

Office of the Presiding Officer
Military Commission

12 August 2004

SUBJECT: Presiding Officers Memorandum (POM) # 6, Requesting Conclusive Notice to be Taken

1. Military Commission Order 1 permits the Commission to take conclusive notice. This POM establishes the process for Counsel to request the Commission to take conclusive notice. This POM is issued under the provisions of MCO No. 1, paragraphs 4A(5)(a) and (c) and paragraph 6D(4).
2. When Counsel are aware they will request the Commission to take conclusive notice, they are encouraged to work with opposing counsel. Counsel may agree - in writing - that they do not, and will not, object at trial to the Commission's taking conclusive notice of a certain fact. It is unnecessary to involve the Presiding Officer or the Assistant while Counsel work these issues with each other. Counsel may also agree to stipulations of fact in lieu of agreeing to ask the Commission to take conclusive notice.
3. It is imperative that the matter to which conclusive notice is to be taken is precisely set out using the exact language that will be provided to the Commission. Any agreement or stipulation shall specify whether the facts shall be utilized by the Commission on merits, sentencing (if such proceedings are required,) or both.
4. Once counsel have agreed to take conclusive notice (or enter into a stipulation of fact,) the writing encompassing that agreement shall be emailed by the Counsel who requested the writing (or if jointly requested, both counsel) to opposing counsel, Chief and Deputies of the Prosecution and the Defense, the Presiding Officer, and the Assistant.
5. If Counsel desires that the Presiding Officer take conclusive notice, but is unable to obtain the agreement of opposing Counsel, the Counsel desiring that conclusive notice be taken shall:
 - a. Send an email to the Presiding Officer, and the Assistant, with copies furnished to opposing counsel, and Chief and Deputies of the Prosecution and the Defense.
 - b. The body of the email, or an attachment, shall be styled in the name of the case and be titled "Request to Take Conclusive Notice - [Subject] [Us v. last name of Accused]." The subject line of the email shall be the same as the title.

c. The content of the email, whether in the body or an attachment, shall contain the following matters in separate numbered paragraphs as follows:

(1). The precise nature of the facts to which conclusive notice is requested. See paragraph 3 above as to the content of this portion of the request.

(2). The source of information that makes the fact generally known or that cannot reasonably be contested.

(3). Other information to assist the Presiding Officer in resolving the matter.

6. The counsel receiving a request as stated in paragraph 5 shall:

a. Within three duty days of receiving the email in paragraph 4 above (the definition of “received” shall be as provided in POM #4), the Opposing party shall “reply all” to the email set out in paragraph 4 above and answer in the following, separately numbered paragraphs:

(1). That the responding Counsel (agrees) (disagrees) that conclusive notice shall be taken.

(2). If the Counsel disagrees:

(a). The reasons therefore.

(b). Any contrary sources not cited by the requesting Counsel.

(c). Other information to assist the Presiding Officer in resolving the matter.

b. The response provided by the responding party as described in this paragraph shall be the party’s opportunity to be heard, unless there is a legal basis why the Commission should reserve decision on the matter until oral argument can be heard.

7. Replies by the requesting party. Counsel who originally requested the conclusive notice will not reply to the email sent in accordance with paragraph 6 above unless it is to withdraw their request for conclusive notice. If additional information is needed, the Presiding Officer will request it.

8. Timing.

a. Counsel shall attempt to obtain agreement on conclusive notice or stipulations of fact at the earliest opportunity to assist in trial preparation for all.

b. As soon as it appears to Counsel that a party will not agree to a request that conclusive notice be taken, that Counsel shall send a request as provided in paragraph 5 above.

c. If Counsel have not resolved a request to take conclusive notice within ten duty days of the date set for the first session of the Commission, they shall send the request as provided in paragraph 5 above.

9. Stipulations of fact. While Counsel are free to use stipulations of fact in lieu of agreeing on the taking of conclusive notice, the Commission has no authority, and shall not be asked, to require a party to enter into a stipulation of fact.

Original signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer