NIMJ Reports from

GUANTÁNAMO

Volume 5

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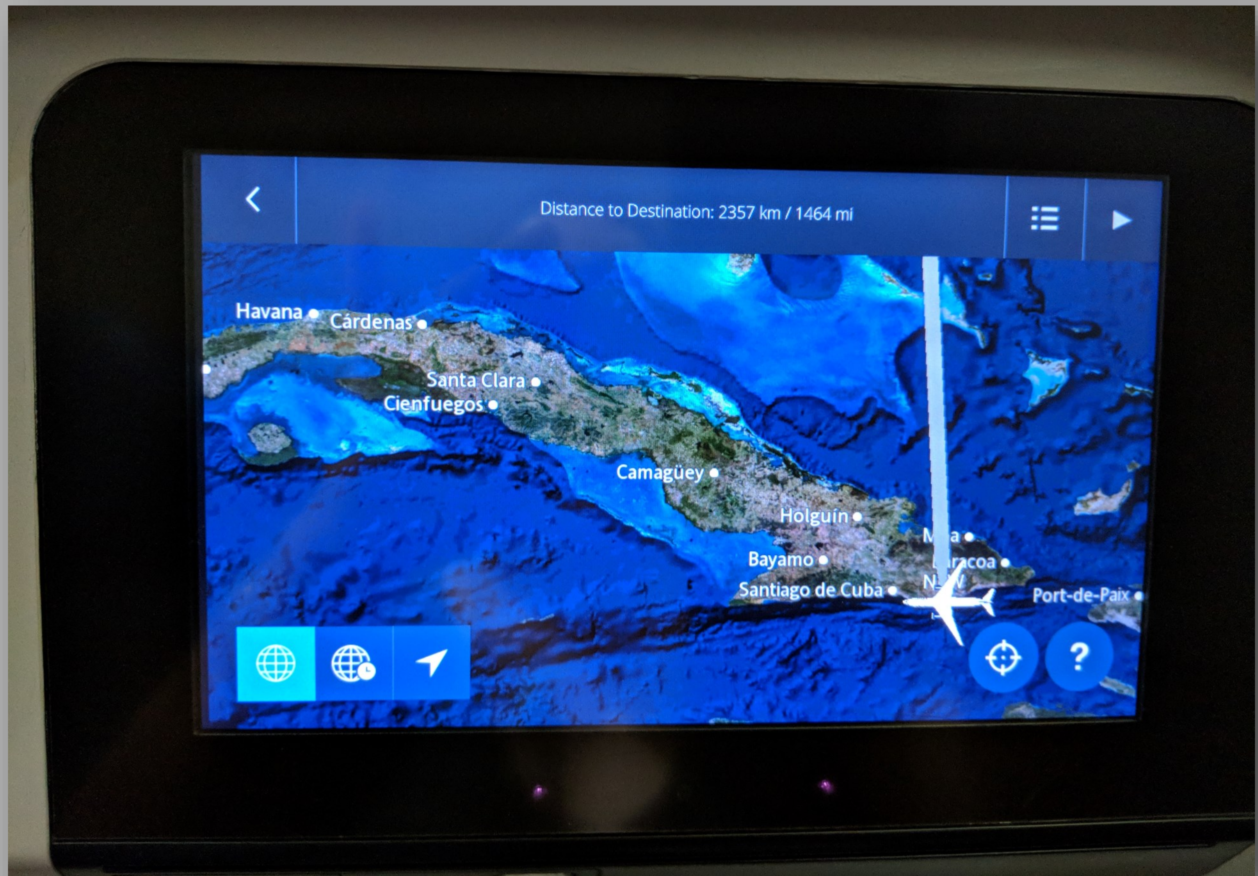
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FOREWORD

In the period covered by this volume, August 2013 to February 2014, the military commissions continued to hear only the cases against Abd al-Rahim Al-Nashiri and against the five alleged September 11 conspirators, including Khalid Sheikh Mohammed.

NIMJ sent five observers to these hearings, including its President and Treasurer, its Summer Intern, the Director of the Dean Rusk International Law Center at the University of Georgia, and an attorney in state government. Their reports, taken as a whole, continue to describe the seemingly endless procedural, evidentiary, and structural questions in which the commissions, hampered by the lack of precedent and the inexperience of the participants, however well-intentioned, are mired. Those issues include the handling of classified information, defendants' access to their own statements and to computer resources, the commission's jurisdiction over various charges, the availability of defense counsel who are completing their military service, the admissibility of evidence of torture and the related question of the admissibility of defendants' subsequent statements, the commission's subpoena powers, the existence and effect of unlawful command influence, and the Constitutionality and applicability of the death penalty.

The issues became so abundant and prolix that the military judge in the KSM case at one point (see p. 46) calculated that there were over 500 issues that remained to be resolved before the case could go to trial. That these issues remain, and proliferate, after some of the defendants have been held at Guantanamo for over twelve years, cannot but call into question the sense, utility, fairness, and Constitutionality of the commission proceedings.

Ronald W. Meister

Chair

National Institute of Military Justice

Khalid Sheikh Mohammed, et al.

19-23 August 2013

Daniel Abraham

At the time of this report, Daniel ("Sparky") Abraham was a student at Yale Law School and a summer intern for NIMJ. After graduating in 2014, Sparky served as an Equal Justice Works fellow at Housing and Economic Rights Advocates, where he helped servicemembers and veterans with consumer finance issues including foreclosure and student debt, as an Enforcement Attorney at the Consumer Financial Protection Bureau, and as an Economic Justice Fellow at the NAACP Legal Defense Fund. Currently, Sparky is a Consumer Fraud Attorney at Bet Tzedek Legal Services in Los Angeles, where he helps seniors with problems related to real estate fraud and also works on the Impact Litigation and Policy Team.

Hearing Day 1
Monday, August 19, 2013 at 9:00 am

All defendants were present as required in the first hearing day of each week. The first issue addressed was Defendant Mr. al Hawsawi's presence. Commander Ruiz pointed out Mr. al Hawsawi's neck brace and stated that he is experiencing pain from a neck condition. The pain is exacerbated when he must sit for long periods of time. CDR Ruiz requested that Mr. al Hawsawi be allowed to voluntarily waive his right to be present for the remainder of the day. CDR Ruiz also noted that JTF had denied his requests to meet with Mr. al Hawsawi's doctor, and the prosecution had not responded to his request for medical records, and so he had no documentation of Mr. al Hawsawi's condition or medication. CDR Ruiz asked that Mr. al Hawsawi be allowed to return to camp immediately.

Mr. Swann spoke for the prosecution. He said that he received a request for Mr. al Hawsawi's medical records for the previous year. Those records are undergoing classification review and would be released to CDR Ruiz when available. He also said that he would make Mr. al Hawsawi's doctor available to CDR Ruiz and the court today so long as the doctor's identity is not disclosed. He agreed to the judge having a colloquy with Mr. al Hawsawi to determine if he wished to voluntarily waive his right to be present, and if so, to the judge excusing him for the day.

CDR Ruiz largely agreed to these conditions, but requested that a defense translator be present for the colloquy. While the court waited for the translator to arrive, the judge asked whether there would be any logistical problems returning Mr. al Hawsawi to the camp. Mr. Swann said it would be easiest logistically to transfer him to the holding area immediately, then move him back to camp at lunch. CDR Ruiz conferred with Mr. al Hawsawi, then stated that he is more comfortable in the courtroom than in the holding area, and so would prefer to remain in court until lunch. All parties agreed. When the translator arrived, the judge had a colloquy with Mr. al Hawsawi and confirmed that he wished to voluntarily waive his right to be present.

The next issue was a defense examination of FBI Special Agent James M. Fitzgerald about his testimony in AE008C Prosecution Exhibit J, in which Agent Fitzgerald testified as to Mr. al-Hawsawi's proficiency in English. After General Martins swore in Agent Fitzgerald, CDR Ruiz cross-examined him on his credentials to determine someone's proficiency in English generally, and Mr. al-Hawsawi's proficiency in particular (he had none except practical interrogation experience).

In the course of CDR Ruiz's cross, the topic of Agent Fitzgerald's interrogation notes arose because they are the only documentation of what complicated legal concepts may have been discussed in English. CDR Ruiz took this opportunity to hold up some pieces of paper to Agent Fitzgerald and ask him to verify whether they were his notes. The pieces of paper were completely blacked out.

CDR Ruiz stated that he had received 80 pages of Agent Fitzgerald's notes, all but two and a half pages of which were blacked out. It got a chuckle in the gallery, but Judge Pohl was not amused.

The judge said that discovery complaints were not at issue here, as he was only hearing testimony on Agent Fitzgerald's ability to assess Mr. al-Hawsawi's language skills. The judge also noted that CDR Ruiz could obtain the statements of the accused by signing the Memorandum of Understanding (MOU) on classified information and thereby agreeing to abide by the judge's protective order issued in January.
Mr. Swann noted that the two and a half unredacted pages provided were the portions of the notes that bear on the issue at hand—language proficiency.

CDR Ruiz continued to question Agent Fitzgerald. After establishing Agent Fitzgerald's proficiency determining qualifications (or lack thereof), CDR Ruiz asked about what was said during the interrogation. Agent Fitzgerald testified that he and the other interrogators spent approximately 10-15 minutes speaking with Mr. al-Hawsawi about his ability to converse in English before beginning the interrogation. Agent Fitzgerald also testified that he gave Mr. al-Hawsawi some legal admonishments, including that he had the right to end the interrogation at any time, and that he was in the exclusive custody of the Department of Defense. However, he did not tell Mr. al-Hawsawi that he had a right to an attorney, did not lay out what he was suspected of with specificity, and did not Mirandize him.

Trial counsel's questioning of Agent Fitzgerald focused on his long experience in law enforcement, his many interrogations of suspects with varying levels of English proficiency, and his past demonstrated ability to determine when suspects could sufficiently understand him. Agent Fitzgerald also testified that he asked open-ended questions and that Mr. Hawsawi's responses led him to conclude that Mr. al-Hawsawi understood the questions. Agent Fitzgerald also testified that he provided Mr. al-Hawsawi with several documents to inspect that were all in English.

Next, the court turned to what matters it would consider going forward. The court stated that it would attempt to stick to the prosecution's proposed schedule, but that it was not written in stone. Mr. Nevin, counsel for KSM, stated his desire to resolve AE018, about legal mail, then move to AE155M, about email, before addressing any other motions. His preference was based on defense counsels' inability to adequately prepare their arguments on the other pending motions without being able to communicate with their clients by mail or each other by email.

General Martins responded that the prosecution does not want to push AE15SM to the front because there are so many pending motions that were filed and briefed earlier. He said that since the motions were fully briefed and had been pending for some time, there would be no prejudice to defense on these motions from any difficulty in preparing arguments.

Judge Pohl said that he would not decide the order of motions immediately, but that there was something to be said for the older motions having been fully briefed already.

Mr. Nevin stated that to the contrary, the communication issues affect defense attorneys' readiness to do any work on any motions, including those that are fully briefed. Mr. Nevin also pointed out that the discovery issues litigated are mostly meaningless until the IT issues (and attendant motions) are resolved, because defense attorneys aren't able to use the discovery that the prosecution provides.

Ms. Bormann, counsel for Mr. bin Attash, agreed. She noted that the defense has not even been receiving judicial orders and that the IT problems run through all of OMC. She said that Mr. Nevin understates the problem when he says its resolution is crucial.

Mr. Nevin added that AE018, about mail, is also critical because it is the only way that the attorneys can communicate with their clients when they are not on the island.

Mr. Connell, counsel for Mr. al-Baluchi, noted that he had not been able to file a motion by email and so requested to file it by hand. The judge paused in apparent frustration before allowing Mr. Connell to file the motion.

General Martins argued that the sophistication of very recent defense motions about the IT problems belied their ability to effectively prepare. General Martins did not want to halt proceedings due to an "email glitch." He requested the court to stick to the prosecution's proposed schedule to be sure to address the important long-pending motions.

The court recessed for 15 minutes and returned to hear testimony from Agent McClain of DoD CITF on the same issue that Agent Fitzgerald testified on. Agent McClain was also present for three of the four days that Mr. al-Hawsawi was interrogated. He was similarly (un)qualified to judge language proficiency. He had interrogated at least 12 Arabic speakers before and had used a translator for all. Agent McClain testified, though, that he believed from Mr. al-Hawsawi's answers to questions and conversation that he understood clearly everything that was being said. Agent McClain believed the interrogation might have been videotaped, but was unsure. (Agent Fitzgerald testified that the interrogation was not taped.) Agent McClain testified that he did not recall anyone giving Mr. al-Hawsawi an opportunity to make a written statement.

> Judge Pohl reiterated that he issued the protective order twice and that he cannot keep reconsidering it while defense counsel ignores it.

After Agent McClain's testimony, the court turned to the MOU issue. Judge Pohl pointed out that attorneys Connell and Thomas (counsel for Mr. al-Baluchi) signed the MOU, but no other defense attorneys had signed. As a result, Mr. al-Baluchi's team had some classified discovery, but not much (discussed later). The judge suggested that all defense counsel have an obligation to sign and that failure to sign without a legal reason is obstructing the prosecution from providing discovery. The issue has nothing to do with what the prosecution has provided, so counsel should not argue about discovery problems.

Judge Pohl also brought up CDR Ruiz's recent challenge to the protective order and MOU based on the Convention Against Torture. The judge was obviously displeased with CDR Ruiz's filing the motion nearly seven months after the protective order was issued. CDR Ruiz emphasized that he was not delaying things, but had been genuinely occupied with the other legal, practical, and ethical problems the defense counsel face. CDR Ruiz explained that the protective order and MOU present delicate and

complicated ethical concerns for him and that he was not able to draft a sufficient motion explaining those concerns before last week.

Judge Pohl stated that the MOU only tracks the protective order and so does not classify anything unclassified. Therefore, it does not change any duties of defense counsel.

CDR Ruiz stated that Mr. al-Hawsawi has independent rights under CAT, and so the MOU would affect what advice CDR Ruiz can give him on those rights. Judge Pohl pointed out that Mr. al-Hawsawi hasn't litigated those CAT rights. CDR Ruiz countered that Mr. al-Hawsawi could not assert his CAT rights, because he cannot communicate outside the island. Judge Pohl asked, then, if Mr. al-Hawsawi can't litigate his CAT rights, what does the MOU change?[1] Judge Pohl reiterated that he issued the protective order twice and that he cannot keep reconsidering it while defense counsel ignores it. He asked CDR Ruiz if CAT was the only impediment. CDR Ruiz wouldn't say that it is the only impediment but did state that it was the major impediment.

Another recess.

Mr. Nevin addressed the MOU next. Mr. Nevin argued that signing the MOU constitutes a promise to adhere to the protective order. However, according to *Lankford v. Idaho*, a defendant in a capital case is entitled to know every outcome-determinative rule before making decisions affecting their rights.[2] This ruling requires the question of whether classified information can be provided to defendants to consider before defense counsel can bind himself or herself with the MOU.

The judge again pointed out that he had ruled on the protective order twice and asked when the reconsideration ends. Mr. Nevins stated that the reconsideration ends when there is no more doubt about the rules. The judge asked who determines that, and Mr. Nevins responded that all parties do collectively. The judge pointed out that he is the ultimate decision maker.

Mr. Nevins distinguished the protective order being final and him signing the MOU. He argued that signing the MOU has additional consequences for his client. Signing the MOU means that he agrees as his client's representative that the prosecution can withhold evidence from his client by providing it only to him, even when the government intends to kill his client based on that evidence. Mr. Nevins will not make that deal, and the protective order doesn't require him to do so. The protective order only says that if he doesn't sign, he won't be entitled to receive classified discovery. For all of these reasons, Mr. Nevin must know the resolution for other motions, including AE013GG (motion to amend protective order). So Mr. Nevins needs a resolution to the CAT issue and AE013GG before he can decide whether to sign the MOU.

Ms. Bormann echoed these concerns. She also stated that the MOU was superfluous as to the protective order, and the protective order has additional legal problems.

Principal among these is that the OCA has been stating that its classification policy conflicts with the protective order and that defense counsel must follow OCA guidance and ignore the protective order where they conflict. The OCA was also unaware that the presumptive classification issue was resolved, and so had recently read-on Ms. Bormann and included the

[1] I don't understand the CAT issue, or what litigating it would entail, but this seemed an especially callous and legally suspect statement by the judge. Having rights and being practically unable to (presently) litigate them, and having your counsel limit themselves with regard to those rights, seem like two situations different in kind. I don't think being practically unable to litigate your rights is the equivalent of not having them.

[2] 500 U.S. 110, 125-27 (1991).

provision that she may not disclose anything her client says, including what kind of sandwich he wants for lunch.

The prosecution stated that it was unaware of these conflicts. The prosecution stated that the protective order should guard defense counsel against criminal liability for violating OCA guidelines and that defense should have come to the prosecution with these problems sooner. Mr. Harrington, counsel for Mr. bin al-Shibh, stated that defense counsel vouches for the system by representing their clients in it. He emphasized his difficulty explaining to his client that he can be trusted with secret evidence, especially with so many other systemic problems eroding that trust (e.g., email). He also needs AE013 and the CAT issue resolved before deciding to sign the MOU.

Mr. Connell stated that he signed the MOU, but has so far only received 411 words of classified discovery, and those 411 words weren't material to the case. The judge distinguished summarized and classified discovery and pointed out that much-summarized discovery is still awaiting his review. Ms. Baltes for the prosecution weighed in that the vast majority of the classified discovery is summarized, and so is awaiting review by the judge.

Ms. Baltes also stated that the defense attorneys must sign the MOU and that there should be consequences for not signing. Also, pending changes to the protective order don't bear on the MOU, because the MOU incorporates the protective order changes at the time they are made.[3]

The court took a recess for lunch as Mr. bin Attash was feeling ill.

(On our return, defendants entered the courtroom and began doing prayer. The observers watched from the gallery for a few minutes, but then an internal guard force supervisor came in and yelled at some soldiers apparently for failing to make the observers leave until prayers are over. We were escorted out.)

The remainder of the day after lunch concerned Mr. bin Attash's health, and what constitutes voluntariness for waiving rights to attend the proceedings. I will write about this tomorrow, as it's late now and the problem is likely to be discussed further in the morning.

Due to Mr. bin Attash's inability to attend, the court recessed for the day. However, the judge stated his intention to have closed 502 sessions on AE052 after the recess.

Mr. Connell asked to make an argument about the closed session. The judge told him he could not do that in open court, but Mr. Connell insisted that he had worked out an argument that did not present any classified information.

Mr. Connell argued that *in re Terrorist Bombings* established that the need for closed hearings must be decided on a case-by-case basis and should be governed by a four-factor test.[4] Here, the factors weigh against a closed session. First, having the information presented in open court would not jeopardize any lives. Second, the government would retain its ability to control the transfer of information. Third, attorney participation would be the same either way. Fourth, defendant input, in this case, could be very valuable, and so leans in favor of an open session.

Mr. Connell made a three-part layered request. First, he asked for an open session on AE052. If not that, he asked that other interested parties, such as the press and NGOs, be given an opportunity to be heard on the closure. If not that, then the prosecution should articulate what damage it will suffer and which information is classified so that the session can be

[3] This seems like exactly the problem with *Lankford,* in that signing the MOU means the defense is committing to be bound by rules that remain undetermined.
[4] 552 F.3d 93, 130 (2d Cir. 2008).

bifurcated into both open and closed portions. Ms. Baltes responded that there is no authority to force the government to articulate which information is classified or why, and that it had already done so in AE136.

Judge Pohl summarily denied all defense requests and adjourned open court for the day at around 3:45 pm.

Hearing Day 2
Tuesday 8/20 at 9:02 am

Mr. bin al-Shibh is the only defendant present. First, the commission addressed the absent defendants. CDR Massucco testified that he had read the standard form and obtained signatures from KSM, al-Baluchi, and al-Hawsawi. Per the discussion yesterday, Mr. bin Attash was read the form, and then was asked whether his reason for not coming to court was medical. He said, in English, "I want to sign the form. I already signed the form." The government took that as a knowing and voluntary waiver and the defense did not contest it.

The first issue argued was on AE013DD, which concerns a proposed amendment to Protective Order One that would strike language requiring defense teams to turn over signed MOUs to the prosecution where the defense team members who signed are non-public members of the team. Mr. Connell argued that giving these MOUs to the prosecution gave them an unjustified and unbalanced window into the composition of his team. The prosecution's concern was that they need to be sure that whomever they give classified information at the defense offices is qualified to receive that information. Mr. Connell countered that he and his team had been receiving classified information for some time without any verification that they had signed MOUs, including before the MOUs existed. Judge Pohl suggested a possible solution whereby defense teams can turn over MOUs signed by public members, and give the prosecution a list of individuals qualified to receive classified information. That way, there is no window into the defense structure, and the prosecution doesn't have to worry about making unauthorized disclosures. Both sides seemed agreeable, though the prosecution maintained that any amendment to the protective order is unnecessary.

The next issue was AE013FF, which concerns how defense teams must handle potentially classified information obtained from public or "open-source" sources. The main problem arises from the fact that Protective Order One requires defense attorneys to handle as classified *any* information about the Rendition, Detention, and Interrogation Program (RDI) Program. This issue and other motions on similar issues were discussed primarily in terms of two hypotheticals:

- The defense team reads something in the New York Times about the RDI Program.
- The defense interviews a non-government witness about his or her perceptions with respect to the RDI Program.

Mr. Connell stated that the prosecution and defense essentially had the same view—open-source information is not classified and should not be treated as classified until a cleared individual discusses or comments or vouches for its truth. However, the OSS takes a contrary view. For example, the OSS has interpreted the protective order to require that hypothetical 2 take place. Mr. Connell suggested solving this problem by adding language to the protective order to the effect that it does not interfere with counsel's right to interview non-cleared individuals so long as counsel does not disclose classified information.

Ms. Baltes argued for the government that the amendment would be unnecessary and that the prosecution doesn't intend to interfere with any such interview. If the information is coming from an open source, like this sort of interview, then the protective order already contains provisions setting out the proper procedure. The defense is supposed to seek and follow guidance from the OSS. Moreover, despite some possibly conflicting interpretations, the prose-

cution is diligently working with OSS and the OCA to make the protective order interpretations consistent.

Mr. Nevin pointed out that the protective order definition for what information to treat as classified appears to also cover information officially declassified, such as the number of times KSM was water-boarded in March 2003. Another problem that arises is defense counsel's ability to ask follow-up questions, where those questions would indicate their interest in a topic and so might imply its importance or truth. Under the protective order and OSS/OCA guidance, a simple follow-up question might be an unauthorized disclosure. Defense counsel should also be able to discuss interviews with their investigators over unsecured lines so long as they're not confirming or commenting on the content—just like they should be allowed to discuss a NYT article on the street corner so long as they don't confirm its content.

Ms. Bormann asked similar questions, and also asked what should be done when the commission and the OSS give her conflicting guidance on proper procedures concerning the classification of information. She stated that the language in Mr. Connell's proposed order would at least solve questions concerning interviewing witnesses in unsecured locations.

Mr. Harrington brought up a situation in which he might receive classified information that was unlawfully distributed (think Snowden). OSS/OCA guidance requires him to bring that to a secure location immediately. He called it the height of silliness to treat information this way when everyone knows it. He only offered this observation and did not propose a solution.

CDR Ruiz pointed out that the CAT motion outlines a litany of difficulties faced by the defense team concerning classification issues. He pointed out that the competing concerns at issue are possible national security implications and a full and fair capital trial.

He said that in order to better vindicate the former, either the court or the prosecution could simply take death off the table. That might solve several problems. Alternatively, the government could simply declassify the info that is already in the public sphere that is causing the defense the most problems.

Ms. Baltes agreed for the prosecution that protective order does not require declassified information to be treated as classified. She also agreed that defense could interview open-source witnesses about, e.g., ROI information, and then communicate the results of those interviews through unsecured means. However, she did state that follow-up questions in those interviews would be limited. For example, she said, defense counsel could ask, "did you see anything else," but not whether they saw a specific thing.

The next issue was AE013GG, which concerned whether the protective order should be amended to include a paragraph protecting ICRC material from disclosure outside authorized individuals. Mr. Connell's position is that defendants and defense counsel are authorized individuals under the governing rule, and so adding this language would assuage government concerns and also preserve their access to the information.

General Martins spoke in opposition to the motion. He said that they had been consulting with the ICRC since June on whether they could access the information and whether ICRC would waive its privilege in any circumstances. He sought a court order authorizing him to send a search request to the ICRC document custodians to establish if there is any potentially discoverable information. He would then bring that information to the commission in a MCRE 506 hearing. Thus, the court could avoid ruling on the privilege issue, provide discovery where necessary, and protect the information.
CDR Ruiz did not join AE013GG, because it adopts the government's classification scheme. He also noted that this is the first time he has

heard argument on any use of MCRE 506, and wanted to ensure that the prosecution met its burden on invoking public interest and that the defense would have a chance to contest that invocation.

The next issue argued was AE013HH. This portion of the hearing involved a fairly complex issue about OSS procedure for handling defense requests for classification review. The defense sought an amendment to the protective order that would ensure attorney-client privilege is protected at every stage. The primary concerns were partitioning the portions of the OCAs that receive attorney-client privileged defense documents for review, ensuring that OCA personnel are prohibited from disclosing privileged information, and ensuring that defense does not waive its privilege by allowing OSS to forward privileged information to the OCA. Mr. Connell argued for language in the protective order mandating compartmentalization, requiring OCA employees handling privileged information to sign non-disclosure agreements, and memorializing the results of classification reviews to protect the defense from future liability. Defense counsel also requested an order stating that privilege is not waived by engaging in the review process.

LT Kozinski argued for the government that the privilege should attach and stay, but that the proposed changes go too far in constraining the authority of the OCAs and there is no authority for a court dictating how an OCA functions with respect to its classification functions. When pressed on what is being dictated, she pointed to the proposed NDAs and memorialization requirements. She also noted that classification review personnel must be able to consult other components of the organization; thus, a compartmentalization order could be problematic. Finally, the NDA requirement is outside the province of the court to order and unnecessary.

Mr. Connell said that he had no problem with reviewing personnel consulting other components of the OCA on privileged information so long as those components aren't involved in the prosecution. He could also agree to an OCA keeping cop-

ies of his privileged documents with a proper compartmentalization order. However, without such an order or NDA, they could turn over copies of his privileged documents to the prosecution or anyone without any repercussions.

AE013KK concerned an amendment to the protective order that would correct the classification status of filings after it has been determined by the OSS (which happens after they are filed with defense counsel's initial determination as to their classification status). The government did not oppose the motion, but there was some discussion as to what exactly the problem is. (Clearly, the judge does not use the docket tool on me.mil.)

After lunch, Mr. Harrington stated for Mr. bin al-Shibh that due to conflicts with the guards, he wished to leave for the afternoon. The judge had a colloquy with him after which there was some doubt as to whether he voluntarily wanted to leave, or felt that his situation with the guards meant that he had to leave. Mr. bin al-Shibh claimed that the guards were psychologically torturing him by disturbing his communications with his attorney and by only serving him food when he would be unable to eat it. After a short recess for Mr. Harrington to speak to Mr. bin al-Shibh, the colloquy repeated, and he stated he would voluntarily leave. After he left, there was some discussion of whether the judge could do anything about the alleged activity of the guards. Result: probably not.

The next issue was AE013II, also addressing how to handle open-source information, which must be treated as classified on at least one reading of the protective order. Mr. Connell's testimony mainly concerned with the NYT hypothetical. He asked that the protective order be modified to allow him to access and print open-source information on his computer, regardless of whether it is about RDI. He also asked for an unauthenticated OCA (CIA) memo provided to him without date or author, which articulated that open-source information need not go through classification review until included in a pleading, be incorporated into the protective order. The government argued that the protective order was already consistent with the OCA memo and that the protective order incorporates OCA guidance so the defense can already save public-source information per OCA guidance no matter what the protective order says. Defense only needs to seek OSS/OCA guidance on a specific document if there is a reason to believe it may be unlawfully disclosed or otherwise classified.

Mr. Connell asked what happens when info is contained in both classified and unclassified sources. He pointed to a case in which the D.C. Circuit held that the Army was wrong to revoke someone's clearance where he relied on open-source information in making a disclosure, even though he was cleared to access the same information as classified from the government source.[5] Ms. Bormann expanded on this with a real-life example where she was unable to receive information from her investigator because she didn't have access to the right security procedures, and it was information from an open-source but that she already knew the same information from a classified source.

Next was AE013JJ, a defense motion to allow client participation in the defense. This motion seeks an amendment to the protective order that would allow defendants access to classified information where it is being used against them. Mr. Connell argued that the protective order already allows review when the information is the defendant's statements, but that the defendants are also entitled to see all the information presented against them, including classified information. This entitlement arises from the Military Commissions Act (MCA), which states that all evidence admitted by any rule or procedure must be provided to the defendants.

[5] *Hoska v. U.S. Dept. of the Army*, 677 F.2d 131, 141 (D.C. Cir. 1982).

The judge and counsel had substantial back and forth on whether evidence can only be admitted on the merits, or whether the evidence in pretrial hearings (e.g., attached to motions) is also admitted for the purpose of this MCA provision. Mr. Connell argued that since this provision of the MCA was inspired by the *Hamdan* ruling about the Geneva Convention Art. III requirements, it does not directly track an explicit federal court requirement.[6] Still, at least twelve federal courts have issued protective orders giving defendants full access to classified information against them, including that used in pretrial hearings.

The judge was skeptical that a defendant in an Article I court could have more rights concerning classified information than a defendant in an Article III court, especially where the basis is the Geneva Convention. Mr. Connell reiterated that the basis is the MCA and that the MCA provision is consistent with the general principle that defendants get access to all information to allow them to mount a defense. Mr. Connell also pointed out that Mr. al-Baluchi has so far been denied access to even his own statements, presumably due to classification.

Lt. Kozinski countered that there is no federal case where a terrorism defendant got blanket access to classified evidence against him. Other protective orders use at least "as necessary" language, and many of the defendants in the cases the defense cites didn't ever get to see classified evidence. Mr. al-Baluchi's statements are currently undergoing a classification review. Lt. Kozinski also stated the government's position that "admitted" evidence in the MCA means evidence on the merits and does not mandate disclosure of classified evidence used in pretrial hearings.

Mr. Connell reiterated the statutory basis for his argument and noted that one of the two cases relied upon *in re Terrorist Bombing* permitted disclosure of classified evidence to the accused where it was used in pretrial hearings.[7]

Mr. Nevin argued that "admitted into evidence" in the MCA applies both to evidence on the merits and evidence considered in pretrial hearings. He argued that "any procedure" must include procedures such as today's procedure. If the judge didn't want to allow the defendant to access classified evidence used in a pretrial hearing, he could simply decline to consider it if it was attached to a motion. The judge asked whether this is a determination better made on a case-by-case basis. Mr. Nevin stated that substantially all of the classified information, in this case, is about the ROI program. This information is central to both phases of the case, but especially to the sentencing phase. Therefore, especially in a capital case, all the evidence should go to the defendant. Ms. Bormann made similar arguments.

The judge then asked trial counsel if it thought accused should have access to their own classified statements in pretrial hearings. Lt. Kozinski said generally no, but the defense can still seek access through the court per the protective order.

Hearing Day Three
8/21/13 at 9:02 am

Two defendants were present when the commission opened this morning—KSM and Mr. al-Baluchi. CDR Massucco again testified that the other defendants had knowingly and voluntarily waived their rights to be present using the standard form. Judge Pohl initially forgot to enter a finding to this effect in the record, but realized this omission and did so a few hours later.

The substance of the hearing began with defense motions to compel witness testimony on AE00S—the defense motion to dismiss for defective referral. The first motion to compel addressed was AE00SBB, the motion to compel testimony by Mr. Breslin, who was legal counsel for Convening Authority (CA) Admiral MacDonald.

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[6] 548 U.S. 557, 631-33 (2006).

[7] 552 F.3d 124-25 (2d Cir. 2008).

The MC previously denied a motion to compel this testimony, but that was before Admiral MacDonald's testimony in the June hearing.

Mr. Connell, counsel for Mr. al-Baluchi, argued that the MC's previous denial should be reconsidered on two grounds. First, the June testimony revealed that there was an investigation into the February legal mail seizure, which was overseen by the CA's legal advisors, Mr. Breslin, and Mr. Chapman. However, Admiral MacDonald wasn't very familiar with the details of the investigation or the results. Therefore, Mr. Breslin's testimony was needed to discover what sort of investigation occurred. This testimony relates to the defective referral issue because AE00S argues that learned counsel did not meaningfully "represent" the defendants at the time of referral, because the restrictions placed on legal mail prevented them from establishing a relationship. This issue also implicated counsel's ability to submit pre-referral mitigation evidence, though it is a separate issue from whether defendants had a right to pre--referral mitigation.

Judge Pohl expressed concern about what remedy would solve the problems laid out in AE00S and other motions. Mr. Connell stated that the only way to solve the problems would be to both fix the mail problem and dismiss the referral as defective. This solution would allow counsel to meaningfully represent their clients at the time of referral, and to effectively argue for non-death referral.

Judge Pohl pressed on whether there could ever be a sufficient referral if the mail problem remained. He expressed concern that finding a defective referral would remove the court from the situation entirely, and, then, there would be no one to order that the mail problem be fixed. Thus, there may never be an adequate referral on the defense's theory of adequacy concerning the mail problem. Mr. Connell pointed out that the Joint Task Force (JTF) could change the mail policy immediately, or at any time, without a court order.

The second ground for reconsideration is that Admiral MacDonald said that Mr. Breslin was responsible for a policy draft that eventually became the December 2011 Woods Memo on legal mail—the policy challenged as precluding meaningful representation. The CA cannot merely state its reliance on an investigation into an allegedly faulty policy when it created the policy.

Mr. Nevin, counsel for KSM, argued that Military Commissions Rule 601(d)(2) provides a "full-stop" prohibition on capital referral without learned counsel representing the accused. He emphasized that the rule says "represent" and not "appointed." Whatever representation means, it must involve being able to communicate with the client. However, under the December 27, 2011 order, some topics central to the defense are per se contraband and so cannot be discussed or disclosed. This order precludes "representation."

Ms. Bormann argued that there are two issues with respect to communications that warrant testimony from Mr. Breslin. First, the legal mail issue, as discussed by other counsel. Second, defense counsel was prevented from bringing materials related to the defense into meetings with the accused. Admiral MacDonald testified that Mr. Breslin informed him this wasn't happening. However, Ms. Bormann contends that it did happen.

The judge again asked whether the impediments to representation weren't the real problem, rather than the investigation that would warrant testimony from Mr. Breslin. Ms. Bormann responded that her theory is that the CA was actively involved and knew about the access to counsel issues. Mr. Breslin was in charge of that issue. Moreover, the pretrial advice to the CA contained no information about torture, despite its centrality to the case, particularly at sentencing. Mr. Breslin prepared that advice. Finally, the CA's office (via Mr. Breslin) was responsible for clearing and granting access for the mitigation expert. If the expert had access,

then counsel could have argued against a capital referral possibly to a different result.

CDR Ruiz argued that there is more to his position on the motion than mitigation as a right. He also argued that deprivation of counsel is a structural error, and so no showing of prejudice is required. He noted that Mr. Connell had asked to speak with Mr. Breslin about the issues in AE008, and Mr. Breslin had declined to talk with him. Therefore, it is difficult for defense counsel to attest to the relevance of Mr. Breslin's testimony when they are not sure what he will say.

Judge Pohl went back to his common theme throughout these arguments. If the referral is defective, then there is no independent authority *(e.g.,* judge) to rule on the problems that created the deficiency *(e.g.,* legal mail). So, if the referral is defective, there might never be a sufficient referral because these problems could persist. He noted this time that the ramifications of dismissing the referral don't matter, because if the referral is defective, that is the end of the issue. However, this concern was important to him.

[This concern seems misplaced at best. The judge seems to think he is the only one who can solve the mail problem. It seems to me that if the judge ruled that the referral was defective for problems A, B, and C, then someone will immediately fix those problems and it will be immediately re-referred. The concept that this case will never come back to trial because the legal mail policy makes an adequate referral impossible seems absurd. The administration has a humongous interest in bringing this case. I would imagine that the President himself could (and maybe would) call JTF and tell them to change the policy, and they would be more likely to heed that command than an order from Judge Pohl.]

CDR Ruiz argued that testimony from Mr. Breslin is necessary, because ADM MacDonald's statement made clear that he wasn't running the CA office. CDR Ruiz compared ADM MacDonald to an absentee landlord, with Mr. Breslin and Mr. Chapman as his property managers who were really running the show.

Mr. Groharing argued for the prosecution that there is a substantial evidentiary record on AE008 already. He argued that the defense had not shown even a hint of what Mr. Breslin would testify to that would advance defense positions. The judge asked whether the prosecution might fall back on a theory that the referral was not defective, because the CA acted in good faith reliance on the investigation conducted in part by Mr. Breslin. Mr. Groharing stated that the prosecution would not advance such a good faith argument. He reiterated that the defense had not established the relevance of the sought testimony.

Judge Pohl suggested that perhaps the defense hadn't presented the relevance of the testimony because Mr. Breslin has refused to talk to them. Mr. Groharing pointed out that Mr. Breslin had a right to refuse to speak to the defense, there is no reason to believe his testimony would differ from ADM MacDonald's, and there has been nothing new presented on the motion since the court denied it.

Mr. Connell argued that the prosecution's position means that the prosecution gives both the prosecution and the witness an effective veto over the defense's ability to call witnesses, where the prosecution has no such limitation. That is, the prosecution can deny a defense request to provide a witness, and if the witness himself chooses not to speak to the defense, the defense is incapable of showing why his testimony would be relevant, because the defense doesn't know what he would say. The prosecution, on the other hand, does not have to seek defense permission to call its witnesses and can subpoena witnesses who don't wish to appear. When the defense wants a witness that the prosecution doesn't want to provide, it must file a motion to compel to get him or her, and that motion can be defeated by the witness's refusal

to talk to the defense. When the prosecution wants a witness that the defense doesn't want to provide, it's the defense who has to bring the action in court as a motion to quash a subpoena.

The judge pointed out that in both cases, the question comes before the court and the party seeking the witness testimony must show relevance and necessity. Mr. Nevin pointed out that Mr. Breslin is not a bystander witness but gave the legal advice that resulted in the capital referral.

The next issue that came up was about to be resolved by a stipulation by all parties to expected testimony. However, the judge pointed out that general court-martial practice is to have the accused sign all stipulations. This assertion presented a problem, because some of the accused had not come to court and would not be able to sign the stipulation immediately. Mr. Connell argued that the requirement for the accused to sign a stipulation in military commissions only applies when the stipulation has to do with the merits of the case. Where the stipulation concerns a pretrial matter, there is no defendant signature required. Ms. Baltes for the prosecution disagreed and stated that court-martial practice should apply. The parties agreed to discuss further and revisit the issue.

> The defense attorneys aren't required to think about security. In fact, they only have to think about loyalty to their clients.

AE008M next. This defense motion to compel documents related to the investigation conducted by the CA referenced above, including the report produced after the investigation. CDR Ruiz argued that the investigation caused the CA to stop issuing clearances to defense team members and, thus, greatly affected defense capabilities. The same problem arose concerning relevance in that the defense had not seen the report and did not know what it said. CDR Ruiz argued that the defense should have the opportunity to view the report before arguing about relevance.

Mr. Groharing argued that this approach would "turn discovery on its head." He said that the prosecution should do a relevance review whenever the defense requests discovery. In this case, the prosecution concluded that there is no information in the report that advances the defenses' interests. The only material issue is the timing of the clearances issued, which is before the court in other evidence. Judge Pohl asked if the report includes any information about the CA processed clearance requests from the defense. Mr. Groharing said that there was only non-case specific information about the clearance process. He stated that he had a copy of the report in hand that he would gladly provide to the judge.

The judge then asked CDR Ruiz if in camera review would be acceptable. CDR Ruiz stated that in camera review is the very least that the rules require. The prosecution didn't object to in camera review either but stated their position that it's unnecessary.

Ms. Bormann stated that the CA's failure to clear her mitigation specialist was a major problem for her mitigation submission and bore directly on the defective referral question. This investigation occurred concurrently with that failure and concerned the same subject matter. She pointed out that in an Article III court, the defense wouldn't have to go through the prosecution to obtain a third-party document (since this is a CA document), they would just subpoena it. Since the MCA requires a similar discovery procedure, the MC should allow the defense to decide what's material to its interests-not the prosecution.

Judge Pohl stated that he would review the report in camera.

Next, the court heard AE031V—the defense motion to compel testimony from CDR Massucco on the defense motion to dismiss for unlawful command influence. CDR Ruiz argued that

CDR Massucco, as the Staff Judge Advocate (SJA) staff for high-value detainees (HVDs), was effectively the liaison between defense attorneys and their HVD clients and oversaw the search and seizure of the defendants' legal mail in February. CDR Ruiz stated that since, under the MCA, unlawful command influence occurs whenever anyone interferes with defense relationships and decision-making, and since the mail seizures undoubtedly affected defense relationships and decision-making, CDR Massucco's testimony is relevant and necessary to the motion. Though CDR Massucco previously testified on this motion, at that time, it was not clear that privileged communications had been seized.

Mr. Groharing argued for the government that he has spoken with CDR Massucco about this issue, and CDR Ruiz has not. CDR Massucco has the same knowledge as when he previously testified, and the defense has not articulated what relevant testimony he would have to give. CDR Ruiz pointed out that he couldn't have had the same knowledge, because he since learned which documents were seized.

Next, AE031F is a defense motion to compel evidence from CPT Welsh on whether attorney-client communications were monitored and who was monitoring them, as related to the defense motion to dismiss for unlawful command influence. CPT Welsh previously testified about JTF's combination of detention and intelligence functions and an intelligence task force since disestablished. CDR Ruiz stated that the motion seeks evidence of this disestablishment. On questions from Judge Pohl, CDR Ruiz answered that the testimony goes to CPT Welsh's credibility on other facts, but maybe not exclusively to credibility.

Mr. Trivett, arguing for the prosecution, stated that he had the documents in hand proving disestablishment of the task force. Judge Pohl asked why he didn't just hand them to CDR Ruiz. Mr. Trivett said that he would consider it, but that the document doesn't touch on what the defense alleges and there might be other reasons not to disclose the documents. Judge Pohl granted Mr. Trivett's request for in camera review.

CDR Ruiz next argued on AE031M, a motion to compel testimony from the guards who searched and seized the defendants' legal mail. Most of the relevance arguments up to this point were rehashed as related to the guards. Major McGovern argued for the prosecution that the timing is telling—the motion was filed in May 2012, and the searches occurred in February 2013. He also argued that the only relevant facts were addressed in CDR Massucco's testimony.

Next, AE047 is a defense motion to compel communications between the CA and the President's office for the motion to dismiss due to unlawful command influence. (The motion was filed before the naming convention changed and has its own number even though it relates to AE031.) Mr. Connell noted that this request is more fully considered in AE168 and is critical now because the role of other agencies in the decisions about legal mail policy wasn't evident until June.

Major McGovern argued that there is a strong presumption that the CA performs his or her duty without bias, so searching through various communications is unnecessary. This presumption is especially true given that ADM MacDonald unequivocally stated that no one influenced him in making his decisions as CA. The prosecution doesn't think it should have to bother the White House with this concern.

Mr. Connell noted that the motion wasn't just seeking potential communications but seeks actual communications testified to by ADM MacDonald and CPT Welsh. CDR Ruiz noted that the case that the prosecution relied on for the statement that there is a strong presumption that the CA is unbiased concerned the right to cross- examine the CA on a claim of vindictive prosecution. These facts are distinguishable as

the issue here is unlawful command influence, which makes whether the CA was biased as a result of influence a direct question.

Next, some confusion ensued about whether there is a pending motion relating to AE144. The confusion seemed to stem from the naming convention change. AE144 was filed as a vehicle for addressing the legal mail issues, and so is effectively subsumed under AE018.

Judge Pohl then brought up three pending motions-AE032K, AE032N, and AE032E. CDR Ruiz noted that 32K is essentially the same as the previously discussed motion for compelling testimony from guards relating to seizure of legal documents. He also pointed out, though, that privileged materials he had submitted under seal had not yet been addressed. He said that 32N should stay pending and that 32E requires a 505 hearing because it contains classified information.

MAJ McGovern argued that in addition to 32K seeking cumulative testimony, the judge has already ruled on the factual predicate that the sought testimony would elucidate. Finally, to the extent that the testimony might address ongoing violations, there is an interim order that addresses the issue.

Mr. Swann argued that 32N is not yet ripe and that a privilege review team (PRT} must review DVDs that defense counsel wishes to show to defendants as addressed in that motion. CDR Ruiz replied that the DVDs contain attorney-client privileged information and so that resolving AE018 would likely resolve AE032N. He expressed concern for how deeply a PRT would look at the privileged content of the DVDs. Ms. Bormann stated that concerning 32K, she takes exception to MAJ McGovern's statement that the court should accept JTF's findings of guard force interference with privileged information and communications. She said that after a blanket statement that no seized information was privileged, she saw with her own eyes that some of it was privileged. Without more testimony from guards, she doesn't know for what remedy to request.

Recess for one hour for lunch. Return at 14:04. Mr. bin al-Shibh is now present.

Ms. Bormann requests that her co-counsel, translator, and a paralegal be allowed to exit to the holding area, where Mr. bin Attash is currently held. He wants to participate in the hearing but is too sick to be in the courtroom. There is no objection from the prosecution, and the court granted the request.

Next, the court considered the defense motion for reconsideration of AE018, the government motion for a privileged written communications order. Mr. Nevin stated that after the hearing in June, he submitted a revised privilege order suggesting changes. The prosecution filed a memo objecting to most or all of the changes. Mr. Ryan, for the prosecution, clarified that he opposes all changes. Mr. Nevin challenged some of the prosecution's arguments, then methodically reviewed his changes. First, he challenged the prosecution's contention that he misconstrued the attorney-client privilege. He explained that the privilege extends to any statement that facilitates representation, not just statements of direct legal advice. Therefore, contrary to the prosecution's assertion, a letter written by KSM introducing Mr. Nevin as his lawyer (for Mr. Nevin to present to a potential witness) is privileged and work-product, but the order contained in AE018 identifies such a letter as non-legal mail.

Judge Pohl asked what limitation defense attorneys would have in what they could declare to be legal mail in Mr. Nevin's rewrite. Mr. Nevin stated that the attorneys are bound by their good faith following of the rules. He emphasized how difficult it is to build trust with the clients, especially given cultural differences, previous treatment, and the attorneys working for the government. It destroys this trust when the defendants see that their communications with their attorneys are subject to government intrusion.

Mr. Nevin also noted that, in the scheme under the order, the PRT is only supposed to review documents for the attorney-client marking, not for content. So, under the current scheme (theoretically but not in practice), defense attorneys are sole determiners for when something is legal mail.

Ten-minute recess to address the problem with the audio feed.

Mr. Nevin continued that every protective order issued in federal court contains an exception to the informational contraband definition for information and materials related to representation. Mr. Nevin reiterated the impropriety of the SJAs or guard force, determining what is related to the defense. He gave an anecdote of an SJA demanding to know what defense a document pertained to when he attempted to bring it into a meeting with his client. He didn't think he should be required to say, notwithstanding, he told the SJA. The SJA said, "that's not a defense." This screening is clearly improper. Mr. Nevin argued that you must rely on the professionalism of the lawyers to conform to the rules. This dilemma is the case in every criminal prosecution in America, and it is unavoidable if privileged information is to be protected.

On the privilege team, Mr. Nevin stated he has been of two minds. First, the PRT should be left out. Since they are only reviewing for the banner marking and not content, they are unnecessary as anyone can identify the banner. Second, keep the PRT but change the order of the wording to protect the privilege. The order currently states that the purpose of the privilege team is to protect the attorney—client privilege "to the fullest extent possible." This measure is something less than completely protecting it. Mr. Nevin argued that this language should state that the privilege team exists to fully protect the privilege.

Judge Pohl noted that Mr. Nevin also marked out language requiring the PRT to consult defense counsel before approaching the JTF when it sees information in legal mail that presents a security concern. Mr. Nevin asked how they could see such information if they are only reviewing for the proper markings, and not for content, as the order requires. Judge Pohl thought that this provision only protected the defense from having the PRT take information directly to JTF When/if they came across it, even if they improperly came across it. Mr. Nevin stated that a better way to assuage this concern would be not to have a PRT.

Mr. Nevin conceded that defense attorneys couldn't send anything to their clients without any security review by marking it legal mail. He said that there would probably be an exception for any physical contraband.

Mr. Nevin reiterated that despite prosecution assertions to the contrary, the legal mail procedures violate the rights of the defendants. The mail procedures "define without exception elements of our defenses as contraband." For example, all discussion of the history or context of terrorist attacks, such as discussion of American military presence in the Middle East, is defined as contraband. This evidence, which goes to the motives and perspective of the defendants, is critical to the case and normal to present in any criminal proceeding. Defining it as contraband here is a violation of the defendants' rights. Mr. Nevin noted that the MOU governing the administrative review board includes a contraband exception for information necessary to the defense, which defense counsel is allowed to define.

Mr. Nevin contested the prosecution's claim that the contraband definition is comparable to other government provisions. None of the provisions the prosecution points to define defenses as contraband. Further, the definition of contraband in AE018 even covers some paragraphs in the charge sheets. So, under AE018, Mr. Nevins argues that he is not allowed to send the charge sheet to his client because it discusses jihad.

He challenged various other prosecution claims. He stated that defense counsel doesn't use the legal mail system not because it's not important, but because it violates the defendants' rights. He stated whether the prosecution is involved in reviewing legal mail is irrelevant, since any third-party review outside the privilege destroys the privilege. Finally, he challenged the prohibition on "propaganda materials." Propaganda is a loaded term, and a thinly veiled reference to information about historical context. It is not the government's or prosecution's role to define propaganda. If information relates to a valid defense-and historical context does, then it must be accessible by defendants. Otherwise, Mr. Nevin is exposed to an ineffective assistance of counsel claim.

Mr. Nevin stated that the markings of privilege should be on the back of the pages of documents so that they are easier to see and present less of a risk of exposure to privileged content. Moreover, he stated that defense counsel should not be required to initial every single page of the multi-page submissions and that defense counsel should be allowed to directly deliver non-legal mail to the JTF instead of being required to send it by USPS. He said that the SJA should seal mail from KSM to Mr. Nevin in front of KSM and then deliver it directly to a defense courier. KSM shouldn't be required to retain attorneys himself-other organizations should be allowed to retain attorneys for KSM so long as they can get proper clearance.

Disciplinary status should not affect KSM's ability to speak with his attorneys. Finally, the guard force should not review meeting notes of either KSM or his attorneys.

Mr. Ryan argued for the prosecution on AE018. He explained that there must be a robust security process in place. The security concerns are not idle. Evidence was presented in June that the defendants were found in possession of a pen refill and an "Inspire" magazine marked as legal mail with an article about bomb making. Other al-Qaeda cases show the extent of security threats from detainees. The defense attorneys aren't required to think about security. In fact, they only have to think about loyalty to their clients. However, the judge must balance communication concerns with the safety of the guard force. The defense's proposed order offers no balancing at all.

Mr. Ryan pointed out that the government's drafted order is identical to the one Judge Pohl issued in *al-Nashiri*, which was significantly less restrictive than the order the government sought. Judge Pohl cautioned Mr. Ryan not to rely on *al- Nashiri* as each case is unique. (He effectively said that he didn't want to hear about *al-Nashiri*.) Mr. Ryan next pointed out that first, the defense demanded "unfettered access" to the defendant. That was patently unreasonable. Only five months ago did they propose revisions to the government's drafted order at AE018.

Mr. Ryan next began to review the reasons for concern with Mr. Nevin's specific changes. He noted that Mr. Nevin's definition of contraband allowed the defense to decide that something is not contraband only on the "subjective reasonable belief" that it is relevant to a defense. Judge Pohl asked if the prosecution's drafted order was overly-restrictive in that it prohibits defense counsel from discussing historical context with the defendants. Mr. Ryan conceded that it might be overly restrictive, but it should not be amended to give the defense all the authority.

Mr. Ryan pointed out that Mr. Nevins changes would allow whole books to be marked attorney-client privileged, even though neither the attorney nor client wrote the book. Then, the guards could only search the books for physical contraband, and not review for content. This procedure could allow some very "inflammatory and incendiary" material to come into the facility.

Mr. Ryan noted that Mr. Nevin submitted a D.C. District (DDC) protective order on a Guan-

tanamo case that substantially undercuts the defense position. This order doesn't forbid the PRT in that case from reviewing the content of communications. Further, the contraband exception for case-related material is very narrow. Finally, the DDC order allowed the guard force to approach JTF with any security concern, while the defendant's drafted order requires the guard force to approach the defense first.

The judge interrupted Mr. Ryan to ask if he could stop there and pick his argument back up tomorrow. This conclusion seemed abrupt as it was only 16:25, and most of the gallery expected to stay until 17:30 or 18:00. The court was adjourned for the day around 16:30 without explanation.

Hearing Day Four
8/22/13 at 09:05 am

KSM and al-Baluchi are the only two defendants present. Mr. Swann had the standard voluntariness discussion with LCDR Massucco. LCDR Massucco noted that Mr. bin al-Shibh would probably come in the afternoon. Also, Mr. bin Attash had come from the camp to the holding cell but didn't feel well enough to come inside. Ms. Bormann asked for the same arrangement as yesterday—defense attorney, paralegal, and translator staying in the cell with Mr. bin Attash. Judge Pohl granted the request.

The hearing began with a lengthy discussion about what motions would be addressed today and tomorrow. There was considerable confusion all around about which discovery motions related to which substantive motions. The judge ended up asking counsel to identify every substantive motion that a filed discovery motion pertains to when sending it to the clerk. (After lunch, the judge rescinded this on the clerk's request, and told counsel to continue filing each discovery motion under the heading of every substantive motion it relates to.) Ultimately, even though CDR Ruiz had asked to take testimony on his Convention Against Torture (CAT) motion (AE200), and the prosecution had agreed, even though they haven't briefed the motion yet, that testimony will be delayed until the next hearing on Mr. Connell's request. At the end of the discussion, Judge Pohl gave a short lecture on being prepared to argue the motions that are on the docket, even if they relate to motions not on the docket.

The first substantive argument in the hearing was a continuation of Mr. Ryan's argument from yesterday for the government opposing the defense's proposed changes to the legal mail order (AE018). First, he recapped the key points of his argument from yesterday about the District of Columbia District (DDC) protective order in the GTMO defendants case. Namely that the DDC order permits the privilege review team (PRT) to do content reviews, defines "related to the defense" exception to contraband information narrowly, and that the PRT reports security- related information directly to the Joint Task Force (JTF) without first consulting the defense attorneys.

Mr. Ryan further argued that there is a spectrum of appropriate materials defense attorneys might send into camps. For example, the 9/11 Commission Report is clearly case-related, and the PRT should review the content to make sure it's what it should be, and then forward it to the defendant. However, there are also books that discuss acts of violence and exhort future violence against the U.S. Even if this is represented as case-related, the PRT should be able to prevent it from entering the facility because it is contraband. If the defense doesn't like a decision that an item cannot enter the facility, it can seek judicial review.

Mr. Ryan characterized this issue as the parties missing the forest for the trees, or the leaves on the trees. He emphasized three basic components of the broader situation. First, the detention facility has a right to maintain good order and discipline, and the government generally has a right to protect security. Second, the defendants are charged with committing acts of terrorism against the U.S. and killing nearly

3,000 people. When you're charged with that sort of crime, your communication will be restricted. Third, despite all this, the prosecution's drafted order is still reasonable and protects the defendants' communication interests.

Mr. Nevin reiterated his point that no protective order in a criminal case in history had gone so far, and that Mr. Ryan had not identified one. He argued that the DDC order actually supports the defense position. That case is not one in which the detainees are presumed innocent, or where the standard is beyond a reasonable doubt. However, even where these protections are absent, the order is still broader than the government's proposed order. The DDC order does not make information about the Rendition, Detention, and Interrogation Program (RDI) contraband, while the proposed order makes this information contraband despite its relevance to defenses.

Judge Pohl asked about the 9/11 Commission Report example. He asked if there would be any problem with the PRT reviewing the content in that case. Mr. Nevin said that would be a problem. He said that he might have highlighted certain portions. After PRT review in the proposed order, the prosecution could question KSM on the stand about having read it and what parts were highlighted. The judge asked what Mr. Nevin could send that would not be privileged. Mr. Nevin said that he sends volumes of unprivileged, nonlegal mail. Finally, the judge asked about the Inspire magazine issue. Should that automatically go in with a privilege stamp? Mr. Nevin pointed out that the prosecution is proceeding on a conspiracy theory with al- Qaeda in the Arabian Peninsula (AQAP), that the prosecution would put in evidence about what AQAP has said in arguing for KSM's conviction and execution. In this context, he must be able to discuss those relevant materials with his client. So the issue of Inspire magazine was privileged because it is part of the defense. He said that if the prosecution isn't willing to trust the professionalism of defense attorneys, they shouldn't have brought charges against his client.

Mr. Nevin made two more points. First, the case is about people alleged to be at war with the United States, who are held in military custody, being tried in a military commission, and being prosecuted and defended by military lawyers. The notion that inflammatory language would threaten security in the facility is unreasonable. Second, there is no problem identifying the detainees' legal notes that come from meetings with counsel. CDR Massucco says that there are already a lot of legal notes, and the guards are just stamping each page of legal pads. Rather, the problem is with following the rules after the information has been identified as legal notes.

Ms. Bormann spoke next. She pointed out that books can clearly be privileged. The charges in the case have spurned hundreds of books, and some of the books' authors will likely be witnesses. She pointed out that under the government's proposed order, the only way for her to communicate with her client about passages in "contraband" books is to transcribe entire passages herself and send it as privileged legal mail. If the court grants AE018, she will spend upwards of twenty hours doing this almost immediately. This is not the best use of her time. AE018 would also bar her from bringing books into client meetings. The same problem arises.

Mr. Harrington said that the underlying question lies with Judge Pohl. He emphasized that the prosecution bears the burden of convincing the judge that every restriction they request is necessary. They haven't done that. Also, the government has previously represented to the court that it would not listen to attorney-client meetings. By the same logic, if Mr. Harrington had an amazing memory, he could memorize passages of "contraband" books and then recite them to his client without any problem. If the court trusted defense counsel, there would not be a "case- related" category for documents—only non-legal or privileged. Determining what is privileged is the task of defense counsel, not a PRT or the judge. Requiring defense counsel to justify its every decision is "abhorrent to our system of justice." It is impossible to treat these

defendants any more securely than they are already. There is no language more inflammatory than what is already in the charge sheet attributed to the defendants. Inflammatory language is the subject matter of the case. Finally, the PRT is not part of the privilege. PRTs in other cases are also not part of the privilege. Moreover, defense attorneys in other cases involving PRTs would probably also say that they cannot adequately perform their functions. LTC Thomas (counsel for Mr. al-Baluchi) took exception to Mr. Ryan's statement that his only duty is to his client. He pointed out that the duty of military counsel includes defending the Constitution and discharging all the duties of an officer.

CDR Ruiz presented three envelopes that he had attempted to use for sending documents to his client. All three were returned to him after several weeks in various states of disrepair. These problems make clear the need for an alternative to the USPS for delivering documents. Next, CDR Ruiz addressed the PRT. He pointed out that the PRT in the habeas case was created to provide guidance on classification. In this case, there is overwhelming guidance, including Defense Security Officers. He asked that the judge's order include language on DVDs to the effect that whoever reviews the mail should only inspect DVDs for the privilege stamp on the outside. The judge asked about when the DVD might include some privileged and some non-privileged material. CDR Ruiz said that this would be a rare situation, but that they could have a convention for naming files. Finally, he asked that the judge address client to attorney communications. He suggested that these should be treated as classified on the way out, and whatever is the standard treatment should apply when they come back to the clients.

Mr. Ryan had no further argument. On questions from Judge Pohl, he said that there is no evidence that the detainees are treated at the highest possible level of security, and that the prosecution would prefer if the judge addressed the DVD issue later.

Mr. Ruiz then noted that there was a motion on the docket this week (AE032N) that did address the DVDs, and he needs to get the DVD material to his client as soon as possible.

Some discussion ensued about whether a decision on AE018 would make AE032 moot. The defense attorneys made the case that the factual predicate underlying AE032 bears on other motions even if the relief would be moot. Court recessed briefly for Mr. bin al-Shibh to enter the courtroom. Some parties were late returning, and the judge, obviously frustrated, gave a short lecture about it. Discussion continued about the relationship between AE032 and its discovery motions, and AE018. Defense counsel agreed to file future discovery motions under every substantive motion to which they were relevant but insisted that argument on AE032 must include classified information and so a S0S(h) hearing is required.

Mr. Connell next addressed AE133N, a motion to compel discovery about the courtroom audio session. Mr. Connell articulated four requests:

1. The prosecution should produce the individual who "pressed the button" to interrupt court on 28 Jan. 2013.
2. The prosecution should produce any documents and information relating to what happened that day.
3. The defense should be allowed to interview audio tech staff in a sufficiently secure location for them to discuss aspects of the system they had previously refused to discuss.
4. The prosecution should provide as-built schematics for the audio system, which witness testimony established were being created months ago.

This information will allow the defense to determine if a motion is warranted.

Judge Pohl said that the defense isn't supposed to file motions to develop factual predicates. Mr. Connell responded that the defense only needs enough information for a good-faith basis to file a discovery motion. The defense has a good-faith basis for a backward-looking challenge to the courtroom audio system. The motion seeks the documents and information necessary for the potential motion.

Mr. Trivett argued for the prosecution that they had given the defense access to the schematics it had. The prosecution is not required to create discovery for the defense. Also, the defense hadn't shown the relevance of the discovery. Judge Pohl asked Mr. Connell if he is asking the prosecution to create something that doesn't exist. Mr. Connell said that the prosecution's claim is superficial. Even if the as-built schematics don't exist, the information that would constitute them does exist, and the prosecution has access to it—for example, the programming code for the system. On the relevance question, Mr. Connell said that the request should be judged on the general discovery standards, and the information sought is clearly relevant for a backward-looking challenge.

The commission recessed for lunch and returned at 14:16 with Mr. bin Attash present in addition to the other defendants.

Mr. Nevin continued the argument on AE133N. He said that the information sought is necessary to resolve AE133, and so only the discovery motion is ripe. He said that all the information that the prosecution had so far provided has come with limitations and omissions.

Mr. Ruiz informed the court that Mr. al-Hawsawi is now present in the holding cell and requested a recess to speak with him. Judge Pohl said that the court has been accommodating of detainees' requests to be present or absent, but if their movements end up causing delays, he will require them to be present in court every day. He granted the recess, and the commission resumed at 14:36.

Mr. Connell next argued AE091, which is a constitutional separation of powers challenge to the MCA on the ground that the CA mixes prosecutorial and judicial functions. Mr. Connell listed all the ways in which the CA behaves as a prosecutor (*e.g.,* referring charges, deciding whether to seek capital punishment, deciding witness immunity, receiving legal advice from the prosecution supervisor), then as a judge (*e.g.,* detailing panel members, processing and maintaining transcripts, reviewing and modifying findings and sentence, and suspending sentence).

He presented a hypothetical to show potential conflicts, which involved the CA granting immunity to one defendant for providing testimony against another defendant (presumably on his or her belief that the witness is credible), then reviewing the findings of the court partly on the basis of witness credibility.

Even though these are substantially the same as the CA functions under the UCMJ, Mr. Connell argued that the different context is relevant, and that ruling the MCA unconstitutional would not apply to a CA under the UCMJ. This argument is grounded in the factors from *Curry v. Secretary of the Army* that justify the CA's mix of functions under the UCMJ, which factors do not exist under the MCA.[8]

Judge Pohl asked if the CA had different significant functions under the MCA, rather than just operating in a different context. Mr. Connell said that though the powers are the same, the roles of the CA in the two systems are different. The role was the critical test in *Curry*. Under the UCMJ, the CA's purpose is maintaining good order and discipline, not purely punitive. The

[8] 595 F.2d 873, 878-80 (D.C. Cir. 1979).

UCMJ CA has more roles than just being a CA, such as duties as a commander, whereas the MCA CA has only one role in the system. The driving role for the CA under the UCMJ is combat-readiness. Finally, the CA in the military system is in the same service as the accused, whereas in the MCA this is clearly not the case. Mr. Connell's overall point seemed to be that the MCA system would not survive scrutiny if a party exercised the functions of the MCA CA in an Article 3 court, and *Curry* suggests it wouldn't survive under the UCMJ either given the relevant differences.

Judge Pohl asked what the exact constitutional violation is. Mr. Connell said the system violates the due process clause and the define and punish clause. Since the motion is a facial challenge, the only solution is for Congress to fix the statute.

The prosecution rested on its brief.

Next, LTC Thomas argued AE106, a constitutional challenge to the MCA grounded in the equal protection clause. He argued that the MCA created the only MC in American history that discriminates based on alienage, and the only other governments that had set up such a system are Nazi Germany and Imperial Japan. LTC Thomas argued that the commissions may only discriminate based on alienage if the result of not doing so would be impractical or anomalous. However, trying citizens in MCs is not impractical or anomalous as a matter of law because the Supreme Court said so in *Ex parte Quirin*.[9] Similarly, it is not impractical or anomalous as a matter of fact because the U.S. has tried citizens by military commissions (at least 86 times in the Mexican-American war). The MCA creates a system that is "separate and unequal," given that citizen combatants are tried under the UCMJ or in federal court.

LTC Thomas argued that strict scrutiny should apply. The rational basis for discrimination on the basis of alienage only applies to statutes regulating immigration, government benefits, or government service. This case is none of these, and Mr. al-Baluchi's situation is identical to that the Supreme Court rejected in *Wong Wing*.[10]

Judge Pohl asked if this is a challenge based on a limitation on Congress or based on a personal right of Mr. al-Baluchi. LTC Thomas said it is both. He further explained that the MCA fails on the rational basis test as well, since *Quirin* says it's not necessary and Americans are tried for the same crimes in federal court. The jurisdictional provision is not severable, and without it, the MC has no one to try. Congressional testimony makes clear that Congress would not have passed the MCA if it had jurisdiction over citizens. Finally, even if the detainees cannot be transferred to the U.S., a federal court could come to GTMO. Since the MCA discrimination is not related to a legitimate interest, it fails rational basis.

Gen. Martins argued for the prosecution. He argued that Congress established a robust system for trying noncitizens that would survive a due process challenge if the detainees are determined to have due process rights. The prosecution's position is that the commission does not need to decide whether the detainees have individual rights relevant to the motion. There is an entire chapter of the U.S. code that applies only to noncitizens. The defense is unable to distinguish cases about differential treatment of noncitizens in FISA courts. Those cases were decided on a rational basis, and though they didn't concern criminal trials, they were in a criminal posture. It was rational for Congress to decide that noncitizen enemies will have fewer contacts with the U.S., making the collection of evidence more difficult, and so it is rational to create a separate system.

Gen. Martins also argued that the strict scrutiny cases are distinguishable. *Wong Wing* didn't get

[9] 317 U.S. 1, 37, 44 (1942).
[10] 163 U.S. 228, 237-38 (1896).

a trial at all, and here the defendants are getting a robust trial. Here, the defendants "opted-in" to jurisdiction. Judge Pohl questioned this opt-in point. Gen. Martins said that the defendants could have chosen not to fight illegally, and thus avoided MC jurisdiction. Judge Pohl asked if Gilani opted-in to federal court jurisdiction. Gen. Martins said no, but his point is that the defendants put themselves at risk.

LTC Thomas argued in his reply that *Wong Wing* says aliens cannot be held for capital crimes without indictments. Judge Pohl pointed out that accused under the UCMJ are not indicted. LTC Thomas again pointed to *Yick Wo* and *Wong Wing,* to the differences in context between a MC and a court-martial, and the court must rule out strict scrutiny before applying a rational basis test.[11]

Mr. Nevin argued that Gen. Martins' opt-in argument denigrates the presumption of innocence. Judge Pohl expressed doubt that any defendant opts-in to any jurisdiction, but he doesn't think the remark or the question is of particular significance. Ms. Bormann said that when the government prosecutes someone in a criminal trial, all personal rights attach regardless of citizenship. Gen. Martins responded that since the MC ultimately decides the question of jurisdiction, there is no problem for the presumption of innocence. He then pointed to *Eisentrager* for the proposition that the citizenship distinction is crucial in the context of hostilities.[12] Congress can make different rules for noncitizens so long as the system remains fair, and the robust MC system is fair.

Court recessed and returned at 16:00.

Mr. Connell argued AE104, a motion to dismiss because the MCA exceeds Congress' power under the define and punish clause by limiting jurisdiction to noncitizens. Mr. Connell started with *Eisentrager*. He noted that *Eisentrager* is about individual rights, and the define and punish clause imposes a structural restraint on Congress. Mr. Connell made five points:

- Congress' power to issue the MCA clearly comes from the define and punish clause.
- Congress' power is limited to violations of the law of nations, and
- Congress cannot authorize law of nations trials in a system that violates the law of nations.
- Geneva Conventions Common Article 3 is part of the law of nations, and
- Article 3 requires MCs to follow court-martial rules unless deviations are justified by practical needs.

Here, there is no practical need for deviating by restricting the MCs' jurisdiction—there can be any sort of MC trial at GTMO. Therefore, the MCA violates the define and punish clause on its face. Judge Pohl asked if UCMJ Article 10 would also need to apply to MCs using this argument. Mr. Connell replied that there might be a practical need to deviate from the speedy trial provision, but there is clearly no practical need for the citizenship distinction.

Gen. Martins responded for the prosecution, arguing that the Geneva Conventions require a "regularly constituted court" and that *Hamdan* countenanced deviations from court-martial practice without finding specific practical needs.[13] A regularly constituted court means one "set up in accordance with recognized principles" that apply in the administration of justice, which requirement the MCs satisfy. Geneva Conventions Common Article 3 allows flexibility, only requiring "regularly constituted."

Hearing Day Five, 8/23/13 09:02 am

No defendants present for court today (as is the norm on Fridays). Mr. Swann and LCDR Massucco established knowing and voluntary waiver for each.

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[11] *Yick Wo*, 118 U.S. 356, 369-71 (1886).

[12] 339 U.S. 763, 775-77 (1950).

[13] 548 U.S. 557, 631-33 (2006).

The commission began with Mr. Connell's reply to General Martins' argument from Thursday on AE104, the defense motion to dismiss on the grounds that the MCA violates the define and punish clause because it limits MCs' jurisdiction to noncitizens. He challenged Gen. Martins' account of what constitutes a "regularly constituted court" under the Geneva Conventions Common Article 3. The prosecution's position is that to be a regularly constituted court; a tribunal must only comport with fundamental principles of justice. However, Mr. Connell argued, the *Hamdan* court said that regularly constituted means existing (Judge Pohl cut him short here).

Judge Pohl asked whether Congress' only choices, then, were to try these defendants in courts-martial (CMs) or Article 3 courts. Mr. Connell said that those weren't the only options, but a practical need must justify any deviation from those systems. No such need exists for the jurisdictional limit.

Next, Mr. Connell argued AE105, the defense motion to dismiss for violation of the appointments clause. The defense contends that the MCA creates a convening authority (CA) that is a principal officer, whom the Senate must confirm. CDR Bogucki asked for this motion to be put off until the parties argue AE031, because AE031 concerns the convening authority's level of autonomy, which bears on whether s/he is a principal or inferior officer. The idea here seemed to be that arguing the two motions at once would force the prosecution to simultaneously claim that the CA is autonomous and that the CA is not a principal officer. The judge denied this request, and the parties argued AE105.

Mr. Connell argued first. By establishing that the CA is an officer and established by law, Mr. Connell narrowed the issue to whether the CA is a principal or inferior officer. He argued that the CA is a principal officer, emphasizing the broad discretion granted to the CA by the MCA. Judge Pohl pointed out that CAs in the military justice system have the same broad powers but are not separately appointed and confirmed by the Senate. Mr. Connell pointed out that UCMJ CAs act within the chain of command, so they are always inferior. The CA's commanding officer can always take over as the CA, so the UCMJ CA's autonomy and discretion are limited. Under the MCA, no such chain of command governs the CA.

Judge Pohl asked about the Secretary of Defense's power to designate new CAs under the MCA, “Doesn't this count as the same supervision?” Mr. Connell claimed it is not the same, because the Secretary of Defense may only designate a new CA, not take over the job him/herself. Gen. Martins countered that in *Weiss*, military judges were not determined to be principal officers despite their autonomy.[14] Scalia's concurrence, in that case, notes that military appeals judges are not removable but are inferior officers nonetheless.[15] The MCA CA is no different. Gen. Martins said that this question is statutory and not constitutional. Congress must vest appointment power in the head of a department to appoint inferior officers. By creating the CA role in the MCA, and then allowing the Secretary of Defense to establish the office and "designate" a CA, Congress has vested the power to appoint even if the statute does not say "appoint."

Next, the commission heard argument on AE107, a defense motion to dismiss for lack of jurisdiction because the charge sheets do not state war crimes. CDR Ruiz invited Gen. Martins to argue first, because the prosecution bears the burden of establishing jurisdiction.

Gen. Martins noted that the *Hamdan II* court looked first to codified international law like treaties, then to customary law, then to treatises and commentaries.[16] He used that template to argue for jurisdiction for each of the charges. Mostly rehashing the prosecution's brief, he

[14] 519 U.S. 163, 175-76, (1994).

[15] *Id.* at 195-96.

argued that attacking civilians is a core violation of the law of war. "Murder" is not a term used in treaties, but since the charges involve completed acts *(i.e.,* not inchoate acts—what the *Hamdan II* court seemed worried about), murder in violation of the law of war is triable by MC.[17] The same goes for the destruction of civilian objects and destruction of property. Though these crimes are not laid out in any code with elements, Congress has given guidance and content to how the offenses should be tried.

Gen. Martins sidestepped the ex post facto problem by claiming that Congress had simply increased the level of process defendants received for particular crimes, and increasing process could not be an ex post facto violation.

He argued that hijacking is mentioned in the commentaries, and again that the fact it was a completed act puts it within MC purview. Terrorism has been a crime in international law going back more than a century. Gen. Martins said that the defense would argue that the crime of terrorism has not had consistent elements.

Gen. Martins said this isn't a concern, because the charge sheet contains the core elements of any terrorism charge. Finally, serious bodily injury is a crime under the Rome Statute and is a completed crime, so it is also triable by MC.

Gen. Martins addressed the conspiracy charge at Judge Pohl's request. He noted that conspiracy as a completed offense is a long-standing violation of the law of war. He looked to *Alstoetter,* where the defendants were not held liable for their inchoate conspiracy but were held liable for planning the completed act.[18] Judge Pohl questioned what Gen. Martins meant by "completed." In American jurisprudence, a conspiracy is complete when the plan is made and an overt act is taken. Gen. Martins said that by "completed," he means that the planned action itself is completed. That's what creates conspiracy liability countenanced in the law of war. He claimed that international tribunals avoid the term "conspiracy" because of its specific meaning in American law, but often hold defendants liable for planning acts that they later carry out.

Court recessed and returned at 10:45 am.

CDR Ruiz responded to Gen. Martins argument. He argued against only conspiracy and terrorism as stand-alone offenses in the charge sheet. He said that the judge should consider AE107 and AE120 [prosecution motion to make minor changes to the charge sheet to remove conspiracy offense but retain conspiracy liability] as separate motions, not intertwined as the prosecution suggests. The question on AE107 is only whether conspiracy as a stand-alone violation is a war crime. If it is not, then it must be removed from the charge sheet regardless of what happens with the related theories of liability.

CDR Ruiz pointed out that the *Alstoetter* court dismissed conspiracy as a stand-alone offense from the indictment.[19] That is exactly what the defense is looking for in AE107, and that is what should be done here. On the remaining liability, CDR Ruiz pointed out that the *Alstoetter* defendants were charged with other association crimes and explicit theories of liability that could support conspiracy-type liability.[20] Here, the only association-related language in the charge sheet is the conspiracy charge. The prosecution is simply trying to sneak uncharged theories through the back door.

Judge Pohl asked if CDR Ruiz was claiming that his client wasn't on notice of the conspiracy liability issue, or whether he is making a sub-

[16] 548 U.S. 557, 629-31.
[17] *Id.* at 577, 610-11.
[18] 6 L. Rep. Tr. War Crim. 1, 62, 65-66, 109 (1948).
[19] *Id.* at 5.
[20] *Id.* at 2-6, 73.

stantive argument that vicarious liability cannot apply without a conspiracy charge. CDR Ruiz said that without a conspiracy charge and any other related association crimes, the liability cannot persist. In other words, it's not just a notice issue.

Judge Pohl noted that it is standard for CM charge sheets not to include explicit references to theories of liability. CDR Ruiz said that putting that issue to one side, the question of conspiracy as a stand-alone offense is clear and direct. There is no jurisdiction for a stand-alone offense of conspiracy because it is not a law of war violation. The prosecution is simply trying to bypass that conclusion by now arguing for the separate liability.

CDR Ruiz then noted that in order for conspiracy liability to apply, it must itself be accepted in the international law of war. The prosecution admits that international tribunals don't like the word "conspiracy," so they look to "joint criminal enterprise" liability. However, this is not a largely accepted theory of liability and, even if it was, joint criminal liability is not the same thing as conspiracy liability. Since the prosecution included neither offense in the charge sheet and only relied on the stand-alone conspiracy offense, it should not be able to get them in now.

CDR Ruiz next addressed the terrorism charge. He pointed out that rather than finding an offense of terrorism, the prosecution had simply cherry-picked uses of the word "terrorism" from international documents without developing to what sort of conduct the term applies. CDR Ruiz argued that the term "terrorism" is much like the term "white-collar crime"; there are individual chargeable crimes that fit within each as a category, but they are not crimes with elements of their own. Neither the Geneva Conventions nor the Hague Convention defines terrorism. In the Rome Statute, the U.S. strongly opposed including terrorism as a stand-alone offense. In Article 8(2)(b) of the Rome Statute, which the prosecution cites, terrorism comes up only in the context of an attack on civilians. However, the prosecution has charged both terrorism and an attack on civilians. Similarly, the Geneva Conventions only discuss terrorism in the context of how P.O.W.s must be treated.

Continuing his history lesson, CDR Ruiz noted that in 1991, the U.S. opposed a U.N. conference meant to define terrorism and decide whether it is a crime. In 1996, the U.S. lobbied to exclude terrorism from "crimes against peace." In 2004, the State Department said that no one definition of terrorism is universally accepted.

Mr. Connell argued next on the same motion. He noted that his client's position differs from the other defendants' in that he is not challenging the charges of attacking civilians, destroying civilian objects, or murder as a violation of the law of war (MVLW). He concedes that these are war crimes and fall within the statutory jurisdiction of the MC. He contends that the other charges, though, are not war crimes and so fall outside the MC's jurisdiction.

Mr. Connell distinguished international armed conflicts (IACs) and non-international armed conflicts (NIACs). This distinction is very important to international law and the law of war but is given short-shrift by the prosecution. In the Geneva Conventions, IACs are governed by Common Art. 2, NIACs by Common Art. 3. In addition to these articles, war crimes can fall under two Geneva Convention Protocols has the same scope as Art. 2 and Protocol 2 covers a subset of Art. 3—namely, those non-international armed conflicts where a rebel group controls territory. Since the war on terror is a NIAC that falls outside Protocol 2, it is only governed by Art. 3.

The Rome Statute draws the same distinction. Article 8(2)(c) and 8(2)(e) govern NIACs, while Article 8(2)(a) and 8(2)(b) govern IACs. Mr. Connell presented a matrix of crimes and their corresponding international law sections. He pointed out that conspiracy is not countenanced as a war crime in either code, under

either the NIAC or IAC provisions. In contrast, attacking civilians is a crime under both statutes' provisions for both IAC and NIAC. However, destruction of property is only an offense under the NIAC provisions—neither code makes it an offense in IAC. The prosecution cites Rome Statute Art. 8(2)(a) to establish the serious bodily injury offense, but this provision only applies in NIAC. The prosecution also cites the International Criminal Tribunal for the former Yugoslavia for serious bodily injury and terrorism, but again these offenses only fall under the NIAC category.

Judge Pohl asked about whether these crimes were defined categorically or functionally. That is, could Congress use the term "terrorism" for an act that is a violation of the law of war even if the law of war doesn't use the word "terrorism." Mr. Connell stated that you have to charge elements of these crimes, so the relevant question must be categorical. If the elements of the crime are different, then it is a different crime.

Mr. Nevin joined the original motion and continued to contest the charges that Mr. Connell conceded in the argument. He did not argue.

Gen. Martins replied for the prosecution. He claimed that, as in *Alstoetter*, the vicarious/joint liability theory is clearly already included in the charge sheet, so dismissing conspiracy as a stand-alone offense would not require giving up on conspiracy-type liability.[21] He then pointed out that customary international law is essentially common law, so it is functional rather than categorical. *Hamdan II* found specific acts of terrorism are war crimes. He said that the defense distinction of IAC vs. NIAC crimes is artful but irrelevant. He pointed to *Yamashita* and some of the Africa statutes to explain that the distinction mainly exists because some conduct is less likely found in NIACs.[22] The standard to apply is "firmly grounded in international law," which does not need to consider international choice of law provisions. All of the offenses are "firmly grounded," so there is jurisdiction for all the charges.

Mr. Connell responded that to the extent the Africa statutes include "acts of terror," those acts are explicitly linked to Geneva Protocol 2, meaning that they are limited to conflicts in which rebel groups hold territory. Those statutes support the defense position, because they show that where terrorism is made an offense, it is limited to specific circumstances that don't apply here.

Before lunch, the commission turned briefly to the question of CDR Ruiz continuing as counsel in the case. He is scheduled to leave active duty on 5 Sept., and so asked the CA to continue in the case as learned counsel. Now both his departure from active duty and his appointment as learned counsel are in limbo. Judge Pohl addressed the prosecution in an attempt to "impart ... a sense of urgency" about coordinating the parties (the Navy and the CA) and getting the issue resolved. CDR Ruiz said that the Office of the Chief Defense Counsel has been zealously inquiring on his behalf, and noted that the prosecution might not be his best advocate, especially in light of the unlawful command influence that some aspects of the situation raise.

Court recessed for lunch and returned at 13:30.

After lunch, Gen. Martins addressed AE120, which is the prosecution's motion to make minor changes to the charge sheet—essentially to eliminate the stand-alone conspiracy charge but retain conspiracy liability. He noted that the UCMJ does not deprive MCs jurisdiction over offenders or offenses that may be tried in MCs by statute. *Hamdan II* rests on the preexisting MCA. He gave the prosecution's "bottom line" as no opposition to dropping conspiracy as a stand-alone offense, but the commission must grant AE120 so that the charging instrument

[21] *Id*. at 5.

[22] 327 U.S. 1, 7-9, 11-15 (1946).

can continue to give notice that the defendants are liable on a vicarious liability theory.

Gen. Martins also noted that the UCMJ does not require theories of liability to be stated in charge sheets. Further, the Rome Statute does not grant impunity for those who do not personally execute attacks. If the commission takes a categorical approach at the intersection of these two statutes then it will create a lot of impunity—something that comports with neither.

Conspiracy is both a crime and a theory of liability. AE107 is important and ripe, and AE120 shows how to deal with the concerns raised while preserving liability. Judge Pohl asked about the factual predicate underlying conspiracy liability and what the panel must find. Gen. Martins said that the panel must find all the elements of a stand-alone conspiracy offense and that the planned act was completed. The difference in panel instruction would simply be to leave out the qualification that to find the accused guilty of conspiracy, you need not find them guilty of the underlying offense. (Some confusion followed about whether the underlying completed act must be found complete beyond a reasonable doubt.)

Gen. Martins argued that the UCMJ itself shows Congressional intent to allow vicarious liability for law of war crimes. Art. 77 states, "any person punishable under this chapter," not "under this chapter." The *Jefferson* case and the Judges' Benchbook also attest that you can have vicarious liability without a stand-alone conspiracy charge.[23]

Judge Pohl then pressed on how AE120 could be considered "minor changes" to the charge sheet. He noted that charge sheet amendments are usually changes to specifications. Those changes leave the specifications on the charge sheet. What the prosecution wants in AE120 is to remove a specification completely. Gen. Martins responded that the defense contends that narrowing liability constitutes a minor change to the charge sheet. That is exactly what the prosecution proposes. They want to narrow the conspiracy liability so that it only encompasses plans where the underlying act was completed (*i.e.,* not inchoate). He argued that the panel would get a limiting instruction on the conspiracy issue and that striking the language completely from the charge sheet would only create confusion. He said that there is "no due process right to confuse the panel."

Judge Pohl expressed concern at various points that the prosecution was creating a do-loop. In order to prove the conspiracy liability, it must prove the underlying offense. However, to prove the underlying offense, it must prove elements of conspiracy. Mr. Nevin reiterated this point in his reply. He also noted that unspecified theories of liability are especially inappropriate in a capital case. Judge Pohl noted that the government had not plead aiding and abetting liability and asked if that had the same problem. Mr. Nevin said that it does. The prosecution must plead all theories of liability.

Judge Pohl pressed Gen. Martins on why he would need vicarious liability if it required liability for the underlying offense as well. Gen. Martins said that it doesn't require liability for the underlying offense-this is why it's not a do-loop. The panel doesn't need to find the defendants liable for the underlying act; it only needs to find that the act occurred. That finding makes the vicarious liability not inchoate. So long as the underlying act occurred, no matter who is liable for it, that element of the vicarious liability/conspiracy liability is satisfied.

Court recessed and returned at 14:56.

After the recess, Mr. Connell argued AE160—a defense motion for a protective order covering defense claims for compensation directed at the CA. Essentially, the defense worries that there is no bilateral agreement that the CA will not provide defense bills, requests for compensation, etc. to the prosecution. The prosecution

[23] 22 M.J. 315, 323-25 (1986).

thinks the order is unnecessary, but the parties reached agreed-upon language.

Judge Pohl granted the order.

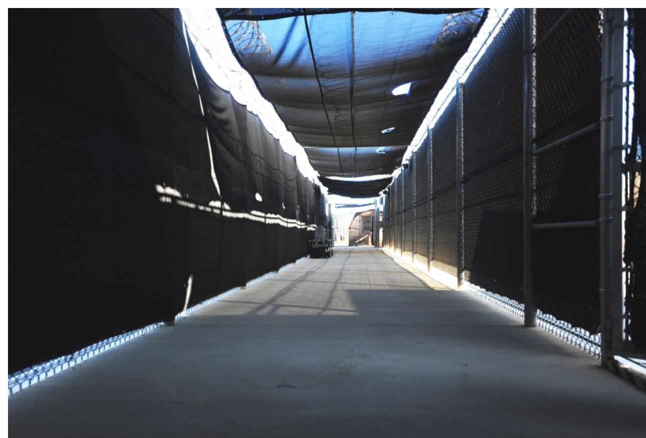
Mr. Connell then addressed AE162—a defense request for the NDA that the PRT in the al-Nashiri case signed. The prosecution claimed that they don't have it, but the court should have it. Judge Pohl granted this request to the extent that the court has it.

Major Wright argued AE155—the defense motion to abate proceedings until the defense IT problems are resolved. Major Wright explained that the IT problems go to the right to counsel, to attorney-client (A/C) privilege, and legal ethics. He briefly recounted some of the problems, noting that in the first few months of 2013 the defense teams lost over seven gigabytes of data. There were improper data permissions on both sides, and a search run for the prosecution in March resulted in prosecution access to numerous defense emails. There were also defense concerns about their activities being monitored. (Maj. Wright gave an example of doing an internet search, receiving an error, and shortly thereafter getting a phone call asking why he had done that search.) All of these concerns led to the April 2013 Chief Defense Counsel (CDC) order to stop sending privileged information by email.

The defense was told in June that it would have a stand-alone system that would solve these problems within 45 days. Since then, the OMC email migration has caused emails to vanish and other emails to go to the wrong people. Last week, defense counsel learned that the CA had not yet acted on any course of action for implementing the stand-alone defense system, so no progress had been made. Currently, the defense teams are relying on external hard drives, personal laptops, and coffee shop wireless internet to do their jobs.

Defense counsel interviewed some key players this week and learned that the situation is even worse than it appears. There is currently no contract in place for establishing the stand-alone defense network. OMC is still collecting quotes and considering courses of action. OMC says that implementing a new system will take 65-120 days, but that clock doesn't start until after the plan is finalized, approved, staffed, funded, and a bid is awarded. Also, the hardware for the on-island component of the new system must be physically shipped, which will take even more time. The only solution is for the court to abate the proceedings until defense counsel can communicate via email.

Ms. Bormann added that she had been unable to file anything substantive since the CDC email order was issued. Judge Pohl asked about the Convention Against Torture memo. Ms.



Bormann said that wasn't her team, and speculated that CDR Ruiz might have an easier time with the restrictions because he is both appointed and learned counsel, so he doesn't have to coordinate with anyone. Ms. Bormann said that her team has been losing files since January 2013. They found at least 50- 55 investigative files that are now missing. She has not received any response to her requests to the OMC for help recovering them. She said that these problems make her job "mind-bogglingly difficult."
Mr. Harrington noted that he is relying on a fax machine to do his job. He asked the court to "raise hell," noting that if the prosecution were having these problems, they would be solved very quickly.

LTC Thomas said that the al-Baluchi team had experienced emails vanishing as recently as the previous Friday. An email to file a motion disappeared, and so Mr. Connell filed it by hand

on Monday. LTC Thomas noted that the defense teams have no way of knowing what has been lost until they go looking for it. He noted that receiving discovery from the prosecution will be meaningless without the capability to organize and review it. There is no parity of arms here.

CDR Ruiz noted with some frustration that the work he has done is now being used against him. He said that the al-Hawsawi team faces the same problems. He said that a substantial portion of the delay in filing the Convention Against Torture motion was caused by lost emails.

Mr. Trivett argued for the prosecution. He said that the fact that defense counsel had filed 29 motions this week belies their functionality. The prosecution is not responsible for "inconveniences from Col. Mayberry's order." Still, the prosecution will file a pleading explaining the IT plan going forward.

Judge Pohl asked if this pleading will give a date when the defense will have its own system. Mr. Trivett said that it would have attachments that will discuss timelines, but ultimately the date depends on Col. Mayberry's decision. The prosecution position is that the current defense IT infrastructure provides for safe privileged communications. In fact, it is better than what service attorneys around the world get. The prosecution has been asking since May what documents the defense lost and have not gotten a comprehensive response. (Mr. Trivett doesn't seem to give much credence to the claim that the defense can't know what's missing until they go looking for specific things and can't find them.) Since the defense has been effective, and since they won't articulate what they have lost, how important could the lost documents be?

Mr. Trivett divided the problem into two issues: a long-term fix of IT problems, and the email issues, which are temporary. The prosecution does not expect the email problems to continue for very long, and in the meantime, the defense teams have demonstrated their capability to proceed despite the problems.

Ms. Bormann responded that no one is waiting on a decision to form a plan from Col. Mayberry—both the defense and the OMC agree that she has chosen a plan. The delay arises from receiving cost analyses. Neither Col. Mayberry nor the OMC expects a solution before 2014.

Mr. Nevin said that he is joining other motions even though he would like to articulate his own theory simply because the IT problems limit his ability to draft pleadings. He thought that the defense should stop practicing all together when the problem arose so that the prosecution couldn't claim that they are getting along just fine. Attorneys cannot litigate any case this way, let alone this case. The KSM team would be putting forward better pleadings and better arguments without these IT problems. No other criminal case in the U.S. is being tried with these sorts of problems, and this is the most complex case there is. Judge Pohl said that they would come back to this issue at the beginning of the September hearings and he will decide then.

Open court ended at 16:05 for the parties to have an 802 hearing, followed by a press conference.

Khalid Sheikh Mohammed

et al.

16-20 September 2013

Hardy Vieux

Hardy Vieux is an attorney in private practice in Washington, D.C. He focuses on white collar criminal defense and complex civil trials. Before moving to private practice, Hardy was a criminal appellate defense counsel in the United States Navy's Judge Advocate General's Corps, where he served as lead counsel in a capital punishment case and argued issues involving Fourth Amendment search and seizure, Sixth Amendment ineffective assistance of counsel, and procedural due process. He also serves on the board of the National Institute of Military Justice.

Hearing Day 1
Monday, September 16, 2013

What follows is an account of the abbreviated first day of hearings.

Day 1 was adjourned not long afternoon because one of the defendants' counsel was ill. The Court was to resume Wednesday morning, September 18, assuming counsel could continue at that time.

Day 1 of the hearings started around 0815 when our 13-person observer group was seated alphabetically in the gallery at the rear of the courtroom. The gallery is separated from the courtroom by soundproof glass. Gallery observers, which include victims' family members and interested observers from the Guantanamo Naval Base Community, are able to hear and also see the same closed-circuit feed available to the general public viewing the proceedings from Fort Meade, Maryland. That feed is on a 40-second delay that allows the Court to act on any potentially classified material that might be discussed in open court.

At about 0835, the government security detail entered with the five defendants, one at a time. The defendants sit in chairs at the far left end of the counsel's table, when viewing the courtroom from the gallery's perspective. The five defendants—all of whom were charged by the United States government in February 2008 for their alleged involvement in the September 11 attacks—are seated in a row behind one another as follows (table one is closest to the judge's bench):

Judge Pohl, Colonel, United States Army, presiding
Khalid Sheikh Mohammed
Walid Bin Attash
Ramzi Bin al Shibh
Ali Abdul Aziz Ali
Mustafa Ahmed Adam al Hawsawi
The prosecution, led by Brigadier General Mark Martins, United States Army, sits on the right side of the courtroom in three rows of tables.

Colonel Pohl took the bench at approximately 0903 and immediately called the proceedings into order, Counsel then entered their appearances, with BGEN Martins introducing a new mem-

ber of the prosecution team, a civilian, Danielle Terran.

The Court then noted that the learned counsel (an experienced death penalty lawyer serving as lead counsel in this matter) for Walid Bin Attach, Cheryl Bormann, was not feeling well. Before addressing that issue, the Court, as it normally does at the outset of each weekly court session, proceeded to advise each of the defendants of their right to absent themselves from the proceedings. Among the advisements, the Court informed the defendants that their failure to be present at every session could negatively impact their ability to confer with counsel and aid in their defense. The Court then inquired as to whether each defendant, one by one, understood their rights. Khalid Sheikh Mohammed (KSM) directly addressed the Court when he said that he has no ability to get papers from his lawyers. Subsequently, KSM's learned counsel, David Nevin, argued that the meetings with his client are significantly constrained. The Court indicated that it was all too familiar with that argument. As for today's proceedings, the Court was only interested in knowing whether KSM understood his right to absent himself from this week's proceedings and the potential ramifications of such a decision. Mr. Nevin then refined his argument, stating that one of the paragraphs of the advisement (paragraph no. 6), as currently worded, might lead one to believe that the advisement encompasses proceedings apart from the in-court ones slated to occur this week. Having noted the objection, the Court again asked KSM whether he understood his right to absent himself; KSM so acknowledged. Walid Bin Attash acknowledged that he understood his rights.

Ramzi Bin al Shibh, however, took the opportunity to express his discontent with the manner in which he has been treated while in detention, stating, among other things, that he has been deprived of sleep. (Ramzi Bin al Shibh and Ali Abdul Aziz Ali speak English. The other detainees and their counsel have access to certified interpreters) The Court then ordered Mr. al Shibh forcefully removed from the courtroom with the understanding that he could return should he decide to participate constructively in the proceedings. The Army security detail then took him out of the courtroom.

Ali Abdul Aziz Ali acknowledged that he understood his rights, as did Mustafa Ahmed Adam al Hawsawi.

The Court then made clear its intention to adjourn until noon so that Ms. Bormann could visit the base emergency room. After a medical evaluation, the Court hoped to have a better sense of Ms. Bormann's condition. Before adjourning, learned counsel for Mr. al Hawsawi, Commander Walter Ruiz, United States Navy--the only military learned counsel in this matter told the Court that his client wished to abstain himself from the balance of this week's proceedings.

The Court adjourned at 0925

At about 1150, the observers returned to the gallery. Four of the five defendants were back in the courtroom. All five defense teams were also present, with the exception of Ms. Bormann, of course. The prosecution team was not in the courtroom, however. At 1200, the Army security detail informed the gallery that the Court adjourned the day's proceedings. The Court later entered an order stating that the hearings would resume on Wednesday, September 18. To make up for the lost days, the order set a week of hearings next month. Those weeklong hearings were previously tentatively set on the Court's docket; the order made clear that those hearings would now surely go forward.

September 17, 2013 - No Proceedings

September 18, 2013 - Day 2

Day 2 of the hearings placed the focus on the myriad information technology problems encountered by the defense teams dating back to

December 2012. Those problems which involve lost data, monitoring of investigative research, and production of defense e-mails to the prosecution caused the chief defense counsel to issue an order directing her office not to store privileged or confidential data on the office's network. The chief defense counsel issued that April 2012 order thinking she would lift it as soon as the problems were fixed. And yet to this day the order, by force of circumstance, is still in place.

Day 2 of the hearings started around 0845 when our observer group was seated in the gallery. On Day 1, members of the media occupied the first of the four rows that comprise gallery seating. Today, however, many of the front seats were empty, which meant a few of us could break the confines of alphabetical order and move to get a better view. From the front row, one is afforded a better view of the defendants, only two of whom Walid Bin Attash (seated at table two) and Ramzi Bin al Shibh (seated at table three), chose to be in the courtroom today. All of the defense counsel was present, as was the prosecution team (referred to as trial counsel in the military system), which was now joined by Joanna Baltes of the United States Department of Justice, who was not in the courtroom on the first day of hearings.

As a preliminary matter, a Navy lawyer assigned to the Joint Task Force (JTF), which operates the Guantanamo detention facility, testified that KSM; KSM's nephew, Ali Abdul Aziz Ali; and Mustafa Ahmed Adam al Hawsawi, all waived their right to attend today's hearings early this morning when he informed them of this legal entitlement. KSM and al Hawsawi reserved their right to attend today's afternoon session.

Lieutenant Commander Kevin Bogucki, United States Navy, a member of the Bin al Shibh defense team, then addressed the Court to speak to his client's forcible removal from the courtroom yesterday. LCDR Bogucki stated that his client was trying to bring important issues to the Court's attention, namely the ongoing abuse that prevents him from sleeping through the night. By depriving his client of sleep, LCDR Bogucki argued that it is not reasonable to expect his client to then meaningfully assist in his defense during in-court proceedings. The Court, though, made clear that it would tolerate no such outbursts: "I do not litigate with accused." The proper way to raise such issues, according to the Court, is through counsel, who can then brief the issue, thereby giving the government notice and opportunity to respond. The Court can then consider the arguments and evidence in a more thoughtful way than the "undisciplined, spontaneous manner" for which Mr. Bin al Shibh opted yesterday.

> The defendant apparently had no objection to a woman on his defense team, and in fact warmly greeted her at the beginning of each session, shaking hands with her.

Nonetheless, LCDR Bogucki pressed his point that his client only spoke when it was his turn to speak. Mr. Bin al Shibh simply took that opportunity to call into question whether his presence is truly meaningful when the JTF is engaging in conduct that disrupts his sleep. The Court urged the defense to file a motion. In the meantime, the Court stated that Mr. Bin al Shibh was asked to answer a straightforward question about his right to absent himself. The Court offered to re-read Mr. Bin al Shibh his rights later today. Counsel agreed that such re-advisement makes sense given that his client never really answered the Court's question as to whether he understood his rights.

Defense Presents Evidence Regarding Information Technology Problems

The first and only witness of the day then took the stand. Colonel Karen Mayberry, United

States Air Force, chief defense counsel, Office of Military Commissions, was called by the defense to testify regarding the defendants' joint motion to abate the proceedings (labeled Appellate Exhibit (AE) 155) as a result of information technology problems that are allegedly impeding the defense's ability to maintain the attorney-client privilege and thus effectively mount a defense. Cheryl Bormann, now feeling less ill than Monday, kicked off the questioning for the defense.

COL Mayberry, a 24-year veteran, oversees the Office of the Chief Defense Counsel (OCDC) based in Rosslyn, Virginia. She is the sixth chief defense counsel, having assumed the job from her predecessor, Colonel Caldwell, in July 2012. OCDC consists of approximately 150 personnel, to include military and civilian lawyers as well as various support staff. The office is scattered among four buildings on a city block. The office also includes civilian lawyers not located in Rosslyn, but rather in their hometowns throughout the United States.

For almost three hours, Ms. Bormann elicited detailed testimony from COL Mayberry regarding the various information technology issues that plagued OCDC starting in late December 2012. It was at that time that COL Mayberry said that the Pentagon devised a plan to mirror OCDC's electronic files so that defense teams could readily and quickly access those files when working at Guantanamo Bay. Because OCDC members cannot transport their work laptops to GTMO, this replication process was essential to enable OCDC team members to seamlessly work when in Cuba.

The replication process started on December 23, 2012, and lasted through the holiday break, when most members of COL Mayberry's staff were on holiday leave. The replication process unleashed a myriad of technical problems, which did not fully come to light until much of the staff returned to the office at the start of the new year.

Some OCDC members lost access to the office's shared drives (drives H and O on the server); others retained their access but what was on the shared drives was incomplete—files were all of a sudden gone, and others could not move or edit certain files on the shared drives. COL Mayberry described the situation as fluid. On any given day, different OCDC members were differently impacted. The problems worsened as January progressed and OCDC members prepared for upcoming Guantanamo hearings. The situation prompted OCDC IT personnel to direct users to save files to their individual hard drives, and not the shared drives, to ensure accessibility and integrity of the files.

Enterprise Information Technology Services Directorate (EITSD), the agency that provides information technology services to the Office of the Secretary of Defense (OSD), under which falls the Office of Military Commissions (OMC), assured OCDC—which is a component of the OMC—that the technical problems would be fixed by February 6, 2013, at which time OCDC team members could resume storing to the H and O drives. But, February 6 brought no relief to COL Mayberry's office. By late March, COL Mayberry asked EITSD to stop the then ongoing replication process, which seemed to be the cause of OCDC's IT problems.

Around that time, COL Mayberry elevated the issue to her direct supervisor at the Pentagon's general counsel's office. Concurrently, COL Mayberry became aware of an instance whereby e-mails involving OCDC team members were ostensibly inadvertently swept up in a data search request stemming from a court order in another military commission case. That request—referred to as Investigative Search Request (ISR)—yielded defense counsel e-mails that were provided to the trial counsel's office. A member of the trial counsel team came across these e-mails, which were likely attorney-client privileged communications, and stopped reading. This trial counsel member then informed the defense counsel in OCDC. This was then brought to COL Mayberry's attention. She was

not able to ascertain whether this had occurred before nor why the government had swept up potentially-privileged defense communications that ended up in the hands of their adversaries.

By April 10, COL Mayberry had seen enough. Having carefully considered her options over the course of several days, she felt that she had no choice ethically but to order OCDC members to stop using the network to store privileged and confidential communications. She issued the order, which she acknowledged would make it harder for her team members to communicate with one another, particularly with those not located in or around Rosslyn, Virginia.

On April 11, COL Mayberry met with EITSD members and the acting military commission convening authority, Paul Oostburg Sanz, among others, to discuss the scope of the problem. At that meeting, it became abundantly clear to COL Mayberry that EITSD's senior leadership did not fully appreciate the significance of the "catastrophic loss of data that occurred in February. She asked for a separate network to protect her staff's work. The problem, according to COL Mayberry, may have involved hundreds of thousands of missing files.

> The question that I've been asked by the press and one that I've struggled with is whether a defendant detainee can receive a fair trial under the current version of the MCA.

Things got worse in May 2013. It was at that time when the vast majority of OSD would migrate from their "osd.mil" e-mail addresses to new "mail.mil" addresses. OSD would exempt OCDC, however, given the number of problems already besetting their IT system. Nonetheless, as a result of the migration, some e-mails sent to OCDC personnel never arrived, some e-mails arrived without attachments, and some e-mails sent by OCDC personnel never made it to the addressees. When EITSD asked COL Mayberry to provide a list of problems, all she could say was that "we didn't know what we didn't know." COL Mayberry continued to press for an independent OCDC IT system; the current one was unreliable, after all.

COL Mayberry testified that the problems today are just as bad as when she issued her April 2013 directive. Drafting pleadings now takes 3-4 times as long as before, assuming the entire defense team is in the same building. If not, it is even longer.

David Nevin, learned counsel for KSM, then questioned COL Mayberry, He elicited testimony from her establishing that he lives in Boise, Idaho, which makes it even harder for him nowadays to effectively communicate with the rest of his team, who are mostly based in Rosslyn. Her April 2013 directive means that members of his team must now use workarounds to electronically communicate with him—working from local coffee shops with wireless connections and from home are now regular occurrences. These workarounds are not ideal, COL Mayberry said, but they are necessary given the office's IT issues, which she hoped would be resolved in the short term when she issued her directive to the office.

Mr. Nevin then questioned COL Mayberry about two OCDC researchers, who filed declarations in support of this motion to abate on the grounds that their legitimate legal research—done at the direction of lawyers—was monitored by government information security personnel. COL Mayberry testified that she was aware that DoD officials regularly monitor activity on the DoD network by means of computer algorithms. When those algorithms detect usage patterns that might concern the government—say, malware, for example—the algorithms are set to send notices to information security personnel for follow up, which is what happened here when researchers were visiting Web sites that were electronically flagged for follow up.

COL Mayberry then testified about four other IT issues of concern. First, a military lawyer on a defense team had his computer "mapped" to a computer of another DoD employee at a different agency. Mapping provides user access

to a defined set of files. So, here, this lawyer had access to someone else's files. Second, some OCDC users noticed that their files contained modification dates and times when those users did not modify those files, raising the question of, "Who did?". Third, an OCDC user discovered hidden files among files that were restored after having gone missing. Finally, prosecution files were found on OCDC's shared drive.

COL Mayberry also discussed the collection of privileged defense e-mails that ended up in the hands of the prosecution. As a result of an order in another military commission matter—the al Qosi case—the court of military review issued an order, which necessitated searching of the prosecution's electronic files. This process was initiated by means of an Investigative Search Request (ISR). The DoD person responsible for executing the ISR received guidance from the defense and prosecution that defense files ought not be searched. Nonetheless, six OCDC lawyers' files were searched several times, with each successive search iteration yielding more documents deemed responsive. Those e-mails were then provided to the prosecution, who, upon discovering the mistake, alerted OCDC to the problem. Subsequently, a new process was put in place, requiring any ISRs impacting OMC data, be it prosecution or defense, be routed through OCDC for COL Mayberry's sign-off.

On cross-examination, Edward Ryan (of the prosecution team) raised the issue of whether COL Mayberry's directive to her counsel not to use the OMC network to store privileged or confidential data could actually bind counsel. After all, each counsel has an independent ethical duty to their respective clients. This line of questioning prompted the Court to ask her whether "[she] even gets a vote in this matter?" She responded by stating that none of the counsel expressed an issue with her decision. Moreover, she felt that she had no choice given that practices like monitoring, for example, were inappropriately breaching the attorney-client relationship.

Mr. Ryan then questioned whether workarounds requiring defense counsel to work from coffee shops, for example, the "Starbucks solution") could possibly be more secure than the DoD network. COL Mayberry's response made clear that she understood that her decision caused hardship, but she made that decision because she felt that not using the network was better than using it given the demonstrated breaches of the last several months. She was not dealing with hypothetical scenarios. The attorney-client privilege was breached and nothing to date—including, encryption—could assure her that the OMC network was reliable for her counsel to use and maintain the privilege.

This is why she wants the OCDC placed on their own network, much like the model followed by the DoD Inspector General's office and Federal Public Defender offices, COL Mayberry rebuffed the government's suggestion that she wants her office given special treatment. She argued that all she wants is reasonable assurance that her office's teams can reasonably protect client confidences as required by governing ethical rules. In other words, as she told Mr. Nevin on redirect, she simply wants a system that works, nothing more.

At day's end, the Court instructed Mr. Bin al Shibh of his rights to absent himself from this week's proceedings. This time, he acknowledged those rights.

September 19, 2013 - Day 3

Day 3 of the hearings focused on the need of the chief defense counsel to issue an order directing her office not to store privileged or confidential data on the office's network. That order, though not perfect, was the "best bad option" available to her at that time. The day's testimony also revealed that the incompetence of the Office of the Secretary of Defense's IT office likely caused electronic defense files to go missing. All of the misplaced data, however, was ostensibly located and restored. Going forward, the Penta-

gon suggested two possible courses of action to remedy the defense's IT infrastructure problems, both of which involve some degree of separation between the defense's network and the general DoD network. Encryption is also an option for better securing the defense's privileged communications. The National Security Agency, among others, has the ability to de-encrypt those communications, should they see fit.

The "Best Bad Option"

Day 3 of the hearings started around 0845 for the observer group. Only two of the defendants—Khalid Sheikh Mohammed (seated at table one) and Walid Bin Attash (seated at table two)—were present in the courtroom today. All defense counsels were present, as was the prosecution team. Like yesterday, the government called a witness to testify that all of the defendants were informed of their right to attend today's session.

Court started with picking up where we left off the day before: COL Mayberry's redirect examination. Ms. Bormann took to the podium first, given that Mr. Nevin concluded his redirect yesterday. (Each one of the five defense teams is afforded the opportunity to question each witness.) Ms, Bormann started by exploring the challenges faced by OCDC personnel who do possess a DoD common access card (CAC) or its equivalent, which allow DoD personnel and contractors to access DoD's computer network. Pro bono defense consultants, for example, according to COL Mayberry, cannot access the DoD network, thereby making it difficult for counsel to share information with those members of their defense teams.

COL Mayberry again made the point that her office did not need or want some sort of heightened IT infrastructure. Rather, she wants a system that works. Under questioning by James Harrington, another defense learned counsel, COL Mayberry acknowledged that the workaround solution (dubbed the "Starbucks solution" by the prosecution) was far from ideal; it was the "best bad option" OCDC had available to it. She also stated that she was not motivated by delay when she directed her teams not to use the OMC network. In fact, the prospect of delay made her April 2013 decision that much more difficult.

Under redirect questioning by Lieutenant Colonel Thomas, COL Mayberry stated that using external hard drives is also an insufficient workaround for her teams. This is because much of the teams' work has to be done on a network-connected computer. Doing so could still allow an unauthorized party access to an external drive connected to the network.

The "Dirty Shutdown" Causes Heartache and Missing Files

COL Mayberry was excused at 0953. The defense then called Scott Parr to the stand. Mr. Parr is the Guantanamo-based branch chief of OMC Technology. Mr. Parr's office is the liaison between EITSD, the Office of the Secretary of Defense's IT provider, and OMC, which is part of that office. He provides support to the Office of the Chief Defense Counsel (OCDC) when their IT personnel need assistance addressing a problem.

On direct examination, Mr. Parr agreed that the December 2012 replication process, which should have created mirror images of OCDC's networked files at GTMO, should not have impacted the defense teams' ability to access their files. In a December 2012 e-mail, EITSD claimed that they successfully replicated OMC's files, which would have meant that defense and prosecution legal teams no longer needed to backup and hand carry a copy of their electronic files when traveling to Guantanamo, EITSD, it turns out, incorrectly advised Mr. Parr.

Mr. Parr then told the Court of other EITSD missteps.

On at least one occasion, likely in February 2013, it appears that a data-loss problem was caused by a "dirty shutdown," whereby a server was improperly shut down as the mirroring process took place. This caused the Rosslyn server (the OMC North server) to fail to properly synch with the GTMO server (the OMC South server). Mr. Parr attributed this dirty shutdown to EITSD personnel and Microsoft, who failed to warn EITSD of this problem should the server fail to properly shut down. When files fail to properly synch, the dominant server—the OMC North server-deletes the files and places them in the pre-existing folder on the server, a sort of home for wayward files.

Mr. Parr could not say for certain what caused the loss of OCDC data on other occasions since the start of replication in December 2012. Reluctantly, though, he pointed the finger at EITSD, acknowledging that he told EITSD to "get their act together" on more than one occasion.

Mr. Parr then said that for a period of several months, dating back to December 28, 2012, EITSD failed to backup OCDC's files. Such a failure, according to Mr. Parr, is an inexcusable, basic misstep, covered in "IT 101" class.

On cross-examination, Mr. Parr stated that all "misplaced" OCDC files have been retrieved from the pre-existing folder and restored. The defense teams now have access to all of their files. With regard to the prosecution's purported access to defense files, Mr. Parr agreed that could have taken place. But, this is no longer the case because he has taken steps to limit the prosecution's access privileges. In fact, under the two proposed courses of action to remedy OCDC's IT problems, OCDC alone would determine who could access their files. Currently, IT administrators outside of the defense office are able to access confidential, privileged defense files. The proposed courses of action would greatly limit such access only to those within the defense office, which means those within the defense

teams' attorney-client privilege, as is required by various legal professional codes.

The Way Forward

The defense then called Wendy Kelly, director of operations of the Office of Military Commissions, to the witness stand. Ms. Kelly, a retired Army JAG colonel and a former federal prosecutor, oversaw construction of the Guantanamo military commission complex, which includes the state-of-the-art courtroom, adjoining office space, and short-term detention cells. Ms. Kelly's office oversees all logistical support for the OMC.

Ms. Kelly testified that the two courses of action to address the IT lapses suffered by the defense were recently presented to COL Mayberry. Option 1 involved a virtual separation of the defense's network from other DoD networks, This rather straightforward option would be accomplished by using software privileges and would take some 65 days to implement, once approved and funded; Option 2 would provide the defense teams with their own free-standing IT network. It would take just over 100 days to implement, again, from approval and funding. Although Ms. Kelly afforded to share the cost of both options, the Court felt that it did not need to know.

The Dark (and Acronym-Filled) Art of Encryption

At the close of Ms. Kelly's testimony, the prosecution started its case on the IT issue by calling Brent Glover, who is a longtime Department of Defense contractor specializing in encryption technology and processes. Mr. Glover described his job as helping his government clients ensure that their information is secure. Public-key infrastructure (PKI) is at the heart of this effort.

PKI is an array of hardware, software, and digital certificates that allow users to securely communicate over a non-secure public network. Through the use of digital certificates, authorized users can securely communicate—via encryption, for example—with one another in a manner that allows them to verify one another's identity. The PKI creates and stores digital certificates that map to unique authorized users. The digital certificates are issued, stored, and revoked by a certificate authority (like a DoD agency, for example).

By using PKI technology, defense teams could, in theory, securely communicate between users - say, based in Rosslyn on the DoD network and those not on the DoD network—say, those based at their private legal offices (like David Nevin, counsel for KSM, who is based in Idaho). However, Mr. Glover acknowledged that PKI-enabled encryption technology could not hide potentially-privileged information contained in an e-mail's "to" and "from" lines—all e-mails must contain that information in decrypted form so that the message reaches the intended person. As for the rest of an e-mail, that information could easily be encrypted by purchasing commercially-available, DoD-approved PKI certificates through one of three vendors. This technology enables a DoD network user to send encrypted e-mail to a user, not on DoD's network.

DoD cannot monitor or decode encrypted e-mail, only the intended user, who possesses a unique private key, can unlock an encrypted message. But, under cross-examination, Mr, Glover acknowledged that the National Security Agency (NSA) and the Defense Information Systems Agency (DISA) have complete access to all private keys. So, although encrypted communication is secure, the NSA and DISA could access those communications by means of the private keys that they safeguard. This prompted David Nevin to ask Mr. Glover whether he appreciated that the defense would be nervous about using PKI, given that the NSA's stated mission is to monitor the communication of enemies of the

United States (the defendants, for example). Mr. Glover responded that he was not aware of the NSA's primary mission.

Monitoring of Pentagon Computers and Search Requests

The prosecution then called Ronald Bechtold to the stand. Mr. Bechtold is the chief information officer for the Office of the Secretary of Defense. Joanna Baltes, the prosecutor, questioned Mr. Bechtold on his duties, which encompass IT support for all of the personnel and components of the Secretary of Defense's office. EITSD falls under his purview.

One of the chief concerns is that of potential cyber threats that could bring the nation's IT infrastructure to a halt. To protect DoD's IT infrastructure, the government monitors computers on that network. The monitoring looks for patterns that might yield clues to potential hacking threats, use of malware, or other improper manipulation of network assets. The monitoring is not done by people; rather, algorithms bring problematic patterns to the attention of DoD information security officials, who then follow up.

From there, Mr. Bechtold discussed Investigate Search Requests (ISRs), which are requests to gather and turn over electronic data from a particular universe of DoD network users. These requests come from Congress, Freedom of Information Act requests filed by members of the public, and court-issued orders. Upon receiving an ISR, Mr. Bechtold first consults with the Pentagon's general counsel's office to assure that the request is valid. Once that is done, the request is converted to searchable Boolean terms. The terms are often tweaked over the course of several iterations.

This was the case in March 2013, when Mr. Bechtold's office received an ISR stemming from a court order in another military commission matter. In that matter, the initial search produced some 200,000 hits—that is, responsive electronic documents. Successive iterations yielded more hits, some of which, according to COL Mayberry, were privileged defense communications that were subsequently turned over to the prosecution. Looking back, Mr. Bechtold admits that the process for that ISR was flawed; the person in his office taking the lead on the request was not well-supervised, and the process contained few checks and balances. With COL Mayberry's input, Mr. Bechtold's office recently put in place a new office, which, among other things, seeks to assure that no privileged defense communications are swept in the collection.
This new office should serve as a check on potentially overbroad collections. Moreover, two people are now responsible for formulating the search queries on the front end. On the back end, a privilege team will review the results of the search before any communications are turned over to the requester.

The Court then adjourned. Mr. Bechtold will again take the stand tomorrow morning,

September 20, 2013 - Day 4

Today marked the final day of three days of argument on the defense's request to abate the proceedings until their IT infrastructure issues are resolved. Ideally, the defense seeks an infrastructure completely segregated from the rest of the Department of Defense. The prosecution dismisses the defense's arguments as exaggerated. They contend that the defense's problems are a thing of the past or easily solved by quick fixes that the defense is reluctant to embrace because what they really want is more delay. The Court seemed skeptical that it could resolve the problems to the defense's satisfaction. It cannot envision itself overseeing IT infrastructure minutiae or ordering COL Mayberry, the chief defense counsel, to allow her defense teams to once again use the government network.

On this day, none of the five defendants were in the courtroom, which means there was far fewer Army security personnel present. An-

other change was noticeable in the manner of dress of some of the female counsel. Typically, civilian women serving on the defense teams wear traditional Muslim abayas or hijabs in the presence of their clients, presumably out of respect for their clients' faith. But, for example, on this day, Cheryl Bormann, one of the learned counsel, swapped her abaya for civilian clothing.

Does al Hawsawi Understand English?

Even though none of the defendants were present, there were plenty of fireworks early on. This time it came during the usually perfunctory morning ritual to determine if the defendants knowingly waived their right to appear in court. The government's witness, a naval officer assigned to the detention facility, testified to each defendant's knowing waiver, one by one. All was fine until he turned his attention to the final defendant, Mustafa Ahmed Adam al Hawsawi (table no. 5).

The officer claimed that Mr. al Hawsawi understood his rights, which the officer read in English, while Mr. al Hawsawi followed along with an Arabic version. When asked by the prosecution whether Mr. al Hawsawi understood his rights, the officer said "yes," which gave rise to an objection from Mr, al Hawsawi's learned counsel, Commander Walter Ruiz, United States Navy. CDR Ruiz emphatically informed the Court that the officer has made this assertion time and again with no basis to do so. Should the officer persist on this path, the Court should fully expect CDR Ruiz to seek permission to question the officer on his qualifications to conclude that Mr. al Hawsawi understands his English. From CDR Ruiz's perspective, the government ventures into this territory regularly only to lay the groundwork to argue later that Mr. al Hawsawi's acknowledgment of his rights is evidence that he understands English-which is a debatable point in CDR Ruiz's eyes. The Court promptly settled the matter by stating that it would use the witness's testimony for nothing more than the narrow issue of whether Mr. al Hawsawi waived his right. CDR Ruiz took his seat, seemingly mollified, for now.

The Court's Hearing Schedule Establishes an Artificially Fast Pace

The IT infrastructure issue, though debated for two full days already, was far from settled, however. The defense wanted to abate the proceedings until those issues were resolved. In the related vein of providing effective representation to their clients, the defense this morning asked the Court not to hold monthly pre-trial hearings as it intends to do for the foreseeable future. Preparing and attending monthly hearings, according to David Nevin, one of the learned counsel, needlessly complicates the defense teams' ability to conduct thorough investigations, which, given the case, take lawyers and investigators to far-reaching regions around the world. Monthly weeklong hearings are hard to juggle with all of the pressing demands to investigate and research salient issues.

The Court pushed back, however. In the Court's estimation, there are some 500 discrete issues pending, all of which require resolution before a trial can take place. "The issues," according to the Court, are being kicked down the road. Mr. Nevin squarely laid the blame for the delays at the prosecution's feet. Issues such as the government's alleged interference with the attorney-client relationship are not of the defense's making, Mr. Nevin argued. Moreover, Mr. Nevin questioned whether there is some "abstract obligation to move things along" given that the government seeks to kill the five defendants in a case involving unique legal issues. The Court stated that it does believe it has an obligation to proceed in a deliberate manner, which likely means the flexibility to hold monthly hearings should it see fit. The Court then tabled this issue until the afternoon, when the parties would discuss whether it makes sense to schedule a one-

party (*ex parte*) hearing during which the defense could lay out its investigation strategy and concerns to the Court outside of the prosecution's presence.

Prosecution: the Defense's Problems Are Exaggerated and Easily Fixed

With that matter tabled, the IT issue was again front and center. Mr. Bechtold, the chief information officer at the Office of the Secretary of Defense, resumed his seat on the witness stand. His questioner, Joanna Baltes of the prosecution, sought to pick up where she left off yesterday. But, this was not to be. A courtroom alarm sounded, it seems that someone brought a cell phone into the courtroom. Cell phones, like almost all electronic items, are not allowed in this state-of-the-art courtroom designed to handle classified evidence. The Court recessed to allow for the clearing of the courtroom and gallery.

When court resumed, Mr. Bechtold made the point that his office is prepared to provide COL Mayberry's defense teams with a full-time IT professional who will help the defense implement processes to secure their data. The defense's IT problems are easily and quickly solved with solutions readily available, according to Mr. Bechtold. He is frustrated that his office has not been able to do more to support the defense. Part of the problem, according to Mr. Bechtold, is the lack of an ongoing dialogue between his office and the defense. If he had more facts about the issues plaguing the defense, he could work with them to fashion solutions.

The lack of dialogue likely stemmed from the fact that Mr, Bechtold believes that COL Mayberry does not trust him. Around May 2013, he provided her office with an independent team of contractors to help her wrestle through IT issues and devise possible solutions. That team of Booz Allen contractors recently suggested that a separate network would address the defense's IT needs in a more secure fashion. Though a separate network is doable, according to Mr. Bechtold, that option—which is embodied in the Course of Action No. 2 proposal—is costly. It is at least $1 million more than Course of Action No. 1, which envisions virtual separation between the defense and the rest of the Office of Military Commissions (but with defense still benefitting from the existing security infrastructure that the DoD network provides).

Mr. Bechtold testified that he agreed that DoD network monitoring should be done by a person within the defense's attorney-client privilege. He also agreed that the December 2012 replication process was mishandled. In hindsight, he would have copied existing data from the old server in Rosslyn onto a newly-built server that would then be shipped to Guantanamo. Notwithstanding the missteps, all 69 requests by the defense to restore missing files were successfully completed; all of those files were restored.

In May 2013, Mr. Bechtold's EITSD IT team committed additional "missteps" during the course of migrating Office of Secretary of Defense (OSD) e-mail accounts from "osd.mil" e-mail addresses to new "mail.mil" addresses. This migration was to include all OMC offices except the defense. COL Mayberry did not want her people migrated given the office's existing IT issues. But, EITSD inadvertently migrated the Army personnel assigned to the defense, which created a "dual personal" problem: e-mails sent to those defense team members often did not reach their "osd.mil" addresses; the e-mails, instead, ended up in the new "mail.mil" addresses, which the Army personnel on the defense team could not access because they were not authorized to do so, having ostensibly been exempted from the migration in the first place. In other words, those migrated members of the defense had no authority to check their new e-mail Inboxes because they theoretically did not possess new e-mail accounts.

On cross-examination, Mr. Bechtold agreed to commit himself to 1) augmenting the de-

fense's IT capability by adding additional skilled staff; and 2) implementing a network-based separation between the defense and the rest of OMC.

The Court then recessed for lunch.

Upon returning from lunch, the parties agreed that the Court would hold an ex parte hearing at day's end, which would allow the defense an opportunity to explain more fully why they wish to change the current hearing schedule. The parties could also submit additional papers on this topic by next Wednesday, should they so wish.

Back on the stand, Mr. Bechtold was asked if he ever suggested to COL Mayberry that he could hire someone within the privilege immediately to augment her office's IT capability. He responded that, although he did not put his suggestion in writing, he believes that he told her such during one of their many conferences on the subject earlier this spring.

Mr. Bechtold is retiring from government service on November 1, 2013. But, before he retires, he promises to affect the changes to the defense's IT infrastructure discussed during his testimony.

Having thoroughly covered the entire IT landscape with Mr. Bechtold during some eight hours of testimony over two days, the parties released him at about 1800.

Defense Argues that their Motion Implicates Fundamental Fairness Issues

From there, the defense summed up its position. At the heart of that position is a fairness issue: the defense argued that it is not fair for them to be forced to plow ahead with an IT infrastructure that is flawed and hampers their ability to maintain client confidences. The infrastructure problems compromise the defense's legal and ethical obligations to ensure that client communications remain with the ambit of the attorney-client privilege. It is difficult for the defense to tell their clients that this system is valid when the defense lacks the most basic of tools to retain confidences.

The Court Voices Skepticism

But, here's the rub, the Court cannot understand how it is to rule on something that is not within its control. COL Mayberry put in place a directive that precludes defense teams from using the network for privileged or confidential communications. The defense wants the Court to abate the proceedings until the colonel lifts that order. The five defendants and their lawyers are parties, not COL Mayberry. How can the Court order COL Mayberry to lift that order when she is not a party to this case?

Moreover, if the Court abates the proceedings until the colonel lifts the directive, the Court would not provide the colonel with any incentive to lift the directive. Courts normally abate to incentivize a recalcitrant party—that party adversely impacted by the abatement—to act in a way that would allow the proceedings to go forward. That is not the case here, COL Mayberry, as the head of the defense, seemingly has no incentive to lift her directive.

The Prosecution Accuses the Defense of More Stall Tactics

Ed Ryan, a civilian Department of Justice prosecutor, argued in response that the defense's complaints were much ado about nothing. The defense presented no evidence of any significant data loss, and any IT infrastructure problems were addressed when the government modified systems and processes, like the investigative search request process, to accommodate the defense's concerns. Any remaining problems can be addressed by augmenting the defense's IT capability with a professional within the privilege; in short, the solutions "lie with good government servants."

The urgency that might have supported this emergency motion no longer exists. According to Mr. Ryan, this motion was nothing more than "the emergency motion to abate du jour," referring to earlier defense requests to halt the case based on suspected government eavesdropping on meetings between counsel and their clients. “We had to stop everything else and spend days proving no one was listening. This time we had to prove no one was reading," Mr. Ryan said. He then referred to the victim family members sitting in the gallery and their need for swift justice. The Court quickly interrupted Mr. Ryan by reminding him that it has an obligation to rule on the law and facts, not on passion and emotion.

With the last word, Mr. Nevin pointed out that COL Mayberry would have been irresponsible if she had failed to do something to remedy the IT problems. In the end, there are serious problems with the defense's IT system—problems that call into question principles of fairness.

Khalid Sheikh Mohammed, et al.

21-25 October 2013

Dru Brenner-Beck

Dru Brenner-Beck is an attorney in private practice in Highlands Ranch, Colorado, and consults and writes on international law and the law of armed conflict, as well as the Guantanamo military commissions.

She graduated from Georgetown University's School of Foreign Service, Boston University's School of Law and earned an LL.M in military law from the US Army Judge Advocate General's Legal Center and School. She is also the current President of the National Institute of Military Justice.

October 21, 2013:

After arriving in GTMO and getting our security badges, we were invited to a barbeque hosted by the al-Baluchi defense team. This is a practice that this defense team tries to do every session, as it allows the NGO Representatives to meet them, and become comfortable with asking questions of them throughout the week. It also allows them to provide information on the composition of their defense team, which includes defense paralegals, several attorneys, the defense victim liaison, and the defense security officer, all of whom work together to provide a defense team for Mr. al-Baluchi. Foremost on their agenda is AE200, the defense motion to dismiss because amended protective order #1 violates the convention against torture. This motion argues that the judge's proposed protective order, designed to protect classified information, actually interferes with the defendants' right to speak about and seek redress for their claims that US government officials tortured them. It is also likely that AE008, the Defense Motion to Dismiss for Defective Referral, in which they argue that the truncated time frame, the lack of security-cleared defense learned counsel, and the lack of translator support during the critical pretrial period eliminated any meaningful ability for their clients to present evidence, such as evidence of claimed torture by US government officials, against a capital referral. Evidence was presented on this motion in the June 2013 hearing. The defense claims that such a limitation in time and assets at a critical stage in the processing of the case resulted in a defective referral, requiring the case be dismissed.

It is important to measure the Commissions' procedures against those in both a DOJ death penalty decision, and a UCMJ court-martial referral as a capital case, both of which include substantial pretrial discovery and mitigation consideration in the decision to seek the death penalty, with an average 10-month period in federal courts, and an adversarial Article 32 hearing in the UCMJ context.

Accused/ Counsel

Khalid Sheikh Mohammed (KSM)/ David Nevin, MAJ Wright,
Walid Muhammed bin 'Attash/ Cheryl Bormann/ LCDR Hatcher,
Ramzi Bin al Shibh/ James Harrington, LCDR Boducki,

Ali Abdul Ali Aziz Ali (Ammar al Baluchi)/ James Connell, LTC Thomas,
Mustafa Ahmed Adam al Hawsawi/ CDR Walter Ruiz.

October 22, 2013:

Mr. Nevin, counsel for Khalid Sheikh Mohammed, clarified that all defendants did not object to the gallery presence during courtroom prayer time, which previously had been cleared out of concern for privacy/respect of the accused.

Cheryl Bormann, counsel for Mr. bin-Attash, raised the issue of continuing guard force intrusions into, seizure, and translation of stamped attorney-client material contained in the accused legal bins and on top of the legal bins as they are full. She alleged and provided illustrative evidence that the JTF is not following its own procedures concerning marking of written materials. She alleged that their continued seizure, translation, and reading of the content of properly stamped attorney-client information was corroding the attorney-client relationship and had resulted in her client not writing to her for fear his letter would be seized, translated, and read by the government. CDR Ruiz (Mr. Hawsawi's counsel) stated that his client had experienced similar intrusions and negative effect on the attorney-client relationship. The remaining three defense attorneys (Mr. Nevin and Harrington) stated that the guard force also brings a translator with them, which raises doubts as they are translating properly marked information. BG Martins of the government wants to investigate the factual situation to determine if this is occurring. His position that the comprehensive communication management system with a privilege review team (PRT) under AE018 would routinize the management of documents. All defense counsel claimed that communications management order was not relevant to this situation, as the guards were violating the Commission's prior order not to examine further items stamped as attorney-client information. Judge Pohl, the Military Judge (MJ) said they would hear from CDR Masucco on Wednesday, and he could address the facts of this allegation, giving the government a little time to investigate.

> If the US wants to prohibit discussion of torture, they cannot simultaneously pursue the death penalty.

The MJ queried whether AE200 was a purely legal question, making the requests to compel witness production irrelevant to its resolution. Mr. Connell (counsel for Mr. Al-Baluchi) argues that AE 200 is not ripe for argument because, at least for his client, there are classified factual predicates dependent on disapproved witness requests for Dr. Novak (from the UN, expert in international law), and pending requests for two medical witnesses (identified as HM6 and Dr. 1 in the redacted DoD medical records provided to Mr. al-Baluchi's defense counsel. Mr. Connell had requested a 505 hearing to resolve the issues raised in his classified annex to AE 200. CDR Ruiz had similar concerns, but subject to the ability to supplement his argument after discovery disputes were resolved, he was prepared to address the legal issues in AE 200.

Mr. Connell clarified that he was prepared to argue but that the classified elements of his claim were critical to a full argument on the issue for his client. The US responded that although they had not responded to the witness request for HM6 and Dr. 1 in writing, they were denying it now on the record, and could provide a piece of paper to memorialize that decision. Mr. Connell stated that they would file a motion to compel in response. His position is that Dr. Novak is relevant and necessary to explain that the CAT has risen to customary international law binding on all countries, even given the reservations by the Senate in it.

CDR Ruiz (Mr. Hawsawi's counsel) began the argument on AE 200 that the amended protec-

tive order #1 (PO) violates the Convention Against Torture (CAT) because it prohibits the defendants from speaking about their torture (because the classification guidance continues to classify the defendant's memories and experiences of the treatment they experienced after their capture by the US, from 2003-2006). He argued that the CAT gave the defendants' rights to speak about their torture and to assert claims for redress. He disagreed with the government that this was an issue of being able to assert CAT rights in the commission or other domestic courts. Instead, he argued first that the requirements for defense counsel in a death penalty case required counsel to investigate and develop any possible mitigation evidence, and that the protective order placed substantial obstacles to their ability to meet the 8th Amendment standard in a death penalty case. He asked as a remedy that the Commission either dismiss the charges entirely or dismiss the death penalty possibility because of the impediments to their representation imposed by the PO. Moreover, the PO interfered with affirmative rights under the CAT. This situation is complicated by the fact that the personal experiences and memories of the accused are classified; no clear classification guidance has been provided by the US. They are pursuing the steps in the Executive Order to seek the declassification of the torture facts, but the CIA has denied their request, so they are taking it to the next authority for a determination. CDR Ruiz submitted an ex parte submission to detail the practical difficulties of investigating and developing mitigation evidence under the current proposed PO. For CDR Ruiz, the US position was that the defendants have no advocacy rights to be protected by the Military Commissions outside of the Commissions, with defense counsel limited to exploring and developing mitigation evidence only. CDR Ruiz referred to the Intervenor, a British NGO, which has recently filed a motion to obtain Hawsawi's power of attorney to pursue a CAT claim in other remedial courts, of any signatory nation to the CAT with less restrictive implementing rules.

The MJ pushes back again on his point is even if I grant the changes you are asking for in the PO, aren't you still restricted by the requirements under existing classified national security information regime to safeguard classified information anyway; what practical difference does this make? Aren't you rearguing AE 013 on the classification of the defendants' observations and experiences? Ruiz answers that yes, that is so, but it is the first step in a many-step process both in the Commission and in collateral proceedings to challenge that regime and the US government's actions in classifying the information.

The CAT specifically prohibits relying on national security justifications to hide evidence of war crimes or to avoid embarrassment. For Ruiz,

signing the MOU, which accompanies the PO makes counsel complicit in silencing their clients. He argues that the defendants' observations and experiences of torture at US hands (allegedly) are improperly classified, and that although the changes to the PO would not completely unshackle the restrictions on Hawsawi's individual legal rights (even if not practically exercisable at present), they are a recognition that the Commission would not be complicit in violating the defendants' rights under the CAT.

MAJ Wright, for KSM argued that although the CAT is not a self-executing treaty, that Article 13 rights apply regardless of any implementing legislation because it has become a norm of customary international law (CIL), and that Dr. Novak

(from the UN) appearance as a witness is critical to understanding its status under international law, and therefore in US law under the Supremacy Clause and US case law. The Supreme Court in Hamdan v. Rumsfeld recognized that portions of Additional Protocol I to the Geneva Conventions have risen to the level of CIL, recognizing the relevance of CIL to US law. He also argued that US consistent practice had indicated an intent to be bound by the provisions of the CAT; it is taught to military practitioners as mandatory norms. He argued that the PO violates the CAT by restricting the defendants' ability to speak; the US cannot use national security to classify evidence of war crimes violations or to avoid embarrassment. Also, defense counsel cannot fulfill their 8th Amendment and ethical obligations to explore and develop mitigating evidence fully or to pursue collateral attacks if appropriate. The PO orders KSM to forego his legal right under CAT to pursue remedies to his claimed torture, and violates the object and purpose of CAT.

Cheryl Bormann argued that if the US wants to establish a classification regime to prohibit the disclosure of evidence on torture, they cannot have their cake and eat it too, by pursing the death penalty in this case. The Military Commission can abate the proceeding as a remedy, and that can be the first domino that may result in a change in US policy regarding the classification of this info. Modification of the PO is not futile in this case, as it goes further than an underlying obligation to protect classified and the classification regime, in this case, has continued to evolve. The 8th Amendment requires death penalty counsel to pursue both evidence of mitigation and collateral attacks where appropriate. If the US wants to prohibit discussion of torture, they cannot simultaneously pursue the death penalty.

Harrington for al Shibh argued that the Commission could not issue a PO that violates the CAT, its orders should be right, and meet the spirit and letter of the CAT.

After lunch, Mr. Trivett responded for the US, First that this is not a CAT issue but an attempt to relitigate AE 13. If PO/MOU went away, they would still be bound by requirements of classification scheme. He declared that "this case is not about torture," it is about the 2,976 people who were killed. He contends that the defense will be given what they need to properly defend the defendants, they will have a full opportunity before the Commission to raise those issues. He (incorrectly) contends that CIL only binds the US if the US chooses to officially acknowledge that a specific provision binds it and that the Judiciary (even federal) has no role in deciding whether a norm of CIL is part of US law. He also confused the self-execution issue with the entirely separate issue of whether the US has an international law obligation to comply with the CAT. He claimed that there are plenty of other avenues of redress to meet the US obligations under the CAT and that defendants cannot assert rights under the CAT which is what they are trying to do, referring to AE 200 Attachment E, which is the US government position on redress avenues under the CAT. GTMO ICRC visits are another avenue (somewhat disingenuous as the US contests production of those reports to the defense). He also states that the CAT does not provide a private right of action, and Congress requires that specific articulation of a private right of action for one to exist, that it would be improper for the judiciary to determine that one exists absent such specific authorization. He argued that this is an attempt to authorize the disclosure of classified information to uncleared personnel.

CDR Ruiz reiterated the US commitment to the CAT and the prohibition on torture. The CAT also restricts the obstruction of an individual torture victim to seek redress and imposes a state duty to assist other states in effectuating the rights of the Convention.

The Military Judge (MJ) pushed back again on the same point even if PO negated doesn't the classification regime restrictions still bind you?

Yes, but, the first step. There is no classification guidance from OCA that the US can show us that justifies the victims' experiences and observations being classified, that is precisely what the CAT prohibits, and it happens to apply uncomfortably enough, to the actions of our government in this case. The Commission can recognize that it can limit the obstacles the defense faces by dismissing the death penalty or all the charges. The US is incorrect that the defense can do everything it needs to do. When asked if a court could impose a PO protecting classified information learned during a proceeding, he said yes, but that the court should weigh what other laws and values that that decision implicated. He asked the Commission to "do what you can with what you have."

MAJ Wright /KSM, he emphasized that Dr. Novak was critical to his argument that Article 13 of the CAT was CIL, but that just because the classification rules violate the CAT, does not mean that the Commission should violate the CAT and that the defendants are entitled to as much relief from the Commission as possible. Asked to treat the lawlessness of RDI (CIA's Rendition Detention Interrogation program) as classified, the same government agency alleged to have tortured the defendants are not seeking to silence them.

The MJ asked don't we normally tie the remedy to the wrong, wasn't this what CIPA (upon which the 2009 MCA's provisions are based) designed to avoid. The response is that Dr. Novak will testify that this attempt to classify the defendants' observations and experiences of their own torture is unprecedented in the history of the world. Defense counsel needs to investigate this gross misconduct, which may save the defendants' lives. The Military Commission should not be a party to the amended PO's attempt to silence KSM. Actions of the US does not comply with CAT requirements.

Some of the papers in Mr. Mohammed's cell included pictures of flag-draped coffins and some al-Qaeda propaganda.

Cheryl Bormann, the PO, imposes additional burdens beyond the classification regime.

The MJ discussed with Mr. Trivett whether the PO's provisions governing protection of classified information "obtained in the course of the proceedings." The MJ asked, didn't that create a difference between what could be protected versus preexisting knowledge of the defendants. He responded that the defense could not consent to release of classified information obtained in the course of proceedings, but could seek authorization to release the preexisting category, but retracted that when all defense counsel requested that authority on the record, and Mr. Connell stated that he had already asked and been denied for Mr. al Baluchi.

The Court then discussed a short break to transition to the 505 hearing on classified material, upon which the US objected to the presence of the other defense counsel because they had not yet signed the MOU. The objection sparked objections from all defense counsel, as the motion with classified attachments had, IAW the Rules of Military Commission, been provided to all defense counsel, on one super email so the Government was aware of their knowledge and could hardly claim surprise now. After much to do, the MJ allowed the defense counsel to be present for the 505 hearing as an exception because this motion presents unique circumstances. This decision was after a short bit of exasperation by the MJ that the defense counsel had not immediately complied with or contested his original order to sign the MOU, with those contests coming late in his mind.

The gallery was cleared to discuss the classified portion of the factual predicate for Mr. al-Baluchi's AE 200 argument to commence in the morning, and out into the hot Cuban sun, we went, after ascertaining that they would not

attempt to consolidate the unclassified argument into the 505 hearing to expedite the conclusion of this motion.

October 23, 2013

Summary:
Excellent argument on CAT issue in AE 200, contending that the proscriptions against torture evidenced by the CAT have risen to the level of a jus cogens norm, and as such apply as the law of the land in the US although the CAT itself is not self-executing. Excellent analysis of why the observations and experiences of the defendants (being tortured) cannot be properly classified. A strong argument from the defense that the PO cannot silence the defendants from exercising their right to complain of torture.

Statutory construction arguments on the classified document procedure of the MCA.

Other subsidiary matters.

Substance:
Hearings commenced with the MJ explaining that the closed 505h session held last evening to discuss whether close the Commission under Rule 806 to discuss classified information had determined that no discussion of classified information was required. All defendants except for Mr. al-Baluchi are present, so the routine inquiry into Mr. al-Baluchi's waiver was conducted.

LTC Bogucki, representing Mr. al Shibh again raised the issue that his client alleged continuing noise and vibrations in his cell, in violation of the Commissions prior oral ruling to cease any such conduct, if it was occurring. Counsel asked for abatement until the "maltreatment" was discontinued. The MJ declined to treat this as an emergency motion because the only evidence was claims from the defendant. The MJ did note that it would be reasonable for counsel to talk to relevant guard force personnel identified by his client who might corroborate any such claims (possibly through cooperation by the government or appropriate motion), but it was unclear what relief was appropriate to remedy a situation that the government claimed was not occurring.

On a quick side issue, CDR Ruiz asked what the Commission's guidance was on when defense counsel could consider a non-response by the Convening Authority to a defense request (for resources) could be considered a constructive denial. The MJ agreed that some period was reasonable but wanted to consider the possible solutions. The defense wanted to ensure that the delay did not reflect adversely on them as being dilatory.

Once these matters were disposed of (in the first hour of the session), Mr. Connell, Mr. al-Baluchi's counsel began his argument on AE 200 and its claim that the amended PO violated the CAT. To commence, Mr. Connell first clarified how the PO imposed restrictions that were not imposed by the classification regime by showing the Commission a large manila envelope in which he had placed a statement written at counsel's request by Mr. al-Baluchi stating an instance when he was tortured, and where he claimed to have been tortured. This information was from Mr. al-Baluchi's life experience, not from any exposure to classified information during the Military Commission process. Mr. Connell stated that he had not seen the statement in the envelope. Because the classification Executive Order and relevant laws of the US only allow classification of information controlled by, owned, or produced by or on behalf of the US. Mr. al-Baluchi personal life experience which was written down in the envelope could not be classified because it did not fit into those categories and was not from a person not in privity with the US. If the envelope were addressed to the UN Special Raconteur for Torture, no violation of any classification violation would occur BECAUSE THE INFO in the envelope is not classifiable. The sole prohibition on its being sent to the UN would arise

from the PO. In AE013HH it was fully briefed that if someone in privity with the US added something to such information, or otherwise vouched for it, that info could be converted into classified information, but the raw information derived from the defendant's life experience could not be classified. Under the CAT, the defendant has the right to directly complain to third parties on torture that he alleges occurred based on his personal knowledge and experience?

Mr. Connell also distinguished his client's position on AE200 from that of the other defendants. He argued that it was not the CAT that created a right in domestic court, instead it was the status of the norm against torture as customary international law (CIL), in fact as what he termed, super CIL, or jus cogens, As such the prohibition on torture was part of the law of the land of the US, with CIL forming a form of federal common law on the question. He disagreed with the government's position that the Military Commission did not have "jurisdiction" to hear the claim that the PO violated the CAT. In two key cases, Sosa v. Alvarez-McCain, 542 US 692 (2004), the Supreme Court addressed both whether the court had jurisdiction (yes), and if there was an enforceable right of action. Under Sosa, if a norm is specific, obligatory, and universally accepted, it can be held to have ripened to the type of federal common law that is part of the law of the land. In Kiobel, a 2012 Supreme Court case, he argued, the Supreme Court made a distinction

between enforcement of a cause of action and jurisdiction and determined in the context of the Genocide Convention that there was a jus cogens norm, but that the Court lacked jurisdiction. The cause of action, in this case, arises from the international jus cogens norm against torture, not from the CAT itself as a treaty, making the issue of whether it is self-executing irrelevant. These cases negated the US position that there was a lack of jurisdiction to hear this claim.

Arguing on remedies, he reiterated that the actual statements of the accused are not classified, and asked the Commission to strike the portion of para. 2g5 purposed to treat this unclassified information as classified. Such a provision in the PO would violate the jus cogens proscription against torture (which he argued also included the fundamental right to complain of torture), by silencing the accused. He argued that even if he is wrong about the legal conclusion that EO 13526 does not permit the classification of the accused memories and life experiences, if the classification law system is set up such that it silences the accused right to complain about torture, then the system itself violates jus cogens, and the case must be dismissed. In effect, the Government will have set up a problem that the Commission cannot solve, and the only solution is to dismiss the case.

Re the international law piece of this issue, he disagrees with the US position that only if the US has signed, ratified, and adopted enabling legislation for a treaty, is its provisions a part of domestic US law. To show the inconsistency of this argument, he showed that the US position in AE 107A extensively relied upon international law to detail offenses before 2006, it relied on the Rome Statute as evidence of CIL even though the US did not ratify it and the US actually considered withdrawing its signature. Additionally, in AE 120, the government argues using CIL throughout the case as providing relevant rules of law for the Commission to

consider. The US relies upon API which it has not signed, ratified or provided enabling legislation, but the US had agreed that portions of AP I and AP II (of the Geneva Conventions) have risen to the level of customary international law. Similarly, the CAT is evidence of an international law norm in the same way as AP I/AP II/ the Rome Statute/ ICTY Decisions, etc. relied upon by the Government in other motions. The government's jurisdictional argument also raises an ultimate irony if the Military Commission does not have jurisdiction to over international law questions—the international law of war is the basis of the entire Commission itself.

In response to the Commissions' query on whether there is a distinction between the principles of the CAT and its procedures, he responded that Dr. Novak would testify on this very point, as the foremost world expert on this issue.

The MJ queried if even if the prohibition against torture is jus cogens, is the right to complain also jus cogens? Mr. Connell responded that it does not have to be coextensive, but in this case, the right to complain is part and parcel of the right against torture. The right to remedy can include, under international law, the right to truth, with a public acknowledgment and promise to prevent its reoccurrence as well as a right to rehabilitation.

The determination that the CAT is not self-executing is correct but is irrelevant to the question whether an enforceable right exists under domestic law because of jus cogens norm against torture (evidenced in part by the CAT). In Filartiga v. Pena-Irala, 630 F.2d. 862 (2d Cr. 1980), the 2d Circuit recognized that a right against torture existed under international law. In 1980 the CAT had not been signed by the US, but the 2d Circuit, relying on other Conventions recognized that although these conventions were not self-executing, it did not mean that the principles they represent were extant under CIL, and therefore were part of domestic US law. Sosa also had this same analysis by the Supreme Court, if the norm was specific, obligatory, and universally accepted. The US Torture Victim Protection Act does not create a new right; instead, it recognized a preexisting cause of action and codified Filartiga.

Under EO 13526, the OCA (original classification authority) does not have the authority to classify al-Baluchi's statement (in the manila envelope).

The best evidence of what the US thinks about CAT is that it ratified it, and EO 13491 signed by Pres. Obama ensures that only lawful interrogations are allowed, and references the CAT and its applicability to GTMO. Although a nation may opt-out of a norm of CIL by being a persistent objector, the US instead has strongly endorsed the prohibitions against torture.

Under EO 13526, and the MJ Query, is not the classification decision OCA's call?

There are four requirements for classification of information, (1)OCA is classifying the info (with proper delegation and procedures), the information is owned by, produced by or for, or under the control of the US government, (3) it is one of the listed categories in the EO, and (4) it is classified according to the expected damage to national security expected to arise from its disclosure (seen in FOIA cases). In ACLU v. DoD, the government records generated as part of an interrogation to document the treatment of a detainee were within the government control, but that should be distinguished from the detainees own memories of their treatment. Under the Charming Betsey canon, where ambiguity exists in the statute, it should be interpreted to be consistent with CIL.

Mr. Connell reiterated that if he was wrong about the classification law issue (that the government could classify the memories and life experience of an individual not in privity with

it, then such a system would violate the CIL norm against torture and included right to complain, creating a problem the Commission could not resolve, and requiring dismissal of charges. He used two medical reports made by Mr. al-Baluchi in 2006 to US medical personnel (Dr. 1 and HM6 from yesterday), to illustrate why the Government's claim that other avenues in US law satisfy the accused right to complain, by showing that no investigation was conducted into these allegations of US torture despite DoD regulations requiring such an investigation. Similarly, Mr. al-Baluchi is prohibited from complaining to Congress by the PO.

MR. Connell adopted the amicus argument of the requesting intervenor as it addressed the interplay between the procedural aspects of the norm against torture and the norm against torture itself.

The Government declined to offer any response to Mr. Connell's argument.

The MJ queried whether removing the language "without limitation" in para. 2g(5) and substituting "information shall include information attained as a result of participation in these proceedings" in effect creating a distinction between information from personal experiences and information gleaned from participation in commission proceedings. (as an aside, the MJ said the agreed-upon changes to AE013 has already been done and will be included in final decision).

Mr. Connell thought the changes would address the concerns.

Mr. Trivett, however, stated that the life experiences of the accused would be classified, the EO's terms are that information can be classified if the accused are under the control of the US government, they were exposed to sensitive sources and methods produced by the US government and therefore their personal observations and experiences could be classified in the context of this armed conflict with hostile alien combatants. (if Government voluntarily exposes sources and methods to foreign national without privity to the government if the foreign national is within US control).

Ms. Bormann responded that could not mean that it can prevent people from complaining of torture so long as it captures them, She asked to have a pro bono consultant present argument to the Commission, but since he did not qualify as counsel under the RMC, the MJ denied the request.

CDR Ruiz contested Mr. Trivett's that the observations and experiences of the accused were in some way voluntary in these circumstances of on-going armed conflict, in effect this is an argument that torture is ok because we were at war. He read the CAT which states that: No exceptional circumstances, whatsoever, including a state of war, the threat of war, or any other national emergency is a justification for torture.

Mr. Nevin, Ms. Bormann, both objected to any inference that their clients "voluntarily" participated in the CIA's RDI program.

We break for lunch.

On return, we turn to AE073D and E and AE 156, in which Mr. Nevin argues that the plain language of section 949p4, which is not identical to CIPA, does not create an ex parte presentation opportunity for the government's declaration to invoke its classified information privilege. The structure of the statute (10 USC section 949p(4)) is quite specific in excluding the ex parte opportunity in subsection (a), while explicitly providing it in (b). The plain reading of the statute requires that the information (at least the declaration invoking the privilege) be provided to the defense, and only the ex parte provision on the MJ's evaluation of any substitutes or redacts as adequate substitutes. Ms. Bormann wants at least a general description of

information the government believes is subject to discovery. Mr. Connell adopts their arguments as correct.

LT. Korczynski for the Government argues that the CIPA is the authoritative source to interpret section 949p. There is no right to a public claim of privilege or to access to the underlying information sought to be withheld by the government.

Mr. Nevin responds that CIPA is authoritative only to the extent the CIPA is not consistent with the MCA, and here the plain language of the statute provides no ex parte opportunity for the declaration of the assertion of privilege.

AE 164, deals with Ms. Bormann's argument that section 949(j) is materially different from CIPA, and by creating a bar to reconsideration of an adequate substitute it denies due process to the accused. She argues that all cases on this premise due process validation of CIPA on availability of reconsideration, Government disagrees with that reading of case law.

Prayer break. The Commission takes a half-hour break to allow the defendants time for their afternoon prayer, which they do in the courtroom on prayer rugs they bring with them in their legal bins brought with them from the detention facility.

Mr. Connell illustrates the potential pitfalls of a failure to allow a request for reconsideration by detailing the provision of FBI 302s, of financial documents and telephone data documents, which include 9913 pages of discovery, with 12833 redactions in them, which would stretch over two miles long if laid end to end (and which would stretch further than the ferry dock on the leeward side of the island to the windward ferry dock) and includes redaction of all first names, many last names, all addresses, phone numbers, dates of birth, bank account numbers, calling card numbers, hotel numbers, fax numbers, ATM terminal numbers and every password number. Absent an ability to request reconsideration, if this occurred during the 949 processes, he would be stuck with such an obliterated response (the government is voluntarily reevaluating the redactions in this document production).

The government argues that the defense could instead use a motion to compel evidence, which

they do not consider a motion to reconsider which is barred by 9494j.

The Commission recessed until tomorrow a.m.

October 24, 2013
Substance:
RE: 144, 18, 8, 31, and 32. All defendants except for Mr. Hawsawi were present, and the normal testimony on voluntary waiver was conducted with CDR Masucco.

CDR Ruiz examined CDR Masucco concerning his knowledge of searches of attorney-client material at Camp 7 the Detention Facility, particularly as to AE144 filed ex parte under seal. This exhibit detailed three accordion file folders seized from Mr. Hawsawi's cell during the searches conducted from 11-13 February 2013 during that session of the Commission. CDR Masucco testified that he had, at the direction of the MJ, investigated whether any attorney-client privileged material had been seized by the guard force, and in doing so had gone to the evidence room, and found one attorney-client document, which he returned to the defense. However, Mr. Hawsawi had approached him near the end of February to say that other documents had been taken from his cell and not returned. CDR Masucco asked the guard force if they were aware of any other documents from Mr. Hawsawi's cell. He testified he also checked the evidence room and nothing was in Mr. Hawsawi's box in the evidence room. The guard force called him in mid-March to ask him what they were supposed to do with the envelope with Mr. Hawsawi's documents. CDR Masucco opened the sealed file in the evidence bag and found 2-3 accordion files with attorney -client marked documents. When he saw the markings, he did not review the content and returned the documents to Mr. Hawsawi. CDR Masucco and CDR Ruiz had a meeting to discuss these missing documents, which included a list of expected pretrial motions, and a table of potential penalties for each offense. CDR Masucco did not know who conducted the search, although it would have been one of the guard shifts, who ordered the search, and where the documents were during the missing period. In September 2013 the librarians also conducted "cataloging" of the books in the defendants' cells. CDR Masucco was not aware of any instance of seizure of attorney-client privileged documents after the February timeframe. CDR Masucco was not involved in the commander's inquiry into the seizure of attorney-client privileged information.

Cpt. Schwartz for Mr. bin 'Attash questioned CDR Massucco further on the librarian cataloging of books in the cells in Sept. 2013. For Mr. bin 'Attash, the librarians initially seized two books, one book in Arabic that was subsequently determined to be a book on Sharia law and another on computer/internet/cell phone use that had Mr. al-Shibh's detainee number on it, and which contained Arabic writing in black ink pen, which are prohibited for detainees. An interpreter accompanied the librarian (which is a soldier assigned to these duties in the detention facility) so that they could assist in identifying books in Arabic. The sharia law book was returned to Mr. bin 'Attash, and the other was considered to be contraband. CDR Masucco acknowledged that at times, particularly with the turn over of the guard force, some of the guards were confused on the standards of what could be brought into attorney-client meetings. Mr. Harrington asked similar questions.

Mr. Groharing elicited testimony from CDR Massuco that there were 87 unmarked pages from the GTMO Watch blog, and several Arabic language newspaper articles found in Mr. Mohammed's cell laid out on his bunk. Insinuating that the defense counsel had introduced these documents into the facility, CDR Masucco also testified that an envelope with 6-inch long zip ties had accidentally fallen into a detainee's legal bin, but that the post-visit search of it had disclosed these items (which had been intended to be given to CDR Masucco and used to bind books/papers used by the defendants). He also

testified that some of the papers in Mr. Mohammed's cell included pictures of flag-draped coffins and some al-Qaeda propaganda.

Mr. Nevin took offense at the prosecution's insinuation that the defense had been responsible for these unmarked documents found in Mr. Mohammed's cell, but the MJ at this point informed counsel that the motion before the Commission dealt with the seizure of marked attorney-client privileged material, not unmarked material, and he not willing to provide any more leeway on a matter he considered to be irrelevant to the matter before the Commission. CPT Schwartz argued that the amount and nature of the vast amounts of unmarked material in the defendants' cells were relevant to the detention facility's continuing justifications of searches of legal bins despite the ability of the detention facility to search for contraband at any time. He introduced AE 144 Q-U, which was a multi-foot stack of unmarked documents from Mr. Mohammed's cell that were a result of the JTF failure to follow their own procedures. CPT Schwartz argued that at some point, the incompetence would amount to intentional interference with the attorney-client relationship, and the extent of the current interference was taking a toll on the attorney-client relationships in this case.

CDR Ruiz took issue with CPT Schwartz concession that the detention facility had an absolute right to inspect the cell every day, because at some point a systematic pattern of harassment could impact the unfettered discretion to conduct searches.

CDR Masucco was excused and CDR Ruiz brought up the issue of the production of Mr. Broyles to address the issue of translator support during the pre-referral stage relevant to AE008. After much discussion analyzing the government's agreement yesterday not to contest Mr. Hawsawi's English language proficiency for the purposes of this motion only, it was decided, after acknowledgment that this request for production of Mr. Broyles to rebut allegations in Mr. Roberson's declaration in AE008C att. G. After some back and forth, Mr. Broyles will testify by VTC tomorrow at 10.

CDR Ruiz needs to examine Mr. Broyles to be able to argue AE008 (defective referral). There are three outstanding motions to compel also relevant to that motion: AE008QQ MAH, AE008JJ MAH, and AE008MM MAH, as well as AE 064 (which also relates to AE 013 on the protective order). The Government declined to produce all three requests. MM requested the production of the unredacted notes of FBI SA Fitzgerald, QQ to any notes or agendas from

VTCs held between Admiral MacDonald (the Convening Authority), Adm. Frazier (SOUTHCOM Commander), Mr. Lietzau (Under Sec Def for Detainee Affairs), and the CDR, JTF GTMO Adm. Woods. The government denied this motion without determining if the records of the VTCs even exist, and MM because CDR Ruiz has not signed the MOU, and because the redacted portions of the notes are not material to the defense for this motion.

The MJ queried which was the basis of the denial, because if the adequacy of the substitute was at issue, wouldn't he have to examine the unredacted notes in camera before he could deny a request to produce the unredacted classified notes.

Ms. Bormann also planned on introducing some documentary evidence as to this motion.
Tomorrow, the MJ stated he wanted to address, AE31, AE32, AE008, and maybe: 161, 112, 149, 168, 182, 183, 184, 195, 206, 209. Mr. Nevin asked for a chance to meet for a longer period with his client as tomorrow is Friday, and they are unlikely to want to be present, which was approved by the MJ.

Several of the NGO representatives met with the international law expert on Ms. Bormann's team, Mr. Tony Cadman, an English barrister, who has recent experience observing tribunals in Bangladesh (he is pro bono and acting as a consultant).

October 25, 2013

All defendants were present except for Mr. Hawsawi. The usual establishment of voluntary waiver procedure was followed.
The MJ inquired of CDR Ruiz if he felt that AE031 was ripe for argument. CDR Ruiz stated that he would be filing several motions to compel for the production of the persons who conducted and ordered the Feb. 11-13, 2013 searches of Mr. Hawsawi's cell. The MJ wanted to know how CDR Ruiz viewed his motion which has been pending since before arraignment. The motion had begun as a motion to dismiss because of unlawful command influence arising from extrajudicial statements of high ranking government officers, including the President, Vice-President, Sec. Def., and others, the effect of such statements on the referral, and perhaps a structural challenge to the Commissions themselves. The motion now focused on another aspect of the statements' effect at the "micro" level on the detention facility staff. The MJ wanted to know both aspects should be argued together or if the "macro" level issue could be argued now, and the witnesses and other issues related to the "micro" issue dealt with later.

CDR Ruiz, argued that both were related, with the extrajudicial statements themselves on the Convening Authority (CA) and other parties within the Military Commissions, but also the effects of Admiral Woods' actions, which he argued affected attorney-client communications. (Adm. Woods was the JTF GTMO Commander who issued the 2012 orders that affected the ability of counsel to communicate with their clients by requiring review of all written materials provided by counsel to their clients, and of any attorney notes detailing meetings with their clients). Ruiz felt it was proper to argue both together, as they created aggregate effects that impacted the attorney-client relationship. There is an outstanding motion to compel from Sept. 2013 on this issue.

MAJ Poteet for Mr. Mohammad indicated that there are outstanding discovery requests related to AAE031, 31GG, and 31HH, which would explore the connection between the high-level officials'' statements and the actions of the guard force that repeatedly violated the attorney-client privilege. Preference is to argue together.

Mr. Connell indicated that AE168, also outstanding was ancillary to the issue of communications between the Convening Authority and other individuals at JTF GTMO.

Mr. Swann for the US Government argued that there have been 7 supplements to AE031, with its original allegations of 71 statements by high-

level government officials and that not every impediment to the attorney-client communication amounted to unlawful command influence, and that this matter needed to be decided to move the case along.

CDR Ruiz stated that the filing of the motion to compel in September was not because of dilatoriness by the government, instead, the initial discovery request was sent on 6 June, with no response by the government, with a follow up in August, again with no response, resulting in the September motion to compel.

The MJ decided that parties could add any argument on the 31GG31HH/168 that relate to 31 in a brief to him (but not addressing any issues related to 008 and 013), and that AE31 and AE 08 would be argued during the December session.

Mr. Connell described the AE 168 issue for the Commission. It involves the communications between the Convening Authority and the JTF GTMO CDR on the Base Line Review (BLR) and legal mail policy implemented in October 2012, Mr. Breslin was key in the that the Commission denied communication and his production. That denial makes production of the meeting notes and agendas from VTCs between the Convening Authority, OGC DoD, SOUTHCOM, the JTF SJA, and the JTF GTMO Commander even more critical (Adm. MacDonald, the Conv. Auth testified as to the existence of these VTCs in his testimony in June 2013 before the Commission). The facial challenge to the Commissions involving the structure of the Conv. Auth. In AE 091 has already been fully argued and briefed. Mr. Connell also informed the Commission that there exists an unfiled as-applied challenge focusing on the involvement of the Conv. Auth. In the legal mail problems which interfered with attorney-client communications at a critical pre-referral period. In its response to the defense discovery request to produce these VTC meeting notes and agendas was that the defense has failed to adequately articulate with specificity how these materials are materially necessary for the preparation of the defense. Mr. Connell emphasized that there is no requirement in the rules for the defense to articulate the specific defense theory their request was oriented to in the rules.

Mr. Groharing for the Prosecution responded that in their view the request had asked for those documents to prepare for the expected testimony of Adm. MacDonald in the June hearings, and they considered it moot after his testimony. The MJ asked what the basis of the denial was if it was because the documents did not exist, or because they were not material to the preparation of the defense, because if the documents were claimed to be not responsive, then the MJ would have to see them before ruling. Mr. Groharing responded that they had not looked to see if the documents existed.

Principal Deputy Chief Defense Counsel Brian Broyles, from the Office of Military Commissions, testified by VTC for CDR Ruiz on the issue of translator support during the pre-referral periods. As no billing information had been admitted on this issue, CDR Ruiz did not intend to explore any testimony on that issue.

Mr. Broyles job was to liaison with the WHS and OMC Conv. Auth, and worked contracting issues through Daryl Roberson, the COR for the Conv Auth on translator support for the various defense teams with each high value detainee (HVD) to receive one properly cleared translator on their team, with a TS/SCI clearance (to allow them to assist with meetings with their clients). There are 6 current "in house" translators that provide document translation support, although in March 2011 there were no in house translators. The in house translators may translate documents classified at the level they are cleared for, but there is only one at the TS-SCI level at this time. In March 2011, it was not possible to use in house translators to meet with Mr. Hawsawi, as none had a TS SCI clearance, necessary for any HVD meetings. CDR Ruiz first expressed he needed a dedicated team translator to meet with his client in March 2011,

but there was no such person available, so Mr. Broyles approached Mr. Roberson, as the COR for the Office of the Convening Authority to request he contract with ALC for such an individual. The Hawsawi team did not receive such an individual until July 2012. From March 2011-July 2012 CDR Ruiz frequently made it abundantly clear that they needed a properly cleared team translator with the required security clearances, following up if Mr. Roberson missed any deadlines for progress on that request.

Candidates were provided for the first time on 28 March 2011, and they selected the first person on 10-11 April, although he was not yet hired and could therefore not travel to GTMO, within 1-2 days of selection he withdrew his candidacy through no fault of the defense. Another set of 2 candidates were provided but then substituted with 3 higher qualified candidates. The original 2 were "off the table." When provided for selection, the company represented that the translator was immediately ready to begin work on the contract. The contract required a TS SCI clearance. In April, the defense selected Mr. Sharifi with the intent he would be cleared to travel to GTMO in May 2011; he was never cleared for travel as he spent over a year trying to get his security clearance updated. It had been represented at that time, that in order to bring the clearance up to date, the translator only needed to receive an SCI briefing (a read on) for a routine bring up. At that time, the Office of the Convening Authority was prohibited from doing read-ons. In March 2012, Mr. Sharifi withdrew his candidacy after a year of trying to bring his clearance up to date.

In an attempt to get some help, Mr. Broyles approached SAIC to see if they could get another qualified translator while they were waiting for Mr. Sharifi to be cleared, and also submitted two of the in house translators to get the appropriate clearances. A 4th candidate (from SAIC) was provided in May 2012, and he appeared ready to travel, but Mr. Roberson said he could not be used as only ALC was allowed to provide consecutive translator services. Mr. Broyles had observed the testimony of Adm. MacDonald when he testified that CDR Ruiz had refused the services of 8-10 translators, and the only context of that number was that each time a set of translators was provided to the defense for selection, one was selected, and the remaining candidates who were not selected were "rejected." So CDR Ruiz did not reject any translators. Mr. Broyles had reviewed Mr. Roberson's declaration where he stated that the defense had indicated a female interpreter was not acceptable, but that was not accurate, the contractor itself had suggested steering away from female translators, and they had merely accepted the contractor's advice. Of the two original translators provided initially, the original two were unilateral-

ly withdrawn by the contractor and replaced by the three "higher qualified" candidates, so they were not "rejected," the contractor made that determination. Only in May 2012 were they informed that candidates with existing SCI clearances might be fast-tracked for updates.

Mr. Trivett cross-examined Mr. Broyles, first asking if he had represented Mr. Khatani, a 9-11 defendant whose case had not been referred. The judge understood that that issue could go to bias, so he allowed it, but in a limited form. Mr. Broyles stated that he did not pursue other translators during the period the Convening Authority did not have authority to read on translators because each time he inquired he was told a solution was imminent, and that CDR Ruiz asked and did explore other options. The Convening Authority office was not aware of the exclusive nature of the consecutive translator contract with ALC until late in the game.

On redirect, CDR Ruiz asked if the SAIC translation contract had been used for one of the other 9-11 defendants, yes. The Military Commission then moved on to consider AE161, which was not ripe because they were in the process of trying to come to an agreement between the defense and government (AE161, Defense Motion to Require the Government to Comply with MCRE 506 Regarding Redaction on Unclassified Discovery)

AE149 (Joint Motion for Return of Computer Hard Drive and Back DVDs). Related with AE 182 (motion to allow computers in cells), and AE189 (motion to compel return of prior materials).

Mr. Nevin for Mr. Mohammed: This motion sought to require the return of the laptop computers taken from the defendants at the close of the first iteration of the Commission in this case, on which Mr. Mohammed and the other defendants had written notes and prepared for their defense. The computers were then seized from the defendants (as the Commissions were on hold) and are being held by the Air Force Office of Special Investigations. This motion asks for return of the computers, specifically the hardware, the hard drive containing files produced by the defendant, any backup files created with the assistance of the government, and any copies that might have been made. The contingent event on which this order was requested to be premised was a specified number of days after the Commission's resolution of AE 018 and counsel's signing the MOU on classified information. However, this implicates the 5g issue; there is no classified discovery that was provided to the defendants in the first iteration. Therefore the only information which should be on the computers was created by the defendants, as 5g includes an exception for materials produced by the defendants in the first instance being returned to them. In other words, to resolve earlier issues in the Commission, there was an exception to allow the defense counsel to discuss information originally provided to them by the defendants with the defendants as the government's position (which is vehemently contested) is that the thoughts, impressions, memories and life experiences of the defendants are classified if they involve the CIA's RDI program. The defense also requested the return of any backups made (during that period the government would assist the defendants in making backups).

Mr. Nevin emphasized that prosecution access to the computers was not the only issue; instead, the defense sought to find out anyone who had reviewed the information on the computers who was outside of the attorney-client privilege. Mr. Nevin informed the Commission that the prosecution had not responded to the related computer issue in AE182 which sought to provide computers to the defendants going forward.

Ms. Bormann emphasized that it was the ability to retrieve the information on the computers that was key as she had been informed that the actual laptops did not exist any longer. The MJ agreed that the ability to retrieve the information was implicit in the defense motion. Mr.

Nevin interjected that it was his understanding that the prosecution intended to return these actual laptops.

Mr. Harrington wanted to emphasize that their clients had created the information on the laptops in the 2008-2009 timeframe and as such would provide counsel with information memorialized by their clients much closer to the events in question (with the now additional five -year delay).

Mr. Connell wanted to emphasize that the MJ order included the wording "an accused" versus "the accused" as the efforts in the first iteration of the Commission had been a joint defense effort by the defendants, and that the current defense agreement would similarly not bar access to information from co-accused by counsel for only one. He argued that the entry of an order in AE018 was not a good milestone as it excluded overall the issue of the defendants' access to any electronic media.

Mr. Swann for the Prosecution provided some background. In 2008 the Government agreed to provide laptops to the accused for use in the courtroom and the detention facility. When that process ended in January 2010, the laptops were taken from the defendants and bubble wrapped. They were transferred to the Air Force Office of Special Investigations as part of another investigation that arose from the discovery of a potentially classified document in the defendants' cell at the detention facility in March 2010. The prosecution was walled off from that investigation, but It raised concerns that perhaps inadvertently classified information had made its way onto the laptops. The government was willing to return the information on the laptops contingent on an agreement that the laptops would be maintained in a SCIF. The government's position was also that the memories and life experiences of the accused were classified (the issue in paragraph 5g of the amended PO). They agreed that any backups would also be returned to counsel who could then return the information (not the computers) to their clients using the procedures established through the written communications order—a hard copy not media unless otherwise directed by the Commission. The government wanted to ensure no classified material existed on the laptops, apart from the information provided by the defendants, and they were positively maintained until that determination had been made.

The MJ asked why we could not rely on the professionalism and responsibilities of counsel on this issue as we did on the government's representations that they understood their responsibilities on discovery and could comply accordingly.

Mr. Swann also offered to provide the Commission and opposing counsel with a pleading that informed the court the results of their inquiry into where the laptops had been maintained (through the chain of custody documentation) but also who had access to the laptops, information on the laptops, and any backups in the intervening time periods.

The MJ was going to grant the motion that the laptops and all associated information be returned to the defense counsel, to be treated as if they contained classified information until and unless reviewed by defense counsel and determined otherwise, i.e., to be maintained in a SCIF. The prosecution was given two weeks to file a motion to inform all parties where the laptops had been and who had access to them. There is no requirement for the privilege team, if established, to review the documents on these computers, but the second step of providing the information back to the defendants might involve a privilege team review, depending on the source of information. The issue of use of a computer going forward is a future decision.

Mr. Connell wanted to emphasize that the detention facility where the defendants are being held is a SCIF.

Moving to AE184, which is a defense request to photography parts of the defendant's body to document abuse and injuries occurring within

the black sites during his detention prior to arrival at GTMO in 2006. The defense argued that the use of the combat camera was not appropriate. The defense was willing to use appropriate camera equipment as designated by the WHS Office of Special Security to ensure it met all security concerns and were will into to have the photographs reviewed for security classification determination, but wanted to the photography itself to be done by a member of the defense team. The location was an open issue.

Ms. Bormann joined, objecting to the use of combat camera and JTF personnel to take the photographs as they were willing to go through the appropriate security review and subsequent classification markings.

Mr. Connell also joined, as did Mr. Harrington.

Mr. Groharing for the Government argued that because of security concerns it was a reasonable approach to have the JTF personnel and combat camera take the photos and that the defense should not object to that because the photos being reviewed for security classification meant there was no privilege to protect. The MJ cautioned Mr. Groharing to be very careful about following that road as they had had extensive discussions that the defense submission of documents or evidence for classification determination and review did not constitute a waiver of the attorney-client privilege and that the Government did not want to revisit that issue.

This photo request is distinguished from the inquiry to the MJ yesterday if he objected to team photographs with the defense attorneys and their clients in the courtroom. These photographs were being done so that defense teams could use them in overseas investigative trips to provide evidence to potential witnesses that they were representing the defendants in this case and were not other government operatives. The MJ yesterday had replied that control of the use of the courtroom as a location for photos was not his concern so long as the Commission was not in session. Similarly, the location of the photography in AE 184 is also not involved but should be worked out by the various stakeholders at any proposed location.

AE183, a defense motion for telephonic access to defendants. Not ripe for argument as they are working through discovery aspects of this request as discussed at an earlier 802 session. This motion will be kept on the docket. Ms. Bormann indicated that the telephonic access issue was troubling when considered in conjunction with the timing of 802s, if done after court or in the evening, it was almost impossible for her to be able to talk to her client about them before the resumption of the Commission with the notice of visitation requirements of the JTF for visits with her client. She asked the MJ to fashion a remedy so that the counsel could see their clients, for example at night, or on weekends prior to the Commission's hearings on issues coming up at 802. The MJ was loathe to fashion a hard and fast rule as a remedy but stated that the Commission could adjust its schedule to allow visitation with clients if the 802 raised issues that needed to be discussed with them, for instances by starting later on a Monday if necessary to allow that to occur.

AE 195 and AE 112, the Zero Dark Thirty motions required a 505h hearing prior to their argument. AE 206 involved a potential witness issue would be continued to the December docket.

In AE120, the MJ had granted the Government's request to supplement, which it had done, and defense requested an opportunity to respond to the government's argument.

The MJ indicated that for the afternoon he wanted to address AE167 a motion to compel discovery on four items, perhaps Mr. Connell's argument on AE120, possible discussion on AE175, and maybe the following AE32, AE112, AE114, AE114F, AE190, AE191, and AE195.

LUNCH.

Beginning with AE167 Mr. Connell was contesting the provision of four redacted copies of CIA reports on the financial structure and funding of al-Qaeda, with four specific documents at issue, a 12 April 2001 document entitled "Pursuing the Bin-Laden Financial Target, another document entitled "Identification of al-Qaeda Donors and Fundraisers," a document on Saudi Banking, and a 1 June 2007 document entitled "11 September, The Plot and the Plotters." The government had significantly redacted these documents arguing that the redacted portions were not material to the preparation of the defense. [Mr. Connell is the sole counsel who has signed the MOU on classified information, so there is no issue involving access to classified information]. Mr. Connell argued that the case against his client is primarily a financial one [that he was an al-Qaeda financier and provided funds to the al-Qaeda hijackers] and that the Government's position on that issue had changed over time. The requested documents point to the evidence the government relied upon to draw earlier different conclusions and are therefore critical to the defense of the case. The documents are not necessarily focused on these five defendants but instead provide relevant data on al-Qaeda financing during the relevant period. All other counsel joined in this argument.

Mr. Groharing for the Government argued that the first three documents go to the "macro" level of funding of al-Qaeda and that the government has reviewed the unredacted versions of the documents, and the redacted portions do not deal specifically with these five specific defendants or the specific 9-11 attacks. Mr. Groharing claims that Mr. Ali (al-Baluchi) is not charged with raising any money for al-Qaeda, only with taking money given to him by Mr. Mohammad and giving it to the hijackers; the other information is not relevant. The defendants here are not "financiers," instead are more in the nature of "financial facilitators." As to the June report, the Government is trying to get a less redacted version of the report to provide to the defense, as the report also involves

sources and methods that are not relevant to this matter. The Government position is that the documents are not relevant to the preparation of a defense.

As discussed earlier this week, the MJ stated that to rule on this, he needed to conduct an in camera review of the redacted and unredacted version of the documents.

AE175 Government Motion for a Trial Scheduling Order and Notice of Status of Discovery.

BG Martins argued for the Government that the Commission asked earlier, when will this end, and appropriately so. The Government was submitting a process to establish a schedule to put "a mark on a wall" to assist in moving the case forward, that could be done 2-3 weeks at a time. He argued specifically for a 6 December 2013 deadline to file all defense legal and discovery motions, which would allow them to be argued in the 6-31 Jan Commission session. He proposed a 1 April 2014 deadline for all evidentiary motions, with a four-week session from 29 Jul to 22 August 2013 to litigate those motions. A Voir Dire process at the end of January 2015.

Mr. Connell responded that it might help the Commission to understand the task confronting the defense through a discussion of discovery by category. He used a pie chart showing the distribution of various types of anticipated discovery, and first discussed the yellow or law enforcement category. The basic law enforcement discovery has not even been provided, and even that which has been provided is so substantially redacted to limit its usefulness. He reminded the court of the limited law enforcement data already provided and discussed involving the FBI 302s, an illustration he had provided the Commission earlier this week with redactions of over 12% of the reports, to include all names, account numbers, telephone and fax numbers, etc., that out of the approximately 9913 pages provided there were 128833 redactions which if laid end to end would stretch over 2.1 miles long. The discovery sought is also data-dense and contains financial data scattered throughout the various documents and which requires expert assistance to analyze. The defense has had a request for such an expert pending with the Convening Authority since May 2013, but hopefully, the defense can now rely on the Commission's guidance on constructive denial if no response within a reasonable period. Even once approved, the individual has to be hired and cleared before he can begin work. The same issue exists in the telephonic records, which are complex and data-dense and took the Government with all the resources devoted to the 9-11 case numerous years to analyze. He then published an illustrative chart to show the difficulties existing in discovery. His team has submitted 67 discovery requests, two discovery requests that the government has agreed to, 21 which are in various stages of being produced, two requests have been refused, and 13 are currently pending motions to compel, 17 motions to compel have been denied, and 17 discovery requests are completed (all numbers are independent).

There are significant discovery gaps, including: any information on the pre-GTMO detention interrogations, all identifying information in FBI discovery, half of the expected GTMO medical discovery, any client statement other than to the "clean team," any info concerning the defendant's arrest, any information of the uncharged co-conspirators, other than Moussaoui.

The following motions are on the horizon: suppression of information from pre-GTMO confinement and interrogation, voluntariness of the statements to the "clean team," outrageous government conduct, illegal pretrial punishment, claims under international law, witness confrontation issues, extraction of statements form 'cooperating' witnesses and the relationship between the Convening Authority and the Prosecuting Attorney.

Ms. Bormann adopted Mr. Connell's arguments and wanted to underscore that in order to file discovery motions, she had to receive discov-

ery, read it, and conduct inquiries into the information. Ms. Bormann states that a comparison with statistics from a case involving comparable discovery might be illustrative for the Commission, involving the prosecution of Moussaoui, who was a 9-11 defendant with the same factual basis as the case against these defendants, but which did not involve the CIA's RDI program. Of the FBI reports provided as Form 302s, in the Moussaoui case, there were 180,000 FBI 302s, 1200 audio tapes, 1225 videotapes, 1210 hard drives and CDs at the unclassified level. There were over 200 compact disks, 1400 classified documents, and 29 two-inch binders of summaries under CIPA at the classified level. In order to be effective as counsel, they must read/parse/determine relevance/ organize in a useable, retrievable way/ ensure that the discovery is accurate with no deletions. The Government's case is the largest in US history according to BG Martins, and was done by the FBI/CIA, and other government agencies. It has already been tried once in federal court. The case spans five continents, and to investigate it properly requires travel to those locations by qualified personnel. To put the Moussaoui case in context, it quickly advanced to a guilty plea so that the bulk of the statistics on Moussaoui was tendered on sentencing and mitigation. Their ex parte Motion AE 181D explains to the Commission where they estimate they will have to travel and why. They also have an ex parte motion to compel pending on the Convening Authority's failure to respond for a request for a defense expert. That means they face six-month delays each time they make a response just to get a response, let alone to litigate the issue, hire the individual if approved, and get them to work. Discovery requests face similar obstacles, particularly if they have to file a motion to compel for every witness request. Why a document entitled "September 11th: The Plot and The Plotters" is not discoverable as not relevant to the preparation of the defense in incomprehensible. We are constantly obstructed by the government on items, which they then claim we are dilatory.

Mr. Harrington. The Government has had a long time to prepare this case; we have had not even a fraction of the time they have had. There are over 17 countries involved where we need to investigate. BG Martins proposed schedule is completely unfair. We will not have a fair trial unless the defense has time to prepare.

Mr. Nevin. The proposed schedule is one way to extend this case forever. It sets up an ineffective assistance of counsel claim. It is ludicrous even to discuss pretrial motion deadlines before discovery is even complete. Failure to assure a level playing field for the defense in a death penalty case has a tendency to come back to haunt you. Mr. Nevin used the example to the court that the normal response of a tribunal in a death penalty case is to assure the defense gets what it needs to defend the case vigorously. This is the most extensive investigation in US history, involving many countries and languages. It is in a new forum, which also contributes to new and different issues. Mr. Ruiz adopted the argument of other counsel.

BG Martins responded we have discovery ready; we are waiting for the resolution of the protective order issue. We need a deliberate schedule to set a mark on the wall and move the case forward. The government wants effective assistance of counsel.

The MJ queried, wouldn't it be helpful to have a constructive denial standard as that is not currently addressed in the rules for discovery going forward and for requests to the Convening Authority. BG Martins responded that we want to get discovery going, it is the lack of the MOU that is holding it back. The MJ continued we do not have court-imposed deadlines on discovery; the Commission is inclined to establish one to ensure a balance between pressure to move forward and being fair to all parties. BG Martins responded that he would like to see more Commission involvement in the enforcement of the MOU. The MJ stated that they

would likely see a Commission order on the timeline of a constructive denial if no response received within a specific timeframe. The MJ wants to keep the discovery process on track with more court supervision. There will be an order forthcoming that if no response it is treated as a denial. BG Martins also argued that Moussaoui is distinguishable as not representative and misleading. The Government here is helping by eliminating unnecessary duplicates.

AE188/193 the motion concerning the transfer of CDR Ruiz to a civilian status is a bit like a moving target. It will be considered as moot but can be refiled later if not resolved.

AE158 Defense Motion to Require Notice of Force-feeding of Defendant.

CDR Ruiz asked for a Commission order requiring notice to counsel before the JTF sought to force-feed his client. Although Mr. Hawsawi is not currently classified as a hunger striker, he does miss meals and foregoes food as a way to protest events at the detention facility. The definition of a hunger striker is subject to JTF manipulation depending on the number of meals, or calories. Defense is asking that a certain number of missed meals should trigger a notice to counsel requirement. There are already notice requirements up the chain to SOUTHCOM. The AMA and the World Medical Association condemn force-feeding as akin to torture and violative of medical ethics. The MJ asked is that meant that the prisoners had the right to commit suicide, and the JTF Detention Facility commander could do nothing to do stop that. CDR Ruiz contested the analogy. The hunger striker process is more gradual, but the defense position is that the prisoners have the right not to eat, even if death is a result. However, the defense is only asking that the Commission impose a notice requirement before implementing that procedure with his client, responding to a procedure that in their opinion amounts to torture. That procedure would be less intrusive on the medical decision. In response to the Government's argument to leave the issue to the judgment of a medical professional, the senior medical person for the force-feeding is a PA with one year's experience, and the senior medical officer on GTMO is a family practice doctor with less than five years' experience. A notice requirement would, at the very least allow the defense to request the involvement of more experienced and specialized medical professionals.

CPT Liebowitz for the Prosecution, argued that this motion is speculative, Mr. Hawsawi is not designated a hunger striker and such a designation is not on the horizon, it is a hypothetical matter and is not ripe for discussion. The JTF GTMO policy affords autonomy to patients unless the life or health of the patient is threatened. The calorie level necessary to designate a detainee a hunger striker does not mandate the entrail feeding technique, only if life or well-being is threatened is it used. They first try to educate the detainee or provide other nourishment. It is akin to the Bureau of Prison policies, of autonomy until the health or life is threatened.

CDR Ruiz responded that the procedure violates medical ethics for a patient who is capable of forming an unimpaired and rational judgment. The UN states that the life health and personal integrity of detainees should be respected, and would allow the informed and voluntary refusal of such a measure. The procedures the defense is proposing help strike a balance necessary here, and permit the involvement of counsel at an appropriate time. This situation is usually gradual, allowing time for the notification procedure.

AE 195/112 Zero Dark Thirty 505h hearings. MJ states that he intends to do these hearings in Washington as the defendants cannot be present at the hearings. They will coordinate to do a one-day session to resolve the 505h matters there. 505h hearings are usually closed sessions that determine if the discussion of classified information is necessary to resolve a matter before the Commission if the MJ determines that

such discussion is required, he can then hold a closed session of the Commission to consider such evidence.

AE 224 ex parte submission by Mr. al-Baluchi's team. Mr. Connell reminded the Commission it is pending and a window of opportunity was about to close if they did not get a ruling on it.

Press Conference:

BG Martins remembered the victims of 9-11. He stated that the classified information procedure in the 2009 MCA was designed to make the Commissions as transparent and meaningful as possible and to safeguard genuine national security information. He reminded the press that with the attorney-client privilege issue, it is distinct from the question of whether the prosecution read the information, the Prosecution has had no access to any of this information. The Government has an "err on the part of safety" approach to discovery.

CDR Ruiz discussed the Convention Against Torture (CAT) Motion. Torture was illegal the beginning of the week, it is illegal now, and it was illegal from 2003-2006. The President has affirmed our national commitment to the CAT, which means that we will not torture nor tolerate those who do. We will not prevent those who suffer torture from complaining and seeking redress. He referred to the letter sent to President Obama and signed by all civilian and military defense counsel, in this case, to declassify the CIA's RDI program, to allow the defense to fully and fairly represent their clients, and to meet our international obligations.

Mr. Connell also began by remembering the victims of 9-11 and their families; he and his counsel think about them every day.

The Government's argument this week is that it was compelled to torture because of its war aims, that it can control people's minds simply because it controls their bodies. This is the language of dictatorship. You heard unclassified evidence this week for the first time of the injuries that my client sustained serious head injuries while in CIA custody, to include serious audio-visual hallucinations and memory loss and pain. The US response to that injury was no investigation, no accounting, and no follow-up. If the public knew the whole story, so many holes in the curated narrative would emerge.

This case involves the horrendous death of their loved ones for the 9-11 families. This case also involves the subsequent betrayal of our ideals by our government in its use of torture. The suffering of the 9-11 families has been made worse. The mythology of 9-11 is a constant reminder of their pain, and their being here, watching us talk about legal issues often retraumatizes them, as they watch the defendants get the due process that their loved ones did not get. However, that does not mean that we deny the defendants their due process. As defense attorneys, we believe in the Constitution, we believe in America, and we believe that we are better than this.

Cheryl Bormann. This week you heard the government argue that they own a person's thoughts and perceptions. This assertion is deplorable, unjust, and illegal. Unfortunately, the US took this road, if not, the victims' families would already have seen justice done. This Commission exists because George W. Bush wanted to hide evidence of torture and put the defendants at GTMO where they perceived a lawless zone. It cannot be lawless. Only when the law and the Constitution apply to these proceedings, only then can you have the truth, only then can you have justice. Tony Cadman also discussed his concerns over the fairness at GTMO, particularly over the fact that the prosecution had to approve the production of witnesses and the giving of the oath to a witness by the Prosecutor.

The families of victims addressed the press and were angry and upset. They had not seen one shred of evidence of torture and wanted these men tried.

Kathleen Doty

Kathleen A. Doty is the Director of Global Practice Preparation at the Dean Rusk International Law Center at the University of Georgia School of Law. Previously, she served as Assistant Counsel for International Law and Arms Control at the Department of the Navy, Office of the General Counsel, Strategic Systems Programs. She currently chairs the American Society of International Law's Nonproliferation, Arms Control, and Disarmament Interest Group. She holds a BA from Smith College, a JD from the University of California -Davis School of Law, and is currently an MA candidate in political science and international affairs at the University of Georgia. Doty observed pre-trial hearings in the Al-Nashiri case for the National Institute of Military Justice in 2012, 2013, and 2017.

Summary of Significant Issues in United States v. Khalid Sheikh Mohammad, et al., 22-26 October 2013.

The most significant issue argued this week was AE200, the Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture.

The Convention Against Torture (CAT) is an international treaty. The United States has both signed and ratified this treaty, but the Senate in its reservations declared that the majority of its provisions were not self-executing. As such the government argued, characterizing its arguments as jurisdictional, its provisions do not create a private right of action that can be applied in any domestic US court including the Military Commissions in this case. The defense argued that the provisions of the CAT prohibiting torture have risen to the level of a peremptory norm of international law and as such is a part of US law under the Constitution's Supremacy Clause. The cause of action relied on by the defendants here, they argue, arises from the international jus cogens norm prohibiting torture, not from the CAT treaty provision. Part and parcel of the international jus cogens norm against torture is the right to complain of, and seek redress for torture. The CAT represents evidence of this jus cogens norm in the same way the Geneva Conventions and opinions of international war crimes tribunals are evidence of the validity of the charges against the defendants as war crimes violations under international law. The defense argues that the US position that they can classify the defendants' thoughts, memories, and life experiences and prevent their complaining to third party parties designed to receive such complaints violates this international law mandatory norm. The argument on this point focused on the distinction between the classification of government records documenting the torture, and the defendants' own knowledge and memories of the torture. The argument was masterfully done, and if you have time to read any of the transcripts, I commend this argument to your attention. The transcript is not yet available at the Military Commissions website, but the argument began Tuesday morning approximately an hour after the Commissions opened, and continued for the day. Mr. Connell's argument, conducted Wednesday morning about one hour after the Commission resumed until lunch is worth reading. I have also scanned the documentation provided by the defense detailing their letter to President urging him to declassify the CIA's Rendition, Detention, and Interrogation (RDI) program.

The Commission covered a lot of discovery-related motions. These motions highlight the nature of the material sought, and the defense claim that the government's redactions of responsive documents interferes with their ability to prepare a defense (for instance removing all names, account numbers, telephones numbers, banking routing numbers from FBI 302s for the case against Mr. al-Baluchi which is focused largely on the financial information). Recall that Mr. Connell, Mr. al-Baluchi's counsel has signed the Government's MOU (while contesting it as required to do by the ethical opinions received by defense counsel) so that any complaint based on an agreement to safeguard classified information does not apply to him.

The Commission received testimony from Mr. Brian Broyles to contest statements made by the Convening Authority, Admiral MacDonald, that Commander Ruiz had turned down 8-10 translators offered to be part of his defense team. The evidence presented did provide substantial evidence that CDR Ruiz and the Office of the Chief Defense Counsel were diligent in seeking a properly cleared translator so that CDR Ruiz could communicate with his client prior to referral. This issue goes to AE008, Defense Motion to Dismiss for Defective Referral.

Two statutory interpretation motions, AE073D/E and ARE 156, were heard on the availability of an ex parte procedure for the government to invoke the classified information privilege under section 949p(4) of the 2009 MCA, governing classified information procedures. The defense relied on the clear language of the statute, which included such an opportunity in section 949p(4)(b), but not in 949p(a)(1). The defense position is that under the plain language of the statute, the government's declaration of the invocation of the privilege should be provided to them and is discoverable. This provision of the MCA is not identical to the CIPA provision, and that while Congress intended the judicial interpretations of CIPA to be authoritative in interpreting section 949p, it also limited that instruction in section 949p, limiting it to the extent CIPA is not consistent with the MCA. This limitation indicates that Congress intended to create a different procedure. The in camera review process is limited to part b of section 949p, although the defense also claimed that in a death penalty case, even the authorization in subsection b was unconstitutional. The government argued that the MCA should not be construed to provide greater rights to these defendants than to a defendant in an Article III court and that the judicial interpretations of CIPA should control, and as argued in its brief, authorized an ex parte submission of the declaration invoking the classified information privilege.

AE 164 involved an argument that section 949j's bar to reconsideration of a determination that a substitution or redaction is sufficient under the MCA classified information procedures removes the key provision in CIPA that makes its provisions constitutional. Absent an ability to request reconsideration, the bar to reconsideration violates due process, fair trial rights in the 5th and 6th Amendment, and the 8th Amendment protections against Cruel and Unusual Punishment. The government contends that the bar is consistent with CIPA case law and does not create any other due process violation, as the defense can always file a motion to compel discovery rather than a motion for reconsideration barred by the provision. The Military

Judge pointed out that in some instances a motion to reconsider might be broader than a motion to compel because in some instances the fact that 'you do not know what you don't know' might make a difference.

AE158 on Force-Feeding sought an order requiring notice to counsel prior to implementing any force-feeding technique on Mr. Hawsawi.

AE175 was the attempt by the government to have the Commission establish a written scheduling order. The actual "relaxed" dates posed by the government, however, are not in any way reasonable or realistic. For example, the government proposed a 6 December 2013 deadline for all legal and discovery motions, prior to the completion of discovery, let alone its commencement. The defense did a good job of highlighting the practices of the government in opposing most requests for discovery and witnesses, and its practice of extensive redaction in discovery that it does provide. The picture that emerged from the discussion of the discovery practices of the United States, although early in the process, is one not worthy of it, particularly in a case of this national importance. It is concerning that the open files practice in military courts-martial did not accompany the creation of the Rules for Military Commission, which are directly based on the Rules for Courts-Martial. One cannot help but question whether that was Congress' intent in basing the Rules for Military Commission on those for Courts-Martial. Whether this distinction between written rules and the actual tradition of open files discovery violates the requirement in Hamdan v. Rumsfeld to measure the fairness of the procedures against those in courts-martial is an open question. Nevertheless, if this policy continues, it is unlikely that any conviction obtained by the Commission will either be perceived as fair or actually be fair.

I have attached a copy of the Defense Counsels' letter to the President asking for the CIA's RDI program to be declassified. Torture remains a significant issue in this capital case, not only with the Convention Against Torture, but because of the government's position that it can classify the memories and life experiences of the defendants and use that classification to prevent their complaining of the alleged torture to appropriate international and domestic institutions. The government's position that they can classify a person's life experiences, absent any privity with the government or other agreement to protect classified material a person receives from the government, is a bold assertion that should be critically examined.

Alexandra Stupple

Abd al-Rahim Al-Nashiri

17–21 February 2014

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2/17/14 Monday

The Al-Nashiri pretrial hearing on Monday lasted seven minutes.

Al-Nashiri entered the courtroom and was wearing all white, short-sleeves, and was clean-shaven, with short hair. He was neither shackled nor chained. At first, he stood for a bit, looking affable and shaking hands. After he put on his translation headphones, he swiveled back and forth in his chair, looking confident and at ease. A few words were spoken between Al-Nashiri and his civilian learned counsel Richard Kammen.

For the next few minutes before the hearing began, Major Allison Daniels, Assistant Detailed Defense Counsel, appeared to be ardently trying to convince Al-Nashiri of something, animatedly talking to him at a close distance. Al-Nashiri responded less ardently, laconic and shaking his head, continuing to swivel in his chair.

Judge Pohl entered the courtroom. He asked Mr. Al-Nashiri whether he understood his right to have detailed counsel as well as a learned counsel on his defense team (under the Military Commission Rules, a military commission defendant facing a possible death sentence must have a "learned counsel" on his team, meaning someone with death penalty experience). Al-Nashiri responded that, yes, he did understand that right. Next, he was asked whether he wanted Commander Mizer and Major Hurley to join his defense team. He responded that he did.
Mr. Kammen stood and informed Judge Pohl that Al-Nashiri has lost confidence in Mr. Kammen and no longer wants him on the defense team. Judge Pohl asked whether there would be any learned counsel on the team if Mr. Kammen were to leave. Mr. Kammen replied that there would not be.

Commander Andrea Lockheart for the government said that trial counsel would need to hear that Al- Nashiri no longer wanted Mr. Kammen on his team from Al-Nashiri himself, not through his counsel.

He also stated that he would like to have some time to work it out with his client, and Judge Pohl asked how long it would take to resolve whether Al-Nashiri wanted new learned counsel. Mr. Kammen asked whether he could have two days. Judge Pohl

said he could have two days and if the hearings went forward, they would make up the days on Saturday and Sunday.

Court was recessed until Wednesday.

The NGO representatives and the family members of the victims of the USS Cole bombing and at least one victim who had been on the ship at the time of the bombing were escorted out. The family members expressed frustration outside the courtroom, saying that Al-Nashiri will do anything to stall the proceedings and that this latest development was a ploy.

I have been told that Al-Nashiri does not pray when prayer is called, instead requesting that his door be closed and that he does not have a Quran. I was also told he sleeps all day, even when in the recreation area (where the other high-value detainees enjoy playing Wii bowling), and that he is claustrophobic, so much so that one of the two doors to his cell is left open so that he can see what is going on outside his cell. His claustrophobia reportedly also makes his transport hard because the detainees are held in a small building outside the courthouse before and after the hearings and that he needs to be given medication before transport. He did not appear sedated to me, however.

After the hearing, the NGO reps were taken to the beach. We swam below a barbed-wired holding area that looked like a prisoner tennis court, which supposedly holds three Uyghers who have been cleared to leave Guantanamo but are fearful of doing so and have therefore been allowed to stay on the island with some relative freedom. (I later learned this holding area is called Camp Iguana.) This green fenced-off area stood up on a bluff over the water, occasionally melting into the rocks and occasionally looming, depending on how long you thought about it while you were being bounced around by the sea. It was maybe like recreating at Alcatraz if Alcatraz still had prisoners. I also heard the Uyghers have the best cable on the island.

(What I've been told could also all be totally false. Or not. Guantanamo reminds me of Saudi Arabia, where I grew up, in that with such secrecy and lack of information, rumors abound and are all you have to go on.)

2/19/2014 Wednesday

On Monday, Mr. Al-Nashiri's learned counsel, Mr. Richard Kammen, announced that Mr. Al-Nashiri was considering dropping him from the defense team. Judge Pohl gave Mr. Kammen a few days to try to resolve the issue.

Mr. Kammen approached the podium and stated that everything seemed to have been resolved. He said that he had the opportunity to meet with Mr. Al-Nashiri under better circumstances on Monday and Tuesday and that Mr. Al-Nashiri would like him to continue on as his learned counsel.

Judge Pohl asked Mr. Al-Nashiri whether he wanted Mr. Kammen to stay on as his counsel, and Mr. Al- Nashiri said yes and said that he wanted to say something. Judge Pohl said he usually limits what the accused may say in court but allowed it. Mr. Al-Nashiri first apologized for the delay of the past few days. He said that he is the one most affected by delays in the proceedings and that he had argued with "Mr. Rick" about such matters. He said he is in a unique and strange court and that Mr. Rick cannot give him an Arabic attorney and that some lawyer he would like present cannot be, such as "Madames Nancy and Daphne." Such circumstances have made him doubt whether his lawyers can represent him. He went on to say that when his lawyers tell him, there are secret sessions but that the lawyers cannot tell Mr. Al-Nashiri what was said in the session. Such secret sessions in a capital case make him want to withdraw from the court. He ended by saying that during the last two days, he discussed many of the matters with his defense team and that he figured out that it's in his interest to let them continue to represent him. He then thanked Judge Pohl for listening.

Judge Pohl told Mr. Al-Nashiri that his defense team has objected to the secret sessions and that they are not his counsels' fault; it's his (Judge Pohl's). Mr. Kammen spoke up to say that Mr. Al-Nashiri is severely traumatized and the secret sessions and other structural impediments create trust issues with his client. He said the genesis of the problem is the structure of the court.

Next, the judge informed Mr. Al-Nashiri of his right to be present and asked if he understood that right. He said that he did.

The first issue addressed was an objection by the government to going over motions already decided. This one had to do with the absence of Capt. Jackson on the defense team. Apparently, she recently had a baby and the convening authority will not pay for her to fly a caretaker for her baby down to Guantanamo and she is unable to afford the price of the ticket and accommodations. She, therefore, has not been traveling to GTMO. Mr. Kammen argued that a Rule of Military Commissions (RMC) required her presence.

Judge Pohl said that Capt. Jackson has made the choice not to be present, and that other military person detailed to various locations are not given money to bring along caregivers and babies; if she wants to attend court, she must make other arrangements for the care of the child, like other soldiers and airmen. He also stated that he had no fiscal authority for such an authorization. Judge Pohl ended by saying that he had already ruled on the issue.

Next was the issue of the absence of Ms. Nancy Hollander, an ACLU attorney who had been on the Al- Nashiri defense team since 2008. According to the defense, the last two times she tried to visit her client, she was turned away at the gate for not having the correct security clearance. She had been told that because she was representing Mr. Al-Nashiri in the military commission as well as before the European Court of Human Rights, the government determined there was a "conflict." The government is concerned she will divulge classified information before the latter court.

Judge Pohl asked whether, regardless of the reasons she has been denied access, he has the authority to conduct a hearing to determine whether the decision to deny her access was arbitrary and capricious. Trial counsel Andrea Lockhart said that case law requires the judge not question why someone was not given a security clearance; a judge may look at the process the government used to reach its decision, but may not question the result.

Lieutenant Commander Mizer for the defense argued that, for the judge to determine whether the government's decision was arbitrary, he should look to the altered PAR. He said the PAR had been whited out in places and written over.

> The difference between courts-martial and the military commission is that the military's goal of maintaining good order and discipline does not exist in commissions.

Judge Pohl said he would issue a ruling soon, hopefully at the next session (this did not occur). Commander Mizer stated that he would like to abate until Ms. Hollander can be present.

The next issue was AE 197, a defense motion to dismiss due to unlawful command influence. Major Hurley for the defense argued the motion, but first Judge Pohl clarified for the court that the RMC statute says "unlawful influence," not "unlawful command influence," as is in the UCMJ. Major Hurley argued that Article 37 of the UCMJ and the Military Commissions Act (MCA) statute control and that "any person" can have "unlawful influence." He said that members of Congress and the president made

inflammatory statements that essentially convicted the accused by "presidential fiat" and that members of the panel will be influenced by their statements.

Judge Pohl said that the members' issue can be addressed in voir dire and that the issue before them was about the referral of charges against Mr. Al-Nashiri. Major Hurley said that President Bush's statements about the guilt of Mr. Al -Nashiri amounted to unlawful influence over the Convening Authority. He noted that the Court of Appeal for the Armed Forces (CAAF) says there need only to be "some evidence" of influence and that, when that evidence is found, the burden shifts to trial counsel to prove that there was no influence. He argued that Bush's calling of Mr. Al-Nashiri a terrorist, "lieutenant of al-Qaeda," etc., has certainly influenced the Convening Authority to refer charges against Mr. AI- Nashiri.

Judge Pohl asked why removing the death penalty would be a remedy when most of the time change of venue is the remedy. Major Hurley stated that Bush speaking about Mr. Al-Nashiri having been "brought to justice" is code for execution.

Davis for the prosecution argued that influence must have an object and an effect on that object. He said there is no evidence that the Convening Authority, witnesses, nor any actor in the commission knew of or was influenced by the statements. He also said that the Convening Authority is not subject to rank. Judge Pohl and Davis went back and forth about whether this was true and whether the choosing of the members might be influenced by the Convening Authority and whether that was unlawful influence.

Davis argued that the speaker has to "deliberately orchestrate" influence, under U.S. v. Simpson. He also said that in a case regarding a defendant who took part in the My Lai massacre, the court found that voir dire was enough to remedy any influence that statements by Nixon regarding the defendant. Major Hurley pointed out that the court found Pres. Nixon's statements "overall neutral." He asked that all charges and specifications be dismissed.

Judge Pohl made it clear that, if he determines the burden has shifted to the prosecution, he will only look at evidence already before him.
After lunch, AE 184 was up. It was a defense motion for relief to issue a subpoena of former CIA operative Jose Rodriguez, who reportedly issued the destruction of the tapes that show Mr. Al-Nashiri being waterboarded, in accordance with RMC 703. Commander Mizer for the defense argued the motion. Before he started, Judge Pohl asked Commander Mizer what authority he had as a judge of the military commission to issue the subpoena.

Mizer said that in Daniels because there was a gap in the court-martial process and filling the gap is up to Congress, not a judge, the court there abated the proceedings. However, Article 47 of the UCMJ was broadened in MCA § 949j (a)(2) and that the subpoena power can run to foreign nationals. Mizer said that the military commission's subpoena power "runs to any place where US jurisdiction runs." He said Congress gave the commission the power to compel foreigners to come before the commission.

Judge Pohl asked whether his authority to compel US citizens to appear in GTMO lies in MCA § 949j or in section 1793 of the Manual for Courts-Martial (MCM), or both. Mizer responded section 1783 would compel foreigners to GTMO. Judge Pohl said that's not the issue because the motion is in regards to a US citizen. Mizer pointed out that MCA § 949j and the MCM rule omitted the language about not being able to compel a US citizen to appear in a foreign country. He said that Congress did this on purpose and the language of the MCA states that the subpoena power runs to anywhere with US jurisdiction. He proposed that Congress did this because not many people will want to testify for the defense.
Judge Pohl then asked how he was to enforce

the subpoena power. With US Marshals? He pointed out there are no US Marshals at GTMO. Mizer responded that the local marshal's office would enforce the subpoena. Judge Pohl then asked whether there were any other statutes that compel US citizens to leave the US. The response was that there were not. Judge Pohl asked whether he should rely on the MCM provision. Mizer responded that the military commission is a hybrid of military law and civilian law and that he could compel witnesses to appear at GTMO.

Andrea Lockhart of the prosecution argued that although the judge has the power to subpoena witnesses, it is only to testify voluntarily and either in person or via CCTV at a VTC site; the subpoena power provision does not say the witness must come to GTMO.

Judge Pohl then posed the issue as being whether he has the power to compel a citizen to be brought involuntarily to GTMO and whether that power could be enforced. If it can't be enforced, there is no power. Lockhart responded that the judge does not have that power.

Commander Mizer took to the podium again and argued that one can infer from the exclusion of the 1783 language that the judge of a military commission has broader power to compel a person to appear, similar to an Article III court: anywhere in which US jurisdiction runs. Judge Pohl asked whether there was an analogous Article III situation where the court was sitting within a foreign power, like in Guam. Mizer pointed out that Guam was captured in 1848, the same year at GTMO, to which Judge Pohl said that the US had captured "a lot of stuff" and that Guam is a territory. He asked whether Mizer's argument was that GTMO is more like Guam than Okinawa.

Mizer again stated that the power runs to any place with US jurisdiction. The MCA reworked the UCMJ and broadened the subpoena powers because Congress recognized the remoteness of GTMO.

Finally, Judge Pohl said perhaps the issue isn't ripe because the defense hasn't asked Rodriguez to come to GTMO voluntarily, to which Mizer said that the answer to everything cannot be that it's not ripe or it's moot. He said we need to figure out what will happen, so we don't have to argue and decide what to do in a new session.

Next, AE 188, a government motion to reconfirm for the record that all periods of delay are excludable under RMC 707. The defense had no issue and agreed to the relief requested.
The next motion was AE 169, a defense motion to dismiss Charge IX because hijacking or hazarding a vessel does not violate the international law of war. Again, Commander Mizer argued for the defense. He started by saying that naval warfare is different from land warfare: more treachery is allowed. For instance, you may lower a false flag as long as you do so at any moment before an attack. Also, as to Specification 2, the MV Limburg was not civilian property; it was a lawful military target (as argued in AE 174). Oil tankers are military targets because stopping them and suppressing them would harm the state economically, and oil is the lifeblood of nations.

Mizer also pointed out that hijacking a sea vessel is not like the hijacking of an aircraft. He also said that if you took Hamdan II and replaced "material support of terrorism" with "hijacking a vessel" throughout, Judge Pohl would have the language to write his decision. He also pointed out that neither the Geneva Conventions, The Hague Convention, nor the 1988 Rome Convention mention hazarding a vessel as an offense. Mizer next brought up that there is a maritime violence treaty, so a federal statute making violence on the high seas already exists. In addition, the common law of war argument was rejected in Hamdan.

After Judge Pohl asked whether attacking a civilian vessel were a war crime, Mizer stated that the government may not create a crime after the event has occurred and find that it's a capital offense. He said that no one has found hazarding a vessel to be a war crime, and this commission shouldn't be the first tribunal to do so.

Judge Pohl asked whether Mizer's argument would change if the DC Circuit adopted the common law of war. Mizer replied that there was an 1864 case adopting the common law of war and then radio silence. He said that the only cases that old that should ever be cited are Marbury v. Madison or Dred Scott.

Trial Counsel Major Simone came to the podium and argued that hazarding a vessel is a war crime, based on three principles: (1) protecting civilians; (2) the distinction between civilians and combatants; and (3) military necessity, where exigencies require action. He said hazarding a vessel embraces targeting civilians and creates dangers such as shipwreck and oil spills; harm to the object matters.

With regard to Hamdan, Simone said that there is a distinction between material support for terrorism and hazarding a vessel, because the former is an inchoate crime, whereas, here, there were completed acts. He also brought up the difference between piracy and terrorism. The latter is motivated by political or ideological reasons. He said that the MCA and the SUA (?) Convention (a treaty) make endangering the safe navigation of a ship or vessel that is not a military target a crime and the former requires prosecution regardless of the citizenship of the offender.

Commander Mizer then rebutted that, although courts implement SUA, the issue before the court should be looked at through the lens of the law of armed conflict.

Following that motion, AE 174, a defense motion to dismiss the second specification of Charge IX, the attack on the French ship, the MV Limburg. Navy Commander Mizer informed Judge Pohl that the law of naval warfare is different from other types of combat. For instance, it does not require navies to wear uniforms, and false flags may be flown if lowered any time before warfare.

He next argued that the commission lacks jurisdiction because the MV Limburg was a French ship sailing on a Malaysian contract, the crew-

member killed was Bulgarian, and the attack occurred off Yemen. (The government argues that the French were war allies at the time.) Judge Pohl questioned what he should decide if the target is legitimate, but the person carrying out the attack is an unlawful belligerent. Mizer argued that the unlawful belligerent should have a Geneva Convention Article 5 hearing; it's domestic law.

Going back to an earlier argument, Mizer said that if Mr. Al-Nashiri and Al-Qaeda are on par with a state, then an attack on a French oil tanker is a legitimate target. The target was the tanker, not the civilians on board, just as Admiral Nimitz had targeted certain non-military targets in the Pacific.

Judge Pohl asked whether the attackers would have to be lawful combatants to make the target legitimate or does only the target matter. Mizer answered that if attackers are unlawful combatants, domestic law applies, but because Mr. Al-Nashiri (judged to be an unlawful combatant) is sitting in an international tribunal, international law must apply, and therefore the commission has no jurisdiction.

Judge Pohl asked why the question of whether the MV Limburg was a tanker during a war was a factual question and not a legal question. Mizer said that oil tankers have never been considered civilian vessels because oil is a quintessential element of war; oil is ammunition. Admiral Nimitz said, "We sent everything to the bottom," and the United States has sunk many an oil tanker and killed civilians doing so. He then cited more examples of instances where sinking ships with cargo used for war purposes was considered a legitimate exercise of war. He said that the same argument applies to the USS Cole and again stated that if Mr. Al-Nashiri is truly an unlawful combatant under international law, then criminal, domestic law applies and he should be tried in an Article III court, not in an international-law court.

Judge Pohl asked if there were any charges against Mr. Al-Nashiri that would allow him to be tried before the military commission, and Mizer answered that perfidy is one because there is no right for privileged or unprivileged belligerents to engage in perfidy.

In sum, Mizer argued that if the MV Limburg is considered a civilian ship, the military commission does not have jurisdiction and that if France is considered a cobelligerent, then the oil tanker, flying the French flag, was a legitimate target.

Major Simone argued for the prosecution. He argued that the MV Limburg was a civilian ship, full of civilian crewmembers, with no munitions aboard and no military escort. He said that terrorism specifically relates to protected persons; the status of the victim is an essential element. The status of the victim is a factual question, and the panel should be presented with these facts.

The next motion was AE 172, which was a defense motion seeking to prevent the Convening Authority from preselecting panel members. Mr. Kammen argued this motion. He mentioned that AE 117 challenged the neutrality of the Convening Authority. Under military and commission law, the Convening Authority may c**hoose panel members who are more educated**, more worldly, etc., than in state and federal courts. However, he argued, the difference be-

tween courts-martial and the military commission is that the military's goal of maintaining good order and discipline does not exist in commissions. The Convening Authority of the commissions exists to organize the commissions, which is more akin to US Attorneys General, and General Martins is more like an Assistant AG.

Mr. Kammen said that the Convening Authority is not neutral and that is particularly important with regard to jury selection; picking the pool of panel members is a significant power. He said it is also an Eighth Amendment problem and that Judge Pohl must rely on higher authorities than the RMC, such as treaty obligations and the Constitution. Our treaty obligations show that the Eighth Amendment applies. Loving said that the Eighth Amendment doesn't apply to courts-martial because of the need to maintain good order and discipline. Because the good order and discipline of Al-Qaeda doesn't apply here, neither does the Loving holding. He then asked that Judge Pohl abate the proceeding or the judge could issue an order for the random selection of 200,000 officers in the four branches. Judge Pohl asked whether he had the authority to do that. He said there is a chain of command issue. Mr. Kammen said the Secretary of Defense could issue the order.

Mr. Kammen next went to the issue of "age, experience" and judicial temperament," qualities of a person that are part of the panel selection process. He said that these requirements either make for an arbitrary choice of panel members or involve investigating persons.

Mr. Kammen argued that the Convening Authority choosing the pool of panel members is inherently unfair because the Convening Authority also decided this was a good case to pursue and determined that it should be a capital case, meanwhile determining that a different suspect (presumably Mr. Al Darbi) deserves a different sentence: the Convening Authority is not neutral.

He also argued that this process is not even the same as in capital cases in courts-martial. Here, only 37 people have been detailed so far to serve on a panel, whereas in the Hassan court-martial, over 200 were detailed. Judge Pohl then said that they can get more and that raw numbers don't matter. He said they could spend weeks and months doing panel selection. Mr. Kammen said he doesn't know the mechanics of panel selection, and Judge Pohl replied that neither did he. He also said they will do challenge for cause and, if they run out of possible panel members, they will get more.

Mr. Kammen said that the public perception of a fair trial matters and that since there are fewer peremptory challenges and because this is a capital case, panel selection matters. Judge Pohl pointed out that a previous Convening Authority referred the charges, not the current one, but Mr. Kammen rebutted that the current Convening Authority has not granted a single request for resources by the defense.

Mr. Kammen ended by saying that Pohl was trying to glom onto a court system, something that was meant for a military system of moving things along, not to hold trials. He said that the person choosing the pool of possible panel members should not be someone structurally strongly aligned with the prosecuting attorney.
Judge Pohl asked Davis for trial counsel whether the military system is an inherently different beast from the military commissions. David replied that the structure of the MCA has been upheld and that there are the Article 25 guarantees of challenges. The members of the panel will be up to the parties.

Judge Pohl asked how a civilian Convening Authority applies the "judicial temperament" requirement. He asked if there is any paper trail of how the pool is selected. Davis said yes and that they are rehashing AE 117. He said that the law is that government decisionmakers are assumed to be men of conscience and intellectual integrity.

Mr. Kammen rebutted. He said that the transparency only applies to one side and that the defense never gets the paper trail; only one side gets information, and the Convening Authority is on the prosecution's side. Judge Pohl told him he could have asked, which is a common courts-martial motion. Mr. Kammen stated that the fact that the defense has to ask and that everything has to be subject to a motion shows the system is not neutral.

Mr. Kammen asked what criteria officers who choose from their ranks use. He said it is not a neutral process, like having a jury clerk select names. Mr. Kammen said that they are all writing on a clean slate and that everyone hopes that by the time it gets to the DC Circuit they say they got it right. He said that is a big risk in a capital case. He urged, "Let's do something we're proud of and err on the side of fairness." Judge Pohl then ordered trial counsel to give the paper trail to the defense.

The last motion of the day was AE 173, a defense motion saying that 10 USC § 948i(b) is unconstitutional and that Mr. Al-Nashiri has a Sixth Amendment right to a civilian jury trial. Major Hurley argued for the defense.

Hurley cited Boumediene, listing the elements on which to decide whether the constitutional right to habeas corpus applied: the accused's citizenship, the nature of the sites of detention and apprehension, and the practical obstacles to applying the Constitution. Judge Pohl said that a jury trial is for an Article III court and that no statute says that Mr. Al-Nashiri is entitled to one. He asked whether Boumediene has been extended beyond habeas. Hurley said no, and Judge Pohl asked why he should.

Hurley said that the right to a jury trial is an important right and that Judge Pohl should have to go through each constitutional right and see whether it applies. He said that Mr. Al-Nashiri has been in custody for 12 years and that bringing a civilian jury to GTMO is not impracticable.

Judge Pohl asked whether sending out jury notices and going to GTMO for 6 months would not be impracticable, forcing members of the jury to come here. Hurley stated that they would be doing their civic duty and that there are practical problems with detailing members of the military as well.

Judge Pohl said, "Oh, really?" He said the members of the military are told what to do and where they are stationed.

Davis for the prosecution came up. He said that the MCA provides a jury right, the same one as for service members, and courts have held that up. The MCA panel provisions are the same as UCMJ Article 25. The only difference favors the defendant because he is entitled to 12 panel members. He also stated that Ex parte Qirin says that there are no Sixth Amendment rights in military commissions.

Judge Pohl recessed at 1615.

2/21/2014 Friday
Al Nashiri Pretrial Hearing

Judge Pohl started the morning with some scheduling: A Rules for Military Commissions (RMC) section 505(h) to discuss classified information was to be held Saturday, and AE 205, which is a motion to compel three witnesses to testify regarding Mr. Al Nashiri's mental health would be argued Tuesday (this was later changed to Monday).

The first motion up was AE 167, a defense motion to appropriately apply the evidentiary provisions of the UCMJ and the 2002 Manual for Courts-Martial (MCM) as required by the ex post facto clause. Commander Mizer argued for the defense. He started with the premise that when a law created after the crime occurs requires less evidence to convict, there is an ex post facto violation. Because the Military Commissions Act (MCA) was written after the bombing of the ships the accused is alleged to have been involved in and because hearsay,

among other things, is allowed in under the MCA, there is an ex post facto violation. He cited Carmell, a Supreme Court case where a man was alleged to have committed a sex offense against a minor and where the law regarding the testimony of the minor changed after the alleged act occurred, allowing the minor to testify against the accused. The Court found the law violated the ex post facto clause.
Judge Pohl asked whether the UCMJ should be the default for evidentiary provisions. Mizer said that it should be the default as well as the MCM as written in 2002. Part of his reasoning for why was that the UCMJ allows for military commissions and for law of war offenses. Judge Pohl said that the MCM written in 1950 incorporated constitutional protections.

Mizer agreed that the 1950 code provided all the constitutional protections but said that the commission doesn't need to get into whether constitutional rights apply. The law of offenses allowed for military commissions since 1950, and Hamdan II stated that one must apply the statute in place at the time of the occurrence of the offense. Judge Pohl disagreed as to whether Hamdan II reached the ex post facto issue. He said the court "danced around it."

Military commissions in any other Western nation do not give out death penalties

Mizer pointed out Kavanaugh's footnote and argued that any procedural rule that lowers the burden of proof is not a fair one. He cited Carmell again and a few more cases. Commander Mizer noted that in its brief, the government cited Ex parte Quirin and Yoshimata but that those cases do not weigh in on the hearsay issue. Mizer said we are starting a court from scratch and that using new evidentiary rules is "not the way to run the railroad"; it's better to use law that has been in place for a long time.
Judge Pohl asked how he was to apply the 2002 MCM, which was written before Crawford. Commander Mizer said that Crawford is in concert with the 2002 MCM.

Next, Brigadier General Mark Martins argued for the government. He said that section 949a of the MCA of 2009 does create an ex post facto clause issue. Judge Pohl said that the ex post facto clause is a limitation on Congress and asked whether it applied to this situation. Martins agreed that it did. He noted that Article 36 of the UCMJ was talked about in Hamdan I: this is a jurisdictional issue because, according to the preamble to Article 36, the president may change or create law when practicability requires. Therefore the law has not changed: the UCMJ says, "subject to the international law or rules prescribed by the president."

Judge Pohl asked whether the president is allowed to violate the ex post facto clause. Martins said that there are limits on how much the ex post facto clause applies to the president. He said the commission should look at the sufficiency of the evidence versus the quantity of evidence allowed in. He argued that section 949a does not change the burden of proof and that the defendant can bring in the same type of evidence (e.g., hearsay) as the government. Martins said that if the change in the law is linked to "practical need" and to "hostilities," the president may change MCM rules. In any case, to allow hearsay in, the party proffering the evidence would still have to show probity, reliability, and that the admittance of the evidence would be in the interest of justice. Martins said that no accused could have had a vested right in the 1990s.

Judge Pohl changed it up again and said that they are talking about Congress's power and the ex post facto clause. Martins noted that when the law is not something that makes the accused worse off, it does not violate the ex post facto clause. He said courts don't freeze in time all laws; it must be asked whether the change in law results in something manifestly unjust and oppressive. Was someone in 1990

not on notice that he could be tried by military commission? Is there unfairness of allowing in hearsay? He said that the judge of the military commission must settle the question of what is allowed in.

Commander Mizer came back to quickly say that fundamental fairness is at issue.
The next motion was AE 177, a defense motion to prohibit capital punishment for intentional murder or conduct evincing a wanton disregard for human life because the laws allowing for such a punishment violate the ex post facto clause. Again, Commander Mizer argued for the defense.

He started by saying that it was necessary to look at the third Calder category. A greater punishment (death) is allowed for in the 2009 MCA than in the 2002 MCM (which does not allow for the death penalty). Again, because of the timing of the events the accused is alleged to have committed, the defense believes the 2002 MCM should apply.

Mizer also stated that the 2002 MCM was cabined by Eighth Amendment jurisprudence. Loving v. U.S., 517 U.S. 748, struck down unpremeditated murder as being a capital offense in the UCMJ. Further, he argued, the Eighth Amendment doesn't allow a death penalty for what is essentially a strict liability standard (that is, hazarding a vessel, which has no intent requirement, plus a death resulting). Hazarding a vessel results any time someone, intentionally or unintentionally, puts a ship in danger. When doing so results in a death, under the MCA, the death penalty can result.

Trial counsel Major Simone came up to argue that the question is whether the death penalty would have resulted from the 2002 MCM. He said that it did because the accused's act was intentional in nature and resulted in a death. Judge Pohl asked whether the act or the death had to be intentional. Major Simone said that only the act need be intentional according to the international law standard. He said the death penalty was allowed in the 2002 MCM for a law-of-war violation that resulted in death, such as espionage.

Judge Pohl asked what cases say that that is the law now. He asked whether any court has upheld that. He said that rape of a child was once a death-penalty-eligible offense but is not any longer.

Major Simone said that the accused has committed law-of-war violations that are firmly grounded in international law and that international law is a hierarchy, with treaties ranked higher than customary international law. The Third Geneva Convention talks about the death penalty, as do other treaties. And under customary international law, Nuremberg and British practice have upheld the death penalty. Simone said that the ex post facto clause is concerned with an increase in the quantum of punishment meted out, but that a range of international law was incorporated into the 2002 MCM.

Commander Mizer got up again and argued that Article 18 provides jurisdiction over law-of-war offenses. Here, all the government need do is label something a "serious offense," and it becomes a death-eligible crime. Also, he argued, there is not one case in which perfidy resulted in a death sentence.

Judge Pohl asked whether Mizer was saying that there needed to be a first case before there could be a second case. Commander Mizer answered that Nuremberg involved serious offenses. As regards perfidy and hazarding a vessel, there is no guidance. Since 1949 international law has continued to change, and there has been no case. Mizer said we need some authority to find perfidy or hazarding a vessel as death-eligible offenses. He said that the MCA makes those offenses death-eligible that involve a person committing an act in which they could "foresee loss of life." Judge Pohl said, "What was the last line? You don't think that fits?"

Commander Mizer argued the next motion as well, AE 179, a defense motion to prohibit capital punishment for intentional murder, under the ex-post fact clause. Like the last motion, Mizer argued that the third Colder category had to be used, that is, the commission had to ask whether the new law imposes a higher penalty. He said RCM section 1004 applies.

Also, Mizer argued that national security was not at risk at the time of the MV Limburg incident because the ship was a French vessel. Again, Mizer argued that the 2002 MCM should apply. He said that the change in the law in the MCA could be compared to the sentencing guidelines case of Peugh. Peugh held that you must apply the sentencing guidelines that were in place at the time of the incident. Mizer argued that there should not be a greater opportunity to impose a penalty after the crime occurred.

Judge Pohl asked whether RCM 1004 changed the factual predicate needed to charge someone with a crime or whether the sentencing range changed. He said that in Peugh the same facts were applied before and after the change in the law, whereas here, the range is the same, but the facts that get one to the range have changed.

Commander Mizer quoted Peugh, saying the issue is whether the change in the law creates a sufficient risk in increased punishment. He said a formula change is a sufficient risk and asked that 2002 MCM be applied.

Major Simone for the prosecution rebutted first by saying that under the 2002 MCM the accused was on notice that he could face death for more than one crime. He also said that the MCM and RMC 1002 result in the possibility that there may not be any punishment for the accused at all; section 1002 completely removes the formula. Judge Pohl reminded him that the Rules for Courts-Martial have mandatory minimums, and Major Simone said that the RMC does not. In military commissions, the accused faces the spectrum of no punishment all the way through death.

Major Simone said he read Peugh as saying that a change in range that requires judges to prefer greater punishment violates the ex post facto clause. Here, however, the panel may come up with their own mitigating factors and that

therefore there is no range and no change in the possible sentence the accused faces now. He also noted that RCM 1004 factors are not new; they were incorporated into "violates law of war" provisions.

Commander Mizer stated that this is not true. The 1004 "factors" resulted in a sentencing-range change because it added aggravating factors. He said that, concerning the panel having broad discretion, risk of death is a greater risk than existed in other cases. Therefore, it's irrelevant that no punishment may be given instead.

The next motion was AE 201. This was a defense motion to find that RMC 1001(g) violates the ex post facto clause as applied to Mr. Al Nashiri. Commander Mizer argued. He urged Judge Pohl to follow Judge Allred regarding pretrial confinement counting as credit toward time served (Hamdan). He said it is a due process issue. Judge Pohl pointed out that the military doesn't give such credit after Allen. Mizer repeated that it's a fundamental due process right and said that the time of credit should start at arrest. In response to Judge Pohl's question as to what that means, Mizer noted that "arrest" is defined as the time at which the defendant no longer suspects he might not be punished. He said that all the defense asks for is for Judge Pohl to apply Allred's ruling, in particular, to do so because it's judicially created law. Judge Pohl said that it may be judicially created law, but it was done so by the trial court, not an appellate court. Mizer said that no matter whether he applied the Court of Appeals for the Armed Forces (CAAF) or COMA law, the basis of the law is the Constitution. He also added that in regards to ripeness, "We can't keep kicking the can down the road."

Davis for the prosecution sought to rebut the argument by saying that the issue is not yet ripe. Because the accused is innocent until proven guilty, there is no prejudice in waiting to decide this issue of punishment until he is convicted. Judge Pohl said, "But the fact is he's been put in jail, so isn't that all the facts I need?" Davis said that, no, he needed to know whether he was convicted. Judge Pohl said that it's standard practice to decide at this point in the process, to which Davis replied that he didn't know what other commissions do.

Davis argued that the government can hold enemy combatants and that it is not pretrial confinement; the government can hold them until hostilities end. He cited a case where a UCMJ military commission did not allow for pretrial confinement credit, and that enemy combatants have never had that right.

Commander Mizer came back to the podium to argue that the Bureau of Prisons and Department of Defense regulations are rooted in liberty and due process and that by not putting such a right in the MCA, the military commissions have gone back to 1950 and that they now need to litigate everything anew. Judge Pohl said he needs a higher source to strip 1008g. Mizer said that source is due process.

Next up was AE 176, a defense motion to dismiss the capital sentence for perfidy and hazarding a vessel because of the Eighth Amendment. Mizer was up again. He again made the strict liability argument regarding hazarding a vessel. Judge Pohl asked whether any charge was death-eligible. Mizer said there were some death-eligible offenses, but none involve substantial participation.

Trial Counsel Sher got up and said that perfidy and hazarding a vessel are death-eligible when victims die. He said the Supreme Court found that the death sentence is not excessive when someone dies. He added that Congress has codified a law-of-war crime as a criminal offense in 18 U.S.C. 2280. A defendant was tried for a capital charge under the statute in 2011, so there is a civilian precedent. Further, he said, CAAF allowed a capital penalty when victims died when someone willfully hazarded a vessel.

With regards to perfidy, he said that perfidy has been around for a long time as a war crime and that seventeen people died on the Cole. It should be a capital offense because it resulted in death. Also, there was a wanton disregard for human life in the Cole bombing, which Tyson requires. Even surprise at death is not a defense. Al Nashiri was not surprised at the deaths; he meant to do what he did.

Commander Mizer came up again and said that the UCMJ has been slow to change. Hazarding is probably not death-eligible because the Eighth Amendment has moved on. For example, Coker says rape is no longer death-eligible. Sher rebuts that rape is not the same as someone dying.

Next, the commission moved to AE 180. It was a defense motion asking the judge to find that the MCA sentencing scheme and RMC 1004 violate the Eighth Amendment. Mr. Kammen took the podium. He said that death penalty analysis is rooted in the Eighth Amendment. The MCA and RMC are flawed, treaty obligations and military commissions must follow the Eighth Amendment. "Cruel and unusual" is an Eighth Amendment violation, so death penalty analysis follows Eighth Amendment jurisprudence.

Mr. Kammen said there is a constitutional death-penalty regime that requires (1) the definition of crimes and (2) the definition of aggravating offenses. He showed a diagram, a pyramid: at the base are all homicides in the world, then all homicides that the military commissions have jurisdiction over, then all aggravating factors that can lead to the death penalty.

Judge Pohl asked whether aggravating factors must be statutory. (The MCM was an executive order and is therefore not statutory.) He asked whether the factors must come from Congress. Mr. Kammen said that the prosecution has adopted the federal model of nonstatutory aggravating offenses, but that they should be statutory. He argued that, in all of this, there is no significant narrowing of homicides that deserve the death penalty as a sentence. 1004 does no narrowing; the MCA and RMC increase the risk that everyone will get the death penalty, rather than narrowing who will receive it. Everyone is death-eligible, and every homicide offense potentially is a death offense, which is against death-penalty jurisprudence as it stands.

Judge Pohl asked why, because Congress did not narrow the crimes, he should narrow them? Mr. Kammen said that all homicides before the MCs would meet at least one aggravating factor and therefore, all homicides are death-eligible, which is violative of the Eighth Amendment. He said that if the judge doesn't narrow 1004 by striking some of the factors, a conviction will be overturned by the DC Circuit. He said, with a sad laugh, that part of him wants that to go ahead and happen, and part of him wants the military commission to do the right thing and have a fair trial.

Recess until 1300

Mr. Kammen came again to the podium and reminded the judge that RMC 1001 and 1004 are too broad.

Trial Counsel Sher came up to rebut. He said that Congress did do a narrowing: the non-death-eligible homicides are tried in Article I and Article Ill courts; they don't come before military commissions. Murder and a violation of the law of war is a narrowed group. Then the executive narrowed further with RMC 1004(c) factors.

Judge Pohl asked whether the items listed in 1004 were aggravating evidence or factors. Sher said they are evidence. Pohl said, "So 'factors' was put in there in error?"

Mr. Kammen returned to the podium. He said that the "unlucky souls" that couldn't be before a federal court or court-martial but instead find

themselves before a military commission are all death-eligible. He pointed out that another error is the lack of a requirement of mens rea, which would be required in Article III courts.

Essentially, Mr. Kammen argued that saying all murders are the denominator is only a pretense of narrowing. Selection here of who is death-eligible (because they are before the military commission and everyone is, therefore, death-eligible) is based on the identity of the accused, not the crime. A US citizen cannot end up before the military commission. Thus Congress has narrowed who may be before the military commission; it did not narrow the offenses. Not everyone who comes before a death- penalty jurisdiction can be put to death under the Eighth Amendment. You cannot have death for every offense (citing Gregg), and this jurisdiction has not tried to achieve that.

Next came AE 183, a defense motion to dismiss the capital referral because there was no grand jury indictment. Major Allison Daniels argued the motion. She pointed out that the referral for the death penalty was initiated by a single civil service representative and that death requires more process than that. She said that a grand jury is a bulwark against politically motivated individuals.

She said that "death is different," and the Eighth Amendment requires heightened reliability. Courts-martial have Article 32 investigations before the committee makes a recommendation to the convening authority. At a minimum, there should be some initial investigation. She requested the capital referral be dismissed.

Trial Counsel Davis rebutted. He said that Ex parte Quirin holds that no grand jury is required for a military commission. He also pointed out that even with an Article 32 investigation, the convening authority in a court-martial can do as he or she pleases. Also, here, there are higher requirements than in courts-martial. There is a requirement for a unanimous 12 members to find guilt and that there are aggravating factors, and the panel must take into account mitigation factors and must find the aggregating factors outweigh the mitigating factors. He said that Ex parte Quirin is directly on point and that that's the end of the story.

The next motion was AE 185. This was a defense motion to strike the death penalty because the death penalty is no longer civilized or acceptable for war crimes. Commander Mizer stated how international law matters in this commission. He cited Supreme Court cases that cite international law to limit the death penalty, and he cited Hamdan II as doing such. He said that the United States is the only Western nation that authorizes the death penalty and that international criminal tribunals no longer have the death penalty even when domestic statutes of those tribunals did authorize it; the tribunals applied international law, not domestic law.

He said that while there is no international prohibition, there is not international acceptance either. Even in Behenna, where a US soldier made an Iraqi strip naked and then shot him during an "interrogation," CAAF upheld his 20-year sentence, and he's been let out on parole after only five years.

Trial Counsel Major Simone said that treaties are the primary source, and they manifest states' consent to certain things, and there is no prohibition in those treaties. In fact, under the Geneva Conventions, Article 100 requires giving notice of a death sentence, and Article 68 of the Fourth Geneva Conventions state that for a "serious violation," death may be appropriate.

Simone said that, when there are hostilities and war, there is a different context and violations are more egregious. Death is particularly appropriate for law-of-war violations. He said that the Rome Statute isn't the norm of international law. He said that WWII tribunals meted out death sentences and that nothing has taken that off the table since then.

Commander Mizer came back to the podium. Judge Pohl asked him whether the judge should look at international law or domestic law in deciding the motion. Mizer said that Hamdan II requires him to look at the law of war as it exists. Pohl said that the status quo at Nuremberg was death. He asked whether Mizer argued that, since Nuremberg, because death penalties have not been given out, the status quo has changed.

Mizer answered that military commissions in any other Western nation do not give out death penalties. He said that the Eichmann trial in Israel in 1962 was the last time.

Next, AE 191 (and to some degree AEs 191-196) were argued. They all regarded striking "aggravating factors" 2 through 7. The issue was whether the "factors" were truly factors or whether they were evidence. Mr. Kammen said that you cannot just put evidence out in the air to show that someone is a bad person; evidence can't exist without it being evidence of something. And it must be proved beyond a reasonable doubt. Here the system is (1) finding of guilt; (2) finding of factors, which is an individual moral judgment; (3) weighing; and (4) the decision as to the sentence. After Fuhrman, the aggravating factors have to properly plead. This system is sending the commission back to pre-Fuhrman.

Mr. Kammen said if the commission continued down this road, the system would fall. Nonstatutory aggravating factors must be things that make the crime more heinous, resulting in heightened sentencing, and involve a moral calculus. Further, they must be proved beyond a reasonable doubt.

With regard to AE 191 (the aggravating factor that there was a continuing pattern of violence), "hostilities" is at the heart of the definition of war. Mr. Kammen said that it is alleged that the United States is at war. The factors should be looked at in the context of "hostilities" because that changes the calculus of what is allowed. Military ships are fair game in the military context. However, what is unique and proper at war becomes an aggravating factor under this system. He argued that "war at its heart is a continuing pattern of violence" and penalizing someone for doing what they were supposed to do during war, like drone strikes, makes your crime worse.

Judge Pohl asked whether the status of someone as an unprivileged belligerent changes things. He argued that perhaps there is combatant immunity in such a case. Mr. Kammen argued that even guerrilla warriors do not lose status of warrior forever. If a soldier kills a POW, the fact that the soldier had been in ten battles before killing the POW, does not make the latter fact an aggravating factor.

With regard to AE 193 (the aggravating factor at issue was that the act put the US's national security at risk), Mr. Kammen pointed out that the point of invading Iraq was to topple a regime and affect national security. This system takes indicia of war and purports to make them aggravating factors.

Trial Counsel Sher then argued that one has to follow the laws of war and that the "factors" are not part of the eligibility phase; they are aggravating evidence. At this point, Judge Pohl pointed out that trial counsel's brief said "factors" and asked which was meant.

Sher said that RMC 1004(c) are factors and RMC 1001(b) are nonstatutory factors. Judge Pohl asked whether they had to be pleaded and members had to vote to find them beyond a reasonable doubt. Sheer said he was not sure but that "we can figure this out."

Judge Pohl said that the way he read 1004(c), members must vote to find existence beyond a reasonable doubt. He asked what about 1001(b)(2)? She said the former is to be found beyond a reasonable doubt (i.e., are evidence) and 1001(b)(2) is a factor.

Mr. Kammen said juries must not weight evidence after Stringer v. Black, 223 Supr. Ct. 1130 (1992). You don't proffer evidence and then "add a bunch of other stuff" and weight it all. He said that no vague, improper factors are

allowed; the case falls. If it's evidence, it's not a factor, unrelated to anything other than showing the accused is a bad guy. Therefore 1004(b)(2) must be narrowly tailored, and the government would have to give notice of the evidence it will present.

Further, Mr. Kammen said that if they are not proper aggravating factors, they are also not proper aggravating evidence. They are expansive aggravating rules, not narrow ones; they are all will result in death. He asked the judge to strike 2 through 5 because they are not proper in war crimes trials. He said that aggravating evidence unrelated to aggravating factors does not exist in modern death penalty law: one cannot list aggravating evidence of aggravating factors.

Mr. Kammen said that the RMC was basically cut and paste some from federal law, some from state, some made up. The drafters were intending to create a "death factory." The "factors" are the reason the result (death) is antithetical to modern death penalty jurisprudence, where only the worst of the worst get death. He said that intent here was to give everyone death.

At his turn at the podium, in a turn of events, Sher admitted that 1004(c)'s authority came from 1004(b). At that point, Judge Pohl said that the issue is whether they are proper aggravating factors. He intimated that after what Mr. Kammen had elucidated regarding factors and evidence, they likely were not. Next came AE 198. This was a government motion to exclude from sequestration victims that may testify during any potential penalty phase (i.e., victim-impact statements). Lieutenant Morris argued that victims should not be excluded from watching the trial just because they might testify in victim- impact statements.

Mr. Kammen said that it was too far in advance to decide and that the issue isn't ripe because there are unanswered questions, such as who the "victims" are. He was concerned because the term covered too many people and he was concerned about a fair trial because, on GTMO, everyone runs into each other all the time. He said there are logistical problems with not unfairly impacting the trial.

Judge Pohl said the motion is granted "as a concept," but until he gets motions with numbers, etc., he will not decide. He said he needs an

execution plan from the prosecution first, that the ruling applies the same way to both sides, and that he will revisit if one side asks for it.

Next AEs 189 and 190 were discussed. Apparently, there had been a prior order from Judge Pohl that, contrary to courts-martial, here, only de minimus notice is required and the judge will perform a Garies analysis. The prosecution argued that they had not agreed to this, but Mr. Kammen showed the order Judge Pohl wrote saying only de minimus notice was needed, and Judge Pohl claimed that trial counsel had indeed agreed to it at the time.

AE 186 was next. This was a government motion, for Judge Pohl, to take judicial notice of adjudicative facts. Trial counsel pointed out that if Judge Pohl were to do so, the members of the panel would not be required to take them as facts. Judge Pohl said, however, that the reality is that they probably would do so. The facts the government wanted taken as facts were as follows:

(1) The two fatwas issued by Osama bin Laden in 1996 and 1998.

(2) That the US sent bombs into Osama bin Laden's camp in 1998 and that this is a "hostility."

(3) Executive Order 13099 of placement of Osama bin Laden and Al Qaeda on a terrorism list.

(4) Department of Treasury currency rates between Yemen rial and US dollar.

Judge Pohl asked trial counsel if he would be usurping the fact-finders' role. He also said he would perhaps be putting in opinion evidence (i.e., that President Clinton thought that bin Laden and Al Qaeda were terrorists).

Morris said that there is no reasonable dispute that hostilities existed.

Regarding the missiles, Judge Pohl asked what the difference was between taking notice of an explosion going off on the USS Cole. Morris did not really answer. He just said that they are asking only for notice of facts not reasonably in dispute.

Mr. Kammen rebutted by saying that the government wants Judge Pohl to "grease up the machinery of death." He also noted that trial counsel has not attached the original fatwas, so they want the judge to take notice of their translation.

Regarding the executive order, Mr. Kammen said that deciding whether the United States was engaged in hostilities is up to the panel to determine. He also pointed out that a judge taking notice of facts does not often happen in criminal cases and that a judge certainly cannot take judicial notice of an element of the offense, such as, here, the United States being at war.

Judge Pohl adjourned at 1615 until Monday 0900.

On Tuesday, AE 205 will be argued regarding the defense getting an expert in persons who have been tortured.

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