[The military commission was called to order at 0840, 5 August 2008. Parties present when the commission went into recess were once again present.]

MJ [CAPT ALLRED]: The court is called to order.

Mr. President, did we get the exhibits in to you so that you could access them? I guess we talked to this last night, didn't we?

PRES: Yes, sir, we did; and they came in last night, and they were there. Some of them were there this morning so----

MJ [CAPT ALLRED]: Okay.

PRES: And right now they are setting up the computers.

MJ [CAPT ALLRED]: So you should have access to all of the exhibits that have been admitted into evidence?

PRES: Correct.

MJ [CAPT ALLRED]: Either with a hard copy or an electronic version?

PRES: Correct.

MJ [CAPT ALLRED]: Okay. Are you prepared to retire to deliberate then?

PRES: We are, sir.

MJ [CAPT ALLRED]: All right. The court will be closed for deliberations.

PRES: Thank you.

MJ [CAPT ALLRED]: Thank you.

BLF: All rise **[all persons did as directed and the members departed the courtroom.]**

[The military commission closed for deliberations and the R.M.C. 803 session commenced at 0841, 5 August 2008.]

MJ [CAPT ALLRED]: Okay. Please be seated **[all persons did as directed]**.

The members have withdrawn from the courtroom.

I got an e-mail this morning from the prosecution asking me to reconsider the issue we discussed yesterday regarding murder in violation of the Law of War.

And I guess you got copies of the same thing?

CDC [MR. MCMILLLAN]: Yes, sir.

MJ [CAPT ALLRED]: I read Judge Brownback's opinion. I didn't find that helpful because he was actually addressing the issue of whether that statute was an *ex post facto* law; and so the fact that there was historical precedent and that he found that it was a pre-existing offense was pretty much all I gathered from Judge Brownback's review.

I read the Court of Military Commissions Review opinion, which recited the language of *Ex parte Quirin* for the proposition that *Quirin* had essentially reached; but I found one thing that I think gives me pause and that is, if you look in the Manual for Military Commissions on page 4-3, "murder of protected persons" is the first

offense made punishable by the Congress; and a protected person, according to that definition means civilians not taking an active part in hostilities; military personnel placed hors' de combat by sickness, wounds, or detention; and military medical or religious personnel; and that's the definition I gave the members yesterday, at the defense's request, for murder in violation of the Law of War.

The fact that there were two separate statutes and the fact that one of them criminalizes the murder of protected persons suggests that murder in violation of the Law of War was intended to be something different.

So that's as far as I have gotten.

CDC [MR. MCMILLLAN]: I would like to address that, Your Honor, if I might.

MJ [CAPT ALLRED]: Yeah, uh-huh.

CDC [MR. MCMILLLAN]: May I come to the podium?

Your Honor, I think the first point that needs to be made is that the extraordinary motion that was filed yesterday evening is improperly styled. It should be styled "a motion for a mistrial." If the relief that they are requesting at this point were to be considered, it would constitute a mistrial, as closing argument has been made, the deliberations are underway based on the instructions that this court gave. Those instructions were the correct statement of the law. They were correct statement of the law under the M.C.A.

They were a correct statement of the law under the Law of War. Nothing that the--none of the authorities that the prosecution provided, particularly the *Khadr* decision, supports the idea that Congress intended to alter the Law of War as it was correctly stated by Professor Schmitt from the declaration that you read.

On the contrary, the statute itself supports the proposition that Congress did not intend to take an extraordinary step of imposing criminal liability merely on the basis of unlawful combatancy. Those are distinct concepts. One is established under a preponderance of the evidence standard, as was applied by this commission in the December 2007 hearing. The other, war crime, is established by the beyond a reasonable doubt standard in a criminal trial. Now the M.C.A. itself, at Section 950(z) identifies as a military objective combatants, indicating that the intention of Congress was to abide by the notion of standard principles of international law: that directing fire at combatants who are not removed from combat and are, therefore, protected persons, but are equipped, armed, on the battlefield, and engaged are lawful targets; and to kill or to attempt to kill such individuals in combat is not a war crime. It does, however, render the unlawful combatant liable under domestic law; and in fact, the *Khadr* case, from September of 2007, correctly states that principle; and I'm not sure if this is being displayed to you or not but----

MJ [CAPT ALLRED]: I read that this morning.

CDC [MR. MCMILLLAN]: They may be treated as criminals under the domestic law of the capturing nation. The *Quirin* case involved combatants. It involved uniformed soldiers, officers of the German army that were put ashore on the United States territory, stripped off their uniforms to then engage in acts of sabotage. That is not the situation here. They were combatants, and as combatants, they took steps then that were unlawful as combatants.

So that is not precedent. There is nothing in this *Quirin* case that undercuts the proposition that is set forth in Professor Schmidt's--I mean, Professor Schmitt is acutely aware of the *Quirin* case and what its meaning is; and he has interpreted it properly. The M.C.A. identifies elements for murder in violation of the Law of War, and one of them is the murder must be in violation of the Law of War. Now the protected person's statute that you refer to is indeed a violation of the Law of War; but there are, you know--there are other ways in which you can murder in violation of the Law of War. Perfidy for example. Approaching under a flag of truce and then, you know bringing weapons to bear. You know, there are other ways in which you can murder combatants using improper weapons, bullets, you know, or other unlawful weapons that go beyond, that go beyond that statute; and it should not be understood--the protected person's statute should not be understood as implying in some way that Congress intended to

depart from the established principle that a murder in violation of the Law of War is not equivalent of unlawful combatancy.

In fact, the *Khadr* case further supports our position in that regard by referencing the term "investing principle". The term "investing principle", of course, is where possible the statute should be interpreted consistently with international law. This statute certainly can be, and it indicates by its text that it should be, consistently applied with international law. There is no statutory support whatever in the M.C.A. for the extraordinary proposition that the prosecution is advancing in front of this court. The M.C.A., on the contrary, supports the instruction as properly given by this court. To change that instruction at this point would constitute a mistrial and would be a serious mistake.

That's the defense position.

MJ [CAPT ALLRED]: Well, some of those same arguments occurred to me as I was--I just read them, the government's supplemental filing within the last 20 minutes. So I haven't had a chance to think it all the way through, but I do note that the military commissions punishes separately perfidious attacks under Subsection 17.

So murder in violation of the Law of War wasn't intended, I don't think, to encompass perfidious attacks if it's separately punishable. I'm looking to see whether there is a separate punishment for using improper weapons. Because if we eliminate that as a

possible instruction of murder in violation of the Law of War and if we eliminate murder of protected persons, then it appears that murder in violation of the Law of War was intended to mean a killing of a lawful combatant by an unlawful combatant.

CDC [MR. MCMILLLAN]: I would point to the definition of a military objective that's in the text of the statute.

MJ [CAPT ALLRED]: Well, the outcome of your position though would be that an unlawful combatant could kill lawful combatants and face no punish, isn't it?

CDC [MR. MCMILLLAN]: Incorrect, sir; they would absolutely face punishment under the domestic law of any state that had personal jurisdiction over that individual; and that is the properly-stated proposition that you saw in Dinstein and that you saw in Schmitt; and there is absolutely nothing in this statute that would contradict that. In fact, based on the definition of military objective, there is statutory basis to presume that Congress intended to abide by that proposition of international law.

MJ [CAPT ALLRED]: Well, the Military Commissions Act is the domestic law of the United States.

CDC [MR. MCMILLLAN]: Well, it's the domestic----

MJ [CAPT ALLRED]: That's what he is subject to.

CDC [MR. MCMILLLAN]: ----it's the domestic law, which is, as the statute itself recites, a statement of the Law of War. The statute

itself indicates that these are pre-existing offenses; and it's only on that basis that the jurisdiction of the tribunal exists at all over these--over this defendant. It's a statute passed in 2006, attempting to impose criminal liability on conduct from prior to 2001; and the only basis on which you can do so is to assert that these are pre-existing offenses. They are Law of War offenses, and the Law of War is properly stated in Dinstein. It's properly stated in Schmitt. The text of this--they are asking for a statutory interpretation which violates the *Charming Betsy* principle, which violates the statutory text elsewhere in the M.C.A., and which would substitute--which has no support that they can point to in this M.C.A. itself, aside from these arguments, that well, this is--this would be captured there, that would be captured here. Use of--use of illegal weapons, I don't know if that is captured somewhere; but that would be a killing in violation of the Law of War.

MJ [CAPT ALLRED]: Well, I mean, that's captured potentially under the offense that talked about using poison or similar weapons. They are described as weapons that cause death or serious damage to health through asphyxiating, bacteriological, or toxic properties. I mean, I guess a flame thrower might be the only other kind of unlawful weapon. I don't know what other unlawful means of causing death might be criminalized under this.

CDC [MR. MCMILLLAN]: Well, historically under the Law of War, you know, what used to in the old days be called dum-dum bullets, expanding projectiles that were designed to inflict unnecessary suffering and tissue damage----

MJ [CAPT ALLRED]: Uh-huh.

CDC [MR. MCMILLLAN]: ----were the classic type of examples of an unlawful type of weapon. In any event, Your Honor----

MJ [CAPT ALLRED]: Well, okay.

CDC [MR. MCMILLLAN]: ----we--those are----

MJ [CAPT ALLRED]: I understand your position.

Mr. Trivett, I appreciate your--your keeping the fight up. I'm afraid--I'm afraid it’s almost coming too late, even though you might be right.

Here is the quandary I have: If Congress, in identifying murder in violation of the Law of War intended to criminalize only those murders that violated the Law of War, then we have to turn to scholars on the Law of War to figure out what those prohibitions are. That's how I got to Dinstein and Schmitt. Maybe they are wrong. Maybe there are other scholars that would say, no, a killing of a combatant by an unlawful combatant without war is a violation of the Law of War.

Now I didn't get all the way through your--maybe it wasn't you, but the government's brief, in the *Khadr* case, in which you laid

out your historical precedent. I was reading *Winthrop* and summary executions and all of that stuff. I mean, I don't--I don't think that is still the law. We are certainly still not doing summary executions. But I will invite you to find some authority that contradicts Professor Schmitt, that the Law of War, post-Geneva perhaps, was intended to criminalize the killing of a combatant, a lawful combatant, by an unlawful combatant. Otherwise, I don't know what to make of this phrase "in violation of the Law of War".

What's your sense?

CTC [MR. TRIVETT]: Yes, sir. Well, our position in regard to international law itself is that there is certainly conventional law, that being the Hague Conventions and the Geneva Conventions, and they specify one means in which people can fight. You know, that's the Hague Convention. And the second one is means by which you need to treat your captured prisoners. But there is also the common Law of War. The Geneva Conventions make--and the Hague Conventions make certain that it is not the all-encompassing statement of international law or the Law of War. It's simply what the parties to the conventions have agreed upon. We believe that the common law precedence, certainly pre-Hague, shows that these individuals who were belligerents and not following the Laws of War, not fighting for a state, not wearing a uniform, hiding behind their civilian status in order to gain advantage over their enemy who is in--is fighting in

accordance with the Law of War is a, per se, war crime. It's your act of belligerency while not following the Laws of War that make you unlawful.

And we believe that all of the cases that were cited, at least in the *Khadr* filing, indicate that that's how we treated them. We certainly are not saying that we can summarily execute anyone anymore; but we think it's evidence to show that their crimes were per se lawful and that's how--per se unlawful and that's how we had handled them historically.

So we believe under the common Law of War, if an individual or a group, such as al Qaeda, who doesn't wear uniforms, doesn't fight for a state, you know, all of the positions that the government believes make al Qaeda an unlawful organization, if al Qaeda is targeting our airmen that are flying over Afghanistan and they aren't following the laws of war in doing it, if they are hiding amongst the civilians, if they are not wearing uniforms, there is no way for us to identify them, that that is unlawful. Period. And because that's unlawful and they are unlawful combatants because they don't fit the criteria, if they murdered someone or attempted to murder someone, they could certainly be charged domestically as criminals; but they could also fall under violations of the laws of war, and we believe that *Quirin* cites to that proposition, as well as certain other language that we've cited in the *Khadr* case.

So that's the government's position on it, is that unlawful belligerency is a per se war crime. Now it doesn't mean that that's a status. It's not a static status. You need to take a belligerent act; but if you take a belligerent act in the context of and associated with an armed conflict and you are not following the laws of war, you are in violation of the laws of war. And if you kill someone, that's murder.

MJ [CAPT ALLRED]: Isn't that exactly the proposition though that Professor Schmitt rejects, that unlawful combatancy by itself renders someone criminal?

CTC [MR. TRIVETT]: Right. And I did--and I did read--I did read Professor Schmitt. I think there are many inconsistencies from what he says and how Congress has determined to, under the Law of War, and decided the issues of the Law of War--I think that they are in conflict; and certainly if the two are in conflict, I believe that Congress under Article 1, Section 8, would trump Professor Schmitt.

MJ [CAPT ALLRED]: Well, is there any legislative history that would shed light on what Congress intended this offense to criminalize?

CTC [MR. TRIVETT]: I'm not certain, sir; but I could certainly check for you.

MJ [CAPT ALLRED]: Well, I would appreciate that. I mean, it might be--it might be that you are right; and I'm more inclined to believe that today than I was yesterday.

CTC [MR. TRIVETT]: Yes, sir.

MJ [CAPT ALLRED]: Because I have identified murder of protected persons as a separate offense, and I have identified perfidy as a separate offense; and those are two of the categories Professor Schmitt said were violations of the Law of War. And I think it follows that this murder in violation of the Law of War probably means something else. It may--may mean that Congress intended to criminalize the murder of a lawful combatant by an unlawful combatant--or the killing of an unlawful combatant, lawful by unlawful.

But it's kind of coming up late in the game.

CTC [MR. TRIVETT]: Yes, sir.

MJ [CAPT ALLRED]: So you might be right. You might be able to persuade me that the instruction I gave was the wrong instruction for this case, but I don't know if you could do it soon enough to fix this.

CDC [MR. MCMILLLAN]: Your Honor, I'm not sure what your position would be on the comment that this motion should be a motion for a mistrial but----

MJ [CAPT ALLRED]: Well, I have----

CDC [MR. MCMILLLAN]: ----but if you don't deem it as such from the prosecution, then the defense would certainly make that motion if there is a change in instruction at this point, after closing, after deliberations. The--you know, the explanation that has been presented by the prosecution is, as you correctly noted, directly refuted by scholars on the Law of War; and in fact, it would, if accepted as a correct statement of the Law of War, render illegal the kind of conduct we saw happening with mujahideen against the Soviet forces in the 1980s.

You know, the prosecution's own expert sat here, showed a video of missile strikes against Soviet aircrafts. When asked if that was terrorism, his position was, “Well, no.” That is just paramilitary conflict. The United States is well known with supplying these Stinger missiles; and if the prosecution's position on the Law of War is accepted, it renders the United States complicit in murder in violation of the Law of War. That's not the correct statement of the facts. It's not the correct statement of the law. So I would offer that for your----

MJ [CAPT ALLRED]: Well, I hear what you are saying; but I'm still uncomfortable with the result that an unlawful combatant who hides behind civilian status for example, and then kills a lawful combatant, there seems to be no provision for punishing that.

This Military Commissions Act is the domestic law of the state. That's what he is made subject to by virtue of his unlawful combatancy. And you are saying that because he didn't use a prohibited weapon, because he didn't kill a protected person, and because this murder in violation of the Law of War only criminalizes those activities, that he can't be punished; aren't you?

CDC [MR. MCMILLLAN]: Well, actually I'm not at all saying that. I'm saying that he is subject to criminal punishment under the domestic law. I understand your point that this is now in the domestic law; but it is--it is a statute issued or promulgated under the define and punish power, as the prosecution has repeatedly insisted.

MJ [CAPT ALLRED]: So you are saying that the government's only remedy is to take such an offender to New York City and punish him in the Southern District of New York for murder?

CDC [MR. MCMILLLAN]: Yes, sir. For--for if, in fact, there is, you know, proof of murder in violation of the Law of War, that should be prosecuted as attempt--you know, as murder or attempted murder under the domestic criminal law. There is indeed plenty of precedent for that and it's--it's--it's happening, you know, as we speak, those kinds of prosecutions.

So there should not be a readiness on the part of this court to interpret the M.C.A. in a way that does violence to the long-

established principles of the Law of War and equates unlawful combatancy with criminality. Unlawful combatancy has one effect only: It strips the individual from combatant immunity. It's found on a preponderance of the evidence. Criminality is found beyond a reasonable doubt.

So the equation that is being proposed would violate or offend some basic principles of criminal law in that regard, sir.

MJ [CAPT ALLRED]: All right. Well, what did Congress mean when it criminalized murder in violation of the Law of War?

CDC [MR. MCMILLLAN]: Well, I----

MJ [CAPT ALLRED]: Knowing that it also criminalized separately perfidy and attacks on protected persons?

CDC [MR. MCMILLLAN]: Well, it's--it's--it criminalizes--I don't necessarily have it in the forefront of my mind an exhaustive list in the ways in which murder in violation of the Law of War can occur; but use of unlawful weapons is--is one thing that I have offered that it doesn't appear to me as separately criminalized in the M.C.A., you know it's--it's a----

MJ [CAPT ALLRED]: That would be a stretch though, won't it, to think that that's what Congress intended by these elements? That would be a stretch.

CDC [MR. MCMILLLAN]: Well, the statute can be a "catch-all" to pick up anything that may not be separately identified. It can be

understood as the kind of "catch-all" sort of position to--to, in fact, criminalize in a manner consistent with the Law of War anything that Congress has otherwise failed to expressly call out in the enumeration of offenses.

So it's not at all unusual for Congress to use such kind of catch-all--catch-all provisions in legislation. It shouldn't be interpreted, however, to--to contradict well-established principles under the Law of War. There is no statutory support for it. They are asking you to enter into, you know, this kind of speculation and conjecture about intent of Congress, depart from the statutory text; and they are inviting you to do so in a way that the CMCR itself in the *Khadr* case said would not be appropriate. That under that *Charming Betsy* principle, this statute should, if possible, be--should be read in a manner consistent with the Law of War; and moreover, the plain language of the statute, you know, indicates that Congress intended to only criminalize pre-existing offenses, only criminalize pre-existing offenses and that this was, therefore, not an *ex post facto*, you know, prosecution. That--the pre-existing offenses are properly stated by Dinstein and Schmitt, and there is nothing--there is nothing in the text that would support this idea that Congress had some intent to promulgate something new.

MJ [CAPT ALLRED]: Or if it did, it only applies after October of 2006.

CDC [MR. MCMILLLAN]: That's correct.

MJ [CAPT ALLRED]: What's your reaction to the *ex post facto* angle, Mr. Trivett, you thought about that?

CTC [MR. TRIVETT]: Well, yes, sir. I mean, we believe that the common Law of War as laid out, you know, specifically on how we dealt in the Revolutionary War, or certainly in the Civil War, is part of our traditions. It's part of our legal jurisprudence regarding the common Law of War.

Whether Mr. Hamdan knew that or whether al Qaeda knew that clearly wouldn't be required for an *ex post facto* challenge--for the government to overcome an *ex post facto* challenge.

If we have traditionally tried people for their unprivileged belligerency, that would negate any *ex post facto* argument that the defense could come up with me. I mean, that's one of the worst ones, certainly, I mean, because it predates Hague. I mean, we are not talking about something that came after 2006. We are--we are talking about something that existed in the 17 or 1800s, and that we believe is still part of the common Law of War. So I don't think there would be any *ex post facto* concerns regarding unprivileged belligerency.

I don't think that Congress was making a new offense. I think they are were just binding--searching to our common law in how we traditionally have done it in order to do a more encompassing list

of what it believes were violations of the laws of war or conduct that would have violated the Law of War.

CDC [MR. MCMILLLAN]: It's clear, Your Honor, that the prosecution really wants it both ways. They want to argue on the one hand that the M.C.A. has changed the existing Law of War, the existing Law of War correctly stated by Schmitt and Dinstein. The M.C.A. has changed that and you should--should follow that; but they now want to say disregard the *ex post facto* nature of that change in having it imposed on this defendant.

MJ [CAPT ALLRED]: So----

CDC [MR. MCMILLLAN]: So if they are right about the change, then necessarily its an *ex post facto* application and an *ex post facto* prosecution.

MJ [CAPT ALLRED]: Well, that was--that was the comment I was going to make to Mr. Trivett here. If there is evidence in the common Law of War for the proposition that an unlawful combatant who kills a lawful combatant can be punished, why would Schmitt not have acknowledged that in his discussion of what amounts to the common Law of War?

CTC [MR. TRIVETT]: I think the best answer, sir, is: I don't know.

MJ [CAPT ALLRED]: I don't know either.

CTC [MR. TRIVETT]: I--I tried to call him yesterday.

MJ [CAPT ALLRED]: Oh, did you?

CTC [MR. TRIVETT]: I did. It was too late. He was not in the office. I think it would be an interesting conversation quite frankly because I think we can cite to a bunch of precedent where we have done this, the United States has done this. The United States has said under the Law of War, we are going to punish you for this; and ultimately, it's the United States' job and the United States military's job to discipline those who violate the laws of war. It's a very important component of being able to fight effectively.

MJ [CAPT ALLRED]: Uh-huh.

CTC [MR. TRIVETT]: Because if you can't discipline your enemies when they are not following the Law of War, you will continually be at disadvantage by having to fight people who hide among civilians and who target your lawful combatants.

So clearly, while it may have been murder, just like the East African Embassy bombings may have been a crime punishable, that doesn't also make it an attack under the Law of War; and it doesn't make unprivileged belligerency a crime which we can try at military commissions.

So just because one thing may fit one category doesn't preclude it from fitting the other.

MJ [CAPT ALLRED]: Okay. Well, I'm not sure I'm going to be able to resolve this. I think I understand the parties' arguments and concerns.

I was going to work on the pretrial confinement credit motion today, but this seems to be more pressing. The government wants to bring by some--I mean, let's check the law reviews. Let's get out the scholars, find somebody that says that Schmitt is wrong, find some legislative history if you want. I don't know what would help me resolve this; but----

CDC [MR. MCMILLLAN]: Your Honor, I don't know what your reaction is to the idea that it would really constitute a mistrial and this should be deemed a motion for a mistrial. Because to come back late this afternoon, there may be a--there may be a verdict by this afternoon.

MJ [CAPT ALLRED]: I haven't had a mistrial in a long time. I don't think I have ever had a mistrial. So I haven't looked at that law.

CDC [MR. MCMILLLAN]: I mean, where the defense has made its argument premised on----

MJ [CAPT ALLRED]: I will tell you what: Why don't you bring me some authority for the proposition that changing the instructions after the jury has retired to deliberate would entitle you to a mistrial. I don't--if that's the law, then I don't think we want to

have a mistrial; and I think the government would probably accept perhaps the continuation of this trial even if the instructions may not be what it believed it is entitled to, knowing that maybe we got it wrong this time but it's not necessarily wrong for next time. I don't know--I don't know that that would be grounds for a mistrial; but I'm going to go continue my work in my office, and you can bring me whatever you want.

Oh, let me ask by the way, as long as we are talking about the motion for pretrial confinement credit, I received from Mr. Professor Swift what is styled a "declaration" and which is supported with three enclosures; and I received from Commander Stone what I think is also styled a "declaration" and which is supported by some number of pages and enclosures.

Do the parties intend that I accept those declarations and those attachments then----

CDC [MR. SWIFT]: We are working----

MJ [CAPT ALLRED]: ----as evidence that I may----

CDC [MR. SWIFT]: ----and we are working----

MJ [CAPT ALLRED]: ----consider on that motion?

CDC [MR. SWIFT]: ----a stipulation--yes. And we are working toward a stipulation of fact setting out that chronological record, and I think we will have it within an hour or so.

TC [LCDR STONE]: It depends on how much time we are researching mistrials but----

CDC [MR. SWIFT]: Yeah.

MJ [CAPT ALLRED]: This is one of those days when it's good to have four prosecutors and five defense counsel, isn't it.

TC [LCDR STONE]: Amen, sir.

MJ [CAPT ALLRED]: And only one judge though. Remember. So I--I've got to move more slowly perhaps.

TC [LCDR STONE]: Well, Commander Swift is right. Well, sorry. Mr. Swift. We've been talking, and I think we will be able to reach sort of the permanent cell locations stipulation; and then for you to actually consider that, I mean, not only with regards your motion, but then whether or not they choose to try to introduce that on sentencing, if we get that far.

MJ [CAPT ALLRED]: Try to introduce what?

TC [LCDR STONE]: Try to introduce some of the facts that might be contained in that in any sort of sentencing case that they might have.

MJ [CAPT ALLRED]: Oh, uh-huh.

TC [LCDR STONE]: So--and that's kind of the reason for entering into this stipulation; and then whether, you know, and then we may argue the relevancy of it; but nonetheless, we both agree that we need to get to that step before we argue whether it's relevant or whether

it be considered; but we are working. We should have it fairly soon I think.

MJ [CAPT ALLRED]: Okay. Well, then I will go work on the pretrial confinement motion I suppose, unless I receive some authority from one of the sides that suggests I should either do something different about the instructions----

CDC [MR. SWIFT]: I am going to offer a few parts to Your Honor----

MJ [CAPT ALLRED]: ----or----

CDC [MR. SWIFT]: ----if you were going to work on the pretrial confinement, in light of the decision that I handed you the--the decision.

MJ [CAPT ALLRED]: The *Padilla* decision?

CDC [MR. SWIFT]: The *Padilla* decision.

MJ [CAPT ALLRED]: I read that.

CDC [MR. SWIFT]: I think there are two parts that need to be highlighted in what I count Mr. Hamdan's case as analogous.

First off, it should be noted by this Court that since July 3rd of 2003, Mr. Hamdan has been different than the vast majority of detainees held at Guantanamo Bay. On July 3rd, he was found to--by reason of presidential finding, by a reason to believe that he was eligible for trial by military commission. That differentiated him from all the five other detainees who were in the pretrial part; and

at subsequent parts, he has been treated in the pretrial, most significantly, while he was in Camp Echo and then for a 27-day period when he was in Camp 5, pursuant to orders for pre-commission segregation.

But even in the periods he was not, he was still different; and that is, that subsequent to the Supreme Court's decision in 2004, they instituted, well, both the Combat Status Review Tribunal but also the Administrative Review Tribunal Board.

The Administrative Review Board looks at the issues of whether continued administrative confinement was appropriate, whether somebody aided--two factors: intelligence value and further threat.

Mr. Hamdan, in light of the fact that he was being held for a military commission was ineligible for that consideration, in other words he was in pretrial confinement of some form and for that entire period of time, and that differentiates him from the idea of----

MJ [CAPT ALLRED]: I read that assertion in your declaration. That's why I was asking if both parties intended for me to consider that all to be admissible evidence on the motion.

CDC [MR. SWIFT]: Okay. Those were the parts that I wanted to highlight for the court, that there was that period of time that--well, we have argued for all of it. There is, admittedly, a stronger argument that begins once someone is no longer eligible for release inside the program set up by the United States government; and

we would direct that even administrative detention in the *Padilla* case and the other individual was given credit there where they knew about the offenses, were investigating the offenses, and were part of it; and in Mr. Hamdan's case, during the period of time that has come out quite clear in this trial by virtue of a video, they knew about at least one offense that they intended to charge on the day of his capture.

So you know, but at some point, you know, again, and this Court's look at it, whether it has been brought to Guantanamo; and I leave that to the Court; and again, the Court looked at its own factors in *Padilla* in determining what point did it administratively come to the point of the--what we would assert that Mr. Hamdan was in pretrial confinement from the time of the RTB that designated from his trial; and if that doesn't happen, this is the injustice to this point. Mr. Hamdan filed a habeas petition while he was in Camp Echo; went all the way to the Supreme Court, and he won; comes back, there is a M.C.A. mistrial. The--if he is not granted pretrial credit for that period of time, this is the remedy: You should have pled guilty back then because at least you would have gotten the credit. That cannot be the law, especially when the government simultaneously asserts there is no right to a speedy trial. It would create a situation where we merely charge you, take you out of the administrative system, and then hold you for years with no ability to

obtain pretrial credit for that. The only way to offset, if one finds there is no right to a speedy trial, to offset the government from engaging in a position where we simply force you to plead guilty----

MJ [CAPT ALLRED]: Uh-huh.

CDC [MR. SWIFT]: ----is to grant pretrial credit for that period. Otherwise, why appeal? Why litigate that at all? You are losing time.

MJ [CAPT ALLRED]: I appreciate that position.

CDC [MR. SWIFT]: Yes, sir.

MJ [CAPT ALLRED]: I thank you for your argument. Commander Stone, I think you have already argued this motion. Do you have some----

TC [LCDR STONE]: Well, only----

MJ [CAPT ALLRED]: ----new insights to share?

TC [LCDR STONE]: Well, only with respect to the *Padilla* cite by Mr. Swift. Sorry. I keep calling him "commander."

He is a little off on the facts when he says "as of July 3rd there was no administrative remedy or any other administrative issues that took place." Because the CSRT--and if you harken back to defense motion No. 1 and--to dismiss and the CSRT that was presented by the government, which started this long string of events, you will notice that that was done actually in, I believe it was October of '04.

MJ [CAPT ALLRED]: Uh-huh.

TC [LCDR STONE]: So there is an administrative process. Now as being designated, there were no administrative review boards in which--because he was, in fact, going to be tried; and, in fact, there was the subject of, as we know, multiple issues with regards to litigation.

So I mean, that is a little off on--on that piece. The second piece of it is with regards to sentencing. Remember, it is the sentencing authority in the federal court that have the opportunity to make that determination; and as it has been batted around a little bit, the idea that the jury can decide or an instruction to the jury that would say, you can take this into consideration, as one of many sentencing factors certainly becomes analogous with the *Padilla* issues.

And with regards to whatever issues may have occurred within Camp Echo, that also may be one of those things that the jury may decide whether or not he should get any other credit. I would also point to the fact that if the defense tries to make a big deal out of that it doesn’t needs to be an either/or proposition with regards to detention within the laws of war, versus, you know, pretrial confinement and that it must be one or the other, as you may or may not remember, there is substantial precedence within the United States and within the United States military, especially with dealing with forces overseas, in which you can have an individual detained for

other purposes while at the same time not gaining pretrial credit for it.

I would point you to a case, I don't know if it became a published opinion quite frankly, sir; but it was *U.S. vs. Marquez*, in which----

MJ [CAPT ALLRED]: What court?

TC [LCDR STONE]: I think it eventually became a C.A.A.F. decision. I don't know if it was a published decision, where the defense counsel challenged this very idea of an individual being held in detention--or in a Japanese--in an American brig, pending Japanese trial; and then the defense counsel challenged that, saying that he should be given pretrial credit because of his conditions tantamount to confinement, because he was sitting in the brig in Yokosuka Naval Base. That defense counsel lost. He was brought up on appeal on other grounds; but that's just one example of a long-standing military tradition where you do have detention, which is what we have here; detention. Whether--and with the idea that a sovereign, in that case the United States, as in this case the United States, can easily then turn that into prosecution and the accused not get specific credit for the previous time. So there is precedence in existence with regards to that.

MJ [CAPT ALLRED]: Did you cite those cases in your written brief. I don't remember----

TC [LCDR STONE]: No, sir, because it never came up because this just came up with respect to the *Padilla* and the argument that was just made; and quite frankly, the only reason I remember *Marquez*, sir, is because I was the defense counsel.

MJ [CAPT ALLRED]: You were the defense counsel who lost, huh?

DC [LCDR MIZER]: I was the appellate defense counsel.

TC [LCDR STONE]: And Lieutenant Commander Mizer was the appellate counsel.

DC [LCDR MIZER]: There was no decision in that case----

MJ [CAPT ALLRED]: Okay.

DC [LCDR MIZER]: ----Your Honor, on that point. So to the extent that a court-martial judge's decision is considered precedent for this court, that's for the record----

MJ [CAPT ALLRED]: There was no C.A.A.F. opinion then on whether or not he was entitled to credit for that detention?

DC [LCDR MIZER]: There is not. There is neither a--there is no C.A.A.F. opinion. That is correct, Your Honor. The court declined to grant review; and as you know, a court denying cert is no statement on the substance of the--of the ball.

MJ [CAPT ALLRED]: Okay. Well, I will go work on that. You can work on whatever is most important to you, and we will wait for the members.

BLF: All rise **[all persons did as directed]**.

MJ [CAPT ALLRED]: They are probably going to be ready to take their recess here in about ten minutes, so don't go too far.

[The R.M.C. 803 session recessed at 0923, 5 August 2008.]

[The military commission opened at 1016, 5 August 2008.]

MJ [CAPT ALLRED]: The court is called to order. The members have returned to the courtroom.

Members, are you interested in a recess?

PRES: Yes, sir.

MJ [CAPT ALLRED]: Okay. I see it's 1015 by the clock on the pillar here.

Does 15 minutes sound like a good time?

PRES: Yes, sir.

MJ [CAPT ALLRED]: Okay. The court will stand in recess then until 1030.

[The members departed the courtroom.]

[The military commission recessed at 1017, 5 August 2008.]

[The military commission was called to order at 1031, 5 August 2008.]

MJ [CAPT ALLRED]: The court is called to order. The members have returned to the courtroom.

Are you ready to continue your deliberations?

PRES: Yes, sir.

MJ [CAPT ALLRED]: Very good. The court is closed for deliberations. Thank you.

[The members departed the courtroom.]

[The military commission closed at 1032, 5 August 2008.]

[The military commission opened at 1217, 5 August 2008.]

MJ [CAPT ALLRED]: This court is called to order. The members have returned to the courtroom.

Are you ready to recess for lunch?

PRES: We are, sir.

MJ [CAPT ALLRED]: 1400 sound like a good start time, or do you want to shorten the----

PRES: Yes, sir. 1400 is fine. Or do you have another proposal?

MJ [CAPT ALLRED]: Well, I wondered since we are closing a little bit earlier, if you wanted to come back and start early. 1400 is fine with us if that is what you would like.

PRES: Is 1330 too soon or----

MJ [CAPT ALLRED]: No, that's fine. 1330. We will be in recess until 1330. Off you go. Oh, I'm sorry, does that give the defense enough time to get lunch and----

I beg your pardon? We have noon prayers we need to accommodate.

PRES: Okay.

MJ [CAPT ALLRED]: What time----

PRES: 1400.

MJ [CAPT ALLRED]: You want to go with 1400? Okay. Let's return at 1400. Thank you.

[The members departed the courtroom.]

[The military commission recessed and the R.M.C. 803 session commenced at 1219, 5 August 2008.]

CTC [MR. TRIVETT]: Sir, if we could take up a very brief issue, the issues that we spoke of before.

MJ [CAPT ALLRED]: Okay. I don't know. Okay. Have a seat. We will go back on the record.

CTC [MR. TRIVETT]: Sir, the prosecution has done some additional research and found an additional supplement that it wanted to provide to the Court. Specifically, this is titled a "Department of the Army Pamphlet 27-9-1," which is the Military Judge's Bench Book for trial of enemy prisoners of war. It was promulgated in 2004, and it was specifically--it was specifically drafted to be applicable to trials of enemy prisoners of war by general and special courts-martial. So this wasn't done specifically for the prior commissions act.

MJ [CAPT ALLRED]: Uh-huh.

CTC [MR. TRIVETT]: Specifically, on the offense, it's titled differently. It's titled "murder by an unprivileged belligerent"; but within the explanation of the law behind it--I want to specifically reference one part for Your Honor--for the offense of murder by an unprivileged belligerent, the victim's status is immaterial. Even an

attack on a soldier would be a crime if the attacker did not enjoy belligerent privilege or combatant community.

Specifically, we would like to bring the Court's attention to the fact that the Army is, in fact, the executive agency for the Law of War for all Department of Defense, and that this was not written in anticipation of the prior commissions but in the event we exercised our special or general court-martial jurisdiction over enemy prisoners of war.

So we would like to make this available to the judge if the bailiff can come and retrieve it.

MJ [CAPT ALLRED]: Thank you.

What is the date on that document?

CTC [MR. TRIVETT]: 2004, sir; 4 October 2004.

MJ [CAPT ALLRED]: Does it cite any previous versions of the document that might show that this has been a long-standing practice, or you don't know that off the top of your head?

CTC [MR. TRIVETT]: What it specifically does, sir, it specifically says that it incorporates the provisions of the Geneva Convention relevant to the treatment of prisoners of war, as well as decisions of international, military, and higher courts ,and comments and opinions of individual legal specialists on international and criminal law. So it was to be an all-encompassing reference to what the Law of War was----

MJ [CAPT ALLRED]: Okay.

CTC [MR. TRIVETT]: ----at that time.

MJ [CAPT ALLRED]: Well, I'm happy to take that and read it. Could I have my copy or another copy----

CTC [MR. TRIVETT]: Yes, sir. You can have that copy.

MJ [CAPT ALLRED]: ----of Professor Schmitt's affidavit back.

CTC [MR. TRIVETT]: Yes, sir.

MJ [CAPT ALLRED]: I loaned that to you yesterday, so I don't have access to it anymore.

CTC [MR. TRIVETT]: Yes, sir.

CDC [MR. MCMILLLAN]: Your Honor, could I speak to this very briefly?

MJ [CAPT ALLRED]: Certainly.

CDC [MR. MCMILLLAN]: It appears among the references--this document has just been handed to us as we walked in just this minute, so we haven't had a chance to really examine it--but I do note that among the references at the end of this section is the MCI, which I understand to be the Military Commission Instructions, indicating that this was in connection, perhaps, with the previous military commission promulgated unilaterally by the executive branch that was deemed illegal by the Supreme Court decision in 2006.

And if we are handing up authority, Your Honor, I would ask leave to hand up a 2005 article from Professor Mike Schmitt that

addresses the question that directly as well, and essentially reiterates the point that was set forth in his 2004 declaration and cites to, among the authorities in support of that position, U.S. Army's Operational Law Handbook, as well as the other manuals of the UK and other major powers, for the proposition that under the Law of War, combatants enjoy no general protection from attack, so attacking them cannot be a war crime absent more. And I have flagged that section, as well as footnotes indicating that no treaty, including the statutes governing the international criminal tribunal for the former Yugoslavia or for the former--or for Rwanda, suggests that targeting combatants is unlawful.

So with your permission, I hand that up, and I would be happy to provide a cite to that article to the prosecution.

CTC [MR. TRIVETT]: Please do.

MJ [CAPT ALLRED]: I didn't bring my glasses to the bench, but this looks like the Chicago Journal of International Law, 2005. Okay, the cite is on the front page.

Well, Professor Schmitt is nothing if he is not a prolific writer of articles.

Did you do any research on whether amending the instructions at this point would be grounds for a mistrial? Because it may be that the government is or was entitled to this instruction but that it's too late to give it now without causing----

CDC [MR. SWIFT]: We----

MJ [CAPT ALLRED]: ----some impact on the injuries deliberation.

CDC [MR. SWIFT]: We did, Your Honor. We researched specifically the instructions portion of the Military Commissions Act and the Military Commissions Instruction is 920, which is taken verbatim from Rule for Courts-Martial 920.

MJ [CAPT ALLRED]: Uh-huh.

CDC [MR. SWIFT]: 920--we particularly researched R.C.M. 920(c) which has--which as the appropriate article that sets out that counsel shall request instructions, as was the case in this, and that counsel shall be told prior to final argument--or prior to their arguments the result of those rulings so that they could--and I would argue here, it does not say in the discussion, but I would argue here, that so that they may rely on them in argument.

I researched R.C.M. 920(c), and there have been no decisions that have ever looked at the idea of changing a substantive instruction after it has been denied in the period of members; but I would point out to the court the substantial prejudice that we are about to encounter.

We had two arguments, and this really goes to Specification 2, Charge I and Specifications 3 and 4. We had two arguments. We had argument No. 1: that arguing the law as it was instructed.

Our secondary argument, which we then move to a very sec--proposed secondary position, was that Mr. Hamdan had simply borrowed the car and never had the intent to enter into conspiracy and never had the intent to deliver this to anyone since he was simply giving back the car and giving back the contents therein that had never been delivered.

We did not place that argument at the forefront. We relied on the instructions. We made the instructions at that point. I think R.C.M. and--both the Rule for Courts-Martial and the Rule for Military Commission, sets out that where counsel request instructions, and both sides did, we have the right to know what they are going to be and to shape our arguments to them at that stage in the trial.

If trial counsel had wanted to do more research or continue to argue this, they should have asked for a continuance at that point. They did not, and so they placed us in the position that even if we did--we don't believe Your Honor should reverse the instruction--but even if you do at this point, we suffer extraordinary prejudice on the instructions and how we have argued and formulated our case, and that will not be cured by rearguing because we will start with, "Well, the argument we gave you before doesn't apply anymore; but here, we have another one."

MJ [CAPT ALLRED]: Uh-huh.

CDC [MR. SWIFT]: And that is substantial prejudice. I don't think that it can be found in the record anywhere because no court has ever considered it.

MJ [CAPT ALLRED]: All right.

CDC [MR. SWIFT]: And I searched by keynote and by the particular paragraph for the point.

MJ [CAPT ALLRED]: Uh-huh.

CTC [MR. TRIVETT]: Sir, we had done research as well, and I think we can make this issue very easy for the court.

We believe that the--we believe that the case law that we have found, which I don't have right now, allows for this specifically in the event that there was an erroneous instruction to the jury, that the judge can go back and that there is case law that supports this, even after argument of counsel, you know, providing that it doesn't change the theory of the government's case, which it doesn't. I mean, the theory of the government's case was set forth in the specification itself, that we believed that this was a violation of the Law of War by intentionally targeting these guys with SA-7 missiles.

So we believe at this point that the case law would allow for us to do it. However, we realize we are inviting an issue of appeal that we need not get into. So at this point, we agree with the court that it's too late for the instruction.

Our concern though is the defense goes away. They only had one case. The prosecution is on the record saying that we plan on charging at least 80 individuals down here at commissions, many of which for either conspiracy to commit a violation of the Law of War, specifically, murder, or, in fact, murder, you know, whether it be the COLE case or the East African Embassy bombings or the Pentagon. The concern for the prosecution is that the law be right and our--and with all due respect to Your Honor, we believe that they were instructed incorrectly on this aspect of the law.

So we want to make sure that the record is very clear; and while the court did not have the benefit of briefs on this from either side, that this not be held as having some type of precedential value for other cases to come and say, “See, Judge Allred said you can't attack--you know, that you can't attack combatants.” That's our main concern with that issue.

So--but that being said, the defense had a 917 motion; but they had it before both sides had benefit of what the instructions were truly going to be. So the prosecution, before it determines what it--what path it will take on this issue, would like to know if the defense counsel feels that under 917 there is not evidence to go forward on this Charge as currently charged and as the evidence has bore out. That's what we--we are requesting so we are aware of what their position is.

MJ [CAPT ALLRED]: Do you--you want to make a 917 motion?

CTC [MR. TRIVETT]: No, sir. See, specifically Professor Swift got up on this issue and started thinking--he started stating, I believe, that there was no other possible way in which the jury could still find guilt on this charge; but then he said, "Well, wait a second, I just thought of one" and he sat down. We think it's important for the record to establish what the--what the defense's position is in regard to 917 on Charge I Spec 2, based on the law as you have charged them and which the jury is currently charged with and the case as the government has presented it. That will help shape the government's strategy to go forward.

MJ [CAPT ALLRED]: It's a little odd to ask the defense to reveal the argument that might have been--that might have torpedoed their case.

CDC [MR. SCHNEIDER]: I suggest we think about whether we understand what was just said; and if we understand it, we will respond after lunch; but I--frankly right now I don't quite know what I just heard.

MJ [CAPT ALLRED]: Okay. Well, the easy issue, if you agree that it's too late to give the jury this instruction in this case, then that resolves that question. I--I tend to agree that it's too late and that it would prejudice the defense by making them come up with some other argument after they have already argued the case.

I look forward to reading this article. I mean, law review articles have footnotes. They have other sources and they cite other scholars and other readers of the international law; and I'm sure that at least half of these pages are footnotes. So this will give me a good grasp and give you a good grasp perhaps for future cases.

I may well have instructed the members erroneously. My sense is that we met--met, what was it, Saturday morning or sometime I sent out a draft. We met for two hours on Saturday evening.

CDC [MR. SCHNEIDER]: Saturday evening at 1700 for an hour and a half, and you invited any of us to request a similar conference Sunday evening. None of us did.

MJ [CAPT ALLRED]: Yeah, yeah. I mean, you apparently didn't see the defense's affidavit from Professor Schmitt and--but the instruction that was based on it was given to both sides and----

CDC [MR. MCMILLLAN]: In June, in the second week of June.

CDC [MR. SCHNEIDER]: Second week of June.

MJ [CAPT ALLRED]: That's when you gave your notice of the requested instructions. Okay. So I don't know that my jury instructions will come to be the model--unless you wanted to fight their precedential value, I don't think jury instructions generally have any precedential value; and I don't know what I could do now to correct it in any event, even if I agreed with you that they were wrong.

CTC [MR. TRIVETT]: Yes, sir.

MJ [CAPT ALLRED]: The only way to surely have this issue resolved is to in the next case let this Charge go to the jury, get a conviction on it, and have the appellate courts tell us those were wrong, I guess; but I will read these materials, and you can think about--is there something you wanted the defense to do then over lunch?

Your 917 motion, I don't understand what you want them to say now.

CTC [MR. TRIVETT]: Right. And it's not a 917 motion by the prosecution.

MJ [CAPT ALLRED]: Uh-huh.

CTC [MR. TRIVETT]: It's just so that the record is clear whether or not they believe there is grounds for dismissal under 917 on Charge I, Specification 2. That's all we are asking.

MJ [CAPT ALLRED]: Well, they didn't make that motion before trial, so I think they have waived that motion if they had it. I mean, that's the time for 917 motions. They moved to dismiss Charge I, Specification 1.

CDC [MR. MCMILLLAN]: And we moved to----

MJ [CAPT ALLRED]: Or I thought I was----

CDC [MR. SWIFT]: To be clear, Your Honor--and I want to consult with counsel in the interim, but my argument to this court was based

on--on the 917 on Specification 2, I argued to the Court that mere possession of missiles was insufficient to suggest a conspiracy----

MJ [CAPT ALLRED]: Did you----

CDC [MR. SWIFT]: ----based on, I provided Your Honor a paraphernalia case and argued simply clear line of conspiracy cases, not whether the underlying crime was a crime or not. What I argued was that possession in and of itself was insufficient. Your Honor said that the circumstantial evidence was sufficient to conclude that possession plus could be inferred in the light most favorable to the prosecution, that it could be. The 917 motion was then resolved at that point. I don't think we should have to waive it or not. The grounds that we articulated at the time was unrelated to the instruction. It was simply based on a matter of law of the evidence where I cited drug paraphernalia does not suggest a drug distribution conspiracy for that point. And here we had weapons paraphernalia, and I said it doesn't suggest that there is a conspiracy, and my theory of that argument, which this Court rejected----

MJ [CAPT ALLRED]: You don't need to restate it. I remember it.

CDC [MR. SWIFT]: Yeah I.

CDC [MR. MCMILLLAN]: Just so the record is clear, we moved to dismiss all charges in writing, though Professor Swift has only addressed several of them at the podium.

MJ [CAPT ALLRED]: That's true. That's true.

CDC [MR. MCMILLLAN]: Right.

MJ [CAPT ALLRED]: Okay. I think we have resolved everything we can resolve before lunch.

CDC [MR. MCMILLLAN]: Yes, sir. That's fine.

MJ [CAPT ALLRED]: It may be that the instruction was erroneous, but I guess I feel like you have waived the right to challenge it by not challenging it sooner; and it may actually have been correct. We will have to read deeply into the footnotes to see whether it was or not, but you will have the opportunity to litigate the issue in each of the subsequent cases with different judges, maybe smarter judges that have more time to prepare.

So why don't we recess until 1400?

CTC [MR. TRIVETT]: Yes, sir.

[The R.M.C. 803 session recessed at 1235, 5 August 2008.]

[The military commission was called to order at 1405, 5 August 2008.]

MJ [CAPT ALLRED]: The court is called to order. All parties present when the court recessed are once again present.

Mr. President, are the members ready to continue in their deliberations?

PRES: Yes, sir, we are.

MJ [CAPT ALLRED]: Very good. The court is closed for deliberations. Thank you.

[The military commission closed at 1406, 5 August 2008.]

[The next session was not recorded. It included bringing the members back into the courtroom and recessing the court to allow the members to take a break.]

[The military commission was called back to order at 1534, 5 August 2008.]

MJ [CAPT ALLRED]: The court is called to order.

The members have returned from their recess.

Are you ready to continue deliberations?

PRES: Yes, sir, we are.

MJ [CAPT ALLRED]: The court is closed for deliberations.

[The members departed the courtroom.]

MJ [CAPT ALLRED]: Nobody noticed it, and I didn't notice it; but the court reporter wasn't here when we took the other recess. So good to see her down there.

[The military commission closed at 1535, 5 August 2008.]

[The military commission opened at 1706, 5 August 2008.]

MJ [CAPT ALLRED]: The court is called to order.

Members, please be seated.

Counsel, please be seated.

I have been told by the bailiff that you are ready to recess for the evening.

PRES: Yes, sir.

MJ [CAPT ALLRED]: That is entirely appropriate.

Before I let you go, I would like to remind you not to discuss this case amongst yourselves during the evening and to be particularly attentive not to discuss the case with anyone else.

There are many members of the press and nongovernmental agencies and others who are interested in what you are thinking, what you have been talking about; and we would like you to announce that when you announce the verdict after you have finished your deliberations.

So please hold all of the discussion of this until you have completed your deliberations and are ready to announce your verdict.

Shall we begin tomorrow morning at 8:30 again?

PRES: Yes, Your Honor.

CDC [MR. SWIFT]: Just out of an abundance of caution too, there is a lot of press reports right now speculating about what they are thinking. That should be avoided by the members if possible.

MJ [CAPT ALLRED]: To speculate about what they are thinking?

CDC [MR. SWIFT]: The press is--avoiding the press stories during this time or any media.

MJ [CAPT ALLRED]: Well, that's the reason I thought we should talk about it. The press is here. They are very active. They want to know how this historic trial will turn out, and so anything that

falls from your lips could be recorded and reported. And so I urge you not to do that, not to let that happen.

I'm sorry I couldn't find a more formal instruction.

Is there something that you would like me to say that I omitted?

CDC [MR. SWIFT]: I think it is just to avoid media coverage of the trial all together, Your Honor.

MJ [CAPT ALLRED]: Okay.

CDC [MR. SWIFT]: Reading it.

MJ [CAPT ALLRED]: There you go. Okay.

We will stand in recess until tomorrow morning at 8:30.

Thank you, members.

[The military commission recessed at 1709, 5 August 2008.]

[END OF PAGE]

[The military commission was called to order at 0835, 6 August 2008.]

MJ [CAPT ALLRED]: The court is called to order. The members are in the courtroom, and all the parties that were here when it recessed are here again.

Are the members ready to close for deliberations?

PRES: We are, sir.

MJ [CAPT ALLRED]: Very good. The court is closed for deliberations.

[The military commission closed at 0836, 6 August 2008.]

[The military commission opened at 0948, 6 August 2008.]

MJ [CAPT ALLRED]: The court is called to order. The members have returned to the courtroom. We will be in recess until ten o'clock.

[The military commission recessed at 0949, 6 August 2008.]

[The military commission was called to order at 1010, 6 August 2008.]

MJ [CAPT ALLRED]: The court is called to order. All parties present when the court recessed are once again present.

Mr. President, I was told during the recess that the members have reached a verdict.

PRES: Yes, Your Honor, we have.

MJ [CAPT ALLRED]: Are you--I'm going to make sure Mr. Hamdan understands.

Okay. Apparently there are two voices--that's fixed? Okay.

Have you reflected your findings on the findings worksheet?

PRES: We have, Your Honor.

MJ [CAPT ALLRED]: And did you sign it at the bottom by chance?

PRES: I did not, but I will.

MJ [CAPT ALLRED]: I'm not sure we put a signature----

PRES: There was not a block per se; but if you would like----

MJ [CAPT ALLRED]: Okay. Would you sign the findings worksheet, please?

[The president did as directed.]

MJ [CAPT ALLRED]: Okay. Bailiff, would you please fold that in half please, and ask the bailiff to bring it up to me to review?

[The president and the bailiff did as directed.]

[The military judge examined the document.]

MJ [CAPT ALLRED]: This is a complex findings form, so forgive me if I take a few moments to ensure that it's in the proper format.

[The military judge examined the document.]

MJ [CAPT ALLRED]: When we drafted the findings worksheet, we didn't highlight for the members the language they need to read in order to announce their findings. This is one of the things we didn't catch in time.

So would you move to my office and get a highlighter, a yellow highlighter?

Okay. Mr. President, I'm going to write on a yellow sticky some words that you need to read at the beginning; and then I will highlight the words from the form that you need to read to announce your findings. This way it will be clear to all of parties.

PRES: Very well, sir.

MJ [CAPT ALLRED]: And then the findings worksheet will be attached to the findings worksheet to reflect exactly what you wrote.

[The military judge did as he instructed the president he would do.]

MJ [CAPT ALLRED]: Okay. What appears on the findings worksheet in yellow highlighting is my additions, along with a little introductory language, which I have added as a yellow sticky. The form, it appears to be in the proper format.

Accused and Counsel, please rise.

Mr. President, would you please announce the findings of the court; and if you will read slowly so the interpreter can follow your announcement.

PRES: And Your Honor, your additions you would like me to--or your highlighted comments you would like me to add in?

MJ [CAPT ALLRED]: Yeah. Just read the portions that are highlighted in yellow and the little introductory language on the sticky. I think that's the proper way to announce----

PRES: All right.

MJ [CAPT ALLRED]: ----the findings.

PRES: Salim Ahmed Hamdan, it is my duty as president of this military commission to announce that this military commission finds you:

Of Charge No. I:	**Not Guilty,**
Of Specification 1:	**Not Guilty,**
Of Specification 2:	**Not Guilty;**
Of Charge II:	**Guilty,**
Of Specification 1:	**Not Guilty,**
Of Specification 2:	**Guilty,**
Of Specification 3:	**Not Guilty,**
Of Specification 4:	**Not Guilty,**
Of Specification 5:	**Guilty,**
Of Specification 6:	**Guilty,**
Of Specification 7:	**Guilty,**
Of Specification 8:	**Guilty.**

MJ [CAPT ALLRED]: Thank you, Mr. President.

Defense Counsel, you may be seated **[the defense counsel did as directed]**.

If you will retrieve the findings worksheet from the members and deliver it to the court reporter. That will be attached to the record of trial, and counsel are welcome,--the members did enter specific findings with respect to some of the overt acts and other sub-elements for some of those offenses that I didn't feel like needed to be read into the record.

Mr. President, because you have entered findings of guilty as to some of the charges--one of the charges and some of the specifications there under, we will proceed to a presentencing session. That will give both parties the opportunity to present

evidence that you will consider when you evaluate an appropriate sentence for Mr. Hamdan.

And I will need to ask the government how soon you can be ready to present your sentencing evidence?

TC [LCDR STONE]: Sir, we would like to take a little bit of time to digest this, probably about after lunch at about 1400?

MJ [CAPT ALLRED]: 1400. How about the defense? What is your----

CDC [MR. SWIFT]: We will be read at 14--immediately after that. We will be ready at 1400 too, Your Honor.

MJ [CAPT ALLRED]: 1400. Okay. I guess we will recess until 1400. When we return both parties be prepared to present their sentencing evidence.

How long do you expect your case to take, Mr.--Commander Stone?

TC [LCDR STONE]: Maybe one hour, sir.

MJ [CAPT ALLRED]: And how about the defense?

CDC [MR. SWIFT]: About three hours, I would think at the most. We have----

MJ [CAPT ALLRED]: Okay.

CDC [MR. SWIFT]: ----half hour video. We will be calling Dr. Keram and a few letters, et cetera. So I don't think it would----

MJ [CAPT ALLRED]: Okay.

CDC [MR. SWIFT]: ----take more than three. I always leave that open to the cross; but our merits part shouldn't take more than two.

MJ [CAPT ALLRED]: Okay. So looks like we won't finish probably today, but we will start again at 1400.

Okay. We will excuse the members until 1400.

BAILIFF: All rise **[all persons did as directed and the members departed the courtroom.]**

[The military commission terminated and the R.M.C. 803 session commenced at 1027, 6 August 2008.]

MJ [CAPT ALLRED]: Okay. Please be seated **[all persons did as directed]**.

I have not completed my ruling on the motion for pretrial confinement credit.

Am I still going to get some stipulation from the parties, or shall I proceed without that?

CDC [MR. SWIFT]: We were going to enter into a stipulation depended upon Your Honor's--because we both put--Your Honor, excuse me. Because we--it was my intention that a stipulation we would enter into depending on your ruling we both put forth our affidavits.

MJ [CAPT ALLRED]: Okay. Well, I have both affidavits. I would say I'm in the same position you were in last week when I got some big stacks of paperwork to go through in the last couple of days; but I

will--I will make a ruling on that motion before the members return for the presentation of evidence with respect to a sentence.

TC [LCDR STONE]: Yes, sir.

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

MJ [CAPT ALLRED]: And then you both know going into presentencing what my decision is.

Let's see: Mr. Hamdan--well, we can take this up at 1400 when we come back from lunch. This effects--I have a motion alone for Mr. Hamdan. I will--I will advise him of this right to make a sworn or unsworn statement, present other evidence in extenuation and mitigation.

I'm sure you have discussed that with him.

CDC [MR. SWIFT]: At length.

MJ [CAPT ALLRED]: Okay. The court will be in recess until 1400.

[The R.M.C. 803 session recessed at 1028, 6 August 2008.]

[The R.M.C. 803 session was called to order at 1404, 6 August 2008.]

MJ [CAPT ALLRED]: The court is called to order outside the presence of the members.

CTC [MR. MURPHY]: Your Honor, if I may just interject before we bring the members in. The government would like to announce that it has one witness and one document and wanted to just state that prior to the members coming in.

MJ [CAPT ALLRED]: Okay.

CTC [MR. MURPHY]: Our one witness is a return of a witness who testified during the trial itself.

MJ [CAPT ALLRED]: Uh-huh.

CTC [MR. MURPHY]: It's Special Agent Robert [redacted]----

MJ [CAPT ALLRED]: Uh-huh.

CTC [MR. MURPHY]: ----who was on duty as an F.B.I. agent and responded as an F.B.I. agent to 9/11----

MJ [CAPT ALLRED]: Uh-huh.

CTC [MR. MURPHY]: ----in Manhattan. That's our one live witness that we propose being our first presentation on sentencing. Secondly, I provided the defense with a minority report from Senators Kyle, Graham, Sessions, Colburn and Cornyn; and that's the only document the government intends to offer.

MJ [CAPT ALLRED]: Okay.

CDC [MR. SWIFT]: If we are doing the objections now, I will do them now.

MJ [CAPT ALLRED]: This looks like a good time to do them, I suppose.

CDC [MR. SWIFT]: I will start in reverse order with the document. The government is entering from a bill that did not pass the Habeas Restoration Act, the comments of three--of four senators with regards to the potential recidivism of detainees in general leaving Guantanamo; and my objections are multiple.

The first is----

MJ [CAPT ALLRED]: All right. Let's not even go through. Which rule do you think this falls under in term of the military rule--Rules for Military Commissions that allows you to offer this statement?

CTC [MR. MURPHY]: Your Honor, we believe that it does show evidence of aggravation. It is directly related to the offenses and the consequences of the offenses.

MJ [CAPT ALLRED]: Wait. Wait. You are just reading out of the rule book.

CTC [MR. MURPHY]: Yes, sir.

MJ [CAPT ALLRED]: How could a report about recidivism in general be directly related to this accused?

CTC [MR. MURPHY]: It is a factor that speaks directly to rehabilitation. It's my understand--it's the government's understanding that the accused is going to call a psychiatrist who will be addressing the issue of recidivism specifically.

MJ [CAPT ALLRED]: Uh-huh.

CTC [MR. MURPHY]: And this represents something from the congressional record, the minority view of five senators that address that. The defense is going to be putting on similar evidence through a psychiatrist.

MJ [CAPT ALLRED]: But the defense's evidence has to do with Mr. Hamdan. I think I'm not inclined to let that in, in your case-in-chief.

CTC [MR. MURPHY]: All right.

MJ [CAPT ALLRED]: Unless it's something to do with Mr. Hamdan's likelihood of reoffending.

CTC [MR. MURPHY]: I certainly can represent to the court that it's not Mr. Hamdan specific, but it does identify a general concern of recidivism----

MJ [CAPT ALLRED]: Okay.

CTC [MR. MURPHY]: ----that is going to be a part of the sentencing hearing.

MJ [CAPT ALLRED]: Why don't you use that to cross-examination Dr. Keram if you wish, and maybe it will be appropriate in rebuttal?

CTC [MR. MURPHY]: All right.

Then, Your Honor, the only matter we would have in aggravation would be Agent [redacted].

MJ [CAPT ALLRED]: Okay.

CDC [MR. SWIFT]: We--based on our understanding and his limited proffer that they are going to testify--that Agent [redacted] will testify to injuries and other trauma he suffered as part of his official duties after 9/11 and that he was also an investigating agent in this case. The defense believes that it’s probative value is outweighed by

the prejudicial effect of such a witness, (a) to wit: the members are likely to give him more standing, as he is, in fact, an investigative agent and has been called as such in the case.

Moreover, the direct proximity of anything that Mr. Hamdan has been found guilty of and the agent's testimony is so attenuated--had Mr. Hamdan, for instance, been found guilty of conspiracy to commit 9/11, then the agent would be much more relative to the proceedings; but given his--the level of relativity, we believe that the probative value of this agent's testimony regarding pulling bodies out, his own lung damage or the such and the--what he experienced on that day--the government put in the videotape of the kind to say that they were going to show that a war existed. Well, we have an argument on probative value versus prejudicial effect. That while that is an element of their case, at this point Mr. Hamdan's been convicted of material support, but not in any--he has not been convicted of the conspiracy of 9/11 or any of this--and at this, it’s really trying to sneak in the back door what the government didn't do in its case-in-chief; and we believe that any value that this might have, the government would like to put on that there--you know, that 2,000 some people killed and others who suffered injuries, et cetera, that, you know, the prejudicial effect probably is less there; but to call a witness in this particular case, especially when he has been a case

investigator in this case, we believe is **[inaudible]** toward and improper.

MJ [CAPT ALLRED]: Okay.

CTC [MR. MURPHY]: Your Honor, the government believes that his testimony is very relevant to the offenses to which Mr. Hamdan has been convicted.

He has been convicted of providing material support on five counts, of becoming a member of the organization, supporting Usama bin Laden through transportation, through bodyguard services; and facilitating the communication and planning for terrorist acts throughout the period that includes 9/11.

The government was particularly careful of 403 issues in selecting this witness. We are calling a professional law enforcement witness who will provide straightforward, unemotional descriptions of how that event affected him and what he saw and how he responded professionally that day.

It's the government's position that it's directly related to the offense--offense to which he has been charged.

It does speak to aggravating issues such as the social impact and the economic impact of victims, including himself, who watched it. I believe the way the government will present it--not through an emotional family member, but through a professional law enforcement officer--speaks a lot to the fact that the government is

mindful of 403. But this is relevant testimony. This is an impact of the very charges of which he has now been convicted.

MJ [CAPT ALLRED]: Okay. Well, I'm not going to bar this witness all together. It may be that parts of his testimony is inappropriate, but the government is right: The accused has been found guilty of providing material support for Al Qaeda, an international terrorist organization engaged in hostilities against the United States during the time period that includes this attack.

CDC [MR. SWIFT]: Lieutenant Commander Mizer would like to address that directly.

DC [LCDR MIZER]: Your Honor, and the second issue that we would like to take up is that of multiplicity.

MJ [CAPT ALLRED]: Oh. That's the next issue I'm going to turn to.

DC [LCDR MIZER]: Okay. I will let you, Your Honor, take that up as--in due course as you had planned; but you have already instructed the members in one of the four material support for terrorist instructions correctly, that conviction for material support of an international terrorist organization permits the government only to address the criminal act of material support and not for the crimes of the organization itself. And that is--that is the Humanitarian Law Project case, which is cited; and again the members have already been instructed on that--on that proposition of law.

In the Humanitarian Law Project, the 9th Circuit cited the case of *Ferguson v. Estelle*, a 5th Circuit case, where a number of rioters were charged with rioting and a small group of the rioters had also committed arson. And so the government's argument in that case was all members of the riot could be charged with arson, and the 5th Circuit said no, that's not the case. You are--you are punished individually for the crimes that you have committed. And so it isn't appropriate for the government to be allowed to come in and say that Mr. Hamdan is responsible for all of the crimes of Al Qaeda merely because he has supported Al Qaeda.

He may be punished for body guarding. He may be punished for serving as a driver, but not for those acts for which these members have acquitted him of having any involvement in it. Guilt is personal in the United States, sir; and it should remain so in this case when these members are being--want to go back in that deliberation room and decide a verdict. They must judge Mr. Hamdan for what Mr. Hamdan has done, not for the crimes of others that were near Mr. Hamdan, associated with Mr. Hamdan.

CTC [MR. MURPHY]: Your Honor, the government's position is this speaks very much to Mr. Hamdan. He stands convicted of providing material support to al Qaeda, transportation and body guarding service, directly facilitating communication and planning used for

acts of terrorism. That is directly on point with the charge and this--these sentencing----

MJ [CAPT ALLRED]: What are you reading from there?

CTC [MR. MURPHY]: I'm reading from the five charges under material support for terrorism for which this accused has been found guilty. By providing said service or transportation, he was directly facilitating communication or planning used for an act of terrorism. 9/11 is covered within the period of the charge to which he has been found guilty, and it is proper aggravation in that it is a consequence of his conviction for material support to terrorism.

The government has gone to great lengths to not make this a graphic presentation but rather a summary of how this agent was impacted by that day, for which this accused has been convicted of providing material support for. It is not dependent on a charge of conspiracy being proved. It is not necessary----

MJ [CAPT ALLRED]: Yeah.

CTC [MR. MURPHY]: ----that conspiracy be proved to call this witness.

MJ [CAPT ALLRED]: I would feel a lot more comfortable calling this witness if he had been convicted of conspiracy because then he would be possible responsible for the acts of his co-conspirators, and the evidence you proposed to offer would be directly related to then the act of a co-conspirator.

CTC [MR. MURPHY]: Well, Your Honor, the plain reading of the--of the specification for which he has been found guilty is that he was directly facilitating communication and planning used for an act of terrorism, and that's----

MJ [CAPT ALLRED]: Okay.

CTC [MR. MURPHY]: ----and that's clearly related to what this witness will be addressing.

MJ [CAPT ALLRED]: All right. I'm going to sustain the defense objection. I think that he was such a small player and so little involved in the planning and that the social, financial, psychological, and medical impact was so remotely the result of any small support he might have given, that it would be more prejudicial to appear to be holding him responsible for the 9/11 attacks than it would be probative of what he actually knew or did or supported.

So I will sustain the defense objection to that witness.

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

CTC [MR. MURPHY]: Well, Your Honor, we have no witnesses to present.

MJ [CAPT ALLRED]: Okay. That's a hard call. I didn't really see it coming, and so I probably should have given more thought to it in advance; but I think that is the right decision.

Okay, I'm ready to talk about--I--I will give you a partial ruling on the pretrial confinement motion because I have not had time

to go through all of the documents that have been provided and think through all of the issues.

The first request for relief was that Mr. Hamdan be removed from the punitive conditions of confinement. That part of the motion is denied. It's now moot. I was waiting for additional evidence, which came slowly; and more importantly, it became apparent early on that Mr. Hamdan was attending all of the trial sessions, participating with his counsel, responding to the evidence and reacting to the evidence. He testified twice in his own defense, and the feared impact of the conditions of his confinement didn't materialize. So that part is denied as moot.

The request for pretrial confinement credit is denied as it pertains to the period from 24 November 2001 to 1 July 2003. During this period I find that Mr. Hamdan was detained with many other battlefield detainees under the well-recognized authority of a detaining power to detain until the end of the period of hostility those that were captured on the battlefield.

As of 1 July 2003, the accused was identified as someone who would be prosecuted in a military commission, and from that day he was ineligible for administrative release and other benefits that might have led to his repatriation.

So for the period of 1 July 2003 to today, the motion is granted for day-for-day credit for each day served in pretrial

detention. By my count, that is 61 months and 7 days of credit the accused is entitled to; and I will instruct the members that he will be given credit for that portion of his detention. But that the period from 24 November 2001 to 1 July 2003, he will not be given credit for, and they should consider that as a factor in determining what sentence they consider appropriate.

With respect to the part of the motion that asked for extra credit for conditions of confinement that were unnecessarily harsh or punitive, I haven't finished my thinking on that one; but I will tell you that I believe I have the authority to award that relief and that I'm prepared to award that relief if I consider it appropriate. I will make my findings of fact and resolve that issue before I authenticate the record of trial and before it goes to the convening authority, if I don't resolve it before the end of our time here in Guantanamo Bay.

So I think you have what you need to argue your cases to the members; and there may be additional credit ultimately awarded, or there be not; but I didn't have time to work through all of your documents and resolve that.

Now let's--are there any questions about that?

CDC [MR. SWIFT]: No, there are not, Your Honor.

MJ [CAPT ALLRED]: Okay. Let's turn to the motion regarding multiplicity that was argued before findings. I agreed that the--many

of the specifications under Charge II were multiplicious and indicated that I would let the government send those back to the members for their findings.

The accused, having been convicted of Specification 2, which alleges material support for al Qaeda, an international terrorist organization, by receiving training, by driving, by body guarding, and by transporting weapons, it appears that Specifications 5, 6, 7, and 8, should all be merged into Specification 2.

Specifications 5 and 6 are alternative methods of proving material support for terrorism by driving. Seven and eight are alternative methods of proving material support for terrorism by body guarding.

So before I make my decision, I would like to announce my inclination to merge all five specifications into one. In other words, into Specification 2, but not to dismiss Specifications 5, 6, 7, or 8 until appellate review is complete and the appellate courts have had a chance to resolve this.

In the meantime, I propose to instruct the members that they have all been merged and that Mr. Hamdan should be sentenced for a single specification, Specification 2, of providing material support for terrorism.

I will let the parties be heard before I--before I finish up.

DC [LCDR MIZER]: Your Honor, that was the relief that the defense is going to request.

MJ [CAPT ALLRED]: Okay. You may sit down.

TC [LCDR STONE]: We would object to the merging of Specifications 5 and 7 with Specification 2; and the reason is if you harken back to our February session with regards to--as the manual lays out with regards to multiplicity, it is two separate and distinct charges. Whereas the accused can be found guilty and has been found guilty with regards to providing material support to an act of terrorism, which would encompass a specific act that occurred during that time; and then he broad based material support to the organization, which is what two is.

Two and then five and seven should stand by themselves because you have the individual acts as separate charges, as well as then the other time that encompasses all of that period of time.

MJ [CAPT ALLRED]: Okay. Well, I don't think I need to resolve that argument because I'm not going to dismiss 5, 6, 7, or 8. I read the multiplicity and the language you argued when we argued this motion to give you what you need to get through appellate review.

TC [LCDR STONE]: Right.

MJ [CAPT ALLRED]: Those specification--those findings will remain in the record of trial, and I express my opinion that they should all be merged after the appellate courts have completed their

review and so that he is only found guilty of one offense and sentenced for one offense because it appears that they all are encompassed within Specification 2.

TC [LCDR STONE]: And we also note for the record that that does not affect the sentencing maximums one way or the other----

MJ [CAPT ALLRED]: This doesn't affect the sentencing maximum; but the record; he is entitled not to be sentenced multiple times for the same offense and not to be found guilty multiple times--or not to be found guilty of multiple offenses for the same act----

TC [LCDR STONE]: Right.

MJ [CAPT ALLRED]: ----which was driving Mr. bin Laden around Afghanistan.

TC [LCDR STONE]: Right.

MJ [CAPT ALLRED]: So I, having heard the parties, will order then the relief that I just expressed. I will instruct the members that Mr. Hamdan will be sentenced for Specification 2, a single specification alleging many types of support for terrorism. I will leave 5, 6, 7, and 8 in the record to be dismissed after appellate review.

TC [LCDR STONE]: Yes, sir.

MJ [CAPT ALLRED]: Okay. I mean, this is the first case--this is the first time this has actually been litigated; and I will give the government----

TC [LCDR STONE]: All right.

MJ [CAPT ALLRED]: ----I'm afraid if I dismiss them now there should later be some--I don't know if an appellate court can resurrect findings of guilty after they have been dismissed at the trial level, or if there should be some other problem that they identify.

TC [LCDR STONE]: I think that was our major concern in February----

MJ [CAPT ALLRED]: Uh-huh.

TC [LCDR STONE]: ----was to let them run through.

MJ [CAPT ALLRED]: I will let them remain in the record of trial and express my opinion that they should all be merged into Specification 2 and dismissed after appellate review is complete. So Mr. Hamdan will be sentenced today for one specification of providing material support for terrorism.

Okay. The last thing I want to note before we bring the members in is that I acknowledged yesterday on the record the possibility of an instructional error. Turns out if there was an error, it would favor the accused; and it also turns out that the accused was acquitted of the specifications with respect to which that error may have been there. So kind of moot; water over the dam, or under the bridge or whatever.

So that issue is gone.

Okay. So the government has no evidence then to present on the case-in-chief in sentencing; is that correct?

TC [LCDR STONE]: That's correct Your Honor, only argument at the conclusion of the sentencing hearing.

MJ [CAPT ALLRED]: Okay. Good, well then we will just--are you your witnesses ready to go?

CDC [MR. SWIFT]: We are going to need--because things changed just a little, a 15-minute recess, Your Honor, after we--after you finish advising the accused of--Mr. Hamdan of his rights at sentencing, if we could take a brief 15 minutes and then we could proceed quickly without having to have any more recesses I think to our case. In other words, I will be faster if given a little time to re-prepare in light of----

MJ [CAPT ALLRED]: You expressly told me that you were going to be ready to go at 1400.

CDC [MR. SWIFT]: I am actually.

MJ [CAPT ALLRED]: And now you are back pedaling.

CDC [MR. SWIFT]: Well----

MJ [CAPT ALLRED]: Okay. That's fine. We will do that.

Mr. Hamdan, at this point in the trial, you have the right to present matters in extenuation and mitigation. This includes matters about yourself or the offenses that you would like the members to know as they deliberate regarding the sentence.

Included in your right to present matters in extenuation and mitigation is that right you have to testify under oath, to make an unsworn statement, or to say nothing at all.

If you testify under oath, you may be cross-examined by the prosecutors and questioned by the members of the court.

If you make an unsworn statement, you may not be cross-examined by the prosecution or questioned by the members of the court.

Finally, if you elect to say nothing at all, I will instruct the members that that is your right and that they should give you the benefit of that right and not hold it against you in any way.

Do you understand these rights to present evidence now before the members deliberate on a sentence?

ACC [MR. HAMDAN]: Yes.

MJ [CAPT ALLRED]: Okay. Well, I will have the members instructed then that the government has no evidence to present and that we will start at 2:45 with the defense's case.

DC [LCDR MIZER]: Your Honor, I just want the record to be clear with respect to the--to the ruling I think it was D-014, multiplicity and unreasonable multiplication of charges. It's our position that those charges should be dismissed with prejudice. I understand Your Honor's ruling; but I just want to preserve that for the record.

MJ [CAPT ALLRED]: No, I appreciate that. No, I do. And once again, because this is the first time this statute has been litigated, I'm going to recognize you----

DC [LCDR MIZER]: Yes, Your Honor.

MJ [CAPT ALLRED]: ----your placeholder on the record and leave those specifications in place for appellate review. Okay.

We will stand in recess then until 2:45.

[The R.M.C. 803 session recessed at 1430, 6 August 2008.]

[The R.M.C. 803 session was called to order at 1449, 6 August 2008.]

MJ [CAPT ALLRED]: The court is called to order outside the presence of the members.

CTC [MR. MURPHY]: Your Honor, the government appreciates you allowing me to speak one more time before we bring in the members; and I am going to ask the Court to reconsider its decision of Agent [redacted]. I will be very brief.

I know it was a close call. You indicated as such when you made that ruling and I wanted to come back to just revisit it briefly.

The consequences of 9/11 are absolutely connected to the charged offenses. They are the logical result of providing material support to a terrorist organization that facilitated the carrying out and the planning of terrorist acts. Nothing could be more closely connected with these charges than the end result.

The government has carefully selected the witness in light of 403 considerations. We have a professional witness. We have military members. We are not here to make, you know, very emotional appeals but factual presentations; and we would ask the court to reconsider that that type of testimony really is fundamentally aggravating to the charges to which he has been convicted.

And that's our position, Your Honor.

MJ [CAPT ALLRED]: Thank you. I will not reconsider.

CTC [MR. MURPHY]: All right.

MJ [CAPT ALLRED]: And the rule requires that the aggravating evidence be directly related to or resulting from the acts and offenses of which the accused has been convicted. And my sense is that the relationship is just too tenuous between what he knew, what he did, where he was, and those horrific acts to hold him--you know, to allow that in aggravation of his driving and body guarding activities.

Thank you for petitions for reconsideration, but your motion is denied.

Please call the members back into the courtroom.

BAILIFF: All rise **[all persons did as directed and the members entered the courtroom]**.

[The R.M.C. 803 session terminated and the military commission commenced at 1451, 6 August 2008.]

MJ [CAPT ALLRED]: Thank you members. Please be seated. Please be seated everyone **[all persons did as directed]**.

Well, I apologize for not starting at 1400 but as I explained at the beginning of the trial, there are often matters that arrive that I have to resolve outside of your presence and that--we have been in court since 1400 doing those things.

At the beginning of the trial I asked you all to look at the charge sheet and to note that many of the offenses were interrelated and--and seemed to be repetitive, charged in different ways. The government did that for a particular purpose, and I permitted that in recognition of that valid purpose; but at this point, I would like to instruct you that Specifications 5, 6, 7, and 8, of which you have found the accused guilty, are considered for sentencing to be merged into Specification 2, which is a global specification, charging all of that same conduct.

So as we begin the presentencing hearing, I would like you to bear in mind that Mr. Hamdan will be sentenced now for one violation of providing material support to terrorism for an international terrorist organization; and that is Specification 2 under Charge II.

The other findings of guilty will remain on the record until the appellate courts have reviewed our work; but for today, for

purposes of sentencing, he has been convicted only of Specification 2. Fair enough?

PRES: Yes, sir.

MJ [CAPT ALLRED]: Okay. Thank you very much for deliberating and reaching findings as to those other specifications as well.

Trial Counsel, does the government have an opening argument?

TC [LCDR STONE]: Your Honor, we would prefer to argue at the close of the presentation of evidence.

MJ [CAPT ALLRED]: Fair enough.

Does the defense have an opening argument?

CDC [MR. SWIFT]: We will also argue at the close----

MJ [CAPT ALLRED]: Excellent.

CDC [MR. SWIFT]: As pursuant to the military **[inaudible]** of--put on our witnesses and then----

MJ [CAPT ALLRED]: Excellent.

CDC [MR. SWIFT]: ----and then address the point.

MJ [CAPT ALLRED]: Okay. The government has no evidence to offer to you this afternoon. So we will let the defense proceed with its case.

CDC [MR. SWIFT]: Yes, Your Honor. The defense calls Dr. Emily Keram.

MJ [CAPT ALLRED]: Uh-huh. Bailiff. Oh, she is here.

Dr. EMILY KERAM, a civilian, was recalled as a witness by the defense, was reminded she was still under oath, and testified as follows:

DIRECT EXAMINATION

Questions by the civilian defense counsel:

Q [MR. SWIFT]: Dr. Keram, first what I would like to do with the members is go a little briefly over your qualifications. I don't want to go over your entire extensive CV. I really--you are being called as a sentencing person, so I'm going to try and focus on that.

A [DR. KERAM]: Okay.

Q [MR. SWIFT]: Can you briefly outline your education.

A [DR. KERAM]: I'm a graduate of Duke University, with a bachelor of science in zoology. I then graduated from medical school at the University of North Carolina in Chapel Hill.

Following that, I completed a residency in psychiatry at that hospital; and then, I did a fellowship in forensic psychiatry with the United States Department of Justice. I finished that in June of 1992.

Q [MR. SWIFT]: Can you briefly go over your employment experience.

A [DR. KERAM]: From 1992 until 1996, I was in private practice. I had two types of practices. One was a clinical practice treating patients, and in the other, I did forensic evaluations, both criminal

and civil. And I have continued to do those type of evaluations through to this day.

In 1996, I became the medical director of an outpatient satellite clinic for mental health for the VA in Santa Rosa, California. We were a satellite of the San Francisco VA. And then my entire clinical practice from 1996 on has been in the VA, with the exception of a small, outpatient, private practice.

From--and I know this is a little bit complicated. I will try to be brief. From 2000 until 2004, I was on the full-time faculty at the UCSF School of Medicine, a professor--sorry--assistant Clinical Professor of Psychiatry in the Psychiatry and Law Program. And I left that full-time position for an unpaid part-time position in 2004, but I'm still on the faculty and still teach actively in that forensic psychiatry fellowship.

Q [MR. SWIFT]: Now, have you ever worked for the Department of Justice?

A [DR. KERAM]: Yes, I did.

Q [MR. SWIFT]: Can you----

A [DR. KERAM]: And I actually continue to work for the Department of Veteran's Affairs in a half time capacity now treating patients.

Q [MR. SWIFT]: Have you ever worked in a penal setting?

A [DR. KERAM]: Yes, I have. I have worked in several. In terms of providing treatment to incarcerated populations, I did so when I worked for the Department of Justice and the Bureau of Prisons. I also worked in a variety of settings in North Carolina, including the maximum security facility for women where I worked on death row and in general populations.

Since I have been in California, it's been since 1992, I have worked in a variety of mostly state, but some federal, both pretrial and post-conviction settings, doing the different types of forensic evaluations, including sentencing evaluations.

Q [MR. SWIFT]: Approximately how many sentencing evaluations have you done?

A [DR. KERAM]: I couldn't estimate. I was, for a number of years, the consultant to a program in San Francisco, mental health diversion program, and we did hundreds of sentences, sentencing evaluations. But then I have also, as I said, done them in other jurisdictions as well.

Q [MR. SWIFT]: Have you--do you know Mr. Hamdan?

A [DR. KERAM]: Yes, I do.

Q [MR. SWIFT]: How do you know Mr. Hamdan?

A [DR. KERAM]: I was retained to evaluate Mr. Hamdan in October of 2004, and I first met him in March of 2005.

Q [MR. SWIFT]: How--approximately how much interviews or hours of interviews have you conducted with Mr. Hamdan?

A [DR. KERAM]: I have spent between 120 and 125 hours interviewing Mr. Hamdan over the past three and a half years on approximately perhaps somewhere between six to eight visits to Guantanamo.

Q [MR. SWIFT]: Is that normal in doing a sentencing evaluation?

A [DR. KERAM]: No, not in the least. We usually don't have that much time to spend evaluating somebody--yeah--for two reasons: One was the longitudinal experience with the person. We usually just see somebody--usually just once frankly; and then if we see them more frequently than that, it's usually over the period of a week or two perhaps. In the federal system times we could see them for up to 60 to 90 days if they were pretrial incarcerated, but to see somebody over a three-and-a-half-year period for the length of time that I spent with him each time I was here is highly unusual. So I was able to get to know him and get a more full sense of him.

Q [MR. SWIFT]: Now do you speak Arabic?

A [DR. KERAM]: No, I do not.

Q [MR. SWIFT]: How were you able to interview him?

A [DR. KERAM]: Through a translator.

Q [MR. SWIFT]: And that was a translator assigned to the defense?

A [DR. KERAM]: That's correct.

Q [MR. SWIFT]: When you did your interviews, your forensic interviews, were defense attorneys present during those interviews?

A [DR. KERAM]: I believe. Let me just frame for you--in general a forensic evaluator would not see somebody in the presence of their attorney, but because of JTF regulations, on occasion we would be in the room together awaiting a decision on movement and that type of thing. But ordinarily, no. Out of the 120, 125 hours perhaps, an hour or an hour-and-a-half during my evaluation was an attorney in the room.

Q [MR. SWIFT]: Why don't you want an attorney in the room?

A [DR. KERAM]: Because I am--I'm a neutral evaluator. I'm asked a question or a series of questions, and based on my review of the evaluee and whatever evidence I determine I need to see, I form my opinion. And I want to avoid sources of potential contamination of my opinion, and so I don't want to be exposed in a sense to somebody else's theory of the case or that type of thing.

Q [MR. SWIFT]: Now, Doctor, were you asked to prepare a sentencing evaluation in Mr. Hamdan's case by the defense?

A [DR. KERAM]: I was asked to form opinions about----

Q [MR. SWIFT]: ----particular areas in a sense, not a complete evaluation, no.

A [DR. KERAM]: Right. Correct. Yeah. Ordinarily we would have a period of usually 30 to 45 days to review the data, interview the defendant, and then write a report. That occurs usually after the verdict comes in. So this is very unusual for me to be here so soon after the delivery of a verdict. So there is no written report because of that.

Q [MR. SWIFT]: Did you prepare to do such an evaluation in advance of a verdict?

A [DR. KERAM]: I certainly have collected, I believe, all of the information that I base my opinion on, prior to the verdict, yes.

Q [MR. SWIFT]: Did you prepare some slides----

A [DR. KERAM]: Yes, I did.

Q [MR. SWIFT]: ----in regards to what you did? Would they aid you in your testimony?

A [DR. KERAM]: Yes, they would.

CDC [MR. SWIFT]: For demonstrative purposes, I would ask that the slides be shown to the witness and to the courtroom and to all of us.

MJ [CAPT ALLRED]: Okay. You may.

Questions by the civilian defense counsel continued:

Q [MR. SWIFT]: In preparation of the evaluation, can you go over and explain each of the things that you reviewed in literature.

A [DR. KERAM]: Obviously this was an unusual type of an evaluation, and I needed to develop a working knowledge of areas that I have listed here. In order to understand Mr. Hamdan, I had to place him in his cultural context, and so I did a literature review on Arab culture and psychology and society.

I also felt that it would be useful for me to understand something about the history of Arabs in Afghanistan, in the Soviet and post-Soviet conflicts. I read about Al Qaeda as well, and also more broadly about terrorism, which I have some experience in outside of this case and terrorist networks.

It's very common in a complicated evaluation--and I teach this to my students--to seek consultation from different types of experts. And so I identified different areas in which I felt that having an expert consultation would assist me in understanding and most accurately forming an opinion or opinions. So I consulted a Yemeni psychologist. I also consulted with Mark Sageman. Mark Sageman is a psychiatrist. He is actually an MD, PhD; but more importantly he was a foreign service officer who served--I believe he was based in Pakistan, but essentially was involved in the conduct of what is known as the Secret War, worked very closely with mujahideem

and was based overseas there for a number of years and had a very good understanding of the introduction of Arabs into that conflict.

Even more important than that, he has gone on since--he has left federal employment to become really the expert in terror networks. He has written the foremost--the book that we all turn to in understanding the organization and psychology of terror networks.

So in addition to reading his literature, I also called and spoke with him on the phone. I wanted to take advantage of--again, you know, as a forensic psychiatrist, what you are trying to do is collect as much information as you can and analyze it. And I didn't realize that Colonel [redacted] would be testifying, but--until later, much later, and I took advantage of his presence last week to interview him after he testified because he had seen Mr. Hamdan at a point in time in which I hadn't. And I felt that seeing that snapshot or brief moving picture of Mr. Hamdan at that time would be helpful. And then I'm an expert in risk assessment. But I wanted to consult others in risk assessment to check out their opinion of how I was thinking through things.

I did a little bit more if you have the next slide.

Q [MR. SWIFT]: Yes, I do.

A [DR. KERAM]: Oh, no, I'm sorry. Of course, I review the records; and I have listed them here: the 302’s, the capture video, his--when I say "custodial" records, I mean the records the guards are

keeping, his medical and mental health records; and I also read the SOP's for Camp Delta that were published in 2003.

Q [MR. SWIFT]: Beyond that record review, what else did you do? If we could go to the next slide please.

A [DR. KERAM]: Well, actually, this is a slide that I prepared to help----

Q [MR. SWIFT]: Well, before we go to it----

A [DR. KERAM]: Yeah.

Q [MR. SWIFT]: ----and I will break there.

CDC [MR. SWIFT]: At this point I would like to qualify Dr. Keram as an expert in risk assessment and rehabilitative potential.

TC [LCDR STONE]: I'm not so sure those are the best categories, but we have no objection to Dr. Keram giving her opinion with regards to rehabilitative potential, as a known forensic psychiatrist that has been previously sworn and qualified of this court.

MJ [CAPT ALLRED]: Okay. That sounds like a, "no objection".

CDC [MR. SWIFT]: That sounds like a, "no objection" to me too, sir.

Questions by the assistant defense counsel continued:

Q [MR. SWIFT]: In looking at Mr. Hamdan, why is Arab culture important?

A [DR. KERAM]: For a couple of different reasons. Perhaps the most important is so that I wouldn't make incorrect assumptions about

him. I--I'm, you know, very--very--I very commonly interview people from different types of backgrounds; and when one does that, one tries to develop some working knowledge of, as I said, the culture, the psychology, the society, so that one can better understand decision-making that the person engages in and the factors that the person is basing their decision-making on.

Also, another reason is that when I do a forensic evaluation, I don't want the focus of the evaluation to be on me. I want to be as invisible in the room as possible. You know, obviously I'm asking the question, but what I mean by that is you have to adapt yourself as the evaluator, as the--to the cultural expectations of the person who you are evaluating so that they don't focus on doodling or something that you are doing and that you might become a distraction during the course of the evaluation, or an irritant. Those are probably the two.

Q [MR. SWIFT]: Well, besides Arab culture, can you talk about the importance of how it influences some of Mr. Hamdan's answers regarding the idea of face?

TC [LCDR STONE]: Objection. I'm not so sure she has the ability to testify to that.

CDC [MR. SWIFT]: Within the----

MJ [CAPT ALLRED]: You have already qualified her as an expert on the Arab culture?

CDC [MR. SWIFT]: I will rephrase the question.

MJ [CAPT ALLRED]: Why don't you rephrase?

Questions by the civilian defense counsel continued:

Q [MR. SWIFT]: In your interviews, how did Arab culture play into the interviews and things that you were asking and trying to discover?

A [DR. KERAM]: Well, there are a number of different ways. I will give you some early examples. Mr. Hamdan does not touch females unless they are related to him. So my usual greeting of introducing myself and offering a handshake would not have been appropriate in that context. I had to be very careful about the placement of my feet because showing the soles of your shoes or the bottom of your foot to an Arab person is a high insult; and so when I would cross my legs, I would be very careful about where my feet were pointing.

There were times at which I would ask him questions, that the answers to which might have, in Mr. Hamdan's world view, would have lent the appearance--not in my world view, but in his--that the answers indicated a disrespect towards the defense team. And so that's one of the reasons I consulted with an Arab psychologist, was to figure out how to phrase the question in a way where he would not be disrespecting his attorneys, where he would be preserving your public face. You know, there are many, many examples, you know.

Q [MR. SWIFT]: Well, we will come back to this list inside the culture of his family history. If we can go to the next slide, please.

In looking at this, did you take a look at for his social background and the social history of Yemen in general to place him inside?

A [DR. KERAM]: Yes, I did. I didn't want to make assumptions about his socio-economic status and background, and so I--I looked at Yemen as a country as a whole, and then narrowed down to his geographic region that he came from. I wanted to provide you with some of the information that I learned. This is based on World Bank data from 2006.

The per capita income in Yemen in 2006 was about $760. Physicians look at these other indices as measures of socio-economic health. Life expectancy is 62 if you are born in that year actually. So it's probably shorter earlier on. Child malnutrition nationwide is 46 percent, which means that in Yemen, almost half of the children under five are malnourished. And infant morality is--these are live births--76 out of 1000 children, babies, die. In the United States I don't recall the figure exactly. I'm just familiar with this, but it's far less on, you know, on the--at least a tenth of that. So what I learned was that Yemen was one of the most poor countries in the world and that was important for me to understand, as we will come to

later, in understanding decisions that Mr. Hamdan might make that might not make sense to me.

Q [MR. SWIFT]: If you could please go to the next slide, please. In Mr. Hamdan's life history--did you take a life history?

A [DR. KERAM]: Yes.

Q [MR. SWIFT]: Is that standard in any evaluation?

A [DR. KERAM]: Yes.

Q [MR. SWIFT]: Okay. What did you learn about him?

A [DR. KERAM]: Again, focusing from the big picture downwards, what I wanted to understand was something about where he was from; and I was able to actually--to find some pictures of the village that he was born in. And I'm sure I'm not going to do a good job of pronouncing the name. Mr. Hamdan comes from an area of Yemen that is known for--is it's called the Hydraumount; and again I apologize for the pronunciation. It's known as an Arab region with some rivers, primarily date farming. I lost a slide here. Okay.

Q [MR. SWIFT]: We were going to pull up the geographic----

A [DR. KERAM]: Okay. I looked for data that would describe the region at the time of Mr. Hamdan's birth in terms of population, but all it would say was "inhabited." Most of the buildings were and still are made of mud bricks. At the--at the time Mr. Hamdan was growing up, there were no paved roads in his village. There was a market, or a souk, and a community school that was associated with a

mosque. There--here, this is the area that he is from **[indicating].** This is a river valley that you can see in a--well, if I--if I touch this will it make--yeah.

You can see that these are small villages along the river valley in sort of clusters, and I believe this is al Korayba, the village that he is from. This is the--I think it's call the al Durwan Valley; and why don't we take you through the pictures first so you can get a sense of where he is from.

CDC [MR. SWIFT]: Go ahead. Next slides please. Clear the marks.

A [DR. KERAM]: This--can I clear the marks?

CDC [MR. SWIFT]: Thank you.

A [DR. KERAM]: This is his village looking down over the cliff, and I particularly wanted to put this up to show the fields on the other side of the river. Each those fields is a family farm. The families grow food, not only for themselves on those plots of land, but also for their farm animals. So you are talking at the time of Mr. Hamdan's birth about, really, virtually subsistence-level farming. Farming not only for your own food but for the food of your animals as well.

Next picture, please.

This is his city in 2007. Again, al Korayba. You can see that these buildings are made out of mud bricks that are sort of covered up with a fine layer.

At the time that Mr. Hamdan was growing up, some of these buildings had electricity, some of them were gas-lit. The houses were multi-generational. You will see that there are different stories. What would happen is a family member would get married, and they would build another floor on top of the house; and the new family would move in there and raise their family there. That's why you see these narrow houses, but tall.

May I have the next slide, please?

I wanted to give you a sense of transportation. Again, this is a photo from 2007. This would be the type of unpaved path that people would travel to get to the next village.

Next slide, please.

These are the women in the fields farming and as best we could determine, these pictures are of women who are farming grain that they will feed to animals, such as goats.

Is that the end of the pictures?

Q [MR. SWIFT]: Yes, it is.

A [DR. KERAM]: Okay. So that's the type of environment that he came from.

Q [MR. SWIFT]: Okay. Is Mr. Hamdan's life typical to those in that group?

A [DR. KERAM]: No, it's not. I want to stress one thing about the society that he came from. We can move past this slide. I think we covered that. Go back to the last slide.

I want to stress a couple of things here. In that last line there, I wrote social stratification. This is very important. The social strata in the village in which Mr. Hamdan was raised was divided into three layers: The sheiks or the tribal leaders, the tribesmen, and then a class of people who would be the descendents of slaves. The sheiks were thought to be direct descendents of the prophet Mohammed actually.

Mr. Hamdan's family belonged to the tribesmen class and his tribe is Hamdan.

Next slide.

There is--although this is a huge social stratification, there is not much economic differentiation between the different classes. And in his village, people subsisted as date farmers and merchants, and when I say "merchant," you have to think of things like people who might sell batteries in the souk or other things that they could trade.

Next slide.

Okay.

Q [MR. SWIFT]: Mr. Hamdan himself.

A [DR. KERAM]: Yes. We spoke about him being very unusual. Mr. Hamdan had little extended family within this village, which is highly unusual. I believe his father had no brothers and his mother had one brother. That's enormously unusual; usually, families have a number of children. And Mr. Hamdan himself was an only child. I put a little bit about his family background there, but the important thing here is that when Mr. Hamdan was six or seven years old, his mother died. And then he was orphaned at the age of nine or ten, and because he had--he lacked an extended family, he was really marooned in a society in which your status depends on your family connections and so he was without that.

Q [MR. SWIFT]: Did this cause Mr. Hamdan to do anything?

A [DR. KERAM]: Well, on the next slide I showed he had no one to live with in his--in his town. And a friend of his parents, a person who belonged to the same tribe and who had come from that same village, took Mr. Hamdan a year or two later, after he had lived with another family or families in the village, to live in a town called Mukalla. And it didn't work out for Mr. Hamdan and this family. They had older children and a store, and I think there were too many people, and so at the age when Mr. Hamdan could reasonably be expected to care for himself, he left the home, moved to San'a, which is the capital of Yemen, and was hired. There are people who owned what we

would call a taxi there. They called them dabobs or flies. It's sort of like the little Cushman vehicles that take us back and forth to the tent; and what--drove a dabob that somebody else owned.

So as a result of his losing his moors in his society, he had little economic or social features because he had no--future, I'm sorry--because he had no family connection or skills with which to improve his situation.

Q [MR. SWIFT]: If we could go ahead. Now in San'a, was he approached or recruited for jihad? Did he relate that to you?

A [DR. KERAM]: Yes, he did. When he was approximately 28, he had come across a group of men who would discuss the oppression of Muslims by Russians in Tajikistan. The men described that Muslims were being murdered, that there was ethnic cleansing, that rape was a common instrument of oppression; and he was told that this happened not only to adults, but also to children. The conversations lasted for several months, and he eventually decided to join them when they offered to take him to Tajikistan. And when I asked him why he joined them, he told me that he felt a heart reason, “I wanted to help people because I was orphaned and I had needed help.” And this actually becomes a theme for him, the identification with people who are suffering.

“I didn't know much about Islam, and it was an opportunity to learn more about Islam.”

Q [MR. SWIFT]: Was he--at the time that he was recruited, was he a fundamentalist?

A [DR. KERAM]: No, no, he was not. He described to me not really knowing the Koran--the Koran well, reading different chapters and not really understanding them.

Q [MR. SWIFT]: What type of education does he have?

A [DR. KERAM]: He left school in what we would consider 4th grade, probably around the time his dad died, around the age of 9 or 10.

Q [MR. SWIFT]: We've heard in merits for a portion of this trial that he didn't make it to Tajikistan. That is undisputed. What did he tell you about why he joined Usama bin Laden?

A [DR. KERAM]: When it was clear that he would not be able to go to Tajikistan, he planned to return to Yemen and go back to driving his dabob. And when he told this to the people that he was traveling with, they said to him, “You know, don't go back there. There is nothing for you there. You have no future. But we know a sheik who will give you a job driving.”

Q [MR. SWIFT]: Who was that sheik?

A [DR. KERAM]: It was bin Laden.

Q [MR. SWIFT]: Did he know who bin Laden was?

A [DR. KERAM]: He--he described that in Yemen there were bookstores that--in Sana’a--maybe one bookstore, I don't know--that

carried books by bin Laden and tapes. And so although he had never read or heard any of these, he was aware of the name and he was aware of his reputation as a rich man.

Q [MR. SWIFT]: Next slide, please.

How did working for bin Laden change Mr. Hamdan's economic situation?

A [DR. KERAM]: I, you know, asked Mr. Hamdan about how much money he was making in Sana’a as a dabob driver, and you know, he told me he couldn't really estimate in terms of a monetary figure, but he wasn't saving anything. He was living potentially day-to-day. He could cover his daily expenses with what he made.

Once he began to work for bin Laden, his initial salary was a hundred dollars. It went up to $150 per month, and his room and board were paid for, and because of that, he was able to save about 75 percent of his salary. And I asked him, you know, how that changed things for him, and he said, “The sky opened up for me,” or, “The horizon opened up for me.” In other words, he now had future possibilities. His salary allowed him to plan for a future for the first time. And he told me that--that for the first time that he thought that he might be able to get married and have a family because he would now have some of the things that were needed, or requisite, in order for a family to agree to allow him to marry into it. And the

reestablishment of a family was tremendously important to him as somebody who had been orphaned.

Q [MR. SWIFT]: Thank you. Did he express to you at any time that there was an ideological reasoning behind what he was doing?

A [DR. KERAM]: No. You know, consistent with the--the--I think we saw in one of the 302’s, he found the religious sermons, he told me, they were kind of boring.

Q [MR. SWIFT]: Did he really have the religious education or the sophistication to understand them?

A [DR. KERAM]: No. No. He did not. No.

Q [MR. SWIFT]: So would it be your opinion that his actions were generated primarily on the idea of wealth or gathering money?

A [DR. KERAM]: Gathering money. I think it's important to remember though it's gathering money for the purpose of being able to re-enter Yemeni society in a position to be able to--to get married. In Yemen there is something called a bride price, and at the time that Mr. Hamdan got married, it was three to four thousand dollars. So, you know, he need to--to get money and to save money in order to be considered eligible to marry into any family, particularly given that he didn't have any type of family status or education to offset his economic disparity.

Q [MR. SWIFT]: How did he feel towards bin Laden? Did he relate?

A [DR. KERAM]: He told me that it was extraordinarily unusual for a person in bin Laden's position, somebody who had wealth and education and the family status that bin Laden had, to be so modest and humble with somebody from Mr. Hamdan's class, not meaning particularly the Hamdan tribe, but meaning a driver. And he said that bin Laden extended this not only to him but to everybody he came in contact with.

Q [MR. SWIFT]: How did that----

A [DR. KERAM]: That he didn't----

Q [MR. SWIFT]: How did that affect Mr. Hamdan?

A [DR. KERAM]: We talked about the importance of self-respect and the respect towards somebody else, and it elevated his sense of self-esteem and self-respect to have somebody of this stature treat him in a respectful and modest manner.

Q [MR. SWIFT]: Since he had been an adult, had that ever happened to him?

A [DR. KERAM]: I don't think it ever happened to him in his life. No. No.

Q [MR. SWIFT]: And----

A [DR. KERAM]: And he said to me, “You know, anyone who treats you with that respect and politeness, you will feel respect and

gratitude towards." So this is the person who not only enhanced his own sense of self-esteem and self-respect, and engendered feelings of appreciation, but who created the possibility that Mr. Hamdan could have the future that he sought, to reestablish a family in Yemen.

Q [MR. SWIFT]: In 1998, he was able to realize that dream?

A [DR. KERAM]: Yes. Yes.

Q [MR. SWIFT]: How would--can you talk about how his marriage and how that tied in further to bin Laden?

A [DR. KERAM]: Yes. What happened in 1998 was the--the COLE bombing in I believe August of 1998.

Q [MR. SWIFT]: Are you sure about that date?

A [DR. KERAM]: I'm sorry, not the COLE bombing. The embassy--I'm sorry--the embassy bombings, the East African Embassy bombings; and Mr. bin Laden [sic] did not know that bin Laden was responsible for those until sometime afterward when he overheard people watching a videotape and discussing it. And at that point he decided that he wanted to start to move away from bin Laden and the people that he was surrounded with. He didn't approve--that he was upset by the embassy bombings. The knowledge that civilians had been killed was very distressing to him as a Muslim, and so he told bin Laden that he was going to leave and return to Yemen to get married.

Now as I mentioned, you know, the bride price at that time was $3 to $4,000; and bin Laden gave him a thousand dollars. And I

asked, you know, he said he came--when Mr. Hamdan was taking leave, or at some point around that time, bin Laden said, “Here, get married, I'm giving you a gift.” I asked Mr. Hamdan if that were unusual. He said no, that it would be expected that the employer would give a gift to an employee who was getting married commensurate with the salary or income that the employer had, the wealth of the employer. So it wasn't unexpected at all or unusual at all.

So he left bin Laden and he returned to Yemen, was able to find a family that would let him marry into it and then planned to stay in Yemen with his new wife. He stayed for about six to eight months after his marriage and looked for work. He did not want to return to work driving a dabob. He was making enough money driving a dabob to pay for his own daily expenses, but he said to--you know, I said to him, “Why didn't you just go back and drive a dabob?” And he said, “Well, now we are two and soon we will be three, four, and five,” and so he wanted to look for work that would--would be better paid, better compensated.

Q [MR. SWIFT]: Did he eventually return to Afghanistan?

A [DR. KERAM]: He did.

Q [MR. SWIFT]: Why?

A [DR. KERAM]: He returned for two reasons--and I see now that there is an incorrect--the name on the slide is incorrect. There is a gentleman named that Nasser al Basri, Basri, B-A-S-R-I, who also

worked for bin Laden. Actually he was one of the people that Mr. Hamdan had traveled to Tajikistan with from Yemen, and he and Mr. Hamdan traveled back to Yemen together to find brides.

Mr. al Basri is a very social guy who makes lots of friends easily and knew a lot of people in San'a and found a woman to marry. And they, Mr. Basri and his fiancée discussed the fact that he she had a younger sister who was also of marriageable age. Mr. al Basri approached Mr. Hamdan and said, you know, “I think you should marry the sister of my fiancée,” and he agreed; and that's how he met his future wife.

What happened was after they married, Mr. al Basri and that sister went back to Afghanistan shortly after that, and the family didn't hear from them again. No communication; no letters, no telephone calls. And they became quite anxious about the disappearance of this older daughter. That reason his--his appreciation for the anxiety that his in-laws had over this missing daughter, and the fact that he wasn't getting anywhere in trying to look for work, led him to decide to return to bin Laden's employment.

Q [MR. SWIFT]: Was that--from an economics viewpoint, was that a good decision for him?

A [DR. KERAM]: Yes. Yes. His salary was increased because he was married. People who were married earned $200 a month, and they were moved into their own housing, a separate housing situation, which

was paid for. So he again was able to--to save more money and the anticipation, the plan to return to Yemen. His--his work routine was unchanged so he was doing the same type of work for more money and was able to save more money.

Q [MR. SWIFT]: Did he ever go back to Yemen?

A [DR. KERAM]: Yes, he did. In August of 2000, his brother-in-law, Mohammed, was going to get married, and so Mr. Hamdan and his wife returned to San'a for that wedding. They remained in Yemen for approximately 7 months. I thought this was interesting that Mohammed, the brother-in-law, asked Mr. Hamdan if--if--because now he was going to be two and soon three and four and five, if he should come to Afghanistan to look for work, and Mr. Hamdan told him, “No. That's not a good place to work. Don't come here.”

He himself continued to work--to look for work in Yemen. The hope was that eventually, if not at that point in time, then later, he would be able to drive his--to afford his own vehicle. And so he was looking to see if he could find a vehicle to buy, that he could afford, where he wouldn't have to be driving for someone else. But he couldn't do that, and so he didn't have enough money to stay there. He said to me, “Now we are three. We were already three.”

[END OF PAGE]

Q [MR. SWIFT]: Why did he return to Afghanistan, did he tell you?

A [DR. KERAM]: Okay. He went to Yemen in August of 2001. In October of 2001, the COLE bombing happened, which he did not in any way connect bin Laden. In fact, the media in Yemen reported that the Mossad was responsible for the COLE bombing, and I think most people believed that. Certainly Mr. Hamdan had no reason not to believe it. It was well within what would normally be--it would have been attributed to.

He remained in Yemen and during the Hajj, which is the annual pilgrimage to Mecca. He took his in-laws to Mecca, and while he was in Mecca his wife's family informed him that the investigation of the COLE bombing had led the Political Security Organization, the political police, to begin to round up anybody who had been in Afghanistan. And even though Mr. Hamdan did not think that Mr. bin Laden was involved and did not think that, you know, he should be a suspect in any way, this was terrifying to him. And what he said to me was, "This is not the police. This is security. This means prison. No trial, no verdict, only prison. You enter the prison system and you are lost. You disappear; your life is ended."

So he--decided that he would return to Afghanistan. I asked him about all kinds of other plans that, you know, he could have done, or I thought he could have done. But really it came down to--for a

lot of different reasons it came down to two choices: He could either go back and be lost in prison, or he could return to bin Laden and continue to try to save money to get himself back to Yemen some day. His plan was that once the COLE investigation was over, and once those responsible were identified and charged, that it would be safe for him to go back to Yemen. So he didn't anticipate becoming a fugitive in Afghanistan. He just wanted to wait things out so that when he actually would turn himself over to this organization, he might have a shorter period of incarceration. So he felt he had a choice of going to prison or working for bin Laden.

Q [MR. SWIFT]: Well, when he got to Afghanistan, did it work out that way?

A [DR. KERAM]: No, it did not. Approximately a month after he arrived in Afghanistan, he learned that bin Laden was responsible for the attack on the COLE; and he told me that he realized he was, as he put it, “stuck between two fires,” and he felt betrayed by bin Laden. He wanted to leave right away when he found out that bin Laden was responsible for the COLE. Like the East African attacks, it--it was not--it was disturbing and distressing to him. But there were people who were looking for him in Yemen.

I asked Mr. Hamdan if his feelings for bin Laden changed after the COLE attack, after he learned about the responsibility, and he--you know, remember this is a man that Mr. Hamdan had described to

me as somebody who he felt gratitude towards and appreciation for, somebody who had created Mr. Hamdan's future in a sense by allowing him to get married and re-establish a family. And he said to me, "It kills you. It's a shock. Someone who you greatly respect, whom you hold in esteem suddenly turns into someone else. What you believed, you can no longer believe. I held someone highly, and they betray you. The fear is that I can't hold someone in high esteem again because I will be betrayed again. How do you trust yourself again?"

I spoke with Mr. Hamdan about his decision to stay with bin Laden after the COLE; and again, it really was an economic decision. He said to me, "After I learned about the COLE, I didn't want to be with bin Laden because of my personal feelings; but I was forced to. I had a wife and a child. I had to work." He didn't want to be on the street accepting charity with a wife and a child.

So he--while he was saving money, waiting for the COLE investigation to die down, he also began to make preparations to leave and go back to Yemen, and he had two different plans that he thought would work or could work. The first thing he did was obtain an Afghani passport for himself. So his--one of his thoughts was--let me just explain: Getting a visa to travel among these countries is difficult, particularly if you are from Yemen. Yemen is very poor. You know, these countries don't necessarily want lots of Yemenis coming over. So he couldn't enter Saudi Arabia at any time of the

year, but he knew that he could enter it during the Hajj. So he hoped that by having the Afghani passport, he would be able to get a visa in Pakistan, would use it to go to Pakistan; get a visa for Saudi Arabia and go during the Hajj and then smuggle himself into Yemen and then turn himself over to the Yemeni security police. Okay.

Conversely--let me just point out, there is another thing called the Umrah, which is anybody can get a visa at any point in time to go to Saudi Arabia but--from Pakistan. But Mr. Hamdan chose not to do that because, again, he was waiting for the COLE investigation to end; and so--this speaks to something I put on the slide earlier. This is a sort of--a sense of time that I believe is a cultural aspect that has a cultural aspect to it and certainly is, you know, representative of Mr. Hamdan in many different ways that, you know, the sky is not falling in and I will just wait it out until my plan has the best chance of succeeding. Okay.

So chose not to get the Umrah visa. He chose to wait for the Hajj, and he hoped to enter Saudi Arabia and then Yemen. But he had a Plan B. If things got too hot too quickly, he would just travel to Yemen on his Yemeni passport and be picked up at the border without any opportunity to negotiate with the security police that he might have if he had smuggled himself in. But that was his backdoor plan.

He--I asked him, “Well, what about your family? How are they going to get in?” He said it wouldn't be difficult for his

family to travel to Yemen on their Yemeni passports, his wife and his daughter, that they would be allowed in; and he--his wife was pregnant at the time. He didn't discuss the plans with her because he didn't want her to worry.

Q [MR. SWIFT]: At this point we are going to ask a little about the----

MJ [CAPT ALLRED]: Wait a minute. You are going to ask a little bit about something that is causing the yellow light to flash.

CDC [MR. SWIFT]: Yes, it is; and I pre-alerted the Court Security Officer to that fact. I don't--I expect about eight questions here, but unfortunately this is part of the interview with Colonel [redacted] that you had and with the client regarding his feelings towards bin Laden and the aftermath of bin Laden.

MJ [CAPT ALLRED]: So what do you propose? Can we--can we ask these questions in a way that will not require us to take any security precautions?

CDC [MR. SWIFT]: I don't think so. I mean, I would--we would continue to wish that the Court would stay open; but I'm going to ask particularly not----

MJ [CAPT ALLRED]: You wanted me to keep the court open for some discussion of some classified information? “No,” is the right answer.

CDC [MR. SWIFT]: “No,” is the right answer; and I'm trying to think--you know, at what point on the question am I going to go over,

and it's probably, I--after this consultation with the court security officer, I said, when I got to Bagram I would let him know.

MJ [CAPT ALLRED]: Okay. Well----

CDC [MR. SWIFT]: I just won't--you understand my position, Your Honor? Why don't we skip over it; and we will come back to it at the end, Your Honor.

MJ [CAPT ALLRED]: Well, an alternative is to have Dr. Keram submit the--I don't know. We can create a question and answer form, stamp it SECRET, and give it to the members without closing the court or something like that. But it's your case. You try it any way you want, and we can't discuss classified information without closing the court.

So what would you like to do, go forward without--I mean skip this part of this story?

CDC [MR. SWIFT]: We will skip this part for the moment. It is important----

MJ [CAPT ALLRED]: Okay.

CDC [MR. SWIFT]: ----towards his rehabilitative potential and feelings that were expressed----

MJ [CAPT ALLRED]: Well----

CDC [MR. SWIFT]: ----and motivation.

MJ [CAPT ALLRED]: I mean, then skipping is the way to go.

CDC [MR. SWIFT]: Okay. We will come back to it at the end.

MJ [CAPT ALLRED]: Uh-huh.

CDC [MR. SWIFT]: If we would go to the next slide.

Questions by the civilian defense counsel continued:

Q [MR. SWIFT]: Based on his family history and your consultation, did you--what did you do to take an opinion of the rehabilitative potential?

A [DR. KERAM]: Well, I considered all of the documented records that I reviewed, you know, certainly the capture video. His custodial records I thought were very interesting. The statements of the high-value detainees was also very important. His own statements. The interviews that I had with Colonel [redacted] and Dr. Sageman.

Q [MR. SWIFT]: Next slide, please. Based on everything that you reviewed----

A [DR. KERAM]: Uh-huh.

Q [MR. SWIFT]: ----do you have an opinion as to Mr. Hamdan's rehabilitative potential?

A [DR. KERAM]: Yes, I do.

Q [MR. SWIFT]: What is that?

A [DR. KERAM]: It's excellent.

Q [MR. SWIFT]: Why?

A [DR. KERAM]: One has to look at the trajectory of Mr. Hamdan's involvement in his relationship to bin Laden, going back to his decision in 1996 to go to Tajikistan. I think--I think it's probably

best if I go through the slides and do it--instead of doing it chronologically, just give you my thoughts about these different topics.

Q [MR. SWIFT]: Yes.

A [DR. KERAM]: Can we get the slide before this one, please?

Q [MR. SWIFT]: Slide before.

A [DR. KERAM]: As I----

Q [MR. SWIFT]: Let's skip over the consultation with Colonel [redacted], and we will do that at the end.

A [DR. KERAM]: Okay. All right.

Q [MR. SWIFT]: We will go to the 302's and everything.

A [DR. KERAM]: Okay. In the 302, you know, what--okay. So what am I looking for? What I'm looking for is evidence that Mr. Hamdan does or does not adhere to the ideology that we are interested in here and the extent to which ideology is followed by behavior. Okay? So I'm looking both at his expressions and also at his behavior during the time that he has been in custody.

Let's start with the 302's, and I reviewed all of them. They show that he is completely cooperative with all of his interviews with FBI agents, with the exception of asking to be moved on one occasion once he realized that there was a connection between the interviewers and the JTF, which he they did for him. He--I would say I think as many people as have met him have observed, he is very

social. He formed an attachment, I believe, to one of the particular agents who--I'm sorry, I don't recall his last name; but in the 302, he described Mr. Hamdan shaking his hand and crying after the interview.

I looked at the evolution of his feelings towards bin Laden, which you can begin to see and we will discuss later if we go classified, as he is exposed to an ideology that it turns out he doesn't agree with. And I was particularly interested in his reaction to the videotape that was played in court of the 9/11 attacks. I was not in court that morning or that afternoon, but I did watch it live on our CCTV. I was not focused on what was happening in the video. I was focused on Mr. Hamdan's reaction to the video; and if you looked at him as well, you know that he--he teared up, that he brushed tears away from his face. And so I--I asked--I went down during the next break and I had just arrived here on Guantanamo so I hadn't seen him, and so I said to him, you know--I didn't want to say, “Hey, I saw you were crying,” because then it's me introducing the evidence. So--and he can agree to it if it's not true, but I said to him, “You know, tell me--tell me what that was like for you.” He was devastated. This seems hard again from a Western perspective to understand, from our perspective to understand, but Mr. Hamdan had not seen video tapes of the attacks before. He had never seen buildings that big before. The largest building in San'a is perhaps twenty stories tall, and the

largest building in Afghanistan in Kabul during the time that he was there was ten to twelve stories tall. He knows how big an airplane is. He told me that it was like watching a mouse hitting an elephant, okay? That that was the scale for him. He had no idea that skyscrapers had that type of scale, and when people started screaming and crying, he told me that--that he could barely keep a hold of himself, that he felt that his head was going to explode; and he was particularly fixated on a young child--I'm from New York, and it looked like they were--the image of the second plane hitting, one of the images, was taken from Battery Park, which has a concourse that runs down it. So you have that nice shot right to the second tower, the first tower, the second tower that was hit. And he could not get the image out of his head of a boy standing there with his father, and both of them are stunned. And he said to me, “Why are they even there?” You know, I explained nobody knew that this was going to happen. He said, “Why didn't the father run? Why didn't they get the--the father get the child out there and?” You know, I explained to him that they were probably stunned and they couldn't believe it, just like Mr. Hamdan couldn't believe it.

I asked him what it was like knowing that he had worked for bin Laden and knowing that bin Laden had done this, and he told me that it was hard on his soul, and he said a prayer for--a traditional prayer of comfort for the families who are suffering, for families

that are suffering. He said that in Arabic for the families of the 9/11 victims.

Q [MR. SWIFT]: What about talking with Dr. Sageman?

A [DR. KERAM]: Again, we are looking at the trajectory of Mr. Hamdan's adherence to a belief system, which, you know, I think was tangential at that--you know, that he had agreed to go to Tajikistan, without really knowing what that meant. There are a couple of things that Dr. Sageman pointed out. Obviously, I have read his literature, but in discussing the specifics of Mr. Hamdan's case, he remarked to me that terrorism is a full-time job. It's not a part-time job. And the fact that Mr. Hamdan left bin Laden twice and returned to San'a for lengthy periods of time, you know, the first time I think was six to eight months and the second time was from August of 2000 to February of 2001, looking for work, that you don't take a holiday. You don't take a vacation from terrorism. So he doesn't--he doesn't have--Sageman has reviewed five hundred cases of international terrorists, and he has never seen that----

TC [LCDR STONE]: I would object to her testifying about Mark Sageman. We have gone on a long way about what the accused has told her, but with regards to what may or may not be Dr. Sageman's potential theories; I'm not so sure she has the basis to say that.

MJ [CAPT ALLRED]: You know where--I don't know where she's going. I was enjoying the narrative, but I don't know where she was taking us.

CDC [MR. SWIFT]: She was--she was going toward is using what all professionals do in risk assessment with the work and why it related, particularly in here, and if she would be allowed to finish the answer, I think it's the last part in here. But it goes toward, in particular, Mr. Hamdan and her consultations with others supporting her opinion, which is exactly what experts do.

MJ [CAPT ALLRED]: Overruled.

CDC [MR. SWIFT]: Thank you.

WIT [DR. KERAM]: Could you read back the last few sentences of my answer?

Questions by the civilian defense counsel continued:

Q [MR. SWIFT]: I believe rather than having it read back, it was a departure of several months--periods of multiple months----

A [DR. KERAM]: Oh, yeah. Yes. So Dr. Sageman said that in looking at over five hundred cases of international terrorists, he had never seen anybody do that. So he felt that that was highly unusual and indicative of somebody who didn't adhere to the ideology, the philosophy.

Shall I continue with my analysis?

Q [MR. SWIFT]: How about--yes, with regards to his future plans.

A [DR. KERAM]: It was one of the things that you do is you ask people about their future plans and when--because you are looking to see are they able to keep themselves from expressing the ideology or from trying to give you the rhetoric that they are trained to give or that they believe in; and the first thing that Mr. Hamdan said to me--he's very sardonic. He has an ironic sense of humor. He said to me, "If I ever give back to Yemen, I'm going take my daughters and my wife and go into the desert with the camel and never talk to anybody again." And I said, “Look, you know, I don't think that's going to happen. If you ever get back to Yemen, what are you really going to do?” And he said, “I'm going start over.” He said, “Of course, I would prefer to be a driver, but I'll take any job I can get.”

Q [MR. SWIFT]: What's his attitude toward Americans?

A [DR. KERAM]: I asked him about that. He told me--I asked him if he felt any anger or resentment towards Americans because of the seven years, almost seven years that he's been in American custody and--and again, I think it speaks to that slide I showed you about some characteristics of Arab culture. One can make generalizations. There's a sense of fatalism that certainly pervades--present in many of the literature reviews I did--are suggested in many of the literature reviews I did and is very present in Mr. Hamdan. So frame

it in that sense of fatalism that to a certain extent. Your life is out of your hands and what happens is God's will.

He said to me, “That person sitting up there,” and he gestured out of the room as if he were pointing to America, he said, “I've never met him and he's never met me. So it would be shameful if I were angry with him. What has he ever done to me? He has nothing do with it. It would be”--and he repeated that it would be shameful for him to have bad--hard or bad feelings against somebody that he had never met.

Well, now, I know that he has had some run-ins with some of the guards here and some feelings about some of the treatment that he has had here, and so I specifically asked him about that as well, and he said that he is angry with people who he felt treated him in a fashion that was demeaning or abusive. And I said, “Do you have any desire to get back at them, to harm them in any way?” And he said, “They didn't hurt my children. They didn't hurt my wife. They didn't steal my money, and they didn't cut me into a thousand pieces. So compared to that, those things, what they did is nothing. I'm not going to seek retribution or retaliation for this.” And again, that that speaks to that Arab sense of fatalism, I think.

There were things that happened to Mr. Hamdan that didn't bother him over the years that surprised me; and again, you know, it was just, “This is God's will.” He would say the same prayer that

he--or similar prayer to the one that he--that, you know, the counseling patience in times of suffering.

Q [MR. SWIFT]: Has he changed as a result of his time at GTMO?

A [DR. KERAM]: I asked him about that, his perceptions of how he might have changed during his time at Guantanamo, and he gave me an answer which I wouldn't have predicted, but I think is very consistent with what I know of Mr. Hamdan. He told me that before he came to Guantanamo that he was a very closed person. I asked what he meant by that, and he said he was very closed-minded and he had very little experience. That at Guantanamo he met detainees from all over the world. They spoke different languages and they had different cultures and different customs and that he--but he said something important as well. He said, “You Americans come from all over the world too, and you speak different languages and have different cultures and customs,” he said, “So I had to learn all of that. That allowed me to treat other people better and them learning my culture allowed them to treat me better, and that made me happy.” He said, “Somebody who sits at home all the time and doesn't think about this or meet people is closed, and I have become open.”

And you know, again, I wouldn't have anticipated that answer, but from what I have come to know of Mr. Hamdan, it is very consistent with what I know of him.

Q [MR. SWIFT]: Do you ever discuss the role that his family plays in his rehabilitative potential?

A [DR. KERAM]: I think that his family is enormously important to him, and we saw the effects of being orphaned on him, that I think it was the primary shaper of his desires in life in terms of wanting to recreate a family. And he was able to do that. He was able to marry. It turned out to be a good match for him, even though they met under traditional circumstances that wouldn't have predicted that. He's attached to his--certainly his eldest daughter and his younger whom he has never met. He lives for them. He lives for his family.

There have been times where he's been on--one particular time where he was on a hunger strike here where I recall--I was called and asked for advice about how to make him stop. I can't remember if you called me or if it was a different counsel, and I said, “Tell him that he cannot do that to his children,” and I believe he came off the hunger strike within a day or maybe that day.

It's a concern, because his--as you can imagine, with the economy of Yemen being the way it is, his wife and his daughters have no economic support. She does not work outside the home, which is typical that somebody where they are would have a male protector, both socially and economically. And at some point, his wife is going do have to move on because they have two children who are now I believe

seven and nine, approximately, and they are going have needs. Increasing financial stress will be placed on her.

Q [MR. SWIFT]: If that happens, isn't he exactly where he was in 1960--or in 1996?

A [DR. KERAM]: No.

Q [MR. SWIFT]: Why not?

A [DR. KERAM]: For a variety of different reasons. One is, he said to me--when he was talking about how he could never trust his own judgment again, he said, “You know, once you are bitten by a snake, you are afraid of a rope,” and he said that he's going to be very wary of other people and he has no interest in him pursuing any type of religious ideology. He wants to--he wants to reunite with his family.

I believe that his family is protected, in a sense, that they are part of the glue that will hold him together. They are certainly an important factor, but I don't believe that he's absolutely going to return to jihad if he--I don't know that he actually set out for what we think of the jihad when we say that. It's not the same thing that he thought of.

Q [MR. SWIFT]: Will he have a better chance at rehabilitation if he's able to return to his family----

A [DR. KERAM]: Yes. Yes he would.

Q [MR. SWIFT]: ----and his nuclear family?

A [DR. KERAM]: Yes. Yeah, that would continue that trajectory that he's on. Separation--even though that separation is largely complete at this time.

Q [MR. SWIFT]: The last part I would like to--I don't--I want to be clear on the record, your Honor, I don't want to close the court, but I want to put on secret information--all right--that is presumptively secret. So rather than ask the questions and get in trouble, I guess this is the part where we close the court.

MJ [CAPT ALLRED]: Well----

CDC [MR. SWIFT]: I want to put on the evidence----

MJ [CAPT ALLRED]: ----I don't want to close the court either, but if you want this evidence----

CDC [MR. SWIFT]: I do.

MJ [CAPT ALLRED]: ----then you are at a fork in the road.

CDC [MR. SWIFT]: Where I----

MJ [CAPT ALLRED]: Do you want to close the court?

CDC [MR. SWIFT]: No, I do not, Your Honor, but I want to ask the questions.

MJ [CAPT ALLRED]: Okay. Then your question is--your examination is over.

CDC [MR. SWIFT]: Well, your Honor, I want to preserve an objection in closing the court.

MJ [CAPT ALLRED]: Okay.

CDC [MR. SWIFT]: But then when told that the court will be closed if I go there, I'm going to go there.

MJ [CAPT ALLRED]: Well, you can't object to closing the court unless you ask me to close the court--I mean, if you ask me to close the court.

Do you want this evidence or not?

CDC [MR. SWIFT]: Well, I guess what I will do is ask the question, let the prosecution object to it; and then we will close the court.

TC [LCDR STONE]: Well, it's their decision on whether they want to go what is, they believe is presumptively classified. I don't know what question he is going to ask----

MJ [CAPT ALLRED]: Well, maybe you ought to have a little consultation over there and see if we can----

CDC [MR. SWIFT]: I am going ask her specifically about interactions in Bagram that Mr. Hamdan had with parties, that have presumptively previously been closed.

MJ [CAPT ALLRED]: All right. Well, why don't you ask the first question, and we'll ask the witness to wait to see if we need to stop.

[END OF PAGE]

Questions by the civilian defense counsel continued:

Q [MR. SWIFT]: Dr. Keram, were you present when Mr. Hamdan testified--or excuse me--when Colonel [redacted] and Lieutenant Colonel [redacted] testified?

A [DR. KERAM]: Yes, I was.

Q [MR. SWIFT]: Did you speak----

MJ [CAPT ALLRED]: Okay, now. Dr. Keram, you have to pause after the question.

WIT [DR. KERAM]: For the objection?

MJ [CAPT ALLRED]: To see if we are going have to stop or not. Look at old Bob over there. He's ready to jump.

WIT [DR. KERAM]: Who is the person I should be looking at for the----

MJ [CAPT ALLRED]: Just pause.

WIT [DR. KERAM]: Okay.

Questions by the civilian defense counsel continued:

Q [MR. SWIFT]: Well, what did you----

MJ [CAPT ALLRED]: Let me ask you this: Does she have to repeat this discussion she had with this witness in order to give her opinion about it?

CDC [MR. SWIFT]: Well, let's see if we can get there. I'm going try, though.

MJ [CAPT ALLRED]: Maybe you could just ask her if she had a good talk with Colonel [redacted] and if they ranged long and free over all the world's good information and if that somehow supports her opinion.

CDC [MR. SWIFT]: Well, actually, it has do with discussions she had with Mr. Hamdan after watching the testimony.

TC [LCDR STONE]: Is this a basis of her opinion with regards to rehabilitative potential?

CDC [MR. SWIFT]: It is one of the bases.

TC [LCDR STONE]: Certainly, otherwise, it wouldn’t be relevant; but why don't you ask a question or two and see if we can get to go there. I mean----

CDC [MR. SWIFT]: I will keep stopping.

Questions by the civilian defense counsel continued:

Q [MR. SWIFT]: Did you discuss with Mr. Hamdan his cooperation with U.S. authorities in Bagram in December and January of--December of 2001/January of 2002.

MJ [CAPT ALLRED]: Okay. It looks you are going have to close the court if you want this evidence.

CDC [MR. SWIFT]: I do want the evidence so----

MJ [CAPT ALLRED]: Okay. Then you need to make a motion.

CDC [MR. SWIFT]: Okay, I'll make the motion to close the court, Your Honor.

MJ [CAPT ALLRED]: Okay. Now the question becomes: Do we want to give the government a chance to cross-examine Dr. Keram about the unclassified portions of her testimony before we close the court so we can have direct and cross on these last few questions?

CDC [MR. SWIFT]: I'm open to that, Your Honor.

MJ [CAPT ALLRED]: Is it--you have basically completed your examination of Dr. Keram with respect to this small piece--

CDC [MR. SWIFT]: This small part, but I do want to----

MJ [CAPT ALLRED]: Okay. Why don't--if we have to close the court, let's do it only once and for the minimum amount of time necessary.

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

MJ [CAPT ALLRED]: Okay. We have been on the record since about a quarter to three. This might be a good time to take a recess in any event. Okay. Why don't we go until about ten minutes.

BAILIFF: All rise **[all persons did as directed]**.

MJ [CAPT ALLRED]: Court is in recess. We'll ask the members and the parties to return at a quarter after four.

[The military commission recessed at 1606, 6 August 2008.]

[The next session was a closed session and can be found in the secret annex of the record of trial, pages 4015-4023.]

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