UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**P-009** **Defense Opposition** To Prosecution's Motion for Reconsideration 10 October 2008

1. **Timeliness**: This Opposition is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court and the Military Judge's ruling on the Defense Request for Special Relief.

2. **Relief Sought**: The Prosecution's Motion for Reconsideration should be denied.

3. **Overview**:

> Accused: "If you ask me what the color of this paper is, I will tell you the color is white. You say no, it's black. I say white, you say black. I say fine, it's black. Then you say no, it's white. This is the American government."

(Transcript of Proceedings, 28 April 2008, at 280.)

On August 7, 2008, the United States Government said to Mr. Hamdan: "You are sentenced to 66 months, reduced by credit for pretrial confinement in the amount of 61 months, eight days."

Now the United States Government wants to say to Mr. Hamdan: "Your sentence is NOT 66 months, reduced by credit for pretrial confinement in the amount of 61 months, eight days. In fact, we would like to re-sentence you to a much longer term." No wonder Mr. Hamdan is distrustful of the Government.

Actions speak louder than words. On August 7, 2008, the Administration heralded the verdict in *U.S. v. Hamdan*, releasing a statement to the press emphasizing the fairness of the outcome. Now, 65 days later, the Administration demonstrates that, in fact, it was sorely disappointed in the verdict, because it now seeks to have the Military Judge vacate the sentence

that the Members of the Commission saw fit to impose. The Prosecution's attempt to have the sentencing verdict thrown out is nothing more than "sour grapes" and an unvarnished attempt to impose a longer sentence on Mr. Hamdan than the Commission Members deemed appropriate. In short, the Administration's position is that it should have two opportunities to seek a sentence that it deems long enough, first during the trial based on the evidence and information the Commission Members considered, and then later by changing the evidence and information on which the Members relied.

The Members knew exactly what they were doing when they imposed a sentence that Mr. Hamdan will serve in full by year-end. They understood before they announced their decision that a 66-month sentence would result in Mr. Hamdan being released in five months given the 61-months credit for pretrial confinement he already had received. It would be totally unfair now -- two months after the Commission Members completed their deliberations -- to reassemble the Panel and ask the Members to impose a longer sentence just because the Administration would like to avoid releasing Mr. Hamdan in December. Doing so would make our system of justice appear ridiculous to the rest of the Western World and would demonstrate that the Administration can ignore the Rule of Law when it wishes, and retry a case whenever it thinks the Panel Members were too lenient.

The Prosecution's Motion should be denied. First, the Prosecution not only waived any objection to the instructions the Members received, it also affirmatively concurred that the Members should be informed that whatever sentence they imposed would be reduced by 61 months, eight days credit for pretrial confinement. The Members relied on that instruction in fashioning their sentencing verdict, and the Prosecution should not be allowed to have it both ways -- agreeing that the Members should be made aware on August 7 that their verdict would

be reduced by 61 months, eight days, and then challenging two months later the Members' entitlement to take pretrial credit into account when determining their verdict. Second, the untimely relief sought by the Prosecution now is barred by the Military Commissions Act ("MCA") and the Rules for Military Commissions. Third, the Military Judge was well within his discretion and authority to rule on credit for pretrial credit, and there was no abuse of discretion in the Military Judge's Ruling awarding 61 months, eight days credit.

4. **Burden and Standard of Proof:** The Prosecution correctly acknowledges that it bears the burden of persuasion. RMC 905(c)(2).

5. **Facts:**

A. On 5 August 2008, outside the presence of Commission Members, the Military Judge heard oral argument on Mr. Hamdan's motion for pretrial confinement credit (D-019)[1] (See Attachment A, Trial transcript (unauthenticated) for 5 August 2008 session at 23-29).

B. On 6 August 2008, again outside the presence of the Members, the Military Judge announced a partial ruling on D-019, granting Mr. Hamdan some credit for time served, to be credited against any sentence imposed. In making that ruling, the Military Judge stated that he would "instruct the members" that Mr. Hamdan would be given day-for-day credit for the period from 1 July 2003 to the present; that Mr. Hamdan be given no credit for the period from his capture on 24 November 2001 through 30 June 2003; and that the Members should consider his detention during that earlier uncredited period "as a factor in determining what

[1] Defense Motion for Relief from Punitive Conditions of Confinement and for Confinement Credit D-019, originally was filed on 1 February 2008, and thus had been pending for over seven months at the time it was decided. Prosecution cannot pretend to be surprised that credit for pretrial confinement was considered before the Members deliberated their sentencing verdict.

sentence they consider appropriate." (Attachment A, Trial transcript (unauthenticated) for 6 August 2008 session at 65.)

C. The Prosecution did not object to any aspect of the 6 August ruling. Nor did the Prosecution take any steps to seek interim review of the ruling before it was implemented, or to stay its effect. Indeed, there were no questions from counsel concerning the 6 August ruling, and no objections were made concerning the anticipated instruction to the Members. (*Id.* at 66.)

D. The very next day, 7 August 2008, was to be the last day of trial. Based in part on the manner in which they intended to present oral argument at the end of the sentencing phase, Defense counsel initially requested that the Commission Members not be instructed regarding the pretrial credit that would be applied against any sentence they decided. (Attachment A, Trial transcript (unauthenticated) for 7 August 2008 session at 69-71). The Prosecution did not object to excluding that instruction. Nor did the Prosecution insist that the information not be communicated to the Members. Nor did the Prosecution object to the prior day's ruling that credit for pretrial confinement would be applied.

E. The Military Judge, with the concurrence of counsel, indicated initially that he would not mention pretrial credit to the Commission Members, but rather would instruct them that they should consider Mr. Hamdan's pretrial detention generally and give it the weight they deemed appropriate, without requiring any specific formula to be used with respect to it. (*Id.* at 73-74).

F. During the sentencing phase of trial, the Defense submitted evidence going to the

full range of issues relevant to the Commission Members' sentencing decision, including matters in extenuation and mitigation, factors relating to deterrence, rehabilitative potential, and likelihood of future dangerousness. The evidence included testimony from psychiatrist Dr. [redacted], relevant photographic evidence, and an unsworn statement to the Members made by Mr. Hamdan. (*See, e.g.*, Trial transcript (unauthenticated) (6 August 2008 session) at 76-124).

G. Following the introduction of this evidence and oral argument from counsel regarding sentencing, Commission Members were instructed by the Military Judge on their sentencing determination. Specifically, the Military Judge instructed the Members on pretrial confinement credit in precisely the manner agreed upon with counsel: "You should consider the duration of the accused's pretrial confinement or detention, I should say. The law does not require that you use any specific formula in considering this pretrial detention, but it does require that you consider the detention and give it the weight you deem appropriate." (Attachment A, Trial transcript (unauthenticated) for 7 August 2008 session at 100.) There were no objections to the instructions in general or to this sentencing instruction in particular from either the Prosecution or the Defense. (*See* full instructions on sentencing, *id.* at 98-106).

H. Prior to withdrawing for deliberations on sentencing, Commission Members submitted two written questions to the Military Judge. (AE 324, AE 325). Both questions went to the same issue, namely, how long Mr. Hamdan had been detained, and how "time already served" should be expressed in sentencing. (Attachment A, Trial transcript (unauthenticated) for 7 August 2008 session at

107, 113, 115).

I. Based on evidence admitted during trial on the merits, the Commission Members were aware that Mr. Hamdan had been captured in Afghanistan on November 24, 2001, and that he had been transferred to the Guantanamo Bay Naval Station in 2002. The evidence at trial indicated that Mr. Hamdan had been in confinement without interruption since the date of his capture, and that he repeatedly had been interrogated in both Afghanistan and while imprisoned at Guantanamo.

J. The Military Judge disclosed the Members' written questions to the Prosecution and the Defense. Neither side objected to the Military Judge providing an answer to the questions. (Attachment A, Trial transcript for 7 August 2008 session at 113-14).

K. In an 803 session outside the presence of the Members, the Military Judge proposed that in responding to the Members' written questions "we tell them [the Members] the exact answer and exactly what he's going to get credit for and what he's not going to get credit for, and put it in their hands. That's where the burden should be." (*Id.* at 107.) No one suggested the issue be ignored in light of the explicit questions received from the Members.

L. Defense counsel immediately agreed with that proposal, urging that the Members be told that credit would be given for the period from 1 July 2003 to the present, but that they could also consider the detention during the period from November 2001 up until 1 July 2003. (*Id.* at 108.) While the statements from the Prosecution were somewhat opaque, it appears that the concern articulated related to the period from November 2001 through 1 July 2003, specifically, that Mr.

Hamdan should not be given credit for that period. (*See id.* at 111: "[Asst. Trial Counsel]: I think it's appropriate to just tell them, sir, that [Mr. Hamdan's] been in detention since 24 November 2001. But that it is not appropriate for them to give him credit for that time . . . ." The Military Judge restated this by saying "Okay. What I'm going to do then is I'm going to [tell] them that [Mr. Hamdan] was held in detention during that period of time, that I haven't ordered credit for that, but that they should give it the weight they believe it deserves. And then I'll tell them that I've ordered credit for the other period [1 July 2003 to the present], and they should give that the weight it deserves." (*Id.* at 112.) This met with no objection from either side. (*Id.* at 112, 114.) Indeed, the last word on this proposed course of action prior to the delivery of the instruction came from Trial Counsel: "No objection from the government, your honor." (*Id.* at 114.)

N. Based on the parties' concurrence, the Military Judge proceeded in reliance on what everyone understood was an agreed basis. The Military Judge specifically instructed the Members in conformity to that agreed-upon proposal. (*Id.* at 115-116).) Specifically, the Judge explained to the Members that Mr. Hamdan would be given 61 months, 8 days credit for pretrial confinement, which would be credited against and subtracted from whatever sentence the Members returned. (*Id.* at 115-117.) The Defense then requested that, to avoid any confusion, the Military Judge provide an arithmetic example of how that credit would operate, using a hypothetical sentence of confinement for a given number of months. (*Id.* at 118.) That request for clarification elicited no objection from the Prosecution. The Military Judge then gave a specific example of how the credit for time served

would operate. Again, no objection of any sort was raised by the Prosecution before or after this exchange precipitated by the Members' written questions. (*Id.*)

O. The Commission Members then withdrew to decide an appropriate sentence, returning later the same day (7 August 2008) to announce that they had reached a sentence of 66 months total confinement. (*Id.* at 123.) The trial having concluded, the Military Judge then adjourned the Military Commission and dismissed the Members.

P. As of the date of this Opposition, the record of trial has not yet been authenticated.

Q. At the outset of the trial, the Commission Members had been instructed that, at all times prior to rendering a verdict and possible sentence, the Members should avoid publicity about the matters they were to decide, and were to base their verdict and any possible sentence only on the evidence presented in Court and the instructions from the Military Judge.

S. On 24 September 2008, the Prosecution moved for "reconsideration and reversal of the Military Judge's ruling and sentencing instruction that the accused is entitled to credit against the adjudged sentence for time spent in detention . . . prior to trial." (Govt. Motion at 1.) At no time prior to 24 September – 47 days after the sentence was returned, and the trial concluded, and the Members dismissed – did the Prosecution object or otherwise attempt to prevent the Members from reaching a sentence that they fully understood would be offset by 61 months, 8 days.

6. **Law and Argument:** The Prosecution's motion to set aside the sentence as the product of legal error should be denied. To begin with, the Prosecution waived any objection to the sentencing instructions by failing to voice those objections prior to the Members withdrawing to deliberate on the sentence. RMC 1005(f). But even had their objection be properly preserved, both the MCA and the RMC prohibit the reconsideration sought here, as the sentence imposed is legal on its face, no extraneous information prejudicial to the substantial rights of the accused was introduced, and the only purpose the Prosecution hopes to serve by the post-trial session – to increase the severity of the sentence – is expressly prohibited by RMC 1102. Moreover, the Prosecution is simply wrong in asserting that it is beyond the authority of the Military Judge to award credit for pre-trial confinement. As discussed below, "credit for pretrial confinement and/or punishment has a long history in military law," *United States v. Rock*, 52 M.J. 154, 156 (C.A.A.F. 1999), and nothing in the MCA or the RMC suggests that military commissions cannot consider pretrial confinement in determining a proper sentence. On the contrary, the MCA calls for military commissions to generally "apply the principles of law . . . [employed] by general courts-martial," and the RMC expressly provides that "the sentence to be adjudged is a matter within the discretion of the military commission." MCA § 949a; RMC 1002. The Prosecution, however, would prefer that no law apply.

In this case, the sentence of 66 months of confinement was imposed with the knowledge and expectation that 61 months, 8 days credit would be given against that sentence. Thus, the reality of the sentencing decision announced by the Members was that they imposed a sentence of 4 months and 22 days of additional confinement for Mr. Hamdan. They knew what they were doing. The Prosecution has identified no valid basis for reconsidering that determination. To the extent the Prosecution claims that it merely wants to remedy a legal error (should the Prosecution acknowledge that it is barred from increasing the severity of the punishment imposed – in reality as well as in form), its Motion fails to demonstrate that the purported error amounts to "plain error," which is the standard applicable here. Indeed, the Prosecution's motion calls for a pointless exercise and a vast waste of time, money, and effort, as all that can occur under the

MCA and RMC is to move a large number of people to Guantanamo for the purpose of expressing the same sentence in different words: "4 months and 22 days," rather than "66 months with a credit of 61 months, 8 days." That is a long way to go for such a trivial result.

A. The Prosecution Waived Any Objections to the Sentencing Instructions

The Prosecution's motion should be denied because its newly-asserted objection that the sentence is the product of legal error has been waived. RMC 1005(f) provides, in pertinent part:

> **Rule 1005. Instructions on sentence**
>
> (f) *Waiver*. Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error.

In this case, the Defense initially requested that the Commission Members not be informed about the decision of the Military Judge to grant credit for pre-trial confinement. (Attachment A, Trial transcript (unauthenticated) for 7 August 2008 session at 69.) However, when the Members asked about "time already served" and how that should be expressed in the sentence, neither party objected to instructing the Members about the pre-trial credit. (*Id.* at 113-14). That information then became an integral part of the instructions. After being informed about the award of credit, the Members closed to deliberate, and then returned and announced the sentence. Accordingly, pursuant to RMC 1005(f), the Prosecution waived its objection to the sentencing instructions and to the credit that was one of the most significant elements of the instructions.

B. The Relief Sought by the Prosecution Is Barred by the MCA and the Rules for Military Commissions

Even if the Prosecution had preserved its objection to the sentencing instruction (which, as the record reflects, it did not), the relief requested by the Prosecution is expressly barred by both the MCA and the Rules for Military Commissions.

1. The MCA Prohibits the Re-sentencing Hearing in the Absence of Material Prejudice to the Substantial Rights of the Accused

The Prosecution acknowledges that its motion "presents a pure question of law." (Govt.

Motion at 6.) Under these circumstances, the Military Commissions Act prohibits the review and re-sentencing sought by the Prosecution:

> **§ 950a. Error of Law; lesser included offense**
>
> (a) Error of Law.— A finding or sentence of a military commission under this chapter may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

In this case, the alleged error of law – the decision to award credit for pretrial confinement and to inform the Commission Members of that fact – did not materially prejudice the substantial rights of the accused. Rather, the award of credit was potentially – but not certainly – beneficial to Mr. Hamdan. The decision to inform the Commission Members about the credit in response to their questions was neutral in its effect. It neither helped nor hurt Mr. Hamdan; it simply assisted the Members in assessing an appropriate sentence based on the operation of an important factor at play in the equation. Indeed, had that information <u>not</u> been provided, it is entirely possible that Mr. Hamdan could have been prejudiced by an incorrect assumption on the part of the Members concerning how much credit would be given. Providing this information to the Members simply allowed them to fine-tune their decision to precisely reflect their judgment on the appropriate length of future confinement. It did not materially prejudice Mr. Hamdan. Under such circumstances, the Prosecution's request for re-sentencing based on the alleged error of law is precluded by MCA § 950a.

Although its motion fails to mention the applicable standard, in order to prevail now the Prosecution must show that the Military Judge's instruction providing Mr. Hamdan credit for pretrial confinement amounts to "plain error." *Id.* "[The] Court may exercise its discretion to reverse on a forfeited error only if the error materially prejudices the substantial rights of the appellant, or the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Ruiz*, 54 M.J. 138, 143 (C.A.A.F. 2000) (quotation marks and citation omitted). "Further, the plain-error doctrine is reserved for those circumstances in which a miscarriage of justice would otherwise result." *United States v. Jackson*, 38 M.J. 106, 111

(U.S.C.M.A. 1993) (internal quotation marks and citation omitted) (holding that the Military Judge's jury instructions were erroneous but not sufficiently flawed to constitute "plain error"). Even if the Prosecution were correct that the Military Judge's instruction on pre-trial confinement was legally erroneous – and for reasons identified below, *see* Part 6.C, *infra*, the instruction was wholly appropriate and lawful – the professed error hardly produced a "miscarriage of justice" that "affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Ruiz*, 54 M.J. at 143; *Jackson*, 38 M.J. at 111. Indeed, the Prosecution's request that the Commission Members reconvene for the pointless exercise of pronouncing a new sentence using different arithmetic demonstrates that the claimed error is harmless, at most.

2. The Conditions for Impeachment of a Sentence Set by RMC 1008 Have Not Been Met

The Rules for Military Commissions allow sentences to be impeached in only a limited set of circumstances, none of which is present here. RMC 1008 provides:

> **Rule 1008. Impeachment of sentence**
>
> A sentence which is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon a member, or unlawful command influence was brought to bear upon any member.

In this case, the sentence imposed by the Members is proper on its face, whether described as 66 months not counting a credit for pretrial confinement, or as the net of 66 months minus 61 months and 8 days. The Prosecution does not contend that a sentence of 4 months, 22 days is either illegal or ambiguous. The only way the Prosecution can plausibly contend that RMC 1008 is satisfied is to maintain that information about the pre-trial credit – provided in response to Members' questions – constituted " extraneous prejudicial information . . . improperly brought to the attention of a member." However, this information was neither "extraneous," "prejudicial," nor "improperly" brought to the Members' attention. It was not extraneous because it was highly pertinent to the sentencing decision that the Members had to

make. They needed that information to assess the degree of punishment that their sentence would impose. In addition, the Prosecution does not maintain, and obviously cannot show, that such information was prejudicial. Indeed, as discussed above, it was perfectly neutral in its operation. Knowing the amount of pre-trial credit awarded, the Members could determine how their sentencing decision would work in practice and precisely tailor the sentence to reflect their judgment on how to best achieve the legitimate ends of sentencing. There was nothing "improper" in providing this information to the Members. It was explained to them at their request, without objection from the Prosecution, in a manner that was procedurally and substantively appropriate.

Neither of the other conditions mentioned in RMC 1008 – outside influence and unlawful command influence – is alleged by the Prosecution. Accordingly, the relief requested by the instant motion is barred by that Rule.

3. The Grounds for Reconsideration of a Sentence – Illegality as Described in RMC 1009 – Are Not Present Here

RMC 1009(a) provides that "[s]ubject to this rule, a sentence may be reconsidered at any time before such sentence is announced in open session of the court." RMC 1009(b) identifies "Exceptions" to that rule, two instances where reconsideration would be appropriate due to the illegality of the sentence. The first exception is where "the sentence announced in open session was less than the mandatory minimum prescribed," and the second is where the sentence "exceeds the maximum permissible punishment." RMC 1009(b)(1) and (2).[2]

The sentence imposed in this case, announced in open court on 7 August 2008, is neither less than any required minimum nor greater than any maximum punishment imposed under the MCA or the RMC. Thus, the reconsideration requested by the Prosecution is unauthorized under RMC 1009. Nor is there any ambiguity in the sentence that would require a post-trial session under RMC 1009(c).

[2] The rationale for prohibiting reconsideration after a sentence has been announced presumably relates to the fact that, after announcement and adjournment, members are permitted to discuss their deliberations with counsel, to be interviewed by the press, and to read press accounts of the trial and reactions to the verdict and sentence.

4. The Prosecution is Seeking to Increase the Severity of the Sentence in Violation of RMC 1102(c)

RMC 1102(c)(3) provides that post-trial sessions may not be directed by either the Military Judge or the Convening Authority "[f]or increasing the severity of the sentence unless: (A) the commission failed to adjudge a sentence prescribed by the M.C.A. as mandatory . . .; or (B) the adjudged sentence was less than that agreed to by the accused and the convening authority in a pretrial agreement. . . ."

Neither of those conditions is present here. There is no mandatory sentence for a conviction of Material Support for Terrorism. Nor was there any pretrial agreement between the Convening Authority and Mr. Hamdan. The only purpose that could possibly be served by reconsidering the credit granted by the Military Judge is to increase the severity of the sentence. The Prosecution's assurance that it would not seek a sentence greater than the 66 months already imposed is insufficient to avoid the potential of a more severe sentence, as the 66 month sentence was obviously imposed with the expectation that 61 months, 8 days would be subtracted as a credit for time served. Thus, absent an instruction to the Commission that whatever sentence is imposed cannot run beyond 31 December 2008 (66 months minus 61 months, 8 days, from a point starting on the date the sentence was imposed, 7 August 2008), then the reality of the re-sentencing sought by the Prosecution will run afoul of the RMC 1102(c) prohibition on increasing the severity of a sentence. The Prosecution should not be permitted to side-step the RMC and the intention of Congress by arguing that it only seeks modification of the credit rather than the announced sentence. That argument elevates form over substance, ignores the reality of the punishment imposed, and trifles with the considered judgment of the Members.

C. The Military Judge Has the Authority to Award Credit for Pretrial Confinement, and Did Not Abuse His Discretion in Making Such an Award

The Motion for Reconsideration should be denied for the additional reason that the Prosecution is simply wrong in asserting that the Military Judge does not have authority to award Mr. Hamdan credit for pre-trial confinement. The Prosecution's argument is that the MCA and the Manual for Military Commissions ("MMC") do not expressly mention such credit, and

therefore no authority exists for the award. This argument fails on multiple grounds.

First, the absence of express reference to pre-trial confinement credit in the MCA or the MMC does not logically lead to a conclusion that the Military Judge lacks authority to award such credit. As was pointed out by the Defense in its briefing on D-019 (Defense Motion for Relief from Punitive Conditions of Confinement and for Confinement Credit), "credit for pretrial confinement and/or punishment has a long history in military law." *United States v. Rock*, 52 M.J. at 156. The absence of reference to "*Allen*" credit (for legal pretrial confinement) or to "*Pierce*" credit (for nonjudicial punishment) in the UCMJ or the Manual for Courts-Martial has not stopped military courts from awarding such credit on due process grounds. *See United States v. Rock*, 52 M.J. at 156-57 (discussing cases).[3]

The CMCR's decision in *United States v. Khadr* provides a clear example of how the lack of a provision in the MCA or MMC on a particular issue does not indicate that a military commission lacks authority to proceed in a manner consistent with recognized principles of military jurisprudence. In that case, the military judge at the trial court initially ruled that he lacked authority under the MCA to hear evidence and make a determination on personal jurisdiction because there was no provision in the MCA expressly describing such a procedure. The CMCR reversed that decision, explaining that

> Congress, clearly aware of historical court-martial practice, and desiring that military commissions mirror this firmly rooted practice to the maximum extent practicable, would not have deprived military commissions of the ability to independently decide personal jurisdiction absent an express statement of such intent. No such statement is contained anywhere in the MCA.

[3] The Defense incorporates by reference the argument and authority set out in its briefing on D-019. *See* in particular D-019 – Defense Reply at 3, discussing the decisions of military appellate courts recognizing pretrial confinement and/or punishment credit as an element of military due process. Such considerations of due process are obviously of paramount importance to any "regularly constituted court" committed to the fair and impartial administration of justice. *See* MCA § 948b(f) (indicating that, in enacting the MCA, Congress "appears to have embraced the minimal safeguards guaranteed by Common Article 3," *United States v. Khadr*, CMCR 07-001 at 15 (24 September 2007)). Indeed, in *Khadr*, the CMCR found that due process (and Common Article 3) would be offended were a military commission to accept the Government's argument that a CSRT finding be given dispositive effect on a jurisdictional question. *Id.* at 15 ("Such lack of notice offends our most basic and fundamental notions of due process; therefore it also violates Common Article 3").

* * *

> Accordingly, we may properly find – as clearly indicated in the language of M.C.A. §§ 949a(a) and 948b(c) – that Congress intended for military commissions to "apply the principles of law" and the "procedures for trial [routinely utilized] by general court-martial . . . ."

Khadr, CMCR 07-001 at 23. Thus, the CMCR rejected the narrow reading of the MCA urged by the Prosecution in this case. Awarding credit for pretrial confinement is a "firmly rooted practice" in American military jurisprudence, and consistent with the approach prescribed in *Khadr*, the Military Judge in this case properly determined that he had the authority to "mirror this firmly rooted practice." The Prosecution has advanced no new authority or argument to call that ruling into question.

Moreover, contrary to the Prosecution's contention about the Commission's restricted authority on this issue, both the MCA and the RMC provide military commissions with broad discretion and authority in the imposition of punishments. MCA § 948d(d) provides

> (d) Punishments.— A military commission under this chapter may, under such limitations as the Secretary of Defense may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when authorized under this chapter or the law of war.

The Secretary of Defense has not promulgated any regulation prohibiting a military commission from awarding credit for pretrial confinement. Nor is the imposition of a punishment that takes pretrial confinement into consideration forbidden anywhere in the MCA. Accordingly, the Military Judge did not err in ruling that Mr. Hamdan would be entitled to receive such credit.

Likewise, RMC 1002 provides broad discretion in the imposition of a sentence:

> **Rule 1002. Sentence determination**
>
> Subject to limitations in this Manual, or when appropriate, the limitations in the law of war, the sentence to be adjudged is a matter within the discretion of the military commission. Except as instructed by the military judge, a military commission may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.

As noted above, there is no provision in the MMC that prohibits the award of pretrial confinement credit, and no limitation on such an award under the law of war.[4] Under these circumstances, the sentence "is a matter within the discretion of the military commission." There was no abuse of that discretion in this case, much less any legal error in the determination of the sentence. Rather, the sentence imposed reflected the carefully considered judgment of the Commission Members, following proper instruction on how the award for pretrial confinement would operate. Accordingly, the Prosecution's Motion for Reconsideration should be denied.

7. **Request for Oral Argument:** The Defense does not request oral argument.

8. **Request for Witnesses:** The Defense anticipates no need to call witnesses concerning the instant motion.

9. **Attachments:**

A. Selected pages from the Trial transcript in *United States v. Hamdan.*

[4] On the contrary, Article 75 of Additional Protocol I to the Geneva Conventions, which "articulates many of the fundamental guarantees" protected by Common Article 3 (*Khadr*, CMCR 07-001 at 15 n.24), prohibits penalties "except pursuant to a conviction pronounced by an impartial and regularly constituted court." The award of pretrial confinement credit is consistent with this prohibition on penalties absent a conviction under the law of war.

Respectfully submitted,

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ATTACHMENT A

5 AUGUST 2008

1 ADC [MR. SWIFT]: ----a stipulation--yes. And we are working
2 toward a stipulation of fact setting out that chronological record, and
3 I think we will have it within an hour or so.
4 TC [LCDR STONE]: It depends on how much time we are researching
5 mistrials but...
6 ADC [MR. SWIFT]: Yeah.
7 MJ [CAPT ALLRED]: This is one of those days when it's good to
8 have four prosecutors and five defense counsel, isn't it.
9 TC [LCDR STONE]: Amen, sir.
10 MJ [CAPT ALLRED]: And only one judge though. Remember. So
11 I--I've got to move more slowly perhaps.
12 TC [LCDR STONE]: Well, Commander Swift is right. Well, sorry.
13 Mr. Swift. We've been talking, and I think we will be able to reach
14 sort of the permanent cell locations stipulation; and then for you to
15 actually consider that, I mean, not only with regards your motion, but
16 then whether or not they choose to try to introduce that on sentencing
17 if we get that far.
18 MJ [CAPT ALLRED]: Try to introduce what?
19 TC [LCDR STONE]: Try to introduce some of the facts that might be
20 contained in that in any sort of sentencing case that they might have.
21 MJ [CAPT ALLRED]: Oh, uh-huh.
22 TC [LCDR STONE]: So--and that's kind of the reason for entering
23 into this stipulation; and then whether, you know, and then we may

1 argue the relevancy of it; but nonetheless, we both agree that we need
2 to get to that step before we argue whether it's relevant or whether it
3 be considered; but we are working. We should have it fairly soon I
4 think.
5 MJ [CAPT ALLRED]: Okay. Well, then I will go work on the
6 pretrial confinement motion I suppose, unless I receive some authority
7 from one of the sides that suggests I should either do something
8 different about the instructions----
9 ADC [MR. SWIFT]: I am going to offer a few parts to Your
10 Honor----
11 MJ [CAPT ALLRED]: ----or----
12 ADC [MR. SWIFT]: ----if you were going to work on the pretrial
13 confinement, in light of the decision that I handed you the--the
14 decision.
15 MJ [CAPT ALLRED]: The *Padilla* decision?
16 ADC [MR. SWIFT]: The *Padilla* decision.
17 MJ [CAPT ALLRED]: I read that.
18 ADC [MR. SWIFT]: I think there are two parts that need to be
19 highlighted in what I count Mr. Hamdan's case as analogous.
20 First off, it should be noted by this Court that since July
21 3d of 2003, Mr. Hamdan has been different than the vast majority of
22 detainees held at Guantanamo Bay. On July 3d, he was found to--by
23 reason of presidential finding, by a reason to believe that he was

1 eligible for trial by military commission. That differentiated him
2 from all the five other detainees who were in the pretrial part; and at
3 subsequent parts, he has been treated in the pretrial, most
4 significantly, while he was in Camp Echo and then for a 27-day period
5 when he was in Camp 5, pursuant to orders for pre-commission
6 segregation.
7 But even in the periods he was not, he was still different;
8 and that is, that subsequent to the Supreme Court's decision in 2004,
9 they instituted, well, both the Combat Status Review Tribunal but also
10 the Administrative Review Tribunal Board.
11 The Administrative Review Board look at the issues of whether
12 continued administrative confinement was appropriate, whether somebody
13 aided--two factors: Intelligence value and further threat.
14 Mr. Hamdan in light of the fact that he was being held for a
15 military commission was ineligible for that consideration. In other
16 words, he was in pretrial confinement of some form and for that entire
17 period of time; and that differentiates him from the idea of----
18 MJ [CAPT ALLRED]: I read that assertion in your declaration.
19 That's why I was asking if both parties intended for me to consider
20 that all to be admissible evidence on the motion.
21 ADC [MR. SWIFT]: Okay. Those were the parts that I wanted to
22 highlight for the court, that there was that period of time that--well,
23 we have argued for all of it. There is, admittedly, a stronger

1 argument that begins once someone is no longer eligible for release
2 inside the program set up by the United States government; and we would
3 direct that even administrative detention in the *Padilla* case and the
4 other individuals was given credit there where they knew about the
5 offenses, were investigating the offenses, and were part of it; and in
6 Mr. Hamdan's case, during the period of time that has come out quite
7 clear in this trial by virtue of a video, they knew about at least one
8 offense that they intended to charge on the day of his capture.
9 So you know, but at some point, you know, again, and this
10 Court's look at it, whether it has been brought to Guantanamo; and I
11 leave that to the Court; and again, the Court looked at its own factors
12 in *Padilla* in determining what point did it administratively come to
13 the point of it; but we would assert that Mr. Hamdan was in pretrial
14 confinement from the time of the RPB that designated for a mistrial;
15 and if that doesn't happen, this is the injustice to this brought: Mr.
16 Hamdan filed a habeas petition while he was in Camp Echo; went all the
17 way to the Supreme Court, and he won; comes back, there is an MCA
18 mistrial. The--if he is not granted pretrial credit for that period of
19 time, this is the remedy: You should have pled guilty back then
20 because at least you would have gotten the credit. That cannot be the
21 law, especially when the government simultaneously asserts there is no
22 right to a speedy trial. It would create a situation where we merely
23 charge you, take you out of the administrative system, and then hold

1 you for years with no ability to obtain pretrial credit for that. The
2 only way to offset, if one finds there is no right to a speedy trial,
3 to offset the government from the engaging in a position where we
4 simply force you to plead guilty----
5 MJ [CAPT ALLRED]: Uh-huh.
6 ADC [MR. SWIFT]: ----is to grant pretrial credit for that period.
7 Otherwise, why appeal, why litigate that at all. You are losing time.
8 MJ [CAPT ALLRED]: I appreciate that position.
9 ADC [MR. SWIFT]: Yes, sir.
10 MJ [CAPT ALLRED]: I thank you for your argument.
11 Commander Stone, I think you have already argued this motion.
12 Do you have some----
13 TC [LCDR STONE]: Well, only----
14 MJ [CAPT ALLRED]: ----new insights to share?
15 TC [LCDR STONE]: Well, only with respect to the *Padilla* cite by
16 Mr. Swift. Sorry. I keep calling him "commander."
17 He is a little off on the facts when he says "as of July 3d
18 there was no administrative remedy or any other administrative issues
19 that took place." Because the CSRT--and if you harken back to defense
20 motion No. 1 and--to dismiss and the CSRT that was presented by the
21 government, which started this long string of events, you will notice
22 that that was done actually in, I believe it was October of '04.
23 MJ [CAPT ALLRED]: Uh-huh.

1 TC [LCDR STONE]: So there is an administrative process. Now as
2 being designated, there were no administrative review boards in
3 which--because he was, in fact, going to be tried; and, in fact, there
4 was the subject of, as we know, multiple issues with regards to
5 litigation.
6 So I mean, that is a little off on--on that piece.
7 The second piece of it is with regards sentencing. Remember,
8 it is the sentencing authority in the federal court that have the
9 opportunity to make that determination; and as it has been batted
10 around a little bit, the idea that the jury can decide or an
11 instruction to the jury that would say, you can take this into
12 consideration, as one of many sentencing factors certainly becomes
13 analogous with the *Padilla* issues.
14 And with regards to whatever issues may have occurred within
15 Camp Echo, that also may be one of those things that the jury may
16 decide whether or not he should get any other credit.
17 I would also point to the fact that if the defense tries to
18 make a big deal out of that it needs to be an either/or proposition
19 with regards to detention within the laws of war, versus, you know,
20 pretrial confinement and that it must be one or the other, as you may
21 or may not remember, there is substantial precedence within the United
22 States and within the United States military, especially with dealing
23 with forces overseas, in which you can have an individual detained for

1 other purposes while at the same time not gaining pretrial credit for
2 it.
3 I would point you to a case, I don't know if it became a
4 published opinion quite frankly, sir; but it was *U.S. vs Marquez*, in
5 which----
6 MJ [CAPT ALLRED]: What court?
7 TC [LCDR STONE]: I think it eventually became a C.A.A.F.
8 decision. I don't know if it was a published decision, where the
9 defense counsel challenged this very idea of an individual being held
10 in detention--or in a Japanese--in an American brig, pending Japanese
11 trial; and then the defense counsel challenged that, saying that he
12 should be given pretrial credit because of his conditions tantamount to
13 confinement because he was sitting in the brig in Yokosuka Naval Base.
14 That defense counsel lost, was brought up on appeal on other grounds;
15 but that's just one example of a long-standing military tradition where
16 you do have detention, which is what we have here; detention.
17 Whether--and with the idea that a sovereign, in that case the United
18 States, as in this case the United States, can easily then turn that
19 into prosecution and the accused not get specific credit for the
20 previous time. So there is precedence in existence with regards to
21 that.
22 MJ [CAPT ALLRED]: Did you cite those cases in your written brief.
23 I don't remember----

1 TC [LCDR STONE]: No, sir, because it never came up because this
2 just came up with respect to the *Padilla* and the argument that was just
3 made; and quite frankly, the only reason I remember *Marquez*, sir, is
4 because I was the defense counsel.
5 MJ [CAPT ALLRED]: You were the defense counsel who lost, huh?
6 DC [LCDR MIZER]: I was the appellate defense counsel.
7 TC [LCDR STONE]: And Lieutenant Commander Mizer was the appellate
8 counsel.
9 DC [LCDR MIZER]: There was no decision in that case----
10 MJ [CAPT ALLRED]: Okay.
11 DC [LCDR MIZER]: ----Your Honor, on that point. So to the extent
12 that a court-martial judge's decision is considered precedent for this
13 court, that's for the record----
14 MJ [CAPT ALLRED]: There was no C.A.A.F. opinion then on whether
15 or not he was entitled to credit for that detention?
16 DC [LCDR MIZER]: There is not. There is neither a--there is no
17 C.A.A.F. opinion. That is correct, Your Honor. The court declined to
18 grant review; and as you know, a court denied cert is no statement on
19 the substance of the--of the ball.
20 MJ [CAPT ALLRED]: Okay. Well, I will go work on that. You can
21 work on whatever is most important to you; and we will wait for the
22 members.
23 BLF: All rise.

1 MJ [CAPT ALLRED]: They are probably going to be ready to take
2 their recess here in about ten minutes, so don't go too far.
3 **[The military commission closed at 0923, 5 August 2008.]**
4 **[The military commission opened at 1016, 5 August 2008.]**
5 MJ [CAPT ALLRED]: The court is called to order. The members have
6 returned to the courtroom.
7 Members, are you interested in a recess?
8 PRES: Yes, sir.
9 MJ [CAPT ALLRED]: Okay. I see it's 1015 by the clock on the
10 pillar here.
11 Does 15 minutes sound like a good time?
12 PRES: Yes, sir.
13 MJ [CAPT ALLRED]: Okay. The court will stand in recess then
14 until 1030.
15 **[The members departed the courtroom.]**
16 **[The military commission recessed at 1017, 5 August 2008.]**
17 **[The military commission was called to order at 1031, 5 August 2008.]**
18 MJ [CAPT ALLRED]: The court is called to order. The members have
19 returned to the courtroom.
20 Are you ready to continue your deliberations?
21 PRES: Yes, sir.
22 MJ [CAPT ALLRED]: Very good. The court is closed for
23 deliberations. Thank you.

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1 holding him responsible for the 9/11 attacks than it would be probative
2 of what he actually knew or did or supported.
3 So I will sustain the defense objection to that witness.
4 DC [LCDR MIZER]: Thank you, Your Honor.
5 ATC [MR. MURPHY]: Well, Your Honor, we have no witnesses to
6 present.
7 MJ [CAPT ALLRED]: Okay. That's a hard call. I didn't really see
8 it coming, and so I probably should have given more thought to it in
9 advance; but I think that is the right decision.
10 Okay, I'm ready to talk about--I--I will give you a partial
11 ruling on the pretrial confinement motion because I have not had time
12 to go through all of the documents that have been provided and think
13 through all of the issues.
14 The first request for relief was that Mr. Hamdan be removed
15 from the punitive conditions of confinement. That part of the motion
16 is denied. It's now moot. I was waiting for additional evidence,
17 which came slowly; and more importantly it became apparent early on
18 that Mr. Hamdan was attending all of the trial sessions, participating
19 with his counsel, responding to the evidence and reacting to the
20 evidence. He testified twice in his own defense, and the feared impact
21 of the conditions of his confinement didn't materialize. So that part
22 is denied as moot.
23 The request for pretrial confinement credit is denied as it

1 pertains to the period from 24 November 2001 to 1 July 2003. During
2 this period I find that Mr. Hamdan was detained with many other
3 battlefield detainees under the well-recognized authority of a
4 detaining power to detain until the end of the period of hostility
5 those that were captured on the battlefield.
6 As of 1 July 2003, the accused was identified as someone who
7 would be prosecuted in a material military commission, and from that
8 day he was ineligible for administrative release and other benefits
9 that might have led to his repatriation.
10 So for the period of 1 July 2003 to today, the motion is
11 granted for day-for-day credit for each day served in pretrial
12 detention. By my count, that is 61 months and 7 days of credit the
13 accused is entitled to; and I will instruct the members that he will be
14 given credit for that portion of his detention; but that the period
15 from 24 November 2001 to 1 July 2003, he will not be given credit for;
16 and they should consider that as a factor in determining what sentence
17 they consider appropriate.
18 With respect to the part of the motion that asked for extra
19 credit for conditions of confinement that were unnecessarily harsh or
20 punitive, I haven't finished my thinking on that one; but I will tell
21 you that I believe I have the authority to award that relief and that
22 I'm prepared to award that relief if I consider it appropriate. I will
23 make my findings of fact and resolve that issue before I authenticate

1 the record of trial and before it goes to the convening authority, if I
2 don't resolve it before the end of our time here in Guantanamo Bay.
3 So I think you have what you need to argue your cases to the
4 members; and there may be additional credit ultimately awarded, or
5 there be not; but I didn't have time to work through all of your
6 documents and resolve that.
7 Now let's--are there any questions about that?
8 ADC [MR. SWIFT]: No, there are not, Your Honor.
9 MJ [CAPT ALLRED]: Okay. Let's turn to the motion regarding
10 multiplicity that was argued before findings. I agreed that the--many
11 of the specifications under Charge II were multiplicious and indicated
12 that I would let the government send those back to the members for
13 their findings.
14 The accused, having been convicted of Specification 2, which
15 alleges material support for al Qaeda, an international terrorist
16 organization, by receiving training, by driving, by bodyguarding, and
17 by transporting weapons, it appears that Specifications 5, 6, 7, and 8,
18 should all be merged into Specification 2.
19 Specifications 5 and 6 are alternative methods of proving
20 material support for terrorism by driving. Seven and eight are
21 alternative methods of proving material support for terrorism by
22 bodyguarding.
23 So before I make my decision, I would like to announce my

1 inclination to merge all five specifications into one. In other words,
2 into Specification 2, but not to dismiss Specifications 5, 6, 7, or 8
3 until appellate review is complete and the appellate courts have had a
4 chance to resolve this.
5 In the meantime, I propose to instruct the members that they
6 have all been merged and that Mr. Hamdan should be sentenced for a
7 single specification, Specification 2, of providing material support
8 for terrorism.
9 I will let the parties be heard before I--before I finish up.
10 DC [LCDR MIZER]: Your Honor, that was the relief that the defense
11 is going to request.
12 MJ [CAPT ALLRED]: Okay. You may sit down.
13 TC [LCDR STONE]: We would object to the merging of Specifications
14 5 and 7 with Specification 2; and the reason is if you harken back to
15 our February session with regards to--as the manual lays out with
16 regards to multiplicity, it is two separate and distinct charges.
17 Whereas the accused can be found guilty and has been found guilty with
18 regards to providing material support to an act of terrorism, which
19 would encompass a specific act that occurred during that time; and then
20 he broad based material support to the organization, which is what two
21 is.
22 Two and then five and seven should stand by themselves
23 because you have the individual acts as separate charges, as well as

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1 CTC [MR. MURPHY]: Your Honor, it's the government's
2 understanding that they're combined. Obviously, they're sentencing
3 him one specification, but the government does intend to argue that
4 he was convicted of five specifications that are now going to be
5 considered in sentencing as one, and they are grouped.
6 MJ [CAPT ALLRED]: I think that's fair. I mean, he was found
7 guilty of--of providing support for specific acts of terrorism,
8 vague, though, they may be. So, I'll permit vague references to acts
9 of terrorism and instruct the members that they're to sentence him
10 only for his material support and not for the----
11 DC [LCDR MIZER]: Yes, Your Honor.
12 MJ [CAPT ALLRED]: ---- illegal conduct.
13 Okay. Other than that, I gather that the standard
14 sentencing instructions are acceptable to all the parties?
15 CDC [MR. SWIFT]: Two other things, we wanted to put on to the--
16 counsel made reference to five specifications, I trust that that was
17 just the point that counsel was going to--what he could argue, but
18 that he wasn't going to argue that he's been found guilty of five
19 specifications, because that is the exact reverse of multiplicity at
20 this point.
21 CTC [MR. MURPHY]: Your Honor, the government is going to be
22 cautious on this, but I think it's fair to say he was convicted of

1 five specifications, but that the members for sentencing will
2 consider one, and merge all of them into that one.
3 MJ [CAPT ALLRED]: I think that's--I think that that's fair. I
4 mean basically--the problem is, as I've tried to make it clear, the
5 other four kind of restate conduct that you already charged under
6 Specification 2, and I let you send those specifications back to the
7 members to preserve whatever issues might come out on appeal, but, in
8 fact, you know, driving is mentioned in Specification 2, body
9 guarding is mentioned in Specification 2, and----
10 CTC [MR. MURPHY]: Your Honor, the government doesn't intend to
11 dwell on this, but we'll make a brief reference to it. I've
12 carefully written out my closing, so I believe the government will
13 not be straying into any areas that are beyond what we've discussed
14 here.
15 MJ [CAPT ALLRED]: Okay. If you do, I'll just shut you down.
16 CTC [MR. MURPHY]: Right.
17 CDC [MR. SWIFT]: Yesterday, Your Honor expressed the intention
18 to give a sentencing or pretrial credit sentencing instruction.
19 Generally, that's to the benefit of the accused, it's not a mandatory
20 instruction. And having thought about it overnight, we would request
21 that you not give that instruction.
22 MJ [CAPT ALLRED]: Not tell the members that he's going to get
23 credit for part of the time?

1 CDC [MR. SWIFT]: And I won't be arguing anything on his time on
2 Guantánamo, so I won't go against it either. But we request that you
3 not give them that instruction. It's to the benefit of the accused
4 under the clearer part of it, but we decided, through consultation,
5 that we would not like the instruction given. There are other
6 instructions, such as his failure to testify, that are supposedly to
7 his benefit, but in weighing it, we request, if it's a non-mandatory
8 instruction that it not be given.
9 MJ [CAPT ALLRED]: All right. Let's see. Is the government
10 going to be requesting a fine?
11 TC [LCDR STONE]: No, sir, and we have actually prepared the
12 sentencing worksheet in two ways that eliminate the fine as a
13 possibility.
14 MJ [CAPT ALLRED]: Okay. Well, I won't give the instruction on
15 fines then.
16 TC [LCDR STONE]: Sir, we would like to have a minute or two
17 with regards to the defense's not wanting the sentencing--the credit
18 instruction. I think my gut feeling is that we would like that to be
19 included, but I could at least talk with some people here to see if
20 that's kind of what our position is.
21 MJ [CAPT ALLRED]: Okay. Do you want to do that off the
22 record?

1 TC [LCDR STONE]: Yes, sir, I think so, and we can certainly
2 just get back to you after we've made a decision and----
3 MJ [CAPT ALLRED]: Okay. Why don't we come back on the record a
4 couple of minutes before 11 and--the sentencing instructions are very
5 simple so----
6 CDC [MR. SWIFT]: I'll need a little time. I have set up my
7 closing argument in such a way as to not and I'm using some
8 demonstrative aids as to not argue pretrial credit. So that if it
9 were reversed, I'd need a little a time. Our part on--our position
10 is that it's a non-mandatory instruction for our benefit, we would
11 ask that it be--we waive its reading or ask that----
12 MJ [CAPT ALLRED]: Well, take a recess and let you think about
13 it.
14 **[The 803 session recessed at 1050, 7 August 2008.]**
15 **[END OF PAGE]**
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1 **[The 803 session was called to order at 1106, 7 August 2008.]**

2 MJ [CAPT ALLRED]: The court is called to order. During the

3 recess, I was handed a note. I think has been shown to both counsel.

4 CTC [MR. MURPHY]: Yes, Your Honor.

5 DC [LCDR MIZER]: Yes.

6 MJ [CAPT ALLRED]: From a representative of the Los Angeles

7 Times, I believe, pointing out that the press and the American people

8 are interested in these proceedings and that they want to have

9 maximum access. I think what happened is, after we finished taking

10 the classified portion of Mr. Hamdan's statement, the audio feed

11 didn't get reconnected to the remote viewing area.

12 So the court instructed--the court reporters have burned a

13 disc with that audio, and they're transcribing it now to deliver to

14 the press as fast as we can type the last few minutes of his

15 statement.

16 As far as I know, the transcript of the testimony of

17 Colonel Banks and Lieutenant Colonel Taylor is at SOUTHCOM being

18 reviewed. Hopefully, we can get that back today, so maybe that can

19 be released as well.

20 Okay. Government, have you completed your huddle?

21 TC [LCDR STONE]: Yes, sir. And we do not object to not giving

22 the instruction.

1 MJ [CAPT ALLRED]: Okay. It shall be done. And are there any
2 other issues then to resolve before we call the members in for
3 arguments and sentencing instructions?
4 TC [LCDR STONE]: I have one question on the personal matters of
5 the accused. With that consideration of what we're doing, I have the
6 section seven, duration of the accused detention, as a potential--you
7 know, the law doesn't require----
8 MJ [CAPT ALLRED]: I'll just--I'll just mention it. I think----
9 TC [LCDR STONE]: Okay. Does the--I was going to see whether
10 the defense wants that to be mentioned in light of the idea that they
11 do not want the instruction?
12 MJ [CAPT ALLRED]: That says the law does not require that you
13 use any specific formula in considering this pretrial confinement,
14 but it does require that you consider it and give it the weight you
15 deem appropriate.
16 DC [LCDR MIZER]: That's fine. Charlie that's fine.
17 MJ [CAPT ALLRED]: Okay. We'll do to that.
18 TC [LCDR STONE]: I would change the word from "pretrial" to
19 "detention," and use the terms, "July 1, 2003 through today." Is
20 that----
21 MJ [CAPT ALLRED]: Well----
22 CDC [MR. SWIFT]: That's misleading.

1 MJ [CAPT ALLRED]: I think I'm just going to leave it vague.
2 Oh, I see, it does say--it does have a--yeah, I think I'll just say
3 pretrial detention and leave it at that.
4 TC [LCDR STONE]: Okay.
5 MJ [CAPT ALLRED]: Okay. Are both parties prepared to argue
6 then with respect to----
7 CTC [MR. MURPHY]: We are, Your Honor.
8 MJ [CAPT ALLRED]: Are you the man on this one?
9 CTC [MR. MURPHY]: I am, Your Honor.
10 MJ [CAPT ALLRED]: Okay.
11 Please ask the members to return to the courtroom.
12 **[The 803 session recessed at 1109, 7 August 2008.]**
13 **[The military commission was called to order at 1109, 7 August 2008.]**
14 BAILIFF: all rise.
15 [All persons did as directed, and the members entered the courtroom.]
16 MJ [CAPT ALLRED]: Please be seated.
17 [All persons did as directed.]
18 MJ [CAPT ALLRED]: Members have returned to the courtroom.
19 Trial Counsel, you may make your argument with respect to a sentence.
20 CTC [MR. MURPHY]: Thank you, Your Honor.
21 Mr. President and members, let me begin by thanking you
22 again for your time, and your attention, and your--and your important
23 consideration of all of the facts in this case.

1 We're now turning to the argument on sentencing, a very
2 important decision that you will make, and I have comments for you,
3 representing the government, that we believe are tremendously
4 important for you consider and evaluate when you go back and consider
5 sentencing on your findings in this case.
6 I'd start by noting that you have found the accused guilty
7 of five extremely seriously offenses, five separate specifications of
8 providing material support for terrorism. Your finginds in all five
9 of these specifications are now to be considered by you, grouped in a
10 single specification for sentencing.
11 The seriousness of the one specification for sentencing
12 before you now is reflected in the fact that this one specification
13 carries a sentencing possibility of life imprisonment, and it
14 properly carries this high possible penalty for a reason, and you
15 should consider life sentencing possibilities when you consider all
16 of the facts in this case and some of the particularly aggravating
17 aspects in this case.
18 Briefly, I will mention that factually you found the
19 following in your verdict. You found between the time of February
20 1996 through and including November 24, 2001, the accused provided
21 material support for terrorism, all during a period in which the
22 United States was in the armed conflict with Al Qaeda. You found
23 that he became an actual member of the Al Qaeda organization. You

1 CTC [MR. MURPHY]: Your Honor, does the government have rebuttal
2 sentencing?
3 MJ [CAPT ALLRED]: No.
4 CTC [MR. MURPHY]: No?
5 MJ [CAPT ALLRED]: No, the government doesn't get a rebuttal in
6 sentencing argument.
7 CTC [MR. MURPHY]: Okay.
8 MJ [CAPT ALLRED]: Members of the court, before I read the
9 sentencing instructions, I would like to give you a particular
10 instruction.
11 During the course of the government's argument, the
12 prosecution showed you photographs of various terrorist attacks that
13 have occurred over the years, and asked you to consider the victims
14 of those attacks in reaching your sentence. With respect to that, I
15 would like to remind you that the accused has not been convicted of
16 those attacks or participating in them directly. A defendant who is
17 convicted of material support for an international terrorist
18 organization is punished solely for the criminal act of material
19 support and not for the illegal conduct of the international
20 terrorist organization. Does each of you understand this instruction
21 and agree to apply it in your deliberations?
22 I see affirmative responses from all members.

1 You are about to deliberate now and vote on the sentence in
2 this case. It is the duty of each member to vote for a proper
3 sentence for the offense of which the accused has been found guilty.
4 And as I mentioned yesterday, all of the offenses are considered to
5 be one single offense for purposes of your sentencing deliberations.
6 Your determination of the kind and amount of punishment, if any, is a
7 grave responsibility requiring the exercise of wise discretion.
8 Although you must give due consideration to all matters in mitigation
9 and extenuation, as well as those in aggravation, you must bear in
10 mind that the accused is to be sentenced only for the offense of
11 which he has been found guilty, which is the offense of providing
12 material support to an international terrorist organization.
13 You must not adjudge an excessive sentence in reliance upon
14 possible mitigating action by the convening or another authority.
15 The maximum punishment for the offense of which the accused has been
16 found guilty is confinement for life. Bear in mind that the maximum
17 punishment is a ceiling on your discretion. You are at liberty to
18 arrive at any lesser sentence or a sentence of no punishment at all
19 based upon your own evaluation of the evidence presented.
20 As I have indicated, this court may sentence the accused to
21 confinement for life. Unless confinement for life is adjudged, your
22 sentence to confinement should be adjudged either in full days, full
23 months, or full years without the use of fractions. For example,

1 confinement for a year and a half should be announced as confinement
2 for 18 months. If you wish, as I said you may sentence the accused
3 to receive no punishment. Anything between those two bookends is
4 within your discretion.
5 In selecting a sentence, you should consider all the
6 matters in extenuation and mitigation as well as those in aggravation
7 whether introduced before or after your findings. Thus, all of the
8 evidence you've heard in this case is relevant to the subject of
9 sentencing, remembering, of course, only to sentence the accused for
10 the offenses of which he is found guilty and not for the offenses of
11 which he was found not guilty. Among the matters you should consider
12 in this case are the accused's age; he's 40 years old. You should
13 consider the duration of the accused's pretrial confinement or
14 detention, I should say. The law does not require that you use any
15 specific formula in considering this pretrial detention, but it does
16 require that you consider the detention and give it the weight you
17 deem appropriate.
18 The accused's education is estimated to be a third or
19 fourth grade level education. You should consider also the accused's
20 marital status, married with two children, and that he is the sole
21 support for those children. You should also include in your
22 considerations the accused's unsworn statement and his expressions of
23 remorse. The accused, as I said, has an absolute right to remain

1 silent in this proceeding. The court will not draw any inference
2 adverse to the accused from the fact that he did not elect to testify
3 under oath as a witness during the sentencing portion of the trial.
4 The court will not draw any adverse inference to the accused from the
5 fact that he did not elect to testify under oath as a witness during
6 the sentencing phase of the trial. An unsworn statement is an
7 authorized means for the accused to bring to your attention
8 information he wants you to consider as you consider a sentence and
9 that must be given appropriate attention. The accused cannot be
10 cross-examined by the prosecution or interrogated by court members or
11 me with respect to his unsworn statement, but the prosecution was
12 offered the opportunity to rebut statements of fact contained in
13 that; they did not offer any rebuttal. The weight and significance
14 to be attached to an unsworn statement rests within the sound
15 discretion of each court member. You may consider that the statement
16 is not under oath, its inherent probability or improbability, and
17 whether or not it is contradicted or supported by other evidence in
18 the case as well as any other matter that may have a bearing upon its
19 credibility. In weighing your unsworn statement--I'm sorry, in
20 weighing this unsworn statement, you are expected to utilize your
21 common sense, your knowledge of human nature, and the ways of the
22 world.

1 Our society recognizes five principle reasons for imposing
2 sentences on those who violate the law. These are protection of
3 society from the wrongdoer, punishment of the wrongdoer,
4 rehabilitation of the wrongdoer, preservation of good order and
5 discipline in society, and deterrence of the wrongdoer and those who
6 know of his crime and his sentence from committing the same or a
7 similar offense.
8 When you close to deliberate and vote, only the members
9 will be present. And your deliberations should begin with a full and
10 free discussion on the subject of sentencing. The influence of
11 superiority and rank shall not be employed in any manner to control
12 the independence of members in the exercise of their judgment. When
13 you've completed your discussion then any member who desires to do so
14 may propose a sentence. You do that by writing out on a slip of
15 paper a sentence you propose, which in this case can only address a
16 period of confinement or no period of confinement. The junior member
17 collects the proposed sentences and submits them to the president,
18 who will arrange them in order of their severity. You then vote on
19 the proposed sentences by secret written ballot. All must vote; you
20 may not abstain. Vote on each proposed sentence in its entirety
21 beginning with the lightest, until you arrive at the required
22 concurrence, which is two thirds or four members. A sentence that
23 incurs--includes confinement in excess of 10 years requires the

1 concurrence of three-fourths of the members, that is five members.
2 The junior member will collect and count the votes. The count is
3 then checked by the president, who shall announce the result of
4 ballot to the members. If you vote on all of the proposed sentences
5 without arriving at the required concurrence, you then repeat the
6 process of proposing and voting upon sentences. The second time
7 around, if a member desires do so, he may vote on all new proposals
8 or on proposes rejected on an earlier vote. But once a proposal has
9 been agreed to by the required concurrence, then that is your
10 sentence. You may reconsider your sentence at any time prior to its
11 being announced in open court, but after you reach and determine a
12 sentence, if any member suggests reconsideration of the sentence,
13 open the court, and I will give you specific instructions on how to
14 reconsider a sentence that you have already reached.
15 The president should only announce that reconsideration has
16 been proposed without announcing whether the proposed re-ballot
17 concerns increasing or decreasing the sentence. As an aid in putting
18 your sentence in proper form, you may use the next appellate exhibit
19 in order, which is a sentencing worksheet.
20 I'll ask the bailiff to deliver this to the senior member
21 now. [Bailiff handing the appellate exhibit number 322 to the
22 president]. The worksheet only offers two possibilities. No
23 punishment or confinement for a period of time that you may select.

1 Once you have the decision as to the punishments you will
2 impose, please fill out the worksheet, cross out the words that don't
3 apply, and sign it at the bottom, so it's clear that this is your
4 sentence.
5 If during deliberations you have any questions concerning
6 sentencing matters, please open the court, and I will take up those
7 questions with you. I would ask that if you do have such a question
8 that you write it down in advance, send it out to me via the bailiff,
9 and we might need to do some research or discuss what the proper
10 answer is for your question.
11 You may not consult the Manual for Military Commissions or
12 any other writing not admitted into evidence. My instructions, of
13 course, must not be interpreted as indicating any opinion on my part
14 as to what would be an appropriate sentence in this case. That
15 decision is entirely for the members of the court.
16 In your deliberation room, you will have all of the
17 evidence that have been admitted--all of the exhibits, I should say,
18 that have been admitted into evidence. I don't believe we have any
19 new evidence admitted in sentencing do we? What do we have?
20 CDC [MR. SWIFT]: The photographs.
21 MJ [CAPT ALLRED]: The photographs. The photographs and the
22 videotape of Mrs. Hamdan were admitted during sentencing so those
23 will be provided to you if you want to review those again. Please do

1 not mark on any of the exhibits except the sentencing worksheet. In
2 accordance with your best judgment, based upon the evidence that has
3 been presented in this case and your own experience that general
4 background, you should select a sentence which bests serves the ends
5 of good order and discipline in society, the needs of this accused,
6 and the welfare of society.
7 Are there any questions regarding these instructions?
8 PRES: Yes, Your Honor. I assume, Your Honor, you're going to
9 give us a copy of the instructions that you've----
10 MJ [CAPT ALLRED]: I didn't prepare a copy of these written
11 instructions for today. I can Xerox the pages of the judge's bench
12 book here, if you want to refer to any particular parts of the
13 instructions, but I don't have a document to hand you.
14 PRES: During deliberations that would be fine, sir.
15 MJ [CAPT ALLRED]: Okay, we'll see----
16 PRES: ----and then I did have another question. I wrote it
17 down, if you'd like the bailiff to----
18 MJ [CAPT ALLRED]: Sure. Bailiff?
19 Why don't you show that to counsel, bailiff, like you've
20 done with the other questions? [The bailiff retrieved the question
21 from member number one and handed it to defense table. Defense
22 counsels reviewed, marked, and then turned it over to Prosecution
23 table. Trial counsels reviewed and marked. The bailiff retrieved

1 the question from prosecution table and handed it to the military
2 judge.]
3 MJ [CAPT ALLRED]: Okay. We'll mark this as the next appellate
4 exhibit in order. Okay. Looks like I will need to consult with
5 counsel outside the presence of the members before answering this
6 question.
7 What I propose here, it's 1215 we would normally recess any
8 way at 1230 for lunch, so why don't I excuse you for lunch, ask you
9 to return at 1400? 1400. I'll be ready to answer this question when
10 you return, and you can immediately begin your deliberations. Fair
11 enough?
12 PRES: Thank you, Your Honor.
13 MJ [CAPT ALLRED]: Thank you. We'll stand while all the members
14 withdraw from the courtroom.
15 BAILIFF: All rise.
16 [All persons did as directed, and the members withdrew from the
17 courtroom.]
18 **[The military commission recessed at 1216 hours, 7 August 2008.]**
19 **[The 803 session was called to order at 1216 hours, 7 August 2008.]**
20 MJ [CAPT ALLRED]: All right, please be seated.
21 [All persons did as directed.]
22 The members have withdrawn from the court room.

1 Well, the question, "How many months has the accused served
2 in pretrial detention?" And the government wanted to discuss that
3 outside their presence.
4 What's the issue your--you'd like me to consider?
5 ATC [MAJ ASHMAWY]: Your Honor, it was just unclear because we
6 actually spent quite a bit of time discussing the fact that we
7 weren't going to inform the members. Actually, I think when we were
8 discussing instruction it was initially the government's suggestion
9 that we tell them the period of time that he has been in detention,
10 and the court said that--that the court did not want to, in fact, do
11 that.
12 MJ [CAPT ALLRED]: The court didn't care; it was the defense
13 that didn't want it to that.
14 ATC [MAJ ASHMAWY]: Well, that was going to be my----
15 MJ [CAPT ALLRED]: And you guys said okay.
16 ATC [MAJ ASHMAWY]: And that was going to be my next point. Is
17 I just wanted to clarify the position of the parties.
18 MJ [CAPT ALLRED]: I don't know what your position--I don't know
19 what the defense hopes to achieve by not letting the know this. My
20 proposal is that we tell them the exact answer and exactly what he's
21 going to get credit for and what he's not going to get credit for,
22 and put it in their hands. That's where the burden should be.

1 DC [LCDR MIZER]: The defense agrees, Your Honor. We believe
2 that the statement--the answer should be he's been in--he's been
3 detained since November 24, 2001, and he will receive--I think we
4 need to bifurcate, though, I mean we need to have something that
5 says, "He will receive 61 months of credit, but you may also consider
6 that entire period of pretrial detention."
7 MJ [CAPT ALLRED]: Okay. Well, I'll answer this when they
8 return then, kind of that way.
9 CTC [MR. MURPHY]: Your Honor, I think the government would
10 suggest, though, that they not know of any confinement credit. That
11 really, I think, will confuse the verdict. They should give a
12 verdict that will be reviewed for what it stands for now and that any
13 future of this, either by the convening authority or the appellate
14 system, can have a sentence that reflects their judgment here and not
15 confuse it with any credit that's been imposed.
16 MJ [CAPT ALLRED]: Let me read you instruction that is given in
17 every military trial on this point. It says, "In determining an
18 appropriate sentence in this case you should consider the fact that
19 the accused has spent X days or months in pretrial confinement. In
20 this connection you should also realize that if you adjudge
21 confinement as part of your sentence, the--that period of time the
22 accused spent in pretrial confinement will be credited against any
23 sentence to confinement you may adjudge. This credit will be given

1 by the convening authority and will be credited on a day for day
2 basis." So I mean, the prejudice you fear is something you've
3 learned to deal with by just giving the members the information as
4 they make their decision.
5 TC [LCDR STONE]: I think a more accurate--based on your most
6 recent ruling, sir, I think the more truly accurate information that
7 goes to the members is not November 20 with regards to credit, its
8 November 24 through the time, but rather----
9 MJ [CAPT ALLRED]: Yeah, that's what I propose to do.
10 TC [LCDR STONE]: Right, but I mean, rather July 1, 2003, and I-
11 -I mean, the most--if the decision is from--you said, that the most
12 accurate information go to the jury, we may have to kind of play with
13 that other period prior to the time that you ordered credit, which is
14 July 1, 2003.
15 MJ [CAPT ALLRED]: How what you propose to play with that
16 period?
17 TC [LCDR STONE]: Well, if the instruction that you said says he
18 should be getting day for day credit----
19 MJ [CAPT ALLRED]: Well, I'll modify the instructions to say
20 that I ordered credit for this period and no credit for that period,
21 and you can consider that----
22 TC [LCDR STONE]: Well, that's ----
23 MJ [CAPT ALLRED]: ----as you reach whatever sentence you----

1 TC [LCDR STONE]: Right.

2 DC [LCDR MIZER]: Yes, Your Honor. We would just ask that there
3 be an instruction, as you stated, that they may also consider that
4 additional theory, for which you've----

5 MJ [CAPT ALLRED]: That's what the instructions will say.

6 DC [LCDR MIZER]: All right, Sir.

7 TC [LCDR STONE]: We would object to the considering of November
8 24th through the time in GTMO as a fact that he is held on the
9 battlefield incident to laws of war and would not otherwise be
10 considered any sort of pretrial punishment, pretrial credit, pretrial
11 detention, pretrial confinement, et cetera. So----

12 MJ [CAPT ALLRED]: Well, that's--that's kind of the reason I
13 reach the decision I reached is because for that period, it seemed
14 like he was properly detained under some other authority. All right.
15 Well, I'll craft an instruction that I hope will be satisfactory to
16 the parties. If I tell them that he's been detained for that period
17 of time and he's not going---that I didn't order credit for it maybe
18 I should also say something like, "He was detained under the law of
19 armed conflict principle of the battlefield detention," and let them
20 consider that.

21 ATC [MAJ ASHMAWY]: I think, Your Honor, in addition to that, is
22 that it's our position that it would not be appropriate that the
23 instruction says that based on United States law and the laws of

1 armed conflict, it would not be appropriate for them to give him
2 credit for that time that he was held incident to--to his detention.
3 MJ [CAPT ALLRED]: Well, I don't know whether it is or not.
4 The--what the instruction says--well, the instruction I've already
5 read with the parties concurrence says that you should give this the
6 pretrial detention the weight you deem appropriate. So I think maybe
7 that's what I ought to say with respect to the first part that I
8 didn't order credit, but you should give it the credit--the attention
9 you deem appropriate or whatever the word was here.
10 ATC [MAJ ASHMAWY]: The concern, Your Honor, is that his
11 pretrial detention started on the date that you determined and then
12 previously given him credit. Prior to that date, it would not be
13 pretrial detention, but it would--its detention in accordance with
14 the Law of War, and as such, he would not be entitled to----
15 MJ [CAPT ALLRED]: Well, I mean, the members are smart people.
16 When they say how many months has he been held in detention, they're
17 just going to wonder what happened between November of 2001 and June
18 of 2003. Where was he?
19 ATC [MAJ ASHMAWY]: I think it's appropriate just to tell them,
20 sir, that he's been in detention since 24 November 2001. But that it
21 is not appropriate for them to give him credit for that time because
22 he was held incident to----

1 MJ [CAPT ALLRED]: Okay. Okay. What I'm going to do then is
2 I'm going to them that he was held in detention during that period of
3 time, that I haven't ordered credit for that, but that they should
4 give it the weight they believe it deserves. And then I'll tell them
5 that I've ordered credit for the other period, and they should give
6 that the weight it deserves.
7 ATC [MAJ ASHMAWY]: Separate issue, Your Honor. If I may.
8 There's been evidence presented of--of the sentence given to David
9 Hicks in a previous court. Traditionally, and you have the
10 instruction in the bench book, members are instructed to not consider
11 that when crafting a sentence.
12 MJ [CAPT ALLRED]: You know that was objectionable. I expected
13 an objection from the government during that point.
14 ATC [MAJ ASHMAWY]: Actually, we did object, Your Honor. Mr.
15 Murphy did, in fact, object.
16 MJ [CAPT ALLRED]: He did during the argument, but when that
17 came in as part of the accused's unsworn statement, that would have
18 been the time to object.
19 ATC [MAJ ASHMAWY]: It's traditionally considered that an
20 accused's unsworn statement is unfettered.
21 MJ [CAPT ALLRED]: What instruction do you want me to give?
22 ATC [MAJ ASHMAWY]: The traditional instruction out on the bench

1 book, Your Honor, which is that it--while evidence has been
2 presented----
3 MJ [CAPT ALLRED]: You identify and bring it to me. Okay. I
4 don't know which one you're talking about right now.
5 ATC [MAJ ASHMAWY]: Absolutely, sir.
6 MJ [CAPT ALLRED]: It's not part of the standard sentencing
7 instructions.
8 ATC [MAJ ASHMAWY]: It's usually added by military judge if the
9 accused in his unsworn statement gives examples.
10 MJ [CAPT ALLRED]: Why don't you find that and bring that to me?
11 ATC [MAJ ASHMAWY]: Absolutely, sir.
12 MJ [CAPT ALLRED]: If you will. I don't remember seeing it this
13 morning, and I don't know exactly where we'll find it.
14 Okay why don't we recess until 1400? Nope. [Bailiff
15 handed another question from the members to the military judge.]
16 Another question. Let's just read it here. I'll surprise you all.
17 "How would we express time already served in our
18 sentencing?"
19 It's the same thing. For example, if we believe that a
20 sentence of 10 years is appropriate, but we are considering his six
21 and a half years already in--you know, do we state 10 years with six
22 and a half already served or do we state 42 months from now?"

1 All right. I think we've discussed the answer to this
2 question, and if I tell them that he's going to get credit for part
3 and not credit for the rest then they figure out what number of
4 months they want to impose.
5 Okay. Good. We will see you at--let's come back at 1355
6 on the record for the parties so we can call the members in and get
7 them their answers at 1400.
8 **[The 803 session recessed at 1225, 7 August 2008.]**
9 **[The 803 session was called to order at 1401, 7 August 2008.]**
10 MJ [CAPT ALLRED]: The court is called to order. Please be
11 seated.
12 [All persons did as directed.]
13 MJ [CAPT ALLRED]: During the lunch recess, counsel brought me
14 from 61 MJ 482, United States versus Barrier, a proposed instruction
15 with respect to comparing the accused's unsworn statement, the
16 sentence that he mentioned. Both sides looked at this instruction
17 from this other case and appeared to agree that is an appropriate
18 instruction. So I will give that.
19 And I believe we have the answer prepared to give the
20 members about Appellate Exhibits 324 and 325. So, unless there is
21 objection, I'll call the members in and give--answer their question;
22 give them this final instruction and release them to deliberate.
23 TC [LCDR STONE]: No objection from the government, Your Honor.

1 DC [LCDR MIZER]: None from the defense, Your Honor.

2 MJ [CAPT ALLRED]: Commander? Okay.

3 Please ask the members to come in to the courtroom.

4 **[The 803 session recessed at 1403, 7 August 2008.]**

5 **[The military commission was called to order at 1403, 7 August 2008.]**

6 BAILIFF: All rise.

7 [All persons did as directed, and the members entered the courtroom.]

8 MJ [CAPT ALLRED]: Okay. Please be seated [all persons did as

9 directed]. The members have returned to the courtroom.

10 Before departing, I received two questions from two

11 different members, it appears, which has been marked Appellate

12 Exhibit 324 and 325. They both asked essentially the same question.

13 And that has to do with the amount of time that the accused has been

14 detained or confined and how that will be reflected in his sentence.

15 The accused was detained by U.S. forces on November 24,

16 2001, has been continuously in the custody of U.S. forces since that

17 date. Between November 24, 2001 and the July 1st of 2003, the

18 accused was detained under the law of armed conflict as a battlefield

19 detainee. Being this--will not be receiving any expressed credit

20 against a sentence to confinement that you may adjudge for that

21 period. You should, however, consider that period of detention in

22 reaching any sentence to confinement that you reach. From July 1st,

23 2003 to the present date, the accused was detained for purposes of

1 participating in this trial, and I have awarded him credit on a day-
2 for-day basis for 60 months--61 months, maybe it is, and 8 days. In
3 other words, from July 1, 2003 until today, he will receive credit
4 for the period of time he served awaiting trial. You may consider
5 both of these periods and the way in which they will or will not be
6 credited in reaching the sentence that you ultimately reach. Is that
7 a satisfactory answer to both the questions?
8 [The members nodded.]
9 MJ [CAPT ALLRED]: Very good. Looks like I see some smiles,
10 head nods, and other expressions of affirmation.
11 Okay. I'd like to also instruct you that during the
12 accused's unsworn statement, he alluded to the case of another
13 individual, David Hicks, whom the accused indicated had received a
14 certain amount of punishment. The disposition of other cases is
15 irrelevant for your consideration in adjudging an appropriate
16 sentence for this accused. You did not know all the facts and
17 circumstances of those cases--of that case nor anything about that
18 accused in that case, and it is not your function to consider that
19 case at this trial. Likewise, it is not your position to consider
20 the disposition of other cases or to try to place the accused's case
21 in its proper place on the spectrum of some hypothetical scale of
22 justice. Even if you knew all the facts about the other case and the
23 other offender, that would not enable you to determine whether the

1 accused should be punished more harshly or more leniently because the
2 facts are different and because the disposition authority in that
3 case cannot be presumed to have any greater skill than you have in
4 determining an appropriate punishment. If there is to be meaningful
5 comparison of the accused's case to the case of David Hicks, it
6 should come by consideration of the convening authority at the time
7 she acts on the adjudged sentence in this case. The convening
8 authority can ameliorate a harsh sentence to bring it in line with
9 appropriate sentences in other cases, but she can not increase a
10 light sentence to bring it in line with similar cases.
11 In any event, this action is within her sole discretion.
12 You, of course, should not rely on this ameliorating action by the
13 convening authority in determining what is an appropriate sentence
14 for Mr. Hamdan for the offense of which he stands convicted. If the
15 sentence that you impose in this case is appropriate for the accused
16 in this case and for his offenses, you should not be concerned
17 whether other accused were punished differently under other
18 circumstances. You have the independent responsibility to determine
19 an appropriate sentence and you may not adjudge an excessive sentence
20 in reliance upon the possibility of mitigating action by some other
21 authority.

1 Any questions then before you retire to deliberate? Is it
2 fair to say that you don't require a recess before we you begin your
3 deliberations?
4 PRES: That's correct.
5 MJ [CAPT ALLRED]: Very good.
6 CDC [MR. MCMILLAN]: Your Honor, just for the complete avoidance
7 of doubt, could the defense request that there be a specific example
8 of an actual number provided that might come in from the jury
9 deliberation room and then how the credit for 61 months would be
10 applied to that number to result in an additional period of
11 confinement?
12 MJ [CAPT ALLRED]: Yes. Yes, okay, I don't mind doing that. If
13 you sentence the accused to 61 months of confinement, in other words,
14 time served. He will no longer be confined as a result of the
15 sentence of this court. If you sentence him to 8 years; 61 months
16 will be subtracted from that amount, and he will be serving the
17 balance as a result of a sentence of this court. Is that understood-
18 -clear how that would work out?
19 PRES: Yes, sir.
20 MJ [CAPT ALLRED]: Okay. We'll close for deliberations then.
21 We'll wait to hear from you when you're ready to proceed.
22 BAILIFF: all rise.

1 [All persons did as directed, and the members withdrew from the
2 courtroom.]
3 **[The military commission closed at 1409 hours, 7 August 2008.]**
4 **[The military commission was called to order at 1503 hours, 7 August**
5 **2008.]**
6 MJ [CAPT ALLRED]: The court is called to order. The members
7 have returned to the courtroom.
8 Would you like a recess?
9 PRES: Yes, Your Honor.
10 MJ [CAPT ALLRED]: Why don't we recess for 15 minutes? Is that
11 too much?
12 PRES: 10 minutes is fine.
13 MJ [CAPT ALLRED]: 10 minutes. The court is in recess. Thank
14 you very much.
15 **[The military commission recessed at 1503, 7 August 2008.]**
16 **[The 803 session was called to order act 1503, 7 August 2008.]**
17 MJ [CAPT ALLRED]: The court is called to order outside the
18 presence of the members.
19 CDC [MR. SWIFT]: Your Honor, I understand that you're still
20 considering our punitive credit. We would like to add for the record
21 that last night Mr. Hamdan was moved prior to his sentence being
22 imposed to a separate wing in camp five. Camp five is a maximum
23 security prison. He has been housed there, as Your Honor is well

1 aware, for the last year. However, his conditions of confinement
2 significantly differ as of last night in that Mr. Hamdan's--the wing
3 on which he is held has no other prisoners on it. In other words,
4 he's in solitary confinement. We believe that this is yet another
5 day of illegal pretrial punishment. A sentence has not been imposed,
6 and while this court can't do something about the level confinement,
7 we believe the con--the JTF jumped the gun because he has not yet
8 been sentenced to any time and punishment. So we would ask that this
9 day, along with the days in camp echo, be considered impunitive
10 pretrial.
11 MJ [CAPT ALLRED]: Okay. Does the government have any
12 information about this new development?
13 TC [LCDR STONE]: Not that it's more then three to six seconds
14 old. I can--I do know that the position will be that it is not
15 solitary confinement. There are no solitary confinement cells in JTF
16 Guantánamo. It continues to be that way. It has been that way
17 forever. So to the--to the characterization and mischaracterization
18 with regards to solitary confinement, there clearly isn't, has never
19 been one, and never will be. With regards to whether he was moved to
20 a separate wing, based on the fact that he is an adjudged prisoner,
21 although not necessarily through with the sentence, I would have--I
22 wouldn't characterize necess--assuming that the facts are true, which
23 I don't know that they necessarily are, I wouldn't characterize it as

1 necessarily as even jumping the gun. I can certainly, if it's
2 anything of any significant, I can certainly give JTF a call and see
3 what the position was, how it happened, what it was, or whether he
4 was moved et cetera with regards to that. I'm not so sure that any
5 sort of declaration or anything else would otherwise be necessary.
6 MJ [CAPT ALLRED]: I'll accept the representation of parties, I
7 think, at this point if it's just----
8 TC [LCDR STONE]: But I will have to give them a call and see
9 what happened.
10 MJ [CAPT ALLRED]: Okay.
11 TC [LCDR STONE]: Because you know, I've had it for 9 seconds
12 now.
13 MJ [CAPT ALLRED]: We'll do that. I'll give you some time to
14 look into it. Why don't we recess until, well, 8 minutes from now.
15 **[The 803 session recessed at 1506 hours, 7 August 2008.]**
16 **[The military commission called to order at 1511 hours, 7 August**
17 **2008.]**
18 MJ [CAPT ALLRED]: The court is called to order and closed for
19 deliberations. Thank you.
20 **[The military commission was closed at 1512 hours, 7 August 2008.]**
21
22
23

1 **[The military commission was opened at 1544 hours, 7 August 2008.]**

2 MJ [CAPT ALLRED]: The court is called to order. The members

3 have returned to the courtroom.

4 Mr. President, have the members reached a sentence in this

5 case?

6 PRES: Yes Your Honor, we did.

7 MJ [CAPT ALLRED]: And is it reflected on the sentencing

8 worksheet?

9 PRES: It is.

10 MJ [CAPT ALLRED]: Have you signed that?

11 PRES: I have.

12 MJ [CAPT ALLRED]: Would you fold it in half and let the bailiff

13 ----

14 **[The bailiff retrieved the findings worksheet and handed it to the**

15 **military judge. The military judge examined the findings worksheet,**

16 **handed it back to the bailiff to return to the president of the**

17 **members.]**

18 MJ [CAPT ALLRED]: Okay. The sentence is in proper format.

19 Accused and Counsel, please rise.

20 [The accused and his counsels did as directed.]

21 MJ [CAPT ALLRED]: Mr. President, you may announce the sentence

22 of the court.

23 PRES: Thank you, Your Honor.

1 Salim Ahmed Hamdan, it is my duty as president to inform
2 you that this military commission sentences you:
3 **To be confined for 66 months.**
4 MJ [CAPT ALLRED]: Thank you. You may be seated.
5 [The accused and his counsels did as directed.]
6 MJ [CAPT ALLRED]: Mr. President, if I can retrieve that, and
7 bailiff, you give that to the court reporter.
8 Members of the court, you have now completely your duties
9 and you are discharged with my sincere thanks. Please leave all the
10 exhibits behind. If they are any classified notes that you have
11 taken, please leave those behind. Those will be destroyed for you.
12 Unclassified notes, you are free to take with you, if you wish to
13 keep them, or if you leave them behind, they will be destroyed by the
14 court reporter.
15 To assist you in determining what you may discuss about
16 this case now that it is over, I would like to give you some
17 guidance. At the beginning of the case, you took an oath as members
18 not to discover the voice or vote of any member of the court. This
19 means that you may not disclose how you or any other member of the
20 court voted. You may not disclose what opinion you or any other
21 member of the court held or expressed in your deliberation room.
22 You're free to say, "Many members felt this way, some felt that way.
23 We didn't believe this witness. We believed that witness," those

1 kinds of general comments, but you cannot disclose how any person
2 voted or what opinion any individual person, including yourself,
3 expressed in the deliberation room. Other than that, you are free to
4 talk to anyone about your service as a member of this court, that
5 includes the attorneys in this case, family members, and the press,
6 if you wish to talk to any of those people. Your deliberations are
7 carried on the secrecy of the deliberation room to permit the utmost
8 freedom of debate and so that each of you can express your views s
9 without fear of being subjected to public scorn or criticism by the
10 accused, the convening authority, or anyone else. In deciding
11 whether to answer questions about this case, and if so, what to
12 disclose, you should have in mind your own interests and the
13 interests of the other members of the court.
14 Do any members have questions about this guidance at this
15 time?
16 [Negative response from the members.]
17 MJ [CAPT ALLRED]: Very well. Members of the court, again, I
18 thank you for your service in this most significant and historic
19 case, and I discharge you with my thanks. You're free to withdraw
20 from the courtroom and go about your duties.
21 BAILIFF: All rise.
22 [All persons did as directed.]

1 MJ [CAPT ALLRED]: Oh, wait just a moment. Am I getting a
2 signal from the defense?
3 DC [LCDR MIZER]: No, sir.
4 MJ [CAPT ALLRED]: Mr. Hamdan is acting like he might want to
5 say something.
6 CDC [MR. SCHNEIDER]: The accused would like to say something,
7 Your Honor.
8 MJ [CAPT ALLRED]: Okay. If you'll be seated? We'll--Mr.
9 Hamdan would like to say something to you, and I'll--I'll give him
10 that privilege.
11 [All persons were seated.]
12 ACC [MR. HAMDAN]: I would like to apologize one more time to
13 all the members. And I would like to thank you for what you have
14 done for me. And I would like also to say--to thank the judge, and I
15 would like to thank everybody. And I apologize once again.
16 MJ [CAPT ALLRED]: Thank you, Mr. Hamdan, that was very
17 gracious.
18 Members of the court, thank you very much. You're excused.
19 BAILIFF: all rise.
20 [All persons did as directed, the members were permanently excused,
21 and the members withdrew from the courtroom.]
22 MJ [CAPT ALLRED]: Okay please be seated.
23 [All persons did as directed.]

1 The members have withdrawn from the courtroom. Professor
2 Swift----
3 CDC [MR. SWIFT]: Yes, sir.
4 MJ [CAPT ALLRED]: Commander Mizer, I don't really know who's
5 the main--who I should address this question to. But have you
6 discussed with Mr. Hamdan his post trial and appellate rights?
7 CDC [MR. SWIFT]: We have discussed them in general. We have
8 tailored an appellate rights form, which it may be helpful to Your
9 Honor simply to go over with him, and then we'll sign it at the end.
10 And we can bring up the form that we tailored. We have not yet--
11 because it's not in Arabic, it's kind of hard to go over with him.
12 We've tailored the form the best that we could.
13 MJ [CAPT ALLRED]: Okay.
14 CDC [MR. SWIFT]: There was none available.
15 MJ [CAPT ALLRED]: I will ask you to just go over that with him
16 later in the privacy of your consultation areas, get his signature on
17 it, and deliver it to the court reporter for inclusion in the record
18 of trial.
19 CDC [MR. SWIFT]: We will do that.
20 MJ [CAPT ALLRED]: And I will discuss generally with him now
21 what will happen next.
22 Mr. Hamdan, I want to talk to you now about what--what
23 comes after the trial. I want to make sure you understand that the

1 next phase of this proceeding involves preparing a copy on the record
2 a trial. That means that the court reporter will assemble all the
3 documents, all the photographs, all the maps, and all the testimony
4 into one document. That will be delivered to you or to your defense
5 attorneys. You are entitled to have a copy of that. Have you talked
6 about this with your attorneys?
7 CDC [MR. SWIFT]: We did not talk at length about where the
8 record would go. We talked about his right to appeal.
9 MJ [CAPT ALLRED]: Okay. I'm--I'm sure it will be written in
10 English, so it probably make most sense for one of your attorneys to
11 take custody of your copy of the record. Once the record of trial is
12 prepared, your attorneys will have the right to help you submit
13 matters to the convening authority for her consideration, before she
14 takes action on the findings and sentence imposed by this military
15 commission. The convening authority has the power to reduce the
16 sentence to change any finding of guilty to a finding of not guilty
17 and to otherwise give you relief or to improve the outcome of the
18 trial for you, for any reason or for no reason at all. Once the
19 convening authority has made her decision with respect to the
20 findings and the sentence of this commission, you will have the right
21 to have the case reviewed by the Court of Military Commissions Review
22 and other federal courts in our system. If we have made any errors
23 in the conduct of this trial, higher courts will correct them. At

1 some point, given the sentence imposed of 66 months and the fact that
2 you will be given credit for 61 months of confinement already served,
3 you will be released from the status of being a post-trial confinee.
4 After that, I don't know what happens. Apparently, you'll become
5 eligible for administrative review of your threat to the United
6 States or to its allies, perhaps; I don't know. And at some point,
7 you'll become eligible for release to return to your country. That's
8 what I understand. You probably know better than I how that part
9 works.
10 Do you have any questions, Mr. Hamdan, about these rights
11 or how they by the effect you?
12 CDC [MR. SCHNEIDER]: No questions, Your Honor.
13 MJ [CAPT ALLRED]: Okay.
14 Well, this has been a long journey for Mr. Hamdan, who
15 began in 2001; for Mr. Swift, who began in 2004; for Mr. McMillan and
16 Schneider, who began, I guess, in 2004; and for others who have
17 joined the case along the way. It's been a pleasure for me to work
18 with you. I commend you all for your professionalism and your
19 courtesy to each other and the tremendous investment of hard work
20 and--and your professional skills that have gone into the trial of
21 this case. I wish you all God speed in your future journeys and
22 other cases you may try.

1 And Mr. Hamdan, I hope that the day comes that you return
2 to your wife and your daughters and your country. And that you're
3 able to be a provider----
4 ACC [MR. HAMDAN]: God willing.
5 MJ [CAPT ALLRED]: ----and a father, and a husband in the best
6 sense of all those terms.
7 ACC [MR. HAMDAN]: God willing.
8 MJ [CAPT ALLRED]: In Shallah. [God willing in Arabic.] Okay.
9 Is there anything else before we adjourn this military commission?
10 TC [LCDR STONE]: No, sir.
11 MJ [CAPT ALLRED]: Okay. I owe you a ruling of one motion. I
12 don't know that I will finish that today or tomorrow before I leave
13 the island, but before I authenticate the record, I will. And ----
14 TC [LCDR STONE]: I do actually have an answer from JTF GTMO on
15 the----
16 MJ [CAPT ALLRED]: About last night?
17 TC [LCDR STONE]: Yes, sir, about the sua sponte one day motion
18 for pretrial confinement credit.
19 MJ [CAPT ALLRED]: Yes.
20 TC [LCDR STONE]: The accused is held in accordance with Geneva
21 Convention Article 476 and as well----
22 MJ [CAPT ALLRED]: Which convention?

1 TC [LCDR STONE]: The Geneva Convention--the fourth Geneva
2 Convention.
3 MJ [CAPT ALLRED]: The Geneva Conventions? The Geneva
4 Conventions?
5 TC [LCDR STONE]: Yes, sir. Which talks as well as 16th Naval
6 Regulation 1640.9, which talks about the Naval--which is the Naval
7 Corrections Manual, which sets out a very specific standard with
8 regards to the moving an individual who has been convicted to a
9 separate location, however, he was--because he was convicted last
10 night, he was within his own wing, but had a line of sight guard
11 within him due to his emotional state. There was a linguist, and he
12 had the right to medical 24 hours a day, and there was--there was
13 however, no one else on his cell block, but it is not solitary
14 confinement per JTF GTMO regulations.
15 MJ [CAPT ALLRED]: Well, that sounded like a pretty thoughtful
16 response.
17 CDC [MR. SWIFT]: I would point out that they were one day
18 early, sir. He had not yet been sentenced.
19 MJ [CAPT ALLRED]: Well, we'll fold that into the great
20 constellation of your request for credit for punitive conditions of
21 pretrial confinement.
22 Okay. I'm reluctant to end this, but I guess it's that
23 time. I wish you well.

1 This court is closed.

2 [The military commission was closed at 1557 hours, 7 August 2008.]

3 [END OF PAGE]