
</tr>
<tr>
<td>Right to Interlocutory Appeal</td>
<td>5th Amendment</td>
</tr>
<tr>
<td>Right to Appeal of Verdict</td>
<td>Art. 1 §9 cl. 2</td>
</tr>
<tr>
<td>Right to Appeal of Sentence</td>
<td>Art. 1 §9 cl. 2</td>
</tr>
<tr>
<td>Right to Reasoned Judgment</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Right to be Present at Pre-Trial Hearings</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Right to be Defend Oneself in Person or Through Counsel of His Own Choosing</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Rights of Victims &amp; Victims‘ Families</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Rights of the Prosecution</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Rights of the Press</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>Rights of Witnesses (Expert and Fact Witnesses)</td>
<td>6th Amendment</td>
</tr>
<tr>
<td>NGO Observers</td>
<td>6th Amendment</td>
</tr>
</tbody>
</table>
**e. U.S. Military Commission Law; International Humanitarian Law Instruments**

<table>
<thead>
<tr>
<th>Right</th>
<th>UCMJ</th>
<th>MCA of 2009</th>
<th>MC Regulations</th>
<th>Common Article 3</th>
<th>Common Article 2</th>
<th>Art. 75, Protocol I</th>
<th>Art. 6, Protocol II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to a Fair Hearing</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(4)</td>
<td>(2)</td>
</tr>
<tr>
<td>Right to be presumed innocent</td>
<td>51(c)(1)</td>
<td>949l, 949m</td>
<td></td>
<td></td>
<td></td>
<td>(4)(d)</td>
<td>(2)(d)</td>
</tr>
<tr>
<td>Right to have the Burden of Proof on the Prosecution</td>
<td>51(c)(4)</td>
<td>949l, 949m</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Freedom from Retrospective Application of Criminal Laws (No Ex Post Facts Laws; Nullem Crime Sine Lege; No Crime Without Law)</td>
<td></td>
<td>948d, 950p,</td>
<td></td>
<td></td>
<td></td>
<td>(4)(e),</td>
<td>(2)(e)</td>
</tr>
<tr>
<td>Freedom from Double Jeopardy</td>
<td>44</td>
<td>948h, 950d(b), 950h(d)</td>
<td></td>
<td></td>
<td></td>
<td>(4)(b)</td>
<td></td>
</tr>
<tr>
<td>Right to Trial by a Competent, Independent, and Impartial Tribunal</td>
<td>25, 37</td>
<td>948d, 949h, 949h-948g, 949l</td>
<td>948d, 949h, 949h-948g, 949l</td>
<td></td>
<td>(1)(d)</td>
<td>(4)</td>
<td>(2)</td>
</tr>
<tr>
<td>Rights During Pre-Trial Hearing Stage (Post-Charges)</td>
<td>32</td>
<td>948h(d)(1)(C), 949h, 948h</td>
<td></td>
<td>17, 12</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Counsel</td>
<td>27, 38(b)</td>
<td>948k, 948f, 948h, 948p</td>
<td></td>
<td>9</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Information &amp; Access to Information</td>
<td>46</td>
<td>949f, 949f-1 to 949p-7</td>
<td>17, 19</td>
<td></td>
<td></td>
<td>(3), (4)(a)</td>
<td>(2)(a)</td>
</tr>
<tr>
<td>Right to adequate Time &amp; Facilities to Prepare a Defense</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Prompt Judicial Proceedings</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(1)(d)</td>
<td>(1)(d)</td>
</tr>
<tr>
<td>Right to Trial Without Undue Delay, Within a Reasonable Time, or to Release; Right to Speedy Trial</td>
<td>10</td>
<td>948h(b)</td>
<td></td>
<td></td>
<td></td>
<td>(3)</td>
<td></td>
</tr>
<tr>
<td>Right to Liberty and Security of Person, including Freedom from Arbitrary Detention; Right to Review of Lawfulness of Detention</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(3)</td>
<td></td>
</tr>
<tr>
<td>Right to Humane Treatment &amp; Humane Conditions of Detention</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(1)</td>
<td>(1), (6)</td>
</tr>
<tr>
<td>Freedom from Torture, and Cruel and Inhuman Treatment or Punishment</td>
<td>55</td>
<td>949h</td>
<td></td>
<td>(1)(c)</td>
<td></td>
<td>(2)</td>
<td></td>
</tr>
<tr>
<td>Freedom from Incommunicado &amp; Solitary Confinement; Right to Access to the Outside World</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rights to Interpreter / Translator</td>
<td></td>
<td>948l</td>
<td>7-3</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Public Proceedings</td>
<td></td>
<td>948d(c)</td>
<td>19</td>
<td></td>
<td></td>
<td>(4)(d)</td>
<td></td>
</tr>
<tr>
<td>Right to Call &amp; Examine Witnesses</td>
<td>46</td>
<td>949j</td>
<td>17-3</td>
<td></td>
<td></td>
<td>(4)(g)</td>
<td></td>
</tr>
<tr>
<td>Right to Cross-Examine Witnesses</td>
<td>32(h), 49</td>
<td>949j</td>
<td></td>
<td></td>
<td>(4)(g)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Freedom from Self-Incrimination</td>
<td>31</td>
<td>948h(d), 949a(h)(2)(C), 949h, 948, 831(c), 949l</td>
<td></td>
<td></td>
<td>(4)(f)</td>
<td>(2)(f)</td>
<td></td>
</tr>
<tr>
<td>Rights related to Classified Information</td>
<td></td>
<td>949p to 949p-7</td>
<td></td>
<td>18</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Equality of Arms</td>
<td></td>
<td>949c, 949j</td>
<td></td>
<td></td>
<td>(1)</td>
<td>(1)</td>
<td></td>
</tr>
<tr>
<td>Right to Non-Discrimination</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(1)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Interlocutory Appeal</td>
<td></td>
<td>950d</td>
<td>25-5</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Appeal of Verdict</td>
<td></td>
<td>950h, 950f, 950g</td>
<td>24, 25</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Appeal of Sentence</td>
<td></td>
<td>950h, 950f, 950g</td>
<td>24, 25</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to Reasoned Judgment</td>
<td>51, 52</td>
<td>949l, 949m</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to be Present at Pre-Trial Hearings</td>
<td>27(c)(1), 32, 38(h)</td>
<td></td>
<td></td>
<td></td>
<td>(4)(c)</td>
<td>(2)(c)</td>
<td></td>
</tr>
<tr>
<td>Rights of the Defendant in Person or Through Counsel of His Own Choosing</td>
<td>38(b)</td>
<td>949(c)(b)</td>
<td>9</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Rights of Victims &amp; Victims’ Families</td>
<td>---</td>
<td>---</td>
<td>16</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Rights of the Prosecution</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Rights of the Press</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Rights of Witnesses (Expert and Fact Witnesses)</td>
<td>---</td>
<td>---</td>
<td>13, 16</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>NGO Observers</td>
<td>---</td>
<td>---</td>
<td>19 (Public)</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
</tbody>
</table>
Appendix D:

[Forthcoming]

What You Need To Know Before You Travel to Guantanamo Bay or Ft. Meade on an NGO Observer Mission (forthcoming)
Schematic of Guantanamo Bay Courtroom # 2 (For trials involving classified information. The seating Chart below is from the 9/11 Case)

<table>
<thead>
<tr>
<th>Court Security Officer (CSO)</th>
<th>Military Judge</th>
<th>Witness Stand</th>
</tr>
</thead>
<tbody>
<tr>
<td>Khalid Shaik Mohammad (KSM)</td>
<td>Interpreter</td>
<td>Counsel - Major Derek Poteet (DMC) &amp; Gary Sowards</td>
</tr>
<tr>
<td>Walid bin Attash*</td>
<td>Interpreter</td>
<td>Counsel - Michael Schwartz &amp; Major Matthew Seeger</td>
</tr>
<tr>
<td>Ramzi bin al Shibh</td>
<td>Interpreter</td>
<td>Counsel - Major Alaina Wichner (DMC) &amp; Commander Tri Nhan (DMC)</td>
</tr>
<tr>
<td>Ali Abdul Axix Ali (aka Ammar al Baluchi or “Triple A” or “AAA”)</td>
<td>Interpreter</td>
<td>Counsel - Lt. Col. Sterling Thomas (DMC)</td>
</tr>
<tr>
<td>Mustafa al Hawsawi</td>
<td>Interpreter</td>
<td>Counsel - Lt. Col. Jennifer Williams (DMC), Lt. Col. Sean Gleason (DMC), &amp; Suzanne Lachelier</td>
</tr>
<tr>
<td>(DMC = Detailed Military Counsel) Tables for Other Defense Staff</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*bin Attash’s counsel have been sitting in this row after he said he wanted to fire them.*

Double-paned glass partition separating the “well” of the courtroom from the Observation Gallery.

Press sits in reserved seats in the front row of the gallery, behind the double-paned glass. NGO Observers have 14 seats allocated to them, beginning in the second row. Others visitors (including U.S. government officials, service persons stationed at GTMO, JTF-GTMO personnel) are permitted to take the few remaining seats in this section.

Small aisle between the two parts of the Gallery.

The Victims’ & Victims’ Families (Section can be cordoned off with a curtain)

NB: This scale is not drawn to scale. Names of additional persons will be added.
Appendix E

Al Nashiri -- U.S.S. Cole Case

Referred Charges of 28 September 2011
# CHARGE SHEET

## I. PERSONAL DATA

1. **NAME OF ACCUSED:**
   Abd Al Rahim Hussayn Muhammad Al Nashiri

2. **ALIASES OF ACCUSED:**
   SEE ATTACHED APPENDIX A

3. **ISN NUMBER OF ACCUSED (LAST FOUR):**
   10015

## II. CHARGES AND SPECIFICATIONS

4. **CHARGE:** VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.

**SPECIFICATION:**

SEE ATTACHED CONTINUATION SHEET OF BLOCK II. CHARGES AND SPECIFICATIONS

## III. SWEARING OF CHARGES

<table>
<thead>
<tr>
<th>Sr. NAME OF ACCUSER (LAST, FIRST, MI)</th>
<th>Sr. GRADE</th>
<th>Sr. ORGANIZATION OF ACCUSER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regan, Edward J.</td>
<td>O-6</td>
<td>Office of Military Commissions</td>
</tr>
</tbody>
</table>

**SIGNATURE OF ACCUSER**

**AFFIDAVIT:** Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 15th day of September, 2011, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Nathaniel R. Gross
Typed Name of Officer

Office of Military Commissions
Organization of Officer

**O-3**

Grade

Signature

**Judge Advocate**

Office of Military Commissions

Official Capacity to Administer Oath

(See R.M.C. 307(b) must be commissioned officer)

**MC FORM 458 JAN 2007**
## IV. NOTICE TO THE ACCUSED

6. On 15 September 2011 the accused was notified of the charges against him/her (See R.M.C. 306).

**Andrea K. Lockhart/O-5**  
Typed Name and Grade of Person Who Caused  
Accused to Be Notified of Charges  
Signature

**Office of Military Commissions**  
Organization of the Person Who Caused  
Accused to Be Notified of Charges

## V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at 1126 hours on 16 Sept 2011 at Alexandria, Virginia

For the Convening Authority:  
**Donna L. Wilkins**  
Typed Name of Officer

**GS-15**  
Grade  
Signature

## VI. REFERRAL

<table>
<thead>
<tr>
<th>Sr. DESIGNATION OF CONVENING AUTHORITY</th>
<th>Bb. PLACE</th>
<th>Sr. DATE (YYYYMMDD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Convening Authority 10USC §948h</td>
<td>Alexandria, VA</td>
<td>20110928</td>
</tr>
<tr>
<td>Appointed on 25 March 2010</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Referred for trial to the capital military commission convened by military commission convening order 11-02 dated 28 September 2011

Subject to the following instructions: This case is referred capital, See R.M.C. 103(a)(4) and (5)

**Bruce MacDonald**  
Typed Name and Grade of Office  
Signature  
Official Capacity of Officer Signing

## VII. SERVICE OF CHARGES

9. On ________________ I (caused to be) served a copy these charges on the above named accused.

**Typed Name of Trial Counsel**  
Grade of Trial Counsel  
Signature of Trial Counsel

### FOOTNOTES

*See R.M.C. 601 concerning instructions. If none, so state.

**MC FORM 458 JAN 2007**
Al Nashiri - U.S.S. Cole Case – Charges Referred (Without Appendices A - C)  
(28 September 2011) (Page 3 of 12)

CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI

CHARGE I: VIOLATION OF 10 U.S.C. § 950t(17), USING TREACHERY OR PERFIDY

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 12 October 2000, in the context of and associated with hostilities, invite the confidence and belief of one or more persons onboard USS COLE (DDG 67), including but not limited to then FN Raymond Mooney, USN, that two men dressed in civilian clothing, waving at the crewmembers onboard USS COLE (DDG 67), and operating a civilian boat, were entitled to protection under the law of war, and intending to betray that confidence and belief, did thereafter make use of that confidence and belief to detonate explosives hidden on said civilian boat alongside USS COLE (DDG 67), killing 17 Sailors of the United States Navy (see Charge II for a list of deceased) and injuring one or more persons, all crewmembers onboard USS COLE (DDG 67) (See Appendix B for the list of injured).

CHARGE II: VIOLATION OF 10 U.S.C. § 950t(15), MURDER IN VIOLATION OF THE LAW OF WAR

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 12 October 2000, in the context of and associated with hostilities, in violation of the law of war, to wit: by committing an act of perfidy, said act of perfidy being two men dressing in civilian clothing, waving at the crewmembers onboard USS COLE (DDG 67), and operating and detonating an explosives-laden civilian boat alongside a United States naval vessel, intentionally and unlawfully kill the following 17 persons:

1. HT3 Kenneth E. Clodfelter, USN;
2. ETC Richard Costelow, USN;
3. MSSN Lakeina M. Francis, USN;
4. ITSN Timothy L. Gauna, USN;
5. SMSN Cherone L. Gunn, USN;
6. ITSN James R. McDaniels, USN;
7. EN2 Marc I. Nieto, USN;
8. EW3 Ronald S. Owens, USN;
9. SN Lakiba N. Palmer, USN;
10. ENFA Joshua L. Parlett, USN;
11. FN Patrick H. Roy, USN;
12. EW2 Kevin S. Rux, USN;
13. MS3 Ronchester M. Santiago, USN;
14. OS2 Timothy L. Saunders, USN;
15. FN Gary G. Swenchonis, Jr., USN;
16. ENS Andrew Triplett, USN; and
17. SN Craig D. Wibberley, USN.
Al Nashiri - U.S.S. Cole Case -- Charges Referred (Without Appendices A - C)
(28 September 2011) (Page 4 of 12)

CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI

CHARGE II: VIOLATION OF 10 U.S.C. § 950t(28), ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

Specification 1: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 3 January 2000, in the context of and associated with hostilities, with the specific intent to commit Murder in Violation of the Law of War, attempt to intentionally and unlawfully kill one or more persons onboard USS THE SULLIVANS (DDG 68), in violation of the law of war, to wit: by committing an act of perfidy, and committing acts that amount to more than mere preparation, and to effect the commission of Murder in Violation of the Law of War, the two suicide bombers dressed in civilian clothes launched an explosives-laden boat, with the intent to perfidiously approach USS THE SULLIVANS (DDG 68), detonate the explosives while alongside USS THE SULLIVANS (DDG 68) so as to damage and sink USS THE SULLIVANS (DDG 68), and kill one or more persons onboard that vessel.

Specification 2: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 12 October 2000, in the context of and associated with hostilities, with the specific intent to commit the offense of Murder in Violation of the Law of War, attempt to intentionally and unlawfully kill one or more persons onboard USS COLE (DDG 67), in violation of the law of war, to wit: by committing an act of perfidy, and committing acts that amount to more than mere preparation, and to effect the commission of Murder in Violation of the Law of War, the two suicide bombers dressed in civilian clothes launched an explosives-laden boat, to perfidiously approach USS COLE (DDG 67), detonate the explosives while alongside USS COLE (DDG 67) so as to damage and sink USS COLE (DDG 67), and kill one or more persons onboard that vessel.

CHARGE IV: VIOLATION OF 10 U.S.C. § 950t(24), TERRORISM

Specification 1: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 12 October 2000, in the context of and associated with hostilities, and in a manner calculated to influence and affect the conduct of the United States government by intimidation and coercion and to retaliate against the United States government, engage in an act that evinced a wanton disregard for human life, to wit: intentionally detonating an explosives-laden boat alongside USS COLE (DDG 67), resulting in the deaths of seventeen persons (see Charge II for a list of deceased) onboard USS COLE (DDG 67).

Specification 2: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission,
CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUIHAMMAD AL NASHIRI

did, in or around the coast of Al Mukallah, Yemen, on or about 6 October 2002, in the context of and associated with hostilities, and in a manner calculated to influence and affect the conduct of the United States government by intimidation and coercion and to retaliate against the United States government, intentionally kill and inflict great bodily harm on one or more protected persons and engage in an act that evinced a wanton disregard for human life, to wit: detonating an explosives-laden boat alongside MV Limburg, resulting in the death of one civilian person, Atanas Atanasov, serving onboard MV Limburg.

CHARGE V: VIOLATION OF 10 U.S.C. § 950t(29), CONSPIRACY

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, at multiple locations in and around Yemen, Afghanistan, Pakistan, Saudi Arabia, the United Arab Emirates (hereinafter “UAE”), Qatar, Besmee, the Middle East, the Arabian Peninsula, and other locations, in the context of and associated with hostilities, from an unknown date prior to approximately August 1996, through approximately October 2002, willfully conspire, agree, and join with at least one of the following (see Appendix C for the list of aliases for each co-conspirator):

a. Usama bin Laden;
b. Ayman Al Zawahiri;
c. Mohammed Atef;
d. Mushin Musa Matwalli Atwah;
e. Walid Muhammad Salih Muhammad bin 'Attash;
f. Jamal Ahmed Mohammed Ali Al Badawi;
g. Fahd Mohammed Ahmed Al Quso;
h. Hassan Sa'id Awad Al Khamri;
i. Ibrahim Al-Theidar;
j. Taha Ibrahim Hussein Al-Ahdal;
k. Hadi Muhammad Salih Al-Wirsh;
l. Nasser Ahmad Nasser Al-Bahri;
m. Khalid Ibn Muhammad Al Juhani;
n. Fawzi Muhammad 'Abd-Al-Qawi Al-Wajih;
o. Fawzi Yahya Qaim Al-Hababi;
p. Muneer Al Sharabi;
q. Walid Al Shaybah;
r. Mohammad Rashed Daoud Al-Owhali;
s. Jihad Muhammad Abdah Ali Abdullah Al-Harazi;
t. Ali Hamza Ahmed Suliman Al-Bahlu;
u. Nasir ‘Awad;
v. Husayn Al-Badawi;
w. Ahmed Mohammed al Darbi;
Al Nashiri - U.S.S. Cole Case -- Charges Referred (Without Appendices A - C)  
(28 September 2011)  (Page 6 of 12)

CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI

x. ‘Umar Sa’id Hassan Jarullah;
y. Muhammed Sa’id Ali Hasan Al-Amari;
z. and others, both known and unknown;

to commit Terrorism and Murder in Violation of the Law of War, both offenses triable by military commission, with the conspiracy resulting in the death of one or more victims (See Charge II and IX for a list of deceased) and, knowing that Terrorism and Murder in Violation of the Law of War were the unlawful purpose of the conspiracy, and intending his actions to further the unlawful purpose of the conspiracy, the said NASHIRI did knowingly commit at least one of the following overt acts:

1. Between approximately 1994 and 1999, NASHIRI and co-conspirators joined a call to jihad against the enemies of Islam by Usama bin Laden (“bin Laden”). NASHIRI and the co-conspirators traveled to locations such as Bosnia, Tajikistan, and Afghanistan. In these locations NASHIRI and co-conspirators attended training camps either run by or associated with al Qaeda. NASHIRI trained in or gave training in military tactics, including but not limited to, training on combat, weapons, bomb-making, and assassination. NASHIRI and the co-conspirators then participated in, or attempted to participate in, jihad by fighting in brigades of mujahideen.

2. Between approximately 1996 and 1999, NASHIRI and co-conspirators met personally with bin Laden and other high-ranking members of al Qaeda and some of the co-conspirators swore an oath of allegiance to bin Laden. During this time period, NASHIRI developed relationships with individuals who would later assist him in what would become known as the “boats operation.”

3. In approximately late 1997 to 1998, NASHIRI discussed with bin Laden plans for a boats operation to attack ships in the Arabian Peninsula, a plan which previously had been discussed by bin Laden and Walid Muhammad Salih Mubarak bin ’Attash (“Khallad”).

4. NASHIRI, bin Laden and Khallad ultimately planned al Qaeda’s boats operation, which came to encompass at least three separate terrorist attacks: an attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000; a completed attack on USS COLE (DDG 67) on 12 October 2000; and a completed attack on a French supertanker, MV Limburg, on 6 October 2002.

5. In approximately 1998, at the direction of bin Laden, NASHIRI and Khallad traveled to Yemen, at the southern tip of the Arabian Peninsula, to prepare for the boats operation. NASHIRI scouted the Al-Hudaydah area of Yemen and conducted surveillance of ship traffic in the region. As NASHIRI and Khallad collected

6
CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUIHAMMAD AL NASHIRI

information, they and bin Laden began to focus their attention on mounting an attack in Aden Harbor.

6. In approximately the summer of 1998, in response to direction by bin Laden, NASHIRI and Khallad assisted in another al Qaeda plot, simultaneous attacks on United States embassies in Kenya and Tanzania in East Africa, where NASHIRI provided a fraudulent Yemeni passport used by one of the suicide bombers to enter Kenya immediately before the attack on the Embassy of the United States in Nairobi, Kenya, and where Khallad provided that same suicide bomber with details of the attack plan.

7. In approximately early 1999, at the direction of bin Laden, NASHIRI and Khallad continued preparing for the boats operation, including (but not limited to) obtaining and storing explosives for use in the boats operation. NASHIRI then left Yemen because Khallad had been arrested by Yemeni authorities.

8. After Khallad’s arrest and subsequent release from jail in May 1999, NASHIRI returned to Yemen with instructions from bin Laden. NASHIRI took control of the boats operation, at the direction of bin Laden, due to unwanted attention Khallad received as a result of his arrest. NASHIRI took over preparations for the boats operation, and Khallad returned to Afghanistan.

9. During late 1999 and early 2000, NASHIRI spoke with Khallad on the phone several times to relay information about the boats operation, and on at least one occasion Khallad relayed this information to bin Laden.

9. Between approximately the summer of 1999 and the winter of 1999, NASHIRI continued making preparations to implement al Qaeda’s boats operation, some of which he accomplished personally and some of which he directed others to accomplish. These preparations included, but were not limited to, enlisting the assistance of additional co-conspirators, purchasing vehicles, purchasing a boat and materials, renting houses to store the boat and materials to assemble the attack boat, and obtaining false identification documents.

10. On or about 3 January 2000, the first boats operation attack commenced when, at NASHIRI’s direction, at least two of the co-conspirators launched a boat packed with explosives from the Madinat Al-Shaab beach area into Aden Harbor, intending to steer it toward a United States warship, USS THE SULLIVANS (DDG 68), which was refueling nearby. The attack ultimately failed when the explosives-laden boat beached in the surf of Aden Harbor.
Al Nashiri - U.S.S. Cole Case -- Charges Referred (Without Appendices A - C)  
(28 September 2011) (Page 8 of 12)

CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI

11. On or about 4-6 January 2000, NASHIRI and other co-conspirators recovered the attack boat from the beach at Madinat Al-Shaab, on the edge of Aden Harbor. NASHIRI and other co-conspirators recovered the boat, its motor, its cargo of explosives, and other materials used in the attempted attack. During these recovery efforts, NASHIRI claimed ownership of the attack boat and the motor. NASHIRI and the other co-conspirators ultimately used a front-end loader, crane, and flatbed truck to recover and take physical possession of the attack boat and return it to its storage location in Aden.

12. After the attempted attack on USS THE SULLIVANS (DDG 68) in January 2000 but before approximately September 2000, NASHIRI returned to Afghanistan, where he and Khallad met with bin Laden and other high-ranking members of al Qaeda at bin Laden’s compound in Qandahar.

13. After the attempted attack on USS THE SULLIVANS (DDG 68) in January 2000 but before approximately September 2000, NASHIRI received additional training in Afghanistan from an al Qaeda explosives expert.

14. After the attempted attack on USS THE SULLIVANS (DDG 68) in January 2000 but before approximately September 2000, NASHIRI tested the explosives he recovered from the failed attack to make certain they were still usable for future attacks.

15. Later in 2000, after returning from Afghanistan, NASHIRI continued preparations -- some of which he accomplished personally and some of which he directed others to accomplish -- for a second boats operation attack. These preparations included, but were not limited to, renting another house from which to conduct surveillance of Aden Harbor, repairing and re-fitting the attack boat, transferring ownership of and registering the attack boat, purchasing another vehicle, securing another location at which to store the attack boat, testing the attack boat on the waters of Aden Harbor, making arrangements for the attack to be videotaped, and hiring a crane operator to launch the attack boat.

16. During approximately the summer of 2000, NASHIRI informed Khallad that the boats operation was nearly ready and that bin Laden should send the suicide bombers.

17. In or about September 2000, NASHIRI informed Khallad that the boats operation was ready to execute and further informed Khallad that he had already chosen the suicide bombers for the attack.

18. In or about September 2000, NASHIRI spoke again with Khallad, who relayed to NASHIRI a directive from bin Laden that NASHIRI leave Yemen before the attack and return to Afghanistan.
Al Nashiri - U.S.S. Cole Case -- Charges Referred (Without Appendices A - C)
(28 September 2011) (Page 9 of 12)

CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI

19. At some point after January 2000, but prior to 12 October 2000, NASHIRI filled the attack boat with explosives in preparation for the attack.

20. In approximately September or October 2000, prior to the attack, NASHIRI left Yemen, as instructed by bin Laden. NASHIRI met Khalid, and the two traveled together to Qandahar, Afghanistan, to meet with bin Laden. NASHIRI informed bin Laden that an attack on a United States warship in Aden was imminent.

21. On or about 12 October 2000, pursuant to NASHIRI’s instructions, the co-conspirators removed the attack boat from its storage location, drove the attack boat to the launch site and, using a crane, lowered it into the water.

22. On or about 12 October 2000, as a result of planning and preparation by NASHIRI and others, the suicide bombers, at the direction of NASHIRI, dressed in civilian clothes, piloted the explosives-laden boat to where USS COLE (DDG 67) was refueling, offered friendly gestures to several crew members, and brought their boat alongside USS COLE (DDG 67), roughly amidships. Once alongside at approximately 11:18 a.m. (local), the suicide bombers detonated the explosives, blasting a hole in the side of USS COLE (DDG 67) approximately 30 feet in diameter, killing 17 crewmembers and injuring at least 37 crewmembers. The suicide bombers died in the attack.

23. In approximately May 2001, NASHIRI met with bin Laden and another high-ranking member of al Qaeda at bin Laden’s compound in Qandahar.

24. In approximately 2001 and 2002, NASHIRI continued al Qaeda’s boats operation by directing acts which included, but were not limited to, acquiring a boat for use in the attack, acquiring explosives for use in the attack, transferring ownership and registration of the boat, and obtaining a global positioning system (GPS) device for use in planning the attack. NASHIRI supplied the necessary resources, planned the attack, and directed the transfer of money for use in an upcoming attack.

25. In approximately 2001 and 2002, NASHIRI and other co-conspirators implemented operational security measures to avoid detection.

26. On or about 6 October 2002, near the port of Al Mukallah, Yemen, as a result of planning by NASHIRI and others, suicide bombers, at the direction of NASHIRI, used an explosives-laden boat to attack the French supertanker MV Limburg. The explosion blasted a hole through the hull of the ship, resulting in the death of a crewmember, injury to approximately 12 crewmembers, and spillage of approximately 90,000 barrels of oil into the Gulf of Aden.
Al Nashiri - U.S.S. Cole Case -- Charges Referred (Without Appendices A - C)  
(28 September 2011) (Page 10 of 12)

CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ADD AL RAHIM HUSSAYN MUIIAMMAD AL NASHIRI

CHARGE VI: VIOLATION OF 10 U.S.C. § 950t(13), INTENTIONALLY CAUSING SERIOUS BODILY INJURY

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, in the context of and associated with hostilities, on or about 12 October 2000, intentionally cause serious injury to the body of:

1. 
2. 
3. 
4. 
5. 
6. 
7. 
8. 
9. 
10. 
11. 
12. 
13. 
14. 
15. 

10
CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI

16. [Redacted]

17. [Redacted]

All crew members onboard USS COLE (DDG 67), with unlawful force and violence, in violation of the law of war, to wit: perfidiously operating and detonating an explosives-laden vessel alongside USS COLE (DDG 67).

CHARGE VII - VIOLATION OF 10 U.S.C. § 950(16), DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 12 October 2000, in the context of and associated with hostilities, intentionally destroy property belonging to another person, without that person's consent, in violation of the law of war, to wit: two men perfidiously approaching USS COLE (DDG 67), and detonating concealed explosives, resulting in the destruction of USS COLE (DDG 67), property of the U.S. government, destruction of supplies and rations located onboard USS COLE (DDG 67), property of the U.S. government, and destruction of personal effects located onboard USS COLE (DDG 67), property of the crew members onboard USS COLE (DDG 67).

CHARGE VIII - VIOLATION OF 10 U.S.C. § 950(28), ATTEMPTED DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 3 January 2000, in the context of and associated with hostilities, with the specific intent to commit the offense of Destruction of Property in Violation of the Law of War, attempt to intentionally destroy property on board USS THE SULLIVANS (DDG 68), belonging to another, without the lawful owner's consent, in violation of the law of war, to wit: by committing certain acts that amount to more than mere preparation and to effect the commission of Destruction of Property in Violation of the Law of War, the two suicide bombers dressed in civilian clothes launched an explosives-laden boat, with the intent to perfidiously approach USS THE SULLIVANS (DDG 68), detonate the explosives while alongside USS THE SULLIVANS (DDG 68), so as to damage and sink USS THE SULLIVANS (DDG 68), and destroy USS THE SULLIVANS (DDG 68), property of the U.S. government.
Al Nashiri - U.S.S. Cole Case -- Charges Referred (Without Appendices A - C)  
(28 September 2011) (Page 12 of 12)

CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI

destroy supplies and rations located onboard USS THE SULLIVANS (DDG 68), property of the U.S. government, and destroy personal effects located onboard USS THE SULLIVANS (DDG 68), property of the crewmembers onboard USS THE SULLIVANS (DDG 68).

CHARGE IX: VIOLATION OF 10 U.S.C. § 950t(2), ATTACKING CIVILIANS

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around the coast of Al Mukalla, Yemen, on or about 6 October 2002, in the context of and associated with hostilities, intentionally attack civilian persons onboard MV Limburg, a civilian oil tanker crewed by civilian personnel, not taking direct or active part in hostilities, and that resulted in the death of one person, Atanas Atanasov, and the said NASHIRI knew that such targets were in a civilian status.

CHARGE X: VIOLATION OF 10 U.S.C. § 950t(3), ATTACKING CIVILIAN OBJECTS

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around the coast of Al Mukalla, Yemen, on or about 6 October 2002, in the context of and associated with hostilities, intentionally attack MV Limburg, a civilian oil tanker owned by a civilian entity and crewed by civilian personnel, not a military objective, and the said NASHIRI knew that such target was not a military objective.

CHARGE XI: VIOLATION OF 10 U.S.C. § 950t(23), HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT

Specification: In that Abd al Rahim Hussayn Muhammad al NASHIRI (See Appendix A for a list of aliases), an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around the coast of Al Mukalla, Yemen, on or about 6 October 2002, in the context of and associated with hostilities, intentionally endanger the safe navigation of a vessel, MV Limburg, not a legitimate military objective, to wit: by causing an explosives-laden civilian boat to detonate and explode alongside MV Limburg, causing damage to the operational ability and navigation of MV Limburg, and resulting in the death of one crewmember, Atanas Atanasov.
Appendix F

Khalid Shaik Mohammad (9/11 case)

Referred Charges of 2011 / 2012
Khalid Shaikh Mohammad / 9-11 Case Referred Charges  
(Excerpts - Without All Appendices & Cover Sheets) (2011 & 2012)  
(Page 1 of 28)

### Charge Sheet

#### I. Personal Data

<table>
<thead>
<tr>
<th>1. Name of Accused:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Khalid Shaikh Mohammad</td>
</tr>
<tr>
<td>Walid Muhammad Salih Mubarak Bin 'Attash</td>
</tr>
<tr>
<td>Ramzi Binalshibh</td>
</tr>
<tr>
<td>Ali Abdul Aziz Ali</td>
</tr>
<tr>
<td>Mustafa Ahmed Adam al Hawsawi</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2. Aliases of Accused:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Khalid Shaikh Mohammad (aliases Mukhtar al Baluchi; Haifz; Meer Akram; Abdul Rahman Abdullah Al Hamdi)</td>
</tr>
<tr>
<td>Walid Muhammad Salih Mubarek Bin 'Attash (aliases Khaled; Saleh Saeed Mohammed Bin Yousef; Silver; Tawfiq)</td>
</tr>
<tr>
<td>Ramzi Binalshibh (aliases Abu Ubaydah; Ahad Abdullahi Sabat; Abu Ubaydah al Hadrami)</td>
</tr>
<tr>
<td>Ali Abdul Aziz Ali (aliases Ammar al Baluchi; Isam Mansur; Isam Mansour; Isam Mansouri; Ali Alishe; Han)</td>
</tr>
<tr>
<td>Mustafa Ahmed Adam al Hawsawi (aliases Zahir; Hashem Abdollahi; Muhammad Ahanad; Abderahman Mustafa)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>3. ISN Number of Accused (Last Four):</th>
</tr>
</thead>
<tbody>
<tr>
<td>Khalid Shaikh Mohammad (10024)</td>
</tr>
<tr>
<td>Walid Muhammad Salih Mubarek Bin 'Attash (10014)</td>
</tr>
<tr>
<td>Ramzi Binalshibh (10013)</td>
</tr>
<tr>
<td>Ali Abdul Aziz Ali (10018)</td>
</tr>
<tr>
<td>Mustafa Ahmed Adam al Hawsawi (10011)</td>
</tr>
</tbody>
</table>

#### II. Charges and Specifications

4. Charge: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.  
SPECIFICATION:  
See Attached Charges and Specifications.

#### III. Swearing of Charges

<table>
<thead>
<tr>
<th>5a. Name of Accuser (Last, First, M)?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Graziano, Anthony</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>5b. Grade</th>
</tr>
</thead>
<tbody>
<tr>
<td>CW3</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>5c. Organization of Accuser</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Investigation Task Force (CITF)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>5d. Signature of Accuser</th>
</tr>
</thead>
<tbody>
<tr>
<td>[Signature]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>5e. Date (YYYYMMDD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>20110531</td>
</tr>
</tbody>
</table>

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 31st day of May, 2011, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

<table>
<thead>
<tr>
<th>Darlene S. Simmons</th>
</tr>
</thead>
<tbody>
<tr>
<td>Typed Name of Office</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CDR, JAGC, USN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grade</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Office of Military Commissions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge Advocate</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Signature</th>
</tr>
</thead>
</table>

MC FORM 458 JAN 2007
IV. NOTICE TO THE ACCUSED

6. On 31 May 2011, the accused was notified of the charges against him/her (See R.M.C. 308).

<table>
<thead>
<tr>
<th>Office of Military Commissions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organization of the Person Who Caused Accused to Be Notified of Charges</td>
</tr>
</tbody>
</table>

Clayton G. Trivett, Jr, GS-15
Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges

[Signature]

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at 1746 hours on 1 June 2011 at Alexandria, Virginia

<table>
<thead>
<tr>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alexandria, Virginia</td>
</tr>
</tbody>
</table>

For the Convening Authority: Donna L. Wilkins
Typed Name of Officer

GS-15
Grade

[Signature]

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY
Convening Authority, 10 U.S.C. § 948h, designated on 25 Mar 10

<table>
<thead>
<tr>
<th>Place</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alexandria, VA</td>
</tr>
</tbody>
</table>

20120404

Referred for trial to the capital military commission convened by military commission convening order 12-02 dated 4 April 2012

subject to the following instructions:

See continuation sheet

By Direction of the Convening Authority, Bruce MacDonald
Command, Order, or Direction

Donna L. Wilkins, GS-15
Typed Name and Grade of Officer

[Signature]

Official Capacity of Officer Signing

Convening Authority, Chapter 47a

Title 10 U.S.C. § 948h

VII. SERVICE OF CHARGES

8. On 6 April 2012, caused to be served a copy these charges on the above named accused.

<table>
<thead>
<tr>
<th>Clayton G. Trivett, Jr</th>
</tr>
</thead>
<tbody>
<tr>
<td>Typed Name of Trial Counsel</td>
</tr>
</tbody>
</table>

GS-15
Grade of Trial Counsel

[Signature]

FOOTNOTES

See K.M.C. 551 concerning instructions. If none, so state.

MC FORM 455 JAN 2007
Khalid Shaikh Mohammad / 9-11 Case Referred Charges
(Excerpts - Without All Appendices & Cover Sheets) (2011 & 2012)  (Page 3 of 28)

CONTINUATION SHEET – MC FORM 458 JAN 2007, BLOCK VI, REFERRAL
(Original Charge Sheet, Sworn on 20110531)

In the case of United States of America v.

RAMZI BINALSHIBH (aliases: Abu Ubaydah; Ahad Abdollahi Sabet; Abu Ubaydah al Hadrami)

The charges against the above named accused will be tried at a joint trial with the trials of

Khalid Shaikh Mohammad;

Walid Muhammad Salih Mubarak Bin 'Attash;

Ali Abdul Aziz Ali; and

Mustafa Ahmed Adam al Hawsawi

These charges will be tried in conjunction with the additional charge sworn on 25 January 2012 and referred on 4 April 2012.

The following charges are referred to trial as capital offenses: Conspiracy, Attacking Civilians, Murder in Violation of the Law of War, Hijacking an Aircraft, and Terrorism. This case is referred capital. See R.M.C. 103(a)(4) and (5).

By Direction of the Convening Authority:

[Signature]

Date: 4 April 2012

Convening Authority, Chapter 47A of Title 10 U.S.C § 948h
CHARGE I: VIOLATION OF 10 U.S.C. §950t (29), CONSPIRACY

Specification: In that Khalid Sheikh Mohammed (a/k/a Mukhtar al Baluchi; Hafiz; Meer Akram; Abdul Rahman Abdullah Al Ghamdi); Walid Muhammad Salih Mubarak Bin 'Attash (a/k/a Khallad; Salah Saeed Mohammed Bin Yousaf; Silver; Tawfiq); Ramzi Binalshibh (a/k/a Abu Ubaydah; Ahad Abdollahi Sabit; Abu Ubaydah al Hadrami); Ali Abdul Aziz Ali (a/k/a Ammar al Baluchi; Isam Mansur; Isam Mansur; Isam Mansour; Ali; Aliosh; Hani), and Mustafa Ahmed Adam al Hawaw (a/k/a/ Zahir; Hashem Abdollahi; Muhammad Ahanan; Abderrahman Mustafa), persons subject to trial by military commission as alien unprivileged enemy belligerents, did, at various locations, from in or about or about 1996, to in or about May 2003, in the context of and associated with hostilities, conspire and agree with Usama bin Laden, Mohammed Atef (a/k/a Abu Hafs al Masri), 19 individuals who hijacked four commercial airliners on September 11, 2001: (American Airlines Flight 11, a Boeing 767 aircraft, tail number N334AA, hereinafter AA #11) Mohamed Atta (a/k/a Abd al-Rahman), Satam al Suqami (a/k/a Azmi), Waleed al Shehri (a/k/a Abu Mis‘ab), Wail al Shehi (a/k/a Abu Salman), Abdul Aziz al Ormari (a/k/a Abu al-Abbas al-Janubi); (United Airlines Flight 175, a Boeing 767 aircraft, tail number N612UA, hereinafter UA #175) Marwan al Shehhi (a/k/a al-Qa‘a‘), Hamza al Ghamdi (a/k/a Juluybib), Ahmed al Ghamdi (a/k/a Ikrimah), Mohand al Shehri (a/k/a Umar al-Azdi), Fayez Rashid Ahmed Hassan Al Qadi Banihammad (hereinafter Fayez Banihammad) (a/k/a Abu Ahmad); (United Airlines Flight 93, a Boeing 757 aircraft, tail number N919UA, hereinafter UA #93) Ziad Samir Jarrah (a/k/a Abu Tariq), Ahmad Ibrahim A. al Haznawi (a/k/a al-Jarrah al-Ghamdi), Ahmed al Nami (a/k/a Abu Hashim), Saeed al Ghamdi (a/k/a Mu’tazz); (American Airlines Flight 77, a Boeing 757 aircraft, tail number N644AA, hereinafter AA #77) Hani Hanjour (a/k/a Urwah al-Ta’ifi), Khalid al Mihdhar (a/k/a Sinan), Nawaf al Hazmi (a/k/a Rabi’ah al-Makki), Majed Moqed (a/k/a al-Attar), Salem al Hazmi (a/k/a Bilal al-Makki); and various other members and associates of the al Qaeda organization, known and unknown, to commit the following offenses triable by military commission, to wit: attacking civilians; attacking civilian objects; intentionally causing serious bodily injury; murder in violation of the law of war; destruction of property in violation of the law of war; hijacking or hazarding a vessel or aircraft; and terrorism. Each of the five accused, knowing the unlawful purpose of the agreement, and with the intent to further the unlawful purpose, willfully joined the conspiracy and did knowingly and intentionally commit at least one of the following overt acts, in order to accomplish some objective or purpose of the agreement, with said conspiracy resulting in the deaths of 2,976 persons (see Charge Sheet Appendix A for a list of victims killed in the attacks):

1. In August 1996, Usama bin Laden (al Qaeda’s “emir” or leader) issued a public “Declaration of Jihad Against the Americans,” in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.

2. In 1996, Khalid Sheikh Mohammed met with Usama bin Laden in Afghanistan and discussed the operational concept of hijacking commercial airliners and crashing them into buildings in the United States and elsewhere. This plan was ultimately approved by Usama bin Laden.
3. Between 1996 and 2001, **Khalid Sheik Mohammed**, Usama bin Laden, and Mohammed Atef (a.k.a Abu Hafs al Masri, the military commander of al Qaeda), proposed and discussed potential targets for attack by hijacked commercial airliners and decided to target economic, political, and military buildings in the United States and Western Pacific.

4. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of “International Islamic Front for Fighting Jews and Crusaders,” issued a fatwa (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to “plunder their money.”

5. On or about May 29, 1998, Usama bin Laden issued a statement entitled “The Nuclear Bomb of Islam,” under the banner of the “International Islamic Front for Fighting Jews and Crusaders,” in which he stated that “it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God.”

6. In early 1999, Usama bin Laden directed **Walid Muhammad Salih Mubarak Bin `Attash** (a.k.a Khalid, hereinafter **Khallad Bin `Attash**) to obtain a United States visa so that he could travel to the United States and obtain pilot training in order to participate in what **Khallad Bin `Attash** termed the “Planes Operation.”

7. On or about April 3, 1999, **Khallad Bin `Attash** traveled to San`a, Yemen, and applied for a visa to travel to the United States using the alias “Salah Saeed Mohammed Bin Yousef.” This application was denied.

8. On or about April 3, 1999, and April 7, 1999, respectively, Nawaf al Hazmi (AA #77) and Khalid al Mihdhar (AA #77) received visas in Jeddah, Saudi Arabia, in order to travel to the United States.

9. In or about September 1999, **Khallad Bin `Attash** administered a forty-five day special course in hand-to-hand combat training at an al Qaeda camp in Logar, Afghanistan, in order to help select trainees for the “Planes Operation.” Nawaf al Hazmi (AA #77) and Khalid al Mihdhar (AA #77) attended this course. After completing the course, al Mihdhar (AA #77) and al Hazmi (AA #77) were selected to be part of the “Planes Operation.”

10. In or about November 1999, **Khallad Bin `Attash** and Nawaf al Hazmi (AA #77) traveled from Qandahar, Afghanistan, to Karachi, Pakistan, where they moved in with **Khalid Sheik Mohammed**. With the assistance of **Khalid Sheik Mohammed**, **Khallad Bin `Attash** and Nawaf al Hazmi (AA #77) studied compact discs, books, and other materials to learn about flying airplanes.

11. While living in Karachi, **Khallad Bin `Attash**, and Nawaf al Hazmi (AA #77) used computer simulators to learn how to fly planes, and studied and researched flight timetables for United States air carriers with **Khalid Sheik Mohammed**, in order to coordinate the simultaneous hijacking of multiple aircraft.
12. **Khalid Sheikh Mohammad**, who was educated in the United States, taught **Khallad Bin ʿAttash** and Nawaf al Hazmi (AA #77) various English phrases needed for hijacking airplanes, including “get down,” “don’t move,” “stay in your seat,” and “if anyone moves, I’ll kill you.”

13. In or about 1999, **Khalid Sheikh Mohammad** requested and received funding for his idea of hijacking planes and crashing them into buildings from Usama bin Laden (hereinafter the “Planes Operation”).

14. In or about November 1999, **Khalid Sheikh Mohammad** provided Nawaf al Hazmi (AA #77) and Khalid al Mihdar (AA #77) with funds in order to travel to the United States to train and prepare for the “Planes Operation.”

15. In or about December 1999, **Khalid Sheikh Mohammad** directed **Khallad Bin ʿAttash** to conduct a casing mission in support of the Planes Operation. **Khalid Sheikh Mohammad** gave Bin ʿAttash a razor knife to secrete on his person while traveling in order to assess airline security measures. **Khallad Bin ʿAttash** carried this razor knife on flights to Kuala Lumpur, Malaysia, Bangkok, Thailand, and Hong Kong, China. On these flights, **Khallad Bin ʿAttash** collected information on United States air carriers, such as the number of passengers on the flights that were in first class, business class, and economy class.

16. In or about December 1999, **Khallad Bin ʿAttash** devised a scheme in order to assist Nawaf al Hazmi (AA #77) in traveling to the United States. In order to hide al Hazmi’s previous travel to Pakistan, **Khallad Bin ʿAttash** directed al Hazmi to purchase two different tickets for travel to Malaysia, one using a fraudulently-issued Yemeni passport, which masked his travel to Pakistan and Afghanistan on Hazmi’s valid Saudi passport.

17. On or about December 30, 1999, **Khallad Bin ʿAttash** (using the alias Salah Saeed Mohammed BinYousaf), traveled from Kuala Lumpur, Malaysia, to Bangkok, Thailand, via Malaysia Airlines Flight #782 and stayed at the JW Marriott, a five star hotel in Bangkok.

18. On or about December 31, 1999, **Khallad Bin ʿAttash** (using the alias Salah Saeed Mohammed Yusuf) traveled as a first-class passenger from Bangkok, Thailand, to Hong Kong, China, via United Airlines Flight #2 to conduct surveillance on airline security and collect information regarding air carriers for flights in Southeast Asia.

19. On or about January 1, 2000, **Khallad Bin ʿAttash** (using the alias Salah Saeed Mohammed Yusuf), traveled as a first-class passenger from Hong Kong, China, to Bangkok, Thailand, via United Airlines Flight #1 to conduct surveillance on airline security and collect information regarding air carriers for flights in Southeast Asia.

20. On or about January 2, 2000, **Khallad Bin ʿAttash** (using the alias Salah Saeed Mohammed BinYousaf), traveled from Bangkok, Thailand, to Kuala Lumpur, Malaysia,
via Thai Airways Flight #415 in order to facilitate onward travel for Nawaf al Hazmi (AA #77) and Khalid al Mihdhar (AA #77) from Kuala Lumpur to the United States.

21. On or about January 5, 2000, Khalid al Mihdhar (AA # 77) traveled to Kuala Lumpur, Malaysia, via Malaysian Airlines Flight #91.

22. Between, on, or about January 5, 2000 and on or about January 8, 2000, while in Malaysia, on various occasions, Khallad Bin ’Attash briefed Nawaf al Hazmi (AA #77) and Khalid al Mihdhar (AA #77) regarding Khallad Bin ’Attash’s surveillance during casing flights, to include the security on the flights, secreting the razor knife onboard the aircraft, and other flight information for use in the “Planes Operation.”

23. On or about January 8, 2000, Nawaf al Hazmi (AA #77), Khalid al Mihdhar (AA # 77), and Khallad Bin ’Attash (using the alias Salah Saeed Mohammed) flew together, seated in the same row, from Kuala Lumpur, Malaysia, to Bangkok, Thailand, on Malaysia Airlines Flight #782.

24. On or about January 15, 2000, Nawaf al Hazmi (AA #77) and Khalid al Mihdhar (AA #77), the first two hijackers to reach the United States, traveled from Bangkok, Thailand, to Los Angeles, California, on United Airlines Flight # 2, with orders from Khalid Sheikh Mohammed to undergo flight training, learn English, and affiliate with a mosque to help them assimilate in the United States.

25. On or about January 20, 2000, Khallad Bin ’Attash (using the alias Salah Saeed Mohammed BinYousaf), traveled from Bangkok, Thailand, to Karachi, Pakistan, via Thai Airways Flight #507.

26. Upon his return to Karachi, Pakistan, Khallad Bin ’Attash prepared a written report and briefed Khalid Sheikh Mohammed and Mohammed Atta (a/k/a Abu Hafs al Masri), the military commander of al Qaeda) on airline security and Khallad Bin ’Attash’s ability to get the razor knife on board the flights.

27. Between November 1999 and February 2000, Ramzi Binalshibh, Mohamed Atta (AA #11), Marwan al Shehhi (UA #175), and Ziad Jarrah (UA #93) traveled from Hamburg, Germany, to Qandahar, Afghanistan to attend an al Qaeda training camp.

28. In or about January 2000, Usama bin Laden chose Ramzi Binalshibh, Mohamed Atta (AA #11), Marwan al Shehhi (UA #175), and Ziad Jarrah (UA #93) to participate in the “Planes Operation” in the United States.

29. In or about January 2000, Usama bin Laden and Mohammed Atta (a/k/a Abu Hafs al Masri, the military commander of al Qaeda) tasked Ramzi Binalshibh, Mohamed Atta (AA #11), Marwan al Shehhi (UA #175), and Ziad Jarrah (UA #93) to obtain flight training for a martyrdom operation and report to Khalid Sheikh Mohammed on their progress.
30. In or about January 2000, Ramzi Binalshibh, Mohamed Atta (AA #11), and Ziad Jarrah (UA #93) filmed videos to serve as their “martyr wills” in anticipation of dying in an attack against the United States.

31. In or about January 2000, Mohammed Ataf (a/k/a Abu Hafs al Masri, the military commander of al Qaeda) sent Ramzi Binalshibh and Mohamed Atta (AA #11) to Karachi, Pakistan, to meet with Khalid Sheikh Mohammed for the first time to discuss future communication protocols between Khalid Sheikh Mohammed and the hijackers.

32. As part of the operational security for the “Planes Operation,” Khalid Sheikh Mohammed instructed both Mohamed Atta (AA #11) and Nawaf al Hazmi (AA #77) to meet in places in the United States where tourists frequent so they would not stand out.

33. In or about January 2000, Khalid Sheikh Mohammed told Ali Abdul Aziz Ali that “Marwan” (identified by Ali as Marwan al Shehhi (UA #175)) would be traveling to meet Ali in Dubai, United Arab Emirates. Khalid Sheikh Mohammed directed Ali and al Shehhi (UA #175) to use the internet to order a video entitled “CityBird,” depicting cockpit operations in a Boeing 767-300 while flying throughout the world.

34. On or about January 3, 2000, Marwan al Shehhi (UA #175) and Ali Abdul Aziz Ali ordered the “CityBird” video online and had it shipped to Ali at Post Office Box (P.O. Box) 16958, Dubai, United Arab Emirates. After receiving the video, Ali delivered the video to Khalid Sheikh Mohammed in Pakistan.

35. On or about January 3, 2000, Marwan Al Shehhi (UA #175) and Ali Abdul Aziz Ali also purchased Boeing 747 flight simulator computer software.

36. In or about March 2000, upon returning to Hamburg, Germany, Ramzi Binalshibh and Mohamed Atta (AA #11) researched flight schools via the internet in support of the “Planes Operation.”

37. On or about March 22, 2000, Mohamed Atta (AA #11) sent an email from Germany to several flight schools in the United States stating, “we are a small group (2-3) of young [sic] men from different arab countries… We would like to start training for the career of airline professional pilots.”

38. On or about March 26, 2000, Ziad Jarrah (UA #93) submitted an application to the Florida Flight Training Center (FPTC) in Venice, Florida, and later enrolled.

39. In or about April 2000, Khalid Sheikh Mohammed provided Ali Abdul Aziz Ali with over $100,000 to be utilized for “operational purposes.”

40. In or about April 2000, at the direction of Khalid Sheikh Mohammed, Ali Abdul Aziz Ali spoke over the telephone with Nawaf al Hazmi (AA #77) (who was in the United States), who requested Ali Abdul Aziz Ali send funds.
41. On or about April 16, 2000, Ali Abdul Aziz Ali transferred approximately $5,000 to Nawaf al Hazmi (AA #77), through a third party, in San Diego, California.

42. On or about May 17, 2000, in Berlin, Germany, Ramzi Binalshibh applied for a visa to travel to the United States, which was denied.

43. On or about May 18, 2000, in Berlin, Germany, Mohamed Atta (AA #11) received a visa to travel to the United States.

44. On or about May 25, 2000, in Berlin, Germany, Ziad Jarrah (UA #93) received a visa to travel to the United States.

45. On or about May 29, 2000, Marwan al Shehhi (UA #175) traveled from Brussels, Belgium, to Newark, New Jersey.

46. On or about June 3, 2000, Mohamed Atta (AA #11) traveled from Prague, Czech Republic, to Newark, New Jersey.

47. On or about June 13, 2000, Ramzi Binalshibh sent a Moneygram wire transfer from Hamburg, Germany, in the amount of 5,789.26 German Deutschmarks (U.S. $2,708.33) to Marwan al Shehhi (UA #175) in New York, New York.

48. On or about June 15, 2000, in Berlin, Germany, Ramzi Binalshibh applied for the second time for a visa to travel to the United States, which was denied.

49. On or about June 21, 2000, Ramzi Binalshibh sent a Moneygram wire transfer from Hamburg, Germany, in the amount of 3,862.76 German Deutschmarks (U.S. $1,803.19) to Marwan al Shehhi (UA #175) in New York, New York.

50. On or about June 27, 2000, Ziad Jarrah (UA #93) traveled from Munich, Germany, to Atlanta, Georgia.

51. On or about June 29, 2000, Ali Abdul Aziz Ali (using the alias “Isam Mansar”) transferred approximately $5,000 from Dubai, United Arab Emirates, to Marwan al Shehhi (UA #175) in New York, New York.

52. On or about July 7, 2000, Mohamed Atta (AA #11) and Marwan al Shehhi (UA #175) opened a joint checking account at SunTrust Bank in Venice, Florida, with a $7,000 cash deposit.

53. On or about July 18, 2000, Ali Abdul Aziz Ali (using the alias “Isam Mansur”) transferred approximately $10,000 from Dubai, United Arab Emirates, to the joint SunTrust Bank account of Mohamed Atta (AA #11) and Marwan al Shehhi (UA #175) in Venice, Florida.
54. Between, in, or about July 2000 and in or about December 2000, Mohamed Atta (AA #11) and Marwan al Shehhi (UA #175) attended flight training classes at Huffman Aviation in Venice, Florida.

55. On or about July 26, 2000, in Germany, Ramzi Binalshibh wired 3,853 German Deutschmarks (U.S. $1,760.61) from Hamburg, Germany, to Marwan al Shehhi (UA #175) in Sarasota, Florida.

56. On or about August 5, 2000, Ali Abdul Aziz Ali (using the alias "Isam Mansour") transferred approximately $9,500 from Dubai, United Arab Emirates, to the joint SunTrust Bank account of Mohamed Atta (AA #11) and Marwan al Shehhi (UA #175) in Venice, Florida.

57. In or about August 2000, Ziad Jarrah (UA #93), while attending flight training at Florida Flight Training Center, assisted Ramzi Binalshibh in his attempt to enroll in flight training with him.

58. On or about August 14, 2000, Ramzi Binalshibh wired 4,739.32 German Deutschmarks (approximately U.S. $2,200) from his account in Germany to the Florida Flight Training Center, in Venice, Florida.

59. On or about August 29, 2000, Ali Abdul Aziz Ali (using the name "Mr. Ali") transferred approximately $20,000 from Dubai, United Arab Emirates, to the joint SunTrust Bank account of Mohamed Atta (AA #11) and Marwan al Shehhi (UA #175) in Venice, Florida.

60. Beginning in September 2000, Ramzi Binalshibh attempted to enroll in the Aviation Language School in Miami, Florida.

61. On or about September 15, 2000, in San’a, Yemen, Ramzi Binalshibh applied for the third time for a visa to travel to the United States, which was denied.

62. On or about September 17, 2000, Ali Abdul Aziz Ali (using the alias "Hani (Fawaz TRDNG)") transferred approximately $70,000 from Dubai, United Arab Emirates, to the joint SunTrust Bank account of Mohamed Atta (AA #11) and Marwan al Shehhi (UA #175) in Venice, Florida.

63. On or about September 25, 2000, Ramzi Binalshibh wired $4,118.13 from Hamburg, Germany, to Marwan al Shehhi (UA #175) in Nokomis, Florida, via Western Union.

64. On or about October 25, 2000, in Berlin, Germany, Ramzi Binalshibh applied for the fourth and final time for a visa to travel to the United States, which was denied.

65. When Ramzi Binalshibh was unable to obtain a visa to travel to the United States, Khalid Shaikh Mohammed named Binalshibh as his main assistant in the “Planes
Operation” due to his knowledge of the details of the plot. **Khalid Sheikh Mohammed** selected Mohamed Atta (AA #11) as the “emir,” or leader, of the group and Nawaf al Hazmi (AA #77) as Atta’s “deputy.” **Khalid Sheikh Mohammed** gave Mohamed Atta (AA #11) full authority to make operational decisions in the United States.

66. On or about November 5, 2000, Mohamed Atta (AA #11) ordered flight deck videos for the Boeing 747 Model 200 and the Boeing 757 Model 200, as well as other items from Sporty’s Pilot Shop in Batavia, Ohio.

67. In or about December 2000, **Khallad Bin ’Attash** provided Hani Hanjour (AA #77) with an email address in order to contact Nawaf al Hazmi (AA #77) in the United States.

68. On December 2, 2000, Hani Hanjour (AA #77) traveled to Dubai, United Arab Emirates.

69. On or about December 5, 2000, **Ali Abdul Aziz Ali** helped Hani Hanjour (AA #77) open a banking account at the Deira, Dubai, United Arab Emirates, Citibank (hereinafter Hanjour Citibank account), and provided approximately $3,000 to Hani Hanjour to deposit in the account.

70. In or about December 2000, **Ali Abdul Aziz Ali** reserved a plane ticket for Hani Hanjour (AA #77) to travel to the United States to join the other operatives already there.

71. On or about December 8, 2000, Hani Hanjour (AA #77) traveled from Dubai, United Arab Emirates, to San Diego, California.

72. Upon Hani Hanjour’s (AA #77) arrival in San Diego, Nawaf al Hazmi (AA #77) contacted **Ali Abdul Aziz Ali** to advise him that Hanjour had arrived safely.

73. On or about December 11, 2000, Mohamed Atta (AA #11) ordered flight deck videos for the Boeing 767 Model 300ER and the Airbus A320-200 from Sporty’s Pilot Shop in Batavia, Ohio.

74. On or about December 26, 2000, **Ali Abdul Aziz Ali** traveled from Dubai, United Arab Emirates, to Karachi, Pakistan, and returned to Dubai on or about January 5, 2001.

75. On or about January 28, 2001, in Dubai, United Arab Emirates, **Ali Abdul Aziz Ali** deposited $5,000 in Hani Hanjour’s (AA #77) Citibank account.

76. In or about late January 2001, **Ramzi Binalshibh** traveled from Germany to Afghanistan to notify Usama bin Laden, Mohammed Atuf (a/k/a Abu Hafs al Masri, the military commander of al Qaeda), and **Khalid Sheikh Mohammed** that Mohamed Atta (AA #11), Marwan al Shehhi (UA #175), and Ziad Jarrah (UA #93) had completed their initial flight training in the United States.
77. In or about March 2001, having already earned his pilot’s license in 1999, Hani Hanjour (AA #77) attended flight simulator training in Phoenix, Arizona, at Pan Am International Flight Academy, Jet Tech International.

78. On or about January 30, 2001, Hani Hanjour (AA #77) paid the balance of his simulator training with a Bank of America cashier’s check in the amount of $5,745.00.

79. Between on or about January 31, 2001, and on or about February 6, 2001, Mohamed Atta (AA #11) and Marwan al Shalhawi (UA #175) took flight “check rides” around Decatur, Georgia.

80. On or about March 19, 2001, Nawaf al Hazmi (AA #77) ordered flight deck videos for the Boeing 747 Model 400, the Boeing 747 Model 200, and the Boeing 777 Model 200, and another video from Sporty’s Pilot Shop in Batavia, Ohio.

81. In or about April 2001, Mustafa al Hawsawi traveled to Dubai, United Arab Emirates, from Karachi, Pakistan, at the direction of al Qaeda’s Media Committee.

82. Between in or about September 2000 and in or about July 2001, Khalid Sheik Mohammed instructed the non-pilot hijackers to travel to their home countries to obtain “clean” passports (a passport not reflecting travel to Pakistan or Afghanistan), visas from other Western countries, and visas to the United States, then return to Pakistan. Following the hijackers’ return to Pakistan, Khalid Sheik Mohammed sent them to Dubai, United Arab Emirates, to await final travel to the United States. On several occasions, Khalid Sheik Mohammed provided the non-pilot hijackers with chemicals in an eye dropper to remove any Pakistani stamps from their passports.

83. Khalid Sheik Mohammed personally trained the hijackers and informed them that they were going on a martyrdom operation involving airplanes, but at the time of their training they were not made aware of the specific targets.

84. Khalid Sheik Mohammed and others trained the non-pilot hijackers by providing instructions on how to pack their bags to best secrete knives onto a plane, and on how to slit passengers’ throats by making the hijackers practice on sheep, goats, and camels in preparation for the “Planes Operation.”

85. Khalid Sheik Mohammed directed al Qaeda members to film martyr videos of some of the hijackers, several of which were later released publicly through al Qaeda’s media wing, As Sahab Productions.

86. Beginning on or about April 19, 2001, Khalid Sheik Mohammed ordered that the non-pilot hijackers be sent to the United States and gave the hijackers operational guidance on how to avoid detection during their travel to the United States.
87. On or about April 23, 2001, Satam al Suqami (AA #11) and Waleed al Shehri (AA #11) traveled from Dubai, United Arab Emirates, via Emirates Flight #7 to London-Gatwick, England, and Virgin Atlantic Flight #27 from London to Orlando, Florida.

88. On or about May 1, 2001, Satam al Suqami (AA #11) and Waleed al Shehri (AA #11) opened a joint bank account at SunTrust Bank in Florida with a cash deposit of $9,000.

89. On or about May 2, 2001, Ahmad al Ghamdi (UA #175) and Majed Moqed (AA #77) traveled from Dubai, United Arab Emirates, via Emirates Flight #1 to London-Heathrow, England, and United Airlines Flight #925 from London to Washington-Dulles, Virginia.

90. Beginning in or about May 2001, while in Florida, Ziad Jarrah (UA #93) joined a gym and took martial arts lessons which included instruction in knife fighting.

91. On or about May 26, 2001, Mohand al Shehri (UA #93), Ahmed al Nami (UA #93), and Hamza al Ghamdi (UA #175) purchased plane tickets to travel from Dubai, United Arab Emirates, to Miami, Florida, via London, England. They all listed 050 7696327 as their contact number, a phone number associated with Ali Abdul Aziz Ali.

92. On or about May 28, 2001, Mohand al Shehri (UA #93), Ahmed al Nami (UA #93), and Hamza al Ghamdi (UA #175) traveled from Dubai, United Arab Emirates, via Emirates Flight #7 to London-Gatwick, England, and Virgin Atlantic Flight #5 from London to Miami, Florida.

93. On or about June 1, 2001, Mohand al Shehri (UA #93), Ahmed al Nami (UA #93), and Hamza al Ghamdi (UA #175) opened bank accounts at SunTrust Bank in Florida with cash deposits of $4,700, $4,800, and $3,000, respectively.

94. On or about June 6, 2001, Ahmad al Haznawi (UA #93) and Wail al Shehri (AA #11) purchased plane tickets to travel from Dubai, United Arab Emirates, to Miami, Florida via London, England. They both listed 050 7696327 as their contact number, a phone number associated with Ali Abdul Aziz Ali.

95. On or about June 8, 2001, Ahmed al Haznawi (UA #93) and Wail al Shehri (AA #11) traveled from Dubai, United Arab Emirates via Emirates Flight #7 to London-Gatwick, England, and Virgin Atlantic Flight #5 from London to Miami, Florida.

96. On or about June 18, 2001, Wail al Shehri (AA #11) opened a bank account at SunTrust Bank in Florida with a deposit of $8,000.

97. On or about June 23, 2001, Mustafa al Hawsawi opened a bank account at the Standard Chartered Bank in Sharjah, United Arab Emirates, and obtained an ATM card in connection with the checking account.
Khalid Shaik Mohammad / 9-11 Case Referred Charges
(Excerpts - Without All Appendices & Cover Sheets) (2011 & 2012)  (Page 15 of 28)

107. On or about June 29, 2001, Salem al Hazmi (AA #77) and Abdul Aziz al Omari (AA #11) traveled from Dubai, United Arab Emirates, to New York, New York, via Zurich, Switzerland.


109. On or about July 8, 2001, Mohamed Atta (AA #11) purchased two Victorinox Swiss Army pocket knives in Zurich, Switzerland.

110. On or about July 9, 2001, Nawaf al Hazmi (AA #77), Majed Moqed (AA #77) and Ahmed al Ghamdi (UA #175) opened bank accounts at the Dime Savings Bank in New Jersey.

111. On or about July 12, 2001, Ahmad al Haznawi (UA #93) opened a bank account at SunTrust Bank in Florida with a $500 deposit.

112. On or about July 12, 2001, Saeed al Ghamdi (UA #93) opened a bank account at SunTrust Bank in Florida with a $4,500 deposit.

113. On or about July 18, 2001, Fayeza Banhammad (UA #175) opened an account at SunTrust Bank in Florida with a $1,000 deposit.

114. On or about July 18, 2001, Khalid al Mihdhar (AA #77) opened a bank account at Hudson United Bank in New Jersey with a $300 deposit.

115. On or about July 18, 2001, Mustafa al Hawsawi took power of attorney over Fayeza Banhammad’s (UA #175) Standard Chartered Bank accounts in the United Arab Emirates.

116. On or about July 18, 2001, using his power of attorney, Mustafa al Hawsawi picked up Fayeza Banhammad’s (UA #175) VISA and ATM cards from Standard Chartered Bank in the United Arab Emirates.

117. On or about July 23, 2001, Mustafa al Hawsawi withdrew 500 Dirhams (U.S. $136.24) from an ATM in Sharjah, United Arab Emirates, from the Standard Chartered Bank account of Fayeza Banhammad (UA #175).

118. On or about July 23, 2001, Mustafa al Hawsawi sent a package using the alias “Hashim” to Fayeza Banhammad (UA #175) in Delray Beach, Florida, listing the mobile phone number 5209905 and P.O. Box 19738, SHJ, UAE.

119. On or about August 1, 2001, in Florida, Fayeza Banhammad’s (UA #175) Standard Chartered Bank VISA card was used for the first time in the United States to withdraw approximately $2,804.50.
120. On or about July 21, 2001, Salem al Hazmi (AA #77) opened a bank account at Hudson United Bank in New Jersey with a $500 deposit.

121. On or about July 26, 2001, Abdul Aziz al Omari (AA #11) opened a bank account at Hudson United Bank in New Jersey with a $100 deposit.

122. On August 13, 2001, Marwan al Shehhi (UA #175) purchased two knives from Sports Authority, Boynton Beach, Florida.


124. On or about August 17, 2001, Ziad Jarrah (UA #93) took a “check ride” at a flight school in Fort Lauderdale, Florida.

125. On or about August 22, 2001, Faez Banihammad (UA #175) used his VISA card in Florida to obtain approximately $4,800 cash, which was previously deposited into his Standard Chartered Bank account in the United Arab Emirates.

126. On or about late August 2001, Ramzi Binalshibh sent a message to Khalid Shaikh Mohammad notifying him that Mohamed Atta (AA #11) had chosen September 11, 2001, as the date of the operation. Khalid Shaikh Mohammad reported the date to Usama bin Laden, who began preparing al Qaeda members and their families in Afghanistan in anticipation of the expected United States military response. Khalid Shaikh Mohammad traveled from Afghanistan to Pakistan shortly after having been notified.

127. On or about August 25, 2001, Mustafa al Hawsawi applied for a supplemental Standard Chartered Bank VISA card in the name of Abdul Rahman Abdullah al Ghamdi, and attached a photograph of Khalid Shaikh Mohammad as the supplemental applicant.

128. On or about August 25, 2001, Khalid al Mihdhar (AA #77) and Majed Moqed (AA #77) reserved tickets for American Airlines Flight 77, scheduled to depart Washington Dulles International Airport, Dulles, Virginia, at 8:10 a.m. and arrive at Los Angeles, California, on September 11, 2001.

129. On or about August 26, 2001, tickets were reserved for Waleed al Shehri (AA #11) and Wail al Shehri (AA #11) on American Airlines Flight 11, scheduled to depart Logan International Airport, Boston, Massachusetts, at 7:45 a.m. and arrive at Los Angeles, California, on September 11, 2001.

130. On or about August 27, 2001, tickets were reserved for Faez Banihammad (UA #175) and Mohand al Shehri (UA #175) on United Airlines Flight 175, scheduled to depart Logan International Airport, Boston, Massachusetts, at 8:00 a.m. and arrive at Los Angeles, California, on September 11, 2001.
Khalid Shaikh Mohammad / 9-11 Case Referred Charges
(Excerpts - Without All Appendices & Cover Sheets) (2011 & 2012) (Page 17 of 28)

131. On or about August 27, 2001, tickets were reserved for Nawaf al Hazmi (AA #77) and Salem al Hazmi (AA #77) on American Airlines Flight 77 for travel on September 11, 2001.

132. On or about August 27, 2001, tickets were reserved for Saeed al Ghamdi (UA #93) and Ahmed al Nami (UA #93) on United Airlines Flight 93, scheduled to depart from Newark International Airport, Newark, New Jersey, at 8:00 a.m. and arrive at San Francisco, California, on September 11, 2001.

133. On or about August 27, 2001, Nawaf al Hazmi (AA #77) purchased a Leatherman Wave Multi-tool from Target, in Laurel, Maryland.


135. On or about August 28, 2001, tickets were reserved for Mohamed Atta (AA #11), Abdul Aziz al Omari (AA #11), and Satam al Suqami (AA #11) on American Airlines Flight 11 for travel on September 11, 2001.

136. On or about August 28, 2001, tickets were reserved for Marwan al Shehhi (UA #175) on United Airlines Flight 175 for travel on September 11, 2001.

137. On or about August 28, 2001, in Dubai, United Arab Emirates, Ali Abdul Aziz Ali applied for a visa to travel to the United States on September 4, 2001, for a period of one week. This application was denied.

138. On or about August 29, 2001, tickets were reserved for Ahmed al Ghamdi (UA #175) and Hamza al Ghamdi (UA #175) on United Airlines Flight 175 for travel on September 11, 2001.

139. On or about August 29, 2001, tickets were reserved for Ahmed al Haznawi (UA #93) on United Airlines Flight 93 for travel on September 11, 2001.

140. On or about August 30, 2001, tickets were reserved for Ziad Jarrah (UA #93) on United Airlines Flight 93 for travel on September 11, 2001.

141. On or about August 30, 2001, Hamza al Ghamdi (UA #175) purchased a Leatherman Wave Multi-Tool from Lowe’s Home Improvement, Boynton Beach, Florida.

142. On or about August 31, 2001, tickets were reserved for Hani Hanjour (AA #77) on American Airlines Flight 77 for travel on September 11, 2001.

143. On or about September 3, 2001, Mustafa al Hawsawi, using the alias Hashem Abdollahi, and listing the contact phone number 050 7692590, sent $1,500 to Ahad Abdollahi Sabet, an alias for Ramzi Binalshibh.
144. On or about September 4, 2001, Mohamed Atta (AA #11) sent a Federal Express package containing Fayeza Banhammad’s (UA #175) ATM card and a blank check to Mustafa al Hawsawi’s P.O. Box 19738 in Sharjah, United Arab Emirates. Mustafa al Hawsawi collected the package on or about September 8, 2001.

145. On or about September 5, 2001, Fayeza Banhammad (UA #175) wired approximately $8,000 from his Florida SunTrust account to his Standard Chartered Bank account, over which Mustafa al Hawsawi had power of attorney.

146. On or about September 8, 2001, Mohamed Atta (AA #11) wired $2,860 to “Mustafa Ahmed” in the United Arab Emirates. Mustafa al Hawsawi retrieved the funds, using a true name photo identification, at the Wall Street Exchange, Dubai, United Arab Emirates, on or about September 9, 2001.

147. On or about September 8, 2001, Mohamed Atta (AA #11) wired an additional $5,000 to “Mustafa Ahmed” in United Arab Emirates. Mustafa al Hawsawi retrieved the funds, using a true name photo identification, at the Wall Street Exchange, Dubai, United Arab Emirates, on or about September 10, 2001.

148. On or about September 9, 2001, Waleed al Shehri (AA #11) wired $5,000 to “Ahmad Mustafa” in the United Arab Emirates. Mustafa al Hawsawi retrieved the funds, using a true name photo identification, at the Al-Ansari Exchange, Sharjah, United Arab Emirates, on or about September 11, 2001.

149. On or about September 10, 2001, Marwan al Shehhi (UA #175) wired $5,400 to “Mustafa Ahmad” in United Arab Emirates. Mustafa al Hawsawi retrieved the funds, using a true name photo identification, at the Al-Ansari Exchange, Sharjah, United Arab Emirates, on or about September 11, 2001.

150. On or about September 10, 2001, Nawaf al Hazmi (AA #77), using the alias “Rawf Al-Dog,” attempted to send a package to Mustafa al Hawsawi’s P.O. Box 19738, Al Sharjah, United Arab Emirates, containing a First Union VISA check card in the name of Khalid al Mihdhar (AA #77) and other account information.


152. On or about September 11, 2001, in United Arab Emirates, Mustafa al Hawsawi deposited approximately 60,000 Dirhams (U.S. $16,348) into his Standard Chartered Bank account.

153. On September 11, 2001, prior to the hijackings taking place in the United States, in Dubai, United Arab Emirates, Mustafa al Hawsawi transferred approximately 24,000 Dirhams (U.S. $6,534) from Fayeza Banhammad’s (UA #175) Standard Chartered Bank account into his own account, using a check dated September 10, 2001, and signed by...
Fayez Banihammad (UA #175). **Mustafa al Hawsawi** then withdrew approximately 5000 Dirhams (U.S. $1,361), nearly all the remaining balance in Banihammad’s (UA #175) account, by ATM cash withdrawal.

154. On or about September 11, 2001, in United Arab Emirates, **Mustafa al Hawsawi** prepaid approximately 150,000 Dirhams (U.S. $40,871) to a VISA card connected to his Standard Chartered Bank account.

155. On or about September 11, 2001, **Mustafa al Hawsawi** flew from Dubai, United Arab Emirates, to Karachi, Pakistan.

156. On or about September 11, 2001, Mohamed Atta (AA #11) possessed a handwritten set of final instructions for a martyrdom operation using knives on an airplane. Copies of these instructions were in the possession of at least one hijacker on United Airlines #93 and also placed in Nawaf al Hazmi’s (AA #77) Toyota Corolla at Washington Dulles International Airport.

157. On September 11, 2001, Mohamed Atta (AA #11) and Abdul Aziz al Omari (AA #11) flew from Portland, Maine, to Boston, Massachusetts.

158. On or about September 11, 2001, Mohamed Atta (AA #11) possessed an operating manual for a Boeing 757/767 Simulator, pepper spray, a knife, and a German travel visa.

159. On September 11, 2001, Mohamed Atta, Abdul Aziz al Omari, Satam al Suqami, Waleed al Shehri, and Wail al Shehri hijacked American Airlines Flight 11, which had departed from Boston, Massachusetts, at approximately 7:59 a.m. They crashed Flight 11 into the North Tower of the World Trade Center in Manhattan at approximately 8:46 a.m., causing the collapse of the tower and the deaths of 87 passengers and crew members on-board, and thousands of persons in and around the World Trade Center. (See Charge Sheet Appendix A for the list of individuals killed on Flight 11 and at the site of the World Trade Center).

160. On September 11, 2001, Marwan al Shehhi, Hamza al Ghamdi, Fayez Banihammad, Mohand al Shehri, and Ahmed al Ghamdi, hijacked United Airlines Flight 175, which had departed from Boston, Massachusetts, at approximately 8:14 a.m. They crashed Flight 175 into the South Tower of the World Trade Center in Manhattan at approximately 9:03 a.m., causing the collapse of the tower and the deaths of 60 passengers and crew members on-board, and thousands of persons in and around the World Trade Center. (See Charge Sheet Appendix A for the list of individuals killed on Flight 175 and at the site of the World Trade Center).

161. On September 11, 2001, Hani Hanjour, Khalid al Mihdhar, Majed Moqed, Nawaf al Hazmi, and Salem al Hazmi hijacked American Airlines Flight 77, which had departed from Dulles, Virginia, at approximately 8:20 a.m. They crashed Flight 77 into the Pentagon in Arlington, Virginia, at approximately 9:37 a.m., causing the deaths of 59 passengers and
crew members on-board and 125 persons in the Pentagon. (See Charge Sheet Appendix A for the list of individuals killed on Flight 77 and at the Pentagon).

162. On September 11, 2001, Ziad Jarrah, Saeed al Ghamdi, Ahmed al Nami, and Ahmed al Haznawi hijacked United Airlines Flight 93, which had departed from Newark, New Jersey, at approximately 8:42 a.m. After resistance by several passengers, Flight 93 crashed in Somerset County, Pennsylvania, at approximately 10:03 a.m., killing all 40 passengers and crew members on-board. (See Charge Sheet Appendix A for the list of individuals killed on Flight 93).

163. Between on or about September 11, 2001, and on or about September 21, 2001, Khalid Shaikh Mohammad and others in his Karachi, Pakistan, guesthouse recorded many news stories of the attacks for future use in propaganda films.

164. On or about September 13, 2001, Khalid Shaikh Mohammad used the supplemental VISA card connected to Mustafa al Hawsawi’s Standard Chartered Bank VISA account to make six ATM withdrawals in Karachi, Pakistan.

165. In late September 2001, Usama bin Laden, Ramzi Binalshibh, Mustafa al Hawsawi, and other members of al Qaeda met near Kabul, Afghanistan, to discuss the September 11th attacks; this meeting was videotaped and later released by al Qaeda for propaganda purposes.

166. On or about October 7, 2001, in Afghanistan, Usama Bin Laden praised the September 11th attacks, and vowed that the United States would not “enjoy security” before “infidel armies leave” the Arabian Peninsula.

167. On or about late 2001, Khalid Shaikh Mohammad attended a meeting with Usama bin Laden when Usama bin Laden confirmed al Qaeda’s involvement in the September 11th attacks in a videotaped message.

**CHARGE II: VIOLATION OF 10 U.S.C. §950T (2), ATTACKING CIVILIANS**

**Specification:** In that Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak bin `Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi, persons subject to trial by military commission as alien unprivileged enemy belligerents, did, on September 11, 2001, at or near the World Trade Center (New York, New York), the Pentagon (Arlington, Virginia), and Shanksville, Pennsylvania, while in the context of and associated with hostilities, intentionally engage in attacks on civilian populations, to wit: the civilian population of New York, New York, in and around the World Trade Center, the civilian population of the Pentagon, and the passengers and crew of four civilian aircraft, to wit: American Airlines Flight #11, United Airlines Flight #175, American Airlines Flight #77, and United Airlines Flight #93, by intentionally crashing said civilian aircraft into the World Trade Center (New York, New York), the Pentagon (Arlington, Virginia), and a field in Shanksville, Pennsylvania, intending the object to be,
and the object which was, a civilian population as such, and individual civilians not taking direct or active part in hostilities; knowing the factual circumstances that established their civilian status, resulting in the deaths of 2,921 civilians. (See Charge Sheet Appendix A for a list of the names of civilians killed).

**CHARGE III: VIOLATION OF 10 U.S.C. §950t (3), ATTACKING CIVILIAN OBJECTS**

*Specification:* In that Khalid Shaikh Mohammed, Walid Muhammad Salih Mubarak Bin `Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawaswi, persons subject to trial by military commission as alien unprivileged enemy belligerents, did, on September 11, 2001, at or near the World Trade Center (New York, New York), the Pentagon (Arlington, Virginia), and Shanksville, Pennsylvania, while in the context of and associated with hostilities, intentionally engage in attacks on civilian property, to wit: the World Trade Center (New York, New York) and four civilian aircraft, to wit: American Airlines Flight #11, a Boeing 767 aircraft, tail number N334AA; United Airlines Flight #175, a Boeing 767 aircraft, tail number N612UA; American Airlines Flight #77, a Boeing 757 aircraft, tail number N644AA; and United Airlines Flight #93, a Boeing 757 aircraft, tail number N591UA; that is, property that was not a military objective, intending the object to be, and the object which was, civilian property; knowing that such property was not a military objective, by intentionally crashing the said four civilian aircraft, into the World Trade Center (New York, New York), the Pentagon (Arlington, Virginia), and a field at or near Shanksville, Pennsylvania.

**CHARGE IV: VIOLATION OF 10 U.S.C. §950t (13), INTENTIONALLY CAUSING SERIOUS BODILY INJURY**

*Specification:* In that Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin `Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawaswi, persons subject to trial by military commission as alien unprivileged enemy belligerents, did, on September 11, 2001, at or near New York, New York and Arlington, Virginia, while in the context of and associated with hostilities, intentionally cause and inflict serious injury to the body and health of one or more persons, with unlawful force and violence, in violation of the law of war by intentionally crashing civilian aircraft, to wit: American Airlines Flight #11, United Airlines Flight #175, and American Airlines Flight #77, into the World Trade Center (New York, New York) and the Pentagon (Arlington, Virginia). (See Charge Sheet Appendix B for a list of some, but not all, of the victims that suffered serious bodily injury in the attacks).
Khalid Shaikh Mohammad / 9-11 Case Referred Charges
(Excerpts - Without All Appendices & Cover Sheets) (2011 & 2012) (Page 22 of 28)

CHARGE 2: VIOLATION OF 10 U.S.C. §950t (15), MURDER IN VIOLATION OF THE LAW OF WAR


CHARGE 3: VIOLATION OF 10 U.S.C. §950t (16), DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR

Specification: In that Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin ‘Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawaswi, persons subject to trial by military commission as alien unprivileged enemy belligerents, did, on September 11, 2001, at or near New York, New York, Arlington, Virginia, and Shanksville, Pennsylvania, while in the context of and associated with hostilities, intentionally destroy property belonging to another person, without that person’s consent, to wit: four civilian aircraft (American Airlines Flight #11, a Boeing 767 aircraft, tail number N334AA; United Airlines Flight #175, a Boeing 767 aircraft, tail number N612UA; American Airlines Flight #77, a Boeing 757 aircraft, tail number N644AA; and United Airlines Flight #93, a Boeing 757 aircraft, tail number N591UA); the Pentagon (Arlington, Virginia); and the North and South Towers of the World Trade Center (New York, New York); in violation of the law of war, by intentionally crashing said four civilian aircraft into the World Trade Center (New York, New York), the Pentagon (Arlington, Virginia), and a field at or near Shanksville, Pennsylvania.

CHARGE 4: VIOLATION OF 10 U.S.C. §950t (23), HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT

Specification: In that Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin ‘Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawaswi, persons subject to trial by military commission as alien unprivileged enemy belligerents, did, in the skies over the United States, on September 11, 2001, while in the context of and associated with hostilities, intentionally seize, exercise unauthorized control over, and endanger the safe navigation of aircraft that were not legitimate military objectives, to wit: American Airlines Flight #11, United Airlines Flight #175, American Airlines Flight #77, and United Airlines Flight #93, resulting in the deaths of 2,976 persons. (See Charge Sheet Appendix A for a list of victims killed in the attacks).
CHARGE VII: VIOLATION OF 10 U.S.C. §950t (24), TERRORISM

Specification: In that Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin' Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi, persons subject to trial by military commission as alien unprivileged enemy belligerents, did, on September 11, 2001, at or near New York, New York, Arlington, Virginia, and Shanksville, Pennsylvania, while in the context of and associated with hostilities, intentionally kill and inflict great bodily harm on one or more protected persons and engage in an act that evinced a wanton disregard for human life, in a manner calculated to influence and affect the conduct of the United States Government and civilian population by intimidation and coercion, and to retaliate against United States Government conduct, by intentionally crashing four civilian aircraft, to wit: American Airlines Flight #11, United Airlines Flight #175, American Airlines Flight #77, and United Airlines Flight #93 into the World Trade Center (New York, New York), the Pentagon (Arlington, Virginia), and a field at or near Shanksville, Pennsylvania, resulting in the deaths of 2,976 persons. (See Charge Sheet Appendix A for a list of victims killed in the attacks).
Khalid Shaikh Mohammad / 9-11 Case Referred Charges
(Excerpts - Without All Appendices & Cover Sheets) (2011 & 2012) (Page 24 of 28)

Charge Sheet Appendix B

The names of some of those that suffered serious bodily injury as a result of the attacks of September 11, 2001

The following people, and others not named below, evidence about whom will be presented at trial, suffered serious bodily injury on September 11, 2001, in or around the World Trade Center in New York City, as a result of two commercial airliners crashing into the two main towers or as the result of the buildings collapsing:

1. [redacted] fractured bones and other serious bodily injuries
2. [redacted] fractured bones and other serious bodily injuries
3. [redacted] fractured bones and other serious bodily injuries

The following people, and others not named below, evidence about whom will be presented at trial, suffered serious bodily injury on September 11, 2001, in or around the Pentagon in Arlington, Virginia, as a result of American Airlines Flight #77 crashing into the southwest side of the Pentagon:

1. [redacted] severe burns and other serious bodily injuries
2. [redacted] severe burns and other serious bodily injuries
3. [redacted] severe burns and other serious bodily injuries
Khalid Shaikh Mohammad / 9-11 Case Referred Charges  
[Excerpts - Without All Appendices & Cover Sheets] (2011 & 2012)  
(Page 25 of 28)  

CHARGE SHEET  
I. PERSONAL DATA  

1. NAME OF ACCUSED:  
   KHALID SHAHID MOHAMMED  
   Walid Muhammad Salih Mubarak Bin 'Attash  
   Ramzi Binalshibh  
   Ali Abdul Aziz Ali  
   Mustafa Ahmed Adam al Hawaswi  

2. ALIASES OF ACCUSED:  
   Khalid Shykh Mohammad (aliases Mukhtar al Baiuchi; Hafiz; Meer Akrum; Abdul Rahman Abdullah al Ghamdi)  
   Walid Muhammad Salih Mubarak Bin 'Attash (aliases Khalid; Yusuf Salwah Mohammad Bin Yusuf; Silver; Yawfiq)  
   Ramzi Binalshibh (aliases Abu Ubaydah; Abu Abdullah Babat; Abu Ubaydah al Hadrami)  
   Ali Abdul Aziz Ali (aliases Awamir al Baiuchi; Isam Mursur; Isam Mansur; Isam Manzur; Ali; Alios; Han)  
   Mustafa Ahmed Adam al Hawaswi (aliases Zahir; Hashem Abdulahi; Muhammad Ahanad; Abderahman Mustafa)  

3. I.S. NUMBER OF ACCUSED (LAST FOUR):  
   Khalid Shykh Mohammad (10024)  
   Walid Muhammad Salih Mubarak Bin 'Attash (10014)  
   Ramzi Binalshibh (10013)  
   Ali Abdul Aziz Ali (10018)  
   Mustafa Ahmed Adam al Hawaswi (10011)  

II. CHARGES AND SPECIFICATIONS  

4. ADDITIONAL CHARGE: VIOLATION OF 10 U.S.C. 950h (13), INTENTIONALLY CAUSING SERIOUS BODILY INJURY  
SPECIFICATION:  
   In that Khalid Shykh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawaswi, persons subject to trial by military commission as alien unprivileged enemy belligerents, did, on September 11, 2001, at or near New York, New York and Arlington, Virginia, while in the context of and associated with hostilities, intentionally cause and inflict serious injury to the body and health of one or more persons, with unlawful force and violence, in violation of the law of war by intentionally crashing civilian aircraft, to wit: American Airlines Flight #11, United Airlines Flight #175, and American Airlines Flight #77, into the World Trade Center (New York, New York) and the Pentagon (Arlington, Virginia). (See Charge Sheet Appendix B (Change 1) for a list of the victims that suffered serious bodily injury in the attacks.)  

III. SWEARING OF CHARGES  

5a. NAME OF ACCUSER (LAST, FIRST, MI)  
   Grimmer, Jared L.  

5b. GRADE  
   O-4  

5c. ORGANIZATION OF ACCUSER  
   Office of the Chief Prosecutor, Office of Military Commissions  

5d. SIGNATURE OF ACCUSER  

AFFIDAVIT:  
   Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 25th day of January, 2012, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.  

   Kenneth Sachs  
   Typed Name of Officer  
   Office of the Chief Prosecutor, Office of Military Commissions  
   Judge Advocate  
   (See R.M.C. 3070c must be commissioned officer)  

   Lieutenan Colonel, U.S. Air Force  
   Grade  
   Kenneth W. Sachs  
   Signature  

MC FORM 458 JAN 2007
### IV. NOTICE TO THE ACCUSED

On **27 January, 2012** the accused was notified of the charges against him/her. (See R.M.C. 308).

**Clayton G. Trivett, Jr, GS-15**

<table>
<thead>
<tr>
<th>Type/Name/Grade of Person Who Caused Accused to Be Notified of Charges</th>
<th>Organization of the Person Who Caused Accused to Be Notified of Charges</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Signature

### V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at **1525** hours on **2 February 2012**, at **Alexandria, Virginia**.

<table>
<thead>
<tr>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>For the Convening Authority: <strong>Isaac R. Peterson</strong></td>
</tr>
<tr>
<td><strong>SFC/SF</strong></td>
</tr>
</tbody>
</table>

Signature

### VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY

Convening Authority, 10 U.S.C. § 948b, designated on **25 Mar 10**

<table>
<thead>
<tr>
<th>Convening Authority, Chapter 47A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title 10 U.S.C § 948b</td>
</tr>
</tbody>
</table>

Referred for trial to the capital military commission convened by military commission convening order dated **4 April 2012**

subject to the following instructions:

See continuation sheet

By **Donna L. Wilkins, GS-15**

<table>
<thead>
<tr>
<th>Official Capacity of Officer/Signer</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Convening Authority, Chapter 47A</strong></td>
</tr>
</tbody>
</table>

Signature

### VII. SERVICE OF CHARGES

9. On **6 April, 2012** I caused to be served a copy of these charges on the above named accused.

<table>
<thead>
<tr>
<th>Clayton G. Trivett, Jr</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>GS-15</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Type/Name of Trial Counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
</tbody>
</table>

Signature of Trial Counsel

## FOOTNOTES

1See R.M.C. 601 concerning instructions. If none, so state.

**MC FORM 458 JAN 2007**
CONTINUATION SHEET – MC FORM 458 JAN 2007, BLOCK VI, REFERRAL
(Additional Charge Sheet, Sworn on 20120125)

In the case of United States of America v.

KHALID SHEIKH MOHAMMED (aliases: Mukhtar al Baluchi; Hafiz; Meer Akram; Abdul Rahman Abdullah Al Ghamdi)

The charge against the above named accused will be tried at a joint trial with the trials of

Walid Muhammad Salih Mubarak Bin ‘Attash;

Ramzi Binalshibh;

Ali Abdul Aziz Ali; and

Mustafa Ahmed Adam al Hawsawi.

This charge will be tried in conjunction with the original charges sworn on 31 May 2011 and referred on 4 April 2012.

By Direction of the Convening Authority:

[Signature]

Date: 4 April 2012

Convening Authority, Chapter 47A of Title 10 U.S.C § 948h
Khalid Shaik Mohammad / 9-11 Case Referred Charges
(Excerpts - Without All Appendices & Cover Sheets) (2011 & 2012)  (Page 28 of 28)

Charge Sheet Appendix B
(Change 1)

The following people suffered serious bodily injury on September 11, 2001, in or around the World Trade Center in New York City, as a result of two commercial airliners crashing into the two main towers or as the result of the buildings collapsing:

1. fractured bones and other serious bodily injuries
2. fractured bones and other serious bodily injuries
3. fractured bones and other serious bodily injuries
4. fractured bones and other serious bodily injuries
5. nearly severed arm with protracted impairment
6. fractured bones and other serious bodily injuries
7. fractured bones, severe burns and other serious bodily injuries
8. fractured bones and other serious bodily injuries

The following people suffered serious bodily injury on September 11, 2001, in or around the Pentagon in Arlington, Virginia, as a result of American Airlines Flight #77 crashing into the southwest side of the Pentagon:

1. severe burns and other serious bodily injuries
2. severe burns and other serious bodily injuries
3. severe burns and other serious bodily injuries
4. loss of five fingers, severe burns, and other serious bodily injuries
5. loss of lung function and other serious bodily injuries
Appendix G

Hadi al Iraqi Case

Referred Charges of 4 February 2014
**Hadi al Iraqi Case -- Charges Referred**

**CHARGE SHEET**

**I. PERSONAL DATA**

1. NAME OF ACCUSED:
   ABD AL HADI AL-IRAQI

2. ALIASES OF ACCUSED:
   SEE ATTACHED APPENDIX A

3. SSN NUMBER OF ACCUSED (LAST FOUR):
   10028

**II. CHARGES AND SPECIFICATIONS**

4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.
   SPECIFICATION:

   SEE ATTACHED CONTINUATION SHEET OF BLOCK II. CHARGES AND SPECIFICATIONS

**III. SWEARING OF CHARGES**

5a. NAME OF ACCUSER (LAST, FIRST, MI)
   TAWIL, KHALIL, M.

5b. GRADE
   CPT/O-3

5c. ORGANIZATION OF ACCUSER
   Office of the Chief Prosecutor, OMC

5d. SIGNATURE OF ACCUSER
   

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 3rd, day of February, 2014, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

MARY K. KRIVDA
Typed Name of Officer

LTC / O-5
Grade

MC FORM 458 JAN 2007

Office of Military Commissions
Organization of Officer

Judge Advocate, Article 136(e)(1), UCMJ
Official capacity to administer oath
(See R.M.C. 397(b) must be commissioned officer)
<table>
<thead>
<tr>
<th>IV. NOTICE TO THE ACCUSED</th>
</tr>
</thead>
<tbody>
<tr>
<td>6. On 5 February 2014, the accused was notified of the charges against him/her. (See R.M.C. 308).</td>
</tr>
<tr>
<td><strong>James F. Hodgson, GS-13</strong></td>
</tr>
<tr>
<td><strong>CITF Fort Belvoir, VA 22060</strong></td>
</tr>
<tr>
<td><strong>Signature</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>V. RECEIPT OF CHARGES BY CONVENING AUTHORITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. The sworn charges were received at 1629 hours on 10 February 2014 at Alexandria, Virginia.</td>
</tr>
<tr>
<td><strong>Donna L. Wilkins</strong></td>
</tr>
<tr>
<td><strong>GS-15</strong></td>
</tr>
<tr>
<td><strong>Signature</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>VI. REFERRAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>8a. DESIGNATION OF CONVENING AUTHORITY</td>
</tr>
<tr>
<td>Convening Authority 10 USC 6948e</td>
</tr>
<tr>
<td>Appointed on 22 March 2013</td>
</tr>
<tr>
<td>Arlington, VA</td>
</tr>
<tr>
<td>8c. DATE (YYYYMMDD) 2JUNE2014</td>
</tr>
<tr>
<td>Referred for trial to the non-capital military commission convened by military commission convening order 5 February 2014. Subject to the following instructions: this case is referred.</td>
</tr>
<tr>
<td><strong>Paul L. Ostburg, SAS</strong></td>
</tr>
<tr>
<td><strong>Signature</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>VII. SERVICE OF CHARGES</th>
</tr>
</thead>
<tbody>
<tr>
<td>9. On [Date] I (caused to be) served a copy of these charges on the above named accused.</td>
</tr>
<tr>
<td><strong>[Name of Trial Counsel]</strong></td>
</tr>
<tr>
<td><strong>Grade of Trial Counsel</strong></td>
</tr>
<tr>
<td><strong>Signature of Trial Counsel</strong></td>
</tr>
</tbody>
</table>

*See R.M.C. 601 concerning instructions. If none, so state.*

MC FORM 458 JAN 2007
CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI

COMMON ALLEGATIONS

These common allegations set forth the manner and means by which the accused, Abd al Hadi al-Iraqi, also known as Nashwan ‘Abd al-Razzaq ‘Abd al-Baqi (“Abd al Hadi”) (see Appendix A for a list of aliases), and his co-conspirators participated in a common plan and agreement, and aided, abetted, counseled, commanded, and procured the commission of each of the offenses listed at Charges II through IV. Further, these common allegations set forth the manner and means by which the accused, by virtue of his position as a superior commander, knew, had reason to know, and should have known that a subordinate was about to commit such acts and had done so and the accused failed to take the necessary and reasonable measures to prevent such acts and to punish the perpetrators thereof.

The accused, a person subject to trial by military commission as an alien unprivileged enemy belligerent, did, from in or about 1996 to on or about 1 November 2006, at multiple locations in and around Afghanistan, Pakistan, Iraq, Turkey, and elsewhere, in the context of and associated with hostilities, knowingly conspire and agree with Usama bin Laden, Ayman al Zawahiri, Mohammed Atef, Khalid Shaikh Mohammad (see Appendix B for a list of co-conspirator aliases), and other individuals, known and unknown, to commit substantive offenses triable by military commission, including Terrorism, Denying Quarter, Using Treachery or Perfidy, Murder of Protected Persons, Attacking Protected Property, Attacking Civilians, Attacking Civilian Objects, and Employing Poison or Similar Weapons, in order to force the United States, its allies, and non-Muslims out of the Arabian Peninsula, Afghanistan, and Iraq. To that end, the accused and his co-conspirators committed the following overt acts to accomplish the objectives and purposes of the conspiracy:

1. In or about August 1996, Usama bin Laden (see Appendix B for a list of aliases), leader of the terrorist organization al Qaeda, issued a public statement entitled “Declaration of Holy War Against the Americans Who are Occupying the Land of the Two Holy Places,” (“1996 Declaration”) in which Usama bin Laden called for, among other things, the killing of U.S. military personnel serving on the Arabian Peninsula.

2. In or about 1996, Abd al Hadi commanded al Qaeda’s al Farouk terrorist training camp located at or near Khost, Afghanistan.

3. In or about February 1998, Usama bin Laden and others, issued a fatwa (purported religious ruling) under the banner of “The International Islamic Front for Jihad against the Jews and the Crusaders,” (“1998 Fatwa”) claiming that “to kill Americans and their allies, both civilian and military, is the individual duty of every Muslim able to do so, and in any country where it is possible” or words to that effect. The 1998 Fatwa further declared it is “God’s order to kill Americans and plunder their wealth wherever and whenever they find it,” or words to that effect.
CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI

4. On or about 29 May 1998, Usama bin Laden issued a statement entitled “The Nuclear Bomb of Islam,” calling for all Muslims to continue efforts to seek nuclear and biological weapons in preparation for a war against America and its allies.

5. Beginning in or about 1996 through in or about 1998, Abd al Hadi commanded al Qaeda guesthouse operations at or near Kabul, Afghanistan, including the Ashara and the Ghulam Basha guesthouses.

6. Beginning in or about 1996 through in or about 1998, Abd al Hadi distributed copies of al Qaeda propaganda to existing and prospective al Qaeda members to garner further support for al Qaeda and al Qaeda’s unlawful aims.

7. Beginning in or about 1997, Abd al Hadi commanded al Qaeda’s operations at or near Kabul, Afghanistan.

8. In or about 1999, Abd al Hadi swore bayat (an oath of loyalty) to Usama bin Laden.

9. Beginning in or about 1999, Abd al Hadi served as an al Qaeda liaison to the Taliban.

10. In or about 2000, Abd al Hadi participated as a voting member of the group that merged al Qaeda with Egyptian Islamic Jihad and elected Usama bin Laden leader and Ayman al Zawahiri (see Appendix B for a list of aliases) deputy leader of the new al Qaeda.

11. In or about 2000, Abd al Hadi served on al Qaeda’s senior advisory council.

12. Beginning in or about 2000, Abd al Hadi and other members of al Qaeda’s senior advisory council drafted the rules that govern al Qaeda.

13. Beginning no later than in or about 2000, Abd al Hadi met with co-conspirators, including Usama bin Laden and Ayman al Zawahiri, and discussed al Qaeda’s objectives, which included killing Americans and other civilians.

14. In or about 2000, Abd al Hadi communicated with senior al Qaeda member Muhammed Atif (see Appendix B for a list of aliases) concerning efforts to acquire chemical weapons.

15. Beginning in or about 2000, Abd al Hadi served as one of al Qaeda’s representatives to the Taliban’s “Arab Liaison Committee.”
CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI

16. In or about March 2001, in his role as al Qaeda commander of the region, Abd al Hadi led a group of al Qaeda who assisted Taliban members in the destruction of the Buddha statues at or near Bamiyan, Afghanistan.

17. Between in or about June 2001 and in or about September 2001, Abd al Hadi and Usama bin Laden discussed al Qaeda’s upcoming major attack on the United States mainland.

18. During their meetings between in or about June 2001 and in or about September 2001, Abd al Hadi acquired approximately $20,000 U.S. from Usama bin Laden to purchase weapons and ammunition.

19. Between in or about March 2002 and in or about 2004, Abd al Hadi directed, organized, funded, supplied, and oversaw al Qaeda’s operations against U.S. forces, coalition forces, and civilians in Afghanistan and Pakistan.

20. Between in or about March 2002 and in or about 2004, Abd al Hadi coordinated al Qaeda’s operations with Taliban and other associated groups’ and persons’ operations against U.S. forces, coalition forces, and civilians in Afghanistan and Pakistan.

21. Between in or about March 2002 and in or about 2004, Abd al Hadi funded Taliban and other associated groups’ and persons’ operations against U.S. forces, coalition forces, and civilians in Afghanistan and Pakistan.

22. Between in or about March 2002 and continuing at least until in or about 2004, Abd al Hadi issued orders consistent with, and his co-conspirators adhered to, the following al Qaeda tactics:
   a. to kill Americans and their allies wherever found;
   b. to kill everyone encountered on the battlefield and to take no prisoners;
   c. to view civilians and medical personnel as acceptable targets;
   d. to dress in local attire in order to blend in with the local civilian population in order to commit treacherous and perfidious acts;
   e. to use non-conventional methods such as suicide bombings and vehicle-borne improvised explosive devices (“VBIEDs”); and
   f. to videotape attacks and victims’ deaths for propaganda purposes.

23. In or about Spring 2002, Abd al Hadi and Khalid Shaikh Mohammad (see Appendix B for a list of aliases) met and plotted operations against Americans and their allies and plotted to assassinate Pakistani President Pervez Musharraf.

24. In or about Spring 2002, Abd al Hadi received approximately $100,000 U.S. from Khalid Shaikh Mohammad to fund al Qaeda’s operations.
CONTINUATION SHEET – MC Form 458 (Jan 2007) -- Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI

25. In or about December 2002, Abd al Hadi directed his co-conspirators to conduct attacks on U.S. military installations at or near L’Wara, Afghanistan.

26. In or about December 2002, at or near L’Wara, Afghanistan, Abd al Hadi’s co-conspirators conducted multiple attacks on U.S. military installations using rockets and small arms.

27. On or about 21 December 2002, at or near Shkin, Afghanistan, Abd al Hadi’s co-conspirators shot and killed a U.S. soldier.

28. On or about 29 December 2002, at or near L’Wara, Afghanistan, Abd al Hadi’s co-conspirators shot a U.S. soldier, which rendered the soldier blind.

29. Beginning in or about 2003, Abd al Hadi took charge of providing security for Ayman al Zawahiri.

30. Between in or about 2003 and in or about 2004, Abd al Hadi served on al Qaeda’s senior advisory council for the area at or near the town of Shkai on or around the border of Afghanistan and Pakistan.

31. On or about 25 April 2003, at or near Shkin, Afghanistan, Abd al Hadi’s co-conspirators attacked a U.S. convoy, killing two U.S. service members and injuring numerous others.

32. On or about 25 April 2003, Abd al Hadi compensated his co-conspirators for executing the 25 April 2003 attack on U.S. forces at or near Shkin, Afghanistan.

33. On or about 7 June 2003, Abd al Hadi supplied a co-conspirator with a suicide bomber, approximately $2,000 U.S., and a video camera to execute and record an attack on coalition forces at or near Kabul, Afghanistan.

34. On or about 7 June 2003, at or near Kabul, Afghanistan, the suicide bomber Abd al Hadi provided to his co-conspirator detonated a VBIED appearing to be a civilian vehicle near a bus carrying members of the German military, killing and injuring numerous German military members, and injuring civilians.

35. In or about September 2003, Abd al Hadi organized and planned an attack on U.S. forces located at or near a U.S. military installation at or near Shkin, Afghanistan.

36. On or about 29 September 2003, Abd al Hadi led and executed an attack on U.S. forces at or near a U.S. military installation at or near Shkin, Afghanistan, killing one U.S soldier and injuring two U.S. soldiers.

37. On or about 29 September 2003, during the attack on U.S. forces at or near a U.S. military installation at or near Shkin, Afghanistan, Abd al Hadi’s operatives fired
CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI

rocket-propelled grenades ("RPGs") and small arms at the military medical helicopter while it attempted to land to evacuate the U.S. casualty suffered during the attack.

38. On or about 29 September 2003, Abd al Hadi ordered the attack on U.S. forces located at or near a U.S. military installation at or near Shkin, Afghanistan, to be videotaped and made into a propaganda film, entitled *Harb Wa Salib*, which includes video footage of the U.S. soldier dying.

39. On or about 2 October 2003, Abd al Hadi funded an explosive device attack against coalition forces at or near Kabul, Afghanistan.

40. On or about 2 October 2003, at or near Kabul, Afghanistan, Abd al Hadi’s co-conspirators planted and armed a roadside explosive device which then detonated, killing two members of the Canadian military and injuring one Canadian military member.

41. On or about 25 October 2003, at or near Shkin, Afghanistan, Abd al Hadi’s co-conspirators attacked a convoy they believed to be carrying “important persons” or “diplomats” by using RPGs and small arms, killing two U.S. persons. During this attack, Abd al Hadi’s co-conspirators shot at injured coalition service members who had been gathered at a Casualty Collection Point.

42. On or about 25 October 2003, Abd al Hadi funded the attack targeting persons he believed to be “important persons” or “diplomats.”

43. On or about 16 November 2003, Abd al Hadi provided a reward of approximately $200 to $300 U.S. to the Taliban for assassinating a civilian United Nations worker at or near Ghazni, Afghanistan, at which time Abd al Hadi knew the victim was a civilian.

44. In or about late 2003, Abd al Hadi provided three of his al Qaeda operatives, including Ahmed Khalifan Ghaifani, to Hamza Rabia for use in terrorist operations intended to occur outside of Afghanistan and Pakistan.

45. On or about 27 January 2004, Abd al Hadi provided a suicide bomber and funding to a co-conspirator to execute two simultaneous suicide attacks on coalition forces at or near Kabul, Afghanistan.

46. On or about 27 January 2004, at or near Kabul, Afghanistan, the suicide bomber Abd al Hadi provided to his co-conspirator detonated an explosive vest directed at a Canadian convoy, killing a member of the Canadian military, injuring three Canadian military members, and injuring civilians.

Page 5 of 12
Hadi al Iraqi Case -- Charges Referred

(4 February 2014) (Page 8 of 16)

CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI

47. On or about 28 January 2004, at or near Kabul, Afghanistan, a second suicide bomber detonated a VBIED appearing to be a civilian vehicle directed at a British and Estonian convoy, killing a member of the British military and injuring other British and Estonian military members.

48. On or about 29 March 2004, Abd al Hadi provided a suicide bomber to attack coalition forces at or near Jalalabad, Afghanistan.

49. On or about 29 March 2004, at or near Jalalabad, Afghanistan, Abd al Hadi’s suicide bomber attacked a convoy of U.S. forces by attempting to detonate a VBIED appearing to be a civilian vehicle.

50. On or about 23 May 2004, Abd al Hadi directed, planned, funded, and trained co-conspirators for an attack on coalition forces at or near Kabul, Afghanistan.

51. On or about 23 May 2004, at or near Kabul, Afghanistan, Abd al Hadi’s co-conspirators attacked a convoy of Norwegian forces using small arms and RPGs, killing a member of the Norwegian military.

52. On or about 29 May 2004, Abd al Hadi ordered and funded an improvised explosive device (“IED”) attack on coalition forces at or near Qalat, Afghanistan.

53. On or about 29 May 2004, at or near Qalat, Afghanistan, Abd al Hadi’s co-conspirators planted and armed a pressure-plate roadside IED which then detonated, killing four U.S. service members.

54. In or about late 2003 or early 2004, Abd al Hadi provided $25,000 U.S. to a co-conspirator to carry out a plot to kill Pakistani President Musharraf.

55. Beginning no later than in or about 2005, Abd al Hadi acted as an al Qaeda liaison to al Qaeda in Iraq (“AQI”).

56. In or about June 2006, at the direction of Usama bin Laden, Abd al Hadi began travel to Iraq to advise and assist AQI with its insurgency.

57. On or about 16 October 2006, in an effort to continue to travel undetected to Iraq to advise and assist AQI with its insurgency, Abd al Hadi presented himself to Turkish officials in the false name, Abdulrahman Son Of Yar Mohammed (“Abdulrahman Yar Mohammed”) and presented a fraudulent passport in the name of Abdulrahman Yar Mohammed with a number of counterfeit entry stamps to conceal his true identity.

58. Between on or about 16 October 2006 and on or about 27 October 2006, in an effort to continue to travel undetected to Iraq to advise and assist AQI with its insurgency, Abd al Hadi made one or more false statements concerning his true
CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI

identity and travel intentions during one or more interviews with Turkish officials.

59. On or about 17 October 2006, in an effort to continue to travel undetected to Iraq to advise and assist AQI with its insurgency, Abd al Hadi applied for asylum from Turkey in the false name “Abdulrahman Yar Mohammed” and made false statements in connection with that request to conceal his true identity.

60. On or about 17 October 2006, in an effort to continue to travel undetected to Iraq to advise and assist AQI with its insurgency, Abd al Hadi presented himself to Turkish officials in the false name “Abdulrahman Yar Mohammed” when fingerprinted by Turkish officials pursuant to his request for asylum to conceal his true identity.

61. On or about 27 October 2006, in an effort to continue to travel undetected to Iraq to advise and assist AQI with its insurgency, Abd al Hadi filed a “letter of objection” to the denial of his fraudulent request for asylum in which he continued to use the false name “Abdulrahman Yar Mohammed” and made false statements.

62. On or about 28 October 2006, in an effort to conceal his true identity and to continue to travel undetected to Iraq to advise and assist AQI with its insurgency, Abd al Hadi received and signed a Turkish immigration document entitled “Delivery and Receipt Document” in the false name “Abdulrahman Yar Mohammed” wherein Abd al Hadi was notified that Turkish authorities had rejected his request for asylum.

63. On or about 29 October 2006, in an effort to conceal his true identity and to continue to travel undetected to Iraq to advise and assist AQI with its insurgency, Abd al Hadi received and signed a Turkish immigration document, entitled “Delivery and Receipt Document” in the false name “Abdulrahman Yar Mohammed” wherein Abd al Hadi was notified that Turkish authorities had denied his appeal of the rejection of his initial request for asylum.
CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI

CHARGE I: VIOLATION OF 10 U.S.C. § 950t(6), DENYING QUARTER

SPECIFICATION: In that Abd al Hadi al-Iraqi, also known as Nashwan ‘Abd al-Razzaz ‘Abd al-Baqi (“Abd al Hadi”) (see Appendix A for list of aliases), a person subject to trial by military commission as an alien unprivileged enemy belligerent, did, from in or about 2003 to in or about 2004, at multiple locations in and around Afghanistan and Pakistan, in the context of and associated with hostilities, while in a position of effective command and control over subordinate forces, declare, order, and otherwise indicate to those forces that there shall be no survivors, when it was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist, with the intent to conduct hostilities such that there would be no survivors.
Hadi al Iraqi Case -- Charges Referred

CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL IRAQI

CHARGE II: VIOLATION OF 10 U.S.C. § 950t(4), ATTACKING PROTECTED PROPERTY

SPECIFICATION: In that Abd al Hadi al-Iraqi, also known as Nashwan ‘Abd al-Razzaz ‘Abd al-Baqi (“Abd al Hadi”) (see Appendix A for a list of aliases), a person subject to trial by military commission as an alien unprivileged enemy belligerent, did, on or about 29 September 2003, at or near Shkin, Afghanistan, in the context of and associated with hostilities, intentionally attack a military medical helicopter, which was protected property under the laws of war as a military medical aircraft bearing the emblem and distinctive sign of the Medical Service of armed forces, to wit: the red cross on a white ground, by firing at said military medical helicopter as it attempted to evacuate a United States military casualty from the battlefield, which protected property was the object of the attack and Abd al Hadi knew and should have known of the factual circumstances that established the military medical helicopter’s protected status.

The Accused is liable for the above alleged offense as a principal, a co-conspirator, and a participant in a common plan, as set forth in the section entitled “Common Allegations” which is hereby re-alleged and incorporated by reference as if set forth fully herein.
CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI

CHARGE III: VIOLATION OF 10 U.S.C. § 950(t)(17), USING TREACHERY OR PERFIDY

SPECIFICATION 1: In that Abd al Hadi al-Iraqi, also known as Nashwan ‘Abd al-Razzaq ‘Abd al-Baqi (“Abd al Hadi”) (see Appendix A for a list of aliases), a person subject to trial by military commission as an alien unprivileged enemy belligerent, did, on or about 7 June 2003, at or near Kabul, Afghanistan, in the context of and associated with hostilities, invite the confidence and belief of at least one person that a vehicle appearing to be a civilian vehicle was entitled to protection under the law of war, and, intending to use and betray that confidence and belief, did, thereafter, make use of that confidence and belief to detonate explosives in said vehicle thereby attacking a bus carrying members of the German military, resulting in death and injury to at least one of those German military members.

SPECIFICATION 2: In that Abd al Hadi al-Iraqi, also known as Nashwan ‘Abd al-Razzaq ‘Abd al-Baqi (“Abd al Hadi”) (see Appendix A for a list of aliases), a person subject to trial by military commission as an alien unprivileged enemy belligerent, did, on or about 27 January 2004, at or near Kabul, Afghanistan, in the context of and associated with hostilities, invite the confidence and belief of at least one person that an individual appearing to be a noncombatant civilian was entitled to protection under the law of war, and, intending to use and betray that confidence and belief, did, thereafter, make use of that confidence and belief to detonate explosives concealed beneath said individual’s civilian clothing thereby attacking a coalition convoy carrying members of the Canadian military resulting in death and injury to at least one of those Canadian military members.

SPECIFICATION 3: In that Abd al Hadi al-Iraqi, also known as Nashwan ‘Abd al-Razzaq ‘Abd al-Baqi (“Abd al Hadi”) (see Appendix A for a list of aliases), a person subject to trial by military commission as an alien unprivileged enemy belligerent, did, on or about 28 January 2004, at or near Kabul, Afghanistan, in the context of and associated with hostilities, invite the confidence and belief of at least one person that a vehicle appearing to be a civilian vehicle was entitled to protection under the law of war, and, intending to use and betray that confidence and belief, did, thereafter, make use of that confidence and belief to detonate explosives in said vehicle thereby attacking a coalition convoy carrying members of the British and Estonian militaries, resulting in death and injury to at least one of those military members.

The Accused is liable for the above alleged offenses as a principal, a co-conspirator, and a participant in a common plan, as set forth in the section entitled “Common Allegations” which is hereby re-alleged and incorporated by reference as if set forth fully herein.
CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI

CHARGE IV: VIOLATION OF 10 U.S.C. § 950t(28), ATTEMPTED USE OF TREACHERY OR PERFIDY

SPECIFICATION: In that Abd al Hadi Al-Iraqi, also known as Nashwan ‘Abd al-Razzaq ‘Abd al-Baqi (“Abd al Hadi”) (see Appendix A for a list of aliases), a person subject to trial by military commission as an alien unprivileged enemy belligerent, did, on or about 29 March 2004, at or near Jalalabad, Afghanistan, in the context of and associated with hostilities, with the specific intent to commit the offense of Using Treachery or Perfidy (10 U.S.C. § 950t(17)), invite the confidence and belief of at least one person that a vehicle appearing to be a civilian vehicle was entitled to protection under the law of war, and, intending to use and betray that confidence and belief, did, thereafter, make use of that confidence and belief to attempt to detonate explosives in said vehicle thereby attacking a convoy carrying United States military members with the intent to kill and injure at least one person.

The Accused is liable for the above alleged offense as a principal, a co-conspirator, and a participant in a common plan, as set forth in the section entitled “Common Allegations” which is hereby re-alleged and incorporated by reference as if set forth fully herein.
CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI

CHARGE V: VIOLATION OF 10 U.S.C. § 950t(29), CONSPIRACY

SPECIFICATION: In that Abd al Hadi al-Iraqi, also known as Nashwan ‘Abd al-Razzaq ‘Abd al-Baqi (“Abd al Hadi”) (see Appendix A for a list of aliases), a person subject to trial by military commission as an alien unprivileged enemy belligerent, did, from in or about 1996 to on or about 1 November 2006, at multiple locations in and around Afghanistan, Pakistan, Iraq, Turkey, and elsewhere, in the context of and associated with hostilities, knowingly conspire and agree with Usama bin Laden, Ayman al Zawahiri, Mohammed Atif, Khalid Shaikh Mohammad (see Appendix B for a list of co-conspirator aliases), and other individuals, known and unknown, to commit the following substantive offenses triable by military commission: Terrorism; Denying Quarter; Using Treachery or Perfidy; Murder of Protected Persons; Attacking Protected Property; Attacking Civilians; Attacking Civilian Objects; and Employing Poison or Similar Weapons, in order to force the United States, its allies, and non-Muslims out of the Arabian Peninsula, Afghanistan, and Iraq. Abd al Hadi, knowing the unlawful objectives and purposes of the agreement, did willfully join said agreement with the intent to further its unlawful objectives and purposes and did, thereafter, knowingly commit one or more of the following overt acts in order to accomplish some objective or purpose of the agreement:

The paragraphs numbered 1 through 63 in the section entitled “Common Allegations” are hereby re-alleged and incorporated by reference as overt acts if set forth fully herein.
Appendix A

List of Accused’s Aliases

Aliases of Abd al Hadi al-Iraqi, among others:

- Hadi al-Iraqi
  (Variants: Abd al-Hadi, Abdul Hadi, al-Iraqi, Hadi)
- Nashwan Abd al-Razzaq Abd al-Baqi
  (Variants: Nashwan, al-Razzaq, al-Baqi)
- Abdullah Khan
- Abu ‘Abdullah
- Abd al-Muhayman al-Iraqi
  (Variant: Abdul Muhaymin)
- Abd al-Hadi al-Ansari
- Abu Nadia
- Ahmad Gazi
  (Variant: Ghazi)
- Khutaiba al-Ansari
  (Variant: Khotaira)

Abdulrahman Yar Mohammed
  (Variant: Abdulrahman Son of Yar Mohammed)

Mohammad Reza Ranjbar Rezai
  (Variant: Muhammet Reza Ranjbar Rezai)

2 June 2014
Appendix P

List of Co-Conspirator Aliases

Aliases of Usama bin Laden, among others:
Sheikh Abu Abdulla
(Variant: Abu Abdulla)
Usama bin Muhammed bin Laden
(Variants: Sheikh Usama bin Laden, Usama bin Laden, Sheikh Usama, Sheikh bin Laden)
The Sheikh

Alias of Ayman al Zawahiri, among others:
Dr. Ayman al-Zawahiri

Aliases of Mohammed Atef, among others:
Abu Hafs al Masri
(Variants: Sheikh Abu Hafs, Abu Hafs)
Almed Abd al-Aziz
(Variant: Alamd bin ‘Abd al-Aziz)
Abu Hafs al Commandan
(Variants: Al-Komandat, The Commandant)

Aliases of Khalid Sheikh Mohammed, among others:
Mukhtar al Baluchi
(Variant: Mukhtar)
Hafiz
Meer Akram
Abdul Rahman
Abdullah Al Ghamdi
Appendix H

Executive Order

Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities

22 January 2009 (President Barack Obama)
Executive Order –

Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities

(22 January 2009) (President Barack Obama)

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. Definitions. As used in this order:

(a) "Common Article 3" means Article 3 of each of the Geneva Conventions.

(b) "Geneva Conventions" means:

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (6 UST 3114);

(ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (6 UST 3516).

(c) "Individuals currently detained at Guantánamo" and "individuals covered by this order" mean individuals currently detained by the Department of Defense in facilities at the Guantánamo Bay Naval Base whom the Department of Defense has ever determined to be, or treated as, enemy combatants.

Sec. 2. Findings.

(a) Over the past 7 years, approximately 800 individuals whom the Department of Defense has ever determined to be, or treated as, enemy combatants have been detained at Guantánamo. The Federal Government has moved more than 500 such detainees from Guantánamo, either by returning them to their home country or by releasing or transferring them to a third country. The Department of Defense has determined that a number of the individuals currently detained at Guantánamo are eligible for such transfer or release.

(b) Some individuals currently detained at Guantánamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both
within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice. Merely closing the facilities without promptly determining the appropriate disposition of the individuals detained would not adequately serve those interests. To the extent practicable, the prompt and appropriate disposition of the individuals detained at Guantánamo should precede the closure of the detention facilities at Guantánamo.

(c) The individuals currently detained at Guantánamo have the constitutional privilege of the writ of habeas corpus. Most of those individuals have filed petitions for a writ of habeas corpus in Federal court challenging the lawfulness of their detention.

(d) It is in the interests of the United States that the executive branch undertake a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice. The unusual circumstances associated with detentions at Guantánamo require a comprehensive interagency review.

(e) New diplomatic efforts may result in an appropriate disposition of a substantial number of individuals currently detained at Guantánamo.

(f) Some individuals currently detained at Guantánamo may have committed offenses for which they should be prosecuted. It is in the interests of the United States to review whether and how any such individuals can and should be prosecuted.

(g) It is in the interests of the United States that the executive branch conduct a prompt and thorough review of the circumstances of the individuals currently detained at Guantánamo who have been charged with offenses before military commissions pursuant to the Military Commissions Act of 2006, Public Law 109-366, as well as of the military commission process more generally.

Sec. 3. Closure of Detention Facilities at Guantánamo.

The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

Sec. 4. Immediate Review of All Guantánamo Detentions.

(a) Scope and Timing of Review. A review of the status of each individual currently detained at Guantánamo (Review) shall commence immediately.

(b) Review Participants. The Review shall be conducted with the full cooperation and participation of the following officials:

(1) the Attorney General, who shall coordinate the Review;

(2) the Secretary of Defense;

www.whitehouse.gov/the_press_office/Closure_Of_Guantanamo_Detention_Facilities
(3) the Secretary of State;
(4) the Secretary of Homeland Security;
(5) the Director of National Intelligence;
(6) the Chairman of the Joint Chiefs of Staff; and
(7) other officers or full-time or permanent part-time employees of the United States, including employees with intelligence, counterterrorism, military, and legal expertise, as determined by the Attorney General, with the concurrence of the head of the department or agency concerned.

(c) **Operation of Review.** The duties of the Review participants shall include the following:

(1) **Consolidation of Detainee Information.** The Attorney General shall, to the extent reasonably practicable, and in coordination with the other Review participants, assemble all information in the possession of the Federal Government that pertains to any individual currently detained at Guantánamo and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual. The Attorney General may seek further information relevant to the Review from any source.

(2) **Determination of Transfer.** The Review shall determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release. The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.

(3) **Determination of Prosecution.** In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

(4) **Determination of Other Disposition.** With respect to any individuals currently detained at Guantánamo whose disposition is not achieved under paragraphs (2) or (3) of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals. The appropriate authorities shall promptly implement such dispositions.

(5) **Consideration of Issues Relating to Transfer to the United States.** The Review shall identify and consider legal, logistical, and security issues relating to the potential transfer of individuals currently detained at Guantánamo to facilities within the United States, and the Review participants shall work with the Congress on any legislation that may be appropriate.
Sec. 5. Diplomatic Efforts.

The Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order.

Sec. 6. Humane Standards of Confinement.

No individual currently detained at Guantánamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The Secretary of Defense shall immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance with this directive. Such review shall be completed within 30 days and any necessary corrections shall be implemented immediately thereafter.

Sec. 7. Military Commissions.

The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.

Sec. 8. General Provisions.

(a) Nothing in this order shall prejudice the authority of the Secretary of Defense to determine the disposition of any detainees not covered by this order.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Barack Obama

The White House,

January 22, 2009.

Page 4 of 4 www.whitehouse.gov/the_press_office/Closure_Of_Guantanamo_Detention_Facilities
Appendix I

Statement of Honorable Brian P. McKeon
Principal Deputy Under Secretary of Defense for Policy

Testimony of Before the Senate Committee on Armed Services

5 February 2015

DRAFT
Statement of Honorable Brian P. Mckeen
Principal Deputy Under Secretary of Defense for Policy

Testimony of Before the Senate Committee on Armed Services February 5, 2015

Not For Distribution Until Released By The Senate Committee On Armed Services

Mr. Chairman, Ranking Member Reed, distinguished members of this committee, thank you for the opportunity to testify today on the detention center at Guantanamo Bay, our policies on transferring detainees, and related issues.

On January 22, 2009, President Obama signed Executive Order 13492, which ordered the closure of the detention center at Guantanamo Bay, Cuba. Pursuant to that order, a special task force was established to broadly review information in the possession of the U.S. government about the detainees, and to determine the possibility of their release. Through that rigorous interagency effort, which continued for several months into 2010, a certain number of detainees were approved for transfer, a certain number of detainees were referred for prosecution or further review, and a certain number were designated for continued law of war detention.

Since then, pursuant to Executive Order 13567, signed on March 7, 2011, and consistent with section 1023 of the NDAA [eds/ National Defense Authorization Act] for FY 2012, a Periodic Review Board has begun to review the status of those detainees not currently eligible for transfer except for those detainees against whom charges are pending or a judgment of conviction has been entered.

When President Obama came into office in January 2009, there were 242 detainees at Guantanamo Bay. Today, because of the work of the task force and subsequent efforts, 122 detainees remain. Of these, 54 are eligible for transfer, 10 are being prosecuted or have been sentenced, and 58 are being reviewed by the Periodic Review Process (PRP). In his nearly two years as Secretary of Defense, Secretary Hagel has approved the transfer of 44 detainees -- 11 of whom were transferred in 2013, 28 of whom were transferred last year, and 5 of whom have been transferred this year. The great majority of these transfers occurred under the authorities in section 1035 of the FY14 NDAA. I urge you to maintain these authorities.

Closure Is a National Security Imperative

Mr. Chairman and members of the committee, I want to make a fundamental point regarding the detention facility at Guantanamo Bay. The President has determined that closing this detention facility is a national security imperative. The President and his national security team all believe that the continued operation of the detention facility at Guantanamo weakens our national security by draining resources, damaging our relationships with key allies, and is used by violent extremists to incite local populations. It is no coincidence that the recent ISIS videos showing the barbaric burning of a Jordanian pilot and the savage execution of a Japanese hostage each showed the victim clothed in an orange jumpsuit, believed by many to be the symbol of the Guantanamo detention facility.

Forty retired military leaders -- all retired general officers or flag officers -- wrote the chairman and ranking member of this committee on January 28, 2015 and stated, “[I]t is hard to overstate how damaging the continued existence of the detention facility at Guantanamo has been and continues to be. It is a critical national security issue." The letter continued, “[M]any of us have been told on repeated occasions by our friends in countries around the world that the greatest single action the United States can take to fight terrorism is to close Guantanamo.”

This letter is signed by General Charles C. Krulak, a retired Commandant of the Marine Corps, Major General Michael R. Lehner, the first commanding general of the joint detention task force at Guantanamo, General Joseph Hoar, the former head of CENTCOM, General David M. Maddox, the former head of the U.S. Army in Europe, and thirty-six other retired senior military leaders.

Many other military leaders acknowledge the need to close this detention facility. Admiral Michael Mullen and General Martin Dempsey, the former and current chairman of the Joint Chiefs of Staff, support Guantanamo closure. In 2010, General David Petraeus, then the commander of CENTCOM stated, “I’ve been on the record on that for well over a year as well, saying that it [Guantanamo] should be closed. . . . And I think that whenever we have, perhaps, taken expedient measures, they have turned around and bitten us in the backside. . . . Abu Ghraib and other situations like that are nonbiodegradable. They don’t go away. The enemy continues to beat you with them like a stick.”

Senior figures across the political spectrum have made clear that Guantanamo poses profound risks to our national security and should be closed. Former Secretaries of Defense Robert Gates and Leon Panetta, and the current Secretary of Defense, Chuck Hagel, all support Guantanamo closure.

Finally, President George W. Bush concluded that the Guantanamo detention facility was “a propaganda tool for our enemies and a distraction for our allies.”

Page 1 of 4  (Testimony of Brian McKeon Before the Senate Committee on Armed, Services 5 February 2015)
I will now briefly address the remaining specific issues addressed by the Committee’s letter of invitation.

Recent Decisions to Transfer Detainees Held at the Detention Facility at Guantanamo Bay, Cuba, by the Department of Defense and Explain How Detainees are Designated as Ready for Transfer.

Twenty-seven detainees have been transferred since November 2014. These detainees have been transferred to nine different countries.

Key features of the process that leads to a decision to transfer include a comprehensive interagency review and rigorous examination of information regarding the detainee, the security situation in the potential host country, and the willingness and capability of the potential host country to implement and maintain appropriate compliance with security measures. These initial reviews were conducted by career professionals, including intelligence analysts, law enforcement agents, and attorneys drawn from the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and other agencies within the intelligence community. Next, any transfer decision requires an assessment by the Special Envoy of the security situation in the receiving country, and of the willingness and capability of the country to comply with security assurances.

Finally, each decision to transfer has been subject to the unanimous agreement of six Principals – the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, the Attorney General, the Chairman of the Joint Chiefs, and finally, the Secretary of Defense. Under Section 1035 of the NDAA, the Secretary may approve the transfer if he determines that the transfer is in the national security interests of the United States and that actions have been or are planned to be taken that will substantially mitigate the risk of the detainee engaging in terrorist or other hostile activity that threatens the United States or U.S. persons or interests. The factors considered in making this determination include:

- The security situation in the foreign country to which the detainee is to be transferred;
- Confirmed past activities by individuals transferred to the foreign country to which the detainee is to be transferred;
- Actions taken by the U.S. or the foreign country to reduce the risk the individual will engage in terrorist or hostile activity;
- Security assurances provided by the foreign government; and
- An assessment of the willingness and capabilities of the foreign government to meet those security assurances.

A primary concern we have regarding a potential transfer is whether a detainee will “return to the fight” or otherwise reengage in acts that threaten the United States or persons. We take the possibility of reengagement very seriously. The most recent public data on reengagement of former Guantanamo detainees was released in September 2014 and are current as of July 15, 2014. There is a lag in the public reporting and I know you may have seen a more recent classified report on this matter. I can address updated classified statistics in a closed setting.

The ODNI categorizes the figures in three ways: 1) Total, 2) Pre-22 January 2009, which refers to former detainees who departed Guantanamo prior to January 22, 2009, and 3) Post-22 January 2009, which refers to former detainees who departed Guantanamo after January 22, 2009, as follows:

- **Total:** 17.3% confirmed of reengaging (107 of 620), 12.4% suspected of reengaging (77 of 620), for a total of 29.7% confirmed or suspected of reengagement.

- **Pre-22 January 2009:** 19% confirmed of reengaging (101 of 532), 14.3% suspected of reengaging (76 of 532), for a total of 33.3% confirmed or suspected of reengagement.

- **Post-22 January 2009:** 6.8% confirmed of reengaging (6 of 88), 1.1% suspected of reengaging (1 of 88) for a total of 7.9% confirmed or suspected of reengagement.

In other words, the rate of reengagement has been much lower for those transferred since 2009, which attests to the rigor of this new process. Of the detainees transferred under this Administration, over 90% are neither confirmed nor suspected of having reengaged. This statistic speaks to the result of the careful scrutiny given to each transfer in the intensive interagency review process, and the negotiation of agreements regarding security measures the receiving government intends to take pursuant to its own domestic laws and independent determinations that will mitigate the threat that the detainees will not pose a continuing threat to the United States and its allies after they have been transferred.

An additional point about the data: of the 107 confirmed of reengaging (the vast majority of them transferred prior to 2009), 48 are either dead or in custody.

Page 2 of 4 (Testimony of Brian McKeon Before the Senate Committee on Armed, Services 5 February 2015)
Reengagement also does not equate to a free pass. We take any indications of suspected or confirmed reengagement very seriously, and we work in close coordination with our partners to mitigate reengagement and to take follow-on action when necessary.

**Explain How Security Arrangements Are Determined to be Sufficient to Transfer Detainees to Receiving Countries**

I cannot discuss the specific security assurances we receive from foreign governments with any degree of specificity in open testimony. However, among the types of security measures that we seek are the ability to restrict travel, monitor, provide information, and reintegrate/rehabilitation programs.

The decision to transfer is made only after detailed, specific conversations with the receiving country about the potential threat a detainee may pose after transfer and the agreement about the measures the receiving country will take in order to sufficiently mitigate that potential threat. We also review the capability of the receiving country and its security establishment, and its track record in adhering to prior agreements in this regard.

**Provide a Detailed Explanation of the Procedures of the Periodic Review Board (PRB) and PRB Risk Assessment**

The PRB process is an interagency process established to review whether continued detention of detainees held at Guantanamo Bay remains necessary to protect against a continuing significant threat to U.S. national security. We will be providing your staff information detailing the process and the PRB conduct of detainee risk assessments.

To date, the results of ten full hearings, for nine detainees, have been made public.

Six detainees have been made eligible for transfer with appropriate security assurances, pursuant to the PRB process. Two of these detainees made eligible by the PRB process have been transferred, one to Kuwait and one to Saudi Arabia. The other three detainees remain subject to law of war detention. Efforts are being made to expedite the PRB process and prioritize hearings.

PRB panels are made up of senior representatives from the Departments of Defense, Homeland Security, Justice, and State; the Joint Staff; and the Office of the Director of National Intelligence. Pursuant to the Executive Order, and consistent with section 1023 of the FY12 NDAA, the Department of Defense established the Periodic Review Secretariat (PRS) to administer the PRB review and hearing process. ThePRSis responsible for overseeing the implementation of the process and coordinates with the agencies involved. It is headed by a retired admiral.

The PRB process makes an important contribution toward the Administration’s goal of closing Guantanamo Bay by ensuring a principled and sustainable process for reviewing and revisiting prior disposition determinations in light of the current circumstances and intelligence, and identifying whether additional detainees may be designated for transfer.

By necessity, detainee reviews involve consideration of highly classified intelligence in addition to information that can be made public. To enhance the transparency of these reviews, the Department of Defense operates a website sharing unclassified information with the public. Postings include milestones in each detainee’s case, unclassified information associated with the PRB hearings, and the results of the detainee reviews. In addition, a portion of the PRB process is open to the press and representatives of NGOs.

The PRB process does not address the legality of any individual’s detention under the authority of the Authorization for Use of Military Force, as informed by the laws of war. Detainees have the constitutional privilege of the writ of habeas corpus to challenge the legality of their detention, and nothing in EO 13567 or its implementing guidelines is intended to affect the jurisdiction of federal courts to determine the legality of their detention. If, at any time during the PRB process, material information calls into question the legality of detention, the matter is referred immediately to the Secretary of Defense and the Attorney General for appropriate action.

**Proposed Legislation**

The recent legislation proposal by Senator Ayotte and several members of this Committee would effectively ban most transfers from Guantanamo for two years. It reverts to the previous certification regime under the NDAA for FY 2012 and the NDAA for FY 2013, which resulted only in court-ordered transfers, transfers pursuant to plea agreements and only a few national security waivers. In addition, it adds a proposal to limit transfers based on JTF-GTMO threat assessments that may be outdated or not include all of the available information. We believe that any decisions regarding transfers should be based on current information and individual assessments of detainees.

Because this legislation, if enacted, would effectively block progress toward the goal of closing the Guantanamo Bay detention center, the Administration opposes it.

**Yemen**

The proposed legislation bars transfer of any detainees to Yemen for two years. 76 Yemenis remain at Guantanamo Bay: 47 are eligible for transfer, 26 are eligible for PRB review, 2 have charges referred and 1 is serving pre-sentence confinement.

A ban on transfers to Yemen is unnecessary because we are not, at the present time, seeking to transfer any of them in Yemen.

---

(Testimony of Brian McKeon Before the Senate Committee on Armed Services 5 February 2015)
especially in light of the recent further deterioration in the security situation. Since the President’s moratorium on detainee transfers to Yemen was lifted nearly two years ago in favor of a case-by-case analysis, not a single detainee has been transferred to Yemen. The 12 Yemenis who have been transferred recently have been transferred to five countries: Slovakia, Georgia, Kazakhstan, Estonia, and Oman. We are currently seeking to find other third countries to take additional Yemenis.

Plan to Close Guantanamo Detention Facility

Our plan has three main elements.
First, we will continue the process of responsibly transferring the 54 detainees eligible for transfer.
Second, we will continue the prosecution of detainees in the military commissions process, and if possible, in the federal courts. Currently 7 detainees are being actively prosecuted under the military commission process; 5 accused of the 9/11 attacks, 1 charged with the bombing of the USS Cole, and 1 charged with actions as a senior al Qaeda commander, and 3 are in the sentencing phase or are serving sentences.
Third, we will continue and expedite the PRB process.
When we have concluded these three lines of effort, it is likely that several detainees cannot be prosecuted but who are too dangerous to transfer, even with security assurances, will remain in our custody.
Ultimately, closing the detention center at Guantanamo Bay will require us to consider additional options, including the possibility of transferring some detainees to a secure facility in the United States. The Department of Justice has concluded that in the event detainees were relocated to the United States, existing statutory safeguards and executive and congressional authorities provide robust protection of national security.
We understand that such transfers are currently barred by statute. As a result, the Government is prohibited from prosecuting any detainees in the United States, even if it represents the best — or only — option for bringing a detainee to justice. The President has consistently opposed these restrictions, which curtail options for managing the detainee population. We understand the Committee has a continuing request for more information. We understand we need to work with Congress on this and I pledge to you we will do so.

Explain the Administration’s Policy Regarding the Detention of Future Combatants Captured on the Battlefield

The disposition of an individual captured in the future will be handled on a case-by-case basis and by a process that is principled, credible and sustainable. When a nation is engaged in hostilities, detaining the enemy to keep him off the battlefield is permissible and is a humanitarian alternative to lethal action. In some cases, those detained will be transferred to third countries. In other cases, they will be transferred to the United States for federal prosecution, after appropriate interrogation, as occurred in the case of Ahmed Warsame. Some cases may be appropriate for law of war detention. But the President has made clear that we will not add to the population of the detention center at Guantanamo Bay.

Conclusion

President Bush worked towards closing Guantanamo, and many officials in his Administration worked hard towards that objective. We are closer to this goal than many people may realize. Of the nearly 800 detainees to have been held at Guantanamo since the facility opened in 2002, the vast majority have already been transferred, including more than 500 detainees transferred by the previous Administration. The President and the national security experts of this Administration believe it should be closed. The senior military leaders of the country and the leaders of the Department of Defense concur. We believe the issue is not whether to close Guantanamo, the issue is how to do it.

Thank you and I look forward to your questions.
Appendix J

Excerpt from Military Commission Website – www.MC.mil
How Military Commissions Work

A military commission is a military court of law traditionally used to try war or other offenses. An alien who is a member of an enemy belligerent who has engaged in hostilities, or who has been captured or has been subjected to military necessity, against the United States, its coalition partners or was a part of al Qaeda, is subject to trial by military commission under the Military Commissions Act of 2006.

Convening a Military Commission

The military commission legal system begins when the prosecution drafts charges, when appropriate, against individuals subject to the Military Commissions Act of 2006. (This Act establishes procedures governing the use of military commissions.) Charges may then be approved by any person subject to the Uniform Code of Military Justice. Once charged, a process is initiated to determine if the accused individual subject to trial by military commission are in accordance with a reasonable doubt.

The Convening Authority decides whether to refer any or all charges to trial. A referral requires a finding of probable cause, similar to a grand jury in civil court returning an indictment. If the Convening Authority decides to refer a case to trial, a military commission is created.

Serving on a Military Commission

The Secretary of Defense or his designee appoints the Chief Judge of the Military Commissions Trial Judiciary. The Chief Judge then selects a military judge to each case referred to trial. Each military commission consists of a military judge and at least five “members” (similar to civilian jurors). In a case in which the accused may be sentenced to death, a minimum of 12 members and unanimous agreement are required. Commissioned officers of the Armed Forces or active duty are eligible to serve on a military commission unless they are disqualified because of a previous connection to the case.

Each of the Armed Forces nominated military officers to serve as members of military commissions. The Convening Authority selects the best qualified nominees to be members based on education, training, experience, length of service and judicial temperament.

Processing Evidence in a Military Commission

The rules of evidence for military commissions meet domestic and international legal standards while addressing unique factors in a military context. For example, evidence seized outside the United States may be included in the proceedings when it was obtained pursuant to a search warrant. Similarly, statements of an accused are not excluded merely because the accused was not read a Miranda warning. Instead, the rules of evidence for military commissions focus on whether the evidence is reliable and probative, and if its admission is in the best interests of justice.

Determining a Verdict and Sentence

A guilty verdict and the imposition of a sentence must have the concurrence of a two-thirds of the Military Commission members, the same number required in courts-martial of U.S. service members. Sentences that include confinement for 20 or more years must be concurred in by at least three-fourths of the members. If less than the required percentage votes for conviction, the accused is acquitted. (There are no “hung juries” as in civilian courts.)

If there is a finding of guilty, Military Commission members must impose a sentence—up to the maximum sentence authorized—including death, if the case is referred as a capital case by the Convening Authority. The Convening Authority may reduce the sentence, dismiss any charges or specifications or order a rehearing for any charge for which the accused was convicted. The prosecution may not appeal any mitigation action by the Convening Authority.

Appealing a Verdict and/or a Sentence

Each case which includes a guilty verdict is referred to the U.S. Court of Military Commission Review. After the Court of Military Commission Review makes its decision, either party may appeal further to the U.S. Court of Appeals for the District of Columbia Circuit. The Supreme Court of the United States may review by writ of certiorari the judgment of the Court of Appeals.
Appendix K

White House Fact Sheet:

New Actions on Guantanamo and Detention Policy

(7 March 2011)
White House Fact Sheet: New Actions on Guantanamo and Detainee Policy
The White House (7 March 2011) (For Immediate Release)


Office of the Press Secretary

In a speech nearly two years ago at the National Archives, the President advanced a four-part approach to closing the detention facility at Guantanamo Bay, keeping our country safe, and upholding the law: (1) to bring detainees to justice in prosecutions in either federal civilian courts or in reformed military commissions; (2) to comply with court-ordered releases of detainees; (3) to transfer detainees from Guantanamo whenever it is possible to do so safely and humanely, and (4) when neither prosecution nor other legal options are available, to hold these individuals in lawful military detention. He affirmed that “whenever feasible, we will try those who have violated American criminal laws in federal courts.”

The Administration remains committed to closing the detention facility at Guantanamo Bay, and to maintain a lawful, sustainable and principled regime for the handling of detainees there, consistent with the full range of U.S. national security interests. In keeping with the strategy we laid out, we are proceeding today with the following actions:

Resumption of Military Commissions

The Secretary of Defense will issue an order rescinding his prior suspension on the swearing and referring of new charges in the military commissions. New charges in military commissions have been suspended since the President announced his review of detainee policy; shortly after taking office.

The Administration, working on a bipartisan basis with members of Congress, has successfully enacted key reforms, such as a ban on the use of statements taken as a result of cruel, inhuman or degrading treatment, and a better system for handling classified information. With these and other reforms, military commissions, along with prosecutions of suspected terrorists in civilian courts, are an available and important tool in combating international terrorists that fall within their jurisdiction while upholding the rule of law.

Executive Order on Periodic Review

In the Archives speech, the President recognized there are certain Guantanamo detainees who have not been charged, convicted, or designated for transfer, but must continue to be detained because they “in effect, remain at war with the United States.” For this category of detainees, the President stated: “We must have a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified.”

Today, the President issued an Executive Order establishing such a process for these detainees. A copy of the order is attached.

The periodic review established by this order will help to ensure that individuals who we have determined will be subject to long-term detention continue to be detained only when lawful and necessary to protect against a significant threat to the security of the United States. If a final determination is made that a detainee no longer constitutes a significant threat to our security, the Executive Order provides that the Secretaries of State and Defense are to identify a suitable transfer location outside the United States, consistent with the national security and foreign policy interests of the United States and applicable law. As the President has stated before, no Guantanamo detainee will be released into the United States.

We are grateful to all of our allies and partners who have worked with the Administration to implement the transfers undertaken thus far in a secure and humane manner, especially those who have resettled detainees from third countries. Our friends and allies should know that we remain determined in our efforts and that, with their continued assistance, we intend to complete the difficult challenge of closing Guantanamo.

Continued Commitment to Article III Trials

Pursuant to the President’s order to close Guantanamo, this Administration instituted the most thorough review process ever applied to the detainees held there. Among other things, for the first time, we consolidated all information available to the federal government about these individuals. That information was carefully examined by some of our government’s most experienced prosecutors, a process that resulted in the referral of 36 individuals for potential prosecution. Since the time of
those referrals, the Departments of Justice and Defense, with the advice of career military and civilian prosecutors, have been working to bring these defendants to justice, securing convictions in a number of cases and evaluating others to determine which system – military or civilian – is most appropriate based on the nature of the evidence and traditional principles of prosecution.

In recent months, some in Congress have sought to undermine this process. In December, Congress enacted restrictions on the prosecution of Guantanamo detainees in Federal courts. The Administration opposes these restrictions as a dangerous and unprecedented challenge to Executive authority to select the most effective means available to bring terrorists to justice and safeguard our security. The Executive Branch possesses the information and expertise necessary to make the best judgment about where a particular prosecution should proceed, and Congress’s intrusion upon this function is inconsistent with the long-standing and appropriate allocation of authority between the Executive and Legislative branches.

Time and again, our Federal courts have delivered swift justice and severe punishment to those who seek to attack us. In the last two years alone, federal prosecutors have convicted numerous defendants charged with terrorism offenses, including those who plotted to bomb the New York subway system; attempted to detonate a bomb in Times Square; and conspired in murderous attacks on our embassies abroad. These prosecutions have generated invaluable intelligence about our enemies, permitted us to incapacitate and detain dangerous terrorists, and vindicated the interests of victims – all while reaffirming our commitment to the rule of law. Spanning multiple administrations, Republican and Democratic, our Federal courts have proven to be one of our most effective counterterrorism tools, and should not be restricted in any circumstances.

Military commissions should proceed in cases where it has been determined appropriate to do so. Because there are situations, however, in which our federal courts are a more appropriate forum for trying particular individuals, we will seek repeal of the restrictions imposed by Congress, so that we can move forward in the forum that is, in our judgment, most in line with our national security interests and the interests of justice.

We will continue to vigorously defend the authority of the Executive to make these well-informed prosecution decisions, both with respect to those detainees in our custody at Guantanamo and those we may apprehend in the future. A one-size-fits-all policy for the prosecution of suspected terrorists, whether for past or future cases, undermines our Nation’s counterterrorism efforts and harms our national security.

Support for a Strong International Legal Framework

Because of the vital importance of the rule of law to the effectiveness and legitimacy of our national security policy, the Administration is announcing our support for two important components of the international legal framework that covers armed conflicts: Additional Protocol II and Article 75 of Additional Protocol I to the 1949 Geneva Conventions.

Additional Protocol II, which contains detailed humane treatment standards and fair trial guarantees that apply in the context of non-international armed conflicts, was originally submitted to the Senate for approval by President Reagan in 1987. The Administration urges the Senate to act as soon as practicable on this Protocol, to which 165 States are a party. An extensive interagency review concluded that United States military practice is already consistent with the Protocol’s provisions. Joining the treaty would not only assist us in continuing to exercise leadership in the international community in developing the law of armed conflict, but would also allow us to reaffirm our commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict.

Article 75 of Additional Protocol I, which sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, is similarly important to the international legal framework. Although the Administration continues to have significant concerns with Additional Protocol I, Article 75 is a provision of the treaty that is consistent with our current policies and practice and is one that the United States has historically supported.

Our adherence to these principles is also an important safeguard against the mistreatment of captured U.S. military personnel. The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.
Appendix L

Guantanamo: Why the U.S. Has a Naval Base in Cuba

By Professor Chris Jenks

(August 2014)
Guantanamo: Why the U.S. Has a Naval Base in Cuba

By Professor Christopher Jenks
Southern Methodist School of Law
NGO Observer at Guantanamo Bay 11 – 15 August 2015

http://blog.smu.edu/declinlaw/guantanamo-why-the-u-s-has-a-naval-base-in-cuba/

Naval Station Guantanamo Bay ("Gitmo," for short), at the southeastern tip of Cuba, is not only the United States’ oldest overseas military base but it’s also the only one to exist in a country with which the U.S. does not have diplomatic relations. The story behind the U.S. presence there dates to the 1898 Spanish-American War.

Given U.S.-Cuban relations now, it’s worth remembering our country’s invasion of Cuba at that time was in support of a Cuban insurgent movement rebelling against their colonial occupiers: Spain. Following the war, the U.S. helped establish the new Republic of Cuba. In turn, in 1903 Cuba agreed to lease 45 square miles of area now comprising Gitmo in exchange for $2,000 in gold coins per year. In response the U.S. agreed to use Gitmo as a coaling and naval station, and also allow free passage of vessels engaged in Cuban trade.

Three decades later the agreement was further outlined in the 1934 “Treaty Between the United States of American and Cuba” signed by President Roosevelt and his Cuban counterpart. As part of the revised terms, the payment (rent, actually) was recalculated on what $2,000 in 1903 gold coins would be worth in 1934, or roughly $4,085 — a fixed amount the U.S. has paid ever since.

Given our countries’ mutual dislike of each other, how this treaty manages to exist as-is lies in the treaty itself, specifically Article III, which notes that the treaty is to remain in effect “[u]ntil the two contracting parties agree to the modifications or arrogations.” So in essence the U.S. has a rent-controlled lease with a mutual break-up clause.

Following the Communist revolution and Fidel Castro taking power in 1959, Cuba’s attitude toward the U.S. and its Gitmo lease has changed, to put it mildly. Specifically, the Cuban government has refused to cash its U.S. rent checks for more...
than 55 years. Castro literally has stuffed the un-cashed checks in his desk drawer (though he does acknowledge accidentally cashing one in 1959).

In early 1961, the U.S. terminated diplomatic and consular relations, with President Eisenhower issuing a statement that the termination had “no effect on the status of our Naval Station at Guantanamo. The treaty rights under which we maintain the Naval Station may not be abrogated without the consent of the United States.”

The U.S.-sponsored Bag of Pigs invasion of Cuba that same year and the Cuban Missile Crisis in 1962 didn’t exactly improve relations between our countries. Accordingly, it’s interesting to think that during those two dangerously dramatic events there were several thousand U.S. service members stationed at Gitmo, which Castro called “a knife stuck in the heart of Cuba’s dignity and sovereignty.”

In 1964, in response to the U.S. fining Cubans for fishing too close to Florida, Castro cut off Gitmo’s water supply for three days. (Apparently sponsoring an invasion of Cuba didn’t warrant turning off the water, but Cuban fishermen being fined crossed the line.) Castro then turned the water back on, but claimed the U.S. had been stealing the country’s water. Afterward, Gitmo’s base commander John Bulkeley devised a simple solution to that: He cut off Gitmo’s water supply lines from Cuba. Out of necessity this led to Gitmo becoming self-sufficient, ultimately creating its own systems to collect and convert sea water to fresh water. [Military history aside: Vice Admiral Bulkeley had received the Medal of Honor in World War II and commanded the PT boat that evacuated Gen. Douglas MacArthur from the Philippines.]

Over the years, many military and diplomatic escalations have occurred between the two countries. And while political difficulties continue, the military relationship has stabilized. But this wasn’t always the case.

Early on, the Cuban military began throwing rocks onto the tin roofs of the U.S. Marines’ sleeping barracks, prompting the Marines to build a 40-foot high fence. The Cubans then hung metal objects on the fence to clutter in the wind, prompting the Marines to add barbed wire to the fence. Both sides then erected ever-taller flagpoles, with Cuba technically winning that competition by planting a giant flagpole on a significant ridge.

In addition, the Cubans also enlisted a high-powered spotlight to shine into the windows of the Marines’ barracks. In turn, the Marines erected a giant tent as a light shield. (Or so the Cubans thought.) Thirty days later, when the Cubans turned on the spotlight, the Marines dropped the tent, revealing a giant Marine Corps globe and anchor symbol on a concrete slab. Needless to say, the Cubans turned off their spotlight.

Cuba began availing itself of the media to complain about the U.S. presence at Gitmo. In the mid-1970s the Cuban Ministry of Foreign Affairs published an 86-page booklet, “Guantanamo: Yankee Naval Base of Crimes and Provocations.” Shortly thereafter, during a 1977 Barbara Walters interview with Castro, discussion of the 1934 treaty led the Cuban leader to argue “when one mentions an undetermined length of time in a legal contract, it’s understood that it means 100 years.” Regardless, both Cuba and the U.S. understand that the agreement will continue to exist until both sides agree to modify or repeal it.

More recently the Cuban government has complained to United Nations human rights organizations that the U.S. use of Gitmo as a detention facility is itself a human rights violation. That’s a rather odd complaint coming from Cuba, since while Gitmo is used to hold al-Qaida and Taliban detainees, Cuba first used the place to detain thousands of Cuban “excludables” or refugees. — C.J.
Appendix M

United States of America and Cuba (No. 50 of 2014)

Opinion of the

United Nations Working Group on Arbitrary Detention (WGAD)


Advanced Unedited Version
[Page Intentionally Blank]

No. 50/2014 (United States of America and Cuba)

Communication addressed to the Government of the United States of America on 25 August 2014 and to the Government of Cuba on 15 September 2014

Concerning Mustafa al Hawsawi


The United States of America is a party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group’s mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), the Working Group transmitted the above mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

   (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

   (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
ADVANCE UNEDITED VERSION  
A/HRC/WGAD/2014

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. The case has been reported to the Working Group on Arbitrary Detention as follows:

4. Mr. Mustafa al Hawaswi, aged 45, is a native of Jeddah, Saudi Arabia. It is reported that on 1 March 2003, Mr. al Hawaswi was arrested during a raid in Rawalpindi, Pakistan. He was then imprisoned by Government agents of the United States of America at undisclosed and classified locations, until his transfer to a Top Secret prison at the U.S. Naval Base at Guantanamo Bay, Cuba, on 6 September 2006.

5. According to the source, the U.S. Government has acknowledged that, prior to his arrival at Guantanamo, Mr. al Hawaswi was part of the Central Intelligence Agency (CIA) Rendition, Detention, and Interrogation Program (RDI), which has now become known as the Torture Program. Because the U.S.A. Government has classified the details of this programme, Mr. al Hawaswi and his legal representatives are prohibited from revealing any circumstances of Mr. al Hawaswi’s capture, including the identities of the personnel who carried out the arrest and subsequent detention, and any details of torture, or other degrading, cruel, or inhumane treatment that he may have been subjected to during that time.

6. Mr. al Hawaswi’s legal representatives have been prohibited from meeting with him at his place of detention.

7. On 21 March 2007, Mr. al Hawaswi was brought before a Combatant Status Review Tribunal (CSRT). The tribunal met for the purpose of determining whether Mr. al Hawaswi met the criteria to be designated as an enemy combatant against the U.S.A. or its coalition partners. The source reports that instead of being assigned an attorney, Mr. al Hawaswi was assigned a one-time personal representative who was a military officer without any legal training.

8. The tribunal hearing lasted one hour and nine minutes, after which time it concluded that Mr. al Hawaswi met the definition of Unlawful Enemy Combatant, and that he should remain in detention. The source informs that the tribunal failed to provide basic procedural protections such as the exclusion of coerced statements, the exclusion of unreliable hearsay evidence, the ability to cross-examine witnesses, and consideration of Government evidence as presumptively correct.

9. The source informs that Mr. al Hawaswi continued to be held without charges or legal representation until April 2008, when he was assigned a military lawyer that was not of his own choosing. Over five years after Mr. al Hawaswi’s arrest, the U.S.A. Government provided notice of its intention to seek the death penalty against Mr. al Hawaswi, and...
charged him with numerous allegations of violating the law of war. The violations included: murder, conspiracy, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, hijacking or hazardizing a vessel or aircraft, terrorism, and providing material support for terrorism. A military commission was established for the purpose of trying Mr. al Hawsawi and four co-accused.

10. On 29 January 2009, all proceedings related to Mr. al Hawsawi’s military commission ceased prior to having reached a resolution, or being brought before a jury, following the issuance of the Presidential Executive Order 13492, directing the review and disposition of individuals detained at the Guantanamo Naval Base and closure of detention facilities. Meanwhile, Mr. al Hawsawi remained in detention at the Top Secret prison in Guantanamo Bay.

11. On 21 January 2010, all charges against Mr. al Hawsawi and four co-accused were dropped. The report states that Mr. al Hawsawi continued to be detained without charges until 31 May 2011, when the process for prosecution was again initiated against Mr. al Hawsawi and four co-accused. Presently, Mr. al Hawsawi is charged with conspiracy, attacking civilians, attacking civilian objects intentionally causing serious bodily injury, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking or hazardizing a vessel or aircraft, and terrorism.

12. The report states that the deprivation of liberty of Mr. al Hawsawi is considered arbitrary and falls under category 1 of the Working Group’s defined categories of arbitrary detention. The domestic law utilised by the Government of the U.S.A. to detain does not conform with international human rights law and international humanitarian law, in particular Article 9 of the Universal Declaration of Human rights, Article 9 of the International Covenant on Civil and Political Rights, and Principles 4, 10, 11, 12, 32, 36 and 37 of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.

13. The report states that Mr. al Hawsawi has been subjected to a prolonged and indefinite detention, without any legal basis or known charges against him for the five years following the date of his arrest. It argues that the arrest of Mr. al Hawsawi by unidentified government’s agents and his subsequent detention at undisclosed locations violates his right to be brought promptly before a judicial authority to challenge the legality of his detention. He has also been imprisoned for over 10 years without a trial, and without the reasonable means to prepare for such a trial. Further, as a result of the public pronouncements made by authorities of his guilt, his presumption of innocence has been compromised in breach of Article 11(1), UDHR, and Principle 36 of the Body of Principles.

14. According to the source, Mr. al Hawsawi has been charged for acts which the international law of war does not recognise as a legitimate crime, that is, the material support for terrorism, conspiracy and terrorism. It submits this is in contravention of Article 11(2) UDHR, and the jurisprudence of the U.S.A. Court of Appeals for the District of Columbia.

15. The source further submits that the deprivation of liberty of Mr. al Hawsawi falls under category III of the Working Group’s defined categories of arbitrary detention. The detention of Mr. al Hawsawi is in total or partial non-observance of the international norms relating to a fair trial, guaranteed by Article 10, UDHR, Article 14, ICCPR, and Principles 15, 16, 17, 18 and 19 of the Body of Principles. The source highlights that Mr. al Hawsawi was held without consular access, access to family and access to legal counsel. Furthermore, the CSRT hearing provided to Mr. al Hawsawi has been deemed defective by the U.S.A. Supreme Court as the hearing was reportedly conducted in secret, on the basis of unreliable evidence, and without permitting Mr. al Hawsawi representation by qualified legal counsel.
16. According to the source, Mr. al Hawawi’s detention infringes Principle 1, 6 and 33 of the Body of Principles, because Mr. al Hawawi was detained as part of the Central Intelligence Agency’s Rendition, Detention and Interrogation program, and no justification may be invoked for subjecting a detained individual to torture or to cruel, inhumane, or degrading treatment or punishment. Further, it contravenes Principles 2, 13, 14, 21, 23 of the Body of Principles, as Mr. al Hawawi’s detention is not consistent with the legally recognized protocols for detention and interrogations. Mr. al Hawawi was allegedly not entitled to an explanation of his legal rights during interrogations, and has been also deprived of the use of a dedicated Arabic translator.

17. The source further submits that the deprivation of liberty of Mr. al Hawawi falls under category V of the Working Group’s defined categories of arbitrary detention for reasons of discrimination based on his status as a foreign national. It argues that Mr. Hawawi is deprived of due process and fair trial protections of legitimate criminal justice systems because of his foreign national status. Instead, he is subject to the inadequate and inferior protections of the military commissions system. It argues this contravenes Article 10 of the UDHR, Articles 14 and 26 of the ICCPR, and Principle 5 of the Body of Principles.

Response from the Governments

18. In the communications addressed to the Government of the United States of America on 25 August 2015 and to the Government of Cuba on 15 September 2014, respectively, the Working Group transmitted the allegations made by the source. The Working Group stated that it would appreciate if the Governments could, in their reply, provide it with detailed information about the current situation of Mr. al Hawawi and clarify the legal provisions justifying his continued detention. The Government of the United States of America replied to the communication of 25 August 2014 on 29 September and 14 November 2014. The Government of Cuba has not responded to the communication of 15 September 2014, which the Working Group regrets.

19. According to the US Government, Mr. al Hawawi continues to be detained lawfully under the Authorization for Use of Military Force (AUMF) (U.S. Public Law 107-40), as informed by the laws of war, in the ongoing armed conflict with al-Qaeda, the Taliban, and associated forces. This law authorizes the President of the United States to "use all necessary and appropriate force against those . . . organizations[] or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," including the authority to detain persons who are part of al-Qaeda, the Taliban, or associated forces.

20. All Guantanamo Bay detainees have the ability to challenge the lawfulness of their detention in U.S. Federal court through a petition for a writ of habeas corpus. Detainees have access to counsel and to appropriate evidence to mount such a challenge before an independent court. Except in rare instances required by compelling security interests, all of the evidence relied upon by the government in habeas proceedings to justify detention is disclosed to the detainees’ counsel, who have been granted security clearances to view the classified evidence, and the detainees may submit written statements and provide live testimony at their hearings via video link. The United States has the burden in these cases to establish its legal authority to hold the detainees. Detainees whose habeas petitions have been denied or dismissed continue to have access to counsel pursuant to the same terms applicable during the pendency of proceedings.

21. The Government informs that an attorney filed a habeas petition on behalf of Mr. al Hawawi in 2008 without Mr. al Hawawi’s authorization, leading to the dismissal of the petition in 2009, Mr. al Hawawi has never replied.
22. Mr. al Hawaswi has been charged with crimes in relation to his alleged role in the planning and execution of the September 11, 2001 attacks. The charges have subsequently been referred to a military commission for trial. There were eight charges referred: conspiracy; murder in violation of the law of war; attacking civilians; attacking civilian objects; destruction of property in violation of the law of war, intentionally causing serious bodily injury, hijacking aircraft, and terrorism. Mr. al Hawaswi is presumed innocent unless proven guilty beyond a reasonable doubt. Pursuant to requirements of the 2009 Military Commissions Act (MCA), Mr. al Hawaswi has been provided with defense counsel with specialized knowledge and experience in death penalty cases. These proceedings are currently in the pre-trial litigation phase.

23. Military commissions are a lawful and appropriate forum for trying violations of the law of war and other offenses triable by military commission. All current military commission proceedings at Guantanamo Bay are governed by the 2009 MCA, which instituted significant reforms to the system of military commissions. These reforms include prohibiting the admission at trial of statements obtained through cruel, inhuman, or degrading treatment, in addition to torture, except for statements by individuals alleging that they were subject to torture or such treatment as evidence against a person accused of committing the torture or mistreatment. All military commissions under the MCA incorporate fundamental procedural guarantees, including: the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt; prohibitions on the use of coerced evidence; additional evidentiary requirements for the admission of hearsay evidence; a requirement that an accused in a capital case be provided with counsel "learned in applicable law relating to capital cases," the provision of latitude to the accused in selecting his or her own military defense counsel; and enhancements to the accused's right to discovery of evidence. The accused is convicted by a military commission, the conviction is subject to multiple layers of review, including judicial review in the U.S. Court of Appeals for the District of Columbia Circuit, a Federal civilian court consisting of life-tenured judges, and ultimately by petition to the U.S. Supreme Court.

24. Further, the United States is committed to ensuring the transparency of commission proceedings. To that end, proceedings are now transmitted via live video feed to locations at Guantanamo Bay and in the United States, so that the press and the public can view them, with a 40-second delay to protect against the disclosure of classified information. Court transcripts, filings, and other materials are also available to the public online via the website of the Office of Military Commissions: www.mcmil.

25. The United States has a strong interest in ensuring the detainees at the Guantanamo Bay detention facility have meaningful access to counsel in both habeas and military commission proceedings. The government respects the critical role of detainees' counsel in these proceedings and the fundamental importance of that role in the U.S. system of justice, and will continue to make every reasonable effort to ensure that counsel can communicate effectively and meaningfully with their clients. Presumptive classification has been a handling procedure to enable counsel to use information obtained from their clients while also safeguarding classified information. In response to defense concerns that this handling procedure unfairly burdens the attorney-client relationship, in September 2012, the U.S. government requested a modification of the protective order applicable to the military commission proceedings for Mr. al Hawaswi. That modification, which was granted by the military commission judge and reflected in the revised protective order issued in December 2012, removes the presumption of classification from statements made by Mr. al Hawaswi and is intended to clarify that defense counsel, who have always had the ability to discuss with their client a broad range of topics directly related to the military commission proceeding, may now publicly discuss information unless they have reason to know it is classified. Additionally, the military commission procedures provide for a robust attorney-
client privilege, which is not waived by any application of the handling procedures required by the protective order.

26. According to the applicable Counsel Access procedures, defense counsel must hold a valid, current United States security clearance at the appropriate level in order to have in-person access to detainees at Guantanamo Bay. The Counsel Access procedures governing prosecutions by military commissions are modeled on the Counsel Access procedures applicable to counsel representing detainees in habeas corpus cases, which were issued by a U.S. federal court. These procedures balance the strong interest in counsel access with the need to comply with U.S. law and regulations regarding the protection of classified national security information.

27. As holders of a valid U.S. security clearance, detainees’ defense lawyers are obligated to protect classified information acquired in the course of their representation of individuals detained at Guantanamo Bay according to applicable U.S. law, regulations, and signed agreements between the holder of the clearance and the U.S. government. All holders of U.S. security clearances are subject to these same obligations.

28. The United States takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantanamo Bay. On one of his first days in office, January 22, 2009, President Obama issued Executive Order 13491, Ensuring Lawful Interrogations. The Executive Order directed that individuals detained in any armed conflict shall in all circumstances be treated humanely, consistent with U.S. domestic law, treaty obligations, and U.S. policy, and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the United States. It further ordered that such individuals shall not be subject to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3. The Executive Order also revoked all previous executive directives, orders, and regulations to the extent inconsistent with that order. All U.S. military detention operations, including those at Guantanamo Bay, comply with Common Article 3 of the Geneva Conventions, and other applicable international laws.

29. Regarding the former detention and interrogation program referenced in the Working Group’s letter, President Obama has made clear that certain aspects of that program were inconsistent with the values of the United States as a Nation. One of the President’s first acts in office was to sign Executive Order 13491, which brought an end to that program.

30. For some time, the Obama Administration has made clear that the 500-page Findings and Conclusions and Executive Summary of the final report by the Senate Select Committee on Intelligence on the former detention and interrogation program should be declassified and released by the Senate Committee, with appropriate redactions necessary to protect national security.

Comments from the source

31. On 19 November 2014, the source submitted its comments to the US Government’s response.

32. According to the source, the Government’s response is based on policy statements which do not reflect the actual practices at Guantanamo Bay. The petitioner respectfully directs the Working Group’s attention to concrete facts which conclusively demonstrate the arbitrary character of the detention scheme currently in place at Guantanamo Bay. The
arbitrary and prolonged detention in Guantanamo Bay affects not only to Mr. al-Hawsawi but all Guantanamo Bay Detainees similarly situated.

33. As previously observed, Guantanamo Bay’s detention policies continue to be arbitrary because the United States Government justifies its detention with domestic policies that do not actually conform to human rights law and international humanitarian law, and which instead allow and promote prolonged and indefinite detention. Mr. al-Hawsawi’s detention and that of similarly situated Guantanamo Detainees is also arbitrary because the Government’s military commission system violates international norms recognizing the right to a fair trial, as spelled out in the Universal Declaration of Human Rights and other international instruments accepted by the states concerned. These violations are of such gravity as to rise to the level of arbitrary detention.

34. Nothing in the Government’s response alleviates the fact that its detention scheme at Guantanamo continues to violate international law by discriminating against detainees based on their status as foreign nationals.

35. The following facts conclusively rebut the government’s response and demonstrates the arbitrary character of the detention scheme at Guantanamo Bay:

36. The Authorization for Use of Military Force (AUMF) (Public Law 107-40) sets forth absolutely no timeline or definition for what an “ongoing armed conflict with al-Qaida, the Taliban or associated forces” means. This blanket authorization apparently authorizes detention in perpetuity. Additionally, U.S. Government prosecutors at Guantanamo Bay have indicated that even a Guantanamo detainee is acquitted by a military commission, the AUMF still authorizes his indefinite detention. Therefore, justice is impossible at Guantanamo Bay. Even an acquitted would not provide meaningful redress.

37. The Government asserts that all Guantanamo detainees can challenge their detention in a U.S. Federal Court through a writ of habeas corpus. This is a hollow promise. U.S. courts treat habeas corpus petitions by Guantanamo detainees differently from those submitted by U.S. prisoners. All Guantanamo petitions are handled by the Federal Court for the District of Columbia Circuit, which has created a separate body of law specifically for Guantanamo habeas corpus petitions. This body of law has ensured that all Guantanamo habeas corpus petitions since 2009 have been denied except one, and in that case the Government itself recommended the detainee’s release.

38. The Government affirms that Mr. al-Hawsawi has been provided (one) counsel with specialized knowledge and experience in death penalty cases. This is true. But the appropriate representation standards for death penalty cases, as set forth by the American Bar Association, require at least two attorneys with significant knowledge and experience in the defense of death penalty cases. The Government has consistently opposed ethical resourcing for death penalty cases at Guantanamo Bay. Counsels at Guantanamo have been denied access to classified evidence even though they possess the requisite security clearances. Ethical death penalty defense requires adequate resourcing and access to evidence. These are non-existent at Guantanamo Bay.

39. The Government continues to affirm that proceedings in Guantanamo Bay are governed by the 2009 Military Commissions Act, which purportedly introduced significant procedural protections and reforms. The Government claims that these include the prohibition of evidence obtained through torture, coercion, or cruel, inhuman, and degrading treatment. It also claims “additional evidentiary requirements” to protect against the introduction of hearsay evidence, and “enhancements to the accused’s right to discovery of evidence.” In reality, the military commission system lacks adequate procedural safeguards and meaningful mechanisms for redress for the indefinite and prolonged detention men in Guantanamo Bay are currently subjected to. These are the facts:
ADVANCE UNEDITED VERSION
A/HRC/WGAD/2014

40. The Military Commission Rules of Evidence (MCRE) provide:

- that evidence derived from torture is admissible under MCRE 304(5)(A)(ii);
- that evidence derived from coerced statements is admissible under MCRE 304(5)(B)(i)(ii);
- lowered standards of admissibility for hearsay evidence, in that, hearsay evidence is broadly admissible under MCRE 803(b). This rule states that “Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts martial may be admitted in a trial by military commission.”

41. Furthermore:

- Anyone who represents Guantánamo Bay detainees must be approved by the U.S. Department of Defense. Foreign legal representatives of the detainee’s choosing, may not appear in military commission proceedings. The Government has denied Mr. al-Hawsawi the opportunity to personally meet with international legal representatives willing to act on his behalf and challenge his arbitrary detention in international human rights courts;
- The United States Government continues to prohibit Guantánamo detainees from meeting with representatives from their government. For instance, the government of Saudi Arabia has been prohibited from meeting with Mr. al-Hawsawi, who is a Saudi national;
- There are no “enhanced rights to discovery of evidence.” To date, U.S. Government prosecutors at Guantánamo Bay continue to deny access to evidence. Large amounts of necessary evidence may never be disclosed to Guantánamo Bay detainees.

42. The United States alleges that the Government remains committed to ensuring the transparency of commissions proceedings. However, U.S. Government prosecutors in Guantánamo Bay have consistently opposed requests by media organizations and defense representatives to open the proceedings to the general public beyond a few sites on largely inaccessible military installations. U.S. intelligence agencies have interfered with judicial proceedings, for example by shutting off the sound broadcast of a public hearing without the knowledge or approval of the Military Judge. The Federal Bureau of Investigation recently infiltrated defense teams by recruiting members as confidential informants. These concrete examples of external governmental manipulation demonstrate that while the Government may say it is committed to transparency, its current practices contradict such claims.

43. Since February 2014, no substantive legal challenges by Mr. al-Hawsawi have been addressed by the military law of war court. This is due to the interference by the Federal Bureau of Investigation and the subsequent repercussions. While Mr. al-Hawsawi has repeatedly asked the military law of war court to address his legal challenges, the military court has been unwilling to entertain any substantive legal challenges and will not do so anytime in the near future.

44. The Government’s practice of over-classification of evidence undermines any claims that it is committed to transparency. This practice shields government agents from embarrassment and criminal accountability based on their flagrant violations of human rights law. Rather than promote open and confidential communications between detainees and counsel, new policies ensure that detainees such as Mr. al-Hawsawi are effectively silenced and prohibited from exercising their independent right of action before international tribunals as victims of torture.

45. According to the source, the United States Government has extended this practice of over-classification to classify the minds of Guantánamo Bay detainees to include their own
life experiences and observations (and particularly their experience of torture at the hands of the Government). Thus, in October 2013, the Military Judge questioned U.S. Prosecutor Clayton Trivett, the Managing Deputy Trial Counsel for the Chief Prosecutor. The colloquy went as follows:

Military Judge: The question becomes, “Is the government's position on life experiences [ ] I'm going to use that term [ ] of the accused, that they know personally, would that be classified information?”

Mr. Trivett: Yes.

Judge Pohl: Okay. Then I come back to the executive order about being in control of the United States Government, I'm not paraphrasing it.

Mr. Trivett: Yes.

Judge Pohl: Is that considered in control of the United States Government, if it's in the accused's brain?

Mr. Trivett: The accused are currently in control of the United States Government. That's one part of the analysis.

Judge Pohl: Okay.

Mr. Trivett: The second part of the analysis is the fact that the accused were exposed to sensitive sources and methods that were produced by the U.S. Government.

46. The practices in place reveal not a commitment to transparency but rather a commitment to secrecy and unaccountability. For instance, the identities of government agents who tortured men is deemed classified and such identities have not been provided even to defense counsel who possess the requisite security clearances. The names of countries and locations where men were held and tortured remain classified. The details of the agreements between the United States and liaison countries remain classified.

47. U.S. Prosecutors, led by Chief Prosecutor Brigadier General Mark Martins, refuse to turn over classified evidence to defense teams unless they sign an agreement (a Memorandum of Understanding) that would essentially make the attorneys complicit in the denial of the torture victims’ rights by compelling defense counsel to police their own clients and prevent them from speaking about the torture they endured. Thus:

- Recently, the name of a specific non-governmental organization advocating on behalf of a Guantanamo detainee has been deemed classified;
- References to specific geographical continents have been classified;
- The names of specific legal cases brought on behalf of Guantanamo detainees in international forums have been classified;
- The name of a specific international human rights court has been classified.

48. The Government's response states that “The United States takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantanamo Bay...The Executive Order directed that all individuals detained...shall in all circumstances be treated humanely, consistent with U.S. domestic law, treaty obligations, and U.S. Policy...”

---

1 “Sources and methods” is a government euphemism. “Sources” = identities of the torturers. “Methods” = the torture techniques themselves.
49. The facts show otherwise. Mr. al-Hawsawi is held in a secret detention camp, where a Government investigation has acknowledged that the conditions are the worst in the Guantanamo prison. In 2012, another detainee in the same camp agreed to plead guilty. Part of his agreement was that, “...as long as I am fully and truthfully cooperating with the Government as required by this agreement, I should not be detained in [this camp] and should be detained at a facility consistent with the detention conditions appropriate for law of war detainees.”

50. Thus, whatever its executive orders may say in theory, in practice the Government reserves humane treatment consistent with its treaty obligations for those who agree to “cooperate” and work with the government. Thus, the conditions of arbitrary and prolonged detention are used as a spur to coerce guilty pleas and “cooperation,” while the humane conditions to which the detainees have a right are withheld as a reward for pleas of guilty and forfeiture of rights.

51. Accordingly, the U.S. Government’s current practices and procedures contradict the policy statements with which it responded to the committee. The current detention scheme in Guantanamo Bay violates international law and conflicts with the U.S. Government’s public policy statements, which purport to repudiate torture and affirm the need for accountability.

52. Guantanamo Bay’s detention policies continue to be arbitrary because current practices do not actually conform to human rights law and international humanitarian law. Rather, current practices instead allow and promote prolonged and indefinite detention. The U.S. military commission system which permits external manipulation, allows introduction of derivative evidence obtained through torture and coercion, suppresses evidence and denio meaning ful reductio, violates international norms requiring fair and impartial tribunals and the right to a fair trial, as spelled out in the Universal Declaration of Human Rights and other international instruments accepted by the states concerned. These violations are of such gravity as to rise to the level of arbitrary detention.

53. The United States of America and the Republic of Cuba signed an agreement on 16 and 23 February 1903 for the lease of some lands within Cuban territory including the location of the United States Naval Base on Guantanamo Bay. This agreement was further complemented by an additional agreement in July 1903. In 1934, the agreement was revised. There is no doubt that this is a lease agreement because the agreement provides for the United States to pay a certain amount on an annual basis to Cuba. In principle, a lease agreement would not imply any transfer of sovereignty. However, the set of agreements here provides for the United States to exercise complete sovereignty over the areas covered by the lease. In addition, the lease is indefinite and can only be terminated if the United States decides to vacate the naval base or if the two states, namely the United States and

---

2 T.D. 410, see references extracted from United States, Department of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2013, p. 67, available online (http://www.state.gov/documents/organization/218912.pdf).


4 See Article III, Feb. 1903 Agreement: “While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.”
Cuba, agree. The circumstances of this lease imply an effective transfer of sovereignty from Cuba to the United States for the period of the lease, even though this period is not limited in time. The February 1903 Agreement does state that Cuba remains sovereign but such sovereignty is only theoretical and is suspended while the effective sovereignty is exercised by the United States.

54. This analysis could be challenged when one considers the arguments presented by the United States Government before the United States Supreme Court in Rasul v Bush. Indeed the United States Government argued in court that its jurisdiction does not extend to foreigners on Guantanamo Bay which is outside of its territory. However, the Working Group here bears in mind the specific circumstances of such an argument and does not view it as a unilateral act that should be given any legal value. As a result, only the United States currently exercises sovereignty over Guantanamo Bay and the Working Group has based its decision on that the alleged violations on Guantanamo Bay engage the responsibility of the United States Government. The Working Group has limited its analysis of the case to the United States.

Discussion

55. The Working Group recalls that the International Court of Justice, in its judgment in the case concerning United States diplomatic and consular staff in Tehran, emphasized that “wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights”.

56. In a joint statement of 1 May 2013, the Working Group, together with the the Inter-American Commission on Human Rights (IACHR), the United Nations Special Rapporteur on torture, the United Nations Special Rapporteur on human rights and counter-terrorism, and the United Nations Special Rapporteur on health, reiterated the need to end the indefinite detention of individuals at the Naval Base in Guantanamo Bay.

57. In Opinion No. 10/2013 (United States of America) the Working Group requested the release of another Guantanamo Bay detainee, and referred to the 2013 Joint Statement, the jurisprudence of the Working Group and statements by the United Nations High Commissioner for Human Rights and the International Committee of the Red Cross expressing with utmost concern that the Guantanamo detainees lack of legal protection and the resulting anguish caused by the uncertainty regarding their future has led them to take the extreme step of a hunger strike to demand a real change to their situation. In the 2013 Joint Statement, the jurisprudence of the Working Group and statements by the United

---

5 See Article III, May 1934 Agreement: “Until the two contracting parties agree to the modification or abrogation of the stipulations of the agreement in regard to the lease to the United States of America of lands in Cuba for coaling and naval stations signed by the President of the Republic of Cuba on February 16, 1903, and by the President of the United States of America on the 23rd day of the same month and year, the stipulations of that agreement with regard to the naval station of Guantanamo shall continue in effect. The supplementary agreement in regard to naval or coaling stations signed between the two Governments on July 2, 1903, also shall continue in effect in the same form and on the same conditions with respect to the naval station at Guantanamo. So long as the United States of America shall not abandon the said naval station of Guantanamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty.”


---
ADVANCE UNEDITED VERSION
A/HRC/WGAD/2014

Notions High Commissioner for Human Rights, it is underlined that, even in extraordinary circumstances, the indefinite detention of individuals, goes beyond a minimal and reasonable period of time, and constitutes a flagrant violation of international human rights law, which in itself constitutes a form of cruel, inhuman, and degrading treatment. These international bodies have also confirmed that the continuing and indefinite detention of individuals without the right to due process is arbitrary and constitutes a clear violation of international law.

58. In the 2013 Joint Statement, the Working Group reiterated the request it made to the Government of the United States of America on 22 January 2002, and reiterated on 25 June 2004, along with the Special Rapporteurs and other United Nations human rights mechanisms, to be allowed to visit the Guantánamo detention centre and to hold private, confidential interviews with the detainees as soon as possible.

59. Furthermore, the IACHR, the Working Group, and the Special Rapporteurs urged the United States of America to: (a) adopt all legislative, administrative, judicial, and any other types of measures necessary to prosecute, with full respect for the right to due process, the individuals being held at Guantánamo Naval Base or, where appropriate, to provide for their immediate release or transfer to a third country, in accordance with international law; (b) expedite the process of release and transfer of those detainees who have been certified for release by the Government itself; (c) conduct a serious, independent, and impartial investigation into the acts of forced feeding of inmates on hunger strike and the alleged violence being used in those procedures; (d) allow the IACHR and the United Nations Human Rights Council mechanisms, such as the Working Group and the Special Rapporteurs, to conduct monitoring visits to the Guantánamo detention centre under conditions in which they can freely move about the installations and meet freely and privately with the prisoners; and (e) take concrete, decisive steps toward closing the detention centre at the Guantánamo Naval Base once and for all. Along these lines, they urged the Government to state clearly and unequivocally what specific measures it would implement toward that end.

60. In its 2008 annual report, the Working Group elaborated a list of principles for the deprivation of liberty of persons accused of acts of terrorism in accordance with articles 9 and 10 of the UDHR and articles 9 and 14 of the ICCPR (WGAD annual report 2008, A/HRC/10/21, 16 February 2009 [53]-[54]. They were set out as follows:

(a) Terrorist activities carried out by individuals shall be considered as punishable criminal offences, which shall be sanctioned by applying current and relevant criminal and penal procedure laws according to the different legal systems;

(b) Resort to administrative detention against suspects of such criminal activities is inadmissible;

(c) The detention of persons who are suspected of terrorist activities shall be accompanied by concrete charges;

(d) The persons detained under charges of terrorist acts shall be immediately informed of them, and shall be brought before a competent judicial authority, as soon as possible, and no later than within a reasonable time period;

(e) The persons detained under charges of terrorist activities shall enjoy the effective right to habeas corpus following their detention;

(f) The exercise of the right to habeas corpus does not impede on the obligation of the law enforcement authority responsible for the decision for detention or maintaining the detention, to present the detained person before a competent and independent judicial authority within a reasonable time period. Such person shall be brought before a competent and independent judicial authority, which then evaluates
the allegations, the basis of the deprivation of liberty, and the continuation of the judicial process;

(g) In the development of judgments against them, the persons accused of having engaged in terrorist activities shall have a right to enjoy the necessary guarantees of a fair trial, access to legal counsel and representation, as well as the ability to present exculpatory evidence and arguments under the same conditions as the prosecution, all of which should take place in an adversarial process;

(h) The persons convicted by a court of having carried out terrorist activities shall have the right to appeal against their sentences.

61. In several of its Opinions and reports the Working Group has addressed detention at the Naval Base of Guantanamo Bay. Already in its 2002 annual report (ECN 4/2003/8), the Working Group published its “Legal Opinion regarding the deprivation of liberty of persons detained in Guantanamo Bay”. In the 2006 annual report (9 January 2007, A/HRC/4/440) the Working Group responded to the United States Government submissions to the Working Group’s Opinion No. 29/2006 (United States of America). The Government had referred to the United States Supreme Court in Hamdan v. Rumsfeld, and asserted that the law of armed conflicts governs the armed conflict with Al-Qaeda. In the 2006 annual report [14], as in section IV of the 2005 annual report (ECN 4/2006/7), the Working Group pointed out that “the application of international humanitarian law does not exclude the application of international human rights law”. This is also restated in the Working Group’s “Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law”, see the 2012 annual report (21 December 2012, A/HRC/22/45) [45].

62. According to the joint report by five special rapporteurs on the situation of detainees at Guantanamo Bay (ECN 4/2006/120, [83]), international armed conflicts, including situations of occupation, imply the full applicability of relevant provisions of international humanitarian law and of international human rights law, with the exception of guarantees derogated from, provided such derogations have been declared in accordance with article 4 of the ICCPR by the State party. The United States has not notified any derogation from the Covenant.

63. In the 2006 annual report [15] the Working Group repeated that a State’s jurisdiction and responsibility extend beyond its territorial boundaries, referring to the consistent jurisprudence of the Human Rights Committee on the ICCPR. The Working Group and the Human Rights Committee here apply general principles as they have been clarified by the International Court of Justice and gradually also in the jurisprudence of the regional human rights courts (in particular, the European Court of Human Rights and the Inter-American Court of Human Rights) see in particular Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion ICJ Reports 2004, p. 136 and Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation) Provisional Measures, Order of 15 October 2008, ICJ Reports 2008, p. 353 [109] where the Court stated that “these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory”. The nature of human rights treaties and their foundation in universality, require a justification for a territorial limit on their scope, and this is a consequence of the object and purpose of human rights treaties.

64. The Working Group recalls that the Human Rights Committee already in 1985, in López and Callebaut, held that “it would be unconscionable to so interpret the responsibility under Article 2 of the International Covenant on Civil and Political Rights (ICCPR) as to permit a State party to perpetrate violations of the Covenant on the territory of another
State, which violations it could not perpetrate on its own territory.\(^8\) The Human Rights Committee referred to article 5(1) of the ICCPR that provides that: “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.” The Working Group has adopted these views in its constant jurisprudence, notably in No. 10/2013 (United States of America) and No. 57/2013 (Djibouti, Sweden and the United States of America).

65. It is at the core of this general rule that a state’s international law obligations equally apply to its acts abroad, and those of its agents abroad, and it is clear that it applies when individuals are held in detention. Adopting ‘a contextual and purposive interpretation’ of article 2 of the ICCPR, the Human Rights Committee has confirmed that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party.”\(^9\) It is widely accepted that persons incarcerated by state authorities in detention facilities located outside the state’s territory are subject to the effective control of that state. To this end, the joint report of five special procedures mandate holders of the former Commission on Human Rights,\(^10\) and the Opinions rendered by the Working Group have confirmed that the obligations of the United States under international human rights law extend to persons detained at Guantanamo Bay. The gross violations of international law at Guantanamo are such that any state that has actively facilitated or in any way acquiesced in the detention, must hold enquiries into the acts of its officials and provide remedies to individuals for any breaches of international law that their facilitation or acquiescence may give rise to.

66. The United States is bound by international law and its international human rights obligations regarding its detention of Mr. al Hawasini. The International Court of Justice in its 2010 Daggio judgment stated that article 9, paragraphs 1 and 2, of the ICCPR applies in principle to any form of detention, “whatever its legal basis and the objective being pursued.”\(^11\) The Working Group has emphasised that “[it] would like to stress as a matter of principle that the application of international humanitarian law to an international or non-international armed conflict does not exclude application of human rights law. The two bodies of law are complementary and not mutually exclusive.”\(^12\) Customary international law prohibits arbitrary detention and arbitrary detention is confirmed as a peremptory norm (jus cogens) in the constant jurisprudence of the Working Group, see also the clarification of the prohibition of torture as a peremptory norm of international law (jus cogens) in Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of the International Court of Justice of 20 July 2012.

67. The prohibition of arbitrary detention provides for clear and precise rights and guarantees from which there is no scope for derogations or restrictions by international humanitarian law. Neither can international humanitarian law operate as a principle of interpretation, and is not lex specialis even in this context of interpretation. The rules and

---

\(^8\) López Borges v. Uruguay, Case No. 52/79, UN Doc. A/36/40, p. 176, HRC (29 July 1981) [12.3], and Coliberti de Casariego v. Uruguay (29 July 1981) 68 ILR 41, see [12.3] and [10.3].
\(^9\) Human Rights Committee, General Comment No. 31 (2004), CCPR/C/21/Rev.1/Add.13, para 10.
\(^10\) ECN 4/2006/12 at para 11.
\(^12\) Opinion 44/2005, para 13, also quoted in Opinion 2/2009, para 27. See also General Comment No. 31, para 11; Draft General Comment No. 35, para 67, and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports (1996), 226 at para 25.
procedures of international humanitarian law must comply with the prohibition of arbitrary detention in international law, and authorities are always subject to review by international and domestic courts for their compliance.

68. The Working Group has stated that ‘the struggle against international terrorism cannot be characterised as an armed conflict within the meaning that contemporary international law gives to that concept’. In the present case, the Working Group points out that the detention of Mr. Al-Hawsawi is also in direct contravention of the protection provided by international humanitarian law. With no concrete evidence that Mr. Al-Hawsawi has committed any belligerent activity or directly participated in hostilities, the United States cannot rely on international humanitarian law to argue that the detention of Mr. Al-Hawsawi serves the purpose of preventing a combatant from continuing to take up arms against the United States. The Working Group further points out that the Geneva Conventions require that enemy belligerents and civilians who are detained as threats to security be released at the end of the armed conflict or hostilities. At this point in time, whether an international or non international armed conflict, any of the procedures for detention regimes under international humanitarian law cease to operate. International humanitarian law has never been conceived to apply to a detention of the length of Mr. Al-Hawsawi’s and procedures for detention regimes under international humanitarian law cease to provide any support, if they ever did, for detention of the individuals at Guantanamo Bay.

69. Among the several further issues relating to the legality of the detention, even if it had not otherwise been in contravention of international law, the Working Group points to the absence of any express legal domestic authority for detention. The Authorization for Use of Military Force (AUMF), which authorizes the President to ‘use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorised, committed, or aided the terrorist attacks that occurred on September 11, 2001’ does not specifically authorize arrest or detention.

70. Article 9(4) of the ICCPR entitles any individual deprived of liberty by arrest or detention to take proceedings before a court without delay to challenge the legality of detention. This right is non-derogable under both treaty law and customary international law, as confirmed in the constant jurisprudence of the Working Group. Mr. Al-Hawsawi first received an administrative hearing before the Combatant Status Review Tribunal (CSRT) in 2004, two years after he was incarcerated, and appeared annually before the Administrative Review Tribunal (ART).

71. This two-year delay in allowing Mr. Al-Hawsawi to challenge his detention is a grave and clear violation. It is further aggravated by his continued detention.

72. The Working Group again concludes that the administrative hearings before the CSRT and ART did not satisfy Mr. Al-Hawsawi’s right to habeas corpus and failed to guarantee his right to a full and fair trial as required under article 14(1) of ICCPR and customary international law. The source has again drawn the Working Group’s attention to the ruling by the United States Supreme Court that the CSRT is not an adequate and effective substitute to habeas corpus proceedings; and the Working Group has itself

---

13 Opinion 43/2006, para 31. See also E/CN.4/2006/120, para 21, noting that ‘the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law.’


15 See the Working Group’s “Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law” (21 December 2012) A/HRC/22/44 (2017).

UN Working Group on Arbitrary Detention WGAD
USA and Cuba (al-Hawsawi - Guantanamo Bay - 9/11 case defendant)
No. 50 of 2014 (10 February 2015)

ADVANCE UNEDITED VERSION
AHRC/WGAD/2014

previously stated that “the procedures of the CSRT and the ARB are not adequate to satisfy the right to a fair and independent trial as these are military tribunals of a summary nature.”

73. Mr. al-Hawsawi’s case will be discussed under category I, III and V of the categories applicable to the cases before the Working Group. The Working Group has not considered categories II or IV as applicable.

74. Category I applies when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty. Category I embodies a principle of legality. This requires a legal base for detention in domestic law that complies with international law. Mr. al-Hawsawi’s detention does not satisfy this requirement. The domestic law used by the United States Government to detain Mr. al-Hawsawi does not comply with international law and the requirements of human rights law and international humanitarian law on the further grounds that his detention is prolonged and indefinite.

75. Mr. al-Hawsawi’s case falls into category I of the categories applicable to the cases before the Working Group.

76. Category III applies when the total or partial non-observance of the international norms relating to the right to a fair trial, established in the UDHR, other customary international law and in the relevant international instruments accepted by the United States, is of such gravity as to give the deprivation of liberty an arbitrary character. The source has alleged that there were several grave violations of the fair trial rights of the defendant in the main proceedings. The Working Group has considered all the submissions made by the source and the responses by the Government.

77. The Government contends that the restrictions on the accused’s access to confidential material in the investigation file were legitimate under international human rights instruments. In this regard, the Working Group notes that such restrictions would be legitimate in respect of material which is not then used as evidence against the accused at trial and is not of an exculpatory nature. In the current case, however, in violation of article 14, paragraph 3(b) of the Covenant, the accused, on the pretext of national security, was denied access to substantial evidence used by the prosecution at trial and to some potentially exculpatory evidence.

78. In addition, the Working Group has in its constant jurisprudence considered counsel-client confidentiality as a core element in the due process and fair trial guarantees in article 14 ICCPR and article 10 UDHR and other customary international law, see Opinion No. 6/2013 (Turkey). The Working Group holds that deprivation of the accused’s right to communicate with their defence counsel in private in the courtroom during the trial, constitutes a most serious breach of the due process and fair trial guarantees in article 14 ICCPR and article 10 UDHR and other customary international law.

79. The Working Group concludes that Mr. al-Hawsawi’s rights to fair trial and due process have been repeatedly violated in breach of articles 9 and 14 of the ICCPR during his more than ten-year detention. Mr. al-Hawsawi was not provided with the reasons for his detention, was not promptly brought before a judicial authority for review of his detention, and was not provided with legal counsel, within a reasonable time. The Government did not provide him with formal information of the reasons for his detention for at least two years. He was not given an opportunity to have his detention reviewed promptly by a judicial authority, and he was also denied the legal counsel that international law requires throughout his administrative and military hearings.

17 Opinion 2/2009, para. 32
80. Mr. al Hawaswi’s case falls into category III of the categories applicable to the cases before the Working Group.

81. Category V applies when the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth, national, ethnic or social origin; language; religion, economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights.

82. Mr. al Hawaswi has been subjected to prolonged detention because of his status as a foreign national. He was also deprived of due process and fair trial protections of the court system because of his foreign national status. The source contends that these acts of discrimination that make his detention arbitrary. The Working Group agrees; these acts in violation of international law for reasons of discrimination based on national and other origin and which both aims towards and results in ignoring the equality of human rights.

83. Mr. al Hawaswi’s case falls into category V of the categories applicable to the cases before the Working Group.

84. The Working Group has, notwithstanding that the findings of the present opinion have been directed to the circumstances of Mr. al Hawaswi’s unlawful detention, addressed the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the law on arbitrary detention. The Working Group has clarified many issues of international law in its Guantamano jurisprudence, to which this opinion is the most recent addition. To avoid any ambiguity, the Working Group makes it clear that, while it has in this opinion specifically addressed Mr. al Hawaswi’s case, no a contrario argument can be made in respect of any of the findings in the present opinion. The conclusions reached by the Working Group in the present opinion applies to other persons finding themselves in similar situations in Guantamano Bay, including the conclusions on the remedies below.\(^{18}\)

85. Under international law the United States has a duty to release Mr. al Hawaswi and accord him an enforceable right to compensation. The duty to comply with international law rests on everyone, including domestic authorities and private individuals, and international and domestic law must provide remedies to make international law effective. States are under a positive obligation to provide an effective remedy for violations of international law on human rights. Domestic courts have a particular role in granting tort remedies (responsabilité administrative et constitutionnelle). Domestic law cannot erect barriers in the form of immunities, jurisdictional limitations, procedural hurdles or defenses based on an ‘act of state doctrine’ in any form that would limit the effectiveness of international law. One basis for jurisdiction is the exercise of control over individuals, and under international law it exists whenever an act attributable in the widest sense to a state has an adverse effect on anyone anywhere in the world.

86. Article 8 of the Universal Declaration of Human Rights provides that ‘everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law’, see article 9(5) of the International Covenant on Civil and Political Rights. Article 14 of the UN Convention against Torture provides that ‘each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate

---

\(^{18}\) See the International Court of Justice in Case Concerning Avena and Other Mexican Nationals (México v United States of America) (Judgment) [2004] ICJ Rep 12, 76f, para 151, and the Declaration of President Guillaume in the LaGrand Case (Germany v United States of America) (Declaration President Guillaume) [2001] ICJ Rep 517.
compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation. 19 The duty to provide such redress is confirmed as customary international law in the constant jurisprudence of the Working Group. The Working Group points out that the arguments raised and doctrines offered in defence against remedies have so far been only too effective. In terms of actual outcomes, international courts and tribunals and domestic courts have not provided effective remedies. It is contrary to the rule of law and the requirements to an effective international legal order to accept new restrictions effectively barring remedies in domestic courts as under international law principles of subsidiarity and complementarity the domestic legal orders have the primary responsibility to provide remedies.

Disposition

87. In the light of the preceding, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Mr. al Hawaswi is arbitrary and in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and 9 and 14 of the International Covenant on Civil and Political Rights. It falls into categories I, III and V of the categories applicable to the consideration of the cases submitted to the Working Group.

88. Consequent upon the opinion rendered, the Working Group requests the Government of the United States of America to take the necessary steps to remedy the situation of Mr. al Hawaswi and bring it into conformity with the standards and principles in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

89. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. al Hawaswi and accord him an enforceable right to compensation in accordance with article 9(5) of the International Covenant on Civil and Political Rights.

[Adopted on 20 November 2014]

---

19 See the clarification of the prohibition of torture as a peremptory norm of international law (jus cogens) in Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of the International Court of Justice of 20 July 2012. Arbitrary detention is confirmed as a peremptory norm (jus cogens) in the constant jurisprudence of the Working Group.
Appendix N

Ruling on

Defense Motion to Dismiss for Unlawful Influence on Trial Judiciary

(9/11 Case) (Judge Pohl)

(25 February 2015)
Ruling on Defense Motion to Dismiss for Unlawful Influence on Trial Judiciary (9/11 Case) (Judge Pohl) (25 February 2015) (Page 1 of 10)

UNCLASSIFIED//FOR PUBLIC RELEASE

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH
MUBARAK BIN ATTASH,
RAMZI BIN AL SHIBHI,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM
AL HAWSAWI

AE 343C
RULING

Defense Motion to Dismiss
For Unlawful Influence on Trial Judiciary

25 February 2015

1. Defense moves to dismiss the charges and specifications based on alleged unlawful influence exerted on the trial judiciary by requiring Military Judges to move to U.S. Naval Station, Guantanamo Bay, Cuba (GTMO) for the duration of the trial. The government opposes the motion and the Defense Reply reiterates their position. The Commission has considered the pleadings submitted by both sides.

2. Facts.

a. On or about 1 October 2014, Mr. Vaughn A. Ary was appointed as the Convening Authority for the Military Commissions.

b. Subsequent to assuming his role as the Convening Authority, Mr. Ary conducted an assessment of Commission cases and concluded, inter alia, "...the status quo does not support the pace of litigation necessary to bring these cases to a just conclusion. I believe we must

*= Defense Motion To Dismiss For Unlawful Influence on Trial Judiciary, filed 30 January 2015 (AE 343).
*2 Government Response To Defense Motion To Dismiss For Unlawful Influence on Trial Judiciary, filed 13 February 2015 (AE 343A).
*3 Joint Defense Reply To Government Response To Defense Motion To Dismiss For Unlawful Influence on Trial Judiciary, filed 20 February 2015 (AE 343B).
*4 In its response, AE 343A, the government discusses other aspects of the DEPSECDEF decision, e.g., additional staffing of the trial judiciary. These other aspects of the DEPSECDEF's decision have no relevance to the issue presented and will not be discussed further.

Appellate Exhibit 343C
Page 1 of 10

UNCLASSIFIED//FOR PUBLIC RELEASE
realign resources and reposition the trial judiciary to make it a full-time, on-site duty for the judges assigned to military commissions.\footnote{AE 343, Attachment B.}

c. Mr. Ary recommended the Deputy Secretary of Defense (DEPSECDEF) change the Regulation for Trial by Military Commissions (R.T.M.C.) requiring detailed Commission judges to live at the venue of the trial, GTMO, for the length of the trial.\footnote{“until adjournment, final disposition of charges, recusal, replacement by the Chief Trial Judge pursuant to R.M.C 505(e), or reassignment by the appropriate Judge Advocate General.” AE 343, Attachment B, Tab A.}

d. Mr. Ary did not staff the proposed change with The Judge Advocate General (TJAG) of any service.\footnote{AE 343A, Attachment B, page 1.}

e. The proposed change was not staffed with the Chief Trial Judge, serving as the designee of the Secretary of Defense, for the “supervision and administration of the Military Commissions Trial Judiciary.”\footnote{“The Chief Trial Judge, Military Commissions Trial Judiciary, as a designee of the Secretary of Defense or his designee, is responsible for the supervision and administration of the Military Commission Trial Judiciary,” Para.1-3b, R.T.M.C.}

f. On 7 January 2015, the DEPSECDEF approved the recommendation of Mr. Ary as to Change 1 of the R.T.M.C.\footnote{AE 343, Attachment B.}

3. Witnesses. The pleadings speak for themselves. The Commission does not believe further fact finding is necessary to resolve the issue. Accordingly, the Defense request for witnesses\footnote{Para. 3, AE 343.} is DENIED.

4. Oral Argument. The issue has been fully briefed by both sides. The issue presented goes to the very heart of the trial process. This issue needs to be resolved deliberately but as expeditiously as possible. Accordingly, pursuant to Rule for Military Commission (R.M.C.) 905h and Military
Commissions Trial Judiciary Rule of Court (R.C.) 3.9, the request for oral argument is
DENIED.\textsuperscript{11}

5. Assignment and Detailing of Military Judges.
   a. Military judges are certified to be qualified for duty as a military judge by The Judge
Advocate General (TJAG) of the armed force of which such military judge is a member.\textsuperscript{12}
   Military judges may perform judicial duties only when he/she is assigned and directly
   responsible to service TJAGs.\textsuperscript{13}
   b. Commission military judges are nominated by the service TJAGs for Commission
duty.\textsuperscript{14} The Military Commission Trial Judiciary consists of a pool consisting of the Chief Trial
Judge and other nominated Military Judges.\textsuperscript{15} The only role of the Department of Defense in
regard to Commission judges is to designate the Chief Trial Judge from the pool of Military
Judges nominated by TJAGs\textsuperscript{16} and provide the requisite logistical support for trials. Once a case
is referred for trial, the Chief Trial Judge details the presiding Military Judge.\textsuperscript{17}

6. Independence of the Trial Judiciary.
   a. It has long been a tenet of American law that an independent trial judiciary is essential
to any system of justice. It is elementary that “a fair trial in a fair tribunal is a basic requirement
trial is an impartial judge. See ibid.; Tumey v. Ohio, 273 U. S. 510, 532 (1927).

\textsuperscript{11} The government waived Oral Argument: “The Commission can decide this matter without oral argument, as the
Defense has failed to meet their initial burden. See Military Commissions Trial Judiciary Rule of Court 3.9(a). If
the Commission grants the Defense an opportunity to present oral argument, however, the Prosecution requests an
opportunity to do the same.” See Government Response To Defense Motion To Dismiss For Unlawful Influence on
Trial Judiciary, filed 13 February 2015 (AE 343A), Para. 8.
\textsuperscript{12} Article 26(b), UCMI, 10 U.S.C. § 826b.
\textsuperscript{13} Article 26c, UCMI, 10 U.S.C. § 826c.
\textsuperscript{14} R.M.C. 503(b)1.
\textsuperscript{15} R.M.C. 503(b)3.
\textsuperscript{16} R.M.C. 503(b)2.
\textsuperscript{17} R.M.C. 503(b)1.
b. In *United States v. Weiss*, 510 U.S. 163 (1994), the United States Supreme Court recognized the importance of the statutory scheme designed to protect the independence of Military Judges by shielding them from the authority of the convening officer. The Court held:

Article 26 places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer. 10 U. S. C. § 826. Rather than exacerbating the alleged problems relating to judicial independence, as petitioners suggest, we believe this structure helps protect that independence. Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. By placing judges under the control of Judge Advocates General, who have no interest in the outcome of a particular court-martial, we believe Congress has achieved an acceptable balance between independence and accountability. 18

7. Unlawful Influence.

a. The Military Commission Act (MCA) prohibits Unlawful Influence. 19 The Act prohibits such influence regardless of source and provides greater protection than the Uniform Code of Military Justice (UCMJ)20 prohibition of Unlawful Command Influence (UCI).

b. Although the MCA provision is more expansive than the UCMJ, extensive UCI litigation in military courts provides a useful framework in analyzing the issue.

c. Unlawful Command Influence is the improper use, or perception of use, of superior authority to interfere with the court-martial process. See Gilligan and Lederer, COURT-MARTIAL PROCEDURE, Volume 2 §18-28.00 (2d Ed. 1999). 21

---

21 No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case. Article 37(a), UCMJ, 10 U.S.C. § 837(a) (2012).
d. Unlawful Command Influence is the "mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). Article 37, of the UCMJ was enacted by Congress to prohibit commanders and convening authorities from attempting to coerce, or by unauthorized means, influence the action of a court-martial, or any member thereof in reaching the findings or sentence in any case. Article 37(a), UCMJ.

e. UCI can manifest in a multitude of different situations and can affect the various phases of the court-martial process. See *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). Furthermore, "[t]he term 'unlawful command influence' has been used broadly in our jurisprudence to cover a multitude of situations in which superiors have unlawfully controlled the actions of subordinates in the exercise of their duties under the UCMJ." *United States v. Hamilton*, 41 M.J. 32, 36 (C.M.A. 1994).

f. Unlawful Command Influence can manifest itself in one of two ways either through actual UCI or apparent UCI. The R.T.M.C. specifically warns against the appearance of unlawful influence: "all persons...should be sensitive to the existence, or appearance, of unlawful influence, and should be vigilant and vigorous in their efforts to prevent it." Therefore, even if there is no actual UCI, there may still be apparent UCI, and the military judge must take affirmative steps to ensure that both forms of potential UCI are eradicated from the court-martial in question. *United States v. Lewis*, 63 M.J. 405, 416 (C.A.A.F. 2006).

g. The "appearance of unlawful command influence is as devastating to the military as the actual manipulation of any given trial." *Lewis*, 63 M.J. at 407. Thus, the disposition of an issue involving UCI, once it has been raised, is insufficient if it fails to take into full consideration even the mere appearance of UCI. *Id* at 416. The question of whether there is apparent UCI is determined "objectively." *Id*. This objective test for apparent UCI is similar to

---

22 R.T.M.C. Chapter 1, p. 1-4.
the tests that are applied in determining questions of implied bias of court members or in reviewing challenges to military judges for an appearance of a conflict of interest. *Id.*

Specifically, the Court must focus on the “perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public.” *Id.* Therefore, the central question to ask is whether, an “objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding.” *Id.*

h. In *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999), the U.S. Court of Appeals for the Armed Forces (C.A.A.F.) provided an analytical framework applicable to cases of UCI. The Court held that the initial burden is on the defense to raise the issue of UCI. The burden is “low,” but it is more than mere allegation or speculation. The quantum of evidence required to meet this burden, and thus raise the issue of UCI is “some evidence.” *Biagase*, 50 M.J. at 150.

Elaborating on this rule C.A.A.F. has held that the defense must show facts which, if true, would constitute UCI, and it must show that such evidence has a “logical connection” to the court-martial at issue in terms of potential to cause unfairness in the proceedings. Again, if the defense shows “some evidence” of such facts, then the issue is “raised.” *United States v. Stoneman*, 57, M.J. 35, 41 (C.A.A.F. 2002).

i. Once the issue has been raised, the burden then shifts to the government. The government may show either that there was no UCI, or that any UCI would not taint the proceedings. If the government elects to show that there was no UCI, then it may do so either by disproving the predicate facts on which the allegation of UCI is based, or by persuading the Military Judge that the facts do not constitute UCI. The government may choose not to disprove the existence of UCI, but prove that it will not affect these specific proceedings. The government
must meet their burden of beyond a reasonable doubt, despite which tactic they choose. Stoneman, 57 M.J. at 41 (citing Biagase, 50 M.J. at 151).

j. If actual or apparent UCI is found to exist, the Military Judge “has broad discretion in drafting a remedy to remove the taint of unlawful command influence,” and such a remedy will not be reversed, “so long as the decision remains within that range.” United States v. Douglas, 68 M.J. 349, 354 (C.A.A.F. 2010). The judge may consider dismissal of charges when the accused would still be prejudiced despite remedial actions, or if no useful purpose would be served by continuing the proceedings. Douglas, 68 M.J. at 354. C.A.A.F. elaborated: “However, we have noted that when an error can be rendered harmless, dismissal is not an appropriate remedy. Dismissal is a drastic remedy and courts must look to see whether alternative remedies are available.” Id. Indeed, the Court went on to say that, “this Court has recognized that a military judge can intervene and protect a court-martial from the effects of unlawful command influence.” Id. Finally, the Military Judge should attempt to take proactive, curative steps to remove the taint of UCI, and therefore ensure a fair trial. Id. C.A.A.F. has long recognized once UCI is raised “…it is incumbent on the military judge to act in the spirit of the UCMJ by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings.” United States v. Gore, 60 M.J. 178, 186 (C.A.A.F. 2004) (citations omitted).

8. Discussion.

a. The Commission considered providing a detailed chronology as to what caused the delays over the last year that appear to concern the Convening Authority. However, to do so would be a tacit admission the Commission needs to explain its rulings to the Convening Authority. Such an admission would compromise the independence of the Commission.
b. Continuances and pace of litigation are in the sole discretion of the trial judge.23 “[A] judge is ultimately responsible for the control of his or her court and the trial proceedings…[p]roper case management during a trial…is encompassed within that responsibility.” United States v. Vargas, 74 M.J. 1, 8 (C.A.A.F. 2014) (internal quotations and citations omitted). This is a complicated international terrorism case with a joint trial of five accused under a new statutory scheme with an unprecedented amount of classified evidence. It will take time to try.24

c. The Commission is at a loss as to how assigning the military judge at GTMO will make the litigation proceed at a faster pace. Hearings require the presence of counsel and support personnel, apparently none of whom are being assigned to the Naval Station. Unless the intent is to make the military judge ignore his duty to exercise discretion under the law and instead move the case faster to shorten his stay at GTMO, the purported change will not, and cannot, have its intended effect. Moreover, any legitimate denial of delay requested by the Defense immediately gives rise to an issue as to whether the military judge acted in the interests of justice or personal convenience. Though the DEPSECDEF may not have intended for the Military Judge to adjust his trial schedule to limit his personal inconvenience caused by living at GTMO, his actions did create the appearance of that intent.25 An “objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding.”26

d. Applying the Biagase analysis, defense has met its initial burden to show that the actions of the DEPSECDEF raise the issue of Unlawful Influence by creating the appearance of

22 R.M.C. 707(h) HE, R.M.C. 801(a)(3)
23 As a point of reference the trial of Zacarias Moussaoui began 2 January 2002 and concluded 4 May 2006.
24 AE 343, Attachments D, F and G.
25 United States v. Lewis, 63 M.J. 405, 416 (C.A.A.F. 2006)
improper pressure on the military judge to adjust the pace of the litigation. There is no dispute that the actions of the DEPSECDEF did take place. As discussed earlier, the actions do affect the proceedings as they are directed at the military judge in the exercise of his sole discretion. The government has failed to prove beyond a reasonable doubt that the Unlawful Influence will not affect the proceedings.

9. Holding. The actions by the DEPSECDEF, on the recommendations of the Convening Authority, constitute, at least the appearance of, an unlawful attempt to pressure the Military Judge to accelerate the pace of litigation and an improper attempt to usurp judicial discretion; thereby, compromising the independence of the Military Judge. As such, Change 1 to R.T.M.C. violates 10 U.S.C. §949b.

10. Remedy

a. Remedies for unlawful command influence are designed in order to cure the prejudice. *United States v. Salyer*, 72 M.J. 415, 427 (C.A.A.F. 2012). The Commission has broad discretion as to remedies for unlawful influence. Dismissal is one and has been requested by the defense. The Commission believes taint from the DEPSECDEF and Convening Authority’s actions can be remedied and as such does not believe such a drastic remedy is needed at this time under the current facts.

b. Another option would be to rule that Change 1 is an unenforceable illegal order. However, leaving Change 1 in place, but unenforced, could create the perception that subsequent rulings on continuances and the trial schedule are influenced by the specter of Change 1. Public confidence in the independence of the trial judge would be compromised. Accordingly, the Commission believes that leaving the order in place but unenforced will not completely eradicate the unlawful influence.
Ruling on Defense Motion to Dismiss for Unlawful Influence on Trial Judiciary (9/11 Case) (Judge Pohl) (25 February 2015) (Page 10 of 10)

UNCLASSIFIED//FOR PUBLIC RELEASE

c. The Commission believes the only real remedy is to return to the status quo ante before the issuance of Change 1. Accordingly, the Commission orders ABATEMENT of the proceedings in this case until Change 1 to R.T.M.C. is rescinded by proper authority. If such rescission is not done in a timely manner, the Commission will consider other remedies.

So ORDERED this 25th of February, 2015.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge

Appellate Exhibit 343C
Page 10 of 10
Appendix O

Bench Ruling on
Executive Branch's Unlawful Influence on the Trial Judiciary
(al Nashiri USS Cole Case)
(2 March 2015)
[The R.M.C. 803 session was called to order at 1030, 2 March 2015.]

MJ [Col SPATH]: These commissions are called to order.

All the parties present before the recess are again present

Major Jackson, congratulations. I know you pinned

on.

ADDC [Maj JACKSON]: Thank you, sir.

LDC [MR. KAMMEN]: I was going to mention that on the

record, that Captain Jackson is now Major Jackson.

MJ [Col SPATH]: Indeed. All right.

The written ruling is not in final form. The written

ruling will go in as the next appellate exhibit in the 332

series. I anticipate that will be published -- not published

to the public until it goes through the review process, but it

will be published reasonably soon because it’s almost done.

I’m going to go through my ruling in shorter form than the

written version and without many of the citations.

The accused is charged with multiple offenses in

violation of the Military Commissions Act of 2009. The

defense filed AE 332 alleging the convening authority,

Mr. Ary, unlawfully influenced the military judges of the

military commission trial judiciary by having DEPSECDEF, the

Honorable Robert O. Work, change paragraph 6-2 of the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5873
Bench Ruling on Executive Branch's Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 2 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Regulation for Trial by Military Commissions to make military
2 commissions the exclusive duty of the military judges assigned
3 to the trial judiciary; and moreover directed they shall be
4 issued assignment orders for duty at the venue where the
5 military commissions are to be convened.
6 The defense in that motion requested the charges and
7 specifications be dismissed with prejudice. In the
8 alternative they requested abatement. The prosecution
9 responded in AE 332A, and they argued that Change 1 is not an
10 example of unlawful influence. The defense replied.
11 Testimony and the motion was heard between 23 and 27 February
12 2015.
13 The following facts were demonstrated by a
14 preponderance of the evidence:
15 A, on 10 July 2014 Colonel James Pohl, Chief Judge
16 Military Commissions Trial Judiciary, detailed me as the
17 military judge in the case of United States v. al Nashiri.
18 B, on or about October 1, 2014 Mr. Ary was appointed
19 as the convening authority for the military commissions. He
20 also serves as the Director of the Office of the Convening
21 Authority.
22 C, Mr. Ary believed his dual role of designated
23 convening authority and director gave him the authority to and

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5874
Bench Ruling on Executive Branch's Unlawful Influence on the Trial Judiciary - (at Nashiri USS Cole Case) (2 March 2015) (Page 3 of 26)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

required him to both resource the trial judiciary and recommend changes in the military commission process to DEPSECDEF for implementation. In this instance the recommended changes -- Change 1, as I refer to it throughout -- impacted the assignment location and exclusivity of duty of the currently detailed commission trial judge or judges.

Soon after being appointed as the convening authority, Mr. Ary did an assessment of the adequacy of resources in the Office of the Chief Prosecutor, Office of the Chief Defense Counsel, and Office of the Trial Judiciary.

During the assessment Mr. Ary became concerned with the pace of litigation in commission cases. As a result of his assessment, Mr. Ary concluded the pace of litigation in commission cases was too slow. He also identified resourcing issues.

Concerned with the pace of litigation and to improve the trial judges' availability for hearings, Mr. Ary formulated a concept of both making the trial of commissions cases the judges' full-time duty and moving them to Guantanamo Bay Naval Station. This concept became Change 1.

The final proposed and signed change to the Regulation for Trial by Military Commission consisted of two

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5875
Bench Ruling on Executive Branch’s Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 4 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 paragraphs. 6-2(a) states, "The Chief Trial Judge will detail
2 a military judge for the military commissions trial judiciary
3 when charges are referred. Once detailed, military
4 commissions shall be the military judge’s exclusive judicial
5 duty until adjournment, final disposition of charges, recusal,
6 replacement, or reassignment by the appropriate Judge Advocate
7 General. A detailed military judge shall be issued assignment
8 orders for duty at the venue where the military commissions
9 are to be convened."
10 And then paragraph 6-2(b) stated, "A detailed
11 military judge may perform such other duties as are assigned
12 by or with the approval of the appropriate Judge Advocate
13 General, provided that such other duties don’t conflict with
14 the judicial duties as detailed military judge for military
15 commissions."
16 The pre-Change 1 version of paragraph 6-2 did not
17 make military commission trials the exclusive judicial duty of
18 military judges, and it did not require the issuance of
19 assignment orders to detailed military judges to the venue
20 where military commissions are to be convened.
21 Mr. Ary conferred with legal advisors assigned to his
22 office concerning Change 1. Mr. Ary did not staff Change 1
23 with The Judge Advocates General, hereafter TJAGs, of the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5876
Various services. Mr. Ary did not staff Change 1 or discuss
Change 1 with the Chief Trial Judge of the Military
Commissions prior to its implementation.
Mr. Ary knew that Change 1, if approved and signed by
DEPSECDEF, might impact currently detailed and assigned
commission judges. By impact them, he understood they might
not continue as currently detailed and assigned judges in a
case they were currently working. He recognized there might
also be an impact on the pool of commission judges nominated
by service TJAGs. The only coordination of Change 1 outside
the Office of the Convening Authority by Mr. Ary was with the
DoD general counsel’s office, specifically Mr. Steve Preston,
the DoD general counsel.
Sometime prior to 21 November 2014, Mr. Ary directed
Ms. Wilkins, Director, Office of the Court Administration,
Office of Military Commission, to gather information on days
on the record for FY 2013 and ’14 for each of the currently
referred commission cases. The reports attached to
Ms. Wilkins’ e-mail to Mr. Ary were organized by individual
case and judge. When this information was ultimately
submitted to DEPSECDEF, it was consolidated with no reference
to individual judges. The information was used to support the
proposed Change 1.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT
5877
On 21 November '14 Ms. Wilkins e-mailed Mr. Ary. The e-mail subject was "Hours and Numbers on the record." The attachment was On the Record 2014.xlsx, and the e-mail stated, quote, "Sir, per your request, please see the attached document. Sorry it took so long to get this information to you. It took longer than I had anticipated."

The spreadsheet On the Record 2014 contains the reports in AE 3320, Product 112, Bates numbers 127556-127559. The reports are broken out by individual case and individual judge. The spreadsheet provides information on hours of audio, page count for the transcript, and days on the record. On 24 November 2014, Office of the Court Administration, followed up on the above reports by e-mail, stating, quote, "Ms. Wilkins asked me to adjust the numbers on the chart that she sent you this past Friday. These updates were to account for classified Military Commission Rule of Evidence 505(h) sessions held in the pending commissions cases."

On December 2014 Mr. Ary personally approved an action memo that was forwarded to DEPSECDEF as evidenced by his initials. The action memo states in part, quote, "I believe the status quo does not support the pace of litigation necessary to bring these cases to a just conclusion. I
1 believe we must realign resources and reposition the trial
2 judiciary to make it a full-time onsite duty for the judges
3 assigned to military commissions." It also states, "I believe
4 these actions will accelerate the pace of litigation"
5 Finally, Mr. Ary recommended what ultimately became
6 Change 1. On 9 December 2014 Mr. Ary personally approved an
7 executive summary, also forwarded to DEPSECDEF. The executive
8 summary starts with a conclusion of his assessment of the
9 commission process and includes the statement, "I am convinced
10 we must take action to realign resources and better position
11 the commission to achieve the efficient, fair, and just
12 administration of ongoing and future military commissions."
13 The executive summary details the days each
14 commission was on the record in FY '14 and '13 along with
15 actual hours on the record for each commission. The paragraph
16 includes the statement, "In other words, during FY '14 the
17 commissions as a whole averaged less than three days of
18 hearings each month and an average of less than three and a
19 half hours on the record for the days on which hearings were
20 held. An analysis of the FY '13 hearing data yields a similar
21 pattern." Additionally, quote, "If you approve my
22 recommendation, which includes Change 1, I believe the pace of
23 litigation will accelerate." The executive summary includes

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5879
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the recommendation that ultimately became Change 1.
2 On 7 January 2015 DEPSECDEF approved the
3 recommendation of Mr. Ary as to Change 1. On 26 February ’15
4 DEPSECDEF rescinded Change 1 in response to the ruling on a
5 similar motion in U.S. v. Khalid Shaikh Mohammad.
6 Mr. Ary did provide credible testimony before the
7 commission. Detailing military judges -- and this is the law
8 that applies to the motion, "A military judge presides over
9 each military commissions case. The assignment of a military
10 judge to a commission case is the act of detailing. A
11 military judge shall be detailed to each military commission
12 under this chapter, SECDEF shall prescribe regulations
13 providing for the manner in which military judges are so
14 detailed to military commissions."
15 10 U.S.C. 948j(e) requires consultation with the
16 service TJAGs should a third party desire to assign other
17 duties beyond presiding over a military commission to a
18 commissioned military judge. A commissioned officer, as
19 certified to be qualified for duty as a military judge of a
20 military commission under this chapter, may perform such other
21 duties as are assigned to such officer by or with the approval
22 of the Judge Advocate of the armed force of which such officer
23 is a member.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5880
10 U.S.C. 948j(f) makes it clear the convening authority cannot formally or informally comment on how commission judges preside over the case to which they're detailed. The convening authority of a military commission may not prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge detailed to the military commission which relates to the judge's performance of duty as a military judge.

In the Rules for Military Commissions, Secretary of Defense gave substance to the statute, "Secretary or his designee selects a chief trial judge from the pool of military judges certificated by the service TJAGs. Secretary of Defense or designee shall select a military judge from the pool to serve as the chief trial judge for the military commissions. A military judge shall be detailed to preside over each military commission by the chief trial judge from a pool of certified trial judges nominated for that purpose by the TJAGs of each military department. It is within the discretion of the chief trial judge to detail and remove trial judges from commission cases."

The Rule for Military Commission does not bestow this detailing or removal of authority to the convening authority, the DEPSECDEF, or even the service TJAGs. The United States
Bench Ruling on Executive Branch’s Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 10 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Supreme Court in United States v. Weiss recognized the
2 importance of this statutory scheme designed to protect the
3 independence of military judges by shielding them from the
4 authority of the convening officer.
5 Here the chief trial judge is responsible for the
6 supervision and administration of the military’s trial
7 judiciary. The chief trial judge is the Secretary’s sole
8 designee for these matters. The convening authority, as
9 Director, Office of the Convening Authority, has the
10 responsibility to ensure the trial judiciary is properly
11 staffed with a chief clerk of the trial judiciary and any
12 additional staff necessary to perform the various support
13 roles and duties necessary to maintain the proper and
14 efficient administration of the trial judiciary, and to assign
15 other personnel necessary to facilitate military commissions.
16 The convening authority’s sole interaction with the
17 trial judiciary is as a provider of resources, not a creator
18 of requirements, not a supervisor of trial judges or staff,
19 and most certainly not an entity that sets the pace of
20 litigation.
21 This next section talks about unlawful influence.
22 The 2009 Military Commissions Act prohibits actual or
23 attempted unlawful influence. The Act prohibits such
Bench Ruling on Executive Branch’s Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 11 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 influence, regardless of source, and actually provides greater
2 protection than the Uniform Code of Military Justice, which
3 prohibits unlawful command influence. Although the 2009 MCA
4 provision is more expansive than the UCMJ, extensive UCT
5 litigation in military courts provides a useful framework to
6 analyze the issue in front of us.
7 UCI is the improper use, attempted use, or perception
8 of use of superior authority to interfere with a court-martial
9 process. UCI is seen as the mortal enemy of military justice.
10 Article 37 of the UCMJ was enacted by Congress to prohibit
11 commanders and convening authorities from attempting to coerce
12 or by any unauthorized means influence the action of a
13 court-martial or any member thereof in reaching the findings
14 or sentence in any case. UCI can manifest itself in a
15 multitude of different situations and it can affect the
16 various phases of the court-martial process.
17 Furthermore, the term "unlawful command influence"
18 has been used broadly in our jurisprudence to cover a
19 multitude of situations in which superiors have unlawfully
20 controlled the actions of subordinates in the exercise of
21 their duties under the UCMJ. Unlawful command influence can
22 manifest itself in one of two ways, either actual unlawful
23 command influence or apparent unlawful command influence.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5883
The Regulation for Trial by Military Commissions specifically warns against the appearance of unlawful influence. All persons should be sensitive to the existence or appearance of unlawful influence and should be vigilant and vigorous in their efforts to prevent it. So therefore even if there is no actual UCI or UI, there may still be apparent unlawful influence, and the military judge must take affirmative steps to ensure that both forms of potential unlawful command influence are eradicated from the court in question.

The appearance of unlawful command influence is as devastating to the military as the actual manipulation of a given trial. Thus, the resolution of an issue involving unlawful command influence, once it has been raised, is insufficient if it fails to take into full consideration even the mere appearance of unlawful command influence.

The question of whether there is apparent unlawful command influence is determined objectively. This objective test for apparent unlawful command influence is similar to tests that are applied in determining questions of implied bias of court members or in reviewing challenges to military judges for an appearance of a conflict of interest.

Specifically the court must focus on the perception
Bench Ruling on Executive Branch's Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 13 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 of fairness in the military justice system as viewed through
2 the eyes of a reasonable member of the public. The central
3 question to ask is whether an objective, disinterested
4 observer fully informed of all the facts and circumstances
5 would harbor a significant doubt about the fairness of the
6 proceedings.
7
8 In U.S. v. Biagase the United States Court of Appeals
9 for the Armed Forces provides an analytical framework
10 applicable to cases of unlawful command influence, and the
11 court held the initial burden is on the defense to raise the
12 issue. The burden is low, but it's more than mere allegation
13 or speculation. The quantum of evidence required to meet this
14 burden and thus raise the issue of unlawful command influence
15 is some evidence. Elaborating on this rule, C.A.A.F. held the
16 defense must show facts which, if true, would constitute
17 unlawful command influence, and it must show that such
18 evidence has a logical connection to the court-martial at
19 issue in terms of potential to cause unfairness in the
20 proceedings.
21
22 Again, if the defense shows some evidence of such
23 facts, then the issue is raised. Once the issue has been
24 raised, the burden shifts to the government. The government
25 may show either there was no unlawful command influence or

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5885
1 that any unlawful command influence would not taint the
2 proceedings.
3 If the government elects to show there was no
4 unlawful command influence, it may do so either by disproving
5 the predicate facts on which the allegation of unlawful
6 command influence is based or by persuading the judge that the
7 facts do not constitute unlawful command influence. The
8 government may choose not to disprove the existence of
9 unlawful command influence, but instead prove that the
10 unlawful influence will not affect the specific proceedings at
11 issue. No matter which tactic the government chooses, the
12 government’s burden is beyond a reasonable doubt.
13 If actual or apparent unlawful influence is found to
14 exist, the military judge has broad discretion in crafting a
15 remedy to remove the taint of unlawful command influence, and
16 such remedy will not be reversed so long as the decision
17 remains within that range. The judge may consider dismissal
18 of charges when the accused would still be prejudiced despite
19 remedial action or if no useful purpose would be served by
20 continuing the proceedings. However, when an error can be
21 rendered harmless, dismissal is not an appropriate remedy.
22 Dismissal is a drastic remedy, and courts must look to see
23 whether alternative remedies are available.
Indeed, the court went on to say, "This court has recognized a military judge can intervene and protect a court-martial from the effects of unlawful command influence. The military judge should attempt to take proactive curative steps to remove the taint of unlawful command influence and ensure a fair trial."

C.A.A.F. has long recognized once unlawful influence is raised, it is incumbent on the military judge to act in the spirit of the UCMJ by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the proceedings.

Let me move on to the discussion. The purpose of Change 1 was to accelerate the pace of litigation, and it was specifically predicated upon analyzing judicial performance.

Mr. Ary, although well intentioned, was concerned with influencing the process so that the various commission cases were concluded at an accelerated pace.

Decisions on continuances and pace of litigation are within the sole discretion of the trial judge. A judge is responsible for the control of his or her court and the trial proceedings. Proper case management during a trial is encompassed within that responsibility.

This is a complicated international terrorism case.
Bench Ruling on Executive Branch’s Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 16 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 under a relatively new statutory scheme with an unprecedented amount of classified evidence. There are numerous factors that impact the pace of litigation, not one of which would be affected by relocating the trial judiciary.

5 In the face of what was Change 1, any legitimate denial of a delay requested by the defense immediately gives rise to an issue as to whether the military judge acted in the interests of justice, personal convenience, or an acknowledgment of the convening authority’s belief that the pace of litigation is too slow. Even though the DEPSECDEF may not have intended for the military judge to adjust his trial schedule to limit any personal inconvenience caused by living at GTMO, his actions created the appearance of that intent.

14 An objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding.

17 The convening authority was aware the implementation of Change 1 could have the direct effect of removing an otherwise properly detailed military judge from presiding over a military commission case to which they were currently detailed. He also knew the change had the potential to actually impact the available pool of judges who were available to be detailed to these cases.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5888
Bench Ruling on Executive Branch's Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 17 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 The convening authority in his e-mail to the various
2 service TJAGs expressed his desire that the currently detailed
3 military judges would remain on their cases. However, this
4 demonstrates the convening authority was well aware of the
5 potential impacts of Change 1. There is no evidence these
6 outcomes were made known to the general counsel or the
7 DEPSECDEF.
8
9 The defense has demonstrated that the motivation
10 behind Change 1 was to ensure that trial judges would move
11 cases along faster. This is evidenced by the history behind
12 the change, the supporting documentation gathered in
13 finalizing the recommendation, and the final package that was
14 sent to DEPSECDEF for his signature. The convening
15 authority's role is well defined in relation to the military
16 commission trial judiciary.
17
18 The Director, Office of Convening Authority is
19 critical in relation to resourcing. Resourcing is defined and
20 clearly does not include the ability to impact the location or
21 duties of currently assigned or detailed commission trial
22 judges. Mr. Ary's recommended Change 1 was outside of his
23 role as the convening authority for commission cases. He
24 clearly stepped into the arena of the Chief Trial Judge of the
25 Military Commissions and the service TJAGs, and he did this

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5889
Bench Ruling on Executive Branch’s Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 19 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 without any coordination or discussion with any of them.
2 Additionally, the language of Change 1 even conflicts with the
3 language of the 2009 Military Commissions Act and the R.M.C.s
4 related to the detailing of commission judges, Regulation for
5 Military Commissions.
6 The recommendation, if approved, would have the very
7 real potential to impact an outsider's view of the objectivity
8 of the trial judiciary, future rulings and decisions made by
9 any trial judge, whether it involved Change 1 or not, and the
10 fairness of the overall system. Any objective outsider
11 watching the process may well have concerns that an impacted
12 trial judge is making decisions in a manner that would allow
13 them to depart GTMO and return to their previously assigned
14 duty locations. They would easily wonder if decisions were
15 made in the interest of speed, rather than a just, fair
16 outcome.
17 The convening authority's gathering data to document
18 how much time a particular military judge spent on the record
19 in a commission case to show his dedication to moving the pace
20 of litigation forward at an acceptable level can be viewed as
21 a commentary on the efficiency with which the military judge
22 exercises one of his functions in the conduct of the
23 proceedings.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5890
Bench Ruling on Executive Branch’s Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 19 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 His gathering of data occurred at the same time
2 another commission judge made a comment about having conflicts
3 with his two jobs. While possibly coincidental, again, an
4 objective observer would have concerns about the timing of
5 these events. Whether purposeful or not, the timing of the
6 request for reports and the issue in another commission case
7 that had been highlighted by Mr. Ary’s staff gives rise to a
8 strong impression that Mr. Ary was requesting information
9 specifically about commissions trial judges and their
10 efficiency. This improper report or comment is compounded in
11 reporting this data in a repackaged format to DEPSECDEF in the
12 executive summary in support of the need for the change.
13 This action directly impacted the trial judiciary and
14 directly impacted the appearance of the independence of that
15 judiciary. In fact, any objective observer would wonder if
16 this was a punitive measure taken against trial judges and if
17 it would impact their substantive decisions in order to cause
18 the relevant case to move more quickly to conclusion. This
19 appearance issue is solidified as the trial judges wore the
20 only entities the convening authority recommended and
21 DEPSECDEF directed to relocate.
22 In applying the Biagase analysis, the defense more
23 than met its initial burden to show some evidence that the
Bench Ruling on Executive Branch's Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 20 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 action of the convening authority and DEPSECDEF raised the
2 issue of unlawful influence by attempting to accelerate the
3 pace of litigation and creating the appearance of improper
4 pressure on the military judge to adjust the pace of that
5 litigation.
6 There is no dispute the convening authority
7 formulated Change 1, did not staff Change 1 as proposed
8 outside his circle of legal advisors in the Office of the
9 Convening Authority and the general counsel, recommended the
10 change to DEPSECDEF, and that DEPSECDEF approved Change 1. As
11 discussed earlier, the actions would affect the proceedings as
12 they were directed solely at the military judge in these
13 proceedings in the exercise of his sole discretion in managing
14 the pace of litigation.
15 So finding that Mr. Ary set out to impact the pace of
16 litigation with a likely acknowledgment -- I'm sorry, with
17 acknowledgment of a likely impact on detailed judges, we turn
18 to see if the government presented any evidence to demonstrate
19 no unlawful influence or that the actual attempted or apparent
20 unlawful influence will not taint the proceedings, or the
21 taint was removed by corrective action taken by the
22 government.
23 The government chose to present no evidence when

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5892
Bench Ruling on Executive Branch's Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 21 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 offered the opportunity to do so. The government called no
2 witnesses and they offered no additional documentary evidence.
3 The government did not marshall any evidence to disprove the
4 facts or their consequences if implemented
5 There is no doubt the action of the convening
6 authority and his legal advisors at a minimum appeared to
7 attempt to unlawfully influence the military judge in this
8 proceeding.
9 The commission certainly doesn't understand how
10 assigning a military judge at GTMO would make the litigation
11 proceed at a faster pace. Hearings in this capital-referred
12 case require the presence of counsel, including learned
13 counsel, and a large number of support personnel, almost none
14 of whom are or, in the case of the learned counsel, can be
15 permanently assigned to GTMO.
16 Unless the intent is to make the military judge
17 ignore his duty to exercise discretion under the law and
18 instead move the case faster to shorten his stay at GTMO, the
19 purported change will not and cannot have its intended effect.
20 Moreover, any legitimate denial of delay requested by the
21 defense immediately gives rise to an issue as to whether the
22 military judge acted in the interest of justice or personal
23 convenience.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5893
Though the convening authority, in developing the
recommended course of action worked to obtain DEPSECDEF
approval, and ultimately DEPSECDEF approving the change may
not have intended for the military judge to adjust his trial
schedule to limit his personal inconvenience caused by living
at GTMO, these actions did create the appearance of such an
intent. An objective disinterested observer fully informed of
all the facts and circumstances would harbor a significant
doubt about the fairness of the proceeding.

As to whether the influence was removed, the
government points to the rescission of Change 1. This only
removes part of the appearance of unlawful influence. With
Change 1 removed, the specific effort to speed the pace of
litigation has been removed. However, the actions of the
convening authority outside of his appropriate field of action
cast a cloud over the independence of the military commission
trial judiciary.

The convening authority in this case believed he had
the responsibility to recommend action to his superior,
DEPSECDEF, that would affect the location, duty assignment of
the detailed trial judge. He went about making such a
recommendation knowing it might result in the loss of this
trial judge assigned to this case. As an experienced military
Bench Ruling on Executive Branch's Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 23 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 attorney, he should have known this was an unwarranted
2 intrusion into the sole province of the trial judge. A
3 disinterested member of the public may always wonder whether
4 this convening authority meant to have this particular judge
5 removed or if it was just an unintended consequence. No
6 matter, it leaves doubt as to the independence of the military
7 trial judiciary.
8 Remedy: As noted in Douglas, the military judge has
9 broad discretion in crafting a remedy to remove the taint of
10 unlawful influence. In crafting a remedy, the commission
11 takes note of the 26 February 2015 action by DEPSECDEF to
12 rescind Change 1. DEPSECDEF did also require any future
13 proposed change to the regulation of rules to be staffed with
14 the Office of the General Counsel, the various DoD components,
15 the service TJAGs, and the trial judiciary as appropriate.
16 This does not remove some of the unlawful influence
17 from this case; however, the commission also notes the
18 convening authority testified if presented with similar facts
19 again in the future he would act similarly. He believed his
20 recommendation was appropriate and, thus, DEPSECDEF's action
21 proper.
22 Dismissal with or without prejudice is a drastic
23 remedy, and it's not appropriate at this juncture. Lesser

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5895
Bench Ruling on Executive Branch’s Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 24 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 measures can be taken to remove the taint of unlawful
2 influence from this military commission. DEPSECDEF has taken
3 some action to purge the taint of unlawful influence, and the
4 commission does find the convening authority did not act in
5 bad faith in making the recommendation to Change -- which
6 became Change 1.
7 However, the actions of the convening authority and
8 his legal staff are central to the cause of the unlawful
9 influence. In order to purge this military commission of the
10 possibility of future of unlawful actions, the current
11 convening authority, Mr. Vaughn Ary, and his staff of legal
12 advisors, Mr. Mark Toole, Ms. Alyssa Adams, Commander Raghav
13 Kotval and Captain Matthew Rich, are disqualified from taking
14 any future action in this case. They are disqualified from
15 all decisions related to this case and from providing
16 recommendations specific to this case from this point forward.
17 Similar to disqualifications of a convening authority
18 in the traditional military justice scenario, Secretary of
19 Defense or his designee will appoint a new convening authority
20 who will seek legal advice from a legal staff outside the
21 Office of Military Commission, Office of the Convening
22 Authority.
23 Furthermore, to ensure all taint from unlawful

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5896
Bench Ruling on Executive Branch’s Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 25 of 28)

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1. influence is expunged, the trial judge needs to affirmatively
2. demonstrate there is no pressure to accelerate the pace of
3. litigation or succumb to pressures of any convening authority.
4. To demonstrate this, any potential evidentiary session this
5. week is postponed until at least our next session on the
6. record.

Additionally, the current scheduled April hearing in
8. this case is truncated by one week. This is to further
9. demonstrate the pace and timing of litigation is solely within
10. my discretion and to demonstrate that this detailed trial
11. judge feels no pressure to accelerate the pace of this
12. litigation. It is imperative that no similar efforts be
13. undertaken in the future to improperly influence the trial
14. judiciary, as that will likely lead to a more drastic remedy
15. in the future. So accordingly, AE 332 is granted in part and
16. denied in part.

After working on and finalizing that ruling, I then
18. worked on -- I don't have rulings to read to you, but I can
19. give you at least some -- you're going to get written rulings
20. that will confirm this with a couple other motions that are
21. out there.

First, with regard to 205 -- I know we still have
22. 205, the large motion, outstanding. I don't have a ruling on

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

5897
that yet. I anticipate having a ruling on that reasonably
soon, and I know it's been out there for a while, and for that
I apologize. However, 205BB, a motion to reargue -- a motion
to reargue, and 205FF, a motion to supplement additional
pleadings, those are going to be denied. I anticipate you'll
see those reasonably quickly, and then the ruling on 205 to
follow.

Another one that you're going to see very soon is
272D, a government reconsideration motion. I am not going to
reconsider. The motion to reconsider is denied. If you have
any questions about the order that's in place, you can talk to
the trial judiciary staff, and they'll be happy to assist in
what the order means, but I'm not going to reconsider that
order. And, again, that written ruling should be on its way.
I hope we get it done this week. We're working hard to get
those rulings out in short order.

The unlawful influence motion took a lot of our time
and a lot of effort, and the commissions have been the subject
of other unlawful influence motions in the past, including the
disqualification of a legal advisor in the past. I realize it
was under an older Military Commissions Act. But I can't
stress enough in any practice the importance of an independent
judiciary and how improper it is for somebody to attempt to
Bench Ruling on Executive Branch’s Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 27 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1. impact the judiciary, comment on the pace of litigation with a
2. desire for it to go faster, and to take an action
3. notwithstanding the fact it could result in my being relieved
4. of my duties on this case because it gives the perception that
5. the convening authority either doesn't want the person on the
6. case or doesn't care if they leave the case, which is why the
7. relief is formulated the way it's formulated.

8. We're going to break for lunch. My plan is to come
9. back and begin to talk about the order we're going to take up
10. the remaining motions on the docket. Over the weekend I had
11. an e-mail through the trial judiciary. The defense wanted to
12. start with 333. The government wants to start with 331 and
13. the ones that impact how we're going to do the hearsay
14. motions. Part of that was due to the timing of the
15. evidentiary hearing at the end of the week, but we're not
16. doing that at the end of the week. So we'll probably go in
17. the order of the docket.

18. 333 is going to require a closed session. And I'm
19. going to try to do that this afternoon or early tomorrow so
20. that we do everything on the record while everybody's here,
21. and then we'll stop and try to do a closed session, like I
22. said, either late today or early tomorrow. I'm going to give
23. you all some time to gather your thoughts, work through the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

5899
Bench Ruling on Executive Branch’s Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015) (Page 29 of 28)

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ruling. The written ruling hopefully will be published in the
2 next few days, and I'd like to start at 1300 with the docket
3 that we have before us.
4 Trial Counsel, any other matters to take up before we
5 recess?
6 DCP [COL MOSCATI]: No, Your Honor.
7 MJ [Col SPATH]: Defense Counsel?
8 LDC [MR. KAMMEN]: No, sir.
9 MJ [Col SPATH]: All right. I'll see you all at 1300.
10 We're in recess.
11 [The R.M.C. 803 session recessed at 1113, 2 March 2015.]
12 [END OF PAGE]
Appendix P

Periodic Review Board Executive Order

(7 March 2011)

DRAFT
Executive Order 13567

Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force


By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force of September 2001 (AUMF), Public Law 107-40, and in order to ensure that military detention of individuals now held at the U.S. Naval Station, Guantánamo Bay, Cuba (Guantánamo), who were subject to the interagency review under section 4 of Executive Order 13492 of January 22, 2009, continues to be carefully evaluated and justified, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. Scope and Purpose. (a) The periodic review described in section 3 of this order applies only to those detainees held at Guantánamo on the date of this order, whom the interagency review established by Executive Order 13492 has (i) designated for continued law of war detention; or (ii) referred for prosecution, except for those detainees against whom charges are pending or a judgment of conviction has been entered.

(b) This order is intended solely to establish, as a discretionary matter, a process to review on a periodic basis the executive branch's continued, discretionary exercise of existing detention authority in individual cases. It does not create any additional or separate source of detention authority, and it does not affect the scope of detention authority under existing law. Detainees at Guantánamo have the constitutional privilege of the writ of habeas corpus, and nothing in this order is intended to affect the jurisdiction of Federal courts to determine the legality of their detention.

(c) In the event detainees covered by this order are transferred from Guantánamo to another U.S. detention facility where they remain in law of war detention, this order shall continue to apply to them.

Sec. 2. Standard for Continued Detention. Continued law of war detention is warranted for a detainee subject to the periodic review in section 3 of this order if it is necessary to protect against a significant threat to the security of the United States.

Sec. 3. Periodic Review. The Secretary of Defense shall coordinate a process of periodic review of continued law of war detention for each detainee described in section 1(a) of this order. In consultation with the Attorney General, the Secretary of Defense shall issue implementing guidelines governing the process, consistent with the following requirements:

(a) Initial Review. For each detainee, an initial review shall commence as soon as possible but no later than 1 year from the date of this order. The initial review will consist of a hearing before a Periodic Review Board (PRB). The review and hearing shall follow a process that includes the following requirements:

(1) Each detainee shall be provided, in writing and in a language the detainee understands, with advance notice of the PRB review and an unclassified summary of the factors and information the PRB will consider in evaluating whether the detainee meets the standard set forth in section 2 of this order. The written summary shall be sufficiently comprehensive to provide adequate notice to the detainee of the reasons for continued detention.
(2) The detainee shall be assisted in proceedings before the PRB by a Government-provided personal representative (representative) who possesses the security clearances necessary for access to the information described in subsection (a)(4) of this section. The representative shall advocate on behalf of the detainee before the PRB and shall be responsible for challenging the Government's information and introducing information on behalf of the detainee. In addition to the representative, the detainee may be assisted in proceedings before the PRB by private counsel, at no expense to the Government.

(3) The detainee shall be permitted to (i) present to the PRB a written or oral statement; (ii) introduce relevant information, including written declarations; (iii) answer any questions posed by the PRB; and (iv) call witnesses who are reasonably available and willing to provide information that is relevant and material to the standard set forth in section 2 of this order.

(4) The Secretary of Defense, in coordination with other relevant Government agencies, shall compile and provide to the PRB all information in the detainee disposition recommendations produced by the Task Force established under Executive Order 13492 that is relevant to the determination whether the standard in section 2 of this order has been met and on which the Government seeks to rely for that determination. In addition, the Secretary of Defense, in coordination with other relevant Government agencies, shall compile any additional information relevant to that determination, and on which the Government seeks to rely for that determination, that has become available since the conclusion of the Executive Order 13492 review. All mitigating information relevant to that determination must be provided to the PRB.

(5) The information provided in subsection (a)(4) of this section shall be provided to the detainee's representative. In exceptional circumstances where it is necessary to protect national security, including intelligence sources and methods, the PRB may determine that the representative must receive a sufficient substitute or summary, rather than the underlying information. If the detainee is represented by private counsel, the information provided in subsection (a)(4) of this section shall be provided to such counsel unless the Government determines that the need to protect national security, including intelligence sources and methods, or law enforcement or privilege concerns, requires the Government to provide counsel with a sufficient substitute or summary of the information. A sufficient substitute or summary must provide a meaningful opportunity to assist the detainee during the review process.

(6) The PRB shall conduct a hearing to consider the information described in subsection (a)(4) of this section, and other relevant information provided by the detainee or the detainee's representative or counsel, to determine whether the standard in section 2 of this order is met. The PRB shall consider the reliability of any information provided to it in making its determination.

(7) The PRB shall make a prompt determination, by consensus and in writing, as to whether the detainee's continued detention is warranted under the standard in section 2 of this order. If the PRB determines that the standard is not met, the PRB shall also recommend any conditions that relate to the detainee's transfer. The PRB shall provide a written summary of any final determination in unclassified form to the detainee, in a language the detainee understands, within 30 days of the determination when practicable.

(8) The Secretary of Defense shall establish a secretariat to administer the PRB review and hearing process. The Director of National Intelligence shall assist in preparing the unclassified notice and the substitutes or summaries described above. Other executive departments and agencies shall assist in the process of providing the PRB with information required for the review processes detailed in this order.

(b) Subsequent Full Review. The continued detention of each detainee shall be subject to subsequent full reviews and hearings by the PRB on a triennial basis. Each subsequent review shall employ the procedures set forth in section 3(a) of this order.

(c) File Reviews. The continued detention of each detainee shall also be subject to a file review every 6 months in the intervening years between full reviews. This file review will be conducted by the PRB and shall consist of a review of any relevant new information related to the detainee compiled by the Secretary of Defense, in coordination with other relevant agencies, since the last review and, as appropriate, information considered during any prior PRB review. The detainee shall be permitted to make a written submission in
connection with each file review. If, during the file review, a significant question is raised as to whether the detainee's continued detention is warranted under the standard in section 2 of this order, the PRB will promptly convene a full review pursuant to the standards in section 3(a) of this order.

(d) Review of PRB Determinations. The Review Committee (Committee), as defined in section 9(d) of this order, shall conduct a review if (i) a member of the Committee seeks review of a PRB determination within 30 days of that determination; or (ii) consensus within the PRB cannot be reached.

Sec. 4. Effect of Determination to Transfer. (a) If a final determination is made that a detainee does not meet the standard in section 2 of this order, the Secretaries of State and Defense shall be responsible for ensuring that vigorous efforts are undertaken to identify a suitable transfer location for any such detainee, outside of the United States, consistent with the national security and foreign policy interests of the United States and the commitment set forth in section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998 (Public Law 105-277).

(b) The Secretary of State, in consultation with the Secretary of Defense, shall be responsible for obtaining appropriate security and humane treatment assurances regarding any detainee to be transferred to another country, and for determining, after consultation with members of the Committee, that it is appropriate to proceed with the transfer.

(c) The Secretary of State shall evaluate humane treatment assurances in all cases, consistent with the recommendations of the Special Task Force on Interrogation and Transfer Policies established by Executive Order 13491 of January 22, 2009.

Sec. 5. Annual Committee Review. (a) The Committee shall conduct an annual review of sufficiency and efficiency of transfer efforts, including:

(1) the status of transfer efforts for any detainee who has been subject to the periodic review under section 3 of this order, whose continued detention has been determined not to be warranted, and who has not been transferred more than 6 months after the date of such determination;

(2) the status of transfer efforts for any detainee whose petition for a writ of habeas corpus has been granted by a U.S. Federal court with no pending appeal and who has not been transferred;

(3) the status of transfer efforts for any detainee who has been designated for transfer or conditional detention by the Executive Order 13492 review and who has not been transferred; and

(4) the security and other conditions in the countries to which detainees might be transferred, including a review of any suspension of transfers to a particular country, in order to determine whether further steps to facilitate transfers are appropriate or to provide a recommendation to the President regarding whether continuation of any such suspension is warranted.

(b) After completion of the initial reviews under section 3(a) of this order, and at least once every 4 years thereafter, the Committee shall review whether a continued law of war detention policy remains consistent with the interests of the United States, including national security interests.

Sec. 6. Continuing Obligation of the Departments of Justice and Defense to Assess Feasibility of Prosecution. As to each detainee whom the interagency review established by Executive Order 13492 has designated for continued law of war detention, the Attorney General and the Secretary of Defense shall continue to assess whether prosecution of the detainee is feasible and in the national security interests of the United States, and shall refer detainees for prosecution, as appropriate.

Sec. 7. Obligation of Other Departments and Agencies to Assist the Secretary of Defense. All departments, agencies, entities, and officers of the United States, to the maximum extent permitted by law, shall provide the Secretary of Defense such assistance as may be requested to implement this order.

Sec. 8. Legality of Detention. The process established under this order does not address the legality of any detainee's law of war detention. If, at any time during the periodic review process established in this order,
material information calls into question the legality of detention, the matter will be referred immediately to the Secretary of Defense and the Attorney General for appropriate action.

Sec. 9. Definitions. (a) "Law of War Detention" means: detention authorized by the Congress under the AUMF, as informed by the laws of war.

(b) "Periodic Review Board" means: a board composed of senior officials tasked with fulfilling the functions described in section 3 of this order, one appointed by each of the following departments and offices: the Departments of State, Defense, Justice, and Homeland Security, as well as the Offices of the Director of National Intelligence and the Chairman of the Joint Chiefs of Staff.

(c) "Conditional Detention" means: the status of those detainees designated by the Executive Order 13492 review as eligible for transfer if one of the following conditions is satisfied: (1) the security situation improves in Yemen; (2) an appropriate rehabilitation program becomes available; or (3) an appropriate third-country resettlement option becomes available.

(d) "Review Committee" means: a committee composed of the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff.

Sec. 10. General Provisions. (a) Nothing in this order shall prejudice the authority of the Secretary of Defense or any other official to determine the disposition of any detainee not covered by this order.

(b) This order shall be implemented subject to the availability of necessary appropriations and consistent with applicable law including: the Convention Against Torture; Common Article 3 of the Geneva Conventions; the Detainee Treatment Act of 2005; and other laws relating to the transfer, treatment, and interrogation of individuals detained in an armed conflict.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Nothing in this order, and no determination made under this order, shall be construed as grounds for release of detainees covered by this order into the United States.

BARACK OBAMA
THE WHITE HOUSE
March 7, 2011

The Periodic Review Board [About the PRB]

(http://www.prs.mil/AboutthePRB.aspx)

The Periodic Review Board (PRB) process is a discretionary, administrative interagency process to review whether continued detention of particular individuals held at Guantanamo remains necessary to protect against a continuing significant threat to the security of the United States. This Periodic Review Board (PRB) process was established by the President’s March 7, 2011 Executive Order (EO) 13567 and will be conducted consistent with section 1023 of the National Defense Authorization Act (NDAA) for the Fiscal Year 2012.

The PRB includes a cross-section of the national security community. The PRB decision-making panel consists of one senior official from the Departments of Defense, Homeland Security, Justice, and State; the Joint Staff, and the Office of the Director of National Intelligence.

The PRB process does not address the legality of any individual’s detention under the authority of the Authorization for Use of Military Force, as informed by the laws of war. Detainees have the constitutional privilege of the writ of habeas corpus to challenge the legality of their detention, and nothing in EO 13567 or its implementing guidelines is intended to affect the jurisdiction of federal courts to determine the legality of their detention. If, at any time during the PRB process, material information calls into question the legality of
detention, the matter will be referred immediately to the Secretary of Defense and the Attorney General for appropriate action.

The PRB will consider the threat posed by each detainee under review. In particular, the PRB will be tasked with determining whether law of war detention remains necessary to protect against a "continuing significant threat to the security of the United States." In making this assessment, the Board will be given access to all relevant information in detainee disposition recommendations that have been produced by the Guantanamo Review Task Force (established by EO 13492), the work product of any prior PRB, and any additional relevant information that has become available. The PRB may also consider diplomatic considerations or security assurances related to the detainee's potential transfer, the detainee's mental and physical health, and other relevant information. The PRB will also receive and take into account all mitigating information relevant to whether the detainee poses a continuing significant threat. The PRB will not rely on information that has been obtained as a result of torture or cruel, inhuman, or degrading treatment to support a determination that continued law of war detention is warranted for a detainee.

The PRB process is intended to assist the executive branch in making informed decisions as to whether detainees held at Guantanamo Bay should remain in law of war detention. Informed decision-making will be aided by providing detainees an opportunity to participate in the process as appropriate. To this end, detainees will be provided an unclassified written summary of the information considered by the PRB and will be permitted to respond with statements written by themselves and witnesses. Detainees will also be afforded the opportunity to appear before the PRB via video or telephone conference. Detainees may request the presentation of testimony at the hearing by witnesses who are reasonably available and willing to offer relevant and material information regarding whether continued law of war detention is warranted.

In every PRB proceeding, the detainee will be provided with a uniformed military officer (referred to as a personal representative) to assist the detainee during the PRB process. The detainee's personal representative will have the security clearance necessary to review the information provided to the Board and will be responsible for advocating on behalf of the detainee, challenging the government's information, and introducing information on behalf of the detainee. The detainee will also have the ability to obtain private counsel, at no expense to the government, to assist the detainee in the review process.

The detainee's personal representative will receive full access to the information considered by the PRB, except in the rare instances where doing so would put the national security at risk. Any private counsel for the detainee possessing an appropriate security clearance will also receive access to the information the PRB considers, except in the exceptional circumstances above, or where necessary to protect law enforcement or privilege concerns. In cases where information considered by the PRB is withheld from a detainee's personal representative and/or private counsel, substitutes or summaries of the withheld information will be provided. The PRB will ensure that any such substitutes or summaries of information are sufficient to provide the personal representative or private counsel with a meaningful opportunity to assist the detainee during the review process.

Full reviews of each detainee, to include the hearings described above, will be conducted every three years. File reviews will be conducted for any detainee whom the PRB has determined that continued detention is necessary every six months in between full reviews, and will focus on any new information or changed circumstances that the PRB should consider.

The PRB can recommend continued law of war detention or recommend a detainee's transfer, including establishing the conditions for transfer. A Review Committee will conduct a review of the PRB's determination if: (1) a member of the Review Committee seeks review within 30 days of the PRB's determination, or (2) the PRB cannot reach consensus. The Review Committee is composed of the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff. Once a PRB determination becomes final, the detainee may not appeal. However, with semi-annual file reviews and periodic full reviews, the detainee will have a continuing opportunity to regularly present to the PRB any new and relevant mitigating information.
Periodic Review Board – Governance


Executive Order 13567 /March, 2011
Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force

Executive Order 13567

Directive-Type Memorandum 12-005 /Apr, 2012
Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13567

• Directive-Type Memorandum (DTM) 12-005
  (NOTE: The Directive-Type Memorandum (DTM) is a temporary DoD Issuance and will be replaced by a DoD Instruction (DoDI). Some of the content of the DTM and the process it outlines has been superseded by later decisions. These changes will be reflected in the new DoDI, which will be available at this website in the coming months.)

Secretary of Defense Memorandum /May, 2012
Secretary of Defense Memorandum, Establishment of the Periodic Review Secretariat and Discontinuation of the Office for the Administrative Review of the Detention of Enemy Combatants

• Memorandum

Extension Approval for DTM 12-005 /Oct, 2012
Extension Approval for Directive-Type Memorandum (DTM) 12-005

• Extension Memo

National Defense Authorization Act (NDAA) for the Fiscal Year 2012

• Section 1023 of 2012 NDAA (Public Law 112-81)

Periodic Review Board – General Review Information

(http://www.prs.mil/ReviewInformation.aspx)

INITIAL REVIEW: For each detainee, an initial review shall commence as soon as possible. The initial review will consist of a hearing before a Periodic Review Board (PRB).

FILE REVIEW: File reviews will be conducted for any detainee whom the PRB has determined that continued detention is necessary every six months in the intervening years between full reviews, and will focus on any new information or changed circumstances that the PRB should consider.

FULL REVIEW: The PRB shall promptly convene a full review if, during a file review, a significant question is raised as to whether the detainee's continued detention is warranted. The full review consists of a hearing before the PRB.

SUBSEQUENT FULL REVIEW: The continued detention of each detainee shall be subject to subsequent full reviews and hearings by the PRB on a triennial basis.
Periodic Review Board – FAQs
(http://www.prs.mil/FAQ.aspx)

Q: What is the periodic review process?
A: The Periodic Review Board (PRB) process is an interagency process designed to review whether continued detention of Guantanamo detainees is necessary to protect against a continuing significant threat to the security of the United States. The PRB process is established by Executive Order 13567 (EO 13567) and will be conducted consistent with section 1023 of the National Defense Authorization Act (NDAA) for Fiscal Year 2012.

Q: Who is responsible for the process?
A: The PRB process is an interagency process. The PRB is made up of representatives from the Departments of Defense, Homeland Security, Justice, and State; the Joint Staff; and the Office of the Director of National Intelligence. The Department of Defense created the Periodic Review Secretariat (PRS) to administer the PRB review and hearing process. The PRS is responsible for overseeing the implementation of the process, and will coordinate with the agencies involved.

Q: How often will detainees be subject to review?
A: Full reviews of each detainee subject to PRB review, to include hearings, will be conducted every three years. File reviews to consider any new information will be conducted for each detainee subject to PRB review every six months in between full reviews.

Q: What will the PRB consider when assessing whether a detainee can be released?
A: The PRB will consider the threat presented by the detainee, and whether law of war detention remains necessary to protect against a continuing significant threat to the security of the United States. In making that assessment, the PRB will be provided with all relevant information in the detainee disposition recommendations produced by the Task Force under Executive Order 13492 on which the government seeks to rely, the work product of a prior PRB, and any relevant information that has become available subsequent to either on which the government seeks to rely. The PRB will also be provided all relevant mitigating information.

Q: What is a “continuing significant threat”?
A: It is a threat to the national security of the United States that cannot be sufficiently mitigated through feasible and appropriate security measures implemented by another country, organization, or entity.

Q: Will the detainee be represented by a lawyer?
A: The PRB process provides the detainee with a personal representative who is responsible for challenging the government’s information and introducing information on behalf of the detainee. The detainee also has the ability to obtain private counsel, at no expense to the government, to assist him in the review process.

Q: How can a detainee challenge the legality of his detention?
A: The PRB process does not address the legality of any individual’s detention under the authority of the Authorization for the Use of Military Force, as informed by the law of armed conflict. Detainees held at Guantanamo have the constitutional privilege of the writ of habeas corpus, and nothing in Executive Order 13567 or its implementing guidelines is intended to affect the jurisdiction of federal courts to determine the legality of their detention. If, at any time during the PRB process, material information calls into question the legality of detention, the matter will be referred immediately to the Secretary of Defense and the Attorney General for appropriate action.
Q: Will the detainees have access to all of the evidence that will be used against them?
A: The Board will review the relevant information on which the Government will rely related to the detainee’s threat, as well as relevant mitigating information. Much of this will be classified intelligence information. The detainee’s personal representative will receive full access to the information considered by the PRB, except in the rare instances where doing so would put the national security at risk. Any private counsel for the detainee possessing an appropriate security clearance will also receive access to the information the PRB considers, except in the exceptional circumstances above, or where necessary to protect law enforcement or privilege concerns.

In cases where information is withheld, the detainee’s representatives and/or private counsel will be given summary or substitutes of that information that is sufficient to provide the personal representative or private counsel with a meaningful opportunity to assist the detainee during the review process. The detainee will be provided with an unclassified written summary of the factors and information the PRB will consider in evaluating whether he meets the standard.

Q: Will the detainee be provided with an opportunity to appeal a PRB determination?
A: Once a PRB determination becomes final, there are no appeals. However, with semi-annual file reviews and regular full reviews, the detainee will have ample opportunity to regularly present his case before the PRB.

Q: Will transcripts of PRB proceedings be made available to the public?
A: The Department of Defense anticipates posting a transcript of unclassified portions of each hearing.

---

Periodic Review Board Observers

Observers
The Periodic Review Secretariat has updated the procedures for selecting non-media observers to view Periodic Review Board proceedings at the closed circuit television (CCTV) site located in Arlington, VA. In selecting applicants for observer status, the following criteria will be considered:

- Reach of the applicant organization or individual (e.g., audience size, readership, subscriptions, circulation, viewers, listeners, website hits, writings, broadcasts, professional standing, diversity of audience, etc.).
- Nexus of the applicant’s organizational mission to Periodic Review Board proceedings, wartime detention, international law, and/or human rights. If the applicant is an individual, the nexus of the individual’s writings, commentaries, and/or broadcasts on the same topics may be considered.
- Extent to which applicant has provided longstanding and frequent coverage of issues relating to Periodic Review Board proceedings, wartime detention, international law and/or human rights.

All groups, organizations, and individuals (if not affiliated with a group or organization) will be evaluated under these procedures. Applicants are asked to provide documentation and examples of how the organization or the individual meets the above criteria.

Any observer wishing to be approved for attendance at the CCTV site located in Arlington, VA, should email his/her request to Observer Authorization Approval.

Observers selected to attend the proceedings are required to agree to the observer ground rules and present photo identification upon arrival.
Appendix Q

President Obama’s Plan to Close Guantanamo Bay (23 February 2016)
Plan to Close Guantanamo Bay Detention Facilities (23 February 2016)  (Page 1 of 21)

Plan for Closing the Guantanamo Bay Detention Facility

As the President has made clear, closing the Guantanamo Bay detention facility is a national security imperative. Its continued operation weakens our national security by furthering the recruiting propaganda of violent extremists, hindering relations with key allies and partners, and draining Department of Defense resources.

Of the nearly 800 detainees at one time held at Guantanamo Bay, more than 85 percent have been transferred, including more than 500 detainees transferred by the prior Administration and 147 detainees transferred by this Administration. As of February 23, 2016, 91 detainees remain at Guantanamo Bay. To close the Guantanamo Bay detention facility, the U.S. Government is pursuing three lines of effort simultaneously: (1) identifying transfer opportunities for detainees designated for transfer; (2) continuing to review the threat posed by those detainees who are not currently eligible for transfer and who are not currently facing military commission charges; and (3) continuing with ongoing military commissions prosecutions and, for those detainees who remain designated for continued law of war detention, identifying individualized dispositions where available, including military commission prosecution, transfer to third countries, foreign prosecutions or, should Congress lift the ban on transfers to the United States, transfer to the United States for prosecution in Article III courts and to serve sentences.

Notwithstanding these efforts, the Administration expects there to remain a limited number of detainees who will not be designated for transfer, subject to ongoing military commission prosecutions, serving any adjudicated sentences, or candidates for prosecution in Article III courts, and who cannot safely be transferred to third countries in the near term. For these detainees, the Administration intends to work with the Congress to relocate them from the Guantanamo Bay detention facility to an appropriate site in the continental United States while continuing to identify other appropriate and lawful dispositions.

(1) Securely Transferring Detainees Designated for Transfer by the President’s National Security Team

Of the 91 detainees who remain at Guantanamo, 35 have been determined to be eligible for transfer by relevant national security departments and agencies (Departments of Defense, State, Justice, and Homeland Security, the Office of the Chairman Joint Chiefs of Staff, and the Office of the Director of National Intelligence) through the interagency 2009 Executive Order 13492 Task Force or the ongoing Periodic Review Board process. A decision to designate a detainee for transfer reflects the best judgment of U.S. Government experts, including counterterrorism, intelligence, and law enforcement professionals, that, to the extent a detainee poses a continuing threat to the United States, the threat could be sufficiently mitigated — and the national interest would be served — if the detainee were transferred to another country under appropriate security measures. Consistent with current law, the Department of Defense transfers detainees following certification by the Secretary of Defense, pursuant to section 1034 of the National Defense Authorization Act (NDAA) for Fiscal Year 2016, that actions were taken or are planned to be taken that will substantially mitigate the risk of these individuals engaging or reengaging in any
terrorist or other hostile activity that threatens the United States or U.S. persons or interests, and that the transfer is in the national security interests of the United States. In making each certification, the Secretary of Defense consults with the Attorney General, the Secretary of State, the Secretary of Homeland Security, the Chairman of the Joint Chiefs of Staff, and the Director of National Intelligence. The NDAA prohibits the use of Department of Defense funds to transfer a detainee from Guantanamo Bay unless the Secretary submits the required certification not later than 30 days before the transfer of the detainee.

The United States obtains two types of assurances from a receiving country: security assurances (i.e., measures to sufficiently mitigate the threat posed by the detainee) and humane treatment assurances (i.e., measures to ensure that the transfer comports with the U.S. Government's humane treatment policy). These assurances are obtained following consultations among diplomatic, military, law enforcement, and intelligence professionals from the United States and the receiving country.

This Administration works extensively with receiving governments to obtain their assurances that appropriate security measures will be in place to substantially mitigate the risk that the transferred individual will engage or reengage in any terrorist or other hostile activity that threatens the United States or U.S. persons or interests. In particular, the Administration seeks assurances from receiving governments that they will take certain security measures that, in the U.S. Government's experience, have proven to be effective in mitigating threats posed by former detainees. The specific measures that are ultimately negotiated vary depending on a range of factors, including the specific threat a detainee may pose, the geographic location of the receiving country, the receiving country's domestic laws, the receiving country's capabilities and resources, and, where applicable, the receiving country's international legal obligations.

Importantly, the Administration will transfer a detainee only if it determines that the transfer is in the national security interest of the United States, the threat posed by the detainee will be substantially mitigated, and the transfer is consistent with our humane treatment policy. The security assurances obtained from receiving countries generally cover:

- restrictions on travel, which can include the denial of travel documents and other measures to prevent transferred detainees from leaving the country (or specific cities or regions in the country) for a specified period of time;
- monitoring of the detainee, which may include physical and electronic monitoring, or other measures available under the receiving country's domestic laws;
- periodic sharing of information concerning the individual with the U.S. Government, including any information regarding attempts to travel outside of the receiving country; and
- other measures to satisfy the United States' national security interests and to aid the detainee in reentering society, such as medical support, skills training, language training, enrollment of the detainee in a reintegration or rehabilitation program, family relocation, and assistance in accessing a variety of public services.
In each case, the specific security assurances negotiated take into account the individual facts and circumstances of the transfer, including the detainee's specific threat profile, as well as the capabilities and domestic legal authorities of the receiving government.

**Approach to Transfers.** Of the 147 detainees transferred during the current Administration: 81 have been transferred to countries in the Middle East, Africa, and the Arabian Peninsula; 47 have been transferred to countries in Europe and Asia; 13 have been transferred to the Americas; and 6 have been transfers to the South Pacific. The Administration generally aims to transfer detainees to their home countries. Where that is not feasible, the Administration seeks resettlement opportunities in third countries. The Administration intends to continue working to secure transfer and security commitments from countries around the world, including transfers to rehabilitation programs, so long as these arrangements satisfy security and humane treatment requirements.

The Departments of State and Defense, through the offices of the Special Envoys for Guantanamo Closure, are implementing an engagement strategy for the 35 detainees currently approved for transfer, focused on engaging with countries that can accept detainees under conditions that satisfy both our national security requirements (to substantially mitigate the risk the detainees pose to the United States or U.S. persons or interests) and our humane treatment standards. In Fiscal Year 2015, the United States transferred 35 detainees from Guantanamo to ten countries: Afghanistan (4), Estonia (1), Georgia (3), Kazakhstan (5), Morocco (1), Oman (10), Saudi Arabia (2), Kuwait (1), Slovakia (2), and Uruguay (6). Thus far in Fiscal Year 2016, the United States has transferred 23 detainees from Guantanamo to nine countries: Mauritania (1), the United Kingdom (1), the United Arab Emirates (3), Ghana (2), Kuwait (1), Saudi Arabia (1), Oman (10), Montenegro (1), and Bosnia-Herzegovina (1). The Administration has commitments from, or is pursuing commitments from, foreign governments that account for the remaining 35 detainees approved for transfer.

The U.S. Government provides Congress with information on individual detainee cases as required by section 319 of the Supplemental Appropriations Act of 2009 (Public Law 111-32), enacted into law on June 24, 2009. Section 319 provides that the President shall provide to Congress, not later than 60 days after the date of the enactment and every 90 days thereafter, a current accounting of all the measures taken to transfer each eligible detainee to the individual's country of citizenship or another country. The most recent version of this classified report provides additional information on each detainee.

Once a foreign government has agreed to accept one or more detainees, the Administration works with that government to identify particular detainees whose circumstances – such as family ties and language – suggest they would be appropriate fits for that country. The Administration also negotiates security assurances – based on the detainee and the capabilities of the receiving country – to ensure that our national security interests are protected. Matching an individual detainee to a resettlement country is an interagency process, as described below.

- The Offices of the Special Envoy for Guantanamo Closure at both the Departments of State and Defense work with the recipient country to craft specific security and humane treatment assurances.
To assist the foreign government in identifying particular detainees for resettlement, the U.S. Government provides intelligence reporting and other information about potential transfer candidates, to include medical and behavioral information, and facilitates visits, if desired, by representatives of these foreign governments to Guantanamo Bay to meet and interview potential transfer candidates.

Prior to all transfers, relevant members of the President’s national security team – including the Attorney General, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and the Secretaries of Homeland Security and State – review potential transfers to determine whether steps have been, or will be, taken through negotiated security assurances to substantially mitigate the risk of reengagement in any terrorist activity or otherwise threaten the United States or its allies or interests, and that the transfer is consistent with our humane treatment standards.

Based on these inputs and his own judgment, the Secretary of Defense makes the final decision on whether to transfer each detainee. If the Secretary of Defense approves a detainee transfer, he is required to make the required written certification to Congress not later than 30 days before the transfer of the individual.

Although the Administration’s policy preference is to repatriate detainees to their home countries, it is likely that the majority of future transfers will involve resettlements to third countries. For example, because the repatriation of the 29 Yemeni nationals currently eligible for transfer is not currently feasible and is not permitted by statute, the U.S. Government is working to identify other foreign countries where they may be resettled. To this end, the Department of State is negotiating with foreign governments to facilitate the transfer of designated detainees, provided that credible assurances of appropriate security and humane treatment measures can be obtained. The Departments of Defense and State will continue to regularly brief Congress on detainee transfers as additional information becomes available.

(2) Continued Review of Detainees by the Periodic Review Board

The Periodic Review Board (PRB) is an interagency body with representatives from the Department of Defense, the Department of Homeland Security, the Department of Justice, the Department of State, the Office of the Chairman of the Joint Chiefs of Staff, and the Office of the Director of National Intelligence. The PRB examines whether, given current intelligence and other information, the continued detention of the detainee remains necessary to protect against a continuing significant threat to the security of the United States. The Administration is committed to accelerating the review of those detainees who have not had an initial PRB review and are neither currently designated for transfer nor charged or convicted by military commission. The Administration plans to complete all initial reviews by fall of 2016 and will seek to identify responsible and humane transfer options in instances in which the PRB determines that a detainee is eligible for transfer. Even in cases where a detainee’s status is not changed by an initial PRB review, that detainee will continue to receive PRB file reviews every six months and will continue to be a candidate for an individualized disposition option, as discussed below.
(3) Ongoing Military Commissions and Disposition Options for Remaining Detainees

Military commissions under the Military Commissions Act of 2009 (MCA) continue at Guantanamo Bay. Currently, three active cases involving seven accused are in the pretrial phase and there are two cases in which detainees have pled guilty and await sentencing. The three active cases are litigating pretrial matters — many involving complex facts or legal questions — and remain in discovery. Both prosecutors and defense counsel have explained to the presiding military judges that it will take significant additional time to properly identify, produce, and examine the substantial volume of classified material involved in these cases. These complex issues and the volume of classified discovery have resulted in the filing of hundreds of motions — many of which raise matters of first impression in the commissions system. Resolution of these motions and completion of discovery are necessary steps in order to effectuate a full and fair trial, and to seek justice for both the victims and the accused. We can expect lengthy appeals once the active cases go to trial and reach verdicts. All of this currently costs $91 million per year and is expected to continue for several years.

Criminal cases of this magnitude are often lengthy and costly, but some processes may be improved by legislative changes. Thus, the Administration is considering seeking changes to the MCA to improve the efficacy, efficiency, and fiscal accountability of the commission process fully in alignment with the interests of justice and consistent with our American values of fairness in judicial processes. Some of these changes are relatively simple. For example, changes that would provide flexibility in conducting certain proceedings may ease the burden on the parties and facilitate better management of the process. Additionally, the Administration is also considering whether there are other legislative changes outside the context of the MCA that might enable detainees who are interested in pleading guilty in Article III courts, and serving prison sentences according to our criminal laws, to do so. We look forward to working with Congress on these proposals.

Detainees who remain designated for law of war detention will be considered, on a case-by-case basis, for the following disposition options:

A. U.S. Prosecution or Transfers to Third Countries

- **Article III or Military Commission Prosecution.** Of the 46 detainees who currently are not eligible for transfer and are not in some stage of the military commissions process, 22 were initially referred by the Guantanamo Review Task Force for prosecution (either before a military commission or in an Article III court). In the event these detainees are transferred to the United States, it may be possible to prosecute some of them in one of these two fora. The Administration would work with Congress to establish a site for the ongoing military commission proceedings in a manner consistent with applicable domestic and international law. The Department of Justice would also consider whether it would be possible and appropriate to prosecute any of the other detainees in an Article III court. A number of federal district courts have an established track record of safely and securely conducting high-profile national security trials. Indeed, the record of Article III courts in terrorism cases — providing fair, thorough, and speedy disposition of these
cases – is outstanding. It is not clear how many, if any, detainees would be subject to prosecution in an Article III court; this issue has not been assessed since the statutory prohibition on bringing detainees to the United States was enacted.

- **Transfers to Third Countries.** Detainees not otherwise designated for transfer or subject to prosecution or conviction by military commissions or Article III courts will continue to be considered on a case-by-case basis for transfer to a foreign country, including for foreign prosecution. Any such transfer would be undertaken consistent with applicable domestic and international law and our humane treatment policy and would be carried out only where it was assessed that the conditions under which the detainee would be transferred would substantially mitigate the risk to the United States or U.S. persons or interests.

B. **Law-of-War Detention in the United States**

For the group of detainees who remain designated for continued detention and who are not candidates for U.S. prosecution or detention or transfer to a foreign country, the Administration will work with Congress to relocate them from the Guantanamo Bay detention facility to a secure detention facility in the United States, while continuing to identify other non-U.S. dispositions. These individuals would be detained under the Authorization for Use of Military Force (AUMF), P.L. 107-40, as informed by the law of war, and consistent with applicable domestic and international law for such detentions.

The Administration has already provided an analysis of the legal issues surrounding such detention. In response to the requirement set out in section 1039 of the NDAA for Fiscal Year 2014, the Department of Justice, in coordination with the Department of Defense, submitted to Congress a report considering whether a Guantanamo detainee relocated to the United States could be eligible for certain forms of relief from removal or release from immigration detention or could have related constitutional rights (the Section 1039 report). (Appendix 1) The Section 1039 report’s analysis demonstrates that existing statutory safeguards and executive and congressional authorities provide robust protection of the national security.

Historically, the courts have treated detainees held under the law of war who are brought to the United States as outside the reach of immigration laws. In addition to the relevant judicial case law, Congress separately has the authority to provide expressly by statute that the immigration laws generally, or the particular forms of relief found in relevant provisions of the Immigration and Nationality Act (INA), are inapplicable to any detainees held in the United States pursuant to the AUMF as informed by the law of war. The AUMF provides authority to detain those individuals within the United States until the end of hostilities and then transfer them out of the United States. Thus, assuming detainees are held in the United States by the Department of Defense pursuant to the AUMF and that the immigration laws do not apply to their detention or subsequent transfer abroad, Guantanamo detainees relocated to the United States would not have a right to obtain the relief described in relevant provisions of the INA. Moreover, even in a scenario where a relocated Guantanamo detainee was in removal proceedings under the INA, there are numerous bars to such relief. The INA and Federal regulations include various bars to obtaining relief on national security and other grounds, and provide legal authority to hold a
The Department of Defense examined time needed for modifications; disruption to the existing mission at the site; access to troop housing and support; distance to a military airfield and military medical facilities; and force protection and anti-terrorism requirements. Any location would require modifications to meet the legal and policy standards for secure and humane treatment of detainees, at varying levels of cost. All sites would require significant security upgrades to cells, construction of or upgrades to medical facilities, additional surveillance equipment, and sensitive compartmented information facilities for classified work. All sites would also require the added construction or modification of buildings to create office spaces and a secure courtroom for military commissions.

The Fiscal Year 2015 cost to operate the Guantanamo Bay detention mission was approximately $445 million. In addition to annual operating costs, maintaining this mission in the future would require approximately $200 million in military construction that has been deferred in recent years, and $25 million for related furnishings. Based on site surveys and an in-depth review of every major cost center associated with detention operations, the Administration assesses that executing this plan, including the transfers described above, and then shifting to the operation of a U.S.-based detention facility for 30 to 60 detainees, would lower costs by between $140 million and $180 million annually, as compared to FY 2015 Guantanamo operations costs. The exact cost reductions would depend on whether the detention facility was relocated to an existing U.S. military facility or to a non-Department of Defense location that may not have preexisting support infrastructure or security.

Most of the savings would result from a decrease in the number of U.S. personnel necessary to guard and care for a smaller detainee population, and associated reductions in operations and facility costs. In addition, costs related to travel, information technology (IT), contracted support, headquarters activities in the National Capital Region, and detainee case reviews would
be reduced. The Administration continues to assess whether further savings can be realized in these and additional areas. While reducing the population at Guantanamo to 30 to 60 detainees would also reduce costs, the Administration estimates that recurring costs at Guantanamo would be between $65 million and $85 million higher annually than at a U.S. facility, primarily due to higher Guantanamo costs associated with facility maintenance and sustainment, personnel, travel, and base support.

Transitioning to a U.S. detention facility would entail certain one-time costs. These one-time costs would include facility construction/modifications, security enhancements, IT development, detainee transportation from Guantanamo, and, if necessary, the cost to lease or purchase property or existing facilities. In total, the Administration estimates these one-time transition costs at a U.S. facility could be between $290 million and $475 million. However, within three to five years the lower operating costs of a U.S. facility with fewer detainees (compared to operating Guantanamo with the same number of detainees and the deferred military construction) could fully offset these transition costs, and generate at least $335 million in net savings over 10 years and up to $1.7 billion in net savings over 20 years.

C. Disposition of Future Detainees

The Administration approaches new captures on a case-by-case basis with a range of options, including: prosecution in the military commission system or in Federal court; transfer to another country for an appropriate disposition there; or law of war detention, in appropriate cases. For each potential or actual capture, the appropriate Departments would review the pertinent information and make a determination on the best course of action for the individual case. This has been the policy of this Administration and it has allowed commanders the flexibility to respond to the complexities of today's conflicts. Our national security team has repeatedly chosen Article III courts in appropriate circumstances and the results have been clear — our court system has resolved cases involving some of the most hardened terrorists in the highest-profile cases. Consideration of whether future prosecutions should be pursued in a military commission or in an Article III court will take into account the demonstrated ability of the Article III courts to effectively deal with the enormous complexity and challenges of international terrorism cases, and the struggles of the military commissions to address the complicated issues they face — and to achieve recognition as being an effective forum.

D. Legislative Change

To accomplish this plan, the Administration will work with Congress to lift unnecessary prohibitions in current law. Additionally, the Administration is considering requesting changes to the Military Commissions Act of 2009 that would facilitate the efficacy and fiscal accountability of military commission proceedings while ensuring that they continue to operate in a fair and impartial manner.

******

As the President has said, it is time to bring this chapter of American history to a close. We must close the detention facility at Guantanamo and with it bring an end to the detention of detainees
Plan to Close Guantanamo Bay Detention Facilities (23 February 2010) (Page 9 of 21)

who can be safely, humanely, and responsibly transferred overseas, deprive terrorists of a propaganda tool, reduce costs, and permit more of our brave men and women in uniform serving at Guantanamo Bay to return to meeting the challenges of the 21st century around the globe.
Appendix

1
Plan to Close Guantanamo Bay Detention Facilities (21 February 2010)  (Page II of 21)

U.S. Department of Justice
Office of Legislative Affairs

RECEIVED MAY 14, 2014

Office of the Assistant Attorney General
Washington, D.C. 20530

May 14, 2014

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Buck McKeon
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Messrs. Chairman:

We are submitting herewith, in consultation with the Department of Defense, the report required by Section 1039 of the National Defense Authorization Act for Fiscal Year 2014.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Peter J. Kadzik
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable James M. Inhofe
Ranking Minority Member
Senate Committee on Armed Services

The Honorable Charles E. Grassley
Ranking Minority Member
Senate Committee on the Judiciary

The Honorable Adam Smith
Ranking Minority Member
Plan to Close Guantanamo Bay Detention Facilities (21 February 2016) (Page 12 of 21)

House Committee on Armed Services

The Honorable John Conyers, Jr.
Ranking Minority Member
House Committee on the Judiciary

The Honorable Chuck Hagel
Secretary of Defense
Report Pursuant to Section 1039 of the

May 14, 2014

Introduction

The Attorney General, in consultation with the Secretary of Defense, hereby submits this report pursuant to section 1039 of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 (2013). Section 1039(b)(1) seeks an assessment of whether relocation of a detainee currently held at the detention facility at Guantanamo Bay, Cuba, into the United States could result in eligibility for: (A) relief from removal from the United States, including pursuant to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (B) any required release from immigration detention, including pursuant to the decision of the Supreme Court in Zadvydas v. Davis; (C) asylum or withholding of removal; or (D) any additional constitutional right.

As required under section 1039, this report considers whether a Guantanamo detainee relocated to the United States could be eligible for certain forms of relief from removal or release from immigration detention or could have related constitutional rights. The analysis provided below demonstrates that existing statutory safeguards and executive and congressional authorities provide robust protection of the national security.

Historically, the courts have treated detainees held under the laws of war who are brought to the United States as outside the reach of the immigration laws. In addition to the relevant case law, Congress separately has the authority to expressly provide by statute that the immigration laws generally, or the particular forms of relief identified in section 1039(b)(1)(A)-(C), are inapplicable to any Guantanamo detainees held in the United States pursuant to the Authorization for Use of Military Force (“AUMF”) as informed by the laws of war. The AUMF provides authority to detain these individuals within the United States and transfer them out of the United States. Assuming that detainees are held in the United States by the Department of Defense pursuant to the AUMF, and that the immigration laws do not apply to their detention or subsequent transfer abroad, Guantanamo detainees relocated to the United States would not have a right to obtain the relief described in section 1039(b)(1)(A)-(C).

Even in a scenario where a relocated Guantanamo detainee were in removal proceedings under the Immigration and Nationality Act (“INA”), there are numerous bars to the relief identified in section 1039(b)(1)(A)-(C). As described in greater detail below, the INA and

---

1 This report focuses on the specific information sought by the reporting requirements in section 1039 and does not purport to address all issues presented by, or that may arise from, the relocation of detainees from Guantanamo to the United States.

federal regulations include various bars to obtaining relief on national security and other grounds, and provide legal authority to hold a detainee in immigration detention pending removal. We are not aware of any case law, statute, or constitutional provision that would require the United States to grant any Guantanamo detainee the right to remain permanently in the United States, and Congress could, moreover, enact legislation explicitly providing that no such statutory right exists.

1. Asylum

No Guantanamo detainee relocated to the United States would have a right to receive a grant of asylum in the United States. Asylum is a discretionary form of relief generally available to an alien who demonstrates, inter alia, that he was persecuted or has a well-founded fear of persecution in his country of nationality on account of his actual or imputed race, religion, nationality, membership in a particular social group, or political opinion. Although an alien who is physically present in the United States may, with limited exceptions, file an application for asylum, that application may be denied as a matter of discretion even if the alien were able to satisfy the eligibility requirements. With respect to those eligibility requirements, there are a number of bars to asylum relief. For example, an alien who has engaged in terrorist activity as described in INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), is ineligible for asylum. An alien is also barred from obtaining asylum where he has ordered, incited, assisted, or otherwise participated in persecution on account of a protected ground or where there are reasonable grounds for regarding the alien as a danger to the security of the United States. Additionally, where an alien, having been convicted of a particularly serious crime, poses a danger to the community or where there are “serious reasons for believing that the alien has committed a serious nonpolitical crime” outside the United States, the alien is also barred from receiving asylum.

Asylum applications are generally assessed through an individualized, case-by-case determination by the Department of Homeland Security (“DHS”) or an immigration court; however, a determination regarding asylum could be made with respect to a category of aliens (such as individuals formerly detained at Guantanamo). Thus, for example, the Executive Branch could promulgate a regulation that would bar Guantanamo detainees relocated to the

\[ \text{References:} \]


3 The bars to asylum are listed at INA § 208(b)(2)(A)(i)-(v), 8 U.S.C. § 1158(b)(2)(A)(i)-(v). See also INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (excluding persecutors from refugee definition). Once evidence indicates the applicability of a bar to asylum, the alien bears the burden of proving its inapplicability by a preponderance of the evidence. 8 C.F.R. § 1240.8(d).

4 See INA § 103(a), (g), 8 U.S.C. § 1103(a), (g) (describing the Immigration authorities of the Attorney General and the Secretary of Homeland Security).
2. Withholding of Removal

Section 10399 asks about withholding of removal under the INA, which is a statutory form of protection from removal that is available only when individuals are placed in proceedings under that statute. This protection is rooted in the United States' non-refoulement obligations under the 1967 Protocol relating to the Status of Refugees. Pursuant to that treaty, the United States is obligated not to return an individual (with some exceptions noted below) to a territory where his life or freedom would be threatened because of his race, religion, nationality, membership in a particular social group, or political opinion (the five "protected grounds"). In order to prevail on a claim for withholding of removal, the applicant bears the burden of showing that it is more likely than not that were he removed to the country designated for removal, he would be persecuted on account of one of the protected grounds. Withholding of removal limits only the government's ability to remove an alien to the specific country or countries where the threat to life or freedom exists, and thus would not prevent removal of a detainee to a third country where no such threat is posed.

---

7 The INA also gives the Executive Branch the authority to put in place other limitations and conditions for asylum. See INA § 208(d)(2)(C), 8 U.S.C. § 1158(b)(2)(C) ("The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1)"); see also Lopez v. Davis, 331 U.S. 230, 243-44 (2001) (observing that "[w]hen a statute requires individualized determinations . . . the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority") (quotation omitted). Since 2003, the Secretary of Homeland Security has also had the authority to issue asylum regulations. See 6 U.S.C. §§ 202, 271, 557; INA § 103(a)(1), (3), 8 U.S.C. § 1103(a)(1), (3).

8 INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). Statutory withholding under the INA is only applicable once an alien is physically present in the United States and subject to a removal order, whether or not he has been formally admitted under the immigration laws.


10 Assuming that a relocated detainee were being transferred to a foreign country pursuant to AUMF authorities and not immigration authorities, the implementing mechanisms under the INA and federal regulations would be inapplicable. The United States could employ an alternate mechanism based on the existing inter-agency process, discussed below, for addressing torture and other humane treatment concerns with respect to detainees relocated from Guantanamo.


12 8 C.F.R. § 1208.16(f).
An alien who has engaged in terrorist activity, as defined in the INA, is ineligible for withholding of removal under the INA. An alien is also barred from the remedy of withholding of removal (1) for ordering, inciting, assisting, or otherwise participating in the persecution of others on account of a protected ground; (2) when, having been convicted of a particularly serious crime, the alien poses a danger to the community; (3) where there are serious reasons for believing that the alien committed a serious nonpolitical crime outside the United States; or (4) where there are reasonable grounds to believe that the alien is a danger to the security of the United States. Unlike asylum, if an alien is eligible for withholding of removal, it cannot be denied as a matter of discretion, but the individual can be removed to a third country, consistent with our non-refoulement obligations.

3. Convention Against Torture (“CAT”)

Section 1039 also asks about relief from removal under the immigration laws, including pursuant to the CAT. Focusing on the CAT, under article 3 of the Convention, as implemented through immigration regulations, the United States may not return an alien to a country where he is “more likely than not” to be tortured. The United States already applies this standard as a matter of policy to all transfers from Guantanamo, pursuant to an existing inter-agency process. Federal law does not provide for judicial review of the United States’ compliance with its CAT non-refoulement obligations except in immigration cases arising out of review of a final order of removal under the INA. Thus, existing law contains no provision for judicial review of the

---


14 See INA § 241(b)(3)(B)(i)-(iv), 8 U.S.C. § 1231(b)(3)(B)(i)-(iv); 8 C.F.R. § 1208.16(d)(2). The INA specifies that an alien described in section 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B) – which then references INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), rendering inadmissible aliens engaged in terrorist activity – will be considered a danger to the security of the United States and thus barred. Where the evidence indicates that one of these bars applies, the alien bears the burden of proving its inapplicability by a preponderance of the evidence. 8 C.F.R. § 1208.16(d)(2).

15 See, e.g., Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681, 2681-822 (8 U.S.C.A. § 1231 note) (“It shall be the policy of the United States not to expel, extradite, or otherwise effect involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”). Since the Guantanamo Bay detention facility opened in 2002, more than 500 detainees have been transferred to other countries for repatriation or resettlement. Since 2009, these transfers have been effectuated through a thorough inter-agency process that considers various factors, including whether the threat the detainee may pose can be sufficiently mitigated, as well as whether the transfer can be conducted consistent with our humane treatment policy. The United States would continue to apply such a process with respect to detainees held in the United States.

16 See FARRA div. G, § 2242(c) (8 U.S.C.A. § 1231 note); Kiyemba v. Obama, 561 F.3d 509, 514-15 (D.C. Cir. 2009) (“Congress limited judicial review under the Convention to claims raised in a challenge to a final order of removal... Here the detainees are not challenging a final order of removal. As a consequence, they cannot succeed on their claims under the FARR Act.”).
merits of CAT claims filed by Guantanamo detainees relocated to the United States and detained pursuant to the AUMF, as informed by the laws of war.

Even if a Guantanamo detainee relocated to the United States were placed in removal proceedings, and were eligible for one of the forms of CAT protection, the detainee could be removed to any country that did not trigger such protection. Immigration regulations provide two types of CAT-related protection: withholding of removal and deferral of removal.\(^1\)\(^7\) Such protection bars removal only to the country or countries in which it is shown to be more likely than not that the individual would be tortured, allowing for removal to a third country. Thus, if a Guantanamo detainee relocated to the United States were placed in removal proceedings, and were eligible for one of these forms of CAT protection, the detainee could nonetheless be removed to any country where there is no showing that it is more likely than not that the individual would be tortured.

The bars that apply to withholding of removal under the INA\(^1\)\(^8\) also apply to withholding of removal under the CAT regulations.\(^1\)\(^9\) As discussed above, these bars include engaging in terrorist activity, as well as involvement in serious criminal activity. Deferral of removal, by contrast, is not subject to any bars based on the conduct of the applicant; thus, an individual eligible for CAT protection but ineligible for withholding of removal would be granted deferral of removal.\(^3\)\(^0\) However, even if deferral of removal is granted, the United States may, as noted above, effect removal to any third country if there is no showing that it is more likely than not that the individual would be tortured in that country. Additionally, DHS could seek termination of deferral if additional evidence relevant to the possibility of torture becomes available.\(^3\)\(^1\) The United States could also consider whether to pursue diplomatic assurances and other measures related to humane treatment with the goal of addressing concerns and ensuring that the United States satisfies its treaty obligations and its humane treatment policy.\(^3\)\(^2\)

\(^1\)\(^7\) The regulations regarding the availability of CAT withholding and deferral of removal may be found at 8 C.F.R. §§ 208.16-208.18, 1208.16-1208.18. Deferral of removal is available to aliens who are “subject to the provisions for mandatory denial of withholding of removal,” but who nonetheless are at risk of torture if removed to a particular country. 8 C.F.R. §§ 208.17(a), 1208.17(a). More so than withholding, deferral is a temporary form of protection that can be more easily and quickly terminated if circumstances change.


\(^1\)\(^9\) See FARRA div. G, § 2242(c) (8 U.S.C.A. § 1231 note); 8 C.F.R. § 1208.16(d)(2). For both withholding and deferral, the burden of proof rests with the applicant to show that it is more likely than not that he would be tortured if removed to a particular country. 8 C.F.R. § 1208.16(b), (c)(2).

\(^3\)\(^0\) 8 C.F.R. § 1208.17(a).

\(^3\)\(^1\) See 8 C.F.R. §§ 208.17(d), 1208.17(d).

\(^3\)\(^2\) The immigration regulations implementing the United States’ obligations under article 3 of the CAT provide that the United States may attempt to obtain credible diplomatic assurances from the government of the specific country at issue that the alien would not be tortured if removed to that country. See 8 C.F.R. §§ 208.18(c), 1208.18(c). Upon receipt of diplomatic assurances obtained by the Secretary of State, the Secretary of Homeland Security “shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien’s removal to that country consistent with Article 3 of the [CAT].” Id.; see 8 C.F.R. §§ 208.18(c),
4. Possible Rights to Release from Immigration Detention and Related Constitutional Rights

As explained above, assuming that detainees are held in the United States by the Department of Defense pursuant to the AUMF, as informed by the laws of war, and that the immigration laws do not apply to their detention and subsequent transfer from the United States, Guantanamo detainees relocated to the United States would not have a right to a grant of the relief described in section 1039(b)(1)(A)-(C). In light of the focus in section 1039 on certain forms of relief from removal or release from immigration detention, however, we assume for purposes of this subsection of the report that a detainee relocated to the United States from Guantanamo is being held in immigration detention in the United States, pending the individual’s removal under the INA. Such an alien could be detained under one of several different INA provisions pending a determination of his removability.23

Detention during the pendency of removal efforts is generally governed by sections 236(a), 236(c), and 235(b) of the INA. Aliens detained during routine section 240 removal proceedings will typically be detained under INA § 236(a), 8 U.S.C. § 1226(a), which grants DHS the authority to detain or release the alien on bond pending a final removal determination. DHS’s decision to detain an alien or release that alien on bond is subject to redetermination by the Attorney General.24

Under certain circumstances, DHS may also invoke the more narrowly tailored detention provisions under sections 235(b) or 236(c) of the INA, 8 U.S.C. §§ 1225(b), 1226(c). Certain criminal aliens or aliens who engaged in terrorist activity are subject to detention under INA § 236(c), 8 U.S.C. § 1226(c). Aliens detained under that section can only be released in limited circumstances where necessary to provide protection to a witness, and where the alien satisfies the Secretary of Homeland Security that he “will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.”25 Additionally, section 1208.18(c). With the enactment of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2273, and subsequent amendments, Pub. L. No. 108-7, div. I, 117 Stat. 531, 536-37 (2002), the Secretary of Homeland Security has assumed the former authorities of the Attorney General relating to diplomatic assurances in removal cases. See generally 6 U.S.C. §§ 202, 251, 551, 557; INA § 103(a), 8 U.S.C. § 1103(a).

23 See INA § 235(b)(1)(B)(i)(IV), (b)(2)(A), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), (b)(2)(A) (detention of certain applicants for admission); INA § 236(a), (c), 8 U.S.C. § 1226(a), (c) (detention while removal proceedings are pending).

24 At a bond re-determination hearing under INA § 236(a), 8 U.S.C. § 1226(a), the Attorney General must be satisfied that the alien does not pose a danger to the community, or a risk of flight, if released. The Attorney General has broad discretion in bond proceedings to determine whether to release an alien on bond. See Matter of D-J-R, 23 I. & N. Dec. 572, 575 (AG 2003). Bond hearings are conducted by immigration judges, to whom the Attorney General has delegated the authority to conduct such hearings, and whose decisions can be appealed to the Board of Immigration Appeals (Board). 8 C.F.R. § 1003.19(f). The Board’s decisions can then be referred to the Attorney General for review. 8 C.F.R. § 1003.10(b).

25 INA § 236(c)(2), 8 U.S.C. § 1226(c)(2). In applying section 236(c), some courts have held that bond hearings are required in circumstances where an extended period of time has passed. See, e.g., Ly v. Hansen, 351 F.3d 263, 270-
235(b) of the INA, 8 U.S.C. § 1225(b), provides for the detention of aliens intercepted at the border and other aliens subject to expedited removal under INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i).

Once a removal order has become final, Congress has mandated detention of certain criminal aliens, and aliens who have engaged in terrorist activity, during the ninety-day removal period following a final order of removal.26 After that period expires, the government has discretionary authority to continue detention,27 during which time the government could continue to seek suitable removal arrangements. In Zadvydas v. Davis, the Supreme Court construed INA § 241(a)(6), 8 U.S.C. § 1231(a)(6), which by its text allows for detention of aliens beyond the ordinary ninety-day removal period, to contain a presumptive six-month limit on detention if there is “no significant likelihood of removal in the reasonably foreseeable future.”28 The Court reached this result based in part on its conclusion that “[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem.”29

A relocated Guantanamo detainee, if held in immigration detention in the United States, might cite Zadvydas or Clark v. Martinez,30 in an effort to challenge his continued immigration detention after six months if removal were not significantly likely in the reasonably foreseeable future.31 The Supreme Court specifically noted in Zadvydas, however, that its decision did not preclude longer periods of detention in cases of “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”32

71 (6th Cir. 2003) (declining to set a “bright-line time limitation” but requiring bond hearing when length of detention is unreasonable); Diao v. ICE/Homeland Sec., 656 F.3d 221, 233-34 (3d Cir. 2011) (same); see also Rodríguez v. Robbins, 715 F.3d 1127, 1139, 1144 (9th Cir. 2013) (affirming preliminary injunction requiring bond hearings). An individual in immigration custody who disputes that he is properly categorized as an alien subject to section 236(c) may do so in a proceeding before the Secretary of Homeland Security and in a hearing before the Attorney General. See 8 C.F.R. § 1003.19(a), (b), (h)(2)(i); 8 C.F.R. § 236.1(c)(10), (d)(1); Matter of Joseph, 22 I. & N. Dec. 799, 805 (BIA 1999).


27 [See INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) (providing that an inadmissible alien, an alien subject to detention under INA § 241(a)(2), 8 U.S.C. § 1231(a)(2), or an alien determined to be a risk to the community or unlikely to comply with a removal order, “may be detained beyond the removal period”); see also INA § 247(b)(8), 8 U.S.C. § 1252(b)(8) (instructing that INA judicial review provisions do not preclude continued detention of alien challenging removal order).


29 Id. at 690.


31 In Martinez, the Court extended its Zadvydas 180-day statutory construction reasoning to inadmissible aliens. Id. at 185-86.

32 333 U.S. at 696. The government has implemented this aspect of Zadvydas through the promulgation of regulations that interpret section 241(a) and provide for further detention with respect to certain aliens, including
Moreover, following the *Zarqis* ruling, Congress expressly provided for detention during removal proceedings and beyond the presumptive six-month period of aliens who have been certified as endangering national security if their removal is unlikely in the reasonably foreseeable future. Section 236A of the INA, 8 U.S.C. § 1226a, authorizes the detention of an alien where it is certified that there are reasonable grounds to believe that the alien meets the terrorist grounds of removal or is “engaged in any other activity that endangers the national security of the United States.”

It is important to note that *Zarqis* and *Martinez* address detention of individuals in the immigration removal context, and do not speak to the length of detention permissible for Guantánamo detainees who may be relocated to the United States and held under the AUMF, as informed by the laws of war. The Supreme Court in *Hamdi v. Rumsfeld*, which post-dates *Zarqis*, made clear that detention pursuant to the laws of war is authorized for the duration of the conflict in which the detainee was captured.24 Indeed, in the law of war setting, national security interests are paramount, the continued detention of enemy belligerents serves that compelling purpose, and deference to military judgments is substantial.

In general, any constitutional rights applicable in a particular context for a Guantánamo detainee relocated to the United States should be no greater than those that would normally apply to a similarly situated alien present in the United States in that same context. For example, if any relocated Guantánamo detainees were placed in immigration removal proceedings in the United States, he should enjoy no greater constitutional rights than other similarly situated aliens in the immigration removal context. Similarly, if a relocated Guantánamo detainee were subject to criminal proceedings in the United States, the same criminal trial rights would apply as for any other alien defendant in such a trial. As discussed above, there are a number of statutory provisions that should render Guantánamo detainees relocated to the United States inadmissible under the immigration laws. Such inadmissible aliens should generally have a limited set of statutory and constitutional rights, even when they are physically present in the United States.

23 The detention authority under section 236A of the INA, 8 U.S.C. § 1226a, has not previously been exercised. See also *Martinez*, 543 U.S. at 379 n.4, 386 n.8 (noting that interpretation of the statute in *Zarqis* did not affect the detention of alien terrorists because sustained detention of alien terrorists is authorized by different statutory provisions — INA § 236A, 8 U.S.C. § 1226a, and the Alien Terrorist Removal Court provisions in INA § 507(b)(2)(C), 8 U.S.C. § 1537(b)(2)(C)).

Detainees in the United States, like detainees at Guantanamo, will have the right to maintain actions challenging their detention through writs of habeas corpus. For aliens detained under the AUMF, any arguably applicable constitutional provisions should be construed consistent with the individuals’ status as detainees held pursuant to the laws of war, and the government’s national security and foreign policy interests and judgments should be accorded great weight and deference by the courts.35

Conclusion

Most of the questions posed by the section 1039 report requirement concern relief relating to immigration detention or removal. If, however, detainees are held in the United States by the Department of Defense pursuant to the AUMF, as informed by the laws of war, and the immigration framework does not apply to their detention or subsequent transfer abroad, Guantanamo detainees relocated to the United States would not have a right to obtain the relief described in section 1039(b)(1)(A)–(C). Congress could, moreover, expressly preclude those forms of relief by statute. Even if such relief were available, the immigration-related relief described in section 1039(b)(1)(A)–(C) is circumscribed by a variety of statutory and executive authorities that provide robust protection of our national security.

Observation / Monitoring Note Page