

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Motion
To Compel Discovery
(Eyewitnesses)

15 January 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court.
2. **Relief Sought:** The defense respectfully requests that this Commission order the government to produce the requested discovery, namely the identity and most recent contact information for all eyewitnesses to the events forming the basis for the charges against Mr. Khadr
3. **Overview:** The Defense seeks production of the names and most recent contact information of all eye witnesses to the events that led to Mr. Khadr's arrest and the instant charges against him. The statute and regulations governing this Commission, as well U.S. constitutional precedent and international law, require production of discovery relating to eyewitnesses. The Government has withheld the identity and contact information for as many as approximately forty-three eyewitnesses. The Defense does not know the identity of the individuals present at the events in question, and the government's refusal to produce the requested information impedes the defense's right to "have a reasonable opportunity to obtain witnesses and other evidence" and to examine evidence "material to the preparation of the defense". *See* 10 U.S.C. § 949j; Rule for Military Commission (R.M.C.) 701(c)(1). The government's denial of this discovery request also violates its obligations under R.M.C. 701(j) not to "unreasonably impede the access of another party to a witness or evidence." The Defense therefore moves for an order from the commission to compel the Government to disclose the identity of and contact information for all eyewitnesses to the firefight that led to Mr. Khadr's arrest.
4. **Burden of Proof:** The Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. The Defense, however, need not show by a preponderance of the evidence that the requested discovery is material. *See generally, Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555 (1995) (On review, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").
5. **Facts:**
 - a. The government has provided the Defense with the sworn statements or interview summaries of thirty-two eyewitnesses to the firefight that resulted in the charges at issue here.

Major Groharing stated in an R.M.C. 802 conference held on 9 November 2007 that there were fifty to seventy-five witnesses at the fire.

b. A disclosed eyewitness interview summary indicates that at least one witness provided the Government with contact information current as of December 2005 for eyewitnesses to the events in question. [REDACTED] Report of Investigative Activity (RIA) of 6 Dec 05 at 3 (Attachment A).¹

c. The disclosed eyewitness statements and interview summaries contain inconsistencies.²

e. On 09 November 2007, the defense submitted to the government a request for discovery that sought, among other items, the following: “A list of all eyewitnesses to the events forming the basis for the charges.” (Def. Discovery Req. of 9 Nov 07, ¶ 3(f)) (Attachment D).

f. Trial counsel responded that:

The government has provided the Defense with statements from numerous individuals present at the raid resulting in the capture of the accused. The government will assist the Defense with locating a particular individual upon a Defense showing how they expect the witness testimony will be material to the preparation of the Defense.

(Govt Resp. of 4 Dec 07 to Def. Discovery Req., ¶ 3(f)) (Attachment E).

¹ Major Groharing or other members of the prosecution may have personal knowledge of the identity of the undisclosed witnesses as Major Groharing or another member of the Prosecution was present at sixteen of the twenty-five interviews for which summaries were released to the Defense. *See, e.g.*, Report of Investigative Activity of 6 Dec 05 at 1 (Attachment A).

² For example, two witnesses who state they were positioned near the front door of the compound where the fire occurred have differing accounts as to whether, at the outset of the fight, *grenades* were thrown *from* inside the compound, or whether *a grenade* or *one or two* grenades were thrown *into* the compound. *Compare* Soldier #4 RIA of 7 Dec 05 at 2 (grenades were thrown out of the compound) (Attachment B) *with* [REDACTED] RIA of 7 Nov 05 at 1 (one or two grenades were thrown into the compound) (Attachment C) and [REDACTED] RIA of 6 Dec 2005 at 1 (a grenade was thrown into the compound) (Attachment A). Other witness statements that support one or the other version, don’t mention that issue at all, or state that a grenade was thrown into *and* several were thrown from inside the compound. The statements also differ as to the number of U.S. soldiers wounded at the scene before Combat Air Support was called in.

6. **Argument:**

a. **The M.C.A., R.M.C., Regulations for Trial by Military Commission, the Due Process Clause and International Law Require Disclosure of the Requested Information**

(1) Disclosure is Required Under the Statute, Rules and Regulations Governing Military Commissions

(i) The M.C.A. states that “Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.” *See* 10 U.S.C. § 949j. The Regulation echoes the statute. *See* Regulation for Trial by Military Commissions 17-2(a) (“Pursuant to 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.”).

(ii) Rule 701(c)(1) of the Rules of the Military Commission (“R.M.C.”) requires the government to permit the defense to examine documents and things “within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and *which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial” (emphasis added). The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16³ addressing discovery, for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to “information [that] is at least ‘helpful to the defense of [the] accused.’” *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (“materiality standard is not a heavy burden”) (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would “significantly help [] in ‘uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal’”) (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C.1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the prosecution to turn over any information that is “at least helpful to the defense.” In addition, R.M.C. 701(e)(1) requires the government to disclose “the existence of evidence known to the trial counsel which reasonably tends to ... [n]egate the guilt of the accused of an offense charged.”

(iii) As discussed in more detail in part (b) below, eyewitness testimony is evidence that can assist in impeaching or rebutting aspects of the Government’s case, and is therefore material. *See United States v. Karake*, 281 F.Supp.2d 302, 309 (D.D.C. 2003) (“[W]hen

³ The relevant portion of Federal Rule of Criminal Procedure 16 is nearly identical to R.M.C. 701(c)(1). It states: “Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense.” Fed. R. Crim. Proc. 16(a)(1)(E)(i).

someone has witnessed the offense, disclosure of his or her identity ‘will almost always be material to the defense.’”) (quoting *Harris v. Taylor*, 250 F.3d 613, 617 (8th Cir. 2001)). Thus, it must be disclosed under both R.M.C. 701(c)(1) and R.M.C. 701(e)(1).

(2) Disclosure is required under the Due Process Clause

(i) The disclosure requirement under the R.M.C. 701(c) echoes a fundamental principle of U.S. law: The government’s failure to disclose “evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The government’s duty to disclose such evidence encompasses exculpatory evidence, including impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (characterizing impeachment evidence as exculpatory evidence). Such evidence is “material” “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 682. “The message of *Brady* and its progeny is that a trial is not a mere ‘sporting event’; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory.” *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986); *see also Bagley*, 473 U.S. at 675 (“The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur”).

(ii) The MCA makes *Brady*, at least with respect to exculpatory evidence, applicable to military commissions. *See* 10 U.S.C. § 949j(d)(2). Section 949j(d)(2) of the MCA states that the prosecution must disclose exculpatory evidence that it “would be required to disclose in a trial by general court-martial.” *Brady* governs disclosure of exculpatory evidence in general courts-martial. *Mahoney*, 58 M.J. at 349. Therefore, by virtue of MCA § 949j(d)(2), *Brady* applies to military commissions.

(3) Disclosure is Required Under International Law

(i) The Military Commissions Act (M.C.A.) and the Manual for Military Commissions (M.M.C.) incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions. *See* 10 U.S.C. § 948(b)(f) (“A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”)⁴; R.M.C., Preamble (stating that the Manual for Military Commissions

⁴ Whether military commissions, in fact, comply with common article 3 is ultimately a judicial question that Congress does not have the power to answer. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the *judicial department* to say what the law is.”) (emphasis added). Any congressional attempt to legislative an answer to such a judicial question violates the bedrock separation of powers principle and has no legal effect. *See id.* at 176-77 (“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”). Because a statute should be construed to avoid constitutional problems unless doing so would be “plainly contrary” to the intent of the legislature, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936), the only reasonable interpretation is that § 948(b)(f) is that it requires military commissions to comply with common article 3.

“provides procedural and evidentiary rules that [. . .] extend to the accused all the ‘necessary judicial guarantees’ as required by Common Article 3.”) They must, therefore, be read in light of Common Article 3 and international law surrounding that provision.

(ii) The Geneva Convention Relative to the Treatment of Prisoners of War prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *See* Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Common Article 3. The judicial safeguards required by Common Article 3 are delineated in article 75 of Protocol I to the Geneva Conventions of 1949.⁵ Article 75(4)(g) provides that, “anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf *under the same conditions as witnesses against him.*”⁶ (Emphasis added).

(iii) Read in light of international law principles, precedents applying the U.S. Constitution, and the rules governing this Commission, the Government’s denial of the Defense request for eyewitnesses in this case ignores fundamental concepts of fairness and places in question the integrity of these proceedings.

b. Eyewitnesses Testimony is Potentially Exculpatory or Impeaching Evidence That Must be Disclosed

(1) It is a fundamental notion of American due process – and one that Congress made applicable to military commissions through MCA § 949j(d)(2), *see* discussion *supra* para. 6(a)(2)(ii) – that the Government must produce in discovery evidence favorable to the accused when that evidence is material to guilt. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). It is also well established that a *Brady* violation arises “where the Government fails to disclose impeachment evidence that could have been used to impugn the credibility of the Government’s ‘key witness,’ *see Giglio v. United States*, 405 U.S. 150, 154-55, 92 S.Ct. 763 (1972), or that could have ‘significantly weakened’ key eyewitness testimony. *Kyles*, 514 U.S. at 441, 453, 115 S.Ct. 1555.” *Conley v. United States*, 415 F.3d 183, 189 (1st Cir. 2005).

⁵ *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978 [hereinafter Additional Protocol]. The Protocol has not been ratified by the United States, but the U.S. government has acknowledged that Article 75 is customary international law. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2797 (2006) (stating that the government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled”). *See also* Memorandum from W. Hays Parks, Chief, International Law Branch, DAJA-IA, et. al., to Mr. John H. McNeill, Assistant General Counsel (International), OSD (8 May 1986) (stating art. 75 of Additional Protocol I is customary international law). The Supreme Court has also relied on the Additional Protocol in construing the meaning of Common Article 3 of the Geneva Conventions as applied to military commissions. *See Hamdan*, 126 S.Ct. at 2796.

⁶ The ICTY and the ICTR similarly provide “minimum guarantees” for the accused “to examine, or have examined, the witnesses against [the accused] and to obtain the attendance and examination of witnesses on [behalf of the accused] under the same conditions as witnesses against [the accused].” ICTY Statute, *supra* note 8, art. 21(4)(e); ICTR Statute, *supra* note 7, art. 20(4).

(2) Eyewitness identification is generally recognized as a field wrought with complications. *See, e.g., Watkins v. Sowders*, 449 U.S. 341, 349-51 (1981) (Brennan, J., dissenting) (noting that eyewitness identification evidence has “extraordinary impact,” and detailing Supreme Court’s record of recognizing “the inherently suspect qualities” of such evidence.) Eyewitnesses to events do not necessarily recall the same information, and may witness entirely different aspects of an event. The perceived reliability of eyewitness testimony is the subject of general controversy and challenges at trial.⁷ *See United States v. Mathis*, 264 F.3d 321, 333-43 (3d Cir. 2001) (evaluating eyewitness issues as area of expertise and reversing trial court denial of expert on eyewitness observation); *United States v. Brown*, 49 M.J. 448 (C.A.A.F. 1998) (discussing eyewitness testimony in context of admissibility of expert testimony about eyewitness evidence). Numerous courts, including the U.S. court-martial system, have developed specific jury instructions to guide juries in the use of eyewitness evidence. *See United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (developing and requiring use of jury instruction to govern eyewitness evidence); *see also United States v. McLaurin*, 22 M.J. 310, 312 (C.M.A.1986) (recommending use of jury instruction to address eyewitness testimony, as adopted in *Telfaire*); *United States v. Montebalno*, 605 F.2d 56 (2d Cir. 1979) (recommending adoption of *Telfaire* rule); *United States v. Hodges*, 515 F.2d 650 (7th Cir. 1975) (adopting *Telfaire* policy of requiring eyewitness jury instruction); *United States v. Holley*, 503 F.2d 273 (4th Cir. 1974) (same); Military Judge’s Benchbook (2003 ed.), § 7-7-2 (Military Jury Instruction regarding “Eyewitness identification and interracial identification”). And Supreme Court precedent has consistently guarded the jury from hearing unreliable eyewitness testimony. *See Watkins*, 449 U.S. at 352 (Brennan, J. dissenting) (outlining Supreme Court precedent limiting use of eyewitness evidence).

(3) Eyewitness evidence is invariably potential *Brady* evidence: one eyewitness may inculcate an individual, while another eyewitness’ perspective may provide exculpatory information; an eyewitness may contradict discrete but critical facts offered by another witness (for example in describing an alleged perpetrator); or, an eyewitness may fully challenge another’s testimony. It is entirely appropriate, therefore, to request in discovery all eyewitnesses, particularly where the Government has made clear it will introduce in evidence the testimony of eyewitnesses.⁸ Failure to provide access to all eyewitnesses *ab initio* deprives the Defense of a fair trial.⁹

⁷ Indeed, one eyewitness, Major [REDACTED], had three versions of what occurred immediately after the grenade was allegedly thrown. On 27 August 2002, Major [REDACTED] wrote an after action report stating that the person who allegedly threw a grenade that killed Sgt Speer was shot by US Forces but did not die. After Action Report of 27 July 2002, at 00766-000586 (Attachment F). The next day, Major [REDACTED] prepared another report. This time he stated the person who allegedly threw a grenade that killed Sgt Speer was killed by US Forces. Memo re Operation to Postively Identify And Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 Jul 02, at 00766-001768 (Attachment G). Another version of this report does not indicate whether the person who allegedly threw the grenade that killed Sgt Speer was dead or alive after being shot by US Forces. Memo re Operation to Postively Identify And Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 Jul 02, at 00766-001655 (Attachment H).

⁸ The Defense notes that a request for favorable information is not necessary in view of the government’s established disclosure obligations that require the release of discovery where impeachment or exculpatory evidence is at issue. *See Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555 (1995) (analyzing *Brady*

(4) Here, there are dozens of eyewitnesses to the central event at issue, namely the firefight that resulted in Mr. Khadr's arrest. The Government is withholding the names and contact information from as many as forty-three eyewitnesses. Considering the plethora of case law addressing the complications involved with eyewitness testimony (as noted above), coupled with the fact that the government is selectively calling certain eyewitnesses to testify at trial, the Defense's request for discovery regarding remaining eyewitnesses is patently material. *Cf. Strickler*, 537 U.S. at 293 ("We recognize the importance of eye-witness testimony."); *Watkins*, 449 U.S. at 352 (Brennan, J. dissenting) ("much eyewitness identification evidence has a powerful impact on juries."). The statements the Defense has received contain conflicting and different observations, and indicate these witnesses were not all in the same location with the same vantage point of events. The Defense therefore must be afforded the opportunity to interview every eyewitness to determine whether any favorable evidence is available. In light of the particularly subjective nature of eyewitness information, obstructing the Defense from interviewing every eyewitness will ensure that the Defense cannot adequately prepare for this trial, and will thereby undermine confidence in any eventual result. *Cf. Kyles*, 514 U.S. at 434 (defining fair trial "as a trial resulting in a verdict worthy of confidence."); *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (same).

c. Conclusion

(1) The Supreme court has said "that the United States Attorney is 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Strickler*, 537 U.S. at 281 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). When the prosecution reserves to itself the determination of what evidence ought be considered, it disregards its duty to seek justice, and usurps the role of the court, defense counsel and the trier of fact. *Cf. Brady*, 373 U.S. at 87-88, n. 2. The integrity of these proceedings will be fatally undermined if the defense is not afforded the opportunity to independently investigate the factual allegations at issue in the case. At a minimum, this requires that the defense be allowed to know the identities of individuals who witnessed and/or participated in the 27 July 2002 firefight. The Commission should therefore grant the requested relief.

and affirming that violation of Government's disclosure obligations is implicated even where the Defense never makes a request for favorable evidence). The Defense reminds the Government that its discovery obligation is on-going. *See* R.M.C. 701(a)(5).

⁹ As the military judge is aware, just before the arraignment in this case that was held on 8 November 2008, the Government revealed that it had inadvertently discovered that one of the eyewitnesses not previously disclosed to the defense possessed potentially exculpatory information. Had the Government not inadvertently discovered this evidence, the defense would never have known of the witness's existence, let alone the information he possessed.

Disclosure of all eyewitnesses is particularly important here, where "other government agencies" told the prosecutors in the Office of Military Commissions that any exculpatory information would be withheld from the prosecutors. Capt Carr email of 15 Mar 04 (Attachment I) ("In our meeting with OGA, they told us that the exculpatory information, if it existed, would be in the 10% that we will not get with our agreed upon searches).

7. **Oral Argument:** The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that “Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions.” Oral argument will allow for thorough consideration of the issues raised by this motion.

8. **Witnesses:** The Defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the Prosecution’s response raise issues requiring rebuttal testimony.

9. **Conference:** The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

10. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

11. Attachments:

- A. [REDACTED] Report of Investigative Activity of 7 Dec 05
- B. Soldier #4 Report of Investigative Activity of 7 Dec 05
- C. [REDACTED] Report of Investigative Activity of 7 Dec 05
- D. Defense Discovery Request of 9 November 2007
- E. Government response of 4 December 2007 to Defense Discovery Request of 9 November 2007
- F. After Action Report of 27 July 2002
- G. Memo re Operation to Positively Identify and Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 July 2002, Bates No. 00766-001766-70
- H. Memo re Operation to Positively Identify and Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 July 2002, Bates No. 00766-001653-57
- I. Captain Carr and Major Preston emails of March 2004

/s/
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LCDR, USN
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Rebecca S. Snyder
Assistant Detailed Defense Counsel

MILITARY COMMISSION

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Discovery Request

9 November 2007

1. The accused, Omar Khadr, by and through his detailed defense attorney, hereby requests that the government produce and permit the defense to inspect, copy, or photograph each of the items listed in the sections below. The defense requests that the government notify the defense in writing which specific items or requested information or evidence will not be provided and the reason for denial of discovery. The specific items listed below are examples, not limitations, of the items requested under a cited provision. The requested evidence is material to the preparation of the defense and/or is exculpatory. Defense counsel cannot properly provide effective assistance of counsel, nor prepare for trial, without production of the documents and items requested. The requested information is known, or should, with the exercise of due diligence, be known to the United States or its agents. If the government does not intend to provide defense with copies of documents or tangible objects the defense requests a reasonable opportunity to inspect, photograph and photocopy such documents or objects.

DOCUMENTS AND TANGIBLE EVIDENCE

2. All papers which accompanied the charges at preferral and referral, specifically to include, but not be limited to:
 - a. The charge sheet and all allied papers, transmittal documents accompanying the charges from one headquarters to another, or which accompanied the charges when they were referred to a military commission;
 - b. Any sworn or signed statement relating to an offense charged in this case;
 - c. All law enforcement reports whether prepared by military or civilian law enforcement personnel;
 - d. Any order purporting to refer the charges to a military commission, convening order, any pretrial advice given in conjunction with such an order, or any order appointing and describing the duties of the convening authority;
 - e. Any other qualifying document, order, or statement described in R.M.C. 701(b)(1)(A).
3. Any books, papers, documents, photographs, or copies or portions thereof and the opportunity to inspect tangible objects, buildings, or places that are in the possession,

custody, or control of military authorities, and that are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case in chief, or were obtained from or belong to the accused. R.M.C.701(c)(1). The foregoing shall include, but not be limited to:

- a. All drafts of FBI “302” forms and CITE “40” forms provided to the defense.
- b. All materials in the possession, custody or control of the government, including, without limitation, intelligence, law enforcement, or other files, relating to the participation of the following individuals in the conspiracy alleged in Charge III:
 - i. Usama Bin Laden
 - ii. Ayman Al Zawahiri
 - iii. Sayeed Al Masri
 - iv. Saif Al Adel
 - v. Ahmed Said Khadr
- c. All materials within the possession, custody and control of the government relating to the investigation and prosecution of [REDACTED].
- d. All materials within the possession, custody and control of the government relating to the investigation and/or prosecution of other individuals for detainee mistreatment or abuse at Bagram Airbase, Afghanistan, between July 2002 and November 2002.
- e. All materials within the possession, custody, and control of the government relating to or describing events forming the basis for the charges, including, but not limited to, reports prepared by a non-DoD federal agency referenced in discussions between the prosecution and defense on or about 6 November 2007.
- f. A list of all eyewitnesses to the events forming the basis for the charges.
- g. Any handwritten statement prepared by the accused.
- h. All results of any interrogations or interview of the accused.
- i. Any videotape, real-time, or other imagery relating to the events forming the basis for the charges, including, without limitation, any videotape, “gun camera” footage or other recording of said events. R.M.C.701(c)(1).
- j. Any physical evidence seized from the site of the 27 July 2002 firefight at or near Khost, Afghanistan, including, but not limited to, circuit boards, watches, or other materials allegedly used to manufacture explosive devices. R.M.C.701(c)(1).
- k. Any video or audio tape recording of any interrogation or interview of the accused by any person or entity, including, but not limited to, any video or audio tape recording

of interviews by Canadian intelligence and/or law enforcement officials.
R.M.C.701(c)(1).

- l. Shrapnel, or other physical evidence seized from the bodies of Christopher Speer and the two Afghan Military Force members identified in the overt acts alleged in Charge III. R.M.C. 701(c)(1).
 - m. All interrogation manuals, directives, instructions and other policy guidance issued by any agency involved in any aspect of the intention and interrogation of the accused or of any other witness in the case, including individuals whose statements the government provides to the defense through discovery.
4. Any death investigations, homicide reports, pathology reports and all other evidence relating to the deaths of Christopher Speer and the two Afghan Military Force members identified in the overt acts alleged in Charge III. R.M.C. 701(c)(1).
 5. The defense requests notification of testing upon any evidence that may consume the only available samples of the evidence and an opportunity to be present at any such testing; and an opportunity to examine all evidence, whether or not it is apparently exculpatory, prior to its release from the control of a government agency or agents. *United States v. Mobley*, 31 MJ. 273, 277 (C.M.A. 1990); *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986).
 6. Please provide all chain of custody documents or litigation packets generated by any law enforcement or military agency in conjunction with the taking or testing of evidence during the investigation of the alleged offenses.
 7. Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, that are within the possession, custody, or control of military authorities at all any level, the existence of which is known, or by the exercise of due diligence may become known, to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case in chief at trial. R.M.C. 701(c)(2). This specifically includes, but is not limited to:
 - a. Copies of the records of any and all medical screenings, physicals, examinations, mental health evaluations, as well as notes prepared by any treating physician, physician's assistant, medic, psychiatrist, psychologist, chaplain, counselor, or other person who has examined the mental or physical condition of the accused at any time since he entered the custody of the United States, including, but not limited to, all files on the accused created or kept by the "Behavioral Sciences Team" mentioned in the document identified by Bates number 00766-012575.
 - b. The defense does not authorize the government to review or examine any such reports, notes, or other documents as they may be covered by M.C.R.E. 503 or 513, by M.C.R.E. 302, or by common-law privileges and privacy interests with respect to medical treatment. The defense does, however, request that the government order any such material turned over to the defense and provide contact information for any person who obtained or created such reports or other materials.

8. Any statement - oral, written, or recorded - made or adopted by the accused, that are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial. R.M.C. 701(c)(3).
9. All written material that will be presented by the government as evidence at the presentencing proceedings. R.M.C. 701(d)(1).
10. All writings or documents used by a witness to prepare for trial, to include any writings or documents used by any witness to refresh memory for the purpose of testifying, either while testifying or prior to testifying. M.C.R.E. 612.
11. A photocopy of the entire CITF or other investigative files, to include all case notes, case agent summaries, interim, final and supplemental CITF reports, interrogation reports, photographs, slides, diagrams, sketches, drawings, electronic recordings, handwritten notes, interview worksheets, and any other information in the CITF case file or associated with this case, including the files of any other government agency not a part of CITF. Additionally, the defense requests the names, current addresses, and current telephone numbers and email addresses of all government and civilian investigators who have participated in the investigation. R.M.C. 701(b)(1)(C); R.M.C. 701(b)(2).

STATEMENTS AND WITNESSES

12. All statements, in any form to include, but not limited to, hand-written, typed or recorded statements or summaries of conversations, concerning the offenses that are in the possession of the government. This includes all statements of any person, not just the accused or potential government witnesses, taken by or given to any person or agency including all civilian or military law enforcement agencies, inspector general investigations, intelligence agencies, military units, or any other agency or person involved in this case. R.M.C. 701(b)(1)(C); R.M.C. 701(c)(1); R.M.C. 701(c)(3).
13. Provide all oral and written statements made by government witnesses relating to this case, R.M.C. 914, 18 U.S.C. § 3500 et. seq.
14. Provide the names, addresses and telephone numbers (commercial and DSN, if applicable) of all witnesses the government intends to call to rebut a defense of alibi or lack of mental responsibility. R.M.C. 701(b)(2)(B). At this time, the defense does not claim that the accused has an alibi defense or that the accused lacked mental responsibility at the time of the charged offense. If such a defense becomes known, the defense will notify the government. The defense cannot make a determination about the latter defense until the government has complied with all discovery requested in paragraph 4 of this request.
15. Provide all hearsay statements, oral or written, intended to be offered at trial under M.C.R.E. 803. Please provide notice of the intent to offer the statement and “the particulars of the evidence” including the time, place and conditions under which the statement was obtained, the name of the declarant and the declarant’s telephone numbers and address. M.C.R.E. 803(b).

16. Provide information concerning any immunity or leniency granted or promised by any government witness in exchange for testimony. R.M.C. 701(c)(1); M.C.R.E. 301(c)(2).
17. Any intent by the government to invoke R.M.C. 701(f) or M.C.R.E. 505 or 507, as well as the purpose and rationale supporting the invocation of such a privilege. If the government does invoke such privilege, the defense requests immediate compliance with R.M.C. 701(f)(3), 701(f)(5), and 701(f)(6). The defense intends to challenge the government's use of this privilege and, in order to prepare for litigation of the matter, requests the production of summaries of the evidence as contemplated by R.M.C. 701(f)(3) and 701(f)(5).
18. The identity, including name, address, and telephone number, of any informants and/or notice of a government's intent to exercise privilege under M.C.R.E. 507.
19. Disclose all evidence affecting the credibility of government witnesses to include, but not limited to:
 - a. Prior civilian and court-martial conviction and all arrests or apprehension of government witnesses. In complying with this discovery request, the defense requests the government check with the National Crime Information Center (NCIC), National Records Center (NRC), and all local military criminal investigatory organizations for each witness. *United States v. Jenkins*, 18 M.J. 583, 584-585 (A.C.M.R. 1984); R.M.C. 701(c).
 - b. Records of nonjudicial punishment, or adverse administrative actions (pending and completed), whether filed in official files or local unit files including, but not limited to, discharge prior to expiration of term of service for any reason, relief for cause actions, letters or reprimand or admonition and negative counseling relating to adverse or disciplinary actions concerning any government witness. R.M.C. 701(c).
 - c. All investigations of any type or description, pending initiation, ongoing or recently completed that pertain to alleged misconduct of any type or description committed by a government witness. *United States v. Stone*, 40 MJ. 420 (C.M.A. 1994); R.M.C. 701(c).
 - d. All evidence in control of or known to the United States concerning the mental status of the accused or any government witness. *United States v. Green*, 37 MJ. 88 (C.M.A. 1993). Material sought includes, but is not limited to, medical records reflecting psychiatric diagnosis or treatment or head injury of any type and drug and/or alcohol addiction diagnosis or rehabilitation records. *United States v. Brakefield*, 43 C.M.R. 828 (A.C.M.R. 1971); *United States v. Brickey*, 8 M.J. 757 (A.C.M.R. 1980) affirmed 16 M.J. 258 (C.M.A. 1983); *United States v. Eschalomi*, 23 M.J. 12 (C.M.A. 1985); R.M.C. 701(c)(2).
 - e. Evidence of character, conduct or bias bearing on the credibility of government witnesses in the control of or known to the United States including, but not limited to: information relating to any past, present, or potential future plea agreements, immunity grants, payments of any kind and in any form, assistance to or favorable treatment with respect to any pending civil, criminal, or administrative dispute

between the government and the witness, and any other matters that could arguably create an interest or bias in the witness in favor of the government or against the defense or act as an inducement to testify to color or shape testimony. *Giglio v. United States*, 405 U.S. 15 (1972); R.M.C. 701(c).

- f. The current and, if applicable, the former military status of all witnesses to include: the date of separation, the discharge status and a summary of the circumstances explaining any discharge; further, please provide copies of the each government military witnesses' counseling file. R.M.C.701(c).
 - g. Copies of the official civilian personnel file of any government witness that is a civilian employee of the United States. R.M.C.701(c).
 - h. The results of any polygraph examinations, including the Polygraph Examiner Report and related polygraph records, the Polygraph Consent Form, the Polygraph Examination Authorization Request, the Polygraph Examination Quality Control Review and any rights certificate executed by the examiner and the subject. *United States v. Mougenel*, 6 M.J. 589 (A.F.C.M.R 1978); *United States v. Simmons*, 38 M.J. 376 (C.M.A.1993); R.M.C. 701(c).
 - i. Any writing or document used by a witness to prepare for trial. M.C.R.E. 612.
 - j. The contents of all CITF accreditation files for all CITF investigators who have participated in investigations relating to this case, and similar such files for agents of any other government agency who have have participated in investigations relating to this case. R.M.C.701(c).
20. A copy of the Official Military Personnel File (OMPF) of all witnesses intended to be called by the Government on the Government's case in chief or during the pre-sentencing phase of the trial. R.M.C.701(c)(1).
21. Notice of whether the government intends to impeach any witness with a conviction older than ten years. M.C.R.E. 609(b).

EVIDENCE REGARDING ACCUSED

22. The defense requests the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel and within control of the armed forces, regardless whether the government intends to use the statements at trial. M.C.R.E. 304(d)(1); *United States v. Dancy*, 38 M.J. 1, 4 (C.M.A. 1993).
23. Notice of all evidence seized from the person or property of the accused or believed to be owned by the accused that is intended to be offered at trial.
24. Evidence of any prior identification of the accused at a traditional line up, photo line up, show up, voice identification or other identification process that the government intends to offer against the accused at trial, or failure or misidentification of the accused at any such procedure. R.M.C. 701(c)(1); R.M.C. 701(b)(1)(C); R.M.C. 701(b)(2); R.M.C. 701(e).

25. Provide notice of the general nature of evidence of other crimes, wrongs, or other misconduct, the government intends to offer at trial as well as the government's theory of admissibility concerning the prior conduct. M.C.RE. 404(b).
26. All documents or information regarding any mistreatment of Mr. Khadr at the hands of U.S. or Allied Armed Forces, civilians or contractors of which the government is aware. This includes any recorded allegation of such mistreatment made by the accused, any witness to the mistreatment, or any non-governmental organization (e.g., the International Committee for the Red Cross) that purports to document allegations of mistreatment. M.C.R.E. 304, R.M.C. 701(e).
27. All documents and information related to the capture and/or detention of the accused. This includes documents and information regarding the circumstances of capture, transfer to U.S. authorities (if applicable), subsequent transfers between places of detention (to include means, methods and dates of transfer), the identity of all U.S. Military units and individuals responsible for and involved in his detention, all records regarding the accused's detention up to and including Guantanamo Bay Naval Station, Cuba, and conditions of detention. This should include a detailed chronology showing each and every place in which the accused has been held in confinement from the time of his capture in Afghanistan to the present date. R.M.C. 701(c).
28. The names, duty positions, and contact information of all personnel who ordered, supervised, or directed the confinement of the accused from the time of his capture in Afghanistan to the present date. R.M.C. 703; R.M.C. 701(e).
29. The names, duty positions, and contact information of all personnel who interrogated, questioned, guarded, or otherwise interacted with the accused since the time of his capture in Afghanistan. R.M.C. 703; R.M.C. 701(e).
30. The defense requests that the government provide all documents related to the conditions under which the accused was held from the time of his capture to the present date. This includes, but is not limited to, all written orders, memoranda, directives, SOPs, or other documents that purport to direct agents of the US government in the manner in which the accused should be treated, fed, housed, and given medical attention. This also includes any information relating to mistreatment, abuse, inhumane treatment or conditions, degrading treatment or conditions, cruel or oppressive treatment or conditions, or torture, that is known, suspected, or alleged to have occurred since the date of the accused's capture in Afghanistan. R.M.C. 701(e); R.M.C. 701(c)(l).
31. All documents and information related to considerations and determinations by the United States or its agents concerning the accused's "status" as a detainee (i.e., whether the accused should be given the status of prisoner of war, unlawful enemy combatant, civilian internee, etc.). R.M.C. 701(c)(l).
32. All documents and information related to considerations and determinations by the United States or its agents concerning whether the United States was in a state of "armed conflict" (as that term is defined under international law) with the Taliban, al Qaeda, or any alleged

terrorist organizations, or any nation-states allegedly sponsoring terrorist organizations from approximately 1990 through the present, and whether any such armed conflict was “international”, “internal/non-international” or “internationalized” (as those terms are defined under international law) in character. R.M.C.701(c)(I).

33. All interrogation techniques used against detainees in Afghanistan, aboard U.S. vessels, or at the U.S. Naval Base in Guantanamo Bay, Cuba, as well as identification of which methods were used against detainees whose statements and/or testimony the prosecution intends to introduce at trial. This includes techniques used against Mr. Khadr, as well as against any other detainee whose statements and/or testimony the prosecution intends to introduce at trial. M.C.R.E. 304, R.M.C. 701(e), R.M.C. 701(c)(I).

OTHER EVIDENCE MATERIAL TO THE PREPARATION OF THE DEFENSE

34. The defense requests all exculpatory, extenuating, or mitigating evidence known, or, which with reasonable diligence should be known, to the trial counsel that tends to negate the guilt of the accused of any offense charged, reduce the guilt of the accused of an offense charged, or reduce the punishment. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1993); *United States v. Kinzer*, 39 M.J. 559 (A.C.M.R. 1994); *United States v. Sebring*, 44 M.J. 805 (N.M. Ct. Crim App. 1996); R.M.C. 701(e).
35. Request all evidence in rebuttal that is exculpatory in nature or material to punishment. *United States v. Trimper*, 460 M.J. 460 (C.M.A. 1989); *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993); R.M.C. 701(e).

COMMISSION MEMBERS AND PRESIDING OFFICER SELECTION

36. The defense requests the personnel files and officer record briefs of each member of the commission. Additionally, defense requests any questionnaires submitted by trial counsel to each member and the member’s responses. R.M.C. 912.
37. All written matters provided to the convening authority concerning the selection of the members detailed to the commission. R.M.C. 912(a)(2).
38. The convening order, all amending orders and all requests to be excused received from commission members and any written documents memorializing the denial or approval of the request. R.M.C. 701(b)(1)(B); R.M.C. 912(a)(2).
39. All documents and information related to the identification, review and appointment of commission members. This request includes all documents and information submitted or considered by agents of the United States, regardless of whether the convening authority or her designees considered such matters. Such documents and information include, but are not limited to, the following:
 - a. The process used to select the pool of potential commission members, the requests and content of verbal requests for potential commission members, and any criteria to

- be included or excluded in selecting the pool of potential commission members (e.g., rank, gender, combat experience, etc.).
- b. Any discussions or interviews of potential commission members that agents of the United States participated in or conducted, including, but not limited to, interview notes.
 - c. Criteria used in selecting commission members including any communication of any kind made to the convening authority that relate to the qualifications, fitness, availability, character, temperament, or other characteristics of any member.
 - d. Any public or private writings or statements made by commission members related to military commissions.
 - e. Any other information bearing on the potential impartiality or bias of commission members. R.M.C. 701(b)(1)(B); R.M.C. 912(a)(2).

JUDICIAL NOTICE

- 40. Provide all matters that the government intends to have judicially noticed. M.C.R.E. 201.
- 41. Provide notice and a legible copy of all law, foreign and domestic, of which the government intends to ask the judge to take judicial notice. M.C.R.E. 201A.

EXPERTS

- 42. The defense requests notice of, and the curricula vitae for, all expert witnesses the government intends to call in its case-in-chief and during pre-sentencing. The defense requests the government disclose the number of times each expert has been qualified as an expert witness in a military or civilian court, the types of court each witness has testified in (civilian or military), the locations (city and state) of each of these courts and the civil and criminal docketed number of each of those cases. The defense further requests disclosure of any information, or evidence considered by the expert prior to testifying. R.M.C. 705.

COMMAND INFLUENCE

- 43. The defense requests all statements, oral or written (including e-mail), made by the convening authority in this case or by any officer (military or civilian) superior to the convening authority, whether written or oral, that:
 - a. withhold from a subordinate commander or from any agent of the government the authority to dispose of the accused's case in a court-martial or federal criminal trial in District Court;
 - b. provide guidance to any civilian or military authority in this case concerning appropriate levels of disposition and punishment of the offenses, to include types and severity of any restrictions on liberty, either made before or after the offenses at issue in this case; or,

- c. indicate that the officer has anything other than an official interest in the matter, *United States v. Jeter*, 35 M.J. 442, 445 (C.M.A. 1992); R.M.C. 923; R.M.C. 1008.

44. Disclosure of any information known to government agents that indicates that a person who forwarded the charges with recommendation is now, or has recently been suspected of committing an offense under the UCMJ. *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994).

INSTRUCTIONS

45. The defense requests the government provide all proposed instructions it intends to request the commission to use in its instructions to the members and the authority for each instruction.

RULES OF PROCEDURE AND EVIDENCE

46. The defense requests that the government produce the following, which is information material to the defense and without which the defense does not believe it can be effective:

- a. Copies of any drafter's analysis, notes, memoranda, emails, circulars, or any other written communication or information regarding the formulation of the rules of procedure and evidence used in these military commissions, how and why rules were drafted as they were, dissents or objections to the formulation, language, construction, or meaning of these rules, and rights provided under these rules.
- b. Sources of law upon which the drafters of these rules relied.
- c. The identity, job description, and contact information of any person involved in, or consulted regarding, the formulation and drafting of these rules.

EVIDENCE REGARDING INDIVIDUALS HELD BY THE UNITED STATES

47. The identity and photographs of all individuals detained by the United States or coalition countries, presently or in the past, who are believed to be associated with al Qaeda, so that these individuals can be screened by the defense and accused to search for potential witnesses. R.M.C. 703.

48. Copies of all message traffic from the capturing unit, from Central Command, or from any higher U.S. authority regarding the "status" under the Geneva Convention, movement and treatment of Mr. Khadr. R.M.C. 703; R.M.C. 701(c)(1).

49. A list of the names and ISN numbers of all released detainees from Naval Base Guantanamo Bay with accompanying photographs. R.M.C. 703.

50. Access to review and copy all records in the possession of the government regarding the accused and any other detainee to which the defense is granted access. R.M.C. 703; R.M.C. 701(c)(1).

EVIDENCE HELD BY THE CANADIAN GOVERNMENT

51. The defense requests your assistance in obtaining the following information under the control of the Canadian government:
- a. Copies of all audio or video recordings of interrogations of the accused conducted by Canadian investigators or diplomatic personnel or in which they participated or observed. R.M.C. 701(c)(3); M.C.R.E. 304.
 - b. Interviews of the Canadian investigators involved in the investigation of the accused. R.M.C. 701(c)(3); M.C.R.E. 304.
 - c. Diplomatic correspondence or other communications between the U.S. and Canadian governments relating to the detention, interrogation, investigation or transfer of the accused.

EVIDENCE OF AND CONTENTS OF MONITORING OF THE ACCUSED IN CONSULTATION WITH HIS COUNSEL OR OF COMMUNICATIONS OF AND BETWEEN COUNSEL

52. The defense requests notice of, reasons for, and the dates, nature, and content of any communication monitored in any way between the accused and his counsel, or any communication between or by counsel for the accused, by any government agency at any time during the processing, trial, or other course of this case. If no such monitoring has occurred, the defense requests a statement to that effect from government counsel.

CONCLUSION

The defense requests equal and adequate opportunity to interview witnesses and inspect evidence. Specifically, the defense requests the trial counsel to instruct all of the witnesses and potential witnesses under military control, including those on any retired list to cooperate with the defense when contacted by the defense for purposes of interviewing these persons or otherwise obtaining information from them. R.M.C. 703. This discovery request is continuing and shall apply to any additional charges or specifications that may be preferred after this request for discovery is served upon the government. Immediate notification is requested on all items the government is unable or unwilling to produce.

By: /s/
William Kuebler, LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

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

From: Borch, Fred, COL, DoD OGC

Sent: Monday, March 15, 2004 11:29

To: [REDACTED] CAPT, DoD OGC; Lang,

Scott, CDR, DoD OGC; [REDACTED], LtCol, DoD OGC; [REDACTED]

LtCol, DoD OGC; [REDACTED] MAJ, DoD OGC; [REDACTED] CPT, DoD

OGC; [REDACTED], LT, DoD OGC; [REDACTED] Mr, DoD OGC;

[REDACTED] Mr, DoD OGC; [REDACTED], LtCol, DoD OGC

Cc: [REDACTED], CW3, DoD OGC; Preston,

Robert, MAJ, DoD OGC; Carr, John, CPT, DoD OGC

Subject: Allegations of misconduct and
unprofessionalism against Chief Prosecutor

Importance: High

All:

Please read below.

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

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

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

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

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

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

COL Borch

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

From: Carr, John, CPT, DoD OGC

Sent: Monday, March 15, 2004 07:56

To: Borch, Fred, COL, DoD OGC

Cc: Preston, Robert, MAJ, DoD OGC; [REDACTED],

[REDACTED], CAPT, DoD OGC; [REDACTED], CPT, DoD OGC

Subject: RE: Meeting with Colonel Borch and

myself, 4:00 p.m. today, Col Borch's office

Sir,

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

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

It is my opinion that our problems are much more fundamental. Our cases are not even close to being adequately investigated or prepared for trial. This has been openly admitted privately within the office. There are many reasons why we find ourselves in this unfortunate and uncomfortable position - the starkest being that we have had little to no leadership or direction for the last eight months. It appears that instead of pausing, conducting an honest appraisal of our current preparation, and formulating an adequate prosecution plan for the future, we have invested substantial time and effort to conceal our deficiencies and mislead not only each other, but also those outside our office either directly responsible for, or asked to endorse, our efforts. My fears are not insignificant that the inadequate preparation of the cases and misrepresentation related thereto may constitute dereliction of duty, false official statements, or other criminal conduct.

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

1. CDR Lang's misrepresentations at the Mock Trial - CDR Lang made many misrepresentations at the Mock Trial, to include stating that we had no reason to believe that al Bahlul had suffered any mistreatment or torture. When I confronted him immediately after the mock trial with his notes to the contrary, he admitted that he was aware of abuse allegations related specifically to al Bahlul. Interestingly, it was because of Prof. [REDACTED] comments at the mock trial that we even began to inquire into the conditions at the detention camps in AF, which prior to the mock trial had been consciously ignored. Other troubling aspects of the mock trial include, but are not limited to: statements that we would be ready for trial in 3 days, that al Bahlul has maintained from day one that he is a member of AQ, the deliberate and misleading presentation of select statements from al Bahlul, the careful coordination of the schedule to limit meaningful questions, the conscious inclusion of an overwhelming amount of paper in the notebooks, and the refusal to include a proof analysis.

2. Suppressing FBI Allegations of Abuse at Bagram - Over dinner and drinks, KK and Lt [REDACTED] heard from FBI agents

that detainees were being abused at the Bagram detention facility. Lt ██████ told KK after dinner that they couldn't report the allegations because it was told to them "in confidence." KK told CDR Lang, LtCol ██████ and ██████ anyway, and all three stated that there was not credible evidence and concluded on their own volition that they should not report the allegation to you or other members of the office. Interestingly, CDR Lang recently suggested the Lt ██████, despite his lack of experience and judgment, be sent to review the CID reports of abuse at Bagram.

3. Refusal to give Mr. Haynes the COLE video -

Mr. Haynes asked CDR ██████ twice for a copy of the COLE video. I heard CDR ██████ ask CDR Lang whether she should take a copy of the video over to Mr. Haynes. CDR Lang told her not to, and that maybe in a few days Mr. Haynes would forget that he asked for it.

4. The disappearance/destruction of evidence -

As I have detailed to you, my copy of CDR Lang's notes detailing the 302 in which al Bahlul claims torture and abuse is now missing from my notebook. The 302 can not be located. Additionally, ██████ of the FBI related last week that he called and spoke to CDR Lang about the systematic destruction of statements of the detainees, and CDR Lang said that this did not raise any issues.

5. "I've known about this for a year."

Hamden's name is on the UN 1267 list, and we only learned of it in Dec. When CDR Lang was confronted with this information, he claimed that he had known about it for the last year. No attempt had been made prior to Dec to discover upon what evidence Hamdan was added to the list, and we still don't know. If he was aware of this fact, one is left to wonder why no inquiry was made with the State Department. He made the same "I've known about this for a year" claim about the Tiger Team AQ 101 brief, although he has had many of us searching for the information contained within it for months.

6. CDR Lang's misrepresentations at the office

overview of his case. As detailed in a previous e-mail to you, CDR Lang made numerous misrepresentations concerning his case at the office meeting to discuss his case, indicating that he either consciously lied to the office, or does not know the facts of his case after 18 months of working on it.

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

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

"I understand that misrepresentations are being

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

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

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

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

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

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

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

A few examples include:

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

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

principal liability for TANBOM, KENBOM, COLE and PENTBOM was misguided to say the least.

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

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

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

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

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

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

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

We continue to foster the impression that CITF is responsible for our troubles and lack of evidence, although we have learned in the last few weeks that we haven't even sat down with the case agents to figure out what evidence they have and how they have

gathered it. You acknowledged last week that we will not even try to fix the problems with CTF. What is perhaps most disturbing about the lack of progress by our investigative agents is that it does not appear we have ever adequately explained the deficiencies to the CTF leadership.

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

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

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

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

One justification for the concealment and minimization of the problems has been the often stated proposition that MG Altenburg will be able to remedy many of these problems when he becomes the Appointing Authority. However, you have recently stated that MG Altenburg is a good friend of yours, that you hope he will be heavily reliant on BG Hemingway for a period of time, and that we will not be forwarding any documentation of cases (e.g. proof analysis) to MG Altenburg which suggests that he will not be in a position to exercise independent judgment or oversight.

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

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

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

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

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

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

[REDACTED]

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

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

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

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

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

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

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

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

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

v/r,

Capt Carr

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

From: Preston, Robert, MAJ, DoD OGC
Sent: Thursday, March 11, 2004 16:19
To: [REDACTED], CAPT, DoD OGC
Cc: Borch, Fred, COL, DoD OGC
Subject: RE: Meeting with Colonel Borch and myself, 4:00 p.m. today, Col Borch's office

Ma'am

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

Certainly there have been some unfortunate symptomatic issues like Cdr Lang's recently heightened animosity towards John (and I'm not going to let that one go either), but my fundamental

concerns here have nothing to do with personality conflicts or intellectual disagreements.

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

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

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

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

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

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

PS: John's not back yet. I think he was at FBI this afternoon.

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

From: [REDACTED] CAPT, DoD OGC
Sent: Thursday, March 11, 2004 13:36

To: Preston, Robert, MAJ, DoD OGC; Carr, John,
CPT, DoD OGC
Cc: Borch, Fred, COL, DoD OGC
Subject: Meeting with Colonel Borch and myself,
4:00 p.m. today, Col Borch's office

Major Preston and Captain Carr,

Captain Carr and I had a long talk this morning.
Based on his expressions of concern for some unresolved issues,
including both ethical matters and person