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THE ROLE OF MILITARY COMMISSIONS IN THE GLOBAL WAR ON TERRORISM

Morris D. Davis

Moderators:

Dean Gerald Korngold, Dean and Everett D. and Eugenia S. McCurdy Professor of Law, Case School of Law, and

Professor Amos N. Guiora, Professor of Law and Director, Institute for Global Security Law and Policy, Case Western Reserve University School of Law, Lt. Col. (Ret.) Israel Defense Forces, Judge Advocate General's Corps

Speaker:

Colonel Morris D. Davis, Colonel, United States Air Force, Chief Prosecutor for the Office of Military Commissions, United States Department of Defense

PROFESSOR AMOS N. GUIORA:

I first met Colonel Davis four years ago when, as Commander of the Israeli Defense Forces School of Military Law, I visited Colonel Davis and his staff at the U.S. Air Force Judge Advocate General School. Little did I know that four years later, in my capacity as Director of Case Law School's Institute for Global Security, I would have the privilege and pleasure to host Colonel Davis in his capacity today as Chief Prosecutor of the Office of Military Commissions for the Department of Defense.

In the fall of 2004, the Department of Defense selected Case Law School to be the only law school in the United States to work with the prosecutors in Guantanamo on a broad range of international, criminal, and constitutional law issues. The legal work that we do here at Case Law School for the Office of the Chief Prosecutor is an extraordinary honor for the students, one that the students take very seriously. The students deeply

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appreciate the opportunity to impact the public debate. As Dean [Gerald] Korngold mentioned, Colonel Davis expressed in writing and stated to him the significance of the students’ work for the Department of Defense. It is an extraordinary privilege for Case Law School to be the very first law school where Colonel Davis will speak publicly, addressing the critical issues of Guantanamo.

Colonel Davis was appointed Chief Prosecutor for the Office of Military Commissions in September 2005. He leads a team of legal professionals selected from all the military services and the Department of Justice. Colonel Davis is responsible for the prosecution of individuals detained at Guantanamo, whom the President has determined are subject to the Presidential Military Order of November 2001. Colonel Davis has been an Air Force Judge Advocate for more than twenty-two years. He served as Staff Judge Advocate four times, including a tour in Saudi Arabia in support of Operation Desert Storm. He was the Director of Legal Information Services, the Department of Defense Executive Agent for Development in Support of Legal Information Technology, and served two tours at the Air Force Judge Advocate General School as Deputy Commandant and Civil Law Instructor. He has served as Defense Counsel, Circuit Prosecutor, and Appellate Counsel, where he was responsible for Air Force criminal cases filed with the United States Supreme Court. Colonel Davis has published writings on enhancing military relations with the press and on government contract law. Today, we at Case Law School are indeed honored to host Colonel Davis. It is my great privilege and pleasure to ask you to join me, very warmly, in welcoming Colonel Morris Davis.

**COLONEL MORRIS D. DAVIS:**

It truly is a pleasure to be with you. The main reason I am here in Cleveland is to say thank you to Case Western Reserve Law School for the important work you are doing. As Professor Guiora noted, you are the only school supporting the Office of the Chief Prosecutor in the Military Commissions, and we are very grateful for the work you are doing. I have been the Chief Prosecutor for about five months now and I can tell you I had never heard of the tu quoque defense that was raised in a defense motion not long after I arrived. I was pleased to find that one of your students had already written a fairly substantial volume of work on the tu quoque defense, and it made our job pretty easy to pull her work off the shelf and draft our response to that novel motion.

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I am here to talk about the people we are holding at Guantanamo Bay and our efforts to hold them accountable in our part of the “Global War on Terror.”

Some ask me why we are doing this. We are doing this because of people like Boeing employees Chandler Keller, Dong Chul Lee, and Ruben Ornedo, who were murdered when al Qaeda hijacked American Airlines Flight 77 and crashed it into the Pentagon, killing sixty-four people on the plane and 125 people in the Pentagon. If you look around outside right now, folks do not realize—it is not readily apparent at least—that we are at war. But we are.

Last week, at Guantanamo Bay, we had a preliminary hearing in the al Bahlul case. Mr. al Bahlul said during the proceedings, “I do not want an American military lawyer to represent me. I am from al Qaeda. He is from America. He is my enemy, and we are at war.” Mr. al Bahlul has been removed from the battlefield for quite some time, but he understands that we are at war with al Qaeda. We get comfortable in our everyday lives and we lose sight of the fact that that we are a nation at war.

Folks ask me, “Are you concerned about your safety?” I read an article last week that appeared on-line with the headline: Moe Davis, Chief Prosecutor and War Criminal. There are tens of thousands of young men and young women around the world who truly are in harm’s way, so any risk that we face in prosecuting detainees pales in comparison to what the young men and young women who are performing duty all around the world face on a daily basis.

So, I will talk just a bit, and I would like to keep this informal. I am here to try to answer any questions that you have. There is nothing off limits. I can tell you that there may be some things that I just can not answer, but no question is off limits. Please feel free to ask questions. I have a few remarks I want to go through, but the rest of the time is yours.

I want to talk a little bit about the enemy we face. I will be honest with you, my level of knowledge about the War on Terrorism and al Qaeda, and about military commissions was probably about the same as any other member of the general public up until August of last year, when I got a telephone call asking if I would be interested in coming for an interview for the job that I am in now. My family had just moved. As Amos mentioned, he and I met in Montgomery, Alabama, of all places. I was in Montgomery, Alabama, until January of last year. In 2005, I moved to Cheyenne, Wyoming where I was the Staff Judge Advocate for 20th Air Force—the command that controls all the intercontinental ballistic missiles that are in

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Wyoming, North Dakota, and Montana. I had only been there for about six months when I got a call asking me if I could come for an interview in Washington. And I did. It was inconvenient for my family to have to move and set up a home in three different states in less than twelve months, but as an attorney, this is an historic opportunity that does not come along every day.

Back in 2001 when the commission process first started, I volunteered to be on the defense side. I did that for a couple of reasons. One, I thought it would be tremendously unpopular to represent terrorists. Four years later I am finding I may have been wrong on that count, but at the time it seemed like it was going to be extremely unpopular to stand up and represent someone accused of engaging in terrorism. The other thing was that I believed it was critically important that we show the world that al Qaeda attacked us, our way of life, and our system. And I think it is critically important that we show the world that our system, no matter how reprehensible the acts committed against us, that we will still stand up and extend appropriate rights and privileges and protections to those that attacked us. And I still believe that.

So, I was called a few months ago and asked if I was interested in the job as Chief Prosecutor, and I took it because I still believe it is important that we show the world we can provide full, fair, and open trials to members of al Qaeda. On the pictures that just went by you saw Osama bin Laden and members of al Qaeda. In 1996, Osama bin Laden declared war on America and issued a fatwa. In 1998, he expanded the fatwa, saying it was the duty of all good Muslims to attack Americans, whether they are military or civilian, wherever they are located. That year we had the embassy attacks in Tanzania and Kenya. Two years later we had the attacks on the U.S.S. Cole. In 2001, it was kind of a slap across the face when al Qaeda struck here in America, and it continues. If you watch the news, al Qaeda is still using terror as a weapon to try to force the world to adopt its strict brand of ideology.

One question people ask is about POW status. Why are we not treating al Qaeda members as prisoners of war? The Geneva Convention prescribed four standards, four rules, that have to be met for a combatant—a lawful combatant—to be entitled to prisoner of war status.

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the Geneva Conventions. Al Qaeda does not comply with any of those requirements. Therefore, I believe the President was correct when he said that they are unlawful enemy combatants who are not entitled to Geneva Convention protections.

So al Qaeda is the enemy that we face, and terrorism is the weapon that they choose. So what do we do with these folks? A number of people have said: "Military commissions, even though we have never done one, we know they are bad. They will not work. They can not produce a fair trial." The analogy that I have used a number of times is this: when I was a little kid, I knew something about carrots and I knew something about cakes, and I knew that carrots and cakes did not belong in the same sentence. This is a true story. So, I was probably thirteen or fourteen years old before I ever tried carrot cake, because I was firmly convinced that a good cake could not contain carrots. I was surprised when I actually tried it and found that my assumptions were all wrong. I believe that to be true of military commissions as well. People say they cannot possibly be fair. Well, we have not done one. I think after we have done one, we can either say they are fair or unfair, or whatever you choose to say, at least you will have facts that you can base your opinions on.

Look back to 1969. I think Amos and I are the only ones old enough to remember this. In 1969, Joe Namath said that the New York Jets were going to win the Super Bowl. Those of you who are old enough to remember will recall that during the pre-game shows all of the experts said it was not a question of whether the Jets would win or lose. It was only a question of how badly the Baltimore Colts would beat them. Whether the Jets could win was simply not an option. It was a question of how badly they would be beaten. Going into the game, the Jets were a twenty-one-point underdog. The Jets won, I believe, fifteen to eight, or fifteen to six was the final score.

*VOICE:*

Sixteen to seven.

*COLONEL DAVIS:*

Sixteen to seven. Thanks. They beat the point spread handily. But when it was over, the post-game analysis proved to be much more insightful than all of the pre-game predictions. And that is what we have had in the case of military commissions. There have been a lot of pre-game predictions on how military commissions are going to turn out. I believe after we do one the post-trial analysis will be more insightful. I do not claim to be Joe

\[ Id. \text{ art. } 4(A)(2). \]
Namath, but I will assure you that the military commissions are going to be full, fair, and open, and produce a fair trial for the detainees we are holding at Guantanamo Bay.

When folks look at the military commissions and criticize them, they make what I think is an apples and oranges comparison. Senator Lindsay Graham from South Carolina sponsored the Detainee Treatment Act that was recently enacted. The President signed it on December 30th. Senator Graham is a Colonel in the Air Force Reserves, a member of the JAG Corps, and he understood the distinction between Title 18 domestic criminal courts and Title 10 law of war courts.

In your typical criminal case, let's say the Drug Enforcement Administration is going to raid a meth lab. Their endgame—what they hope to accomplish in raiding the meth lab—is to prosecute the person that is operating it. So when they go to the house to raid the lab, they go with a search warrant. When they apprehended the individual, they read Miranda rights. All the evidence is catalogued and tagged, and you have a good chain of custody. So, when you get to the courthouse for the trial, that primary objective of prosecuting the offender can be carried out. That is the Title 18 process.

Let's take the military commission process. There is one case that I will use as an example. There is already some record developed in the Khadr case. Mr. Khadr is a Canadian that has had a preliminary hearing. Now, what was alleged in the charge sheet, and let me stress this is only what is alleged. It is not proven. There is a presumption of innocence, and he is innocent until proven guilty beyond a reasonable doubt. What is alleged is that he was involved in a firefight in which an American soldier was killed. Now, as you can imagine, in a firefight like that, the first and primary objective is to survive. Second is to prevent the enemy from carrying out its objective. Third is to gather whatever intelligence you can gather: when is the next 9-11, and where are the bombs hidden? And prosecuting that individual is probably a fourth or fifth-level consideration at the time of apprehension. So Mr. Khadr was not read Miranda rights. The troops did not get a search warrant before they went into the house, and the evidence was not catalogued and the chain of custody was not maintained. In an Article 3 domestic criminal court, we would never get past motions, as you can easily imagine. So the question then is: can we develop a fair system to deal with these types of facts? I believe the answer is: yes, we can, and they are called military commissions.

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When I first got to the military commissions, it seemed like we were blazing a new trail. And you hear some criticisms that we are making this up on the fly. It is comforting to go back and look at what Robert Jackson said sixty years ago. Robert Jackson was serving on the U.S. Supreme Court when he stepped down from the Court to serve as the Chief Prosecutor at Nuremberg. And I went back and read his opening statement, which started at ten in the morning and ended at five in the afternoon, and I can assure you that at my age I am not going to be talking that long. What he had to say sounded a lot like what I would say to folks that question the military commission process today. People are saying that this is new law that we are making up as we go along. These folks—al Qaeda—did not know that what they were doing would be handled in this manner. I could not have said it any better than what Robert Jackson said sixty years ago when he had to confront the Nazis, a new enemy the law had not contemplated at that time.

The law can not remain stagnant. It has to adapt. And that is what we are attempting to do with the military commissions. Again, paraphrasing what Robert Jackson said sixty years ago, I think the hope of the detainees at Guantanamo that we are bringing before military commissions, is that the law will lag behind their conduct, so that they can walk free because the law has not adapted to what they have done. This is a photo of Robert Jackson at Nuremberg more than sixty years ago. He got it right. This is not a domestic criminal trial. It is a continuation of the war effort. I would certainly agree with his statement about extending rights and protections to the folks that are going on trial, rights that they never contemplated.

When Chandler Keller, Dong Chul Lee, and Ruben Ormedo were on that plane on September 11th, al Qaeda did not ask if it would be convenient for them if they hijacked the airplane and crashed it into the Pentagon. And

8 Justice Robert Jackson, Opening Remarks on Behalf of the United States, International Military Tribunal Sitting at Nuremberg, Germany (Nov. 21, 1945) [hereinafter Justice Jackson Opening Remarks]; Projection, supra note 3 (displaying the quote, "It may be said that this is new law, not authoritatively declared at the time they did the acts it condemns, and that this declaration of law takes them by surprise").

9 Justice Jackson Opening Remarks, supra note 8; Projection, supra note 3 (displaying the quote, "The refuge of the defendants can be only their hope that international law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law").

10 Justice Jackson Opening Remarks, supra note 8; Projection, supra note 3.

11 Justice Robert Jackson, Summation on Behalf of the United States, International Military Tribunal Sitting at Nuremberg, Germany (July 26, 1946); Projection, supra note 3 (displaying the quote, "As a military tribunal, this Tribunal is a continuation of the war effort . . . . [I]t is not bound by the procedural and substantive refinements of our respective judicial or constitutional systems. They have been given the kind of trial which they, in the days of their pomp and power, never gave any man.").
when Daniel Pearl was brought before a video camera and was executed in front of a camera, his due process rights were not a great concern to al Qaeda. Despite the reprehensible nature of their conduct, we are equipped and we will provide a full, fair, and open trial for the folks we are bringing before military commissions. And this goes back, as I mentioned before—on the battlefield when you are picking up information and detaining individuals, you do not have rights advisements. You do not have cleansing statements. You do not have chain of custody. But does that mean you can not use that type of evidence to produce a fair and just result?

So I did find a lot of comfort in the words of Robert Jackson, even though it seemed like we were blazing a new trail. The trail had not been blazed before when our country was at war with the Nazis in World War II and Robert Jackson faced the same type of issues and criticisms that we face today. Military commissions have been used for several centuries in our country. Admittedly, there has been a lull in the action. There have not been military commissions in several decades. But it is not unprecedented to proceed with military commissions. They stem from the President’s authority under the Constitution, as Commander-in-Chief, and they are expressly recognized in Title 10 of the United States Code.

It is funny because if you go back and look at what Robert Jackson said about Nuremberg—he gave a number of talks afterwards—there was one to the Canadian Bar Association in 1946 where he talked about the trials and tribulations of conducting Nuremberg and how people were critical of the process, saying that it could not possibly be fair, that they were making it up as they went along. This was the headline from an article last week that talked about the legacy of Nuremberg and how the current military commissions fall short of that standard. Mr. Robert Jackson, sixty years ago, was facing the same types of criticisms that we face today.

This is a photo of where we conduct the proceedings at Guantanamo Bay. It is the commission building; it is up on top of a hill overlooking the bay. The whole authority for conducting military commissions, as I said, begins with the Constitution and Title 10. On November 13, 2001, President Bush entered a Presidential Military Order that authorized the trial of enemy combatants before military commissions. His Order applies to al Qaeda members and to those engaged in acts of international terrorism, and to those providing support to either one of those categories of folks. It

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12 Projection, supra note 3.
13 Id.
14 Id.
16 Id. § 1(a).
requires a presidential determination that the individual facing trial meets those criteria. So, in each one of the ten cases that are presently referred to trial, President Bush has made a personal determination that those individuals meet the criteria set out in his Presidential Military Order. The Order requires that we extend a full and fair trial to each individual. It establishes the evidentiary standard, which is evidence is admissible if it would have probative value to a reasonable person. It provides for closed proceedings to protect classified information and authorizes the Secretary of Defense to issue orders and regulations to carry out the intent of the President’s Military Order.

This is a picture from when we went down to Guantanamo in January. One of the things I have tried to do in the time that I have been there—I think we have not done as good as job as we could in getting out and telling our side of the story. And the example that I have given is when you go to the airport, if you looked out and the airplane only had a left wing, you probably would not get on it because you need both wings to provide balance. So, I am pleased to have the opportunity to get out and talk whenever I can to provide some balance to the discussion so you have more than just the left wing. One of the things I have done is to try to engage with the media as often as possible. One thing I have learned is that the defense, for a long time, had a field day to say anything they wanted, no matter how outrageous, without any fear of the record being set straight. I have learned over the last couple of months that some folks just do not like hearing the truth. So, I made it through twenty-two years as an attorney with no ethical complaints. I have racked up two in two months now. So, whether some people want to hear it or not, I am going to continue trying to get out and tell the truth about what we are doing to hold the enemy accountable.

Another thing I have tried to do is to engage with the nongovernmental organizations that have an interest in what we are doing at Guantanamo Bay. This is a picture from January of this year. From left to right: Avi is from Human Rights First; Katherine is from Human Rights Watch; Jumana is from Amnesty International, and Ben is from the American Civil Liberties Union. On both trips down there, I sat down and spent time talking with them. I did not win them over at hello, and I doubt I will ever win

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17 *Id.* § 2(a).
18 *Id.*, § 4(c)(2).
19 *Id.*, § 4(c)(3).
20 *Id.*, § 4(c)(4).
22 *Id.*
23 *Id.*
them over. But at least I think it is helpful that we can sit down and have a conversation. I have offered that whenever they want, if they are back in D.C. or wherever, I will meet with them and hear what they have to say. And it is not just them. I am interested in hearing what others have to say. I kind of inherited a process that was already in existence. I am like the engineer on the train—I get to drive the train but I did not get to build the railroad. I am certainly interested in hearing other people's thoughts on how I can best do my job to ensure full, fair, and open trials.

This is a common picture that you see of the detainees at Guantanamo Bay.\textsuperscript{24} I saw this picture again over the weekend. As you know, last Friday, the Department of Defense released thousands of pages of information about the detainees. And in the news articles I read, this is one of the common pictures that has been shown to reflect Guantanamo Bay. What this picture shows you is Camp X-Ray.\textsuperscript{25} Camp X-Ray closed a little over two years ago. Nonetheless, every time you hear the words Guantanamo Bay, you see Camp X-Ray pictures. Here is a current picture of Camp X-Ray.\textsuperscript{26} Here is another one.\textsuperscript{27} You will notice the rusted fencing and the tall weeds at this abandoned facility. Nonetheless, in the media, when they portray Guantanamo, you see that old picture of Camp X-Ray, and the detainees kneeling out there in the yard. This is what Camp X-Ray really looks like.\textsuperscript{28} These are what the current facilities look like; this is Camp Delta.\textsuperscript{29} We are in the process of building Camp Six. I was down there last week. My understanding is that the facility will be completed sometime this summer. And if you have ever seen any other federal prison, that is what Camp Six will look like. Camp Delta, this is what it looks like, not the pictures that you see of Camp X-Ray.\textsuperscript{30} These pictures are available in the public domain. Yet whenever you see something in the press, you tend to see Camp X-Ray pictures, which are more shocking. This is the inside of the current facility.\textsuperscript{31}

While we were down there last week, there was a delegation from the Office of Security and Cooperation in Europe. It was a Belgian delegation. They went out and toured the camp, and the headline over the weekend—I printed this off of the internet—and the headline was: \textit{Guantanamo
is Better than Belgian Prisons According to O.S.C.E. Expert.\textsuperscript{32} You normally do not hear that kind of thing about Guantanamo Bay. You only hear about the negative.

The young men and young women that are down there, when they meet each other, the first one says, "Honor bound." The other one responds, "To defend freedom." Now there are some members of the bar that find it humorous that they do that, but they are a very dedicated group of young men and young women that are down there, not living and working under the best of conditions. They live in a place called Camp America that consists of simple plywood buildings, with about twelve of them to a building, sitting up on cinder blocks. It is not the best of conditions. But they are doing a very honorable job of representing our country. That is not to say that some individuals have not done some things that we should all be embarrassed about. But a few bad apples should not obscure our view of what is really a very good orchard.

This is a quote from ABC News: "At the level of the detention facilities, it is a model prison, where people are better treated than in Belgian prisons."\textsuperscript{33} Until recently, you have not heard that kind of talk about Guantanamo Bay. In my opinion, I think it is a deliberate defense effort to avoid having to step into the courtroom. If they can drag this out long enough, if they can generate enough outcry through the media and the public, then perhaps they can just make this process go away. The last thing they want to do is to have to step into the courtroom and actually face the facts, because they know that those facts are pretty compelling. Given the conduct the enemy engaged in, it is not unreasonable for us to hold them accountable.

This is the President's Military Order.\textsuperscript{34} Again, I will show you the web site in a minute. I encourage you, if you have an interest in this, to go to the web site and take a look.\textsuperscript{35} It has all the authorities from the President's Military Order down through Presiding Officer Memoranda available for your perusal. It has transcripts of the proceedings conducted to date and a whole host of information about what we are doing at Guantanamo Bay. The link to the web site is listed there at the bottom of the slide. It shows you the current cases that we are conducting and the information that is available. On there you will find, as I said, the President's Military Order, authorizing the Secretary of Defense to issue orders and regulations to carry out the President's Military Order.

\textsuperscript{33} Id. (quoting Alain Grignard); Projection, supra note 3.
\textsuperscript{34} Projection, supra note 3; Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001).
Secretary Rumsfeld has done that through a series of Military Commission Orders, or MCOs. There are currently three MCOs in effect. MCO No. 1 is kind of the over-arching framework for conducting military commissions. There is a recent revision to Military Commission Order No. 1; it was published in August of 2005. There are a number of folks that said the way the original commission process was set up was unfair. You had the Presiding Officer, who is an attorney—in essence, the judge, who is part of the commission—he sat with the commission members and he voted with the commission members. So, in essence, you had the judge sitting with the jury at trial. A number of folks said that was not fair . . . the judge, the Presiding Officer, ought to be more independent and more like a judge, not a voting member of the jury. I think it was the American Bar Association that was one of the leading proponents of separating the Presiding Officer and giving him an independent judicial type role. In August, that was one of the major changes Secretary Rumsfeld implemented in a new Military Commission Order. Now, the Presiding Officer rules on matters of law. The commission members determine the facts. But it is interesting . . . the defense complained initially that the judge was sitting with the jury and that was not really fair. So now, it is changed so that the Presiding Officer is independent and not a voting member. Now the defense is saying that is not fair, because the President's Military Order says that the military commission will sit as triers of law and fact and therefore you have to have the whole commission there to make any legal or factual determinations. We won a motion last week on that, because in the Detainees Treatment Act implemented on December 30th, it expressly references Military Commission Order No. 1 enacted in August. So both the President and Congress have given their seal of approval to the current procedure.

Military Commission Order No. 1 defines the commission personnel. The Appointing Authority is Mr. John Altenburg. Mr. Altenburg is a retired Army two-star general who came back out of private practice to serve as the Appointing Authority. There are currently four Presiding Officers. They are all O-6s . . . Colonels or Captains in the Navy . . . and are experienced military judges. It defines the role of the Chief Prosecutor and the Prosecutors that work in my office. Currently, I have about fifteen attorneys working in the office from the Army, Navy, Air Force, and Marine Corps, as well as the Department of Justice. The Chief Defense Counsel is Colonel Dwight Sullivan. Colonel Sullivan is a member of the United States

37 3 C.F.R. 918.
38 32 C.F.R. 9-17.
Marine Corps Reserves, who was called to active duty, I believe, in July of
2005. Prior to that, he was serving as the Director of the Baltimore office of
the American Civil Liberties Union before being called to active duty in the
Marine Corps. Colonel Sullivan—to be honest with you, I am not sure the
exact number of attorneys he has—I think has six that are permanently as-
signed and eight that are temporarily assigned. He is getting four more in
the next thirty to sixty days and eight more before the summer. So he will
soon have twenty-four attorneys assigned full-time to his office.

Military Commission Order No. 1 provides for the presumption of
innocence, proof beyond a reasonable doubt, defense access to evidence, the
right to testify, the right to remain silent with no adverse inference, the right
to present evidence and call witnesses and cross-examine witnesses.\(^{39}\) It
establishes the post-trial appellate review process, and it also authorizes
both the Appointing Authority and the General Counsel for the Department
of Defense to issue additional regulations and guidance to implement the
President's Military Order.\(^{40}\)

Military Commission Instructions are issued by the Department of
Defense General Counsel.\(^{41}\) Currently, there are nine Military Commission
Instructions. Probably the one to look at, if you are only going to look at
one, would be Military Commission Instruction No. 2, which defines
offenses and elements of offenses. And the other Military Commission
Instructions primarily define roles and responsibilities and administrative
procedures. The Appointing Authority, has issued, has three Appointing
Authority Instructions that deal with disclosure of communications, trial
procedures, and professional responsibility. But most importantly at the trial
level and for what we are doing are Presiding Officer Memorandums.
Colonel Brownback, Pete Brownback, is a retired Army Colonel and has
been a military judge for a number of years. He was recalled to active duty
as the first Presiding Officer and was recently appointed as the Chief
Presiding Officer. He has issued fifteen Presiding Officer Memoranda,
which are really the details of how the commission process works. For
instance, neither the President's Order nor the Secretary's Orders tell you
how to style a motion or how to file a motion, so the Presiding Officer
Memorandums kind of flesh out the details of how the process works.

As I said, currently we have ten cases that have been referred to
trial before military commissions. Everybody, I think, knows that the Ham-
dan case, one of the ten, is currently pending oral argument in the Supreme

\(^{39}\) Id.
\(^{40}\) Id.
Court on March 28th. We hope that some time in June we will have a decision. From our perspective, there are three outcomes that are possible in the *Hamdan* case. The Supreme Court can say everything is fine as is, which is what the D.C. Circuit said. Chief Justice Roberts was on the D.C. Circuit at the time. The D.C. Circuit said the military commission process is legitimate, the President acted within his authority, and we can press on. We are hopeful that the Supreme Court will say the same thing. If you have been following the case, you see Justice Roberts is sitting it out since he was part of the D.C. Circuit when they rendered their decision. He is not participating at the Supreme Court. It will be up to the other eight Justices to reach a decision, and we are hopeful that they say everything is okay.

There are three issues that are pending in *Hamdan*. One is whether the President acted within the scope of his authority when he created military commissions. Second, is whether an individual has the authority to assert Geneva Convention protections. And a third issue, which you will not find on their website, is the effect of the Detainee Treatment Act. The Detainee Treatment Act says that the federal courts are divested of jurisdiction, except in a new appellate review process. So, depending on how the Court answers that third question of whether they still have jurisdiction, they may not have to get to the first two. But certainly what we are hoping for is a decision from the Supreme Court that says that the commission process is legitimate and valid and we can press on.

The second alternative is that the Court says the commission process is not fatally flawed, but some corrections are required. It would be up to the Administration then to decide whether to implement those corrections. I would hope that, in fairly short order, that could happen so we can begin the trials. I guess the third alternative is they say the process is fatally flawed, in which case I am unemployed and available.

We are hoping that we will get a decision by June, and at that point we will have a pretty clear sense of direction. In the mean time, one of the questions I get is: "Why you are pressing ahead if you are waiting for the Supreme Court to render a decision?" Last week, when we were down at Guantanamo Bay, the representative from the American Bar Association was complaining about the detainees languishing at Guantanamo Bay ... it has been almost four years for some of them and they have never had their day in court. So why are we letting them just sit around and nothing is happening? Then later he said, "Well, we should not be doing anything while we are waiting for the Supreme Court to make a decision." The Supreme Court granted cert in the *Hamdan* case back in October, so if we waited until June, that means we sit for eight months and do absolutely nothing.

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waiting for the Supreme Court decision. So, what we have tried to do is to continue moving forward with preliminary matters that do not get to the merits of the cases so when we get a decision we are at a stage where we can make progress and not be starting from scratch. I quoted Bart Simpson when I was at Guantanamo and I said, “Damned if you do; damned if you don’t.” That saying seems to apply quite frequently in military commissions. We are damned because we are not doing anything, but if we do something we are damned because we should be waiting and doing nothing at all. I think we are doing the right thing by trying to move forward as best we can while we await the Supreme Court’s decision.

I mentioned the Detainee Treatment Act. As I said, it purports to divest the federal courts of jurisdiction, except in an appellate review role. Pretty much for every detainee, somebody rushed in on their behalf and filed a petition, a habeas petition, in some court, somewhere prior to the Detainee Treatment Act being implemented on December 30th. We are hopeful that the plain language will apply, that the federal courts are divested of jurisdiction, except in their appellate role. Otherwise, the Detainee Treatment Act is pretty worthless, if all 490 folks at Guantanamo still have habeas rights. It is kind of a waste of time to go through the whole process of implementing the Detainee Treatment Act. It also creates a role for the federal courts. Under the old process, if a person is convicted in a military commission, when the process is over, there is a review board that will review the case for legal sufficiency and sentence appropriateness. The Appointing Authority would also review it, and then either the Secretary of Defense or the President would review it, and that was the end of the process. The Detainee Treatment Act provides for an appellate role for the federal courts. In addition to the process I just described, the D.C. Circuit would have jurisdiction to review the case and the Supreme Court would have an additional review beyond that. So there are at least five layers of review if someone is convicted before a military commission.

What I foresee as the road ahead is that we are going to continue to prepare cases for trial. Right now, we have ten cases where charges have been approved and referred to trial. When I left the office yesterday, there was another case sitting on my desk that should be going to the Appointing Authority in the next couple of weeks for approval and referral to trial. The folks in my office have approximately two dozen cases that they are working at various stages of development. I would anticipate between now and the Hamdan decision to forward several more cases to the Appointing Authority for referrals so that when we get the green light to proceed, we have a number of cases in the queue and ready to go.

Current issues that I think are of interest to you . . . one is, you may have heard a little bit about torture. It is like the elephant in the room that you can not avoid talking about. We can not ignore it. I think the existing standards that we have a place are adequate to deal with the issue. The
President's Military Order requires that the accused receive a full and fair trial and only evidence that has probative value to a reasonable person should be admitted. So the Presiding Officer—first off let me tell you, my perspective as the Chief Prosecutor, in the ten cases that have been referred to trial, the Prosecution will not offer any evidence that, in my opinion, comes anywhere close to any definition that anyone would call torture. That is not to say in future cases we will not have more difficult issues to face, but if we do, I have instructed folks in my office that we are not going to press the edge of the envelope in trying to offer evidence that may be unduly coerced.

As I said, it is my objective to keep these proceedings as open as possible and also to ensure a full, fair trial for each individual. If the Defense disagrees and they believe evidence was unduly coerced, they can certainly raise that before the Presiding Officer. The Presiding Officer will have to determine whether that evidence has probative value to a reasonable person and if the accused will be denied a full and fair trial if that evidence is introduced. The one thing I have found is that in looking at the different domestic and international laws dealing with torture, what they define are effects and not acts. Generally, it says anything that creates significant physical or emotional pain constitutes torture. I think we can all agree on that standard. When you apply that standard to acts, however, it is much more difficult. Certainly, there are some things we can all . . . ninety-nine people out of a hundred can agree that some things clearly meet that threshold. But there are probably other things that ninety-nine out of a hundred would agree do not meet that threshold. There is a tremendous gray area in between where, personally, each of us might strike the balance at different points.

So, one of the issues that I have to face as the Chief Prosecutor is, on behalf of the United States, where do I strike that balance? I can tell you that I have not reached a firm, definite conclusion in my mind. So I certainly would be happy to entertain any thoughts that anyone else has. But again, the Presiding Officer will have to make that initial determination; the members of the commission will have to decide what weight to attach to the evidence; and then there is the post-trial review process, including the D.C. Circuit and the U.S. Supreme Court. So, any issues of unduly coerced evidence will be fully vetted and fully resolved to ensure a full and fair trial.

The other issue that I think is worthy of discussion is secret proceedings. It was raised a number of times that an individual can be convicted based on evidence that they did not even have a right to see. I can tell you that in the ten cases so far, I believe we can conduct many of those cases entirely in the open. I have instructed my folks that our primary objective is to keep the proceedings as open and transparent as possible. So if there is a piece of evidence that is classified and the only way to get it in is to close the proceedings, we are going to take a long, hard look at whether it
is so important that we need to go to the extraordinary step of closing the trial. We will make every effort to get evidence declassified to keep the trials entirely open, but I can not rule out the possibility that in some cases there will be some closed proceedings.

In closing, I would say that it was al Qaeda that declared war on America, and al Qaida chose terrorism as its weapon. It is my job as Chief Prosecutor to prosecute unlawful conduct, not to persecute anyone because of their beliefs. In my opinion, it does not matter if you are Muslim or Methodist, it is your conduct and not your convictions that determine whether you are going to be held accountable before a military commission.

In the five months that I been the Chief Prosecutor, I have been tremendously impressed by the caliber of the young folks serving at Guantanamo Bay, and I am certainly impressed by the professionalism and ethics of the folks that work with me in my office. I can tell you that from my perspective, as your representative, you have nothing to be ashamed of at Guantanamo Bay.