

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL HADI AL IRAQI</p>	<p>AE 059</p> <p>Defense Motion for Appropriate Relief: Requiring Verbatim Recording and Transcription of R.M.C. 802 Conferences and Request for Compressed Briefing Schedule</p> <p>1 July 2016</p>
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1. **Timeliness:** This motion is timely filed.

2. **Relief Sought:**

a. The Defense seeks an order from the Commission directing the following:

- a. That from the date of the filing of this motion forward, all conferences held by the Commission pursuant to R.M.C. 802 shall be recorded and transcribed verbatim; and
- b. A compressed briefing schedule directing the Government to respond to this motion by no later than 7 July; and
- c. A Commission decision on this motion before the next scheduled 802 conference at the July hearings.

3. **Overview:**

a. The Government has subjected the Accused to the worst excesses of secrecy. In Rule for Military Commission 802, the Government has provided the Military Commission the authority to conduct closed-door, off-the-record hearings outside the presence of the Accused and outside

the observation of any alleged victims, the media, and the public at large. The constitutional rights of the public, as well as those of the Accused, limit the authority of the Military Commission to conduct hidden proceedings. The Military Commission should not conduct 802 conferences, but if it finds them absolutely necessary to address uncontested administrative matters, it should order that they be recorded and transcribed.

b. Since 2011, the Government has attempted to rebrand the Military Commissions process by announcing to the press the allegedly “reformed,” “transparent” and “fair” system under which this case will be tried. To this point:

i. The Convening Authority’s website¹, wherein each page contains the banner “Military Commissions: Fairness*Transparency*Justice”); and

ii. *Guantanamo Trials Will be More Transparent, Chief Prosecutor Mark Martins Says*²; and

iii. “Reformed military commissions,” the Chief Prosecutor claims, “are closely guided by federal practice in matters of transparency, such as decisions regarding public access to trials.”³; and

iv. General Mark Martins has stated that “[i]f students and other observers withhold their judgment of the reformed military commissions until they observe a trial firsthand or read these materials, I believe that they will see a system that is fair and legitimate, and deserving of their confidence.”⁴

v. “...my present and final mission until retirement is to implement the reforms contained

¹ www.mc mil (last visited 22 June 2016).

² Ben Fox, Associated Press (5 October 2011) (last visited 22 June 2016).

³ Brigadier General Mark Martins, Address to the New York Bar Association titled *Legitimacy and Comparative Law in Reformed Military Commissions* (10 January 2012). (last visited 22 June 2016).

⁴ <http://today.law.harvard.edu/brig-gen-mark-martins-legitimacy-and-limits-of-military-commissions-video/> (last visited on 22 June 2016).

in our Military Commissions Act of 2009 and thereby to seek justice through transparent and fair criminal trials of detainees;” and trials “conducted of the referred charge or charges incorporates all of the fundamental guarantees of fairness and justice;” and “those of us charged with implementing our policies and laws are committed to ensuring that these reformed and accountable military commissions are fair and that they will serve a positive role;” and “[t]he concern that military commissions are unknown and conducted in secret is increasingly difficult to fathom, as the public and media now observe them both in person and by closed circuit transmission to sites in the United States.”⁵

c. Despite such self-serving Government assurances, due to the well-documented and undisputed events outlined herein (below), the Defense has legitimate, well-grounded and grave concerns that “justice,” “fairness” and “transparency” are merely public relations talking points. In an effort to ensure that the record of proceedings is accurate and that the public truly has access to a more complete picture of the process, the Defense requests open and transparent R.M.C. 802 conferences. Verbatim recordings and transcripts of all hearings in this trial will further Defense interests as well as the oft-stated interests of the Chief Prosecutor and the U.S. Government, which bears the burden of proving that these proceedings are in fact legitimate, regularly convened courts and not an empty appearance of due process.

⁵ Brigadier General Mark Martins, Address to the Chatham House titled *The Use of Military Commissions for Trials of Al-Queda and Associated Forces* (28 September 2012) <https://www.chathamhouse.org/events/view/185455> (last visited 22 June 2016).

4. **Facts:**

a. The current Military Commissions are an untested and experimental system. On this point, per Nuremburg Chief Prosecutor (and Supreme Court Justice) Robert Jackson, the Nuremburg trials were:

...novel and experimental, [but] not the product of abstract speculations nor [wa]s it created to vindicate legalistic theories. Th[e] inquest represent[ed] the practical effort of four of the most mighty of nations, with the support of seventeen more, to utilize international law to meet the greatest menace of our times....⁶

b. The current Commissions, quite unlike the Nuremburg Trials, were created to vindicate legalistic theories and lack international support. While Nuremburg had the support of the four “might[iest] nations” and “seventeen” others, the current Commissions lack such robust and credible support—either national or international—and America stands virtually alone in championing—rather justifying—their use. The nearly universal international objection to not only Guantanamo as a prison, but also to the Commissions as a process, is almost deafening. Accordingly, great care must be taken by this Commission to ensure that the Commissions’ trials are not used to defy:

[t]he common sense of mankind[, which] demands that law shall not stop with the punishment of petty crimes by little people[but must] also reach men who possess...great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.⁷

c. Failing to keep these Commissions proceedings as wide open and as transparent as possible will result in the concealment of the crimes of “...men who possess[ed]...great power and ma[de] deliberate and concerted use of it to set in motion evils which...”⁸ have literally left

⁶ <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/> (last visited on 22 June 2016).

⁷ *Id.*

⁸ *Id.*

“...no home in the world untouched....”⁹ This is most true regardless of whether such crimes were committed, first: by those responsible for the terror attacks of 9/11; second: by those who worked with or for those responsible for 9/11; and third: by those who responded thereto with the so-called “Global War on Terror.”¹⁰

d. In that regard, the lack of transparency in Commissions proceedings has resulted in Pulitzer Prize Winning Journalist, Charlie Savage credibly observing that the Commissions have to date presented:

...bizarre episodes [which] compounded problems raised by prosecuting the cases in a brand-new, legally untested judicial system. In contrast to federal court, where virtually every permutation of every procedure has long since been settled...challenge[s] to every rule and procedural step in a blizzard of pretrial motions...[are the norm]...¹¹

Such criticism of the Commissions’ legitimacy has been bolstered by allegations of what can most generously be called “irregularities”—many confirmed—as well as allegations of gross Government misconduct that is antithetical to traditional Anglo-American concepts of objectively fair procedural due process and substantive due process, as well as antithetical to truth-seeking and claims of openness and transparency. On this point, consider that the federal Government, by and through its various agencies:

i. Has used or allowed the Commissions process to conceal (via over-classification and compartmentalization) evidence of Government wrongdoing via the Government's self-

⁹ *Id.*

¹⁰ As revealed in a report issued by the Senate Select Committee on Intelligence (hereinafter, “SSCI report”), which looked into the CIA’s Detention and Interrogation Program (now universally known as the “Torture” Report), and of which this Commission is asked and thus required to take judicial notice. This Commission is required to take judicial notice of judicially established facts (being undisputed) pursuant to the MMC, Section II, Rule 201(b) and (d) since the predicates therein are satisfied by recitation to the concessions of the Chief Prosecutor, Brigadier General Mark Martins, on the record in the 9/11 cases. BG Martins stipulated that “the facts” contained in the SSCI report “are true,” although he would not stipulate to the Report’s “conclusions.” Thus, the Commission is asked and thus required to take judicial notice of the Government’s stipulation in the so-called “9/11 Five” commissions cases, which are conjoined in a single case: *United States v. Khalid Shaikh Mohammad; Walid Muhammad Salih Mubarrak bin ‘Attash; Ramzi Bin al Shibh; Ali Abdul Aziz Ali; and Mustafa Ahmed Adam al Hawsawi.*

¹¹ Page 545 of his book “Power Wars,” Kindle Edition, Little, Brown and Company, New York (2016).

determined, conveniently applied classification morass. This system then allows the Government to use the Classified Information Procedures Act¹² to deny the Accused access to the very totality of circumstances surrounding the evidence, which Supreme Court precedent requires be demonstrated and established on the record before an accused can invoke the necessary legal protections that are endemic to a true justice system—protections that promote the liberty of all (both innocent and guilty) by punishing/ discouraging Government criminality via suppression or even dismissal of charges as a consequence of conscience-shocking Government conduct;

ii. Has used or allowed the Commissions process to foster Other Government Agency interference with the attorney client privilege through the use of electronic listening devices secreted inside smoke detectors¹³ inside the interview rooms used by defense attorneys when they met with their clients;

iii. The federal Government, by and through its various agencies, has used or allowed the Commissions process to allow Other Government Agencies to block the 40-second delayed public broadcast of a hearing by activating “white noise” to suppress the broadcast without the knowledge or approval of the Military Judge¹⁴ in the 9/11 trial;

¹² A most distressing note evincing the absurd secrecy of these “reformed” Commissions proceedings consider that the Commissions version of the CIPA, under Commissions Rule of Evidence 505, allows the “delet[ion]” or destruction of potentially exculpatory and/or mitigating evidence (see paragraph 4(d)(i)(xiii), below)—something not even the federal CIPA allows. Given the existence of such a deceptive, contrived rule allowing the destruction of evidence, keeping all proceedings open and on the record is of utmost importance now if this Commission and the Government wish to establish that these proceedings are anything, but a means of national retribution specifically designed to convict while insulating its own criminal conduct from exposure. The use of open and public 802 proceedings might offset the adverse conclusions to be drawn from the use of rules and procedures that conceal from the public and the Accused potentially exculpatory and mitigating evidence which in turn handicaps the Accused’s ability to mount a constitutionally adequate and effective defense, and all of which thus ensure both a vengeful conviction and suppression of embarrassing, criminal Government conduct. In short, on-the-record 802s will be a small step towards giving these Military Commissions some minimal level of legitimacy and credibility belied by the procedures, the rules and the statute.

¹³ <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1948120.html> (last visited on 23 June 2016).

¹⁴ <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article3622717.html> (last visited on

iv. Has used or allowed the Commissions process to assign a CIA interpreter to infiltrate a defense team and pierce the attorney-client privilege;

v. Has used or allowed the Commissions process to solicit members of the 9/11 defense teams to provide inside information to the Government;¹⁵

vi. Has used or allowed the Commissions process to foster Other Government Agency infiltration of defense team communications, specifically, the submission of defense counsel e-mails¹⁶ to the prosecution by persons not entitled to have access thereto;

vii. Has used or allowed the Commissions process to be slowed down by random and hap-hazard revocations of the security clearances of defense personnel, which then take forever (over a year in some cases) to get resolved before the defense personnel are either back on the team or replaced;

viii. Has used or allowed the Commissions process to convict people via guilty plea to unconstitutional *ex post facto* offenses¹⁷;

ix. Has used or allowed the Commissions process to be slowed down by needless delays in approving security clearances for Commissions personnel—a process that is exclusively controlled by the executive branch of the federal Government—which also controls the evidence classification system; controls the Commission's prosecution and charging process; appoints and controls the Commission's judiciary; controls the Commission's panel (jury) members' careers and selection process; and controls the first level of Commissions' conviction appeals¹⁸—to this end—the federal Government bickers over whether one possessing a DoJ clearance is suitable

23 June 2016).

¹⁵ <http://www.miamiherald.com/news/nation-world/world/americas/article1966673.html> (last visited on 23 June 2016).

¹⁶ <http://www.miamiherald.com/news/nation-world/world/americas/article1955207.html> (last visited on 23 June 2016).

¹⁷ See *Hicks v. United States*, 13-004 (CMCR 2015) and *al Bahlul v. United States*, 792 F.3d 1, 28, DC Cir. (2015).

¹⁸ See generally, the Military Commissions Act of 2009, 10 USC §§ 948, et seq, and the Manual For Military Commissions governing the proceedings and personnel selection.

for a DoD clearance¹⁹—even though both agencies use the same OPM website (EQIP) to process the applicant’s clearance and both report to and are controlled by the same Chief Executive official;

x. Has used or allowed the Commissions process to be plagued by inadequate and unequal resourcing of both defense staff and equipment. It has been 10 years since the first MCA was passed in 2006 and upon information and belief, the military services have only staffed about 1/2 of the required personnel the defense branch requires;

xi. Has used or allowed the Commissions process to deny equal access to both witnesses and evidence based upon self-serving and unverifiable claims of privilege, classification or witness unavailability. This includes the transfer of witnesses to other countries without first providing either notice or equal access to the Defense (the Beau Bergdahl prisoner swap involving the so-called “Taliban Five,”²⁰ each of which is potentially a witness to one or more Accuseds facing a Commissions trial);

xii. Has used or allowed the Commissions process to fail to produce complete and meaningful discovery, despite the passage of numerous years for preparation and identification of same—upon information and belief, despite a near universal failure by the Government to produce the required discovery evidence, not a single Commissions’ judge has threatened to sanction the Government for its recalcitrant and dilatory discovery practices—and in all cases the Government has failed to cooperate in discovery until specifically ordered to do so by a Military Judge. The bottom line is that without adverse consequence the Government’s indifferent, arguably sanctionable, dilatory discovery misconduct continues unabated;

¹⁹ See the Affidavit of Brent Rushforth, attachments B.

²⁰ <https://armedservices.house.gov/issues/taliban-5>, incorporated herein by reference, and judicial notice, which is hereby requested and must be taken per MMC Rules of Evidence, Rule 201(b) and (d), unless the Government desires to dispute the authenticity of its own official publications as posted on official Government websites. (Last visited 23 June 2016).

xiii. Has used or allowed the Commissions process to utilize hearsay that is three or four (or more) degrees removed from the original utterance and hidden behind “substitutions,” or “summaries” or other sanitizing action—apparently up to and including deletion and destruction of evidence²¹—a complete abandonment of the “indicia of reliability” standard and a complete denial of access to the “totality of circumstances” standard required by both the Military Commissions Act²² and precedent to establish whether suppression of evidence or other remedy is both appropriate and necessary;

xiv. Has used or allowed the Commissions process to interfere with the defense attorney's constitutional obligations and the Accused's constitutional rights, e.g., the defense attorney cannot discuss evidence with their client, due to the classification, to find out the truth or falsity thereof, or to even determine if the incident in question in fact occurred or occurred in a manner even remotely as described in the charges—effectively rendering both the defense attorney and the Accused ineffective in mounting a constitutionally required defense; and finally

xv. Has relied upon the statutory secrecy rules of both evidence and procedure (designed to conceal evidence rather than effectuate justice) to allow a federal Government official (the Chief Military Judge for the Commissions, who is presiding over the 9/11 Commissions cases²³) approve and sustain the Government’s secret motions requesting secret court orders approving

²¹ See Manual for Military Commissions Rule of Evidence 505(f)(1)(a) and footnote 22, below.

²² See the Manual For Military Commissions, Rules of Evidence, Rule 304(a)(2)(a), which provides that an analysis will be required of the “totality of the circumstances” surrounding each statement or portion thereof in order to assess the admissibility/suppressability of those statements. Another MMC rule, 304(a)(2)(b), clearly provides that statements are admissible only when they were “...made incident to *lawful conduct* during military operations at the point of capture or during closely related active combat engagement...” The current Commissions’ practice, generally, and in this Commission’s case specifically, use Rule 505 to deny the Accused the very totality of the circumstances required by Rule 304. The practice also eliminates the Government’s burden of demonstrating admissibility by presuming it in the absence of an effective Defense challenge based upon the “totality of the circumstances.”

²³ See footnote 10 for a list of the so-called “9/11 Five” cases that have been conjoined into a single Commissions proceeding.

the destruction of evidence²⁴ that was favorable to the Accused, all without notice to the Accused or his Defense counsel—who apparently only accidentally discovered the arguably conspiratorial agreement some eighteen months or so later, in May 2016.

e. In light of these events, the Chief Prosecutor’s assertions of openness and transparency seem particularly hollow and thus it is all the more important that this motion be filed and sustained by the Commission if it is at all concerned with preserving the legitimacy and integrity of the proceedings—at least to the extent allowed by the statute, procedures and rules.

5. Law and Argument:

a. The Defense relies first upon the Chief Prosecutor’s own statements, most importantly, his concession that “[a]ny closure of proceedings must meet the same strict criteria demanded in federal civilian criminal trials and must be tailored to be as narrow as possible.”²⁵ Off the record 802 proceedings—which can quickly devolve (and have) into actual off-the-record litigation—are the epitome of closed, off-the-record proceedings. The practice of memorializing the 802 proceedings after-the-fact results in omissions and errors on the record—presumptively accidental—but, where humans are involved, probably not always. Regardless of actual intent behind such errors—the errors are to be avoided at all costs for in a true justice system, the measure of its success is not the absence of errors, but the lack of opportunity for any such errors to actually occur.

b. The foregoing considerations dictate that to avoid their repetition, this Commission must consider that due to the infancy and irregularities of this Commissions’ system, the day-to-day trial practices are being established anew with every new session—especially in the face of

²⁴ <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article77015207.html> (Last visited on 23 June 2016).

²⁵ See Brigadier General Mark Martins’ comments to the Chatham House, referenced in footnote 4, above.

possible pending amendments to the Military Commissions Act (as part of the latest National Defense Authorization Act), portions of which even the United States Attorney General, apparently, opposes on the basis that they would “violate longstanding rules of criminal-justice procedure.”²⁶ Of the few Commissions trials litigated at Guantanamo Bay under the 2009 Military Commissions Act prior to this case, the trend is for the Commissions to follow, when not contraindicated in the rules, United States courts-martial practice. This is likely due in large part to the fact that the Military Commissions Act is based almost entirely on the Uniform Code of Military Justice.

c. The Rules for Courts-Martial, as well as United States military practice, provide for off-the-record conversations prior to and between proceedings recorded and transcribed for public release.²⁷ However, the media and general public have displayed a heightened interest in Military Commissions at Guantanamo Bay. In response, and in an attempt to create the appearance of fairness, the Government has gone out of its way to publicize its view of these Military Commissions as legitimate and transparent. Verbatim recordings and transcripts of all proceedings, not just proceedings held in the courtroom, will effectuate the transparency the Chief Prosecutor and his prosecution teams claim to desire.

d. The President has directed that the Accused be tried in a Military Commission on a remote military base, as opposed to a regularly constituted²⁸ court in the United States. The public’s access to these proceedings is already drastically limited by layers of secrecy (which are

²⁶ <http://nypost.com/2016/06/21/loretta-lynch-opposes-obamas-guantanamo-bay-proposal/> (last visited on 22 June 2016).

²⁷ See *Manual for Courts-Martial United States* (2008), Rule for Courts-Martial 802. Rule for Military Commissions (R.M.C) 802 mimics this procedure. See *Manual for Military Commissions United States* (2010), R.M.C. 802.

²⁸ It is certainly doubtful that a special statutory scheme contrived after-the-fact to prosecute and “pass judgment” on detainees while simultaneously concealing evidence of the detaining power’s own culpable criminal conduct can meet the Geneva Convention’s Article 3 definition of a “regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”—like the regular due process and evidence access guarantees typically available to an Accused in US state courts, military courts-martial and Art III federal courts.

then further shrouded in the incomprehensible darkness of “compartmentalization,” extraordinary, oppressive physical security, and significant geographical remoteness. Exacerbating those conditions is Rule for Military Commissions 802, which permits a Military Commission judge to order closed-door, off-the-record conferences outside the view of the public. Exercising the authority to conduct hearings away from observers, however, exacerbates the secrecy, opacity and irregularities already inherent, by design, in the Military Commissions.

e. The Accused files this motion to emphasize the constitutional and statutory limits on the authority of the Military Commissions to conduct 802 conferences outside the presence of the Accused and the view of the victims, the media and the public at large and hereby registers his objections to such hidden proceedings. If this Military Commission orders 802 conferences, however, the Defense asserts that it must also order recording and transcription of those proceedings—not because the rules specifically require it, but precisely because the rules specifically do not require it.

i. Closed-door conferences violate the First Amendment right of the public to open proceedings as well as the Sixth Amendment right of the Accused to a public trial.

A. The Military Commission may not conduct closed-door proceedings on any topic other than uncontested administrative matters without giving the public notice and an opportunity to be heard and articulating findings of a closure policy narrowly tailored to serve a compelling interest. The public clearly has a First Amendment right to observe criminal trials.²⁹ Two of the many reasons for these historic rights to open proceedings are particularly pronounced in this case.

²⁹ *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575-76 (1980) (Opinion of Burger, C.J.). The public’s First Amendment right to observe the criminal process extend to pretrial hearings. *Press- Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986); *United States v. Criden*, 675 F.2d 550, 562 (3d Cir. 1982) (ordering release of transcripts of *in camera* hearings). The Accused similarly have a Sixth Amendment right to public proceedings. *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

B. Open proceedings in this case will serve the critical purpose of allowing alleged victims of crime, as well as the community, to observe the process of the Military Commissions.³⁰ The terrorist attack that gave rise to America's War on Terror has inflicted massive damage to individuals, families, cities, civil liberties, and the nation as a whole; the need for openness is correspondingly greater than in the trial of any ordinary crime which, while important to those involved, affected few people directly. Different people will reach different conclusions about the fairness of the proceedings and the appropriate outcome of each case, but each person should have the opportunity to observe and judge the totality of the proceedings and reach these conclusions for him or herself.

C. Second, the torture the United States Government (per the Central Intelligence Agency's own claims³¹) visited upon various detainees (to get evidence against the Accused) while it was holding the Accused in secret prisons demonstrates the overriding importance of openness in a democratic society. History has demonstrated that secrecy allows the worst in human nature and political policy to go unchecked—Supreme Court Justice Louis D. Brandeis once noted that “sunlight is said to be the best of disinfectants.”³² Open proceedings are that sunlight and are the “fundamental protection against ‘star chamber’ trials and back alley justice.”³³ This observation is not a suggestion that 802 conferences would involve any untoward conduct, but rather a reminder that “the appearance of justice can best be provided by allowing

³⁰ *Richmond Newspapers*, 448 U.S. at 571 (Opinion of Burger, C.J.).

³¹ See the SSCI Torture Report, footnote 10, above, wherein, at pages 369 and 370, the SSCI report clearly documents the CIA's proud declaration that evidence against the Accused was derived from Hasan Ghul after Ghul was subjected to enhanced interrogation techniques. Records evincing the “totality of those circumstances,” along with any off-the-record 802 proceedings, will continue to be denied to both the Defense and the public.

³² [http://3197d6d14b5f19f2f440-](http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45_r81.cf1_rackcdn.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf)

[5e13d29c4c016cf96cbbfd197c579b45_r81.cf1_rackcdn.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf](http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45_r81.cf1_rackcdn.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf) (last visited 1 July 2016).

³³ *United States v. Walker*, 66 M.J. 721, 753 (N.M.C. Ct. Crim. App. 2008).

people to observe it.”³⁴

D. Before this Military Commission conducts closed-door hearings on any topic other than uncontested administrative issues, it must hold a hearing with notice to the public on the propriety of closing the hearings. At least where a criminal defendant does not seek closure to protect his or her right to a fair trial, “The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”³⁵

ii. RMC 802 only permits closed-door conferences to discuss uncontested administrative matters.

A. RMC 802(a) authorizes a military judge to order conferences, but the permissible range to topics for such conferences is limited. Essentially, 802 conferences can only address uncontested, administrative matters such as scheduling.

B. The Discussion following RMC 802(a) explains that “the purpose of such conferences is to inform the military judge of anticipated issues and to expeditiously resolve matters on which the parties can agree, not to litigate or decide contested issues.” Similarly, military jurisprudence regarding RCM 802 clearly limits 802 conferences to uncontested administrative matters. “Except for purely administrative matters, the use of RCM 802 sessions should be discouraged.”³⁶ “Litigation of contested issues at such off-the-record conferences is clearly to be avoided.”³⁷

C. The Army appellate court in particular has cautioned military judges not to use 802

³⁴ *Richmond Newspapers*, 448 U.S. at 572 (Opinion of Burger, C.J.).

³⁵ *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984); *see also* RMC 806(b)(2) (stating required findings for closure).

³⁶ *United States v. Loving*, 34 M.J. 956, 963 n. 10 (Army Ct. Mil. Rev. 1992).

³⁷ *United States v. Stewart*, 29 M.J. 621, 624 (C.G. Ct. Mil. Rev. 1989).

conferences to address issues which may arise on appeal.³⁸ In addition, military courts have warned against the use of 802 conferences to address several specific types of issues.³⁹ Given these precedential restrictions, it is an improper use of an 802 conference to conduct a “dry run” of the parties’ arguments on contested issues. Rather, the military courts of appeal have strongly cautioned that 802 conferences should only address uncontested administrative matters.

iii. Conducting 802 conferences outside the presence of the Accused violates their right to be present under the Fifth and Sixth Amendments and 10 U.S.C. § 949a(b)(2).

A. If the Military Commission takes up any matter other than uncontested administrative issues at an 802 conference, it will violate the constitutional and statutory rights of the Accused. The Fifth and Sixth Amendments to the United States Constitution grant the Accused the right to be present at all proceedings where his presence may have an effect on the outcome.⁴⁰

B. In addition, Title 10 U.S.C. §949a(b)(2) guarantees the Accused the right “[t]o be present at all sessions of the Military Commission (other than those for deliberations or voting), except when excluded under section 949d of this title.” *See also* RMC 804(a). Unlike Federal Rule of Criminal Procedure 43(b), § 949a(b)(2) does not contain an exception for questions of

³⁸ *United States v. Lopez*, 37 M.J. 702, 704 n.2 (Army Ct. Mil. Rev. 1993) (“We have cautioned military judges on the use of RCM 802 conferences concerning matters which are potential appellate issues.”); *United States v. Hamilton*, 36 M.J. 723, 730 (Army Ct. Mil. Rev. 1992) (same language); “[M]atters which have even a remote possibility of becoming an appellate issue should be litigated on the record.” *United States v. Washington*, 35 M.J. 774, 777 n.1 (Army Ct. Mil. Rev. 1992); *see also United States v. Johnson*, 36 M.J. 862, 865 n.6 (Army Ct. Mil. Rev. 1993) (echoing the concerns of *Washington*); *Loving*, 34 M.J. at 963 n. 10 (same language as *Washington*).

³⁹ *See United States v. Curtis*, 44 M.J. 106, 151 n.12 (C.A.A.F. 1996) (explaining that *voir dire* “is not the type of matter which should be discussed at an RCM 802 conference”); *United States v. Sadler*, 29 M.J. 370, 373 n. 3 (C.M.A. 1990) (“Discussion of instructions should be conducted on the record, rather than in a conference under RCM 802.”); *United States v. Czekala*, 38 M.J. 566, 572 (Army Ct. Mil. Rev. 1993) (“[T]he denial of a requested witness is not a matter to be resolved at a RCM 802 conference. It was error for the military judge to attempt to do so.”).

⁴⁰ *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987); *United States v. Gagnon*, 470 U.S. 522, 526 (1985); *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964); *United States v. Walker*, 66 M.J. 721, 753 (N.M.C. Ct. Crim. App. 2008).

law.

C. Certainly, precedent exists for the proposition that a court or court-martial may address purely legal or administrative questions outside the presence of the Accused.⁴¹ But this Military Commission should not follow this practice. The Accused has every reason to distrust this Military Commission and his detailed attorneys, and conducting proceedings outside of his presence will only magnify that distrust. Avoiding proceedings outside the presence of the Accused will help diffuse the suspicion that detailed counsel are colluding with others to the detriment of the Accused. On this point, it bears noting that although 802 conferences may be held over the objection of a party,⁴² “no party may be compelled to resolve any matter at a conference.”⁴³

iv. Transcription of any 802 conference is necessary to create a verbatim appellate record.

A. If an 802 conference must take place, it should at a minimum be recorded and transcribed. A transcription will guarantee a complete verbatim record for appellate review and avoid inadvertent waiver of issues which the parties actually argued.

B. RMC 1103(a) requires a complete record of trial in each trial by Military Commission. RMC 1103(b)(1) explains that a complete record includes “a verbatim transcript of all sessions except sessions closed for deliberations and voting.” In a case involving the life in prison, it is especially important that the record be verbatim.⁴⁴

C. A verbatim record requires transcription of all proceedings. “Inclusion of the substance of a portion of the record of proceedings dealing with material matter is not a

⁴¹ See, e.g., *United States v. Jones*, 34 M.J. 899, 912 n.8 (N.M.C. Ct. Mil. Rev. 1992) (approving use of 802 conference to resolve procedural matters in the absence of the Accused).

⁴² *United States v. Curtis*, 44 M.J. 106, 151 (C.A.A.F. 1996)

⁴³ *Washington*, 35 M.J. at 777; see also RMC 802(a) (Discussion) (same language).

⁴⁴ *Walker*, 66 M.J. at 755.

verbatim transcript of the record.”⁴⁵ Even if the substance of an argument or ruling is placed on the record, “discussion of these matters in an RCM 802 conference may deny reviewing authorities necessary information about the positions and arguments of the parties.”⁴⁶ *United States v. Weinmann*, 37 M.J. 724, 726 n.2 (A.F. Ct. Mil. Rev. 1993), is just one example of a case in which the military judge’s summary was adequate, “but a verbatim transcript of the discussions would have been preferable.”

D. Admittedly, the military courts have divided on the question of whether an 802 conference may exceed routine administrative matters without violating the requirement of a verbatim transcript.⁴⁷ In light of this disagreement, the prudent course is to avoid discussing any matter other than uncontested administrative matters in an 802 conference.

E. In addition to violating the verbatim requirement of RMC 1103, the failure to record and transcribe 802 conferences can result in the waiver of arguments actually advanced by the parties.⁴⁸ Accordingly, “counsel should be cautious of the issues which they agree to resolve in a RCM 802 session, for they may waive appellate review of substantial issues.”⁴⁹ The risk of inadvertent waiver is especially dangerous in light of RMC 802(b), which only requires the Military Commission to place “matters agreed upon” on the record, potentially leaving aside positions vigorously asserted by the parties, but not agreed upon.⁵⁰

⁴⁵ *United States v. Gray*, 7 M.J. 296, 297 (C.M.A. 1979) (per curiam) (quoting *United States v. Sturdivant*, 1 M.J. 256, 257 (C.M.A. 1976)).

⁴⁶ *United States v. Olson*, 38 M.J. 597, 600 (A.F. Ct. Mil. Rev. 1993); see, e.g., *Loving*, 34 M.J. at 963 n. 10 (“In the case before us, appellant alleges statements made by the military judge at the 802 sessions exhibited his bias and prejudice against defense counsel.”).

⁴⁷ Compare *United States v. Suksdorf*, 59 M.J. 544, 547 (C.G. Ct. Crim. App. 2003) (citing *United States v. Bevacqua*, 37 M.J. 996, 1003 (C.G. Ct. Mil. Rev. 1993)); *United States v. Garcia*, 24 M.J. 518, 520 (A.F. Ct. Mil. Rev. 1987) with *United States v. McQuinn*, 47 M.J. 736, 738 (N.M.C. Ct. Crim. App. 1997); *United States v. Thomas*, 32 M.J. 1024, 1026 (A.F. Ct. Mil. Rev. 1991) (limiting, but not overruling, the holding of *Garcia*).

⁴⁸ See, e.g., *United States v. Lloyd*, 69 M.J. 95, 98 n.5 (C.A.A.F. 2010); *United States v. Latorre*, 53 M.J. 179, 181 (C.A.A.F. 2000).

⁴⁹ *United States v. Washington*, 35 M.J. 774, 777 (Army Ct. Mil. Rev. 1992).

⁵⁰ See *United States v. Cordell*, 37 M.J. 592, 594 (A.F. Ct. Mil. Rev. 1993) (in identical RMC 802(b), “there is no legal requirement to summarize anything other than ‘matters agreed upon’”). RCM 802(b) goes on to impose an

F. The uniqueness of this case virtually guarantees appellate scrutiny at the highest level, and it is the duty of this Military Commission to ensure a complete record of proceedings. The many pitfalls associated with 802 conferences are the reason the military appellate courts have explained that “matters which have even a remote possibility of becoming an appellate issue should be litigated on the record.”⁵¹ This Military Commission should avoid 802 conferences, but if absolutely necessary, should ensure that they are recorded and transcribed.

f. It is worth noting that Supreme Court Justice Robert Jackson famously observed that:

“[p]rocedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. **It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the government, as they should on matters of policy which compromise substantive law.** If it be conceded that in some way [that the agency could take the action it did], does it matter what the procedure is? **Only the untaught layman or the charlatan lawyer can answer that procedure matters not. Procedural fairness and regularity are of the indispensable essence of liberty.** Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices. **Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on ex parte consideration.**”⁵² (Emphasis added).

g. Consistent with Justice Jackson’s observation, above, the Defense herewith seeks to

explicit waiver rule: “Failure of a party to object at trial to failure to comply with this section shall waive this requirement.” Indeed, this was the issue that arose in this case when the Military Judge incorrectly stated that the Defense had not objected at the 2 November 2015 telephonic 802 conference to going forward without all their counsel and that they were not agreeing to wait only for Brent Rushforth’s clearance and appearance on the record.⁵¹ *Washington*, 35 M.J. at 777 n.1; *see also Johnson*, 36 M.J. at 865 n.6; *Loving*, 34 M.J. at 963 n. 10. Given the record of disputed 802s in this case to date—from the dispute over whether the Defense had agreed to a continuance solely to allow Brent Rushforth, but not other counsel to be retained to the Military Judge’s incorrect attribution of approximately 57 days of delays to the current Defense team when those delays were specifically caused by the prior Defense Team’s decision to not file the supplemental pleadings directed by the Commission, which role was specifically limited by both the Accused and the Commission to communicating with the Commission. See 22 September Transcript, pages 653 and 654.

⁵² *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206, 224–25 (1953).

remove the stain of *ex parte* proceedings by not having any—*ex parte* in the sense that the Accused and the public are denied the opportunity to observe, scrutinize and criticize the actions of its Government—as much as possible in this Commission trial.

h. Rule for Military Commissions 802 states: “[T]he military judge may, upon request of any party or *sua sponte*, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial.” R.M.C. 802(a). The Rule provides that “conferences need not be made part of the record, but matters agreed upon at a conference shall be included in the record orally or in writing.” R.M.C. 802(b). The Discussion section of R.M.C. 802 addresses the need for such conferences, which allow the parties to dispose of administrative matters in an expeditious manner. That expeditious manner, however, comes with a cost as it necessarily inhibits transparency since human error in reciting what occurred previously—sometimes months later—cannot be accurately recalled and memorialized. In this case, it is clear that transparency trumps expediency: consider that the Government has taken more than a decade to bring this case to trial, but rarely misses an opportunity to declare its dedication to a fair, just and transparent process.

i. The matter pending before the court is among the most solemn forms of litigation known to American jurisprudence: the Government seeks to permanently deprive Accused of his freedom from now until his death (should he be convicted and receive a life sentence). Every argument made, every factual assertion put forth, and every ruling of this Commission will be scrutinized by higher courts. It is essential that the appellate courts have an accurate record from which to make determinations of both fact and law—especially in a proceeding already tainted with allegations of systemic bias and failures—such as the destruction of evidence—in clear violation of *Brady v. Maryland*, 373 U.S. 83 (1963), that presented either or both exculpatory or

mitigating evidence. R.M.C. 802 conferences in far less complicated cases involving a single accused are fertile ground for misunderstandings. Attempting to accurately record by recollection the positions of all parties, and the nuances of those positions, after-the-fact, is not only time-consuming, but fraught with the opportunity for error. The Defense wishes to avoid any confusion or miscommunication by having the content of each 802 conference directly and contemporaneously recorded verbatim.

j. The public is watching. The world wants to determine whether the proceedings in the matter of *U.S. v. abd al-Hadi al-Iraqi*, are fair and in keeping with the values held inviolate by the United States of America and consistent with its Anglo-American jurisprudential traditions. The public can only accurately assess whether the proceedings meet those standards if the proceedings are not only open and transparent, but constitutionally legal. R.M.C. 802 requires that matters settled in and 802 conference be memorialized on the record later, but this is merely summarized (read: essentially worthless in value as compared to verbatim, contemporaneous recorded transcripts). Here, in a case involving novel arguments of law, arcane constitutional issues, and matters of great import, the watching world—the Accused, his Defense team and America need not settle for summaries. Not only is this case of primary importance to the civilized nations worldwide—but it is especially important to U.S. Servicemembers who may in the future find themselves in the hands of a detaining power who will decide their fate by looking to U.S. precedent). This Commission can provide to the Accused, the appellate courts, the public and the world the exact words of the parties as well as its own words.

k. The relief sought does not threaten national security concerns. If a classified matter is touched upon in conference, the Commission's security officer can excise and seal the classified material prior to public release. The classified portion would be appropriately and confidentially

preserved for later assessment by higher courts.

l. This Commission has the resources to record verbatim every in-person conference and every telephone conference held with the parties. When an R.M.C. 802 conference is held before, during or after a court proceeding, a court reporter is already present and readily available. When the Commission convenes an off-site R.M.C. 802 conference, a court reporter can be required to attend or a taped recording can be made for later transcription. Telephonic conferences can also be recorded for subsequent transcription.

m. By utilizing the basic technologies of audio recording and in-court transcription—technologies that already exist within the Commissions—this Commission’s processes and its rulings can be preserved in their entirety with utmost accuracy—the hallmark of a just, fair, open and transparent system. A verbatim record of all R.M.C. 802 conferences protects all parties and the record of trial. It also provides the public access to a more complete record of Commissions’ processes. In keeping with the promise of systemic fairness and transparency, the Defense requests that all conferences held pursuant to R.M.C. 802 be recorded verbatim and be made available as part of the record from the date of this filing forward.

n. In final support of this motion, the Defense closes by again quoting Nuremburg Chief Prosecutor, Justice Robert Jackson, who observed that:

[w]e must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.⁵³

o. In the spirit of Justice Jackson’s prescient and cautious warning, this motion clearly serves the interests of justice by ensuring that no avoidable errors or omissions creep into the

⁵³ <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/> (last visited on 22 June 2016).

proceedings while remaining off the record—an all too human inevitability. Transcripts of all 802 conferences, in addition to the regular proceeding transcripts, will ensure that by and through these proceedings, America is not “pass[ing] a poisoned chalice...to [its] own lips,”⁵⁴— assuming that it is not already too late.

6. Request for Oral Argument:

Oral argument is not requested, especially since the Accused’s choice of counsel—his entire litigation Defense team—are unable to attend the hearing due to the Government’s failure to properly and timely adjudicate their security clearances.

7. Conference with Opposing Counsel:

Movants have conferred with the prosecution. Oddly (and insipidly) enough, the prosecution objects to this motion but has no objection to this Commission’s actually ordering the recording and transcribing of all 802s. The e-mail string attached as Attachment C, below, outlines the discussions between the parties.

8. Attachments:

- a. Attachment A: Certificate of Service.
- b. Attachment B: Affidavit of Brent Rushforth dated 19 Jan 2016.
- c. Attachment C: E-mail string demonstrating the parties attempts to work out an agreement to file this as a joint motion.

Respectfully submitted:

⁵⁴ *Id.*

//s//

BRENT RUSHFORTH
Pro Bono Civilian Counsel

//s//

JAMES SZYMANSKI
Pro Bono Civilian Counsel

//s//

ROBERT PALMER
Pro Bono Civilian Counsel

//s//

ROBERT T. KINCAID III
Major, U.S. Army
Detailed Defense Counsel

//s//

WENDALL H. HALL
Major, U.S. Army
Detailed Defense Counsel

//s//

KEITH B. LOFLAND,
Lieutenant Commander, JAGC,
U.S. Navy
Detailed Defense Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on 1 July 2016, I filed AE 059 with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record via e-mail as required by the Rules. As such, per the “mailbox rule,” service upon the Government is deemed effective and successful upon sending the document as an attachment to an e-mail sent via the Government’s own e-mail system.

//s//

ROBERT T. KINCAID III
Major, U.S. Army
Detailed Defense Counsel

ATTACHMENT B

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA	Exhibit to AE 054X
v.	Supplement to the Defense Motion For A Continuance
ABD AL-HADI AL-IRAQI	19 January 2016

**AFFIDAVIT OF MR. BRENT RUSHFORTH REGARDING THE SECURITY
CLEARANCE PROCESS**

District of Columbia)
) SS:
City of Washington)

Before me, the undersigned notary public, this day, did personally appear Brent Rushforth, an individual known to me, who, being duly sworn according to law, deposes and states the following:

I, Brent Rushforth, have filed of record my Notice of Appearance as Pro Bono Civilian Counsel, following my due designation as such by, Brigadier General John G. Baker, United States Marine Corps, Chief Defense Counsel, Military Commissions Defense Organization (MCDO). Although I have filed my appearance with this Commission, I have been unable to either travel to Cuba or to meet with my client and remain unable to effectively represent the Accused. In support of that statement, I affirmatively state under oath the following:

1. That as of this date, the status of my security clearance application is as follows:
 - a. In late August or early September 2015, I received a call from the Department of Justice (DoJ) advising me that my previously granted habeas corpus proceedings-related security clearance was about to expire and asking whether I wanted to update it. I asked them to please process the update. Shortly thereafter Major (MAJ) Robert Kincaid contacted me in September

2015 inquiring into whether I was still interested in and available to assist in representing a GTMO detainee in a pro bono capacity, to which I responded affirmatively.

b. After discussing the pro bono representation issue with MAJ Kincaid, I spoke with Captain (CAPT) Brent Filbert, JAGC, USN, Deputy Chief Defense Counsel, MCDO about the position. I then contacted the DoJ Security Office officials with whom I had previously spoken to inquire into the status of my security clearance renewal.

c. Shortly thereafter, on or about 8 December, 2015, General John Baker, the Chief Defense Counsel, formally designated me a member of the Pool of qualified civilian attorneys. I then submitted all required security clearance documents, on or about 9 December 2015, via USPS, first class postage prepaid thereon, as directed by my Military Commissions Defense Organization point of contact, Lieutenant (LT) Tia Suplizio, JAGC, USN, to the Department of Defense (DoD), using the following Pentagon mailing address:

Mr. [REDACTED]
Military Commissions Defense Organization
1620 Defense Pentagon
Washington, D.C., 2301-1620

d. On or about 11 December 2015, Mr. [REDACTED] who I believe introduced himself as being with Pentagon Security, called my office and stated that he had received the packet at the Pentagon and had no idea to whom it should be delivered. He was not familiar with either the address or "Mr. [REDACTED]" and when told to send it to the Office of Military Commissions, he stated he didn't know how to get it to them.

e. I immediately engaged MAJ Kincaid, who called and e-mailed Mr. [REDACTED] and arranged for one of his Paralegals, SGT [REDACTED] who was already at the Pentagon that day, to retrieve the package. Upon receipt of the package, MAJ Kincaid notified me that SGT [REDACTED] had delivered it to Mr. [REDACTED] who forwarded it to the Mark Center for processing. The Mark Center is the building housing the Office of Military Commissions Headquarters and the Convening Authority.

f. On or about 8 December 2015, CAPT Brent Filbert, USN, sent a memorandum to the Assistant Director For Personnel Security, WHS, via the Convening Authority requesting that Mr. Rushforth, "as an approved pro bono civilian counsel for high value detainee, Mr. Hadi al-Iraqi," be granted an approved security clearance. CAPT Filbert specifically mentioned the "court-ordered deadline to obtain a security clearance." As a precaution, the same memo addressing Mr. Rushforth CAPT Filbert re-submitted the packet on or about 11 December 2015, this time to COL [REDACTED] USA, explaining that CAPT Filbert had been advised to send "...all security clearances like these..." to the "...CAs office before they go to the WHS..." and further stating that he didn't understand why.

g. On or around 4 January, 2016, I received a call from the DoD's Mr. [REDACTED] who advised that he was the individual responsible for moving my security clearance application to completion.

h. Mr. [REDACTED] further advised that he had no record of my application having been submitted or being processed by the DoD, to which I responded by stating that I was surprised given that I and several of my references had already been interviewed by numerous FBI agents who advised that they were working on my background clearance update.

i. I immediately called Mr. [REDACTED] whom I know from past experience to be in charge of DoJ Security. As stated above, due to my prior habeas corpus litigation experience, this is not my first high-level security clearance. Mr. [REDACTED] advised that the DoJ had in fact been working on my clearance since my call back in September. I asked him if he could transfer the entire packet to the DoD's Mr. [REDACTED] and he told me to have Mr. [REDACTED] call his office to work out the transfer. Mr. [REDACTED] stated that my DoJ point of contact was Ms. [REDACTED]

j. I then called DoD's [REDACTED] and told him that the DoJ would gladly transfer the paperwork and gave him both Mr. [REDACTED] and Ms. [REDACTED] DoJ contact information.

k. About one week later, approximately 11 January 2016, I called DoD's Mr. [REDACTED] about the status of my clearance and he stated that he called the DoJ point of contact several times and had left messages, but there was no return call. He stated that he would try again.

l. Approximately two days later, DoD's Mr. [REDACTED] called me and said that he had reached DoJ's Ms. [REDACTED] and asked her to send the paperwork that DoJ possessed to the DoD, where Mr. [REDACTED] would finish the investigation and get my TS and other clearances issued. Ms. [REDACTED] told the DoDs Mr. [REDACTED] that there were numerous bureaucratic reasons why that could not be done, despite her superior's (Mr. [REDACTED]) statements to the contrary.

m. At this writing, to the best of my knowledge, my security clearance is stuck in government limbo—probably still at the DoJ when it needs to be at the DoD and the DoD seems powerless to retrieve it, nor will it issue me the clearances I need to do my job as Pro Bono Counsel for the Accused in the case of U.S. v. Abd al-Hadi al-Iraqi.

2. I have in total placed between three or more calls to the DoJ (Mr. [REDACTED]) and another five or more calls to the DoD (Mr. [REDACTED]). As far as I know, the investigation continues at the DoJ and DoD has received nothing, despite my paperwork having been submitted directly to the designated DoD component on or around 9 December 2015.

3. I can literally do nothing else and I find it quite telling, if not disturbing, that the DoD representative, Mr. [REDACTED] asked me if I could inquire with the Office of Military Commissions to have that agency attempt to exert some influence on getting the DoJ and DoD—both federal government agencies—to both speak to and cooperate with each other because he [REDACTED] is powerless to make anything happen.

4. Perhaps the most disturbing aspect of this whole experience is that it appears that the paperwork I submitted to the DoD has disappeared after being first mis-delivered by the Pentagon mail and security office. Indeed, it appears that all the progress made thus far in obtaining my security clearance update is due entirely to my own efforts with, by and through the DoJ. Had I

not reached out to them in September to facilitate this process, I—and most importantly, my client—would still be waiting on the DoD to process paperwork that they have either lost, have failed to process, or have yet to receive despite it being sent to and delivered to them.

Further, you Affiant sayeth naught.

Dated 19 January, 2016, at 12⁰⁰ o'clock, p. m.

Brent D. Rushforth

Brent Rushforth

Subscribed and sworn to before me this 19th day of January, 2016.

Michael Newton Notary Public



Commission Expires: 11-14-16

MICHAEL NEWTON
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires November 14, 2016

ATTACHMENT C

Kincaid, Robert T III MAJ OSD OMC Defense

From: Kincaid, Robert T III MAJ OSD OMC Defense
Sent: Thursday, June 30, 2016 3:42 PM
To: 'DOUGLAS2'
Cc: FELICEJV; Kevin L. Flynn; BRIANVS; KRISTYNN; [REDACTED]
[REDACTED] Capt USMC (US); Spitler, Lindsey Off-site; Brent Rushforth; Catherine Moore; Erwin Chemerinsky, Hall, Wendall H MAJ USARMY OSD OMC (US); Jimmy Szymanski; Lofland, Keith B LCDR USN (US); Robert Palmer; Robert Palmer
Subject: RE: [Non-DoD Source] RE: Pre-Filing Conference
Attachments: RE: [Non-DoD Source] RE: Pre-Filing Conference

Sir:

The government will be quoted in all its glory.

MAJ K

Kincaid, Robert T III MAJ OSD OMC Defense

From: DOUGLAS2 <DOUGLAS2 [REDACTED]>
Sent: Thursday, June 30, 2016 3:37 PM
To: Kincaid, Robert T III MAJ OSD OMC Defense
Cc: FELICEJV; Kevin L. Flynn; BRIANVS; KRISTYNM; [REDACTED]
[REDACTED] Capt USMC (US); Spitler, Lindsey Off-site; Brent Rushforth; Catherine Moore; Erwin Chemerinsky; Hall, Wendall H MAJ USARMY OSD OMC (US); Jimmy Szymanski; Lofland, Keith B LCDR USN (US); Robert Palmer; Robert Palmer
Subject: RE: [Non-DoD Source] RE: Pre-Filing Conference

MAJ Kincaid,
This is a position that is consistent with the R.M.C. Please be sure to include our position, from my last email, in the Certificate of Conference, should you choose to file a motion.

In any event, I hope your whole team has a great Fourth of July.
R, CDR Short

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

From: Kincaid, Robert T III MAJ OSD OMC Defense [mailto:Robert.Kincaid [REDACTED]]
Sent: Thursday, June 30, 2016 3:28 PM
To: DOUGLAS2 <DOUGLAS2 [REDACTED]>
Cc: FELICEJV <felicejv [REDACTED]>; Kevin L. Flynn <KEVINLF [REDACTED]>; BRIANVS <brianvs [REDACTED]>; KRISTYNM <kristynm [REDACTED]>; [REDACTED] Capt USMC (US); [REDACTED]; LINDSERS <LINDSERS [REDACTED]>; Brent Rushforth <brushforth@mckoolsmith.com>; Catherine Moore <moore.catherine7@gmail.com>; Erwin Chemerinsky <echemerinsky@law.uci.edu>; Hall, Wendall H MAJ USARMY OSD OMC (US) <wendall.h.hall [REDACTED]>; Jimmy Szymanski <jgszymanski@aol.com>; Lofland, Keith B LCDR USN (US) <Keith.Lofland [REDACTED]>; Robert Palmer <rlp378@icloud.com>; Robert Palmer <RPalmer@mckoolsmithhennigan.com>
Subject: RE: [Non-DoD Source] RE: Pre-Filing Conference

Roger, Sir. Sadly, the Government's reversal on this issue was unfortunately all too predictable.

V/R,

ROBERT T. KINCAID, III
MAJ, USA
Defense Counsel

Military Commissions Defense Organization Office of Military Commissions

Work: (703) 696-9490 [REDACTED]
BB: [REDACTED]
GTMO: [REDACTED]
robert.kincaid [REDACTED]
robert.t.kincaid [REDACTED]

Kincaid, Robert T III MAJ OSD OMC Defense

From: Kincaid, Robert T III MAJ OSD OMC Defense
Sent: Thursday, June 30, 2016 3:28 PM
To: 'DOUGLAS2'
Cc: 'FELICEJV'; 'Kevin L. Flynn'; 'BRIANVS'; 'KRISTYNM'; [REDACTED]
[REDACTED] Capt USMC (US); Spitler, Lindsey Off-site; 'Brent Rushforth';
'Catherine Moore'; 'Erwin Chemerinsky'; Hall, Wendall H MAJ USARMY
OSD OMC (US); 'Jimmy Szymanski'; Lofland, Keith B LCDR USN (US);
'Robert Palmer'; 'Robert Palmer'
Subject: RE: [Non-DoD Source] RE: Pre-Filing Conference
Attachments: RE: [Non-DoD Source] RE: Pre-Filing Conference

Roger, Sir. Sadly, the Government's reversal on this issue was unfortunately all too predictable.

V/R,

ROBERT T. KINCAID, III
MAJ, USA
Defense Counsel

Military Commissions Defense Organization Office of Military Commissions
Work: (703) 696-9490 Ext. [REDACTED]
BB: [REDACTED]
GTMO: [REDACTED]
robert.kincaid [REDACTED]
robert.t.kincaid [REDACTED]

Kincaid, Robert T III MAJ USARMY OSD OMC (US)

From: DOUGLAS2 <DOUGLAS2 [REDACTED]>
Sent: Thursday, June 30, 2016 3:19 PM
To: Kincaid, Robert T III MAJ USARMY OSD OMC (US)
Cc: FELICEJV; Kevin L. Flynn; BRIANVS; KRISTYNM; [REDACTED]; [REDACTED] Capt USMC (US); LINDSERS; Brent Rushforth; Catherine Moore; Erwin Chemerinsky; Hall, Wendall H MAJ USARMY OSD OMC (US); Jimmy Szymanski; Lofland, Keith B LCDR USN (US); Robert Palmer; Robert Palmer
Subject: RE: [Non-DoD Source] RE: Pre-Filing Conference

MAJ Kincaid,

Upon closer review of the Rules for Military Commission ("R.M.C."), and reviewing your proposed motion again, the Government objects to requiring a recording of all conferences under R.M.C. 802. The R.M.C. does not require the recording and transcribing R.M.C. 802 conferences, and R.M.C. 802(b) specifically states that "[c]onferences need not be made part of the record." While the Government would not object if the Military Judge, in his sole discretion, determines it is appropriate to record and/or transcribe some or all R.M.C. 802 conferences in this case, it is simply not required by the rules. The Government position is that R.M.C. 802 provides numerous safeguards for the parties. Part of this consideration is that 802 conferences often involve personal issues that certainly should not be part of a record (i.e. if an attorney has an illness or death in the family).

You should have enough time to request an AE # to file for tomorrow.

R,
 Douglas J. Short
 CDR, JAGC. USN
 Deputy Trial Counsel
 Office of the Chief Prosecutor
 for Military Commissions

O: [REDACTED]

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

From: Short, Douglas J CDR USN (US) [mailto:douglas.j.short4 [REDACTED]]
 Sent: Thursday, June 30, 2016 10:12 AM
 To: Kincaid, Robert T III MAJ USARMY OSD OMC (US) <robert.t.kincaid [REDACTED]>; DOUGLAS2 <DOUGLAS2 [REDACTED]>
 Cc: FELICEJV <felicejv [REDACTED]>; Kevin L. Flynn <KEVINLF [REDACTED]>; BRIANVS <brianvs [REDACTED]>; KRISTYNM <kristynm [REDACTED]>; [REDACTED] Capt USMC (US); [REDACTED] LINDSERS <LINDSERS [REDACTED]>; Brent Rushforth <brushforth@mckoolsmith.com>; Catherine Moore <moore.catherine7@gmail.com>; Erwin Chemerinsky <echemerinsky@law.uci.edu>; Hall, Wendall H MAJ USARMY OSD OMC (US)

<wendall.h.hall [REDACTED]>; Jimmy Szymanski <jgszymanski@aol.com>; Lofland, Keith B LCDR USN (US) <keith.lofland [REDACTED]>; Robert Palmer <rlp378@icloud.com>; Robert Palmer <RPalmer@mckoolsmithhennigan.com>
Subject: Re: [Non-DoD Source] RE: Pre-Filing Conference

Maj Kincaid,
I should be back in the office this afternoon and will get it out to you R, CDR Short

Sent from my BlackBerry 10 smartphone.

Original Message

From: Kincaid, Robert T III MAJ OSD OMC Defense

Sent: Thursday, June 30, 2016 10:08 AM

To: DOUGLASZ

Cc: FELICEJV; Short, Douglas J CDR USN (US); Kevin L. Flynn; BRIANVS; KRISTYNM; [REDACTED]
[REDACTED] Capt USMC (US); Spitler, Lindsey Off-site; Brent Rushforth; Catherine Moore; Erwin Chemerinsky; Hall, Wendall H MAJ USARMY OSD OMC (US); Jimmy Szymanski; Lofland, Keith B LCDR USN (US); Robert Palmer; Robert Palmer
Subject: RE: [Non-DoD Source] RE: Pre-Filing Conference

Commander Short:

Good morning. I previously advised that the Defense liked the idea of a short and sweet motion, re: on-the-record 802s. However, time is running short. Would you mind advising if you plan on circulating today a draft joint motion that you suggested so that it can be filed today or tomorrow?

If not, the Defense will file its own version today.

Thanks!

Rob

Kincaid, Robert T III MAJ OSD OMC Defense

From: Kincaid, Robert T III MAJ OSD OMC Defense
Sent: Tuesday, June 28, 2016 4:44 PM
To: DOUGLAS2
Cc: FELICEJV; Short, Douglas J CDR USN (US); Kevin L. Flynn; BRIANVS; KRISTYNM; [REDACTED] Capt USMC (US); Spitler, Lindsey Off-site; Brent Rushforth; Catherine Moore; Erwin Chemerinsky; Hall, Wendall H MAJ USARMY OSD OMC (US); Jimmy Szymanski; Lofland, Keith B LCDR USN (US); Robert Palmer; Robert Palmer
Subject: Re: [Non-DoD Source] RE: Pre-Filing Conference

Sure, Commander. I am open to suggestions. My draft was just that, a draft.

Let me see your thoughts on paper and we will discuss it on our end.

Thanks.

MAJ K

Sent from my BlackBerry 10 smartphone.

Original Message

From: DOUGLAS2

Sent: Tuesday, June 28, 2016 4:41 PM

To: Kincaid, Robert T III MAJ OSD OMC Defense

Cc: FELICEJV; Short, Douglas J CDR USN (US); Kevin L. Flynn; BRIANVS; KRISTYNM; [REDACTED] Capt USMC (US); Spitler, Lindsey Off-site; Brent Rushforth; Catherine Moore; Erwin Chemerinsky; Hall, Wendall H MAJ USARMY OSD OMC (US); Jimmy Szymanski; Lofland, Keith B LCDR USN (US); Robert Palmer; Robert Palmer

Subject: [Non-DoD Source] RE: Pre-Filing Conference

Major Kincaid,

The Government objects to the motion as currently drafted. When you sent your initial email, the Government was under the impression that this joint filing would be brief and simply request that 802 conferences be recorded and transcribed. ("...it can and will be a short, three to 5 line motion." - your email of 23JUN16). We do not object, generally, to the request of certain 802 conferences being recorded and transcribed, but object to the underlying reasons you discuss for the request. We can send you a draft joint motion that would address the issue of recording 802 conferences. Of course you would be free to file a motion relating to the remaining issues you assert in your proposed joint motion separately.

R,

Douglas J. Short

Send us a draft of the joint motion. I assume we would want to go the more simple route - following a review of the draft, of course.

R, CDR Short

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

From: Kincaid, Robert T III MAJ OSD OMC Defense [mailto:Robert.Kincaid [REDACTED]]
Sent: Thursday, June 23, 2016 11:19 AM
To: DOUGLAS2 <DOUGLAS2 [REDACTED]>
Cc: FELICEJV <felicejv [REDACTED]>; Short, Douglas J CDR USN (US) <douglas.j.short4 [REDACTED]>; Kevin L. Flynn <KEVINLF [REDACTED]>; BRIANVS <brianvs [REDACTED]>; KRISTYNM <kristynm [REDACTED]>; [REDACTED] <[REDACTED]@ [REDACTED]> Capt USMC (US); LINDSERS <LINDSERS [REDACTED]>; Brent Rushforth <brushforth@mckoolsmith.com>; Catherine Moore <moore.catherine7@gmail.com>; Erwin Chemerinsky <echemerinsky@law.uci.edu>; Hall, Wendall H MAJ USARMY OSD OMC (US) <Wendall.Hall [REDACTED]>; Jimmy Szymanski <jgszymanski@aol.com>; Lofland, Keith B LCDR USN (US) <Keith.Lofland [REDACTED]>; Robert Palmer <rlp378@icloud.com>; Robert Palmer <RPalmer@mckoolsmithhennigan.com>
Subject: RE: Pre-Filing Conference

Commander:

Regarding the below, since the Government does not object to the Defense desire to move the Commission to require that all 802 conferences be conducted on the record and transcribed, is the Government willing to participate in a joint motion? If so, it can and will be a short, three to 5 line motion. If not, then we can and will file a regular motion that states that the Government does not object, however, that seems like unnecessary work if an agreeable, joint motion can be filed instead.

Please advise as soon as you can.

Thanks!

MAJ K

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

From: DOUGLAS2 [mailto:DOUGLAS2 [REDACTED]]
Sent: Tuesday, June 21, 2016 7:42 AM
To: Kincaid, Robert T III MAJ OSD OMC Defense
Cc: FELICEJV; Short, Douglas J CDR USN (US); Kevin L. Flynn; BRIANVS; KRISTYNM; [REDACTED] <[REDACTED]@ [REDACTED]> Capt USMC (US); Spitler, Lindsey Off-site; Brent Rushforth; Catherine Moore; Erwin Chemerinsky; Hall, Wendall H MAJ USARMY OSD OMC (US); Jimmy Szymanski; Lofland, Keith B LCDR USN (US); Robert Palmer; Robert Palmer
Subject: [Non-DoD Source] RE: Pre-Filing Conference

MAJ Kincaid,
The Government does not object.
R, CDR Short

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

From: Kincaid, Robert T III MAJ OSD OMC Defense [mailto:Robert.Kincaid [REDACTED]]
Sent: Monday, June 20, 2016 5:15 PM
To: FELICEJV <felicejv [REDACTED]>
Cc: DOUGLAS2 <DOUGLAS2 [REDACTED]>; Short, Douglas J CDR USN (US) <douglas.j.short4 [REDACTED]>;
Kevin L. Flynn <KEVINLF [REDACTED]>; BRIANVS <brianvs [REDACTED]>; KRISTYNM <kristynm [REDACTED]>;
[REDACTED] Capt USMC (US) [REDACTED];
LINDSERS <LINDSERS [REDACTED]>; Brent Rushforth <brushforth@McKoolSmith.com>; Catherine Moore
<moore.catherine7@gmail.com>; Erwin Chemerinsky <echemerinsky@law.uci.edu>; Hall, Wendall H
MAJ USARMY OSD OMC (US) <Wendall.Hall [REDACTED]>; Jimmy Szymanski <jgszymanski@aol.com>;
Lofland, Keith B LCDR USN (US) <Keith.Lofland [REDACTED]>; Robert Palmer <rlp378@icloud.com>; Robert
Palmer <RPalmer@McKoolSmithHennigan.com>
Subject: Pre-Filing Conference

Mr. Viti:

We intend to file a motion soon seeking to have all future 802 sessions conducted on the record and transcribed--as is done with the 9/11 teams. Will the government object to that motion?

Thank you!

MAJ Kincaid