



MILITARY COMMISSIONS

TRIAL JUDICIARY

RULES OF COURT

24 APRIL 2013



MILITARY COMMISSIONS TRIAL JUDICIARY

24 April 2013

From: Chief Judge of the Military Commissions Trial Judiciary

Subject: Military Commissions Rules of Court

Reference: (a) Military Commissions Act of 2009, 10 U.S.C. §§948a, *et seq.*, (M.C.A.)
(b) Manual for Military Commissions, 2010, (M.M.C.)
(c) DoD Regulation for Trial by Military Commission

1. **Purpose:** To prescribe Rules of Court for the Military Commissions consistent with the references.
2. **Background:** These Rules of Court are specifically promulgated within the authority of Rule for Military Commissions (R.M.C.) 108. The references authorize, and the sound administration of justice for Military Commissions requires, Rules of Court for the conduct of Military Commission proceedings. The enclosed rules are intended to facilitate the smooth and orderly trial of Military Commission cases and insure the utmost in public access while adhering to requirements of national security. To the extent that inconsistencies are perceived, the rules contained within references (a) and (b) shall control.
3. **Action:**
 - a. The judges of the Military Commissions Trial Judiciary shall ensure enforcement of these Rules of Court.
 - b. All counsel practicing before Military Commissions shall become familiar with these Rules and shall comply with them.
4. **Effective Date:** These rules are effective upon publication and shall remain in effect until cancelled, superseded, or modified.

A handwritten signature in blue ink, reading "James L. Pohl", is positioned above the printed name and title.

James L. Pohl
Colonel, U.S. Army
Chief Judge, Military Commissions Trial Judiciary

Military Commissions Trial Judiciary

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Military Commissions Trial Judiciary

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Military Commissions Rules of Court

RULE 1: INTERPRETATION, SHORT FORM, CITATIONS, MODIFICATION

1. These Rules of Court (RC) are established pursuant to Manual for Military Commissions (M.M.C.) 2010 and the Rules for Military Commissions (R.M.C.) 108 and 801(b) (1). They shall apply to all cases referred to trial by Military Commission.
2. The Rules of Court shall be interpreted to be consistent with the Military Commissions Act (M.C.A.) and the M.M.C. In the event of any conflict between the M.C.A. or M.M.C. and the Rules of Court, the former two shall prevail.
3. Rules of Court may be cited as RC followed by the Arabic numeral of the Rule and then the Arabic paragraph number, and if applicable, subparagraph letters. For example, this Rule and paragraph may be cited as RC 1.3.
4. The Rules of Court will be added to or modified on an as-required basis. Counsel and all other interested parties will be furnished any additions or modifications as soon as they are made.
5. In the interests of justice, a Military Judge may modify or change any Rule of Court or any portion thereof, or determine a certain Rule of Court or any portion thereof is not applicable to a given trial by Military Commission. When taking such action, a Military Judge will so advise counsel in the case, other interested parties, the Chief Trial Judge, and the trial judiciary staff.

Military Commissions Trial Judiciary

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Military Commissions Rules of Court

RULE 2: COMMUNICATIONS

1. Purpose. This Rule establishes general procedures for communications among counsel, the Military Judge, and trial judiciary staff.

2. These procedures are designed to avoid *ex parte* communications, to ensure procedural matters leading to trial are handled efficiently, and to provide efficient and expeditious methods of communications. *Ex parte* communication by a party with the Military Judge or *vice versa* concerning the case is prohibited except as authorized by the M.C.A. or the M.M.C.

3. The preferred, and most reliable, method of communication with the Military Judge and counsel is email. Failure to comply with these rules will result in the communication being returned for lack of compliance with these rules or other plenary relief as the Military Judge may direct. *See RC3, Motion Practice.* The following email conventions will be followed:

a. All emails or other communications for the Military Judge will be sent to the Chief Clerk of the Trial Judiciary at MLAdd-OMCTrialJudiciary@osd.mil. Email will not be sent directly to the Military Judge.

b. All e-mails sent to the Chief Clerk of the Trial Judiciary for a Military Judge shall also be sent “cc” to counsel for both sides, the Chief Defense Counsel, the Chief Prosecutor, the Chief Legal Clerks for the Prosecution and Defense, and the paralegals assigned to the case. In addition, all filings will be sent “cc” to the Director, Office of Court Administration, Office of Military Commissions.

c. Emails will be kept to a single subject and use a simple, descriptive, subject line.

d. If the email pertains to a specific case, use the case name in the subject line of every email. If an Appellate Exhibit designation has been assigned, include the designation in the subject line e.g. AE 001, *US v Smith*, Defense Motion to Compel Discovery.

e. Identify, in the body of the email, each attachment being sent: e.g. AE 001, *US v Smith*, Defense Motion to Compel Discovery with attachments A through F. List what the attachments are in the body of the email.

f. Every paragraph and sub-paragraph of any email to the trial judiciary containing more than one paragraph or sub-paragraph will be numbered or lettered to provide for easy reference. A logical numbering or lettering scheme will be used, such as: 1, 2, 3a (1).

g. All attachments to a filing will be sent in the same email as the document to which it is an

attachment. If the attachments exceed the capabilities of the system being used, the original email must indicate that additional attachments will be in a subsequent email, and the subsequent emails should refer back to the original email.

h. Text attachments will be in PDF version with the exception of a draft order required by paragraph 3.i, below, or images, paragraph 3.j, below. Motions or attachments will not be in “track changes” or “mark-up” format.

i. If a draft order or other document requiring signature is provided to the Military Judge for consideration, a Word version must also be attached. The draft order shall include a watermark indicating that it is a draft.

j. If it is necessary to send images, in order of preference, PDF, JPG, BMP, or TIFF may be used. If a party wishes to use some other file format, the party must request and receive permission from the Chief Clerk of the Trial Judiciary, the Trial Judiciary Staff Director, or a Trial Judiciary Staff attorney.

k. Before sending an archived or compressed file request and receive permission from the Chief Clerk of the Trial Judiciary, the Trial Judiciary Staff Director, or a Trial Judiciary Staff attorney.

l. If the Military Judge will need to know classified information to resolve a matter, an unclassified description of the materials and the location of the classified materials the judge will need to review shall be noted in the email.

4. Because of potential changes to the composition of trial teams, the Military Judge or trial judiciary staff may elect to send an email to the Chief Defense Counsel or Chief Prosecutor, and/or their respective Chief Legal NCOs, for distribution to all counsel or all counsel of a particular team. The trial judiciary staff will be copied on the email that is forwarded to those to whom distribution was directed in compliance with these instructions.

5. When a telephonic or video conference is necessary, the trial judiciary staff will arrange the conference call unless otherwise directed by the Military Judge. Conference calls or video conferences will be in accordance with R.M.C. 802.

6. When authorized by these instructions, or directed by the Military Judge, any member of the trial judiciary staff may sign for, and issue directions, instructions, requests, or rulings to the parties and others “For the Military Judge” or “By Direction of the Military Judge.” Signatures “for” or “by direction of” carry the same force and effect as if signed by, or personally issued by, the Military Judge.

Military Commissions Trial Judiciary

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Military Commissions Rules of Court

RULE 3: MOTION PRACTICE

1. Purpose. This rule establishes general procedures for motion practice among counsel, the Military Judge, and trial judiciary staff. These procedures are designed to avoid *ex parte* communications, to ensure procedural matters leading to trial are handled efficiently, and to provide efficient and expeditious motion practice.

2. Ex Parte Communications. *Ex parte* communication by a party in a case or by Office of Military Commissions, DoD General Counsel or any intelligence or law enforcement agency, with the Military Judge is prohibited except as authorized by the M.C.A. or the M.M.C. This is to preclude any actual or perceived attempt to improperly influence the Commission in violation of 10 U.S.C. § 949b. This does not include administrative matters necessary for the administrative management of the Office of Trial Judiciary.

3. Public Release of Filings: Judicial policy is all filings and judicial orders shall be released to the public, subject to any regulatory restrictions imposed by the Department of Defense, unless filed under seal, *ex parte*, or in camera, are classified, or are otherwise ordered by the Military Judge not to be released (see RC 6).

4. Communication with the Military Judge: All emails or other communications for the Military Judge will be sent to the Chief Clerk of the Trial Judiciary at MLAdd-OMCTrialJudiciary@osd.mil. Email will not be sent directly to the Military Judge (see Rule 2).

5. Definitions (including procedures for some filings):

a. Motion: an application to the Military Judge for particular relief or for the Military Judge to direct another to perform, or not perform, a specific act. A motion as used herein also specifically includes those motions addressed in R.M.C.s 905, 906, and 907.

b. Filing: includes a written motion, response, reply, amendment, supplement, notice of joinder, special request for relief, or any other communication involved in resolving a motion.

c. Response: the opposing party's answer to a motion.

d. Reply: the moving party's answer to a response.

e. Supplement: an additional filing in regard to a previously filed motion, response, or reply. A supplemental filing may only add new facts, not known at time of filing, or newly decided case law to an existing motion; it may not raise new issues or advance new

argument concerning an existing motion. A Motion for Leave to File a Supplemental Filing must be filed either before or contemporaneously with the subject supplement.

f. Amending a Motion: a party may only amend an existing motion response or reply to correct a misstatement of fact or law or a clerical error. An amendment may only be made with the permission of the Military Judge.

g. Joint Motion: in a case with multiple defendants, a “Joint Motion” is a motion filed by two or more defendants.

h. Joining A Motion: in a case with multiple defendants, when one or more defendants file a motion and one or more other defendants join the original motion. Parties have (7) seven calendar days from the day a motion is filed to join the motion. A party must file a Motion to File Out of Time if more than (7) seven calendar days have elapsed since the original motion was filed. When joining an existing motion, the joining party(s) must adopt the issues advanced by the party originally filing the motion and may add new facts or law, but may not introduce new issues. The time for the opposing party to make a response begins anew after a new party joins an existing motion. If the party who originally files the motion withdraws the motion, it is considered moot, and parties that had joined the motion may file a new motion.

i. Redacted Filing: a copy of a motion, response, reply, or supplemental filing that has been reviewed by the DoD Review Team (*see n*, below). Redacted copies are not to be considered judicial documents of the Commission and will not be included in the Record of Trial unless otherwise properly introduced into evidence. Only original filings will be considered as judicial documents.

j. Certification of Conference: a statement by the moving party confirming the moving party has conferred with the opposing party and whether the opposing party concurs with or objects to the requested relief. All motions must contain a Certificate of Conference except a Certificate is not required for motions serving notice; e.g., a motion serving notice of a filing IAW R.M.C. 505.

k. Certification of Service: a statement by a party confirming their motion, response, reply, supplement, or notice has been served on opposing counsel. All motions, responses, replies, supplemental filings and notices of joining a motion must have a Certificate of Service. Service may be accomplished by email or providing a hard copy or CD.

l. Oral Argument: all motions, responses, replies, and supplemental filings will indicate whether the parties are requesting oral argument on the issue. IAW R.M.C. 905(h), the decision to grant oral argument on a written motion is within the sole discretion of the Military Judge.

m. Sealed Filing: a document is filed under seal to prevent general disclosure and is done so by direction or concurrence of the Military Judge. A sealed document is not

necessarily classified. A document sealed by the Military Judge may not be unsealed except by direction of the Military Judge; a sealed document may not be disclosed to parties beyond those indicated in the sealing directive.

n. DoD Review Team: the Security Classification/Declassification Review Team, consisting of original classification authorities from DoD components and commands, established IAW OSD Memoranda 09260-08, 10522-08 and 12079-08 (*see* Para 18-1b of reference (c)).

6. Computation of Time:

a. In computing any period of time prescribed or allowed by these Rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day, which is not one of the aforementioned days.

b. When a time is used in these Rules, or in a message, order, email, or other directive from a Military Judge, that time refers to Eastern Standard or Daylight Savings Time—whichever is in currently in effect--unless otherwise specifically stated.

c. If a filing is sent on a Friday after 1600 or on Saturday or Sunday, the filing is considered to have been received the following Monday. If the following Monday is a Federal holiday, the filing is received on the following business day. A filing sent on a Federal holiday is not received until the first business day after the holiday.

d. A filing sent after 1600 Monday - Thursday is considered as being received the next business day.

7. Timing for filing motions, responses, and replies.

a. A motion, response, reply, supplement, or amendment is only considered filed when received by the Chief Clerk of the Trial Judiciary and all conditions precedent (Certification of Conference and Certification of Service) have been met.

b. Motions.

(1) Timing. Motions addressed in R.M.C. 905(b) (1) – (6) must be raised and made by the time provided in R.M.C. 905(b) unless the Military Judge directs otherwise. As to other motions, the Military Judge will ordinarily establish a deadline for the filing of motions by way of an Order.

(2) Joining a Motion: a party wanting to join an existing motion must do so within (7) seven calendar days of the original filing. *See* RC 3, para. 5h.

(3) Format: *See* Form 3-1.

(4) Waiver. Motions, which are not made in a timely fashion or as directed by the Military Judge, are waived.

a. Requests for an extension of time to file or exceptions to waiver must be addressed to the Military Judge with motion-specific reasons for failure to make the motion in a timely fashion.

b. A request for waiver must be submitted as an unclassified document; if classified information is necessary to support the request, it must be submitted separately as a classified attachment.

c. Requests for extensions of time to file a motion must be filed as a Motion For Extension of Time to File a Motion To (title of the substantive motion) and be filed at least one day before the subject motion is due to the Commission.

d. Requests to file a motion out of time must be filed as a Motion to File (title of the substantive motion) Out of Time and be filed either before or contemporaneously with the subject motion.

c. Responses.

(1) Timing. Unless the Military Judge provides otherwise, a response is due within (14) fourteen calendar days after a motion or supplement is filed unless another party later joins the motion. The time for the opposing party to make a response begins anew after a new party joins an existing motion.

(2) Format: See Form 3-2.

(3) Waiver. Responses which are not made in a timely fashion are waived.

a. Requests for an extension of time to file or exceptions to waiver must be addressed to the Military Judge with motion-specific reasons for failure to make the response in a timely fashion.

b. A request for waiver must be submitted as an unclassified document; if classified information is necessary to support the request, it must be submitted separately as a classified attachment.

c. Requests for extensions of time to file a response must be filed as a Motion For Extension of Time to File a Response To (title of the substantive motion) and be filed at least one day before the subject response is due to the Commission.

d. Requests to file a response out of time must be filed as a Motion to File Response to (title of the substantive motion) Out of Time and be filed either before or contemporaneously with the subject response.

d. Replies.

(1) Reply Optional: Counsel may submit a reply to a response; however Counsel must take care that matters that should have been raised in the original motion are not being presented for the first time as a reply. Replies are unnecessary to simply state the party disagrees with a response. If a reply is not filed, that indicates the party stands on their motion or initial filing, and it does not indicate agreement with a response.

(2) Timing: Replies shall be filed within (7) seven calendar days of receiving a response unless the party does not desire to file a response.

(3) Format: See Form 3-3.

(4) Waiver. Replies which are not made in a timely fashion are waived.

a. Requests for an extension of time to file or exceptions to waiver must be addressed to the Military Judge with motion-specific reasons for failure to make the reply in a timely fashion.

b. A request for waiver must be submitted as an unclassified document; if classified information is necessary to support the request, it must be submitted separately as a classified attachment

c. Requests for extensions of time to file a reply must be filed as a Motion For Extension of Time to File a Reply To (title of the substantive motion) and be filed at least one day before the subject reply is due to the Commission.

d. Requests to file a reply out of time must be filed as a Motion to File Reply to (title of the substantive motion) Out of Time and be filed either before or contemporaneously with the subject reply.

8. Burdens of Proof and Persuasion

a. As a general rule, the burden of proof (production of evidence and preponderance of evidence), and the burden of persuasion are on the moving party. (see R.M.C. 905(c)). In any motion in which the moving party does not believe the general rule should apply, or believes one or both of the burdens should change after a certain quantum of evidence is introduced, the moving party must provide justification for the burden shift in the filing consisting of:

- (1) A statement of the burden of proof (production of evidence) for that motion;
- (2) A statement of the burden of persuasion for that motion;
- (3) The point, if any, at which either the burden of proof or the burden of persuasion is shifted to the non-moving party; and,
- (4) The legal argument in support of the statement.

b. A response must address those matters concerning shifting of the burden(s) raised by the moving party.

9. Rulings on Motions.

a. The Military Judge may make final rulings on all motions based upon the written filings of the parties submitted in accordance with this Rule and the facts and law as determined by the Military Judge, unless:

- (1) Material facts necessary to resolution of the motion are in dispute and require the taking of evidence;
- (2) A party correctly asserts in a filing that the law does not permit a ruling on filings alone, accompanied by citation to the authority which prohibits the Military Judge from ruling on the filings alone; or,
- (3) The Military Judge determines that oral argument is necessary to provide a full and fair trial.

b. See also R.M.C. 905(e).

c. A ruling by the Military Judge may either be done orally during a session of the Commission or in writing; a written ruling is only required in the discretion of the Military Judge.

10. Procedures for Filing a Motion, Response, Reply or Supplemental Filing

a. Format: generally see Form 3-1, 3-2, or 3-3

- (1) The motion response, reply, or supplemental filing, when printed, will contain one inch margins on 8 1/2 x 11 paper and be in a 12 point type face. The brief will be double-spaced.
- (2) A filing that is *ex parte* or sealed IAW M.C.R.E. 505 or 506 will so indicate above the filing designation. See Form 3-1

(3) All filings will indicate in the title which party (government or defense) is making the motion, response, reply, or supplemental filing.

(4) All classified filings will be protected and marked following standard procedures as set out in DoD directives, Chapter 18 of reference (c), and any applicable protective orders.

(5) If an otherwise unclassified motion contains one or more classified attachments, the attachment(s) will be filed separately and an unclassified tab used to designate the attachment. The motion will be filed according to its proper classification.

(6) A Certification of Conference, a Certification of Service, and a draft redacted filing must be included in all filings.

(7) Captions shall follow the original motion's caption unless the caption is inflammatory, prejudicial, or disrespectful to the Commission.

b. Appellate Exhibit Designation: Prior to filing anything with the Commission or serving it on the opposing party, the party making the filing must contact the Chief Clerk of the Trial Judiciary by sending an email to MLAdd-OMCTrialJudiciary@osd.mil to obtain the Appellate Exhibit (AE) number for the filing. The email should list what type of filing the party is seeking to make (motion, reply, response, etc.) and provide a description of the filing (ie, Motion to Exclude SGT Smith's Statement). A party seeking an AE number should send the mail to the Chief Clerk no later than (24) twenty-four hours prior to when the party seeks to make the filing. All subsequent filings concerning the original motion must use the same AE designation with an alphabetical subdesignation, e.g., AE 075A, AE 075B, AE 075C, etc. The Appellate Exhibit serves as the official designation for any filing.

(1) Once a filing has been assigned an Appellate Exhibit number, all future communications - whether in hard copy or by email - concerning that series of filings will use the Appellate Exhibit as a reference in addition to the name of the filing. This includes adding the initial file designations to the style of all filings, the subject lines of emails, and the file names to ALL email attachments.

Examples:

* An email subject line forwarding a response to AE003 in *US v Jones* should read: "AE003 *US v Jones*: Defense Response - Motion to Exclude Statements of Mr. Smith." The filename of the filings shall be the same as the response being sent.

* The filename of a document that is an attachment to the response should read: "AE003 *US v Jones*: Defense Response - Motion to Exclude Statements of Mr. Smith - attachment - CV of Dr. Smith."

(2) The names given to matters that may appear on the Filings Inventory - such as the subject of a motion - will not be classified or otherwise protected as the Filings Inventory is a working document and is intended to be transmitted through unsecured networks. Counsel must therefore ensure the names of their filings are not in themselves classified.

c. Service of Filing: all filings with the Commission must be served on the opposing party or parties either before filing, if hard copy or by CD, or concurrently if done electronically. A Certification of Service must be included for all filings.

d. Filing the Motion, Response, Reply, Supplemental Filing or Amendment

(1) The party making the filing will do so with the Chief Clerk of the Trial Judiciary. A motion, response, reply, supplement thereto, or amendment will not be accepted for “filing” without:

(a) Certification of Service

(b) Certification of Conference (if required)

(c) If the motion is requesting the Military Judge issue an order, it must contain a Word version of a draft order.

(2) Unclassified Filings:

(a) Unclassified filings may be filed under seal or *ex parte* and must be marked IAW para.10a (1), above.

(b) Unclassified filings will be filed with the Chief Clerk of the Trial Judiciary using email at MLAdd-OMCTrialJudiciary@osd.mil. The documents to be filed must be attachments to the transmittal email.

(3) Classified Filings:

(a) Classified filings, or those believed to be classified, may also be filed *ex parte* and/or sealed.

(b) Classified Filings will be filed with the Chief Clerk of the Trial Judiciary on SIPRNET at MLAdd-OMCTrialJudiciary@osd.smil or will be hand carried to the Chief Clerk’s office after making prior arrangements with the Chief Clerk.

(c) The filing must adhere to all requirements for service and timeliness.

(d) The party making the classified filing must send the Chief Clerk of the Trial Judiciary an unclassified notice of the filing using the Appellate

Exhibit number and an unclassified title so that the filing can be accounted for through normal procedures and added to the Filings Inventory.

(4) Paper or Filing by CD:

(a) Filings may be done by paper or CD format due to classification or location constraints. Before doing so, the filing party must so notify the Chief Clerk of the Trial Judiciary.

(b) Filings submitted in paper or CD format must adhere to all other requirements for filing. See RC 6, para. 3d3c for other rules pertaining to CD or paper filings.

(c) Before making a filing in paper or CD, the filing party must make prior arrangements with the Chief Clerk of the Trial Judiciary to bring the latter the filings. Three (3) CD copies of the filing must be filed with the Commission. Also, the filing party must comply with the service requirements in RC 3, para. 10c.

(d) If the proponent is unable to file a CD or electronic copy with a paper filing, the party has 48 (forty-eight) hours from filing the paper original to provide the Chief Clerk of the Trial Judiciary an electronic copy or (3) three CD copies.

e. Special Provisions:

(1) *Ex Parte* filings: notice of *ex parte* filings must be served on the opposing party.

(2) Attachments to filings: Common publications (e.g. DoD regulations, pamphlets, etc.), published cases, and other general references should not be attached to a filing. The filing party may reference these, and, if appropriate provide a URL link to the document. Excerpts from general references may be included if not more than 5 pages in length.

Form 3-1 Format for a Motion

UNITED STATES OF AMERICA

v.

[Name of Accused]

[aka if any; not required]

Filed Ex Parte Under Seal

AE 002

Defense Motion

to Suppress Statement Allegedly Made by the Accused
to Joe Jones

[Date motion filed]

Note: Use bold as shown above.

NOTE: The following will be included in **separately numbered paragraphs**. Use Arabic numbers.

1. A statement the motion is being filed within the time frames and other established guidance or direction of the Military Judge.
2. A concise statement of the relief sought.
3. (Optional) An overview of the substance of the motion.
4. (May be required) Statement concerning burden of proof.
5. The facts, and the source of those facts (witness, document, physical exhibit, etc.). Each factual assertion will be in a separate, lettered sub-paragraph. This will permit responses to succinctly admit or deny the existence of facts alleged by the moving party. If the facts are, or the identity of the source is, protected or classified, that status will be noted.
6. Why the law requires the relief sought in light of the facts alleged, including proper citations to authority relied upon.
7. Whether oral argument is requested or required by law. If asserted that argument is required by law, citations to that authority, and why the position of the party cannot be made fully known by filings.
8. The identity of witnesses who will be required to testify on the matter in person and/or evidentiary matters that will be required. Listing a witness is not a request for the witness. Requests for production of witnesses by the defense must be made separately and in accordance with R.M.C. 703. Stating the evidence needed is neither a discovery request nor a request for access to evidence.
9. A certification of conference indicating the moving party has conferred with the opposing party and whether the opposing party concurs with or objects to the requested relief.
10. Additional information not required to be set forth as above.
11. A list of attachments. Normally, Attachment A will be the certificate of service.

Form 3-2 Format for a Response

UNITED STATES OF AMERICA

v.

[Name of Accused]

[aka if any; not required]

AE 002

Government Response

To Defense Motion to Suppress Statement Allegedly
Made by the Accused to Joe Jones

[Date motion filed]

Note: Use bold as shown above.

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement the response is being filed within the time frames and other established guidance or direction of the Military Judge.
2. Whether the responding party believes the motion should be granted, denied, or granted in part. If granted in part, the response shall be explicit about what relief, if any, the responding party believes should be granted.
3. (Optional) Overview - This paragraph is not required even if the motion had an overview.
4. Those facts cited in the motion the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief the fact will be stipulated to for purposes of resolving a motion. The agreed upon facts will correspond to the subparagraph in the motion containing the facts involved.
5. The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), insofar as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered subparagraph and will correspond to the subparagraph in the motion containing the facts. If the facts or identity of the source is protected or classified, that status will be noted.
6. Why the law does not require or permit the relief sought in light of the facts alleged, including proper citations to authority relied upon.
7. (May be required) Address issue regarding burdens if addressed in the motion or otherwise required to be addressed.
8. Whether oral argument is requested or required by law. If asserted that argument is required by law, citations to that authority, and why the position of the party cannot be made fully known by filings.
9. The identity of witnesses who will be required to testify on the matter in person, and/or evidentiary matters that will be required. Listing a witness is not a request for the witness. Requests for production of witnesses by the defense must be made separately, and in accordance

with R.M.C. 703. Stating the evidence needed is neither a discovery request nor a request for access to evidence.

10. Additional information not required to be set forth as above.

11. A list of attachments. Normally, Attachment A will be the certificate of service.

Form 3-3 Format for a Reply

UNITED STATES OF AMERICA

v.

[Name of Accused]

[aka if any; not required]

AE 002

Defense Reply

to Government Response to Defense Motion to
Suppress Statement Allegedly Made by the Accused to
Joe Jones

[Date motion filed]

Note: Use bold as shown above.

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement the reply is being filed within the time frames and other established guidance or direction of the Military Judge.
2. In separately numbered paragraphs, address the response as needed. When referring to the response, identify the paragraph in the response being addressed.
3. Citations to additional authority if necessary.
4. The identity of witnesses not previously mentioned in the motion or response who will be required to testify on the matter in person, and/or evidentiary matters not previously mentioned in the motion or response that will be required. Listing a witness is not a request for the witness. Requests for production of witnesses by the defense must be made separately, and in accordance with R.M.C. 703. Stating the evidence needed is neither a discovery request nor a request for access to evidence.
5. Additional information not required to be set forth as above.
6. A list of any additional attachments. Normally, Attachment A will be the certificate of service.

Military Commissions Trial Judiciary

24 April 2013

Military Commissions Rules of Court

RULE 4: APPEARANCE, ABSENCE, AND EXCUSAL, RELIEF, OR WITHDRAWAL OF COUNSEL

1. Purpose. This rule governs the entry of appearance of counsel and the absence, excusal, relief, and withdrawal of counsel.

2. Detailing and Appearance.

a. Military Counsel.

(1) Military counsel have made an appearance on behalf of the United States or an accused when such counsel are detailed by proper authority to a case which has been referred for trial by a Military Commission.

(2) Upon referral of a case, the Chief Defense Counsel and the Chief Prosecutor will provide copies of detailing documents to the Chief Clerk of the Trial Judiciary, the Director, Office of Court Administration, and to opposing counsel. If opposing counsel are not known, the detailing documents will be provided to the Chief Prosecutor or Chief Defense Counsel, as appropriate.

(3) Until the detailed defense counsel is relieved or excused from his duty of representation by competent Authority, in accordance with R.M.C. 505, counsel will continue to represent the interests of an accused.

(4) Under R.M.C.s 109, 503, and 506, it is the responsibility of the Chief Defense Counsel to provide representation for an accused at all times by detailing a qualified defense counsel. R.M.C. 502 outlines the qualifications and duties of detailed defense counsel, associate or assistant defense counsel, and civilian defense counsel. (See Chapter 9 of reference (c)).

b. Civilian Defense Counsel. A civilian defense counsel will be deemed to have entered an appearance with the Commission when counsel submits Form 4-1, the notice of appearance and agreement, including MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel, by email to the Chief Clerk of the Trial Judiciary.

c. Learned Counsel. A military or civilian counsel, experienced in capital litigation, appointed under the provisions of 10 U.S.C. § 949a(2)(C)(ii). Learned counsel will be detailed and make an appearance in accordance with RC 4, paras. 2a-b.

d. Associate or Assistant Defense Counsel. An associate or assistant defense counsel may perform any act or duty a defense counsel may perform under law, regulation,

or custom of the service, under the supervision of the lead defense counsel. (See R.M.C. 502(d)(7)). Detailed defense counsel or civilian counsel, if they are lead counsel, should ensure assistant defense counsel are always afforded appropriate supervision.

Assistant defense counsel may not appear alone at any session of a Military Commission or an R.M.C. 802 conference and may not submit motions under only their signature.

Assistant defense counsel is considered to have made an appearance when a written notice of detail is provided to the Military Judge by the Chief Defense Counsel.

e. Standby Counsel. If an accused has standby counsel under R.M.C. 506(d)(2) and the accused desires the standby counsel's presence at counsel table, the accused must so inform the Military Judge either by written motion or during a session of the Commission.

f. If any counsel believes that his participation in the Military Commissions or representation of an accused is or may be prohibited because of ethical or other considerations, he shall follow the procedures set forth in R.M.C. 109.

3. Presence of Defense Counsel at Commission sessions. The following rules govern the presence of defense counsel at Commission sessions.

a. General Rule: All defense counsel who have entered an appearance in a specific case must attend all sessions of that case before the Commission.

b. The Military Judge may authorize defense counsel's absence from a particular session with advanced waiver of that counsel's presence by their client. Any counsel seeking authorization for absence from a session will request, by motion, permission from the Military Judge and provide written evidence of the waiver by the client. The signed waiver by the accused must be provided to the Military Judge in advance of the scheduled session.

c. If, at any session, the accused seeks to revoke his written or on-the-record waiver of the presence of the counsel, that counsel will be required to be present at all subsequent sessions of the Commission. Alternatively, the counsel may request to withdraw from the case completely, and the request may be granted at the discretion of the Military Judge. Any such revocation of waiver by the accused during a given session will not require the counsel's presence during the session at which the revocation of waiver was made.

4. Excusal, Relief or Withdrawal of Defense Counsel After Arraignment.

a. Excusal/Relief/Withdrawal: The terms are defined as the termination of all representational responsibility of detailed counsel or a qualified civilian counsel after entering an appearance. See R.M.C.s 505(d)(2) and 506(b).

b. Written notice of termination of representation of detailed counsel is required. Written notice of such termination will be provided to all parties including the Military Judge.

A defense counsel who has entered an appearance in a Commissions session will not be excused without permission of the Military Judge.

5. Excusal, Relief, or Withdrawal of Government Counsel After Arraignment. The excusal, relief, or withdrawal of a prosecutor is at the discretion of the Chief Prosecutor and will be indicated on the record at the start of a session. At least one detailed prosecutor must be present at all sessions of the Commission.

Form 4-1 Notice of Appearance and Agreement

UNITED STATES OF AMERICA	)	CIVILIAN DEFENSE COUNSEL
	)	NOTICE OF APPEARANCE
v.	)	AND AGREEMENT
	)	
NAME	)	(DATE)
	)	
	)	
	)	

1. Pursuant to procedures of court/instruction for counsel, I, ATTORNEY'S FULL NAME, hereby provide notice to the Military Judge of my appearance on behalf of CLIENT'S FULL NAME. My office address, phone numbers, and email address are: ADDRESS, VOICE AND FAX PHONE NUMBERS, & EMAIL ADDRESS. I am an active member in good standing licensed to practice in the following jurisdictions: LIST BAR ADMISSIONS.

2. I have attached MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel.

COUNSEL NAME

Military Commissions Trial Judiciary

24 April 2013

Military Commissions Rules of Court

RULE 5: FILINGS INVENTORY

1. Purpose. This rule establishes:

- a.** The definition of a Filings Inventory.
- b.** Requirements and formats for the Chief Clerk of the Trial Judiciary to maintain a Filings Inventory.
- c.** Responsibilities for counsel to check the accuracy of a Filings Inventory to ensure counsel are certain of those matters pending before the Military Judge.

2. Definition. The Filings Inventory is a tracking document to set forth which filings and other matters are before the Military Judge. It is considered a working document of the Military Judge and as such will not become part of the Record of Trial unless otherwise directed by the Military Judge.

3. Establishing the Filings Inventory. The Chief Clerk of the Trial Judiciary shall establish and maintain a Filings Inventory for each case referred to the Commission indicating those filings pending before the Military Judge.

- a.** The Appellate Exhibit number will be used as the designation for a motion and subsequent filings pertaining to that motion.
- b.** Amicus curiae briefs will be filed in the chain of the original motion (*see* RC 8).
- c.** Third party challenges to whether material presented at session of a Commission or in a filing, ruling, order, or transcript may be released to the public or is not appropriately designated as “protected” will be filed as a motion and given an Appellate Exhibit number.
- d.** The Chief Clerk of the Trial Judiciary may, as necessary, add a simple description of the nature of the filing in the section titled “Notes.”
- e.** The Filings Inventory shall indicate the date on which motions, responses, replies, and supplemental filings are filed (*see* RC 3) and orders of the judge are issued.
- f.** The Filings Inventory for each case will be updated after receiving any filing and will be reconciled at least weekly to ensure accuracy

4. Distribution of the Filings Inventory.

- a.** As directed by paragraph 19-4d of the DoD Regulation for Trial by Military Commission, the Filings Inventory may be sent to the Office of Military Commissions webmaster after every update.
- b.** The Chief Clerk of the Trial Judiciary, when directed by the Military Judge, will distribute copies of the Filings Inventory to all counsel on the case and to the Director of Court Administration, Office of Military Commissions.

5. Counsel's responsibility when receiving the Filings Inventory. The Filings Inventory is one method by which counsel can determine which filings have been received by the Military Judge and which matters are before the Military Judge.

- a.** Counsel will examine each Filings Inventory when received and notify the Chief Clerk of the Trial Judiciary and opposing counsel of any discrepancies.
- b.** If counsel believes they have submitted a filing, which is not reflected on the Filings Inventory, they shall immediately send that filing - with all attachments - to the Chief Clerk of the Trial Judiciary and opposing counsel, noting the discrepancy and documenting timely submission in compliance with these rules.
- c.** If there is a discrepancy in the Filings Inventory, and counsel fail to take the corrective action as indicated above and in paragraph 6 below, the Military Judge may elect not to consider that filing.

6. Effect of omission in Filings Inventory.

- a.** If a filing or other matter is not on the Filings Inventory, it may not be before the Military Judge for decision. If a matter has been mistakenly left off the Filings Inventory, it is the responsibility of counsel to note the omission and advise the Chief Clerk of the Trial Judiciary (*See* paragraph 5, above).
- b.** If counsel believes a matter should be on the Filings Inventory and has made that known to the Chief Clerk of the Trial Judiciary, and the Chief Clerk does not or fails to include the matter on the Filings Inventory, it is the responsibility of counsel to raise the matter with the Military Judge.
- c.** Failure to fulfill the responsibilities noted above constitutes waiver should the Military Judge not address or rule upon a matter that is not on the Filings Inventory.

7. Format: The Filings Inventory will indicate the Appellate Exhibit and the date of the filing.

- a.** The Filings Inventory will reflect any special conditions pertaining to a filing including if it is classified, filed under seal, or filed *ex parte*.

b. The Filings Inventory will generically reflect where the original of classified filings are stored (e.g. with Director, Office of Court Administration)

Military Commissions Trial Judiciary

24 April 2013

Military Commissions Rules of Court

RULE 6. PUBLIC ACCESS AND RELEASE OF RECORDS

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

2. Public Access:

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

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

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

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

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

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

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

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

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

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

3. Release of Records

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

b. Definitions:

(1) **Redacted Filing:** a copy of a motion, response, reply, supplemental filing, or other filing that has been reviewed by the DoD Review Team.

(a) Information protected by virtue of being classified, protected under the terms of a protective order issued by the Commission, or otherwise protected by law (e.g. Privacy Act) must be deleted by the party filing the motion or by the DoD Review Team.

(b) Redacted copies of filings are not considered judicial documents of the Commission and will not be included in the Record of Trial as an exhibit unless otherwise properly introduced into evidence. Only original, un-redacted filings will be considered as judicial documents.

(2) **Record of Trial:** the Record of Trial is the full, verbatim, record of the trial with all exhibits and allied papers. It is the responsibility of the Government, IAW 10 U.S.C § 948l(c) to control and prepare the Record of Trial. The contents of the Record of Trial shall be IAW R.M.C. 1103.

(3) **Transcript:** a document generated contemporaneously with the Commission proceedings that purports to record the words spoken by the parties, witnesses, court personnel, and the Military Judge during the conduct of the proceedings. Transcripts are made available to the public IAW paragraph 19-4e of the DoD Regulation for Trial by Military Commission. Unauthenticated transcripts are not judicial records and may not be an accurate representation of the proceedings.

c. Release of Transcripts: A Military Judge may, to preserve the integrity of a Commission proceeding, direct that part or all of a transcript not be released under the provisions of paragraph 19-4a of DoD Regulation for Trial by Military Commission. Any directive will minimize the amount of information that may be withheld and will be lifted as soon as the need for limiting the release ends.

d. Security review of Filings

(1) Paragraph 17-1c and 19-4 of the DoD Regulation for Trial by Military Commission require filings to be reviewed for classified or other protected information before being released to the public. This section sets out the responsibilities of the Chief Clerk of the Trial Judiciary to facilitate that review.

(2) All filings, regardless of classification, shall undergo review by the DoD Review Team prior to being released to the Office of Military Commissions website IAW paragraph 17-1c1 and 19-4 of the DoD Regulation for Trial by Military Commission.

(a) This policy and these procedures apply to all filings.

(b) Because of their nature the following filings will not be sent for review: *ex parte* filings, filings sealed at the request of the defense IAW R.M.C. 505 or 506, and other filings sealed for reasons other than security by the Military Judge.

(3) The Chief Clerk of the Trial Judiciary will immediately notify the DoD Review Team and such non-DoD federal departments or agencies that have been designated in writing when any filing requiring review has been received.

(a) Unclassified Filings: Unclassified filings will be forwarded by the most expeditious means to the Defense Review Team and any designated departments or agencies.

(b) SIPRNET Filings:

(1) SIPRNET filings must comply with all requirements set forth in RC 3.

(2) Proponent counsel must provide an unclassified notice of filing to the Chief Clerk of the Trial Judiciary and all parties.

(3) The Chief Clerk of the Trial Judiciary shall forward the filing to the Defense Review Team and any designated agencies.

(4) If a designated department or agency does not have SIPRNET capability, the Chief Clerk of the Trial Judiciary will arrange for that entity to come to the judicial chambers to receive a copy at an agreed upon date and time or for a courier to carry a copy as necessary.

(c) Paper or CD Filings: if the proponent cannot use electronic filing procedures, the following procedures apply:

(1) Paper or CD filings must comply with all requirements set forth in RC 3.

(2) Proponent counsel must provide an electronic unclassified notice of filing to the Chief Clerk of the Trial Judiciary and all parties.

(3) Proponent must hand carry a paper original and 3 CD copies to the Chief Clerk of the Trial Judiciary's office. If classified, all appropriate markings and protections will apply.

(4) If the proponent is unable to file a CD or electronic copy with a paper filing, the party has forty-eight (48) hours from filing the paper original to provide the Chief Clerk of the Trial Judiciary an electronic copy or 3 CD copies.

(5) If the filing cannot be transmitted electronically, the Chief Clerk of the Trial Judiciary will arrange for the Defense Review Team and each designated entity to either come to the judicial chambers to receive a copy at an agreed upon date and time or have a courier hand carry the filings for review.

(e) Redacted Filings: Documents returned to the Chief Clerk of the Trial Judiciary approved for public release will be forwarded to the webmaster without further review unless sealed by the Military Judge for a reason other than security.

Military Commissions Trial Judiciary

24 April 2013

Military Commissions Rules of Court

RULE 7. USE OF TECHNOLOGY IN THE COURTROOM

1. “Court Room Technology” is any form of graphic or other data display, any image, picture, moving image or picture, sound, or any combination of these media, which is presented to the Commission through an electronic device, such as an image projector, a speaker, a “speaker-phone” telephone, or a video monitor combined with a computer, VCR, DVD or other electronic media player, and includes video-teleconference transmissions and computers employing similar software. This definition also includes other media which perform a function analogous to those items listed in the definition but not specifically listed above. The Military Judge enjoys plenary discretion to designate novel media or other technology not specifically contemplated by the rule as “Court Room Technology” for the purposes of applying this Rule of Court.

2. General Rule:

a. It is the responsibility of counsel to make sure any courtroom technology they plan to use meets all security requirements mandated by both the security requirements of the locations where the technology will be used and the classification level of information to be conveyed to the Commission

b. During trial, any material to be introduced into evidence and published by electronic means must first be properly admitted under the Military Commission Rules of Evidence (M.C.R.E.).

c. When used during closing arguments, any matter displayed electronically must either have been admitted into evidence, or must represent a fair comment on the evidence admitted, such as an accurate summary of data or other similar demonstrative aid. *See* RC 7-6

d. Use of courtroom technology is within the discretion of the Military Judge to admit or exclude, consistent with applicable authority.

e. A session will not be delayed or otherwise interrupted by virtue of the unavailability of courtroom technology.

f. Any displays, whether technology based or not, a party or a party’s witness intends to use must be submitted to the Court Security Officer (CSO) at least twenty-four (24) hours before a party intends to use it in order to allow the CSO a chance to review the information for classification and security purposes. If a party is unable to provide the display(s) to the CSO at least twenty-four (24) hours prior to its intended use of the display(s), the information must be provided to the CSO as soon as practicable without

causing a delay to the proceedings. At the time of presentation, the presenter will provide the CSO a second copy of the material intended to be used, to ensure the material remains unchanged from that which was submitted for review and approved for use.

3. Pre-Trial Requirements. This is a requirement for notice and does not provide any substantive right of discovery for any party to obtain the content of any courtroom technology not otherwise subject to the rules governing discovery.

a. Notice.

(1) To ensure facilities (i.e., a properly equipped courtroom) and equipment are available (e.g., where portable equipment is needed) and to obtain the permission of the Military Judge, counsel shall provide notice of the intent to use courtroom technology by motion at any time. The motion shall describe generally the technology and purpose desired for use (e.g., electronic media to display evidence, the presentation of remote live testimony, or otherwise to bring matters before the Commission). No further elaboration is necessary in the motion.

(2) The motion shall indicate whether any exhibit is classified or otherwise protected.

(3) Pretrial notice is not required for the use of courtroom technology for impeachment or in rebuttal; however, if notice of such an intention is not provided, counsel risk unavailability of necessary facilities, equipment, or access to remote witnesses unless already approved.

b. Disclosure.

(1) Where a party has provided notice of intent to use courtroom technology, counsel should discuss the proposed use with the Military Judge at a conference under R.M.C. 802.

(a) The Military Judge may, by a Case Management Order or other directive, set the date on which disclosure, if any, of courtroom technology to the Commission or to opposing counsel is required.

(b) The Military Judge may allow different disclosure dates for different uses of courtroom technology and may direct descriptions or summaries of electronic media be disclosed in lieu of a copy in order to protect the value of the presentation. For example, the nature and origin of material to be introduced into evidence and published via electronic media may be required to be disclosed, if necessary, sufficiently in advance of trial to dispose of any objections or to provide any needed safeguards, such as for the use of classified information.

(2) Opening statement or closing argument. If electronic media is intended for use in opening statement or closing argument, counsel shall discuss such use with the Military Judge at an R.M.C. 802 conference.

(a) Use of electronic media must comply with the Rules for Military Commission, Military Commission Rules of Evidence, and case law applicable to opening statements and closing arguments.

(b) Counsel are highly encouraged to disclose the content of such electronic media to opposing counsel. This will help ensure such use of electronic media is properly within the governing rules and will minimize the potential for objections that would interrupt the presentation of counsel.

(c) As a precondition to using electronic media in opening statements or closing arguments, the Military Judge may require disclosure of the nature of the presentation, or the contents thereof, to the Military Judge and opposing counsel, if necessary in the interests of justice. Ordering disclosure of contents should ordinarily occur only so far in advance as is necessary to resolve any issue, giving fair consideration to protecting the value of the presentation from premature disclosure.

(3) Case in Chief. The content of material either side proposes to present using courtroom technology during their respective cases in chief may be made the subject of a pretrial motion *in limine* by either counsel. Such a motion should be disposed of in accordance with the terms of the Case Management Order setting the date for submission and hearing of pre-trial motions. Objections to electronic media that are not readily susceptible of resolution as a pre-trial matter, such as an objection to opening statements, refreshed recollection, impeachment, rebuttal, or closing argument, may be disposed of in the discretion of the Military Judge.

c. Remote live testimony.

(1) Remote live testimony includes, but is not limited to, testimony by video-teleconference, closed circuit television, telephone, or other similar technology. To use remote live testimony, counsel must provide notice to opposing counsel and to the Military Judge, using the procedures set forth in paragraph 2.a., above.

(2) In a contested case, counsel requesting the use of remote live testimony during their case-in-chief must submit a written motion, at the time required by the Military Judge, requesting such remote live testimony and setting out the justification for its use, pursuant to the Rules for Military Commission (see R.M.C. 914A) and governing case law.

(3) In a motion for remote live testimony counsel must set out the methods that will be used to ensure the integrity of remote testimony.

(4) Counsel requesting remote live testimony must annotate their witness list to indicate which witnesses are expected to testify remotely and what method of courtroom technology will be used.

4. Trial Procedure.

a. Admission and Publishing of Exhibits.

(1) Loading Media.

(a) Counsel should not pre-load any media into electronic devices in the courtroom for a trial until they have requested and received permission to do so from the Military Judge. Permission to preload any evidence into courtroom electronic devices, or to connect laptops to electronic display media, should be requested at an R.M.C. 802 conference prior to the hearing.

(b) Classified information may ONLY be loaded and displayed on electronic devices previously cleared to contain and exhibit such items. Permission to use such devices must be obtained from the Military Judge at an R.M.C. 802 conference prior to the hearing.

(2) **Offering/Admitting Evidence Electronically.** The procedures for the use of electronic media should be the subject of discussion with the Military Judge at a conference under R.M.C. 802.

(3) **Publishing Pre-Admitted Evidence.** Counsel may not operate the electronic media control panel to activate the monitors of the court-martial members without the permission of the Military Judge.

(a) When electronic exhibits have been admitted into evidence at an R.M.C. 803 session, counsel will ordinarily be given permission to publish/display those exhibits at counsel's discretion. Once the Commission is called to order, counsel should request permission to activate the members' monitors and publish/display the enumerated item of previously admitted evidence. Once authorized by the Military Judge to do so, counsel may activate the members' monitors.

(b) If a series of exhibits are being published, counsel may request and be permitted to publish/display the series without seeking permission for each item individually.

(4) Evidence Not Pre-Admitted.

(a) Counsel may not operate the electronic media control panel to activate the monitors of the Commission members without the permission of the Military Judge.

(b) When electronic exhibits have not been previously admitted into evidence outside the members' presence, such as when used to refresh recollection or to impeach, counsel shall use standard evidentiary procedures to use or offer that evidence at trial.

(c) Counsel should initially request to activate only the monitors of the witness and may do so only upon a grant of permission by the judge. If an exhibit is not admitted into evidence when use of the exhibit is completed, counsel shall turn off the monitors of the witness, orally informing the Commission so the fact is captured in the verbatim transcript.

(d) If an electronic exhibit used to refresh or impeach is admitted into evidence, counsel should request to activate the members' monitors and to publish the item or items of evidence to the members.

(5) Electronic Imaging.

(a) Counsel may publish documentary and other items of admitted evidence by use of visual presentation equipment after requesting and receiving permission from the judge.

(b) In switching between items of evidence on the visual presentation equipment, counsel shall ensure the image being used is "frozen" on the monitors or that the members' monitors are turned off prior to removing a published item. Members' monitors should remain off, or the image of the last item of evidence published should remain frozen on their monitors, until the next item of admitted evidence is in place to be published electronically. Counsel may request and be granted permission from the judge to publish a series of admitted items without seeking permission for each item individually.

(6) Witness Monitors. Counsel may activate the monitor of a witness at the appropriate time in their questioning, after first requesting and being granted permission of the judge. Members' monitors may not be activated until the proponent counsel has requested and been granted permission by the Military Judge to publish an item of evidence by electronic means.

b. Remote Live Testimony.

(1) Before beginning any remote live testimony, proponent counsel shall request an R.M.C. 803 session during which the remote witness will be

properly placed before the remote camera or telephone and a sound check completed. The receiving monitor will then be turned off or the telephone placed on “hold.” Once the members are present, proponent counsel should request to call the witness for remote live testimony. Upon receiving permission, proponent counsel may activate the receiving monitor or telephone, and the remote witness will be sworn and testify.

(2) If technical problems are encountered, such as loss of the phone connection or other transmission signal, proponent counsel should request a recess in order to resolve the problem.

5. Preservation of Evidence for the Record

a. Electronic Media Not Admitted as Evidence. When electronic media is used at trial but is not admitted into evidence, such as a PowerPoint opening statement or closing argument, or an item used to refresh recollection, or otherwise, the media must be printed, labeled as an Appellate Exhibit, and included in the record of trial.

b. Real Evidence. When items of real evidence are published to the court by use of visual presentation equipment, proponent counsel must move to substitute a photograph for the original exhibit in the record of trial.

c. Annotations to an Exhibit.

(1) Oral Descriptions. All annotations made to an exhibit by a witness using the touch-screen monitor should be clearly described for the record by the witness or counsel. If a witness uses multiple colors, print fonts, symbols, or the like to annotate a document, an oral description of each convention used must be provided by the witness or by counsel.

(2) Annotated Exhibits.

(a) Whenever a witness uses the touch screen monitor to make annotations on an exhibit that was previously admitted into evidence, the annotations shall be preserved for the record separately from the original exhibit, which shall remain unaltered. There is no need, however, to separately preserve an unmodified exhibit that is neither intended nor offered as evidence until the witness modifies it.

(b) At the conclusion of a witness annotating an exhibit, the proponent counsel will request admission into evidence of the annotated exhibit as a separate prosecution or defense exhibit marked next in order as an appendix to the original exhibit.

(c) Upon admission into evidence by the Military Judge, the proponent counsel shall request the electronic media exhibit be “saved” as

annotated and marked as the appropriate exhibit number and a printed copy be substituted in the record of trial.

(d). If the offered exhibit is not admitted into evidence, the court reporter shall save the exhibit electronically and print a copy to be appended to the record, marked as the exhibit numbered “for ID.”

(3) Corrections. If a witness needs to make a correction to an annotation, counsel shall first request permission of the Military Judge to make the necessary correction.

(4) “Clear All” Function. When counsel has completed questioning a witness using courtroom technology, counsel must request permission to verify with the court reporter that all witness annotations on the touch screen have been preserved for the record. Upon such confirmation by the court reporter, counsel must then request permission from the Military Judge to activate the “clear all” function. Only the Military Judge may authorize counsel to hit the “clear all” button to remove markings from the touch-screen monitor. Court reporters will maintain backups of all screen snapshots to ensure files are not accidentally deleted.

d. Audio-Video and Remote Live Testimony. Evidence published in an audio or audio-video medium, or remote live testimony, shall be recorded during its presentation in court and transcribed verbatim, subject to the requirements of R.M.C. 1103 regarding verbatim transcripts. Proponent counsel will provide the court reporter any electronic file used, which shall be saved in the court reporter’s electronic file of the case and forwarded with the printed record of trial. If cassettes (audio or video) or CDs are admitted into evidence, these must be labeled with the caption of the matter, the date, the prosecution or defense exhibit number, and shall be included as part of the original record of trial.

6. Use of Electronic Media in Deliberations. When the court members retire to deliberate, a printed copy of all previously admitted and published exhibits will ordinarily be provided to the senior member to take into the deliberation room. If an original exhibit was admitted electronically, the printed copy shall be an exact duplicate of the original, including color.

Military Commissions Trial Judiciary

24 April 2013

Military Commissions Rules of Court

RULE 8: AMICUS CURIAE BRIEFS

1. Purpose. This rule establishes general procedures for submitting an *amicus curiae* brief. An *amicus* brief, which logically addresses an important matter not previously considered by the Commission, or addresses an important matter in a way another brief filed with the Commission does not, may be of benefit and may be requested or permitted by the Commission, though the Commission is not bound to consider them.

2. Submitting briefs. A person individually, or on behalf of an organization or entity, may provide an *amicus* brief to the Chief Clerk, Office of Trial Judiciary, Office of Military Commissions. The person submitting the brief must obtain an Appellate Exhibit number in accordance with RC 3. The person submitting the brief must meet the following qualifications, and such qualifications shall be stated in the first paragraph of the brief:

(a) The submitter is an attorney who is licensed to practice before the highest court of any State of the United States or the District of Columbia;

(b) If the submitter is a party to any other Commission case in any capacity or has an attorney-client relationship with any person whose case has been referred to a Military Commission, or serves as counsel in habeas proceedings for any detainee, the submitter must so state and further state the submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding; and,

(c) The submitter certifies, by submitting the brief, that he in good faith as a licensed attorney believes the law is accurately stated, he has read and verified the accuracy of all points of law cited in the brief, and he is not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

3. Format. Any *amicus* brief submitted to the Chief Clerk, Office of Trial Judiciary, Office of Military Commissions shall comport with the following:

(a) The brief must be in PDF (Adobe Acrobat) format as an attachment to the email submitting the brief to the Chief Clerk, Office of Trial Judiciary, Office of Military Commissions in accordance with RC 3.

(b) The brief, when printed, will contain one inch margins on 8 1/2 x 11 paper and be in a 12 point type face. The brief will be double-spaced and will not exceed 25 pages without leave of the court.

(c) The brief may use URLs (web links) as cites to legal authority not generally available through legal research services such as LEXIS or Westlaw. Parties submitting briefs are responsible for ensuring that the URL is functional on the date of submission.

(d) The brief must follow the format set forth in Form 8-1.

4. Action by the Chief Clerk, Office of Trial Judiciary, Office of Military Commissions.

When received, the Chief Clerk shall process the brief in accordance with RC 3.

5. Consideration by a Military Commission.

(a) An *amicus* brief may be considered by a Military Commission if:

(1) A filing (motion, response, or reply) by a party cites and endorses an *amicus* brief, and a copy of the brief is appended to the motion filing; and,

(2) The *amicus* brief cited is relevant to the issues being asserted in the filing; and,

(3) The *amicus* brief, the certification, and its manner of submission meet the criteria in paragraphs 2 and 3 above.

(b) The Military Judge may consider an *amicus* brief *sua sponte*, regardless of the provisions of this paragraph.

6. Other matters.

(a) No person may argue an *amicus* brief before the Military Judge without specific, prior leave from the Military Judge. However, any party may invite the attention of the Military Judge to an *amicus* brief cited in the party's motion or response or in oral argument when such argument is permitted.

(b) The submission, processing, and consideration of *amicus* briefs will not be allowed to delay the Commission.

7. Public Access: *Amicus* motions, to include responses from the parties, will be immediately released to the public, subject to any administrative requirements imposed by DoD for security review, unless otherwise prohibited by the Military Judge.

8. Time frame exceptions.

(a) If a significant *amicus* brief has been made available as provided in paragraph 4, above, after a party has filed a motion, response, or reply on the same or a substantially similar issue, and before the Military Judge has issued a ruling on the record or in writing, a party may request the Military Judge consider the *amicus* brief by:

(1) Requesting in the motion, response, or reply the Military Judge consider the brief; and,

(2) Stating those matters raised in the *amicus* that were not considered or known before all filings were due.

(b) If the Military Judge agrees to consider the brief, the Military Judge may allow the opposing party to file a response within the time allocated by RC 3 or as otherwise ordered by the Military Judge. As a general rule, no reply to that response will be permitted. No adverse inferences will be drawn from an election by the opposing party not to respond to an *amicus* brief.

Form 8-1
Format for an Amicus Brief

UNITED STATES v. (Name of Accused)

BEFORE A MILITARY COMMISSION
CONVENED PURSUANT TO THE MILITARY
COMMISSIONS ACT OF 2009

(Date brief is sent to the Director, Office of Court
Administration, Office of Military Commissions)

Amicus Brief filed by
(person filing the brief)
[on behalf of (if applicable, indicate the entity on
whose behalf the brief is submitted)]

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers. Sub paragraphs will be numbered or lettered.

1. (Required in every brief.). My name is _____. I certify I am licensed to practice before the (state jurisdiction). I further certify:

a. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor am seeking to be *habeas* counsel for any such person, and I am not currently nor am seeking to be next-friend for such person. **OR,**

I am (describe the condition listed in paragraph 1a above and the specific individual case involved) and I further state the submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding.

b. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, I have read and verified the accuracy of all points of law cited in the brief, and I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

2. Issue(s) Presented. [Set forth, in a concise statement, each issue presented.]

3. Statement of Facts. [Set forth accurately all facts pertinent to the issues raised.]

4. The law.

5. Argument. (Optional.)

Signature Block
Office Address
Email Address
Phone Number

Military Commissions Trial Judiciary

24 April 2013

Military Commissions Rules of Court

RULE 9: MILITARY COMMISSION BAILIFF

1. Purpose: This Rule sets out the duties and responsibilities for bailiffs supporting the Military Commissions at Guantanamo Bay, Cuba. The Prosecution Office of the Office of Military Commissions is responsible for providing bailiff support.

2. Assignment, Uniform, and General Duties:

- a.** The bailiff works at the direction of the Military Judge to ensure the orderly conduct of the trial. When the Commission is not in session, the bailiff will perform tasks assigned by the Military Judge or the trial judiciary staff.
- b.** Bailiffs will be enlisted members, in the grade of E-4 or above, of any armed force.
- c.** Bailiff will wear the duty uniform of his service. They will not carry side arms.
- d.** When the Commission is in session, the bailiff's place of duty is inside the courtroom unless the Military Judge directs the bailiff to leave the courtroom to perform other duties. When the members are in deliberations, the bailiff will remain near the deliberation room.
- e.** Bailiffs will report to the judicial chambers, in proper uniform, at the time prescribed by the trial judiciary staff.
- f.** Questions about the bailiff's duties will be directed to the trial judiciary staff.
- g.** Anytime witnesses are expected to testify during a session or a panel of members is present, two bailiffs will be used.

Military Commissions Trial Judiciary

24 April 2013

Military Commissions Rules of Court

RULE 10: COURT SECURITY OFFICER

- 1. Purpose:** This rule sets out the functions and responsibilities of the Court Security Officer.
- 2.** The Court Security Officer (CSO) and any Assistant Court Security Officers (ACSO) are officers of the court. *Ex parte* communication by a party in a case, to include the Office of Military Commissions, DoD General Counsel, or any intelligence or law enforcement agency, with the CSO/ACSO is prohibited except as authorized by the M.C.A. or the M.M.C. This is to preclude any actual or perceived attempt to improperly influence the Commission in violation of 10 U.S.C. § 949b. *Ex parte* communication does not include administrative matters necessary for the management of the security responsibilities of the Office of Trial Judiciary.
- 3.** The CSO is the principal security advisor to the Chief Trial Judge, to the Director of the Trial Judiciary Staff, and to the sitting trial judges. The CSO and ACSO provide expertise in advising trial judges on protective orders, procedures for using classified evidence in trial proceedings, and all other aspects of security requirements presented to the Military Judge for determination.
- 4.** The CSO and ACSO work for the Chief Clerk of the Trial Judiciary.
- 5.** The CSO and ACSO serve as primary security liaison between the trial judiciary and the Office of Military Commissions, the DoD, and other federal law enforcement and intelligence entities on all security matters within the limitations on *ex parte* communications, see paragraph 2, above.
- 6.** Under the direction of the Chief Clerk of the Trial Judiciary, the CSO and ACSO will:
 - a.** Develop, implement, and oversee the policies, instructions, procedures, control systems, and methods for classification and declassification review for all filings (*see* RCs 3 and 6).
 - b.** Ensure that classification requirements, document marking, safeguarding, and use restrictions are followed by the Military Judges and by the Trial Judiciary staff.
 - c.** Ensure that personnel access to controlled areas and need to know criteria are complied with by the Military Judges and the Trial Judiciary staff.
 - d.** Ensure that physical storage and control requirements for classified materials are followed within the Office of Trial Judiciary.

e. Ensure that the transmittal, transfer, reproduction, and destruction of classified materials is accomplished IAW established regulations.

f. Work with the Office of Court Administration to make sure all filings are available for the Record of Trial.

7. As participants in sessions of a Commission the CSO and ACSO will be under oath. The following oath will be executed prior to participating in Commission sessions.

“Do you swear (or affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trials by military commission, all the duties incumbent on you as the court security officer to this military commission, (so help you God)?”

The oath may be executed as a one-time oath for all cases. A copy of the oath will be retained by the Office of Trial Judiciary.

Military Commissions Trial Judiciary

24 April 2013

Military Commissions Rules of Court

RULE 11: CLASSIFIED INFORMATION (M.C.R.E. 505)

- 1. Purpose:** This rule sets out the parameters for reviews of classified information under the provisions of M.C.R.E. 505 and sets forth the requirements for retention of the information provided for judicial review.
- 2.** Before requesting a review under M.C.R.E. 505, the requesting party, absent exigent circumstances, will request that the Original Classification Authority (OCA) review the materials for declassification. The request and results will be annotated in any motion for review
- 3.** Any conferences conducted IAW R.M.C. 802 or *ex parte* discussions with either party in regard to a review under M.C.R.E. 505 will be recorded by a court reporter, transcribed, and sealed as part of the Record of Trial. The requisite security classification will be applied to the transcription.
- 4.** In order to ensure any documents reviewed by the Military Judge are available for later use in the Commission or for use by appellate authority, the procedures outlined below will apply in all cases.
 - a.** The requesting party will file an *ex parte* motion requesting judicial review with the Chief Clerk of the Trial Judiciary IAW M.C.R.E. 505.
 - (1)** When filing the *ex parte* motion, the requesting party will also provide unclassified notice of the motion to the other party and to the Chief Clerk of the Trial Judiciary.
 - (2)** The requesting motion will include a proposed order.
 - (3)** The motion will include an index that contains a detailed description of each item to be reviewed; e.g “X Agency Duty Log, dated 12 July 2004, 32 pages.”
 - (4)** If multiple binders of information are provided for review, a copy of the index will be placed in each binder.
 - (5)** Binders will be numbered sequentially for each case.
 - (6)** Motions filed IAW M.C.R.E. 505g will be filed at least thirty (30) days prior to any hearing at which an Accused desires to offer the materials that are the subject of the M.C.R.E. 505 motion.

(7) Motions for hearings IAW M.C.R.E. 505h will be filed at least thirty (30) days prior to any hearing at which the proponent desires to offer the materials that are the subject of an M.C.R.E. 505h hearing.

b. The requesting party will coordinate with the trial judiciary staff and the Court Security Officer for date and location for review by the Military Judge.

c. When the Military Judge conducts the review of materials, representatives of the party requesting review will not be present, but must be generally available in case the Military Judge has questions or requires changes to any summaries drafted for discovery purposes.

d. At the conclusion of the judicial review, the Military Judge may publish an order, if appropriate. An unclassified “place holder,” with a general description of the material reviewed, will be placed in the Record of Trial.

e. The original documents reviewed by the Military Judge will be sealed by the court reporter, marked as an appellate exhibit, and retained in a classified storage facility with controlled access and approved by the Director of Court Administration, until the Record of Trial is authenticated by the Military Judge.

Military Commissions Trial Judiciary

24 April 2013

Military Commissions Rules of Court

RULE 12: PAYMENT OF LEARNED COUNSEL

1. Purpose: Paragraph 9-1a6G of Regulation for Trial by Military Commission (2011 edition) requires the Military Judge, in a case that has been referred capital, to review the hours and fees of learned counsel before payment by the Convening Authority.

2. Payment submitted for review by a Military Judge must be accompanied by:

(a) Completed copies of Forms 12-1 and 12-2.

(b) An affidavit or sworn statement by the Detailed Defense Counsel setting forth he has reviewed the hours and expenses submitted and that in his professional estimation they are correct and proper and are necessary to the defense of the client. (Filling out Form 12-1 satisfies this.)

3. Requests for review will be submitted, with required documentation, to the Trial Judiciary at MLAdd-OMCTrialJudiciary@osd.mil.

4. The Military Judge, after review of the submitted documentation, may validate the voucher based upon the representations of the Defense. The Military Judge may also require additional documentation of hours and fees claimed.

5. The review of the Military Judge will be forwarded to the Convening Authority, Office of Military Commissions for payment under the terms of the agreement or contract with learned counsel executed by the Convening Authority.

Form 12-1

1. CIR./DIST./DIV. CODE	2. PERSON REPRESENTED	3. VOUCHER NUMBER			
4. DIST.DKT./DEF. NUMBER					
5. ATTORNEY'S NAME (First Name, M.I., Last Name, including any suffix) AND MAILING ADDRESS					
6. NAME AND MAIL ADDRESS OF LAW FIRM					
7. STAGE OF PROCEEDINGS Check the box which corresponds to the stage of the proceedings during which the work claimed at Item 15 was performed even in the work is intended to be used in connection with a later stage of the proceedings. CHECK NO MORE THAN ONE BOX. Submit a separate voucher for each state of the proceeding.					
<table style="width: 100%; border: none;"> <tr> <td style="width: 33%; vertical-align: top;"> CAPITAL PROSECUTION a. ☐ Pre-Trial e. ☐ Appeal b. ☐ Trial f. ☐ Petition for the U.S. Supreme Court c. ☐ Sentencing Writ of Certiorari d. ☐ Other Post Trial </td> <td style="width: 33%; vertical-align: top;"> HABEAS CORPUS g. ☐ Habeas Petition k. ☐ Petition for U.S. Supreme Court h. ☐ Evidentiary Hearing Writ of Certiorari i. ☐ Dispositive Motions j. ☐ Appeal </td> <td style="width: 33%; vertical-align: top;"> OTHER PROCEEDING l. ☐ Stay of Execution m. ☐ Appeal of Denial to Stay n. ☐ Petition for Writ of Certiorari to the U.S. Supreme Court Regarding Denial of Stay o. ☐ Other </td> </tr> </table>			CAPITAL PROSECUTION a. ☐ Pre-Trial e. ☐ Appeal b. ☐ Trial f. ☐ Petition for the U.S. Supreme Court c. ☐ Sentencing Writ of Certiorari d. ☐ Other Post Trial	HABEAS CORPUS g. ☐ Habeas Petition k. ☐ Petition for U.S. Supreme Court h. ☐ Evidentiary Hearing Writ of Certiorari i. ☐ Dispositive Motions j. ☐ Appeal	OTHER PROCEEDING l. ☐ Stay of Execution m. ☐ Appeal of Denial to Stay n. ☐ Petition for Writ of Certiorari to the U.S. Supreme Court Regarding Denial of Stay o. ☐ Other
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HOURS AND COMPENSATION CLAIMED					
8. CATEGORIES (Attach itemization of services with dates)	HOURS CLAIMED	TOTAL AMOUNT CLAIMED			
a. In-Court Hearings (Rate per Hour = \$)					
b. Interviews and Conferences					
c. Witness Interviews					
d. Consultation with Investigators and Experts					
e. Obtaining and Reviewing the Court Record					
f. Obtaining and Reviewing Documents and Evidence					
g. Consulting with Expert Counsel					
h. Legal Research and Writing					
i. Travel					
j. Other (Specify on additional sheets)					
Totals: Categories b thru j (Rate per hour = \$)					
CLAIM FOR TRAVEL AND EXPENSES (Attach Itemization of expenses with dates)					
9. Travel Expenses (lodging, parking, meals, mileage, etc.)					
Other Expenses (other than expert, transcripts, etc.)					
GRAND TOTALS (CLAIMED AND ADJUSTED):					
I certify that the foregoing is a true and accurate statement of the hours expended and expenses incurred during the dates covered by this billing. FROM _____ TO _____ Attorney _____ Date _____					
I swear that I have reviewed the hours and expenses and that in my professional estimation they are correct, and are proper and necessary for the defense of the client. Detailed Defense Counsel _____ Date _____					

Form 12-2

	In Court Hearings (\$178.00 per hr.)	Interviews & Conferences	Witness Interviews	Consultation with Investigators and Experts	Obtaining & Reviewing the Court Record	Obtaining and Reviewing Documents & Evidence	Consulting with Expert Counsel	Legal Research & Writing	Travel	Other	
Date	A	B	C	D	E	F	G	H	I	J	Total for Day
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	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Total Hours: 0.00

Total Amount Claimed \$0.00