# RECORD OF TRIAL COVER SHEET

## IN THE MILITARY COMMISSION CASE OF

## UNITED STATES V. ABDUL ZAHIR

**ALSO KNOWN AS:**

**ABDUL BARI**

**NO. 060001**

**VOLUME ___ OF ___ TOTAL VOLUMES**

**1ST VOLUME OF TRANSCRIPT: R. 1-75**

**APRIL 4, 2006 SESSION**
**(REDACTED VERSION)**

# *United States v. Abdul Zahir*, NO. 060001

## INDEX OF VOLUMES

**A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at http://www.defenselink.mil/news/commissions.html.**

**Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.**

**After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.**

**Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.**

| VOLUME NUMBER | SUBSTANCE OF CONTENTS |
|---|---|
| **ALLIED PAPERS** | **Not part of "record of trial"** |
| I[1] | Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—includes DoD rescinded publications) |
| II[1] | Supreme Court Decisions: *Rasul v. Bush*, 542 U.S. 466 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. 2 (1866) |

[1] Interim volume numbers. Final numbers to be added when trial is completed.

## *United States v. Ali Hamza Sulayman Zahir*, NO. 060001

## INDEX OF VOLUMES


| VOLUME NUMBER | SUBSTANCE OF CONTENTS |
|---|---|
| III[2] | DoD Decisions on Commissions including Appointing Authority orders and decisions, Chief Clerk of Commissions documents |
| IV[2] | Federal Litigation in *Hamdan v. Rumsfeld*, at U.S. Supreme Court and D.C. Circuit |
| V[2] | Federal Litigation at U.S. District Courts Not Filed by Counsel in *United States v. Zahir* |
| VI[2] | Selected filings and U.S. District Court decisions in *United States v. Zahir* |


## Record of Trial


| | |
|---|---|
| VII[2] | Transcript (R. 1-75) (April 4, 2006 session) |
| VIII[2] | Review Exhibits 1-24 (April 4, 2006 session) |


[2] Interim volume numbers. Final numbers to be added when trial is completed.

# VOLUME I OF TRANSCRIPT

## United States v. Abdul Zahir

## Index of Transcript

**FIRST SESSION:**

**April 4, 2006**


| DESCRIPTION | PAGE # |
|---|---|
| List of Persons Present at Hearing | 1, 4 |
| Defense translator agrees to provide all translations for the Commission. (The Accused's language is Farsi.) | 1-2 |
| Appointing Order presented to Commission (RE 5) | 2-3 |
| President's Reason To Believe Determination presented to Commission (RE 1) | 3 |
| Charge Sheet (RE 2), Approval of Charges (RE 3), and Referral To Commission (RE 4) were presented to the Commission | 3 |
| Charges were served in English, Arabic and Pashto on Feb. 4, 2006 (RE 22). Arabic Charges (RE 20) and Pashto Charges (RE 21) are provided to the Commission. | 4 |
| Parties were previously sworn | 5 |
| Clerk for Commissions will verify translation after hearing | 5 |
| Prosecutors were properly appointed (REs 10 & 23) and sworn | 6 |
| Defense Counsel was properly appointed (RE 6) and sworn | 7 |
| Presiding Officer tasked the Prosecutors to provide Charges in Farsi to the Accused and to advise the Presiding Officer and Defense Counsel when the task is completed | 8-10 |

## United States v. Abdul Zahir

## INDEX (Cont.)


| DESCRIPTION | PAGE # |
|---|---|
| Presiding Officer explains the Accused's rights to counsel. The Accused said in the future he would ask for a civilian counsel. | 11-16 |
| The Presiding Officer indicates he has entered the transcript and Review Exhibits from Khadr as Review Exhibits in Zahir, and added supplemental voir dire information (REs 14, 15 & 17). | 17-18 |
| The Presiding Officer provides some additional clarifying information about his military record. | 19-21 |
| Defense Counsel voir dire of Presiding Officer. The Presiding Officer's bar membership is currently inactive (R. 23). The Presiding Officer described the following matters: | 23-63 |
| (1) his family | 23-24 |
| (2) his military and legal background | 25-28 |
| (3) his views on some military Commission procedures | 28-34 |
| (4) his plans for future employment after his military retirement. (He said he wanted to be a judge in the civil sector.) | 34-35 |
| (5) his research into areas relevant to Commission procedures, and the placement of some legal articles and cases in the Commission Library | 34-45 |
| (6) how he was selected to be a Commission Presiding Officer and how he learned of this selection | 43-49 |
| (7) his reading and television preferences | 50-56 |
| (8) his knowledge about Commission prior to being selected to be a Presiding Officer | 57-58 |
| (9) his service in Iraq | 59-62 |

## United States v. Abdul Zahir

## INDEX (Cont.)


| DESCRIPTION | PAGE # |
|---|---|
| The Government did not challenge the Presiding Officer. | 63 |
| The Defense Counsel did not challenge the Presiding Officer, but would have an opportunity to do so after reviewing the voir dire in Khadr which was expected to occur the following day. | 64-65 |
| Reading of the Charges was waived. | 65-66 |
| The Parties agreed to abide by the three Protective Orders issued by the Presiding Officer. | 66-68 |
| The Presiding Officer approved the Defense Counsel's request to reserve pleas and motions. | 68-70 |
| Arraignment. | 69-70 |
| Scheduling of motions. | 70-73 |
| Hearing recessed on Apr. 4, 2006 | 74 |
| Authentication page for pages 1-74 of this hearing | 75 |

*The Commissions Hearing was called to order at 0917, 4 April 2006.*

*[Throughout this transcript, Colonel Robert S. Chester, U.S. Marine Corps, will be referred to as the Presiding Officer or PO. Captain [redacted] U.S. Air Force Reserve, will be referred to as the Prosecutor or PROS. Major [redacted] U.S. Army, will be referred to as Assistant Prosecutor 1 or APROS1. Captain [redacted] U.S. Army, will be referred to as Assistant Prosecutor 2 or APROS2. Lieutenant Colonel Thomas J. Bogar, U.S. Army Reserve, will be referred to as Defense Counsel or DC.]*

**Presiding Officer:** The Commission will come to order.

Before you start, Captain, what I want to do right off the bat is take up the issue of the translator. We had an 8-5 this morning, in which the prosecution and defense counsel were present. We agreed that the defense translator would translate and handle all the translation duties this morning.

Defense counsel, are you amenable to that?

1 **DC:** Yes, sir.

2

3 **Presiding Officer:** And you are satisfied that your

4 translator, can in fact, handle both duties?

5

6 **DC:** Yes, sir.

7

8 **Presiding Officer:** All right. If it does become a

9 problem, please let me know and we will find an

10 alternative, and if necessary, postpone

11 proceedings until later in the week, all right?

12

13 **DC:** Yes, sir.

14

15 **Presiding Officer:** And I do appreciate the defense

16 agreeing to having your translator handle all the

17 duties this morning.

18

19 Prosecution?

20

21 **PROS:** Yes, sir. This military Commission is appointed

22 by Appointing Order Number 06-0001, dated January

23 18th, 2006, copies of which have been furnished to

the Presiding Officer, counsel, and the Accused, and which have been marked as Review Exhibit 5 and attached to the record.

The presidential determination that the Accused may be subject to trial by military Commission has been marked as Review Exhibit 1 and has been previously shown to the defense. Review Exhibit 1 has been provided to the Presiding Officer. Sir, it has been previously marked and I believe you have it.

**Presiding Officer:** I do.

**PROS:** The charges have been marked as Appellate Exhibit 2, and have been properly approved by the appointing authority and referred to this Commission for trial. The approval of the charges and their referral to this Commission have been marked as Review Exhibit 3 and 4, respectively.

The prosecution caused a copy of the charges in English, Arabic, and Pashto, one of the Accused's native languages, to be served on the Accused on February 4th, 2006. A copy of the charges in Arabic, and Pashto are attached to the record as Review Exhibit 20 and 21, respectively. The service of charges has been marked as Review Exhibit 22.

The prosecution is ready to proceed in the Commission trial of United States versus Abdul Zahir. The Accused and the following personnel detailed to this Commission are present:

**Colonel Robert S. Chester, Presiding Officer;**
**Captain [redacted] Prosecutor;**
**Captain [redacted] Assistant Prosecutor;**
**Major [redacted] Assistant Prosecutor;**
**Lieutenant Colonel Thomas Bogar, Detailed Defense Counsel;**
**Lieutenant [redacted] has been detailed to this Commission, was also part of the**

1 **prosecution team, but has been previously excused**
2 **from appearing at this session.**
3
4 A court reporter has been detailed for this
5 Commission and has been previously sworn.
6 Security personnel have been detailed for this
7 Commission, and have been previously sworn.
8
9 **Presiding Officer:** Thank you. I have been detailed the
10 Presiding Officer of this Commission and I have
11 been previously sworn.
12
13 One other matter that I did want to mention
14 concerning the translation is that when we are
15 done here, a copy of the audio from the court
16 reporter will be provided to the Clerk of the
17 Military Commissions to have a military
18 commission just verify the translation and the
19 accuracy, and I believe that both sides have
20 agreed to that as well. Is that correct?
21
22 **DC:** Yes, sir.
23

1 **PROS:** Yes, sir.

2

3 **Presiding Officer:** Thank you. Captain [redacted] would you

4 please indicate the legal qualifications,

5 detailing, and whether the prosecution team has

6 been sworn?

7

8 **PROS:** Yes, sir. All members of the prosecution have

9 been detailed to this Commission by the Chief,

10 Prosecutor. All members of the prosecution are

11 qualified under Military Commission Order Number

12 1, paragraph 4(b), and we have been previously

13 been sworn. No member of the prosecution has

14 acted in any manner, which might tend to

15 disqualify us in this proceeding. The detailing

16 document has been marked as Review Exhibit 10 and

17 as amended by Review Exhibit 23. The prosecution

18 also has sitting at the prosecution table a

19 paralegal who will assist the prosecution but

20 will not be representing the government.

21

22 **Presiding Officer:** Thank you. Colonel Bogar?

23

1 **DC:** Yes, sir. I have been detailed to this military
2 commission by the Chief, Defense Counsel. I am
3 qualified under Military Commission Number 1,
4 paragraph 4(c), and I have previously been sworn.
5 I have not acted in any manner which might tend
6 to disqualify me in this proceeding. The
7 document detailing counsel was marked as Review
8 Exhibit 6.
9
10 **Presiding Officer:** I take it, Colonel Bogar, you are the
11 only defense counsel in this case?
12
13 **DC:** Yes, sir.
14
15 **Presiding Officer:** Let me ask you, while I have got you on
16 your feet, the trial counsel indicated that the
17 charges had been translated and served on the
18 Accused in English, Arabic, and Pashto. I
19 understood the Accused's native language was
20 Farsi. Is the translation sufficient for him, or
21 does it need to be translated into Farsi?
22
23 **DC:** If I may have a moment to ask him?

1

2 **Presiding Officer:** You may.

3

4 [The DC coffered with the ACC.]

5

6 **DC:** My client advises me that the documents were in

7 Pashto and his preference would be that the be in

8 Farsi.

9

10 **Presiding Officer:** All right. Captain [redacted] I will task

11 you to see to that and have them served on the

12 Accused as your earliest opportunity and advise

13 myself once that has been done.

14

15 **PROS:** Yes, sir.

16

17 **Presiding Officer:** Myself as well as the defense counsel.

18

19 **PROS:** Yes, sir.

20

21 **Presiding Officer:** Are you still prepared to proceed this

22 morning, Colonel Bogar, even though they have not

23 been translated into Farsi?

1

2 **DC:** One moment.

3

4 [The DC conferred with the ACC.]

5

6 **DC:** We are good to go.

7

8 **Presiding Officer:** All right, thank you. And as--I am

9 sorry, Captain [redacted]

10

11 **PROS:** Sir, the--we were explained by the translator

12 that the defense has--that the charges were

13 translated in Farsi for the Accused but if the

14 Accused still wants a Farsi translation, we will

15 provide him one.

16

17 **Presiding Officer:** I am sorry, I don't follow you.

18

19 **PROS:** Our understanding was that the translator, the

20 defense translator, translated----

21

22 **Presiding Officer:** Oh, okay. He did it orally?

23

1 **PROS:** I believe so.

2

3 **Presiding Officer:** All right, well the requirement, I

4 believe, and is, at least for this proceeding,

5 that they be translated in writing and served on

6 the Accused in Farsi.

7 **PROS:** Yes, sir.

8

9 **Presiding Officer:** So there is no question there.

10

11 **PROS:** Okay, sir.

12

13 **Presiding Officer:** I want that done.

14

15 **PROS:** Yes, sir.

16

17 **Presiding Officer:** And I think it is clear on the record

18 that the Accused does need the services of a

19 translator, does have those services available.

20 As I indicated earlier, if that becomes a problem

21 during this session, Colonel Bogar, please let me

22 know and we will take steps to resolve it.

23

1 **DC:** Yes, sir.

2

3 **Presiding Officer:** Mr. Zahir, pursuant to Military
4 Commission Order Number 1, you are represented by
5 Lieutenant Colonel Bogar, who serves as your
6 Detailed Defense Counsel. You may also request a
7 different military lawyer to represent you. If
8 the person you request is reasonable available,
9 he or she would be appointed to represent you as
10 your Detailed Defense Counsel. If you are
11 represented by Detailed Defense Counsel of your
12 own choice, you would normally lose the services
13 of Lieutenant Colonel Bogar, however, you may
14 request that Colonel Bogar remain on your case,
15 and the authority that detailed him, that is the
16 Chief Defense Counsel, in his sole discretion
17 could either grant or deny your request. Do you
18 understand this?

19

20 **ACC:** Yes.

21

22 **Presiding Officer:** Detailed defense counsel are provided
23 to you free of charge. Do you understand this?

1

2 **ACC:** Yes.

3

4 **Presiding Officer:** In addition to Detailed Defense

5 Counsel, you may be represented by a qualified

6 civilian lawyer. A civilian lawyer would

7 represent you at no expense to the United States

8 Government. To be qualified, a Civilian Defense

9 Counsel must be a U.S. Citizen, admitted to

10 practice law in a state, district, territory or

11 possession of the United States or a federal

12 court, may not have been sanctioned or

13 disciplined for any relevant misconduct, be

14 eligible for a secret security clearance, and

15 agree, in writing, to comply with the orders,

16 rules and regulations of Military Commissions.

17 If a civilian lawyer represents you, your

18 Detailed Defense Counsel will continue to

19 represent you and the Detailed Defense Counsel

20 will be permitted to be present during the

21 presentation of all evidence. Do you understand

22 what I have just explained to you?

23

1 **ACC:** Yes.

2

3 **Presiding Officer:** Do you have any questions about your

4 right to counsel?

5

6 **ACC:** No.

7

8 **Presiding Officer:** Do you desire to be represented by

9 Colonel Bogar?

10

11 **ACC:** Yes.

12

13 **Presiding Officer:** Do you want any other defense counsel?

14

15 **ACC:** I would like to have more, but I would like

16 Colonel Tom to help me in that regard.

17

18 **Presiding Officer:** And when you say you would like more,

19 is it your desire to be represented by an

20 additional military counsel, or by a civilian

21 counsel? Let me make it easy, why don't you take

22 a moment and discuss it with Colonel Bogar.

23

1 **DC:** Thank you, sir.

2

3 [The DC conferred with the ACC.]

4

5 **Presiding Officer:** Colonel Bogar?

6

7 **DC:** Yes, sir.

8

9 **Presiding Officer:** Would you like a short recess?

10

11 **DC:** No, sir. We are fine.

12

13 [The DC conferred with the ACC.]

14

15 **DC:** Okay, Your Honor.

16

17 **Presiding Officer:** Have you had a chance to discuss it

18 with him?

19

20 **DC:** Yes, sir.

21

22 **Presiding Officer:** Mr. Zahir, do you understand your

23 rights to counsel?

1

2 **ACC:** Yes.

3

4 **Presiding Officer:** And do you want an additional military

5 counsel?

6

7 **ACC:** No, right now is sufficient.

8

9 **Presiding Officer:** All right, do you want a civilian

10 counsel?

11

12 **ACC:** In the future, of course, I will ask for one.

13

14 **Presiding Officer:** What I will task you to do, Colonel

15 Bogar, is stay in contact with your client,

16 assist him should he either desire to request

17 individual Detailed Defense Counsel, or

18 additional Detailed Defense Counsel, or if he

19 desires to seek the services of a civilian

20 counsel, assist him in doing that, all right?

21

22 **DC:** Roger.

23

1 **Presiding Officer:** And unless I hear back from you, I will
2 assume that is in your hands and that you have
3 got it for action.
4
5 **DC:** Yes, sir.
6
7 **Presiding Officer:** Thank you. Prior to today's session,
8 the defense counsel had asked to be able to
9 consider the questionnaire that I provided to the
10 defense in the case of U.S. v. Khadr, which I
11 agreed to, as well as the biography that I
12 provided in that case. The defense also
13 submitted some additional questions which I
14 responded to and I believe those have all been--
15 also the voir dire questions that were submitted
16 to me on the record by the government in U.S. v.
17 Khadr, and I agreed that all of those would
18 become a part of the record for this case and
19 would be considered a part of the voir dire
20 process, and those have been marked as Review
21 Exhibits and I believe that both sides have
22 copies of those. Is that correct?
23

1 **PROS:** Yes, sir.

2

3 **DC:** Yes. Sir.

4

5 **Presiding Officer:** All right. Does the government desire

6 to ask any additional voir dire questions?

7

8 **PROS:** Yes, sir. Just a couple. Sir, as you stated, as

9 per defense request from March 9th, 2006, to

10 incorporate Review Exhibit 29 from U.S. versus

11 Khadr----

12

13 **Presiding Officer:** I am not--is that the questionnaire?

14

15 **PROS:** Sir, yes, sir. As it applies to U.S. versus

16 Zahir----

17

18 **Presiding Officer:** Right, and I believe that is marked as

19 RE 14.

20

21 **PROS:** Yes, sir, RE 14. Also, defense requested to

22 include, on the record voir dire of the Presiding

23 Officer in United States versus Khadr.

1

2 **Presiding Officer:** That is marked as RE 15. Where are we

3 going?

4

5 **PROS:** Yes, sir, RE 14.

6

7 **Presiding Officer:** 15.

8

9 **PROS:** Sir, you granted the request on March 9th as

10 well.

11

12 **Presiding Officer:** Do you have questions for me?

13

14 **PROS:** I do, sir. Have you reviewed the answers to the

15 questions that were asked during voir dire in

16 U.S. versus Khadr?

17

18 **Presiding Officer:** I have, and I believe in RE 17, which

19 is the additional questions by the defense, I

20 provided a clarification to question B5 of the

21 Khadr questionnaire.

22

1 **PROS:** Sir, in addition to that, do you need to change
2 or supplement any other answers today?
3
4 **Presiding Officer:** No, I don't believe so.
5
6 **PROS:** Is there any new matter not reflected in RE 14
7 and 15?
8
9 **Presiding Officer:** I am not sure if it is in--it's
10 actually in the bio, which I don't see here but
11 thought the defense had. Do you have a copy of
12 that, Colonel Bogar?
13
14 **DC:** Of your bio, sir?
15
16 **Presiding Officer:** Yes. I got a legion of merit for an
17 end of career award, my retirement award. That
18 is not reflected in there. The only other thing
19 is that I received, and I think it falls under
20 the education thing; I received a Certificate of
21 Judicial Methodology from the National Judicial
22 College, I think since I completed the bio and
23 questionnaire in Khadr.

1

2 **PROS:** Thank you, sir. Any----

3

4 **Presiding Officer:** Hold on a second. As to the update, I

5 had indicated that I provided legal advice to the

6 1st MEB Commander, who is actually General

7 Mattis, who was dual-hatted at the time as the

8 Deputy, I MEF Commander. There was an issue that

9 came up when he was deployed to Afghanistan

10 having to do with women in combat. The Staff

11 Judge Advocate for Marine Forces Pacific, who was

12 providing the--also served as the Staff Judge

13 Advocate for Marine Forces Central Command, which

14 I chopped, which was provided to the Chief of

15 Staff of Marine Forces Pacific and ultimately

16 General Mattis' Chief of Staff, concerning the

17 subject. That would have constituted the only

18 legal advice that I provided him concerning the

19 operations in Afghanistan.

20

21 **PROS:** Sir, does giving legal advice in that particular

22 area, women in combat, as you have indicated,

1 does that impair your ability to serve as
2 Presiding Officer in this Commission?
3
4 **Presiding Officer:** No.
5
6 **PROS:** Sir, as you sit here today as Presiding Officer,
7 do you feel completely free and independent to
8 ensure that the Accused receives a full, fair,
9 and impartial trial?
10
11 **Presiding Officer:** I do.
12
13 **PROS:** One moment, Your Honor. That is it, sir.
14
15 **Presiding Officer:** Thank you. Colonel Bogar?
16
17 **DC:** Yes, sir. A few follow-up questions, if I may.
18
19 **Presiding Officer:** If you are going to ask a follow-up on
20 one of those that is in the materials that I
21 provided, if you could refer me to it.
22

1 **DC:** I will. Every question will be referred. Either
2 to the written interrogatories I submitted to you
3 and you answered or to your CV and whatnot, I
4 will preface you. To begin, on your CV----
5
6 **Presiding Officer:** I don't think it qualifies as a CV. It
7 is a bio.
8
9 **DC:** A bio, excuse me. You indicated that you were
10 licensed in Idaho and in California. Are you
11 still active in both states?
12
13 **Presiding Officer:** I am not active in either state. Let
14 me clarify that. When I was originally licensed
15 in Idaho, back in 1982, because I was not
16 practicing within the state, you could not be an
17 active member of the Idaho Bar. After I was
18 certified as a Judge Advocate, about 2 years
19 later I took the California Bar. Because I was
20 not actively practicing in California, I had an
21 inactive status. Probably 2 years ago I had my
22 status in Idaho changed to active, and it was
23 subsequently changed back to inactive. I have

1 complied and am current, although as an inactive
2 member you don't have to, I am current on CLE for
3 both jurisdictions.
4
5 **DC:** You just answered my follow-up question.
6
7 **Presiding Officer:** To include ethics.
8
9 **DC:** Roger. Just for clarification, I understand some
10 states do have military inactive status. Is your
11 inactive status that you are currently on, or is
12 it something different?
13
14 **Presiding Officer:** No, it is not tied in anyway to the
15 military. It is just inactive status. I think
16 Idaho refers to it as, I want to say an affiliate
17 member and California refers to it as an inactive
18 status, but it is the same, whatever you call it.
19 It is the same. I pay them money every year.
20
21 **ACC:** On your bio you also indicated that you [redacted]
22 [redacted]
23

1 **Presiding Officer:** No, that is incorrect. They are

2 currently [redacted]

3

4 **DC:** [redacted] sorry. And you are currently [redacted]?

5

6 **Presiding Officer:** [redacted]

7

8 **DC:** Do any of those [redacted] people hold any positions

9 for pay or otherwise, whereby a reasonable person

10 may question your impartiality?

11

12 **Presiding Officer:** No, they are not in anyway associated

13 with the government. [redacted]

14 [redacted]

15 [redacted]

16

17 **INTERPRETER:** Your Honor, I didn't hear the last

18 part.

19

20 **Presiding Officer:** [redacted]

21 [redacted]

22 [redacted]

23

1 **DC:** On your bio, you indicated that you split time as
2 a defense counsel and a trial counsel during
3 three terms, 1982 through 1984--do you have your
4 bio in front of you? I could----
5
6 **Presiding Officer:** I don't, but go ahead.
7
8 **DC:** From 1982 to 1984, 1986 to 1988, and 1988 to
9 1990.
10
11 **Presiding Officer:** '88 to '90, I was the Deputy Staff
12 Judge Advocate at Second Marine Division, 2 MEF,
13 so if that is what I put in there, it is a typo.
14
15 **DC:** And, you put--it says, "and served as trial
16 counsel and Senior Defense Counsel." Is that not
17 correct?
18
19 **Presiding Officer:** Give me the dates again.
20
21 **DC:** 1988 to 1990.
22
23 [The PROS handed a copy of the bio to the PO.]

1

2 **Presiding Officer:** What dates were you asking me about?

3

4 **DC:** 1988 to 1990.

5

6 **Presiding Officer:** Yes, that is correct. '90 to '92 I was

7 the Deputy Staff Judge Advocate for 2nd Marine

8 Division of 2 MEF,

9

10 **DC:** For each of those periods that you are looking at

11 that I indicated, can you tell me how much time,

12 approximately to the best of your recollection,

13 you spent as a defense counsel versus the time

14 you spent as a trial counsel?

15

16 **Presiding Officer:** I believe from '82 to '84, I spent

17 approximately 6 months as a trial counsel and

18 then I became a defense counsel. I spent the

19 rest of the time as a defense counsel. In '96, I

20 was not a prosecutor. I was the assistant OIC

21 and I spent the first year as the Senior Defense

22 Counsel where I had, it usually averaged

23 somewhere around 11 defense counsel working for

1 me, and in addition I was also defending cases.
2 Then I spent the other part of the remaining
3 time, again which was approximately a year, as
4 the Assistant OIC of the Legal Services Support
5 Section. In '88 to '90 I spent the first year as
6 a prosecutor and the second year as the Senior
7 Defense Counsel, and I believe I had, I want to
8 say about eight defense counsel working for me,
9 approximately.
10
11 **DC:** As the Senior Defense Counsel, I think you
12 indicated that you had taken on some cases
13 yourself in that second period. Did you do the
14 same during that third period?
15
16 **Presiding Officer:** '88 to 90, you mean?
17
18 **DC:** Yes, sir.
19
20 **Presiding Officer:** Yes, in fact, I defended a capital
21 murder case during that time period.
22

1 **DC:** Okay, as a follow-up to the interrogatories now,
2 the written questions that I submitted to you.
3
4 **Presiding Officer:** You are talking about RE 17?
5
6 **DC:** Yes, sir.
7
8 **Presiding Officer:** Captain [redacted]
9
10 [The PO handed the copy of his bio back to the PROS.]
11
12 **Presiding Officer:** Okay.
13
14 **DC:** Question number 10, you indicated--the question
15 was, "You are familiar with the Commission
16 procedural rules, otherwise referred to as the,
17 quote, POMs----
18
19 **Presiding Officer:** POMs.
20
21 **DC:** POMs, correct.
22
23 **Presiding Officer:** Short for Presiding Officer Memorandum.

1

2 **DC:** Thank you. "are there any instances when a

3 Presiding Officer should or must raise a motion

4 sua sponte, and your answer was, "Ask in court."

5

6 **Presiding Officer:** I think motion is a bad word. A

7 Presiding Officer and judges don't make motions.

8 They may raise issues or raise matters to the

9 attention of counsel for resolution sua sponte.

10 And, yes, I think there are times when a

11 Presiding Officer will need to raise things sua

12 sponte. If you are going to ask me what they

13 are, to try to list them, it is impossible. It

14 depends strictly on what has happened in the

15 court. This morning I raised sua sponte the

16 issue of the translation of the charge sheet.

17 That is an example. My role is to ensure a full

18 and fair trial. If I see things that are denying

19 either side that, then I think it is my

20 obligation to raise the matter to the attention

21 to counsel and attempt to resolve it, always

22 keeping in mind that it is the responsibility of

23 counsel to try their cases.

1

2 **DC:** If during the course of the proceeding or trial,

3 after we finalize voir dire of the Presiding

4 Officer, if an otherwise unforeseen fact or

5 circumstance were to be made to the Presiding

6 Officer, yourself, so that the Presiding Officer

7 could no longer preside as an impartial arbiter

8 of the law, would that be a reason for a

9 Presiding Officer to raise an issue or a motion,

10 or how ever you put it?

11

12 **Presiding Officer:** You are asking if something came to

13 light after we completed the challenge process?

14

15 **DC:** Yes, sir.

16

17 **Presiding Officer:** Well let me answer it this way. Even

18 if it did not disqualify me, if some issue came

19 to light that I felt might cause a question, I

20 would raise it with counsel. Whether it

21 disqualified me or not is not, I think, the

22 operative or the controlling factor; it is

23 whether it is something that should be brought to

1 the attention of counsel and I would bring it to
2 the attention to counsel and give them the
3 opportunity to delve into it if they want to, in
4 a matter I think appropriate within the limits I
5 would place on it depending on what it is. Much
6 like the reopening of voir dire, if you will.
7
8 **DC:** If the fact and circumstances to which I alluded
9 to were to cause you, as the Presiding Officer,
10 to feel he could not be fair and impartial, would
11 you feel compelled to disqualify yourself?
12
13 **Presiding Officer:** Yes.
14
15 **DC:** I direct your attention to question number 15.
16 Again, there is a question there, generally
17 speaking, what areas of law will be particularly
18 relevant throughout the military commission
19 process. You asked me to ask you in court.
20
21 **Presiding Officer:** I don't know. I mean, we are going to
22 deal with; obviously, international law is going
23 to have some application here. I would suppose

1 we are going to look at military criminal law,
2 the UCMJ if you will, and the regulations and
3 things that go along with that. We will probably
4 look at Federal criminal law and procedure. I
5 think all of those areas, while not controlling,
6 certainly are places I think that smart people
7 would look to assist us in filling gaps, whether
8 a procedural gap or--I mean, I have heard a lot
9 of discussion about that the rules of procedure
10 for these commissions are not completely fleshed
11 out.
12
13 There are volumes in most every jurisdiction
14 where the courts are interpreting and filling
15 gaps in procedural rule. That is a large part of
16 what appellate courts do. Often they look to
17 other jurisdictions to see how they followed it
18 and adopt a similar rule.
19
20 **DC:** As a follow-up question, with regards to--and
21 generally speaking, not necessarily with this
22 case in particular, but generally speaking, as to
23 the commission process, you indicated

1 international laws, some sources of UCMJ, some
2 federal criminal law; would a Presiding Officer
3 deem them as persuasive authority or--let me ask
4 you this, how would a Presiding Officer consider
5 those sources of law?
6
7 **Presiding Officer:** The question is too vague. You are
8 asking me to tell you whether or not
9 international law is going to be controlling,
10 whether the UCMJ would be controlling; it is too
11 vague a question. I am not going to speculate as
12 to what would be controlling under what
13 circumstances. I will leave that until you make
14 a motion and we litigate it.
15
16 **DC:** Fair enough. Is any law controlling?
17
18 **Presiding Officer:** I am sure some are.
19
20 **DC:** Have you thought about that?
21
22 **Presiding Officer:** Again, I am not going to attempt to say
23 which piece of law--what out there is

1 controlling. If you want to give me a motion
2 with a specific issue, I will decide the issue,
3 but I am not going to speculate what is or is not
4 controlling.
5
6 **DC:** Question number 19 on the interrogatories; you
7 answered the question regarding political
8 aspirations, and you answered, "Not other than a
9 judicial position." Clarification if I may?
10 Does that mean you are considering running for a
11 political----
12
13 **Presiding Officer:** No.
14
15 **DC:** Is that an appointed job?
16
17 **Presiding Officer:** No, I was just trying to indicate that
18 over the last 30 years the job that I have
19 enjoyed doing most and I think I am particularly
20 good at is being a trial judge and I would like
21 to be a trial judge when I leave here. Some of
22 those are political appointments. Many of them
23 are appointed. Federal judges are appointed. I

1 indicated that I applied for a immigration law
2 judge before I was appointed as a Presiding
3 Officer. That is a--I consider that a somewhat
4 political appointment. I got to admit, I am a
5 neophyte in that area. You know, if you asked me
6 what I would do when I grow up; I would be a
7 judge.
8
9 **DC:** Thank you.
10
11 **Presiding Officer:** Anything else on that?
12
13 **DC:** No, sir. Next question. Number 22. On the same
14 set, you indicated that you read too many
15 articles, whether a law review or a news article,
16 regarding the military commissions to list. If
17 you can, can you provide me any titles, or
18 authors, any law reviews that you may remember
19 reading that you felt most significant or
20 influential, if you may?
21
22 **Presiding Officer:** No. I will say that what I have done
23 is gone into Lexis and done searches and pulled

1 up articles on issues that I believe may become
2 relevant during these proceedings. There was on
3 in particular that deals with due process at
4 Nuremberg that I did believe that it was
5 particularly helpful.
6
7 **DC:** Okay.
8
9 **Presiding Officer:** All of the articles that I have pulled
10 down and read I have provided to Mr. Harvey, the
11 Chief Clerk of the Commissions for inclusion in
12 the Commission Library so it could be available
13 to all counsel. Whether I felt they were
14 particularly helpful or not; I felt the Nuremberg
15 article was particularly helpful.
16
17 There was also a Supreme Court case and I never
18 remember citations. Some people are good at
19 that. I am not. The Supreme Court case I
20 thought was particularly helpful because it
21 talked about due process. If you want to hit me
22 with a question when we got done here, I will
23 provide the articles to you. They are available.

1

2 **DC:** All right.

3

4 **Presiding Officer:** They should be available. I don't know

5 if Mr. Harvey has actually posted them or not. I

6 provided several to him at the last--probably 20

7 articles to him at the last term of the

8 Commissions here at Guantanamo.

9

10 **DC:** For the record, they are in the Commission

11 library, but there is no indication as to whom

12 they were downloaded--so I will take you up on

13 your offer to find out what you found interesting

14 off the record--and find out what you found

15 interesting.

16

17 With regards to the Supreme Court Case that you

18 read, was that, if I may just delve into your

19 memory a little bit and if I can just weed that

20 out; was that a recent case or an older case?

21

22 **Presiding Officer:** I don't know how you define recent.

23

1 **DC:** Recent as----

2

3 **Presiding Officer:** I believe it was within----

4

5 **DC:** ----in our lifetime, or my lifetime.

6

7 **Presiding Officer:** Then it was recent. So I am ancient,

8 is that it?

9

10 **DC:** Not necessarily. Your lifetime, maybe mine. I

11 just----

12

13 **Presiding Officer:** I believe it was within the last--I

14 want to say within the last 10 to 15 years. I

15 consider that to be a fairly current precedent.

16

17 **DC:** Did it deal with Commissions or something else?

18

19 **Presiding Officer:** I believe it dealt with the application

20 of the Fifth and Sixth Amendment to aliens

21 outside the United States, non-U.S. citizens

22 outside the United States. And as I recall, the

23 fact pattern something to do with a drug

1 enforcement, DEA, was down in Mexico. They had
2 apprehended a--they didn't apprehend him, the
3 Mexican authorities had apprehended a Mexican
4 national for drug distribution in the United
5 States and turned him over to the U.S. and he was
6 brought back into the U.S. Right after he got
7 here, the DEA asked the Mexican authorities to
8 search his residence, which they did, without
9 any--without any search warrant, without any
10 magistrate reviewing the issue, so the case dealt
11 with whether or not the--I believe it was--they
12 were addressing the Fourth or Sixth Amendment,
13 the lesser extent they touched on the Fifth
14 Amendment and its applicability to aliens with
15 virtually no connection to the United States and
16 the actions took place outside of the United
17 States by authorities from another nation.
18 Whether there was any requirement for a
19 magistrate or judge to issue a search warrant
20 before the DEA could have asked the Mexican
21 authority or the foreign authority to search the
22 residence of the Accused in that case.

1 **DC:** Without--again, without going into this case in
2 particular specifically but generally speaking,
3 did you find any relevance of that case to the
4 Commission process?
5
6 **Presiding Officer:** Yes.
7
8 **DC:** How so?
9
10 **Presiding Officer:** It has to do with the application of
11 the amendments to the U.S. Constitution before a
12 national outside the United States. We are
13 outside the United States. The Accused, I
14 believe, is a foreign national. And if you are
15 asking me, is it controlling, what weight I would
16 give it, how would I apply it? I have no idea.
17 I just felt the issues were relevant to what we
18 are doing here.
19
20 **DC:** Okay.
21
22 **Presiding Officer:** And, actually, that case was provided
23 to me by one of the other Presiding Officers.

1

2 **DC:** Speaking of the Supreme Court, have you followed

3 the Hamdan case recently or the court arguments?

4

5 **Presiding Officer:** I read--I read the--some of the news

6 accounts of it.

7

8 **DC:** Have you read any of the resubmitted on behalf of

9 the Hamdan?

10

11 **Presiding Officer:** I might have, I might have. I know I

12 read some of Hamdan briefs. I don't remember if

13 they were those at the district court level or

14 the circuit court level, but I have read some of

15 those briefs, or a lot of them.

16

17 **DC:** I understand, Your Honor.

18

19 Do you have any impressions after reading of

20 these briefs, other than, you know, a lot of

21 reading?

22

1 **Presiding Officer:** No. Above my pay grade, I mean, the
2 Supreme Court is going to tell us what to do.
3
4 **DC:** Okay. With regards to the oral questioning that
5 occurred in that case, the Khadr case----
6
7 **Presiding Officer:** Yes.
8
9 **DC:** One question, unfortunately, I can't readily
10 direct you to that question, so I'll----
11
12 **Presiding Officer:** Could you give me a page number and a
13 line number?
14
15 **DC:** Unfortunately I don't. It is a generalized
16 question, so----
17
18 **Presiding Officer:** Oh, okay.
19
20 **DC:** You had indicated, and you can correct me if I am
21 wrong, if I mistake your--your position, you
22 indicated you were about to retire until you were
23 asked to serve----

1

2 **Presiding Officer:** Correct.

3

4 **DC:** ----as a Presiding Officer in this proceeding.

5 May I ask, who asked you to serve as a Presiding

6 Officer?

7

8 **Presiding Officer:** Initially, I received--this goes back

9 to when we were asked--when the services were

10 tasked to provide, I believe it was five

11 nominees, to be Presiding Officers, each service

12 was. I was asked, and I don't recall by whom. I

13 think it would have been either--I believe it was

14 the Deputy Director of the Judge Advocate

15 Division for the Marine Corps asked, and I

16 indicated I was and I filled that form out, it

17 was kind of a--it was a one-page thing that was

18 so cursory that I didn't find it particularly

19 helpful to anybody; but that's what they asked

20 for so that's what I gave them. And then I

21 didn't hear anything for--and I think it was

22 when--I believe it was when Hamdan was decided by

23 the D.C. circuit, then we--the--the services were

1 asked to validate those nominees, I think with an
2 expectation that they were going to start moving
3 forward. And so I got a call and I am sure that
4 that second one was from the Deputy Director of
5 the Judge Advocate Division, he is a colonel of
6 Marines, and I validated it. Nothing had changed
7 except my amount of service. And then, as I
8 indicated, I got a call from Mr. [redacted] I
9 believe he was the Chief of Staff for Mr.
10 Altenburg. He indicated that I had been
11 selected; I wasn't asked if I wanted to serve; he
12 had indicated I had been selected. I told him in
13 return that I would be more than happy to serve
14 except I was mandatory for retirement at the end
15 of June. He then said he would go back to Mr.
16 Altenburg to see if he--they wanted me to do it.
17 He called me back, and I think this all happened
18 within the same week. He said that Mr. Altenburg
19 did and I recei--he said there was a piece of
20 paper that he had to sign, the actual letter
21 appointing me and I got that via--I can't
22 remember if it was a fax or an attachment to an
23 email but I got the hard copy in the mail a

1 couple of weeks later. And as I indicated, in
2 the Khadr case there was never a time when--when
3 I was waiting to hear that I was actually being
4 considered. In fact, what had happened is I
5 called the Deputy Director of the Judge Advocate
6 Branch and asked him if there was any likelihood
7 that I would be asked to serve. He said, "No."
8 And then, again, I don't know that he was
9 speaking from any particular information or it
10 was just his sense from being up in the beltway.
11 He said, "No." I submitted my letter to retire.
12 I had gone through a couple or three, I think, of
13 the retirement seminars that you have to go
14 through to retire and then I got the call.
15
16 **DC:** You, um--you said something interesting. I may
17 have misheard you, so if I did, please correct
18 me. I thought I heard you say that your
19 mandatory retirement date is June.
20
21 **Presiding Officer:** Correct.
22
23 **DC:** Is that June '06?

1

2 **Presiding Officer:** Yeah, 29 June--30 June.

3 **DC:** Have you been extended or going to get extended?

4

5 **Presiding Officer:** I have been.

6

7 **DC:** You have been?

8

9 **Presiding Officer:** I will retire on 30 June, all right. I

10 put a request, an administrative action form, an

11 AA form, is what they call it in the Marine

12 Corps, and asked to be continued for 1 year and

13 Headquarters, Marine Corps, has approved that.

14

15 **DC:** Got you.

16

17 **Presiding Officer:** So I will retire 30 June of this year

18 and be continued until 30 June '07 with a

19 possibility and, again, depending on what happens

20 on these Commissions, that I could ask to be

21 extended again or continued again is the proper

22 word, I think. That would have to be approved by

23 the Secretary of the Navy.

1

2 **DC:** When you retire, does that mean you fall into

3 retired reserve and you're activated from June on

4 or it has to stop----

5

6 **Presiding Officer:** No, I go into a retired list, I think

7 it's that. I don't understand it. It is one of

8 those things you never consider over a 30-year

9 career, but you go under a retired list, is my

10 understanding, and then all my status changes

11 from retired--it's done immediately, it's a unit

12 diary entry at Headquarters, Marine Corps, where

13 the status changesfrom--I am trying to remember

14 the term they use. I got a letter, a set of

15 orders, that said it was changed from the

16 inactive retired or something like that, though

17 I'm--but I'm just continued on active duty, so I

18 continue to draw the same pay and allowances as

19 colonel. In fact, the orders say that, that I

20 will be paid as a Colonel of the Marines.

21

22 **DC:** I see. With regards to serving as a PO,

23 Presiding Officer, do you know how many other

1 folks were asked to serve other than those that
2 are currently serving?
3
4 **Presiding Officer:** No, I don't know anything. The only
5 thing I have--information I have was that--that
6 each service, when I say, "service," the Navy and
7 the Marine Corps are two different services for
8 purposes of this--that each service was asked to
9 provide five nominees. The Marine Corps provided
10 five. I assume the other services did as well.
11 I guess my assumption has always been that those
12 who were asked said, yes, because the submission
13 of the names was voluntary. At least on the
14 Marine Corps side we were asked if we wanted to
15 do it and we said, "Yes." I mean, I don't think
16 anybody has been told they have to do it.
17
18 **DC:** Other than your qualifications as indicated on
19 your bio, do you know why you, or anybody else,
20 was asked to serve, you in particularly?
21
22 **Presiding Officer:** No. Neither Mr. [redacted] nor Mr.
23 Altenburg talked to me. I was never given a pre-

1 hiring interview, if you will. The only thing I
2 ever did was submitted the questionnaire--I think
3 we were asked to provide our last fitness report,
4 performance evaluation. And, I told the Deputy
5 Director that if somebody wanted that, they could
6 go pull my record. I wasn't going to do it. So
7 they may have looked at that, I don't know. And
8 I would--I don't think anybody does anything in a
9 vacuum. I suspect that Mr. Altenburg talked to
10 perhaps the Director of the Judge Advocate
11 Branch, who knows me, the Deputy Director. I
12 mean I am assuming there was some discussion. I
13 guess--the thing they looked at was pretty
14 cursory, or the thing I filled out was pretty
15 cursory.
16
17 **DC:** The next set of questions are just some
18 generalized questions; they don't refer to
19 anything you have said and they generally relate
20 to the media.
21
22 **Presiding Officer:** They what?
23

1 **DC:** They generally relate to the media.

2

3 **Presiding Officer:** Oh, okay.

4

5 **DC:** As a general matter, do you regularly read a

6 newspaper, Internet news, or any news magazines?

7

8 **Presiding Officer:** I don't take a newspaper or magazines.

9 I routinely, by "routinely," sometimes multiple

10 times during the day, will check out the Fox

11 Internet site as well as CNN. I also have a

12 thing called a Life drive by Palm that has the

13 ability to tap into the Internet. And there is a

14 thing called Abantgo, A-B-A-N-T-G-O.com, that is

15 not an advertisement, but it allows you to tap

16 into a whole series of news channels of Business

17 Week, Asia Pacific News, the Washington Post, the

18 Times, the New York Times, I believe MSNBC,

19 something to do with Palm Info. These are the

20 ones I tapped into that I routinely download.

21 Like everyday I will sync my Palm and it will

22 download those--the current articles on those

1 websites and then when I get a chance I will read
2 it.
3
4 **DC:** And are you looking for anything in particular or
5 just general news articles?
6
7 **Presiding Officer:** Just reading the news, trying to stay
8 abreast of what is going on in the world.
9
10 **DC:** Do you not subscribe to a daily newspaper?
11
12 **Presiding Officer:** I do not.
13
14 **DC:** Or any magazines, Time or----
15
16 **Presiding Officer:** I do not.
17
18 **DC:** Do you watch any news on TV?
19
20 **Presiding Officer:** Generally, I was the O'Reilly Factor
21 until they become too obnoxious. I never watch
22 Hennedy and Colmes. My wife likes to watch
23 Greta. I prefer to turn it to Law and Order. I

1 like to watch Brit Hume. I prefer not to watch
2 those where people are rude to each other.
3
4 **DC:** I understand. My question--that was a follow-up
5 question, but you answered my follow-up question.
6 But with regards to news, national news, I know
7 Brit Hume is a national news caster, but the
8 networks, ABC, NBC, CBS, and in the cable, CNN,
9 or Fox, or-----
10
11 **Presiding Officer:** One thing I will do is I have a SIRIUS
12 radio-thing in my car and I listen to the Fox
13 News Channel on the way to and home from work
14 sometimes.
15
16 **DC:** That was my follow-up question.
17
18 **Presiding Officer:** I don't generally don't listen to CNN,
19 although I did watch Lou Dobbs last night.
20
21 **DC:** Okay, and when you listen to your SIRIUS radio,
22 do you----
23

1 **Presiding Officer:** No, I don't listen to that----

2

3 **DC:** I know--I know.

4

5 **Presiding Officer:** No, I don't listen to Howard.

6

7 **DC:** I am an XM man, myself, I would have sold you on

8 XM, but when you do listen to your satellite

9 radio, is there anything--how often do you listen

10 to the news programs?

11

12 **Presiding Officer:** Probably everyday depending on what

13 time it is. As I said, I wouldn't listen to

14 Hennedy and Colmes, so if he was on or they would

15 on I would turn it to smooth jazz.

16

17 **DC:** Now as a follow-up then to your own practices and

18 procedures; during the course of the proceedings,

19 do you plan or intend on continuing your daily

20 routine news coverage or watch----

21

22 **Presiding Officer:** No, I--well yes. Because of what

23 happened in Khadr, I have actually gone out and

1 looked for news stories on the Commissions
2 because it became an issue in Khadr. There was a
3 motion filed on it. So, I, at this point I think
4 I think it is important to try to see what is
5 being said out there to see if there is a problem
6 so if there is one, I can raise it with counsel
7 early on so that we can, if need be, take steps
8 to protect the integrity of the proceeding.
9
10 **DC:** For my own edification, if you could summarize
11 what that issue was in the Khadr case?
12
13 **Presiding Officer:** There was a press conference held here,
14 in which the defense first and followed by the
15 Prosecution, specifically Colonel Davis, the
16 Chief Prosecutor, Mr. Ahmad from Khadr, and Major
17 Fleener from the al Bahlul case held a press
18 conference here. And the defense raised a motion
19 asking that I in some way limit or take
20 corrective action because they thought the
21 Prosecution had made statements that were
22 inappropriate. As a result of that, I was
23 provided exhibits, a fairly significant stack of

1 articles that had been written based on both that
2 press conference and then a whole bunch of, I
3 don't remember if they were letters or interviews
4 that the defense had given or provided in the
5 Khadr case, specifically Mr. Ahmad and Mr.
6 Wilson, who were--Mr. Wilson was of counsel--was
7 not on the record in Khadr at point but Mr. Ahmad
8 was, but they both had written articles or given
9 interviews or something where they had talked
10 about the proceedings. So, I was given a very
11 significant number of those to read through,
12 which I did, because it was necessary to decide
13 the motion. I believe they are all marked--all
14 part of the record.
15
16 **DC:** I understand. So will you continue to read then,
17 based on your experience with the Khadr case?
18
19 **Presiding Officer:** I will make efforts to try to have a
20 sense of what is being said in the press because
21 I think it is important and became important
22 because both sides are entitled to a full and
23 fair trial. If the press accounts become such,

1 and I have already issued a prophylactic order to
2 all the members not to read anything and to stay
3 away from the press with anything dealing with
4 these Commissions, but it is important that when
5 they come in here, they have an open mind as to
6 the issues that may be presented and that they
7 are asked to decide. So I believe that is
8 important, to at least have some sense of what is
9 going on in the press.
10
11 **DC:** Okay, thank you. One last question, but then,
12 there may be some follow-up questions. With
13 regards to the questionnaire, just a general
14 question that is separate, you had indicated that
15 you had no knowledge as to my client, Abdul
16 Zahir, and as a follow-up question I am just
17 going to specify the wording on that, because it
18 may have been too broad. I am going to ask you
19 that, other than the pleadings submitted in this
20 case, have you read, seen, or heard, anything
21 that mentions my client?
22
23 **Presiding Officer:** Yes.

1

2 **DC:** Okay, can you tell me what that is?

3

4 **Presiding Officer:** The only thing that I remember reading

5 is when the Pentagon released the names of all of

6 the detainees here in Guantanamo, my

7 understanding is there were multiple thousands of

8 pages. They didn't just give a, here is a list

9 of names; they released the names in the context

10 of some combatant review status, I think is the

11 term they used, boards.

12

13 **DC:** Uh-huh.

14

15 **Presiding Officer:** And I believe your client was mentioned

16 in several articles because they talked of--there

17 was excepts from what he was alleged to have done

18 or something. Again, I don't remember

19 specifically what was said. I didn't pay that

20 much attention. I just saw his name in some of

21 the articles.

22

1 **DC:** Okay, based on what you read, will it have any
2 bearing on the way you----
3
4 **Presiding Officer:** No.
5
6 **DC:** ----rule from the bench?
7
8 **Presiding Officer:** No. I don't even remember what was
9 said. I didn't pay that close attention.
10
11 **DC:** If I may have 1 minute with my client?
12
13 **Presiding Officer:** Sure.
14
15 [The DC conferred with the ACC.]
16
17 **DC:** Yes, Your Honor, one follow-up question. You
18 indicated earlier that your experiences in
19 Afghanistan, and that some of that----
20
21 **Presiding Officer:** I am sorry, my what?
22
23 **DC:** While you were in Afghanistan?

1

2 **Presiding Officer:** I have never been to Afghanistan.

3

4 **DC:** You opined on Afghanistan? You wrote a memo?

5

6 **Presiding Officer:** Oh, oh, oh, no. I haven't been to--I

7 wrote a--a CHOP, probably more accurate, a legal

8 paper on women serving in combat and whether that

9 was permitted or not.

10

11 **DC:** And that was related to Afghanistan?

12

13 **Presiding Officer:** Correct. It was provided to,

14 ultimately to the Chief of Staff for General

15 Mattis. I am sure General Mattis was briefed on

16 it while he was there, actually at Camp Rhino,

17 which was the forward operating base that they

18 established in Afghanistan.

19

20 **DC:** So you had never been to Afghanistan?

21

22 **Presiding Officer:** I have never been to Afghanistan.

23

1 **DC:** Have you been to Iraq?

2

3 **Presiding Officer:** Yes. I spent about 2 and half months
4 during Operation Iraqi Freedom 2 as a judge over
5 there. I didn't go into Iraq during the first
6 Gulf War. I made it up into Kuwait during the
7 first Gulf War. I spent 6 months over there
8 during that as the Deputy SJA for 2nd Marine
9 Division.

10

11 **DC:** Was that the last time you were in Iraq, or were
12 you in OIF 1?

13

14 **Presiding Officer:** No, I have only been to Iraq once,
15 during OIF 2. Again, that was as a judge.

16

17 **DC:** Based upon your presence in Iraq and your,
18 presumably you had some interaction with some
19 local people?

20

21 **Presiding Officer:** Yes, there was a--I assume they were
22 locals. I didn't check their nationality but
23 there were--we were primarily located at al

1 Takatum, and then we would go out to Faluja, al
2 Asad, down into Kuwait, and while in al Asad or
3 al Takatum, there was a, like a store,
4 restaurant-type thing and I bought a power strip
5 and a power converter or something so I could
6 change the 220 to 110, 50 phase to 60 phase.
7
8 **DC:** And that----
9
10 **Presiding Officer:** I think that was all I----
11
12 **DC:** And that was in Iraq?
13
14 **Presiding Officer:** Yes.
15
16 **DC:** Presumably then the salesmen or the store keep
17 was and Iraqi?
18
19 **Presiding Officer:** I guess.
20
21 **DC:** Okay.
22

1 **Presiding Officer:** There was also some work parties that I
2 am sure were Iraqi that were eating near my--I
3 stayed in a place we called--I called it the
4 "Krack House." It was a building that had some
5 bombs hit near it so the walls were full of
6 cracks. I called it the "Krack House." We
7 spelled it different. They were working near it
8 and they offered to let me sit down and eat with
9 them and I declined the opportunity.
10
11 **DC:** Well based on your experiences in the Mid-East
12 and Southwest Asia, and the local folks there,
13 would any of those experiences have any effect on
14 your viewpoint towards my client?
15
16 **Presiding Officer:** No.
17
18 **DC:** Or any people of that--from the Mid--Southwest
19 Asia?
20
21 **Presiding Officer:** No, like I said, I had very little
22 contact with them. Not enough to form an
23 impression.

1

2 **DC:** Okay, no further questions.

3

4 **Presiding Officer:** Do you have any questions?

5

6 **PROS:** No, sir.

7

8 **Presiding Officer:** Do you want to take about a 10-minute

9 recess? Let's take 10 minutes because we have

10 been on the record quite a while.

11

12 *The Commission hearing recessed at 1025, 4 April 2006.*

13

14 *The Commission hearing was called to order at 1041, 4 April*

15 *2006.*

16

17 **Presiding Officer:** The Commission will come to order.

18 All those present when we recessed are again

19 present.

20

21 Government, challenges?

22

23 **PROS:** None, sir.

1

2 **Presiding Officer:** Defense?

3

4 **DC:** At this point, Your Honor, the defense asks the

5 court if we could defer any challenges pending

6 the Khadr voir dire, which is scheduled, I

7 understand, for this afternoon and into tomorrow.

8

9 **Presiding Officer:** It is going to be put off now. I just

10 approved a defense request for a continuance

11 until tomorrow morning in Khadr.

12

13 **DC:** If we may then, following Khadr, if I may make

14 motions or challenges at that point in time?

15

16 **Presiding Officer:** No. What I will allow you to do though

17 is if something comes up that you think is

18 sufficiently important, you may ask to reopen the

19 voir dire.

20

21 **DC:** Thank you. Very well, and if I may then also

22 incorporate those, if I request it and with your

1 approval, any voir dire from Khadr to this
2 proceeding if anything is relevant?
3
4 **Presiding Officer:** You may.
5
6 **DC:** Thank you, then at this point I have no
7 challenges.
8
9 **Presiding Officer:** All right, thank you.
10
11 It appears that at this point all parties to the
12 proceedings have the requisite qualification and
13 have been sworn. Defense Counsel, you have
14 indicated that you are ready to proceed even
15 though you don't have a copy of the charges in
16 Farsi, is that correct?
17
18 **DC:** At this point, yes, sir.
19
20 **Presiding Officer:** Do you desire that the charges be read?
21
22 **DC:** No, sir. We will waive the reading of the
23 charges.

1

2 **Presiding Officer:** All right, the reading will be waived.

3 There were three protective orders issued in this

4 case and they have been attached as Review

5 Exhibits. Do both parties understand the

6 protective orders and is there anything there

7 that we need to address at this point?

8

9 **PROS:** No, sir.

10

11 **DC:** No, sir.

12

13 **Presiding Officer:** And both parties understand the

14 provisions of Military Commission Order Number 1

15 as it governs protected information?

16

17 **DC:** Yes, sir.

18

19 **PROS:** Yes, sir.

20

21 **Presiding Officer:** Both parties understand their

22 obligations to inform me should they intend to

1 get into protected information here in open
2 court?
3
4 **PROS:** Yes, sir.
5
6 **DC:** Yes, sir.
7
8 **Presiding Officer:** Is either party aware of any other
9 protective orders that might govern these
10 proceedings other than the three that I have
11 issued?
12
13 **PROS:** No, sir.
14
15 **DC:** No, sir.
16
17 **Presiding Officer:** If there is anything that comes up,
18 particularly, Colonel Bogar, if you do request or
19 do think that you need some relief from one of
20 those or more of those protective orders, I would
21 ask you to please approach the Prosecution first,
22 attempt to resolve it, and then if need be,
23 approach me.

1

2 **DC:** Yes, sir.

3

4 **Presiding Officer:** And all of the Presiding Officer

5 memorandums that are in effect to date remain in

6 effect. I believe we have eliminated the

7 requirement to attach those to the record, but

8 you do have a copy of those?

9

10 **DC:** Yes, sir.

11

12 **Presiding Officer:** Government, you do have a copy of them

13 as well?

14

15 **PROS:** Yes, sir.

16

17 **Presiding Officer:** We talked at the 8-5 and I quite

18 frankly don't remember if it was this morning or

19 yesterday, I think it was yesterday, about

20 motions, pleas, and the defense, you have

21 indicated that you wanted to reserve both pleas

22 and motions, is that correct?

23

1 **DC:** That is correct, Your Honor.

2

3 **Presiding Officer:** And I indicated I would allow you to do

4 that. I will, however, ask or call, rather, for

5 pleas by your client. I will not ask that you

6 enter those pleas at this time, all right?

7

8 **DC:** Your Honor, if I may ask that you speak a little

9 slower. I have been told it is a little

10 confusing.

11

12 **Presiding Officer:** Mr. Zahir, at this point I am going to

13 ask that you enter pleas as to the charges

14 against you. I am not going to require that you

15 answer that call for pleas. Your defense counsel

16 has asked to reserve that, in other words, enter

17 those pleas at a later date, and I have given him

18 permission to do so. Do you understand that.

19

20 **ACC:** Yes.

21

1 **Presiding Officer:** Additionally, I have given him leave,
2 permission to file motions on your behalf at a
3 later date. Do you understand that?
4
5 **ACC:** Yes.
6
7 **Presiding Officer:** At this time, Mr. Abdul Zahir, I ask
8 you, how you plead, again, I will allow you
9 reserve those pleas.
10
11 [The Accused remained silent.]
12
13 **Presiding Officer:** All right. This morning at our 8-5 we
14 talked about our schedule for future proceedings.
15 I was provided a, basically a handwritten form
16 that addresses those dates. We agreed, and it is
17 my understanding that the counsel intend to go to
18 [redacted] for preparation and that they will
19 return [redacted] And I have
20 indicated that while they are gone, they are to
21 discuss it amongst themselves and arrive at a
22 proposed trial date, and by trial date, I am
23 talking about when we will actually seat the

1 members of the Commission and begin the
2 presentation of evidence in the case. In the
3 event that counsel cannot arrive at a mutually
4 agreeable time, or date rather, or a date that is
5 satisfactory to myself, I have indicated that we
6 will return here during the week of 10 July to
7 litigate the issue of when we will actually set
8 the trial date. I fully anticipate we will not
9 have to do that.
10
11 Counsel also agreed that we would litigate the
12 law motions during the trial term that will go
13 during the week of 21 August and that we will
14 return during the week of 11 September, during
15 that trial term, and we will litigate all the
16 remaining motions.
17
18 As to the other dates that are contained on the
19 exhibit, which are basically filing deadlines, I
20 will ask counsel to reduce this to a more
21 suitable format, in other words, typed, and
22 provided to the Clerk or the, rather the
23 assistant to the Presiding Officer as well as the

1 court reporter for inclusion in the record as a
2 review exhibit.
3
4 I would also note that we were to litigate any
5 motion that the defense had with respect to
6 discovery, and I believe we were to do that
7 today. Colonel Bogar, you indicated you have no
8 motion, is that correct?
9
10 **DC:** That is correct, Your Honor, and just to clarify
11 what you just said, it was as the discovery
12 order.
13
14 **Presiding Officer:** The discovery order.
15
16 **DC:** And we have no motion as to the discovery order.
17
18 **Presiding Officer:** Correct, although there may be motions
19 with respect to discovery itself?
20
21 **DC:** Yes, sir.
22

1 **Presiding Officer:** All right. As to discovery and the due
2 dates, the counsel have indicated a willingness
3 to work with those dates between themselves and
4 just keep the Presiding Officer informed, and I
5 have agreed to that procedure. As to the dates
6 for filing of motions and responses, as well as
7 replies, counsel have also indicated a
8 willingness to work with each other. Should
9 either side need to slide the filing deadline a
10 day or so out and I have agreed to that, again,
11 so long as they keep myself informed. If there
12 does become a problem, counsel will let me know,
13 again vie email.
14
15 I have also indicated during that 8-5 a
16 willingness on my part, if we need to do an 8-5
17 to resolve some issue that we can do that
18 telephonically and I have provided my work number
19 to the counsel.
20
21 I believe that is all we have to take up today.
22 Does either side have any additional matters they
23 want to raise?

1

2 **PROS:** No, sir.

3

4 **DC:** No, sir.

5

6 **Presiding Officer:** Then until the next session, the

7 Commission will be in recess.

8

9 *The Commission hearing recessed at 1052, 4 April 2006.*

**AUTHENTICATION OF**
**FINAL SESSION TRANSCRIPT**

in the case of:

***United States v. Abdul Zahir***
a/k/a/ Abdul Bari

This is to certify that the Pages **1** through **75** (includes this Authentication Page) are an accurate and verbatim transcript of the proceedings held in the above styled case on **April 4, 2006**.

Robert S. Chester
Colonel, USMC

27 Apr 06
DATE