NIMJ Reports from

GUANTÁNAMO

Volume 6

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FOREWORD

This volume of Observer Reports covers the period February 2014 through February 2015, during which NIMJ sent eight observers to Guantanamo to report on three pending cases, those of the accused September 11 conspirators, of Abd al-Rahim al-Nashiri and al-Hadi al-Iraqi. Those observers included law professors, law students, a State Superior Court Judge, and NIMJ's President, who went twice.

The cases were presided over by military judges who have long since been replaced, one following a controversy arising from his submission of an application to be appointed a federal Immigration Judge, which some considered evidence of partisanship towards the Government, whose prosecutorial representatives were appearing before him.

The careful reader of these reports will discern little progress made towards the ultimate resolution of the cases. Issues customarily decided towards the outset of criminal cases were still being litigated throughout this period—including issues of jurisdiction, access to classified evidence, the applicability of Constitutional protections, the applicability of the death penalty, the scope of protective orders, and the Constitutionality of the Military Commissions Act itself. Other issues peculiar to these cases continued to arise, including claims of the Government's intrusion into the defendants' communications with their attorneys, assignment of a former CIA employee as a defense interpreter, the defendants' objections to the use of female guards to forcibly extract them from their cells, and the medical condition of at least one of the defendants.

While the observers' narratives are filled with discussion of highly-technical issues, the picture emerges of proceedings that have become so complex, so entangled in minutia, and so far from any ultimate issue of guilt or innocence, that it is hard to recognize them as criminal cases in which the defendants' lives are at stake. The goals of Secretary of Defense Rumsfeld and others who designed this system, to have proceedings that would be swift, secret, and conclusive, have long been left behind. This year of reports in which little progress is apparent provides an object lesson of the difficulties in attempting to devise a new system for military commissions, outside the realm of Article III courts and the Uniform Code of Military Justice.

Ronald W. Meister

Chair

National Institute of Military Justice

Seguin Strohmeier

At the time of this report, Seguin Strohmeier was a student at Yale Law School. Following graduation, she served as an associate in private practice and clerked for two federal judges. She is currently the Regional Director and Program Manager, Voter Protection, for the Montana Democratic Party

Abd al-Rahim Hussein Muhammed Abdu al-Nashiri Hearing
02.24.14

This morning's hearings started at 9 a.m. First, an observation, which became apparent immediately upon entering, and only became more noticeable as the proceedings got going: the 40-second delay on the feed feels exceptionally long and makes observing somewhat discombobulated. The benefit of being in the courtroom seems to be that as people are speaking, you can choose to look at people's reactions or the speaker—essentially to decide where you want to look based on the conversation. Because of the excessive feed delay, someone else decides whose face will be shown when generally, it is the person speaking at a given time, which takes away from one of the benefits of actually being in the courtroom. It draws a clear line between observers and participants and undermines the sense of transparency that the gallery is meant to cultivate.

Al-Nashiri was brought in, and he spent a while greeting his counsel, smiling, and chatting. He was dressed in white cotton pants, a shirt, and was given a grey suit jacket that he sometimes put on and sometimes placed over the back of his rolling chair. He was free to move around, but stayed seated for the duration of the hearings. Al-Nashiri seemed very bored at times, sleepy, and sedated.

AE168

Judge Pohl ran through the scheduled motions for the day. The first motion heard was AE 168: Defense Motion to Dismiss Charges 9-11 (actually 7-9 on the referred charges sheet) for lack of jurisdiction under international law. The incident here is the bombing of the MV Limburg tanker off the coast of Yemen in 2002. Commander Mizer said that he would not rehash arguments about Hamdan II, Article II, or the law of war, but instead concentrated on the M.C.A. (Military Commissions Act), particularly 10 U.S.C. § 948a(7)(A), saying that it compels the same result. Under § 948(7)(a), an unprivileged enemy combatant is subject to jurisdiction when he has engaged in hostilities against the U.S. or a coalition partner. The MV Limburg, he notes, was not a U.S. vessel. It was in Yemeni waters, flying a French flag, carrying Iranian oil, under a Malaysian contract. The attack indirectly caused the death of a Bulgarian national.

Moreover, Mizer argues that France did not believe it was a coali-

tion partner involved in armed conflict in Yemen at the time of the attack. He cites that when NCIS arrived to investigate, the French lawyers said that the MV Limburg was sovereign French territory and that they objected to their presence. He adds that at the time of the attack, Congress served "freedom fries" in a demonstration of America's distance from France. Mizer notes that Yemen has jurisdiction but declined to move; Bulgaria and France also declined to pursue the charges. He argues that the U.S. did not even think it had jurisdiction until the M.C.A., and now is asserting jurisdiction under the protective principle of international law. Judge Pohl asked whether this was a question of proof, and Mizer agreed that it might be the subject to an evidentiary hearing.

Mizer argued that the U.S. did not have jurisdiction under the protective principle, since that applies only to situations where acts threaten the security of the state or the functioning of its government. Here, Mizer argues that the facts do not support the application of the protective principle to assert jurisdiction and that doing so would imply a form of universal jurisdiction. Mizer cites to the dissent by Judge Torruella in *United States. v. Cardales-Luna*, in which he notes that the government cannot punish dogfighting in Java based on the Constitution. He also cites Justice (then Chief Judge) Breyer's opinion in *United States v. Robinson*, saying that the protective principle's application must be reasonable. In al-Nashiri's case, Mizer says the protective principle is unreasonable.

Brigadier General Martins argued in response that the defense misconstrued the government's position and that instead of framing the question as one of international law, it should be understood as a matter of statute. He argues that there is an explicit grant of jurisdiction under the historical law of armed conflict to try unprivileged enemy belligerents for the offenses punishable by military commissions. Martins adds that these offenses may be against the U.S. or coalition partners. He argues that being a part of Al-Qaeda matters because § 948a(7)(c) grants jurisdiction over Al-Qaeda members. He also notes that al-Nashiri is accused of three offenses punishable under the law of war and that the attack on the MV Limburg was part of a plan meant to disrupt the world economy that included the attack on U.S.S. The Sullivans and the U.S.S. Cole. He said that the prosecution would present evidence of this, including that 90,000 barrels of oil were dumped into the sea, insurance rates went up, etc., all of this indicating that the attack was part of a general plan of the Al-Qaeda cell to disrupt the U.S. and world economies ("directed at the Community of Crusaders, led by the U.S."). In response to a question from Judge Pohl, BG Martins says that although the disjunctive in § 948a(7) means that the government does not rely on the coalition element to establish jurisdiction over al-Nashiri on charges related to the MV Limburg, the U.S. considered the French to be coalition partners as they were also fighting against Al-Qaeda, having invoked Article 5 of NATO. BG Martins accused the defense team of revisionist history. BG Martins argues that the government should be allowed to present evidence to establish these facts at trial beyond a reasonable doubt. Martins closed by saying the Commission should look primarily to the statute for a ruling on jurisdiction. That international law is only useful as an analogy because this case applies the law of armed conflict.

Mizer began rebuttal by saying that the defense focused on the protective principle because that is what the prosecutors' pleadings focused upon. He requested leave to supplement their pleadings to address the prosecution's argument about 948a(7)(c). Mizer then essentially made a facial challenge to the statute, arguing that basing jurisdiction on mere membership in Al-Qaeda raises problematic First Amendment issues. He cites several freedom of association cases, including communist scare cases, *Brandenburg v. Ohio,* and *Holder v. Humanitarian Law Project*, for the proposition that mere membership in terrorism is not enough for prosecution, there must also be action. In contrast to this

case law, he argues, the statute says mere membership, not membership plus actions—and that is the problem. Judge Pohl asked whether it was true, however, that in Article I courts, Congress can limit jurisdiction to specific categories of accused (i.e., the UCMJ is limited to service members). Mizer responded that yes, there is a narrow categorization, but 7(c) has never been presented before the Commission. Mizer finished by maintaining that France was not a coalition partner at the time of the attack. There was no evidence that France believed they were in armed conflict off the coast of Yemen, and that perhaps an evidentiary hearing would be appropriate to determine whether the prosecution's theory of the attack's disruption of the world economy is supported by facts (he cited the vast disparity between the amount of oil consumed every day and the amount of oil spilled by the MV Limburg as an example). He says that the defense will reply to a government motion based on 7(c), but right now, the issue before the judge is 7(a) and whether that comports with the First Amendment.

BG Martins returns to the podium to say that he does not mind supplementation. He makes the point that the prosecution claimed in its brief that the defendant should have received notice by the very fact of his joining Al-Qaeda that he could be hailed into a U.S. court. He also argues that the statute is not punishing mere membership—that it requires an action that is punishable under the chapter for prosecution.

[T]he structural impediment of classification is part of an entire litigation approach designed to hobble defense preparation, and which will require every member of the defense team to consult with their respective state bar associations and hire ethical counsel.

Judge Pohl asked the defense to file a new pleading by March 7 on the issue of membership in Al-Qaeda as a basis for jurisdiction (noting that the pleadings will be merged later). Judge Pohl said that the prosecution would have two weeks to respond after those pleadings are filed.

AE 181 (unclassified portion)

The next motion Judge Pohl heard was the unclassified portion of AE 181, which took up the end of the morning: Defense motion to dismiss capital referral of all charges where the defendant has not been and will not be granted access to classified evidence presented to the Commission as required by due process and the Eighth Amendment. Richard Kammen argued for the defense. He argued that the defense lawyers were being rendered ineffective without the ability to discuss the classified evidence with their clients. As a result, the death penalty should be taken off the table. He said that every state bar association, professional ethics guidelines, and military rule of professional responsibility include the obligation to consult with the accused before trial and that in al-Nashiri's case, the counsel was precluded from doing so, raising serious concerns for the fairness of the trial, and professional responsibility of the lawyers themselves. Kammen cited *Gardner v. Florida*, in which a death sentence was overturned because the judge had instituted the death penalty after seeing a secret pre-sentencing report that was not shared with counsel. Here, Kammen says, it is far more than the pre-sentencing report that is being kept secret. Instead, whole classes of evidence have been broadly and improperly classified, meaning that defense cannot provide "anything approaching effective counsel." He then argued that the structural impediment of classification is part of an entire litigation approach designed to hobble defense preparation, and which will require every member of the defense team to consult with their respective state bar associations and hire

ethical counsel.

Judge Pohl asked why, if this were true, Kammen had not already hired his ethical counsel? Kammen responded that he had and that the ethical counsel was appalled and had told him to take it to the judge first. Judge Pohl fired back, “They are appalled that the accused does not have an unfettered right to classified information?” Kammen responded that first, there is always the question of whether the information has been appropriately classified in the first place. However, second, the accused cannot see the evidence against him, not that he cannot see all classified information. He said that this issue has not come up in a federal death penalty case, but that the case of *Moussawi* was closest. However, this is different from CIPA litigation in Article III courts. There, cleared counsel can see all the evidence and then get an unclassified summary for un-cleared counsel and the accused. Critical information would rarely be withheld from the accused entirely. Here, on the contrary, the accused gets nothing. “So,” Judge Pohl asked, “it's the breadth of the classification here that's the problem?"

Kammen agreed and added that this is primarily a problem on the penalty side. In *Padilla v. Kentucky*, he noted, the court found that the obligation to consult was critical to the decision-making process. However, Kammen added, he realized that the issue of classification here is not simple and that the court can order rules preventing discussion. However, the defense needs to be able to consult on critical issues. For example, if the prosecution says that al-Nashiri felt no remorse for his actions, the defense will need to talk with al-Nashiri about what statements he made that produced this conclusion. The government, he notes, says that everything will somehow be fixed at trial and that he will be able to hear evidence against him. However, the defense counsel and al-Nashiri need to hear it before to prepare for trial—this is hobbling their preparation. As an example, Kammen described a hypothetical situation during which al-Nashiri hears some evidence and turns to the defense and says, "That is not true! You need to go find this person or that." Kammen asks the judge whether they are going to recess the trial for two weeks or two months to do that work. Is this, he asks, real fairness and transparency?

Kammen raises the issue of the discovery concerning AE120, a classified motion, with an unclassified filing. He discusses the issue of evidence concerning al-Nashiri's 13 years of confinement and treatment. The Commission, he notes, has said that the right to present mitigating evidence is extensive, but will the government's declassification extend to defense? He then notes that the lack of transparency will hurt the public's confidence if the penalty phase is closed. He then noted that under eventual habeas review, a similar situation in court would be considered a violation of the Sixth Amendment and counsel's obligation. In response to Judge Pohl's questions, Kammen draws a distinction between evidence excluded under CIPA in federal court, saying that in federal court, the evidence withheld is typically evidence that the accused never had and had never been exposed to (e.g., nuclear secrets germane to the case). Judge Pohl asked, well, in that case, how would you know whether he needed to see the evidence? Kammen responded that it is not about needing to see the evidence, but about if the accused had access to it before needing to be able to discuss it.

Nevertheless, here in Guantanamo, the classification concerned evidence to which the accused had been exposed. Kammen reiterates that they think that the government improperly classified large swaths of evidence and that the judge should be able to revisit that classification, but okay, he says, if classification has been imposed, then that choice has consequences: he argues that the government cannot say that the accused cannot see the evidence, but we still want to kill al-Nashiri! He ends with a plea to Judge Pohl, saying that this is the judge's responsibility to be the bulwark protecting al-Nashiri's rights. If there is no such protection, this Commission is just a Potemkin village, a

facade with no meaning. A further argument, he says, will be made in closed session, and that al-Nashiri again objects absolutely to being excluded from that hearing.

After a break, the government replied. Sher started by saying that the government will only present unclassified information during their case-in-chief. Furthermore, restricted pretrial access to classified information is not unique in federal courts. Routinely, Article III courts restrict access, see, inter alia, Abu Ali, and the embassy bombings. He says that between classified pretrial hearings and unclassified case-in-chief, the government can "have it all" to protect and classify. If the defense wants to present classified information, they can go through the 505-hearing process. Pohl asked him about the defense's desire to discuss information with al-Nashiri, and Sher responded that they could not, but they can review unclassified information, and then al-Nashiri can disclose whatever he wants. Pohl clarifies that the first time al-Nashiri will hear classified evidence will be in court. Sher says yes. In response to another question, Sher says that the government will not be using classified evidence in their case-in-chief or in pre-sentencing. The judge says okay, but they will be held to this. A note was passed to Sher from the prosecution table. He takes a moment and then returns to the podium, saying that actually, a small amount of classified information will be held from al-Nashiri. Perhaps 14%. He adds though, that holding this information back will not deny the right to counsel. The defense has not cited any case where the court has sanctioned the government by taking the death penalty away for similar reasons *Moussawi* and *Gardner* were distinguishable. In *Gardner*, the judge changed a jury verdict based on secret information.

Kammen responded that in Abu Ali, the accused had the right to unclassified summaries of the evidence, which is not true here. In *Moussawi*, the court never reached the question because he pled guilty, and in the other cases cited, maybe four documents were withheld (about 200 words). This, Kammen notes, is very different from 14% of a case. He says that the accused does not have the right to 86% of a lawyer! He goes back to the point of discovery, which is to ask one's client, "Is this true?" which is not the same as "what do you remember?" There was then a bit of confused debate between Judge Pohl and the prosecution when Pohl asked whether an accused would be present at the 505 if either side wants to present classified information. The prosecution objected to the "long road" presented by Pohl, who pressed them to explain whether there is a 505, and evidence is determined to be admissible. There is no unclassified substitute, and it goes to the fact finder, the accused would be excluded from the case while the classified information was being discussed. Finally, after some hesitance, the prosecution says that the procedure would be the same whether the government or the accused wanted to use classified evidence and that the accused could stay in the courtroom. Kammen continues with his argument, raising the issue of cross-examination. During the government's case-in-chief, the defense will need to cross-examine witnesses, and for that, they will need to be able to prepare with al-Nashiri. Or, Kammen asks, will the government be able to proscribe the extent of cross-examination? He goes back to the hypothetical in which al-Nashiri says, "that is not true!" about a witnesses' statement. The point of pretrial prep, he says, is pretrial prep! In response to Pohl's question about whether all classified discovery should be discussable with al-Nashiri, Kammen says it is a matter for the closed session. Sher comes back and says that the 14% number is the amount of classified discovery, but that the accused is entitled. to 100% of the evidence that the prosecution needs to prove beyond a reasonable doubt.

Dru Brenner-Beck

Dru Brenner-Beck is an attorney in private practice in Highlands Ranch, Colorado, who 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.

U.S. v. Khalid Sheikh Mohammed, et al., 16 June 2014
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 Bogucki
Ali Abdul Ali Aziz Ali (Ammar al Baluchi)/ James Connell, LTC Thomas
Mustafa Ahmed Adam al Hawsawi/ Mr. Walter Ruiz.
16 June 2014

Substance:

The Military Commission was called to order, and the Special Trial Counsel put his qualifications on the record. Defense Counsel accounted for the presence of their counsel, and Mr. Harrington had LCDR Trinhan as a member of the defense team and counsel of record.

Before arguing on AE 292 (the defense Joint Motion to Abate Proceedings and Inquire into Existence of a Conflict of Interest Burdening Counsel's Representation of the Accused), Ms. Bormann, counsel for Mr. bin Attash, raised the issue that the PRT (privilege review team) refused to work on the weekend to review attorney notes from the Saturday 802 session. As a result, she asked for a period of time to review those items which she had missed in her discussions with her client because she was unable to take her notes into her client meeting. The judge granted a brief recess to allow such discussions to occur. She will raise the PRT's systemic issue of refusing to work weekends in a separate motion to be addressed by the Commission later. Mr. Nevin, counsel for Mr. Mohammad, raised the issue that the PRT was refusing to evaluate bound books, requiring that they are photocopied and submitted for review in that form. Mr. Nevin had tried to submit a copy of the 9-11 Commission Report and was denied. He will also raise this issue in a separate motion.

Mr. Harrington, counsel for Mr. Bin al-Shibh again raised the issue of alleged harassment of his client by detention guard personnel, that worsened after Mr. Harrington complained to COL Bogden, the JTF Detention Group Commander. Additionally, his client, Mr. Bin al-Shibh, has been on a hunger strike since 25 May and has not been referred to a doctor for evaluation.

Mr. Harrington began argument on AE 292 by stating that in response to the Commission's order in April 2014, the defense counsel queried their teams on any approaches by the FBI in response to Mr. Bin al- Shibh's Defense Security Officer (DSO) having come forward to report the FBI's questioning of him, and its attempt to recruit him as a confidential informant (CI). Mr. Harrington identified the DSO as Mr. Dante James.

The argument from various counsel elicited the following facts: Mr. Thomas Gilholl civilian investigator from Mr. Ruiz's team representing Mr. Hawsawi, had been in contact with an unnamed member of Mr. Harrington's team, and had referred him to the FBI to report this person's concerns over the actions of a Bin al-Shibh's defense team member, but had also attended FBI interviews of that individual.

From circumstantial evidence, Mr. Harrington believed that the unnamed individual was Mr. Elbert Cruz, a civilian investigator from his team. However, Mr. Cruz, a prior ATF agent, now government contractor, denied any such contract or agreement in the defense inquiry directed by the judge. Mr. Harrington has been unable to get any details from Mr. Cruz on the scope or content of the cooperation suspected to have been provided by Mr. Cruz. There were also indications that Mr. Cruz had been notified by one of the prosecutors on the Special Review Team required by the Military Judge to investigate the FBI investigations of the defense teams that he would have to appear as a witness in a post-trial matter in the case of the murder of Chaundra Levy. Mr. Cruz had arrested the cellmate/CI of the defendant in that case.

From what we can glean from the argument, as the pleadings have yet to be cleared for public release, there was one "Preliminary Investigation" by the FBI involving contacts with the Harrington unidentified but suspected as Mr. Cruz private investigator, the DSO Mr. James, and the private investigator for Mr. Hawsawi's team, Mr. Gilholl. This investigation into Mr. Harrington's team was believed to have started in November 2013 and continued at least through 12 May 2014 (it was "closed" by the FBI on 12 May 2013 during the period of time extended by the military judge for the government response to this motion) and involved six months of potential intrusions into protected attorney-client privileged matters. There are additional assertions of a separate "full investigation" into the activities of a linguist on Mr. Mohammad's team, an investigation that was active in January 2013, and which appears to have been closed in January 2013. The Government, through the special review team (SRT), has filed two ex parte filings on the scope and content of these two investigations based on the assertion that there was an ongoing criminal investigation. This investigation was closed on 12 May 2014 and referred to the DoD for action on security clearance issues on 28 May 2014.

As the five defense teams have a joint defense agreement, they share both resources and information. Therefore, compromises in any defense team potentially affect the privileges of all the remaining teams. Additionally, Mr. Gilholl had access to joint defense material. Mr. Harrington is seeking to depose Mr. Gilholl, who is leaving the U.S. next week and will not return until September. The two declarations from the FBI supervisory special agents are insufficient to enable the defense counsel to determine the existence of a conflict. The questioning of Mr. James, the DSO, by the FBI was not limited to inquiries on non-attorney members of defense teams. Instead, it was broad questioning on all defense team members and was also directed at Mr. Mohammad's team members and included broad inquiries, which included defense attorneys.

Mr. Nevin argued the following: The investigation on Mr. Mohammad's linguist began in January 2013, and included interviews on both January 2d and 3d, with the person interviewed on the 3d identified as the target of the investigation, but it is unclear if these interviews were of one or two separate people. It is also unclear

the extent, if any, of the compromise of privileged defense information.

As regards the two declarations filed with the government response, Mr. Nevin argued that the Government's declarations are carefully worded to only state that no defense member or teams were "currently" under investigation, but whether other investigations existed in the past, could not be definitively stated without the names and birth dates of the defense teams. Mr. Nevin disputed the government position that the two investigations were closed and were not focused on the attorneys meant there could be no conflict based on the cases of Montano, Loft, and Lafuentes. Other cases, however, Mr. Nevin argued that a conflict could arise from investigations of defense team members, and a reasonable fear of investigation by government officials.

Mr. Nevin informed the Commission that because of these investigations, he canceled an investigative trip to the Middle East and that threats referencing the Lynne Stewart case throughout these proceedings have caused significant concerns for all defense counsel.

Mr. Nevin argued that the full investigation, since closed, of his linguist, who was questioned and then recruited as a CI, made his team very cautious about investigatory activities that could put them under an FBI investigation. A complete inquiry that disclosed the scope and content of these FBI investigations into the defense team would allow them to dispel the concern of an actual or potential conflict and allow a possible waiver of such conflicts.

Mr. Nevin also asserted that he had canceled an investigatory trip to the Middle East because of the concerns raised by these FBI investigations. A full inquiry by the Commission could assist in resolving whether a conflict existed, and although the referral letter to DoD, sent by DOJ on 28 May 2014, dealt with the security clearance consequences of the outcome of the investigation that mainly dealt with activities predating employment with the Mohammad team, it still imposed significant penalties that included the deprivation of a way of earning a livelihood.

Ms. Bormann for Mr. bin Attash summarized her argument as, "I do not know what I do not know," but the existence of the joint defense agreement and the shared resources and information among defense teams meant that the compromise of any one defense team affected the remaining teams and had a chilling effect of their zealous advocacy of their client. She asserted that she could not advise her client on any potential or actual conflict without knowing what had occurred.

> Mr. Bin al-Shibh, has been on a hunger strike since 25 May and has not been referred to a doctor for evaluation.

Additionally, she asserted that the fact that Joanne Baltes from DOJ had responded to a pending discovery request (AE 284) into whether the defense teams were being monitored by the intelligence community (CIA, DIA, NSA, FBI) by "declining to respond" and was signed by Joanne Baltes, a previously detailed attorney to the prosecution of this case, who also served as the Chief of Staff to the Deputy Director of the FBI.

In arguing this motion, Mr. Connell, for Ali Aziz Ali (aka al-Baluchi), conceptualized the issue as procedural, requiring first a determination of whether a conflict existed at all. If not, then the issue went to a full stop. Otherwise, there was a requirement to determine if a potential, actual, or possible conflict existed, and then whether such a conflict was waivable. If so, the Military Commission was required to advise the defendants of their right to conflict-free counsel, and the risks associated with the proceeding. He detailed how careful and suspicious his client has been of his ability to safeguard his client's

confidences, and after each issue in the case (written communications compromised by the Woods' orders, the smoke detector microphones in the attorney-client meeting rooms, the access of an unknown agency to the ungated microphone feed in the courtroom, and now the FBI attempting to recruit defense team members as confidential informants).

Specifically, Mr. Connell argued that he did not use an introductory letter (despite it being his client's desire and in his interests to do so) to a significant mitigation witness in a foreign country because of his concern of the FBI investigation into the provision of defendant communications (even though unclassified) to third parties, and the FBI's assertion that this violated some unspecified federal law.

For Mr. Connell, four parties need to have access to the information on the FBI investigations: First, the military Commission itself, which need info on the scope of the investigations to determine if a conflict exists, and then conduct a Curcio hearing to advise the defendants of any such conflict, and the risks of proceeding with conflicted counsel. Second, the defense counsel under the applicable state bar Rules 1.7 was required to evaluate the existence of ethical conflict and whether it was waivable. Third, the Chief Defense Counsel, who under the Rules for Trial by Military Commission, had to make an independent determination whether to appoint an independent counsel to advise on any such conflict. Finally, the defendants, who had to knowingly, voluntarily, and intelligently make a decision to waive the right to conflict-free counsel.

He has provided an extensive briefing on the ex parte pleadings by the Government affecting A.E. 292J, a portion of 292T, and 292 EE. The Commission will have to determine if these pleadings should remain ex parte at least as to the defense.

Mr. Connell also argued that under 292L, there was a necessity to appoint independent counsel for Mr. Al-Baluchi, but that any work product of a specific defense attorney would trump the interests of the other defendants.

He also described the “things we do know we know,” to include the fact that both Mr. Cruz and Mr. James entered a special relationship with the FBI. He asked that the judge order inquiry that included three categories of witnesses: first, the FBI agents who questioned defense team members; second, the supervisory agents who completed the declarations in the filings; and third, the individual who authorized the investigations to determine their authorized scope. He also sought to determine the relationship between the FBI and Ms. Baltes, no longer detailed as a prosecutor on this case, on any cross-contamination on these investigations.

Mr. Ruiz for Mr. Hawsawi argued that although he joined in the original motion, he no

longer believed that any conflict existed for his client. He also requested the Commission move to other issues, such as his recently filed severance motion (which is not yet cleared for public release). Therefore, he asked that whatever the Commission decided as for the other defendants, that it not abate the proceedings as to Mr. Hawsawi. He had no objection to Mr. Gilholl, his team's private investigator, being interviewed by other defense teams so long as he was present. He also referenced a motion for Mr. Hawsawi contesting his conditions of confinement, but his severance motion was foremost.

The Government argued that this issue could be resolved solely as a legal issue, contending that:

(1) Because the Military Commission was not the "same prosecuting authority," it was unlikely that any conflict existed.

(2) That as a legal matter, even setting aside the ex parte pleadings, the Commission could determine that no conflict existed because the Government contended there could be no conflict when there was no ongoing investigation. Since the investigations had been closed, and because the fear of investigation was inadequate to create a conflict, no conflict could exist.

(3) Although these investigations might be relevant to other potential motions (i.e., outrageous governmental conduct), those could be addressed later if raised by the defense.

(4) The bottom line of the government position was that no conflict could exist absent an ongoing investigation of the actual defense counsel, and this could be resolved as a legal question with no further factual inquiry by the Commission based on the case law, which they referenced as *U.S. v. Novatone*, 271 F.3d 968, 1012 (11th Cir. 2001) and *U.S. v. Montana*, 199 F.3d 947, 949 (7th Cir. 1999).

(5) He also argued that the vigorous advocacy of defense counsel indicated that they were not pulling any punches in the zealousness of their defense.

> [T]he existence of the joint defense agreement and the shared resources and information among defense teams meant that the compromise of any one defense team affected the remaining teams and had a chilling effect of their zealous advocacy of their client.

In rebuttal, Mr. Connell for Mr. al-Baluchi argued that the Government's argument was contrived to depend on the "formalistic" closing of the investigation, which was accomplished during the extension of time granted by the Commission for government response in this matter. He also distinguished the cases relied upon by the Government as being largely post-conviction relief cases (*Mickers*, *Montana*, *Novotone*) versus those that dealt with prospective relief (*Holloway*). He argued that the proper way forward as required by appropriate case law is that the Commission must first determine if any conflict exists. If not, then the issue comes to a full stop. If so, then the Commission must determine if the conflict is waivable. (only those so severe that no reasonable person could waive the conflict cannot be waived). Finally, the appointment of independent counsel is critical in the advisement of defendants of whether they should waive any conflict. He contended that current counsel could continue to represent counsel until a conflict was identified, then independent counsel would help resolve the waiver issue. He also disagreed with the Government's highly technical determination of when an investigation existed. Mr. Connell also reminded the Commission Judge that even if the Commission determined that no 6th Amendment conflict existed, each defense counsel had an independent ethical requirement to make his or her determination on the existence of a conflict. He asked the Military Judge to consider their motion in 292L as a separate issue from the 6th Amendment issue on the appointment of independent counsel (with

a commission order necessary because of logistics and funding).

He asked the Military Judge to focus on *Holloway* as the relevant Supreme Court case. Mr. Nevin contested the Government's argument that separate prosecution authorities were relevant under the circumstances of this case as DOJ had detailed a significant number of prosecutors. Secondly, he contended that the interests of the defense attorneys do not diverge from those of the defendants over the issue of whether a conflict exists and that the obligation to ensure conflict-free counsel falls to the tribunal. Finally, he argued that the cases do not establish the legal proposition that the test is whether there is a "current" investigation ongoing as the sole test for a conflict. Instead, the focus is prospective in this case, and even *Lafuentes* establishes a different rule, where reasonable fear of investigation can create a conflict. Ms. Bormann, for Mr. bin-Attash, argued that there is no invitation of error if the Commission were to conduct a further factual inquiry. Instead, error exists as the Commission is insufficiently protective of the defendants' right to conflict-free counsel.

Mr. Harrington asked that Att 1 to Att D to A.E. 292R remain sealed to protect the privacy of an individual, with the Government's agreement. The Commission so ordered.

Mr. Harrington also reminded the Commission that this situation always involves a potential conflict of interest, with the FBI's broad general questions in their questioning of defense team members. A cloud will remain here until information concerning the scope of these investigations is provided to the defense.

The Government agreed that the Special Review Team representing the U.S. and the Defense Teams shared an interest in ensuring the defendants were represented by conflict-free counsel to ensure the proceedings' integrity and fairness. He reiterated that the case law, in the view of the U.S., established that no conflict existed in the absence of an ongoing investigation. The Special Trial Counsel contended that the Commission had all the facts it required (ignoring the ex parte pleadings, which he recommended the Commission disregard) to determine the purely legal question of whether a conflict existed. In this case, because all investigations are closed, no conflict can exist as a matter of law.

Mr. Nevin requested ninety seconds to reinforce that under *Lafuentes*, relied upon by the Government, fear of an investigation is sufficient to create a conflict and that his team had demonstrated such a fear.

The Military Judge took the issue under advisement and would issue a ruling in due course. The proceedings recessed. The next anticipated action is the arraignment of al-Iraqi on Wednesday.

The case names were determined phonetically from oral argument, and there was no access to transcripts to determine correct case spellings and citations.

United States v. al-Nashiri

16-17 July 2014

Jack Nevin

Jack F. Nevin is a Superior Court Judge in Tacoma Washington. Judge Nevin is retired from the Army Reserve. In his last duty position, he served as Chief Judge of the US Army Court of Criminal Appeals.

In 2009, Mr. Nevin was awarded the Army's Distinguished Service Medal. Judge Nevin currently serves on the board of advisors of the National Institute of Military Justice.

On July 16th and 17th, I served as a civilian observer for NIMJ in hearings concerning Abd-Rahim al-Nashiri, the alleged mastermind of the bombing of the USS Cole. As a retired Judge Advocate who worked on Guantanamo issues beginning in 2004 and concluding in 2008, this was an opportunity to look at the process from a unique perspective, having weathered the storms of the many debates between OTJAG and the DODGC concerning enhanced interrogations, application of Geneva protections and the role of military members in interrogations.

Guantanamo is, in some respects, the same place it had been since early in the 20th century. It is a tropical, yet surprisingly mountainous terrain. The Navy base continues with the same mission it has had since then, a US presence at the edge of the Caribbean. However, Guantanamo is also quite different as well, given the presence of the Joint Task Force, an organizationally separate military force devoted exclusively to the maintenance of the detention facility. The joint task force is commanded by an active-duty Navy admiral, whose deputy commander is typically a one-star general from the Army Reserve or National Guard. Based upon the relatively few correctional staff (with whom I could chat), I calculate most are mobilized reservists and National Guard members from all services. I must emphasize that this is supposition based on only a few conversations. Courtroom security was assigned to a port security Coast Guard Reserve unit from San Diego. Most of the personnel were mobilized civilian police officers from Southern California.

My first observation was the extent of the security precautions. The security was extraordinary, yet inconsistent and sometimes puzzling. We received no fewer than three different and diametrically opposed “policies” concerning photography on the island, from no photos anywhere to only in selected areas. It was clear that the security apparatus in place had been advocated and orchestrated by federal agencies. As a sitting state court judge, I am sensitive to courtroom security, and admittedly a little envious of the security afforded the federal court system. However, I could not understand the rationale for some of the security precautions. Granted, we were in the “high value” court, but the observers were in a separate room, with one-way glass separating us from the courtroom, which

by design could accommodate a trial for easily a dozen separate defendants at once. We were provided pens for writing and prohibited from using a spiral notebook, as the wire could be detached and used as a weapon. However, I am still wondering where, given that we were in an entirely separate area from the courtroom, guarded by the CG port-security reserve unit from San Diego.

> There is a fundamental point that gets lost in all of the rhetoric criticizing military commissions. That question is whether military commissions are still a viable means to try those detained or taken prisoner during times of war. While the Supreme Court has heard a number of cases concerning military commissions, they have yet to find that military commissions should no longer be an option.

The defendant was represented by two civilian lawyers, one of whom, Richard Kammen, may be the most experienced capital litigator in America, having defended 36 separate capital cases. The other civilian, I believe, was on leave from a federal public defender's office. The remaining counsel were both 04s, one from the Navy, and the other a woman from the Air Force. The defendant had no objection to a woman on his defense team and warmly greeted her at the beginning of each session, shaking hands with her. This was significant only because many of the detainees are reportedly reluctant to recognize and certainly not inclined to touch a female.

The legal issues presented were as follows although in no particular order (I am highlighting the most significant issues, at least the ones I found most significant):

<u>Access to the client detainee without shackles</u>

Mr. Kammen argued that the defendant was suffering PTSD secondary to his torture at the hands of the CIA before arriving at Guantanamo. That al-Nashiri was waterboarded and subjected to extreme interrogation methods is, to my surprise, admitted and accepted as fact. As is the case with most judges facing similar motions, including myself, Judge Pohl deferred to the security requirements of the facility. In essence, he ruled that he would not substitute his judgment for the camp commander. The shackles referred to were a single leg shackle run through a bolt on the floor of the meeting room. I gather that high-value detainees such as Mr. al-Nashiri are housed at yet another facility at Guantanamo, one we did not see in our "windshield tour" of the base. It is referred to by some counsel as "Camp 7." I am acquainted with one of the learned counsel in the KSM case, and he advises me that the location of this Camp is unknown, and they meet their clients in a separate building not far from the JTF HQ.

Incidentally, the defendant was not shackled in court. Previously, Judge Pohl ruled that so long as the defendant behaved appropriately, there was no need to shackle him during court proceedings. The defendant seemed quite comfortable in court and appeared to have a working knowledge of English. At the beginning of the hearings, the judge wanted to ensure the defendant's audio system was working. The defendant gave the judge a thumbs up, suggesting he could understand the judge's request.

The Privilege Review Team (PRT). The next motion concerned the role of a group of contracted employees who ensure that only legal

correspondence is transferred to a detainee. When the new JTF commander took command, he conducted a search where an al Qaeda magazine was found in the cell of one of the detainees. That generated the creation of the Privilege Review Team (PRT) to ensure that detainees receive only legal documents. This, in turn, led to a highly circuitous argument where the defense argued that the team could only discern that communication was appropriate by reading it, therefore violating the privilege. The JTF commander (arriving late, duly noted by Judge Pohl) testified to the history which led to the creation of the PRT. However, he was unable to identify its members, its composition, or the professional background of the members. Based upon this lack of information, Judge Pohl rejected the defense request to require their attendance for testimony. I am sure this is not the last we have heard of this issue, as the PRT will continue reviewing detainee correspondence, at least for the near future.

Request for Expert Witnesses

The next motion concerned the role of the Convening Authority in approving defense requests for expert witnesses. This motion was, from my perspective, another variation of the frequent criticism lodged at military courts about the role of the Convening Authority versus the military judge. The second Cox Commission identified this as an area of needed reform in the military justice system. It is a legitimate point and one which I've always felt identified a potential defect in our system. As with courts-martial, the crux of the matter is that the defense often has to "show its hand," so to speak, in requesting the expert witness, and of course, the trial counsel, as legal advisor to the CA, is involved. Judge Pohl denied this motion. I am not surprised that he did so, but I do think this is perhaps another appellate issue.

MCR 505/CIPA. I am going to apologize to the military scholars in our group, in advance of my next paragraph. This issue concerns the MCA equivalent of CIPA, 18 USC app. Sec 6 (2000), MCR 505. I do not claim expertise in this area, and with apologies will provide a "Cliff's Notes" version of the argument. CIPA limitations on defense discovery are nothing new, and typically are the basis for numerous motions in national security cases. As under CIPA the Military Commissions court may issue protective orders prohibiting defendants from disclosing classified information, authorize the government to delete, summarize or substitute specified items of classified information from discovery upon proper showings, review government submissions regarding such information on an ex parte basis, conduct closed hearings, provide advance notice to the government of any ruling requiring disclosure of classified information and opportunity for an interlocutory appeal, and last, allow the government a chance to dismiss all or part of its cases or enter into stipulations to avoid such disclosure. However, unlike CIPA, the defense has seemingly little if any recourse to the court's rulings, in that under MCA 505 Congress specifically and expressly prohibited motions for reconsideration by the defense. This was, in my opinion, unnecessary and will create an appellate issue. Good judges know when to grant motions for reconsideration and when not to. They do not need legislative bodies telling them when it is not appropriate. Mr. Kammen based his argument around this issue, stating that Congress had made a huge mistake.

Judge Pohl wisely acknowledged that might be the case. However, he correctly ruled that right or wrong, Congress meant what they said, implying more than once that it was not his job as the trial judge to second guess Congress.

Above I have outlined the most significant motions. Admittedly there is more to what they argued than just the above; however, the above will hopefully orient the reader to the most significant issues. Below are some personal observations.

As some of you know, this was particularly interesting to me as a retired GO, having served on active duty at the Pentagon, off and on from 2004-2009, the majority of that time but not all with OTJAG. It was fascinating to see where we are now and juxtapose that with where we were.

The question that the press has asked me, and one that I've struggled with, is whether a defendant detainee can receive a fair trial under the current version of the MCA. My response may seem to some as contradictory, but as a trial court judge who has also served as the Chief Judge of a military appellate court, I guess I feel compelled to split hairs.

First, I do believe that a defendant can receive a fair trial under the MCA of 2009. However, I am not altogether sure that the MCA of 2009 can withstand the appellate challenges that are inevitable. I realize that some litigators might argue that if it cannot withstand appellate scrutiny, then it is not fair. I would respectfully offer that regardless of the forum, it is not that simple. From my study and brief exposure, I believe that a detainee can receive just as fair a trial as any soldier, sailor, marine, airman, or coast guardsman can in a military court. That said, I have been asked by my colleagues and students an important question; whether we would experience this same level of difficulty with appellate scrutiny if detainees were tried by military courts-martial. The answer I feel is yes, however for slightly different reasons. Second, the military appellate system is very paternal, and rightfully so. As a general proposition, the military appellate system is a stricter hurdle for the government to overcome than the civilian system where it might depend on the federal circuit hearing the matter or most state appellate systems. Moreover, the lack of

precedent for these issues, which will inhibit the current appellate process would probably exist to some extent as well in the military court system.

The question I pose to my law students at Seattle University that generates the most discussion is whether both the Bush and Obama administrations chose a process designed to ensure convictions. Even if you accept the current process, it is an essential question for everyone to discuss, because it does strike at the heart of our system of justice, and perhaps even the Anglo-American common law.

There is a fundamental point that gets lost in all of the rhetoric criticizing military commissions. That question is whether military commissions are still a viable means to try those detained or taken prisoner during times of war. While the Supreme Court has heard a number of cases concerning military commissions, they have yet to find that military commissions should no longer be an option. Military commissions present unique factual and evidentiary issues calling for a unique process. The US Supreme Court, albeit many years ago, affirmed military commissions as a viable means to try those citizens accused of crimes on the battlefield. It may be they are no longer a viable forum, but that will be for appellate court judges to decide. For now, military commissions are still an option.

In his post-hearing press conferences, Mr. Kammen characterized the process as a "second class system of justice" (I think anything short of a federal district court forum would be unacceptable to the defense). I respect that as a capital litigator, he must continue to communicate that position at every turn. However, I disagree with his position. My initial thought was that Mr. Kammen needs to spend more time in a busy underfunded state criminal court system. There he would see a system of justice beset with extraordinary fiscal challenges, staffed by committed attorneys with extremely limited resources.

Mr. al-Nashiri has some of the finest lawyers I have ever seen, led by an attorney who may very well be the most experienced capital litigator in America. While all attorneys can argue about resources, by all that I saw, the defense is not being denied anything, save a statutory scheme they think provides the accused a fair trial.

The following NGO's were present at the hearings, besides the NIMJ. They included Amnesty International, Human Rights Watch, ACLU, NACDL, Suffolk University, and Heritage Foundation. The representatives were all quite collegial, and that they represented different perspectives was never an issue.

One aspect I found interesting was that except for two of us, most of the other NGO representatives had little or no experience in criminal law, and none had experience in military law. Certainly very bright and affable people, however, their questions to me showed a fundamental lack of understanding of the trial process, particularly in an Article I court. I attempted to explain that despite all of the political/international aspects, this was still a capital case, and the judge had to make rulings protecting his record because capital appellate litigation is different from other criminal appellate litigation. Additionally, Judge Pohl was making virtually all of his rulings with a lack of precedent, a very challenging endeavor.

To conclude, this was truly a fascinating experience, and I appreciate the NIMJ allowing me the opportunity to participate.

Chris Jenks

Chris Jenks is a Professor of Law at Southern Methodist University Dedman School of Law. He is a retired Army judge advocate, including service as the Chief of the International Law Branch for the US Army. He is a West Point graduate and was commissioned as an infantry officer.

United States v. Binalshibh
AE 312A Government Emergency Motion to Reconsider Severance (Cont.)
Wednesday, August 13th 2014

The Military Judge began the session at 1400. Present in the courtroom were counsel for Mr. Binalshibh, Mr. Binalshibh himself, and counsel for the Government. The other 9/11 accused were not present as they were not a party to the motion, some but not all of their attorneys attended. Victims' family members, media, and NGOs watched from a viewing gallery at the rear of the courtroom.

The purpose of the hearing was an additional oral argument now that the Defense had submitted a written response to the Government's motion to reconsider severance. Of note, the Defense motion, for the first time, affirmatively requested severance. The Defense previously had affirmatively taken no position on severance.

Ultimately, the Military Judge granted the motion to reconsider, placing the previous severance order in abeyance. It is not a question of if, but when, severance will again arise. The Defense's burden is presumably less in moving to reverse the decision to abate the severance order than in having to move for severance outright.

Judge Pohl probably erred in his approach to severance. The Court sua sponte ordered severance. In response to the Government's inevitable request to reconsider, Judge Pohl allowed the Defense to insert at least a claim of prejudice before essentially reversing himself. This is now added to the growing list of appellate issues. While appellate issues are, of course, inevitable, the 9/11 case already has a fair number of such issues, and discovery has yet begun.

<u>Defense</u>

Mr. Herrington began by explaining how AE 152 (the noise/vibration in the cell claims) and the mental health/706 issues are intertwined with the severance issue. Herrington argued that these issues could be more fully and quickly addressed if Mr. Binalshibh's case was severed from the other 9/11 accused. Accordingly, for the first time, Mr. Herrington affirm-

atively requested severance. He then shifted to AE 292 (conflict issue), claiming he did not know the potential conflict's full nature.

Government

Clay Trivett presented oral argument on behalf of the Government. Interestingly he began by claiming that now was not the time for severance. He acknowledged there may be events in the future that might render severance appropriate, just that the case was not at that point quite yet. Accordingly, Trivett requested the Military Judge abate the severance order.

In their response, the Defense mentioned the Government, not Mr. Binalshibh, as the barrier for the victim's families to see justice. Trivett labeled this "the most offensive thing to come from that side of the aisle thus far." He reminded the Military Judge that Binalshibh has not had to carry his burden, and the Defense cannot identify a substantial right of the accused prejudiced by continued joinder.

In response to the Military Judge's questions, Trivett seemed capable, pointing out that on Monday, the Defense did not have a good answer as to what prejudice the accused would suffer, and they still do not today. According to Trivett, there is no prejudice; there is no abrogation of a substantial right. Based on the tone and tenor of Military Judge's questions (and outcome), Trivett confirmed to the Military Judge that the Government sought abatement, not for the Military Judge to vacate the severance order.

Trivett raised the MOU issue saying that the Defense cannot simultaneously talk about delays while not signing the MOU and thus not receiving classified discovery. Trivett theorized that in the not too distant future, the Defense would be subject to either a show cause order or having to withdraw. This indeed appears destined as a significant issue for the hearings in October. Trivett closed with a word choice that the Defense, at least Ruiz, is seizing upon. Ruiz repeatedly referred to the Government, "treating the concept of individualized justice as a gift." Ruiz will likely use this sentence, or variants thereof, for a while.

Defense

Mr. Herrington on rebuttal claimed that Government had to but failed to meet the burden of showing manifest injustice. He continued that the Military Judge could and should consider prejudice not just from the perspective of Mr. Binalshibh, but also from the other 9/11 accused. He then attempted to clarify the language in the Defense motion discussing the victim's families, labeling Trivett's characterization "inappropriate."

In what seemed an attempt at putting the Military Judge on notice, Herrington said that if he did not receive information concerning the potential conflicts on his defense team, he would prepare a declaration which he claimed would then be an issue.

The Military Judge ruled that while concerned about the pace of the proceedings, he granted the Government's motion and abated his previous severance order.

Thursday, August 14th 2014 Session 1

The Military Judge began the session at 0900. Present in the courtroom were counsel for the accused (Khalid Sheikh Mohammad (KSM), Ramzi Binalshibh, Walid Muhammad Salih Mubarak Bin 'Attash, Ali Abdul-Aziz Ali Mustafa Ahmed and Adam Al Hawsawi), the accused, and initially, special review counsel for the Government, later replaced by government counsel. Victims' family members, media, and NGOs watched from a viewing gallery at the rear of the courtroom.

Four of the accused elected to wear Palestinian headscarves in support during their recent armed conflict with Israel.

The purpose of today's hearing was first to address AE 292 (conflict issue), notably Mr. Herrington's written response to the Government's motion to reconsider severance, to which the Government waived submitting a reply brief. Following AE 292 the plan was to address a host of other issues, including the ongoing refusal of 4 of 5 defense counsel to sign the MOU governing the protective order and classified discovery a motion by Army Judge Advocate Jason Wright, a detailed military defense counsel concerning whether he would continue as counsel past his expiration time of service. Ultimately the MJ made very little headway, not resolving a single issue and continuing the Commission until October.

Of note, the MOU issue looks to be significant. As discussed more below, the Military Judge appears to have exhausted his patience with defense counsel. In either the next session or perhaps the one after that, absent a change by defense counsel, the Military Judge is likely to either order the defense counsel to show cause or withdraw from the case.

Defense

Mr. Herrington, on behalf of Mr. Binalshibh, and Mr. Nevin on behalf of KSM said they wanted the mandated 14 days to respond to the special counsel's most recent filing that there is no conflict, thus ensuring that the Commission would not resolve AE 292 at this session. On behalf of Mr. Hawsawi, Mr. Ruiz objected to the rejoinder of Binalshibh and the un-joined motions filed by counsel for KSM and Ali.

Mr. Nevin claimed that as a result of the potential conflict issue, he had been "pulling punches and trimming sails" and canceled a mitigation trip. He insisted that the way forward began with the Supreme Court's case of *Holloway v Arkansas*, "thorough inquiry" into potential conflict. This led to an extensive exchange with the Military Judge concerning the MOU. The Military Judge labeled the issue a "conundrum created by the defense." At the same time, Nevin contended that the "Government decided to invade defense teams" and that the "Government has sown chaos in the defense." The Military Judge contended that given that he (the Military Judge) is the decision-maker, it is up to him to decide whether he has sufficient

> While appellate issues are, of course, inevitable, the 9/11 case already has a fair number of such issues, and discovery has not yet begun.

information to rule on the issue. If the investigation into one or more defense teams is over, then Nevin's concern must be prospective to be relevant. In what appears to be a preview of things to come, the Military Judge pressed Nevin on what the outcome would be if, in the end, the Military Judge does not see a conflict, even if the Defense does. The Military Judge's point seemed to be that the Defense would need to withdraw in such a circumstance. Nevin contended that an attorney could not tell their client, "I cannot show you the information, but there is a conflict, and you can/should waive it." To this, the Military Judge responded the Defense could obtain a waiver or withdraw.

Mr. Connell cited what he called the continuing effects of the conflict issue. Connell argued that the conflict is a three-tiered, potential conflict concerning Mr. Ali, a potential conflict concerning the interpreter on the KSM defense team, and his own personal potential ethics conflict. On the last point, Connell contended that he has potential issues meeting his ethical obligation of competence and that his client provides informed consent. He labeled the situation a government "invasion of the defense function

to defense counsel who may have a conflict." Somewhat oddly, Ms. Bormann, on behalf of Mr. Bin'Attash, argued that she should speak

after the Government. Her basis was that as the Government had not submitted a reply brief, she did not know what they would argue until she heard their oral argument. She claimed that she usually would argue that in waiving the reply brief, the Government waived its opportunity for oral argument. However, for reasons not made clear, she was not so doing here. Her whole argument seemed odd, as the default setting was that she would argue, followed by the Government, and then Ms. Bormann would argue last. As a result of her request, the Military Judge said she need not argue first, she would argue once after Government, which she would have done anyway.

Government

One of the members of the special review team argued for the Government. He opened by claiming that the Military Judge was correct that no conflict existed in four of the five defense teams, and that all facts needed to resolve the potential issue in the fifth defense team were already in the record. He stated that the three potential sources of conflict involved: Non-attorney member of the Binalshibh team; Non-attorney member of the KSM team; and The June 24th, 2014, meeting between Mr. Harrington and a DoD representative concerning the potential conflict.

He then went on to represent that "there are no FBI moles or poison pills on the defense teams." He stated that the investigation into the possible conflict is over, and clarified that the FBI referring to the investigation to DoD was only because DoD had issued the security clearance of the individuals at issue. He stressed that this referral was not the investigation itself being transferred, continued, or restarted. Given that, any defense fear of investigation is speculative, which cannot give rise to a claim of conflict. Furthermore, without conflict, there is no need for an independent counsel or the *Holloway* inquiry.

Defense

Ms. Bormann waived oral argument. Mr. Nevin cited the *Lafuente* case to suggest that a defense counsel's fear may give rise to a conflict. This led to a lengthy exchange with the Military Judge. The Military Judge queried the following: what should happen if the Military Judge is satisfied that no conflict exists, but the Defense has a subjective fear of investigation, what is the next step? Nevin responded that it would be for the Defense to withdraw from representation. At one point, Nevin stated he did have a conflict based on fear of investigation, which the Military Judge seized on, leading Nevin to qualify his view as a "potential fear."

Mr. Connell argued that the Defense's attorney-client relationship must be viewed through the eyes of the accused and in light of the history of their experience, that is—mistreatment, their mail being censored, and CIA and FBI intrusion.

Government

Counsel pushed back on Mr. Nevin's interpretation of *Lafuente*, claiming that Defense was reading a conjunctive where there was none. According to government counsel, *Lafuente* was about there either being no investigation or no defense counsel fear. Furthermore, in this case, the Government is affirmatively representing to the Defense that there is no investigation. The matter has been transferred to DoD for clearance issues, not for investigation.

The Military Judge concluded the argument by clarifying that although argument on the issue would continue in October, AE 292QQ is the current operative order in place, meaning that the state of the record is that there is no conflict.

The Military Judge then placed the Commission in recess.

Leslie Esbrook

United States v. al-Hadi al-Iraqi

15 September 2014

Leslie Esbrook is a 2015 graduate of Yale Law School. She has worked on issues related to national security and international humanitarian and criminal law throughout her law school tenure.

She is currently a federal law clerk and adjunct professor of legal writing at Brooklyn Law School.

Hearings on AE013 Motion to Protect Against Disclosure of National Security Information, United States of America v. Abd al Hadi al-Iraqi
Monday, September 15, 2014

Hearings in the case of U.S. v. Abd al-Hadi al-Iraqi began at 1330 hours. Judge Waits introduced the new defense counsel, Lt. Col. Thomas Jasper Jr., U.S. Marine Corps, who will replace Lt. Col. Callan. He read Lt. Col. Jasper's legal qualifications into the record and informed the defendant of his counsel rights given the change in counsel. Lt. Col. Callan will be excused as of October 1, 2014. However, he will not be released from the case until September 30, 2014, because the new scheduling order will instruct parties to provide a sealed ex parte list of motions intended to be filed in the case. Judge Waits believes that Lt. Col. Callan could be instrumental in identifying these legal motions. As a result, the defendant will have two military defense counsel until the end of September, although he is only entitled to one. Judge Waits also read into the record the fact that all interpreters in the Military Commission had been previously sworn in and notified the parties that a new scheduling order would be issued after the close of hearings today.

The Military Judge proceeded to discuss the RMC 802 meeting held yesterday between the parties. In that meeting, the Judge recounted that the following was discussed:
1) The Commission was introduced to Lt. Col. Jasper;
2) The hearings were pushed back to 1300 to allow Lt. Col. Jasper to meet with his new client;
3) Neither party submitted additional evidence on the Government Motion to Protect Against Disclosure of National Security Information (AE 013), at issue in today's hearings;
4) The defense did not file a response to its objection to the protective order for sensitive but unclassified information, rendering the issue moot;
5) The Military Judge asked for clarification to an omission in the footnote 1 of proposed order AE 014;
6) The Military Judge asked about the defendant's previous statement that he would like to retain civilian counsel and ascertained that at this time, Hadi had not done so. In the hearing, this was discussed, and the Judge informed Hadi he had the right to an attorney, at no expense to the U.S.;
7) The prosecution requested clarification for an AESF request for CCTV at Ft. Governs, MA, regarding whether it would be

open to the general public. The court ordered that it would only be for family members;
8) In response to a defense request to push back the deadline on law motions, the Military Judge stated he would issue a new scheduling order following the hearings;
9) The Military Judge reviewed Lt. Col. Callan's scheduled removal from the case;
10) The prosecution asked for clarification on whether evidentiary motions included government motions;
11) The Military Judge stated that interpreters were previously sworn in;
12) The Military Judge informed the parties that the responses at the arraignment that were not interpreted on the record were determined omissions that were overcome by today's hearing's discussion of Hadi's right to civilian counsel;
13) The Military Judge gave proposed scheduling dates through 2015 and asked the parties to block out their calendars.

The prosecution noted that CCTV locally to the Buckley Hall site was having technical difficulties today, and the Military Judge accepted this and stated that the Commission considers CCTV to rise above the constitutional and due process requirements of the Commission.

The prosecution, represented by Mr. Mikael Clayton, then accepted the burden of proof concerning AE 013. He argued that, generally, the Military Commissions Act, as well as U.S. criminal code and the Classified Information Procedures Act (CIPA), all contain language directing that the bench "shall" issue a protective order and favor a "well-articulated process." He then addressed specific objections raised by the defense.

First, the defense wanted to revise the protective order to prohibit revealing information related to the "enhanced" interrogation of the Accused. Mr. Clayton stated that this would ignore the classified information concerning conventional interrogation techniques; moreover, enhanced interrogation techniques were not applied in this case, rendering the limitation meaningless.

Second, the defense wanted to add that unauthorized disclosure would exist, in addition to the situations listed in the proposed order, "where the very existence of the information is classified." The prosecution had no objection to this addition. The Military Judge clarified that the sentence would need to be re-written to clarify whether the language referred to unauthorized or authorized disclosures, to make certain that the language referred to unauthorized disclosures. He proposed changing the sentence from "XXX constitutes disclosing that information," to "XXX constitutes unauthorized disclosure of that information." The prosecution agreed.

Third, the defense proposed deleting part of the proposed order that refereed to the Original Classification Authority (OCA) as the deciding arbiter on need-to-know status. The prosecution cited to *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011), which held that having clearance does not equate to having need-to-know access. The Military Judge asked, if not the OCA to make this determination, then who? The prosecution further cited *CIA v. Simms*, 471 U.S. 159 (1985) to argue that the designee (OCA) has a clearer picture of what may be shown to a need-to-know designate than the parties or the bench, in support of having this executive branch arbiter.

Fourth, the defense objected to the classification of observation and experiences of the Accused. The prosecution interpreted this to mean the ability to control the Accused's observations when communicated to outside persons. It differentiated this particular situation from that of *United States v. Pappas*, cited by the defense as support for its argument, because Pappas's disclosure was related to antecedent classified information not pertinent to his trial. The prosecution further argued that CIPA and the types of classification it refers to are only related to classified information produced and used in a

trial setting. There are other bodies of law that govern other types of disclosure, such as disclosure of prior classified facts. The prosecution concluded by observing that these types of omnibus protective orders at issue, in this case, are routine under CIPA, and military commissions (citing to *Mohammed* and *Nashiri* protective orders).

The Military Judge asked Mr. Clayton if he was asserting a distinction between *Pappas* and Hadi because Hadi was currently in custody. The prosecution answered in the affirmative, reiterating that custody, in this case, is one of the other types of protection against disclosure of information that it was talking about regarding classified information not meant to be covered by the protective order.

Major Robert Stirk argued on behalf of the defense. He started by noting that the prosecution and defense seemed to be much closer to agreement than they had been previously. His primary prerogative was to narrow the scope of the protective order. He responded to the prosecution's points in reverse order:

First, he stated that the defense agreed with the prosecution's interpretation of classifying observations of the accused. He understood this to mean that his observations would only be treated as classified concerning the proceedings, based on the defendant's custodial situation.

Second, he clarified that the issue about the OCA was that in the past, the OCA process had been time consuming and has caused undue delay in the defense team's ability to discuss the evidence of the case with its client. It would be burdensome to have to cull through thousands of classified discovery pages to find five relevant pages and then have to return to the OCA to approve sharing the pages with the defendant. The Military Judge stated that he would not be the arbiter, as he wholeheartedly agreed with the prosecution that the OCA was more competent to make these determinations. Therefore, the defense stated that it only wanted to ensure that a Defense Security Officer (DSO) would be appointed in a timely manner. The Military Judge stated that according to the proposed order, the appointment of a DSO was at the request of the defense counsel. Hence, the decision to appoint was already in defense counsel's hands. The Military Judge reiterated that he would be on notice of the issue that counsel and accused might get different need-to-know statuses, and that this could potentially pose an issue that would require future litigation and resolution.

Third, Major Stirk agreed with the new revision to the sentence stating that "XXX [constitutes] unauthorized disclosure of that information." Finally, he agreed that the word "enhanced" need not be in the protective order as the prosecution clarified that there was no enhanced interrogation performed on the defendant.

Finally, the Military Judge read into the record the draft of the new scheduling order, which proposed dates for the next two pre-trial law motion submissions, oral arguments, and evidentiary motions. The Military Judge did not allow questions on the scheduling order.

The Military Judge then placed the Commission in recess until November 17, 2014.

ERIC CARPENTER

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United States v. al-Nashiri
Article 949d Session, November 5-6, 2014

Al-Rahim al-Nashiri is accused of being the mastermind of the bombing of the U.S.S. Cole in 2000 that killed seventeen American service members as well as the attempted attack on the U.S.S. The Sullivans and the completed attack on the Limburg oil tanker. This motion's hearing lasted a day and a half. On November 5, 2014, the Commission took up AE 181G, AE 205BB, AE 284 and 284L, AE 286B, AE 314 and 314C, AE 315 and 315B, AE 320, and AE 321A. On November 6, 2014, the Commission took up AE 277 and AE 319.

The motions fell into three categories: attempts to reargue earlier motions, substantive motions, and attempts to shape upcoming motions. While everyone—family members, prosecutors, defense counsel, and the military judge—expressed concern about how long it took to get this case to trial, this session did not seem to move the case forward very much.

Category 1: Rearguing Earlier Motions

This first category relates to the change in military judges. In early July 2014, COL Pohl excused himself from the case and detailed COL Spath as his replacement (AE 302). When he left, COL Pohl still had not ruled on several motions that were argued before him. The defense filed a motion (AE 305) to reargue all of those pending motions before COL Spath. COL Spath decided that he would rule on the pending motions after reviewing the pleadings, the evidence previously submitted, and the oral arguments. He said that he would not allow a re-argument unless he had questions or needed clarification after conducting those reviews (AE 305D).

The defense filed a few motions to reargue, and the legal test that emerged resembled the basic tests for reconsideration of a previous ruling (remember, COL Pohl had not issued rulings on these motions). Judge Spath stated that he would allow reargument if either new facts arose or the law changed between the time of the original motions hearing but before he issued a ruling on those motions. During the current proceedings, the parties would often stray into the merits of the underlying issue (and so, essentially, reargue it). However, the narrow issue was whether the military judge would allow the defense to reargue the underlying issue.

A.E. 181G

In November 2013, the defense filed a motion to dismiss the capital referral related to any charges where the accused would not be granted access to classified evidence (AE 181). Since the original argument, the government had attempted to give the defense more access to classified evidence by using a "DISPLAY ONLY TO THE ACCUSED" marker. The defense argued that this was a new fact that would require a new motion hearing, while also arguing that this solution still did not solve the underlying problem and expressing concerns that the marker was not legal and so the government might later seek sanction against them for mishandling that material.

The military judge told the defense that it was a stretch to think the government would tell them to rely on this marker (see AE 281 and associated pleadings) and then prosecute them or remove them from the case because they did. The military judge also asked the defense how these actions by the government could be construed as a new fact related to that earlier motion. Here, the government was just trying to improve the accused's access to classified material. The military judge commented that this seems to fit the adage, "No good deed goes unpunished." The colloquy indicates that the military judge will likely deny the defense request to reopen the earlier motion.

AE 205BB

In January 2014, the defense filed a motion to abate the proceeding until the accused received adequate medical care (AE 205). There, the defense argued that the accused suffers from PTSD and depression because the C.I.A. had tortured him. The basic legal test was whether the government had shown deliberate indifference to the accused's medical needs. That motion now has a long tail of pleadings associated with it (the military judge's ruling on this motion to reargue will likely be EE). In AE 205BB, the defense sought to reargue the underlying issue and to have a new evidentiary hearing. The defense based this request on a new fact (the President's recent statement that "[w]e tortured some folks") and recent case (*Hatim v. Obama*, 2014 WL 3765701 (D.C. Cir. 2014)).

As for the new fact, the military judge asked the defense how he was supposed to use the President's statement, and the defense response was that the President had access to all of the available information and he came to a conclusion that "some folks," to include the accused, had been tortured. The defense continued that the doctors at GTMO have access to similar information (or should have access to it), should recognize that the accused had been tortured, and so should provide him appropriate medical care for the medical issues related to that torture. The government argued that the President's statement was not a new fact and that the military judge had a complete factual record from which to make a ruling.

As for the new law, the issue arose because the government mentioned Hatim in passing during an earlier hearing. In the defense pleading, the defense stated that Hatim did not apply to the current case and wanted oral argument about that in front of the military judge; however, at the hearing, the defense argued that the *Hatim* was potentially persuasive authority—and so should be able to argue that before the military judge. The court in *Hatim* analyzed other decisions related to prison conditions at GTMO using a similar, deferential test, and the military judge indicated that he thought this case might be useful when solving the current problem.

In addition, in the earlier proceedings, COL Pohl limited the testimony of two medical witnesses. The defense also raised that issue, essentially asking for reconsideration of COL Pohl's earlier rulings. The military judge questioned the defense on this, asking them whether the information that COL Pohl kept out would

be useful in determining the ultimate issue of deliberate indifference.

The military judge also commented that it could be possible that the government had shown deliberate indifference to the accused's medical issues in the past, but no longer was. In that case, he wondered aloud what might be the appropriate remedy. That comment suggests that he needs clarification on the underlying issue and so might grant the motion to reargue and might seek more evidence.

Category 2: Substantive Motions

AE 284 and 284L

In June 2014, the defense filed a motion (AE 284) to allow the accused to Skype with his elderly parents. The defense initially argued that this communication was needed to help treat the accused's PTSD. The legal test was whether the government had shown deliberate indifference to this medical need. In earlier hearings, medical witnesses testified that the communication would be helpful for treating the accused's PTSD, but no one testified that the communication was necessary.

This original motion generated a significant amount of pleadings. In the interim period, the Department of Defense issued a directive on the treatment of detainees (DoDD 2310.01E), which included a provision that stated, where practicable, detainees should be allowed to exchange letters or have phone calls or teleconferences with immediate family members. The commander at GTMO then determined that it would not be practicable to allow high-value detainees (HVDs), like the accused, to have phone calls or to Skype. This decision generated the defense's latest pleading, AE 284L.

At the start of this hearing, the defense made a surprising announcement: the accused had just told them that the day before, someone in the detention facility told the accused that he would be allowed to make a time-delayed phone call to his parents. This announcement caught everyone by surprise, including the government. (The government was ready to argue that making this phone call was impracticable.)

The military judge continued with the proceeding and indicated that the defense would not prevail on the first theory—that the government showed deliberate indifference to the accused's medical needs by denying him the chance to Skype. He indicated that this was because the medical witnesses did not testify that the communication was necessary for treatment—they only testified that it would be helpful.

The military judge did say that he would hold an evidentiary hearing on the second, new theory: that the commander's decision that it was impracticable for HVDs to make these communications was "unreasonable" (the military judge used that language, rather than a language like "arbitrary or capricious"). The military judge told the government that they would have to produce someone with knowledge about the decision as well as the person who told the accused that he would be allowed to make a phone call.

The next day, the government told the military judge that the accused would be allowed to make a phone call, probably by the end of the year, once some technical issues were worked out. Both parties agreed that the motion could be held in abeyance.

The whole thing was pretty bizarre. The day before the very hearing where the prosecution was going to oppose the defense request, someone from the government told the accused that he would get to communicate with his parents. Moreover, that was not a mistake—he was actually going to be able to communicate with his parents. At the very least, it appeared that the prosecution team and the camp commander were not communicating.

AE286B

The next substantive motion was a defense motion to withdraw the capital instruction because there would be no military necessity in executing the accused (AE 286B). The defense argument was that the four common-law preconditions for military commissions, described by Winthrop and discussed by the Supreme Court in Hamdan I, stand for the proposition that military commissions can only be used by an army that is in the field, that captures an unlawful enemy belligerent, and that then delivers swift punishment.

Here, the defense argued, the time delay from capture to trial was so long that death could not be a necessary punishment. The government and the military judge pointed out that Winthrop's four conditions only apply when there is no other statutory guidance, and for these commissions, we have statutory guidance. The military judge also commented that those four conditions apply to the legitimacy of commissions at the macro level, not to the individual Commission's decision at the micro-level. He also noted that everything the defense just argued would be highly relevant during the extenuation and mitigation case.

While the military judge forecast that he would rule against this motion, he did make a couple of interesting side comments. He mentioned that there might be other motions where taking death off the table might make sense, like motions related to the accused's conditions of confinement or pretrial punishment (where torture would fall into one or the other). The judge stopped there, but the primary argument is that any remedy awarded for pretrial punishment or unusually harsh confinement conditions must be meaningful. The usual remedy for these issues is sentencing credit, but for life and death sentences, sentencing credit has no meaning. Therefore, another remedy (like converting a life sentence to a term of years or a death sentence to a life sentence) might be required.

AE 277

The defense filed a request for an MRI in June 2014 (AE 277). The defense theory is that the accused suffered brain damage as a result of the torture he received by the C.I.A., and the de-

fense wants an MRI to see if that imaging will reveal brain damage. The defense also advanced a theory in its pleadings that the MRI was needed for medical care, but did not focus on that during the oral argument (the government focused exclusively on that theory).

The defense styled the request under the production rules found in R.M.C. 703. This rule requires production at trial of evidence that is necessary, relevant, and noncumulative. However, the request probably should have been made as a request for expert assistance, where the expert would create this evidence for the defense and which the defense may or may not use at trial or even have disclose to the government (see R.M.C. 701(g)(4)).

The government argued that the defense had not met its burden to show facts that satisfied the necessity requirement, using a hybrid of production rules and expert assistant rules. The military judge responded that he had access to facts within ex parte briefs and suggested that these facts would satisfy the defense's burden.

The military judge made it pretty clear that he would grant this relief, noting that defense teams in capital cases have a duty to investigate plausible leads and citing instances where appellate courts had found ineffective assistance of counsel when the defense counsel did not pursue similar issues. The military judge pushed the government on those points, stating that he wanted to make sure that the Commission did this right the first time, but the government would not concede the point.

AE 320

The last substantive motion was a defense request to halt the process of authenticating the transcripts of previous hearings (AE 320). Administrators in the Office of the Convening Authority sent notices to the defense that it was going to authenticate the transcripts for the period that COL Pohl was the presiding judge. The administrators said that they were going to start this process this October.

The defense told the military judge that they could not stop what they were doing to focus on these transcripts, particularly with the current appellate activity in the case. The government told the military judge that they had been continuously inviting the defense to authenticate the transcripts over the last few years but that the defense had not taken them up on those invitations. The military judge asked the government if the government ever gave the defense official, formal notice that they needed to authenticate any of those transcripts, and the government said that it had not. The military judge then asked if there was any reason that these transcripts needed to be done now, noting that COL Pohl was going to be available for the foreseeable future.

The military judge then transitioned into a general discussion about the bad relationship between the two parties. He said that this was an issue that he should not have to get involved in, and he encouraged both parties to work in good faith to resolve problems like these and cited examples where both sides could have taken small steps to solve small problems. He indicated that he would not issue an order on this motion and that he expected the parties to work this out.

Category 3: Shaping Upcoming Motions

AE 314, 314C, 315, 315C

In AE 314, the defense moved to suppress the accused's statements to federal law enforcement agents and to agents at his Combatant Status Review Tribunal (CSRT). The defense theory was that the government did not present the accused to a magistrate in a reasonable period of time after he was arrested or detained on a federal crime. In AE 315, the defense moved to dismiss the accused's statements because he was not given Miranda warnings. In AE

314C/315B, the defense requested the production of certain witnesses for the evidentiary hearing. That issue—production—was argued at this hearing. After the military judge rules on this, the parties will still likely argue on the underlying issues at a later hearing.

The defense argued that it needed to present evidence through these witnesses because the motions were mixed questions of law and fact. Toward the presentment issue, the defense theory appeared to be that there were some periods when the accused was being detained for a federal crime, like those periods when he gave those statements. According to the defense, if he were being held for federal law enforcement purposes, he would be entitled to the presentment. Therefore, the defense needed to call witnesses to prove why the federal government had detained the accused.

The government argued that this was purely a legal issue. According to the government, presentment only applies when either a person is detained on a federal crime (and here the accused was only detained on military authority from the time he was captured until he was charged) or a person is charged with a federal crime (and here the accused was not charged until 2011, when he then received the benefit of the presentment provisions found in the Military Commissions Act). According to the government, no facts are necessary to solve this problem, so no witnesses are required.

The military judge asked the defense what the witnesses could say that would help him solve the problem. The defense said that they would help the military judge decide whether the federal government tried to circumvent the rights that would typically attach if the accused had been tried in an Article III court.

On the presentment issue, the government's purpose does appear relevant. If the accused was detained for a federal crime at some point before 2011 (and in particular, at the time the statements were taken), then presentment rights might attach. Furthermore, if the federal law enforcement agents should have been driving the accused to a magistrate rather than interrogating him, those statements might be excludable. (The statements he gave to the CSRT would be a further stretch). If, however, the accused was held only for military purposes, then the presentment would not attach. Why he was being held seems to be a factual issue.

The arguments were framed the same way with the Miranda issue, with the military judge asking the defense whether Miranda applied to interrogations of unlawful enemy belligerents and the defense replying that Miranda did, depending on the government's purpose when asking those questions. Again, the purpose would be a factual issue. For both issues, if the military judge decides that the government's purpose for detention or questioning does not matter for presentment or Miranda, then he can solve this problem without additional evidence.

In the original pleadings, the defense did not present the voluntariness of the statements as a discrete issue—the issues were whether presentment rights and Miranda apply. Subsequent pleadings related to AE 314 and 315 did reference voluntariness, but that issue was not brought up in this hearing, except for the military judge making comments that some of what the defense was arguing could be argued in a future motion to contest the voluntariness of the statements under 10 U.S.C. § 948r.

AE 319

The government provided notice that it intends to introduce 72 hearsay statements (AE 166, 166A). The defense then filed a motion to exclude those statements (AE 319). The military judge limited the scope of this hearing to the mechanics of that upcoming motions hearing—one that both parties acknowledged would be four to six weeks long. At this future hearing, the parties will litigate whether the government

has satisfied the 10 U.S.C. § 949a(3)(D) hearsay requirements for each of these 72 statements. In many ways, this will be a rehearsal for the real trial.

According to the defense counsel, these hearsay statements are central to the government's case. In general, the statements were taken by F.B.I. agents from Yemeni citizens in 2000 and 2001.

The government provided notice that it planned to call seven witnesses. The defense requested the production of over forty witnesses, including the seven that the government intended to call. The government denied the defense request for all but those seven. The military judge asked the parties to go back, relook the defense list, and find reasonable places to agree. He then told the defense to file a motion to compel the production of witnesses if the defense needed to. The military judge indicated that he would like to take that issue up at one of the next hearings, with the expectation that the evidentiary hearing would occur in February.

The defense told the military judge that it still needed to conduct a proper investigation before this hearing could occur. The defense theory is that several of the hearsay declarants were held in inhumane conditions while in Yemeni captivity and may have been tortured, and thus their statements are unreliable, and the declarants' will had been overborne.

The defense stated that it still needed discovery from the government related to the circumstances under which the statements were taken. The defense said that it needed the government to provide any evidence that the Yemeni government or government officials were complicit in the Cole bombing; evidence about the treatment of the hearsay declarants while the declarants were in Yemeni custody; and any evidence that the Yemeni government had interfered with the American investigation.

When it tried to interview two of the government's witnesses, the defense stated that members of the government would direct the witnesses not to answer specific defense questions. The defense asserted that the discovery that they had received, including the actual statements, was still heavily redacted.

The military judge stated that the members of the prosecution team were officials of the court, and he expected that they would comply with their discovery obligations. He then told the defense to file any necessary motions to compel discovery for this motion or to produce witnesses. Based on the current relationship between these parties, that will likely be the next step, and those motions will likely be litigated in the January hearing, making a February hearing on the substance unlikely.

A.E. 321A

In AE 321, the government filed its proposed member questionnaire. In A.E. 321A, the defense filed a request for an extension to file its response. The military judge noted that the deadline for the questionnaire was based on a trial order that was now unrealistic and indicated that he would issue a new order with new deadlines and that the deadlines would be after the evidentiary landscape was clear. He also encouraged the parties to arrive at a 90% solution before approaching him to resolve any conflicts in the questionnaire.

Malcolm Savage

United States v. al-Hadi al-Iraqi

25-29 January 2015

At the time of this report, Malcolm Savage was a student at the University of Richmond School of Law. He is currently an associate with Shapiro & Brown in Norfolk, VA.

Part One: Through AE027–Motion to Dismiss Co-Conspirator Liability

Hearings on AE027 Motion to Dismiss Co-Conspirator Liability; and AE026 Defense Motion to Dismiss For Lack of Personal Jurisdiction Because the Military Commissions Act Violates the Due Process Clause. *United States v. al Hadi al-Iraqi*.

Monday, January 26, 2015

The accused arrived in the Court Room at 0938. The hearings in the case of U.S. v. Abd al-Hadi al-Iraqi were brought to order at 0954 hours.

Judge Waits began the day's hearings with a recap of the three RMC 802 meetings held since the last session:

November 19, 2014:

Discussed scheduling of litigation milestones to help keep the July *in personam* jurisdiction hearings a reality; and the parties were ordered (at that time) to provide a joint litigation schedule by December 12, 2014.

The joint schedule was submitted, and from the Judge's understanding (with the concurrence of Counsel), this would provide for a two-week hearing, beginning in the third week of July. The first week of the scheduled hearings will deal with questions on motions related to *in personam* jurisdiction and the preadmission of evidence related to this question. The second week will be devoted to hearings on the actual issue of *in personam* jurisdiction.

January 25, 2015:

Held in a conference room at Andrews Air Force Base while awaiting the departure of our delayed flight to GTMO. Because the powers that be request your arrival at 0600 hours and the flight, in our case delayed to 1230, is "closed" at 0800, there was ample time yester-

day for the Defense and Prosecution to meet with the Judge before boarding.

At this meeting Judge Waits informed Counsel of an Equal Opportunity suit that had been filed against him by "one or more" female guards at JTF GTMO, because of his interim order to prevent female guards from touching the accused. This issue has been fully briefed, and is to be discussed at the hearing scheduled for tomorrow, Wednesday, January 26.

Judge Waits also informed Counsel that he received a request from the Government for an RMC 505(h) hearing to discuss the scope of classified material that had been released by the Government to the Commission, for review and subsequent release to the Defense.

Furthermore, Judge Waits informed Counsel that if there were any other motions to be filed regarding *in personam* jurisdiction that they needed to be filed by the end of this week.

Additionally, the Judge recapped that he and Counsel had discussed the order of events for the hearing, including the scheduling of another RMC802 conference for this week (held Monday morning before this hearing was called to order).

The Judge ascertained whether there were any Defense objections (there were) to specific issues regarding government witnesses for the "female guard issue" and the last thing discussed was a Defense objection to an improperly filed response, AE021S.

January 26, 2015:

This RMC 802 conference was conducted at 0845, and concerned what classified information might be contained in discussion of the "female guard issue." Resultantly, an RMC 505 (h) conference, was scheduled for the afternoon of the 26th to discuss the "female guard issue."

Having concluded the summary of prior RMC 802 conferences, Judge Waits put additional information on the record regarding the extent of his knowledge of the Equal Opportunity complaint ("female guard issue" or "E.O. complaint"). The Judge then opened the floor for voir dire related to the E.O. complaint.

Lt. Col. Jasper, for the Defense, asked Judge Waits the provenance of the information he received regarding the E.O. complaint and, the Judge explained that he was informed by the Navy-Marine Corps Trial Judiciary ("NMTJ"), his superior, who was in turn informed by the Chief Judge of the Army.

Regarding the necessity of being informed, the call of Lt. Col. Jasper's next question, Judge Waits believed that he was informed as a matter of professional courtesy. Furthermore, he also assumed that NMTJ was aware that he was litigating motions regarding female physical contact this week, in response to Lt. Col. Jasper's next question.

> [i]t is the international law of war that governs the charges in a United States Military Commission, not only the American common law.

The next question proffered by the Defense asked whether an E.O. complaint had ever been filed against the Judge. Answer: No. The follow up asked if any other military judge had ever received an E.O. complaint regarding an order. Answer: No. It was established that this was a unique situation and that it would, in the Judge's opinion, not affect his decision-making.

The Defense ceded the floor to the Prosecution while requesting to reserve the right to ask additional voir dire pending discovery into this issue, which request was granted.

For the Prosecution, Mr. Mikael Clayton raised only one issue by asking of the Court's

knowledge of RMC 902, regarding recusal. The Judge acknowledged his comprehension and proceeded to analyze the situation under RMC 902 in light of the facts, and included his intentions regarding recusal. The Judge stated he had no conflict, and citing RMC 902(a), stated that because the E.O. complaint was not an enumerated ground for recusal, and because he did not believe his impartiality could be reasonably questioned, he would decline to recuse himself. In doing so, he cited the fact that the interim order was a lawful expression of his power and was narrowly tailored to ascertain the progress of the trial. Because of this, and the Judge's skepticism regarding any cognizable avenue for an E.O. complaint to challenge the Judge's ruling in an order such as this, with Counsel declining to request recusal, the hearings proceeded to the order of the day.

The first motion to be argued was AE027, Motion to Dismiss Co-Conspirator Liability. Judge Waits informs the Court that this motion is at least in the style of an *in personam* jurisdiction challenge, but, as Maj. Stirk for the Defense confirms, it is also something of a companion motion to AE019 regarding the striking of co-conspirator and common plan language from the charge sheet.

Maj. Stirk begins by arguing that it can be reasonably gleaned from the structure of MCA 2009 § 950q that it was intended by Congress to track the analogous language regarding co-conspirator liability from Federal law. And since the Prosecution concedes that this was the legislative intent of Congress, a problem arises in construing the statute in this fashion. The Military Commissions at Guantanamo Bay are constituted by the MCA 2009, purely as a law of war tribunal. That being said, the charge is impermissible because co-conspirator liability in the broad American style is not a recognized war crime in customary international law. Additionally, Maj. Stirk, suggests that the Government has conceded in other cases that this broad American style, a la *Pinkerton* style liability, and inchoate liability, is not accepted in international law.

Maj. Stirk states that he concedes that a form of co-conspirator liability, that of Joint Criminal Enterprise ("JCE") is customary in international law, but that these two charges are not exactly analogous, and thus charging co-conspirator liability on the charge sheet, which will be available to the Panel (i.e., Jury) from the beginning and throughout the trial will unfairly burden his client.

Maj. Stirk responds to a question by the Military Judge suggesting that the Prosecution has not charged inchoate liability, so why does Maj. Stirk insist on arguing about it? Maj. Stirk replies that the overt acts alleged have not been proven by evidence at this point and that as a result of allowing the phrase "co-conspirator" in the charge sheet without more would suggest to the Panel before evidence is introduced, that mere agreement is a chargeable crime in the international law of war, which it is not.

By suggesting that American style co-conspirator liability, known to Americans through T.V. and movies, provoking thoughts of mob movies and the RICO Act, the charge sheet becomes unduly prejudicial. In actuality, the style of co-conspirator liability prosecutable in a Military Commission is much more technical and akin to JCE.

Maj. Stirk's angst is directed at the wording of the charge sheet, which he believes states unequivocally that the accused is liable for the alleged acts in charges II-IV, and that this wording in the charge sheet would serve as an impermissible direction on the law governing the facts of the case.

Maj. Stirk requests that the overt acts stated in the charge sheet, because evidence of their existence has not been admitted to prove them, should be stricken from the charge sheet, or in the alternative, instruction on what JCE liability entails should be provided along with the charge sheet, because Maj. Stirk believes that this is the correct form of co-conspirator liability, which the Judge will probably in the future instruct the Panel on. Maj Stirk states:

> So what they are trying to do—what we believe they are trying to do is take a federal court definition of conspiracy and co-conspirator liability, but use that in a forum that allows hearsay evidence and other types of evidence that would never get into that federal forum.

Maj. Stirk cedes the floor to the Prosecution for rebuttal by Mr. Clayton.

Mr. Clayton begins by remarking on how different the substance of the oral argument is from what was briefed to be argued. Mr. Clayton states that he believed the motion to regard the actual existence of co-conspirator liability as a chargeable offense in a Military Commission. What Mr. Clayton heard was a discussion of AE019 but, despite his confusion, he is willing to argue in response to the Defense and that he is prepared.

Mr. Clayton first denies that the Government has ever taken the position that *Pinkerton* liability and inchoate liability do not apply in military commissions. He also notes Maj. Stirk's failure to cite any such position. Additionally, Mr. Clayton suggests that Maj. Stirk is conflating the charges in II-IV with charge V, which is charged as inchoate co-conspiracy. As a result, the argument of the motion is misapplied.

Mr. Clayton states that it is the Government's position that inchoate conspiracy, the simple agreement among co-conspirators is a completed crime and that the vicarious liability issue raised by the Defense's motion in AE027, is distinct from any discussion on the principle of inchoate liability.

Secondly, Mr. Clayton states that the Government disagrees with Maj. Stirk's assertion that the charge sheet is directive on the law, and impermissible. He notes that in other charge sheets, the level of detail alleged is congruent with that raised in the Accused's charge sheet. Mr. Clayton also notes that during discussions on AE019 the Government conceded the complexity of the Military Commission system, that the present case is sprawling in scope and na-

ture, and recognized the likely need of continuous instruction from the Judge to the Panel on how to consider allegations, as well as the possible necessity of a flyer informing the Panel with similar information.

Interestingly, Mr. Clayton also notes that he believes that the Defense has indicated through its conduct and argument that this case will proceed to trial.

Mr. Clayton then moves on to respond directly to the arguments made in the Defense motion regarding the existence of the crime of "co-conspiracy" in international law. Mr. Clayton cites the Government's brief and the corresponding international tribunal holdings in support of the viability of a charge of vicarious liability (i.e., co-conspirator). Mr. Clayton directly equates co-conspirator liability with JCE.

The Military Judge wonders aloud why co-conspirator liability/JCE exists if everything that Mr. Clayton had been describing beforehand in support of the Government's position could be classified under Command liability? Why would co-conspirator liability be necessary to the law of war when Command liability already exists? Mr. Clayton replies that it is an alternative theory of liability, borne out of the necessity of prosecuting unlawful belligerents whose command structure might not be self-evident.

Mr. Clayton briefly responds to the Defense argument that the language of 950q tracks Federal law, and as such, once this concept makes the jump from Federal Court to a military commission, it is limited to interpretation at the direction of JCE. Mr. Clayton argues that this argument should be rejected as the Court of Military Appeals has suggested that such a jump when it ends up being charged in a Court Martial, is not subject to reinterpretation, and therefore to Mr. Clayton it would be anomalous to strip vicarious (*Pinkerton*) liability from the charge under the MCA.

Mr. Clayton begins to wrap up and cites three cases, *Budd* (6th Cir.), *Macey* (7th Cir.) and *Davis* (5th Cir.) which directly state that even if the "agreement crime" is not to be pursued in Court, it is not improper to classify the charges in this manner. Mr. Clayton then cedes the floor.

The Judge inquires about military commission discussion of the presence of *Pinkerton* liability and is informed by Mr. Clayton of the *al Bahlul* case in the D.C. Circuit, which he believes supports the assertion that choate co-conspiracy as charged in the Military Commissions is comparable to JCE. He does not mention any discussion of inchoate liability and appears to rely on the D.C. Circuit's decision, in that case, to speak for itself about the applicability of inchoate liability. The Judge has no further questions.

Maj. Stirk rises and insists that the opposite of Mr. Clayton's inference from discussions in *al Bahlul* is true. He asserts that the rehearing en banc of *al Bahlul* may produce an opinion that rejects the concept of inchoate liability as chargeable in military commissions. He adds that because of the limbo state that *al Bahlul* has created for the charge of co-conspiracy, it is not proper to put the charge before the Panel in its current state, and at least not until Judge Waits himself has determined its delineation.

Finally, prompted by Judge Waits, Maj. Stirk readdresses the Defense's initial contention that 950q cannot be interpreted in light of Federal law, and must be interpreted in light of the international law of war. Maj. Stirk reiterates that the validity of this argument is grounded simply and authoritatively through Congress enacting through the MCA, international law of war tribunal. As such, it is the international law of war that governs the charges in a United States Military Commission, not only the American common law.

Part Two: Through AE026-Motion to Dismiss For Lack of Personal Jurisdiction Because the Military Commissions Act Violates the Due Process Clause

Hearings on AE027 Motion to Dismiss Co-Conspirator Liability; and AE026 Defense Motion to Dismiss For Lack of Personal Jurisdiction Because the Military Commissions Act Violates the Due Process Clause; *United States of America v. Abd al Hadi al-Iraqi*.

Monday, January 26, 2015

Military Judge Waits ever-present next moves on to hear oral argument on Defense motion AE026, *Defense Motion to Dismiss For Lack of Personal Jurisdiction Because the Military Commissions Act Violates the Due Process Clause*. Judge Waits informs the Commission that "the relief sought specifically focuses the commission on the equal protection component of the due process clause."

Maj. Stirk approaches the lectern and states his name and the fact that the Defense bears the burden of proving this motion by a preponderance of the evidence. Maj. Stirk begins his argument asserting that the M.C.A. 2009 creates an impermissible segregated criminal justice system for noncitizens. What is more, this type of system is without precedent in the history of the United States.

The ever-present *Quirin* is invoked for its record, which states that both aliens and citizens were subject to trial by Military Commission. This consistently cited precedent is supplemented by *Wong Wing*, which speaks of a system which the Defense contends stands for an inverse proposition to that offered in *Quirin*, that alienage is a proper basis for establishing a streamlined criminal justice system. However, this system (*Wong Wing*) was invalidated by the Supreme Court, which held that the equal protection provision of the 5th amendment applied to the proceedings in *Wong Wing* in much the same way as the 5th amendment should apply to the United States Military Commissions in regards to its alienage provisions, Maj. Stirk contends.

Maj. Stirk opines that since *Wong Wing* held that any person brought into the jurisdiction of the United States is afforded the protections of the 5th amendment because the Military Commissions are an American law of war tribunal, al Iraqi should be afforded the protections of the 5th amendment, which would entitle him to the use of a strict scrutiny test to determine the constitutionality of the M.C.A. Maj. Stirk asserts that he believes that despite the Commission being held in Cuba, the 5th amendment would nevertheless apply because it is a U.S. jurisdiction.

Judge Waits counters Maj. Stirk with the government's argument that M.C.A. 2009 provides protection that is satisfactory under the 5th amendment. Maj. Stirk says that the government's contention is incorrect. He says, essentially, this separate but equal system of criminal justice is anything but equal when one looks at the inadequacies of the hearsay standard and the lack of Miranda rights, among other things. And all this even though this is a tribunal set up to prosecute war crimes. War, according to Maj. Stirk, is not an adequate justification for the scale of departure from the admittedly wide scope of Congressional power in this area to be able to account for the substantive and procedural inadequacies that exist in the M.C.A.

The scope of Congressional power in this area must comport with the 5th amendment. Equal protection under the laws in a criminal prosecution is not a political privilege, argues Maj. Stirk and any departure therefrom based on alienage should be evaluated with the strictest scrutiny. According to Major Stirk, the system failed to provide adequate protection and was only passed by Congress because it limited the jurisdiction of this Constitutionally deficient legislation to noncitizens. However, such a ca-

veat is violative of the 5th amendment and, therefore, unconstitutional.

Maj. Stirk reiterated the precedential value of *Wong Wing* and encouraged the Commission to treat its holding as controlling for purposes of the M.C.A. 2009's alienage restrictions.

Having ceded the floor to the Prosecution, Mr. Clayton rises and proceeds to point out two flaws in Maj. Stirk's argument: (1) the flawed assertion that the United States has never before delineated the scope of criminal prosecution based on a distinction between alien enemy belligerents and citizens (disregarding the Defense's "system" argument); and (2) the flawed assertion that the strict scrutiny test controls this Congressional action, rather than the rational basis test.

Mr. Clayton then begins his argument by citing to *Harisiades v. Shaughnessy*, 342 U.S. 580, which holds that "[w]ar is the most usual occasion to treat aliens differently." Additionally, the U.S.C.M.C.R. in *Hamdan*, the Supreme Court in *Eisentrager*, and the Second Continental Congress are cited by Mr. Clayton to stand for the proposition that alienage is a proper basis for legislative distinction during wartime.

Further, Mr. Clayton thinks the need to gather evidence, ferret out individuals, and capture them is a rational basis upon which to base legislation that discriminates against noncitizens, especially in times of war. Furthermore, because of the foregoing, it is, in fact, not anomalous to legislate based on alienage, as the Defense's "overstatement" would have the court believe. Mr. Clayton then cites *Matthews v. Diaz* for the proposition that the foreign relations and war powers are entrusted exclusively to the political branches. As such, they are entitled to great deference and are largely immune from judicial inquiry or interference.

As a result, the rational basis test, as it has been incorporated by reference to the C.M.C.R case of *Hamdan* throughout the military commission system (in *Nashiri* and *K.S.M. et al.*), to decide this type of issue establishes rational basis review as the proper standard. The two prongs of the rational basis test have been satisfied. That is, (1) the government has established a legitimate national security interest in legislation; and (2) that the interest identified in the first prong would be properly achieved by the current legislation. Mr. Clayton then directs the court's attention to Judge Henderson's concurrence in *al Bahlul* 767 F.3d at 33, which contains several cases addressing the equal protection argument and the rational basis test. Altogether, the cases that Mr. Clayton cites, in his opinion, serve as binding precedent in this present Commission to suggest the application of the rational basis test over that of strict scrutiny.

Mr. Clayton then cedes to the Defense and Maj. Stirk.

Maj. Stirk only speaks briefly and begins by pointing out that the Second Continental Congress precedent is at this point an anachronism in that spying was a crime chargeable only against aliens. A domestic spy would necessarily be charged with Treason. This is a distinction, relates Maj. Stirk, drawn on alienage, but within the same criminal justice system, not created and charged in an entirely separate alienage based system.

Furthermore, in terms of the prosecution's cited precedent, *Eisentrager*, according to Maj. Stirk, is inapplicable here because of two things: (1) the decision was in consideration of a habeas plea that merely held that relief in federal court was not available in the U.S. occupied Germany to alien enemies; and (2) "there is nothing about those military tribunals that suggested American citizens who had committed violations of the laws of war couldn't be tried by them."

Maj. Stirk further disputes the prosecution's contention that the rational basis for enacting the M.C.A. 2009 is to provide a forum for this

type of tribunal (i.e., the law of war). In fact, this is not true since the federal court in the Southern District of New York would have served the same purpose. Maj. Stirk contends that the decision to constitute a military tribunal at Guantanamo is not rationally based, but is, in fact, a "hysterical response to trying these al Qaeda super-soldiers in the Southern District of New York and how dangerous that would be."

Finally, Maj. Stirk addresses the precedential value of the C.M.C.R 's review of the *Hamdan* case that Mr. Clayton had cited as binding. He suggests that there is little precedential value to the decision that has been overturned, albeit on other grounds, by the *en banc* panel of the D.C. Circuit. The Military Judge was anxious to hear this type of argument from the Defense, as it seems he too has questions on the precedential value of this case, in its current form.

Maj. Stirk proceeds. He states that the commission cases that Mr. Clayton cited (*al Nashiri* and *K.S.M. et al*.) that have ruled by reference to *Hamdan* have not addressed the issue since the *en banc* D.C. Circuit returned the decision to the three-judge D.C. Circuit panel, because it lacked sufficient briefing on the issue at hand (that being the role of equal protection in due process, and the subsequent use of a rational basis or a strict scrutiny review). Maj. Stirk's point is that there is little precedential value in what would be a binding decision because the D.C. Circuit itself did not find it to be useful on this issue, hence the remand.

The Military Judge questions Maj. Stirk on his characterization of the D.C. Circuit's disposition in this case. Judge Waits says his reading of the decision did not suggest that the *en banc* panel leaned one way or the other. The Military Judge, at this point, remains unsure what to do because of this reading. This relevant portion of the three-Judge panel decision was not overturned; it was merely remanded for further consideration. Is he not bound by the decision of this directly superior court, which still stands, albeit not totally briefed?

Maj. Stirk thinks the disposition of the D.C. Circuit is actually much clearer and believes there is evidence, because of questions that have subsequently been raised, that the due process issue will be reversed. At this point, the Military Judge and the Defense cannot see eye to eye, and Maj. Stirk states that he can do no more than respectfully disagree with the Military Judge's perceived bind.

The judge then relates that this Commission and others are currently awaiting a decision and direction on this issue, but that he feels, at this point, beholden to the, in his opinion, undisturbed precedent directly on point, which happens to be contrary to the wishes of the Defense. Again, Maj. Stirk respectfully disagrees.

The argument in AE026 is concluded.

The judge then decides not to accept one of the prosecution's replies, which were submitted late, in order to preserve adherence to the strict procedural deadlines in the interest of justice. This was an issue contained in the judge's summary of previous RMC802 conferences.

Additionally, the judge overrules a Defense objection to Remote Testimony from AE021R. He will allow a Guard relevant to the Female Guard Contact issue to testify remotely. As a result, it appears that there will be a remote witness testimony, probably closed and classified, in the January 28 hearings. Because this is a collateral issue, not probative of ultimate innocence or guilt, the rules of evidence do not apply to the female guard issue.

Hearing on AE021 Emergency Defense Motion for Appropriate Relief To Cease Physical Contact with Female Guards; *United States of America v. Abd al Hadi al-Iraqi*.

Wednesday, January 28, 2015

The Military Judge arrived in the courtroom at 0907 hours. The session was brought to order at 0913 hours. Judge Waits set the hearing in motion, checking off his first order of business by detailing the schedule for this morning and tomorrow. Wednesday's Commission will be used as an evidentiary hearing to set the stage for oral argument of AE021, Emergency Defense Motion for Appropriate Relief To Cease Physical Contact with Female Guards, on Thursday.

Having laid out the plan, Judge Waits asks Hadi al Iraqi's defense counsel if they intend to introduce any documentary evidence. LtCol. Jasper replies in the affirmative and seeks to move into evidence exhibits marked AE021W (a stipulation of facts relevant to the female guard motion), AE021X (declaration of Mohammad Fadel, learned scholar of Islam, stating that unwanted touching by females is against the Muslim religion, in some denominations), and AE021Y (declaration of Hadi al Iraqi regarding the female guard incident).

The Prosecution has no objections to the first two pieces of evidence but reserves the right to challenge the veracity of the information therein provided by Hadi. Mr. Clayton for the Prosecution also points out that some statements contained in the declaration are outside the scope of the original motion to cease female contact, and are therefore irrelevant. Judge Waits lets it be known that he was curious about the Defense's intention during the argument, and the Defense answers that the scope of the argument has indeed expanded to seek the cessation of all physical contact with female guards, not just in the case of movements to and from the Commission and Attorney meetings.

Having received proper clarification from the Defense, the Military Judge overrules the Government's relevance objection. The Defense then asked and was granted the right to read Hadi al Iraqi's statement into evidence, as well as submit the original copy. The Judge then enters into a colloquy with Hadi concerning the willfulness of his declaration and the consequences of entering a declaration. Hadi answers all the Judge's questions positively in a mix of English and Arabic. His declaration reads:

> I, Hadi al-Iraqi, am submitting this declaration in support of Appellate Exhibit 021, my request for religious accommodation. I declare under the penalty of perjury that the following statements are true and correct to the best of my knowledge: "1, I'm a devout Muslim. My faith is integral to my life. It is more important to me than anything else, including my commission case. Even though I am detained by the United States, I must continue to live according to my faith. It is a violation of my Islamic faith to have physical contact with females to whom I am not married or closely related. Islam is two things, worship and rules. Both come from God, as revealed to the Prophet. While the female contact may seem a small part of the rules, it is an important part of my Islamic faith. I have refused all movements within this prison that required a female guard to come into contact with me. I have never knowingly or willingly allowed a female guard to have physical contact with me during any movement here. The first time I was forcibly extracted from my cell after a legal meeting on October 8, 2014, was the first time I ever noticed a female

> guard who needed to touch me. I have been forcibly extracted three times because of my religious beliefs, once after attending a legal meeting and twice subsequently for medical appointments. All three times, I was forcibly extracted from my cell or because of my Islamic faith and our belief that it is a sin to touch a female to whom I am not married or closely related. For my religious beliefs, I was also disciplined after these three forcible extractions. If female guards must have physical contact with me to bring me to meetings with my attorneys or to Court, my faith requires me to refuse those movements, and I will continue to refuse them. When I say this, I am not resisting their authority. I will go where they wish to take me if they honor my Islamic faith and simply not have female guards touch me during these movements.

Lt. Col. Jasper, having read his client's declaration into evidence, cedes the floor to the Prosecution. Judge Waits asks the Prosecution if they have any documentary evidence they would like to introduce, and Maj. Long replies in the affirmative. Maj. Long seeks to enter exhibits AE021AA (1994 memorandum signed by Martin Dempsey (Chairman Joint Chiefs of Staff) and Leon Panetta (SecDef) *Re*: Elimination of the 1994 Direct Ground Combat Definition Assignment Rule), AE021BB (2013 memorandum for the SecDef from the Chairman of the Joint Chiefs of Staff, Martin Dempsey), and AE021CC (White House Press Release statement from the President regarding the memo in AE021BB).

The Defense has no objections, so these exhibits are moved into evidence.

The Commission then moves on to determine two unresolved Defense objections. The first is an objection to the relevance of admitting a letter from KSM that was attempted to be passed to Hadi, but which he never received, and did not solicit. The second objection is to the declaration of a Government witness who will be testifying under the pseudonym Former Commander because it is cumulative.

The cumulative objection is overruled. So is the relevance objection to the KSM letter because the rules of evidence do not bind a preliminary hearing, and in the opinion of Judge Waits, the letter from KSM tends to be probative of the fact that news of Hadi's Cease Female Contact motion is disrupting the prison.

The Government then proceeded to call four witnesses. The examination of three of the witnesses was completely open, which the Court did not anticipate. The fourth and final witness

was subjected to direct examination in open Court, while the cross and redirect is subject to classification and thus, a closed session.

It became apparent over the several hours of witness testimony that these witnesses were directly involved in the incident of female guard touching and subsequent series of forcible cell extractions that led to this Emergency Motion.

The first witness called was, as it turned out, the female guard who touched Hadi on October 8 and sparked this Emergency Motion. It was established during her ("Escort Guard") examination that despite standing directly in front of Hadi in the doorway of his cell at the beginning of his movement from the cell to the attorneys, Hadi could have mistaken her presence for that of a man, or may not have known that she physically touched him because as the testimony established, she came up from behind him to make contact. It was not until one of his co-detainees objected to the same female guard's touching of him on a joint return trip from attorney meetings that Hadi became aware of her touching any detainee. When the female guard's team attempted to establish physical control over Hadi, he refused to be touched by her, and objected strenuously, but apparently peacefully to her commands.

The second witness, known to the Commission as "Current Commander," testified to the current logistical challenges he faces because of the interim order banning female guards from touching Hadi. He is a very experienced prison camp commander, and he claims that it is extremely difficult for him to complete his mission with the order in place. And, Current Commander claims, if the order were to be extended to all other detainees, his mission would fail. The Defense questions the extremeness of the current hardship. The Defense also asks why the Current Commander cannot "adapt and overcome" when Current Commander states that the exigencies experienced in GTMO are much different than he was prepared for and that he did not have adequate notice to "train as you fight."

Despite this Defense jab, the Current Commander maintains that the mission is extremely difficult. This remains true even with the apparently ample notice he receives about prisoner movement to and from attorney meetings and the Commissions. The Defense likens any religious accommodation to the varying medical needs of the Detainees, which the Current Commander capably provides for.

Nevertheless, under the Current Commander's direction, Hadi has been subjected to three forcible cell extractions ("FCE") since the first incident of Female touching on October 8, 2014.

The third witness testified under the pseudonym Former Commander from the mainland via video teleconferencing technology. She testified to the difficulty of staffing the prison guard corps for this mission, which was responsible for the female touching of Hadi. The Former Commander was only there for a short time but managed to accommodate Hadi for a period of six months before the October 8 incident. She also spoke to Hadi after his incident with the female guard on October 8. During that meeting, she acknowledged that Hadi was calm and rational, and made it known to her that he did not object to the presence of female guards, merely their touching of him. After this incident, there was only a very short timeframe that Former Commander had to deal with Hadi and the Court order before she had to leave.

The final witness closed out the day. She was subjected to direct examination under the pseudonym "Tier Guard." Tier Guard is a Platoon Sergeant, Senior NCO, and it was her opinion that the morale of the Guard Staff was being affected by the Court order. That the male contingent was angry to have to pick up the slack, and that the female contingent was upset because they were made to feel inadequate. Final-

ly, she opined that the reduced flexibility created by the court order increased the risk to the guard staff.

The session was closed before cross-examination by the Defense. Tomorrow oral argument on AE021 will begin.

Hearing on AE021 Emergency Defense Motion for Appropriate Relief To Cease Physical Contact with Female Guards. *United States v. Hadi al -Iraqi*.

Thursday, January 29, 2015

The Commission was called to order at 0913.

Today's hearing on AE021 was relatively brief. Yesterday, the Commission held an evidentiary hearing regarding this motion. The Defense bears the burden on this motion and therefore argues first. The burden can be met by a preponderance of the evidence.

The Defense, represented by LtCol. Jasper requested on behalf of Hadi al Iraqi the cessation of all physical contact by the female guard force during transportation to any appointments, "as it substantially burdens his free exercise of religion and access to counsel." Importantly, the order requested would not apply during exigency or emergency regarding his or the guard force's health, safety, and welfare.

LtCol. Jasper points out that since 2007 the JTF guard force has been able to accommodate his religious beliefs, and that it was only recently, since October 8, 2014, that he has been confronted by female guards in this religiously offensive capacity. He is now confronted with a Hobson's choice between violating the requirements of his religion or forgoing attorney meetings and medical appointments.

LtCol. Jasper alleges that as a non-American man, locked up in Guantanamo Bay for the last seven years, not seeing females on a regular basis, that it is not impossible that Hadi on the day he was touched by a female guard, which is the incident that led to this motion, was unaware that a female stood in his presence. Regardless of that possibility, though, having never before been touched by a female at GTMO, it is not unreasonable that because the female guard when touching him did so from behind, he remained unaware that JTF policy had been modified to allow female escort guards to touch him.

Furthermore, LtCol. Jasper states that his client, once he became aware of the female guard issue, stated with respect and dignity that he could not be touched by a female. Yet, on this occasion, having met with two officers about his concerns for a period of 45 minutes, he was ultimately forcibly extracted from his location and to his cell.

As a result of JTF-GTMO's unwillingness to accommodate Hadi's religion, LtCol, Jasper submitted to the Court that the guards' ongoing conduct violated the First, Fifth, Sixth, and Eighth Amendments, as well as customary international humanitarian law ("IHL").

Additionally, LtCol. Jasper asserted that Hadi was entitled to the protections of the Religious Freedom Restoration Act ("RFRA"). He also noted that all of the cases that the government cited were decided before the Supreme Court handed down its decision in *Hobby Lobby*. Using the Dictionary Act LtCol. Jasper attempted to solve the extraterritorial application problem that arises when attempting to apply RFRA to Guantanamo. He cited to *Guam v. Guerrero* for the proposition that Guantanamo Bay falls within the "covered entity" language of RFRA.

Ultimately, if the Court deems RFRA applicable to Guantanamo Bay, and Hadi it will rest with the government to show a compelling interest in violating Hadi's religious rights and that the interest is being achieved through the least restrictive means. LtCol. Jasper then draws a

comparison with the Supreme Court's *Hobbs v. Holt* decision in that the decision allowed an incarcerated and convicted man to maintain a religious practice deemed a security risk, so this Commission should be willing to guarantee at least the same protections to a man who has not been convicted of a crime.

The reasoning behind no female touching is delved into a bit more deeply next. The Judge asks LtCol. Jasper to defend an assertion made by a Dr. Fadel (his declaration was admitted into evidence yesterday) regarding the legitimacy of the no female touching restriction. In particular, the Judge has trouble believing that touching in a Prison setting could lead to sexual arousal, which, in his view, is the underlying reason given by Dr. Fadel for the practice. LtCol. Jasper wants to emphasize that the practice is a precautionary measure.

The JTF-GTMO Joint Detention Group ("JDG") policy also violates Hadi's First Amendment right to practice his religion freely; his Fifth Amendment right to due process, and to be free from pretrial punishment that results from the use of Forcible Cell Extraction; his Sixth Amendment right to counsel may be violated if the policy remains in effect because of his refusal to leave his cell under the power of a female guard; and his Eighth Amendment right to be free from pretrial punishment.

Furthermore, LtCol. Jasper argues that the government's use of *Turner v. Safley,* which is regularly used to evaluate Constitutional protections concerning prison regulations, does not control in this instance because of Hadi's non-convict status.

Under IHL, Hadi is entitled to the religious protections of Common Article 3 for his right to practice religion and prohibit outrages upon personal dignity humiliation and degrading treatment.

LtCol. makes one more argument in favor of the Defense motion by appealing to common sense. He likens the JDG to a basketball team. It is not unreasonable for this team to have to make substitutions and deal with workforce issues. In that regard, the JDG must adapt and overcome and revert to the pre-October 8th policy on female guards for Hadi. The government threw a "pity-party" yesterday, claiming that the Hadi order put such a major strain on the JDG team, according to LtCol. Jasper. To uphold and respect someone's religion is not a lot to ask in this situation. It may be hard work, but it is the right thing to do.

LtCol. Jasper cedes the floor to LtCol. Long for the Prosecution.

He immediately set out that the Defense has not met its burden under *Turner v. Safley*. LtCol. Long highlights that the Defense misstated the date of the cases cited by the Prosecution. He wants to make clear that, unless he is wrong, *Hatim v Obama* and *Allaithi v. Rumsfeld* were both decided well after *Hobby Lobby* was published, giving those Courts ample time to consider the impact of *Hobby Lobby* on the *Turner* test that they both use. He says that the Defense is improperly trying to shift prison policy review to a "strict scrutiny type of test" instead of using the controlling law of the jurisdiction, which was announced by the D.C. Circuit in *Hatim*.

The Judge, at this point, asks that LtCol. Long make sure to focus on the fact that a lot of the case law on point here refers to convicted prisoners, and explain the repercussions of that fact. So, LtCol. Long states that *Hatim*, the controlling law of the jurisdiction, although it was a habeas case concerned the pretrial detention of detainees. So, as for that line of reasoning raised by the Defense, the distinction is meaningless.

LtCol. Long goes on to cite a string of cases that stand for the proposition that the Courts owe substantial deference to the decisions of corrections officials. Including *Bell v. Wolfish* at 441 U.S. 520; *Thornburgh v. Abbott*, 490 U.S. 401 at

411; *Florence v. Board of Chosen Freeholders*, 566 U.S. 318; *O'Lone v. Estate of Shabazz*, 482 U.S. 342.

Under Turner then, LtCol. Long contends, the JTF-GTMO policy of using female guards in Camp VII operations is reasonably related to legitimate penological interests under the *Turner* test:

> The first, running a humane and well-functioning detention facility; the second, maintaining similar standards for employment for female guards across all military and federal detention facilities; and third, promoting a gender integration while avoiding gender discrimination among servicemembers.

The Turner test:

> Whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; whether there are alternative means of exercising the asserted right that remains open to the prisoners; whether accommodation of the right will have an impact on guards and other inmates; and whether there are ready alternatives to the policy that fully accommodate the prisoners' rights at *de minimis* costs to valid penological interests.

After making a case for the first two factors, LtCol. Long switches to a piece of evidence admitted yesterday, the letter of KSM to Hadi. He uses this letter to show that this motion argument about the Hadi order has clearly affected the other inmates to encourage them to use surreptitious means to communicate with Hadi, against prison policy. The letter is described as offering legal advice to Hadi on his upcoming hearing. And, in fact, the LtCol. implies illegality by citing the existence of an ongoing conspiracy between KSM and Hadi, from the earliest days of their acquaintance in Afghanistan.

> It is the government's position, and fast-forward to this letter, that that collusion that conspiracy endures; that the beliefs that took the accused into a position of leadership, as alleged by the government, in al Qaeda, that caused him to swear bayat to Usama bin Laden, that caused him to destroy the Buddhist statues in Bamiyan . . .

Additionally, LtCol. Long, towards the end of his argument, cites the fact that the prison already gives the detainees many things to allow them to practice their religion. Prayer rugs, Qurans, prayer beads, and prayer caps are provided. The guards do not touch the Qurans except for exigent circumstances. The detainees are allowed to wear religious garb and are not incarcerated in orange jumpsuits, and the guards maintain respectful silence during prayer time. There are actually many guarantees for the detainees.

LtCol. Long concluded his argument, and surprisingly, the Defense decided not to rebut.

Khalid Sheikh Mohammad, et al.

23-27 February 2015

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.

U.S. v. Khalid Sheikh Mohammed, et al., Feb. 9, 2015
Accused/ Counsel Khalid Sheikh Mohammed (KSM)/ David Nevin, MAJ Derek Poteet,
Walid Muhammed bin 'Attash/ Cheryl Bormann
Ramzi Bin al Shibh/ James Harrington, LCDR Bogucki Ali Abdul Aziz Ali (Ammar al Baluchi)/ James Connell, LTC Sterling Thomas
Mustafa Ahmed Adam al Hawsawi/ Mr. Walter Ruiz Prosecution Special Review Team (SRT), Mr. Campoamor-Sanchez, and Kevin Driscoll from DOJ.

DOWN THE RABBIT HOLE, ONCE AGAIN The Commission was called to order at 0900, and the Military Judge (M1), COL Pohl, had the parties account for Counsel who was appearing for each accused. The Special Review Team represented the Prosecution. As the first order of business, before providing the accused their standard advisement of their right to be present and the ability to waive that right, Cdr Kevin Bogucki requested to be excused from further participation in the Commissions as Mr. al-Shibh's military Counsel because of his pending retirement. MAJ Elena Wickner also presented her credentials and stated that she was going to be representing Mr. al-Shibh as military Counsel. When asked if he consented to release, Cdr. Bogucki and accept MAJ Wickner, Mr. al-Shibh stated that he did, but that there was a problem because he was having difficulty with his headphones, and the translator sitting next to him to provide a translation into Arabic was one of the translators that had participated in his interrogation by the CIA at a black site, and was involved with his torture. This immediately caused the Commissions to have to deal with this unexpected issue. A short recess was taken from 0907 to 0920. Upon resumption, Cheryl Bormann stated on the record that her client had recognized someone in the courtroom who had participated in his torture. The M.J. also asked if Cdr. Bogucki intended to continue to represent Mr. al-Shibh this week, and when Cdr. Bogucki replied that he was not going to continue to represent him in the courtroom, the M.J. informed him he was free to depart if he wished. It was determined that the wrong prosecution team was present, and they needed to get BG Martins and his regular prosecution team to address this translator issue. This necessitated another short recess at 0920. Upon resumption at 0933, Mr. Nevin summarized that more than one accused had recognized someone in the courtroom who had participated in their interrogation. Much of the discussion of this issue was very careful to avoid mention-

ing classified information. In response to the M.J.'s query on the way forward, BG Martins proposed that the Government be allowed to investigate and provide the information through written motions, and responsive defense motions. Mr. Nevin (for KSM) asked that the proceedings be halted until they were able to figure out what was going on, and asked the Commission to order the translator in question not to leave the island and to make himself available to the defense to be interviewed. BG Martins reiterated that they are allowed to investigate and file motions to encompass the facts, as well as to treat any witness request through the standard witness request procedures, mainly as this situation affects more than one accused. He also stated that they would file something later today. The M.J. asked if the individual was available to be interviewed and commented that there may be a myriad of reasons that he would want or not want to be interviewed and whether he consented was up to him. The M.J. said that the Commission would reconvene at 0900 on Wednesday morning. The M.J. approved Mr. Nevin's request for the defense to meet with their clients through the afternoon at the courtroom and commented that Mr. Mohammad was also uniquely involved so that Mr. Nevin needed to meet with his client, and that this issue necessitated more client involvement than other issues might.

Mr. Connell asked to clarify the planned way forward: that the individual translator in question would be made available for interview to which he may or may not consent. And he asked to clarify that the motions to be filed by the Government would not be ex parte. Although BG Martins stated that was his intent, he qualified that assurance by stating that that might change depending on the outcome.

Ms. Bormann (for Mr. bin 'Attash) stated that she was concerned that BG Martins might not be the correct prosecution team to conduct this investigation, particularly if this "coincidence" was part of the ongoing pattern to infiltrate the defense teams to be addressed by the SRT with AE 292 (dealing with the FBI infiltration of the defense teams and the potential conflict of interest for Mr. al- Shibh). She commented that the placement of this individual in the courtroom was concerning and that her client was visibly shaken.

There was some discussion that they might have to hold a 505h hearing to determine if they would need to close the proceedings to discuss the facts of this new issue regarding the translator in the courtroom alleged to have participated in the prior CIA torture of the defendants.

The M.J. conducted the rights advisement to all accused advising them of their right to be present, and that the process through which they could waive that right. All acknowledged their understanding.

The Commission recessed until Wednesday at 0900.

The initial plan for this morning had been to address the AE 292 motion with the Special Review Team and the individual Counsel appointed for Mr. al-Shibh as the first order of business, and then the severance issue with the regular prosecution team. Both of which were postponed because of this new bizarre issue.

U.S. v. Khalid Sheikh Mohammed, et al., Feb. 11, 2015
Accused/ Counsel
Khalid Sheikh Mohammed (KSM)/ David Nevin, MAJ Derek Poteet, Mr. Sowards
Walid Muhammed bin 'Attash (WMA)/ Cheryl Bormann
Ramzi Bin al Shibh (RBS)/ James Harrington, MAJ Wickner
Ali Abdul Aziz Ali (Ammar al Baluchi)(AAA)/ James Connell, LTC Sterling Thomas
Mustafa Ahmed Adam al Hawsawi (MAH)/ Mr. Walter Ruiz
Prosecution Special Review Team (SRT), Mr. Campoamor-Sanchez, and Kevin Driscoll from

DOJ.
Independent Counsel for Mr. al-Shibh, LTC Julie Pitvorik
MJ: Military Judge
MC: Military Commission

Summary:

The Trial Counsel filed AE 350 (a classified motion) as a response to the issue of the former CIA interpreter at black sites on the al-Shibh defense team whom he confirmed had worked for the CIA. From the argument, the motion accuses the defense teams and Office of the Chief Defense Counsel of not performing due diligence on vetting the interpreters and failing to protect their clients' confidential information. The defense vehemently contests this claim, particularly as they are provided no ability to verify the information provided by potential new defense team interpreters. [Note: Mr. Harrington said earlier out of Court, that he asked the former CIA interpreter if he had worked with the CIA or other government entity and the interpreter had denied any such activity]. This is particularly ironic as this interpreter was the temporary replacement for the interpreter who is believed to have been an FBI Confidential Informant, and who had been fired as a result, and which resulted in the AE 292 conflict issue. The M.J. decided to proceed to address both the conflict issue, in AE 292, and the severance issue in AE 312, despite Mr. Nevin's vehement objection to moving forward until AE 350 was resolved.

> Mr. al-Shibh stated that . . . there was a problem because he was having difficulty with his headphones, and the translator sitting next to him to provide a translation into Arabic was one of the translators that had participated in his interrogation by the CIA at a black site, and was involved with his torture.

The SRT asked for a closed hearing to address information pertaining to the conflict of interest issue (AE 292) involving Mr. Harrington and his team, to include only the MJ, the independent Counsel for Mr. al- Shibh and the SRT. The SRT has not provided any of the ex parte information to the Independent Counsel. After the argument, the M.J. denied the motion for a closed hearing.

The M.J. also stated that he did not consider the conflict issue to be resolved at this point, and then questioned the Prosecutor whether it was still their position (despite the already seven-month delay since he had issued the severance motion and put it in abeyance until this session in Feb. 2015), and a likely lengthy continued delay to resolve AE 292, that they still opposed the severance of Mr. al-Shibh from the joint case. The Government emphatically stated that even if delayed for months, and for "the foreseeable future," they still opposed severance. It was their position that there was still much progress in the case behind the scenes despite not being visible to include discovery. The M.J. was clear that resolution of the conflict issue in AE 292 will likely require months more delay, and the Prosecution indicated their understanding and acceptance of that delay.

The M.J. then requested suggestions on what could be accomplished while the AE 292 conflict issue barred substantive proceedings involving Mr. al-Shibh. After input from all Counsel, seven motions involving only Mr. Hawsawi (AE 192, AE 214, A.E. 214A, AE 303, AE 332, AE 333, AE 334), and one involving Mr. al-Baluchi (A.E. 230A) will be argued tomorrow, and possible argument will be done this week on AE 303 and the final evidence in AE 008. The Commission will reconvene tomorrow.

Proceedings

The Commission convened at 0900 with all defendants present, and the regular prosecution team headed by BG Martins representing the U.S. The Military Judge (MJ) wanted to discuss the way ahead and contemplated order for today.

AE 350 (CIA Linguist on RBS Team): BG Martins confirmed for the Government that an interpreter for the bin al-Shibh team was a former CIA interpreter, and at the point of his service with the defense team for al-Shibh he was not working for the CIA. He then stated, twice, that the presence of a former CIA linguist on the defense team was not due from any action by any Executive Branch Agency to gather intelligence from the defense teams. The Prosecution filed a classified filing this morning (which was provided to the defense), and a draft ruling (350B). BG Martins stated that identifying information on the individual, whether he was in the courtroom, or whether he was present in Guantanamo remain classified. (despite the fact that we all observed in the public hearing his presence at both locations). The Government then outlined their response, which attacked the process used by the al-Shibh defense team to vet translators, to include how the team requested translator services and how the team "vetted them." (From earlier hearings from June and October 2013, we know that translator services for the Office of the Chief Defense Counsel and the individual teams are done through a central contract administered by the Office of Military Commissions). BG Martins contended that if the Military Commission (MC) wanted to go down this road, the first step would be to get affidavits from the al-Shibh defense team on their steps to vet the interpreter, and compliance with their ethical obligations to protect client confidences, in effect, placing the blame on the defense for the presence of the former CIA interpreter on the al-Shibh defense team. We have no access to this motion since it is classified.

Mr. Connell from Mr. Ali's team then reiterated that they had just been informed that any fact on whether and if the translator had ever been to Guantanamo was classified.

He summarized the Prosecution's motion, stating that AE 350 accused the defense of violating their ethical duty to protect their client's confidential information from the FBI/CIA, but contended that any such failure was the Government's fault, as they continued to deny them classification guidance, the CV of the interpreters, and interfered with their ability to vet the proposed interpreters, some of whom had been turned down in the past because of their inability to ensure vetting. In effect, the Government was accusing the Office of the Chief Defense Counsel and their staff of inadequately vetting interpreters and thereby causing the placement of a former black site CIA interpreter on Mr. al-Shibh's team.

The Military Judge acknowledged that there might have been reluctance by the CIA translator to disclose his former participation to the defense, or a Non-Disclosure Agreement preventing such disclosure, complicating full vetting by the defense.

Mr. Connell agreed that limitations on being able to verify the information provided made proper vetting difficult to impossible, but that he had sent a letter to the Convening Authority on the issue of a way to deal with the vetting of interpreters over two weeks ago.

Mr. Connell said his view was that not only would a 505h hearing (to discuss whether to close the hearing because of classified information) be useful; it was pretty much mandatory for the 350 issues.

Mr. Nevin stated that the Prosecution was saying that the defense failed to exercise due diligence, and that is what had caused the CIA interpreter's presence. He was going to seek affi-

davits from the Prosecutor on whom he had queried in the limited period since Monday in order to be able to make the broad definitive statement that no Executive Agency had taken any action to put the interpreter on the defense team "to gather information." He asked, perhaps there are other reasons for putting this former CIA linguist in such a position, and stated that the defense had to get to the bottom of what information supported the Prosecution statement, similar to that given by the SRT gave in AE 292. At this point, the M.J. activated the muting function of the public feed (the hockey puck) because he felt Mr. Nevin was getting too close to classified information. After reestablishing the public feed, and explaining why it had been activated, the M.J. re-activated the muting function almost immediately because he felt the microphone picked up what was said between Mr. Sowards and Mr. Nevin at the podium.

Mr. Nevin also wanted to discuss Mr. Mohammad's reaction to the events of Monday. However, the M.J. told him to avoid a discussion of facts, which he could include in his responsive filing, and to discuss the proposed way forward on this issue. Mr. Nevin said they could not go forward until they resolved this issue, which is much more complicated than it appears.

Ms. Bormann contested the broad assertion of BG Martins that no Executive Agency had been involved in placing the translator on the al-Shibh team to gather information or intelligence. The M.J. asked her to focus on the way forward instead. She, however, stated that all former and present defense team members needed to be vetted by the appropriate agencies and that the particular CIA linguist "was asked," but at that point, the M.J. interrupted and redirected her not to discuss the facts and to file a motion containing the facts and legal position. She then stated that the trust between her team and her client was so decimated that they could not go forward.

Mr. Harrington stated that although styled as a conflict of issue situation, the Prosecution's motion was raising a claim of ineffective assistance of Counsel, but that this situation directly related to Mr. al Shibh's existing conflict issue in AE 292.

Mr. Ruiz stated that they needed a 505h hearing because BG Martins' statement was, in some ways, misleading. Unless the Government chose to declassify the facts, the defense was then limited to rebutting this conclusory public statement only in classified responses. Instead, they needed to determine what was or was not classified to enhance their ability to respond publicly.

The M.J. stated that after the break he wanted to discuss the way ahead on this, but wanted to switch to AE 292 (conflict of interest issue for Mr. aI-Shibh), and wanted the SRT switched in to represent the Government. He then anticipated coming back with the standard prosecution team to discuss the severance issue after the conflict issue was discussed.

Mr. Nevin asked to stop the case until they could get to the bottom of the A.E. 350/CIA interpreter issue, which the M.J. denied. Break from 9:34 to 9:59.

The SRT argued for the U.S., but Mr. Nevin renewed his objection to going forward on a 6th Amendment basis.

Mr. Campoamor-Sanchez argued the motion for a closed hearing would resolve the current pending motions of the conflict of interest and would allow for the advising of the accused and the waiver colloquy if the M.J. held there was still a conflict. He proposed that only the SRT and the independent Counsel for Mr. al-Shibh, LTC Julie Pitvorik, be present for this hearing. This would allow a review of the facts and the objections of Mr. Harrington. He then provided a quick summary of the dates involved in this issue, where the allegations of the FBI approach to the defense team member was addressed in the April 2014 hearing, and again argued in the June 2014 hearing. A new allegation was made thereafter concerning statements

by Stephanie Flannery of the Office of Special Security, who was responsible for the administration of security clearances to Mr. Harrington. Because Mr. Harrington claimed that her statements raised the issue of a revocation of a security clearance for members of his team and caused a conflict, the SRT wanted to address this issue in the closed session. The Commission decided to appoint independent Counsel for Mr. al-Shibh in July 2014. LTC Pitvorik assumed her duties as independent Counsel in October 2014. In December 2014, the MC issued a protective order at the SRT's request, and she signed the MOU and was given classified discovery. Mr. Campoamor-Sanchez claimed that Mr. Harrington had refused to sign the MOU. Because he was possibly operating under a conflict, he was not the appropriate person to address this issue for Mr. al-Shibh. Mr. Campoamor- Sanchez stated that the M.J. had denied the other four defense teams' motion for reconsideration, thereby resolving any conflict issue for them (the defense teams later indicated that this was not accurate). The SRT also said that Mr. Harrington's argument that Mr. al-Shibh was entitled to learned Counsel for this motion was not accurate.

Mr. Connell reiterated that the decision to refer this case to a joint trial had been made on April, 4, 2012, and that the Government's position that they could hold a hearing closed to the public and most Counsels in the case, was not consistent with their prior position on A.E. 200R dealing with discussions of Mr. al Baluchi's medical records.

Mr. Connell argued that holding a closed 803 hearing would violate the accused's rights to presence, their factually interrelated right to Counsel, and therefore (and the affected public's) Mr. al-Baluchi's right to a public trial, that directly revolved the 5th, 6th, and 8th Amendments and the Detainee Treatment Act, the accused, have a right to be present for all sessions of the Commission except when specifically excluded under section 949d (for the physical safety of an attendee, or to prevent disruption), which did not apply. He also argued that an 803 session involves the substantive rights of the accused and that such hearings must be held in the presence of the accused, Counsel, and the Prosecution by statute and RMC. Exclusion of the accused was the precise flaw identified in Hamdan, and that Article 75, API required the accused's presence and representation. The MC has previously addressed this issue in another motion (A.E. 136A), which required a choice between two 2d Circuit cases as precedent (*In re Terrorist Bombings*, and *Clark*). Here, the issue is critically important to the accused, not a tangential matter, and *Clark* would apply. Mr. al-Baluchi's concern is intense. Such a hearing would also violate the right to counsel under the 6th and 8th Amendments and the Detainee Treatment Act. The rule for Military Commission (RMC) 506 and 805 require at least one Counsel be present, as well as the section 949a of the MCA. The defendants and the public also have a right to a public trial under the 1st and 6th Amendments, and there was no public notice given as required by the RMC of potential closure. There has also been no proper invocation of the National Security privilege by a Head of an Executive Agency as required, no public involvement as required by *Ellsworth*, and no tailoring as required by the RMC, as well as no notice by the SRT to the defense.

There have been extensive ex parte motions filed on this issue, and two ex parte orders issued. Such ex parte practice is unsupported by the rules. As to the legal interrelationship, Mr. Connell argued, that there are three possible bases for conflict: the investigation into Mr. Mohammad's interpreter (in Jan. 2014), the investigation into Person A (believed to be Mr. Cruz) on Mr. al-Shibh's team, and the FBI's approach to Mr. James, the Defense Security Officer (DSO) on Mr. al-Shibh's team. The issue with Mr. Cruz/Person A is the primary one that also involves Mr. al-Baluchi, as the al-Baluchi defense team traveled overseas with this interpreter on investigative trips. He reminded the

Commission that he and his team had signed the MOU and consistently complied with the restrictions not to share such info with the other defense teams. Although Mr. Connell concludes that the MOU adds nothing to the protection of classified information, the Government has been inconsistent in requiring it before providing classified information to the other defense teams and has twice provided classified information to the defense teams who have not sighed the MOU (despite its insistence that they do so before the defense teams receive classified discovery) when it is in the Government's interest to do so (in AE 331A and AE 350, itself classified).

Mr. Harrington underlined the timeline of the conflict in AE 292. First, that the approach by the FBI to Mr. Cruz/Person A (interpreter) was made in Nov. 2013, but he and his team continued unaware of this fact until April 2014 when they were informed of the FBI investigation, resulting in an FBI informant remaining on his defense team for five months, unbeknownst to him or his team. In August 2014, the FBI approached Mr. al-Shibh's DSO (Mr. James), asking to interview him at his home after church. The interpreter/Mr. Cruz loses his security clearance as a result of this investigation. Despite this, the SRT argues that there is no conflict of interest. Nevertheless, the M.J. did direct the appointment of independent Counsel for Mr. al-Shibh in AE 292QQ. The M.J. received information ex parte from some third party and subsequently invited the SRT to investigate this unknown issue, the content of which has not been disclosed to the defense. However, the M.J. did provide notice of the existence of these ex parte filings to the defense counsel. Then this week, we have another intrusion into the defense counsel function with the former CIA interrogator placed on Mr. al-Shibh's team. Finally, the SRT and the independent Counsel participated in an 802 session, but no "learned" death penalty qualified counsel participated in this 802, leaving Mr. al-Shibh unrepresented by a learned counsel as required by the MCA. Now the SRT is proposing that the M.J. hold a closed session in which Mr. al-Shibh is also not represented by learned counsel, nor allowed to be present. This is a critical stage of the proceeding, and the SRT wants to leave Mr. al-Shibh unrepresented by learned (death-qualified) counsel. We do not know what the purpose of this proposed closed hearing is; the M.J., SRT, and Independent Counsel have shared information, but the defendant was not present, nor was his learned Counsel. The Government is trying to compartment his right to counsel. All 803 sessions require presence unless special circumstances, which are not present, are met. As Mr. al-Shibh's Counsel, Mr. Harrington outlined his responsibilities to his client who is to tell him what he believes the facts to be, whether he believes there is a potential or actual conflict; whether he believes he can continue to zealously represent him, and the nature of the allegations (to include whether they are criminal, administrative, or ethical).

The defendant must be in the position to make an intelligent and knowing decision to waive any conflict, which is required unless the M.J. determines there is no conflict of any kind. Mr. Harrington stated, based on his knowledge, he cannot tell his client the facts or his conclusions. As to the MOU issue, Mr. Harrington said that the SRT had not requested him to sign an MOU and that enforcement of the Protective order in this issue is not dependent on the MOU being signed. He stated he could not properly assess the situation without the full facts, and that Mr. al-Shibh was entitled to all the facts so he could make a decision after proper legal advice concerning his representation.

Mr. Nevin pointed out that the Government had chided the defense teams for not performing due diligence in the AE 350 CIA interpreter issue, but was now pushing to resolve the conflict issues while the defense team was in disarray as a result of the appearance of the former CIA interpreter in the courtroom and on a defense team. He also contested the SRT representation that the defense motion for reconsideration concerning the remaining four defense teams as to the existence of an actual or potential conflict had been decided. He objected to the lack of notice to Mr. Mohammad's defense team as to the 802 between the SRT, M.J., and independent Counsel for Mr. al-Shibh. The requirements to close this session are not met here. The right to presence and Counsel are fundamental. There is a considerable factual interconnection between the conflict issue with Mr. al-Shibh because the KSM defense team traveled on 1-2 trips to the Middle East together with the interpreter/Mr. Cruz/Person A and the subject of the questioning by the FBI when they approached the DSO (Mr. James) was the KSM team.

Ms. Bormann adopted all the other arguments of Counsel and underlined the factual and legal interconnection. She said the intrusion into the defense function earlier this week with the CIA interpreter was not a new issue and then listed the following other instances: the microphones in smoke detectors; the ungated feed on courtroom microphones monitored by the CIA; the seizure of legal materials from the defendants by the JTF; the FBI's approach to the bin-Shibh DSO where they asked him to "please tell us about the information you have learned about your team and all the other teams;" and finally the presence of the former CIA black site interpreter on the al-Shibh defense team. We have the right to know about government interference with the defense function that has occurred or will continue to occur. The existence of the allegation is sufficient to prove the interconnection. The joint trial was the Government's choice, so the 803 hearing should include all the parties, as is the defendants' right, unless the nonapplicable exceptions apply. You cannot exclude the defendants or their Counsel. The MOU is a red herring, this is a hearing, and the MOU pertains only to discovery, not substantive rights.

Mr. Ruiz argued that on May 21, 2014, Mr. al Hawsawi moved to sever his case from the remaining defendants, and on June 16, 2014 given the information provided and the opportunity to interview the witness, he moved to unjoin the AE 292 litigation because Mr. Ruiz concluded Mr. Hawsawi did not have a conflict. However, given the extensive ex parte filings, there remains an open question on whether there is a conflict that Mr. Ruiz is not aware of. Mr. Ruiz contended that Mr. Hawsawi should be severed, but so long as he was part of the joint case, they would ask for the opportunity to be heard.

LTC Julie Pitvorik, independent Counsel for Mr. al-Shibh, stated that she was appointed on Aug. 8, 2014, as a result of the M.J. order in AE 292QQ, and received the appropriate clearances in October 2014. There are eight filings, and two orders that have been filed ex parte in 292. These ex parte items have not been provided to her. The Government is trying to bifurcate or compartmentalize the conflict, but there is only

one conflict, caused by government interference with the defense function. She cannot advise Mr. al-Shibh absent, knowing the underlying facts and information necessary to make determinations and advise him.

The SRT claimed to have provided notice to all defense teams as to the 802 held with the M.J. and Independent Counsel. Despite the defense arguments that the facts and legal issues are interrelated, the legal issue to be decided is whether there is an actual or potential conflict. He contends the closed session is necessary to discuss the classified information necessary to resolve the conflict issue as to Mr. al-Shibh's interpreter and defense team, and Ms. Flannery's statements. The SRT contends the independent Counsel is in a position to determine the facts. He also claimed that Mr. Harrington could not both claim to have a conflict question and to continue to represent Mr. al-Shibh.

The M.J. denied the SRT request for a closed hearing. The MC recessed for 15 minutes, to allow the exchange of the SRT for the regular prosecution team.

On resuming, the M.J. asked the Prosecution (Clay Trivett) whether the Government continued to adamantly oppose severance, as it will slow the proceedings as to the remaining four defendants until the conflict issue (292) concerning Mr. al-Shibh is resolved.

The Government responded that it continued to oppose severance and that significant progress could still be made behind the scenes, such as the disclosure of classified info to Mr. al-Shibh's independent Counsel. Although there may come the point where severance will become necessary, we are not there yet. The M.J. asked how long would be enough, as this issue arose in April 2014, the M.J. ordered the appointment of independent Counsel in July 2014, and at least since the M.J. put his severance order in abeyance in August, no resolution of this issue has occurred (seven months later). The forward view in August was that it would be resolved by the Oct. 2014 hearings, which were canceled because AE 292 was not resolved. The Dec. 2014 hearings were equivalently canceled for the same reason.

[Note, the Commissions flew down to Guantanamo with all participants in mid-December 2014, and only on arrival did the SRT ask for a protective order, ask the independent Counsel to sign the MOU, and agree to provide classified discovery to her]. It is now February 2015.

The M.J. stated that he would listen to the input of all parties before deciding any issue, but the only view that mattered as to whether this issue is resolved was his, and in his opinion, he did not think it was resolved today. So, he asked for the government position again on how long was too long to wait.

The Government indicated that severance now would result in short term gains and long term pain. If they were bumping up against deadlines (such as a trial date), then the Government might reconsider its opposition. Here, the defense has asked for discovery on the entire SSCI Torture Report (and its associated 6 million exhibits). Therefore that would take a long time to resolve with the 505 processes. The hearings are a small part of what is going on in this case, but the remainder is not visible. There are discovery requests and responses ongoing. The Government's position is that 292 needs to be resolved before other matters, even though the U.S. knows it may take months more. The Prosecution wanted to confer with the SRT to see if they had an estimated time (the M.J. reminded them that that is only the SRT's view, which may or may not be the M.J.'s view). The M.J. reminded the Government that the severance order was placed in abeyance at Government request, and the Government was adamant that 292 and 350 must be resolved first. [Note: the competence of Mr. al-Shibh must also be resolved for the record before proceeding to other issues, and is necessary to assess the voluntary and knowing nature of any potential waiver.]

Mr. Connell reminded the MC that the defense has had no opportunity to respond to AE 350 (the CIA Interpreter issue) and that it was not ripe for resolution without the development of additional facts.

BG Martins for the U.S. argued that AE 350 could be addressed in the interim this week if the M.J. decided to go down that road. When asked by the M.J. why AE 350 changed the Government's position that AE 292 had to resolved first, and how can Mr. al-Shibh participate while 292 still out there (note: also the original competency motion filed by the Government in Dec. 2013 has not been resolved either, and must be before substantive proceedings involving Mr. al-Shibh). BG Martins wanted a chance to talk to the SRT on their expected timeline on AE 292. Mr. Nevin asked to be present if the Prosecution was going to talk to the SRT. The M.J. reemphasized to BG Martins that the risk of such a discussion was on the Government. The M.J. asked the Government to outline what it felt could be accomplished with the absence of Mr. al-Shibh in this interim period waiting for resolution of AE 292.

The Commission recessed at 1142 and reconvened at 1400.

The Government (Mr. Trivett) asked the MC to continue to hold the severance order in abeyance for the foreseeable future. The Government suggested that several long term motions involving only Mr. al Hawsawi could be addressed this week, as well as certain motions to compel on AE 254 (the female guard issue), that the motions contained all the information necessary for the M.J. to decide these motions to compel without argument. By doing so, the underlying substantive motions could be advanced in the interim, allowing them to be decided quickly after the resolution of AE 292. The Government also argued that the issue of signing the MOU could be addressed for the Mohammad, bin 'Attash, and Hawsawi defense teams. The M.J. asked how that could be addressed when the Government had just filed a motion to amend the protective order to remove two categories of information concerning the RDI program, and the defense had not had the opportunity to respond. The Government argued that the changes only inure to the benefit of the accused; therefore, the pending change in the protective order should not matter to the requirement to sign the MOU. Mr. Trivett also stated that the closed hearing requested by Ms. Bormann on AE 008 (defective preferral) could also occur, as well as the 7 Hawsawi motions listed on AE 334C pages 10 and 11. These motions are: AE 192 (MAH) (Motion to Disqualify the Legal Advisor Due to Unlawful Interference with the Professional Judgment of the Chief Defense Counsel and the Detailed Military Defense Counsel); AE 214 (MAH) Defense Motion to Compel Mr. Hawsawi's Access to the Government of Saudi Arabia in Compliance with United States Law); AE 214A; AE 303(MAH) (Defense Motion for Appropriate Relief to Require Confinement Conditions that Comply with International Humanitarian Law Standards; AE 332, AE 333(MAH), and AE 334, and AE 230 involving Mr. al-Baluchi's access to the Government of Pakistan (similar to AE 214). This is based on information provided on the listing in AE 334C, which is not yet cleared for public release on the Commission website. The exact titles of the motions that do not include them are also not currently available with the communications abilities here at G.

Mr. Ruiz asked that the MC hear argument on the above motions as they were long-standing motions affecting Mr. Hawsawi, not constrained by AE 292 (the conflict issue). They have also technically been unjoined by the other defendants (the standard rule is that a defendant is considered to have joined a motion filed by one defendant unless a defendant affirmatively indicates that they are not joining). The other defendants have affirmatively unjoined these motions.

Ms. Bormann indicated that she thought that all that was left on AE 008 (defective preferral) was the information on the RDI program, which has

now been declassified as in the SSCI report, but she needed to recheck the details. The Government indicated it needed to recheck the actual items listed in the 505h listing against the new classification guidance. Ms. Bormann said she would prefer to argue the maximum that could be argued publicly in that way. She also stated that the various requests to compel funding of experts and resources could be addressed without 292 resolution: AE 56, AE 337, AE 309, AE 326, and AE 327. The M.J. also commented that the Prosecution also had not waived their oral argument on AE 008, which had been halted because of the Prosecution's request for a competency determination for Mr. al-Shibh in Dec. 2013.

Mr. Ruiz stated that they also had the decision on AE 008 MFL MAH Supp waiting for a decision.

Mr. Harrington also clarified that he was continuing to operate as Mr. al-Shibh's Counsel until a conflict was found by the Court and did not see a bar to him and his team continuing to file motions on Mr. al- Shibh's behalf, but that a potential problem exists if the Court subsequently determines that a conflict exists--what might be the retrospective effect of such a determination of conflict. There is some risk with this path, as well as an enhanced risk to all with the addition of the AE 350 issue.

Mr. Ruiz responded to the question that he did not believe that AE 350 precluded going forward on the seven listed motions in AE 334C and that based on the information he currently had, he did not think it caused a problem. He remained concerned about what he was not aware of given the recent developments. The M.J. reemphasized that all parties had a right to file for reconsideration or to file a supplement if new information comes to light.

Mr. Connell noted that AE 214A was equivalent in substance to AE 230 (which concerned his client); and that AE 303 concerning the conditions of confinement was a considerable issue and required substantial discovery, which was why he had unjoined it, as he thought it was not yet ripe for decision.

He also asked for the MC to order the taking of the deposition of the former CIA interpreter, the bin- Shibh team, as he was still present. He also identified AE 339 as the most pressing motion remaining, and AE 262 because of its age.

Mr. Nevin asked for the Court to inquire into the discussion between the SRT and the Prosecution, and BG Martins responded that an administrative discussion was held according to the existing protocol that incorporated best practices.

The M.J. indicated that the Commission would address the six Hawsawi motions, not including AE 303 at this time, and AE 230A for Mr. al-Baluchi's team.

Mr. Ruiz asked that AE 303 be addressed as it had been filed long ago and the other defendants were not joined on this motion, he was very concerned about the conditions of confinement and wanted to have it addresses speedily.

The M.J. said they would decide tomorrow morning whether AE 303 would be addressed. Mr. Nevin supported the request for the deposition of the CIA linguist, by the M.J. deferred deciding that issue until the Trial Counsel had the opportunity to respond. The Commission recessed at 1434 and will reconvene tomorrow, Feb. 12, 2015, at 0900

US v. Khalid Sheikh Mohammed, et al., Feb. 12, 2015
Accused/ Counsel
Khalid Sheikh Mohammed (KSM)/ David Nevin, MAJ Derek Poteet, Mr. Sowards
Walid Muhammed bin 'Attash (WMA)/ Cheryl Bormann
Ramzi Bin al Shibh (RBS)/ James Harrington, MAJ Wickner

Ali Abdul Aziz Ali (Ammar al Baluchi)(AAA)/ James Connell, LTC Sterling Thomas
Mustafa Ahmed Adam al Hawsawi (MAH)/ Mr. Walter Ruiz
Prosecution Special Review Team (SRT), Mr. Campoamor-Sanchez, and Kevin Driscoll from DOJ.
Independent Counsel for Mr. al-Shibh, LTC Julie Pitvorik
MJ: Military Judge
MC: Military Commission

Summary:

Mr. Ruiz argued the outstanding motions that pertained only to Mr. al-Hawsawi. Mr. Ruiz has determined that there is no conflict for the Hawsawi defense team, so that enables the Commission to go forward with these motions. Mr. Ruiz presented an argument on the intertwined issues of adequate medical care for Mr. al-Hawsawi, who has significant medical issues arising from his torture, and for access to his medical records and doctors (AE 332). He also argued AE 303, which seeks relief for the conditions of confinement at Camp 7, which he contends do not meet the applicable domestic and international standards. The Government response asserted that most of the international standards, and correctly the Geneva Conventions, do not apply to these detainees and that the 2009 MCA bars any reliance on the Geneva Conventions. The argument was not sophisticated on the effect of certain norms of the Geneva Conventions, having attained the status of customary international law. Finally, Mr. Ruiz sought an order to allow consular representatives of Saudi Arabia to meet with his client. (AE 214)

The Orwellian nature of the Commissions continues with the Government asserting that the fact that former CIA interpreter whom Mr. al-Shibh had alleged had participated in his torture at a black-site is now classified, therefore prohibiting the defense counsel or any other person with a security clearance from speaking of it. The identity of the individual could remain classified for security and national defense reasons. However, the classification of the entire matter only raises the issue of the lack of transparency for the Commissions yet again. The motion is filed (AE 350) on the issue is classified but seeks to place the blame on the defense counsel for failure to vet defense interpreters properly despite the fact that this interpreter had been asked about his past activities and had denied any involvement. The issue of interpreters has been an ongoing issue as the defense are not provided C.V.s and are not given any way to verify the information provided by the prospective interpreters. One also wonders how the manager of the Special Access Program for the Commissions would not have known of the history of this individual prior to granting access to the courtroom. As to the FBI Investigation/Conflict issue in AE 292, which is halting the Commissions: The Special Review Team has provided almost no information to the independent Counsel for Mr. al-Shibh, despite independent Counsel being appointed in August 2014, and receiving appropriate clearances in Oct. 2014. There is no way to move forward on this issue until and unless complete information is provided to the independent Counsel and no way to resolve any conflict if the independent Counsel is prohibited from conveying any of the underlying facts of her ultimate conclusion on conflict to Mr. al-Shibh (as is required by the different protective order dealing with 292). The M.J., however, has stated on the record that he does not feel that the conflict issue has been resolved. The exchange this week on whether the Government understood that this could take a significant period to resolve and did it still oppose the severance of Mr. al-Shibh so the trial could move forward was clear that the Government is willing to experience a substantial delay in the proceedings to retain a joint trial. It could take up to a year. Additionally, the Government's position on the requirement for the defense counsel to sign the MOU (involving the protective order and classified information), which is pending argument

and decision by the Commission, means that no classified discovery can take place during this delay. There also remains the competence issue involving Mr. al-Shibh that must be resolved after 292 before the Commission can return to any of the long-standing motions, to include a large number that were filed at the arraignment. The victim family members' press conference highlighted the various ways that the family members have dealt with their loss, ranging from understandable anger to an articulate commentary on why these commissions must be conducted to exemplify American values and that how these commissions are conducted is the best example of why our system is better than the barbarity of al-Qaeda. The press conference is available on the military commission website.

Feb. 12, 2015

All defendants except Mr. al-Baluchi were present. The Commission convened and did the standard colloquy on Mr. al-Baluchi's waiver of his appearance. Mr. Nevin renewed his objection to continuing forward without resolving the CIA Interpreter issue (AE 350), and the judge overruled his objection. Ms. Bormann stated that her client had vested interests that were involved in Mr. al-Hawsawi's motions to be argued today, particularly any involving unlawful influence as the defendants have alleged a continuing pattern of unlawful influence. The M.J. determined that since the al-Baluchi team had requested reconsideration of the order determining that there was no conflict for defense teams, (not including the al-Shibh team) that they would not argue Mr. al-Baluchi's motion on consular notification. Mr. Ruiz stated he would rest on his briefs for AE 192/AE 196. He also requested that the M.J. address the unlawful influence merits in these motions because even though Mr. Breslin, the subject of AE 192, has since departed the position, the necessity for the legal analysis survives as these motions form part of a continuing pattern of interference with the defense function.

AE 332/Emergency Medical Care Motion for Mr. al-Hawsawi. It also involves the discovery component of this motion to seek access to his medical records (both from 2003-2006, and thereafter), and to treating and supervising medical personnel. Mr. al-Hawsawi suffers from long-standing chronic medical conditions arising from the many years of torture he experienced from 2003 to 2006. Mr. Ruiz addressed the discovery issues, while LTC Gleason addressed the substance of the medical care motion.

Mr. Ruiz claimed we have a legal and ethical responsibility to ensure adequate medical care while detaining Mr. al-Hawsawi for trial. Mr. al -Hawsawi has ongoing bleeding, and colorectal issues stemming from his captivity with the CIA, and the physicians have not ruled out cancer. During his detention by the CIA, he was subject to excessive and rough medical procedures, done without medical necessity (SSCI Report), including feeding and hydration tubes inserted into his rectum. Mr. Ruiz needs to be able to speak to his treating physicians (Senior Medical Officer, treating physicians, and colorectal or gastroenterology specialist at Guantanamo). Mr. al-Hawsawi has no one to discuss his medical condition with, and his defense team can help him with this collaboratively,

and stand in as his family with whom he cannot talk. The defense team has made extensive efforts to get his medical records and seek to talk to his doctors, but most of the attempts resulted in no response from the JTF/physicians. The defense team has had difficulty developing a trusting relationship with their client, and now he is asking for their assistance in getting appropriate medical care. The names of the treating physicians have not been given to the defendant, so the ability to interview them also helps the defense team to be able to develop evidence in mitigation for use at the eventual trial. Mr. Hawsawi was 140 lbs. at capture and now weighs less than 100 lbs. The first step for the defense team is to safeguard his health pending trial.

Mr. al-Hawsawi is seeking the return of his medical devices and proper bins that were seized by the guards. In the two months that have passed since the filing of this emergency motion, the majority of the devices have been returned to Mr. al-Hawsawi. Although the legal bins have been returned as well, he does not have independent access to particular bins at this time. The defense team cannot resolve this at a lower level as the SJA office refuses to meet with them to work through issues. Mr. al-Hawsawi is seeking the ability to interview the treating physicians, past and present, and the senior medical officer and specialist; alternatively, they ask to depose them. The ability to depose is not limited solely to preserving testimony at trial but can be done in the interests of justice. LTC Gleason will address the adequacy of medical care.

The Prosecution, Mr. Ryan, said that the injuries arose from an incident on Dec. 7, 2014, caused by the defendant's refusal to return to his cell, that the accused initiated the use of force by pushing and pulling the guards, falling to the floor and thrashing and biting (biting one guard), and that Mr. al- Hawsawi refused medical treatment at the time for any injuries. The Prosecution claimed that this was a recurring theme where the defense asked the Military Judge to become the jailer, and now it is asking him to become the doctor as well.

The Government is providing the medical records to Mr. al-Hawsawi's defense on a rolling basis, with the last installment provided through the date of Aug. 2014, the next batch is due soon. However, the Prosecution is refusing to provide the classified medical records because the defense counsel have not signed the MOU. Mr. Ryan then recast the defense refused to sign the MOU as recalcitrance, and that the defense thinks of it as an indignity. He argued that *Touhy* governed the interview of the government physicians. The medical devices and medications (neck braces and orthopedic pillows) have been returned to him. The legal bins were only taken for one hour during the incident on Dec. 7. There was no video of the incident. *Bell v. Wolfish* and *Turner v. Safely* govern the conditions of confinement and require deference to prison officials. As to the deposition request, it is unauthorized as a method to make a factual record, the defense does not seek to preserve testimony for trial, and have not made a showing that the evidence is otherwise unavailable.

Mr. Ruiz listed the long list of attempts going back to March 2014 of their attempts to get medical information and records on their client. There are indications of potential cancer that has not been ruled out. The incident on Dec. 7, 2014, involved the physical takedown of Mr. al-Hawsawi by at least eight guards, while shackled, where Mr. al-Hawsawi weighs only about 100 lbs. This event involved the excessive use of force that exacerbated his long-standing chronic medical conditions that began with his torture, including the excessive rectal exams and feeding, which was, in effect, forced sodomy, from 2003-2006. These injuries were caused by an employee of our Government who violated our laws.

Constitutional rights do not stop at the prison door. We have the responsibility to preserve his health, and we have to communicate with him

and his doctors to ensure the adequacy of his medical care.

The refusal to sign the MOU is not from any improper motivation. It is not an indignity; it is a matter of integrity. The defense believes it imposes an affirmative obligation to cooperate in denying the defendants their legal rights, particularly to complain of their torture under domestic and international law.

Not only won't the Government provide the medical records (classified records from 2003-2006) to the defense, they also will not provide them to Mr. al-Hawsawi's present doctors, causing compromise of his current medical care.

LTC Gleason, for Mr. al-Hawsawi, argued that Dec. 7, 2014, incident involved an eight-member guard force that took down the defendant while shackled, injuring Mr. al-Hawsawi. The Government has only provided an unsworn 3-page letter by an unidentified government agent in response to discovery requests as to this incident. The defense is entitled to the remaining evidence on this incident under *United States v. Skipper*, which makes relevant evidence which deals with the defendant's adjustment to prison life, which, if offered, opens the door for the defendant's future dangerousness. These are highly relevant in sentencing in a capital case.

Mr. Swann for the Government stated that the Camp Commander had investigated the incident, and the 3-page statement was the result. It was declassified in order to provide it to the defense. The defense will have the DIM reports, and the Serious Incident Reports on this incident soon. There was no video of the incident as it was not a forcible cell extraction (FCE), which is videotaped.

The defense teams can now do their defense visit to their client at Camp 7 since the MC clarified that the Government could not require the signing of the MOU as an additional requirement before implementing the Commission's order.

AE 303: Ms. Bormann stated that the issues in 303 applied to all the defendants, and they did not want it argued in the future that they somehow forfeited their right to file and argue the issue as to their clients because they had unjoined this motion. They did so because they did not have sufficient discovery to raise the issue at this time appropriately—the M.J. clarified that all of the remaining defense teams could raise this issue in the future.

Mr. Ruiz then turned to AE 303, which deals with the conditions of confinement at Camp 7. There are long-standing conditions of confinement that violate the Law of War/IHL standards. It affects the life and ability of his client to engage with his defense counsel. Mr. al-Hawsawi's team had to decide to file and address these issues or wait. Because it was so important, he decided to file, rather than fight endless discovery disputes in order to get the issues before the Commission. As part of this motion, the defense proffered to the Commission the ICRC records that were provided to the defense under seal as a basis to support the allegations of failure to meet the required conditions of confinement. These are under seal and cannot be discussed in Court even though not classified.

First, international norms of detention standards by the U.S. and the international community provide prisoners in a pretrial detention setting with a right to a meaningful opportunity of contact with friends and family. Yes, security considerations must be accounted for in implementing this right, but an absolute bar is not permissible. The Government has very recently initiated the ability to record a video message to the family in Oct. 2014 and in Jan. 17, 2015, they began to implement a "skype" type process with appropriate security restrictions. The U.S. has repeatedly asserted that the detainees will

be treated in accordance with the Geneva Convention standards. However, the Prosecution is claiming that the Geneva Conventions, particularly Article 16, do not apply to the detainees and that they cannot seek any relief for the denial of these standards to them. Significant to this deprivation is that Mr. al-Hawsawi cannot be denied the ability to practice the tenets of his religion. This applies to all religions, not just Islam. One can look to the Hague detention facility to see a facility where the international standards and the security needs are appropriately balanced.

Mr. Trivett, for the Prosecution, argued that although we are bound by Common Article III, Article 16 of the Geneva Conventions only applies to international armed conflicts. In contrast, the conflict with al-Qaeda is a non-international armed conflict. Regardless, the 2009 MCA contains a statutory bar to the defendants' relying on the Geneva Conventions as a claim for relief. Moreover, any attempt to rely on customary international law would be an end-run around congressional intent. Hague is an impossible legal standard. Mr. al-Hawsawi is being detained as an enemy alien unlawful belligerent, and not as a POW or pretrial detainee. The defense cannot simply attack conditions of confinement by asserting some relation to the relationship with the defense attorney. He then analogized the claim for certain conditions of confinement to a future request for ice cream to support the defense relationship.

Mr. Ruiz responded that issues memorialized in the ICRC reports are troubling and serious. This is not ice cream. At this point, BG Martins interrupted to assert the Government Information privilege. The M.J. did not seem to think that Mr. Ruiz was approaching any discussion of the content of the ICRC documents, but Mr. Ruiz agreed not to raise ice cream further.

Mr. Ruiz reminded the M.J. that it was his business, responsibility, and authority to address these severe conditions that violate international law and humane treatment. The Hague example was not brought up to show an absolute requirement, but instead as an example of a

facility dealing with serious criminals under IHL but still able to balance rights and security concerns.

The reason that the defense moved to prohibit the Prosecution's attempt to publish statements in their response to AE 119, because the statements were directly derived from torture, and they are holding the Prosecution to their word that they will not use tortured evidence.

Mr. Trivell disagreed with the way the statements in their AE 119 response were derived.

As to AE 214A, in the interim between now and the resolution of classified discovery availability, the Government and Defense agreed to stipulate that the Government of Saudi Arabia had made numerous requests to see Mr. al-Hawsawi, and they will litigate the discovery issues as to the classified documents supporting this later.

Break for Lunch

AE 214/214A:

Mr. Ruiz brought forth three real-world examples of the U.S. vehemently protesting the holding of U.S. citizens in incommunicado detention. We need to mean what we say and act in conformity with our statements, not just for our citizens but for those that we detain. The Vienna Convention on Consular Relations (VCCR) and the bilateral agreement with Saudi Arabia apply to the detainees, and Mr. al- Hawsawi. U.S. Dep't of State policy characterizes these as mutual obligations. The case of *Sanchez-Llamas v. Oregon* authorizes courts to order appropriate accommodations for consular notification during the trial. There is a federal circuit split on this issue, with the 7th Circuit case (480 F.3d 822) supporting the defense argument.

In response to the M.J. question, 214A still needs a ruling. The M.J. ordered updated pleadings on the status of the discovery in this motion.

BG Martins for the Government argued that two issues determine this claim. First, that there is no judicially enforceable cause of action for the defendants in the VCCR and bilateral treaty, and the U.S. contends this is a request like a mandamus, and subject to its stringent requirements. The VCCR is self-executing but does not provide an individual right of action. *Olathe v. Rumsfeld*, a 2014 D.C. Circuit case, governs this issue.

The standard of review that is appropriate here is that of a request for a writ of mandamus and under *Cheney v. U.S. Dist. Court*, one can be issued only if there are no other means of obtaining desired relief if it is appropriate under the circumstances, and if the is a clear, indisputable right to the writ. BG Martins cast the reason of the VCCR as ensuring adequate representation and awareness of the charges. He argued that this has already been accomplished by the charge sheet and the televising of the proceedings. The 7th Circuit has come out the other way, but this does not make this a debatable issue.

Mr. Ruiz argued that just because the defendants are charged with serious crimes does not justify this treatment. *Olathe* is not a decision on the merits and provides little support for the Government's claim that it controls the resolution of this issue. All of the cases involving the VCCR's creation of rights deal with retrospective post-trial evaluations. At the same time, *Sanchez-Llama* is forward-looking and stands for the proposition that the Court does have the authority to order relief.

The U.S. publicly argued that an individual right of action attached in the Iran case. We would never accept that reading a charge sheet or watching T.V. satisfies our citizens' rights. There is no requirement to show any nexus of the deprivation to how the representation by Counsel is affected, but it is factually anyway. There is an ongoing issue of trust. Mr. al-Hawsawi wants to meet with Saudi consular officials and enlist their help in getting assis-

tance with his defense efforts in Saudi Arabia. This is critical contact and must happen.

The M.J. asked all parties if anything further could be done in light of the halt that AE 292 has put on further proceedings.

Mr. Connell asked for the Judge to order the deposition of the CIA interpreter and was told to file a motion.

Mr. Ruiz identified that A.E. 341J, an ex parte filing, and 248 series could be decided without further argument.

Furthermore, he was willing to waive oral argument on the discovery aspects of the female guard issue.

Mr. Harrington brought up the simmering issue of the JTF's change in handcuffing procedures that have resulted in injuries to their clients in the recent past, and this week specifically, which was impacting the clients' willingness to meet with his attorneys.

Ms. Bormann informed the Commission that the E.O. investigation filed against the M.J. by the female guards was complete and asked if the Judge had any information on the E.O. complaint. The M.J. said he has had no additional information, but would notify Counsel if he did, as he did when informed a complaint had been filed.

Mr. Ruiz clarified that the M.J. remained as a potential witness on this issue.

The M.J. recessed the Commission until April but then cautioned that that could only occur if the AE292 conflict issue has sufficiently advanced. The Commission recessed at 1426.

Jeffrey Kahn

Prosecutor v. Abd al-Rahim al-Nashiri

23-27 February 2015

Jeffrey Kahn is a University Distinguished Professor, Robert G. Storey Distinguished Faculty Fellow, Altshuler Distinguished Teaching Professor, and Professor of Law at the Southern Methodist University Dedman School of Law. He is a graduate of Yale College, Oxford University, and the University of Michigan Law School.

February 23, 2015

Primary Issue:

Defense Motion to Dismiss for Unlawful Influence & Denial of Due Process (AE 332)

Overview:

Defendant claimed the unlawful influence of the military judge and due process violations as a result of Change 1 to the Regulation for Trial by Military Commission. Defendant sought an order compelling discovery of Convening Authority documents and examination of witnesses related to the issue. The Government both opposed the motion on its merits and asserted the deliberative process privilege concerning all documents sought by Defendant. The Government also argued that no witnesses need to be compelled to testify.

Colonel Spath ruled that the deliberative process privilege applied to none of the documents he reviewed in camera; nevertheless, seven of forty-seven documents would not be released because these were neither relevant nor non-cumulative; and examination by Counsel of Mr. Vaughn Ary, Convening Authority and Director of the Office of Military Commissions, was necessary, relevant, and material to a determination of the merits of the unlawful influence issue.

Report:

COLONEL SPATH called the proceedings to order at 13:00. The Defendant, indicated he wished to add to his defense team. LIEUTENANT COMMANDER JENNIFER POLLIO was introduced to the Commission and admitted as a counsel for the Defendant.

The proceedings were consumed by the Defense Motion's argument to Dismiss for Unlawful Influence and Denial of Due Process for Failure to Provide an Independent Judiciary (AE 332). This motion resulted from "Change 1 to Regulation for Trial by Military Commission," which Deputy Secretary of Defense Robert O. Work approved on January 7, 2015. In relevant part, Change 1 states:

The Chief Trial Judge will detail a military judge from the Military Commissions Trial Judiciary when charges are referred. Once detailed, military commissions shall be the military judge's sole judicial duty. A detailed military judge shall be issued assignment orders for duty at the venue where the military commissions are convened.

COLONEL SPATH began by recounting in detail how he learned of Change 1. He then noted several exchanges he subsequently had with others about Change 1. He recounted a weekly staff meeting at which Major General Jeffrey Rockwell, Deputy Judge Advocate General of the Air Force, and Lt. Gen. Christopher F. Burne, the Judge Advocate General, were also in attendance. COL. SPATH noted that General Burne asked to speak with him and expressed concern about Change 1, to which COL. SPATH responded by noting he could not discuss pending matters (of which he recognized two, al-Nashiri and *U.S. v. Wilson* at Robbins A.F.B.). COL. SPATH noted a discussion on the record with Counsel in the *Wilson* case, after which he ruled that he would not disqualify himself because the matter remained unripe. Second, COL. SPATH also noted a phone conversation with Col. Plummer regarding judicial assignments, during which Col. Plummer said that he thought Major General Rockwell had indicated that Change 1 did not apply to him. COL. SPATH similarly made clear that he could not discuss the matter.

With that précis, COL. SPATH invited Counsel for each side to conduct a short voir dire. LEARNED COUNSEL KAMMEN for the Defendant went first at the suggestion of the Prosecution, followed by LT. MORRIS. What followed was the strange scene of attorneys for each side examining a sitting judge about the facts that had just been related. Particularly noteworthy was COL. SPATH's lengthy pauses before answering two questions put to him. LEARNED COUNSEL KAMMEN asked COL. SPATH if he was "surprised" by Change 1. COL. SPATH, after a long pause, expressed anxiety about "adjectives and adverbs" before saying he was surprised that OMC was the source of Change 1. Government counsel, LT. MORRIS asked if COL. SPATH thought Change 1 would affect his ability to be fair and impartial. After a very long pause, COL. SPATH said, "I don't know." He observed, quite rightly, that this was the basis of the motion, at the present moment unresolvable because of the need to hear any relevant evidence and work through the motions. In retrospect, it seemed imprudent for LT. MORRIS to ask a question on the ultimate issue. What other answer could he have reasonably expected? The answer he received only served to emphasize the gravity of the issue.

COL. SPATH then summarized a brief conversation with Judge Pohl that he had forgotten to mention, which triggered another round of examination by defense counsel.

Following this directed questioning, COL. SPATH turned to the defense request before him for the discovery of the Convening Authority's internal documents about Change 1. These were submitted to COL. SPATH for in camera review, which he conducted. The Prosecution asserted the deliberative process privilege with regard to them all.

COL. SPATH heard argument on whether these documents should be disclosed. While the Defense bore the burden of persuasion with regard to the motion to compel production, COMMANDER MIZER noted that the Prosecution bore the burden with regard to privilege.

COMMANDER MIZER than presented a spirited argument supporting the Defense's motion. He began by noting that documents already provided in the Government's response to the motion (AE 332A). An "Executive Summary" for DepSecDef Worth from Mr. Ary (Tab B of Attachment B to AE332A) expressed "in every paragraph" a "drumbeat" of interest in speeding up the proceedings. These, CMDR. MIZER asserted, were far from oblique references to a

profoundly impermissible purpose for the Convening Authority to undertake: regulating the pace of the proceedings and recounting some recent military legal history, CMDR. MIZER noted how Congress gave TJAGs three stars to strengthen them in arguments with their civilian counterparts regarding the military commissions. These documents, he asserted, give the appearance of an "end run" around the TJAGs. It appeared to him that the Convening Authority consulted no one, beginning this action just 60 days into Mr. Ary's tenure. CMDR. MIZER went so far as to assert that unlawful influence may constitute a crime under the UCMJ (Article 98) and the MCA. However, he conceded that such an interpretation had only been advanced in theory, not practice.

COMMANDER MIZER next analyzed the claimed ability to assert the deliberative process privilege under MRE 501. In the main, he argued that the few cases marshaled by the Government did not satisfy the relevant portion of Rule 501, which limits the universe of available privileges to those found in "principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence, insofar as the application of such principles in trials by military commissions is practicable and not contrary to or inconsistent with the M.C.A., these rules, or this Manual." CMDR. MIZER (to my mind, quite successfully) distinguished the precedents offered by the Government to satisfy this requirement. In the main, he said, this privilege tends to be asserted in FOIA cases, not criminal cases.

Moreover, those few criminal cases cited by the Government concerned the invocation of the privilege to protect decisions about whether to try a case (i.e., selective prosecution claims). What is more, CMDR. MIZER continued, the deliberative process privilege has only been recognized by the Court of Appeals for the Armed Forces concerning the deliberations of panel members and the judge.

On the contrary, the Government asserts the privilege in this case well past the point of the charging decision in order to protect from disclosure. This assertion goes against the truth-seeking function that the Supreme Court noted in *Trammel v. U.S.* recommended a narrow construction of the privilege: assertion of this privilege should not be used to prevent the public from evaluating the conduct of their Government. Here, CMDR. MIZER made an impassioned argument that the merits of his motion "goes to whether you are even a military judge. That's how serious this is."

CMDR. MIZER concluded on a few more technical errors he claimed the Government had made in its assertion of the privilege. First, the privilege must be invoked by the head of the department; the Convening Authority, he asserted, could not qualify for that status, which at the very least, required the DepSecDef to personally review the documents and assert the privilege himself. In addition, CMDR. MIZER noted that the Defense was hamstrung by the absence of any privilege log or Vaughn index that ordinarily accompanies the assertion of the privilege when it is invoked in FOIA cases. This, he alleged, reflected the Government's assertion of this privilege as a "post hoc rationalization." Relatedly, he noted that the privilege does not protect entire documents, only those portions that expose deliberations. Thus, each item to be withheld must be both pre-decisional and deliberative in nature. The Government, he alleged, was using it in a manner more akin to the state secrets privilege.

> LT. MORRIS asked if COL. SPATH thought Change 1 would affect his ability to be fair and impartial. After a very long pause, COL. SPATH said, "I don't know."

In his final words to the Court, CMDR. MIZER circled back to his primary theme, quoting from *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997), that "where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government" (internal quotations and citations omitted). You, judge, he said, are the "last sentinel in the struggle against unlawful influence." (In rebuttal remarks after LT. MORRIS spoke, CMDR. MIZER returned to this theme yet again, urging COL. SPATH "not to lose sight" of the fact that the Convening Authority was essentially telling him that he must move faster on a capital case and would be staying on base until he was finished. The Government was asserting the deliberative process privilege, he said, over something unlawful for the Convening Authority to deliberate: how to speed up the case.

It now fell to LT. PAUL MORRIS to respond for the Government. Candidly, he did not match CMDR. MIZER's level of advocacy on this occasion. COL. SPATH set the boundaries of the discussion for him with a few early exchanges that established that the deliberative process privilege was the only privilege the Government asserted. The standard for compelling ordinary discovery should be used if COL. SPATH were to find that the privilege did not apply. COL. SPATH noted that he could not find a single case where a Convening Authority invoked this privilege concerning decisions affecting a trial. (LT. MORRIS later conceded that he, too, could find no such case.) Finally, COL. SPATH extracted an agreement from LT. MORRIS that *In re Sealed Case* provided a helpful framework for evaluating the assertion of the privilege in this case. This concession meant that it was agreed before LT. MORRIS began that the deliberative process privilege was only a qualified privilege that could be pierced based on need. LT. MORRIS was, therefore, starting in a somewhat defensive posture.

He did the best he could. Nevertheless, his arguments, most likely for want of useful cases, were too general and policy-oriented in response to his adversary. LT. MORRIS noted the apparent basis of the privilege in a desire to prevent a chilling effect on the candid expression of opinions necessary to make good decisions. He tried to claim that the Defendant's claims were too speculative and lacked sufficient factual foundation to challenge the assertion of the privilege. This did not seem particularly helpful since the Defendant's theory invoked both the dangers of actual unlawful influence and the appearance of unlawful influence.

Thus, in response to his arguments, COL. SPATH repeatedly noted the public policy concerns raised by the very nature of the allegation and the unique position of the Convening Authority in the military commission system. The need for transparency was great. LT. MORRIS's response did not help his case. He said that the Government was "heartened" that COL. SPATH now had all the documents in his possession. Therefore, he could demonstrate deliberation by his evaluation of all the factors for the privilege (presumably, upholding its assertion).

COL. SPATH noted that he did, indeed, have all of the documents in his possession and had read them all. He then asked for an argument on the motions regarding witnesses that the Defendant wished to compel to testify (I believe these are AE 332E & G). CMDR. MIZER identified the following witnesses as "key" to a determination of unlawful influence:
1) Mr. Vaughn Ary—How did he decide that the pace of litigation was his responsibility?
2) Deputy Secretary Robert Work—Why were TJAGs cut out of the decision-making process?
3) TJAGS themselves—Only the Army TJAG apparently provided a response in writing.
CMDR. MIZER then laid a bit of a trap for COL. SPATH. CMDR. MIZER said that he recognized that it might be "uncomfortable" to call the TJAGs to testify. This elicited a swift response

from COL. SPATH, who said that he was not at all uncomfortable doing so, that he sees these individuals on a weekly basis, and that he was "quite comfortable that I have peaked my military career." However, the specter of unlawful influence was so obvious that the observer's gallery burst into laughter.

CMDR. MIZER then noted two other desired witnesses:

4) Lt. Col. Jonathan Vaughn

5) Stephen Preston—CMDR. MIZER noted the "optics" of the Convening Authority reaching out to the CIA's former General Counsel, now General Counsel for the Defense Department.

LT. MORRIS responded by adamantly reasserting that no facts had yet been offered that could constitute unlawful influence. By reaching for the moon, he appeared to make another miscalculation about how to defend the privilege and limit discovery concerning its assertion. He staked out an absolute position rather than making a tactical retreat to salvage as much as could reasonably be hoped to save. COL. SPATH reacted rather strongly, noting that the search for facts was "the whole point." COL. SPATH then tipped his hand a bit, noting that the Convening Authority seemed to be making statements about its displeasure with the pace of litigation and "displeasure at the speed I am moving it forward." Why, he asked, is the Convening Authority, "which has no authority over me," commenting in this way? The question, therefore, is whether there was the actual or appearance of influence on him. COL. SPATH wondered aloud whether "an objective member of the public" who watches these proceedings would see "paybacks" or "currying favor" with one side or the other in his rulings? COL. SPATH expressed astonishment that the Government held that not a single witness was needed to explore this issue. In a colloquy with LT. MORRIS just a few moments later, COL. SPATH returned to his hypothetical "objective member of the public" to emphasize that appearance mattered as much as actual fact. "Will the public think I am making decisions faster so that I can go home?"

After allowing a short rebuttal from CMDR. MIZER, a recess was called at 1452.

The proceedings reconvened with all present at 1600. COL. SPATH noted that there would likely be additional findings of fact and conclusions of law but stated the following for the record.

Having reviewed all of the documents in camera, he found that the deliberative process privilege applied to none of them. (A few moments later, COL. SPATH noted that among the documents was a copy of the 2014 NDAA, a public record, leading him to muse "why that is deliberative process, I don't know . . . .")

However, COL. SPATH then said that he had also assessed the documents to determine what appeared at present to be relevant and non-cumulative for purposes of discovery. From the index to Attachment B to AE332j, he determined that all forty-seven items must be provided to the Defendant with the exception of seven items (## 4, 5, 15, 16, 17, 21, and 23) that were unrelated and irrelevant. These seven, therefore, would not be released. COL. SPATH directed the Government to provide the rest to the Defendant, which the Government predicted would require approximately one hour. COL. SPATH then indicated that all of the documents would be sealed in the record of the AE 332 series.

Turning to the matter of witnesses, COL. SPATH noted that reviewing the documents just released to the Defendant may result in a request for additional witnesses beyond any he might order be compelled to testify in the current proceeding. COL. SPATH directed the Defendant to identify additional witnesses, if any, by noon on Tuesday, February 24, or indicate why more time was needed.

In the meantime, COL. SPATH stated that he felt that the testimony of Mr. Vaughn Ary was "necessary, relevant, [and] material" to the issue. It may be possible that other witnesses would be needed as well. He directed the Government to inquire about his availability to testify. He would be welcome to do so in person at Guantanamo Bay or via VTC. This should be determined by Tuesday or Wednesday, February 24 or 25.

The proceedings concluded with COL. SPATH's inquiry whether any other pending matters could be considered in the interim. The Government stated its opinion that the proceedings should continue. CMDR. MIZER stated that all proceedings should stop until this motion was resolved. That would be consistent with other cases concerning unlawful influence—however, MR. KAMMEN later conceded that perhaps upon further consideration, some less substantial matters might be found to discuss.

COL. SPATH said that he would make findings for the record, rather than rule now from the bench. He hoped to do so by tomorrow, Tuesday, February 24. Noting that "no good deed goes unpunished," and worrying that this final comment would come back to haunt him, COL. SPATH noted in the conclusion that Change 1 was not the Prosecution's doing and that it was clear that they were not involved. However, unlawful influence is "incredibly destructive" and "must stop if it is here." The proceedings would reconvene at 1300 on Tuesday, February 24.

The proceedings adjourned shortly before 1700.

February 24, 2015

Primary Issue:

Defense Proffer Regarding the Possible Testimony of Additional Witnesses in Support of Defense Motion to Dismiss for Unlawful Influence & Denial of Due Process (AE 332)

Overview:

At the conclusion of the proceedings held February 23, Col. Spath noted that review of the documents he had ordered released to the Defendant may result in a request for additional witnesses beyond the testimony he ordered be taken of Mr. Vaughn Ary, Convening Authority and Director of the Office of Military Commis-

sions. Colonel Spath directed the Defendant to identify additional witnesses, if any, by noon on Tuesday, February 24, or indicate why more time was needed. It was announced that Mr. Ary would testify via VTC at 0930 tomorrow.

Today, the Court heard a Defense request to compel the testimony of four additional witnesses. A proffer was heard from Cmdr. Mizer and a rebuttal from Lt. Morris. In the interests of speed and efficiency, Col. Spath suggested notifying three of these individuals that their testimony could be possible following Ary's testimony, but expressly declined to issue any ruling on the matter.

Participants Speaking on the Record (in speaking order):

Colonel Vance H. Spath, USAF, presiding as Military Judge, Military Commissions Trial Judiciary;
Colonel Robert C. Moscati, USA, Deputy Chief Prosecutor;
Mr. Richard Kammen, Learned Counsel, representing the Defendant;
Commander Brian Mizer, USN, representing the Defendant;
Lieutenant Paul B. Morris, USN, Trial Counsel, representing the United States.

Report:

COLONEL SPATH called the proceedings to order at 1331. All present yesterday were present today. A summary of the 802 sessions held at noon today was provided. Mr. Ary will testify via VTC at 0930 tomorrow. A colloquy between the Court, COL MOSCATI, and MR KAMMEN clarified the universe of documents produced to the Defendant and how the documents not provided would be sealed and identified in the record. COLONEL SPATH then asked CDR MIZER to identify the four additional witnesses that the Defendant wanted to testify and to explain the relevance of their testimony to the issue of unlawful influence.

CDR MIZER began by noting two broad themes to Defendant's request. First, expressly noting that he was paraphrasing former Senator Howard Baker, CDR. MIZER said that the Defendant's Unlawful Influence Motion required a finding of "what did the Convening Authority know, and when did he know it." Second, he asserted that *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006), could be read to support Defendant's theory that unlawful influence may be sourced either to the convening authority itself or to conduct by the convening authority's staff that is then imputed to the convening authority. In this case, the unlawful influence either came from the Convening Authority himself or from his staff's conduct, of which he perhaps was unaware.

CDR MIZER then identified the four witnesses whose testimony the Defendant wants to compel:
1) Lt. Col. Alyssa Adams, a legal advisor to the Convening Authority;
2) Cdr. Raghav Kotval, a legal advisor to the Convening Authority;
3) Matthew Rich (or Rich Matthew, the Defendant was uncertain), position unstated;
4) Lt. Col. Jonathan Vaughn, position unstated.

With regard to Adams, CDR MIZER laid out a theory of her relevance as someone involved at the earliest stages in the slow evolution of the memorandum to the DepSecDef. Her name appears as the author of numerous emails sent to specific personnel in the Convening Authority and to what appears to be a listserv, "OMC List CA Legal Advisors." It is important to at least one of the Defendant's theories of unlawful influence to know who is on that list since email criticism of COL SPATH before a larger forum might be imputed to the Convening Authority. Referencing two such emails (found at Tab 2 [Bates 127498] and Tab 8 [Bates 127542] of the documents ordered released yesterday), CDR MIZER noted her critique of CAPT WAITS (the military judge presiding over the military Commission for Abd al Hadi) to the effect that "he

had a day job." CDR MIZER depicted the exchanges in these emails as beginning with ideas for unlawful influence far more egregious than that resulting from their ultimate action.

The central witness, however, seemed to be Cdr. Kotval, whom CDR MIZER depicted as the only "whistleblower" among the legal advisors. Referring to the emails previously noted, he read from one the claim that: "The defendants and the judges are aligned on this issue. The judges don't want to move." This and other quoted statements shot out like a smoking gun, producing several waves of titters in the observer's gallery. Against these critiques of sitting military judges, in email exchanges about changing their assignments and physical location (if not, in some readings, changing the judges themselves), CDR MIZER read out the concerns expressed by Cdr. Kotval: Are we coercing a judge? If not, why are we intruding in this process? In trying to speed up the trial, are we affecting its fairness? One by one, he seemed to be laying out the objections to and concerns about the effects of what became Change 1 (which was discussed at length in the proceedings on February 23).

COL SPATH interrupted the proffer to ask whether the chatter of the advisors was relevant to what the Convening Authority actually did. CDR MIZER, hitting on COL SPATH's repeated concern, emphasized the perception of such emails created. And, he continued, if the Convening Authority is ignoring the legal advice of a concerned advisor, this should enter into the unlawful influence analysis, too. CDR MIZER reiterated that the actions of SJAs [which I take as an acronym for "staff judge advocates"] could constitute unlawful influence itself.

CDR MIZER continued with his description of two more email chains (found at Tab 18 [Bates 127578] and Tab 19 [Bates 127582]) between Kotval and Adams. In one, we find a statement that yes, the Convening Authority is influencing, but this is not unlawful influencing. In the other, the email chain ends with Adams's exhortation "Enough emails now!" After the other smoking guns, CDR MIZER succeeded in leaving the darkest impression as to what purpose this exclamation served without the need to explicitly characterize the sentence himself. He merely asked the question: what did she mean? For purposes of supporting the potential relevance of her testimony, this seemed more than adequate.

CDR MIZER then noted what he called the "cameo appearance" of a third legal advisor, who is either Matthew Rich or Rich Matthew (MIZER was uncertain but referred to Tab 11 [Bates 127561]). This person offered "my two cents" on decisions about possibly recalling reserve judges and detailing them. He notes that some reservists might be former prosecutors in Article III courts who might be "ideal candidates" if willing to relocate to Guantanamo. CDR MIZER suggested that this might indicate that at some point, these advisors were contemplating unseating judges with individuals they thought better suited for the job. In the end, CDR MIZER surmised, the decision was made simply to seek more law clerks, which part of Change 1 indeed reflects. This was, however, just descending from outrageous unlawful influence to not so outrageous, but still unlawful, influence.

Finally, CDR MIZER identified Lt. Col. Jonathan Vaughn, but only by name and with reference to his name having been mentioned at yesterday's proceedings. Pointing to Tab 29 (Bates 127621), an email to Kotval and Adams, he wrote: "FYI. You are the lead for RAH materials. Good hunting." CDR MIZER simply wanted to know what that might mean.

Before concluding his presentation, CDR MIZER noted that he felt it to be a "dangerous business for defense counsel" to feel the need to advise someone of his "31-B rights." In this context, this remark seemed to be a reference to Article 31(b) of the Uniform Code of Military

Justice, which states: "No person subject to this chapter may interrogate or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial."

CDR MIZER also asked to correct a misstatement he made at yesterday's proceedings. It was then Judge Homer Ferguson, not Andrew Effron, who dissented in *United States v. Ray*, 20 USCMA 331, 336 (1971), with the statement: "I have yet to learn of a single instance wherein the sanctions of Article 98 have been involved. Its enactment has not resulted in the anticipated objective and, to all intents and purposes, appears to have been an exercise in futility."

As a final (and, given what came before, an exceptionally effective) closing word, CDR MIZER noted that he saw Cdr. Kotval while in Washington D.C. to observe the oral argument in al- Nashiri's appeal before the D.C. Circuit. Apparently, Kotval was no longer mobilized. Was his year up, or was the whistleblower, the only dissenting voice among the Convening Authority's legal advisors, "sent out to pasture"?

LT MORRIS then offered the Government's response. He began by disputing the interpretation CDR MIZER offered of Lewis. It should not be read to support an order compelling legal advisors to testify. Lewis was about a voir dire of a judge orchestrated by a staff judge advocate. That is not what we have here.

LT MORRIS next argued that all of the witness requests should be considered moot by the fact that Mr. Ary will testify tomorrow, making this inquiry premature.

Finally, LT MORRIS characterized the email exchanges as just the sort of internal communications that should be expected among legal advisors. COL SPATH disagreed, stating that he would have expected some coordination with someone outside the Convening Authority before sending a recommendation to the DepSecDef. Then, perhaps to the surprise of LT MORRIS, COL SPATH asked him directly whether he was concerned, as a guardian of this process, with the content of these emails. LT MORRIS answered rather stiltedly that "the Government is heartened that these concerns were looked at." He then repeated his characterization of the exchanges as ordinary roundtable brainstorming as ideas are being formulated. LT MORRIS emphasized that the email chains did not include Mr. Ary himself.

COL SPATH agreed that Mr. Ary did not seem to be copied on the emails, but asked just who would have seen the comment "The defendants and judges are aligned on this issue. The judges don't want to move." Was that office talk? How did that talk relate to the issue of unlawful influence, especially as that allegation concerned the importance of appearances, too? LT MORRIS did not have a good answer, simply repeating that Mr. Ary could answer all of these questions himself.

In rebuttal, CDR MIZER asserted that the email exchanges showed the evolution of complaints about judges into queries about the efficiency of the trial judiciary (which MIZER equated to questioning the judges' "billable hours"). This is "naked" unlawful influence, he said, that is then covered with something that might be a little less appalling to practitioners of military law. CDR MIZER, therefore, concluded that these witnesses were necessary for impeachment purposes and—noting that he himself served as Justin Lewis's appellate defense counsel—disputed LT MORRIS's characterization of the *Lewis* case. Finally, he recommended to COL SPATH that the gravity of the allegation of unlawful influence demanded a "complete" ruling.

COL SPATH then spoke, emphasizing that he was not issuing a ruling. He began by noting his "thick skin" to criticism. Nevertheless, he

appeared rather stung by the criticisms in these emails, although he expressed this as concern about the impression that goes out to the public that judges do not want to move these cases along in an efficient manner. More than once, however, he noted that he had scheduled a two-week set of back-to-back proceedings in order to begin evidentiary hearings. Absent Charge 1, those hearings would already be taking place. It was clear that COL SPATH felt it not a little ironic that he was accused of not moving fast enough by advisors to the Convening Authority whose recommendations (resulting in Change 1) have now set back the progress of this Military Commission by at least a week. COL SPATH, therefore, suggested that three of the witnesses—Adams, Kotval, and Rich—be notified that there was a possibility they might be called to testify and preparations begin to eliminate any delays to their prompt appearance should that need become a reality.

COL SPATH noted that he did not feel comfortable that a disinterested member of the public would think him dispassionate and fair should he work on other matters in the case while the unlawful influence motion remained undecided. Although he felt that he could conduct his work dispassionately and fairly, he worried about the public perception.

Although he appeared ready to adjourn, COL SPATH entertained a request by COL MOSCATI to speak on the issues himself. Before allowing him to do so, COL SPATH asked him the same direct question that had been put to LT MORRIS: "Let me ask you, as second chair, do you believe that the Defendant has shown 'some evidence' that there may be an unlawful influence?"

COL MOSCATI answered unequivocally: "Short answer: No." COL MOSCATI rejected CDR MIZER's theory of imputation. These legal advisors were talking amongst themselves, which was their role: to consider the ramifications of actions that their principal might take. They are not actors. Imputation cases concern advisors who reach out to touch the judiciary. They do not extend to internal email communications that, but for Mr. Ary's action, this Court would never have seen. Since the Convening Authority, Mr. Ary, would appear tomorrow, there was no need for these additional witnesses.

COL SPATH reiterated that he was not making a ruling, merely suggesting that possible witnesses be notified and readied to avoid further delay. The only relevant witness about whom he had ruled was Mr. Ary. As to the imputation theory, COL SPATH noted that he would not ordinarily care about the criticisms, but if the Convening Authority is commenting on others.

It seems worth noting the following summary provided in Judge Erdmann's opinion in *Lewis*: "The record reflects that the SJA—a staff officer to and legal representative for the convening authority—was actively engaged in the effort to unseat MAJ CW as a military judge. The trial counsel, who was provided advice on VoIP during MAJ CW by the SJA, became the tool through which this effort was executed." *United States v. Lewis*, 63 M.J. 405, 414 (C.A.A.F. 2006).

Forums on his effectiveness or efficiency that may be significant for purposes of unlawful influence analysis. Not all of the emails were private discussions; some of them contain listservs. COL MOSCATI expressed his preference not to deal in hypotheticals when the testimony of Mr. Ary was only a day away.

The proceedings would reconvene at 0900 on Wednesday, February 25, with Mr. Ary expected via VTC at 0930.

The proceedings adjourned at 1436.

February 24, 2015

Primary Issue:

Testimony of Vaughn A. Ary
(Defendant's Motion to Dismiss for Unlawful Influence & Denial of Due Process (AE 332))

Overview:

Mr. Vaughn Ary, Convening Authority and Director of the Office of Military Commissions, testified via VTC. Mr. Bobbie Lee Little Jr., Deputy Chief Defense Counsel, was called as an impeachment witness. Their testimony was punctuated by notice that Judge Pohl had ordered abatement of the commission proceedings for Khalid Shaikh Mohammad, et al. This order, in a ruling docketed while testimony was underway, followed from Judge Pohl's finding of "at least the appearance of, an unlawful attempt to pressure the Military Judge to accelerate the pace of litigation and an improper attempt to usurp judicial discretion."

The taking of testimony from other witnesses is expected. The Government has agreed to the testimony of the Army, Navy, and Air Force TJAGS. Subject to their availability, their testimony may be taken within the next few days. Judge Spath anticipated a written ruling on Defendant's motion next week.

Participants Speaking on the Record (in speaking order):

Colonel Vance H. Spath, USAF, presiding as Military Judge, Military Commissions Trial Judiciary;
Mr. Richard Kammen, Learned Counsel, representing the Defendant;
Lieutenant Paul B. Morris, USN, Trial Counsel, representing the United States;
Commander Brian Mizer, USN, representing the Defendant;
Colonel Robert C. Moscati, USA, Deputy Chief Prosecutor.

Report:

COLONEL SPATH called the proceedings to order at 0902. All present yesterday were present. Before beginning Mr. Ary's scheduled testimony, COL SPATH felt obliged to notify Counsel that while working the previous night, he had remembered a second supplemental filing to the defense motion for recusal and to abate proceedings filed in *United States v. Wilson*, a case over which he is presiding. The filing stated that the TJAG of the Air Force (General Burne) had informed the lead defense counsel in *Wilson* about Change 1, the document at the center of the proceedings these three days.' The document further asserted two facts that the TJAG allegedly told the Wilson defense counsel: "(A) in light of the requirement that military commissions judges relocate to Guantanamo and cease judging in courts-martial, JAG does not intend to permit Colonel Spath to continue to serve as a detailed military commissions judge; and (B) TJAG is in the process of finding a replacement for Colonel Spath to serve as a military commission judge. The timing of the replacement has not yet been determined. Negotiations on the implementation of Change 1 are ongoing."

MR KAMMEN asked whether COL SPATH would follow an order by General Burne to remain his chief judge (rather than move to Guantanamo per Change 1). COL SPATH made clear that he had reported this filing out of an abundance of caution. He was detailed to this case, he said and has neither recused himself nor been undetailed by his superiors. Therefore, he intended to continue with the proceedings, the proposed dilemma about "which orders to follow," not having materialized.

After a short recess, Mr. Ary was sworn and began his testimony via VTC. His testimony would take almost the entire day. After the early morning round of examination, however, a second dramatic revelation occurred that should be described first. Reconvening after a short recess during which an 802 session occurred, COL SPATH announced that Judge Pohl had issued a ruling on the unlawful influence motion that Change 1 had catalyzed in the military commission proceedings for Khalid Shaikh Mohammad and others. COL SPATH announced that Judge Pohl had ordered abate-

ment of those proceedings until Change 1 was rescinded. This announcement sent a shock-wave through the observer's gallery. COL SPATH stated that this ruling would not prevent the scheduled testimony. MR KAMMEN then took the opportunity to zero in on COL SPATH's frequently stated concern with public perception:

I just want to say something, and I want to say it, and I'm afraid it won't sound respectful, but I mean it with respect. Here's the problem with what Mr. Ary has done. It's all about the pace of litigation. Every time you say we've got to forge ahead, every time you say, as you did yesterday, time and time again, I want to keep this moving, it seemed to the public . . . this worrying out loud had just its intended effect. COL SPATH interrupted MR KAMMEN with a lengthy statement, the heart of which was the following:

Change 1 to Regulation for Trial by Military Commission was approved by Deputy Secretary of Defense Robert O. Work on January 7, 2015. Trial By Military Commission in the relevant part states: "The Chief Trial Judge will detail a military judge from the Military Commissions Trial Judiciary when charges are referred. Once detailed, military commissions shall be the military judge's exclusive judicial duty until adjournment, final disposition of charges, recusal, replacement by the Chief Trial Judge pursuant to R.M.C. 505(e), or reassignment by the appropriate Judge Advocate General. A detailed military judge shall be issued assignment orders for duty at the venue where the military commissions are to be convened."

AE 343C, Ruling, Defense Motion to Dismiss for Unlawful Influence on Trial Judiciary, U.S. v. Khalid Shaikh Mohammad, et al. (February 25, 2015).

But for the public, hopefully, they can pick this up: I feel no pressure to move the case forward inappropriately. What I feel is the pressure for everybody involved in this process, that it has gone on far too long and, where appropriate, we're going to move forward. Where not appropriate, we're going to stop. And obviously, the UI issue has caused me to stop. I have already told you we're not moving on to the evidentiary stuff next week, so clearly, I'm not just forging ahead. And I didn't take it disrespectfully. I appreciate your comments about the perception, and I think they're important. That's part of what this whole UI issue is about. But absent an order to abate, we have a witness, we're getting testimony, and we need to finish the UI motion, and that is a good use of our time right now. I also think it is important for any perception—I appreciate Judge Pohl's dealing with the KSM case. If you all want to ask questions as well from the trial side, you may. His opinion, in that case, has no reflection on what we're going to do in this case. It appears to me he didn't have an evidentiary hearing before he issued his order, because I knew of the KSM proceedings a week ago or two weeks ago or whenever they were, I did not think this issue was addressed, so it appears to me this was issued on brief. And we clearly are having an evidentiary hearing and even having witnesses, and so I want to move forward as we work through that.

Listening to these remarks, it was hard not to conclude that COL SPATH had succumbed to a felt need to express yet again his feeling of freedom to assuage concerns and strengthen public perception of the proceedings. But the more frequently this protest was made, the less effect it seemed to have. The spectral presence of unlawful influence seemed to hang in the courtroom all the darker despite efforts to cast it out into disinfecting sunlight.

Turning now to Mr. Ary's testimony, MR KAMMEN's view of Mr. Ary as a hostile witness, despite being called by the Defendant, was immediately apparent from the very start of the morning examination. MR KAMMEN's examination took most of the day, extending

from 0930 until at least 1430. His tone and style of questioning was aggressive and sometimes even harsh and discourteous (if not disrespectful). More than once, his approach drew admonishment from the bench.

MR KAMMEN was utterly unfazed by the Court's occasional displeasure. His theatrics were clearly part of an intentional examination strategy designed to rattle Mr. Ary and lead

him to say more than a cautious, seasoned military officer and experienced lawyer might otherwise be expected to say. For example, MR KAMMEN required Mr. Ary to acknowledge the large number of people watching his testimony "all over the world." MR KAMMEN referred to Change 1 as Mr. Ary's "brainchild." Later in the testimony, MR KAMMEN asked whether someone had been able to "explain" to Mr. Ary that complex litigation moves slowly. The choice of verb, in this context, so condescending, could not have been accidental given Mr. Ary's immediately prior service as the Staff Judge Advocate to the Commandant of the Marine Corps. On other occasions, when Mr. Ary attempted to elaborate yes/no answers, MR KAMMEN took a sarcastic tone, asking at least once: "Are you done with your speech?" Other times, MR KAMMEN would slightly restate testimony using his voice, posture, and facial expressions to discredit the answer without in any way misstating it. For example, MR KAMMEN asked Mr. Ary whether "in affecting the pace of litigation, your desire was to change the status quo" and received an affirmative response. MR KAMMEN then went to great lengths to point out how Mr. Ary's actions had ground the proceedings to a halt.

Given Mr. Ary's clear intelligence and long experience, he could not help but have understood the purpose of MR KAMMEN's concession-based method of examination (i.e., demanding yes/no answers to declarative statements that MR KAMMEN turned into questions by asking for confirmation of their truth). Over the course of the day, this method nevertheless achieved some degree of success. On occasion, Mr. Ary could not resist providing more information than the minimal yes/no answer required by the question. When he attempted to do so, he was either discourteously cut-off by MR KAMMEN or stumbled into a line of questioning that, in retrospect, he may have preferred not to go down.

The unofficial/unauthenticated transcript of the proceedings having already been posted on the Military Commission's website, a detailed description of the direct examination does not appear useful. A summary of several exchanges, however, might provide some sense of the day's events that a sterile transcript does not easily convey.

One line of questioning was aimed to extract an admission that Mr. Ary not only felt entitled to affect the pace of litigation in the commissions but also that he had that objective as his conscious design in drafting and recommending Change 1. Mr. Ary's position was that "I have a duty to make sure that everyone is properly resourced and positioned" to accomplish the mission of fair, transparent, and just military commissions. Change 1 was meant, he said, to further that objective. MR KAMMEN sought evidence to support the Defendant's position that Mr. Ary and/or his staff used claims of resourcing as a cover for a more sinister purpose,

unlawful influence of the trial judiciary (or, at the very least, the appearance of such unlawful influence). Under that theory, moving judges to Guantanamo and limiting their duties to commissions was a tool of coercion to push commissions to a faster conclusion.
http://WWW.mc.mil/CASES.aspx.

As part of this discussion, the historical role of TJAGs was explored and comparisons made between the military commission system and regular courts-martial under the UCMJ. MR KAMMEN sought to portray Mr. Ary's view of his role as that of a "super" convening authority endowed with powers that, for a good reason, are not lodged in "regular" convening authorities. Although Mr. Ary disputed the "super" label, he did express the view that his role as convening authority was "somewhat different" than the ordinary one. Asked to provide a statutory source for the power to order judges to move to Guantanamo and drop their other duties, Mr. Ary first clarified that the Military Commissions Act (MCA) makes the SecDef the Convening Authority, a role then delegated to him. Mr. Ary then answered that the MCA and rules promulgated by the SecDef or his designees to accomplish the purposes of the MCA gave him that authority.

MR KAMMEN sought to portray Mr. Ary as acting without consulting the other stakeholders in the military commission's process, especially the TJAGs. Mr. Ary testified that he spoke to no judges or TJAGSs Acting on advice, he said, he concluded that to have done the contrary would have been inappropriate under the reasoning of *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013). Mr. Ary said that he did not want his actions to take on the appearance of criticism of any of the judges. MR KAMMEN painted this as a post hoc rationalization, asking if "the *Salyer* rationalization" appeared in any of the emails that either he or his staff prepared. Mr. Ary said that no email he wrote raised the issue and that he did not know if it appeared in staff emails.

Another line of questioning sought to obtain information about Mr. Ary's legal advisors. During this questioning, Mr. Ary fell prey to MR KAMMEN's aggressive, concession-based approach to the examination. Asked to confirm that he did not want "yes men" surrounding him, Mr. Ary found himself unable to stop with a sufficient answer, yes. Instead, he volunteered: "I always encourage free and open discussion with my legal advisors." This unnecessary explanation was gleefully repeated by MR KAMMEN when he explored the advice of Raghav Kotval (whom CDR MIZER characterized the previous day as the "only voice of dissent" and a "whistleblower" who may have been "sent out to pasture").

MR KAMMEN spent some time inquiring into the logic of Change 1 itself. First, MR KAMMEN noted that Mr. Ary and his staff reviewed judicial records. MR KAMMEN seemed to imply some sinister prying by Mr. Ary's staff into the substance of decision-making by COL SPATH, leaving the door open for Mr. Ary to say, as he did, that this review was only meant to determine the number of days on the record in court for each of the commissions. Mr. Ary explained that he was trying to determine whether a third courtroom needed to be built. Mr. Ary further explained that the timing of his recommendation was also driven by the release of the Senate Select Committee on Intelligence Executive Summary, which he saw as a "game-changer" that could result in a faster declassification process. Yet another factor was the number of personnel requests unfilled when Mr. Ary became the Convening Authority.

MR KAMMEN then went on the attack with a series of very sharp, aggressive questions aimed to show how Change 1 could not affect any of the factors that Mr. Ary had identified as brakes on the commission process, noting the need for the participation of the various constituencies interested in declassification, the activity of lawyers making motions, their presence to argue them, etc. Then, MR KAMMEN chose a

rather personal example on which to make his final point, referring to the document created by Mr. Ary's staff assessing total time in Court (the tone of questioning that may be detected in this transcript was typical of MR KAMMEN's examination):

Q. What this document tells you if you had looked at it, was about Colonel Spath and his time spent on the record in 2014, correct? At least up—fiscal year—A. Yes.
Q. —, 2014, true?
A. That's correct.
Q. Now, it doesn't tell you anything about what he was doing and the work he was doing on this case when he wasn't on the record, does it?
A. No, it does not.
Q. You don't know from this how many motions he was deciding, right? A. No, I do not.
Q. You don't know from this how many pleadings he had in front of him, right? A. In the commission's cases?
Q. Yeah.
A. That's correct.
Q. In this case.
A. That's correct.
Q. You don't know from this whether there was a lull because one of the lawyers was, say, in trial or sick or something like that. That wouldn't be reflected on this, would it'?
A. No, it would not.
Q. Now, one of the causes of delay in this case prior to -- under Colonel Pohl was the fact that I was in a trial that lasted, sort of from beginning to end, about six months. You were aware of that, weren't you?
A. I don't recall being aware of that.
Q. Well, that's why nothing happened in this case under Colonel Pohl from June to December of 2013. You weren't aware of that, right?
A. Okay.
Q. And had your rule been in effect in 2013, Colonel Pohl would have been sitting in Guantanamo Bay with no other duties and nothing to do, right?
A. That's correct.
Q. And can we agree that maybe that's not the best use of judicial resources? Right?
A. Yes.

What is more, MR KAMMEN sought to show how Change 1 would result in even slower proceedings going forward, referencing Judge Pohl's ordered abatement of the 9/11 case. "The biggest criminal case," MR KAMMEN began, "in the history of America is tolled because of your action, that change. You're aware of that, aren't you?"
A. Yes.

> This was "classic Guantanamo litigation," MR KAMMEN said, noting GENERAL MARTINS's last-minute appearance. After a whole week of argument, after the Convening Authority said he didn't do anything wrong, after LT MORRIS "for two hours," said we did nothing wrong, "only now do we get this perfunctory 'we get it.'"

Q. Okay. Now, if your rule were in effect and it takes six or eight months or more to sort that all out, Colonel Pohl would be sitting in Guantanamo Bay with nothing to do, right?
A. That's correct.
Q. Pretty good use of time and resources, right? That's your opinion? That's the best available use of time and resources?
A. No, I would not say that.
Q. Well, you did say that because you recommended Change 1.
A. That's right.

On re-direct, LT MORRIS did his best to provide Mr. Ary an opportunity to give his explanation for Change 1 by walking him through a series of documents referenced in the direct examination. This did not turn out to be a good

approach. Mr. Ary seemed confused at times by LT MORRIS's questions, which asked for confirmation of statements written in the documents (which seemed to speak for themselves). As a result, many of the documents were simply read out by Mr. Ary. Only later in the redirect did LT MORRIS provide more open-ended opportunities for Mr. Ary to express his point of view about the rationales behind his actions and the documents presented to him during the direct examination.

Nevertheless, the general position developed by the Government was that Change 1 was nothing more than an attempt to provide resources to different parts of the military commission's system (Office of the Chief Defense Counsel, Office of the Chief Prosecutor, Trial Judiciary) based on requests for more personnel, a new courtroom, and other resources that Mr. Ary found waiting for him when he became the Convening Authority and Director of the Office of Military Commissions. Mr. Ary, like any good leader new to his position, made the rounds of various constituencies seeking to educate himself as to their needs. In the process, and with the help of his legal advisors, he came to the conclusion that Change 1 was needed to address resourcing and placement issues fully within his purview of his new role. In essence, Change 1 was part of a "holistic approach" that was "influence neutral" with regard to the trial judiciary.

Mr. Ary also reiterated his belief that he should not approach the TJAGs prior to making his recommendation to the DepSecDef lest they "take action that was pre-decisional that could have an effect on trials." In response to follow up questioning by COL SPATH, Mr. Ary said that he also felt reluctant to have an ex parte communication with the chief trial judge. It was better, in Mr. Ary's view, simply to make a recommendation to the DepSecDef, whose decision could then be implemented by the TJAGs.

After Mr. Ary was excused with the admonition not to discuss his testimony with anyone until the motion was decided, CDR MIZER asked to call Billie Lee Little Jr., the Deputy Chief Defense Counsel, for purposes of impeachment. Contrary to what CDR MIZER believed to be Mr. Ary's testimony that he did not discuss the pace of litigation in his meeting with the Office of the Chief Defense Counsel, Mr. Little (who was present at that meeting) said that the pace of litigation had indeed been discussed. Mr. Little testified that Mr. Ary, at one point, turned to him, smiled, and said, "you didn't come all the way from Arizona not to see these cases move forward." Mr. Little testified that he remembered the exchange well because he found it shocking. LT MORRIS was not successful in casting doubt on this testimony, but COL SPATH made clear that his own notes were unclear as to how Mr. Ary had described the meeting and that he was quite able to assess the credibility of the witnesses himself.

Following the testimony of Mr. Little, a discussion ensued on the next round of witnesses. The Government did not oppose the Defendant's request to examine the TJAGs of the Army (Lt. Gen. Darpino), the Navy (Vice Adm. DeRenzi), or the Air Force (Gen. Burne). The parties were directed to work together to determine their availability.

COL SPATH tentatively scheduled an 802 hearing with the parties for 1030 on Thursday. The start time for proceedings that day, if any, was left undetermined.

The proceedings adjourned at 1642.

February 26, 2015

Primary Issue: Argument on Defendant's Motion to Dismiss for Unlawful Influence & Denial of Due Process (AE 332)

Overview: No proceedings occurred in this Commission on Thursday, February 26. The Government did not concede that the burden of proof had shifted from the Defense (to show

"some evidence" of unlawful influence) to the Government (to disprove the same beyond a reasonable doubt). Therefore, the issue of further testimony sought by the Defendant from the service TJAGs ripened. In the early morning session, Colonel Spath heard an argument on the prospective testimony of the TJAGs for the Army, Navy, and Air Force. Between that session and the noon proceeding, at which Navy TJAG Vice Admiral DiRenzi's testimony was scheduled to occur, Colonel Spath reported that he had received word that the DepSecDef had rescinded Change 1, the catalyst for this motion. The argument was taken regarding whether the unlawful influence motion was, therefore, moot. Colonel Spath concluded that the motion was not moot and ruled that the Defendant had met its burden to provide "some evidence" of unlawful influence. The Navy TJAG's testimony was no longer required. The Government chose not to present further evidence to meet its burden, so the parties proceeded to final arguments on the motion. Late in the afternoon session, the Government notified the Commission that Colonel Pohl had issued an order that rescission of Change I was an adequate cure for the unlawful influence that resulted in the abatement of the proceedings in that Commission. Following a dramatic set of concluding arguments from General Martins and Mr. Kammen in the final minutes of the proceedings, Colonel Spath took the motion under advisement, with a ruling expected on Monday morning. Participants Speaking on the Record (in speaking order): Colonel Vance H. Spath, USAF, presiding as Military Judge, Military Commissions Trial Judiciary; Commander Brian Mizer, USN, representing the Defendant; Colonel Robert C. Moscati, USA, Deputy Chief Prosecutor; Lieutenant Paul B. Morris, USN, Trial Counsel, representing the United States; General Mark Martins, USA, Chief Prosecutor; Mr. Richard Kammen, Learned Counsel, representing the Defendant.

Change 1 to Regulation for Trial by Military Commission was approved by DepSecDef Robert Work on January 7, 2015, on recommendation by Vaughn Ary, the Convening Authority and Director of the Office of Military Commissions. In relevant part, it states: "[o]nce detailed, military commissions shall be the military judge's exclusive judicial duty . . . A detailed military judge shall be issued assignment orders for duty at the venue where the military commissions are to be convened."

In his final argument to the Commission, CDR MIZER read this paragraph aloud.

COL MOSCATI argued that Vice Admiral DiRenzi had no connection to this Commission, having done or said nothing that affected it. While Mr. Ary's testimony was appropriate because his actions were relevant to this Commission, and Lt. Gen. Darpino (USA TJAG) and Gen. Burne (USAF TJAG) had both reportedly made statements of relevance to this Military Commission, the Navy TJAG had not done so, and therefore any relevance was purely prospective. In response to COL SPATH's question regarding the relevance of her testimony to the Defendant's theory of total pollution of the pool of judges, impacting the entire military commissions' process, COL MOSCATI conceded that this "arguably" was relevant but made the same distinction regarding the other TJAGs. This concession did not seem enough for COL SPATH, who expressed the sentiment that it was hard to believe that the TJAGs and their staffs had not talked amongst themselves about Change 1. He noted that the Government did not concede that the Defendant had met the "some evidence" burden. But understanding how low that burden is, COL SPATH expressed his failure to understand why there hadn't been some concessions. Therefore, he decided to allow the Defendant to interview Vice Adm. DiRenzi at 0930. He had to dispel for the public, even the appearance of unlawful influence. Therefore, there was no harm to a full discussion of the facts. COL SPATH noted that it was difficult to convince the Government even to allow Mr. Ary to testify, which necessity

seemed so clear to him. COL SPATH asked COL MOSCATI why the Government wasn't making every effort to dispel even the appearance of unlawful influence and seemed quite dissatisfied with his rather boilerplate response: although the interview might, perhaps, show some relevance to the testimony, there was none to see now. Rather sharply, COL SPATH noted that this was the same problem every time. The public must have confidence in the process. "We do not leave our common sense or knowledge of human nature at the door," he said. There was simply no way that the TJAGs did not have conversations about Change 1 between themselves or through their staff, A sharp colloquy ensued in which COL MOSCATI argued that the Government had demonstrated its belief in the importance of openness and was simply arguing based on the rules established under the MCA. COL SPATH tartly reminded the Government of its opposition to Mr. Ary's testimony, the relevance of which "you should have conceded on day one." COL SPATH recessed the proceedings shortly before 0900 with a tentative schedule for testimony from Vice Admiral DiRenzi at 1200, General Burne at 1430, and General Darpino at 1600. However, when the proceedings were reconvened at 1130 (with Major Macmillan the only absentee), the world had changed. COL SPATH noted that he had received an email from DoD General Counsel announcing the DepSecDef's rescission of Change 1; the email attached the rescission order itself as well as Judge Pohl's ruling in the Khalid Shaikh Mohammad commission. He would now hear an argument about whether the Defendant's motion was moot.

CDR MIZER argued that the rescission suggested that DoD conceded the actual unlawful influence inherent in Change 1. But he reminded the Commission of the distinction between actual and apparent unlawful influence, both of which are impermissible. The memo accompanying the rescission, he said, now states that coordination should occur with the TJAGs. And the Convening Authority testified that he would do the same thing all over again. Therefore, one could expect that there will be Change 2, Change 3, Change 10 until the stated goal is achieved: speeding up the litigation. That is unlawful influence.

CDR MIZER asserted that COL SPATH had been given "a shot across the bow" by the Convening Authority, which is keeping track of his time on the record and appears to think that to be a valuable metric. It is "meddling" with the trial judiciary staff to compile that data. That, CDR MIZER asserted, definitely gave the appearance of unlawful influence, if it is not itself actual unlawful influence as well. The Convening Authority's explanations—the Senate Select Committee on Intelligence report and the *Salyer* case—are inadequate. They "fired a bullet into a crowded house where three judges were sitting, knowing one might be hit. That is inherently dangerous and reckless." The only remedy is to bar the Convening Authority from this case, for they do not think they did anything unlawful. The memo received with the rescission order is itself unlawful influence, CDR MIZER continued, asking when COL SPATH had last tried a court-martial in which the DepSecDef intervened while the court-martial was underway.

Concluding, CDR MIZER said that the motion was far from mooted and that he would not concede anything. He wanted to move forward with the witnesses to support both the unlawful influence and due process issues in the Defendant's motion. CDR MIZER stated that he believed that Lt. Gen. Darpino and Vice Adm. DeRenzi would testify that they were working through the logistics of what to do. In his proffer to COL SPATH about General Burne's likely testimony, CDR MIZER indicated that he had been told that General Burne said, "I can't afford to have Col. Spath in Guantanamo staring at iguanas," a statement that COL SPATH noted had the ring of General Burne's locution.

COL MOSCATI argued just as strongly that the Defendant's motion was moot. There is no Change 1 anymore, he said, and since there would have been no motion without Change 1, the underlying factual basis for the motion is gone. As to any actual unlawful influence, COL MOSCATI said that it was gone from the case. He noted that COL SPATH was the Commission: a voir dire or a verbal statement from the bench might be necessary to remedy any concern about actual unlawful influence. As to an appearance of unlawful influence, COL MOSCATI asked what could be more demonstrative than the fact that, within twenty-four hours of Judge Pohl's ruling, Change 1 was rescinded. This showed that Change 1 was considered a serious matter. It showed that there was no intent or belief that the Military Commission should be affected by the Convening Authority or the DepSecDef. Furthermore, even if the Commission were to find unlawful influence in ruling on the motion, what more appropriate remedy could there be than rescission of Change 1. This has already happened and presents a very strong record that the Government saw the appearance of unlawful influence as a concern and addressed it.

In rebuttal, CDR MIZER asserted that this response offered no check in place for the due process issue that is part of the Defendant's motion. "When the Convening Authority and the DepSecDef say jump, TJAGs will say how high," he said. Change 1 is not an unlawful influence; the unlawful influence is all of the actions surrounding it. By removing the vehicle, the Government hasn't excised "the mortal enemy of military justice." In sur-rebuttal, COL MOSCATI argued that to proceed would be to return to a world of hypotheticals and speculation about what TJAGs might do. COL SPATH marked the rescission package as AE 322S. He mused that the two most likely responses to Judge Pohl's motion were either an Article 62 appeal or rescission. The rescission having occurred, this changed the "glide slope" of the Defendant's motion. While a "Change 3," or his un-detailing, or a decrease in the pool of judges could mean further unlawful influence concerns, COL SPATH no longer felt the need to hear the TJAGs' testimony. He could see what they were contemplating based on the evidence already made available regarding the effects on the pool of judges and the effects on the detailed judges. However, COL SPATH continued; the Defendant's motion is not moot. He found that the Defendant had carried his burden to show "some evidence" of unlawful influence. It was now up to the Government to decide whether to present evidence to meet its burden (which would allow the Defendant an opportunity to rebut it) or proceed to argument on the motion. The Government indicated that it would make that decision over the luncheon recess. COL SPATH asked if the parties would be ready to argue the motion. MR KAMMEN noted that the Defendant had been tasked with preparing for witness testimony and that there was a lot to marshal. The Government said that it was ready to argue the motion in the event that no further evidence is to be taken. Following luncheon, the proceedings reconvened at 1458 with all present (including Major Macmillan). The Government had decided not to present further evidence. Therefore, the final argument was heard on the motion. LT MORRIS presented the Government's position. He appeared intent to begin a carefully prepared presentation on Mr. Ary's testimony and its relation to the rescission. He argued that this testimony showed no evidence of any action taken with anything other than good faith. His goal was to lawfully resource and position the commissions in the best interests of the Government, the Defendant, and the American people. This opening provoked an interruption by COL SPATH that proved to be the first of many. Assuming good intentions, COL SPATH asked, could there still be an unlawful influence? LT MORRIS conceded that there could be. That was the last concession in over an hour of argument, and that proved to be the Government's undoing. First, COL SPATH asked whether Mr. Ary's actions could truly be said to have been

"upfront," as LT MORRIS had just characterized them. After all, the testimony showed that he had not staffed them through the chief judge of the trial judiciary or any TJAG. The only place other than his office included in the process of making the Change 1 recommendation was the DoD OGC. When LT MORRIS emphasized the unique role Mr. Ary held as both the Convening Authority and the Director of the Office of Military Commissions, and his care to "reach up" to the DepSecDef rather than to "reach down" (presumably impermissibly) into the judiciary, COL SPATH rebuked him. "We need to have an intellectually honest debate about this," he said. The Convening Authority did not put a single concern, not a single negative, that his staff had raised with him about Change 1 into the package sent to the DepSecDef. Did that not trouble you that he did not share these risks? LT MORRIS, taking the absolutist position that had marked (and, as it turned out, marred) all of the Government's arguments this week, argued that if these concerns had troubled the Convening Authority, he would not have raised the matter higher in the first place.

Next, COL SPATH questioned LT MORRIS on the rationale behind Change 1, evoking the response that it was part of a holistic resourcing approach, one part of a multi-factored process of resourcing and positioning the commissions to accomplish the mission. COL SPATH drilled down on the fact that judges were ordered to move to Guantanamo, but support staff, court reporters, translators, the lawyers for both sides were not. This was coupled by evidence that information was collected by the Convening Authority about the amount of time the commissions spent on the record, an assessment made close in time to a comment made by one of the trial judges (presumably the "I have a day job" comment by Captain Waits). Did this not raise a concern about the appearance of unlawful influence? What possible purpose could be served by moving the three trial judges to live in Guantanamo without any support staff? Again, LT MORRIS took an absolute position and blurred in his response the distinction between actual unlawful influence and its appearance (of equal concern for purposes of the motion).

Although LT MORRIS sought to return to his prepared remarks to introduce the Government's position on the nature of the remedy should any unlawful influence be found, COL SPATH soon turned him back to the question of the appearance of unlawful influence to the "disinterested observer aware of all the facts and circumstances," that the *Lewis* case sets as the standard. Would that objective viewer "harbor a significant doubt as to the fairness of the proceedings?" LT MORRIS again took an absolute position, ceding no ground. COL SPATH cast a doubtful light on Mr. Ary's testimony that his concern with ex parte communications with the Chief Judge and his hesitancy to stray into *Salyer*'s concerns led to his decision not to consult any of the TJAGs or trial judiciary. "Actions in the Pentagon get staffed to death," COL SPATH noted, "except this one."

At least three times, COL SPATH asked whether LT MORRIS would concede that there is an appearance issue to the Convening Authority acting in this way, even if he did so in good faith? LT MORRIS refused to make any concession. COL SPATH asked whether LT MORRIS could see that every time the Commission denied a defense motion for a delay, that the public would wonder if this was because a trial judge wanted to go home faster, that the trial judge's decisions were influenced by being forced to live here until the trial was finished. LT MORRIS gave no ground. COL SPATH reminded LT MORRIS that under Change 1, only the trial judiciary was ordered to live at Guantanamo. Isn't that what would cause a disinterested, objective observer to wonder? LT MORRIS said that the totality of the facts, rather than the narrow sliver of Change 1, would make such an observer understand that there was no unlawful influence (and, presumably, not even the appearance of such influence; LT MORRIS tended to blur the distinction in his answers).

Although he was very careful to contain what his facial expressions suggested was exasperation, COL SPATH finally said that he was looking for acknowledgment from the trial team. This was important to the public. Even with good faith, there can be an unlawful influence. Mr. Ary did not say that he would recommend sending prosecutors, or defense counsel, in a staged sequence of moves to Guantanamo. Mr. Ary did not talk about the obvious communications issues. And yet, COL SPATH noted, the Government would not even concede this point. Instead, LT MORRIS argued that resourcing and "pace of litigation" were simply two sister issues and that it was "naïve" to think otherwise.

After a short "health and comfort break" requested by CDR MIZER, the Defense began its argument. COL SPATH engaged in significantly fewer interruptions as CDR MIZER methodically presented his case. First, noting that attempted unlawful influence was also prohibited by statute, he reminded the Commission that "beyond a reasonable doubt" was the standard of review, stated in *Lewis*, to determine that even the appearance of unlawful influence had been ameliorated or made harmless. Next, he noted that evidence of good faith was only relevant for purposes of determining a remedy. There was no mens rea to the offense of unlawful influence; it is a strict liability standard.

CDR MIZER then developed the theme of his remarks. The unlawful influence, in this case, he said, went much deeper than Change 1 itself, and was more serious than the unlawful influence found in the *Salyer* and *Lewis* cases. At the heart of this case was a convening authority, "tampering with the independence of the judiciary."

CDR MIZER than carefully worked through numerous statutory provisions to show not only that Mr. Ary lacked any authority under the Military Commissions Act to affect the trial judiciary in the manner that Change 1 attempted (though he claimed in his testimony to find his authority there). But despite nothing in the

MCA give any such responsibility to the Convening Authority, Mr. Ary was attempting to insert himself where he should not be. Indeed, CDR MIZER identified several provisions (particularly in the 948j series) that he claimed were violated by Mr. Ary's and the DepSecDef's actions. If anything, Congress's intent was clear that there should be stronger protections against unlawful influence with regard to military commissions than in the preexisting system of military justice.

CDR MIZER next worked through the documents, relating them to Mr. Ary's testimony. His theme was that the documents that were not intended to be released to the public revealed a much more concerted effort to unlawfully influence the military commissions than ultimately occurred. CDR MIZER claimed that Mr. Ary attempted to distance himself from emails and drafts about which he could not possibly have been unaware. His sole responsibility is three cases, CDR MIZER said, and he has eighty people on his staff. Common sense tells us he was not distracted by other matters; he is closely involved. Pointing to particular pages of the unofficial/unauthenticated transcript (particularly, in his order, pages 5692, 5586, and 5674) and documents (the already released executive summary, and emails at Bates 127578, drafts at Bates 127551), CDR MIZER painted a picture of legal advisors eager to accelerate the pace of litigation. That was the goal. Picking up on COL SPATH's repeated concern that Mr. Ary testified that he made his recommendation to the DepSecDef knowing that Change 1 presented the possibility that a detailed trial judge could be removed, CDR MIZER described Mr. Ary's attempt as an "incredibly reckless action" again using the analogy to firing a gun into a crowded house where three judges are sitting.

CDR MIZER disparaged Mr. Ary's claim that *Salyer* led him to believe that staffing his idea to TJAGs would be inappropriate. CDR MIZER called this a "preposterous" reading of the case that "flies in the face of common sense." In any event, he observed, there was no mention of *Salyer* in any of the documents or emails, just as there was no mention of concern with determining whether to build a third courtroom, another justification for the actions behind Change 1. This makes no sense, CDR MIZER concluded, colorfully comparing these nonsequiturs to deciding "I need to buy a car so I'm going home to build a bed." If any emails or documents containing such references existed, a possibility CDR MIZER doubted to be true, it was the Government's burden to have produced them to corroborate Mr. Ary's claims. In CDR MIZER's view, these were all "post hoc rationalizations" for Mr. Ary's attempt to accelerate the pace of litigation.

Moving to the question of remedy, CDR MIZER structured his argument around a footnote in *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). Footnote 4, he said, noted that the record in the case did not show whether the relevant participants were subject to any ethical or disciplinary sanctions. CDR MIZER reminded the Commission that, "as the Government stands in the well of the courtroom today, they tell you they did nothing wrong." (CDR MIZER made clear that he was not referring to the prosecutors themselves, who were merely "carrying the Convening Authority's water." Colorfully, he noted that "you have to dance with the one who brought you.") The Commission was faced with an "unrepentant Convening Authority," and the rescission of Change 1 says nothing except that the next attempt at unlawful influence should have proper staffing. The DepSecDef took away the vehicle for the unlawful influence, about which the Commission could have done something.

Perhaps knowing he was asking for something very unlikely to happen, CDR MIZER did his best to argue for dismissal as the proper remedy. This was because the Convening Authority remained "unrepentant." A mere lecture from the bench was not enough in the face of the

Government's inability to concede that there is even any appearance of unlawful influence. This appearance will return every time the Commission denies a request from the Defendant for a continuance. "The Convening Authority has rolled a grenade into this courtroom and this military commission."

Reading the paragraph from *Campos* noted in footnote 2 to this report, CDR MIZER concluded that the DepSecDef and the Convening Authority had displayed the ability and intent to invade the courtroom. If the Commission would not order dismissal of the charges against the Defendant, it must at the very least strike the Convening Authority and all of his legal advisors to create a walled-off judicial system. Nothing less than that was sufficient for both these due process and unlawful influence violations.

LT MORRIS and CDR MIZER each respectively made brief statements in rebuttal and surrebuttal. In his rebuttal, LT MORRIS notified the Commission that Judge Pohl, sitting in the Commission trying Khalid Shaikh Mohammad and others, had that day just issued an order stating that the rescission of Change 1 was an adequate cure. This order was marked as AE 332T. LT MORRIS stated that he was shocked that CDR MIZER put such weight on the emails of the legal advisors as compared to the live testimony of Mr. Ary. Had the Defendant wished to call the legal advisors to testify, he should have done so. CDR MIZER, in response, noted that the Government had the burden to rebut the Defendant's production of "some evidence" of unlawful influence. The Defendant did not have to call them. The Government could have done so itself.

Unexpectedly, GENERAL MARTINS rose to address the Commission. This seemed to be a last-minute attempt to convince the Commission of the Government's commitment to preventing unlawful influence in light of CDR MIZER's reference to footnote four of *Lewis*. Since this was the first and only time GENERAL MARTINS spoke during the entire week, it seems reasonable to conclude that the Government felt that his voice was now needed. He noted that "we are all guardians" of these proceedings and that the Government was mindful of this. "We get that there is an appearance concern," he said, a statement he echoed at the conclusion of these brief remarks, "We get that." The independence of the judiciary is the heart of this. And so, "I did not want to let this moment pass." Since he easily could have made these same comments eight hours earlier in the day, this seemed incomplete as an expression of his motivation.

COL SPATH expressed appreciation for "acknowledgment" of the appearance issue, being careful to note that he wouldn't say this was a "concession." He asked for agreement from GENERAL MARTINS that what was described by Mr. Ary is "not how things of this sort are staffed." GENERAL MARTINS, supporting LT MORRIS's argument, said that it appeared to him that Mr. Ary was respectful of the judges' prerogatives. Pushing back, he asked COL SPATH how often as an SJA he had gone to the TJAGs. Noting his own lengthy and distinguished record of service, GENERAL MARTINS indicated that he did not do so very often at all. "The standard to making a change within your purview cannot be perfection," he said, repeating his mantra a third time, "We get it."

COL SPATH now allowed MR KAMMEN to speak, while promising the Government the last word. This was "classic Guantanamo litigation," MR KAMMEN said, noting GENERAL MARTINS's last-minute appearance. After a whole week of argument, after the Convening Authority said he didn't do anything wrong, after LT MORRIS "for two hours," said we did nothing wrong, "only now do we get this perfunctory 'we get it.'"

MR KAMMEN noted that Mr. Ary was responsible at a micro-level for individual funding decisions. "He cannot be trusted anymore," Mr.

Kammen said. Whenever he denies a request from the Defense, we must now ask whether he is mad at us. Mr. Kammen noted that Mr. Ary would pick the panel that will decide whether to kill his client. He then exclaimed again, "He cannot be trusted." That trust was sacrificed with his order and his testimony that he would do it all again. Mr. Kammen predicted that the Convening Authority would indeed do it again, only "more elegantly, more cleverly, more dressed up." In his final words to the Commission, MR KAMMEN declared that "They want what looks like a trial but is, in fact, a death train."

COL SPATH offered the Government the last word. COL MOSCATI indicated that the Government was done with its presentation. COL SPATH then noted that he would try to prepare a ruling by Monday. He indicated his intention to go on the record at 1030 on March 2, announcing his ruling from the bench with a written ruling to follow. Depending on the nature of that ruling, it may be possible to work on motions following its announcement.

The proceedings adjourned at 1738.

February 28, 2015

Primary Issue: Ruling on AE 332, Defense Motion to Dismiss for Unlawful Influence and Denial of Due Process for Failure to Provide an Independent Judiciary.

Overview: Judge Spath specifically found that 10 USC 948(j)(e) and (f) precludes the Convening Authority (CA), Mr. Ary, from taking the actions he did in recommending Change 1 to DepSecDef Work. This action by the CA, though done in good faith, created the appearance of influencing this judge in this case. The Government did not show that that appearance either did not exist or would not affect the proceedings. Therefore, Judge Spath was left to exercise his discretion in crafting a remedy. The dismissal was not appropriate here. Instead, Judge Spath has precluded the existing CA, including his legal advisors, from taking any action on this case. Further, to demonstrate that he has not been influenced by the actions of the CA, he will only hear certain non-evidentiary hearings this week and then truncate the hearings in April to only one week.

Report: Judge Spath called the Commission to Order and proceeded to discuss his upcoming ruling on Defense Motion. He does not have it in the final form yet but will have it soon.

Facts: Judge Spath specifically found the following facts (this is not a complete list but the ones I thought most pertinent to the eventual ruling): Mr. Ary was concerned about the "pace of litigation" and the allocation of resources to the Commissions. He requested data from the OMC on the number of days of hearings and the number of hours per day of hearings for the various Commissions. After gathering the data, he formulated Change 1 as a way to "accelerate the pace of litigation." Mr. Ary did not staff Change 1 with the TJAGs or anyone outside his office before sending it to the DepSecDef for his approval. DepSecDef Work approved Change 1. During the litigation in both the KSM and Al-Nashiri case, the unlawful influence issue was raised. Judge Pohl abated proceedings in the KSM case until Change 1 was rescinded. DepSecDef rescinded Change 1.

Law: 10 USC 948(j)(e) and (f) precludes the CA from looking at or reviewing specific actions by the military judge (MJ) in Commission cases. The Chief Trial Judge is the only person who details judges to cases—not the CA, TJAGs, or anyone else. CA has no authority to "set the pace of litigation." Art 37 and other precedents from courts-martial provide helpful information concerning the application and remedies of unlawful influence cases. The defense has the burden to raise "some evidence" of unlawful influence. They have met that burden. The prosecution must establish beyond a reasonable doubt that either 1) there was no un-

lawful influence, or 2) the unlawful influence will have no effect on the proceedings. The Government has done neither. When unlawful influence is found, the MJ may fashion an appropriate remedy. That remedy may include dismissal, but only in the most serious cases. The MJ should attempt to cure the proceedings of the unlawful influence.

Discussion: Judge Spath laid out the following conclusions from the law and facts.

Change 1 did create the appearance of unlawful influence. The CA knew Change 1 might affect the current detailing and the potential pool of judges that the TJAGs provided for detailing to the Commissions. However, there is no evidence that the DepSecDef knew of this potential effect. Change 1 was clearly outside the role of the CA under the MCA. The CA's gathering of data on the work of the judges was inappropriate. "Any disinterested objective observer" would believe that the CA's actions were evidence of an attempt to influence the Commission. There is no doubt that Change 1 was an attempt to influence Judge Spath in this specific litigation. The Government proffered no evidence to overcome the unlawful influence or its impact on the case. The rescission of Change 1 only removed some of the apparent unlawful influence from the case—that associated with the pace of litigation.

Remedy: The MJ has broad discretion when selecting a remedy to unlawful influence. Judge Spath acknowledges the rescission of Change 1 and the order that any future changes must be fully staffed, to include the TJAGs. Judge Spath determines that dismissal would not be appropriate in this case. The CA did not act in bad faith, but the apparent unlawful influence remains and cannot be undone. Therefore, Mr. Ary and his legal staff are disqualified from taking any further action in this case. A new CA and staff must be appointed for al-Nashiri. To demonstrate that the MJ is not affected by the unlawful influence to "increase the pace" of proceedings, Judge Spath is delaying all evidentiary proceedings until April and then truncating the April hearings from two weeks to one week.

Other items:
Motion in AE 205 not yet fully decided but should be coming soon.
Motion on AE 205bb and 205ee are both denied.
The motion on AE 272d is denied.

Noon Recess

Some of the motions are naturally delayed based on the ruling from this morning, and others are delayed based on the Government's interlocutory appeal that is before the DC Circuit Court of Appeals.

Judge Spath asked Counsel to start with motions on hearsay.

AE 331—Government Motion to Amend the Docket

The judge sought argument on his ability to separately deal with the eightyish pieces of hearsay evidence that the Government is going to try to enter into evidence. The motion is to call the evidence by witness, not by evidentiary applicability.

The defense argued that the Government is simply trying to prove hearsay by hearsay in violation of *Idaho v. Wright*.

The defense argues that no case in recorded history has relied on eightyish pieces of hearsay evidence, and that is why the Government is trying to get it all in by trying to demonstrate its reliability by volume instead of by each individual piece.

Government acknowledges that the MJ must rule on each individual piece of evidence separately.

Judge Spath confirms that Rule 803 is the proper standard and that *Ohio v. Roberts* is the basic standard.

AE 319J—Defense wants to keep open hearings on hearsay until the CMCR rules on the interlocutory appeal. The standard for moving forward is whether the issues are not solely related to the issue on appeal.

AE 319F, AE 319G—Will be taken up in a 505 hearing at the end of the day.

AE 256D, AE 257D—Notice of aggravation about the use of civilians in the attack

The defense argues that if we were at war in 2000, this would make some sense. But the US was not at war. And there was no "coalition" at the time, as the charge states. The defense is unclear how the Government is going to prove to terrorize and who the people are, that were terrorized, that belong to the coalition. It appears the Government is arguing that the people throughout the world were terrorized.

Government recognizes that they must prove the existence of armed conflict beyond a reasonable doubt. The terrorizing is about the intent to terrorize more generally.

AE 324, AE 325, AE326—Motion seeking pre-admission of evidence.

This evidence was gathered by Yemenis, and the Defense is unclear how the Government will get this in. If the evidence is pre-admitted, they want to be able to call all of those witnesses back and treat them as hostile. This seems like a big waste of time to the Defense, and like they will be litigating everything twice.

The MJ normally does this when the evidence is uncontested.

The Government argues that it will spare the days of presentation of evidence only to have the MJ rule that some of it is inadmissible, requiring instruction for the members. Also, it preserves the option of an interlocutory appeal.

End of the Day

March 3, 2015

Primary Issue: Went through the remaining non-evidentiary motions.

Overview: No rulings given, but argument heard on a number of motions concerning pre-admission of evidence, compelling witnesses, and the effect of torture or Cruel, Inhuman, and Degrading Treatment (CIDT) on testimony.

Report:

AE 335—Motion to compel witnesses

The real issue here is whether the previous ill-treatment of Mr. Al-Darby that may amount to CIDT or torture taints his current testimony at trial under section 948r.

Govt agrees that it will not use any of Al-Darby's statements that came from the torture or CIDT. Instead, they will call him as a witness to testify. That testimony will be voluntary and subject to cross-examination.

Defense wants to suppress Al-Darby's testimony, and it wants to have an evidentiary hearing about the potential testimony where it can call witnesses. The taint of the prior torture or CIDT is not removed, and if he testifies, it will likely be because of the previous ill-treatment and potential for similar ill-treatment in the future.

AE 207—Pre-admission of Evidence

The defense argues to compel a specific witness to testify for its case. The witness was a supervisor over the agents who collected the data at the site of the explosion. The witness is currently incarcerated and represented.

Government argues that the production of the witness is unnecessary and that he had no direct role in the case.

Senate Torture Report (STR)

Defense wants to ensure that they have all the potentially exculpatory info from the recently released STR. They want the judge to order the Executive Branch to get them a copy that the judge can keep under seal. It was clear from the Defense that once it is here, they will argue that they should have access to it.

Government opposes the motion. They are currently reviewing it at the Senate. They understand their requirement to provide all the exculpatory evidence they have. They will do so.

AE 319, 333, 337—Al evidentiary issues with respect to classified information.

The MJ will read the briefings and the information and issue a ruling soon.

Noon Recess

AE 248H—Motion to Reconsider

In an earlier ruling, the MJ had limited coverage of the treachery charge to only those who were on the USS Cole. In other words, when the Government attempts to prove treachery and perfidy in Charge 1, they can do so only as it relates to the individuals who were on the USS Cole. In the same ruling, the MJ appeared to similarly limit the use of evidence in Charge IV on terrorism to the same group of people. The Government believes that such a ruling is a legal error.

The Government entered evidence to show that there were a number of others, not on the USS Cole but in the harbor and close to the USS Cole, that was also in danger of being injured and that al-Nashiri acted with wanton disregard for human life as to those persons.

The defense responded by arguing that the Government has entered no new facts of law and that the MJ should deny the motion for reconsideration.

AE 334—Grooming

The Defense had previously raised a motion, arguing that al-Nashiri should be able to groom himself before any meetings with his attorneys and any sessions of Court. The Government did not oppose the motion and thinks the issues will be taken care of by the next session.

The hearings are completed until April.

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