[The R.M.C. 803 session was called to order at 0942, 7 February, 2008.]

MJ [CAPT ALLRED]: Court's called to order. All parties present when the court last recessed are once again present. As near as I can tell, it looks like we have two new representatives on the government side. Counsel, would you introduce yourselves and state your qualifications and status as to oath, please?

APROS [MR. OLDHAM]: Your Honor, my name is Andrew Oldham. I have been detailed to the Military Commission by the Chief Prosecutor. I'm qualified to serve under R.M.C. 503, and I have previously been sworn in accordance with R.M.C. 807. I have not acted in any manner that might tend to disqualify me in this proceeding. I am a civilian attorney with the Department of Justice.

MJ [CAPT ALLRED]: Thank you.

APROS [MR. GOLDSTEIN]: Your Honor, I am Jordan Goldstein. I have been detailed to this Military Commission by the Chief Prosecutor. I am qualified to serve under R.M.C. 503 and have been previously sworn in accordance with R.M.C. 807. I have not acted in any manner that might tend to disqualify me in this proceeding. I'm a civilian attorney with the Department of Justice.

[The court reporter was present, was detailed to the commission by the convening authority and was previously sworn.]

MJ [CAPT ALLRED]: Very good. Thank you. I noticed that Lieutenant Mizer has been promoted to Lieutenant Commander.

Congratulations.

DDC [LCDR MIZER]: Yes, Your Honor. Thank you.

MJ [CAPT ALLRED]: Very good.

We held an 802 conference yesterday morning in which Mr. Swift, Lieutenant Commander Mizer and Miss Prasow represented the defense. Colonel Britt, Commander Stone, and Mr.'s Murphy, Goldstein and Oldham, I think, were all present for the Government. We discussed scheduling issues, including some possible adjustments to the final trial order, the order of motions for today, and the defense discovery motion numbered D-017. I proposed to counsel that it might be more efficient and economical to move our next session of court to Wednesday the 12th of March at 1300 to permit counsel to spend a little less time on Guantánamo Bay and away from their normal duties.

Of course, this will depend upon the number and complexity of the motions that need to be litigated at the next session. Commander Swift said that he thought three days; Wednesday, Thursday and Friday would suffice. I don't know how soon we need to make this decision in order to let the other parts of the system work. Are you prepared now to represent to the Court that three days will be sufficient for the fact motions?

ADDC [MR. SWIFT]: It is difficult, Your Honor, because of the ongoing discovery issue as to state with clarity.

I would say with what I know now, three days would be sufficient. I would note, Your Honor, that my understanding from Mr. Chappell is that we actually don't have three days--that we have two and a half days, because an arraignment will occur that morning. Within the two and a half days, with what I know today, I think that if there needs to be a change, if we get discovery in the process we'll immediately notify the court that there is gonna be more to be considered, but envisioning the witnesses that we would have I would say two and a half days would be enough based on what I know today.

MJ [CAPT ALLRED]: Does the government have any motions to litigate at our next session?

PROS [LTC BRITT]: We have a least one, Your Honor.

MJ [CAPT ALLRED]: Okay, well in the interest of being conservative I guess we'll leave the schedule as it is now. I'll come down on the previous Saturday plane, and I'll be here on Monday ready to go, and when counsel are ready and whatnot, we'll get started. If it turns out there's not enough to keep us busy, we'll try to shorten the week and----

ADDC [MR. SWIFT]: ----maybe leave--if we start on the 10th, then leave after the arraignment.

MJ [CAPT ALLRED]: That would work. We might be able to start earlier in the day. Okay. So we discussed that yesterday in our 802 conference.

Do counsel want to supplement my recollection of our discussions at the 802 conference?

PROS [LTC BRITT]: No supplementation from the government, Your Honor.

ADDC [MR. SWIFT]: We also discussed that there was one motion that we had filed--the illegal pretrial confinement motion that the court did not grant leave on our request to hear that out of a normal timeliness schedule, and it will be briefed on regular time, I presume with the government's answer due tomorrow, and then heard at the next hearing.

MJ [CAPT ALLRED]: Yes. Yes, that's true. I think that's the way to handle that one.

ADDC [MR. SWIFT]: Thank you, Your Honor.

PROS [LTC BRITT]: Now, respectfully, the government is going to request an additional period of time. It's just going to be too difficult with these proceedings ongoing, with all the counsel assigned to this case at this table, for us to prepare an answer and file it and do it justice for the defense's request.

MJ [CAPT ALLRED]: Okay. That's fair enough. I think that's fair enough. You can respond after you get home.

PROS [LTC BRITT]: Thank you, Your Honor.

MJ [CAPT ALLRED]: Since the session that we held on the fifth of December, Appellate Exhibits 58 through 111 have been appended to the record of trial. AE 111 is dated 5 December 2007, it contains a classified document and has been ordered sealed and attached to the record of trial as a sealed document. I believe that document's in the possession of the court reporter.

[The military judge noting action by Prosecution.]

MJ [CAPT ALLRED]: Do you have it, Trial Counsel?

PROS [LTC BRITT]: No, sir. We had it.

MJ [CAPT ALLRED]: You have it?

PROS [LTC BRITT]: I don't have it.

MJ [CAPT ALLRED]: The government has----

PROS [LTC BRITT]: It’s in our constructive possession sir.

MJ [CAPT ALLRED]: Very good. We’ll rely on you to deliver that to the court reporter.

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: At the last hearing, the commission received evidence and heard arguments regarding the defense motion for an Article V status hearing and the motion to dismiss for lack of jurisdiction over the accused. The motion for an Article V hearing was granted and the motion to dismiss for lack of jurisdiction was reconsidered, and after reconsideration denied. The commission found

that the accused is subject to its jurisdiction.

I neglected at our last session to note that I received a request from two New York attorneys that represented various news organizations asking for standing in this case to argue for the release of additional materials regarding the proceedings in this case, and complaining that the OMC website, which is a place for the release of such materials had no entries on it; no postings since May of 2007, the date of referral. I referred these documents to counsel for both sides and asked for their comments, both sides agreed that releasing documents to the press and the public was in the interest of justice and I agree.

I have been releasing materials related to the case under Military Commissions Trial Judiciary Rule 3.9, and the last time I looked at the OMC webpage several hundred pages of material from the June session of court had been posted. Many of the materials from the December 2007 hearing have also been provided to OMC for review and release.

Today we have scheduled motions hearings on the defense motion to dismiss for lack of subject matter jurisdiction, arguing ex post facto charges. A motion for an order implementing the requirements of the fourth Geneva Convention, a motion to dismiss certain charges for multiplicity and unreasonable multiplication of charges, a motion to dismiss Specification 2 of Charge I, and

Specifications 3 and 4 of Charge II on the basis of combatant immunity, a motion to dismiss certain charges and specifications as a matter of *res Judicata*, and three motions relating to the provision of discovery. One seeks to compel production of correspondence, investigation notes, etc. One seeks to compel production of names and contact information of government agents involved in the investigation of the case, and one seeks to compel production of records of confinement.

It seems to me that we also have pending the issue of access to certain witnesses that are detained here or elsewhere. Are any of these--have any of these motions been rendered moot by anything that happened after our 802 conference yesterday?

PROS [LTC BRITT]: I would ask the defense to respond, because we provided search and discovery materials, Your Honor, after our hearing.

ADDC [MR. SWIFT]: No, Your Honor. As we discussed in the 802, while the defense regarding the notes on interrogations, etc. and notes of confinement, while the prosecution has some of these documents, they remain germane to the period after the interrogations, largely, not the period during it.

MJ [CAPT ALLRED]: Okay. We'll take up that motion, then, in due time.

APROS [LCDR STONE]: Well, sir, if I could--I could probably

moot it now by saying, with--after our 802 and the defense said, we really want to get 2002, I've gone back to JTF-GTMO and said, "Where's 2002?" They have come back to me saying, "We're looking--we don't know where it is, we're trying to find it." If at such a time as they find it we're certainly going to turn it over to them, but there's no reason--I don't think there's any legal issue with regards to arguing it. We know that we're going to comply it[sic], but they don't have it.

MJ [CAPT ALLRED]: Okay. Well, so you don't object to the motion, you're just having difficulty finding materials?

APROS [LCDR STONE]: Just can't give 2002 because----

MJ [CAPT ALLRED]: Which one was that?

APROS [LCDR STONE]: That was Defense 20.

MJ [CAPT ALLRED]: Okay. Well, it sounds like the government doesn't object. I'll grant the defense motion to compel production of records of confinement without government objection, and I don't know what you would ask me to do if they can't find the record you are looking for.

ADDC [MR. SWIFT]: We'll cross that bridge----

MJ [CAPT ALLRED]: Cross that bridge downstream?

ADDC [MR. SWIFT]: ----when we come to it. I would note, however, though we keep talking about Guantánamo. Mr. Hamdan was not confined solely in Guantánamo, or interrogated solely in Guantánamo.

And our request is for the entire period of time, so we also seek all records pertaining to his confinement in Afghanistan, and all records pertaining to interrogations, notes--the same documents for the Afghan period.

MJ [CAPT ALLRED]: If there is a part--does government concede that it is trying to provide those documents as well?

APROS [LCDR STONE]: Sure. All known records have been provided with the exception of the 2002 GTMO records that we are aware of.

MJ [CAPT ALLRED]: Okay. Well, once again, it sounds like your motion has been granted, the government doesn't oppose production of any of these documents, and they've given you everything they can find. If you need further relief, I'll let you take that up at our next session, I guess.

Fair enough?

[Mr. Swift nodding in consent.]

APROS [LCDR STONE]: Sir, just one other quick--sir. If the defense has very specific things that they're looking for, if they communicate with us and give us a little more of a path, we'll certainly track that down as well, sir.

MJ [CAPT ALLRED]: Well, that sounds like a very responsive offer. Okay. Well, you work that out amongst yourselves. It looks to me like there's no objection from the government to providing the materials; it's just a matter of how far back their records go.

The current filings inventory is marked as Appellate Exhibit 110. It was released on 6 February 2008, have counsel had a chance to review it and concur with its accuracy?

PROS [LTC BRITT]: We have, Your Honor. We made one change, I believe that has been reflected in the latest update and at this time it's satisfactory.

MJ [CAPT ALLRED]: You're right. There was a version I got this morning.

Have you looked at this, Commander?

[LCDR Mizer nodded in agreement.]

MJ [CAPT ALLRED]: Mr. Swift?

ADDC [MR. SWIFT]: I don't think I have, Your Honor.

MJ [CAPT ALLRED]: All right. I'll give you a chance to do that. Please bring any objections to the accuracy of that inventory to the attention of Colonel Chappell, would you please?

ADDC [MR. SWIFT]: I will, sir.

MJ [CAPT ALLRED]: Okay, I'd like to remind counsel that the protective orders issued by Judge Brownback several years ago in this case are the current protective orders. They are in place and of the security concerns in this courtroom. Does either counsel anticipate that any security--any classified material will be addressed today in any of our motions?

PROS [LTC BRITT]: There may be one motion, Your Honor, where that material would be addressed and that would be defense motion 18. And it may be productive to suggest having a brief 802 before we take up that motion.

MJ [CAPT ALLRED]: Okay maybe we can do that. Okay. If either side desires any changes in those protective orders I will ask you to propose them to the court. They seem to be satisfactory and we've worked with them in the past.

PROS [LTC BRITT]: Yes, sir. If I could bring one other matter to the court's attention, and that would be, it's the government's contention--and I don't think the defense would disagree--that the protective orders that were issued during our 5 December session, and that would be AE 111 for identification, that those protective orders would also be applicable for these hearings.

MJ [CAPT ALLRED]: True. Those are applicable to every session of the court. Okay.

I have not established any timelines for argument today, but I would just like to remind counsel that I have read your briefs and submissions and I would ask you to focus your arguments on the most important parts of those and not simply re-iterate what you've said in your brief. On the 20th of December 2007, after consulting with the parties, I issued a final trial schedule. The defense had requested several periods of delay to accommodate the teaching

schedules and other commitments of the defense team, and I granted all of those periods of delay with the understanding that the defense accepts responsibility for those delays. I invited the defense to object to my understanding of their filing if I had misunderstood it.

I got no objection, so I assume that the defense is content to accept all the delay associated with the trial schedule.

Is that correct?

ADDC [MR. SWIFT]: That is correct, Your Honor.

MJ [CAPT ALLRED]: Okay, very good. Let's see. We have a number of motions today, I believe I told the defense I would let them address the motions in any order they chose, and so I say to the defense, where do we go next?

[Defense Counsel conferring at desk.]

MJ [CAPT ALLRED]: Which one are you turning to, can you----

ADDC [MR. MCMILLAN]: May it please the court, my name is Joe McMillan for the accused, Salim Hamdan. The first, Your Honor, that we'll address, will be the ex post facto motion.

Your Honor, the defense has moved for the dismissal of the two charges; conspiracy and providing material support for terrorism on the basis that to prosecute this defendant would be to prosecute charges in an ex post facto manner; a manner that is prohibited by every applicable law and indeed prohibited by any law that is applicable in this court including the M.C.A. There has been a great

deal of the briefing devoted to whether or not the ex post facto prohibition in the Constitution applies.

But, the main point that I want to make this morning is that we don't need to even address that question because the Military Commissions Act, which both parties agree apply here, the Military Commissions Act imports an ex post facto prohibition. It reflects the intention of Congress.

May I just interrupt myself to ask the court to have the slides which I will go through here published publicly? They consist of no evidence, simply a series of quotations from statute and case law.

MJ [CAPT ALLRED]: Very well. We may do that.

[The court reporter published the slides to the gallery.]

ADDC [MR. MCMILLAN]: This slide indicates that the ex post facto principle is imbedded in every conceivable statement of law. It is universally recognized by federal law, by constitutional law, and international law, by treaty law. All of which, it is the defense’s position, apply in this proceeding. We understand it is the prosecution's position that only the Military Commissions Act applies. And the Military Commissions Act itself is sufficient to essentially resolve this motion with a dismissal as against Mr. Hamdan of the conspiracy and material support charges. We see that the M.C.A., in section 950(p) which is displayed here, we see that

Congress did not intend to authorize ex post facto prosecutions under the M.C.A. The statement of substantive offenses that Congress wrote indicates that this chapter, the M.C.A., does not establish new crimes that did not exist before its enactment. So this is perfectly consistent with Congress' authority under the Define and Punish Clause of the Constitution in Article I, section a.

Under that provision, Congress has the power to define, but not to create, international law. And we've cited to the court a number of cases that stand for that proposition. Some of them of long standing, such as the one indicated here, *United States v. Furlong*. The Supreme Court rejected an argument that Congress could redefine 'murder' to become 'piracy' in order to assert jurisdiction over that offense. The Supreme Court said, in that context, "If, by calling 'murder' 'piracy', Congress might assert a jurisdiction over that offense, what offense might not be brought within their power by the same device?"

Some years later, in *United States v. Arjona*, the issue involved counterfeiting of foreign securities, and again the Supreme Court indicated that international law depends on a universally recognized obligation, and under the Define and Punish Clause, Congress is not attempting or authorized to create new international law. In the offense as defined as an offense against the Law of Nations depends on the thing done not on any declaration to that

effect by Congress. Mere recitals by Congress that an offense is an offense against the Law of Nations are not sufficient.

Indeed, one of the authorities that the prosecution relies most heavily on in this motion is an Attorney General opinion dating from 1865. They rely on that opinion with respect to the material support charge. That opinion itself states that, "…to define is to give the limits or precise meaning of a word or thing in being." To make, by contrast, "…is to call into being." Congress has the power to define, not to make, the Laws of Nations.

Again, one of the founding fathers, James Wilson, at the Constitutional Convention correctly stated the scope of Congress's power with his comment: "To pretend to define the Law of Nations which depended on the authority of all the civilized nations of the world would have a look of arrogance that would make us ridiculous." He was objecting to language in the Define and Punish Clause. Governor Morris of Pennsylvania responded to James Wilson at the Constitutional Convention, replying that, "The use of the word 'define' was intended to suggest the need to provide detail, but not to create offenses where none had previously existed." Scholars who have looked at the Constitutional Convention agree that Congress-- Bates at the convention made clear that Congress would have power to punish only actual violations of the law of nations, but not to create new offenses.

Perhaps the most recent article appearing in the Harvard Journal of International Law states this quite clearly. “This is not to say the founders intended to give Congress free rein to determine offenses against the Law of Nations, rather the word 'define' was carefully chosen.”

It's clear from the drafting history of the clause that only offenses established by the consent of nations, to use Chief Justice Marshall's phrase, "... would qualify." Congress could not create these offenses, but it only retained a second order authority to assign more definitional certainty to those offenses that already existed under the Law of War. Now, Congress acted in a manner consistent with all that authority. They did not intend to--the M.C.A.--to create new offenses, and the statute that we look at illustrates that.

Congress also incorporated in the M.C.A. another source of authority for the ex post facto principle, and that is Common Article 3. Again, we don't need to dwell at length on whether or not the Geneva Conventions are self-executing, or the ex post facto principle of the Constitution is applicable here in this courtroom, because the applicable law that both parties agree on, the M.C.A. itself, incorporates Common Article 3, and that the CMCR itself as stated in the Khadr opinion of September 2007.

And what I have on the screen, Your Honor, **[pointing to the monitor display screen in the courtroom]** is the language of the Khadr opinion, indicating that, "Congress appears to have embraced the minimal safeguards guaranteed by Common Article 3, requiring that even unlawful enemy combatants..."--so even those of whom this court has already made a finding that it has jurisdiction--"that even unlawful enemy combatants are to be tried by a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized people." And the citation is to 948(b)(f).

In this section of the Khadr opinion, the Court of Military Commissions Review goes on to demonstrate how the protections of Common Article 3 will be applied. They go on to talk about basic guarantees of due process, which in that proceeding were incorporated by the M.C.A. and had to be enforced. And in that case, you see the CMCR speaks in terms of “no serious authority would contest the notion that one of the most indispensable and important judicial guarantees among civilized nations honoring a tradition of due process and fundamental fairness is the right to adequate notice and an opportunity to be heard in regard to allegations that might result in a criminal sanction.” So here you have an example of the CMCR referring to the M.C.A. which incorporates Common Article 3 and thereby basic due process notions.

Common Article 3--and in fact the CMCR identifies Article 75 of Protocol 1 to the Geneva Conventions as setting forth many of these most fundamental guarantees. Article 75, in that context, was cited because of the requirement that notice and an opportunity to be heard be afforded. But Article 75 also set forth the ex post facto principles.

So, in essence, a great deal of the briefing is devoted to an issue that the court doesn't even really need to reach. The court can dispose of this motion based on the M.C.A. alone. Now, the question then becomes--given that the M.C.A., and indeed any law, will enforce an ex post facto prohibition--the question then becomes, “Are conspiracy and material support indeed pre-existing offenses?” And a great deal of the briefing is devoted to those questions as well, and that's where I'd like to turn.

The Supreme Court in the *Sosa v Alvarez-Machain* case sets forth the appropriate standard that the court should apply in determining whether or not conspiracy and material support for terrorism are pre-existing Law of War violations. And the standard here is expressed, “Actionable violations of international law must be of a norm that is specific, universal and obligatory.” And the court went on to say, "Any claim based on the present-day Law of Nations must rest on a norm of international character accepted by the civilized world, and it must be defined with specificity

comparable to the features of the 18th century paradigms." The 18th-century paradigms for international law offenses related to things like ‘violations of flag of truce’ or ‘piracy’ or ‘attacking ambassadors.’

The Hamdan case involved a thorough and exhaustive consideration of whether or not conspiracy was a pre-existing offense under the Law of War.

Virtually all of the authorities presented to this court in support of their conspiracy charge come from the Civil War era or the World War II era, authorities that were considered by the Supreme Court of the United States and rejected by a plurality of the Justices. Four of the eight justices found that, as stated here, the government must make a substantial showing that the crime of conspiracy, for which it seeks to try the accused by military commission, is acknowledged to be an offense against the Law of War, and that burden was far from satisfied. Nothing new has been offered to this court. The prosecution instead is urging this court to reject the considered opinion of the plurality on that point.

Hamdan v. Rumsfeld explained that the crime of conspiracy has rarely, if ever, been tried as such in this country by any Law of War military commission that was not exercising some other form of jurisdiction. And that is the answer to the Civil War era authority that the prosecution was presenting. The plurality opinion in Hamdan

1 explained, "…that military commissions can be of at least three
2 types. They can be Law of War Commissions, which is the sort of
3 commission that we are in now, or they can be Occupation Courts or
4 Martial Law courts."
5 In the American Civil War the jurisdictional bases of the
6 commissions that operated, and in some cases, heard conspiracy
7 charges were mixed. They were of a hybrid character. The plurality
8 opinion is very clear on this point. And, in considering the
9 question, they concluded that there are not clear and unambiguous
10 precedents from the Civil War era showing conspiracy to be a Law of
11 War violation.
12 As the Court went on to say, it does not appear in the
13 international sources either. In either the Geneva Conventions or
14 the Hague Conventions, which are the major treaties on the Law of
15 War. The court--the plurality--in Hamdan acknowledged that the
16 common law is evolution--the common Law of War--is evolutionary in
17 nature. And, in fact, in the postwar era we see conspiracy having
18 been recognized in certain areas of international law; conspiracy to
19 commit genocide; conspiracy to commit crimes against peace.
20 The latter was, in fact, recognized at Nuremberg--the
21 conspiracy to commit genocide in the late 40s in the Genocide Treaty.
22 But never in international law has conspiracy been recognized as a
23 Law of War offense. "The precedent," the court said, "must be plain

and unambiguous" in order to find that these offenses, State Law of War Offenses, no such plain unambiguous precedents can be found.

The sources that the government rely upon to show that conspiracy to violate Law of War is itself a violation, in fact demonstrate the opposite.

And I can move through these quite quickly, the court is familiar with the authorities that the prosecution has proposed; *Ex Parte Quirin*, the 1942 case involving German saboteurs. The plurality’s view was, if anything, that case supports Mr. Hamdan's argument that conspiracy is not a violation of the Law of War.

The Supreme Court pointedly declined to address the conspiracy charge in that case, and indeed, the other 1950s era case, *Colepaugh* decision of the 10th Circuit likewise contains no discussion of the conspiracy charge, although it is mentioned that the conspiracy charge was advanced, but it's unclear that the defense even challenged it.

The records of Howland--Howland who authored the digest of the opinions of The Judge Advocates General. Again--Civil War era cases. These records provide no support for the inclusion of conspiracy as a Law of War violation.

Winthrop, the Blackstone of military law, excludes conspiracy of any kind from his own list of offenses against the Law of War, and as the plurality emphasized, Winthrop's position was

that, "Law of War offenses must consist of overt acts rather than intentions only."

Now, bear in mind, even if there was a ground for maintaining that conspiracy did have a history in American jurisprudence as a Law of War offense, the standard is a universal standard, internationally accepted by all civilized nations. And as the plurality noted in *Hamdan*, the international sources confirm that conspiracy is not a recognized violation of the Law of War.

They addressed the military tribunal at Nuremberg, which pointedly refused to recognize conspiracy to commit war crimes as a violation. The court noted that conspiracy is a concept prevalent in Anglo-American law but not part of the European legal tradition. Arguably not an element of the internationally recognized laws of war.

Indeed, if you look at all the relevant international sources today, going back to the Hague convention, the Fourth Hague Convention of 1907 through the Geneva Conventions in 1949, through the International Criminal Tribunal for the Former Yugoslavia, and for Rwanda, and the Rome Statute setting up the International Criminal Court, we do not see conspiracy recognized as a Law of War offense.

The ICC statute contains an exhaustive list of Law of War offenses. Conspiracy is not among them. Over 130 nations have subscribed to--acceded to that treaty.

Now, let's turn briefly to material support for terrorism. Likewise, the same standard applies. A norm of international character that is well-defined and clearly visible in well-established precedents. That's the standard the court needs to apply. That standard cannot be met here.

The international sources we just talked about likewise contain no reference to material support for terrorism as a Law of War offense. Commentators, both overseas and in the United States, have pointed out that there is no basis for maintaining that material support for terrorism is a Law of War offense. This, from a November 2007 report of the UN Special Reporter indicates that, “Offenses such as providing material support for terrorism go beyond offenses under the Laws of War.” And indeed, even a Congressional research service report authored in September of 2007 notes that, “Defining, as a war crime, that material support for terrorism does not appear to be supported by historical precedent.”

The authority that the prosecution relies on for material support as a traditional Law of War offense is almost exclusively that 1865 Attorney General opinion. That, I would suggest, was

perhaps an accurate statement of the Law of War 140 years ago. It is not an accurate statement of either U.S. or international law today.

There has been a lot that occurred in the international arena since the American Civil War. In fact, the section that I have displayed here **[pointing to defense PowerPoint slide, viewable on published screen to gallery]** simply illustrates the state of the Law of War at that time as set forth in that authority that the prosecutor relies on. Essentially the Law of War at that time countenanced summary executions of unlawful combatants. "A pirate, an outlaw, where he common enemy to all mankind may be put to death at any time. It is justified by the law of nature and nations." The Attorney General of 1865 said that, "No reader, not to say student of the law of nations can doubt but that..." that statement from Mr. Patrick Henry in the 18th century, fairly stated the laws of war.

The banditti, the bands of marauders, the armed gangs which moved across the landscape in the Civil War era--as the Attorney General said, "They spring up in times of war, and they are respecters of no law...and may be hunted down like wolves." That was the statement of the Law of War 140 years ago. It is not the statement of the Law of War today. That authority does not provide sufficient authority on which to prosecute material support for terrorism in this Commission. If any law is going to apply in this courtroom, the *ex post facto* principle must be respected.

Congress has illustrated an intention in the M.C.A. itself and the CMCR has interpreted the M.C.A. to incorporate Common Article 3. So both the M.C.A. and Common Article 3 show that *ex post facto* principles must be respected. The authority that has been put forward does not support the proposition that conspiracy or material support for terrorism are pre-existing offenses. If there are any questions I'd be happy to address them.

MJ [CAPT ALLRED]: Well, my mind is full of questions. This is a fascinating subject. Let’s see--one of your slides said "rarely if ever." Conspiracy has "rarely if ever" been punished by a military commission that was not also exercising some other kind of jurisdiction.

Do you remember that slide?

ADDC [MR. MCMILLAN]: Yes I do. That is a statement from the plurality opinion.

MJ [CAPT ALLRED]: Does that not mean that on occasion it was, in fact, prosecuted by a military commission that was not exercising some other kind of jurisdiction?

ADDC [MR. MCMILLAN]: Well, my recollection of the opinion is that the plurality opinion, at least, does not provide an example of when it was. *Quirin* may be an example of a military commission that charged and prosecuted conspiracy from the World War II era. But, again, the affirmance of that conviction was based on the court’s

examination of the other charges and its determination that they clearly stated violations of the Law of War. And it did not need to reach the question.

So, I think that would support the language that you are inquiring about. Rarely, if ever, has a Law of War commission prosecuted a conspiracy. The *Quirin* court apparently did, but it was affirmed not on that basis, because it was, in a sense, superfluous to clearly defined Law of War offenses that no one argued about.

MJ [CAPT ALLRED]: I'm curious about Winthrop's statement as well, when he said, "intentions only are not a crime." As I read that authority, he was saying that--he was apparently, arguably saying that in his mind the word "conspiracy" meant "entering into an agreement but without any overt act in support--in furtherance of the agreement." And he might've been saying, "That is not an offense--just to enter into an agreement." And the language you quoted from his treatise, I guess it was, that "...intentions only are not a crime." You know, so that authority I am not sure what to make of it either. That's probably true that intentions only are not a crime.

ADDC [MR. MCMILLAN]: Right. I think what he goes on to say is that "...overt acts or acts sufficient to constitute an attempt." So the standard would be attempted murder or attempted misdeeds of one sort or another. So if there are agreed to standards sufficient to

represent an attempt, but it's an attempt towards a certain underlying offense. Those might suffice.

Conspiracy, however, is not one that he lists as among those that historically were tried by pure Law of War commissions. Conspiracy could be tried, certainly, under domestic law and conspiracy could be tried as occupation courts--Military Commissions sitting as occupation courts applying domestic law. But I think--I'm not disagreeing with Your Honor's point, which is that----

MJ [CAPT ALLRED]: ----It's not clear Winthrop was saying, I guess.

ADDC [MR. MCMILLAN]: ----what's the line between attempt and conspiracy as defined to be an agreement plus acts in furtherance of the agreement? I think it's a blurred line. The standard, however, is one of clear and unambiguous precedents of an international character. So even if we were to concede, and we're not, but even if we were to concede that one can find instances in American history of the past where conspiracy was prosecuted, that has been superseded by the evolution of international law and it's these international sources which are key to determining whether or not the Law of Nations criminalizes conspiracy.

MJ [CAPT ALLRED]: Part of what I'm struggling with, then, is whether the word "conspiracy" as used today had the same meaning in the 1800s or at previous periods in history. If previous users of

the word, like Winthrop, were referring only to an agreement, I can understand that there may not have been a violation. They may have called it a different word--they may not have called it conspiracy then, but the act of entering into an agreement and then trying to carry that out, if that was an offense then but called something different, that's what I'm trying to figure out--what to make of these precedents.

ADDC [MR. MCMILLAN]: Well, I think it's incumbent on the Court to look at the state of international law today. And, as pertinent a question as that is to the mindset of the 19th Century or early 20th Century, in one sense it's of academic interest only. Because it's the contemporary international scene that sets out the standard of what is and is not an offense against the Law of War. As we saw from the Attorney General's opinion from 1865, the Law of War at that time permitted summary executions. The Law of War does not permit them in 2008.

MJ [CAPT ALLRED]: Well, given the fact that you like the principle of the evolution of international law in this instance, do you think evolution of international law can go the other way? I mean, this is basically the President's--this is what the President is saying. International law needs to evolve in response to counter terrorism and----

ADDC [MR. MCMILLAN]: ----And there are interesting commentaries by scholars about Congress' power under the Define and Punish Clause to push the envelope, as it were to try to nudge the community of nations in the direction of recognizing--universally--an offense of conspiracy.

Indeed, the prosecution even points out such effort on the material offense charge in its brief with the passage of a Security Council resolution in September of 2001. At that point, the Security Council, which--I don't know how many nations are on Security Council--2 dozen? Less, probably--called on member states to criminalize material support for terrorism. Here again, an international body urging the international community to seriously consider elevating or creating an internationally recognized offense under Law of War.

But that is itself evidence that supports the defense proposition in this case--or the defense position that that has not crystallized.

Now, can Congress or the President do the same? I think that they can. They can try to move the international community in that direction, and in fact this court doesn't need to really reach the question of whether individuals apprehended after the passage--or individuals apprehended and charged with acts that occur after the passage of the M.C.A. may well be prosecuted and that that would not

be ex post facto, because Congress has succeeded in moving--and setting a new international standard.

But those are not the facts here. And in that sense, the defense position is not asking the court to strike down or strike out of the M.C.A. the “conspiracy” offense or the “materials for” offense. That may be within Congress’ prerogative to push the envelope. But, it is Congress’ intent, we maintain, not to apply that retroactively to conduct that occurred before the passage of the M.C.A.

MJ [CAPT ALLRED]: Okay. I have one final question then I’ll let you rest. It seems that, in a footnote to the plurality opinion in *Hamdan*, the Court conceded that conspiracy might be an offense to the extent it is an aiding and abetting kind of level of proof. And it seems to me that they used the word "common criminal conspiracy--common criminal enterprise…"

ADDC [MR. MCMILLAN]: "Common criminal enterprise."

MJ [CAPT ALLRED]: And saying we acknowledge that a common criminal enterprise that amounts to aiding and abetting would be a type of conspiracy that violates the Law of Nations. This specification charges a common criminal enterprise.

Do you think that that cuts against your argument?

ADDC [MR. MCMILLAN]: The offense in the M.C.A. and the offense that is charged on the charge sheet is conspiracy.

MJ [CAPT ALLRED]: It’s labeled conspiracy, that's true.

ADDC [MR. MCMILLAN]: And while there is language in the charge sheet that tries to evoke the common criminal enterprise standard, that is not the offense that is recognized in the M.C.A. or the offense that is being prosecuted in this Court. That footnote in the plurality opinion does note that common criminal enterprise theory of liability is beginning to be recognized in international law, but a common criminal enterprise theory of liability is not a substantive offense. A common criminal enterprise theory of liability is akin to aiding and abetting and it is a way to attach liability--whatever way liability may attach to a joint venturer in some misdeed. But, common criminal enterprise, the plurality said, is not a substantive offense, is not one that is recognized by the M.C.A., it is not one is being prosecuted here despite the relatively loose language that appears in the charge sheet.

MJ [CAPT ALLRED]: Okay. I thank you sir for a fine argument. Is the government ready to respond?

APROS [MR. GOLDSTEIN]: This is going to little more old-fashioned presentation. Hopefully still exciting.

MJ [CAPT ALLRED]: Actually, Mr. Goldstein why don't we take a recess for a few minutes? Maybe I should ask. Does anybody need a recess?

[No affirmative responses were noted.]

MJ [CAPT ALLRED]: Okay. We'll go ahead and hear your argument, and then we'll take a recess.

[The court reporter gives note to military judge as Mr. Goldstein approaches the podium and prepares to deliver his argument.]

APROS [MR. GOLDSTEIN]: The United States----

MJ [CAPT ALLRED]: Okay, I'm sorry----

APROS [MR. GOLDSTEIN]: I'm sorry, recess?

MJ [CAPT ALLRED]: ----apparently we've received a message via forces that we don't all comprehend that someone needs a recess, so we'll take a comfort break, alright then take up your argument afterwards.

APROS [MR. GOLDSTEIN]: That's fine.

[The R.M.C. 803 session recessed at 1037 hours, 7 February 2008.]

[The R.M.C. 803 session was called to order at 1055 hrs, 07 February 2008.]

MJ [CAPT ALLRED]: The court’s called to order. Government, we're ready to hear your argument.

APROS [MR. GOLDSTEIN]: Thank you, Your Honor. The United States may try the accused under the M.C.A. for conspiracy for providing material support for terrorism. The first point I will discuss is that Congress, contrary to what the defense just represented, intended the M.C.A. to apply retroactively.

My second point will be that, in order for this commission to hold that Congress cannot do what it intended, this commission would first have to hold that Congress exceeded its authority under either the Ex Post Facto Clause or international law. Neither is true. Third, I will argue that this commission has jurisdiction to try the accused for conspiracy and providing material support for terrorism because Congress has defined both and----

MJ [CAPT ALLRED]: I'm sorry--the lights. Did you see the little lights there in front of you?

APROS [MR. GOLDSTEIN]: Yes.

MJ [CAPT ALLRED]: See the little yellow one on?

APROS [MR. GOLDSTEIN]: I see that now.

MJ [CAPT ALLRED]: That's for you.

APROS [MR. GOLDSTEIN]: Okay. I won't take it personally.

Third, I will argue that the commission has jurisdiction to try the accused for conspiracy and providing material support for terrorism because both have been defined as violations of the Law of War under the Offenses Clause. And fourth, I will argue that in any event, both conspiracy and providing material support for terrorism have historically been violations of the Law of War, thus obviating any *ex post facto* concerns.

The United States will therefore ask this commission to make the following findings: That this commission has jurisdiction to

try the offenses as violations of the Law of War; second, that the accused has no standing to assert any rights under the Ex Post Facto Clause; third, that international law does not prevent Congress from applying the M.C.A. retroactively; and fourth, that conspiracy and providing material for support terrorism were violations of the Law of War at the time of the charged conduct, thus obviating any ex post facto concerns.

I will begin with the accused's retroactivity claims, which seems to be also where the defense concentrated its arguments. Congress expressly made the M.C.A. and the offenses of conspiracy and providing material support for terrorism retroactive and applicable to the accused.

In the M.C.A., Congress stated emphatically that they intended the act to apply to offenses committed prior to its enactment.

First, in section 950p (a), which the defense referenced during its oral argument, Congress explained that the M.C.A. does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission. However, I do not believe that the defense put up in his presentation section 950p (b), which explains the effect of section 950p (a), which is that because the M.C.A. is declarative of existing law, it

does not preclude trial for crimes that occurred before the date of its enactment.

Third, Congress expressly defined the jurisdiction of the M.C.A. and of this commission to include acts committed not only prior to enactment of the M.C.A., but prior to September 11th itself. In section 948d (a), Congress wrote, "A military commission under this Chapter shall have jurisdiction to try any offense made punishable by this Chapter or the Law of War, whether committed by an alien unlawful enemy combatant before, on, or after September 11th 2001." The accused' argument appears to be either that Congress did not mean what it so clearly said, or that Congress lacked the power to do so. Both arguments are clearly wrong.

First, it is clear from the text of the M.C.A., in particular sections 950p (b), and 948d (a) that Congress intended the M.C.A. to apply retroactively. It's hard to understand what those sections would mean otherwise. As the court in *Boumediene* correctly noted, "The Constitution demands clarity, not redundancy."

Second, the M.C.A. was passed in direct response to the Supreme Court's decision in *Hamdan v. Rumsfeld*, in which the Court virtually invited Congress and the President to invoke; to authorize a lawful system of military commissions to try Mr. Hamdan. The legislative history is clear, that supporters of the M.C.A. envisioned its being used to try those who planned and supported the

1 people behind the terrorist attacks of September 11th, attacks that
2 obviously predate enactment of the M.C.A.
3 Finally, as we explain in our briefs, every member of the
4 *Hamdan* majority noted that Congress' inaction at that point was key,
5 in finding the then-existing system of military commissions to be
6 *ultra vires*. Presumably, the Justices expected Congress and the
7 President to respond with a system of military commissions capable of
8 trying a person such as Mr. Hamdan for his crimes. That is, by means
9 of legislation having retroactive effect. Otherwise the court would
10 have sent Congress and the President on a fool's errand. Clearly the
11 M.C.A. was intended to apply retroactively.
12 The accused's fallback argument, which, on today's argument
13 defense did not spend much time, but is a relevant ground for this
14 decision, is that despite Congress and the President unambiguously
15 legislating that the M.C.A. can and should have retroactive effect,
16 Congress is somehow powerless to do so because of the Ex Post Facto
17 Clause.
18 As the Court correctly found in its 19 December order,
19 however, the Constitution does not apply to alien enemy combatants
20 detained outside the sovereign territory of the United States with no
21 connection to the United States other than their confinement. And
22 the authorities for that are *Boumediene* and *Eisentrager*. As
23 *Boumediene* explained, under the reasoning of *Eisentrager*, the accused

may not invoke the Ex Post Facto Clause, the Bill of Attainder Clause, the Suspension Clause, the Due Process Clause or any other protection of the Constitution, since the accused has no rights under the Constitution. In addition, any distinction between individual rights, such as in the Fifth Amendment, or "structural rights," as in the Ex Post Facto Clause is illusory. It's a distinction without a difference.

All rights in the Constitution are restrictions against governmental power. The same rationale that supports the Court's holding in *Eisentrager*--that the due process clause does not apply to alien enemy combatants detained abroad--compels the conclusion that the Ex Post Facto Clause likewise does not apply to them. As the court in *Boumediene* noted, the First Amendment is framed as a restriction on governmental power. "Congress shall make no law abridging freedom of speech." But *Eisentrager* clearly determined that such combatants do not possess rights under the First Amendment. That's page 784 of *Eisentrager*.

Likewise, the DC Circuit, whose decisions are binding on this Commission, has found that aliens beyond the territorial jurisdiction of the United States are generally unable to claim the protections of the First Amendment and we'd cite, for example, DKT Memorial Fund, which is in our supplemental citations. Accordingly, nonresident aliens such as the accused, who are held outside of the

United States' territory, lack any rights under the Constitution regardless of whether those rights are framed in terms of persons, as in the Fifth Amendment, or instead refer to prohibitions on Congress itself, as in the First Amendment and Due Process Clause.

Further, this defendant has no standing to raise a constitutional ex post facto challenge on behalf of others. And we would cite, for example, *Kowalski v. Tesmer*, which is cited in our briefs––a 2004 Supreme Court case. Under basic standing doctrine, the accused' purported ex post facto injury would not be redressed by a favorable decision vis-à-vis other potential defendants who might be protected by the Constitution.

Accordingly, the accused "lacks the necessary zeal," and that's quoting *Kowalski*, to bring a constitutional ex post facto challenge on behalf of others. The accused's attempt somehow to carve the Ex Post Facto Clause and Bill of Attainder Clause out of *Eisentrager*'s constitutional holding has already been rejected by the DC Circuit and by this Commission, and we urge this Commission to continue to reject such arguments.

With respect to international law, any ex post facto principles imminent in international law do not apply to the M.C.A.'s substantive offenses. As initial proposition, we explained in our briefs that Congress is not bound by international law, whether in

the form of a previously enacted treaty or customary international law.

And we cite the *Head Money Cases*, *Reid v. Colvert*, both of those are with respect to treaties–-and *TMR Energy* and *Community of U.S. Citizens living in Nicaragua*, those are DC Circuit cases with respect to customary international law that stand for that proposition.

Congress has expressly declared that all substantive offenses in the M.C.A. may be applied to acts that predate the M.C.A.'s enactment. That's section 950p. To the extent there is a principle in international law that would prevent this, Congress has clearly disapproved application of that principle with respect to the substantive offenses codified in the M.C.A. And that's section 940d(a) and again 950(p). In addition, to the extent Common Article 3 contains any ex post facto principle,

MJ [CAPT ALLRED]: I'm sorry, are you reading from something now?

APROS [MR. GOLDSTEIN]: I'm sorry?

MJ [CAPT ALLRED]: Are you reading from something now?

APROS [MR. GOLDSTEIN]: No.

MJ [CAPT ALLRED]: Okay. This is just your argument.

APROS [MR. GOLDSTEIN]: This is my argument. Although I am going to mention a particular section, which is that to the extent

Common Article 3 contains any ex post facto principle, Congress has stated that the accused may not invoke it as a source of rights. And that's section 948b (g). Accordingly, the accused may be prosecuted for conspiring and providing material support for terrorism prior to enactment of the M.C.A.

As to the jurisdictional point, I'm not sure how much disagreement there necessarily is on that. The government's position is that because Congress has defined the two offenses as violations of the Law of War pursuant to its authority under the Offenses Clause, the accused may be tried for it in this commission. It's not clear to me that the defense disagreed with me on that, at least from a prospective standpoint, Congress' plenary authority under the Offenses Clause to define and punish violations of a Law of Nations.

The defense referenced the *Hamdan* plurality. Some of the statements that might seem to suggest that there has to be some universal assent or something along those lines; at lease with respect from a retroactive standpoint, and then they appear to concede there might be a different rule from a prospective standpoint. It's not really clear what the source of that distinction would be, and it certainly doesn't appear, as far as I know, in the *Hamdan* plurality.

We cite in our briefs the bin Laden case from the Southern District of New York, which was criticized on some other grounds

later on by the Second Circuit, but it made some statements regarding that even assuming certain acts are not widely regarded as violations of international law, it does not necessarily follow that those provisions exceed Congress' authority under the Offenses Clause. And it cites various sources for the proposition that essentially Congress has authority to "push the envelope," which I think even the defense used that term, and to shape the discourse of international law.

So, presumably, that regardless of whether it is widely considered to be a violation of international law--conspiracy and the provision of material support for terrorism--that is kind of a non sequitur to whether or not Congress has the authority under the Offenses Clause to define it as such. In Ha----

MJ [CAPT ALLRED]: What page of your brief was that case on?

APROS [MR. GOLDSTEIN]: Sure. Page 13, there's a block quote from that case.

MJ [CAPT ALLRED]: Okay, thank you.

APROS [MR. GOLDSTEIN]: Numerous provisions of U.S. law support Congress' authority under the Offenses Clause to define and punish foundations of the law war. Three of them were actually cited by the plurality in *Hamdan*; section 904, aiding the enemy, 906, spying, and 18 U.S.C. 24.41, dealing with war crimes. In our regard, we note that even prior to enactment of the M.C.A., at least three justices

on the Supreme Court would have held the conspiracy was a violation of the Law of War, and four Justices, although they found the opposite, expressly premised that finding on Congress' non-action up to that point. That was repeatedly referenced by the plurality.

In addition, Justice Breyer, who concurred with three other justices, ultimately rested his conclusion upon a single ground. And, I'm quoting here, "Congress has not issued the Executive a blank check." Justice Breyer explained that nothing to the President from returning to Congress to seek the authority he believes necessary.

Similarly, Justice Kennedy, who did not join the plurality as to conspiracy agreed with the government that Congress, not the court, is in the better position to undertake the sensitive task of determining whether conspiracy is a violation of the Law of War. Congress has now acted, and reasonably defined both conspiracy and providing material support for terrorism as violations of the Law of War. Given Congress' plenary authority in this arena, particularly in light of the weighty historical evidence we've cited in our brief, Congress' decision must be respected.

Finally, we note that the Hamdan plurality is not to the contrary, since one, it was directly premised on Congress' non-action up to that point, and second, it failed to command the assent of a majority of the Justices, and therefore is not binding even with respect to Mr. Hamdan in the United States, since only the judgment

of Hamdan has preclusive effect, and that judgment did not include the plurality's discussion of conspiracy.

With respect to the historical arguments, those are two lines of argument. One is that because the ex post--because Congress appended the M.C.A. to apply retroactively, and because the Ex Post Facto Clause and international law do not bar that, the accused may be tried for his pre-M.C.A. acts in this commission so long as there is jurisdiction and it is currently a violation of the Law of War. That served as the first line of argument.

Second line of argument, both on which the government would also prevail, is that because conspiracy and providing material support for terrorism have historically been violations of the Law of War, that both establishes jurisdiction and obviate any ex post facto concerns.

Beginning with conspiracy, there are two prongs of conspiracy in the M.C.A. and the M.M.C. The accused has been charged under both of them. And either is an independent sort of specification; an independent way of finding the accused guilty. First is entering into agreement to commit a violation of the Law of War. The second way of proving conspiracy, is if the accused joined an enterprise of persons sharing a common criminal purpose along the lines as described in the M.M.C. Both of those have historically been violations of the Law of War punishable by military commission.

With respect to the entering into an agreement prong, in *Ex parte Quirin*, the Nazi saboteurs who arrived in the United States planning terrorist acts, were charged with conspiracy and tried before a military commission. The fact that the Supreme Court did not expressly affirmed on that grounds is, I guess, of interesting historical note, but I don't really see it as particularly dispositive in any way, and the idea of reading into the silences some implicit disapproval is kind of a radical interpretation of the text.

In *Colepaugh v. Looney*, a 10th Circuit case from 1956, which we know it is, of course, after the Geneva Conventions, another Nazi saboteur whose convictions were subsequently upheld was also tried before military commission for conspiracy after secretly entering the United States intent on committing espionage on behalf of the German Reich. His conviction for conspiracy was also upheld and the fact that the court did not go out of its way to say, “We really mean it. Is it really a violation of the Law of War?” It’s hard to see how that had much weight, and if anything, the fact that the Court did not comment on it probably suggests quite the opposite, that it was unexceptional and the 10th Circuit said they accepted that.

With respect to the Lincoln assassination, we’ve noted in our briefs that those conspirators were charged with “combining,

confederating, and conspiring" with, among others John Wilkes Booth to kill and murder Abraham Lincoln. In addition, Winthrop lists among offenses cognizable by military commissions--criminal conspiracies, and cites, as an example of that, the Lincoln conspirators.

The Army Field Manual in paragraphs 498, 499 and 500 lists the offense of conspiracy to commit war crimes, which are defined as violations of the Law of War, as itself a violation of the Law of War. That edition of the Army Field Manual was published in 1956, also after the Geneva Conventions. Moreover, violations of international law may be punished under the Army Field Manual regardless of whether the perpetrators are servicemen or civilians. And that's section 498. And we've cited other materials in our brief; I'm not going to go through it all now.

With respect to the second prong, joining an enterprise, there is precedent for that as well. In the Attorney General opinion, upon which the government relies, and it seems at times, the defense, the Attorney General determined that the Lincoln assassination conspirators not only could be tried before a military commission, but ought to be. And the Attorney General wrote that, "To unite with banditti, jayhawkers, guerrillas or any unauthorized marauders, is a high offense against the Law of War. The offense is complete when the band is organized or joined." The atrocities

committed by such a band do not constitute the offense but make the reasons, and sufficient reasons they are, why such banditti are denounced by the Law of War. Again, it is the mere joining of the enterprise that result in the conspiratorial liability, not the effect of that enterprise.

In the Nuremberg trials, Article X of the charter for the IMT, the International Military Tribunal, provided that in cases where, "a group or organization is declared criminal by the tribunal, the competent national authority of any signatory shall have the right to bring individuals for trial for membership therein."

Under this authority, numerous individuals were convicted and sentenced to death or imprisonment for being a member––for knowing and voluntary membership in the SS, an organization that had been declared criminal by the IMT. And we've cited *United States v. Grant* in our supplemental authorities, which is the Nazi Doctors Case. It's one among many authorities.

Accordingly because there is historical precedent for criminalizing both prongs of the conspiracy offense as violations of the Law of War, the accused may be tried under either or both prongs in this commission without implicating any ex post facto concerns.

Moving on to the provision of material support for terrorism, the government continues to advance the same argument, which is; that it has historically been a violation of the Law of

1 War. We begin with respect to the material support offense with the
2 premise that the systematic use of terror––terrorism--of terror
3 against a civilian population historically has been punished as a
4 violation of the Law of War. We see examples of this in the Geneva
5 Conventions. Common Article 3 provides that, "…persons taking no
6 active part in hostilities shall not be subject to violence against
7 life or person."
8 Pictet, in his commentary to the Fourth Geneva Conventions,
9 discusses a cardinal principle that the civilian population must
10 enjoy complete immunity during war. The Hague forbids treacherously
11 killing or wounding civilians. That's Article 23. Article 25
12 forbids attacking, by whatever means, undefended towns or buildings.
13 Under the War Crimes Act, which is 18 USC 2441, as it read during the
14 charged offenses, all violations of Common Article 3, as well as
15 violations of Articles 23 and 25 of the Hague Convention were war
16 crimes."
17 The attacks of 9/11, the hijacking and purposeful use of
18 airlines as missiles targeted at thousands of innocent civilians,
19 killing nearly 3000 of them clearly violated these international
20 norms and the Law of War. Those attacks and subsequent attacks were
21 made possible by those who provided material support to Al Qaeda, the
22 Taliban and associate forces, whether in the form of weapons or
23 through their own person. In that regard, providing material support

to unlawful or regular combatants, including providing oneself, has historically been punished as a violation of the Law of War.

We see an example of that in the Attorney General's 1865 opinion, the "uniting with banditti, jayhawkers, guerillas…the offense being complete when the band is joined." The contribution of one's person to the band is a violation of the Law of War.

There are numerous civil war court-martial orders we cite in our briefs in which the various Courts-Martial found that not only was someone a guerilla, but violated the Law of War for joining or belonging to a notorious band of guerillas, again, contributing one's person.

There are examples in––there is a document called The War Of The Rebellion, it's an 1894 House of Representatives document which we cite in our briefs and it discusses how numerous rebels, they furnished the enemy with arms, provisions, clothes, and means of transportation violated the Law of War.

We also note that there is precedent in domestic law, from which an accused could reasonably be on notice, that providing material support to terrorist organizations was a violation of the Law of War, or at least was prohibited and there are examples of that in 18 USC 2339b, that's the Material Support for Terrorist Organizations statute.

At this point I am happy to answer Your Honor's questions and in terms of just particular points that were raised by the defense, I agreed with Your Honor's term cross (phonetic) on Winthrop. The discussion of overt acts which is, I believe on page 841, at least of the edition I have.

I think the point of that is that there has to be more than merely harboring criminal intent, whether under the conspiracy provision or the material support provision. The Law of War does not punish thought crime, for example. Some acts are required. Those could be either the acts that have been alleged in the conspiracy offense, it could be the acts that have been alleged in the material support offense as well as joining a band oneself.

All those have historically been punishable as violations of the Law of War. By contributing oneself to al Qaeda, that frees up resources for the organization to commit further acts of violence against the civilian population and that is material support, that is the definition of material support. I am happy at this point if there are particular other points?

MJ [CAPT ALLRED]: Yes. What do you make of the absence of conspiracy in any of the international treaties that the defense referred to that specifically list war crimes? Does the history of those treaties indicate that it was discussed and rejected? Never considered? Or do you know?

APROS [MR. GOLDSTEIN]: As a historical matter, conspiracy has not certainly been codified by international organizations as a violation of the Law of War in many cases. However, Congress has authority to shape the contours of international law and to define offenses essentially in retrospect at times so long as there is some precedent that the accused would be on notice that the act was not "innocent when done." That's a phrase that comes from *Calder v. Bull*. It's––I mean, these arguments at some level, although we sort of discussed them separately, at times blend together.

The accused' argument ultimately appears to be that, when an actor reasonably believes he can perform a particular act, it's somehow unfair in some way or violates some international norm to punish him for that act after the fact.

The Nuremberg precedents make clear that there is not a requirement, as a Constitutional matter, that an offense must be precisely defined under international law in terms of elements and punishments at the time the offense was committed for it to be punishable by a later-created war crimes court. The quote from Dr. Frances Lieber, in his work, Guerilla Parties, considered with reference to the Laws and Usages of War.

And he discusses how the lack of a clear definition of "guerillas," those sorts of marauders that the defense referred to earlier, did not preclude their punishment in the Nuremberg trials.

There was not a “crime against humanity” offense that had been codified prior to, or necessarily been received under international law prior to those offenses. However, the offenders were certainly prosecuted and convicted and executed, in many cases for committing that. Because, it was clear when they committed the acts that they should not be.

And the precedence here that, whether agreeing to commit violations of the Law of War or joining an enterprise––a criminal enterprise committed to prosecuting violations of the Law of War or providing support to those who would inflict terror on the civilian population, all those, regardless of how denominated, have been violations of the Law of War, certainly at the time of the offenses here. And that’s really what’s required.

MJ [CAPT ALLRED]: You just used the phrase, “some precedent” to describe the amount of evidence Congress would have to have before it could define an offense under the Law of War without creating a new one. And, frankly, I’ve been intrigued as I’ve looked at this motion about just what that standard was. “Some evidence” is what you suggest.

I think the defense offered a different––“substantial showing” is what the defense claims should be the standard. Where did you get “some precedent?”

APROS [MR. GOLDSTEIN]: I was taking that––I was paraphrasing––perhaps badly from the bin Laden case I mentioned earlier. This notion that, even assuming that certain acts are not widely received as violations of the Law of War, that does not mean that Congress exceed its authority.

What seems incorrect would be the notion that there has to be either a universal agreement or even some sort of majority rule or something like that. I mean, Congress' authority under the Offenses Clause is distinct, for example, from its authority under the Commerce Clause. Under the Commerce Clause Congress can regulate commerce. Congress is not given the power to define the meaning of commerce. Under the offenses clause, it's a much broader plenary authority.

Now, the defense cites *Furlong* for the proposition that there is some outer limit on Congress' authority under the Offenses Clause. It's not clear if the defense is arguing that there's an outer limit from a retrospective sense and that's different from a prospective sense, I mean I think *Furlong's* point was that––the dicta *Furlong* was that there might be some outer limit in general. I mean, first, we would note that that discussion was dicta. The decision in *Furlong* turned on Congress' intent with respect to a particular statute, not whether or not Congress had exceeded its authority under the Offenses Clause.

MJ [CAPT ALLRED]: Okay. Do you agree that the notions of due process bind this commission, and that "due process" somehow that vague notion prohibits an ex post facto application even if the accused is not entitled to Constitutional protection--even if he's not entitled to international law protection?

APROS [MR. GOLDSTEIN]: In terms of "due process," I mean I guess it depends what we mean by "due process," right? There is a process that is spelled out in the M.C.A. That is a process.

MJ [CAPT ALLRED]: Well, let me be more specific. The Congress has declared that these commissions shall reflect the standards of civilized society and universally accepted notions of justice, that kind of language. Does that include a right to be protected against *ex post facto* laws?

APROS [MR. GOLDSTEIN]: Well, with respect, I believe that Congress in, I think 948b(f) said that these commissions comply with those standards. That is a statement more than an injunction. It's not in the hortatory. It's not "this commission must," it's Congress passed the M.C.A. and enacted certain procedures. It then declared along with the President that those procedures meet our nation's foreign obligations; so that is the legislative branch and the executive branch interpreting both the treaty and I assume other international law that we are in compliance with that.

It would be, as we say in our briefs, extraordinary for a court to say that the Executive's and Congress' clear intent––clear statement that they have complied with international law could be overturned. In addition, we note that Congress is not bound by international law, and there's ample case law for that. Congress passed the statute that passed. And, in that statute, the M.C.A. was intended to apply retroactively. That's what section 948d(a)and(e) is. This commission has jurisdiction to try offenses prior to September 11th.

MJ [CAPT ALLRED]: Okay.

APROS [MR. GOLDSTEIN]: That's certainly retroactive.

MJ [CAPT ALLRED]: I appreciate that. Thank you for your argument.

APROS [MR. GOLDSTEIN]: Thank you.

[Mr. Goldstein resumes his seat at counsel table.]

MJ [CAPT ALLRED]: Okay. What's the next motion you'd like to take?

ADDC [MR. MCMILLAN]: Your Honor, I will address the Fourth Geneva Convention motion.

MJ [CAPT ALLRED]: Fourth Geneva Convention? Very good. I'm sorry, I'm trying to turn off the microphone in front of you there so you can consult with your client without it being amplified, but apparently that's not possible.

Defense Translator: Your Honor, I'm sorry for the bother.

MJ [CAPT ALLRED]: No, it's not a problem. I want you to be able to do that, but I thought we could just turn the mic off easily.

[Defense counsel and defense paralegal set up laptop at podium.]

ADDC [MR. MCMILLAN]: Your Honor, may I begin by asking that the slides again be published? They contain the same sort of material as the previous----

MJ [CAPT ALLRED]: That's fine.

[The Court reporter published the defense slides to the gallery.]

ADDC [MR. MCMILLAN]: Your Honor, Salim Hamdan requests an order that the requirements of the Fourth Geneva Convention be implemented. This request is put forward in a defensive posture. The accused is not asserting an offensive use of these treaty rights rather, in this criminal prosecution, is asking the Court to afford him protections that the Law of War and the solemn treaty obligations of the United States impose.

There are three or four real issues in dispute in connection with this motion and I'll try to move through them quickly. The first is, does the treaty even apply? And the application of the treaty is addressed in Article 2 of the Fourth Convention. Article 2 makes clear it applies in all cases of conflict or occupation--conflict or occupation. A great deal of the prosecution's brief is devoted to the proposition that the American

presence in Afghanistan is not an occupation as defined under the Hague regulations. Our position is that's irrelevant because conflict or occupation is the condition on which the treaty applies.

There is no dispute about the nature of the conflict. In fact, as we pointed out in our briefing, this Court has already implicitly ruled that Mr. Hamdan was captured in the context of an international armed conflict in which the Third Geneva Convention applied at least in so far as requiring an Article 5 hearing.

The Article 2 of these Conventions are identical. They apply in identical circumstances. If the Geneva Convention applied at least insofar as requiring an Article 5 hearing, then the Fourth Convention applies also. Nevertheless, it is worth noting that the Geneva Convention does not require the kind of formal occupation that is described under the Hague regulations. The commentary cited in our briefing make this crystal clear.

So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of Article 42 of the Hague regulations. The relations between the civilian population and troops advancing in the territory, whether fighting or not, are governed by the civilian Convention. There is no intermediate period between an invasion and a stable regime of occupation. There is not a gap in the protection that the Law of War, as codified in the

Fourth Convention, recognizes. There is no gap and that's been made very clear.

Accordingly, the authority relating to occupation and the distinction between invasion and occupation, while relevant in other contexts, is not relevant with respect to whether the Fourth Convention applies. We cited this language, "that even a patrol penetrating enemy territory"----

MJ [CAPT ALLRED]: No need to read that. I have read that in your brief. Thank you.

ADDC [MR. MCMILLAN]: Okay. The question then is, if it applies, is Mr. Hamdan a protected person under Article 4? Article 4 of the Convention sets out the standards by which you determine whether or not a person is protected.

Paragraph 1 is broad in its scope. Persons protected by those who at any given moment and in any manner whatsoever find themselves, again in either conflict or occupation, circumstances in the hands of a party of which they are not nationals. The argument--the real argument--revolves around Paragraph 2 of Article 4, and the meaning of this somewhat obscure passage.

In fact, the International Committee of the Red Cross commentary acknowledges that Paragraph 2 is less than crystal clear, and provides an explanation as to what this language means. What this language--well, the first sentence is quite clear. "Nationals

of a state not bound by the convention are not protected by it." And then the remaining sentence--the second sentence is the one that's at issue. "Nationals of a neutral state who find themselves in the territory of a belligerent state and nationals of a co-belligerent state shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State whose hands they are."

The defense acknowledges that this is not a model of clarity. Nevertheless, the commentary itself and the final record of the Geneva Conference makes clear that the framers of the Convention were talking about two different circumstances. One, aliens on the home territory of a belligerent state and individuals in occupied territory.

And a more clear way of describing "occupied territory" would be, as I put in this slide, "occupied/invaded" territory. And in brief there are three exclusions, and they are listed here. Nationals of a state not party to the convention; nationals of a co-belligerent state, so this would mean for example, the nationals of the American allies as they moved into Afghanistan in the relevant period. Or persons protected under one of the other conventions. Again, that's not an issue in this case.

Mr. Hamdan, it's been established pursuant to the ruling of the court, is not protected by the Third Convention. This is the

commentary, and again this was cited in the briefing, I don't need to dwell on it at great length, but this brings up the main point that the framers' intention was that in occupied territory, occupied or invaded territory, anyone falling into the hands of a power of which they are not nationals are protected.

So, I think the briefing quite clearly posed the issue. I'd be happy to answer questions that you may have about that, but we would urge the court, as it has in the past, to look to the commentary as an authoritative interpreter of the meaning of some of these obscure passages.

Most of the convention is not obscure at all. Most of it sets forth crystal clear, judicially-enforceable standards that this court can and should apply. Whether or not Mr. Hamdan is a protected person or falls into one of those exclusions is cryptic.

We believe the commentaries should provide guidance. The Supreme Court of the United States, the Court of Military Commissions Review, and indeed this court in some of its earlier orders, have referred to the commentaries. The prosecution, in contrast, invites this court to disregard the commentaries. We think that that would be a mistake.

Now, we note--and I don't believe it's disputed--that even those who are identified as unlawful combatants are protected by the Civilian Convention. The U.S. Army Field Manual itself dating from

the 1950s, recognized that. Those protected by the Civilian Convention, GC stands for Civilian Convention, "…also include all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war."

So that brings us to, I think, the third key issue or point on dispute on this motion, which is the meaning of this passage in the M.C.A.--Section 948b(g)--which provides, "No unlawful enemy combatant"--you are familiar with this?

[The military judge affirmed counsel's assertion.]

ADDC [MR. MCMILLAN]: This calls upon the court to engage in an exercise of statutory construction. This language is not nearly as clear and unambiguous, we would maintain, as the prosecution suggests.

In fact, let me say first, that this statement does not contend that this Court does not have the power to apply the Fourth Geneva Convention. In its own terms, it says the defendant may not "invoke" the Conventions. Now, if that is interpreted to mean that you cannot apply the protections of the Fourth Geneva Convention, or are precluded from doing so, that would raise a serious Constitutional issue, which should be avoided by a proper statutory interpretation of this question.

The prosecution addressed not at all the question--the cases that the defense put forward to demonstrate that this, if

interpreted to preclude the defense from invoking the Conventions in their own protection, would intrude upon the judicial function, would compromise the integrity of this court, would render it not regularly constituted as a court of law to apply the law.

The cases that the defense cited included the 2001 Supreme Court decision in *Legal Services Corporation*. In that case, Congress had passed a statute that prohibited attorneys from advancing certain legal challenges based on Federal Statutes or on the Constitution to welfare laws. The Supreme Court found that statute inconsistent with accepted separation of powers principles. It was, the Court said, an impermissible "attempt...to exclude from litigation those arguments and theories that Congress finds unacceptable but which, by their nature, are within the province of the courts to consider."

A court applies the law. Congress cannot dictate to this court what the existing law is and what law can or cannot be applied. And that's the proposition that *Legal Services Corporation* stands for.

Other Supreme Court cases stand for similar propositions. The *Plaut v. Spendthrift Farms* case invalidated a Federal statute that attempted to re-litigate a particular issue and reopen judgments that had been finally concluded by courts. "Congress," the court said, "may not declare…" retroactively "… that the law applicable to the very case was something other than what the courts said it was."

The Supreme Court has held that Common Article 3 applies in this context. The Supreme Court has held that Common Article 3 applies and the M.C.A. has been interpreted by the Court of Military Commissions Review to incorporate Common Article 3. Congress should not be reported to have meant in the M.C.A. that this court can't apply that body of law or the body of law that’s in the Fourth Convention, either.

The last case we cited was *United States v. Klein*, an 1871 decision which, in some ways, is perhaps most analogous where we are now. In that case, Congress passed a statute that tried to dictate the effect--the legal effect--that would be given to a presidential pardon. The court rejected that, saying it violated separation of powers by “prescribing rules of decision to the judicial department… in cases pending before it.”

Congress attempted to impose on the court a requirement that if a pardon had been granted by the president, that would be conclusive evidence of disloyalty and would require dismissal of jurisdiction. The Court recognized that was an impermissible means to an end and disallowed or struck down that provision, refused to countenance legislative encroachment on the judicial determination what the law is and how it should be applied.

Accordingly, the interpretation advanced (provided) by the prosecution of 948b(d) is inferior, we think, to the interpretation

1 that was offered by three of the key sponsors to this legislation,
2 Senators McCain, Warner, and Graham. And we cited this in our brief
3 as a perfectly tenable way to interpret 948d(g). "This legislation"
4 the senator said, "would not bar individuals from raising to our
5 Federal courts in their pleadings any allegation that a provision of
6 the Geneva Conventions--or for that matter, any other treaty
7 obligation that has the force of law--has been violated. It is not
8 the intent of Congress to dictate what can or cannot be said by
9 litigants in any case."
10 The interpretation that they offer is, in fact, consistent
11 with the cases cited in the prosecution brief. The prosecution cited
12 cases for the proposition that the Geneva Convention is not self-
13 executing. The cases they cited all relate to an offensive use of
14 the Geneva Conventions seeking money damages or injunctions or
15 affirmative offensive relief. That is not the context in which Mr.
16 Hamdan invokes Geneva Conventions. And what the senator said here
17 is, the statute should be seen "...as an expression of Congress's
18 agreement with the view..." set forth in those cases cited by the
19 prosecution, "… that the Geneva Conventions…" do not provide "…
20 Private rights of action…" They do not confer upon individuals the
21 ability to seek money damages or claim other affirmative relief.

That is the kind of interpretation that keeps the M.C.A. consistent with international law in the way, in fact, that both this court and the CMCR has interpreted the M.C.A. in the past.

We saw the CMCR, in fact, on a jurisdictional question before in *Khadr*, interpret the relevant statute to say that mere membership alone in an organization like al Qaeda or the Taliban and is not sufficient and it was not Congress's intent that mere membership would establish unlawful combatancy. That's an example.

And in fact they cite, then, to the Additional Protocol--Additional Protocol 1. They cite through international law sources, and then observe that their interpretation of the M.C.A. is fully consistent with these international law sources.

The opinion in the CMCR closes with a citation for the *Charming Betsy* case, saying that it is a long-standing canon of statutory construction that where an interpretation can be advanced that allows the statute to conform to international law, that should be preferred. This interpretation would--it's a tenable interpretation that this court should adopt with respect to that statute.

The final issue goes to the self-executing nature of the treaties. The CMCR addressed this in what the prosecution dismissed as a passing observation. The defense would submit that it was more than a passing observation, it was an exercise in statutory

interpretation of the M.C.A., admittedly in the context of a jurisdictional issue, but providing the background and context in which the M.C.A. must interpreted. "The Geneva Conventions..." the CMCR said, "are generally viewed as self-executing treaties...(they) form a part of American law..." they are binding on American courts.

Treaties are given the effect of Federal statutes under our system, and the interpretation of these treaties is emphatically the province and duty of the judicial department, from an opinion going back to *Marbury v. Madison*.

Just as in the Article 5 ruling of this court previously, we see that the provisions at issue here are clear; they are capable of judicial enforcement. The articles that we have invoked under the Fourth Geneva Convention set out clear, unambiguous guidelines capable of judicial enforcement in precisely the way the Article 5 of the GPW, which this Court enforced, do. There is no call for further action by Congress with respect to the provisions that we have cited to the Court and seek the protection of.

The *Head Money Cases* is a landmark case on how treaties are treated under American law, cited by both sides, and the operative provisions or the relevant provisions are set forth here, that where the treaties prescribe a rule by which the rights of the private citizen may be determined and when they are of a nature that can be

enforced in a court of justice, the Court resorts to the treaty for the rule of decision just as it would to a statute.

These are the provisions that we believe apply, we believe it’s clear that this treaty is self-executing, there may not be--it may be capable of identifying individual provisions which would not be self-executing.

For example, all of the Conventions contain a provision asking the signatory powers to pass penal legislations to criminalize grave breaches. That is the kind of non-self-executing provision addressed to a government asking for further action. None of the provisions at issue here are of that type. And in fact I don't need to linger on them because the prosecution did not dispute in its opposition the interpretation offered with respect to any of the seven Articles that were set forth in our motion.

If there are questions, I'd be happy to address them.

MJ [CAPT ALLRED]: Well, you've done a good job of covering it in your written motion. All the relief you request comes from the portion of the Fourth Geneva Convention that applies to occupied territories. If I resolve that issue against you, in other words, if I conclude that this was not an occupied territory, are there other portions of the Fourth Geneva Convention you think you're still entitled to be protected by?

ADDC [MR. MCMILLAN]: Well, there may be. And as we noted in the brief, we reserve the right to bring them to the Court's attention as they come to the fore in this proceeding. As I stand here, I'm not prepared to necessarily identify a handful of other provisions. These are the ones which, in our view do require enforcement, particularly in light of the clear commentary guidance that "occupation" is not given the meeting of a “formal regime” as described in the Hague regulations.

So, I mean, my answer is, if you determine that the Fourth Geneva Convention does require the formal occupation prescribed by the Hague regulations, then you deny the motion.

MJ [CAPT ALLRED]: Okay. I could conclude, for example, that the Convention applies because of the “conflict” phrase in Article 2 and then determine that all the relief you requested only applies in occupied territories.

Okay. I think that's--you know I am intrigued by the notion that Congress may be in a position to interpret international law authoritatively when it implements treaties. Your objection to 948----

ADDC [MR. MCMILLAN]: Subpart d.

MJ [CAPT ALLRED]: ----whatever that section was that says I can’t--that the accused can't rely upon international law--or the Geneva Conventions as a source of rights may mean that Congress has

1 implemented all the Geneva Conventions for the United States with
2 this Military Commissions Act and that that is within their
3 authority.
4 Do you want to respond to that idea?
5 ADDC [MR. MCMILLAN]: Yes. Let me say this in response to that.
6 Under the U.S. Constitution treaties are ratified with the advice and
7 consent of the U.S. Senate. Reservations can be advanced at that
8 time--when the treaty is acceded to. The typical procedure at that
9 point under international law is to identify the reservations which
10 the signatory power--under which the signatory power--accedes to the
11 treaty.
12 These treaties--this treaty in particular was ratified in
13 1955. There were no reservations of the sort which are now--which
14 would be the prosecution's interpretation of this provision. In
15 fact, and it is inconsistent with practice--it would be
16 unprecedented--for the United States government to advance post-hoc,
17 50 years later, additional reservations.
18 Such would be, as we contended in our brief, an abrogation
19 of the treaty, which it is Congress's prerogative to do. We think
20 it's crystal clear from the text of the M.C.A. that it was not the
21 intention of Congress to abrogate the treaty. And advancing an
22 interpretation that is so cramped and so narrow and so restrictive
23 that so violates the spirit of the treaty, which protects individual

rights not State interests, would constitute an abrogation--a position, frankly, which the prosecution did not seem to disagree with. They insisted, nevertheless, that it was within Congress's right to do that.

The defense agrees it's within Congress's right to do that, but were saying, as a matter of statutory interpretation, it's clear upon reading the statute as a whole that it was not Congress's intent to abrogate, and this provision should be read in the context of the whole under an interpretation, for example, of the sort offered by the primary sponsors, Senators McCain and Warner and Lindsay, men who understand the importance of the Geneva Conventions to the United States and to the international community.

MJ [CAPT ALLRED]: Thank you. Once again, a very thoughtful brief and argument. I appreciate it.

All right.

Mr. Oldham for the government.

APROS [MR. OLDHAM]: Your Honor, may it please the court, this motion should be denied for three reasons. First, the M.C.A. conclusively resolves this issue. Second, the defense's attempts to obscure the crystal clear text of the Military Commissions Act are premised on fundamental misunderstandings of both Constitutional and treaty law. And third, even on their own terms, Articles 2 and 4 of the Fourth Geneva Convention do not apply.

Your Honor, section 948b(g) provides, in 24 words, a crystal clear reason that this motion must be denied. "No alien unlawful enemy combatants subject to trial by military commission under the M.C.A. may invoke the Geneva Conventions as a source of rights." Your order on 19 December held that Mr. Hamdan is an alien unlawful enemy combatant and he therefore may not invoke any of the Geneva Conventions as a source of rights. It bears emphasis that section 948b(g) does not say, "He may not invoke them in an offensive posture or a defensive posture", it says, “he may not invoke them” period.

I believe it also merits emphasis that there's nothing particularly defensive about the defense's attempts to invoke the Geneva conventions here. They're seeking affirmative relief.

Notwithstanding the defense's rhetorical questions in its reply brief, it's difficult to imagine how Congress could have framed section 948b(g) any clearer than it did. In an attempt to evade the plain meaning of this provision, the defense makes two arguments.

First, it argues that 948b(g) is somehow violative of the Constitution, and second, it argues at 948b(g) somehow constitutes a "breach" of international law. Both arguments should be rejected.

First, it is simply untenable to argue that section 948b(g) is inconsistent with the judicial function or otherwise violative of the Constitution. As my co-counsel has already argued, the

Constitution does not apply under *Boumediene*, under *Eisentrager*, under *Verdugo-Urquidez*, and indeed under this Court's 19 December order. Nor did any of the cases that the defense cites, that suggest that somehow Congress is powerless to provide the law applicable in this Commission, suggest that 948b(g) is unconstitutional.

For example, the defense relies principally upon *LSC v. Velasquez*. That decision turned almost exclusively on the First Amendment and Congress's ability to limit lawyer's arguments, which the Court found to implicate "central First Amendment concerns." We would point the military judge to page 547 of the Supreme Court's opinion for that proposition.

The court also worried that the funding restriction implicated in that case would insulate legislation from judicial review and it would, "impair the judicial function" if lawyers couldn't challenge the statute.

Your Honor, section 948b(g) does nothing of the sort. That provision of the M.C.A. simply limits the effect of the Geneva conventions in this military commission, which is something the Congress is well within its power to do. As the defense counsel concedes, Congress routinely dictates the effect of its international obligations through reservations, understandings, and decorations submitted in ratification of the treaty.

The defense also suggests that it would be, to borrow defense counsel's words, "unprecedented" for Congress to do the exact same thing with the statute. And we respectfully submit that that is false.

One of the supplemental authorities that the government submitted for the court consideration into the defense counsel is the Bern Convention Implementation Act of 1988, Section 2 of which specifically provides that the Berne Convention is not self-executing. So Congress may, through reservations understandings and declarations or through a statute, effectuate a binding interpretation of our, that is the United States’, obligations under international law.

Section 948b (g) does not underline this Court's legitimacy, independence and impartiality anymore than a reservation, understanding or declaration, nor does it anymore than the Berne Convention Implementation Act.

Your Honor, briefly, because the defense counsel brought it up, I would like to address the other cases for which the defense cites to suggest that 948b(g), its plain terms and its plain effect, somehow jeopardize the impartiality and independence of this military commission.

Your Honor, *Plaut v. Spendthrift Farms* is completely inapplicable here. That case involved a congressional attempt to

reopen a final judgment. In that case, the Supreme Court had decided in a case called *Lampf* that a specific statute of limitations had run and a specific pending claim was untimely. Congress then passed a statute that would reopen a final judgment, and the Supreme Court decided that its judicial function under Article 3 of the Constitution gives it the power not only to decide cases, but to decide them finally.

So, in that case, where there was an entry of summary judgment and the claim had been dismissed, Congress had no ability to go in and to revive an otherwise dead claim.

Your Honor, that is not what's going on here. *Klein*, Your Honor, is similarly inapposite. That case involved the proceeds of properties seized and sold by the United States Army in the Civil War. And it involved the effect of a Presidential pardon to improve loyalty and the ability to sell and possess property.

After the plaintiff had recovered in the Court of Claims, Congress passed a statute denying pardons the effect that they had previously had under previously enacted law. Congress further directed that on proof of such a pardon or its acceptance, the Court of Claims should dismiss the suit for lack of jurisdiction, and the Supreme Court found that jurisdictional provision invalid.

Now, in subsequent cases, the DC Circuit for example, in another case we've cited, *National Coalition to Save Our Mall v.*

Norton has characterized, "Klein's exact meaning is far from clear."

But, Your Honor, the Supreme Court in the *Plaut* case itself has clarified what *Klein* means and what it does not mean. This is quoting from *Plaut*, "Whatever the precise scope of *Klein*, later decisions have made clear that its prohibition does not take hold when Congress amends applicable law." And that's from page 218 of *Plaut*.

Other cases dealing with this precise proposition are *United States v. Schooner Peggy*, and *Miller v. French*.

Your Honor, whatever *Klein* does stand for, it does not prohibit Congress from passing laws that bind this commission, and that this commission is duty-bound to interpret.

Finally, the last case defense cited in its brief, which was not brought up here today, was *Williams v. Taylor*, which involved an amendment to AEDPA, which is an amendment to the habeas statute that would limit Federal courts power to review State courts' interpretations of Federal law. They cite to an opinion by Justice Stevens, which was rejected by a majority of the Court, but in Justice Stevens' separate opinion, he suggests that binding Federal Courts with State Courts' interpretations of Federal law would be inconsistent with Article 3 of the Constitution. And while that may be true, even though the Supreme Court rejected it, regardless, it's inapplicable here.

Again, section 948b(g) does nothing that Congress does not routinely do--whether through reservations, understandings and declarations or through statutes.

Finally, Your Honor, on this point I would like to emphasize that notwithstanding the defense's assertions in its reply brief, specifically at page 4, that the Supreme Court's decision in *Hamdan* was a separation of powers holding, that case did not involve the separation of powers, rather, that case, as evidenced by page 2794 in the Supreme Court reports, was very clearly a statutory case. In that case and at that page of the Supreme Court decided and noted a footnote from *Eisentrager* and it held that--and it refused to reach the question of whether the Geneva conventions themselves are self-executing--and it instead held that the Geneva Conventions as they had been interpreted constituted part of the Law of War, which had been incorporated through Article 21 of the UCMJ. That, of course, is not applicable here.

The defense's second attack against section 948b(g) and its crystal clear 24 words of text is based on a fundamental misunderstanding of international law. At pages 7 to 8 of its reply brief, the defense suggests that section 948b(g) is somehow a "breach" of international law. And for that proposition, the defense relies on footnote 4 of the CMCR's decision, which the defense again presented here today.

But, Your Honor, both the arguments in the reply brief and the defense's attempts to invoke footnote 4 of the CMCR's decision are based on a fundamental conflation of two distinct propositions and principles in international law.

One of the supplemental authorities that we cited to the court is the restatement third of the Foreign Relations Law of the United States. According to comment H in section 111 of the restatement third, "Whether a treaty is self-executing..." which is what the CMCR was talking about, "... is a question distinct from whether the treaty creates private rights or remedies." The restatement goes on to note that there may be, under certain circumstances, a presumption in favor that a treaty is self-executing. Specifically that is the reporter's note 5 in section 111.

But when it comes to whether a treaty creates private rights, Your Honor, the exact opposite presumption applies. So we would point Your Honor to section 907 of the restatement, comment A which provides, "International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." Federal courts have relied on that proposition, have cited that proposition, and have reached the exact same result.

We would point the court to another one of our supplemental authorities which is *United States v. Lee*, an en banc decision from the First Circuit in 2000.

We would also point Your Honor to a case from the United States Supreme Court which emphasizes this proposition. The defense, I believe, relies on *Sanchez-Llamas v. Oregon*, a 2006 decision which interpreted the Vienna Convention on Consular Relations.

In that case, a majority of the Supreme Court held that the Vienna Convention does not provide a private right--there, the private right was a suppression remedy--even though every one of the Justices agreed that the Vienna Convention on Consular Relations was self-executing.

We would also point the Court to pages 7 to 8 of the government's brief, which points out that every single court that has ever considered the question has held unanimously--and the defense does not rebut this point in its reply brief--that the Fourth Geneva Convention does not provide a source--is not a source of private rights.

So whatever else might be said about whether the Fourth Geneva Convention is self-executing or whether it's not, this much, Your Honor, is abundantly clear--it does not provide a source of private rights, Congress's provision, its 948b(g) simply ratifies what everyone has long known to be true.

The defense's suggestion at pages 2 to 3 of its reply brief, which defense counsel has again reiterated this morning, that this court is somehow able to invoke the Fourth Geneva conventions on behalf of Mr. Hamdan, even though he himself cannot, flies in the face of every principle of international law regarding private rights.

Your honor, it would be superfluous for the Supreme Court to engage in the opinion of, say, for example, *Sanchez-Llamas*--which discusses whether or not the accused has a private right--if any one of the Justices he or herself was able to invoke that private right on the accused for the defendant's behalf.

Your Honor, it would also do violence to centuries of standing law which provide that any source of rights, whether it's under a statute, under the United States Constitution, or in this case under a treaty, that the proper plaintiff, or in this case the proper accused--the movant--must have proper standing to bring a claim, and the court never has the right to apply such provisions on the movant's behalf.

Moreover, Your Honor, even if we were going to talk about the Fourth Geneva Convention being self-executing--which we submit it's not necessarily relevant to the question here--but even if it were, there is no evidence, and the defense provides none, to suggest that the Fourth Geneva Convention is, in fact, self-executing.

The CMCR's decision, which the defense suggests is somehow--and footnote 4, specifically, of the CMCR--which the accused, the defense suggests, was an exercise of statutory interpretation, on this point, surely was not. What the CMCR in footnote 4 said is it relied on two cases--*The United States v. Lind* and *The United States v. Noriega*--neither of which held that the Fourth Geneva Convention is self-executing.

Rather, *Lind* suggested the Articles 87 and 99 of the Third Geneva Convention are self-executing and Noriega specifically refused to reach the result that any specific provision of the Third Geneva Convention was self-executing, although in dicta Noriega suggested that they might be.

Regardless of whether those two cases with respect to the Third Geneva Convention, or in particular Articles 87 and 99 of the Third Geneva Convention, it is a bedrock principle that the self-executing inquiry is an Article-by-Article one. So, for example, restatement section 11, comment H provides that some treaty provisions may be self-executing while others are not. So the fact that the Third Geneva Convention may be is utterly irrelevant to the inquiry as to whether the Fourth Geneva Convention is.

Finally, Your Honor, we would point you to footnote 14 of the *Eisentrager* opinion, which suggests that all of the Geneva Conventions are not self-executing.

And the Supreme Court, in its *Hamdan* opinion, at page 2794 suggested and elliptically criticized footnote 14, but specifically refused to overturn it.

Turning, Your Honor, to the merits of the Fourth Geneva Convention, and again we reiterate that there is no need and indeed we would urge this court not to reach the merits of the Fourth Geneva Convention, because we believe that the M.C.A. conclusively and clearly resolves this question. But even if this court somehow finds that there is ambiguity or that 948b(g) were not applicable, the merits of the Fourth Geneva Convention are not met here.

As defense counsel rightly points out, in order for the Fourth Geneva Convention to apply the defense must satisfy both Article 2 and Article 4.

Turning first to Article 2; the defense all but abandons its argument as to occupation. The government's brief--where we point out at great length for nine consecutive pages devoted to occupation--was in direct response to the defense's wholesale reliance on that point.

In its reply brief, the defense relegates its entire discussion of the occupation to footnote 9. And here again today the defense suggests that the relevant inquiry is whether this is a "conflict" for purposes of Article 2.

Now, that drastic shift has many problems with it, the first of which is that in a Supreme Court case named after the accused in this case, the United States Supreme Court held--and this is not a plurality point--that the accused was detained in a conflict with al Qaeda, which is a conflict not of an international character.

Article 2 and the conflict prong of Article 2 only applies with respect to a conflict between "high contracting parties". And no one disputes that the term "high contracting parties" refers to states or countries and it does not refer to non-state terrorist organizations. And that was the basis for the Supreme Court's Common Article 3 holding.

This court's 19 December ruling is in perfect accordance with that, wherein Your Honor held that the accused was not affiliated with the Ansars, or least there is no evidence in the record to suggest that he's affiliated with the Ansars, and again there's no evidence of record to suggest that the accused is a member of or a supporter of a lawful Army.

With respect to the other requirements of Article 2, I'm prepared to discuss them, but if Your Honor has no questions on those, we're happy to rest on our briefs and I can move straight to Article 4.

MJ [CAPT ALLRED]: Please do.

APROS [MR. OLDHAM]: Yes, sir. Article 4 extends the protections of the Fourth Geneva Convention only to certain protected persons, and members of al Qaeda, such as the accused, do not so qualify. Article 4 paragraph 1 applies to those who find themselves in the hands of a party to the conflict in the party's home territory. As Your Honor rightly points out, the “home territory” requirement can be gleaned from the structure of the Fourth Geneva Convention.

All of the obligations that the defense has cited in the valid provisions of the Fourth Geneva Convention that it deems relevant come from Part 3 that deals with occupied territory. Even if the defense goes back and tries to find other provisions that it deems implicated here, it will only have one other section of Part 3 of the Geneva Conventions in which to rely, and those deal with conflicts in the home territory of a conflict of the party.

That is, the obligations of a party to the conflict are only implicated in two circumstances. One, where the party to the conflict is the occupying power, and two, where the party to the conflict has detained accused in the party's home territory, and that's gleaned from the structure of the Geneva Conventions and neither is implicated here, as we have pointed out in our briefs.

Even if this court was to somehow determine that the accused was, in fact, detained in the territory of the United States

and that the other requirements of Article 2 and Article 4 were met, this commission would still have to deal with Article 4 paragraph 2, which provides that, "...nationals of a neutral State are not protected persons while the neutral State's diplomats enjoy representation in the State in whose hands the nationals are."

Now, the defense attempts to suggest that the terms of Article 4 paragraph 2 are somehow less clear than they are. Their only source for that proposition is Pictet's commentary, which attempts to elevate above the plain text of the treaty, just as it attempts to elevate a statement never read on the floor the United States Congress over the plain text of the Military Commission Act.

And just as the latter should be rejected, we suggest that the former should be rejected. The provisions of Article 4 paragraph 2 are plainly, plainly clear. They provide that, "Where a national of a neutral state…," such as Yemen, "…are detained in the hands of a state…," such as the United States, "…that has normal diplomatic representation with the if the accused's home state; the provisions of the Fourth Geneva Convention did not apply." And notwithstanding the defense's rendition in its principal brief of the diplomatic relations of the United States with other countries relying on Wikipedia (phonetic) articles, the United States and Yemen have had normal diplomatic representation since at least 1990, and almost

uninterrupted since 1960, thus rendering the Fourth Geneva Convention inapplicable.

Finally, Your Honor, on this point I would like to point out to the Court pages 24 and 25 of our brief, where we emphasize that Pictet's commentary itself disclaims being authoritative as to the meaning of Article 4.

Just as commentators have noted that and emphasized that, even courts have noted and emphasized that as we recount on pages 24 and 25 of our brief. And although the defense counsel has suggested this morning that somehow Pictet's rendition of Article 4 is somehow rooted in the final record of the Negotiating Conventions, we have not found a single citation in either the principal brief or the reply brief that suggested that's true. I'm happy to answer any questions that Your Honor may have.

MJ [CAPT ALLRED]: I appreciate that. How would you respond to the statement of the three Senators that the defense references in their reply brief which seem to suggest that an accused may rely upon the Geneva Conventions if he wants to?

APROS [MR. OLDHAM]: Your Honor, I would respond to that in two points. The first, or the more general one, would be that no court, under any circumstances, has ever held that legislative history can trump the plain text of the statute, as I'm sure you're well aware.

We'd point the court to *Alapado*, which is a case that we have in our brief for that proposition.

But the second is that--a perfectly consistent way of interpreting the legislative history that counsel presented today is to look at section 5, subsection (a) of the Military Commissions Act, which again talks about an ability to bring private causes of action and civil litigation.

MJ [CAPT ALLRED]: Section 5, subsection (a) of the Military Commissions Act?

APROS [MR. OLDHAM]: Yes, sir. As you may know, the Military Commissions Act--section 2 of the Military Commissions Act--or it might be section 1 includes all of the substantive amendments to Title 10. But following all of those, after the substantive offenses in section 950, there are several other sections, section 5 of which deals with treaty obligations not establishing a ground for certain claims.

So, Your Honor, I would respond both by relying on the plain text of the statute and by pointing out that whatever the Senators may have been relying upon or may have been talking about may be adequately addressed in section 5(a).

MJ [CAPT ALLRED]: Okay. The word "neutral," does that have the meaning of declared neutrality such as the status of Switzerland, or simply uninvolved in the current conflict?

APROS [MR. OLDHAM]: Your Honor, based on our research of the final record for this proposition, and we have indeed scoured Pictet's commentary, but have also gone back to the final record, which we think is more authoritative on this point, it seems to us that the term "neutral" refers to a non-party to the conflict. And it would be a conflict-by-conflict inquiry, and not the more general neutrality of a State such as Switzerland.

[There was a pause while the military judge reviewed the issues on the bench.]

MJ [CAPT ALLRED]: So you think that the CMCR was mistaken when it wrote that the Geneva Conventions are self-executing? They misread the two cases that they relied upon in footnote 4?

APROS [MR. OLDHAM]: No, Your Honor, I don't necessarily think that they were mistaken. I do think that what they said there was unnecessary to reach the decision that they reached, and I also believe that if you go to the sources that they were citing, it elucidates what they were trying to say, which is that certain courts have considered this question as it has come up before them.

For example, in *Lind*, where there were two specific provisions of the Third Geneva Convention that were at issue, 87 and 99, and it held that those were self-executing. So, no, I don't believe that they were necessarily wrong, I just believe that it was,

in fact, dicta and that the sources upon which it relied, elucidate what it meant.

MJ [CAPT ALLRED]: And do you construe, then, the Military Commissions Act of 2006 I guess it was, as a reservation, understanding or declaration with respect to the Geneva Conventions passed in? In other words, a normal Congressional implementation of the treaty?

APROS [MR. OLDHAM]: No, Your Honor, I believe that reservations, understandings and declarations are--it's a specific term of art and it specifically refers to things that the United States Senate includes in its advice and consent to ratification.

Nor do I necessarily think it's perfectly analogous to the Berne Convention Implementation Act of 1988. What I do believe it is, it’s perfectly consistent with what every court that has ever considered the question of whether a litigant can rely on the Fourth Geneva Convention as a source of rights and it simply ratified that.

And as we point out at the conclusion of our brief, to the extent that it does anything other than that--to the extent that it does anything other than ratify what has always been the law--then it does, indeed, trump anything else to the contrary, that is, it is well within Congress's power to say, "You may not rely on a specific international instrument in litigation, whether that's before a

military commission, before a Federal court or what-have-you, and then that's the binding law of the United States.

MJ [CAPT ALLRED]: Okay. Thank you very much. Counsel, it's 12:30, I suggest we have a recess for lunch.

Court will be in recess.

[The R.M.C. 803 session recessed at 1232 hours, 7 February 2008.]

[The R.M.C. 803 session was called to order at 1408 hrs, 7 February, 2008.]

MJ [CAPT ALLRED]: Court's called to order. All parties present are once again present. I look to the defense for the next motion in order.

[Defendant motioned to headset and conferred with courtroom interpreter.]

MJ [CAPT ALLRED]: The headset is not working.

[The bailiff exited the courtroom.]

MJ [CAPT ALLRED]: Okay. To the interpreters, Mr. Hamdan and his interpreter are hearing in English rather than Arabic. We have some technology people who are probably listening as well.

[Court waited for technology issue to be resolved.]

[The bailiff re-entered the courtroom.]

MJ [CAPT ALLRED]: Mr. [redacted], are you hearing anything now? I mean, I'm not talking so maybe there's nothing to be heard.

[Interpreter indicated system was working.]

MJ [CAPT ALLRED]: Now it's good? Okay. I mean, the interpreters might have been waiting for something to interpret. Okay.

Lieutenant Commander Mizer.

DDC [LCDR MIZER]: Yes, Your Honor.

MJ [CAPT ALLRED]: What motion are you going to be----

DDC [LCDR MIZER]: The defense would like to address now D014, multiplicity.

And just two matters of housekeeping before we begin. The translators have pleaded with us to speak more slowly than some to make a concerted effort to do so.

MJ [CAPT ALLRED]: And more loudly.

DDC [LCDR MIZER]: And more loudly. I could do that as well. The defense has also reviewed the filings inventory that we discussed at the last session and it is accurate to the best of our knowledge.

Your Honor, this commission should apply--or needs to apply just one case in resolving this issue of multiplicity, and that's the case of the *United States v. Albrecht*.

Now, the vast majority of cases involving multiplicity deal with one act or course of conduct that allegedly violate several distinct statutory provisions; multiple statutory provisions. In those cases, this commission would apply the Teeters or Blockberger

analysis, examine the elements and determine whether or not Congress intended to create one offense or multiple offenses.

The Albrecht case deals with a distinct and relatively rare situation where the government charges one act or course of conduct as multiple violations of the same statutory provision. And in *Albrecht*, Your Honor, the CAAF addressed the issue of forgery and uttering a forged instrument under Article 123 of the Uniform Code of Military Justice. So two acts--or one act that allegedly violated two provisions of the same statute.

This case deals not with the two charges at issue in *Albrecht*, but an unprecedented eight violations. For one course of conduct, the government has created eight violations of a single sentence under this statutory provision in this case 950v(25).

In *Albrecht*, the CAAF acknowledged the general principle of statutory construction, that in such situations Congress intended to create only one offense for alternative violations of that single statutory provision. It's important to note that Albrecht departed from that general principle of statutory construction, in that case because the language of the statute itself--the plain language of the statute--suggested an intent by Congress to create two offenses, and it was in accordance with the common law. The offense of forgery and the offense of uttering a forged instrument had long been recognized as individual offenses.

And when Congress merged those two offenses, if you will, under Article 123 and its predecessor in the Elliston Act a year before the Uniform Code of Military Justice, it still enumerated them as separate offenses. One was forgery and two was uttering a forged instrument. If you contrast that with what Congress did in this case, in 950v(25), they merged much more complex statutes under the United States Code into one sentence of the Military Commissions Act.

Congress did not, as the government suggests in this case, simply take 18 USC 2339, material support for terrorism, and 18 USC 2339b, material support for a designated terrorist organization, and simply insert those into the Military Commissions Act.

As elements removed, as we point out and particularly the reply brief, and so any argument that these were meant to remain as distinct and separate offenses is greatly weakened just by the plain language of the statute itself.

It's worth noting here that section 2339a has a very high scienter requirement in that the government must prove that the individual provided material support and knowing or intending that that support was going to be used to commit one of 30 enumerated violations of the U.S. Code.

Now the government has done away with that element altogether in the distant cousin of that statute that is codified in the Military Commissions Act, and it now just generally relies on

providing material support to terrorism. So it's very distinct and on the plain language of the statute.

2339b, as we point out in the brief, has a number of elements that are also removed and, Your Honor, you don't even need to read the statute. If you go and pull up 2339b, what you'll find is roughly a three-page long statute at that section of the U.S. Code, and so the government is claiming that they somehow taken that three-page long statute and put it into a half a sentence and still maintain the same offense. It’s just not supportable by simply the plain language of the M.C.A.

Importantly here, Your Honor, what we're trying to divine is the Congressional intent. These are not historic offenses under the common law; these are creatures of a statute that are roughly a little over a decade old--these offenses. Congress created these offenses in 1994 and then 18 months later in 1996 with respect to material support for a terrorist organization.

And it could have, had it desired, simply have taken those offenses and put those into the M.C.A., even the elements themselves, the identical offenses out of the code and plugged them into the M.C.A. It did not. It removed various elements and created one general crime, in this case material support for terrorism.

In short, 950v(25) defines two alternative means of violating one offense. The general offense, under the Code, of

1 material support for terrorism. That can happen either by providing
2 material support to individual terrorists not affiliated with an
3 international terrorist organization, or it may also occur by
4 providing that same material support to an international terrorist
5 organization--individuals versus terrorists.
6 That is precisely how it's charged typically in Federal
7 courts in when you're looking at this, Your Honor, we would suggest
8 that you go and pull up the annotated statutes 2339a and 2339b. And
9 you'll find roughly a dozen cases on both of these statues, as I
10 said, they are not very old and you can go through and examine and
11 typically what you will see in most of these cases is the government
12 charges one or they charge the other. 2339b is charged typically for
13 al Qaeda and designated terrorist organizations when the government
14 can prove that, and if it is just a small collection of individuals
15 or some undesignated terrorist organization, the government typically
16 charges at a 2339a.
17 But you won't find cases where the same conduct is charged
18 under both provisions of statute. And I should say, there's going to
19 be one exception to that, and I would invite the Court's attention to
20 the case was decided just last week out of the Fourth Circuit, which
21 can be found at 2008 U.S. Appellate Lexus 1262 and it's the *United*
22 *States v. Chandia*.

And in that case, the Fourth Circuit upheld using the Blockberger elements analysis--a multiplicity challenge. So the court analyzed the elements of the two statues there and found distinct elements. And the element that the court relied on in the Fourth Circuit was that high scienter requirement that you knowingly intend then you bootstrap in the other violations of U.S. Code.

Again, that's gone from the statute and, more importantly, with both of those are dealing with independent statutory provisions 2339 a and b are separate, whereas here Congress, instead of creating those two sections has provided just one.

And so what this court should do is first apply *Albrecht*.

[The military judge motioned to counsel to slow down.]

DDC [LCDR MIZER]: My apologies, Your Honor. If this court were to find that Congress intended to create multiple offenses by reducing these provisions--these separate crimes--into one sentence of one crime, then the Court would apply the Teeters and Blockberger analysis as the *Albrecht* court did.

And I won't go through the Teeters and Blockberger analysis. I think that's adequately addressed in the defense's brief. But this charge ultimately should read as, "Mr. Hamdan did allegedly violate material support for terrorism 10 USC § 950v(25) by providing transportation, weapons..." what the government has parsed out into eight separate offenses. That should be the first part of

that charge. The second part of that single charge should be, "... or provided material support by..." again then parsing out those definitional elements that are provided for in 18 USC 2339 as incorporated into the Military Commissions Act.

The last thing that I would like to address, Your Honor, is the “unreasonable multiplication of charges” aspect of this.

So even if this commission were to say that *Albrecht* is inapplicable here, or that Congress intended to create two offenses in that single statutory provision and it found that *Teeters* and *Blockburger* indicated separate statutory provisions, then we have to get over this third hurdle, which is the unreasonable multiplication of charges. Your Honor, you are certainly----

[The bailiff spoke to the military judge then left the courtroom.]

MJ [CAPT ALLRED]: I'm sorry, just go ahead.

DDC [LCDR MIZER]: Your Honor, you are certainly--you have been on the bench for some time--you're certainly no stranger to unreasonable multiplication of charges. As a concept unique to military justice, for instance, you can have a case because of the unique nature of the code, let’s take, for example a case involving sexual harassment. That could be charged as an orders violation.

[Bailiff re-entered the courtroom.]

DDC [LCDR MIZER]: That could be charged as a general disorder. It can also be charged as indecent language. And so you can get to

three criminal statutes, if you will, by creative drafting.

And the defense maintains that is exactly what has happened here is creative drafting has resulted in a number of unreasonably multiplied charges. And if you apply--the problem is--is that if you apply the Blockberger analysis to those elements you're going to find it is not multiplicious for double jeopardy purposes. But still military law recognizes this concept of unreasonable multiplication of charges.

And that's exactly what is at play here where Mr. Hamdan is alleged to have taken missiles to individuals at Kandahar and then is simultaneously alleged to have taken those same missiles to the same individuals who also are members of al Qaeda and the government is able to multiply Mr. Hamdan's criminal liability, again, through creative drafting.

Your Honor, if you have any questions I'll be happy to address them. Otherwise, that concludes my argument.

MJ [CAPT ALLRED]: Well, let me just review your motion and see exactly what relief you are requesting.

Are you questing a single Specification be made of all of the Specifications under Charge II?

DDC [LCDR MIZER]: That's right, Your Honor. Or, in the alternative, if you are going to find that they are separate--there's

multiplicity within multiplicity here, in essence. We would ask that there be one Specification.

If you were to find that there are two separate crimes--material support and material support for a terrorist organization--if those are two crimes, then you should condense the various acts--those definitional acts--into that continuing course of conduct.

It's the defense's primary position though that these are not separate statutory provisions whatsoever in accordance with *Albrecht* and that there should be one statutory violation alleged here.

Alternative means of violating that statute, which again comports with the CAAF's general proposition or general standard of statutory construction, which was addressed in Albrecht.

MJ [CAPT ALLRED]: Okay. Well, the "relief sought" paragraph of your motion asks me to dismiss----

DDC [LCDR MIZER]: It should say 2 through 8, Your Honor.

MJ [CAPT ALLRED]: 2, 3, 4, 5, 6, 7, 8--So that's--I see. Dismiss 1, 3, 5 and 7 for multiplicity and all of them except the first one for unreasonable multiplication of charges. So what you really would like is for me to end up with one Specification under Charge II--

DDC [LCDR MIZER]: That's right, Your Honor.

MJ [CAPT ALLRED]: That alleges first, raw material support for terrorism or material support for an international terrorist organization. And the government would have two theories, that they could prove either/or or both, but end up with one single Specification.

DDC [LCDR MIZER]: Your Honor, it's Mr. Hamdan's position that is what Congress would like you to do.

MJ [CAPT ALLRED]: Congress?

[The military judge stated the word with emphasis and surprise.]

DDC [LCDR MIZER]: Would certainly go along with Congress, at least on this issue. Again, divining Congress's intent through *Albrecht's* general standard of statutory construction.

MJ [CAPT ALLRED]: Okay. And if I agree to dismiss 1, 3, 5 and 7, can you explain why I should do that instead of 2, 4, 6 and 8? Or why you requested that relief instead of the other? Is it simply a matter of flipping a coin?

DDC [LCDR MIZER]: Your Honor, I think the reason that we did that is, I suppose it is in the alternative that if you find that--if you get into the Blockberger and Teeters analysis and you were to find that one is a lesser included offense, which you certainly could find here, and as I said that's addressed in the brief. And so we're dealing with different layers of multiplicity, so *Albrecht* would require you to merge them all into one.

If you get past *Albrecht* and you get into *Teeters* and *Blockberger*, and then you're going to have to--I think what the elements would show you--Your Honor, is that you have a lesser included offense there, which is material support of terrorism, that two-element offense that is listed under the statute. And so that would be a lesser included offense of the greater offense of providing material support for a terrorist organization. And so that's where we get into the full elements versus all being merged into one.

Primary position, though, Your Honor, is all eight must go into one.

MJ [CAPT ALLRED]: Okay.

DDC [LCDR MIZER]: Thank you, Your Honor.

MJ [CAPT ALLRED]: Well----

DDC [LCDR MIZER]: Sorry.

MJ [CAPT ALLRED]: ----let me just pose one more question, because this is the last time I'll have a chance to talk to you. Is this a motion that should be deferred until all the evidence is in? I mean is it proper to decide before hearing the evidence, which offenses should be merged into the others?

DDC [LCDR MIZER]: Your Honor, the R.M.C. and indeed the R.C.M. under courts-martial clearly contemplate--and it's in the plain

language--when charges are plainly multiplicious as these are, that they should be dismissed.

Mr. Hamdan should not be prejudiced by having his criminal culpability exaggerated throughout the merits portion of this trial. And so we would ask that you reduce these into one offense, you give the government the opportunity to prove up these various means of violating that one offense. But one offense should go to the members in this case, Your Honor.

MJ [CAPT ALLRED]: Very good. Thank you.

Lieutenant Commander Stone?

APROS [LCDR STONE]: First, sir, we didn't have the opportunity to–-the defense didn't notify us that they were going to supplement with their authority with *Chandia* and to the point where that may in fact be relevant, we'd like to be able to reserve the opportunity to supplement our brief if necessary--our argument. I'm not so sure that that actually will be, though.

And the other thing is that, just to correct the defense counsel initially, when he argued that in Federal court they only charge one Specification. That's actually not true. Routinely charge both using the same offenses so to that extent the defense was actually inaccurate.

When you deal with multiplicity within the confines of the military commission and our jurisprudence, sir, you need to look at

it through the backdrop of not just the statutory construction, but the military commission rules. And I need to cite you to rule 907b, which is particularly important. I'm not going to quote it necessarily but otherwise to look at it, it deals with exigencies of proof, the review, appellate language and whether or not it will survive--the structure of a Charge or a Specification.

And then when you deal with the discussion contained in 907, it talks about ordinarily a Specification should not be dismissed before trial unless it clearly alleges--and it goes through--important point being it may be appropriate to do so after findings and those findings in which they have been reached.

Due consideration, although--and assuming we get that far with multiple convictions, then we may have to have another discussion, sir because the subset of that discussion talks about due consideration also must be given with regards to how this statute or the convictions would survive the appellate process.

And I don't think anybody in this room would disagree with me when I say the unproven nature of this statute as it works its way through the appellate process is certainly something that would be at issue. So we need to first look at the military commission jurisprudence, the structure of the statute, before you start looking and dealing with the confines of multiplicity, because the government has its right to a fair trial as well and to not be prejudiced.

The government's position is that the defense is really using multiplicity in this argument, sir, as a shield to shield itself from viable criminal charges as opposed to any sort of unnecessarily multiplying of them.

I'll go through the analysis. We believe that it has been properly pled, that it's judicially prudent to do so, and it really gives the Judge, the defense and the members when it comes time a good road map to the government's theory, the liabilities of the defendant and how we're going to go ahead and prove that.

Furthermore, it's based on the charge sheet as you know, this is nothing new, that we're going to be asking for those instructions to show how the 17 separate definitions of material support contained within the M.C.A. apply to the charges with regards to the accused. What we've done is culled out those 17 different definitions, crossed out the ones that don't apply, put in within each Specification where we believe the evidence that we're going to present shows that the accused is culpable. Now, to that extent what I think you could do--what that gives us--you could look at this, see the charging scheme, see the evidence were going to present, and how that applies. That gives the jury a good road map into where we're heading. And it really focuses the evidence with regards to this case.

Now, I'd also like to say that, let's deal a little bit with the unreasonable multiplication of charges. First, the defense's position is that this all needs to be collapsed into one. 907, sir, really says that that is not the preferred method, at least when there is an issue of these specifications and when there's a legal doubt we need to expand it, allow and make--get verdicts on all of those things.

One of the questions you asked LCDR Mizer was, “Should we not wait until findings are done and then have this discussion?” We believe that there's two separate Specifications--I'm sorry that the charging scheme of the statute sets out two separate statutes and the evidence there is divided as such under--if you look at the odd specifications--they match very specifically with the even specifications.

We believe that if we wait until the evidence is heard on this the--we probably may have to revisit this issue with regards to how some of the evidence comes out. The problem with that is, then we'll have a pretty good idea where it fits, we'll have a jury verdict that preserves the appellate issues, and then we deal with it on a sentencing issue with regards to any time that may in fact be adjudged to an accused, assuming that we get to a sentencing phase.

So, from that standpoint you really need to allow the charge sheet to go forward as it is. Now government does recognize

that through a standard military justice jurisprudence you probably wouldn't see a charge sheet like this.

Which is why I want to focus you towards our brief, where it says, specifically, limiting instructions could cure this type of issue. A limiting instruction may in fact be necessary here, and we'd certainly be willing at some point in the future to offer our language with regards to any type of limiting instruction or--not really a limiting instruction--but sort of as a prefatory jury instruction. I know that just from past dealings with yourself, we've--you and I have come to the conclusion one time seven years ago.

Certainly a possible and an appropriate remedy, and we'd certainly be willing to work craft our language as well as if the defense would if that's how you find it. But to take the defense's position that it all needs to be collapsed into one is really an error. What the government sees, sir, is you really have three options. You can leave the way it is, which provides a proper judicial blueprint for the jury, for yourself. If you provide some type of limiting instruction or prefatory instruction, any potential issue with regards to any prejudice certainly goes away.

MJ [CAPT ALLRED]: I'm sorry, what makes it go away?

APROS [LCDR STONE]: Any sort of limiting or prefatory instruction to the jury about, "watch"--"Some of this conduct may be

overlapping..." certainly removes any potential possible prejudice that the accused may find. And so that’s issue one. That's how we've charged it. That's the way it needs to go forward.

The second way would be to combine it basically into two mega-specs where we would take all of the odd Specifications and all of the even specifications, run them separately, and then put in it each definitional language; transportation, personnel et cetera.

The problem with that is this, sir, if you look at the statutory construction of those 17 definitions, you're then going to have to, when it comes to findings, take that and break each one of them out, and put the language back into it.

The more judicially appropriate way to do that is to basically leave it the way it is, because it's already done, and that's the way it was charged. The other way, if you wanted to follow the defense's mantra of multiplicity and unreasonable multiplication of charges, you remove three valid ways in which the accused could be found guilty of an offense as statutorily prescribed by Congress and you then prejudice the United States of America and you could potentially and--not to mention--you’d confuse the jury.

MJ [CAPT ALLRED]: "Confuse the jury?"

APROS [LCDR STONE]: Sure. So, we would ask that, one the statute stays–-the Specification stays as is. If a limiting instruction is necessary, we'd certainly--if you'd deem so--we don't

believe that it is, but we recognize that it could, in fact, remove any whatsoever problem that may be associated with it. That's all I have sir.

MJ [CAPT ALLRED]: Okay. Let me ask you a couple questions. I think the defense suggested, if I understood them correctly, that providing material support to terrorism is a lesser included offense of providing material support to an international terrorist organization?

APROS [LCDR STONE]: Correct. That is their position.

MJ [CAPT ALLRED]: Do you agree with that?

APROS [LCDR STONE]: No, we don't. Our brief addresses that, which is why I didn't.

MJ [CAPT ALLRED]: Okay.

APROS [LCDR STONE]: A quick analysis, sir, if you go through the "elements" test, what you get if you give the facts--I'll use the facts that were admitted in December here—and an accused evacuates Usama bin Laden September 4th, goes with him through November 5th of 2001, where he evacuates Tarnak Farms, does this whole host of things. A jury has the potential to find him guilty of the greater offense, supporting the terrorist organization, where at the same time under the same facts could potentially find him not guilty of what the defense says is a lesser included offense.

That, sir, runs entirely counter to every known form of American jurisprudence, whether it be Federal court, whether it be military court, what's structured in the military commissions. So it cannot be a lesser included offense.

MJ [CAPT ALLRED]: Because they could find him guilty of the greater and not guilty of the lesser?

APROS [LCDR STONE]: Right, because it was--well, right. We'd find him guilty of the greater, not guilty of lesser, that's----

MJ [CAPT ALLRED]: Okay.

APROS [LCDR STONE]: So, and that is the Teeters analysis followed through, sir. They're two separate offenses.

MJ [CAPT ALLRED]: Let's assume that we go through findings and the accused is found guilty of one of these pairs--seven and eight, for example.

APROS [LCDR STONE]: Seven and eight?

MJ [CAPT ALLRED]: Let's just assume.

APROS [LCDR STONE]: Okay.

MJ [CAPT ALLRED]: At that point do you agree, then, that it should be a single offense for purposes of sentencing?

APROS [LCDR STONE]: Maybe. And the reason I say that, sir, is I think it's a little--the way we've charged it we've recognized that issue. The problem with it, though, is--lots of things happen in a trial. And we----

MJ [CAPT ALLRED]: Okay. Well, let's say we are at findings, that you have guilty to seven and eight. Is it still two separate offenses for purposes of a sentence?

APROS [LCDR STONE]: They are found guilty of seven and eight--let me check specifically seven and eight, sir.

MJ [CAPT ALLRED]: I assume they’re just one of the matching pairs?

APROS [LCDR STONE]: Right. Not necessarily, because there could be evidence put forth for protecting and being a bodyguard for Usama bin Laden that could meet each one separately and independently. Where he actually does bodyguard him with regards to a terrorist act, but then at the same time is providing the general "supporting a terrorist organization" separately.

MJ [CAPT ALLRED]: What is the appellate issue that you're trying to protect? And why should I be concerned about----

APROS [LCDR STONE]: Well, I'll tell you why the appellate issues that has been batted around and I don't think I'm giving away the farm in any stretch of the imagination. Go back to material support for terrorism by providing himself, there have been articles written with regards to a concern as to whether or not providing material support for terrorism himself would withstand judicial scrutiny with regards to it being a status crime in the context of a Law of War violation. Now, we believe that it will.

I hope I didn't just create an additional appellate issue for the defense, but nonetheless if you do what the defense is telling you, sir, which is why I don't think I am, they want you to eliminate every known material support specification except for that.

And that, sir is a sword that *Quiroz* was not designed to be. If it does not survive, the will of the American people has just been thwarted and the jury's determination would then become moot.

MJ [CAPT ALLRED]: Okay. I appreciate your argument and I understand your position. I should tell counsel that I have found all of the briefs on all of the motions very well done and I'll go back and study them some more. That's for sure where we need to go.

Mr. Swift, you're jumping up.

ADDC [MR. SWIFT]: I'm next, sir.

MJ [CAPT ALLRED]: Okay. Is this the combatant immunity motion, D015?

ADDC [MR. SWIFT]: *Res Judicata*, I believe, is first, sir. D-016, sir.

[Defense paralegal and counsel set up laptop at podium.]

ADDC [MR. SWIFT]: And if I might, as Mr. McMillan did, have the PowerPoint published to the courtroom, sir? It contains no new evidence, simply cites and places briefs or by points.

MJ [CAPT ALLRED]: You don't have as nice a background as he had. This is a very plain white background.

ADDC [MR. SWIFT]: I'm working off the white board, sir.

MJ [CAPT ALLRED]: Okay.

ADDC [MR. SWIFT]: It's just a plain, stark argument.

MJ [CAPT ALLRED]: You can publish it to the--go ahead.

[The court reporter published the contents to the gallery.]

ADDC [MR. SWIFT]: Sir, since I reported to the military commissions back in March of 2003 we've been having an argument. And the argument was, when did this start of hostilities begin? All parties agree, I believe agree, that the start of hostilities is necessary for the crime to be within the jurisdiction of this military commission.

And it goes back to Winthrop. It's not been seriously contested. From the beginning, that was what our positions against the conspiracy charge against Mr. Hamdan who was originally brought to the first military commission.

We challenged the military commission based on three ideas. That was personal jurisdiction, subject matter jurisdiction, was it properly constituted? Over the course, different courts would look at it different ways.

When I got to the District Court in DC, which originally ruled that the commission did not have jurisdiction, it based it on two ideas, personal jurisdiction in that there hadn't been an Article

5 tribunal, something we basically finally worked through, and he’s had his Article 5 tribunal within the findings of this court.

The other one was that it wasn't properly constituted. It had to follow the UCMJ. It had to comply with Article 36. It abstained on the question of whether the charges were within the jurisdiction of the Court, having found that Mr. Hamdan was neither personally within, and the court wasn't properly constituted.

It could have stopped at the time of personal jurisdiction, but it understood that the “Constituted” issue was going to be raised immediately thereafter if you went to an Article 5 tribunal.

At the DC circuit, they reversed the earlier decision. They found that a), the Judge’s personal jurisdiction decision was not correct. They gave great deference to the President and found that the President's determination was sufficient, and they noted that the commissions, interestingly enough, could be the Article 5 tribunal though they noted that the alternative.

They agreed also, and part of why they found that the Article 5 wasn't there, was that there was a separate conflict with al Qaeda and therefore the ideas of Common Article 3 and how the Court would be constituted implicated on this idea of a separate conflict and, in fact, they pointed out in two quotes from it that they disagreed with the--they pointed out that the District Court had disagreed with the President's view of Common Article 3, apparently

because the Court thought that we were not engaged in a separate conflict with al Qaeda distinct with the conflict from the Taliban.

And they went on to find, there, that Mr. Hamdan was captured in Afghanistan in November of 2001, but the conflict with al Qaeda arose before then in other regions including this country in September 11, 2001.

In other words, and I was there, they bought the government theory that there had been a long-time war with al Qaeda and this eliminated the subject matter concern. In fact, to clear the hurdles to go forth, they had agreed that it had to be properly constituted dummy head as subject matter jurisdiction, and you had to have personal, so they'd found all 3--declare the orders.

Subsequently the Supreme Court granted cert. and it asked the question--one of the questions we granted on--was whether the petitioner and others similarly situated for war crimes in the war on terror, which was this larger idea duly authorized by all of the regulations.

The court in its majority opinion, this is that section of the opinion that was joined by Justice Kennedy--everything but 5, reversed the DC circuit and found that for the commission to be properly constituted, that it had to comply with the UCMJ Article 36, and that it had to, via Article 21 in the offenses that by statute or by Law of War may be tried by the military commission, that Common

Article 3 had come in via Article 21. This was particular to Justice Kennedy. He spent a great deal of time here.

All Justices, not just the majority, all Justices agreed that a court-martial--some did not think a court-martial was necessary--but all Justices found that a court-martial would be properly constituted. In other words they'd answered, "What does a properly constituted court look like?"

Earlier this morning the government spent time talking about how they had invited Congress--the Court had invited Congress--to change. And it should be noted that in each of the plurality opinions that this is what they're talking about changing; Article 36 and potentially Article 21 and the portions here.

But certainly Article 36, that had basically required at least, if not a court-martial, something very, very close to a court-martial, including for instance Article 31b, the military Miranda etc.

Thereafter, of course, Congress passed the M.C.A., but before doing, it's important to stop and look at what the plurality did--because the plurality reversed also on the idea that the charges were prior to hostilities. And that conspiracy is not a war crime.

Now, we dealt with "conspiracy is not a war crime" this morning, but I'd like to deal with the most fundamental element, "prior to hostilities" now. There was some argument that the Court

1 didn't reach this. As I suggested in my reply brief, I don't think
2 you have to go any farther than Justice Thomas to answer that
3 question. Justice Thomas was very clear. He was very--he agrees
4 with the government's theory and he felt that he--the government had
5 wrongly--or the court--had wrongly decided this.
6 So there's a question that comes up. Let's say for a
7 moment, and I think this is the best way to look at what was the
8 binding effect of the Court's hearing, "What would have happened if
9 they hadn't passed the M.C.A., and instead, a court-martial had been
10 brought into being?" Also a statutory creature; equally viable,
11 still equally viable.
12 Certainly nothing in the Supreme Court's decision, and the
13 majority said that couldn't happen. Now, there we look at Article
14 18, which wasn't talked about a lot because we weren't at a court-
15 martial and it says courts-martial's simolay (phonetic)--it's
16 referenced in 21 shall have jurisdiction to try those who are subject
17 to the Law of War. That same test--the exact same test--now just put
18 to different forms. One under the Geneva was mandatory for POWs or
19 for our soldiers, the other one, not mandatory commissions available.
20 By the plurality decision, the charges that were against
21 Mr. Hamdan could not have been brought to a court-martial. He had
22 four votes. Now, he did not have the majority votes, but as we
23 explained at the holding of the case, as it went back down, the

plurality had said that his crimes were not within that definition. The definition was no different in article 21. So he would not have been before a court-martial is based on those charges.

Now, you note in my motion I don't address the Kandahar battle because, based on the plurality's holding that would have been within the zone of the war. But on the charges that went up, which have been largely replicated again, only now adding in material support alleging the same actions, they would not have been viable before court-martial.

So the question is, based on those four folks, does the passage of the M.C.A. somehow change the jurisdiction of Article 18 and 21 to open it up? And I agree; Congress could have applied this in *res Judicata*. If the statute has changed, it doesn't apply. Now we need to look and see; did Congress change it?

And I would note here that in the subsequent proceedings, that the court did dismiss--the District Court and that is on appeal at the DC Circuit--but it dismissed it without reaching any of the Court's order. It dismissed it based on, it believed reading the M.C.A., it longer had jurisdiction.

Now, my point here--the next point is--but 905g brings the Hamdan decision, this portion of the plurality decision that was finally reached through Mr. Hamdan back to life. Because, while the M.C.A. took away the District Court’s ability to enforce that, R.C.M.

905g, which is identical as we pointed out in our brief, to the *res Judicata* ideas, and the area that I highlighted----

[Mr. Swift referred to published PowerPoint slide]

ADDC [MR. SWIFT]: ----seems directly to say, with a big sign, "Hamdan" brought back to life the effect of the decision unless, of course, Congress changed the jurisdiction. Unless, of course, Congress now changed that you no longer needed a war crime or somehow these didn't fall--the statutes--within the common Law of War. One of the requirements, of course, being a war.

But that's not what Congress did. Congress got in their subject matter jurisdiction for the crimes and said, “traditionally been triable by military commissions.”

Now, certainly we are at Winthrop here. Certainly we're in the history. In fact, their traditional history is the military war crimes commission, which is this is clearly what this is, has not tried crimes that occurred outside the zone of hostilities. And in fact, that's shown in the charges against Mr. Hamdan. They allege hostilities.

Now I'm sure the government has and will continue to point out that the overall jurisdiction has this portion that says "…committed by an alien unlawful enemy combatant before on or after September 11, 2001.”

I have three points here; one, I readily admit Mr. Hamdan's decision was a plurality and that the government and other persons that we'd asked them to decide from Mr. Hamdan and others similarly situated with regards to when the war started; they only decided to--regards to Mr. Hamdan that's what happened.

But there are other similarly situated persons and certainly Congress, aware that it was a plurality decision--the Hamdan decision was the impetus to this--didn't statutorily decide to take away or give effect to the plurality decision to make it mandatory--to give an opportunity to the government to argue this again. Just not in this case because of the *res Judicata* provision that comes in to Mr. Hamdan's benefit.

Secondly, even here one needs to also remember that military commissions and this creation of it is not, as Senator McCain pointed out, only for the war against al Qaeda.

It's for all conflicts and many war crimes have no statutory--statute of limitations. They can be brought at any time. It's been involved in countless conflicts, so it's quite possible that Congress didn't want to restrict and say well this is only the al Qaeda court in fact they went to pains to say “no, this will be for all.”

And so where we are articulating those common-law war crimes and if the commission is constructed to meet all of the

international requirements, there is no problem with using it. Though, again, I don't think that the on, before or after September 11th necessarily controls or says Congress was saying anything to the alternative or deference of that.

And lastly, it would be dangerous to construe the--the portion to say that Congress can declare war retroactively. War could exist in two different states. War can exist on declared war, which we can either argue whether the AMF was or not or is etc., or *de facto* of war. De Facto is facts--the law applied to facts and determination there, which is a determination of judicial function; not Congress's function.

So Congress would be, they the judicial free asset (phonetic), to walk in on the plurality and say, “no you got it wrong and I'm reversing your decision.” Again, if we can read the statute in such a way as we don't even come to that issue, which is easy to do; we shouldn't do it.

So we come to the end of it and we find that Mr. Hamdan in these charges, which require in the charges against him, the conspiracy charge that al Qaeda was engaged in hostilities listing the exact same facts that had been determined by the court as a matter of law in the plurality not the constitute--a war or armed conflict and then associated with armed conflict without listing any new facts necessarily requires that this Court respect that decision

in Mr. Hamdan's case and dismiss that conduct that occurred before September 11.

While in determining personal jurisdiction as this Court ruled in December we can escape this issue because we dealt only inside what no one on the defense certainly argued was not clearly international armed conflict. We now find ourselves in a position where we must address it when it comes to the charges against him.

And at this case, it's not again a hard question for this Court, it's not a hard question--it would be extraordinarily hard--we would point in legal authority after *Hamdan* to the *al Mari* decision, which again rejected the course of conduct, separate war with al Qaeda and found that Mr. al Mari for acts very similar to those that are alleged against Mr. Hamdan was not a combatant.

But we need not finish that argument here; in fact it would not be appropriate for us to do so at this point the dictates of *res Judicata* decide that this issue, decided for Mr. Hamdan that in the Supreme Court he won something for himself, requires that we dismiss these charges.

Thank you and I'll answer any questions Your Honor has.

MJ [CAPT ALLRED]: I'd like you to respond to what I think will be the government's argument, which is that a 4-3 decision with two judges not participating has to be *res Judicata* only with respect to the narrowest issue on which they agree, which is that the Court

wasn't properly constituted or that it wasn't statutorily--properly authorized, or some issue narrower than the beginning date of the war and whether or not conspiracy were----

ADDC [MR. SWIFT]: I would respond first in that there isn't a plurality decision that the court was not properly constituted. That was the majority decision. Justice Kennedy joins----

MJ [CAPT ALLRED]: Okay.

ADDC [MR. SWIFT]: Justice Stevens in all but the five. We then come to the 4-3-1. My response on it is as a matter of law of the case that it doesn't set precedent for any other case; however, it does reverse the DC Circuit. And one thinks about this in the context of what would have happened had it gone down. Was the fact that it was 4-3-1--? The word “plurality” means nothing because that portion is the only portion of the plurality opinion. That's just to say that Justice Kennedy's very clear to what he joined--and this is the only section he doesn't--is that this portion is decided on a necessary element subject matter jurisdiction that was clearly before the court. It was essential to the dissent's position that's why they're in the dissent. And it's that they do not have the votes.

And while Mr. Hamdan has four votes here that was enough because in a 4-3-1 and I pointed out similarly what had happened in the law of the case in the context of a Fourth Amendment search would

1 we have gotten a 4-4-1 where actually we had a tie and only one
2 justice joining on a limited grounds?
3 But when we went down; we didn't just apply Justice
4 Scalia's test. We applied the plurality test. The plurality test
5 was what was applied in his case. Now that did not become law. That
6 was not the binding law of the United States and one daresay that it
7 probably isn't the binding law of the United States now.
8 But in reversing the District, in reversing the DC--or
9 excuse me the Ninth Circuit in that case we applied something which
10 only had four votes and that became the binding, law as I pointed
11 out, and how the court dealt with that case. And similarly, that's
12 the case with Mr. Hamdan.
13 I mean we can argue that, "Oh well, he only got four votes,
14 only got four votes, than were going to use Justice Scalia's one vote
15 test." And that's essentially what the government's arguing for.
16 "We're going to use the Justice Kennedy one vote test."
17 All--we have seven Justices who agreed that the start of
18 the war was critical to this analysis. For our one side three on the
19 other. That's the decision. We were well aware that if we went in
20 and got a 4-4 tie we'd lose. A 4-4 tie, DC Circuit's opinions hold
21 absolutely. So if we'd had a 4-4 tie on this issue the DC Circuit's
22 opinion would have become law. There was no 4-4 tie. It was
23 reversed.

MJ [CAPT ALLRED]: How would you respond to Justice Thomas' argument that Congress clearly intended when it passed the Military Commissions Act to hold responsible those who had planned and executed the attacks against--the September 11 attack. In other words, to try cases that occurred before September--try offenses that occurred before September 11.

ADDC [MR. SWIFT]: It was actually in the sense here not particularly answered, but we had an answer to that question. If it had been asked in the court--looking at Nuremberg and what was traditionally available, I would agree it's not charged here and we still haven't--maybe there's a theory under which we would hold Mr. Hamdan responsible for 9/11. We cite 9/11 a lot; we haven't charged him with killing anyone. We haven't charged him directly with participating in it or planning at.

Nuremberg recognized an exception. Nuremberg recognized the exception for the planning etc. of these acts outside of the war for the leaders; that where the leaders--where you would have the act conducted at the start of hostilities such as 9/11 as the Court found. But the leaders would be responsible for that even though they did not conduct it. So my view on it is, is that under a lot of--under a--the theory that the government has put forth of, I believe I'm blanking for a moment, Your Honor, “enterprise liability.”

In enterprise liability theory, wherein you show that Mr. Hamdan or any other person was integral to the parts of that attack they are liable on the day of the attack. I would disagree with Justice Scalia that it meant and we did disagree, we briefed it and quite frankly, Your Honor, we won. That prior to that, other than the outside those limited circumstances that would be any ability to charge.

But again my point is Sheik Khalid Mohammad is not sitting here. He may well decide these questions, but this court need not. Mr. Hamdan is here. Now if the government chooses instead to come with a charge that says that Mr. Hamdan through enterprise liability--he was sufficiently involved in the planning, the preparation and the carrying out of that attack to be considered a member of that attack, then they would bring it within the jurisdiction of the Law of War as the plurality decided it in Mr. Hamdan's case.

But they've charged exactly the same facts that the plurality found would not do that. That were all outside of the relevant conflict. That did go----

MJ [CAPT ALLRED]: Let me stop you for just a moment, can I?

ADDC [MR. SWIFT]: Yes sir.

MJ [CAPT ALLRED]: The charge--or the specification under the charge of conspiracy alleges that Mr. Hamdan conspired with Usama bin Laden. I mean the leaders essentially the charges--the government

has charged that he has or was a part of that inner circle that planned the attacks including an attack of September 11. Is that not a matter for trial?

ADDC [MR. SWIFT]: Well if--if we’re going to restrict the jury to evidence that shows that he was in fact part of the inner circle; that he was in on the planning and that will be instructed to the jury as what they have to find. That he knew and was part of the planning of the 9/11 attack; that he materially contributed to the 9/11 attack--and I've seen all the discovery--but if that's what we’re going to instruct the jury on----

MJ [CAPT ALLRED]: You're prepared to go to trial on that issue----

ADDC [MR. SWIFT]: I'm prepared to go to trial on that, sir. I don't think that's what the government's charging. I think the government is charging a broad-based conspiracy in which he had after knowledge of 9/11, some idea that he was in a terrorist organization, but no specific knowledge of any particular attack and no particular role in any attack other than maybe having driven Usama bin Laden to it.

Now they're free to charge conduct after 9/11, and we're not seeking the dismissal of all, though one of the difficulties with the charge sheet is it's so general that certainly if we put on “starting on September 11th” and moving forward we can--and the

government has things that they want to fashion inside that they can do so. But I don't read the charge sheet in any way in its general allegations to be that specific conspiracy. Now if the--Judge if we reform it to that portion----

MJ [CAPT ALLRED]: I'm just reading what's on the charge sheet. I don't know what the evidence will be, but from the conspiracy specification it appears to allege that he was part of that inner circle. Maybe not.

Let me turn to my final question. Which branch of government do you think is charged with determining when hostilities begin?

ADDC [MR. SWIFT]: I believe ultimately outside of a declared war that that ultimately falls to the Court, because it's an application of facts and law for the purposes in of determining judicial power while you're determining jurisdiction. Because if it doesn't, if it falls and I'll--if I can, I'll try and supplement this with a couple of cases, the *Texas Oil Fill* case being the most important after the prize cases. But that it falls into the judicial branch to make these decisions, otherwise we fall to the part where Congress is free to expand or the President to expand irrespective of the facts.

War exists in two different stems, one which is almost passé. And that is, the declaration of war which puts all parties on

notice that you're at war, or facts that are such that constitute a war, but in the ultimate part if it's to Congress to make that decision then you would violate even the parts of the M.C.A. and R.C.M. that say that this court is to determine its statutory--its subject matter and jurisdiction. Because you would simply say well actually Congress determines that.

MJ [CAPT ALLRED]: Okay. I appreciate your argument thank you very much.

ADDC [MR. SWIFT]: Thank you.

MJ [CAPT ALLRED]: Who's arguing this one for the government?

PROS [LTC BRITT]: Your Honor, at this time, I would like to ask the court on behalf of the prosecution team for a brief recess perhaps if we could have a quick one.

MJ [CAPT ALLRED]: Quick, there's no such thing as a quick break around here.

PROS [LTC BRITT]: I've been informed that it would take 10 minutes, no more.

MJ [CAPT ALLRED]: Okay. Let's see if we can take a recess for 10 minutes.

[The R.M.C. 803 session recessed at 1510 hours, 7 February 2008.]

[The R.M.C. 803 session was called to order at 1522 hours, 7 February 2008.]

MJ [CAPT ALLRED]: Please be seated. The court’s called to

order. Let's see where were we, I think the government was going to argue the DC Circuit--I'm sorry *res Judicata* motion.

APROS [MR. GOLDSTEIN]: Yes, sir.

MJ [CAPT ALLRED]: All right.

APROS [MR. GOLDSTEIN]: Once again sadly no slides.

The accused raises as an affirmative defense the claim that the specifications in counts one and two relating to conduct prior to 11 September 2001 must be dismissed because the Supreme Court has conclusively determined that those actions occurred outside the period of hostilities between the United States and al Qaeda. As I will explain in a moment, because the accused has failed to carry his burdens of proof and persuasion the motion to dismiss must be denied.

Regardless of who bears the burdens, in addition the motion it should be denied. Ultimately the accused’s claim comes down to the any factual statement made by plurality in a habeas case, must bind those same parties in any other litigation notwithstanding that the factual statement was not adopted by a majority of the Court, was not part of the Court's holding defined as the position taken by the members who concurred in the judgment on the narrowest grounds.

And third, that the statement in question was irrelevant even to the plurality's own conclusion. Let's look at exactly what was said in *Hamdan* on pages 2777 and 2778. The plurality discussed, “Whether the system of military commissions then at issue was

1 authorized under the AUMF which the plurality described as the Act of
2 Congress on which the government relies for exercise of its war
3 power, and thus for its authority to convene military commissions."
4 That's quoting from the plurality.
5 Because, according to the plurality, it was the AUMF that
6 would have given the President authority to convene a system of
7 military commissions, the question for the plurality was, "What
8 period did that authorization cover?"
9 The plurality appears to have determined that the AUMF only
10 authorized the convening of military commissions with respect to
11 offenses committed on or after 9/11 that is; the 11 September 2001
12 date was relevant to the plurality not because it defined the period
13 of hostilities per se, but because it defined the relevant period of
14 hostilities under the AUMF. And under the plurality's reasoning, the
15 use of military commissions circumscribed by the terms of the AUMF.
16 I would just note in passing at this point that the non-
17 precedential plurality's interpretation of the AUMF is somewhat
18 absurd, since it would mean that Congress under the AUMF had not
19 authorized the President to prosecute Usama bin Laden for his role in
20 9/11 with respect to his pre-9/11 acts. That interpretation is at
21 odds with the backwards looking language of the AUMF. In any event,
22 the plurality's determination, if it was a determination, has,
23 regardless of its merits, been overtaken by events.

Congress in the M.C.A. broadly defined the scope of hostilities between the United States and al Qaeda as occurring prior to September 11, 2001. Section 948d(a), which I discussed earlier today, in the M.C.A. Congress wrote, "A military commission under this chapter shall have jurisdiction to try any offense made punishable by the Law of War when committed by an alien unlawful enemy combatant before, on or after September 11, 2001." And in addition in section 950p, Congress recognized that military commissions try violations of the Law of War.

When you put that together, by defining the commission's jurisdiction as including acts prior to 11 September 2001, Congress necessarily made clear that it considered hostilities to have likewise commenced prior to that 11 September 2001 date.

It's difficult to conceive of anything less amenable to judicial review than the joint defining by the Legislative and Executive branches of the federal government of when war has begun. Congress made clear, in the M.C.A. that U.S. hostilities with al Qaeda and the Taliban began prior to 9/11.

To the extent the plurality in Hamdan reached a contrary determination it did so in the context of interpreting Congress' intent under the AUMF, which was expressly grounded in the 11 September 2001 attacks. That analysis has since been mooted by an enactment of the M.C.A., which makes clear that Congress was

1 concerned with a far broader scope of hostilities--that is--
2 hostilities before, on or after 11 September 2001.
3 As we argued in our pleadings, the plurality's entire
4 discussion of conspiracy failed to command the assent of a majority
5 of the Justices and therefore is not binding with respect to Mr.
6 Hamdan and the United States. Since only the judgment of Hamdan has
7 preclusive affect with respect to Mr. Hamdan, which judgment does not
8 include any of the plurality’s discussion of conspiracy. And I
9 would, for example, refer Your Honor to Ex Parte Discount Foods,
10 which is a case we emailed yesterday afternoon. In any event, the
11 plurality’s musings regarding the commencement of hostilities with al
12 Qaeda were clearly dicta.
13 Even had its conclusions with respect to conspiracy status
14 as a violation of the Law of War been adopted by the entire Court,
15 the plurality's objection to trying the accused for conspiracy was
16 simple; it believed that conspiracy was not a violation of the Law of
17 War--and I think that's what counsel recently said--and therefore was
18 not triable by a Law of War military commission. However, it's very
19 clear from reading Justice Stevens’ opinion that he was not claiming
20 that conspiracy was somehow a violation of the Law of War after 9/11,
21 but not before. Had that been the point, the date of hostilities
22 might have been relevant.

Rather, the plurality's objection to trying the accused for conspiracy was much simpler. The plurality believed that conspiracy was not a violation of the Law of War. The commencement of hostilities with al Qaeda, whether in 2001 or 1996 or some point in between, was irrelevant to the plurality's determination that conspiracy was not a violation of the Law of War.

Black's dictionary defines dicta as, “[A] judicial comment made while delivering a judicial opinion that is unnecessary to the decision of the case and therefore not precedential."

The statement by the plurality regarding the date hostilities commenced with al Qaeda were relevant to the plurality’s determination if determination it was--to determine if conspiracy was not a violation of the Law of War.

Accordingly, its statements regarding the date hostilities began were dicta. I will also note that the accused in his reply brief states that Solicitor General Clement, during the oral arguments in the Hamdan case, "…conceded that the armed conflict with Al Qaeda began on September 11, 2001."--I'm quoting or trying to quote as close as I can from the replied motion at page 1----

MJ [CAPT ALLRED]: I remember that comment.

APROS [MR. GOLDSTEIN]: I have listened to the oral arguments and reviewed the transcripts of General Clement's presentation in Hamdan. And I honestly don't understand what the defense is talking

about. The closest I've been able to find is General Clement's statement that, "I think the events of 9/11 speak to the fact that this is a war in which the Laws of War are involved." Since the accused doesn't provide any citation to what portion of the oral argument he's referring to, we're at a bit of a loss as to how to respond.

I will, however, say that the Solicitor General's statement that, "…the events of 9/11 speaks to the fact that this is a war," in no way undermines the government's position that this war began earlier. 9/11 was not the start of hostilities, it was rather that point beyond which it was difficult to disagree that we were indeed at war with a dangerous enemy. Nothing in General Clement's presentation undermines the government's position that the war with al Qaeda began some time before 9/11 notwithstanding that the existence of that ongoing war was dramatically and tragically illustrated on that day.

Returning to the (inaudible) motion, the accused's argument appears to be that dicta and plurality opinion is binding law of the case for the litigants in that case. Now, that can't be right. Courts resolve particular cases and controversies. They do not resolve all possible disputes between litigants until the end of time. Under Article 3, the Court, including the Supreme Court is limited to deciding only those issues before it. Even a unanimous

Court, to say nothing of a plurality, cannot fill its opinion with dicta and expect that a subsequent court will consider itself bound, rather to the extent any law of the case exists here; it can exist only with respect to conclusions essential for the Court's holding.

Here whether hostilities with al Qaeda commenced in 2001, 1996 or at some point in between was irrelevant to the *Hamdan* plurality’s statement or its determination that conspiracy was not a violation of the Law of War. The accused is attempting to disaggregate the Court’s factual findings, if that's what it was, from the Court’s role in adjudicating particular issues, and that doesn't make any sense.

The Supreme Court's decision in *Hamdan* was not intended to be an encyclopedia of the War of al Qaeda. It was a decision intended to resolve particular legal issues between the parties, in this case, whether conspiracy was a violation of the Law of War. Some facts were relevant to that determination and some facts were not. Those facts that were irrelevant, such as whether hostilities commenced in 2001 or 1996 cannot have preclusive affect either on these litigants or on any others, because the plurality’s statements regarding the commencement of hostilities with al Qaeda were irrelevant to the ultimate conclusion regarding conspiracy status under the Law of War. It was dicta; therefore had no *res Judicata* affect.

With respect to our other arguments on *res Judicata*, we're content to rest on our briefs. And we urge the commission to deny this motion and I'm happy to take any questions at this point.

MJ [CAPT ALLRED]: Well you just used the term "sometime before 9/11" as the start date of hostilities, but in your specification you've alleged a conspiracy that began in 1996. Does this commission have to determine what the start date was and preclude evidence of the accused's acts before that start date?

APROS [MR. GOLDSTEIN]: Well, the government would certainly--I guess agrees with the defense that military commissions try violations of the Law of War, in other words try offenses committed in the context of armed conflicts. It's the government's position that this period of armed conflicts included all events in the dates alleged so that would be part of the Court's determination, but the government's position is that this case goes forward because the period of armed conflict includes all the offenses and dates alleged, in other words, from February 1996 through November 24, 2001.

MJ [CAPT ALLRED]: Is it the government's position that the conflict with al Qaeda began at a different time than the conflict with the Taliban, and that these are two separate conflicts?

APROS [MR. GOLDSTEIN]: I don't know if the government has taken a position in terms of whether the dates of those are co-terminus. They might well not be. I mean, the government's charging indicates

that the armed conflict from which these offenses arose was ongoing. But the conflict with Al Qaeda and the Taliban need not have occurred at the same time and there's no requirement of that under the M.C.A. or just logically.

MJ [CAPT ALLRED]: Let me--let me ask you to respond to this and I'll give the defense a chance if they'd like to do it as well. The Supreme Court was trying to--I guess I don't have a very well-formulated question. I'll wave off on that I guess.

APROS [MR. GOLDSTEIN]: But again, we advanced a number of different arguments for why there is no *res Judicata* effect, but I think the simplest one is that even if the plurality is taken on its own terms. Even if he had commanded the assent of all nine of the Justices, just accepting that, which it obviously he did not; it determined that conspiracy was not a violation of the Law of War.

Government concedes that that is the determination plurality makes, and disagrees vigorously with it. That determination was not based on whether hostilities began in 1996 or 2002. There is nothing in Justice Stevens' opinion that would in anyway suggest that that date is a relevant one. To the extent that the plurality sort of goes off on a detour and has other facts in its opinion that are not essential to its conclusions, that might well be interesting, but that certainly cannot have preclusive effect. Plurality cannot put dicta in and give preclusive affect that is not

relevant to its conclusions even if it actually had some sort of binding effect, which it did not.

MJ [CAPT ALLRED]: Well I appreciate your argument. Thank you.

APROS [MR. GOLDSTEIN]: Thank you.

MJ [CAPT ALLRED]: I'll read your briefs carefully in the case decided and try to work through this one as well.

We're making pretty good progress. Are we ready for the next one?

ADDC [MR. SWIFT]: Yes, Your Honor.

[Defense paralegal and counsel set up laptop at podium.]

ADDC [MR. SWIFT]: A matter of house-keeping, Your Honor. With regards, and understanding where your questions are going in the event we of course argued you don't need to, but in the event that you find something we both agree on. You find that it's not *res Judicata* you're not bound in your decision. We would--if Your Honor wants briefs on when the war started irrespective of *res Judicata*, what authorities and all hold--there’s a lot out there--and would invite us to brief, we would be willing to do so on that subject. It was not directly in mind because I was arguing it as a matter of procedure, but both sides do agree----

MJ [CAPT ALLRED]: The thought--the thought did occur to me that maybe September 1 or some period before 9/11, but I don’t know how far before might be the time when the attack was forming, so that the

period of hostilities clearly began, you know, at some vague date before September 11. I don't know----

ADDC [MR. SWIFT]: Your responding----

MJ [CAPT ALLRED]: You're welcome.

ADDC [MR. SWIFT]: ----to add to your----

MJ [CAPT ALLRED]: Submit your supplemental briefs on that if you----

ADDC [MR. SWIFT]: ----certainly.

MJ [CAPT ALLRED]: ----like. I guess I don't know----

ADDC [MR. SWIFT]: ----actually, it’s some case law----

MJ [CAPT ALLRED]: ----if I have to decide when the conflict began so that the specification reads not 1996 but 1998 or 1999 or-- or not. Well let's see how that *res Judicata* motion works out and then maybe we can take up----

PROS [LTC BRITT]: Your Honor, if I could just speak for a brief bit on that. We'd like to decline the opportunity to brief this issue, because we don't believe that resolution of that particular point is necessary for your determination in our case.

MJ [CAPT ALLRED]: You know I think that's true.

PROS [LTC BRITT]: And the reason is, is we're simply contending that Mr. Hamdan entered into the ongoing conspiracy as of the date alleged. And that----

MJ [CAPT ALLRED]: February ‘96.

PROS [LTC BRITT]: Yes, sir. And therefore hostilities were ongoing as of that date whether or not hostilities were going previously and as of what date the hostilities commenced is not relevant to your determination.

MJ [CAPT ALLRED]: What happened in February of 96 that represented the beginning of hostilities?

[Prosecution counsel conferred.]

MJ [CAPT ALLRED]: Let me whisper to counsel.

PROS [LTC BRITT]: Yes, sir. Thank you. I think we can adequately address the--the Court’s question. In February of 1996, that was essentially the date when Mr. Hamdan entered Afghanistan, and therefore that would be the date that we contend that he joined the ongoing hostilities which were taking place. So that's the significance of us choosing that particular date.

MJ [CAPT ALLRED]: Okay.

ADDC [MR. SWIFT]: We would really like to brief that if the court finds not *res Judicata*, the war started with Mr. Hamdan by him entering Afghanistan at a time--I would like to brief that, Your Honor. And whether that's within the jurisdiction of this court?

MJ [CAPT ALLRED]: I don't think the government said Mr. Hamdan started the war when he crossed into Afghanistan. I think they allege that there was an ongoing conspiracy he joined on that date.

PROS [LTC BRITT]: Yes, sir. That's correct.

MJ [CAPT ALLRED]: Were there hostilities? Had there been an attack prior to February of ‘96?

PROS [LTC BRITT]: Our position would be there had been several attacks prior to that and I think that part of our case is developing what constituted hostilities at that time, but I don't, I don't----

MJ [CAPT ALLRED]: Here's what I would like to--well, you're welcome to file any supplemental brief you'd like to if the government wants to respond it may, if it wants to decline then that's fine too.

Now I lost my thought here. Okay. I'm sorry they got away from me, maybe it will come back later. Okay. Are you going--do you have anything else before we turn to the next motion?

PROS [LTC BRITT]: No, sir. Just once again, I believe that would be our evidence at trial. The hostilities were ongoing and we’re prepared to prove that, that in February of 1996, that's when Mr. Hamdan came into Afghanistan and joined the ongoing hostilities. And we will prove that with competent evidence before this Court.

MJ [CAPT ALLRED]: This is the question that just escaped me and now it's come back. Whether the existence of a state of war is a question for the jury or not? Whether it will be an element that you'll have to prove or whether that's a legal question that has to be resolved. In other words, when I end up instructing the members at the end of the evidence what the elements of the offense are, will

it include the element that these were, you know, connected to a period of hostilities?

ADDC [MR. SWIFT]: The defense's position, Your Honor, is that it's a matter of law and you need look no further than Winthrop and that it is a subject matter jurisdictional question which doesn't go to the jury.

It admittedly has elements of fact in it and when I was thinking about what to do with it, it did seem that if we moved on it would be a more natural for the next hearing where we would have factual hearings, if the government intends to put forth, similar to the question of whether those factual personal jurisdictions and then there's the question of factual subject matter jurisdiction, but we contend that where the court determines its subject matter jurisdiction, that's not a question for the jury to decide. It's a question for the military judge to decide because the existence of hostilities is ultimately the application of law to fact and within the providence of the Court.

MJ [CAPT ALLRED]: Okay. Well, we'll cross that bridge when we get to it, I guess. We're ready to talk about combatant immunity.

ADDC [MR. SWIFT]: Yes, Your Honor. Again, if I could have these published to the gallery.

MJ [CAPT ALLRED]: You may.

[The court reporter published the slides to the gallery.]

ADDC [MR. SWIFT]: Combatant immunity deals with Charge I--or Specification 2 of Charge I and Charge II; Specifications 3 and 4. And here to begin, I think it's important to understand in the government's motion--in their reply or answer pointed out that Mr. Hamdan had been deemed to be an unlawful combatant and as such he could not have combatant immunity. I think it's important--Professor Dinstein is particularly helpful here.

He points out that an unlawful combatant status doesn't necessarily mean that you are guilty of a crime. It means that you are subject to domestic prosecution. If you are a lawful combatant you maybe guilty of a crime but you must be tried only under international law and in that sense. And international law as we've--our previous hearing was all about was--does this have to be a court-martial? Because if you are a lawful combatant, it does.

Here what we have is the M.C.A. as the domestic law that Mr. Hamdan now becomes subject to. But the M.C.A. brings back into it international law by referencing in the unique thing of the United States military commissions system that it’s trying Law of War offenses.

And here what we have are the underlying crimes of the M.C.A. here, it’s Murder in violation of the Law of War, it’s the underlying crime of the conspiracy. And looking at this section, what I look at that needs to be done is distinguishing what can make

one an unlawful act combatant from those things that might be considered Murder in violation of the Law of War.

Now much like the conspiracy and the material support of terrorism charges, I went looking in the "ICTY" and the Geneva Conventions and The Hague, and I could not find Murder in violation of the Law of War. But we haven't filed that that's an ex post facto charge because I actually think I know what Congress means. What it probably means is murder committed as acts of sabotage in this--or acts of terrorism, which have been set up inside the Law of War which recognizes acts historically. Acts of sabotage are punishable under the domestic law as murder. That a saboteur in committing those acts has in fact committed murder. Now--and I think I've covered it in Mr. Hamdan, so I'll move on to the next slide.

In the conspiracy, the principles of Mr. Hamdan and one or more unknown members of al Qaeda or the Taliban, the underlying violation is that the use of SA-7 missiles in the defense of Kandahar, against Allied air crews engaged in aerial bombardment of the city would have constituted a murder by those who used it.

What's the necessary part? It's the clear evidence that we've received today. It's the clear evidence of the government's theory; and in fact I would argue--why we haven't argued for instance that the conspiracy case was multiplicious in the two conspiracy charges, as the government clearly contemplates.

Two different charges, one with Usama bin Laden and others and one with an unknown group of people in the city of Kandahar. As Professor La Fave explained for inchoate crimes like conspiracy et cetera, “An individual is not guilty of attempting to solicit or conspiring to do an act which is not criminal but which he merely believes is criminal.”

Really it’s intent--if he believes it not to be criminal or to be criminal--the underlying act for which Mr. Hamdan is supposedly conspiring to do must and in fact be criminal. In other words, the use of the missiles in Kandahar has to constitute murder. What the government has essentially charged, is that the Taliban forces that were in Kandahar and described to this Court in the December hearing, and the Ansar, which were described and found by this Court to be constituted as lawful combatants, nevertheless had no right to shoot back. If they shot back, under any circumstances, it was murder.

Now, the Taliban clearly would not qualify under either of the spies or saboteurs, neither would the Ansars. We are contemplating what we absolutely agreed was an international armed conflict where only one side gets to have guns. It's hard to think the Law of War would criminalize the complete actions of one of the sides. Whoever shoots back in defense of their bombardment in a conventional war under conventional circumstances is nevertheless guilty of murder.

And I refer this Court back to the testimony of Major [redacted], who said that the missiles were to a military certainty, in his judgment, on the field going to be used in the defense of Kandahar. Without a description and the Court has made findings regarding that battle.

Now, Mr. Hamdan didn't get to the battle and he had not yet associated himself with Ansars, in fact the government said--thought that he might do that. But this Court found he hasn't made that clear assertion so that he could claim POW status. But he is not being charged in the underlying act for not doing that, in fact the underlying act contemplates that he would have gotten to the Ansars or the Taliban, given them the missiles, either joined them or turned it over it either one would be sufficient, and then that those missiles would be used against allied airplanes that were, at the time, dropping I believe they were referred to as "daisy cutters" with devastating effect on the Taliban.

Now as a member of the military at that time, I applaud them dropping the "daisy cutters" with devastating effect; that's called winning. But the other side fighting back is not called murder.

At first I thought to myself, well this is on--I could tell this Court that this was unprecedented in the Law of War. I can't. I can actually cite to two examples but they're not pretty ones. The

Germans actually made this argument in World War II. With regards to the Soviet Union, they claim that they hadn't signed at that time the Geneva Conventions of ‘29. Therefore, every German soldier was in fact a murderer and could be summarily executed--or a Soviet soldier could be summarily executed. Nuremberg and others proved that idea to be a fallacy.

In the Indian wars, there were such times at the very beginning of the wars in the West, where the idea that the Indian tribe had no right to resist or to fight conventionally. The history of that shows that those early decisions were repudiated over time, and that they would only hold those members of the tribe who fought in saboteur-type roles. In other words, they went to a settler’s cabin and committed what would clearly have been a war crime if it had been done by a soldier, responsible for that. But they did not hold them responsible as to murder for fighting back in what was a war even between tribal organizations.

But I think the most interesting thing is the government's interpretation of what it would mean if we looked back in time and looked at the Soviet in its invasion into Afghanistan. We are not the first to go to Afghanistan. The Soviet Union crossed across. The United States as a matter of public policy support the Mujaheddin. We supported them throughout this process. We provided

them material support--incidentally in the form of Stinger missiles among other things.

Now, I cannot see how the government is making a different argument here. The members of the United States military and intelligence services that supplied those missiles to the Mujaheddin to resist invasion by a different country that, by the way, had Afghan allies--they were able to get some of the Afghan tribes to join with them--would be guilty of the war crime.

By materially--by conspiring to commit murder in violation of the Law of War because the use of those SA-7 missiles by the Mujaheddin against Soviet aircraft that were devastating them would somehow now be--that the United States had systematically engaged in murder while conspiring--or conspiracy in material support of murder in violation of the Law of War.

It doesn't make sense and if the Law of War is going to work, it has to cut equally both ways in all circumstances and this is an extraordinarily dangerous precedent.

The United States incidentally in the Soviet invasion was careful not to support groups that weren't. They encouraged at all times that the groups abide by the Geneva conventions. They encouraged that they do things like the Taliban and Ansars were doing in the defense of Afghanistan. They tried to get them uniforms or parts of it. They tried to get them to fight in organized part and

they did not encourage acts of sabotage or acts--war crimes attacks against civilians or desecrations and those sorts of things. They encouraged only their ability to do what was done here. Provide missiles to fight off aircraft in defense of your city.

I should also note that this is a very brief time in the history of the Battle of Afghanistan. It was a short period of time from the entry of U.S. forces to the eventual fall of the Taliban government.

Article 3--or international armed conflict ended with really the fall of Kandahar or shortly thereafter. So we are really here at the last moments of that conflict, nevertheless we are still in that conflict at the time.

Now, I did not spend a lot of time in my brief time on the providing material support for terrorism. It looked to me that if these individuals weren't committing murder, it would be extremely hard to understand how they were terrorists and nevertheless the individuals in Kandahar would constitute either material support of terrorism or an international terrorist organization.

Looking briefly at the statute, specification—and what we've already discussed somewhat a multiplicity but the use of an SA-7 missile is an act of terrorism and then specification; supplying an international terrorist organization. Paragraph 24 defines terrorism as "…either the intentional killing or inflicting of great bodily

harm on one or more protected persons and/or the intentional engaging in an act that evidences wanton disregard for human life." Now----

MJ [CAPT ALLRED]: Specifications 3 and 4 are the ones you highlighted in that last slide?

ADDC [MR. SWIFT]: Yes I did. In coming to the M.C.A.'s definition of what a protected person is, well, based on the evidence that we had we know that that's eliminated. Because a protected person is a civilian not taking part in hostilities, military personnel placed hors de combat and medical or religious personnel. From the testimony we received about the Battle of Kandahar that wasn't relevant to the missiles. They weren't shooting at hospital planes. They were engaged in a hot combat with attack planes coming in doing their job, so no one here would be a protected person within this that would be shot at.

The alternative is that somehow this would be wanton disregard for human life. That the Ansars and Taliban, in defending Kandahar were somehow by using SA-7 missiles was against the aircraft against them displaying a wanton disregard for human life in trying to defend the city. This comes back to the idea that they have no right to fight. That goes against any idea--there was no showing in this that the battle was directed in an unconventional manner; that the forces targeted during the Kandahar Battle which was brief,

thankfully and effective thankfully. That the battle was limited to between military forces and that both sides used force proportional to try to achieve their military objectives.

Our force was greater and that's good. They fought in a normal military manner in this battle. They were not as well-controlled, they were not as effective. I am glad for those facts, but it does not mean that they had wanton disregard for human life in trying to stave off attack aircraft against them.

Specification 4 says that it would be to an international terrorist organization engaged in hostilities against the United States. I would say that the military judge's findings again preclude either the Ansars or the Taliban from being such an organization. As lawful combatants, the Ansars could hardly be and the Taliban was engaged in its defense of Afghanistan.

And as the testimony showed here it was not subservient to bin Laden, it gave him positions. That was a major mistake by them. They paid dearly for it and appropriately so, but they were not an international terrorist organization in their defense of Kandahar.

Now arguably, of course, we've talked a lot about al Qaeda in the context of this and I'm not arguing by any means that al Qaeda is not, but the prosecution's own theory during the December hearing on how this was working. That Mr. Hamdan was going to Kandahar to

1 join the forces there shows a separate conspiracy or a separate set
2 of actions independent of al Qaeda--completely independent at that
3 point in the battle.

4 And I understand the confusions and it's good to have some
5 testimony that helped us here. Because you had Major [redacted] and when
6 Major [redacted] was asked about it, Major [redacted] had been briefed, Arabs
7 are al Qaeda. He didn't know about the Ansars. He said he didn't
8 know who was there. He knew there was an enemy force. His job was
9 to take out the enemy force.

10 But as we learned in the course of it, there were
11 differences between these forces. And Mr. Hamdan is appropriately in
12 one sense charged with separate actions here under the government's
13 own theory that this was a different set of acts. It wasn't part of
14 the ongoing conspiracy or part of the ongoing material support.
15 These were separate. And in making them separate to this
16 organization, they have combatant immunity for their actions in
17 defending the city of Kandahar under those circumstances. And Mr.
18 Hamdan's underlying support of them does not make him criminal.

19 I would point out that this would be different--that his
20 unlawful combatant status wouldn’t matter if he was charged with
21 attempt. If Mr. Hamdan, as an unlawful combatant himself, attempted
22 to use the missiles, there was a showing that he was going to engage

without having joined up with these forces and gained for legitimacy of it. He could be charged because that would make him within that category of spies and saboteurs who condition on that a saboteur is not--a saboteur is an unlawful combatant but he's tried for what he's done as a saboteur.

In Mr. Hamdan's case, he didn't get to that and in fact the testimony was he couldn't have, because the missiles were unfireable. It could not have happened; he had to gain another part. I'm sure if the government had evidence, they would have charged him with attempted murder. They don't have the evidence of it.

So that while he may, as Professor Dinstein points out, be an unlawful combatant because of his close association to hostilities, yet not having joined as a civilian in the force and brought himself into that process. It does not mean that his underlying those acts make him a criminal, and what he's charged with providing the materials.

For those to be crimes, we must conclude that as a matter of law those individuals had no right to shoot back. Now the government has also argued that well this should go to the jury if it does and I would refer Your Honor to the interesting idea in military justice of an orders violation. It's the best example that I can find in this.

And I've been on the--today glad to say I was on the losing end of this argument. At one time, I objected to argue that anthrax, for instance, orders should go to the members rather than to the judge and the military courts made it very clear to me that I was very wrong in that order--that the lawfulness of the order was the special providence of the military judge to decide. We would then decide--the members decided whether the individual obeyed it or not. They didn't decide whether the order itself was lawful.

And *Khadr* sets out that same similar idea that combatant immunity, the status of these or the underlying crimes belongs to the military judge, not to the jury. The jury is equipped to find facts, not make the determinations of whether those were not lawful combatants. And this Court has reached those decisions and therefore Mr. Hamdan claims combatant immunity as to the acts. It does not shield him from trial on other charges, but it does shield him from trial for that particular offenses.

And I'd be happy to answer any questions, Your Honor.

MJ [CAPT ALLRED]: I want to make sure I understand your argument. Your position is that because he was delivering the missiles to the Taliban or the Ansars that he was not delivering them to an international terrorist organization.

ADDC [MR. SWIFT]: That's correct, Your Honor.

MJ [CAPT ALLRED]: That's, that's the gist of your argument, isn't it?

ADDC [MR. SWIFT]: That is correct that is the gist of my argument.

MJ [CAPT ALLRED]: And no matter what else was going on that day, those specifications must fail because they allege that he was delivering them to an international terrorist organization.

ADDC [MR. SWIFT]: Yes, as to that one. And to the other ones, a terrorist act that neither of them would be terrorist acts.

MJ [CAPT ALLRED]: Because they were lawful combatants engaged in--you've confused me. I don't think that anyone who is an unlawful combatant, and I've determined that Mr. Hamdan unlawfully participated in hostilities or supported them, could claim the combatant immunity.

Do you agree with that?

ADDC [MR. SWIFT]: Actually, we cited to the DC Circuit court case--excuse me to a District Court case where the individual had--was accused of much the same crimes; providing material support to these organizations that were in a different war. Now under that circumstance, he would not be a lawful combatant. And he really made no claim that “I'm a lawful combatant sitting in the United States funneling weapons to this hostility.” Nonetheless, the court looked at it to see if funneling--if their receipt of the weapons and their

use of them would be lawful. Because when looking at material support----

MJ [CAPT ALLRED]: Okay. Okay. Just--you're getting too far away from my question. The law--the combatant privilege is limited to those who are lawful combatants; isn't that right?

ADDC [MR. SWIFT]: Yes, sir.

MJ [CAPT ALLRED]: So how could an unlawful combatant ever be entitled to that privilege?

ADDC [MR. SWIFT]: He's entitled to the privilege here, sir, because he is charged with their acts. That his delivery to it. The ultimate crimes by their acts in this process, it's the inchoate part that they are either these organizations or that they are committing murder and that is where I say that that is barred by combatant immunity. This Court has often pointed out how soldiers don't commit these crimes. So that even though Mr. Hamdan has no standing to do them himself his delivery of missiles to them and they do the acts is not unlawful.

MJ [CAPT ALLRED]: Okay. I understand your argument. I'm not sure I buy it--I'm not sure I buy that. My sense is that those who unlawfully participate in hostilities may be tried and prosecuted for those acts they do to, you know, to support the hostilities without having the combatant privilege. If a civilian picks up a gun and

shoots a soldier as he drives by that's murder in violation of the Law of War.

ADDC [MR. SWIFT]: I don't disagree, Your Honor.

MJ [CAPT ALLRED]: You don't disagree?

ADDC [MR. SWIFT]: I don't disagree----

MJ [CAPT ALLRED]: Okay.

ADDC [MR. SWIFT]: ----at all----

MJ [CAPT ALLRED]: So if he hands the ammunition to a lawful combatant who shoots the soldier then he is still an unlawful combatant directly participating in hostilities.

ADDC [MR. SWIFT]: Yes.

MJ [CAPT ALLRED]: The soldier who shoots has the combatant immunity; he gets prosecuted for unlawful participation in hostilities.

ADDC [MR. SWIFT]: I would disagree with that.

MJ [CAPT ALLRED]: You disagree on that?

ADDC [MR. SWIFT]: No, sir. What crime has been committed?

MJ [CAPT ALLRED]: Well.

ADDC [MR. SWIFT]: If the soldier’s shooting of the soldier--if that was lawful--in this argument we get to the point where we find ourselves where any civilian that provides aid--they may make themselves an unlawful combatant in their providing of aid in these processes, but it does not make them, absent a material support of an

unlawful organization, make them guilty of a crime. They may cross the line to where they are no longer civilians, and inside the rubric of war, a civilian is protected from attack, unlike an unlawful combatant who may be attacked. An unlawful combatant may be tried for their own actions that are, in fact, violations.

But the finding of an unlawful combatancy does not in itself find that any of the acts that made them unlawful combatants are, in fact, violations of the Laws of War. And here we have the part where we really have a two-step process.

Mr. Hamdan, for instance, in the conspiracy charge, is providing--is charged with conspiracy to commit murder in violation of the Law of War. They're not charging that Mr. Hamdan was going to do it, they're charging that someone else was, and that somehow providing the ammunition or abilities--and this really comes to the Afghan example I just gave you. Under the theory, the United States intelligence officers who provided weapons to the Afghan soldiers--they weren't lawful combatants. Under no circumstances were they.

MJ [CAPT ALLRED]: Because?

ADDC [MR. SWIFT]: Well, in one case, in the intelligence services, they didn't meet any of the tests.

MJ [CAPT ALLRED]: Exactly.

ADDC [MR. SWIFT]: Yet they were not guilty of war crimes by doing so because they were helping a group repel an invasion that had the right to do so.

MJ [CAPT ALLRED]: All right. I don't know that we're going to agree on this. I think your point about the Taliban not being an international terrorist organization is one that I'll be very interested to hear the government respond to. Let's see if I have any other questions, though, based on your argument.

There was a lot of discussion in the briefs about being entitled to the defense-—the affirmative defense of unlawful combatancy and what amount of evidence would have to be entered before you'd be entitled to an instruction to that effect? You're content to rely on your briefs with respect to that discussion?

ADDC [MR. SWIFT]: Yes, Your Honor. Again, our position was initially that that is a decision like the lawful order for the military judge to make based on the circumstances. The question of the underlying crime--in fact, cognizance of violation of the Law of War. Again, if we went to Professor La Fave, Your Honor, and looked at this, and the inchoate crime, it would be a decision for the court to make whether the act contemplated, i.e.----

MJ [CAPT ALLRED]: You're saying that an unlawful combatant can only be prosecuted for his acts if they themselves are war crimes.

ADDC [MR. SWIFT]: That's correct, Your Honor. It doesn't change----

MJ [CAPT ALLRED]: But you don't believe that participating in hostilities without the combatant's privilege is a violation of the Law of War?

ADDC [MR. SWIFT]: I found no law to that effect, that it constitutes either a conspiracy or murder in violation. His acts, in all of the parts put forward, the saboteurs or bands et cetera, in the participation here he may take on liability for the band's parts, but it is always the acts that they do for which they are prosecuted. The saboteur becomes the saboteur either by attempting or by committing sabotage and murder and these things.

MJ [CAPT ALLRED]: Okay. I seem to be remembering, and I'll have to go look for it, a phrase in *Quirin*, perhaps, that says "unlawful combatants may be prosecuted for their conduct," which renders their combatancy unlawful.

ADDC [MR. SWIFT]: That is absolutely right.

MJ [CAPT ALLRED]: Which means providing missiles to those who are shooting them, for example, if you don't--if you're not into----

ADDC [MR. SWIFT]: I would say that, Your Honor, in answer to that, in their case their conduct was unlawful in and of itself. They were lawful combatants, German soldiers, who when they took off their uniforms the very act of taking off their uniforms and entering

the country rendered them unlawful combatants. Professor Dinstein's part, that I've referred you to, points out that that often is the case. It's probably mostly the case.

But there are circumstances such as a driver delivering weapons, wherein the act of delivering weapons is not, they don't have the status to claim POW, they are tied up close enough to be an unlawful combatant, meaning that they're stripped of POW type protections, and they have significantly less protections as a civilian--as having committed in belligerency--but they have not yet committed a violation as a violation against the Law of War.

Being there is not the violation in that case. Sometimes it will be. Sometimes you don't know who the unlawful combatant is until they pick up the grenade in a spur of the moment and throw it, and that's what makes them an unlawful combatant. Until that moment they were not. And other times, as in delivering them, that in itself may make them the unlawful combatant, but we still look to see is the act itself, what will be done, a war crime. And in this particular case, in the conspiracy, what we say here is that Mr. Hamdan committed a conspir--entered into a conspiracy with individuals who could do something lawfully. That he is--in the sense that deprives conspiracy of its meaning; similarly with a terrorist organization.

MJ [CAPT ALLRED]: Okay. That’s a thoughtful point. I appreciate it.

ADDC [MR. SWIFT]: Thank you, sir.

MJ [CAPT ALLRED]: I’ll let the government address that now.

[The bailiff exited the courtroom.]

MJ [CAPT ALLRED]: Mr. Oldham.

[The bailiff reentered the courtroom.]

APROS [MR. OLDHAM]: May it please the Court, as an initial matter, I'd like to apologize. I'm not sure if we missed an attachment or perhaps a supplemental filing, but with respect to each of the references that Mr. Swift made to Professor Dinstein and La Fave, the government is at a loss as to know exactly what he's citing to. It's certainly not in the briefs. If it's in an appendix or a supplemental authority, we'd be grateful for the opportunity to respond to that.

[Judge laughed.]

APROS [MR. OLDHAM]: I'm sorry. Your Honor, as your questions to Mr. Swift illustrated, I believe that you understand exactly the issue here, so I'll try to be as brief as I can. There are one of two ways to analyze the question of combat immunity and under either the government must prevail on this motion. Either the question is a jurisdictional one, in which case this Court's 19 December order

clearly resolves the matter, or this issue is an affirmative defense, in which case it must be presented to the members at trial.

So taking the first one, in this Court's 19 December order, specifically at pages 7 and 8, Your Honor held that the accused is not entitled to the protections of a lawful combatant or prisoner of war under either section 948a of the M.C.A. or under the Third Geneva Convention. That resolves this motion.

As you noted earlier, as we point out in pages 6 to 7 of our brief, an individual is entitled to combatant immunity only--only if he is entitled to the protections afforded to prisoners of war. This point is made clear as Your Honor pointed out in *Quirin*, I would refer you specifically to pages 30 and 31. Page 30 specifically is what you referred to earlier Your Honor. Unlawful combatants--this is a quote, "Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment…”--not immunity--“…punishment by military tribunals for acts which render their belligerency unlawful."

The CMCR made this clear in pages 5 and 6 of its Khadr decision, Lieber made this clear in his Code specifically paragraphs 56 and 57, he likewise made it clear in his paper on the guerrilla parties at page 41.

Winthrop made it clear in his *Precedents* at pages 783 to 784. The Army Operational Law Handbook makes it clear at pages 17

and 18 and the District Court, which Mr. Swift referred to, made it very clear in *Lind* specifically at page 554.

Accordingly, Mr. Hamdan is not entitled--as an alien unlawful enemy combatant--is not entitled to lawful combatant immunity and the motion must be denied. Now, if the 19 December order--if this court's 19 December order does not resolve the question, then this motion is properly considered as one for an affirmative defense, which is premature at this stage.

Now, it should be noted and as we point out our brief, it is not at all clear that it can be--the affirmative defense of combat immunity is available here--for a myriad of reasons, one of which, it's not listed in the enumerated defenses and rule 916.

It's also--if you look at the CMCR's decision in Khadr, and specifically with Your Honor's indulgence I will read from page 6 of that decision. The CMCR held, "Unlawful combatants, on the other hand, are not entitled to combatant immunity or any of the protections generally afforded lawful combatant who become POWs." So the CMCR's decision appears to preclude the affirmative defense altogether.

MJ [CAPT ALLRED]: Mr. Oldham.

APROS [MR. OLDHAM]: Yes, sir.

MJ [CAPT ALLRED]: Do you see that little yellow light in front of you?

APROS [MR. OLDHAM]: Yes, sir.

MJ [CAPT ALLRED]: That's a request to slow down.

APROS [MR. OLDHAM]: Yes, sir.

MJ [CAPT ALLRED]: Okay.

APROS [MR. OLDHAM]: Thank you.

MJ [CAPT ALLRED]: Thank you.

APROS [MR. OLDHAM]: In any event, even if there is some way for the defense to rely on combatant immunity as an affirmative defense, it is well established that such affirmative defenses, or in the terms that the CMCR used, special defenses, must be raised at trial and proved to the panel members. We submitted to the court yesterday and to the defense counsel four specific cases that make this point very clear, all from the CAAF or the Court for Military Appeals. Specifically, Hibbard, Davis, Brown and Simmelkjaer.

The only case that the defense cites for the contrary proposition--that is that this issue is somehow an issue of law for the military judge--is a case called United States v. New, which is a CAAF opinion from 2001. But the question there had nothing to do with affirmative defenses, it had nothing to do with combatant immunity. There, the accused was court-martialed before a special court-martial for failing to obey orders to wear a UN insignia on his uniform. And the lawfulness of that order--he failed to obey it—and the lawfulness of that order was the subject of the court-martial.

It's completely inapposite here and we're at a loss to understand the analogy. It bears mentioning that lawfulness of orders does come up as a special defense in the court-martial system under R.C.M. 916 as well as in the military commission context under R.M.C. 916, but in that context it's that the accused followed an unlawful order, and the accused can then raise the lawfulness of the order as an affirmative defense to prosecution. But the United States v. New says nothing on that point.

Now, to be sure at trial the government is going to be obligated to prove beyond a reasonable doubt said Mr. Hamdan conspired to commit murder in violation of the Law of War. And an element of that offense, obviously, is violation of the Law of War. And Mr. Swift discussed at length what he believes murder in violation of the Law of War means, and he seemed to suggest that it was somehow limited to sabotage. And we respectfully disagree vehemently. As Your Honor pointed out in questions, murder in violation of the law of war is the "engagement in hostilities by an individual who does not comply with the laws of war." And it certainly is not limited to sabotage.

An individual, dressed as a civilian, not bearing an insignia, not obeying responsible command, not carrying his arms of war, or any one of those four, who engages in hostilities and commits

murder, or in this case conspires to commit murder, is liable for that war crime.

Finally, Your Honor, I like to make one brief point that the defense raised in its brief and also raised again here today and it's the so-called "status" argument. And the defense puts it like this on page 5 of its principal motion, "Immunity from prosecution of an act in the context of an international—international--armed conflict does not turn solely on the status of the individual committing the act." The defense reiterates that argument on page 2 of its reply brief.

There's several problems with this argument. The first of which is that there is not a scintilla of evidence, and again, it even if we were taking the charitable view that somehow the accused could invoke combatant immunity as an affirmative defense, as we point out in our brief, you would have to raise at least a scintilla of evidence that he's entitled to it. There's not a scintilla of evidence in this record that the accused was in any way engaged in an "international armed conflict," and therefore all of the reliance on international armed conflict and the laws thereto in the defense's brief in its reply brief are irrelevant. Quite to the contrary.

The Supreme Court of the United States, as I mentioned earlier in our argument on the Fourth Geneva Convention, has made very clear that the accused was detained and was involved in a non-

international armed conflict. That is, an armed conflict not with a nation, but rather with a terrorist organization to wit: al Qaeda.

Second, the only authorities that the defense cites in its briefs for the significance of this distinction, of its status argument, are a working paper written in the personal capacity of the legal advisor to the ICRC and also a status report by the ICRC. Now taking them in reverse order the ICRC paper on page 9, which is the cited page the defense offers, specifically deals with violence committed by one civilian against another civilian and it suggests remarkably that inter-civilian violence is not a war crime. The government has no quibble with that point. I would submit to you, Your Honor, though, that has nothing to do with hostilities and nothing to do with the laws of armed conflict, which are at issue.

Second, the working paper, written in the personal capacity of a legal adviser to the ICRC, stands for the precise opposite proposition for which the defense cites it. The author of that paper, Your Honor, emphasizes, and this is specifically from page 10 which I quote, "civilians who directly participate in hostilities may be prosecuted for such participation." Your Honor, I----

MJ [CAPT ALLRED]: Oh, I missed whatever was whispered. What was the message? **[Bailiff had a discussion with the Judge.]**

MJ [CAPT ALLRED]: It's the yellow light thing again.

APROS [MR. OLDHAM]: Yes, sir. Your Honor, there is nothing in this record that connects Mr. Hamdan to either the Taliban or the Ansars. He pledged "bayat" to Usama bin Laden, these are all findings from this Court's 19 December order, delivered weapons at Usama bin Laden's request, he trained at al Qaeda training camp, he was a member of al Qaeda and not the Ansars. And there is no evidence that he was fighting for either the Ansars or for the Taliban.

Now, the defense's motion seems to be premised on the notion that this court has somehow found, or somehow that the facts in this Court's 19 December order lead to the ineluctable conclusion that the Ansars--it was "ineluctable"--that the Ansars were a lawful fighting force. But we submit that this court held no such thing, nor did it hold any such thing with respect to the Taliban. Even if it were true, and the government will present at trial evidence to suggest that it's not true, but even if it were true that the Ansars wore uniform and insignia and fought under a responsible command, and again we do not concede those points--we will present evidence to the contrary, but even if all three of those things were true, we submit, and the court certainly found nothing to the contrary, to suggest that the fourth vital prerequisite to lawful combatancy, that is compliance with the laws of war, were in any way meant by anyone engaged at the battle of the defense of Kandahar.

Now Mr. Swift suggests that that's somehow unfair. That it's somehow fighting with one hand behind your back in the sense the United States is allowed to use force but its enemies are not. And, Your Honor, that has never been the position of the United States in Afghanistan either during the Soviet invasion or during the war with al Qaeda.

The position of the United States has always been that our enemies, like the United States, must comply with the Laws of War. And that those who take up arms, and that those who fight our soldiers, our men and women in uniform, must likewise comply with the laws of war that render belligerency lawful. And to the extent that they fail to do so, under every precedent, and we cite a litany of them in our briefs--from Quirin to Winthrop to Lieber--if they fail to do so, they are prosecutable and they do not enjoy combatant immunity for the acts that render their combatancy unlawful.

If Your Honor has any questions, I'm happy to entertain them.

MJ [CAPT ALLRED]: I do. Why wasn't Mr. Hamdan charged with just driving the truck? I mean that's the act that rendered his combatancy unlawful, and it's characterized now as material support to terrorism. Is there an offense under the Code that specifically addresses driving a truck delivering ammunition to combatants that more appropriately reflects the unlawful nature of this conduct?

APROS [MR. OLDHAM]: I'm sorry, do you mean is there an offense under the M.C.A. that specifically?----

MJ [CAPT ALLRED]: I'm sorry, yes. If I didn't say that, that's what I meant.

APROS [MR. OLDHAM]: Sure. That specifically prohibits driving a truck?

MJ [CAPT ALLRED]: Well, these are the acts that render his combatancy unlawful.

APROS [MR. OLDHAM]: Yes, sir.

MJ [CAPT ALLRED]: Delivering ammunition to fighters. And yet, that's been charged as material support to terrorism. I'm going back--maybe this didn't appear in the briefs, but Mr. Swift raised what I think is an intriguing question. And that is, you've charged him with material support to terrorism, an international terrorist organization, when in fact he was delivering weapons to what may have been lawful combatants.

APROS [MR. OLDHAM]: Yes, sir.

MJ [CAPT ALLRED]: Do you want to respond that?

APROS [MR. OLDHAM]: I'm sorry?

MJ [CAPT ALLRED]: Do you understand the point he made and that I'm intrigued by?

APROS [MR. OLDHAM]: I believe--I'm not sure I understand.

MJ [CAPT ALLRED]: Do you intend to show at trial that the Taliban was an international terrorist organization?

APROS [MR. OLDHAM]: Your Honor, from what I understand and I was not involved in drafting the charge sheet, but from what I understand we do not necessarily intend to prove to whom he was delivering weapons. What we do intend to prove is that to whomever he was intending to deliver the weapons, they were an unlawful fighting force.

MJ [CAPT ALLRED]: An unlawful fighting force?

APROS [MR. OLDHAM]: An unlawful fighting force. A force that does not comply with the laws of war. And that that is why his conspiracy to commit murder in violation of the Law of War is a tenable charge.

MJ [CAPT ALLRED]: Okay. We're reading from Specification 3 that alleges that he provided material support and resources, to wit: weapons and weapons systems, we're talking about the missiles now, to be used in preparation for or carrying out an act of terrorism.

Your position is that the Taliban's defense of Kandahar was an act of terrorism?

APROS [MR. OLDHAM]: Yes, sir. Our position is that delivering those missiles and attempting to deliver those missiles--in Mr. Hamdan's case--was an act of terrorism and material support. One of the things that comes up in our ex post facto briefs when we

specifically talk about material support are some of the things that have traditionally been understood to constitute material support.

Justice Thomas, in his dissent in Hamdan actually lists several of these things as well. And one of them is delivering things to forces that are unlawful. So, for example, in the Civil War delivering horses, clothes, armaments and the like to guerrilla parties to banditti, to Jayhawkers, constituted material support for their unlawful activities. And it's because the group itself is unlawful and it's because the individual was attempting to render support in the form of material, whatever that is, in this case it was missiles, it could also be oneself under the material support offense. But in any event it's rendering that material support to an unlawful fighting force that constitutes the violation of the law of war. And it has for centuries.

MJ [CAPT ALLRED]: Specification 4, then, which alleges that he was delivering the missiles to al Qaeda leaves open the possibility that the members will find that they were the ultimate recipients of the missiles? They were an international terrorist organization?

APROS [MR. OLDHAM]: Yes, sir if you see at the----

MJ [CAPT ALLRED]: So 3 and 4, I guess, are offered for contingencies of proof. You don't know who the missiles were destined for?

APROS [MR. OLDHAM]: I believe that that is the theory, Your Honor and I believe that was what Lieutenant Commander Stone was arguing earlier in the sense that I believe that these are offered such--but I'm not exactly sure how it will play out once the members come back.

If Your Honor looks at the last sentence of Specification 4--I'm sorry, the penultimate line. This is the top of page 6. You will see that we list "al Qaeda, the Taliban or others directly associated…" So it's charged without definition is to specifically who the missiles were going to.

But it's the position of the United States--and we will prove at trial beyond a reasonable doubt--that these missiles were intended to be delivered to a fighting force that is unlawful and since that's a violation of the Law of War.

MJ [CAPT ALLRED]: Yes, I guess the problem is; is an unlawful fighting force the same as an international terrorist organization? For example, let's assume the Taliban was the regularly constituted Army of Afghanistan, and for some reason, maybe they didn't wear their uniforms that day, you allege that they were not lawful combatants. Is that the same as an international terrorist organization?

APROS [MR. OLDHAM]: Your Honor, I'm not sure that those are necessarily coterminous. But I leave that for the charges to stand

and certainly for the purposes of rejecting this motion, the only relevant--again part of it is--it's a little difficult to have this discussion in the procedural posture in which the defense has raised this motion. If this comes up as an affirmative defense at trial, and we have the specific facts, and it turns out that that hypothetical is at issue, then we would have to prove to the members that that organization was not a lawful fighting force at the relevant time. If it was for a day that they weren't wearing their uniforms or for a month or for the entire battle, but for whatever it was.

And whether that necessarily overlaps perfectly with the definitions of an international terrorist organization, and what the requirements of an ITO would be, I'm not exactly sure, to be perfectly honest. But what I do know is that for the purposes of this motion, this Court need not answer that question, because it’s, like I said, it's speculative and hypothetical.

MJ [CAPT ALLRED]: Well, my suspicion is that the reason there's no affirmative defense of lawful combatancy in the Manual for Military Commissions, is because lawful combatants aren't tried here. They have been sent to a court-martial.

APROS [MR. OLDHAM]: That's right.

MJ [CAPT ALLRED]: If the accused raises some evidence of each of the elements of lawful combatancy, do you agree that he's entitled to an instruction on that defense?

APROS [MR. OLDHAM]: Your Honor, yes. I mean, I believe if he were to raise that then we would have to have--the government would have to prove beyond a reasonable doubt that he wasn't entitled to it to the extent that this court finds that it's a special defense--an affirmative defense. But again, that question--he certainly has not done so.

And I think you're exactly right that it's very difficult to imagine a circumstance in which an unlawful enemy combatant could make the argument that he was fighting lawfully. But to the extent that he did, we would have to confront it at that time.

MJ [CAPT ALLRED]: Okay. Fair enough. Thank you very much for your argument.

APROS [MR. OLDHAM]: Thank you, sir.

MJ [CAPT ALLRED]: Well done. Okay. By my tally we have reached the point where we have some discovery issues to address. Is that the next thing on the list?

PROS [LTC BRITT]: That's correct Your Honor.

MJ [CAPT ALLRED]: Okay. Which one do we want to take up first? I've granted defense motion 020 without opposition from the government so we have the 17 and 18.

Commander Mizer, are you in charge which motion comes next or are you debating over there?

DDC [LCDR MIZER]: No, Your Honor. Mr. Swift is actually going to take that, but if I could just address two matters of housekeeping very briefly. With respect to the schedule, the defense believes that we can go on those three days in March beginning on the 12th. And the other issue that I want to put on the record is, I think there's been some confusion about defense motion 019, which is the motion for credit for pretrial punishment, in addition to a request; the cessation of that pretrial punishment.

The thing that I wanted to put on the record, Your Honor, is that motion is very narrow in that we're seeking credit from the conditions of solitary confinement for Mr. Hamdan and we reserve the right to, at a later point, seek confinement credit similar to Allen credit for the entire 6 1/2 years of confinement. So before the government begins working on that motion, I want to make sure that, when we come here----

MJ [CAPT ALLRED]: You've orally expanded your motion a little bit?

DDC [LCDR MIZER]: No, I've orally narrowed it, Your Honor, is what I'm saying.

MJ [CAPT ALLRED]: Oh, okay.

DDC [LCDR MIZER]: On its plain face, it's asking essentially for the cessation of solitary confinement and for credit for punitive conditions of confinement, approximately two years that Mr. Hamdan has spent in solitary confinement. We leave for another day, should we reach sentencing, the broader issue of should he receive credit for what the government will maintain is administrative detention and we would like to litigate that. But we want to make sure that we are reserving an issue for later when it should properly be raised, at sentencing.

That's all I have Your Honor.

MJ [CAPT ALLRED]: Okay, I think the government's on notice.

PROS [LTC BRITT]: Yes, sir. Thank you very much.

MJ [CAPT ALLRED]: Five sharp attorneys over there, I'm sure they'll be able to respond with something appropriate.

ADDC [MR. SWIFT]: We've submitted briefs and the timeliness, etc. issue. I would be comfortable on this one, rather than getting up and arguing, letting the government put forth and having any reply I might have, the easiest way to deal with it----

MJ [CAPT ALLRED]: Okay. Okay, I think that's fine. You don't care. Now let's talk about D-017, the motion for complaints against legal adviser the Convening Authority.

Are you ready to take up that one?

PROS [LTC BRITT]: Yes, sir, I am.

MJ [CAPT ALLRED]: You want to be heard?

PROS [LTC BRITT]: I would like to be heard, yes, sir. And, Your Honor, once again if you could please repeat your instructions for answering this motion. I understand the defense isn't going to orally argue? We would just be responding essentially to their request for these documents?

MJ [CAPT ALLRED]: Yes. Yes.

PROS [LTC BRITT]: All right, sir. One thing that's interesting when I read the defense request is it appears to be simply in the nature of, "please get us these documents." And they anticipate my response as to "where is the theory of relevancy?" by simply saying, "these documents are relevant because we know that that's what the government's going to argue--is that they're not relevant."

There are essentially two documents which the defense is requesting and the first is an April 30, 2004 IG investigation into complaints made by several former prosecutors in the Office of Military Commissions prosecution against the chief prosecutor.

And I am watching the light, Your Honor.

This investigation, Your Honor, was complete as of April 30, 2004, and it's simply not relevant in the instant case against Mr. Hamdan. First, all the complainants and the chief prosecutor at that time serving in the Office of the Military Commissions' prosecution have since departed.

Next, Mr. Hamdan is charged in the Military Commissions Act and not the series of military commissions orders which governed charging of detainees during that period of time when the complaint was made.

Third, the defense has a copy of the report already because they supplied that as part of their discovery, though admittedly redacted and missing the supporting statements. I would direct Your Honor’s attention to page 30 of the report, which the defense has supplied, where it states, "this project is closed as unfounded."

Turning now to the second investigation, again the defense correctly anticipates that I would argue that that report is as well not relevant to this commission. These materials relate to the former chief prosecutor, and it's no mystery to anyone in this room who has participated in these proceedings, or who is a follower of the media, that these relate to a complaint filed originally by Colonel Morris Davis.

For timing purposes, Mr. Hamdan was charged under the current charges on the 5th of April 2007 and the charges were referred to this commission on the 10th of May 2007. The previous legal adviser left his particular position, Brigadier General Hemingway, in approximately August-September of 2007, and was replaced by the current legal adviser in July of 2007.

Hence, the critical decisions of charging Mr. Hamdan and referring his charges preceded the arrival of the legal advisor who is the subject of Colonel Davis' complaint. Again there is a redacted version of this report on the Office of Military Commissions website and it is available for public viewing. Again, there is certain information that's been redacted as is customary on this website, however, again, it is simply not relevant. If Your Honor determines that either of these reports are relevant, and of course would follow your review of the redacted versions of both reports, the government would recommend this that you accept directly copies of the original investigations and consider those in an in camera setting and subsequently rule as to whether there is relevance with regard to the current case against Mr. Hamdan. The government is certain following review of those documents you will make the determination, which I strongly recommend, that you find that neither of those complete investigations should be supplied to the defense and deny their motion.

Thank you.

MJ [CAPT ALLRED]: Okay.

ADDC [MR. SWIFT]: May I be heard, Your Honor?

MJ [CAPT ALLRED]: Yes, I think you can.

ADDC [MR. SWIFT]: Very briefly. With regard to----

MJ [CAPT ALLRED]: Can I ask you a question? I didn't get copies of either of these redacted versions. Do you have----

ADDC [MR. SWIFT]: We will have--I can supply----

MJ [CAPT ALLRED]: I don't need them. Do you have them?

ADDC [MR. SWIFT]: Yes, I do.

MJ [CAPT ALLRED]: Okay.

ADDC [MR. SWIFT]: Dealing with each. The first one, at the time that the 2004 investigation was going on and all of the activities, Mr. Hamdan was one of the four charged persons. There were allegations, which are the parts that are cut out, on the destruction of evidence or mishandling of evidence or suppression or hiding of evidence. That would be relevant going all the way back. That's government conduct whether the M.C.A. had been passed or not. I can't state with good faith whether it involves Mr. Hamdan or not, the investigation was closed, the parties weren't permitted to talk about it, but I think that it is relevant here for our enclosed and into it.

And while I appreciate that the government reached a conclusion that nothing bad happened, that conclusion doesn't substitute for the Court and the original documents and our opportunity to take a look at it. We might take a different view and ultimately the Court might take a different view. And we think it's appropriate to turn it over.

Turning to the most recent one, as I understand from both the redacted version and from Colonel Davis' and General Hartman's multiple statements in public, the dispute is principally structural and in the role of the prosecutor and in the role of the legal advisor.

This raises--the government argues, "Well, since the prosecutor's gone, and it was a different group and the prosecutor and a different legal advisor decided Mr. Hamdan's position, then there can't be any relevance." I find that interesting because if Colonel Davis was acting ultra vires, he had it wrong. He may have violated and the entire charge has been brought in an irregular manner in Mr. Hamdan's case. In fact, in some ways, the government's holding that the legal advisor is in the appropriate role now and Colonel Davis is the one who should leave and Colonel Davis is the one--and the previous legal advisor are the ones who brought the charges against Mr. Hamdan, I don't know that that argues that there's no problem.

Secondly, the next question that comes in is that Colonel Davis put down that there was "undue command influence" being exerted on him throughout the process in this, and I think that that becomes material throughout.

And finally, the legal advisor has not ceased acting in Mr. Hamdan's case nor will he cease acting. He takes over. And the

legal advisor has important duties, some of which he performed last week, which was sending over members to Mr. Hamdan commission.

If we've missed a block in building this, then--as I read the Military Commissions Act each time I am struck both that there are amazing similarities to the court-martial system--and then I read a section I go, "Wow, that's really different" in its structural composition. And we would seek not for an in camera review but to have the documents provided to us because these are issues of first impression.

And while the military judge, I know, studies with extraordinary clarity, there isn't a lot of law in the process to look through it and say, “Well these are obviously the issues. This is obviously the standard." And so it's going to be difficult to sit there and say, "Well, after looking through this is there a structural defect that the defense might see differently or find law on?" Hamdan is an inaugural case and we continue to struggle to do our best to elicit all of the issues that are in it and I think that it is appropriate that we have both investigations to look at them. We would be willing as I indicated in the 802 to take them under a protective order. I understand that the reasons they've been released redacted as they contain sensitive information.

I don't believe this court wants to hide from the public, but it's those things that are relevant that come out to the public

in the course of the proceedings and if we determine that there’s something worth briefing, we cross that bridge when we come to it.

But, I don't believe that an in camera review, especially in the timelines that we have, is the most expeditious or efficient way to do this. They don't contain classified information and to the extent that we're supposed--that privacy is at issue, and other matters are at issue, they're easily cured by a protective order in this particular case, especially where there are investigations.

MJ [CAPT ALLRED]: How long will it take you to provide these, either to me or to the defense if I order them today?

PROS [LTC BRITT]: Again, Your Honor, as we discussed at the 802 I think that would be based entirely upon some timelines you might set. In other words, I don't have those investigations within my arms reach, using another area of the law.

MJ [CAPT ALLRED]: Well, I mean that Mr. Swift's point is well taken. If I take the time to wait for them to be sent to me and then conduct an in camera review and then send them to the defense, we have another--our last motion session is already set for a month from now?

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: So, I think what I'm inclined to do is deliver them to the defense under a protective order and I will

invite counsel to suggest terms that would be appropriate to the government, and get them moving so that your interests are protected?

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: We've got a green light up here.

[Counsel laughed.]

ADDC [MR. SWIFT]: It's a first, Your Honor.

MJ [CAPT ALLRED]: Oh. The lights are broken.

[Counsel laughed.]

MJ [CAPT ALLRED]: Okay. Why don't you propose some terms for a protective order?

PROS [LTC BRITT]: Yes, sir, I will. If I may, and once again may I address the court from my seat or would you like me to come up?

MJ [CAPT ALLRED]: Yes, that's fine.

PROS [LTC BRITT]: Just a comment and then a recommendation and a question. I just need to clarify for the Court and maybe for those that are listening, it wasn't Lieutenant Colonel Britt decided that there was nothing arising or amiss--the subject of April 30, 2004 investigation. That was the conclusion of the investigator, once again, found on page 30 where he indicated, "…this project is closed as unfounded."

And thank you for allowing me to make that clarification.

MJ [CAPT ALLRED]: Well, I appreciate that. If we had more time, I think I would give you the benefit of an in camera review,

and might have decided on my own authority that there's nothing here for the defense, but if you want to maintain the trial schedule we have set----

PROS [LTC BRITT]: Yes, sir, understand.

MJ [CAPT ALLRED]: ----I think we need to protect your interests with an order and rely upon the defense to respect the sensitivities that the government brings to this issue, and see if there is anything there, so we can litigate it in March if there is.

PROS [LTC BRITT]: Very well.

MJ [CAPT ALLRED]: Fair enough?

PROS [LTC BRITT]: Your Honor, with the court's permission I would like to take up an additional matter--just a clarification of something that took place this morning with regard to Defense 20, I believe, for the record--a motion is that was previously made with regards to the discovery--and in that particular ruling and please help me out if I'm mistaken, but I believe it was colloquy between the government and the defense and Your Honor to the degree that we had indicated that we had turned over the materials that were required to be turned over to the defense pursuant to their original discovery motion to the extent that we had in those materials in our possession.

And I believe at that time the Court responded that they were granting defense motion 20 with regard to discovery. The

concern I have had since then, in thinking through this, there are obviously--the problem of materials that may come to light in the future. And once again I can't speculate what might come to light, but we understand that our discovery obligation is a continuing discovery obligation.

If we come upon materials that the rules don't contemplate, of course, we want to be able to re-approach the court and discuss those materials again, if they are of such a nature that it may raise issues that are outside of the materials that we have already disclosed. And we would ask if that exception be granted to your granting of Defense 20.

MJ [CAPT ALLRED]: Of course. I granted the motion because you didn't appear to oppose it. You seemed to concede that what they had asked for you were prepared to deliver and had delivered and were continuing to search for. But if additional matters come to light that you want to approach the Court about, we have March to do it in open court or you can submit them by e-mail and whatnot if they don't require oral argument.

PROS [LTC BRITT]: Yes, sir. Thank you.

MJ [CAPT ALLRED]: Okay? That's fair enough?

PROS [LTC BRITT]: Yes, sir. Thank you.

MJ [CAPT ALLRED]: Okay. It's five o'clock. My sense is that we're close to what we have for today, but does anyone want to take a recess before we continue?

PROS [LTC BRITT]: Your Honor, if I could make one more--and I'll make this in terms of an offer to the defense, I believe that we can resolve Defense 18 and if we could have maybe a slightly longer recess, in recess and an opportunity for me to discuss what the defense is requesting in this particular motion, I am hopeful that we can resolve it without having the Court's intervention in this process.

MJ [CAPT ALLRED]: Well, what do you mean by a “slightly longer recess?--half an hour or an hour or two?

PROS [LTC BRITT]: No, Your Honor, nothing of that length. I would recommend the normal break being 15 minutes and an additional 15 minutes.

MJ [CAPT ALLRED]: Okay. I'm happy to do that. Let me actually turn to the motion to compel access, too. Because I'd like to propose something for your consideration and you can discuss that during the recess as well.

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: Are you prepared to do that?

[Defense and Prosecution counsel indicated an affirmative response.]

MJ [CAPT ALLRED]: My sense is that the defense has made an adequate showing of a need to talk to these people. And at the same time the government has made a significant showing of security concerns. And what I propose to the parties is an order that would allow the defense to submit written questions to these witnesses. The questions could be reviewed by some security reviewer not associated with the prosecution to make sure that the questions were appropriate. That they could be translated, answered in writing, those answers reviewed by a security person to make sure no improper material was revealed and delivered to the defense.

And if there was some dissatisfaction on the part of the defense, we could potentially treat that as a request for, you know, the exclusion of classified evidence under rule 505. My sense is that that could possibly give the defense the access they need, the ability to determine the answers to their questions, while at the same time protecting these witnesses from interviews--unsupervised interviews--that might threaten some of your security interests.

So, discuss that during the recess as well, and if that could be worked out, then we can talk about that again after the break.

Okay? Okay, we'll be in recess then until about 1730.

[The R.M.C. 803 session recessed at 1701 hours, 7 February 2008.]

[The R.M.C. 803 session was called to order at 1741 hrs, 07 February 2008.].

MJ [CAPT ALLRED]: Court's called to order. Colonel Britt.

PROS [LTC BRITT]: Yes, sir. At this time, let me report on, and make a suggestion to Your Honor, and perhaps follow up on something that you said earlier. And this is in regard to Defense 17. And again the subjects of Defense 17 were the two investigations that the defense has requested. The 2004 IG investigation and the second is what we refer to as the "Tate Commission" investigation as the second report that the defense has requested.

During the break we inquired and were able to determine that we can have copies of both of those investigations in your hands by 12 o'clock tomorrow. And I think Your Honor stated that you would like to conduct an in camera investigation. You would like to be able to tell me that, but given the time you couldn't and now perhaps you would like to agree to do that.

MJ [CAPT ALLRED]: I'll do that. I'll do that if I can have the investigations by 12 o'clock tomorrow.

PROS [LTC BRITT]: Thank you, Your Honor. Kind of--to go back to Defense 20. And that was what I'll refer to as their “general discovery motion” or their concerns about the government's failure to comply--or inability to comply as we've styled it--without particular discovery requests.

As we began to discuss this matter in the hallway, it became very clear to all parties who were in that particular discussion that there was very little meeting of the minds and understanding of your order this morning and my request to you for reservation or exception to that order. And as a result, all of us have agreed it would be best to go back on the record, clarify some key points and seek further guidance from the Court.

So, at the appropriate time would ask that you do that please.

MJ [CAPT ALLRED]: You're asking for a written ruling? Or----

PROS [LTC BRITT]: No, sir. We're simply----

MJ [CAPT ALLRED]: ----another chance to address it on the record?

PROS [LTC BRITT]: Just a chance to address it on the record. Yes, sir.

MJ [CAPT ALLRED]: You're contemplating a session tomorrow----

PROS [LTC BRITT]: No, sir, I hope we can move through this----

MJ [CAPT ALLRED]: ----or in March?

PROS [LTC BRITT]: ----briskly.

MJ [CAPT ALLRED]: Oh, tonight?

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: Okay.

PROS [LTC BRITT]: It's just dealing specifically with your ruling and some of the defense's concerns and the government's concern with regard to the ruling.

MJ [CAPT ALLRED]: Okay.

PROS [LTC BRITT]: On, let's see on 18, I had hoped to resolve 18. We were unable to make any progress; we'll have to discuss that matter with you on the record. If that discussion begins to go in some directions that were the subject of Exhibit 111, which I believe we brought to the Court's attention, we may have to discuss this in a different location perhaps at a different time.

But in any event, that is the status of those three motions and then I understood that we were additionally to meet and discuss the issue of whether or not some form of interrogatories to provide the defense with a limited form of access would be acceptable to the government.

Your Honor, we had considered and I think this issue was first raised in the 802. And at that particular time we had discussed very briefly whether or not that would be acceptable to the government. We discussed it at that time. It was the government's position that interrogatories would not be acceptable for the simple reason that the high-value detainees and with regard to their access, risks disclosure of sources and methods reasonably expected to cause

exceptionally grave damage to national security and we intend to go on the record at the appropriate time to discuss that further.

That is still our response to your suggestion and we'll await further guidance from the court on that matter.

Thank you.

MJ [CAPT ALLRED]: Well what do you propose, then, as a resolution to the defense's motion?

PROS [LTC BRITT]: Your Honor, we would like to go on the record and discuss why we believe the defense has failed to make the requisite showings and outline to the Court detainee-by-detainee where they failed to make that showing. And I would also, based on my discussion with the defense, respectfully request that you ask the defense what their position is on the interrogatories as well.

MJ [CAPT ALLRED]: Well, when do you propose to have this detainee-by-detainee discussion?

PROS [LTC BRITT]: That's what was set for the motion and we would do that right now.

MJ [CAPT ALLRED]: Oh, okay.

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: What was the defense position on the interrogatory idea?

ADDC [MR. SCHNEIDER]: Your Honor, I'd like to answer that question directly and then with the Court’s patience speak to three

topics on that issue. The direct answer to your question is yes, we would welcome the opportunity to submit questions in writing and receive answers in writing and we would engage in a process. If I may, I would like to address those three topics which are related to that position.

The first is to tell you why we believe that, while welcome, there are some deficiencies to that process. The second would be to discuss in a little more detail the type of case where that would be more appropriate than this one and the third thing I would propose to mention is a solution we think might be preferable--we think is preferable.

With regard to the first topic, "while acceptable to us, why we think it's not ideal" in this case. Number one, that process of interviewing a witness recognized by the courts, military--civilian, permits the parties to determine the suitability of calling a witness to trial--at trial. The interview is preliminary, and that's something that is difficult to do, we would submit, by having the witness fill out a questionnaire.

Number two, the credibility of the process we believe suffers if done in writing. Why? Because you here have witnesses who have been detained for some considerable period of time, most I think unrepresented. Some, I believe, according to published reports, having undergone unusual interrogation techniques. And I

think this process ultimately would require transmission of a written interrogatory delivered by someone that the witness knows is not affiliated in any way with the defense of this accused, Mr. Hamdan, and we think that is going to precipitate some credibility issues with respect to the witness's willingness to be candid and forthcoming.

We think it is more likely that when we get to the real truth of the matter if we are able to engage in an interview. The third reason we think is deficient is that, any interview involves, as you know, a give-and-take conversational format even if it's done through translation. Sometimes an answer unanticipated precipitates a question that was not projected. And we think that that is a much preferable method.

And if this is going to be a quest for truth, as it surely is intended, let me be clear--written questions are better than nothing, which is what were being offered I believe--but we believe it falls a few steps short of guaranteeing the accused a right to fully prepare his defense.

The second topic, if I may, “What type of case would written questions be more appropriate?” Based on my reading of the authorities that we cited to this commission, the Moussaoui case is one that really discusses that in some detail. And the Moussaoui case is relevant in a number of respects including the fact that it

involves conspiracy charges and the court does determine that those allegedly involved in a conspiracy are relevant witnesses. But let me speak more precisely to the issue of why written substitutions for an interview were more appropriate in that case than in this one.

In that case, the Court determined that the circumstances presented involved a valuable intelligence source that was in the process--who was in the process--of being interrogated. And it was the potential disruption, or the word the Fourth Circuit used, the "interruption" of that intelligence-gathering activity that would have adverse effects on national security.

Here, given the proximity in time, we're farther away from the events. And there was absolutely no showing on this record, there is nothing in the declaration that has been submitted to suggest that we're in a similar circumstance. And so that "interruption" of an active ongoing intelligence-gathering of that witness is not present.

And then last, that involved “trial testimony.” It's a different proposal. Having the witness come in and spontaneously testify in open court is a much different proposition than an interview before calling the person in court.

The third topic is what I described, I think accurately, is what I believe is a preferable solution. And that is, if I understood the court correctly you inquired about a supervised--

excuse me--you mentioned the danger the government sees in an unsupervised interview.

Well, we'd be willing to do a supervised interview with a security officer present who would have ample opportunity, we believe, to accomplish just what the doctor ordered, so to speak--the "interruption" of a question that would elicit that type of information. And with the translation that should not be difficult.

And let me last say why we think that is entirely feasible here. If you study the record that’s been presented as to a classified information constitutes a danger to national security, there is nothing in the record to suggest that it’s information regarding events prior to capture. Prior to capture.

The basis for this invocation of “state secrets” or “classified protected information” is information acquired by the witness post-capture. And why is that relevant to the question that the court asks of counsel? Because we're not interested in the former--excuse me--the latter.

We are interested in what these witnesses know based on their personal experience in Afghanistan before capture. The government is exclusively concerned about information they acquired from the government post-capture. And so to state it succinctly, what's important here is to ask the witness not what he knows about the intelligence gathering techniques, the methods, the sources, the

locations of confinement, the circumstances--but to ask the witness what he knows about before he was captured, none of which would be classified. That's what we seek.

The government vigorously tries to prevent us from acquiring information we don't want--we don't need. And a combination of a supervised interview with security officer present empowered to cut off the question and an admonition, and instruction, in order for this court requiring us to do what we propose to do, stick to the facts before capture--don't venture into what the prisoner learned after capture, we think would account was the purpose that you intended in a way which would be much more productive, and would satisfy the interests of the accused for a fair defense. Thank you.

MJ [CAPT ALLRED]: Okay, there’s a thought.

Nobody likes my idea. Government?

DDC [MR. SCHNEIDER]: Well, for the record, Your Honor, we liked it more than the prosecution.

PROS [LTC BRITT]: That may be so, Counsel.

Your Honor, in listening to my colleague's argument, I'm first struck by the fact that he has cleverly meshed what should be a two-step analysis into one single step. And he has approached the court assuming that Your Honor has already determined that there

should be access. That is not what the statutory scheme that's set out in M.C.A. and the M.M.C. contemplates.

The statutory scheme that has been established to determine these issues is governed by rules 701 and 703, and in conjunction those particular rules mandate that Your Honor first make a determination as to whether or not the defense has made a showing of relevance and materiality. The discussion of access, the modes of access, the means of access is completely premature until such time as your honor undergoes the analysis of that first step.

Let me say by way of review, and in reviewing your previous ruling on 7 December 2007, you found as a matter of fact that Khalid Sheikh Mohammed, Ramzi Bin al Sheib, and Abu Faraj al Libi are extremely highly placed members of al Qaeda. To paraphrase your description earlier, “Members of the inner circle.”

You also found that special security procedures are required in order to access them. Again that recognizes the second step of the analysis. But focusing on the danger, the concern that we have about those particular detainees has given them the classification, at least in our circles--in the commission circles--of high-value detainees.

The analysis, however, remains the same for access to any detainee. And it's incumbent upon the defense to come forward to

your honor and make a showing, presumably in writing, to meet this first step.

Now, I would direct Your Honor's attention, and timing is very important Your Honor, as the defense has come to you in an attempt to make their showings. The first came before you on 4 December 2007, and on that date, as a general matter on page 4 of their brief, they state, "The defense request to interview potential witnesses was reasonable." How do we know it was reasonable? We don't know. But we do know is they state, "The defense request to interview potential witnesses who may have relevant material or exculpatory information is entirely reasonable." That tells us nothing.

And Your Honor, to simply grant access based on these types of conclusory statements flies directly against the statutory scheme set out in M.C.A. We would ask Your Honor to make a finding not as a group determination but to make a finding as to each individual detainee and I would like briefly to address the showing that the defense has made in their 4 December filing as to each detainee.

Now, as a general matter again, and I think this is the section that I would refer to in the defense's brief as “general matters.” The defense states the government has alleged that Khalid Sheikh Mohammed, Ramzi Bin al Sheib, and Abu Faraj al Libi are or were al Qaeda leaders and operatives. Each is likely to be in a

position to know--is likely to be in a position to know. Simply because they occupy a position they are therefore likely to know? That would definitely depend on the government's theory of our case and how we intend to present our evidence as to whether or not anybody would be in a position to know.

Secondly, whether or not Mr. Hamdan was a member of al Qaeda--almost an undisputed fact in this case. We don't rely on whether someone else knows or doesn't know--we rely on the statements previously admitted in the hearing and found by Your Honor that Mr. Hamdan pledged "bayat."

Whether he was a combatant and whether Mr. Hamdan participated in the planning and execution of acts that allegedly violated the Law of War, Your Honor, I'll moot that right now. We don't contend that Mr. Hamdan was in the planning cell for the attacks in East Africa Embassy bombings. We don't allege that Mr. Hamdan was in the planning cell for the attack on the COLE and certainly we do not contend that Mr. Hamdan was in the planning cell for the attacks in New York City and the Pentagon on the 11th of September.

The defense goes on to say, "The potential witnesses likely have material and relevant evidence." And at least one witness “may” possess exculpatory evidence.

Your Honor, the defense is asking for access to some of the most notorious terrorists the world has ever seen based simply on "may" or "perhaps" or "likely." Each potential witness might well possess information regarding Mr. Hamdan's alleged membership in al Qaeda. That is true for anybody who's in detention here in Guantánamo Bay, and perhaps anybody who's in this room. They may well have information. Equally true that they may well have not.

The summary of the defense's position is also an enormous concession because what they're saying is, "they don't know." And "they don't know," according to the rules, doesn't get you in the door to see the high-value detainees. It doesn't get you in the door to see any detainee.

Now turning specifically--first of all, let's consider Khalid Sheikh Mohammed. What do we hear about Khalid Sheikh Mohammed? We hear he will testify regarding his role in al Qaeda. Fine. Not relevant, but perhaps interesting. He'll testify that Mr. Hamdan was not a member of al Qaeda or that he was not involved in either the planning or execution of acts that allegedly violate the Law of War.

MJ [CAPT ALLRED]: What are you reading from, please?

PROS [LTC BRITT]: I'm sorry, Your Honor.

MJ [CAPT ALLRED]: This is the original filing?

PROS [LTC BRITT]: I'm reading from--again--the defense's brief, and this would be attachment----

MJ [CAPT ALLRED]: This is the 4 December motion?

PROS [LTC BRITT]: Yes, sir. Attachment C--I'm sorry, moving on--attachment D. I apologize. And, one more correction—it's attachment E. It's attachment F--we're going to go no further. It's attachment F. Defense's brief page 2.

MJ [CAPT ALLRED]: I think you finally got it right.

PROS [LTC BRITT]: I think I got it right, Your Honor.

ADDC [MR. SCHNEIDER]: We'll stipulate it's "F."

PROS [LTC BRITT]: But again directing Your Honor's attention to the bottom of page 2; the statement in the clause that specifically, "relevance and necessity of training." Here's the relevance we find. "Mr. Mohammed's alleged role in al Qaeda suggests he will be able to testify as to whether Mr. Hamdan was also a member of that organization and whether he participated in the planning or execution of acts that allegedly violated the Law of War."

Again, we are not contending that Mr. Hamdan planned and was involved in planning or executing any of the actions which I previously stated. Moving to Ramzi Bin al Shibh. Again, synopsis of expected testimony similar if not identical to the showing that was previously made. We learn that Mr. Hamdan, according to Mr. Bin al Shibh, may or may not be a member of al Qaeda or that he was not

involved in either the planning or execution of acts that allegedly violated the Law of War; again, not material.

Again, under the section entitled, "relevance and necessity of testimony," whether Mr. Hamdan was also a member of the organization and whether he participated in the planning or execution of acts that allegedly violated the Law of War. This is a cut-and-paste from the exact showing that we saw from KSM.

Number four, Abu Faraj al Libi; identical. "Relevance and necessity of testimony," whether or not Mr. Hamdan was a member of al Qaeda, and again, whether he participated in the planning or execution of acts that allegedly violated the Law of War.

Those are the showings that we have. And on those showings the defense is claiming access to these notorious high-value detainees. Time elapses. This was 4 December 2007. We had a discussion, Your Honor, that we titled, "Defense's Motion to Compel Production." We discussed some of the same concepts, some of the same rules and following our meeting in December, we are now in January, and we are on the 25th of January, so we're a little less than two months, and the defense having had that period of time after the discussions that we had in this very courtroom, to come forth with a higher, better, and greater showing of materiality and relevance, give you the following:

An overview, and this is page 2 of the defense reply brief dated 25 January 2008. They give you, as an overview that the high-value al Qaeda individuals that they seek access to; they are operatives with various leadership responsibilities within the organization, and because each of them necessarily has knowledge and information regarding whether the charges brought against the defendant Hamdan have any factual basis, certainly we're not suggesting that they are going to determine whether or not the charges have any factual basis. Of course I would turn to the members to make that final relevant determination.

But moving on, the new claim is, is they most definitely possess without any factual basis, and this is at the top of Page 3, they must definitely possess firsthand knowledge of relevant information on the broader and critically more important issue of whether Hamdan is guilty of the charges he faces.

Now, moving on down, the government contends and I'm reading again from their brief, "that al Qaeda witnesses identified by Hamdan are some of the world's most accomplished terrorists." True. The government simultaneously contends that these same witnesses would not have relevant information regarding whether Hamdan participated in their conspiracy to wage terrorism or whether he materially supported their terrorist activities.

Your Honor, that's false logic. Let me explain how that is. The President of the United States does not know, I can guarantee you, Lieutenant Colonel Will Britt. However, if Lieutenant Colonel Will Britt were his personal driver, he would know him--he would know his favorite color.

Moving on down, access is sought because these witnesses, again pertaining to the high-value, are uniquely qualified to speak to the ultimate issue of whether defendant Hamdan conspired and whether defendant Hamdan provided material support for terrorism waged by al Qaeda operatives. Again a general conclusion as to why they seek access.

Then they go down and indicate at the bottom of page 3, if Hamdan was a co-conspirator of these seven witnesses, and I would direct Your Honor's attention to our charge sheet, and when I read through the charge sheet I have difficulty locating where we have Hamdan charged with conspiring with any of those seven witnesses. They're not. That's why I don't see it, it isn't there.

Top of page 4, "They surely know about it."--"They surely know about it." Well, I don't know if "they surely know about it" or not. But that's not a showing of any kind.

We then get the specific showings, and recalling, Your Honor, we are now a month and a half after their original attempt, and here's the specific showing on Khalid Sheikh Mohamed. Now he has

relevant knowledge. Before he might have, but now he has it, but we don't learn what that is. What we receive is; is not an exculpatory showing but an inculpatory showing. "Because he will substantiate Hamdan's claims that he's only a member of Usama bin Laden's motor pool." Well, that's one of the things that we're contending, is that, in fact, that Mr. Hamdan was Usama bin Laden's driver. That's not exculpatory. "And that he did not have advance knowledge of the attacks of September the 11th, and that he did not participate in the planning or execution of those attacks."

We would contend the evidence will show that Mr. Hamdan did not have advanced knowledge of that specific incident that occurred on September the 11th, though he did in fact know some big event, perhaps an attack, was looming prior to September the 11th.

Moving on to Ramzi Bin al Shibh, again we have the statement, "he has relevant knowledge" before, "he might have". But now in that month and a half he now has. He had, "he was the communications link between KSM and the military committee in Afghanistan, including those who executed the attacks of September the 11th." And he knows the details of the plot and the identities of those involved.

Again, we do not contend that Mr. Hamdan was a member of the planning cell on any of the attacks that occurred against the United States coalition--American or coalition interests.

He can, of course, substantiate Hamdan's claim of simply being one of six drivers in the motor pool. Inculpatory. Mitigating, perhaps not the only driver, but, you know, we're not stating that Mr. Hamdan was, to the exclusion of the world, the only person who ever drove Usama bin Laden around Afghanistan.

Abu Faraj al Libi--he was in charge of the al Qaeda training camps in Afghanistan. He is material to Hamdan's defense because he can substantiate that attendance at one of those camps and that did not automatically make one a member of al Qaeda.

Your Honor, I believe the evidence in the case will show that our basis is the pledging of "bayat." Furthermore, the way the evidence will show in this case, that Mr. Hamdan's arrival--the date we discussed previously of February 1996--may well have predated that method of joining al Qaeda. To wit: the training camp model. And I believe we are prepared to educate the Court and the members as to how that operates in our factual presentation.

Perhaps he would know if Hamdan was or would know if Hamdan was involved in the transportation of precision weapons to the Ansars in the front lines--perhaps not relevant in light of your ruling that there was no connection between Mr. Hamdan and the Ansars at all.

What we did get in this motion, interestingly, was a new list of high-value detainees. Now, Your Honor, there are some number of detainees here in Guantánamo. There are high-value detainees and

there are regular detainees. The additional requests didn't incorporate any other additional detainees. Now in our discovery we've turned over to the defense, there are relevant individuals with relevant information. But the request for access simply is, "Give us more high-value detainees."

And who do we see in this group? We see Abdul Rahim Nasiri. And again he's alleged to be the principal planner of attacks on the USS COLE and the Limburg, and he's the only person who knows the details and identities of those involved in these attacks. And he's known Hamdan since 1996, based on their travels, and he was also very close with Usama bin Laden and he frequently would have interacted with Hamdan. "He frequently would have"--that's a supposition, of course that he would have, maybe not.

He was in a position to observe Hamdan's relationship to al Qaeda and Usama bin Laden and therefore he is material to Hamdan's defense because he will state that Hamdan was only a member of the motor pool and not involved in terrorist activities.

Again, that's an inculpatory statement and whether or not he was involved in terrorist activities, we never alleged he was a member of the planning and execution cell of al Qaeda.

We learned newly a request for Abdul Hadi al Iraqi, and this detainee presents an interesting twist because quite possibly, quite possibly he was in command of the Ansars.

Your Honor heard testimony from an individual who claimed and you accepted him as an expert in this Court as to the Ansars, who they were, what they did, etc. and the individuals who were associated--I don't recall, I could be wrong and I will stand corrected if Abdul Hadi al Iraqi ever appeared in that testimony as being the leader of the Ansars, certainly I don't recall.

Mustafa Ahmed al Asawi--he can substantiate that Hamdan was a member of the motor pool--again inculpatory--and not involved in terrorist activities.

And Your Honor, in each one of the showings what the defense has asked you, even after a month and a half, is being put on notice that they needed to do better, is they've simply come back having rehashed that particular statement which they originally gave you.

Now, let me very quickly conclude by touching on several of the defense's other arguments.

Of course, in their brief, we find the defense heavily foot notes their contentions with the claim that Hamdan is entitled to the protections of the Geneva conventions, furthermore they contend he is a prisoner of war. Of course, this predated your ruling previously, and I understand that that issue is now moot because, in fact, you ruled that he was not a lawful combatant; not a POW.

The defense questions the government about how we can classify information which forms the basis for his alleged activities as a co-conspirator and provider of material support. And they questioned, and I heard earlier from my colleague, how release of this information puts anybody at risk, because all they would be asking were specific questions dealing with the earlier period of time and not the--well, let me move on.

And, to get right to the point, the defense, Your Honor, misunderstands the government's concerns. I would never think that these defense attorneys would go in and specifically attempt to ask any of the high-value detainees questions in any of the areas of the government might be concerned about, to wit: The classified areas that exist with regard to their testimony. It's not them that I'm worried about. I'm worried about--and what the government is worried about--is what these high-value detainees would say. They obviously don't understand our system of law and justice. They don't appreciate our laws are way of life; certainly they didn't on 9/11, during the attack on the USS COLE and the East Africa Embassy bombings.

We can assume not the best, but the worst as to the information they will relay.

The defense next contends that Mr. Hamdan is forced to testify unless they can access the high-value detainees, and that's

an interesting conclusion. They have the best source of information relating to what those high-value detainees might have to offer Mr. Hamdan. And given, as I stated previously, the period of a month and a half, we still only received supposition, guesstimation and "what if" with regard to a showing of relevance and materiality.

The critical question in this analysis is whether or not, on the other side, the government understands the requirements to disclose to the defense evidence which reasonably tends to exculpate the accused in regard to the high-value detainees, as with the other detainees as with any evidence that the government of the United States has in our possession within the laws set forth in the M.C.A. and elsewhere. It's no accident or oversight that they have not received any. It is because there is none based on the information that is available.

To conclude, R.M.C. 701 suggests a term and the term is "reasonable" what is "reasonable?" Dealing with production? With dealing with access?

It is not reasonable, Your Honor, for the defense to hold the view that alien unlawful enemy combatants have a right to demand access to others who are similarly situated in a time of an ongoing period of war. And as we are a nation at war, and as we do see the defense requesting access to the most dangerous of our enemies, it is

only "reasonable" to expect that they make the requisite showings as identified in the law.

Thank you.

MJ [CAPT ALLRED]: Let me ask you a couple of questions.

PROS [LTC BRITT]: I've been reminded to—briefly, I believe the discussion of Moussaoui came up and I will distinguish the Moussaoui situation from the situation found here, even though I can direct Your Honor's attention to page--the bottom of page 14 in our 11 January 2008 brief, essentially the Fourth Circuit Court held, "that even where the Compulsory Process Clause applies, the defendant must demonstrate the relevance and the necessity of the information at issue in order to overcome the government's obligation to protect national security." Because Moussaoui, unlike Hamdan, was entitled to the protections of the Sixth Amendment, and because Moussaoui, unlike Hamdan, could point to numerous specific examples of exculpatory information in certain witness statements, the Court held that Moussaoui had met his burden. Even so, however, the Court held that the government may offers substitutions for the witness' testimony.

So, in this particular case, Your Honor, I would choose simply to state what is exactly written as opposed to paraphrase the holding in Moussaoui.

I stand by to answer questions.

MJ [CAPT ALLRED]: Well, I mean the first question was going to be Moussaoui. The way I read that, the standard applied was "plausible showing" of relevance and necessity. I'll go read that again and I'll read that footnote in your brief as well, because Moussaoui was what appeared to be the best guidance on point.

Did you mention in your brief that you have offered the defense other low-value detainee witnesses that might give them the same evidence they seek from the high-value detainees?

PROS [LTC BRITT]: No, sir. What we've done is we've provided them with that discovery and they've never come back to us to make that request. With the exception of two detainees, and that was prior to the previous hearing--Mr. Boujaadia and Riyad.

MJ [CAPT ALLRED]: What do you mean you provided them with discovery?

APROS [LCDR STONE]: They’ve received statements in the past, sir, of other detainees that have identified Mr. Hamdan as essentially what he has been otherwise charged with, and which is the same proffer which they make. The same proffer that they make with regards to the high-value detainees, that information is contained within statements made by detainees with regards to Mr. Hamdan of which both of those--their proffer with the high-value detainees and the information provided to them reflect what’s in the charge sheet and therefore, basically, their showings are inculpatory not

exculpatory and to the extent that these might also be cumulative requests because the information is available.

MJ [CAPT ALLRED]: I'd like to see what's been given to the defense in terms of other witnesses who might provide the same testimony. I'd like to see whatever discovery you gave them.

PROS [LTC BRITT]: All right, sir.

And once again, when you say which might give other testimony to which the defense requests, we contend that this showing is inadequate, number one, but number two, we also contend that this showing can’t be made under any circumstances.

MJ [CAPT ALLRED]: What showing can't be made?

PROS [LTC BRITT]: Okay. Well, the evidence that they’re seeking is evidence from the high-value detainees, which would provide--would be exculpatory in some sense of the word and what we are stating is, is the non-high-value detainees that we can provide access to additionally would not provide any exculpatory information beyond what's facially stated in the statements that we've provided to the defense.

So, in other words, I don't know if it would provide a substitute for what they're looking for, because I just don't know. Because they haven't made any type of factual showing.

MJ [CAPT ALLRED]: Well, that's part of the problem. You're asking them to make a showing without letting them even interview the

witness. I mean they can't--they can only do so much without interviewing the witness in terms of making a showing what the witness will say. If there are non-high-value detainees that could give them what they're asking for, I'd like to know about that.

PROS [LTC BRITT]: Well, we'd be happy to provide that, Your Honor.

MJ [CAPT ALLRED]: The second thing I'm concerned about is the affidavit that was attached to your response identified a specific area of concern. And I don't see how that area of concern is implicated by the defense's access to these witnesses for the other things that they want to talk to them about.

And so, in a way I sense the ardor of your resistance, but it seems to be misplaced. They're not going to ask about those things. They won't ask about those things. So are you resisting them just because these are high-value detainees and nobody can talk to them about anything?

PROS [LTC BRITT]: No, sir. As I've previously stated my argument, again going back to the statutory scheme that's set up, there has to be some showing. Otherwise, the defense is free merely to list every detainee that's incarcerated.

MJ [CAPT ALLRED]: Well, they haven't done that and I wouldn't let them go see every detainee that's incarcerated.

PROS [LTC BRITT]: But, what we saw was an initial list and then more suddenly added. Now, that would tell me that tends more towards more requests than fewer.

MJ [CAPT ALLRED]: Okay.

PROS [LTC BRITT]: But what I would request, Your Honor, is that we be permitted the opportunity to provide you with that discovery that's been given. And there have been several iterations of discovery provided. There was discovery provided under the old military commission order system. A complete set of discovery. So there has been discovery in defense counsel's--at least one member of the defense has had access to the discovery virtually for years.

MJ [CAPT ALLRED]: Okay. I don't recognize all of these names except for the top two, I guess. Is it the government's position that they all are high-value detainees?

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: In the same category as KSM and Ramzi Bin al Sheib?

PROS [LTC BRITT]: Yes, sir. And this isn't a recent phenomenon--the government just classifying them as such is the result of the defendant's request in the sense that these have always been identified since their arrival at Guantanamo as high-value detainees.

MJ [CAPT ALLRED]: Okay. Well, I appreciate your position. I'll go read Moussaoui again, I'll look at the additional--the discovery that you provided to the defense again.

PROS [LTC BRITT]: I'm sorry, Your Honor. I've been told that we can really provide these statements as early as tonight.

MJ [CAPT ALLRED]: That's way soon. I won't get to them until tomorrow, for sure.

PROS [LTC BRITT]: Yes, sir. But again, Your Honor, before you issue your ruling we would request a detainee-by-detainee finding as to each one, respectfully.

MJ [CAPT ALLRED]: Let me ask--okay. That's fair enough. I really think is a good idea and I will do that.

PROS [LTC BRITT]: Thank you, sir.

MJ [CAPT ALLRED]: If I were inclined to give the defense more access to some of these than others, are there some of these who are lower high-value detainees?

PROS [LTC BRITT]: No, sir. They're equally----

MJ [CAPT ALLRED]: They're all the same category; equally secure?

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: Equally wrapped up in secret tape? Let's see. Oh. The last question is for the defense. You don't have to----

[LTC Britt exited the podium.]

[ADDC Schneider approached the podium.]

PROS [LTC BRITT]: I will get out of the way.

MJ [CAPT ALLRED]: There's a reference in your 25 January filing to an attachment "C", the statement of Mr. Hamdan. I got LCDR Mizer's affidavit, attachment "B". I never saw attachment "C". Is that something that you are still preparing, or did I just miss it?

ADDC [MR. SCHNEIDER]: Nor have I. It's not there. There were some issues that arose during the visits by counsel with the accused which resulted in----

MJ [CAPT ALLRED]: A decision not to submit attachment C?

ADDC [MR. SCHNEIDER]: --an inability to generate the declaration which is independent of his ability to provide information.

MJ [CAPT ALLRED]: I don't know what that means. You're still working on it?

ADDC [MR. SCHNEIDER]: That--No.

MJ [CAPT ALLRED]: You're not going to submit it?

ADDC [MR. SCHNEIDER]: We tried to submit in time for the filing. Issues came up which were irrelevant to this motion with respect to relationship between counsel and the accused and that preempted our ability to get it done.

MJ [CAPT ALLRED]: Okay. Shall I wait for it, or are you going to waive the opportunity to submit it?

ADDC [MR. SCHNEIDER]: I think you should not wait for it. We will not be submitting it.

MJ [CAPT ALLRED]: Okay. Well, you don't make it easy do you? All right. Well, I'll take your arguments and your briefs and go back and make the detainee-by-detainee finding after receiving your additional information.

ADDC [MR. SCHNEIDER]: Might I address a couple of issues? And the reason I ask is because I tried to focus on the proposed solution that was discussed.

MJ [CAPT ALLRED]: Sure. Colonel Britt? Anything else from the government? PROS [LTC BRITT]: No, sir. I would like to reserve an additional period of time because it appears that the Court is leaning one way versus the other. If counsel would permit me to have perhaps a----

MJ [CAPT ALLRED]: I'll let you have another word.

PROS [LTC BRITT]: Thank you.

MJ [CAPT ALLRED]: I'm not sure which way I'm leaning, so if you've figured it out, you're smarter than me.

ADDC [MR. SCHNEIDER]: And I'll try to focus on issues that came up after I spoke, but initially I was guided by the court's comment that there had been--there appeared to have been substantial showings by both sides as to the interests at stake, so I didn't want to belabor the evidence of that. I would point out, and I think the

brief addresses this, the government's position is that the showing required under 703, in their view, has not been met. Why is that? Because we haven't had the opportunity to interview to make that showing, which we would have to do to call them at trial.

"Reasonable" request? Are these detainees any more sensitive than the ones in Moussaoui where the court provided some access? I don't think so.

Third point and this is a bit of an unusual situation, but in this situation the absence of knowledge of these witnesses is as material as the presence of knowledge. Why? Because of the nature of the charges brought.

MJ [CAPT ALLRED]: You mean the absence of knowledge-----

ADDC [MR. SCHNEIDER]: Of complicity.

MJ [CAPT ALLRED]: ----of complicity?

ADDC [MR. SCHNEIDER]: And the discovery speaks to references where, presumably, he's identified by somebody. You know, I saw him--I knew him. Well, I don't want to belabor the examples in the brief, but if someone's on trial for organized crime, and they have the opportunity to bring in the Godfather to ask what the accused's role was, it's highly relevant if he says, and “I’ll tell you the nature and extent of his role.” It's equally relevant if he says, "To my knowledge he had no role.”

These two charges implicate activity with others. Conspiracy can't occur by itself. Material support of itself is not a crime. We simply seek access to talk to the others who, by all accounts, based on the declaration of LCDR Mizer submitted with our reply, are in a position absolutely to know proximate, present, leadership, in some instances admitted organizers. We think we've made the showing.

MJ [CAPT ALLRED]: Okay. I thank you. Last word from Colonel Britt?

PROS [LTC BRITT]: Thank you, sir. Very briefly, sir the statements made by counsel would be true in any case anywhere at any time. There is obviously an interest in the part of the detainee to know as much as you can possibly know about anything and everything that relates to his situation and the charges against him. And that would be absolutely true were it not that the Military Commissions Act specifically interposes that two-step analysis as seen in the Rules for Military Commissions.

It is simply not a matter of, "My client is in a bad situation and he wants to talk to everybody that he can possibly talk to on the outside chance that someone might know something about his situation."

Your Honor, that's what we refer to, both colloquially and in our brief, as a "fishing expedition." The defense has had

chances--2 chances through brief and once right now to say specifically, "This is what these high-value detainees offer my client beyond generalizations." And R.C.M. 701 and 703 don't countenance generalizations.

You observed the declaration and you pointed out to me the declaration. It's the government's position that that declaration is a fallback. That's a backstop. But that’s only a backstop if the defense meets that hurdle with regard to the 701-703 analysis and in addition, Your Honor, I would ask you to review our brief. It's the best source of additional Article 3 case law that covers this issue and backstops the argument as well.

But in this particular case, if the defense can't make that showing other than an attempt to make an impassioned plea to the Court, then we contend that their request should be denied.

Thank you.

MJ [CAPT ALLRED]: Thank you. I can't remember whether we had--we do have one issue pending. Why don’t we adjourn for the night and reconvene in the morning? Everyone is going to be here tomorrow, right? Is there any interest in----

ADDC [MR. SWIFT]: Ours are very short on that issue, and given all of the transportation and I'd like to continue interviews with the client, if there's no objection, and I know this is strange coming from me, I'd like to finish, if Your Honor has no objections.

MJ [CAPT ALLRED]: I don't want everyone to get into the idea that we can't quit at a normal working hour and come back the next day. That's not the case.

It's D-018 that’s unresolved. Is that right?

PROS [LTC BRITT]: Sir, we are certainly not trying to work you to death, but we would like to join the defense in their request that we continue on.

ADDC [MR. SWIFT]: And it's going to be so rare, sir.

MJ [CAPT ALLRED]: Okay. Let's hear the argument on D018. Do you remember the terms of the order I signed in Appellate Exhibit 111?

[Defense counsel conferred.]

ADDC [MR. SWIFT]: Yes I've been totally reminded.

MJ [CAPT ALLRED]: Okay. Let's talk about D018, then.

ADDC [MR. SWIFT]: Again, because we filed the brief I'll let the government go first.

PROS [LTC BRITT]: No, I believe we get the last word as has been the practice all along today. So, no offense, I appreciate my colleague’s offer, but----

ADDC [MR. SWIFT]: They can still have the last word. I'm just trying to cut it short. If the government so insists. D-018 is a request that the defense be furnished the names of those individuals and location and an ability to contact or an agent in the alternative

or what manner of contacting those individuals who were present at the time that the videotape Your Honor has seen was made and were part of the interrogation. We seek that because we want to determine the totality of the circumstances under which it was taken. We've been told by the government that there are no notes other than the videotapes, so the only other source would be these individuals. We will accept the names under a protective order.

This is one where, in discovery it's simply the ability to either contact them ourselves, or to have them contact us when they're available or there's a third party to contact through. We simply seek the opportunity to be able to talk to them. And normally you ask for names and locations, but we certainly would accept as a substitute, and the government has offered one of the above and ask whether that would be sufficient.

MJ [CAPT ALLRED]: What do you mean one of the above? Names? Or locations?

ADDC [MR. SWIFT]: They've offered to make one of the persons who was there available to us and we're going to take them up on that offer. My hesitancy in shutting down right now, Your Honor, is I'm presuming what’s going to happen in the interview and that I'd have no questions, and I have absolutely agreed one of the people present was enough to talk to. And I can't do that.

I would like the opportunity to talk to all of them on an open basis because I don't know, again, in an interview whether one would be sufficient or not.

MJ [CAPT ALLRED]: You're asking specifically, then, for the agents who conducted--who created the videotape?

PROS [LTC BRITT]: American forces, sir.

MJ [CAPT ALLRED]: American forces who created the videotape. Oh yes it does say November 26, 2001.

ADDC [MR. SWIFT]: To clarify it, etc., in addition to that we were seeking the names of those--all those persons who were then involved in interrogations to the best of the government's knowledge of Mr. Hamdan afterwards.

We've been furnished the names of all the persons from whom we've received 302s--or, excuse me, yes, 302s and form 40s and intelligence reports, but those aren't, in our belief, all of those persons who were involved. Some, by the representations of the governments, didn't write reports, and we'd like their names as well. And that's again just to be able to determine all of the statements made by Mr. Hamdan, which are, by their very terms relevant.

Thank you, Your Honor.

PROS [LTC BRITT]: May it please the court.

Even though the evidence was not presented at the last hearing with a view towards this motion, I think it provides a good

place to start when you consider the totality of how this particular piece of evidence came to exist and the persons that may have been present when it was made in the persons that were not.

As I've stated in my prior argument, we are a nation at war and being a nation at war, and understanding some of the hardships endured by those specific American forces, it should not surprise this Court that some of those individuals may still be operational.

Given that representation, I will also state to the court that that particular video and individuals that were involved in the making of that particular video are evident from the video itself. Now, we've heard testimony from Major [redacted], and Major [redacted] indicated that the detainee, Hamdan, was delivered directly from the scene of capture into an area where he was monitored, into an area where he was checked on, where his health and welfare was monitored by Major [redacted] personally.

The video and the facts and circumstances of the video are best determined not by reference to those who may have been standing about, but through the viewing of the video itself. And that is, in fact, I would submit, the reason why a video was conducted at that time. It was to memorialize the circumstances of how Mr. Hamdan was interrogated.

Now, what the government has offered and what counsel alludes to, is the government is prepared to bring forth an

additional member of those American forces who will testify or will present evidence, because we intend to call him as well as allow him to be made available for defense questioning, an individual who was present throughout the entire series of transactions. He was in the area when Mr. Hamdan was initially detained. He was present when Mr. Hamdan was brought forth to interview. He was present during the entire course of the interview. He can give evidence and he can testify to every facet of that interview and whether or not there is any exculpatory information that the defense might be entitled to above and beyond what we've already provided them.

Now, what they don't know is, is they don't know the extent to which this gentleman can testify.

MJ [CAPT ALLRED]: This gentleman you're offering?

PROS [LTC BRITT]: Yes, sir. He's an Arab linguist, to begin with. He speaks Arabic, he is also an individual who is intimately associated with every parcel and piece of evidence which I will call the "pocket litter" which Your Honor has not heard much about, but I anticipate will become relevant in the weeks to come. A very key piece of evidence linking Mr. Hamdan to al Qaeda. This individual, as well, was able to verify the authenticity of the video and also the translation that came forth.

There was obviously another--there was a person who asked the questions. How he asked the questions, once again, that's

contained in the video. There was an additional individual whose identity--recognizable identity--obviously, it's no mystery has been blacked out, because when Your Honor viewed the tape, his features were washed out and that was again to protect his identity. It's no secret, when you wipe somebody's face out that obviously what's taking place. That individual provided no function other than to serve as additional security in that scenario, and the remainder of the individuals that were present in that group American forces were not participants in the making of that video. Now they were there in the area, they were--some were doing other duties, some were inside and some were outside.

But, if what the defense is looking for is the facts and circumstances of what occurred during the course of the making of the video, then what I had offered was to make this individual available, and then if they were not satisfied and didn't believe he gave the totality of what occurred on the day that the video was made, then we could discuss the matter further.

But at this particular time the government is simply not a position to offer access to the other individuals for the following reasons. And I know we begin to backtrack a little bit. But, again, there has been no showing of materiality and relevance, and I, in fact come in the circumstance--because I have had access to this

particular witness, can state that this particular witness can cover the gamut of what occurred that day.

MJ [CAPT ALLRED]: Now, I think you're changing between this particular witness. You're telling me now that the witness that you're offering the defense----

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: Can tell them everything that happened during that day?

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: Okay. I thought a moment that this particular witness was the one whose face was blacked out or----

PROS [LTC BRITT]: No, sir----

MJ [CAPT ALLRED]: ----or he couldn't, for some reason talk to us.

PROS [LTC BRITT]: No, no and I apologize for the confusion. The witness that we are going to offer as a witness who can testify basically to where everyone else was standing, where they were, what they were doing and the like.

MJ [CAPT ALLRED]: Okay.

ADDC [MR. SWIFT]: Just to clarify two things. One, that our brief does ask for all interrogators and other persons who obtained statements from Mr. Hamdan--that had ever, in that case, obtained a

statement from him in the Afghan period and were struck by a particular blackout. So, we're not simply stating there.

The other part that I'm absolutely struck with, Your Honor, and I'll write a reply on it is, what the government has offered us, is we get to interview the witnesses that they're going to put on at trial. That's it. That should be fine. That's--all you need to know is what were going to put on, and this really has struck--it's a continuing theme--that you accept our version of the events, with the witness that we intend to call.

I think that in any other setting that I would be inviting malpractice if I were to accept and say to the accused that, "Well, I listen to who the government witnesses were, but I didn't check the veracity of the story with anyone else. That was sufficient in the process." And so we seek the opportunity to talk to others beyond that. Yes, I appreciate the opportunity to talk to the witness before they testify.

I also point out to this court that the suppression hearing of this tape and this timing process, which will then find ourselves yet again being called delinquent despite the fact we've asked for these things for months, is due next Friday.

So, here's our witness, talk to him, file your suppression motion or don't and come back to the Court when your same suppression

motion's due and put in your request. It puts us in an impossible situation.

We needed to know some time ago, we put in our discovery request timely, I mean, we've now come to the position where we need an answer and we need to know what we're going to have. And we need the opportunity to fully investigate the case. And that's really all we are asking.

MJ [CAPT ALLRED]: Okay, well, okay. Colonel, I don't think you addressed--you didn't address the request for the information about other investigators. Do you want to address that?

PROS [LTC BRITT]: No, but I'd like just to briefly touch on this. We made this individual available on the 21st of December. Now, we made other evidence available as well, and the defense has taken us up on our offer. For example, to examine the pocket litter. They have--they followed up. But on this individual, we have heard nothing. So he has been in a position to be interviewed and----

MJ [CAPT ALLRED]: ----So, I'm sorry--the witness you're now offering the defense you offered them by the 21st of December?

PROS [LTC BRITT]: Yes, sir. Same guy.

MJ [CAPT ALLRED]: And they haven't contacted that witness?

PROS [LTC BRITT]: Same individual. Yes, sir.

MJ [CAPT ALLRED]: And there's one additional witness who was present when the tape was made, that’s the one we're arguing over?

PROS [LTC BRITT]: This is the individual who caused the entire tape to be made.

MJ [CAPT ALLRED]: What do you mean "this"? The one you've offered them or the one we're arguing about?

PROS [LTC BRITT]: Yes, sir. This is one we're offering. Yes sir. The one we're offering. It's the same one.

ROS [LCDR STONE]: It's the same one, sir. It's the same guy.

MJ [CAPT ALLRED]: Okay so they have one witness, which you're saying is the main man who knows everything and caused the tape to be made?

PROS [LTC BRITT]: What were saying is we're offering the main man, the one that knows everything and caused the tape to be made. That's the one person----

MJ [CAPT ALLRED]: And there's one additional witness who was present at the making of the tape, that's what we're talking--we're arguing about is one?

PROS [LTC BRITT]: There are potentially two, but that was seen on the tape.

MJ [CAPT ALLRED]: Okay. The man whose face was blacked out, is that the one we’re arguing about, or another one?

DDC [LCDR MIZER]: Your Honor, we're arguing about a number of witnesses here. We would like to know who those two witnesses are, speak with those two witnesses. But, as Commander Swift said,

there's a period of darkness in his timeline that we have between November and roughly sometime in late 2002-2003 when "law enforcement investigators" as the government puts it in their response. What we would like to talk to and we know upon information and belief.

MJ [CAPT ALLRED]: Okay. Let's not go there yet. Let's just talk about the one at the making of the tape. It looks like you've offered one, there are two others who might have something to say. Is that what I understand? I guess Major [redacted] had something to testify about it.

Would the interests of the parties--would your interests be protected if you were able to have that witness call the defense without giving their name and discuss the circumstances surrounding the making of the tape with the defense over the phone?

PROS [LTC BRITT]: Okay, sir. And I apologize, now I'll have to ask you, which witness? Is this the main witness?

MJ [CAPT ALLRED]: No, the main witness is a given.

PROS [LTC BRITT]: That's a given.

MJ [CAPT ALLRED]: Nobody has a name here, but the main witness is a given?

PROS [LTC BRITT]: And he's covered by the protective order, that's why we're referring to him as "the witness" and not giving a name to him.

MJ [CAPT ALLRED]: Okay. I mean, we're talking about two other witnesses who were apparently present for the making of the tape that you haven’t offered.

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: Could those witnesses call one of the defense team, submit to an interview over the phone without disclosing their names, so that the defense would be able to investigate the circumstances surrounding the making of the tape?

PROS [LTC BRITT]: If we can take a recess, I can have your answer right back to you on that. We can resolve the very quickly.

MJ [CAPT ALLRED]: Okay. Well, I don't want to take a recess for that right now, but that might give the defense a chance to conduct their investigation and see what else is out there.

DDC [LCDR MIZER]: Your Honor, we've been--I spoke with Commander Stone again yesterday about speaking with the witness that you say is a "given" and we are promised a date sometime in the future subject to this person's schedule.

With respect to the "pocket litter," we've been going back and forth now for 60 days and I understand it’s through no fault of the prosecutors, but I've called the point of contact at the FBI and there continues to be a problem with clearances.

And so while the prosecutors have said, "Yes, you can have the pocket litter,” I called this point of contact approximately

every week since the December hearing, and we still won't have access to the pocket litter.

And again what my co-counsel, Mr. Swift was saying is, you know, we have motions due a week from today. And we have this problem whether it's dealing with the investigations, which Your Honor has suggested he will conduct an in camera review, but we need those things if we're going to file these motions seven days from now. Whether it's those investigations, or whether its suppression motions for witnesses that we haven't even talked to. We haven't even had an opportunity.

MJ [CAPT ALLRED]: Okay. You've made this point.

DDC [LCDR MIZER]: Okay, Your Honor.

MJ [CAPT ALLRED]: I understand the timing issue. My question, I guess, is for the government. What's up? How come the defense can't get access to the stuff?

APROS [LCDR STONE]: Sir, on December 20 your order came out setting a discovery schedule in the 21st of December, we said, "You can have access to this one individual who we believe is relevant and necessary." This is the "given." So we've done that.

MJ [CAPT ALLRED]: What's the clearance issue, though?

APROS [LCDR STONE]: They need--this individual--if they come to us we will arrange such a meeting with this individual. And we've made that available to them and we will.

The clearance issue, I think what Lieutenant Commander Mizer's talking about is with the FBI pocket litter. On the 21st of December we provided them copies of the pocket litter, and they've had those. The clearance issue is, they've asked to go to the FBI headquarters and see the original pocket litter and we've been doing that. We thought we had the nut cracked. The people that were going to the FBI to visit the pocket litter then went to Yemen for three weeks. Upon their return to look at it, they did get a call, and this is no fault to myself or Lieutenant Commander Mizer in any way, saying the clearance information that they thought was a done deal and I thought was a done deal, they said, well, no, it needs to go to one other person and my understanding is that's also been taking care of.

So, the clearance issue really is something separate and associated with an issue with regards to the access to this individual, the individual we said we'd make him available, they haven't taken us up on our offer--they have now taken us up on the offer, and we will make a person available as soon--Lieutenant Commander Mizer asked me, "Well, when can we talk to him?" I said, "Well, I haven't called him." I don't know what he's doing. We need to----

MJ [CAPT ALLRED]: Well, I think the government needs to get proactive now and make sure the defense can get in there and talk to

these people and see the litter. If you can arrange that----

APROS [LCDR STONE]: The litter's a done deal. And they said--they had asked to see it somewhere around the middle of February, and my understanding is that's on track.

MJ [CAPT ALLRED]: Okay

APROS [LCDR STONE]: So, I mean that's a done deal. That's not really what we're arguing about.

MJ [CAPT ALLRED]: Okay. So. Access to these other two witnesses who were present at the making of the tape.

MJ [CAPT ALLRED]: **[Speaking to LTC Britt]** Do you need to--could you send Commander Stone out to make that phone call while we address the rest of the issues so we don't have take a recess for that?

[LCDR Stone rose to leave the courtroom.]

APROS [MR. MURPHY]: Your Honor, may I accompany Commander Stone?

MJ [CAPT ALLRED]: Sure.

APROS [LCDR STONE]: Sir, we may have to get authorization from you to come back in because of the security.

MJ [CAPT ALLRED]: You can come back in.

APROS [LCDR STONE]: Okay.

[Mr. Murphy and LCDR Stone exited the courtroom.]

MJ [CAPT ALLRED]: Okay. Let's talk about the "black hole." The period between the making of the tape and sometime in 2003 there is a black hole where the defense believes some investigators have interviewed their client and they haven't received any information about who they are.

Is that the issue?

PROS [LTC BRITT]: Sir, I'd be of interest to know a little more about that. I hear “black hole” between a certain period----

MJ [CAPT ALLRED]: I think that was the phrase someone over on the defense table used. I know it's a scientific phrase that doesn't really pertain here.

DDC [LCDR MIZER]: Your Honor, if I can be precise, Mr. Hamdan was captured on November 24, 2001, and the first 302 that has been discovered to us from law enforcement personnel is dated January 31, 2002. We know Mr. Hamdan was somewhere between November 24, 2001 and January 31, 2002. You have videotaped evidence that American forces were interrogating him two days after his capture. We want to know what happened in that approximately 1 year period of time, Your Honor. And we would like----

MJ [CAPT ALLRED]: ----From December of '01 to January of '02 is two months.

DDC [LCDR MIZER]: January 31 of '02, Your Honor.

Your Honor, I'm sorry. I'm sorry. You're right.

MJ [CAPT ALLRED]: Have you been shown the results of any interviews during that period? Apparently not.

DDC [LCDR MIZER]: No, Your Honor, but we have information that would suggest that there were interviews by American forces during that time other than this videotaped interview.

MJ [CAPT ALLRED]: Okay. And those are the ones you're--want to talk to?

ADDC [MR. SCHNEIDER]: And that's who we want to talk to, Your Honor.

MJ [CAPT ALLRED]: Okay. You understand what the "black hole" is that we are referring to now?

PROS [LTC BRITT]: The dates of the “black hole” were?

MJ [CAPT ALLRED]: November 21st, the date of capture, to January 31 of the following year, when they got the first 302 from the FBI, I guess.

PROS [LTC BRITT]: Is it--would it be fair, Your Honor, and I would ask this sort of in conjunction with the defense, I believe we had testimony from Major [redacted] that Mr. Hamdan gladly was separated from their presence after--I believe the testimony was about a week. I mean, I'm just trying to more specifically define those boundaries. So, it really wouldn't be December--or November 21st, it would be more towards December 1st and then November the 21st?

MJ [CAPT ALLRED]: Well, I don't know that that makes any difference. During that period, from the date of his capture, why don't we--that's clearly what they're asking for. Whether there were other people than those who made the tape who interviewed him from the time he was captured until their FBI interview on the 31st of January.

PROS [LTC BRITT]: I think it was--I feel unfortunately in the same position that Lieutenant Commander Stone was this morning. It's almost like trying to disprove a negative. I don't--I'm not aware of anything that took place with regard to questioning during this period. I just am not aware. We will endeavor to double-check now that we know that the court is interested in this specific period. And I will do so.

But, we've turned over what the rules have required us to turn over and----

MJ [CAPT ALLRED]: All right. Here's what we'll do. We have the defense's motion and I've heard their argument on the motion, so their right to oral argument has been honored. I'll give the government time to respond in writing inasmuch as this motion was filed two days ago, maybe some of this was catching you by surprise. Commander Stone and Mr. Murphy was it?

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: I'm sorry?

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: ----left the courtroom. Here's what I made in my notes about the resolution of the motion. The defense counsel has copies of the pocket litter and the trial counsel make an inspection of the originals at the FBI building possible as soon as possible on our mutual return to Washington.

I guess this is Commander Mizer who--Miss Prasow, you are in Washington?

[Miss Prasow indicated an affirmative response.]

DDC [LCDR MIZER]: We both are, Your Honor. We're the ones that are going down.

MJ [CAPT ALLRED]: Okay. So who ever wants to go look at it from the defense, trial counsel will facilitate that.

Unless I hear otherwise, after Commander Stone and Mr. Murphy make their phone call, I understand that the other two witnesses present at the making of the tape will call the defense without revealing their names and submit to an interview. If that turns out to be a problem, I guess, well, we always have tomorrow to come back to the courtroom and resolve it, but I assume that will work out and I'll ask you to come tell me if that's not going to work. Fair enough?

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: Is there anything else we need to resolve now before we close for the day?

I've kept you all past dinner and other commitments you may have had.

PROS [LTC BRITT]: Judge, I hate to bring up one more, but I think we still have that issue of some confusion on defense motion request number 20. And again Lieutenant Commander Stone would be the one that would handle the government's portion. So it's a request I would like to bring him down immediately and----

MJ [CAPT ALLRED]: Okay. Why don't we--why don't I just ask you to respond in writing, if you prefer----

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: ----and I'll rule in writing after I receive your written response. I mean, I've heard the defense's position and I thought I was just acceding to the mutual agreement of the parties, but if there needs to be clarity, make sure in your written response what you want clarified, and I'll figure that out.

PROS [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: Now, it seems to me like our--oh and here come our two colleagues.

[Mr. Murphy addressed the bench from his seat at counsel table.]

APROS [MR. MURPHY]: Your Honor, Commander Stone has asked me to address this. We've looked at this further. The government does

oppose any contact with these witnesses and we have the following to say: The government has reviewed the information they have and it is not exculpatory.

I have also reviewed written materials related to what they have and can personally report, but it's not exculpatory. What the defense has on this is a video of the event that also contains audio. Excuse me. They have a transcript. They also have a translated transcript. And we are offering them a witness who was present. So we feel that is sufficient.

MJ [CAPT ALLRED]: Okay. Well, I think the parties are entitled to a written ruling in any event, so I'll take that on board as well.

PROS [LTC BRITT]: Thank you, Your Honor and once again I would remind the court said that particular motion needs to also be examined in light of Exhibit 111, which is the document referred to. I would invite Your Honor please to review the document in light and prior to making your ruling. Thank you.

MJ [CAPT ALLRED]: Which one is this? The D-020?

ADDC [MR. SWIFT]: No. It's 111 on the Exhibit list.

MJ [CAPT ALLRED]: Motion 18?

PROS [LTC BRITT]: Motion 18. Yes, sir--motion 18.

MJ [CAPT ALLRED]: Okay. Our next session of Court is scheduled here beginning on Wednesday the 12th of March. We may very well be in the new courtroom down at the bottom of the hill and Colonel

Kohlmann up here in a different case, but unless I hear otherwise I will see you on Wednesday the 12th.

APROS [LCDR STONE]: Sir, could we address--we were going to address?

PROS [LTC BRITT]: No, no. We've resolved that.

APROS [LCDR STONE]: Roger that. Okay, never mind. Sorry. I apologize.

MJ [CAPT ALLRED]: You just want to stay all night, don't you?

Well, okay here's my final question, I guess. Which of these issues, if any, needs to be resolved first? Because you've given me enough work for two weeks, I'm sure. Things you've been mastering for months. Is there one motion that needs to be resolved before the others, or can I choose the easiest one first and save the hardest one for last?

ADDC [MR. SWIFT]: Discovery is the most critical to our next set of motions, Your Honor. And unfortunately the most relevant discovery is now going to be subject to written discovery requests. I mean, our discovery motion that will be substituted in by Your Honor has now moved that they'll be written motion them both of those, 18 and 20.

MJ [CAPT ALLRED]: Well, okay. Good point. I can't give the government the luxury of a week to respond, but given the fact that

the defense needs to file their next round of motions by Friday, can I have your response by Monday to 18 and 20, I think it is?

PROS [LTC BRITT]: Sir, I'll yield to the responsible party.

APROS [LCDR STONE]: Yes, sir. For 18 and 20?

MJ [CAPT ALLRED]: I think those are the ones that I offered you a chance to respond to in writing.

APROS [LCDR STONE]: Very well, sir.

MJ [CAPT ALLRED]: Okay. Those will get my first attention. And I'll try to have my rulings to you on Monday or Tuesday at the latest. By the way, since you're the responsible party, I charge you to get the defense team into the FBI building this next week so they can see the pocket litter.

APROS [LCDR STONE]: Yes, sir.

MJ [CAPT ALLRED]: Can you make that happen?

APROS [LCDR STONE]: I believe that we can. Sir, I would have told--Lieutenant Commander Mizer and I said this was a done deal on January 1st.

MJ [CAPT ALLRED]: Just walk over there together in your white outfits and tell them you want to come in.

DDC [LCDR MIZER]: We’re selling ice cream, sir, you bet.

MJ [CAPT ALLRED]: All right.

DDC [LCDR MIZER]: Sir, I just wanted to note our objection to that limited remedy that you proposed of just this anonymous phone

call from these individuals. I don't think I voiced that. We'll just wait until we get the written response from the government to fully address that in the potential reply.

MJ [CAPT ALLRED]: I don't--if you're going to have a reply, it's going to be a quickly crafted document?

DDC [LCDR MIZER]: That was my reply, Your Honor. That was my reply. I just wanted to make sure that we voice our objection. Thank you.

MJ [CAPT ALLRED]: Okay your objection is noted.

Well, it's been a busy and a long day. I thank you all for your excellent preparation and your hard work. I'll get on these motions and try to make sure that your further preparation is not impeded by the work I need to do. Now we'll be in recess then until the 12th of February (sic).

[The military judge was referring to the 12th of March.]

[The R.M.C. 803 session recessed at 1914 hours, 7 February 2008.]

[END OF PAGE]

[The R.M.C. 803 session was called to order at 1007, 28 April 2008.]

TC [COL MORRIS]: Good morning, Your Honor.

All parties present when the court closed are again present. Two additional members on the prosecution, Mr. Jordan Goldstein, from the Department of Justice who has previously appeared in this matter is present today. My name is Colonel Lawrence Morris; I'm here--detailed myself to this case just for the purpose of the Command Influence motion.

MJ [CAPT ALLRED]: Very good. Would you--would state your legal status and qualification for the record, please?

TC [COL MORRIS]: I'm qualified and certified under Article 27(b); sworn under Article 42(a); and I have not acted in any manner which is inconsistent with representing the government in this case.

MJ [CAPT ALLRED]: Very good, thank you.

TC [COL MORRIS]: I should also note, my apologies, that two court reporters are appearing for the first time, Sergeant First Class [redacted] and Specialist [redacted]; both of them have been previously been sworn.

MJ [CAPT ALLRED]: Thank you very much.

Is the interpreting equipment working well this morning? **[Defense team gave positive response.]** Okay, good.

I should note for the record that I had a telephonic 802 conference with some members of the government team and some members

of the defense team, a couple weeks ago while I was traveling in Washington. The primary purpose for the 802 conference, as I remember it, was to indicate there were several motions that have been filed by the defense that the defense has waived oral argument on, and that both parties agreed were ready for the court to address without--without oral argument. And those were D-018, 23, 24, 25, and 31. The defense agreed and those were submitted without oral argument for decision. Another list of motions that were going to be heard this week was identified.

The government requested a pre--a preliminary ruling on D-019, which addresses conditions of pretrial confinement and the court issued that preliminary ruling and intends to hear that motion in the next session of court in May.

Commander Britt--Colonel Britt--I'm sorry, asked for a preliminary ruling with respect to D-029, a motion to suppress some of the statements of the accused and I have not made a preliminary ruling on that motion.

I guess at the end of the day, we agreed to slide both D-019 and D-029 to the next session of court scheduled for early--late May and take those up just before the assembly of the members.

So, one of the members of the prosecution team proposed a summary of the 802 conference, which I think the defense has reviewed and agreed with. If there’s no further objection or supplement of my

summary of our 802, I'll just attach this to the record as a reflection of what we discussed that day.

DC [LCDR MIZER]: Nothing from the defense, Your Honor.

MJ [CAPT ALLRED]: Okay. Commanders, whoever has this, would you send a copy of this to the court reporters for addition?

TC [LTC BRITT]: Yes, I would. And, Your Honor, I authored it and obviously there is no objection.

MJ [CAPT ALLRED]: Okay, so this will be the next Appellate Exhibit in order.

We also had an 802 conference yesterday, at which we discussed the order in which motions will be taken up today. I was given some notice of the number and the identity of the witnesses that the parties intend to call.

We discussed the two motions from the last session that are still unresolved. One is the ex-parte motion which I'm still working on and one was the multiplicity motion that I'm still working on as well. To a certain extent, I thought the multiplicity motion we had agreed to wait for a trial and address that, so that's still in the harbor.

We discussed the number of motions that are scheduled for trial today and tomorrow.

And the government raised issues with respect to two of the other rulings that I entered last week. With respect to D018, I had

ordered the government to disclose to the defense the identity of what is now called, what I call Witness B, and the government reported yesterday that they don't know who Witness B is and on the exercise of due diligence have not been able to identify Witness B. So the court considers D-018 to have been complied with, absent any objection from the defense, I'm satisfied with that.

With respect to D-024, a motion to compel production of witnesses abroad, I had issued a ruling. The government reported that two of the witnesses are on the no-fly list and cannot be brought to the United States or to Guantánamo Bay. And that there are security and mechanical difficulties with getting the testimonies of the other two, and explained to me exactly what they meant when they said they cannot guarantee that the other two, which is Mr. Hamdan’s wife and Mr. Hamdan’s brother-in-law, will actually be able to fly. We ended up asking the parties to discuss amongst themselves the mechanisms that would best serve their interests in getting this testimony, and I indicated that I will be willing to modify my order after the parties have had those discussions.

We discussed other preparations that needed to be taken for trial. I asked the parties to be proactive in identifying instructions for the jury, in drafting the instructions that they need, and in supporting the requested instructions with citations to

the law or to whatever authority that they believe entitles them to that instruction.

We discussed some specific issues that we will need to instruct the members on and I asked counsel to identify the others--other instructions they will want and draft those instructions and submit them to me. We discussed the need for members' questionnaires of those who have been identified to serve as members on the panel, and we discussed the propriety and probably the good sense of drafting a supplemental questionnaire to help identify those who may have some bias or disqualifying background, so they can be excused from the panel before they are brought to Guantánamo Bay for voir dire. And I would ask the defense and the government to consult about the questions that a supplemental questionnaire might need to include. I asked the parties to submit to me written voir dire questions that they propose to have asked to the jury as a panel. We discussed the procedure by which group voir dire and individual voir dire will be conducted.

Looks like the jury box is capable of holding 12 and we need to end up with at least five, so I think it was Professor Swift who noticed that it might be a good idea to bring some extra members, if there are concerns about not being reduced below quorum. I think that's a good idea.

Okay; with respect to D-026, the Unlawful Command Influence motion, the trial counsel offered to be interviewed and gave the court notice that Colonel Morris would be appearing today to argue that motion.

Colonel Morris, are you going to just appear today and just argue that motion or do you anticipate a larger participation in the trial?

TC [COL MORRIS]: Just this motion, Your Honor.

MJ [CAPT ALLRED]: Okay.

Well, I think that kind of summarizes our conference yesterday.

Does the government or the defense want to supplement it with anything that I have overlooked?

DC [LCDR MIZER]: No, Your Honor.

TC [LTC BRITT]: Yes, Your Honor, just briefly. This is my way of correction on the record, I believe, Your Honor said that you were still considering the Ex-parte motion, I believe you meant to say the Ex-post Facto motion.

MJ [CAPT ALLRED]: Yes.

TC [LTC BRITT]: That’s--I--that’s just for purposes of the record. Additionally, Your Honor, you’ve requested the parties to come together and identify a proposed scheduling for the motions today. And what I've done is, with the help of the defense and the

agreement of the defense, we have in fact compiled that list and I will--LCDR Mizer will**--[handing motion list to Lieutenant Commander Mizer]** I will distribute this to the court as well, so Your Honor can track along in calling the motions for hearing today.

[Trial counsel handed the military judge lists of motions for today's hearing.]

MJ [CAPT ALLRED]: Thank you; very good.

DC [LCDR MIZER]: Your Honor, as a point of clarification, if I understood you correctly, we are not going to argue D-029 today?

MJ [CAPT ALLRED]: Well, I'm not planning to----

DC [LCDR MIZER]: ----Okay.

MJ [CAPT ALLRED]: I understood that you wanted to get Dr. Keram's presence or Karam or whatever----

DC [LCDR MIZER]: ----That's correct, Your Honor.

MJ [CAPT ALLRED]: For that motion and that we decided to take that up in May?

DC [LCDR MIZER]: Right, sir.

TC [LTC BRITT]: Your Honor, the reason why I put that particular motion on is--I think, I still wanted to address the court, on the record, on a couple of points dealing with the law, that I don't believe have been complied with, that would authorize the defense to file their motion in the form that it is currently in. So at the appropriate time, not arguing the motion, I think we all

agreed we wouldn't argue the motion per se, but just to narrow the government’s concerns, so we can respond adequately when we come to court.

MJ [CAPT ALLRED]: You're right, we did discuss that. I forgot to mention that, there was a----

DC [LCDR MIZER]: ----Should the court entertain that, we would be prepared to respond to it.

MJ [CAPT ALLRED]: Okay. You know and it looked to me, one of the members of the defense team who was here last time is not here today, is that right?

[Mr. Schneider shows Mr. McMillan is present.]

ADC [MR. MCMILLAN]: I am taking Ms. Prasow's suppress position behind the pole.

MJ [CAPT ALLRED]: Mr. McMillan once again, I'm sorry that----

CDC [MR. SCHNEIDER]: Once again with the court's preference I’m willing to step back and let anybody in the back step forward.

MJ [CAPT ALLRED]: It's your decision. I knew--I knew I saw Ms. Prasow, but I do have a restricted view of you here today.

ADC [MR. SWIFT]: Your Honor, I have--from the translators, we need to slow down, we've kind of forgotten that there is translation going on. They're having a great deal of difficulty keeping up.

MJ [CAPT ALLRED]: Okay.

TC [LTC BRITT]: And, Your Honor, I guess as a preliminary matter, I would respectfully request the court to inquire into the status of Mr. Hamdan. Obviously he's come into court today wearing his detention clothing as opposed to his civilian clothing.

I believe in our previous discussion with Your Honor, we indicated that Mr. Hamdan was given the opportunity to arrive in civilian clothing. Obviously he has elected not to and if, Your Honor, would please make an inquiry into that situation; if it's appropriate.

MJ [CAPT ALLRED]: Commander Mizer, do you want to address this?

DC [LCDR MIZER]: Your Honor, I think that--Mr. Hamdan, before we begin, would like to address the court.

MJ [CAPT ALLRED]: Okay.

Mr. Hamdan, is there something you would like to say to me this morning?

[The accused spoke to the defense translator at the defense table.]

ACC [MR. HAMDAN]: The animal has rights or not? Can you answer me, please?

MJ [CAPT ALLRED]: I'm sorry I didn't understand the question?

ACC [MR. HAMDAN]: The animal has--has rights or not? My question is, the animal, has a right or rights or not? But human being doesn’t have rights.

MJ [CAPT ALLRED]: The question is whether an animal has rights and whether human beings have rights? The answer is the human being has rights.

Is that all you wanted to say?

ACC [MR. HAMDAN]: Yes.

MJ [CAPT ALLRED]: Thank you. The record shall reflect that Mr. Hamdan is in fact wearing his, I guess, prison outfit whatever it's called, instead of the suit and nice court clothing he has appeared in the past; and I guess that’s his choice.

ACC [MR. HAMDAN]: That’s--that’s not my own choice, you forced that to me. All the security procedures that has no sense. This is very severe treatment and the whole--the word, the meaning of the word. Without any human rights, references, detained a Muslim. Because I am detained I don't have any rights. You tell me about laws and laws, where is the law. And you come to me and tell me about the law has changed. Everybody can do whatever he wants; where is the law?

I refuse participating in this and I refused all the lawyers that is presiding on my behalf and I don’t allow my--all lawyers to talk without my presence.

Thank you and I'm sorry.

[The accused stood up to leave the courtroom.]

MJ [CAPT ALLRED]: Okay, wait; Mr. Hamdan, please sit down for a moment; please sit down for a moment.

[The accused sat down.]

MJ [CAPT ALLRED]: Mr. Hamdan, I understand from what you said that you are unhappy about the conditions of your confinement, and the way that you're being treated in confinement. I understand that you feel, because of these conditions, that you cannot change your clothes and put on your nice suit and the clothes you've worn previously.

I don't have control over the conditions of your confinement. But your defense attorneys have made a motion asking me to look into those conditions and asking for me to grant you some relief. So I expect that at the next session of court, we will be addressing that question. That's the time your defense counsel asked me to take that into consideration.

Are you with me so far? Do you understand what I've said so far?

ACC [MR. HAMDAN]: Yes, you are discussing a word and that you postponed it every time and every moment. I’m also discussing what happened today.

MJ [CAPT ALLRED]: Okay. I don't know what happened today, specifically, but I gather that it was something you didn’t like to have happen.

ACC [MR. HAMDAN]: Your Honor, do you respect my religion or not?

MJ [CAPT ALLRED]: I do.

ACC [MR. HAMDAN]: The American Soldiers, do they respect that too?

MJ [CAPT ALLRED]: I don't know specifically who you are referring to, and I don't know how your religion has become an issue. But I will tell you that your defense attorneys are trying to help you. There are several of them who spend a great deal of time trying to help you. And if there are issues regarding your religion that they are there to try to help you.

Now, they are also trying to help you with respect to this case that the United States has brought against you. You have the right to have their services, to help you defend against these charges, and they have been giving a great deal of time and effort to help you.

I understand your frustration with the process and I know that it has been a very long one, but they are here to help you.

ACC [MR. HAMDAN]: I don't think you'll allow me to talk because you will not take what I'm talking about. And I stopped talking; you'll probably forbid me from continuing. I'm sure you will love--stop me from talking. I would like to postpone this hearing. My self-esteem, my feeling does not allow me to continue or speak.

Forgive me, I would like to use the bathroom, the Soldiers did not allow me to go to the bathroom. He wants to be inside the bathroom looking at me and seeing what I am doing in the bathroom.

Is that respect? Is that the law for human being, of rights to the human? Don't tell me that is something here in America. Do you except that in your own country?

MJ [CAPT ALLRED]: I think the answer is yes. I think American prisoners in our jails are subject to observation for those kinds of functions.

Do you need a recess now to use the bathroom?

ACC [MR. HAMDAN]: Answer me, what does the surveillance on your prisoners; if you please?

MJ [CAPT ALLRED]: I'm not sure that I can tell you exactly, but I think that mo--that many American prisoners are confined in cells that have bars across the front of the cells and a toilet in the cell; and the guards can look through the bars and see what the prisoners are doing.

ACC [MR. HAMDAN]: That's the right, if he has something to cover himself with.

MJ [CAPT ALLRED]: Okay, I think I understand what your issue is this morning.

Commander Mizer, what a--do you want to recess so that you can address this with the government and see if he can make

arrangements for the accused to use the restroom before we begin?

DC [LCDR MIZER]: Yes, Your Honor, I think that would be appropriate, I believe.

MJ [CAPT ALLRED]: I think that's where we need to go from here. The court will stand in recess.

[The R.M.C. 803 session recessed at 1031, 28 April 2008.]

[The R.M.C. 803 session was called to order at 1404, 28 April 2008.]

TC [COL MORRIS]: Sir, all parties present when the court recessed are again present, the accused is present.

MJ [CAPT ALLRED]: Very good, thank you.

Mr. Hamdan, do you hear me?

The Arabic is not coming into the headsets. For those who are listening and can hit the switch. I don't think Mr. Hamdan can hear. Of course, I'm not saying anything right now, so maybe that's why you're not hearing anything, but--where are the technology people who make sure the headsets are working. Mr. Hamdan is listening intently.

Nothing. I get--okay, somebody is on it.

Mr. [redacted], I gather that you are not hearing anything at all?

[Mr. [redacted] gave a negative response.]

MJ [CAPT ALLRED]: Okay, nothing yet.

[Mr. [redacted] acknowledged the headsets were working.]

MJ [CAPT ALLRED]: Okay, it appears to be working now; good.

Mr. Hamdan, do you hear me? Do you hear me now?

[The accused nodded his head to acknowledge.]

MJ [CAPT ALLRED]: Okay.

Before we--before we closed or recessed earlier this morning, you indicated a desire not to be represented by the attorneys who are with you this mo--afternoon and a desire not to participate in the proceedings. I'd like to talk about that. I see that you have changed your clothing now and are dressed in your court clothing.

Have you changed your mind about being represented by your counsel as well?

[The accused spoke with the defense translator at the defense table.]

ACC [MR. HAMDAN]: Yes, I've changed my opinion now.

MJ [CAPT ALLRED]: You would like to continue to have these attorneys continue to represent you; is that what I understand?

ACC [MR. HAMDAN]: Yes.

MJ [CAPT ALLRED]: And do you want to continue to be here this afternoon and be present for the proceedings?

ACC [MR. HAMDAN]: If I'm not too tired; if I don't get too tired, I will stay with you.

MJ [CAPT ALLRED]: Okay, well; we'll consider that to resolve the matter then and we'll go ahead and proceed with our business this

afternoon. Unless I hear otherwise, I'll assume you are feeling fine and want to continue to be present.

What is the first order of business then? I understand there are some witnesses waiting to testify, some motions waiting to be heard.

Commander Mizer, the motions are yours; I'll give you the first crack at where we need to begin.

DC [LCDR MIZER]: Your Honor, the first motion is the Motion to Reconsider D017.

MJ [CAPT ALLRED]: Okay.

DC [LCDR MIZER]: But first, I like to put something in the record with respect to D018. We would just like to preserve our objection to the government's failure to identify and make available Witness B. We understood the court's ruling here, we do not want any confusion in the record about the defense consenting to the failure to at least identify Witness B. He was in deployment of U.S. forces, at some point, and we would again request that he be identified.

Additionally, with respect to that ruling, the classified addendum that I submitted to this court, I believe it was last week, identified a number of other interrogators that had not been previously identified, as noted in that addendum, some of those witnesses have told a very different story about where and how Mr. Hamdan was captured that has been previously testified to before this

court. And it is of vital importance that the defense be allowed to speak with these witnesses.

MJ [CAPT ALLRED]: Okay. Let’s take those one at a time.

I guess I understand your point. I understood the government to say that they were unable, in spite of reasonable diligence efforts, to identify Witness B.

Is that what the government said?

TC [LTC BRITT]: That would be correct, Your Honor.

MJ [CAPT ALLRED]: Okay; what is your objection?

DC [LCDR MIZER]: Your Honor, that individual got to Afghanistan in the employ of U.S. forces, in some manner. It is just difficult to believe that there is no identity to that individual.

MJ [CAPT ALLRED]: Okay.

DC [LCDR MIZER]: And if that's the case then--then we have to proceed.

MJ [CAPT ALLRED]: I think we’re going to have to proceed. I have to overrule your objection, I think; because it was a battlefield, people are moving around. And if they can't find him or identify him; I don't know what else I can require of them.

DC [LCDR MIZER]: Yes, Your Honor.

MJ [CAPT ALLRED]: Now, your second point, you want to speak to other witnesses. I did receive the affidavit or statement that you

submitted, in which you identified certain persons that you had spoken to, somewhere in Georgia or what ever.

DC [LCDR MIZER]: Lieutenant Colonel [redacted], Your Honor, is the witness. And he identified at least one Army Staff Sergeant who was perhaps the first individual outside of U.S. forces to question Mr. Hamdan.

MJ [CAPT ALLRED]: Did he give you the name of that Staff Sergeant?

DC [LCDR MIZER]: Staff Sergeant [redacted] is--is the name. And, Your Honor, this is all contained in the--in that classified addendum. Additionally, two Lieutenant Colonels which are also named in that addendum.

MJ [CAPT ALLRED]: Well, I think I indicated my ruling to D018, I expect the government to disclose those witnesses unless there are some national security objection that they need to file--here's that good-looking Lieutenant Commander Stone ready to respond.

Are you close enough to the microphone to be heard?

ATC [LCDR STONE]: I’m pretty loud, sir.

MJ [CAPT ALLRED]: Okay.

ATC [LCDR STONE]: With regard to--it’s actually not a Staff Sergeant, it is a person who we’ve identified as Sergeant of some form variety or other, [redacted], no idea if that's a first name or a last name and we're doing what we can. I mean there is a due

diligence search to find an American Soldier named [redacted], somewhere around Afghanistan in 2001.

Second part of that, there were four other individuals--we have provided one of those individuals the contact information. He disputes the information, he disputes what Colonel [redacted] says he would say, but nonetheless the defense has a point of contact for that person.

There are two others that I now have the information for that I will be providing to the defense, depending on how late it is tonight, they should have it before we leave the island.

The other individual is a retired individual, who--I believe, we should find, it’s just the question of, you know, when we know their location or their employments--pretty easy to find, but when they retired it takes a more effort but we are making----

MJ [CAPT ALLRED]: What you're telling me is that you are trying hard to identify and disclose to the defense everyone who is responsive to that order----

ATC [LCDR STONE]: Absolutely, sir, and I've got three of the five.

MJ [CAPT ALLRED]: Three of the five?

TC [LCDR STONE]: Got three of the five, hopefully to have the other two.

DC [LCDR MIZER]: Your Honor, it's our--it’s our belief that it's not limited to those five. There are unnamed members of U.S. forces as referenced in Appellate Exhibit 111, that Lieutenant Colonel [redacted] spoke with and interacted with, that we would like to speak with as well.

MJ [CAPT ALLRED]: Does he know who they are?

DC [LCDR MIZER]: No, sir; we’re--we’re optimistic that the government knows what unit was operating in that--in that area and could help us locate those individuals. Again, they--they've told us or at least told Lieutenant Colonel [redacted] a very different version of Mr. Hamdan's capture; an entirely different region of the country and it's very important that we be allowed to speak to those witnesses.

MJ [CAPT ALLRED]: Okay; I assume you're trying on your own--own efforts to locate these witnesses.

DC [LCDR MIZER]: I don’t know if that would be possible, Your Honor. In light of Appellate Exhibit 111, I don't know how else to answer that.

MJ [CAPT ALLRED]: Well, I don't know what to tell you, except that I agreed with your motion. I ordered the government to comply with it and I would accept Commander Stone's representation of their trying.

Well, he did say three of five;

Are you trying to identify all discoverable people who----

ATC [LCDR STONE]: Absolutely.

We--there is, in light of your ruling on D-020, which came out, which we thought was a little broader than what we would have originally thought of our motions would be----

MJ [CAPT ALLRED]: What was D-020?

ATC [LCDR STONE]: D-020 was document production, Your Honor.

MJ [CAPT ALLRED]: Okay.

ATC [LCDR STONE]: Which we've basically complied with, we believe that we've complied with, although reading your language; we believe it might be a little broader than what we thought we were otherwise required to do. Based on that, we're going back to, not necessarily to the drawing board so to speak, but there's--we'll be doing a little bit more reviewing and see if there is anything else out there that needs to be turned over--we're having extreme difficulty----

MJ [CAPT ALLRED]: Okay; well, good. We're getting close to trial.

ATC [LCDR STONE]: Absolutely.

MJ [CAPT ALLRED]: So you need to be diligent and timely, so the defense can have these materials in time to prepare.

DC [LCDR MIZER]: Thank you, Your Honor.

MJ [CAPT ALLRED]: Okay; I think we've aired your objection and your request in respect to disclosures.

DC [LCDR MIZER]: If then we can then move to the Reconsideration Motion of D-017, which is production of the unredacted copy of the Tate Investigation.

I'll be very brief, Your Honor.

In this court's initial denial of--of that motion, this court focus almost exclusively on the charging decision and the fact that the key individuals that are alleged to have been involved in the unlawful influence in this case, were not present at the time of charging. But I think it has been more than adequately laid out now in the unlawful influence motion, that the charging decision plays a very small port--part in the unlawful influence in this case.

The central focus of this--of this motion is an attack on the integrity of this--of this process itself, a structural attack. And we have identified general prejudice and then also some specific prejudice to Mr. Hamdan's case.

The prosecution for its part, has challenged out of failure to include additional specific prejudice and we have information that would suggest that the testimony of the two prosecutors in this case, military prosecutors, Lieutenant Colonel Britt and Lieutenant Commander Stone, would be relevant to the interference, specifically

of General Hartmann in the Office of the Chief Prosecutor, late last summer; summer of 2007.

The government's arguments, in this case, are reminiscent of--of those arguments that they raised in response to our access to the high-value detainee motion; where they said that we had not produced enough evidence; they--they decline to give us the evidence and said that we had not met our burden after the--they have declined to give us the evidence. And we're in a similar situation here. Where we know there is relevant testimony that was included as part of the Tate Investigation. And we believe that we've met our burden under R.M.C. 701, for the production of that unredacted investigation, Your Honor.

MJ [CAPT ALLRED]: Do you want the whole thing or just certain portions of it?

DC [LCDR MIZER]: Your Honor, I believe that the whole thing is relevant, given the scope of the investigation; however, immediately, we would like to have the--the sworn testimony of the two military prosecutors in this case.

MJ [CAPT ALLRED]: Who's arguing this for the defen--for the government?

TC [COL MORRIS]: Sir.

MJ [CAPT ALLRED]: Colonel.

TC [COL MORRIS]: Your Honor, pardon me, I don't see where--what new evidence there is to disturb the original ruling. The law is the same, the facts are the same; it's no more relevant to conduct in this case than it was earlier. This case was charged and referred before General Hartmann assumed his duties. And finally, the government did make both counsels available for interviews and both were interviewed.

MJ [CAPT ALLRED]: And both were interviewed? Okay.

Do you envision calling the two prosecutors then to testify today?

DC [LCDR MIZER]: We would not, if you granted us copies of their sworn testimony, Your Honor. We seek to avoid that outcome. We believe the easiest outcome is just to provide us--provide us with that sworn testimony.

MJ [CAPT ALLRED]: Okay; I'll grant that motion. You can even have access to the prior transcript of the testimony of Lieutenant Commander--Lieutenant Colonel Britt and Lieutenant Commander Stone before the Tate commission.

You're going to use this to argue the Unlawful Command Influence motion, today or tomorrow?

DC [LCDR MIZER]: I would assume given the lateness of the hour and, Your Honor's, decision to end these proceedings at five o'clock; that we probably argue--anticipate arguing that motion tomorrow.

MJ [CAPT ALLRED]: Okay. Well, I'm not going to give you a copy to keep, you can take a copy, you can review it, and then I want you to return it to prosecution after we argue the motion.

DC [LCDR MIZER]: Certainly, Your Honor.

MJ [CAPT ALLRED]: Okay. So are you going to send your people out to review that document now?

DC [LCDR MIZER]: Yes, Your Honor.

MJ [CAPT ALLRED]: Does the government want to somehow facilitate this, with a member of your team?

TC [COL MORRIS]: We'll make that happen, sir; I suspect somebody is watching on TV and can make that happen.

MJ [CAPT ALLRED]: Okay; who's leaving the courtroom then, to review these two transcripts?

CDC [MR. SWIFT]: I will be, Your Honor.

MJ [CAPT ALLRED]: Okay. When you're ready to return just let the security folks on the outside know that you're ready to return and I will readmit you.

[Mr. Swift left the courtroom.]

MJ [CAPT ALLRED]: Okay; what's next, Commander?

DC [LCDR MIZER]: Your Honor, I deferred to--to Colonel Morris on this issue, he's mentioned that one of his witnesses or his only witness has to travel here in 15 minutes. I have a fairly lengthy

witness to call and we're interested to know how the Colonel likes to handle this.

TC [COL MORRIS]: Sir, General Altenburg----

MJ [CAPT ALLRED]: ----15 minutes?

TC [COL MORRIS]: He has to head towards the ferry in about an hour and 15 minutes; so my preference, to make them more useful to the court, is for the defense to present as much of its evidence as it could and then call him; though I appreciate the flexibility to take him somewhat out of order. The proposal would be to take as much of Colonel Davis' testimony till maybe about 1445 and then worse case, interrupt him at that point and permit General Altenburg to testify at that stage, out of order.

MJ [CAPT ALLRED]: It's your motion, I mean, is this is going to be the kind of situation where General Altenburg looks at the clock and says, “I got to go, right now”?

TC [LCDR MORRIS]: There appears to be some flexibility with getting him to this dedicated aircraft, so we’re not quite that rigid, sir.

MJ [CAPT ALLRED]: And how long do you anticipate that he will testify?

TC [COL MORRIS]: My direct of him should be--no worse than half an hour; maybe 20.

MJ [CAPT ALLRED]: Is that a good estimate or is that a----

TC [COL MORRIS]: No worse; perhaps 20 minutes. But I can't----

MJ [CAPT ALLRED]: Have you interviewed General Altenburg?

DC [LCDR MIZER]: Professor Swift has, Your Honor.

MJ [CAPT ALLRED]: Okay; well, maybe it would be a good thing, if we had him here for the direct examination of General Altenburg, if he’s going to be the one doing the Cross; is that right?

Why don’t you call Colonel Morris in?

Bailiff, could you call Colonel Morris to the stand please?

[The Bailiff did as directed.]

TC [COL MORRIS]: I think Colonel Davis, perhaps.

MJ [CAPT ALLRED]: I--I always do that, I beg your pardon here, the Freudian slip, again.

DC [LCDR MIZER]: I will probably do it a least a dozen times here, sir, on this argument, Your Honor.

Your Honor, I would ask that the court reporter switch over the control of Courtroom 21 technology to the defense, we have a number of documents we like to show the witness and then publish to the courtroom; principally attachments to the motion.

MJ [CAPT ALLRED]: Attachments to the motion----

[Mr. Swift entered the courtroom.]

MJ [CAPT ALLRED]: Mr. Swift, you’re back.

CDC [MR. SWIFT]: I was not sure, watching this on TV, whether my presence--estimates for General Altenburg is no more than 15 minutes on cross.

MJ [CAPT ALLRED]: I think we decided to call Colonel Davis to testify first, while you're reviewing the transcripts and then will send a messenger when General Altenburg comes to testify; does that work for you?

ADC [MR. SWIFT]: It does, Your Honor.

MJ [CAPT ALLRED]: Very good, thank you.

[Mr. Swift left the courtroom.]

MJ [CAPT ALLRED]: Does the government have any--I can’t remember what the attachments to the motions were.

Do you have any objections if those are shown to the courtroom at large; the members of the audience?

My copy of the motion does not have the attachments enclosed.

TC [COL MORRIS]: No objection, Your Honor.

MJ [CAPT ALLRED]: Can you show the government what you're--no objection?

[The government indicated that they do not object.]

DC [LCDR MIZER]: Sir, there is one more--one more exhibit that we would like to put up, it’s the DOD Inspector General complaint filed by Colonel Davis, which we just received from Colonel Davis,

yesterday. So it is not an attachment, that we would ask, at the appropriate time, that you would mark the next Appellate Exhibit in order.

MJ [CAPT ALLRED]: You had some attachments attached to your motion?

DC [LCDR MIZER]: That’s right, Your Honor. And then there’s going to be this separate Appellate Exhibit, which is the entire DOD IG complaint, which Colonel Davis produced for us yesterday.

MJ [CAPT ALLRED]: A substantial document?

DC [LCDR MIZER]: I believe so; Your Honor, I think it's several pages and then probably----

MJ [CAPT ALLRED]: Okay, why don’t we--we’ll just attach it to the motion and leave it recorded as the same Appellate Exhibit number then----

DC [LCDR MIZER]: ----okay----

MJ [CAPT ALLRED]: Along with your other attachments.

DC [LCDR MIZER]: Yes, Your Honor.

MJ [CAPT ALLRED]: Do you happen to know where Colonel Davis was waiting?

DC [LCDR MIZER]: He was upstairs in our spaces, your Honor.

MJ [CAPT ALLRED]: Does the bailiff know to look for him there? Have we got a security? Can you go upstairs; make sure the bailiff knows to look in the defense spaces rather than the VIP lounge?

ADC [MS. PRASOW]: Excuse me, Your Honor; I believe he is in the DV lounge, actually.

DC [LCDR MIZER]: Your Honor, may LN1 [redacted] approach the court reporters? She has to inquire about a technology issue here.

MJ [CAPT ALLRED]: She may.

[LN1 Lindee approached the court reporters.]

[Colonel Davis entered the courtroom.]

MJ [CAPT ALLRED]: Colonel Davis, I presume.

WIT [COL DAVIS]: Sorry, changed the batting order on me.

MJ [CAPT ALLRED]: Okay.

COLONEL MORRIS B. DAVIS, U.S. Air Force, was called as a witness for the defense and sworn and testified as follows:

DIRECT EXAMINATION

Questions by defense counsel:

Q. [LCDR MIZER]: Could you state your name for the record and spell it?

A. [COL DAVIS]: Yes, it's Morris, M-O-R-R-I-S D. Davis, D-A-V-I-S.

Q. [LCDR MIZER]: Where do you work, sir?

A. [COL DAVIS]: I work at Bolling Air Force Base in Washington, DC.

Q. [LCDR MIZER]: And what is your present assignment?

A. [COL DAVIS]: My title is Director of the Air Force Judiciary. I oversee justice throughout the Air Force and I serve as the chairperson of the committee on professional responsibility.

Q. [LCDR MIZER]: What was your previous assignment?

A. [COL DAVIS]: I had Colonel Morris' job as chief prosecutor.

Q. [LCDR MIZER]: How long were you in that position?

A. [COL DAVIS]: About 25 months, from September 2005 to October 2007.

Q. [LCDR MIZER]: I'd like you to take the judge, if you would, sir, through those two years, beginning with your 2 August 2005 hiring interview.

A. [COL DAVIS]: Sure, I was--in July of 2005, serving as a Staff Judge Advocate for Headquarters 20th Air Force in Cheyenne, Wyoming. I got a phone call from Major General Jack Rives, the Judge Advocate General of the Air Force, asking if I would be interested in a chief prosecutor job. And I just PCS'd about six months earlier, he said, "This is kind of short notice and odd, but I'd appreciate it if you'd consider it." So that was, I don't remember the exact date, middle part--latter part of July, and if I was interested, I was to come to Washington for an interview with----

DC [LCDR MIZER]: Can you slow down just a little bit, sir.

WIT [COL DAVIS]: I'm sorry----

DC [LCDR MIZER]: ----with the translation issues.

MJ [CAPT ALLRED]: Is there a little set of lights there in front of you; red, yellow, and green?

[The witness indicated that he does not have any lights in front of him.]

MJ [CAPT ALLRED]: Apparently not.

WIT [COL DAVIS]: Not that I see.

MJ [CAPT ALLRED]: Okay.

WIT [COL DAVIS]: Okay, I'm sorry.

DC [LCDR MIZER]: Go ahead, sir. I’m sorry.

A. [COL DAVIS]: Sure, prior to coming to Washington--the interview was with Jim Haynes, the DOD General Counsel, prior to the interview or prior to getting the phone call, and in all honesty, my familiarity with military commissions was probably about the same as the general public. I--occasionally would see an article but I had no real in-depth knowledge. So between----

MJ [CAPT ALLRED]: Colonel, I'm sorry to interrupt you.

WIT [COL DAVIS]: Still going to fast?

MJ [CAPT ALLRED]: This is all being translated into Arabic, which is about twice as dense a language as English, maybe one and a half times, so you would have to slow down in order for Mr. Hamdan to understand.

WIT [COL DAVIS]: Okay.

MJ [CAPT ALLRED]: So that the interpreter can keep up, I guess really.

A. [COL DAVIS]: So prior to coming for the interview, I tried to read as much as I could to become familiar with the military commissions. As now, back in that day, there was a website, had a lot of information on, and so I read the directives and the instructions.

I went out to Yale Law School, it has the thing call Avalon Project, it has a lot of military tribunal type information on it. So I try to read up on Nuremberg and the other similar type tribunals.

And then I--we flew to Washington; I believe August 2d, 2005, was a Tuesday. I had an appointment to meet with Mr. Haynes, which took place in his office at the Pentagon.

Q. [LCDR MIZER]: Was there anyone else present during that interview?

A. [COL DAVIS]: Yes, the entire interview lasted; my best guess is, 30 minutes. Mr. Dan Dell'Orto, who at the time was the principal Deputy General Counsel, now the Acting General Counsel, was present for parts of the interview.

[END OF PAGE]

Q. [LCDR MIZER]: What, if anything, do you recall about that conversation?

A. [COL DAVIS]: It was basically, what I consider a hiring interview, a chance to sit down and talk and for him to get to know me. During the interview, one of the things that I talked about, in the reading that I'd done in the week or two leading up to the interview was, in my opinion, was that the government had done a terrible job of telling its side of the story.

We allowed the defense and the critics to say, you know, whatever they wanted. From what I saw, large parts of it weren't entirely accurate and the government had their standard, you know "no comment" response. I'd written an article for military journal, shortly--not too long before that, about how, in my view, it's imperative that we be more effectively engaged with the media. So I brought that up with Mr. Haynes. It appeared to me that we had a good story to tell and we're doing a poor job of telling it. I remember he leaned forward in his chair and he said, "I'm so happy to hear you say that, and I agree with you 100 percent." So he was very enthusiastic about having a more aggressive engagement with the media.

During that he said that these trials are historic, these trials would be the Nuremberg of our times. And I recall, you know, from reading the Nuremberg cases, you know, there were some

acquittals in Nuremberg, so I said as a prosecutor you certainly never go to court aiming for an acquittal, but if there were some acquittals in the commissions that perhaps it might not be a bad thing. It would tend to show the world that these are truly fair trials and at that point, he rocked back on his chair and his eyes got kind of wide.

My impression was that this was a thought he hadn't entertained up until that point. And he looked at me and said, "We can't have acquittals. We've been holding these guys for years, how are we going to explain acquittals? We can't have acquittals, we got to have convictions."

Q. [LCDR MIZER]: What did you think of Mr. Haynes' comment, at that time?

A. [COL DAVIS]: I think he was caught off-guard, like I said, it appeared to me that this was a thought he had never entertained and the prospect of someone showing up here in this courtroom and being found not guilty was just unfathomable for him.

Q. [LCDR MIZER]: Now you had a hiring interview with Mr. Haynes, did you work for Mr. Haynes at that time, sir?

A. [COL DAVIS]: No, one of the things I looked at in preparing for the interview, the original military commissions instructions, I believe, was number five, laid out the reporting chain. The original military commission instruction number five--number five had the

chief prosecutor reporting to the General Counsel's office.

As you recall, Mr. Haynes was nominated for a seat on the 4th Circuit Court of Appeals, he was approved by the Senate Judiciary Committee and before he came up for a full vote of the Senate is when--when what became known as the "The Torture Memo," appeared in public and it became an impediment to him. There was an article--a number of articles, critical of Mr. Haynes, one was authored by Senator Ted Kennedy, I believe in the Washington Post, in April 2004, and about 10 days or two weeks after that, Mr. Senator Kennedy's op-ed, Mr. Haynes rewrote military commissions instruction number five and took himself out of the chain of command. So when I went for the hiring interview in August of 2005, the General Counsel had absolutely no role in the prosecution's chain of command, he had taken himself out of that role.

Q. [LCDR MIZER]: Approximately a month later, September 2005, you had your--your first staff meeting, correct?

A. [COL DAVIS]: Correct; we, like I said, the interview was August the 2nd, he wanted me in place by Labor Day, so we went back to Wyoming, packed up and actually drove into D.C. on Labor Day weekend, 2005. I replaced Colonel Bob Swann, now Mr. Swann, who is still with the military commissions. Colonel Swann didn't retire immediately. There was a, and I don't recall the exact timeline, but about 10 days, 2 weeks after I showed up**----[the court reporter**

indicated to the witness, he needed to slow down].

Sorry.

MJ [CAPT ALLRED]: There’s a little yellow light here that comes on; I'm sorry that you don't have one.

WIT [COL DAVIS]: I don't.

A. [COL DAVIS]: There is a gap of, like I said, 10 days to 2 weeks between my arrival and Colonel Swann's retirement. One of the things that I detected when I got to the office, and you know there—it’s been widely publicized is before that, there had been a turmoil in the chief prosecutor's office; where some other Air Force prosecutors, in a fairly noisy way, expressed concerns about feeling compelled to do things they believed were unethical. When I came into the job, my sense was a meeting--what I did, I scheduled meetings with individuals in the office one-on-one. My sense was, people are still kind of leery about what my policy was going to be and how far I was going to push the edge of the envelope and expect them to push the edge of the envelope. So the first----

MJ [CAPT ALLRED]: Okay, why don't you wait for the next question, I’m not sure if you are going somewhere or not.

DC [LCDR MIZER]: Yes, sir.

Q. [LCDR MIZER]: Sir, for the record, those--that controversy was that involved the--the so-called “Preston-Carr e-mails”?

A. [COL DAVIS]: Correct.

Q. [LCDR MIZER]: Okay. When you have these discussions with your counsel, did you discuss evidence derived by torture?

A. [COL DAVIS]: Yes; that was where I was headed. After the individual meetings and the sense I had that people were, you know, waiting to see what my policies were going to be. The first meeting after I officially took the reins as chief prosecutor, I said look, you know we had some problems in the past; I don't want anyone to feel that they're going to be pushed to do something they feel is unethical. I say you know the things I've looked at, in my opinion evidence obtained by water-boarding, is not reliable evidence. So if you're working on cases that involve evidence obtained by water-boarding, I want to make it clear right now, we're not going to use that evidence.

I told them, I thought--to me water-boarding was a no-brainer; you can argue over where the line is, between acceptable and unacceptable, but water-boarding was clearly over that line; and if there were other techniques that made them uncomfortable, I wanted them to come talk to me because I didn’t want anyone to feel they were being pressured to do anything unethical.

Q. [LCDR MIZER]: Were there specific cases that involved conduct that was over the line, sir?

A. [COL DAVIS]: In my opinion, there was.

Q. [LCDR MIZER]: And what were those cases, sir?

A. [COL DAVIS]: Well at that point, obviously the high-value detainees--has been publicly disclosed now, you know, the water-boarding was limited to the high-value detainees; at that point they were in CIA custody, not DOD custody. I understood that at some point it was likely they will come into our possession but at that point in 2005, it was unclear how many and how many have been subjected to water-boarding. There were some other cases----

MJ [CAPT ALLRED]: I'm sorry, what's the question you asked?

DC [LCDR MIZER]: Were there individual cases, Your Honor, that he believed that coercion have crossed the line?

MJ [CAPT ALLRED]: Okay, the answer is yes.

WIT [COL DAVIS]: Yes.

Q. [LCDR MIZER]: And what were those cases, sir?

A. [COL DAVIS]: The two that pop up fairly readily were Slahi al Qahtani.

Q. [LCDR MIZER]: Now, sir, during your first year was there any external influence exerted over your office?

A. [COL DAVIS]: No, the first year was--it seemed like no one really cared too much of what we did--we had free rein to operate as we saw fit.

Q. [LCDR MIZER]: Did that change at some point?

A. [COL DAVIS]: Yes, it changed a year later in September 2006 with the transfer of the high-value detainees.

Q. [LCDR MIZER]: And what changed?

A. [COL DAVIS]: Suddenly everybody has strong opinions about how we ought to do our jobs.

Q. [LCDR MIZER]: On 8 January 2007, were you contacted by individuals from Attorney General Alberto Gonzalez's office?

A. [COL DAVIS]: September--I'm sorry, what was the date again?

Q. [LCDR MIZER]: 8 January 2007, sir.

A. [COL DAVIS]: Not by his office, but by representatives from Department of Justice.

Q. [LCDR MIZER]: Okay. And what did they tell you?

MJ [CAPT ALLRED]: I'm sorry, what was the date?

DC [LCDR MIZER]: 8 January 2007, Your Honor.

A. [COL DAVIS]: That there was a meeting to take place with the Australian embassy to discuss the Hicks case. They wanted to prepare the Attorney General, kind of a bullet paper, about the Hicks case. Lieutenant Colonel Kevin Chenail was the lead prosecutor who prepared what I've referred to as, "the talking paper," that we provided to the Department of Justice. And I believe also from the military commissions' side, I believe General Hemingway was also to attend that meeting.

Q. [LCDR MIZER]: Did anything happen the next day, 9 January 2007?

A. [COL DAVIS]: Yes; the first thing to happen was the president announced that he withdrew the nomination of Jim Haynes for a seat on the 4th Circuit Court of Appeals; the second thing that happened was that for the first time in my tenure as chief prosecutor, Mr. Haynes called me to talk about a specific case.

Q. [LCDR MIZER]: What did he say?

A. [COL DAVIS]: ”How quickly can you charge David Hicks?”

Q. [LCDR MIZER]: Did he explain why you had to charge David Hicks?

A. [COL DAVIS]: He didn’t. I expressed some aggravation that--whenever he talked about the Attorney General, he referred to him as “Al.” And he said Al--“You gave Al information that you didn’t give me and I kind of got blindsided, so in the future, anything Al gets I got to get. But we got to get Hicks charged, how quickly can you charge Hicks?”

I explained to him, in my view it was kind of like, in Washington, we just built a new ball--in Washington, we just built a new ball park and it would be like trying to play the first game, before you put in the bases and hired an umpire and completed the stadium.

At the time he made the call, I explained to him that there are a number of pieces that are required in order to have a proceeding like this. You had to have the statute, which you know the Military Commissions Act had been enacted at that point, you had to have the Manual for Military Commissions, which was particularly important, the statute added material support for terrorism, an offense that didn’t exist under the President's Military Order and obviously, the manual lays out the elements of the offense so it was kind of like--to say we can charge somebody with an offense that we didn't know what the elements were going to be.

We also have to have the Regulation for Trial by Military Commissions, the court's rules and probably most importantly, you have to have a convening authority to send the charges to. On that--that day we had one of those five pieces.

Q. [LCDR MIZER]: What was Mr. Haynes' response when you said that?

A. [COL DAVIS]: It was, “Well, how quickly, after you get the manual, could you charge Hicks?”

Q. [LCDR MIZER]: Did he offer to get you a copy of the manual?

A. [COL DAVIS]: No, we were expressly--the prosecution and defense were expressly excluded from any involvement with the manual, now other people that worked on my team from DOJ and other offices

were intimately involved in writing it, but we were expressly excluded.

Q. [LCDR MIZER]: Did he discuss other cases being charged that day, 9 January?

A. [COL DAVIS]: Not by name, but he asked in addition to Hicks, were there others we could charge at the same time.

Q. [LCDR MIZER]: Did he explain why he wanted other cases charged?

A. [COL DAVIS]: He didn't expressly explain why my--what seems to be the clear inference was, charging Hicks alone was going to look odd, if he was batched with some others, it would look like part of a group.

Q. [LCDR MIZER]: Did Mr. Dell'Orto call you later that day?

A. [COL DAVIS]: Yes, it was within 30 minutes of--well let me back, Mr. Haynes insisted--he asked, "How long after you get the manual, can you charge Hicks?" I explained it would take about two weeks. His opinion was two weeks was far too long; we had to do it quicker.

I explained that we had to--you know, the manual was a fairly substantial document, we needed time to review it and digest it; then compare it with the evidence that we have--to determine what we can charge and who we can charge.

There’s also a fairly elaborate vetting process charges go through; once we drafted them, they’re reviewed by DOJ, CIA, NSC, a number of other agencies before they are in final form. That takes time, so I said, “my best guess is it'll take about two weeks.”

Q. [LCDR MIZER]: And then you were called by Mr. Dell’Orto?

A. [COL DAVIS]: Mr. Dell’Orto called within 30 minutes and said, “I talked to Jim,” and his words were, “I took a wire brush to him, explained to him that he can't be having those kinds of conversations with you; that those are your decisions and not his. So I want you to disregard everything Jim told you.”

Q. [LCDR MIZER]: When did you next hear from Mr. Haynes?

A. [COL DAVIS]: I don't recall the exact date, the manual--my recollection is Secretary Gates signed the manual on the 17th or 18th of January and two weeks to the day after that, Mr. Haynes called and said, “Where are the charges on Hicks?”

Q. [LCDR MIZER]: What was your response?

A. [COL DAVIS]: That we had drafted charges, they were going through this vetting process; we weren't quite ready yet, I felt we would be soon; but more problematic is--as the chief prosecutor, once you swear charges--because we are acting both as the prosecutor and the accuser, we were to forward them to the convening authority and we had no convening authority to forward them to.

Q. [LCDR MIZER]: Did General Hemingway contact you about an advance copy of the R.M.C.?

A. [COL DAVIS]: It is actually Mr. Haynes during that earlier, 9 January conversation said he would have General Hemingway send me the part on material support, so we can start working on that in advance of the manual being final.

Q. [LCDR MIZER]: What, if anything, do you recall about that advanced copy?

A. [COL DAVIS]: My recollection is that it was one-page; the most striking thing was it authorized the death penalty for material support of terrorism. I knew from the Manual--for the Military Commissions Act, you can only adjudge the death penalty where specifically authorized by Congress and Congress hadn’t authorized the death penalty for material support; so we were about to publish a manual that will authorize death for an offense that Congress didn't authorize.

Q. [LCDR MIZER]: Now, sir, you have previously stated that your office was not involved in drafting of the Rules of Military Commissions, who was drafting those rules?

A. [COL DAVIS]: There was a group--it was a group effort; certainly the Convening Authority's office, General Hemingway and his folks, folks from the General Counsel's office, DOJ, CIA, other agencies; everyone except the prosecution and defense; which I

analogize to, if the NFL rewrote the rules of football, they would've probably asked the players for input; but they were not asked for input.

Q. [LCDR MIZER]: Now let's go back to the second phone call about David Hicks; this time did Mr. Haynes ask you to charge anyone along with Mr. Hicks?

A. [COL DAVIS]: He asked if there were others; and my recollection is, we had about five cases that we were looking at; Mr. Hicks and I believe four others that were potential candidates. There were some other issues, at the end the day, it came down on February 2 that Hicks, Hamdan, and Khadr were the three cases that we signed the charges on.

Q. [LCDR MIZER]: Colonel, I know it's important for you to explain this; would you have eventually charged Mr. Hamdan?

A. [COL DAVIS]: Eventually, when the pieces were in place, we would have charged Mr. Hamdan.

Q. [LCDR MIZER]: Just not when you charged him?

A. [COL DAVIS]: Correct. Is--I think the analogy that I made is that the train was leaving the station before the tracks were laid, and I think that is a good analogy.

[END OF PAGE]

Q. [LCDR MIZER]: And you did that as a result of pressure from Mr. Haynes?

A. [COL DAVIS]: While I don't think any prosecutor would charge someone in a system that were still being built around; it would be like the Nationals trying to play ball in the ballpark while you're still putting in the bases and hiring an umpire.

Q. [LCDR MIZER]: Let's talk about 28 September 2006. What is the Senior Oversight Group?

A. [COL DAVIS]: It was a group that was created after the high-value detainees or as they were being transferred--to oversee at the DOD part of the dealing with the high-value detainees.

Q. [LCDR MIZER]: How often did it meet?

A. [COL DAVIS]: To my knowledge, it met once a week.

Q. [LCDR MIZER]: Did you attend that meeting that day, sir?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: And why did you attend that meeting?

A. [COL DAVIS]: Prior to the--about the time the high-value detainees were being transferred, we were asked to prepare a timeline. There are a lot of parts involved, as you well know, in getting one of these trials on; at the time, we had this one-room courtroom, so there was a plan to try to build a--what now is the compound down the hill, but we were asked to lay-out a timeline from that point through when we thought we can get the high-value

detainees into the courtroom. I worked on that--well, a number of people did, I worked--Frank Jiminez at the time, was the Deputy General Counsel, a Deputy General Counsel to Mr. Haynes, and he was the one I primarily interacted with.

Normally, he would attend the Senior Oversight Group; he had some scheduling conflicts on that day, we were to brief the timeline--the timeline was to be briefed; he asked if I would go instead, to brief the timeline.

Q. [LCDR MIZER]: And you briefed that timeline?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: Who was at that meeting, sir?

A. [COL DAVIS]: The meeting is chaired by the Deputy Secretary of Defense, Gordon England. I don't recall the exact number of people; I would estimate about two dozen; it included Jim Haynes, as the General Counsel, Ileana Davidson, Steve Cambone, who at the time was under Secretary of Defense for Intelligence, Brian Whitman from Public Affairs, you know, folks of that level.

Q. [LCDR MIZER]: You've mentioned Deputy Secretary of Defense, Gordon England; did he make any comments during that meeting?

A. [COL DAVIS]: Yes, he said, as I recall, this is September of '06, the midterm elections were coming up in November and he said, "There could be some real," I remember the words because I haven't heard these before, "there could be some real strategic political

value in charging some of the high-value detainees before the elections and we needed to think about who we can charge, what we can charge them with, and when we can charge them."

Q. [LCDR MIZER]: Was there reaction, in that room, to that comment?

A. [COL DAVIS]: Yes, I mean, as soon as he made the comment, Jim Haynes jumped in and said, "Wait a minute, under the statue, there is only one person authorized to make those decisions, and it's him," and he pointed at me. And the group--everyone seemed of--kind of nodded--understanding that was the end of that.

Q. [LCDR MIZER]: He said that charging decisions were yours alone?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: And that was approximately 4 months before the president withdrew his nomination?

A. [COL DAVIS]: Correct.

Q. [LCDR MIZER]: You mention that Dr. Steven Cambone attended those meetings.

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: Did he ever say anything remarkable?

A. [COL DAVIS]: There were two things; one was General Altenburg, at that point, had announced that he was planning on going back to private practice, I think--they can probably explain this

better than I can, I think he viewed this--the changeover from the President's Military Order to the Military Commissions Act was kind of a natural breaking point for him to leave. He stayed longer than he intended.

To handle, they needed someone new to come in. So this meeting, Dr. Cambone said,--the topic came up with who's going to be the convening authority and Dr. Cambone said, “It needed to be someone of national stature that people know and respect, some dollar a year guy.” And it took me a second, I wasn’t familiar with that expression, “a dollar a year guy,” eventually registered someone who accumulated enough wealth where they can take the job without having to worry about the--the pay.

Q. [LCDR MIZER]: And what was the second thing, sir?

A. [COL DAVIS]: The second thing was that we really need to get DOJ rolled down with this, that no one in DOD had the sophistication and expertise to handle cases like this. The pros were in DOJ, so we needed to get them involved.

Q. [LCDR MIZER]: Before you resigned, sir, had any attorney from the Department of Justice made appearances in this case?

A. [COL DAVIS]: No.

Q. [LCDR MIZER]: Sir, while these meetings were taking place, Congress was drafting the M.C.A.; were you involved in that process?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: How were you involved, sir?

A. [COL DAVIS]: Well, the first court-martial I've ever participated in was in 1984 and my opponent was Captain Lindsey Graham. So I got a call from his office asking if I would come over and meet with them as they were working on the M.C.A.; it was the early part of September 2006.

Q. [LCDR MIZER]: Where did you meet--and by "them" who do mean "them", sir?

A. [COL DAVIS]: Well, I'm sorry; the meeting was at a conference room in Senator Graham's office and it was staff members for Senator Graham and Senator McCain. The meeting lasted, I would say, 90 minutes to 2 hours. Senator Graham was there for probably an hour of it; Senator McCain came in for, I would say, 20 to 30 minutes.

Q. [LCDR MIZER]: What was the nature of that conversation?

A. [COL DAVIS]: I remember specifically when Senator McCain came in and he said, "What do you need to get the job done right?" So I laid out some recommendations that I thought were necessary to ensure we have full, fair, and open trials.

Q. [LCDR MIZER]: And what would those recommendations be, sir?

A. [COL DAVIS]: As I said earlier, after the high-value detainees were--were being transferred, suddenly everyone had real strong opinions about how we should be prosecuting cases.

Department of Justice was beginning to get involved, it was mine--in my view that--let me back up just a bit, we'd met earlier in looking at the high-value detainees, kind of looking at the evidence that was available and potential forums those cases could be prosecuted in; because of issues like Article 31 or Miranda, chain-of-custody, and speedy trial; the group--and the group is made up of DOD, DOJ, CIA, FBI, and NSC.

I think it was fairly unanimous opinion that these cases were not suitable for an Article 3 court--or court-martial; and that Military Commissions were the most viable option. What I began to see was that--that for DOJ, that they couldn't try this in their normal courts, so we would make this into a federal-court-light and we call it--cloaked it under title 10 and put the military banner on it, but it would be a federal-court-light for DOJ.

So one of the things I recommended was that the chief prosecutor and chief defense counsel had to be uniformed Judge Advocates.

Q. [LCDR MIZER]: Why did you do that, sir?

A. [COL DAVIS]: Because if these are military commissions, they should be run by the military, and not as subterfuge for a federal-court-light.

Q. [LCDR MIZER]: What were your other--two recommendations, sir?

A. [COL DAVIS]: There was another one, as I said, a lot of folks were beginning to express strong opinions about--and many of these folks are not attorneys, but they still have strong opinions about evidence and trial strategy and charges.

One of the things I recommended--if you look at the language the standard unlawful command influence language out of the UCMJ and compared it to the language of the M.C.A.; you will see there is some additional language that I wrote. I told them that--there were people that the--I told them what my policy was on water-boarding, that it was inadmissible. Senator Graham and Senator McCain were both very pleased that that was my policy.

I told them that there were others like Mr. Haynes had a contrary opinion and we needed some statutory protection to enable us to exercise our own professional legal judgment in prosecuting these cases. So they asked that if I would draft some language, which I did, and it was included in the M.C.A.

It’s the language that says prosecution and defense can exercise professional judgment without any undue influence or coercion. It was my view that--if you look at the--these cases are unique in that they had an international audience and the international tribunals, whether it's Rwanda, the Sierra Leone,

Yugoslavia or Cambodia, everyone of those in their statute has a requirement that the prosecution be independent; so I felt that this gave us that same independence that was recognized in the international community.

Q. [LCDR MIZER]: And you specifically had Mr. Haynes in mind?

A. [COL DAVIS]: Yes. In fact, there is an e-mail that I sent back when I specifically referred to why I thought this was critically important, specifically referring to water-boarding.

Q. [LCDR MIZER]: Let's go back to Mr. Haynes pressuring you to charge David Hicks, what ultimately happened in that case?

A. [COL DAVIS]: Mr. Hicks was charged on February the 2d 2007, and I said it was a bit awkward, the Chief Prosecutor is supposed to transmit charges to the Convening Authority and we had none. My recollection is Ms. Crawford, was appointed February 7th, five days after we charged Davis Hicks. I don’t recall the exact date, but you know it was shortly thereafter she referred charges.

If you look at the charge sheet in the Hicks case, you will see a lot of pen and ink changes that she made, because the Convening Authority and the Legal Advisor had no role in the prosecution drafting those charges. So our professional opinion and their professional opinion differed, which is the way I viewed the system ought to work. And so they changed--made some changes on the charges and she referred the charges she thought were proper to trial.

Q. [LCDR MIZER]: Do you know if there were changes made to the charges in this case?

A. [COL DAVIS]: I believe the first three we sent forward all had some fairly significant disagreement between what we sent forward, what the Convening Authority and her staff thought were appropriate. So yes I believe there were changes made in this case.

Q. [LCDR MIZER]: What was the ultimate disposition of the Hicks case, sir?

A. [COL DAVIS]: We sent three cases forward, Hicks was the only, the first one, it was referred to trial separately by itself. Hamdan and Khadr were referred sometime afterwards. We had discussions with Major Dan Mori, some of his civilian, Australian civilian counsel about a possible plea deal in the Hicks case. It seemed the defense concern was getting David Hicks back to Australia as quickly as possible. They weren't as concerned about the—what the sentence was, it was really how quickly can we get--get David Hicks back home to Australia.

In our discussions, I would always use John Walker Lyndh as a benchmark. John Walker Lyndh got 20 years, so that was the starting point for our negotiations is the 20 year point. Over time we came down off of that, but certainly----

TC [COL MORRIS]: ----Objection, Your Honor, we are willing to listen to as much as you believe relevant, but hard to know how the

internal workings of negotiations on a case that is not co-accused or anything else of this case, is relevant to motion.

DC [LCDR MIZER]: Your Honor, it is—it is absolutely relevant. The negotiations in the Hicks case, as will be outlined in the testimony of Colonel Davis, were procured through political pressure and ultimately a deal was secured in that case, which was significantly less than that recommended by the prosecutors in this case. I mean the very, the central purpose of this motion is that forces external to the office of the Chief Prosecutor, whether it be the Convening Authority herself, Mrs. Haynes, or ultimately General Hartmann exerted pressure in places and areas that they should not have and ultimately forced the recusal of Colonel Davis. We believe it is relevant.

MJ [CAPT ALLRED]: Okay. I will overrule the objection. I don’t know that I need to know the details of the offer and the counter-offer and the all the discussion that surrounded it.

TC [COL MORRIS]: And while I am up, Your Honor, I really hate to do this, but given our other witness’s problem. Do you mind taking a recess in place so I can check to see what travel flexibility he has?

MJ [CAPT ALLRED]: Why don’t you, can you just send a member of your team up or----

TC [COL MORRIS]: ----By all means.

MJ [CAPT ALLRED]: The bailiff could do that if you wish.

TC [COL MORRIS]: Sure.

MJ [CAPT ALLRED]: What?

TC [COL MORRIS]: Just to know his depart time, so we can know when we can interrupt.

MJ [CAPT ALLRED]: Okay. That’s fine. Go ahead.

[Bailiff left the courtroom.]

[Lieutenant Commander Mizer continued his questioning of Colonel Davis.]

Q. [LCDR MIZER]: Sir, were you aware of the plea bargain in David Hicks case, before you arrived on the island?

A. [COL DAVIS]: No. We--we came here expecting a 30-minute arraignment.

Q. [LCDR MIZER]: And ultimately what was the plea deal in that case?

A. [COL DAVIS]: It was, he pleads guilty and everything in excess of 9 months was waived and transferred to Australia as quickly as possible.

Q. [LCDR MIZER]: Would you have recommended that plea deal sir?

A. [COL DAVIS]: I wouldn’t recommend a misdemeanor sentence for David Hicks.

MJ [CAPT ALLRED]: You wouldn’t?

WIT [COL DAVIS]: Would not.

MJ [CAPT ALLRED]: Not.

WIT [COL DAVIS]: Captain.

Q. [LCDR MIZER]: Did you speak publicly about not being included in the negotiation, sir?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: And where did you do that?

A. [COL DAVIS]: Over at Buckley Hall at the media center immediately after, I believe it was a Friday night is when the trial wrapped up it was immediately after the trial.

Q. [LCDR MIZER]: Did the Convening Authority speak to you about your comments?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: And what did she say?

A. [COL DAVIS]: It was the, in all honesty, I think I had two real discussions with Ms. Crawford in my entire tenure other than just hello. I got a message shortly after we got back from D.C., after the Hicks case, asking me to come down to her office. When I went down there the--the reason she wanted to see me was to express her displeasure that I had been critical of the plea deal in the Hicks case and she said, “Well we can’t have that happening, you and I have to be hand and glove and I can’t have you out in the media contradicting me.

Q. [LCDR MIZER]: What was your response, sir?

A. [COL DAVIS]: My response was I thought it was a healthy thing. If this truly is an independent process, then our differing views, I think showed that this is a fair process and that this hand and glove arrangement that she wanted would show--would lend credence to the argument that this is a kangaroo court. She said I--I understand that but you have to understand that we can't—I can't have a Chief Prosecutor out there disagreeing on my decisions.

Q. [LCDR MIZER]: Did you have surgery in July 2007?

A. [COL DAVIS]: Yes, July 5.

Q. [LCDR MIZER]: Who was running your office while you were away?

A. [COL DAVIS]: Lieutenant Colonel Britt.

Q. [LCDR MIZER]: And was it that time that General Hartmann arrived to his present duty?

A. [COL DAVIS]: Yes, he arrived on the, I am not sure of the exact date, Monday of that week, that is when he reported in, my recollection is that the first day was taken with you know the normal in-processing kind of things you have to do. I believe he came to our office on Tuesday and it was like 30 minutes, you know bam here on board, walked around and shook hands, very uneventful meeting. I believe the next day was the 4th of July holiday and the day after

that I had surgery, so I had spent about 30 minutes working for our team and having surgery.

Q. [LCDR MIZER]: How would you describe his management style?

A. [COL DAVIS]: I would describe it as; I think I have described as he took micro-management to the nano-management level and it is cloaked beneath the veneer of what some would consider cruelty and maltreatment.

Q. [LCDR MIZER]: Did you receive an email from General Hartmann on 13 July 2007 concerning training?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: And what was the subject of that email?

A. [COL DAVIS]: Well he was displeased that we didn’t have a robust training program for counsel. He was angry that, when he found out that in the Hicks case, Lieutenant Colonel Chenail read his sentencing argument and that was unacceptable and that we together need to have a robust training advocacy program that covered everything from opening statement, closing argument, motions, soup to nuts on how a case is going to be prosecuted that--that we were going to work together to put together this program to ensure cases were prosecuted aggressively.

Q. [LCDR MIZER]: Did he have any thoughts about the detailing of attorneys to specific cases?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: And what were those, sir?

A. [COL DAVIS]: While I was out on convalescent--I had 30 days of convalescent leave. While I was out Colonel Britt started arranging at General Hartmann's request briefings on cases, where he and Mr. Chapman would come up and Colonel Britt and whoever the counsel was would sit down and run him through the case with General Hartmann. As a result of that there were some counsel that he had great confidence in and others that he had doubts about and so he wanted to make sure he had, you know the folks he had confidence in on the cases.

Q. [LCDR MIZER]: Now you mentioned Lieutenant Colonel Britt, were you in contact with Lieutenant Colonel Britt during your convalescent leave?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: How often would you speak?

A. [COL DAVIS]: I wouldn't say every day, but probably close to it.

Q. [LCDR MIZER]: What were the--was there a consistent theme to those conversations?

A. [COL DAVIS]: Yeah that he was--again I think I would describe it as cruelty and maltreatment from General Hartmann.

Q. [LCDR MIZER]: Did General Hartmann have a particular category of cases that he wanted you to prosecute?

A. [COL DAVIS]: Yeah, as he was briefed on the cases he was disappointed. Well, you know, we had the original ten cases from the old PMO system that had been charged. They were the likely candidates as we started up under the M.C.A. He was briefed on those cases. The ones that we refer to as facilitators, he wasn't that enamored with. Now the ones that were he said, you know, the term we use around the office is a "sexy" case and I know I have seen it reported in the media and attributed to him, but that was our term that he eventually adopted.

The cases, in fact in his words, in fact if a guy had blood on his hands, that's the case that the public would--would understand and get excited about. These other cases, where it's moving money and forging documents, it's just not that exciting. So he wanted to put the sexy cases up front. I remember one in particular, he was bad about names and there was one case, Jawad that he would always case up "you know the guy that threw the grenade, now that's a good case" and he didn't like al Qosi, cause that wasn't very exciting so why are we not pushing Jawad instead of pushing al Qosi?

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Q. [LCDR MIZER]: Did he ever pressure you to bring charges against the 9/11 detainees?

A. [COL DAVIS]: I wouldn’t say pressure, it was an underlying theme of we got to get--you get the train rolling, there is an election coming up in November this year and there was that consistent theme that if we don’t get these things rolling before the election this thing is going to implode and if you get the 9/11 guys charged, it would be hard, once you get the victims’ families energized and public interested, it would be hard for whoever wins the White House to stop this process. But, you know that was kind of the underlying thing.

DC [LCDR MIZER]: Sir, I am told we are having some translation problems. They switched the translators and it is not coming through to Mr. Hamdan at this point.

MJ [CAPT ALLRED]: Okay. Did the interpreter, did the translator hear that? Apparently when they switched, when you switched out a new interpreters, Mr. Hamdan could not hear.

DEFENSE INT: He can hear translations we are not getting what he is saying.

MJ [CAPT ALLRED]: Okay. It’s a quality of interpretation issue?

DEFENSE INT: Yes.

MJ [CAPT ALLRED]: Why don’t we try a different interpreter and see if we can continue with this testimony and I will ask the senior interpreter to manage that issue up in the interpreters’ booth.

DEFENSE INT: Your Honor, I am not sure they--only one can hear you at a time. Only one up there can hear you at a time.

MJ [CAPT ALLRED]: Okay. Lets----

DEFENSE INT: He is on.

MJ [CAPT ALLRED]: Looks like we got a different, we got a fix in place. Okay let’s continue then.

DC [LCDR MIZER]: All right, sir.

MJ [CAPT ALLRED]: Looks like we have it fixed. Why don't you go up and give the message anyway bailiff, thank you.

[The bailiff did as instructed.]

Q. [LCDR MIZER]: Did you and General Hartmann have disagreements on the use of evidence derived by torture, sir?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: What was the nature of that disagreement?

A. [COL DAVIS]: He questioned what gave me the authority as the chief prosecutor--what gave me the authority to make those decisions about what evidence the prosecution would offer, that there were other people obviously senior to me that felt water-boarding was acceptable, so why was it--why did I think it was my decision to decide that.

Q. [LCDR MIZER]: Who did he believe that it should be left to?

A. [COL DAVIS]: His view was everything was fair game and let the judge sort it out. And that caused heat and I don't recall if we discussed this in great detail, but now I think it's an ethical issue, the rules for professional conduct say that a prosecutor won't offer evidence obtained by illegal means and we have had a great number of people from the Director of the CIA to the Director of the FBI and the Attorney General say that in their view if they were water boarded it would be torture. So to allow or direct the prosecutor to come in this courtroom and offer evidence that we've had senior officials say that they would consider torture, I think it puts the prosecutor in an ethical bind. And so I disagreed with him on that point.

Q. [LCDR MIZER]: How do you define torture, sir?

A. [COL DAVIS]: I don't.

Q. [LCDR MIZER]: And what do you mean by that?

A. [COL DAVIS]: You know I had that question asked by the NGOs and the media and the academics. As the chief prosecutor, you know the chief prosecutor's job is to prosecute detainees that are accused of violating the law of war.

The question of torture in my view focuses not on the reliability of the information that you get from the detainee, it focuses on the potential accountability of the person performing the

technique and it wasn't my job to potentially prosecute whoever performed the technique, I was interested in whether the information that they obtained was reliable and in the interest of justice.

So I never got wrapped around the axle about whether something constituted torture or not. Now my standard was whether it was reliable and in the interest of justice.

Q. [LCDR MIZER]: Sir, would you consider statements taken after sustained beatings reliable and in the interest of justice?

A. [COL DAVIS]: I would not.

Q. [LCDR MIZER]: How about statements taken with one's arms shackled behind one's back and pulled up behind their head?

A. [COL DAVIS]: I would not.

Q. [LCDR MIZER]: Was General Hartmann ever directly involved in this case?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: When was that, sir?

A. [COL DAVIS]: Professor Swift would know the exact date. I don't recall, it would have been I believe in September of 2007, August or September, I don't recall exactly. I was in General Hartmann's office for a meeting and Natalie, the secretary for the convening authority, stuck her head in the door and said,--talking to General Hartmann, said, “Mr. Haynes wants to see you right now.” And

so General Hartmann said, “Hey, I am going to have to run. We will have to take this up later,” and he left.

Q. [LCDR MIZER]: Did you see General Hartmann later that day?

A. [COL DAVIS]: Yes, I had another meeting with him down at his office in the afternoon. He said that he had gone over to see Mr. Haynes. Mr. Haynes had received a phone call from Neal Katyal, the civilian counsel for Mr. Hamdan and that Mr. Katyal was interested in working out a plea deal and General Hartmann said that Mr. Haynes had asked him about settling the Hamdan case.

Q. [LCDR MIZER]: General Hartmann was taking direction from Mr. Haynes?

A. [COL DAVIS]: I wasn't there for the meeting. I just know what he told me when he came back from the meeting. So that's when I went back, I informed Commander Stone and Colonel Britt. They called General Hartmann and offered their--in my view and my policy was--I was not opposed to a plea deal in any case that results in a fair outcome for both sides. So I was not opposed to a deal in Hamdan’s case. Colonel Britt and Commander Stone offered their assistance, the plan was that General Hartmann was going to fly down here with the defense and negotiate the deal and they offered their assistance and General Hartmann said that he didn’t need any help from the prosecution that he could handle this on his own.

Q. [LCDR MIZER]: Did you take a trip with General Hartmann in August of 2007?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: And did General Hartmann discuss the speed of charging decisions during that trip?

A. [COL DAVIS]: Yes, he was unhappy with the speed with which we were bringing charges.

Q. [LCDR MIZER]: What, if anything, do you recall about that conversation?

A. [COL DAVIS]: That we had to pick up the pace, that these things had to get going, that if we didn't start making progress in this, things were going to implode, so it was imperative. The way you validate the system is to get into court, get convictions, and get good sentences and that's the way you validate it. We've got to get moving.

My view was the transparency of these proceedings is critical to their legitimacy in the eyes of the world. And I can tell you and I am sure you all know getting evidence declassified is a time-consuming, frustrating process. He said, you know, we can't waste time with this declassification stuff, we've got to get--get cases going. Congress gave us the authority to have closed proceedings and we need to use the authority they gave us and get these things moving.

Q. [LCDR MIZER]: Sir, did you have a benchmark for which cases would be brought before military commissions?

A. [COL DAVIS]: Yes, as I said, the first year I was in the job nobody much cared what we did. When we had asked for guidance from the General Counsel my impression was he did everything he could to keep his fingerprints off of anything related to detainees or military commissions. So we got minimal guidance.

One of my questions had been, what's the threshold we use to determine the cases that should be prosecuted?

I never got an answer. So what I instructed the staff was to again use John Walker Lyndh as a benchmark. If they sat down with CITF and went through the facts of the case and they thought they had reliable evidence, that in their mind warranted a sentence of 20 years or greater then we should proceed with those cases. If in their heart of hearts they thought that it was something less than 20 years, then we should put that one aside and not worry with it. So 20 years with the benchmark that I set down.

Q. [LCDR MIZER]: Did General Hartmann agree with that benchmark?

A. [COL DAVIS]: No. There was another time where he asked, you know, what thinks you--what makes you think you have the authority to make that decision.

Q. [LCDR MIZER]: What happened as a result of these disagreements with General Hartmann, sir?

A. [COL DAVIS]: It escalated to a point where the latter part of August, I wrote out a fairly detailed complaint laying out the problems that we'd run into and I requested Ms. Crawford's assistance to resolve it. I typed it out, signed it, and I carried it down to her office about 3 o'clock in the afternoon. She had left work early to go to the Johnny Mathis concert and wasn't present. So I left-- left it at her office and hopefully, I thought, she would resolve it.

Q. [LCDR MIZER]: Did you ever inquire as to the progress of that complaint, sir?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: And when did you do that?

A. [COL DAVIS]: I don't recall exactly. I waited, what I thought was a reasonable period of time for a response. When I didn't hear anything, I called and made an appointment to go down and talk with her, because like I said the day that I took it down she had left early for the concert, so I went down and this would have been the second of the two substantive conversations that I had with her and it was to inquire what the status was of the complaint.

There were two things that came out at that, one was, she said the Legal Advisor doesn't work for me, so I forwarded it to Jim Haynes. Which struck me as odd that the Legal Advisor to the

Convening Authority, doesn't work for the Convening Authority. And then she brought up the same issue he had about, we got to get cases moving, declassification is great, that Congress gave us the authority to have closed hearings and we need to use that authority can get these things going and not get wrapped around the axle on getting evidence declassified.

Q. [LCDR MIZER]: Did she ever explain why she felt the cases needed to get moving, sir?

A. [COL DAVIS]: No, I don't recall her specifically addressing it.

Q. [LCDR MIZER]: Did that complaint eventually result in an investigation, sir?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: And is that what has is now referred to as the Tate investigation?

A. [COL DAVIS]: Correct.

Q. [LCDR MIZER]: And do you know who convened that investigation, sir?

A. [COL DAVIS]: Jim Haynes.

Q. [LCDR MIZER]: And to your knowledge, did the military prosecutors in this case give sworn testimony before that investigation?

A. [COL DAVIS]: Yes they did.

Q. [LCDR MIZER]: And do you know the nature of their testimony from conversations with them?

A. [COL DAVIS]: In general, we talked frequently around the office, we were--I think I testified first and they were after me that day in General Tate's office and later they brought over our verbatim transcripts for all three of us to sit down and review and sign.

Q. [LCDR MIZER]: And what generally was the nature of their testimony, sir?

A. [COL DAVIS]: I think it was the same that I've laid out. The problems that they were having and the ethical dilemmas they were facing in dealing with the--with General Hartmann.

Q. [LCDR MIZER]: Sir, do you know if either of those prosecutors notified you of intent to seek a formal ethics opinion?

A. [COL DAVIS]: Yes, Commander Stone did at one point. I don't recall specific--that would have been end of August, 1st of September, I don't recall the exact time frame. But he gave me written notice that he intended to seek an ethics opinion through Navy channels. He laid out his concerns with how General Hartmann's involvement had created an ethical dilemma for him.

I believe I responded back to him in writing shortly after that, encouraging him to go ahead and pursue it and ultimately I resigned, I don't know if anything ever--ever came of his complaint.

DC [LCDR MIZER]: Sir, with the court's permission I'd like to publish that exhibit to the witness and to the--and to the----

MJ [CAPT ALLRED]: ----Why don't you publish it first to the witness and to me and we will talk about publishing it further?

DC [LCDR MIZER: Yes, sir.

Q. [LCDR MIZER]: Sir, do you see that document on your screen?

A. [COL DAVIS]: No.

MJ [CAPT ALLRED]: Is it on?

WIT [COL DAVIS]: That would probably help.

A. [COL DAVIS]: Yes--yes, dated 30 August.

Q. [LCDR MIZER]: And is that Lieutenant Commander Stone's notice or intent to seek an ethics opinion?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: Sir, what was the end result of the Tate investigation?

A. [COL DAVIS]: The end result was a report that--you know not--the members of the Tate Commission here, General Tate was one of my instructors in the grad course, my current boss, you know, General Rich Harding and a Captain, I believe the name was Dronberger from the Navy, I've got great respect for all of them, I frankly think they got it wrong, by analogizing commissions to a court-martial. They analogized the role of the Legal Advisor to that of a Staff Judge Advocate in a court-martial. If you go to the National

Institute of Military Justice website, they've got the Cox commission report, I think all of us involved in military justice know that the biggest criticism that we face is commander involvement in the process.

We defend that involvement on the basis that commanders are responsible for the mission readiness of their units. Readiness is based on maintaining good order and discipline. So when a convening authority refers a case to court-martial; the accused is a member of the convening authority’s command, that's one of his troops that's on trial. In the military commission, to my knowledge Ms. Crawford has no duty to maintain good order and discipline of Al Qaeda, and to assist Usama bin Laden in maintaining an operational readiness over his troops.

So the basis we used to justify command involvement in a court-martial, that predicate is totally lacking in the military commissions context. This isn't about good order and discipline; it's about retribution and punishment. So in my view the basis that they use to analogize to a court-martial is a flawed analysis.

Q. [LCDR MIZER]: Sir, how did you find out about the results of that investigation?

A. [COL DAVIS]: I believe the date was September the 4th, 3d or 4th, I'm sorry October 3d or 4th, 2007, I got a call to go to Mr. Haynes office. So I went over to the Pentagon to his office. I was

in the waiting area, Mr. Haynes came out of his office and shook my hand and said, "Hey, I'm sorry, I got to run off to a meeting, so I'm not going to be able to talk with you, but Dan," I'm referring to Dan Dell'Orto, "Dan's going to sit down and go over this with you and you know and we will move ahead from here." So with that, Mr. Haynes left and Mr. Dell'Orto came out and got me. We went into his office and Paul Nye, who is the Deputy General Counsel, was also present. Mr. Dell'Orto had said that General Tate and his group had completed their report and based on that, they came up with the memo that Secretary England signed; laying out the chain of command, that this solution outcome had been briefed to all the TJAG's. Then briefed to Senator Graham and I believe briefed to the majority and minority member of the SASC and everyone was in agreement with this is the way ahead. And with that, he handed me the two memos that Secretary England had signed the day before.

DC [LCDR MIZER]: Sir, at this time I would like to publish one of those memos to the judge and to the witness?

MJ [CAPT ALLRED]: You may.

Q. [LCDR MIZER]: Sir, do you recognize that document?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: What is that document?

A. [COL DAVIS]: It is the appointment--it was the first time in writing that I was appointed the Chief Prosecutor for the Military

Commissions and it is dated October 3, 2007 and signed by Deputy Secretary of Defense, Gordon England. It was presented to me on October the 4th.

Q. [LCDR MIZER]: And who was your immediate supervisor?

A. [COL DAVIS]: According to this memorandum General Hartmann.

DC [LCDR MIZER]: Your Honor, if I could ask that that be published to the court?

MJ [CAPT ALLRED]: I mean this isn't----

DC [LCDR MIZER]: ----I'll move on, Your Honor.

MJ [CAPT ALLRED]: They can hardly read it, it's only one paragraph and there is no content here worth reading.

DC [LCDR MIZER]: Yes, Your Honor.

Q. [LCDR MIZER]: To your knowledge did General Hartmann receive a similar letter?

A. [COL DAVIS]: Yes, in fact I think both of us received both memos when we met with, we met separately with Mr. Dell'Orto but I know in my case they gave me both memos.

Q. [LCDR MIZER]: And who was General Hartmann's supervisor according to that memo.

A. [COL DAVIS]: The Deputy General Counsel, Paul Nye.

Q. [LCDR MIZER]: And do you know who--to whom he reported?

A. [COL DAVIS]: Jim Haynes.

Q. [LCDR MIZER]: What did you do upon receiving these two documents?

A. [COL DAVIS]: I went back to my office, typed up my resignation and quit.

Q. [LCDR MIZER]: Why did you resign, sir?

A. [COL DAVIS]: Well, obviously you know the--the friction with General Hartmann and the friction with Ms. Crawford were not pleasant, but I would continue butting heads with him if that's what it--it had come down to. But when they put Jim Haynes in my chain of command, you know in his earlier statements that were opinions now came with the force of a command order. And the guy that said water-boarding is “A-OK”, I was not going to take orders from and I quit. That was the tipping point.

Q. [LCDR MIZER]: Sir, did you also file a complaint with the Inspector General for the Department of Defense?

A. [COL DAVIS]: Yes. During the--between filing the complaint with Ms. Crawford in the final outcome of the Tate investigation, nothing seem to be happening, I forwarded essentially the same complaint with the DOD Inspector General.

DC [LCDR MIZER]: Sir, at this time I'd like to publish that complaint to the judge and to the witness.

MJ [CAPT ALLRED]: You may.

Q. [LCDR MIZER]: Sir, do you recognize that document?

A. [COL DAVIS]: Yes, that is the complaint that I had sent to the Inspector General on the 11th of September.

DC [LCDR MIZER]: And sir, we, as I addressed earlier, I'd just like to have this included as an attachment to the motion. It is not one of the original attachments, but we will make sure that it is properly marked.

MJ [CAPT ALLRED]: Okay. You may.

Q. [LCDR MIZER]: What happened with that----

MJ [CAPT ALLRED]: ----42 pages?

Q. [LCDR MIZER]: What happened with that complaint, sir?

A. [COL DAVIS]: I don't recall the exact date but shortly after I resigned, I got a one-page letter from the DOD Inspector General saying that this was an issue dealing with legal matters and so they had referred it to the expert on legal matters, Jim Haynes. Oh and I am sorry, it went on to say that and they were briefed that a solution had been developed, that it had briefed to Senator Graham and other members of Congress and the TJAG's and that it was a satisfactory resolution therefore they considered the case closed.

Q. [LCDR MIZER]: And did you investigate that claim, sir?

A. [COL DAVIS]: Yes I did.

Q. [LCDR MIZER]: And how did you do that?

A. [COL DAVIS]: Well, I was a bit shocked that, particularly General Rives had signed off on--on this arrangement.

MJ [CAPT ALLRED]: Who is that General?

A. [COL DAVIS]: Yes----

MJ [CAPT ALLRED]: Who is it?

A. [COL DAVIS]: Major General Jack Rives, the Judge Advocate General of the Air Force.

MJ [CAPT ALLRED]: Okay.

A. [COL DAVIS]: And also that Senator Graham would have signed off on this deal, because they--it seemed contrary and I thought it was clear that the independence of the prosecutor was a fundamental component of what Congress intended. So when I got this outcome, I called General Rives and I said I understand that all the TJAG's were briefed and everybody is an agreement that this is the way ahead, he tells me that that was false that they were given--they were notified of what the decision was going to be and offered an opportunity to comment and that his input back to the General Counsel was advocating the position that I had taken from the beginning. I contacted Jennifer Olson, who is an assistant to Senator Graham; I expressed the same thing that I was surprised that he had signed off on this arrangement.

I got an e-mail back from her saying that he would contact me shortly. Again I don't recall the exact date, but he called me at home and said that my understanding of what Congress intended was exactly what it was and that while General Tate and Mr. Dell'Orto had come to his office and briefed him, it was an informational briefing not a briefing looking for his concurrence or non-concurrence.

Q. [LCDR MIZER]: Sir, did you receive an end of tour award?

A. [COL DAVIS]: I did not.

Q. [LCDR MIZER]: Is that something that is common in the Office of the Prosecutor?

A. [COL DAVIS]: I am not aware in the two years that I was there that anyone ever left without receiving any decoration.

DC [LCDR MIZER]: No further questions, sir.

MJ [CAPT ALLRED]: Okay. All of these exhibits that you have shown today or are attached to your motions with the exception of this DOD investigation?

DC [LCDR MIZER]: That is correct, sir.

MJ [CAPT ALLRED]: Any objection from the government to the court to consider all of these on the motion?

TC [COL MORRIS]: No objection, Your Honor.

MJ [CAPT ALLRED]: Okay. It's 1535, I assume you've worked out and I don't know what the General's travel plan is. Are you ready to begin your cross-examination now?

TC [COL MORRIS]: Actually if you could indulge us a short break.

MJ [CAPT ALLRED]: Okay, I think that is probably a good idea.

TC [LTC BRITT]: I second that.

MJ [CAPT ALLRED]: Okay, why don't we take a recess for 10 or 15 minutes?

BAILIFF: All rise.

MJ [CAPT ALLRED]: Court is in recess.

[The R.M.C. 803 session recessed at 1537, 28 April 2008.]

[The R.M.C. 803 session was called to order at 1553, 28 April 2008.]

TC [COL MORRIS]: Your Honor, all parties present when the court recessed again are present.

MJ [CAPT ALLRED]: Very good, thank you. Please continue with your--pick up your cross-examination.

CROSS-EXAMINATION

Questions from the trial counsel:

Q. [COL MORRIS]: Colonel Davis, a lot of your concerns have that route of belief that the legal advisor's role is not similar to the role of the Staff Judge Advocate in the ordinary military justice setting, isn't that correct?

A. [COL DAVIS]: That's correct.

Q. [COL MORRIS]: And you were concerned that if you shared any information or any paper with the Legal Advisor, then that would be discoverable by the defense?

A. [COL DAVIS]: Yeah that was--we weren't sure, but that was a potential risk.

Q. [COL MORRIS]: Did you do anything to make sure? Did you do anything to resolve that question? Did you all conduct any research to determine whether that critical issue of whether you shared information with the Legal Advisor would make it discoverable by the defense?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: And what conclusion did you come to?

A. [COL DAVIS]: We discussed it, this came----

Q. [COL MORRIS]: ----What conclusion did you come to Colonel Davis about whether information that you shared with the Legal Advisor would be discoverable by the defense?

A. [COL DAVIS]: I thought there was a strong possibility that it would be.

Q. [COL MORRIS]: What is--what policies did you put in place?

A. [COL DAVIS]: That we did not provide the information that he requested.

Q. [COL MORRIS]: So when you continued to provide binders full of information to General Hartmann you were assuming the risk that all that information was discoverable by the defense?

A. [COL DAVIS]: Correct.

Q. [COL MORRIS]: And your professional judgment today would be that all that information would be discoverable by the defense?

A. [COL DAVIS]: I suspect it would be.

Q. [COL MORRIS]: You mentioned Mr. Haynes' eyebrows going up when you talked about Nuremberg?

A. [COL DAVIS]: He brought up Nuremberg.

Q. [COL MORRIS]: In what you considered to be a job interview?

A. [COL DAVIS]: Correct.

Q. [COL MORRIS]: Following which he hired you?

A. [COL DAVIS]: Correct.

Q. [COL MORRIS]: Following which he gave you a performance rating?

A. [COL DAVIS]: No.

Q. [COL MORRIS]: He never gave you a written performance rating?

A. [COL DAVIS]: No, the only two performance ratings I ever had were from General Hemingway.

Q. [COL MORRIS]: Were from General Hemingway. He didn't sign off a performance rating that said to promote you to General?

A. [COL DAVIS]: He signed off on a promotion recommendation, not a----

Q. [COL MORRIS]: ----To make him [sic] a General Officer?

A. [COL DAVIS]: Yes, to make me a General Officer.

Q. [COL MORRIS]: Signed by Mr. Haynes?

A. [COL DAVIS]: Correct.

Q. [COL MORRIS]: Early in your testimony, you said that you directed your staff upon taking charge, to not--prepare not to consider any evidence obtained as a result of water-boarding?

A. [COL DAVIS]: Yes. To build cases around it there----

Q. [COL MORRIS]: So you became aware before it became public, you knew in September of '05 about the water-boarding information that become public then in December of '05?

A. [COL DAVIS]: In general terms, yes.

Q. [COL MORRIS]: And it was in anticipation of that that you made that specific order to your staff in September of 05?

A. [COL DAVIS]: Correct.

MJ [CAPT ALLRED]: Colonel Morris.

TC [COL MORRIS]: Sir.

MJ [COL MORRIS]: I'm sorry; do you see the lights in front of you there on the podium?

MJ [CAPT ALLRED]: The interpreter is trying to signal.

TC [COL MORRIS: I apologize. I will slow down. I will do my best to slow down.

Q. [COL MORRIS]: Now you said that you directed your staff not to generate cases based on torture?

A. [COL DAVIS]: I don't ever recall using the word torture.

Q. [COL MORRIS]: So you did not use the word torture then?

A. [COL DAVIS]: Not--not that I recall.

Q. [COL MORRIS]: And in fact, you’re aware of course that the Military Commissions Act bars the use of evidence obtained as a result torture anyway?

A. [COL DAVIS]: Well, it didn't exist in 2005, but I am aware it does today.

Q. [COL MORRIS]: You are aware that it does exist?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: And therefore you would be enforcing the law?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: But you didn't use that term in '05 anyway?

A. [COL DAVIS]: No.

[END OF PAGE]

Q. [COL MORRIS]: All you said to your staff was, "if you have problems with evidence, I want you to come talk to me," is that right?

A. [COL DAVIS]: I gather you want a yes or no answer and I can't answer that yes or no.

Q. [COL MORRIS]: Let's talk about Mr. Hamdan’s case. You had no concerns about maltreatment of Mr. Hamdan as you evaluated his case, is that correct?

A. [COL DAVIS]: That's correct.

Q. [COL MORRIS]: You had no concerns about water-boarding as you evaluated his case, is that correct?

A. [COL DAVIS]: That's correct.

Q. [COL MORRIS]: You had no concerns about torture when you evaluated his case?

A. [COL DAVIS]: That's correct.

Q. [COL MORRIS]: Your staff, your counsel on whom you relied for evaluation of that case acted ethically in all respects?

A. [COL DAVIS]: Absolutely.

Q. [COL MORRIS]: As they prepare the case and as they gave you advice?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: And you personally endorsed----

WIT [COL DAVIS]: I think you are having an equipment issue.

ADC [MS. PRASOW]: Excuse me, Your Honor, I think it is a speed issue that that the interpreter is not able to keep up with the pace.

MJ [CAPT ALLRED]: I'm sorry, what is the problem?

ADC [MS. PRASOW]: I don't believe the interpreter is able to keep up with the pace of the questions and answers.

MJ [CAPT ALLRED]: Of the cross-examination?

ADC [MS. PRASOW]: Yes.

MJ [CAPT ALLRED]: Okay, my light is green; so let's continue.

TC [COL DAVIS]: So is mine. That was my only concern.

ADC [MS. PRASOW]: Your Honor, if I could just clarify. The interpreters are translating the questions but not the answers or the answers but not the questions. So when it's happening continuously---

MJ [CAPT ALLRED]: ----Okay, that means were going to fast. Let's slow down and try to get it all.

Q. [COL MORRIS]: You believed when you approved the swearing of charges in this man's case that in all respects they were warranted by the evidence?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: Isn't it true in the Air Force that Staff Judge Advocates supervised prosecutors and advise convening authorities?

A. [COL DAVIS]: Yes.

ADC [MS. PRASOW]: Excuse me, Your Honor.

[The military judge nodded to recognize Ms. Prasow.]

ADC [MS. PRASOW]: The interpreter didn't translate the witness's answer. We seem to be having an ongoing problem with this.

MJ [CAPT ALLRED]: Is your microphone turned on Colonel?

WIT [COL DAVIS]: As far as I know.

MJ [CAPT ALLRED]: Okay, for the interpreter, I am speaking now to the interpreter.

COURT INT: Yes, Your Honor.

MJ [CAPT ALLRED]: They appear--do you hear me?

COURT INT: Yes, Your Honor, I hear you.

MJ [CAPT ALLRED]: Did you hear what Ms. Prasow said?

They are hearing the question in Arabic.

COURT INT: Yes.

MJ [CAPT ALLRED]: But not the answer.

COURT INT: Yes, Your Honor, sometime the interpreter is hearing like two voices at the same time.

MJ [CAPT ALLRED]: Okay. Apparently we----

COURT INT: ----If they give me a time for a response that would be great. But when I hear two voices at the same time I hear the louder one.

MJ [CAPT ALLRED]: Okay. That's the problem.

COURT INT: Thank you.

MJ [CAPT ALLRED]: Thank you.

Q. [COL MORRIS]: When you were considering the charging of the three individuals, Hamdan, Khadr, the other individual whose name escapes me, shame on me.

A. [COL DAVIS]: Hicks.

Q. [COL MORRIS]: Hicks, thank you. Isn't it true that you and your staff had receive--had reached a consensus that you needed to push the system by charging as quickly as possible?

A. [COL DAVIS]: No.

Q. [COL MORRIS]: You did not have such a discussion with your staff?

A. [COL DAVIS]: We had a discussion about moving as quickly as possible, but not before all the pieces, the mechanism was in place to do that, no.

Q. [COL MORRIS]: So you didn't receive advice from your staff saying we should charge ahead and charge these individuals now. And force the others who were involved with, for example the creation of the regulation to move along and do that?

A. [COL DAVIS]: I don't recall that, no.

[END OF PAGE]

Q. [COL MORRIS]: Is it not also true that when you were looking at charging those three individuals that the concern was not singling out Mr. Hicks, but rather ensuring that no one ethnic group appeared to be singled out for charging in the first set of charges?

A. [COL DAVIS]: I don’t recall that being a consideration, it was a matter of which cases were ready to go.

Q. [COL MORRIS]: You were not part of a discussion that addressed that issue at all?

A. [COL DAVIS]: Not that I recall, no.

Q. [COL MORRIS]: Is it not also true that those three individuals had all been previously charged under the prior system?

A. [COL DAVIS]: Yes. In all honesty there were about--there were five cases that were essentially ready to be charged and it just happened that those three became the first. But it was by virtue of being ready, not these other considerations.

Q. [COL MORRIS]: It so happened that you made the judgment that those three were ready?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: You talked about your conversations with some politicians in the drafting stages of the Military Commissions Act in summer, fall '06?

A. [COL DAVIS]: Early September '06.

Q. [COL MORRIS]: It's about a year after you took the job?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: The year during which you had nearly no involvement with Mr. Haynes?

A. [COL DAVIS]: Correct.

Q. [COL MORRIS]: Because you believed he was keeping his hands off this, perhaps for his own purposes?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: Yet when you were drafting or you were giving advice on the drafting of that language regarding the exercise of professional judgment, you had Mr. Haynes specifically in mind?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: Isn’t it true that after the Hicks process was worked, you said to your staff not that I wouldn’t have accepted a misdemeanor--a misdemeanor deal but that I wouldn’t have charged him to begin with?

A. [COL DAVIS]: I inherited Hicks, he did not meet my 20 year cut line.

Q. [COL MORRIS]: Isn’t it true that you said I would not have charged him to begin with?

A. [COL DAVIS]: Yes.

I think we are having some more technical issues.

[Accused is speaking with the interpreter at the defense table.]

ADC [MS. PRASOW]: Your Honor, I'd like to elaborate a little bit further on what I think the problem might be. After the witness answers the question the interpreter needs some time to translate that, before the next question is asked. So if we could maybe, if it's possible to insert a pause between each one. Otherwise, Mr. Hamdan is simply not getting the exchange at all, Your Honor.

MJ [CAPT ALLRED]: Okay. Colonel Morris.

Q. [COL MORRIS]: You of course took a commissioning oath, right?

A. [COL DAVIS]: Yes, I did.

Q. [COL MORRIS]: Which leads off with swearing allegiance to the Constitution, right?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: Doesn't mention the Commander and Chief or any political appointees?

A. [COL DAVIS]: Correct.

Q. [COL MORRIS]: And your oath to the North Carolina bar a similar thing, support and defend the Constitution?

A. [COL DAVIS]: That was 25 years ago, I think that's what it says.

Q. [COL MORRIS]: I can--I could give you a copy if you like, but again it's to the Constitution, correct?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: We as military lawyers also, and no doubt you as the chair of the Professional Responsibility Committee for the Air Force, to follow the ABA model rules for professional responsibility?

A. [COL DAVIS]: Correct.

Q. [COL MORRIS]: And they give specific ethical advice, inducement, and constraints to prosecutors?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: As do the ABA rules on the prosecution function?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: Who is your client when you are the chief prosecutor?

A. [COL DAVIS]: United States.

Q. [COL MORRIS]: Isn’t it true Colonel Davis that you have been disappointed with your inability to--to affect the commissions process since you left it?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: You have expressed frustration at not receiving the quantity and quality of press coverage for your analysis of the shortcomings of the process?

A. [COL DAVIS]: Well, the gag order made it a little tough to talk, but yes. It's a fair summary.

Q. [COL MORRIS]: And you have contacted members of the current prosecution team to ask them to speak to the press on your behalf?

A. [COL DAVIS]: I don’t ever recall asking to speak to the press.

Q. [COL MORRIS]: Your testimony is you have never asked any members of the prosecution team to speak to the press on your behalf?

A. [COL DAVIS]: I don’t--I’m not saying it didn’t happen, I’m saying I don’t recall that happening. I have had members of the press ask how to contact them, but I don’t ever recall contacting Colonel Britt or Commander Stone asking them to engage with the media.

Q. [COL MORRIS]: Your judgment in this case was your own? Your judgment to charge Mr. Hamdan was your own?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: You believed in all respects warranted by the evidence and ethical and appropriate decision to charge him?

A. [COL DAVIS]: Yes.

TC [COL MORRIS]: Nothing further, Your Honor.

MJ [CAPT ALLRED]: Thank you. Thank you, Colonel.

[END OF PAGE]

REDIRECT EXAMINATION

Questions by the defense counsel:

Q. [LCDR MIZER]: Sir, at some point did Lieutenant Commander Stone write an article for the Wall Street Journal?

A. [COL DAVIS]: Yes.

DC [LCDR MIZER]: Your Honor, with your permission I would like to publish that to the witness and to the court.

MJ [CAPT ALLRED]: You may.

DC [LCDR MIZER]: Just one moment, Your Honor. We are having a technical problem.

WIT [COL DAVIS]: Can I correct one thing in response to a question that Colonel Morris asked about; I do recall something that I think I have answered incorrectly.

MJ [CAPT ALLRED]: It's actually--Colonel Morris will have another chance to redirect, re-cross, Colonel Morris will have another chance.

TC [COL MORRIS]: Yes, sir.

WIT [COL DAVIS]: One of my answers--one of my answers was incorrect.

MJ [CAPT ALLRED]: Okay?

DC [LCDR MIZER]: Do you recognize this draft article, sir?

A. [COL DAVIS]: **[Examining the article posted.]** Yes.

Q. [LCDR MIZER]: And that's the article given to you by Lieutenant Commander Stone?

A. [COL DAVIS]: Yes.

Q. [LCDR MIZER]: Did you encourage him to publish that in the Wall Street Journal?

A. [COL DAVIS]: No, I did not.

Q. [LCDR MIZER]: And why not, sir?

A. [COL DAVIS]: That--I thought these issues were being addressed through what I was doing and I didn't see any point in two people throwing themselves on a grenade.

Q. [LCDR MIZER]: You were trying to protect your prosecutors?

A. [COL DAVIS]: I felt it was my--my duty not his to fight this battle.

DC [LCDR MIZER]: Your Honor, we would ask that this also be inserted in as an attachment to the Unlawful Command Influence motion and again we will take the procedures to make that happen.

MJ [CAPT ALLRED]: Okay.

DC [LCDR MIZER]: Nothing further, sir.

MJ [CAPT ALLRED]: Colonel Morris?

TC [COL MORRIS]: Nothing further, Your Honor.

MJ [CAPT ALLRED]: The witness offered to correct one of his answers. Did you want to give him that chance or did you mean nothing further?

TC [COL MORRIS]: By all means, Your Honor.

MJ [CAPT ALLRED]: Okay.

WIT [COL DAVIS]: Thanks. I think I did contact Lieutenant Commander Stone once.

RECROSS EXAMINATION

Questions by the trial counsel:

A. [COL DAVIS]: There was a story for Dan Rather Reports. And there was a point they wanted--they wouldn't publish anything that hadn't been confirmed by a second source. And I think I called him to see if he would verify a point and he wasn't comfortable doing it and I think Steve Couch ended up doing it. That's the only time I can recall contacting anybody from the prosecution.

Q. [COL MORRIS]: And you do know at that time Commander Stone was under an order not to talk to the press?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: You have seen the current charge sheet on Mr. Hamdan, correct?

A. [COL DAVIS]: If it's the same one that we sent forward, then I have, yes.

Q. [COL MORRIS]: So every specification of every charge is one that you, were in all respects, endorsed?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: You reviewed the evidence before you made that endorsement?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: You viewed the video?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: You saw the point where Mr. Hamden was standing next to Usama bin Laden?

A. [COL DAVIS]: Yes.

Q. [COL MORRIS]: You considered all that information before you made your independent recommendation to charge?

A. [COL DAVIS]: I have never had any doubts about Mr. Hamdan's guilt.

TC [COL MORRIS]: Nothing further.

MJ [CAPT ALLRED]: Very good. Can we excuse the witness then?

TC [COL MORRIS]: No objections.

DC [LCDR MIZER]: Yes, Your Honor.

MJ [CAPT ALLRED]: Let me ask a question of counsel. Yesterday I received this e-mail attachment, an affidavit from Colonel Davis, that I gathered was to be offered as evidence and nobody has formally mentioned that to me. What was that supposed to be for?

TC [COL MORRIS]: I think that was forward planning by my team, Your Honor. But given his testimony I have no objection to introducing it, but I have no need to offer it.

MJ [CAPT ALLRED]: Okay. Well I've read it, so I guess I will consider it. It seems to coincide with his testimony today?

DC [LCDR MIZER]: No objection from the defense, Your Honor.

MJ [CAPT ALLRED]: Thank you, sir, for your testimony. You're excused as witness, thank you.

[The witness was excused and withdrew from the courtroom.]

MJ [CAPT ALLRED]: Looks like the interpretation has been getting to Mr. Hamdan for the last few minutes.

Are we ready to call our next witness?

DC [LCDR MIZER]: The defense is ready to call its next witness, however given the government's timeline, Your Honor, I believe the government would like to call General Altenburg.

TC [COL MORRIS]: Please if you could indulge us that, Your Honor.

MJ [CAPT ALLRED]: Very good. Bailiff would you call General Altenburg, please?

[The bailiff did as instructed.]

MJ [CAPT ALLRED]: And let the record reflect that former Lieutenant Commander and now Professor Swift has returned to the courtroom.

ADC [MR. SWIFT]: It seemed like an opportune moment. For the record I have been watching the proceedings from the status room.

[The witness, Major General Altenburg, entered the courtroom.]

MJ [CAPT ALLRED]: Very good, thank you.

Good afternoon, General.

WIT [MG ALTENBURG]: Good afternoon, Sir.

MJ [CAPT ALLRED]: This is the witness stand **[motions to the witness stand]**. The trial counsel will swear you in just a moment.

[The witness took the witness stand.]

JOHN D. ALTENBURG, JR., Civilian, was called as a witness for the prosecution and sworn and testified as follows:

DIRECT EXAMINATION

Questions by trial counsel:

Q. [COL MORRIS]: Sir, are you John D. Altenburg, Jr.?

A. [MG ALTENBURG]: I am.

Q. [COL MORRIS]: Alten-B-U-R-G? Uniform, Romeo, Golf?

A. [MG ALTENBURG]: Correct.

Q. [COL MORRIS]: Retired Major General?

A. [MG ALTENBURG]: That's right.

Q. [COL MORRIS]: What do you currently do, sir?

A. [MG ALTENBURG]: I am a lawyer with Greenberg Traurig in their Washington, D.C. office.

TC [COL MORRIS]: Your Honor, for speed and foundation, I would ask to have offered as the next exhibit, General Altenburg's bio.

ADC [MR. SWIFT]: Without objection, Your Honor.

MJ [CAPT ALLRED]: Very well.

Q. [COL MORRIS]: Sir, how many years of military service did you have?

A. [MG ALTENBURG]: 30 years total, just over 30 years.

Q. [COL MORRIS]: How many years commissioned service?

A. [MG ALTENBURG]: 28 years, commissioned service; almost 2 years, enlisted.

Q. [COL MORRIS]: What conflicts did you serve in, sir?

A. [MG ALTENBURG]: I served in Vietnam; I served in Desert Storm and I--wasn’t a conflict as it all turned out, but I served in Haiti in 1994 with Joint Task Force 180.

Q. [COL MORRIS]: In the course of your career, did you serve as a trial counsel, a military prosecutor?

A. [MG ALTENBURG]: I did.

Q. [COL MORRIS]: About how many cases did you try as a prosecutor?

A. [MG ALTENBURG]: I believe that I prosecuted over 400 cases.

Q. [COL MORRIS]: How many times did you serve as a Staff Judge Advocate?

A. [MG ALTENBURG]: I served twice as a Staff Judge Advocate. First with the 1st Army Division in Germany for 3 years, from '88 to '91; and then again as the Staff Judge Advocate at the 18th Airborne Corp from 1992 to 1995.

Q. [COL MORRIS]: And during--in each of those positions, you served part of that time in conflict?

A. [MG ALTENBURG]: With 1st Army Division in Saudi Arabia and Kuwait and Iraq in 1991; and with 18th Airborne Corp, a humanitarian operation domestically in 1992 and deployed to Haiti for Operation Uphold Democracy with Joint Task Force 180 and 18th Airborne Corp in September of 1994.

Q. [COL MORRIS]: And did you have opportunity in any of those---

MJ [CAPT ALLRED]: ----Excuse me, Colonel. General, I'm sorry; you don't have the benefit of the little flashing lights that I have up here. But the interpreter is signaling, he's is having difficulty keeping up with the exchange. So I'll ask trial counsel to speak more slowly and you as well. Try to leave a space between for the interpreter to keep up. Thank you.

WIT [MG ALTENBURG]: Thank you, Your Honor.

Q. [COL MORRIS]: Did you ever advise commanders or convening authorities from a service other than the Army?

A. [MG ALTENBURG]: Yes. I've advised commanders from the Air Force and from the Navy and from the Marine Corp as part of the Joint Conventional War Force Task Force on two occasions in the 70s. And I was the--several exercises with the Marines, agile providers and

other exercises in the 90s and then Joint Task Force 180, as I've mentioned a couple of times in Haiti.

Q. [COL MORRIS]: About how many cases do you estimate were tried under your supervision during your time as a Staff Judge Advocate?

A. [MG ALTENBURG]: Nearly 700.

Q. [COL MORRIS]: As a general officer, did you as a Brigadier General serve as the Assistant Judge Advocate General for Military Law and Operations?

A. [MG ALTENBURG]: I was the Assistant Judge Advocate General for Military Law and Operations for the Army from 1995 to 1997.

Q. [COL MORRIS]: Can you briefly explain the criminal law related responsibilities in that position?

A. [MG ALTENBURG]: My criminal law responsibilities in the position of the AJAG or Military Law and Operations included supervision of the Criminal Law Division in the Office of the Judge Advocate General, Department of the Army, Crim-Law Division. And that office was responsible for all criminal law of policy for the Department of the Army, including the publication of the Military Justice Regulation. I also supervised the government appellate branch or government appellate division of the United States Army Legal Services Agency. The government appellate division was responsible for the government advocacy of all criminal appeals to

the Court of Appeals, the Army Court of Criminal Appeals, with the Court of Appeals for the Armed Forces and that's the Supreme Court of the United States.

Q. [COL MORRIS]: After that did you serve as the Assistant Judge Advocate General?

A. [MG ALTENBURG]: I was the Deputy Judge Advocate General of the Army from 1997 to 2001.

Q. [COL MORRIS]: In that position, did your responsibilities include supervising Army Staff Judge Advocates?

A. [MG ALTENBURG]: They did.

Q. [COL MORRIS]: Did you also give instructions to and advise others on the role of the Staff Judge Advocate as the advisor to the convening authorities?

A. [MG ALTENBURG]: I did. I brought forward with me a course that I've developed as the 18th Airborne Corps Staff Judge Advocate, I have that job. Then Judge Advocate General, Michael Nardotti liked it and had me present it every year at the Staff Judge Advocate Course for all new Deputy and Staff Judge Advocates in June of every year that were going out to assume those positions. And included in that was a significance about the administration of the military justice and the especially the responsibilities of the Staff Judge Advocate and his or her relationship with the convening authority and administration of justice. So I continue to teach the course every

year and as a Deputy Judge Advocate General, I taught not only that course but another hour instruction with these leaders before they became Staff Judge Advocate and Deputy Staff Judge Advocates.

Q. [COL MORRIS]: ----you are then, I'm sorry. Go ahead.

A. [MG ALTENBURG]: I was going to say; I also, during those 6 years as a flag officer, occasionally would spend an hour with what we call the solo course at the Judge Advocate General school in Charlottesville, Virginia. That's a course that was conducted 6 times a year for mostly O-6 Colonels; commanders who are about to assume command of a brigade, sometime battalion commanders attend that course also. It was a course of long-standing. It had been in the Army for over 30 years and during the time it was conducted; either I or the Judge Advocate General would spend an hour with those commanders talking about policy and their responsibilities as convening authorities and the like. And we developed a course that--the last 4 years for the pre-command course for all new battalion brigade commanders regardless of branch. That was conducted monthly at Fort Leavenworth and I did that course every month for those four years.

Q. [COL MORRIS]: You are familiar with the Uniform Code of Military Justice and its statutory history?

A. [MG ALTENBURG]: I am.

Q. [COL MORRIS]: Are you familiar with the predecessors of the UCMJ including the articles of war?

A. [MG ALTENBURG]: I am familiar with the articles of war, and the articles for the government in the Navy, though I never have the opportunity to practice in either system.

Q. [COL MORRIS]: Is your familiarity based not just on your experience but on study and your own professional reading?

A. [MG ALTENBURG]: It had to be on based on studying professionally; yes, sir.

Q. [COL MORRIS]: Are you familiar with Winthrop and the leading authorities on the military justice system?

A. [MG ALTENBURG]: I am.

Q. [COL MORRIS]: Are you familiar with Army regulations 27-1, the Army Doctrinal Publication on Judge Advocates?

A. [MG ALTENBURG]: I am, sir.

Q. [COL MORRIS]: You're also familiar with Army Regulation 2726, the Army Doctrinal Publication on Ethics?

A. [MG ALTENBURG]: I am.

Q. [COL MORRIS]: Are you familiar, sir, with the Navy JAG Man. and other non-Army regulations on Staff Judge Advocate, Legal Advisor rolls and ethics?

A. [MG ALTENBURG]: Yes. I am.

Q. [COL MORRIS]: Are you familiar with the Military Commissions process?

A. [MG ALTENBURG]: I am, sir.

Q. [COL MORRIS]: And you served as the appointing authority now known as the convening authority from March 2004 to November 2006; is that correct?

A. [MG ALTENBURG]: That's correct, those are the dates.

Q. [COL MORRIS]: And among other things, during that time that you served in that role. Did you evaluate the function in the role of the Legal Advisor?

A. [MG ALTENBURG]: I did.

Q. [COL MORRIS]: And are you familiar with the discussions and the processes that lead to the enactment of the Military Commissions Act?

A. [MG ALTENBURG]: I am familiar with that process and in fact--as a point of fact it was sparked by position of the Supreme Court in the *United States v. Hamdan*.

Q. [COL MORRIS]: And the Act itself was passed shortly before you concluded your responsibilities as the Appointing Authority, is that correct?

A. [MG ALTENBURG]: That is correct.

TC [COL MORRIS]: Your Honor, I would tender General Altenburg to the court under Rule 702, as an expert in Military Criminal Law,

in particular regarding the role of the Staff Judge Advocate and Legal Advisor.

DC [LCDR MIZER]: Your Honor, the defense would not object to his qualifications as an expert on Military Law but the government is offering this witness as an expert on the legal question that is before this court. The role of the Legal Advisor, that's a ruling of law of statutory construction. The central issue of--which is before this court. This court is presumed to know and apply the law. I don't know that this witness could assist this court. Additionally, this witness may be qualified to testify as to the role of Legal Advisor and Staff Judge Advocate under the Uniform Code of Military Justice which is an entirely separate statutory standard. And the defense would object on those bases, Your Honor.

MJ [CAPT ALLRED]: Okay, your objection is noted. I recognize him as an expert in Military Law and recognizing that he also served two years as the equivalent of the Convening Authority. I would be interested in his perspectives on Military Commissions organization.

Please go ahead.

Q. [COL MORRIS]: Sir, the first set of questions has to do with the role of the Staff Judge Advocate. Who is the client for the SJA?

A. [MG ALTENBURG]: The client for the SJA is the United States; United States, United States Army.

Q. [COL MORRIS]: Can you talk about the role of the Staff Judge Advocate as a counselor, as an advisor to a convening authority or the senior commander in the organization of which he is a member?

A. [MG ALTENBURG]: Well, the relationship is a professional one and that has--as I said a second ago, its the allegiance or the client itself is the United States, United States Army, and it's incumbent upon the Staff Judge Advocate to give his or her best counsel and advice and take dispassionate objective matters to the convening authority and to protect the convening authority's neutrality, vice that judicial role as--in a military justice system.

Q. [COL MORRIS]: And the--pardon me. The SJA then also has a--has a specifically designated function under the UCMJ in giving advice to the convening authority before making decisions with regard to courts-martial; is that correct?

ADC [MS. PRASOW]: Excuse me, Your Honor. We seem to be having the same problem with the pace of the testimony in interpretation.

MJ [CAPT ALLRED]: Okay. Thank you. I'm sorry; please slow down.

TC [COL MORRIS]: Yes, sir.

MJ [CAPT ALLRED]: The light is green up here. I don't----

CDC [MR. SWIFT]: They may not be using it. But, it's not coming through.

MJ [CAPT ALLRED]: Okay. **[The accused speaks to defense interpreter.]** What are you hearing [redacted]?

DEFENSE INT: Well, there are entire questions that are dropping out. I think a pause between a question and answer would be--would help.

MJ [CAPT ALLRED]: Would solve it? Okay. We'll try again.

TC [COL MORRIS]: Noted.

A. [MG ALTENBURG]: I recall the question.

Specifically, the Staff Judge Advocate is responsible for a pretrial advice that the company's--any proposed set of charges for in the convening authority to refer to court for trial.

Q. [COL MORRIS]: Typically, is that same individual that Staff Judge Advocate also the supervisor of the Office of the Staff Judge Advocate, the lawyers who work in that section?

A. [MG ALTENBURG]: That's correct. A Staff Judge Advocate, besides being a counsel to the convening authority, also supervises the various functions of that office. In a full office, it would include an Administrative Law division and a Legal Assistance Division, a Claims Division, an International and/or Operational Law Division, and a Criminal Law or Military Justice Division. In some stateside offices, will include a Federal Prosecutor or a Magistrate and Felony Prosecution in U.S. District Court.

Q. [COL MORRIS]: Can I ask you to explain whether or to what extent you perceive a tension between the counselor role in which the SJA gives advice to the convening authority about military justice matters, and the role as the supervisor of an office that includes prosecutors?

A. [MG ALTENBURG]: I think--I think there is some tension. I think it's the tension that exists--I'm trying to give the interpreter time to catch up, that's why I did that. I think it's the same tension that exists in the very term "judge advocate." We seem to be, in terms that aren't consistent with one another because "Judge" implies neutrality and objectivity; and "advocate" implies working on one side and pushing one aspect or for one client. And so the term itself, "judge advocate," I think manifests or exemplifies the tension that exists in the roles and responsibilities, especially of Staff Judge Advocates.

They, on the one hand have to be objective and protecting the neutrality of the convening authority on the other hand they're responsible, at least, to see that all their functions. But in this particular context--the prosecution function does its job. And in some cases, you know, are certainly authorized, if they to choose to get pretty involved in the prosecution of a case, to get involved in; how are you putting that case together, what does that case look like, what are the weaknesses in that case, what are the strengths in

that case, how soon are you ready to go with that case. And then turn around subsequently whether its days or weeks or months later, and take that case and the pretrial advice to the convening authority and advise the convening authority on the appropriateness of a referral to court. And a judge--Staff Judge Advocate has got to be able to balance both of those responsibilities.

Q. [COL MORRIS]: Now, needless to say, the Staff Judge Advocate does not or has not for more than a generation, supervised the defense counsel; is that correct?

A. [MG ALTENBURG]: That's correct.

Q. [COL MORRIS]: Though he may have responsibilities for resourcing and supporting the defense counsel.

A. [MG ALTENBURG]: And the Staff Judge Advocate clearly does have, in the Army at least, the responsibility for resourcing the defense counsel for ensuring that--well first of all, in an informal way, for ensuring that they get the right people and that they get experienced people and people that are appropriately defense lawyers, prepared to be defense lawyers and then more--in the more mundane aspect of it. But clearly, a more direct responsibility, the Staff Judge Advocate is responsible for the office organization for ensuring that they have the right equipment picture of a budget is adequate to their needs and so forth. And providing, I'm sorry, in providing the enlisted support, the paralegal support that they might

need or the hiring a civilian, a secretary and assistants and paralegals that they might need in the defense counsel office. That responsibility falls on the Staff Judge Advocate.

Q. [COL MORRIS]: Is the role of the Staff Judge Advocate defined, in part, in Army regulation 27-1?

A. [MG ALTENBURG]: It is.

Q. [COL MORRIS]: And you have reviewed that regulation?

A. [MG ALTENBURG]: I have.

Q. [COL MORRIS]: In it, includes specific references to supervision of the military justice function?

A. [MG ALTENBURG]: That's correct; always has. I mean, it had to change when we created the Trial Defense Service because up until the experiment in 1976 in the Army, the Staff Judge Advocate was also responsible for supervising the defense lawyers.

Q. [COL MORRIS]: And you're familiar with the language among others that the role of the Staff Judge Advocate is to ensure justice is done as opposed to that convictions are obtained?

A. [MG ALTENBURG]: I am familiar with that provision that the Staff Judge Advocate is responsible for all of that. And specifically, that the Staff Judge Advocate is responsible, again focusing on the "judge" part of the title, for ensuring that the administration of justice is fair and impartial.

Q. [COL MORRIS]: Let me move you next, sir, to discuss the role of the Legal Advisor in the military commissions process. In your opinion, what is the value of the legal advisor in a system such as the military commissions process?

A. [MG ALTENBURG]: I see the legal advisor as almost identical if not identical to the Staff Judge Advocate and--in the courts-martial system. I came to the duties of Appointing Authority in March of 2004 and as I assumed those duties, the structure of the organization was that the chief prosecutor was supervised by a deputy general counsel in the office of the General Counsel. And the Legal Advisor worked directly from beneath the appointing authority.

I was asked if I had any objections to changing the system at that time in March, April 2004. And what was proposed was that we make it like the military justice system and that the Legal Advisor supervised the chief prosecutor, much as a Staff Judge Advocate would supervise a chief of military Justice. And that it would be something that we were all familiar with, convening authorities, Staff Judge Advocates advise convening authorities, Staff Judge Advocates also supervised the prosecution function, courts-martial.

Here we would have appointing authority advised by Legal Advisor; Legal Advisor also supervised the prosecution function. And we discussed this at length and decided that that's what we were all very familiar with. We understood how Staff Judge Advocate/Legal

Advisor do that, how'd they--we walk line, how they handle that tension of providing objective advice to the convening authority, the appointing authority on the one hand and yet on the other hand supervised prosecution function.

Q. [COL MORRIS]: Now, as the appointing authority obviously you were also having--you were also a lawyer. In light of that, looking at a convening authority who is also a lawyer, is there any value then in having someone--in having the position of a Legal Advisor to give advice to a lawyer who is the convening authority?

A. [MG ALTENBURG]: Yes. I mean--I think that when you are a lawyer and you have a non-legal job, which is what the convening authority job is, then you rely on the advice of your Legal Advisor because you're focused on a different set of responsibilities. Not that you don't employ your legal training but in--in several different jobs that I had where I wasn't practicing law even in the Army, you have to force yourself to rely on the lawyers advice to you and make sure that you know, work your own set of responsibilities. The people who become Secretary of the Army and Secretary of the Navy, who are lawyers and even General Counsel before, have to--have to force themselves to do that.

But I think it is important to keep in mind that the distinction that when you are in a non-legal job and the convening

authority is a non-legal job, you definitely defer to the legal advice of your counsels', so to speak.

Q. [COL MORRIS]: And in your experience then, did the Legal Advisor fulfill those functions, perform that role?

A. [MG ALTENBURG]: Absolutely.

Q. [COL MORRIS]: Now there was a supervisory--a change in the supervisory structure in fall 2007 from reporting to the Legal Advisor to reporting to officials in the DOD General Counsel office.

Do you see any obvious advantages or disadvantages to either of the structures that you have addressed?

A. [MG ALTENBURG]: I think that there are advantages and disadvantages to each of, what we're now describing as three different ways of organizing. And there is another that we haven't talked to, which quite frankly, I advocated for over a year, that would have been even--even a different type of supervisory structure. And it happens to be something that I have thought a lot about, because I was going through that in 2004 and 2005 and I have accepted the change that was presented to me in March and April, where we went on this SJA model. Also supervising me--the prosecutor, and I thought about the pros and cons of that and then, as I said, advocated yet a different system that we were never able to persuade people to put in place for a variety of reasons. And what I conclude

from that is that any of these, now four systems in my mind, have pros and cons and they'll all work effectively, in my view.

Just as in a larger sense, the original commission system could have, in my opinion, produced full and fair trials. The Military Commissions Act is a different way of doing it, and I believe that can produce full and fair trials. And there is, an un-discussed third process, which some of us are interested in, we think could have produced full and fair trials also. And there are pros and cons to each of those three systems and there are pros and cons to each way of organizing the Legal Advisor-chief prosecutor relationship.

Q. [COL MORRIS]: Sir, the defense has raised some concerns about public statements made by the current Legal Advisor regarding the commissions process. Are you familiar, generally, with statements that Brigadier General Hartmann, current Legal Advisor, has made regarding the charging of individuals and the military commissions process?

A. [MG ALTENBURG]: I have seen some of the press conferences that General Hartmann has conducted. I don't think I've seen every statement that he has made. I think that it can be appropriate for a Staff Judge Advocate or Legal Advisor to make public statements, critical would be the nature of the statements. If a Staff Judge Advocate or a Legal Advisor made public statements in any way

indicated a conviction on his part that the individual is guilty or any way detracted from you know the appearance of neutrality and fundamental fairness, then it'd be inappropriate. So, I think it can be appropriate for a Legal Advisor, Staff Judge Advocate to make public comments. What is critical is, what's the nature of the comment, if there--if it mirrors factual statement, then I think that can be appropriate.

Military justice is pretty arcane stuff, you know in the public context. And the Military Commissions is pretty arcane stuff in the military justice context. And based on what I've seen, in the last 5 years, since the publication of the Presidential Military Order, nobody should be talking about these things to the public other than a military attorney. Who they choose to be the military attorney to do that, is--it can be any one of a number of people, but I think that's critical.

Q. [COL MORRIS]: And looking at the analogies to the military justice system, would your concern in evaluating those comments be guided, at least in part, by concerns about factors such as affecting or intimidating witnesses, panel members, and that sort of analysis?

A. [MG ALTENBURG]: It would be those factors, which of course they would be for courts-martial and even more so the--the sense of fundamental fairness and concern for the process and concern for the

system, because it's so foreign and not known to a great segment of the population.

Q. [COL MORRIS]: Does the Staff Judge Advocate, generally, and then the Legal Advisor, in the commissions context; have a proper role in resourcing the defense function? Not supervising content but resourcing the function.

A. [MG ALTENBURG]: Yes. I've already discussed, at least within the Army, the responsibilities of the Staff Judge Advocate are. And I must say that in the commissions, it is exactly that role that the Legal Advisor can be and the Convening Authority, quite frankly as a practical matter, play in resourcing the defense and so speaking for the previous regime so to speak, my Legal Advisor and I were very involved in ensuring that travel budget for the defense was adequate and ensuring that they had access to the press and were authorized to speak to the press.

Part of what we do and specifically the Legal Advisor does, is to almost protect the defense counsel from those that don't understand the system and don't understand the process. In the almost 3 years that I was the appointing authority, there were numerous times that unknowing, un-experienced political appointees, quite frankly, would complain about comments that defense lawyers are making and should do anything to stop that. Those are--those are military officers. And in each place we told them to stay out of it,

they are doing what they should do, don't worry about it. We're not going to put the clamps on them; we're not going to stop them from talking. And I know for a fact that the Legal Advisor and I both, but the Legal Advisor especially, worked hard to ensure that happened.

I think it is especially important with commissions and that we expect military officers to understand these things and understand how this process has to work. And in the military justice system, that is to say in the courts-martial system, all we have to worry about protecting is the convening authority's neutrality for the most part and subsequently the jury's neutrality. I don't think we worry about judge or prosecutor or defense neutrality so much, at least not anymore with the creation of the defense services. But in the military commissions process by its very nature, you know, and by the type of attention it gets, you have the people in the Department of Defense and other places who are political appointees, who have interest in it, because obviously the importance of the country to national security, generally. And so they have a--let's just say they have no litigation experience. So they don't how long it takes to get a case ready to go to trial. They have no concept really of how long it takes, once you have a case ready to go to trial, or what it takes logistically to be ready here, in this room, you know, and all the various moving parts. And so I think we rely more than ever,

military officers to insert themselves and protect the process and protect the system.

There came a time when the first chief defense counsel was retiring and we needed to find somebody to become the new chief defense counsel. My Legal Advisor and I were arguing in favor of a specific person that some political appointee saw it to be inappropriate because he had a lot of defense experience and he had been the executive director of the ACLU in Maryland. And of course our view was that's perfect. That's exactly the kind of person that should be the chief defense counsel. And ultimately we were able to persuade people and that's how you ought to run the system, that's how you ought to do it.

So that shows again the various roles the Legal Advisor plays. Here is somebody who is responsible for ensuring that the prosecution function does its job, at least, and on the other hand he's ensuring and taking extra steps to ensure that the defense lawyers are protected, that nobody--that anybody that's complaining about their public comment is backed off and leaving it alone, and then goes out of his way to ensure that they get the right kind of leadership to lead the entire organization; all in the face of other people that simply don't understand the system.

Q. [COL MORRIS]: Sir, back to your experience as a Staff Judge Advocate; did you ever have goals for your prosecutors that you set as a SJA?

A. [MG ALTENBURG]: Yes.

Q. [COL MORRIS]: Did you ever, for example have time periods in which you've expected charges to be sworn?

A. [MG ALTENBURG]: I--I--I thought it was important to have a system and a process and a philosophy on this, how we were going to handle military justice regardless of how we were measured by other headquarters in terms of processing for example. And so I had a goal for them that perhaps we--I'm not sure we ever met it even once, but I mean the goal was to get on the case right away as soon as you knew about allegations or possible offenses and get the charges preferred within three days and get the case moving. The processing time in the military is measured in terms of when you prefer those charges, not when the offense occurs. It struck us that a more meaningful measure is how soon after the event are you able to bring charges.

Q. [COL MORRIS]: Sir, did the fact of having these goals and similar policies, limit your ability as the SJA to dispassionately evaluate the evidence when it then came time for you to make disposition recommendations to the Convening Authority?

A. [MG ALTENBURG]: No, I don't think it did it all. I mean I would even require them to produce prosecution memos for me that we

developed that gave them a template for a specific type of analysis of a case and the important factors in the case. And what I found is that by holding them to that kind of a standard, it informed me even better of what the case is all about and gave me a better basis for them objectively providing advice to the commander. It would also force them to identify weaknesses, you know, and sometimes the identification of a weakness would cause you to advise in favor of the accused, quite frankly when you went to the convening authority. So the--okay?

The two roles really kind of inform one another, once you understand and once you're trained to live that role as a Staff Judge Advocate and of course there is no analog in the civilian community. There just isn't one and that is why it is important for military officers to get--to do this right and to be the ones that are articulating it.

Q. [COL MORRIS]: Did you at times set or direct the terms for pretrial agreements or the negotiating limits for pretrial agreements that you gave to your counsel?

A. [MG ALTENBURG]: Yes, I recall just by way of example, I recall a first-term prosecutor telling me that it was my obligation as a Staff Judge Advocate to take the agreement that he had secured from the defense lawyer on behalf of the accused, and it was my job to persuade the Convening Authority, that he should approve that

pretrial agreement. And I closed the door and educated him as to the fact that first of all, it is the Convening Authority's case, not his; and

Secondly, I'm the Advisor to the Convening Authority. And if he wanted to ensure that his offers were accepted, he needed to talk to me first and I would tell him what the mark on the wall was, in a given case.

I had the same conversation with the chief prosecutor, who would bring a case or a certain term of years and I would say I don't think that's enough, I'll take it to the general, but I am going to recommend that he disapprove it. And so this particular fellow was going back to the trial counsel saying "you stupid guy, why did you come up with a deal like that?" Well it was because he'd agreed to it, he hadn't talked to me, so I told him "look talk to me about it. You don't have to tell the other prosecutors that you're talking to me about it. Talk to me and I will tell you what the standard is. And then you go back out there and do it."

But I mean all of this rather long-winded way of talking about the responsibilities was the Staff Judge Advocate's to advise the convening authority and I directed the prosecutors in their negotiations and when need be, I conducted negotiations.

Q. [COL MORRIS]: Directly with the counsel?

A. [MG ALTENBURG]: Directly with defense lawyers. I must say not frequently, because that just wasn't the way I like to do it, but where I thought it was critical, I would conduct a negotiation personally. I didn't like it that much when I was a prosecutor and so I was sensitive to that, but certainly and in very special cases, capital litigation, you know, was the time for the Staff Judge Advocate to talk to the defense lawyer.

Q. [COL MORRIS]: Let me ask you to step out of your testimony as an expert now and I have a couple questions in an ordinary witness sense regarding the Hamdan case before the court. You do know Colonel Davis, sir, correct?

A. [MG ALTENBURG]: I do.

Q. [COL MORRIS]: He was the chief prosecutor under--during some of your time as the Appointing Authority?

A. [MG ALTENBURG]: Yes, he was.

Q. [COL MORRIS]: And you know the key Department of Defense leadership and the Department of Defense General Counsel leadership during the time period during which you served as the Appointing Authority?

A. [MG ALTENBURG]: I do.

Q. [COL MORRIS]: Did it ever come to your attention during the time that you supervised Colonel Davis, 14 or 15 months, did it ever come to your attention during that time that he was subjected to any unlawful influence or any attempted unlawful influence?

A. [MG ALTENBURG]: No.

Q. [COL MORRIS]: Were you ever subjected to any such influence or attempted influence?

A. [MG ALTENBURG]: I was not.

Q. [COL MORRIS]: Were you made aware of comments attributed to Secretary England in September 2006 that some cases should be charged before the midterm election?

A. [MG ALTENBURG]: I never heard about that statement until some time in the last week when I learned about this motion and the fact that I would be asked to testify. Until this time, I had never heard that anything like that had ever been uttered.

Q. [COL MORRIS]: And then therefore, you would not have heard about any corrective statements that Mr. Haynes would have said at that meeting either?

A. [MG ALTENBURG]: That’s right. And to that extent I guess you could say that I was pretty well buffered as the Appointing Authority from that type of stuff because I don’t know who all knew that, nobody ever told me about that.

TC [COL MORRIS]: No further questions, Your Honor.

MJ [CAPT ALLRED]: Very good, thank you.

CROSS-EXAMINATION:

Questions by the assistant defense counsel:

Q. [MR. SWIFT]: General, the duties of the--of chief prosecutor or chief of justice include detailing counsel for a particular case?

A. [MG ALTENBURG]: Right.

Q. [MR. SWIFT]: Developing the charges in conjunction with his counsel?

A. [MG ALTENBURG]: Correct.

Q. [MR. SWIFT]: Or her counsel?

A. [MG ALTENBURG]: Yes.

Q. [MR. SWIFT]: Supervisor--being their supervisory attorney for ethics purposes?

A. [MG ALTENBURG]: Correct.

Q. [MR. SWIFT]: Do they have any other duties if--when they're not trying the case themselves?

A. [MG ALTENBURG]: Training.

Q. [MR. SWIFT]: Now, if an SJA takes an active role and begins to detail counsel or direct who the detailed counsel are, that’s permissible under the Army reg?

A. [MG ALTENBURG]: I believe so.

MJ [CAPT ALLRED]: I’m sorry, what was the question? The SJA can direct who the detailed prosecutors are?

ADC [MR. SWIFT]: Yes, Your Honor. And the answer I believe was that's correct?

A. [MG ALTENBURG]: Yes.

Q. [MR. SWIFT]: Can the SJA direct what the charges will be?

A. [MG ALTENBURG]: Well I think, well I think he can, he can--he or she has to be careful when they start down that road in many ways in terms of how actively one supervises prosecution, but only in the sense that you end up being disqualified to act as the SJA.

Q. [MR. SWIFT]: And can they then make the supervision--become perso--can they act as the supervisory attorney for the purpose of ethics that is they resolve ethical conflicts for trial counsel?

A. [MG ALTENBURG]: Yes, I believe so.

Q. [MR. SWIFT]: Now, so the SJA can in fact become the equivalent of the chief prosecutor?

A. [MG ALTENBURG]: Your words, but----

Q. [MR. SWIFT]: ----They can assume all the same duties----

A. [MG ALTENBURG]: ----They can certainly play the role, certainly plays as--can play a strong role. I think that on the one hand we're talking about what the law allows the Staff Judge Advocate to do and on the other hand there is a question of leadership style and so there is--there is lots of things that a Staff Judge Advocate can do that don't involve--that--that involve incredible micromanaging, let's put it that way.

Q. [MR. SWIFT]: So----?

A. [MG ALTENBURG]: ----and no one would say that's the way that you want to run the organization. Can you do that? Sure I mean you can--you can yell at subordinates, you can tell a subordinate to do things three different ways, and--but it doesn't mean that you're an effective leader; it just means working within your authority.

Q. [MR. SWIFT]: So basically, within the authority of the SJA they can assume the job of the chief prosecutor?

A. [MG ALTENBURG]: That doesn't feel good to me to say that. I'm at that's what I say you're----

Q. [MR. SWIFT]: ----What responsibility that the chief prosecutor has can they not take over?

A. [MG ALTENBURG]: I can't think of one.

Q. [MR. SWIFT]: Okay.

A. [MG ALTENBURG]: But there may be one.

Q. [MR. SWIFT]: In reviewing--well--now in your opinion under the Uniform Code of Military Justice, that would not violate Article 37, being undue influence. Is that appropriate?

A. [MG ALTENBURG]: I think that's probably true.

Q. [MR. SWIFT]: Are you familiar with the Military Commissions version of Article 37?

A. [MG ALTENBURG]: The part of the statute that you read to me earlier today?

Q. [MR. SWIFT]: Yes, sir.

A. [MG ALTENBURG]: Yes, I have a passing familiarity with that provision.

Q. [MR. SWIFT]: You'd noted that it changed one particular area and we went over that it had changed that it had added to what would constitute unlawful command influence that the exercise of professional judgment by a trial or defense counsel, would count?

A. [MG ALTENBURG]: Correct.

Q. [MR. SWIFT]: That's not in the UCMJ?

A. [MG ALTENBURG]: That's right.

Q. [MR. SWIFT]: So the Army regulation and the SJA system, wherein they control the prosecution or can micromanage the prosecution has never been tested within the meaning of the new Article passed by Congress?

A. [MG ALTENBURG]: That's true. I think that certainly our thinking after the M.C.A. was passed and we took special note of that language was on the one hand by the language alone one could argue that the chief prosecutor can't tell a prosecutor what to do and on the other hand the driving philosophy of the people who were pushing M.C.A. was make it like courts-martial, make it as much like courts-martial as possible which would argue in favor of a legal advisor analog Staff Judge Advocate.

Q. [MR. SWIFT]: And certainly--not to debate the legal point, understanding that they had had that philosophy yet they had added another set of language and the argument might be made, they didn't mean anything by it or the argument certainly you have to agree, the sentence was not written for no purpose whatsoever. Would you agree with that?

A. [MG ALTENBURG]: I agree with that.

Q. [MR. SWIFT]: Now inside the system that you ran, the legal authority or the appointing authority, why we use that name I have no idea, but----

A. [MG ALTENBURG]: ----I believe it's historical that courts-martial were convened and Military Commissions, historically, were appointed; going back 200 years.

Q. [MR. SWIFT]: Thank you.

A. [MG ALTENBURG]: Yes, sir.

Q. [MR. SWIFT]: The appointing authority's office, the SJA was in your office or the Legal Advisor, I'm sorry----

A. [MG ALTENBURG]: ----The Legal Advisor was in our suite of offices, yes.

Q. [MR. SWIFT]: Was he under your command?

A. [MG ALTENBURG]: Command is a term of art, but he was certainly under my direction.

Q. [MR. SWIFT]: He reported to you?

A. [MG ALTENBURG]: That’s correct.

Q. [MR. SWIFT]: I believe we discussed that there probably was never a fitness report done for General Hemingway, but if one had been done, you would have prepared it?

A. [MG ALTENBURG]: I was to be his rater and senior rater, that we--we had described a system like that we just--there were--there were several people in the organization that I never actually wrote an evaluation report on, but I technically was their rater or their senior rater.

Q. [MR. SWIFT]: And I believe your earlier testimony was that the uniform presence of General Hemingway and his leadership allowed him to resist certain, perhaps uninformed efforts of political decisions that occurred during the period of time to say "no, that’s appropriate within the process." Is that correct?

A. [MG ALTENBURG]: I am not sure that I would characterize all of that as political decisions as much as--frequently it was political appointees, often times it was below the political appointee level, but there was a--a lack of understanding of first of all military law, generally; military justice, more particularly commissions for sure and litigation in general.

I mean just how hard it is to put things together and then when you come to the logistics part of it, it was even more

complicated and there were just people that didn’t understand and--and that’s when my Legal Advisor and I had to go talk to people and explain to them the facts of life. Explain to them why you wanted the defense lawyers to be able to speak to the public and be able to make comments, even when it might appear that they were going beyond the law in some cases, I mean--I mean, we did--did just--we were convinced that everybody needed to have a long leash and we weren’t going to criticize defense lawyers. It was just too important to the overall process. And any criticism would have been taken out of context and--and frequently there were people in various departments, not just Defense, who because of their lack of experience and knowledge of military law simply didn’t understand, they didn’t get it.

They have watched lots of movies and they thought in the military, with its hierarchal structure, if you tell somebody to do something they do it, automatically. There would be no resistance. They just didn’t understand how we could allow this to occur and why we couldn’t just make things happen in a week instead of two weeks or two weeks instead of three months. Why can’t you just force it? And so we had to be the ones to educate them, to keep them from criticizing others, keep them from saying silly things and alike.

Q. [MR. SWIFT]: You--the phrase you used I believe was “my Legal Advisor”?

A. [MG ALTENBURG]: Correct.

Q. [MR. SWIFT]: Now, Colonel Morris referred to a new system in 2007, where in the Legal Advisor senior rater is not gen--is not Judge Crawford?

A. [MG ALTENBURG]: Right.

Q. [MR. SWIFT]: The current Convening Authority. In fact his advisor is again in the DOD General Counsel’s, his rater and senior rater?

A. [MG ALTENBURG]: Correct.

Q. [MR. SWIFT]: Are you aware of any SJA system in the military where in we found the ability to be a prosecutor and a SJA, where the SJA reports to someone else for their rating rather than the Convening Authority?

A. [MG ALTENBURG]: No, except for the one exception that I mentioned in our--in our conversation earlier and that is at least in my experience sometimes the Staff Judge Advocate is rated by the Chief of Staff. But always senior rated by the Convening Authority, that’s true.

[END OF PAGE]

Q. [MR. SWIFT]: Now, you would agree that the person who is the senior rater and the rater in this--in a chain of command, has command authority with regard to that person, that that's essential in making the rating that you have a supervisory capacity?

A. [MG ALTENBURG]: Well again I wouldn't say command authority.

Q. [MR. SWIFT]: Supervisory authority?

A. [MG ALTENBURG]: Supervisory.

Q. [MR. SWIFT]: Now, if the--a civilian directs the SJA on what charges to bring, directs what trial counsel to use, directs what their ethical obligations will be, is that person not also fulfilling the roles of the senior trial counsel?

A. [MG ALTENBURG]: Well, I guess he or she would be trying to do that. My, I mean, my automatic response, I've got to just tell you, my reflexive response to that is that the Legal Advisor would tell that person to pack sand. I'm going to take care of this. I'm going to advise the convening authority. I'm going to make sure the prosecution is doing their job. You stay out of it. And if he was reminded that--that he is being rated by this person, he would simply say you don't get it. You're a civilian, you may or may not be a political appointee, this is different you don't understand and I'm going to do it my way.

Q. [MR. SWIFT]: So what you are saying is that in your automatic responses that they would defy their senior raters' wishes?

A. [MG ALTENBURG]: I think they--I think they might, depending on what the senior rater wanted. I mean it would depend on what kind of a line it crossed. It just happens in the case that we are talking about the senior rater is also a Brigadier General in the reserves, so he probably understands the system fairly well.

Q. [MR. SWIFT]: Would you agree with me coming back, that if those directions were followed, the person didn't do it and if the individual, General Hartmann or any other person who is acting as the SJA under this system follow the directions on who the counsel should be, what the charges should be, and what the ethics were, that we would have a de facto civilian prosecutor?

A. [MG ALTENBURG]: We would if we did that, yes. But the fact that that person writes the ticket or is the rater for the Legal Advisor, doesn't necessarily mean that he is going to play that role, just means that he does an evaluation.

I think that the military services have probably lots of examples where there is a senior rater that--that has nothing to do with that person's job, doesn't really know much about it, you know, in some of the joint commands and in some of the diverse commands--attaché and alike, you know, they get rated by somebody based on

somebody's reports for them. They're not really directive in terms of supervising their day-to-day operations.

Q. [MR. SWIFT]: Are you aware of an SJA who has in its military justice function, a senior rater who doesn't have an idea what their job is?

A. [MG ALTENBURG]: I can't think of one right now and there may not be one, but I would allow for the possibility that there is one.

ADC [MR. SWIFT]: No further questions.

MJ [CAPT ALLRED]: Thank you.

REDIRECT EXAMINATION

Questions by the trial counsel:

Q. [COL MORRIS]: Sir, Colonel Davis has testified about his intimate involvement with drafting and passage of the Military Commissions Act. Is it fair to say you had some involvement in that process as well?

A. [MG ALTENBURG]: I think so.

Q. [COL MORRIS]: You were consulted from time to time in the drafting process?

A. [MG ALTENBURG]: Yes.

Q. [COL MORRIS]: Was the Manual for Military Commissions, the drafting of that started at your initiative?

A. [MG ALTENBURG]: Well there's--there's two Manuals of Military Commissions. My organization had tried to change the

Presidential Military Order and draft to a potential statute and drafted a Manual for Military Commissions that we tried to get implemented in 2005.

Q. [COL MORRIS]: Well before the Hamdan decision?

A. [MG ALTENBURG]: Well before the Supreme Court decision.

So we had that on the shelf, so to speak. Once the Military Commissions Act was passed and this is another example of some of the responses that I gave to Mr. Swift, once the act was passed, there was great pressure by people that didn't know any better to produce, you know our response to it, the implementing regulations. I mean it was just absurd request in terms of the timeline that they wanted from the time that the president would sign the legislation until they wanted us to be ready to go. And you know, you just had the military lawyers would go to the right people and tell them in an appropriately respectful manner that they were making a silly demand and we weren't going to meet it and they needed to wait for us to get it done correctly.

And so that was the work that we did on the military--the Manual for Military Commissions. So it was--that's the Manual for Military Commissions that implements the Military Commissions Act. We have an earlier version before there was a Military Commissions Act that we never really used, although we borrowed heavily from it,

you know, but we had to make it consistent within the law, so that was what was different.

Q. [COL MORRIS]: Am I correct that you interpret the language of the Military Commissions Act as encouraging commissions to be like courts-martial other than the areas in which particular exclusions are made, such as Article 10, Article 31?

A. [MG ALTENBURG]: That's--that's what I thought they were all about and they unfortunately kept using the word UCMJ, when what they meant was courts-martial because military commissions have always been, since 1950, part of the UCMJ. So we recognize that when critics, said, "we wanted to be more like the UCMJ," what they really meant was we wanted it to be more like courts-martial.

Q. [COL MORRIS]: In any of the discussions you had or were a party to in the process of developing the Military Commissions Act during that short period in 2006; did you ever have any discussions about making the chief prosecutor essentially a District Attorney, somebody with unreviewable, independent authority to judge--to charge?

A. [MG ALTENBURG]: There might have been a discussion of that, but that there was certainly no intent for that, from--from my perspective or the Legal Advisor's perspective or quite frankly in my recollection even the chief prosecutor's perspective. I think the chief prosecutor at the time seemed very pleased with the Staff Judge

Advocate role that the Legal Advisor played. My recollection is that the concern was for perhaps even the Department of Justice attorneys or other people in the Department of Defense that was--that's what drove the request for that language in my recollection.

Q. [COL MORRIS]: That last paragraph in the command influence language?

A. [MG ALTENBURG]: Correct.

TC [COL MORRIS]: Thanks, Sir.

Nothing further, Your Honor.

MJ [CAPT ALLRED]: I'm sorry; would you clarify that last answer for me?

What was it that drove the request for that language in your opinion?

WIT [MG ALTENBURG]: My recollection and you know, Colonel Davis could answer this directly, but my recollection is that what drove that language----.

MJ [CAPT ALLRED]: ----And when we say that language we are referring to the last phrase?

WIT [MG ALTENBURG]: That UI language, yeah. What drove that was concern that others other than military people would try to influence the chief prosecutor's decision making.

MJ [CAPT ALLRED]: I see.

WIT [MG ALTENBURG]: And especially, I think quite frankly it started with the Department of Justice attorneys and with political appointees.

MJ [CAPT ALLRED]: Okay. Mr. Swift, any final questions?

ADC [MR. SWIFT]: I have no follow up, sir.

EXMINATION BY THE COURT

Questions by the military judge:

Q. [CAPT ALLRED]: General, earlier in your testimony you described the beginnings of the process that culminated in the enactment of the M.C.A. and you used the word “we” to describe a group who wanted the M.C.A to be like the court-martial system.

Do you remember that testimony that you gave?

A. [MG ALTENBURG]: I remember that generally, that section, yes, sir.

Q. [CAPT ALLRED]: Who were the "we" that were involved in those discussions?

A. [MG ALTENBURG]: The--the Office of Military Commissions, myself, my Legal Advisor, and several staff attorneys. Actually in late 2004 even before the stay by the District Court in the Hamdan decision, had started talking about creating a modification to the Presidential Military Order. Specifically to ensure that commission members couldn’t overrule the judge. A statute to provide military commission procedures similar to Article 135 for courts of inquiry,

we even entitled it 135(a). And it was fairly brief as is 135. And the Manual for Military Commissions that was ultimately about, you know, over a hundred pages long. And we worked that all the way through 2005 and were not able to persuade people in government to make those kinds of changes; we made some changes, but not the more serious changes.

And then we waited for the litigation to play out, although you may be aware that we referred several other cases to trial and there were hearings going on in 10 or 11 cases down here in early 2006. Once the manual for--for--or the Military Commissions Act was passed then we--was the Office of Military Commissions, the Appointing Authority's office. And so again, that would have been myself and my Legal Advisor and several staff attorneys. And then we also, there were--there were representatives from each of the judge advocate general, sometime from criminal law and international law people from the from the General Counsel's office, and then there was members basically a DoD working group put together and coordinating with Department of Justice also. So there were--there were lots of moving parts and lots of proposals and suggestions and this is what the implementing regulation of the M.C.A. look like. And that occurred from the time that the Act itself passed, I take that back, that was happening while we were debating arguing and writing literally the M.C.A. and then once the M.C.A. passed, then there was

pretty much what was going the appointing authority's office and our people were the ones that were directly responsible for putting together the implementing the regulations

Q. [CAPT ALLRED]: So did you recommend then to the members of Congress or whoever was drafting the M.C.A. that this system you and your staff had developed which mirrored in some ways the military justice system.

Did you recommend that to them; did you feel that was what they also intended?

A. [MG ALTENBURG]: I definitely think that's what they intended. I didn't speak directly with any members of Congress. I was an employee of the Department of Defense as an Appointing Authority and there were other people in the Department that spoke for the Department. So the Department had positioned, I guess, at the DEPSECDEF level. And the Justice Department, they had people and they were working on it also. Essentially, what we have done was, in 2004, when he saw it was we said, let's just look at the UCMJ and the manual and it looked like it will work for commissions, we'll have this on the left side and we'll bring it over to the right side. And we kept doing that and then get to a part, where we said, well, that won't work, that's different. Let's not do that, we need to allow "hearsay" for example. And then we write a two or three pages analysis of why we're not going to forbid hearsay and with an

explanation of that. And so we did that quite frankly, through the whole manual. And in that way, we came up with a system that was like courts-martial; but allowed for the differences that we thought was important for the military commissions.

Q. [CAPT ALLRED]: So is your opinion then that this similarity between the legal office, the Legal Advisor and the Convening Authority, and the SJA and the Convening Authority was not simply your office's preference, but that was in fact folded into the legislation as it was drafted?

A. [MG ALTENBURG]: That's what I believe. I believe that the staffers and the congressmen, more significantly the congressmen, and the senators that was their goal to make it as courts-martial like as possible. I say that even though they don't name the Office of the Legal Advisor, they don't talk of that in staff--there is no mention of a Legal Advisor. I say that in spite of the fact that he or she is not specifically mentioned because I think the overall thrust, what was driving that, quite frankly from the Supreme Court decision and politically was, we wanted to make this as close to as court-martial as possible. And you can't get there from here without a Staff Judge Advocate.

MJ [CAPT ALLRED]: Yes.

I think that's the only question that I had.

Does counsel have any in light of mine?

DC [MR. SWIFT]: I do, Your Honor.

RECROSS-EXAMINATION

Questions by the assistant defense counsel:

Q. [MR. SWIFT]: The M.C.A., the Military Commissions Act contain no equivalent Article 34 advice, did it?

A. [MG ALTENBURG]: I don't think so.

Q. [MR. SWIFT]: In the M.C.A. you said, "Driven from a court-martial perspective," it basically deleted things, correct? Kept everything that was workable, deleted some things that were viewed to be unworkable, like hearsay.

A. [MG ALTENBURG]: I guess so. Personally, I don't like the M.C.A.; I like 135(a) a lot better. It's more simple and it was more in keeping with what we've done historically to the UCMJ, 'cause it would've allowed for military commissions, 40 years from now. What they did was subpart 47(a), create something and applies only to GITMO and I think that was silly.

Q. [MR. SWIFT]: Last question; are you aware of anything, any provision that was borrowed or substantially, from the Uniform Code of Military Justice, other than the section regarding unlawful command influence where they added language, they added protections?

A. [MG ALTENBURG]: No. I'm not, but that doesn't mean that I think there isn't any. It just--I'm not familiar with one.

ADC [MR. SWIFT]: Nothing further, Your Honor.

MJ [CAPT ALLRED]: Thank you. Colonel Morris?

TC [COL MORRIS]: Nothing, sir.

MJ [CAPT ALLRED]: Could we release the General to return to his duties?

DC [LCDR MIZER]: Yes, Your Honor.

[The witness was thanked, excused, and left the courtroom.]

MJ [CAPT ALLRED]: Okay, it's 1730. Are there any other witnesses or evidence that needs to be received today?

DC [LCDR MIZER]: Your Honor, we just have one last witness and we would have Mr. Berrigan testify tomorrow morning if it’s agreeable with the government.

MJ [CAPT ALLRED]: I would ask I guess then the same question that I asked a few moments ago. I received yesterday an e-mail, an affidavit from Ms. Crawford, the Convening Authority in this case. I don't know how that was expected to be used and whether if I was to consider that as evidence on this motion or not.

TC [COL MORRIS]: Yes, I would like to, Your Honor. If this is as good a time as any to introduce a couple of other documents--hers directly and offer others as--I ask you to take judicial notice of some regulatory extracts. Let me first, show again to the defense the affidavit from Judge Crawford **[trying to place the documents onto the overhead, to show the military judge and the defense].**

MJ [CAPT ALLRED]: You don’t need to put it up on that electronic gizmo if you just want to show it to the pros--to the defense and hand it to me.

[Colonel Morris handed the documents to the military judge and the defense to examine.]

DC [LCDR MIZER]: There is no objection from the defense with respect to Ms. Crawford’s affidavit.

MJ [CAPT ALLRED]: Okay, the affidavit of Judge Crawford will be admitted as the next Appellate--well, we will attach it to Prosecution’s Response to this motion, as whatever appellate exhibit that’s numbered as.

[The court reporter indicated that it was numbered as Appellate Exhibit 186.]

MJ [CAPT ALLRED]: 186?

[The court reporter nodded in response to the military judge.]

MJ [CAPT ALLRED]: All right.

TC [COL MORRIS]: Next, Your Honor, several other exhibits to which the defense said it has no objection. Next is what----

MJ [CAPT ALLRED]: ----have they not been marked yet? They haven’t been marked.

TC [COL MORRIS]: They’ve been stamped but not marked, they need numbers, Your Honor.

MJ [CAPT ALLRED]: Okay if there are--you’ve seen these, Defense? This stack of exhibits the Colonel is offering?

DC [LCDR MIZER]: We have, Your Honor.

MJ [CAPT ALLRED]: Okay, without objection, those will be admitted into evidence that the defense will be--I think if those are evidence you want considered on this motion, we can just attach them as enclosure to your response rather than marking them with additional----

TC [COL MORRIS]: ----Sure, what ever makes sense to the court.

MJ [CAPT ALLRED]: Okay. Good; I’ll consider those as admitted on the motion as well.

TC [COL MORRIS]: And then depending on the next defense witness, the government has nothing else otherwise, to offer.

MJ [CAPT ALLRED]: Okay. Well, I think we've started a trend of not staying until 9 o'clock at night or later and recess the court now until 9 o’clock in the morning, fair enough?

TC [COL MORRIS]: Yes, sir.

DC [LCDR MIZER]: Yes, sir.

MJ [CAPT ALLRED]: We’ll see you tomorrow morning at 9.

TC [COL MORRIS]: All rise.

MJ [CAPT ALLRED]: The court is in recess.

[The R.M.C. 803 session recessed at 1734, 28 April 2008.]

[The R.M.C. 803 session was called to order at 0916, 29 April 2008.]

TC [COL MORRIS]: All parties present in the court when it closed are again present, Your Honor.

MJ [CAPT ALLRED]: Very good, thank you. Okay, yesterday we had the defense presenting evidence on the Unlawful Influence motion.

Lieutenant Mizer, let's see--I guess before we get----

DEFENSE INT: ----They can't hear you upstairs, Your Honor.

MJ [CAPT ALLRED]: Can't hear me upstairs? Is there a switch here that's been turned off?

Good morning, can you hear me now?

The interpreters can't hear me, even though my voice is booming throughout the courtroom

DEFENSE INT: Right, Right.

MJ [CAPT ALLRED]: Someone’s been messing with the electrons overnight? Okay?

Wherever our technology guy is, he needs to flip the switch that sends my voice into the interpreters’ area.

[Fixing the microphone for the military judge.]

MJ [CAPT ALLRED]: Is it working now?

DEFENSE INT: They say that they are working on it.

MJ [CAPT ALLRED]: They can hear now?

DEFENSE INT: Yes, yes.

MJ [CAPT ALLRED]: Okay. Good. We're ready to continue with the defense presentation of evidence on the Unlawful Influence motion.

Yesterday, I authorized Mr. Swift to review the testimony of Commander Stone and Colonel Britt from the Tate Report, and-- directed the defense to return their copy to the prosecution.

I guess I didn't understand what you wanted it for. I thought you just wanted to read it and be familiar with it before you examined General Altenburg, but in fact, I suspect you want to do something different with that.

Commander Mizer, will you tell me; what is the defense's position with respect to the Tate Report?

DC [LCDR MIZER]: Yes, Your Honor, we intend to offer those two transcripts of that testimony as attachments to our Unlawful Command Influence motion which is D26.

MJ [CAPT ALLRED]: Okay. Where are those?

DC [LCDR MIZER]: I have them here.

MJ [CAPT ALLRED]: You have the copies.

DC [LCDR MIZER]: I do, Your Honor. And I would like to state for the record that we've made no additional copies per this Court's direction

MJ [CAPT ALLRED]: Okay. Do you want to hand them in now; have them marked as----

DC [LCDR MIZER]: Yes, Your Honor.

MJ [CAPT ALLRED]: Let's see, they have actually been considered already and they should be appellate exhibits from the motion where you wanted access to this investigation several months ago. If you don't mind giving me those copies, I'll use those to read from instead of having to go find the disk or wherever they were, and do you need access to any other parts of the Tate investigation to litigate this motion?

DC [LCDR MIZER]: Ideally, Your Honor, we would have had access to that investigation, but given the time constraints before this Court we believe that we no longer need that access. We believe that testimony will be sufficient.

MJ [CAPT ALLRED]: Okay. Because there's time this afternoon or tomorrow if you want to look at more parts of it before I make my decision, but I do hope to resolve this motion within the next week or so; and so there is some time but not much more than that. Are you satisfied that this is everything you need?

DC [LCDR MIZER]: Yes, Your Honor, and if our position changes we'll let you know----

MJ [CAPT ALLRED]: ----Okay.

DC [LCDR MIZER]: ----on that issue.

MJ [CAPT ALLRED]: Well, I have here a sworn statement of Lieutenant Commander Timothy Stone and the sworn statement of

Lieutenant Colonel William Britt, two documents that I will consider on the unlawful influence motion as if the testimony had been given in this proceeding, and then I'll make sure the court reporter has a copy of--or trial counsel would you make sure the court reporter has a copy of the disc, whatever it was that I reviewed in January that had all the statements and affidavits and things on it, both the 2004 report that I reviewed and this Tate Report.

TC [COL MORRIS]: Yes, sir.

MJ [CAPT ALLRED]: You have those? Okay.

I think that resolves that.

What you have next for us Colonel--Commander?

DC [LCDR MIZER]: The defense calls Mr. Michael Berrigan to the stand.

MICHAEL J. BERRIGAN, Civilian, was called as a witness for the defense and sworn and testified as follows:

DIRECT EXAMINATION

Questions by the defense counsel:

Q. [LCDR MIZER]: Good morning, sir.

A. [MR. BERRIGAN]: Good morning.

Q. [LCDR MIZER]: Can you state your name and spell it for the record?

A. [MR. BERRIGAN]: My name’s Mike Berrigan, Michael J. Berrigan, B-E-R-R-I-G-A-N.

Q. [LCDR MIZER]: And where do you work, sir?

A. [MR. BERRIGAN]: I'm the Deputy Chief Defense Counsel at the Office of the Chief Defense Counsel for Military Commissions in Washington D.C. in Rosslyn, Virginia.

Q. [LCDR MIZER]: Sir, did you receive an e-mail from Colonel Wendy Kelly on January 29, 2008?

A. [MR. BERRIGAN]: Yes, I did; it was in the mid-morning time.

Q. [LCDR MIZER]: And what was the nature of that e-mail?

A. [MR. BERRIGAN]: It was a set of draft charges that were eventually the 9/11 charges against the six individuals that were charged on the 11th of February. It was a draft set of charges that have been forwarded to me.

Q. [LCDR MIZER]: The charges were attached to the e-mail

A. [MR. BERRIGAN]: They were attached to the e-mail; yes.

Q. [LCDR MIZER]: Who were the addressees on that e-mail, sir, if you can recall?

A. [MR. BERRIGAN]: The addressees were--it was forwarded to me from Colonel Wendy Kelly, who is, I think her title now is Operations, Chief of Operations, Operations Director for Office of Military Commissions. She works for General Hartmann. She was forwarding an e-mail which came from the Army Reserve Majors, Major Gifford there was another Army Major, Army Reserve I forget his name at this moment. She was forwarding an e-mail from them with the

charges to what turned out to be--he was attempting to forward to a guy named Mike Breslin, who is another attorney that works for General Hartmann, who is a retired Air Force JAG apparently. And when she typed in "BE" or something like that my name popped up instead of his and that's how I got on it.

And also on the e-mail was a Jason Foster, who's another attorney that works for General Hartmann in the Convening Authority's office.

Q. [LCDR MIZER]: Were any of the addressees on that e-mail outside of the office of the convening authority?

A. [MR. BERRIGAN]: No, they all seem to be internal to the people that work for General Hartmann in the Office of the Convening Authority.

Q. [LCDR MIZER]: What did you do upon receiving the e-mail, sir?

A. [MR. BERRIGAN]: Well, I was not sure what it was initially. We had a farewell luncheon for somebody. I was about to go to, but I looked at it and it seemed like that it might be an issue, and I was concerned because having done a good bit of civil litigation, the issue of inadvertent disclosure is something that comes up fairly frequently.

So I notified Colonel David, who is my boss, Chief Defense Counsel, that I had received this, which may cause some issues.

And I started to look at what my professional responsibilities were under the rules that govern my conduct as an attorney.

I am licensed by the State of Georgia, and the Georgia State Bar rules govern, but I didn't have a lot of time to do that before I had to leave for the luncheon, so--I then, either at that point or when I got back from lunch, I notified Colonel Kelly that I had received this e-mail and asked her whether it was in fact inadvertent as it seemed like it probably was.

Q. [LCDR MIZER]: Were you eventually able to research the ethical issues and consult with your bar?

A. [MR. BERRIGAN]: Yes, I did, I researched it, there was an article that had been written and published in the Georgia Bar Journal on this issue and it seemed pretty clear what my obligations were and options were, but I also talked with an ethics attorney at the State Bar of Georgia on this issue to make sure that I was reading the law correctly.

I talked with Colonel David again about what my options were, what I thought that I was going to do and then I had another series of e-mails exchanges, I think with Colonel Kelly. I think we also talked on the phone.

Q. [LDCR MIZER]: Now after those e-mail exchanges with Colonel Kelly; did you receive a letter from General Hartmann?

A. [MR. BERRIGAN]: Yes, this happened on a Tuesday, and Wednesday. And that following Saturday, we were supposed to fly down here to Guantanamo for a session. I forget which cases were being heard then. When I arrived at the Andrews AFB terminal, Colonel David handed me a copy of a letter that he had received via e-mail the evening before.

It was an e-mail letter, a memorandum from General Hartmann to him, to Colonel David. And cc'd on the letter were Mr. Koffsky, who is a--he’s the Deputy General Counsel for Personnel and Health Policy. He’s a three star General equivalent, my understanding, within DOD, he is our--he is Colonel David's boss. He is my senior rater.

Also cc'd on that memorandum was Mr. Paul Nye, who at that time was the equivalent to Mr. Koffsky, but he was in charge of Office of Legal Counsel; I believe it is called and he was the individual who supervises--as we heard yesterday--supervises General Hartmann and the prosecution function.

Q. [LCDR MIZER]: What did the letter say, sir?

A. [MR. BERRIGAN]: Well the letter was about this inadvertent disclosure of these draft charges and it appeared to be offering legal advice about what we should do as defense counsel with respect

to having received these charges and essentially demanding that they be returned. They went through some legal analysis, which was not on point and not accurate and had not been appropriately researched and, but it was what it was and they fired to our bosses and attempted to have us take a certain course of action.

Q. [LCDR MIZER]: How did you perceive the letter, sir?

A. [MR. BERRIGAN]: I perceived it as typical General Hartmann from my dealings with him since he has been in that position, a bullying effort is what it was.

Q. [LDCR MIZER]: Have you had any other interactions with General Hartmann where he has attempted to influence the Office of the Chief Defense Counsel?

A. [MR. BERRIGAN]: Yes, we had. Prior to this incident back in the Fall, we were coming down for a hearing in the Khadr case and at that point there were some serious issues, internal defense counsel issues with civilian defense counsel in Canada and so forth, that we had multiple sessions with the Military Judge on. And at that time the issue was whether one particular Canadian counsel would come down for a scheduled hearing. And we had had, as I recall, an ex-parte session with the Military Judge on this issue and Colonel David, Colonel David, the Chief Defense Counsel, had made the decision not to allow this particular Canadian defense counsel to come down for that hearing. And the prosecution had decided--the prosecution

decided initially, I believe they were considering having the Judge order this Canadian counsel be brought down, as I sit here, I don't recall whether they actually asked the judge to do that, and he declined or they decided not to do that.

We believed that the matter was settled, but then the Convening Authority's Office, General Hartmann, took it upon himself to order the Canadian counsel be brought down despite the Detailed Defense Counsel, Lieutenant Commander Kuebler's wishes that he not and the Chief Defense Counsel direction that he not. And that resulted in an exchange between Colonel David and General Hartmann about what the proper role of the Legal Advisor was and that he should not be interfering with the defense's function and what the role of the Chief Defense Counsel was.

Q. [LCDR MIZER]: Were there any other incidents, sir?

A. [MR. BERRIGAN]: Yes, on that same, that same hearing in the Khadr case, there was an incident where after a hearing, Lieutenant Commander Kuebler apparently wandered into the prosecution space and some of the prosecutors took offense at that and somehow or another General Hartmann, who I believe was up in Washington at the time, got wind of it and called down about 11:30 at night; actually one of the prosecutors, Captain Petty had called and said that General Hartmann wanted to talk to the Chief Defense Counsel.

Colonel David and I were sharing an East Caravella room and he had already gone to sleep for the second time and I took the call. I called General Hartmann and General Hartmann expressed some concern about the incident. I think his exact words were "What the heck is going on down there?" I had no idea what he was particularly referring to, but he was concerned apparently about Commander Kuebler walking into the prosecution space. That seemed somewhat unusual for a one-star General and a Legal Advisor to be doing that, but that's another episode.

Q. [LCDR MIZER]: Did you hear from Mr. Koffsky about that episode?

A. [MR. BERRIGAN]: Yes, the next day morning when Colonel David and I came into the office upstairs. Colonel David called Mr. Koffsky to give him a heads up that this happened the night before and General Hartmann had already called Mr. Koffsky and told him a version of events, which was at odds with what had actually happened and I prepared and forwarded a Memorandum for Record on the events that had actually transpired and that was the last that I've heard of that incident.

TC [LCDR MIZER]: No further questions, Your Honor.

MJ [CAPT ALLRED]: Can I ask you to remind me who Mr. Koffsky was?

WIT [MR. BERRIGAN]: Mr. Koffsky is the Deputy Chief--Deputy General Counsel for Personnel and Health Policy. He is the three-star equivalent, SES equivalent, who is the general officer, overseer of our office. He is Colonel David's boss, so to speak.

MJ [CAPT ALLRED]: Okay, Colonel, go ahead.

CROSS-EXAMINATION

Questions by the trial counsel:

Q. [COL MORRIS]: Sir, isn't it true that General Hartmann has been personally involved in ensuring that the defense counsel have appropriate working space in Washington D.C.?

A. [MR. BERRIGAN]: Yes, I think that's fair to say.

Q. [COL MORRIS]: And that he personally put on pressure to speed up the completion of the SCIF, the additional location for your counsel to work in?

A. [MR. BERRIGAN]: Yes, I'd say that is fair to say.

Q. [COL MORRIS]: Isn't it also true that he has been an advocate for your obtaining qualified personnel, qualified military advocates to work on the defense team?

A. [MR. BERRIGAN]: I'm not so sure about that, he has made efforts, but they seem to be more on what he wants done on his timing rather than us. It's not a consultative process.

Q. [COL MORRIS]: And you're aware that he has for example, has personally advocated that Colonel David should be allowed to interview and reject any counsel who is nominated by one of the services to work as a defense counsel?

A. [MR. BERRIGAN]: No, sir. I am not aware of that, but I know that has been our long-standing policy and that has been agreed upon. I'm not personally aware that he took that position.

Q. [COL MORRIS]: And you're aware that he has made repeated and personal appeals to the Judge Advocates General to give the best possible advocates to this process, but in particular to the defense?

A. [MR. BERRIGAN]: I'm not personally aware of that, but that certainly could have happened.

TC [COL MORRIS]: Nothing further, sir.

MJ [CAPT ALLRED]: Thank you, Colonel.

DC [LCDR MIZER]: Nothing from the defense, Your Honor.

EXAMINATION BY THE COMMISSION

Questions from the military judge:

Q. [CAPT ALLRED]: Is General Hartmann responsible for funding your office?

A. [MR. BERRIGAN]: Yes, sir; we have no budget and no funds, everything goes through the Convening Authority's office and then if they don't fund it then we make motions to the judges if there's cases----

Q. [CAPT ALLRED]: ----I don't mean funding for litigation, but for copiers and paper?

A. [MR. BERRIGAN]: Everything is everything--we have no budget at all, sir. Everything comes from OMC.

Q. [CAPT ALLRED]: And by OMC, you mean the Convening Authority?

A. [MR. BERRIGAN]: Yes, sir.

Q. [CAPT ALLRED]: Or General Hartmann?

A. [MR. BERRIGAN]: All the people that work for General Hartmann do all that, everybody falls under him.

Q. [CAPT ALLRED]: Colonel Morris' question asked I guess about whether General Hartmann has been a good boss in that respect, can you comment on that?

A. [MR. BERRIGAN]: Yes, sir. I would say that, I don't know what type of boss he has been for the prosecution. He's not of course the defense's boss, but from my perspective having been here 14 months the entire time he has been here. The clear message we get is that these cases will go forward on the timing that the government wants them to go forward and the defense is never consulted about anything that's core to us.

Translators for example, they've terminated translator contracts recently, that has a tremendous impact on our ability to form attorney-client relationships to continue to have them operate effectively and done without consulting the defense at all. Same

thing with personnel manning. Colonel Morris asked me about requests, I was told yesterday by Colonel David up in D.C. that he stumbled upon a request for additional counsel that was being submitted that we were never consulted about at all. So it's when General Hartmann wants something done. And they can dress it up, as for the defense that's what happens, but it's not in my view, an honest, concerted effort to give the defense what we want because we are never asked and with respect to the SCIF. The SCIF----

MJ [CAPT ALLRED]: ----Wait just a moment. You don't have the benefit of this little yellow light?

WIT [MR. BERRIGAN]: No, sir.

MJ [CAPT ALLRED]: Well, the interpreters are signally that you are speaking too fast for them to keep up and I am also trying to take notes.

WIT [MR. BERRIGAN]: Yes, sir.

Q. [CAPT ALLRED]: Okay with respect to the SCIF?

A. [MR. BERRIGAN]: With respect to the SCIF, we were moved into offices in Rosslyn, we were moved into because we were going to have these high-value cases and we needed a SCIF that was large enough to have multiple defense teams work there. We were told in September, that they could have a SCIF done in two months all it took was the right level of people to make things done. It never happened.

When--before charges were preferred on the 11th, the week before we were down here for a hearing, the decision was made that we have to have a SCIF for the defense so that we can say we have a SCIF when the charges are referred. So they took one of our corner offices and made it into a SCIF, but there was none of the electronic equipment that JWICS terminal, SIPRNET and so forth that makes a SCIF useful. It was just something they could point to, and to this day we do not have construction that has started on the large SCIF to allow us to do those other cases.

So again it’s a--and we are not in the process--we have no budget, we just, we are consulted when they want us to be consulted and it's not a fruitful process.

Q. [CAPT ALLRED]: Have any of General Hartmann's actions impacted this case?

A. [MR. BERRIGAN]: As I sit here, sir, I would--I would defer to the counsel on the case, I'm trying to play back in my mind what his actions may have been particularly on this case. I would say I don't know what his actions are with respect to the contractor, translator services, but I know [redacted] had issues right before we came down about his employer being terminated and having a new contract in place and whether he could come down and serve as a translator. So I view that as a significant impact, they were able to----

Q. [CAPT ALLRED]: Well, that sounds like an administrative snafu that got resolved, I mean you recited or you related an event that occurred in the Khadr case and an event that occurred with respect to one of the High Value Detainees, but I didn't hear anything about influence in this case.

A. [MR. BERRIGAN]: I'm not aware as I sit here, sir, what any actions that he has taken personally on the Hamdan case. I maybe I just----

Q. [CAPT ALLRED]: Just don't know where?

A. [MR. BERRIGAN]: Yes, sir.

MJ [CAPT ALLRED]: Any questions in light of mine?

DC [LCDR MIZER]: Yes, sir.

REDIRECT EXAMINATON

Questions by the defense counsel:

Q. [LCDR MIZER]: Sir, you mentioned that your office has no budget?

A. [MR. BERRIGAN]: That's correct.

Q. [LCDR MIZER]: How do the defense teams in your office receive funding then for expert witnesses?

A. [MR. BERRIGAN]: Now you are reminding me correctly, we use--the individual trial teams make requests to the Convening Authority for any expert witnesses, consultants, things of that sort that they need and then the Convening Authority's office takes that under

advisement and scrubs it and goes through their internal process. They seem to be come back and forth with counsel and then they either approve it or generally deny it.

Q. [LCDR MIZER]: Who advises the Convening Authority as to whether or not to approve or deny those requests, sir, do you know?

A. [MR. BERRIGAN]: It’s--it’s the same attorneys I believe that we talked about on the--that related to that email string of the charges. It's Mike Chapman, he’s the Deputy to General Hartmann, he is a retired Army Colonel, JAG Colonel, and then the people that work for him are individuals like Captain Suberly, an Air Force Captain, Jason Foster, who is a civilian attorney, who is also involved in that.

I'm not sure who all else, I have not been directly involved in that, that's generally the teams directly with the Convening Authority.

Q. [LCDR MIZER]: But those attorneys work for General Hartmann?

A. [MR. BERRIGAN]: Yes.

Q. [LCDR MIZER]: Are you aware of, if the defense has filed a request for an expert on the conflict in Afghanistan in this case?

A. [MR. BERRIGAN]: Yes, I am.

Q. [LCDR MIZER]: And do you know the status of that request?

A. [MR. BERRIGAN]: I believe--I believe it was denied. I believe it's been denied on a couple of occasions, if I recall

properly, it came back for more information and then more information was provided and denied again.

Q. [LCDR MIZER]: Are you aware of a request from the defense for an expert on Al Qaeda in this case?

A. [MR. BERRIGAN]: Yes.

MJ [CAPT ALLRED]: These matters are already in front of the court and other motions, I don't think----

DC [LCDR MIZER]: ----All right, sir----

MJ [CAPT ALLRED]: ----we need to raise that with this witness.

DC [LCDR MIZER]: Nothing further.

MJ [CAPT ALLRED]: Sir?

TC [COL MORRIS]: Nothing further, Your Honor.

MJ [CAPT ALLRED]: Thank you for your testimony, Mr. Berrigan.

WIT [MR. BERRIGAN]: Thank you, sir.

MJ [CAPT ALLRED]: You may be excused as a witness.

[The witness was excused and left the courtroom.]

DC [LCDR MIZER]: Defense is prepared to argue at this time, Your Honor.

MJ [CAPT ALLRED]: Does the government have any evidence to present on this motion?

TC [COL MORRIS]: Nothing else, Your Honor.

MJ [CAPT ALLRED]: Okay. Let's go with the defense first at best.

DC [LCDR MIZER]: Your Honor, I'll do my best to do this in sort of a halting manner to allow the translation to catch up. The central question before this court is, whether Mr. Hamdan can continue to be tried in a judicial system where the independence of the Chief Prosecutor and the Chief Defense Counsel is not guaranteed.

The M.C.A. requires that judicial independence as well as Common Article 3, which requires that Mr. Hamdan be tried in a regularly constituted tribunal. Indeed that's the reason the Supreme Court sent us back here was that Mr. Hamdan was to receive a fair trial in accordance with Common Article 3.

We are perhaps all familiar with Justice Sutherland's opinion in *Berger v. United States.* Where he said the prosecutor 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. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer.

That prosecutor does not charge cases because they are sexy, because they capture the imagination of the American public and validate a questionable judicial system before it implodes, which is some of the testimony that you heard from Colonel Davis yesterday.

Nor does that prosecutor charge cases to influence elections in Australia or in the United States. We've got the U.S. Attorney scandal in the United States last year caused such a furor because it raised the specter of politically motivated prosecutions; a notion that is important to the American, American notions of justice.

In Colonel Davis, this process had that servant of the law that is referred to in Justice Sutherland's opinion. As Senator Graham said from the Senate floor, he is committed to render justice and I think you saw a testament to that yesterday. Where he sat here alone and gave testimony against very powerful individuals for a man that he wrongly believes is an Al Qaeda terrorist. That is Colonel Davis' commitment to justice. It should be no surprise that Senator Graham whom he has known for many years and Senator McCain came to Colonel Davis when they were going to create this new commission system in accordance with the opinion of *Hamdan v. Rumsfeld*. And based upon Colonel Davis' recommendation, they included two provisions in the M.C.A. that were intended to guarantee the independence of the Office of Chief Prosecutor.

First of these was the requirement that the Chief Prosecutor be a uniformed officer. Colonel Davis knew the attorneys, senior attorneys, in the Department of Justice and the Department of Defense, including Mr. Haynes by name, had sanctioned the use and application of torture. He also knew that the Judge Advocate General

had both publicly and privately condemned the use of torture specifically with the use of so-called water boarding. He also intended from his very first staff meeting not to use evidence, he doesn't like to use the word torture, but statements that weren't reliable due to physical coercion. And I think that you're going to see evidence in this case when we reach the merits of the coercion motion.

I specifically asked him about two of the techniques that were applied to Mr. Hamdan in this case, beatings and then this instance when he was held by U.S. Forces and had his hands shackled behind his back and was being asked questions about Egyptian members of al Qaeda, as his interrogator pulled his shackled arms out behind his back.

Second and more importantly, the M.C.A. dramatically bolsters the protections afforded U.S. service members under Article 37 of the UCMJ. And this may be the only place where Mr. Hamdan and his fellow detainees have more rights than uniformed service members because of this language that was included in the M.C.A. at the request of Colonel Davis and that language, specifically 949 subsection (c), 949b subsection (c), no person may coerce or unlawfully influence the exercise of professional judgment of trial or defense counsel.

It does not say as General Altenburg suggested no civilian person may attempt to unlawfully influence or coerce the professional judgment of trial or defense counsel. But General Altenburg is correct that the drafters were afraid of what civilians would do if they were allowed to influence this system and you also heard this from Colonel Davis, but I think that you're seeing this played out now.

Colonel Davis' testimony is replete with instances were Mr. Haynes, General Hartmann and the Convening Authority all sought to interfere with his professional judgment. Both General Hartmann and the Convening Authority directed Colonel Davis to abandon the pursuit of trials through the time-consuming declassification of evidence. Colonel Davis wanted open prosecutions, General Hartmann and the Convening Authority wanted fast prosecutions. Both urged Colonel Davis to bring charges more quickly, and Colonel Davis admits that the charging of Mr. Hamdan, when he charged Mr. Hamdan because of pressure from Jim Haynes.

Did Mr. Hamdan in that instance receive the statutorily required uniformed prosecutor when the decision to charge Mr. Hamdan, although it would have eventually have happened according to Colonel Davis, in that instance was subterfuge to conceal what would later occur in the trial of David Hicks? Those same individuals did not want it to appear that David Hicks was being singled out for the

special treatment that he was in fact about to receive. And so Mr. Hamdan is here today at this point in time because of that charging decision.

General Hartmann began plea negotiations in this case on Mr. Haynes' orders as well, and when the prosecutors offered to assist, he essentially told them to mind their own business. Plea negotiations in a criminal case. General Hartmann told Colonel Davis that it was not his decision on whether or not his office would use evidence derived by torture. Whether or not the prosecutor would introduce evidence before a court was. It was not the prosecutor's decision. And we see independent evidence of this in General Hartmann's testimony before Congress where he refuses to answers questions about water boarding and that----

MJ [CAPT ALLRED]: Is that in one of your attachments?

DC [LCDR MIZER]: It is Your Honor.

MJ [CAPT ALLRED]: Okay.

DC [LCDR MIZER]: He refuses to answer questions about water boarding whether it constitutes torture and whether or not such evidence will be introduced into court. He plainly states that such decisions will be left to the judge. And those decisions are not solely the role of the judge. The prosecutor--it’s the traditional function of prosecutors that they determine what evidence is going to be used. Thinking back to Justice Sutherland's quote, "the pursuit

of justice", Your Honor, not what the judge will let us get away with. Now in a few moments the prosecution will assert that there is no influence in this case.

Because Colonel Davis largely resisted such influence and that is correct, largely correct with the exception of the charging decision in this case. He resisted until October 3, 2007, when Deputy Secretary of Defense Gordon England, who had a year earlier urged prosecutions for political gain, subordinated Colonel Davis to General Hartmann and ultimately to Mr. Haynes.

Mr. Hamdan cannot be tried in a system where politicians hold a final say on who is charged and what the outcome will be and there can be no serious discussion that that is what occurred in the case of David Hicks. And we're operating in that same system with many of those same players in place.

The prosecution will also say that this commissions process is like courts-martial and that therefore nothing illegal has taken place; focusing on that word illegal influence or unlawful influence. I would note that the statue also says no attempt to coerce prosecution or defense and does not have that qualifier. First that--let me say that this claim cannot address the role of Mr. Haynes in this process because as General Altenburg readily conceded yesterday, there is nothing analogous to the role that Mr. Haynes struck out for himself in this process.

The Staff Judge Advocate doesn't work for political appointees in any other courts-martial in any command and General Altenburg stated that as well. More importantly this is not the Uniform Code of Military Justice, sir, if you read the legislative history of the Uniform Code the principle evil at which the code is directed is unlawful command influence. Congress struck a delicate balance in the code between the need to preserve good order and discipline and the desire to preserve individual rights.

The Convening Authority and her Staff Judge Advocate under the Uniform Code of Military Justice have sweeping powers and can interfere in court-martial more so in the Army system by regulation because of the need to prosecute successfully this nation's wars. But as Colonel Davis said pointedly yesterday it is not the business of the Convening Authority in this case to ensure the good order and discipline of al Qaeda. The same concepts that limit individual rights in the Uniform Code of Military Justice are absent here. The sole focus of this system is justice and so therefore it resembles much more a--much more of a traditional system of justice.

Colonel Davis compared it to other international war crime tribunals. We don't see this type of system. You don't see it because it is not necessary.

General Altenburg correctly described a desire to comply with the Uniform Code of Military Justice, when drafting the military

commissions act and the defense would agree with that. I think we have that same proposition in the conspiracy motion that we will be discussing a little bit later this morning. But that general desire cannot contradict specific statutory language in the Military Commissions Act where, Congress has intentionally elected to depart from the Uniform Code of Military Justice.

In the Self-Incrimination Motion that we are going to hear later today, the prosecution notes that the defense relies or cites 12 times provisions within the Uniform Code of Military Justice and they complain that Congress has deliberately omitted that language, but they are about to stand up and say where the Congress has omitted Article 6, the Staff Judge Advocate, where Congress has omitted Article 34, the advice of that Staff Judge Advocate, that all of that should be ignored and should be inferred from that, that Congress intended to replicate the Uniform Code of Military Justice at least with respect to the role of the Legal Advisor and the Staff Judge Advocate.

As I said this is reflected in the statute, there is no Staff Judge Advocate provided. The Convening Authority role itself is greatly diminished from the Uniform Code. And there is an entirely new animal, the Chief Prosecutor, that is nowhere in the Uniform Code of Military Justice. At the same time the Congress created the chief prosecutor to bolster the language in 949d.

MJ [CAPT ALLRED]: What section are you referring to with respect to the chief prosecutor?

DC [LCDR MIZER]: Your Honor, I'll have to get that citation for you. It is the provision that provides for the uniformed Chief Prosecutor, but I will provide that for you, for the court. Section 949(d), again is the only provision that bolstered rights and indeed these are strange actions for a Congress intending to replicate the Staff Judge Advocate function; to have removed these, created this independent office of the prosecutor.

Nevertheless, the Legal Advisor in this case has asserted sweeping powers within the commissions process based upon the thinnest legal authority found in the Regulation for Military Commission. This court must also consider that the Deputy Secretary of Defense’s 3 October 2007 memo subordinates the Legal Advisor not to the Convening Authority again under the UCMJ, but the political appointees within the Department of Defense.

Finally, even if this were the Uniform Code of Military Justice, which it is not, General Altenburg’s testimony confirms that General Hartmann's conduct would disqualify him from further service in this case, which is the alternative remedy that the defense has asked for here, the disqualification of both the Convening Authority and General Hartmann.

You see an example of how this system was designed to work in General Hartmann's February 11, 2008, announcement of charges against the September 11 detainees, which is also attached as--to our motion, Your Honor. What he says is, “today in my office I received sworn charges against the 9/11 detainees.” In fact those charges had been circulating in his office two weeks prior as you heard from Mr. Berrigan. He then states that he will conduct an independent assessment of those charges, make a recommendation to the Convening Authority and that she will then take action on those charges.

So in public, there is an acknowledgment of the way the system is supposed to work yet there is this separateness. They're part of important functions that the Legal Advisor performs. Mr. Berrigan briefly touched on the witnesses. The defense has requested witnesses in this case and what is in effect, General Hartmann who has become the de facto Chief Prosecutor. The attorneys in his office are determining what expert assistance that the defense gets. What is contemplated at least by the rules which generate this Legal Advisor is that independent and neutral assessment that General Hartmann talks about in the February 11 press conference.

And I would note that this court has already overruled at least in part two of those determinations that the defense was entitled to expert assistance. But to see how the system actually works, Your Honor, and this is why we wanted the testimony from

Lieutenant Colonel Britt and Lieutenant Commander Stone. Colonel Britt's testimony at Page 8----

MJ [CAPT ALLRED]: ----Excuse me, just a minute.

DC [LCDR MIZER]: Yes, Your Honor

MJ [CAPT ALLRED]: Okay. For some reason I was under the impression that these documents were classified and apparently they're not.

DC [LCDR MIZER]: No, Sir, there was no marking.

MJ [CAPT ALLRED]: I don't know why I had to read them on a classified computer maybe that was, okay, go ahead. Colonel Britt's testimony?

DC [LCDR MIZER]: Yes, Your Honor; at page 8, he says that General Hartmann wanted to know "how we did things, how we prioritized things, what the cases were about, how we selected cases, what cases we were going to swear charges on, six-month plan, eight-month plan, year plan, how the detainees were vetted for purposes of selecting prosecutions, just everything like I said basically A to Z," cooperation from the neutral and independent Legal Advisor.

On page 11 he said, "General Hartmann said, 'we are not prosecuting this case do you understand that Colonel. This case is not going to trial, but that case will. And the reason why that case will and this case won't is because this case is going to seize the imagination of the American public and that case won't.'"

On page 13 he says, "I can say, I did very clearly feel, however, that the duties and responsibilities that were previously Colonel Davis' were being taken over."

And you have to consider this again, Your Honor, in light of the congressional decision to protect the prosecutor to create a uniformed independent prosecutor. And you also have to ask yourself, what remains of the prosecution's professional judgment in this case. Certainly some of the defense function remains although you have seen General Hartmann's attempt to influence the office of the Chief Defense Counsel as well.

General Altenburg testified that the Legal Advisor would have to be careful not to become too much engaged in these charging decisions, so as not to disqualify himself. That was also the recommendation of the Tate investigation, Your Honor. And General Altenburg also said that a Staff Judge Advocate and Legal Advisor would have to be careful when making public statements so as to not detract from the appearance of neutrality and impartiality. And there are a number of statements attached to the defense brief where General Hartmann proudly proclaims that he is the driving force behind the prosecutorial effort in these commissions.

This case in conclusion, Your Honor, is similar to the *Lewis* case, which is cited in the defense brief; the Unlawful Command Influence case where the Staff Judge Advocate, in collaboration with

the trial counsel, forced the recusal of the military judge for reasons that are not relevant here. It's that kind of structural attack on the system itself that has taken place. In that case, the military judge in the Sierra, what was then the Sierra Judicial Circuit, it was four judges later when Justin Lewis was finally brought to trial.

The judge had ordered that Convening Authority be recused, that the staff judge advocate be recused and entire--another general had to deal with the case. And CAAF said that--that wasn't enough because of the, that type of structural attack on the system could not be tolerated. There was very little actual prejudice in that case, Your Honor. And what CAAF--the only thing that the court had mentioned was the fact that the trial counsel had stayed the same. Now you can imagine that that is hardly any prejudice at all.

And for the first time they set aside the case on the appearance of unlawful influence. First time in history of the Uniform Code because the public's perception of military justice could not tolerate what had happened in that case. However offensive the conduct in that case, certainly backdoor dealings as we've heard between the Attorney General and Mr. Haynes on which cases will be prosecuted and who will receive justice and limitations of their sentence are no less offensive.

The *Mabe* case also deals with a similar structural attack on the Judiciary. There is certainly an appearance problem in this case where the independence of the prosecutor and defense is not guaranteed. But there is also specific prejudice dealing with the witnesses that we have been denied when the Chief Prosecutor determines who the members are or at least advises the Convening Authority as to who the members will be.

And at the conclusion of this case, whether or not Mr. Hamdan deserves clemency on a case where he is the driving force behind the prosecutorial effort. Even if you accept that this is the Uniform Code of Military Justice, you cannot accept that the Legal Advisor has not exceeded his authority and therefore both he and Ms. Crawford should be recused if you will, from this case and this case referred to an independent Convening Authority and Legal Advisor for further action on this case.

If there are no questions, Your Honor, that concludes my argument.

MJ [CAPT ALLRED]: Thank you. No, I don't have any questions for you. You have addressed all the questions I had in my mind.

Colonel?

TC [COL MORRIS]: Your Honor, I guess I'm here representing what remains of the independent prosecutorial function. I ask your indulgence in advance, it will take some time because I will try like

heck to be as slow as the amber light requires and it’s a motion of some gravity. When the government is asserted to have brought charges that are tainted by command influence; as you know there is no graver charge somebody can raise. I will treat it for the purpose of arguments as essentially two motions. And will address for each the government's understanding of the law, then the facts, and then apply the law and draw some conclusions. And for our purposes of analysis, will treat it first as an Unlawful Influence motion and then secondly as a Motion to Disqualify the Legal Advisor.

On the first issue, Unlawful Influence, the law on that, I'll grant you that it's a hypothetical and nearly irrelevant discussion on shifting the burden of proof at this stage, but for the purposes of our analysis, we understand in the unlawful influence setting that the burden shifts when the defense produces some evidence that one, if true, two, has a logical connection to the case, and three, then a potential to create unfairness. And that the government may disprove this in three manners by disproving the facts, by demonstrating that the facts do not constitute unlawful command influence, obviously we're importing the only law we have in this area, and then thirdly, by demonstrating that the arguable unlawful influence will not affect the proceedings.

I think both parties to this discussion acknowledged that unlawful influence under the M.C.A. is not the exact same as unlawful

command influence, but I think both accept that its principles in the case law are broadly applicable. And in that sense Article 37, like Article 31 of the UCMJ, is rooted fundamentally in concerns about command authority and rank disparities that can distort the administration of justice in a command run system. Not all of these are applicable or as applicable to military commissions. For example, there are no subordinates or intermediate commanders in the commissions process and so the concerns about the inherent pressure of working for the boss aren't present here.

There is no serious concern about inflexible convening authorities or of transmitting the personal concerns or biases of a convening authority to junior officers who are entrusted with decision-making in the military justice system. There is here, no rating relationship between the convening authority and prosecution personnel including the prosecutors, including the Chief Prosecutor, and including the Legal Advisor, all unlike the military justice system.

The absence of that relationship reduces any incentive, any temptation on the part of those individuals to trim their advice to please a convening authority who institutionally cannot affect their ratings and their professional progress. That also reduces their ability to be agents, witting or otherwise--agents of the unlawful

influence of the Convening Authority because others won't view them as transmitting her views or her biases.

The government certainly acknowledges that the Legal Advisor can commit unlawful influence. Most anybody standing in the shoes of a convening authority can do so, and our case law is replete with examples of senior NCOs, trial counsel, general staff. But they can do so only as an agent of the convening authority. And the legal advisor is institutionally incapable of doing so in the current structure. It is appropriate to evaluate, and the government encourages you to evaluate, structural vulnerabilities or a mean-ability to unlawful influence. To evaluate whether structural, that is reporting relationships, regulatory and legal incentives, statutory incentives move the process toward justice and against unlawful influence or unethical conduct.

The other two areas in which the normal unlawful command influence rubric is not quite applicable; is there no concern here about witness intimidation; the chilling of cooperation with the defense that is an acute concern in the military justice system, and then finally, no impact on panel selection or the independent judgment of panel members. Again, our concerns typically there are that panel members might be exposed to comments, prejudices, policies of a convening authority; say convening authority with a strong anti-

drug campaign, anti-fraud campaign and that somehow walks its way into the deliberation room.

Your Honor, I suggest then that there are two legal tests to apply. First and primarily of course, is whether somebody with the mantle of authority, what the *Stombac* case of course calls the "mantle of command authority," said or did something that led to a decision or judgment that otherwise would not have been made, and is therefore contrary to justice. In the absence of that, and I'll suggest to you there is an absence of that, there is no decision in this case that the defense can point to at all. But in the absence of that and you get in to of course, the issue of apparent command influence and whether conduct of any of the officials reduces the confidence of the public, or in case law. We know the public or the rank and file in the military justice system, viewed through the perspective of a reasonable person knowing all the facts.

Let me then address some facts please on the unlawful influence issue. There are some distinctions that are important to draw the courts attention to. Differences from the facts presented in the defense motion as acknowledged now by Colonel Davis in his affidavit or his testimony, including the fact that the statements attributed to the Deputy Secretary of Defense in September '06, were instantly corrected by Mr. Haynes, the DOD General Counsel, to the

apparent satisfaction as reported by Colonel Davis of everyone in the meeting.

Secondly the statements attributed to Mr. Cambone were not made as the defense motion says repeatedly but made one time in a glancing fashion at the same meeting. And Mr. Cambone did not and does not have any role in the commissions process. Most importantly Colonel Davis testified that he felt unaffected by any of those comments.

Next, under the facts, the issue of rating relationships as you know those relationships changed from the chief prosecutor reporting----

MJ [CAPT ALLRED]: Colonel, I'm sorry the light has gone red.

TC [COL MORRIS]: Shoot, I'm sorry, it is my mistake I didn't--I took my eyes off the---

MJ [CAPT ALLRED]: Off the ball. We're good to go then.

TC [COL MORRIS]: The rating relationships where, at that time, the Chief Prosecutor reported to the Legal Advisor. The Legal Advisor reported to the Convening Authority. The Convening Authority reported to the Deputy Secretary. Now the Chief Prosecutor still reports to the Legal Advisor. The Legal Advisor however, reports to a bureaucrat in the Department of Defense General Counsel Office. And the Convening Authority continues to report to the Deputy Secretary.

Permit me now to argue some of those facts in light of the law that I laid out. The defense has to prove--produce some evidence if true, some of that evidence was true, we know that there are some important distinctions to be aware of. Most of them I have already corrected, but there was a glancing mention in the defense's argument just now asserting that Mr. Hamdan had been tortured. A couple of references for which there is no support in the record and first mentioned in argument.

Next, the defense has to show some logical connection to the case and this is the crux of the weakness itself, the defense argument. There is no link, not an arguable link or a tenuous link, but no link between the defense's assertion in the timetables and decisions on this case, and the court’s obligation is to rule on this case. Mr. Haynes' comments, the August job interview, pretty broad, pretty unexceptional it was not taken. There's no reasonable interpretation that they would be taken as direction that's inappropriate, unlawful, unethical. And Haynes hired Colonel Davis anyway after that and endorsed him for general officer and spoke up at the Pentagon meeting 13 months later, and by Colonel Davis' testimony, hardly spoke to him between 2005 and 2007, but still Mr. Haynes is a sort of Dr. TJ Eichelberger looking through those yellow glasses, kind of a felt presence there; hanging over Colonel Davis' exercise of prosecutorial discretion.

They tell us that Mr. Haynes called General Hartmann and said "negotiate the Hamdan case", as though it's an inappropriate decision by the Chief Legal Officer of the Department of Defense when he receives a direct appeal from a civilian counsel. Would it not maybe be wiser for Mr. Haynes to delegate that than to personally manage it himself?

The Deputy Secretary's comments I think we have already addressed, but for its impact. Clearly we know it was instantly fixed. The fact omitted from the defense brief, but now on the record. We also must note that that was never transmitted to the Appointing Authority at the time, General Altenburg, and never transmitted to the Convening Authority for Hamdan, who took office months later and is the only person in the military commissions process with whom the Deputy Secretary has a relationship.

MJ [CAPT ALLRED]: Remind me what statement you're referring to please?

TC [COL MORRIS]: The statement----

MJ [CAPT ALLRED]: ----The one that was never transmitted----

TC [COL MORRIS]: ----it is attributed to the Deputy Secretary about trying some cases for political purposes at the September 2006 meeting.

MJ [CAPT ALLRED]: Okay. I remember it now. I'll find it.

TC [COL MORRIS]: Meeting of the special oversight group of September in that year. The Cambone statements even if accurately reported are just the irrelevant musings of somebody who appears not to have had, if accurate, much confidence in the military counsel, but has nothing to do with the process and irrelevant.

The Legal Advisor's statements, more to the point, made months after the Convening Authority made her decision can have no logical connection to this case. I'll later address his disqualification. But these comments are wholly irrelevant to the unlawful influence portion of the case. The defense does cite General Hartmann's statement under questioning by Senator Graham; it ends up, in front of the Senate committee last December. And his answer on water-boarding in which he did not, to displeasure of the defense, he did not publicly commit to ruling out using evidence of water-boarding. And apparently the fact that he did not choose at that setting to make policy for the United States, somehow contributes to an atmosphere of unlawful influence.

The next factor, Your Honor, and I appreciate your patience as I'm trying to remain as slow as possible, is to the potential to create unfairness. And in that area the government suggests to focus on parties that command influence traditionally seeks to protect. None of those usual important protected the parties' witnesses, immediate commanders, and potential court members are affected at

all. The only possible person is then the Convening Authority, herself. She affected as a recipient of influence that somehow flowed to her from beneath, the Legal Advisor. The Legal Advisor doesn't report to her or from above, statements she never received. We know she was not in the job at the time. She tells you in her affidavit that she has had no substantive communications with the Deputy Secretary or other political appointees since she took the job. And the only potential conduit himself, Colonel Davis was unaffected.

The defense wants to suggest to you that Colonel Davis was granite, unwavering in his independent prosecutorial judgments, but somehow have sort of permeable membrane through which unlawful influence flowed despite his incorruptibility. And not only that, but the flow persisted many months and the Convening Authority later. The Legal Advisor in this case under these facts was not a conduit of unlawful influence because he again cannot transmit her unlawful influence to others, yet the traditional path is the subordinate, amplifies or broadcasts the influence of the senior. There's no assertion of her unlawful influence, so nothing to transmit.

In any event, we know that the dates do not correlate and the Legal Advisor is institutionally independent of her because she doesn't rate him. We know he assumed duties after she made the relevant decision in this case, which is to refer the Hamdan case to

trial. So the defense may be trying to craft an argument that unlawful influence is ongoing and that some later claimed improper conduct by the Legal Advisor taints, the decisions and judgments of the Convening Authority. No evidence, no evidence of any impact on anyone with a role in the process of this case.

So we know then that the Convening Authority is the least institutionally able person to assert or be affected by unlawful influence. And that it's greatly different from the vulnerabilities in the military justice system. Not different in her function but surely different in those vulnerabilities; doesn't supervise any of these individuals as we've mentioned. So all of the structural, legal, statutory, regulatory incentives that govern or effect peoples' conduct in this critical process, all run in favor of justice and against unethical conduct or unlawful influence.

Let's start with the oath that any officer takes to defend the constitution, not work for the president, not work for a political appointee, and defend the Constitution. Compounded by the oath that attorney takes, defend the Constitution, reinforced by the ABA model rules, which talk about justice and integrity. Reinforced further by the ABA rules on the prosecution function, which are replete with references to justice, to not being affected by, to ensuring that person is not affected by personal motivation, political motivation, a one lost record by a prosecutor. Further

than there are State Bar rules. The military regulations talk about incorporating that and that should inform the conduct of a military officer who works as a prosecutor.

So the critical analysis in the unlawful influence area then is to examine the structure. There is no structural impediment to justice here then, or inducement on ethical conduct. All the factors that I mentioned, encourage justice, encourage ethical conduct, and if they don't, in all the statues to Thomas Moore in the world won't do so. The rules are written for the ordinarily ethical, the ordinarily competent prosecutor or chief prosecutor; maybe not someone with the courage and reputation of Colonel Davis that mentions merit in the Congressional record. That kind of person needs no rules. And there probably aren't enough rules for some weathervane who is so bucketed by acute sensitivity to politics and bosses that you could have reams of rules and the person is mush. But it is all these factors taken together are as much structural guarantees of independence and justice that a system still run by humans can generate.

Taken to the defense's extreme, nobody can ask any questions. A call from Mr. Haynes, a call from the DOD General Counsel asking a question like, "When can you charge Mr. Hicks?" A question raised, what; 6 years after the apprehension of Mr. Hicks, is somehow inappropriate. Is it because Mr. Haynes is a political

appointee? Is it because he signed off on a recommendation that Colonel Davis be promoted to general officer? Is it because the military commissions process is run by the Department of Defense? I mean the 2 million person department of which he's the Senior Legal Officer. Is the defense position that anyone with political ties, in a political appointed position, can't ask such a question? A U.S. Attorney couldn't ask about the progress on the Unabomber or the Timothy McVeigh case. In short and obviously, Your Honor, not all questions by political appointees are political in some improper sense or inappropriate and certainly not so in a system in which the military is subordinate to civilian control.

To begin to conclude in the area of unlawful influence before moving to the disqualification. The best defense construction of the facts is that Colonel Davis was independent and unaffected, but still a potential unwitting agent of unlawful influence. But the unlawful influence osmosis through him from fall of '06, to Judge Crawford in spring of '07 and that--there's a sort of reverse osmosis from the Legal Advisor's conduct in summer '07 that somehow relates back to her decisions in the spring of '07.

I'm obliged to take a minute to address Colonel Davis' testimony and credibility. It is not the government's position that Colonel Davis is an untruthful person and we honor his service as an officer and as Chief Prosecutor, but I do think--I do think

inappropriate--it seems that his agenda, his concerns, his bitterness affect his perspective and the weight this court should give to his sworn testimony as the defense's key witness. He acknowledges he is disappointed in the lack of press coverage that he received for his criticism of the process since he left it. The depths of his disappointment led him to solicit subordinates to violate military orders and to talk to the press on his behalf.

One of his subordinates, two ranks subordinate to him, shared with him a draft, a draft of a potential reply to an article in a newspaper and then he finds that presented in open court months later. I mean some of the circumstances, Colonel Davis doesn't just toss his subordinates under the bus, and he grabs the wheel and accelerates and then talks to the court about falling on a grenade for the team that he left behind. By his own testimony Colonel Davis is a very sensitive subordinate; sensitivity that maybe not in all circumstances translates to officers formerly in his charge.

More to the substance, Colonel Davis related the discussion on that question about--pardon me--whether information that prosecutors shared with the legal advisor would be discoverable by the defense. It seems to the prosecution clearly not so, but also a debatable point, but a potentially paralyzing point for the prosecution. It seems that Colonel Davis never got beyond a--what the military calls a bog-set, right, a bunch of guys sit around

talking, just ruminating about it; which reflects either a stunning assumption of risk in that documents and binders and stuff shared by the Convening Authority goes into the pipeline to the defense. Or it might reflect just a casual argument that masks what he really meant to say which is, I've got this overbearing new boss, lay off of us a bit, let us get organized a response to this new way of doing things. Colonel Davis--about some matters--about some matters had a strong memory, be it a nano memory in his terminology, about details and meetings and phone calls, but no recollection, no recollection about discussions of which he was a central participant that had Hamdan, Hicks, and Khadr charged together for a good carefully considered and deliberate reasons. Couldn't recall discussions of which he as the Chief Prosecutor, to which he was central, that resulted in a consensus to charge these individuals no matter that the Manual for Military Commission and the other items on his checklists were not yet finalized. Because of the team's shared belief that they need to charge to go ahead and prod the system. I mean there's no right or wrong to any of that analysis. It is just an inconsistency presented to the court.

His testimony about torture was contradictory in important ways. Initially, he claimed to have told his team in September 2005 that we would have no dealings with evidence resulting from water-boarding, later acknowledging water-boarding was really on the screen

at that time, and amended it to say that he addressed concerns with the reliability of evidence. I mean that is, that is unremarkable in its ordinariness, Your Honor. I would suspect that an average prosecutor like the incumbent can probably walk a staff through that concern, being aware of the reliability of evidence.

None is to suggest that Colonel Davis is untruthful, but that if his memory is that inconsistent, then that's appropriate to consider in determining the weight to give to his testimony and it is appropriate to evaluate his motives when assessing that weight. Clearly didn't like, clearly didn't get along with General Hartmann, and that does not appear to put him in exclusive company. But that's also an unremarkable event quite often in the military and elsewhere and at its core, this is a personality and a philosophical conflict dressed up as an ethical problem. And to hear sworn testimony yesterday, potentially a criminal problem as we heard twice in his conclusion, this lawyer, that General Hartmann's conduct is cruelty and maltreatment, which we know is a legal term and a crime under the UCMJ, not a casual talk.

Which leads us then, sir, to the second issue; though I will not take as long to address this one; the disqualification of the Legal Advisor. The law in this area, clearly the Secretary of Defense has express authority under the Military Commissions Act to create such a position. Of course the position is not expressly

mentioned in the Act, but the Act does direct the Secretary of Defense to model the Manual for Military Commissions on the Manual for Court-Martial. Apply the principles of law so far as practicable of general courts-martial. So it is appropriate to provide a legal advisor to the convening authority, who need not be a lawyer, happens to have been a couple of times, but need not be, given the gravity of her role. And you heard the wisdom of General Altenburg talking about how he needed a legal advisor even though he himself was a lawyer.

There's no basis, no legal basis for the defense’s statement in its written motion that says Congress sought to create an independent office of the chief prosecutor. No evidence presented, not a sentence from the statute. We know well that's not the military model. It's not the federal courts model. So we're adrift looking for a model. He's certainly not an elected district attorney. We have no grand jury over him to otherwise sift or evaluate the evidence. So the defense's argument simply of course is that because it was not explicitly mentioned in the Act, therefore Congress must have not wanted it.

I'd suggest to you the contrary. I mean there's nothing to that kind of statutory construction. Congress express--expresses a strong preference to parallel the manual and the UCMJ. And it does expressly exclude three articles of the UCMJ, 10 for speedy trial, 31

for self-incrimination, and 32 for the pretrial investigation. You have the opportunity then to exclude the legal advisor, had it wanted to do so. And we know otherwise the clear analog to the courts-martial practice as the witnesses discussed and I don't need to repeat in detail. It is important to affirm and recognize that there is a long history of Staff Judge Advocates serving in both roles. They're not an inherent conflict. There is of course, a natural tension that requires some skill, some facility and ethics on the part of the person who holds that job. But those functions have long been validated by the courts and I'd suggest to you as General Altenburg suggested, they are complementary and reinforcing more than they are intentional.

I ask you to look at your convenience at some of the language in Army Regulation 27-1 that also addresses the role of both supervisor and general counsel advisor to the convening authority and you'll even note in there, in a regulation that long predates this process express reference to supervising military commissions.

It is also appropriate, to say the least, and important and responsible for the legal advisor to take on the logistical concerns of defense counsel. It's not optional but expected. Now Mr. Berrigan disagrees with some of General Hartmann's tactics and tact and questions his motives, but cannot deny actions that General Hartmann on behalf of the Office on the Convening Authority, has

taken on behalf of the defense in getting them facilities, in getting them personnel, and reinforcing their independence by advocating for their ability to choose their personnel by making direct an unsolicited appeals to the TJAG's to get them the right people. So it is, we acknowledge possible, possible and rare and agree to circumstances for staff judge advocates to forfeit that General Counsel role by their conduct; to zealous supervision of prosecution or serving as a conduit or an amplifier for unlawful influence.

Last item under the law, there is that new provision, that new clause in the Act about the independent judgment of trial counsel and defense counsel. I suggest to you that there are any number of possibilities beyond the sort of barstool legislative history that suggested by Colonel Davis' chat with Senator Graham. It is the first time that a military statute memorializes the independence of defense counsel; a welcome and tardy recognition that probably reflects the first time that a military statute has been adjusted or amended since independent defense counsel have become the norm in our system. And therefore it makes sense to have equivalent language to govern the trial counsel. Suggest it could also recognize that trial counsel will advocate in the course of Military Commissions' unique issues in developing areas of the law; including interrogations, classified evidence, broaden hearsay.

It's reasonable that Congress would want to cover and protect the judgments that those individuals make when preparing for court and coming into court. Also as some of the witnesses speculated about trying to minimize intra-governmental squabbles for example Justice Department trying to tell Mr. Murphy what he will argue in this case, where he remains a Justice employee but he is part of the commission process.

Important to note that, that clause though does not say, the independent judgment of the chief prosecutor or the chief defense counsel. And if you take the defense's argument to its extreme it would eviscerate the ability of the chief prosecutor or the chief defense counsel to supervise and direct their personnel because those personnel would be wrapped in a statutory cocoon that couldn't be penetrated by their boss who is responsible for their ethical, professional, well-prepared advocacy.

Finally the facts in the area of the legal advisor. The defense this morning cites a testimony, I guess, and Colonel Britt where he said something about reporting to the legal adviser on how to select cases, prioritize cases, what we are to charge, that is Colonel Britt speaking in the--what we the prosecutors are to charge, a 6 to 8 month plan and all that. Sounds like the operation of an ordinary military legal office and somebody who has a boss. The idea

that the legal advisor would ask those questions seems unremarkable and appropriate.

Obviously, General Hartmann gave some energy to the prosecution effort and obviously in not all respects his approach or his demands were appreciated, or comfortable, or tactfully delivered, none of which is a disqualifier to say the least. He has spoken about and publicly spoken about the types of cases that should be tried. The defense cannot point to a sentence in that ream of transcripts that it attaches to its motion, cannot point to a sentence in which he has characterize the proof in the case, in which he has suggested an appropriate outcome. There's nothing in the conduct presented to the court that would suggest the Legal Advisor acted in a way that is inconsistent with the norms of a staff judge advocate in his General Counsel or Legal Advisor role.

The defense quotes this morning, General Hartmann's statement after the 9/11 charges were sworn that, in his statement he said, "I received sworn charges." And somehow wants to suggest that that's maybe sneaky because he had seen the unsworn charges earlier. Of course we know the statement is accurate, he did receive sworn charges that day and the defense argument here simply is, there can be no consultation with the Chief Legal Advisor before charges are sworn because it must be concrete between the prosecutor and the legal advisor, who must have no role.

The defense's theory essentially is that the legal advisor's relationship to the government has to be akin to his relationship to the defense to get them pens and paper and stuff and don't talk substance with them. And if that is the court's perspective then we do have a problem to the extent of that involvement, suggests quite to the contrary that it is consistent with the role, well explained in our case and through General Altenburg. The defense tells you this morning that his attorneys are deciding who gets experts, a conclusion that no doubt would surprise the Convening Authority whose signature is on all of those decisions and really comes down to a defense argument that because they disagreed with us it must be improper.

So applying the law and the facts in this last area, the Legal Advisor's conduct is consistent with the General Counsel in supervisory roles. The Convening Authority is unaffected and the defense has to concede that she is unaffected; there is not a peppercorn of evidence to the contrary. His work on behalf of the defense is evidence of the breadth of the legal advisor's role. I mean notwithstanding how to characterize it. You look at concrete factors, actions taken on behalf of the defense, the SCIF, the personnel, the resourcing. And you also find, if anything, that General Hartmann at least appears to be an equal opportunity offender

given that Colonel Davis' testimony about his demeanor seems to be not dissimilar to Mr. Berrigan's.

Colonel Davis thought the Convening Authority would help solve the problem rather than pass it forward, way back last fall when he raised his questions. I mean not only was she not available on a Friday afternoon, when he came to lodge the complaint, but he tells us more than once she compounded the indignity by attending a Johnny Mathis concert. Chances are she didn't anticipate his visit, from what he tells you is their second ever conversation; second ever, about a system that the defense wants to suggest is marinated in unlawful influence. Colonel Davis' complaint and you have all of his complaints in the defense record; reflect more than anything a core misapprehension and a late rising misapprehension 2 years into his tenure about the structure and roles of the individuals in the system.

None of the facts, as well laid out by the defense through its motion and in court, should have any impact on public confidence. It is not a factor in the analysis of the legal advisor’s conduct anyway, they do attach an article from the Nation magazine and I concede I have no countervailing article from National Review but none of which is reasonably reflective of public confidence. You heard General Altenburg say, "Would any serious observer of the military justice system know, the SJA can perform both functions."

There's no reason not to analyze the legal adviser like an SJA. He and many others have done both roles, they've set milestones and goals for prosecutors and have been able to turn their chair and give wholly independent, dispassionate advice often contradictory to what the prosecutors, want to a convening authority. The roles are not tension free but they are complementary.

To conclude, Your Honor; there is not one instance of improper speech or inappropriate conduct by the Legal Advisor, certainly nothing that would get to the level of disqualification. None of his comments, none of his conduct can have--can have had any impact on the Hamdan case because of the swearing and preferral--correction and referral of course preceded him and no ongoing impact.

Colonel Davis' misunderstanding and he suggested essentially he reached out for marital counseling and ended up in divorce court and still the defense theory is that his departure from the process was kind of a self executing resignation. Regardless, whether it's a resignation or not, although the concept of a military officer resigning from an appointed position is novel. His personal or professional disappointment with the Legal Advisor with his latest Legal Advisor can not be allowed to become the cause of disqualifying that person from executing his duties.

It gets to the function of this Court; you know this isn't a Rand Corporation study on organizational effectiveness or a sensing

session on command climate. I mean, you could post any number of alternative ways of structuring an office, and the military, if they can do nothing else right, it can create a mean wire diagram. There is of course more than one way to structure that. It's been done a couple of different ways. The question is what it has inappropriately done in a way that invites or reinforces unlawful influence.

So the overall conclusions then, Your Honor, there is no basis to disqualify the Legal Advisor because one, the Secretary of Defense had clear authority to insert this position and Congress encouraged it by the wording of the Military Commissions Act.

Two, the Legal Advisor's conduct is consistent with traditional SJA functions.

Three, many other factors. The web of ethical and other requirements and obligations properly rein in and limit and inform and inspire the conduct of the SJA Legal Advisor.

And finally, even if the court had any concerns about his speech or conduct, there is no impact, no impact on the Convening Authority or any other party when we traditionally try to protect under unlawful command influence doctrine.

Next, there's no unlawful influence in any sense again for four main reasons. We cannot point to any improper conduct by any official.

Secondly, the convening authority was unaffected.

Thirdly, no other parties who command influence traditionally is concerned about witnesses, commanders, members are affected or potentially affected and there's no issue of apparent command influence.

Command influence is the greatest charge in the military justice system that somebody can bring; the military's equivalent of the most damning charges in the outside world; of correction (sic) or racism. There's no basis to find apparent--apparent unlawful influence when you fail to find actual unlawful influence. I mean these gauzy assertions can't be a basis for corrective action in an area that's so critical.

Command influence is properly characterized as the mortal enemy of military justice. And because of that gravity, the courts also warn against finding command influence in the air, so that they and the system are not paralyzed by every passing whiff of controversy. The courts properly leave open, the possibility of directing of a judge directing corrective action when the rank and file or the public confidence in the system would be shaken. But that test scrutinizes the conduct from the perspective of a reasonable person knowing all the facts. Such a person would come to positive conclusions in this case.

The courts justly warn us against finding command influence in the air; you don't have command influence in the stratosphere in this case. It's not *Lewis*, it's not *Mabe*, the defense suggest you finely the Lewis case. That is a heck of an important case. It is a sustained and corrupting assault on the independence of the judiciary. Interesting that the defense also appropriately cites *Mabe*, also an assault on the Judiciary, based on concrete and repeated conduct by people in official positions that would grossly call into question the integrity of the system. Not the arched eyebrow or the intemperate comment that might be at the sorts of things here. Nothing is more grave than a command influence charge and nothing is more flip than one casually offered. Ultimately there is no impact, there's no substantial evidence in this case. The government asks you to rule in its favor.

Thanks, Your Honor.

MJ [CAPT ALLRED]: Thank you, Colonel. I propose a recess. It's 10 minutes after 11, so I guess I propose a short recess and then come back for another hour or half hour whatever the parties want to do and then will break for lunch. I see some nodding in the affirmative. That work? Okay. We'll recess for 10 or 15 minutes.

[The R.M.C. 803 session recessed at 1111, 29 April 2008.]

[The R.M.C. 803 session was called to order at 1144, 29 April 2008.]

TC [LTC BRITT]: Your Honor, if the record could please reflect

that all parties are present that were previously present with the exception of Colonel Morris who has joined us in the audience.

MJ [CAPT ALLRED]: Okay. I'll take your word for it; I don't see him out there. He's hiding in the back.

TC [LTC BRITT]: He made his way out, I apologize. I thought he was going to remain with us.

MJ [CAPT ALLRED]: Okay. I'm thinking if we take half an hour and we can break for lunch. So Commander Mizer, do you have one motion or two that you can take up with the court within half an hour or so.

DC [LCDR MIZER]: Your Honor, I think we'll take up our next motion D29. But for the record, Your Honor, you asked for a cite during my last argument.

MJ [CAPT ALLRED]: I found it. Thank you.

DC [LCDR MIZER]: You did, okay, thank you, Your Honor.

ADC [MR. MCMILLAN]: Your Honor, I think it’s the prosecution that would take the lead on D-029 as they are arguing on a preliminary basis that that motion should not be considered.

TC [LTC BRITT]: I believe that's correct, Your Honor.

MJ [CAPT ALLRED]: You know, I didn't bring that motion with me to Guantánamo Bay because I thought we had slid it to May. I would like to read I think again, the prosecution’s written filing, before we argue it because it may very well be that I just need to say no,

you haven't made your initial showing or whatever, so why don't we skip that motion for now, can we?

DC [LCDR MIZER]: That's fine with me, Your Honor.

MJ [CAPT ALLRED]: And then I'll try and get a copy of that over lunch and read it.

TC [LTC BRITT]: Yes, sir. As an administrative matter, we have consulted with the defense and we'll be shifting two of the motions with Your Honor's consent. We have previously scheduled D-030 and D-022 as the next motions. What we have requested is that D-022 be considered before D-030. So it would go 22, 30 and then back into order.

MJ [CAPT ALLRED]: That's fine. I don't have any interest in what order you choose, so D-022 can be----

ADC [MR. MCMILLIAN]: ----Your Honor, Your Honor, if I may in light of the fact that we're skipping D-029, the defense would request that we stick with our original plan which would--to go to D-030, Motion to Suppress Based on Self-Incrimination. Hearing no objection from the prosecution?

TC [LTC BRITT]: I think what we can do, Your Honor, is just continue with the order that we have. If we have any kind of problem with placing too much stress on one of the members of the team, we'll simply request that they be reordered, so I think that's one----

MJ [CAPT ALLRED]: I don't care what order----

TC [LTC BRITT]: ----go here and hear the motions.

MJ [CAPT ALLRED]: ----let's hear motions. Just bring them up and let's go. This is D-030 then?

TC [LTC BRITT]: That would be correct, Your Honor.

ADC [MR. SCHNEIDER]: D-030, good morning, Your Honor. Harry Schneider, on behalf of the defendant.

MJ [CAPT ALLRED]: Good morning.

ADC [MR. SCHNEIDER]: Salim Hamdan. The defense seeks your ruling excluding from evidence at trial those statements taken by law enforcement investigators, in the course of investigating a crime taken over more than 2 years, while the accused was detained and interrogated without ever being advised that he had a right against self-incrimination. The M.C.A. provides explicitly a right against self-incrimination. Because of the importance of that right, this motion asks the straightforward question whether the military commissions process----

MJ [CAPT ALLRED]: ----Mr. Schneider, I'm sorry, are you focused on the light?

ADC [MR. SCHNEIDER]: I was, and last time I looked it was green.

MJ [CAPT ALLRED]: [redacted] is waving furiously behind your back and it's now yellow. I'm sorry to interrupt you.

ADC [MR. SCHNEIDER]: Under the circumstances, I'm glad you did.

The motion asks the straightforward question whether the military commissions process is going to afford Mr. Hamdan that right among several basic rights that are fundamental to the American criminal justice system. Those rights that are so integral to what we as a nation consider sacred to fair, and due process in the administration of justice. Whether in criminal prosecutions that take place under the Uniform Code of Military Justice or under the federal laws or under the 50 states' laws or under the Military Commissions Act, rights that are recognized internationally by other nations whom we consider peers.

Those rights as the Supreme Court said in this very case are recognized as indispensable. The question that fairly can be asked and should be asked is what good is the right of self-incrimination--against self-incrimination, guaranteed by the Military Commissions Act, if the government is permitted to apprehend and detain someone for several years while admittedly investigating a crime, and building the proof to convict that person. A crime in which the detainee is concededly a suspect at the time. And then once the case is fully developed, years later, attempt to introduce at trial from that witness stand, as evidence of criminal guilt, in a case that could result in the imposition of a life sentence, those very same incriminating--self-incriminating, un-advised statements that were made during the pretrial detention. What good then, is

that right? We submit that under those circumstances the so-called right of self--against self-incrimination becomes nothing more than an illusion. The utility of which is to create a perception. A perception of fairness that is an application of no real use to the defendant. Under those circumstances, we would just be pretending that the right has been recognized by saying "oh well, Mr. Hamdan wasn't forced to take the stand at trial." "Look," we can say to the world, "we're in compliance." Even though we did call to that very same witness stand, people whose purpose was simply to recite those same self-incriminating statements made by the accused. Let me touch on a few facts without reciting all of them.

In the papers we've shown and these are undisputed, 30 plus interrogations, some lasting days if not weeks. Each occurred away from the battlefield, in the context of an ongoing criminal investigation, in which this man [pointing to the accused] was a suspect. Statements were taken by law enforcement investigators not intelligence gatherers. No indication of which we are aware that Mr. Hamdan was made aware of the fact that he was a suspect in a crime until years later. And the purpose is undisputed was to build the criminal case.

Your Honor will recall the testimony of Special Agent [redacted] in December; his purpose was to investigate a crime in which Mr. Hamdan was a suspect. Your Honor will recall that he did not

1 give warnings, only for one reason. What did he say? It was policy
2 at Guantánamo. And Your Honor will recall perhaps most importantly
3 the question-and-answer on cross examination: “If you were within
4 the 50 states, what would you have done?” The answer, “I would not
5 have proceeded to ask questions without giving him that warning.”
6 It's important also to understand and reflect on the facts and
7 circumstances in which Mr. Hamdan was, before he ever met any of the
8 interrogators at Guantánamo. Your Honor heard evidence and made
9 findings that he had reason to be in fear of his life when first
10 apprehended by non-Americans. He was taken into custody. He was
11 flown to various locations. At one point as we've indicated in
12 motion D29, he was put into hands of forces in the Panjshir Valley.
13 One cannot imagine a less welcome host for an Arab in Afghanistan
14 than those being in the custody of those loyal to the Northern
15 Alliance. He was taken to Bagram Airbase, where he was on site when
16 another detainee, similarly situated, was beaten to death. He
17 witnessed other beatings. He was removed from the visibility of the
18 International Red Cross while there. He had, I would submit, every
19 reason to think that he was in grave danger and jeopardy; perhaps
20 most pointedly, with no end in sight. No indication that he would be
21 charged or permitted a defense. And when he arrived at Guantánamo,
22 it's difficult for me to imagine a picture portraying a greater sense

of despair based on what had preceded his arrival. And it is in that context that those 30 plus statements were obtained.

I would like to address five topics in the legal argument. The text to the M.C.A.; the applic--second, the application of the UCMJ before the M.C.A. was enacted; third, the ill wisdom of making the M.C.A. retroactive, the Ex-Post Facto type argument; fourth, the fact that this outcome we seek is consistent with international law which does apply; and last, just touch briefly on the public policy so to speak considerations. First of all the M.C.A., to streamline the argument, it's not explicit in the language and what we seek to have you rule and we invite that ruling, is to imply that the right explicit in the statute, to be giving any meaning, to be given any effect, to accomplish its purpose must be applied to statements that proceed getting on the stand.

Our understanding as based on the Constitution. That's the Constitution that we heard at 1030 this morning applies to the conduct of those who prosecute crimes under the M.C.A. I'd expect we'll hear this afternoon, cannot apply to those who are prosecuted for crimes under the M.C.A. The important point with the Constitution is that the result we seek in this proceeding is the same result that occurred over time with a similar language in the Constitution; nothing in the Constitution that says, pretrial statements can't be taken without warning, but that was implied. The

Constitution says no self-incriminating statements in any case. To rule otherwise, we believe, we submit, would permit the abrogation of self-incriminating statements to be end-run in any instance the prosecution would choose.

Second, the UCMJ. This man was apprehended in 2001, the statements were obtained between 2001 and 2003. He was first charged with a crime in 2004, and the M.C.A. on which the prosecution relies to introduce those statements was passed in October of 2006. In the absence of the M.C.A., the UCMJ applied. You, Your Honor, probably know that instinctively based on your experience. The rest of us know that because the Supreme Court said so, and held in this case, that absent compliance with the UCMJ, the previous commission process could not stand. We know that at the time the statements were obtained this accused was destined for a prosecution in the military criminal justice system, not an Article 3 court. Indeed, we all know that the administration has gone to considerable lengths to prevent him from being charged in an Article 3 court and therefore at the time the statements were taken, the UCMJ had to apply; there was no other law.

Third, retroactivity. Would it be fair, would it work with our sense of fair process--due process, to apply a law later this--later next month that unquestionably altered and diminished the rules of evidence by making them more lenient to introduce evidence against

the accused? If the M.C.A. and Rule 301 are applied, as the government would ask you to apply. The cases are pretty clear that where statements, which would have been inadmissible when taken, are later offered in evidence because they arguably comply with more lenient of later enacted rules, they should not come in.

Fourth topic, international law. There is no suggestion in resistance of this rule. That's based on an argument that international law would permit the statements to be introduced. The argument at bottom is that this court is powerless to recognize and apply those principles of international law. Article 3, Geneva Article 3, requires that all judicial guarantees recognized as indispensable be afforded this defendant. Indeed this commission has already recognized that this defendant is entitled to certain protections under Geneva. The right against self-incrimination under Article 3, I believe its Protocol 75 is one section.

Last, the public policy considerations. When one analyzes any rule against self-incrimination and in application of prohibition of pretrial statements taken, the purpose is a fairly evident. But I believe it's appropriate to reflect on a couple. One is what's fair to the defendant in the prosecution of a crime that the statements be voluntary. In the civil--in the criminal law outside the military context, I would expect it to be the same in the military law. Indicia of voluntariness, it can be based on such factors as the

circumstances of confinement, when the statements were obtained, whether the accused, who made the statements, had any legitimate fear for his safety or his life, the level of intelligence and education, the ability to communicate in native language, the length and duration and over what period of time the accused was asked for those statements.

And here, Your Honor, it's hard for me to comprehend a blueprint that would be a more powerful design to show that the indicia of voluntariness were not present during that multi-year period. Another purpose in applying that rule, that construct is to deter inappropriate means or unfair means of obtaining evidence. The ruling sought by the prosecution on this motion would serve the opposite purpose not by any intent of the prosecutors here but surely it would encourage and it would not deter the use of long term multi-year interrogations without advisements in the future.

Now under the Department of Justice's view the following scenario is not far-fetched. Mr. Hamdan could be in a holding cell or out in the hallway, the first day at trial. He could be interviewed out there and for one reason or another compelled to provide incriminating statements while detained against his will. The trial opens in an hour, the first witness called is the person who heard those statements and they're used to convict him. I presume the Department of Justice would say that's no problem. Mr.

Hamdan didn't get on the stand. We didn't force him to testify from that stand. We just use the self-incriminating statements out of line with American concepts of fairness by having someone else get up and recite them in evidence at trial before this Commission.

In closing, I would say that this courtroom is the place where those concepts of fairness are ultimately enforced and applied. But their application does not stop or start when Mr. Hamdan steps over that threshold to enter into the courtroom. The right against self-incrimination must apply also to those self-incriminating statements made in the course of a criminal investigation even though they were obtained on the other side of that door. Thank you.

MJ [CAPT ALLRED]: Thank you.

TC [MR. MURPHY]: Good morning, Your Honor, John Murphy on behalf of the United States. I'd like to respond to the arguments of counsel. First at what I'd call a strategic level and looking how this court itself fits into the judicial system. And then we'll go through some more precise, legal authority that shows that there should be no relief under this motion. Not to put a too fine a point on the obvious, but to stress that we are not at a military courts-martial and we're not at a criminal prosecution in federal district court nor are we in any state court of the United States.

In these other forums, issues such as Article 31 under the UCMJ or the UCMJ itself, the U.S. Constitution or international law

would or could become relevant for consideration. Here we're in a wartime court; a military commission. Something different than traditional civilian or military courts and these proceedings, unlike other courts of the United States, only try a particular type of individual. That is an individual that has been judicially determined to be an alien unlawful enemy combatant.

Now the United States has had other special courts with the unique rules at historic moments in our history, with similar proceedings to these, perhaps the most famous being the Nuremberg trials during World War II and the trials of the conspirators to Abraham Lincoln's assassination. So what's happening here is not unique to American history. It is simply inaccurate to compare a special commission such as this military commission will and the legal rules we operate with to the ordinary criminal courts that try citizens, try service members or aliens who are not enemy combatants.

These commissions serve vastly different purposes and logically they have different rules and procedures. Practically the legal rules we operate under, passed by Congress and signed by the Executive, do provide for fair trials that reflect the war conditions under which alleged crimes occurred across the globe on the battlefield where evidence was gathered, statements were taken, critical wartime intelligence was obtained and exploited and

ultimately legislation such as the M.C.A. was passed and the charges then referred by a convening authority.

So in that broad context, now I'll turn to some of the specific legal authority relied on by the defense. And the defense relies on legal authority that is conclusively and undeniably inapplicable in these commission proceedings. It sets forth three classes of law. First, it sets forth Article 31 of the UCMJ; second, the U.S. Constitution and specifically the Fifth Amendment and the Ex Post Facto Clause; and thirdly, it turns to international law, specifically a Rome Statute, Additional Protocol 1 to the Geneva Convention, Common Article 3 of the Geneva Convention and the International Covenant on civil and political rights.

The government asserts that none of these three classes of authority offer any relief for which the accused is seeking in which he tries to suppress all of his statements that the government intends to offer before this Commission. Let's look first at Article 31. The accused asserts in his brief "the M.C.A. right against self-incrimination incorporates the protections of the UCMJ and the military rules of evidence." The defense goes on to further say that "Mr. Hamdan's statements must be suppressed because they were obtained in violation of the UCMJ."----

MJ [CAPT ALLRED]: ----Mr. Murphy, I'm sorry; you're just going too fast.

ATC [MR. MURPHY]: Sorry.

The plain statutory fact is that the UCMJ specifically and quite--the M.C.A. rather, specifically and quite emphatically makes the UCMJ self-incrimination provisions inapplicable and providing the particular cites for the court 10 USC, 948 b(c) and 948d(2). Congress makes the UCMJ inapplicable here, unless Congress specifically incorporates the UCMJ through the M.C.A. itself.

Now, not only is Article 31 specific--not specifically incorporated in the M.C.A. Article 31 of the UCMJ is explicitly excluded at 10 USC, 948c(1)(b). This section clearly states "the following provision shall not apply to trial by military commission under this chapter, Article 31A, B and D; relating to compulsory self-incrimination." Congress also legislates that all of judicial interpretations of Article 31 of the UCMJ are inapplicable and nonbinding at section 948(c). What Congress does do, is provide for the introduction of all appropriate statements at 948a(b)(2)(a), including out of court statements which the defense makes much of its argument at 949a(b)(2)(e) and even go so far as to permitting allegedly coerced statements that are nevertheless reliable at 948r(c) and 949a(b)(2)(c).

What does the accused have in these proceedings regarding self-incrimination rights?

Under the M.C.A. the accused has a congressionally authorized but nevertheless limited right against self-incrimination at 10 USC 948r(a), which provides "no person shall be required to testify against himself at a preceding of a military commission under this chapter." The government would respectfully focus on the words testify and proceeding in that section of the statute. And consider these terms for their plain meaning. In its brief, the government cites the Hartford case that stands for the proposition that Congress says in a statute what it means. It cites the *Rond Pear Enterprises* case that says when a statute's language is plain, the sole function of the courts is to enforce these words according to their terms.

What the defense is asking the court to do is to legislate from the bench, not to enforce the law. That's contrary to the statue and contrary to the legal principles that we have set forth. Going beyond the plain language of the statute itself, it's instructive to also look at Rule 301(g) to the Military Commission Rules of Evidence, which says most clearly "references to the Fifth Amendment of the U.S. Constitution and Article 31 of the UCMJ cannot be found in Military Rule of Evidence 301 and have been deleted as in opposite. Under the M.C.A. an alien unlawful enemy combatant's privilege against self-incrimination is strictly limited." And it's limited to testimony before a military commission." The government puts special emphasis on the word testimony in this statute.

Now turning to the accused’s constitutional claims to seek to suppress statements. They have no basis in law. The accused seeks relief in the Fifth Amendment to the U.S. Constitution and the Ex-Post Facto Clause. However, the Eisentrager case cited in the government's brief, holds that aliens captured and detained at a U.S. military base in Germany have no right under the Fifth Amendment.

More recently in the Boumediene case from the DC Circuit, a court in the direct appellate review of this Commission, specifically applied Eisentrager holding that detainees held at Guantánamo Bay had the same result or the same rights as in *Eisentrager*. Boumediene is good law; it's followed by the DC Circuit today. There are no cases in the DC Circuit held in abeyance pending the review of this case by the Supreme Court. This Commission should find that the there is no distinction between the detainees at Guantánamo Bay and the prison in Germany and that the Fifth Amendment application does not apply. Similarly the DC Circuit has also noted that the Ex-Post Facto Clause is similarly inapplicable.

So the government urges this Commission to rule in conformity with both *Eisentrager* and *Boumediene* regarding the accused’s constitutional claims and there simply is no legal basis to do otherwise. The government would note that the commission itself in its December 2007 jurisdictional hearing stated on page 9 "all of

the accused’s constitutional arguments are deemed to be without merit."

Finally, on the international law issue, the United States has pointedly refused to sign the Rome statute. The United States is not a signatory to Additional Protocol 1 to the Geneva Convention. The accused’s reliance on Article 3 of the Geneva Convention--Common Article 3 of the Geneva Convention says nothing about self-incrimination rights or privileges. Even if you were to consider these treaties not adopted by our nation, Hamdan is an alien unlawful enemy combatant as determined by this Court and could not invoke those protections.

Finally, the citation of the defense to the International Covenant on Civil and Political Rights is non-self executing and Hamdan has no private right of enforcement under it. The M.C.A. trumps, in any event every inconsistent provision of international law, so the accused can find no statutory, constitutional or international authority to exclude all of his statements.

My last comments on the factual issues is that Mr. Schneider touched on in terms of the statements coming in, and this commission has heard statements made by the accused without Miranda warnings and without Article 31 warnings under the UCMJ. And this was presented to the Commission through the testimony of the agents [redacted] and [redacted] at the jurisdictional hearing. The Commission

quoted from this testimony and the admissions that were introduced and relied on them in fashioning its judicial ruling in the jurisdictional hearing. The government itself and me in particular, who was questioning these agents brought up the fact on direct testimony that the statements were made without any rights advisements, Article 31 of Miranda or otherwise. And also without any coercion being present.

The government carefully elicited all of the circumstances on which these statements were made and at trial we will continue to do so. The commission has relied on these admissions at a critical juncture in this case to determine the very jurisdiction of the commission. And the defense has advanced nothing in its pleadings or argument today that should make these statements inadmissible.

At trial the government does intend to call a number of federal law enforcement agents who will continue just like Agent [redacted] and Agent [redacted] did earlier, to explain in great detail the completely non-coercive conversational encounter between the agents and Mr. Hamdan.

MJ [CAPT ALLRED]: When the light goes yellow that means the interpreter is struggling but still afloat.

ATC [MR. MURPHY]: I'm sorry, Your Honor.

MJ [CAPT ALLRED]: When it goes red, I think he's drowning.

ATC [MR. MURPHY]: Yes sir, I'm almost done.

MJ [CAPT ALLRED]: If he's drowning that doesn't help.

ATC [MR. MURPHY]: Yes, sir.

MJ [CAPT ALLRED]: You still have to take a break.

ATC [MR. MURPHY]: Okay.

MJ [CAPT ALLRED]: He's come up for a breath of air now.

ATC [MR. MURPHY]: Mr. Hamdan as the court has already heard has made candid and forthright admissions regarding his role in Al Qaeda, his support for UBL, and his assistance to terrorists before, during, and after horrific violent terrorist attacks against our citizens and other citizens of the world. Many of these admissions that the defense now seeks to suppress were conducted by law enforcement professionals in the accused’s native Arabic language in which he readily participated in these conversations without any reluctance. And although it is true that the defense comments that a--he was a suspect and that he was interrogated by FBI agents. It was not exclusively for law enforcement purposes, the FBI serves both a criminal law enforcement function and as an instrument of national defense and participates in intelligence gathering and review.

So finally, in summary, the government believes that there's no legal basis and no factual support to keep this important and highly probative evidence from the members in this Commission.

And that concludes my comments unless the court has any questions.

MJ [CAPT ALLRED]: Actually, I think your brief was very well written and I don't have any additional questions.

ATC [MR. MURPHY]: Thank you, Your Honor.

MJ [CAPT ALLRED]: Okay. I think it's time, probably, for a recess; it's 1220. Would 1330 be pressing people too much to get out for lunch and get back?

TC [LTC BRITT]: No, sir.

DC [LCDR MIZER]: No, Your Honor.

MJ [CAPT ALLRED]: I know there are security obstacles to be negotiated but why don't we shoot for 1330.

[The R.M.C. 803 session recessed at 1223, 29 April 2008.]

[The R.M.C. 803 session was called to order at 1407, 29 April 2008.]

TC [LTC BRITT]: Your Honor, all parties are present that were present, when the court last recessed.

MJ [CAPT ALLRED]: The court’s called to order with that announcement. Okay. Let's see, I guess we were ready to take argument on the next motion in order.

TC [LTC BRITT]: Your Honor, respectfully I have taken it as one of my applied tasks this afternoon to try and keep Mr. Goldstein as spaced out as possible in his arguments, given the number of arguments that he's inherited from the attrition schedule that we've been on. So I'd respectfully request that we take his D-022 next, which I think is the next scheduled one in any event.

MJ [CAPT ALLRED]: Fair enough.

TC [LTC BRITT]: Is that fine with the defense?

MJ [CAPT ALLRED]: This is the motion to dismiss the conspiracy specification.

DC [LCDR MIZER]: That's correct, Your Honor.

MJ [COL ALLRED]: On the grounds that alleges a joint criminal enterprise.

DC [LCDR MIZER]: That's right, Your Honor.

MJ [CAPT ALLRED]: Not an authorized theory of liability.

DC [LCDR MIZER]: That's correct, Your Honor.

MJ [CAPT ALLRED]: Okay, go.

DC [LCDR MIZER]: Mr. Hamdan was tried for or at least charged with joining a common criminal enterprise under the old commission system. A system that as you recall the Supreme Court found--found to be illegal. The defense has addressed the four member plurality opinion in that case back in February, where the opinion recognized that the crime of conspiracy had not yet emerged as a clear doctrine under international law. But the court--or the plurality opinion on page 2779 said that whatever the merits of conspiracy are as a crime of international law, certainly both "ill defined crimes" like joining an organization are not so recognized. So it should not be surprising that when Congress drafted this statue with this case in

mind; they did not include that ill defined crime of joint criminal enterprise or common criminal enterprise.

In the Military Commissions Act, much of the discussion here today has been focused on the intent of the framers of the Military Commissions Act to rely, if not incorporate, many of the provisions founded in the Uniform Code of Military Justice into the Military Commissions Act. In that same tradition, Congress in drafting the Military Commissions Act inserted almost verbatim Article 81 of the Uniform Code of Military Justice into section 950(v)(b)(28), but they didn't insert the exact same language, they narrowed the scope of Article 81 as it applies to Mr. Hamdan. They narrowed it by requiring the overt act be committed by the accused himself unlike Article 81 of the UCMJ, which requires that the overt act be done by one member of the conspiracy. And so there's a clear congressional intent to depart from the UCMJ with that one aspect of Article 81, but that is to narrow the scope of conspiracy.

There are three requirements for a conviction of conspiracy under Article 81 of the Uniform Code. There must be an agreement to commit a criminal act. There must be an overt act that is done with a specific intent to commit that underlying offense. Given the identical language or nearly identical language of Article 81, when you open the Manual for Courts Martial or excuse me the Manual for Military Commissions, you would expect to see which what you see in a

Manual for Courts-Martial and you do not. Interwoven into the conspiracy--the elements of conspiracy and the Manual for Military Commissions is the crime of common criminal enterprise or joint criminal enterprise. And that's a consistent theme with what you'll see throughout this process, Your Honor, as are nearing the end of these motions, is in the Manual for Military Commissions, the drafters of that manual attempt to claw back authority and deprivations of--of rights that Congress and Supreme Court have denied them.

This court must now as its duty, look to the statute and determine what the elements of the crime of conspiracy under the Military Commissions Act are, consistent with the *Prit* case, the *Gonzalez* case, and the Mans cases of the Court of Appeals for the Armed Forces. You must do so without any deference to the elements that are contained in the Manual. Now the prosecution argues that the term "conspires" is ambiguous and that therefore the Secretary of Defense is permitted to broadly interpret that--that word. Now the government cannot cite a single case in the near 60 years of the Uniform Code where a military court has found that word to be ambiguous, the same word that is in Article 81 of the Code. Instead they cite two non-legal dictionaries to support that proposition.

The statutory language is not ambiguous in the statute, Your Honor. And as Mr. Murphy so eloquently pointed out just before

the lunch break, when the statutory language is plain, it is the duty of this court to enforce the law. And it must do so with respect to the Military Commissions Act. The prosecution must make this argument that the statute is ambiguous to get to its next argument, which is the Secretary of Defense is entitled to Chevron deference and that therefore, you must avert to this overly broad definition, which is as pointed out on the defense papers is really incorporation of an entirely separate concept of criminal liability, not a definition of conspiracy.

Now in its supplemental e-mail involving supplemental authorities, the government cites *Babbit* versus *Sweet Home Chapter* for the proposition that criminal--the deference is entitled in criminal cases and I want to be precise about this.

MJ [CAPT ALLRED]: I've read the *Babbit* case.

DC [LCDR MIZER]: Okay. Your Honor, holding EPA's interpretation of a statute was reasonable and deserving of deference even though the statue was criminally enforced. Now, Your Honor, what you have to look at is the Supreme Court authority that is cited in--in the defense brief *Gonzalez* versus *Oregon*, which is actually a criminal case and where the Supreme Court says no Chevron deference in a criminal case. Now, the *Babbit* case stands for in a--for the proposition that in a civil case--and *Babbit* is a civil case--that if the statute is criminally enforced, there may be deference due to the

agency. Mr. Hamdan is not tried in a civil case and I don't know that the government will contest that. Instead of the rule of deference, Chevron deference, this court must apply the rule of laity, which requires this court to apply the least to harsh--excuse me least harsh of two different constructions of the criminal statute.

Did he do a search, Your Honor, for Chevron deference? From the Court of Appeals for the Armed Forces case law in the past 60 years, you will not find a single case. You will find those other cases that I cited saying that it is the duty of this court to interpret the statute regardless of what the President incorporates in the manual. And this court must do the same with respect to the manual here. At the very least this court should acknowledge this legal framework and strike the joint criminal enterprise language from the conspiracy charge, conspiracy Charge I, Specification 1.

As you know Judge Brownback has done this in the Khadr case, but this case requires additional action. What the government has conceded before this court and in pleadings that it does not intend to prove the actual elements of the crime it has charged, and I want to be very precise about this. Mr. Hamdan is charged with conspiring with Usama bin Laden himself and other senior ranking members of Al Qaeda to attack civilians, attack civilian objects, murder and so on and so forth as listed in the charge sheet. And in

the pleadings the government has said Mr. Hamdan had no foreknowledge of these terrorist attacks. It is difficult to imagine how one can agree to commit a terrorist attack without knowing about it ahead of time.

They said that he was not involved in the planning or execution of terrorist attacks and "we note that Mr. Hamdan is not charged with specific involvement with specific terrorist attacks or discrete terrorist activities." And yet he is charged with conspiracy to commit terrorism, which again requires an agreement, an overt act, done with the intent to further the underlying charged offense. Instead the prosecution intends to rely on a case, it is apparent now, of guilt by association based upon two seconds long shots of Mr. Hamdan's face in brief films of bin Laden. They will allege that Mr. Hamdan is a terrorist because he drove terrorists. I would note that he also drove ABC news journalist John Miller to a 1998 interview with Usama bin Laden and no one has alleged that he is an NBC or ABC journalist by merely driving that individual to an interview.

Mr. Murphy's correct when he says that many of these attacks are horrific, violent terrorist attacks and those who are actually responsible should be brought to justice, Your Honor. But the government should not be allowed to blame Mr. Hamdan or hold him liability [sic] simply because he was there and caught up in some

dragnet theory of liability which is one of the common criticisms of joint criminal enterprise. And whatever those merits of those criticisms may be, Congress did not draft--that crime did not create that crime when it drafted the M.C.A.

If there are no questions, Your Honor, that concludes my argument.

MJ [CAPT ALLRED]: Thank you. I understand your argument very well. I guess I should ask a question. You're asking me then to rely upon concessions made in the government's brief, assuming that I accept your logic that the joint criminal enterprise theory of liability isn't authorized by the statute.

DC [LCDR MIZER]: That's correct, Your Honor.

MJ [CAPT ALLRED]: And you're asking me to take the next step and rely upon the government's concessions in its brief that it doesn't intend to prove actual membership in the agreement and dismiss the specification?

DC [LCDR MIZER]: That's correct, Your Honor. In the Rules for Military Commissions allow for that remedy when the specification fails to state an offense and a specification that is solely based upon joint criminal enterprise must be dismissed. It should not go before the members so that Mr. Hamdan is prejudiced by inflammatory statements about 9/11, the bombing of the Cole and the U.S.

embassies. Crimes that he had nothing to do with, no foreknowledge of these, these same concessions that have already been made.

MJ [CAPT ALLRED]: Okay. Thank you.

ATC [MR. GOLDSTEIN]: Good afternoon.

MJ [CAPT ALLRED]: How are you, Mr. Goldstein?

ATC [MR. GOLDSTEIN]: Very well. The first point that the government wants to make is that the defense's motion to dismiss Specification 1 of Charge I is untimely. All the Law motions were due pursuant to Your Honor's ruling no later than 9 January 2008.

MJ [CAPT ALLRED]: Okay. Let’s move on, I’m not going to----

ATC [MR. GOLDSTEIN]: Sure.

MJ [CAPT ALLRED]: ----make a decision based on timeliness in this case.

ATC [MR. GOLDSTEIN]: Just to pick up on Commander Mizer’s--the way in which he approached these issues. M.C.A. section 950v(b)(28) codifies the offence of "conspiracy" as a violation of the law of war. The M.C.A. however does not define what exactly the word conspire means. The Secretary of Defense has elaborated on the meaning of the word conspires pursuant to an express delegation from Congress and the President in sections 3b and 949a para(a) of the M.C.A. And the Secretary’s explained that that word "conspires" includes both entering into an agreement, as well as knowingly joining a criminal enterprise. That interpretation is reasonable.

The government cited two dictionaries including the American Heritage dictionary, which defines "conspires" both as to plan together to commit an illegal or wrongful act, as well as to join or act together to combine. The Oxford English dictionary similarly defines the word "conspires" both as agreeing together to do something criminal and combining privily for an illegal purpose.

As the government explained in determining the scope of the statute a court should look first to its language and rely on that language’s ordinary meaning and we cite *Ingalls Shipbuilding* for that. The Secretary's definition in the M.M.C. of the word "conspires" is wholly consistent with at least one of that word’s meaning and is entitled to deference under Chevron which holds that a court should defer to an agency’s reasonable interpretation of an ambiguous statute.

In the first Specification of Charge I, the prosecution has alleged each element of both theories of liability. Contrary to what Commander Mizer just argued. First the government has alleged that the accused entered into an agreement to commit violations of the M.C.A. and the law of war. Second, the government has alleged that the accused joined Al Qaeda, a criminal enterprise, knowing that one of its purposes was committing violations of the law of war. Now, in our answer brief we have described how the charge sheet alleges each and every element of the offense. And--I think this might be helpful

just to compare the two because part of the defense's argument seems to be that the government failed to allege facts that sort of slot into the relevant elements of the offense.

The conspiracy offense in the M.M.C. provides that--essentially define three steps for finding liability----

MJ [CAPT ALLRED]: ----Tell me what page I should look at----

ATC [MR. GOLDSTEIN]: Sure.

MJ [CAPT ALLRED]: To follow your argument.

ATC [MR. GOLDSTEIN]: Do you have the M.M.C.?

MJ [CAPT ALLRED]: 2 4-20?

ATC [MR. GOLDSTEIN]: Yes, exactly. All right and to the extent if you have the charge sheet as well.

MJ [CAPT ALLRED]: That I didn't bring to the bench with me.

ATC [MR. GOLDSTEIN]: Okay.

MJ [CAPT ALLRED]: But if you've written it out--if you’ve laid that out in your written motion.

ATC [LTC BRITT]: Well, I can supply a copy, Your Honor, if, Your Honor, would like to use my copy.

MJ [CAPT ALLRED]: Actually I have the written motion so I'll just follow along in it.

ATC [MR. GOLDSTEIN]: It probably have--it should have the relevant parts excerpted.

So just working from the elements, the first element is that the accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission. In Specification 1, its alleged that Mr. Hamdan, between February '96 and November 24, 2001, conspired and agreed with Usama bin Laden and others to commit various violations of the law of war. And some of those are listed in the overt acts. Those overt acts--serving as a body guard for Usama bin Laden, transporting and delivery weapons and so on--are material--are examples of among other things material support for terrorism. Those form some of the acts that are alleged in the material support count. So, you have conspiring and agreeing with Usama bin Laden and others to commit various violations of the law of war such as material support. So that meets elements the element here, which is entering into an agreement with one or persons to commit one or more substantive offenses triable by military commission.

The second element along the agreement theory of liability is that the accused knew the unlawful purpose of the agreement and joined it willfully. In Specific----

MJ [CAPT ALLRED]: ----You know, I don’t think that the defense is really challenging your--having alleged the elements in the specifications.

ATC [MR. GOLDSTEIN]: It actually seemed that--it seems that they were saying that the government had either failed to allege all the elements necessary for either the agreement prong or the enterprise prong to the extent----

MJ [CAPT ALLRED]: ----Okay; well, I'll let you get--I think I understood Commander Mizer to argue that if I dismiss the joint enterprise prong under the argument they proffer that leaves you with the other theory of liability which requires that the accused himself personally commit an act in furtherance of the conspiracy.

Is that a fair summary of your argument, Commander Mizer?

DC [LCDR MIZER]: Yes, sir.

MJ [CAPT ALLRED]: Okay. So let--why don't you address that?

ATC [MR. GOLDSTEIN]: Sure.

MJ [CAPT ALLRED]: The agreement theory; is that what you are calling it, the agreement theory?

ATC [MR. GOLDSTEIN]: Right. Essentially there are two prongs, the agreement theory----

MJ [CAPT ALLRED]: ----Okay, I'm sorry; the defense acknowledges that you have alleged all of the elements; they argue that you've also admitted that you are not going to prove that he actually entered into the conspiracy. That's the defense argument.

ATC [MR. GOLDSTEIN]: Right, so

MJ [CAPT ALLRED]: Okay.

ATC [MR. GOLDSTEIN]: To address that, you sort of have to unpack, exactly what's been alleged and maybe I'm doing a bad job of it.

MJ [CAPT ALLRED]: Okay, go ahead; I'll let you run.

ATC [MR. GOLDSTEIN]: Essentially there are two theories of liability: agreement and enterprise. Part of the problem is the defense is sort of conflating all of it and misreading both the charge sheet as well as--or at least misreading the charge sheet. They may or may not be misreading the M.M.C. So, I think you'll see once I sort of lay this out that the conclusion, even if you were knock out the enterprise theory, there would still be sufficient facts alleged under the agreement theory. We can come back to whether or not the merits of knocking out the enterprise, that's of a different issue.

So, again under the agreement theory there's sort of three steps for liability; entering into an agreement with one or more persons to commit a substantive offense triable by military commission; there is a knowledge requirement that's element two, (b)(2) for the conspiracy offense, knowing the unlawful purpose of the agreement; and then (b)(3) is the overt acts.

So the government has alleged: conspiracy and agreeing with Usama bin Laden and several others, to commit various violations of the law of the war. Those violations are set forth in the overt acts

at the bottom of the charge sheet, serving as a body guard for Usama bin Laden and so on. Transporting and delivering weapons and so on, and transporting and delivering weapons, I'll just note that in your ruling in 19 December, you found that the accused had done that and that was part of the basis for finding that he was an unlawful enemy combatant. It has nothing to do with 9/11, so even if you put aside any connection to 9/11, you still have conspiring and agreeing with Usama bin Laden and others to commit those various overt acts.

The next element is the knowledge requirement, it’s been alleged that the accused knew the unlawful purpose of the agreement in driving Usama bin Laden, delivering the weapons and so on. The overt acts have obviously have been alleged. So even if you took out, even if you carved out the enterprise theory from Specification 1, the government still alleged facts sufficient to meet each and every element of the agreement theory.

Just as to close the loop, the government has also alleged elements sufficient to meet each and every prong of the enterprise theory. The enterprise theory, going back to the manual says, "or otherwise joined an enterprise of persons, common criminal purpose committed to violating the law of war." In the charge sheet it says, "and joined in enterprise or persons known as al Qaeda committed to violating the law of war." That’s where the references to 9/11, to the Cole, to the Embassy bombings and so on come in.

Just wait a sec.

MJ [CAPT ALLRED]: Go ahead; I think they have caught up with you.

ATC [MR. GOLDSTEIN]: Okay.

MJ [CAPT ALLRED]: The lights don’t seem to be working right.

ATC [MR. GOLDSTEIN]: So part of the difficulty and sort of responding to the defense’s brief, which we tried in our motion is to explain that they’re sort of conflating the two prongs and they are reading them together when that’s the wrong way to read them and that’s not how it's set out in the statute or in the manual at the very least. And so even if you take out any connection to 9/11 that only responds to the enterprise prong of conspiracy and that does not in any way impede the government’s allegation along the agreement theory.

And this is laid out in the brief.

MJ [CAPT ALLRED]: I’ve read your brief.

ATC [MR. GOLDSTEIN]: Okay; and then the accused’s final argument, I’ll just hit it just a briefly because they did not discuss it up here; is that the due process clause and the *Scales* line of cases, prohibits the government from prosecuting him under the joint enterprise theory. As an initial matter we just note once again that, Your Honor’s 19 December ruling found that the Fifth Amendment does not apply to the accused under Boumediene and

Eisentrager; and *Scales* of course this Fifth Amendment case making it inapplicable to the accused.

Just, secondly, even if the government, even if *Scales* did somehow apply to the accused, it held only that mere membership in a criminal enterprise--there are the Communist Party was--could not be prosecuted in and of itself. Scales expressly disclaimed any application to acts of conspiracy and there's a quote in our brief on page 10 which quotes from *Scales* at 227 and 228 of Scales. And we have quoted the relevant language on page 10 of our brief but essentially the Court, the Supreme Court expressed a contrast mere membership in an illegal organization with the conspirator who acts in furtherance of an illegal enterprise. And in the present case Mr. Hamdan is not accused merely of being a member of a conspiracy of various overt acts are alleged and so on. And that clearly takes it out of *Scales*.

Just to respond to Commander Mizer's other point about the Chevron deference because I think that is an important point. Commander's Mizer point as I understood it is essentially that Chevron has no application either to criminal law in general or at least in this sphere or something like that.

The first point is that the cases that Commander Mizer is relying on for the most part are inapposite. The issue is not does the Secretary of Defense receive Chevron deference in enforcing a

statute. The question is whether the Secretary of Defense receives Chevron deference in interpreting and implementing a statute. For example, if we were talking about whether the Department of Justice receives Chevron deference in interpreting a particular federal statute, the answer would generally be no. The reason for that is that the Department of Justice is not the agency charged with interpreting the federal code; it's the department charged with enforcing it. Interpreting the federal code falls to the federal courts, which is why DOJ would generally not receive Chevron deference when interpreting a statute. Here however, the Secretary of Defense has been entrusted not merely with enforcing the M.C.A. but interpreting it, section 3(b) and 949a para(a) again, authorizes the Secretary to promulgate the M.M.C. We agree; for example, the prosecution's, our interpretation, of the M.C.A. and M.M.C. in a particular case would not be entitled to Chevron deference. Just as DOJ's interpretation in the civilian world would not be, but here when the Secretary of Defense promulgates regulations implementing the M.C.A., he's acting in a rulemaking rather than in an adjudicatory capacity and he therefore receives Chevron deference just as the head of the EPA would when he promulgates environmental regulations. We also refer, Your Honor, to our supplemental citations in *Sash v. Zenk*, which is the 2d Circuit case we noted. The 2d Circuit found that "the Supreme Court has rejected the idea

that the rule of lenity should trump the deference we traditionally afford to reasonable administrative regulations," and the court relied on *Babbit* as well.

Now, to the extent courts-martial have interpreted the UCMJ in a contrary way, we note that such decisions are not applicable to this Commission and that's M.C.A. 948b(c), which Commander Mizer did not mention. So accordingly Chevron is fully applicable to the Secretary's articulation in the M.M.C. of the elements of the conspiracy offense set forth in the M.C.A.

And just to make one other point, the defense cited or at least noted Judge Brownback's ruling in the Khadr case. Just to make a couple quick points on that. First, is the government quite obviously disagrees with Judge Brownback's conclusion. Second, that decision is obviously not precedential. The third, is that a number of arguments that were included in the response to Your Honor, were not included in the pleadings that Judge Brownback received and the Khadr team may well move for reconsideration on that basis. And fourth, we believe our arguments in our briefs are more compelling than Judge Brownback's analysis.

I'd be happy to answer any questions.

MJ [CAPT ALLRED]: Yes, have you read *Gonzalez versus Oregon*?

ATC [MR. GOLDSTEIN]: Yes.

MJ [CAPT ALLRED]: The defense summarized the holding of that case as that the Chevron deference simply wasn't applicable in a criminal case. Do you agree that was the holding? In construing criminal statutes might be a better way to characterize it.

ATC [MR. GOLDSTEIN]: Right.

Gonzalez--as I've said there are a number of cases that hold that the government is not entitled to Chevron deference with respect to a defendant's guilt and so on in a particular case, and that's *Gonzalez v. Oregon*. Which----

MJ [CAPT ALLRED]: Can you give me the cite there, while you've got it. I don't find it in here in the brief?

ATC [MR. GOLDSTEIN]: Sure. I mean *Gonzalez v. Oregon* is 554 US 243 and then page 264, which is essentially saying that--I just note, we respond to this on footnote 2, page 5 of the government's brief. We respond to the *Gonzalez v. Oregon* issue. We also note that another opinion *Crandon v. United States*, this is also footnote 2, page 5 of the government's brief. Holds or at least notes in passing that the government's decision to prosecute is not entitled to Chevron deference.

We're not saying that the fact that the government has decided that Mr. Hamdan is guilty and is therefore prosecuting him. We are not saying that decision should be entitled to Chevron deference. It just says--as I was saying DOJ to give you the example

that these cases are coming out of, would not receive Chevron deference in charging someone. That is a different animal very much from whether or not the Secretary of Defense receives Chevron deference in promulgating regulations.

Gonzalez v. Oregon does not speak to that, nor does Crandon speak to that and that's where a case like where *Sash* is a much more relevant precedent.

MJ [CAPT ALLRED]: Okay. Well, I'll read the cases then. I do have one more question, if you wish to address it. *Babbit v. Sweet Home Chapter* whatever it was, relied on an extensive legislative history that clearly showed that Congress intended the word "take" to include a definition like "harm."

ATC [MR. GOLDSTEIN]: Right.

MJ [CAPT ALLRED]: I don't have the legislative history here and I have trouble knowing that Congress really meant that he wanted -- that they want the Secretary of Defense to, you know, to confine-- define conspiracy in this new way.

ATC [MR. GOLDSTEIN]: Right. *Babbit* does not address this issue honestly as on point as *Sash* does. The reason we cite *Babbit* largely is because *Sash* is relying on *Babbit*. *Sash v. Zenk*.

MJ [CAPT ALLRED]: I read *Sash* too.

ATC [MR. GOLDSTEIN]: Okay, well.

MJ [CAPT ALLRED]: The absence of a legislative history is what makes a difference between that line of cases and the argument you're making today. Would you like me to re-read *Sash*?

ATC [MR. GOLDSTEIN]: I guess I did not see *Sash* as being driven largely by the legislative----

MJ [CAPT ALLRED]: No, *Babbit* was, *Babbit* was and *Sash* just relied on *Babbit*.

ATC [MR. GOLDSTEIN]: *Sash* is an elaboration of Babbit; *Sash* is I think, a reasonable extension of *Babbitt*. I agree with that Babbit is not is on point as *Sash*, but *Sash* you actually have a court of appeals really dealing with this issue of the rule of lenity in comparison with Chevron deference and how to balance that and I think the reasoning in *Sash* is very sound. But I agree that *Babbit* is not a direct endpoint precedent and there's only so much work it can do in and of itself.

MJ [CAPT ALLRED]: I guess my other reaction to *Sash* is it seemed to me to find that adequate notice was given by criminal regulations so that they were willing to enforce this administrative--whatever you call it interpretation because the accused was arguably on notice. Now the joint criminal enterprise theory of conspiracy, I don't see any administrative notice either that will put someone on, you know, on notice that that was a new interpretation.

ATC [MR. GOLDSTEIN]: These arguments, at some level, dovetail with the Ex-Post Facto motion that Your Honor is still considering. And--*Sash* is both a Chevron case and an Ex-Post Facto case and so you have these arguments that are coming together. As we argued in our Ex-Post Facto briefs and to, Your Honor, last time we were here; the enterprise theory of conspiracy, however denominated, has been a violation of the law of war going back to the civil war. In Nuremberg there's a precedent we relied on and cited relating to the SS and so on. And so, whether or not Mr. Hamdan would have, you know, a prior notice that the word conspires in a manual that would not be promulgated until 2006 would be elaborated and interpreted to mean entering into an enterprise, the relevant issue is that he was on notice that his conduct was prohibited under the Nuremberg precedent and so on. The joint criminal enterprise committed to violate the law of war was a violation of the law of war. He was on notice as to that and the fact that this prosecution came about because Congress in 2006 passes the M.C.A., I think, sir, confuses the issue. So at some level this is going to fall back on Ex-Post Facto issue, at least as to this point.

MJ [CAPT ALLRED]: I see, okay. So your theory of notice is the general law of war and the Nuremberg precedents and that kind of thing.

ATC [MR. GOLDSTEIN]: Right. That there goes encompasses both theories of conspiracy as it has to under the Ex-Post Facto arguments.

MJ [CAPT ALLRED]: Thank you very much.

TC [LTC BRITT]: Your Honor, at this time we would be calling D-032 and I think that's an order on our sheet; Defense Request for Expert Witness, Sageman.

MJ [CAPT ALLRED]: Okay; before we do this, I'd like to talk to the government please. I'd like to know what expert witnesses you have coming to testify for you, and what their areas of expertise are, how many you have, and that kind of thing.

TC [LTC BRITT]: Yes, sir. At this particular time, we are planning on calling Evan Kohlmann. I believe all his qualifications are set forth in our motion that we filed before the clerk for pre-admittance of al Qaeda 101.

MJ [CAPT ALLRED]: So he's an international terrorist al Qaeda kind of expert.

TC [LTC BRITT]: Yes, sir. That would be correct. Additionally, we may seek to qualify any number of the witnesses and I understand we haven't given the defense our witness list yet and we will make amends to that very shortly, based on our discussion, Your Honor, indicated we have, setting suspense for that type of thing; but there's a possibility that we would seek to qualify any number of our

case witnesses based on their involvement on global war on terrorism, country origin and that type of thing.

MJ [CAPT ALLRED]: Okay. Well this is going to be interesting if you plan to have six or seven country specific experts then that's going make--that's going to be relevant when the defense asks for a country specific expert.

TC [LTC BRITT]: Sir, I believe our discussions in our group indicate no more than two of those individuals would be expert.

MJ [CAPT ALLRED]: All right. The number is two then and what will their expertise be?

TC [LTC BRITT]: Their expertise would be knowledge of Islamic extremists groups and that would of course encompass all the terrorists' organizations which fall under al Qaeda to include al Qaeda and Taliban and maybe several others should they become relevant.

MJ [CAPT ALLRED]: Okay, now----

TC [LTC BRITT]: And obviously, it's difficult in a lot of these trials are like chess matches and we have to think that sixth move down on the board to understand exactly what to prepare for, what we anticipate might possibly come up. So we have various----

MJ [CAPT ALLRED]: Well, we are a month from trial; so it's just a few moves down the board.

TC [LTC BRITT]: I understand, I understand before the opening moves made.

MJ [CAPT ALLRED]: And I need to know, well if much of the defense's argument on this motion is that you have a bunch of experts and they need the ability to respond. And I'll need to know who you have or what you have.

TC [LTC BRITT]: Those are the experts right now.

MJ [CAPT ALLRED]: So these two unnamed experts that will be international terrorism specialists. Are they professors with PhDs who write books?

TC [LTC BRITT]: They're FBI agents.

MJ [CAPT ALLRED]: FBI agents.

TC [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: Okay. Well, those can still qualify as experts. Okay. Do they have different areas of expertise?

TC [LTC BRITT]: Yes.

MJ [CAPT ALLRED]: Was one of them an Afghanistan guy?

TC [LTC BRITT]: Functionally, the same answer. One's actually DOD, operating with the FBI. So it will actually be specifically one DOD, one FBI. And a lot of our determination as to what experts to obtain are driven by what we see the defense requesting at this hour. I mean obviously we start off with a case where we have a certain number of witnesses we're planning on calling one expert. And the

defense puts out a request for an expert and we look at that we see what their theory is in their case, and then we make a determination as to whether or not----

MJ [CAPT ALLRED]: ---Well, they're arguing that you have experts and they need to be able to rebut your test----

ADC [MR. SWIFT]: ----They don't tell us who it is, so we have to give our theory away, Your Honor.

TC [LTC BRITT]: Well, I'd be very interested in knowing what my experts are if they know and I don't, but I think the point is right now we have one Evan Kohlmann, who we've noticed, at least I think constructively, noticed everybody on through our--our filing of al Qaeda 101 plan; and secondly, we have two others, which may need to be qualified as experts depending on where the case goes.

ADC [MR. SCHNEIDER]: My only question is whether those two witnesses have names.

TC [LTC BRITT]: Sir, I think at this particular point and these are not with witnesses which are totally unknown, these are witnesses one of which testified [redacted], who testified at the pretrial jurisdictional hearing in December of 2007. But then again, there may be no need to qualify him as expert. We just need to see how the case goes. But to represent the voluminous number of defense expert witnesses are needed to confront an unknown army of government

experts, we've given no indication. I have not noticed the defense that those people even exist.

MJ [CAPT ALLRED]: Well they are trying to prepare whether your evidence is going to come in by expert testimony or not. They're merely trying to prepare to rebut what they see as a developing case. So [redacted] and another unnamed agent

TC [LTC BRITT]: [redacted].

MJ [CAPT ALLRED]: [redacted].

TC [LTC BRITT]: [redacted]. Formally of the Federal Bureau of investigation now employed by Giuliani Securities.

MJ [CAPT ALLRED]: Okay. That's your expert. Evan Kohlmann, Ali or I'm sorry.

TC [LTC BRITT]: [redacted].

MJ [CAPT ALLRED]: And [redacted].

TC [LTC BRITT]: [redacted].

MJ [CAPT ALLRED]: Okay. Now who’s arguing it for the defense?

ADC [MR. SWIFT]: I am, Your Honor.

MJ [CAPT ALLRED]: Listen, I don't know that I need an argument. Come step up to the podium if you want and let's talk about this. **[Counsels walked up to the military judge's table.]** Oh, I'm sorry. I didn't mean you should stand by the microphone, I don't need a formal argument is what I was saying.

TC [LTC BRITT]: Your Honor, for the government Lieutenant Commander Stone was prepared to argue these motions so I'm going to surrender to him and let him to the degree you need questions answered.

MJ [CAPT ALLRED]: Okay.

Well, listen here's my reaction to the motions on Marc Sageman. Now you know what the government’s experts are and that narrows I think your field of maybe narrows your defense, do you still you need Marc Sageman?

ADC [MR. SWIFT]: Absolutely, Your Honor, he is an----

MJ [CAPT ALLRED]: Okay, here is my question, you have Brian Williams.

ADC [MR. SWIFT]: Yes, sir.

MJ [CAPT ALLRED]: Who has previously been qualified as an al Qaeda expert and as a central Asia expert?

ADC [MR. SWIFT]: Yes, Your Honor.

MJ [CAPT ALLRED]: You have Dr. Keram.

ADC [MR. SWIFT]: Keram.

MJ [CAPT ALLRED]: Keram.

ADC [MR. SWIFT]: Yes, Your Honor.

MJ [CAPT ALLRED]: Who has previously been made available, she is a forensic psychiatrist, who spent already a 100 hours working on this case. My sense is that Dr. Sageman is a mix between the two.

ADC [MR. SWIFT]: Actually he is not, Your Honor.

MJ [CAPT ALLRED]: Forensic psychiatrist and al Qaeda expert and my question is why do you need him when you appear to already have the expertise that you have.

ADC [MR. SWIFT]: I can state that pretty easily, Your Honor. Mr.--Dr. Williams is an expert principally on the Jihadist movement in Afghanistan and in Central Asia. His principal expertise is to testify to with regards to a group known as the Ansars and a group known as the Taliban in that area and the Arabs that fought with them. In that study he's come in contact with Al Qaeda because they did come in contact with them. But he hasn't studied the international terrorist organization, he hasn't studied international terrorist attacks. He would tell you that he knew very little or nothing about 9/11 or any of those parts. Mr. Hamdan's activities are focused principally on what happened in Afghanistan.

Now I would be the first to admit that if, Your Honor were to rule at some point that the hostilities in the *res Judicata* that the attacks of 9/11, the attacks of the Cole and attacks of the embassies are not related to this case. And unless there is evidence that ties Mr. Hamdan to them and he was part of the planning or coordination or carrying out, Mr. Sageman is not relevant to those portions. And I ask for Dr. Sageman at this point because I'm just not sure where we're going to end up. We have an al Qaeda expert.

Now what Dr--Mr. Sageman or Dr. Sageman is absolutely is an expert on by the international terrorist attacks that were carried out by the organization known as al Qaeda. He has made an extensive study of those attacks, the individuals, the means that they were carried out. He had a background both as a psychiatrist, as a Naval flight surgeon and as a CIA operative to make this study. So in that sense he is an expert on a field--on the field of the international terrorist attacks. To us, those are very distinct things in our theme and theory of the case. In one being conflict happening in Afghanistan, which he was though once part of, will also admit that he did not study nor participate in, he basically stopped shortly before Mr. Hamdan--his involvement with the study or knowledge of that area of the world ended about 1990 some six years before Mr. Hamdan ever got there and he can't testify.

MJ [CAPT ALLRED]: Who are you talking about now, Dr. Williams?

ADC [MR. SWIFT]: That's Dr. Sageman, sir.

MJ [CAPT ALLRED]: Dr. Sageman.

ADC [MR. SWIFT]: Now with regards to the psychiatrist part, he has done something that Dr. Keram has not done. Dr. Keram is testifying on both the conditions of Mr. Hamdan's confinement and on the conditions of his interrogations. That's not Dr. Sageman's field. Dr. Sageman has done an extensive study of what the membership of these terrorist organizations or the membership of that

attack their profile. And we would also seek to introduce Dr. Sageman at sentencing because we anticipate an argument that if Mr. Hamdan's found guilty of any these crimes and they all carry life in prison. An extraordinary large sentence, that Mr. Hamdan by virtue of his association is extraordinarily dangerous that he will represent a continuing threat to society--to the world as a whole for the rest of his life and Dr. Sageman has----

MJ [CAPT ALLRED]: But Dr. Sageman hasn't even met your client.

ADC [MR. SWIFT]: We have asked, part of our problem was to have him meet and be able--and he has to, be able to do this, meet and review the files. Now he has the advantage of being able to review Dr. Keram's work up to that point, meet briefly, and then testified with regards to his rehabilitative potential and future dangerousness. He is perhaps the only man in the Western world who could offer such opinions based on scientific evidence and study of what the membership, recidivism rates and individuals and what they did with any basis in fact. So Dr. Sageman, fortunately for us and we've tried to pare it down not knowing what any particular witness was, but he is one who crosses and gives us both because he has to do it in a study of the individuals, studying the attacks, study all of the parts of it and how they were conducted, gives us that part and we think it will play directly. If we hear testimony about these attacks or that theory on whether Mr. Hamdan’s activities were

related or not. Because he will talk about how the attacks were carried out, what was related, etc. In brief, he will testify that had Mr. Hamdan's relationship to these attacks were such that if he had been killed and the entire camp been blown-up, for instance on 9/11, some two years earlier, it would have zero effect on whether the attacks would have occurred. That it had no relationship, but that's evidence that may need to be heard and we believe that he is the appropriate expert to testify to that.

MJ [CAPT ALLRED]: Okay. When the Convening Authority denied your request on April 1st, she invited you to resubmit.

Did you think about trying to meet her----

CDC [MR SWIFT]: Your Honor, we have played this game. We have resubmitted and we have resubmitted, we have never have had anything approved, not one witness, not one other and with it getting to this point in time in trial, where we resubmit and cannot put a motion in, Your Honor, has set a hard trial date. And we have done so as fast and as capable without knowing what one government witness was. We thought it advisable at this point to bring up the witness to this court.

MJ [CAPT ALLRED]: Okay. What makes you think you need 80 hours of preparation time for a witness with this man’s qualifications? Is that just a number you pulled out of the air?

CDC [MR SWIFT]: We consulted with--we consulted with him and

because he needed to review Dr. Keram’s work and had not yet seen it. And because we were trying to make a comprehensive request for both his testimony, time and knew that we could not--there would be no time to come back and say you know we thought it would take 50 hours, it’s turned out to take 60 can we have 10 more please? On May 15th, for instance, we’re out of time. So we ask for 80 hours, we believe in being good stewards of the government's money and it’s not our desire to spend more than that or that’s what we have. But the way this process works is that if you run out of the time, if you exceed it, you're done. So again if I were asking for this in December of this year--of last year, with a May 28th trial date, I might say well we will go on the low end and say that Dr. Keram’s test--everything she has done will be sufficient, he will need little to no time, everything will go smooth with the JTF visit, he won’t sit around for two days trying to meet Mr. Hamdan, using up time in that way, and ask for less. I asked for 80 hours to insure that I would have a witness on May 28th.

Because this court has indicated that it wants to go on May 28th or there is near as there about as possible. We're trying to do everything to meet that despite the fact that as I said, I am guessing at the government’s case. I have no idea who the witnesses are. We learned a hard lesson in the December hearing, because we submitted our witness request at the same as the government and found

that we have done nothing timely, so we have tried to do everything timely in this case.

MJ [CAPT ALLRED]: Okay. Commander Stone.

TC [LTC BRITT]: Sir, if I could just make one point before Lieutenant Commander Stone and I don’t want to test the patience of the court, but based on this colloquy, I understand sir, based on this colloquy, I think it be wise and prudent to indicate that there is potentially one more government expert and that would be some mental-health expert, person to be named later, based on whatever the defense proffers as an affirmative defense or otherwise.

MJ [CAPT ALLRED]: What--what would you need to call a mental health expert for?

TC [LTC BRITT]: To rebut whatever theory the defense is going to use with regard to effects of incarceration, essentially rebut Emily Keram’s proffer of testimony and should we be noticed as to some type of mental capacity defense, we need to be prepared as well with an expert to rebut back.

CDC [MR SWIFT]: Let me be clear, Your Honor. We did not proffer Dr. Sageman as a defense. In his capacity--in his testimony regarding Mr. Hamdan’s future likeliness to re-offend, we proffered him as a sentencing expert to talk about the likelihood that this individual presents the type of threat that justifies a life sentence.

MJ [CAPT ALLRED]: Okay. Under any event for court-martial, it's much harder to get a sentencing witness then to get a merits witness. I haven't looked at the rule lately but I'll have to check that.

ATC [MR. MURPHY]: Would you like me to address that, sir?

MJ [CAPT ALLRED]: No, I----

CDC [MR SWIFT]: I understand that it is under the Manual for Court-Martial more difficult. However, this is an unusual circumstance where we have no fixed sentence. The minimum--the maximum sentence for every crime that Mr.--Mr. Hamdan has been charged is life in prison. The members--the normal factors that are considered by juries or by members in military courts, either with a fixed determinate sentencing system or in a courts-martial, etc. on the individual don't really play--are not present and so, we believe that it is essential that the jury be educated about Mr. Hamdan and how the threats that he would pose, because he is not someone within their common understanding. There is no way that the jury has as a common understanding someone from his background someone from his upbringing and the threats that he pose, especially given what the government has already indicated. There will be a parade of victims from 9/11 etc., testifying as to the necessity for the maximum sentence possible and we believe that it is appropriate for the jury

in weighing future dangerousness against attacks that were truly horrific and create a real feel and fear of danger.

To have an expert who has studied these attacks and can speak to this person’s dangerousness under those circumstances to the--to the--to commit future attacks or future crimes and we are admittedly--there are good reasons why experts are more difficult in court-martialing sentencing, determinate sentencing, known factors in common experience of the members are able to judge a soldier or sailor who--what kind of threat they propose, there is something within their common experience, Mr. Hamdan is not.

MJ [CAPT ALLRED]: You know I have heard Dr. Sageman lecture and I am familiar with his research. But I am not familiar and I don't think you proffered that he has any background in predicting the likelihood of re-offending or that there's any scientific or other database on which he can rely to make those----

CDC [MR SWIFT]: Well he will testify----

MJ [CAPT ALLRED]: ----opinions.

CDC [MR SWIFT]: Well, certainly it may be appropriate, you know, to have this put fourth in Daubert, but we have to obtain him first and then put it forward. He has been working out--one of his studies and lectures that he has now published, appear publishing, is regarding the mental state, the make up and the what bayat and loyalty and the idea of death pledge and continuing the kind of thing

that would make someone an absolute threat. To continue an attack as opposed to others who are near or surrounding it. And he has looked very carefully into the motivations and really continuing threat on what a crime drives towards motivation and whether this individual shared the same common motivations, purposes, etc., that would lead a group of men to drive--to fly planes into air--into a building and kill thousands.

MJ [CAPT ALLRED]: He has published some work in this area?

CDC [MR SWIFT]: Yes, he has.

MJ [CAPT ALLRED]: Would you give me a copy of his most recent publication in this area?

CDC [MR SWIFT]: We will--I will do so, it's, you know, without the funding it is somewhat tough to, but I will ask him to provide some of his work for the court. If it proffered----

MJ [CAPT ALLRED]: Is it a published article?

CDC [MR SWIFT]: I believe it is now. He was in process of it in December, so.

MJ [CAPT ALLRED]: Okay, well. Does he need it to be funded? I mean this is a published in a journal that we could just copy or something?

CDC [MR SWIFT]: I will contact him, sir and provide what he has to the court----

MJ [CAPT ALLRED]: I would like to know what research he's done and what background he has to make these opinions----

CDC [MR SWIFT]: ----at my earliest--Okay.

MJ [CAPT ALLRED]: Commander Stone, thank you for waiting patiently.

ATC [LCDR STONE]: No problem, sir.

[Lieutenant Commander Stone moved to the podium.]

ATC [LCDR STONE]: Well, it's nice to hear what the defense actually is going to do with Dr. Sagemen for the first time here. Start first with, I'm going to go backwards since you first started with the idea of Dr. Williams, which--which would meet the adequate substitute part of the language and remember that the government or the defense is entitled to, under the Burnett Case, what would be, competent assistance not necessarily, you know, I am not going to spend a lot of time on the law, it is pretty well settled where we go and what we do. Think back to the December jurisdictional hearing, when Dr. Williams said “those of us in the know, call it Al Qaeda al Sulbah”, okay those—ands since you are familiar with Dr. Sageman’s book “Understanding Terror Networks”, as you flip through it you'll never find that in there. But their offer and their proffer speaks specifically with regards to Al Qaeda al Sulbah and how that will in fact work and how that mythical organization actually participates in terrorist organizations. Most importantly with that is the defense

in their request for Dr. Williams themselves specifically said they wanted Dr. Williams to testify or to be assigned for assistance to develop an—the defense the Al Qaeda plan which the government has offered.

Fast forward couple of minutes, you know, two weeks later, three weeks later, whatever it was we get the same request for the same thing from a different expert. Now whether the Convening Authority denied it or whether they didn't, that is really kind of moot at the moment, because you've ordered Dr. Williams, he's testified in court, he has been accepted as is and he has been accepted as an expert and testified in this proceeding with regards to the information that the defense seeks to elicit as well as Al Qaeda. The idea that the Ansars go back to the jurisdictional test--sorry I have a red light--green light, okay. If you go back to the jurisdictional test—that's jurisdictional hearing and the testimony elicited from Dr. Williams, he discusses how the Ansars and Al Qaeda are basically the same. So to the idea that they are trying to pull in a second expert witness to do basically the same work, it is really not necessary and he would serve certainly as an adequate substitute.

Now, the other thing that is important to go and I will go back, kind of--kind of flip to the front. The defense in their reply says, you know, that the government has talked about putting the cart

before the horse, in that we asked them to put forth some of the information, some of the scientific evidence, the 702 standard that would say Dr. Sageman would meet. Not a full-blown Daubert hearing, but you have nonetheless, in the bio that they site, 16 terror publications, two books, and nothing from the defense that shows the methodology, whether this is an accepted method, how he did it, what the study of 400 Al Qaeda people are. Then we go to the subset of it, if you have read “Understanding Terror Networks”, you'll know that when he breaks out the core cluster Arabs, the Maghreb cluster Arabs, the Asian cluster Arabs and the fourth one, which deals with the specific close group of Al Qaeda individuals.

The defense has not done the work to even show where this accused would fit within the study of Dr. Sageman’s book, which they then try to purport to pass him off as an expert. I mean, well--if--this--this is not Dr. Sageman doing the work. This is the defense doing the work and getting a proffer from Dr. Sageman and that’s--you know this is not something new, this is not something fashionable, something that we’re holding the defense’s feet to the fire. This is common regular standard military practice. It is a fundamental requirement for the approval of an expert to testify and they haven't done any of it. Nor have they gone ahead and said, well you know, it would be nice you know--also if in Dr. Sageman's book, if you look at the Core Cluster Arabs, the Maghreb Cluster Arabs, etc., all of those

which he specifically delineates have different percentages, different ideas associated with all kinds of social and economic studies. You know, one of which even includes Omar Khadr with regards to this membership of this terrorist organization.

Now, until they come forward and provide the specific information and how Dr. Sageman's testimony will work, production is by far not required, not necessary and should be denied. One more piece, sir, when we talk about the profile evidence. The defense in their reply makes a big deal that we are not seeking profile evidence, when they say Dr. Sageman has conducted extensive research into the profiles of al Qaeda membership. Profile evidence is defined as evidence that presents a, well surprisingly enough, characteristic profile of an offender and then to be used to show that the person either conformed with that characteristic profile or did not. The defense's proffer of Dr. Sageman to the best that we can figure is nothing more than trying to throw out profiles and then saying that Mr. Hamdan doesn't fit. So eve--until--deny this. Make them go back. Make them do it right and then we can have discussion on the merits of the request, on the scientific foundation of what he did and then we can address that as other issues.

[Lieutenant Commander Stone returned to the prosecution table and Mr. Swift moved to the podium.]

MJ [CAPT ALLRED]: Okay. Have you talked to Dr. Sageman about getting a proffer of his expected testimony?

CDC [MR SWIFT]: We have talked with him, but we have not asked for a proffer yet from him.

MJ [CAPT ALLRED]: I think the government’s point is well taken. I am open to the possibility that this will be fair----

CDC [MR SWIFT]: ----Can we have funding to get a proffer? You know because----

MJ [CAPT ALLRED]: ----Yes. How much, two hours?

CDC [MR SWIFT]: Four hours, Your Honor. You--I mean, you know, as I said there is an awful lot of the work to be done and----

MJ [CAPT ALLRED]: Okay. Four hours. I authorize four hours of Dr. Sageman’s time to get a proffer. I'd like to see copies of his research; I want you to meet the standard that is laid out in the rules and get it to me quickly because I am going to rule on this motion. I mean if he needs time to prepare, he has to have time to prepare for a month out from trial. Okay?

CDC [MR SWIFT]: Yes, Your Honor.

MJ [CAPT ALLRED]: What's the next motion?

TC [LTC BRITT]: Your Honor, we just plan to keep right on going down the list. We do--we do have a member of our party though who indulged, against all advice and good sense, in coffee, water, and etc, and are requesting a brief break.

MJ [CAPT ALLRED]: **[Chuckling.]** Well, let's see, we've been, I don’t mind if one person steps out to take a recess. It’s so hard to get people in and out of the court room, unless there’s a general consensus that we all need a break. We've only been on the record for 50 minutes, okay why don’t you step out if you need a recess and you can come back in. **[Mr. Murphy left the courtroom.]**

MJ [CAPT ALLRED]: Whose--who is arguing the request for Dr. Carapico?

ADC [MS. PRASOW]: I am, Your Honor.

MJ [CAPT ALLRED]: Okay.

[Miss Prasow moves to the podium.]

MJ [CAPT ALLRED]: Whenever you are ready. It’s good to see you at the podium.

ADC [MS. PRASOW]: Thank you, Your Honor. It is a pleasure to be here.

MJ [CAPT ALLRED]: You have been back there by the post, backing up the A-team for so long.

ADC [MS. PRASOW]: I will only be here very briefly on this issue, Your Honor.

MJ [CAPT ALLRED]: Okay.

ADC [MS. PRASOW]: I don’t think it’s necessary to discuss the legal standard, excuse me for a moment, Your Honor.

MJ [CAPT ALLRED]: And the government didn’t respond in writing to this motion, is that right?

TC [LTC BRITT]: That’s correct, sir.

ATC [LCDR STONE]: We had an agreement not to in order to speed things along.

ATC [MR MURPHY]: I thought we did, we didn’t send it?

TC [LTC BRITT]: Yes, we sent it.

ADC [MISS PRASOW]: Your Honor, can we just have a brief moment to confer at the counsel table?

DC [LCDR MIZER]: It will take just a minute, sir, please.

MJ [CAPT ALLRED]: Yes.

[Defense counsel conferred with the accused at the defense table.]

ATC [LCDR STONE]: Sir, we did respond in writing.

MJ [CAPT ALLRED]: I'm sorry I don’t have it with me at the bench and I haven’t read it, so I will look for it after I finish here.

ATC [LCDR STONE]: It’s brief, sir.

CDC [MR. SCHNEIDER]: Your Honor, may we have an 802? I understand, but we’ll go through the next three.

MJ [CAPT ALLRED]: Can we – Do you just want to do it in place or do we need to close the court? Okay, we’ll take a recess. Come on and we will have an 802 conference in that conference room at the end.

[The R.M.C. 803 session recessed at 1516, 29 April 2008.]

[The R.M.C. 803 session was called to order at 1557, 29 April 2008.]

MJ [CAPT ALLRED]: I didn't realize that you all were waiting in here, nobody came by to signal.

TC [LTC BRITT]: Your Honor, and we would apologize for that, Mr. Hamdan just arrived, so I think your timing was perfect.

MJ [CAPT ALLRED]: Okay, good.

TC [LTC BRITT]: Your Honor, when Mr. Hamdan was brought back in, I would like to note for the record that he has changed clothing and if, Your Honor, would please inquire as to the potential significance of this new development, respectfully.

MJ [CAPT ALLRED]: He is welcome in whatever clothes he wants I think. Okay, we are ready to argue D-038, D-038.

CDC [MR. SWIFT]: Your Honor, before arguing D-038, I wanted to explain that we needed a recess, because I had not made clear to Mr. Hamdan, what Ms. Prasow's role it was a translation error--error on my part, my part alone and he was surprised at her position going up to argue and he didn't understand her role in the case.

MJ [CAPT ALLRED]: Fair enough.

ADC [MS. PRASOW]: Good afternoon again, Your Honor.

MJ [CAPT ALLRED]: Good afternoon.

ADC [MS. PRASOW]: Andrea Prasow, counsel for the defendant Salim Hamdan. Your Honor, I will be not as brief as I was last time,

but fairly brief. I don't think that we need to discuss the relevant law, I think all parties agree on it. Your Honor already has ruled on some similar motions. The issue before the court is whether Professor Sheila Carapico is a relevant and necessary expert witness for the defense. There are additional issues the prosecution has raised in its submissions which is whether the government has provided an adequate substitute as to one of the issues for which the defense would like Professor Carapico to testify and I will address both of those issues.

There--the two issues that Professor Carapico is, I am getting orange light, the two issues that the defense would like Professor Carapico's expert testimony for are the definition and the understanding of the term bayat. The government has already introduced evidence alleging that Mr. Hamdan pledged what has been termed a partial or a conditional bayat. I think that the meaning of that term is something that certainly falls outside the area of expertise of counsel. It's an area where the court would benefit from the assistance of an expert, in particular the meaning of the term in Yemen where Mr. Hamdan is from. Mr. Hamdan is from Hadramout area of Yemen where there is according to Professor Carapico a particular understanding of that term. The defense noted in our submissions that Mr. Bin Ladin's family is from the same region. So, the significance of that term to both Mr. Hamdan and Mr. Bin Laden

may well be very relevant, depending on what evidence the government does choose to submit.

As Your Honor noted earlier the defense is in a bit of difficult position in trying to determine which experts are necessary, without the benefit of seeing the government’s full case. We have carefully tailored our expert request based on the discovery from the government, based on the testimony that we've seen here before and while the government’s submissions suggest that perhaps we have over emphasized the role of the alleged pledge of bayat, the defense would submit that it's simply impossible to tell that at this point and we would request Professor Carapico’s expert assistance, should it become necessary. Obviously if she is here and there is no need to call her as a witness, we won’t do so, but certainly given the difficulties in obtaining witnesses’ physical presence at Guantanamo as well as the preparation time that she does require in order to be able to testify, the defense would request that we be granted her assistance.

The second issue for which Professor Carapico's expert testimony is sought is regarding the socio-economic conditions in Yemen. The defense has asserted that Mr. Hamdan was a civilian employee of the bin Laden organization. That his physical proximity to and association with bin Laden was purely based on an employment relationship and Proffer’s--Professor Carapico’s testimony will

assist the commission with understanding why that relationship was necessary. Mr. Hamdan is an orphan from an extremely poor country and the monetary benefit he received from being an employee of Mr. bin Laden as well as auxiliary benefits he may have received, is something which Professor Carapico can elaborate on for the benefit of the commission.

The government has raised the issue that Professor Williams is an adequate substitute on the issue of bayat only. As an initial matter the defense does note that despite Your Honor's order authorizing his employ, the Convening Authority has not yet taken steps to actually employ Professor Williams, although we certainly would expert that she would do so, in compliance with Your Honor's order. But Professor Williams is simply not an adequate substitute. Yemen is not his area of expertise. The defense did not seek to qualify him in the areas of bayat or the socio-economic conditions of Yemen and indeed would not because he has not studied those areas.

Professor Carapico has been studying Yemen, researching, writing about it, living in it, visiting the country for over 30 years. She is probably the--the--the best expert on the country who can be found in the United States, perhaps in the Western world and her expert testimony would greatly benefit the members and the military judge in their assessment of the case.

MJ [CAPT ALLRED]: All right. Let me ask you some questions.

ADC [MS. PRASOW]: Please.

MJ [CAPT ALLRED]: Could not Professor Williams, for example, add this--these two small pieces of information to his expertise by reading some of Dr. Carapico’s writings or using some of his other preparation time, that I have authorized to----

ADC [MS. PRASOW]: Well----

MJ [CAPT ALLRED]: I mean he testified about bayat when he was here last time. I know he's somewhat familiar with that concept.

ADC [MS. PRASOW]: Yes.

MJ [CAPT ALLRED]: And learning what it means in Yemen or that there are individual--different meaning in Yemen, that doesn’t strike me as a whole new area of expertise that requires another specialist.

ADC [MS. PRASOW]: Well Your Honor, the defense would note that you have authorized a fairly limited amount of preparation time for Professor Williams, probably largely based on the fact that he did do some preparation for the December hearing. So I think we would have to consult with him to determine if that was feasible given the amount of time we've been authorized.

MJ [CAPT ALLRED]: Okay. Well, you know--okay. Both of these areas, I guess my question is the same as to both of these areas, it strikes me like these are not something so specialized that someone already familiar with the area, like Professor Williams couldn't

familiarize himself with. So as to give you this testimony if he's going to be here anyway.

ADC [MS. PRASOW]: Well, particularly with respect to the socio-economic conditions, the government has not suggested that Professor Williams would be an adequate substitute, although of course if Your Honor determined so then--then the defense would work with that. I think that Professor Carapico’s expertise in that area stands out as--as significantly different from Professor Williams experience and areas of research.

MJ [CAPT ALLRED]: Okay. Let me pose another question. We talked the other day in a different context about obtaining testimony by video teleconference, does this--do any of these witnesses have access to that?

ADC [MS. PRASOW]: Professor Carapico is a Professor at the University of Richmond in Virginia I am not familiar with the facilities that they have there, but I--I imagine that it might be possible----

MJ [CAPT ALLRED]: Might be possible----

ADC [MS. PRASOW]: ----for the government to provide video testimony.

MJ [CAPT ALLRED]: Okay. Thank you. Commander Stone.

ATC [LCDR STONE]: Sir.

[Lieutenant Commander Stone moved to the podium and Ms. Prasow returned to the defense table.]

ATC [LCDR STONE]: The prosecution didn't offer Professor Williams as an adequate substitute.

MJ [CAPT ALLRED]: I'm sorry?

ATC [LCDR STONE]: The government didn't offer Professor Williams as----

MJ [CAPT ALLRED]: ----Oh----

ATC [LCDR STONE]: ----an adequate substitute for the economic conditions with regards to Yemen, because that's not something worthy of expert testimony. At best Dr. Carapico what the govern--or the defense just said will come in here and say that many individuals seek employment outside of Yemen and that Usama bin Laden paid the accused a better salary and the accused received a better benefit package, then he would have had he stayed in Yemen and sought an honest and legitimate employment. That doesn't come anywhere near the requirements of a 702 standard, so that is why we didn't offer him as an adequate substitute. I mean, we're at a loss for anything else to say. With regards to the idea of bayat.

The defense makes a big deal in their briefs with regards to bayat, but you know, bayat may have multiple meanings, it doesn't necessarily indicate allegiance, that it might. Dr. Carapico, again same thing; four books, six pages of articles, reports, language and

the defense doesn’t show a single one of them to proffer with any sort of specificity what this bayat may have been, what it may not have been. The important part of it though is that and the defense says well you know [redacted] may have done, played it up little too much or he may not have described it well--the point of it was is it wasn’t Special Agent [redacted], it was the accused. This is the accused’s bayat that he said that he gave. So to the extent that there may be another form of bayat somewhere in the Arab world, is irrelevant, it's not necessary with regards to calling Dr--calling Dr. Carapico as an expert, if an expert who would otherwise be necessary with regards to this we agree 100 percent, wholeheartedly with your line of questioning that Dr. Williams could probably go find one of those article that the defense hasn’t bothered to give us. In fact I got a whole thing here that they did though, whole curriculum vitae that they could probably go look and find and try to find one.

MJ [CAPT ALLRED]: Okay. The motion to compel production of Dr. Carapico is denied. I am satisfied that Brian Williams is an adequate substitute as it pertains to bayat or by the exercise of reasonable diligence, he could add an understanding of bayat in Yemen to his already assisting understanding of bayat and I agree with the prosecution that the economic conditions in Yemen are not

sufficiently complex to require an additional expert witness. So that one is denied. D-016, commencement of hostilities?

[Accused started to speak.]

MJ [CAPT ALLRED]: I'm sorry.

ACC [MR HAMDAN]: Your Honor, this is Hamdan. I am speaking to you. May I--may I speak to you for a few minutes?

MJ [CAPT ALLRED]: Yes, you may.

ACC [MR. HAMDAN]: You did not ask me why I changed my clothes. He said do you care to know? It was said that you did not care to know. That's number one, secondly I do not want anyone to interrupt my speaking to you, especially my defense attorney.

MJ [CAPT ALLRED]: I am sorry I didn't hear the first thing that he said. Can some--did someone else hear that and understand that?

ADC [MR. MCMILLIAN]: I heard that, Your Honor. He said "he did not ask me why I changed my clothes, do you not want to know why I have changed my clothes?"

MJ [CAPT ALLRED]: I'm happy to let you come to court in that outfit if that is what you like to wear.

Do you want to tell me why you have changed your clothes?

ACC [MR HAMDAN]: I like these clothes.

MJ [CAPT ALLRED]: That's fine with me.

ACC [MR HAMDAN]: Last night I help you and told you that I did not want to come to this court, because there is no such a thing as

justice here. The law is clear, the law in America is clear, the Constitution in America is clear, the International law is clear. If you ask me what the color of this paper is, I will tell you the color is white, you say no it's black, I say white, you say black, I say fine it's black. Then you say no, it's white, this is the American government. Do you understand what I have just said, Your Honor?

MJ [CAPT ALLRED]: I did.

ACC [MR HAMDAN]: The--my interpreter told me yesterday that I should speak directly, but now I am speaking indirectly. Usually Arabs don't confront by indirectly this is how Arabs are. So I don't cause any uncomfortableness. These words are not directed to you personally, I am talking about the American government. I said to you everything is clear, we don't need a new law. If you want to try me, you can try me the civil law, with any law that is recognized. It has been 4 years now we are in this court, we told you about the American law and you said private military—courts. We fought the Supreme Court and the Court made a decision, then the government went to the Congress and they changed the law. Why did they change the law, just for my case? You are thinking about tomorrow or 100 years ahead of time? These words are not for you, Your Honor, this is about the American government, don't take it personally.

Why, why don't we follow the law? Where is the justice? Americans tell the whole world that they have freedom and justice and

injustice. I did not see that, your--there is almost 100 detainees present here--300. We did not see any rights, any human rights, you did not lead us our prayers, you do not give the least bit of the human rights. What do you want from us? Do you want us confess the things that we did not do? Right now I personally I would admit to anything you want me to, but give me a just court and give me a rescue me--human rights groups all these things. I will give you a white piece of paper and you will write everything you want from me, any charge you want and then try me with the law.

Do you agree with my words, Your Honor?

MJ [CAPT ALLRED]: I understand your frustration, Mr. Hamdan. I know that you have been held as a detainee for 6 or 7 years now. I know that the government has tried three times to try you for the offenses it believes you committed. Twice they have done it wrong, but it apparently it has always been the government's belief that you have violated not American law, but the law of war. I would like you to have a fair trial. I believe you are entitled to a fair trial. I want you to have a fair trial. I read an affidavit that you wrote in 2004, it's been attached by your attorney to some of the papers that I have been given. In which you have said, "I want a fair trial," and as soon as I read that I understood how you must feel. The government believes that you have committed crimes against the law of

war. Your attorneys believe that you have not or that the government can’t prove it and that's why we're here.

My light is still green. I am sorry maybe I am going too fast. I appreciate your frustrations. I don’t have any control over the conditions of your confinement. I've read in the newspapers that--that you and others are unhappy with them and I understand that. This trial will give you an opportunity to see the evidence against you, after all these years. It will give you the opportunity to call your witnesses and then a group of people who we hope will be fair and impartial will make a decision about your guilt or your innocence. And we hope that the process will be fair. Even in our country people accused of the most wicked and heinous crimes receive this kind of trial. The government brings its evidence into the courtroom. The defense challenges the government’s evidence and contradicts it and shows that another set of facts may have been what happened and then someone who is impartial applies the law. I appreciate your frustration and I'm glad you spoke to me. But at the end of the day I want you to have a fair trial.

ACC [MR HAMDAN]: With which law do you try me?

MJ [CAPT ALLRED]: By which law are you being tried? Congress has passed a law that it believes represents long-standing crimes against the law of war. So I guess the direct answer to your question is that you are being tried by an American statute that

applies international law of armed conflict. This is a series of rules that have been developing for at least 100 years.

ACC [MR HAMDAN]: The Congress law is not the same as the Congress--American law, not the same as the Constitutional law, it's different. You changed the law to pertain this law, the government changed that to its advantage. You think it was a just trial in America, true because it is being by the American law. But I am not being tried by the American law. I am being tried by the law of the American government, not the law of the United States. If you see I will not let them--I am not making fun of you, it's just the way I speak, my style.

MJ [CAPT ALLRED]: Okay. You have made a very eloquent expression of your position today and your attorneys here who understand American law and international law are committed to making sure you get a fair trial and--and if we make a mistake at this trial, another court will review our work and correct it. And if that court makes a mistake, yet another court, a higher court will correct those mistakes and by this process our system hopes to give you a fair trial something that will be recognized by the world, by the other nations of the world as a fair trial.

Now every nation has its own system of justice and the international law recognizes that one nation might apply the law of armed conflict differently then another nation. So you are being

tried by the American government under a system that permits that kind of law.

ACC [MR HAMDAN]: I have some of the best lawyers out here. Why--why aren't they trying to defend me and they are asking for international law, but prosecutor is asking for their own law to be applied, this is the conflict. If this hadn't occurred we would have been done with this trial way back. They are asking for the law, but they are not asking for the law from their hand. When will this be a just or a fair trial, impossible for it to be a fair trial, it is impossible.

MJ [CAPT ALLRED]: Well, I will try to answer that question. That is a very thoughtful question. With respect to every one of these issues, your attorneys who are excellent and talented and skilled and devoted, try to persuade me what the law is and then the government attorneys with equal skill try to persuade me that something else is the law and I try to make the correct choice and the correct decision in each case. So if I make a mistake, which is possible, a higher court will correct that mistake. But your attorneys are doing their job by trying to persuade me of the law that I should apply to each one of these issues they raise.

ACC [MR HAMDAN]: We have heard the deliberation in the session that happened on 5 July--December--December and we do know the law and you are a lawyer and you heard what the opinions of the laws and

the judges all of them pretty much are. The path is clear, the path is straight. If you go to the right, it is a problem, if you veer to the left, it’s a problem. So why don’t we go straight that is the best path. I don’t want to go into--don’t think that I am trying to dispute anything with you or be in an altercation, I could summarize all of this in one sentence. But I just wanted to be on this straight path so you would know what I mean by my words and I have already mentioned yesterday what my opinion of this court was and I came after the session and you asked me again questions. I told you now, yeah I am agreeable, I agree--and that I agree, but now I change my opinion again and will not change it another time. I do refuse and I do boycott this court and I do refuse to participate in it and I do refuse for any member of my team to speak on my behalf if I am not there, meaning that if I am not present, I do not allow for them to speak on my behalf.

I would just like to clarify my sentence again, because yesterday there was a little bit of unclarity in my sentence and especially back yesterday and we were in court made my room that I had refuse them or their representation, meaning that they would not represent me. That was not my intent. If they represent me or defend me, with my presence, I want--I am here, I'm present with the law, with the law, I am present. If you ordered them because of your rank, because of your decision, that’s something else, but on my end

I would not allow for anyone to speak on my behalf, if I am not present. I'm sorry.

MJ [CAPT ALLRED]: Well, let's talk about then your right to be present, okay? I think it is very important for you and for your welfare and for your future and for the outcome of these proceedings, for you to be present.

Let me tell you why. You are entitled to see and hear the evidence against you. You need to be here so you can whisper in your attorneys' ear about something they should know, to respond to that evidence. You're entitled to put on your own evidence; and I think it's important for you to be here for all of those things.

When the day comes that we begin the trial in this case and a jury comes into the jury box; they will wonder where you are. If they see a nicely dressed, smiling, clean-cut, happy, participatory Mr. Hamdan; they may learn to like you and be more favorable to you than if your chair is empty. In other words, if you're not here, they will have no idea who you are when they pass their judgment. And so for all those reasons, I think it would be better for you to be here and participate, so you can get the best result from this proceeding that is possible.

If you're not here where would you be? Back in the camp? Maybe this is a better place to be than that; just for a change of venue for a change of view. Okay, that's why I think you should

choose to be here for your trial. At the same time, you have the right to not be present. We have begun the trial, you've been present for much of it already, you've seen who the attorneys are against you, you know the judge, and you know the attorneys who will be here to representing you. And if you choose to be absent, this trial will go on without your presence. We could hear all the evidence, reach findings of guilt or innocence and impose a sentence without you being present.

ACC [MR. HAMDAN]: Without the presence of me, victories of course.

MJ [CAPT ALLRED]: I'm sorry? Could you repeat that? I didn't hear the last thing that Mr. Hamdan said, "Without the presence of the attorneys," was it something like that?

[The accused's last comment was mistranslated.]

ACC [MR. HAMDAN]: You said that the trial will go on without my presence.

MJ [CAPT ALLRED]: Yes.

ACC [MR. HAMDAN]: How?

MJ [CAPT ALLRED]: Well, an attorney will be appointed to represent you even if you choose not to be present at the trial. In other words, you can't stop the trial from proceeding just by leaving the courtroom. You can fire or release your attorneys, we will go get another one and we will continue the trial.

ACC [MR. HAMDAN]: You're telling me it's a just trial.

MJ [CAPT ALLRED]: Well, we want it----

ACC [MR. HAMDAN]: ----so how will you force me--force on me something that is in not in the law to begin with or exception to it. You will bring an attorney to represent me? I didn't refuse anyone here.

MJ [CAPT ALLRED]: You don't----

ACC [MR. HAMDAN]: I'm sorry.

[The accused said, "I'm sorry." in English, to much surprise of everyone in the courtroom.]

MJ [CAPT ALLRED]: "I'm sorry"? You speak English too?

ACC [MR. HAMDAN]: 7 years I've been here, Your Honor----

MJ [CAPT ALLRED]: I'm sorry, the interpreter, I can't quite hear you, can you turn up the volume please, on your microphone or----

INTERPRETER: Yes, Your Honor.

MJ [CAPT ALLRED]: Thank you.

ACC [MR. HAMDAN]: 7 years I have been here, Your Honor, so I have to learn English a little bit no matter what.

What I said is that, I did not refuse any of the attorneys that I have here. I had asked for justice, I asked for the law. If there is a law and if there is a justice, it's not conditions for me to be here, it's not a condition; because I do have confidence or

trust in God, and in the lawyers that I have; if you do apply or implement the law.

4 years that Swift have been with me; and there are things in the law that I understand better than him maybe, right now. Keep on asking yourself now. He may be understand what the law is, give me the law and you can leave me in my cell over there and let them speak on my behalf.

But now you are threatening me, Your Honor; you're telling me that the trial will go on. You’re telling me you’re going to appoint an attorney in-spite me. How?

MJ [CAPT ALLRED]: Well, it's not me that's going to do it, but that's what the system allows. Now, you have a big smile on your face today and I’ve enjoyed this exchange with you. I think this is been very helpful for you to express some of the frustrations you've been feeling for several years.

Have I persuaded you that it’s in your best interests to stay here, to keep your defense team working for you, and to proceed with the trial?

ACC [MR. HAMDAN]: With the law?

MJ [CAPT ALLRED]: Well with the last?

ACC [MR. HAMDAN]: With the law.

MJ [CAPT ALLRED]: With the law, and that's my job, Mr. Hamdan, is to study the law and apply it correctly.

ACC [MR. HAMDAN]: I would like you to study the law that they have brought with them from Congress; American law for justice, in a general sense, justice with any law that you try me with. Swift have been with me now, how many years? He and I are old like this.

What else would you like me to say more than this?

I would like the law, I would like justice; nothing else. The prosecutors that are right there, I have nothing between me and them--I have against them. Just try me with the law and the justice, I wouldn't say “no” to them--to you. I will tell you at the end “thank you.”

MJ [CAPT ALLRED]: Okay, let's do that.

ACC [MR. HAMDAN]: So you would try me with the law or with these military commissions? This special law and I really don’t like that----

MJ [CAPT ALLRED]: ----Well, the military--the military commission law is the law that we have to apply. This is part of the law of the United States that's based on the international law of armed conflict.

ACC [MR. HAMDAN]: Forgive me, your words have not convinced me; with all apologies.

MJ [CAPT ALLRED]: Okay. So shall we continue today? Your attorneys are still trying to represent your interests and achieve for you the best outcome they can achieve. As you say, Mr. Swift has

been with you for 4 years; your other attorneys, I don't know, 2 years, 3 years, these people have a lot of their lives tied up in your case and they want you to win; whether it's a big win or a medium win or small win, those people sitting at the defense table with you are not here to make me happy. They're here to protect you.

True, Congress changed the law or enacted a new law for military commissions. That's the law we apply and whatever other law seems to be appropriate in each case, but I do not think that you will get a better result by firing these people and leaving the courtroom then you will get by working with them to get the best outcome they can get for you.

ACC [MR. HAMDAN]: I accept. I did not ask the attorneys to leave and you will know what the decisions of the Supreme Court might be, the one that's upcoming, as far as the law of the Congress and I think I understand you well.

MJ [CAPT ALLRED]: Mr. Hamdan, I think you should have great faith in American law because you have already been to the Supreme Court of the United States, you have already beaten--they didn't take you, you waited here while Mr. Swift went to Washington, and the Supreme Court of the United States said to the President of the United States, you cannot do that to Mr. Hamdan. And you were the winner. Your name is printed in our law books. You beat the United

States once, in our system with these attorneys there here with you today.

ACC [MR. HAMDAN]: I did not win against you.

MJ [CAPT ALLRED]: Against me?

ACC [MR. HAMDAN]: I didn't win against you.

MJ [CAPT ALLRED]: You--you won, the very first time I met you, Mr. Hamdan, you won.

Your attorneys came in and won, with me the very first time we started this trial. Now, you may not win every time and you may not win all the time, but that's not what a fair trial is.

A fair trial is one in which, someone who is committed to apply the law, applies it. Sometimes your side will win, sometimes the government will win, sometimes--I will split the baby perhaps, but I think the best thing for you to do----

INTERPRETER: If you can repeat that couldn’t hear the word.

MJ [CAPT ALLRED]: Oh split the baby--I’m sorry----

TC [LTC BRITT]: Split the difference, perhaps.

MJ [CAPT ALLRED]: Split the difference. Sometimes it will be a win for both sides or half of a win for both sides.

ACC [MR. HAMDAN]: I am happy with that. If both sides could win, I'll be very happy with that. We’d say thanks to everybody.

MJ [CAPT ALLRED]: Well, Mr. Hamdan, I cannot guarantee the outcome. You may be found guilty of some of these offenses and you

may receive a sentence. You may be found not guilty of some of the other offenses; and these attorneys, that's what they're trying to do for you.

They have invested a great amount of their personal energies for you in this system in which you have already won significant victories.

So, I appreciate this exchange. It's good to talk to you. It's good to see you smiling and laughing.

Are you ready to continue?

ACC [MR. HAMDAN]: I'm sorry.

MJ [CAPT ALLRED]: Yes?

ACC [MR. HAMDAN]: I'm sorry. I'm sorry. Does the interpreter know what I'm sorry means?

My opinion is what I have said before which is not to participate in, I’m sorry.

MJ [CAPT ALLRED]: To the--the interpreter needs to lean in more closely to the microphone, we can't hear what you're saying in the courtroom.

INTERPRETER: Your Honor, it’s a central control issue, I’m as close as I can to the microphone, the interpreter is. The interpreter could repeat the last statement if the court would like him to.

MJ [CAPT ALLRED]: The last thing that I remember Mr. Hamdan saying was that he was sorry. I don’t know what that means.

INTERPRETER: The last thing that Mr. Hamdan said is, “I'm sorry, but I would stay true to what I have said before, I will not continue with the trial.”

ACC [MR. HAMDAN]: Mr. Interpreter you are interpreting the words of the judge.

DI [MR. SCHMIDT]: Translator, can you translate the last words of the judge, please. You said them in English.

MJ [CAPT ALLRED]: Interpreter, Mr. Hamdan didn't hear the last words I said to him.

INTERPRETER: Yes, Your Honor.

MJ [CAPT ALLRED]: What were they; what did I say?

INTERPRETER: I said to Mr. Hamdan, that you could not hear the last sentence.

MJ [CAPT ALLRED]: Okay.

Mr. Hamdan, I am trying to persuade you to stay in the courtroom, to keep your defense team with you, and to proceed with the trial.

ACC [MR. HAMDAN]: This defense team can continue with my defense if I am present in the courtroom.

MJ [CAPT ALLRED]: Okay.

ACC [MR. HAMDAN]: If I am not present no one should speak on my behalf. And I will repeat it one more time, I refuse to participate in this trial. And I'm sorry, again.

MJ [CAPT ALLRED]: Does this come as a surprise to you Commander Mizer?

DC [LCDR MIZER]: It does, Your Honor.

MJ [CAPT ALLRED]: It's 5 o'clock, do you think we should take a recess so you can huddle with your defense team or have you already decided what your next step will be?

DC [LCDR MIZER]: Could we have just five minutes, Your Honor.

MJ [CAPT ALLRED]: Absolutely.

DC [LCDR MIZER]: Okay.

MJ [CAPT ALLRED]: Absolutely. Okay, the court will stand in recess.

[The R.M.C. 803 session recessed at 1649, 29 April 2008.]

[The R.M.C. 803 session was called to order at 1719, 29 April 2008.]

TC [LTC BRITT]: Your Honor, all parties are present that were present when the court last recessed, with the exception of course, of the accused and Tech Sergeant Gibbs, but he is busy.

MJ [CAPT ALLRED]: Busy.

Yes, I noticed that the accused is absent. Commander Mizer, it looks like during the break you've had a meeting with your client or discussed it among yourselves----

[Tech Sergeant Gibbs entered the courtroom.]

DC [LCDR MIZER]: That’s correct----

MJ [CAPT ALLRED]: Where--where you stand with respect to the accused’s absence. It appears that he's chosen to be absent for this session of the proceedings, is that right?

DC [LCDR MIZER]: That's correct and Mr. Schneider is going to speak for the defense, Your Honor.

ADC [MR. SCHNEIDER]: Your Honor, Harry Schneider. We did not meet with our client during the recess. It is our understanding that he chose not to meet with us, and given that circumstance, I'm prepared to share with you where we think we are.

MJ [CAPT ALLRED]: Please.

ADC [MR. SCHNEIDER]: Under the circumstances based on what was said in open court and not having heard anything from him since then, I think there are four scenarios here that may be presented.

The first is that the accused would agree to continue the proceedings with these lawyers and be present in court; he’s declined to do that; I think, it is obvious to all of us.

The second scenario is that he chooses to be absent himself but he in effect consents to the lawyers proceeding and waives his right to be physically present. I'm not sure he's precisely done that because of the statement that he made, that he would prefer that no one speak on his behalf in his absence. The third alternative is

one where he chooses to be absent and he affirmatively terminates his representation, fires his attorneys. We heard him say that he had not done that, and so that is not a scenario that's--that’s present. And fourth, he conceivably could choose to represent himself and he has not done that.

I think that the scenario he intended to choose is an outcome or an alternative that is not available to him and that is to choose to leave the courtroom but without terminating his representation or firing his lawyers, preclude them from speaking on his behalf in his absence. Pertinent to that discussion, I think is the fact that after not terminating us he communicated to us through the guards that he did not want to speak with us in the break. So that's where we are.

There are, as we understand it, certain decisions relating to the conduct of the case that are for the accused only to make. Those would include such things as what plea to enter, whether to accept a plea agreement, whether to waive a jury trial, whether to testify in his or her own behalf, and whether to appeal. Other strategic and tactical decisions are made by defense counsel, after consultation of the client where feasible. Those decisions include such things as what motions to make; and we’re relying in part on the ABA Criminal Justice section standards 4.5--4-5.2.

After consultation with my co-counsel, I speak on behalf of all of us that we--we believe we are in a situation where even in the client's absence having not terminated our representation, if the court is inclined to hear the remaining motions today; we are prepared to speak.

MJ [CAPT ALLRED]: It sounds like this is something you saw coming before today and have had a chance to do the research before today; is that fair to say?

ADC [MR. SCHNEIDER]: It's fair to say we had concerns yesterday and we discussed various scenarios briefly but the situation resolved itself before we had to choose or conclude as to which alternative was available to us. It's fair to say that we've done a lot of thinking about this in the last 20 minutes but in a very short period of time, concentrated thinking and discussion.

MJ [CAPT ALLRED]: Concentrated group thinking. Well, there are a couple of other options that might be available for the short-term; those would include waiving your right to oral argument and just submitting the remaining motions to be decided without argument. Those would include holding some informal discussions in an 802 conference if there are some coordinating or other kind of matters we could discuss without going on the record.

And they might include recessing for the evening, coming back tomorrow morning to see whether, after a little bit more

research and a little more thought, it's still clear to all that--that going forward on the record without Mr. Hamdan’s presence but with you still acting for him, is the preferred choice. As a defense team, you talked about this, where do you feel like you are?

CDC [MR. SCHNEIDER]: We talked about the first of the two alternatives--additional alternatives that you’ve suggested, namely waiving oral argument on the motions and submitting them on the record. Again I believe I speak for the entire defense team, when I say that we think it is not in the best interests of Mr. Hamdan, our client, to do that. We think it is in his best interests for the court to hear oral argument because we think it will be helpful to the court's determination of those motions.

Frankly, we did not discuss the possibility of a recess for the evening. I don't know if we have a strong feeling one way or the other on that.

MJ [CAPT ALLRED]: I think we’re all scheduled to get on the same plane tomorrow and that it leaves about noon or 1, I don’t know.

[The defense team discussed briefly amongst themselves.]

ADC [MS. PARSOW]: I think it leaves at 1400, Your Honor.

MJ [CAPT ALLRED]: It leaves at 1400, so we have a few hours in the morning, I would propose, although I realize it imposes a burden on the--on the administrative staff, that we just recess for the evening and you can do--meet with your client, consider additional

options may be, and when we come back in the morning, I'll be happy to hear oral arguments on the remaining issues, if that's the course that we decide. I mean--I----

[The defense counsel discussed briefly amongst themselves.]

CDC [MR. SCHNEIDER]: Your Honor, obviously we're--we appreciate that and we are guided by your insights as well and we--I think we would do that with the knowledge that Lieutenant Commander Mizer may not be present tomorrow because he has another obligation.

The remaining motions to be argued are ones that we are prepared to argue without Lieutenant Commander Mizer.

MJ [CAPT ALLRED]: What time is your other obligation, Commander Mizer, because you're the one member of the team that's----

CDC [MR. SCHNEIDER]: Yeah, that's the irony.

MJ [CAPT ALLRED]: ----kind of the default got to stay guy.

DC [LCDR MIZER]: 9 A.M., I have a meeting with another client----

MJ [CAPT ALLRED]: And how long is that likely going to take?

DC [LCDR MIZER]: Probably 20 or 30 minutes, Your Honor, and I can ask if that can be moved.

MJ [CAPT ALLRED]: Why don't you try to move that a little earlier?

DC [LCDR MIZER]: All right, sir.

MJ [CAPT ALLRED]: And we can start at 0930 or something and try that----

DC [LCDR MIZER]: Why don’t we start at 0900, sir; I’ll move it.

ADC [MS. PARSOW]: Your Honor, can I just provide a bit of additional information? The guard came in because Mr. Hamdan asked for a pen; it's entirely possible he's trying to communicate with us in writing right now, so as much as----

MJ [CAPT ALLRED]: Mr. Hamdan has asked for a pen?

ADC [MS PARSOW]: Yes and the guard took the pen to him.

MJ [CAPT ALLRED]: And they brought the note to you. Okay, well, I think recessing for the night, while this situation sorts itself out is probably the thing to do. And if we decide to go forward with counsel present and Mr. Hamdan not present, and do the oral arguments, we'll do them tomorrow morning at 9. All right. That'll give us time to think this through and step out smartly.

All right, the court is in recess until 9 o’clock in the morning.

[The R.M.C. 803 session recessed at 1727, 29 April 2008.]

[END OF PAGE]

[The R.M.C. 803 session came to order at 0739, 30 April 2008.]

MJ [CAPT ALLRED]: The defense counsel and their paralegal. And Mr. Hamdan is not--not present this morning, okay. Well let's see, we did have a discussion last night after counsel had a chance to collect their thoughts and consult amongst themselves. And I believe the plan for today is the defense has decided to submit two motions for consideration without argument, defer two of the motions that would otherwise have been argued today, to our next session. And thereby comply with the instructions of their client even though they feel perhaps ethically permitted to go forward in spite of those instructions; and then go try to repair the relationship with Mr. Hamdan, persuade him. That is to save his interest, to calm and continue participating in the proceedings.

And that the government would like to actually be heard on some of these motions, even though the defense is deferring its argument.

Looks like a new water bottle just keeps appearing up here, I don't know where these come from.

TC [LTC BRITT]: You have another one.

MJ [CAPT ALLRED]: **[Laughing.]** Okay. Commander Mizer, I don't know who's speaking for the defense this morning, is that--does that correctly kind of summarize the defenses position or is----

DC [LCDR MIZER]: I'll defer to Mr.----

MJ [CAPT ALLRED]: Anything you'd like to add, I'm sorry.

DC [LCDR MIZER]: I'll defer to Mr. Schneider this morning, sir.

MJ [CAPT ALLRED]: Mr. Schneider.

CDC [MR. SCHNEIDER]: That correctly states the intention of the defense this morning, with one additional thought and that is that we--we also submit the two motions that you will decide without argument from the defense, can be decided without oral argument.

MJ [CAPT ALLRED]: Okay, so you don't feel like you have compromised or waived your----

TC [LTC BRITT]: Your Honor, briefly from the government, review of our schedule indicates that there are actually five motions that are pending and I think what's been left out or what we have skipped over was D-029, which is where I had requested the court to make a few comments about the burden on the request for ruling on the motion to suppress based on coercion or duress.

MJ [CAPT ALLRED]: Okay.

CDC [MR. SCHNIEDER]: And we would propose to provide any argument on behalf of the defense when this commission next convenes.

MJ [CAPT ALLRED]: Okay, with respect to D-029, I read over again last night the government's filings and the defense's brief, and in this case I'm not--I'm not prepared to entertain a motion that just globally suppresses all of the statements on the basis of, you know an uncertain relationship with any coercive techniques that may

have been applied. When we come back for trial, that will be the time when the witnesses will be here and I'll entertain the defense motion to--to suppress statements where there is a relationship and a demonstrated correlation between some level of coercion and a statement that may or may not have been voluntarily--voluntary or reliable.

So, with respect to the preliminary determination that the government requested in our 802 conference on the telephone, I will hear the D19 motion and not the D-029, okay?

Now which of the two motions that you wanted to submit for--for decision without argument?

CDC [MR. SCHNIEDER]: The two for decision without argument would be D36, the Bill of Particulars and Special Request for Relief regarding Lieutenant Commander Mizer’s access to high-value detainee, which I believe does not have a designation number yet.

TC [LTC BRITT]: I think that one has been numbered D-034.

CDC [MR. SCHNIEDER]: 34, thank you.

MJ [CAPT ALLRED]: Defense contact with high-value detainees, that's D34?

TC [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: All right and the two that you wanted to defer to our next session then.

CDC [MR. SCHNIEDER]: The two that would be deferred are D16, regarding the court's determination of the start of hostilities and D33, which is the motion *in limine* to exclude evidence unrelated to hostilities.

TC [LTC BRITT]: But of course we would be presenting argument today----

CDC [Mr. SCHNIEDER]: That's my understanding.

TC [LTC BRITT]: ----on those motions. Your Honor, before we proceed----

MJ [CAPT ALLRED]: Do you want to argue--these are the four you want to argue on today.

TC [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: The same four? Okay.

TC [LTC BRITT]: Your Honor, before we proceed, I'm having a little difficulty understanding if the defense, just very simply, are they still representing Mr. Hamdan, all five defense attorneys at this particular point? I don't know what transpired last night after we adjourned.

CDC [MR. SCHNIEDER]: That's why we're here.

MJ [CAPT ALLRED]: Okay, they are.

TC [LTC BRITT]: All right.

MJ [CAPT ALLRED]: Okay, they are. I gather from the defense counsel they are. They are all here smiling and dressed for court.

Mr. Swift is little cranky looking, but otherwise I think they are representing their client----

[Mr. Swift at the defense table]

CDC [MR. SWIFT]: Very perceptive, Your Honor.

MJ [CAPT ALLRED]: And no as I understand it, they believe they are still representing their client, they have not been released or fired or discharged or given the "sack" as his counsel.

CDC [MR. SCHNIEDER]: Just to be clear, nothing has changed in that regard from what I have summarized from the podium yesterday.

MJ [CAPT ALLRED]: Last night as Mr. Hamdan was leaving the building, I am told that he said to one of the guards; don't wake me in the morning. I don't want to be there, I'm sleeping in; and so. That is what the defense is and all issues honored, Mr. Hamdan slept in this morning and he's in his cell in the camp, but all five counsel are still on the case and representing him. But as a tactical matter decided to not argue anything before the court this morning because they wanted to not cause a rift perhaps between their client and themselves that might actually be irreparable had they done that.

TC [LTC BRITT]: Thank you, Your Honor; I believe that was the point that I wanted to have on the record and didn't really feel particularly comfortable asking, so thank you.

MJ [CAPT ALLRED]: Thank you, no I am glad that we made that clear.

Okay, let's see, so that leads me to--okay.

Who is going to argue the Special Request for Relief?

TC [LTC BRITT]: Your Honor, what number would that be?

MJ [CAPT ALLRED]: D-034, that’s what I think we are calling it.

TC [LTC BRITT]: Contact with HVD’s that would be Mr. Murphy.

MJ [CAPT ALLRED]: Okay, Mr. Murphy. Now with respect to this one since the defense has waived argument, I guess I'll just take the government's argument and then make a decision is that the plan?

ATC [MR. MURPHY]: Yes, Your Honor, and I only have a few brief but important remarks.

Good morning, Your Honor. The government as you know opposed the plan the court did ultimately implement which was a questions-only access to certain high-value detainees that are trained al Qaeda terrorists. The defense now seeks further liberalization of that order. In a way that the government views as dangerous, as threatening grave national security interests. And I will just take up a couple of the implications of some of the changes that the defense has proposing.

Under the current approach, which again the government opposes, but under the court’s current approach which tries to balance national security interest with discovery, you had one-way

communication. You have questions going in and either a response coming out or no response coming out and that's what the court envisioned to it. With the new change that's proposed by the defense, you lose that control flow of information. You now have two-way communications with directed at dialogue with these high-value detainees. You lose other things too; there is now no record. Under the questions-only approach there was a written document record of the both with the questions and the answers; that's gone with this new approach. What's also gone are--is the danger of spontaneous admissions of classified information that was otherwise controlled in the questions-only format. Particularly important is the role of the security manager is gone. The court in its order went and spent a great deal of time discussing how the security manager was an important component to the flow of information and the security officer or manager was walled-off from the prosecution, but was alert, and could talk with relevant agencies to determine what information could jeopardize national security; that's gone under the new approach. There's no security manager and this free-flowing dialogue.

This new approach carries the inherent risk of manipulation in which this trained or these trained al Qaeda terrorists can take full advantage now of having direct conversational contact with individuals who are not their attorneys.

There is also the inability to redact information with these exchanges which was an important component of the court's earlier ruling. The court took the position that it was necessary to balance grave national security concerns by implementing safeguards and as I've just detailed both safeguards go away.

The government cannot stress enough that we are talking about the worst of the worst, highly trained known deceptive Al Qaeda terrorists; who are the brain trust to some of the worst terrorist activity that the world has seen in our lifetime. The court should continue to impose restrictions that limit the risk of disclosure, and this is not any subversion on the defense counsel, we trust in their integrity completely; but we are worried about the highly classified information and manipulation that these detainees could undertake, to--to thwart this commissions process, so we would urge the court to certainly not go further in granting access to these individuals. And the government is prepared to answer any questions if the court may have in that regard.

MJ [CAPT ALLRED]: Well, yes as long as you're up there, we discussed and one more step I'm thinking of taking to assist the defense in--in their efforts to satisfy or mollify these high-valued detainee last night.

Do you want to respond to that, on the record?

ATC [MR. MURPHY]: Yes, Your Honor. And to state it explicitly, there was some thought that perhaps, and this was raised by the court and the government specifically said it wanted to address this issue particular it on the record, some thought that Mr. Hamdan would hand some sort of letter or note that would go into the HVD's. The government is unalterably opposed to that and for several good reasons.

Your Honor, this is a conspiracy case. It is fundamental to conspiracy trials that co-conspirators should not and in every court I've been in, are not permitted to have contact with one another. It has many dangers. It allows the flow of information that can undermine evidence in the case. It can cause the release of classified information in coded form between known terrorists. Your Honor, just imagine one member of al Qaeda, who the facts in this hearing has shown that he was a close associate and driver of Usama bin Laden being able to write a letter unrestricted apparently----

MJ [CAPT ALLRED]: Okay, that's not what I had in mind. What I had in mind is allowing Mr. Hamdan to send a short note to each of these high-value detainees that says something like: my name is Mr. Hamdan, these questions are in fact from my attorneys, I'm going to trial and it think it would be nice if you would help me out by answering the questions.

You could specify the language of the note; I'll specify the language and that's what I want you to respond to.

ATC [MR. MURPHY]: Your Honor, responding to that the government would still oppose it. And the reason for that is there's no indication that it will work. Questions have already gone into this individual and when the court fashioned this remedy, it was fully understood that there may not be a responsive answer. That was always a possibility, even likelihood, when you really think about it; so there's no indication that that will be successful and it does permit at least the detainees--the high-value detainees to know that this individual is there, is able to communicate, is able to identify themselves. The government doesn't want even that information to flow into these very dangerous terrorists. There is no, I think reasonable belief, that any thing more than the questions themselves is going to elicit a better response; and I think the defense has to take the answers as they come or the non answers as they come and not bring together in any form of writing, be it ever so limited, between a driver of UBL and known violent, trained, manipulative terrorists. They shouldn't know he's out there; they shouldn’t know he's able to communicate and there should not be a flow of information of any kind, be it ever so limited, between those two and they’re all co-conspirators.

MJ [CAPT ALLRED]: Okay. I appreciate your argument.

ATC [MR. MURPHY]: Thank you, Your Honor.

MJ [CAPT ALLRED]: I'm going to allow this one more level communication with the high-value detainees in the interests of helping the defense determine whether or not they will get any responsive answers.

I think it protects all the government's interest in a controlled flow of information, preventing direct dialogue with the high-value detainees. It preserves a record of the communications. It prevents spontaneous admission of any classified information. It leaves a security manager in the picture. It doesn't, in my mind, increase the risks of any cont--of any manipulation and it preserves the ability of the security manager to redact things that are inappropriate, I mean, an attempts to decode [sic].

My sense is that since the counsels drafted by--I mean the questions as drafted by counsel have already been presented to these detainees, they know. They know Hamdan is here.

So, I'll let the government draft the language; I want, I mean, I envision or I authorize a short note not a letter, not something that they can conceal some kind of secret message in, but something written in--in, I don't know is it possible to sign something in Arabic, so that they will recognize someone's signature. You can have the--you can have the note written by your government

translator, if you want to, to prevent Hamdan from concealing any secret stuff in the note, and he can sign it.

The other reason that I want to do this is because I want to try to persuade Hamdan to come back to trial and I think there is an interest; the government has an interest and the system has an interest and this defense has an interest in Mr. Hamdan sitting there and participating in the trial. And I sense that this might make him feel like he is doing something in his defense, involved in the process.

And so, the motion for Direct Access is denied.

And I know Commander Mizer has a high-value detainee as his own client and will be meeting with one of--with someone, I don't know who it is, at some point and will have, I guess, unsupervised, uncontrolled direct dialogue with no record of the communication with someone but even so I'll protect the government’s interest against his meeting with other high-value detainees that he is not assigned to represent.

So are there any questions about my ruling on D-016?

ATC [MR. MURPHY]: No, Your Honor.

MJ [CAPT ALLRED]: Okay. The next one is D-033.

DC [LCDR MIZER]: Your Honor, just one no--housekeeping matter, I just want to remind the court that I have to go and have an additional meeting with a high-value detainee.

MJ [CAPT ALLRED]: I am trying to get you out by 0830.

DC [LCDR MIZER]: All right, sir. But----

MJ [CAPT ALLRED]: Maybe you'll have to be excused before the government finishes its argument.

DC [LCDR MIZER]: Thank you, Your Honor.

TC [LTC BRITT]: Your Honor, with--with the way of the court, can we present D16 first and then D-033? I think sequentially they'd be more logically followed.

MJ [CAPT ALLRED]: Yes.

TC [LTC BRITT]: Thank you, Your Honor.

MJ [CAPT ALLRED]: Now, let's see, this is the commencement of hostilities. Let me just review the relief that the government asked on this. I may not need the argument or much argument.

Okay. Why don't you, Mr. Goldstein why don't you briefly summarize the defense's request as you see it and then make your argument as briefly as you can and I'll ask you any questions. This is D16.

ATC [MR. GOLDSTEIN]: Sure.

MJ [CAPT ALLRED]: I'm sorry, wait, this is----

TC [LTC BRITT]: D-016, sir.

MJ [CAPT ALLRED]: Okay, D-016.

ATC [MR. GOLDSTEIN]: It's the one titled <u>The Supplemental Submission to the Res Judicata</u> motion. Sir, in terms of accurately

summarizing the defense's point, you said?

MJ [CAPT ALLRED]: Well, as I remember the motion, the defense seeks to dismiss several of the specifications because they allege conduct that occurred before September 11, 2001, the start of hostilities.

ATC [MR. GOLDSTEIN]: Right----

MJ [CAPT ALLRED]: Maybe you can put a more sophisticated point on it.

ATC [MR. GOLDSTEIN]: Well, I think part of the issue is the govern----

MJ [CAPT ALLRED]: Since the defense isn't arguing it----

ATC [MR. GOLDSTEIN]: No, no, I--I----

MJ [CAPT ALLRED]: I'd like you to recapitulate their position before you answer it, if you would, to make sure I'm thinking along the right lines.

ATC [MR. GOLDSTEIN]: No--fair enough. And some of these briefs came sort of, not like ships in the night, but we both--each side tackled it somewhat differently and partly there was I think, some confusion over actually what we were supposed to do. In terms of what the supplemental briefing was supposed to be a response to.

I mean, the defense essentially laid out its review as to why the armed conflict or the hostilities, as I think they called it, did not begin until 9/11 and they cite various speeches and so on,

authorities to that end. And the defense argued that the court should determine the start date of hostilities and that start date would be after 9/11. In that this was in response to--and as a result of that certainly, since the defense's argument, as I understand it to be that since the requirements of the law of war and so on required the conduct to be--conduct under the military commissions to be within the context of hostilities to the extent hostilities do not begin until 9/11, conduct that predates that would not--could not be part of a specification and be struck out. That's what I understand the defense to have argue----

MJ [CAPT ALLRED]: That's what I remember.

ATC [MR. GOLDSTEIN]: The government went back to the transcript and looked at what we had thought, Your Honor, had requested and what we saw there was Your Honor asking, "whether the existence of a state of war is a question for the jury or not, whether it will be an element we'll have to prove or that there is a legal question that has to be resolved." It seems that the defense essentially answered that--it seems that they did answer that in passing, in the sense that they decided this is a question for Your Honor to resolve. And then they listed how they believe you should resolve it and why. The government's brief was a bit shorter and--although the government is certainly prepared to answer that, if and when necessary, we have a more modest point to sort of explain how we come at it and to explain

certain--where hostilities, how hostilities as used in the M.C.A. and armed conflict is used in the M.C.A. interact so that's what I'm going to talk about today.

MJ [CAPT ALLRED]: Okay. Go.

ATC [MR. GOLDSTEIN]: I just have a few remarks and would be happy to take any questions thereafter.

So, under the M.C.A. the concept of hostilities and armed conflict arises in two distinct ways. Under 948a(1)(A)(i), which is the jurisdictional section, the Military Judge exercise jurisdiction over the accused if he has engaged in hostilities purposely or materially supported hostilities against the U.S. or it's co-belligerents. As we referred to yesterday, in your 19 December ruling, you found that by no later than November 2001, Mr. Hamdan, was engaged in such hostilities and therefore this commission has jurisdiction over him. The second and distinct way this concept arises is that the M.C.A. defines substantive of criminal liability with respect to certain offenses by whether they occurred, where they "took place in the context of and was associated with an armed conflict." As an initial matter we note that whether an action is associated with an armed conflict is a broader question than whether it occurred during armed conflict--during hostilities.

More to the point though, whether a particular action occurred in the context of and was associated with an armed conflict

is a question of fact; not a question of law. It's one for the members to decide, just as the members must decide whether the accused is guilty of each and every other element of the offense, which is where that term is used, in the elements.

Your Honor has already found the accused is an alien unlawful enemy combatant. However, whether his particular acts occurred in the context and were associated with an armed conflict that, like I said, remains a matter of fact where the defense is not entitled to, sort of two bites at the apple, where first they argue, to Your Honor, that each and every act did not occur in an armed conflict and then when we get to trial, stand before the members and make the exact same argument. That start date is factual question and Mr. Hamdan will have a chance at trial to challenge the government's version of events. At trial the government will establish that the U.S. and its allies were in an ongoing conflict with al Qaeda by at the latest February 1996, the earliest date of the offenses charged against Mr. Hamdan. And the government will establish that those offenses took place in the context of and associated with an armed conflict. The defense can challenge it at that point, and that's fine. That’s the system we have. But that's the appropriate time to resolve--to resolve that. Now once personal--the personal jurisdictional, I mean it’s kind of a personal/subject matter jurisdiction, but that question having been answered, we then

move on to trial and then can be resolved--the other issue would be resolved then.

And that's my only prepared remarks; I'll be happy to answer any other questions.

MJ [CAPT ALLRED]: No, no I don't have any other questions. I won't--I won't, I guess rule conclusively this morning but I should tell you that I am inclined to deny this motion. I believe that because one of the elements of each--for material support or each of the specification under material support for terrorism is that the offense occurred, was committed or involved associated with a period of armed conflict. But that will be an issue of fact for the members at trial. At least--as far as the motion to calls upon me to dismiss the Charge and its Specifications, that's denied.

But I will re-read these filings and reserve the right to issue a more sophisticated or detailed decision after I have thought it through a little more thoroughly.

Thank you for your arguments.

ATC [MR. GOLDSTEIN]: Sure. I'm also going to be arguing the next motion.

MJ [CAPT ALLRED]: Okay, what is that one?

ATC [MR. GOLDSTEIN]: If you want, I can just stay here. This D-033, which is a related motion, I'll just try to summarize the best I can the defense's argument which was this is the motion to strike,

just make sure I have it accurate--to exclude evidence regarding transportation services not constituting direct involvement in hostilities. And the specific person that the defense mentions is FBI Special Agent [redacted] who testified 6 December 2007 here, regarding the accused's involvement in the charge--in the charged event. Essentially these--this is--it would seen that how Your Honor approaches this motion is similar to how you approach the last one, which is how we define hostilities and how we define armed conflict, whether that needs to be defined now and evidence that goes to prove certain of those points and whether that should be admitted.

So, should I just plunge in to, sort of, our view or I'm happy to try to characterize accurately defense's----

MJ [CAPT ALLRED]: No, I'm better prepared on this motion.

ATC [MR. GOLDSTEIN]: Okay.

MJ [CAPT ALLRED]: I read all of these briefs and you can just go into your argument.

ATC [MR. GOLDSTEIN]: Okay. The testimony of FBI Agent [redacted] is directly relevant to the offenses with which Mr. Hamden has been charged, providing material support and conspiracy. Examples of Mr. Hamdan's unlawful conduct or the overt acts relating to the conspiracy offense, these are listed in the charge sheet, includes serving as a bodyguard and driver to Usama bin Laden, taking bin Laden to do news conferences, contributing his own person to Al Qaeda

thereby freeing up Al Qaeda resources to commit further terrorist acts. As I explained yesterday, when we were discussing the joint enterprise motion, Specification I of the conspiracy offense does not inherently rely on the accused’s connection or not to the 9/11 attacks or the bombing of the USS Cole; rather they are two prongs to the conspiracy offense.

And the agreement prong only requires that the accused, "enter into agreements with one or more persons to commit one or more substantive offenses triable by military commission." That's quoting from the manual. Those substantive offenses for the agreement of trial are not the ones listed in the charge sheet after the obligation allegation of enterprise conspiracy, 9/11, bombing of the USS COLE and so on. Rather those of the ones listed at the bottom of the Specification as overt acts: serving as a bodyguard to Usama bin Laden, delivering missiles to Qaeda members, and so on. Those acts have been separately charged as violations of the M.C.A.'s material support provisions, and therefore are appropriate predicate acts to support a finding of guilty under the agreement theory of the conspiracy offense, even if the accused had never heard of 9/11.

Now with respect to those underlying substantive offenses, FBI Special Agent [redacted] testified on 6 December 2007, about--at the 803 about the accused’s unlawful contact with bin Laden, how the accused was offered a position in bin Laden's security detail, how

the accused drove bin Laden to a news conference, and the accused's role in evacuating the compound in Kandahar just prior to the 98 Embassy bomb--African Embassy bombings.

Those--that testimony is directly relevant to the acts to which Mr. Hamdan has been charged and both demonstrates the accused's involvement in al Qaeda as well as his degree of knowledge as to it's criminal aims. And knowledge is a requirement in the charged offenses.

Moreover, nothing about Agent [redacted]'s testimony is confusing or unduly prejudicial which is what--how the defense described it. And again, just--as we've just mentioned in the previous motion, it's not appropriate at this point, as I think, Your Honor, may agree to define exactly the start date of the armed conflict with Al Qaeda now.

The other issue that took place in the commencement of hostilities as the question of fact, that's for the members.

So Agent [redacted]'s testimony is relevant to whether the accused committed the particular acts and whether he had the requisite mental state to be guilty. It's not confusing, it's not prejudicial and it should be admitted at trial. And I am happy to answer any questions you may have.

MJ [CAPT ALLRED]: Actually, no. I think you--I see now--I remind myself now, that both this issue--this motion and the last are

the ones that the defense wanted to defer to our next session.

ATC [MR. GOLDSTEIN]: Yes.

MJ [CAPT ALLRED]: So, rather than--let me ask the parties this.

Does anyone feel like they would be prejudiced, in terms of their preparation for trial, if I don’t even give either of these motions any attention until we've return to Guantánamo Bay at the end of May, and we've heard the defense’s argument?

TC [LTC BRITT]: The only--the only factor that this would bear on, Your Honor, would be our presentation, which I believe, al Qaeda 101, which is P-004, which would be encompassed under the similar issues that Mr. Goldstein has addressed today. So to the degree that, Your Honor, will be able to read and prepare for the Al Qaeda 101 and the rulings that Your Honor will issue. I believe that it's a complicated presentation and it's a long presentation. And in order to be prepared for that presentation, we believe that these issues need to be decided, at least within your own mind to--to be able to grapple with--with how we’re going to present our theory of when armed conflict actually started, the events which support our theory of that particular date or choice of dates, so I think it would be beneficial for Your Honor, to have ruled at least somewhat----

MJ [CAPT ALLRED]: At least in my own mind.

TC [LTC BRITT]: Yes, sir, to the degree that you'll be able to approach that particular motion.

MJ [CAPT ALLRED]: Well, I'll give--I'll give a great deal of time to studying these briefs, but--but I want to give the defense a chance to respond before deciding finally. And when we--when we agreed to defer these until just before trial, it didn't occur to me that this might impact on which witnesses you are going to bring to Guantánamo Bay or not and which theory you are going to present or not. So if--if that won't un--discomfort anyone to not decide these until just before trial, I will set these aside. I'll decide them in my mind if that makes the government happier, but I would like to hear the defense's response before I really decide. Okay?

TC [LTC BRITT]: Thank you.

MJ [CAPT ALLRED]: And now we have the motion for the Bill of Particulars.

TC [LTC BRITT]: Good morning, Your Honor and this will this presentation will be the briefest of the briefs. The defense's motion for the Bill of particulars----

MJ [CAPT ALLRED]: Briefer than Ms. Prasow's first argument yesterday?

[All counsels are humored by the military judge's comment.]

TC [LTC BRITT]: I think that--I think it will be equally brief; yes, sir.

The defense's motion for Bill of Particulars should be denied.

The charge sheet, the discovery, and the evidence produced at the December 2007 jurisdictional hearing adequately informed the accused of the nature of the offenses charged against him; certainly allows him to avoid or reduces his possibility that he will be surprised during the proceeding; certainly protects him from double jeopardy. Motion for Bill of particulars may not be used under the law as a general discovery device and to gather evidence that the prosecution might use against the defendant. And as Your Honor knows we have had discussions about discovery and these proceedings and we have made full discovery in this case with the exception of the full outstanding taskers which Your Honor has indicated and we're prepared to comply with.

But in any event----

MJ [CAPT ALLRED]: And which are those, just so we're talking on the same wavelength.

TC [LTC BRITT]: There are several individuals which Your Honor has ordered us to provide the defense access to and we're prepared to do that based on our 802 which we had the other day and under cert----

MJ [CAPT ALLRED]: Have you got those names and phone numbers right with you today?

TC [LTC BRITT]: Yes, well--we have those, we'll provide those immediately upon our return to Crystal City.

I'm not sure if we brought them with us on this trip.

MJ [CAPT ALLRED]: Okay. I hate to interrupt you in your argument, but the defense is preparing for trial.

TC [LTC BRITT]: Yes, sir.

MJ [CAPT ALLRED]: And if you have them, but you're holding back on providing them that, I don't know if there is some tactical advantage you're trying to gain or you just don't know the area code yet or what's going on?

ATC [LCDR STONE]: I think it's a question of opening a file upstairs to see if the right file is here and--and that's it.

MJ [CAPT ALLRED]: Okay.

ATC [LCDR STONE]: If they are there, we'll give them if not, upon our return to Crystal City, they will have them tomorrow, so----

MJ [CAPT ALLRED]: We--we talked about this the other day, I thought that you might go to the file Monday evening to see if they are there and disclose the phone numbers then. Okay----

TC [LTC BRITT]: Yes, sir; and these were----

MJ [CAPT ALLRED]: I'm pushing the government to get their discovery obligations done.

TC [LTC BRITT]: Absolutely, Your Honor, and these were not individuals that we had planned on calling. We had to go and find

out----

MJ [CAPT ALLRED]: Track them down----

TC [LTC BRITT]: ----their address and phone numbers, which--which we have done.

Your Honor, continuing under R.C.M. 906(b)(6), which is a--additionally identical to M.M.C. 906 (b)(6), a Bill a Particulars may not be used to force detailed disclosure of the accused's acts underlying a charge. And in this particular motion that's exactly what the defense is attempting to do.

They're also attempting to subtly reinforce their argument that hostilities commenced on 9/11 in the way that they had drafted their specifics in their requests for their Bill, therefore the government will take this opportunity to again inform the court, that the court has jurisdiction over all these offenses, all that are currently charged to include the period from in and about February 1996 to on or about November the 24th, 2001.

Your Honor, reviewing the defense's motion, they contend primarily that the charge sheet is vague and indefinite; I would direct your honor's attention to R.M.C 307(c)(3), where we can find the definition of a specification, generically. A "Specification" is a plain concise statement of the essential facts constituting the offense charged. And the specification we laid out in each of these charges essentially is drafted within that simple guideline.

Now the key question with regards to notice that allows the defense to prepare their case to avoid double jeopardy and surprise is what makes the Hamdan case unique in the area of adequate notice to the defense. Two key points:

Number one, the accused has the unprecedented benefit of a judicially mandated opportunity to hear the government's witnesses and see a large portion of the evidence through the accused’s pretrial jurisdictional hearing and that's it, Your Honor, the accused has already seen our case. It's albeit a shortened version of our case, but we believe that the conclusion of our presentation where there are jurors sitting in this box, with the instructions form the court, we could've rested at that particular point.

Secondly, a large portion of this case, of the government's case, comes not from agents, but from the mouth of the accused himself, through his statements, his videotaped captured video and through his conduct as seen on other videos. A large portion of the evidence is generated for and by and on behalf of al Qaeda, the terrorist organization through their own propaganda instruments.

The defense, Your Honor, knows very well through discovery the quantity of the evidence in the government's possession. And a portion of this evidence is certainly what the defense is working so hard to suppress in these various motions and hearings. Now

specifically, how does the government satisfy any and all inquiries under R.C.M. 906 (b)(5);

Number one, the accused is adequately informed of the nature of the charges with sufficient precision to enable him to prepare for trial. We not only provided him with the specific discovery but as I said, we have already essentially put on our case.

Second, given the number of motions and the voluminous Hamdan-related litigation in this and all the other Hamdan cases, the danger of surprise is certainly none. The evidence that we've provided enables him to assert some type of double jeopardy argument against future prosecutions for the same offenses and as I said previously the drafting of the charges comports with the requirements as set out from the Manual for Military Commissions.

In conclusion, Your Honor, having met the full requirements of the applicable law, the government, requests respectfully, that the defense’s request for Bill of particulars be denied.

Pending questions?

MJ [CAPT ALLRED]: That was a nice argument but by far not the briefest of the brief.

TC [LTC BRITT]: I apologize for that, Your Honor.

MJ [CAPT ALLRED]: So you are guilty this morning of hyperbole.

TC [LTC BRITT]: Thank you, sir. If I may return to my seat.

MJ [CAPT ALLRED]: You may. Chastised but still loved. Okay,

I’d like to talk about a couple of issues, I guess--and the government can--or the defense can respond to these scheduling kinds of issues if it wants to.

My sense is that we have quite a bit of work to do yet, before we're ready to assemble the members. And so, I plan to be here on whatever--Memorial Day is it, at the end of May?--Memorial Day weekend and that entire following week to hear several remaining motions and some of which I suspect will involve the taking of considerable testimony, factual issues about the conditions of confinement, and Mr. Hamdan's mental state and whatever else is--the suppression of his statements if the defense wants to challenge some of those.

So, I think I will tell the Clerk of the Court to bring the members down the following week on Sunday night or whenever it is they want to schedule their flight; and plan to--to begin our voir dire on Monday--I didn't bring the calendar, the 1st, 2nd, 3rd of June, something like that. The Monday after Labor Day.

I don't know how many witnesses each side has but I asked the Clerk to tell the members to expect a two-week trial and I invite you to respond if you think that's not good advice or good planning.

TC [LTC BRITT]: That would be correct, Your Honor.

ATC [LCDR STONE]: That would be accurate.

MJ [CAPT ALLRED]: Okay. Does defense have any reaction to this?

ADC [MR. SCHNEIDER]: It makes sense to us. I would point out that I'll be attending a college graduation on May 26, my colleague, Mr. McMillan will be attending a high school graduation on June 14. That's simply to say there may come a time when he takes leave and comes back but other than that conflict that makes sense to us. We would anticipate proceeding in his absence----

MJ [CAPT ALLRED]: High school graduation.

ADC [MR. SCHNEIDER]: Just to be clear.

MJ [CAPT ALLRED]: Well, I appreciate the notice. I mean the high school graduations are important, is this someone that you love and care about?

ADC [MR. McMILLAN]: This is my daughter, Your Honor.

MJ [CAPT ALLRED]: All right, well that could've been an easy, yes.

ADC [MR. SCHNEIDER]: That's a yes. I speak for Mr. McMillan, that's a yes.

MJ [CAPT ALLRED]: Okay so, within that time--I don’t know what date the 14th is or whether----

ADC [MR. SCHNEIDER]: It's a Friday.

MJ [CAPT ALLRED]: You know, I don't know how long it will take, so----

DC [LCDR MIZER]: It's a Saturday.

MJ [CAPT ALLRED]: Saturday, so we might be--we might be finished by then, who knows. Okay. Well, both sides have work to do and so do I; and so----

ADC [MR. SWIFT]: Your Honor, one other thing on scheduling, you have mentioned that there would be some date final when we would provide witness list.

MJ [CAPT ALLRED]: Yes.

ADC [MR. SWIFT]: As of this moment there is no date final, somehow I suspect it would be a couple of days before trial, that we would finally figure it out, unless you set a date.

MJ [CAPT ALLRED]: Oh okay, well, I don't know--I don't know that we need to do that on the record, but why don't we meet in an 802 conference and hash that out right now, as soon as we recess and I can issue a written order. I think the time--we are getting pretty close to the time where you should just disclose your witnesses to each other, I'm looking, in the next week. As soon as you get back to Crystal City and open your files perhaps, and see if there are any names in there. Okay.

ADC [MR. SCHNEIDER]: Motion P-003, I believe is the al Qaeda 101 video.

MJ [CAPT ALLRED]: Yes, yes.

ADC [MR. SCHNEIDER]: We would propose that opposition be submitted one week after the Convening Authority approves the additional funding that you authorized on Monday of this week. Currently it's set to be due May 5, his additional work----

MJ [CAPT ALLRED]: The additional funding that 4 hours that I authorize for Dr.?

ADC [MR. SCHNEIDER]: Dr. Williams. Dr. Brian Williams. His participation is key to our position.

MJ [CAPT ALLRED]: Okay, so what's up with that?

TC [LTC BRITT]: That's fine, Your Honor. We have----

ADC [MR. SCHNEIDER]: It's a change in the existing schedule.

MJ [CAPT ALLRED]: Well, I know it's fine, but what's the delay in getting the convening authority's approval to--what is it, to authorize Dr. Williams to bill the government?

ADC [MR. SCHNEIDER]: The additional 4 hours----

MJ [CAPT ALLRED]: No.

ADC [MR. SCHNEIDER]: I'm sorry, 20 hours.

TC [LTC BRITT]: Your Honor, at this particular point that would be outside of our--I'm sure we would be happy to re-approach the convening authority on that, and will do so certainly upon our return.

MJ [CAPT ALLRED]: Okay.

TC [LTC BRITT]: To find out why that--possible.

MJ [CAPT ALLRED]: Does the Convening Authority know that that was my decision? They got a copy of my ruling, I guess. Okay.

TC [LTC BRITT]: They're served with a copy of all--all of Your Honor's rulings, as part of the normal distribution.

MJ [CAPT ALLRED]: Okay and the--so your request was what? What happens one week after your funding?

ADC [MR. SCHNEIDER]: Our opposition would be served and filed.

MJ [CAPT ALLRED]: Your opposite motion--your opposition in response to motion P003?

ADC [MR. SCHNEIDER]: Yes.

MJ [CAPT ALLRED]: Erroneously characterized as number 4. Somehow, we all got into that. Okay. That sounds fair enough. Okay. Can you think of anything else we need to address on the record before we adjourn? Okay. When are you planning to come to Guantánamo? The 28th is a Wednesday, are you actually going to be here on Tuesday the 27th?

TC [LTC BRITT]: We would like to arrive as early as we can and of course that's going to be governed by the airplane. So--I mean that's----

MJ [CAPT ALLRED]: Okay, I'll be here.

ADC [MR. SCHNEIDER]: Members of the defense will be here by the 27th at least with one exception, myself. I will be here on Wednesday, the 28th.

MJ [CAPT ALLRED]: Okay, well, if we need to we have 4 days in trial, in court, that week.

And it's apparent, you know, I've asked you the other day to begin drafting instructions. One of the instructions that I anticipating the need for is a definition of hostilities, and I know that's going to be very contentious or period of armed conflict or something along those lines, so. Give some thought to that, I mean you have widely different views of what constitutes a period of hostilities and so I mean it may be--it may be that the--yeah, I don't know how to resolve that yet. But, please draft the proposed instructions and add some authority that will help me draft an instruction that we can give to the members.

Or maybe we can just, if we can't agree on a definition, I would just have to say, "it's up to you, look at the facts, see if this is a period of hostilities." You can each argue your respective theories. Well, I see the grin that's on your face, that's the grin on my face when I think about reconciling your different views what of the period, what the definition is going to be. I suppose I can do what we often do when asked for instructions, is just say, "your request for that instruction is denied; I'm going to give the other instructions.”

Okay, let see, why don't we get Commander Mizer on the road to his gig, and then we'll met later? I think you all should sit

down amongst yourselves and see if you can generate a list for an exchange--I mean a chronology for exchange of witness list, summation of what voir dire questions, submission of requested instructions, other milestones that you would like to see met. Both of you have interests and prepare for trial and then come talk to me about any conflicts that I need to resolve.

Okay, is there anything else?

DC [LCDR MIZER]: None from the defense, Your Honor.

TC [LTC BRITT]: Nothing from the government, sir; and I understand that we will have an 802 immediately after we adjourn today. Is that correct?

MJ [CAPT ALLRED]: Yes. Okay, you need to draft, or if you want to, the note for Mr. Hamdan to sign.

TC [LTC BRITT]: I propose that we do this immediately after the 802. I need to circulate it amongst some people.

MJ [CAPT ALLRED]: And the gover--the defense needs to give me a deposition order to draft--to sign. Okay?

All right, the court is closed then until we meet again.

[The R.M.C. 803 session recessed at 0829, 30 April 2008.]

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