

THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

Morris D. Davis

Columbia Center for Oral History

Columbia University

2012

PREFACE

The following oral history is the result of a recorded interview with Morris D. Davis conducted by Myron A. Farber on March 20, 2012. This interview is part of the Rule of Law Oral History Project.

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

VJD

Session One

Interviewee: Morris D. Davis

Location: Washington, D.C.

Interviewer: Myron A. Farber

Date: March 20, 2012

Q: This is Myron Farber on March 20, 2012, interviewing retired Air Force Colonel Morris Davis for Columbia's oral history on Guantánamo Bay detention camp and related matters. This is session one.

Colonel Davis, do I understand that you retired in 2008 after twenty-five years of service in the Air Force?

Davis: Yes, it was almost exactly twenty-five years.

Q: You were chief prosecutor for the Guantánamo Bay military commissions from September 2005 to October 2007, is that correct?

Davis: Correct.

Q: What is your current position?

Davis: I currently am on the faculty at the Howard University School of Law here in Washington, D.C.

Q: How long have you been doing that?

Davis: I started there this school year, which began in August 2011.

Q: Can we go back a little bit? You were born when?

Davis: July 31, 1958.

Q: Whereabouts?

Davis: In Shelby, North Carolina.

Q: Is that anywhere near Charlotte?

Davis: It is. If you look on a map, Shelby is about halfway between Charlotte and Asheville.

Q: I was just down in Charlotte, interviewing a former colleague of yours.

Davis: Stu [V. Stuart] Couch?

Q: Stuart Couch. Right. Where did you grow up?

Davis: I spent most of my early life in Shelby, North Carolina. I was born there. I went through high school, and left when I was eighteen to go to college at Appalachian State University in Boone, North Carolina. I graduated from Appalachian State in 1980, and went from there to law school at North Carolina Central University in Durham, North Carolina.

Q: You're pretty devoted to the state.

Davis: I like North Carolina, and I like it a lot more now that I've been in the Air Force and seen other places. Growing up there, you tend to take it for granted, but seeing other places makes you appreciate how good we had it. There's a lot to be said for North Carolina.

Q: At the time you were growing up, what would the population of Shelby have been?

Davis: I don't think it's changed much, to be honest with you. It's somewhere in the twenty thousand range, so it's a fairly small town. It's nice there. It's convenient to Charlotte, which is about forty-five or fifty minutes away. You kind of get the benefit of having the big city nearby, but with the advantage of a rural environment.

Q: Then you went to law school there.

Davis: Right, in Durham, North Carolina.

Q: Graduating in—?

Davis: I went to summer school and finished a semester early, so I finished in December of 1982, which enabled me to take the February 1983 bar exam. Then I officially graduated in May of 1983.

Q: When you were an undergraduate at Appalachian State, what did you major in?

Davis: In criminal justice.

Q: You knew you wanted to be a lawyer?

Davis: I didn't. When I was in undergraduate school, just as kind of a fluke—a friend of my father's in Shelby was a bail bondsman, and I was at home for Thanksgiving or Christmas and this friend of my father's said, "Hey, you go to college up in Boone, don't you?"

I said, "Yeah."

He goes, "Well, I got a call from somebody wanting me to come up and get him out of jail. There's not a bail bondsman in that county. It's two hours away. I'm not going to drive up there. You ought to look into doing it. If you're interested, you can do it through me, and whatever you make you can keep. Whatever you lose, you pay. But you ought to check into it."

Q: How old were you then? You weren't twenty-one.

Davis: No, I was nineteen.

Q: Can you do that at nineteen?

Davis: You could back then. I don't know if you can now. That would have been 1977 or 1978; somewhere in that area.

Q: Did you do that?

Davis: I did that through college. It was a great part-time job. At the time, Boone, North Carolina, which is up in the mountains, was a dry county. It was in Watauga County, North Carolina, which is where the college is located. The next town over is called Blowing Rock, which is in a different county, and that's where the bars were. So if you wanted to go out drinking, there was Highway 321 that connected Boone and Blowing Rock. So on a Thursday, Friday, or Saturday night, after midnight, if the police stopped every car coming into Boone, probably one in five had a drunk driver behind the wheel. Most of them were college students. Most of them didn't have five hundred dollars in their pocket to post bail. The majority of the bonds that I signed were for drunk-drivers, and most college kids aren't going to drop out of school and flee the country over a DUI [driving under the influence].

Q: But you're signing with the authority of that man that you're working for, so to speak.

Davis: Right. He was the one who had posted a large amount of security with the state. I had to go to the capital in Raleigh and take an exam, and I signed on basically as his agent. What I made I kept. What I lost I paid. If someone didn't show up for court, I went and hunted them down and took them to jail and turned them in. It was a pretty interesting part-time job for a college student.

Q: But you didn't major in bail bondsmanship in college, you majored in criminal justice—

Davis: Criminal justice, right.

Q: —and with a view, after that, to doing what?

Davis: I didn't know, to be honest with you. After I started doing the bail bond thing, I was tempted to stay on after graduating and continue doing that because it was fairly lucrative. I was the only bail bondsman in the county, so I kind of had a corner on the market. The only bad part was most people don't get arrested between 9:00 and 5:00. It was always 2:00 in the morning. I just couldn't see doing that for the rest of my life.

Q: After you graduated law school, what kind of law practice did you envision—if you did—for yourself?

Davis: While I was in college I did an internship with the attorney general's office in North Carolina, working in law-enforcement training. The attorney general at the time was a gentleman

named Rufus [L.] Edmisten. I did an internship there over the summer in 1979. I started a law enforcement training needs survey and then my internship ended, so when I finished school—kind of like with law school, I finished a semester early by going to summer school—but in my spring semester they hired me back to complete this survey of law enforcement training needs in the state. My intention had been, when I went to law school, was to finish law school and perhaps go back to the attorney general's office. Then, just on a whim, I applied to the Air Force. I can't say it was a lifelong dream to be in the Air Force, but my brother had served in the Air Force, and I wasn't exactly sure what I wanted to do, so I thought, what the heck, I'll apply.

Q: You applied to be a lawyer in the JAG [Judge Advocate General] Corps?

Davis: Correct.

Q: Not as a pilot or anything.

Davis: No. I took the bar exam in February. It was probably April 1983 when I got the results back. I had applied to the Air Force in the interim. I got my bar results back and I had passed. Between the time I found out I'd passed the bar and the time I actually got sworn into the bar there was about a ten-day gap, and in between that my father died. My dad was a one hundred percent disabled veteran of World War II, and had always been real proud of—he'd been the commander of the American Legion back when the Legion was a big deal—he was very proud of having served in the military. So I guess the timing of it—I had applied to the Air Force, he passed away, and I got the call from the Air Force that I'd been accepted—the timing just kind of

fell into place. I guess what really sold the deal was when they said, "You've been accepted and we'd like to send you to Cocoa Beach, Florida." So I thought I'd do that for a few years. I think I kind of felt like I owed it to my dad, and sending me to Cocoa Beach didn't sound like too shabby an offer.

Q: What was there?

Davis: Patrick Air Force Base. It's a base that provides support to the Kennedy Space Center. One of the advantages of the JAG Corps for a young attorney is that you get courtroom experience, where with a law firm, most times you'll have to pay your dues for a few years before you get into court. That's not the case in the JAG Corps. I thought it would be a good chance to get some courtroom experience, live on the beach for a few years, and kind of pay my debt to my dad and serve in the military.

Q: You didn't think you were going to do it for twenty-five years.

Davis: No. I thought I'd do four years and the next thing I knew it was twenty-five years later.

Q: Is it so that in one of your first trials as a Judge Advocate General lawyer, your opponent was none other than the now senator from South Carolina, Lindsey [O.] Graham?

Davis: It was actually my first court martial. I joined the Air Force in October 1983. It's changed a bit now, but back then you went to—our JAG school is in Montgomery, Alabama, at Maxwell

Air Force Base—so in October 1983 I went to Alabama for nine weeks of training. I actually went for two weeks before that to what's called the Air Force Officer Orientation Course. It's for doctors, chaplains, and lawyers to try to teach you to march in a straight line, and which hand to salute with—kind of the basics that you'd learn if you went to the Air Force Academy, or ROTC [Reserve Officers' Training Corps], or through some other commissioning program. There were two weeks of that, and then nine weeks at the JAG school, learning military law.

It was December 1983, right around Christmas, when I finished my training and got to Cocoa Beach. It was the spring of 1984 when Senator Graham, then Captain Graham, was stationed—

Q: Captain Graham of—

Davis: He was on active duty in the Air Force at the time, and he was stationed, I believe, at Shaw Air Force Base in South Carolina.

Q: As a JAG?

Davis: Yes. He still is a JAG. To this day, he's still a member of the Air Force JAG Corps, in the Reserve program. He's a colonel in the Reserves.

He was stationed at Shaw Air Force Base at the time. Right as I got to Patrick—the Air Force has a urinalysis drug-testing program—they'd had a base-wide drug test, and something like a hundred people had tested positive for some type of drugs. The military has a process called non-

judicial punishment that's basically an administrative punishment, but you have the right to refuse it. You can turn down non-judicial punishment and demand a court martial if you don't think you ought to be punished administratively. So out of the roughly hundred people who had tested positive for drugs and were offered administrative punishment, there were two who turned it down and demanded a court martial—a guy named Hodges and another named Richardson. They were the two NCOs [non-commissioned officers] who turned it down and demanded trial by court martial.

Lindsey had been involved in defending some other people. In fact, he was on *60 Minutes*, I think in 1984 or 1985, when he defended a B-52 pilot at Barksdale [Air Force Base] that had generated a lot of publicity, and it eventually led to the drug testing lab—

Q: You mean in connection with urinalysis?

Davis: Yes. So in 1984, the two accused from Patrick—as we were preparing for trial, the defense asked for every person who had handled their sample to be subpoenaed as witnesses. At the lab, there were probably thirty people who had handled their samples—so rather than bring thirty people from Brooks Air Force Base in San Antonio, Texas, to Florida, we took the two accused and flew to San Antonio, and had the pre-trial hearing there. That was where I first met—.

Q: He was defending Hodges or Richardson?

Davis: He was part of the defense team involved in both cases. Their lead counsel was a Captain Bill Groves, who was from the base where I was stationed. There were four or five other defense attorneys working as a team with him.

Q: Do I understand that he's in the JAG Corps—

Davis: Correct.

Q: —and he's serving as a defense attorney? He could have been serving, on another appointment, as a prosecutor. Right?

Davis: Yes.

Q: In the JAG Corps.

Davis: Yes. The Air Force was the first to do it—all the services do it now—but for defense attorneys, you do—defending is your full-time job for a year or two, or however long you choose to do it. But he was the defense attorney for Shaw Air Force Base, I believe. Because of his experience with the urinalysis program and the drug lab, he was co-counsel on this case from my base.

Q: Do you remember him leaning over to you and saying, "Watch yourself, because I'm going to be a United States senator one day?"

Davis: It was words to that effect.

Q: [Laughs] I'm only kidding.

Davis: That was not too far off. We went out to the drug lab in San Antonio. We had orders to go for a week, thinking we'd get out there, get set up, the judge would conduct—there was a motion to dismiss the charges, alleging that there was command influence within the lab that led to some false-positive results and other bad things. So we thought we could do the hearing in a couple days, go back to Florida, the judge would make his ruling on whether to suppress the evidence, and, assuming we won, we'd press on with the trial.

That week we were going to spend in Texas turned into a month, because the drug lab really was as corrupt as Captain Graham had represented it was. The hearing kept dragging on and on, because of their obstreperous attitude of the drug lab's leadership. During that month we were staying—they kicked us off base, eventually, saying they were booked up, so we had to move off-base. One weekend we were staying at the La Quinta Inn, down by the Riverwalk in San Antonio, and we had like a Sunday afternoon that we weren't having court, so the whole gaggle of us—there must have been ten of us—went to the pool at the hotel. At that point, most of us were probably twenty-seven, twenty-eight, twenty-nine years old. We're all sitting around the pool drinking beer, except for Lindsey, who doesn't drink. He was having an iced tea or something. We were sitting around talking about what we wanted to do with our lives when we grew up, and he said, "You know, one day, I'm going to finish up"—because he, like most of the

rest of us, had signed up for four years—he said, "I'm going to finish up my obligation, I'm going to go back to South Carolina, and I'm going to run for Congress." Sure enough, he finished up his active duty commitment, went back to South Carolina, and ran for Congress.

Q: He's enjoyed quite a national prominence, partly in connection with his close association with John [S.] McCain [III]. I don't know whether he had—if they were not of like-mind on so many things—whether he would be known as widely as he is now.

Would you say that when Lindsey Graham speaks today, the military pays attention?

Davis: Yes, they do. As you know, the percentage of the public, and the percentage of those on Capitol Hill, who have served in the military is an ever-decreasing number. So just having someone like him, who has laced up the boots and put on the uniform, and knows what they're talking about, I think that commands a lot of respect from the Pentagon.

Q: Even beyond urinalysis.

Davis: Yes.

Q: I don't think on the Supreme Court of the United States there is one veteran.

Davis: Well, [Samuel B.] Alito served in the Reserves. When [John Paul] Stevens retired, he was the last combat veteran on the court. Alito was in the Navy Reserves or something, for three or

four years, but has never actually deployed or served in combat. He was in the service during the period between Vietnam and the start of the First Gulf War, I believe.

Q: In the years between 1984 and 1985 and, let's say, the summer of 2001, you were essentially serving as a JAG lawyer, right?

Davis: Yes.

Q: At different places?

Davis: Yes. Like I said, I started out in Florida, thinking I was going to do four years, and then from Florida they offered me a job here in Washington doing appellate work, which was interesting to me, so I came here to Washington. While I was doing that, I started going to school at night at George Washington University to get a Master of Laws in Government Procurement Law. In the midst of doing that, the Air Force picked me to go to Charlottesville, to the Army JAG's school's Master of Laws program, so I moved from here to Charlottesville. Then, when I finished up that program, I went to Alabama, to the Air Force JAG School, where I taught government procurement law and federal appropriations and fiscal law. That would have been 1992 to 1995. Then in 1995, I moved to Columbus, Mississippi, where I was the staff judge advocate, which is basically the senior attorney at the installation. I was the senior attorney at Columbus, but that's kind of a relative term, because there was me and one other JAG. I was the senior of the two of us.

I did that from 1995 to 1998. Then I moved from there to Abilene, Texas, where I was the staff judge advocate at Dyess Air Force Base, which was a bigger base with a larger legal staff. Columbus Air Force Base is a pilot training base, so it's fairly small, like twelve hundred people.

Q: In those positions, in the late 1990s—are those really administrative positions, or did you actually try cases? Try or defend, I should say.

Davis: I did both. When I was in Florida, the first year and a half or two years, I was on the prosecution side—when I was doing the case with Lindsey.

Q: Against Lindsey.

Davis: Right, in that one case. In the summer of 1985, I moved over to be the designated defense counsel for the base. I did that from the summer of 1985, from July 1985, until January 1988.

Q: All I'm getting at here is that up until the summer of 2001, and beyond that case involving Lindsey Graham, how would you characterize the amount of trial experience that you had, wherever it was?

Davis: I counted it up at one point a few years ago. I was either prosecuting or defending in roughly a hundred cases at the trial level and I argued another fifty-five or so at the appellate level.

Q: Okay. What was your position in the summer of 2001? What was your position on September 10, 2001?

Davis: I was the deputy commandant at the Air Force JAG School.

Q: Not in Charlottesville.

Davis: No, in Montgomery, Alabama. Charlottesville is the Army JAG School [Judge Advocate General's Legal Center and School].

Q: That's right. Do you recall what you were doing on September 11, 2001?

Davis: Yes, I recall exactly what I was doing. Montgomery is in the Central Time Zone, so we were an hour behind the events taking place here in Washington and in New York. I'd gotten to the office, gotten a cup of coffee, and I was sitting in my office at my desk. I don't recall specifically what I was reading—I was grading papers or something, but I don't recall specifically what the papers were. I was sitting there at my desk with my feet up on the desk, with a cup of coffee, reading papers, and directly across from my desk was a credenza with a television in it that I usually kept on whenever I was in the office with the sound muted. It was on CNN [Cable News Network], I think. As I was sitting there, I looked up, and they were beginning the coverage of the first plane that had hit. At first—I think like most people—I thought it was just a horrible accident that had happened. Some other people who were in the outer office came in, because I had one of the few televisions in the building.

Q: You turned the sound on?

Davis: At that point, yes. I put down what I was doing and I went out and said “Hey, come here and look at this.” Some other people came in and were kind of standing around watching the coverage. Then the second plane hit, and that was when—I think it was silent for a few seconds, because it just kind of registered with everybody that, “Holy shit! This isn't an accident!” Certainly, the world changed in that moment.

Q: Did you stay in the office that day?

Davis: Yes, I stayed in the office. We had classes going on. I can't remember the exact number of students we had, but we probably had one hundred-plus students at the school, in different courses. Maxwell Air Force Base, if you've ever been there—if somebody dropped you in the middle of it, you'd think you were in the middle of a college campus. This is where all the Air Force officer continuing education takes place. It's a big campus where, at any given moment, there are thousands of students there. So the first order of business was, what do we do with the students? Do we send them home to their bases? Do we keep them here? What do we do?

Q: These are military people, though, these students—right?

Davis: Predominately. There were a few civilian attorneys from other federal agencies, but the vast majority was in the military.

Q: It's easy to look back and say a lot of things changed as a result of that, but at that time, did you really think that a lot of things were going to change?

Davis: I think we did. I think we realized we were being attacked, and you didn't know what September 12 was going to hold.

I'll give you an example. Maxwell Air Force Base, like I said, was like a college campus. It was a pretty laid-back environment by military standards. We weren't flying fighter jets. It was an educational institution, so it was pretty relaxed by military standards. We had thirty-six holes of golf and a nice officers' club, so it wasn't a real strict military environment. Within a couple of hours, all the buildings on the base were locked down. You had to have a guard at the door. The gate had a Humvee sitting there with a manned sixty-caliber machine gun on top. Every ID was checked. Every car trunk had to be opened and inspected. The next day, September 12, when I went to work, where normally it took me twenty minutes to get from my house to my office, it took two and a half hours because the gate was backed up; because they were searching every car that came through the gate; because nobody knew what was going to happen next.

Q: Were you married at that time?

Davis: Yes, I was married and I had a daughter who was about ten or eleven. Going back to September 11—when I eventually left the base that day, it was late, after dinner time, and I had called my wife and said, "I'm on my way home." She said, "Can you stop at the grocery store" to

pick up something. I don't remember what it was I bought, a loaf of bread or something, but when I got to the checkout there was an older lady in front of me with her shopping cart, and she saw me come up behind her, in uniform, and she said, "You go ahead of me, son. I know this day has been a lot harder on you than it has on me."

Q: Oh, really?

Davis: I was tempted to say, "Look, that's not necessary," but it occurred to me—I think, for her, it made her feel like she was doing something, so I just said "thank you" and I went ahead of her.

Q: Right. What, in fact, did you do after that? What did you do between September 12, 2001, and the summer of 2005?

Davis: I stayed on at the school. I was the deputy commandant, then the interim commandant, for a period of time. It caused us to make a lot of changes in our course structure. Up until then, the notion of deploying—going overseas to combat—was kind of a theoretical concept. Everybody knew it could happen, but it really hadn't on a large scale since Vietnam. Like the First Gulf War, for instance, it was over and done in about a week. This whole notion of deploying was more theory than reality. So a lot of our courses had to adapt. We developed a contingency contracting course, because, suddenly, we were about to start deploying people in large numbers. Every time you deploy somewhere, you've got to buy everything from building space to bottled water, so we had this sudden need to train people on doing government contracting and fiscal

law in a deployed environment, and operations law became a big deal. We really ginned up our production on deployment training.

In February 2003, I got a call from The Judge Advocate General [TJAG], who was Jack [L.] Rives, who was The Judge Advocate General of the Air Force. He's now a retired three-star, and he's the executive director of the American Bar Association. Let me back up. At the time, General Rives was the deputy Judge Advocate General of the Air Force. General Tom [Thomas J.] Fiscus was The Judge Advocate General. General Rives was the two-star deputy TJAG.

He called and said, "Look, we've got a sexual assault scandal out at the Air Force Academy. Would you be available to head up the investigation? It'll take about a week." I said, "Yes, Sure." So in February 2003, I left Alabama and came up here to Washington, to the Pentagon, and kind of split time between here and the Air Force Academy in Colorado Springs, Colorado. The week-long investigation ultimately turned into a three-month investigation of this sexual assault problem at the Air Force Academy.

There is another agency in the same building as the JAG School called the Air Force Legal Information Services Agency. This was before the internet was as prolific as it is now. The Air Force had been the Department of Defense [DOD] executive agent for computer-assisted legal research. So if you were an Army JAG in Korea, and you're doing legal research on whatever topic, it was actually taking place on a mainframe in Montgomery, Alabama, at Maxwell Air Force Base.

During the time I was at the Air Force Academy, they brought in a new deputy commandant at the school, and I became the director of Legal Information Services. From the summer of 2003 until February 2005, I was the director of Legal Information Services. So, I spent from 2000 to 2005 in Alabama, at Maxwell Air Force Base. Either in late January or early February 2005, I moved to Cheyenne, Wyoming, where I was the staff judge advocate for the Twentieth Air Force. It's an intermediate command that's responsible for all the intercontinental ballistic missiles [ICBMs] that were deployed at three different bases, but all three bases reported to Twentieth Air Force, which then reported up to Air Force Space Command.

I was the staff judge advocate there from roughly February 2005 until July 2005, when General Rives called and said, "Would you be willing to be the chief prosecutor for the military commissions?"

Q: When he called you with that offer in the summer of 2005—and I must say, being in the military certainly let you get around—what did you know about military commissions? Were you familiar with President [George W.] Bush, in November 2001, having signed the Military Commissions Order, and that the first detainees had arrived in Gitmo [Guantánamo Bay detention camp] in 2002? Were you paying attention to that, and, basically, what did you know?

Davis: I guess it would have been in late 2002. President Bush signed the order you mentioned on November 13, 2001. Nothing really happened after that. There was no great effort to convene military commissions and prosecute people, even though the order authorized it. It was probably the latter part of 2002 when the Pentagon finally got around to thinking, "Maybe we ought to

start looking at prosecuting some of these guys." So a call went out through all the services looking for volunteers to participate in the military commissions, whether it was to be judges, defense counsel, prosecutors—all the different roles that needed to be filled, they were looking for volunteers. At the time I was the deputy commandant at the JAG School and I volunteered to be the chief defense counsel for the military commissions.

Q: In 2002.

Davis: Correct.

Q: Nothing came of that.

Davis: Nothing came of it. I volunteered because I thought two things. Number one, I didn't think anybody would want the job, because at that time, we'd invaded Afghanistan, and we were at war with al-Qaeda. I think nerves were still pretty raw from 9/11, so I didn't see it being a particularly popular role for anyone to take on. Secondly, I thought it was important for somebody to do it, and try to do it right—kind of like John Adams did after the Boston Massacre when he defended the British troops. I remember Lloyd [N.] Cutler had written an op-ed in December 2001. Lloyd Cutler was the youngest member of the prosecution team in the Nazi saboteur case, *Ex parte Quirin*.

Q: Was he, really? Lloyd Cutler?

Davis: Yes.

Q: I knew Lloyd Cutler.

Davis: He died in about 2005, I guess. He wrote an op-ed in December 2001, in the *Wall Street Journal*, saying that, drawing upon his experience from having participated as the youngest member of the prosecution team in the Nazi saboteur case, *Ex parte Quirin*, that it was important that we do this right. I remember the last line in his op-ed was, "This will say as much about us as it does about al-Qaeda." So that was kind of my mindset when I volunteered to be the chief defense counsel.

The person who was selected was a friend of mine, who had been a faculty member with me at the JAG School, Colonel Will [A.] Gunn—who is now the general counsel for the Veterans Administration. Will was selected for the job. He was an Air Force Academy grad, a former White House fellow, Harvard Law School. He certainly was a first-rate choice for the job. So when I didn't get selected for that job, I think I kind of paid as much attention to military commissions in Guantánamo as most other military members did. It wasn't high on my list of priorities, but I probably paid more attention to what was going on than the average member of the public.

Q: Do you remember seeing the pictures that were published of the detainees that arrived in January 2002?

Davis: Yes. Those were the ones from Camp X-Ray. Actually, to this day, if there's a story about Guantánamo, there's at least a fifty-fifty chance that those are the pictures that are going to accompany the story. I think the public—to this day, still—when they think of Guantánamo, those are the iconic images that come to mind.

Q: Well, that changed dramatically, didn't it, over time?

Davis: It did.

Q: I mean the physical conditions.

Davis: Yes. When I go out and speak—depending on the audience and what my topic is—but when I talk about Guantánamo, I show pictures of what was Camp X-Ray. Camp X-Ray was left over, if you recall, from the Haitian boat lift. It was a facility that had been used to house the criminals who had been rounded up as part of the Haitian boat lift. So at the time they chose to move war on terror detainees to Gitmo, it was there and available. So that was where they put them until they could build a more permanent facility—which took about a hundred days. Camp X-Ray was open from January 10, 2002 until some point in about April 2002.

Q: And it evolved, and today it's more like a federal max security prison, isn't it?

Davis: Oh, it is. In fact, when I go out and speak, I've got a picture of a cell. I'll show the picture, and I'll ask the audience, "What's inhumane about this cell?"

Usually people will say, "Well, it's kind of small. It's got a little window. It doesn't look very pleasant."

I'll go, "Okay, here's another picture. What's inhumane about this cell?"

They'll go, "Gosh, it looks a lot like the first one."

I'll then put the pictures up side by side, and I'll say, "You're exactly right. This is the cell where Congressman Bill [William J.] Janklow served his sentence, and this is where Omar [Ahmed] Khadr served his, and they're identical. They were built using the same blueprint."

Q: For the record, Omar Khadr served in Gitmo, and Congressman Janklow served a criminal penalty in the United States.

Davis: Correct. The blueprint for Camp 5 at Guantánamo was the same blueprint that had been used for the prison where Congressman Janklow served his sentence.

Q: Okay. I think it's fair to draw a distinction, perhaps, between the physical conditions that did change significantly, and what might be described as the other conditions in being at Gitmo. But let me come back to that at a later time.

You were not an expert in the military commissions.

Davis: Nobody was.

Q: Right. You were in the JAG Corps. When you saw the pictures of the detainees arriving, was it surprising to you that they looked like they did? They were dressed in these orange jumpsuits, and had these goggles over their eyes, and that kind of thing. I don't want to put any words in your mouth; maybe you thought this was just the way it ought to be.

Davis: The pictures from Camp X-Ray of the guys kneeling down in the orange jumpsuits, outside of what looked like dog cages—when I saw the pictures it did strike me as, "What in the hell are we doing?" It just didn't comport with what I expected of how we would treat people.

Q: But you didn't know anything about transporting prisoners at that time, right? Maybe you did.

Davis: I certainly did in the military. The military operates Fort Leavenworth, which is where Sergeant [Robert] Bales is now. Over the years, I've been at bases where we've operated a military detention facility, or had prisoners that we transferred to military detention facilities. Certainly, the dog cages that I saw in those pictures—what appeared to be dog cages—I'd never seen anything like that in any other military detention facility.

Q: Well, surely, you heard—as every American heard—the secretary of defense [Donald H. Rumsfeld] and others in the military hierarchy, and in the administration, calling these people the

"worst of the worst." And they continued to call them the worst of the worst over a period of years.

Davis: Yes. When I took the job, I believed that. The secretary of defense had told me and the world that these guys were all the worst of the worst. They'd chew through the hydraulic lines of the airplane flying them to Gitmo just to kill Americans.

Q: Right. General [Richard B.] Myers said that.

Davis: Yes, and I didn't have any reason to doubt that that was anything less than truthful.

Q: When you got there, in September 2005, this is after the Supreme Court decision in 2004, of course, *Rasul v. Bush*, in which the court held that detainees had the right to appeal to the federal court on statutory grounds. It was before the *Hamdan v. Rumsfeld* case, which the Supreme Court ruled on in June 2006, and it was actually even before the Detainee Treatment Act of 2005.

Davis: Right.

Q: As a lawyer, would you say that the administration, up until the time you arrived, and even for a period of time after you were there, was opposed to habeas corpus rights of appeal to the United States federal courts?

Davis: I think they were totally shocked that a federal court would interfere with executive power, in dealing with any war issue, including detainees. I think they were flabbergasted that the court intervened.

Q: Was that your view?

Davis: No.

Q: Was it your view that the detainees have no business trying to get into the federal courts here?

Davis: When I came into the job, I believed the narrative that all these guys were the worst of the worst, that they'd been screened, and these were the really bad guys. My government had told me these guys they were all like Khalid Sheikh Mohammed [KSM], every one of them. So the fact that they weren't getting access to the courts didn't keep me awake at night. Like in World War II—when I was in Abilene, right outside the base there was what used to be called Camp Humphrey. During World War II, there were thirty thousand German POWs [prisoners of war] there, and they didn't each one get the right to go to federal court, to try to get released. So it didn't conflict with my notion of the way detainees are treated during times of war.

Q: When you arrived in September 2005, did you know that the previous year, several prosecutors—after all, you were now going to be the chief prosecutor—that several prosecutors, including Robert Preston—

Davis: John Carr.

Q: —John Carr, Carrie Wolf—

Davis: Yes.

Q: —and, eventually, Stuart Couch, asked to be reassigned out of that position, with various complaints. Are you familiar with their complaints?

Davis: Yes.

Q: How would you summarize what their complaints were? This is essentially before you got there, right?

Davis: I think that's how I got there. The first chief prosecutor was Fred [Frederic L.] Borch, an Army colonel. He'd been one of my instructors when I was in school in Charlottesville. The highest grade I made in the LLM [Master of Laws] program was from Fred Borch. Fred had been the first Chief Prosecutor, and that was when some emails ended up in *The New York Times*. Rob Preston, John Carr, and Carrie Wolf felt they were being pressured—that this was a kangaroo court and that the fix was in, and this was really a theatrical production more than a judicial proceeding. There were some email exchanges between them and Fred Borch that eventually wound up being published in *The New York Times*, which created quite a to-do within the Pentagon. That happened sometime before General Rives called me. The spring of 2005 was

when this kind of blew up, as I recall, and it created a distraction. You'd have to ask General Rives what his perception was and why he called me.

Q: These emails were leaked in 2005, right?

Davis: Yes, I believe so. I think people that I've worked with, if you asked them—I'm pretty even-keeled and I have good people skills, and I think like with the Air Force Academy sexual assault scandal—I think when General Rives needed somebody he could count on to provide steady leadership under stressful circumstances and get the job done, he would often call me. When he called me that July—it was late July—I had only been in Cheyenne about six or seven months at that point, and he called and said, "Would you consider taking the job? We've had these three Air Force officers who have raised these concerns—."

Q: JAG officers?

Davis: Yes. They had raised these concerns, it's kind of blown up in the media, and the morale within the chief prosecutor's office is in the toilet. He said, "I kind of feel like the Air Force has helped create this problem, and we ought to help fix it. I'd like to put you in and nominate you to be the chief prosecutor, because I think you can help right the ship and get things back on track."

At first I was reluctant to do it. My daughter, at the time, would have been fifteen, so she was just starting high school. We had just moved from Alabama to Wyoming in February, and now he wants me to move from Wyoming to Virginia, or the D.C. area, that summer. It wound up my

daughter went to high school in three different states in the course of 2005. I was reluctant, initially, just because we had uprooted her once, and now we're going to uproot her again. He said, "Look, if you take the job I promise you—I don't know how long the military commissions will last, but there are a lot of jobs for colonels in the D.C. area—I promise you we'll get her through high school and won't move you again."

Q: Were you a full bird at that time?

Davis: Yes. He said, "Would you at least consider it?" So I said, "Let me talk to my wife." I went home and talked to her. She was not thrilled with the idea. We lived on-base in Cheyenne, Wyoming, in a house that's on the National Historic Register—this 4,500 square-foot brick house that was literally a two-minute walk from my office to my front porch. It was rent-free, utility-free, and we were debt-free. I was a pretty nice arrangement, so she was not enamored with up and moving again after we'd just gotten settled there.

I had to come here for an interview with Jim [W. James] Haynes [II], who was the DOD [Department of Defense] general counsel.

Q: Here to Washington?

Davis: Yes, to the Pentagon. I talked to my wife, and she said, "Look, if you really want to do this then do it." For an attorney, it was a unique opportunity that doesn't come along—I can't even say it comes along once in a lifetime because it's not that frequent. We hadn't done military

commissions since World War II. I thought it was a unique opportunity to be involved in something historic. I still viewed it kind of as I had in 2002 when I volunteered to be chief defense counsel; I thought it was important that we do this right.

In talking with General Rives, when he called me about the job, he was telling me about the friction between the uniformed side and the political-appointee side, and how the uniformed side was being marginalized in the discussion.

Q: The discussion of—?

Davis: —the Geneva Conventions being "quaint," and detainees not having any rights, and this whole process that—the military services were uniform in their opposition to a lot of the policies that were implemented under the Bush administration, and when the uniformed side didn't give the answers that the administration wanted, they were just marginalized. You had the John [C.] Yoos, the David [S.] Addingtons, the Jim Hayneses, the Dick [Richard B.] Cheneys, and the Steve [Stephen A.] Cambones on one side—

Q: —and then you had the Tom [Thomas J.] Romigs, etc—

Davis: —exactly. You had the Romigs, and the Riveses, and Alberto [J.] Mora, John Hutson, and Don [Donald J.] Guter who were uniform in their opposition to—

Q: Would you say they lost the battle though?

Davis: Yes, they clearly did. I guess one of the collateral benefits of that—Lindsey Graham had been pushing for a number of years to make The Judge Advocate Generals three-stars instead of two-stars because there are a lot of meetings that take place that if you don't have at least three stars, or the civilian equivalent of three stars, you don't get in the room. That's where a lot of these decisions were made. So I guess one kind of collateral benefit of all this is that it gave Lindsey the ammunition he needed to get The Judge Advocate Generals elevated to three stars, to guarantee they had a seat at the table and were no longer just shut out of the debate.

Q: Are they now?

Davis: Yes.

Q: Just to make sure that people get this picture a long time from now, the Gitmo military commission office headquarters was not at Gitmo, it was in—

Davis: Crystal City, in Virginia near the Pentagon.

Q: Crystal City, Virginia. That's where you're operating from.

Davis: Correct.

Q: Of course, you're going to go to Gitmo from time to time, I take it.

Davis: Right.

Q: Now you took that job in September 2005, and did you say you had a meeting with Jim Haynes, perhaps the next month?

Davis: No, the meeting with Haynes took place either August 1 or August 2 of 2005. General Rives called me sometime in late July to ask if I would consider taking the job. He wanted to put my name forward as a nominee for the position. Ultimately, Jim Haynes, the DOD general counsel, before committing to me filling the billet, he wanted to meet me. So I drove down to Denver from Cheyenne, caught a flight here to Washington, and had a meeting with Jim Haynes on whatever that Monday would have been—August 1 or August 2, 2005— somewhere in that time frame.

Q: Had you ever met Haynes?

Davis: We had met, but I had never had a lengthy discussion with him. When we did the Air Force Academy sexual assault investigation, it was really an Air Force issue, but he wanted to be briefed on it, so there was a briefing for him and his deputy, a guy named Dan [Daniel J.] Dell'Orto, in 2003. I had seen him at some legal conferences. When he started out, he was the general counsel for the Army, years earlier, so I was familiar with him. I had never actually sat down with him and had a one-on-one conversation like we did in August 2005.

Q: At which time he was the Department of Defense general counsel.

Davis: Correct.

Q: Is it fair to say that he was closely associated with David Addington, Vice President Cheney's chief of staff?

Davis: Yes. That is at least my understanding of how he got his start. I guess during the first Bush administration, during the transition period, he had worked with Addington. Haynes was essentially a nobody at the time, and Addington kind of took him under his wing. Which led to him becoming the youngest general counsel of any service in the history of the military, to then being the DOD general counsel under Bush 43.

Q: So he called you to this meeting?

Davis: Actually, General Rives was who I was conversing with, said, "Can you get to Washington and meet with Jim Haynes? He wants to meet with you before giving the okay for you taking the job."

I flew in on a Sunday, came into the Pentagon on a Monday, went to his office, and met with him for twenty minutes maybe.

Q: How did that meeting go?

Davis: He's very personable. If you've ever met Jim Haynes, he's a sharp-looking guy, and he's very articulate. In all my dealings with him, he's never raised his voice or cursed. At least on the surface, he seems to be a fairly affable kind of guy.

I go to his office, and they buzz me in. I wait in the outer office in the lobby, and he eventually comes out, shakes my hand, and takes me back to his office. We're seated at a table, not a coffee table, but like a small conference table that would accommodate four people. We walked through the door, sat down at this table. His desk was on the far wall. I'm sitting with my back to the door and he's sitting kind of across from me, facing me. He asked how the trip was and all that usual kind of stuff. Then he starts telling me about the military commissions. At that point, nobody had come close to actually being tried at Gitmo. There were a number of cases that had been charged, but they had been tied up in federal court. He said the president was really anxious to get these things moving and get them done, and they were really disappointed that it had taken so long. There had been these emails in the *New York Times*, and they were really looking for somebody to come in and get things on track, and get this done.

During that conversation, he made the statement that, "These cases will be the Nuremberg of our times." In the couple of days between talking to General Rives and coming to this meeting, I had tried to read up on as much as I could about military commissions, war crimes prosecutions and that kind of stuff. When he made that comment about "these trials being the Nuremberg of our times"—well, let me back up just a bit.

He asked what my perception was of the military commissions, and I said that I'd read through the rules, and it looked like, at least the framework, that it appeared to be a decent framework. But I said, "It appears we're getting our butts kicked on the public diplomacy front, because the critics are ripping it apart, and the Pentagon is saying 'No comment.' It looks like we've got a better story to tell than we're telling."

I had written an article—I'm sorry that I keep jumping around here—after the Air Force Academy experience and the mess that became, with the sexual assault problem, I wrote an article in November 2004 for *Air Power Chronicles*—a professional journal for the Air Force—called "Effective Engagement with the Media: A Leadership Imperative in the Modern Age." Because during the sexual assault scandal, the Secretary of the Air Force—in a press conference—had said, "There are fifty-three reported rapes and sexual assaults at the Air Force Academy." So, in the public's mind, they're thinking, "Oh, my God. We've got fifty-three Central Park jogger cases going on out there in Colorado Springs." The truth was there were four or five or six no-kidding rapes or sexual assaults by any definition of those terms. However, the vast majority of the fifty-three reports he was talking about were female cadets or male cadets who had gone to the counseling center at the Air Force Academy, and said, "You know, when I was nine years old, back in Mississippi, my neighbor did—," whatever. It had nothing to do with the Academy, other than that the person reporting it was now a cadet.

So I wrote this article about how the military does a terrible job of communicating with the public and engaging with the media, and we needed to do a better job. I raised that during the discussion with Jim Haynes—that I thought the military commissions had a better story to tell

than we'd been telling. He said, "I'm so glad to hear you say that. You're exactly right. We need to educate the public, and let them know that what they're hearing is not the whole story." And then he made the comment about "these trials will be the Nuremberg of our times."

I said, "You know, at Nuremberg, not everybody was convicted. There were a few acquittals. Certainly, as a prosecutor, you never go into court looking to lose, but if that happened, it wouldn't necessarily be entirely a bad thing, because it would lend credibility to the process. It would show that this isn't just some rigged procedure."

I remember he was sitting in his chair, and he had been leaning forward. He leaned back, his eyes got kind of big, and he said, "Acquittals? Wait a minute. We can't have acquittals. We've been holding these guys for years. How are we going to explain to the world why we've been keeping these guys all these years, if they're acquitted? No. We can't have acquittals. We've got to have convictions."

People have asked me, "did that not send up warning flags?" It struck me that the thought had never crossed his mind before, that there could possibly be acquittals. If you look at the order President Bush signed in November 2001, it was essentially the same order [Franklin D.] Roosevelt had signed in the *Ex parte Quirin* case in 1942. From the time those guys were captured, prosecuted in a military commission down the way at the Justice Department building, through Supreme Court review, and then executed and buried down by the Anacostia River, it took forty-three days. That is what Jim Haynes had envisioned. I think he was just totally

flummoxed that it had taken this long, and I don't think it ever occurred to him that there could possibly be acquittals.

I didn't take his comment about no acquittals as him directing me that I had to go out and rig the process to get convictions. It struck me that this notion of the possibility of anything other than a conviction had just hit him for the first time; that it made him stop and think, "Oh, my God, we could have acquittals, and how would we explain it?"

Q: Did you get into a sort of tête-à-tête with him, or did you just absorb what he was saying?

Davis: I just absorbed what he was saying.

His deputy was a guy named Dan Dell'Orto. It was about that time when he came in the room, and the conversation wrapped up a few minutes later.

Q: At that time, in the late summer of 2005, did you know anything about any involvement, directly by Jim Haynes, in the approval of enhanced interrogation techniques on detainees at Guantánamo Bay?

Davis: I knew generally. I knew there had been enhanced interrogation techniques. I knew there were allegations about abuse. At that point, it wasn't public knowledge that waterboarding was a CIA [Central Intelligence Agency] practice, not a DOD practice. These allegations were out there in the public domain. I talked with General Rives when he called me about possibly taking

the job. Before I met with Haynes, I went and met with General Rives, and got the background on this loggerhead between the uniformed JAG community and the political appointee-general counsel community. So I knew, in general terms, that these techniques had been approved, had been used, and some of them were problematic. Right after I met with Haynes, I met with—the person who is really in charge of the day-to-day oversight of the military commissions is called the convening authority, and at the time it was a General John [D.] Altenburg [Jr.], who had been an Army two-star, had retired, and left private practice to come be the convening authority. His attorney was a Brigadier General Tom [Thomas L.] Hemingway, who had been my old boss years ago in the Air Force, who had also retired, who had been recalled to active duty to be the senior attorney to General Altenburg.

I spoke with them as well about the Carr-Preston-Wolf emails, and this perception that people were being pushed to do things they thought were unethical, and that this process was not going to be fair. That was when Altenburg told me that the reason he left the law firm he was with here in D.C., to take this job—that Secretary [Donald H.] Rumsfeld had called him and invited him over, and said, "Look, I'd like you to be the convening authority for the military commissions. I'd like to bring you back on active duty, and put you in charge." General Altenburg said he could already see where the meddling by Jim Haynes, Addington, and John [C.] Yoo—he said he could just see these political appointees who didn't—in General Altenburg's words—"know shit from Shinola" about military law or military justice, screwing this up, and then blaming the military and military lawyers for making a mess of it.

He said he told Rumsfeld, "Look, I'll take the job, but only if you let me take it in a civilian capacity, not in uniform. If I come back in uniform and you tell me to do something, I've got to salute and say, 'Yes, Sir,' and do it. I need to be able to come in here and tell you, 'Look, I hear what you're saying, but I'm not going to do it.'" So he took the job—according to General Altenburg—with the express purpose of trying to prevent these political appointees, who didn't know anything about military law, from screwing this up and making a sham of it, and having it blow up and look bad for the military.

Q: Very few people, I daresay even today, know this business about the convening authority. Can you spend a few minutes explaining the relationship between the prosecution at Guantánamo Bay and the convening authority? Who's got the power to do what? Also, what was required at that time to charge somebody? Did it actually involve the president of the United States issuing an RTB [Reason to Believe] or something of that sort? Just for history's sake, can you spend a few minutes on that?

Before we go there, have you come to know that Jim Haynes, himself, on December 2, 2002, signed off on a whole roster of enhanced interrogation techniques?

Davis: Yes. That's the one where Rumsfeld wrote in the margins about standing.

Q: "I stand for eight hours a day. What's wrong with this?"

Davis: Yes. That was the Haynes memo that Rumsfeld wrote in the margin on. I hadn't seen it prior to taking the job, but I saw it afterwards.

Q: Did you know about the [Mohammed] al-Qahtani case [*United States v. al-Qahatani*] at that time?

Davis: No, I really learned about it from Stu Couch after I became chief prosecutor.

Q: If you'll explain for history's sake—and history is messy, despite my best efforts—the relation of the convening authority to your job.

Davis: It's difficult. I was having a discussion with a reporter last night who's working on a story on Sergeant Bales—and I've had this discussion with members of Congress. Trying to explain what a convening authority is, is difficult because there is no analogous position in any civilian court. It's unique to the military, so people have a hard time wrapping their head around it.

A convening authority, to me, is kind of like a referee. It's typical—under the Uniform Code of Military Justice [UCMJ] and court martial practice—usually, the convening authority is the installation commander. He's called the court martial convening authority and he oversees the prosecution of troops that break the law, like Sergeant Bales. If Sergeant Bales is charged, it will go most likely to the commander at Fort Lewis, who is the convening authority. The convening authority is supposed to be—he reviews the charges, and decides which, if any, of the charges are referred to trial. When the trial is over, he reviews the findings and the sentence, and can

decrease the sentence or disapprove a finding of guilty, but he can't change a not guilty to guilty. He can approve the sentence as adjudged, or reduce it. He allocates resources, like the case I was talking about with Lindsey Graham, where we took the accused from Florida and went to Texas to have the pretrial motions hearing. The convening authority had to approve allowing us to do that. It comes out of his operating budget.

Q: These convening authorities are all over the United States.

Davis: Oh, yes. There's an official list. Within the military, there are hundreds of them, and not just in the U.S. Every overseas installation has one, too. It's typically whoever is assigned as the senior commander for the installation is also the convening authority over those in that command.

Q: So when people want to throw mud at the chief prosecutor—like yourself—they're missing the mark. The convening authority has more power, right?

Davis: Yes. If this was a pyramid, the tip of the pyramid is the convening authority.

Q: But not the president. The president doesn't have to approve anything does he?

Davis: Not under the current military commission system. You mentioned RTBs—Reason to Believe determinations. Under the original, November 13, 2001 order—if you look at it, it says that the people who could be tried by military commission are the people that the president has

determined that there is reason to believe are members of or supporters of al-Qaeda or affiliated forces.

Q: But specific individuals, you mean, by name.

Davis: Yes, by name. At the time I became chief prosecutor, there were probably twelve or fifteen cases that had already been charged, and were in some stage of prosecution, like [Salim Ahmed] Hamdan, Khadr, David [M.] Hicks, [Ali Hamza] al-Bahlul. A lot of the cases that have been tried now were cases that had already been started when I came on board. But for each one of those—there's an organization located at Fort Belvoir called CITF (pronounced “sit-if”) —the Criminal Investigation Task Force—which is a military, law-enforcement organization, and their job—

Q: Brittain Mallow's outfit.

Davis: Exactly. He was the CITF commander before I came on. I think he was leaving about the time I was coming in.

I think that's one thing the [Barack H.] Obama administration didn't understand when they came in—I think they were under the impression that at Gitmo there are these neat file cabinets on each detainee, with everything tabbed, and that you could go open the Khalid Sheikh Mohammed file cabinet and it was all there, which was not the case. There were bits and pieces

of information at Gitmo, or at the CIA, or NSA [National Security Agency], or with the Pakistani government. There was no coherent collation of all the information at a central point.

CITF's job was to try to go out and get their arms around all these bits and pieces of information and try to put it in some coherent form to where decisions could be made on whether we had a case that was prosecutable or not. Once they put it together, they would do a package that came to my office, that I would review, and if it looked like a case where we had evidence to support a potential war-crime prosecution, then we did a package that went—I'm not sure of all the stops along the way—from my office, to the DOD general counsel's office, then through the National Security Council, to the president. President Bush had to personally sign a letter that designated whoever—Omar Khadr, for instance—as eligible for trial. There's a letter somewhere with George Bush's signature on it, saying that, "For the following reasons, I've determined there is reason to believe that he is a member of or supporter of al-Qaeda, or associated forces." You couldn't charge somebody with a war crime under the military commissions system back then until the president had personally signed that RTB.

Q: Did you then have to get the convening authority's approval?

Davis: Yes. Once the president signed the RTB—typically, if a case was sufficient to warrant an RTB, there was enough there for us to prepare charges. So we would prepare a charge sheet. There's a form that it goes on. It's like a court martial. There is a Defense Department form that you fill out the charges on. It's called Preferral of Charges. Someone in my office would sign the charges. We would fax them to Gitmo and somebody would go over to Omar Khadr or whoever

and say, "Here's what you're charged with" and give them a copy of the charge sheet in their native language. Then I would carry the file to the convening authority, which initially was General Altenburg, then later, Susan [J.] Crawford. I would hand it to her staff, and then it was in their ballpark.

Q: Okay. At the time you came, in September 2005, had there been any prosecutions?

Davis: No. There had been some hearings, and some cases where charges had been filed, like with *Khadr, Hicks* [*United States v. David Matthew Hicks, 2007*], *Hamdan*, and some of those cases. There had been some hearings, but nothing had ever gotten—there had never been a jury impaneled. They'd never gotten that far along in any of the cases because, typically—I remember one time we were preparing to go to Guantánamo, and at 10:00 the night before, I think it was Judge [Gladys] Kessler, issued an injunction. So as a federal judge would issue an injunction in one case, we would put that one on the back burner, and try to push another one along. But none of the cases had gotten to the presentation of evidence stage at that point in time.

There wasn't a coherent pattern to how we were trying to move these cases. In a perfect world, you'd like to do these cases in some logical order, kind of like a RICO [Racketeering Influenced and Corrupt Organization] case where you're going after the mob. You'd kind of like to start at the bottom, pick off the small players, and flip them against the bigger ones as you move up the hierarchy. The military commissions became a "Who can we get in court first without getting blocked by the federal courts?" endeavor.

Q: Well, you must have gone home, taken a hot shower, and said, "I'm going to fix this situation." No?

Davis: I had hoped to. I live about forty miles outside of D.C.—because when I took this job—

Q: You mean now.

Davis: Now, and I did then, too.

Q: Oh, then, too?

Davis: Yes. When I came here for the interview with Jim Haynes, we also had a day to go house-hunting. I wound up buying a house in a day, at the peak of the housing market bubble in 2005. That's why I'm still here, primarily. I think a lot of people think I retired from the military in 2008 because of Guantánamo. I retired mainly because the housing market crashed and I bought at the peak of the market. I couldn't afford to move. But when I bought the house, I bought it away from the city because I thought I'd be spending ninety-five percent of my time in Cuba, and I wanted my family to be away from town, in a safe, gated community. If I'm going to be prosecuting al-Qaeda terrorists, I'd like to have them in a safe environment. As it turned out, it was the exact opposite of my assumption. We spent five or ten-percent of our time in Cuba, and ninety or ninety-five-percent here in Washington.

I don't know if I answered your earlier question about the convening authority very well.

Q: I get the drift.

So you're coming into a situation where there are already a lot of critics, not only of the idea of the military commissions but even how things are set up down there, ranging from—remember a Colonel Dwight [H.] Sullivan? Here he is, in a book called *Guantánamo Lawyers*, published several years ago, saying that back then you had inadequate courtroom space down there.

Davis: Yes.

Q: You had inadequate housing.

Davis: Yes.

Q: You had inadequate transportation. You had inadequate telecommunications. The defense lawyers had inadequate access to their clients. He uses inadequate constantly. He goes into the legal limitations, and then finally says that an assessment—he quotes Secretary [Robert M.] Gates, in March 2007, saying, "Because of things that happened earlier at Guantánamo, there is a taint about it."

Davis: Yes.

Q: "It's one of the reasons why I had recommended or pressed the issue of trying to get the trials moved to the United States, because I felt that no matter how transparent, no matter how open the trials, if they took place at Guantánamo in the international community, they would lack credibility." And Colonel Sullivan says that assessment is correct. "The trials at Guantánamo do not merely appear unfair; they are unfair."

Here you are, the chief prosecutor; what are you going to do about this situation?

Davis: What you read from Secretary Gates is as true today as it was when he said it in 2007. It's the optics. You could have the most perfect trial ever conducted for Khalid Sheikh Mohammed at Guantánamo in 2012, and the world is going to look at it with a very skeptical eye because of the years of failure and frustration. What Secretary Gates said then is true today. We should bring them to the U.S., and do the trials in federal court. I think the military commissions are so tainted at this point that there's no redeeming them and making them credible.

When I came in, my office was located in a suite of offices at Crystal City. Directly next door to me was Stu Couch. Within the first day or two after I got there, Stu came in, plopped down for an hour, and gave me—because he had been there for a long time—I think he was one of the original group that came over. He kind of gave me a rundown on his take of how things looked. That was the first time I heard about the *al-Qahtani* case.

Q: Did he mention [Mohamedou Ould] Slahi?

Davis: Yes, he mentioned Slahi. He explained that the folks in the office were looking—I was the third chief prosecutor that some of them had worked for. There was Fred Borch, then Bob [Robert L.] Swann, and now me.

Q: When was Bob Swann there? Do you know?

Davis: He's still there.

Q: Did he succeed Borch as chief prosecutor?

Davis: Yes, Bob was the second chief prosecutor. He retired when I got there, and stayed on as a civilian attorney. He's still there.

Q: As a civilian. When it came out that these people wrote the emails—Preston and what have you—Borch was the chief prosecutor.

Davis: Right.

Q: Then Swann became the chief prosecutor for a short period. Isn't that correct?

Davis: Yes.

Q: Before you.

Davis: Right.

Q: It couldn't have been too long a period.

Davis: I don't remember exactly when Bob took over—it was a year or so before I arrived. He wasn't in the position too terribly long.

Q: Okay. I may want to refer to him again. But there you are, you met Couch, who, in May 2004, asked to be reassigned from the Slahi case because he thought that they were attempting to use information from Slahi to prosecute him that had been gained from enhanced interrogation techniques. This is even before you came on.

Davis: Right.

Q: So he's telling you this stuff. Did it make an impression upon you?

Davis: It did. Stu's a real credible guy. He's a Marine, a former aviator, a kind of a no-nonsense—well, "no-nonsense" probably isn't the right description because he's got a good sense of humor—but he's a very credible guy. He certainly had as much experience as anyone in the office, not just having worked in the office but he'd been involved in the case in Italy, the Marine Corps—

Q: Aviano Air Base.

Davis: Yes. He was an experienced guy who knew his way around a courtroom. Certainly, over time, I gained even more respect for Stu, but from the start he was someone I took seriously.

Q: Well, look, you're there. Did you see any of this use of enhanced interrogation techniques?

Davis: Yes, I was aware it happened. Did I actually see any take place? No.

Q: Did you think it was still happening?

Davis: I didn't make my first trip to Guantánamo until January 2006. At Guantánamo, there is the Guantánamo Naval Station, which has been there for over one hundred years. Then you have the detention operation, which is located at Guantánamo, but it's not run by the Naval Station staff. The detention operation consists of a medical group, an intelligence group, and a detention group. The detention group is basically under the camp commandant, who runs the day-to-day operations of the camp. The intelligence group is mainly the interrogators who try to get information out of the detainees. Then, of course, the medical group provides medical and dental care. All three groups report to a one-star who commands the overall detention operation under the heading Joint Task Force Guantánamo, or JTF-GTMO.

When I made the first trip down there, the head of the intelligence group was a civilian named Paul [B.] Rester. I'm not sure if he's still there or not.

Q: I think he is.

Davis: He may be. He was there at the start, in January 2002. He left for a period of time and went, I believe, to Afghanistan, then he came back to Guantánamo. My first trip down there in early 2006 I met with Paul Rester, and he told me, "Look, there were things that happened in the late 2002 to 2003 timeframe that is an embarrassment, and should never have happened." It was my impression that by the time I came on board—by the time I went to Gitmo for the first time, in 2006—it was my impression that the egregious behavior had been over for some period of time.

Q: Well, had you seen the pictures that came out of Abu Ghraib in April 2004?

Davis: Yes.

Q: Did it make an impression on you?

Davis: Yes, it did. I think "shocking" is probably a gross understatement to anyone who saw those, particularly being done by members of the U.S. armed forces.

Q: Well, at that time, you didn't know what was going on at Guantánamo, in a case like Slahi, or a case like *al-Qahtani*. You didn't know. You didn't know anything, I assume, about black sites or renditions, or did you?

Davis: I'm trying to think of the timeframe. I got here in September, October, November—it was the latter part of the year—of 2005, like November, December. I had a top-secret security clearance from my job in Wyoming, with the ICBM program, but I had to get some additional clearances because of the CIA involvement, and some other involvement, in these detainee cases. So there was a period of time where there were things that I didn't have access to, and things that people couldn't talk to me about. It was probably around November when I got the approvals on the clearances that I needed—it's called "being read in," where once you're approved they sit you down and say, "Okay, here's what's going on." So it was the latter part of 2005 when I got briefed on the black sites, interrogation techniques, and those kinds of things.

Q: Colonel Davis, what was your reaction to that?

Davis: Well, let me back up a bit. In the first staff meeting I had with the prosecution team—after I took over—Stu Couch had told me, "Look, people here are waiting to see what you're going to do." They felt like Fred Borch and Bob Swann were pushing them to do things that they felt were unethical or immoral. Now they're looking to see, "Okay, what's the new guy going to expect us to do?" So the first staff meeting I had, we had a big conference room with a long conference table, and at that first meeting with the prosecution team I said, "Look, I've heard the stories about the enhanced interrogation techniques, waterboarding, torture, and all these other things. I know that some of you have concerns about what my policy is going to be, and how far I'm going to push you. I'd like for our grandkids to someday have the romanticized view of Guantánamo that we have of Nuremberg. I'd like for us to be able to sit on the porch with our

grandkids and be proud of what we did, not ashamed of it. So we're not going to use any evidence that was obtained by waterboarding, or torture, or any enhanced techniques that you feel crossed the line, where it's not credible evidence for use in a criminal prosecution. If you're in doubt, if there's anything you're uncomfortable about, I want you to come see me, and let's sit down and talk about it. Because I don't want anybody to feel like they're being pushed to do something they don't think is right. We want to win these cases, but we don't want to push the edge of the envelope to see how much we can get away with."

When that meeting broke up, I could see Bob Swann was sitting to my right. He's retired, and he stayed on as my deputy. I could see Bob didn't make eye-contact with me. He just kind of looked down at the table. I could see Stu was noticeably enthusiastic. When the meeting broke up and I went back to my office, Stu came in and said, "Sir, that was exactly what they needed to hear. That was exactly the right message." I had discussed it with General Altenburg, General Hemingway, and General Rives, and everybody was in agreement with my policy of not using any of that information—which doesn't excuse what happened to al-Qahtani, Slahi, or anybody else. It doesn't excuse how they were treated while they were in our custody, but as far as my job as chief prosecutor for the military commissions, if we're not going to use that information, it makes it irrelevant for their trials.

Like with *al-Qahtani*. That was the one case I had intended to personally prosecute. Prior to September 2006, when the high-value detainees were transferred from the CIA to DOD, in my view, up until that point, *al-Qahtani* was the dirtiest of the cases at Guantánamo, as far as his treatment went. It was my view that if I was the chief prosecutor, I shouldn't pawn the dirtiest

case off on one of my subordinates. If somebody was going to take the heat and be held accountable for the dirtiest case, it ought to be me and not one of my subordinates.

So I took that case over myself. Stu had spent the most time working on it, and he turned over his stuff to me. That was the one case that I intended to personally prosecute, but I was going to do it without using anything he ever said in U.S. custody.

Q: Okay. But now you know about the black sites.

Davis: Yes.

Q: And the rendition program?

Davis: Yes.

Q: Did you know that in the year that you took over as chief prosecutor down there, Secretary of State Condoleezza Rice, said, "We don't torture, and we don't send people to be tortured."

Davis: When I resigned in 2007—that was one of the primary reasons for my resignation. My immediate superior told me, "President Bush says we don't torture. Who are you to say we do?"

Q: Let me come to that. I'm speaking about the secretary of state.

In any event, between the time the first detainees arrived and the time you came, some 758 detainees had been brought to Guantánamo, of the eventual total number of 779. By the time you came, 260 of those 758 had been sent home, or sent to some other place—sent out of Guantánamo. What were the criteria, as you understood it, for the release of those people, and how many among the remaining roughly five hundred there, at the time you came, were you really targeting for prosecution? Was it everybody? Did you begin to see any chink in the worst-of-the-worst argument?

Davis: It became apparent pretty quickly that the worst-of-the-worst narrative was false. It didn't take fifteen minutes of looking at the David Hicks case to realize that David Hicks was a knucklehead, and not a Khalid Sheikh Mohammed. So yes, it became apparent quickly.

Let me back up. There were a total of roughly seventy-five that I thought we had some prospect of prosecuting. That meant that there were four hundred fifty or so that I never looked into. CTF was putting these cases together for the RTBs that I would review, and if I thought it warranted it, it would go forward to the president. Like *al-Qahtani*. *Al-Qahtani* went to the president and never came back. It was somewhere between the Pentagon and the White House for about a year, and never got rejected or approved. Then *Hamdan*—the Supreme Court decision came down and kind of blew everything out of the water—but *al-Qahtani* was in the pipeline for over a year and just never moved. I was told that White House Counsel Harriet [E.] Miers had the *al-Qahtani* RTB package sitting on her desk for months and it stayed there until finally the *Hamdan* decision made it moot, and, of course, the whole process was just sort of dead in the water at that point.

Q: In terms of prosecution.

Davis: Right. There was a separate—it's called OARDEC—the Office for the Administrative Review of the Detention of Enemy Combatants—but there was a separate group of people who managed the Combatant Status Review Tribunals [CSRTs] and the Administrative Review Boards [ARBs], separate and apart from the military commissions. In fact, I can't say that there was a physical wall built between us, but we purposefully—

Q: Those CSRTs and the ARBs were set up in reaction to *Rasul*, isn't that correct? As I understand it, the administration wanted to show that, "Oh, wait a minute. You say they've got a right to habeas corpus in federal courts. But we can do our job down here. We don't need that. We can do our job with the CSRTs and ARBs." But unless you were directly involved with the CSRTs or the ARBs, let's pass over that, because there continues to be an argument, to this day, as to whether they were worth the paper they were written on, or the hearings that they held.

Davis: One of the arguments I lost—one of many—was in the spring of 2007, roughly May 2007. If you recall, [Lakhdar] Boumediene had petitioned the Supreme Court, and they'd denied cert in early 2007. Then Steve [Stephen] Abraham, who's an army lieutenant colonel, who was a JAG, who had served on some of the CSRTs, publicly came out and said, "Look, I served on some of those things, and in many cases they were a sham."

Q: The CSRTs and the ARBs.

Davis: Right. As he said, if we met, and we determined that the person wasn't a threat and shouldn't be detained, they'd send it to another panel until they got the result they wanted.

Q: That's right.

Davis: And that led to the Supreme Court, for the only time in my lifetime, reconsidering having denied cert, and they then granted cert—which I think—

Q: Okay, but look, of the approximately five hundred who were still left at Guantánamo when you came, you considered seventy-five or eighty of them—

Davis: Potentially prosecutable.

Q: What about the rest? You had been told that these were the worst of the worst. These are people who had been languishing there, some of them for several years, at that point, not charged with anything. Did you gather the boys around and say, "Are these the worst of the worst, all these others?" What did you think?

Davis: Well, we didn't have enough resources to deal with the cases we had—I think there were potentially about seventy-five that, based on the initial CITF workup, we thought potentially could be prosecuted. There was a group of about two dozen cases where we actually had prosecutors assigned—most prosecutors had two or three or four cases they were working on at any given point in time. When I first got there, for instance, Stu Couch had *Hamdan*, *Slahi*, *al-*

Qahtani, and maybe some others. I don't recall specifically. But I had more cases than I had prosecutors to work on them, so we tended to concentrate on about two dozen cases that we had people actually assigned to and doing legwork on. We didn't have enough people to look at the entire seventy-five, much less the four hundred fifty more beyond that.

Q: I hear you. But did you not say—a couple years after you came—that while you had been a true believer in what the administration was saying about the worst of the worst, in 2002 when you heard it, that by the time you left there in 2007, you said—if this is correct—"though some fit that description." That is, the worst of the worst, and the ones who would chew through hydraulic lines—"Though some fit that description, a great many others did not. Some were teenagers; some were old men who lacked the ability to gnaw through a boneless chicken breast much less a hydraulic line." Surely that is one of the great lines out of the whole Gitmo situation.

But you never had occasion to make some sort of systematic analysis yourself of who the others were, the four hundred men we're talking about. But you could, in fairness, say that you stand behind that statement, even today, that I just read? That was your impression of the situation there?

Davis: Yes. I think if you look at it—in the current administration, there are roughly thirty they intend to prosecute, out of a total of 779 or whatever the total was over the years. It's roughly four-percent of all those who was ever taken to Guantánamo, that there's even an intention to prosecute. Clearly, the vast majority aren't the worst of the worst if you only have a view towards prosecution for less than five-percent of the total.

Q: Well, you know, there are some people in the administration—Dick Cheney in the previous administration—who will say recidivism—if you look carefully at the figures, a fourth of the people who are sent back are up to no good again.

Davis: Yes.

Q: Do you have faith in these kinds of figures?

Davis: No. I think there clearly is some number of recidivists, but I think anybody who tries to assign a number to it is just venturing a guess. Even if you accept that argument as true, compared to—in U.S. prisons our recidivism rate is much higher than that. I've forgotten the guy's name, but Tom [Thomas B.] Wilner represented one of the Kuwaiti detainees who eventually blew himself up after being released from Guantánamo. If you talk to Tom he will tell you, "I don't think the guy was a committed jihadist when he went to Guantánamo, but I think he was when he blew himself up years later."

Q: You were there as chief prosecutor for two years. Is that correct?

Davis: Yes.

Q: How many cases got done in that time?

Davis: One.

Q: And that was—?

Davis: David Hicks.

Q: That's right. Now did things change when the Bush administration moved the high-value detainees out of the black sites to Guantánamo in September 2006? Did that have any impact on what you were doing?

Davis: Yes. I would say that up until then, from September 2005 until September 2006, I felt like we were pretty autonomous. I could kind of call the shots as I saw them, like the policy I had on evidence derived by enhanced interrogation techniques—we're not going to use any of that. I felt like I ran a fairly autonomous shop. General Altenburg, for instance, was concerned about avoiding even the appearance of impropriety. At the time, we were all crammed into an office building over in Crystal City, and there was a doorway between my suite of offices and the part for his staff. He couldn't bolt it shut, for fire purposes, but he had an alarm put on the door between the office suites because he thought it looked bad for the prosecution and the convening authority staff to be able to intermingle. He wanted to physically separate the two to avoid any appearance of being too cozy.

So for the first year, I was optimistic that we were going to make this a credible process. After September 2006, when the high-value detainees were transferred, it went from nobody much

caring what I did to everybody caring what I did, and having opinions on how I ought to do it, particularly from the Department of Justice [DOJ]. When I eventually got read into all these programs, and briefed on—the reason Bob Swann retired was to stay on to prosecute Khalid Sheikh Mohammed and the high-value detainees. He'd been read into the programs and had been working on those cases for some time, and he still is, to this day.

As I learned, the agency wanted to get these guys off their books, because they thought that they had exceeded their legal mandate. If federal courts were going to intervene, at some point they were going to get burned. They thought their mandate was to extract intelligence, and once you've extracted all the intelligence there is to extract, they didn't think they had a legal basis, then, to operate a secret bureau of prisons just to keep people in custody. So they were anxious to get these guys off their books, and they were much more cooperative with me than DOD was. I think they were willing to do whatever they needed to do to get these guys off their hands. So I always had what I felt was great cooperation from the CIA.

In the spring of 2006—you can imagine, if you're an attorney in DOJ, prosecuting Khalid Sheikh Mohammed in federal court is a career-maker.

Q: Or breaker.

Davis: Yes, depending on how it goes. There were a lot of people on the DOJ side who really advocated for—I mean, President Bush eventually had to make a decision on what do we do with these guys. He had a group of people advocating for "Bring them to federal court," and then

another possibility was to prosecute them in courts martial. A third possibility was to prosecute them in military commissions. What we eventually did was to convene a group of people from all the different disciplines and come up with recommendations that went through the National Security Council to the president for him to make a decision. I think a lot of folks at DOJ were disappointed that the decision was to go the military route. When they lost that battle—that these were going to be military cases—they still wanted to manipulate the process and pull the strings and participate in the prosecution. It was basically going to be like a federal court-lite. If these cases won't stand up to federal court standards, then we'll call them military commissions to justify doing something less. But they still wanted to hold the reins and control the process.

Q: You're talking about the high-value detainees?

Davis: Yes. They weren't really interested in the others.

Q: Well, why would that change your life and what you're intending to do down there?

Davis: Because what eventually happened was, when the decision was made to transfer the high-value detainees, suddenly I've got a lot of people with opinions on what I should be doing, how I should be doing it, what the rules ought to be, and what evidence should be used. That's why, in September 2006—the *Hamdan* decision comes out in June. Everything's dead in the water at that point. Now the decision had been made to transfer the high-value detainees to Gitmo before the *Hamdan* decision came down.

Q: Well, the *Washington Post* and others had uncovered these black sites.

Davis: Yes. So there was a real effort to shut the black sites down. I think most people were of the opinion that the government was going to win the *Hamdan* case. We were making plans as if once this decision comes down, it's full speed ahead.

Q: You mean upholding the military commissions.

Davis: Yes.

Q: As they were then constituted.

Davis: Yes. I'll never forget the day the decision came out. There's a guy—Lyle Dennison—

Q: I know Lyle.

Davis: Yes. Well, Lyle was blogging on SCOTUSblog [Supreme Court of the United States Blog], as they're announcing the decision, and I remember shortly before the decision was going to be announced, Bob Swann and I were both in the men's room at the office in Crystal City. Everybody was getting ready, waiting for the decision to come out, and I remember Bob standing at the urinal, and somebody said, "What do you think the outcome is going to be?" He was saying, "Oh, it's going to be at least six-two. I guarantee, at least six-two."

Q: Meaning six-two—

Davis: —in favor of the government. So everybody kind of huddles around the computer, and we're hitting refresh constantly, trying to get the results—and you kind of see the blood start to drain out of Bob as it became apparent it wasn't going to be six-two, or five-three, or even four-four; we were going to lose. But I think up to that point, there were a lot of people who were under the impression that this was going to be a win, and it was going to be off to the races with the military commissions.

Q: But *Hamdan* was a serious blow.

Davis: Yes. It just shut down the whole thing—in fact, that was the only time in my tenure that Jim Haynes ever came over to our offices. Right after the *Hamdan* decision, he came over and had kind of a pep talk—"Keep the chins up. We're going to get this back on track."

Q: Actually, *Hamdan* said that the Geneva Conventions did apply to these detainees down there, particularly Common Article 3. Isn't that right?

Davis: Right.

Q: This was an opinion written by Justice [John Paul] Stevens, I think, that the attempts by the government to run these commissions as they were running them were not constitutional, right? That's just for the record.

Davis: Right.

Q: I want to go back for a second, though. You're saying that one result of the transfer of the high-value detainees from the black sites—and the apparent closing down of the black sites, which followed press reports that the black sites existed, which the administration had not revealed—

Davis: Right.

Q: —one result was that your life was made more complicated.

Davis: Yes.

Q: Before we continue, in this at least nominally chronological matter, I want to go back again. When you were read-in to the existence of these black sites, did you get a picture of what was being done to these people, from waterboarding on? Were you told that?

Davis: I was briefed by the people who actually conducted the waterboarding.

Q: Before, you made mention of this article by Lloyd Cutler about *Quirin* and what have you, how in the end he points out that we're going to be remembered for how we act, not so much how they act.

Davis: Right.

Q: Well, look. You're a military man. The CIA people are telling you, "This is what we're doing." Truly, what was your reaction?

Davis: My intention—it doesn't excuse what we did to these guys—but in my little domain of military commissions, if I'm going to prosecute Khalid Sheikh Mohammed, and not use anything he said in our custody, it doesn't excuse what happened while he was in our custody but it makes it irrelevant in his criminal proceeding. Until I resigned, that was our agenda—to build these cases independent of anything they ever said in our custody.

Q: In other words, you didn't sit back in your chair and say, "Holy Moly! They don't do this in Boone, North Carolina, or Shelby, North Carolina. This is really off the wall." You didn't have that reaction.

Davis: No, it clearly struck me as—

Q: I don't want to force you to say something that isn't so.

Davis: I tried to look at it through the lens of, if we wouldn't condone it being done to one of us, then why would we condone it being done by us? Whatever process we're using, whether it's for prosecution, or interrogation, or detention; if it's something we wouldn't tolerate if the shoe was

on the other foot, then we shouldn't condone it when we do it. 'American exceptionalism' doesn't mean that there's an exception when we do stuff we condemn other people for doing.

So I didn't excuse what we had done in the past and I expected at some point there would be some accountability, but my job at the time was to try to get these cases prosecuted. And if we weren't going to use any of that evidence—it wasn't my job to go prosecute the CIA agent who waterboarded Khalid Sheikh Mohammed; it was my job to prosecute Khalid Sheikh Mohammed.

Q: Although you know there are some people who believe they should be prosecuted.

Davis: I'm one of them. There should be accountability, but I think accountability starts at the top, not at the bottom. I think the people who administered the enhanced interrogation techniques did so in good faith. They believe that it had been approved from the Justice Department to the White House, and that what they were doing was approved and legally permissible. So if you're going to place blame, we should start at the top, not at the bottom.

Q: In any event, you were fairly autonomous, you say, in that year, 2006. Then along comes the high-value detainees, and things move along, but you're coming upon a more complicated life. Then after *Hamdan*, there's a new Military Commissions Act in 2006, isn't that correct?

Davis: Right.

Q: And then you've got work to do, I guess, creating new rules again. Right?

Davis: After *Hamdan* came down in June, in probably August 2006, I got a call from Lindsey Graham's office asking if I would come over and meet with Senators Graham and McCain, which I did. When I got there—we met in the conference room near Graham's office—I told him what my policy was—that we were going to build these cases independent of any statements that were made in U.S. custody. When McCain came in a few minutes later, Graham said, "Hey, tell John what you just told me." I did, and Senator McCain put his hand on my shoulder and said, "I'm so glad to hear you say that. That's exactly the right thing to do. I fought the Bush administration over this. They fought me tooth and nail. But you're doing exactly the right thing there."

We sat down and they said, "Okay, what do you need to get the job done right?" I said, "I'm beginning to get strong-armed by DOJ and others in the Bush administration. Where before I was autonomous, now I've got everybody and their brother trying to tell me what to do and how to do it."

Lindsey Graham said, "Can you draft some language that we can put in the act?" There's a section in there on unlawful command influence that, if you compare that language to the language in the Uniform Code of Military Justice, there's some additional language that I wrote, that Lindsey Graham put in the bill, that says "the prosecution can exercise independent professional judgment without undue influence or coercion." That was intended to keep DOJ and the White House appointees, like Jim Haynes, or anyone else from meddling in how I chose to prosecute these cases. That was the express reason for why it was put in there.

Q: Right. Then the Military Commission Act of 2006 was passed.

Davis: Right.

Q: Which would be superseded by other later Military Commission Acts.

Let's take a break, and then I want to come back to the beginning of 2007, when you got another call from Jim Haynes. Is that correct?

Davis: Yes.

[END OF SESSION]

VJD

Session Two

Interviewee: Morris D. Davis

Location: Washington, D.C.

Interviewer: Myron A. Farber

Date: March 20, 2012

Q: This is Myron Farber on March 20, 2012, continuing the interview with Colonel Morris Davis, for the Guantánamo project. This is session two.

Colonel, in January 2007, at least two things interesting happened. One, you wrote an op-ed piece in *The New York Times*—excuse me. That was in June. In January, rather, you got a call from Jim Haynes. He must have lost track of where you were, but he found out and he called you. Actually, Haynes's own situation was interesting at that time because President Bush had nominated him for a seat on the Fourth Circuit Court of Appeals, I think, and had withdrawn the nomination as a result of—what?

Davis: He had been part of the group that the Senate had held up in the confirmation process. I think the administration eventually took him off the list to break the impasse. I don't think it was just him. I think there were a couple of names they took off the list, in order to make—

Q: You don't think it was associated with anything having to do with the so-called torture memos? Were they known, at that time?

Davis: Yes, they were known. I can tell you he was placed back on the list the same day I met with Graham and McCain about the Military Commissions Act.

Q: But that was in 2006.

Davis: Yes. He had originally been nominated—I don't remember exactly when. I think he was a nominee when I took the job in 2005—

Q: Oh, really?

Davis: —and it was tied up in the confirmation process. Eventually, his name was taken off the list. Then in September 2006—I believe it was the exact day I met with Senators Graham and McCain—President Bush nominated him a second time. I remember at the meeting, when John McCain came in the room, he was talking to Graham, and he said, "Hey, did you hear that Bush has re-nominated Haynes?"

Graham said, "No."

McCain said, "Well, what do you think?"

Graham responded, "I think when hell freezes over, he'll get confirmed."

Q: Okay, but in January 2007, Jim Haynes called you. Is that correct?

Davis: Correct.

Q: What's he got on his mind?

Davis: I don't recall the exact date. It was early in the month, like the seventh, eighth, or ninth, somewhere in the early part of January. It was after the Christmas and New Year's holiday period. It was the day that President Bush withdrew his name for a second time for a seat on the Fourth Circuit Court of Appeals. Until that point, he had never once called me about a specific case.

Q: Ever since that first conversation you had had with him?

Davis: No, I had other conversations with him about administrative stuff—trying to get resources and people—but as far as having a conversation about a detainee and a specific case, he had never once called me. From September 2005 until January 2007, he never called about a case. But that day, he called and said, "How quickly can you charge David Hicks?" I said, "Well, not any time soon." The Military Commissions Act Congress passed, I believe, in September 2006, President Bush signed it, and the statute itself is kind of a broad framework, without a lot of detail in it. There's another document called "The Manual for Military Commissions," which is—I've forgotten exactly how long it is. It's two or three hundred pages long. It really fleshes out—it kind of puts meat on the skeletal framework that the statute creates.

Q: Meat to do what?

Davis: It defines the elements of the offenses, the rules of procedure, and the rules of evidence. It's modeled after—in court martial practice, we have a document called "The Manual for Courts-Martial," which is a thick book that is kind of the bible for how you do a court martial. Well, the Military Commissions Act required a similar document for military commissions.

Q: But didn't you have one from the old days?

Davis: No.

Q: You had never had one?

Davis: No. There was a draft of one that was never completed. John Altenburg's staff had put together a partial draft when we were operating under the pre-*Hamdan* Bush procedures, but it had never gone anywhere. The old process worked under a series of—they were called MCOs—Military Commission Orders.

Q: You mean the kinds of things that Colonel Dwight Sullivan had complained about?

Davis: Yes.

Q: And the defense lawyer Josh [Joshua L.] Dratel?

Davis: Yes. There are a series of orders, instructions, and directives that came either from the president, the secretary of defense, the general counsel, the convening authority, or the presiding officers that attempted to create the architecture for the military commissions.

Q: Just as an aside—Josh Dratel, the defense lawyer, and a Lieutenant Colonel Darrel [J.] Vandeveld—retired now, I suppose.

Davis: No.

Q: Not retired—who, in 2009, did the same thing as these other commission prosecutors we're talking about—asked to be reassigned. Did he not?

Davis: Yes.

Q: He told Congress that they were broken beyond repair.

Davis: Yes.

Q: He and Josh Dratel wrote an article that was published on *Salon.com*, in March 2010, in which they say that the commissions are now in their fifth incarnation, and that all that's been done is to rearrange the deck chairs on the Titanic. The reason I'm pointing this out is because they say there is yet to be these kinds of rules that you're talking about. This is in 2010. We'll come to that.

"The commissions are now in their fifth incarnation. Hastily conceived after 9/11, they were repeatedly revised by Presidents Bush and Obama, and by Congress. Under the most recent version—the Military Commissions Act of 2009—the Department of Defense has yet to even devise rules for these proceedings."

Davis: Yes. The rules for the proceedings came out shortly after that, literally at 10:00 PM the night before the *Khadr* military commission was to start.

Q: Let's go back. We're talking about this call from Jim Haynes, and he says, "How fast can you charge David Hicks?" And you're telling him, "Wait a minute." Or you're telling me that you didn't have the manual in hand yet.

Davis: Well, there were two things that were missing when he called me. Congress had passed the statute. The Defense Department was working on creating the Manual for Military Commissions, which defines the elements of the crime. At that point, I told him, "I don't know what I could charge Hicks with, because it would be kind of nice to know what the elements of the crimes are before I decide which crimes to charge him with." The other problem was John Altenburg left in November 2006. Susan [J.] Crawford wasn't appointed until February 2007, so there was no convening authority at the time.

Q: She was appointed when?

Davis: February 2007.

Q: And she was succeeding Altenburg as the convening authority.

Davis: Right.

Q: Who was she?

Davis: At the time, she had recently retired as a judge on the Court of Appeals for the Armed Forces. Before that, when Dick Cheney was the secretary of defense, she'd been his inspector general at the Defense Department. So she was a long-time—at her retirement—which I didn't attend, but I think Dwight Sullivan did—the only person she mentioned by name at her retirement from the Court of Appeals for the Armed Forces was David Addington. She was appointed to replace General Altenburg to run the military commissions.

When Haynes called me in January 2007, it was after Altenburg had left and before Crawford had been appointed, so there was no convening authority. Number one, I had no Manual for Military Commissions to tell me what the elements of the crimes were, and number two, I had no convening authority to forward charges to if I could charge somebody.

Q: What did he say?

Davis: He said, "Well, we're working on the manual. We're getting close. We're going to have it done soon, and we're looking at a couple of candidates for the convening authority job. We're going to get that done soon, so how quickly can you get Hicks charged after you get the manual?"

I said, "Well, we're probably going to need a couple weeks."

He goes, "That's too long. Why do you need that long? You've had this case for a couple years now."

I said, "Yes, but the Military Commissions Act authorized charging material support for terrorism as an offense; it didn't exist under the earlier version of military commissions. So there are some new offenses and new rules. It's going to take a little time to digest this two or three hundred-page guidebook, and then match that up to the facts of the case, and determine what we can charge Hicks with."

He said, "That's just too long. You need to get this thing moving."

I said, "Well, I'll do the best I can."

Q: Well, why?

Davis: He didn't say. Before I forget—it was a fairly short conversation—he also asked, "Is there anybody else you can charge in addition to Hicks?" I said, "Yes. We're looking at a couple of cases." He never asked me who the other cases were, nor did he say why he had a particular interest in *Hicks*. It was my impression—and what I believe to this day—is that the John [W.] Howard administration in Australia was just getting beat—

Q: John Howard, the—

Davis: At the time he was prime minister in Australia. Hicks had become kind of a cause célèbre in Australia. Howard was facing re-election later that year, and he was getting killed over the David Hicks issue. So it was my impression that Haynes wanted me to expedite *Hicks* to get it off the ledger for John Howard. I think he asked me if I could charge other people, in addition to Hicks, because it would be more palatable if it was a part of a package of cases and not a stand-alone. If we just charged David Hicks, it was going to stick out like a sore thumb. If he was just one of several cases, then it wouldn't look like an anomaly.

Q: David Hicks—he hadn't flown any planes into the World Trade Center, had he?

Davis: No. He stood outside the Kandahar Airport with a rifle guarding a broken-down tank.

Q: That's a facetious way of saying he's not your most bad guy, is he?

Davis: David Hicks was a knucklehead.

Q: When he said "package deal," did he throw in KSM? Who did he throw in with David Hicks?

Davis: He didn't ask who else I'd charge in addition to Hicks. I think he just wanted it to be *Hicks* and some other cases so *Hicks* didn't stand out. I don't think it really mattered to him who the others were.

Q: Was it troubling to you to lead with *Hicks*?

Davis: Yes. I think anyone involved with the commissions—Stu Couch, or anyone who had been involved—would tell you that if you could pick one case to lead with, it would not be that one case. Because the world, at this point, had been watching for—what, five years? All of a sudden, with the first of the worst of the worst that we're going to bring into court—and, as Lloyd Cutler said, this is going to be as much about us as it is about them. To lead off with a David Hicks, a guy who sat with a rifle guarding a broken-down tank at the airport at Kandahar and never fired a shot—it was one of those moments where people are going to look at it and go, "What the hell is this? This is the worst of the worst?"

In a perfect world, he would have been far down my list of priorities. But it was clearly a top priority for Jim Haynes and whoever was leaning on him to get the *Hicks* case done.

Q: So what did you do?

Davis: He was a little miffed. Again, like I said earlier, he has never, to this day, raised his voice or cursed or anything else, but he clearly was annoyed that it was going to take a couple weeks after we got the Manual for Military Commissions, and a convening authority, to get the *Hicks* case teed up. Within thirty minutes of me hanging up with Jim Haynes my phone rang again, and it was Dan Dell'Orto, who was the deputy general counsel for the Department of Defense.

Dell'Orto had been a career Army JAG. Unlike Haynes, he understood the military and military law. Dell'Orto called me and said, "Hey, Jim just came in and told me about the conversation he had with you. I took a wire brush to him. Disregard everything he just told you. You do what you need to do in the time you need to do it, and forget what Jim told you."

Now I interpret that what he meant by "I took a wire brush to him" was that when Haynes came into Dell'Orto's office and said, "Hey, Davis just told me it was going to take two weeks, and I told him he's got to hurry up," Dell'Orto said, "Don't you understand command influence? You can't do that. It's up to him, not to you." Then Dell'Orto called me and told me to disregard what Haynes had said to me.

Q: But the fact is that Haynes—Salim Hamdan, who had been this alleged occasional driver for Osama bin Laden, and Omar [A.] Khadr, this so-called fifteen-year-old grenade thrower, or however you would put it—they were then charged the next month, weren't they?

Davis: Yes.

Q: It must not have been a big, strong wire brush.

Davis: Interestingly, between that first call and charging those three, I got another call from Haynes. After I'd been told by Dell'Orto to disregard everything he'd said—the Manual for Military Commissions eventually gets signed later in January. Exactly two weeks after the manual is signed by Secretary Gates, Haynes calls me again and says, "Where are the charges on David Hicks? You told me that two weeks after you got the manual you'd have charges. It's been two weeks. Where are the charges?"

I said, "Well, we're getting close. We're not quite ready yet. We're still sorting out who we're going to charge, and exactly what we're going to charge them with. We're getting close, but we're not quite there yet. Besides, we still don't have a convening authority, so who am I going to deliver the charges to?"

He goes, "Well, Susan Crawford's going to be the convening authority, and we're getting ready to get her appointed. So you need to get these charges ready, and as soon as she's appointed you need to get the case going."

Again, he never asked who else other than Hicks we'd charge, and he talked specifically about David Hicks. I forget the exact date—it's February 3, 4, or 5, somewhere in there—Susan Crawford is appointed, we charge the three guys, and I thought we were finally off to the races.

Q: And were you? What were you off to the races, in fact? By the way, when she was appointed, did she bring in a Brigadier General Thomas [W.] Hartmann as her legal advisor? In that year?

Davis: It was July 2007. Altenburg left in November 2006, Hemingway left in May 2007, and Hartmann came in in July to replace Hemingway.

Q: Okay. But going off to the races again, then, in February or March, where did you go to? What did you do? You got *Hicks*, and clearly DOD is interested in *Hicks*.

Davis: We got *Hicks*, *Hamdan*, and *Khadr*. We scheduled the arraignment for *Hicks* for March or April.

Q: *Hicks* took a plea deal in March.

Davis: We didn't know that. We scheduled the arraignment. An arraignment is a proceeding that normally takes thirty minutes, maybe. It's bringing the accused in before the judge, the judge informs him of his charges and his rights, and asks him if he has any questions about his rights. It's fairly perfunctory, maybe a thirty-minute proceeding.

Q: I've been arraigned.

Davis: Well, then you understand.

Getting to Guantánamo, in and of itself, is an adventure. There's no Amtrak to Gitmo. It's a major ordeal to get there. So we'd made arrangements to have an arraignment for David Hicks, I

believe in April—March or April 2007. We left on a Sunday to go to Guantánamo. There had been discussions over a period of months with Josh Dratel and Dan [M. Dante] Mori about a possible plea bargain.

Q: Who were the lawyers for, at that time—?

Davis: I'm sorry, for David Hicks. Dan Mori was a Marine Corps major, and Josh Dratel was a civilian attorney. They were both working on the *Hicks* case, on his defense. We'd had discussions about a possible plea deal, but we'd never come to terms. So we leave on a Sunday to go to this arraignment that was going to be done on Tuesday, at Guantánamo, and I find out on Monday morning—I get a call from General Hemingway saying that there's a plea deal in the *Hicks* case.

In my twenty-five years in the Air Force, I saw hundreds and hundreds of plea deals. They're very common in military justice. They're negotiated between the prosecution and defense, and then, as I mentioned, the convening authority is kind of like a neutral referee; it then goes to the convening authority for review and approval. In this case, the prosecution was totally excluded from the negotiations, and it was negotiated directly between the defense and the convening authority.

So we go to Gitmo thinking we're going to be there for a day or two, to do an arraignment that was going to take thirty minutes, only to find out that there had been this plea deal negotiated between Susan Crawford, Dan Mori, and Josh Dratel, that the prosecution was excluded from.

Q: So he took a plea deal, and he was fairly soon on his way back to Australia, wasn't he?

Davis: Again, I don't recall the exact date—March or April.

Q: Do you know when he got to Guantánamo?

Davis: January 2002.

Q: And he left in—?

Davis: 2007.

Q: 2007. Is that justice? From what you know of that case? The man spent five years in prison, right?

Davis: Well, he was one of the lucky ones. You've still got 171 guys who are still there. One of the jokes we used to make at Guantánamo is, "You have to lose to win."

Q: You have to lose to win?

Davis: Yes. If you get charged as a war criminal, like David Hicks, and you go to court and lose, and you get convicted and sentenced, there's a chance you might get to go home, like what

happened with *Hicks* and *Hamdan*. If you're never charged with a war crime, you may still be sitting there ten years later with no end in sight.

Q: Well, actually, isn't Khadr destined to be sent back to—?

Davis: Canada.

Q: Canada. Right.

Davis: So if you're charged as a war criminal and convicted, and you lose, you might actually win your freedom, whereas, if you're never charged, you may spend the rest of your life in prison at Guantánamo.

Q: In other words, in that early part of 2007, you're wrapped up with these—*Khadr*, *Hamdan*, *Hicks*, and what have you. Then, as you say, Haynes has been on the phone with you, and Susan Crawford, who is something of a protégé of the Cheney crowd, right?

Davis: Right. I think that's a fair characterization.

Q: She is now the convening authority. Then she brings in General Thomas Hartmann around July, as her legal advisor. Right?

Davis: Right.

Q: Now in June 2007, you wrote this explosive op-ed in *The New York Times*, appearing on June 26, 2007—which elicited a number of dissenting voices, I must say, in the paper the following day—"The Guantánamo I Know." You say here in the beginning that, "The image of Guantánamo Bay and the reality of Guantánamo Bay are completely different." You're quoting, at that point, Lindsey Graham. Then you go on to say, "It is disappointing that so many embrace a contrived image. Reality for Guantánamo Bay is the daily professionalism of its staff, the humanity of its detention centers and the fair and transparent nature of the military commissions charged with trying war criminals. It is a reality that is all but ignored or forgotten." And, again donning your extremely quotable hat—although this hardly surpasses the chicken breast line, I think—you say that, "Some imply that if a defendant does not get a trial that looks like Martha Stewart's and ends like O. J. Simpson's, then military commissions are flawed. They are mistaken." You go on to say, "Guantánamo Bay is a clean, safe and humane place for enemy combatants, and the Military Commissions Act"—of 2006— "provides a fair process to adjudicate the guilt or innocence of those alleged to have committed crimes."

I'm somewhat wanting to read the entire thing. Again, it was on June 26, 2007. You sound like a guy who is very much sold on this setup here.

Q: I was. Actually, *The New York Times* op-ed is just a shorter version of a longer article I did for the *Yale Law Journal* that came out in August 2007. I believed that we were committed to having full, fair, and open trials, and that Guantánamo, at that point in time, was nothing like the pictures that the public had seen of Camp X-Ray.

Q: Well, that's the physical matter. I'm referring especially to your assessment of the military commissions. At that time, who was convicted? Who was even tried, by June 2007, other than Hicks, Hamdan, maybe Khadr? I'm talking about where there was some charge put in place, some activity on the charge. What was the status by June 2007?

Davis: By June 2007—actually, let me back up to May 2007. We went down to arraign Hicks. It turned into a guilty plea in exchange for a nine-month sentence—a misdemeanor punishment for pleading guilty to a war crime that got him sent home soon thereafter. We went down in May to do the arraignments on Hamdan and Khadr, which had different judges assigned to each case. Both of the judges dismissed the charges against Hamdan and Khadr for lack of jurisdiction—because the Military Commissions Act says the military commission has jurisdiction over "an unlawful enemy combatant," and that a Combatant Status Review Tribunal determination is dispositive. Well, unfortunately, a Combatant Status Review Tribunal only determines that a person is an enemy combatant, not that he's an unlawful enemy combatant.

Q: Which they're assumed to be, going in.

Davis: I suppose so. I never participated in one, but I think that's probably a fair assumption.

So the judges said, "The statute says they've got to be determined to be an unlawful enemy combatant for a military commission to have jurisdiction. The tribunal only determines they're an enemy combatant; therefore, you haven't proved jurisdiction. Case dismissed." That's in May.

The folks at the Department of Justice are livid. I think they had this perception that people in uniform were going to be—that this was going to be a pushover, and that people were just going to do what some perceived as "the right thing." They were going to make this easy and fast, and it was going to be over and done. So they were shocked that these military judges dismissed the charges.

So they said, "You've got to appeal those decisions." Well, the appeal process created in the statute says we'd appeal to the Court of Military Commission Review. There was none. The administration had never gotten around to creating the appellate court that I'm now supposed to appeal these two cases to. There were no judges, they had no address, and they had no rules. It only existed in ink, in the statute. I'm saying, "How do you expect me to appeal this to a court that doesn't exist?" They said, "Okay. Well, go back to the judges and ask for reconsideration, because that will take a week or two for them to reconsider their rulings. In the meantime, we'll create this appellate court."

Which is what we did. We filed motions for reconsideration in *Hamdan* and *Khadr*, in order to buy time for the administration to create the Court of Military Commission Review that didn't exist, so we could later file an appeal with that court.

Q: All right. I misspoke, I think. By this time, in June 2007, the only person who had been convicted—and then, again, only on the basis of a plea—was David Hicks. *Hamdan* and *Khadr* had not been resolved, and would not be resolved for at least another year or so. So only Hicks, and by a plea deal, and under the situation that you described before—and you probably would

never have gotten around to him by your account, except for the administration's desire to help out Australian Prime Minister John Howard.

Davis: Who eventually lost his election anyway.

Q: Oh, did he? Okay.

Yet, with a straight face, apparently, you write this op-ed piece in *The [New York] Times*, saying that things are all hunky-dory down there with the commissions.

Davis: That was about two weeks before General Hartmann showed up. That was when the wheels—

Q: You were still "drinking the Kool-Aid." Is that correct?

Davis: Yes.

Q: Isn't that the way you put it once, later on?

Davis: Yes. I've had people ask me, was I just toeing the company line, and saying what I was expected to say? Up until that point, I believed that we were committed to doing this right; that this wasn't going to be an embarrassment that Lloyd Cutler had envisioned in 2001, when he wrote his op-ed. My op-ed came out, and two weeks later General Hartmann came in.

Q: Okay. General Hartmann comes in in the summer of 2007, as legal advisor—

Davis: —to Susan Crawford.

Q: Why does the convening authority need a legal advisor? Isn't that what you people are doing?

Davis: Well, the legal advisor for the military commissions—it's an anomaly that's taken from court martial practice, like the *Bales* case—Sergeant Bales from the Afghan shooting. In court martial practice, like I said, typically the convening authority is the senior officer, the commander of the installation where the individual is assigned, and that's not a lawyer. It's usually a fighter pilot or a tank driver. So you have this oddball situation here, where both General Altenburg and Susan Crawford, and now Admiral [Bruce E.] MacDonald, are all lawyers. It does kind of beg the question of why does a lawyer need a lawyer?

Q: I see. I understand. Thank you.

So he comes in, and you pick up from there.

Davis: He came in the week of July 4. The charges had been dismissed in *Hamdan* and *Khadr*, and we were again kind of dead in the water like we had been the year before when the Supreme Court shut things down. I'd been putting off having surgery, and I realized that getting *Hamdan* and *Khadr* resolved was going to take a couple of months, so we're going to be dead in the water

for a bit, so it was a good time to take—I needed thirty days to recuperate from the surgery—so I figured it would be a good time to go ahead and do it.

I think General Hartmann came in on July 3. July 4 was a holiday, and on July 5 I had surgery. I was supposed to be out for thirty days after that. He comes in, and within ten days—by the middle of July—I'm starting to get emails and phone calls at home from members of my staff, saying, "You better get your ass back in here. The general's taking over and running amuck."

He and I exchanged some terse phone calls and emails. At that point we had split the prosecution office into two parts. Lieutenant Colonel Will Britt was my deputy, who managed the non-high-value detainee cases, which was done out of the Crystal City office. Then Bob Swann was a second deputy managing the high-value detainee cases out of a site furnished by the CIA, so I had two separate operations running at the same time.

Q: Is Swann in civilian clothes now?

Davis: Yes, he is. I come back early from convalescent leave, after having surgery, because General Hartmann is just eating my deputy, Will Britt, alive—wanting briefings, case files, and basically becoming the chief prosecutor.

Q: Who was Hartmann?

Davis: Hartmann was in the Air Force Reserves. He was a corporate attorney for—I forget the name of the company—it was an energy company up in the Northeast. He was their general counsel. He volunteered to take this job with the military commissions, and I think, in his mind—I don't know, but it would be interesting to know—I think in his mind this thing had been screwed up for five years and he was going to come riding in and be the savior who was going to swoop in and save the day.

Q: In any case, that's the situation. He's inserting himself in a very forceful way, and you're getting these calls about that. You're recovering from this surgery. So what happens?

Davis: I come back, and he's never been to Guantánamo, so he wants to go to Guantánamo to visit. I arranged for us to go down to Gitmo together. In order to get there, we had to fly from Washington to Fort Lauderdale, then catch an FBI flight from—they have a charter flight, or at least they did at the time—I don't remember the exact days, but it went down twice a week and came back twice a week. You had to get to Fort Lauderdale, spend the night, get up early in the morning, and catch this charter flight to Gitmo. In fact, we flew to Fort Lauderdale, and he and I went out to dinner that night. I remember it was the day the bridge collapsed in Minneapolis, which killed a bunch of people. It was that same day.

Q: The bridge connecting Minneapolis and St. Paul, was it? Or something like that.

Davis: Yes. I remember it, because we had landed, gone to the hotel, checked in, changed into civilian clothes, and we were getting ready to go out to dinner. It came on the television that this

bridge had collapsed and it was a major catastrophe. So I've got a reference point I remember specifically.

He and I walked over to this little Cuban restaurant near the hotel for dinner that night, and that's when he brought up for the first time—he was asking me questions about cases, and military commissions, and all that, and he brought up, "Well, you know, President Bush says we don't torture people, so why are you excluding all this information in all these cases?" So I explained what my policy had been, that General Altenburg had supported it, and that we had evidence independent of the whole thing. It wasn't a confrontational discussion; it was more like just a conversation over dinner. He and I get up the next day and caught the FBI flight to Gitmo. That's when I learned that he has extreme seasickness.

Q: You got the flight to Gitmo?

Davis: Yes.

Q: Where was this first conversation?

Davis: At dinner in Fort Lauderdale. So we get to Gitmo, and the runway is on one side of the bay, and the base is on the other, and you've got to take a boat across. It was really interesting, because he has acute sea sickness. He was not a happy camper on the trip across the bay. But we get over. We spend a couple of days. A lot of times on that trip it's just me and him, going to

dinner or driving around. We'd go to the camps. I'll never forget—we go over to the camps for the first time, and it's Camp 5.

Q: For the first time what?

Davis: It's the first time he actually sees any of the detainees.

Q: Had you seen them before?

Davis: Yes. I'd been going down there, by that point, for—

Q: You said they were sort of separated from the administrative part, were they not? Where the detainees actually were at that time—could you function as a military commission lawyer down there and not be in the detainee area?

Davis: Well, clearly, as a defense counsel, you could not. You had to go to the detention camp to meet with your client. For the prosecution side, you really had to go inside the facility where the FBI, the CIA, and CITF had their offices, which was adjacent to but outside the actual camp. Going inside the actual camp is called going "inside the wire."

Q: Right. Also, you went in where the detainees were?

Davis: At times. Depending on their level of compliance—some were living in a communal environment, some were living in individual cells, some were in the hardened facilities. They were all inside this larger perimeter fence, "inside the wire." Inside that, there were different—

Q: Okay. In any event, Hartmann is seeing this for the first time, right?

Davis: Right. The thing I remember specifically—we went to Camp 5, which is this facility that's modeled after the one where Congressman Janklow had served his sentence [Laughter]—so it's your typical cells, concrete cells with a metal door. They take the detainees out two hours a day to an exercise yard. It's really like a chain-link fence enclosure. I don't know the exact dimensions—maybe twenty feet by thirty feet or something like that—with a concrete floor. It was covered with a green tarp to keep the sun from hitting you directly. At the end of the exercise pens they had a board where they would post news. Obviously, the news was sanitized, but they would print out headlines that didn't tell you a whole lot, so the detainees got some news. It mainly gave the detainees a chance to get outside and get some exercise. They had elliptical machines, or stationary bikes, or different things in the different little pens—but probably about eight detainees at a time would be out in the exercise area, in these individual pens.

I remember we walked out there, and we were being escorted by the deputy commander of the detention operations, who was a brigadier general like Hartmann. General Hartmann and I and a couple other people—we walk out, and one of the detainees was in the exercise area right next to us. When we first walked out, you could hear the six or seven detainees chattering back and

forth. All of a sudden, when we walked out, they got completely quiet for a few seconds after they noticed us. Then they started chattering, yelling, gesturing, and I couldn't understand what they were saying, except the guy in the pen right next to us, who said—in perfect English—because General Hartmann is seeing all this commotion, and how they're all angry, and yelling, and he's got kind of a smirk on his face. And the guy in the pen next to us says—I'm trying to remember his exact words. It was something to the effect of, "You may be smiling now, but it will not always be so, God willing. Osama bin Laden is alive, so fuck America!" I remember General Hartmann was just taken aback. He was kind of shocked by this outburst. A few minutes later, as we were walking out of the building, I said, "It was really nice of that guy to say, 'Good luck, America.'" General Hartmann didn't get the joke and answered me in a serious tone, "I don't think he said, 'Good luck.'"

Q: And he spoke in plain English.

Davis: Yes.

Q: Any guess as to how many of the detainees, of the 779, spoke English?

Davis: I don't know. I know there weren't a lot, because speaking English was one reason Hicks kind of got along with the guards and interrogators.

Q: So you ended that trip with Hartmann.

Davis: Yes. I came back from that trip and met with my deputy, Will Britt, who had taken the brunt of Hartmann's abuse while I was out on convalescent leave. I came back, and I said, "I think we've kind of smoothed this stuff over, and I think it's going to be okay." I immediately realized I was overly optimistic, because Hartmann really—he thought we were just a bunch of slackers who had been sitting around doing nothing for two years. I was trying to explain to him, "Look, every time we turn around we get an injunction here, a Supreme Court decision there. Moving cases along was not due to a lack of effort." It had to be frustrating for my guys, particularly the ones who had been there longer than I had. It had been up and down—a get ready and wait, start and stop cycle—for several years. But he was just adamant that he was going to whip everybody into shape, get these things moving, and he wanted briefings on every case. The [*United States v. Mohammed*] *Jawad* case that you mentioned, with Darrel Vandeveld—for some reason he got briefed on that case and he became enamored with it. I think he realized, too, that this worst of the worst nonsense was truly nonsense.

Jawad was one of the few cases—kind of like *Khadr*; I remember him saying—it was a case where the guy had blood on his hands. He'd actually done something. He wasn't just a propagandist, or a money-lauderer, or whatever, he actually had done something that looked like a crime. So he was constantly asking, every day or two, "Well, what about the guy who threw the grenade?" Now we're not talking about *Khadr*; we're talking about *Jawad*. "What about the guy who threw the grenade?" We had about a dozen cases that I had people assigned to work on that we were trying to move through the process. *Jawad* was not ready yet. Vandeveld had just gotten there in May or June 2007, so he was fairly new to the office. He picked up the

Jawad case. So it hadn't had the development that a lot of the other cases had, but Hartmann just had a fixation on "the guy that threw the grenade."

Q: Whatever happened to that case?

Davis: Vandeveld wound up resigning. There was a guy named Dave [David J.R.] Frakt, Lieutenant Colonel Dave Frakt, who was the defense counsel for *Jawad*. Vandeveld eventually went to him after he discovered there was some exculpatory evidence, that—I think in the haste to accommodate Hartmann, and get the "guy who threw the grenade" into court, Darrel hadn't had a chance to review everything there was on the case, and when he eventually did, he found information that suggested that *Jawad* had been tortured, and that information had not been provided to the defense. Eventually, there was a hearing in the *Jawad* case where the military commission judge found that *Jawad* was tortured, and recommended that the authorities take appropriate disciplinary action against those who mistreated *Jawad*. That was in 2008, and to this day no one has ever been held accountable for the mistreatment of Mohammed *Jawad*. Eventually, the charges were dismissed, and *Jawad* is a free man now back home in Afghanistan.

Q: In early October 2007, after these discussions with Hartmann, and this crowding in by Hartmann and what have you—who, by the way, has denied talking about coercive procedures, with you—

Davis: Well, I'll say again now, as I've said repeatedly for years—I'll be happy to take a polygraph, if he will.

Q: All right. We're not going to do that today, unfortunately. In any event, very early, the next month, in October 2007, you got a call from a deputy secretary of defense?

Davis: No, it was from Dan Dell'Orto, the deputy general counsel.

Q: Okay, what did he say?

Davis: Let me back up just a bit. By the end of July, I thought Hartmann—we had made our trip to Gitmo, and it looked like we'd kind of gotten things back on the right track. By early August, it was apparent that we hadn't, and that he was still running roughshod over the prosecutors—calling the shots in the office. I wrote out a lengthy memorandum on the problems I was having with Hartmann, and why I felt it was a violation of the unlawful influence language that I had written for the Military Commissions Act that said the prosecution can exercise independent judgment, and while he was a member of the convening authority staff, he was supposed to be neutral, not favoring the prosecution or defense. I wrote out this lengthy memorandum and took it to Miss Crawford. It was a Friday afternoon. I walked it down to her office.

Q: In Crystal City?

Davis: Yes. I walked it down to her office. She wasn't there. It was the day of the Johnny Mathis concert, so she had left work early to get ready for the concert. She wasn't there, so I left it on her desk in an envelope. I didn't hear anything for about a week. Eventually, I called her and said, "I

brought you a memorandum about the problems I'm having with General Hartmann. They're continuing. I need your help."

She said, "Well, he doesn't work for me. There's nothing I can do."

I said, "His title is 'legal advisor to the convening authority;' he's the legal advisor to you."

She said, "Yes, but he works for Jim Haynes. He doesn't work for me."

So, I took the same memorandum I'd done for her and I went to Haynes. That was when they appointed General [Clyde J. "Butch"] Tate [II], General [Richard C.] Harding, and somebody from the Navy. It was like a three-person panel that interviewed me, and Will Britt, and Hartmann, and everybody, because up until that point there was never a clear chain of command. People would ask me, "Who do you work for?" I would say, "I don't really know, to be honest with you," because there never was a clear chain of command established.

They convened this group, which eventually led to—I get the call from Dell'Orto on October 4 or 5, whatever the date was. Actually, it was from Haynes. I got a call from Haynes's secretary, saying, "Can you come over and meet with Mr. Haynes?" I said, "Yes, sure." I get on the Metro, go to the Pentagon, and go up to Haynes' office. Haynes comes out and says, "I'm sorry, I've got to run to a meeting, but Dan's going to brief you on the situation with General Hartmann. I think you'll be satisfied. Sorry, I've got to go." He leaves, and Dell'Orto takes me into his office with one of his assistants—a guy named Paul [C.] Ney [Jr.], an attorney who did a lot of the Gitmo

work. We go in, and Dell'Orto says, "The group looked at this issue, and we've been to—" it was Deputy Secretary Gordon [R.] England—"we've been to the secretary, and here's the decision on this dispute you're having with General Hartmann." He handed me copies of two memorandums. It was one to me saying that I reported to General Hartmann, and then one addressed to Hartmann, saying that he reported to Jim Haynes.

So now I've got written orders from the deputy secretary of defense that says my chain of command is Hartmann, who is telling me, "President Bush says we don't torture, so who the hell are you to say that we do? You need to take this information you've been ignoring and use it in court," who now reports to Haynes, who prepared the torture memorandum Rumsfeld signed. That was when I concluded that my confidence in our commitment to having full, fair, and open trials had disappeared. I left Dell'Orto's office, went back to my office, wrote out my resignation, and emailed it to Gordon England.

Q: Can you just resign?

Davis: I asked to be reassigned. I don't know exactly how I worded it, but I said that I no longer felt I could do the job as chief prosecutor, and asked that I be reassigned to other duties.

Q: Then what happened? Did you hear from them?

Davis: It was interesting. That was early afternoon. It took about an hour from the time I sent the email until anything official happened, and in the interim Mike [Michael] Isikoff, who's now

with NBC [National Broadcasting Company] News, who used to be with *Newsweek*, just happened to call. He would call every month or so, just to see if there was anything going on with the military commissions, and he just happened to call between the time I submitted my request to be reassigned and anybody contacting me. He said, "Anything going on?" I said, "Funny you should ask." I tell him the whole story, and *Newsweek* does an editorial about this whole dustup with Hartmann. The first official call I get is from Hartmann, giving me an order that I'm prohibited from talking to anybody about why I was asking to resign as chief prosecutor, which was followed up by a written order from Susan Crawford. Then the next day, I got a one-line memo back from Secretary England, saying my request to be relieved of duty had been accepted.

Q: What do you do then? You've been relieved of that assignment, right?

Davis: Right.

Q: That doesn't mean that you can just sit at home and draw your paycheck, does it?

Davis: No. Throughout this entire process, I had been meeting and talking with General Rives, who was the judge advocate general of the Air Force—a three-star—about my problems with the one-star. I'd been talking with him on a fairly—I don't know if I could say every day, but on a very regular basis about the problems I was having. Before I sent the email to Secretary England, I talked to General Rives and said, "Here's what I'm planning to do." He said, "Fine. As quickly as I can, I'll get you reassigned back to me and out from under Jim Haynes."

When I submitted it, he was going to reassign me to be the director of the Air Force Judiciary. I knew before I sent the email where I was going to land.

Q: You knew from—?

Davis: General Rives.

Q: Right. Now that's probably an unfamiliar term to most people—the Air Force Judiciary. If you spoke of the United States Judiciary, you would be speaking about a lot of different elements.

Davis: Right. I guess the analogy would be like the attorney general. The judiciary includes the trial counsel, defense counsel, corrections, clemency, parole, policy, and the appellate representation for the defense and for the government. It's about three hundred fifty people.

Q: It embraces the Air Force JAG?

Davis: It's not the entire JAG Corps. The two big divisions under the judge advocate general—there's the director of the Civil Law Division responsible for environmental, contracts, claims and that kind of stuff. Then there's the director of the judiciary, who basically manages the Air Force criminal justice apparatus.

Q: Some people might say, "Gee, that sounds like a promotion from your Gitmo job." No?

Davis: It depends on how you look at it. I went from supervising—leading a team—of about one hundred twenty people to a group of three hundred fifty people scattered around the world.

Q: Well, no one stood in your way and said, "We've got to get rid of this troublemaker." Right?

Davis: No. It was my decision—

Q: No one in Haynes' office or anywhere else in the government said, "This guy's been causing us too much trouble." Hartmann didn't try to prevent it or anything, right?

Davis: No.

Q: Okay. You took that job, and you had that job until—

Davis: —for a year. I take it back. I took it in October 2007. Let me back up just a bit.

General Rives said, at the time I resigned—I immediately get the order that I can't talk to anybody about why I resigned. General Rives said, "I'll get you reassigned from DOD to me as quickly as I can, and once I do, you can say what you feel like you need to say—as long as you're not revealing classified information—or lying—you say what you feel like you need to say." So Bill [William] Glaberson from *The New York Times* contacted me, and—I forget her

name, the producer from *60 Minutes*. There was a producer from *60 Minutes* who'd been in touch with me for several weeks about a story they were doing on Omar Khadr—Joyce Cordero was her name—and she wanted to talk with me about what had happened. I said, "I'm under an order that says I can't talk to anybody about it." Miss Cordero said *60 Minutes* wanted to "do an exclusive on this" and she said "Please don't talk to anybody else about why you resigned, and as soon as you're able to talk, we want to do a story on it."

As soon as I got reassigned to be the director of the Judiciary and the gag orders from Hartmann and Crawford no longer applied, Morley Safer came down from New York and spent a day in my living room with a film crew to do a story on the problems with the military commissions. That was October 16, 2007. The segment was advertised on their website and in television ads. It was going to air on Sunday evening, October 21, along with the story about Valerie [E.] Plame. Then I got a call on Friday afternoon, before it was to air on Sunday, from Joyce Cordero. They had asked the Pentagon to interview General Hartmann, and the Pentagon had said no. Then once they posted that they were going to run the story that Sunday evening, the Pentagon said, "Wait a minute. We'd like a chance to comment on this." So they delayed running the story, and came down to the Pentagon the next week and interviewed General Hartmann. I heard from someone who worked for Hartmann that the interview did not go well and DOD wanted to make the whole thing go away.

I never heard from *60 Minutes* again. I got a call from Dan [Daniel I.] Rather [Jr.]'s office, saying *60 Minutes* is dropping the story. What they heard was that the Pentagon traded the bomb-making video of Omar Khadr—which was classified up until that point—for dropping the

military commission story. When Omar Khadr was captured in Afghanistan, in the rubble of the compound where he was hiding, they found a videotape of Omar Khadr and his dead colleagues. They had videotaped themselves making IEDs [Improvised Explosive Device], and then planting them along the road where the American forces traveled. There were two copies of that video that I knew of; the Canadians had one and we had one. Suddenly, *60 Minutes* had the video and they used it in a story they had been working on for several months on Omar Khadr. So the story about tortured evidence and political manipulation in the military commissions never aired on CBS, and I wound up doing an interview with Dan Rather a short time later for his show on Mark Cuban's HDNet that essentially covered the same material. I had trusted CBS and *60 Minutes*, and to this day I feel like they sold me out and used me. I sometimes wonder if things at Guantánamo might have turned out differently if *60 Minutes* had focused attention on the problems back in 2007.

The next spring, in 2008—since I'd been here since 2005—it was time to move or retire. Typically, in the military, a stateside assignment is usually three years or so. If I was going to stay in the military and advance my career it was time to go, and I had a range of options as to where I could have gone; some really great jobs in some fabulous locations. But by 2008 the housing market had tanked and I was so far underwater that I couldn't afford to sell or rent without incurring major losses, so I just couldn't afford to move. A lot of people think I retired from the military and stayed in the Washington area because of what happened at Guantánamo, but the collapse of the housing market was really the primary factor.

Q: Before you get to that though, you wrote an op-ed piece, again, in the *Los Angeles Times*, in December 2007. Now you're head of the Air Force Judiciary. You're in uniform, right?

Davis: Yes.

Q: And you write this op-ed piece about why you quit. You say here that the MCA—the Military Commissions Act—you're still saying "Provides a foundation for fair trials, but some changes are clearly necessary." You wrote that on December 10, 2007. Weren't you supposed to appear the next day before a hearing of the Senate Judiciary Committee, doing oversight on the military commissions?

Davis: Yes. I've got it at home somewhere—the letter from Senator Dianne [G.B.] Feinstein, asking me to come and testify at the committee hearing.

Q: Did you appear?

Davis: No.

Q: Why?

Davis: I was ordered not to by the secretary of defense. I got a call from a DOD public affairs officer telling me the secretary had prohibited me attending the Senate hearing and testifying.

Q: You mean between the time the *Los Angeles Times* came out on the tenth, that day you were ordered not to testify?

Davis: No, I actually met with Senator Feinstein about a week prior to the hearing, and she said, "I'm going to convene a hearing, and you'll get an invitation to appear." Since I was still in uniform at the time, I had alerted my superiors that the invitation was coming.

Q: Okay. In any case, the Pentagon—

Davis: —ordered me not to appear, and they sent General Hartmann instead.

Q: Oh, is that right?

Davis: Yes. He didn't do well at the hearing, and Andrea Mitchell covered it, including the Pentagon blocking me from testifying, that evening on the NBC Nightly News.

Q: Okay. Then the following April, in what was certainly an unusual event, I would suppose, you appeared at a hearing—at Gitmo was it? Salim Hamdan—a hearing on his case.

Davis: Yes.

Q: That was in April 2008. You appeared in uniform, right?

Davis: Yes.

Q: Now it was your position that Hamdan was guilty of something, wasn't it?

Davis: Yes.

Q: You're being called by his lawyer, right?

Davis: Right.

Q: Why would he be calling you?

Davis: I wound up testifying in *Hamdan*, *Jawad*, and *Khadr*—so three times, and all three times it was on the issue of unlawful command influence in the military commissions—primarily by General Hartmann.

Q: It was not on the question of their guilt or innocence.

Davis: No. I personally approved the charges on *Hamdan* and *Khadr*. I didn't approve the charges on *Jawad*; that came after I resigned. But on at least two of the three, I had personally approved the charges, so it wasn't a question of whether I believed they were guilty or innocent; but I think they're entitled to a fair trial, and not just some theatrical production staged to look like a trial.

Q: Right. That's key, isn't it?

Davis: Yes. The way I've described it before is—by the time I resigned, it was like being Mickey Mouse at Disney World. If you go to Disney World, you expect somebody in a mouse suit to come out every hour or so and wave at the crowd. If you didn't see Mickey Mouse, you wouldn't feel like you'd been to Disney World. The Bush administration wanted to have military commissions because they'd accepted that these cases were going to be problematic in federal court, but DOJ and others still wanted to run the process from behind the curtain, so somebody had to put on the military costume and come out and wave at the crowd periodically, to make it look like it was really a military function. That was the job I was filling. I was the guy who put on the military costume and came out and waved at the crowd so they could say that this was a military commission.

Q: You were telling me that you decided to retire from the military.

Davis: Yes.

Q: If General Hartmann hadn't come along, and you hadn't run into those differences with him, would you have been apt to be retiring from the military at that time? You might still be prosecuting cases down in Guantánamo.

Davis: I don't know. With the benefit of hindsight, there are at least twelve different vectors that could have been possible. It's hard to say.

Q: Okay. Were you up for a medal of some kind, a meritorious medal or something? Is that routine?

Davis: Yes. Normally, at the end of an assignment you—typically, in the military—you don't get a bonus in the military, you get a medal. It's called an end-of-tour award, which is routine. When Stu Couch left, for example, I presented him with the Defense Meritorious Service Medal for his service on the prosecution team. When I left in October 2007, Lieutenant Colonel Will Britt, who had been my deputy and then became the interim chief prosecutor when I departed, submitted a package for an end-of-tour Defense Meritorious Service Medal for me. Months went by, and nothing ever happened.

I eventually got an email from Colonel Kelly Wheaton in May 2008. Wheaton was an Army colonel who worked for Jim Haynes as his military assistant. He sent me an email saying, "I just wanted to let you know that your medal has been disapproved, and I wanted to tell you that I was one of the ones who recommended disapproval, because your service was not honorable during the time you were chief prosecutor. You should not have spoken up about the problems with the process. You should have done your job, and completed it. You put your personal interests ahead of the mission. Therefore, you're not going to be getting a medal."

Q: All right, but you're not inclined to keep your trap shut when you think it should be open, are you?

Davis: Well, what's the point of doing that?

Q: After you retired, in October 2008, you took a job with the Congressional Research Service [CRS], right?

Davis: Yes.

Q: And you were—what? Assistant Director of the Foreign Affairs, Defense and Trade Division?

Davis: Actually, my title was Senior Specialist in National Security, and Assistant Director of Congressional Research Service. I was assigned as the head of the Foreign Affairs, Defense and Trade Division.

Q: Dealing with Guantánamo at all?

Davis: Well, yes and no to an extent.

Q: What does the Congressional Research Service do?

Davis: It's probably one of the least known government agencies, and probably one of the most unique. It's described in some places as Congress's think tank. It's a government agency—part of the Library of Congress—which has been around for almost one hundred years now. It's about six hundred people, roughly. My division was the largest. There are five research divisions that make up the Congressional Research Service, and they provide advice and assistance to Congress on every issue you can possibly think of. If you've ever seen CRS reports—they're great.

Q: They are prepared at the request of Congress?

Davis: Yes, generally. My division was the largest of the five divisions. There are about ninety-five people in the Foreign Affairs, Defense and Trade Division, and our primary clients were the Senate and House Armed Services Committees, the Foreign Relations and Foreign Affairs Committees, and then the parts of the banking committees that dealt with everything that wasn't domestic economy—foreign trade and monetary issues.

Q: Right. But here you are, coming from an office that doesn't want to give you a routine medal, because somebody up there thinks you should have kept your trap shut down at Guantánamo. Yet, you manage to get this very nice-sounding job with the Congressional Research Service. Again, no one's standing in your way. Right?

Davis: Right.

Q: Does that surprise you?

Davis: It did at the time. I had applied for some other jobs and had been told that because of Gitmo I was “too toxic” to hire, particularly in the Executive Branch. I had interviewed for a job at Congressional Research Service in the spring of 2008. It was an attorney job in another division. That was probably in May 2008. I got a call from the director, a guy named Dan [Daniel P.] Mulhollan, saying, "There's somebody else we think is better suited for this particular job we interviewed you for, but we really thought highly of you, and there are some other positions coming open in the future. Would you be interested in another position?" I said yes. I was really impressed with Congressional Research Service and the work they do. I was pleased that they would consider me for a position.

On July 30, 2008, I testified at the House Armed Services Committee about military commissions, and I told them in my written testimony and my oral testimony a lot of the same things we've talked about this afternoon and that I've said before. When I left that hearing, I had a phone message and an email from Dan Mulhollan, saying, "Can you give me a call?" I called him, and he said, "We're going to be filling a position as the director of the Foreign Affairs, Defense and Trade Division in the near future. We'd like to have you apply for it. The announcement will come out in the next few weeks. Could you come in and have lunch with my deputy sometime in the next few days, and let her tell you about the job?"

So I did. The announcement went up, I applied, and I got hired.

Q: In other words, something like the CRS doesn't go back to the secretary of defense or something, and say, "What do you think of this guy?" No?

Davis: No, it's totally independent. It's not part of the Executive Branch, it's part of—

Q: Well, no, but they might want to know something about your career, no?

Davis: Well, they did check with my references and some of my former military supervisors. I know they spoke with some of them. I had also listed all of the op-eds and appearances I'd made where I talked about Guantánamo. That was included in my—

Q: President Obama is president when you took this job, right?

Davis: He had been elected, but he got sworn in a month after I started work.

Q: How long did you last at the Congressional Research Service?

Davis: I started on December 20, 2008, and my last day was January 20, 2010, so thirteen months.

Q: Do you want to say why it came to a sad end?

Davis: Yes. Let me back up a bit. You mentioned President Obama.

The military stays out of politics. The military answers to the commander in chief. Members are encouraged to vote and to stay informed, but as far as active participation—you may have seen recently, I guess it was in Iowa, where a military member showed up in uniform and spoke at a Ron [Ronald E.] Paul event, and he got in some real hot water. That's one thing where there's no ifs, ands, or buts—the military stays out of politics.

So when I retired on October 1, 2008—which was about a month before the election—it was the first time in my adult life I had actually been able to actively participate in the political process. I donated to President Obama's campaign. I put up an Obama/Biden sign in my front yard at my house. Somebody came in my yard one night, doused it with lighter fluid, and set it on fire, so I got me another sign and put up another one. On Election Day, I volunteered with the Obama campaign, and went door-to-door out in my area, getting people out to vote for Obama. When January came, I don't know anybody in this town who was more excited than me, because if you look back at what he had said about torture, about Guantánamo, and about military commissions—it was the start of a new era. His first real official act, the day after the inauguration, was signing an order that Guantánamo would be closed within twelve months of that day. I was extraordinarily optimistic about the future.

In the interim, in November 2008, I met with the Obama transition team that was helping set up for taking over Guantánamo from the Bush administration. I think, in their minds, they pictured these neat file cabinets of, "Here's the Mohammed Jawad case, and here's the—whatever." I remember that I called General Rives after I met with the transition team, and I said, "I don't

think these guys get what a mess they're inheriting. It's not this neat, orderly process that they seem to expect it's going to be. I tried to tell them, but I just don't think they get it."

In May 2009, President Obama gives the talk at the National Archives about changing course on national security and upholding the rule of law. He says all the right things. Then by summer, he begins to encounter some headwinds from the far right. By the fall, he begins to backpedal, and Attorney General [Eric R.] Holder says they're reconsidering and maybe reviving the military commissions.

Let me back up again. During the period I was at the Congressional Research Service, I gave a number of talks, with their approval, at a Human Rights Watch dinner, at Syracuse University's law school, and at Case Western University's law school. I wrote a *Law Journal* article for Case Western. I know the Case Western appearance was broadcast nationally on C-Span, and in it I said the same things I eventually said in an op-ed that ran in the *Wall Street Journal* on Veterans Day of 2009; that it's a mistake to try to have military commissions and federal prosecutions, and that the administration needed to choose one or the other, but to try to have both created a double standard and it was a mistake. I was invited to give a talk on Guantánamo and military commissions at a Federal Bar Association luncheon on—I believe it was November 13. The luncheon was to be held in the Library of Congress and the Library's General Counsel Elizabeth [A.] Pugh was an officer in the FBA's Capitol Hill chapter who invited me and sponsored the event. I had to decline the morning of the event after Mulhollan got upset about the op-eds.

Anyway, I got my termination notice the day after the op-eds ran—well, actually, that day was the Veterans Day holiday. The day after that, I got a letter of reprimand for writing the op-ed. A week later, I got my notice of termination.

Q: The head of the CRS—his name is Mulhollan?

Davis: Yes, Dan Mulhollan. He's retired since then.

Q: He's the one—I take it—who made that decision. Is that right?

Davis: Right.

Q: Why do you think they did that? In effect, firing you?

Davis: The Library of Congress has a written regulation that says employees are encouraged to write and speak on issues outside the scope of their official responsibilities. Now you asked earlier if I had any responsibility for issues involving Guantánamo? The reason I hesitated—actually, we did have a very limited role. Part of what my division did was to provide advice to the Armed Services Committees on DOD budget issues. When it came to DOD funding—which would obviously include Guantánamo—we did provide advice on that. When it came to military commissions and legal policy matters, there's another division called the American Law Division that handled those matters. There are probably two dozen CRS reports, memorandums, and conferences that have been held on Guantánamo and military commissions over the years, and

every one of those was conducted by the American Law Division, not Foreign Affairs, Defense and Trade. So my division never had any contact with anything related to military commissions or the prosecution of terrorism suspects. That was a legal issue, not a Foreign Affairs, Defense and Trade kind of budgetary issue. Whether Guantánamo and military commissions were good or bad was outside the scope of my official CRS responsibilities.

Q: Did you ever talk to the man firing you and say, "Here's the situation. This is the wrong thing to do."

Davis: I did. We had a meeting the day I got the letter of reprimand, and he said if I would acknowledge that I was wrong to write the op-ed, and agree that—because I kept saying, "Look, the Constitution says you have the right to free speech, and you've got a regulation that says I'm encouraged to write on issues that I'm not responsible for. I don't see where I've violated the policy." I even gave him the cite to the Supreme Court's decision in *Garcetti* [*v. Ceballos*, 2006] on free speech and public employees. If I would have acknowledged that my constitutional right to free speech didn't extend to the op-ed and promised not to do it again, then I could have avoided being fired. But I told Dan, "I took an oath and spent twenty-five years in uniform defending the Constitution. I'm not going to sit here and tell you that it doesn't apply to me. I'd be making a false official statement if I said that."

Q: The deed was done.

Davis: Yes.

Q: That ended January 10, right?

Davis: That was in November 2009. I stayed on as head of the division until December 20, 2009, because I was in probationary—you know, your first year of federal employment, in most positions, you're in a probationary status. If you go past the one-year point, then you're converted to permanent status, and unless you murder somebody on the premises, during duty-hours, it's very difficult to fire you when you're in permanent status. So they ended my position as assistant director for Foreign Affairs, Defense and Trade, effective December 20, and made me special assistant to Dan Mulhollan for the next month.

Q: Okay. Now as you mentioned, President Obama said he was going to close Gitmo, right?

Davis: Yes.

Q: And that would have been the end of the military commissions, right or wrong?

Davis: Not necessarily. It probably would have been, but the military commissions are kind of like the Uniform Code of Military Justice in that it's a portable system. The statute doesn't say it's geographically limited to Guantánamo, so, in theory, you could do a military commission anywhere. What we were talking about doing—there was a guy in Iraq that the Iraqis were transferring to U.S. custody. I think the agreement with the [Nouri al-] Maliki government was

that they won't take him to Guantánamo, but wherever they take him he could face a military commission.

Q: When you wrote this op-ed piece that preceded your firing from the Congressional Research Service, were you not, in effect, saying, "Look, you can't have a double legal standard. The gold standard is the federal courts, and then you've also got the military commissions. You have to have the same standard." Is that what you're saying?

Davis: Yes.

Q: Are you saying, implicitly, if not explicitly, "Forget the military commissions. Let's just have the federal trials." And is that your position today?

Davis: I don't think there is anything inherently wrong with a military commission. Had this been handed off to the military to begin with, and if you didn't have political appointees and civilians trying to manipulate—pull the strings from behind the curtain—this could have been done in a credible way. If you look at Common Article 3 of the Geneva Conventions, it says they're entitled to, "The rights recognized as indispensable by civilized people," which is what Justice Stevens quoted in the *Hamdan* opinion. As he notes in that opinion, that's a fairly amorphous concept—the rights recognized as indispensable by civilized people. He says you have to look at Article 75 of the additional protocol to the Geneva Conventions that defines what those are—notice, the right to counsel, the right against self-incrimination, and such.

I think a military commission, if it's properly conducted, satisfies the Geneva Convention requirement. I think the problem, at this point, is that we've screwed this up over and over for more than a decade, and we've fixed it over, and over, and over, and every time we fix it, we tell the world, "Trust us, this time we've got it right." We're like the little boy who keeps crying wolf; people stop believing you. I think at this point, more than a decade after we first started down this road, it's not a question of could we do it; it's a question of should we do it. What do we gain by pressing forward with this discredited process that we've reformed again, and again, and again, and again, when we've got the federal courts available where we've successfully prosecuted hundreds of terrorism-related cases? What does it get us other than proving that, by God we said we'd do it and we did?

Back in September 2006, when the plane landed at Gitmo, we didn't know how many people were going to get out. There were fourteen, including Khalid Sheikh Mohammed and Ahmed [Khalfan] Ghailani. Ghailani is the only person who has ever left Gitmo and came to the U.S., and was prosecuted in federal court. Some people look at his case and say, "Well, he was acquitted of all but one charge," so, my God, this was almost a catastrophe. But he got a life sentence without parole for that offense, in the supermax prison in Florence, Colorado, which is a greater sentence than anyone at Guantánamo has ever gotten.

Q: Well, maybe he had a softie judge.

Davis: Well, the judge did find that some of the evidence was obtained by torture and refused to allow it.

Q: I understand about Ghailani, but if the federal courts are as competent as their supporters say in trying terrorism cases and terrorism-related cases, then is there any justification for having military commissions in the first place? You've got the federal courts that have been operating for a long time now, and they're experienced. What was the point of mucking around with military commissions?

Davis: I don't think anyone wished for 9/11 to happen. At least, no American wished for 9/11 to happen. But I think you had a core group—the Dick Cheneys, the David Addingtons, and the John Yoos—who believed in "unitary executive authority"—that the presidency had been weakened from Watergate forward. I think when 9/11 happened, you had a majority of the public and a majority of the Congress who didn't give a damn what happened, as long as you kept them safe. I think they seized on that opportunity to regain power for the president. They picked Guantánamo because they thought no law applied. It was the perfect place to take people and exploit them for intelligence, because they didn't think a U.S. court could reach it—no international court could reach it—and Cuban courts couldn't reach it. It was the perfect law-free zone. From the afternoon of September 11 forward, it was a deliberate attempt to avoid the law. And they chose military commissions because the case of the eight Nazi saboteurs back in 1942 suggested it would be a swift, secret and severe forum; of course it proved to be none of those.

Q: Well, you were part of that, weren't you?

Davis: For two years, yes.

Q: When you first heard—either you heard it contemporaneously or you learned it later—that in February 2002, I believe February 7, President Bush said that the Geneva Conventions didn't apply to these folks, but we were going to treat them humanely as a matter of policy, not of law. You were a lawyer. Didn't you say to yourself, "Wait a minute. I'm not sure I can be part of that. They're going to throw out the Geneva Conventions?" The U.S. military had been adhering to the Geneva Conventions for a long time, hadn't they?

Davis: Yes.

Q: What I'm trying to get at is, didn't that trouble you even then? Why are they giving the Geneva Conventions a hard time? Did you come to learn that, in fact, they wanted to keep the Red Cross off the island, also?

Davis: Yes. Like I said, for the military, the Geneva Conventions are kind of like our Bible. You're taught from the first day of basic training to the day you retire, to respect the Geneva Conventions. You always hear the argument, "Well, the other side never lives up to them, so why should we?" We've typically tried to set the high standard, not the minimum threshold for what's acceptable conduct. The people I dealt with in uniform, I think, were uniformly disappointed that the administration jettisoned the Geneva Conventions, and made light of them as being quaint, obsolete, and irrelevant.

Q: Yes. Of the high-value detainees who were brought to Gitmo in 2006, how many of them have been tried?

Davis: Ghailani. One.

Q: Was he among the high-value detainees?

Davis: He was one of the fourteen who got there in September 2006. There was one more who arrived later, [Abdul] Hadi al-Iraqi came in a few months after the others. Some people complained, saying "Hey, wait a minute." Remember, President Bush, in September 2006, said, "I've emptied the black sites. They are no more." Then Hadi shows up around December 2006, and people are going, "Hey, wait a minute. Didn't the President say—?" President Bush actually told the truth. We didn't capture Hadi until November 2006. He went into a black site for about a month, and then he was transferred to Guantánamo, so the black sites were empty in September when Bush made the statement.

Q: Speaking of black sites, and what was going on in the black sites, in terms of interrogation— President Bush, in his memoir *Decision Points*, said that the CIA interrogations in these sites "helped break up plots to attack American military and diplomatic facilities abroad, [London] Heathrow Airport and Canary Wharf in London, and multiple targets in the United States. Experts in the intelligence community told me that without the CIA program, there would have been another attack in the United States." That's a quote.

John Yoo, in his book *War by Other Means*, also lists these various successful results—as he puts it—of the EITs [Enhanced Interrogation Techniques]. He says, on page 190 of that book, "Coercive interrogation of Abu Zubaydah, Ramzi bin al-Shibh, and KSM, all captured in the space of about one year, netted American interrogators a great deal of information" about "the entire command structure of al-Qaeda, its processes and organization," and the "Interrogation of KSM produced the names of two al-Qaeda pilots, in addition to Moussaoui slated for a second wave of attacks in the United States. This is invaluable information."

Is it possible to justify these treatments on the basis of getting good information?

Davis: No.

Q: When I say "good information," I mean actionable, useful information.

Davis: A couple things. George Bush, Dick Cheney, and John Yoo never waterboarded anybody. They've never even been in a fistfight—much less a firefight—but they're self-described experts on the law of war?

Look at what former FBI agent Ali [H.] Soufan, who actually conducted interrogations of many detainees, had to say. He's told you that they got useful, actionable intelligence by treating these guys humanely. Then the CIA comes rolling in and wants to play cowboy with these guys. Like with Iraq and yellowcake uranium and weapons of mass destruction. I can't remember the guy's name—the person who provided the information we used to justify the war in Iraq. When we

went back and said, "Why did you lie about that?" he said, "Well, I was being tortured, I wanted it to stop, so I told them what they wanted to hear." The apologists can always find some reason to try to justify their actions, but I've seen no evidence of good and a lot of evidence of harm from engaging in torture. Torture may work to make people talk, but torture can't make them tell the truth. The mess in Iraq shows what happens when you rely on torture.

Q: You must have had access to intelligence down at Gitmo, right? Were they getting useful information at Gitmo, in terms of prosecution? In fact, did you ever ask yourself, "This place, Gitmo—is it really here to gather intelligence on these people as much as we can, or is it really to prosecute these people?" How interested are we in prosecuting them?

Davis: We weren't interested in prosecuting detainees. Prosecution was an afterthought. Clearly, Gitmo was intended to be an intelligence collection operation first and foremost, with prosecution as a third or fourth-tier consideration. That's one of the problems. I think a lot of people don't appreciate this distinction. There's a difference between intelligence and evidence. That's one thing I found during this that I probably didn't understand very well going in. What an intelligence interrogator may accept as a fact for intelligence purposes is often markedly different from what an investigator or agent would accept as a fact in a law-enforcement context.

I'll give you an example. This is a bit of a hypothetical, but it's got kind of a factual context. Occasionally, somebody would get captured somewhere. We would be trying to figure out who it is, so they would take a picture of the guy and send it to Gitmo and say, "Hey, show this to the detainees, and see if anybody can identify him. We think this is Khalid Sheikh Mohammed's

nephew, for example, but we're not sure. We think it is, so check and see if anyone can identify him."

If you had a law enforcement guy and an intelligence guy sit down with a detainee, the intelligence person would say, "Hey, do you recognize this photo?"

Well, let me back up. The law enforcement, the FBI or CITF agent, would say, "Do you recognize this photo?"

The detainee would say, "No, I don't."

The agent would go, "Are you sure?"

"Yes, I'm sure. I don't recognize the guy." They might ask a few more times, but basically that was it; the detainee did not ID the person in the photo.

The intelligence interrogator would say, "Do you recognize this photo?"

"No."

"Are you sure?"

"Yes."

"Wait a minute, now. Weren't you in the training camp at Tarnak Farms in the summer of 2000?"

"Yes."

"Wasn't Khalid Sheikh Mohammed's nephew at Tarnak Farms in 2000, too?"

"I don't know. Maybe."

"Well, if we had information that said he was there when you were there back in 2000, could this possibly, maybe be Khalid Sheikh Mohammed's nephew?"

"I don't know. It could be."

"Well, is it possible that you might have seen this guy at Tarnak?"

"I don't think I did, but yeah, it's possible."

"So then you think this could be Khalid Sheikh Mohammed's nephew in the photo, right?"

"Yes."

So when they write up the report to send back—and, again, most of these intelligence reports are not the detainee sitting down with a pen and paper and writing out his own statement in his own words—it's the interrogator summarizing what the detainee said, perhaps through an interpreter because of the language differences, and you might see that written up as "Detainee identified the individual as the nephew of Khalid Sheikh Mohammed." That's what I'm supposed to take into court and say, "Okay, here's proof of guilt?"

So there was a huge difference between intelligence and evidence. Basically, I was handed a box of square pegs and told to fit them into a round hole. It just didn't fit.

Q: The Supreme Court, in 2008, in the *Boumediene* [*v. Bush*] decision, ruled that the detainees had the right of habeas corpus on constitutional grounds, in federal courts. Is that okay by you?

Davis: It is. However, the U.S. Court of Appeals for the District of Columbia Circuit has largely rendered the *Boumediene* decision meaningless, but I think if you apply what the Supreme Court said literally, I thought it was a good decision.

An interesting part of that—remember I mentioned in May 2007 that the judges dismissed the charges against *Khadr* and *Hamdan* because the CSRT didn't determine they were unlawful enemy combatants? That was at the same time the Supreme Court had now granted cert in *Boumediene*, after having initially turned it down—so I argued, "Look, maybe we can get a twofer out of this. The rules for the CSRTs are written by the deputy secretary of defense. Why don't we rewrite the rules? Make it a meaningful process and a process where the panel makes a

determination whether the person is or is not an unlawful enemy combatant, and then redo all the CSRTs. That way, you clear up the jurisdictional problem we've got in *Hamdan* and *Khadr*, and you potentially address the concern the Supreme Court apparently had in *Boumediene* with this sham process that Steve Abraham talked about. We could potentially avert an adverse Supreme Court decision and clear up the military commission jurisdictional issue." The answer I got was, "We said these procedures are adequate, so they're adequate."

Q: Right. Despite your high hopes for him, you've become something of a critic of President Obama and his administration, have you not?

Davis: Yes, I have.

Q: In fact, you were quoted in something called *Truth-Out* [.org], in November 2011, as saying that "There's a pair of testicles somewhere between the Capitol Building and the White House that fell off the president after Election Day [2008]." You go on. "He got his butt kicked. Not just with Guantánamo but with national security in general. I'm sure there are a few areas here and there where there have been 'change,' but to me it seems like a third Bush term when it comes to national security."

What has Obama gotten right and what has he gotten wrong, in terms of anything related to Guantánamo Bay? Factor in the resistance of Congress to changes that he initially wanted.

Davis: I think it's primarily been a lack of leadership. President Obama reminds me of Jimmy Carter—a smart guy, a nice guy, and a terrible leader, because he's allowed the other side, the Dick Cheneys and the Liz [Elizabeth] Cheneys, to carry the narrative. If you look at polling now—five years ago a majority of the American public said torture was wrong, they were opposed to indefinite detention, and they were opposed to extra-judicial assassination. Now, a majority of Americans support all three of those, and it's because the president, in my view, has not provided the leadership to stand up and educate the public and to tell them the truth. I think the majority of the public still believes that the folks at Guantánamo are the worst of the worst, and they don't care what happens to them. As long as they've still got cable TV and beer in the refrigerator, the public is perfectly happy and doesn't care about detainees.

To me, what's frustrating—I think with President Bush, you can almost look at him and say, "Well, he didn't know any better." President Obama knows better, but he just hasn't had the backbone to stand up to the opposition and lead on this issue. He's let the public be swayed and misled by misinformation. I'm probably doing a disservice to President Bush when I said it was a third Bush term. President Bush never killed an American citizen with a drone missile fired by the civilians at the CIA in Yemen. I think President Obama has actually exceeded what the Bush—

Q: Well, you saw the attorney general's defense of that the other day at Northwestern Law School. Did you read that?

Davis: I did.

Q: Has he got anything going there?

Davis: No. Number one, he doesn't address—we talk about the war on terror, the battlefield, enemy combatants, and the right under the law of war to kill the enemy. I think one of the problems with the drone program is that we don't have a drone program, we have two drone programs. We have a military drone program operated by the Air Force, which operates under the Geneva Conventions and the law of war. Then we have a paramilitary drone program run by the civilian operated and controlled CIA and CIA contractor employees that do not qualify as lawful combatants. If you accept that Anwar al-Awlaki was an enemy combatant—back up; if you start with the premise that the deliberate killing of another human being is murder unless there is some legal justification that excuses it or provides immunity—one justification would be self-defense, like you've got the argument now of the young man who was killed in Florida, where the neighborhood watch guy said he acted in self-defense—if you truly act in self-defense, where you think you're in immediate danger of death or serious bodily harm, and you act, and you deliberately kill another human being, the law says you are legally justified in doing that.

Another area where there's legal justification for deliberately killing someone is called "combatant immunity." If two sides are fighting a war, soldiers kill each other. That's not murder, provided they're lawful combatants engaged in lawful armed conflict. It's like with Omar Khadr. Khadr was charged with murder in violation of the law of war because he killed a soldier when he was not in uniform and not entitled to combatant immunity. Well, the CIA is a civilian agency. They're not combatants wearing uniforms and under military command. They're not

covered by combatant immunity. The deliberate killing of a human being is murder, absent legal justification, and I can think of none for a civilian agency to deliberately kill a human being.

Attorney General Holder didn't address that distinction between the two separate drone programs. Then he talked about the *Mathews* [*v. Eldridge*, 1976] case, about due process, but he did an extreme gloss-over of what the court said in *Mathews*. Clearly, they laid out more stringent criteria essentially saying that as an absolute last resort—if there is no other option—then a process short of judicial process may satisfy the due process requirement. We've got a FISA [Foreign Intelligence Surveillance Act] court that we use to get permission to wiretap somebody. There ought to be some Article 3 involvement in this, somebody other than just the president deciding who lives and who dies. So, again, my apologies to George Bush for comparing him to Barack Obama. I think Obama has taken the Bush problems and compounded them.

Q: You know, with regard to Gitmo, as you point out, there are 171 people left down there. Correct me if I'm wrong here, but I think that maybe half of them are Yemenis who have been cleared for release, if Yemen were a different place than the Yemen of today.

Davis: Right.

Q: The other half probably included some of the people you were contemplating prosecuting when you said you were contemplating seventy-five or eighty people a long time ago. Some of

them will be prosecuted, including KSM and his cohorts, I assume, and, certainly [Abd al-Rahim al] Nashiri is a case coming up very soon.

Davis: Right.

Q: Now laying aside the Yemenis, these other people, they're never going to leave American custody, are they? Let's say KSM or Nashiri are acquitted. They're not going anywhere, are they? Is this a farce?

Davis: Yes, it's a farce. There are 171 people at Guantánamo. Eighty-nine of the 171 have been cleared for release or transfer, so it's more than half that we don't want to keep. They're people that the CIA, DOD, DOJ, the FBI, and everybody has taken a look at and said, "There's no evidence they committed a crime. We don't intend to charge them. They're not a threat to our safety, and we don't want to keep them here." We've got eighty-nine people that we don't want at Guantánamo that we've still got at Guantánamo, and some have been there over ten years. Like you said, two-thirds of the eighty-nine are Yemenis, and the "underwear bomber" kind of cut off the pipeline to Yemen. So you've got eighty-nine people who are being indefinitely detained in prison because of their citizenship, and nothing else.

That's eighty-nine. That leaves what? Eighty-two? There are about thirty—if you don't count the ones that have already been tried in the six or seven military commissions we've done so far. If you omit Ghailani, Khadr, the group that have been prosecuted—there are about thirty more that they intend to prosecute, and it's really just a question of which forum. Either military

commissions or federal courts are the two choices. I think the more problematic group is that other group of about thirty-eight or thirty-nine people that the administration doesn't intend to send home, and doesn't intend to prosecute. What are they entitled to?

Q: Take away the Yemenis again. Take away the Yemenis plus—

Davis: The eighty-nine. That should leave eighty-two. You've got about six or seven of those who have been convicted in a military commission or federal court, so that would leave—

Q: Well, at least half of them were plea bargained, and only one that I know of—al-Bahlul—got any kind of serious sentence.

Davis: And that was after boycotting his trial and presenting no defense.

Q: And he boycotted his trial, right. In any case, let's say you've got six. I'm talking about the ones who are still left there. So take away, even the six, the number six. You're down to what?

Davis: If you take out the eighty-nine who have been cleared for release or transfer, that leaves eighty-two. Then you figure there are seven of those who have been—well, that's not true, because Hamdan—five of those who are still at Gitmo have already been convicted, so that leaves—

Q: Yes, but they're gone, some of them.

Davis: I'm taking out Hamdan and Hicks. That would leave five, counting Ghailani, convicted and still in our custody. That would leave seventy-seven others. Then there are about thirty of those who are the KSMs and the Nashiris that the administration wants to prosecute. So there are about thirty-seven others who are in this no-man's-land. They won't get their day in court, they won't go home, and you've got Nashiri. The defense filed a motion in Nashiri—

Q: Wait a minute. They won't get their day in court, and they won't go home?

Davis: Right.

Q: And yet you've got those who are going to get their day in court, right?

Davis: And probably won't go home.

Q: And they won't go home.

Davis: Or, maybe. Majid Khan cut a deal to testify against KSM in return for an eighteen year sentence for his role in murdering a dozen people in Bali.

Q: I think the question I put to you was really—military commissions or federal trials, federal trials or military commissions. What difference does it make now for this group of people who are left, who are going to face either one of those things, in terms of the real world? Does it

matter? Why not say there's no point in trying any of these people because, for political or other reasons, they're not going anywhere.

Davis: That was the argument I got back when I was chief prosecutor. Steve [Stephen A.] Cambone was the undersecretary of defense for intelligence for most of the time I was chief prosecutor. The hardest problem I ever had was trying to get information declassified, to use as evidence, so we could have an open trial, and so the world could watch and see this process work.

His argument was, "Wait a minute. Don't I have a right to detain the enemy for the duration of the armed conflict?"

"Yes."

"And is there any chance that the war on terrorism is going to end in our lifetime?"

"No."

"Then why do you want me to declassify intelligence, and put it on public display, when I keep these guys locked up forever anyway?"

Q: That's not the same thing, is it, Colonel? You can keep the enemy for the duration of hostilities, although that's complicated in this business, because we don't know when the end of

hostilities is—although some say it really ended with the killing of Osama—but that's not really what I was talking about. Those people who you say we can keep to the end of hostilities—don't we have to treat them a certain way?

Davis: You would think.

Q: Did you ever say, "Okay. You want to keep them until the end of hostilities? We've got to treat them like prisoners of war"?

Davis: I agree. The uniformed services argument has always been that we should treat these guys as prisoners of war. They're entitled to some meaningful review process, and, again, I think it ought to be a process, that if it was applied to an American by—pick whatever government you want—that we would say okay if it's done to one of us. If we wouldn't allow an American to be subjected to whatever the due process is, we shouldn't be applying it to others.

Q: You mentioned before these thirty thousand Germans or something who were being held outside—where? I forget.

Davis: Abilene, Texas.

Q: Abilene, Texas or Kansas?

Davis: Texas.

Q: Isn't there an Abilene, Kansas?

Davis: Yes, there is.

Q: They were not being charged, right?

Davis: Right.

Q: Were they people, basically, who had been in uniform, in Germany? In the German army?

Davis: Yes, I assume they were.

Q: They were being given prisoner-of-war status, weren't they?

Davis: Yes.

Q: These people at Guantánamo had been down there—as we know, many of them have left now—but for years, without any charge of any kind. Many of them were not people who were picked up on a traditional battlefield. In June 2005, just before you took over, in one week President Bush, Vice President Cheney, and Secretary of Defense Rumsfeld all explained, publicly, that these were people picked up on the battlefield, bomb-throwers—picked up on the

battlefield, and if you let them go, they're going to go back to the battlefield. That word was constantly used at that time.

Davis: Yes.

Q: I'm surprised that you didn't turn to your wife and say, "Where is that battlefield?" Would you say that you were somewhat naïve when you went into this situation?

Davis: Yes. Clearly, I was. I bought into the worst of the worst narrative.

Q: Even as late as the time you went in, you didn't recoil in any fashion, such as you came to recoil later on. You were writing editorials in *The New York Times* saying how nice it was down at Guantánamo, and here you're saying that President Obama has lost his testicles. Either you've gotten harder, or the situation has gotten worse, or what?

If you look back on it, if you were lying down on some shrink's couch, God forbid, and you were asked "What about Guantánamo?" They created this thing in December 2001, they started bringing people there in January 2002, and it's still going on. Congress doesn't want these people to leave. They want to put more people there, if necessary. What does it all add up to? In terms of American values, in terms of your own personal experience, in any way that you would speak of it—what does it all add up to?

Davis: I don't know exactly. To me it adds up to America being extraordinarily hypocritical. We want to say we're the land of the free and the home of the brave, but we're actually behaving like we're the constrained and the cowardly. Was it [Benjamin] Franklin who said, "If you're willing to give up your liberty for your security, you deserve neither?" It seems like that's what we're doing. I don't know if you saw the other day—there's a guy, Amir [Mirzaei] Hekmati, who is an American citizen who was convicted in an Iranian court and sentenced to death for being a spy. Victoria Nuland, a spokesperson for the State Department, at a press conference, said, "We condemn this verdict. It was rendered by a court that doesn't comply with the regular court procedures in Iranian courts. It was conducted in secret. It used coerced evidence, and he got an inadequate defense." And I'm thinking, "That sounds a lot like what we're doing at Guantánamo."

So we criticize others for following our example. We're really good at preaching and not so good at practicing. We've done that with the International Criminal Court. We led the way in creating the International Criminal Court, and then we were one of the seven countries that voted against it, along with China, and Iraq, and Israel, and Yemen, and Libya, and Qatar; many of the countries we like to point to as human rights offenders. Every country on the planet has signed the Convention on the Rights of the Child, except us and Somalia. We're really good about lecturing, preaching, and complaining about others, but we're not willing to hold that same mirror up to ourselves and apply it to us. I think that's where we're falling short. We're always talking about being the light on the hill and setting the example for others to emulate—we are setting an example, but we're setting a bad example. The rule of law is supposed to be rules that are well-known and uniformly applied. We're not very good at—.

Q: Well, part of the military's job, certainly, and part of the president's job, is to keep us safe, right?

Davis: Right.

Q: There hasn't been a major attack on American soil since 9/11.

Davis: Right.

Q: Should there be some applause for that?

Davis: Sure, but how do you prove a negative? How do you make the link between what we did and what didn't happen?

Q: Well, look. For example, you had the so-called underwear bomber over Detroit. Was he trying to light something in his underwear?

Davis: Yes.

Q: He wasn't successful. Had he been successful, several hundred people or something like that on that airliner would have crashed.

Davis: Intelligence techniques didn't stop the underwear bomber from carrying out his suicide bombing. It was just his and his handlers' ineptitude that foiled the plot. It wasn't an intelligence victory. It was a failure of idiots.

Q: How about this fellow in Times Square. Remember that?

Davis: Faisal [Shahzad].

Q: He was also up to no good, right?

Davis: Yes, but once again, it's another example of where ineptitude, not intelligence, stopped—

Q: Of course, the president says this and that was thwarted by—

Davis: I know he says that, but to me the problem with Guantánamo is—like the military commissions. A military commission isn't arguably necessary because of what the individual did to us. It's necessary because of what we did to the individual. Had we treated them humanely, had we read them their rights, had we treated them the way we would expect to be treated if we were in custody, there would be no issue about taking a case to federal court. It's not what Nashiri did that makes a military commission a potential option. It's what we did to Nashiri that makes it even necessary as a consideration. We've tried to build a court process to accommodate what we did to him, not what he did to us.

Q: You mean you've come around to the view that the federal court is adequate?

Davis: Federal court is adequate and, I believe, it has proven it's up to the task.

Q: Didn't the Obama administration seek to have KSM tried in New York?

Davis: Yes, and then they backed down.

Q: You make it sound almost as if it's easy not to back down.

Davis: I'm not saying it's easy, but many things aren't. When Obama took office, the economy was falling off a cliff, healthcare reform was his number-one priority, and nobody's going to get elected or re-elected in 2012 saying, "I stood up for the rights of the detainees at Guantánamo Bay." I've had some people say, "Well, in the second term he'll do the right thing," but if that's the way we judge when it's time for doing right or wrong—if licking your finger and sticking it in the political wind to see how it's blowing to decide when it's time for doing what's right or wrong, we're in trouble.

One other thing, before I forget it. You mentioned Bush's and Yoo's books. I think you could make an argument—in fact, I was on Piers [S.] Morgan's show with Harvard Law Professor Alan [M.] Dershowitz right after Osama bin Laden was killed, where we debated the propriety or impropriety of torture. I think you can make an argument—the "ticking time bomb" scenario is the one you always hear—if you capture somebody, and there's a ticking time bomb—

Q: That's Dershowitz's thing.

Davis: Yes. But so far there hasn't been one ticking time bomb that we found just as it was about to explode. There's not one case I can point to that says, by torturing this guy today, we stopped the bomb going off this evening. There may be an argument on Osama bin Laden that by torturing somebody a decade ago, it led to a tip that led to this, that led to that, which Ali Soufan says is nonsense. Ali Soufan was there, and torture didn't help. I remember seeing John Yoo interviewed, saying, "Hey, look. I was just a lawyer. I was asked to provide a legal opinion on a range of options, and I provided an opinion, but I didn't make a decision." Then you have George Bush being interviewed during his book tour, saying, "Hey, look. I'm not a lawyer. The lawyers said this is what is legal." You know what I mean? It's plausible deniability. Nobody's accountable for a decision. Everybody sits there and points at somebody else, and it becomes a buck-passing endless circle, not a straight line with a definitive endpoint that shows you where the buck stops.

I think if you have the ticking time bomb scenario, and the president made the decision to authorize torturing somebody to try and prevent it—I'm not saying that's the right decision—but I think you could make a moral argument explaining why you did it. But if you make that kind of decision you ought to have the integrity to take responsibility for it rather than what you've got with Bush and Yoo pointing the finger at each other and saying, "No, not me."

Q: Or with Obama backing down over trying KSM in New York.

Davis: Yes. It's been a real disappointment with Obama. I was excited when Marty [Martin S.] Lederman, who's at the Justice Department, and Harold [H.] Koh, at the State Department, and others I respected got jobs in the administration, and am extraordinarily disappointed that, apparently, their principles are malleable. It seems like this administration is doing what the last one did, in forum shopping, trying to find a legal opinion somewhere that supports the decision they wanted to make to begin with, rather than—like they did with Harold Koh on the hostilities in Libya not rising to a level that triggers the War Powers Act. DOD didn't agree, DOJ didn't agree, but they found somebody in the State Department that agreed, and that becomes the administration's legal opinion for its policy—which is a lot like John Yoo saying that "Unless it's equivalent to death or major organ failure, it's not torture."

Q: Finally, what would make you happy? You're unhappy with Obama, and you were unhappy with the way the military commissions were being carried out, and that pressure was being brought, and what have you. Obama agreed to that dicey mission to kill Osama bin Laden. In the real world today, with the various political pressures that exist today, what developments on this front that we've been talking about today would please you?

Davis: If I were king and I could do whatever I wanted—I think it requires more of an international effort. This go-it-alone attitude—it seems like on the conservative side anything with word “international” in it—except maybe the International House of Pancakes—sends cold chills up their spines. Given the global economy, the global environment—the fact that terrorism is not just a U.S. domestic issue; it affects pretty much everybody worldwide—and I think we

need to be more of a partner in a global international community, like with the International Criminal Court. Currently, the Rome Statute that created the International Criminal Court doesn't cover terrorism, but it could be amended to include terrorism, where you'd have a uniform, internationally accepted standard for holding terrorists accountable for their conduct. But that would mean us giving up a little bit of our reliance on exceptionalism and not being the exception in participating in, I think, a more international effort to address some of these problems that impact us all.

Q: It appears that Guantánamo Bay is going to be sitting there with some people in it for some time to come. Is there some other solution to that? Realistically?

Davis: There clearly is. There are eighty-nine people we want to get rid of. We've never taken a one into the United States, including the Uyghurs. Some of the Uyghurs are still at Guantánamo. I don't know what the number is now, but I know that when I was around with the military commissions, we'd been to two dozen other countries, saying, "Hey, these guys aren't a threat. Help us out, and take them." We've never taken a single one ourselves. I think it was Judge [John D.] Bates that ordered them released in D.C., and there's a large Uyghur community here willing to take them in and help them transition. All of a sudden, we're saying, "Oh, my God, they're too dangerous to bring to America." We want everybody else to help us, and we're not willing to do any of the heavy lifting ourselves. I think you could get rid of eighty-nine right off the top, if we were willing to participate a bit and take a few ourselves.

That still leaves eighty-two, like KSM and Nashiri, who deserve to be prosecuted and held accountable for their actions, who should be prosecuted in federal court. I think the really tough ones are in that other group; those being detained as an enemy combatant for the duration of hostilities. They're entitled to some meaningful review process—habeas—but I think that's the more difficult nut to crack.

Q: Finally, many people would think, "KSM, Nashiri, they are the worst. They are the worst." So who is this other group you were just mentioning that you can't try—these hardcore characters? How hardcore are they?

Davis: The administration has never named who's in that group, so I'm not sure exactly who it includes. I would assume al-Qahtani is probably in that group, where they've determined there's not sufficient evidence to prosecute him, but they believe he really intended to be the twentieth hijacker and is a threat to our safety. He's stuck in this no-man's-land between court and release. Again, I think it boils down to if the shoe was on the other foot, and it was an American citizen being detained under the same circumstances by another country, what would be accepted as a minimum standard of due process, that we would say, "Okay. That's legitimate"?

Q: Okay. I did want to ask you again about the killing of Osama, though. I take it that that was as much a surprise to you as to anybody. What was your reaction to that? Do you remember?

Davis: I have no qualms with it at all. I give President Obama credit for carrying out the mission. I thought it was pretty gutsy to send in the SEAL [United States Navy Sea, Air, and Land] team to do the job, rather than just bombing the house.

Q: I didn't see you write an op-ed in the *Los Angeles Times*, or the *Wall Street Journal*, or *The New York Times*, or all these other publications that you've favored with your writing. I didn't see you write an op-ed saying, "You did well there, Mr. Obama."

Davis: I did a couple of appearances on CNN on Piers Morgan's show. I gave the president credit for killing bin Laden. In fact, Alan Dershowitz and I were on again discussing the bin Laden photos. I agree with Obama about not releasing the photos. It would do a lot of harm and there's very little good to come from releasing the photos. I give him credit for some of those things where he made tough, and what I believe were correct, decisions.

Q: You don't want a drone striking al-Awlaki, but it's okay to kill Osama that way—not with a drone but, in effect, a raid on his house?

Davis: That one didn't offend me. What bothers me in particular is an American citizen like al-Awlaki—if you wanted to foreclose on his house, it requires some judicial hearing to foreclose. Yet, we can have a civilian agency kill him, with no judicial process at all, just the president saying, "Do it."

Q: Even though there are these various tapes and what have you of him urging jihad against the United States, that doesn't give cause for you?

Davis: To me, that's espousing hate speech.

Q: Isn't he at least alleged to have been connected to the underwear bomber?

Davis: Alleged. Again, I think there needs to be some judicial process to vet that allegation before the president makes a unilateral decision to hunt him down and kill him.

Q: You think Osama bin Laden was beyond that.

Davis: I don't see where he had any constitutional rights that al-Awlaki would have had. I think even more problematic—we keep talking about al-Awlaki. There were two other Americans who were killed along with him. His son, and a guy from Charlotte, North Carolina, were the other two who were killed. I think you could make an argument that had it been the military drone program, and they took out a legitimate military target—al-Awlaki—the other guys would be considered collateral damage. But there is no collateral damage that stems from combatant immunity here because the CIA doesn't have combatant immunity.

Q: If you were in charge that night that they got Osama, would you have said to the Navy SEALs, "You know, I want this son of a bitch caught and tried. Don't go in there and come back and tell me you had to shoot this guy, unless he's got a gun right in his hand, pointed at you."

Davis: I think I would have said, "Take no chances. Err on the side of your own safety. Don't stand there and debate is he or isn't he. If you feel that he's a threat, then take the threat out."

A question I'm asked occasionally is whether the Obama administration, since capturing people and prosecuting them has become so problematic—have they switched to a “don't capture them, kill them policy”? Like with al-Awlaki or Osama bin Laden. I don't know. I hope that's not the policy that we've adopted. I hope we haven't gone that far in trying to avoid the law.

Q: Do you have occasion in your classes at Howard [University] to talk about this kind of stuff?

Davis: This semester I'm teaching legal writing and we've talked about it some, but starting in the fall I'm teaching a course in national security law.

Q: So you have a free hand in developing that?

Davis: Yes, I do.

Q: All right. Well, look, you've been very patient today. Is there something that you want to add, that we haven't talked about? This is the moment, I suppose.

Davis: I think we've pretty much covered the waterfront.

Q: We didn't cover General Mark [S.] Martins' optimistic view of the military commissions, as voiced in a number of forums, including on Tuesday, January 10 of this year, in which he draws—

Davis: It is a point I guess we didn't cover that we should have. If you look at what he says, and in his talk to the New York City Bar Association, or if you look at Attorney General Holder's talk at Northwestern [University], they clearly say that federal court is the preferred venue. But they say there are some cases that are appropriate for military commissions, but they don't really tell you what the criteria are for differentiating between the two. I'm afraid what the answer is, is what Dianne Feinstein said. I guess it was in April 2010, when Attorney General Holder appeared—it was when they started talking about backpedaling and reviving military commissions—he was sort of backpedaling on military commissions versus federal court. At that hearing, Feinstein said, "You use your best judgment, and pick the forum where we'll best get a conviction."

To me, that's not the right standard. It's not "give them as much justice as you can that still guarantees that we win," but that seems to be what the criteria is. I'd be really interested in hearing the attorney general or General Martins explain how you choose between the two different forums and to be specific about why.

Q: Well, it is interesting. I've read his speech and his talk to the bar association, and I find it a little opaque. On page nine of my printed version, he says here, "Reformed commissions provide accountability during armed conflict where there otherwise would be no adequate means to do

so." But he doesn't really spell that out. Then a few paragraphs later, he says, "As I have suggested, the answer is that there is a narrow but critically important category of cases in which the pragmatic choice among the lawful tools available to protect our people and serve the interests of justice is a reformed military commission."

Davis: Well, look at Nashiri. Nashiri's defense attorney filed a motion asking the government to acknowledge—if he's acquitted in his military commission and the military officers on the jury say he's not guilty, does that mean he gets to go home, or does he go right back into a cell for indefinite detention? The government responded, saying, "He's still subject to indefinite detention." The point being—as I described it to somebody else—it's almost like a play at the local community mystery dinner theatre, where you go to the community theatre, they serve you a meal and they put on a mystery play. Although, in this instance there's no mystery and there's no meal; you can't eat in a courtroom, and you know how this is going to end before it starts. What's the point in having the trial when in the end the accused is going right back to a cell in the prison? It's heads you lose, tails we win for the prosecution at Guantánamo.

If I could, let me add one more thing. Sometimes I'm asked if I have any regrets about the decisions I've made. On a purely personal level, I don't. I'm disappointed that the public has no interest in whether our government tortures, or indefinitely detains, or kills Americans without trial. I'm disappointed that I'm considered toxic by both Republicans and Democrats, and that both sides will trade liberty for security and use fear to sell it to the public. Sometimes I feel like Don Quixote who saddles up to go tilt at windmills, but I believe in the Constitution and the Geneva Conventions and in standing up for principles. So, I'm not going to quit.

The only regret I have is that my choices have an impact on my family. They read the things that are said about me at times. I spend a good bit of time writing and traveling to give talks, so I'm often away from home. Some people who appeared to be friends don't call like they used to. I spent months on unemployment while sending out one-hundred-plus resumes trying to find a job. I now earn well less than half what I did before I got fired. Don't get me wrong, we have a good life, but I can't do the things for my family that I could have done had I kept quiet. They followed me around for years while I served in the military, and we'd envisioned a life after I retired that hasn't exactly turned out like we'd planned. Neither my wife nor my daughter has ever complained, but I'm sure they've had to have asked themselves, 'what if' I had said no when General Rives called in July 2005? Who knows? In any case, I regret the impact my decisions have on them. I probably don't tell them often enough how much I appreciate all they've put up with in order to support me.

Q: As you pointed out, you offended the Bush administration; you've now offended the Obama administration, are you looking forward to offending a [Richard J. "Rick"] Santorum or a [W. Mitt] Romney administration?

Davis: If Santorum gets elected, I'll have to learn the words to *O, Canada*. [Laughter]

Q: Yes. Very good. Thank you very much, Colonel Davis.

Davis: Sure.

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