

While the M.C.A. and R.M.C. 806(d) are ultimately controlling here, the historic precedents from respected World War II tribunals provide persuasive authority. These World War II materials pre-date the widespread adoption of the “substantial likelihood of material prejudice” standard.¹⁶ They also pre-date the M.C.A., which gives rule-making authority to the Executive Branch, 10 U.S.C. § 949a, and the prescription, under that authority, of R.M.C. 806(d) by the Secretary of Defense. However, this last authority places a potential order squarely within the purview of the Military Judge, who may properly consider prior law-of-war tribunal precedent in balancing the important interests involved.

Declaration and the United Nations War Crimes Commission, and reprinting the various press releases issued by the Office of Chief of Counsel to that date); Report from Robert H. Jackson, Chief of Counsel, to the President (June 6, 1945), *reprinted in* 12 DEP'T ST. BULL. 1071 (June 10, 1945) (reporting on progress made since appointment as Chief of Counsel and setting forth the legal bases and plan to try alleged German war criminals); Press Release, Chief of Counsel Robert H. Jackson (Aug. 8, 1945), *reprinted in The Texts of the War Crimes Committee Report and the Jackson Statement*, N.Y. TIMES, Aug. 9, 1945, at 10 (observing that the London Agreement granted the International Military Tribunal jurisdiction to try war crimes, crimes against humanity, and crimes against peace consistent with international law); Press Release, Chief of Counsel Robert H. Jackson (Mar. 9, 1946), *reprinted in* C. L. Sulzberger, *Jackson Stresses Allies' Trial Unity*, N.Y. TIMES, Mar. 10, 1946, at 5 (describing the procedural protections of the International Military Tribunal, which included that “the prosecution must prove its case by evidence, the defense must have a chance to disprove it by evidence and to answer it with argument, and irrelevant political issues must be kept out”). An exception to the measured extrajudicial statements of Chief of Counsel Jackson was a Dec. 4, 1945 chiding of a service newspaper for suggesting that Jackson was seeking to discredit the profession of arms by trying German general staff officers as war criminals. *See* Press Release, Chief of Counsel Robert H. Jackson (Dec. 4, 1945), *reprinted in Jackson Scolds Critics of Trial*, N.Y. TIMES, Dec. 5, 1945, at 3. The historical example of educative and informational efforts by Jackson, a sitting Associate Justice of the Supreme Court before and after his service as chief United States prosecutor at Nuremberg, discredits the defense’s disappointing attempt here to characterize similar efforts as unacceptable, unethical, or prejudicial. *See* AE 266 at 24.

¹⁶ *See generally* Mattei Radu, *The Difficult Task of Model Rule of Professional Conduct 3.6: Balancing the Free Speech Rights of Lawyers, the Sixth Amendment Rights of Criminal Defendants, and Society’s Right to the Fair Administration of Justice*, 29 CAMPBELL L. REV. 497, 498 (2007) (recounting the history of regulation by courts and bar over extrajudicial speech, beginning with concern that Jack Ruby’s killing of Lee Harvey Oswald may have been partially caused by widespread media coverage surrounding the shooting of President Kennedy and with the Supreme Court’s condemnation of the uncontrolled media frenzy and call for preventive measures in its decision in *Sheppard v. Maxwell*, *supra* note 11).

G. *The Commission's Consideration of an R.M.C. 806(d) Order Should Strive for a Balance Missing from Defense Counsel's Motion*

Indeed, the fundamental problem with defense counsel's argument is that it lacks the balance that must be brought to the difficult task of regulating extrajudicial speech. It has already been highlighted that the proposed protective order is one-sided as to parties in the litigation, thereby violating the norm of neutrality as to point of view that provides one aspect of the balance sought by courts and bar associations alike. But authorities that have seriously considered the matter also place great importance upon the requirement for balance as to the competing *interests* at stake:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.¹⁷

The imperative of achieving balance is also apparent in R.M.C. 806(d) and the associated discussion, as well as in the Rules of Court in force before this Commission. While the government appreciates that restraints on the speech of participants in a trial are necessary to prevent publicity from materially prejudicing fairness and impartiality, especially in criminal jury trials,¹⁸ there is no apparent recognition by the defense of anything more than that R.M.C.

¹⁷ A.B.A. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. para. 1.

¹⁸ *Cf.* guidance to Justice Department employees at 28 C.F.R. § 50.2(b)(f) ("Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period."). While some have suggested that officers comprising a panel may be less subject to being inflamed or prejudiced than a randomly selected civilian jury drawn from a typical district, the position recommended by the government here is that even if such a suggestion could be established empirically (it cannot, given lawful

806(d) is worth invoking, if it enables them to stain the reputation of military commissions while hamstringing those who may see things differently. Missing in the defense position is any acknowledgment of the public's interest in the fair administration of justice or of the need to safeguard the integrity of a trial process where decisions are based "on the evidence and arguments properly advanced in open court."¹⁹

The foregoing analysis thus respectfully recommends a careful and balanced approach by the Military Judge, one mindful that because there is heightened danger of prejudice from statements in the period close to and during trial, the Commission should—as trial approaches—consider issuing a show-cause order notifying counsel and perhaps media representatives of the intent to emplace an R.M.C. 806(d) restriction on extrajudicial statements by all parties. Should one or more defense teams or the media object, the Commission should then provide the opportunity to be heard that is recommended in the discussion to the rule. The government will not object to an R.M.C. 806(d) protective order, binding on all parties, that is consistent with Local Criminal Rule 57.1 of the United States District Court for the Eastern District of Virginia. *See* Attachment E.

IV. The Defense Fails Even To Make a Prima Facie Case of Unlawful Influence Due to Prosecution or Government Statements, Which Statements Have Been Appropriate and Good Faith Efforts To Provide Information Regarding Military Commissions Topics the Public Knows Little About

In proposing their imbalanced and self-serving "Fair Trial" order, defense counsel for accused Bin 'Attash also invoke the unlawful influence provision of the M.C.A.:

No person may attempt to coerce or, by any unauthorized means, influence . . . the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case; . . . the action of any convening, approving, or reviewing authority with respect to their judicial acts; . . . or the exercise of professional judgment by trial counsel or defense counsel.

limits on jury studies), the better course here is to take a prudently preventive and yet also balanced and fair course.

¹⁹ *Bridges v. California*, 314 U.S. 252, 271 (1941).

10 U.S.C. § 949b(a)(2)(A)-(C). Apparently blinded to the possibility that their advocacy in the media might itself be unlawful were the strained interpretation they advance actually to be adopted,²⁰ defense counsel make a case here that is barely intelligible, much less persuasive.

The information summarizing military commissions law and procedure posted on the government-maintained website, like the efforts undertaken at Guantanamo before and after session weeks, amounts to a good faith and completely non-prejudicial discharge of responsibilities that defers to court processes and seeks the fair administration of justice.²¹ As such, the reasonable interpretation of any “message” being “sent,” and by no one in a superior-subordinate relationship much less a command position, is only the salutary one that the law should be followed. The motto and ideal of the Office of Military Commissions, “Fairness, Transparency, Justice,” meanwhile, is no more objectionable or prejudicial than is “E Pluribus Unum” (“Out of Many, One”) on the seal of the United States.

²⁰ Unlike the unlawful command influence provision in the Uniform Code of Military Justice (“UCMJ”), *see* 10 U.S.C. § 837, the unlawful influence provision in the M.C.A. does not limit its proscription to convening authorities, commanders, and other persons subject to the UCMJ. Though no court has yet considered the reach of the M.C.A. provision effected by the “[n]o person” language, defense counsel’s imaginative conjurings about possible lines of influence, if endorsed by any court, would necessarily sweep themselves into consideration under the plain language of the statute.

²¹ While summaries such as those provided by private advocacy groups, *see, e.g.*, Press Release, Human Rights First, Military Commission Proceedings Violate International Law (Aug. 17, 2004) (annexing table entitled, “Comparing Fairness Protections”), the Congressional Research Service, *see, e.g.*, JENNIFER K. ELSEA, CONG. RESEARCH SERV., R40932, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT 11-27 (2013), and the military commissions website inevitably leave some information out in the interest of meeting a public demand for something digestible, such summaries cannot reasonably be interpreted as causing a prejudicial influence on panel members in a particular case. The fact is that the M.C.A. *is* different in some ways from—and similar in many other ways to—criminal trial systems of which the public is more familiar. *See, e.g.*, 10 U.S.C. § 948b(d) (directing the inapplicability of certain provisions of the UCMJ), § 949a (establishing “rights of the accused,” including right to counsel learned in capital cases at government expense if facing the death penalty), § 949l (requiring a presumption of innocence and proof beyond a reasonable doubt). This fact, and the variety of attempts to describe it, does not even suggest the spectre of unlawful influence.

Accordingly, the defense has failed even to meet the initial burden of raising the issue of unlawful influence by showing “facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the [trial], in terms of its potential to cause unfairness in the proceedings.” *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999); *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006). And were the Commission to assume, *arguendo*, that it had met such burden, the facts already provided in attachments to the pleadings establish beyond a reasonable doubt that there is no unlawful influence. *See Biagase*, 50 M.J. at 151.

The case cited by the defense in support of the unlawful influence argument, *United States v. Kirkpatrick*, 33 M.J. 132 (C.M.A. 1991), only reinforces how poorly conceived its argument is. In *Kirkpatrick*, the Military Judge instructed panel members on sentencing that the convicted senior noncommissioned officer had been “directly in violation of [the] open, express, notorious policy of the Army” against marijuana use. The defense thus clumsily compares plainly erroneous instructions that “br[ought] the commander into the deliberation room,” 33 M.J. at 133 (quoting *United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983)), with general descriptive information intended to promote fairness and dutiful application of the law.

This argument, like the defense’s others, fails, and it cannot support the requested relief.

V. A Protective Order Is Not Necessary with Respect to Witness Production as the Military Commission Has Already Ruled, in AE 036C, that the Requirements Set Forth in R.M.C. 703 Govern this Military Commission, and that AE 036D Governs the Conduct of Trial

In yet another example of its never-ending expansion of what constitutes unlawful influence, and with absolutely zero evidence of any prosecutor influencing any witnesses not to speak with the defense, the defense claims it is necessary for a protective order to prevent unlawful influence over testimony of witnesses. There is no good faith basis for requesting this relief, and it thus should be denied. The prosecution affirms that it has not and will not try to dissuade any prospective witness from speaking with the defense (with proper safeguards for the disclosure of classified and sensitive unclassified government information).

The defense cites as “examples” of unlawful influence that the staff judge advocate of JTF-GTMO and members of the Office of the Convening Authority have declined or been reluctant to speak with defense counsel in the past on issues in litigation. *See* AE 266 at 27-28. Whether prospective witnesses agree to be interviewed by defense counsel is entirely up to them, and the defense admits as much. *See* AE 266 at 4. And, of course, where the information the defense seeks to elicit from a prospective witness is “government information” that the prospective witness learned in the performance of his or her official duties—especially where such information is classified or sensitive unclassified information—it is not within the authority of the individual prospective witness to disclose that information without proper authority from the command or entity that “owns” that information, even if the witness consents to a defense interview. In such instances, the prospective witness must also consult with the command or entity that “owns” the information to obtain guidance on whether or not—and under what conditions—he or she may disclose that information.²² The defense has proffered no evidence that any witnesses refused to speak with the defense because the prosecution told them not to, or otherwise threatened or intimidated them not to speak with the defense.

As it does throughout AE 266, in regard to the defense request for a protective order enacting what it terms “constitutionally-mandated” reciprocal discovery requirements, the defense seeks to re-litigate the motions it has already lost by repackaging the same themes and calling them unlawful influence, or otherwise requesting a protective order that merely restates applicable law with no proof that the applicable law actually has been violated by the prosecution. In regard to what it now claims is a “power grab” over defense witnesses, AE 266

²² None of this is to say that the defense may be denied access to discoverable information. Rather, it is simply to make explicit the unremarkable point that where government information—especially classified and sensitive unclassified information—is at issue, the process by which the defense obtains access to that government information is more involved than simply interviewing an individual. The rules provide a process for defense access to government information, regardless of whether that information is contained in a document or an individual’s recollections. Those rules protect the defense’s right to discoverable information while ensuring the government’s ability to protect sensitive information in the national interest.

at 5, the defense simply reiterates and expands upon arguments it already made, and had rejected, in AE 036, claiming now that the ruling in AE 036 offends “fundamental fairness” by imposing no reciprocal duties on the government in witness production, and seeking such notice in its proposed protective order.

While refraining from restating all of its successful arguments in AE 036A, the prosecution, as representative of the United States Government in these proceedings, has certain obligations in the context of any prosecution that the defense does not, including not only carrying the burden of proof at trial, but also funding witness expenses. As such, and as has been the military practice since at least 1969, the defense must tender a synopsis of expected testimony for its witnesses so the prosecution can make a determination, prior to having to furnish the expense, as to whether the witness is relevant and necessary and should be produced. *See* AE 036A at 4. If the witness is denied by the prosecution, the Military Judge ultimately decides on the necessity of a witness.

The defense argues for its protective order regarding witnesses partly by claiming the prosecution has continually sought to expand its control of defense witness production, including the production of what it terms “voluntary defense witnesses,” by citing prosecution motion AE 036E. *See* AE 266 at 29. However, in the prosecution Motion to Amend and Clarify the Military Judge’s Trial Conduct Order Regarding Government-Funded Production of Defense Witnesses and Use of Government Video Teleconference (AE 036E), the prosecution made it clear that when the defense seeks a witness at no expense to the government, no such notice is required. *See* AE 036E at 7. However, the prosecution reiterates that simply because a witness wants to testify for the defense, or is available via VTC, does not make that witness “voluntary” under R.M.C. 703 if the government will incur an expense associated with that witness.

As set forth in AE 036E, in determining whether a witness is voluntary under R.M.C. 703, a careful analysis of the comparable rule in the Rules for Courts-Martial demonstrates that such a request for a willing witness via VTC or in person would still constitute a request for production of a defense witness pursuant to R.C.M. 703. R.C.M. 703 addresses the “Production

of Witnesses and Evidence,” and R.C.M. 703(b) specifically includes the use of remote live testimony by VTC for interlocutory motions and also at trial, under certain circumstances. There is no distinction made in R.C.M. 703 between contested or uncontested witnesses as they relate to the costs and burdens incurred by the government when ensuring their testimony. Indeed, the only time the rules recognize a distinction for a “voluntary” witness is when that witness’ production will be at no expense to the United States. The discussion of R.C.M. 703(e)(2)(A) states, “[a] subpoena is not necessary if the witness appears voluntarily *at no expense to the United States.*” R.C.M. 703(e)(2)(A), Discussion (emphasis added). Therefore, where the defense seeks to produce a witness at no expense to the government it need not seek the assistance of trial counsel with the administrative aspects of that production. However, where the witness testimony will result in a cost to the government, the witness is not considered “voluntary” for purposes of R.C.M. 703.

As the Military Judge has recognized in earlier litigation on R.M.C. 703, “[e]very witness here will incur a cost. It’s simply a matter of how do we determine who has to be produced here and how that production is funded and what notice is done and who tells whom to make the witness show up.” Tr. at 1033. If defense counsel personally agreed to fund all of the travel and related expenses of every prosecution witness, it would have a legitimate argument that such a prosecution synopsis, as is sought now in its proposed protective order, should be required prior to the production of the witness. However, until such time as the defense agrees to fund all of the prosecution witnesses, such a protective order is neither warranted nor appropriate in this context. Of course, the defense will receive a list of prosecution witnesses in accordance with whatever timeline the Military Judge sets forth for providing such information.

7. Conclusion

The Commission should deny the defense motion and enforce its 24 January 2014 deadline for signing of the MOU. However, as trial approaches, the prosecution respectfully requests that the Military Judge consider issuing a protective order under R.M.C. 806(d), binding

on all parties and witnesses and limiting statements made outside of court that present a substantial likelihood of material prejudice to a fair trial by impartial members.

8. Oral Argument

The prosecution waives oral argument, but to the extent the Commission grants the defense request for oral argument, the prosecution requests the opportunity to be heard.

9. Witnesses and Evidence

None.

10. Additional Information

None.

11. Attachments

- A. Certificate of Service, dated 5 February 2014.
- B. DVD of *60 Minutes—Inside Guantanamo*.
- C. Transcript of *60 Minutes—Inside Guantanamo*.
- D. Extrajudicial Statements by Counsel for Accused Bin ‘Attash.
- E. United States District Court for the Eastern District of Virginia, Local Criminal Rule 57.1.

Respectfully submitted,

//s//

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ATTACHMENT A

ATTACHMENT B

(Hand Delivered)



ATTACHMENT C

Inside Guantanamo

November 3, 2013

Lesley Stahl

The following script is from "60 Minutes—Inside Guantanamo" which aired on Nov. 3, 2013. The correspondent is Lesley Stahl. Rich Bonin, producer.

Brigadier General Mark Martins has one of the toughest missions there is in the war on terror -- not on the battlefield -- but in the courtroom of a special military commission. It will hold what's being called "al Qaeda's Nuremberg," the first trial of those charged with plotting the attacks on 9/11, 12 years ago. And as chief prosecutor, Martins will be asking for the death penalty.

Pre-trial proceedings have begun, and he's already taking fire because the five defendants were all subjected to widely-condemned interrogation techniques used by the CIA, among them waterboarding; and because of where the trial will be held—at the notorious military prison camp at Guantanamo Bay. Since Congress passed a law banning the defendants from setting foot on U.S. soil, everyone involved in the case has to go there.

Every six weeks for the last year and a half, Gen. Martins and his team of prosecutors, defense lawyers, bailiffs, interpreters -- about 250 people in all -- are airlifted aboard a government charter to the U.S. naval base at Guantanamo Bay, Cuba, at a cost of \$90,000 a flight.

[Greeter: "Hello everyone and welcome back to Guantanamo Bay, Cuba, pearl of the Antilles."]

When the trial begins more than a year from now, it'll be the biggest war crimes tribunal since Nuremberg and much of the burden rests on Gen. Martins' shoulders.

Lesley Stahl: So when it's a military tribunal or commission, how is it different from a civilian proceeding?

Gen. Martins: The similarities really swamp the differences. I mean, the accused is presumed innocent, the prosecution must prove guilt beyond a reasonable doubt.

Gen. Martins knows a lot's at stake: the 9/11 defendants must be seen as getting a fair and legitimate hearing.

Gen. Martins: We've got to ensure that what we do in these cases is justice and can't be accused of being vengeance. And that's a great challenge.

Lesley Stahl: Now we have talked to some of the defense attorneys and they've told us it's a show trial.

Gen. Martins: Uh-huh (affirm).

Lesley Stahl: It's a charade.

Gen. Martins: Well, I mean, I don't think the test of any system is what the defense counsel say about it.

But hard as he tries to ensure that it's seen as a fair trial, he keeps running into one obstacle after the next --starting with the reputation of the venue itself -- Guantanamo Bay -- where 164 detainees sit in cells, most of them for nearly 12 years. And, except for the 9/11 five, most have not been charged. One of them cried out when he saw our cameras.

Detainee: Please, we are tired. Either you leave us to die in peace, or either tell the world the truth. Let the world hear what's happening.

Lesley Stahl: Twelve years. With no charges.

Gen. Martins: That's one of the reasons I have a sense of urgency to try everybody that we can try.

Lesley Stahl: Does it in any way taint what you're doing?

Gen. Martins: I wouldn't characterize it as taint. I believe that it influences people's perceptions.

Another thing that influences perceptions is the elephant in the courtroom: the question of torture. All five of the 9/11 defendants were held incommunicado for years at CIA black sites, where they were subjected to harsh interrogation techniques. They were legal at the time, but have since been banned by the Obama administration.

Walid bin Attash's attorney, Cheryl Bormann, says she's not allowed to talk about the interrogations because they've been classified.

Lesley Stahl: Was your client waterboarded?

Cheryl Bormann: I can't answer the question. A proposed protective order bans me from telling you anything I know about what happened to my client, beginning from the moment of his capture in 2003 until the moment that he landed in Guantanamo Bay in 2006.

Lesley Stahl: So if you were to tell me that he was subjected to a specific, harsh interrogation technique, you would be breaking a law? You would be--

Cheryl Bormann: I would be.

Lesley Stahl: --convicted of something?

Cheryl Bormann: I would be prosecuted. And imprisoned for, I believe, up to 30 years.

David Nevin: This is not a system that is set up to deliver justice.

David Nevin represents Khalid Sheikh Mohammed - KSM, known as the architect of 9/11. Considering that KSM has admitted to the worse terrorist attack on U.S. soil, you would think the case might be open and shut. But part of the problem is that he was waterboarded 183 times in one month. Nevin filed this declaration detailing the treatment of his client. But after the censors got through with it, this is all that made it into the public record.

David Nevin: Think about this for a minute. The government says they can't talk publicly about what happened to them because it's classified. If the government didn't want to reveal its secrets to them, it shouldn't have tortured them. And yet--

Lesley Stahl: Well, no, no. The government said, "We were trying to stop the next terrorist attack." They were trying to stop the next attack. They're not all totally evil, right?

Cheryl Bormann: Good intentions-- of course not. Good intentions pave the road to hell, though. Right?

What about statements KSM made during the waterboarding? The law says any evidence "obtained" through harsh interrogation techniques is inadmissible. But there's a loophole.

Gen. Martins: It is possible for a voluntary statement to be made after a passage of time at-- in a different location perhaps with different questioners.

And so, once the CIA's harsh interrogations of the five 9/11 defendants stopped, the FBI sent in a so-called "clean team" to question them all over again - but without coercion. And those statements are admissible.

Cheryl Bormann: It's like Alice going down the rabbit hole, right? You torture him for three years. You keep him in captivity after you stop torturing him in a place like Guantanamo Bay. And then you send in agents from the same government that tortured him for three years to take statements. And then if you're Gen. Martins, you say, "Well, those are now clean." Guess what? They're not.

Gen. Martins: I understand, I understand the argument. The people do not forfeit their chance for accountability because someone may have crossed a line or have coerced or subjected to harsh measures somebody who is in custody.

Lesley Stahl: So you're saying that it's unfair to the justice system not to be able to question these guys later.

Gen. Martins: The point that I reject and that the law rejects is that there can be no voluntary statements following an instance of coercion. Justice requires that you look deeper, that you determine if the statement-- even though there had been a prior instance-- was nevertheless voluntary. And there can be such statements.

Navy Commander Walter Ruiz is a military attorney representing Mustafa al-Hawsawi.

Cmdr. Walter Ruiz: Gen. Martins - I respect him. I believe he is a patriot. I believe that if our government asked him to sell ice to Eskimos he would try his best, if he believed it was in our nation's interest. But ultimately, you have a system where we've classified evidence of war crimes, where you have loopholes for torture and coercion. Every day we listen to the national anthem in Guantanamo Bay, Cuba, but yet the constitution has been kicked down the road and is persona non grata in Guantanamo Bay, Cuba.

David Nevin: At the end of the day I think we all have to look at each other and say, "Are we doing this?"

Lesley Stahl: Your client KSM, he admits that he was the mastermind of 9/11. He didn't wear a military uniform. He wasn't on a real, traditional battlefield. He hid among civilians. This is a bad guy, by his own confession.

David Nevin: Yeah, you know Lesley--

Lesley Stahl: You're not saying -- he's not the mastermind?

David Nevin: Here's what I'm saying. I'm saying that in the United States, we have a process. We follow it. We've always followed it. We apply it to everyone except not now.

There will be a lot of firsts in this trial by military commission - given the CIA's tactics, the unique nature of the crime, and unprecedented legal questions that are now being fought over in pre-trial motions at this high-security legal complex.

This is the first time cameras were allowed to videotape where the trial will take place.

Lesley Stahl: This is the courtroom where the first American war crimes trial is taking place since World War II. These tables are for the defendants. One each for the 9/11 five. And this is for Khalid Sheikh Mohammed, the self-confessed mastermind of 9/11. He's defendant number one, as you can clearly see. And this is where he sits. He has his own screen to read court documents. If he wants to hear the Arabic translation, it comes out through that box. While we were here, he appeared in court in a long henna-dyed red beard and a military camouflage jacket over a long white robe. He sat here quietly and calmly. If he had acted up, he could have been shackled.

When court is in session, the defendants are transported from a secret facility on the base, known as Camp 7, to these holding cells where they stay until they're escorted to the courtroom. They're on the so-called "black mile corridor" beneath dark sniper meshing that camouflages the walkway.

This is Khalid Sheikh Mohammed's holding cell, an 8x12-foot steel, air-conditioned room with an arrow pointing toward Mecca for when he prays.

The defendants are under constant surveillance - even, their lawyers claim... when they're not supposed to be. Another complication.

Cheryl Bormann: I'm meeting with my client in a room. And up on the ceiling, like you would normally find in a jail with a client, there's a smoke detector. And one day I'm sitting in there and my client stops one of the correctional guards and says, "That's-- what is that? You're listening, aren't you?" And-- and the guard says, "Of course we're not listening. That's a smoke detector."

She believed the guard, but decided to look up the manufacturer of the smoke detector - on Google.

Cheryl Bormann: And it turns out that they only make listening devices that are intended to look like smoke detectors and other surreptitious listening devices. We find this out while we're in Guantanamo. I go, "What?"

Motions were filed, witnesses were called and while it was confirmed that the smoke detector actually was a listening device, the judge determined that Gen. Martins and his team were not eavesdropping. But the defense lawyers suspect it was the CIA and they base that on something that happened this past January.

David Nevin: I was speaking one day in the courtroom and making innocuous, unclassified remarks and suddenly the red hockey light goes off.

When the red hockey light went off, everything stopped. That's only supposed to happen when classified information is disclosed and the only ones authorized to activate the light are the judge or the court's security officer.

David Nevin: I looked at the judge and I looked at his court security officer. And both of them looked at each other as if to say, "I didn't do it. Did you?"

Lesley Stahl: So who did it?

Gen. Martins: I don't know.

Lesley Stahl: You actually don't know to this day who did it? Were you horrified?

Gen. Martins: I don't get horrified or not. I stay in that band between grim determination and tempered optimism.

The judge found out who did it: the CIA.

Lesley Stahl: Wait a minute, are they in the courtroom?

David Nevin: No, they're not in the courtroom.

Lesley Stahl: Where are they?

David Nevin: I don't know. I'd like to know.

Lesley Stahl: So wait, they're--

David Nevin: I've demanded to know. But the government won't tell me.

Lesley Stahl: Do you think that the CIA has any kind of right to keep listening because these were terrorists or they're charging that they were terrorists. They believe that these guys were bad guys, who did a dastardly deed.

David Nevin: The constitution guarantees everybody certain rights. And one of them is that you don't listen in on the lawyers in a serious capital case. You just don't do it.

Lesley Stahl: The defense teams say that the CIA has a completely different agenda from yours.

Gen. Martins: We are going to do these trials fairly. All these allegations they can raise and we have a process to sort that out.

Lesley Stahl: I've heard people say, "Look, he's trying KSM. Why are we contorting ourselves?" These guys slaughtered 3,000 innocent people. This was not the battlefield; these were people going to work.

Gen. Martins: Well, I understand the point of the view and the criticism. The law requires, and justice requires, the prosecution must present proof beyond a reasonable doubt before we hold someone guilty. And we aim to dispense justice that we can be proud of.

ATTACHMENT D

UNCLASSIFIED//FOR PUBLIC RELEASE
 SAMPLE OF EXTRAJUDICIAL STATEMENTS BY COUNSEL FOR ACCUSED BIN 'ATTASH

Item	Date	Reporter/Title/Org.	Extrajudicial Statement	Commission Matter Implicated
1	Dec. 2, 2013	Carol Rosenberg, "Guantanamo Judge: Lawyers Can Photograph Scars of Accused Sept. 11 'Mastermind,'" Miami Herald	In October, nine military and four civilian Pentagon-paid 9/11 case defense lawyers wrote President Barack Obama asking him to declassify the CIA's so-called Rendition, Detention, and Interrogation program in order to make it a fair trial. To do otherwise, they said, would "only facilitate further concealment of war crimes committed by agents of our government." <i>Air Force Capt Michael Schwartz, lawyer for Bin Attash, said that as of Monday the commander-in-chief had not responded. "Busy pardoning turkeys, I guess," he said.</i>	AE 200
2	Nov. 3, 2013	Lesley Stahl, "Inside Guantanamo," 60 Minutes	Walid bin Attash's attorney, Cheryl Bormann, says she's not allowed to talk about the interrogations because they've been classified. Lesley Stahl: Was your client waterboarded? Cheryl Bormann: <i>I can't answer the question. A proposed protective order bans me from telling you anything I know about what happened to my client, beginning from the moment of his capture in 2003 until the moment that he landed in Guantanamo Bay in 2006.</i> Lesley Stahl: So if you were to tell me that he was subjected to a specific, harsh interrogation technique, you would be breaking a law? You would be-- Cheryl Bormann: <i>I would be.</i> Lesley Stahl: --convicted of something? Cheryl Bormann: <i>I would be prosecuted. And imprisoned for, I believe, up to 30 years.</i>	AE 013

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Lesley Stahl: Well, no, no. The government said, "We were trying to stop the next terrorist attack." They were trying to stop the next attack. They're not all totally evil, right?

Cheryl Bormann: *Good intentions-- of course not. Good intentions pave the road to hell, though. Right?*

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And so, once the CIA's harsh interrogations of the five 9/11 defendants stopped, the FBI sent in a so-called "clean team" to question them all over again - but without coercion. And those statements are admissible.

Cheryl Bormann: *It's like Alice going down the rabbit hole, right? You torture him for three years. You keep him in captivity after you stop torturing him in a place like Guantanamo Bay. And then you send in agents from the same government that tortured him for three years to take statements. And then if you're Gen. Martins, you say, "Well, those are now clean." Guess what? They're not.*

AE 133

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The defendants are under constant surveillance - even, their lawyers claim... when they're not supposed to be. Another complication.

Cheryl Bormann: *I'm meeting with my client in a room. And up on the ceiling, like you would normally find in a jail with a client, there's a smoke detector. And one day I'm sitting in there and my client stops one of the correctional guards and says, "That's-- what is that? You're listening, aren't you?" And-- and the guard says, "Of course we're not listening. That's a smoke detector."*

She believed the guard, but decided to look up the manufacturer of the smoke detector - on Google.

			Cheryl Bormann: <i>And it turns out that they only make listening devices that are intended to look like smoke detectors and other surreptitious listening devices. We find this out while we're in Guantanamo. I go, "What?"</i>	
3	Aug. 23, 2013	Johannes Schmitt-Tegge, "Defending The Underdogs: Tough Fate for 9/11 Trial Lawyers," Deutsche Presse-Agentur GmbH	Most people understand that everyone, including terrorists, has a right to a fair trial, and that the role of the defending counsel is defined in the US constitution, Nevin notes. "We should never punish, sanction - never mind execute - anyone until he has gotten access to legal counsel," he says. <i>Cheryl Bormann agrees with him. Everybody, she stresses, is entitled to the guarantee "that the government doesn't abuse its power."</i> Bormann represents Walid bin Attash, who served as a bodyguard to the late al-Qaeda founder Osama bin Laden and who allegedly provided fake stamps and visas to perpetrators of the attacks.	
4	Aug. 19, 2013	Michelle Shephard, "Brother of 9/11 Victim To Witness Hearings of Accused Plotters," Toronto Star	Pentagon prosecutors are pushing for their trial to start in September 2014. Defence lawyers say that date is wildly optimistic for death penalty cases. <i>"There is no way this case is getting to trial by then,"</i> defence lawyer Cheryl Bormann said at a news conference Sunday night. <i>"I believe the prosecution knows that but this is politics."</i>	AE 175
5	June 19, 2013	Ben Fox, "Red Cross' Guantanamo Reports Sought in 9/11 Case," Associated Press	Defense attorneys say they don't intend to publicly release any of the Red Cross reports if they get access to them. Attorney Cheryl Bormann said her client, Walid bin Attash, did not have a lawyer from the time of his capture in 2003 until 2008 and there may be information in the confidential files relevant to his defense. <i>"What we are dealing with here is a balance, a balance of respecting the tradition of the ICRC compared with somebody's life,"</i> she said.	AE 108

6	Feb. 18, 2013	<p>Dina Temple-Raston,</p> <p>“Hints of Progress After Investigation at Guantanamo Court,”</p> <p>NPR Morning Edition</p>	<p>DINA TEMPLE-RASTON: The most dramatic moment of the week’s hearing: The one-legged man stood. The defendant, Walid bin Attash, got up to berate the judge. His attorney, Cheryl Bormann, explained what happened afterward.</p> <p>CHERYL BORMANN: <i>Well, I think it was fairly apparent that he was incredibly disturbed. . . .</i></p> <p>For the sake of Allah, bin Attash shouted at the judge as his attorneys tried to calm him down, this is important. Again, his attorney, Cheryl Bormann.</p> <p>CHERYL BORMANN: <i>In this system, every time we turn around, we’re finding that they are seizing letters that I have written to him and reading them. They are seizing letters that he wrote to me and reading them. I cannot explain to you how disruptive it is.</i></p>	AE 031
7	Jan. 18, 2013	<p>Carl Arrindell,</p> <p>“Interview with U.S. Attorney—Air Force Captain Michael Schwartz,”</p> <p>In Focus</p>	<p>“As part of the explanation I said that my client, because he had been subjected to torture by the United States . . . so for the next forty seconds, we had to sit in silence, while this red light is spinning, and the Judge, uh, seemed not particularly happy about what was going on. And at the end of the forty seconds he looked at me—at that point we’re off the record—and he says to me, essentially, Captain Schwartz, you know better than to say that; you know where the lines are. You’re crossing the line. And I and the other four defense attorneys sitting at the tables at that point were completely shocked.”</p> <p>[23-minute interview discussing various aspects of case.]</p>	AE 133

8	Jan. 12, 2013	<p>Terri Judd,</p> <p>“U-Turn Leaves Guantanamo Bay 9/11 Trials in Disarray,”</p> <p>Independent News and Media Limited</p>	<p>“<i>It is a much bigger deal than they are making it out to be,</i>” said Cheryl Bormann, a lawyer for defendant Walid bin Attash. “<i>It is going to make their case far more difficult to prove.</i>” She added that <i>demonstrating intent to murder was far more challenging than proving conspiracy.</i> Along with lawyers for Mustafa Ahmad al-Hawsawi and Ammar al-Baluchi, Ms Bormann insisted <i>that it would make it harder to convict those accused of supporting roles.</i> . . . Ms Bormann added: “<i>The prosecutor has been forced to recognize the cases they are challenging are unravelling. I would urge General Martins not to wait until the cases go to the appellate court but actually do his job as prosecutor and dismiss these charges now, as well as recognize the Military Commissions system in its entirety is unfair.</i>”</p>	AE 107
9	Oct. 23, 2012	<p>Staff Reporter,</p> <p>“Washington: First Week of Pretrial Hearings Wraps Up for 9/11 Suspects,”</p> <p>Plus Media Solutions Private Limited Pakistan</p>	<p>Bormann told reporters she empathizes with the victims’ families. “<i>I feel for them, very much so,</i>” she said.</p> <p>However, she defended accommodations the court is making to respect the defendants’ religious beliefs, <i>saying they are the same kind of accommodations the United States makes for all its own citizens.</i></p>	
10	Oct. 17, 2012	<p>Shawn Boburg,</p> <p>“Family Frustrated by Delays at GITMO,”</p> <p>New Jersey Record</p>	<p>Cheryl Bormann, lawyer for bin Attash, added: “<i>There’s a good chance our winning streak will come to an abrupt end when we start considering more vital issues in this case,</i>” including whether the government can keep the defendants from talking about the CIA’s use of enhanced interrogation techniques by claiming they are part of a classified program.</p>	

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11	Oct. 15, 2012	Michelle Shephard, “9/11 Trial: Hearing Tackles How Much of CIA Secrets Can Be Made Public,” Toronto Star	On Sunday night, Walid bin Attash’s lawyer Cheryl Bormann told journalists here that <i>her defence team could no longer work in the office provided on this base, saying the lawyers were falling sick because of rodent feces and mould.</i> Bormann, who caused a stir in May by donning in a black abaya and saying the dress of female members of the prosecution team were distracting her client, said <i>she would address the issue with Pohl Monday afternoon.</i>	AE 082/ AE 095
12	Oct. 14, 2012	Carol Rosenberg, “9/11 Hearings To Focus on Secrecy, Transparency,” Miami Herald	“ <i>Everything is presumptively Top Secret. So if my client had a tuna fish sandwich for lunch, I couldn’t tell you that,</i> ” Cheryl Bormann, defense lawyer for alleged al Qaida lieutenant Walid bin Attash, told reporters after the May proceedings.	AE 013
13	June 7, 2012	Pete Yost & Ben Fox, “Book: Military Feared Use of Terrorist’s Comments,” Associated Press	Cheryl Bormann, an attorney for another of the defendants, Walid bin Attash, said <i>she wouldn’t be surprised if the government had surreptitiously recorded her client’s conversations. “Their entire scheme here, meaning the U.S. government, has been to collect intelligence,”</i> Bormann said. “ <i>The system was designed to do that and prosecution was an afterthought.</i> ”	
14	May 21, 2012	Carol Rosenberg, “Accused 9/11 Planners Might Get Separate Guantánamo Trials,” Miami Herald	But Cheryl Bormann, defending an alleged trainer of the 9/11 hijackers, Walid bin Attash, said Monday <i>she had not received sufficient court resources to know whether splitting the trial was in her client’s best interest.</i>	AE 008

15	May 8, 2012	Steve Mills, “Lawyer from Chicago on Defensive at Gitmo: Attorney Wears Traditional Muslim Garb, Jolting Some,” Chicago Tribune	“ <i>My client has never seen my hair, has never seen my arms, has never seen my legs,</i> ” Bormann said in an interview Monday. “ <i>All of the defense counsel, all of the guards and everybody who works in Guantanamo Bay camp has seen me dressed like this . . . I never thought in my wildest dreams that this would become an issue.</i> ”	
16	May 7, 2012	Richard A. Serrano, “9/11 Defense Team Calls Tribunal Unjust,” Los Angeles Times	On Sunday, she said <i>her client was offended by women who did not dress in conservative Islamic attire, feeling that it caused him to sin. “It is distracting to him to see a woman who has anything bare other than her face,”</i> she said. She added that <i>she had met with her client a dozen times and always dressed respectfully. “He is that conservative,”</i> she said.	
17	May 7, 2012	Josh Margolin & Bob Fredericks “Defense Lawyer Dressed to the Whines,” New York Post	The loopy lawyer for 9/11 terror thug Walid bin Attash yesterday defended her decision to wear a black hajib, the traditional Muslim head garb, and a black robe during the military tribunal and her demand that other women in court do the same. “ <i>I dress that way when I meet with my client at all times. It’s out of respect for his cultural and religious beliefs,</i> ” sniffed Washington lawyer Cheryl Bormann, 52. She claimed a woman in the courtroom Saturday distracted her sensitive client”	

18	May 7, 2012	<p>Peter Finn,</p> <p>“9/11 Detainee’s Attorney Vows a Prolonged Fight,”</p> <p>Washington Post</p>	<p>“Judge Pohl admittedly does not have the knowledge nor the expertise to handle this kind of litigation,” Bormann said, “and as we go forward in this case that’s going to become apparent.”</p> <p>The defense questioned why Pohl, the chief judge at Guantanamo, had appointed himself to the two major cases underway there - the Sept. 11 case and the prosecution of Abd al-Rahim al-Nashiri, a Saudi of Yemeni descent who was arraigned here in November on charges of murder and terrorism, as well as other violations of war, in connection with the 2000 al-Qaeda attack on the USS Cole in Yemen that killed 17 U.S. sailors. The defense noted that there are eight other judges available and that Pohl already has the two most high-profile cases at the military detention center.</p>	Voir Dire of Military Judge
19	May 7, 2012	<p>Becky Bratu,</p> <p>“9/11 Defense Attorney Wears Hijab at Hearing, Wants Others in Court To Dress More Modestly,”</p> <p>MSNBC</p>	<p>Bin Attash’s military attorney, <i>Air Force Capt. Michael Schwartz, told msnbc.com he didn’t think Martins had the opportunity to see what sparked Bormann’s request due to the setup of the courtroom. Schwartz said one of the female attorneys present in the courtroom was wearing a skirt whose bottom hemline appeared closer to her waist than to her knees when she was seated.</i></p> <p><i>“Knowing our clients’ conservative religious beliefs we were concerned about their ability to really participate in the defense of their case without losing focus for fear of committing a sin under their religion,” Schwartz said.</i></p> <p><i>He said Bormann wears the hijab or abaya whenever she’s around their client “out of respect for [bin Attash’s] religious beliefs.”</i></p>	In-Court Objection to Female Prosecutor Clothing
20	May 6, 2012	<p>Randy Kaye,</p> <p>“Accused 9/11 Plotters Rebel in Court,”</p> <p>CNN: Sunday Morning</p>	<p>(BEGIN VIDEO CLIP)</p> <p><i>CHERYL BORMANN, ATTORNEY FOR WALID BIN ATTASH: I can’t speak to my colleagues. I have been doing death penalty work for a very long time. So I’m accustomed to being, I guess, universally hated for that. I can’t comment on what happened to other people. It disturbs me.</i></p> <p>(END VIDEO CLIP)</p>	In-Court Objection to Female Prosecutor Clothing

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21	May 6, 2012	Jan Crawford, “Terror Trial,” CBS Evening News	CRAWFORD: Cheryl Bormann, a lawyer for Walid bin Attash, accused of helping train the hijackers, wore an abaya in yesterday’s hearing and urged female prosecutors, most in military uniforms with skirts, to dress more conservatively. CHERYL BORMANN (Defense Lawyer): (From tape.) <i>“There was somebody dressed in a way that was not in keeping with my client’s religious beliefs[.]”</i>	In-Court Objection to Female Prosecutor Clothing
22	May 6, 2012	“9/11 Trial Focused on Torture,” Telegraph Online (UK)	At a news conference on Sunday morning, defence lawyer James Connell called the actions of the defendants a “peaceful resistance to an unjust system” following years of torture. “These men have endured years of inhumane treatment and torture. This treatment has had serious long-term effects and will ultimately infect every aspect of this military commission tribunal,” he said. Mr Connell, who represents defendant Ali Abd al-Aziz Ali, said the government has tried to eliminate the mention of the use of torture from the trial and he said he is committed to revealing what he claims is evidence his defendant and others were mistreated. Cheryl Bormann, a civilian defence lawyer for accused 9/11 co-conspirator Walid bin Attash, <i>said her client has scars on his arms from alleged mistreatment at the hands of the government. “We’re hoping to address that while in the courts and hoping to get a fair hearing on that,”</i> said Ms Bormann.	AE 200
23	Feb. 20, 2012	“More Guantanamo Detainees Say Tortured by CIA in Poland,” BBC International Reports (Europe)	The Yemeni man Walid bin Attash (who is also at Guantanamo), suspected of preparing the attack against the USS Cole destroyer, claims that he was imprisoned in Poland. His representative Cheryl Bormann has just visited Warsaw. <i>She wants to file a request to have her client awarded the status of a wronged individual in the Polish investigation. She met with lawyers from the Helsinki Human Rights Foundation and members of parliament from the Palikot Movement.</i>	AE 200

ATTACHMENT E

LOCAL RULES

FOR THE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA



Effective November 19, 2010

LOCAL CRIMINAL RULE 57.1

FREE PRESS – FAIR TRIAL DIRECTIVES

(A) **Potential or Imminent Criminal Litigation:** In connection with pending or imminent criminal litigation with which a lawyer or a law firm is associated, it is the duty of that lawyer or firm not to release or authorize the release of information or opinion (1) if a reasonable person would expect such information or opinion to be further disseminated by any means of public communication, and (2) if there is a reasonable likelihood that such dissemination would interfere with a fair trial or otherwise prejudice the due administration of justice.

(B) **Grand Jury Proceedings:** With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in or associated with the investigation shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated, by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

(C) **Pending Criminal Proceedings – Specific Topics:** From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the termination of trial or disposition without trial, a lawyer, law firm, or law enforcement personnel associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be further disseminated by any means of public communication, if such statement concerns:

- (1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation, and family status and, if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his or her apprehension or to warn the public of any dangers such person may present;
- (2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;
- (3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;
- (4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;
- (5) The possibility of a plea of guilty to the offense charged or a lesser offense;
- (6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer or law firm during this period, in the

proper discharge of the official or professional obligations imposed, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the Court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against such person.

(D) Pending Criminal Proceedings - General: During a jury trial of any criminal matter, including the period of selection of the jury, no lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview relating to the trial or the parties or issues in the trial, which a reasonable person would expect to be disseminated by means of public communication, if there is a reasonable likelihood that such dissemination will interfere with a fair trial, except that the lawyer or law firm may quote from or refer without comment to public records of the Court in the case.

(E) Provisos: Nothing in this Local Rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against such lawyer.

(F) Court Personnel: All Court personnel, including, among others, the U.S. Marshal, deputy Marshals, Clerk's Office staff, court security officers, court reporters, and employees or subcontractors retained by the Court as contract court reporters, are prohibited from disclosing to any person without authorization by the Court, information relating to a pending grand jury proceeding or criminal case that is not part of the public records of the Court. The divulgence of information concerning grand jury proceedings, in camera arguments, and hearings held in chambers or otherwise outside the presence of the public is likewise forbidden.

(G) Motions: In a widely publicized or sensational criminal case, the Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order.

(H) Open Court: Unless otherwise provided by law, all preliminary criminal proceedings, including preliminary examinations and hearings on pretrial motions, shall be held in open Court and shall be available for attendance and observation by the public; provided that, upon motion made or agreed to by the defense, the Court, in the exercise of its discretion, may order a pretrial proceeding be closed to the public, in whole or in part, on the grounds:

- (1) that there is a substantial probability that the dissemination of information disclosed at such proceeding would impair the defendant's right to a fair trial; and

(2) that reasonable alternatives to closure will not adequately protect defendant's right to a fair trial.

If the Court so orders, it shall state for the record its specific findings concerning the need for closure.