

UNITED STATES OF AMERICA
v.

PO-102
Prosecution Response to Presiding
Officer Direction to Respond to
Certain Questions

DAVID M. HICKS

Does MCO # 1 Conflict with the
President's Military Order

The following questions were presented by the Presiding Officer (referencing MCO # 1 dated 31 Aug 2005):

Question 1: Assuming the President's Military Order is lawful in every respect, is the referenced MCO lawful and consistent with the President's Military Order? If so, explain your answer. If not, explain your answer.

Prosecution Response to Question #1:

1. Military Commission Order No. 1 (hereinafter "MCO #1") dated 31 August 2005 is lawful and consistent with the President's Military Order of 13 November 2001. The President's Military Order, Sec. 4. (b) & (c) states :

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including *pretrial, trial, and post-trial procedures*, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for –

- (1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;
- (2) a full and fair trial, *with the military commission sitting as the triers of both fact and law*;
- (3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (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), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

See Detention Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, § 4(c)(2), 66 Fed. Reg. 57,833 (Nov. 13, 2001) (Emphasis supplied).

2. Changes to MCO #1, of 31 August 2005, are consistent with the President's Military Order; including the requirement that the accused be provided a full and fair trial, with the military commission sitting as the triers of both fact and law. See Detention Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, § 4(c)(2), 66 Fed. Reg. 57,833 (Nov. 13, 2001).

3. The President's Military Order requires only that the military commission, as a whole, be the trier of both fact and law. The Commission is a body, not a proceeding in and of itself, and although the presiding officer and the commission members may have different roles during commission proceedings, collectively the commission as a whole remains the source of the law and the trier of fact. The amended MCO is consistent with the PMO because the Presiding Officer rules "upon all questions of law," MCO No. 1, §4A(5)(a), and the remaining members of the Commission determine "the findings [of fact] and sentence without the Presiding Officer, and may vote on the admission of evidence, with the Presiding Officer." *Id.*, § 4A(6). The sole manner in which the President's Military Order's requirement that the commission be the trier of both fact and law could be violated would be for some other body, outside of the commission itself, to usurp the authority of the commission and decide an issue of law or fact for the commission.

4. The Department of Defense has clearly and unambiguously stated its position that the changes that have been made to MCO #1 are "consistent with the President's Military Order of Nov. 13, 2001 that established the military commission process to try enemy combatants for alleged violations of the law of war." See Department of Defense News Release of 31 August 2005 "Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures" (available at <http://www.defenselink.mil/releases/2005/nr20050831-4608>). The Secretary of Defense's interpretation of the President's Military Order is to be given great deference, as he is the principal charged by the President with issuing such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary... See Detention Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, § 4(b), 66 Fed. Reg. 57, 833 (Nov. 13, 2001). Furthermore, the military order of 13 November 2001 is derived from the President's authority as Commander in Chief of the Armed Forces of the United States. See *Id.* If the President, as Commander in Chief of the Armed Forces determines that his order is being violated by the promulgation of the revised Military Commission Order #1, he could address that issue and order the Secretary of Defense, his subordinate, to rescind the revised MCO. He has not done so. The President's silence on this issue may reasonably be interpreted as his acquiescence that the changes, which were made public on 31 August 2005 after coordination with various agencies in the United States Government, are consistent with his order of 13 November. See Special Defense Department Briefing on Military Commissions from the Legal Advisor to the Appointing Authority, 31 August 2005. (Briefing can be found at <http://www.defenselink.mil/transcripts/2005/tr20050831-3821>). It is implausible to believe that the President is not aware of the changes that were made to Military Commission Order No.1 on 31 August 2004.

Question 2. If the referenced MCO is not lawful or not consistent with the President's Military Order, what procedures should the Commission follow rather than those outlined in MCO #1 and the revised MCIs based thereupon, and what is the authority for your position?

Prosecution Response to Question #2:

5. The prosecution's position is that the amended Military Commission Order #1 is lawful and consistent with the President's Military Order. However, should it be determined to be unlawful or inconsistent with the President's Military Order of 13 November 2001, the commission should proceed under the directives set forth in the President's Military Order.

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Prosecutor