

Memorandum

To: Pacific Council GTMO Task Force
From: Alex Su
RE: *US v. Khalid Shaikh Mohammad et al. (II)*
Summary of Military Commissions Proceedings 22 July through 26 July 2019
Date: 8/20/2019

This memorandum summarizes and analyzes the experience of observing the Military Commissions proceedings that took place July 22, 2019 through July 26, 2019 aboard Camp Justice, US Naval Station Guantanamo Bay, Cuba (“Camp Justice” or “Gitmo”) against five defendants accused of major roles in planning the 9/11/2001 attacks.

The week was unusual, according to veteran observers, in that there were quite a few court hearings held. Usually, the prosecution insists on closed hearings, which means all observers are not permitted to attend, or the hearings get canceled at the last second.

IMPRESSIONS OF THE DEFENDANTS

Surreal. Hannah Arendt wrote about the “banality of evil” while observing the war crimes proceedings against Nazi SS officer Adolf Eichmann. And this much is true here.

Each of the defendants here appeared well-fed and well-groomed. They appeared to wear clean clothes and most seemed happy to see their lawyers. Some would make conversation with their counsel as if they were visiting with friends at a coffee shop. Each is brought into the court wearing a series of chains, and then they are bolted to the floor when seated. Each has 4-5 guards. The detainees are held about 20-30 minutes away at Camp 7. All of the detention facilities are run by an entity called Joint Task Force Guantanamo.

Khalid Sheikh Mohammed (KSM)

Would wear camouflage jacket or vest. Has longer beard, with freshly added orange dye. Hair is closely cut, wearing a skull cap of some kind. Short and portly. Was in court each open session except Friday. Spoke in English to his counsel, but relied upon translator for answering the judge’s questions.

Walid bin Attash

Would wear camouflage jacket or vest. Was in court each open session except Friday.

Barely speaks with his lead defense counsel, Cheryl Bormann, because she's a woman. WBA is a Yemeni citizen.

Ramzi bin Al-Shaib

Would wear camouflage jacket or vest, with white robe and sandals. Was in court each open session. Has a sense of humor and often seen trying to make funny small talk with his counsel and even his guards. He makes his guards laugh. RBS is a Yemeni citizen.

Ali Aziz Ali (Al-Baluchi/AAA)

Appears tall, lanky. Wears hipster glasses and sports full on beard. Speaks very cheerfully with his counsel. Wearing a fez. Was only present in open court sessions Monday through Wed. Al-Baluchi is KSM's nephew and citizen of Pakistan. He was also involved in the murder of Daniel Pearl.

Mustafa Al-Hawsawi

Has difficulty walking. Stayed in Court only on Monday and asked to be excused, in part, because of colorectal surgeries to help repair some of the damage he sustained during torture at a CIA black site. Al-Hawsawi is a Saudi citizen.

IMPRESSIONS OF THE LAWYERS

From afar, it does not appear as if anything is happening. The reality is that the lawyers are fierce advocates, are permitted to conduct a lot of motions practice, and have gotten personal in their arguments.

Prosecution

Chief Prosecutor Army Brig. Gen. Mark Martins is always in the courtroom at counsel's table. For motions arguments, Martins defers to his chief trial counsels (mostly Robert Swann, Clay Trivett, and Ed Ryan). Martins was Obama's classmate at HLS and a Rhodes Scholar. Martins built his reputation as a specialist in operations law and is not known for his experience in criminal law.

The Prosecution used to meet with the NGOs and Martins would invite everyone to come on runs with him. The Prosecution no longer takes any meetings with NGOs.

Defense

All the female civilian defense attorneys wear hijabs in court for the purpose of making their clients more comfortable.

The Chief Defense Counsel is Marine Brig. Gen. John Baker, but unlike Martins, he does not sit in the Courtroom directing strategy. Rather, he manages the teams, of which each defendant is entitled to a lead “learned” counsel, who has been certified as such by the ABA as having deep experience in capital cases. Baker has spent 30 years in the USMC, mostly focused on practicing criminal law, having served as a prosecutor, defense counsel, and judge. He recently was passed up for a second star, apparently in part because of allegations in the *Al-Nashiri* case where he was sentenced to the brig for permitting civilian defense counsel to withdraw from representation, after listening devices were found in rooms where the defendants and their lawyers would meet.

KSM’s learned counsel is David Nevin of Boise, ID.

Bin Attash’s learned counsel is Cheryl Bormann of Chicago, IL.

Bin Shaib’s learned counsel is James P. Harrington of Buffalo, NY.

Al-Baluchi’s learned counsel is James Connell III of Washington, DC.

Al-Hasawi’s learned counsel is Walter Ruiz of Tampa, Florida.

The Defense teams actively court the NGOs, sharing disturbing tales of intrusion into legal principles we hold dear (e.g., right to speak with their attorney, attorney-client privilege, right to fair trial, right to discovery). They all hold TS-SCI security clearances. Many have a JAG background.

Judiciary

A new judge is presiding over these cases—USAF Col. W. Shane Cohen. He concurrently serves as Chief Judge of the USAF’s Eastern Circuit. He is formal, polite, and appears sincere. And he seems to be willing to work really hard to push the cases along. For instance, he has scheduled 3 continuous weeks’ worth of hearings in September.

On the last day of the hearings, he said “I am trying to put order to a process I did not create.”

IMPRESSIONS OF THE SURROUNDINGS AND FELLOW OBSERVERS

NGOs

Most of the NGOs are represented at the hearings by lawyers. The NGOs present in this round of scheduled hearings are:

- Human Rights Watch (Julia McKay, recent Kenyon College graduate)
- September 11th Families for Peaceful Tomorrows (Terry Rockefeller, a long time film producer)
- National Institute for Military Justice (Carson Walker, rising 3L, South Texas College of Law)
- NYC Bar Association (Joyce LaVacca, attorney)
- University of Toledo Law School (Amelia Wolf, rising 2L,)
- Georgetown University Law Center (Frank “Mario” Trujillo, recent graduate)
- US Military Commission Observation Project, Indiana University McKinney School of Law (Daniel Pereira)

Terry, in particular, stands out. She lost her sister, Laura, on 9/11 in the Twin Towers. Terry has attended the proceedings 9 times and even testified at the sentencing trial of Zacharias Moussaoui, who pled guilty to conspiracy to kill US citizens. I sat next to her on the flight and all week.

Media

Carol Rosenberg, who recently left her long-time post with the *Miami Herald* for *The New York Times*, is a well-known presence. Rosenberg was followed by two producers of a NYT podcast called *The Daily*.

John Ryan of *LawDragon*.

Victims' Family Members (VFMs)

Not surprisingly, the Prosecution made effort to spend time with the VFMs, who were housed in much nicer quarters and given plenty of respect by everyone else. NGOs are given the least respect. Many of the VFMs on this trip lost a family member that was FDNY or NYPD. They were not interested in interacting with the NGOs. Those victims are, in no particular order:

- Fire Marshal Ronald Bucca
- Police Officer John D'Allara
- NYPD Det. Joseph Vigiano
- FDNY Firefighter John Vigiano (Joseph's brother)

- FDNY Capt. William F. Burke
- Ms. Karlie Rogers

SUMMARY OF EVENTS

The Commission scheduled the following motions to be heard:

- AE 118N: Government Motion to Reconsider and Clarify AE 118M Ruling re classification determinations
- AE 530TTT: Defense Motion for Joint Detention Group Commander to Show Cause and Abate Proceedings Pending Compliance
- AE 616W: Show Cause Order Interpreter Testimony
- AE 628B: Al-Baluchi's Motion to Compel Witnesses In Support of al Baluchi's Motion to Suppress
- AE 635: Al-Baluchi's Motion to Compel Diplomatic Correspondence Regarding Torture 1994-2007
- AE 637: Defense Motion to Compel Production of Discovery Related to Evidence Provided by the Convening Authority to the Prosecution
- AE 639: Proposed Trial Scheduling Orders
- AE 523N: Al-Baluchi's Motion to Reconsider AE 523L Protective Order #5 and AE 523M Ruling
- AE 530AAAA: (U) Defense Motion to Compel the Government to Produce a Releasable Version of AE 530SSS (GOV)
- AE 530BBBB: Al-Hawsawi's Motion to Compel Witness Testimony from Colonel Yamashita, Commander, Joint Detention Group, Joint Task Force-Guantanamo
- AE 642: Order Directing Update Regarding Motions to Compel Discovery Concerning Hostilities

Sunday, 7/21/2019

Travel day to Gitmo. Washington DC was experiencing a massive heat wave at the time. Temperatures exceeded 100 degrees with 90%+ humidity.

I left my friend's couch at 4 a.m. and arrived at the Air Terminal at Joint Base Andrews by 5 a.m. for check-in. The various groups (NGOs/media, defense teams, prosecution teams, victims' family members, and trial judiciary) all fly on the same single chartered plane. There are

maybe 150 people. We have staggered check-in times and segregated seating by section. We wait in a secured area. A lot. The flight does not take off until after 10:30 a.m. I tend to sleep on planes now and woke up to us flying over the Bermudas as we wind our way around Cuban airspace to land at Gitmo. Everyone else was in casual clothing except Martins who was in uniform.

Upon arrival, we take a ferry across the Bay to Camp Justice, grab our bags, get issued ID cards, check into our tents, and get settled. The ID cards have to be carried everywhere we go, cannot be photographed, and are returned upon departure. We are given repeated admonitions not to take unauthorized photographs of radar domes and repeatedly warned to not touch the iguanas.

We meet briefly with Army Col. Jacobsen, who is a JAG reservist tasked with getting the facilities ready for trial. His blunt opinion was that the Prosecution's request for a 2020 trial was not feasible. He described the concerns that potential jury members would have on their career and potential challenges in getting an impartial jury empaneled (e.g., what are the boundaries of eliminating a juror "for cause"?).

Monday, 7/22/2019 (Hearings All Day)

The NGOs and media must clear 2 security checkpoints and be sequestered before the legal teams and VFMs arrive. There is no movement of any vehicles throughout Camp Justice when the Defendants are in transit. The same goes for the Courtroom itself—no movement.

Judge Cohen discloses that he is friendly with the Deputy Chief Trial Judge, who once represented WBA in a previous iteration of the commissions.

The Commission asks each defendant if he understands his right to be present at the proceedings. Only Bin Al-Shaib responds in English. The others use a translator.

USAF Major Virginia Barre makes her first appearance on the record, presenting her credentials as counsel for Bin Al-Shaib.

Bin Al-Shaib's team had made a motion to permanently release one of its counsel who has been re-assigned to another case. The Commission asks Bin Al-Shaib if he understands that this is a voluntary release. He says yes.

AE 118N Gov't Motion to Reconsider Prior Ruling re Classification Determinations

The Gov't has made a motion to reconsider the Commissions' prior ruling which, in response to massive delays in getting filings containing classified information properly vetted

and categorized, ordered Washington Headquarters Section's Office of Special Security (WHS/OSS) to turn this function over to DOD's Security Classification/Declassification Review Team (SC/DRT) and ordered the parties to meet-and-confer.

The Gov't's position, as argued by prosecutor Clay Trivett, is that:

- SC/DRT lacks the equipment to handle these tasks and SC/DRT, as a DOD-only component, is not authorized to make classification determinations for non-DOD documents.
- That said, the originator of the classified documents (Original Classification Authorities) have given permission to SC/DRT, with the exception of the State Dept.
- Trivett expects there to be efforts to meet the 60 day deadline. The Gov't further argued that meeting-and-conferring would disclose the personal identity of the points of contact who work in classified settings.

Connell (Al-Baluchi learned counsel) led the Defense's argument:

- Defense teams don't even have Security Classification Guides that are used frequently throughout the classified world. The Defense teams carry security clearances, and are thus, under a duty to protect classified information. They cannot protect classified information if their Defense Information Security Officers do not have the following: (1) broad guidance from the Guides; (2) day-to-day guidance from Defense Information Security Officers; and (3) a mechanism that protects the attorney-client privilege.
- WHS/OSS is a glorified mail courier. It asks the Original Classification Authority for how to classify rather than doing the determination itself. The most persuasive arguments were that Defense counsel could miss filing deadlines involving classified material if the attorneys are stuck waiting. And there was the problem of waiver of privilege, where if the Defense teams were to submit proposed work-product to an agency like CIA (which holds Originator Controlled-authority over classified info), the DC Circuit case law is harsh in its consequences. Connell had no issue with keeping personnel anonymous, but proposed meeting with agency lawyers, whose heads are well known.

The Commission ordered the counsel to meet-and-confer on names of people who can meet and to report back in 45 days.

AE 628B Al-Baluchi Motion to Compel Witnesses in Support of Motion to Suppress

The Commission invited *voir dire*. The Defense argued that there are 6 prosecution witnesses and 12 defense witnesses.

The Gov't emphasized the practical need for a date certain so as to get all witnesses ready for travel. Most of the witnesses would testify as to chain of custody. It also filed two *ex parte* motions (AE586 and 641) and requested that the Commission decide those two motions prior to deciding this Motion to Compel.

Argument was not completed and is scheduled to continue during the week of 9/9/2019.

AE 637 Motion to Compel Production of Discovery Related to Evidence Provided by the Convening Authority to the Prosecution

It became known to the Defense that at certain points, the Convening Authority was able to see Defense information and that it had shared some of it with the Prosecution. In particular, the Defense had to provide info on their travel arrangements for Defense team investigators, as they flew around the world, to the Convening Authority. Without any notice, the Convening Authority turned over this information to the Prosecution.

The Government opposed the motion, arguing that there was no need since the Convening Authority is supposed to be neutral.

Bin Al-Shaib counsel USAF Major Virginia Barre argued for the Defense that the Convening Authority has not been neutral in the past. And indeed, sometimes they recuse themselves.

The Court took it under consideration.¹

AE 643, Motion to Disqualify the Convening Authority.

Previously, the Convening Authority had recused himself from 2 other cases. The Prosecution somehow obtained access to emails of billing information from Defense experts. The Defense propounded discovery into this and the Government refuses to respond.

The Defense argues:

- That the Government used to respect the sanctity of not digging into information that could be revealing of defense strategy. Judge Cohen asked why the Defense has not inquired of the Convening Authority. The Defense responded that they did, but the Convening Authority referred them to the Prosecution.

Ed Ryan of the Prosecution agreed that the Convening Authority should be neutral, but that there is only 1 document at issue: Attachment B to AE616S.² The Defense responded that

¹ A ruling was posted on 7/26/2019. As of this writing, it remains unreleased.

the document in question is a work chart created by an interpreter who concealed his former employment by the CIA at a black site. This interpreter was ordered by the previous military judge, Marine Col. Keith Parrella, to testify (AE350RRR). The Defense further argued that the Convening Authority has been made an unwitting pawn and directed the Judge to AE616F (Attachs. D-H).

Judge Cohen grilled the Prosecution on whether the Defense knew what the Prosecution knows.

Bormann (Bin Attash learned counsel) emphasized that here the Convening Authority does not appear neutral and that there needs to be parity in the system.

Barre (Bin Al-Shaib) argued that her client was more concerned about other intrusions into the integrity of the justice system and cited the red light tripping incident, the fake smoke detector in meeting rooms between defense counsel and their clients, and spies on the defense team.

The Court ordered an *in camera* review of all of the Convening Authority documents. The Government has 2 weeks to provide the documents.

AE635 Motion to Compel Production of Diplomatic Correspondence re Torture from 1994-2007

The Defense seeks diplomatic cables, demarches, and other official correspondence regarding representations to other governments regarding torture.

Al-Baluchi counsel Ben Farley argued that:

- These documents were likely to contain examples of acts or circumstances that US officials would have considered to be “torture,” which would affect the jury when considering the Defense’s contention that such statements were simultaneously being put forth by US officials in representations to other governments at the same time the OCAs were torturing the defendants. These cables involve the US Gov’t’s evaluation and advice to other countries as to whether certain acts by those foreign governments constituted “torture” in the eyes of the US Gov’t. The cables serve as a “hidden body” of precedent.
- Torture evidence also relates to mitigation, suppression, demonstrating “outrageous government conduct,” and a *Kastigar* hearing. The jury could determine that the Government had unclean hands and eliminate the death penalty.

² Still not permitted for public release on the Commission docket.

- Judge Cohen asked why the Defense wanted cables dating back to 1994, as opposed to any other date range like 1999-2000. Farley responded that 1994 was when the US ratified the Convention Against Torture, but that they would be happy with a narrower date range, such as from 1999 onwards. KSM counsel Rita Radostitz also added that the timing coincides with the commencement of “hostilities.”
- Farley cited to *US v. Bin Laden*, 156 F. Supp. 2d 359 (S.D.N.Y. 2001), to draw a comparison to scenarios where the death penalty would have been disallowed.

Trivett (Prosecution) argued that:

- The Defendants are not entitled to a *Kastigar* hearing nor can “outrageous government conduct” be presented to the jury.
- The Defense request is overly broad and would result in 6M+ documents. This is “not a Westlaw database” that one could easily key word search through. Trivett acknowledged that a narrow production range would be better, but if any of the cables were classified, the counsel would need to resolve disclosure limitations in a classified hearing.
 - Farley disputed this assertion as Farley had previously served at DOS at the “Gitmo desk.”³ (Fellow observer LaVacca agreed with Farley’s assertion, having also previously worked as an attorney at DOS on Gitmo matters).
- The Defense is on a “deep sea fishing expedition” and they already have all the evidence they need to argue that the CIA RDI program constitutes “torture.”
- Trivett also asked for an opportunity to brief the Judge on the question of “outrageous government conduct” since most governing case law deals only with entrapment, whereas here, the enhanced interrogation took place because of and after the 9/11 terrorist attacks.

Radostitz (KSM counsel) also argued that the Prosecution should not be permitted to sit on their hands and make these blanket assertions regarding feasibility. They should at least be obligated to ask DOS. She argued that this discovery also provides relevance to the personal jurisdiction question of when “hostilities” began.

Later, Trivett got personal. He said they should “be a lawyer” and go to trial.

³ Farley was hired into DOS as a Presidential Management Fellow and served as Senior Adviser to the Special Envoy for Guantanamo Closure. He also happened to have sat next to a law school contact of mine.

Al-Hawsawi learned counsel Ruiz took exception and forcefully laid out examples in 2012, 2013, and 2014 where the Prosecution said the same thing, but after Motions to Compel were filed, turned over numerous documents. Ruiz also stated that Trivett was not qualified because he had only ever litigated 1 capital case in his entire career whereas Ruiz had litigated many.

After the hearings recessed, Al-Baluchi's legal team hosted a happy hour for the media and NGOs to ask questions. On the way over, we passed by Camp X-Ray, which is overrun with weeds but subject to preservation due to the pending litigation. The happy hour took place at the temporary quarters of one of the Al-Baluchi lawyers. The team hinted at the roles former FBI agents Ali Soufan and Steven Gaudin as well as CIA officer Hank Crumpton could play at trial. They represented that they had many experts retained, including those with expertise on the psychological effects of torture.

I met one Defense team member who claimed to have been threatened with counter-intelligence investigations.

Tues, 7/23/2019 (Closed/Classified Hearings All Day)

We are not permitted to attend, nor are the Defendants because they do not hold security clearances. Rumor was that it was highly contentious. Session appeared to run until 6 p.m., based on when counsel appeared in the Galley.

Our escorts took us around on some touristy experiences. We hiked the Ridge trail in the morning, where I got a better view of Camp X-Ray. We visited Windmill Beach (next to Camp America and JTF Gitmo, where the detainees are held), Marine Hill, Radio Gitmo, and the Chapel. At the Chapel, we were chased by a rather territorial iguana that the locals have named Reptar.⁴

We visited a beach with some Coast Guard people on leave. One guy grabbed an iguana. Another guy claimed to have helped provide escort security to the Obamas and the Trumps. He admired how Barack and Michelle treat each other off-screen, insisting very drunkenly, that they love each other. In contrast, when asked about the Trumps, he stated that Melania "was doing what she needs to do."

I also managed to squeeze in a jog in the 95 degree heat (achieving a paltry 2.25 miles in 30 minutes). It was my only attempt at fitness that week.

⁴ The base residents appear to name any large iguana as Godzilla or Reptar. It's also hard to tell the iguanas apart since you are not permitted to closely inspect them.

Wed, 7/24/2019

Judge Cohen documented that the Convening Authority and the Prosecution had advised the defendants of their right to attend the proceedings. Al-Baluchi and A-Hawsawi are absent. The Convening Authority's testifying witness is a Staff Judge Advocate (in-house legal adviser to commander) whose name tape has been removed and refuses to be identified by name. Instead, the name tap bears the initials "ASJA" for Assistant Staff Judge Advocate and holds the rank of Lt. Commander in the Navy. Al-Baluchi learned counsel Connell re-iterates his standing objection to the inability to confront this witness at a later time because they are unnamed.

Counsel for both sides provided updates regarding various meet-and-confer efforts. They were unable to convince Colonel Yamashita, Commander of the Joint Detention Group, to stipulate to various facts and thus he would need to testify.

Harrington (Bin Al-Shaib learned counsel) informed the Commission that the Govt had filed AE350TTT which made criminal allegations against him personally as to leaking classified information. Harrington said this sort of accusation had happened before, an investigation of which ultimately decided was unfounded. Harrington stated that he needed to consult with his own defense attorney and is not ready to argue.

Bormann (Bin Attash learned counsel) seconded the concerns.

Alka Pradhan (Al-Baluchi) signaled readiness to argue AE 616.

Counsel for KSM asked to argue AE 616 and 350TTT together because the Gov'ts filing of AE350TTT put him into a conflict position akin to Harrington's.

The Commission stated that it was not ready to hear argument on AE350TTT but would insist on AE616W.

AE 616W Show Cause Order Re Interpreter Testimony

The motion concerns an order by the prior presiding judge, USMC Col. Keith Parrella, that a former Defense team interpreter must testify as to why and how he concealed his prior employment by the CIA at a black site where Bin Al-Shaib was tortured.⁵ Judge Cohen limited the scope of argument to whether the proffered testimony would relate to/support an existing substantive motion. Judge Cohen commented that it was highly irregular to call someone for

⁵ Judge Parrella never got to hear argument. His retina detached and he had to be evacuated off Gitmo. He was also subject to a Motion to Disqualify because of his prior service with the DOJ's National Security Division. Parrella now serves as chief of Marine embassy security forces.

testimonial deposition. Usually, a witness either testifies in support of a pending motion or the counsel just takes a deposition. Judge Cohen emphasized that the key question was to find out **how** the interpreter came to join the Defense team.

Trivett argued that:

- The Defense conflates the difference between a CIA officer and an interpreter. He added that the interpreter's name has previously been spilled by the accused (intentionally) and the defense teams (unintentionally). AE350TTT has 3 new facts. Trivett kept drawing a comparison to ringing a bell as softly as he could. He further argued that there is a concern regarding "appearance in context" as well as the implications on "mosaic theory."
- This order really relates to a discovery issue. He attacked the Defense team for changing positions. First, they had asked Judge Parrella to issue an order for a deposition of the interpreter. The interpreter in question is a witness to nothing. Trivett stated that the Gov't was prepared to do the hearing in a closed session. He then made the threat that if Judge Cohen insists on an open court testimony, then the Gov't would assert the national security privilege and ask for substitutions.
- In an argument that has been advanced before, Trivett argued that (1) national security information could be released into the public, and that (2) the interpreter could be identified via his accent and unique speech patterns, exposing his family to danger. The cases cited to by the Defense are not related. *Press Enterprise* concerned *voir dire* in open or closed sessions. *Waller* concerned law enforcement wiretaps. Rather, the Commission should look to *Marzook*, where Israeli intelligence agents were permitted to testify in closed session while wearing disguises.
- Trivett further emphasized his concern with appearance in context (that 10 separate unclassified things could reveal a single classified picture). He cited to *US v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989).
- The Commission asked whether the Gov't would be able to submit a declaration from the correct source as to whether the Gov't had any involvement in inserting the interpreter into the hiring pool for the Defense. Trivett answered that it would need two weeks to obtain the declaration. Trivett further emphasized his representation to the Commission that the interpreter had not been inserted onto the Defense teams by an intelligence agency.

The Commission then asked the Defense teams about the history of the motion

concerning the interpreter. Al-Baluchi counsel Pradhan answered that it was initially a discovery motion.

At 11:16 a.m., a red light is triggered in the courtroom and the gallery's 40-second delayed feed is cut to static. It is restored 2 minutes later and Trivett states on the record that the government had mistakenly asserted the national security privilege.

Pradhan was permitted to continue:

- Initially, the Defense had asked for a deposition. Judge Parrella did not grant a deposition. Rather, on his own, he ordered testimony, in court, about (1) any directed/substantial contact between the interpreter and the defendant at a CIA black site and (2) the circumstances leading up to how the interpreter was placed on the Defense team. But since that order, the facts of the case have changed, and now the motion is no longer about discovery. The Defense teams have filed a motion to suppress FBI Letter Head Memoranda ("LHM") and the Gov't has produced documents whereby it admits that the interpreter was indeed employed at a black site.
- This is particularly relevant because of a series of intrusions into the Defense teams and their attorney-client privileged relationship with the clients. The Defense teams would be walking violations of the Sixth Amendment's requirement of effective assistance of counsel if they did nothing.
 - January 2013: Somehow, the red light is remotely triggered and a forensic investigation reveals that it was hacked and that certain government agencies had access to an "ungated" feed into the Courtroom.
 - March 2018: Bugged smoke detector in Defense meeting rooms, despite Gov't assertions otherwise. The Prosecution obtains access to Defense emails.
 - April 2014: The FBI attempts a second time to recruit a confidential informant on the Bin Al-Shaib team.
 - June 2017: The Gov't admits to unintentionally accessing Defense emails, despite a prior order explicitly forbidding it.
 - December 2018: Detention, interrogation, and roughing up of a former member of the Bin Attash team, with accusations that he would be another Nidal Hassan, as detailed in AE 615.

11:29 a.m.: The red light is triggered again just as Pradhan starts discussing torture. The

gallery is emptied.

11:59 a.m.: Commission resumes. Judge Cohen discloses that his Court Information Security Officer triggered the red light and that from now on, it is the Prosecution's burden.

Pradhan reminded that the Court of Military Commission Review requires a balancing test and that the Gov't still has not explained in practical terms where the threat is and its substantial probability.

She also challenged the Prosecution's citation to *Marzook*, saying that no one seems to know if the interpreter is acting on behalf of orders or on their own. The Gov't fails to address how inquiring into the interpreter's job application implicates classified information. The interpreter's identity was previously disclosed in 2015 and nothing has happened since that time.

Upon breaking for lunch, I noticed that a member of the base community kept following the NGO group, eliciting information. I found it uncomfortable. He represented that his name was Gabriel (Last Name Unconfirmed)⁶. He had a shaved head and full length beard. He appeared to be of slight to medium build and stood about 5'10". He made multiple representations that did not make sense (e.g., that he had been simultaneously admitted to medical, law, and dental school; that there was good surfing off of Long Island; that he was trained in various dialects of Arabic and was teaching himself Korean). He did not present as particularly threatening (of course how one looks is never a good measure). He went out of his way to express his dislike of NYC Mayor Bill DeBlasio and that he claimed to have seen people jumping out of the Twin Towers on September 11th. He claimed to have been at Gitmo for a month where he spent most of his time drafting "SOPs" and that people on the base do not really interact with each other. The individual's behavior made almost all the NGOs, except 1, somewhat uncomfortable. Apparently, he was told to leave the group alone and did not return after an extended break during the afternoon.

Upon return from lunch:

- Pradhan (Al-Baluchi): There was no adequate case law guidance on mosaic theory, most of which focused on closed hearings involving FOIA requests. Both Bin al-Shaib and Bin-Attash recognized the interpreter in court.
- Radostitz (KSM): This is an unusual situation. The Bin Al-Shaib team learned that the FBI had recruited an informant on their team. The Gov't claimed that the KSM

⁶ I saw him give out a gmail email address on the Space A sign-in sheet at the first security checkpoint.

and Bin Al-Shaib teams were not under investigation, which later turned out to be false. Then the interpreter is hired on to the bin-Attash team, knowing that he was being hired for the 9/11 case. Then the Senate Committee on Intelligence releases portions of its report. Only 3 things about CIA RDI remains classified: (1) locations, (2) timeline of events, and (3) personnel's identities. The rest is largely available in the unclassified version of the Senate Intelligence Committee Report on Torture.⁷

- Bormann (Bin Al-Shaib): The interpreter joined defense team in 2012 before being revealed in 2015 when Bin Al-Shaib actually saw him in Court. This means the interpreter had been working on privileged information for 3 years. This is not an isolated event.

The Prosecution reserved their rebuttal for a closed session.

AE 642 Order Directing Update Regarding Motions to Compel Discovery Concerning Hostilities

The motion is about the Commission's personal jurisdiction. The Gov't asserts that a continuous period of hostilities began in 1996 with bin Laden's Declaration of Jihad. The Defense had filed a motion to seek documents that would find out whether the US was targeting bin Laden vs. Al-Qaeda during Operation Infinite Reach (i.e., Tomahawk cruise missile strikes on terrorist training camps) as well as to gain access to presidential libraries and executive memoranda on the subject. The Gov't resisted disclosure, asserting that the requests were overbroad.

Farley (Al-Baluchi) argued that:

- The Defense still needs access to Presidential libraries and executive orders. What a government chooses to do and not to do can indicate whether a period of hostilities exists. The law of armed conflict ("LOAC") is governed by the Geneva Conventions, which only covers state-vs-state conflicts. Here, the US Gov't does not have a Congressional Declaration of War, but rather an Authorization for Use of Military Force against a non-state actor. Farley drew an analogy to the Hong Kong protests, and how the PRC government's decision to rely on Hong Kong Police instead of its military would indicate that "hostilities" do not exist. Similarly, a question remains as when the US decided to use its military's combat power to confront Al-Qaeda. Various other tribunals, like ICTY, look at "intensity" of fighting.

⁷ Only about 525 pages of the Report has been release to the public. The Report totals over 6,000 pages.

- The lawyers would have to educate the jury (who may not have even been alive on 9/11/2001) on an obscure period of history as to whether the US Gov't was in a period of "hostilities."
 - Until August 1998, the Gov't relied mostly on diplomatic, intelligence, and law enforcement resources to address Al-Qaeda. Then there was the use of military force in Operation Infinite Reach. And then the Gov't went back to relying on diplomacy, intelligence, and law enforcement until 9/11.
 - Moreover, if the Gov't deployed the military in a law enforcement function, LOAC also does not apply as there are no "hostilities." Rather, there must be sustained, armed violence between the sides, as opposed to sporadic, isolated acts of violence.
 - In Operation Infinite Reach and Operation Enduring Freedom, the Gov't cited to UN Charter Art. 51 (self-defense) as justification. Not all acts of "self-defense" constitute "hostilities."

Trivett (Prosecution) argued that:

- 9/11 was like Pearl Harbor and that the Gov't has produced 5,000 pages of documents after reviewing 6.2 million pages related to RDI and no further disclosure is needed. The Gov't has the burden to prove beyond a reasonable doubt that the Defendants undertook their plan for 9/11 during a period of "hostilities." There are 10 distinct acts—the 1996 Declaration of Jihad; the 1998 expanded fatwa (which shows clear intent to commit LOAC violations against civilians); the US Embassy bombings; the *USS Cole* attack; the *USS Sullivans's* attempted attack; and the 4 planes hijacked on 9/11. The Prosecution intended to present evidence on the organizational structure of Al-Qaeda via expert witness.
- At a minimum, "hostilities" began on 9/11. Moreover, 3 of the Defendants continue to wear camouflaged jackets, as if to show they are soldiers, which supports of a finding of "hostilities."
- Hostilities existed as of 1998 because: (1) there was protracted violence; (2) it was organized (evidence of which would be presented via expert); (3) the US military deployed in August 1998; (4) there were numerous casualties (from the missile strikes, from the embassy bombings, and from 9/11); and (5) leaders' statements of existence of an armed conflict (i.e., fatwas, Al-Qaeda propaganda, DOD statement re Infinite Reach, statements of Presidents Clinton and W. Bush, statements of the

Secretary of Defense.

Trivett proffered that the Gov't would have LTG Wagner of the Joint Chiefs of Staff testify as to what the Gov't was doing at that time and that the Gov't would prove that there was a conspiracy to attack civilians from 1996 to the Present, that Al-Qaeda's primary purpose was to attack the United States and that they have never stopped trying to kill Americans.

At 4:37 p.m., proceedings are interrupted so the Defendants can have prayer time. The entire courtroom is recessed and vacated for 10 minutes.

Farley argues a rebuttal: Pearl Harbor only involved a state vs. a state scenario, not a state vs. non-state actor. In state vs. state conflicts, there are two ways to start hostilities: (1) declare war or (2) throw the first punch. The other cases of persuasive authority involving non-state actors involve drug trafficking organizations, but they were opposed by the US Coast Guard and DEA in law enforcement roles.

USMC Lt. Col. Poteat (KSM) stuck to making a statutory argument, asserting that Rule of Mil. Comm. 401 and 701 mandate disclosure by the Gov't.

The Commission moves on.

AE 530BBBB al-Hawsawi's Motion to Compel Witness Testimony from Colonel Yamashita, Commander, Joint Detention Group, Joint Task Force-Guantanamo

Counsel inform Judge Cohen that he will testify.

Thurs, 7/25/2019 (2 Hour Open Session, Rest of the Day is Closed/Classified)

The Open Session begins at 2 p.m. and Judge Cohen goes again through the ritual of documenting the fact that certain Defendants are not present and that they have been advised of their rights to attend the proceedings. The same ASJA from the day before testifies and cites to filings of AE 648D-G.

Next, Judge Cohen summarized that during the closed session:

- The Commission had discussed AE642 further (al-Baluchi's team was re-assessing specificity of the documents sought and the Commission would await the update);
- That he would order depositions re AE35ORRR/35OC, but could reconsider the scope.
- And that the Prosecution had withdrawn AE35OTTT.

AE 530BBBB Testimony from Joint Detention Group Commander

Joint Detention Group Commander Army Col. Steven G. Yamashita was called to the stand. The motion was filed because Al-Hawsawi was previously given access to a laptop to

review document production, but was then severely restricted. His lawyers wanted to know why. Al-Hawsawi's learned counsel Ruiz conducted the questioning.

Yamashita testified that:

- He has authority over all the detention camps, including Camp VII, where high value detainees are held.
- He acknowledged that "he had heard things" about features and capabilities at the detention facilities. Ruiz introduced a map of where Al-Hawsawi resides (AE350ZZZ(MAH)).
- Al-Hawsawi has a modified 2008 Panasonic laptop (sounds like a Toughbook). Its screws are welded shut to prevent tampering and its wifi capabilities are removed.
- Multiple forensic examinations have turned up nothing.
- Al-Hawsawi has no violations re use of his legal computer
- Al-Hawsawi is the only detainee at Camp VII whose is judicially-approved to use a computer. The Guard Force need only track 1 computer in the entire detainee population.
- Al-Hawsawi is now limited to using the computer a total of 4 hours per day, one of those windows being from 2-4 a.m. Yamashita insisted that this was necessary to balance Al-Hawsawi's right to a computer with the security needs of the facility.

Most notable, Col. Yamashita was unable to fully and directly answer Ruiz's question on whether Yamashita had ever been instructed to not acknowledge the existence of certain features at the detention facility. The Prosecution objected and insisted on taking the examination into a closed session. Judge Cohen overruled it, finding that the questioning goes to reasonable alternatives and Yamashita's credibility.

On cross-examination by the Prosecution, Yamashita's testified that to having an extensive resume, including, 25 years as a military police officer; was J3 of a Joint Chiefs of Staff unit for Special Operations; that Camp VII involves some of the greatest security risks with which he has ever been associated. He identified the potential ability of Al-Hawsawi to manipulate the previously-disabled features on the laptop constituted a security threat.

The open session ended after about 20-25 minutes of total examination.

Meeting with Chief Defense Counsel

The meeting at the offices of the Military Commissions Defense Organization was

somewhat emblematic of Gitmo and maybe a harbinger of the logistical challenges facing those who wish to carry out a trial. The air conditioner had broken in the concrete SCIF. The average outside temperature was 95 and everyone was sweated profusely.

General Baker patiently answered NGOs' questions and spent an hour presenting and discussing the Commissions process. Here is a summary of his personal thoughts:

- Defense teams keep having intrusions into their homes and cars. Baker has ordered at least six investigations into these intrusions.
- Wonders if the OMC and CA are really the same entity/person. He is also concerned that the CA has a conflict of interest. The CA for Al-Nashiri was in the Pentagon on 9/11/2001.
- Insists on the distinction between “learned” and “lead” counsel.
- In 11 years, the Military Commissions system has produced only 1 conviction that has withstood appellate review (Darbi, who was sent to Saudi Arabia).
- General Baker does **not** believe that an Article III judge presiding over the proceedings because their hands would be tied up in the Military Commissions system.
- We should expect the Al-Nashiri case to resume because he just hired a new “learned counsel,” former public defender Tony Natale.
- Defense teams are forbidden from traveling overseas to investigate black sites
- Gitmo lacks the facilities to adequately house everyone.
- MCDO cannot get people through the security clearance process quickly enough.
- The IT systems are poorly designed.
- The Prosecution accuses Defense lawyers of serious misconduct (like AE350TTT—which the public is unable to see but generates a reaction from Defense counsel who say they need to consult their own criminal defense counsel)
- The only thing to make an Original Classification Authority back off would be Congressional intervention from the Senate Intelligence oversight committee.
- Nothing prevents another *Boumediene* from upending everyone's timetables.

Fri, 7/26/2019

In making friends with one of the security guards whose collateral duties is to sell flags at cost that are flown at Camp Justice, I manage to convince them to provide a microwave and Keurig coffee maker for the NGO tent. Too bad I cannot use it.

Only Bin Al-Shaib is present. He is still wearing a BDU vest. The Commission repeats the process of swearing in a staff judge advocate witness to testify to the absence of the other Defendants and their having been advised that they can skip, etc. Their acknowledgments are documented into the record at AE648G-J. This ASJA is from the Army, a Major, female, wearing glasses, maybe 40s to 50s years old, wears a wedding ring, and **somehow** is able to wear an Apple watch with a white band inside the SCIF courthouse.

The Prosecution officially withdraws, on the record, their motion at AE350TTT. Judge Cohen grants the withdrawal.

Judge Cohen summarized the prior day's closed session proceedings:

- There was a RMC 802 Conference. Bormann (Bin Attash) will withdraw AE530AAAA.
- Radostitz (KSM) emphasizes the request for giving everyone enough time to check-in for the return flight to Joint Base Andrews.
- Acknowledges pending Motions to Suppress.
- Judge Cohen recognized this case was special and was willing to address more RMC 702 questions in depositions and willing to allow affidavits.
- AE639: That there was substantial argument re issues with discovery and adequate time to prepare for trial.

Judge Cohen emphasized his interest in having a workable process.

Ruiz (Al-Hawsawi) offers into the record a recently received document (AE530MMMM(MAH)). Ruiz represents that the document was received without any classified markings and contains rules regarding Camp VII detainees. It directly rebuts Yamashita's testimony from the closed session. Ruiz argues that Yamashita does not know his own rules.

Connell (Al-Baluchi) alerted the Commission to the fact that his motion challenging personal jurisdiction had been pending for 2 years and will need witnesses for the hearing. The Prosecution has proposed 16 witnesses in support of a motion to suppress⁸ hearing as well as the motion challenging personal jurisdiction. Connell proposes calling them all in September. All but 1 witness is ready to go in September (retired FBI Special Agent Stephen Gaudin).⁹

Trivett (Prosecution) agreed that witnesses should be sworn for testimony. The Gov't was only interested in questioning Gaudin as to the source of tips regarding Bin Attash.

⁸ I believe the lawyers are referring to FBI "Clean Team" interviews of the Defendants.

⁹ Gaudin is known for his man years-long hunt through the 1990s for KSM.

Ruiz (Al-Hawsawi) noted that the Gov't is proposing a one-shot deal to examine witnesses when Al-Hawsawi has not joined in the Motion to Suppress.

Similarly, Nevin (KSM) inquired as to whether the witnesses would be available for a *Kastigar* hearing (particularly regarding immunity granted to witnesses as to torture).

Judge Cohen emphasized that he was willing to recall witnesses and that the witnesses can be re-ordered to appear upon a showing of good cause. When pressed by Harrington (Bin Al-Shaib) as to the meaning of "good cause," Judge Cohen emphasized that the Defendants were entitled to a fair trial and that Defense lawyers should have access to evidence that they are entitled to obtain. If necessary, a deposition off-site or affidavits could be used too. He also noted that the Defense need only claim that any statements made by Defendants were involuntary, at which point the burden shifts to the Gov't to show by a preponderance that the statements were voluntary.

Judge Cohen further hinted that the death penalty could be taken off the table.

Ed Ryan (Prosecution) took the time to read, into the record, the names of the Victims, whose family members who were present in the Gallery.

AE 639, Motions for Scheduling Order/To Set Trial

Ryan argued that:

- There needs to be a trial date. "A goal without a deadline is just a wish." And that ordering a trial date would make the Gov't actually provision the resources necessary to the logistics of a trial.
- RDI discovery is almost complete. Judge Pohl issued the widest classified discovery order ever issued in AE701 and 397F. The Gov't thought the RDI discovery was complete, but then Judge Pohl suppressed the FBI "Clean Team" statements on the grounds that there was insufficient "rich and vivid" detail in the substitutions placed in the RDI document productions. And then KSM and Al-Baluchi propounded further discovery. But the Gov't will be ready for a 505 hearing by Sept. 1.
- Medical evidence and witnesses also presented a problem. There is real difficulty in identifying the health care providers. People used pseudonyms, 750 of them. But no "master key" exists for the identification of the health care providers. The Gov't has narrowed down the identities and will produce records from 2006-2007 in the next few weeks. Further document production will be provided on a rolling basis. The Defense will have all unclassified medical records.
- The Defense's proposed scheduling order has deadlines for everyone but the Defense

teams. The Court speculated that at the fastest, maybe there is a February 2021 trial, when accounting for possible delays. The Court also asked about difficulties in getting contracting completed for trial logistics (personnel, equipment, facilities, etc.). Ryan countered that the Gov't would be ready to go in June 2020.

We recess for lunch and there is a mad scramble to the terminal to get checked in for our flight back to Joint Base Andrews. The Defense, Prosecution, NGOs, and media get in the same ticket counter line, which is run by two civilian women.

Upon return:

- Judge Cohen notes that having only 1 courtroom to hear cases would impact the schedule of other cases.
- Connell argues that the Gov't estimate of 187 days for trial is unrealistic and something more like 6 months is to be expected. Connell advocated for an approach of reading various "benchmarks" or "landmarks." He asks for Oct 2021.
- Connell is also concerned with completion of discovery, in case the Gov't declines to complete RDI document production. In fact, during the lunch break, the Gov't produced 96 pages, of which 2,117 pages remain. At some point, the discovery must come to a stop.
- Various logistical stumbling blocks that holding a trial would "break" Gitmo. If the Convening Authority genuinely wants a case, they should provide the resources to get it ready
 - Getting experts their security clearances.
 - Linguist contracts remain unfulfilled.
 - Where would witnesses and jury members stay; there literally are not enough beds and they need to be kept segregated to avoid tampering concerns. Right now there are not even enough hotel beds for the witnesses needed for the evidentiary hearings.
 - There has been a significant decline in resources afforded to the media; even their building is condemned
 - Health care provider pseudonyms was a problem that the Gov't created.

At 2:28 p.m., Judge Cohen halts proceedings, informing everyone that a cell phone alarm went off. He tells everyone that it is perhaps a false alarm and that everyone should continue. A few minutes later, the cell phone alarm goes again and everyone is ordered to stop. Judge Cohen steps off the bench. Guards search the courtroom thoroughly, looking under every chair.

Nevin (KSM) argued that the Commission must be fair and appear fair to the observers.

- Torture evidence is relevant and exculpatory. Nevin displays a proposed Trial Scheduling Order from 2008 signed by Trivett to emphasize the point that the Prosecution has said, at multiple points, that discovery is complete, only to subsequently further produce other documents.
- Nevin further displays a photo of KSM's kids when they are minors (AE639J). Nevin alleges that the children were taken into custody and mistreated. The Gov't only turned over an undated photo, but in normal federal practice, one would see an FBI FD-302 authenticating and laying a foundation for the photograph and the interview.
- Pseudonyms in the medical records are unacceptable. Hundreds of witnesses have disappeared and the Gov't can't find them. KSM needs to be able to document his medical condition. He can't even get access to his own records. And if he can't, then Defense counsel cannot conduct thorough investigation, thereby rendering his assistance ineffective.

Bormann (Bin Attash) raised her own points in arguing that the Commission should set hard deadlines for discovery:

- Had the Gov't turned over its document earlier, she would have cross-examined Col. Yamashita instead of relying on Ruiz to ask for its admission into the record.
- Similarly, the FBI LHMs are inadequate narrative summaries of FBI FD-302 reports. Bin Attash was interviewed 3 times by the FBI. She asked for the records in 2011 (especially notes by FBI agent Gaudin), and only just started receiving the documents 6 days before.
- The Convening Authority de-funded money for Defense experts.
- Lack of adequate resources (no DISOs, not enough intel analysts, lack of secured offices).

Ruiz (Al-Hawsawi) also echoed the lack of infrastructure planning for a trial. After all, the Gov't chose this location.

Ryan takes back his commitment for 9/1 to complete RDI discovery, and now asserts 10/1.

Commission recesses and the NGOs go eat at a Jamaican food cart that is only open on Fridays. We spend the rest of the evening packing up and cleaning.

Sat, 7/27/2019

We are up by 5:30 a.m. Col. Yamashita is in t-shirt and shorts to see us off. He looks cheerful. We all wait for a long time in the single air terminal—everyone occupying their own corners and minding their own business. There’s a Subway but it runs out of food quickly. We get on the flight and learn that there are not enough meals for everyone. One friend jokes and says “welcome to the military.”

The flight departs relatively on time and we land at Joint Base Andrews at about 11:30 a.m. We get stuck with waiting outside on the tarmac with no shade while waiting for a single CBP officer to process our return. It takes over an hour as we roast in the 90+ degree heat. I absent-mindedly hold an orange (grown in Florida) and get it confiscated on the grounds that its export to nominal Cuban soil renders it a disease risk.

REFLECTIONS

I am constantly reminded of one thing I kept seeing in all of the VFMs—their gray hair. It is 2019 and for them, there is no question that they have not gotten closure. Emotionally, I feel the same twinges I felt when “interning” at the LA County DA’s office—that while prosecutors are supposed to speak for the Government/People, they also, on a practical level, speak for the victims and their families too. Who else speaks, as a lawyer, for the dead, to the jury? I saw this played out in the genuine interactions between the Prosecutors and the VFMs.

The Defense lawyers make plenty of effort to reach out to the media and NGOs. They do not hide the fact that they intend to win in the court of law and public opinion. Sometimes, things are said in the courtroom (lengthy recitations of violations of Defense team protections) that makes me wonder if their real purpose is to sway the gallery, as opposed to assert a legally significant position. I am, of course, unable to evaluate accurately the veracity of those assertions. On its face, the statements, evidence, and arguments make the Prosecution look bad.

The Commission follows the military tradition of letting trial counsel argue, largely without interruption, until they are done. To this civilian litigator, it comes across as inefficient. Counsel can argue for a long time, engaging in hyperbole and even bloviating statements, that to me, seem unnecessary for the purpose of winning a motion hearing. And indeed, veteran observers have stated that the arguments have been repeated from the past. A cursory but independent search of prior transcripts of proceedings confirms this. Perhaps it is for the gallery to hear. Examples include detailed recitations of the kinds of enhanced interrogation techniques that the Defendants suffered or exhortations of how many innocents died on 9/11 or the dangers of revealing an interpreter’s name. It is also perhaps because there is little governing case law. It

is unclear how much DC Circuit law applies.

Some of the cases cited also seemed inapposite (e.g., Farley's argument that *US v. Bin Laden*, 156 F. Supp. 2d 359 (S.D.N.Y. 2001), a case about mitigation arising out of extradition of a terror suspect was relevant to why the defense should be granted its motion to compel production of diplomatic cables which could maybe go to mitigation).

This seems to be the Prosecution's case to lose.

Counsel for Al-Hawsawi has made it clear that they think the Gov't has critical weaknesses in its case in chief, but I have not heard any other defense teams make such a statement. With each instance of government agency misconduct (remote unauthorized triggering of the hockey light, surveilling defense counsel's homes, destroying documents related to torture, withholding documents relating to torture, intruding upon defense attorney-client meetings, interrogations of Defense team members), it stitches together a narrative that some government agency (likely the OCA) is interfering with the ability of the legal process to get to a fair trial.

Moreover, the Prosecution's repeated arguments about "mosaic theory" and "appearance in context" as a grounds from preventing further disclosure of sources and methods does not appear credible. Apparently, *Zero Dark Thirty* director Kathryn Bigelow got more information than the Defense teams. Whatever the Prosecution's concerns, the information is not only already in the public eye, but also the subject of Oscar winning films. Plenty of public attention is already on it, unless the fight is over disclosure of documents showing specific sources and methods. If it is the latter case, the Commission should quickly adjudicate the issue and order full disclosure in closed sessions. Trivett's citation to *Yunis* cuts against his argument as the Defense have repeatedly attempted to lay out for the Commission how certain information (cables, interpreter testimony) would bolster an outrageous government conduct motion.

The fight over "hostilities" is a bit strange. Why the parties are unable to stipulate to when "hostilities" began is surprising. What is strange, and perhaps a failure of the drafter of the Military Commissions Act, is the dual-natured aspect of the meaning of "hostilities," which could either relate to an act of hostility or a time period of hostilities.

Moreover, it is strange that a formal motions and argument is necessary for setting a trial. Civilian judges entertain very little argument. In civil cases, federal judges will not even bother.

Finally, the military judge lacks adequate power. The Commission lacks the subpoena power normally found in a federal district court. Despite Judge Cohen's statements, I fail to see

how he can they compel certain non-party witnesses to testify, if they decide to be resistant. This sort of problem was encountered in the *Al-Nashiri* opinion issued by the D.C. Circuit. I do see the judges trying to level the playing field. In response to the Gov't forbidding Defense teams from traveling overseas to investigate their case, one judge, as a sanction, suppressed the use of FBI Letterhead Memoranda, which contained important statements made by the Defendants.

I have an ongoing concern as to whether SCOTUS will intervene and conclude that the Defense teams were so compromised, intimidated, and/or hampered so as to violate the Sixth Amendment requirement of effective assistance of counsel. In doing so, that could send the Defendants back to the beginning of their legal process, further delaying trial. Everyone in the Gov't will look like fools if the Defense can cogently argue a violation of the Sixth Amendment requirement of effective assistance of counsel.

The stakes cannot be more legally significant in the 9/11 cases. They are the marquee cases of the Military Commissions.

There is also an argument to be made that how the US Gov't conducts itself here will set the tone for future military commissions. If history is any good guide, it is all but guaranteed that the US will one day find itself again having to try enemy combatants for war crimes and crimes against humanity, whether committed in the name of a religious or some other ideology.