

Trial Guide for Military Commissions
(Draft of 17 Aug 2004)

**This Guide is a draft and subject to revision, modification, and objection by
Commission participants**

I. INITIAL SESSION THROUGH ENTRY OF PLEA(S)

1-1. ASSEMBLY OF COMMISSION

PRESIDING OFFICER (PO): Please be seated. This Military Commission is called to order.

A folder will be previously placed before each Commission Member location and the folder will contain a copy of the appointing order and the charges.

PROSECUTOR (P): This Military Commission is convened by Appointing Order No. _____ dated _____ (as amended by Appointing Order No. _____, dated _____) copies of which have been furnished to the members of the Commission, counsel, and the accused, and which will be marked as a Review Exhibit (RE) __ and attached to the record.

P: (The following corrections are noted to the Appointing Order(s): _____.)

P: The Presidential determination that the accused may be subject to trial by Military Commission has been marked as RE __. RE __ is being handed to the Commission SSO for review.

[Upon completion of SSO review] RE __ is being provided to the Presiding Officer and the government requests that this classified exhibit be annexed to the record of trial under seal in accordance with Military Commission Order No. 1.

The charges have been properly approved by the Appointing Authority and referred to this Commission for trial. The prosecution caused a copy of the charge(s) in English (and _____, the accused's native language) to be served on the accused on _____. The prosecution is ready to proceed in the Commission trial of *United States v.* _____.

The accused, Commission Members and alternate Commission Member(s) named in the Appointing Order(s) and detailed to this Commission are present.

P: (Reads name of each member and receives response from each member to be noted by reporter.)

All detailed counsel are present (and civilian counsel is also present).

A court reporter has been detailed reporter for this Commission and [has been previously sworn) (will be sworn at this time.)] Security personnel have been detailed for this Commission and [(have been previously sworn) (will be sworn at this time.)] (The interpreter(s) (has)(have) been detailed for this Commission and [(has)(have) been previously sworn) (will be sworn at this time.)]

Note: The above reference does not apply to the accused's interpreter, if any.

Note: The following oath may be used:

Do you [(solemnly swear) (affirm) to faithfully and properly perform the duties of [(Prosecutor) (Defense Counsel) (Civilian Defense Counsel) (Court Reporter) (Security Person) (Interpreter) (Foreign Attorney Consultant) (____)] in all Military Commissions to which you are appointed or detailed, (so help you God.)

PO: I have been designated as the Presiding Officer of this Military Commission by the Appointing Authority and have previously been sworn. The other members of the Commission and alternate members will now be sworn. All persons in the courtroom please rise.

PO: Commission Members, please raise your right hands. Do you swear or affirm that you will faithfully perform your duties as Military Commission members and alternates, including your duty to proceed impartially and expeditiously and to provide a full and fair trial, and that you will not disclose or discover the vote or opinion of any particular member of the Commission upon findings or sentence unless required to do so in the due course of law, so help you God?

COMMISSION MEMBERS (CM): (Response).

PO: Please be seated. The Commission is assembled.

PO: Before continuing with other preliminary matters, it is necessary for me to inquire into the accused's need for an interpreter.

PO: _____, are you able to understand and speak English?

Accused (ACC:)_____.

PO: (If the accused states he does not speak or understand English or desires an interpreter, continue as follows). What language do you speak?

ACC: _____.

PO: Is there an interpreter with you now in the courtroom who speaks the language that you do? If so, please also tell me the interpreter's name.

ACC: _____.

***NOTE:** If the Accused answers in the negative, the Presiding Officer will cause arrangements to be made for the Accused to have a qualified interpreter.*

PO: In what language will the interpreter be speaking to you?

ACC: _____.

PO: (To the interpreter): Please identify yourself, tell me if you are qualified to interpret the Accused's language, and whether you have been sworn.

Interpreter:_____.

NOTE: If the interpreter has not been sworn, the Prosecutor will issue an oath.

PO: Prosecutor, please state by whom you have been detailed and your qualifications.

P: (I) (All members of the prosecution) have been detailed to this Military Commission by the Chief Prosecutor. (I am) (All members of the prosecution are) qualified under Military Commission Order No. 1, Paragraph 4.B and (I) (we) have previously been sworn. (A representative from the Department of Justice, appear(s) as (a) Special Trial Counsel(s)). (I have not) (No member of the prosecution has) acted in any manner, which might tend to disqualify (me) (us) in this proceeding. The detailing document is now being marked as the next Review Exhibit in order.

P: *[If (an) investigator(s) or similar representative(s) will sit at prosecution table throughout the proceedings]* The Prosecution also has sitting at the Prosecution table an (investigator) (assistant) who will assist the Prosecution but will not representing the Government.

NOTE: The Prosecutor should identify the investigator by government agency but not disclose his identity.

1-2. ACCUSED'S CHOICE OF COUNSEL

PO: _____, pursuant to Military Commission Order Number 1, you are represented by your detailed defense counsel. (He) (She) (They) (is) (are) provided to you at no expense.

You also can request a different military lawyer to represent you. If the person you request is reasonably available, (he)(she) would be appointed to represent you free of charge. If you request a different military lawyer and that lawyer is made available to represent you, then your detailed defense counsel would normally be released from your case. You could, however, request that the Appointing Authority or the General Counsel to allow your detailed defense counsel to stay on the case.

In addition, you may be represented by a qualified civilian lawyer. A civilian lawyer would represent you at no expense to the government. (He) (She) must be a U.S. citizen, admitted to the practice of law in a State, district, territory, or possession of the U.S., or a Federal court, may not have been sanctioned or disciplined for any relevant misconduct, be eligible for a Secret clearance, and agree in writing to comply with the orders, rules, and regulations of Military Commissions.

If a civilian lawyer represents you, your detailed defense counsel will continue to represent you as well and this detailed defense counsel will be permitted to be present during the presentation of all evidence. Do you understand what I have just told you?

ACC: (Response).

PO: Do you have any questions about counsel representation before this Commission?

ACC: (Response).

PO: Do you desire to be represented by the counsel currently seated at your table and no other counsel?

ACC: (Response).

PO: Defense counsel will announce (his) (her) (their) detailing and qualifications.

DETAILED DEFENSE COUNSEL (DDC): (I) (All detailed members of the defense) have been detailed to this Military Commission by the Chief Defense Counsel. (I am) (All detailed members of the defense are) qualified under Military Commission Order No. 1, Paragraph 4.C and (I) (we) have previously been sworn. (I have not) (No member of the defense has) acted in any manner that might tend to disqualify (me) (us) in this proceeding. The document detailing counsel is now being marked as a Review Exhibit in order.

CIVILIAN DEFENSE COUNSEL (CDC) [If present]: I am a civilian counsel who has been determined to be qualified for membership in the pool of qualified civilian defense counsel in accordance with section 4(c)(3) of Military Commission Order Number 1. I have transmitted my notice of appearance through the Chief Defense Counsel. I have signed the civilian counsel Agreement to Practice before a Military Commission and I have not acted in any manner that may tend to disqualify me to practice in this proceeding.

PO [If civilian defense counsel present]: Please mark the notice of appearance including the qualification determination as RE _____ and attach it to the record.

PO [If civilian defense counsel present]: The civilian defense counsel will now be sworn. Do you swear or affirm that you will faithfully perform your duties in the Commission now in hearing, so help you God?

CDC [If present]: I do.

DDC: (If others are at the defense table who are not detailed or civilian counsel as indicated above (such as a FAC), they will now be identified, and if necessary, sworn.)

PO: All personnel appear to have the requisite qualifications, and all required to be sworn have been sworn.

1-3. PRESENTATION OF CHARGE(S)

PO: Prosecutor, please have the charge sheet marked as RE ____ and attach it to the record.

P: (Complies).

PO: Defense counsel, have you previously been provided a copy of the charge(s)?

DC: (Response).

PO: All parties to the trial have been furnished with a copy of the charge(s). The prosecutor will announce the general nature of the charge(s).

P: The general nature of the charge(s) in this case is (are) _____.

PO: Members of the Commission and alternate members, at this time it is appropriate for you to review the charge sheet and appointing order(s).

Before continuing, the Presiding Officer should give the Members sufficient time to read the charge sheet and appointing order(s).

PO: Have all Commission members and alternate members had the opportunity to review the charge sheet and appointing order(s)?

CM: (Response).

PO: Is the name and rank of each Commission member and alternate member properly reflected on the appointing order?

CM: (Response).

PO: Does either party want the charge(s) to be read in open court?

P: The prosecutor (does)(does not) want the charge(s) read.

DC: The accused (does)(does not) want the charge(s) read.

PO: (The reading will be omitted.) (Prosecutor will read the charge(s).)

1-4. QUESTIONING OF PANEL MEMBERS AND ALTERNATE MEMBERS

PO: Members of the Commission and alternates, the Appointing Authority who detailed you to this Commission has the ability to remove you from service on this Commission for good cause. Is any member or alternate aware of any matter that you feel might affect your impartiality or ability to sit as a Commission member? Please bear in mind that any statement you make should be in general terms so as not to disqualify other members.

CM: (Response).

The Presiding Officer may conduct follow up questioning as appropriate during this portion of the proceedings.

PO: I have previously filled out a Commission Member Questionnaire. I have previously provided counsel for both sides a summarized biography, a list of matters that one would ordinarily expect counsel to ask during a voir dire process, and a document about how I know the Appointing Authority. These documents will now be marked as the RE next in order. Those documents are true.

PO: Does either party wish to have this voir dire conducted outside the presence of the other members?

PO: Prosecution, any questions for me?

P:

PO: Defense, any questions for me?

DC:

PO: Any challenge against the Presiding Officer?

P:

DC:

PO: [There are no challenges by either side against the PO for cause.] [I have considered the challenge for cause made by the Prosecution/Defense. I will forward it to the Appointing Authority for his action. The proceedings (are) (are not) abated.]

NOTE: If challenged, the Presiding Officer will determine whether the proceedings will continue and present that information to the Appointing Authority to decide whether the challenge shall be granted.

[If PO remains on the case because not challenged, or because challenged and will continue to participate, proceed as follows:]

PO: Have all other Commission Members prepared a summarized biography?

CM: (Response).

PO: Have both the prosecutor and the defense been provided copies of the Member biographies and had an adequate opportunity to review them?

P/DC: (Response).

PO: Prosecutor, please have the member biographies marked as the next RE and provide them to me. The RE containing the biographies will be sealed.

P: (Complies).

PO: Members, I will now ask you a few preliminary questions. If any member has an affirmative response to any question, please raise your hand. As I ask these questions and make reference to the “members,” this refers to both Commission Members and alternates.

1. Does anyone know the accused? (Negative response) (Affirmative response from _____).
2. [If appropriate] Does anyone know any person named in any of the charges?
3. Does any member know any of the counsel involved in this case?
4. Having seen the accused and having read the charge(s), do any of you feel that there is any reason you cannot give the accused a fair trial?
5. Do any of you have any prior knowledge of the facts or events in this case that will make you unable to serve impartially?
6. Do any of you feel that you cannot vote fairly and impartially because of a difference in rank or because of a command relationship with any other member?
7. Have any of you had any dealings with any of the parties to the trial, to include counsel for both sides, which might affect your performance of duty as a Commission member in any way?
8. Do any of you feel that you cannot fairly and justly decide this case because of any prior experiences related to previous military assignments or duties?
9. Do any of you feel that you cannot fairly and justly decide this case because of something you have read, heard or seen in the media concerning the events of 9-11, al Qaida, Usama Bin Laden, or terrorism generally?
10. Have any of you been a victim of an alleged terrorist attack or had a close friend or family member who was a victim of an alleged terrorist attack?
11. The following individuals may be called as witnesses before this Military Commission: _____. Do any of you know any of these potential witnesses?
12. [If so] Do any of you feel your relationship with any of the potential witnesses will in any way affect your ability to fairly and justly decide this case?

13. As Commission Members, we must keep open minds regarding the verdict until all the evidence is in. Is there any member who cannot follow this instruction?

14. The accused is presumed innocent and this presumption remains unless his guilt is established beyond a reasonable doubt. The burden to establish the guilt of the accused is on the prosecution. Does each member agree to be guided by this principle in deciding this case?

15. Do any of you know of anything of either a personal or professional nature that would cause you to be unable to give your full attention to these proceedings throughout the trial?

16. Are any of you aware of any matter that might raise a substantial question concerning your participation in this trial as a Commission member?

PO: Prosecution, any questions for any of the members other than myself?

P:

PO: Defense, any questions for any of the members other than myself?

DC:

[If there are questions for an individual member, the PO may decide to hold individual voir dire while the non-voir dired members retire.]

PO: I intend to allow questioning of this member outside the presence of other members so what this member has to say does not affect the other members. Does counsel for either side object?

: [After all general and individual voir dire is completed.]

PO: Any challenge by either side against any member?

P/DC:

PO: *[If there are no challenges:]* I find that all Commission Members, alternates and I are qualified to serve on this Military Commission. The members of the Commission and alternate members will be those listed on the appointing order.]

[If a member is challenged, the Presiding Officer will determine whether the proceedings will continue and present that information to the Appointing Authority to decide whether the challenge shall be granted.]

[If a member is challenged, and the PO decides that the proceedings will not be held in abeyance, proceed as follows:]

PO: Members, at this point, it is appropriate for me to inform you of some of the procedures the Commission will be using in deciding this case.

Previously I emailed each of you instructions that you have acknowledged receiving. Those acknowledgements are now being marked as the next RE in order. To the extent you believe there is any conflict in the instructions given earlier, and the instructions I am about to give, the following instructions shall control.

I have been appointed as the Presiding Officer. In the references establishing the Commission, I have been given certain duties. Among these is that I will preside over the Commission proceedings during open and closed sessions. As I am the only lawyer appointed to the Commission, I will be the source of law for you. However, the President has directed that the Commission will decide all questions of law and fact, so you are not bound to accept the law as given to you by me. In closed sessions, my voice and my vote will count the same as any other member.

During any recess or adjournment, we will not discuss the case with anyone, not even among ourselves. We will hold our discussions of the issues in closed conference when all members are present. When deciding issues in this case, we will consider only evidence properly admitted before this Commission. In this regard, we will not consider other accounts of the trial or information from other sources and we will limit our contact with counsel, the accused and any other potential witnesses.

During the course of the military commission proceedings you may not discuss the proceedings with anyone who is not a member of the commission panel. If anyone who is not a member of the commission panel attempts to discuss the proceedings with you, you shall notify me immediately and appropriate action will be taken. While we are in closed session deliberations, we alone will be present. We will remain together and allow no unauthorized intrusion into our deliberations.

Each of us has an equal voice and vote in discussing and deciding all issues submitted to us. I will, however, act as Presiding Officer during our closed session deliberations and will speak for the Commission in announcing results. The issues submitted to us will be decided based upon the evidence properly presented before this Commission. Outside influence from superiors, other government officials, the media or any other source will not be tolerated. Members, in the event any such attempt is made to influence you in the performance of your official Commission duties, you shall notify me immediately and appropriate action will be taken. Additionally, it is impermissible for the Appointing Authority, a military commander, or any other government official who may have influence over your career to reprimand or admonish you because of the way you perform your duties as a military commission member. If any such action takes place, you shall notify me immediately.

You are not authorized to reveal your vote or the factors which lead to your vote, or to reveal the vote or comments of another member, when it comes to deliberations on findings and, if necessary, on sentence. This is a lawful order from me to you and you

may only reveal such matters if required to do so by superior competent authority in the Military Commission process - namely, the Appointing Authority, the General Counsel of the Department of Defense, the Review Panel for Military Commissions, the Secretary of Defense, or the President of the United States - or by a United States Federal Court. This order is continuing and does not expire.

The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If anyone needs a break at any time, please let me know.

Are there any questions?

CM: (Response).

1-5. REVIEW OF RESPONSIBILITIES REGARDING PROTECTED INFORMATION

PO: Do counsel for both sides understand those provisions of Military Commission Order No. 1 governing Protected Information?

P/DC: (Response).

PO: Do you understand that you must, as soon as practicable, notify me of any intent to offer evidence involving Protected Information so that I may consider the need to close the proceedings?

P/DC: (Response).

PO: Is there any issue relating to the protection of witnesses that should be taken up at this time as may be necessary to discuss and litigate motions or conduct other business before the presentation of evidence on the merits?

P/DC: (Response).

PO: As I am required by Military Commission Order No. 1 to consider the safety of witnesses and others at these proceedings, do both counsel understand that they must notify me of any issues regarding the safety of potential witnesses so that I may determine the appropriate ways in which testimony will be received and witnesses protected?

P/DC: (Response).

1-6. MOTIONS AND PLEA(S)

PO: Accused and defense counsel, if you have any motions, please state them now.

DC: The defense has (no) (the following) motions (requests to defer motions at this time.)

***NOTE:** The Presiding Officer should resolve all motions and other issues capable of resolution prior to the entry of plea(s). However, the entry of pleas will take place at the initial session, even if all motions and other issues are not resolved.*

1-7. ENTRY OF PLEA(S)

PO: Accused and counsel please rise. _____, how do you plead?

DC: The accused, _____, pleads as follows: _____.

PO: You may be seated.