

THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

Charles D. Swift

Columbia Center for Oral History

Columbia University

2011

PREFACE

The following oral history is the result of a recorded interview with Charles D. Swift conducted by Ronald J. Grele on March 23 and March 24, 2011. 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.

3PM

Session One

Interviewee: Charles D. Swift

Date: March 23, 2011

Interviewer: Ronald J. Grele

Seattle, WA

Q: This is an interview with Charles D. Swift being conducted on March 23, 2011 in Seattle, Washington. The interviewer is Ronald Grele. Do you want to say who you are?

Swift: Charles Swift, also known as Charlie.

Q: Were you born in Franklin, North Carolina?

Swift: That is incorrect. I was born in Washington, D.C. I was raised in Franklin, North Carolina starting at the age of five. My mother corrects these things on Wikipedia.

Q: You were adopted?

Swift: That's correct.

Q: What were your adoptive parents like? Who were they?

Swift: They're both still alive. My father holds a PhD in forestry from Duke University, a master's from North Carolina State University and a bachelor's degree from the New York School of Environmental Science at Syracuse University. My mother is a graduate of Syracuse

University at the very beginning of the television broadcasting program. Ultimately, she became a homemaker, rather than work in journalism, after meeting my father. They were married when my father was still in the Army. He was in ROTC [Reserve Officers' Training Corps].

Q: Was he a Southerner?

Swift: No, he's a Californian. The Swifts, it's fun to say, came to this country quite a bit ago. My father's parents traced their families back to the *Mayflower*. My great-great-great-great-great-great-great-grandmother is Bridget Bishop. She was taken from Salem Village to Salem Hill and hanged by the neck until dead as a witch in the year of our Lord 1699. The Swifts had been here almost an equal amount of time as the Bishops. They had been in California for hundreds of years. The most notable of the Swifts prior to that had been the first Supreme Court judge of the California Supreme Court. The most notable of the Bishops was Edward Bishop, who founded the science of paleontology.

Q: Were you told these things when you were young?

Swift: Yes.

Q: Oh, so you grew up knowing this family tradition?

Swift: Absolutely. My family had been heavily involved in government service. My grandfather had been a vice-chief of the United States Forest Service. He had been head of the Fish and

Game portion of what became the Fish and Wildlife Service when they broke up the government. After that, he had been on the board of the National Geographic. He then served as the president of the Cosmos Club in D.C.

There was a long history of D.C. government service. For example, I had an uncle by marriage who was an admiral. One was captain, one was an admiral. Both had been in [Hyman G.] Rickover's Nuclear Navy. Their father had served heroically during World War II as both an executive officer at one of the ships at Pearl Harbor and later as the CO [commanding officer] of the USS *Cassin Young DD793*, which was kamikazed not once, not twice, but three times during the last year of the war. He served as the commandant of the midshipmen at the United States Naval Academy.

The family was fiercely patriotic and voted fiercely, but my parents had moved to the South in the 1960s. My father had decided to pursue research forestry, and research forestry was only taught in two places after the Army. It was taught in North Carolina, with Duke and North Carolina State in the southern forests, and in upstate New York through Syracuse and Cornell. Since he had already been to Syracuse, it was suggested to him that he should go to the South, and that's what he did. My mother was from upstate New York. They arrived in the South in the early 1960s.

Q: Was this western North Carolina?

Swift: For the first few years, my father worked at Coweeta Hydrological Laboratories. But we lived and worked most of the time—that was during the summer—in Durham at Duke University. He was still a graduate student and he, like many, many graduate students, taught and he had not yet made a decision whether he would move into pure research or academics. Both were viable career patterns. Early on, he was trying to debate whether he wanted to go teach or he wanted to do research—purely research for the government—or go into commercial applications, such as pulp and paper. He was not interested in the commercial parts of forestry, so he gravitated more toward the government, ultimately, than the academic side of things. But in this area, it's hard to say where government ends and the academics begins in this area.

At that point in time, we were spending a lot of time in Durham. My first memories are about civil rights. My mother, for instance, had three babies and so my grandparents paid for her to have assistance since my father couldn't afford it. She had a live-in maid that helped with all this stuff, so we could travel. In the South, a maid was not supposed to travel with the family and was expected to give up her seat on bus, plane, etc. for someone who was white. My mom would not put up with that. She fought them tooth and nail on this sort of thing. She was very aware of everything. To her, the race thing was a big deal.

Q: I was going to ask about being northerners in the South at that point in time.

Swift: It was very much that these people were wrong, that this was unfortunate and wrong. The idea in the household was that Dr. [Martin Luther] King [Jr.] was brilliant. My father did not share in the anti-war movement, but he very much shared the equal rights movement. He was

very big into that. He was very supportive of the country in the Vietnam War. He didn't disagree with it. He didn't like war, but on the other hand, he would never protest against countries going to war. Coming from where he and my mom did, the equal rights issue in the South bothered them. They did little things. For example, when I grew up in western North Carolina, I was the first child of a middle class family—I think, probably the first child at all—to invite the black children to birthday parties and to things like this. My mother was absolutely insistent on it. Some people wouldn't come and she said, "Well, that's their problem. We're going to do this throughout the process."

Q: Were they religious people?

Swift: They are. They're in the Methodist Church and they have been from the time that I was a child. They always went to church. My father taught Sunday school. He was very much into the moral values of it. My parents were very hugely into the Boy Scouts and Girl Scouts of America. My father was an Eagle Scout; my mother was a Gold Girl Scout. They went to everything. They still do everything. All of the ideas of church, Scouting and country emanated. They used those tools as ways to integrate, to push open these organizations.

Q: Now there are two kinds of Methodists. One is the more community-oriented and the other is evangelical.

Swift: They're community-oriented.

Q: Evangelicals were the Baptists?

Swift: The Baptists were the evangelicals in our community. The Methodists, especially in the community that I grew up in, were community activists. Early on, I remember my father waking me up—I'm maybe twelve—for this new project that he was very excited about called Habitat for Humanity. He thought it would be just terrific. "Let's go build houses for people." My parents are very community-oriented. It's all about the community. The church also met with their needs. They didn't really care what people believed because their faith is personal. They're happy to talk about what mattered to them. My father always taught faith in practice—what you do, not what you say. He was not particularly impressed by people who said one thing on Sunday and did something else on Monday. His questions were, "What do you do on a daily basis? Are you involved in community? Do you give back to your community? Are you a responsible person in it?"

On the other hand, he didn't like to criticize people. It was not one of his parts to publicly cast scorn on people. It was much more to be supportive of positive efforts, so he was very involved in Scouting. He was involved in Habitat for Humanity and the church. My parents were also very involved in Outward Bound. When my father discovered it, he thought it was huge, again, because he saw its potential to reach out across class. For him, organizations which broke down class and race and made people equal inside the organization were very important. That's not to say he's not a capitalist. He is absolutely a capitalist. But he did like organizations, especially for young people, that brought you into touch with everything.

Q: I can see forest ranger, Outward Bound, being out in—

Swift: One with nature.

Q: I can picture that.

Swift: Yes, absolutely. All of that went together.

Q: There's a certain consistency.

Swift: Right. Again, his great history had been to be involved in the environmental movement of this country through regulations and study. His was very much about stewardship of nature. On the other hand, he was not an extremist. While he was an early member of the Audubon Society and the Sierra Club, both he and my grandfather would drop out of both of those organizations because they felt they became extremist. They did not support, nor does my mother to this day support, the more extreme environmental organizations. He believes in management of the forest, not pure preservation. His ideas are about people first, and that people are promoted through a healthy environment.

But he also had a lot to say about poverty. I was exposed to poverty very early in my life. My mom wanted us to see it and my father was very aware of it. Back in the hollows of western North Carolina there was at that time, and still is, some of the most gripping American poverty. We didn't move away from that in part to see that. His point was that poverty existed in the

Philippines, that poverty existed in India, that poverty existed in Pakistan and it existed in parts of China and throughout Africa, that sort of idea. He would say, “When you say, ‘Don’t cut trees in the rainforest,’ a guy has to eat. How do you tell him not to eat?” So your priorities may not be his priorities.

Q: Were you educated in Franklin, a small school?

Swift: Small high school. I grew up there. My mother versus the school system the entire time. For her, it was déjà vu. She had grown up in upstate New York. My father had been the benefit of as probably as good a primary and secondary high school education as there is in the country. He liked to say, of all the schools I listed earlier, the one he was most proud of was The Western High School in Washington, D.C. And they did say “The.” He said there were more PhDs per person on faculty when he attended at The Western High School than there were then at the New York School of Forestry. It became the New York School of Environmental Science. There were more PhDs per person at The Western High School, an extraordinary place which existed in the long-gone, small government town that was D.C. of its age.

Q: Your father would be one of the few PhDs in the whole area?

Swift: In western North Carolina?

Q: Yes.

Swift: Oh, absolutely.

Q: But your mother was primarily—

Swift: —a homemaker, yes. She did Girl Scouts and all that. Very few women worked outside of menial type tasks when I first grew up. She has worked since. She got a degree to teach and was a kindergarten teacher after she had her children. But married women didn't work then in western North Carolina.

Q: You said that she was on you about the school system?

Swift: Oh, she was on the school. She felt the school system lacked certain integrity and courses. It's funny because now I don't think she would ever leave Franklin, North Carolina—she would never go—but at the time, all she wanted to do was get out of western North Carolina. She had been sentenced to the South. And my father would go get an interview at Cal or someplace. All of it sounded great, and he would never go.

She was never very happy with Franklin. One of the things she tried to do was improve the school system and courses like that. The favorite story doesn't involve me. It involves my second brother. She had gone to St. Lawrence and she had come from an area with the idea of private school was high in her list of things to do. She viewed American education in a particular way. My brother had taken the SATs and I believe he had gotten like 1270, which was very good back then. But my mother knew that that was only the average score to get into Davidson College.

Therefore, Bill was to take it again. I think at the end he scored 1440. But he was to take it again because “You have to get a higher score for Davidson!” She'd research this and he was to take it again. She was sure he could do better, and he ought to study for it, and maybe if he did some math problems he could get an 800 on it.

Q: Now had she decided he would go to Davidson, or he had decided?

Swift: He had expressed interest and she thought that was an excellent choice. It was always a combination with my mother. She did not make you go somewhere you did not want to go, but if you expressed interest and it met her criteria, then she strongly encouraged.

Q: What kind of a student were you in grammar school and high school?

Swift: Inconsistent. If I liked it, I excelled at it. If I did not like it, I did not do it. But my brother, Bill, was an extraordinarily good student. In the subjects of history and certain mathematics classes, I was number one in the school. In the subjects of chemistry and biology, which I really did not want to do, I got Cs. So I was inconsistent at best. I ended up doing well enough on the SATs and going to private school for a year to get into the Naval Academy, because the Naval Academy was highly competitive.

Q: When did you make the decision that you'd go to the Naval Academy?

Swift: I did not know what I wanted to do after high school, whereas my brother, although he changed, had very clear ideas of what he wanted to do. I did not have any. I did not have any goals or career that I particularly wanted to pursue. I started looking for things and my father, who'd been in the military, thought the military would be a good idea, but my mother was horrified at the idea of me enlisting. That would never do. If you are going to go into the military, you should go to the Naval Academy, and that was suggested. I was indifferent, but I agreed to sign up. It was an easy way to do it. I went to visit and when I visited it I really liked it, and then I started to apply.

Q: Were they heavy in the science curriculum though?

Swift: Oh yes. I struggled throughout the Naval Academy. It was not the greatest choice in some ways. I look back on it, and it became clear in my later life that the smart move—and what I really would have excelled at—would have been economics at any university that taught it since it's a combination of history and mathematics. Those were the two subjects in which I was fairly decent. When I started doing economics, I was like, “Wow. This is easy.” But at the time, I think one of the interesting parts was the one thing the family did not do was business. They had never done it—even my mother's father, who was a small businessman of sorts, an oral surgeon and dentist. In those days, you weren't a businessperson; you were professional. There just was no one across the generations who was a businessperson. That career field was not pushed. Professionalism was pushed among the children.

Q: Did you have a particularly interesting teacher in high school?

Swift: Yes. Shirley Reynolds. She was my history teacher.

Q: Funny how we always know the names, don't we?

Swift: Absolutely. Shirley was my history teacher. Shirley was the one person who kind of believed. Shirley actually was also very supportive of going to the Naval Academy. She said, "Because you're just like Bobby, except you don't study like Bobby did." Bobby Cuppers had preceded me by four years from Franklin, North Carolina to the Naval Academy.

Q: Just a local boy?

Swift: He was a local boy. Bobby had been a legend in Franklin. Bobby was the first person ever to obtain the Morehead Scholarship from this area and he turned it down to go to the Naval Academy.

Q: The Morehead Scholarship was a scholarship?

Swift: The Morehead Scholarship provides you a full scholarship. It's like the Rhodes Scholarship. It's to the University of North Carolina, with tuition, books, boarding, and with summers abroad. Interestingly enough, another famous lawyer from Guantánamo Bay, Clive Stafford Smith, came to America on the Morehead. Bobby turned it down and went to the Naval Academy. But Shirley thought it was a great idea because I was just like Bobby in a lot of ways.

She would say, "Bobby liked it." She would say, "You have to study." And I never really knocked that one out. I had trouble studying at the Naval Academy too.

Q: Did you have to get a recommendation from a congressman?

Swift: I had to be appointed by a congressman. In this case, it was Jesse Helms, ironically. They don't ask the political backgrounds of the individuals that are applying. I didn't much care. My mother was a little, "Oh my gosh, Jesse Helms?" But she also understood, "Hey, look, whoever it is, it is. So grab on and go."

Q: Did you meet him?

Swift: No. Jesse nominated completely competitively. So I met somebody from his office who did an interview of everybody and that was it. Some people nominated preferentially. He nominated competitively. So off I went. I enjoyed Shirley in history. She had a great sense of it, and we talked about government and politics a great deal.

Q: When you finally did get to the Naval Academy, what were your impressions there? You had been there earlier.

Swift: Sure. I was there for twenty-four hours. The Naval Academy cannot be summed up in twenty-four hours. During plebe year, the goal is not to be noticed. That's the secret to success. There's a part that goes, "If you run a race, where do you want to finish?" The answer isn't first

and it's not last. It's in the middle, because those who are noticed have the hard time from the upperclassmen. I was not good at not being noticed. People tended to like me or hate me among the upperclassmen. A lot of them liked me and were very helpful. Some of them really were on me though. Ultimately, I survived it. I wouldn't put it any other way. I didn't leave plebe year a believer in the system.

Q: Did you find the rituals difficult?

Swift: No. It was the idea that I didn't get the group—one of the things that the service academies do is they strip away your individuality and have everyone play by the group ritual, that you can't be different. Different, that's bad, and I was different. They believe very much that the system, taking away everything else and then rebuilding you in their image, made you a better leader. There was an idea there that leadership could be taught, and that if it can be taught, then it's a particular style. It's not individualistic.

I didn't believe that. I believe that leadership was very much about caring. It was very much about listening to their people and finding what they needed. It was about being creative. I didn't think that any of their systems of yelling or screaming or rigid conformity really worked, and I didn't think that you were making people better by screaming at them. I didn't believe I became any better because of that, and I didn't believe anybody else became any better because of it.

Sometimes the people who have the most difficult time plebe year are the toughest people for the next three years. My part was that I basically didn't play for three years. I said, "I'm not going to go out and open revolt, but I don't believe in this."

Q: I wonder if you can give me an example.

Swift: Part of the system was that plebes are required to recite knowledge and to do all rote memorization. If they screw it up, you yell at them and you give them demerits. You inspect their room. You can make their lives hard. You can really insult them. I didn't ever ask anything on rote memorization because I thought it was of little value. I always thought if you can write it down, why would you have to memorize it? That just sounds stupid to me, and the idea to push rote memorization over learning is a dumb idea. It struck me that a lot of the Naval Academy was rote memorization over learning.

So if I talked to the plebes, I would ask them "why?" I wanted to have a discussion, "What are we going to learn about that?" I never yelled at any of them. I wanted to know what they thought. They would have a real hard time with that. "What do you really think? I'm actually interested. Did you read the *Washington Post* this year? Do you think we should do this? Grenada, should we invade or not?"

And I was the only one. I said, "Do you think that maybe there might be a reason not to invade Grenada? Why are we filled with pride because we are beating up an island? This island has the economy of the city of Washington D.C., and we are like, 'Wow, we took it over.'" I would hope

so. “If we couldn’t take it over—?” I asked questions like that. Again, the administration tolerated me most of the time.

Q: Two things come to mind. The first is that I read somewhere that you were a wrestler in high school.

Swift: Yes.

Q: Now wrestling is a sport that rewards individual accomplishment within team ethos, unlike, say, football, in which you are screamed at in ropes to carry through plays. It kind of fits your personality.

Swift: It did. Inside the part of it, it's tenacity, inside the team. Teammates in wrestling play an extraordinarily important role, but they don't in the match. They're about practice. You never see great wrestlers, especially at the high school level and really even at the college level, in groups of less than three. It was one of the things that hurt me in high school. I made it up into the final rounds of the State regional tournament, but I didn't have somebody to practice against and it hurt me when I came up against top competition. I had to go to Cherokee for competition because nobody could beat me on my team. I found out really fast that that meant if nobody could beat me, I couldn't get better. To get better, you had to face somebody who was stronger and faster than you. You couldn't get better when you were just beating people who were easy.

Q: It just struck me that there was a kind of continuity of style there.

Swift: My father said some things always seem to fit to style, and that that was the sport for me. They recognized it early on. I had a physical talent for it. But he said, “The other part that you do very well on is you have no memory. When you won, you were ecstatic for three minutes. When you lost, you were despondent for three minutes. And then, everything was the way it was before. This is not to say you didn’t compete to the absolute, to the point of death. It just didn’t stay with you afterwards.”

This was very important to deal with a sport, in part, was that you didn’t have peaks and valleys in it—that you very much could be absolutely passionate, but your real passion was for playing. You wanted to be in there and that was the passion. The outcome was secondary. I think that would later play out in things I did well.

Q: When you are talking about questioning about Grenada in a place like this, did you have support among the faculty or were there certain faculty people who encouraged that open, questioning kind of mind?

Swift: Sure. Did I have support among the faculty? I don’t think the faculty much knew about it. But was there a mind? There was.

Q: I mean in the classroom.

Swift: In the classroom, the best professor was an English professor, not a history professor. It was Professor [Charles J.] Nolan, who was a legend at the Naval Academy. He had been a military officer. He spoke to something beyond the military ethos, and that was to your humanity. One of the things he told all of us wasn't directed just to me. It was to everybody. In class he said, "When you leave this place and become a military officer, your humanity is measured by the number of friends you have that are not in the military. Otherwise you'll lose perspective. You have to remember that you are in a minority organization and you are exposed to minority, not majority thought. It's not to say that what you think is necessarily wrong, just understand that it is necessarily limited."

Q: Now you got married while you were—

Swift: After the Naval Academy.

Q: Oh, after?

Swift: Right after, because you can't get married while you're in the Naval Academy. I met Debbie when I was in the Naval Academy, as I was coming out of my period of unfortunate incarceration.

Q: Oh, tell? There's a story here.

Swift: Well, my junior year was not a good year. In my junior year, I managed to have not one but two 5000-series offenses. I almost get kicked out of the Naval Academy and ended up on restriction for about six months.

Q: What did you do?

Swift: They all involved alcohol. I no longer drink. I had the problem. But I did stupid things when I got drunk, and I had some pretty stupid moments. Both offenses at that point—one landed me in the emergency room in Georgetown and another had landed me in particular problems. But I had survived. And Debbie was part of the turning point because at that point I came around.

One of the problems that I'd had at the Naval Academy was I had been very much about survival. I hadn't been about success. I had succeeded in surviving, but little more. After the incident and after meeting Debbie, I became about actually succeeding. My grades went up significantly in my senior year, and I no longer got in trouble. Now, it was about time because I was about to be gone. But after meeting Debbie, she helped, and everyone in the family went, "Oh boy was that good for him. Now he seems to have found a reason to do things. And with Charlie, as long as he has a reason, we're not worried." The last year went very smoothly and I ended up graduating. The only regret the family has was, "Why couldn't you have met her three years earlier?"

So I met Debbie and we ended up getting married. We got married when I got on a ship that was stationed in Guam. We were there because our plan had been that wherever I was stationed, she

would go to school. But I was interested in her education and she was interested in her education. And she was eighteen, nineteen, so she is just starting college. Our thought process had been, “Well, look. Why don’t you go to college? You’ll just transfer to wherever. If I’m in Norfolk, transfer to Norfolk. If I’m in San Diego, transfer to San Diego. If I’m in Newport, Rhode Island, you can transfer to Newport and go to the University of Rhode Island.” Wherever the Navy was, there were schools. She was all for Hawaii. “I’ll go to the University of Hawaii. This’ll be a blast.”

And I said, “Well, we’re a little farther west than Hawaii.”

“How far west?”

“Guam.”

“Where’s that?”

And then lots of crying. Her grandmother said, “I’m not sending you out to Guam on my dime to go to the University of Guam.”

Q: Her grandmother was paying for the tuition?

Swift: Right. “I’ll pay for the tuition wherever you are, but I’m not sending you to Guam so you can be near your boyfriend.” So she said, “We’ll get married.”

Q: Now she was local?

Swift: Yes, Annapolis.

Q: Family background was—?

Swift: Her parents had both been in the Navy as enlisted. Her father had divorced her mother when they were five. No, when she was very young—two or three. Her mother had taken her out to Eugene, Oregon and dropped her with her mother's grandmother, Debbie's great-grandmother, who had eventually written to Debbie's grandmother in Annapolis, Maryland. And I like to say, don't mess with Debbie's grandmother in Annapolis, Maryland. She had written for money and rather than send money, Debbie's grandmother sent a lawyer and brought Debbie back to Annapolis, Maryland. She lived with her father sometimes. But the predominant force in her life was her grandmother, who essentially decided that both her son and her daughter-in-law were incapable of raising this child, were not responsible people, and she would do so. Although she was not thrilled with the idea, she would. But her grandmother was very proud of Debbie. She was very critical. Difficult.

Debbie's father committed suicide when she was sixteen, so it had been a tough time. She met me and there was something about us that attracted each other. I think at that point in time in our lives, we both could do things for the other person that no one else could. I could sit and be sympathetic and hear things that no one else did with Debbie. At the same time, she was this

civilizing force. There was four and a half years difference in age, which was bigger at the time. Most sides of the family thought it was a pretty good idea. They said, "Obviously, you two are together."

Q: When you were going to graduate from the Academy, what did you think you would do?

Swift: I knew what I was going to do. I was going into surface line. I didn't know what I would do after five years. But I knew what I was going to do for the next five years. So off I went.

Q: Oh, that was all programmed?

Swift: That was programmed. One of the beautiful things about the Navy was it made decisions for you. My decision was, did I want to be a Marine or did I want to be a Naval officer? I knew I didn't want to be a Marine. I didn't have the grades to be in nuclear, and aviation didn't particularly attract, so it was surface line. I could have just barely made the aviation track, but I didn't think I'd do very well on it.

Q: Now when you went to Guam, what did you actually end up doing?

Swift: First thing, I was on an AFS, which is a fast combat store ship, out of Guam. I was the damage control assistant [DCA] on her and when I got to her I had thirty guys working for me. But I had no chief petty officer, which almost everybody else has. There are two jobs that are considered the toughest first order jobs. Those are the main propulsion assistant [MPA] and the

damage control assistant. Engineering is a harder division officer job than any other job. On this ship, the MPA was a limited duty officer. That means he had been in the Navy for years. He was an enlisted who had been made an officer. The DCA was a straight ROTC or Academy commission. I had the toughest boss on the planet, Lieutenant Commander—retired as Captain—Val Lippa.

I reported to the USS *Niagara Falls* in the Philippines. After a six-month cruise, she had just pulled into Subic Bay in the Philippines. I was flown out to ride her back to Guam. It was a five-day trip back. She was going to go into the yards, but they wanted me to at least be on her for a moment in time. Now I get flown out there and I show up in my whites, which are trashed by going through the—it's just tough. I finally get there and Val is amused.

And so Val takes me out that night and at some point I said, “I reported today. When do I take over as DCA? When do you want me to take over as DCA?” The other DCA had left.

Val says, “What time did you report this afternoon?”

“1500, sir.”

He says, “You've been the DCA since 1501.” Oh, great. The division officer notebook has all this stuff about relieving letters, but not so much for Val. Two days later I got up the nerve to ask Val what my job would be. Val said simply, “I will ask questions and you will provide answers.” That was my job for the next year and a half. It may sound easy. It wasn't.

I learned more about leadership from Val Lippa than any other human being on the planet. Val Lippa had fought a fire on the USS *Nitro*, an ammunition ship using a group of midshipmen that were on board for training and stopped the fire at the last bulkhead before the magazines. If it had reached the magazines it would have blown the ship out of water, but he never wavered. Val did what he thought he was right. Val could admit when he was wrong. Val could be tough as nails and cared about people all at the same time. Val was a unique guy. There's nobody like him. There has been nobody before or after like Val Lippa. He had an impact.

Q: These ships are kind of like their own little world?

Swift: Yes, every ship it its own world. And Val Lippa was the god of his. Val was Val. He had risen from boiler technician fireman recruit [BTFR]. He would rise to O6 before he was stopped. He was a unique human being.

Q: Given what your response to the Academy had been—

Swift: It was the opposite. I went to number one. Because under someone like Val, who believed in individuality, absolutely. There is no right way to do something. There is the effective way to get it done. Val cared about results. Val thought memorization was stupid. If you could write it down, why would you memorize it? You know, this line, at the time, hit inside me, but I learned it from Val. "Memories are fallible. Checklists are not. Write it down. Figure it out. Don't come to me with problems, come to me with your solution. It's not about figuring out who to blame, it's

about getting the mission done. Why isn't the ship ready to get under way? I don't want to hear excuses, I want to see results. I'll never punish you for doing your best, ever. But I don't think this is your best."

That was Val all the time. Val believed you don't learn something in part. He said, "Listen to your people. They know more about what you're doing than you do. How did they do today? Who's unhappy? Four of your guys have been busted for dope. Do you have any idea why? What are you going to do about it? And I'm not talking about punishment."

He taught me what leaders do, what leaders really do. What do effective leaders and managers do? What are the characteristics of someone? Val could get people to follow him into hell without any questions whatsoever. Everyone would do what Val said.

Q: So it was more than just management of the property of the ship. It was also management of the people working.

Swift: Val thought the ship was secondary. People were everything. Knowing the machinery is a requirement but knowing your people is the essential part that makes it go. What on this ship will run without your people? There's no such thing as an automated ship. He thought automated controls and all that was stupid. He said, "This is a people business. It's not about steam, it's about people. Learn the people. Everything else will follow. Learn what they do and then you can lead them. Go down and watch your people work. Find out what they are doing with their days. If you don't know what they did today that's your fault."

Q: How adequately had the Academy prepared you for the actual experience?

Swift: Not at all. But that was fine. A lot of people at the Naval Academy had trouble when they hit the fleet, especially in a situation like this. The beauty was that I wasn't tied to the thought process. So as soon as Val started, you know, "Leadership by Val Lippa," I was completely engrossed. There were two disciples of Val. The other disciple, Chris Csagvoc, came on board a little earlier or a little later. Chris had been in the Nuclear Power School and had gotten out of it, but he was a graduate of Cornell University. He got that guy too. And Val loved us. He loved to screw with us, but he also saw an opportunity to have an impact because he was there.

He never had an Ivy League or a Naval Academy guy under his control before. It was rare. He worked at particular 600 pound plants. He'd been under some, but he'd never had the power as a department head to completely mold them, control them, and undo what he saw. "By academic standards, you're the best. By ability and all that, you couldn't get into the schools you got into if you weren't extremely talented people. So why is it you are such screw-ups? As a group?" His part was to take a lot of that away.

It was as if you came out of law school. Let's say you'd gone to Harvard or Yale or one of the Ivy League schools, and through some blind chance, they dumped you in with Gerry Spence to teach you how to be a lawyer. And they said, "Here, Gerry," who has a completely different way of the world. Val Lippa was to leadership what Gerry Spence is to law. It was extraordinarily

effective. Like I said, he was from BTFR, completely self-made and never went to college, but he could write an extraordinary report. He had taught himself everything.

Q: Now would you stay with the *Niagara*?

Swift: I stayed there for three years. Val Lipa was my boss for only a year and a half of it, but I qualified everything under Val. By the time Val left, Csagvoc and I were the most dominant officers. Even the CO would say that we ran the ship.

Q: Csagvoc from?

Swift: Chris Csagvoc from Cornell. Everyone admitted that we ran the ship. We got in trouble together a great deal. Our second CO was a trip—Herbie Brown. Herbie was an interesting human being. Herbie put us both in hack because Chris spoke Russian.

By that time we had been transferred out of engineering and we were both up on the deck. After we had survived Val and done everything, we felt like we could run the ship. To our mind, we were more capable than any of the other officers and, after having gone through Val for a year and a half, we very much took over. We would tend to just do things. Val had taught us to be innovative. You didn't ask for permission, you solved the problem. That was part of what we'd been taught.

In this particular case, the Navy put ships together. We were bringing in all of these ships, and we looked out on the horizon through the radar, and we noted that there was this ship out there. We could see that in an hour it was going to be a real problem because it would be smack dab in the middle of where we wanted to be, and the aircraft carrier and all that. So we went, “Well, what can we do?” We’re looking at different ways to turn and trying to figure out how to move twenty ships around. Finally, Chris says, “Why don’t we just ask him if he’ll move? After all, if he moves, it’s easy.”

So we said, “Well, who is it?” We get up, we go out, and we try and see it. We figure out that it’s a Russian freighter. Chris goes, “Great, I speak Russian.” Chris calls the freighter up on bridge to bridge in Russian, since he is a product of Cornell. In a combination of Russian and English they agree to move. They’ll alter course to allow us to do this. Just as we’re ending this conversation, the captain comes on the bridge, and Chris says, “Dosvedanya” and thanks them in Russian for being so accommodating. Brown goes nuts.

He would later say on *48 Hours* the speech that he gives us at that moment—that we’re out here so that his grandchildren don’t have to speak Russian, and you don’t say “thank you” to Communists, you blow them out of the water. We’re looking at him like, “Are you freaking insane?” Nevertheless, Chris is irreverent and I’m irreverent. We said, “Sir, it was just good manners.” We are relieved and sent to our state room. We were roommates.

The XO [executive officer] comes down and says, “You two have to write an apology.”

I said, "For what? What exactly are we apologizing for?"

"Captain says you can't go back on watch until you write an apology."

We're like, "Good. We can skip watch."

The XO is there, "Let me put it to you this way. I'll make your lives as miserable as hell until you write your damn apology." So we wrote an apology.

Q: How did you become a legal officer?

Swift: Val thought legal officer was a stupid collateral duty because I was supposed to work for him, and there is no other time. He couldn't believe that the XO had sent me to that school. So while Val was there, I didn't have to be legal officer. I also didn't get put in hack. He would have never allowed a lot of what happened to Csagvoc and I to happen. But when Val left, I got made legal officer. Since I was no longer in engineering, I actually had the time.

We had a case where one of the sailors hit another sailor, and it was simple. They were both mess cooks. The allegation was that there was a verbal argument. Then when the guy turned the corner, this guy just socked him in the face. It probably wouldn't have been handled with judicial punishment, except that his retina was detached and he lost sight in the eye. This was a serious injury. Captain asked, "How would it look if I just take somebody to mast for blinding a guy?"

We work it all out and we take it to court martial in the Philippines. We have probably one of the

worst prosecutors that JAG [Judge Advocate General] Corps ever produced. He did no work, and the defense counsel was really quite good. He came on the ship and did a lot of interviews. He put on a self-defense theory which ended up winning the case. He was acquitted. I had been there, and you just didn't think things would go well with Herbie because they hadn't come out the way Herbie wanted.

Q: Now as legal officer, you would bring the case rather than arguing it?

Swift: I would put together the charge sheet. The lawyers and the judge took over after that in a court martial. Later I'd be one of those people.

Q: You were not at that stage.

Swift: No. At that stage, I just wrote up the charges for a special court martial. When the case was over and the defense had won, I was like, "Oh man. I've got to go tell Herbie about this. This is awful." I was really not looking forward to this. Think of the Soviet episode. I'm thinking, "Oh gosh. I'm going to get put into hack. I'm going to get yelled at." And it wasn't my fault.

I went up to talk to Herbie, and Herbie expressed the other side. I tell him about it and I apologize. I apologize.

He says, "Why are you apologizing?"

I said, "Well, it didn't come out the way we wanted."

He said, "Who said there was a way we wanted? What we wanted was a trial. Charlie, we fight for trials. I believe in process. If we're not going to accept what the democratic process gives us, what the legal process gives us, what are we doing?"

He got on the 1MC and he congratulated the guy for winning. He said that if anyone was tempted to think that maybe this came out the wrong way, they would see him this afternoon to find out what process is. He was innocent and we should move on. He took no action against the officers who had voted. I mean, as far as he was concerned, that was the process. That was a completely different side of Herbie. It had a huge impact.

Q: But a good lesson to learn.

Swift: Absolutely. He gave me a speech that I would later use in almost every court martial about the difference between us and the Communists. Herbie was obsessed with the Communists. He said, "What's the difference between us and them?" I said, "They have regulations, they have a manual for court martial. They have ships, they have supplies. The stuff is that when we say this stuff, we mean it. When they say it, they don't. So I'm fighting for the fact that we mean it. And I am not a hypocrite." I thought the stuff on the ship was ridiculous, but Herbie wasn't a hypocrite. Herbie believed what Herbie believed. He had a huge impact on me as well over time, but not so much on the day-to-day leadership.

Q: What was your next assignment?

Swift: I was assigned as the navigator for the USS *Rathburne*.

Q: Out of?

Swift: Hawaii.

Q: So Debbie did get to Hawaii?

Swift: Debbie got to Hawaii. She taught in Hawaii. When I got to Hawaii, I had worked out a deal. By this time, I'd started to figure it out and the USS *Hewitt*, which was a DD that was on deployment.

Q: What is a DD?

Swift: It was a destroyer who had been on deployment with us. As Debbie liked to say during my three years in Guam, "You never lived in Guam, not once. You visited on occasion." I was at sea an average of six months out of every year for three years, and in some, longer. We were always at sea. This was before they got excited about deployment schedules, and we were gone so often. I was trying to get some time at home. I had been at sea and Debbie had made it very clear that she was tired of that. The Navy still has only recently started to think through the idea of a ship that doesn't deploy back to back, but it had never thought it through back then. You could be

transferred from one ship coming off deployment, go onto the other ship, and turn around for deployment again. Nobody seemed to care about this.

So, thinking about how to break this routine, I decided, "Go on and transfer to a ship that's on deployment with you. Then you're in the same schedule. So at least you come back too." I went over to the USS *Hewitt* and I got to know their CO. By that time I was pretty well-known among the junior officers and I was popular. I went over and I walked and I talked and I did everything that was necessary. And they were like, "Absolutely, we'd love to have you. We'll call placement and put in a by-name request."

The slot they had available was navigator. I was like, "Man, this'll be great." I met the CO and XO and I'd politicked my way. I'd done a little bar hopping. I'd met their JOs [junior officers]. I had a great idea on the thing and I was like, *Hewitt*. I am a *Hewitt*. I had my *Hewitt* hat and all that stuff. I'm going to be a *Hewitt* sailor and I was really excited about it.

The USS *Rathburne* was easily the worst ship in Pearl Harbor at the time that I reported to her. She had just flooded her main shaft alley. She had failed inspection. She was a disaster afloat. She did nothing right. And I had come from Val Lippa, and whether you liked or disliked Herbie Brown, all these different guys who were there, AFS was a fantastic ship. It was an old ship, but we never missed a commitment. There was a great deal of truth to the fact we weren't the best looking, but the idea was we were the best run. There was a lot of pride in the people who were there.

One of the things that did happen was there was a high quality of senior leaders. I get on Herbie, but Herbie went on to be a three-star admiral. Gary would have been a three-star admiral except for a collision. He was as highly rated a fighter pilot as there had ever been. He had been a test pilot. He was fantastic. These guys were really good at what they did. They were great leaders and they were going on to command aircraft carriers, then battle groups. Not this frigate.

I had a theory that you wanted to work for good guys and that the most important thing was who are the people, not the platform. But I knew a lot about the *Hewitt's* new CO. And everybody thought he—

Q: Now what is the distinction between the *Hewitt* and the *Rathburne*?

Swift: The *Hewitt* was the ship I wanted to get onto.

Q: Okay.

Swift: I politicked. I didn't even know the *Rathburne* existed, but I got orders to Hawaii. Well, they got changed to the *Rathburne* while I was in navigation school. I found out later the reason they got changed. When a CO gets relieved for cause, the incoming CO has some ability. They realized that it's rarely just because of the CO that things are really bad. They are ultimately responsible, but much like when you fire a head coach, you're going to need to change a few of the assistant coaches.

Q: Yes, you clean house.

Swift: So we're going to be cleaning out other officers quickly. One of the ways to ensure that you get it is the CO gets to look through the records of people who are around and draft them. Because it was clear they had to clean the ship up. I got drafted. I came down to the *Rathburne* and I was standing on the pier and I was pissed. There were several things that had me extremely unhappy that afternoon. The first was *Rathburne's* deployment schedule, which I had gotten the day before and explained to my wife, who was now thinking about leaving me. She was deploying in three weeks, the exact scenario I tried to avoid. Secondly, she was a piece of garbage. And third, no one had even asked me or told me. I had just gotten this message and I was like, "I can't believe it."

So I'm standing on the pier in my khakis now. I'm not so stupid as to report in whites anymore. I've worn my service warfare pin, and I'm watching this ship pull in. She's just failed yet another major inspection, which I've heard about, and her line handlers are horrible. Nobody is doing what they're supposed to do. You can just look at it and go, "This thing sucks."

I start pointing out under my breath, "What's wrong with the piece of garbage? This ship is a piece of garbage. Look at the rust of the side of it. What, those guys don't know how to handle a line? Did you see that guy put his hand down there? A good boatswain would throw him overboard. Where's the discipline? Where's anything with this ship? I can't believe it." There's a commander standing down there watching, who then walks over and listens. He says, "So why

are you so interested?" I said, "Sir, I'm the most unlucky guy in the world. I'm the guy who just got his orders changed to this ship."

He says, "Hi, my name's Doug Gurtin. I'm your new CO. I'm the guy who changed it. I listened to the list you had. I want all those things fixed this afternoon, and you're in charge. Don't leave the ship this afternoon until you've done it. I don't care what you need to do, go do it."

For a year and a half I worked for Doug Gurtin. Gurtin had been the youngest CO of SIMA [Shore Intermediate Maintenance Activity]. He was sent to fix this ship, and we fixed it. It was not just me and him, but the entire lot of people that came in. Doug was always about, "Change the ship." He was like Val. He didn't care how you got it done. He cared that you got it done. I was chief engineer for two weeks because he fired the chief engineer. He was going to get a new one, but we missed our first underway period.

I come into the wardroom and the chief engineer and the MPA and the DCA are all sitting in the wardroom room watching TV. We didn't get underway on time. I'm running the messages, et cetera. I look at that and I think about what Val would have done if we had—in a year and a half, we never missed, not by seconds. I said, "Holy crap. What would've happened if we weren't able to get underway at a scheduled time? Okay, that's a nuclear explosion. It's just something I do not need to deal with."

But it was also instilled on us that you were working twenty-four hours a day if you weren't going to meet the commitment. You had to meet the commitment. It wasn't about possibly. You

said you were going to do it, you do it. Val Lippa never went into power. Nobody ever told him back. That just doesn't happen. There's pride. So I was furious in the wardroom. I said, "I can't believe you guys." And so I went to the CO. I said, "Sir, can I get this ship going?" He walked down and said to the chief engineer, "You're fired. Get off the ship."

Q: Wow.

Swift: He said, "You're fired. I want you off here this afternoon. Charlie, you're in charge. Let's get underway." We got underway in an hour and a half. I was like, "Hey, we're going to get this thing lit off and get all the chief petty officers in. I want to hear what we need to do to light this ship off, where the parts are, and what's doing. You are not to leave the engine room except to get a part until we're underway." Yes, Val Lippa was there—"I want khaki in the spaces!"

Q: As I listen to you tell these stories, I get the impression that the Navy that you're describing is the place in which things get done. So much of the popular culture about the civilian Navy or the Navy during peacetime is that it's just a bureaucratic mess and nobody ever does anything. There's a kind of comic aspect to it.

Swift: I think that misses it completely. In the Navy I was in, the only difference between peace and war was whether you fired the weapons at somebody or not. But you still went out on deployment every six months out of eighteen. My Navy, for the first five years, I spent at least one month in the Persian Gulf on patrol or supporting patrol, which the war was there. The first, the tanker war, and then, basically, the quasi-war between Iraq and the tanker war in all of that

period of time, so we were always out there. We had real battle conditions when we went. I was also there when [Ferdinand E.] Marcos fell. We were the ship he came out to and all that.

So in our world, the war was real.

The other part about the Navy is that the ocean is the constant enemy. Very few hostile fire kills people. It's ultimately the ocean that does. The ocean is the same in peace and the war. You had to have a level of professionalism. I started out on a working ship whose mission would have been absolutely the same whether there were bullets flying in the air or peace. We were out there supporting the patrol and the operations.

Just as an aside, we are going back to the war we were fighting. The Navy will rise to again prominence because nobody is going to be in a land war in Asia anytime soon. I was very proud of the job I did. I thought we were on the forefront of the defense of democracy, and we believed in that. Nobody on the ship ever talked about that. It was about being a professional. Val thought all that pledge of allegiance, all that rigmarole, "go Navy, beat Army," was a bunch of garbage. It's about being a professional. Val instilled, too, that the reality of it is that we were there for each other. And if it we weren't, he had a very simple system called ninety/ten. You owed ninety percent of your loyalty to the people who work for you, ten percent of your loyalty to yourself. They owed ninety percent of their loyalty to you and ten percent to themselves. "What have you done for your people today? What have your people done for this ship today? What have we all done for the common good?" He said, "If you do that, the big stuff takes care of itself." That was where I learned not slogan leadership but real leadership. Val was the kind of guy who'd put a

guy in hack because he was late. But, if the reason he was late was his girlfriend had had a baby and he didn't have medical stuff, Val would find the money. He'd punish the guy. He wouldn't take him to mast because cutting his money wouldn't make any sense—didn't want to put the CO in that position. He wanted you involved in your people's life every day. At the same time, you weren't their friend. You were their boss. There's a difference.

Q: Yes. What's coming across is a sense of a growing pride in the institution of the Navy itself.

Swift: Oh, absolutely. I believed in it completely.

Q: That the experiences are building up to this point in which you are a certain person.

Swift: And then, ironically, I chose to leave. And the reasons were threefold. The first one was again, my father and my uncle and all were worried. They thought I'd make a great CO. They were really worried about how I'd do as an XO. I was not the administrative type. I was the leadership type. You exist on leadership. You get people to do things.

Q: CO is commanding officer, XO is the—

Swift: —is the administrative officer, executive officer. They were concerned. They were there, “If you could make it to CO, you will be a huge success. But we are worried. You have not perfected.” I heard the same thing from my XO. He said, “Charlie, you're the best leader on this boat and you may be the worst manager.” He said that if I liked something, I exceeded. If I didn't,

you know. And he said, "At some point, you're going to have to do this stuff. You get in the wrong situation and it's going to bite you."

The executive officer who was far more far-seeing, Tim Ketchum, saw the Cold War downsizing coming. Tim thought we were going to be half our size, and he waited to see what orders I would get after this. "The department had a slot that they want to give you guarantees your death," he said. "You're not going to have your career killed today. Today, you'll get early promoted. But you're going to go be the pre-commissioning CO on an AOE [Fast Combat Support Shop]." He said, "You are absolutely trained to keep somebody out of trouble and you'd be a great XO of one of those two, in a sense that you would be terrific for an aircraft carrier CO because you've been a navigator. You know these ships. You know what to do to help keep them out of trouble in the ship part of it, but you'll never make command. And the reason you won't make command is you've had only one destroyer tour. You can't possibly get there from here, unless you go into this part. They're not offering that to you. If you do fight them on it, they'll give you a low end one."

Q: What were they offering you?

Swift: They were offering me to be a pre-commissioning.

Q: What does that mean?

Swift: It means the ship hasn't been built yet, or it's being built. You go to the yards, you build the ship, and you get deep selected to lieutenant commander. In other words, you become it two years early. For those two years, you manage it from the arch and then you're the commissioning crew and get it out. That fulfills your department head tour, or maybe both. It's a great deal and then you go to staff.

The problem was, as Tim said, "How do you get command? Because you haven't commanded." He said, "These ships will be gone. You can't command this ship. You'll have never been on a ship which had the high end weapon systems, so you're not a war fighter, per se. You got a good tactical mind. You just don't have any experience. They're going to fight you on that one. Even if you go to a staff and learn something on that part, which we could help round out, it's still going to be a tough go. He said, "If you're in the auxiliary world, which is not a bad world, the problem is women are coming. Women are coming to the Navy." Tim could see it.

He said, "Those first commands are going to be in auxiliary world. Someday women will command destroyers. But right now, as a first step, you will be competing with women who need their first command tour and we're not promoting. So you will not get the command. You're in the wrong place at the wrong time, my boy. Get out. Get out while you're still top-rated. Get out while you still have choices." He was very honest with me in that sense. So I decided to go to law school.

Q: But before you left, you had experience as a legal officer?

Swift: Right. The definitive experience occurred in Sabah in Malaysia. Malaysia doesn't have the most enlightened drug policy on the planet. That's not to say there are no drugs. You would think with the death penalty there would be no drugs. For those who think that the death penalty actually deters on something like that, welcome to Sabah, where there were tons of drugs.

I got on the 1MC as the legal officer. This was my last port that I ever pulled in out on the *Rathburne*. We pull in. I get on the 1MC and I explain to the sailors about the drug policy here—how it's not enlightened and, in fact, that they had put a grandmother to death. Because of this, we have a zero tolerance policy, but they have a *real* zero tolerance policy, as in zero, as in no more life. Whatever temptation one might have should be completely overcome.

We had been met by the consulate. We were unique pulling into this port. The whole reason we were in was the aircraft carrier was in Singapore, and they were trying to branch us out into some of the smaller islands areas. We were in this little port where everybody had come out and met us. But on the last night, everybody had gone home. It was Sunday night. We were going to get underway on Monday. They've all gone home to their families. We're getting underway the next morning, so there was no point for diplomatically liaison anymore. There are two frigates here. Nobody's available on the phone. I come back from going out and I think I went out for about three hours.

I come back and walk into the wardroom. "What's up?" Three of our sailors had been arrested for possession of marijuana or hashish, so a debate ensues in the wardroom on what to do. The captain calls me in—and he's new because Gurtin had left. There's a new CO and XO at this

point. The new XO is no Tim Ketchum. Tim Ketchum was an extraordinarily smart guy. He's being the typical hard-nosed officer—"Let them rot. We warned them."

I'm there saying, "We can't do that."

The captain goes, "Yes, but we warned them. What are we supposed to do?"

I said, "I don't know. But we have to do something."

We go back and forth on what to do, and whether we should do anything, discussing what our part and responsibilities are. I ultimately won the argument that we were going to do something. The way I won it was by saying, "Here's what I know, sir. At some point we're going to have to write these boys' mothers. I would like to put in that letter that we did everything we could to get them home. As soon as we get them home, I'm in complete agreement with the executive officer that I will, as legal officer, bring them in. We'll punish them, we'll kick them out of the Navy with bad paper because this has been a disaster for us. There's no doubt about that. But that doesn't mean we leave them. Not to this system, not in this place. We do not leave our people. We'll go get our people. Maybe we can pay a bond and just get them on the ship and leave."

So we were wondering, "Where would we get the money?" We passed the hat around the wardroom in the chief's mess. "Every dime that you have, put it in this hat, and we'll go down and see if I can offer to pay a bond." I'm asking myself whether we can bail them out, so I take all the money. People don't think that this is how wardrooms work, but we collect money for our

people all the time and you're expected to contribute what you got. So out I go. Ultimately I got two out of the three out by arguing a unique argument that isn't legally true, but is factually true. Only one person can possess it at a time. Unfortunately, they had written a police report, so they were not going to let everybody go. They accepted bail for two of the people. For the last person, I chose the guy I thought was the toughest. I had to choose who would stay.

Because I hadn't used all my money, I negotiated all night to improve his conditions and to move him up from the basement up into the better cells. I wanted to get him his own cell and get him food. I went back and said, "This is what we've done. We've got to send the message, but we need to leave a junior officer because we need to have somebody go visit him every day. And if we don't leave somebody, I don't know that those guys will keep their word. If I leave somebody, I know they will keep their word because he'll go and visit them. I've told them that there is going to be a visitor every day. I told them I want him to have four hours of visitation time. Since they believe someone will come, they're making sure that he has food and a shower because they're worried about how he will look. If nobody shows up tomorrow, they'll know that it's not true."

That's what we did. Eventually, the Navy hired a local lawyer, and he was bailed out on a bond by a Hewlett-Packard executive. They built Hewlett-Packard stuff there. He was leaving and never coming back, so he could tell the court that he would make sure that he would be back. Everyone knew he was leaving, so that nothing would happen to him. Of course, after bailing him out, we took him to the embassy and flew him out of the country.

Q: I'm trying to think of what the poor guy, the one who has to stay behind, must have been thinking in his mind.

Swift: I said, "You're staying. But we're going to get you out of here. Don't worry about it." I didn't tell him I decided to leave him or any of that. They didn't know. I said, "You two are going to be free to go. You can go. You are staying here, but somebody's going to be here to visit you tomorrow." When they got back to Hawaii, I kicked them all out.

Q: Wasn't that around the time they did execute the couple of Australians there?

Swift: Yes.

Q: Yes, I vaguely remember that. It was about the same time.

Swift: We got them out. It was a tough place. My standpoint was that this was the right thing to do. You have to also understand what drugs were in the Navy at that time. That was only two years after that major accident on a carrier involving fatalities, where some of the several of the sailors on deck were high. After that, there was a really hardcore no tolerance policy for drugs. The executive officer wasn't wrong when he was arguing, "How long do we baby, mollicoddle people? They were warned. They were told. What more is there?"

Now, ultimately the XO said mine was the right decision. But he didn't feel bad for the argument he had made.

Q: A tough one.

Swift: It was a famous one though, argued out over time. When I finished it, I knew I was going to be a lawyer.

Q: What about that experience convinced you that you wanted to be a lawyer?

Swift: I knew I was going to be a lawyer at that time.

Q: What was it about the law that was so attractive?

Swift: I was good at it, as much as anything. I liked it. I was interested in it. It was a natural. It was easy. I took the LSATs with absolutely no preparation and scored in the ninety-ninth percentile. I was just good at it.

Q: Then why Seattle?

Swift: I applied around. It was one of the Navy ports. I wanted to go to Wake Forest in North Carolina. I didn't have the greatest of choices because of how I had done at the Naval Academy. I had Ivy League LSAT scores with not anywhere near Ivy League undergraduate grades. The combination made me qualified for a tier-three school. Wake Forest looked like a possibility in-

state, so I applied to Wake Forest. That was my first choice. I applied to all the schools in North Carolina.

Q: Now where were you living then?

Swift: I was living in Newport, Rhode Island. I applied to all of those schools. I had one year. After I had decided I was going to be a lawyer, I left Hawaii. I didn't apply from Hawaii. I had taken the LSATs in Hawaii, but I took a short tour to Newport, Rhode Island for a year to get out from there. I was the international military training officer, which would have impact on me later. Most of my clients were from the Middle East.

Q: What did you do as the international—?

Swift: —training officer? We had an international department head school where people from Saudi Arabia, Pakistan, all came here for training. I was their coordinator.

Q: In the Navy?

Swift: Yes. I was their coordinator.

Q: Saudi Arabians have a Navy?

Swift: Yes, they have a fairly large area to patrol. They have a huge coastline and they have a lot of money. Iran had a very nice Navy for a very long time. Pakistan had quite a Navy. I like to say the Pakistanis were very single-minded about sinking Indian aircraft carriers. But as a whole, the training coordinator was to put everything together and to handle their problems, which were very interesting.

I had applied to Seattle University. It was Puget Sound School of Law at the time. I came out here and Debbie loved Seattle. I came out in March, a day much like today. Seattle is beautiful in March. People don't know that. Half the days are like today in March, and it's gorgeous with blue sky. So Debbie was very much supportive of, "Let's come here." She got a job as a teacher literally that afternoon, so we came here.

Q: Had you known anything about the school?

Swift: Nothing whatsoever. I looked through it and said, "Okay." Their part was they had a multiple and I qualified inside the multiple. I ended up even getting a little money. Then I did very well while I was in school here. But I quickly gravitated toward doing something else. From a job perspective, I wanted to do aviation and admiralty law. I didn't think about going back in the Navy. That was not at all on my mind. I quickly figured out where I wanted to work. I had been a DCA, damage control assistant, and a navigator. And that made me the equivalent of a doctor in a medical malpractice shop in admiralty. I could read the chart. I knew the rules, all of the parts. I could go down and look at a ship and figure out how much it would cost to fix it. I'd been the repair officer. For ship board accidents, I understood exactly what had happened. I had

six years of practical experience. The navigation was on a warship, but the engineering was on a merchant vessel for all intents and purposes. That was an extraordinarily asset. So I figured, “If I’ve been at a third tier law school”—and Seattle’s moved up, but at that time that’s where it was—“the smart move and the smart money to get a job and do well is to play on your other strengths.” Immediately I thought, “I’m going to do admiralty. I will be successful.”

Q: Did they teach admiralty law at Seattle?

Swift: Sure.

Q: They did?

Swift: Absolutely. Professor [James E.] Beaver.

Q: It’s such a specialized field.

Swift: Sure. All admiralty law is basically in federal courts. The first thing you have to do is learn federal law, conflicts, the admiralty law and the Jones Act. But the real hard part in learning the field is in knowing about ships.

Q: Because it’s mostly insurance?

Swift: Right.

Q: Yes, or that's my impression of it.

Swift: Oh, but it's fun. The real pirates exist in the world of admiralty. It's fun, and it pays.

Q: You are constantly figuring out how much something is.

Swift: It appealed to every sense of mine. There are no juries, just judges. It's a game. I always thought it was a cool game. Then I found out that the Justice Department had a division that only did admiralty law. I could represent the Navy and other people who I love and play the game. Let's spin the wheel. See how much we pay or get back today on collisions and all that stuff, crash and splash. I thought I had a good chance of getting an honors position. Then 1994 happened.

Q: How was the law school?

Swift: Oh, law school was great.

Q: Seattle's a Jesuit school?

Swift: Yes, but it was University of Puget Sound [UPS] at the time. We were sold during the time that I was there. Law school was law school. Here's the deal on law school from my impression. The greatest thing that you get by going to a top school is the people you study with.

You can get really unique perspectives from some of the professors. But truthfully, being a top-rated professor has very little to do with your ability to teach anything. It has much more to do with your ability to write and contribute in the field, secondarily on teaching. Yale is an exception. Yale has extraordinary professors, but even going to Cornell or a lot of the Ivy League schools, it's not guaranteed that your professor is any better than the professor at Seattle University. They all went to the same schools. They don't pay for teaching, they pay for publishing. There's no guarantee that, for instance, a professor at Duke or Michigan is better than a professor at UPS. The books are exactly the same. Anyone will tell you that you don't learn law in the classroom. The real advantage to Ivy League schools is who you study with. To a lesser extent, you can have the same advantage here because one of the unique things about—

Q: And who you meet.

Swift: Who you meet. One of the unique things as far for the connections is for later. At UPS, we had a group of people who were here who were very talented, but were going here because they were here because of spouses or some other reason. They were here, and I enjoyed them a great deal. And it struck me very quickly that one of UPS's immediate climbing assets was the extraordinary number of people who were here as spouses that they could recruit into their classes. The student body, I quickly discovered, was far better than the school. The fact that Seattle has more college degrees per capita than any place else is one of the reasons they've climbed, and could climb.

University of Washington is very small and it still favors in-state applicants. If you've just moved here, there are not a lot of choices. There are a lot of talented people who would choose the alternative and were excellent. That fueled the growth. Law school was an excellent experience for me. It was the opposite of the Naval Academy, where I started out struggling. In law school I started out succeeding immediately. In fact, I was in the top twelve percent and then dropped slowly over three years. Because when I thought I had a job, my care level dropped.

Q: Now the first year is kind of standard I would imagine. Contracts and—

Swift: Yes, absolutely. I was very good at contracts. I still love contracts. I was the TA [teaching assistant] in contracts. I enjoyed it immensely.

Q: Procedures.

Swift: I enjoyed civil procedure. I love that course. It's all about the game. I enjoyed the game and the analytical part to it. I think to be persuasive, there are two parts. First, you have to be analytical. You have to give solid reasons to back up with the emotion. It's first with the head, then with the heart. To persuade people, you need to believe very much in what you are doing. But you also need to articulate something other than pounding on a desk and believing in it.

Q: Did they also involve the so-called Socratic method?

Swift: Absolutely. I loved the Socratic method. I couldn't believe that people were scared of it in law school. I was like, "Jesus. I'd been yelled at by the very best." Remember when I told you about Val Lippa? Val Lippa taught everything by the Socratic method. I've been exposed to the Socratic method by a guy who had fought fires and led people in the height of race riots and drug deals. He'd been there at the Navy's low point and he'd excelled. Val taught with the Socratic method—"I'll ask questions, you'll provide answers. That's my job."

For me the Socratic method was a piece of cake. The other thing that's hard for people about law school is they don't provide you any feedback for at least six months, sometimes a year, and then there's one exam. This drives people crazy. They need to be told they're doing well. Val didn't tell me I was doing well until I qualified as the engineering officer of the day for the first time. This is what he said—"You did better than I expected. That was a good job." And that was it. He was not about, "You walk on water." Rather, he was like, "Why would you expect to be praised for doing what you should do?"

Q: Were there particular professors that you had that stand out for you?

Swift: In law school, I loved the professors. They were great. In fact, I liked every professor I had the first year. I had Julie Shapiro, who's still there, for civil procedure. Julie had been on the forefront of gay and lesbian rights activism in the 1980s. She had been a warrior in Philadelphia at the beginning. She was great. She understood that you didn't do civil rights if you didn't do civil procedure. It doesn't matter what you have to say if you can't get in there to say it. You've got to get *how* to be there. These are the tools of advocacy, and if you don't know how to use

them, you're not going to succeed. She was great on that. She loved it. This is what makes you great as a lawyer. I loved every moment in her class. It was her first year and she tried so hard. I thought she was terrific.

I had Professor Holdike, who had been there from the very beginning, and I loved—Professor Holdike's nickname was Spike. He was the consummate contracts professor. I didn't get the highest grade in his class. If you added up my two grades in the two classes I would have, but I was beat on both exams. He still hired me as his TA and assistant based on consistent performance and the fact that I would argue with him on anything. Holdike had a huge influence on me over time.

I had Professor Nock for criminal law. George Nock had started out as a conservative prosecutor. He was one of the people who had prosecuted Charlie Manson, had been the number one graduate out of Humboldt, and had been a famous California prosecutor. Then he changed over and became against the death penalty. I had him for property and for criminal law. I had Nock the entire time. I had Dick Settle for torts. I didn't really like torts. I liked Dick. He was great, but torts were not my thing. I've forgotten who I had for legal writing.

Q: Were there clinics at that time?

Swift: Not really.

Q: That's a later development, I think

Swift: Yes. During the second year, I had Professor Beaver for admiralty evidence and I had Professor [David M.] Skover for constitutional law. What I realized later was I was getting as fine a constitutional law—when I finally got to know Neal [K. Katyal]. The quality of professors and Skover’s instruction on constitutional theory was high, but at the time I thought “Well, this is fascinating. But why do we need to know it? You only need to know it if you are going to argue at the Supreme Court.” It did come in handy.

Professor [David] Boerner had a huge impact.

Q: Dean Boerner?

Swift: David Boerner. He had been dean. He was a professor then. There are great offices around the country and one of the great offices of all time was [Norman K.] Maleng's prosecutor's office here in Seattle. He was an extraordinary guy and he attracted extraordinary people. Judge [Robert S.] Lasnik, who is the first judge on *Hamdan* [*Hamdan v. Rumsfeld, 2006*], was the deputy. Lasnik is big in everything.

David Boerner had also been a deputy in that office, and he taught administrative law. He had gone on and been big in the AG's [attorney general] office and all that. He taught a class where he was absolutely torn because law school is all about case books and case book method. But he argued, “Administrative law has nothing to do with that. Even though there are famous administrative law cases, you have to understand tactics for administrative law. Administrative

law is where law meets the political arena, and it is about using the law in conjunction with politics.” The only notes I ever went back and reread, or tried to think about when I would go out to do the cases I did in the future, were David Boerner's. I would find myself consistently in David Boerner situations.

Q: That's kind of interesting because the ideology of administrative law is that it is beyond politics. That it is simply a matter of adjudication.

Swift: That may be the reality, but it is practiced in the political arena. In administrative law, I am trying to stop you until I can get another political decision the other way. It's about who wants to go fast and who wants to go slow. It's about whether you have to follow the process or whether they didn't—a political decision has been made and I want to stop it. I disagree with the political decision. If I agree with it, what is there to argue about? I'm the opponent of a political made decision, either by a legislator or an executive or an executive administrator agency. It's not about the courts. It's not about court made decisions. Now, I have to understand the politics of that decision to play the game well. In that context, I would find myself in those situations throughout my military career.

David Boerner taught the class that mattered. He always talked about law over lunch. “Who wants to go fast? Who wants to go slow? How do you position yourself? Force your opponent to make a political mistake that you can exploit in court.”

If you're defending the government and you're in court, you've already lost. How do you get standing? How do you keep it? How do you slow it down? How do you stop it? It's all about politics. It's all about the decision. How do you challenge a political decision? What is part of the record? How do you influence, in *Hamdan*, where I very much want to change? I understand where I am at the moment in time. I've got to change the record. I need to push things.

Q: I was going to ask you about because I didn't realize the University of Puget Sound was at that time, vis-a-vis Seattle—I was going to ask you about the influence of the Jesuits, whether or not there was a religious influence at all?

Swift: No, not at all. Although they do not have Jesuit education, like at Georgetown, they have little influence.

Q: Well, they have a kind of moral—

Swift: Seattle University, incidentally, has become a center of human rights. It was not there at the time. I didn't think I was going to do any of that. I took David Boerner's class because I needed to fill it in and I was told he was an excellent professor. I thought admiralty might have some administrative features to it, so I'll take administrative law. Professor Beaver said that I should take the course.

Q: What was it like to be a married law student?

Swift: Pretty easy. Lots of us were. It was an unusual class in that one of the things about Seattle was that the student body was a bit older. While I went to Seattle University because of my wife's decision, it actually was a great decision. There were far more people in the classes who were like me. There were lots of people who were taking this up after a career or midcareer switches and stuff like that. Many of them were married. While there were particularly a number of young students, the group that I studied with all were married. The biggest adjustment for Debbie and I was we went from having lots of money to having no money. She taught. We had to really downsize, and that was an adjustment. But other than that, we went through it fine. We lived three years without health insurance, which for us was kind of weird. Nothing happened. We were lucky.

Q: What does she teach?

Swift: She taught second grade at Seabury, a private and gifted school. The campus was in Tacoma and she was great.

Q: So why didn't you go to admiralty law?

Swift: 1994 was a magical year. There was no budget. It was much like this year is threatened to be. There were no honors programs, and that was where I had planned on getting a job.

Suddenly, I was stuck. We were in the middle of recession and finding a job was not easy. I found myself in the position where I had not applied for clerkships. I was at the top of my class

and should get a job, but I hadn't done much to get one. I had planned on going one place and I had every reason to believe I would.

The JAG Corps at the admiralty division had two officers. I expressed my fear to them. I called them up and said, "What can I do?" They said, "We still have slots and we are unaffected by the government shut down. Why aren't you applying to us? You are a shoe-in." So I applied, out of desperation.

Q: Weren't you in a private firm for a little while?

Swift: Yes, for a very short period of time. I immediately figured out that I was miserable. I was not having a good time. I had planned on working for the government. It was not good. I was despondent. I was really worried, because I've had these three years and now, if this was what it was like—! What was good about government was they give you lots of responsibility and let you do your own thing, which was where I excelled. At the firm, you were very much about being on a team, and doing the administrative work to begin with. That was that XO job that everybody who knew me said, "That's probably not going to be your best day."

Q: The first year at a firm you work with this one, and you work with this one, then you work with that one. You carry out orders.

Swift: You're used to being in charge, so that's not going to work well. I didn't like the jobs I was given. I felt like, "Ugh, I hate this." It was not going well, and I knew it. But I was fortunate. that I went off and did something else. I went back in the Navy.

Q: Went back in the Navy?

Swift: Yes. I hoped I'd be an admiralty attorney.

Q: What is the formal procedure to do that?

Swift: I went down to the recruiter and said, "I want to go join the JAG Corps." I filled out an application. Then, after I had told the firm I'd done that, they let me go. That was nice. I don't mention their names because I don't want to get in trouble with them, but they let me go. I got a valuable lesson in business.

How I ended up being a member of the bar in North Carolina is a long story. I thought that the firm would let me continue to work there while it was pending. Then, as soon as I got my bar results, I planned that I would go into the Navy. They weren't at all interested in that. It was, "Bye. Congratulations on being admitted." At the time, the Navy JAGs said I couldn't join yet. What normally happened was that people would take the bar and then—

Q: Here in Washington?

Swift: They would take it in Washington or wherever. They would go into Officer Candidate School to learn how to be officers. I'd been to the Naval Academy and been an officer for seven years at that point. They weren't sending me to Officer Candidate School. But usually they got paid the whole time they were there, usually about ten weeks or so. I needed to get in early because I was looking at being unemployed for six months, which my spouse was anything but happy about.

Q: I was going to ask about whether or not this was a family decision.

Swift: We tried to figure it out. I called the recruiter back up and said, "Well, can't I go while my bar results are pending?"

They said, "We've had people fail."

I said, "I'm not going to fail the bar."

He said, "Our policy has been that we're not going to take people until we get the results because when they fail, we have to disenroll them and it's just not going to work."

So I said, "Okay." I found out that North Carolina, which I was originally from, got the bar results out the fastest of any state. I could sign up quickly. I had to pay a late fee, but I could get my bar results. In two weeks I had to learn the bar for North Carolina instead of for here. That was a piece of cake.

Q: The procedures were similar, no problems?

Swift: Similar enough. I just had to go over all the differences. And where it wasn't, I guessed. I did pretty good. The question I guessed on, I was later told, was the model answer.

Q: Was what?

Swift: The model answer. They used it as a model answer. The president of the Bar Association was a family friend, so he found out how I'd done for me. He said I had passed after the first five questions. I got the results back very quickly and that allowed me to go into the October class at the beginning of the physical year. When I got there, incidentally enough, they'd changed the program. Lots of people hadn't gotten their bar results because they wanted to fill up that class because Congress was reauthorizing and they were allowed a lot more people. So suddenly, they had a lot of people.

Q: Now you knew something about how—

Swift: —the Navy worked. That was easy. I graduated with honors from that group.

Q: Where were you stationed?

Swift: Bremerton, Washington. This is where my seniority all came back, as far as they were concerned. I said, "How does this work?"

They went, "You're the most senior person. What would you like?"

I said, "Admiralty."

They said, "You can't have admiralty."

I said, "Why not?"

They said, "Because you have to do first tour at a Naval Legal Service Office for your first tour."

I said, "Yes, but I want to go to admiralty."

They go, "Be serious and select one of the Naval Legal Service offices."

I said, "Okay. Bremerton."

They said, "Good. Most people choose Hawaii."

I said, "Yes, but I live in Bremerton and don't have to move, plus my wife has a job here and I've lived in Hawaii."

They said, "Okay." So off I went to Bremerton. We lived here for another three years.

Q: What was your initial training like?

Swift: Well, my initial training or cases—

Q: Oh, your training was immediately cases?

Swift: Yes. I had six months as a legal assistant's attorney where I also did some criminal cases. But after that I was a defense counsel. I thought I would be everything but that, but I was a defense counsel. I worked with a guy named Derwin Brent Pope. He probably, at that time, was the best defense attorney in the military. I didn't know them all. But there was a way that it had gone. It had gone from Major [Brian L.] Mizer to a guy who was teaching at the Naval Justice School, Jeffrey Horowitz. Jeff is the funniest human being on the planet. He'll come up later in the stories. Jeff Horowitz was my trial professor as well as the lieutenant commander at that time. He was the funniest human being, but Major Mizer had been number one, then Jeff Horowitz, and, after that, that torch had passed to a guy named Derwin Brent Pope who was twenty and zero in his first twenty contested cases. And he did not get to pick them.

Q: But you did have some training before you went in?

Swift: Oh sure. The JAG Corps gave you—

Q: In court martial law and—

Swift: Oh, yes. You went to school for four months. I graduated with honors from that. I was one of the top people.

Q: And that was in Bremerton too.

Swift: No, that was in Newport, Rhode Island. I went to Newport for JAG school, and had a great time. It was easy. Then I came back out here and started.

Q: So the procedures are not that radically different than civil procedures?

Swift: Well, I already knew them. I had been legal officer. The vast majority of this was review for me. I didn't have to study, didn't work particularly hard and got great grades. It was very easy. I had fun. It was just fun.

Q: So you came out here to practice?

Swift: Yes.

Q: What was your first case?

Swift: The first big case was in Alaska. It was a Coast Guardsman. He was accused of twenty-eight counts of child sexual molestation with three different victims.

Q: Now he would be tried in a military court rather than a civil court?

Swift: He was going to be tried in military court in Kodiak, Alaska. Hell, they didn't have a civil court. That was at the end of nowhere. And D. Brent Pope walked down the hall and said the following—"We are going to have him making a deal in this case." But I asked for an investigator. They wouldn't give me one. But they said I could have a co-counsel, "If you want to go to Alaska and go fishing." I said, "Sure."

Another week and a half passed and Brent said, "The negotiations are not going well. You ought to put together a witness list."

I said, "Sure."

Then he said, "The real negotiations are really going bad and they disapproved all the witnesses. I need you to write a motion to compel their attendance, including Uncle Fred." I called them all up and wrote a motion.

Then he said, "We're going to have to move to suppress all of these statements. The prosecution has filed this and the negotiations still are not going well. We probably ought to go up there and investigate."

Q: Where did you get the list of witnesses?

Swift: The file. I'm sitting there on the file. Brent's a god. I'm just backing him up and writing this stuff along. So Brent and I fly out to Kodiak, Alaska. We go in and he says, "Hey look, this is a four Olympic case." Brent defined cases by number of Olympics, and he didn't count winter because that's not really the Olympics. How many Greeks went skiing? Will your client watch from jail? It's less depressing than listening to years. So a four Olympic case was sixteen years, fifteen to sixteen years. So he said, "This is a four Olympic case. So we ought to make a deal. If we can get two Olympics that would be good."

But then the Staff Judge Advocate [SJA], the guy who was in charge of the Coast Guard case, pissed Brent off. He said, "That guy is a jerk. And these guys can't do anything, so why don't we just contest it?"

I said, "What does the client think?"

He said, "He thinks what we tell him to think."

I said, "This isn't a problem?"

The reply was, "He thinks what we tell him to think."

So we go out and we investigate. Then the judge rules and he keeps some of the critical evidence. One of the girls had made false complaints against other people. We wanted that in and the judge kept that out. I said, "This is ridiculous. I guess we could win on appeal, but ding, ding. That's our case departing."

He said, "It's coming in."

I said, "Did we not go to the same hearing? She ruled it out."

He said, "Yes, for now. But she doesn't know how this game's played. I know how the game is played and it's coming in." And it did come in, because Brent knew how. There's more than one way to beat something, as he taught me.

Over the course of the next three weeks, what was supposed to be a two-day trip turned into a month-long time in Alaska and a full scale war that we won. Hell, at the end, there were two churches in that town. One was on our side and the other was on the girls' side. We were having midnight vigils led by Brent Pope at the pulpit. The whole town. The town was divided simply along one line.

Q: Mobilizing outside?

Swift: Mobilizing, absolutely. I remember we were walking up the steps to go to the court into the hearing. And I'm just ill. Brent says, "You know what? In six months, you won't remember

this guy's name. He'll never forget you. He'll never forget me, because in the next three weeks or two weeks, what we do will determine the rest of his life. We're basically God to him. Isn't it cool?"

I said, "I need to go to the bathroom." No one was as cool as Brent was, no one.

Q: Was the guy innocent?

Swift: Hell if I know. I wasn't there. But in the end of it—

Q: They couldn't make their case.

Swift: They couldn't make the case. I cross-examined the state's expert witness. She was later discredited. She was one of these recovered memory people. I cross-examined on recovered memory. We were in the war, baby. Brent said, "You are cross-examining her. You've read all about that. It's garbage. Have a good time." I gave the closing argument in that case.

I had somebody who absolutely knew what he was doing and absolutely meshed with me. The two of us we would become a partnership for the next year and a half until they broke us up because, for our prospects, this is how life is. I loved working with him, and he loved working with me. There were such memorable moments during that case.

Bruce MacDonald, who later became the Judge Advocate General of the Navy and is currently in charge of military commissions was our executive officer. Commander Jerry Hatch had just been assigned as military judge and I had another case in front of him. He needed a contested case and I was stuck up there, and I was not coming back. I was in trial. It looked like he might have to transfer before the case, so they wanted me to come back because he wanted to help out his friend. I keep getting these messages in the last couple of days, "Call home." Brent's saying, "Ignore them." I'm like "Dude, that guy outranks us."

Q: Who was throwing these—?

Swift: Brent would throw the messages out. He said, "You are not calling him, we're in trial. Focus." Finally, I was ordered to call. So Brent calls on my behalf. And MacDonald picks up the phone and Brent says, "That is why we need a split. We're in trial right now. He's giving the closing argument and you're harassing him. Do you care about clients, about justice, or do you just care about your friends?" Bang.

Q: Wow.

Swift: He just lays him out. MacDonald called back and apologized. Brent was the only human being on the planet who could get away with that. He could get away with it. Later, I could get away with it.

Q: Whatever happened to him?

Swift: He got out. He's now the number at the FAA [Federal Aviation Authority], and one of the people who decides the security measures for this country. He plays a huge role in national security. All of us would. Everyone who was in that little group would play. We would all go on to be important in these things. Back then it was child sexual abuse cases, the burning of the church in Whidbey Island, and a host of other cases, including a guy who refused to give a DNA sample because he was a member of a Hopi Indian tribe. We would change the administrative procedures when I threatened to have the Hopi Indian Nation Dance Team out in front of Bangor, Washington.

We would have a great time. We would burn that place down. We were used to winning. We expected to win. We lost every once in a while, but we expected to win. We were absolutely confident. We were all confident. I remember one poor commander who was put in charge of all of us. He has a new rule that we were going to come in and brief him on cases. And Brent goes, "For what possible reason? What do you know that you could possibly teach me on how to do this? What's your record? When have you ever done a case? I'm not wasting my time on a bureaucratic, stupid idea. If you have something to add, please do. But otherwise, let me do my job. And damn well leave him alone because he's working with me. The rest of these people you can do whatever you want."

Q: How did you become assigned to the defense?

Swift: I actually said I'd be a prosecutor and everyone laughed.

Q: Who made that decision?

Swift: The powers that be assigned me.

Q: There must be a person?

Swift: Well, first, Captain [Sally] McCabe. Then, every CO thereafter.

Q: In charge of the office, the Bremerton office?

Swift: Bremerton office. After I went back, no one seriously considered putting Charlie Swift in anything but defense. You're good at it. You like it and you seem moral and Brent had the same problem. Brent had been a prosecutor. He was prosecutor when I first got there. Then he switched over to defense a few months later. He'd been a great prosecutor. He never lost as a prosecutor. He was really good. He knew exactly how to do it; he just wouldn't sentence people. He didn't believe in putting them in jail. He had two cars. He had a very fancy Saab in which he had installed a subwoofer. Brent had been in the Army and he looked like the all-American boy. In the back of the car he had the subwoofer so that he could play Jay-Z, because that's defense music. The album for the beginning of any trial is Jay-Z's "Reasonable Doubt." You must play it—cranked.

Q: Do you ever speculate about the differences between defenders and prosecutors?

Swift: Oh, I don't have to. I know exactly what the differences are.

Q: Tell me.

Swift: A prosecutor is a judgmental person. They're judging in the whole psychological way. They're analytical, judging instead of feeling, analytic instead of intuitive. They are leaders. They have that leadership quality. They're type A. They're extroverts, judging, and analytical people. Defense attorneys are extroverts, feeling, empathetic and intuitive.

Q: While you're doing these cases, are you also taking classes at different places to enrich your understanding of military law?

Swift: Only when I get to *Hamdan*. No, when I switched over to be in SJA after my three years at Bremerton. They made me leave defense at Bremerton. I didn't want to leave. I had no desire. If I could have kept the year after—the year and a half with Brent—if I could have kept doing that forever I would have never stopped. We had a blast.

Q: You enjoyed it?

Swift: Yes. We thought we'd never lose. I remember the day we lost. But we didn't think there for a while it would ever happen.

Q: Tell me about your loss.

Swift: Oh, it was a rape case in a weird place, Whidbey Island.

Q: It's one of the islands in the Puget Sound?

Swift: Yes, it's up there. It's got weird water. At Whidbey Island, they burned down their church. That is where the chief chopped up his wife and threw her off Deception Pass Bridge. It just was an interesting place. This case was about a jail guard who allegedly raped a girl in jail in the restricted barracks. We came very close to winning. But ultimately, they found him guilty and he ended up with four years in jail. We had done a terrific job because I think if they completely believed it, he would have gotten twenty. It was a tough day. I thought we were going to win, but we lost. Brent would say, "We won in court. We did not win in jury selection."

Q: When you're selecting military folk, is there regular *voir dire*?

Swift: Oh yes. You've got to get good at it too, and it would help me a great deal in *Hamdan*. You have a very limited pool. First off, the convening authority picks them. They handpick them. So he picks who is going to be on the jury. Great. Now you can challenge one for cause and you can do one peremptory challenge.

Q: These are small juries?

Swift: Yes. You get one peremptory and unlimited challenges for cause. Now for instance, in that case up in Kodiak, we busted quorum twice. They had to fly in new jurors because we kept getting them kicked off. I learned how to question people and how to ask. The nice part is that military jurors are honest. You can find out a lot more about them beforehand, so you can learn about them with questionnaires, as well as how you deal with and understand people. In the end, for cross section of people, I'm not sure that you're better off with three hundred out there, because if you can get a cross section of people who will answer your questions honestly, you can pick it. I learned to pick differently over time with the military because I learned to pick for traits. It would work for me to say, "How do I play the strategy of how I think people are going to interact when they get back there?"

Q: What are the traits you look for?

Swift: The first things are—do you want a leader or a follower? Who will be the advocate? Are they analytical or are they intuitive? I try and get the ideas, the same things that I talked about earlier. Is the person a feeling or a judging type? And remember, just because they're judging doesn't mean it's bad for this case. What's your theme? All jurors are not good for all cases. For instance, I think feeling jurors are awful for judging rape cases because they're always going to feel bad for her. If they're judgmental, I know I'm not going to put my client up. They may judge her.

What do I want? What are the personality traits? Just because somebody's a hard-ass Republican doesn't mean they can't be a good juror. The real part is, will they relate to my client? How will

they see him or her over time? Is this someone that I can tell a story to? And also, is this somebody I get a good vibe out of? Is this somebody who I think will listen to me? Is this somebody I can give an argument to? Will they be persuasive back there? The important talking starts when you stop. Those are the only conversations that really matter. That's the first thing about doing trials I learned from Brent. What we do matters very little; what they do matters everything. But what we're doing is trying to influence what they do. So it's about them. Brent didn't even care that there was a prosecution. They don't matter.

I'd later learn that Gerry Spence gets an awful lot of money to teach exactly that same thing. What they do over here doesn't matter. Brent wouldn't even look at prosecutors. He'd say, "They don't matter. What matters is my conversation with you. Judges don't matter; they're referees. Nobody paid to see the referee play. Nobody paid for that. There may be superstar pitchers, but when the home run hitter's up, everybody paid to see him play. Let's play. And remember, you only have to get one. If you jack it, you win. So don't worry about that. Worry about jacking it."

Q: Jack it?

Swift: Jacking the ball out of the park. Brent said, "You can lose a lot of battles, but if you hit one at the key spot, you win, so understand the game."

Q: Why did you leave?

Swift: The Navy made me. They said, "Time to go!"

Q: To where?

Swift: Puerto Rico. I chose Puerto Rico.

Q: With an upgrade?

Swift: Yes, I was promoted at the end of that tour. But I went to be the Staff Judge Advocate in Puerto Rico. I had two choices. I had to go to this SJA job either in Jacksonville, Florida, which is where I went later, or Puerto Rico. Brent's thought process on that was as follows. He said, "Have you looked up how many Hooters there are in Jacksonville, Florida?"

I go, "No."

He said, "Internet. You should try it."

I said, "How many are there?"

He said, "Six." He said, "I wouldn't move to a town with six Hooters if your life depended on it. There are no Hooters as far as I can tell in Puerto Rico. It ought to be an interesting experience." So I went to Puerto Rico.

Q: Was it an interesting experience?

Swift: Yes. I'd been there a year.

Q: Did your wife move as well?

Swift: Oh, yes. She learned to fly there. I'd been there a year and about three months. I did very well. I was the number one rated officer.

Q: What kind of cases would you get?

Swift: I wasn't doing cases. I was the CO's lawyer.

Q: What does that mean?

Swift: I had several hats. I was the corporate lawyer for the commanding officer of the Naval station Roosevelt Roads. Principally, it involved a little bit of military justice. We had a little of that, and a great deal of administrative and employment law. But seventy percent of the job was environmental, even before David Sanes Rodriguez was standing on the outpost of OP [observation post] One looking at a road while a bombing exercise involving Marines off the USS—

Q: In Vieques?

Swift: Vieques. I had gone to Vieques. I knew everybody. I went to Vieques almost every weekend. I had my own boat. I loved everybody at Vieques. I knew the protesters. I knew everybody on the side. I'd know them for six months at that point. And all hell broke loose. I would represent the Navy for the next two years at Vieques.

Q: Before what court?

Swift: In federal court, day in and day out.

Q: In Puerto Rico?

Swift: In Puerto Rico every day. The same people who would later give me awards would burn me in effigy. It's the life of a lawyer. I did Vieques for those years.

Q: Did you win?

Swift: Every single case?

Q: Every single case.

Swift: I had no chance of keeping the Navy in Vieques though. Jesse Jackson put it best—"All politics are local, son. And you ain't got the locals." That's exactly what he said to me. All politics are local.

Q: He was there?

Swift: Yes. I gave him a laptop brief. I met the secretary of the Navy. I had a phone call, very famous for me, with Janet Reno. I also had a phone call with the CNO [Chief of Naval Operations].

Q: What were they asking?

Swift: Oh, different things. Janet was pissed. They were always pissed. Vieques was a political mine field. Let's first and foremost discuss why was Vieques lost before it began.

The following four people have never agreed on anything in their lives as far as I know—Rudy Giuliani, Hillary Clinton, George [W.] Bush the younger and Al Gore. Can you think of anything that those four people could agree on? There was one exception. They agreed on one thing, that the Navy should close its bombing range on Vieques, Puerto Rico. Puerto Ricans are brilliant. Puerto Ricans have long understood that democracy is a participation sport, but they have not marginalized themselves. In fact, they've become more powerful as we become more fractured because Puerto Ricans are almost fifty percent Democrats and fifty percent Republicans. They are concentrated in Illinois, New York and Florida. If you do something against Puerto Rican interests, they will cross party lines to vote against you. Illinois, Florida and New York—New York not so much, Illinois not lately—had historically been battleground states. Puerto Ricans get a lot of good stuff. It's smart. In that year, what they wanted was the Navy out of Vieques. So

I was there. It didn't matter how many we won. But from a historical perspective, the lessons I learned during that time would be invaluable going forward.

One of them was a series of meetings that was held on it. The following people were involved in the meeting—the Secretary of the Navy, Admiral Fox Fallon, who was commander in Afghanistan and the compact Pacific Fleet commander, and General Peter Pace, later chairman Joint Chief of Staff, and myself, Charlie Swift. Now one of these things is not like the other. One of these things just doesn't belong. What's a lieutenant doing in a meeting with these people? Why invite me? I realized at the third meeting why I had been invited. We were the three people who could embarrass the president of the United States. Fallon and Pace could because they could say a battle group wasn't ready. I could because I could say something in court. My part was to vigorously defend the United States Navy without compromising Hillary Clinton or Al Gore's chances of being elected.

I was not to put the president in a position that might embarrass him, nor was my boss who was I supposed to control. It would later strike me on Guantánamo how horrible the staff was for the president. Secretary [Richard J.] Danzig is a brilliant bureaucrat and Secretary [Donald H.] Rumsfeld was a brilliant bureaucrat, as smart as anyone. Guantánamo Bay violated all of Donald Rumsfeld's rules of bureaucracy. He had rules on how the game is played. They were rules that I had not yet heard of, but would later recognize once I came out of tutelage from Secretary Danzig. He's a Democrat, but he's nobody's liberal. Liberals don't get selected to be the service secretaries. I said, "I'm not sure how you guys are even Democrats, but okay." He understood within the realm of the doable what we are doing here.

Q: How severe a loss was that for the Navy?

Swift: Nonexistent. That was the funny part. There was a lot of pride in it. It bothered me underneath. I knew that Vieques was doomed long before. I understood it a year into my tenure. First off, I had been told that this was the premier bombing range for the United States Navy, and I went out to see it a month into my tour. It took quite something to get to the premier bombing range of the United States. You had to take a fast boat over to a dock and then drive on a dirt road, then through town on a paved road, then on eleven and a half miles of dirt road out to the bombing range. It was pretty easy to get there by airplane and pretty hard to get to any other way. But when I got to the gate, I swear to God, it looked like something out of *Butch Cassidy and the Sundance Kid*. Remember when they go to Bolivia, and he gets off the train and there's dogs? "How do you know that all of Bolivia doesn't look this, Butch?" I got to the gate and, I'm not kidding, I saw two extraordinarily overweight Viequesian guards with their pants down and gunslinger belts at these camps that look like they are from Columbia or Bolivia, and dogs and horses and cows just kind of milling about. And I go, "This is the premier facility for the United States Navy? You've got to be kidding me. We sure aren't spending any money on it."

At a conference, it was pointed out that Vieques was not cleared to drop for GPS [global positioning system]. There was a discussion of whether we could ever clear it and whether we would need a new environmental impact statement, which no one wanted to do. It was pointed out by the aviator that this was all a stupid discussion because GPS either works or it doesn't. GP-cleared ranges are forty miles in diameter from where you drop.

Q: Global positioning?

Swift: Global positioning system. In Gulf War One when you see us drop—drop, drop, drop. You saw all the cool little things that are coming. You've got to see the targets. Ten percent of the ordinance dropped was smart ordinance. Ninety percent of it was stupid, dumb bombs because it's extraordinarily expensive to fly those stupid little cameras up. It's really intensive on the pilots. It's a dangerous way to drop because you have to drop it fairly low, and you have to stay nice, level and steady while you drive it in. All of it requires a bombardier navigator to drive the bomb. There's a lot going on here.

That's why Saddam Hussein's antiquated air defense system shot down twenty-one planes. Let's face it, he sucked. Twenty-one planes is not an acceptable loss ratio. So what'd we do about it? GPS, baby. GPS is \$20,000 to add to a bomb and it is extraordinarily accurate. Everything had been built on terrain matching and visual. All of a sudden, the world changed because we could fly a bomb on a GPS signal in a window. Give it a little radar to know its altitude and, oh my God, is that thing accurate. The mini-computer became cheap. If you can drop that bomb, where do you drop it from? You don't drop it from eight thousand feet. You drop it from thirty because up at thirty thousand feet, unless we're fighting ourselves, you're practically invulnerable.

Q: So Vieques is not nowhere—

Swift: No, here's the problem. If you drop at thirty thousand feet and the GPS doesn't work, you put Saint Thomas at risk, and no one was going to risk putting a bomb into a cruise ship. For those of you who still believe there is cancer on Vieques, please check the prevailing winds. The prevailing winds don't blow toward downtown Esperanza. The prevailing winds blow to St. Thomas. No, we were toast. We had to move if we were going to do actual training. The rest of the stuff was like shore bombardment. Shore bombardment, World War II, it was too stupid for words in Vietnam. As if we were going to really control a battle by fire actions. I don't know who in the gun club thinks that, but there's a real point for Naval gunnery. It needs to be shooting at Somali pirates and the like. Gunnery matters, but you need to be practicing it on high speed moving boats, drop the caliber down. Every modern Naval strategist no longer cares about delivering anything to shore.

Let's go to the modern world. In the modern world, we sure as heck are not going to take a \$20 billion asset and put it within range of an enemy that couldn't come out and get it on the blue water. We won't do that when we have Tomahawks sitting in the backseat, which will hit far more accurately and with far more devastation. No. We will fly the GPS part. Run the missions the smart way. If you train like you fight, Vieques made little sense any more, and everyone knew it. One of our first projects was to start to move Vieques over to other training uses. This happened at the same time. I wanted to put in SOC South, and so did the environmental people.

Q: What?

Swift: Special Operations Command South. What did Congress pass? Every president says it's unconstitutional, but they passed the War Powers Act. Part of the War Powers Act is about deployment from the continental United States. We are not in the continental United States in Puerto Rico. It's a territory, so it doesn't count as the United States. It's not a state, so you can do some deployments into hostile areas without telling anyone. Before we've had SOC South in Panama for the same reason, so we could do things without telling Congress or limiting it to the gang of four. These are good things.

Besides, it's not like the media has anybody down in Vieques. At least they didn't at that time. So they can train to their heart's delight in what looked like the Middle East or Afghanistan since everybody was starting to think that maybe the battlefield will look like the Middle East or Afghanistan, and Vieques looks like those places. This could be a really good place to train, because I don't think we're going to be fighting in the jungle. I think we're going to be fighting in Southeast Asia.

So here we have a good plan. Then David Sanes Rodriguez got killed and the whole thing went to hell. The best argument for putting in SOC South was money. You need to know an environmental statute. It's called RCRA [Resource Conservation and Recovery Act] and it manages hazardous waste.

There are those who would say what's on the Naval bombing range is hazardous waste. They would be wrong so long as it's a bombing range. If it's a bombing range, it's not hazardous waste. It's actually being used for its intended purpose. Therefore, it's not yet waste. It will become

waste in the future. But it's not waste now. We had to do that. Otherwise bombing ranges, because they are full of heavy metals and all kinds of nasty stuff, would be unmanageable places. Nobody wanted to close Vieques because then we would have to clean it up.

The way it was politically closed, when it was closed down, we don't have to clean it up. It became an Army Corps of Engineers project, just like Kahoolawe. Do you know how many bombs have been removed from Kahoolawe, which was closed in 1970?

Q: No. Zero?

Swift: Under the way we closed Kahoolawe statutorily, it is immune from all potential suit. They cannot sue us.

Q: Is the same true for Vieques?

Swift: It's brilliantly done. It was funny because there was this part of me that went, "You guys are negotiating on all the wrong things." I understood that my role for the United States government was to put up a good fight and then lose. Because in the political situation that came out, you have to understand David Boerner's move, three steps down the road in administrative law. We were going to win this, baby, and the Viequesians and the Puerto Ricans were not sophisticated in what they were doing. They were also in no mood to listen to the sophisticated people.

I met a woman in D.C., of all places. I found out that she had been over on the other side of Vieques, so she and I had dinner one night and talked it through. She had looked around and seen exactly the same thing. She realized that Vieques was toast and they were negotiating the wrong things. Just want it closed. They're going to screw you on the clean-up because you don't have a senator and you sure don't have the senator on the Senate Armed Services Committee like Hawaii did. The last thing the Navy wants to do is commit billions and billions of dollars for a clean-up. And with the current federal budget, when do you think the dollars for the clean-up in Vieques will start?

Q: Never.

Swift: Ever. No. I won in court. I lost in the court of public opinion. And overall, we won big. And why did they screw up completely? Here's a rule. Never ever piss off a United States senator if you don't have to. There's no good reason. Senator [James] Inhofe came to Puerto Rico for the pure reason of making [William J.] Clinton look bad. I had to have multiple meetings with my boss to remind him that this senator had come to make the president of the United States look bad. It's not our job to help him. Regardless of what party we might be in, we work for the commander-in-chief. It's not our job to make the commander-in-chief look bad. It is our job to make the commander-in-chief look good. And then I understood why I'm in the meeting with the secretary of defense, because I need to keep people in line.

But when Senator Inhofe came—see, my poor boss had been being beat up.

Q: Wouldn't they have had Navy support to come down?

Swift: Inhofe? Sure.

Q: Yes.

Swift: Of course. But I'm not here to help him. He's going to come down to make President Clinton look bad, but I'm not here to make the president look bad. I'm not here to embarrass him. Senator Inhof can investigate and fact-find, but we're here to toe the party line. And the party line is what we're going to get through this political solution that needs to be worked out. We've got faith in the courts and we don't want to vent our frustrations on any given day to a United States senator who has potential to have a hearing and make the president look bad. Because keep in mind, he's not here for the United States Navy. He could give a damn about the United States Navy. He's here to make the president look bad. He's a hatchet job in this particular one who's not up for election this year, and he's absolutely safe in Oklahoma. Let's understand why we're here.

David Boerner courses are going off in my hand. Why is Senator Inhofe here? What is his job? I call up the secretary of the Navy. I said to Secretary Danzig, "Senator Inhofe is coming."

He says, "Yes, I heard. Pleasant windshield tour, Charlie."

“Yes sir.” It was supposed to be a pleasant windshield tour. I did fine, and the CO tried to vent, but I got them apart and didn’t let that happen. The only mistake that we made is where I got to have an unfriendly talk with Janet Reno because my boss complained about the U.S. Attorney's Office on some particular areas. I was like, “Do not do that. Senator Inhofe is going to call Janet Reno in, and Janet Reno's going to call the U.S. attorney and the U.S. attorney's going to call me. And I’m going to be to blame for this.” But we did that.

But the good news was Secretary Danzig did not call because he didn’t get anything from us to complain about the president on. At most, he could beat up the attorney general, and everybody was beating her up those days. He went to see the Puerto Ricans and they just were all over him. And I said, “Why are you doing that?” I’m in the room. I’m saying, “There is no upside to insulting this man.”

Right when I got there, after Vieques closed, Senator Inhofe added an amendment to the DOD [Department of Defense] budget that year on a voice vote that says to pay for the move of the bombing range to the Navy to the Air Force’s bombing range in Florida, we have to sell Roosevelt Roads, complete with all of the environmental liability, at a profit. They thought they'd get it for free. It's rotting. It screwed them and they never even had an idea. They didn’t have a lobby in the field. The vote passed. There's no record of who voted for it or voted against it. Why make a U.S. senator angry when you don’t have to? These are things you learn.

Q: Where did you go after Puerto Rico?

Swift: Jacksonville, Florida.

Q: For?

Swift: I was the OIC of the Naval legal detachment in Mayport, Florida.

Q: Officer in charge?

Swift: Yes.

Q: And where were you when 9/11 happened?

Swift: I was doing a court martial that day. It was a beautiful day. That probably was the nicest day in Florida the entire time I was there. Florida can be hot, but on that day it was a perfect eighty-two degrees. No humidity, absolutely scorching blue skies on the entire East Coast. It was the most beautiful day, and I had a convertible. I carried my uniform in. We were still in whites in Florida. I stopped by Starbucks. I was having my last cup of coffee because you can't afford to spill it on your white uniform, and I would always put the white uniform on afterwards.

I came in and I had the uniform in my hand when I saw the first the pictures. I was doing jury selection that morning, and my first thought was that it was deliberate. They were saying it was an accident. I said, "That's crazy." My wife was a pilot, so from listening to her I knew flying in New York. There's the Hudson River, but nothing gets near Manhattan. There are no flight

routes near Manhattan. There's no way on green earth that on a VFR [visual flight rules] day like that, which is bright, clear, that a pilot could fly into the tallest building.

What I missed, and I think all of us missed it at that moment in history, was the scale. The towers are so big that you have no idea on television how big they are, so when I saw the smoke billowing out and I thought some guy had put a Cessna into the towers. I had no idea that it was 777. I was like, "Oh, somebody put a Cessna into it. It's a terrorist attack. They tried to blow it up ten years before. They tried that before. They set off a truck in the basement, like that's going to have any effect. The newsroom reporters are just idiots if they're saying that this is some sort of an accident. There isn't a pilot on the planet—."

The second one hit right as we were going to start court. I suggested to the judge that we cancel. He said, "No," because military judges do not do that. Then the first one fell down and I said, "We have to cancel." He said, "No." Then all the jurors' cellphones went off and beepers, and they started to get up. The judge asked, "Why?" They said, "We're reporting back to our ships." Then we canceled the case. We would do that case a month later.

Q: Did you have any idea that it would affect you at all?

Swift: None. This was the funny part about bureaucracies. The next day, because of the extraordinary increase in security, I said, "Yes, they are going to attack the base at Mayport, Florida. That makes sense. That's what I'd do next." But everybody, boom! Up goes the security level. It's just an extraordinary pain to get through because they are searching every car and all

that stuff. I'm there, and seeing that the military is not immune from mass panic. To minimize this, they had an "essential personnel only" report. Everyone reported because no one will admit in a bureaucracy that they're not essential, except for me and the defense counsel, who I called and told, "Don't bother coming in." The CO called up at about noon to find out where I was. I said, "Under what theory do you think that I am essential personnel? The last thing we need today is a defense counsel. Under what theory do you see me as essential?"

Q: In your testimony before the Senate Judiciary Committee, you said, "This is a new kind of war. A new war." When did that dawn on you? That's interesting. That is how you would describe it, as a new kind of war?

Swift: Earlier, much earlier. It wasn't my idea by any means. It had been being talked about for some time before it came to fruition. It first came when on my way down to Puerto Rico. I had to go to a war fighting course. I told you I wore several hats. Once upon a time a command there had an admiral. It stemmed out of the famous *Vieques v. United States Navy*, which was the Supreme Court case. There was still ostensibly an admiral tied to it, but I was on staff to that too.

At the course, the president of the War College had come down and given a speech to this three-week rules of engagement class. It was a fascinating take on the law of war. In that speech, he had talked about the change in war. He said that we were talking about rules that applied to nation- state war. He asked us, "Why do we believe we're going to fight a nation-state? We're going to fight tribal war. Tribal war is far older. We are returning to it. The age of the nation-

state as a military conflict is over. Quite frankly, it has ceased to be cost-effective for any nation-state to engage in warfare.”

Now, the Bush administration would not understand that in Iraq. But Iraq would prove that he was absolutely right. Given the outcomes that the rules provide for nation states, why would you go to war at this point in time? We have no reason to believe it. It's better to compete in the marketplace. We go to war with China or we engage in a marketplace. When our number one military competitor in the world is also our number one supplier, what kind of war are we going to have? Strategically speaking, how can this comply with the Clausewitzian norm? Let's talk about the conflicts you are going to fight, and those are tribal wars.

At the end of his discussion on the tribal war and its new paradigms, I said, “The entire purpose of the rules of war is to limit and prevent nation-state war from becoming total war.” Total war is where the rules are off and everybody dies. We want limited conflicts. The whole idea was that we would limit the conflict and avoid the Eastern front, which approached total war during the Second World War. It did not get there. It approached it.

Q: No, this obviously forestalls—

Swift: Yes, so the rules of war are written to avoid that as their primary purpose. That's why the military bought into them and that's why politicians bought into them. Originally, they came from humanitarians, but they aren't enforced by humanitarians. They're enforced by military personnel. So how do we win? Tribal war has always been successfully prosecuted as total war,

at least where nation-states versus tribes. When a nation-state takes on a tribe its goal is the total destruction of the tribe and the end result is total warfare. But total warfare is ugly and it's not compatible with the United States' military's teaching. How do we win under these circumstances? That was the question. That's what I asked.

He answered me this way. He said, "When I went back to Harvard, I wrote a paper based on a suggested solution for the Middle East crisis in Palestine. It went around Harvard for comments until it landed on Henry Kissinger's desk. And Henry Kissinger called me and said, 'You Americans'—Henry Kissinger always called everyone 'you Americans.' Fairly hilarious from the secretary of state—'You are all engineers. You all think that all of life's great problems are simply problems that will be solved by proper application of force, money, et cetera. This is completely untrue. All of life's great problems are simply dilemmas. Dilemmas cannot be solved. They can only be survived.'"

That was my answer. I didn't like the answer in the beginning. I thought it was cute. Very funny. But he didn't answer the question! "Can the witness please be directed to answer the question?" I am on the Val Lippa place. "You don't propose problems without a solution. What kind of leadership is this?"

Q: But you did come around to that thought—it's a new kind of war?

Swift: Absolutely. It was an evolution. I had been taught by some great leaders, and there were great leaders around the department. But I had been taught by a great trial leader and I had been

taught by a great military leader, and this was not in their realm of thinking. It's not how they dealt with things. They were doers and this suggested a problem that I didn't like the answer to. And so I, in some ways, am very sympathetic with the president because I can see how he would dislike that kind of an answer—"Wait a second. There are 1,900 Americans dead and you're giving me that answer? Get the hell out of my office."

Q: Now, I've interviewed some of your compatriots who say it's not war, it's criminal activity.

Swift: Yes.

Q: I would assume that you have heard that argument from many of them?

Swift: Yes. I think that that argument is legally satisfying and practically inapplicable. Let's first understand that the closest analogy that I have seen to what we have today is piracy. Piracy is not solved. Piracy is against law. It's one of the oldest crimes recognizable to man. Pirates are *sui generis*, enemies of all mankind. Since it's a law enforcement problem, we have no problem getting rid of piracy, right? Why is it still with us? Why did it rise here? Piracy defies normal law enforcement procedures because if you look at the administration that you've created for law enforcement—the FBI, local sheriffs—how many of those guys actually could go out and seize a pirate ship?

Now they kind of play like the big boys, don't they? They engage in activities that are different. Usually criminals try to run from the police. These people kill the police. Their aims are

political. Their aims are not economic. That's where they differ from pirates. Pirates' aims are still at least criminal economic.

The current part is also a product of the great golden age and is similar to the golden age of piracy. If one wants to call a period of time of lawlessness looting and general "not nice" behavior—because anybody who romanticizes pirates misses the trick on what lots of pirates were like. Pirates stemmed out of the golden age out of privateering. Today's terrorists were yesterday's privateers.

In the great struggle between the Soviet Union in the Cold War and the United States, neither side could afford to fight each other flat out. It was too dangerous. That's what the Cuban Missile Crisis taught us. We had built to that point in time. We come down to it and both nations are looking at annihilation. We have enough nuclear weapon to annihilate each other and there is no defense. The Clausewitzian norms no longer work. So how are you going to fight? You're going to fight because you're competing and you have accepted a military solution. And you use force to obtain your aims. So how do you fight? Vietnam happens right afterwards, as each side will fight through quasi forces. We'll fight in Afghanistan. We will enlist surrogates to fight on our behalf. We will arm and supply them. We will train them. We will fight through surrogates, modern day privateers if you will.

Both sides created, in this particular part of the world, privateer armies to fight on our behalf. Much like the privateers, when it was over, they didn't go home, in particular in Afghanistan. In fact, they were immediately sucked into Bosnia-Herzegovina, which is the next battlefield after

the Soviet Union falls. Americans didn't pay attention, but the jihadists did. The Dayton Accords kicked all of them out, so they're back in Afghanistan. This created a quasi-state. It also created one of the things that's similar to piracy. Why does piracy thrive in Somalia?

Q: Because it's outside of the state.

Swift: Right. It's a failed state with no power. Somalis have great maritime tradition, and they have the ability and the sophistication to do things at sea. It has become increasingly violent. It always does, by the way. Originally, it wasn't as violent in the Old World. The same thing existed here. North Carolina, for instance, was basically corrupt, failed. Even the state governor probably took money from pirates. There was no law in the Caribbean, in the Bahamas. It requires establishing nation-states in these failed states to get rid of the pirates. Nation-states have a stake in it but Afghanistan's a failed state. Why is Yemen dangerous? Because it could fail. Why can't we capture [Osama] bin Laden? It's because he exists in a place the Pakistan government doesn't influence or control. Does anyone really think that the Pakistan government is in charge of the mountain territories? Come on. Governments don't engage in peace treaties with their own people.

Q: But when it comes down to the particulars of the plane going into the—

Swift: That wasn't even an act. That was cause for war. In fact, the real cause for war is that Afghanistan doesn't turn over bin Laden. The Taliban, which is the government in Afghanistan, does not permit us to come get him. And remember, people forget. The administration started by

playing legit. In the days right afterwards, they were playing legitimately they were demanding the surrender of bin Laden and his followers.

The first thing they did was demand that Afghanistan, as soon as they were sure, turn over bin Laden and the followers over to us. The Taliban didn't do that. Now, there is a real question of whether they could have physically done it. But they didn't do it, and they didn't invite us in to find him. And they made conditions. Well, shielding someone like Bin Laden is cause for war. We are absolutely, absolutely justified in acting in our national interest to invade Afghanistan for the limited purposes of capturing bin Laden. When the Taliban imposes us, then we are absolutely legitimate in saying, "Hey, look, dudes, we could use military force to come in. You have now allied yourself with the criminals and are fighting on their behalf," which they did. Let's not revise history.

Now here's where the revision starts. First off, the Taliban, the interesting thing on that was that was legit international armed conflict because the Taliban wasn't tribal. The Taliban had become a national force. They had military advisors. We can go pull out Jane's reference books, which listed the Taliban Order of Battle on September 11, which incidentally included the 055 Brigade, which was the Arab brigade that fought alongside them, which bin Laden had recruited and pushed a lot of people into. There's a legitimate battle on the battlefield. Those battles, if you go and read the U.S. history on it and every account, were fought as legitimate battles. They are fought very much like the battles that are being fought by Libya right now.

We used air power plus military advisors. The Libyan rebels could use a few of those right now. We'd win in about two more days. As soon as we have military advisors to target the GPSs, you can't lose against a conventional force. And they fought as a conventional force and died in droves. They had distinctive marks. You don't have to be wearing a camouflage uniform under the condition. They were under control and, by and large, operated in compliance with the laws of war. They weren't attacking civilians. They fought in conventional methodology. There was nothing unusual going on there.

Q: This is the Taliban?

Swift: The Taliban, as well as the Arab irregulars who fight with them, fall into a category, and they are clearly under control of the Taliban. That's why they all get killed. It's a wonderful war for us. We like conventional war; we don't lose. That's great. Boom, boom, boom, boom, boom. We roll it up. Incidentally, Salim A. Hamdan is captured in the context of that battle. The first question that all of us asked—and I disagree with the Supreme Court and to this day I will in part—is, “When did the war start?” The Supreme Court said the war started on September 11. They are wrong in my view. Phil [Sundel] and I were asking that question the first day inside the Pentagon. Put it down as October 21. That's the day the first bomb fell. That's the day the war started.

When did the war end? When major combat operations ceased. When did it stop being international armed conflict? I don't know that it ever ended. When did it stop being international armed conflict and revert to internal armed conflict? It was when the Afghan

government was established in February, because there is no Taliban now. Now we are there at the invitation of the Afghan government, so now any conflict would be internal armed conflict under the war, which becomes tribal. So it shifts to a tribal war. The sense here is one thing that has to be broken apart and people do a bad job at this.

Q: But you had seen 9/11 as part of that?

Swift: A continuation, yes. It was a continuation.

Q: It was more than just a criminal act.

Swift: It was cause for war. Could it be tried as a war crime? Yes, probably. Probably in the sense there it doesn't fall outside the range, even if I look at the Yugoslavian tribunal. The attack, given its part, could be put into that conflict. Could it be simply tried as the murder of 1,900 people? Yes. I think it is cleaner tried in a civilian court to tell you the honest truth. It is cleaner tried there in my view. Could it be tried? It's, to me, the close question. The clear ones that can be tried—but see there just are not any—were war crimes that occurred between September, occurred here beginning in October and through the end of the conflict in February.

Now, because the internal armed conflict continued, let me tell you who I think that could be tried in military commissions who, ironically, have not been. Jose Padilla was the most legitimate person to try, because Jose Padilla was sent from the battlefield area to act as a spy. That is something that has always been tried in military commissions in the United States, to

engage not actually as a spy, but to engage in sabotage. Regardless of whether this combat is legit, saboteurs are never legitimate.

The next person who could probably absolutely be tried in the commissions was the Canadian Omar Khadr. He just pled guilty. I looked at his case as clearly within the military commission because he was engaged after. You have the right to fight back until the war is over. At the moment that you switch governments and you're fighting against a legitimate government, you no longer have the right to fight back. We have historically used military commissions to try the people who fought back after the end of the war. Ironically, almost none of those people are in Guantánamo. Almost all of them are in Afghanistan and none of them are being tried. No one has ever argued to have a military commission in Afghanistan where it would be legitimate under the laws of war on the idea that it's part of an occupation court. The irony of the commission was it was never used where it was supposed to be used.

Our argument was not, if you read very carefully, that the military commission in and of themselves were, per se, illegal. It was that it was improperly constituted in that the rules were wrong, and that Salim Hamdan wasn't a legitimate defendant because he wasn't a combatant and he wasn't a civilian being tried in an occupied zone. If you wanted to try him as a civilian, you had to try him in the occupied zone. That was our argument.

Q: When did you first hear about this commission idea? Do you remember at all?

Swift: Oh yes.

Q: It affected you at all?

Swift: No, it didn't affect me on that day. I didn't hear so much about commissions. I didn't even read the president's order. In December, I was asked by my boss at a department head meeting whether I would be willing to be a defense attorney for any of the people coming out of Afghanistan.

Q: Do you have any idea why they asked you?

Swift: They were already asking around for people. By that time, after some years in Mayport, Florida, I had achieved a similar status to great legends as defense counsels such as Derwin and Dwight Sullivan. I certainly had been a defense counsel longer than just about anybody else. Even in my SJA tour for the government I was a defense counsel for the U.S. in civil proceedings. It was pretty well assumed that I would do that sort of thing. And I'd do it. But it was a passing remark and I was not hostile to it. Next time it was mentioned, I wasn't asked.

One of my very "good" friends—a weird way of saying it because he was so much senior to me—but it was interesting, the senior prosecutor was a captain named Dan McCarthy. Dan McCarthy had been Secretary Danzig's attorney for years. I had known Dan McCarthy forever, from Vieques, from before on the Native American thing, and on a lot of other things. I represented senior officers, so I dealt frequently with Dan McCarthy as a commander. I thought he should be the Judge Advocate General in the Navy. But it turned out that Dan had made too

many enemies while being the secretary of the Navy attorney because Dan was a moral and right guy. He would go after senior officers if they screwed up. He was a Naval Academy graduate.

I had known Dan for a long time and he was the boss across the hall. His guys went against me. But we went running and we talked all the time and played golf. We were friends, as much as a lieutenant commander can be friends with a captain. He asked me about the *Quirin* [*ex parte Quirin*, 1942] case. He said, "I want you to look at a case. I want your perspective on it." I read the *Quirin* case. I said, "That is not a particularly good case."

And then Dan was like, "Yes."

Q: What was it about the case?

Swift: Well, clearly there were three things on *Quirin*. I would say they got the law right until the end. The problem with the case was not that they were trying saboteurs. If you followed the legal logic of the first part, the question of jurisdiction, which is where [Kenneth C.] Royall put his eggs in the basket, I thought Royall was wrong.

The first argument had come out of the original Civil War case, which was a question of, how far does military jurisdiction extend? In that case, they had said not to Ohio, because it wasn't a war zone, even though he was planning to take a military armory. It wasn't under occupation and the civilian courts could handle it. They had suggested that if he were a member of the armed forces, their reasoning might be different. But this guy was never a member. The *Quirin* guys are

members of the armed forces and they are engaged in a sabotage act. They were absolutely entitled. What was their crime? Not wearing their uniforms. The rules required you to wear your uniforms. They could be executed for it. Whether we should execute them or not is a completely different question.

My problems with it were, one, the case assumed that the only penalty was death, and we no longer agree with that. That's problematic. Number two is that they skip over the presidential involvement. [Franklin D.] Roosevelt rigged it. He rigged the outcome and he played with it and he made it come out the way he wanted. I said, "That's a problem." And they never did it again. If this were done in a court martial today, these guys should be acquitted for unlawful command involvement, which is the motion that was brought. Clearly, it was unlawful command influence on this case. They short-circuited the entire process. I wouldn't be calling unlawful command influence on just anything. I said, "Moreover, you need to read the *Yamashita* [*in re Yamashita*, 1946] case, which is still in favor of the government. But you need to read the dissents in it and understand that the rules that we needed to do better. This is a product of the military justice system that you and I fought against."

Back then, military justice was to justice what military music is to music. The UCMJ [Uniform Code of Military Justice] and the modern birth of military justice, which got rid of the specter of military justice, was command influence. This was the problem with it. It was fine on paper, but the commanding officer always got what he wanted. It was the Soviet system. That's the truth. If you had a fair commanding officer it could be great. But if you didn't, it was an absolute disaster. The UCMJ was created after World War II and one out of five people had been

subjected to military justice. Get rid of that to make it fair. After the draft was abolished, it was really changed around so that people would join the military. Modern military justice looks nothing like it did in World War II.

Q: No.

Swift: It's not that the rules are substantially different. It's the tenor of the argument, and how it's conducted, and that it's conducted to protect against unlawful command influence. It's not the huge other changes, it was that change. So why would we go and fight for something that our whole career has been against?

We taught the system as the fairest, best system in the country, and it is. When it works, it's the fairest, best justice. F. Lee Bailey put it best—"If you're innocent, there's no panel you'd rather be in front of. If you're guilty, but if you steal a loaf of bread to feed your family, this is not the blind federal sentencing system that slams you." As it will be shown by Mr. Hamdan and other things. This is the fairest system in the country bar none. I've now been in all of them. It's the fairest system there is as long as you keep command influence out of it. But the military commissions were created to ensure command influence. But I talked with Dan about it and so he kind of revises it and there's stuff like the Roosevelt. I found out later he went up for an interview to be the chief prosecutor.

Afterwards, I met with him. He's sitting in my office. I said, "So how'd it go?"

He goes, "Not very good."

I said, "Really?"

He said, "No, I don't think they liked me."

I said, "How could they not like you? I mean, you're Duke, you're Naval Academy. It's kind of a fitting end to your career."

He said, "I just don't think I said the right things. But I told them they ought to hire you as a defense counsel."

I said, "Well, that probably will ensure that I'm not hired."

He said, "I said you'd be great."

Lo and behold, they also were interviewing Colonel William Gunn for the position of chief defense counsel. I'm supposed to get an LL.M. from Temple University. Right as I am supposed to leave, I get a call from the office of the Judge Advocate General in the Navy. And my detailer calls me up and says the Judge Advocate General has a job he would like me to do. I know him. He says, "Are you willing to take a three week detour? They got a case, they want somebody in the commission, and a guy wants to plead guilty. They need somebody to hold his hand." I have not done a lot of guilty pleas lately, but if he wants to plead guilty, I wouldn't say no.

About a week later, I get a call from Colonel Gunn. That was fun. Colonel Gunn called on the day the results came in for the last trial that I had, the last hearing. I'd won a cocaine bust where I'd walked the guy completely. It had been a fun thing. Two of my junior officers had been there and they go, "Does that guy even understand?"

One of them goes, "What are you doing, doing that? You could make so much money."

I said "Yes, but this is fun."

So I drive in. I come into my office. The receptionist says, "You had a phone call while you were out from some colonel." And I said, "What did he allegedly do?" Usually colonels called me because they allegedly did something. She said, "Not that kind of colonel. He's at the Pentagon and he wants you to do some sort of a job. You're to give him a call as soon as you come in."

That was a Friday afternoon and I was there on Monday.

Q: Now you were one of four?

Swift: Right. Two were fired on Monday.

Q: Who were they?

Swift: John Carr and Robert Preston.

Q: And the other neighboring?

Swift: The other guy was somebody I knew a lot of, but had never met before. That was Phil Sundel.

Q: Why had you known a lot of him?

Swift: Phil Sundel began his career in JAG court by writing a certiorari brief to the Supreme Court of the United States when he was at appellate defense and having it granted. The first thing he ever did was a Supreme Court case. He was on the ICTR [International Criminal Tribunal] for Rwanda. He was the first prosecutor on the ground. He was a legend at appellate government on one of the best national security cases ever, in which I was there.

Q: What was the case?

Swift: What was the name of it? It was about a guy who was held by NCIS [Naval Criminal Investigative Service] illegally for thirty days in their own little special prison while they interrogated him. Phil knew more about national security and war crimes than anybody else in the Navy. There was no doubt about it. He was also like me, probably, in that this was not going to help us not to be terminal lieutenant commanders.

Q: Did Gunn ever tell you why he had chosen you or why he asked you?

Swift: No.

Q: Where might the suggestion have come from?

Swift: Phil and I were both nominated by the Navy and he accepted both nominations. He turned down the Army's nominations, and he accepted the Air Force's nominations.

Q: What's your impression of Gunn?

Swift: Brilliant. It's funny in these things, but Gunn had the most to lose. Like I said, Phil and I had both done what we wanted to in the JAG Corps. While the Brent Pope hang-up-the-phone approach is a lot of fun, you do not become the Judge Advocate General of the Navy doing that.

One captain had summed me up very well. He had said, "The Navy needs Charlie. We don't need him anymore. But we do need this one. Continue to promote this man and use good judgment in his assignments."

I asked [Weston D.] Burnett about that. He said, "Like all tools, you have to be wielded appropriately, because you are not appropriate for all assignments." And Wes Burnett was considered one of those brilliant guys in the JAG Corps. He said, "Charlie, I love you man. I do. For what you do, I love you. But we all understand that you're not the guy for every occasion. And as long as you understand that, you'll be happy."

Phil Sundel was the same way. And you know what? After every single tour I had written a letter of resignation, and then withdrawn it when they found something that I could do. Because I always thought, "I'm done. I like doing what I was doing. I don't want to do the new thing. I quit." But I was quitting all the time. That's also not a way to make judge advocate. Other than wanting to do what I wanted to do, Phil was worse than I was. We enjoyed what we did and we did it because we liked it. I think one of the things that Gunn saw in us was that it wouldn't matter to us. We were going to play the game to win it.

Both of the Air Force officers had been passed over. And my God, both of them were extraordinarily qualified. Extraordinarily. They had been on the Black Hawk shoot down case. They had great resumes. When I met both of them, I thought, "These guys are good." I had never met these people before, but you're in a room and I went, "These guys are good. Nothing wrong with these guys."

One of them did the appellate defense counsel and one of the famous Air Force cases to go to the Supreme Court. I saw his argument and brief and I said, "He's good. There's nothing wrong with him." They were kicked because they had been passed over. It was a very political environment. Gunn was the odd man out.

Q: You said he had the most to lose?

Swift: Absolutely. It was this time. Last week was the ninth year anniversary of it. It wasn't on St. Patrick's Day, but it was the day before. It was during the Final Four of the NCAA [National Collegiate Athletics Association] tournament. When I went to that party with Kevin Flood, a civilian who worked for us and was big in the ABA [American Bar Association], I talked to him about Will Gunn. He described Will Gunn this way—"Oh, you mean the first black Judge Advocate General for the Air Force?"

I said, "Well, I think he's a colonel."

He said, "Yes, but he's going to be the first black Judge Advocate General for the Air Force. What's he doing there?"

He had gone to Harvard. He'd gone to the Air Force Academy. He'd held all the right jobs to be Judge Advocate General for the Air Force. He was going to be the man. This was not a good job for him. I think he felt the pressure coming on in this part to play by the rules. If ever there was a "do what they say, survive it and get the hell out of their job," this was the job. I think they knew that. They absolutely knew that this was a mover and shaker and he's got to play along and say and do all the right things.

Q: Or else they thought it was going to be so easy.

Swift: Well he wouldn't be part of it. He was never going to do anything that would jeopardize that part. He destroyed it. Neither Phil Sundel nor I was going to make captain. We could make

colonel or commander. If we played it right, I think both of us had a shot at it. Phil said he had less of a shot than I did. If I wanted to make commander what I should have said at three weeks into it with Gunn was “Hey, thanks, but no thanks. Call me when this gets going. I’m off to my thing.” And by the time it got going, “No way.”

Q: What did Gunn tell you that first meeting that you would be doing?

Swift: He was gearing up to defend these guys immediately.

Q: He told you there were these commissions coming down the line? There were people?

Swift: We had the rules in front of us. We had all received them over the weekend.

Q: The first rules?

Swift: The first set of rules. I'd read them. My comment was, “An administrative board, only worse, where they can kill you, and in fact you can enter tortured evidence.”

Q: Well, those first rules—

Swift: —were amazing. They are up on the wall there. What fascinated me in this game was— that morning we sat there with a white board and we diagrammed out what we would do to

attack it. We didn't have a client, so it wasn't defending anyone. It was destroying the system. How would you destroy the system in the context of defending a client? That was the discussion.

Q: And what was Gunn's reaction to this?

Swift: He led the discussion. He was the guy at the white board that wrote down everything that would be planned out. One was to create an alliance with NGOs [nongovernmental organizations.] Two was involving the academic community. Find professors who will work with you on this part. Triple our power, similar to the death penalty defense. Let's look at what death penalty guys have done. Use NGOs in the field to identify translators and other persons who can work. Every person who we hired has to be double-hatted. They have to be for one purpose that we tell the government and another purpose that we did not. How will we exploit the problems in the rules? Can we sue in federal court and win? Is Royall the example or is [Isoroku] Yamamoto the example? Which one should have been won? Is it better to have a commission, *Yamamoto* [U.S. Military Commissions, 1948], and then fight? How do we overcome the big brass drum *Eisentrager* [*Johnson v. Eisentrager*, 1950]?

Where will we gain experts? Do we want to argue the law of war? Do we want to argue the UCMJ? Procedural and factual attacks? What will our clients look like? Are they actually obviously guilty? What would be the disadvantage of pleading guilty? How do we tell our story in the media when we are gagged? How do we get a second part of a dialogue? All that was on a white board, which, by the way, we later did all that.

Q: When you mentioned *Eisentrager*, then obviously there had been some background research done.

Swift: No, that was brainstormed by four guys who were very good at the game.

Q: Who just brought it up? Well, somebody must have known the case.

Swift: We read it over the weekend. I was told to prepare.

Q: What kind of preparation did you do?

Swift: I went to the LexisNexis and I pulled out all Supreme Court cases involving commissions.

Q: Okay. Nothing esoteric.

Swift: Well, it's not hard. There are four of them. We read it over. We talked about it theoretically. We read the rules. Our part was to win. It's funny. A friend of mine later said that the greatest mistake the administration ever made was allowing that meeting to take place. They knew it. Bill [William K. Leitzau] was the original architect of the commissions, and never has there been a more slippery—he's a good guy. I like Bill. He had worked on the world criminal court. Bill was at the very heart of the beginning of this thing. Bill had been originally on the negotiation team for the international criminal tribunal, ICC, International Criminal Court, which the United States did not sign after dictating all the rules. Bill was a graduate of the United States

Naval Academy. He was two years ahead of me and he was a graduate of Yale. Bill was really smart. When he found out that the four of us were in the building, rumor has it, he had us kicked out. Because he understood what would happen if you gave these guys time. He understood how fragile the commissions were. If you gave them time to think, they might do something.

Another Yale graduate, a submariner named Todd Bowman who also went to Yale Law, was part of the original brain trust that was sent over when they were talking about commissions in early 2002. I knew him from my days in Jacksonville and in Puerto Rico. These are some of the people that didn't make it into stories, but I think they're important. He told me a lot of stories. His first comment was when he heard that Phil and I had been in the basement in the Pentagon for six months thinking about this with nothing to do. He said, "They gave the two of you six months to think about this? Revolutions have been planned with less. What were they thinking? I wouldn't give you six hours. The one thing they controlled was timing. How could they make such a mistake?"

Q: This was that period after you met with Gunn and then—

Swift: Right. Nothing happened. We arrived in March. Nothing happens until December.

Q: Right. But you moved to Washington.

Swift: Yes, I move to Washington. And it's Phil and I all summer, and later Neal. We planned.

Q: What are you doing in that period?

Swift: Thinking about how to dismantle the system. As Phil says, not writing anything because we don't want to intimate when the time comes that we've written any motions. Therefore, we should have more time. But we are thinking about how to dismantle the system and how one might win and how one might deal with a client.

Q: So you are exploring exactly what those things that you put up on the white board the first day?

Swift: Right. Every day we were doing nothing but reading. First you read the cases, and then you develop the theory. Then you read practically. You meet with all kinds of experts about different Arab countries and Arab culture. You read through every history. You pull out the commission's transcripts. You read about the commissions that they held during World War II where they're going to come up with this theory of their liability. How do they win it? Why did defense counsel win commissions? Because they did win a lot of them. So if you can play to win, how would you win them? What are the arguments you could make? What does it look like? We started having questions such as, when did the war start? What constitutes a war crime? What are the sources of war crimes? Why can you admit tortured evidence? Why couldn't you?

Q: How did you get along with Sundel?

Swift: Terrifically.

Q: Was there a division of labor?

Swift: No.

Q: A division of ideas?

Swift: Discussions.

Q: How did you mesh?

Swift: Phil went on to be counsel for the International Commission for the Red Cross [ICRC].

Now he's back at commissions. Here's how Phil works.

There was an article by Katyal and [Laurence H.] Tribe on the commissions. We're in this huge, huge underground basement. It could hold fifty people. There's three of us in these cubicles.

Q: Who's the third?

Swift: Gunn.

Q: Oh, okay.

Swift: Gunn's in his office. We don't know what Gunn's doing. The two of us are having discussions. So Gunn's in there. Phil's in there. He throws this article over the top. He says, "You should read this. He's wrong, but you should read it anyway." I'd go in and I'd give an entire speech to Phil. I'd talk for twenty-five minutes. If Phil said, "Okay," that means Phil agrees. "I don't buy it" means Phil does not agree.

We brainstormed through how to win, and we changed positions over the course of it. My first idea is you fight inside the commissions. I'd come from a different part of it. I came out of the ACLU [American Civil Liberties Union] background.

Q: I saw that, that you were a member of the ACLU.

Swift: Yes, for almost my whole life.

Q: Really?

Swift: I had come out of fighting the gay and lesbian fights. Some of this stuff would happen out in civilian court. So I initially came at our role from that experience. My phone number was on Lambda's speed dial. I was a warrior in that world. I thought it was wrong.

Q: Cases that were brought up?

Swift: I would fight for them in the military. I understood that I wasn't going to fight on the outside. My idea was minimize the impact. Others will fight the federal courts. Phil's there, "There is no way to minimize the impact for these guys. They're going to get slaughtered. If we wait for the federal courts, nobody who waited wins. You've got to get proactive. You cannot wait back on this. If you're waiting, you're losing. If you buy into for a moment that you can win in the commission, you've already lost." That was Phil's position, that you cannot accept its legitimacy.

I said, "You can't argue to a member that they're illegitimate. You have to empower them. These are rigged. We're both right. We're both wrong."

But there's this fundamental question of how we will approach it. We presume that we will have the first contested case. We tell Gunn we don't care who he brings out. We want the first one. We're going to take it together. Phil will argue the law, I'll argue the facts. We can divide the labor. We've got the plan. This is what we're going to do. We'll take these guys apart. Phil's there—"This is a death penalty defense. If they say it's white, we say it's black."

I'm saying, "But death penalty defenses, you only do that when it's a sure loser. Who says we know the client is a sure loser? What if the client could win? Then there's a different approach. Then you want to empower the group."

Phil said, “You think they’re going to bring somebody who has any ghost of a chance in the first twenty? There ain’t no way, so start preparing for the worst. This is a death penalty defense. Get your head on straight.”

This was the argument back and forth. But I’m there—“You’re prejudging it and that’s dangerous, man.” We debate into the night. What were we going to do? What are approaches that people have taken? How would they work? How would we throw the ball? Meanwhile we’re talking to Neal a lot. We were writing him e-mails and bouncing stuff off of him.

Q: When did you bring—?

Swift: May. All summer we talked to Neal.

Q: So early on?

Swift: Early. The first three people involved in the military commissions were—I mean, Gunn’s the first person who is recruited, but Gunn’s in his office. Gunn did nothing for the first nine months. Gunn got involved after nine months when he saw what was going to happen. Gunn is so much like Jesus in the garden of Gethsemane. If he could have avoided this, he would have. But in the end, he did the right thing. Absolutely.

Q: Now you had no input into the procedures at all?

Swift: Well, they asked us to do that. Phil's like, "They'll use it against us. We want the worst procedures possible, so we can argue against it. The worse this looks the better we are. Hell yes, have them use torture. Don't get it out of there. They'll use it any way and not call it torture. Why would you help them build a better mouse trap?" They want input. Phil's there—"All of this will come back to haunt us." Phil won the argument.

I decided to go to the International Humanitarian Law Seminar at Harvard in June, and so I sent out an application. They turned me down. They were sort of like, "Who are you? Some military?" I wrote back and I said, "I am assigned to the Office of the Chief Defense Counsel for Military Commissions Defending Non-U.S. Citizens." I wrote out the whole title of it. I said, "And since you're going to be talking about what a lousy freaking job I'm doing, maybe you ought to have the good graces to invite me." Boom. I got an apology and an invitation. Phil went too.

But I was then written up for this thing where I said "defending certain non- citizens in the war on terror," because I had used the president's title. I thought this was egregious. I was called in and people were angry that I'd used the title that they used because people had made fun of it. I said, "But that's the title you wrote."

"Yes, but that's not what we meant. You should make it—."

I said, "Under what circumstances?" Well, people are unhappy. Phil's attitude on that was if people are unhappy, then we've done something right. And, "We're going to keep making him

unhappy until they do something wrong. Tweak the bear, boy. Tweak the bear.” That was Phil's attitude.

Q: A much harder line than you had at the time.

Swift: Absolutely. Phil was playing this game as a death penalty case. He was right and he was wrong. I find it hilarious because I told the *Wall Street Journal* what I was going to do in February of 2004. They put my defense of Salim Hamdan on the front page of the *Wall Street Journal*. They were shocked when I did it. How can you possibly be surprised? I gave an interview and said exactly what I was going to do. But you could see that article. The office at that time was Sundel, Swift and Gunn. Sundel's mentioned all throughout that article. New people were coming in, but we were the office. And we split over Salim.

So I was saying in this, about Phil and I during the process, it was funny. Neal will say this too. One of the things we always felt bad about was Phil Sundel did not get the credit over time of how important he was in constructing the argument that summer because the argument was largely constructed before we even meet Salim. Phil Sundel, whose first tour had been at appellate defense, and whose second had recently come from appellate government. He really knew the military appellate system, the military law. He understood Article 36 and he wanted to argue from the onset that the president's rules did not comply with Article 36. And in plain language in an article is that it needs to be—

Q: That was the fundamental break, that the president does not have—

Swift: Right. See Neal and Tribe argued that the authority lacked because it wasn't a war or because Congress hadn't declared war. Phil thought that that was not a strong argument and I tended to agree with Phil. He said because that ignores that modern warfare doesn't have declarations of war. It no longer serves a purpose. It ignores that modern warfare exists in the post-Security Council existence. A declaration of war existed for the purpose of making it legal. War is illegal. There are national security actions and self-defense—that's it inside the legal regime. There is no offensive war. The rules of war apply regardless on their face whether there was a declaration or not.

So he said, “The purpose of declaration of war—making the attack, a legal use of force—no longer depends. The legal use of force by the combatants themselves is defined by the rules of war which come into play not based on somebody saying, but based on the facts on the ground. They are fact dependent. Neal's argument and Professor Tribe's argument at the onset ignores this paradigm. So what, we're not at war in Afghanistan? Of course we're at war in Afghanistan and all the tools of war are available to it. See the *Prize Cases* [1863] available to Lincoln which also is a non-declared war.”

In that process, Phil's thought this through. But Phil also thought that doesn't mean that the president has full power to do whatever he wants. The Supreme Court in *Quirin* ignored the president's violations without spelling out what they were so they didn't have to deal with it. Our problem is *Yamashita*, which seems to suggest that you could have different rules. But if we could overcome *Yamashita*, we can make an Article 36 argument. That was Phil's arguments on

this. He suggested using plain language and that we want argue that Congress intended that these rules apply.

My argument was, “They are violating the Geneva Conventions.” Mine went to Common Article 3 and some of the things that applied. At first I thought I'd get somebody out of the occupation. In the first year of occupation, the Geneva Conventions have certain requirements. It's the fourth Geneva Convention that applies during an occupation. I would say they are violating both. We should argue the Geneva Conventions as binding law under Charming Betsy Canon and our own ratification of the Conventions, in combination with the 1995 War Crimes that criminalized a grave breach.

That was my part of the argument, inside the terms of war, and we should be arguing whether it's a war at all if they are trying to try 9/11, which is what I expected. When did the war begin? Can we argue that our guys are outside of it because *The Blackstone of Military Law* has always said that one of the first requirements for a military commission to be defined is that there is a war and occupation? If there's not a war and occupation, then you cannot have a commission. If the conduct precedes the war and/or occupation, it is not within the jurisdiction.

Q: I wonder if we could back up for a minute. You were reached at this point, you and Phil—

Swift: In part, this is in the summer of that year. This discussion is current.

Q: You're reaching out to—

Swift: To Neal.

Q: —and to other people as well as Neal, right?

Swift: Oh, absolutely. Largely at Georgetown. We went down to Georgetown University and we talked to Margaret Kleffner Nydell. She had written a great book on understanding Arabs. We talked to her a great deal. We talked to a couple of religious experts on Al-Qaeda and then on Islam. We went to every seminar we could on the different Arab countries and learned more on Al-Qaeda. We went to media seminars. We were reaching out to lots of different people. Harvard allowed us to start to build the bridges to all the NGOs, but not to CCR [Center for Constitutional Rights]. Phil and Neal were not CCR fans. You've met them. It's not where they are at. I was a little more leaning that way but they didn't go for that stuff—

Q: Actually I haven't met them but I know—

Swift: —the history. No, they weren't. But both of them were, Phil, in particular, very respectful of the International Committee for the Red Cross. What they thought even in private matters to us, so we want to hear from the ICRC. What Human Rights First thinks matters because those are former military and other people were also involved. They would be huge later to galvanize parts. We started to build those bridges. We would go listen to people like Elissa Massimino. Those people also understood that we were legit. That was surprising to Neal, not so surprising to them, but we started to build a reputation.

Q: How did you zero in on Neal Katyal?

Swift: He called us. He called Gunn.

Q: You had read the article and then he called who?

Swift: He called Gunn. He wanted to get a hold of us, and offered his help and advice. He wanted to hear who the defense counsel were. He didn't think anything would come of it, he said. We hit it off from the beginning.

Q: Do you remember the first day you met him?

Swift: Yes, absolutely. I went down to his office.

Q: At Georgetown?

Swift: We talked about it. We started to have the discussion where we raised our concerns with his approach and he raised his concerns with our approach and we began to build an approach. As soon as Neal suggested it, Phil was not as high on it. It was Neal who understood that we had to challenge the commissions at the onset. He brought an understanding from when he had clerked at the Supreme Court, that "You guys, you think you can wait until the trial is over. If the trial's over, you've lost. If they hear it at all, they're going to uphold it. See *Eisentrager*. You

think there's more courage here now to undo the system? You've got to get in front of it. If you're behind it you're going to lose. These decisions were made. You have to get in front of it.” We were really uncomfortable with that.

Q: Why?

Swift: Because that wasn't the way the game was played. You argued it inside the system. You fought the system inside, but you didn't go outside. Now, I increasingly became adamant about going outside and Phil was then worried about going outside.

Q: But Phil wanted to question the authority of the commission?

Swift: Yes, but do it within the context of the commission.

Q: Okay, within the context of the military?

Swift: Right.

Q: Not go to the outside courts?

Swift: Right. Well, somebody else would do that, as in the model that had been followed in all these other cases. We'll tell the story, we'll do all this, but we have to do it in that context.

No military officer since Yamamoto had sued outside the federal courts. None, in the entire history of the JAG Court, no one had ever done it. That had existed before the Judge Advocate General's Corps. Those guys were civilians in military uniforms. They were extraordinarily courageous but they were civilian lawyers, not career. So in the end this process was brought to a head by them granting certiorari—Neal was sure they wouldn't — in *Rasul* [*Rasul v. Bush*, 2004] and *al-Odah* [*al-Odah v. United States*, 2004, consolidated in *Boumediene v. Bush*, 2008]. I knew Fawzi [al-Odah]. Neal calls up, and says “They've granted certiorari. We have to get in.”

I said, “I don't know how we do that.”

He said, “Well, you have to write a brief.”

Q: Because this is so much a part of the story, I want to get the relationship between yourself and Neal Katyal.

Swift: By that time we're pretty close. Neal liked Phil much better than he liked me at the beginning and then over time I won Neal over partly in strategy and the passion for it. Neal started just to see that my ideas began to crystallize a little better and he realized that I was in a strategy to win.

Q: I have a sense you are very different personalities.

Swift: Extremely, extremely different. Over time, we began to click a lot more at the end. Phil and Neal were far more alike. Neal is far more ambitious than Phil is. Phil is an interesting guy; there's just no way around it. Neal's a very interesting guy but over the course of the summer I think I won him over by just continuing. I'm a salesman and I continued to sell. At some point he started to buy and see the process. It's funny. I had been the more resistant at the beginning because to me, Phil's route seemed like the long route to defeat. You weren't going to win and I wanted to win.

There is no second place in trial, a good showing. I remember a murder case where I fought that thing for nine months, did the best I could, my client gets life in prison. Man, he could've been represented by a monkey because death was never on the table. I didn't feel good—"Well, you put up a good fight." Bullshit. You didn't win. So to me, Phil's idea felt like the long fight to defeat. Neal felt that at least he was playing to win. Over time I became more, "We'll go to the federal courts." Not that Phil was against that. Phil started to be persuaded, too, but I really got persuaded that Neal's way was the right way. We've got to get offensive. We can't sit and take this. Brent used to say, "If you're not on an offense, you're losing."

Q: So your first offense was the amicus brief.

Swift: Well, the amicus brief comes in in this part. Yes, *Rasul/al-Odah*. That was the first step, but it was the beginning of the revolution. Another character who played a brief period of time but needs to be recognized for brilliance and bureaucracy is Mark Bridges. He was an Army officer. Neal called up that day and he says "Hey, you've got to file an amicus brief. This is a

disaster. We have to let them know we could lose everything here, because if you don't get jurisdiction it's over." Oops! I'm sold. Phil is not sold. Phil's there, "No, no, we don't even have clients. We're not excitant. How do we have an interest?" And I said, "Okay." The three of us were talked but by this time the office has gotten much bigger, comparatively speaking.

Q: Did they bring Mori in?

Swift: Yes, they brought in Sharon Shaffer, Mark Bridges and Dan Mori. So we're twice as big as we were. We're all of six. Ultimately what happens is, Phil and I say that we've got to get Neal because we're having these conversations and nobody else in the office has even met Neal. Phil and I were still going to do the first case. All that was going to happen and stuff and we wanted Neal. It was strange. In some ways, they were new and we were protecting our resources. But at this point we don't have any cases so now it's time to unveil Neal. We bring Neal in to give a presentation to talk about potentially representing or doing an amicus brief and why we should do it. Neal comes in and makes this sales pitch and Neal's Neal. This guy's brilliant. He's a professor at Georgetown and he's worried about presenting to four military officers like you wouldn't believe. I remember talking to him on the phone about how to persuade these guys. He sold everybody. But everybody's worried about the bar. It was Bridges who came up with the solution. He said, "You tell them you're going to do it, but we hire Neal first."

So here's what we do. We write a letter to Neal saying that we accept you representing us in writing an amicus brief that we'll help you with, under the terms of this. We accept that you'll be our attorney for this process. Each of us will also contribute to the brief, and this is what we'll do.

Because of our position, we'll have to ask permission. We'll let you know, but we lay out the entire brief and all the important reasons why we think we need to do this. And then he sends it to Mr. [W. James "Jim"] Haynes [II] with Neal copied on the letter. Then we say, "Of course, if we're fired we'll have to tell Neal we're not allowed to do it. Then Neal can tell everybody that he was hired but he wasn't allowed to do it." Because at the same time, the British have broken over their people in it, and they're supposed to be the first people up.

Q: Yes, the Tipton Three?

Swift: Yes, the Tipton Three. They're going nuts. So if the defense counsels wanted to file something and are not allowed to do it, well, we're there—"Neal, send it to *The London Tribune*. Watch all hell break loose. They can't sustain this." And sure enough we could do it because they couldn't. One of the biggest arguments was the independence of the defense counsel and Mark knew about that so he knew that Mr. Haynes could never order us not to do it.

Q: So it went to Haynes?

Swift: Of course, but Haynes couldn't do anything about it. He had to say yes. Actually, after thinking about it, he came up with this bureaucratic answer, "Ask your services whether there's any conflict."

So we sent it off to the services and said, "You have three days and we're going to act on this thing." We didn't ask for permission; we told them to tell us no, but we'll do it. All three of them

came back and said, “Absolutely, you can do it.” Now Mr. Haynes is absolutely screwed. So now he has to let him do it.

The next issue is you can't do any press. We file it, and one of the great lines in it—Neal and I will always argue who found it first—was the argument about King George. The Declaration of Independence, a legal document written by Thomas Jefferson, was basically a brief to the world about why our revolution from the crown is legal. Normally one owes a duty of loyalty to the sovereign. So why is it legal for us to rebel against our sovereign? What is our case against the king? One of the cases against the king was that he had made people subject to military jurisdiction without proper rights and tribunes and this onerous process. So, we're not in the military, so we quoted that in the brief. This is the longtime history of the United States. Because the press is not that sophisticated, they just saw that we'd called the president King George. We hadn't technically, but we knew exactly how it'd read and set off a firestorm. For two years, since September 11, no one on the military side had criticized the president; only the far left had.

I want you to think, at this point in time, even with the Iraq War starting to go bad, who had criticized the president? Other than the ACLU?

Q: Well there were demonstrations about the invasion of Iraq and—

Swift: Oh yes, those were massive. Gosh, people were in the streets. There was a big debate in Congress. That was easier to go to than the first Gulf War. It was a far bigger decision, with no debate. No one had said their role. We were the first ones which came from a different position.

It was certainly a thing of five military officers just said what the president is doing is illegal. They said it in an articulate way and they made it in such a fashion that declared that maybe everybody doesn't agree. Maybe things are not the way they are, and man, did that hit. That first punch landed because they had controlled. It hit hard and it hit exactly. The whole point was to change the debate and the brief changed the debate. We changed the debate. We had hit home on that part. Meanwhile, while all that was going on, the administration had decided to go island hopping.

Q: Before we move on, let's stick to the brief for a moment. To file that brief did you have to get the permission of the lawyers for [Shafiq] Rasul and al-Odah?

Swift: Yes.

Q: Who did you go to and how did you secure that? Who went?

Swift: Nobody. They came to us.

Q: Who?

Swift: Clive Stafford Smith and Michael Ratner. They came to us. I'm glad you brought that up because that was a fun meeting.

Q: Was that the first meeting?

Swift: Yes, then we went up and talked to Jonathan Turley. Neal was like, “You’re kidding me on this.” Neal was not coming to those meetings. [Laughter] No, he was not.

Q: How did you deal with those lawyers?

Swift: Easily, easily, easily, easily.

Q: You had to talk to them.

Swift: Absolutely. I'll tell you what, they were shocked. If Neal hadn't had the best opinion of us before he met us, imagine what their opinion was! The reason they met with us at all—because we hadn't even declared that we're doing the brief—was that Turley had worked with JAGs on this case that Phil had been the appellate prosecutor of. He knew that the Judge Advocate General Corps looked nothing like people thought it did. Turley was very well aware of the arguments inside. He was very well aware that the military could be extremely conservative, but that there were an awful lot of people that held different opinions. He had suggested to them, “Why don't you go talk and see who they are? They're being kept under wraps but maybe you can get a meeting with them. You'll want to hear them out. I think it would be beneficial.” So they came to see us.

In part they were shocked. They realized that a complete insurgency was being planned. And they were like, “why don't you need us?” And we were like, “We're planning on winning the

insurgency.” But then we hit it off and it would create a unique set of dynamics over time. In this conversation, Clive Stafford Smith asked the most pertinent question, because Clive was a warrior of the death penalty world of the Deep South. He asked me outside, “How many people are there like you all in the military? In the entire military, how many more of you are there?”

I said, “Counting the people in this room, maybe three more.”

He said, “That's exactly what I thought. It's the death penalty all over again. They put on a good first showing while the press is here and as soon as the press leaves it's back to business as usual. You guys are tokens.” That had the biggest impact on me because I started looking for a guy to fight.

It completely changed it over because Clive said, “I wouldn't be surprised if they wouldn't mind losing a case because it's about the greater good. Because then they can say it's all fair. And then they'll just slam people as soon as people stop watching. When you guys are doing all this you got to understand that you're playing for the man.”

I said, “I don't think they're that sophisticated.”

Clive says, “Well, even if they aren't, you are. Because that's how it'll end up. How long are you going to be in this office? When do you decide that you're going to do something else? How long are any of you going to be in this office?”

I said, “Well, that's always the problem. Do you think they’re going to replace you with the same people?” They did not, by the way.

So Clive was on that and that had a huge impact on me. It was like, “We got to take the system on.” It was one of those moments that I really see all the reasons that people have had. I saw Clive's methodology. It was funny because a lot of people did not like each other because of the differing styles. I liked them all. I liked Neal. I thought Neal was extraordinarily important. I liked Clive because I thought Clive was equally extraordinarily important. I thought they were very dissimilar people, but both brought extraordinary talents to the game and they were good.

Q: I don't know the timing but it just strikes me—

Swift: By the way, I got Clive Stafford Smith his security clearance and that alone should've qualified me for an award.

Q: —as something unfair to say because there had been, within the military itself, a lot of questions about the techniques of torture, a lot of questions about the code of military justice.

Swift: You're missing what I'm saying about Clive's part. At that time, inside the defense counsel, he was concerned. We took the system on and he was there saying, “If you fight it out on in case by case basis instead of systematically, you're going to lose. Because you'll win a case or two here but they'll change the system as soon as you do.” Clive believed that you had to have the attention of the world, but if people weren't watching things went bad.

Q: Oh yes, what he committed himself to.

Swift: Absolutely. Neal believed that only nine people mattered. There were just different approaches; all of them were right. Attention did matter. There are far greater injustices being done in Afghanistan and certainly in Iraq than there were ever done in Guantánamo. But if we play this out—

Q: I can see why you would find Clive Stafford Smith's argument more to your liking because you've already talked to the press.

Swift: No, I hadn't talked to the press at all.

Q: Oh, I thought you said the *Wall Street Journal*.

Swift: No, that's much later. I talked to Clive in the fall of 2003. All this stuff is being germinated before it happens. Clive is in that part. Then it comes up that we're going to do a brief. They didn't love our brief because we took a more neutral Neal-like approach. They wanted fire and brimstone, but the brief was extraordinarily effective.

There would always be an argument. Remember, the guys who were on the CCR, Clive and those guys, thought we were going to lose *Hamdan*. Absolutely. But we were convinced that we

were going to win and it was the only case. They were convinced that we were idiots. Oh, there were huge disagreements—are you kidding? Those would come down the road.

But I saw Salim—and this is no lie. Neal always disputes this, but this is exactly the truth about it. I watched a lot of the History Channel. I was a history major and I love the History Channel. One of the drawbacks to the History Channel is sometimes it feels like it's the “Nazi History” Channel. How many people make their living in Nazi historians? It's like, “Gosh, get over it already.” It's sort of a tired field, but I guess it plays well. Normally, I don't watch those because I've watched a lot of it. I've read about it and I've read some of the seminal works and I'm just there thinking that I'm done with it. But they were having one documentary and in it they interviewed Hitler's driver.

This was right as Salim had hit. My job was to screen the cases and make recommendations for assignments. It's a plum job because I get to tell Gunn who I thought ought to represent each person. I saw the driver documentary and the next day finished Salim's screening and recommended myself. Now, on the top of Salim's package was that he would plead guilty. Phil was not interested in him for that reason. The last thing he wanted to do was be part of some guilty plea that would validate the system. He ended up taking the propagandist, [Ibrahim] al-Qosi, who was next up. I told him he should come on *Hamdan* with me but it would've been hard to get to anyway because this was supposedly a guilty plea. But I'd read Salim's statement and I said, “This isn't a guilty plea!”

Q: The FBI [Federal Bureau of Investigation] interview?

Swift: Yes. I'd read all three of them that they provided. I'm going, "This guy's asking for a lawyer. You don't do that if you're going to plead guilty. I don't think he thinks he did anything wrong. I think he's cooperated significantly but I don't think he thinks he's done anything wrong. And I'm not sure he has either." So I think they'll only get worse from here, in the short term anyway. If we're going to challenge we need somebody who has no blood on his hands, and I think this is the guy.

Now at the same time Dan Mori is assigned to defend David Hicks. David Hicks comes with baggage. David Hicks is already represented by Michael Ratner and CCR [Center for Constitutional Rights].

Q: And someone from Australia.

Swift: Oh, all kinds of baggage. So I go to Neal and said, "I got to get help. I can't do this, but I think Hamdan, not Hicks, is the challenge. First off, Hicks has all this baggage. He has Ratner. He has all these guys. Secondly, he should cut a deal because they're willing to give away the farm with him. If they get certiorari, they're going to give him the deal of a lifetime and it'll dump.

I said, "He's good on the issues of whether he did anything wrong, but you don't want CCR, you don't want to play with it. You want to know the advantage to bin Laden's driver? Nobody else

wants him. Nobody wants him. And it's good on all the issues. What's the war crime? What's all this stuff? What's Geneva? It's all the issues that we want to argue and he didn't kill anybody."

And Neal was like, "He's bin Laden's driver!"

I go, "Can we step back from that for a moment? You don't try drivers for war crimes."

Neal was not so big on that idea. "He's bin Laden's driver!"

I said, "It's not going to get any better. Besides, here's the deal." What happened was, out here in the Ninth Circuit, at the same time that *al-Odah* had come up and Neal was very pessimistic on *al-Odah*, they had decided a case out here where Judge [Stephen R.] Reinhardt had decided that there was jurisdiction.

Q: Had you been to Guantánamo?

Swift: Yes.

Q: Oh, let's back up and get you to your first meeting with Hamdan.

Swift: No, I haven't met Hamdan. I've been to Guantánamo, but I haven't met Hamdan.

Q: What did you go to Guantánamo for?

Swift: I went for a tour of the place. Salim saw me on the tour. He did.

Q: Were they letting lawyers in at that time?

Swift: No.

Q: That was before *Rasul* so there weren't very many going down.

Swift: No, we went down just to get a tour and understand the facility and all that.

Q: Oh, that's right. You could do that because you're in the military.

Swift: Yes. We went down the week they arrested Chaplain [James J.] Yee.

Q: Oh, tell the story.

Swift: Chaplain Yee's arrest? He was arrested in Jacksonville.

Q: No, your trip down and then him—

Swift: Well, the assistant SJA was a long-time acquaintance. I won't use his name in this part because I really dislike this guy. I had had many run-ins with him over the course of my career and Dan Mori was like "No, he'll be cool."

I'm there, "Yes, right." We got stranded at a runway for three hours. I said, "See, cool? Uh-huh."

Anyhow, they were busy arresting Yee during all this. But we went on a tour around through it and we were all highly unimpressed.

Q: What was it like at that point in time?

Swift: It was about as hard as it ever was. It got a little harder the next year, a little harder. But they had not yet begun the frequent flier program. This was the height of a lot of the discipline stuff. They showed us some of the discipline areas and I asked how long that guy had been there and they said, "Well, he can only be here for thirty days."

I said, "How long has he been here?"

"Well, he was here for thirty days and one day out then thirty days back in."

I go, "That's illegal."

And they go, "Sir, you have no authority here."

Then they constructed Camp Echo, which was for the benefit of the guys who were going to have lawyers. I said, “So they’re in solitary confinement and how long will that last?”

“Sir, we're not authorized to talk about that.” Then they said, “Sir, this place sucks.”

After that first tour, I said to Gunn, “The island of misfit toys, sir. Nothing here is quite right. Nothing here is quite right.”

I hadn't been assigned to Salim, none of that had happened. But at the same time, the Ninth Circuit had decided—

Q: *Gherebi*? [*Gherebi v. Bush*, United States Court of Appeals, Ninth Circuit, 2003]

Swift: Ninth Circuit, *Gherebi*, yes.

Q: Ramsey Clark and his group brought that case.

Swift: Judge Reinhardt decided *Gherebi*. Now I have an argument for Neal, “Neal, it's now or never. Based on *Padilla* [*Padilla v. Rumsfeld*, U.S. Court of Appeals, Second Circuit, 2003]”—and we thought *Padilla* was the best law—“a lawyer, when the client is held incognito, can serve as his next friend. I want you to look at the target letter that I've been handed. It said that the only reason I could talk to Salim was to discuss making a deal. If we weren't making a deal, the access

to him would be denied. Based on a denial of access, no guarantee of access after a deal, can I not act as his best friend, prima facie, on this document?"

Neal says, "Yes. Go see, so we have an understanding."

I said, "Now, so what? What does that get us? Where do you think we can sue?"

He said, "Virginia."

I said, "Actually, Seattle."

He said, "How do you figure that?"

I said, "Because that's where I entered military service from. When I came back in way long ago I entered from Seattle."

Now I'd like to tell you that I did love Seattle and I have come back to Seattle, but that's not the reason that I stayed a resident of Seattle.

Q: Why did you stay a resident?

Swift: As long as I was a resident of the state, there was no state income tax. I'm cheap. Why would you volunteer to pay taxes in another state? So legally, under military jurisdiction, I can

file as next friend, where I'm susceptible to suit and where I can file suit. That's Seattle. Neal takes it to two of his civil process attorneys, comes back the next day, "You're right, that's Seattle."

I'm saying, "Dude, we can bring this in the Ninth Circuit. We're guaranteed jurisdiction, which means we'll at least get a merits hearing on our complaints. We need to do this before the Supreme Court rules. Because if we can get a merit hearing—this is at the time when things did not happen exactly to the plan—out in the most liberal area in the most liberal city in America where we could win, if we can get that victory where the judiciary is openly hostile to the military commission, if we can get that victory at that time, then the Supreme Court will think twice about saying there's no jurisdiction. Potentially we will win at the Ninth Circuit and we will have to go to the Supreme Court. We've got a window, but that window is going to close because if *Rasul/al-Odah* comes out the other way and there's no jurisdiction, we'll be foreclosed."

Q: And you did not want to go to the D.C. district?

Swift: Of course not. That was the last place we wanted to be, next to the Fourth Circuit. But you would have thought I would be in the D.C. or the Fourth Circuit. I lived in D.C. and I was working in the Fourth Circuit in northern Virginia. But no, and it was legitimate.

Q: I'm a little confused on something. Had you met Rasul yet?

Swift: Rasul? No. Had I met Hamdan? No.

Q: So this is all before? But you're a friend of the court; you're arguing for Hamdan?

Swift: Not for Hamdan. Well, I did file it on Hamdan's behalf because I've been assigned to be his defense counsel although I have not yet met him. Hamdan doesn't know anything that I've done for him. He doesn't know I exist. All he knows is that he's been placed in solitary confinement in Guantánamo Bay in December when I got assigned.

I'm trying to talk Neal into joining this effort while we're doing this amicus brief. Eventually Neal agrees in mid-January, just at the same time. He'll help me with this, so after filing the amicus brief I go down to meet with Salim. Off I go. I'm already playing the media end at this part because I tell him right off the bat that Carol [Rosenberg], who was a huge force—if you haven't interviewed Carol you have to interview Carol.

Q: Carol Shaffer?

Swift: No, Carol, the *Miami Tribune* [*Miami Herald*].

Q: Rosenberg.

Swift: Carol Rosenberg is calling me up every day for an interview because she now knows our names.

Q: From the amicus briefs?

Swift: Yes. It was announced that I represented Hamdan, and I said, "I need to get out from under the protective order." Carol publishes a story about the protective order. So I push and I got a clearance that you would not believe, where I get to basically talk about anything by creating a crisis. I asked if we could talk about his conditions of confinement, and I sent a copy to Carol.

Q: What they wanted you to do is simply go down and get him to admit guilty and file it and be done?

Swift: But that's not what was going to happen because I had—

Q: Did they know you?

Swift: Everybody asks that question. There's a great line from the chief prosecutor. This is the second one, and this shows the disconnect. Everybody in the military knew what was coming, It was the civilian establishment that simply could not believe it. [Frederic L.] Borch was asked how long the commissions would take. Mr. Haynes said, "A couple of weeks, right?"

Borch said, "Well, first they'll need to be motions."

, “That'll take several months at a minimum.”

“Fred, try years, but several months at a minimum.”

Haynes goes, “There's going to be motions? About what?”

Fred goes, “They're going to challenge the system.”

“No, they won't. They're in the military. Why would they do that?”

Fred goes, “They always do that. They've always done it. But this is different. This isn't Nazis.

This is the War on Terror.”

And so Fred's position, let me get this straight. Nazis, that's okay to challenge. Alleged terrorists, not okay to challenge. What is he thinking? Where did they get this? And of course there were motions.

Q: Tell me about first meeting Hamdan.

Swift: Well, before I tell you about that I got to tell you about first meeting Chuck [Schmitz].

Why, you might ask, had I not gone down to visit Hamdan when I was assigned to defend him at the end of November 2003? Here we are January 30, which is the first date that I visited him?

What could have you been doing for the last two months that you couldn't go down and visit

your client? Well, the military commissions had gotten completely set to go but do you know why they were trying the British first?

Q: Because they spoke English.

Swift: You got it. They didn't have any translators. So when they decided to island hop forward, they still didn't have any translators. I said, "Let me get this straight. We've had brilliant military minds working on this nonstop for two years now and we have no translators. You thought they all spoke English? What the hell?"

But I used this to my advantage because the first week I said, "Assign me a translator."

"We don't have one."

The next week, "Do you have a translator yet?"

"Nope."

The third week I said, "Would you like me to find you a translator?"

"Yes."

"Good. Now I have control of the process, I don't have to fight you about this."

One of the things we had learned when we went to see the ICTY [International Criminal Tribunal for Yugoslavia] was to multi-hat everyone. We wanted multi-roles but they had said the person to multi-hat was the translator and to get an academic. So I said “Get an academic, get somebody who can help you with stuff.” This person is not just going to be translator, they’re going to be part of your defense team. But I thought I’d get an academic from Yemen. Then it was explained to me you can’t do that. One, they’ll never get a clearance. Two, Yemen is a tribal country and you might get somebody who hates your client and you don’t know it. That was explained to me by the ICRC. So the ICRC said, “No, you have to hire a Westerner,” which was completely out of my thought process, but then they wouldn’t give me a recommendation because they’re neutral. God, the neutrality thing would drive me crazy over time.

So ICRC can’t give me a recommendation, but Human Rights First could and several of the other ones could. Amnesty [International] gave me one but Human Rights First gave me the best one. It’s not that one organization’s better than the other. It’s that they had a Yemen presence. ACLU [American Civil Liberties Union], or Amnesty, did not. Amnesty’s rep in Yemen at that time was not particularly strong so they just weren’t as good.

Q: So you wanted an academic that had also studied—

Swift: In Yemen, absolutely. They all came back with one name and she was German and she was teaching at the University of Richmond. I called her up and it became clear to me very early on that she was the ideal person. Everyone would admit that. Unfortunately I also figured out

quickly I wouldn't get security clearance for her. Even though because of NATO [North American Treaty Organization] she should get one, it would take too long and time was ticking away. I asked her for a recommendation and she had three people. They were three Fulbright scholars to Yemen after the civil war ended. After those three recommendations I said, "Great, give me their numbers, I'll call them."

"No."

"Huh?"

"No, I'll talk to them and then we'll all decide who you'll get and you'll like it or you'll hang up or I'll hang up on you."

"Okay, sure. Please do so and get back to me."

The name they came back with was Chuck Schmitz. The first time I called Chuck Schmitz, his wife hung up on me. You have to remember, two translators had just been arrested, one from the Air Force, one civilian. "Yeah, you want my husband to go down and do what?" Amy is like flower power. I mean, she really was flower power. She was at the height of Haight-Ashbury. I love Amy. She's the best. She hung up on me in a heartbeat. I had to call back twice to get him on the line. I met him at the coldest metro station on the coldest day of the year and got him to say yes in the freezing cold after making him stand around.

Off we went. I knew I had the right guy on this process early on. I said, "I have a lot of questions for you. I have one last one, based on what you know, what you've seen so far. Tell me what I am doing wrong."

He looked at me and said, "Well, you could start by calling your client by his correct name."

How do you think it's pronounced?

Q: Oh, I know, "HAHM-dahn."

Swift: Yes, you learned. But "SAH-lem HAHM-dahn." I was saying "sah-LEEM HAM-dan." Now that's perfectly legit if you look at the spelling. Do you know how he, without seeing an Arabic spelling on it, knew that it was wrong? Because I asked, "How do you get that from this, oh Arabic linguist?" He said that American translations mean nothing because there are no exact ones to it, but this is easy to figure out.

And I said, "Why?"

He said, "Because there are no 'HAM-dans' in Yemen. There's a 'HAHM-dahn' tribe and he's from their region in the Hadhramaut and that's the Hamdans. It's not his last name, you idiot. It's his tribe. And there are no 'sah-LEEMs.' That's an Egyptian word. There are only 'SAH-lems.' Therefore, it must be Salim Hamdan. His name is Salim Achmed. He goes down through the

whole thing about how this is the only one that could be close to right from his region and his tribal leader is so and so.

I go, "I've got the right guy. Holy shit, I've got the right guy."

He said, "Yes, I've been to his village. Bin Laden lived one village over. That could be bad."

I said, "Damn right it could!"

"But you need to learn something about the country of where you're going to represent because you don't know anything."

I said, "Man, I've been studying for nine months."

"Wow, and I'm sure you've mastered the Arab world." That was humiliating at the beginning but I knew I had the right guy.

[INTERRUPTION]

Chuck went down on this trip on the thirtieth. First off, you have to know what Guantánamo Bay was like that day. It was the only way to get Chuck down and it took until the thirtieth of January and he was still not cleared. This was a recurrent theme that I've learned inside a bureaucracy. It's been said recently, and people totally took it out of context, that the president's Chief of Staff

Rahm Emanuel said "Never let a good crisis go to waste." Gosh, is that right if you know anything about government! The only way to get anything done in government is to create a crisis. Decisions by bureaucrats are only made in crisis. That's a David Boerner rule from administrative law—creating a crisis is how to get something done.

I created a crisis with Chuck. I said if I sit around and wait for them to say yes, I may never meet this guy. I'll tell them I'm getting on a plane with Chuck and I'm flying down there. We arrive down on the runway and while sitting there I say, "We're spending \$7,000 of the government's money, and I'm about to be turned away and the *Miami Herald* is sitting on the post. What do we do?" Then he got cleared. We were guarded by this reservist who was from Nigeria, a female with a shotgun, sitting on the runway. It was hilarious, because we were supposed to be there. Now I've been supposed to be there forever, but we weren't supposed to be there. No one had told them.

No one had told us that one of the reasons it took longer than I thought it would take was they were running a major exercise that day. In this exercise, Al-Qaeda had attacked Guantánamo. Where they had achieved the air force and navy necessary for an amphibious invasion, no one seemed to—but for the purposes of this exercise, Al-Qaeda had attacked. And in fact they had attacked the military commission because one of the reasons we were holding was, "Of course Al-Qaeda would attack any courthouse in which they were held!" Because that is the scenario, everyone accepts it. So of course they're going to attack here and because it would be necessary to have an air force and a navy, they were magically given one. It had been a major battle that raged for two days but thank God, it just slightly tipped our way.

It was complete with fake wounds when we went down to the Pass and ID section. Yes, Al-Qaeda had, for whatever reason, decided to attack Pass and ID. Al-Qaeda had said they don't need any badges and attacked. The woman sitting there that day had a fake amputation and blood spurting out. It was great. Halloween, April Fools, everything wrapped into one and it's Superbowl weekend. How can it get better than this?" We didn't get to go see Salim until Saturday afternoon because of that.

Q: You came in on a Friday?

Swift: Friday, yes. The next morning we have to go to see the SJA. He's not happy that we're here. Our rule on SJAs was we always disliked the current one and then missed them immensely after they were gone because it never got better. He drives us down to see Salim and we get there at about one o'clock on Saturday afternoon and they take us into Camp Echo. Camp Echo is off from all the other camps. Camp Echo at that time had expanded. They kept a lot of people at Camp Echo that they didn't talk about. But at that time it was smaller; it was only for detainees.

We go through two sets of gates. It has regular wire fence topped with concertina wire, but everything has canvas so you can't see in. A cyclone fence, you go through two sets of gates and then you're inside. There are just huts that look like they're out of *Papillon*. They're just wood huts, all facing inward. In each wood hut there are two doors on each side and there's a cell in each one. Inside the cell, inside that, there's a steel cell where the individual is kept.

Then Hamdan had been brought out and shackled to the table. He was in what we call a four-piece suit, which is the handcuffs, handcuffed to the waist, leg irons, all of it handcuffed together, handcuffed to the ground. Salim probably stood a big 5'4", 5'5", and may have weighed 130 pounds. He's a huge guy [sarcasm]. He has a very long black beard. He's smiling because we are the break in his boredom of the last forty-five days. Salim has been outside when the sun was shining one day in forty-five, for thirty minutes. That's it. That's the whole time.

We proceed to sit down and explain who we are. He did not want Chuck at first. "I want a Yemeni." But Chuck is an extraordinary guy. Later on when we would do interviews, people would say, "They will not talk to you, never." Every one of them talked to us. After five minutes with Chuck they just started talking. He's really good at it. He just talked to Salim. Salim was happy to talk to anybody after a while. Arabic started and they just talked for a while and then we started talking. During the course of that afternoon I explained my grand plan. I didn't know how long I'd have. My mission from Neal was to sign this guy up as a client, to just get his signature. That was all we needed.

Q: The signature for you and for Neal?

Swift: Yes, and then we'd be in business. He really didn't care about the rest. It would be more complicated than that. Neal's never actually dealt with a client. There's a human being on the end of this. I tell Salim all about Neal, and I tell him about the Geneva Conventions. Salim is a very smart guy, but he has a second grade education. He's taught himself to read. His grammar is interesting, according to Chuck. I wouldn't know. He and Chuck argued about Arabic grammar

all of the time. Chuck would say, "If you want to do it that way. But that's an interesting way of doing it." They would argue. During the course of it Salim asked three questions. First, he wanted to understand why I was doing this.

Q: Good question.

Swift: Absolutely. He wasn't buying the "I believe in the country" stuff. I gave him the speech, "I believe in this, I think the president's wrong," all that stuff. He was like, "Whatever, dude." That's not what he says, but that's what he's thinking.

Next he asks, "Will this make you famous?" I give the lawyer answer, "Possibly." He said, "I think you want to be famous." This is what Salim says, which is, "I buy it. Okay. I think that you're going to go out there and fight for me because it's for yourself as well."

I don't know that I really did want to be famous at that point in time or know that I do, but I certainly was ambitious, not so much for the fame but to win this. It was important to me and I thought I could win it. Neal and I both were not lacking in ambition. It was required for this; you had to be audacious.

He asked another question, he said, "Will it make me famous?"

I said, "Probably."

He said, "I do not want to be famous. I want to go home."

I said, "I don't think you can go home without being famous." Then he asked what I think is one of the great—well, there was another thing, and this was before it, a famous line of Salim's and he repeated it out on the steps of the Supreme Court. Salim said, after I had given him the entire Geneva Convention, UMCJ, Professor Katyal, all of this spiel, Salim said, "But the guards say there is no law here at Guantánamo." I said, "I don't believe that. I believe that there is always law but we will have to fight for it; we will have to go to the Supreme Court and win it."

Later, after this wonderfully inspirational speech—I don't know how it translated in Arabic, but Salim got the gist of it. He said "Mind you, I'm not thinking that you have any chance at all, but let's just suppose that the justices, the Supreme Court happen to agree with you. I can't see why they would, but let's say they do. Why would the president follow it? Why would George Bush do what they say?"

That's a great constitutional question, but I didn't give a great constitutional answer. I said, "Because they made him president. He has to do what they say."

His question was exactly, "Why would they do what they say? Does the Supreme Court have more rifles than George Bush?" That was his exact quote, "Do they have more rifles?" Chuck explains he translated that word for word and the reason is that he was struck by it, but in Yemeni what Salim really meant was more power, to be fair.

I'll tell you about meeting Harry [Schneider]. In the end, after we signed Salim up, we needed to file suit in Seattle. We're ready to do it. So we read the rules for the court out here and you need to be a member of the Washington State Bar.

He said, "Are you a member of the federal court?"

And I said, "No."

He said, "Well, you need to join it."

I said, "I can't."

He goes "Why not?"

I said, "I'm not a member of the Washington State Bar."

He said, "You're from Washington. How can you not be a member of the Bar?"

And I explain, "Well, there was this JAG thing, but let me tell you the other reason I never joined it is North Carolina does not require CLE [Continuing Legal Education] or bar dues for anyone in the military. So I've not had to pay bar dues or CLE's for the last ten years. And cheap defines me."

So Neal says, “Are you kidding me?”

We called around and everybody turned us down. We’d been looking for a week and a half and no one was saying yes. I was in Neal’s office, and he’d gotten an email from a student of his, David East, who he was now working for Perkins Coie. Neal said, “David’s with Perkins Coie. What do you think about asking them?”

I said, “Well, they’re the number one firm in Seattle. They’d be great. I don’t know if they’d do it.”

So Neal said, “It doesn’t hurt to ask him.” So Neil fired off an email to David East. We’re asking a first-year associate. David passes it off to the pro bono coordinator, who sets up a phone call.

Now the phone call is with Harry Schneider, who is the senior litigation partner at Perkins. The only reason that Harry is on the phone line and the reason Perkins did this is Harry had given out an award the day before—Perkins wins all the pro bono awards—to another one of the Perkins people for their pro bono work. He had talked and lauded the value of pro bono and how important it was to the community.

On his walk back from the Washington Athletic Club, Harry had thought briefly about his own pro bono work. He thought very briefly about it because there wasn’t any, at least in the last twenty years. By the time he got up to his office in the tower, he stopped by the pro bono coordinator’s office and said the following words—“The next thing that comes in, I don’t care

what it is, it can be some little landlord-tenant, whatever, I'm taking it. I need to do some pro bono and set an example around here. I can't keep giving out if I don't do it."

The next thing that came in was Hamdan.

Q: Perfect story.

[END OF SESSION]

3PM

Session Two

Interviewee: Charles D. Swift

Date: March 24, 2011

Interviewer: Ronald J. Grele

Location: Seattle, WA

Q: This is session two of the interview for the Columbia University oral history project on Guantánamo with Charles D. Swift. The interview is being taking place in Seattle. Today's date is March 24, 2011. The interviewer is Ronald J. Grele.

Swift: This is Charles D. Swift on day two of the interview.

Q: We left off with two things hanging—going down to Guantánamo and Perkins Coie.

Swift: Right

Q: So there were two things hanging.

Swift: I'll back up to Guantánamo because Perkins didn't come into the game until after Guantánamo. First and foremost we had to get the client. There's a story in getting the client. Saturday had gone really well and then along came Sunday. It was Superbowl Sunday. We went to talk to Salim and he was not nearly as excited, at least not as excited as I had thought he had been on the first day. The novelty of us had worn off a little. Doubts had started to creep in about whether we were who we said we were and if this was just a big set-up. Salim determined that he wasn't going to make a decision. He wasn't against it, but he wavered. And Chuck said, "This

isn't the Arab way. You've asked him to make a decision and you've not even asked him what happened."

Q: Right.

Swift: Salim started telling me his entire story, which was really quite something. But we weren't able to get it done. We ended up flying back from Guantánamo on January the thirtieth, having not gotten it done, but with the absolute plan to turn around and four days later and come back.

Q: You hadn't gotten his signature?

Swift: No, we had not gotten his signature. Neal was not pleased. We had to turn it around. We had a lot of phone calls on Monday, asking, "Do you have a signature?"

"Well, we're going to get it."

"Well why don't you?"

"Yes, this is delicate."

"Why would it be delicate?"

Neal came to understand and we turned around a week later and came down again. This time we went all the way through everything that had ever happened to Salim.

Salim was amused at how early I started. I started with those basic questions like where were you born, tell me about your childhood growing up and all that sort of stuff. And Salim's like, "Why do you care?" Then when we got to going to Afghanistan he said, "Ah, now the cart gets hooked to the horse." We talked about that part, and I remember Chuck coming out afterwards saying, "Can't we just explain this to them? This guy's just a simple Yemeni."

He had fully expected, like I, that the government was going to try someone who had played a significant role in Al-Qaeda, a somebody. But this guy is not somebody. He knew that around the fourth interview, he said. He is exactly who he says he is. From his own research out there and how he'd now talk to him long enough, he knew who he was. They've made up their mind. There will be no persuading them; we'll have to persuade others. To get Salim's trust was, I said, "Well, if we do this, why don't we have the court hear from you? Write a statement, an affidavit of what happened to you. That will become the facts of our habeas petition."

That sounds easy but it wasn't. Our first thought was that we would just write it out, in pencil. Chuck could write in Arabic and he'd have him sign it. Salim wanted it typed. He asked if there were others that were typed and I said, "Yes, usually they are typed."

"Then I want mine typed."

“So Chuck can you just type it up on a computer?”

“Well, no, computers have to be set up for Arabic.”

Q: That's right. Yes, yes, yes.

Swift: Chuck could type in Arabic on a computer but it had to be set up and guess what none of the computers in Guantánamo were set up to do? We didn't have one. So I had to go to the MWR [Morale, Well-Being and Recreation] computer area and talk an old friend, who I'd known from earlier in the Navy, into setting up a computer to type in Arabic. Now I want you to imagine you're in Guantánamo. It's 2004 at the height of all Guantánamo things. They are arresting people and we are over in the corner typing up a statement that has been written out by a detainee to take it to a federal court.

Q: Were you able to download a program for it?

Swift: Oh yes, we were able to set it up. We got it set up. But I'm sitting here and Chuck is over here in the corner. It took hours, not minutes, of typing over in the corner. Chuck will tell me what's in parts of it and I'm correcting it. We're typing up this massive statement and Chuck's sure that the guards are coming at any moment to take us away. They weren't monitoring the computer. They weren't monitoring MWR. We got the entire statement done. We take the statement back to Salim Monday morning because we're going to get him to sign it. It says he'll hire Charles Swift and Neal Katyal to be his attorneys.

Salim doesn't like the grammar. He wants changes. And we're like, "Dude!" Eventually he agrees to do it. I explain it to him. He wants it changed because he thinks it should be perfect on the paper. I said, "Actually it's better if you line through things. It shows that you've read it, and that I didn't make it up, and that's really your signature, and you understood what was in it." So eventually he makes lines on it, but he doesn't think that looks professional and the court might not be impressed with us. He's very concerned about these things, but eventually he does sign it.

Then a hard part was administering an oath. I've since done cases and I've heard the real oath. We did the wrong one. In Islamic court, there is actually an oath. It's a beautiful thing. It's probably the greatest oath I've ever heard. It starts with, "I've said my prayers in the morning to God and I have cleansed my soul and I ask God's help in telling only what these eyes have seen and these ears have heard. May it be the truth and may it please God." That's the real oath! It must be delivered by an Islamic official because you are not capable of doing that. It's not delivered by a judge; it's delivered by the Islamic official. In a Sharia court, they are both.

Q: Right.

Swift: But you have to be an official to do that. Well, I said, "I want your oath!" And Salim said he'd do it once, because it was important to us. So he did it and he swore an oath and he signed it. He was very unhappy about that. It wasn't that he was unhappy about the content, but he was unhappy about having to do it that way.

But after that he was very relieved. He felt he had done something. Now we had it and then there is the conversation that I told you about yesterday. It occurred between Neal and I. I'm back with the signature. Neal, meanwhile, has been working feverishly on the petition.

Q: Yes.

Swift: He's pretty much got it and I've worked on parts of it on the military side. It's an eighty-twenty process. Eighty percent is Neal.

Q: I was going to ask what the division of labor was.

Swift: Well, I'm working the client. At that point, he's writing the vast majority of the petition. I am writing twenty percent stuff that is very particular to the military. But we have our ideas locked up. This is the product now of nine months of conversations. We've incorporated everything that Phil thought, and some stuff that Neal's thought. We reworked Neal's theories from Tribe to incorporate the military arguments and to put everything in. "We've basically got the entire thing into the petition. Then the discussion goes, "Okay, we're going to file it in Washington State. You're the sponsoring attorney for it, right?"

"No."

Q: We got to where you got Perkins Coie lined up.

Swift: Where we line up Perkins Coie.

Q: What did they say when you presented them the brief?

Swift: We'll go before I present the brief. The first part was great, when we got Harry on the line. Harry asked a few questions and we explained what we're going to do. Harry wants to stall for time, because he's like, "Oh my God." You have to remember when Perkins said yes. Now, as I sit here today, in 2011, every major firm in America has taken a Guantánamo client. It's the thing to do. You're not even a cool kid in New York on Wall Street if you don't have a Guantánamo client. They all have one. In 2004, none of them had one. This was the first major firm to be asked and to seriously give this consideration. Their clients included Boeing!

Q: Yes.

Swift: As for Boeing's planes, a major part of their business was the work with the Department of Defense. So Harry says, "We need to run a conflicts check."

I'm like, "With the president of the United States?" What it really means is they have to go up and talk to the senior partner. Harry is very near the top of Perkins Coie, but he is not the top. This one is going to have to get cleared at the very top before they say yes. And Harry said later that he went in and he told them, "Well, there's this interesting case that we've been asked to be part of. It could get a lot of media attention, or just a little. It could be over in a couple of weeks, or it could go to the Supreme Court of the United States and be the ground-breaking litigation."

The senior partners are like, "What's it about?"

"We've been asked to represent a Guantánamo detainee under these circumstances."

And the senior partner said to Harry, "What do you think we ought to do?"

He said, "I think we ought to do it."

He says, "Well Harry, we trust you. Don't embarrass us."

In the end, they took it. They come back two days later and take our brief. Now, here is Neal and Charlie's idea. When Perkins Coie takes the case, Perkins Coie's idea is, "These guys are the clients, we'll write a brief for them and do all this stuff." Whereas Neal and Charlie's idea is, "You guys are providing the signature and standing there while we do this because we've thought about this for nine months." A huge back and forth goes on. Neal's is very academic. The next person who was extraordinarily important is Joe McMillan. Joe McMillan is a brilliant writer and appellate attorney. In writing and in thought, there is no greater pragmatist than Joe McMillan. Joe McMillan wins on a daily basis in front of federal courts because he knows how to teach the federal courts and has tremendous credibility. He took one look at our brief and goes, "No, it's way too long, it's way too academic, no, no, no, no, no."

So now Joe and Neal are going to argue and eventually I come out here to try and move this thing forward.

Q: From what I've read, that argument continues throughout the whole process between the two of them.

Swift: Absolutely. I was in the middle mediating the argument. The argument is a great thing. The argument is the advantage we have over the government, because nobody talked critically to them. Joe was always critical of us. Our product always improved because of Joe. Joe and Harry and Charles would re-ground things. They would drive things hard. They were the hardcore pragmatists of, "We win litigation." I had more actual appellate experience than Neal did! He had one. Neal's brilliant, but he had no experience. None. Joe is a veteran of probably a hundred in federal and state cases. Harry has done it all.

So these guys say, "Let's simplify this. Let's simplify and talk about it. Before you write the Supreme Court brief, you've got to get to the Supreme Court. Can we communicate what we want to communicate to a judge that these are early credibility parts? The judge needs to understand this. You do not start with a theory, you start with the facts." They were tremendous additions. The product always improved, but, boy, at times it was hard.

What I saw was how sometimes "teams of rivals," or rival thought, becomes paralysis because they argue and they don't do anything. That was not the case here. The team functioned extraordinarily well. That was not to say that the team wasn't really, sometimes significantly,

disagreed on how to do something. But if I were to look back on every single conversation that ever occurred, no one was wrong. It was all a question and it was such a broad subject, not narrowed down to incorporating all the ideas, into getting six hundred pounds into a sixty pound sack. The famous quote, attributed to a dean of the Harvard Law School, is, "If I had more time I'd write you a shorter letter."

To get these complex ideas down to short pages was always the challenge. To give you an idea, the Supreme Court opinion, not the concurrences or the dissent, but the opinion itself is ninety-two pages long. The solicitor general marveled at how much we could cram into a brief and wondered about our printing techniques at one point.

Q: Now they came with a team, Perkins Coie.

Swift: Yes, it was Harry's team. David really did not work with Harry but David was on the team. It was Charles Sipos, Harry Schneider and Joe McMillan. These guys had handled a wide variety of high-profile litigation for Perkins Coie.

Q: Another name that comes up is Ben Sharp.

Swift: Ben Sharp was in D.C. We moved to Ben in D.C. Of course if you bring a large law firm, it is a team. There were others who worked on the parts, who listened to arguments, who at different points thought through things, so it was truly a Perkins effort. In the early stages,

however, it was sixty-five percent Joe McMillan, twenty percent Charles Sipos and then Harry filling in the rest.

Q: They brought an enormous amount of talent.

Swift: Oh gosh. No question. The other part about Perkins is that they stayed throughout the entire process. They're still on it. I'm off of it, and they're still on it.

Q: I think it's interesting when you say that at that point in time there were no other large firms.

Swift: That's right.

Q: That's true for pro bono because Tom Wilner's firm—

Swift: Right, they were hired.

Q: Getting paid. They were hired by the Kuwaitis.

Swift: Right.

Q: So this is the first pro bono in town.

Swift: Absolutely. The Kuwaitis were in a different categorically completely.

Q: That's an act of courage on the part of that firm.

Swift: It worked out well for them over time. Their current clients were actually not upset; they were impressed. They gained clients overtime. Perkins continues, under Harry and some of the other guys, to become one of the nation's premier large litigation firms. They have won difficult battles in the processes, and this was one of them. They went into it, and took it on.

Q: Now, you filed it with Judge Lasnik?

Swift: Well, we got Judge Lasnik and we filed it here in federal court.

Q: The wheel?

Swift: The wheel gave us Judge Lasnik.

Q: Now is that right down the street, the court house?

Swift: It's right there now but it wasn't there then. It was downtown, over there, it was moving. That was part of what would happen. We knew we were in the game. We knew that we had hit and hit hard and they were going to take this very seriously. Our opposition believed that this was a potential Supreme Court case at the first hearing. Because the first hearing—normally your habeas hearing, especially a scheduling when there is no argument, would be handled by a

deputy AUSA [Assistant United States Attorney], local. It might involve national, but they are not going to come out for that. If they did come out there might be a subject matter expert from the Justice Department who would come out for it. But they probably wouldn't talk; they would just observe.

In this particular case, the Justice Department sent out a deputy solicitor general. Now, those guys never leave the Supreme Court except for a couple of cases, in the circuit courts. I believe it is probably the first time, and maybe the only time, a deputy solicitor general stepped into a district courthouse. He stepped right in and it's not the substantive hearing. It's a scheduling hearing. The U.S. attorney John McKay is there. All he gets to do is introduce people and carry briefcases. The western head of civil litigation is there. The government is over here. It's impressive. Judge Lasnik is completely prepared. The government is arguing that they should hold in abstention. Neal was terrific. This is NFL football. This is not the minor leagues. This is going to be played at the top of the game. And we were disappointed with the ruling, but happy if *Rasul/al-Odah* goes down. We feel like we have a very good judge. We're going to win with this judge if we can stay—

Q: So the news had come to you that the Supreme Court had granted cert for—

Swift: —*Rasul*. Oh yes, all this had been done in the interim. We had done the amicus brief there; this was trying to get through the window.

Q: Oh, that's right. Of course.

Swift: We had tried to get through the window. Charlie's plan to get through the window had just fallen flat because the government had gotten the judge to hold off. It's completely discretionary. He could have gone forward. But the thing that hit me immediately was, "Wow, the federal judges are very well aware that they are looking straight down 1600 Pennsylvania Avenue. They know this is about them and the president of the United States as commander-in-chief. While they are going to make him follow the law, as they see it, they are not looking to get out in front." Neal had said, "This is about looking down 1600 Pennsylvania Avenue and that is a sobering view."

Q: I should know this because it's just a matter of dates, but by this time, the Ninth Circuit had kind of dismissed *Gherebi*?

Swift: No.

Q: No? It was still pending?

Swift: It was pending. They had granted his habeas petition. But no action had been further taken. They were granting that there should be a hearing and all that but it was all stayed while we had *Rasul/al-Odah*.

Q: Oh, I thought they ruled that [Salim] Gherebi had no standing—

Swift: No, he had standing. It was the church one that did not have standing. If Gherebi had no standing we wouldn't have come here.

Q: Right.

Swift: He had standing. It's because he had standing in the Ninth Circuit that we came here. But now it's discretionary to the judge on how fast he wants to move on any petition. Nobody says he has to hear the petition today and Judge Lasnik knew exactly what we were trying to do. We wanted to run this in before the Supreme Court might deny any cert, any standing. Judge Lasnik, as Harry said, if he thought that the military commissions were fine, would hear the case, and we'd lose. But if he thinks that he might reverse it, he does not want to appear eager to do that or to try to do that before the standing issue.

He is really serious about our petition and he is concerned about the things he's read in it—he's a very smart guy—so he said, “Here's the good news and the bad news, in a very practical sense. Your window argument, in hindsight, probably was never going to work because the judge who was going to do it, who's a serious judge, is not going to jump over a fence to try and get out in front of the Supreme Court of the United States.” So we're pending.

But Judge Lasnik says, “The Supreme Court says they are standing. Your briefs are due fifteen days thereafter. I'm going to hear this case. The infamous Japanese internments decisions were in this courtroom, and that's the right court room to hear it in. We're going to hear it here, we're

to determine this.” The government's not leaving feeling good about their chances if standing is held.

I have to go down and tell Salim. His depression starts, because I had promised. The window plan didn't work. Now we're going to have to wait. He'd built up all this hope that this judge was going to let him go.

I've got to digress here. In the interim, I had gone to London to start to make allies overseas. This was at Clive Stafford Smith's, who you interviewed. We still thought the Brits might be up at some point, that that would be the battleground and we were all building allies. We also understood at any level that having the Brits as allies would be important to us, that there was really only one nation that could influence our legal foreign policy. That it did matter to judges what British judges think. There is a part on the Brits and very real. They are the fathers of the law and they've done all this. They have experience in all this and they can speak from a different place, from Ireland—“We've done this and it didn't work, or it did, or there are mistakes here, this is what you're doing wrong.” They have been subject to terrorist attacks. In that sense, the Brits, all of us inside the commission and Neal agreed, felt that they were the trip worth making. We want them as allies. We went over to start to secure allies.

Q: One of the *Rasul* amicus briefs was from British parliamentarians.

Swift: Right. The British parliamentarians were also at *Hamdan*. They were extremely important at *Hamdan*. We saw that from *Rasul* and we wanted it for us in the commissions as well. There

had been a perception in Britain that the military defense counsel would roll over and that there was no need to work or part on that. We wanted to break that perception, but then empower them to not make the argument that we would roll over, which we said, “It's going to fall on deaf ears because they don't believe it, especially on what we're doing. But we want you to now argue against the system, to say that it doesn't let us be defense counsel. The system is designed to disempower us regardless of our intentions. It's a systematic problem, not a personnel problem.”

Q: Who went with you? You and Neal, did Mori go?

Swift: Oh, Mori went, everybody went from the office. The whole office went because the whole office, except for Colonel Gunn, had now become extraordinarily activist and all of us were trying to build—

Q: Poor Gunn.

Swift: Yes. Gunn at this time had, when we had done the amicus part, called us all in a week later and he said the following—and I don't say poor Gunn—“I wanted to let you all know that I've tendered my letter of resignation for two years from now or a year and a half from now.”

One of us said, “Why?”

He said, “Because I don’t think we can do this job and worry about being promoted, and I worry about it. So I’m going to take it out of the game. I’ve made my peace with God on this. And my job is to protect—”

Q: He was a born-again Christian, wasn't he?

Swift: Yes. “My job is to protect you and I can’t do that when I’m worried about what it will do to me. They can’t bust me for all this stuff. All they can do is remove me out of the position and I’m retiring anyway.”

It made him bulletproof. He voluntarily did that and I was there. We're on the table. Now, the disagreements you may have heard about on other parts was all on tactics. We'll now talk about filing the day on the petition and all that, but Gunn had already talked to Phil and I, saying, “Hey, look, there are some things; you have to determine whether I need to know it. I may have to answer a question under the rules as they’re written that you don’t want answered. On the other hand, I may need to know it to protect you. So I’m going to leave it to you to determine what I need to know. But my job is to protect you. That's how I see my job. Your job is to fight the system. It’s not my job to fight the system. It’s your job to fight the system. My job is to make sure that they can’t stop you from doing that.”

People asked me throughout this, did you feel heat? No, because Colonel Gunn was an absolute shield against the heat that could be brought. Whatever heat stopped out there and you never heard about it.

Dan Mori was more aggressive in the media. Colonel Gunn was more concerned in protecting Dan, that he was going too far and he couldn't protect him here. As far as I was concerned, Colonel Gunn was extraordinarily supportive of what we were doing. He very much liked Neal. He looked at the *Hamdan* defense inside our conversations as the high road, the right way to do it. "You're going to go on the high road and any sins you make are sins of commission where you're trying to do the right thing. You're fighting for federal's part and you're doing it in the traditions of Colonel Royall and the defense team in *Yamamoto* or in *Yamashita*. You're not making a mistake" We had absolute cover from Gunn from the beginning until he left. But I now digress back to going to Oxford.

Q: Tell me about going to Oxford.

Swift: They sent us up to Oxford in this kind of fundraising, raising-the-rabble mission. I gave what is famously known as the "cell phone speech."

This is the first time I talked publicly about the case. In the evening, I went into this extraordinary lecture hall in Oxford University with all of the students there. They were there to the rafters and I began. Michael Ratner would later say, "Who knew you were funny?" I give this whole thing on Monty Python and what the administration is doing and my client and have them all going. At the end somebody says, "What can we do?" And I said, "We need a cell phone." And they came flying.

At the time, our big need was to get a hold of Salim's family. If we don't get his family quick, he's going to fold inside this cell. He's under ungodly pressure. He was not doing well. We need to get a hold of his family. We need to tie this part up. He hadn't heard from them in months.

One of the things the interrogators used was the ability to communicate with families as a way to interrogate. Salim had been cut off this family. He hadn't had any letters in months and months.

Things were bad. In solitary confinement, some people can do okay. All people break down over time. Salim was horrible in it. He was not doing well at all.

Q: I wonder if we can spend some time on the whole thing about his situation there as it changed.

Swift: Sure. He had been held over in Camp Delta. He was in the same building as David Hicks. He couldn't speak English very well at all at that time. At the top of his lungs, if he screamed and wasn't punished for that, David could hear him. If David screamed back, he could hear David, but they couldn't carry on a conversation. It was always light in his cell; it was never dark and he never saw the sunshine. He lived in this box and they would take him out half an hour for exercise. Even the government, in his commission, five years later, would admit that those conditions were unduly harsh for the first ninety days. They were extraordinarily bad.

Q: Were they continuing to interrogate him?

Swift: No. They had stopped. In fact, from his standpoint, this was even worse because he just sat there with nothing, day in and day out. Now he worried. First, he couldn't figure out why he was there and that drove him crazy. Then after us, it was all doubts about me, what am I doing,

what are these people doing? He was going nuts. The only thing that was keeping Salim going—and he wasn't on a hunger strike but he wouldn't eat, he was so depressed, we could see him going away—was that there was one guard named Dodds. They all had nicknames because they couldn't use their real names. But Salim's principal evening guard was a guy named Dodds, and Dodds cared about Salim.

Q: D-O-D-D?

Swift: Yes, Dodds, that's what we called him. We had to come up with a name. I'm going to mention a lot of people by their nicknames during that period of time, because there was no name. I'm still not permitted to tell who they were. They can do it, but I can't tell who was guarding Salim at the time. Dodds was this reservist who was really nice to Salim. They hit off a rapport. Dodds would come in and talk to him, sit with him, and try to get him engaged. Dodds was where Salim started to learn to speak English.

He was very concerned about him. He told us on our trips, "He's getting worse. He got better the first week you were here, and now he's getting a lot worse. You need to do something."

I'm asking, "Well, what do we do?"

So Dodds suggests whatever we can do, "You need to come more," you need to do these things and so forth. He would talk to him and try to get him to eat. They had such a relationship that later, when we started to bring Salim food, Salim always insisted that we bring Dodds in to share

the food with him. It's very Arab, to be a host. It allowed Salim to be a host, and to give something in return for the kindness. Dodds was always very kind to Salim.

Still, despite this, he was slipping away. We could see him slipping away in the months of March and April, and then I come back from the cell phone speech. The reason I needed a cell phone was that we were trying desperately to get a hold of family. The ICRC knew where they were, and they wouldn't tell us because it would violate neutrality. Finally, we were able to get through.

Salim gave us directions to his house. Chuck couldn't understand. Nobody could understand it. It was, "Go to Yamouk Station and ask." I'll tell you, after going to Yemen, what that meant. But nobody could figure that out.

Finally, the ICRC passed a message through to the family. They wouldn't give us the address. They wouldn't do anything. We said, "But will you take a message from us to the family?" They decided that would not violate neutrality, because they delivered messages. That took Geneva to decide.

We passed a message that we wanted to talk to them. Clive was going to Yemen for the first time to have a conference. We wanted them to go to it and make contact with Clive. And they did go to it. Salim's brother-in-law Mohammed came, with Salim's two daughters. Clive took pictures of the daughters, and he sent them to me. So now I had pictures of his daughters to prove that we had had contact. I went down, and I was told he hadn't eaten in four days. I brought in coffee. He

wouldn't even look up at me. I was planning on getting the pictures cleared. I thought, come on. They're just pictures of the girls. I pulled them out of the envelope. I got in the most trouble for what I just did.

I pulled the pictures of his daughters out of the envelope, and I pushed them across to him. He looked at them. I said, "We got in contact with your family. If not for you, then for them." He sobbed. He cried, and he cried. It was heartbreaking. This is eleven o'clock at night. Finally, he took the coffee and he said, "Give me food. I'll eat. I'll do my best. I don't know how long I can last, but I'll last as long as I can. You have to get me out of here, but I'll last as long as I can."

And it began. We started the process of going to Yemen to meet them. Later on, the rules were something that didn't really matter to Dan. Dan Mori would give Hicks his letters before they were censored! And Hicks is nobody's bright guy. Hicks would get the censored letters.

To give you an idea, it was the bureaucracy of Guantánamo, not the people, that drove you crazy. In Hicks's case, and in Salim's, they would censor out things like "I love you, daddy." That's censored out. They'd give it to them and then Hicks got it back, a letter which said that blacked through. He went crazy! He yelled at the SJA. "Why is my daughter's—? How do you know what it says?" And Salim's like, "Hicks is an idiot! Do not give him anything!"

Anyhow, I thought, "Holy shit. They are going to toss all the cells, and Salim has these pictures." I confessed that I'd given him the pictures. I got in lots of trouble, and yelled at.

Q: What happened, did they just—?

Swift: I realized they couldn't fire me. They couldn't do that, at that point, because of my visibility. I just got yelled at. But that was the most trouble, because I had given him something unauthorized. At the same time, my gosh, you're making me clear pictures of his daughters. I hold a top secret security clearance. I'm on our side. This is harassing. This is not about security. This is about harassment! But there were times to play within the rules, and times not to. And I said, "Okay. On these things, we're going to have to play within the rules."

Then what we started to do after that was bend the rules dramatically. Right after I got criticized, I went on the offensive. I was there—"I broke the rules. Now, your interrogators, to build rapport, could give him those pictures without clearing it with anyone, right? So you say that I have to get your permission to build rapport with my client, even though you agree. So you are interfering, right? Why am I not permitted to do what an interrogator could do? Why is it not important that I have rapport?"

And so I began this attack—"My client is dying, is going out under psychological conditions."

"Well, we'll find him a doctor."

"I want the doctor in Guantánamo put on the defense team."

"We will not do that."

“You put my client in an untenable position.”

They gave me Dr. Emily Keram as I fought through this. I first fought for Daryl Matthews. I got Dr. Emily Keram. I am the only one who ever got a psychiatrist assigned to their team. I did it early on, because I went into a paper war against them. For a period of time, I could wear civilian clothes to go see Salim. I could bring him any food I wanted. I did not have to clear my letters. I was on them every day. I'd find out and I would say, “The security people did this. Why can't I?” The SJA would say, “What new letter do we have today?” Back and forth we would go, and negotiate everything. The real height of it was when I said, “I am not subject to search.”

They said, “Yes, you are.”

I said, “Well, I'm subject to search for contraband, but not my materials. You do not get to read my notes or any of that stuff. This is defense product.”

“Oh, we're going to read them.”

So I went down, and I'm leaving Guantánamo Bay, and I have my bag. And I said, “This is my bag. It contains defense attorney-client materials. If you search it, you are in violation of the agreement I have with—”

“We're going to search it.”

I said, "Great."

They said, "Well, this is a voluntary search."

I said, "I am not volunteering."

It finally gets all the way up to the colonel. I said, "Sir, you have the guns, and you outrank me. If you order me on gunpoint to turn it over, then I will have to do so. You can have my computer, you can take and confiscate it all. But let's be very clear. You did so, on your order, with the threat of force backing it up. Right?"

The colonel's like—nobody talks to him this way. Chuck is like, "Oh my God. We're going to jail."

I said, "You could put us in jail. You can handcuff us. You can do whatever you want, because you have the power to do this. But I want you to understand something. The moment I get back to the United States—and I will get back to the United States—I will put your name on the front page of every newspaper, that this is what you do, and how we're going to conduct the commissions, that you search all the commissions' attorneys. So what's it going to be?"

And he backed down.

Q: Well, at that point in time, you and Mori—

Swift: Are it.

Q: Are it, yes. And you are military.

Swift: We can play the game in a way that no one can. And in fact, inside the wire, the access for me in particular, and I guess for Dan, was extraordinary. These days, if you talk to an attorney, they talk about visiting hours and escorts. In April, May, June, July, there were no escorts. I drove down to Camp Delta and buzzed in—

Q: This is 2003?

Swift: This is 2004. I buzzed in, was handed the keys by the night watch, because I went to visit him at night. Salim slept during the day.

Q: I was going to ask, why the night.

Swift: We would go at night. We would go until like three in the morning. Then we would sleep during the day too, until about noon. Salim liked night visits, so we would go at night. He also liked it because they would open up the doors. Sometimes they'd let him get up and walk around. There was extraordinary flexibility. Things that would never be permitted later were absolutely permitted then. So we would just sit into the night.

Dodds was on watch then. Dodds liked Salim, and Dodds would do whatever he could. If he figured nobody was going to come, then things got really loose. I had no escorts. I could walk wherever I wanted with the keys. It was the reality here. He can't go anywhere. I'm a military officer. They know I won't let him go anywhere. The entire crew of junior guys, other than Dodds, was all from the Charleston Brig, so they all knew me because I had been coming to visit serious inmates for three years on and off.

This is the strange thing. Most jails view defense counsels as good guys. Prosecutors never come and visit the jail, and prosecutors only upset the prisoners. Defense attorneys, if they're doing a good job, calm the prisoners down. They explain the process to them. They are advocates. They explain that they should be good prisoners. They explain what's going to happen. They take away uncertainty. Prison guards will tell you that they want the attorneys to visit regularly because when they don't, the prisoners become difficult because they have not heard from their attorney. Uncertainty, for the people waiting, is the worst part. Get your attorneys down here. Visit. Around the United States, brigs in jail will constantly call up the Public Defender's office and ask where the damn attorneys are. That is part of the process. So they all understood and viewed this now inside the process.

One of the things that the administration always had trouble with was the military likes to default to norms, and the norm with the court martial, and the normal process. So these guys, when given a choice, defaulted to the normal way they would treat a prisoner. They weren't there to

treat prisoners badly, as a whole, especially the professional prison guards. They understood how this game is played.

And as I told Salim, I said, “They’re not interested in whether you’re guilty or not. That’s not their problem. The question is, are you a good prisoner? If you’re a good prisoner, meaning you follow orders, you do what you’re told, you have a good attitude, then they like you. If you’re difficult, throw feces, do all this other stuff, they don’t. It has nothing to do with whether you’re guilty or not.”

Now, certainly, they were driving home a lot of the parts, and Salim was immune to it for a while. They were driving home, in the outside, that this was the mission on terror, and these guys were the worst of the worst. I think that a lot of people were brainwashed on the outside. That was a terrible message to send. Because the real message, always, to a prison guard should be, “We are interested in orderly transitions.” And there would be huge mistakes made in Guantánamo Bay in prisoner transfer.

But in March through August of 2004 in Camp Echo, the guards were professional prison guards. They knew what they were doing. They were very concerned. I think you’ll hear this echoed if you go talk to French and English detainees who were all there, too. And Hicks, too. At that point in time, their conditions were horrible. The guards were fine. The guards had nothing to do with the conditions. If the guards could have had their way, they would have put them all into a joint cell, and they’ve been happy with it, and just said, “Hey, talk and do whatever,” because they had a charge to ensure their welfare. Especially because of the stress that was on

Hamdan—he didn't speak English and was doing badly—they were very interested in his welfare. They didn't want him to commit suicide. They didn't want him to go downhill. They were very interested in his welfare. Salim was funny, and so guys like Dodds genuinely liked him.

In some ways, it was more normal in that period of time than until right at the time of the commission. For the guards and for the people, you are in the trial system. You have a defense counsel, you can go to trial, and you have a wait and discovery. All of these things happen. The defense counsel comes down and meets with you. We understand you're under pressure. They are professionals. They've done this. It's on the right calendar. That was normal.

Salim was having a horrible time because of the pressure, and the solitude, which was not normal. That was only part of the conditions. He was really slipping, so we had that process going on. Why were they in solitary? The reason that they had been placed into these solitary conditions was they did not want the prisoners in the regular camp to know about lawyers. The whole thing! I mean, *Rasul/al-Odah* had all happened, and no one in that camp knew about it!

Salim knew about it, Hicks knew about it, and, de facto, everybody else in Camp Echo knew about it. But nobody else knew about it. They had kept it extraordinarily secret that lawyers even existed, that there was any litigation or any of this sort of stuff. That was part of the interrogation strategy. There were no lawyers. Camp Echo's principle existence was that they planned on trying these guys without ever letting the camp know about it. They would just disappear. That was their plan.

Q: Now all this changes after *Rasul*.

Swift: Oh, and I'm going to tell you how. Amazingly, the fun part was how it changed the very day of *Rasul*.

Salim really understood. We would play chess to explain things, but he really understood the importance of *Rasul*. So he wanted to know what day it would come out, and he wanted me down there. He did not want to wait. He said, "I don't want to wait for weeks to hear this. I want to know. So you come visit me that whole week that it would likely come out. And you'll be here every day. Because I want to know."

Chuck could come, because school was now out. So we came down every day. *Rasul* came out on a Tuesday. We did not have long to wait.

We came late that day. And Salim's like, "Where have you been?"

I said, "The decision came out, Salim."

He says, "So?"

"We're going to go in front of Lasnik in fifteen days."

“Hamdullah!” He's yelling and screaming. Hicks is trying to figure out what it means. He said, “Your attorney will tell you.” Blah, blah, blah. There was all this yelling and screaming.

But of course, it's in Camp Echo, a half mile from Camp Delta. The plan's working so far.

Wednesday we went to see Salim again. We get there and no Salim. Salim is not there. “Where's Salim?”

“He's at the dentist.”

Salim had been complaining about his teeth. And in my paper war against them, I had written them many letters and asked to take a camera in to photograph his bad teeth. They had really gotten tired of the “torture by toothache” argument. So they said, “We are advised that you have more than three letters about his dental examinations and lack of dental care. We would think that you would be happy that he was at the dentist.” The bureaucracy had finally caught up and moved him to the dentist. The bureaucracy had not told the dentist that he was coming. They had just realized that the defense attorneys were coming down, and they were probably going to get the fourth letter, move him over to the dentist. Salim had arrived, supposedly to be the first guy in that morning. But the dentist didn't know that he was coming, and they didn't know who he was.

Salim is put out in the waiting room and chained to a chair, from 6:30 in the morning until 7:00 that night. He gets to go to the bathroom a few times. But in that period of time, no less than fifteen detainees will come in and be chained next to him.

What do you think they talked about for that period of time? By noon, the entire camp knew. By noon every detainee in Guantánamo Bay knew about *Rasul* and *al-Odah* within twenty-four hours of the decision.

So the vaunted security fell apart about lawyers, and what lawyers could do, and the arguments. Salim had a lawyer. And so that night, there were papers being handed to the guard, saying, “Where's my lawyer?” They were besieged by it. They never could figure out how that happened. I thought, “You guys are idiots.”

Q: A couple things. One of the things we are trying to get a handle on is how the detainees themselves cooperated with one another, or had some kind of agency. Even though they were there, in prison, in a sense, victims of the system, they were not victimized in the sense that they were powerless to talk with one another, to organize.

Swift: They organized constantly. The first thing to understand is that most of these guys were not criminals. A lot of them were innocent aid workers. That is absolutely the case. Not saying all. That's not an accurate part. But there were a lot of guys who had just been swept up.

Initially, there was a tremendous amount of just general uniform rebellion against them. That was in the early days at Guantánamo Bay, before I ever got there. That was because the conditions were really brutal, just physically bad and the food was bad. Everything was bad. It was outdoors. It was bad.

Q: Yes, I've seen the pictures when they first arrived. They were really pretty terrible.

Swift: It was bad. But then the interrogations began in earnest, and people had held out the hope, certainly the interrogators pushed the hope, that if you cooperated with us, you can leave. That divided the camp significantly. But then nobody left. And the camp started to unify, and unify, and unify.

Now the guards will always tell you, the officials will tell you, that the concept of hunger striking was brought in by Clive Stafford Smith because shortly after Clive, who got all of the clients, his clients were leaders of the hunger strike. I don't think that the detainees needed Clive Stafford Smith to tell them about hunger strikes. I think Clive chose the leadership as his clients because Clive was running a political campaign as much as anything. One of the things that Clive understood better than most was that you if you chose the leadership as clients, they would accept the attorneys much more.

The administration foolishly thought originally that leadership was based on your rank in Al-Qaeda, and that's part of it. That was not at all true. Leadership was based on your education experience and overall abilities. For instance, probably one of the largest leaders was the former

foreign minister of the Taliban, who was eventually released. The guy spoke three languages. We interviewed him. He was incredibly good and he was absolutely a leader.

So, leadership was based more on education, more on position, more on that sort of thing, and ability to speak English. English was very important in the leadership because you could communicate joint thoughts of everyone to the guards. Now, the big hunger strike was kicked off in 2005, not in 2004. In 2005, the process began and then stalled, and that really frustrated the detainees. Most of them felt like if they ever got a hearing, they'd get out. Most of them felt that way. As the process stalled, they became very frustrated.

The CSRT [Combatant Status Review Tribunal] process really frustrated them. They realized it was pretty illusory—"I can tell a kangaroo thing when I see it." They pretty much got that this whole thing was kangaroo. They weren't stupid.

And so they were pretty mad, and they went on the general hunger strike in 2005. I remembered that part, because it was striking. There were different periods of time when the camp would negotiate with the leadership of the detainees, and that's absolutely a matter of record. They did. After [Geoffrey D.] Miller left, the new regime said, "Elect your leaders." They did, and they did not like some of their leaders. So they said, "We do not like that."

So the next election they decided they would get some of the Guantánamo attorneys to negotiate on their behalf. It was a runoff between me and Clive Stafford Smith that they wanted. The radicals wanted Clive, the more reasonable wanted me. Salim didn't want me involved at all.

Salim was very concerned about that. Salim's idea was “Low profile, baby.” He was proud that his lawyer was considered high-end, and he liked the status of being able to give information, but he did not like a high profile with the guards. He thought that was a bad idea. I'd given him a lot of speeches about low profile—“Don't give them reasons to make your life bad. You do not want to be famous among the guards. Absolutely, we want to keep this low profile. You are the model prisoner. That you're a bad prisoner hurts you in the courts, and it makes your life hell here. Model prisoner.”

Salim didn't like the idea and eventually the administration nixed it. But it was really interesting that the detainees wanted either I or Clive to represent them, because among the detainees we were the ones who were known—Swift because he had the case, Clive because he had the politics.

Q: Well, he had gone around hunting the families. At one point in time, no one knew who was there.

Swift: Absolutely. He had done that. Clive also met a lot of the detainees. I'd met a lot of leadership because I had gone over and interviewed them. So over time, they knew who we were. They started to get press articles and my name appeared in them, and Clive's name appeared in them. So the detainees, from even their regular lawyers, had seen our names. Word spread around Guantánamo.

You have to remember, too, that I had the big thing in 2004. I'd won the first victory that they could see happen. That had happened over the summer. We had gone to Yemen, and they had begun the commissions.

Q: Tell me about your trip to Yemen.

Swift: We went to Yemen, Chuck and I, in July and August of 2004.

Q: Just the two of you?

Swift: No. Susan went with us. Susan was added to the trip at the last second.

Q: Who was she?

Swift: She was a female JAG, Navy female JAG. Chuck would tell me these things on culture at the last second, and before our trip he said we need a female to be a member of the team to get access to the female members of Salim's family. He's like, "How is it that you didn't know this?"

"Because you didn't tell me."

Chuck points out, he says, "We need a good couple weeks before." Everything's been arranged.

We're getting our visas. We've done all that. And Chuck says, "We need a woman."

I said, "Why? This is an all-male society."

He says, "Exactly. You will not be able to talk to any of the women. We need a woman with us so that they can come."

I said, "When were you planning on telling me this?"

So I ran out and I said, "My excuse to get on the trip was that I might need somebody to administer oaths and be a witness as to what people said." So she wasn't going to be part of the defense team, but she could be a witness as to what other people said. I picked her up. She'd never left the United States before. Chuck goes, "Oh, this is going to be interesting." She was very young.

This was how far Yemen was from everything else. I've got my traveler's checks and my ATM card. Chuck goes, "Why do you have those?"

I go, "Because that's how you travel, with traveler's checks and an ATM."

He says, "What makes you think there's a bank in Yemen? You need cash."

We had to go cash all of this stuff out. Maximize out the withdrawals, all the stuff, to get cash, so that we had \$1,000 in cash. He said, "It's an all-cash economy." He was right. There were no banks. There were no ATMs. Welcome!

There's a joke that they tell in the Muslim world. Mohammed comes back in Islam, the same way that Jesus Christ comes back. So Mohammed comes back, and he looks around. He's in Saudi Arabia first. He sees Mecca, and he goes, "What has happened to my beautiful city? What are all these tourist hotels? How could we do such things? I'll go to Egypt, surely they, at the center of knowledge of the Arab world, they remain pure." And he sees the Nile, and the discotheques, and the bars. What a den of iniquity Egypt has become! I'll go to Jordan. And in Jordan, he sees the dancing girls, and all of this. How could they be such people? I'll go to Yemen. And he gets to Yemen, and he looks around, and he says, "Thank God, just like I left it." This is Yemen. Arabs tell that joke.

We arrive in Yemen. Culture shock, boom. Chuck is happy as all get out. We arrived at three in the morning. Chuck is home. The rest of us are, "Oh my gosh." Eventually we make our way to our hotel, which is embassy-controlled, security gates. Chuck hates the hotel. We have to go to the embassy the next morning, in which they basically say that during our trip in Yemen, we should go from the hotel to the embassy and back to the hotel. "You can't leave, can't do any of this stuff. Great fear, blah blah blah, blah blah blah."

Q: For your safety?

Swift: Oh yes, because we're going to get killed. Chuck said, "This is ridiculous." He goes out in town, makes a phone call, gets Mohammed, Salim's brother-in-law. He will meet us at the hotel. We meet his brother at another hotel, because he says, "He'll never come here, this is America. We need to go to them." He meets him in another hotel, which Chuck says is fine. Chuck is

there. We're out on the street. We meet some of Chuck's friends. He said, "We're dumping the submarine."

After that, we stopped checking in. They called us in after about five days because they were really worried about us. We're out there and then we're told we have to take a driver. Chuck talks to the drivers in Arabic and he gets the driver, he says, "Hey, don't you want to spend more time with your family? Here's some money. Go have a fun time with family."

We get dumped off, and we find Salim's family. Yarmouk station is one of only four gas stations in Sana'a. You go to Yarmouk station, and you ask, and they are the third house on the left, behind the green door. It's easy. When we finally got there and saw it, it was no wonder Salim looked at us like we were idiots that we couldn't find this. This is so easy to find.

I had thought that what I needed to do would take six days. Chuck says, "Good. Put us down for twenty. Because in Yemen, it'll take twenty." We spend an awful lot of time just getting to know the family. We went around to meet all these different people. None of it was really substantive. They'd ask a lot of questions about us. We didn't get to ask a lot of questions about them.

Q: What was their reaction when you told them that you had seen their son, husband?

Swift: Oh, they were extraordinarily—they wanted to know all about how he was. They wanted to know his physical condition. They had questions about the commissions, but that would come

later. They wanted to know about him. They wanted to know everything about him and how he was doing.

Then it was wedding season, and we had to go to a lot of parties. Chuck said that they would go broke entertaining us and he left this open to my solution. He said, "The only problem with my eighteen days is that I'm going to break them. I don't know how to solve this problem." I said, "Oh, great. We'll create an NGO." So we created an NGO for the benefit of detainee families and we put a lot of our travel, our food money into that NGO, and then gave it to them, because they fed us for the next eighteen days. We did not go out to eat. There are really almost no restaurants in Yemen.

Q: Off the topic, what's the food like?

Swift: It's actually quite good, except for saltah, which I could not ever get my head around.

Q: Saltah?

Swift: Saltah. Oh, God. It's a green root that is boiled down to a consistency of a green slime paste that is extremely bitter. You stick bread, maybe it has a little meat in it, and it's the national dish, and there's round pots. All work in Sana'a was done between the hours of nine and eleven o'clock during the day. After that, nothing's done. Nine to eleven.

At eleven, people start planning lunch. Then you go to somebody's house. We go to the house for lunch. Then they have qat. They would sit around. And qat goes until about five o'clock, six o'clock in the afternoon. Then they all go home, and they are all buzzed from the qat, and they stay up till about two in the morning or one in the morning. Then they go to sleep. Then they get up at about eight. Then work goes from nine to eleven the next day. That's the schedule.

We would show up at the house at about eleven for whatever, because we were invited on the social part of the world. We spend our first week and a half just doing social. We went in a lot of different cars. We went out and shot Kalashnikovs. We went out and did everything that was necessary to do to build rapport. We built the rapport.

My whole goal was to meet one guy. Getting his family to talk about it and whatnot, that was important for Salim. But for the case, I needed to meet his brother-in-law. His name was Abu Jandal. I know him as Nasser [al-Bahri]. He had been the former chief of security of Osama bin Laden. He is in the looming towers in all these histories. Ali Soufan, who interviewed Salim and who will testify in the trial, came to prominence right after 9/11 when he interviewed Abu Jandal. Because it's Jandal who confirmed that every one of the hijackers were with bin Laden.

Jandal was in prison in Sana'a at the time. He'd been rounded up with the usual suspects after the USS *Cole*, though he had nothing to do with the *Cole*. They just rounded up everybody who'd been tied to the jihad at some point. They came under pressure to do so, so they rounded him up. He was just sitting in prison. They came and interviewed him, and Jandal is the most important intelligence interview that was done early on.

But I knew that Jandal knew everybody and knew everything. To break the discovery lock, I needed a source that I could cite that they are not giving me everything, and I need access to other people. I couldn't get that without Jandal. I needed a witness.

Q: How did you reach him?

Swift: I kept asking. "Can I meet him? Is he around?"

"Yes, he's around. Yes, he's around."

Chuck goes, "Don't push it."

And I didn't. We were coming into the last week, and I was giving up, thinking it isn't going to happen. Then we got an interesting phone call. We were over at the embassy. I was now starting to communicate back to the United States, because everything was happening on the case. We got a phone call from the family, and they said to come this evening for the Yemen version of pizza. Come this evening for pizza. We were like, "Evening for pizza? Okay!"

Out we go for pizza. We show up, and they're just sitting around. And we sit around, and we sit around, and we sit around, and there's no pizza, and there's no nothing. We sit around, and we sit around, and there's nothing to talk about, nobody to meet, nothing to do. We sat around until it

got dark, and then it got lighter. And then, all of a sudden, the whole family had finally moved up. Even the females had moved up to the upper mafraj.

In Yemen, in a building, the gathering room is on the top floor. Salim said his brother-in-law's house, Mohammed's house, was three stories high. In the first story, they have the kitchen and eating and food preparation and some sleeping quarters. Major sleeping quarters are on the second floor, and then the mafraj on the third floor. What that permits is for the business of the house to go on when guests are upstairs. Because women, when they came in, they wore the hijab. They wore all of this when they were in. It's not that they didn't come see you. They came and talked to you all the time, but they had to wear it. And quite frankly, the house belongs to the women, and not to the men. So they want their world.

This was one of the purposes of Susan, when she was often sent down into the world. Chuck was there, and he said, "No decision is made without the women's input." They need to feel comfortable on this. A guy like Nasser is going to show up because he feels comfortable, and they urge Mohammed to do it. He said, "You need advocates, and you're going to get it from the women. They know everything that happened and they're going to be the ones pushing for Salim. The men are more likely to cut him loose. It's their sister who they are looking out for, who's married to him. Now, you need the advocacy of them."

But on that evening, it gets late, he came in. And the atmosphere in the room changed. In walks this guy. He has a round face. He's bigger than most Yemenis. Most Yemenis are pretty small. Nasser is an average-sized American. He has a round face with a bulky body. No beard, at that

time, turban hat, doesn't chew qat, educated. His Arabic is beautiful, according to Chuck. He looks at us, and he smiles. He said, "It's all my fault. I should be there, not him."

That began the most interesting three days of my life. I spent three days with Nasser, who had been the former chief of security, and a legend in the jihad. Jandal proceeded to tell us all about Yemen. He agreed to an interview, and agreed to do stuff on camera. It was the first time he'd done anything.

Q: Now, he's the guy who put Hamdan in contract with—

Swift: Bin Laden.

Q: He got him the job.

Swift: Yes, he did. He did all those things and he's a fascinating guy. He is absolutely charismatic. Even Susan was completely taken with him. What a charismatic leader. I wouldn't be surprised, if things go badly in Yemen, or they push out the president, he could be one of the guys who rises up. He's that charismatic. When you're with him, you are amazed. I thought, either this man will become a leader of this country or they will kill him, one of the two.

Q: What did you get from him that you would use in the court? Was it an affidavit of some sort, or a story?

Swift: We would go back. We got statements from him. We would go back and build on this relationship. We would use it to get access. To us, it was extremely important to get to guys like Khalid Sheikh Mohammed. Because the argument, they know Salim's level of involvement. His brother-in-law says, "He isn't involved," but he is his brother-in-law. So if we're stuck with it, we'll just go with his testimony. But he also knows what they know. Our problem in this is the government says they don't know anything. He says, "Of course they know what Salim was doing!" We didn't go to the judge and say, "Of course they know." It's not a fishing expedition, because that was the government theory to prevent, because this is a discovery war. We've got to get to the people.

One of the great complaints by defense counsels in the World War II commissions, and even somewhat in the Yugoslavian commissions, is access to witnesses. That the government denies access to the witnesses. That they move them to different camps and they don't let you talk to them. They always say it's for national security. It's a long complaint, so you could see it coming.

I started asking to talk to KSM [Khalid Sheikh Mohammed] in 2004. I was ignored for two years. Then for two years, I was denied, and then in 2008, we were given access. It turned out to be decisive. But the first step in that was talking to Nasser to confirm that KSM would have something. Because Nasser knew him! He actually knew him quite well, had really distinct thoughts about him. Nasser knew them all.

Q: So when you came back, what was the status with *Hamdan*?

Swift: Well, they had convened the commission while I was gone. The first commission hearing was held in August. When we went down to that, it was the first set of arguments. The first day in the commissions, four people were arraigned or brought in during the course of it. On the first day, Hicks went in. Hicks came in with Dan Mori and Joshua Dratel, who had agreed to help out. Joshua had done the first World Trade Center. He's probably the dean of national security lawyers because he's been at it the longest and he is very, very good. Joshua and Dan were on day one. Then Salim and I were just by ourselves with Chuck.

Excuse me. No, we were day one. Hicks came the next day. So we were the first view the press had ever had. That was an extraordinary day.

The first part was that the level of security. I found it amazing. I knew completely well that I could tell Salim, "Hey, we've got to go up to the court. Get in the car." Drive him up, and drive him back. And he wouldn't try and run. He wouldn't do anything.

Salim and I, the night before the court, practiced how he would sit, how he would stand, what he would say. He wanted a dress rehearsal. We went over everything about what he would do. He was concerned about his headscarf, should he wear it or not? He would wear it in, because that's traditional, then take it off and set it on his shoulders, because you don't wear headgear in an American court. Other detainees would wear orange in protest. Salim was going to wear his regular clothes. We were going to be respectful of the court. We weren't going to play that game. Carol wrote about it and they talked about it afterwards. How Salim came in, and the first thing he did. He looked around, and he saw me, and he smiled, and all that.

They were struck that there was a relationship—the press, everyone could see it—between Chuck, myself, and Salim. It wasn't angry or whatever. They obviously have a relationship and this is his defense counsel.

The panel that had been put together was horrendous. They had the Marine who was in charge of transporting him to Guantánamo on the panel. They had an Air Force intelligence officer from Afghanistan on the panel. I said, “That's great. We got the detective and the jailer on the jury. That's great. What else can we think of?” And then another guy who was convinced that Al-Qaeda was going to kill his family for being on the panel.

So we went from seven people to three people. Four people are kicked off the panel.

Q: Now, you're questioning them?

Swift: Yes.

Q: Like a *voir dire*?

Swift: Absolutely. I also pushed it that day. My idea was to get Salim excluded. I needed to get him excluded from the trial because I needed a harm to show Judge [James] Robertson. The first harm was that they were holding him and not charging him. But now we'd lost that harm. They

had him in pre-trial detention with no charges. That's a classic harm. I said, "And it's different than other detention, and what they are holding it for, et cetera, is illegal, blah, blah, blah."

Now they said they charged it. Their argument was very simple. There were three decisions that summer. There was *Padilla*, there was *Rasul/al-Odah*, and there was—oh, what's his name. The guy in Charleston. Yaser Hamdi. He won and is out almost instantaneously. The *Rasul* and *al-Odah* detainees went. The one case that everybody thought the government could lose, *Padilla*, they won. They kicked it on a procedural part, that they are in the wrong court.

Justice Scalia is incensed and cannot believe that *Rasul/al-Odah* came out the way it did. He thinks Justice [Anthony] Kennedy has literally rewritten the Constitution. But he is incensed at *Padilla's* treatment, because he is with Justice [John P.] Stevens. *Padilla*, as far as he's considered, has to be tried for treason. The Constitution is clear here. If they cannot try him, they sure as hell cannot detain him in a prison. Justice Scalia has had it! He says, "This is completely wrong."

And he puts a footnote in *Rasul/al-Odah* that he cannot believe the disingenuity of this court in *Padilla*—"You're sending back an American citizen who started in the right place, and was transferred after the litigation began down to Charleston, South Carolina. Under your theory, the government could avoid court by just transferring him around the country repeatedly. Just transfer him. And then transfer him again. And then transfer him again. Meanwhile, two non-U.S. citizens"—and he's writing about our case now—"have the ability to go forum shopping by choosing lawyers to take it to whatever judge or city they might so choose, to forum shop their

way toward a decision. So a U.S. citizen can be deprived of jurisdiction because you move him around, and a foreign national can choose his jurisdiction, and there's nothing you can do. How does this decision make any sense whatsoever?"

There are times that Justice Scalia is extremely—you just think, wow. What do we say to Justice Scalia other than, "Yes, that's right."

The Supreme Court the next day rectified Justice Scalia's problem, because they ordered all cases consolidated in the D.C. Circuit. That moved *Hamdan* from Judge Lasnik to the D.C. Circuit. Because that courthouse was under construction, the files were lost for three weeks. So it didn't arrive until late in August, and the commissions had already begun.

The government had a new argument. They were very well aware that they had been that close to losing in front of Lasnik. Having reprieve, their new argument was, "You should abstain until a commission is over." This would be their principle argument from now on. I think it was a huge mistake. They want the abstention argument.

Incidentally, all of the liberal groups that would argue or talk to us said we would lose on the abstention. We couldn't possibly win. Every court would boot it. Neal and I were the only people who didn't think we were going to lose on abstention. No court ever even seriously gave abstention a thought for a moment. At this point, they were going to decide it. Neal was saying, "Judges aren't stupid. They understand that this would only be worse."

We get in front, but I'm very concerned about the abstention argument when I'm there in August. What I want to have happen is to show that the commissions are not going to follow the law right off the bat.

One of the great fundamental rights of an accused is to be present. If we go to fundamental rights, be present. The rules allowed the accused to be pulled out when classified information was brought in. They didn't get to see it. For each one of these individuals, especially the ones that had been in Afghanistan, I pushed questions and I would suggest the answer to them.

"Well, could that be classified?"

"Well, yes, it could," because they didn't want to answer it.

"So should we have a classified session?"

"Well, yes, we should."

"Great. Well, let's save that."

So I stacked up my classified sessions in the morning, and in the afternoon, I said, "Okay, we need the classified sessions." I got a delaying tactic. I knew that no one was going to delay anything.

I said, "What we should have happen is, we should have a summary of what they're going to testify to, and see if the individuals who hold that information will consent to having my client present, because he would like to be present for it."

"No!"

"Well, I would still move that my client be present for it."

"No!"

"Well, we'll have the classified session over objection. Do you want to waive the classified session?"

"No, but I want my client present."

So he is excluded from a hearing over objection. Hallelujah. Hallelujah, because we have an error.

Meanwhile, Neal is calling every five minutes. Harry's calling, and all of them want to know what's happening. I can't keep answering these questions from afar.

Q: Now, they're preparing for Judge Robertson.

Swift: Right. They're preparing for Judge Robertson.

Right after that hearing, Neal joins the military commission defense team. He realizes that we need to get all the motions in; we need to get all of this. Neal has enlisted the students of Georgetown and Yale to write briefs. The paper that was handed to the government was impressive. Motion after motion after motion after motion is thrown at the government in this process, in a very short time.

We go in front of Judge Robertson.

Q: What happens with the commission?

Swift: Well, we've got to talk about what happens with Robertson, because what happens with Robertson will now influence the commission. Our first hearing with Robertson is a week after, to set the schedule. We're pushing to have his hearing. And we get him to agree.

At the scheduled hearing, it's obvious that Judge Robertson absolutely knows everything about the case. No judge would ever walk in having not read every single paper, not having done their own research. It's obvious they've done their own research, because they have questions that are not in anybody's documents. They have thought about this at length. Their clerks are all here. The galleries are packed. We're packed for scheduling hearing in D.C.

I got up to do the first part of it with Robertson, and he said the following. This was amazing. Judge Robertson goes, “Everyone has been calling you Lieutenant Commander Swift.”

“I know.”

He said, “Well, I was in the Navy. I rose to the august rank of lieutenant. To me, everybody over lieutenant is Mr. so I’ll call you Mr. Swift. Everyone out there will think that I’m dissing you, but you and I will know different. So Mr. Swift, what do you have to tell me today?”

A note came up from Ben, who had joined the team at that time—“Don’t sit down! He likes you. We’ll keep putting stuff up to you. We’ll hand up what you’re to say.” Because I was only supposed to do this whole part but I did the entire scheduling hearing.

Neal, Joe, and I all argued the next session on this part. It was an extraordinary thing. This was like arguments of old. They don’t do this in federal court anymore. The argument went on for two and a half hours. It’s being argued by a deputy solicitor general of the United States and us. On it goes, and on it goes.

What amazed me was the visual in the church that is the federal court of D.C. It looks like a church. The visual, it’s in the center of this huge courtroom. All the people.

Q: And it’s banked.

Swift: Oh, it's an amazing place. The visual that you saw out there, though, was what was amazing to me. Because the prosecutors are not allowed to sit at counsel table for the solicitor general and they're told they have to come in civilian clothes. The defense team, on the other hand, all comes in uniform. Plus, all the defense attorneys of D.C., the military attorneys, are rounded up, and come to this thing. The first four rows in the church that divides behind the two sides are all the military. The visual is lined up behind the defense, rows and rows of ribbons and uniforms.

Nobody had missed Robertson's statement, "I was in the Navy." The first front row, according to Gunn, are all Naval officers—Naval and Marine Corps officers with the ribbons and all that behind this. The military is on our side. This is versus the Bush administration. This is the visual that we want. By that time, we have retired generals and admirals briefing. We have this idea that it's the military. We are communicating that, and we want to communicate that, that we are about reason, military virtue, and the goodness of it.

Q: Have they submitted amicus briefs?

Swift: Yes, the first set. So we are very much into this part. We have the perfect judge. Neal knows we have the perfect judge. This guy rules against presidents and wins. He has a history. He is highly respected. Everyone is going to take what he says seriously. They may not agree with it, but they are going to take it seriously. And we can win in front of him. That's important.

The argument went on. There were a couple of moments in the trial part that starts it. The first argument that the government wants to make is that they have changed Salim's conditions.

Therefore, another one of our parts warrants abstention. Because the week before the argument was going to go, they pulled him out of solitary and moved him down to a general cell. And that was their argument—“Well, he's not in solitary anymore!”

Judge Robertson asks a series of questions on this. He says, “Can he see the sun from where he sits now?”

“I don't know.”

“Does he have general exercise?”

“I don't know.”

“Does he meet with the general prisoners, and does he have all the same restrictions?”

“I don't know.”

“Well you don't know very much, so I wouldn't bring it up again.” Boom! Holy cow.

Then we bring up the critical fact that he's been excluded from his trial. I'm so anxious. Neal is up on questions, and the judge is asking—“Well, was that forbidden by the UCMJ?”

Neal doesn't know. This was always the problem in stuff in the military. I'm thinking, "I know!" Finally, Robertson says, "I bet Mr. Swift knows the answer to that question." I said, "Yes, sir I do. Absolutely, it's forbidden under the UCMJ." Judge [John G.] Roberts said so, but there's still no opinion.

It goes extraordinarily well, but there is no opinion. In the meantime, we are really putting our efforts in this process into winning with the Democratic campaign. Because [John F.] Kerry's getting very close.

Q: Oh, that's right.

Swift: Very close. It wasn't a done deal. People forget, for a sitting president, how close that election was. That election was Ohio. If Kerry had won Ohio, he'd won the election against a sitting president in war.

We're lobbying them hard. We've stalled long enough. If you switch administrations, we switch the paradigm. We could win without ever having to win. We just stall it, and they run out the clock. So we've got a lot of effort in there, but that doesn't happen. Salim's hearing, the first motion's hearing, is on November 5—also, we're writing all those motions—right after the election, the day after the election.

I was on the plane to go down. Chuck and I got on in D.C., and Kerry was winning the election. We got off in Norfolk, and he'd lost. So we said, "We're going to have a commission.

So we went down. Highs and lows of this emotion. Neal meets us down there, and we are going to argue. My first argument is a weird one. It's a numbers argument that said, "I challenge four people off. They were supposed to replace them under the rules, and they didn't." The truth of the matter, then, is that this did me no good because I've still got to get the same numbers. I didn't benefit at all. These all would have been, all of those people were potential "yes" votes. If they had all voted guilty, it wouldn't have mattered. So I make this argument and say, "This has been a completely unfair system. I wasn't advised of it at the beginning. We need to disband the panel."

It's an interesting argument. Neal was like, "Wow. Where did you come up with that?" I said, "It's just stuff. I'm just throwing it out, in part." They get a note in the middle of it. At the end of it, they all get up and leave!

Q: Is this [Peter C.] Brownback?

Swift: Yes, this is Brownback. They all get up. He says, "The commission is adjourned."

Neal's like, "What happened?"

I said, "I didn't think it was that good an argument. You know, maybe they're considering whether they need to disband, or I don't know!"

Then we get a note out. We're sitting around, and then we hear that this district court in D.C. has reached a decision. They're going to stop the commission. That comes out. That's what the note was, that we are in violation of a district court decision. They went out to read the decision. Then they send a note back that says, "We've read the decision," and they're not coming out again.

And that closed it down. It would never re-open again.

Q: Must have been a good moment.

Swift: It was an amazing moment. It was an amazing moment. It lasted for forty minutes, and then the administration announced that it would appeal.

Salim's life changed dramatically because he was yanked out that night. My relationship with the guards and with everyone else in the SG's office changed that moment. While I would argue with them, before it had always been, "Hey. Come in, have a cup of coffee." Chumming around. I knew all these people and I'd known them for a long time. Neal could never understand. I've known these guys since I joined the Navy. We've been on different sides. This is how it works. They forget. In the world outside, it's a lot more cutthroat. In our world, it was completely—comrades. We fight, but tomorrow I could be on your side.

All that changed that day. I went down to the office. I was going to open up the door and they said, "You need to wait outside, sir."

I said, "Why?"

They said, "The SJA says you are to wait outside from now on."

I said, "Well, I have some questions."

"The SJA says that you are to put them in writing."

And I asked, "Why?"

They said, "Well, the solicitor general has given us very clear instructions, sir. We're not on the same side anymore. From now on, you're out there. War has been declared. You've won your first battle. No one thought that would happen. It's happened. There's no more, this is serious."

I said, "Let me be very serious with you. You are in violation of a federal order, because my client is in separate confinement."

We were considering whether to use "in violation." I said, "You are in violation. I'll be bringing contempt proceedings tomorrow morning if he's not out."

That night, they sent back, "He's been moved. He never went back. Withdraw your contempt."

There's no more friends in here, there's no more letters, there's no more nice.

"I'm going to hold you," my finger's going, "and then I will hold you. Get the SJA out here.

Your name is going to be on the contempt citation, along with your commanding officer. I'm going to hold the two of you. I want to see your legal advice to him. If you advise him, he doesn't have to, and then I'm saying that you're in contempt of a federal order. Think very hard about what you're about to do." Boom, boom, boom.

Because now they're like, "You're coming after us."

I said, "Absolutely."

They never really realized that. Everything has changed. In the blink of an eye, everything changed.

Q: Yes. Many of these procedures, the pro bono lawyers had been governed by them.

Swift: The world had changed. The sense you got was that they had had a hard discussion with the civilian attorneys and had been on the phone with them. They weren't talking about what that discussion had said. But there are no more friends here. Mr. Swift doesn't get access. He's not anybody special. No more of this. He doesn't get to have it both ways.

Salim's life changed both for the better and for the worse at that moment. Now, it was a dramatic change. Down in the commission, they couldn't figure out what the heck had happened because Salim went away in civilian clothes and vanished. At first, they stuck him into a wing with a whole bunch of people, none of whom spoke Arabic. I complained immediately. Back and forth we would go on the contempt parts of this. I was threatening contempt, pushing it. From now on, all of that on how you treated him was different because of a federal order.

The next three years would be different. We knew that, going in at that moment. I didn't know that. I didn't understand the ramifications. When we drove back that night, we all had a pool on when would it reach the Supreme Court. Because now it was real, everyone knew it was real.

Q: Did you know that you would lose so rapidly after?

Swift: As soon as we saw the panel.

Q: You know, what's with Judge [A. Raymond] Randolph, you said?

Swift: Judge Randolph is Judge Randolph. And we're like, got no chance there. Neal thought we might get a chance with Roberts. I thought we had no chance with Roberts.

Q: Well, he had known him.

Swift: Yes. He'd worked for him.

Incidentally, it was Randolph, Roberts, and the guy who wrote the common article, who did believe that Common Article 3 applied. He just thought we should hold that in abstention, and see if you violated it or not. I said, "Well, that's a stupid decision, sir, because Common Article 3 clearly contemplates the right to be present. So it's already been violated." Nevertheless, he wasn't going to write off Common Article 3.

But I looked at that decision, when it came down, as a huge victory. I always say, if you're going to lose, lose big. If you lose big, you've got a better chance of getting to the Supreme Court. You need to force them to do something, and we lost big.

But when that decision came down, the first crisis, other than we were going to have to write a cert petition, wasn't the decision. It was Justice Roberts. Neal had said at the very beginning, "You know what you have to do to be a good Supreme Court litigator? You have to be able to count to five and count to four. Four to get cert and five to win. That's what you have to be able to do. It's all about getting to five. If you can't get to five, you don't win. And if you don't win, there's no second place for being there."

We had counted on our votes to get cert. We absolutely believed that Justice [Sandra Day] O'Connor, after her opinion, was an in-the-bank vote, because she was the swing vote on the court. So we were there, we win. Sandra O'Connor is our vote. We don't even need Justice Kennedy. We have Sandra O'Connor. We've got four votes. She'll want cert. Hell, we got five

votes for cert because [William H.] Rehnquist has written about this. He may not vote for us, but he's written about it. He'll want to hear it even if he loses it. He's not going to play tactics on this.

As the decision comes out, Sandra O'Connor is announcing that she's retiring. Oh, gosh. Right to the guts. Then the decision came out. But it turns out that the day before the decision came out, Justice Roberts was called back from teaching in Europe. He was teaching on the Georgetown program, of all things. This is how Neal knew. He was called back to interview at the White House to be the Supreme Court justice.

We get a call the day after he's announced from the SG's office. They say, "It seems to us that Judge Robertson dismissed the president from the lawsuit." We'd already seen the issue. We've read the transcript, and we don't think he did.

"Would you consent?"

"Afraid we cannot." But we're thinking about it. Meanwhile, Wilner has really seen the issue.

Those who oppose Justice Roberts are like, "You've got a poison pen because that's not ethical."

Now, in some ways and in some ways not. You knew the opinion was written. It was just a matter of getting the clerks to publish it. He'd left. He wasn't having any more input. He said, "I concur in the decision." At most, he might have thought on it, but you know, this is rushing it out. He'd already voted, he'd already thought through it, he'd concurred in all the points.

Somebody was writing a concurrence. And likely, or concurring in part and dissenting in part,

that's the one you're waiting on. So in all likelihood, they're waiting on a judge, and the opinion was written, and his signature was already on it. But it's not out, so it's still pending. So you could argue that.

So there's a decision. Neal and I are talking about this. Neal says he can't make this decision because he likes Roberts a lot. And he says, "I think he should be a Supreme Court judge. Regardless of what his politics are, I think he should be. That taints what I'm thinking, but you know, it's also about litigation. It's about strategy. I think you should decide. I'll do whatever you do. I mean, I'm going to be honest with you. I can't live in this town and take him on. But I'll let you do it."

I said, "You know what?"

Michael and Wilner called me up and yelled at me for twenty minutes.

Q: Why?

Swift: When I said, "I'm not going to. Our whole philosophy on this has been high road. We represent non-politics."

Q: What did Wilner want you to do?

Swift: They tried to intervene in our case to bring a challenge against us because they didn't think we'd get cert. So they were, "You need to do this, do that." People are now running our case for us. And we're like, "Ah, thank you, but no thank you."

They yell at us and all that sort of stuff. Neal was able to deflect that and say, "Well, Charlie's got the decision." So I get called up. Now it's pressure on—"Hey, look. You're just really new in this."

I said, "You know, sir, I am pretty new in it. But we had a philosophy that this was going to be the high road. We're going to go for the high road. I think the remedy is for the Supreme Court to grant cert and for him to abstain. I don't think anything else that I do has any effect on that.

We're going to the Supreme Court on this decision."

Q: But in the end, he recused himself.

Swift: It went down exactly that way. I know we gained points with the court for how we handled that. Part of the real concern in it was, is Neal's theorem—"There's two concerns at the court. One, is this the right issue to hear it? Are these the right litigates? Will they do the issue justice? We gained great credibility that we were the right litigates to do the issue."

We took a lot of heat at that time. We start to really doubt our decision because we got our petition in immediately. Timing-wise, Neal worked tirelessly that summer to try and get in the perfect petition so that it would be heard in the first conference, where most certs are granted.

We do all of that. We push the government. We get all the cert things in, and guess what doesn't happen? It's not granted on the first petition. It's not denied. That went on for weeks.

Q: I want to back up a couple of minutes. One of the things that struck me was the work that David Remes did in getting amicus briefs. How did he come into things?

Swift: That is an important part. David knew Neal early on. He and Neal knew each other going way back, through Yale connections. Covington [Covington & Burling LLP] was starting to get involved. They had gotten involved really when we had brought it east to D.C.

Q: Perkins Coie was still involved, right?

Swift: Absolutely. They were coming east with it. Everyone was coming. But when it came east, I think David Remes and Covington were more impressed with the military side, and they felt comfortable doing that more than—because after *Rasul/al-Odah*, suddenly there was a new thing in New York. Clive Stafford Smith is signing up every New York law firm out there.

Q: They have six hundred lawyers now.

Swift: Right. They are signing them all up. David makes a strategic thing that the game is not here. He agrees that Neal and I, that we have the game. *Hamdan's* the case. He's probably the only big firm lawyer, other than Perkins, who sees it that way, that *Hamdan's* the game. So he signs on on that basis.

Now, this is an embarrassment of riches. But he starts bringing in the amicus, and arguing it, and bringing in that part of it, which had control. Again, in personalities. More people are coming in. Harry's like, "Hey look. We signed up six months ago. Nobody was around. We took it. We got a D.C. office. We got this. How much help do we need?" He was a little defensive on that part. "But now that it's cool, all the kids are around. When it wasn't cool, where were all you?"

So as the amicus, all of this gets going, David does a terrific job. Perkins wasn't in a position to work the room the way Covington was in a position to work the D.C. room. They do a terrific job in putting together the amicus and all of that. They were brilliant on it. David gets very involved at that process. *Hamdan*, by the time it got to the Supreme Court, set a new standard for amicus. Not only were there a ton of amicus—on big cases, there are these days—but it was wonderfully organized. They had bibliographies of what they were. Nobody doubled up on an issue. We covered across. They were incorporated in *Hamdan*. It was one of the secrets to getting sixty pounds into a six pound sack.

David did all of that, and did fantastic at it. Do you know how I knew he did fantastic at it? Neal and I didn't have to think about it. Terry didn't have to think about it. Joe didn't have to think about it. We would have enough to think about.

Another character, probably, you don't know in history. But it's a story that needs to be told in history. How much it influences.

One of the things that Neal had said was, “Here are the people we give interviews to during the course of this litigation. The *New York Times*, the *Wall Street Journal*, etc.” If you go back, you'll notice there are few stories in the *LA Times*, and then there are none. The reason is that we stopped talking to them. The reason we stopped talking to them is Justice O'Connor and Justice Rehnquist left the court. They read the *LA Times*. Why would you give an interview to a newspaper that is not read by the people you want to influence? That was Neal's philosophy—“Why would you give an interview? The justices don't read the *Post*. Give interviews to the people who the justices read.” He knew who they read. He'd been there. That was part of Neal's philosophy. Neal had a lot of insight into the game.

We put an op-ed into the *New York Times* the day before they granted cert. It was by Milt Bearden. Milt had been another person that I'd reached out to early on after getting *Hamdan*. Milt Bearden had been CIA station chief of Islamabad, running it for several years along with that crazy Greek guy and Sageman and others during the war in Afghanistan against the Soviets.

One of the things that Milt had tried to get them to do was play by the Geneva Conventions. Ironically, Milt was very big that the Geneva Conventions apply to conflicts, including those conflicts that involved the CIA [Central Intelligence Agency]. Geneva is who we are. He said early on, it was really hard because the Soviets were treating the Afghans the way we were treating the Afghans at the time. The Soviets were really rough with ex-summary executions.

He said also that when he first took it over, he saw a picture of a Soviet pilot down in the snow with a pistol beside his head where he'd killed himself because you didn't get taken prisoner by

the Afghans, because of what was going to happen next. Milt pushed hard that that's not how the mujahideen should fight, that they should have prisoners. One of the hard parts for a guerrilla force on prisoners is doing something with them. They are a hazard to the force. That's often why they killed them. But Milt made it worth their while by paying for prisoners. He would pay them money. That's where the bounties that would later become part of Guantánamo started. They paid for Soviet prisoners because that was incentive to keep prisoners alive. They were worth something.

Milt wrote about the most famous bounty he ever paid. Toward the end of the war, they took a Soviet fighter plane almost completely intact. Word comes from the mujahideen that they have it. Would Milt like it? “Oh yes! Milt would very much like a Soviet fighter plane almost completely intact!”

“That would great! Could they deliver it?”

“Oh, by the way, we have the pilot, too. Would you like him?”

“Well, sure!”

“What will you give for the pilot?”

“We'll throw in another Hilux pickup truck.”

Now Milt, in this process, had never actually taken them. He let them go home because he was trying to get the Soviets playing inside. This was war in a civilized matter, to the extent that war can be. But he always let word be known to the Soviets that if they would like that swimming pool in Miami, he was free to talk about it.

The colonel sent back word to him through the network as they were taking him out that he appreciated the offer, and he very much thanked them for not having him killed, but he was a loyal Soviet, loyal to the Republic, and loyal to Russia, and he did not want a swimming pool in Miami. He would be going home. Milt never heard of him again until he put down the revolt on the steppes.

So Milt writes this thing about Geneva and what Geneva does. The next day, the justices grant cert. It's a little-known part in all of it.

Do you know the background of all of the justices that wrote opinions favorable to *Hamdan* ? Do you know what Kennedy, Stevens, and Judge Robertson have in common? It's not where they went to school. It's not their time on the federal judiciary. All of them served as military officers in the United States military. All the people who wrote dissenting opinions, none of them ever served a day in the military. Justice Stevens is a hero of World War II. Not just a participant, a hero of the war. Justice Stevens was an extraordinary Naval officer, but they were all serving military officers. I found that it really mattered to them—Geneva, the idea that there is law in the military, struck a chord with them.

Q: The op-ed raises a question about tactics. Going before Supreme Court, is it a wise tactic to also go public?

Swift: There was a dance on what you can do.

Q: Or is it better to lay low?

Swift: There are rules. They are unwritten, apparently, according to Neal. All the rules I know are rules that Neal kept telling me. He would say that we could give press releases at certain periods of time and do interviews, but not at others. He would also say what you do not do. That was the debate as to why we had to have Milt do the op-ed. We could do that one without saying it was us. Others were free to weigh in on the court, but we didn't do anything while the court was considering. He said it was because you don't continue to argue it after you say you're done. You can do anything in the press until you say you've put your final brief.

So you will recall, if you look at our briefings after the decision was pending, there was tons of stuff from us talking about the importance in interviews and all that sort of stuff. And then nothing after it went for consideration, during that period of time, until it was granted. Then we were given an opportunity to talk.

But you asked about David Remes. The extraordinary thing happened. I'm down in Guantánamo Bay on the day they granted cert, or the day after. I get down there. The day they grant, I was

there. I fly right down to tell Salim that we got cert. It's going. One of the other lawyers said, "They're going to strip it from you."

Politically, the administration, which had absolutely resisted John McCain's bill on detainee treatment, grasped at it as a way to get jurisdiction out of the courts. In that grasping at it, they suddenly changed the rules. They wanted to strip it out. Thus would begin the political dance, arguing of this throughout the process at the same time that we were supposed to be writing a brief for the Supreme Court. That didn't make for a fun December or January.

Q: What was Hamdan's response? The Supreme Court's going to hear this, but on the other hand—?

Swift: He was scared to death.

Q: Everything's coming down.

Swift: Yes. Salim went on a hunger strike at the same time. Part of it was, I started ignoring Salim for two months. I sent Chuck down in November after telling him the brief, I said, "You go down and see him. I can't afford five days off." Mainly because we were lobbying hard in Congress. I had to physically get to the Hill. I was the least important writer by any means, but I had a lot of other stuff to be doing. Neal was like, "We're going to win or lose this up here, not down there. You don't have time."

So of course, while we do it, Salim is very upset. His conditions are bad. The administration yanked him back into, with everybody else. He goes crazy on this. We're not in a position where we feel that we should be complaining about his conditions right now, right after we got cert to the Supreme Court. He doesn't like that at all. We feel really locked in and he feels very ignored. As he later told me, "I know that there's the case up there, but there's the detainee down here." Salim goes onto the hunger strike and it was very serious. The only time that he was force-fed was right during this period of time. I think it was his nerves, and just going crazy on what was going on. I think that the administration had put a lot of pressure on him because now he is really famous. This is the Supreme Court case. It's called *Hamdan v. Rumsfeld*. Everybody in Guantánamo now knows about it. Even the most lowly cook knows about Salim. So that laying low thing didn't work anymore.

Salim goes on a hunger strike. I find out about it in January, right after that. That's not a good fact to give to Court, and we are really concerned about Salim's health. What is he going to do? What are we going to do? The administration would love for Salim to pull the plug. There's a question of if he fires us, or anything on that, and he starts to talk like he's going to, we will lose the case. The administration would love that. What are our ethical obligations?

I have Emily by this time. Emily and a Yemeni psychologist help me write a letter to Salim. They suggested, "Pull out all the stops on the girls. Don't talk about him. Talk about his family. Talk about all this stuff. Really lay the guilt on him. He's behaving immaturely. Lay the guilt on hard. He's trying to make you feel guilty. You do the same."

Emily was even, “Well, this might be harsh.” I’ll tell you what. Psychologists can mess with your mind. They know what they’re doing. Psychiatrists and psychologists, they know. The Yemeni psychologist—a friend of Chuck’s—and Emily wrote a letter, and she said, “Oh, no. Be harsher.” She’s writing this stuff out.

Chuck’s like, “Oh my gosh.”

She said, “Oh, yes. Yes.”

So off goes letter. She says, “It’ll sit in front of him for three days. See what happens.”

Then we go down there. He started eating the day after he got the letter. Then what the psychiatrist says is, “Never bring it up again. Let him save face. Never bring it up again.” We continued on. He got out of solitary, the conditions improved, too. But it had been a rough, rough period.

Q: When it came time to argue before the Supreme Court, how did you divvy up the turf?

Swift: We talked about that. My view was, it had always been to get Neal to the court because this was his territory. He knew these people. He was the best to argue it. Neal offered to put in for joint. In the end, it just didn’t seem like a thing even to do. It was a very nice offer, but we didn’t.

Q: Did McMillan want to argue?

Swift: No. It seriously was always Neal's. I had argued parts at the lower courts because you could. I thought I could argue parts of it and there were parts to be brought to the military. Neal, looking back, will tell you that if oral argument makes a difference, it made a difference in front of Robertson, and it helped. And the contributions of Joe and I, nothing was going to change the D.C. Circuit. Neal and I both argued, but nothing was going to change them on any of it. I thought Neal was the right guy to argue it in front of the Supreme Court. It was about winning, so for me, it never was seriously a consideration not to do that.

Q: Is it fair to summarize that by saying that there were really two parts to it? One is about the commissions, whether or not they are authorized, and the second is about the Geneva Conventions.

Swift: There are three parts to the case. This was, in some ways, a decision on the argument. There was Geneva. There is, we argued, in part, this classic idea that comes from—and this was, I think, my biggest contribution—*Quirin* as a model. Follow the *Quirin* model. Have them do what the court did in *Quirin*, only they reach a different conclusion. In *Quirin*, they asked, is this a crime that can be tried by the law of war? The second argument was, is this a defendant who can be tried by the law of war? And the third, is the commission properly constituted?

We had three arguments. Salim isn't someone who can be tried by the law of war in a commission. No one ever took that one seriously. This isn't a crime that can be tried. That was

the conspiracy charge. That was the thing that changed, incidentally, because everything had changed when Sandra Day O'Connor left.

When we brought in the professionals who do Supreme Court litigation to help us, at that point, they loved that this is not a crime that can be tried by the law of war. It had an international argument. It's extraordinarily limited. It just says conspiracy cannot be tried. This is a Justice Kennedy vote. You might get Kennedy simply just to concur on that, but at least you'd win. So that argument bumped up, by the way.

The last one was that it wasn't properly constituted for two reasons. One, it didn't comply with the UCMJ, and two, it didn't comply with Common Article 3 of the Geneva Conventions.

Neal liked Common Article 3 better than Article 36 because we thought the language on Article 36 was kind of strained. The only person who really liked Article 36 was Chris Sipos. He thought it was a winner. And I remember him reading it going, "Ooh! I'm right! I win! I got my votes!" Because Chris Sipos wrote that part. But the Geneva part was really that breakdown.

But the really complicated part—because that's not what the administration was defending on. They were depending on "It's not ripe yet." They were arguing in simple procedure that you shouldn't hear the case.

Now, there was no question, the best person to argue that was Neal Katyal. It was long-determined, because we had split up these arguments, that it was far easier for Neal to master the

very limited question of Article 36 of the UCMJ, or Common Article 3, than it was for anyone else to try and get the second part. If there had been any debate as to asking for divided argument, or any part, it was sealed with the Detainee Treatment Act. It was simple. Neal had to argue the procedural part. Everybody thought we wouldn't get over that hump.

Now, the hard part—and Neal disagrees on this part. But I was there, and this is what I saw. And it was what Joe saw, and what Chris, Charles saw. Neal went back to Yale and to professional people and they didn't understand our argument. I felt very good about the Supreme Court. Because, as I pointed it out to Neal, "I know nobody notices, but the Supreme Court takes one or two military cases about every other term. They actually know the UCMJ." They'd been there for a long time. Justice Kennedy has written an opinion on Article 36. He knows it very well. It's called the *United States v. Loving* [*Loving v. United States*, 1986]. He knows Article 36. Don't think he doesn't. They have a very good idea of the Geneva Conventions. Two were serving military officers. They know what they are. They have a better understanding of these arguments than the lower courts did. They are very savvy on this. They do it all the time. So I think they took it because they want to hear it.

But up at Yale, nobody thought that. So we spent an agonizing period in the moots where Neal was diverted by other people. Joe thought it was a disaster. It was like, "What a disaster. This is going nowhere. Even our briefs, we don't tell them what we want to do, we don't have a clear roadmap, and we don't have anything here."

In the end, though, Neal reverted back. He came all the way back, so that right at the end—and Harry says on this part, I wasn't there. On really big cases, there is a debate that is always sponsored the day before the case. This is where you can argue public policy that you could never argue in the court. This is where you can do the ramifications of the decision. It's historically attended by a great number of the clerks. No justice will go there, but the clerks are going to listen to the policy argument.

Neal says, "It's very important that the clerks hear the policy so that they get echo back. This is what he says will happen if you do this. It's not appropriate to argue policy to the court. They will slap you. They determine what policy is. You don't. You argue the law to them. They may question parts, but you do not come in and say, 'This court must, or this court does, if the court does this, the world will collapse,' this sort of thing. They do not take kindly to that. You are not a Supreme Court judge."

But you can do it in this other forum. So I went down to argue it, and Neal did the final moot. Because the one I had been to before was, in my opinion, a disaster. But Neal had it. The last one, according to Harry, was a thing of beauty. Harry was sick. He was there, "Oh, no. We did one too many. Oh, no. He hit the ball. He was ready. Now we did too one many." The only thing Harry said was, "Well, wow. The twice told tale as we talked about, it got better the second time. I can't believe it."

But one ramification that did happen in the last forty-eight hours had to do with Justice Scalia. Justice Scalia had given a speech in Italy, which was not covered by the American press, but

eventually got wind to the American press, about the case where he had questioned why any detainee would have any rights. He probably shouldn't have done that and he didn't react well when the press questioned him about it. They laid in wait for him when he was coming out of a church service. I sympathize with Justice Scalia. I wouldn't want to be nailed as I'm walking out of church by a bunch of reporters. But it's hard to get access to Supreme Court judges. Anyway, David Remes said, "We should challenge him." I think we kind of jokingly said, "Sure," but we had no intention of doing that.

We thought our most important amicus brief was former military officers and that these JAGs and generals who were arguing were the people who were going to be most listened to. Neal had taken that away from an affirmative action case, the power that the military had in American society when they did the Michigan Law School argument. In that argument it had been pointed out to the justices that racial preferences, based on a very narrow criteria that was similar to Michigan, were done at all the service academies.

The solicitor general came in and said, "It's not about that, and they were there. It has precedent." They were reading the military officers, saying, "We need minority officers to lead minority troops. We can't have an officer corps that doesn't represent. Like, well, isn't that true of lawyers, too? Don't you want lawyers who represent across a broad spectrum of society? Isn't that a legitimate issue? Isn't this narrowly tailored to provide a society issue?"

Neal said, "It was former military officers who pointed this out." There was a very reasonable brief read by Carter Phillips that had just been dynamic on the issue. From Neal's viewpoint the most important brief was the military officers.

David Remes wrote a brief on behalf of them, obviously without calling them, challenging Justice Scalia. Oh, man, was Neal hot. Neal was angry. Harry was disgusted. He would never have reacted that way. Harry's cool under pressure. He doesn't make rash decisions. Neal was so furious he couldn't talk. As a result, he banned David from the table. He wouldn't be seen sitting next to him. He had to distance himself, and hope the Court knew that we had nothing to do with this. To Neal, the high road strategy that Harry and all of us had agreed to had been the strategy. It was how we were going to win. He thought something like this was juvenile and he was angry. I don't know that it had any real effect, but he was angry. That ended their friendship, I think. David was extraordinarily hurt. In the process, he was very, very hurt because he had put in six months of his life into this effort. He'd worked as hard as anybody, maybe harder than most, and had gotten none of the credit, comparatively. Maybe did it because he felt left out. I don't know. Personalities play into these things. But it ended it.

Q: Their careers have gone in very—

Swift: —different directions, didn't they? So did Harry Schneider's career. In a funny way, there was Neal, in part, but there was also Harry and David. Harry pretty much was done with David. Harry's not in D.C. or Wall Street, but inside the profession, he's extraordinarily well-respected

nationally. People think a lot of him. Harry went on his own. By the time the whole day was over, it could not be redeemed.

Q: One of the little side lights on this course was the passage of the Military Commissions Act.

Swift: Right afterwards.

Q: And at the testimony of [Jon L.] Kyl and [Lindsey O.] Graham when the government moved to dismiss, one of their arguments was that the intention of Congress really was, and they made it up!

Swift: Well, they inserted it.

Q: It wasn't part of the argument at all!

Swift: Well, here's the funny part.

Q: Unbelievable.

Swift: It was funny. Justice Scalia has once commented that he never reads the *Congressional Record* because it's a piece of garbage not worthy of any serious person's consideration. Having participated in the debate, and putting in *Congressional Record* comments, I must say that is one of the things that I agree with Justice Scalia on. Never read the *Congressional Record* to try and

determine—first part is, you can insert comments, legally, weeks after the bill has closed. So they were never heard or argued, and that's what happened there.

Here's the funny thing. We were doing the exact same thing. We wrote *Congressional Record* comments and had senators insert them. We put in tons of what we wanted. We negotiated in the committee. It was down to "ands" and "thes." We were all doing it.

We would rely tremendously on Dwight Sullivan's relationship with Senator [John W.] Warner's chief of staff because they'd gone to UVA [University of Virginia] together and were both Marines. Warner would break the ties. We had Sullivan in there every day lobbying Warner, putting in comments, and doing all this stuff over the process. We were both guilty as all hell. That's how we knew that they'd gone too far. It was, "Wait a second! When did they insert that?" Neal had the student read the entire *Congressional Record* to watch it, to see if it ever occurred. Then we figured out when it was inserted, and we called them on it.

But of course now, some of the things we quoted, we inserted. The bridge too far was to make it look like they'd had a debate. We can say, "Senator so-and-so thinks this is what it means and that's why they voted for it." That's how we quoted it. Instead of saying and this, it's a fine point, but instead of saying, it's lawyering and it is after the whole process, I am completely with Justice Scalia. Do not read it.

My respect for the federal government never wavered. I understood what the president was trying to do. I thought he was wrong. I thought he had bad advice. But I have great respect for

the Solicitor General's office and for everyone who worked in it. I have tremendous respect for the people in the Justice Department. I have tremendous respect for most of the people in the administration. I have unbelievable respect for the federal courts and how well they operated during this very difficult period. Judges who voted against me, I understand why. They explained themselves, they prepared themselves. They did the best. They did what they believed.

I have no respect for Congress. Congress is awful. Missing in action.

Q: Tell me about testifying before the Senate Judiciary Committee. The Graham Act.

Swift: My first testimony was not on the Graham Act. My first testimony was when Senator [Arlen] Specter of Pennsylvania decided to have a hearing on this while it was pending in front of the D.C. Circuit. I was like, why have a hearing? But he had a hearing and I got invited on to testify. That was right after the *60 Minutes* story had come out and whatnot. So they were going to have a hearing on it.

It was interesting because the first person I met to help prepare me for it was Senator [Joseph R.] Biden. Now Vice President, but Senator Biden. I spent an afternoon, an hour or so, with Senator Biden, talking about the testimony I was going to give, and a couple other witnesses. It was told to me at the end of that day, he said, "All the other human rights groups have said you're it."

Neal said the same thing. "You are the game. The rest of these people don't count. You'll either win this or lose this, in making this palatable on an issue, on that process."

Testifying in front of Congress is a big deal in the military. It happens all the time, but generally, it's admirals. Now I was going to testify in the most unusual position, against the administration. This is the part where it comes back to Jeff Horowitz. I wrote a memo giving notice of the request for my testimony. Jeff Horowitz was now head of the Congressional Liaison Office that prepares people to testify. So Jeff was there. "Charlie, I've got to be your minder for this. We're going to accompany you and all that."

Neal is furious. "They're putting a military minder on him? I can't believe this. I told you this would happen. Sooner or later, this would happen. Maybe I should testify?"

I'm there, "No worries."

He said, "Why?"

I said, "It's Jeff Horowitz. He's just some commander." Jeff used to wear a T-shirt that says, "OJ is Framed." Are you kidding me? This is no problem! Jeff Horowitz was the great defense attorney for the Tailhook scandal, who got all the senior officers acquitted. This guy is amazing. He is the dean of defense counsel. Of course he's on our side!

It happened immediately as we got in there, Jeff said, "I have very clear instructions that I'm to be neutral in this hearing. Not to hurt you, but I'm not to help you. You're on your own."

Then one of the senators immediately began attacking me about access. I was attacked by General [Thomas] Hemingway, saying that some of the stuff in the letters, I wasn't limited, and all these sort of things.

Horowitz said, "Well, I think that guy just crossed the line. He's attacking the JAG Corps of the United States. I don't think I have to stay neutral anymore."

So he's grabbing letters and sending them back behind the staff. He knows how to work the senators far better than Neal does. He starts handing questions to [Dianne G.B.] Feinstein. And he says, "Here's the line." He sets up the line that I delivered.

Feinstein comes to my rescue. The senator who did it looks bad. Hemingway looks horrible. He helps her cross-examine Hemingway. He sends her the questions. He looks horrible. He looks like, "This is a moment on Jon Stewart. This is inside the military now, but he's some Air Force puke. The Navy takes care of the Navy. We're not going to have this. They took the gloves off. They made this personal. They cannot do that. We do not let that happen."

I said to the senators in my closing remarks, of this back and forth, I said, "Trials say as much about the people who are holding them as they do about the people who stand before them. What does this say about us, senators? Is it a legacy you want to live with?" That's what they played on NBC that night. Jeff set it up. Neal is now, "You're right. That was the delivery. You're in uniform, delivering the lines."

Q: Was it any easier the second time around?

Swift: Oh yes. It became frustrating because you realize they couldn't do anything. It was frustrating to Neal especially. He was there at the last one, when they passed the Military Commissions Act. Afterwards, Senator Specter invited us back to testify on whether it was constitutional or not. Neal is like, "This isn't going to do any good."

I said, "Yes."

He said, "We're going to work all weekend. It isn't going to do any good." Neal will not do sloppy. Neal is going to work like hell. I don't think he slept two hours on the thing.

We delivered the thing, Senator Specter agrees with us, says it's unconstitutional, and votes for it.

At that moment Katyal said, "I feel like Charlie Brown. You talked me into it, and we all ought to know better by now. We ought to know better. We just got kicked down the road again." I remember he said early on, "How many detainees vote? It's going to be a problem in Congress, isn't it? The entire process, because they are disenfranchised, Congress has no incentive to protect them."

Q: What did you do between the arguments in the Supreme Court and the decision? It was a period of months there?

Swift: Yes. I went down to see Salim a lot. I finished up at Temple. My wife left me. That's what happened during that period of time. Well, she started to. She didn't leave until a good part of—

Q: It had been coming a while?

Swift: It had been coming. We had never been together a long time. I say that in the sense that I had my professional career, she had her professional career. Mine had become more and more consuming. This has been absolutely consuming. She had no interest in this one. It did not interest her at all.

She also thought we were going to lose. She just didn't see how Bush could get beat. So she said, "In the end you're going to lose and be crushed, and it'll be over." I always told her, "Next year. Next year, it'll be different. Next year, everything will be normal. We'll take time off."

At the time that I'd started the military commissions, she was going to flight school down at Vero Beach and I was in Jacksonville, Florida, so we saw each other on the weekends. So when I took the job on *Hamdan*, I was supposed to be spending a year with her. We're going to live, make up for three years of not spending a lot of time together. Then it was, "Well, next year we'll go. And then next year." Then I'd done Temple, and then she goes, "You're never going to stop. It doesn't matter. Next year, there will just be something else. It isn't that next year will be different. The only thing that'll be different is what you're doing, not how you're doing it. And she said, "I can't see you ever doing a normal job. How do you go back to a normal job after this? You're not going back. You're just going forward. There's no room for me."

Q: The way you talk about it now doesn't seem to be traumatic.

Swift: It was then.

Q: It was, more so?

Swift: Absolutely. It was crushing because I didn't see it coming. In hindsight, I would say, how I couldn't see it coming. But at the time, we'd been married for twenty years and I'm not a quitter. As I look back on it, it was a great decision. At the time, it didn't feel like one.

Q: Where were you when the Supreme Court decision came down?

Swift: Sitting in the Supreme Court of the United States!

Q: That's right!

Swift: I voted. I said that of course *Hamdan's* coming down on the last day. Everybody said that, except for Neal. For the last three weeks of the Supreme Court's term, they are Tuesdays and Fridays, we trekked to the Supreme Court. Take the Metro, put on my uniform, my blues in the summer, go down to the Court, sit in Court, and listen to them read opinions. Maybe they'll decide *Hamdan* today. Maybe they'll decide *Hamdan* today.

I thought, they're not deciding *Hamdan* today. But it was interesting. I got to know Paul Clement because we were sitting next to each other. Paul has tons of opinions, not just *Hamdan*. The building is empty. They're there for the arguments, but nobody's there for this part because nobody knows when it's coming down.

The Supreme Court understands that the news media covers their opinions, they put the really important ones at the end, so then these media will be there. The media kept thinking it would be the next to last day. And so the next to last day of the term, the Friday, we know it's coming down on Tuesday. The important part that we realize is who has not authored an opinion yet this term. They always break them up. Everybody writes one. They each take responsibilities. The senior judge gets to sign the opinion when he is in the majority, if it's not the chief justice, is —

Q: Stevens.

Swift: Absolutely, at that time. Justice Stevens gets to do that. It means that Justice Stevens always writes an opinion. And sooner or later, he's on the winning side, he signs it himself.

There's no opinion from Justice Stevens. There's a couple of cases where he was on the winning side, on the last one. But there's no opinion from Justice Stevens, which means Justice Stevens likely wrote *Hamdan*.

Now, you know, we thought we'd won something.

To digress on oral argument, the oral argument to *Hamdan* is one of those that occurs about every three years in the Supreme Court. Anna Nicole Smith had a line because it was Anna Nicole Smith, and it's an unusual looky-lose. *Hamdan* had a line of law students from Yale, from Harvard, from Georgetown who want to see this moment in history. The only transcript they released that year was the transcript of *Hamdan*, immediately afterwards. The oral argument is released.

The line was out there that night.

When we came in, there was this real split. General Hemingway was sitting next to one of the professors who worked at CCR. Now these two men, they're old codgers, they've never agreed on anything in their lives, but they've agreed on one thing—"Neal Katyal is going to get his butt kicked here today." The oral argument was a thing of beauty, and it wasn't Neal Katyal's butt that was getting kicked.

I knew we'd won when Justice [Stephen G.] Breyer summarized. Paul Clement is now arguing. He's arguing the procedure part and he's used up a good twenty-two minutes, twenty-three minutes of it. Justice Breyer goes through what I just laid out to you. "They have challenged whether this is a war crime. They have challenged whether this is the person properly before it. They have challenged whether this is properly constituted, based on it not following the UCMJ and not following the Geneva Conventions, which are part of international law that make up the common law of the commission. What do you have to say to those challenges?"

Justice Scalia pipes up and says, “In the six minutes that you have left, I, too, would be interested in hearing that answer.” You can see the frustration on his face—“You have not carried the day with my colleagues, you’re losing! You don’t have Kennedy. I’m losing. I’m frustrated with you because you haven’t delivered, and you’ve wasted your time on things. I don’t have them, and I’m going to lose back there. And I’m blaming you. You could have spent time convincing Justice Kennedy why he should not be voting for this instead of handing softballs to Justice Stevens and spending your entire time being beat up by Justice Breyer and Justice [David H.] Souter, the birdwatcher.” They had beaten the heck out of him for fifteen minutes. He’d taken a shellacking.

I would just say that if you’re ever in front of the court, it would not be a good idea to suggest that Congress has suspended habeas corpus accidentally, unintentionally. That would be a bad idea, to answer a question that way. That was ten minutes of his argument gone, on that part, where they moved forward, not at all.

So Neal’s had gone brilliantly. As I turned around after the argument part of it, General Hemingway and the professor were nowhere to be seen. They were like ball fans who had just seen their team get crunched and had left early. They were gone. This had not gone down the way they thought at all. It was obvious it hadn’t.

The question was, what had we won? It becomes more and more not Justice Kennedy who’s writing the opinion, but Justice Stevens. The possibility that we might have won everything—

Q: You did!

Swift: We had won it, everything. As we sat in there that day, I had a pad of all the issues. There are two columns. I started checking them off. I'm like, we won it all. I remember before. We both have this part. Neal, Joe and Charles, we start to get the feeling that this has gone really well. So Joe and Charles fly out; they take the red-eye because, you know, this is going down. They want to be there. They're all coming out. But I'm there. We—I—think we won it all. Neal thinks we've won it all that day because two of the secretaries that like him a great deal have come out to see the opinion being read. He said, "If I'd lost, they wouldn't be here."

I know we've won for a different reason. I said, "The clerk of the court is a former military JAG." He had been talking to us too. He'd come over to see us all the time. Today, he came over and says, "The opinion will be out soon, obviously." That's all he says.

Neal says, "That seems bad."

I said, "No, no. That's very good."

He goes, "Why?"

I said, "If we'd lost, he'd have congratulated us for doing a great job. We won, so there is no congratulations." You never congratulate the defense when they win. It's a military thing. You always compliment them when they lose.

I said, "We've won. He just telegraphed it. We've won. We've won everything. It was a good effort, young man. None of that, 'You all did great.' That's for losers. Winners get nothing."

In a court martial, they never say congratulations to the winners. It doesn't happen. In a process, that's just the way it works. The one thing I don't want to hear from members or from a judge is that I've done a great job.

Q: What was the effect on you?

Swift: That day?

Q: That day, long term, your career.

Swift: My career in the military ended two weeks later. That had already been decided before the opinion ever came out. The lasting effect on me was that it changed the arc of my life. If I had lost, I think I would probably be in private practice. I would be doing similar things. I would not be doing similar cases. At that point in time, it changed forever how I was perceived. By one vote. It had a profound effect on Neal's career. I think he became deputy solicitor general because of that opinion. If we had lost, it's not like we would have been lesser lawyers. But we would have been defending bin Laden's driver and have lost. In which case, you're just defending bin Laden's driver.

There was tremendous pressure on us, too, because we really believed in the issues. We were really scared of it. I had argued, I had seen at the beginning. For me there was this huge, personal part of it. For me, this critical issue was Common Article 3. Why would you argue that Common Article 3 didn't apply? Why not simply argue, as others would do later, that it meant Common Article 3? It applied but we comply with it. Why would you say that I'm holding a U.S. trial that doesn't afford all of the requirements considered necessary by civilized people? Why would the United States ever put its name on a trial that didn't provide all of the protections considered necessary by civilized people? I mean, that's the words! Under what circumstances would you say Common Article 3 doesn't apply?

Well, the answer to that question was that it wasn't about the commissions. It was about Common Article 3, and what Common Article 3 forbids. Common Article 3 forbids the cruel and humiliating treatment of detainees, including torture. It makes that a war crime punishable in the United States. Violation of Common Article 3 is a war crime.

When *Hamdan* came down, everybody knew that Khalid Sheikh Mohammed had been water boarded. That was the worst-kept top secret in the world. At that time, I knew about it, back in 2004. That was the worst-kept top secret in the entire place. When *Hamdan* came down, those guys had committed a war crime. Because if Common Article 3 is executing an applicable in the war against Al-Qaeda, then cruel and inhumane treatment of the prisoners, which is exactly what they'd been doing, was now a war crime. There were a lot of potential defendants.

Q: A lot of them, or—?

Swift: Well, the first thing that happened was it forever changed how detainees would be treated. For me, that was the most important thing. It had become about it. We were becoming the enemy. From the beginning, it's about that.

Q: What was the effect on Hamdan?

Swift: Nothing. He had won absolutely nothing, except he had because they passed the Military Commissions Act. In the Military Commissions Act, two things had happened. Hamdan won nothing at the beginning, but Common Article 3 now applied. I don't know what will happen in these future commissions. But in the one contested case that comes down, the military will revert to a court martial and call it a commission. That's what happened next.

After passing the MCA—and at first, we thought it wasn't going to pass. It was strange. Democratic allies were nowhere to be found. Guess where all our allies were. Our allies were Graham, McCain, and Warner. They had gotten a good pulse of what the military thought about this. Now the military had been becoming increasingly less supportive, especially the legal voices, even voices like General [David H.] Petraeus.

Remember, at the same time the surge has started. General Petraeus has a different view on how to win a war. In Vietnam, a lot of the same stuff was done. Let's be honest. But it was done under General [William C.] Westmoreland. It was not done under General [Creighton W.] Abrams. General Abrams had a different philosophy on how to win an insurgency. He wasn't a search and

destroy general. He was a make allies, protect the population general, establish law and order. General Petraeus is simply the most recent version of General Abrams's strategy. This is not new stuff. We got General Westmoreland, which was being played as much by Donald Rumsfeld as anyone, followed by General Abrams.

Even inside the military, you have this move away from this extraordinarily aggressive position. You know, how we look and our image is more important. General Abrams believed image was important. Many of the people in Iraq didn't believe that. Part of the philosophy of why Guantánamo doesn't matter is they hate us no matter what. Image doesn't matter. None of it matters.

Q: Once they brought him before the military commission, at the final end, it's bing, bing, bing, bing, bing, and—

Swift: Well, it was quite a thing. The first thing that happened was, we kicked the charges out from the judge. Because we said that he actually wasn't found to be an unlawful combat. He was just found to be a combatant. That kicked it out. That took four months. Then he was found to be an unlawful combatant.

By the way, that's the only hearing, the December hearing, not covered at all. In the December hearing, where that military judge found that the Taliban complied with the laws of war and was entitled to complete status based on the evidence before him. We put on how it was actually fought. We put up the pictures from Jane's *Armies of the World*. We put up the formations. We

put up the things, explained the order of battle, explained how the battle was being fought. And Salim was found to be, nevertheless, an unlawful combatant. We ended up in trial in the late summer and early fall, July, August, the summer of 2008.

Q: You're not the counsel anymore?

Swift: Yes, I am. I never left.

Q: What I thought is that he had new—[Brian L.] Mizer, or—?

Swift: Mizer is his military counsel. I was and am lead counsel. Brian comes on.

Q: You're no longer the military counsel.

Swift: Right. I'm still counsel, still sitting with Salim. Brian is terrific. Brian is now with the Federal Public Defenders in Virginia.

Q: Well I knew you were there, but I somehow got the impression you weren't.

Swift: No. I gave the last argument in it. Harry's there. Joe's there. Brian's there. Salim had gone back and forth. After the commissions, Salim started to decide that maybe he would boycott. He thought it was rigged.

We always had problems with Salim when I didn't go visit. I was at Emory now and I didn't have the money. I was going on my own money. I paid everything to go, myself. I was going on my own funds and I didn't visit as much. That did not make Salim happy.

We were trying very hard to cut a deal. I thought, early after the Military Commissions Act had passed, that I'd cut a deal. Cully Stimson, who had been put in charge of detainee affairs, was a friend of mine. We'd actually been together at Jacksonville. We knew each other. We cut a deal in the Nordstrom's in Northern Virginia, in Crystal City. Those who were opposed to the deal leaked it to the *Washington Post* to kill it and it was killed.

Q: From the military side?

Swift: From the prosecution side. Military side is difficult to say, on the prosecution side. Where the military, and where DOD, and then where Justice begins and ends in that was already difficult to say. From the prosecution side is what is accurate.

So in the last year of this case, it's initially kicked out. My job is to stall this baby until the Supreme Court will rule on the last case. And this is, have they stripped habeas? That's part of it. We argue throughout the part. But one of the advantages to being a professor at Emory University is that I have very limited time I can come. I come on the breaks, which helps us stall it for a year. We stalled it all the way up to the last decision.

Q: July?

Swift: Yes. It comes out at the end of June. It's in 2008, which reinstates review. He was released later by *Boumediene* [*Boumediene v. Bush*, 2008]. The *Boumediene* decision comes down. Lo and behold, *Boumediene* gives cert. But we have been arguing down. The military judge has dismissed it. He's granted some of the motions. Even Salim, he had this extraordinary part on whether he should boycott or not.

The military judge is talking with Salim, through a translator. He says, "But you win sometimes. For all defendants, it's hard. Sometimes you win. Sometimes you lose. That's the nature of these things. I make the decisions as I understand them."

Salim says, "Yes, but every time I win, they change the law. How is that fair?"

And the judge says, "It's a good question."

They had extraordinary discussions. We were arguing Salim wasn't competent, which kind of lost a lot of credibility after they have this extraordinary discussion with Judge [Keith] Allred on the process.

Boumediene comes down. Neal races it in to get it stalled. It's back in front of Judge Robertson. He stopped it once before. Stop it again. Judge Robertson will not stop it. He says in the court hearing, "It appears to me that this time there's a real judge and a real hearing. I may be wrong, but I think it's best if I wait and see."

Later on he said to Neal, "Since it came out the way it did, was I right, or were you right? What's your position?"

Neal's like, "This is not a fair question! I stand on the arguments I've made, but your honor is not wrong."

Robertson sends it back down. It empowers Allred, in some ways, to make decisions when he does this.

Then the *Hamdan* trial begins. One of the questions we've talked about, off the tape, is guards. I told you a little about the guards. The guards, in some ways, will make all the difference in this case. Hamdan lucks out. It's a reserve set of the Coast Guard cops. These guys are all cops in their regular day. Hamdan's just another guy, going to court.

In the third day of trial, Hamdan lost it for a brief moment, watching a video of himself. He's upset. He wants to talk. He can't do it. He pitches a fit. He gets out. He goes into his room. You know, who knows why he's lost it? Anyplace else, doing that, they'd have IRF'ed [Initial Reaction Force] him, handcuffed him, thrown him to the floor.

I go back. I slip out, go back to try and deal with this. The senior guard has not chained him up. Salim's just ranting and raving in his cell. He's not touching him. This is completely against the

rules. He says, "He's just upset. He'll be better in a minute. You let him be. We'll come back out when he feels a little better. He's just upset."

I'm like, "This is a guard?" He goes in there, and he talks to Salim, and he puts his arm around him. He says, "Your lawyers are trying hard. I promise you. It's okay. It's okay."

He brings him back in. The chief guard says, "Salim would like to say something." He apologizes to the members for being disruptive and they accept his apology. It's a huge moment. The prosecution is furious. Their moment of good has now gone to a moment of bad, because the members understand that he was upset. He's a human being and it's a difficult situation. The guards seem to think that all of this is fine. Their treatment of him is absolutely like they would treat anybody else in a big federal or state court trial, where the defendant is not unruly. Have respect for him. This is an important process.

The commission, over time, becomes a court martial. The judge's rulings are in line with the military rules of evidence. He disallows hearsay. He kicks out a torture statement. He does this. He sanctions the government repeatedly. We actually make the rules work for us. Because we have the statements, and the government has killed itself. This is one of the key points to the members.

Ali Soufan will testify that Al-Qaeda is extraordinarily organized. So he mentioned that the Al-Qaeda had committees. They are extraordinarily well-organized. That's part of the organizational thing. And they have a pay committee and all of the members of Al-Qaeda are paid by the

committee. Ali Soufan doesn't know, because no one ever asked him, whether Salim was paid out of that committee. They just know that he was paid. They presume it was out of the committee.

But Ramzi bin al-Shibh has answered that question in an interview. He didn't know what the importance of the question was, nor did he know why he was being asked it. He says, "No, bin Laden paid Salim out of his own pocket because it was personal. He was a personal expense and luxury of bin Laden." Members will seize on this. They will seize on a couple of other key facts and decide that Salim was not part of Al-Qaeda, but a servant of bin Laden. They acquit him of all the major charges and only convict him of driving and doing those things that a servant would do.

It's a twenty-two day trial. Salim is crushed when he's convicted because he's just sure that they will simply sentence him to life. He wasn't the only one. [Katherine A. "Katie"] Couric on the *CBS Evening News* says that tomorrow he'll get life. I was saying, "Fuck you, Katie." Excuse the language on that one.

I absolutely believed, and I told Salim this, "You have never been closer to being free than you are at this moment in time. Not even at the day in the Supreme Court were you closer than you are to freedom, to walking out of here, someday soon, than we are. We just have to maintain." Over the time, we put on the sentencing case. Emily was fantastic.

The judge doesn't allow them to put on anything about 9/11, or victims or anything. The judge shuts down the government sentencing case. Nevertheless, they argue for it. I argued for a range of no time, basically. The members know, based on the rulings. They specifically ask, "How much credit for time served does he get, if any?" They're told exactly how much he will get. I argued for no time to a year. What they gave him was five more months.

What will always be burned in my memory, more than the Supreme Court decision, is the last fifteen minutes of the *United States v. Hamdan*. It comes down this way. Salim is back there. The members came back immediately. They were out for forty-five minutes on the decision, on sentencing. They'd been out for two days on whether he was guilty of anything. Forty-five minutes on sentencing. Out they go. They come back, and Salim's back there. Harry goes back to get him. He says, "What did they give me, life?" He says, "We've got to go hear. Why don't you get up and go?"

Salim gets out, and he walks in, and he looks somber. The judge looks at it, knows what it is, sentences you to sixty months with time served. Salim says, "What does it mean, what does it mean?" I said, "You're out in January." Salim starts to cry. I'm crying. The prosecution looks like somebody has hit them in the stomach with a board.

It amazed me. They had one guy they never let do anything. They wouldn't let him argue. He wanted to argue for for five additional years and he thought he had a decent chance. He was Egyptian. They wouldn't let him talk. I said he was the one guy who could reach them. They were a little far out there, but let me tell you. You still need to give five years. This is an

additional five years. We need ten total. They wouldn't let them do it, because he wanted to take a moderate position to reach these guys. So they'd taken the extreme position.

We're starting into this process, the members and then Salim—after the magnitude of what has just happened, *Al Jazeera* will say to everybody, “If they could have shown this last fifteen minutes, it would've made all the difference.” They desperately wanted the tape of the last fifteen minutes of this trial. Because what happens next? The judge has started to thank the members, and up goes Salim's hand. It's become a participatory trial. Up goes Salim's hand. He's already made a statement to the jurors during sentencing. He didn't testify during the trial. He didn't need to. He'd apologized in the past; he didn't need to testify.

Up goes Salim's hand, I'm like, “Oh no. No. No, no, no, no, no, no. You do not screw with it once it's back. I don't know how they could redo it, but they might be able to! No!” First lesson. I'm thinking to myself, “Your honor, you don't have to call on him. It isn't class. You could ignore him!”

Judge Allred could no more ignore him than do anything else. He's like, “Yes, Salim! Do you have something you'd like to say?” Of course. So Salim stands up. Chuck stands up with him. Salim thanks the members for the sentence and he explains why. Until this moment, he had thought he would never see his family again. He would never hold his children. He would never hold his wife, that all the things that mattered most were lost. And now he knows that those things will happen again, and he will go home, and he will hold them. And for this, it is greater than life itself, for it gives life meaning.

He says then, “So now I know how painful, and the true extent of pain for those who in this war will never have their parents come home and hold them, for those who died on that day, and those who have died because of that day. And for that, I will tell you that I am truly, truly sorry, and that I understand the loss. For you cannot understand it until you get it back.”

The senior member stands up and accepts the apology on behalf of everyone. Arab journalists are going, “Are you—?” They’re looking at the—“Are you an idiot? Do you not understand how powerful this is, this discussion between a black military officer and this Yemeni? Do you understand the power and the symbolism of this, the discussion they are having?”

Then, of course, it gets better. After that, the members get up, then Judge Allred sums up Guantánamo. The first part is he speaks to Salim and he congratulates him on his victory. He says, “During the course of this, it has become clear that you did what you did because of love for your family, to try and to earn money for them. It must also be understood that all acts are not permissible. No matter how difficult your situation, there are some people you cannot work for, no matter how much they pay. This is true for people around the world. There are things you cannot do. We nevertheless understand that you must go forward and have learned. We have learned, and you must learn.”

He said, “At this point, I usually wish the defendant well, and tell them that when they are released, I wish them all luck. In your case, that is difficult, for all I can do is pray for your release, because it has not been guaranteed, much to my dismay, that you will be released at the

end of this. So I will tell you that I will offer my strongest prayers to God that you be released, and do whatever I can to help that happen.”

Salim says, “With God's help.”

And the last words in *Hamdan* are “Insha’Allah,” from Judge Allred. It ends on Insha’Allah.

Al Jazeera is beside themselves. There is an exchange about God, about prayer, and all the problems of Guantánamo Bay have now been summed up in this part. At that point, Salim stood up and he waved goodbye. He looked at the media, at all the people who've been there for a month, he said, “Bye- bye.” Then the guards took him out, and they clapped for him. The Coast Guard guards took him.

There's one last part, right before Salim was going to leave. A thirty-year old guard whose nickname was Scooby—because we have to have nicknames for all guards. Scooby had been Salim's personal escort. He was the one who took him into the bathroom and all this stuff.

They didn't know what to do with Salim. They had to put him back in solitary because under the conventions, he's not supposed to be held with the regular prisoners. But I was going crazy—
“This is cruel and unusual conditions. I can't believe you're doing all this stuff to him, and these conditions.”

The government came up with a way to fix it. He slept at night in a special wing that was only for the convicted people. But during the day, because he was going back to Yemen, he went to rehabilitation classes. He went to classes every day, so he didn't spend all day alone. He actually went to classes. Now we are going to have a rehabilitation program because he's going to be released. So he goes to classes every day. He is being driven to his class every day.

It's coming time. They're going to release them. They know that's coming in November. He's going to be sent back to Yemen to finish out his sentence. Scooby sees the truck that transports Salim driving along inside Guantánamo Bay, so he flips on the lights, pulls the truck over, goes up to it, bangs on the door. Opens it up and says, "Goodbye and good luck." He says, "You're going home in a couple of days. Goodbye and good luck. Don't get in trouble anymore." He leaves him, just like he's probably said goodbye to twenty other people.

Q: When was the last time you saw him?

Swift: I saw him the day after the verdict, and that was it. Harry and Brian and everybody went over to see if he wanted to continue to appeal. My understanding is that he is amused by that idea, but if they want to do it, knock yourselves out!

Q: You've never had any contact with him anymore?

Swift: Not really, no.

Q: Don't know what happened to him?

Swift: He has had a son. I try to keep informed on it. He's had a son who was born. It's difficult there. He has all the problems that all the Yemenis have. No money, no good government, no real resources, all of those problems, but at least he's free.

Q: In the last couple minutes, let's bring you to Seattle.

Swift: I came to Seattle the week after *Hamdan*. I was very appreciative to Emory because they gave me the opportunity to finish. I couldn't have been in private practice and finished. Perkins also gave me an opportunity to come to work with them, but I didn't think I really fit there. In the end, I just didn't think that that was the right part. They didn't have a criminal law section. I love it. Debbie was right.

Since then, since I've come to Seattle, I did the *United States v. al-Siddiqui* [*United States v. al-Siddiqui*, 2010, Southern District of New York]. I have represented several other individuals in what I continue to be the great challenge because the criminal justice system works well when you're not scared of the defendant. The jury of your peers is the brilliant part, but it's very difficult to get a jury of your peers in a terrorism trial. We continue to represent a lot of people like Salim who just happen to be in the wrong place at the wrong time.

[Richard B.] Cheney and the entire theory of Guantánamo Bay was that it was suddenly better to imprison ninety-eight innocent people, or ninety-nine innocent people, if one of the hundred

might be guilty or could actually harm the U.S. The one percent theory after 9/11. The one percent theory is alive and well in our courtrooms. It's alive and well in extraordinarily overreaching laws in the United States. I don't believe in the one percent. I don't believe we are any safer. All it does is radicalize those that might oppose us. Ultimately our policies pose a greater danger than existed before. It certainly makes us lose ourselves. The reason we can lose ourselves is fear, and the appreciation that it will not happen to us. Nobody seriously believes that the Patriot Act applies to them. It applies to Arab-Americans with Islamic beliefs. It doesn't apply to them.

Detentions, in Congress, the idea that anybody arrested will be sent to Guantánamo Bay—we have not actually gone forward. We have gone backwards since that time. I knew that I wanted to continue to fight about that. I also continued to believe deeply in the military justice system. I do courts martial because I believe in the system. This allowed me to do the things that I liked, and my great fortune in the military was I got to do what I liked. I'm still doing it and that's an extraordinarily nice thing. That's why I'm here.

Q: Good place to end.

Swift: Yes.

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