

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMED, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

Joint Defense Motion to Compel Discovery
Related to Unlawful Command Influence.

29 August 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court and this Court's order dated 27 August 2008.
2. **Relief Sought:** The *pro se* accused, joined by counsel for Mr. Bin al Shibh and Mr. Al Hawsawi, respectfully request the Military Judge compel production of discovery sought by the defense in its 20 May 2008 Joint Defense Request for Discovery Related to Unlawful Influence (Attachment A) by 5 September 2008¹ in order to allow the defense the opportunity to review the materials, conduct further investigation, and request witnesses, if necessary prior to the Commissions' hearing scheduled 22 September 2008.
3. **Overview:** The Defense has requested all records relating to allegations of unlawful influence of the Office of the Chief Prosecutor by the Legal Advisor to the Convening Authority. The Prosecution has not responded to the Defense request or produced any of the requested discovery. The Defendants' fundamental right of access to potential evidence and witnesses is provided for in statute and in treaty, and the Defendants hereby assert that right. 10 U.S.C. § 949j (2006); Rule for Military Commission (R.M.C.) 701(j); Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, Common Article 3, entered into force Oct. 21, 1950 (hereinafter Common Article 3).

¹ The defense requests oral argument on the motion in the event that the Military Judge does not compel discovery based on the written submissions.

4. **Burden and Standard of Proof:** The burden of persuasion on this motion rests with the defense. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

5. **Facts:**

- i. On 20 May 2008, the Defense sought discovery related to unlawful influence of the Office of the Chief Prosecutor by the Legal Advisor to the Convening Authority as well as other individuals external to the Office of the Chief Prosecutor.
- ii. As of this filing, the Prosecution has not responded to this request.

6. **Law and Argument:**

Rule for Military Commission (R.M.C.) 701(j) establishes the standard for discovery in military courts: Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence. *See also*, 10 U.S.C. § 949j (2006). The accused is entitled to inspect both exculpatory and inculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986). The ends of justice are best served “by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial.” *Wardius v. Oregon*, 412 U.S. 470, 473 (1973).

Military courts recognize “a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts.” *United States v. Reece*, 25 M.J. 93, 94 (C.M.A. 1987). With respect to discovery, “military law has been preeminent, jealously guaranteeing to the accused the right to be effectively represented by counsel through affording every opportunity to prepare his case by openly disclosing the Government’s evidence.” *United States v. Enloe*, 15 U.S.C.M.A. 256 (C.M.A. 1965). The rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice. *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

In October 2007, the former Chief Prosecutor, Colonel Morris Davis, resigned due to alleged interference in his duties by the Legal Advisor to the Convening Authority and other individuals external to his office. In *United States v. Hamdan*, Colonel Davis testified that the Legal Advisor challenged Colonel Davis' authority to refuse to use evidence derived by torture in trials by military commission. (Hamdan Record at 35)(Attachment C). "His view was everything was fair game and let the judge sort it out." *Id.* General Hartmann also pressed to charge the defendants in this case and to move their cases forward in time for the elections in November. "[Y]ou get the train rolling, there is an election coming up November this year and there was that consistent theme that if we don't get these things rolling before the election this thing is going to implode and if you get the 9/11 guys charged it would be hard once you get the victims families energized and public interested it would be hard for whoever wins the Whitehouse to stop this process." (Hamdan Record at 33)(Attachment C). The Convening Authority "brought up the same issues that he had about we got to get cases moving" during a meeting with Colonel Davis sometime in August 2008. (Hamdan Record at 41)(Attachment C).

The desire to gain politically by charging the defendants in this case was apparently widely-held within the Department of Defense. Before the mid-term elections two years earlier Deputy Secretary of Defense Gordon England suggested at a meeting of the Special Detainee Oversight Group "there could be some real strategic political value in charging some of the high-value detainees before the elections and we need to think about who we can charge, what we can charge them with, and when we can charge them ." (Hamdan Record at 19)(Attachment C).

In *Hamdan*, the military commission found that the Legal Advisor in this case had unlawfully influenced the Office of the Chief Prosecutor by insisting that certain cases be prosecuted for their political value and by directing or attempting to direct the use of evidence

obtained through torture or coercion in trials by military commission. (Ruling on Motion to Dismiss D-026)(Attachment B). But the military commission found that dismissal was not required in that case because Mr. Hamdan's case was not one of the cases that was prosecuted for political value and because Mr. Hamdan was charged long before the Convening Authority and the Legal Advisor reported to their current assignments.

If substantiated, allegations of unlawful command influence could warrant the dismissal of this case. Even the appearance of unlawful command influence can require dismissal of charges with prejudice. *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). This is due to the fact that unlawful command influence is the "mortal enemy of military justice"² and the "appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003)(quoting *United States v. Stoneman*, 57 M.J. 35, 42-43 (C.A.A.F. 2002). "It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion).

The importance of the prevention of unlawful command influence is reflected in the Military Commissions Act (M.C.A.) itself. While Congress attempted to strip detainees of many of our most basic and cherished freedoms, Congress ensured that the prohibition against unlawful command influence contained in Article 37, UCMJ, was codified in the M.C.A. 10 U.S.C. § 949b (2006).

The Defense, as well as the Prosecution, must comply with applicable rules and procedures governing the production and presentation of evidence at trial. *Williams v. Florida*, 399 U.S. 78, 82 (1970). This Court has the authority to impose sanctions for noncompliance

² *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

with rules and orders related to discovery. Sanctions could range from an order compelling discovery to an order prohibiting the offending party from offering evidence not disclosed. Rule for Military Commissions (R.M.C.) 701(l)(3).

According to the most recent trial schedule, the Defense is scheduled to litigate the unlawful influence motion during the week of September 22, 2008. The defense cannot possibly litigate this motion until it has access to all of the relevant witnesses and evidence, which it timely requested over three months ago.

7. Request for Oral Argument: The Defense requests oral argument to allow for thorough consideration of the issues raised by this motion. RMC 905(h) provides: "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions." Specifically, the Defense would request the opportunity to argue this motion on September 22, 2008, as it anticipates the prosecutions' continued objection to disclosing the requested information, which is necessary to litigate the defense motion to dismiss for unlawful influence.

8. Conference with Opposing Counsel: The Defense has conferred with the Prosecution, which opposes this motion.


9. Attachments:

- A. 20 May 2008 Joint Defense Request for Discovery Related to Unlawful Influence
- B. Ruling on Motion to Dismiss D-026
- C. Hamdan Record


Respectfully submitted,

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Attachment A



DEPARTMENT OF DEFENSE
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20 May 2008

MEMORANDUM FOR Prosecution Team, *U.S. v. Mohammed et al.*

SUBJECT: Joint Defense Request for Discovery Related to Unlawful Influence

On behalf of Defendants Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Bin al Shibh, Ali Abdul Aziz Ali and Mustafa Ahmed Adam al Hawsawi, the defense requests you provide discovery related to the specific issue of whether unlawful influence tainted the charging and referral process in this case.

The defense request is made in good faith based facts established in the pre-trial litigation in *U.S. v. Hamdan*, which resulted in the disqualification of the Legal Advisor, BG Hartmann. The military judge declined to dismiss the charges and specifications in *Hamdan* because the case had already been referred when General Hartmann assumed the role of Legal Advisor and thus, "had been shielded from General Hartmann's influence." In contrast, the case against these five defendants was preferred and referred during General Hartmann's tenure. The military judge questioned General Hartmann's ability to perform his duties in a neutral and objective manner in light of his public comments and the pressure he placed on the prosecution; duties which included considering whether to recommend death referrals for some or all of these defendants to the Convening Authority.

The materials requested by the defense are relevant and material to its ability to present a claim of unlawful influence. If you intend on withholding any of the requested materials, the defense respectfully requests a written acknowledgement specifically identifying the documents withheld and the bases for your decision not to disclose the requested materials. It is the defense's position that R.M.C. 701(k) does not apply to the Legal Advisor but, rather, as the plain language states to counsel, i.e., counsel properly exercising their prosecutorial function. Consequently, the defense requests that such communications from the Legal Advisor to members of the prosecution be disclosed. It is not the defense's intention to discover the prosecution's legal strategy or to gain a tactical advantage through access to its internal processes. The defense merely seeks to uncover the nature and extent of any unlawful influence with respect to these particular defendants.

In the military court-martial system, the government has the responsibility to take remedial action to ameliorate the impact of unlawful command influence or risk the dismissal of charges. There is an analogous need for remedial action in the context of military commissions, particularly when Congress attempted to insulate the prosecution from such pressure. 10 U.S.C. 949b (2006). The Court of Appeals for the Armed Forces has suggested that remedial actions might include the "transfer of responsibility for the disposition of charges to commanders not subject to the influence, . . . and the use of discovery and pretrial hearings to delineate the scope and impact of unlawful command influence." *U.S. v. Simpson*, 28 M.J. 368, 373-74 (2003). It in



the interests of all parties involved to honestly assess whether unlawful influence or the perception of unlawful influence has affected these proceedings.

The defendants request, by and through their detailed defense counsel, the production of the discovery itemized below, or the opportunity to inspect, copy, or photograph the requested materials. The term "communication" includes memorandums, correspondence, e-mails, meeting minutes, summaries of conversations later reduced to writing, as well as, the content of conversations, even in the absence of written preservation. The defense specifically requests:

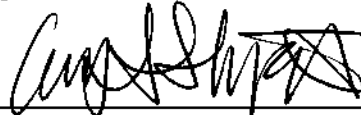
- (1) The contents of all communications between the Legal Advisor, BG Hartmann, and the present and former Chief Prosecutors and/or their subordinates relating to the charging and referral process of these five defendants, including but not limited to:
 - a. Direction from the Legal Advisor regarding the type of evidence that the prosecution should consider in reaching its charging decisions;
 - b. Direction from the Legal Advisor regarding the nature and substance of the charges which should be preferred;
 - c. Any attempt by the Legal Advisor to direct members of the Office of the Chief Prosecutor to use evidence obtained by torture or which prosecutors otherwise believed to be inadmissible in reaching their charging decision; and
 - d. Direction from the Legal Advisor regarding the order in which cases should be tried or referred.
- (2) The contents of all communications between the Legal Advisor and the former General Counsel for the Department of Defense regarding the charging and referral process of these five defendants, including but not limited to:
 - a. Direction from the General Counsel regarding the nature of the charges to be preferred;
 - b. Direction from the General Counsel regarding whether such defendants should be eligible for the death penalty;
 - c. Direction from the General Counsel whether the prosecution should rely on evidence obtained through torture or coercion or other evidence individual prosecutors believed to be inadmissible; and
 - d. Direction from the General Counsel regarding whether political factors influenced the timing and nature of the preferral and referral decisions.
- (3) The contents of all communications between the Legal Advisor and the Acting General Counsel for the Department of Defense regarding the charging and referral process of these five defendants, including but not limited to:
 - a. Direction from the Acting General Counsel regarding the nature of the charges to be preferred;
 - b. Direction from the Acting General Counsel regarding whether such defendants should be eligible for the death penalty;

- c. Direction from the Acting General Counsel regarding whether the prosecution should rely on evidence obtained through torture or coercion or other evidence individual prosecutors believed to be inadmissible; and
 - d. whether political factors influenced the timing and nature of the preferral and referral decisions.
- (4) The contents of all pre-referral communications between the Legal Advisor and the current Convening Authority involving specific substantive details regarding the decision to prefer charges against these five defendants;
- (5) The contents of all pre-referral communications between the Convening Authority and the former Department of Defense General Counsel, the current Acting General Counsel, the Secretary of Defense or individuals acting as his representatives, the Vice President or individuals acting as his representatives, or any other member of an executive branch agency relating to the charging decision and referral process involving these five defendants;
- (6) Any and all notes, minutes or memorandums prepared by the Senior Oversight Group or the Special Detainee Follow-Up Group or any other working group involving the Legal Advisor, his current and former supervisors, the Convening Authority and the Secretary of Defense, regarding the decision to prefer charges against the five defendants, the timing of the preferral decision, the decision to recommend a capital referral, the timing of a capital referral;
- (7) A copy of the complaint, including any attachments, filed by the former Chief Prosecutor with the Convening Authority;
- (8) The results of the Tate Commission investigation including witness statements, summaries of their interviews and any other information that the Commission considered in reaching its findings;
- (9) A copy of the Investigator General's Complaint filed by the former Chief Prosecutor in September 2007 and the results of any investigation formal or informal addressing his allegations; and
- (10) A copy of any "gag order" issued by the Legal Advisor to the Convening Authority, or any one on his staff, to the OMC Chief Prosecutor, the OMC-P office as a whole, or the individual prosecutors in this case, ordering said individuals not to discuss the matter of unlawful command influence and/or the matter of internal office dissension between Col Morris Davis and other prosecutors and the Legal Advisor. If said order was delivered orally, defense requests a memorandum indicating the date, time and place such order was issued (and reissued, if applicable) and the general content of the order and to whom it applied.

As you are aware, under federal law, the prosecution not only has a duty to disclose favorable information, but also, to discover it. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) and *Giglio v. United States*, 405 U.S. 150 (1972). Military courts have extended this duty to the government

as well: "The Government has a duty to use good faith and due diligence to preserve and protect evidence and make it available to an accused." *U.S. v. Kern*, 22 MJ 49, 51 (CMA 1986) Accordingly, the defense requests that the prosecution attempt to locate and preserve any evidence related to the charging and referral process in this case. Specifically, the defense requests the Chief Prosecutor order his counsel to identify and preserve all e-mail correspondence relating to the charging process in this case. The defense looks forward to speaking with members of the prosecution regarding how to best facilitate the release of these materials.

Respectfully submitted,

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Attachment B

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D-026
RULING ON MOTION
TO DISMISS (UNLAWFUL INFLUENCE)

9 May 2008

The Defense has moved the Commission to dismiss all charges and specifications with prejudice, or in the alternative, to disqualify the Convening Authority and the Legal Advisor to the Convening Authority from any further participation in the case as a result of Command Influence on the Chief Prosecutor and other Prosecutors in the case. The Government opposes the motion, arguing that the conflict between General Thomas Hartmann (Legal Advisor to the Convening Authority) and Colonel Morris Davis (formerly the Chief Prosecutor of the Office of Military Commissions) and his staff did not amount to unlawful influence. The Commission heard the testimony of Colonel Morris Davis, USAF, former Chief Prosecutor; Major General John Altenberg, US Army (Ret) and former Appointing Authority; Major (Ret) Michael Berrigan, Deputy Senior Defense Counsel, Office of Military Commissions (OMC), and received various items of documentary evidence in open court at Guantanamo Bay, Cuba on 28-29 April 2008.

FINDINGS OF FACT: In connection with this motion, I find the following facts to be true:

WITH RESPECT TO COLONEL MORRIS DAVIS AND GENERAL THOMAS HARTMANN

1. Colonel Morris Davis traveled to Washington DC in August of 2005 to interview with DoD General Counsel Mr. Jim Haynes for the position of Chief Prosecutor, Office of Military Commissions.
2. During the interview, Colonel Davis observed that the reputation of the commissions for fair treatment might be enhanced if there were some acquittals, as there had been in Nuremburg. Mr. Haynes responded "We can't have acquittals. We've got to have convictions. We can't hold these men for five years and then have acquittals," or words to that effect. Colonel Davis was surprised that Mr. Haynes did not appear to have considered the possibility of acquittals. Colonel Davis also opined that OMC needed to be more engaged with the media, and Mr. Haynes was happy to hear that. Notwithstanding the exchange about acquittals, or perhaps because of it, Colonel Davis was offered the job. Colonel Morris affirmatively denies that this statement had any impact on any of the decisions he made in Mr. Hamdan's case.
3. Colonel Davis reported for duty as Chief Prosecutor in September of 2005. At that time Mr. Haynes was not in his supervisory chain, and so Colonel Davis did not consider the remark about acquittals to be from someone who would have authority over him. Military Commission Instruction (MCI) #3 required Davis to report to the Legal Advisor, who reported to the Appointing Authority. MCI #3 also indicated that the "chief prosecutor shall direct the overall prosecution effort."

4. Soon after reporting for duty, Colonel Davis learned about some dissension in the office prior to his arrival, as a result of the "Preston Carr" memo, written by an Air Force officer previously assigned there. He was eager to settle the prosecutors down and assure them of his policies, apparently in light of the disturbance Carr had occasioned. He met with them individually, and, among other things, told them that they would not be pushed to use any evidence that had been gained by the use of torture, waterboarding, or anything else they considered inappropriate. He invited his prosecutors to come and speak to him if they had any questions about their cases or their evidence. Colonel Davis got very little supervision from anyone during the first eighteen months or so of his tour as Chief Prosecutor. Indeed, he sometimes felt that nobody cared how he did his job. During this period, Colonel Davis was rated by the Appointing Authority and Mr. Haynes, both of whom described his performance in glowing terms.

5. About 28 September of 2006, he attended a meeting of the Senior Oversight Group, held in the office of Deputy Secretary of Defense Gordon England. During one of these meetings, Mr. England said "there could be strategic political value in getting some of these cases going before the [November 2006] elections. We need to think about who could be tried" or words to that effect. The commission takes judicial notice that the Supreme Court issued *Hamdan v. Rumsfeld* in June 2006 and that the Military Commissions Act was not signed until late October 2006. Consequently, there was no possible way in which any military commissions case could be referred, much less brought to trial, before the November 2006 elections.

6. Mr. Haynes immediately jumped into the conversation and corrected Mr. England by saying "There is only one person in this room who can make those decisions, and that is Colonel Davis. Charging decisions are his alone" or words to that effect. Everyone present seemed to agree, and Colonel Davis viewed the remark as an opinion, rather than a command. Colonel Davis affirmatively denies that this statement had any effect on any decision he made with respect to Mr. Hamdan's case.

7. During the same meeting, then-Under Secretary of Defense for Intelligence Mr. Steve Cambone opined that Department of Defense (DoD) attorneys were not sufficiently experienced to handle these cases, and that they needed to get some Department of Justice (DOJ) attorneys involved. Although no DOJ attorney had made an appearance in a military commission hearing before that date, they have since been assigned to military commission trial teams. Colonel Davis affirmatively denies that this statement had any impact on any decision he made in the Hamdan case.

8. While at the time certain "High-Value Detainees" were in the custody of the CIA, Colonel Davis believed they would ultimately come into DOD hands, and that their trials would be assigned to his prosecutors. In September of 2006 the HVD's were transferred to DOD custody, and at that point many people became interested in the OMC Prosecutors and how they performed their duties.

9. On 7 September 2006, as the MCA was being drafted, Colonel Davis was invited to the office of an old Air Force friend, now Senator Lindsey Graham, to discuss the pending legislation. He met for about two hours with Senate Staffers, and more briefly with Senators Graham and McCain. During this meeting, Senator McCain asked Colonel Davis what he needed to do the

job right, and he replied that he needed protection for the independent exercise of judgment by both prosecutors and defense counsel. Colonel Davis had in mind, as he made this observation, the comments of Mr. Haynes and perhaps others he had heard during the course of his many meetings. He was invited to draft some language, and he proposed the language that now appears at MCA §949b(a)(2)(C) "No person may attempt to coerce or, by any unauthorized means, influence—the exercise of professional judgment by trial counsel or defense counsel." The Military Commissions Act was passed on October 17, 2006, and signed into law soon thereafter.

10. On January 9, 2007, Mr. Haynes' nomination for a seat on the Fourth Circuit Court of Appeals was withdrawn, apparently in large part because of a memo he had written regarding the use of torture on detainees. Later that day, Mr. Haynes called Colonel Davis and asked how soon charges could be prepared against David Hicks. Colonel Davis reported that there were still many steps to be put in place before anyone could be charged. These included the issuance of the Manual for Military Commissions (MMC) and the DOD Trial Regulations, which would include the elements of the offenses, and the appointment of a Convening Authority. Mr. Haynes pressed Colonel Davis for an answer, and he finally opined that he might be able to have charges ready within two weeks after receiving the MMC.

11. Within thirty minutes of this call, Mr. Dell'Orto, the Principal Deputy General Counsel, called to assure Colonel Davis that Mr. Haynes had been out of line, and to disregard everything Mr. Haynes had said.

12. Two weeks after the MMC was issued, Mr. Haynes called again to inquire about charges for David Hicks, and asked if others could also be charged. Colonel Davis responded that there were others who could also be charged. These included Hamdan and Khadr. All three had previously been charged before military commissions.

13. Colonel Davis considered this insistence on speedy processing to be premature. There was still not a complete process for the trial of detainees, and there was still no Convening Authority in place who could refer charges even after they were prepared and sworn.

14. Mr. Hamdan's case had first been referred to trial on 13 July of 2004. The Supreme Court issued its decision in *Hamdan v. Rumsfeld* on 29 June 2006. The Military Commissions Act was signed and became effective in October, 2006, and charges were sworn again on 2 February 2007, and referred for trial on 10 May 2007. This Commission dismissed the charges on 4 June, and the Prosecution filed a Motion for Reconsideration on 8 June. Brigadier General Hartman reported for duty as Legal Advisor to the convening Authority on 2 July 2007. On 17 August 2007, this Commission agreed to reconsider the evidence of jurisdiction over Hamdan.

15. Brigadier General Hartmann first met Colonel Davis on 2 July, 2007, while Colonel Davis was about to undergo surgery, followed by a month's convalescent leave. During his absence, General Hartmann began visiting the Prosecutor's Office, asking counsel about their cases, and requiring detailed reports regarding the evidence, witnesses, and level of counsel preparation to try the cases. In Colonel Davis's opinion, General Hartmann took micro management to the level of "nano-management" which amounted to "cruel and unusual punishment."

16. During Colonel Davis's nearly month-long absence for convalescence, LTC Britt called him at home nearly daily to discuss office business. Either LTC Britt or Colonel Davis described General Hartmann's conduct and demands as "cruelty and maltreatment." During the same period of convalescence, General Hartmann called Colonel Davis at home, questioning his leadership, his Deputy's integrity, the general quality of the prosecution shop's work, and giving him specific direction about needed improvements. He punctuated his demands with statements such as "Am I making myself clear, Colonel?" Colonel Davis was shaken, and offered to resign the next day. General Hartmann backed off and assured Colonel Davis that there was no need for that.

17. On 18 July General Hartmann announced that *he* was going to select the next cases to go forward. He wanted cases that would be "sexy" enough to capture the public interest, or cases in which an accused might have blood on his hands, rather than cases involving low level actors transporting documents, etc. "Sexy" was a term then in use in Colonel Davis's office that General Hartmann had adopted. In a meeting in the Prosecution war room on 19 July, General Hartmann announced to all in attendance that he wore two hats: one as Legal Advisor to the Convening Authority, and one in charge of the prosecution.

18. As a result of concerns about what was going on in his office, Colonel Davis returned to work after only 18 days of convalescent leave, a week earlier than he had intended.

19. On 15 August 2007 a meeting was held between Colonel Davis, General Hartmann, and various assistants and representatives of other agencies. Anticipating a favorable decision from the Court of Military Commission Review (CMCR) in the near future, General Hartmann directed that three cases be ready to refer the day that decision was issued. Colonel Davis objected that three cases could not be ready by that date, and thought it odd that the Legal Advisor should be directing a particular number of cases to be referred on a date certain. General Hartmann stopped the discussion by saying "I said we are going to have three cases ready on that day. Does everyone understand me?"

20. On a number of occasions between July and September of 2007 General Hartmann accentuated his position of authority over Colonel Davis by explicit reference to the difference in rank, with phrases such as "Do you understand me, Colonel?" and "Am I making myself clear, Colonel?" On other occasions during the same period of time, the two often had productive, collegial and mutually satisfying discussions about the best way forward in trying these cases. They sometimes laughed together, enjoyed sharing personal, professional and family discussions, and seemed (to Colonel Davis) to be working well together on Commissions matters.

21. General Hartmann had no active involvement in the Hamdan case because it had already been referred for trial and was in the hands of this military judge before General Hartmann reported for duty as the Legal Advisor. Sometime in August of 2007, General Hartmann received a call from Mr. Haynes, who reported that Hamdan's civilian counsel was interested in a pretrial agreement. Mr. Haynes apparently directed General Hartmann to personally conduct the negotiations. When Colonel Davis offered to have the Hamdan counsel brief him on the case and help prepare him for the negotiations, he declined the offer.

22. Before General Hartmann arrived, his predecessor had reached a pretrial agreement in the case of David Hicks without any consultation with or advice from Colonel Davis, who did not learn of the agreement until he arrived in Guantanamo Bay for what he expected to be an arraignment. On that occasion Colonel Davis objected publicly to having been bypassed in the negotiations, and was later counseled privately by the Convening Authority for having done so.
23. The tensions between Colonel Davis and General Hartmann continued to increase, with General Hartmann becoming, in Colonel Davis' opinion, much too deeply involved in the operations of the Chief Prosecutor's Office. General Hartmann wanted a training program to enhance the prosecutors' trial skills, detailed briefs on the witnesses and evidence in each case, including its weaknesses, who they were, and what they would say, and he wanted to know the details of the prosecutors' closing arguments.
24. After General Hartmann's arrival, he and Colonel Davis had numerous discussions about the trial of these cases. In one discussion about the use of testimony obtained by coercive techniques, General Hartmann questioned Colonel Davis's authority to make decisions about the use of such evidence. General Hartmann considered all such evidence potentially admissible, and wanted the judges to determine the matter. Colonel Davis was ethically opposed to using such evidence in nearly every case. Colonel Davis's standard was "reliable and in the interests of justice."
25. In August of 2007, Colonel Davis and General Hartmann traveled together, and General Hartmann expressed his disappointment with the speed at which the trials were moving. General Hartmann wanted the trials to get moving, even if it meant using closed sessions to admit classified evidence, while Colonel Davis preferred the lengthy process of classification review and inter-agency coordination, so that the cases could be tried using declassified evidence.
26. LCDR Stone, the Assistant Trial Counsel in this case, was also bothered by General Hartmann's demands, and specifically by his expressed intent to negotiate single-handedly with the defense. He sought an ethics opinion from the Ethics Division of the Judge Advocate General of the Navy over this issue, and offered to meet with General Hartmann to explain how the General was causing himself an ethical conundrum. LCDR Stone also drafted a letter to the editor of the Wall Street Journal as an expression of this frustration.
27. At length, Colonel Davis responded to this pressure from General Hartmann by writing a complaint, and leaving it on the desk of Judge Crawford, the Convening Authority. She forwarded it to General Hartmann's supervisor, Mr. Haynes, and the complaint resulted in a formal investigation by a three-officer panel headed by Brigadier General Tate.
28. Between 6 and 7 September 2007, the "Tate Commission" interviewed a number of people with knowledge of the dispute between General Hartmann and Colonel Davis, and examined various documents and authorities. The Tate Commission concluded that General Hartmann's supervision of Colonel Davis was authorized by regulation, that the SECDEF was authorized by statute to publish that regulation, and that General Hartmann's efforts to influence Colonel Davis were therefore "authorized."

29. In early October 2007, Colonel Davis was invited to Mr. Haynes' office to discuss the complaint and its resolution, and was there given an appointing letter for the first time since he had entered upon his duties. Mr. Haynes excused himself from the meeting, and Mr. Dell'Orto delivered the letter and the news. The appointing letter indicated that he was to work for the Legal Advisor, and that the Legal Advisor was to work for the DoD General Counsel. Mr. Dell'Orto informed Colonel Davis that this decision had been discussed among, and agreed to by, the Judge Advocates General of all the Services, and by Senator Graham. Because Mr. Haynes, in Colonel Davis's mind at least, advocated both the use of torture and the use of evidence obtained by torture, Colonel Davis found it impossible to continue working with Mr. Haynes as a supervisor.

30. The next day, Colonel Davis resigned from his assignment as Chief Prosecutor. He later spoke to the Judge Advocate General of the Air Force and to Senator Graham, and learned that they had not concurred in the solution described above, but that they had merely been informed of the decision and offered a chance to comment. Major General Rivas had affirmatively objected to the solution and taken Colonel Davis' side.

31. On September 11, 2007, Colonel Davis filed a 42 page complaint with the Department of Defense Inspector General (IG) in which he repeated many of the assertions he had previously made to the Convening Authority. The ID relayed the case to the DOD General Counsel because it dealt with "legal" issues. When Mr. Haynes reported to the IG that the matter had been resolved, the IG's investigation was also closed.

32. In an article published in February of 2008, Colonel Davis wrote that he had resigned because he concluded that "full, fair and open trials were not possible under the current system." This conclusion apparently referred to a system in which the Chief Prosecutor reported to and was supervised by a demanding legal advisor, whose own boss was a political appointee who supported torture and the use of evidence gained by torture.

33. In the months since September of 2007, both General Hartmann and Colonel Davis have written and spoken publicly about the conflict between them over the control of the prosecutor's office. They have written op-ed pieces, appeared on radio talk shows and otherwise publicly aired their disagreement now raised again in the motion before the Commission.

34. The Commission takes note of the 28 February 2008 article in Harper's Magazine entitled "The Great Guantanamo Puppet Theater" that alleges political influences over the trials and publicly challenges General Hartmann's ability to continue to act as the Legal Advisor to the convening Authority.

35. General John D. Altenburg, Jr. (MG, USA, Ret.), a Government witness, served as the Appointing Authority for Military Commissions (a predecessor office to the current Convening Authority for Military Commission) from March 2004 thru November 2006. He described the intent of the MCA drafters to have military commissions mirror the well-understood and familiar military justice model that all the players would be familiar with. He described the role of the SJA in supervising trial counsel, setting goals, establishing standards and procedures for

prosecutors, supervising and sometimes conducting pretrial negotiations in military law. At the same time he acknowledged that the SJA cannot “supervise the trial counsel too actively” or he will risk disqualification as the SJA.

WITH RESPECT TO THE CONVENING AUTHORITY, MRS SUSAN CRAWFORD

36. Judge Susan Crawford, formerly a Judge of the Court of Appeals for the Armed Forces, became the Convening Authority on February 4, 2007. She was appointed by the Secretary of Defense, and reports to the Deputy Secretary of Defense. She does not supervise any personnel within the OMC. Colonel Davis was already in place when she assumed duties as the CA.

37. Judge Crawford has never received input, orders, instructions or suggestions from the Secretary of Defense, his Deputy, or any other person having to do with the trial of detainees by military commissions. Her conversations with the Deputy Secretary have never addressed individual cases being tried or being considered for trial by military commission.

38. Judge Crawford became aware of Colonel Davis’s complaint about interference from General Hartmann sometime after July of 2007. Because General Hartmann did not work for her, she forwarded the complaint to the DOD General Counsel for his consideration. This resulted in the Tate Commission described above.

39. Judge Crawford has had very few conversations with Mr. Haynes about the commissions process and no conversations about individual cases, types of cases, charging decisions or outcomes. She has never met Stephen Cambone or had any communications with him. She has never spoken to the Vice President or anyone in his office about military commissions

THE LAW OF UNLAWFUL INFLUENCE UNDER THE MCA

Relevant Portions of the MCA include:

§949a authorizes the Secretary of Defense to establish pretrial, trial and post-trial procedures for cases triable by military commission, and requires that “pre-trial, trial, and post-trial procedures, including elements and modes of proof . . .” To the extent the Secretary considers practicable, these procedures “shall apply the principles of law and rules of evidence in trial by general court-martial.”

§949b as noted above, prevents “any person” from coercing, or, by unauthorized means, influencing the exercise of professional judgment by the trial counsel or defense counsel.

§948k(d) establishes the offices of Chief Prosecutor and Chief Defense Counsel” and requires them to be fully-qualified military judge advocates.

The Regulations for trial by Military commissions were issued on April 27, 2007. The Regulations contain these relevant provisions:

1-4: 10USC §949b prohibits unlawful influence in military commissions proceedings. All convening authorities, legal advisors, trial counsel and others involved in the administration of military commissions must avoid the appearance or actuality of unlawful influence and otherwise ensure that the military commission is free of unlawful influence.

2-1: The Office of the Convening Authority for Military Commissions is established in the Office of the Secretary of Defense under the authority, direction, and control of the Secretary of Defense. The Office of the Convening Authority shall consist of the Director of the Office of the Convening Authority, the convening authority, the legal advisor to the convening authority, and such other subordinate officials and organizational elements as are within the resources of the Secretary of Defense.

8-6a: The Chief Prosecutor shall supervise all trial counsel and other personnel assigned to the Office of the Chief Prosecutor, including any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

8-6b: Individuals appointed, assigned, detailed, designated or employed in a capacity related to the conduct of military commission proceedings conducted in accordance to the M.C.A. and M.M.C. shall be subject to the relationships set forth below. Unless stated otherwise, the person to whom a person "reports" as set forth below, shall be deemed to be such individual's supervisor and shall, to the extent possible, fulfill all performance evaluation responsibilities normally associated with the functions of direct supervisor in accordance with the subordinate's Military Service performance evaluation regulations.

1. Chief Prosecutor: The Chief Prosecutor shall report to the legal advisor to the Convening Authority.

RMC 406 requires the legal advisor to the convening authority to provide consideration and advice to the convening authority before any case may be referred to trial by military commission, and specifies the contents of that advice. This section repeats nearly verbatim the corresponding section of the Manual for Courts Martial, i.e. RCM 406.

RMC 705 authorizes the "accused, defense counsel, the legal advisor, convening authority, or their duly authorized representatives" to initiate pretrial agreement discussions.

RMC 1106 requires the legal advisor to provide a recommendation prior to action by the convening authority on a case. No one can serve as the legal advisor under this rule who has acted as a trial counsel on the case. There must be a specific recommendation by the legal advisor as to the action to be taken by the convening authority on the sentence.

UNLAWFUL COMMAND INFLUENCE UNDER THE UCMJ

Congress and the military courts have demonstrated concern not only with eliminating actual command influence, but also with "eliminating even the appearance of unlawful command influence from courts-martial." *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979) "Once unlawful command influence is raised, 'we believe it incumbent on the military judge to act in

the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings.” *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F. 2002). “[D]isposition of an issue of unlawful command influence falls short if it fails to take into consideration . . . the appearance of unlawful command influence at courts-martial.” *Id.* Even if there is no actual command influence, “there may be a question whether the influence of command placed an ‘intolerable strain on public perception of the military justice system.’” *Id.* at 42-43.

The threshold for raising the issue at trial is low, but more than mere allegation or speculation. *United States v. Johnston*, 39 M.J. 242, 244 (CMA 1994). The issue can be raised at trial by “some evidence” of facts which, if true, would constitute unlawful command influence, and that the unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings. *United States v. Ayala*, 43 M.J. at 300 (C.A.A.F. 1995); *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991). The “appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.” *United States v. Cruz*, 25 M.J. 326 (CMA 1987). But “proof of command influence in the air” will not do. *United States v. Thomas*, 22 M.J. 388, 396 (CMA 1986), cert denied 479 U.S. 1085 (1987).

Once the issue is raised at the trial level, the burden shifts to the Government, which may either show that there was no unlawful command influence or show that the unlawful command influence will not affect the proceedings. *United States v. Gerlich*, 45 M.J. 309, 310 (1996). Once the issue is raised by some evidence, there is a rebuttable presumption of prejudice and a judge must be ‘persuaded beyond a reasonable doubt that the findings and sentence have not been [or will not be] affected by the command influence.’ After the burden shifts to the Government, the Government may carry its burden (1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading the military judge or the appellate court that the facts do not constitute unlawful command influence; (3) if at trial, by producing evidence proving that the unlawful command influence will not affect the proceedings; or (4), if on appeal, by persuading the appellate court that the unlawful command influence had no prejudicial impact on the court-martial. *United States v. Stombaugh*, 40 M.J. 208, 214 (CMA 1994); *United States v. Argo*, 46 M.J. at 457 (C.A.A.F. 1997); *United States v. Biagase*, 50 M.J. 143, 150-151 (C.A.A.F. 1999).

ANALYSIS

The Commission notes that decision of military courts implementing the UCMJ are not binding on it as it interprets the Military Commissions Act (10 USC §948b(c)). But since there is no established body of case law construing the provisions of §949b(a)(2)(C), this Commission properly looks to military law for guidance. The Commission finds that Congress had the intent to protect military commission participants from unlawful influence, and specifically from political influence, and that its purpose in doing so was to protect the integrity of the proceedings and enhance their reputation in the public view. The Commission generally accepts the military law of command influence as an appropriate model for decisions under the comparable provision of the MCA. But because Congress took special steps in the MCA to protect the prosecutors from unlawful influence, the general military model, in which the SJA properly supervises and

directs the prosecution, military law's general acceptance of SJA supervision of trial counsel must be moderated somewhat to prevent that supervision from becoming not merely intrusive, but coercive or unauthorized. With these considerations in mind, the Commission concludes that:

With respect to the motion to dismiss the charges and specifications:

1. The Defense has not raised the issue of unlawful influence with respect to the decision to swear and refer charges against Mr. Hamdan, who has always been among the first military commission defendants to be charged. He was originally charged in 2004, and charged again in 2007 before General Hartmann arrived for duty. This case was shielded from General Hartmann's influence because this Military Judge already had control of the case before his arrival. If an appellate court should determine that the Defense has raised the issue with respect to the referral of this case to trial, the Commission is satisfied that the Government has shown beyond a reasonable doubt that the influence has not affected these proceedings.

2. While pressure from Mr. Haynes may have resulted in the case's referral earlier than might otherwise have occurred, it did not cause to be referred for trial a case that would not otherwise have been referred. Hamdan was first charged in 2004, and clearly would have been charged again, with or without Mr. Haynes's prodding. Colonel Davis also expressly denies that his decision to refer this case to trial was influenced by any pressure, and asserts that he was personally convinced that this case should have been referred to trial. The Commission agrees with this declaration and finds it to be true.

The motion to dismiss all charges and specifications is DENIED.

With respect to the motion to disqualify the Convening Authority:

The Defense has not raised the issue of unlawful influence with respect to any actions of the Convening Authority. Judge Crawford was never subject to, nor did she subject any Prosecutor to, unlawful influence with respect to any decision in this case. Her decisions to deny expert assistance requested by the defense reflect a careful adherence to the requirements of military law, and invite resubmission and continued debate. There is no evidence that any of these decisions reflect unlawful influence by General Hartmann. The Motion to disqualify the Convening Authority is DENIED.

With respect to the motion to disqualify the Legal Advisor:

1. The Defense has offered substantial evidence that the Legal Advisor to the Convening Authority was closely associated or identified with the Prosecution. General Hartmann's efforts to energize, educate, and professionalize the Prosecutors were clearly within the scope of his proper duties as Legal Advisor, as were his efforts to familiarize himself with the cases being prepared for trial. Robust sentencing and training programs in trial advocacy seem entirely appropriate for the Legal Advisor to institute and insist upon.

2. The Legal Advisor is specifically authorized to *initiate* pretrial agreement negotiations

by RMC 705(d)(1), and General Hemingway's involvement in *conducting* negotiations personally in the Hicks cases certainly created a precedent upon which General Hartmann may have relied. But the pretrial negotiations in this case were initiated by the Defense, via a phone call to Mr. Haynes. If General Hartmann personally participated in negotiations (it is not clear whether the planned negotiations actually took place), he would have done so at the peril of compromising his continued objectivity as the Legal Advisor.

3. Although the duties of the Legal Advisor are largely comparable with those of the Staff Judge Advocate in military practice, Congress has inserted in the MCA specific provisions (1) establishing a Chief Prosecutor, and (2) protecting Prosecutors against coerced or unauthorized influence in the exercise of their professional judgment. This language is not found in the UCMJ, and must be construed to reflect a Congressional determination that Prosecutors in military commissions require greater protection from political pressure than trial counsel in a court-martial require.

4. The Commission is troubled by the following actions of the Legal Advisor that reflect too close an involvement in the prosecution of commission cases:

(a) While RMC 705 authorizes the Legal Advisor to *initiate* pretrial agreement negotiations, General Hartmann intended to *personally conduct* them without any consultation with or the company of the trial counsel. This worked successfully when an agreement was reached in Hicks, but may compromise the Legal Authority's objective position under other circumstances.

(b) Telling the Chief Prosecutor (and other prosecutors) that certain types of cases would be tried, and that others would not be tried, because of political factors such as whether they would capture the imagination of the American people, be sexy, or involve blood on the hands of the accused, suggests that factors other than those pertaining to the merits of the case were at play.

(c) Appearing to direct, or attempting to direct, the Chief Prosecutor to use evidence that the Chief Prosecutor considered tainted and unreliable, or perhaps obtained as the result of torture or coercion, was clearly an effort to influence the professional judgment of the Chief Prosecutor. While it is true that the trial judge is ultimately the gatekeeper for each item of evidence, each Prosecutor also has an ethical duty not to present evidence he considers unreliable.

(d) Challenging the Chief Prosecutor's decision to take to trial first the cases he considered most serious suggests an improper influence on the Chief Prosecutor's discretion.

(e) Making public statements in which he aligned himself with the prosecution, took credit for their success and indicated that he is their leader.

(f) "Nanomanagement" of the Prosecutors' office to such an extent that it could be considered "cruelty and maltreatment" suggests a greater level of involvement than a Legal Advisor can properly engage in without becoming identified as part of the prosecution.

(g) The Legal Advisor's intimate involvement in the details of prosecutorial decision making have led one prosecutor to resign, another to seek ethical guidance from the Navy JAG ethics office, and has led both prosecutors in this case, and their former supervisor, to believe they were being "nano-managed" in both the performance of his duties and the exercise of their discretion.

(h) Finally, the national attention focused on this dispute has seriously called into question the Legal Advisor's ability to continue to perform his duties in a neutral and objective manner. While the public's view of the matter is not controlling, the fact that a national magazine should have called the public's attention to General Hartmann's actions and suggested that he can no longer perform his duties is deeply disturbing.

DECISION AND ORDER

The Commission is not persuaded, beyond a reasonable doubt, that the Legal Advisor to the Convening Authority retains the required independence from the prosecution function to provide fair and objective legal advice to the Convening Authority. These are substantial doubts about that ability based on the length and intensity of the Legal Advisor's involvement with the Prosecution in general, as well as the impact his actions have had on the prosecutors in this case. To ensure that the accused receives the fair and objective advice to which he is entitled during the balance of this case, the motion to disqualify the Legal Advisor to the Convening Authority from further participation in the case of United States vs. Hamdan is GRANTED.

The following additional measures are ordered to ensure the trial is not influenced by unlawful influence and to enhance public confidence in the proceedings:

1. The General Counsel, Department of Defense, is directed to use such means as are at his disposal to ensure that no person who testified before the Tate Commission, or was involved in the litigation of this motion, suffers any adverse consequence, professional embarrassment, unfavorable performance rating, or other disadvantage as a result of such participation. LTC Britt and LCDR Stone are of particular interest to this Commission.

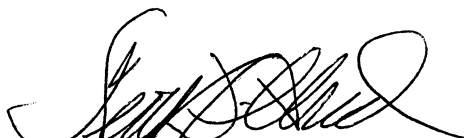
2. The General Counsel, Department of Defense shall appoint a substitute Legal Advisor for the case of United States v. Hamdan. The substitute shall not be a Deputy to, or any other subordinate of, the current Legal Advisor.

3. The Commission here notes that, with the consent of both parties, it received a handwritten note at the conclusion of the litigation of this motion in Guantanamo Bay. The note requested that the transcripts of the testimony of LTC Britt and LCDR Stone be made public, because the Commission indicated in open session that it would consider their recorded testimony before the Tate Commission "as if it had been given in open court." The note was signed by several members of distinguished national newspapers. To ensure that these Trial Counsel are not compromised in their ability to continue to perform their duties as trial counsel in this case, the Commission orders the transcripts of their testimony redacted from public release until the trial is complete. After that point, each Prosecutor may balance all the

competing interests in this matter, and determine whether his testimony before the Tate Commission may or should be released to the public, in accordance with the normal procedure for the release of documents relating to military commission proceedings.

4. The Commission retains control over this matter, and will be alert for evidence of unlawful influence, including retribution of any kind, until authentication of the record of trial. Additional corrective and preventative measures remain within the Commission's discretion until that time, if necessary.

So Ordered.

A handwritten signature in black ink, appearing to read 'Keith J. Allred', with a large, stylized flourish at the end.

Keith J. Allred
Captain, JAGC, USN
Military Judge

Attachment C

1 [LN1 Lindee approached the court reporters.]

2 [Col Davis enters the courtroom.]

3 MJ [CAPT ALLRED]: Colonel Davis, I presume.

4 WIT [COL DAVIS]: Sorry, changed the batting order on me.

5 MJ [CAPT ALLRED]: Okay.

6 **COLONEL MORRIS B. DAVIS, U.S. Air Force, was called as a witness for**
7 **the defense and sworn and testified as follows:**

8 **DIRECT EXAMINATION**

9 **Questions by defense counsel:**

10 Q. [LCDR MIZER]: Could you state your name for the record and
11 spell it?

12 A. [COL DAVIS]: Yes, it's Morris, M-O-R-R-I-S D. Davis, D-A-
13 V-I-S.

14 Q. [LCDR MIZER]: Where do you work, sir?

15 A. [COL DAVIS]: I work at Bolling Air Force Base in
16 Washington, DC.

17 Q. [LCDR MIZER]: And what is your present assignment?

18 A. [COL DAVIS]: My title is Director of the Air Force
19 Judiciary. I oversee justice throughout the Air Force and I serve as
20 the chairperson of the committee on professional responsibility.

21 Q. [LCDR MIZER]: What was your previous assignment?

22 A. [COL DAVIS]: I had Colonel Morris' job as chief
23 prosecutor.

1 Q. [LCDR MIZER]: How long were you in that position?

2 A. [COL DAVIS]: About 25 months, from September 2005 to

3 October 2007.

4 Q. [LCDR MIZER]: I like you to take the judge, if you would,

5 sir, through those two years, beginning with your 2 August 2005

6 hiring interview.

7 A. [COL DAVIS]: Sure, I was--in July of 2005, serving as a

8 Staff Judge Advocate for Headquarters 20th Air Force in Cheyenne

9 Wyoming. I got a phone call from Major General Jack Rise, the Judge

10 Advocate General of the Air Force, asking if I would be interested in

11 a chief prosecutor job. And I just PCS about six months earlier, he

12 said "This is kind of short notice and an odd, but I appreciated it

13 if you consider it." So that was, I don't remember the exact date,

14 middle part--latter part of July, and if I was interested, I was to

15 come to Washington for an interview with----

16 DC [LCDR MIZER]: ----Can you slow down just a little bit,

17 sir.

18 WIT [COL DAVIS]: I'm sorry----

19 DC [LCDR MIZER]: ----with the translation issues.

20 MJ [CAPT ALLRED]: Is there a little set of light there in

21 front of you, red, yellow, and green?

22 [The witness indicated that he does not have any lights in front of

23 him.]

1 MJ [CAPT ALLRED]: Apparently not.

2 WIT [COL DAVIS]: Not that I see.

3 MJ [CAPT ALLRED]: Okay.

4 WIT [COL DAVIS]: Okay, I'm sorry.

5 DC [LCDR MIZER]: Go ahead, sir. I'm Sorry.

6 A. [COL DAVIS]: Sure, prior to coming to Washington, the

7 interview was with Jim Haynes, the DOD General Counsel, prior to the

8 interview or prior to getting the phone call, and in all honesty, my

9 familiarity with military commissions was probably about the same as

10 the general public. I--occasionally would see an article but I had

11 no real in-depth knowledge. So between----

12 MJ [CAPT ALLRED]: ----Colonel, I'm sorry to interrupt you.

13 WIT [COL DAVIS]: Still going to fast?

14 MJ [CAPT ALLRED]: This is all being translated into Arabic,

15 which is about twice as dense a language as English, maybe one and a

16 half times, so you would have to slow down in order for Mr. Hamdan to

17 understand.

18 WIT [COL DAVIS]: Okay.

19 MJ [CAPT ALLRED]: So that the interpreter can keep up, I guess

20 really.

21 A. [COL DAVIS]: So prior to coming to for the interview, I

22 tried to read as much as I could to become familiar with the military

1 commissions, as now, back in that day, there was a website, had a lot
2 of information on, and so I read the directives the instructions.

3 I went out to Yale Law School, it has the thing call Avalon
4 Project, it has a lot of military tribunal type information on it.
5 So I try to read up on Nuremberg and the other similar type
6 tribunals.

7 And then I--we flew to Washington; I believe August 2nd,
8 2005, was a Tuesday. I had an appointment to meet with Mr. Haynes,
9 which took place in his office at the Pentagon.

10 Q. [LCDR MIZER]: Was there anyone else present during that
11 interview?

12 A. [COL DAVIS]: Yes, the entire interview lasted; my best
13 guess is, 30 minutes. Mr. Dan Dell'Orto, who at the time was the
14 principal Deputy General Counsel, now the Acting General Counsel, was
15 present for parts of the interview.

16 Q. [LCDR MIZER]: What, if anything, do you recall about that
17 conversation?

18 A. [COL DAVIS]: It was basically, what I consider a hiring
19 interview, a chance to sit down and talk and for him to get to know
20 me. During the interview, one of the things that I talked about, in
21 the reading that I've done in the week or two leading up to the
22 interview was, in my opinion, was that the government had done a
23 terrible job of telling its side of the story.

1 We allowed the defense and the critics to say, you know,
2 whatever they wanted. From what I saw, large parts of it weren't
3 entirely accurate and the government had their standard, you know "no
4 common" response. I've written an article for military journal,
5 shortly--not too long before that, about how, in my view, is
6 imperative that we be more effectively engaged with the media. So I
7 brought that up with Mr. Haynes. It appeared to me that we had a
8 good story to tell and were doing a poor job of telling it. I
9 remember he leaned forward in his chair and he said "I'm so happy to
10 hear you say that and I agree with you 100 percent." So he was very
11 enthusiastic about having a more aggressive engagement with the
12 media.

13 During that he said that these trials are historic, these
14 trials would be the Nuremberg of our times. And I recall, you know,
15 from reading the Nuremberg cases, you know, there were some
16 acquittals in Nuremberg, so I said as a prosecutor you certainly
17 never go to court aiming for an acquittal, but if there were some
18 acquittals in the commissions that perhaps it might not be a bad
19 thing. It would tend to show the world that these are truly fair
20 trials and at that point, he rocked back on his chair and his eyes
21 got kind of wide.

22 My impression was that this was a thought he hadn't
23 entertained up until that point. And he looked at me and said, "We

1 can't have acquittals. We've been holding these guys for years, how
2 are we going to explain acquittals? We can't have acquittals, we got
3 to have convictions."

4 Q. [LCDR MIZER]: What did you think of Mr. Haynes' comment,
5 at that time?

6 A. [COL DAVIS]: I think he was caught off-guard, like I
7 said, it appeared to me that this was a thought he had never
8 entertained and the prospect of someone showing up here in this
9 courtroom and being found not guilty was just unfathomable for him.

10 Q. [LCDR MIZER]: Now you had a hiring interview with Mr.
11 Haynes, did you work for Mr. Haynes at that time, sir?

12 A. [COL DAVIS]: No, one of the things I looked at in
13 preparing for the interview, the original military commissions
14 instructions, I believe, was number five, laid out the reporting
15 chain. The original military commission instruction number five--
16 number five had the chief prosecutor reporting to the General
17 Counsel's office.

18 As you recalled, Mr. Haynes was nominated for a seat on the
19 4th Circuit Court of Appeals, he was approved by the Senate Judiciary
20 Committee and before he came up for a full vote of the Senate is
21 when--when what became known as the "The Torture Memo," appeared in
22 public and it became an impediment to him. There was an article--a
23 number of articles, critical of Mr. Haynes, one was authored by

1 Senator Ted Kennedy, I believe in the Washington Post, in April 2004,
2 in about 10 days or two weeks after that, Mr. Senator Kennedy's op-
3 ed, Mr. Haynes rewrote military commissions' instruction number five
4 and took himself out of the chain of command. So when I went for the
5 hiring interview in August of 2005, the General Counsel had
6 absolutely no role in the prosecution's chain of command, he had
7 taken himself out of that role.

8 Q. [LCDR MIZER]: Approximately a month later, September 2005,
9 you had your--your first staff meeting, correct?

10 A. [COL DAVIS]: Correct; we, like I said, the interview was
11 August the 2nd, he wanted me in place by Labor Day, so we went back
12 to Wyoming, packed up and actually drove into D.C. on Labor Day
13 weekend, 2005. I replaced Colonel Bob Swain, now Mr. Swain, who is
14 still with the military commissions. Colonel Swain didn't retire
15 immediately. There was a, and I don't recall the exact time line,
16 but about 10 days, 2 weeks after I showed up--sorry.

17 MJ [CAPT ALLRED]: There's a little yellow light here that
18 comes; I'm sorry that you don't have one.

19 WIT [COL DAVIS]: I don't.

20 A. [COL DAVIS]: There is a gap of, like I said, 10 days to 2
21 weeks between my arrival and Colonel Swain's retirement. One of the
22 things that I detected when I got to the office, and you know there--
23 has been widely publicized is before that, there had been a turmoil

1 in the chief prosecutor's office; where some other Air Force
2 prosecutors, in a fairly noisy way, express concerns about feeling
3 compelled to do things they believe were unethical. When I came into
4 the job, my sense was a meeting--what I did, I scheduled meetings
5 with individuals in the office one-on-one. My sense was, people are
6 still kind of leery about what my policy was going to be and how far
7 I was going to push the edge of the envelope and expect them to push
8 the edge of the envelope. So the first----

9 MJ [CAPT ALLRED]: ----Okay, why don't you wait for the next
10 question, I'm not sure if you are going somewhere or not.

11 DC [LCDR MIZER]: Yes, sir.

12 Q. [LCDR MIZER]: Sir, for the record, those--that controversy
13 was that involved the--the so-called "press and call e-mails"?

14 A. [COL DAVIS]: Correct.

15 Q. [LCDR MIZER]: Okay. When you have these discussions with
16 your counsel, did you discuss evidence derived by torture?

17 A. [COL DAVIS]: Yes; that was where I was headed. After the
18 individual meetings and the sense I had that people were, you know,
19 waiting to see what my policies were going to be. The first meeting
20 after I officially took the range as chief prosecutor, I said look,
21 you know we had some problems in the past; I don't want anyone to
22 feel that they're going to be pushed to do something they feel is
23 unethical. I say you know the things I've looked at in my opinion

1 evidence obtained by water-boarding is not reliable evidence. So if
2 you're working on cases that involve evidence obtained by water-
3 boarding, I want to make it clear right now, we're not going to use
4 that evidence.

5 I told them, I thought--to me water-boarding was a no-
6 brainer; you can argue over where the line is, between acceptable and
7 unacceptable, but water-boarding was clearly over that line; and if
8 there were other techniques that made them uncomfortable, I wanted
9 them to come talk to me because I didn't want anyone to feel they
10 were being pressured to do anything unethical.

11 Q. [LCDR MIZER]: Were there specific cases that involved
12 conduct that was over the line, sir?

13 A. [COL DAVIS]: In my opinion, there was.

14 Q. [LCDR MIZER]: And what were those cases, sir?

15 A. [COL DAVIS]: Well at that point, obviously the high-value
16 detainees--has been publicly disclosed now, you know, the water-
17 boarding was limited to the high-value detainees; at that point they
18 were in CIA custody, not DOD custody. I understood that at some
19 point it was likely they will come into our possession but at that
20 point in 2005, it was unclear how many and how many have been
21 subjected to water-boarding. There were some other cases----

22 MJ [CAPT ALLRED]: I'm sorry, what's the question you asked?

1 DC [LCDR MIZER]: Were there individual cases, Your Honor,
2 that he believed that coercion have crossed the line?

3 MJ [CAPT ALLRED]: Okay, the answer is yes.

4 WIT [COL DAVIS]: Yes.

5 Q. [LCDR MIZER]: And what were those cases, sir?

6 A. [COL DAVIS]: The two that pop up fairly readily were
7 Salahi and al Katani.

8 Q. [LCDR MIZER]: Now, sir, during your first year was there
9 any external influence exerted over your office?

10 A. [COL DAVIS]: No, the first year was--it seemed like no
11 one really cared too much of what we did--we had free reign to
12 operate as we saw fit.

13 Q. [LCDR MIZER]: Did that change at some point?

14 A. [COL DAVIS]: Yes, it changed a year later in September
15 2006 with the transfer of the high-value detainees.

16 Q. [LCDR MIZER]: And what changed?

17 A. [COL DAVIS]: Suddenly everybody has strong opinions about
18 how we ought to do our jobs.

19 Q. [LCDR MIZER]: On 8 January 2007, were you contacted by
20 individuals from Attorney General Alberto Gonzalez's office?

21 A. [COL DAVIS]: September--I'm sorry, what was the date
22 again?

1 Q. [LCDR MIZER]: 8 January 2007, sir.

2 A. [COL DAVIS]: Not by his office, but by representatives
3 from Department of Justice.

4 Q. [LCDR MIZER]: Okay. And what did they tell you?

5 MJ [CAPT ALLRED]: I'm sorry, what was the date?

6 DC [LCDR MIZER]: 8 January 2007, Your Honor.

7 A. [COL DAVIS]: That there was a meeting to take place with
8 the Australian embassy to discuss the Hicks case; they want to
9 prepare the Attorney General, kind of a bullet paper, about the Hicks
10 case. Lieutenant Colonel Kevin Shania was the lead prosecutor who
11 prepared what I've referred to as, "the talking paper," that we
12 provided to the Department of Justice and I believe also from the
13 military commissions' side, I believe General Hemingway was also to
14 attend that meeting.

15 Q. [LCDR MIZER]: Did anything happen the next day, 9 January
16 2007?

17 A. [COL DAVIS]: Yes; the first thing to happen was the
18 president announced that he withdrew the nomination of Jim Haynes for
19 the 4th Circuit Court of Appeals; the second thing that happened was
20 that for the first time in my 10 years as chief prosecutor, Mr.
21 Haynes called me to talk about a specific case.

22 Q. [LCDR MIZER]: What did he say?

23 A. [COL DAVIS]: "How quickly can you charge David Hicks?"

1 Q. [LCDR MIZER]: Did he explain why you had to charge David
2 Hicks?

3 A. [COL DAVIS]: He didn't. I expressed some aggravation
4 that--whenever he talked about the Attorney General, he referred to
5 him as "Al". And he said Al--"You gave Al information that you
6 didn't give me and I kind of got blindsided, so in the future,
7 anything Al gets I got to get. But we got to get Hicks charged, how
8 quickly can you charge Hicks?"

9 I explained to him, in my view it was kind of like in
10 Washington, we just build a new ball--in Washington, we just built a
11 new ball park and it would be like trying to play the first game,
12 before you put in the bases and hired an umpire and completed the
13 stadium.

14 At the time he made the call, I explained to him that there
15 are a number of pieces that are required in order to have a
16 proceeding like this. You had to have the statute, which you know the
17 Military Commissions Act had been enacted at that point, you had to
18 have the Manual for Military Commissions, which was particularly
19 important, the statute added material support for terrorism, an
20 offense that didn't exist under the President's Military Orders and
21 obviously, the manual lays out the elements of the offense so it was
22 kind of like--to say we can charge somebody with an offense that we
23 didn't know what the elements were going to be.

1 We also have to have the Regulation for Trial by Military
2 Commissions', the court's rules and probably most importantly, you
3 have to have a convening authority to send the charges to. On that--
4 that day we have one of those five pieces.

5 Q. [LCDR MIZER]: What was Mr. Haynes' response when you said
6 that?

7 A. [COL DAVIS]: It was, "well, how quickly, after you get
8 the manual, could you charge Hicks?"

9 Q. [LCDR MIZER]: Did he offer to get you a copy of the
10 manual?

11 A. [COL DAVIS]: No, we were expressly--the prosecution and
12 defense were expressly excluded from any involvement with the manual,
13 now other people that worked on my team from DOJ and other offices
14 were intimately involved in writing it, but we were expressly
15 excluded.

16 Q. [LCDR MIZER]: Did he discuss other cases being charged
17 that day, 9 January?

18 A. [COL DAVIS]: Not by name, but he asked in addition to
19 Hicks, were there others we could charge at the same time.

20 Q. [LCDR MIZER]: Did he explain why he wanted other cases
21 charged?

22 A. [COL DAVIS]: He didn't expressly explain why my--what
23 seems to be the clear inference was, charging Hicks alone was going

1 to look odd, if he was batched with some others, it would look like
2 part of a group.

3 Q. [LCDR MIZER]: Did Mr. Dell'Orto call you later that day?

4 A. [COL DAVIS]: Yes, it was within 30 minutes of--well let
5 me back, Mr. Haynes insisted--he asked, "How long after you get the
6 manual, can you charge Hicks?" I explained it would take about two
7 weeks. His opinion was two weeks was far too long; we had to do it
8 quicker.

9 I explain that we had to--you know, the manual was a fairly
10 substantial document, we needed time to review it and digest it; then
11 compare it with the evidence that we have--to determine what we can
12 charge and who we can charge.

13 There's also a fairly elaborate vetting process charges go
14 through; once we drafted them, they're reviewed by DOJ, CIA, NSC, a
15 number of other agencies before they are in final form. That takes
16 time, so I said, "my best guess is it'll take about two weeks."

17 Q. [LCDR MIZER]: And then you were called by Mr. Dell'Orto?

18 A. [COL DAVIS]: Mr. Dell'Orto called within 30 minutes and
19 said, "I talked to Jim," and his words were, "I took a wire brush to
20 him, explain to him that he can't be having those kinds of
21 conversations with you; that those are your decisions and not his.
22 So I want you to disregard everything Jim told you."

1 Q. [LCDR MIZER]: When did you next hear from Mr. Haynes?

2 A. [COL DAVIS]: I don't recall the exact date, the manual--
3 my recollection is Secretary Gates sign the manual on the 17th or
4 18th of January and two weeks to the day after that, Mr. Haynes
5 called and said, "Where are the charges on Hicks?"

6 Q. [LCDR MIZER]: What was your response?

7 A. [COL DAVIS]: That we had drafted charges, they were going
8 through this vetting process; we weren't quite ready yet, I felt we
9 would be soon; but more problematic is--as the chief prosecutor, once
10 you swear charges--because we are acting both as the prosecutor and
11 the accuser, we were to forward them to the convening authority and
12 we had no convening authority to forward them to.

13 Q. [LCDR MIZER]: Did General Hemingway contact you about an
14 advance copy of the R.M.C.?

15 A. [COL DAVIS]: It is actually Mr. Haynes during that
16 earlier, 9 January conversation said; he would have General Hemingway
17 send me the part on material support, so we can start working on that
18 in advance of the manual being final.

19 Q. [LCDR MIZER]: What, if anything, do you recall about that
20 advanced copy?

21 A. [COL DAVIS]: My recollection is that it was one-page; the
22 most striking thing was it authorized the death penalty for material
23 support of terrorism. I knew from the Manual--for the Military

1 Commissions Act, you can only adjudge the death penalty where
2 specifically authorized by Congress and Congress hasn't authorized
3 the death penalty for material support; so we were about to publish a
4 manual that will authorize death for an offense that Congress didn't
5 authorize.

6 Q. [LCDR MIZER]: Now, sir, you have previously stated that
7 your office was not involved in drafting of the Rules of Military
8 Commissions, who was drafting those rules?

9 A. [COL DAVIS]: There was a group--it was a group effort;
10 certainly the Convening Authority's office, General Hemingway and his
11 folks, folks from the General Counsel's office, DOJ, CIA, other
12 agencies; everyone except the prosecution and defense; which I
13 analogize to, if the NFL rewrote the rules of football, they would've
14 probably asked the players for input; but they were not asked for
15 input.

16 Q. [LCDR MIZER]: Now let's go back to the second phone call
17 about David Hicks; this time did Mr. Haynes ask you to charge anyone
18 along with Mr. Hicks?

19 A. [COL DAVIS]: He asked if there were others; and my
20 recollection is, we had about five cases that we were looking at; Mr.
21 Hicks and I believe four others that were potential candidates.
22 There were some other issues, at the end the day, it came down on

1 February 2 that Hicks, Hamdan, and Khadr were the three cases that we
2 signed the charges on.

3 Q. [LCDR MIZER]: Colonel, I know it's important for you to
4 explain this; would you have eventually charged Mr. Hamdan?

5 A. [COL DAVIS]: Eventually, when the pieces were in place,
6 we would have charged Mr. Hamdan.

7 Q. [LCDR MIZER]: Just not when you charged him?

8 A. [COL DAVIS]: Correct. Is--I think the analogy that I made
9 is that the train was leaving the station before the tracks were
10 laid, and I think that is a good analogy.

11 Q. [LCDR MIZER]: And you did that as a result of pressure
12 from Mr. Haynes?

13 A. [COL DAVIS]: While I don't think any prosecutor would
14 charge someone in a system that were still being built around; it
15 would be like the Nationals trying to play ball in the ballpark while
16 you still putting in the bases and hiring an empire.

17 Q. [LCDR MIZER]: Let's talk about 28 September 2006, what is
18 the Senior Oversight Group?

19 A. [COL DAVIS]: It was a group that was created after the
20 high-value detainees or as they were being transferred--to oversee at
21 the DOD part of the dealing with the high-value detainees.

22 Q. [LCDR MIZER]: How often did it meet?

23 A. [COL DAVIS]: To my knowledge, it met once a week.

1 Q. [LCDR MIZER]: Did you attend that meeting that day, sir?

2 A. [COL DAVIS]: Yes.

3 Q. [LCDR MIZER]: And why did you attend that meeting?

4 A. [COL DAVIS]: Prior to the--about the time the high-value

5 detainees were being transferred, we were asked to prepare a

6 timeline. There are a lot of parts involved, as you well know, in

7 getting one of these trials on; at the time, we had this one-room

8 courtroom, so there was a plan to try to build a--what now is the

9 compound down the hill, but we were asked to lay-out a timeline from

10 that point through when we thought we can get the high-value

11 detainees into the courtroom. I worked on that--well, a numbered

12 people did, I worked--Frank Caminz at the time, was the Deputy

13 General Counsel, a Deputy General Counsel to Mr. Haynes, and he was

14 the one I primarily interacted with.

15 Normally, he would attend the Senior Oversight Group; he

16 had some scheduling conflicts on that day, we were in to brief the

17 timeline--the timeline was to be brief; he asked if I would go

18 instead, to brief the timeline.

19 Q. [LCDR MIZER]: And you briefed that timeline?

20 A. [COL DAVIS]: Yes.

21 Q. [LCDR MIZER]: Who was at that meeting, sir?

22 A. [COL DAVIS]: The meeting is chaired by the Deputy

23 Secretary of Defense, Gordon England. I don't recall the exact

1 number of people; I would estimate about two dozen; it included Jim
2 Haynes, as the General Counsel, Ileana Davidson, Steve Cambone, who
3 at the time was under Secretary of Defense for Intelligence, Brian
4 Whitman from Public Affairs, you know, folks of that level.

5 Q. [LCDR MIZER]: You've mentioned Deputy Secretary of
6 Defense, Gordon England; did he make any comments during that
7 meeting?

8 A. [COL DAVIS]: Yes, he said, as I recalled, this is
9 September of 06, the midterm elections were coming up in November and
10 he said, "There could be some real," I remember words because I
11 haven't heard these before, "there could be some real strategic
12 political value in charging some of the high-value detainees before
13 the elections and we needed to think about who we can charge, what we
14 can charge them with, and when we can charge them."

15 Q. [LCDR MIZER]: Was there reaction, in that room, to that
16 comment?

17 A. [COL DAVIS]: Yes, I mean, as soon as he made the comment,
18 Jim Haynes jumped in and said, "Wait a minute, under the statue,
19 there is only one person authorized to make those decisions, and it's
20 him," and he pointed at me. And the group--everyone seemed of--kind
21 of nodded--understanding that was the end of that.

1 Q. [LCDR MIZER]: You said that charging decisions were yours
2 alone?

3 A. [COL DAVIS]: Yes.

4 Q. [LCDR MIZER]: And that was approximately 4 months before
5 the president withdrew his nomination?

6 A. [COL DAVIS]: Correct.

7 Q. [LCDR MIZER]: You mention that Dr. Steven Cambone attended
8 those meetings.

9 A. [COL DAVIS]: Yes.

10 Q. [LCDR MIZER]: Did he ever say anything remarkable?

11 A. [COL DAVIS]: There was two things; one was General
12 Altenberg, at that point, had announced that he was planning on going
13 back to private practice, I think--they can probably explain this
14 better than I can, I think he view this--the changeover from the
15 President's Military Order to the Military Commissions Act was kind
16 of a natural breaking point for him to leave. He stayed longer than
17 he intended.

18 To handle, they needed someone new to come in. So this
19 meeting, Dr. Cambone said,--the topic came up with who's going to be
20 the convening authority and Dr. Cambone said, "It needed to be
21 someone of national stature that people know and respect, some dollar
22 a year guy." And it took me a second, I wasn't familiar with that
23 expression, "a dollar a year guy," eventually registered someone who

1 accumulated enough wealth where they can take the job without having
2 to worry about the--the pay.

3 Q. [LCDR MIZER]: And what was the second thing, sir?

4 A. [COL DAVIS]: The second thing was that we really need to
5 get DOJ rolled down with this, that no one in DOD had the
6 sophistication and expertise to handle cases like this. The pros
7 were in DOJ, so we needed to get them involved.

8 Q. [LCDR MIZER]: Before you resigned, sir, had any attorney
9 from the Department of Justice made appearances in this case?

10 A. [COL DAVIS]: No.

11 Q. [LCDR MIZER]: Sir, while these meetings were taking place,
12 Congress was drafting the MCA; were you involved in that process?

13 A. [COL DAVIS]: Yes.

14 Q. [LCDR MIZER]: How were you involved, sir?

15 A. [COL DAVIS]: Well, the first court-martial I've ever
16 participated in was in 1984 and my opponent was Captain Lindsey
17 Graham. So I got a call from his office asking if I would come over
18 and meet with them as they were working on the MCA; it was the early
19 part of September 2006.

20 Q. [LCDR MIZER]: Where did you meet--and by "them" who do
21 mean "them", sir?

22 A. [COL DAVIS]: Well, I'm sorry; the meeting was at a
23 conference room in Senator Graham's office and it was staff members

1 for Senator Graham's and Senator McCain. The meeting lasted, I would
2 say, 90 minutes to 2 hours. Senator Graham was there for probably an
3 hour of it; Senator McCain came in for, I would say, 20 to 30
4 minutes.

5 Q. [LCDR MIZER]: What was the nature of that conversation?

6 A. [COL DAVIS]: I remember specifically when Senator McCain
7 came in and he said, "What do you need to get the job done right?"
8 So I laid out some recommendations that I thought were necessary to
9 ensure we have full, fair, and open trials.

10 Q. [LCDR MIZER]: And what would those recommendations, sir?

11 A. [COL DAVIS]: As I said earlier, after the high-value
12 detainees were--were being transfer, suddenly everyone had real wrong
13 opinions about how we should be prosecuting cases.

14 Department of Justice was beginning to get involved, it was
15 mine--in my view that--let me back up just a bit, we've met earlier in
16 looking at the high-value detainees, kind of looking at the evidence
17 that was available and potential forums those cases could be
18 prosecuted in; because of issues like Article 31 or memoranda, Chain-
19 of-Custody, and speedy trial; the group--and the group is made up of
20 DOD, DOJ, CIA, FBI, and NFC.

21 I think it was fairly unanimous opinion that these cases
22 were not suitable for an Article 3 court--or court-martial; and that
23 Military Commissions were the most viable option. When I began to

1 see was that--that for DOJ, that they couldn't tried this in their
2 normal courts, so we would make this into a federal-court-like and we
3 call it--cloaked it under title 10 and put the military banner on it,
4 but it would be a federal-court-like for DOJ.

5 So one of the things I recommended was that the chief
6 prosecutor and chief defense counsel had to be uniform Judge
7 Advocates.

8 Q. [LCDR MIZER]: Why did you do that, sir?

9 A. [COL DAVIS]: Because if these are military commissions,
10 they should be run by the military, and not as subterfuges for a
11 federal-court-like.

12 Q. [LCDR MIZER]: What were your other--two recommendations,
13 sir?

14 A. [COL DAVIS]: There was another one, as I said, a lot of
15 folks were beginning to express strong opinions about--and many of
16 these folks are not attorneys, but they still have shot opinions
17 about evidence and trial strategy and charges.

18 One of the things I recommended--if you look at the
19 language the standard unlawful command influence language out of the
20 UCMJ and compared it to the language of the MCA; you will see there
21 is some additional language that I wrote. I told them that--there
22 were people that the--I told them what my policy was on water-

1 boarding, that it was inadmissible. Senator Graham and Senator
2 McCain were both very pleased that that was my policy.

3 I told them that there were others like Mr. Haynes had a
4 contrary opinion and we needed some statutory protection to enable us
5 to exercise our own professional legal judgment in prosecuting these
6 cases. So they asked that if I would draft some language, which I
7 did, and it was included in the MCA

8 It's the language that says prosecution and defense can
9 exercise professional judgment without any undue influence or
10 coercion. It was my view that--if you look at the--these cases are
11 unique in that they had an international audience and the
12 international tribunals, whether it's Rwanda, the Sierra Leone,
13 Yugoslavia or Cambodia, everyone of those in their stature has a
14 requirement that the prosecution be independent; so I felt that this
15 gave us that same independence that was recognized in the
16 international community.

17 Q. [LCDR MIZER]: And you specifically had Mr. Haynes in mind?

18 A. [COL DAVIS]: Yes. In fact, there is an e-mail that I
19 sent back when I specifically referred to why I thought this was
20 critically important, specifically referring to water-boarding.

21 [END OF PAGE]

1 Q. [LCDR MIZER]: Let's go back to Mr. Haynes pressuring you
2 to charge David Hicks, what ultimately happened in that case?

3 A. [COL DAVIS]: Mr. Hick's was charged on February the 2nd
4 2007, and I said it was a bit awkward, the Chief Prosecutor is
5 supposed to transmit charges to the Convening Authority and we had
6 none. My recollection is Ms. Crawford, was appointed February 7th,
7 five days after we charged Davis Hick's. I don't recall the exact
8 date, but you know it was shortly there after she referred charges.

9 If you look at the charge sheet in the Hick's case, you
10 will see a lot of pen and ink changes that she made, because the
11 Convening Authority and the Legal Advisor had no role in the
12 prosecution drafting those charges. So our professional opinion and
13 their professional opinion differed, which is the way viewed the
14 system ought to work. And so they changed--made some changes on the
15 charges and she referred the charges she thought were proper to
16 trial.

17 Q. [LCDR MIZER]: Do you know if there were changes made to
18 the charge in this case?

19 A. [COL DAVIS]: I believe the first three we sent forward
20 all had some fairly significant disagreement between what we sent
21 forward, what the Convening Authority and her staff thought were
22 appropriate. So yes I believe there were changes made in this case.

1 Q. [LCDR MIZER]: What was the ultimate disposition of the
2 Hick's case, sir?

3 A. [COL DAVIS]: We sent three cases forward, Hick's was the
4 only, the first one, it was referred to trial separately by itself.
5 Hamdan and Khadr were referred sometime afterwards. We had
6 discussions with Major Dan Morry, some of his civilian, Australian
7 civilian counsel about a possible plea deal in the Hick's case. It
8 seemed the defense concern was getting David Hick's back to Australia
9 as quickly as possible. They weren't as concerned about the--what the
10 sentence was, it was really how quickly can we get--get David Hick's
11 back home to Australia.

12 In our discussions, I would always use John Walker Lynn as
13 a benchmark. John Walker Lynn got 20 years, so that was the starting
14 point for our negotiations is the 20 year point. Over time we came
15 down off of that, but certainly----

16 TC [COL MORRIS]: ----Objection, Your Honor, we are willing to
17 listen to as much as you believe relevant, but hard to know how the
18 internal workings of negotiations on a case that is not co-accused or
19 anything else of this case, is relevant to motion.

20 DC [LCDR MIZER]: Your Honor, it is--it is absolutely relevant.
21 The negotiations in the Hick's case, as will be outlined in the
22 testimony of Colonel Davis, were procured through political pressure
23 and ultimately a deal was secured in that case, which was

1 significantly less than that recommended by the prosecutors in this
2 case. I mean the very, the central purpose of this motion is that
3 forces external to office of the Chief Prosecutor, whether it be the
4 Convening Authority herself, Mr. Haynes, or ultimately General
5 Hartman exerted pressure in places and areas that they should not
6 have and ultimately forced the recusal of Colonel Davis. We believe
7 it is relevant.

8 MJ [CAPT ALLRED]: Okay. I will overrule the objection. I
9 don't know that I need to know the details of the offer and the
10 counter-offer and the all the discussion that surrounded it.

11 TC [COL MORRIS]: And while I am up, Your Honor, I really hate
12 to do this, but given our other witness's problem. Do you mind
13 taking a recess in place so I can check to see what travel
14 flexibility he has?

15 MJ [CAPT ALLRED]: Why don't you, can you just send a member of
16 your team up or----

17 TC [COL MORRIS]: ----By all means.

18 MJ [CAPT ALLRED]: The bailiff could do that if you wish.

19 TC [COL MORRIS]: Sure.

20 MJ [CAPT ALLRED]: What?

21 TC [COL MORRIS]: Just to know his depart time, so we can know
22 when we can interrupt.

23 MJ [CAPT ALLRED]: Okay. That's fine. Go ahead.

1 [Bailiff leaves the court room.]

2 [Lieutenant Commander Mizer continues his questioning of Colonel
3 Davis.]

4 Q. [LCDR MIZER]: Sir, were you aware of the plea bargain in
5 David Hick's case, before you arrived on the island?

6 A. [COL DAVIS]: No. We--we came here expecting a 30-minute
7 arraignment.

8 Q. [LCDR MIZER]: And ultimately what was the plea deal in
9 that case?

10 A. [COL DAVIS]: It was he plead guilty and everything in
11 excess of 9 months was waived and transferred to Australia as quickly
12 as possible.

13 Q. [LCDR MIZER]: Would you have recommended that plea deal
14 sir?

15 A. [COL DAVIS]: I wouldn't recommend a misdemeanor sentence
16 for David Hicks.

17 MJ [CAPT ALLRED]: You wouldn't?

18 WIT [COL DAVIS]: Would not.

19 MJ [CAPT ALLRED]: Not.

20 WIT [COL DAVIS]: Captain.

21 Q. [LCDR MIZER]: Did you speak publicly about not being
22 included in the negotiation, sir?

23 A. [COL DAVIS]: Yes.

1 Q. [LCDR MIZER]: And where did you do that?

2 A. [COL DAVIS]: Over at Buckley Hall at the media center
3 immediately after, I believe it was a Friday night is when the trial
4 wrapped up it was immediately after the trial.

5 Q. [LCDR MIZER]: Did the Convening Authority speak to you
6 about your comments?

7 A. [COL DAVIS]: Yes.

8 Q. [LCDR MIZER]: And what did she say?

9 A. [COL DAVIS]: It was the, in all honesty, I think I had
10 two real discussions with Ms. Crawford in my entire tenure other than
11 just hello. I got a message shortly after we got back from D.C.,
12 after the Hick's case, asking me to come down to her office. When I
13 went down there the—the reason she wanted to see me was to express
14 her displeasure that I had been critical of the plea deal in the
15 Hick's case and she said "Well we can't have that happening, you and
16 I have to be hand and glove and I can't have you out in the media
17 contradicting me.

18 Q. [LCDR MIZER]: What was your response, sir?

19 A. [COL DAVIS]: My response was I thought it was healthy
20 thing. If this truly is an independent process, then our differing
21 views, I think showed that this is a fair process and that this hand
22 and glove arrangement that she wanted would show—would lend credence
23 to the argument that this is a kangaroo court. She said I—I

1 understand that but you have to understand that we can't—I can't have
2 a Chief Prosecutor out there disagreeing on my decisions.

3 Q. [LCDR MIZER]: Did you have surgery in July 2007?

4 A. [COL DAVIS]: Yes, July 5.

5 Q. [LCDR MIZER]: Who was running your office while you were
6 away?

7 A. [COL DAVIS]: Lieutenant Colonel Britt.

8 Q. [LCDR MIZER]: And was it that time that General Hartman
9 arrived to his present duty?

10 A. [COL DAVIS]: Yes, he arrived on the, I am not sure of the
11 exact date, Monday of that week, that is when he reported in, my
12 recollection is that the first day was taken with you know the normal
13 in-processing kind of things you have to do. I believe he came to
14 our office on Tuesday and it was like 30 minute, you know bam here on
15 board, walked around and shook hands, very uneventful meeting. I
16 believe the next day was the 4th of July holiday and the day after
17 that I had surgery, so I had spent about 30 minutes working for our
18 team and having surgery.

19 Q. [LCDR MIZER]: How would you describe his management style?

20 A. [COL DAVIS]: I would describe it as; I think I have
21 described as he took micro-management to the nano-management level
22 and it is cloaked beneath the veneer of what some would consider
23 cruelty and maltreatment.

1 Q. [LCDR MIZER]: Did you receive an email from General
2 Hartman on 13 July 2007 concerning training?

3 A. [COL DAVIS]: Yes.

4 Q. [LCDR MIZER]: And what was the subject of that email?

5 A. [COL DAVIS]: Well he was displeased that we didn't have a
6 robust training program for counsel. He was angry that, when he
7 found out that in the Hick's case, Lieutenant Colonel Sheniad read
8 his sentencing argument and that was unacceptable and that we
9 together need to have a robust training advocacy program that covered
10 everything from opening statement, closing argument, motions, soup to
11 nuts on how a case is going to be prosecuted that--that we were going
12 to work together to put together this program to ensure cases were
13 prosecuted aggressively.

14 Q. [LCDR MIZER]: Did he have any thoughts about the detailing
15 of attorneys to specific cases?

16 A. [COL DAVIS]: Yes.

17 Q. [LCDR MIZER]: And what were those, sir?

18 A. [COL DAVIS]: While I was out on convalescent--I had 30
19 days of convalescent leave. While I was out Colonel Britt started
20 arranging at General Hartman's request briefings on cases, where he
21 and Mr. Chatman would come up and Colonel Britt and whoever the
22 counsel was would sit down and run him through the case with General
23 Hartman. As a result of that there were some counsel that he had

1 great confidence in and others that he had doubts about and so he
2 wanted to make sure he had, you know the folks he had confidence in
3 on the cases.

4 Q. [LCDR MIZER]: Now you mentioned Lieutenant Colonel Britt,
5 were you in contact with Lieutenant Colonel Britt during your
6 convalescent leave?

7 A. [COL DAVIS]: Yes.

8 Q. [LCDR MIZER]: How often would you speak?

9 A. [COL DAVIS]: I wouldn't say everyday, but probably close
10 to it.

11 Q. [LCDR MIZER]: What were the--was there a consistent theme
12 to those conversations?

13 A. [COL DAVIS]: Yeah that he was--again I think I would
14 describe it as cruelty and maltreatment from General Hartman.

15 Q. [LCDR MIZER]: Did General Hartman have a particular
16 category of cases that he wanted you to prosecute?

17 A. [COL DAVIS]: Yeah, as he was briefed on the cases he was
18 disappointed. Well you know we had the original ten cases from the
19 old PMO system that had been charged, they were the likely candidates
20 as we started up under the MCA He was briefed on those cases, the
21 ones that we refer to as facilitators he wasn't that enamored with.
22 Now the ones that were he said, you know, the term we use around the
23 office is a sexy case and I know I have seen it reported in the media

1 and attributed to him, but that was our term that he eventually
2 adopted.

3 The cases, in fact in his words, in fact if a guy had blood
4 on his hands, that's the case that the public would--would understand
5 and get excited about. These other cases, where it's moving money
6 and forging documents it's just not that exciting so he wanted to put
7 the sexy cases up front. I remember one in particular, he was bad
8 about names and there was one case, Jawad that he would always case
9 up "you know the guy that threw the grenade, now that's a good case"
10 and he didn't like al Qosi, cause that wasn't very exciting so why
11 are we not pushing Jawad instead of pushing al Qosi?

12 Q. [LCDR MIZER]: Did he ever pressure you to bring against
13 9/11 detainees?

14 A. [COL DAVIS]: I wouldn't say pressure it was an underlying
15 theme of we got to get--you get the train rolling, there is an
16 election coming up November this year and there was that consistent
17 them that if we don't get these things rolling before the election
18 this thing is going to implode and if you get the 9/11 guys charged
19 it would be hard once you get the victims families energized and
20 public interested it would be hard for whoever wins the Whitehouse to
21 stop this process. But, you know that was kind of the underlying
22 thing.

1 Q. [LCDR MIZER]: Sir, I am told we are having some
2 translation problems. They switched the translators and it is not
3 coming through to Mr. Hamdan at this point.

4 MJ [CAPT ALLRED]: Okay. Did the interpreter, did the
5 translator hear that? Apparently when they switched, when you
6 switched out a new interpreters, Mr. Hamdan could not hear.

7 DEFENSE INT: He can hear translations we are not getting what
8 he is saying.

9 MJ [CAPT ALLRED]: Okay. It's a quality of interpretation
10 issue?

11 DEFENSE INT: Yes.

12 MJ [CAPT ALLRED]: Why don't we try a different interpreter and
13 see if we can continue with this testimony and I will ask the senior
14 interpreter to manage that issue up in the interpreter's booth.

15 DEFENSE INT: Your Honor, I am not sure they--only one can hear
16 you at a time. Only one up there can hear you at a time.

17 MJ [CAPT ALLRED]: Okay. Lets----

18 DEFENSE INT: He is on.

19 MJ [CAPT ALLRED]: Looks like we got a different, we got a fix
20 in place. Okay let's continue then.

21 DC [LCDR MIZER]: All right, sir.

22 MJ [CAPT ALLRED]: Looks like we have it fixed. Why don't you
23 go up and give the message anyway bailiff, thank you.

1 [The bailiff did as instructed.]

2 Q. [LCDR MIZER]: Did you and General Hartman have
3 disagreements on the use of evidence derived by torture, sir?

4 A. [COL DAVIS]: Yes.

5 Q. [LCDR MIZER]: What was the nature of that discriminate?

6 A. [COL DAVIS]: He questioned what gave me the authority as
7 the chief prosecutor--what gave me the authority to make those
8 decisions about what evidence the prosecution would offer, that there
9 were other people obviously senior to me that felt water-boarding was
10 acceptable, so why was it--why did I think it was my decision to
11 decide that.

12 Q. [LCDR MIZER]: Who did he believe that it should be left
13 to?

14 A. [COL DAVIS]: His view was everything was fair game and
15 let the judge sort it out. And that caused heat and I don't recall
16 if we discussed this in great detail, but now I think it's an ethical
17 issue, the rules for professional conduct say that a prosecutor won't
18 offer evidence obtained by a illegal means and we have had a great
19 number of people of the Director of the CIA to the Director of the
20 FBI and the Attorney General say that in their view if they were
21 water boarded it would be torture. So to allow or direct the
22 prosecutor to come in this courtroom and offer evidence that we've
23 had senior officials say that they would consider torture I think it

1 puts the prosecutor in an ethical bind and so I disagreed with him on
2 that point.

3 Q. [LCDR MIZER]: How do you define torture, sir?

4 A. [COL DAVIS]: I don't.

5 Q. [LCDR MIZER]: And what do you mean by that?

6 A. [COL DAVIS]: You know I had that question asked by the
7 NGOs and the media and the academics. As the chief prosecutor, you
8 know the chief prosecutor's job is to prosecute detainees that are
9 accused of violating the law of war.

10 The question of torture in my view focuses not on the
11 reliability of the information that you get from the detainee, it
12 focuses on the potential accountability of the person performing the
13 technique and it wasn't my job to potentially prosecute whoever
14 perform the technique, I was interested in whether the information
15 that they obtained was reliable and in the interest of justice.

16 So I never got wrapped around the axle about whether
17 something constituted torture or not. Now my standard was whether it
18 was reliable and in the interest of justice.

19 Q. [LCDR MIZER]: Sir, would you consider statements taken
20 after sustained beatings reliable and in the interest of justice?

21 A. [COL DAVIS]: I would not.

1 Q. [LCDR MIZER]: How about statements taken with one's arms
2 shackled behind one's back and pulled up behind their head?

3 A. [COL DAVIS]: I would not.

4 Q. [LCDR MIZER]: Was General Hartman ever directly involved
5 in this case?

6 A. [COL DAVIS]: Yes.

7 Q. [LCDR MIZER]: When was that sir?

8 A. [COL DAVIS]: Professor Swift would know the exact date.
9 I don't recall, it would have been I believe in September of 2007,
10 August or September, I don't recall exactly. I was in General
11 Hartman's office for a meeting and Natalie the secretary for the
12 convening authority, stuck her head in the door and said talking to
13 General Hartman, said "Mr. Haynes wants to see you right now." And
14 so General Hartman said "Hey I am going to have to run we will have
15 to take this up later" and he left.

16 Q. [LCDR MIZER]: Did you see General Hartman later that day?

17 A. [COL DAVIS]: Yes, I had another meeting with him down at
18 his office in the afternoon. He said that he had gone over to see
19 Mr. Haynes's. Mr. Haynes had received a phone call from Neal Katyal,
20 the civilian counsel for Mr. Hamdan and that Mr. Katyal was
21 interested in working out a plea deal and General Hartman said that
22 Mr. Haynes had asked him with settling the Hamdan case.

1 Q. [LCDR MIZER]: General Hartman was taking direction from
2 Mr. Haynes?

3 A. [COL DAVIS]: I wasn't there for the meeting I just know
4 what he told me when he came back from the meeting. So that's when I
5 went back I informed Commander Stone and Colonel Britt, they called
6 General Hartman and offered theirs--in my view and my policy was. I
7 was not opposed to a plea deal in any case that results in a fair
8 outcome for both sides. So I was not opposed to a deal in Hamdan
9 case. Colonel Britt and Commander Stone offered their assistance,
10 the plan was that General Hartman was going to fly down here with the
11 defense and negotiate the deal and they offered their assistance and
12 General Hartman said that he didn't need any help from the
13 prosecution that he could handle this on his own.

14 Q. [LCDR MIZER]: Did you take a trip with General Hartman in
15 August of 2007?

16 A. [COL DAVIS]: Yes.

17 Q. [LCDR MIZER]: And did General Hartman discuss the speed of
18 charging decisions during that trip?

19 A. [COL DAVIS]: Yes, he was unhappy with the speed with
20 which we were bringing charges.

21 **[END OF PAGE]**

1 Q. [LCDR MIZER]: What if anything do you recall about that
2 conversation?

3 A. [COL DAVIS]: That we had to pick up the pace, that these
4 things had to get going, that if we didn't start making progress
5 this, thing was going to implode. So it was imperative the way you
6 validate the system is to get into court, get convictions, and get
7 good sentences and that's the way you validate it and we've got to
8 get moving.

9 My view was the transparency of these proceedings is
10 critical to their legitimacy in the eyes of the world. And I can
11 tell you and I am sure you all know any evidence declassified is a
12 time-consuming, frustrating process. He said, you know, we can't
13 waste time with this declassification stuff we've got to get--get
14 cases going. Congress gave us the authority to have closed
15 proceedings and we need to use the authority they gave us and get
16 these things moving.

17 Q. [LCDR MIZER]: Sir, did you have a benchmark for which
18 cases would be brought before military commissions?

19 A. [COL DAVIS]: Yes, as I said the first year I was in the
20 job nobody much cared what we did. When we had asked for guidance
21 the General Counsel my impression was he did everything he could to
22 keep his fingerprints off of anything related to detainees or
23 military commissions, so we got minimal guidance. One of my

1 questions had been, what's the threshold we use to determine the
2 cases that should be prosecuted?

3 I never got an answer, so what I instructed the staff was
4 to again use John Walker Lynn as a benchmark. If they set down with
5 CITF and went to the facts of the case and they thought they had
6 reliable evidence, that in their mind warranted a sentence of 20
7 years or greater then we should proceed with those cases, if in their
8 heart of hearts they thought that it was something less than 20
9 years, then we should put that one aside and not worry with it, so 20
10 years with the benchmark that I set down.

11 Q. [LCDR MIZER]: Did General Hartman agree, with that
12 benchmark?

13 A. [COL DAVIS]: And there was another time where he asked,
14 you know, what thinks you--what makes you think you have the
15 authority to make that decision.

16 Q. [LCDR MIZER]: What happened as a result of these
17 disagreements with General Hartman, sir?

18 A. [COL DAVIS]: It escalated to a point where the latter
19 part of August I wrote out a fairly detailed complaint laying out the
20 problems that we run into and I requested Miss Crawford's assistance
21 to resolve it. I typed it out and signed it, I carried it down to
22 her office about three o'clock in the afternoon, she had left work

1 early to go to the Johnny Mathis concert and was present. So I left-
2 -left it at her office and hopefully I thought she would resolve it.

3 Q. [LCDR MIZER]: Did you ever inquire as to the progress of
4 that complaints sir?

5 A. [COL DAVIS]: Yes.

6 Q. [LCDR MIZER]: And when did you do that?

7 A. [COL DAVIS]: I don't recall exactly. I waited what I
8 thought was a reasonable period of time for a response. When I
9 didn't hear anything, I called and made an appointment to go down and
10 talk with her, because like I said the day that I took it down she
11 had left early for the concert, so I went down and this would have
12 been the second of the two substantive conversations that I had with
13 her and it was to inquire what the status was of the complaint.

14 There were two things that came out at that, one was, she
15 said the Legal Advisor that would work for me, so I forwarded it to
16 Jim Haynes. Which struck me as odd that the Legal Advisor to the
17 convening authority doesn't work for the convening authority and then
18 she brought up the same issues that he had about we got to get cases
19 moving, declassification is great, that Congress gave us the
20 authority to have closed hearings and we need to use that authority
21 can get these things going and not get wrapped around the axle on
22 getting evidence declassified.

1 Q. [LCDR MIZER]: Did she ever explain why she felt the cases
2 needed to get moving, sir?

3 A. [COL DAVIS]: No, I don't recall her specifically
4 addressing it.

5 Q. [LCDR MIZER]: Did that complaint eventually result in an
6 investigation, sir?

7 A. [COL DAVIS]: Yes.

8 Q. [LCDR MIZER]: And is that what has is now referred to as
9 petite investigation?

10 A. [COL DAVIS]: Correct.

11 Q. [LCDR MIZER]: And do you know who convened that
12 investigation, sir?

13 A. [COL DAVIS]: Jim Haynes.

14 Q. [LCDR MIZER]: Into your knowledge to the military
15 prosecutors in this case give sworn testimony before that
16 investigation?

17 A. [COL DAVIS]: Yes they did.

18 Q. [LCDR MIZER]: And do you know the nature of their
19 testimony from conversations with them?

20 A. [COL DAVIS]: In general, we talked frequently around the
21 office, we were--I think I testified first and they were after me at
22 day in General Tate's office and later they brought over our verbatim
23 transcripts for all three of us to sit down and review and sign.

1 Q. [LCDR MIZER]: And what generally with the nature of their
2 testimony, sir?

3 A. [COL DAVIS]: I think it was the same that I've laid out
4 there, problems that they were having and the ethical dilemmas they
5 were facing and dealing with the-- with General Hartman.

6 Q. [LCDR MIZER]: Sir, do you know if either of those
7 prosecutors notified you of intent to seek a formal ethics opinion?

8 A. [COL DAVIS]: Yes, Commander Stone did at one point, I
9 don't recall specific--that would have been and of August, 1st of
10 September, I don't recall the exact time frame, but he gave me
11 written notice that he intended to seek a ethics opinion through Navy
12 channels, he laid out his concerns with how General Hartman's
13 involvement had created an ethical dilemma for him.

14 I believe I responded back to him and writing shortly after
15 that, encouraging him to go ahead and pursue it and ultimately I
16 resigned, I don't know if anything ever-- ever came of his complaint.

17 DC [LCDR MIZER]: Sir, with the court's permission I'd like to
18 publish that exhibit to the witness and to the--and to the----

19 MJ [CAPT ALLRED]: Why don't you publish it first to the
20 witness and to me and we will talk about publishing it further?

21 DC [LCDR MIZER]: Yes, sir.

1 Q. [LCDR MIZER]: Sir, do you see that document on your
2 screen?

3 A. [COL DAVIS]: No. Is it on? That would probably help.
4 Yes--yes it is dated 30 August.

5 Q. [LCDR MIZER]: And is that Lieutenant Commander Stone's
6 notice or intent to seek an ethics opinion?

7 A. [COL DAVIS]: Yes.

8 Q. [LCDR MIZER]: Sir, what was the end result of the Tate
9 investigation?

10 A. [COL DAVIS]: The end result was a report that-- you know
11 not--the members of the Tate Commission where General Tate was one of
12 my instructors in the grad course, my current boss, you know, General
13 Rich Harding and a Captain, I believe the name was Drawnberg from the
14 Navy, I've got great respect for all of them, I frankly think they
15 got it wrong, by analogizing commissions through a court-martial.
16 They analogized the role of the Legal Advisor to that of a Staff
17 Judge Advocate in a court-martial. If you go to the National
18 Institute of Military Justice website, they've got the Cox commission
19 report, I think all of us involved in military justice know that the
20 biggest criticism that we face is commander involvement in the
21 process.

22 We defend that involvement on the basis that commanders are
23 responsible for the mission readiness of their units. Readiness is

1 based on maintaining good order and discipline, so when a convening
2 authority refers a case to court-martial; the accused is a member of
3 the convening authority's command, that's one of his troops that's on
4 trial. In the military commission, to my knowledge Ms. Crawford has
5 no duty to maintain good order and discipline of Al Qaeda, that to
6 assist Osama bin Laden in maintaining an operational readiness over
7 his troops.

8 So the basis we used to justify command involvement in a
9 court-martial, that predicate is totally lacking in the military
10 commissions context. This isn't about good order and discipline;
11 it's about retribution and punishment. So in my view the basis that
12 they use to analogize to a court-martial is a flawed analysis.

13 Q. [LCDR MIZER]: Sir, how did you find out about the results
14 of that investigation?

15 A. [COL DAVIS]: I believe the date was September the 4th, 3d
16 or 4th, I'm sorry October 3d or 4th 2007, I got a call to go to Mr.
17 Haynes office, so I went over to the Pentagon to his office. I was
18 in the waiting area, Mr. Haynes came out of his office and shook my
19 hand and said, "Hey, I'm sorry, I got to run off to a meeting, so I'm
20 not going to be able to talk with you, but Dan," I'm referring to Dan
21 Dell'Orto, "Dan's going to sit down and go over this with you and you
22 know and we will move ahead from here." So with that Mr. Haynes left
23 and Mr. Dell'Orto came out and got me. We went into his office and

1 Paul Nye, who is the deputy general counsel is also present, Mr.
2 Dell'Orto had said that General Tate and his group had completed
3 their report and based on that, they came up with the memo that
4 Secretary England signed; laying out the chain of command, that this
5 solution outcome had been briefed to all the TJAG's. Then briefed to
6 Senator Graham and I believe brief to the majority and minority
7 member of the SASK and everyone was in agreement with this is the way
8 ahead. And with that, he handed me two memos that Secretary England
9 had signed the day before.

10 DC [LCDR MIZER]: Sir, at this time I would like to publish
11 one of those memos to the judge and to the witness?

12 MJ [CAPT ALLRED]: You may.

13 Q. [LCDR MIZER]: Sir, do you recognize that document?

14 A. [COL DAVIS]: Yes.

15 Q. [LCDR MIZER]: What is that document?

16 A. [COL DAVIS]: It is the appointment--it was the first time
17 in writing that I was appointed the chief prosecutor for the military
18 commissions and it is dated October 3, 2007 and signed by Deputy
19 Secretary of Defense, Gordon England. It was per sent it to me on
20 October the 4th.

21 Q. [LCDR MIZER]: And who was your immediate supervisor?

22 A. [COL DAVIS]: According to this memorandum General
23 Hartman.

1 DC [LCDR MIZER]: Your Honor, if I could ask that that be
2 published to the court?

3 MJ [CAPT ALLRED]: I mean this isn't----

4 DC [LCDR MIZER]: ----I'll move on, Your Honor.

5 MJ [CAPT ALLRED]: They can hardly read it, it's only one
6 paragraph and there is no content here worth reading. ?

7 DC [LCDR MIZER]: Yes, Your Honor. To your knowledge did
8 General Hartman received a similar letter?

9 A. [COL DAVIS]: Yes, in fact I think both of us receive both
10 memos when we met with, we met separately with Mr. Dell'Orto but I
11 know in my case they gave me both memos.

12 Q. [LCDR MIZER]: And who was General Hartman's supervisor
13 according to that memo.

14 A. [COL DAVIS]: The Deputy General Counsel Paul Nye.

15 Q. [LCDR MIZER]: And do you know who--to whom he reported?

16 A. [COL DAVIS]: Jim Haynes.

17 Q. [LCDR MIZER]: What did you do upon receiving these two
18 documents?

19 A. [COL DAVIS]: I went back to my office, typed up my
20 resignation in court and quit.

21 Q. [LCDR MIZER]: Why did you resign sir?

22 A. [COL DAVIS]: Well, obviously you know the--the friction
23 with General Hartman and the friction with Ms. Crawford were not

1 pleasant, but I would continue butting heads with him if that's what
2 it--it had come down to, but when they put Jim Haynes and my chain of
3 command, you know in his earlier statements that were opinions now
4 came with the force of a command order. And the guy that said water-
5 boarding is "A-OK", I was not going to take orders from and I quit.
6 That was the tipping point.

7 Q. [LCDR MIZER]: Sir, did you also file a complaint with the
8 Inspector General for the Department of Defense?

9 A. [COL DAVIS]: Yes. During the--between filing a complaint
10 with Miss Crawford in the final outcome of the Tate investigation,
11 nothing seem to be happening, I forwarded essentially the same
12 complaint with the DOD Inspector General.

13 DC [LCDR MIZER]: Sir, at this time I'd like to publish that
14 complaint to the judge and to the witness.

15 MJ [CAPT ALLRED]: You may.

16 Q. [LCDR MIZER]: Sir, do you recognize that document?

17 A. [COL DAVIS]: Yes, that is the complaint that I had sent
18 to the Inspector General on the 11th of September.

19 DC [LCDR MIZER]: And sir we, as I addressed earlier, just
20 like to have this included as an attachment to the motion. It is not
21 one of the original attachments, but we will make sure that it is
22 properly marked.

23 MJ [CAPT ALLRED]: Okay. You may.

1 Q. [LCDR MIZER]: What happened with that----

2 MJ [CAPT ALLRED]: ----42 pages?

3 Q. [LCDR MIZER]: What happened with that complaint, sir?

4 A. [COL DAVIS]: I don't recall the exact date but shortly

5 after I resigned at a one-page letter from the DOD Inspector General

6 saying that this was an issue dealing with legal matters and so they

7 had referred it to the expert on legal matters, Jim Haynes. Oh and I

8 am sorry, it went on to say that and they were briefed that a

9 solution had been developed, that it had briefed to Senator Graham

10 and other members of Congress and the TJAG's and that it was a

11 satisfactory resolution therefore they considered the case closed.

12 Q. [LCDR MIZER]: And did you investigate that claim, sir?

13 A. [COL DAVIS]: Yes I did.

14 Q. [LCDR MIZER]: And how did you do that?

15 A. [COL DAVIS]: While I was a bit shocked that, particularly

16 General Rives had signed off on--on this arrangement.

17 MJ [CAPT ALLRED]: Who is that General?

18 A. [COL DAVIS]: Yes----

19 MJ [CAPT ALLRED]: Who is it?

20 A. [COL DAVIS]: Major General Jack Rives, the Judge Advocate

21 General of the Air Force.

22 MJ [CAPT ALLRED]: Okay.

1 A. [COL DAVIS]: And also that Senator Graham would have
2 signed off on this deal, because they-- it seemed contrary and I
3 thought it was clear that the independence of the prosecutor was a
4 fundamental component of what Congress intended. So when I got this
5 outcome I call a General Rives and I said I understand that all the
6 TJAG's were briefed and everybody is in agreement that this is the
7 way ahead, he tell me that that was false that they were given--they
8 were notified of what the decision was going to be and offered an
9 opportunity to comment and that his input back to the General Counsel
10 was advocating the position that I had taken from the beginning. I
11 contacted Jennifer Olson, who is an assistant to Senator Graham; I
12 expressed the same thing that I was surprised that he had signed off
13 on this arrangement.

14 I got an e-mail back from her saying that he would contact
15 me shortly, again I don't recall the exact date, but he called me at
16 home and said that my understanding of what Congress intended was
17 exactly what it was and that while General Tate and Mr. Dell'Orto had
18 come to his office and briefed him, it was an informational briefing
19 got a briefing looking for his concurrence or not concurrence.

20 Q. [LCDR MIZER]: Sir, did you receive an end of tour award?

21 A. [COL DAVIS]: No, I did not.

1 Q. [LCDR MIZER]: Is that something that is common in the
2 office of the prosecutor?

3 A. [COL DAVIS]: I am not aware in the two years that I was
4 there that anyone ever left without receiving any decoration. ?

5 DC [LCDR MIZER]: No further questions, Your Honor.

6 MJ [CAPT ALLRED]: Okay. All of these exhibits that you have
7 shown today or are attached to your motions with the exception of
8 this DOD investigation?

9 DC [LCDR MIZER]: That is correct sir.

10 MJ [CAPT ALLRED]: Any objection from the government to the
11 court to consider all of these on the motion?

12 TC [COL MORRIS]: No objection, Your Honor.

13 MJ [CAPT ALLRED]: Okay. It's 1535, I assume you've worked out
14 and I don't know what the Generals travel plan is. Are you ready to
15 begin your cross-examination now?

16 TC [COL MORRIS]: Actually if you could indulges in a short
17 break.

18 MJ [CAPT ALLRED]: Okay, I think that is a good idea.

19 TC [COL BRITT]: I second that.

20 MJ [CAPT ALLRED]: Okay, why don't we take a recess 10 or 15
21 minutes.

22 BAILIFF: All rise.

23 MJ [CAPT ALLRED]: Court is in recess.

1 [The military commission recessed at 1537, 28 April 2008.]

2 [The military commission was called to order at 1553, 28 April 2008.]

3 TC [COL MORRIS]: Your Honor, all parties present when the
4 court recessed again are present.

5 MJ [CAPT ALLRED]: Very good, thank you. Please continue with
6 your--pickup your cross-examination.

7 **CROSS EXAMINATION**

8 **Questions from the trial counsel:**

9 Q. [COL MORRIS]: Colonel Davis a lot of your concerns have
10 that route of belief that the legal advisers role is not similar to
11 the role of the Staff Judge Advocate in the ordinary military justice
12 setting, isn't that correct?

13 A. [COL DAVIS]: That's correct.

14 Q. [COL MORRIS]: And you were concerned that if you shared
15 any information any paper with the Legal Advisor, then that would be
16 discoverable by the defense?

17 A. [COL DAVIS]: Yeah that was--we weren't sure, but that was
18 a potential risk.

19 **[END OF PAGE]**

1 Q. [COL MORRIS]: Did you do anything to make sure? Did you
2 do anything to resolve that question? Did you all conduct any
3 research to determine whether that critical issue of whether you
4 shared information with the Legal Advisor would make it discoverable
5 by the defense?

6 A. [COL DAVIS]: Yes.

7 Q. [COL MORRIS]: And what conclusion did you come to?

8 A. [COL DAVIS]: We discussed it, this came----

9 Q. [COL MORRIS]: What conclusion did you come to Colonel
10 Davis about whether information that you shared with the Legal
11 Advisor would be discoverable by the defense?

12 A. [COL DAVIS]: I thought there was a strong possibility
13 that it would be.

14 Q. [COL MORRIS]: What is--what policies did you put in place?

15 A. [COL DAVIS]: That we did not provide the information that
16 he requested.

17 Q. [COL MORRIS]: So when you continue to provide binders full
18 of information to General Hartman you were assuming the risk that all
19 that information was discoverable by the defense?

20 A. [COL DAVIS]: Correct.

21 Q. [COL MORRIS]: And your professional judgment today would
22 be that all that information would be discoverable by the defense?

23 A. [COL DAVIS]: I suspect it would be.

1 Q. [COL MORRIS]: You mentioned Mr. Haynes' eyebrows going up
2 when you talked about Nuremberg?

3 A. [COL DAVIS]: He brought up Nuremberg.

4 Q. [COL MORRIS]: And what you considered to be a job
5 interview?

6 A. [COL DAVIS]: Correct.

7 Q. [COL MORRIS]: Following which he hired you?

8 A. [COL DAVIS]: Correct.

9 Q. [COL MORRIS]: Following which he gave you a performance
10 rating?

11 A. [COL DAVIS]: No.

12 Q. [COL MORRIS]: He never gave you a written performance
13 rating?

14 A. [COL DAVIS]: No, the only two performance ratings I ever
15 had were from General Hemingway.

16 Q. [COL MORRIS]: Or from General Hemingway. He didn't sign
17 off a performance rating that said to promote you to General?

18 A. [COL DAVIS]: He signed off on a promotion recommendation,
19 not a----

20 Q. [COL MORRIS]: To make him [sic] a General Officer?

21 A. [COL DAVIS]: Yes, to make me a General Officer.

22 Q. [COL MORRIS]: Signed by Mr. Haynes?

23 A. [COL DAVIS]: Correct.

1 Q. [COL MORRIS]: Early in your testimony you said that you
2 directed your staff upon taking charge to not--prepare not to
3 consider any evidence obtained as a result of water-boarding?
4 A. [COL DAVIS]: Yes. To build cases around it there----
5 Q. [COL MORRIS]: So you became aware before it became public,
6 you knew in September of 05 about the water-boarding information that
7 become public then in December of 05?
8 A. [COL DAVIS]: In general terms, yes.
9 Q. [COL MORRIS]: And it was in anticipation of that that you
10 made that specific order to your staff in September of 05?
11 A. [COL DAVIS]: Correct.
12 MJ [CAPT ALLRED]: Colonel Morris.
13 TC [COL MORRIS]: Sir.
14 MJ [COL MORRIS]: I'm sorry; can you see the lights in front
15 of you there on the podium?
16 MJ [CAPT ALLRED]: The interpreter is trying to signal.
17 TC [COL MORRIS]: I apologize. I will slow down. I will do
18 my best to slow down.
19 Q. [COL MORRIS]: Now you said that you directed your staff
20 not to generate cases based on torture?
21 A. [COL DAVIS]: I don't ever recall using the word torture.
22 Q. [COL MORRIS]: So you did not use the word torture then?
23 A. [COL DAVIS]: Not--not that I recall.

1 Q. [COL MORRIS]: And in fact you're aware of course that the
2 Military Commissions Act bars the use of evidence obtained as a
3 result torture anyway?

4 A. [COL DAVIS]: Well it didn't exist in 2005, but I am aware
5 it is today.

6 Q. [COL MORRIS]: You are aware that it does exist?

7 A. [COL DAVIS]: Yes.

8 Q. [COL MORRIS]: And therefore you would be enforcing the
9 law?

10 A. [COL DAVIS]: Yes.

11 Q. [COL MORRIS]: But you didn't use that term in 05 anyway?

12 A. [COL DAVIS]: No.

13 Q. [COL MORRIS]: All you said to your staff was if you have
14 problems with evidence, and what you to come talk to me, is that
15 right?

16 A. [COL DAVIS]: I gather you want a yes or no answer and I
17 can't answer that yes or no.

18 Q. [COL MORRIS]: Let's talk about Mr. Hamdan's case. You had
19 no concerns about maltreatment of Mr. Hamdan as you evaluated his
20 case, is that correct?

21 A. [COL DAVIS]: That's correct.

1 Q. [COL MORRIS]: You had no concerns about water-boarding as
2 you evaluated his case, is that correct?

3 A. [COL DAVIS]: That's correct.

4 Q. [COL MORRIS]: You had no concerns about torture when you
5 evaluated his case?

6 A. [COL DAVIS]: That's correct.

7 Q. [COL MORRIS]: Your staff, your counsel on whom you relied
8 for evaluation of that case acted ethically in all respects?

9 A. [COL DAVIS]: Absolutely.

10 Q. [COL MORRIS]: As they prepare the case and as they gave
11 you advice?

12 A. [COL DAVIS]: Yes.

13 Q. [COL MORRIS]: And you personally endorsed----

14 WIT [COL DAVIS]: I think you are having an equipment issue.

15 ADC [MS. PRASOW]: Excuse me, Your Honor, I think it is a speed
16 issue that that the interpreter is not able keep up with the pace.

17 MJ [CAPT ALLRED]: I'm sorry, what is the problem?

18 ADC [MS. PRASOW]: I don't believe the interpreter is able to
19 keep up with the pace of the questions and answers.

20 MJ [CAPT ALLRED]: Of the cross examination?

21 ADC [MS. PRASOW]: Yes.

22 MJ [CAPT ALLRED]: Okay, my light is green; so let's continue.

23 TC [COL DAVIS]: So is my now.

1 ADC [MS. PRASOW]: Your Honor, if I could just clarify the
2 interpreters are translating the questions but not the answers or the
3 answers but not the questions. So when it's coming continuously----

4 MJ [CAPT ALLRED]: ----Okay, that means were going to fast.
5 Let's slow down and try to get it all.

6 Q. [COL MORRIS]: You believed when you approved the swearing
7 of charges in this man's case that in all respects they were
8 warranted by the evidence?

9 A. [COL DAVIS]: Yes.

10 Q. [COL MORRIS]: And isn't it true in the Air Force that
11 Staff Judge Advocate's supervise prosecutors and advise convening
12 authorities?

13 A. [COL DAVIS]: Yes.

14 ADC [MS. PRASOW]: Excuse me, Your Honor.

15 [The military judge nodded to recognize Ms. Prasow.]

16 ADC [MS. PRASOW]: The interpreter didn't translate the
17 witnesses answer. We seem to be having an ongoing problem with this.

18 MJ [CAPT ALLRED]: Is your microphone turned on Colonel?

19 WIT [COL DAVIS]: As far as I know.

20 MJ [CAPT ALLRED]: Okay, for the interpreter, I am speaking now
21 to the interpreter.

22 COURT INT: Yes, Your Honor.

23 MJ [CAPT ALLRED]: They appear--do you hear me?

1 COURT INT: Yes, Your Honor, I hear you.

2 MJ [CAPT ALLRED]: Did you hear what Ms. Prasow said?

3 They are hearing the question in Arabic.

4 COURT INT: Yes.

5 MJ [CAPT ALLRED]: But not the answer.

6 COURT INT: Yes, Your Honor, sometime the interpreter is

7 hearing like two voices at the same time.

8 MJ [CAPT ALLRED]: Okay. Apparently we----

9 COURT INT: ----If they give me a time for a response that

10 would be great. But when I hear two voices at the same time I hear

11 the louder one.

12 MJ [CAPT ALLRED]: Okay. That's the problem.

13 COURT INT: Thank you.

14 MJ [CAPT ALLRED]: Thank you.

15 Q. [COL MORRIS]: When you were considering the charging of

16 the three individuals, Hamdan, Khadr, the other individual whose name

17 escapes me, shame on me.

18 A. [COL DAVIS]: Hicks.

19 Q. [COL MORRIS]: Hicks, thank you. Isn't it true that you

20 and your staff had receive--had reached a consensus that you needed to

21 push the system by charging as quickly as possible?

22 A. [COL DAVIS]: No.

1 Q. [COL MORRIS]: You did not have such a discussion with your
2 staff?

3 A. [COL DAVIS]: We had a discussion about moving as quickly
4 as possible, but not before all the pieces, the mechanism was in
5 place to do that, no.

6 Q. [COL MORRIS]: So you didn't receive advice from your staff
7 saying we should charge ahead and charge these individuals now,
8 enforce the others who were involved with, for example the creation
9 of the regulation to move along and do that?

10 A. [COL DAVIS]: I don't recall that, no.

11 Q. [COL MORRIS]: Is it not also true that when you were
12 looking at charging those three individuals that the concern was not
13 singling out Mr. Hicks, but rather ensuring that no one ethnic group
14 appears to be singled out for charging in the first set of charges?

15 A. [COL DAVIS]: I don't recall that being a consideration,
16 it was a matter of which cases were ready to go.

17 Q. [COL MORRIS]: You were not part of a discussion that
18 addressed that issue at all?

19 A. [COL DAVIS]: Not that I recall, no.

20 Q. [COL MORRIS]: Is it not also true that those three
21 individuals had all been previously charged under the prior system?

22 A. [COL DAVIS]: Yes. In all honesty there were about--there
23 were five cases that were essentially ready to be charged and it just

1 happened that those three became the first. But it was by virtue of
2 being ready, not these other considerations.

3 Q. [COL MORRIS]: It so happened that you made the judgment
4 that those three were ready?

5 A. [COL DAVIS]: Yes.

6 Q. [COL MORRIS]: You talked about your conversations with
7 some politicians in the drafting stages of the Military Commissions
8 Act in summer, fall 06?

9 A. [COL DAVIS]: Early September 06.

10 Q. [COL MORRIS]: That is about a year after you took the job?

11 A. [COL DAVIS]: Yes.

12 Q. [COL MORRIS]: The year during which you had nearly no
13 involvement with Mr. Haynes?

14 A. [COL DAVIS]: Correct.

15 Q. [COL MORRIS]: Because you believed he was keeping his
16 hands off this, perhaps for his own purposes?

17 A. [COL DAVIS]: Yes.

18 Q. [COL MORRIS]: Yet when you were drafting or you were
19 giving advice on the drafting of that language regarding the exercise
20 of professional judgment, you had Mr. Haynes specifically in mind?

21 A. [COL DAVIS]: Yes.

1 Q. [COL MORRIS]: Isn't it true that after the Hicks process
2 was worked, you said to your staff not that I wouldn't have accepted
3 a misdemeanor—a misdemeanor deal but that I wouldn't have charged him
4 to begin with?

5 A. [COL DAVIS]: I inherited Hicks, he did not meet my 20
6 year cut line.

7 Q. [COL MORRIS]: Isn't it true that you said I would not have
8 charged him to begin with?

9 A. [COL DAVIS]: Yes. I think we are having some more
10 technical issues.

11 [Accused is speaking with the interpreter at the defense table.]

12 ADC [MS. PRASAW]: Your Honor, I like to elaborate a little bit
13 further on what I think the problem might be. After the witness
14 answers the question the interpreter needs some time to translate
15 that, before the next question is asked. So if we could maybe, if
16 it's possible to insert a pause between each one. Otherwise, Mr.
17 Hamdan is simply not getting the exchange at all, Your Honor.

18 MJ [CAPT ALLRED]: Okay. Colonel Morris.

19 Q. [COL MORRIS]: You of course took a commissioning, right?

20 A. [COL DAVIS]: Yes, I did.

21 Q. [COL MORRIS]: Which leads off with swearing allegiance to
22 the Constitution, right?

23 A. [COL DAVIS]: Yes.

1 Q. [COL MORRIS]: Doesn't mention the Commander and Chief or
2 any political appointees?

3 A. [COL DAVIS]: Correct.

4 Q. [COL MORRIS]: And your oath to the North Carolina bar a
5 similar thing, support and defend the Constitution?

6 A. [COL DAVIS]: That was 25 years ago, I think that's what
7 it says.

8 Q. [COL MORRIS]: I can--I could give you a copy if you like,
9 but again it's to the Constitution, correct?

10 A. [COL DAVIS]: Yes.

11 Q. [COL MORRIS]: We as military lawyers also, and no doubt
12 you as the chair of the Professional Responsibility Committee for the
13 Air Force, to follow the ABA model rules for professional
14 responsibility?

15 A. [COL DAVIS]: Correct.

16 Q. [COL MORRIS]: And they give specific ethnical advice,
17 inducement, and constraints to prosecutors?

18 A. [COL DAVIS]: Yes.

19 Q. [COL MORRIS]: As do the ABA rules on the prosecution
20 function?

21 A. [COL DAVIS]: Yes.

1 Q. [COL MORRIS]: Who is your client when you are the chief
2 prosecutor?

3 A. [COL DAVIS]: United States.

4 Q. [COL MORRIS]: Isn't it true Colonel Davis that you have
5 been disappointed with your inability to--to effect the commissions
6 process since you left it?

7 A. [COL DAVIS]: Yes.

8 Q. [COL MORRIS]: You have expressed frustration that not
9 receiving the quantity and quality of press coverage for your
10 analysis of the shortcomings of the process?

11 A. [COL DAVIS]: Well, the gag order made it a little tough
12 to talk, but yes it is a fair summary.

13 Q. [COL MORRIS]: And you have contacted members of the
14 current prosecution team to ask them to speak to the press on your
15 behalf?

16 A. [COL DAVIS]: Don't ever recall asking to speak to the
17 press.

18 Q. [COL MORRIS]: Your testimony is you have never asked any
19 members of the prosecution team to speak to the press on your behalf?

20 A. [COL DAVIS]: I don't--I'm not saying it didn't happen, I'm
21 saying I don't recall that happening. I have had members of the
22 press ask how to contact them, but I don't ever recall contacting
23 Colonel Britt or Colonel Stone asking them to engage with the media.

1 Q. [COL MORRIS]: Your judgment in this case was your own?

2 Your judgment to charge Mr. Hamdan was your own?

3 A. [COL DAVIS]: Yes.

4 Q. [COL MORRIS]: You believed in all respects warranted by
5 the evidence and ethical and appropriate decision to charge him?

6 A. [COL DAVIS]: Yes.

7 TC [COL MORRIS]: Nothing further, Your Honor.

8 MJ [CAPT ALLRED]: Thank you. Thank you, Colonel.

9 **REDIRECT**

10 **Questions by the defense counsel:**

11 Q. [LCDR MIZER]: Sir, at some point did Lieutenant Commander
12 Stone write an article for the Wall Street Journal?

13 A. [COL DAVIS]: Yes.

14 DC [LCDE MIZER]: Your Honor, with your permission I would
15 like to publish to the witness and to the court.

16 MJ [CAPT ALLRED]: You may.

17 DC [LCDR MIZER]: Just one moment, Your Honor. We are having
18 a technical problem.

19 WIT [COL DAVIS]: Can I correct one thing in response to a
20 question that Colonel Morris asked about; I do recall something that
21 I think I have answered incorrectly.

1 MJ [CAPT ALLRED]: It's actually--Colonel Morris will have
2 another chance to re-direct, re-cross, Colonel Morris will have
3 another chance.

4 TC [COL MORRIS]: Yes, sir.

5 WIT [COL DAVIS]: One of my answers--one of my answers were
6 incorrect.

7 MJ [CAPT ALLRED]: Okay?

8 DC [LCDR MIZER]: Do you recognize this draft article, sir?

9 A. [COL DAVIS]: Yes.

10 Q. [LCDR MIZER]: And that's the article given to you by
11 Lieutenant Commander Stone?

12 A. [COL DAVIS]: Yes.

13 Q. [LCDR MIZER]: Did you encourage him to publish that in the
14 Wall Street Journal?

15 A. [COL DAVIS]: No I did not.

16 Q. [LCDR MIZER]: And why not, Sir?

17 A. [COL DAVIS]: That--I thought these issues were being
18 addressed through what I was going and I didn't see any point in two
19 people throwing themselves on a grenade.

20 Q. [LCDR MIZER]: You were trying to protect your prosecutors?

21 A. [COL DAVIS]: I felt it was my--my duty not his to fight
22 this battle.

1 DC [LCDR MIZER]: Your Honor, we would ask that this also be
2 inserted in as an attachment to the unlawful command influence motion
3 and again we will take the procedures to make that happen.

4 MJ [CAPT ALLRED]: Okay.

5 DC [LCDR MIZER]: Nothing further, sir.

6 MJ [CAPT ALLRED]: Colonel Morris?

7 TC [COL MORRIS]: Nothing further, Your Honor.

8 MJ [CAPT ALLRED]: The witness offered to correct one of his
9 answers. Did you want to give him that chance or did you mean
10 nothing further?

11 TC [COL MORRIS]: By all means, Your Honor.

12 MJ [CAPT ALLRED]: Okay.

13 WIT [COL DAVIS]: Thanks. I think I did contact Lieutenant
14 Commander Stone once.

15 **RE-CROSS EXAMINATION**

16 **Questions by the trial counsel:**

17 A. [COL DAVIS]: There was a story or a Dan Rather reports
18 and there was a point they wanted—they wouldn't publish anything that
19 hadn't been confirmed by a second source. And I think I called them
20 to see if he would verify a point and he wasn't comfortable doing it
21 and I think Steve Couch wound up doing it, that's the only time I can
22 recall contacting anybody from the prosecution.

1 Q. [COL MORRIS]: And you do know at that time Commander Stone
2 was under an order not to talk to the press?

3 A. [COL DAVIS]: Yes.

4 Q. [COL MORRIS]: You have seen the current charge sheet on
5 Mr. Hamdan, correct?

6 A. [COL DAVIS]: If it's the same one that we sent forward,
7 then I have yes.

8 Q. [COL MORRIS]: So every specification of every charge is
9 one that you were in all respects endorsed?

10 A. [COL DAVIS]: Yes.

11 Q. [COL MORRIS]: You reviewed the evidence before you made
12 that endorsement?

13 A. [COL DAVIS]: Yes.

14 Q. [COL MORRIS]: You viewed the video?

15 A. [COL DAVIS]: Yes.

16 Q. [COL MORRIS]: You saw the point where Mr. Hamden was
17 standing asked to Osama bin Laden?

18 A. [COL DAVIS]: Yes.

19 Q. [COL MORRIS]: You consider all that information before you
20 made your independent recommendations to charge?

21 A. [COL DAVIS]: I have never had any doubts about Mr.
22 Hamdan's guilt.

23 TC [COL MORRIS]: Nothing further.

1 MJ [CAPT ALLRED]: Very good. Can we excuse the witness then?

2 TC [COL MORRIS]: No objections.

3 DC [LCDR MIZER]: Yes, Your Honor.

4 MJ [CAPT ALLRED]: Let me ask a question of counsel. Yesterday

5 I received this e-mail attachments, an affidavit from Colonel Davis,

6 that I gathered was to be offered as evidence and nobody has formally

7 mentioned that to me. What was that supposed to be for?

8 TC [COL MORRIS]: I think that was forward planning by my

9 team, Your Honor. But given his testimony I have no objection to

10 introducing it, but I have no need to offer it.

11 MJ [CAPT ALLRED]: Okay. Well I've read it, so I guess I will

12 consider it. It seems to coincide with his testimony today?

13 DC [LCDR MIZER]: No objection from the defense, Your Honor.

14 MJ [CAPT ALLRED]: Thank you sir, for your testimony here,

15 you're excused as witness, thank you.

16 [The witness was excused and withdrew from the courtroom.]

17 MJ [CAPT ALLRED]: Looks like the interpretation has been

18 getting to Mr. Hamdan for the last few minutes.

19 Are we ready to call our next witness?

20 DC [LCDR MIZER]: The defense is ready to call its next

21 witness, however given the government's timeline, Your Honor, I

22 believe the government would like to call General Altenburg.

23

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMED;
WALID MUHAMMAD SALIH MUBARAK
BIN 'ATTASH;
RAMZI BINALSHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED AL HAWSAWI

D-032

Government Response

to Joint Defense Motion to Compel Discovery

8 September 2008

1. **Timeliness:** This response is not filed within the time allowable by the Military Commissions Trial Judiciary Rules of Court. Undersigned counsel inadvertently failed to respond to this motion within the timeline proscribed.

2. **Relief Sought:** The Prosecution respectfully requests the Military Judge deny the Defense Motion to compel any further discovery related to D-001 other than that which the Prosecution has turned over.

3. **Burden of Proof:** As the moving party, the Defense bears the burden of persuasion. *See* Rule for Military Commissions (RMC) 905(c).

4. **Facts:**

- a. On 4 September 2008 the Prosecution responded to the Defense request for discovery related to D-001 (its allegation of unlawful influence) and turned over documents responsive to the Defense's request that did not constitute attorney work product. The Prosecution withheld approximately 35 pages of material that, while potentially responsive to the Defense request, constituted attorney work product.

5. **Discussion:**

- a. The Prosecution identified approximately 35 pages of material that may be responsive to the Defense request for "contents of all communications between the Legal Advisor, BG Hartmann, and the present and former Chief Prosecutors and/or their subordinates relating to the charging and referral process of the September 11, 2001 accused." It is the Prosecution's position that these documents¹ are not subject to disclosure as these communications are attorney work product between the prosecutors and the Legal Advisor to the Convening Authority (*see* Rules

¹ The Prosecution will have these documents with them at the next session should the Military Judge want to review them and/or orders their production.

for Military Commissions 701 (k)); all of whom are properly and lawfully executing their respective roles. *See generally* Prosecution's response to D-001.

- b. It is also questionable if D-001 (Motion to Dismiss for Unlawful Influence) is a motion still properly before this commission. D-001 was filed by detailed defense counsel prior to arraignment. At arraignment, all five accused elected to represent themselves; three of the five individuals were granted their requests, Mr. Bin al Shibh's request is pending a competency hearing, and Mr. al Hawsawi has not yet made up his mind regarding counsel. Until the issue of representation is decided for Mr. Bin al Shibh and Mr. Hawsawi, it remains uncertain as to whether the accused wish to proceed with this motion. The Prosecution respectfully requests that the issue of representation for Mr. Bin al Shibh and Mr. al Hawsawi be decided prior to the litigation of D-001, and if it is determined that both of these individuals represent themselves, the Prosecution respectfully requests that the Military Judge inquire of the five accused that at least one of these individuals still wishes to litigate this motion.

6. **Conclusion:** The Defense request for further discovery, other than that already provided, should be denied.

7. **Request for Oral Argument:** The Prosecution does not request oral argument but reserves the right to respond to any oral argument the Defense may make.

8. **Respectfully submitted:**

/S/

Clay Trivett
Prosecutor
Office of Military Commissions

UNITED STATES OF AMERICA

**Commission Ruling
D-032**

**Motion to Compel Discovery (Related
to Unlawful Command Influence)**

v.

KHALID SHEIK MOHAMMED et al

1 October 2008

1. Nature of Motion:

a. This joint motion seeks to compel production of “discovery sought by the defense in its 20 May 2008 Joint Defense Request for Discovery Related to Unlawful Influence[.]” During oral argument, all parties agreed that the motion was properly limited at this point to consideration of approximately 35 pages of material “that may be responsive to the Defense request for ‘contents of all communications between the Legal Advisor, BG Hartmann and the present and former Chief Prosecutors and their subordinates relating to the charging and referral process of the September 11, 2002 accused.’”

b. The Commission has also considered the prosecution’s response to D-032 and the oral argument regarding this motion.

c. The Commission has also conducted an *in camera* review of the 36 pages of material that are the subject of this motion. The pages were provided to the Commission by the prosecution, pursuant to the in-court direction of the Military Judge, following the session conducted on 24 September 2008.

2. Discussion:

a. The prosecution claims that these documents are not subject to disclosure because these communications between the prosecutors and Legal Advisor regarding this case amount to attorney work product. The prosecution asserts that these matters are privileged from disclosure under MCRE 502.

b. The defense claims that:

(i) The legal advisor is not a part of the prosecution office and that the communications are actually communications between the prosecution office and the Office of the Convening Authority. The defense argues that when viewed in this light, the documents are not privileged from discovery; and/or

(ii) Even if the documents are privileged under MCRE 502 in the first instance, the crime or fraud exception to the rule set forth in MCRE 502(d) may apply with regard to the defense claim of unlawful influence as discussed in D-001.

c. The role and responsibilities of the legal advisor to the Convening Authority are not addressed by the MCA. MCA, Section 949a(a), however, provides that “Pretrial, trial, and post-trial procedures . . . may be prescribed by the Secretary of Defense[.] Such procedures shall so far as the Secretary considers practicable or consistent with military or intelligence activities, apply principles of law and the rules of evidence in trial by general courts-martial. Such procedures and rules of evidence may not be contrary to or inconsistent with [the MCA].”

d. The Regulation for Trial For Military Commissions [RTMC], Section 8-6 provides that:

“Individuals appointed, assigned, detailed, or designated or employed in a capacity related to the conduct of military commission proceedings conducted in accordance to the M.C.A. and M.M.C. shall be subject to the relationships set forth below. Unless stated otherwise, the person to whom an individual ‘reports’ as set forth below, shall be deemed to be such individual’s supervisor and shall, to the extent possible fulfill all performance evaluation responsibilities normally associated with the function of direct supervisor in accordance with the subordinates Military Service performance evaluation regulations.

1. Chief Prosecutor: The Chief Prosecutor shall report to the legal advisor to the convening authority.”

e. The defense argues that communications between the prosecutors and the legal advisor are outside the scope of the MCRE 502 privilege because the legal advisor is “not internal” to the prosecution office. The controlling regulation, however, establishes a working relationship between the legal advisor and the Chief Prosecutor akin to than in many military justice offices wherein a staff judge advocate serves both as a legal advisor to one or more commanders as well as the reporting senior for the head of the local military justice or prosecution office. As the reporting senior of the Chief Prosecutor, it stands to reason that the Legal Advisor would exercise some measure of oversight with regard to the prosecution office and that there would be communication between the Chief Prosecutor (and possibly his subordinates) and the Legal Advisor regarding this and other cases. It also stands to reason that the communications might include discussion of the charges and specifications prior to the forwarding of the charges to the Convening Authority via the Legal Advisor in accordance with RMC 406 and RTMC, Section 3-3.

f. With regard to the materials contained in the 36 pages that are the subject of this motion, the Commission finds that they are reasonably within the scope of communications between the Legal Advisor and the Prosecution Office conducted in furtherance of the Legal Advisor's responsibility as the reporting senior of the Chief Prosecutor. Accordingly, the Commission finds that that the materials are protected from disclosure by the provisions of MCRE 502.

g. MCRE 502(d) provides that there is no privilege under MCRE 502 if, *inter alia*, an otherwise privileged communication "clearly contemplated the future commission of a fraud or crime[.]" In this case, the defense suggests that the 36 pages may contain some evidence of acts by the Legal Advisor that would support the defense claim of unlawful influence as set forth in D-001. The Commission has reviewed the material in question and has determined that no such evidence is contained therein.

3. **Ruling:** The remaining portion of the motion with regard to production of the 36 pages of material is denied. The materials reviewed *in camera* by the Military Judge in connection with this motion will be attached to the record of trial as a sealed exhibit.

A handwritten signature in black ink, appearing to read 'RALPH H. KOHLMANN', is written over a horizontal line.

RALPH H. KOHLMANN
Colonel, U.S. Marine Corps
Military Judge

—