



Department of Defense

Military Commission Order No. 1

March 21, 2002

SUBJECT: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism

- References:**
- (a) United States Constitution, Article II, section 2
 - (b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001) ("President's Military Order")
 - (c) DoD 5200.2-R, "Personnel Security Program," current edition
 - (d) Executive Order 12958, "Classified National Security Information" (April 17, 1995, as amended, or any successor Executive Order)
 - (e) Section 603 of title 10, United States Code
 - (f) DoD Directive 5025.1, "DoD Directives System," current edition

1. PURPOSE

This Order implements policy, assigns responsibilities, and prescribes procedures under references (a) and (b) for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order. Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this Order, the procedures prescribed herein and no others shall govern such trials.

2. ESTABLISHMENT OF MILITARY COMMISSIONS

In accordance with the President's Military Order, the Secretary of Defense or a designee ("Appointing Authority") may issue orders from time to time appointing one or more military

commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.

3. JURISDICTION

A. Over Persons

A military commission appointed under this Order ("Commission") shall have jurisdiction over only an individual or individuals ("the Accused") (1) subject to the President's Military Order and (2) alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority.

B. Over Offenses

Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission.

C. Maintaining Integrity of Commission Proceedings

The Commission may exercise jurisdiction over participants in its proceedings as necessary to preserve the integrity and order of the proceedings.

4. COMMISSION PERSONNEL

A. Members

(1) Appointment

The Appointing Authority shall appoint the members and the alternate member or members of each Commission. The alternate member or members shall attend all sessions of the Commission, but the absence of an alternate member shall not preclude the Commission from conducting proceedings. In case of incapacity, resignation, or removal of any member, an alternate member shall take the place of that member. Any vacancy among the members or alternate members occurring after a trial has begun may be filled by the Appointing Authority, but the substance of all prior proceedings and evidence taken in that case shall be made known to that new member or alternate member before the trial proceeds.

(2) Number of Members

Each Commission shall consist of at least three but no more than seven members, the number being determined by the Appointing Authority. For each such Commission, there shall also be one or two alternate members, the number being determined by the Appointing Authority.

(3) Qualifications

Each member and alternate member shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. The Appointing Authority shall appoint members and alternate members determined to be competent to perform the duties involved. The Appointing Authority may remove members and alternate members for good cause.

(4) Presiding Officer

From among the members of each Commission, the Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force.

(5) Duties of the Presiding Officer

(a) The Presiding Officer shall admit or exclude evidence at trial in accordance with Section 6(D). The Presiding Officer shall have authority to close proceedings or portions of proceedings in accordance with Section 6(B)(3) and for any other reason necessary for the conduct of a full and fair trial.

(b) The Presiding Officer shall ensure that the discipline, dignity, and decorum of the proceedings are maintained, shall exercise control over the proceedings to ensure proper implementation of the President's Military Order and this Order, and shall have authority to act upon any contempt or breach of Commission rules and procedures. Any attorney authorized to appear before a Commission who is thereafter found not to satisfy the requirements for eligibility or who fails to comply with laws, rules, regulations, or other orders applicable to the Commission proceedings or any other individual who violates such laws, rules, regulations, or orders may be disciplined as the Presiding Officer deems appropriate, including but not limited to revocation of eligibility to appear before that Commission. The Appointing Authority may further revoke that attorney's or any other person's eligibility to appear before any other Commission convened under this Order.

(c) The Presiding Officer shall ensure the expeditious conduct of the trial. In no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably.

(d) The Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

B. Prosecution

(1) Office of the Chief Prosecutor

The Chief Prosecutor shall be a judge advocate of any United States armed force, shall supervise the overall prosecution efforts under the President's Military Order, and shall ensure proper management of personnel and resources.

(2) Prosecutors and Assistant Prosecutors

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to prepare charges and conduct the prosecution for each case before a Commission ("Prosecution"). Prosecutors and Assistant Prosecutors shall be (a) Military Officers who are judge advocates of any United States armed force, or (b) special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States. The duties of the Prosecution are:

- (a) To prepare charges for approval and referral by the Appointing Authority;
- (b) To conduct the prosecution before the Commission of all cases referred for trial; and
- (c) To represent the interests of the Prosecution in any review process.

C. Defense

(1) Office of the Chief Defense Counsel

The Chief Defense Counsel shall be a judge advocate of any United States armed force, shall supervise the overall defense efforts under the President's Military Order, shall ensure proper management of personnel and resources, shall preclude conflicts of interest, and shall facilitate proper representation of all Accused.

(2) Detailed Defense Counsel.

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel"). The duties of the Detailed Defense Counsel are:

- (a) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and
- (b) To represent the interests of the Accused in any review process as provided by this Order.

(3) Choice of Counsel

(a) The Accused may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under Section 7(A). After such selection of a new Detailed Defense Counsel, the original Detailed Defense Counsel will be relieved of all duties with respect to that case. If requested by the Accused, however, the Appointing Authority may allow the original Detailed Defense Counsel to continue to assist in representation of the Accused as another Detailed Defense Counsel.

(b) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney: (i) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. Civilian attorneys may be pre-qualified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis after being requested by an Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5).

(4) Continuity of Representation

The Accused must be represented at all relevant times by Detailed Defense Counsel. Detailed Defense Counsel and Civilian Defense Counsel shall be herein referred to collectively as "Defense Counsel." The Accused and Defense Counsel shall be herein referred to collectively as "the Defense."

D. Other Personnel

Other personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks may be detailed or employed by the Appointing Authority, as necessary.

5. PROCEDURES ACCORDED THE ACCUSED

The following procedures shall apply with respect to the Accused:

- A. The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English and, if appropriate, in another language that the Accused understands.
- B. The Accused shall be presumed innocent until proven guilty.
- C. A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense.
- D. At least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense and until any findings and sentence become final in accordance with Section 6(H)(2).
- E. The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.
- F. The Accused shall not be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused.
- G. If the Accused so elects, the Accused may testify at trial on the Accused's own behalf and shall then be subject to cross-examination.
- H. The Accused may obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available as determined by the Presiding Officer. Such access shall be consistent with the requirements of Section 6(D)(5) and subject to Section 9. The Appointing Authority shall order that such investigative or other resources be made available to the Defense as the Appointing Authority deems necessary for a full and fair trial.
- I. The Accused may have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness presented by the Prosecution who appears before the Commission.
- J. The Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary.
- K. The Accused may be present at every stage of the trial before the Commission, consistent with Section 6(B)(3), unless the Accused engages in disruptive conduct that

justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

L. Except by order of the Commission for good cause shown, the Prosecution shall provide the Defense with access before sentencing proceedings to evidence the Prosecution intends to present in such proceedings. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.

M. The Accused may make a statement during sentencing proceedings.

N. The Accused may have Defense Counsel submit evidence to the Commission during sentencing proceedings.

O. The Accused shall be afforded a trial open to the public (except proceedings closed by the Presiding Officer), consistent with Section 6(B).

P. The Accused shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final in accordance with Section 6(H)(2).

6. CONDUCT OF THE TRIAL

A. Pretrial Procedures

(1) Preparation of the Charges

The Prosecution shall prepare charges for approval by the Appointing Authority, as provided in Section 4(B)(2)(a).

(2) Referral to the Commission

The Appointing Authority may approve and refer for trial any charge against an individual or individuals within the jurisdiction of a Commission in accordance with Section 3(A) and alleging an offense within the jurisdiction of a Commission in accordance with Section 3(B).

(3) Notification of the Accused

The Prosecution shall provide copies of the charges approved by the Appointing Authority to the Accused and Defense Counsel. The Prosecution also shall submit the charges approved by the Appointing Authority to the Presiding Officer of the Commission to which they were referred.

(4) Plea Agreements

The Accused, through Defense Counsel, and the Prosecution may submit for approval to the Appointing Authority a plea agreement mandating a sentence limitation or any other provision in exchange for an agreement to plead guilty, or any other consideration. Any agreement to plead guilty must include a written stipulation of fact, signed by the Accused, that confirms the guilt of

the Accused and the voluntary and informed nature of the plea of guilty. If the Appointing Authority approves the plea agreement, the Commission will, after determining the voluntary and informed nature of the plea agreement, admit the plea agreement and stipulation into evidence and be bound to adjudge findings and a sentence pursuant to that plea agreement.

(5) Issuance and Service of Process; Obtaining Evidence

The Commission shall have power to:

- (a) Summon witnesses to attend trial and testify;
- (b) Administer oaths or affirmations to witnesses and other persons and to question witnesses;
- (c) Require the production of documents and other evidentiary material; and
- (d) Designate special commissioners to take evidence.

The Presiding Officer shall exercise these powers on behalf of the Commission at the Presiding Officer's own initiative, or at the request of the Prosecution or the Defense, as necessary to ensure a full and fair trial in accordance with the President's Military Order and this Order. The Commission shall issue its process in the name of the Department of Defense over the signature of the Presiding Officer. Such process shall be served as directed by the Presiding Officer in a manner calculated to give reasonable notice to persons required to take action in accordance with that process.

B. Duties of the Commission During Trial

The Commission shall:

- (1) Provide a full and fair trial.
- (2) Proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay.
- (3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Order. Grounds for closure include the protection of information classified or classifiable under reference (d); information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an *ex parte*, *in camera* presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof. Except with the prior authorization of the Presiding Officer and subject to Section 9, Defense

Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof. Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable. Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

(4) Hold each session at such time and place as may be directed by the Appointing Authority. Members of the Commission may meet in closed conference at any time.

(5) As soon as practicable at the conclusion of a trial, transmit an authenticated copy of the record of trial to the Appointing Authority.

C. Oaths

(1) Members of a Commission, all Prosecutors, all Defense Counsel, all court reporters, all security personnel, and all interpreters shall take an oath to perform their duties faithfully.

(2) Each witness appearing before a Commission shall be examined under oath, as provided in Section 6(D)(2)(b).

(3) An oath includes an affirmation. Any formulation that appeals to the conscience of the person to whom the oath is administered and that binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties, is sufficient.

D. Evidence

(1) Admissibility

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.

(2) Witnesses

(a) Production of Witnesses

The Prosecution or the Defense may request that the Commission hear the testimony of any person, and such testimony shall be received if found to be admissible and not cumulative. The Commission may also summon and hear witnesses on its own initiative. The Commission may permit the testimony of witnesses by telephone, audiovisual means, or other means; however, the

Commission shall consider the ability to test the veracity of that testimony in evaluating the weight to be given to the testimony of the witness.

(b) Testimony

Testimony of witnesses shall be given under oath or affirmation. The Commission may still hear a witness who refuses to swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness.

(c) Examination of Witnesses

A witness who testifies before the Commission is subject to both direct examination and cross-examination. The Presiding Officer shall maintain order in the proceedings and shall not permit badgering of witnesses or questions that are not material to the issues before the Commission. Members of the Commission may question witnesses at any time.

(d) Protection of Witnesses

The Presiding Officer shall consider the safety of witnesses and others, as well as the safeguarding of Protected Information as defined in Section 6(D)(5)(a), in determining the appropriate methods of receiving testimony and evidence. The Presiding Officer may hear any presentation by the Prosecution or the Defense, including an *ex parte, in camera* presentation, regarding the safety of potential witnesses before determining the ways in which witnesses and evidence will be protected. The Presiding Officer may authorize any methods appropriate for the protection of witnesses and evidence. Such methods may include, but are not limited to: testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms.

(3) Other Evidence

Subject to the requirements of Section 6(D)(1) concerning admissibility, the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.

(4) Notice

The Commission may, after affording the Prosecution and the Defense an opportunity to be heard, take conclusive notice of facts that are not subject to reasonable dispute either because they are generally known or are capable of determination by resort to sources that cannot reasonably be contested.

(5) Protection of Information

(a) Protective Order

The Presiding Officer may issue protective orders as necessary to carry out the Military Order and this Order, including to safeguard "Protected Information," which includes: (i) information classified or classifiable pursuant to reference (d); (ii) information protected by law or rule from unauthorized disclosure; (iii) information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses; (iv) information concerning intelligence and law enforcement sources, methods, or activities; or (v) information concerning other national security interests. As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information.

(b) Limited Disclosure

The Presiding Officer, upon motion of the Prosecution or *sua sponte*, shall, as necessary to protect the interests of the United States and consistent with Section 9, direct (i) the deletion of specified items of Protected Information from documents to be made available to the the Accused, Detailed Defense Counsel, or Civilian Defense Counsel; (ii) the substitution of a portion or summary of the information for such Protected Information; or (iii) the substitution of a statement of the relevant facts that the Protected Information would tend to prove. The Prosecution's motion and any materials submitted in support thereof or in response thereto shall, upon request of the Prosecution, be considered by the Presiding Officer *ex parte*, *in camera*, but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed Defense Counsel.

(c) Closure of Proceedings

The Presiding Officer may direct the closure of proceedings in accordance with Section 6(B)(3).

(d) Protected Information as Part of the Record of Trial

All exhibits admitted as evidence but containing Protected Information shall be sealed and annexed to the record of trial. Additionally, any Protected Information not admitted as evidence but reviewed *in camera* and subsequently withheld from the Defense over Defense objection shall, with the associated motions and responses and any materials submitted in support thereof, be sealed and annexed to the record of trial as additional exhibits. Such sealed material shall be made available to reviewing authorities in closed proceedings.

E. Proceedings During Trial

The proceedings at each trial will be conducted substantially as follows, unless modified by the Presiding Officer to suit the particular circumstances:

- (1) Each charge will be read, or its substance communicated, in the presence of the Accused and the Commission.

- (2) The Presiding Officer shall ask each Accused whether the Accused pleads "Guilty" or "Not Guilty." Should the Accused refuse to enter a plea, the Presiding Officer shall enter a plea of "Not Guilty" on the Accused's behalf. If the plea to an offense is "Guilty," the Presiding Officer shall enter a finding of Guilty on that offense after conducting sufficient inquiry to form an opinion that the plea is voluntary and informed. Any plea of Guilty that is not determined to be voluntary and informed shall be changed to a plea of Not Guilty. Plea proceedings shall then continue as to the remaining charges. If a plea of "Guilty" is made on all charges, the Commission shall proceed to sentencing proceedings; if not, the Commission shall proceed to trial as to the charges for which a "Not Guilty" plea has been entered.
- (3) The Prosecution shall make its opening statement.
- (4) The witnesses and other evidence for the Prosecution shall be heard or received.
- (5) The Defense may make an opening statement after the Prosecution's opening statement or prior to presenting its case.
- (6) The witnesses and other evidence for the Defense shall be heard or received.
- (7) Thereafter, the Prosecution and the Defense may introduce evidence in rebuttal and surrebuttal.
- (8) The Prosecution shall present argument to the Commission. Defense Counsel shall be permitted to present argument in response, and then the Prosecution may reply in rebuttal.
- (9) After the members of the Commission deliberate and vote on findings in closed conference, the Presiding Officer shall announce the Commission's findings in the presence of the Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.
- (10) In the event a finding of Guilty is entered for an offense, the Prosecution and the Defense may present information to aid the Commission in determining an appropriate sentence. The Accused may testify and shall be subject to cross-examination regarding any such testimony.
- (11) The Prosecution and, thereafter, the Defense shall present argument to the Commission regarding sentencing.
- (12) After the members of the Commission deliberate and vote on a sentence in closed conference, the Presiding Officer shall announce the Commission's sentence in the presence of the Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

F. Voting

Members of the Commission shall deliberate and vote in closed conference. A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense. An affirmative vote of two-thirds of the members is required for a finding of Guilty. When appropriate, the Commission may adjust a charged offense by exceptions and substitutions of language that do not substantially change the nature of the offense or increase its seriousness, or it may vote to convict of a lesser-included offense. An affirmative vote of two-thirds of the members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all of the members. Votes on findings and sentences shall be taken by secret, written ballot.

G. Sentence

Upon conviction of an Accused, the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper. Only a Commission of seven members may sentence an Accused to death. A Commission may (subject to rights of third parties) order confiscation of any property of a convicted Accused, deprive that Accused of any stolen property, or order the delivery of such property to the United States for disposition.

H. Post-Trial Procedures

(1) Record of Trial

Each Commission shall make a verbatim transcript of its proceedings, apart from all Commission deliberations, and preserve all evidence admitted in the trial (including any sentencing proceedings) of each case brought before it, which shall constitute the record of trial. The court reporter shall prepare the official record of trial and submit it to the Presiding Officer for authentication upon completion. The Presiding Officer shall transmit the authenticated record of trial to the Appointing Authority. If the Secretary of Defense is serving as the Appointing Authority, the record shall be transmitted to the Review Panel constituted under Section 6(H)(4).

(2) Finality of Findings and Sentence

A Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to Section 4(c)(8) of the President's Military Order and in accordance with Section 6(H)(6) of this Order. An authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty. Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly. Adjudged confinement shall begin immediately following the trial.

(3) Review by the Appointing Authority

If the Secretary of Defense is not the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under Section 6(H)(4). If not so satisfied, the Appointing Authority shall return the case for any necessary supplementary proceedings.

(4) Review Panel

The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to reference (c). At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within thirty days after receipt of the record of trial, the Review Panel shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.

(5) Review by the Secretary of Defense

The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under Section 4(c)(8) of the President's Military Order, forward it to the President with a recommendation as to disposition.

(6) Final Decision

After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense, the Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under Section 6(H)(5) shall constitute the final decision.

7. REGULATIONS

A. Supplementary Regulations and Instructions

The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further

regulations consistent with the President's Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President's Military Order. The General Counsel shall issue such instructions consistent with the President's Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

B. Construction

In the event of any inconsistency between the President's Military Order and this Order, including any supplementary regulations or instructions issued under Section 7(A), the provisions of the President's Military Order shall govern. In the event of any inconsistency between this Order and any regulations or instructions issued under Section 7(A), the provisions of this Order shall govern.

S. AUTHORITY

Nothing in this Order shall be construed to limit in any way the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons. Nothing in this Order shall affect the authority to constitute military commissions for a purpose not governed by the President's Military Order.

9. PROTECTION OF STATE SECRETS

Nothing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.

10. OTHER

This Order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. No provision in this Order shall be construed to be a requirement of the United States Constitution. Section and subsection captions in this document are for convenience only and shall not be used in construing the requirements of this Order. Failure to meet a time period specified in this Order, or supplementary regulations or instructions issued under Section 7(A), shall not create a right to relief for the Accused or any other person. Reference (f) shall not apply to this Order or any supplementary regulations or instructions issued under Section 7(A).

11. AMENDMENT


The Secretary of Defense may amend this Order from time to time.

12. DELEGATION

The authority of the Secretary of Defense to make requests for assistance under Section 5 of the President's Military Order is delegated to the General Counsel of the Department of Defense. The Executive Secretary of the Department of Defense shall provide such assistance to the General Counsel as the General Counsel determines necessary for this purpose.

13. EFFECTIVE DATE

This Order is effective immediately.



Donald H. Rumsfeld
Secretary of Defense

(b)(6)

From: (b)(6)
Sent: Friday, April 09, 2004 16:27
To: (b)(6)
Subject: FW:

Ma'am,

Didn't see you cc'd on this one.

V/R,

(b)(6)

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

From: (b)(6)
Sent: Friday, April 09, 2004 15:26
To: (b)(6)
Subject:

It would be silly to attempt say goodbye or put a good face on this.

I had no choice but to request reassignment, just like I felt like I had no choice but to attempt to force change around here.

That being said, I am truly sorry for the angst that this has caused.

I thought long and hard about saying or doing anything not because I had doubts about what I was saying, but because I worried about the impact on all my colleagues, not just (b)(6) or even myself.

I finally concluded that it was better to press the issues because if we kept going along as we were, we (and the uniformed services that we represent) were very likely to be embarrassed.

I know that many of you are angry and will continue to be. I can't fix that. But when you are stewing in your anger, I would ask you to put yourself in my shoes for just a little while. From my perspective, nobody was stepping forward to address obvious problems that were going to lead to a trainwreck. (b)(6) was telling me that no one was raising these concerns other than (b)(6) myself. I happened to know this wasn't true with respect (b)(6) but for the rest of you I really didn't see any evidence that you were doing anything but going along with the program. If I was misled (b)(6) that is regrettable, but I didn't see anything to indicate that others were stepping up.

I know that most of you have little or no respect (b)(6). Again I would urge you to put yourself in our shoes. I have a pretty good basis for saying that I deserved to be listened to on many issues we are facing, but I don't feel like many of you were willing to listen unless I jammed the issue down your throat. I witnessed the same phenomena (b)(6) except worse. You can think (b)(6) jackass all you want, but the fact is that he identified a lot of very important issues, he proposed meaningful solutions for the problems and he was right about a lot of things. That goes a long way in my book. You can think bad things about him all you want, but for most of you, I saw nothing to indicate that you ever gave him a fair chance.

All that being said. Good luck to you all. I hope this works out for you.

Regards

4/9/2004

(b)(6)

Department of Defense, Office of the General Counsel
Office of Military Commissions, Prosecution
1931 Jefferson Davis Highway
Suite 532, Arlington, VA 22202

(b)(2)

~~CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 USC 552. Do not release outside of DoD channels without prior authorization from the sender. If you receive this transmission in error, please notify the sender.~~

AFG/124
SC/6998
25 January 2001

**SECURITY COUNCIL COMMITTEE ON AFGHANISTAN DESIGNATES FURTHER
INDIVIDUALS,
FINANCIAL ENTITIES RELATING TO RESOLUTIONS 1267 (1999) AND 1333 (2000)**

In a note verbale addressed to Member States on 12 April 2000, the Security Council Committee established pursuant to resolution 1267 (1999) concerning Afghanistan designated funds and financial resources of the Taliban as per paragraph 4(b) of that resolution and approved a list of entities and/or persons that have so far been identified by the Committee based on information provided by Member States as falling under one of the categories mentioned in the above note, as well as in Press Release SC/6844. The following entities have been added to the list:

- Mullah Mohammad Rabbani, Chairman of the Ruling Council, Head of the Council of Ministers;
- Mullah Mohammad Hasan, First Deputy, Council of Ministers; Governor of Kandahar;
- Maulavi Abdul Kabir, Second Deputy, Council of Ministers; Governor of Nangahar Province; Head of Eastern Zone;
- Abdul Wakil Mutawakil, Minister of Foreign Affairs;
- Abdul Rahman Zahed; Deputy Minister of Foreign Affairs;
- Mullah Abdul Jalil, Deputy Minister of Foreign Affairs;
- Mullah Ubaidullah Akhund, Minister of Defence;
- Mullah Abdul Razaq, Minister of Interior Affairs;
- Mullah Khaksar, Deputy Minister of Interior Affairs;
- Mohammad Sharif, Deputy Minister of Interior Affairs;
- Qari Ahmadulla, Minister of Security (Intelligence);
- Mullah Nooruddin Turabi, Minister of Justice;
- Qari Din Mohammad, Minister of Planning;
- Mullah Abbas Akhund, Minister of Health;
- Sher Abbas Stanekzai, Deputy Minister of Health;
- Mullah Yar Mohammad Minister of Communication;
- Alla Dad Tayeb, Deputy Minister of Communication;
- Alhaj Mullah Mohammad Isa Akhund, Minister of Mines and Industries;
- Maulavi Mohammadullah Mati, Minister of Public Works;
- Maulavi Rostam Nuristani, Deputy Minister of Public Works;
- Hafez Mohibullah, Minister of Haj and Religious Affairs;
- Maulavi Moslim Haqqani, Deputy Minister of Haj and Religious Affairs;
- Maulavi Abdul Raqib, Minister of Repatriation;
- Mullah Mohammad Jan Akhund, Minister of Water and Electricity;
- Maulavi Faiz Mohammad Faizan, Deputy Minister of Commerce;
- Maulavi Abdul Hakim Monib, Deputy Minister of Frontier Affairs;
- Qudratullah Jamal, Minister of Information;

- Abdul Rahman Hotak, Deputy Minister of Culture;
- Ramatullah Wahidiyar, Deputy Minister for Martyrs and Repatriation;
- Mullah Niaz Mohammad, Governor of Kabul Province;
- Maulavi Khair Mohammad Khairkhwah, Governor of Herat Province;
- Maulavi Nurullah Nuri Governor of Balkh Province; Head of Northern Zone;
- Na'im Kuchi, Governor of Bamiyan Province;
- Commander Bahsir Baghlani, Governor of Baghlan Province;
- Commander Arif Khan, Governor of Kunduz Province;
- Maulavi Shafiqullah Mohammadi, Governor of Khost Province;
- Maulavi Ahmad Jan, Governor of Zabol Province;
- Mullah Dost Mohammad, Governor of Ghazni Province;
- Noor Mohammad Saqib, Chief Justice of Supreme Court;
- Abdul Rahman Agha Chief Justice of Military Court;
- Maulavi Qalamuddin, Head of Department of Preventing Vice and Propagating Virtue;
- Abdul Salam Zaeef, Taliban Ambassador to Pakistan;
- Abdul Hakim Mujahid, Taliban envoy to the United Nations;
- General Rahmatullah Safi, Taliban representative in Europe;
- Akhtar Mohammad Mansour, Head of Aviation;
- Mullah Hamidullah, Head of Ariana Airlines;
- Alhaj Mullah Sadruddin, Mayor of Kabul City;
- Amir Khan Muttaqi, Taliban representative in UN-led talks;
- Mr Jan Mohammad Madani, Charge d' Affaires, Taliban Embassy, Abu Dhabi;
- Mr Shamsalah Kmalzada, Second Secretary, Taliban Embassy, Abu Dhabi;
- Mr Azizirahman, Third Secretary, Taliban Embassy, Abu Dhabi;
- Mr Mawlawi Abdul Manan, Commercial Attache, Taliban Embassy, Abu Dhabi;
- Taliban Charge D'Affaires in Riyadh, Malawi Abdul Wahab

TALIBAN "EMBASSY", ISLAMABAD

- Mullah Abdul Salam Zaeef (Ambassador Extraordinary & Plenipotentiary)
- Habibullah Fauzi (First Secretary/Deputy Head of Mission)
- Mohammad Sohail Shaheen (Second Secretary)
- Mohammad Sarwar Siddiqmal (Third Secretary)
- Mullah Mohammad Zahid (Third Secretary)
- General Abdul Qadeer (Military Attache)
- Maulavi Nazirullah Anafi (Commercial Attache)
- Maulavi Abdul Ghafar Qurishi (Repatriation Attache)
- Mohammad Daud (Administrative Attache)

TALIBAN "CONSULATE GENERAL", PESHAWAR

- Maulavi Najibullah (Consul General)
- Qari Abdul Wali (First Secretary)
- Syed Allamuddin (Second Secretary)
- Maulavi Akhtar Mohammad (Education Attache)
- Alhaj Maulavi Mohammad Saddiq (Trade Representative)

TALIBAN "CONSULATE GENERAL", KARACHI

- Maulavi Rahamatullah Kakazada (Consul General)
- Mufti Mohammad Aleem Noorani (First Secretary)
- Haji Abdul Ghafar Shenwary (Third Secretary)
- Maulavi Gul Ahmad Hakimi (Commercial Attache)

TALIBAN "CONSULATE GENERAL", QUETTA

- Maulavi Abdullah Murad (Consul General)
- Maulavi Abdul Haiy Aazem (First Secretary)
- Maulavi Hamdullah (Repatriation Attache)

Furthermore, as per paragraph 8 (c) of resolution 1333 (2000) adopted on 19 December 2000, the Committee approved the following list of individuals and entities associated with Usama bin Laden (UBL), including those in the Al-Qaida organization:

- Usama Bin Muhammad Bin Awad Bin Ladin (aka Abu Abdallah Abd Al-Hakim). Born 28/07/57, Saudi Arabia. Saudi citizenship withdrawn, now officially an Afghan national.
- Muhammad 'Atif (aka Abu Hafs). Born (probably) 1944, Egypt. Thought to be an Egyptian national. Senior lieutenant to UBL.
- Aiman Muhammad Rabi Al-Zawahiri. Born 19/06/51, Giza, Egypt. Thought to be an Egyptian national. Former leader of the Egyptian Islamic Jihad, now a close associate of UBL.
- Sa'd Al-Sharif. Born c. 1969, Saudi Arabia. Brother-in-law and close associate of UBL. Said to be head of UBL's financial organisation.
- Saif Al-'Adil. Born c. 1963, Egypt. Thought to be an Egyptian national. Responsible for UBL's security.
- Amin Al-Haq (aka Muhammad Amin). Born C.1960, Nangahar province, Afghanistan. Afghan national. Security coordinator for UBL.
- Ahmad Sa'id Al-Kadr (aka Abu Abd Al-Rahman Al-Kanadi). Born 01/03/48, Cairo, Egypt. Thought to be an Egyptian and Canadian national.
- Zain Al-Abidin Muhahhad Husain (aka next name underlined Abu Zubaida and Abd Al-Hadi Al-Wahab). Born 12/03/71, Riyadh, Saudi Arabia. Thought to be a Saudi, Palestinian and Jordanian national. Close associate of UBL and facilitator of terrorist travel.
- Saqar Al-Jadawi. Born C. 1965. Thought to be a Yemeni and Saudi national. Aide to UBL.
- Bilal Bin Marwan. Born c.1947. Senior lieutenant of UBL.

The above lists will continue to be revised as necessary. The Committee encourages Member States to bring to its attention any information they may have concerning funds, financial resources, as well as entities and/or persons.

* * * * *

The following is an attempt to highlight and explain many, but not all, of the current concerns held by active duty Air Force members of the Office of the Chief Prosecutor, (b)(6) (b)(6) relating to our office and our duties. This paper is prepared out of a sincere concern for the mission that we have been assigned, as well as the reputation of the Air Force Judge Advocate Corps.

1. Office Overview. The organizational difficulties and challenges faced by this office can only be put in context if one understands our current staffing and dearth of experience. There are currently nine attorneys on active duty in the office, to include the Chief Prosecutor. The Deputy Prosecutor graduated law school in 1991 and (b)(6) graduated in 1994. The two Marine 0-5 team chiefs and one Army 0-4 graduated in 1996. (b)(6) graduated in 1997, (b)(6) in 1998 and a Navy 0-3 in 2000. (b)(6) our very talented civilian attorney, graduated in 2002. The office is divided into four main teams (bodyguards, financiers, high-threat-trigger-pullers, and explosives) with two or three attorneys assigned to each team. While each of the attorneys, save (b)(6) has significant experience in military justice prosecutions, very few if any of the prosecutors have experience with complex litigation or voluminous discovery. Only (b)(6) have any significant experience in international law. The prosecution team only has two paralegals and despite our anticipated reliance on documents written in Arabic, Pushtu, and Urdu and witnesses who speak those languages, we currently have no translators or interpreters assigned to the staff. This is despite the fact that there is a well-known problem with documents being translated inaccurately and incompletely due to the increased demands on linguists as a result of the GWOT.

2. Mission Overview. With this staff, which has been supplemented with two reserve personnel and one DOJ attorney, we are responsible for identifying and preparing the prosecution of tens, if not hundreds, of detainees in a legal proceeding not utilized in 50 years. The military commissions process in and of itself is highly controversial, but the use of such a proceeding to prosecute terrorists is completely unprecedented. Consequently, we face significant challenges to our process in the form of public critiques, collateral court challenges, and in-court motions and appeals practices. We anticipate significant legal challenges to the proceedings and our assertion of jurisdiction. These challenges will be primarily based on US treaty obligations, the evolution of international law since the last use of military commissions (post World War II), and decades of US practice that is somewhat inconsistent with our current position. Moreover, we are also challenged to work with the Criminal Investigative Task Force (CITF) in gathering and preparing the case files, as well as coordinating with a host of other agencies, to include DOJ, FBI, OGA, DIA, and the State Department to obtain access to their work products related to the war on terrorism. DOJ/FBI in particular has massive resources devoted to investigation of Al Qaida and Al Qaida operations, to include the TANBOM, KENBOM, and PENTTBOM investigations.

3. Current Case Status. On July 3, 2003, the President designated six individuals as subject to the jurisdiction of the military commissions. This was done in a document referred to as a "Reason to Believe" (RTB) determination. Since this time period, RTB packages have been prepared on at least eight other detainees. We are told that the Chief Prosecutor wishes to present Maj Gen Altenberg – the new appointing authority – eight additional RTB packages upon his arrival for coordination and the signature of the President. Additionally, we are also

told that the charge sheets for the first two or three cases have been thoroughly reviewed and are ready to be approved by (b)(6). Finally, we have been told that it is hoped that charges will be approved in 14 cases by the summer. The trial counsel assigned to these cases have been told to have charge sheets and trial notebooks prepared by 1 Feb 04. It is assumed that each case will include at least one common charge - general conspiracy charge - making consistency between the cases significant.

4. Lack of Common Understanding within the Office. To date, and despite continued requests, the attorneys in the office have had little, if any, discussion concerning the crimes and elements contained in Military Commission Instruction #2. In addition to the obvious point that everyone should have a common understanding of the crimes and elements, it is equally important to note that the crimes and elements instruction states that it is not binding on the military commission panel. Consequently, we will not only have to prove the conduct that meets the elements of the offense, but also the very existence of the offense under customary international law. It has become abundantly clear that the attorneys do not possess an understanding of these crimes and elements or their viability under international law. Moreover, to date, we have had little, if any, discussion regarding how charges will be drafted or what evidence will be used to prove any particular element. In fact, until this week, we have generally not met as an office more than once every two weeks despite numerous requests for us to do so. Even within some teams, information is not shared with the other attorneys and input is discouraged. We have not, as an office, reviewed or discussed the proof analysis for any case. The proof analysis for those cases which can be located on our shared drive may be described as less than adequate.

The lack of coordination and understanding within the office may be best illustrated by an example from the Mock Trial of one case, presumed to be our first, which was held in November. A number of high-level legal advisors to the administration were in attendance, and it was understood that our performance was key to our cases moving forward. Our request to be briefed as an office on the facts of the case prior to the Mock Trial was denied by the Deputy Prosecutor, who was lead counsel on the case. Our request to discuss the proof analysis as an office was also denied as a waste of time. Tellingly, no substantive input regarding the presentation of the evidence was solicited from any attorney in the office. This lack of knowledge not only prevented any attorney from speaking up during the discussion, but also prevented any discussion regarding the candor of the statements made to the guests, which has since come into question. Although (b)(6) is assigned to be second chair on the first case, his requests to be briefed on the case evidence and included on witness interviews has been repeatedly brushed aside. This has made preparation for trial extremely time-consuming and laborious, and also ensures that no other attorney has an understanding of the evidence that we intend to present or the reasons for those decisions.

Predictably, the attorneys in the office do not know how the charge sheets for the first cases have been prepared or what evidence will be introduced to prove the general conspiracy. This is despite the stated expectation that charge sheets will shortly be accomplished and potentially approved by the Appointing Authority. Last week, we met as an office for the first time to generally discuss the conspiracy charge. We have repeatedly requested to talk about the charge sheet. When questions were raised at the meeting, members of the office later stated that it was

inappropriate to question how the charges would be formulated or how we would prove them in an open setting.

In response to many of the concerns that had been voiced, the Chief Prosecutor reorganized the office prior to Christmas. He stated that he would be in the office on a regular basis and that we would hold morning meetings. Additionally, "task forces" were established within the office; most notably, Discovery, Sentencing, and al Qaida. (b)(6) who had previously worked Sentencing and al Qaida, respectively, were reassigned to Discovery and Sentencing, respectively. (b)(6) a seasoned DOJ international lawyer was assigned to al Qaida. (b)(6) has never handled complex discovery (b)(6) has never witnessed a real sentencing case, and (b)(6) has no prior background with al Qaida. For the last month, we have been awaiting a presentation by (b)(6) regarding his suggestions for proving the necessary elements of the general AQ conspiracy.

5. Lack of Evidence Collected/Analyzed/Identified. Despite previous representations, to include at the Mock Trial, our office currently possess little to none of the evidence that links al Qaida to the 9/11 terrorists attacks. We met with the FBI on 17 Dec and for the first time asked if they could establish that AQ was behind the attacks in an unclassified setting. We met with DOJ just this week to ask the attorneys prosecuting in the EDVA what evidence they could provide. We were told that they would get back to us.

Conceivably, our evidence would be gathered and produced by CITF. We have had a significant, but unacknowledged problem obtaining useful products from CITF. There are many excuses offered as to why the CITF relationship is unproductive, but at least one explanation is that CITF has not been apprised of what constitutes relevant evidence for proving these extremely controversial – even radical – charges such as conspiracy. The attorneys at CITF were briefed this week on our vision concerning the general conspiracy, incomplete as that may be. A meeting is also planned with the case agents next week.

We met for the first time as an office last Friday to discuss the types of evidence that each attorney has encountered and what agency produced that evidence. We suggested that we should develop within our office a checklist to aid in our pre-trial preparation, and that a checklist should also be provided to our CITF agents to standardize the initial investigation of the case. It is not an overstatement to say that this simple suggestion was met with much fanfare. This is despite the fact that both suggestions (discussing the evidence and the checklist) had been made numerous times in the preceding months.

6. Discovery. There has been a recent push to prepare for and provide limited discovery to the two defense counsel assigned to represent two detainees. In the absence of a charge sheet, and more importantly, knowledge of what evidence we intend to use to prove the common conspiracy charge, discovery is nearly impossible. Moreover, given the lack of initial evidence collection, much of the requested material will in fact be evidence received and reviewed for the first time. It has been said by at least one attorney in the office (who is also a DOJ attorney) that we are approximately one-year behind in this regard.

7. Appearance of Impartially. It is important to understand that the Appointing Authority serves not only as a convening authority in reviewing and approving charges, but also as an appellate court since the AA may ultimately rule on motions submitted by either side. This point is not only articulated in our Orders and Instructions, but also has been a centerpiece of the DOD PA campaign attempting to show that the commissions will be fair. Recently, the Legal Advisor to the AA requested a copy of the motion responses being prepared by the Prosecution. This move has been discouraged, but it highlights the lack of understanding of roles. We have also been informed that a move is underway to allow the Legal Advisor to the AA to officially rate the Chief Prosecutor – a disaster from a fairness/impartiality/international law perspective.

More significantly, however, it is fairly common knowledge that the Chief Prosecutor has been conducting ex parte communications with the officer presumptively selected to be the first Presiding Officer. The Presiding Officer not only functions in some sense as the trial judge, but also as a member of the jury. It has been admitted that e-mails have been exchanged concerning, i.e., whether a guilty plea inquiry will be conducted. Even if this is technically not improper, it is a poignant illustration of how this organization does not understand the kinds of scrutiny we will face and the importance of maintaining an appearance of propriety at all costs.

8. Sustainability. Even if it is somehow possible to complete the first two cases, we are extremely concerned about our ability to continue with expected follow-on cases in a timely manner given the current procedures in place in our office and our interaction with CITF.

Conclusion. The issues described above are not raised without careful thought and consideration. Although some limited efforts have been made to address the deficiencies, we continued to be extremely concerned with the office's current status and our efforts to correct the problems have not been well-received. Our anxiety is heightened by the state of confusion and lack of preparation within the office, the complexity of the cases, the lack of oversight/understanding of the cases by upper management, the confidence of the public statements regarding our state of readiness, and the ultimate impact the proceedings will have on our country and international law.

(b)(6)

From: (b)(6)

Sent: Wednesday, March 17, 2004 16:28

To: (b)(6)

Subject: State Department

Ma'am,

(b)(6) from the State Department called. She will be in charge of drafting the search criteria for the discovery search. She related the following:

1. Would like to prioritize section 1 and 2, and do section 3 later (estimates July may not be reasonable deadline for co-conspirators)
2. Requests DOB and place of birth for those in DOJ or other custody
3. Requests for all witnesses bio info, such as countries known to have been in before, camps, organizations
4. Requests we limit the time frame of the request
5. The searches will be conducted based upon specific offices within State
6. Suggest they may wish to use results of prior searches and update
7. Emphasized that their files are issue based, not name based.

She wanted to confirm that they are only to search for State generated records, (i.e., not for 302s, Forms 40, etc.).

She is consulting with their records management section regarding how to proceed. I explained that two of the attorneys most familiar with the (b)(6) case and the witnesses requested would not be back until Friday.

v/r,

(b)(6)

1931 Jefferson Davis Highway, Suite 532
Arlington, VA 22202

(b)(2),(b)(6)

~~CAUTION: This message may contain information protected by the attorney-client, attorney work product, deliberative process, or other privilege. Do not disseminate without the approval of the Office of the DoD General Counsel.~~

(b)(6)

From: (b)(2),(b)(6)
Sent: Wednesday, March 10, 2004 9:34 AM
To: (b)(6)
Cc:
Subject: A CITF-NMEC perspective on FBI participation

The main bullets that frustrate the OMC / CITF mission from my perspective:

* FBI does not share with NMEC / CITF any of the material that in some way (no matter how small) relates to DOJ interests; they do not appear to give much regard to DoD interest in the same material; much of their material processed on the NMEC floor is marked as a special project and is specifically ear-marked as a "do not share". In other words, they make use of the assets at NMEC (linguists and media capabilities) but do not cooperate with the overall charter of NMEC.

* Because they are tasked to handle all WOT evidence, they have been able process everything in a separate triage room for "DOJ interests"; this would not be a significant issue except that they do not share the results of their hard work with NMEC / CITF. They have ~5 agents assigned for rotating 60 day tours to do nothing but scan electronic media for FBI interests. NMEC / CITF has been asked to leave the room at times based on a "special project".

* FBI does not inform NMEC / CITF of the results of their findings. Since at times they end up pulling material that would have gone into either Harmony or TTIC, we do not even know what we are missing. They do not offer a mechanism that would allow us to be informed of what is not published into national databases. It is an exclusive mentality. We should be working in parallel not in a bottleneck system.

* FBI seems to not regard TS-SCI/HSC/G tickets as they are defined for the CITF mission to be "need-to-know"; they constantly throw up the "DOJ interest" flag as a superceding ticket

* FBI does appear to recognize that CITF has the authority to review all relevant material related to DoD cases; there is a notable distinction between asking to view an item and actually presenting that item in open court; all items will be cleared prior to appearing in court

* FBI does not give any consideration to DoD authority on detainees; somehow they have been allowed to operate under the assumption that they still own evidence for DoD detainees / releases for prosecution; recommend OSD / CITF forces DOJ to send all relevant items on the top xx cases to DOJ HQ / NMEC for case agents to once and for all fully review. There are physical items (non-media) spread out all over the country and there has yet to be a full disclosure on what the FBI has tucked into INTEL PLUS (instead of Harmony or TTIC) or not into any database based only on their needs. This full disclosure coupled with CIA doing the same is long overdue.

These are the major break-downs in how the FBI is creating a large impediment to NMEC / CITF operations. We have addressed these several times in the past both here at NMEC and at mid-levels of CITF leadership, but it needs to hit at a higher level.

"Formidolosus Venators!"

(b)(2),(b)(6)

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

From: (b)(6)
Sent: Wed 3/10/2004 8:46 AM
To: (b)(6)
Cc:
Subject: RE: RE: (b)(6) Hard Drive (FBI will not pass until they review it first)

(b)(6)

From: (b)(6)
Sent: Friday, March 05, 2004 08:47
To: (b)(6)
Subject: RE: Cdr Lang

(b)(6)

This issue will be addressed today. It would have been addressed yesterday but (b)(6) wanted to coordinate with me and I was in GTMO and unavailable.

We're moving as quickly as possible to make sure the group functions cohesively toward a common goal.

One small item - my last name is spelled with one M.

Thanks for your candor.

(b)(6)

Legal Advisor to the Appointing Authority
Office of Military Commissions

DOD/GC(LC)

(b)(2)

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

From: (b)(6)
Sent: Friday, March 05, 2004 7:51 AM
To: (b)(6)
Cc:
Subject:

(b)(6)

Sir,

This may be coming at you both from out of the blue, but I thought very seriously about a conversation I had with (b)(6) last night and I felt like I needed to clarify my position.

I wish to make you and (b)(6) aware of the depth of my concerns with respect to the (b)(6) problem and I chose to email you both so that there is no ambiguity about this issue.

On Wednesday, (b)(6) confronted me regarding his perceptions of problems in the office. He told me that there was a perceived rift between the Air Force and the other members of the staff. He stated that he felt it was up to me to mend that rift and that I had to choose between my loyalty to the Air Force and my loyalty to this office. He stated that the office staff had entirely "written off" (b)(6) questioned (b)(6) integrity, and that he personally (b)(6) and found him to be manipulative and dishonest and (b)(6) was completely counterproductive to the mission. When we discussed his feelings toward (b)(6) he was visibly hostile and quite literally had a physical reaction. (b)(6) stated that he and other members of the office "knew (b)(6) had gone to the Air Force" and that the Air Force's contact with (b)(6) and (b)(6) would only result in short term inconvenience for him (b)(6) the rest of the office. (b)(6) was going to be increasingly isolated and emphasized that (b)(6) had written Carr off long ago and it was only now that others in the office were finally realizing that they should write Carr off too. (b)(6)

(b)(6) what side I was on before then.

I took (b)(6) statements to be a thinly veiled threat against me, a clear statement of already-completed retaliatory efforts against Carr and an intent to engage in further retaliatory efforts against (b)(6) me if I failed to "join his

team."

(b)(6) stated that my loyalties and the loyalties of all staff members were supposed to be to the team and not to our respective services or other "outsiders." He stated that any reporting of our problems to anyone outside the team was disloyal and demonstrated a lack of integrity. He specifically mentioned this as a problem with (b)(6)

I clearly articulated to (b)(6) that I have spoken frankly with (b)(6) about our organizational problems and that I have spoken to you. I let him know that I have also spoken frankly with my service chain on certain issues. It is clear to me that (b)(6) considers my conversations with my service chain to be disloyal. It is also clear to me (b)(6) (b)(6) considers conversations with you and with (b)(6) as being disloyal and demonstrating a lack of integrity on my part. I also clearly articulated to (b)(6) that I didn't plan on join "his team" because I didn't agree with his assessment.

While you both clearly acknowledge that (b)(6) is causing severe disruption to this process, that he is engaging in truly disloyal and inappropriate behavior (e.g. countermanning (b)(6) explicit instructions) and that he should have been fired long ago, you have both stated that you are severely constrained in your ability to remove him. I can only assume that you base this conclusion on the assumption that (b)(6) is the only one prepared to try (b)(6). I would note that the only reason that (b)(6) is perceived to be so central to (b)(6) is that he refuses to give any other team members access to the case file and that everyone in the office clearly acknowledges this fact. But beyond that, we have demonstrated in numerous ways how (b)(6) is NOT ready to try (b)(6). It is clear that because of his bizarre proclivities and possible mental illness, that he is not ready and because no one can work with him, he will NEVER be ready. While I understand that there are significant constraints on your ability to make staff moves, I believe that it is important for you to understand that I do not believe that (b)(6) (or any other members of our staff) can effectively participate in this process with this issue before us.

(b)(6) has directed members of this staff not to talk to (b)(6) has lied about material facts related to his case preparation from the staff, from (b)(6) and from you. (b)(6) has directed members of the staff to ignore (b)(6) direction. (b)(6) has concealed significant problems in the office and in the cases from both of you and likely from Mr (b)(6) has threatened two Air Force officers (one of whom he rates)

I wish to emphasize that this is not just a personal dispute between two Air Force officers and (b)(6). The complaints about (b)(6) lapses are legion. I have heard significant negative comments about his failures from (b)(6) and many outside agencies.

I cannot overemphasize the fact that it is the very conversations initiated by (b)(6) that have resulted in real and important changes that have prevented severe embarrassment to you and to (b)(6). The ONLY reason that corrective measures have been taken in many cases is that we chose not to cower in the face of (b)(6) inappropriate behavior while others did.

While I realize that (b)(6) may not at heart be a bad person and may have once been very capable, I sincerely wonder if he has collapsed under the strain. Whether his actions are intentional or not, it is clear that he is "combat ineffective" and we cannot continue in this fashion.

I understand that you may be powerless to remove (b)(6) if that is the case, then I request reassignment for myself and for (b)(6). I believe we have already been reprisal against on numerous occasion and I refuse to subject myself or (b)(6) to further abuse. (b)(6) is not excised from this process, there is no way that we can succeed. If this isn't fixed, I will persist in requesting reassignment through every avenue available to me. Frankly, I would rather end my Air Force career than work another day with (b)(6) subject myself or others to further abuse, so if you fail to take action I will do what I think is appropriate to remedy this situation.

v/r

(b)(6)

Department of Defense, Office of the General Counsel
Office of Military Commissions, Prosecution
1931 Jefferson Davis Highway

Suite 532, Arlington, VA 22202

(b)(2)

~~CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 USC 552. Do not release outside of DoD channels without prior authorization from the sender. If you receive this transmission in error, please notify the sender.~~

(b)(6)

From: (b)(6)
Sent: Friday, March 05, 2004 07:51
To: (b)(6)
Cc:
Subject:

(b)(6)

Sir,

This may be coming at you both from out of the blue, but I thought very seriously about a conversation I had with (b)(6) last night and I felt like I needed to clarify my position.

I wish to make you (b)(6) aware of the depth of my concerns with respect to the (b)(6) problem and I chose to email you both so that there is no ambiguity about this issue.

On Wednesday (b)(6) confronted me regarding his perceptions of problems in the office. He told me that there was a perceived rift between the Air Force and the other members of the staff. He stated that he felt it was up to me to mend that rift and that I had to choose between my loyalty to the Air Force and my loyalty to this office. He stated that the office staff had entirely "written off" (b)(6) questioned (b)(6) integrity, and that he personally (b)(6) found him to be manipulative and dishonest and (b)(6) was completely counterproductive to the mission. When we discussed his feelings toward (b)(6) he was visibly hostile and quite literally had a physical reaction. Lang also stated that he and other members of the office "knew" (b)(6) had gone to the Air Force and that the Air Force's contact with (b)(6) and (b)(6) would only result in short term inconvenience for him (b)(6) the rest of the office. (b)(6) was going to be increasingly isolated and emphasized that (b)(6) had written (b)(6) long ago and it was only now that others in the office were finally realizing that they should write (b)(6) too. (b)(6) stated that in the long run things would be back to the way "they are supposed to be," and that I had better choose what side I was on before then.

I took (b)(6) statements to be a thinly veiled threat against me, a clear statement of already-completed retaliatory efforts against (b)(6) an intent to engage in further retaliatory efforts against (b)(6) if I failed to "join his team."

(b)(6) stated that my loyalties and the loyalties of all staff members were supposed to be to the team and not to our respective services or other "outsiders." He stated that any reporting of our problems to anyone outside the team was disloyal and demonstrated a lack of integrity. He specifically mentioned this as a problem with (b)(6)

I clearly articulated to (b)(6) that I have spoken frankly with (b)(6) about our organizational problems and that I have spoken to you. I let him know that I have also spoken frankly with my service chain on certain issues. It is clear to me that (b)(6) considers my conversations with my service chain to be disloyal. It is also clear to me that (b)(6) considers conversations with you and with (b)(6) being disloyal and demonstrating a lack of integrity on my part. I also clearly articulated to (b)(6) that I didn't plan on join "his team" because I didn't agree with his assessment.

While you both clearly acknowledge that (b)(6) causing severe disruption to this process, that he is engaging in truly disloyal and inappropriate behavior (e.g. countermanning (b)(6) explicit instructions) and that he should have been fired long ago, you have both stated that you are severely constrained in your ability to remove him. I can only assume that you base this conclusion on the assumption that (b)(6) the only one prepared to try (b)(6) I would note that the only reason that (b)(6) is perceived to be so central to (b)(6) is that he refuses to give any other team members access to the case file and that everyone in the office clearly acknowledges this fact. But beyond that, we have demonstrated in numerous ways how (b)(6) NOT ready to try (b)(6) It is clear that because of his bizarre proclivities and possible mental illness, that he is not ready and because no one can work with him, he will NEVER be ready. While I understand that there are significant constraints on your ability to make staff moves, I believe that it is important for you to understand that I do not believe that (b)(6) (or any other members of our staff) can effectively participate in this process with this issue before us.

(b)(6) has directed members of this staff not to talk to (b)(6) has lied about material facts related to his case preparation from the staff, from (b)(6) and from you. has directed members of the staff to ignore (b)(6) direction. has concealed significant problems in the office and in the cases from both of you and likely from (b)(6)

(b)(6) has threatened two Air Force officers (one of whom he rates)

I wish to emphasize that this is not just a personal dispute between two Air Force officers and (b)(6). The complaints about Cdr Land's lapses are legion. I have heard significant negative comments about his failures from (b)(6) and many outside agencies.

I cannot overemphasize the fact that it is the very conversations initiated by (b)(6) for me that have resulted in real and important changes that have prevented severe embarrassment to you and to Col (b)(6). The ONLY reason that corrective measures have been taken in many cases is that we chose not to cower in the face of (b)(6) inappropriate behavior while others did.

While I realize that (b)(6) may not at heart be a bad person and may have once been very capable, I sincerely wonder if he has collapsed under the strain. Whether his actions are intentional or not, it is clear that he is "combat ineffective" and we cannot continue in this fashion.

I understand that you may be powerless to remove (b)(6). If that is the case, then I request reassignment for myself and for (b)(6). I believe we have already been reprimanded on numerous occasions and I refuse to subject myself or (b)(6) to further abuse. If (b)(6) is not excised from this process, there is no way that we can succeed. If this isn't fixed, I will persist in requesting reassignment through every avenue available to me. Frankly, I would rather end my Air Force career than work another day with (b)(6) and subject myself or others to further abuse, so if you fail to take action I will do what I think is appropriate to remedy this situation.

v/r

(b)(6)

Major, USAF

Department of Defense, Office of the General Counsel
Office of Military Commissions, Prosecution
1931 Jefferson Davis Highway
Suite 532, Arlington, VA 22202
Phone: (b)(6)
Fax: (b)(6)

~~CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 USC 552. Do not release outside of DoD channels without prior authorization from the sender. If you receive this transmission in error, please notify the sender.~~

(b)(6) MAJ, DoD OGC

From: (b)(6)
Sent: Tuesday, March 02, 2004 07:08
Subject: RE: Follow-up per your request

Got it. I meet with Col (b)(6) in 10 minutes.

(b)(6)
Legal Advisor to the Appointing Authority
Office of Military Commissions
DOD/GC(LC)
(b)(6)

-----Original Message-----
From: (b)(6) MAJ, DoD OGC
Sent: Tuesday, March 02, 2004 6:50 AM
To: (b)(6)
Subject: RE: Follow-up per your request

~~CONFIDENTIAL - BG HEMMINGWAY EYES ONLY~~

Sir

I didn't plan on following up so quickly, but an issue came up that illustrated our concern about not having necessary info - in AI Qosl - just yesterday afternoon the trial counsel discovered that the CITF case agent has a series of TDs and IIRs that the Prosecution does not have - this was brought up by an analyst we have working here - you can imagine the potential dangers when we can't even be sure that we have the same set of documents that the case agent sitting down at CITF has.

I once warned (b)(6) that I feared that defense was going to try to make the Appointing Authority look foolish, dishonest or both - these lapses are the kinds of things that give the defense ammunition to try something like that.

v/r

(b)(6)

~~CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 USC 552. Do not release outside of DoD channels without prior authorization from the sender. If you receive this transmission in error, please notify the sender.~~

-----Original Message-----
From: (b)(6) MAJ, DoD OGC
Sent: Monday, March 01, 2004 16:43
To: (b)(6)
Subject: Follow-up per your request

~~CONFIDENTIAL - BG HEMMINGWAY EYES ONLY~~

Sir,

Thanks again for your gracious invitation. The Army/Navy club was a treat.

In response to your questions earlier, I thought it important to amplify

certain points:

1. The theory of liability - conspiracy to create war crimes - is not that new, but its application to facts like this is extremely novel. Perhaps more importantly, it is not a "catchall" like 18 USC 2339b (Material Support to Terrorism) is for federal courts so we have a much steeper hill to climb. Each of the first 4 cases has significant shortcomings in terms of case preparedness - and some have significant shortcomings in terms of actually being able to prove liability - if a jury actually believes that an accused was in fact only a cook, or only a driver or only a computer repairman, it is hard to see under existing theories of liability how that individual could be proved to be guilty of conspiracy.
2. Case preparedness - cases were not even being evaluated consistent with the current theory of liability until only recently (less than 2 months). Consequently, even if one presumes that the theory of liability will work, there is little or no evidence currently in our possession to prove the charges. Moreover, little has been done to line up live witnesses, secure permission for witnesses to testify, or even determine if live witnesses will testify (example - detainees). With respect to the "grand conspiracy" portion of the charge, we have yet to obtain the necessary evidence, permissions etc. While many in the office ASSUME that we can prove this theory, we have little evidence upon which to base this assumption. I would also emphasize that I and a certain junior officer have been fighting for MONTHS to get others in this office to agree to the basics that you now see on the charge sheet that was presented to you. Despite the fact that we brought this issue up as early as September, it was only recently that the Chief agreed to change the charge sheet and then largely failed to acknowledge how or why the charge sheet was changed.
3. Case organization - near as I can tell, there is little effective organization to any of the cases. I have not seen any comprehensive proof analysis for example, no milestones, no goals, etc. My discussions with attorneys that have looked at Al Bahlul and Hamden tell me that the cases are extremely disorganized and that our office does not yet possess the necessary evidence to prove the charges. While I have not been privy to the case files for Al Qosi or Hicks, my conversations with the lead counsel and his assistants lead me to believe that they are unprepared and underqualified for these challenging cases. It should be noted that the lead defense counsel in Hicks is a nationally recognized lawyer experienced in terrorism cases and the lead in Al Qosi is a highly experienced military counsel with a well deserved reputation for meticulous preparation and aggressive tactics in and out of the courtroom. As far as follow on cases go, to my knowledge there is little or no work being done to prepare these cases and our office is only in sporadic contact with the case

agents at CITF if at all on a given case.

4. Management lapses - Two of the 0-5s are extremely junior as lawyers and they have proved reticent to bring up any problems in the office or in the quality of the cases. Their unwillingness or inability to address numerous leadership failures in this office contributes to an overall negative picture. Beyond that, there are numerous examples of the deputy countermanding the direction of the chief. When these issues are brought to the Chief's attention he has chosen to do nothing about it. This is not just a matter of a deputy who is not acting like a deputy. In this case, the deputy is actually severely undermining the Chief and has been doing so for approx six months. The consequence of these leadership failures is that staff members are contemptuous of the leadership or contemptuous of each other.

5. Lack of Candor - There is a culture of silence in this office. For six months we were told not to bring problems to the Chief (by the Deputy). Once the Chief started working here full time, the Chief has become the gatekeeper for negative information relating to the quality of cases, progress, etc. I and others have witnessed numerous examples of the Chief or the Deputy minimizing or concealing significant problems we have in cases including lack of investigative resources, lack of cooperation with outside agencies, lack of progress/coordination with CITF, failures on the part of this office to direct or work with CITF, quality problems with evidence, etc, etc. At one point, I believed that the Chief was prepared to address these problems, but he has since demonstrated that he is not sincere on this point. I have observed numerous instances when he has promised me or others that he would be frank in his assessment of a weakness or challenge and regrettably he then failed to demonstrate the candor one would expect from an 0-6. His failure to "stand up" with respect to repeated instances of dishonesty or countermanding of his direction has materially affected his statute with subordinates - particularly some of the 0-3s.

Of particular concern is the lack of candor with respect to readiness in ongoing cases. I have heard numerous public statements with respect to the readiness of cases that directly contradicts what our Chief (or Deputy) have said about the cases privately. In particular, I (and others) are concerned about the selective presentation of witness statements to your office and management. It has been admitted in this office that we do not know whether or not we have all of the accused's statements in Al Bahlul or Al Qosi. Given that these cases are largely admissions cases, this is a critical lapse. It is important to remember that none of these statements are verbatim records or statements written by the accused. Rather, these so-called statements are actually agent summaries of past interviews and

even then they are for the most part translations. Consequently, there is always some danger of inaccuracies/inconsistencies so it is extremely important to nail down all available statements ahead of time. Moreover, we suspect that there may be a number of witness statements that have been selectively withheld from you because they paint a picture of contradictory statements or they simply do not "help the case." We believe that there are numerous Form 40s, IIRs, TDs and TDXs that have not been provided to you.

6. Ineffective Utilization of Resources - we have no program for absorbing new personnel and making good use of them, particularly reservists. Significantly, the ramp up time necessary to understand the "basics" about Al Qaida, war crimes prosecutions, the CITF investigation process, and the mountain of information collected is approx. 45 days. Consequently, it is very difficult for anyone, particularly reservists on a short rotation, to make a valid contribution given the lack of orientation, lack of managed taskings, etc. A necessary part of the organization has to be a orientation regarding military commissions, military commission orders & instructions, applicable law, our charging philosophy, general Al Qaida and Taliban information, and CITF/DOJ/FBI resources available at a minimum. I believe a well run program would be a week long and everyone here and at CITF should be required to go through the whole thing.

7. Fairness - I'm sure that no one is surprised that there are aspects of this process that are going to be challenged on appearance of fairness grounds. I have warned the Chief on numerous occasions that it is important to establish a PROCESS that ensures an appearance of fairness. The Chief has been relatively unreceptive to my concerns in this area. I must be frank with you that I believe your appointment as the Deputy Appointing Authority is one of the areas that is likely to prove problematic. From an international perspective, the relationship of the Appointing Authority to the Prosecution was our biggest problem before the fairly controversial decision to detail you as the Appointing Authority. In fact, in my opinion, because of this and because of your necessary involvement in the management problems I have detailed, the most prudent way to handle the first few cases will be for you to voluntarily recuse yourself and ask MG Altenberg to review the case files and charges and make his own independent determination. It would also be my recommendation that MG Altenberg bring his own person or people in to evaluate the system and recommend any changes necessary to remedy any appearance problems or enhance the appearance of fairness.

Beyond that however, there are a few fairness points that I forgot to detail to you that may be the cause of some concern. (b)(6) has stated that he has been in contact with the "presumed" Presiding Officer. While he

assures us that the contact is only related to the trial procedures guide, this contact is going to raise eyebrows down the road - particularly since he has been talking to this guy since well before any decision was made to pick him. Moreover, the Chief has a tendency to make comments like "you know that no military panel is going to acquit these guys," or "you know they are going to pick a presiding officer who is going to steer this thing in the right direction," that make many (including me) uncomfortable. Worst of all, he has a tendency to make these kinds of statements in mixed company (i.e. in front of TJAG for example). For people like you and me who were raised to be meticulous about apparent fairness, this really does cause some concerns - not because anyone is really trying to be unfair, but because of how people are going to try to make it look.

I also cannot overemphasize the problems we have here with respect to fairness as it relates to discovery, particularly alleged exculpatory information. I cannot tell you how many times that I or my junior officer colleague have battled with the staff here regarding the need to prepare for challenges on this point. As some commentators have stated, this issue may be the whole ballgame for commissions and this staff for the most part has been extremely resistant to addressing these issues. Frankly we are not prepared for what lies ahead because no one has been listening to these concerns and nothing is prepared.

8. Macro Organization - you better than anyone understand the limitations we face as members of a DoD level staff trying to execute a mission in the field when we don't have a commander and no formal chain of command with CITF or JTF Gitmo (without reaching back "up the chain" to SECDEF). As a practical matter, agencies downstream understand that they can avoid helping us by being difficult - they know that we are unlikely to appeal to the SECDEF unless it is something really big. Not sure if everyone really understands the difficulties that this is creating for us. As we have no commander and no authority without appealing to a very cumbersome and convoluted chain of command, we really get no support from other agencies. A perfect example would be MG Miller telling us that he wasn't going to have one of his people serve charges for us. This would never happen if our organization had real authority and this example is repeated in hundreds of different examples every day.

In sum, my assessment of the first 4 cases is that we have a somewhat risky theory of liability, severe proof problems, no case organization, no division of labor, little demonstrated progress in the last six months, little authority to actually get things moving, and assuming we could fix all those problems, little likelihood of success with the detailed counsel. Only because you asked, I have attempted to be as frank with you as I can. I realize that this is the military and I don't get a vote, but I will tell you that if

I knew the state these cases were in when I was asked to come here, I never would have committed myself and I would have recommended that the Air Force (and any military judge advocates) run away from it. I have no doubt that if you privately spoke with our staff and assured them confidentiality that many would admit that they want to leave, but can't. In my opinion, the failure to organize, failure to prepare, failure to honestly assess cases, failure to request solutions to the problems, and failure to lead (at this level) represent nothing short of culpable negligence. I don't say these things lightly, but I believe this process is too important to rest on niceties now.

I will do whatever I can to assist you sir, but I feel like people need to start owning up to all this because it really is as bad as it sounds. The only way to fix this (if it can be fixed at all) would be by making major major changes.

v/r

(b)(6)

Major, USAF

Department of Defense, Office of the General Counsel
Office of Military Commissions, Prosecution
1931 Jefferson Davis Highway
Suite 532, Arlington, VA 22202
Phone: (b)(6)
Fax: (b)(6)

~~CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 USC 552. Do not release outside of DoD channels without prior authorization from the sender. If you receive this transmission in error, please notify the sender.~~

(b)(6)

CPT, DoD OGC

From: (b)(6) COL, DoD OGC
Sent: Wednesday, February 25, 2004 13:29
To: (b)(6)

Subject: Our 9 pending RTBs

Importance: High

All:

DoD and interagency coordination is complete---apparently except for the CIA (response expected shortly).

With that in mind, we should expect these 9 RTBs to go to President Bush---and be approved---sometime in March.

Given that information, I want each prosecutor for each of the 9 detainees to begin thinking about charging.

Within 2-3 weeks of the President taking action on these 9 RTBs, I will want to forward FINAL charges in each of these 9 cases to the Appointing Authority for approval (but not referral).

Please plan accordingly. . . .

(b)(6)

(b)(6)

Capt, DoD-OGC

From: (b)(6) Capt, DoD-OGC
Sent: Wednesday, February 18, 2004 2:17 PM
To: (b)(6) COL, DoD-OGC
Subject: FW: PLEASE

Sir,

How would you like me to respond to this?

My efforts to build a positive relationship with (b)(6) and receive prompt replies to our requests, do not appear to be furthered by this continued activity.

I received a phone call from (b)(6) after (b)(6) last trip to New York. FBI HQ did not know that he was up there. FBI HQ only learned about it after CITF put in a request for information after the fact for the material that SDNY had already given us. FBI HQ then looked like fools when they requested the information from SDNY and NY said we already had it. My efforts to explain in the office why we can not continue to operate this way were met with must resistance and contempt, with statements such as "you just don't understand how these things work" and that I was new and trying to make immediate changes to efforts that have worked in the past.

I can not continue to field calls from the FBI who question why requests for information are not coming through me, as we have represented to them on numerous occasions. If we are going to continue to make unofficial phone calls and visits, then I want to quit making representations to the contrary to people who seem like they want to help us.

(b)(6) is also trying to track down how Lt. (b)(6) got a hold of a grand jury transcript which is still under seal. Needless to say, the AUSA was more than a little surprised to learn we had it.

v/r,

(b)(6)

(b)(1)

(b)(6)

MAJ, DoD OGC

From: (b)(6) MAJ, DoD OGC
Sent: Wednesday, February 18, 2004 10:22
Subject: (b)(6) COL, DoD OGC
Army Tiger Team Issues

Sir,

Interesting issues raised from a passing conversation with Col (b)(6)

Gunn mentioned that one of his former troops had attempted to discourage him from taking the Defense Counsel job - that individual had been assigned to GITMO in Spring 02 as part of the Army special projects team - Col (b)(6) effort I guess - and apparently intimated that the process was all messed up.

Just so happens that this individual is also an old friend of mine so I met with him to see what he had to say.

He tells me that he was assigned to review detainees for potential prosecutions and unprompted, he detailed many if not all of the issues we are now concerned about. In particular, he said that the Army team had concluded that most if not all of the cases they were reviewing had been compromised by intel gathering efforts and that there were significant concerns about personal jurisdiction (i.e. people apparently not captured on the battlefield).

He told me that these litigations risks were detailed in what he called "prosecution memorandums" and that while the Army team didn't have official status/authority whatever, they nevertheless attempted to engage with the then newly formed CITF to correct these deficiencies and actually attempt to investigate some cases - the numbers he gave me were that out of 200 detainees reviewed, their team found 6 that were worth further investigation at all and even those had serious problems.

Again unprompted, my friend mentioned an interesting perspective on OGC - he told me that LTC (b)(6) came to visit with Solicitor General Olson and that LTC (b)(6) (these are my friend's words) blatantly lied to the Army team in my friend's presence. I chuckled when he warned me - "watch out of that guy, he's not what he seems to be."

Of course, this also really worries me in that there might be a relatively large number of people from this Army effort who may have a serious ax to grind with OGC and this process and they know what to attack.

In that vein, I also found it interesting that my contact told me that the lawyer in charge at CITF that he was working with was an Army LTC or Maj named (b)(6) and when I told him the name sounded familiar, he told me that may be because (b)(6) has a brother or cousin who is a Marine instructor at TJAGSA - don't know if this is true or not, but could it be that this is the same guy that the defense requested to be their consultant???

I have asked about the Army Tiger team before and was told that their efforts were ineffective, really didn't have their eye on the ball, nobody understands what they were doing, etc. Instead, sounds like they may have been doing exactly what they were supposed to be doing and maybe somebody didn't like the answer.

I really don't like the idea that there may have been fairly extensive analysis of these cases and we don't even know about it... to me that smacks of being brought into this effort on false pretenses...

And of course, given that I originally got this insight from Col (b)(6) it is a fair bet that the defense is going to be doing some probing or already has - my contact told me that he had related all of these issues to Col (b)(6) at least in general.

v/r

(b)(6)

Major, USAF

Department of Defense, Office of the General Counsel
Office of Military Commissions, Prosecution
1931 Jefferson Davis Highway
Suite 532, Arlington, VA 22202
Phone: (b)(6)

(b)(6) Capt, DoD-OGC

From: (b)(6) Capt, DoD-OGC
Sent: Tuesday, February 17, 2004 1:42 PM
To: (b)(6)
Cc: (b)(6) CAPT, DoD-OGC
Subject: OGA Requests

All,

As has been previously noted, OGA has responded to our requests to pull all TD/TDX/CIRs for our initial cases. However, we have learned today that there is an issue with how the searches are being conducted.

OGA will provide name variants of the detainees (Osama, Usama, etc.). However, we must provide a list of all known aliases so that a comprehensive search can be accomplished.

Consequently, it appears that we need to re-accomplish the searches for the first four cases, with a complete list of known aliases submitted to TF Discovery.

For other cases, it may be appropriate for the CITF case agents to carefully document all known aliases as well as spelling variants in the documents to which we have access. We do not know the extent that JDIMS accurately reflects this information.

v/r,

Capt (b)(6)

(b)(6)

MAJ, DoD OGC

From: (b)(6) MAJ, DoD OGC
Sent: Wednesday, February 11, 2004 07:10
Subject: (b)(6) LtCol, DoD OGC
Follow-up

Sir

As we discussed yesterday, the lack of real progress in obtaining evidence and the severe constraints on the cases we do have are going to become apparent in the near future.

I am hoping that others who share these concerns are putting their concerns in email or in writing some other way. To the extent that it is appropriate to copy you in on my communications like that, I will do so.

I would appreciate you doing the same.

I am VERY concerned what is being briefed up the chain, particularly whether they understand the limitations we are facing and the public statements and even interoffice statements don't give me cause to be optimistic.

(b)(6)

Major, USAF

Department of Defense, Office of the General Counsel
Office of Military Commissions, Prosecution
1931 Jefferson Davis Highway
Suite 532, Arlington, VA 22202
Phone: (b)(6)
x: (b)(6)

~~CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 USC 552. Do not release outside of DoD channels without prior authorization from the sender. If you receive this transmission in error, please notify the sender.~~

(b)(6)

MAJ, DoD OGC

From: (b)(6) MAJ, DoD OGC
Sent: Wednesday, February 11, 2004 07:03
Subject: (b)(6) LtCol, DoD OGC
Haynes Briefing

~~Closehold~~

Heard it thru the grapevine that Cdr (b)(6) was briefing M Haynes about the victims' letters and the issue of the Cole Video came up.

Two issues there -

1. really worried about a false sense of progress/preparation being conveyed to victims - that could really backfire on us when they see how many cases we have and what kinds of cases we have.
2. really worried about the fact that Mr Haynes claimed not to know about the Cole Video - how could that possibly be? If he doesn't know those kinds of details about the first few cases, what in the world is being briefed?

(b)(6)

Major, USAF

Department of Defense, Office of the General Counsel
Office of Military Commissions, Prosecution
1931 Jefferson Davis Highway
Suite 532, Arlington, VA 22202

Phone: (b)(6)

Fax: (b)(6)

~~CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 USC 552. Do not release outside of DoD channels without prior authorization from the sender. If you receive this transmission in error, please notify the sender.~~

(b)(6) MAJ, DoD OGC

From: (b)(6) COL, DoD OGC
Sent: Friday, February 06, 2004 13:36
To: (b)(6) MAJ, DoD OGC
Subject: RE: Charges

(b)(6)

Agree with you completely.

Problem is that LTC (b) doesn't know shit about shit—having been here less than 30 days—but he is being called upon to provide legal advice.

MY SUGGESTION is that you not provide anything in writing—or the minimum—and that you discuss these things orally. . . .

I know this is a pain in the ass but if you don't explain the BASICS to (b) I will have to do it. . .

Believe he means well but frankly there will come a time when I may have to say to the AA, "just sign the shit and trust me."

In the meantime, please try to make the AA folks feel comfortable. . . but do keep them at arms length.

Can you do this?

COL (b)(6)

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

From: (b)(6) MAJ, DoD OGC
Sent: Friday, February 06, 2004 13:19
To: (b)(6) COL, DoD OGC
Subject: RE: Charges

Sir,

I'm not crazy about discussing our positions with the Appointing Authority legal staff. This gets back to my issue of apparent and actual fairness. In my view these guys have to make this kind of determination themselves. We should only be answering upon a motion by the defense. Obviously your call.

I am also worried about how this nexus to armed conflict position plays out for us insofar as I think it has not been vetted with DOJ or with DoD (b)(6) (et al) or with the services – my worry is that LTC (b)(6) seemed to be noncommittal about this position and he's not around anymore anyway -- and the position we are taking is policy significant. Clearly DOJ is NOT taking any position with respect to armed conflict prior to 9/11 - there is no reason for them to address it, but that doesn't mean that they would be happy with our position either. I raised this issue awhile back and it was received pretty negatively, but I wanted to point this out now because I think our charging decisions have somewhat ameliorated this problem (somewhat).

The way we have set up the charge sheet – near as I can tell, even in a worse case

scenario we are able to say all conduct is relevant and post 9/11 conduct is what makes the individual culpable.

Again, I'm willing to push this, but I don't want to oversell this expert and I don't want to oversell the viability of this theory. I think we may find out that we don't have to press it too hard.

I pulled a few paragraphs out of the draft nexus to armed conflict brief, but I still don't think it is a good idea to work this way - this informal stuff is going to kill us. Also they BETTER NOT use my words - that would look really hokie.

v.r.

(b)(6)

(b)(6)

Major, USAF

Department of Defense, Office of the General Counsel
Office of Military Commissions, Prosecution
1931 Jefferson Davis Highway
Suite 532, Arlington, VA 22202
Phone: (b)(6)
Fax: (b)(6)

~~CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 U.S.C. 552. Do not release outside of DoD channels without prior authorization from the sender. If you receive this transmission in error, please notify the sender.~~

Nexus to Armed Conflict – Prosecution Theory

It will be the prosecution's position that while the armed hostilities with Al Qaida and its allies, are sporadic and in some cases, unconventional, they are nevertheless as a factual matter and as a matter of U.S. policy, part of an armed conflict. In fact, our view is that even under a conservative/traditional view of armed conflict-as-requiring-state actors, the fact that at least two states, the United States and Afghanistan, are involved in armed hostilities is sufficient to invoke the law of armed conflict. We further argue that the law of armed conflict has to create obligations for any participants in armed conflict, including unlawful participants such as Al Qaida and its allies, regardless of the nature, scope or duration of the hostilities, or the law would be meaningless given the characteristics of modern armed conflict. Most importantly, we assert that the existence of an armed conflict with Al Qaida is a non-justiciable political question already decided by the President and Congress and only the nexus of certain conduct to that armed conflict may be challenged.

Among the justifications for accepting the existence of an armed conflict is that

fact that the Al Qaida organization has for a period of over 10 years engaged in conduct that rises to the level of armed hostilities with the United States, has formally declared war against the United States (1996), and has formally extended the armed conflict to attacking U.S. citizens, civilian and military, wherever they may be found (1998). The fact that United States has elected to respond to Al Qaida aggression with a military response, that the President has declared a state of armed conflict against Al Qaida and its allies, that Congress has formally endorsed the President's actions via a joint resolution and that that the community of nations has formally acknowledged the United States' right to defend itself in this context all support the existence of this armed conflict. We assert that nexus of any specific conduct to armed conflict is a question of fact for the commission members to determine.

It may be argued that engaging in armed conflict with a terrorist organization is a departure from U.S. policy and improperly elevates the status of Al Qaida and its allies from being criminals to being parties to the armed conflict. However, if the political leadership of the United States chooses to characterize the conflict with Al Qaida as an armed conflict, there is no basis for challenging this determination. It is a well-settled principle of U.S. law that the decision to engage in armed conflict and even to label military responses as armed conflicts is left to the democratically elected leadership of the Executive and Legislative branches. It is also a well-settled principle of international law that a country may choose to grant higher legal status to a non-state actor if it chooses to do absent affirmative proof that a *binding* principle of international law prohibits this practice.[1][1] The decision to engage in armed hostilities with Al Qaida and its allies and the decision to hold war crimes offenders accountable via military commissions are clearly examples of this power.

The Executive has determined to defend the United States by using military force against Al Qaida. While it is true that terrorist organizations are not state actors and terrorist acts are normally addressed via criminal prosecutions, it is also true that the Executive is the appropriate decisionmaker to determine how to hold terrorists accountable. In this case, the Executive and Legislative branches have determined that the breadth and severity of Al Qaida attacks warrants a military response. It is our position that the fact that *either* side to the conflict has determined to use armed force necessarily implicates the law of armed conflict. It may well be that Al Qaida never intended to invoke the law of armed conflict and clearly they never intended to comply with it. But it is an undisputed principle of law that malefactors take the law as they find it. When Al Qaida chose to attack the United States in this manner, they risked a military response and they risked application of the laws of armed conflict.

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

From: (b)(6) COL, DoD OGC
Sent: Friday, February 06, 2004 12:25
To: (b)(6) LTC, DoD OGC
Cc: (b)(6) MAJ, DoD OGC (b)(6) CDR, DoD OGC
Subject: RE: Charges
Importance: High

about 10 days.

V/r

(b)(6)

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

From: (b)(6) BG, DoD OGC

Sent: Friday, February 06, 2004 10:07

To: (b)(6)

Cc: (b)(6)

Subject: RTBs

If there is internal coordination that we can complete while we're waiting for the external, let's proceed. We need to be spring loaded to get the packages forwarded.

(b)(6)

(b)(6)

Legal Advisor to the Appointing Authority
Office of Military Commissions
DOD/GC(LC)

(b)(6)

[1][1] See *Kreimeman v. Casa Veerkamp, S.A. de C.V.* 22 F.3d 634, 639 n.18 (5th Cir.1994) citing *The Case of S.S. Lotus (France v. Turkey)*, [1927] P.C.I.J. Ser. A, No 10 at 18-19; *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 555 (N.D. Ohio 1985) (citing the *S.S. Lotus* case for the proposition that the jurisdiction [to adjudicate] of sovereign States is unbounded unless explicitly prohibited). "The rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . . restrictions upon the independence of States *cannot* therefore be presumed."

(b)(6)

Office of Military Commissions
1931 Jefferson Davis Highway, Suite 532
Arlington, VA 22202

Com (b)(6)

DSN

STE:

Fax:

email

SIPR

~~CAUTION: This message may contain information protected by the attorney-client, attorney work product, deliberative process, or other privilege. Do not disseminate without the approval of the Office of the DoD General Counsel.~~

(b)(6)
CPT, DoD OGC

From: (b)(6) MAJ, DoD OGC
Sent: Wednesday, February 04, 2004 12:59
To: (b)(6) COL, DoD OGC
Subject: RE: Charges and evidence

Sir

I appreciate your candor. I realize that my statements may seem very presumptuous, but I am very worried based on my own fairly superficial inquiry.

As for the charge sheets, I am not opposed in principal - I think we have done good work to scale things back to a realistic level BUT I am absolutely against this issue of signing charge sheets now both because of the "where is the evidence" issue and because of the appointing authority issue.

When I say I'm against it, I don't mean that I think reasonable minds can differ and I will defend the decision - I mean I don't think I can work here anymore because I can't make a principled defense of these actions.

When we sign charges, I think the world in general and the AF specifically will think that we mean we are ready to go and of course we're not. Furthermore, the world will see this issue of BG Hemmingway being appointed as yet another example of DoD overreaching/attempting to control the process - I just can't be part of that..

I really don't threaten to quit everytime something isn't to my liking - honest.

v/r

(b)(6)

-- Original Message-----

From: (b)(6) COL, DoD OGC
Sent: Wednesday, February 04, 2004 12:08
To: (b)(6) MAJ, DoD OGC
Subject: Charges and evidence

(b)(6)

You are not heaping problems on me. And even if you were, that is why I am sitting here in this job.

Would be REALLY upset if you stopped raising these issues.

Based on (b)(6) comments to you, I will do some probing. As the Chief Prosecutor, I have been deferring to the Deputy Chief Prosecutor and LtCol (b)(6) on "factual" level issues (i.e. whether they really really really do have sufficient evidence). Perhaps I need to move away from the strategic level and operational level and get my boots a little muddy.

I will let you know what I discover--

In the meantime--and as I said to you this morning---I am most concerned about having the best possible charging document. And, as I value your input on that subject, let me know if you have any last minute "adjust fires."

COL (b)(6)

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

From: (b)(6) MAJ, DoD OGC
Sent: Wednesday, February 04, 2004 11:59
To: (b)(6) COL, DoD OGC
Subject: FW: Sample

Sir,

It is not my intention to heap problems on you, BUT this is a real problem.

I feel like in many ways we are closer than we have ever been, but we are also closer to unraveling than we have ever been.

Per our discussion this morning, I don't think anyone disputes the general approach, but you can see where my reservations come from as demonstrated by the email below.

I concede that I don't know the details of the cases and the actual evidence that we possess, but I have the same feeling as young (b)(6) when I ask our principals about specific points on cases - particularly Al Qosi and Hicks.

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

From: (b)(6) CPT, DoD OGC
Sent: Wednesday, February 04, 2004 09:47
To: (b)(6) MAJ, DoD OGC
Subject: Sample

Sir,

I have reviewed the Al Bahlul charge sheet. As I have mentioned on many occasions to you, I am, and have been, extremely concerned about the preparation of the case, the lack of careful analysis as to whether the available evidence can prove the elements of the charge(s), and the sparse information provided to other attorneys in the office concerning the facts and posture of the case. Per your instructions, I have not engaged CDR (b)(6) on this issue and have had very little active involvement with the case for the last few months, instead focusing on my duties as head of TF Discovery. Although the effort has been difficult, I have compiled the statements of the accused and the available evidence, and also understand the evidence intended to be presented as it has been submitted to TF Discovery.

It is my opinion:

1. We do not have sufficient evidence to prove beyond a reasonable doubt that al Bahlul had knowledge of, and joined in, a conspiracy to kill US civilians.
2. The evidence that is, and has been, presented to the office and those outside commentators is selectively chosen and not representative of the actual case file.
3. The significance of consensus within the office regarding the appropriateness of the charge sheet is greatly diminished given the absence of a comprehensive review and analysis of the case file. Although such a review for the office has been requested numerous times, this request has consistently been refused.

(b)(6)

Office of Military Commissions
1931 Jefferson Davis Highway, Suite 532
Arlington, VA 22202

Com (b)(6)
DSN
STE:
Fax:
email
SIPF

~~CAUTION: This message may contain information protected by the attorney-client, attorney work product, deliberative process, or other privilege. Do not disseminate without the approval of the Office of the DoD General Counsel.~~

(b)(6)

CPT, DoD OGC

From: (b)(6) CPT, DoD OGC
Sent: Tuesday, February 03, 2004 14:44
To: (b)(6) COL, DoD OGC
Subject: Contact with FBI

Sir,

"It has come to my attention" that prosecutors are continuing to contact (b)(6) at FBI independently. I understand that all contact with the agencies is suppose to come through me, and this continued independent contact is not easing my ability to do what you have asked me to do.

Although I thought I understood your direction and expectations from the repeated briefings you have made to the office, I wanted to make sure I was correct that no one should be contacting the agencies, to include the FBI, directly.

v/r,

(b)(6)

(b)(6)

Capt, USAF

Office of Military Commissions
1931 Jefferson Davis Highway, Suite 532
Arlington, VA 22202

Com: (b)(6)

DSN: (b)(6)

STE: DSN (b)(6)

Fax: (b)(6) (Unclass)

email: (b)(6)

SIPR: (b)(6)

~~CAUTION: This message may contain information protected by the attorney-client, attorney work product, deliberative process, or other privilege. Do not disseminate without the approval of the Office of the DoD General Counsel.~~

(b)(6) CPT, DoD OGC

From: (b)(6) COL, DoD OGC
Sent: Friday, January 23, 2004 07:19
To: (b)(6)
Cc: (b)(6)
Subject: Need your help with our Task Forces
Contacts: (b)(6)

(b)(6)

In light of yesterday--my (I think well-received) remarks to all your troops--

And now that you and Mark see how we have created Prosecution Task Forces to work smarter, I would very much like you to consider giving us some direct support.

Ideally, would like:

- Two (2) CITF agents working (at Belvoir) to directly assist Capt. (b)(6) in running Task Force Discovery
- Two (2) CITF agents working (also at Belvoir) to directly assist Mr. (b)(6) (our DoJ prosecutor) on Task Force al Qaida
- One (1) CITF agent working (at Belvoir) to directly assist Mr. (b)(6) in putting together sentencing in his Task Force

I know that I am asking a lot from you and CITF but I think direct, dedicated agent support to these Task Forces will actually enhance CITF's workproduct and bring our two offices together.

I am committed to having the best possible relationship between all the prosecutors and CITF--and having both our organizations running at 110 percent. While I think we are doing extraordinarily well together, I know you will agree that we can also improve on "perfection!" And, as I said yesterday, we can't do anything at all as prosecutors without your product. Ultimately, the key component of the upcoming military commissions is CITF's work product--not what some prosecutor does in a commission. . . .

So please give this some thought.

PPT slides outlining our organization and roles of relevant Task Forces is attached for your use.

BTW, CDR (b)(6) and SA (b)(6) have nearly hammered out the new CITF checklist--think this will be good and it is a solid workproduct--if you haven't seen it you should ask (b)(6) about it.

(b)(6)

(b)(6)
Capt, DoD-OGC

From: (b)(6) CDR, DoD-OGC
Sent: Wednesday, December 31, 2003 11:14 AM
To: (b)(6) Capt, DoD-OGC
Subject: FW: MILITARY COMMISSIONS ASSISTANCE

FYI

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

From: (b)(6) MAJ (b)(6)
Sent: Friday, December 19, 2003 11:31 AM
To: (b)(6) CDR, DoD-OGC
Subject: RE: MILITARY COMMISSIONS ASSISTANCE

Sir, my apologies, I believe Mr. (b)(6) notified you that my command wants an official request, but it should move smoothly once it gets into the tasker channels. I don't anticipate problems with the USCENCOM info - but the info from stateside will be more problematic. Recommend if possible that CITF locate the unit commander of the intelligence unit you identified so that you can work that angle as well.

v/r,

(b)(6)
MAJ, USA
Chief, International Law
CENTCOM CJA
DSN (b)(6)

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

From: (b)(6) CDR, DoD-OGC [mailto:(b)(6)]
Sent: Friday, December 19, 2003 11:10 AM
To: (b)(6) MAJ (b)(6) CDR, DoD-OGC
Cc: (b)(6)
Subject: RE: MILITARY COMMISSIONS ASSISTANCE

Major,

Have not been contacted by anyone from CJTF 180. Appreciate your willingness to assist us in getting what we need. Understand it may take some time. Please provide me updates as the information begins to come in.

R

CDR (b)(6)
Office of Military Commissions

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

From: (b)(6) MAJ (b)(6)
Sent: Tuesday, December 16, 2003 10:29 AM
To: (b)(6)
Cc: (b)(6)
Subject: FW: MILITARY COMMISSIONS ASSISTANCE

CDR (b)(6) You must have gotten the wrong impression from the last e-mail I sent. It is not our intent to derail your efforts. We (USCENTCOM SJA) discussed this with Chairmen's legal as well. We are limited in how quickly we can get you responses. Most of what you request does not reside in Tampa, that being the case, I personally do not have the ability to answer your questions. This means I have to go out to our subordinate units, through our SJA in the field. Again, an informal tasking is not something that rises to the top of the queue. The idea is to get your request(s) into official channels so that you will get timely responses. This does not mean that we discarded your request. I have sent your queries to the field but again, recommend an official tasking to get better results. This is a recommendation, not a demand. The commander's briefing slides I can take care of from here. For the remainder of your request (I assume you have not gotten any of the information you requested) I will have to go back to CJTF-180. Have you received any contact from CJTF-180 based on the suspense given? I want to make sure that I know exactly what has or has not been accomplished. I can assure you I will always lay ground work before I provide a POC with one of our subordinate units. We want to help, not hinder!

v/r.

(b)(6)

MAJ, USA

Chief, International Law

CENTCOM CJA

DSN (b)(6)

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

From: (b)(6) CDR, DoD-OGC (b)(6)

Sent: Tuesday, December 16, 2003 10:05 AM

To: (b)(6)

Cc:

Subject: RE: MILITARY COMMISSIONS ASSISTANCE

Major (b)(6)

After our last conversation, I approached JCS to obtain their assistance in helping us obtain cooperation from combatant commanders. Attached is their memo in response to the request.

I am now renewing my request. In addition, I am requesting that you provide the CENTCOM CDR's briefing slides (J-2 daily update) for the period of October 01 through Nov 02.

If I need to contact CJTF 180 directly, please provide a name and an email address. I would also appreciate you laying some groundwork before I contact them.

R

CDR (b)(6)

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

From: (b)(6)

Sent: Wednesday, November 19, 2003 8:31 AM

To: (b)(6)

Cc:

Subject: FW: MILITARY COMMISSIONS ASSISTANCE

CDR (b)(6) I have sent your request to our SJA office at CJTF-180. They will direct you to the right POCs to get the information you need. Remember, our information is far from perfect. Please provide me with your drop dead date, understanding the sooner the better, but CJTF-180 will track this on their command suspense roster and they need a drop dead date for tracking purposes. Thanks!

v/r.

(b)(6)

MAJ, USA
Chief, International Law
CENTCOM CJA
DSN (b)(6)

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

From: (b)(6) (USN)

Sent: Wednesday, November 19, 2003 7:35 AM

To: Maj (b)(6)

Cc: Col (b)(6)

Subject: FW: MILITARY COMMISSIONS ASSISTANCE

(b)(6) Please send note to LTC (b)(6) and ask that he get in direct contact with proper 180 persons to provide what information they have available. I will forward the available ICRC report I have but I'm sure 180 has better records.

R (b)(6)

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

(b)(1)



(b)(6)

CPT, DoD OGC

From: (b)(6) CDR, DoD OGC
Sent: Monday, September 22, 2003 19:36
To: (b)(6)
Subject: (b)(6) AND OTHER INFO

Just a reminder to everyone that he will be here at 0900 to speak to us on Arabic mindset and AQ 101 type issues. (b)(6) was the lead NCIS investigator on the COLE incident. He has spent about 10 years as an NCIS agent in the Middle East. Fluent in Arabic and worked on Middle East issues for the Air Force when on active duty. Let's take advantage of this opportunity. He is lined up to be our AQ 101 expert at the first Commission.

Some other helpful hints for the new people as you begin to investigate your cases

- Make contact with your case agent. No coordination is required after initial contact is made (ie you don't need my approval to continue to meet)
- Items requested from FBI (other than 302's) require your CITF agent to put in a request to the FBI Liaison at CITF to FBI HQ who will coordinate. You need to track these as they often fall through the cracks. Turnaround time may be as much as 6-8 weeks.
- If FBI documented the interview on an EC thereby making it a classified document, you need to have your agent request that FBI supply you this same information in an unclassified Letterhead Memorandum (LHM)
- If your case requires you to interact with an AUSA or FBI agents at a remote location, I need to formally request through DOJ that this meeting be arranged. Please let me know if you need something like this.
- The OGA (other government agency) meets with us every other week. Your case agent should review the files on your accused at the OGA location. They can take notes on what they see and get good background information. Most likely they cannot walk out with documents. Let CITF put in the requests for document access etc from the OGA. If you have a specific need to share information with DC, the accused, or to use it at trial, that is a request that we generate in the form of a memorandum. SEE LCOL (b)(6) on how to do this.
- Everyone needs a trip out to DOCEX to see how things work out there. This is where a lot of evidence is stored and the translators are located. We have not yet worked out a system with FBI concerning chain of custody access and evidence custodian testimony. This is in the works.
- If you need to have hard drives forensically examined, I recommend you see me so that we can use either the DoD lab or have the people at CART (FBI computer people) do the analysis. Do not take CITF up on their offer to have it done in house. Quality of product will not hold up in court.
- If you need to talk to an agent on the ground in GTMO, this need to be coordinated through someone at CITF Belvoir. They need to give you the green light to do this. If they are creating a roadblock and you need to talk to the person in GTMO, see me.
- Have your agent pull mail (incoming and outgoing) and medical records on your accused from GTMO. This is a lengthy process so get the request in early. Also have a screen done to see if any of the camp logs have entries where your guy has acted out or bit a guard etc.
- If you are not aware of the al FITR celebration video from Jan 2000, you need to be. This is a celebration where UBL and those who in AQ is present. We have copies of the video on the SIPR shared drive. Other videos of interest are Kab Bin Mallk, Saliba 2, USS COLE video.
- Embassy bombing trial transcripts and exhibits are very useful. Transcripts are on FINDLAW and we have the trial exhibits here hard copy.

- Be thinking about how you will establish general information on the AQ organization. I recommend the sworn statements of Hicks and Begg, the Embassy Bombing trial testimony of al Fadl, the 302 of Abu Jandal and Badawi and the

sworn affidavit of Ressam. I have copies of all these items.

Hopefully this will be some good initial information to think about. I will continue to update as I think of more.

R

(b)(6) CPT, DoD OGC

From: (b)(6) COL, DoD OGC
Sent: Tuesday, December 30, 2003 14:05
To: (b)(6)
Cc: (b)(6)
Subject: Utilization of CAPT Davenport
Importance: High

(b)(6)

As you know, CAPT (b)(6) is the "Commander" of Task Force Transfers; she and CPT (b)(6) will discuss her new duties, etc. sometime next week. . . with (b)(6) available initially to help her.

However, while transfers are important, it is critical that we utilize CAPT (b)(6) extensive experience in a more meaningful way. Consequently, I want her to work "for" Capt (b)(6) on the following projects:

1. We need to know how the prosecutors in Moussaui and Lindh cases have handled defense requests for access to documents and witnesses. How did they do it? Should be copy it for our process?
2. Classification reviews in Moussaui and Lindh. Again, how are the AUSAs in those cases handling classification reviews, requests for declassification etc.? Should be do it the same way?
3. Nuts and bolts of discovery process in complex litigation: CAPT (b)(6) either from her own experiences, or else by looking at Moussaui and Lindh cases, needs to come up with some recommendation for configuring our own records. The only parameters that I see are: (a) must be digital (i.e. scan documents and store electronically); (b) must be able to handle up to 100 cases.

Will you please sit down with CAPT (b)(6) sometime on Monday and share this with her---tell her I am sorry I won't be here that day but will look forward to seeing her here at Crystal City on Tuesday.

Thanks---

COL (b)(6)

(b)(6) **CPT, DoD OGC**

From: (b)(6) CDR, DoD OGC

Sent: Wednesday, December 31, 2003 07:56

To: (b)(6)

Cc:

Subject: MEETINGS ON 6 JAN

To all,

COL (b)(6) will provide training on leadership from 0930-1000 on Tuesday 6 Jan. All military required to attend.

COL (b)(6) will provide additional training on charging decisions and other matters. This is mandatory for all people assigned to the OMC Prosecutor shop.

R

(b)(6)

Capt, DoD-OGC

From: (b)(6) CDR, DoD-OGC
Sent: Wednesday, December 31, 2003 9:00 AM
To: 'May Charles T'; Lano, Scott M. CDR, DoD-OGC
Cc: (b)(6)

Subject: RE: asac mcb

(b)(6)

I will be out with Captain (b)(6) at 0830 on 7 January. Topics to discuss include:

- Background checks on agents
- Being able to respond to discovery requests in a timely manner
- How we will search for exculpatory information (can break off separately to get in the weeds of string searches, however hoping you can be prepared in advance to discuss exactly what databases you have the ability to search
- Would also like to discuss some ways to better coordinate the agents and prosecutors assigned to the various teams. It seems there is a lot of cross over between the cases and we may not be sharing the information amongst the various prosecutions as well as we could.

R

(b)(6)

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

From: (b)(6)
Sent: Tuesday, December 30, 2003 6:21 AM
To: (b)(6)
Cc: (b)(6)
Subject: RE: asac mcb

Classification: ~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

great (b)(6) thanks. make it easy on yourself. 7jan sounds good to me. see you then. i plan to include all of the unit chiefs.

(b)(1)

(b)(6)

CPT, DoD OGC

From: (b)(6) CPT, DoD OGC
Sent: Monday, December 29, 2003 16:34
To: (b)(6) COL, DoD OGC
Subject: Brown Bag lunches

Sir,

As requested.

v/r,

(b)(6)

Sir,

A list of potential areas of conversation for brown bag lunches in the office, in no particular order...

1. What is our understanding of the crimes and elements in MCI 2
2. What guided the form of the draft charges
3. What is our theory for the charges in the top 3 cases
4. How does the Arabic calendar work
5. What is the relationship b/n DIA and DOD
6. What is the power of the US Marshals
7. What is the federal subpoena power, and how is it done
8. How does habeas work
9. Who is in custody, and who has been killed
10. Who is an unlawful combatant (al Mari, etc.) and what is the status of any related case
11. Who are the Lackawanna Six
12. What do we know about the cells in Montreal, Seattle, VA
13. What districts have on-going/pending terrorist prosecutions
14. What evidence was introduced at the Embassy Bombing trials
15. Who has been convicted of terrorism related offenses in the US
16. Have there been international cases
17. How much international cooperation is there and who is the lead agency
18. Why is the SDNY the lead for terrorism investigations, and are there other offices within FBI
19. What is the relationship and split of responsibility b/n federal agencies for terrorism
20. Explain the Patriot Act
21. Explain CIFA
22. What happened to the Soviets in AF
23. What happened during the Bosnian crisis and how did it end
24. How are the trials against the war criminal going and what evidence is being introduced
25. What are the GTMO interrogation instructions/regulations (are there other instructions we should be worried about)
26. What victim's groups are out there
27. How is the GC's office setup and what is the relationship to others in the Pentagon
28. What has PA been doing, and what do they see as the challenges ahead
29. What was the damage to the Pentagon
30. What was the damage in NY

(b)(6) CPT, DoD OGC

From: (b)(6) COL, DoD OGC

Sent: Monday, December 22, 2003 13:11

To: (b)(6)

Subject: Individual prosecutor input to Task Force Discovery

All:

In light of the OCP reorganization--effective 5 January--lead prosecutors in all 14 scheduled cases, plus those heading Task Forces "al Qaida" and "Sentencing" must submit the following to Capt (b)(6)

1. Identity of all prosecution witnesses needed, including place of employment/assignment, summary of expected testimony
2. All prosecution documentary evidence needed
3. All persons to whom you expect the defense to request either (a) access or (b) production, or both
4. All documents, videos, etc. to which you expect the defense to request either (a) access or (b) production or both
5. Any request(s) for a classification review for any documentary, etc. evidence
6. Any request for declassification of any documentary, etc. evidence
7. A list of documents, videos, etc. you intend to provide the defense in order to comply with MCO No. 1 para. 5, with those documents identified either as (a) evidence you intend to use at trial or (b) exculpatory

Please have your initial list to Capt (b)(6) not later than COB Friday 16 January. I recognize that this information is subject to change as you put together your cases for prosecution, but give us as much as you can in the initial list.

Any questions, see me.

COL (b)(6)

The sooner this information comes in on all 14 cases

(b)(6)

CPT, DoD OGC

From: (b)(6) CDR, DoD OGC

Sent: Thursday, December 18, 2003 19:08

To: (b)(6) CPT, DoD OGC

Subject: al Bahlul

(b)(6)

Based on the research you are conducting, how about doing a scrub on the al Bahlul and Hamdan charge sheets. Come talk to me if you need some extra factual knowledge on the cases to fill in the gaps we need to fill to put us on the best / Law track.

I am doing up a request form for FBI identifying what agents and evidence we need to have available for trial. Will also request to get notes, 1A materials and have Giglio searches done. Will shoot to you for a quick scrub before I send off to FBI. They want something by Monday.

Not sure if he solicited any assistance, but feel free to engage with (b)(6) in the (b)(6) project. Looks like it needs to be beefed up a bit.

R

(b)(6) CPT, DoD OGC

From: (b)(6) LtCol, DoD OGC
Sent: Monday, December 08, 2003 08:13
To: (b)(6)
Subject: Washington Post

FYI. You called it right on the money, (b)(6)

Washington Post
December 6, 2003
Pg. 6

Deals Reported Afoot For Detainees

But Lawyers Question Pacts for Clients Without Access to Counsel

By John Mintz, Washington Post Staff Writer

The first few detainees at the Guantanamo Bay prison designated for trial soon before special military tribunals have been negotiating plea bargains with their U.S. captors under which they would acknowledge working with the al Qaeda terrorist network or the Taliban, according to several of the men's defense lawyers and other legal sources.

U.S. officials hope that plea agreements with two British prisoners and one Australian held at the U.S. military jail in Cuba will result in them publicly expressing regret for their actions in court, informed sources said. One U.S. goal is to show that cooperating with interrogators results in reduced sentences, they said.

The men's discussions about guilty pleas have been taking place without their having access to legal advice, and their attorneys, who are making plans to visit some of the men at the jail for the first time, said they could well end up trying to dissuade the captives from following through.

"It's quite unusual for someone [to enter into a plea agreement] without any legal advice," said Stephen Kenny, a lawyer for David Hicks, 28, an Australian former kangaroo skinner and ranch hand. U.S. and Australian officials have said he confessed to training with al Qaeda and fighting for the Taliban. "He's been in a cage for two years. This [plea deal] could be very unfair to David," Kenny said.

Human rights activists have long denounced U.S. policy toward the detainees at Guantanamo Bay because U.S. officials refuse to say when the captives will be freed and they are denied access to U.S. courts. Last month, the U.S. Supreme Court said it would review the rights of the detainees in a case brought by some of their relatives.

Lately, however, U.S. officials have stepped up the release of detainees to their home countries, bringing the total to more than 80. The effort to get the military trials underway also would address the criticism that the prisoners should be released or charged.

Kenny, who practices law in Hicks's hometown of Adelaide, said U.S. or Australian officials he declined to identify told him of his client's desire to plead guilty. Likewise, attorneys for a British detainee, Moazzam Begg, said they, too, have been told by U.S. or British "official sources" that he and another detained Briton are discussing plea agreements.

In July, U.S. officials designated six of the 660 Guantanamo Bay detainees as eligible to appear before military tribunals (or, in government parlance, commissions). Only three of the six were publicly identified: Hicks, Begg and fellow British citizen Feroz Abassi.

Earlier this week the Pentagon announced it had appointed an experienced Marine litigator, Maj. Michael Mori, to represent Hicks -- the first government defense lawyer assigned to any of the Guantanamo Bay captives. Mori and Kenny are expected to visit Hicks in Cuba soon.

The private lawyers, mostly human rights advocates with long records of criticizing the United States for the detainees' situation at Guantanamo Bay, were hired by the detainees' families, who from the start dismissed any possibility that their relatives were affiliated with al Qaeda or the Taliban.

Lawyer Clive Stafford Smith, who represents Begg, said that his client can decide to plead guilty if he chooses. But he said he all but assumes any confession his client made was coerced and is a lie. As the Begg family's attorney, he said, "I could say to him, 'We know you didn't do it.' "

Smith said that interrogators had certainly warned his client that " 'these damned defense lawyers will try to talk you out of pleading.' . . . This is all part of a Stalinist show trial, in which you're tried in public only if you agree to plead guilty."

Smith said nongovernment "sources" whom he declined to identify told him that Begg plans to plead guilty to a plot in which he would have helped arrange for an unmanned drone aircraft to fly over London spraying weapons-grade anthrax spores. Security experts say such a sophisticated operation is almost surely beyond the current known capabilities of terrorists, and Smith said it was "clearly a fantasy."

Maj. John Smith a spokesman for the Pentagon's military commissions office, declined to comment on detainee interrogations but said officials cannot have reached any formal plea agreements because the prisoners have not yet consulted lawyers.

Last month, after lengthy consultations with the Australian government, the United States announced a deal under which Hicks would not face the death penalty and would serve any prison time in his homeland. U.S. officials have reached a similar arrangement for the British detainees.

Hicks, a Muslim convert who traveled the world fighting with Islamic guerrilla movements from Kosovo to Kashmir, was captured in late 2001 fighting with the Taliban, U.S. officials said. His family denied he had dealt with terrorists, but this summer Australian officials announced he had confessed to training with al Qaeda.

Begg's family said he was helping to build a school in Afghanistan in 2002 when he was pushed into the trunk of a car in Pakistan by four men, including two with American accents. He called his father in England with his cell phone from the trunk, and months later showed up in Cuba.

(b)(6)

Capt, DoD-OGC

From: (b)(6) Capt, DoD-OGC
Sent: Tuesday, December 02, 2003 2:19 PM
To: (b)(6)
Subject: RE: CIA MEMO RE EXCULPATORY EVID

Sir,

I agree with Maj (b)(6) and think that the reference to a summary of facts and potential charges may be helpful, to perhaps be even further supplemented in the future. While OGA counsel will be very familiar with the definition of "exculpatory," it may be difficult to provide information freeing the accused from blame or accusation if the legal accusations and underlying facts relevant to our MC proceedings are not provided to the agency. Without this information, it appears that the OGA could later easily argue that a document was withheld not because of an unwillingness to turn it over, but because they did not realize given the specific allegations of this case that the document was exculpatory, or possibly even relevant. The more specific and detailed the request, the greater weight to be given to our arguments that we have diligently pursued information -- with perhaps the flip scenario also being true.

Whether we are required to "pursue" information is, of course, another issue.

v/r,

(b)(6)

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

From: (b)(6) LtCol, DoD-OGC
Sent: Tuesday, December 02, 2003 2:03 PM
To: (b)(6)
Cc: (b)(6)
Subject: RE: CIA MEMO RE EXCULPATORY EVID

I think (b)(6) has some good points. Attached is another version that references the CITF factual summary that forms the basis for all of the RTBs. I agree this will cut down on some of the "wobble room" for the OGA without adding a lot to the memo.

I did not include a reminder re the President's Order. I think the tone of the memo sounds more threatening with that in there, and we are going to have enough "blowback" from OGA on this issue as it is.

As for file-keeping, the tracking of CIA discovery is already in progress. I will set up something similar for the other agencies if this is the route we want to go.

S/F,

LtCol (b)(6)

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

From: Preston, Robert J, MAJ, DoD-OGC
Sent: Tuesday, December 02, 2003 1:38 PM
To: Couch, Stuart, LtCol, DoD-OGC; Lang, Scott M, CDR, DoD-OGC; Brubaker, Kurt J, LtCol, DoD-OGC

Cc: (b)(6) Capt, DoD-OGC
Subject: RE: CIA MEMO RE EXCULPATORY EVID

I think the memo is good overall – just a few suggestions:

1. my one major addition would be to be explicit about what Hicks is charged with – maybe include a copy of the charge sheet or summarize the charges.

i.e. Hicks is charged with x,y & z. The following facts form the basis for these charges: _____
_____ We request that you provide any information which would tend to disprove these allegations or otherwise exculpate the accused in relation to these charges.

If you don't have that frame of reference, it will be easy for OGA to deny us documents and even easier for defense to claim that we made a half-hearted request – and we will be the ones on the chopping block, not OGA.

2. Might also be useful to include a copy of the president's order or at least the citation and/or the copy/reference from the MOU which obliges OGA to cooperate and provide us the info.

3. I also think that it would be good idea for us to start setting up our file on inter-agency discovery for each agency. i.e. we are going to need all the correspondence which shows not only our requests for information, but our follow ups and any documentation we have which shows that whomever we are sending this to is the appropriate point of contact – if that's the MOU, a reg, whatever, we are going to need to have it when the discovery furr flies.

4. Finally, I agree with LTC (b) on vetting this – not only is this potentially a can of worms, it is also likely to be the template we are going to have to use with any interagency request so we want to get it right.

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

From: (b)(6) LtCol, DoD-OGC
Sent: Tuesday, December 02, 2003 12:22 PM
To: (b)(6) LtCol, DoD-OGC
Cc: (b)(6) MAJ, DoD-OGC
Subject: CIA MEMO RE EXCULPATORY EVID

Yours (again) for chop.

(b)(6) has brought up a good question: until we have approved charges, how does one define what is "exculpatory" for a detainee? We know that these requests take a long time to get through the OGA; if we wait until we have approved charges to make our first request, that could build even more delay into the process that we don't want. I think it is wise to consider that their definition of "exculpatory" might give them rationale to deny our request at this point.

I think a good middle ground is to start using "exculpatory" language in our requests of them now, and see what the reaction is. That way, we can build a paper trail of times we asked for any information, told them why we needed it, and their denial. In other words, we start to cloak our ongoing requests for information in the mantle of fulfilling our discovery duty to the defense. I don't think we will ever be able to completely shift the burden of finding classified exculpatory information on to the OGA, but we can definitely help protect ourselves from scrutiny if we "paper the file" with our legitimate requests for information.

If anybody has a better spin on this thing, please let me know. We ought to inform COL (b)(6) BGen Hemingway, and maybe Mr. (b)(6) about this request before we send it over to the OGA, because it will definitely raise some issues in the front office.

Thanks --

LtCol (b)(6)

(b)(6) Capt, DoD-OGC

From: (b)(6) CDR, DoD-OGC
Sent: Thursday, November 13, 2003 11:10 AM
To: (b)(6) Capt, DoD-OGC
Subject: FW: (U) 39

FYI

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

From: (b)(6)
Sent: Thursday, November 13, 2003 11:09 AM
To: (b)(6) CDR, DoD-OGC
Subject: RE:(U) 39

I haven't been able to find anything where he talks about mistreatment. I am almost complete with 39's list, then I can start on 149's.

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

From: (b)(6)
Sent: Tuesday, November 11, 2003 12:13 PM
To: (b)(6)
Subject: FW: 39

(b)(6)

Early on in my notes, I made reference to this 302 pertaining to 39. My notes show it may have had some unflattering comments concerning the treatment he got in AF or PK. Do you have anything on this? Real important to track down. Check for any references anywhere where 39 says he was mistreated before he got to GTMO. Things are moving quickly over here. I need you with me 100 percent as this is the case under the microscope. Need you checking in every day and getting quick turnarounds.

How are we doing with retrieving documents on everytime 39 was discussed or had his photo shown to others?

R

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

From: (b)(6) Capt, DoD-OGC
Sent: Monday, November 10, 2003 4:57 PM
To: (b)(6) CDR, DoD-OGC
Subject: 39

Sir,

Do you have a 302 on 39 dated 25 Feb 02?

v/r,

(b)(6)

3/19/2004

TBT

(b)(6)

CPT, DoD OGC

From: (b)(6) CDR, DoD OGC

Sent: Wednesday, October 22, 2003 08:23

To: (b)(6)

Subject: MOOT COURT

To all:

I cannot stress enough the importance of our moot court scheduled for 6-7 November. This is our chance to show (or at least get word to) the decision makers that we are prepared and capable of going forward. These moot courts must go off without any hitches. We have expended a great deal of effort to get where we are and it is now time to demonstrate that such efforts pay dividends.

Because of the importance of this evolution, we are going to rehearse the moot court on Monday, Tuesday and Wednesday of next week.

Monday and Tuesday will commence at 1300
Wednesday will commence at 1100

On Friday, everyone will check in with the Gunny and review the slides prepared that pertain to them.

Monday – we will start in the trial guide from the beginning and get through the testimony of (b)(6) and (b)(6) Gunny we will need the slides and video clips up to speed for Monday. I want to use the conference room and have it set up just as we will be set up for moot court. Monday will equate with getting to 1445 on our moot court schedule

Tuesday – we will pick up with 1445 on 6 November and go through to the finish.

Wednesday is TBD based on how things go on Monday and Tuesday.

There is no tomorrow, run to daylight, the opera ain't over til the fat lady sings. Whatever it takes to get you motivated!!

R

(b)(6)

CPT, DoD OGC**From:** (b)(6) CDR, DoD OGC**Sent:** Tuesday, November 11, 2003 12:44**To:** (b)(6)**Subject:** CAUTIOUSLY OPTIMISTIC

To all:

Things are moving pretty quickly since the moot court. We have been asked to get 10 RTB's prepared for delivery to POTUS by Friday. Also have been told to take the things learned from the moot court and do the necessary tweaking to get the case finalized.

Bottom line is we need the whole office pulling together to get us where we need to be. Following list are some assignments to help fulfill the mission with some completion dates to help assist you in prioritizing.

RTB's - Need them to Lt Col (b)(6) by COB Wednesday. Please check the format from the prior RTB's that made it through the White House. It is painstaking on the review end if these are not properly formatted and we won't meet our time deadlines.

Gunny/LT Col (b)(6) - Get in touch with media people who can splice our clips together and make posters etc. Arrange a meeting for no later than 21 November so we can discuss the services they can provide and what our requirements are.

Gunny - Get me proposed clips from the COLE video for me to review. Just be able to take me to the 2-3 minute segments with what you are proposing. I want to sit down on this Friday and iron this out.

Captain (b)(6) - Reach out to the COLE video expert and at least get a meeting scheduled by the end of the week (meeting can be a few weeks out, just want to have it on the calendar by the end of the week if possible - 14 Nov)

LT Col (b)(6) - Get in touch with Penttbomb people and sked a brief as soon as possible

Captain (b)(6) - contact the Defense lab to discuss finding COLE video on the Internet. See me as I have the POC's and have worked with them before.

Lt Col (b)(6) - Memo to OGA to present this Thursday

Gunny - Find out if media experts can match up al Fitr clips in the COLE video. Otherwise we are going to have to do it ourselves and I would prefer not do that.

Gunny/Captain (b)(6) - Have a clip of people jumping from the WTC to show me by Friday if possible. Idea is this will be needed to superimpose his quotes over.

I am going to try to get us authorization to get to CENTCOM by the end of the week. I foresee a TAD to Tampa for someone.

R

3/17/2004

TAC

(b)(6)

CPT, DoD OGC

From: (b)(6) CDR, DoD OGC

Sent: Monday, October 27, 2003 08:28

To: (b)(6)

Subject: EVENT

Based on input from above and our trying to keep the event of next week low key, we will pass information by word of mouth vice electronically from here on out.

R

(b)(6)

CPT, DoD OGC

From: (b)(6) COL, DoD OGC
Sent: Thursday, February 19, 2004 13:52
To: (b)(6) CPT, DoD OGC
Subject: RE: Office Presentation

(b)(6)

I have read your memo twice and will consider it more carefully over the next few days. As usual, I appreciate your raising these issues with me---and would like you to continue to raise your concerns. That keeps the process honest---and prompts me to re-examine the direction that we are moving.

A few comments at this point:

CDR (b)(6) asked me about showing the COLE video to Mr. (b)(6) today. He opposes letting Mr. (b)(6) see it. I overruled CDR (b)(6) and directed CDR (b)(6) to take the video to Mr. (b)(6) for him to see. I also directed CDR (b)(6) to create a CD Rom with some relevant excerpts from the COLE video so that (b)(6) could see the parts we are likely to introduce at trial.

You are correct, of course, that the video is much more than a video about the COLE. In fact, as you point out, the video is really not about the COLE at all. . . but calling it the "COLE video" is the shorthand we use here now. . . just as we continue to incorrectly call our conspiracy charge the al Qaida conspiracy.

Once charges are approved, the sense of urgency---and the requirement for a more incisive look at evidence---will increase. Expect to see some of your questions and issues addressed at that time.

Keep up the good work. I appreciate what you are doing as do others. . .

COL (b)(6)

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

From: (b)(6) CPT, DoD OGC
Sent: Thursday, February 19, 2004 12:23
To: (b)(6) COL, DoD OGC
Cc: (b)(6) CPT, DoD OGC
Subject: Office Presentation

Sir,

I was greatly interested in the presentation of the evidence supporting charges against both al Bahlul and al Qosl.

My notes from CDR (b)(6) presentation indicate the following:

1. 24 statements exist documenting interviews with al Bahlul;
2. al Bahlul has never recanted his statement that he made those videos mentioned during the briefing
3. al Bahlul stated that he heard of and supported UBL's fatwas 7 times and only denied knowledge once
4. al Bahlul went through the USS COLE video scene by scene and identified it
5. Abu Jandal identified the 9/11 hijackers

My review of the case file indicates:

1. At least 38 statements exist documenting distinct interviews with al Bahlul;
2. al Bahlul has twice denied making any videos other than the COLE tape (8 May 02; 14 Nov 02), and twice said that he did (mid-Oct; 30 May 03);
3. al Bahlul has twice stated that he was aware of bin laden's fatwa (18 Feb 02; 30 May 03), and twice denied that bin laden had ever issued any fatwas (17 Jan 03; 5 May 03).

3/17/2004

4. I have heard (b)(6) state that they did not go through to USS COLE video scene by scene with al Bahlul, and instead fast forwarded it a few times and then hit play, and al Bahlul would respond that yes, that was the tape that he made.

5. I have also heard (b)(6) describe his meeting with Abu Jandal regarding the identification of the 9/11 hijackers. (b)(6) said that he showed Jandal the pictures, Jandal identified the individuals, and then (b)(6) told him that they were the 19 hijackers. (b)(6) then went on to say that Jandal stared in disbelief and started crying saying that he couldn't believe that they had done such a thing. This reaction from a higher-level AQ member would appear to weigh against knowledge of this type of operation, be it either against civilians or possibly of this magnitude.

Specifically regarding al Bahlul's knowledge of UBL's fatwa and his motivation for fighting -- On 18 Feb 02, he said that UBL issued a fatwa in 1998. He said the first part dealing with the expelling of the US from Saudi Arabia was country to country issue which he did not want to involve himself with, and part two dealt with the killing of American Jews and the Christian Alliance, and he clarified Jews as Israelis and said that he would kill a Jew if given the opportunity. This is not an accurate description of the 1998 fatwa. On 30 May 03, al Bahlul said that he had read the 1996 Declaration of Jihad and 1998 Fatwa and that is why he came to AF to join bin Laden. Interesting, during the 30 May 03 interview, (b)(6) did not ask any type of follow up questions about what UBL actually said in the fatwa or declaration.

Al Bahlul has also said on at least three occasions that he went to AF not because of the fatwas, but to support the Taliban, and it is likely that al Bahlul went to the frontlines to fight the Northern Alliance in 1999. He also said on 17 Jan 03, in a statement cited and relied upon for other statements such as wearing an explosives belt, that UBL has not issued any fatwas, that his motive for fighting with UBL was to drive the Jews out of Palestine, and that UBL was just carrying out the fatwas issued by the blind sheik. I am unaware of any knowledge in the office of fatwas by the blind sheik, or any effort to acquire them. On 26 Jan 03, al Bahlul stated that UBL's and AQ primary mission was to liberate Palestine and that was what the video was meant to convey, and later said the mission of the USS COLE was to protect Israel and that is why it was attacked.

The above discussion focuses on just a few of the statements that I heard at the presentation that drew my attention, and will not belabor the point with other examples.

It may very well be that these issues may not prove fatal to a case. However, as I stated in my last e-mail, "2. The evidence that is, and has been, presented to the office and those outside commentators is selectively chosen and not representative of the actual case file. 3. The significance of consensus within the office regarding the appropriateness of the charge sheet is greatly diminished given the absence of a comprehensive review and analysis of the case file. Although such a review for the office has been requested numerous times, this request has consistently been refused."

I am deeply concerned that even in the relatively safety of a presentation to other attorneys in the office, inconsistencies in the detainee's statements are either ignored or quickly dismissed. This appears to be especially significant given the heavy reliance in the case on al Bahlul's statements. It does not appear that a careful analysis of the statements has occurred, looking for internal inconsistencies, reasons for why certain admissions were made (such as the first reference to the COLE video), and how any of the interrogations may have been impacted by camp disturbances, movement of cells, or adjustment of rewards.

It appears that we believe al Bahlul's actual culpable conduct consists of making the COLE video. Given the primary importance of this video to the case, it is perhaps alarming that only a few people in our office have actually viewed the tape. Moreover, while we refer to it as the COLE video, only a few minutes of the tape discusses the COLE bombing or the United States.

I am also concerned that Mr. (b)(6) is not being provided access to, and is claiming to not be aware of, the COLE video. CDR (b)(6) returned from a meeting last week and said that Mr. (b)(6) indicated he was unaware of the COLE video and twice asked her to bring a copy of it to him. I heard CDR (b)(6) asked CDR (b)(6) on speakerphone if she should take a copy of the tape to him and CDR (b)(6) told her not to, and that perhaps in a few days Mr. (b)(6) would forget about it.

Whether or not a more thorough and balanced presentation of the case files should occur is obviously not for me to decide. However, I have had access to the case file in al Bahlul and feel a duty and responsibility to make you aware of my observations. By refusing to acknowledge and discuss the

"difficult issues" of a case, we may certainly propel the case forward at a greater speed. Of course, if these "difficult issues" come to light -- and I don't see how they will not at trial -- it is perhaps likely that we permit those commentators who previously voiced support to declare that they were, at best, not made aware of the issues -- and they can then disavow the process.

v/r,

(b)(6)

(b)(6)

(b)(6) Capt, USAF
Office of Military Commissions
1931 Jefferson Davis Highway, Suite 532
Arlington, VA 22202

Com: (b)(6)

DSN: (b)(6)

STE: DSN (b)(6)

Fax: (b)(6) (Unclass)

email: (b)(6)

SIPR: (b)(6)

~~CAUTION: This message may contain information protected by the attorney-client, attorney work product, deliberative process, or other privilege. Do not disseminate without the approval of the Office of the DoD General Counsel.~~

(b)(6) CPT, DoD OGC

From: (b)(6) CDR, DoD OGC

Sent: Wednesday, October 15, 2003 15:24

To: (b)(6)

Subject: MOOT COURT

Attached are the assignments and proposed sked for the moot court. This is all subject to change, but it at least is enough to get us going.

I will send out a summary document on the witness testimony to help people prepare and will also identify some of the known weaknesses for cross. If you want to see more in depth documents, you can pull the books off the shelf in my office or there will be references to the 302's in my summary document.

R

(b)(6) CPT, DoD OGC

From: (b)(6) LTC, DoD OGC

Sent: Wednesday, October 15, 2003 16:16

To: (b)(6)

Subject: RE: (b)(6)

No conflicts for me.

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

From: (b)(6) CDR, DoD OGC

Sent: Wednesday, October 15, 2003 15:14

To: (b)(6)

Subject: mcfadden

Gentlemen,

(b)(6) is coming over at 0900 on 22 October to go over his direct. I think this might be helpful for the both of you as (b)(6) can hone in on the AQ 101 presentation and LTCOL (b)(6) can see the run through and it might help him prepare for moot court. Any conflicts.

R

*- Didn't get through
- no ?'s*

(b)(6) [redacted] CPT, DoD OGC

From: (b)(6) [redacted] CDR, DoD OGC

Sent: Thursday, October 16, 2003 17:57

To: (b)(6) [redacted]

Subject: MOOT COURT SUMMARY OF EVIDENCE

Attached is provided to help all prepare. Based on your role, you may need to get access to some more specific documents to review, but this should at least be a good start.

R

(b)(6) CPT, DoD OGC

From: (b)(6) CDR, DoD OGC

Sent: Tuesday, October 28, 2003 07:53

To: (b)(6)

Subject: AL BAHLUL ADMISSIONS

Just thought the attached might be a good quick read prior to the moot court so everyone knows the perspective of the accused and the admissions he has made.

R

*- no brief
- just long
document
never
reviewed*

(b)(6) Col AF/JA

From: (b)(6) CPT, DoD OGC
Sent: Wednesday, January 14, 2004 6:16
To: (b)(6) Col AF/JA
Subject: RE: Our Conversation

Sir,

I apologize that this was not sent earlier but I have been out of the office all day. I am happy to provide any clarification deemed necessary. Although we do not relish it, Maj (b)(6) and I can continue in our roles of "agents of change" in an attempt to right the ship. We are just concerned about the sustainability of the effort and our survivability within the office.

v/r,

(b)(6)

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

From: (b)(6) Col AF/JA
Sent: Tuesday, January 13, 2004 13:21
To: (b)(6) CPT, DoD OGC
Subject: RE: Our Conversation

(b)(6) --looking for specifics, examples are great--background paper is perfect-- (b)(6)

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

From: (b)(6) CPT, DoD OGC
Sent: Tuesday, January 13, 2004 1:18 PM
To: (b)(6) Col AF/JA
Subject: RE: Our Conversation

Sir,

I was hoping to clarify whether you are looking for an actual list or more of a background paper, and whether you would like examples provided. I want to make sure I am preparing what you are looking for.

v/r,

(b)(6)

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

From: (b)(6) Col AF/JA
Sent: Tuesday, January 13, 2004 12:24
To: (b)(6) CPT, DoD OGC
Subject: Our Conversation

(b)(6) --need you to give me a specific list of the things you think are broken. E-mail or hard copy, doesn't matter.-- (b)(6)

The following is an attempt to highlight and explain many, but not all, of the current concerns held by active duty Air Force members of the Office of the Chief Prosecutor (Maj (b)(6) and Capt (b)(6) relating to our office and our duties. This paper is prepared out of a sincere concern for the mission that we have been assigned, as well as the reputation of the Air Force Judge Advocate Corps.

1. Office Overview. The organizational difficulties and challenges faced by this office can only be put in context if one understands our current staffing and dearth of experience. There are currently nine attorneys on active duty in the office, to include the Chief Prosecutor. The Deputy Prosecutor graduated law school in 1991 and Major (b)(6) graduated in 1994. The two Marine 0-5 team chiefs and one Army 0-4 graduated in 1996. Capt (b)(6) graduated in 1997, Capt (b)(6) in 1998 and a Navy 0-3 in 2000. (b)(6) our very talented civilian attorney, graduated in 2002. The office is divided into four main teams (bodyguards, financiers, high-threat-trigger-pullers, and explosives), with two or three attorneys assigned to each team. While each of the attorneys, save Mr (b)(6) has significant experience in military justice prosecutions, very few if any of the prosecutors have experience with complex litigation or voluminous discovery. Only Col (b)(6) and Maj (b)(6) have any significant experience in international law. The prosecution team only has two paralegals and despite our anticipated reliance on documents written in Arabic, Pushtu, and Urdu and witnesses who speak those languages, we currently have no translators or interpreters assigned to the staff. This is despite the fact that there is a well-known problem with documents being translated inaccurately and incompletely due to the increased demands on linguists as a result of the GWOT.

2. Mission Overview. With this staff, which has been supplemented with two reserve personnel and one DOJ attorney, we are responsible for identifying and preparing the prosecution of tens, if not hundreds, of detainees in a legal proceeding not utilized in 50 years. The military commissions process in and of itself is highly controversial, but the use of such a proceeding to prosecute terrorists is completely unprecedented. Consequently, we face significant challenges to our process in the form of public critiques, collateral court challenges, and in-court motions and appeals practices. We anticipate significant legal challenges to the proceedings and our assertion of jurisdiction. These challenges will be primarily based on US treaty obligations, the evolution of international law since the last use of military commissions (post World War II), and decades of US practice that is somewhat inconsistent with our current position. Moreover, we are also challenged to work with the Criminal Investigative Task Force (CITF) in gathering and preparing the case files, as well as coordinating with a host of other agencies, to include DOJ, FBI, OGA, DIA, and the State Department to obtain access to their work products related to the war on terrorism. DOJ/FBI in particular has massive resources devoted to investigation of Al Qaida and Al Qaida operations, to include the TANBOM, KENBOM, and PENTTBOM investigations.

3. Current Case Status. On July 3, 2003, the President designated six individuals as subject to the jurisdiction of the military commissions. This was done in a document referred to as a "Reason to Believe" (RTB) determination. Since this time period, RTB packages have been prepared on at least eight other detainees. We are told that the Chief Prosecutor wishes to present Maj Gen Altenberg – the new appointing authority – eight additional RTB packages upon his arrival for coordination and the signature of the President. Additionally, we are also

told that the charge sheets for the first two or three cases have been thoroughly reviewed and are ready to be approved by Maj Gen Altenberg. Finally, we have been told that it is hoped that charges will be approved in 14 cases by the summer. The trial counsel assigned to these cases have been told to have charge sheets and trial notebooks prepared by 1 Feb 04. It is assumed that each case will include at least one common charge - general conspiracy charge - making consistency between the cases significant.

4. Lack of Common Understanding within the Office. To date, and despite continued requests, the attorneys in the office have had little, if any, discussion concerning the crimes and elements contained in Military Commission Instruction #2. In addition to the obvious point that everyone should have a common understanding of the crimes and elements, it is equally important to note that the crimes and elements instruction states that it is not binding on the military commission panel. Consequently, we will not only have to prove the conduct that meets the elements of the offense, but also the very existence of the offense under customary international law. It has become abundantly clear that the attorneys do not possess an understanding of these crimes and elements or their viability under international law. Moreover, to date, we have had little, if any, discussion regarding how charges will be drafted or what evidence will be used to prove any particular element. In fact, until this week, we have generally not met as an office more than once every two weeks despite numerous requests for us to do so. Even within some teams, information is not shared with the other attorneys and input is discouraged. We have not, as an office, reviewed or discussed the proof analysis for any case. The proof analysis for those cases which can be located on our shared drive may be described as less than adequate.

The lack of coordination and understanding within the office may be best illustrated by an example from the Mock Trial of one case, presumed to be our first, which was held in November. A number of high-level legal advisors to the administration were in attendance, and it was understood that our performance was key to our cases moving forward. Our request to be briefed as an office on the facts of the case prior to the Mock Trial was denied by the Deputy Prosecutor, who was lead counsel on the case. Our request to discuss the proof analysis as an office was also denied as a waste of time. Tellingly, no substantive input regarding the presentation of the evidence was solicited from any attorney in the office. This lack of knowledge not only prevented any attorney from speaking up during the discussion, but also prevented any discussion regarding the candor of the statements made to the guests, which has since come into question. Although Capt (b)(6) is assigned to be second chair on the first case, his requests to be briefed on the case evidence and included on witness interviews has been repeatedly brushed aside. This has made preparation for trial extremely time-consuming and laborious, and also ensures that no other attorney has an understanding of the evidence that we intend to present or the reasons for those decisions.

Predictably, the attorneys in the office do not know how the charge sheets for the first cases have been prepared or what evidence will be introduced to prove the general conspiracy. This is despite the stated expectation that charge sheets will shortly be accomplished and potentially approved by the Appointing Authority. Last week, we met as an office for the first time to generally discuss the conspiracy charge. We have repeatedly requested to talk about the charge sheet. When questions were raised at the meeting, members of the office later stated that it was

inappropriate to question how the charges would be formulated or how we would prove them in an open setting.

In response to many of the concerns that had been voiced, the Chief Prosecutor reorganized the office prior to Christmas. He stated that he would be in the office on a regular basis and that we would hold morning meetings. Additionally, "task forces" were established within the office; most notably, Discovery, Sentencing, and al Qaida. Capt (b)(6) and Mr. (b)(6) who had previously worked Sentencing and al Qaida, respectively, were reassigned to Discovery and Sentencing, respectively. Mr. (b)(6) a seasoned DOJ international lawyer was assigned to al Qaida. Capt (b)(6) has never handled complex discovery, Mr. (b)(6) has never witnessed a real sentencing case, and Mr. (b)(6) has no prior background with al Qaida. For the last month, we have been awaiting a presentation by Mr. (b)(6) regarding his suggestions for proving the necessary elements of the general AQ conspiracy.

5. Lack of Evidence Collected/Analyzed/Identified. Despite previous representations, to include at the Mock Trial, our office currently possess little to none of the evidence that links al Qaida to the 9/11 terrorists attacks. We met with the FBI on 17 Dec and for the first time asked if they could establish that AQ was behind the attacks in an unclassified setting. We met with DOJ just this week to ask the attorneys prosecuting in the EDVA what evidence they could provide. We were told that they would get back to us.

Conceivably, our evidence would be gathered and produced by CITF. We have had a significant, but unacknowledged problem obtaining useful products from CITF. There are many excuses offered as to why the CITF relationship is unproductive, but at least one explanation is that CITF has not been apprised of what constitutes relevant evidence for proving these extremely controversial – even radical – charges such as conspiracy. The attorneys at CITF were briefed this week on our vision concerning the general conspiracy, incomplete as that may be. A meeting is also planned with the case agents next week.

We met for the first time as an office last Friday to discuss the types of evidence that each attorney has encountered and what agency produced that evidence. We suggested that we should develop within our office a checklist to aid in our pre-trial preparation, and that a checklist should also be provided to our CITF agents to standardize the initial investigation of the case. It is not an overstatement to say that this simple suggestion was met with much fanfare. This is despite the fact that both suggestions (discussing the evidence and the checklist) had been made numerous times in the preceding months.

6. Discovery. There has been a recent push to prepare for and provide limited discovery to the two defense counsel assigned to represent two detainees. In the absence of a charge sheet, and more importantly, knowledge of what evidence we intend to use to prove the common conspiracy charge, discovery is nearly impossible. Moreover, given the lack of initial evidence collection, much of the requested material will in fact be evidence received and reviewed for the first time. It has been said by at least one attorney in the office (who is also a DOJ attorney) that we are approximately one-year behind in this regard.

7. Appearance of Impartially. It is important to understand that the Appointing Authority serves not only as a convening authority in reviewing and approving charges, but also as an appellate court since the AA may ultimately rule on motions submitted by either side. This point is not only articulated in our Orders and Instructions, but also has been a centerpiece of the DOD PA campaign attempting to show that the commissions will be fair. Recently, the Legal Advisor to the AA requested a copy of the motion responses being prepared by the Prosecution. This move has been discouraged, but it highlights the lack of understanding of roles. We have also been informed that a move is underway to allow the Legal Advisor to the AA to officially rate the Chief Prosecutor – a disaster from a fairness/impartiality/international law perspective.

More significantly, however, it is fairly common knowledge that the Chief Prosecutor has been conducting ex parte communications with the officer presumptively selected to be the first Presiding Officer. The Presiding Officer not only functions in some sense as the trial judge, but also as a member of the jury. It has been admitted that e-mails have been exchanged concerning, i.e., whether a guilty plea inquiry will be conducted. Even if this is technically not improper, it is a poignant illustration of how this organization does not understand the kinds of scrutiny we will face and the importance of maintaining an appearance of propriety at all costs.

8. Sustainability. Even if it is somehow possible to complete the first two cases, we are extremely concerned about our ability to continue with expected follow-on cases in a timely manner given the current procedures in place in our office and our interaction with CITF.

Conclusion. The issues described above are not raised without careful thought and consideration. Although some limited efforts have been made to address the deficiencies, we continued to be extremely concerned with the office's current status and our efforts to correct the problems have not been well-received. Our anxiety is heightened by the state of confusion and lack of preparation within the office, the complexity of the cases, the lack of oversight/understanding of the cases by upper management, the confidence of the public statements regarding our state of readiness, and the ultimate impact the proceedings will have on our country and international law.

(b)(6)

Col AF/JA

From: (b)(6) MAJ, DoD OGC
Sent: Tuesday, March 16, 2004 3:52 PM
To: (b)(6) Col AF/JA

Sir

I am assiduously avoiding emails to the anyone.

However, felt this was a necessary update.

Today Col (b)(6) called a meeting wherein he proceeded to again relate how he felt that he and the office had been unfairly maligned and that he hated to see two officers he admired and respected (b)(6) and me) lodge such hurtful and untruthful allegations.

As I told him and the rest of the office at the time - I am not going to stand for this and I think he knows from my stance that it would not be a good idea to reengage with this type of self-serving diatribe, but on the other hand it is clear that we are at risk every moment that we are here.

Keeping in mind your many cautionary statements, I have to tell you that I am really at wit's end and having a hard time restraining myself. I can deal with relatively complex issues and intricate personnel problems, but here we are talking about an Army O-6 calling AF officers liars in a public setting. I don't really have any training for dealing with that.

BG Hemmingway has apparently circled the wagons around Col (b)(6) and mobilized the staff here to help Col (b)(6) with his "response to the allegations" so I don't expect any help from that end, but someone needs to do something about this.

I am really trying to keep the big picture in mind, but it isn't easy.

As I have come to recognize that this apparently is NOT a sincere process and no one really cares if we prosecute detainees correctly or not, my little micro view of the world has come to be the foremost consideration in my mind. I have a family that is depending on me - my wife gave up her career so I could come here - and these people are now directly attacking my reputation and livelihood. To be honest, I think this is quickly becoming a career ender for me and I am really having a hard time taking one for the team...

v/r

(b)(6)

(b)(6)

Major, USAF

Department of Defense, Office of the General Counsel
Office of Military Commissions, Prosecution
1931 Jefferson Davis Highway
Suite 532, Arlington, VA 22202
Phone: (b)(6)
Fax: (b)(6)

~~CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 USC 552. Do not release outside of DoD channels without prior authorization from the sender. If you receive this transmission in error, please notify the sender.~~

(b)(6) Col AF/JA

From: (b)(6) MAJ, DoD OGC
Sent: Tuesday, March 16, 2004 7:41 AM
To: (b)(6) Col AF/JA
Subject: FW: Allegations of misconduct and unprofessionalism against Chief

Sir

Just wanted to update you. (b)(6) sent the email below out in response to Col (b)(6) missive to the office.

Realize this email has caused a firestorm, but didn't anticipate the reaction to the fact that we emailed (b)(6). We have been emailing him for some time on the myriad of problems around here. To be honest, it was almost the only way to catalog even some of the mass of problems we are facing.

I know MG Fiscus was disappointed in us - while I am sorry about that, we really felt like we had to make a record. That email was in response to a meeting w/ Col (b)(6) where he attempted to gloss over a number of our big "I" word and "E" word concerns and he had Capt (b)(6) sitting there taking notes - a first ever.

Bottom line: didn't see how it benefited (b)(6) at all to forward our emails anywhere, so we didn't assess this as being particularly dangerous - moreover and probably more importantly, everything said in there is clearly true and the vast majority has both been verified by other sources and acknowledged by (b)(6) in previous meetings, conversations, or emails.

(b)(6) is mortified about having embarrassed the TJAG. I can barely get him to focus. I am less embarrassed as I just don't think there are any good answers here - this may not have been the best tactic in the world, but I kind of feel like we are damned if we do, damned if we don't.

v/r

(b)(6)

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

From: (b)(6) CPT, DoD OGC
Sent: Monday, March 15, 2004 13:41
To: (b)(6)
Cc: (b)(6)
Subject: RE: Allegations of misconduct and unprofessionalism against Chief Prosecutor

Sir,

As you know, I too have seen and been quite troubled by the incidents related by both Maj (b)(6) and Capt (b)(6). Frankly-for my own sanity-I have made a point not to keep a running tally of the incidents that form the basis for my upcoming departure. That being said, the messages below (combined with what I'm about to add) are a pretty good reflection of how I think my "list" would look.

The additional "situations" that come to mind:

1. The Moot Court: I witnessed Maj (b)(6) and Capt (b)(6) being urged to raise only a fraction of the issues they originally forecasted. Essentially, CDR (b)(6) directed them not to mount a zealous defense. It was clear that, instead of a genuine vehicle for improving the United States' position in Military Commissions, the moot court was mere window dressing-the goal being to avoid criticism of our case

preparation or courtroom presentation.

The sages assumed we were a team and that we had all played a role in the preparation of al Bahlul. As you know, that assumption was completely false. CDR (b)(6) wouldn't even let his co-counsel, Capt (b)(6) get a peek into what he was doing. I recall asking (b)(6) (because I was completely ignorant of the on with prosecution cases as "the transfer attorney") why he wasn't playing more of a role in the moot court. He basically said he would be incapable of any greater role because he didn't know anything and CDR (b)(6) had been flying solo for months. I also recall dancing around questions from one sage regarding the facts of the case because I knew she would be mortified if I told her only one guy in the office (the one who was reading his compound, leading questions from a piece of paper the entire time) knew the facts of what we had long thought would be the first litigated case.

Finally, members of the office weren't asked once for our input regarding the outcome of the moot court. Maybe it was for the best, because my honest answer would have been that I was embarrassed. (Please note that I wasn't aware during the moot court that facts were being misrepresented . . . I learned that afterward. I would have been even more embarrassed (and a few other things) had I known.) I was embarrassed that the person you have called "our best litigator" gave an opening with too much detail, too little eye contact, choppy delivery and no apparent theme or theory. I was embarrassed that he didn't know his case well enough to float seamlessly through "fake" witnesses with whom he'd practiced numerous times. And finally, I was embarrassed at his curt, often hostile reaction to what I really thought was very mild criticism. (Frankly, I've seen very junior attorneys at the Air Force's intro-level trial ad course give similar performances and get reduced to tears as a result of instructor critiques; I've taught at that course a couple times, and I can tell you I would not have recommended CDR (b)(6) for future litigation duties, given his courtroom presence.)

2. Allegations of abuse at Bagram: CDR (b)(6) mentioned the allegation to me while I was detailed to Hamdan. His comment was "a couple of drunk FBI agents hardly constitute a prima facie case." I'm sure you recognize the problems with that statement . . .
3. Other comments by CDR (b)(6) I have heard him, on numerous occasions-many of which were in your presence-state that he "only cared about his case." Only once did I hear you clarify that we *all* needed to be concerned about *every* case (I took note because I had been waiting so long for it to happen). It was February. I firmly believe there are a number of things only he knows about that could have quite an impact on military commissions as a whole.

Last fall CDR (b)(6) announced that only those in the ranks of O-5 and above would have access to the SCIF-regardless of their clearance. He did this under the guise that I had left the SCIF unsecured; but real story is that he sent me to get the combination to the dial from (b)(6). Upon returning, I was told to enter the combo on the dial; I did so, but we soon realized that the combo to the sipher lock was not the same as we thought. So CW3 (b)(6) just started to push buttons. Remarkably, after numerous tries, it opened. But the Chief wasn't sure what he had entered. Then CDR (b)(6) came and entered his PIC (I was new to the office and didn't have mine). Then CDR (b)(6) instructed me to just prop the door so that CW3 (b)(6) (an individual he knew only had a Confidential clearance at the time-the rest of us found out later) could get in and out. He pinned the whole thing on me because, before I left for the day, I noticed that the SCIF had been closed but no one signed the card to verify it. Noting that the dial was spun off and the door (to which I did not have the combo) closed, I initialed the card, asked Lt Col (b)(6) to verify, and left. CDR (b)(6) who was awakened because the SCIF alarm sounded in the middle of the night (no PIC had been entered to close it), announced to everyone that we would be getting inspected and trained "because of (b)(6)". He also announced the policy that only O-5 & above would get the codes.

4. Keeping things from the front office: CDR (b)(6) knew that we had been directed to keep the front office apprised of our efforts regarding Hamdan's status on 13224. I believe that, like the Cole video, he has avoided fulfilling this promise in hopes that they'll simply forget. He doesn't want any more evidence from the UK because it might not be in line with what he already has.

5. Fueling fires of hostility within the office: the environment is clear when things like the following occur:
 - a. Following AF TJAG's visit, you stated in an office meeting that "they clearly had an agenda" and that it must have been prompted by "something they heard from (b)(6) or (b)(6) or (b)(6)". At that it was clear to everyone that those wearing blue uniforms were not to be regarded as part of the team.
 - b. Mr. (b)(6) during the first few weeks of his assignment here, outlined one of the goals of his TFD briefing as "convince Capt (b)(6)". This clearly implied that (b)(6) instead of an intelligent member of our team, was to be regarded as a troublemaker who only raised points with an eye toward derailing current operations.
 - c. During a TFaQ meeting (b)(6) announced that the al Qosi team's 70+ page "proof analysis" had been dubbed a "piece of shit" by someone in the office. LtCol (b)(6) immediately, in front of about ten analysts, attorneys and maybe enlisted demanded to know who had said that (b)(6) quipped, "you know." Then there were a number of comments in the room clearly indicating they were talking about (b)(6). I was particularly disturbed, as this was the same day you announced that we needed to "work as a team." At the conclusion of that meeting, there was some discussion about how the al Qosi attorneys were having trouble getting some interview documentation because (b)(6) was making them articulate relevance of the documents. I thought the office view of Capt (b)(6) was reflected by Mr (b)(6) response that he could "take care of Capt (b)(6)". (Please note as a side issue that (b)(6) "quote" was completely inaccurate.)

6. No "vision:" We reorganize constantly. It's almost a joke. By the time somebody gets their feet wet in a particular case or task force, they're detailed to something else. This phenomenon perplexes me, and I can think of no potential motivation for it. But it almost seems like our organizational goal is inefficiency. Additionally, in the case of Hamdan, it certainly appeared that I was removed because I deemed the case "a mess." I thought, in telling you that I would support your decision to remove me, that you had a goal in mind (i.e. detail someone who can fix the case and get it ready without being faced by fire from CDR (b)(6) in the form of "you forget that I'm your boss."). When the person who had been sitting on the case for a year simply got it back (with no potential replacement counsel except maybe an incoming Navy LT who "respects CDR (b)(6) superiority"), it showed me that our goal here is not to best serve the United States. You told me you knew he was defying your orders. You told me you knew I was in a sticky situation because he was the deputy and had been working the case for a long time, but you expected me to get the case ready. By the time I had read the portions of the case file CDR (b)(6) gave me, I was gone. And I'd bet money the case is in the same shape now as it was back then.

7. Appearance of Impropriety: I have felt quite uncomfortable with the numerous references you have made to personal contacts with an individual named (b)(6). I believe this person is a Navy O-6. You and CDR (b)(6) often refer to him as "the Presiding Officer," despite the fact that no PO has yet been chosen by the AA. In response to points raised regarding potential defense challenges, I often hear CDR (b)(6) say one of 2 things: 1. The defense will never think of/do that, or 2. (b)(6) won't let them go there. Discussions like these, in addition to knowledge that you have been sending things like the trial procedure guide to (b)(6) for his comments, make me very uncomfortable. Finally, when you say things like "these panels aren't going to acquit," or "the panel members are being carefully chosen" in response to concerns about how certain pieces of evidence will play, it leads me to question whether these proceedings will truly be fair.

(b)(6)

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

From: (b)(6) COL, DoD OGC

Sent: Monday, March 15, 2004 11:29

To:

(b)(6)

Cc:

Subject: Allegations of misconduct and unprofessionalism against Chief Prosecutor
Importance: High

All:

Please read below.

Capt. (b)(6) has made some serious allegations against me as the Chief Prosecutor---charges that, if true, mandate that I be relieved of my duties.

Among other things, Capt. (b)(6) insists that an "environment of dishonesty, secrecy, and deceit" exists within the entire office.

In an email preceding Capt. (b)(6) you will note that Maj. (b)(6) voices similar views: he states that he is "disgusted" with the "lack of vision" and "lack of integrity" in the office, and has "utter contempt" for many of the judge advocates serving with us.

Bottom line: Both Capt. (b)(6) and Maj. (b)(6) believe that what we are doing is so wrong that they cannot "morally, ethically, or professionally continue to be a part of this process."

I am convinced to the depth of my soul that all of us on the prosecution team are truly dedicated to the mission of the Office of Military Commissions---and that no one on the team has anything but the highest ethical principles. I am also convinced that what we are doing is critical to the Nation's on-going war on terrorism, that what we have done in the past---and will continue to do in the future---is truly the "right" thing, and that the allegations contained in these emails are monstrous lies.

It saddens me greatly that two judge advocates---whom I like very much and for whom I have only the greatest respect and admiration---think otherwise. In fairness to all of you, however, it is important that you read what has been written about me and you.

COL (b)(6)

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

From: (b)(6) CPT, DoD OGC

Sent: Monday, March 15, 2004 07:56

To: (b)(6) COL, DoD OGC

Cc: (b)(6)

Subject: RE: Meeting with Colonel (b)(6) and myself, 4:00 p.m. today, Col (b)(6) office

Sir,

I appreciated the opportunity to meet last Thursday night, as well as the frankness of the discussion. The topics covered and the comments made have been replaying in my mind since we ended the meeting. I have also reviewed Maj (b)(6) comments in his e-mail below, and I agree with them in every respect.

I feel a responsibility to emphasize a few issues. I do not think that our current troubles in the office stem from a clash of personalities. It would be a simple, common, and easily remedied situation to correct if this were true. People could be reassigned or removed.

It is my opinion that our problems are much more fundamental. Our cases are not even close to being adequately investigated or prepared for trial. This has been openly admitted privately within the office. There are many reasons why we find ourselves in this unfortunate and uncomfortable position - the starkest being that we have had little to no leadership or direction for the last eight months. It appears that instead of pausing, conducting an honest appraisal of our current preparation, and formulating an adequate prosecution plan for the future, we have invested substantial time and effort to conceal our

deficiencies and mislead not only each other, but also those outside our office either directly responsible for, or asked to endorse, our efforts. My fears are not insignificant that the inadequate preparation of the cases and misrepresentation related thereto may constitute dereliction of duty, false official statements, or other criminal conduct.

An environment of secrecy, deceit and dishonesty exists within our office. This environment appears to have been passively allowed to flourish, if it has not been actively encouraged. The examples are many, but a few include:

1. **CDR (b)(6) misrepresentations at the Mock Trial** - CDR (b)(6) made many misrepresentations at the Mock Trial, to include stating that we had no reason to believe that al Bahlul had suffered any mistreatment or torture. When I confronted him immediately after the mock trial with his notes to the contrary, he admitted that he was aware of abuse allegations related specifically to al Bahlul. Interestingly, it was because of Prof (b)(6) comments at the mock trial that we even began to inquire into the conditions at the detention camps in AF, which prior to the mock trial had been consciously ignored. Other troubling aspects of the mock trial include, but are not limited to: statements that we were ready for trial in 3 days, that al Bahlul has maintained from day one that he is a member of AQ, the deliberate and misleading presentation of select statements from al Bahlul, the careful coordination of the schedule to limit meaningful questions, the conscious inclusion of an overwhelming amount of paper in the notebooks, and the refusal to include a proof analysis.
2. **Suppressing FBI Allegations of Abuse at Bagram** - Over dinner and drinks, (b) and Lt (b)(6) heard from FBI agents that detainees were being abused at the Bagram detention facility. Lt (b)(6) told (b) after dinner that they couldn't report the allegations because it was told to them "in confidence." (b) told CDR (b)(6) LtCol (b)(6) and (b)(6) anyway, and all three stated that there was not credible evidence and concluded on their own volition that they should not report the allegation to you or other members of the office. Interestingly, CDR (b)(6) recently suggested the Lt (b)(6) despite his lack of experience and judgment, be sent to review the CID reports of abuse at Bagram.
3. **Refusal to give Mr. (b)(6) the COLE video** - Mr. (b)(6) asked CDR (b)(6) twice for a copy of the COLE video. I heard CDR (b)(6) ask CDR (b)(6) whether she should take a copy of the video over to Mr. (b)(6) CDR (b)(6) told her not to, and that maybe in a few days Mr. (b)(6) would forget that he asked for it.
4. **The disappearance/destruction of evidence** - As I have detailed to you, my copy of CDR (b)(6) notes detailing the 302 in which al Bahlul claims torture and abuse is now missing from my notebook. The 302 can not be located. Additionally, (b)(6) of the FBI related last week that he called and to CDR (b)(6) about the systematic destruction of statements of the detainees, and CDR (b)(6) said that this did not raise any issues.
5. **"I've known about this for a year."** Hamden's name is on the UN 1267 list, and we only learned of it in Dec. When CDR (b)(6) was confronted with this information, he claimed that he had known about it for the last year. No attempt had been made prior to Dec to discover upon what evidence Hamdan was added to the list, and we still don't know. If he was aware of this fact, one is left to wonder why no inquiry was made with the State Department. He made the same "I've known about this for a year" claim about the Tiger Team AQ 101 brief, although he has had many of us searching for the information contained within it for months.
6. **CDR (b)(6) misrepresentations at the office overview of his case.** As detailed in a previous e-mail to you, CDR (b)(6) made numerous misrepresentations concerning his case at the office meeting to discuss his case, indicating that he either consciously lied to the office, or does not know the facts of his case after 18 months of working on it.

I have discussed each of these specific examples with you, and you told me that you had taken corrective action to some. For example, in reference to paragraph 2, I asked how I was suppose to trust these attorneys to review documents and highlight exculpatory evidence and you responded that "when the time comes" you would put out very direct guidance. I do not believe that ethical behavior is something that can be directed during selective time periods.

These examples are well known to the members of this office, yet there has been no public rebuke of the behaviors. Hence, the environment and behaviors continue to flourish. I am left to wonder why at an office meeting we were not told:

"I understand that misrepresentations are being made concerning the facts of our cases. If I find out this happens again, the responsible party is going to be fired."

"I understand that evidence is being withheld from our civilian leadership. If I find out this happens again, someone is going to be fired."

"I understand that allegations of abuse are not being brought to my attention or reported to the appropriate authorities. If I find out this happens again, someone is going to be fired."

"I understand that evidence is being hidden or destroyed. If I find out this happens again, someone is going to be fired."

Even in regards to CDR (b)(6) recent behavior towards Ma (b)(6) and myself, the office was not told the real reason for why he has been removed as the deputy, only further feeding the underlying animosity and indicating that the action was forced upon you and not really justified - if not, surely you would have taken a less conciliatory stance.

You stated in our meeting last week that what else can you do but lead by example.

In regard to this environment of secrecy, deceit and dishonesty, the attorneys in this office appear to merely be following the example that you have set.

A few examples include:

You continue to make statements to the office that you admit in private are not true. With many of the issues listed here, the modus operandi appears to be for you to make a statement at a meeting, pause, and when no one states a disagreement, assume that everyone is in agreement. To the listener, it is clear that the statements are not true, but we are not to correct, disagree, or question you in front of the office. (For example, when I asked you basic questions concerning conspiracy law at an office briefing, CDR (b)(6) called me into his office and told me that my conduct was borderline disrespectful because it put you in an uncomfortable position.)

You have stated for months that we are ready to go immediately with the first four cases. At the same time, e-mails are being sent out admitting that we don't have the evidence to prove the general conspiracy, let alone the specific accused's culpability. In fact, it may be questioned how we are in a better position to prove the general conspiracy today than we were last November at the mock trial. Of course, it should also be noted that we have substantially changed course even since November and now acknowledge that the plan to prove principal liability for TANBOM, KENBOM, COLE and PENTBOM was misguided to say the least.

We are rushing to put 9 more RTBs together for cases that you admit are not even close to being ready to go trial. We are also being pressed to prepare charge sheets, and you have asked that discovery letters go out on these cases. We are led to believe that representations are being made that these cases can be prosecuted in short order, when this simply is not true.

You told the AF generals that we had no indication that al Bahlul had been tortured. It was after this statement, which CDR (b)(6) quietly allowed to go uncorrected, that I brought up CDR (b)(6) missing notes to the contrary. You admitted to me that you were aware that al Bahlul had made allegations of abuse.

In our meeting with OGA, they told us that the exculpatory information, if it existed, would be in the 10% that we will not get with our agreed upon searches. I again brought up the problem that this presents to us in the car on the way back from the meeting, and you told me that the rules were written in such a way as to not require that we conduct such thorough searches, and that we weren't going to worry about it.

You state in a morning meeting that al Bahlul has claimed "in every statement" that he was an AQ member. When I told you after the meeting that this was not true, you simply admitted that you hadn't read the statements but were relying on what CDR (b)(6) had told you. As I have detailed in another e-mail, it does not appear that CDR (b)(6) is even aware of how many statements al Bahlul has made, let alone conducted a thorough analysis.

When Maj (b)(6) raises concerns about him advising the AA given the potential appearance of partiality, you advised him not to stop giving advice, but to only give advice orally.

CDR (b)(6) has emphasized at morning meetings, with you in the office, that we do not need to be putting so many of our concerns in e-mails and that we can just come down and talk. Given the disparity between what is said in causal conversation and the statements made by our leadership in e-mails, it is understandable that we have relied more and more on written communications.

You have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees, and we only needed to worry about building a record for the review panel. In private you have went further and stated that we are really concerned with review by academicians 10 years from now, who will go back and pick the cases apart.

We continue to foster the impression that CITF is responsible for our troubles and lack of evidence, although we have learned in the last few weeks that we haven't even sat down with the case agents to figure out what evidence they have and how they have gathered it. You acknowledged last week that we will not even try to fix the problems with CITF. What is perhaps most disturbing about the lack of by our investigative agents is that it does not appear we have ever adequately explained the deficiencies to the CITF leadership.

Our morning meetings, briefings, and group discussions are short and superficial - it could be argued designed to permit a claim that the office has discussed or debated a certain topic without permitting such meaningful discussions to actually take place. Two prosecutors were scheduled 15 minutes each to go over the facts of their case. Charge sheets are reviewed by the office the afternoon that they are to be taken over to the Deputy AA. The lay down on the general conspiracy is cursory and devoid of meaningful comments or suggestions. The fact that we did not approach the FBI for assistance prior to 17 Dec - a month after the mock trial - is not only indefensible, but an example of how this office and others have misled outsiders by pretending that interagency cooperation has been alive and well for time, when in fact the opposite is true.

It is claimed that the Tiger Team didn't do "shit" when in fact many of the products (i.e., AQ 101 and the statement of predicate facts) that they put together almost two years ago closely mirror products that taken us months to put together. In fact, even a cursory review of the Tiger Team materials we now (after several efforts to get them were sharply rebuffed by our own staff) shows that the Tiger Team had articulated many of the obstacles we now face and had warned that if these obstacles were not removed that prosecutions could not succeed.

As part of this atmosphere that you fostered, Maj (b)(6) was publicly rebuked for bringing this issue to the group's attention and you specifically stated that you had reviewed the tiger team materials, there was little if any usable material in them, and that the demise of the tiger team had been the result of an unfortunate personality clash and nothing else. A review of the files shows otherwise.

From June to December, you were only present in the office for brief periods, often less than 4 hours every two weeks. However, you continued to insist that CDR (b)(6) spoke for you and directed those who e-mailed you with concerns to address them with CDR (b)(6). It is difficult to believe that his deficiencies were unknown at that time, and consequently it is difficult to believe that you were unaware of the fact we had little to no direction during that time frame. The fact that he directed each of us in the office not to speak to you directly was, and remains to me, astonishing - but does permit one to argue that they were unaware of any difficulties during a critical period of this endeavor.

One justification for the concealment and minimization of the problems has been the often stated proposition that MG Altenburg will be able to remedy many of these problems when he becomes the

Appointing Authority. However, you have recently stated that MG Altenburg is a good friend of yours, that you hope he will be heavily reliant on BG Hemingway for a period of time, and that we will not be forwarding any documentation of cases (e.g. proof analysis) to MG Altenburg which suggests that he will not be in a position to exercise independent judgment or oversight.

It is my opinion that the primary objective of the office has been the advancement of the process for personal motivations -- not the proper preparation of our cases or the interests of the American people.

The posturing of our prosecution team chiefs to maneuver onto the first case is overshadowed only by the zeal at which they hide from scrutiny or review the specific facts of their case - thereby assuring their participation.

The evidence does not indicate that our military and civilian leaders have been accurately informed of the state of our preparation, the true culpability of our accuseds, or the sustainability of our efforts.

I understand that part of the frustration with Maj. (b)(6) discussions with BG Hemingway was that you did not have the opportunity to discuss the matters with him in the first instance. It was clear from the discussions with BG Hemingway that he was unaware of the lack of preparation with our cases prior to signing the charges, or many of the other problems that we have discussed.

You have stated that you are confident that if you told MG Altenburg that we needed more time that he would give it to you. Underlying this comment is the fact that MG Altenburg has not been made aware of the significant shortcomings of our cases and our lack of preparation and cooperation with outside agencies.

I also have significant reason to believe that Mr. (b)(6) has not been advised in the most accurate and precise way. It appears that even the results and critiques of the mock trial, described like so many other efforts in this office as a "home run," were manipulated to present the maximum appearance of endorsement (for example, the reorganization and bold-face in Lt Col (b)(6) critique that was openly discussed in the office)

We originally alleged that the accuseds were responsible as principles for 9/11, the COLE and the embassy bombings. Additionally, we alleged that al Qosi was involved with Mubarak and that al Bahlul was aware of Atta and Jarrah, and was somehow linked to a 9/11 meeting in Malaysia. I understand that significant policy decisions have yet to be vetted with DOJ OLC, and that they appeared less than totally comfortable with our theory of liability and culpability of the accuseds.

The comments we have heard in the office appear to revolve around one goal - to get the process advanced to the point that it can not be turned off. We are told that we just need to get defense counsel assigned, because then they can't stop the process and we can fix the problems. We just need to get charges approved because then they can't stop the process and then maybe we can fix the problems.

If the appropriate decisionmakers are provided accurate information and determine that we must go forward on the path we are currently on, then all would be very committed to accomplishing this task. However, it instead appears that the decisionmakers are being provided false information to get them to make the key decisions, to only learn the truth after a point of no return.

It is at least possible that the appropriate officials would be more concerned about approving charges, arraigning accuseds, and signing more RTBs prior to the arguments in front of the Supreme Court if they knew the true state of the cases and the position they will be left in this fall.

[It is also unclear how the steadfast refusal to have the prosecutors co-located with the CITF agents is in the interests of the American people or the preparation of the cases, and could be motivated by anything but a purely personal issue with someone involved in the process. You have admitted that both organizations productivity would be greatly increased.]

To address at least some of the underlying issues, the following may be proposed:

1. After fully informing the sages or invitees to the Mock Trial of the deficiencies we now acknowledge, solicit their recommendations and suggested courses of action.
2. Before MG Altenburg signs in -- taking on the AA responsibility and further damaging his lucrative private practice -- fully and accurately brief him on the status of our cases, our theories of liability, and the likely timetable in which we would be able to prepare cases after al Bahlul and al Qosi.
3. Fully and accurately brief Mr (b)(6) and DOJ on the status of our cases, our theories of liability, and the likely timetable in which we would be able to prepare cases after al Bahlul and al Qosi.
4. Take immediate action within the office to develop a comprehensive prosecution strategy.
5. Take immediate action within the office to establish an environment that fosters openness, honesty, and ethical behavior.
6. Replace current prosecutors with senior experienced trial litigators capable of maintaining objectivity while zealously preparing for trial.

Instead, what I fear the reaction to Maj (b)(6) and my concerns will simply be a greater effort to make sure that we are walled off from the damaging information - as we are aware has been attempted in the past.

I would like to conclude with the following -- when I volunteered to assist with this process and was assigned to this office, I expected there would at least be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged. It is difficult to believe that the White House has approved this situation, and I fully expect that one day, soon, someone will be called to answer for what our office has been doing for the last 14 months.

I echo Maj (b)(6) belief that I can not morally, ethically, or professionally continue to be a part of this process. While many may simply be concerned with a moment of fame and the ability in the future to engage in a small-time practice, that is neither what I aspire to do, nor what I have been trained to do. It will be expected that I should have been aware of the shortcomings with this endeavor, and that I reacted accordingly.

v/r,

Capt (b)(6)

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

From: (b)(6) MAJ, DoD OGC
Sent: Thursday, March 11, 2004 16:19
To: (b)(6) CAPT, DoD OGC
Cc: (b)(6) COL, DoD OGC
Subject: RE: Meeting with Colonel (b)(6) and myself, 4:00 p.m. today, Col (b)(6) office

Ma'am

While I appreciate the sentiment, I have to tell you that I don't see a lot of use continuing to talk about this stuff, unless your looking at reassigning us out of this office. I don't intend to speak for (b)(6) although I know he feels the same way, but for me I sincerely believe that this process is wrongly managed, wrongly focused and a blight on the reputation of the armed forces. I don't have anything new to say. I am pretty sure that everyone in the world knows my sentiments

about this office and this process.

Certainly there have been some unfortunate symptomatic issues like Cdr (b)(6) recently heightened animosity towards (b)(6) (and I'm not going to let that one go either), but my fundamental concerns here have nothing to do with personality conflicts or intellectual disagreements.

I don't think that anyone really understands what our mission is, but whatever we are doing here is not an appropriate mission. I consider the insistence on pressing ahead with cases that would be marginal even if properly prepared to be a severe threat to the reputation of the Military Justice System and even a fraud on the American people - surely they don't expect that this fairly half-assed effort is all that we have been able to put together after all this time.

At the same time, my frank impression of my colleagues is that they are minimizing and/or concealing the problems we are facing and the potential embarrassment of the Armed Forces (and the people of the United States) either because they are afraid to admit mistakes, feel powerless to fix things, or because they are more concerned with their own reputations than they are with doing the right thing. Whether I am right or wrong about that, my utter contempt for most of them makes it impossible for me to work effectively.

Frankly, I became disgusted with the lack of vision and in my view the lack of integrity long ago and I no longer want to be part of the process - my mindset is such that I don't believe that I can effectively participate - professionally, ethically, or morally.

I lie awake worrying about this every night. I find it almost impossible to focus on my part of the mission - after all, writing a motion saying that the process will be full and fair when you don't really believe it will be is kind of hard - particularly when you want to call yourself an officer and a lawyer. This assignment is quite literally ruining my life.

I really see no way to fix this situation other than reassignment. I don't want to be an obstacle to anyone, but I'm not going to go along with things that I think are wrong - and I think this is wrong. It's not like I'm going to change my opinion in order to "go along with the program." I'm only going to persist in doing what I think is right and at some point that is going to lead to even harder feelings. Half the office thinks we are traitors anyway and frankly I think they are gutless, simple-minded, self-serving, some, or all of the above so you can see how that's going to go...

I know even well-meaning people get tired of hearing this, but the fact is that I really can't stomach doing this and I really don't want to waste time talking about it.

PS: (b)(6) not back yet. I think he was at FBI this afternoon.

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

From: (b)(6) CAPT, DoD OGC

Sent: Thursday, March 11, 2004 13:36

To: (b)(6) MAJ, DoD OGC; (b)(6) CPT, DoD OGC

Cc: (b)(6) COL, DoD OGC

Subject: Meeting with Colonel (b)(6) and myself, 4:00 p.m. today, Col (b)(6) office

Major (b)(6) and Captain (b)(6)

Captain (b)(6) and I had a long talk this morning. Based on his expressions of concern for some unresolved issues, including both ethical matters and personal treatment of the Air Force lawyers, I have asked the Colonel to meet with us all this afternoon. This is meant to be an open and frank exchange, and a chance to put everything on the table for full discussion.

VR/R

(b)(6)

Capt, JAGC, USNR
Office of Military Commissions

(b)(6)