

THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

V. Stuart Couch

Columbia Center for Oral History

Columbia University

2012

PREFACE

The following oral history is the result of a recorded interview with V. Stuart Couch conducted by Myron A. Farber on March 1 and March 2, 2012. This interview is part of the Rule of Law Oral History Project.

The reader is asked to bear in mind that s/he is reading a verbatim transcript of the spoken word, rather than written prose.

VJD

Session One

Interviewee: V. Stuart Couch

Location: Charlotte, NC

Interviewer: Myron A. Farber

Date: March 1, 2012

Q: This is Myron Farber, on March 1, 2012, interviewing Judge V. Stuart Couch in Charlotte, North Carolina, for Columbia's Guantánamo Bay project. This is session one.

What is your current position now, Judge Couch?

Couch: I'm currently an immigration judge with the Executive Office of Immigration Review.

My court is here in Charlotte.

Q: This is a federal appointee.

Couch: It is. I was appointed by Attorney General Eric [H.] Holder on October 24, 2010.

Q: Okay, and correct me if I am wrong here, from August 2003 to August 2006, you were a military commission prosecutor of detainees at Guantánamo Bay detention camp.

Couch: Yes, that's correct. I would describe it as the first generation of prosecutors with the military commissions that were, I guess, created by President [George W.] Bush's military order of November 13, 2001.

Q: Exactly. What was your rank in the military, then?

Couch: Lieutenant colonel.

Q: Do you have a rank in the military now?

Couch: No, I retired from the Marine Corps in September of 2009.

Q: So you're not in the Marine Corps Reserve.

Couch: No, I'm retired.

Q: Okay. How many years were you in the Marine Corps?

Couch: I was in the Marine Corps for a total of twenty-two years, and I had a couple of years of what we call "broken time" in the middle, where I was not on active duty, but I was still a reservist. I can elaborate on some of that.

Q: Do you mind giving me your birthdate?

Couch: My birthdate is April 20, 1965.

Q: You were born here in North Carolina?

Couch: I was born in Durham, North Carolina, and about six weeks after I was born my parents moved to Asheboro, North Carolina, which is basically a furniture mill town in the middle of the state. I grew up in Asheboro, and graduated from Asheboro High School in 1983. I attended Duke University on a Navy ROTC [Reserve Officers' Training Corps] scholarship—Marine option—which means I began the ROTC program as a designated future Marine officer. During my senior year in the program, I was the battalion commander of the NROTC battalion. At that time, we had two hundred ten midshipmen. I graduated in May of 1987, and was commissioned a second lieutenant in the Marine Corps the day before my graduation. After six months of infantry training at The Basic School in Quantico, Virginia, I did two things. I got married to my wife, Kim, and a couple months after that I went to Pensacola, Florida, and began flight training to be a Naval aviator.

Q: Was that your plan?

Couch: That was my plan all the way back to when I was in the eighth grade. I had decided I wanted to be a Marine Corps pilot.

Q: Can you still fly planes?

Couch: I can still fly them.

Q: The planes have changed, haven't they?

Couch: The planes have changed a little bit. The finances are the difficult part.

When I was growing up, I was really active in the Boy Scouts. I was an Eagle Scout. My father was a dentist, and he had an airplane of his own. I kind of had that influence, and the military, sort of, that you get through Scouts. My scoutmaster was a former Marine. I had an uncle who was a retired lieutenant colonel and a Vietnam veteran.

Q: I had an older brother who was an Eagle Scout. He came home from a meeting once, and on his way home he passed a skunk. By the time he got home he was reeking so badly that my mother burned his uniform, and all his stuff, and he never recovered from it.

Couch: Oh, I'll bet. [Laughter] She should have used mayonnaise. I'm told that mayonnaise gets rid of skunk.

Q: But between 1987 and 1989, you were an active pilot.

Couch: Actually, it was later than that. I started flight training in early 1988. I was in training at Pensacola, Florida, and in Corpus Christi, Texas. I got winged—that is, formally given my pilot's wings as a Naval aviator—in November of 1989, and came home to North Carolina. North Carolina has several Marine Corps bases. I was stationed at Cherry Point, North Carolina in November of 1989. I flew for a squadron, Marine Aerial Refueler Transport Squadron 252—VMGR 252—at Cherry Point.

Q: Is that the plane?

Couch: No, that's the squadron. The planes were C-130s, or, more specifically, KC-130s. It's a cargo plane, but the Marine Corps has a variant of it that is also able to refuel jets and helicopters in flight. We also do certain special operations missions with the aircraft, and transport any number of things from here to there.

Q: So you were on your way to being a pilot.

Couch: Well, I was a pilot.

Q: Can we call it a career?

Couch: At the time I thought it was. Like I said, I got winged in 1989. I flew out of Cherry Point from 1989 until 1993. At that time, Desert Storm—the first Gulf War—came and went. And, much like what's happening today, in 2012, there was a rollback on the funding of the military right after the Gulf War, so the flight hours began to get a little scarce.

I got interested in military law at that time. I was the squadron legal officer. Every pilot in a squadron has a ground job. Some guys are the maintenance officers, some guys are logistics officers, and some guys are intelligence officers. You're a pilot, but you're not flying all day, every day.

So my job was as legal officer, and you're handling routine disciplinary issues in the squadron or Marines who are getting into trouble with civilian authorities, and that sort of stuff—conducting investigations. I got interested in the military law aspect. There was a very influential colonel who was the base staff judge advocate, Colonel Keith [T.] Sefton. One day he stopped me. I was over in the law center, and I was wearing my flight suit. He said, “When are you going to turn in those Nomex pajamas and get a real job?” [Laughter] We got into a discussion, and he said, “You know, you can go to law school.”

Q: You can, he said.

Couch: You can. There's a program through the Marine Corps where you go to law school and become a Marine Corps judge advocate. A quarter to a third of the Marine Corps' judge advocates have done something else in the Marine Corps. Then they go to law school, and become Marine judge advocates. That's what I did.

Q: To be a judge advocate, you have to be a lawyer, isn't that correct?

Couch: Correct. There's not like a special law school that our military lawyers go to. You go to any school that's accredited by the American Bar Association, you graduate, and then you go to the Naval Justice School for about two months. You're certified in military law, and then there you go.

Q: So you went to law school here in North Carolina.

Couch: I graduated from Campbell University.

Q: On a Navy scholarship?

Couch: No, it's just called the Law Education Program. It's where the Marines say, "Okay, we're going to pay you for every day you're not in class," so it's kind of strange that way. You take a huge pay cut to go through law school. You pay your own fees. You pay your own tuition and what not, but when you graduate you have a job to go to. You know where you're going, and the three years you spend in law school are counted toward your time in grade, and time in service.

Q: As a result of that law school experience, did you in fact become a judge advocate?

Couch: I did, and I went back to Cherry Point, which is where I had come from. I had been at Cherry Point as a pilot, I went away to law school, and I came back to Cherry Point, this time around as a lawyer. That was a great experience.

Q: Are we up to around 1993 now?

Couch: We're at 1996.

Q: Law school was 1993 to 1996.

Couch: Yes, 1993 to 1996. Then I went to the Naval Justice School, came back to Cherry Point, and this time around I'm a lawyer, and I was a prosecutor—with which I was absolutely thrilled. That's exactly what I wanted to do, exactly where I wanted to do it. It was great. I worked really, really hard, learning the rudiments of being a trial lawyer.

Q: It wasn't flying planes, though, right?

Couch: It wasn't flying airplanes. I had been out of law school about fourteen months when a jet from Cherry Point, an EA6B prowler—it's like an electronic counter-measures aircraft, a four-place jet. At that time the air war over Kosovo was going on, so we had a detachment of these EA6B prowlers from Cherry Point stationed at Aviano, Italy, and they were flying combat missions over Kosovo.

Q: Is Aviano the name of an airbase?

Couch: It's an airbase in northern Italy, right near the Italian Alps. An aircraft from the squadron—they were just finishing up their deployment. They took a low level for training through the Italian Alps, and they clipped a cable that held up a ski gondola system right there at Cavalese, Italy. They basically cut it in half. They were flying too low and too fast for the conditions, and twenty European tourists were killed, as a result. They were from five different countries.

Q: This is in February of 1998.

Couch: February 3rd, 1998. At that time, I was the chief prosecutor at Cherry Point. At that time, in the entire Marine Corps, I think I was one of five Marine lawyers who had been aviators before they'd become lawyers. I was one of about five guys on active duty in the entire Marine Corps, and it just so happened that I was a prosecutor at the base where the air crew was stationed. I was in the general's office that day, briefing him on a case where some Marines had caused the crash of a Harrier because they shot slingshots with ball bearings inside the maintenance bay. We were briefing the general on the findings of an investigation, and the TV was on, up in the corner of the room, with the volume turned down. CNN [Cable News Network] was on. We were discussing things with General [Michael D.] Ryan and the aide stuck his head in. I knew the aide, because we'd been to Duke together. He graduated a couple years after me at Duke. He said, "General, we just got the word back that there are sixteen dead." I was just floored. We later learned that it was actually twenty people who were killed.

I turned around and said, "What's going on?"

He said, "We had a mishap."

Q: You knew they were civilians attending this resort. You didn't think they were military people.

Couch: I didn't know anything about anything. All I knew was that the TV was on in the corner of the room. That was the first moment that I learned about the mishap.

Q: Did you know they were from Cherry Point?

Couch: Yes, because they had said that one of our EA6Bs clipped a ski gondola in Italy and killed sixteen people. When that guy said that, right there, I knew, at that moment, in a flash, that my life was going to get real busy real quick because I was a prosecutor at that base, and had been a Naval aviator—notwithstanding the fact that I was a very junior prosecutor. I had just gotten out of law school. I knew I was going to have some role to play in that case, just because of my background.

Q: Of course, it happened in Italy. They could have been prosecuted in Italy, no?

Couch: They could have. That was litigated, by the way. There's a thing called SOFA—Status of Forces Agreement. When we have bases around the world, like, for instance, the base in Aviano, Italy, the United States and the Italian government signed a treaty called a Status of Forces Agreement. Under that SOFA, there are provisions for what happens when American service members commit an offense on Italian soil.

Initially, the Italians wanted to prosecute. Then there was some litigation in an Italian court, and the United States invoked their rights under the SOFA, and that's how we ultimately got jurisdiction.

Q: The people being prosecuted were the pilot and—anyone else?

Couch: We initially had charges on all four of the air crew—the pilot and the navigator, who were in the front cockpit, and the two electronic counter measure officers who were in the rear cockpit. Ultimately, we only went to trial against the pilot and the navigator. The pilot was acquitted of manslaughter and negligent homicide. That was in March of 1999. Shortly thereafter, the navigator pleaded guilty to obstruction of justice charges. That came about because there was a video camera that was in the front cockpit. After the plane hit the gondola cable, flew back to Aviano and made an emergency landing, the navigator and the pilot swapped the tape that had been in the video camera with a blank tape. They took the used video tape with them out of the cockpit.

Q: Was that ever recovered?

Couch: No, because they burned it in a bonfire.

Q: No kidding.

Couch: There was some really great detective work on the part of NCIS—the Naval Criminal Investigative Service. NCIS did a great job—a lot of hunches on our part, and sort of a painstaking putting the circumstantial evidence together. Then one of the guys from the back seat got immunity, and admitted that they had conspired to burn the tape.

Q: Why would you say you had lost the case against the pilot for involuntary manslaughter and negligent homicide?

Couch: He was acquitted of the homicide charges. The navigator pleaded guilty to obstruction of justice. Then the pilot had a second trial, for the obstruction charges.

Q: Why not—?

Couch: That was a decision he made. He elected to split his charges, and not have them at the same trial. He was convicted in the second court martial of the obstruction charges. The reason I think he was found not guilty of the manslaughter charges is nothing short of jury nullification.

Q: Who was the jury in that case?

Couch: There were eight officers—all officers. Three of them were junior, younger officers, and three of them were pilots. In the military, you have to have a two-thirds majority to get a verdict.

Q: They gave him a pass?

Couch: They did.

Q: You must have been pretty upset about that.

Couch: That was one of the worst days of my life. Shocking. What you've got to know about that case is this—under no circumstances could that airplane, on a flight like that, fly below one thousand feet above the ground. Under no circumstances. They hit the cables at 357 feet.

Q: What the hell were they doing?

Couch: Joyriding. I know that valley better than I know Randolph County by now, and I can tell you, they were just in there for the thrill.

Q: Why do I think that, many years later, the pilot tried to reopen this case or something?

Couch: It was on appeal forever. Actually, years later, after Guantánamo was over for me, I became an appellate judge on the Navy-Marine Corps Court of Criminal Appeals. Within a few months after I went on the court, their cases came before the court on appeal. That was in 2006. So, of course, I had to recuse myself, and couldn't have any discussions with anybody about those cases. But I was just shocked that the cases had languished that long—and it was because the record of trial was like twenty thousand pages.

Q: When that verdict came down acquitting him, as you say, that was a bad day for you.

Couch: President [William J. “Bill”] Clinton was meeting with the Italian Premier that day in Washington. It was a bad day.

Q: After that, did you continue in the military?

Couch: I would say at that point I was fairly disenchanted. I can say now, yes, I was very disenchanted with military justice. I felt like it was extremely unfair. I felt like it was an injustice. For the first time in my life, I did not want to stay on active duty. I was very disappointed by the Marine Corps—my Marine Corps. So within about five weeks after the cases ended, I left active duty, and took a job with a civilian law firm still down in eastern North Carolina. I stayed in the Reserves, which was the smartest thing I did at that time. Looking back now, it was a mistake to leave active duty when I was so within-the-moment, if you will, of that acquittal. But the smart thing I did was that I stayed in the Reserves.

I continued to serve at Cherry Point at a reservist, a couple days a month, two weeks in the summer—that sort of thing—over the course of the next two years. From 1999 to 2000, I was at a civilian law firm doing personal injury, medical malpractice, that kind of stuff. But it just did not have the allure for me. I think I tried one case. I was in court, in front of a jury, for one case that entire fourteen-month span of time. It just was not satisfying to me at all.

So I left that job to take a job in the local district attorney's office, and absolutely loved that job. It was criminal work again. I was in court every day of the week. I'm just a trial lawyer, so that was absolutely fascinating for me.

Q: That was in Beaufort, North Carolina?

Couch: Beaufort, North Carolina. Also, in New Bern, North Carolina. Our office covered both jurisdictions. My first six months I was in Beaufort, and, for the second half of that year, I was in New Bern. It was around about July of 2001.

It was July of 2001 that the Marine Corps had another issue involving an aircraft. The MV-22 Osprey aircraft—this was the tilt rotor—you know, the airplane takes off like a helicopter, and flies like an airplane. It was completely new technology. It had never been used before in the history of aviation, and the Marine Corps was the first military outfit that was trying to develop this, because of the unique nature of our operations. The MV-22 Osprey had been plagued by mishaps, for various reasons, including one that killed a fellow C-130 pilot I had trained with out in Yuma.

That program for the MV-22 Osprey was under great scrutiny by everybody, least of which Congress, and there was some funding legislation pending in Congress, and it was still debatable as to whether Congress was going to fund the entire, full-blown development of the MV-22 Osprey. The airplane, frankly, was not performing up to standards. It was not performing up to its billing that had been made to Congress over the years. So the squadron commander of the first and only Osprey squadron at New River, North Carolina, stood up in front of the squadron one day and said, “This vote in Congress is coming up. We need to make this airplane look good, and we need to do whatever it takes. If that means we're going to lie on the maintenance records, that's what we're going to do.”

Q: Lie?

Couch: Yes. What he didn't realize was that there was an enlisted mechanic—a lance corporal—in the front row, who had a tape recorder in the cargo pocket of his cammies, recording all this. This guy had also taken photographs of the maintenance boards—these big boards that you hold up, with the maintenance officer telling which aircraft—is it up? Is it down? What maintenance gripes there are on it, and so forth. He had photographed those boards, showing four of the five Ospreys in a downed condition. This Marine took it upon himself to turn over the tape and photographs, and a statement, to *60 Minutes*, with a copy to the commandant of the Marine Corps.

So this huge investigation kicks off, and my best friend, [Daniel] “Doc” Daugherty, we were prosecutors together on the Aviano case. There were three prosecutors—Carol Joyce, Doc Daugherty, and myself. Doc and I—we're just as tight as ticks, ever since Aviano. He was the legal advisor to the investigation at Camp Lejeune. So he calls me up and he says, “This thing is getting hot, and it's going to a court martial. They've got the squadron commander dead-to-rights, but he's got a defense lawyer who's got him convinced that he can beat this thing at a court martial.” Doc says, “Are you interested in coming down here and prosecuting this guy?”

I said, “Man, I'm all over that. That's great.”

At the time, I really loved what I was doing in the DA's office. But by this point in my life—and this is in 2001—I'd kind of come out of that fog that had drifted over me after the Aviano case,

and I missed the Marine Corps. I missed being in uniform. I missed the dependability of people you meet in the military, especially the Marines. I really missed being around Marines, a lot. So I said, "Hey, this is an opportunity for me to go back, and there might be a chance for me to come back on active duty through this. I don't know."

In August of 2001, I reported to Camp Lejeune for what I thought was going to be five months. I thought I was going to start up this general court martial. I figured it was probably going to take more like nine months or so to get the prosecution done with. Then I would have to see what was going on, and most likely I would have to go back to being a reservist, and go back to Beaufort as a prosecutor—an assistant district attorney.

Within a couple of weeks of being on active duty, there was a deal cut—the squadron commander agreed to tender his retirement papers and to accept administrative punishment for his conduct. There were several other individuals, too, who all went to this administrative hearing to get administrative punishment, including a two-star general. It was a three-star general who was conducting the hearings. It was during one of those administrative hearings that 9/11 occurred.

Q: Just parenthetically—were any of the planes put in danger by whatever was done with the maintenance records? As far as you know.

Couch: As far as I know, I would say yes.

Q: Were they just changing the records, or were they changing the maintenance?

Couch: It's how you report the airplane. An airplane goes out on a mission, and it comes back at the end of the day. After it comes back, then you have to say, "Okay. What condition is this airplane in? It's going to need fuel. It's going to need the fluids checked." It's going to need those basic things, but if there's anything that went wrong with the airplane during the flight, it's what they call a "downing-gripe," or an "up-gripe." In other words, they'll say, "Well, we've got a little problem with this, but you could still fly it." Some of those problems are downing-gripes, so that you can't fly them. Every morning, every squadron in the Marine Corps reports on every airplane they have. It goes into this huge computer data base, and everybody from Cherry Point all the way to Washington, D.C. can see what the status of those airplanes are. If that fleet of airplanes is anywhere less than, say, about seventy-five percent mission-capable, there's a problem. There's a huge problem.

In the Osprey squadron, they were running about fifty-six percent full mission-capable, which means only fifty-six percent of your aircraft can get up and do their job. Overnight, it went from fifty-six to ninety-seven percent.

Q: But it was really fifty-six percent.

Couch: It was really fifty-six percent. The way they were playing with the maintenance records was reflecting something that was not true up in Washington.

Q: To your knowledge, as a result of the change in the maintenance records, did any plane take off and then crash?

Couch: No, I'm not aware that there were any mishaps that occurred as a result. My recollection is that they had five airplanes, and two or three of those airplanes were down at any one time—which is a horrendous percentage, for that being a brand-spanking-new airplane, with that much emphasis on good maintenance. They probably had one or two airplanes that were work horses, which were able to get their flying operations done just using the one or two airplanes. The incentive was for them to make sure you don't report the gripes into the computer system for the other three or four airplanes so they look like they're in an up position. It's all about making the numbers look good.

The end of that whole point was, within a couple of weeks of being at Camp Lejeune, which is where the Aviano cases had occurred years before—within a couple of weeks the Osprey cases had gone away, and I thought, “Well, here I am. I've got about another four, four and a half months to go. I'll stick around here. I'll try some courts martial. Then I'll probably go back to being an assistant district attorney.”

Q: And then 9/11 happened. Where were you when 9/11 happened?

Couch: I was at home. Because of the experience that I had at that point, they made me—

Q: Home being—?

Couch: Morehead City, North Carolina, which is just shy of an hour away from Camp Lejeune. It's on the coast of North Carolina. Morehead City is basically equidistant between the Marine Corps air station at Cherry Point and the Marine Corps base at Camp Lejeune. I was back home. I had pulled an all-nighter the night before, because one of the junior prosecutors had a very important motion due to the court the day before, and I proofread it before he filed it. It was an absolute abomination. It was horrible—some of the worst legal work I'd seen—so I got an extension from the court to try to fix this thing. I took it home with me, and I wound up staying up most of the night trying to fix this thing. The way I figured it was, “Hey, I've been up all night. I'm going to get a few hours' sleep, then tomorrow morning I'll get up and do some last-minute proofreading of it. I'll check the validity of the cases, and make sure they're still good law.” We do that with an online database called Westlaw. You can get it on the internet. “Then I'll mosey on in to the office, I'll get that thing filed, and we'll take it from there.”

The next morning I woke up. I got a cup of coffee. I went to the computer and turned it on to go onto the legal database and check the cases. I remember I was using the Yahoo browser, and that's when it came up with a news report that there had been a terrorist attack in New York City. By the time I turned on the computer, both the north and south towers had been hit by the two planes. So I turned on the TV, and while I was watching the TV was when the other two airplanes went down—the one into the Pentagon and the one in Shanksville, Pennsylvania. I was just glued to the TV. Shortly thereafter—and I've forgotten how long it was—when the World Trade Center actually came down, my first thought at that time was that my roommate from Duke, Chris Lozada, was killed in one of those buildings. He had also been a Marine at Duke.

We were roommates for the last two years that I was there. He had gotten out of the Marine Corps, gotten a business degree, and was working in the World Trade Center. I hadn't spoken to him for about six months. All he said was, "I'm working in the World Trade Center."

Q: You didn't know for whom.

Couch: I knew it was for Deutsche Bank, or Swiss Bank, or one of the foreign banks. That was all I knew. I'm not a New Yorker and don't know much about New York. I did not realize at that time that the World Trade Center includes many other buildings, other than just Tower One and Tower Two.

As I'm watching the buildings come down, I'm thinking that Chris Lozada is in the middle of that, and my assumption was that many thousands of people were dying in the middle of that. I had been in the World Trade Center once when I was in college, and just realized how huge these things were. Just the shock of the whole thing—and anybody on active duty, most especially Marines, is sitting there watching that surreal event occur. The first thing you know is, "Oh my gosh, I can't believe this is happening. I can't believe all these Americans are dead." But, in the mind of the Marines, the next thing was, "We're going to be busy." In the Marine Corps we had this saying, "Our job is to kill people and break things." That's why a lot of people want to join the Marine Corps. It's just as blunt as that. We train really hard, and we kind of live for a fight.

After I saw those buildings come down that day I knew, man, my life's going to be real different. Because every Marine, whether you're a lawyer, a pilot, a bottle washer, or whatever, every Marine has got a role to play.

Q: You were in the Reserves, still, weren't you?

Couch: I was in the Reserves, but I was on active duty. I had been mobilized to do the Osprey case, so I was actually on active duty at that time.

I guess it was probably sometime after lunch, I got my uniform on and drove the fifty-five minutes down to Camp Lejeune. When I got there, I went into the side gate there at Camp Lejeune, right off of Highway 24, and the line of cars was backed up almost all the way to the main thoroughfare of Highway 24. I stood in line to get on base. It took me fifty-five minutes to get down there, which is usual; it took me another hour and a half, waiting in a line of cars, before I got on the base. The Marines they had on the gate were in full battle rattle—flak jackets, helmets, weapons. They had the Humvees pulled out with heavy machine guns—the whole nine yards. I'd never seen that, even when I was on active duty during the first Gulf War. I had never seen the level of security that was rolled out on 9/11.

I got on base, I went and filed the motion that I'd worked on overnight, and everybody was just kind of in this state of shock. It was kind of crazy. You didn't have a lot of yelling. You didn't have any of that kind of stuff. Everybody was real serious. In retrospect, looking back on that, it's because Marines—the job is to kill people and break things when the nation directs us to go do

that, and I think everybody realized the enormity of what had happened, and where it was going to go next.

Q: At some point, you learned that a good friend of yours was, in fact, on one of those planes, right? Was it that very day?

Couch: It wasn't that day. You know, I ought to go back and try to pull the actual email I got. I don't think it was that day. It was either the twelfth of September or the thirteenth. It was either a day or two days after that I got an email from a friend of mine from my old C-130 days, Jim Myers. His call sign was "Oscar"—Oscar Mayer, like the hotdog. Oscar sent me an email and said—see, I had spent those years in the squadron, and then I kind of went off doing the legal thing. The guys who were still active aviators were all still sort of plugged in, but now that I was a lawyer, I didn't have as much communication with my old pilot buddies. Oscar sent me an email and said, "Hey, I don't know if you've heard yet, but Mike [Michael R.] Horrocks was on the second plane to hit the World Trade Center."

Mike Horrocks was a heck of a guy. His call sign was "Rocks." His claim to fame was that he was probably the best athlete in the squadron. He'd been a college quarterback at West Chester University, in West Chester, Pennsylvania, which is like a division-three school. He was a tall guy, real fit. Marines are always gauging each other for how good a shape somebody is in and what not. Everybody is generally a decent athlete, but he was above the rest. He was very, I wouldn't say cocky, but he was very confident. He was one of the best young pilots in the squadron. He had a natural ability as a pilot, and everybody knew it. I remember we went

through a stretch where we were playing touch football with the enlisted guys a couple times a week at lunch.

Q: Where was this?

Couch: At Cherry Point, back when I was in the squadron. Usually, the enlisted guys are a little bit younger, and they're in really good shape. Generally, the enlisted can more than hold their own. They beat the officers more often than not in these pickup games of basketball, football, whatever, until we had Rocks. I remember these football games we'd play. You always go back into the huddle, and you're like, "Okay, you go this way, you go that way," whatever. You try to do it like they do it on Sunday at the NFL [National Football League], and I just remember Rocks saying, "It doesn't matter. Just get open. Just get out there." He could hit anybody on the field he wanted to, at any time.

Q: He was a quarterback?

Couch: He'd been a college quarterback. He was just the duty quarterback. And he was such a tall guy. He would get his drop back within three steps, then he's got all day long, and he's just hitting people at will. We were just killing the enlisted guys in these flag football games, because we had this ringer, Mike Horrocks.

Q: When you moved on into the legal area, had he stayed on as a pilot in the Marines?

Couch: He stayed on as a pilot in the Marines. I think he did another year. I left in 1993, and he was a year behind me in training. I believe Rocks stayed on until 1994 or thereabouts as a C-130 pilot, and then he went down to flight school in Pensacola with Oscar. They left at the same time. They went down to Pensacola as flight instructors. Oscar had been down there with him at Pensacola, and they were flight instructors teaching the new pilots how to fly for several years. It was at that point that he got out of the Marines and went to United Airlines. On the day of 9/11, he was the co-pilot—or the First Officer, as they call it—of United 175, which took off out of Boston, and hit the north tower of the World Trade Center.

Q: That was the second plane.

Couch: Right. The Al-Qaeda terrorist who was flying the airplane was Marwan al-Shehhi.

Q: I want to distinguish him from another name that we're going to come to.

Couch: Marwan al-Shehhi was the pilot of that plane.

Q: I'm sure there are records to be found everywhere, and in 9/11 Commission Report, but very briefly, do you know what the sequence of events on that plane was?

Couch: Very similar to the others. Years later, when I was prosecuting one of the Guantánamo detainees, [Mohammed] al-Qahtani—al-Qahtani is the true twentieth hijacker. I'm convinced of that. I was the lead prosecutor on the al-Qahtani case, and when I started working on it, I got to

know an FBI [Federal Bureau of Investigation] agent, Jim [James R.] Fitzgerald. We call him Fitz. Fitz is probably in a handful of the most knowledgeable FBI agents on 9/11 that exists. He started working 9/11 on that day, and has an encyclopedic knowledge of it. I remember the first time I met Fitz, when they started looking into doing the al-Qahtani case, was over at the FBI headquarters in Washington, and I said, “Hey, look, this is kind of a personal question,” because I told him about my connection with Mike Horrocks. I said, “Can you tell me what happened to him?”

He says, “You know, United 175 is the flight that we know the least about, from a perspective of evidence gathered from the wreckage”—what little wreckage there was of any of the flight, and the 911 phone calls, the cell-phone calls that came off the flight, the cockpit voice recorder, and so forth. He said, “That's the flight we know the least about, of all four of them. But the sense we have is that the method of attack on each one of the planes was the same. The best conclusion I can give you is that he probably had his throat slit with a box cutter, and was dead on the floor of the flight deck when the plane went into the tower.”

Q: Was the cockpit door barred at all? Was there easy entrance into the cockpit?

Couch: Well, yes, there was, on all the flights, I think, because it's my understanding—and understand, I didn't have a lot of focus of—the cases I was working on were other stuff.

Q: I understand.

Couch: What I know of 9/11—I'm really getting a lot of this from the 9/11 Commission Report that I read back then—is that the standard operating procedure for the airlines at that time was that if you had a hijacking that was going to go on, they were to be fairly submissive to the hijackers, with the expectation that the hijackers were wanting something of value—people released, ransom, the ability to say their piece, what have you. So it was my understanding that with the airlines, pretty much across the board, their standard operating procedure was to squawk. That's in the transponder box, when you turn in a certain code that the radar can see. You put that code in, and that tells the radar controllers, “We're being hijacked.”

So they would put in a certain squawk that a hijacking was in progress, then they would work at basically appeasing the hijacker. That's my assumption as to how the hijacker, on any of the planes, got access to the cockpit, as part of that standard operating procedure. Here's one other aspect too, that we know of. I can't recall which one of the planes this was on. I think it was the one that went in at Shanksville, Pennsylvania. We know that they slashed one of the stewardesses, and that was to elicit the pilots' opening the door, to come to her aid. Basically, to terrorize everybody on the plane into submission, they slashed one of the stewardesses. I think we're getting that from a phone call that was made from that flight.

Q: In fact, that was the plane where there was resistance to the hijackers.

Couch: Right. Flight 93.

Q: That's why it went down in Shanksville, really. People say it was headed for the Capitol. I don't know how they know that.

Couch: There was a mention in an intelligence report that I saw—and I apologize, Myron. It's been so many years since I knew all of that stuff.

Q: No, it's unfair to ask you these things. It's not your terrain.

Couch: I recall that there was some indication in an intelligence report. I can't remember the source of where we got it, but there was some reference to the “white dome.” That was interpreted from the Arabic. Some reference to the white dome, the building with the white dome. I think, even within the intelligence community, there was a debate as to whether it was the White House or the Capitol, but the sense that I get is that the general consensus is that it was headed for the Capitol.

Q: When you knew Mike Horrocks in the squadron days, was he married at that time?

Couch: He was.

Q: So you knew his wife.

Couch: Yes. Miriam [Horrocks].

Q: You were all kind of pals, weren't you?

Couch: Yes. He was closer to other guys in the squadron than he was to me, but the thing we had in common—at Cherry Point there is Highway 70 that goes through eastern North Carolina. Cherry Point is in Havelock, North Carolina. To the north of Havelock is New Bern, North Carolina. To the south and east is Morehead City. Most everybody lives off-base, and most of the pilots congregated up in New Bern, but a few of us lived down in Morehead. So my wife, Kim, and I were in Morehead, and Rocks and Miriam were living in Morehead City. There were a couple of other guys, but there were just a few of us who were living down in Morehead City. Miriam worked at the same hospital, Carter General Hospital, as a respiratory therapist, where my wife, Kim, worked as a pediatric nurse.

We went out to dinner a few times. A squadron is kind of like a fraternity atmosphere. Everybody knows everybody else. You go to squadron parties. There's a fair amount of beer drinking and hijinks. I remember one party we all went to. It was at somebody's house, and there was a swimming pool, and everybody was getting thrown in the swimming pool.

Q: Have you been in touch with Miriam Horrocks since 9/11?

Couch: I have.

Q: How's she doing?

Couch: She's doing as well as can be expected. She remarried, a guy named Paul Isenberg, who had actually played football on the same football team as Rocks. Paul is a great guy. They live right near West Chester, Pennsylvania. Paul's wife died of cancer, so, apparently, when they were all living up there in West Chester, they knew each other's spouses. Paul knew Rocks from the football team, and Miriam knew Paul's wife. Then I think it was like within six months of each other, 9/11 killed Rocks, and Paul's wife died of cancer. A few years after that, these two families came together. This is a great example of watching people who have suffered such loss put things back together, as best you can.

I saw Miriam years later. I think it was in 2008. They were raising money for a statue of Mike that they put outside the football stadium at West Chester University. They were having a fundraiser in downtown Philadelphia, and I got invited to come up there. I said a few words to that gathering of his football teammates. That was the first time I'd seen Miriam since circa 1993. It was really good to see her. I stayed in contact with Paul. We email occasionally. That was one of the few bright spots out of this whole story.

The shocking thing for me was—it was a few days after 9/11, they actually had Mike's funeral, and a photograph of Miriam and their two kids on the front page of *USA Today*. She's sitting there holding the flag in her lap. After I went to work at the military commissions, one of my friends, an NCIS agent named Mark Fallon, gave me a copy of that photograph. I kept that photograph on my desk for the whole three years I was at military commissions.

Q: So you went back on active duty, then, after 9/11.

Couch: After 9/11, yes. I mobilized. I was already mobilized, but then I did a long-term mobilization. I also put in a request for what we call “return to active duty.” It's where you take a reservist who now wants to come back into the Marine Corps as a regular officer. Back then it was pretty hard to get. When I put mine in, I was a very senior major. I was actually in-zone for lieutenant colonel, as a reservist. Then I selected for return to active duty. I was promoted to lieutenant colonel within a week and a half of when they swore me in as a regular officer again. Within a week of being promoted and sworn in as a regular officer is when I left Camp Lejeune and went to Washington, D.C.

Q: To do what?

Couch: To prosecute detainees at Guantánamo Bay.

Q: Well, is that true through August or October of 2003?

Couch: What happened was the president signed the military order in November of 2001, shortly after 9/11 and our invasion of Afghanistan. Within just a couple of weeks, we were scooping people up in Afghanistan left and right. The whole story about the president's military order, the decision to use military commissions, and all that kind of stuff can be told much better, I think, by somebody else. I'll give what details you need, but as it impacted me, we heard that a military order came out, and as soon as that came out I realized at that time, “You know what? They're going to be looking for people to do this. They're going to be looking for prosecutors.” It was

later on, toward the end of November, maybe early December, when we got the word that they were looking at staffing the prosecution shop. A request had gone out to all the senior Marine Corps judge advocates that said, "Submit nominations of people in your command for prosecutors and for defense attorneys, for military commissions."

Q: Military defense attorneys.

Couch: Right. I recall this part of the story pretty well. I was down at the bowling alley. The bowling alley was across the street, on-base. It was across the street from the courthouse that we used, and our offices were right behind the courthouse. At the time, I was the military justice officer.

Q: This was at Lejeune.

Couch: At Lejeune. I was kind of like the district attorney of Camp Lejeune.

Q: And this is around the period of 2002?

Couch: This is 2002. In 2001, the military order came out. Running through 2002, there was this discussion that, "Okay, we're going to put the military commissions together," and they wanted to go out looking for prosecutors and defense attorneys. So sometime in probably mid-2002, I remember I was at the bowling alley. By this point I was a military justice officer. I had eight military prosecutors working for me.

Q: At Lejeune?

Couch: At Camp Lejeune. We were doing all kinds of cases. We had cases coming out our ears. We were down at the bowling alley one Friday afternoon, drinking beer and blowing off steam. I used to always have a training session on Friday afternoons, and at four o'clock sharp we would end training, and go down to the bowling alley. The lieutenant colonel who was in charge of the legal services section there, he came over to the bowling alley looking for me. He said, "Hey, are you interested in getting in this Guantánamo thing? We need to submit nominees for people."

I said, "Yeah, I'm game. I'm all over it."

He said, "Okay." That's when my name got put into the pot.

Q: You didn't actually assume that job—

Couch: —until 2003.

Q: —until mid-2003. Right.

Couch: I knew they turned my name in, and I knew they were trying to get that first crop. They were looking for people who had a lot of experience, and I was kind of an anomaly. In the Marine Corps, as a judge advocate, usually you cycle through different jobs. You go through

being a prosecutor or defense counsel, then you might be like a civil law guy. You might work in legal assistance. You run a tax center. You kind of cycle through these different jobs, but you don't stay in the courtroom your whole time. But here I was, this oddball. I'd done this huge case in the Marine Corps—the Aviano case—then I left active duty, stayed in the courtroom for the next however many years. Now I'm back on active duty, with a lot of trial experience. I tried a lot of cases at Camp Lejeune.

I knew my name was up there on the short list, just because I was this anomaly of a guy who had spent his whole time in military justice, since I'd been a lawyer. By this point, I had seven years of trial experience. I knew my name had been turned in to the powers that be in the Marine Corps. I knew the Marine Corps had me on a short list of two or three guys, and that my name had gone somewhere up in the Pentagon—I didn't know where—for consideration. I just assumed that the Army and the Air Force and the Navy had submitted theirs, as well, because this was going to be a joint service operation.

I was down in New Orleans at a continuing legal education conference about how to prosecute homicide cases. It was right before Halloween in 2002. I remember it, because we had these crazy parades down there, with these really strange folks. I remember the time of year real well, because I was in New Orleans that Halloween. I got a phone call, and they said, “You need to call this number up at the Pentagon, Office of General Counsel for the Secretary of Defense. They're going to do a phone interview with you, because they're putting together the team.” So I conducted that phone interview while I was down there.

Q: Who interviewed you?

Couch: It was a guy named Lieutenant Bill [William K.] Lietzau.

Q: Yes, I know him. He's in charge of detainee affairs now at the Defense Department.

Couch: He's an undersecretary of defense for detainee affairs. I didn't know him personally, but I knew his reputation. We were both Marine lieutenant colonels. Actually, no. I was a major at that time. I was not promoted to lieutenant colonel until right before I went up there. But I knew of Lietzau because he was a Naval Academy grad, a Yale lawyer, and he came through the same program I did, although he had the funded program. He had been an infantry officer before he was a lawyer. He'd been a military judge. We all knew him as this wunderkind, because he had been involved in negotiations of international treaties, as a major. It's just unheard of that a major has that level of responsibility. I knew of his reputation. I didn't know what he was doing at the time. I had heard that he was involved in putting this whole thing together.

So Bill called me up, interviewed me, and said, "Hey, Whit [Paul Whitlock] Cobb wants to talk to you for a minute," and he put him on the phone. Now I knew Whit Cobb from Duke. Whit Cobb was the deputy general counsel for the secretary of defense under Jim [W. James] Haynes [II]. It was an SES [Senior Executive Service] position. Whit Cobb had been the battalion commander of the Army ROTC battalion at Duke the same year that I was the battalion commander of the Navy ROTC battalion, so we were counterparts. We both graduated from Duke in 1987. Actually, our mothers had known each other in nursing school at Duke, so we had

some stuff in common. I knew that he was this big civilian guy who was running all this sort of stuff. He got on the phone and said, "Hey, it's great to talk to you after all these years," and so forth. "I hope you can join us," and this kind of thing.

Shortly after I got back from that that trip to New Orleans was when I found out, okay, I'm one of the two Marine nominees who's going to be there, who's going to do military commissions. "Just stand by. We'll let you know what's coming next." The other Marine, I found out, was a guy named Kurt [J.] Brubaker. Kurt and I had been second lieutenants together at Quantico, right after I got commissioned.

Q: Thank God you didn't say Duke again.

Couch: No. Where was Kurt from?

Q: It doesn't matter.

Couch: Anyway, Kurt and I knew each other. We'd gone to The Basic School together as second lieutenants. We both went to the legal education program, gone to law school at the same time, so we'd known each other all the way through all that stuff. We went to the Naval Justice School at the same time. He was the other guy who got picked.

Q: You're saying that this was around November 2002?

Couch: Correct.

Q: Do you recall that about a year earlier, Secretary of Defense [Donald H.] Rumsfeld had settled on Guantánamo Bay as the place to put some of these people who were being gathered up on the battlefield, as he put it? Do you recall seeing the pictures that were published in mid-January of 2002, when the first detainees arrived at Guantánamo Bay?

Couch: I knew it very well, because my “fairy god general” was General Mike [Michael R.] Lehnert, the guy who started Camp X-Ray.

Q: You knew Mike Lehnert?

Couch: Yes. Okay, back to the story. Recall that I'm back on active duty at Camp Lejeune. I'm in the legal services support section, which fell under 2nd Force Service Support Group at Camp Lejeune. At the time, Brigadier General Lehnert—he retired as a two-star—General Mike Lehnert was the commanding general for 2nd Force Service Support Group, so he was my immediate general.

Q: At Lejeune.

Couch: At Lejeune.

Q: He wasn't the general you went to see—you were briefing at 9/11—

Couch: No.

Q: Okay, forget it.

Couch: Anyway, as soon as I got to Lejeune, and I found out that General Lehnert was my commanding general, I went in to see him because he had been a colonel at Cherry Point, way back in the day, before the Aviano case. I was the chief prosecutor. He had been a group commander, and he had a huge drug ring going in his unit. I was prosecuting those drug cases, and I was rolling them up one after the other. I knew him really well. He called me his “dog on a chain.” This is circa 1996 to 1997. When I was back at Camp Lejeune, and I find out that he's my commanding general, I go in to see him. I'm thrilled to see him, because I know this guy. We had a lot of cases at Camp Lejeune coming out of his command, where he was what we call the convening authority. He was the general I was prosecuting the cases for. So it was like “old home week.”

Q: This is at Lejeune.

Couch: At Lejeune. Now I'm his prosecutor again, but these are much more serious cases.

Q: I don't want to get that far ahead.

Couch: I was with him the Saturday morning he left, in January, to go to Guantánamo, to set up Camp X-Ray. I went into work on a Saturday because we had to get a bunch of pretrial agreements signed off, and I remember being in his office, and he was still packing his boxes and so forth. I said, "Sir, how long are you going to be down there?"

He says, "This thing is going to take a while." He would confide in me in different things, and he just said, "This is going to be a tough job." The whole time he was at Guantánamo, I was back at Camp Lejeune, and this was the time I put in my package to return to active duty. I sent him an email and said, "Sir, I need your help. You're going to have to endorse my package, and I think your endorsement is what's going to do this thing."

He said, "Okay, draft it up."

I remember drafting his endorsement. It's on top of my package. I took it over to his secretary, and she put it in the mail pouch to be flown down to him at Guantánamo. He actually signed the endorsement to bring me back on active duty, full-time, while he was in Guantánamo.

Q: Okay. Now I think it's a fair conclusion that there are only ten or fifteen people in the Marine Corps, and you all know each other.

Couch: [Laughs] That's true.

Q: Let me go back to this process, in which you were seeking to be a military prosecutor at Gitmo [Guantánamo Bay detention center], that was in the works when those pictures came out. Right? These were the first detainees, on January 12, 2002, right? What I'm asking you, really, is what was your reaction to seeing these guys? These pictures? Is this what you expected to see?

Couch: Sure. The enemy combatants. You put them in orange jumpsuits, because when people are detained you put them in orange, so you can see them if they try to run away.

Q: Goggles, I think, and stuff.

Couch: Sure.

Q: Shackled.

Couch: Sure. That's what I was expecting to see.

Q: None of that was a surprise to you?

Couch: No, not at all.

Q: And the fact that Guantánamo Bay had been chosen as the place to put these people?

Couch: My best friend, Doc, had already figured it out, long before it was ever announced. See, Doc and I were together again. He was in charge of the whole legal service section at Camp Lejeune, and I was his military justice officer. I was his head prosecutor. We'd go up there every day, and at the end of the day I'd sit in Doc's office and we'd talk. He was my best friend. He had it figured out.

Q: He had what figured out?

Couch: He had it figured out. I said, "I know we're collecting these guys up. What are we going to do with them? Where are they going to put them?"

He says, "I know exactly where they're going to put them. They're going to put them at Guantánamo."

I said, "What?!"

He said, "Absolutely. They're going to bring them to Guantánamo. Think about it. You've got like the world's second largest mine field on the north end of the base. They're going to keep them on the base. That's where we were holding the Haitians when all that stuff was going on. You've already got some facility to be able to do that. You've got water, with sharks. They can't swim, and they can't get off the north end of the island because you've got the second largest mine field in the world, the first one being the DMZ [demilitarized zone] between the Koreas."

Q: Did you say, "Doc, you're out of your mind," or—?

Couch: It made all the sense in the world. It was very prescient on his part. Let me add this one to you. I said, "Well, you know, are these guys going to have access to the courts?"

He said, "How? Are they going to go to Havana? It's Cuban territory. How are they going to be able to get access to the courts if they're on Cuban soil?"

Q: Well, he wasn't so prescient about that.

Couch: No, but he was prescient enough to know where the legal arguments were going to go, at least on behalf of the government.

Q: Right. I believe it was February 7, 2002, while your application, so to speak, to be a military prosecutor was working its way up through, when President Bush announced that these detainees were not going to be covered by the Geneva Conventions as a matter of law or treaty, and the military was going to treat them humanely, as a matter of policy. Isn't that right? Do you remember hearing about that?

Couch: I remember hearing about that, and here's an interesting story that applies to that. I could be wrong, but my recollection is that around that time there was a press conference held at Guantánamo. General Lehnert was being interviewed, and General Lehnert said, "They will be held in accordance with the Geneva Conventions." That's what any good military officer is

expected to say. What I had been told was that it was immediately—the phone started ringing from the Pentagon, chastising him and his staff judge advocate, his legal advisor, for saying that. They were wanting to maintain the “they will be held consistent with”—they did not want to confer the Geneva Conventions’ protections. That's how I remember that, because I remember there was some hot water I was hearing, coming out of the general's building. There had been some hot water poured on General Lehnert over that. Of course, we're sitting there thinking, “Golly, we wonder if his SJA,” his legal advisor, “screwed up and didn't advise him.”

I didn't see there was any mistake by General Lehnert at all, because that's what he should have said. But that was not the policy.

Q: To the extent that you heard the president say, or you saw accounts of the president saying they were going to be held, as a matter of policy—the Geneva Conventions would be applied by the military. He, significantly, didn't say the CIA [Central Intelligence Agency], but by the military, but not in accordance with any law or treaty. What was your own reaction to that? Or maybe you had no reaction.

Couch: I thought it was a little unusual that they said—that they qualified it; that they had this qualified treatment. As time would go on—and I can't recall if it was at that time, or if it was later on, after I got into military commissions in 2003—but I remember thinking that I didn't have as much of a problem with that qualification because, legally, Al-Qaeda did not represent an entity that was a signatory to the Conventions; therefore, how could they avail themselves of

the protections of the Conventions, if they were not lawful combatants who had been in any way affiliated with an entity that had been signatories to the treaty?

Q: That's what the government was saying.

Couch: Right, and that's the pitch we took. We were going to go forward with the trial, and that was the angle that we took in 2003 and 2004. Now, in retrospect, I think I was incredibly naïve to not have a problem with that, because of what we now know. I think there was an incredible naïveté on my part, and perhaps those of others, of "Trust me, I'm from the government." That if they're going to be held consistent with the protections of the Geneva Conventions, that was good enough, because that showed that we were doing the right thing. We don't want to say they're entitled to something they're not due because they weren't signatories. I never, in my wildest dreams, thought that we would have a policy in place, performing the kinds of acts that, ultimately, we learned were going on.

Q: Okay. Have you ever read a book called *The Least Worst Place*, by Karen Greenberg?

Couch: No. I know of Karen Greenberg, but no, I haven't read *The Least Worst Place*.

Q: That is a fairly unique book about the first hundred days of Guantánamo, in which General Lehnert figures very deeply, of course, because he was there.

Couch: Let me just preface this by saying, Mike Lehnert is one of the most honorable men I know. I've said this before and I'll say it again—I would low-crawl through hell in a gasoline suit if he told me to do it. I also know that there was a crazy Army intelligence officer general, or some general in charge of the intelligence effort at Guantánamo, who actually suggested bringing charges against General Lehnert for giving comfort to the enemy—because of the policies that he put in place about their treatment.

Q: How would you characterize those policies, to the extent that you knew them?

Couch: General Lehnert's?

Q: Yes.

Couch: For what General Lehnert was in control of, and what he knew, to my knowledge, they were consistent with the Geneva Conventions, and, therefore, in compliance with the Geneva Conventions. I do not for a moment believe—I don't have any knowledge of it. Moreover, I would have a hard time believing that Mike Lehnert would ever have anything to do with treatment of detainees that would not be in compliance with the law.

Q: Let me fast-forward before we go back again. Drawing on what you learned between mid-2003 and 2006, in your position in the military commissions, did you ever uncover, or happen upon, anything that showed that detainees were being abused under Mike Lehnert?

Couch: No, not at all. It's my understanding, from what I've read, what I've seen, and what I was able to deduce, that—separate, if you can, my affinity for and relationship with Mike Lehnert—it's my understanding—and I've heard this from others who don't have that affinity for him—that he was there from January until end of March. When he left the scene—and I can't recall the general who came in behind him.

Q: After him, you mean?

Couch: After him.

Q: General [Michael E.] Dunlavey.

Couch: Right.

Q: There were two. There was General Rick Baccus, who was in charge of the maintenance administration of the camp, and there was General Dunlavey, who was in charge of intelligence.

Couch: Dunlavey was the one who suggested that Lehnert be investigated and charged.

Dunlavey's the one. General Lehnert was the general, and he had control of it all—the detainee operations and intelligence operations. It was JTF 160 and 170.

Q: He was in charge of it all, as you say—

Couch: The whole thing.

Q: —then it split.

Couch: When he left, that's when the two JTFs split, and you had 160 and 170.

Q: Then it came back to JTF-Gitmo, the next fall.

Couch: Correct. It was my understanding that when General Lehnert left, and Dunlavey came in and started to run the intelligence operation, that's when the “reindeer games” started.

Q: Okay. Let me go back for a second.

Ever since they let you run off to law school, you had been involved, one way or another, with legal affairs in the military. Had you any knowledge of or familiarity with, even passing knowledge of, military commissions at that time?

Couch: I had vaguely heard about them during law school. Just a passing reference to them in law school, and I knew something about the fact that we had done them in World War II, and that there was a case involving the Nazi saboteurs, and that we had prosecuted Nazi saboteurs who landed in the United States at military commissions, and those guys were executed. That's all I knew.

Oh, and the other thing—the manual for courts martial. I'd be reading through the manual for courts martial, and once in a while you'd see this thing, “military commissions,” and you're like, “whatever that is,” and you'd move on.

Q: Right. But you operated under—

Couch: —court martial.

Q: —the Uniform Code of Military Justice [UCMJ]?

Couch: The Uniform Code of Military Justice.

Q: Right. Does the Uniform Code of Military Justice prohibit cruel and inhumane treatment of prisoners by the military?

Couch: Not in and of itself. I think, yes, it could, under Cruelty and Maltreatment, which I believe is an Article 93 offense. It would also prohibit it under Article 92, which is for violation of general orders, and also under the Assimilative Crimes Act. Myron, you're embarrassing me, here. I think the Assimilative Crimes Act would have been under Article 134, the general article, and here's why. If you get an offense that occurs, and there is no enumerated crime within the Uniform Code of Military Justice that addresses that crime, that crime still can be prosecuted under the Uniform Code of Military Justice, as long as it is an offense of some federal law. All right? Are you tracking with me, here?

Q: I'm tracking with you, but it's my understanding that the Uniform Code of Military Justice, simplified matters, prohibits United States forces from engaging in "cruelty toward, or oppression or maltreatment of" prisoners in any way.

Couch: Article 93.

Q: It also treats both physical assault and threats of injury as felonies—

Couch: Article 121.

Q: —whether they were committed in the course of interrogations or not.

Couch: Correct.

Q: What I'm getting at is that that is the kind of law under which you were operating, lo these various years, since you got out of law school. Isn't that right?

Couch: Yes. Under the UCMJ, under war crimes, you have Article 92, which says if it's a violation of a general order, duly enacted, it's a violation of the UCMJ. Article 93—if it's an offense that involves the cruelty or maltreatment of another, it's an offense. Article 121—if it's an assault, or an assault with means likely to create grievous bodily harm, it's an offense under the Uniform Code of Military Justice. Article 134, general article—even if it's not enumerated under

here, you can do a novel specification, and you can make it a crime. The joke is, we are all walking violations of the Uniform Code of Military Justice. I can do just about anything, and you can find a way to charge it under the UCMJ. Under this Article 134 general article, if there is nothing else in the UCMJ that addresses the alleged misconduct, you can look to Federal Law Title 18 of the United States Code, and incorporate, by reference, into Article 134, and it's an offense under the UCMJ.

The reason that is significant, under 18 USC § 2441, you've got the War Crimes Act. You've got the Torture Act under 18 USC § 2340A. You've got all the other things that I think, ultimately, with what I know now, were implicated, that were done with detainees at Guantánamo Bay and other places. It's clearly chargeable under 18 USC § 2441 and 2340A, and military service members could be prosecuted under the UCMJ for torturing detainees.

Q: Of course, you'll get an argument from the Bush administration on that, probably. But be that as it may, here you know that these are going to be military commissions, not federal Article III civilian trials. And they're not going to be courts martial.

Couch: Let's be specific. You have Article I courts martial, because the Uniform Code of Military Justice is derived from legislation passed by Congress, duly enacted into law. So it's an Article I tribunal, not unlike the tax court, or bankruptcy court. Article III of the U.S. Constitution handles federal prosecutions that you get in federal district court. Under the unique confines, and under the legal reasoning that we proceeded on, there was this Article II, military commissions derived from the president's inherent authority as the commander in chief of the

armed forces. Basically, if the president comes out and says, “As the commander in chief, I’m invoking my Article II constitutional authority to conduct military commissions,” then he would have the authority to do that. That is what was at stake in the *Hamdan v. Rumsfeld* [2006] litigation.

Q: Okay, but what I want to know is what Stuart Couch thought of the use of military commissions, as opposed to these other avenues that were more traditional. After all, there hadn’t been any military commissions since World War II, and there had been very little then, except on the battlefield, perhaps.

Couch: I thought it was legitimate. I thought it was a legitimate exercise of authority. Again, I said, “Hey, look. We’ve had military commissions.” What I learned about them later on was that we had used military commissions since the founding of the United States. I knew that military commissions had been used during the Civil War, and World War II, and I thought they were okay.

Q: Did you ever ask yourself why they had not been used since World War II?

Couch: No, I really didn’t. When I really thought about it, I said, “Well, in Vietnam, it was a completely different conflict than World War II.” In World War II, you had these countries that were overrun—basically France—by the Nazis. When we showed up, that was the law. Ours were the courts that were going to be open. We were the law. Whereas, in Vietnam, we were always there at the invitation, if you will, of the South Vietnamese government. We really didn’t

have the authority in South Vietnam to go conducting military commissions for perceived war crimes.

Q: Well, isn't it true that in Vietnam, and then in the first Gulf War, the military conducted, under the Geneva Conventions—

Couch: Article 5 tribunals.

Q: —Article 5 hearings. A lot of them.

Couch: Exactly.

Q: Right.

Couch: Now, again, I'm a little bit of the devil's advocate here, but why is that? Now I think we would be in agreement, the way this whole thing has transpired. However, why was that? Why were we doing these Article 5 tribunals? Because the Vietnamese, even the North Vietnamese, had been signatories to the Geneva Conventions.

Q: Well, so had the Afghan government, hadn't they?

Couch: Right. But the Afghan government has now failed, and the individuals we're dealing with are not Afghani. Far and away, the majority of these guys being scooped up in Afghanistan were not Afghani.

Q: All right. This opens the door to my asking you this question. The top tier of the administration went out of its way, repeatedly, to describe these detainees who were coming into Guantánamo Bay—and there were six hundred of them, or so, at the time, in mid-2003, when you took over your job—as the “worst of the worst.” Did you hear that?

Couch: Oh, I did.

Q: Did you buy that?

Couch: At that time, yes.

Q: Did you think you had a sound sense—you couldn't have much more, I suppose, before you took your job—of how these particular six hundred people had ended up there, as opposed to anybody else over there?

Couch: All I thought was that these were individuals that we were scooping up off the battlefield that we had figured out were dangerous, and a sub-set of the ones that were dangerous were implicated in crimes committed by Al-Qaeda.

Q: We had figured that out, you figured.

Couch: Yes. I figured that Guantánamo was the area away from the battlefield that, for whatever reason, the powers-that-be had decided that's where they were going to be held, that they were trying to discern who these people were that we had, and that if there was a subset of those people that we had who were determined to be Al-Qaeda operatives, and involved in and responsible for Al-Qaeda operations, that those were going to be the ones we were going to prosecute.

Q: Right. Without going into detail right now, did you ever come to feel that that vetting process was anything less than very good?

Couch: My assumption was that that vetting process, if we were going to go through the effort to transport them off the battlefield and to a place like Guantánamo, that yes, we probably had some pretty legitimate reasons—for either one of two things, or a combination of the two: future danger, future threat to the nation, or, past conduct, or a combination of the two.

Q: Actually, at that time, if some general had come up to you and said, “Couch, straighten up and tell me, where's the battlefield?” What would you have said?

Couch: Global.

Q: Global. People could be scooped up anywhere.

Couch: Global. Because of the conduct of the enemy. I will say this. They're the ones that picked this fight, and they're the ones that elected to attack us where they could find us, and where they could find us vulnerable. They did it when they attacked the [USS] *Cole*. They did it to the embassies in East Africa. They did it to New York twice. They did it at the Pentagon. They're the ones that took this to a global battlefield, so I didn't have a lot of problem with the fact that we could pick them up and take them into our custody in the name of protecting the nation. We can do that.

Q: You mean if they are, let's say, a Pakistani citizen in Lahore, who, somebody says, "Well, I think that guy is associated with Al-Qaeda," and the Americans can decide to send him—it was not troubling to you, it wouldn't be troubling to you that he was a Pakistani, which I think is a signatory of the Geneva Conventions, anyway. But he's a Pakistani being sent, who may never have been in Afghanistan. Maybe that's too esoteric.

Couch: That is too esoteric.

Q: Because, you know, there were people who were sent who were not Afghans, of course, as you point out.

Couch: A lot of these guys we were scooping up were not Afghani.

Q: Right.

Couch: There were a lot of Saudis, and a lot of Yemenis.

Q: Exactly, and they were scooped up in places other than Afghanistan, sometimes.

Couch: But the vast bulk of the Guantánamo detainees—780 was it?

Q: 779.

Couch: At the max number of Guantánamo detainees, the vast majority of them were from countries other than Afghanistan. It was my understanding, too, that the Saudis and the Yemenis stick out like sore thumbs, compared to the Afghanis who were on the battlefield.

Q: Did you know that, at that time, in the late fall of 2001, when we went into Afghanistan, and people were being detained and some of them being sent to Guantánamo, that the United States was dropping thousands of leaflets, telling people to get rich by turning in people? Have you ever seen those leaflets?

Couch: No. I had no idea of that.

Q: “Enrich your entire family. Buy this. Buy that.” A lot of people were eager to get those rewards.

Couch: I had no idea.

Q: So you get this job—

Couch: Well, let's back up. There are a couple things that lead up to that. You'll be interested in a couple of these nuggets.

I remember that while General Lehnert was down at Guantánamo, he signed off on my endorsement package for the return to active duty. He came back that summer of 2002. I prosecuted a serial child molester—

Q: You.

Couch: I did, at Camp Lejeune. That was a tough summer, because that was a really, really hard case—a just ugly case; thousands and thousands of images of child pornography, including of this guy committing the acts.

Q: A Marine?

Couch: Yes, a staff sergeant. Incidentally, he had a deal and plead guilty, per a pretrial agreement of thirty-eight years. The judge sentenced him to life without parole. The judge told me it was the only non-murder case he'd ever sentenced somebody to life without parole.

That took up my summer of 2002. I recall going to the Marine Corps birthday ball in November of 2002, and seeing General Lehnert at the officers' club. That would have been in November.

Q: He was gone now from—excuse me—

Couch: He was back at Camp Lejeune. I had been working that child molester case, so I hadn't seen General Lehnert much after he came back, because that was about the time that this case got going. That's a whole other story. But I remember seeing him at the officers' club, on or about November 10, 2002. This is within ten days of my interview with Bill Lietzau, knowing I was going to be going to the military commissions. The indication I had gotten from them over the telephone was that I'm in. I told General Lehnert about it at the ball, out in the foyer of the ballroom, and he said, "You're going to have your work cut out for you down there. There are a lot of people who are down there," and he goes, "and a lot of them are dirt farmers."

Q: "Dirt farmers?" Is that the word he used?

Couch: Yes.

Q: Did you know what he meant?

Couch: I had an idea. That was my first inkling—

Q: There are no dirt farmers in North Carolina are there?

Couch: No—dirt farmers being somebody who's plowing the ground and, I understood that to mean that there were some people who were down there, who were very low-level, had been scooped up—I didn't draw the conclusion at that moment that he meant that there were people who absolutely had no business down at Guantánamo. What I took that to mean was that at least you had some guys who were just protecting their homes or whatever, and picking up a rifle. I do remember that conversation to this day, though, because that was the first inkling I got that maybe there was more to the story than we were hearing through the news of what was at Guantánamo.

The other significant event around that time is, I had to go to the medical clinic at Camp Lejeune. We had a clinic over at what we call French Creek, which is a part of the base. I've forgotten what it was for. There was a female corpsman. She was taking my blood pressure or something like that, and we got into a discussion. She made some comment that she just got back from deployment, and I said, “Where were you?”

She said, “I was down in Guantánamo.”

I said, “Oh, really? It looks like I'm going to be involved in something down there.”

That's when she said, “Well, there's a lot of weird stuff going on down there.”

I said, “Oh, really?”

She said, "Yes. Stuff like bringing in the working dogs to scare detainees. Stuff like that."

Q: She said that?

Couch: She did.

Q: Around when was that?

Couch: Sometime in that fall of 2002. I just remember thinking, at that time, "Come on. This is probably a junior enlisted. She's a real young, impressionable gal. Maybe she's misunderstanding what she saw." I didn't think much more of it when I heard that. But, in retrospect, that proved to be significant.

[INTERRUPTION]

Couch: That's the summer of 2002. Then we talked about seeing General Lehnert in November of 2002. It was right before then, in October of 2002, that a Marine parachute rigger, within General Lehnert's command at Camp Lejeune, sabotaged thirteen parachutes. He was angry with the leadership in his platoon. It was what we call an air-delivery platoon. He actually went into the parachute loft one night and took thirteen parachutes that he knew were going to be used to jump on the following Saturday. This was on a Thursday night. He unpacked the chutes, pulled the parachute shrouds, cut them clean through, and repacked the chutes. So when they went and

did the air drop on Saturday, of the first five jumpers who jumped out of the plane, three of them had cut chutes. All three managed to hit their reserve chutes and land safely, although one of them suffered a pretty significant shoulder injury.

Q: They have reserve chutes?

Couch: Yes, but they were jumping at one thousand two hundred feet. When I was in college, one of the summers when I was in ROTC, I went to jump school. Again, here I was at Camp Lejeune, and I was the military justice officer when this thing happened. We didn't know who did it for months. Initially, the day it happened, they thought it was a terrorist attack, a terrorist sabotage. This was a year after 9/11. But NCIS soon figured out that this was an inside job. We don't know who did it, but it would have had to have been an inside job, and it just happened that it was under one of the subordinate commands under General Lehnert's command, at 2nd Force Service Support Group.

This was right in the middle of the run-up to Iraq. We knew enough about what was going on that we were going to be going to war in Iraq. We knew that there were battle plans being drawn up. Doc was like, "Look, I can't tell you everything I know, but you're on the deployment roster to go to Iraq when the call comes to go." Then this doggone parachute case happened, and if I remember right, it was October or November of 2002. I was going over every week to see General Lehnert while this investigation was going on. We were letting the investigation take place. Everybody in that forty-man platoon was getting a polygraph, and there was DNA evidence being collected from the thirteen parachutes. NCIS was pulling out all the stops. I was

absolutely exhilarated, because I was the lead prosecutor. I was in the middle of it. I was back in that mode of working on a big case, with all the investigations and everything that goes with it. I loved working with NCIS guys.

I remember January of 2003 rolled around, and we didn't have anything. I remember going into General Lehnert, having a meeting with him, and he said, "Where are we on the investigation?"

I said, "They're still doing this DNA collection. We've got about six or seven suspects out there, but nothing anywhere close."

He said, "Look, we're getting ready to go to war. We're getting ready to get the word, and I've got to have the guys have the ability to jump, because the way the war's going to go, from what I can tell you, we're going to be needing to drop supplies by air drop to pull it off." Of course, I didn't know the specifics to that. Not four days after that discussion we had, we got a break in the case. They identified the guy on DNA evidence. He had not packed the three chutes. You always know who packs what chute, because there's a little card that you put down the rigger's name. He had not rigged or packed those chutes, yet his DNA was found at the place where you tie the knot. So they called him in, and he confessed to the whole thing.

That was a huge break in the case, in mid-January 2003. Of course, I went in there and briefed the general. I told him, "Okay. This is what we've got. This is where we think we're going." It was at that time he told me, "Look, I know this is going to disappoint you, but you're not going

to deploy.” By that time I already knew there was a deployment. The deployment was right around the corner.

Q: Yes, but you wanted to go to the military commissions by then.

Couch: Well, no. I knew the military commissions were out there, but the bigger issue was getting to go to war in Iraq. Here I had this parachute case, and he said, “Look, I want to take you to the war with me.” Well, let me clarify something.

I knew I had been selected for military commissions, but they hadn't called back. I knew that I was one of the guys in there, but nobody had called back and said, “Okay, this is when they're going to start. This is your report date.” None of that. So I was just kind of like, “Well, it's out there, but for all I know, I'm deploying to Iraq.” General Lehnert told me, “Look, this is a very big case. It's got to get done. It's got to get done right. I hate to disappoint you, but you're going to stay back here and do this. You're not going to deploy with us.” That was really frustrating.

Q: Did he go?

Couch: Oh, he went.

I did go to Kuwait. He was based in Kuwait. They set a camp up right outside Kuwait City, and that's where General Lehnert's flag went, to run the logistics base there. Ultimately, I went to Kuwait and saw General Lehnert there in April of 2003. It was right after the march-up to

Baghdad. Immediate hostilities had ended at that point, because we'd basically taken Baghdad. I went out there because I had to interview all the people in this air-delivery platoon, because I was putting the case together. At that time, I didn't think there was going to be a pretrial agreement. I didn't think there was going to be a guilty plea, so I was preparing to go to trial sometime in the summer of 2003.

I went out there, I saw General Lehnert, and I was out there for, I guess it was, about ten days. I can't remember if it was before or after I went to Kuwait that I got a phone call from Fred [Frederic L.] Borch [III], an Army colonel who was the first chief prosecutor for military commissions. He said, "Hey, we're putting the military commissions thing together." It had been communicated to Colonel Borch from Brigadier General Kevin [M.] Sandkuhler. He was the senior lawyer in the Marine Corps, and he had told Borch, "Okay, you're going to get two lieutenant colonels—Couch and Brubaker. We're going to send you Brubaker." They went ahead and sent Brubaker, I think, sometime in like February of 2003, because Sandkuhler told the guys with military commissions, "You're not getting Couch until this parachute case is over. That's the only caveat the Marine Corps is making. You're going to get him, but you're not going to get him until the parachute case is over."

I remember having a discussion with Colonel Fred Borch in April or May of 2003, and that was the first time I knew that, "Yep, we're doing it, and you're coming to Washington, D.C." I told him at the time, I said, "I really don't want to transplant my family from Morehead City up to D.C. They've been ensconced here for a while. Is there any way I can come up there as a geographical bachelor, and just be up there for as long as it takes to do the commissions?" Silly

me. I thought it was going to take about a year and a half to two years to do the military commissions, because that's what it had been billed as—that this was going to be quick. Once we got started, it was going to be fast. He said, “No, you need to go ahead and bring your family up here. That's not going to work.”

It all happened really fast. After that phone conversation, shortly thereafter, we reached a pretrial agreement in the parachute case, and in July of 2003 General Lehnert promoted me to lieutenant colonel. He was the guy who actually swore me in, and pinned my oak clusters on. About a week later, I swore back in the Marine Corp as a regular officer. A couple days after that, we took the guilty plea in the parachute case, and ten days later I moved from Morehead City to Washington, D.C., and reported into the military commissions.

Q: Right. That was out in Crystal City, wasn't it?

Couch: We were technically assigned to the Pentagon, but our offices were over in Crystal City. When I reported, it was within a week of when our offices had shifted from the basement of the Pentagon over to Crystal City.

Q: Okay. Now when people hear “military commissions, Guantánamo Bay,” they think, undoubtedly—and I've taken liberties to assign these views people—”Oh, they're all at Gitmo. That's all down there at Gitmo.” The fact is that the military commissions' office was, as you say, in Washington. At that time, what was that office like? Did you have a rule book? [Laughter] Describe it for me.

Couch: Well, the office at Crystal City was like in an office building. There was a security guard at the desk. I had the assumption that we were going to be in a very secure facility, for a threat that the terrorists might harm us. That thought crossed my mind. I thought it was going to be this real tight security. When I drove up to the building we were in, it had a driveway underneath the side of the building. The driveway was five floors below where my office was. I remember it occurred to me—a decent car bomb, and we're done. [Laughter] I mean, literally. You could collapse that end of the building with one car bomb. No problem.

Q: You mean like they tried to do at the World Trade Center in 1993.

Couch: Oh, yes. Much easier than that. Within the first week, I was kind of shocked. “There's not a lot of security to this.” Then, as it went on, I was expecting that I was going to have a series of briefings, and there was going to be a manual that was going to say, “Okay. Here's what it is.” None of that. Kurt Brubaker, as I told you, was there six or seven months before I got there, and we knew each other from The Basic School. I had called Kurt a few times, checking on stuff, and he actually met me at the Pentagon on the day I checked in. He had said, “When you get here, we actually might be trying cases down in Guantánamo by then, but you're going to be working on the cases they call 'planners and financiers,' and you've got some cases that are pretty serious. The rest of us have got some cases that are going to go to trial first, but you're going to get some cases that are pretty good.”

Q: He wasn't in charge, though, right?

Couch: No.

Q: Were there twenty prosecutors there, at that time, from the Army and—?

Couch: I'm trying to count it up now. I think there were like nine or ten. Scott [P.] Lang was there. Scott was a Navy commander. I knew him because he had been one of my instructors at the Naval Justice School, after I graduated from law school. But I hadn't seen him since then. Then Colonel Borch was there. Colonel Borch was the chief prosecutor, Scott was the deputy chief prosecutor, which just means he had more work to do than the rest of us, because he was also a line prosecutor. Then Kurt Brubaker, then myself, and then there was an Army captain who was there.

Q: Were there any prosecutions underway at that time?

Couch: There were cases that were being developed, but we were not at the phase yet where we said, "Okay, these cases are in the hopper, and are going." Wait a minute—no, that had happened.

At that time, the way it was structured was a thing called "Reason to Believe" [RTB] determination. They would pick one of the detainees and say, "Okay, we're going to prosecute this guy." They would put together a dossier, put together expected charges, send it over to the White House, and President Bush, himself, would sign what they call a "Reason to Believe"

determination—Reason to Believe that this individual was subject to trial under his military order of November 13, 2001. So the first round of Reason to Believe determinations had been signed. I think David [M.] Hicks, the Australian, was in that group. I think [Ali Hamza Ahmad Suliman] al-Bahlul, the public affairs guy for Al-Qaeda, was in that group. [Ibrahim Ahmed Mahmoud] al Qosi was in that group.

Q: Was Omar Khadr?

Couch: No. Khadr wasn't in that group yet.

Q: You've already run through three or four of the five who, for all these years, have been done.

Couch: Have been done.

Q: You're telling me that those were already being looked at?

Couch: Reason to Believe had been done. In my recollection, there was a second round of RTBs, who were signed in the summer of 2004. I could be wrong on this. The first RTB that I had signed off on was [Ahmed Muhammed Haza] al Darbi.

Q: Now, a naïf approaching this matter, like myself, would think, “Wait a minute. You're putting these cases together. You must be down there, on the scene, interviewing them, not sitting in some office building outside Washington.”

Couch: They were going back and forth. When I got there in August of 2003, Scott Lang, Kurt Brubaker, and a couple of other guys—I really apologize. I'm having a hard time remembering that original group. But some of that original group had been going back and forth, and back and forth, and back and forth, to Guantánamo, I think going down there every three or four weeks for a week. Generally, they were going out for a week at a time, back and forth. About the time that I checked into the office was when that slowed down. For whatever reason, that effort slowed down. So for the whole time I was in the office, which spanned three years, I went to Guantánamo seven, maybe eight times, for a week at a time. One time I think I was down for two weeks.

I do remember my first trip to Guantánamo, and we'll talk a lot about that here in a second.

Q: I wanted to ask you that.

Couch: I do remember that that time was in October of 2003, for two reasons. One, because of what I saw when I was there. The other was because that was when the Red Sox lost in the ACLS [American Championship League Series] playoffs. This is a heartbreaker. I remember, that was when I became a Red Sox fan.

I was sitting by myself in my apartment, at Guantánamo, staying up every night watching the playoffs, and I fell in love with the Red Sox.

Q: Who were they playing, do you remember?

Couch: They lost to the Yankees. They were one out away from winning the whole thing.

Q: This would have been October of 2003, and this is your first trip down there.

Couch: Right.

Q: Tell me what you can remember about that first trip. First of all, did it look like what you expected it to look like?

Couch: It did. Kurt and the other guys in the office had already given me the run-up of what to expect. I already knew where our offices were, and how to get in, and all that. We haven't mentioned it yet, but Mark Fallon was the deputy commander for CITF, the Criminal Investigation Task Force. Mark was the lead investigator in the Aviano case, so Mark and I were really close friends.

That was kind of interesting. They had a lot of respect for Mark, because he was the number-two guy at CITF. When I showed up on the scene, they couldn't believe the level of access that I had because of my relationship with Mark. I could really get CITF to do really anything I wanted them to, and was really warmly received down there, because they figure out that I'm close friends with the number-two guy. When I went and saw Mark the first time, it was like old home

week. He's just a great guy, really warm, and we had a really close relationship during the Aviano case.

Q: Before you begin to tell me about that first trip, would you say that the primary objective of Guantánamo at that time was to detain these people who had been brought there, to get intelligence from these people, or to prosecute these people?

Couch: All the above.

Q: In no particular order.

Couch: All the above. At the outset, when I started at military commissions—I'm qualifying all this—with my naïveté intact, my understanding was that we were doing all of the above, and we were to do it simultaneously—that we had a mission, and the mission was to detain, to collect intelligence, to prosecute, and we were doing all of that simultaneously. I had been led to believe that two years from now, our mission is probably going to be completed. I had been led to believe, by Colonel Borch and others, that pretty much by 2005 we should have our cases wrapped up, and perhaps, about that time was when we were going to be looking at what we called the Big Fish—the Big Fish being the immediate detainees responsible for 9/11.

So I go to Guantánamo in October of 2003. This was a familiarization trip. It's like everybody in the office said, “Hey, you've got to go down there. You've got to see it for yourself. Get acclimated for how operations are running, and what to expect.” So I flew down there. We had a

rotator that—I think DOD [Department of Defense] was sharing space on the rotator with the CIA. Actually, no, strike that. That was later. On this trip, there was a reserve squadron out of Raleigh, North Carolina, right near where my mom lived and where I had gone to college. We boarded the plane there, and they flew us down to Guantánamo. I remember that really well for something else which I'll mention in a moment.

So I go down to Guantánamo, and CITF could not have had a warmer welcome. I got familiar with the CITF agents who were down there—

Q: Just for the record, CITF means—?

Couch: Criminal Investigation Task Force. Basically, it's the criminal investigation team, led by Colonel Britt [Brittain P.] Mallow and Mark Fallon, that was in support of what we were doing, in support of military commissions. That was how I understood CITF to begin with.

Q: Okay. So you get down there.

Couch: So I get down there, and I wasn't surprised by anything I saw. I had had C-130 friends of mine, years before, with the evacuation of the Haitians who had done a detachment down there. Guys from my squadron had been stationed at Guantánamo for six weeks.

Q: But you had not been.

Couch: No, I didn't get to go on that one, but I had heard a lot about Gitmo, and knew what to expect.

I got there, and I met the guy from detainee ops. They call it JDOG—Joint Detainee Operations Group. I bought the JDOG T-shirt. I was also told, “Hey, they've got pretty cool T-shirts in the PX.” “Don't Feed the Taliban,” and that kind of stuff. Those shirts, later on, became a real hot topic. I bought one that had JDOG on it—Joint Detainee Operations Group.

Anyway, I went out to the camp. Right there at Camp Four, you've got three different gates you have to go through. You have to be on the roster, and I had a top-secret clearance when I checked into military commissions, so I had no problem with all that. I went into a trailer. It looked like a double-wide trailer that had rooms. There was a single aisle that went down the middle of it, and off to the side there were these individual interrogation rooms. It looked all the world exactly like I've seen in police stations, and the NCIS headquarters at Camp Lejeune—the same kind of thing. You have two rooms right beside each other. There's a two-way mirror in between them, and in one room they conduct an interview, and in the other room you've got people watching through the glass, just like you see on TV. It's got audio equipment that you can tape record it, or you could video record it, and listen in on headsets.

I was working on the al Darbi case. Ahmed al Darbi was this guy who had a plan to sink an oil tanker in the Strait of Hormuz. [Osama] bin Laden had given him a quarter of a million dollars to do it. It was one of the best cases we had at Guantánamo, because we actually had hard, physical

evidence, in addition to his statements, that corroborated this plan. He was being very cooperative.

I was going to sit in and watch the interview with al Darbi through the two-way mirror. So I went in there, I'm sitting in the little video room, and the doors open. I'm waiting for them to bring al Darbi into the interrogation room, and for the person to come in and sit with me while we were going to watch the interview. I heard this heavy metal rock and roll playing from down the hallway—the grinding guitars and all that kind of stuff. I really like music, but there are only two forms of music that I dislike. Heavy metal is one of them, and country and western is the other. I really didn't appreciate either one of them. I can tolerate country and western; I cannot tolerate heavy metal.

So I heard that blaring down the hallway, and it was really loud. What I thought was going on was that perhaps there were some guards who were off-duty who were cranking up a boom box or something down there, and didn't know that we were down here, getting ready to actually conduct an interview. I had my camouflage uniform on, with the lieutenant-colonel rank and everything. I came out of that video room, walking down the hallway, thinking I was going to yell at somebody, and as I came up to the door where the music was coming out of, I could see that it looked like it was black inside, but I could see the flashes from a strobe light coming out from the door. That was where the music was coming from. As I rounded the corner and looked into the room, I see one of the detainees in an orange jumpsuit, sitting in the back corner of the room, and he's shackled. His hands were shackled, and they were shackled down to his ankles. He's sitting on the floor, rocking back and forth, and he looked like he was praying, because his

lips were moving. Immediately, these two civilian guys—and I know they were civilian because one of them was overweight. He was not like a guy you would see in uniform. The other one had this big beard on. They blocked my view of the detainee and said, “What do you want?”

I said, “I’m Colonel Couch. What’s going on down here?”

They just said, “Move along,” and they shut the door in my face.

There was an Air Force captain reserve JAG [Judge Advocate General] lawyer who was with me. He was kind of my escort for this whole thing. He had been down there working with CITF.

I looked at him and said, “Did you just see that?”

He just sort of nonchalantly said, “Yeah, that’s approved.”

I said, “What do you mean? That treatment?”

He said, “Yeah. That’s approved.”

Q: What was it about that treatment that was so striking? The guy is shackled at the hands and feet. They’re playing music. They weren’t beating on him, right? You didn’t see anything like that.

Couch: What was shocking to me about that was—and I'll have to go back in time now, back to March of 1990. In March of 1990, you will recall, I was at Cherry Point. I was in training as a C-130 pilot, a brand-new Naval aviator. I was in a training squadron. At that time, we were being sent by groups of two or three to a school up at Naval Air Station Brunswick, Maine, called SERE school. SERE means Survival, Evasion, Resistance, and Escape. It's basically a school that was created, shortly after Vietnam, in response to how our aviators who were taken captive were being treated by the Vietnamese.

It's a week-long course. You get there on a Sunday, and you have some classes on Sunday. On Monday they give you a bag lunch and put you on a bus, and take you out into the middle of the wilds of upper Maine. You get that bag lunch on that day, and what you don't realize is that that's the last full meal you're going to get for the rest of the week. You're going around in groups, you camp out at night, and they make it clear that, at that point, you're in survival mode. You need to learn to live off the land, and you need to know that the enemy is around and is looking for you. You've had these classes to teach you how to survive off the land, how to evade, and all this kind of stuff. You've also had some survival training during flight school, so it wasn't all completely new to you. I recall having a half of a canteen cup of stew on Tuesday and a piece of bread on Wednesday, but that was it. So you're pretty hungry. You're running around the woods. On Thursday, you're trying to evade patrols of enemy soldiers who are out looking for you. These guys are all dressed up to look like Soviet-bloc soldiers—like Russian soldiers. They all speak in Russian accents. You realize there's a role-play going on.

Ultimately, you get captured and you get taken back to a prisoner-of-war camp, and that's when the games begin. You get strip-searched. It's really cold, and they give you another set of clothes that's got a number on it, so you're wearing this prison garb. They put you in a one-man cell with a can in the corner for you to urinate or defecate in the can. There's really nothing left to defecate, because you haven't eaten in three and a half days. In each one of the cells they've got a speaker, and they're playing blaring music. There's a continual loop of a tape of chainsaws. There was a continual loop that went on for hours of a woman being gang-raped. Tapes of children crying. Tapes that I think were taken during Vietnam, from the Hanoi Jane or whatever—Hanoi Hannah. Sometimes they had rock music, like Beatles music. I remember they played the Beatles' "Back in the USSR." That kind of stuff.

Over the course of what I now know was about thirty-six hours that I was in the prisoner-of-war camp phase, you're taken into an interrogation room. It's the one school in the Department of Defense where the instructors are actually allowed to physically assault students. You get smacked around and slammed into walls. The situation I went through was blowing smoke in my face until my lungs filled up, and I bordered on unconsciousness, before they smack you around. They're constantly pushing you for information, and the information they want is not necessarily the technical aspects of your airplane. The big thing they want is for you to disavow your country.

The next day you have a communal session, where everybody's together, and there's a whole other thing. During that communal session, I remember they stepped in and ripped the Bible in two. They ripped it in two, and they threw it out the window into a mud puddle.

Q: Who did that?

Couch: The make-believe guards. They ripped a Bible in half, and threw it out the window into a mud puddle. One of the prisoners freaked out because they had torn the Bible in two. He went out to pull it out of the mud puddle. I remember they just pummeled that guy. Then shortly thereafter, we're all standing in formation, and they said, "You know, you're about to have an experience you're never going to forget," and then they told us to about-face. Then they told us, "The training's over," and the American flag unfurls out of the guard tower, and they play the national anthem.

Q: But you knew that was going to happen, right?

Couch: I knew that I had a plane ticket that was going to fly me from Brunswick, Maine back to North Carolina on Saturday. I had been counting the days. I knew it was Friday, so I knew that the training was going to be over at some point. I knew that this was a training exercise, but I have to tell you, after not eating for a few days, and not sleeping much, and all that stuff, it starts getting in your head a little bit.

Fast-forward to October of 2003. When I saw that guy shackled to the floor with the music playing, my immediate thought was, "Wow. They're running out of the SERE school playbook. We've got interrogations going on here that are out of the SERE school playbook." I immediately had a few problems, right off the bat. As a prosecutor, your goal is always to martial together the

most credible evidence you possibly can have so that you can convince the judge or the jury—the trier of fact—that this person committed this crime. I knew that in the majority of the cases we had down there, the evidence in those cases was primarily hearsay. It was what detainees admitted that they had done, or it was what other detainees said a particular person had done. But in the vast majority of the cases I had come across by October of 2003, I realized they were made up almost entirely of hearsay.

Now I told you I was there to watch this guy al Darbi. His was one of the few cases where he had told us what he had done, but he was captured with stuff—a GPS, sim cards, papers—those kinds of things that were hard, tangible, “put-them-in-an-evidence-bag evidence,” which would corroborate these statements. But he was the exception, rather than the rule.

When I saw this interrogation that was going on, I was shocked, and I was immediately concerned. My thought was, “If this is how we're collecting some of this evidence, there's no way that people are going to believe the veracity of those statements that are coming out.” As a prosecutor, I knew I had a practical problem, and I had an ethical problem. As a military officer, I had a real problem with what I saw there because I knew it to be violative of the Geneva Conventions. That was the big thing at SERE school. You know what the Geneva Conventions are because your life depends on them. If you're ever taken captive, you know that the United States is going to be pushing for us to be treated in accordance with the Geneva Conventions. What I saw happening at that time, I said, “If this is what they're doing to this guy, they're playing out of the SERE school playbook. I know there are things in that playbook that are violative of the Geneva Conventions.” So I had that reservation, as a military officer. Ultimately,

the reservation that bothered me the most was that it was just wrong. As a Christian, I had a real problem with seeing another person treated like that.

So I had those three immediate reactions, and it's those reactions—as a prosecutor, as a military officer, and as a Christian—that would be with me through the rest of the three years that I spent working on the military commissions.

Q: Well, even that was different. You hadn't even gotten to the point of learning about the case of Mohamedou Ould Slahi, right?

Couch: I had the Slahi case. For background, this guy Slahi was Mauritanian. He was originally taken into custody by the FBI. At that time, I did not know but suspected that he had been in the custody of the CIA for about six months, and then, ultimately, was dropped off in Afghanistan, and had made his way to Guantánamo. I knew, from what others in the office had told me, that Slahi was on “special projects.” If I could put quotes around special projects, I would. My understanding of special projects was that he was different than other detainees and he was having interrogations that were different. I really didn't know what “different” meant. All I knew was that it was special projects. What I was putting together, when I saw that detainee interrogated in October of 2003, was, “Okay. This is probably what special projects is.” Because I could not fathom that we were doing this to all the detainees down there at Guantánamo.

Q: Did you know, at that time, that the CIA was operating black sites, and that the U.S. government was rendering some people they took into custody to other nations, any number of which were known to practice torture? Did you know that then?

Couch: No. What I knew at that time was that there were high-value detainees—

Q: —that were not at Guantánamo?

Couch: —that were not at Guantánamo, that were at other locations. I did have a top secret clearance, but all that top secret clearance allowed me was access to the intelligence reports. What the top secret clearance allowed me to do was read some of these intelligence reports that were products of the CIA. When I would read those products, I was able to identify the individuals as giving up the information, but the way the intelligence report was written was just what information he was stating. It did say, “According to a foreign intelligence source,” so I interpreted that to mean, “He's in the hands of somebody else, somewhere else,” and this is what he's saying. But there was nothing in those intelligence reports that told me how they were being interrogated, where they were being held, and who the foreign source was. None of that.

Q: Well, to the extent that people were rendered to other countries, like Slahi was rendered to Jordan at one point, that's by foreign sources—the intelligence being gathered by foreign sources. But the CIA was running its own network of black sites, in which the interrogators were Americans. Did you know about that? Were you getting intelligence from that?

Couch: I had heard rumors that there were other locations, but that's all anybody would say—there were “other locations.” I knew that these intelligence reports were coming out, but all they said was “a foreign intelligence source.” So I was saying, “Okay. There must be something else going on.” This might seem shocking, but this is when I finally figured out what was happening.

On my way back from this first trip to Guantánamo, we had a layover in Raleigh because we had mechanical problems with the airplane. I remember in the base operations there, in the airport operations in Raleigh, I contacted a senior Marine lawyer, Colonel Kevin [H.] Winters. I called up Colonel Winters and said, “Hey, look. I'm on my way back from Guantánamo.” I think I left a message. “I'm on my way back from Guantánamo, and I need to come over and see you because I've got a concern about some stuff.” Because I had just seen that down there, and I was just shocked. Colonel Winters was the assistant Judge Advocate General of the Navy for military law. He's also somebody I knew. I had known him since I was a lieutenant. I knew that he was an honest guy, and a really smart guy. I wanted to get his input on that.

After I got back to northern Virginia, there was a Barnes & Noble bookstore down in Arlington, Virginia. Actually, it's in Clarendon, right near where I lived. I remember going in there on a Friday or Saturday night with my family, and I was in the magazine section. I'm a magazine reader, and the rest of them are book readers. I stumbled across the *Atlantic Monthly* magazine. I had never read the *Atlantic Monthly* before. I've had a subscription ever since then. The title was “The Dark Art of Interrogation,” by Mark Bowden. He's the same guy who wrote *Black Hawk Down*. I'm a big fan of Mark Bowden. I've read several of his books. On the cover of it, it's got a

guy with a hood over his head, with his arms tied behind his back, sitting in a chair. “The Dark Art of Interrogation.” I sat on the floor at Barnes & Noble and read that article.

In the article he talks about Khalid Sheikh Mohammed—KSM. As we now know, KSM was basically the idea-guy behind 9/11, the strategic commander. He was the key Al-Qaeda operative responsible for 9/11. The article talks about KSM, and it talks in the hypothetical. In other words, “this is what could have happened to KSM.” “He could have been taken into custody. He could have been rendered to a foreign country. He could be in a detention area with CIA agents.” They could be doing this, could be doing that. I know Mark Bowden, and know his work enough to know that he's not writing that unless he's got a source that's telling him that that's what's going on with Khalid Sheikh Mohammed. That article was the first place I saw the word “waterboarding.”

Q: The first time.

Couch: That was it. From what I had seen in Guantánamo, from what I had experienced at SERE school, and from what I read in the Mark Bowden article—and hearing the rumors of special projects—that's when the mist started to clear a little bit, and I started to get a picture of what might be going on.

Q: Let's pick up tomorrow with that.

Couch: Okay.

[END OF SESSION]

VJD

Sessions Two

Interviewee: V. Stuart Couch

Location: Charlotte, NC

Interviewer: Myron A. Farber

Date: March 2, 2012

Q: This is Myron Farber, on March 2, 2012, continuing the interview with Colonel Stuart Couch, in Charlotte, North Carolina, for Columbia's Guantánamo Bay detention camp project. This is session two.

Colonel Couch, Mohamedou Ould Slahi, which is variously spelled S-l-a-h-i, and S-a-l-a-h-i, but for our purposes, we'll just say Slahi—as I believe you mentioned yesterday, was a young Mauritanian. He was thirty-two at the time of 9/11. He was born in 1970, in any case. My understanding is that he moved to Germany in 1988, on a scholarship from what's called the Carl Duisberg Society, for forty applicants and he was one of four chosen. He went there to study engineering. He preached, to some extent. He had studied the Koran very thoroughly, and was preaching in one or more mosques in Germany, also. I do want to elevate that. In the early 1990s, he trained in the Al-Qaeda camp. He went to Afghanistan, trained in an Al-Qaeda camp against the Kabul government at that time, which was a Communist government—

Couch: Correct.

Q: —which was a government, also, that the United States was opposed to, I think, at the same time. He went back to Germany and continued his studies. He then went back to Afghanistan in

early 1992, and according to him, later, after that, at that point, severed his ties to Al-Qaeda. Perhaps you'd like to pick up the story.

He goes back to Germany. He gets an engineering degree in Germany in the mid-1990s, and around 1998, what happens? In 1998-1999, he's in Germany and he gets a call. Right?

Couch: Right. There's one other part of the story, and I can't recall exactly where it came in the sequence. Let me back up.

To my knowledge, Slahi is Mauritanian, which is in the northern part of Africa, a fairly impoverished country. His father was a camel-herder. Of note, his uncle—and I believe his uncle was also a brother-in-law—but I believe his uncle was Abu Hafs al-Mauritani. Abu Hafs al-Mauritani was a member of what we call the Shura Council, that is, the immediate level of leadership below Osama bin Laden and Ayman al-Zawahiri—the president and vice-president of Al-Qaeda if you will.

Abu Hafs al-Mauritani was in that Shura Council, and his role was basically as a spiritual advisor to Osama bin Laden. One of the things that would draw attention to Slahi would be his familial relationship with Abu Hafs al-Mauritani, and to my knowledge, Abu Hafs al-Mauritani has not been captured or killed, that we know of, since 9/11.

In addition to the travels and experiences you set forth just a moment ago, Slahi had also lived in Canada for a period of time, in Montreal, and what I'm aware of is that he attended a mosque

with an individual known as Ahmed Ressam. Ressam, we now know, was the key operative behind what's called the Millennium Bomb Plot, a plot that was conducted in the United States in 1999 in an effort to detonate a bomb in Washington state, to coincide with the millennial new year in 2000.

Q: Just for chronological purposes here, in November of 1999, Slahi moved to Montreal.

Couch: Right.

Q: In fact, he preached at a mosque there.

Couch: By the way, I've seen photographs outside that mosque. It was never made clear to me who obtained those photographs. They showed Slahi out front, talking to an individual. I seem to think that those photographs came from Canadian sources, maybe Canadian intelligence sources.

Q: The millennium plot involved a man named Ahmed Ressam, who was arrested in Washington state with another man. They were attempting to come into the United States in December of 1999, with explosives intended to be used to blow up LAX—Los Angeles airport.

Couch: They actually had some of the explosives in the trunk of the car.

Q: Right, so he was arrested in December of 1999. But before that, in 1998, there was another thing involving Slahi that was of note. Let's call it a two-pronged thing, just for ease.

Couch: Actually, I've got a good way of explaining this. Let me go back. Maybe a better way to explain it would be this. The first time I heard Slahi's name was even before I checked into the military commissions. I didn't hear his name at that time, but Kurt Brubaker, the other Marine prosecutor, in this same conversation where he said they might be trying cases at the time when I finally showed up, he said, "You got some very serious cases that are going to be assigned to you. One of them is, arguably, the most significant guy we're now holding at Guantánamo." That was the first time I ever heard about it. Immediately, when I check in, and I've got my office—there was a whole big stack of case files around, and that's when I said, "Okay. Where is this serious guy that you mentioned on the telephone?" That's when I saw the name Mohamedou Ould Slahi.

What I initially knew of Slahi was everything we've discussed—that he was Mauritanian, he had a connection to Abu Hafs al-Mauritani, that he had studied in Germany, had received an electrical engineering degree, was fluent in several languages, was very much a computer expert, had spent some time in Canada, had some sort of affiliation with Ahmed Ressam, and that his real claim to fame, though, was—well, let me stop right there. That was what I knew about Slahi initially. The other thing I was told was that Slahi was on special projects. This was before I ever made the visit to Guantánamo, in October of 2003. So my question is, "What is special projects?" What I was told by other members of the prosecution staff was, "Well, special projects are selected detainees that the intelligence side is very interested in, and they're focusing a lot of attention on them, and using some enhanced interrogation techniques." Nobody could really tell me what are the contours of special projects. Nobody really knew what, in fact, the

special projects interrogations were about; they just knew there was something called special project cases that were being investigated by the intelligence community.

So it was after I got settled in. Probably within about a month, I saw a more thorough dossier on Slahi from the agent who was working with me from CITF. This agent's name was Greg Highlands. Greg Highlands was an NCIS agent and a former Marine, so Greg and I hit it off right off the bat. We became very good colleagues, and, actually, very close friends, right off the bat.

What I soon learned about Slahi was that his claim to fame, for lack of a better term, was that Ramzi bin al-Shibh had implicated Slahi in an intelligence report. Ramzi bin al-Shibh was the right-hand man of Khalid Sheikh Mohammed, who, we know, is the architect of 9/11. I would say that Ramzi bin al-Shibh was sort of like the gofer for KSM. Ramzi bin al-Shibh, in one of these intelligence reports that I think I mentioned at our previous session—I can read the intelligence report. It says its source is a foreign intelligence service. I see that it's Ramzi bin al-Shibh saying things, but I have no idea where he's being held. I have no idea what methods are being used to get him to talk. I have no idea of what lawyers call the *res gestae* of the circumstances of his statements. All I know is that an intelligence report says that Ramzi bin al-Shibh, Mohamed Atta, and Marwan al-Shehhi met Slahi on a train somewhere in Germany, and that there was a discussion about jihad, and training for jihad, and that Slahi suggested to them that, to train for jihad, they should go to Afghanistan. Then, if I recall correctly, there was some indication in that same intelligence report that Slahi later provided them a point of contact, or someone they could contact, who would help arrange their travel to these training camps in Afghanistan.

Now, from that intelligence report, I never saw any mention that it was to attack America. I never saw the fact that Ramzi bin al-Shibh had said, “We told him what we wanted to do, and he said, ‘This is where you need to go train.’” It was sort of, “This is where you can get training. You need to go train for jihad.” The significance of this, obviously, is that Ramzi bin al-Shibh is the right-hand man for 9/11, Mohamed Atta was the operational commander—that is, leading all the hijackers and the muscle hijackers in the United States, as well as being the pilot of the first plane to hit the World Trade Center—and Marwan al-Shehhi, with him, was the pilot for the second plane, United 175, that hit the World Trade Center, and I was subsequently to learn he was most likely the one who killed my friend, Mike Horrocks.

Q: These people that you mentioned—bin al-Shibh and Atta—these were referred to later on as the Hamburg, Germany cell—the Hamburg cell.

Couch: Correct.

Q: Laying aside the question of the tenuousness, or the strength, of any links other than the conversation about going to—. Everybody seems to agree that Slahi and at least bin al-Shibh had a discussion about jihad, pursuing jihad—whether it was in Afghanistan or in Chechnya against the Russians—is an open question.

Laying that aside, there was some brief contact, and that's in 1998. You're looking at the case in the fall of 2003. You see these statements by Ramzi bin al-Shibh. You were not aware of the fact that Ramzi bin al-Shibh was being held by the CIA in a black site.

Couch: I had no idea of the treatment of Ramzi bin al-Shibh, of where he was or why he was saying the things that he was saying. All I saw was that it was in an intelligence report.

Q: Or the quality of the reports.

Couch: The other thing I knew was that Slahi was, himself, being subjected to special projects. About this time is when I made that trip to Guantánamo, in October of 2003, and read the Mark Bowden article. Incidentally, that Mark Bowden article has a byline date of October 1, 2003.

Khalid Sheikh Mohammed, Ramzi bin al-Shibh, [Abd al] Rahim al Nashiri, and some of these others who were the key players in Al-Qaeda operations against the United States—I called them the Big Fish, and the Big Fish were these detainees who had been captured by the United States intelligence services and were being held by somebody, somewhere, and we were seeing these highly classified intelligence reports. After my trip to Guantánamo in October, after the Mark Bowden article, I became concerned how the information that we're seeing reflected in the intelligence reports was being collected. Because we could very well have a defective piece of evidence at the base of my case that, if I continued to build the case around that defective piece of evidence, it could lead an otherwise decent case to become unraveled, as time went on and as other information came to light. So what I set out to do, in late 2003—and I had another

prosecutor working with me on it—I said, “I want to take a look at Slahi.” I had received information that Slahi was very productive. Suddenly, he had become very productive at Guantánamo in giving information.

What we did was we plotted on a timeline, by date. We could put the date down on the date of the intelligence report, then I sort of graphed, by the significance of the information that he was providing in these intelligence reports. Once we put that together, the graph that I had indicated that he was giving basically minimal information with really no significant value, up until a period of time in, I think it was, August or September of 2003. Suddenly, I had this spike in the significance and value of the information he was giving.

Now mind you, I was not able to qualify that information. I was looking at it purely from the volume of intelligence leads, if you will, that were coming out of that information. So what I honed in on, I said, “Something happened with this guy in the August or September time frame that caused him to give the kind of information he was giving up.” In light of what I knew, of what I saw, myself, going on at Guantánamo, in light of the Mark Bowden article, I was concerned that perhaps what he gave up was as the result of these enhanced interrogation techniques, and there could be something wrong there.

Q: I think maybe we've glossed over too quickly the fact that, after the exposure of the millennial bomb plot, at the end of 1999, the American authorities wanted to talk to Slahi about Ressay and that plot, and they pursued him. The Canadians pursued him in Canada. Then he moved back to Mauritania, and the Americans pursued him. Eventually, the Mauritians, in 2001, arrested him,

and turned him over to the Americans, who turned him over to the Jordanians, where he claims that he was tortured. Then he was sent to Guantánamo, arriving in Guantánamo in August of 2002.

Couch: Well, let's unpack that a little bit. What I've shared with you so far is what I knew—

Q: —a year later.

Couch: No—is what I knew in 2003. As we turned into 2004, again, Greg Highlands, my CITF agent, is gaining more and more information. He had connections with French law enforcement. He had connections with German law enforcement, and he had some resources, what I call on the intelligence side of the fence, down at Guantánamo. He started putting together a more complete picture of what went on with Slahi. What I was then able to learn was, yes, in fact, U.S. law enforcement—the FBI in particular—had sought to interview Slahi, and identified him as a person of interest, at the least.

The FBI went to interview him in Mauritania. I believe it was after 9/11, and at some point I think Slahi admitted that he went to the police station. He knew the FBI wanted to meet with him. He went to the police station, met with the FBI, and at some point—I can't recall how—he gets turned over to the Americans, and then the CIA got involved. What we now know is that he was rendered by the United States from Mauritania to Jordan. I believe he spent about six months in CIA custody, in Jordan. He claims that he was tortured there. Then, after that, he was dropped off at Bagram, Afghanistan.

I saw that same pattern of being in CIA custody, and then being dropped off at Bagram repeated with a couple of other cases that I had, notably al Darbi. The same thing happened with al Darbi.

So something must have gone on. Slahi was in the custody of the CIA, and they must have felt like they got as much information out of him as they could, or, the information they had didn't pan out to his significance, and they just kind of threw him over to U.S. military control at Bagram, Afghanistan. Then, of course, he goes to Bagram, and Bagram sends him to Guantánamo.

Q: That's right. I just wanted to clarify that route to Guantánamo. When he arrives at Guantánamo, as you pointed out, General [John T.] Furlow later testified that Slahi was “the key orchestrator of the Al-Qaeda cell in Europe.” Now whether that’s true or not, the 9/11 Commission later described Slahi as a “significant Al-Qaeda operative.”

Couch: I can tell you where that information derives from, by the way. I do want to note here, for the record—I find it interesting that, ultimately, when I refused to prosecute Slahi, it was six months before the Schmidt-Furlow investigation—General [Randall M.] Schmidt and Admiral Furlow—began. My analysis of and my position on Slahi, which I reduced to writing, was never shared with the Schmidt-Furlow investigation. There is no mention of me and any of my legal analysis related to Slahi in the Schmidt-Furlow investigation. After the article about me came out in the *Wall Street Journal*, the question was made of, I believe, General [Thomas L.] Hemingway. General Hemingway knew my position because he had seen the writing that I'd

provided. He stated, for the record, for the article, that my reservations, and the memorandum that I wrote, were never shared up above the level of the chief prosecutor. So I find it pretty interesting that the findings of the Schmidt-Furlow arrived at some similar conclusions to what I did, independent of what I found.

Having said that, the position stated by the Schmidt-Furlow investigation, and the 9/11 Commission Report about Slahi's significance, I believe derives from a series of intelligence reports that Slahi gave after he broke, under special projects, wherein he sets out what I call the who's-who of Al-Qaeda in Europe. He sets out a pretty extensive network of Al-Qaeda operatives. I think, if my recollection is right, that most of them had already been known to the intelligence services when he was being questioned. He sets out this network of Al-Qaeda operatives in Europe, and it was sort of this who's-who. My assumption is that they are drawing on the analyst's commentary of the significance of Slahi, directly related to his level of knowledge.

I've got to be clear on something. When you read the intelligence reports given up by Slahi, he doesn't implicate himself in anything. The only way he implicates himself is by his knowledge of these people. He never implicates himself in any of what I would consider to be an overt act that was part of the Al-Qaeda conspiracy to attack the United States on 9/11.

Q: Right. To simplify it though, Slahi is brought to Guantánamo in August of 2002. He ain't saying much, and you're working the case a year later, and your initial impression was that he

hadn't been saying much. Then, all of a sudden, there is this flood of intelligence reports coming from Slahi.

Couch: By the way, the dam broke about three weeks before I checked into military commissions.

Q: As early as July or so of 2003.

Couch: July and early August of 2003, my recollection is when he started becoming cooperative. He hit his full stride somewhere in August, September, October, when, as some people have described him, he was the poster child for the intelligence effort at Guantánamo. That's what the intelligence side of the DOD effort at Guantánamo was holding up Slahi as a success story for enhanced interrogation techniques.

Q: All right. Now you came to know that Slahi had received a certain treatment that caused him to—

Couch: —to break.

Q: —to break, as you say, beginning in July or so of 2003, and continuing into the fall. Right? What was that? What happened there?

Couch: Let me preface this. I'm trying to remember where I saw the intelligence reports. I remember seeing information there was some suggestion of Slahi's interrogation by the Agency. There was some indication of that. There was some indication Slahi had given of mistreatment. There was a document we called the Manchester Training Manual—the Manchester Document. The Manchester Training Manual was found in an Al-Qaeda safe house in Manchester, England. In that document, it's this how-to manual for Al-Qaeda operatives, part of which is, if you are taken into custody by the Americans, you need to allege that you have been tortured and mistreated as a means to confuse their efforts, and as a means to continue to wage war against the Americans, even though you're in custody. Does that make sense?

So I went into this whole thing with my presupposition that if a detainee claimed that he had been mistreated or tortured, that that was merely a counter-interrogation technique, taught to them through the Manchester Document. I knew, also, based upon my experience as a prosecutor, that one of the common things a criminal defense attorney does when he tries to attack the statements given up by an accused is to say that they were mistreated by the police. That's a very common criminal defense tactic.

So even though I saw what I saw at Guantánamo, even though I had read the Mark Bowden article, I tried to say, “Okay. Looking at this objectively, my assumption is that all these detainees, when it comes time for them to be incriminated by their own statements, are going to claim that they were mistreated, and that that's why they said what they said.” During this time, Greg Highlands over at CITF was continuing to receive information from this variety of sources he had developed. Most significantly, it was through an unauthorized access to the intelligence

side. Now, understand, the intelligence side is almost like a wall. We have law enforcement on one side, and we have intelligence on the other. What I'm talking about are the intelligence reports, what they call MFRs—Memorandum for the Record. A Memorandum for the Record is the nitty-gritty of the interrogation itself—in other words, who was there, what techniques were being used, and, specifically, what the detainee said. After the detainee gave his statements in the interrogation, the MFR, the Memorandum for the Record, would be reduced down to an intelligence product that would then be promulgated to the intelligence community, writ large.

Out of this Memorandum for the Record, they would glean only the specific information of intelligence value that the detainee had given for production to the intelligence community. At this time, in 2003-2004, it was those intelligence reports that were the only information that intelligence would allow to come over the wall to the law enforcement side. What Greg Highlands managed to do was to gain access under that wall to get to the MFRs. As he began to feed me MFRs and other information he was collecting, that's when I became convinced that Slahi had, in fact, been the victim of torture—not by anything Slahi said, but solely from U.S. government documents from the intelligence databases, detailing, specifically, what had been done to him during the interrogations. If there's nothing else to the story that I've got that I want to emphasize any more, it is that—that ultimately, my conclusion that this man had been tortured came from U.S. government documents, and not from anything the detainee said.

Q: Okay. Did you learn that Secretary Rumsfeld had approved, on August 13, 2003—literally, just as you're starting work—a special interrogation plan on Slahi?

Couch: No.

Q: Did you know that?

Couch: I did not know about Secretary Rumsfeld's decision until after I had refused to prosecute Slahi. I'll tell you how that happened in a moment.

I knew what was being done to Slahi. I had an idea of who was doing it, but I had no idea about the authorization of that, from the layers of responsibility above the interrogation effort. What I found out was that Slahi apparently had some hang-ups about sex. They'd gotten out of him that he was unable to have his wife become impregnated, and a big thing in the Muslim culture is men's ability to procreate—the ability to have children. Children are very important and significant in this culture, and Slahi was very frustrated by the fact that he was not able to get his wife pregnant. As a result, some of the documents that I saw—again, the MFRs, that came underneath the wall, if you will—indicated that they actually had a sex room set up with photographs on the wall of female and male genitalia. They had a baby crib—some just bizarre stuff like that to start working on Slahi's psyche, when it came to the inability to get his wife pregnant.

Slahi was very close to his family. I saw indications from these documents that he was led to believe his brother and his mother had been taken into custody by American officials, and that they were being brought to Guantánamo. The ruse got to the point where one of the interrogators dressed up as a Navy captain and presented Slahi with a letter that was ostensibly on United

States State Department letterhead, which included a discussion about the fact that his mother was going to be coming to Guantánamo, and they were concerned for her safety because she was going to be the only female detainee held at Guantánamo. From what I could tell in the memoranda, for the record, there was a suggestion made to Slahi that his mother and his brother—specifically, his mother—would be harmed if she were brought to Guantánamo. That rang a bell with me, and the bell that rang with me was an application of the definition of torture that we get from the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. That was an international treaty that was ratified by Congress during the Clinton administration, and pursuant to the treaty, had been adopted as domestic law, so that's basically the law of the land. What I was concerned with was that that did meet the definitions found in the UN Torture Convention, and, subsequent to that, there is another part—Article 15 of the UN Torture Convention—that has an exclusionary rule which states that any information derived as a result of torture shall not be used in any proceeding.

The concern I had was, regardless of what our regulations and instructions pursuant to military commissions stated, they might still very well be trumped by this application of the UN Torture Convention that, in my legal judgment, superseded any other instructions put out for military commissions by the secretary of defense.

Finally, the other concern for me with Slahi's treatment was this one event—and I'm assuming this is the event that led Slahi to break—was that he was led to believe he was going to be taken from Guantánamo and turned over to another Islamic government. They actually took him off the island in a boat, drove him around in the boat for a while, and there were other individuals,

speaking in different Arabic dialects to confuse him—he was blindfolded during this whole thing—to basically disorient him, and to have him believe that he was going to be taken to this other country. In conjunction with that, the interrogator was saying such things as, “I had a dream last night. I saw a casket being lowered down into a grave, and 760 was the number on the lid of the casket.” That was Slahi's detainee number—760.

Kurt Brubaker, the other Marine prosecutor, had interviewed a colonel whose name I've since forgotten, who was responsible for detention operations at Guantánamo. This guy, from what Kurt told me, was sort of a screwy-in-the-head guy, and apparently he could speak Sioux Indian. This colonel claimed to Brubaker that he was present and walking behind Slahi when they were leading him out during this ruse, while he was blindfolded, and Slahi was led to believe that he was being taken out to be executed. Then this colonel said he started speaking in Sioux Indian, again, just to confuse Slahi, and that subsequent to that, he saw that Slahi urinated on himself.

Q: There were other things. He was subjected, was he not, to extreme heat and cold?

Couch: I can't recall.

Q: In any case, that was established by the Schmidt-Furlow report.

Couch: I'm just trying to give you exactly what I was made aware of. Here was the tipping point for me. I knew that he had sensory deprivation, as far as not being able to see sunlight, and not being in community with any other people, and limited human interaction. I know for a fact that

that was going on. The tipping point for me was this—again, Greg Highlands found an email over on the intelligence side of the wall, and he sent it to me on a top-secret email system that we had, inside of a SCIF—that's a Sensitive Compartmented Information Facility. We had a SCIF inside the office. I was the manager of the SCIF because I had a top-secret clearance, and a lot of the information I was working on involved the CIA. The CIA had said, “Look, you need to get IceMail”—this top-secret-level email system—“set up in your SCIF, if you're going to communicate with us on a regular basis.” Let me note that I was the liaison to the CIA for the first six months I was in the office. The CIA was less than forthcoming with information, and one of the ways they ran us around, chasing our tails, was getting this SCIF set up with the IceMail.

Ultimately, I had the IceMail account. Greg called me on the phone one day and said, “Look, there's a document you need to see, and I'm sending it to you in the SCIF,” which was the code word that it was coming over on IceMail. I went and pulled up the email. It was an email that was actually classified “Secret.” It's now been declassified, so I can talk about it. It has shown up in the habeas litigation for Slahi. This was an email between an officer who was responsible for the guard detachment working with Slahi and an Army psychologist. The officer with the guard detachment, with the detention operations, said, “Hey, look, our guys are reporting that Slahi is really afraid, and he's reporting that he's having auditory hallucinations. He's really scared. What do you make of this?” I can't quote it verbatim, but the essence of what the psychologist said was, “Well, with the nature of what's going on with him and the way the interrogations are going, it's not unexpected that he would suffer hallucinations. Just try to assure him.”

When I saw that email, to me that was the tipping point that Slahi had been tortured, because part of the UN Torture Convention says that if, as a result of mental suffering—and here I had an expert, a psychologist, stating that this was an expected occurrence, for him to have these hallucinations. He was having these hallucinations because we were setting him up with the sensory deprivation and the nature of his interrogations and so forth, and now he was having sequelae to that by having these hallucinations. To me, that met the definition of the Torture Convention, and that we had done that purposefully, to set up this mental suffering.

I saw that email and the letter about his mom coming to Guantánamo all of that within three days of each other, and it was at that point that I said, “Okay, I’ve seen enough. I’ve had it. Enough is enough.”

Q: Let me just underscore—that letter, brought by this supposed Navy captain, as a representative of the White House—that was all fake.

Couch: Correct.

Q: The mother had not been arrested, and what have you. Okay.

So this is the point you're at. Now, we're significantly into 2004?

Couch: The time I got all this information was in, I believe, May of 2004. I will say, Abu Ghraib began to break in April of 2004. At that point, I did not have any connectivity between what

happened at Abu Ghraib and what had come from Guantánamo. We didn't know that, or, at least, I didn't know it at that time. We also had huge turmoil in our office. We had two Air Force officers who objected to Colonel Borch's leadership, and many other issues within the office.

Q: Colonel who?

Couch: Fred Borch, who was the chief prosecutor. Basically, these two Air Force officers raised their concerns in an email that was sent from the office—somebody forwarded it outside the office, and it ran like wildfire through the Pentagon. As a result, there was a criminal investigation, there was an operational investigation, and, ultimately, Colonel Borch was relieved. That's when they brought in Colonel [Robert L.] Swann. Shortly after Colonel Swann came on board was when I got the rest of this information about Slahi, and, trying to be the honest broker here, it was relatively early into Colonel Swann's tenure as the chief prosecutor, when I went into his office and—

Q: Hold on one second. Let me go back for a second here. When you saw those pictures from Abu Ghraib, which came out in late April or early May of 2004—laying aside any possible connection between Guantánamo and those pictures—what was your reaction to those pictures?

Couch: It was reprehensible. Just reprehensible. It was a clear violation of the Geneva Conventions. There's no doubt.

Q: Well, reprehensible—you were already alert to the possibility that bad things were going on at Gitmo. Were you surprised by this?

Couch: No, I wasn't, and here's why. This is being a little bit philosophical for a minute.

My reservations as to what I saw in October of 2003, and then what I learned happened to Slahi, were all borne out of a variety—I think I talked about it in our last sitting. Three things. One, as a prosecutor, you're not going to get valid evidence like that. Two, as a military officer who knows about the Geneva Conventions and has had formal training in that, I clearly recognized it as a violation of the Geneva Conventions. You can make the argument all you want to about whether or not they represent a country that's a signatory to the Geneva Conventions, but at the end of the day—and I now know, under Common Article 3, but at that time I said, “This definitely violates if not the law the spirit of the UN Torture Convention. But, thirdly, I had a major problem with it as a self-avowed, evangelical Christian, because we don't treat other human beings like this.

So when I saw what was going on in Abu Ghraib, I was not surprised, and that's because, in my view, human beings are inherently sinful. This comes from my religious belief. I think when we have a policy in place that permits the inhumane treatment of other human beings, fundamental to that policy, that policy must be carried out by someone, and the someone it must be carried out by are other human beings who, as I've said, are inherently sinful. When you expect these inherently sinful human beings to carry out an inhumane policy, it's a slippery slope. It's like Pandora's Box. You will never be able to completely control who is conducting that interrogation, who is conducting the treatment of those detainees, and provide enough oversight

to make sure that it doesn't fall down the slippery slope. What I saw with the photographs from Abu Ghraib, when I ultimately learned the facts behind that—that it was the detention group that was doing that—my position was, “Well, obviously, they had seen some of this treatment by the intelligence guys, and thought it was okay for them to similarly mistreat detainees, and that's then why it ran amuck.” That's the problem with an inhumane policy, carried out by inherently sinful human beings.

Q: You alluded a moment ago to Colonel Swann, and to something that was going on in the office. Let's just be clear about that.

Couch: It was Colonel Borch.

Q: Colonel Borch. What you're talking about, if I understand correctly, is that in March of 2004, two of the prosecutors in the Office of Military Commissions, which is the office you're working in, asked to be—what do you call that?

Couch: They asked to be relieved of their duties and transferred.

Q: Relieved of their duties and transferred. One of them, a Captain John Carr, of the Air Force, wrote to Colonel Fred Borch, saying that the prosecutors in the office had suppressed evidence of abuse, and failed to secure potentially exculpatory evidence, which, he wrote to Borch, “may constitute dereliction of duty, false official statements, and other criminal conduct.” He said that

the process appeared to be “rigged” against the detainees, meaning the prosecution process. Then an Air Force Major, Robert Preston, who joined the commissions, I believe, a month after you—

Couch: Yes.

Q: —and was on a team with Carr—

Couch: By the way, Preston is the one where I got the information about the UN Torture Convention. He was the one who gave me the lesson in the UN Torture Convention and the Article 15 implications.

Q: Okay. This is an email he sent to Borch. I believe it's to Borch—“I sincerely believe that this process is wrongly managed, wrongly focused,” and “a severe threat to the reputation of the Military Justice System and even a fraud on the American people.” Then there was another resignation of a Captain Carrie Wolf. When I say “resignation,” I mean “request for transfer,” or what have you.

At the time, you knew about these statements, these emails, which were leaked a year later?

Couch: It was on March 13, 2004, and I remember it because it was my brother's birthday, and my brother happened to be in Washington, D.C. that morning. I was at the office. I got on the Metro and I went over to Washington, D.C. to have coffee with my brother. By the time I got back to the office, the email had been sent. When I left the office, everything was like it always

was. Everybody was working. I went and had coffee with my brother. By the time I came back, all hell had broken loose. I've taken to calling it the "Ides of March."

Q: How many prosecutors were in the office?

Couch: I think at that time it was anywhere from nine to eleven.

Now let me comment on a couple of things first. I think Rob Preston's email was close to the mark. I don't agree with how they went about raising their objections, but I do not object to what he had to say. And that's Robert Preston. As to John Carr—what he had to say, which was patently false—and it's because John Carr, frankly, is a little psychotic. He's got some psych issues. That had become clear to me over the time I'd been working with him. What John Carr did not know when he wrote that email in March was that I had sent a classified memorandum to Borch earlier in January, saying, "We are receiving some reports of some things that went wrong in Afghanistan, in Bagram,"—not even what was going on in Guantánamo—"and I'm seeing some very concerning reports that we're hearing through the grapevine, of the treatment of detainees at Bagram, Afghanistan."

Q: Not in Iraq.

Couch: No, not in Iraq. In Bagram. "We need to get on that. We need to find out everything that went on. We need to have access to all this, to know how does it impact our cases." I was talking to him specifically about the case—which is now a pending case, of al Darbi—because I had

seen some indications that al Darbi had been mistreated in Bagram, and that we needed to get to the bottom of that.

Now did I come at that alone? No. I became aware of problems at Bagram from Commander Scott Lang. Commander Scott Lang was the Deputy Chief Prosecutor of the office. He was developing the case against [Salim Ahmed] Hamdan at that time. Lang is a professional officer and an excellent prosecutor. Lang had stated, at the outset, “We need to find out the treatment of these guys from the moment they came into custody, all the way through Guantánamo. We need to know what was going on with Bagram.” Lang had reached out and found a physician who did medical examinations of the detainees right when they were brought in from the battlefield. He was finding out as much as he could about the detention at Bagram as anybody. As Scott related to me, it was because he had some concerns, and that we needed to shore this up.

We really didn't talk about it at the time. I don't know that he had the moral reservations that I did at the time, but then again, Scott and I are entirely different. He's not a guy who wears his feelings on his sleeve like I have a tendency to do. He's a much more reticent New Jerseyite.

Q: What does that have to do with John Carr?

Couch: John Carr's chief objection in that email—and the person that he claims is the devil himself—was Scott Lang. John Carr was claiming that it was Scott Lang who was covering up evidence of abuse. It's reprehensible, because John Carr was such an odd individual, such a weird bird, and a psychotic officer, that nobody else wanted to deal with him.

Q: Not true of Preston, though.

Couch: Not true of Preston.

Q: How about Carrie Wolf?

Couch: She was a hanger-on. She resigned about two hours after Carr and Preston, and she had never opened her mouth about a problem about anything. Preston knew that I had reservations, because I had talked about it with him at length.

Q: Okay. In any event, this was not the happiest office you were in. When you discover what you have come to believe is the treatment of Slahi—a case that you're supposed to be working to bring this man to military-commission trial—you went to see—

Couch: Let me interject one thing before we get to that.

Q: Yes.

Couch: The Ides of March went down. We were investigated. Jim Haynes, the general counsel of the secretary of defense, put together this investigation team to come assess the Office of Military Commissions prosecutions and what we were doing. It was Brigadier General Scott [C.] Black, the future JAG for the Army, who was the head of it. It was General Black's investigation.

He had a Marine lieutenant colonel on there, whom I can't remember. He was a judge advocate. Jane [G.] Dalton, captain, United States Navy, JAG Corps, who we now know was chairman's legal at the time these interrogation plans were being discussed. She knew from a year before of some of these issues. She was on that team. Charlie [Charles J.] Dunlap [Jr.]. At the time he was a colonel in the Air Force, and he retired as a one-star Air Force JAG. He was in there.

So we're at this conference table and they're conducting an investigation. The day before I asked the question, I said, "Well, they're doing all these interviews. Are they going to interview Brubaker and myself?" Lang was an O5 Navy commander, and then the two other, highest-ranking prosecutors were Lieutenant Colonel Kurt Brubaker and myself, a lieutenant colonel. I was kind of shocked to learn that they didn't have plans to talk to us. I said, "Well, yes they do, because we're implicated in these emails and we should have the ability to discuss that."

I cranked out a memorandum. I was really big on cranking out memoranda, because I wanted to be preserved for posterity of what we knew, when we knew it, and what we did with that information. So I put out a memorandum that discussed, line by line, everything that Carr and Preston raised. I included enclosures to it, and I used this opportunity to talk to the investigation to highlight the problem of detainee mistreatment. Strangely enough, in the Schmidt-Furlow investigation—no, I'm sorry. There was a subsequent congressional investigation after Schmidt-Furlow that went down. Portions of my memorandum turned up in that investigation.

So I was putting them on notice, and I was doing it on purpose. I was using that as a vehicle. “We've got a problem with the detainee treatment, because—” and I remember the quote, “it touches and affects every case we're going to bring before military commissions.”

After all the smoke sort of cleared, after the Ides of March, Colonel Borch was moved out and Colonel Swann was brought in. The reputation of Colonel Swann that we had heard ahead of time was that he was a yeller, and that we were not going to have some of the more genial leadership we had enjoyed under Colonel Borch. Within a couple of weeks of Colonel Swann being there, he made it clear—he didn't want to hear anything about treatment of detainees. I was in the planning stage at that point for a trip to Afghanistan, because we had learned that other detainees who were held by the CIA were going to be coming to Bagram. No, I'm sorry, they had already been turned over to the military at Bagram. I called these guys the Middle Fish. The Little Fish were all at Guantánamo. You might argue that Slahi, and al-Qahtani, and al Darbi were Middle Fish, but, for the most part, we had Little Fish at Guantánamo, we had Big Fish at what we called Hotel California. That's the CIA sites, and we just had a nickname—you know, “You can check out anytime you want, but you can never leave.” The old Eagles song. We called whatever the CIA was doing Hotel California.

By the way, by that time, the word was getting out that the Agency had at least one site in Afghanistan. You had the Big Fish at Hotel California, but then you had these intermediate guys that I had seen coming out of the intelligence reports, from the Big Fish, that had all of a sudden had been dropped off at Bagram. I called these guys the Middle Fish. What we wanted to do with CITF was, we wanted to get into the interrogation box, in Bagram, with criminal investigators, to

question the Middle Fish before they went to Guantánamo, for fear that by the time they got to Guantánamo the stupid stuff—you know, wearing party hats, and having satanic rituals, and baby cribs, and all that crazy stuff—would not happen to these guys once they got to Guantánamo.

Q: Or jeopardize your cases.

Couch: Right. I wanted to have our criminal investigators be the first ones in there to interview these guys after they've been dropped off by the Agency, to try to get the cleanest information possible, before it gets polluted by whatever was going on at Guantánamo.

So I'm preparing for this trip to Afghanistan, Swann was in my office, and the discussion came up. I raised the issue about detainee treatment. I said, "One of the things we need to find out when we get these Middle Fish is what's been done to them." You do this as a criminal investigator. You want to get the target of your prosecution to stake out, as early as possible, and to memorialize everything he claims has happened to him so that, later on, when he gets a criminal defense attorney, they can't suggest things to him, and then he brings them up at trial. If you haven't been prepared for that, you're stuck with that at trial. Whereas, if you've gone to him the first time law enforcement comes in and says, "Tell me everything that's happened to you," you now box him into a story. He's stuck with that story, and that's as good as that story's ever going to get. That's why the criminal investigator from CITF who was going to go to Afghanistan—I had worked with her, and said, "This is where I want to go with these guys. Obviously, I want to get the information. I want to validate what I've read in the intelligence

reports—if it's true—but the big thing is, I want to box them off from what they say their treatment was.”

Swann says to me, “No, we're not going to say anything to anybody about detainee treatment. You're to stay in your lane.” I remember him saying those words, “Stay in your lane. That's not our lane.” I said, “Well, sir, how can it not be? It directly impacts on the veracity of the statements, and our ability to use them at trial. That's the bulk of our evidence.” That was my first bump-up with Swann, over that. As aviators, we used to call it “trading paint.” That's the first time I ever traded paint with him over this issue, and that was early into his tenure.

At this same time, I was getting information from Greg Highlands. Then, ultimately, I saw the top-secret email. Then, I was in church on a Sunday, and we had the liturgy—it's an Anglican church—we had the baptism of a child, and one of the confessions there is, “Will you do everything in your power to seek justice on the earth and treat every human being with inherent human dignity?” To me, I felt convicted, because all this was happening at the same time. That conviction led me to go into Swann's office and to tell him that I was going to refuse to prosecute Slahi. I spelled out for him, chapter and verse, the whole story I've laid out to you. I walked him through my legal analysis as to why I thought the man had been tortured. I told him that, from an ethical perspective, as an attorney, with a bar license from the state of North Carolina, that my understanding of the rules of professional conduct required me to share the information I had obtained, under the wall, from Greg Highlands, with any criminal defense attorney who may be assigned to Slahi in the future. He was never assigned to a defense counsel, and never has been to this day, in 2012. He's never been assigned a criminal defense attorney.

Q: Slahi.

Couch: Slahi. They haven't proceeded with the prosecution of him.

Q: Well, he hasn't been charged, right?

Couch: Correct. I told Swann, "Look, in the future, if we prosecute him, he will be assigned counsel, and I think I've got an ethical duty to share with that counsel what I know, even though I obtained it under the table. It's now within my knowledge. I've got to share it with him so he can avail himself of the protections of the UN Torture Convention." That's how I read the Rules of Professional Conduct of North Carolina, applicable to prosecutors. Then I said, "Ultimately, as a moral issue, what's been done to this man is reprehensible. Really, for that reason alone, I don't want to have any other participation in this case."

I felt like part of my reasoning in taking the stance with Swann that I did was I knew that I had some degree of respect, just because of my rank. I knew I had some degree of respect because of the experience that I'd had. I was one of the more experienced litigators in the office other than Scott Lang. He was perhaps the most experienced. Scott had more experience than I had. He'd done all kinds of murder cases and stuff. My hope was that by having one of his senior officers and experienced litigators raising this issue, he would take it seriously, and he would give that information to the convening authority, and then to the DOD general counsel's office—to Haynes's office—to say, "Hey, look, I've got one of my prosecutors down here who's raised an

issue, and we need to think about it.” Even if he didn't agree with me, he needed to have communicated that information to the decision makers to say, “This is one interpretation of what's happening. We've got this policy of the interrogations out here. This is what could go wrong.” To my knowledge, it was never shared above that level.

I want to go back to a question that you asked me a few minutes ago—when did I learn about the approval of Secretary Rumsfeld? Within weeks of this incident was when I ultimately went to Afghanistan. By that point, Robert Preston, the Air Force major, had been reassigned out of the office and, in fact, was on a joint staff in one of the Arab emirates that was supporting us during the war. We had a huge base there.

Q: Bahrain?

Couch: Not Bahrain. I flew through there and I spent three days there, and I can't believe I can't remember it.

Q: Qatar?

Couch: Qatar. Preston had been assigned to a staff in Qatar. He'd been out of the office now since April. I had communication with him. I knew he was there, and I sent an email to Preston. I said, “Hey, I'm coming through Qatar. Can I see you while I'm there? I'm going to be passing through. I'm flying to Qatar, and then I'll be picking up a plane going to Afghanistan.”

He said, "I'll meet you at the airport."

So I fly into Qatar, Preston meets me at the airport, we went and had dinner on the base, and then I had a couple days having to wait for a C-130 flight up to Afghanistan. The next day, Preston says, "There's something you need to see," so we go to his office, we go back into the SCIF, he pulls open the safe, and he hands me a document. It's the document where Rumsfeld had signed off on the special interrogation plan for Slahi in Guantánamo. He had written in the corner, "I stand for eleven hours a day. What's wrong with this?" Or something like that. You could have knocked me over with a feather. Preston says, "You've got to swear to me that you're not going to tell anybody that you've seen this, and where you saw it."

To me, the shocking thing was, I was half a world away from Washington, D.C., looking at a very significant document about a case that I was prosecuting that I had never been given access to—and I had asked to see everything involving Slahi. I think I told you I was a CIA liaison. I had told the CIA I was working on the Slahi case. I had put in a written request, pursuant to a system that I had developed with the Agency, for handling our requests for information. They had told me, "We have eight volumes of information on Slahi. We're only going to allow you to see 115 documents," I think it was. Of the 115 documents, most of them were the intelligence reports generated by Guantánamo, so there was nothing. When I went to the Agency to review Slahi's information, I never saw any Agency-created documents—CIA intelligence reports—about Slahi. He had been in their custody for six months. They knew I was the lead prosecutor. They knew we were contemplating a capital case. If we could have found his connection to 9/11, we were going to go for the death penalty. I had a top-secret clearance and they didn't share the

information with me. Here I was, months later, half-way around the world, reading that his interrogations had been signed-off all the way to Rumsfeld's level.

Q: You said to Swann that you wanted to be taken off the case.

Couch: Yes.

Q: This is now May of 2004.

Couch: Yes.

Q: Did he say okay?

Couch: His response to me, at the moment I delivered it to him, was, “Why do you think you're so much better than everybody else around here?” That was the first sentence he said to me, after I told him I refused to prosecute Slahi. With that, I just exploded. I was normally a pretty good Marine—not to raise your voice to a senior officer, and not be disrespectful or anything like that. I was disrespectful to Swann on two occasions, and that was one. I just exploded. I said, “That's not the issue here. That's not the issue at all. Don't make the issue about me, the messenger. The issue is about the message, and what's happened.”

Because his response was so poor, that's why, two days later, I put it all into writing.

Q: But what happened? Were you taken off?

Couch: He didn't talk to me for a couple days. Then he basically said, "Okay, turn that file in to Colonel Joyce, and shut up, and get busy on your other cases."

Q: The other cases being?

Couch: Al Darbi and Juma al Dosari, the guy who was connected to the Lackawanna Six.

Q: Salim Hamdan?

Couch: Scott Lang was the lead prosecutor for *Hamdan* until he announced, in early 2005, that he was going to retire from the Navy. So they turned over the *Hamdan* case to me in late January 2005. This was when I became the *Hamdan* prosecutor.

Q: All right. Now you mean you could just say to your boss, "Yes, I've been assigned to this case. I've been working this case for a year and a half, or over two years, and I want to be off it." Really? It was that easy? It's that easy to get off a case that you've been carrying? If you weren't explicit, I assume you were implicit about the treatment that Slahi had been given.

Couch: I told him chapter and verse what I learned.

Q: Right. Did he say to you, "Look, that's par for the course. We're in a new war." Anything of that sort?

Couch: "What makes you think you're better than everybody else around here?" That was his response.

Q: In other words, he certainly didn't seem outraged about what has happening to Slahi.

Couch: No.

Q: Do you think he knew about it before you told him?

Couch: I have no idea. I don't, because that was fairly early into his tenure. I assume he knew something writ large about detainee treatment, because he told us, "Stay in your lane. Detainee treatment is not in your lane."

Q: Yesterday, you mentioned an NCIS agent named Mark Fallon, whom you obviously like and respect.

Couch: Mark Fallon was the lead agent on the Italian ski gondola case.

Q: That's right.

Couch: We were really close friends.

Q: Okay. Did you ever know that Mark Fallon joined with an NCIS psychologist named Michael Gelles?

Couch: Doc Gelles. I'd worked with Gelles, too. I told you I prosecuted a case involving a serial child molester. Gelles had worked with us on that case. Gelles had also helped us on the ski gondola case.

Q: At Lejeune.

Couch: Right. He'd also helped on the ski gondola case, so I knew who Mike Gelles was, and had a lot of respect for him.

Q: Now they—and David [L.] Brant, the head of NCIS—in late 2002, when they learned of the treatment of al-Qahtani which, to some degree, parallels or exceeds the treatment of Slahi—

Couch: Yes, it does.

Q: —that they had gone to Alberto [J.] Mora, the general counsel of the Navy, to try to stop that kind of thing from going on at Guantánamo, and there were ensuing events after that. Did you know about that?

Couch: No.

Q: Even though you were close to Mark?

Couch: Even though Mark and I were really close, Mark never told me any of that.

Here's my al-Qahtani story. I check in the summer of 2003, and I'm having discussions with Scott Lang, I think it was, and I was talking about Slahi, and he was saying, "Yes, Slahi looks like he's a serious guy. We've got another guy down there who's even more significant than Slahi, but we'll never prosecute that case."

I said, "Who's this guy?"

He goes, "al-Qahtani."

I said, "Oh, really? What's the deal with al-Qahtani?"

He says, "Apparently, they went overboard on his interrogation. We'll just never prosecute al-Qahtani." That was really all I knew about al-Qahtani, and nobody really knew what had happened to him. Little bit by little bit, as I made friends and connections with the people down at CITF, they started sharing with me the al-Qahtani story—that apparently the military intelligence folks had had him in an interrogation, and they thought—was it a cardiac thing with him? At some point his body temperature fell below a certain level, and he almost died. They

wound up taking him to the hospital on main-side Guantánamo—not the detainee hospital. They actually had to take him to the Naval hospital, over on main-side Guantánamo, for treatment. I later learned that they had actually held him at this security detention cell that's right beside the hospital, normally where the master-at-arms, which is the Navy version of MPs [military police], keep people.

I'd always sort of just written off al-Qahtani. People said, “Yeah, he's the twentieth hijacker.” I'd just always kind of written off al-Qahtani, so I found it surprising when, in 2005, Swann approached me and said, “I want you to take over al-Qahtani. I want you to look into al-Qahtani and start putting together a case.” That's when I got the al-Qahtani case—after I had refused to prosecute Slahi.

Q: Had you already learned, from Mark or elsewhere, about—?

Couch: No.

Q: You had not.

Couch: No.

Q: That was subsequently.

Couch: Subsequently.

Q: What continued to be your role with al-Qahtani?

Couch: I told Swann, "Okay. He's connected to 9/11. I've got to have access to all of it. How much access am I getting?"

He says, "Well, we're going to set up a briefing for you with the FBI on 9/11." That was the day that I met Jim Fitzgerald, and I told you yesterday about my questions about what happened to Mike Horrocks on United 175.

So I jumped in feet-first into al-Qahtani. What I learned about al-Qahtani was that his claim to fame was the fact that approximately five weeks, I think, before 9/11, we know that al-Qahtani flew into Orlando International Airport in Orlando, Florida. I got all this from the FBI. Jim Fitz laid it out for me chapter and verse.

Q: That's a whole other story.

Couch: All right. Anyway, he flies into Orlando. What we knew was, Mohamed Atta pulls into the parking lot, waits for him, and makes a phone call back to the UAE [United Arab Emirates], which we now know was to Mustafa al-Hawsawi. Then al-Qahtani gets back on an airplane and flies back. We later picked him up in Afghanistan. I started looking at this whole al-Qahtani thing, and my assumption, from what I had been told, was that we knew something bad happened to al-Qahtani. I did the same thing with the al-Qahtani case that I had done with the

Slahi case—I made a timeline. I plotted on the timeline the different intelligence information that we had that came out. I forget exactly where I knew, but I knew dates certain by that point. I knew the dates certain that his special projects had begun. What I ultimately came back to Swann with was this—I said, “I can take everything al-Qahtani gave us up until the moment his special projects occurred. I can take all that information, and I take the position legally that that can be used against al-Qahtani. What I propose we do is this. If we get into a prosecution of al-Qahtani, we give notice. We file a notice with the defense. 'Be on notice that the United States government will not use evidence about al-Qahtani from this date,'” and I forget the date that his special projects began. “‘We will not use any evidence obtained from this date forward.’ If we do that, then, when al-Qahtani comes in, he gets an attorney and the attorney raises all this issue about his maltreatment and stuff, we can say, 'Wait a minute. We've already said that we're not using any information from that point forward. So any discussion about his treatment is irrelevant to his guilt or innocence. It may be relevant, if and when we get to sentencing on the guy if he's convicted of the offense that we're going to charge him with. But it's not relevant to his guilt or innocence.’”

I put together an email to Swann, and I said, “I need to know everything that went on with al-Qahtani. I need to know everything that was approved for him. I need to know all investigations that have been into the al-Qahtani situation. I need to have access to all of that, so I know what the contours of it are, and what to do.” I sent it through an email to Swann, and Swann never responded back to me in an email. Swann and I had a really tough relationship. I almost resigned and asked to be removed from the office in early 2005. This was like in January of 2005. That's a whole other story. He said, “You have the weekend to decide whether you're going to quit

around here, then I'll send you back to the Marine Corps, and they'll figure out what to do with you.” The Marine Corps made it clear to me—it said, “Well, if you come back over here, we're going to send you over to—.” They didn't make it clear, but it suggested to me that if I came back over there, they were going to send me to Iraq in a non-lawyer billet. In a civil-affairs billet.

Q: Swann was not from the Marines.

Couch: No, he was from the Army. I tried to reach out to the Marine Corps to say, “I've got a problem here.” I went in and I spelled it out to these guys, the top two lawyers in the Marine Corps. I said, “Look, this place is screwed up.” I did the same thing that the Air Force guys had done a year before. I went to the Marine Corps and said, “Look, I have tried to work within the confines of the system here. Here are the issues.” I laid it out for them. I typed it up. “These are the issues going, and the detainee treatment looms large, and nobody cares.”

Q: Who are you saying this to?

Couch: Brigadier General Kevin Sandkuhler and Colonel Jim Mallon, his deputy. I was basically told, “Okay. It's up to you, but if you come over here, we're probably going to send you to Iraq.” That's what was suggested to me.

Q: You mean they were not particularly sympathetic to what you were saying?

Couch: No. It was probably one of the lowest points of my career in the Marine Corps because that felt like they were basically saying, “You're on your own.” I was having a big struggle with this. I went back to my friend Doc, from my Aviano days, and I've got this great email train between Doc and myself. I went back to Doc and I said, “What am I doing here?”

Doc says, “You know what? I would rather be fired for doing the right thing than to quit and make it easier on them.” That was the advice I took.

So I went back in to Swann on Monday morning, and I said, “Okay. Here's your answer. I'm not quitting. I'm here until the end of my three-year tour here.” We do three-year tours in the military. “I'm here until the end of my tour, or until I am reassigned by a competent authority—until you guys decide to move me. At this point, right now, I'm not quitting because, as I see it, I haven't gotten to a point yet where you guys are ordering me to do something unethical or illegal. The third point is this—from here on out, I'll deal with you in writing. If I've got reservations, you're not going to hear me talking about it anymore. I'll put it in writing.”

Shortly thereafter is when I put out this thing on al-Qahtani. He didn't respond to the email in writing, but he comes in there and he tells me, to my face, “I'll look into it, and get the information.” About a month later, I'm in Colonel Joyce's office. You'll recall that Colonel Joyce and I been prosecutors together in Aviano, and I was the reason that she was now my boss. I'm in her office, and I see a binder sitting over on her credenza. It had al-Qahtani's ISN [Internment Serial Number] number—sixty-three—on it. I had been working on it, and I said, “What the heck is that doing in here?”

She said, “Oh, that's a bunch of information that Swann had gotten together on al-Qahtani. He told me not to share it with you.”

I said, “Oh, really?” So I reach over there, I pull it off, I open it up, and what do you think that I see is stuck inside the front cover of the binder? My email to Swann, with a response on it that says, “Get what you can.” When you look at that email, it didn't have a banner across the top of it. Usually, when you print up an email, the person who sent it, or printed it up, their name will be over the top of it. It didn't have that at all. So I scratched my head and I said, “I never received that.” In his handwriting, on the side of that email, it said, “Put this in the sixty-three file.”

So I played with Microsoft Outlook, the email system we were using, for the next hour, and I finally figured out how he did it. He took my email, he pushed “Reply,” and he wrote, “Get what you can.” Then he printed it, then he deleted the email.

Q: To what purpose?

Couch: So it would look like he responded to me, but he never did.

Q: Oh, I see.

Couch: Then I went to the IT guy and I said, “I want you to pull from my system, from all the deleted files that I've got on my email account—I want you to pull up every email from Bob

Swann. I want you to pull up, on my profile, every email received from Bob Swann for the last three months.” That email was not in any of it.

So he's setting me up, trying to look like he had told me to get what I could, when he had told me that he would look into it. So what do you think I did? I wrote another memorandum, exactly what I wrote in the email, I signed it, and I delivered it to him. Just so he couldn't get away with it. I said, in the memorandum, “I requested this information. I've told you that I needed this. You did not respond to me, other than to say that you would handle it. I'm putting you on notice, I am not doing anything else with this case until I am provided with all the memoranda, all the investigations, all of the information held by the Department of Defense, pursuant to this detainee.”

Q: Did you get that information?

Couch: No. He never did anything about it.

Q: So you didn't pursue the al-Qahtani matter beyond that.

Couch: No. I set it off to the side.

Q: Now you were also involved, at least marginally, as you pointed out, in the *Hamdan* investigation.

Couch: I was the lead prosecutor for *Hamdan*.

Q: Well, not for a long time, right?

Couch: From January of 2005 until I left the office.

Q: That's right. And it was during that very time that the Supreme Court ruled, in June of 2006—

Couch: The end of July, 2006.

Q: —on *Hamdan*. Right?

Couch: Yes. Actually, I wasn't in the case as long as Scott Lang was in it, but I actually made a lot of contribution to that case, because it was during that time that we found videotapes of Hamdan's first two interrogations on the battlefield. No. I took over *Hamdan*, Myron, in January or February of 2005. That's it. January of 2005. Because Scott Lang retired in April of 2005, so I had it for roughly a year and a half. We developed some more evidence on that and conducted a focus group over at the National War College.

Q: During the Detainee Treatment Act period?

Couch: No. This was all while we were waiting on the Supreme Court. Because here I was, in December of 2005, all the way through August of 2006 when I left, waiting on the Supreme

Court. It was a hard time for me, because I was sick to death of military commissions. I wanted to leave yesterday. The three years I spent in military commissions felt as long to me as the three years I spent in law school. It was drudgery. It was interesting work. I went interesting places, and had interesting things to look at, but it was drudgery.

Q: Well, who pushed you into that job? You did.

Couch: Exactly. Yes. Be careful what you ask for; you might get it.

I'm trying to remember what it was. Sometime in December of 2005 was about the time the Supreme Court granted certiorari [cert]. That's what. When they granted cert on *Hamdan v. Rumsfeld*, that's when I was in this Never-Never land of preparing for trial, but not knowing if I was going to be at military commissions—if I was going to leave in August of 2006, at the end of my three years, or if I was going to be there until 2008 when we finally got to trial with it. It was during that time that I did a focus group over at the National War College with Hamdan's case. Interestingly, they all agreed that he should be convicted, but they gave a sentence that was within six months to a year of what he ultimately received at trial. At that time, Colonel Mo [Morris D.] Davis had come on board, and I went back to Colonel Mo Davis—

Q: —who came on board as—

Couch: —the chief prosecutor.

Q: What happened to Swann?

Couch: He retired. He became a civilian, and stayed as the deputy chief prosecutor, if that makes any sense.

Q: Colonel Morris Davis, of the—

Couch: —Air Force.

Q: —became the—?

Couch: —chief prosecutor.

Q: So now you were working for Morris Davis.

Couch: And Swann.

Q: What happened to Joyce?

Couch: She left. She went over and became chief defense counsel for the Marine Corps. She left me behind in 2005. She knew I wanted to leave. She got herself out of there, but didn't get me out.

Q: You had a focus group on *Hamdan*?

Couch: Yes, and they came out with a sentence of—between seven and eleven years was the range of sentences that they recommended. *Hamdan*, ultimately, I think, was sentenced to like seven.

Q: He didn't serve very much after that, did he?

Couch: No, he didn't. While I was on *Hamdan*, I was the liaison from our office to the solicitor general, Paul [D.] Clement, so I got to work with him. As he was preparing for the *Hamdan* case, they invited me over for moot court. That was a fascinating experience. That man is brilliant. I was in the courtroom when *Hamdan* was argued. I remember coming back from the argument. Of course, they immediately wanted to know, “How do you think it went?”

I said, “I think we're going to lose our shirts on this. I think we're going to lose.” Swann was just incredulous. He could not believe it.

Q: How would you phrase the issue, as you're talking about it?

Couch: Whether the president had the authority, under his Article 2 powers, to direct military commissions, or whether that had been an authority already reserved by Congress to itself, when they promulgated and passed the Uniform Code of Military Justice—because the Uniform Code of Military Justice makes reference to military commissions. The other big issue in *Hamdan* was,

what process was he due by nature of Common Article 3, as a detainee on the battlefield? By extension, if he's entitled to Common Article 3, what procedural safeguards must be in place in at any military commission so that it would be in compliance with our obligations under Common Article 3?

Q: Now would you agree that, with the lead sentence of the *New York Times* Supreme Court correspondent, Linda Greenhouse, on June 29, 2006, reporting on the *Hamdan* decision, “The Supreme Court on Thursday repudiated the Bush administration's plan to put Guantánamo detainees on trial before military commissions, ruling broadly that the commissions were unauthorized by federal statute and violated international law.” She goes on, as many people have since that time, that Common Article 3 of the Geneva Conventions had to apply to the detainees that were being held by the United States—the foreign detainees held by the United States, in particular.

Isn't it fair to say that from the get-go, and through the Detainee Treatment Act of 2005, the Bush administration had been opposed to an opportunity by these detainees at Guantánamo to get their cases before an independent court that could rule on whether their continued detention, without charge, was legal? Hadn't the Bush administration opposed that? How did you feel, as a lawyer?

Couch: Well, I'll tell you how we felt. You've got to think about how pivotal May of 2004 was. We had the Ides of March, we had Borch leaving, we had Swann coming on, and we had the sequelae to Abu Ghraib. We had all that going on. Then, to add to all of that, *Rasul* [*v. Bush*] and *Hamdi* [*v. Rumsfeld*] were decided by the Supreme Court in May of 2004.

Q: To June.

Couch: I remember Scott Lang saying to me that afternoon—we were sitting in his office, and he said, “This is the beginning of the end.”

I said, “What do you mean by that, Scott?”

He said, “This is the beginning of the end. If *Hamdi* and *Rasul* have the ability to challenge their detention by way of a writ for habeas corpus, then any of these other guys we go to prosecute are then going to get access to the Supreme Court with a writ of habeas corpus, to challenge even the very legitimacy of the military commissions before we ever get off the ground. We're going to be tied up until our time here is done.” And he was spot on.

Q: He was spot on, although that wasn't nailed down until the Supreme Court ruled in *Boumediene* [*v. Bush*] in 2008.

Couch: In *Hamdan v. Rumsfeld*.

Q: Yes. Well, if I understand correctly, the Supreme Court had said in *Rasul* that it's within the jurisdiction of the federal courts to receive a habeas corpus petition.

Couch: Correct.

Q: They didn't go much beyond that. Whereas, in *Boumediene* in 2008, in response to the Military Commission Act of 2006, the Supreme Court held that they had a constitutional right to their habeas corpus petitions. That made it absolutely clear.

Couch: Scott was saying, from the perspective of whether we're ever going to get to trial with a jury in the box, and the judge says, "Government, call your first witness." Whether we were ever going to be able to actually get to a trial on the guilt or innocence of the accused, when we saw *Hamdi* and *Rasul* decided, he said, "That's it. That's it for us. If the Supreme Court is even going to entertain a writ of habeas corpus from these guys, then they're going to challenge the very legitimacy of the military commission before we ever even open up evidence, and they're going to stop us." And he was right.

Q: He was wrong to some extent, wasn't he? The Supreme Court really hasn't said the military commissions can't be.

Couch: No, but he was completely spot on, because in *Hamdan v. Rumsfeld*, they struck down and said, "You can't use these procedures against this guy because you haven't even determined, under Common Article 3, the applicability of the Geneva Conventions, because you haven't done an Article 5 tribunal on this guy." That began the whole thing of the CSRTs—the Combat Status Review Tribunals. They said, "You guys haven't even started all that stuff to know what process is due. Because if he does get the Common Article 3 process, then, what the Geneva Convention

says—you've got to give him the same process that you would give a service member of the detaining power in a prosecution,” which, i.e., is a court martial.

In order to pass muster with *Hamdan v. Rumsfeld* is why we have Congress passing legislation—the Military Commissions Act of 2006—and we have yet to see whether that's going to pass muster, until we see these cases go on up.

Q: Wasn't the Supreme Court rebuking the Bush administration, telling them, “Look, you can't create these military commissions unilaterally”?

Couch: That's right. It's the most significant separation-of-powers case since, probably, the early 1970s.

Q: Okay. Then, having opposed them all along, they recreated them in the Military Commission Act of 2006, which has its own problems.

Couch: From my little corner of the world, the day after *Hamdan v. Rumsfeld* came out—they had already said, “Look, you're going to stay until *Hamdan* is done.” The Marine Corps had told me, “You're there until *Hamdan* is over, and after *Hamdan* is over, or they say they don't need you to do *Hamdan*, because the Supreme Court strikes it down, you're going to go over and be an appellate judge on the Navy-Marine Corps Court of Criminal Appeals.” I had already gone to the judge's course, and I was just waiting to see what the Supreme Court ruled. The day after *Hamdan v. Rumsfeld*, I contacted General Sandkuhler, the senior Marine lawyer, and I said,

“Okay. I'm ready to go. I'm ready to leave, because after reading *Hamdan v. Rumsfeld*, they're not going to be able to get his prosecution back on track for another two years.”

Q: Speaking of—?

Couch: *Hamdan*.

Q: You had more or less forgotten about Slahi.

Couch: I had shut the door on Slahi back in May or June of 2004.

Q: And now you're saying you're not going to live long enough to see Hamdan tried. Is that it?

Couch: Six weeks after *Hamdan v. Rumsfeld* was decided, I got my orders.

Q: Since we talked so much about Slahi—because that was a pivotal case in your time there—do you know what has happened in the Slahi case? Have you followed that?

Couch: Not a lot, no. I know that Judge [James] Robertson was the trial judge.

Q: On the habeas?

Couch: On the habeas, and I know that he granted his habeas. I know that the D.C. Circuit Court of Appeals remanded, on a two to one vote, Judge Robertson's order, and I think it's back before Judge Robertson, in accordance with that remand. As far as any military commission efforts against Slahi, I know that they had a Navy lieutenant judge advocate, who was in the office—much less experienced than myself—and they had him review the Slahi case, I guess to make an assessment on my assessment in some way, and I'm not certain what he told them.

I took it, a little bit, as a professional affront, that they would take somebody so much less experienced than myself to review it. I would have felt better if they would have brought in one of the other senior prosecutors and had them take a shot at it.

Q: But Slahi is still at Guantánamo. This is ten years later. He's still at Guantánamo. He won, as you say, a habeas before Judge Robertson, which was originally filed in 2005, but was held up pending some final determination by the Supreme Court, as they did in *Boumediene* in 2008, as to whether these habeas petitions could go forward.

It was filed in 2005, Robertson ruled in 2010, and it went back to Robertson through the D.C. circuit, which had overruled Robertson, and remanded him, saying, “Get more facts.” Boy, that's ten years. He was thirty-two years old, I think, when he went in. He was born in 1970. Now he's still there, still denying he had anything to do with Al-Qaeda after 1992, when he was fighting the Communists.

It's like a number of these people who are down at Guantánamo—there are about one hundred seventy left. He's never been charged with anything. He's in sort of a never-never land, as he goes back and forth from court, to court, to court, to court. It would almost sound more right, somehow, if he was facing some charges, and it was going back and forth to courts.

Q: But that's not how the Supreme Court has ruled. Not in Slahi's case, but the Supreme Court has ruled that under customary international law, an enemy combatant can be detained until the end of hostilities, and they have reaffirmed that, to my knowledge, in at least three opinions. Then that begs the question, which is what's still being litigated, as to whether Slahi meets the definition of such a combatant, so he can be detained until the end of hostilities. Then there's the second question of how do you define the end of hostilities?

Q: Well, that's right. But let me just finish off with Slahi by saying that it's interesting, considering what was before you when you had the Slahi case—essentially that Slahi had a part in planning for 9/11 through Ramzi bin al-Shibh and others, and that he had something to do with the millennium bomb plot that Ressayam—

Couch: I couldn't prove that he had anything to do with it, other than that he knew Ressayam, and went to the same mosque.

Q: Okay, but I would point out to you that in Judge Robertson's habeas, where he orders Slahi freed, he points out two things of considerable interest, perhaps. One is that, in the end, after

Ressam was arrested for the millennium bomb plot, and started to talk as part of a cooperation agreement, I think, he did not implicate your man Slahi in the thing.

Couch: No.

Q: Also, by the time the petition was heard by Robertson in 2010, not only did the government no longer allege that Slahi participated in the millennium plot, but they no longer believe that he knew ahead of time of the 9/11 hijacking plot.

Couch: I couldn't prove it with anything I saw.

Q: And yet this case goes on.

Couch: When Greg Highlands and I were working Slahi, I said, "Greg, my concern is this. If we can't come up with something that ties him to Ressay and his participation in that, that's going to be the easier thing to prove. That's going to be the stronger case, if we can come up with something with Ressay. So what is Ressay saying?"

Greg worked and worked on that thing, and he said, "Hey, look. Ressay is not giving up anything related to Slahi." That's why, ultimately, in the memorandum that I gave to Swann, when I refused to prosecute the case, I said, "We cannot establish culpability on his part for anything involving Ahmed Ressay and the millennium bomb plot." I never found anything.

Q: So you became a judge of the Navy-Marine Court of Appeals.

Couch: Navy-Marine Court of Criminal Appeals in Washington Navy Yard, in D.C.

Q: That's an appellate court.

Couch: Yes.

Q: Right. And you had that position until—?

Couch: —2009, when I retired.

Q: That wasn't a lifetime appointment or anything.

Couch: No, that's a three-year tour.

Q: A three-year tour. On March 31, 2007, while you're a member of the bench. The *Wall Street Journal* publishes an article, on the front page, I think—

Couch: March 31, 2007. It was a Saturday edition.

Q: —called “Conscience of a Colonel,” right?

Couch: Yes.

Q: How did that come about?

Couch: Let's go back in time. Can we take a break real quick?

[END OF SESSION]

VJD

Session Three

Interviewee: V. Stuart Couch

Location: Charlotte, NC

Interviewer: Myron A. Farber

Date: March 2, 2012

Q: Were you being outed in some sense?

Couch: Not really. As I said, *Hamdan v. Rumsfeld* was decided at the end of June 2006. That's when it was clear to everybody in the office that I would be leaving, because we all realized—let me back up just a little bit.

Neal [K.] Katyal, who was Hamdan's civilian lawyer, who argued *Hamdan* in front of the Supreme Court—we had gotten to be friends. We were opposing counsel, but we had gotten to know each other over this process, and we'd gotten to be friends. We had a bet. I had bet Neal a beer that—there were eleven issues that had been spotted, and I told Neal, “I think you guys are going to win eight.”

Neal had said, “Nah, but I do think I'm going to win three. But on the three I think I'm going to win, I'm not certain that it's going to prohibit us from going to trial.”

So I said, “I think you did better than you think. I'm betting you a beer that you won eight.”

There were, I think, a total of fifteen issues, and when the opinion came out, he won eleven of the fifteen. So a couple years later, we were able to settle up our bet.

At any rate, it was clear, because they won eleven out of the fifteen issues, that military commissions were dead in the water, and it was quickly, within—

Q: They were dead in the water as then constructed.

Couch: Yes, as then constructed. They were dead in the water. Even within like two days of the decision coming down, it was clear to us that there was going to be this monumental effort to push through the Manual for Military Commissions. We called it the “blue book.” The Manual for Courts Martial is the “red book.” We started calling this thing the “blue book.” It was the Manual for Military Commissions. General [John D.] Altenburg [Jr.] had had some people working on, basically, trying to make a court-martial-lite version for military commissions, and that's actually something I had advocated for some time. That's much further afield than we need to cover today, but we knew that that effort had been going.

As soon as *Hamdan v. Rumsfeld* was decided, we caught wind that, okay, the blue-book effort was what they were going to try to get pushed through Congress, in the form of legislation that would allow them to do a court-martial-lite construct for military commissions, and they were going to try to get it done before the 2006 elections. Because the Republicans clearly saw the handwriting on the wall that they were going to lose control of the Congress, and they had to get all this legislation through and signed into law before the elections.

In any event, there was a period of about six weeks that I knew that I was leaving, and I was absolutely thrilled to be going over to my new billet as an appellate judge. There had been some

media that had basically lionized, and written very favorable articles of, the military commission defense counsel over the years. They had become pretty much rock stars because of their efforts in opposing the military commissions process. The prosecution, on the other hand, had been under a strict gag-order. We had been given clear direction from the general counsel's office of the secretary of defense that we were not to speak to media at all. Actually, our identities, for some time, were kept out of the news—until the Ides of March story broke, and that was leaked to the media. The Ides of March story came out, and that's—

Q: In 2005.

Couch: —that's how our names finally got out. About this time, Colonel Mo Davis came on board, in the fall of 2005, I think it was. He had written a paper in the Air Force legal community, basically saying, “You need to engage with media.” There's this knee-jerk reaction in the military that we don't do media, and he had argued in that paper, “Times they are a-changing. You need to understand that media is the way it is, and you need to engage the media in such a way that the truth gets out. There is a way, with high-profile cases and high-profile issues, that there can be an engagement with the military and the media.” I'm really oversimplifying it.

I knew that Colonel Davis's predisposition was that we needed to do media, whereas, when Swann had been on board, it was, “We're not doing any media.” After *Hamdan v. Rumsfeld* was decided, one day Colonel Davis came in and said, “Hey, look. There's this reporter for the *Wall Street Journal*, Jess Bravin. He has done a few articles about some of the defense counsels

before, and he wants to do a piece basically profiling some of the prosecutors, on the prosecution side. Would you be willing to sit down for an interview?”

The first thing out of my mouth was, “Has this been approved by DOD general counsel's office?”

Colonel Davis said, “I'll check on that.”

I said, “If it's approved by DOD general counsel's office, I'm willing to talk to him.”

Q: This was before you left the office?

Couch: Yes.

Q: That's almost a year before this article appeared.

Couch: Correct.

So he comes back to me a couple days later and says, “Okay. It's been approved for you to talk to Jess Bravin.”

I said, “You sure?”

He said, "Yes. I'm sure." So Jess Bravin came over to the office, we were in the conference room, and we met for about two hours. Then we went to lunch, and about two hours into the interview he said, "You know, I heard a rumor about you from the guys down in CITF."

I said, "Oh, really?" And let me hasten to add that I was not given any direction about what was off-limits to talk about with Jess Bravin. I knew that anything classified, or anything for official-use-only was off-limits. But about two hours into the interview, Jess said, "Well, I've heard from some sources, law-enforcement guys, that you refused to prosecute a case."

I said, "Yes, that's true."

At that time, that's really about all we talked about. I only had one interview with Jess, and then I left the office. At the same time I left the office and went over to the appellate court, I started going to an evening program to get my Masters of Law over at George Washington University. Jess wanted to meet me one night, and I said, "Okay, you can meet me before I go to class." I remember we ate at a little sandwich shop over there in Foggy Bottom, and he said, "I'm really interested in this issue about the case that you refused to prosecute."

I said, "Well, yes, it's pretty interesting stuff. I'll tell you what. Why don't you take this name right here," and I wrote the name down on a slip of paper, and I gave it to him. I said, "You take this name right here, and you find out everything you can find out about him. Then you come back and tell me what you know."

That's what he did. He came back, and he knew a lot. By that time the Schmidt-Furlow investigation had come out. So, over the course of time, I was willing to give him interviews.

Q: Well, it took him a long time to put that piece together.

Couch: It did. He told me later that the reason he ran it on a Saturday was because he didn't have enough space for the article during the week.

Q: Well, in any case, it came out the end of March 2007.

Couch: It came out on a Saturday.

Q: Now you're serving on the court, right?

Couch: Yes.

Q: What was the reaction to that article?

Couch: Around Christmas of 2006 we met again, and Jess said, "Look, my editors want to run a story." He said he'd been working on a book, and that's when he got the Slahi information. I told him the contours of it. It was right before Christmas of 2006, and he came back and said, "Look, my editor wants me to run a story on it. They want to put it on the front page. That's a pretty big deal. If you don't want that to happen, or don't agree to that, you can say so."

I said, "Let me think about it. Let me pray about it." For a month, pretty much over the Christmas break and holiday and so forth, my wife and I talked a lot about it and prayed a lot about it. At the end of it, I knew it was a risk to do that. I wasn't sure how it was going to be received. I don't know if other people would perceive it this way. I just felt it was a story that needed to be told, to show how faith can inform what we do and what we decide to do.

So I agreed to it. About two or three weeks before it was scheduled to come out, I went and told the chief judge on the court. He's a Navy captain. I went and told him. No, it was further than that. I told him about six weeks out. I told him, "Here's what's coming. This article is going to come out, and this is basically what it's going to be about." He, in turn, advised the JAG, Admiral Bruce [E.] MacDonald. I report direct to the JAG. The nature of the court that I was on, in my billet—he's the guy who writes my fitness report. So it's really unusual that I'm in a position where I report directly to the JAG. There's a lot of protection in that. There's not many other Marine lieutenant colonels who report directly to somebody of that kind of stature.

So the chief judge of our court told the JAG what was going on, and he said, "Okay. Just let us know what happens." Actually, the photograph for the article was taken in the chief judge's office while he was out. I then went to General [James C.] Walker, who at that time had become the staff judge advocate to the commandant. He's the senior Marine lawyer. We were at a memorial service down in Quantico for my mentor who had passed away, and the general was walking out, and I said, "Sir, can I speak to you for a moment?" We went out on the front steps. I had had some discussions with him before about everything that had gone on there. I said,

“Here's what's happening. The *Wall Street Journal* says they're going to run an article. I just don't want you to get blindsided. Here's what it is.”

He said, “Okay. Thanks for letting me know.”

The article came out on a Saturday. I actually saw it online at 10:00 on the Friday night before, and I was just blown away because that article was right down the line, exactly like it happened. It was to a “T.” Even with some of the vehement feelings that I had toward Swann and how that whole thing had gone up—I think he had even dampened out some of that to where it was just a very, very—it was a fair treatment all the way around, even given my bias, that was obviously going to be part of the story.

Monday morning I'm back at the office, and I've got some of the other guys coming in, saying, “Hey man, we read the article.” It went out on the “Early Bird.” The Early Bird is this news service that the DOD uses, so everybody goes and checks Early Bird first thing in the morning for the latest articles, and it was right in the middle of the Early Bird, and some of the guys were coming by, saying, “Man, that was an awesome article.” I ran into some neighbors across the street, and they gave me a copy. “Saw you on the front page of the *Wall Street Journal*.” About 8:30 the phone rang in my office, and it was General Walker. He said, “I've read the article. You made us proud. It was good. I've spoken to the commandant, and the commandant doesn't have any problems with it.” That's the commandant of the Marine Corps. He said, “The commandant thinks it's a good article for us.”

You know, it was just crazy after that. Old friends started coming out of the woodwork. I was getting emails from a lot of people, and I was absolutely shocked that there was the level of support as there was. I had full well expected that I was going to lose friends over that.

Q: Well, a half a year later, weren't you asked by some congressional committee to appear and testify?

Couch: I was.

Q: Did you go and testify?

Couch: I was ordered not to.

Q: What do you mean? They all loved you now.

Couch: I was given an order. I told Admiral MacDonald that I'd had this request. I told Admiral MacDonald that it was coming, and then they contacted me and said, "The Office of Legislative Affairs [OLA] has received a call from DOD. OLA has expressed an opposition."

I said, "Okay. So what is it? You guys—" I'm talking to the OLA guy. I said, "What's the deal here? Because they've asked me to testify, and I'm willing to testify." That's when they informed me that there was an official instruction that states that the secretary of defense controls who goes over to the Hill to testify, and that if I'm a uniformed service member, then I fall underneath

that. As I told the Navy representative, "I'm testifying over there unless I'm given an order by competent authority otherwise." At about 5:00, on the night before I was to testify, I was given a direct order not to testify.

Q: By?

Couch: It came to me through the Navy Office of Legislative Affairs. I said, "Who gave the order?"

They said, "It was given by the Office of General Counsel." Jim Haynes.

Q: Right. Wasn't it Jim Haynes who said that, as a sitting judge and former prosecutor, "It is improper for you to testify about matters still pending in the military court system, and you are not to appear"?

Couch: Yes, and it had absolutely nothing to do with my duties as a judge.

By the way, as an ethical matter, I'll absolutely recuse myself from sitting on any case involving military commissions. There were brethren judges on my court who were part of the Court of Military Commission Review, and we had an absolute code of silence that I would not speak to them about those cases, and they would not ask me about the cases. Moreover, I could not sit as a judge on the Court of Military of Commission Review because of that. That's why I always thought that that directive was absolutely idiotic.

Q: Let me skip around to a few issues that are still outstanding, that I'd welcome your perspective on. You mentioned before about what is the battlefield? Osama bin Laden has been killed now, and there are people like Peter Bergen, who is very knowledgeable about Al-Qaeda, who say, "Look, the war on terror is over. Osama bin Laden is killed." Other people, like Karen Greenberg, will say that we're in an era now of risk-management. It is no war anymore; it's managing risk. Then there's the question allied to that is, what is the battlefield? Do you ever think about these questions?

Couch: I do. I think, perhaps for the first time in human history, that we have to define what is war—what is war, what is a war—and I don't think it fits in a neat, Black's Law Dictionary, or a Webster's Dictionary definition any longer. My own sense would be that we are probably now in more of an era of risk-management. But unlike warfare in the past, where we always pushed up to a level—you always got up to this level, and then we had a military action taken. That military action was only taken after various levels of diplomacy and efforts at non-violent conflict resolution had been exhausted, and we had gone to the UN to get sanctions. Then we had gone to the UN to report the ineffectiveness of the sanctions, and we looked for authorization for use of force and what not. Unlike those times in the past, the enemy that we face is vehemently ideological and religious in nature, and also does not represent a particular nation-state or political entity with whom we can negotiate. By the very nature of the enemy we face, if we are really serious about national security, we're going to need to get to the point where we're willing to use military action, unilaterally, on an ad hoc basis, as we have the opportunity to prosecute targets and do what we need to do. The rub comes—while we may not be attacking Yemeni

forces, or we might not be attacking Pakistani forces, and so forth, we still need to be able, in the name of our own national security, to prosecute those targets with unilateral, military action, notwithstanding the permission or assistance of those countries. That, I think, is a sea change when it comes to the global political arena.

I don't know if that's too simplistic of a response, but based upon the knowledge I have now of Al-Qaeda, of fundamentalists, of Islam, and those types of organizations, I don't think we have any other options.

Q: Well, whether or not we do, the fact is—and I'm laying aside all that happened at Bagram, which is rarely discussed by anybody.

Couch: Yes. You never asked me about my trip to Bagram and what I thought of that.

Q: Laying that aside, there was much ado during [Barack H.] Obama's run for the presidency about closing Gitmo. He made a promise, if he was elected, to close Gitmo within a year. Even today, Gitmo remains open. There are one hundred seventy-some inmates there. What is your feeling about not so much what was feasible to do, because that's really not your arena, but what do you think should be done at Gitmo?

Couch: It's an excellent question. I've given speeches all over this country, and, actually, even over in Germany, about my experience with the Slahi case. I've had the same mantra. In every one of those speeches, I've said the same thing. I've said, "The question for us, as Americans, is

not what we can do on the discrete issue of interrogations and treatment of detainees. It's not what we can do; it's what we should do as Americans." I think that same question should be asked in this realm. It's not what can we do, but what should we do. We know what we can do. We know that whole range of options, from simply monitoring the threats with enhanced intelligence capability, all the way up to prosecuting threats with military action. The difficult thing comes down to what should we do. On the finite issue of Guantánamo and the one hundred seventy-some-odd detainees that remain there, I do think it falls back to a risk assessment. You've got to look at each one of those one hundred seventy and say, "Is this someone who we are willing to take the risk that we're going to see again, with another operative threat against the United States, and we're willing to run that risk?" Now that begs the question of who's making that assessment, and what are the sources of information that go into that assessment? For the life of me, I can't come up with exactly what that paradigm looks like. I can't come up with what those sources of information ought to be. However, as far as having a location to keep them, it's a two-sided coin with Guantánamo. What do they say? It's the least worst place on earth? What was the title of the Greenberg book?

Q: *The Least Worst Place*. Those were Rumsfeld's words—"the least worst place."

Couch: Unfortunately, I might have to agree with him that Guantánamo is the least worst place we can keep them, given that we've established that there. We've got the facility there that we've put big-time resources—manpower and financial resources—into. The legal confines of that are almost now ironed out because of the enormous litigation that has ensued over the last ten years. We have to balance the practicalities of that location, to keep those detainees, with that esoteric

“How do we look in the eyes of the world and the international community, for having this offshore penal colony?”

That's kind of its own risk-assessment, from a perspective of our position in the world. I have to tell you, Myron, I've kind of gone back and forth on it. I started off from a perspective of Guantánamo ought to be open until the end of hostilities. We're not going to have the end of hostilities, and therefore, Guantánamo is going to be open until the end of the world. Then I went through a period of we've got to do whatever it takes to close Guantánamo, because we're getting such a black eye in the international public opinion. I think I've now come full circle. I think I've now come full circle to realize that no matter the best efforts of this country—no matter how hard we work to convince the rest of the world that we are the City on the Hill, that we are a thousand points of light, that we do mean for there to be good, and good will around this world—no matter how hard we try to do those things, they don't believe us. There are elements of those countries out there that will never believe us. I hate to say it—as we sit here in March of 2012, within the last week, in the news, I think we're up to eleven American service members who have lost their lives in Afghanistan by being shot in the back, and in the back of the head, by Afghan policemen and Afghan security forces, that we are there to partner with and to work with, hoping to bring peace to their country.

Again, for the record, because it might be reviewed decades from now, it was all because they burned some Korans in Bagram, Afghanistan, because the detainees inside the detention facility were using the Korans—writing in the margins—as a way to pass information. Somebody, at a low level, made a stupid decision that they were going to take those Korans away from those

detainees and burn them. Somebody else found the charred remains of the Koran, and immediately it became this rallying cry for Muslims across the region to, again, commit acts of violence against us. To me, if I'm fighting an enemy that is able to infiltrate my friend, the friendly forces that I'm there to collaborate with, to where they can shoot me in the head while I'm inside a secure facility in Kabul, then it's okay to have a Guantánamo.

Q: Well, how about just getting out of there? Leaving.

Couch: I do believe we need to leave. I now understand why they call Afghanistan the Graveyard of the Empires.

Q: Do you think it will make any difference if we leave tomorrow than if we'd left three years ago, let's say?

Couch: Yes, a huge difference, because now bin Laden's dead. I would never have advocated leaving Afghanistan until he was dead. But, frankly, now that he is dead, let's pack it up. Guess what? That's what those people in that region of the world understand. They don't understand democracy. Trying to get these people to come along and understand democracy is probably like giving an iPhone to a chimpanzee—just see if they can figure it out. It's not in their makeup. They're not wired that way. What these people do understand is they understand the tribe that has the most force. If you mess with that tribe, you get wounded, and you get killed.

Looking at this whole thing that's gone on for the last eleven years, in the most simplistic fashion, Osama bin Laden had a tribe, and that tribe was called Al-Qaeda. That tribe decided that they wanted to take on the biggest tribe on the face of the planet, the United States of America, and they scored a lick on us. They won a battle on us on 9/11, but we responded. We over-responded in some respects, but we responded, and we killed him. And we killed the majority of his inner sanctum, his inner circle. The ones we didn't kill we've captured, and the ones we haven't captured, they are on their heels.

That's what these people understand, unfortunately—brute force. I think it is time for us to withdraw, pull out of there, but to let them know, “If you ever harbor a tribe that wants to attack our tribe again, we'll be back.”

Q: Osama was killed after Obama gave the order to go in and get him. Whether he should have been captured or killed, let's just lay aside.

Couch: Let me comment on that. I am a Republican. His decision to give a kill-or-capture order was completely correct. I have absolutely no problem with the fact that they sent a team in and said, “Go kill him.”

Q: Obama said, “We're going to close Guantánamo within a year.” Congress pushed back and said, “Not only are you not going to close it, but you can't even put these people in prison in the mainland United States. We're not going to fund them any trials in the United States. This is all going to happen in military commissions. It's all going to happen down here.” So there was quite

a bit of pushback. There are some people who say Obama has gone along with that, and that there's not much difference between the record of Obama against terrorism and terrorists—there's not much difference between his record and the late Bush record.

Couch: I'm trying to be the honest broker here. There are some differences because we no longer have enhanced interrogation techniques. That's a difference. Second point. Politicians can be wrong. I think Obama, in the campaign, before 2008, was incredibly naïve when he was calling for the immediate closure of Guantánamo. I knew then. It's a very multi-faceted issue, and he's making a campaign stump speech. If he were intellectually honest, what he would say now is, “Having been the president for the last three years, yes. Okay. I kind of see why we're doing that,” and make the case. “Here are the issues we've got there.” As to the issue about Congress passing legislation that prohibited him from bringing them to the United States—as I see that, that's just an exercise of separation of powers. The Constitution gives the power of the purse to Congress, and if Congress can thwart what the president wants to do, as the executive, by using that power of the purse, and prohibiting funding for bringing them to the United States to try them, then guess what? The president's got to eat that one. That's the separation of powers. That's the way our government is. He would be wise, as I think he has been, in the face of that opposition from Congress, to say, “Knowing that my authority has been proscribed by Congress in this way, what's the next best effort?” That's why they have put the kind of resources into the military commissions, to get them done.

Q: You mentioned a couple of times that you're a Republican—although you were appointed a federal immigration judge by the Obama administration. Your party is tying it to this year's

election. They keep on portraying this man, Obama, as weak on terrorism, yet he ordered a dicey proposition at the time—the killing of Osama—when they weren't one hundred percent sure of the situation. The administration has prosecuted, or attempted to prosecute, more whistle-blowers under the Espionage Act than all administrations previously. He's imposed the state-secret document in any number of cases, including the Binyam Mohammed case and Jeppesen Dataplan, which was rendering these people to countries. He went along with, or he ordered, the targeted killing by drone of Anwar al-Awlaki, an American citizen, in Yemen.

Couch: —accompanied by another American citizen from right here in Charlotte.

Q: Oh, yes?

Couch: Yes.

Q: My point being, is that—?

Couch: No. I would have to say—and don't get me started on what I think of the Republican candidates, all right? Don't get me started on my observation of them. However, I would say this. I would say that their criticism of this president, with his record as to terrorism, specifically, is misguided. I think it's wrong.

Q: Let me bring it back, finally, to the business of the military commissions—what we started with, and what you were so much associated with. There has long been an issue between the

military commissions and the trials we talked about yesterday. Let's stick for a moment with the issue of military commissions. Since Bush's order of November 13, 2001, they have successfully prosecuted five or six people, including Hamdan, David Hicks, al-Bahlul—who really didn't put up a defense at all—al Qosi, and Omar Khadr, the so-called “child soldier.”

This is what has happened in all these years. In your judgment, how do you characterize this as an achievement, and where do you see it going forward?

Couch: What I would say is this. How many cases was that, that you just listed off?

Q: Five, and I think there's another one. There's been a plea this week.

Couch: Majid Khan.

Q: Yes. Exactly.

Couch: Today, we're in 2012, and we've got six cases. Let's say those prosecutions occurred after 2006, with the first iteration of the Military Commissions Act of 2006, as amended in 2009.

Correct?

Q: Yes.

Couch: Okay. Let's do a time shift, and let's go back to 2006. If you were to tell me, between 2001 and 2006, that we had six military commissions completed, I would have said, "You know what? That's not bad. It's not great, but it's not bad." If we were where we are today, back in 2006, I would say, "You know what? That's not bad. That's doable."

Q: But by 2006 you had zero, right?

Couch: Correct. Here's why I'm setting it up like that, Myron—and why is that? Why are we six years further into it than we should be? That was because the Bush administration did not do a proper legal review and investigation. They did not reach out to the military to find the experts in military law, to assess what they were contemplating. They didn't do the legal due diligence of that policy decision, and once they knew they had some problems, they stayed on a path that even a simple trial lawyer, like myself, tried to point out to them was going to lose. Believe me, there is no self-aggrandizement here. There were all of us in that office, and other people we were working with, and everybody was like, "We think we're doomed. This whole Article 2 route—we think we're doomed. If we want to do these things right the first time, and get it right, and get it supported on appellate review, we need to have a congressional fix." That's what we got in 2006.

I wrote a memo in April of 2005, and I called it, "The Big Picture Memo." It was one night. I was home on a Friday night, I couldn't sleep, so I stayed up all night, and I put together a three-page memorandum. I called it "The Big Picture," and I laid out, chapter and verse, here's where we are, here's where we want to be, here's the pros and here's the cons, here's the limitations, and

here are five options. I set out those five options, and I ranked them one through five of what I recommended that we do. Number one on that list was “congressional fix.” This is what we did in 2006. Number five on that list was, “Do what we're doing.” “Stay the course” was the last option, the worst option. Unfortunately, that's what we did.

My answer to you would be this—had we done what needed to be done after *Hamdan v. Rumsfeld* was decided in 2006, and we would be conducting the military commissions that we are today, I still think that was a right decision.

Q: Well, first of all, when you say—

Couch: Now, granted, all of that that I just said is with the benefit of hindsight. I want to hasten to add, at least in my judgment, from what I learned for two years between 2003 and 2005, I knew that what we were doing was not going to work. It was not going to pass muster.

Q: Yes, but how about 2006? In the Military Commission Act of 2006, in which you're trying to rectify the mistakes that had been made that were being overturned by the Supreme Court, you still were pushing against detainees having habeas rights. That was challenged successfully by detainees in *Boumediene*. They still weren't willing to say that.

If I understand you correctly, you're saying that if you had had six convictions in the first six years, that, you say, would have been okay. But by the time you left office, there were no convictions—

Couch: Correct.

Q: —and it's only been six since that time, and three of them under the Obama administration. If you look closely at those, three of them were actually plea bargains, and the people left the country soon thereafter. Is it worth it, really? Is it worth it to have these military commissions?

Couch: If you were to tell me the nature of the people who have been to the military commissions, their culpability, and if you were to ask me, “Was it worth it?” I'd say no.

Q: None of the so-called Big Fish you were talking about before.

Couch: No. Those were all Little Fish, or non-existent fish, on a couple of occasions.

Q: Al-Bahlul was—

Couch: He's a Little Fish.

Q: In other words, in all those six—

Couch: By the way, I was the co-counsel for al-Bahlul.

Q: In the six that have been convicted or took a plea, there's no Big Fish.

Couch: Let me make sure I get this point straight. If you were to tell me that of the six convicted—just those six, and looking at their level of culpability—and you were to ask me, was all this worth it? I would say no. Come back and talk to me two years from now, after the 9/11 guys have gone in there, the Big Fish, and we get capital convictions on those guys, and we're set to take them into the execution chamber and stick a needle in their arm, and extinguish them from this earth. I will tell you yes, it has been worth it.

One thing we did understand, in my 2003 to 2006 tenure in there—and maybe this was self-preservation. I got sick of kicking around these Little Fish cases, made up of rank hearsay. It was very frustrating, especially when you're reading the intelligence reports of the Big Fish, and you know what they were involved in. But one of the motivations for me was the cases I'm working on now might not seem to be much in the grand scheme of things, but they are putting in place a process that the people who are going to come after me are going to be able to take down the Big Fish and put a needle in their arm.

Q: Well, that's assuming, also, that the Big Fish can't get away with the fact that—waterboarding 183 times, waterboarding eighty-three times—

Couch: That's another reason why a policy of cruelty is a bad idea.

Q: But John [C.] Yoo said—

Couch: John Yoo is full of shit.

Q: He says in his book, *War By Other Means*, on page one hundred ninety, “Coercive interrogation of Abu Zubaydah, Ramzi bin al-Shibh, and KSM, all captured in the space of about one year, netted American interrogators a great deal of information—as a careful reading of the text and footnotes in the 9/11 Commission report reveals. Interrogating these men revealed not only how 9/11 was carried out, but the entire command structure of Al-Qaeda, its processes and organization, and how operations are planned, approved, and executed,” and it goes on, and on, and on.

Now are you saying that’s ineffective?

Couch: No.

Q: He's saying you had to do this, right?

Couch: Okay, but then that comes back to a question I asked earlier—who are we, as Americans? That is rank, post-modern thinking. Okay? That is a rank, post-modern, ends-justify-the-means approach. We need to ask the very basic question, then—is that post-modern viewpoint consistent with American values of fairness, of justice, and doing the right things, even when it isn't popular? I would submit to you, as a guy who served his country for twenty-two years, observing the opinion of some knucklehead, ivory tower charlatan, who has not—that he's wrong. That's not American.

Q: Well, in those memos that he wrote, and with others in the Office of Legal Counsel, of the great Department of Justice—

Couch: Crap. Absolute crap. He's got bigger degrees than I've got hanging on his wall. He's got the Ivy League education and all that goes with it, and I will tell you, I read those things with a fine-toothed comb, with a microscope, and it is flawed legal reasoning. It's crap.

Q: What about from a useful point of view—saving lives. You get this information from bin al-Shibh by waterboarding him and what have you, and he gives you information that will make your military progress better, right?

Couch: The Jack Bauer scenario.

Q: Yes.

Couch: I get that question at a lot of these speeches that I give. Again, for anybody who reads this decades from now, a couple years ago there was a very popular TV show called *24*. *24* is all about this counterterrorism agent named Jack Bauer. Jack Bauer, every week, finds himself in another situation of ever-cascading events, where they're saving the very lives of the United States of America from nuclear holocaust, every week, week-in and week-out, by finding out who the culprit of the next operation is, and then, in many cases, torturing them to get time-critical information to stop the ticking time bomb. So I call this the Jack Bauer scenario.

Here's the problem with the Jack Bauer scenario. If you accept the logic that torturing somebody to get information is going to allow you to stop the ticking time bomb, then the premises that underlie that logic have to be, one, I know that the individual we have in our custody knows where the ticking time bomb is, two, I know that if I apply torture to that individual they will give me true information that will lead me to stop that bomb, and three, he's going to be able to do it in such a time that I can act on that intelligence.

If you talk to any intelligence analysts, any intelligence officer who knows how intelligence works, they will tell you that your information about an individual is never that good. It's never that good. If your information is so good that you know that he has that information, then you've probably got enough information to interdict and stop the threat. You then look at a situation—the second point—that if you apply torture to him, he's going to give you valid information. Think about the situation of John [S.] McCain [III], a senator of the United States, himself a prisoner of war in the hands of the North Vietnamese in the Hanoi Hilton, back there in the late 1960s and early 1970s—the famous story of where they hung him up by his arms, tying parachute shrouds in the rafters, to get him to break. They were wanting to know the rank structure of this squadron. When he finally broke, what information did he give them? What names did he give them? The starting offensive line for the Green Bay Packers.

Now the North Vietnamese didn't know that the names he was giving them were from the Green Bay Packers. All they knew was that they broke the man, and that he gave information.

So now I add the moral component. If you're going to make the John Yoo argument of ends-justify-the-means, post-modern thinking—that if we can torture somebody and stop the ticking time bomb, then it's morally correct—well, okay, let's go past that point and ask, “What if we're wrong? What if we're wrong? What if the individual we have in our custody has the same name, but is not an Al-Qaeda operative? And we do those things to him—we waterboard him, we put him in a coffin, put a gun to his head, threaten him with a drill, or deprive him of sunlight, human interaction, food, and warmth—”

Q: All of which we have done.

Couch: Correct. That's why I'm using those examples. What if we do that with somebody, and we were wrong about his identity to begin with? Is the United States, then, the City on the Hill? Are we the nation of the world that stands for fairness, justice, and goodness? That's not the United States that I know. Unfortunately, that's the situation we've been put in. That's why I absolutely, with every fiber of my being, refute the ridiculous, wrong-headed positions taken by John Yoo and the rest of his ilk.

Q: There hasn't been a major attack like 9/11 since 9/11. There have been instances—this so-called underwear bomber, in that plane over Detroit, who was trying to blow up that plane, and failed. There was that fellow in Times Square.

Couch: The Pakistani. Then there's the [Richard C.] Reid case—the shoe-bomber.

Q: That's right. Would you say that the government of the United States, whether it be the Bush administration or the Obama administration, itself deserves the credit for this not happening again, like it happened? Or are there other key factors that apply, as to why we haven't seen another 9/11 or something like it?

Couch: I think any administration that's in charge gets some of the credit. Because what's really happening is that those professionals down in the trenches—the analysts, the operators on the ground who are collecting the information, the engineers and the scientists who develop new technologies of intercepting communications and aerial observation, sociologists, anthropologists, linguists who are able to assess these different groups and how they operate, and predict these things—I think it goes down to the customs and enforcement guy who was working at Orlando Airport the day that al-Qahtani tried to come into Orlando, and did the interview with the guy, and just realized, “You know, this just isn't stacking up. This guy's not making any sense.” It's the guys like Ali [H.] Soufan, who are fluent Arabic speakers, and know how to get in and establish rapport with a detainee, to sit around, drink tea, eat dates, and pray with them, and then get them to open up, and give them information that advances the ball much further than some sort of special projects ever hope to do. That's who gets the credit, and keeps us safer.

I think if you've got an administration that funds that kind of opportunity, and those kinds of efforts—they fund them, they keep their operations secret, so our enemy doesn't find out how we do things, doesn't figure out our capabilities, then I'm all for it. But when you get an administration that feels more about the media punch than getting the job done, then you've got a problem.

Q: Finally, you started out wanting to be a Marine pilot. And though you haven't admitted it, they figured you weren't a good enough pilot so you had to go to law school. [Laughter]

Couch: I made that decision on my own, I guess.

Q: All right. Staying in the Marines, basically, with a few outside journeys into the private world, or into prosecution privately, or with the non-military, has a military career been good for you?

Couch: Oh, absolutely.

Q: Especially the Marine Corps?

Couch: Absolutely. I'm proud to have been a Marine. I was not promoted. I was passed over for promotion twice, to colonel. So I retired as a lieutenant colonel. I'm very disappointed by that. I don't completely understand that. But with almost three years now, to look back on that eventuality, it was actually a good thing, because I don't think I would be in the position I am now as a judge, if I would have been promoted and continued on in my career for another five or six years. I wouldn't have had the opportunities I've got now. I wouldn't be back in my home in North Carolina. What was it the Rolling Stones used to say? You can't always get what you want, but if you try sometimes, you might find you get what you need. [Laughter] I think, when I look back on my career in the military, I definitely got what I needed.

Q: All right. Thank you, Lieutenant Colonel Couch.

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