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From: [redacted] (OGC) (FBI)  
Sent: Monday, November 08, 2004 5:32 PM  
To: [redacted] (OGC) (FBI); THOMAS, JULIE F. (OGC) (FBI); BATTLE, FRANKIE (CTD) (FBI); [redacted] (CTD) (FBI); [redacted] (CTD) (FBI)  
Cc: [redacted] (OGC) (FBI); [redacted] (CTD) (FBI); [redacted] (CTD) (FBI); [redacted] (CTD) (FBI)  
Subject: The Latest on GTMO Legal processes

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Attached is the decision from Judge Robertson -- it is pretty bad. DOJ has characterized it as a "disaster"

It contains inter-alia

-the President does not have inherent authority to use military commissions

- Al Qaeda and Taliban may be entitled to POW status.

Geneva Conventions are self executing

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CSRT doesn't substitute for Art. V

Since [redacted] POW status is in doubt, he cannot be tried by military commission.

The dust has yet to settle -- but it looks like we will be doing some portion of the CSRT and the Commissions are a relative easy fix -- with a 3 month or so delay -- depending on how long it takes for the CSRTs to become Art. V tribunals. Bottom line for the FBI -- this can only mean more DOJ involvement.- and hence more reliance on the FBI -- This is an opportunity for the Administration to fix the process and still save the process. We still have the current work to do -- the only thing stayed at the moment is the Commissions. I have it on good authority that Mr. Haynes (DoD general counsel ) has had his best people behind closed doors for some 5 hours trying to find a fix -- with pending Habeas actions, the fix will have to come sooner than later.

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SALIM AHMED HAMDAN, :  
 :  
 Plaintiff, :  
 :  
 v. : Civil Action No. 04-1519 (JR)  
 :  
 DONALD H. RUMSFELD, :  
 :  
 Defendant. :  
 :

MEMORANDUM OPINION

Salim Ahmed Hamdan petitions for a writ of habeas corpus, challenging the lawfulness of the Secretary of Defense's plan to try him for alleged war crimes before a military commission convened under special orders issued by the President of the United States, rather than before a court-martial convened under the Uniform Code of Military Justice. The government moves to dismiss. Because Hamdan has not been determined by a competent tribunal to be an offender triable under the law of war, 10 U.S.C. § 821, and because in any event the procedures established for the Military Commission by the President's order are "contrary to or inconsistent" with those applicable to courts-martial, 10 U.S.C. § 836, Hamdan's petition will be granted in part. The government's motion will be denied. The reasons for these rulings are set forth below.

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witness in child abuse case permissible under rule of necessity), which noted that the "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact" and that the "elements of confrontation" -- "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact," serve among other things to enhance the accuracy of fact-finding by "reducing the risk that a witness will wrongfully implicate an innocent person." Id. at 846 (internal citations omitted).

Following Craig in a military case involving child abuse, the Court of Appeals for the Armed Forces found that a military judge had misapplied the Supreme Court's holding when he excluded the defendant from the courtroom during a general court-martial:

There [in Craig], the witness was outside the courtroom and the defendant was present. Here, the witness was in the courtroom and appellant was excluded. While appellant could observe J's testimony, he could not observe the reactions of the court members or the military judge, and they could not observe his demeanor. He could not communicate with his counsel except through the bailiff, who was not a member of the defense team. We hold that this procedure violated the Sixth Amendment, Article 39, and RCM 804. While Craig and [United States v. Williams, 37 M.J. 289 (C.M.A. 1993)] permit restricting an accused's face-to-face confrontation of a witness, they do not

authorize expelling an accused from the courtroom.

United States v. Daulton, 45 M.J. 212, 219 (C.A.A.F. 1996); see also United States v. Longstreath, 45 M.J. 366 (C.A.A.F. 1996) (defendant separated from witness by television but present in courtroom).<sup>17</sup>

A tribunal set up to try, possibly convict, and punish a person accused of crime that is configured in advance to permit the introduction of evidence and the testimony of witnesses out of the presence of the accused is indeed substantively different from a regularly convened court-martial. If such a tribunal is not a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," it is violative of Common Article 3. That is a question on which I have determined to abstain. In the meantime, however, I cannot stretch the meaning of the Military Commission's rule enough to find it consistent with the UCMJ's right to be present. 10 U.S.C. § 839. A provision that permits the exclusion of the accused from his trial for reasons other

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<sup>17</sup> The statute Congress enacted after and in light of the Craig opinion, 18 U.S.C. § 3509, carefully protects the rights of child victims and witnesses in abuse cases but preserves the right of the accused to be present. Even if a child witness is permitted to testify by videotaped deposition, the accused must be "present" via two-way television, and the defendant must be "provided with a means of private, contemporaneous communication with the defendant's attorney during the deposition." 18 U.S.C. § 3509 (b) (2) (B) (iv).