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M E M O R A N D U M

TO: Pacific Council on International Policy

FROM: Zachary W. Byer

DATE: July 1, 2019

RE: *United States v. Khalid Shaikh Mohammad, et al.*
Pre-Trial Hearings (Week Of June 17, 2019)

The 9/11 Military Commission reconvened the week of June 17, 2019. Khalid Shaikh Mohammad (KSM) and his four co-Defendants—Walid bin ‘Attash, Ramzi bin al Shibh, Ammar al Baluchi, and Mustafa al Hawsawi—were first arraigned in June 2008. Those charges were withdrawn in early 2010 with an eye toward bringing the five individuals to trial in federal court. After Congress passed legislation prohibiting any move bringing Guantánamo Bay detainees to the United States, a Pentagon “Convening Authority” for Military Commissions approved new capital murder charges against the five detainees. They were arraigned in May 2012 at Camp Justice at the U.S. Naval Base at Guantánamo Bay (GTMO).

Seven years and thirty-five pre-trial hearings later, the Commission resumed proceedings during this blisteringly hot week in mid-June. The Commission convened for four days of open sessions and covered issues fundamental to the case, including the *voir dire* of a new judge, enhanced public access to the hearings, and the potential suppression of statements allegedly arising from torture. I traveled to GTMO and observed the hearings on behalf of the Pacific Council, one of roughly twenty-five non-governmental organizations approved by the Department of Defense to view the proceedings in person.

June 17

By the time we took our seats in the gallery—separated from the courtroom by multiple panes of glass and a forty-second audio delay—the five Defendants and their counsel were already seated. Actually, only four had taken their seats. Ammar al Baluchi recently suffered an exploded cyst in his spine, which makes him unable to sit.

That made al Baluchi the only Defendant standing when the familiar “all rise” rang out just after 10:00 A.M. and Air Force Colonel Shane Cohen took the bench for the very first time as the presiding judge. Judge Cohen replaced Judge Keith Parrella, who resigned his post after less than a year. Before Parrella there was Judge James Pohl—the first to preside over the Commission beginning in May 2012.

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Judge Cohen's first order of business: advising Defendants of their right to be present or absent at the hearings. By previous order, Defendants must attend the opening session of the pre-trial hearing in person. At that point, the Commission reminds them that their absence from subsequent sessions will be construed as an unequivocal waiver of their right to be present. Of course, Defendants' presence may be compelled in certain circumstances, and a Defendant may attend an afternoon session even if he did not attend the morning session. Judge Cohen asked each Defendant if he understood. All said they did; bin 'Attash said so in English.

Immediately thereafter, al Baluchi asked to return to "camp" to take his medication. After confirming that al Baluchi was knowingly, voluntarily, and intelligently waiving his right to be present for the remainder of the day's proceedings, Judge Cohen dismissed him. Somewhat unexpectedly, al Hawsawi then asked to be excused. He sits on a special donut-shaped pillow due to, among other things, the anal fissures and rectal prolapse he suffers because of CIA interrogation methods. Judge Cohen found that al Hawsawi was knowingly, voluntarily, and intelligently waiving his right to be present, and approved the request. Brigadier General Mark Martins, the Chief Prosecutor, mentioned that this was irregular—that excusals typically do not occur until the first recess. Judge Cohen put on the record that this should not be a sign of regular practice to come, and the Commission recessed only fifteen minutes after coming to order to allow the guard force to escort out al Hawsawi and then al Baluchi.

When the Commission reconvened, Judge Cohen summarized the prior day's [Rule for Military Commissions 802](#) conference. From what he relayed, it consisted largely of administrative matters—introductions and scheduling/security considerations for the week.

Then we finally got to the heart of the day's agenda: *voir dire* of Judge Cohen. State and federal litigators probably have some experience with, or at least an understanding of, the *voir dire* process for seating a jury (called a "panel" in the military system) during which attorneys for each party ask questions of potential jurors to ferret out those who may not fairly assess the evidence. In courts-martial (and these military commissions), however, parties may also *voir dire* the judge and challenge his detail should the questioning raise concerns about bias or lack of impartiality.

General Martins reserved the Prosecution's right to *voir dire* Judge Cohen and ceded the podium to Defendants. David Nevin, learned counsel (ABA death-penalty-qualified counsel) for KSM, started and pulled the laboring oar for Defendants. Nevin set the stage by explaining that he intended to focus on Canon 1—" [a] judge shall uphold the integrity and independence of the judiciary"—and Canon 3—" [a] judge shall perform the duties of the judicial office impartially and diligently—of the Air Force Uniform Code of Judicial Conduct.

Then Nevin launched into questions about Judge Cohen's whereabouts on, and reaction to, 9/11. At Bolling Air Force Base attending a defense counsel orientation on 9/11, Judge Cohen recalled seeing images of the World Trade Center during a break. He reiterated that he felt "just shock"—otherwise, he had "no strong emotions at the time" about what he saw on the television.

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As Judge Cohen learned more about how 9/11 happened, he never felt angry; again, just “shock” and “uncertainty.”

Judge Cohen is currently the Deputy Chief Circuit Military judge of the Air Force’s Eastern Circuit, and will soon become the Circuit’s Chief Judge. According to Judge Cohen, who has served as counsel on both sides of the *v*, he details himself to cases as the Chief Judge—so, it remains to be determined whether he will preside over other cases as the Commission proceeds, but he assured counsel that he plans to let this case dictate his docket. “I understand the seriousness of what we are doing here,” Judge Cohen emphasized. He had initial discussions about being detailed to the Commission in late April 2019, and found out officially about the assignment on June 3.

Nevin (and other Defendants’ counsel during *voir dire*) was interested to know how long Judge Cohen planned to remain with the Commission. Judge Parrella knew from the outset that he would preside for less than a year, which did not add much certainty to an already uncertain case. Judge Cohen, on the other hand, said that it is at least his hope to remain detailed to the Commission for a reasonable period of time for the sake of giving both sides the “continuity they deserve.” He does not reach mandatory retirement for nine years, which spurred some nervous laughter about how much longer this case may proceed. Of course, Judge Cohen conceded that he could put in retirement paperwork before it is mandated. Ultimately, he could not estimate how long he intended to stay on the case, but he hopes that the Air Force sees the benefit to all parties by allowing him to preside for a while.

To this point, Judge Cohen had discussed nothing beyond the general posture of the case and its protective orders with his staff. He had avoided any substantive discussions regarding evidence and broad themes of the case, except for the motions on this week’s docket. And Judge Cohen had no communication with Judges Parrella or Pohl about the proceedings. Although Judge Cohen has started wrapping his arms around the law of the case, he admitted he has not yet spent significant time reading prior pleadings. Pressed some more, Judge Cohen said that the extent of his knowledge about this case is the five Defendants’ names and that it generally relates to 9/11.

This will be Judge Cohen’s first capital case (and also his first multi-defendant case over which he has presided or has had any involvement as counsel). He told Nevin that he was already considering issues regarding panel selection, such as how long it will last and how to do it “on this island.” And he specifically said that he hoped the Government is already thinking about these questions as well. Asked generally about capital punishment, Judge Cohen said that he thinks it can be just, but that something less than the death penalty could be similarly just. Nevin followed up and asked if Judge Cohen agreed “that mitigation is a broad concept.” Judge Cohen responded that he understand Supreme Court case law and other law to allow broad discretion in a capital case with respect to mitigation, but that he would not be setting out any parameters at this time.

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After breaking for prayer and lunch, bin ‘Attash’s learned counsel Cheryl Bormann took over *voir dire* and asked Judge Cohen about his understanding of unlawful command influence—when someone in an authority position uses or appears to use that authority to influence military commission proceedings. Proclaiming that “you can’t put a cost on military justice,” Judge Cohen said that there is no specific category in his performance evaluation or rating with respect to saving government funds. That being said, the Convening Authority—not the Judge—decides whether to supply funds to the parties for things such as expert witnesses. In other words, Judge Cohen implied he will not preside over the case with an eye toward saving the Government money.

James Harrington, learned counsel for al Shibh, questioned next and broached some new topics. How much inherent pressure does Judge Cohen feel given outside criticisms of the length of this process? “Zero.” Does Judge Cohen understand that the parties will be arguing over whether Defendants have been tortured? Yes, but he has done zero independent study of the issue. Does Judge Cohen have any particular views on Israel or its conduct (which might implicate a bias against the Defendants)? Judge Cohen is Mormon, though he has Jewish relatives, and he harbors no ill will toward Islam; that did not really answer the question, however, and neither did his follow-up comment that he was not born when the State of Israel was recognized in 1948 (he said 1947). Does he recall ever saying that the United States should go to war after 9/11? He does not. Does Judge Cohen have an opinion about whether the Constitution applies to the Commission? “I’ve come to no conclusions,” he said, and he hopes the parties will help. Harrington chuckled and quipped, “welcome to the sewer, Judge.”

After James Connell (al Baluchi) and Walter Ruiz (al Hawsawi) asked a few more questions during *voir dire*, the Prosecution simply asked whether Judge Cohen has any pending job applications elsewhere (he does not). This was a not-so-veiled reference to Judge Vance Spath, who had applied to be an immigration judge shortly after he became the judge in Abd Al-Nashiri’s Military Commission in 2014. [The D.C. Circuit recently found](#) that Spath’s “job application to the Justice Department created a disqualifying appearance of partiality” and “vacate[d] all orders issued by Spath after he applied for the job.” Less than ideal, obviously, and not a situation in which the 9/11 Military Commission parties want to find themselves in a few years.

Ultimately, none of the Defendants, nor the Prosecution, had any challenges to Judge Cohen at the end of *voir dire*; Judge Cohen, however, welcomed the parties to question him further as the case proceeds. All told, Judge Cohen came across measured, focused, and respectful of all parties. He described himself as “a process person” and understands his “role is to make sure this process is fair.” Others may have more brute smarts, he acknowledged, but “nobody will out-work [him].” Judge Cohen advised counsel that “[y]ou will find over time I am a very independent thinker.” To be determined.

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June 19

KSM arrived in the courtroom about ten minutes after we did; bin ‘Attash followed close behind. None of the Defendants is required to appear after the opening session of the week, however, and al Shibh, al Baluchi, and al Hawsawi decided to remain at Camp 7. Each morning immediately after the Commission is called to order, the Prosecution calls a witness to introduce the signed statements he obtained from the non-appearing Defendants acknowledging they were knowingly and voluntarily waiving their rights to attend.

Before addressing substantive matters, Judge Cohen advised the parties that he generally will allow one counsel per team to argue a motion, and that he would like twenty-four hour notice otherwise. He also recognized that, under RMC 812, each accused in a joint trial is entitled to the rights and privileges to which he’d be entitled if he were tried separately. Defendants may continue the practice of joining motions filed by a co-Defendant, but each team of attorneys is responsible for individual motions regarding its specific Defendant. Judge Cohen noted that should one Defendant call a witness, each Defendant will also be allowed to question that witness to the extent relevant for the sake of judicial economy—even if some of the Defendants have not filed a motion equivalent to the one for which the witness was called to testify.

* * *

The Commission then heard argument on the Prosecution’s motion related to increasing public access to the hearings (Motion No. AE007I). Right now, anybody can go to Fort Meade in Maryland and watch a CCTV feed of the hearings as if they were sitting in the gallery at GTMO (victims and family members have access to several other sites on the eastern seaboard should they wish to observe the proceedings). The Prosecution wants to designate the Pentagon as another remote CCTV site, at which anyone who has access to the Pentagon may watch the live stream.

But therein lies the rub, which Judge Cohen rightly recognized. Opening up a new CCTV site in the name of “public access” at the Pentagon seems to elevate form over function. The Convening Authority (the body responsible for convening the military commissions) cannot offer escorts at the Pentagon, so interested individuals will need their own access cards or their own escort to reach the observation area. The Prosecution insisted that the press has a permanent presence at the Pentagon, and victims and family members may also visit with fewer burdens on access than the general public. Eventually, after further pressing by Judge Cohen, the Prosecution reverted to arguing that, with or without the Pentagon’s CCTV site, the Commission’s proceedings are accessible well beyond usual if compared to federal criminal proceedings. Judge Cohen wanted to know if the Government was considering opening CCTV sites on the West Coast or anywhere else outside the Mid-Atlantic; the Prosecution said it was taking cost and technological feasibility into account as it was considering possible other sites, but ultimately it believes the current access complies with all legal obligations.

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Defendants seized on Judge Cohen's apparent skepticism. The public's and Defendants' right to an open trial fit hand in glove, they argued. And while they have no objection to opening up a site at the Pentagon, Defendants maintained that that will not benefit "the public." In fact, it is already difficult enough for interested individuals to observe the proceedings from Fort Meade because Fort Meade's website does not even advise how to get to the specific CCTV location or the schedule of public hearings. Defendants also reminded the Commission that all of the hijacked flights on 9/11 were going to the West Coast, so simply having a few CCTV sites on the East Coast because that is where the attacks occurred does not pass the "public access" smell test. They also referenced the [recent GAO report](#) criticizing the public's ability to access the Commission, and explained that the website that houses the Commission transcripts is not accessible overseas to Defendants' families.

For all of his probing the Prosecution's "public access" argument, however, Judge Cohen also pushed back on Defendants. What authority does the judge have to order additional disclosures of hearing schedules or to compel the addition of new CCTV sites, he asked. Defendants argued that the Prosecution opened the door to such an order by coming before the Commission and seeking its approval for the Pentagon site; and, in any event, they insisted that the Commission has inherent authority to say that these proceedings must be, but have not been, sufficiently accessible.

I expect Judge Cohen may have an appetite for gently ordering the Government to look into the feasibility of expanding CCTV access across the country and update the court with a proposal in the next several months. Just as in the gallery at GTMO, there can be a forty-second delay on the audio transmission at the CCTV sites (as there is at Fort Meade) in case there is any "spillage" of classified information that must be buzzed out. The CCTV set-up seems to properly balance the public's right of access (to the extent it even exists) with national security concerns, and it seems unlikely that those security concerns would be elevated by the addition of some observation sites on, for instance, the West Coast. Plus, the Government opened the door to an order along these lines by virtue of filing this motion. But I would be surprised if Judge Cohen goes so far as to order, as some Defendants explicitly argued, that the proceedings be streamed over the internet. Judge Cohen noted that, while somebody can go to federal court and observe proceedings, there typically is no live feed of a federal criminal trial. And even though this case is different because of its national impact (and the inability of a casual observer to travel to GTMO), Judge Cohen acknowledged a concern about sensationalizing these proceedings.

* * *

Next, al Shihb's counsel argued a motion seeking the production of any agreements regarding the provision of evidence by the German government to the United States government that would limit the Prosecution's ability to seek the death penalty (AE621). Al Shihb, along with Zacarias Moussaoui who has already been convicted of terrorism related charges and is serving six life sentences at the Supermax prison in Colorado, was allegedly part of the Hamburg Cell central to

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the events of 9/11. Germany does not have the death penalty, leading al Shibh to expect that any evidence-sharing agreement may contain an explicit provision limiting the Prosecution's ability to seek the death penalty as a condition of receiving the evidence. At this stage, al Shibh is not arguing the admissibility of any agreement, but simply seeks discovery of those agreements. Prosecutors conceded at the hearing that agreements between the Germans and Americans related to the provision of evidence do indeed exist. The Prosecution reiterated that it will not use any evidence obtained from the German government in its case in chief or at sentencing, and that it intends to abide by its agreements related to that evidence.

Al Shibh admitted that he may not have standing to enforce an agreement between two sovereign nations. That, however, does not mean that the Government's violation of an agreement inherently has no relevance to a due-process defense, to witness bias, or to mitigation at sentencing.

Judge Cohen mentioned potentially conducting an *in camera* review of the agreements, where he would review them first before deciding whether they should be discoverable. The Prosecution did not necessarily oppose the idea, but said it would need to consult with the Justice Department and, in any event, thinks al Shibh cannot enforce these agreements. Al Shibh explained that *in camera* review may not be helpful because Judge Cohen does not have the same information that the defense team has, which would allow it to determine whether any agreement has in fact been violated.

* * *

Al Hawsawi brought the open session's final motion—an individual motion to dismiss the charges against him on the grounds that the Military Commissions Act of 2009 (MCA) is an unconstitutional bill of attainder (AE625). Under Article I, Section 9, Clause 3 of the Constitution, “[n]o Bill of Attainder or ex post facto Law shall be passed.” The Bill of Attainder Clause is “rarely litigated,” but “nonetheless has real bite.” *Kaspersky Lab., Inc. v. U.S. Dep’t of Homeland Sec.*, 909 F.3d 446, 453 (D.C. Cir. 2018).

A law is prohibited under the Bill of Attainder Clause if it (1) specifies the affected persons, (2) imposes punishment, and (3) does so without a judicial trial. According to al Hawsawi, Congress violated the Bill of Attainder Clause by passing the MCA because: (1) the MCA applies specifically to aliens alleged to be members of al Qaeda detained at GTMO and purportedly responsible for the 9/11 attacks; (2) the MCA strips this group of rights they otherwise would have been entitled to as criminal defendants in a federal court or a “regularly constituted” tribunal under the Uniform Code of Military Justice; and (3) it took away these rights without judicial trial.

It is an interesting argument, but I don't expect it will gain any traction with Judge Cohen. The full U.S. Court of Military Commission Review already rejected a bill-of-attainder claim made by Ali al Bahlul—a Yemeni citizen detained at GTMO—on an earlier iteration of the MCA.

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United States v. Al Bahlul, 820 F. Supp. 2d 1131 (U.S.C.M.C.R. 2011), *rev'd on other grounds Al Bahlul v. United States*, 76 F.3d 1 (D.C. Cir. 2014). Al Hawsawi's counsel argued that al Bahlul was different because he could not point to statements made by Congress specifically identifying him as a reason for passing the MCA and that he could not show a violation of his rights. But that lends itself to an as-applied challenge to the MCA rather than a facial challenge—and al Hawsawi has brought the latter by arguing that the MCA is unconstitutional on its face.

June 20

KSM was the only Defendant present for the June 20 proceedings, and he was hardly a potted plant. As the day continued, he regularly conferred with his counsel—with and without a translator—and could often be seen reviewing and marking up documents. And the day continued for quite some time, until 6:45 P.M., with short breaks for lunch and for KSM's afternoon prayer.

A critical issue in this case concerns how to treat Defendants' statements to various investigators since they were captured. Broadly speaking, after Defendants were apprehended, each was transferred among CIA black sites from 2002 to 2006 and tortured as part of the Rendition, Detention, and Interrogation (RDI) program. The Prosecution has said that it will not rely on any statements by Defendants during that period to prove its case. But the Government collected additional statements from Defendants during FBI interrogations starting in early 2007 after transferring them to GTMO. You'll sometimes hear these referred to as "FBI Clean Team Statements." The Government posits that these statements by Defendants were sufficiently attenuated from those made while being tortured at the CIA black sites. Defendants, however, contend that the early 2007 statements made to the "FBI Clean Team" were not attenuated from the torture of the preceding three-plus years because the taint of torture had not worn off. Defendants also maintain that the FBI's involvement at points in the black site interrogations renders these 2007 statements anything but "clean."

The Prosecution has taken the position that any interview requests by Defendants for RDI-program witnesses involved in the black sites needed to be routed through the Government in order to protect identities and national security. As a consequence, in August 2018, Judge Pohl ordered these early 2007 statements excluded as a sanction on the Prosecution's limiting Defendants' ability to investigate the RDI program. Under Judge Pohl's order, the Prosecution would not be able to use these statements for any purpose.

But several months after replacing Judge Pohl, Judge Parrella [reversed the ruling](#) and instead announced a plan to hold an evidentiary hearing regarding the statements made during the 2007 FBI interrogations. Judge Parrella found the exclusion remedy to be "premature" and explained:

Although the Commission may ultimately reaffirm both the finding and the remedy, the Commission believes that the more appropriate time to assess the

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Defense's ability to present evidence related to the voluntariness of the FBI Clean Team Statements is after conducting an evidentiary hearing to fully explore the issue. This hearing would allow the Defense to request relevant witnesses, and (if they are produced) conduct a thorough examination on the record. The premature imposition of such an exacting remedy, which prevents the Government from introducing the FBI Clean Team Statements for any purpose prior to the conduct of an evidentiary hearing on voluntariness, results in a manifest injustice.

For most of the day, Judge Cohen heard argument on whether Judge Pohl's original exclusion remedy should be reinstated and, if not, how he could structure the evidentiary hearing so that he could eventually decide how to treat the 2007 FBI interrogation statements. Defendants argued that holding such a hearing at this juncture would be fruitless and violative of due process. Because, the argument goes, Defendants do not know the real names or any background information about the witnesses involved at the black sites (because the Government will not share that information), they could not adequately question a witness brought to GTMO to testify at such a hearing. They suggested various remedies for these investigative restrictions, including compelled interviews or depositions with the witnesses before a hearing, blanket suppression of the 2007 statements, or even striking the death penalty as a potential sentence.

Judge Cohen asked Defendants why the CIA witnesses whose identities have not been disclosed are relevant to the 2007 FBI interrogations, even assuming the FBI was tainted when it made the cleansing statements early that year. Counsel for al Baluchi explained his position, for example, that the 2002-2006 RDI program run by the CIA and the 2007 FBI interrogations were really just one combined program, not two separate ones subject to attenuation. In early 2007 when questioned by the FBI, al Baluchi was in a state of "interrogation compliance" brought about by the torture he suffered in the preceding years—a state of learned helplessness that rendered his statements involuntary. Therefore, according to al Baluchi, Defendants need to be able to fully investigate their time at the black sites so that they can mount their best possible case for suppressing the 2007 statements. Al Baluchi's counsel explained to Judge Cohen that they were investigating the RDI program for some time, until fall 2017 when the Prosecution prohibited all overseas investigation into the black sites and threatened criminal sanctions if the investigations continued.

The Prosecution criticized Defendants for spending four hours rehashing the arguments made before—and rejected by—Judge Parrella. According to the Prosecution, the Government's national security privilege is not any different in the context of a CIA witness's personal knowledge as it is with respect to classified documents. All classified info should be filtered through the Government because there is no remedy that can fix the damage done to national security should it be compromised by inadvertent disclosure.

Judge Cohen seemed fully engaged in the parties' arguments on this extremely important issue. His questions suggested a concern that a suppression hearing in the next several months may be premature because Defendants do not have sufficient information about the foundations of the

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2007 FBI interrogations at GTMO. But he also appeared somewhat persuaded by the Prosecution's representation that they have granted various requests by Defendants to interview certain witnesses and have agreed to produce James Mitchell and Bruce Jessen (the architects of the RDI program) for cross examination. Whatever he ultimately decides with respect to the 2007 FBI interrogation statements, Judge Cohen will undoubtedly shape the direction of the 9/11 Military Commission with a ruling on this matter.

June 21

None of the Defendants appeared in court for the final open session of these proceedings—and with that, the women affiliated with the defense teams no longer wore hijabs and abayas as they all had been during the earlier sessions.

The next several hours would have frustrated most state and federal litigators. Arguing al Shihb's motion for an extension of time to file witness lists (AE629-1), counsel told the Commission that it needed more time to add potential witnesses that may be called at a suppression hearing given recent discovery provided by the Government. But when counsel said that what Defendants really need is some guidance from the Commission about a schedule in order to move forward with minimal delay, Judge Cohen was incredulous. The upshot of the argument was that Judge Cohen wants to set a case management order ASAP. Remarkably, seven years after Defendants were arraigned, one still is not in place. As Judge Cohen put it, there cannot be significant discovery cropping up in the middle of trial because there was not a scheduling order setting deadlines for discovery. And if the parties could set a schedule for discovery, then they could also set a schedule for filing all related pre-trial motions (on, for example, the issue of suppression). Judge Cohen did not mince words: "We are going to set a scheduling order."

The parties gave some ideas about what that scheduling order might look like, but there was not unanimous consensus. Al Shihb's counsel suggested a six-month period for Defendants to investigate witnesses and evidence, followed by suppression motions on any pertinent issues. This sounds reasonable—as counsel noted, although this may create some delay on the front end, it should help avoid a piecemeal approach to suppression hearings and motions. It would also mean that a suppression hearing would need to be pushed back from September, as currently contemplated, so that it is accomplished in one fell swoop after all investigations are complete and there is more assurance that witnesses would not need to be called to testify on multiple occasions. Al Hawsawi's counsel also thought six months sounded reasonable, but reminded Judge Cohen that he could make all of this moot by reversing Judge Parrella's ruling allowing the use of the 2007 FBI Clean Team statements. Counsel for bin 'Attash said that six months would probably work—but that the Government first needed to finalize discovery and Defendants then needed time to review it before they could fashion witness lists and file motions to suppress.

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The Prosecution claimed they have been “begging” for a scheduling order for years. It is hard to assess the veracity of that, although the Prosecution did represent to the Commission that it has been working on a revised scheduling order on an ASAP basis. Judge Cohen pressed and said that the discovery that keeps coming out regarding the RDI program, whether a trickle or not, must be completed by a date certain. It is the Prosecution’s obligation, Judge Cohen advised, to tell the Commission how long it will take to complete the process. The Prosecution stated that completion is not far off. But then the Prosecution said that there should be a separate scheduling order for the suppression motion—that it cannot wait another month for Defendants to submit proposed scheduling orders because the eighteen witnesses approved to travel to GTMO to testify need certainty about if and when they are coming. And waiting for discovery to be 100% complete will, in the Prosecution’s words, be an unacceptable impediment to progress, particularly because Defendants have already been given ample discovery related to the early 2007 statements. In rebuttal, KSM’s counsel made the good point that the dispute will be more about what constitutes *complete* discovery than *by when* it must be complete.

The parties agreed to submit proposed scheduling orders within four weeks, laying out a plan to get the case to the entry of pleas. That will be followed by a scheduling conference (possibly in Washington, D.C. instead of GTMO) and eventually the setting of a case schedule. Maybe this is what the Commission needs to put it on a realistic track toward trial.

* * *

The final motion of the week’s open sessions came from al Hawsawi (AE530TTT). Currently, he has access to an approved laptop for three to four hours a day on which he can access discovery and use a word processing tool. At one point during his detention, however, al Hawsawi and his co-Defendants could access their laptops for twelve hours a day. Now, however, the time has been cut severely and, according to al Hawsawi, half of his access time occurs between 2:00 and 4:00 A.M. Al Hawsawi argues that these limitations unlawfully restrict his ability to meaningfully participate in his defense, and that he should be able to access his laptop for at least twelve hours every day.

The Prosecution tried to reframe the issue as concerning whether an accused has a right to a laptop as part of his right to defend himself. Counsel reminded the Commission that al Hawsawi has access to paper versions of all unclassified or redacted filings and discovery in the case. And the twelve-hour access period came to exist back in 2008 when Defendants had expressed desires to proceed *pro se* (without counsel)—different than the current situation where al Hawsawi has a team of attorneys preparing his defense. Though details were limited given their classified nature, the Prosecution also explained that al Hawsawi’s co-Defendants had violated the policies regarding laptop use when they modified their PCs, prompting the withdrawal of all laptop privileges for all Defendants for a period of time. Al Hawsawi now at least has some access to the laptop and, per the Prosecution, the assessment by the “warden” of Camp 7 that any more time would create a security risk deserves deference. In rebuttal, defense counsel reminded the

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Commission that there was no evidence of wrongdoing by al Hawsawi and declared that al Hawsawi has no training or experience that would allow him to manipulate the laptop.

Although increased laptop access may actually be important to al Hawsawi, this struck me as a motion made with optics, rather than outcome, in mind. Al Hawsawi filed it in mid-May 2019, teeing it up for a new judge who Defendants presumably want to teach about all of the Government's purported attempts to hinder defense efforts. That makes sense, but I think there also is a risk of some blowback. Judge Cohen could see this as a microcosm of why this Commission has languished for seven years without even sniffing a trial—motions begetting more motions, on issues that, frankly, are inconsequential to the resolution of the case and not fundamental to any rights of Defendants. As far as I am aware, federal (and state) prisoners do not have a right to a laptop in order to review pleadings and discovery. Yes, they may have access to a law library in their prison and the 9/11 Defendants do not; but those law libraries are likely filled with bound volumes of cases that, like the paper discovery and filings in this case, are not necessarily easy to peruse.

* * *

As I hope is evident from this report, the legal issues argued during these critical hearings in the 9/11 Military Commission were wide-ranging and critical to further progress in the case. Public access and suppression of the 2007 statements will continue to play central roles up to and throughout trial. And Judge Cohen comes across as willing to make difficult rulings in a timely manner with an eye toward actually getting this case to an entry of pleas and the selection of a panel. I would not hazard a guess as to when a trial might begin, but I think this week's hearings generated some new momentum toward finally setting an attainable schedule.

