

[ORAL ARGUMENT NOT SCHEDULED]

No. _____

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

IN RE KHALID SHAIKH MOHAMMAD,
Petitioner

On Petition for a Writ of Mandamus to Order Abatement
of Petitioner's case in the Military Commissions

PETITION FOR A WRIT OF MANDAMUS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

I. PARTIES AND AMICI APPEARING BELOW

The parties who appeared before the Military Commission were:

1. Khalid Shaikh Mohammad, Defendant
2. Walid Muhammad Salih Mubarek bin ‘Attash, Defendant
3. Ramzi bin al Shibh, Defendant
4. Ali Abdul-Aziz Ali, AKA Ammar al Baluchi, Defendant
5. Mustafa Ahmed Adam al Hawsawi, Defendant
6. United States of America

II. PARTIES AND AMICI APPEARING IN THIS COURT

1. Khalid Shaikh Mohammad, Petitioner
2. Military Judge Colonel Keith A. Parrella, U.S. Marine Corps, Respondent

III. RULINGS UNDER REVIEW

This case involves a petition for a writ of mandamus to abate Military Commission proceedings in this case unless and until the United States Court of Military Commissions Review (USCMCR) is able to assign a panel to address the merits of contested issues raised in the Military Commission case of *United States v. Khalid Shaikh Mohammad et al.* Mandamus is the only available remedy to address motions seeking discovery and recusal of the Military Judge, Colonel Keith A. Parrella, from serving as a judge in Mr. Mohammad’s Military

Commission because, as described more fully below, Mr. Mohammad has no remedy or availability of redress in the USCMCR.

IV. RELATED CASES

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In re Mohammad et al., D.C. Cir. case no. 17-1179, denied October 19, 2018.

U.S. Court of Military Commission Review:

United States v. Khalid Shaikh Mohammad et al., USCMCR No. 17-003, designated Oct 27, 2017. (No substantive action has been taken in case number 17-003, the USCMCR designation for the interlocutory appeal proceedings following this Court's *vacatur* of the June 12, 2017 USCMCR decision in case no. 17-002.)

In re Ammar al Baluchi, USCMCR case no. 18-001, filed February 9, 2018. (The USCMCR has taken no substantive action on this petition filed by a co-defendant of Mr. Mohammad, despite Mr. al-Baluchi's notice to the USCMCR that the underlying matter has subsequently become moot.)

In re Ammar al Baluchi, USCMCR case no. 18-003, filed May 17, 2018.

(The USCMCR has taken no substantive action on this petition filed by a co-defendant of Mr. Mohammad.)

In re Mustafa Ahmed Adam al Hawsawi, USCMCR case no. 18-004, filed November 27, 2018. (The USCMCR has taken no substantive action on this petition filed by a co-defendant of Mr. Mohammad.)

Dated: January 18, 2019

By: _____
Rita J. Radostitz
Counsel for Petitioner

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GLOSSARY OF TERMS

2006 Act Military Commissions Act, Pub. L. No. 109-366 (2006)
2009 Act Military Commissions Act, Pub. L. No. 111-84 (2009)
USCMCR United States Court of Military Commission Review
DOD Department of Defense
MMC U.S. Dep't of Def., Manual for Military Commissions, Part 2,
R.M.C. Rules for Military Commissions (2012)
RTMC Regulation for Trial by Military Commission

JURISDICTION

This Court has exclusive supervisory jurisdiction over Military Commissions and the USCMCR pursuant 10 U.S.C. § 950g. This Court has jurisdiction to issue all writs necessary and appropriate in aid of that jurisdiction pursuant to 28 U.S.C. § 1651.

RELIEF SOUGHT

Petitioner, Khalid Shaikh Mohammad, asks this Court to issue a writ of mandamus directing abatement of his Military Commission proceedings unless and until the United States Court of Military Commissions Review is constituted as required by the Military Commissions Act of 2009 and the United States Constitution, and is able to assign a panel to address the merits of issues raised in the case of *United States v. Khalid Shaikh Mohammad*. Mr. Mohammad further requests a writ of mandamus issue disqualifying Military Judge Colonel Keith A. Parrella, or, in the alternative ordering him to provide further information regarding his actual or apparent conflict of interest in order to determine whether he should recuse himself from serving as a judge in Petitioner's case below.

ISSUES PRESENTED

1. Whether a writ of mandamus should issue because the unavailability of a remedy in the USCMCR renders the Military Commission inconsistent with the Military Commissions Act of 2009 and constitutionally infirm.

2. Whether a judge who (1) has worked for, and provided “memoranda on topics of current relevance to counterterrorism prosecutors, which were widely distributed and read within” the Counterterrorism Section of the National Security Division of the Department of Justice, which is the same entity that is directly involved in prosecuting Mr. Mohammad; (2) has a long-standing relationship with one of the government attorneys currently prosecuting Mr. Mohammad; and (3) believes he has a continuing duty of loyalty and confidentiality to the government agencies responsible for the prosecution and torture of Mr. Mohammad, creates an actual or apparent bias where “his impartiality might reasonably be questioned” requiring his recusal from serving as a judge in Mr. Mohammad’s case, and in the alternative, whether the Military Judge should have provided further discovery regarding his potential conflict of interest.

SUMMARY OF ARGUMENT

Petitioner, Khalid Shaikh Mohammad (Mr. Mohammad) asks this Court to issue a writ of mandamus abating his Military Commission until there is a fully functioning USCMCR as mandated by both statutory authority and the United States Constitution. Due to the lack of a functioning USCMCR, Mr. Mohammad also seeks a writ of mandamus vacating the order issued by Judge Keith A. Parrella

in the Military Commissions denying recusal and further discovery regarding the potential conflict of interest resulting from his involvement with the very division of the DOJ that is prosecuting Mr. Mohammad in this capital case.

Mandamus is an appropriate remedy where, as here, proceedings in a constitutionally invalid system amount to a violation of due process and equal protection that cannot be remedied on appeal, and the underlying issue is one as to whether the lower court judge should have provided further discovery regarding and/or recused himself on the basis of his actual bias and/or an appearance of bias due to the fact that he has worked for, and provided “memoranda on topics of current relevance to counterterrorism prosecutors, which were widely distributed and read within”¹ the Counterterrorism Section of the National Security Division of the Department of Justice, which is the same entity that is directly involved in prosecuting Mr. Mohammad; has a long-standing relationship with one of the government attorneys currently prosecuting Mr. Mohammad; and believes he has a continuing duty of loyalty and confidentiality to the government agencies responsible for the prosecution and torture of Mr. Mohammad. Accordingly, granting mandamus relief now supports the preservation of this Court’s jurisdiction.

¹ App 135 (Transcript at 20497).

STATEMENT OF FACTS

A. Procedural History.

Petitioner, Khalid Shaikh Mohammad (“Mr. Mohammad”) is one of five co-defendants in a joint capital Military Commission at Guantanamo Bay, Cuba. He faces various charges arising from the government’s assertions that he is responsible for planning and carrying out the attacks of September 11, 2001.

Mr. Mohammad was arrested in Rawalpindi, Pakistan, on March 1, 2003, tortured and detained *incommunicado* for some three-and-one-half years in overseas detention facilities known as “black sites” operated by the Central Intelligence Agency (“CIA”). Mr. Mohammad was transferred to U.S. Naval Station Guantanamo Bay, Cuba in September 2006. He was not permitted access to counsel from the time of his arrest until early 2008.

Capital charges against Mr. Mohammad and his four co-defendants were referred to a Military Commission at Guantanamo Bay, Cuba on May 9, 2008. In January 2009, then-President Obama announced his decision to close the detention facility at Guantanamo Bay and to freeze Military Commission proceedings. Eventually in January 2010, the then-pending capital charges against Mr. Mohammad were withdrawn and dismissed without prejudice. In November 2009, then-Attorney General Holder announced the administration’s intention to transfer Mr. Mohammad and his co-defendants for prosecution in the United States District

Court for the Southern District of New York. Bowing to political pressure, President Obama reversed this decision. The government then in April 2011 unsealed and obtained dismissal of the federal indictment of Mr. Mohammad and his co-defendants, and a second Military Commission prosecution was subsequently initiated.

On April 8, 2012, Colonel James Pohl, U.S. Army, was detailed as the Military Judge to preside over this Military Commission.² On May 5, 2012, Mr. Mohammad and the other co-defendants were arraigned again, on eight charges, six of which are capital.

Military Judge Pohl presided over this Military Commission case until August 2018. On August 27, 2018, Colonel Keith A. Parrella, U.S. Marine Corps, was detailed as the Military Judge for this Military Commission, effective that date.³ On September 7, 2018 the defense filed a Motion to Compel Discovery for the Voir Dire of Colonel Parrella. That motion was denied.⁴ On September 10, 2018, Military Judge Parrella was subject to *voir dire* and questioned by counsel for Mr. Mohammad and other defense counsel regarding his qualifications to serve

² App at A41 (AE 001)

³ App at A42 (AE 001A)

⁴ App at A257-A262 (AE 595G RULING Defense Motion to Compel Material and Information Related to the Qualifications of Judge Keith Parrella and Defense Request for Voir Dire of Military Judge in a Closed *Ex Parte* Hearing Filed 10 October 2018).

as military judge in this case.⁵ At the end of *voir dire*, Mr. Mohammad moved Military Judge Parrella to recuse himself,⁶ and separately moved that the proceedings be abated until Military Judge Parrella had fully reviewed the extensive prior proceedings and was genuinely prepared to proceed.⁷ Military Judge Parrella denied both motions.⁸

On October 19, 2018, one of Mr. Mohammad's co-defendants, Mustafa Ahmed Adam al Hawsawi, filed a "Defense Motion to Recuse Military Judge, Colonel Parrella" to which Mr. Mohammad was automatically joined.⁹ On November 19, 2018, Military Judge Parrella denied the motion to recuse and denied a defense motion to abate proceedings pending an appeal of that decision.

On November 27, 2018, Mr. al Hawsawi, filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Application for Stay of Proceedings, in the USCMCR.¹⁰ For the past two months, no substantive action has been taken by the USCMCR on that petition.

⁵ App at A58-A206 (Transcript 20420-20568).

⁶ App at A206 (Transcript 20568).

⁷ App at A211, A226 (Transcript 20573, 20588). Other counsel sought abatement in order to provide further investigation and briefing of the issues raised by the *voir dire*. Tr. 20578-79.

⁸ App at A243 (Transcript 20605).

⁹ Military Commission Trial Judiciary Rules of Court (RC) 3.5.i.(4).

¹⁰ App at A1 (USCMCR Case No. 18-004). Mr. al Baluchi joined that Petition in the USCMCR.

B. The USCMCR is Unable to Assign a Panel of Judges to Review Issues Raised by Mr. Mohammad

On April 7, 2017, Military Judge Pohl dismissed all of the non-capital charges pending against Mr. Mohammad due to the expiration of the statute of limitations. The government appealed to the USCMCR immediately thereafter. In the course of that interlocutory appeal, Mr. Mohammad moved that Judge Scott Silliman recuse himself from the panel due to a number of comments Judge Silliman had made indicating an actual or apparent bias against Mr. Mohammad. Judge Silliman declined to recuse himself. While the government's appeal was pending in the USCMCR, Mr. Mohammad filed a petition for writ of mandamus and prohibition in this Court seeking the recusal of Judge Silliman from participating in Mr. Mohammad's case in the USCMCR, and a motion to stay proceedings in the USCMCR pending this Court's review. While that petition and motion for stay were still pending, the USCMCR issued its decision on the government's interlocutory appeal, and reversed and reinstated the non-capital charges. On August 9, 2017, this Court issued a writ disqualifying Judge Silliman and vacating the opinion in which he had participated.¹¹ Accordingly, on October 20, 2017, Military Judge Pohl reinstated his order dismissing the charges.

¹¹ *In re Mohammad*, 866 F.3d 473, 475 (D.C. Cir. 2017).

On October 25, 2017, the government filed a second interlocutory appeal, again challenging the dismissal. On November 17, 2017 briefing on that appeal was suspended. In the suspension order, it was revealed that the other two judges who had served on the panel with Judge Silliman had recused themselves from further participation in *United States v. Khalid Shaikh Mohammad, et al.* That appeal is still pending because there is no judge on the USCMCR who can serve to appoint a panel for any matter pertaining to Mr. Mohammad or his co-defendants. As the Clerk of the USCMCR wrote in a “MEMORANDUM THRU DEPARTMENT OF DEFENSE GENERAL COUNSEL FOR SECRETARY OF DEFENSE” attached to the order suspending briefing in the case:

On August 9, 2017, the Court of Appeals for the District of Columbia Circuit disqualified Deputy Chief Judge Scott Silliman from participation in any appeal involving Khalid Shaikh Mohammad and vacated a previous decision of the CMCR in an appeal brought by the Government. *In re Mohammad*, 866 F.3d 473 (D.C. Cir. 2017). The Government’s appeal must be heard by the CMCR *de novo*. The other two CMCR Judges on the panel who heard and decided this appeal were Chief Judge Paulette V. Burton and Judge James Wilson Herring, Jr. Chief Judge Burton and Judge Herring subsequently recused themselves from further participation in *United States v. Khalid Shaikh Mohammad, et. al.* Because of Chief Judge Burton’s recusal and Deputy Chief Judge Silliman’s disqualification, a panel to hear the pending appeal cannot be appointed unless you appoint an Acting Chief Judge for *United States v. Khalid Shaikh Mohammad, et. al.* See *United States v. Roach*, 69 M.J. 17 (CAAF 2010). This request also asks that any appointment of an Acting Chief Judge extend for the period in which the Chief Judge and Deputy Chief Judge cannot

act on behalf of the Court with respect to case of Khalid Shaikh Mohammad.

*Id.*¹²

Six months after that Memorandum issued, it became clear that the inability of the USCMCR to designate a panel had not been resolved. On May 17, 2018, Mr. Mohammad's co-defendant Ammar al Baluchi, sought a writ of mandamus with the USCMCR to "prevent the further destruction of material evidence crucial to the guilt-innocence and sentencing phases of the pending Military Commission trial." Upon receipt of the petition, the Clerk of Court for the USCMCR issued a "MEMORANDUM TO THE PARTIES" noting that the Court "cannot address the merits of the issues raised by Petitioner."¹³ The Memorandum states:

Deputy Chief Judge Scott Silliman is disqualified from hearing matters related to Khalid Shaikh Mohammad. *See In re Khalid Shaikh Mohammad*, 866 F.3d 473 (D.C. Cir. 2017). Subsequently, he recused himself from all matters related to *United States v. Khalid Shaikh Mohammad, et al.* Chief Judge Paulette V. Burton and Judge James W. Herring, Jr. were on the panel with Deputy Chief Judge Silliman that heard the appeal in Khalid Shaikh Mohammad that lead to Deputy Chief Judge Silliman's disqualification. Both have recused themselves from all matters involving that case. . . . This leaves only Judge William B. Pollard, III and Judge Larss G. Celtnieks available to consider the present petition and contested motions. By statute, our

¹² App at A247 *United States v. Khalid Shaikh Mohammad et. al*, USCMCR Case No. 17-003, SCHEDULING ORDER, issued November 17, 2017.

¹³ App at A249 (CMCR Case No. 18-003, MEMORANDUM TO THE PARTIES).

panels must be “composed of not less than three judges on the Court.”
10 U.S.C. § 950f(a). Thus, the Court lacks a quorum.

Since the issuance of that Memorandum, Judge Herring has retired from the Court, and two new judges were assigned.¹⁴ However, as the Memorandum goes on to point out:

Moreover, only the Chief Judge and the Deputy Chief Judge have the authority to appoint panels even if three judges were available. *See Manual for Military Commissions (2016 rev. ed.)*, Rule for Military Commission 1201(b)(5); Regulation for Trial by Military Commission (2011 ed.), ¶¶ 25-2d, 25-2e; Rules of Practice for the U.S. Court of Military Commission Review (Feb. 3, 2016), Rule 4. Accordingly, without a panel appointment, no single judge can act on the motions before the Court. *See Rules of Practice for the U. S. Court of Military Commission Review*, Rules 4(b), 21(f).¹⁵

Finally, as is evidenced by the lack of an appointment of a panel in Mr. al Hawsawi’s *Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Application for Stay of Proceedings*, which was filed almost two months ago,

¹⁴ Judge Frank D. Hutchison, Captain, U.S. Navy (Sworn as USCMCR Judge: November 2, 2018) and Judge Marcus N. Fulton, Captain, U.S. Navy (Sworn as USCMCR Judge: November 2, 2018). *See* <https://www.mc.mil/ABOUTUS/USCMCRJudges.aspx> Accessed 14 January 2019.

¹⁵ App. at A250 (CMCR Case No. 18-003, MEMORANDUM TO THE PARTIES).

the USCMCR remains unable to proceed in any matter involving Mr. Mohammad.¹⁶

C. Factual Support for Recusal or Further Discovery.

1. Military Judge Parrella’s Relationship to Trial Counsel

During *voir dire* of the Military Judge and through discovery provided by the Military Judge,¹⁷ Mr. Mohammad learned that Military Judge Parrella had been employed in the same component of the Department of Justice as members of the trial team that is prosecuting Mr. Mohammad – the Counterterrorism Section (CTS) of the National Security Division (NSD) of the Department of Justice (DOJ). Mr. Mohammad also learned that while assigned to the CTS, Military Judge Parrella litigated cases involving terrorism, including those involving “material support of terror.”¹⁸ Military Judge Parrella also had a close association with fellow Marine Corps Judge Advocate Jeff Groharing, one of the DOJ

¹⁶ *In Re Mustafa Ahmed Adam al Hawsawi* (USCMCR Case No.18-004); While the parties have filed briefs in the matter, the docket does not contain any indication of the appointment of a panel. *See* <https://www.mc.mil/Cases.aspx?caseType=cmcr> (last accessed 16 January 2019).

¹⁷ App at A251 (AE 001B).

¹⁸ App. at A116 (Transcript, 20478).

attorneys actively prosecuting Mr. Mohammad¹⁹ and “may have” socialized with another member of the trial counsel team, Mr. Clayton Trivett. *Id.*

Military Judge Parrella and Mr. Groharing have a relationship spanning nearly two decades.²⁰ They began a friendship after meeting through a mutual friend while they were both stationed in San Diego during the late 1990s and early 2000s, including at the time of the attacks of September 11, 2001.²¹ Although Military Judge Parrella recalls where Mr. Groharing was stationed in September 2001 and what he himself was doing at the time,²² Military Judge Parrella claimed that he had no memory of his feelings on September 11, 2001.²³ He did not remember if he ever expressed an opinion on what should happen to the perpetrators of the attacks, saying only that he “probably felt similar to what everybody else felt in the country.”²⁴ Military Judge Parrella then denied defense counsel the opportunity to ask further questions regarding his reaction to the attacks, stating only that his feelings could be left “outside.”²⁵

¹⁹ App. at A93-A94, A170-A171 (Transcript, 20455-20456, 20532-20533).

²⁰ App. at A141 (Transcript, 20503).

²¹ App. A147 (Transcript, 20509).

²² App. at A142 (Transcript, 20504).

²³ App. at A199-201 (Transcript, 20561-20563).

²⁴ *Id.*

²⁵ App. at A199-A201 (Transcript, 20561-20563).

Over the years, the relationship between Military Judge Parrella and Mr. Groharing developed further. For two years, Military Judge Parrella specifically selected Mr. Groharing to compete with him in the All-Military Wilderness Challenge on a four-person team they called the Dale Milton Racing Team.²⁶ The two other people on the team were described by Military Judge Parrella as his friends.²⁷ In a Navy News Service story, then-Major Parrella explained that the Wilderness Challenge “is all about teamwork. . . . That’s what we do every day in real life. You’ve got to work as a team.”²⁸

Referring to the 2008 competition, in which then-Major Parrella’s and then-Major Groharing’s team placed second,²⁹ Marine Major Jason Gaddy described the nature of the relationships that were reinforced by participating in the event: “‘This works right in the Marine Corps hands,’” Gaddy said. “‘We form in fire teams of four, that’s how we fight, that’s how we train, so this works right up our alley.’”³⁰

²⁶ App. A144-A147 (Transcript, 20506- 20509).

²⁷ App. at A145 (Transcript, 20507).

²⁸ *Camp Lejune [sic] Marines Win 2009 All-Military Wilderness Challenge*, Navy News Service, Oct. 20, 2009, available at https://www.navy.mil/submit/display.asp?story_id=48961.

²⁹ *The Call of the Wild*, Army Times, October 8, 2008, available at <https://static1.squarespace.com/static/5796de416b8f5b7c2ec12a2d/t/579ac7e437c581ffa04c4af8/1469761519298/JasonWatkinsWritingSamples.pdf>

³⁰ *2008 All-Military Wilderness Challenge Tests Service Teams*, Navy News Service, Story Number: NNS081016-20Release Date: 10/16/2008 6:16:00 AM, available at https://www.navy.mil/submit/display.asp?story_id=40350.

In 2014, both Military Judge Parrella and Mr. Groharing were assigned to the Counterterrorism Section at the National Security Division of DOJ.³¹ During this time, they socialized at Christmas parties, going-away parties, the Marine Corps Ball, and other social functions several times a year.³² Military Judge Parrella knew that Mr. Groharing was then a member of the prosecution team for the 9/11 case.³³

2. Military Judge Parrella’s Involvement with the Government Agencies Responsible for the Prosecution and Torture of Mr. Mohammad.

According to his military evaluation, or Fitness Report, during Military Judge Parrella’s time at the DOJ National Security Division Counter Terrorism Section, he “seamlessly integrated as a counterterrorism prosecutor.”³⁴ His duties there included “work with partners in the intelligence community including FBI, CIA, NSA, and DOD.”³⁵ The NSD official for whom then-Lieutenant Colonel Parrella worked reports that he “provided guidance in highly sensitive FBI operations, and drafted legal memoranda and recommendations for the Assistant Attorney General that assessed the prosecutorial merit of terrorism cases.” The same letter further details that he “prepared memoranda on topics of current

³¹ App. A169 (Transcript, 20531-20532).

³² App. A94 (Transcript, 20456).

³³ App. A93-A94, 173 (Transcript, 20455-20456, 20535).

³⁴ App. at A254 (AE 595B).

³⁵ *Id.*

relevance to counterterrorism prosecutors, which were widely distributed and read within CTS.”³⁶

Because of his work with the CTS, Military Judge Parrella believes he still holds a duty of loyalty and confidentiality to the FBI, the CIA, and the Department of Justice. His *voir dire* testimony is as follows:

Learned Defense Counsel (LDC) [MR. RUIZ]:

I understand. So as you sit here as a member -- as a judge on this case, you do still have an obligation to protect classified information that may have come from the CIA?

MJ [Col PARRELLA]: Yes. I mean, as far as I know, that obligation hasn't ended.

LDC [MR. RUIZ]: And the obligation would also extend to any privileged communications, work product that you worked on during your time with the Federal Bureau of Investigation? You still have a duty of loyalty and confidentiality to that organization, correct?

MJ [Col PARRELLA]: Yes.

LDC [MR. RUIZ]: Judge, this goes to a challenge based on your alignment with a party to this litigation. The CIA's involvement in this case is extensive and well documented. To the extent that you were embedded with the Department of Justice and had ease of access to CIA facilities, it's directly relevant to the questions that I'm asking. I don't see how that couldn't be more relevant.

MJ [Col PARRELLA]: Because I've answered the question several times now about my relationship with any of those

³⁶ *Id.*

agencies, the extent that I had any involvement with those agencies, what that involvement was, and all of what I did or didn't do while I was at the Department of Justice.³⁷

The involvement of the NSD, CIA and FBI in this case makes Military Judge Parrella's work with the NSD Counterterrorism Section especially noteworthy, and disqualifying. The Counterterrorism Section, along with the FBI, the NSA and the CIA, have been intricately involved in conducting the prosecution in this case, including numerous examples of misconduct.³⁸ Further, those agencies serve as the original classification authorities for classified information review for all materials created, presented, and disclosed as discovery in Mr. Mohammad's case. CTS attorneys appear before the presiding military judge, outside the presence of any defense counsel, to determine what discovery will be produced to the defense and what "substitutions" will be authorized under Rules of Military Commissions 505 proceedings. A reasonable person, knowing of Military Judge Parrella's work with the Counterterrorism Section would reasonably question his impartiality.

REASONS FOR GRANTING THE WRIT

In the Military Commission context, the All Writs Act empowers this Court to "issue all writs necessary or appropriate in aid of our jurisdiction such that we can issue a writ of mandamus *now* to protect the exercise of our appellate

³⁷ App. at A201-203 (Transcript 20563 – 65).

³⁸ App. at A263-272 (AE 530S pp. 14-23).

jurisdiction later.” *In re Al-Nashiri*, 791 F.3d 71, 75-76 (D.C. Cir. 2015) (internal quotations omitted) (original emphasis). In particular, this Court has reaffirmed “[m]andamus is an appropriate vehicle for seeking recusal of a judicial officer during the pendency of a case, as ordinary appellate review following a final judgment is insufficient to cure the existence of actual or apparent bias— with actual bias ... because it is too difficult to detect all of the ways that bias can influence a proceeding and with apparent bias because it fails to restore public confidence in the integrity of the judicial process.” *In re Mohammad*, 866 F.3d 73, 475 (D.C. Cir. 2017) (internal quotation marks and citations omitted.) *See also In re Khadr*, 823 F.3d 92, 97 n.2 (D.C. Cir. 2016).

While mandamus is often described as a “drastic and extraordinary remedy reserved for really extraordinary causes,” *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004), this is an extraordinary case in two respects. First, the inability of the statutorily required intermediate appellate court to hold proceedings involving Mr. Mohammad – for more than a year – raises significant constitutional questions that can be resolved in no other forum.

Second, questions of judicial disqualification present a special case in the law of mandamus. This is because questions of judicial ethics cast “a shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole. ... In recognition of this point we have been liberal in allowing

the use of the extraordinary writ of mandamus to review orders denying motions to disqualify.” *Union Carbide v. U.S. Cutting Service*, 782 F.2d 710, 712 (7th Cir.1986); *see also In re IBM*, 618 F.2d 923, 926-27 (2d Cir. 1980); *In re United States*, 666 F.2d 690, 694 (1st Cir. 1981); 9 MOORE’S FEDERAL PRACTICE ¶ 110.13[10]. In fact, when matters of judicial disqualification arise, some circuits hold that a litigant is obliged, on pain of waiver, to petition for mandamus. *See, e.g., United States v. Horton*, 98 F.3d 313, 316 (7th Cir. 1996).

On the merits, writs of mandamus turn on the three factors enumerated in *Cheney*, 542 U.S. at 380-81. And here, all three factors are readily satisfied. First, the issuance of the writ is the only means by which Mr. Mohammad can seek a remedy for Military Judge Parrella’s disqualifying apparent or actual bias because the USCMCR is not a functioning court due to the lack of a judge who can appoint a panel to hear writs or appeals in Mr. Mohammad’s case. Second, a fully functioning court system is clearly and indisputably required by both the 2009 Military Commissions Act and the due process and equal protection clauses of the Constitution. Third, issuance of the writ under these circumstances is not only appropriate, but necessary, to protect the integrity of the judicial system.

The Military Commissions Act of 2009 is structured to ensure an intermediate appellate court –the USCMCR -- is available to review interlocutory appeals by the government. 10 U.S.C. § 950f(a). Additionally, the USCMCR is

empowered under the All Writs Act to issue writs in aid of its jurisdiction. *In re Al-Nashiri*, 791 F.3d 71, 75-78 (D.C. Cir. 2015); USCMCR Rules of Practice Rule 22. However, since at least November 17, 2017 – more than a year ago – the USCMCR has been unable to proceed in the case of *Mohammad et. al.* Thus, as to Mr. Mohammad and his co-defendants, no intermediate appellate court exists despite the statutory requirements of the 2009 Act. This does two things: it makes it futile and therefore unnecessary for Mr. Mohammad to file this writ initially in the USCMCR,³⁹ and it renders constitutionally invalid the entire Military Commission system as pertains to this case, necessitating abatement until the USCMCR is restored in full as to this case.

THERE IS NO OTHER ADEQUATE MEANS OF OBTAINING RELIEF.

This Court has consistently recognized that challenges to a judge’s fitness can and should be raised as via a writ of mandamus at the earliest opportunity. *Mohammad*, 866 F.3d at 473; *see also In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006) (mandamus disqualifying a special master); *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004) (same); *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003) (mandamus disqualifying a court monitor). This is because “[w]hen the relief

³⁹ *See e.g. Law v. Howard University, Inc.*, 558 A.2d 355, 356 (D.C. 1989) (“It is well settled that no requirement of exhaustion of ... administrative remedies exists in ... disputes involving the government if the attempt to exhaust such remedies would be futile.”) and *Weinberger v. Wiesenfeld*, 420 U.S. 636, 641 n.8 (1975)(administrative appeal “would have been futile”).

sought is recusal of a disqualified judicial officer ... the injury suffered by a party required to complete judicial proceedings overseen by that officer is by its nature irreparable.” *Cobell*, 334 F.3d at 1139. And it is this “irreparable injury that justified mandamus.” *Al-Nashiri*, 791 F.3d at 79.

With actual bias, ordinary appellate review is insufficient because it is too difficult to detect all of the ways that bias can influence a proceeding. *See id.* (“[I]f prejudice exist[ed], it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.”) (quoting *Berger v. United States*, 255 U.S. 22, 36 (1921)). With apparent bias, ordinary appellate review fails to restore “public confidence in the integrity of the judicial process,” *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) — confidence that is irreparably dampened once “a case is allowed to proceed before a judge who appears to be tainted.” *In re Sch. Asbestos Litig.*, 977 F.2d 764, 776 (3d Cir.1992); accord *In re United States*, 666 F.2d 690, 694 (1st Cir.1981) (“Public confidence in the courts requires that [bias] question[s] be disposed of at the earliest possible opportunity.” (Alterations omitted.))

Normally, these issues would have been first resolved by the intermediate appellate court, the USCMCR. However, because that Court has been unable to

appoint a panel of judges in any matter involving Mr. Mohammad, it cannot do so. Leaving these issues to the future appellate review is especially inadequate here, given the current state of the USCMCR being unable to proceed on any substantive matters relating to Mr. Mohammad’s case. Accordingly, a writ of mandamus should issue.

A. A writ of mandamus from this Court is required because the unavailability of a remedy in the USCMCR renders the Military Commission system constitutionally infirm.

Congress authorized the creation of the USCMCR in the Military Commissions Act of 2006 (“MCA”), Pub. L. No. 109-366, 120 Stat. 2600, enacted in response to *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Although the D.C. Circuit had previously had direct appellate jurisdiction over certain Military Commission proceedings,⁴⁰ the MCA of 2006 directed the Secretary of Defense to establish the Court of Military Commissions Review (CMCR) as an intermediate appellate tribunal between the Guantanamo commissions and the D.C. Circuit, 10 U.S.C. § 950f(a) (2006) just as individual military branch Courts of Criminal Appeals (CCA) sit between trial level courts-martial and the United

⁴⁰ In the Detainee Treatment Act of 2005, Congress had for the first time conferred appellate jurisdiction over a Military Commission—although the scope of the D.C. Circuit’s review under the Act was quite narrow. See Pub. L. No. 109-148, § 1005(e)(3), 119 Stat. 2680, 2743; cf. *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864) (holding that Congress had not conferred appellate jurisdiction over Military Commissions).

States Court of Appeals for the Armed Forces (“CAAF”).

The CMCR was not just meant to play a similar hierarchical role as the CCAs; it was expressly modeled on them. *See In re al-Nashiri (“al-Nashiri II”)*, 835 F.3d 110, 122 (D.C. Cir. 2016), cert. denied, No. 16-8966, 2017 WL 1710409 (U.S. Oct. 16, 2017).

When Congress revised the MCA in 2009, Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2603, a number of the reforms were directed toward bolstering the independence of the CMCR vis-à-vis the Executive Branch. The 2009 Act therefore moved away from the CCA model in numerous, intentional respects, including the reconstitution of the intermediate appellate court as an Article I “court of record”⁴¹ and designating it as the United States Court of Military Review.⁴² These changes further evidenced Congress’ intention to provide intermediate appellate review for cases in the Military Commissions at Guantanamo Bay, Cuba.

It is true that the Federal Constitution does not require an appellate court or a right to appellate review at all in a court system. *See, e.g., McKane v. Durston*, 153 U. S. 684, 153 U. S. 687-688. However, once the legislative body does create an appellate system and a right to appellate review, it cannot discriminate among

⁴¹ 10 U.S.C. § 950f(a)

⁴² Hence the new acronym USCMCR.

those who seek to avail themselves of such review. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

“[A] country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law” cannot contenance a system where one set of defendants has intermediate appellate review and another set of defendants do not. *Id.* at 19.

After the Court ordered the recusal of Judge Silliman from the matter involving Mr. Mohammad due to his extra-judicial comments regarding Mr. Mohammad’s guilt and appropriate penalty, the other two judges on the panel assigned to his case recused themselves.⁴³ Although there are five judges currently appointed to the USCMCR, the statute requires the USCMCR to sit in panels of three judges, and requires that the Chief Judge or Deputy Chief Judge appoint a panel. However, as both the Chief Judge Paulette Burton and the Deputy Chief Judge Scott Silliman have been recused, as currently constituted, the USCMCR is not able to form a panel to adjudicate any claims raised by Mr. Mohammad.⁴⁴ Accordingly, Mr. Mohammad and his co-accused are left without meaningful

⁴³ App at A249-A250 (UCMCR 18-003 Memorandum).

⁴⁴ See RTMC 25-2.d. “*Chief Judge and Deputy Chief Judge.* The Secretary of Defense, or designee, will designate from among those individuals nominated by the Judge Advocates General and from among others qualified to serve as appellate military judges, individuals to serve as the Chief Judge and Deputy Chief Judge of the USCMCR.”

appellate review in the USCMCR. Because this is in contrast with other defendants being tried in the Military Commissions at Guantanamo Bay, Cuba⁴⁵, an unequal system has been created. The Due Process and Equal Protection Clauses, which “protect persons like petitioner” from disparate treatment, are violated by a system that provides intermediate appellate review to some detainees and not to others. *See Griffin*, 351 U.S. at 18.

It should be noted that the remedy for this structural error rests completely within the government’s control. Since November of 2017 – more than fourteen months ago – the Secretary of Defense has been on notice that unless and until he designated an Acting Chief or Deputy Chief Judge who can assign a panel, no further action could be taken by the USCMCR in what has been often called biggest terrorism trial in U.S. history.

Further, the government affirmatively chose not to do so – two new military judges were assigned to the USCMCR in November 2018, neither was designated as the Chief or Deputy Chief Judge. Further, in August, 2018, George Washington Law School Associate Dean Lisa M. Schenck was nominated by the President for a

⁴⁵ See e.g. *United States v Abd Al Rahim Hussayn Muhammad Al-Nashiri*, USCMCR No. 18-002, currently pending in this Court (*In re Abd Al-Rahim Hussein Muhammed Al-Nashiri*, Petitioner D.C. Circuit Case No. 18-1279).

position on the USCMCR, also without designation as Chief or Deputy Chief Judge, and her nomination lapsed at the end of the 115th Congress.⁴⁶

Because Mr. Mohammad’s due process and equal protection rights⁴⁷ have been violated, a writ of mandamus must issue, and Mr. Mohammad’s concurrently filed motion for stay must be granted.

B. Military Judge Parrella apparently has an unresolvable conflict of loyalties that require discovery pertaining to his conflict and potential disqualification.

Due process entitles Mr. Mohammad to “a proceeding in which he may present his case with assurance” that no member of the court is “predisposed to find against him.” *Marshall v. Jerrico, Inc.*, 446 U. S. 238, 242 (1980). When reviewing an assertion that a judge should be recused, “the Court asks not whether” a judge harbors an actual, subjective bias, but instead whether, as an

⁴⁶ Judge Frank D. Hutchison and Judge Marcus N. Fulton were sworn as USCMCR Judges on November 2, 2018. Dean Schenck was nominated, but not confirmed, and now her nomination has lapsed by Senate rule. *See* <https://www.congress.gov/nomination/115th-congress/2464?q=%7B%22search%22%3A%5B%22Lisa+M.+Schenck%22%5D%7D&s=4&r=1>

⁴⁷ It should also be noted that under the Geneva Conventions, the United States is required to try prisoners in a “regularly constituted court.” Arguments might be made about whether anything involved in the Military Commissions at Guantanamo Bay, Cuba are “regularly constituted” but even if they are, a system which authorizes an intermediate appellate court on the one hand, and fails to properly staff that court thereby making it unavailable to some litigants, cannot meet the requirements of the Conventions.

objective matter, “the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’” *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 881 (2009). Given Military Judge Parrella’s prior employment with the very division of the government that is now prosecuting Mr. Mohammad, and his self-described friendly association with a member of the prosecution team, any objective observer would see an unconstitutional potential for bias.

Further, as the Supreme Court noted in *Marshall v. Jerrico, Inc.*, 446 U. S. 238, (1980):

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. See *Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall 446 U. S. at 242.

Mr. Mohammad acknowledges that “Judicial rulings alone almost never

constitute a valid basis for a bias or partiality motion.” *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). However, the Supreme Court later clarified this holding: “A favorable or unfavorable predisposition can also deserve to be characterized as "bias" or "prejudice" because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment. (That explains what some courts have called the "pervasive bias" exception to the "extrajudicial source" doctrine.)” *Liteky v. United States*, 510 U.S. 540, 551 (1994)

Mr. Mohammad would note that this “stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,” *In re Murchison*, 349 U.S. 133, 136 (1955). As the Supreme Court noted, the disqualifying criteria “cannot be defined with precision. Circumstances and relationships must be considered.” Here, the circumstances of Military Judge Parrella’s prior service in the very division of the DOJ, and his close relationship with one of trial counsel, when considered together, and in light of the “heightened reliability” required in a capital case,⁴⁸ render his service as a judge disqualifying, and is required, under the holding of *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860

⁴⁸ See e.g. *See, e.g., Zant v. Stephens*, 462 U.S. 862, 884 (1983). In *Woodson v. North Carolina*, 428 U.S. 280 (1976).

(1988) in order to restore “public confidence in the integrity of the judicial process.”

While Mr. Mohammad does not aver that Military Judge Parrella has an explicit bias against him or the issues before him, the question of “implicit bias” due to his close relationship with the prosecution team is an area of concern. When queried by the Learned Counsel for co-defendant Ramzi bin al Shibh, James Harrington regarding implicit bias, Military Judge Parrella refused to answer the question:

LDC [MR. HARRINGTON]: Judge, do you know what implicit bias is?

MJ [Col PARRELLA]: Mr. Harrington, I want to know where we're going with this, so why don't we just get to where we're going. I'm not going to answer that question.⁴⁹

Military Judge Parrella did continue a colloquy with Mr. Harrington on the topic, but refused to acknowledge, or allow further questions on the topic of whether his prior work with the CTS of the DOJ and his relationship with the prosecution team could possibly have an impact on his consideration in the case.⁵⁰

Even in the brief time since Military Judge Parella refused to recuse himself

⁴⁹ App. A106 Transcript 20467.

⁵⁰ App. A106-A107 Transcript 20467-68.

and refused to grant a stay of proceedings while higher courts reviewed the issue of his recusal, he has issued orders in which his bias for the prosecutors and the government can be seen. Military Judge Parella dismissed a serious allegation of unlawful influence, one he recognized had the potential of “upending [this] historical capital trial,”⁵¹ finding it categorically incredible that “senior DoD officials” would perjure themselves in denying the allegations given that these officials had alternative “safe” (i.e., insusceptible of unfair influence allegations) alternative ways to accomplish their goal. In his ruling, he denied the defense request to call witnesses whose testimony would in fact defeat the “safety” of those alternatives. Most importantly, Military Judge Parella preemptively ruled before the defense reply brief was due, and without hearing defense arguments. He could not more clearly evince a biased attitude toward the defense: at best, disinterest, at worst, contempt. Attention to completion of the briefing cycle is a daily occurrence in the Military Commissions, and it was the previous military judge’s position that a matter was not ripe for argument *or adjudication* until either the briefing cycle was complete, or the right to do so had been waived by the affected party. This was not an error or oversight: Military Judge Parella ruled

⁵¹ App at A301 (AE 555EEE RULING Mr. al Baluchi's Motion to Dismiss For Unlawful Influence over Convening Authority and Legal Advisor, (10 January 2019) at p. 29.

against the defense before the defense brief was due.⁵²

Judge Parella’s unequal treatment of the government and the defense extends as well to his view of the nature of proffers. In AE 579L⁵³ the Military Commission accepted the government proffer for a material issue of fact (whether CIA Director Haspel makes decisions about torture evidence that is tendered to the defense). Yet in 555EEE Judge Parella dismissed a defense proffer thus: “[E]ven assuming those proffers to be true” (emphasis supplied). This after admonishing the defense in open court that “proffers are not evidence.” This disparate treatment of assertions by defense counsel, and those by the prosecutors is not, in and of itself, proof of actual bias, but it is one factor this Court should consider in determining whether further discovery is needed to ensure that the public’s perception of the fairness of the Military Commissions is not tainted by a Military Judge serving who has such strong ties to the government entities and prosecution team that is seeking the execution of Mr. Mohammad. As the Supreme Court reminds us, “Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.” *Burger v. Kemp*, 483 U.S. 776, 785 (1987).

⁵² See App at A319 (AE 615B, specifically fn 2).

⁵³ AE 579L RULING Motion to Dismiss All Charges For Unlawful Influence by Director of Central Intelligence Agency (3 December 2018) at 11.

CONCLUSION

For the reasons provided above, this Court should grant the writ of mandamus ordering abatement of Military Commission proceedings in this case unless and until the USCMCR is able to assign a panel to address the merits of contested issues raised in the Military Commission case of *United States v. Khalid Shaikh Mohammad et al.* Mandamus is the only available remedy to address motions seeking discovery and recusal of the Military Judge, Colonel Keith A. Parrella, from serving as a judge in Mr. Mohammad's Military Commission because Mr. Mohammad has no remedy or availability of redress in the USCMCR.

Respectfully submitted,

//s//

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2019, copies of the foregoing Motion for Stay of

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//s//
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**UNITED STATES COURT
OF MILITARY COMMISSION REVIEW**

IN RE
MUSTAFA AHMED ADAM
AL HAWSAWI,

Petitioner.

**Mr. al Hawsawi's Petition
for Extraordinary Relief
in the Nature of a Writ of Mandamus
and
Application for Stay of Proceedings**

U.S.C.M.C.R. No.-----

Arraigned at Guantanamo
Bay Naval Station, Cuba,
on May 5, 2012

Presiding Judge:
Colonel Keith Parrella, U.S.M.C.

PETITION FOR WRIT OF MANDAMUS

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**UNITED STATES COURT
OF MILITARY COMMISSION REVIEW**

IN RE
MUSTAFA AHMED ADAM
AL HAWSAWI,

Petitioner.

**Mr. al Hawsawi's Petition
for Extraordinary Relief
in the Nature of a Writ of Mandamus
and
Application for Stay of Proceedings**

U.S.C.M.C.R. No.-----

Arraigned at Guantanamo
Bay Naval Station, Cuba,
on May 5, 2012

Presiding Judge:
Colonel Keith Parrella, U.S.M.C.

**PETITION FOR A WRIT OF MANDAMUS, AND INCORPORATED BRIEF TO
ENJOIN THE MILITARY COMMISSION FROM PROCEEDING ABSENT RECUSAL
OF THE MILITARY JUDGE**

Statement of the Issue and Specific Relief Sought

Pursuant to the U.S. Constitution, 28 U.S.C. § 1651(a), and *In re Al-Nashiri*, 791 F.3d 71, 75-78 (D.C. Cir 2015), the defense for Mr. Mustafa al Hawsawi requests that this Court order the recusal of Military Judge Parrella from the case of *United States v. Khalid Sheikh Mohammad, et al.*, based on the appearance of bias.

Application for Stay of Proceedings

A separate pleading seeking a stay of the proceedings and rulings below is being filed concurrently with the present Petition.

Previous History of the Case

For an entire year, from 2014 to 2015, Colonel Parrella worked in the very same division that is inextricably intertwined with the prosecution of this case -- the National Security Division (NSD) of the U.S. Department of Justice, which has been materially supporting the prosecution of Mr. al Hawsawi since the inception of this case.¹ During the same year that Colonel Parrella worked at the NSD, prosecutors who belong to that division were actively prosecuting Mr. al Hawsawi and his co-accused. Those same attorneys continue to prosecute Mr. al Hawsawi today. It matters not whether Colonel Parrella worked directly on the case, for he worked in that office – in essence, in the same “firm” as the prosecution. One of those prosecutors moreover, a long-standing member of the prosecution team, was teammates with Colonel Parrella (in 2007-2008) on a four-member team of Marines that Colonel Parrella captained, competing in the Wilderness Challenge. This two-day all-military team athletic endurance event in which they competed together promised that there is “perhaps no better way to build camaraderie and teamwork than to endure a collective physical and psychological beating.”² During voir dire conducted in the military commission, Colonel Parrella himself agreed that this event built camaraderie and teamwork.³

While Colonel Parrella was with the National Security Division – barely more than three years ago -- he worked hand-in-hand with the FBI and CIA.⁴ It is uncontested that these agencies are heavily invested in the prosecution of this case; they are both, moreover, incontrovertibly documented as having improperly interfered with the on-going Military Commissions

¹ In voir dire, Judge Parrella estimated that the National Security Division’s Count Terrorism Section had approximately 60-70 attorneys while he was there. App. 1 (Transcript, 20491).

² App. 2-3 (Watkins, J., “*The Call of the Wild*,” Military Times, Oct. 20, 2008).

³ App. 107-111 (Transcript, 20506 - 20510)

⁴ App. 153-154 (Transcript, 20557 - 20558).

proceedings. The CIA was caught manipulating the external audio and video feed of the Commissions in January 2013.⁵ The FBI was caught infiltrating and monitoring a defense team in rank violation of the attorney-client privilege.⁶ Furthermore, the CIA is a central figure and, in effect, a party to these proceedings, as that agency was directly responsible for the rendition, torture and interrogation of Mr. al Hawsawi from early 2003 to late 2006 – a key aspect of this case.⁷

When pressed during voir dire concerning his access to CIA facilities while he was with the National Security Division, Colonel Parrella was evasive and refused to answer counsel's questions.⁸ Colonel Parrella also admitted on the record that he has a continuing duty of loyalty and confidentiality arising from his former work with the National Security Division, including his association with the CIA.⁹ While he minimized this admission and fact in his ruling denying Petitioner's motion to recuse, the fact remains that he has on-going obligations to these agencies. Additionally, Colonel Parrella does not rule out the Department of Justice or the FBI in his future job searches.¹⁰

Colonel Parrella's answers during voir dire underscore the reasons for concerns about the appearance and reality of bias. His conspicuous evasiveness regarding his access to the CIA while he was working there on litigation for the NSD presents one concern; his inability to answer logical questions about how he felt on 9/11,¹¹ strains credibility. Moreover, one of Colonel Parrella's first orders of business as a judge in the military commission has accentuated

⁵ App. 94-95 (1445 - 1446).

⁶ App. 91-93 (AE 292H).

⁷ See Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (Dec. 9, 2014) (hereinafter "SSCI Executive Summary.").

⁸ App. 86-89 (Transcript, 20563 – 20566).

⁹ App. 87 (Transcript, 20564).

¹⁰ App. 100-101 (Transcript at 20545 - 20546); App. 7 (AE 595O, at 4); App. 28 (AE 595I (MAH), at 15).

¹¹ App. 100-101 (Transcript, 20558 - 20563).

the already prevalent appearance of bias, as he has *sua sponte* conducted an *ex parte* session with the prosecution in which he specifically asked the prosecution to provide him with an unchallenged, private recitation of critical facts surrounding the history of classified litigation in this case;¹² contrary to his assertion, Judge Parrella did, in fact, issue an order to vastly expand the *ex parte* proceeding initially planned.¹³

From Colonel Parrella's prior work in the same prosecution office, to his teaming up socially with a long-standing prosecutor, to his on-going duties of loyalty and confidentiality to the FBI -- the appearance of bias cannot be cleansed here. These facts, individually or taken together, create an irreparable and unacceptable appearance of bias, particularly in these military commissions that are especially sensitive to public scrutiny of how justice will be done with respect to a seminal event that impacted the entire nation. The Guantanamo military commissions are observed by non-governmental organizations, victim family members and the press, who travel to the remote location; the proceedings are also broadcast by closed-circuit television to three locations in the United States, where members of the public and press can watch live. It is not an overstatement to say that these military commissions, created for the purpose of adjudicating the crime of the century, will be studied in perpetuity and the quality of justice delivered will stand as either a testament to long-cherished principles of justice, or as an indelible stain to be regretted forever. Furthermore, because this is a capital case in which the prosecution aims to kill Mr. al Hawsawi, the Supreme Court unequivocally mandates heightened scrutiny and reliability; a case rife with the appearance of bias will not withstand such scrutiny nor deliver the

¹² App. 64-64 (AE 542Q (Amended Order)).

¹³ The Government sought an *ex parte* proceeding for purposes of having the Commission review potential summaries of classified information to be turned over to the Defense. Colonel Parrella's Order (AE 542Q), however, instructed the Prosecution to give him an expanded, *ex parte* presentation about the history of classified litigation in the case.

necessary reliability.¹⁴

Recusal is necessary because the circumstances are such that Colonel Parrella's impartiality is reasonably in question – the facts fully meet the standard for recusal. Colonel Parrella's personal assessment and assertions of impartiality cannot cure the indelible appearance of bias. The law provides that the rules for recusal must be broadly construed as they are intended to promote public confidence in the integrity of the military judicial process. Given this mandate in the law and the facts present here, Colonel Parrella must be recused from adjudicating this case to protect Due Process and assure the heightened standards constitutionally required of a capital prosecution.¹⁵

Statement of Facts

In the Military Commission, Mr. al Hawsawi moved for Military Judge, Colonel Keith Parrella, to recuse himself based on the appearance of bias.¹⁶ On November 19, 2018, Colonel Parrella denied Mr. al Hawsawi's motion.¹⁷

The facts and background leading to the present writ are largely undisputed.¹⁸ Colonel Keith Parrella, USMC, was detailed as a judge to the Military Commission case of United States v. Khalid Sheikh Mohammad, et al., on August 27, 2018. He took over following more than six years of pretrial litigation; Colonel James Pohl, USA, had presided as the military judge from arraignment, in May 2012.

Colonel Parrella's biography reveals that:

In July 2014, Lieutenant Colonel Parrella was selected for the Commandant of the Marine Corps' (CMC) Fellowship program in fulfillment of his top-level school requirement. As a CMC Fellow,

¹⁴ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); U.S. Const. Amend. VIII.

¹⁵ *Id.*; U.S. Const. Amend V.

¹⁶ App. 14-62 (AE 595I (MAH)); App. 65-73 (AE 595K (MAH)).

¹⁷ App. 4-13 (AE 595O).

¹⁸ App. 5 (AE 595O, at 2, where Colonel Parrella sets out the facts he adopts in his ruling.)

Lieutenant Colonel Parrella worked in the Department of Justice's (DOJ) National Security Division as a Counterterrorism Prosecutor and with the Office for Overseas Prosecutorial Development Assistance and Training (OPDAT) within DOJ's Criminal Division.¹⁹

Notably, during the application process for placement in this fellowship, then-Lieutenant Colonel Keith Parrella specifically listed the Department of Justice as one of his preferences for assignment.²⁰

The National Security Division is a product of post-9/11 congressional action. The Congress mandated the creation of the Department of Justice's National Security Division (NSD) in 2006, with passage of a reauthorization of the PATRIOT Act.²¹ Per its own mission statement, the focus of the NSD Counterterrorism Section is on:

[...] the design, implementation, and support of law enforcement efforts, legislative initiatives, policies and strategies relating to combating international and domestic terrorism. The Section seeks to assist, through investigation and prosecution, in preventing and disrupting acts of terrorism anywhere in the world that impact on significant United States interests and persons. The Section's responsibilities include:

- i. investigating and prosecuting domestic and international terrorism cases;
- ii. investigating and prosecuting terrorist financing matters, including material support cases;
- iii. participating in the systematic collection and analysis of data and information relating to the investigation and prosecution of terrorism cases;
- [. . .]
- iv. investigating and prosecuting matters involving torture, genocide and war crimes that are linked to terrorist groups and individuals;
- [. . .]

¹⁹ App. (AE 001B).

²⁰ App. 74 (Transcript, 20544).

²¹ See USA PATRIOT Reauthorization and Improvement Act, Pub. L. No. 109-177, § 507A, 120 Stat. 192 (2006).

- v. assisting the Anti-Terrorism Task Force Coordinators in the U.S. Attorney's Offices through the Regional Coordinator system by facilitating information sharing between and among prosecutors nationwide on terrorism matters, cases and threat information;
- [. . .]
- vi. sharing information and trouble-shooting issues with international prosecutors, agents and investigating magistrates to assist in addressing international threat information and litigation initiatives; and
- vii. providing legal advice to federal prosecutors concerning numerous federal statutes.²²

Since at least the beginning of the prosecution of this case in April 2012, when charges were referred, the NSD's Counter Terrorism Section has been inextricably involved with the prosecution of Mr. al Hawsawi. The NSD has been and continues to be represented by a number of prosecutors on this case.²³ Although Colonel Parrella asserts as the only relevant fact that he did not work directly on the prosecution of the case against Mr. al Hawsawi, the reality remains that when he was working with the NSD's Counter Terrorism Section and collaborating with the FBI and Central Intelligence Agency (CIA) in that work -- as he acknowledges having done in his own ruling²⁴ -- while the NSD was prosecuting this case.

It is well established on the record that, along with the NSD, the FBI, the National Security Agency (NSA) and the CIA are heavily implicated in the prosecution of this case. The

²² DOJ, National Security Division, About the Office, available at: <https://www.justice.gov/legal-careers/job/law-student-volunteer-springsummerfall-counterterrorism-section>; *see also*, Remarks of Assistant Attorney General John P. Carlin, 10-year Anniversary Conference of the National Security Division, Sept. 14, 2016, available at: <https://www.justice.gov/opa/speech/assistant-attorney-general-john-p-carlin-delivers-opening-remarks-national-security>.

²³ App. 85 (AE 003D) (indicating that DOJ prosecutors Mr. Edward Ryan, Joanna Baltes, Jeffrey Groharing, and Clayton Trivett were detailed to this case, with at least three of these specifically assigned to the NSD Counter-Terrorism Section); *see also*, AE 003D, Trial Counsel Detailing Memorandum, dated 28 April 2014 (detailing a LT Kiersten Korczynski to this case). While then-Lieutenant Colonel Parrella was at the NSD Counter Terrorism section, Ms. Korczynski went from prosecuting the present case as military attorney, to becoming a civilian prosecutor with NSD, working this case. *See United States v. Mohammad et al.*, Transcript, at 20567 (10 Sept. 2018).

²⁴ App. 5 (AE 595O, at 2); App. 20 (AE 595I (MAH), at 7).

FBI's improper entanglement with this case has included its well-documented recruitment of an informant, inside one of Mr. al Hawsawi's co-accused's legal team, who systematically informed on the activities of the 9-11 defense teams and siphoned attorney-client privileged information to the FBI.²⁵ Investigation regarding this infiltration of the defense took place specifically when Colonel Parrella was at NSD. Similarly, the CIA was implicated in the unauthorized monitoring and censoring of Military Commission hearings when, in January 2013, the CIA unilaterally cut the live feed to civilian observers of this case, including the media, victim family members and non-governmental organizations; the military judge, who had till then been kept unaware of the CIA's control of the courtroom, admonished this misconduct publicly on the record.²⁶

Colonel Parrella "seamlessly integrated as a counterterrorism prosecutor," according to his military "Fitness Report" from his time at NSD.²⁷ The report also lists his primary duties,

²⁵ See AE 292, series, arising from an Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, filed 13 Apr. 2014, available at www.mc.mil; App. 14 (AE 292H) (ordering the appointment of a Special Review Team upon finding that a member of a defense team was interrogated by the FBI and required to sign a non-disclosure agreement regarding his passing information to the FBI about the defense team.)

²⁶ App. 94-95 (Transcript 1445 – 1446) (emphasis added):

[Due to the security button being pushed, chief security advisor and attorney advisor conferred with the military judge.]

Military Judge [COL POHL]: Trial counsel, note for the record that the 40-second delay was initiated, not by me. I'm curious as to why. What Mr. Nevin said is, if we need to go into – I got the issue. What Mr. Nevin said is simply on the caption of his motion that is unclassified. If you don't feel we can discuss this now, let me know, but I'm just trying to figure out.

Trial Counsel [MS. BALTES of the National Security Division Counter Terrorism Section]: We can address it in 505(h).

MJ [COL POHL]: *I want to address this too because I want -- if some external body is turning the commission off under their own view of what things ought to be, with no reasonable explanation because I, there is no classification on it, then we are going to have a little meeting about who turns that light on or off.*

TC [MS. BALTES]: I understand and I can provide additional explanation at the 505(h) hearing.

²⁷ App. 96-97 (AE 595B).

which included “work with partners in the intelligence community including FBI, CIA, NSA, and DOD.” An evaluation letter from the civilian NSD official for whom Colonel Parrella worked at NSD reports that he “provided guidance in highly sensitive FBI operations, and drafted legal memoranda and recommendations for the Assistant Attorney General that assessed the prosecutorial merit of terrorism cases.” The same letter further details that he “prepared memoranda on topics of current relevance to counterterrorism prosecutors, which were widely distributed and read with the CTS [the Counter Terrorism Section].”²⁸

With regard to his access to the CIA during his time at NSD, Colonel Parrella was evasive in the face of counsel’s voir dire questions. While Judge Parrella, in ruling on Petitioner’s motion to recuse him, disputed this point,²⁹ the transcript demonstrates that he refused to answer counsel’s voir dire questions, after he had acknowledged carrying out a document review at the CIA:

Learned Defense Counsel (LDC) [MR. RUIZ]: Okay. The -- a little bit more about your document review. I think you indicated you conducted a document review at a CIA facility or a warehouse?

MJ [Col PARRELLA]: Correct.

LDC [MR. RUIZ]: Can you tell us a little bit more about that?

MJ [Col PARRELLA]: No.

LDC [MR. RUIZ]: Is that because you don’t want to or you just don’t remember or you’ve got a duty to protect that information?

MJ [Col PARRELLA]: I don’t remember. I don’t remember which case it was. And yeah, I honestly don’t know that I could give you much details, and to the extent I might be able to, they are probably classified.

LDC [MR. RUIZ]: I understand. So as you sit here as a member -- as a judge on this case, you do still have an obligation to protect

²⁸ *Id.*

²⁹ App. 6 (AE 595O, at 3).

classified information that may have come from the CIA?

MJ [Col PARRELLA]: Yes. I mean, as far as I know, that obligation hasn't ended.

LDC [MR. RUIZ]: And the obligation would also extend to any privileged communications, work product that you worked on during your time with the Federal Bureau of Investigation? You still have a duty of loyalty and confidentiality to that organization, correct?

MJ [Col PARRELLA]: Yes.

LDC [MR. RUIZ]: In terms of the -- I understand you don't remember much about the CIA facility. Do you remember if you had to be escorted or if you had the opportunity to enter that facility say, for instance, with your own swipe card or if there were particular procedures ----

MTC [MR. TRIVETT]: Objection, relevance.

MJ [Col PARRELLA]: Sustained. Let's move on, Mr. Ruiz.

LDC [MR. RUIZ]: Judge, this goes to a challenge based on your alignment with a party to this litigation. The CIA's involvement in this case is extensive and well documented. To the extent that you were embedded with the Department of Justice and had ease of access to CIA facilities, it's directly relevant to the questions that I'm asking. I don't see how that couldn't be more relevant.

MJ [Col PARRELLA]: Because I've answered the question several times now about my relationship with any of those agencies, the extent that I had any involvement with those agencies, what that involvement was, and all of what I did or didn't do while I was at the Department of Justice.

LDC [MR. RUIZ]: Well, the question was: Did you have access to their facility without an escort? Could you come and go as you pleased?

MJ [Col PARRELLA]: But that's -- I don't see that as relevant, so we're going to move on. I've described my relationship with that agency, what it was and what it wasn't. So whether I had access to the facility unescorted or escorted I don't see as relevant.³⁰

³⁰ Transcript, at 20563 – 65.

Colonel Parrella is retirement eligible from the U.S. Marine Corps and, according to his voir dire responses and by his own recognition in his ruling,³¹ he has not determined whether, upon leaving the Marine Corps, he would seek employment with the Department of Justice, including the Federal Bureau of Investigation, or the National Security Agency.³² Also during voir dire, Colonel Parrella admitted knowing and/or having worked at NSD when several current and a former prosecutor appearing in this case were working there as well.³³ His contacts with a NSD prosecutor on this case are long-standing. In 2007 and 2008, then-Major Jeff Groharing and then Lieutenant-colonel Parrella, fellow Marine attorneys, joined a four-member team of Marines which Lieutenant-colonel Parrella organized to compete in a two-day athletic endurance event.³⁴ Both years, with judge Parrella as team captain, he competed alongside Mr. Groharing³⁵ on the Dale Milton racing team in this Wilderness Challenge, a race the military's Morale, Welfare and Recreation office holds in West Virginia for active duty military members. Colonel Parrella has publicly emphasized the team-building value of this race: "What we do day-to-day is a lot about teamwork and this [Wilderness Challenge] is all about teamwork...That's what we do every day in real life. You've got to work as a team."³⁶ In voir dire, Colonel Parrella acknowledged the camaraderie and teamwork that existed with Mr. Groharing and his team.³⁷ Notably also in 2008, while he was still an active duty Marine and while he was on Colonel Parrella's team, Major

³¹ App. 8 (AE 595O, at 4); App. 28 (AE 595I (MAH), at 15).

³² Transcript, at 20545-46.

³³ Transcript, at 20455-57; 20502-10; 20566-67.

³⁴ App. 107 (Transcript, 20506).

³⁵ Mr. Groharing is now a civilian attorney on this case; he continues to serve in the Marine Reserves, notably as Military Judge.

³⁶ App. 112-113 ("*Camp Lejune [sic] Marines Win 2009 All-Military Wilderness Challenge*," Navy News Services, Oct. 20, 2009, available at https://www.navy.mil/submit/display.asp?story_id=48961).

³⁷ App. 110 (Transcript, 20509).

Groharing – who now is one of the lead prosecutors litigating this case -- was a military prosecutor detailed to the first round prosecution of this case.

Colonel Parrella's voir dire answers about the 9/11 attacks were evasive. At the time of the attacks on 11 September 2001, he was on active duty in the U.S. Marine Corps. He claimed, in answer to a question about his reaction after 9/11, that it was difficult for him to remember his exact emotions. He said "I probably felt similar [sic] to what everybody else felt in the country," and "I don't have a specific recollection."³⁸ When pressed further on this issue, he said "I think the feeling is – of the country, if you want me to try to ascribe, you know, what that was, I think it was probably anger and just shock."³⁹

The involvement of the NSD, CIA and FBI in this case makes Colonel Parrella's work with the NSD Counter Terrorism Section especially noteworthy, and absolutely disqualifying. The Counter Terrorism Section, along with the FBI, the NSA and the CIA, are steeped in the process of reviewing information and determining what discovery in this case, including classified discovery, falls within the Government's obligation to turn over to the defense. Under the Rules for Military Commissions, NSD attorneys appear before the military judge, outside the presence of any defense counsel (i.e., *ex parte*), to determine what discovery will be produced to the defense.⁴⁰ Thus, Colonel Parrella's undue familiarity with the prosecution must be examined with the context of the litigation in this specific case in mind. The volumes of information associated with this case and which the government deems classified means that the prosecution makes regular and extensive use of the *ex parte* process, under Military Commission Rule of Evidence 505, for evaluating classified information that may be provided to the defense in

³⁸ App. 114-115 (Transcript, 20468 – 69).

³⁹ *Id.*

⁴⁰ *See* R.M.C. 505.

discovery. To-date, there have been 116 notices of *ex parte* proceedings since the beginning of the case.⁴¹ Because the defense is not permitted to be at these proceedings, the law puts the judge in the shoes of the defense to look out for defense theories, defense interests, in the discovery process.⁴² In the context of this procedural requirement, Colonel Parrella's voir dire answers about his on-going obligation to the FBI are particularly disconcerting. During voir dire about whether he had access to information classified by the CIA, and whether he had signed non-disclosure agreements while working at NSD, Colonel Parrella acknowledged that he has an on-going "duty of loyalty and confidentiality" to the FBI.⁴³ He further admitted he has a continuing duty to protect privileged and attorney-work product information he learned during his tenure at the NSD.⁴⁴

Although his history with the NSD, CIA and FBI are of sufficient concern to present grounds for recusal, Colonel Parrella has also now made a ruling that demonstrates the practical realities of the due process challenge raised in this petition, respecting the appearance of impartiality. Colonel Parrella *sua sponte* ordered and conducted, over defense objections, an expanded *ex parte* hearing regarding all prior *ex parte* sessions that already occurred before this Commission.⁴⁵ Specifically, Judge Parrella asked for an *ex parte* session so the prosecution would give him a personal presentation. His order instructed that "[t]he presentation will include, but shall not be limited to, the following topics:

⁴¹ App 234-236.

⁴² *United States v. Amawi*, 695 F.3d 457, 471 (6th Cir. 2012).

⁴³ App. 87 (Transcript, 20564).

⁴⁴ *Id.*

⁴⁵ In his ruling refusing to recuse himself, AE 595O, Colonel Parrella disputes the *sua sponte* nature of his order for an expanded *ex parte* M.C.R.E. 505 hearing; his reasoning ignores the fact that *he* asked the government to answer the above-listed broad line questions on an *ex parte* basis. But for his *sua sponte* order, the *ex parte* hearing would have been about a discrete area of discovery and review of a discrete set of Government proposed summaries, in conformance with the Rule, and as the prosecution initially requested. See AE 542K (Gov Amend), Unclassified Notice of *Ex Parte*, *In Camera* Under Seal Classified Filing (25 Sep 2018) (the underlying *ex parte* filing is not available to the Defense); AE 542Q, Order for *Ex Parte* Presentation (9 Oct 2018).

- a. The general history and procedural posture of all Government filings requesting summaries, substitutions, or other relief from the Commission pursuant to M.C.R.E. 505;
- b. The substance of all declarations of knowledgeable United States officials possessing authority to classify information that have been filed with the Commission; and
- c. All systems or schemes used by the Government for the protection of classified places or people used in M.C.R.E. 505 filings.⁴⁶

Under the factual circumstances laid out above, Colonel Parrella’s reaching out to and relying on the prosecution for a private session about classified discovery litigation history in this case, raises yet more due process problems.

Statement of Jurisdiction

Under the All Writs Act, this Court “may issue all writs necessary or appropriate in aid of [its] ... jurisdiction.”⁴⁷ In conjunction with the All Writs Act, the Military Commissions Act, gives this Court jurisdiction over a final judgement rendered by a military commission.⁴⁸

REASONS FOR GRANTING THE WRIT

LAW AND ARGUMENT IN SUPPORT OF MR. AL HAWSAWI’S PETITION FOR WRIT OF MANDAMUS

A. Due Process Protects Against Even the Appearance of Bias from a Judge.

For an entire year, Colonel Parrella worked with the very division that is materially supporting the prosecution of this case, the National Security Division. And, during that very

⁴⁶ App. (AE 542Q (Amended Order)), M.C.R.E. 505(f)(2)(B). In the face of defense objections to this sweeping order for an *ex parte* hearing, Colonel Parrella amended his order to take out the phrase “shall not be limited to,” from the prefatory language, leaving the remaining broad language above.

⁴⁷ 28 U.S.C. § 1651(a) (“The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”).

⁴⁸ See 10 U.S.C. § 950g(a); see also, *In re al Nashiri*, 791 F.3d at 75 (finding the MCA gives this Court the independent grant of jurisdiction necessary to consider a Petition for a Writ of Mandamus).

same year, prosecutors past and present on this case who work in that division were prosecuting Mr. al Hawsawi and his co-accused. Even as he sits on the bench below now, he retains duties of confidentiality with respect to the agencies he worked for during that time, duties which can conflict with his obligations as a judge. Moreover, Colonel Parrella is personally familiar, and is closely acquainted through shared experience, with at least one of the long-standing NSD prosecutors on this case. During the same time he was at NSD -- which was barely more than three years ago -- Colonel Parrella also worked along-side agencies, notably the FBI and CIA, which have actively interfered with the prosecution of this case; investigation regarding aspects of these infiltrations was conducted specifically when Colonel Parrella was with the NSD.

“[T]he promotion of public confidence in the integrity of the judicial process is an important public policy,”⁴⁹ and “[t]he Military Commission process by any measure is a unique circumstance meriting heightened consideration of the public confidence.”⁵⁰ Judge O’Toole so- found in recusing himself before this Court, *even* when actual bias and the appearance of bias were not directly in question as to him. In that case, *United States v. al Bahlul*, appellant challenged Judge O’Toole because he was no longer a judge on the Navy-Marine Corps Court of Criminal Appeals, a status that appellant argued was a requirement to be a judge in the Court.⁵¹ Without conceding appellant’s argument, Judge O’Toole recognized and focused his ground for self-recusal on the importance of preserving the validity of the system and public trust. He reasoned that “the greater context of the Military Commission process” must be considered.”⁵²

⁴⁹ *United States v. al Bahlul*, 807 F. Supp. 2d 1115, 1122 (C.M.C.R. 2011), *vacated on other grounds in United States v. al Bahlul*, 840 F.3d 757 (D.C. Cir 2016) (en banc), *citing Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988).

⁵⁰ *Bahlul*, 807 F.Supp. 2d at 1123.

⁵¹ *Id.* at 1118-19 (C.M.C.R. 2011), *vacated on other grounds in United States v. al Bahlul*, 840 F.3d 757 (D.C. Cir 2016) (en banc).

⁵² *Bahlul*, 807 F. Supp. 2d at 1123.

At the fundamental outset, it is undeniable that a defendant has a constitutional right to an impartial judge.⁵³ But actual lack of impartiality is not the sole question. The U.S. Supreme Court holds that “due process is denied by circumstances that create *the likelihood or the appearance* of bias.”⁵⁴ In remanding a capital case due to a Pennsylvania Supreme Court judge’s failure to recuse himself, the U.S. Supreme Court recently admonished:

An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.⁵⁵

The insistence on the appearance and reality of impartial justice must be unwavering, especially here, where the quality of justice will be measured in large part by the manner in which it is delivered. Federal courts emphasize that the question to ask in determining when a judge should be recused is not whether the judge was specifically involved in the litigation at issue; rather, as the Supreme Court has held, the focus is “whether the relationship between the judge and an interested party was such as to present a risk that the judge’s impartiality in the case at bar might reasonably be questioned by the public.”⁵⁶ Claims of judicial bias must be assessed not only individually, but in the aggregate.⁵⁷ “In considering whether this standard is met, the Court must consider the totality of the circumstances and cannot pick apart the alleged basis for recusal.”⁵⁸ Here, this standard applies with greater force because of the capital context of this

⁵³ *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

⁵⁴ *Peters v. Kiff*, 407 U.S. 493, 502 (1972).

⁵⁵ *Williams v. Pennsylvania*, ___ U.S. ___, 136 S.Ct. 1899, 1909 (2016).

⁵⁶ *Liljeberg*, 486 U.S. at 858–62; *see also*, *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015); *Philip Morris USA, Inc. v. United States FDA*, 156 F. Supp. 3d 36 (D.D.C. 2016).

⁵⁷ *See United States v. Laureano-Perez*, 797 F.3d 45, 74 (1st Cir. 2015) (holding that claims of judicial bias must be considered individually, and in the aggregate as well.).

⁵⁸ *In re Marshall*, 403 B.R. 668 (C.D. Cal. 2009) (*citing United States v. Bremers*, 195 F.3d 211, 227, note 2 (5th Cir. 1999) (applying a totality of the circumstances test to recuse a trial judge in a criminal case), *United States v. Furst*, 886 F.2d 558, 583 (3rd Cir. 1989) (same)).

case, where the Eighth Amendment requires heightened need for reliability in the process as a whole.⁵⁹

The precedents from the highest military court, the Court of Appeals of the Armed Forces (CAAF), are clear about the perniciousness of the appearance of bias, as that court holds that ““what matters is not the reality of bias or prejudice but its appearance.””⁶⁰ The CAAF instructs that “recusal based on the appearance of bias is intended to ‘promote public confidence in the integrity of the judicial process.’”⁶¹ The policy reason behind this broad recusal standard is that the military justice system is particularly susceptible to outside interference, and the “military judges serve as the independent check on the integrity of the court-martial process. The validity of this system depends on the impartiality of military judges in fact and in appearance.”⁶²

The American Bar Association’s (ABA) Model Code of Judicial Conduct offers further direction regarding the recusal obligation of a military judge. And, of note here where the judge is a military judge, the ABA Code of Judicial Conduct is adopted in the Rules of Professional Conduct for military attorneys, and is relied on by military courts.⁶³ It requires that:

A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances:
[...]

⁵⁹ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (finding that “the penalty of death is qualitatively different from a sentence of imprisonment.”). Subsequent capital cases before the Supreme Court have recognized this heightened standard in adjudicating questions about Sixth Amendment rights, and Due Process. See *Estelle v. Smith*, 451 U.S. 430 (1981); *Caldwell v. Mississippi*, 471 U.S. 320 (1985).

⁶⁰ *Hasan v. Gross*, 71 M.J. 416, 419 (C.A.A.F. 2012), quoting *Litek v. United States*, 510 U.S. 540, 548 (1994).

⁶¹ *Id.* at 418, quoting *Liljeberg*, 486 U.S. at 858, n.7.

⁶² *Id.* at 418–19.

⁶³ See *United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001) (citing ABA Code of Judicial Conduct Canon 3 (2000), which mandates a judge “shall perform the duties of judicial office impartially...”); Dept. of the Navy JAG Instruction 5803.1E (2015), para. 7 (“7. Judicial Conduct. To the extent that it does not conflict with statutes, regulations, or these Rules, the American Bar Association Model Code of Judicial Conduct (Code of Judicial Conduct) (reference (k)) applies to all military and appellate judges and to all other covered USG attorneys performing judicial functions under the JAG’s supervision within the DON [Department of the Navy].”); cf. R.M.C. 109(a) (making the Judge Advocate of each military service responsible for the professional supervision and conduct of military judges in Military Commissions).

(6) The judge: (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association.⁶⁴

The commentary to this Rule further specifies that ‘a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific provisions [outlining bases for disqualification] apply.’⁶⁵ Colonel Parrella acknowledged during voir dire that the ABA Code of Judicial Conduct applies to him, since it forms the basis for the ethical rules applicable to attorneys with the Department of the Navy.⁶⁶

In the Military Commission system, Congress itself declared that protecting against the appearance of bias is central, when Congress included safeguards against the same in the Military Commissions Act (MCA). The MCA of 2009 codifies the importance of avoiding bias and the appearance of bias, instructing that “a military judge *shall* disqualify himself or herself in any proceeding in which that military judge’s impartiality *might* reasonably be questioned.”⁶⁷ Again, this statutory language shows what the Supreme Court already said: that appearance matters in the drive to achieve justice, and that a demonstration of actual bias is not necessary for there to be a violation.⁶⁸ Furthermore, “the greater context of the Military Commission process” matters, as Judge O’Toole ruled in this Court, and it constitutes “by any measure [...] a unique circumstance meriting heightened consideration of the public confidence.”⁶⁹

Ultimately, it is this Court’s very own precedent which demonstrates how to properly apply the rules to protect the integrity of Military Commissions proceedings. The *al Bahlul* decision highlights the importance of avoiding provoking further questions about the legitimacy

⁶⁴ App. 148 151 (ABA Model Code of Judicial Conduct, Rule 2.11 (Disqualification), para. (A)(6)(emphasis added).

⁶⁵ *Id.*

⁶⁶ App. 152 (Transcript, 20484), wherein Colonel Parrella refers to Navy JAG Instruction 5803.1E.

⁶⁷ R.M.C. 902(a) (emphasis added).

⁶⁸ *Williams*, 136 S.Ct. at 1909.

⁶⁹ *Id.* at 1123.

of the system. In recusing himself even where actual bias and the appearance of bias were not directly at issue, Judge O'Toole rightly concluded:

I will not permit the distraction of a collateral issue related to the legitimacy of one judge, and by extension, the legitimacy of the USCMCR, to intrude into the time and resources of this Court. I am equally unwilling to contribute to anything less than full public confidence in the integrity of the military commission process, and the legitimacy of this Court as it renders its first substantive rulings.⁷⁰

The issue here, however, is not collateral; it is of direct impact, and Judge O'Toole's rationale has greater importance where the case serves as a crucible for the legitimacy of the commission system, and the death penalty hangs in the balance. Moreover, the heightened scrutiny owed in a capital case is a vital component of the analysis necessary here to protect Due Process.⁷¹

B. Col. Parrella's Role as a Prosecutor with the NSD, and his Familiarity with a Current Case Prosecutor, Create at least the Appearance of Bias, Such that Recusal Is Necessary to Protect Due Process.

The likelihood of bias, or at least the appearance of bias, is indelible here because Colonel Parrella worked with the same office that has been materially supporting the prosecution of Mr. al Hawsawi throughout the pendency of these proceedings. That office was prosecuting Mr. al Hawsawi and his co-accused at the time Colonel Parrella was there; Colonel Parrella participated in repeated social activities with one of the current prosecutors,⁷² who was prosecuting this very case at the time;⁷³ Colonel Parrella worked hand-in-hand with the FBI and the CIA, and has acknowledged a continuing duty of loyalty and confidentiality;⁷⁴ he was

⁷⁰ *Id.*

⁷¹ *See Woodson*, 428 U.S. at 305; *Caldwell*, 471 U.S. 320.

⁷² App. 107-109 (Transcript, 20506-20509).

⁷³ App. 84 (AE 003).

⁷⁴ App. 87 (Transcript, 20564).

evasive in answering questions regarding his access to CIA facilities;⁷⁵ and, he was unbelievably forgetful and reluctant, in regards to questions about his feelings at the time of the 9/11 events.⁷⁶ These circumstances alone violate Due Process and eviscerate the appearance of fairness required by law.⁷⁷ Colonel Parrella, who worked in the same office as prosecutors on this case, now erroneously believes he can preside, and project the appearance of fairness and impartiality which the law demands. However, affirmations that he had no direct involvement with this prosecution while at NSD, and boilerplate assertions of impartiality, cannot cure the indelible appearance of bias that arises from his relationship to the prosecution and to the NSD.

The National Security Division is an interested party here, as the entity that has been materially supporting the prosecution of Mr. al Hawsawi and his co-accused since at least 2012. The NSD counts two present court-room prosecutors on this case,⁷⁸ and two former prosecutors, all of whom were with the NSD when Colonel Parrella was there. As the transcripts in this case prove, these prosecutors have been directly aware and involved in extrajudicial control of the courtroom; one of them took charge and later briefed the judge, after the live-feed was cut by outside government parties who acted without the judge's knowledge or oversight.⁷⁹ Furthermore, Colonel Parrella's own biography and evaluation underscore that the NSD performs its functions alongside the FBI and other agencies, including the CIA. His U.S. Marine Corps evaluation demonstrates that he played an integral role in supporting the NSD mission,

⁷⁵ App. 86-65 (Transcript 20563-65).

⁷⁷ See *Laureano-Perez*, 797 F.3d at 74 (claims of judicial bias must be considered individually, and in the aggregate as well.); *Bremers*, 195 F.3d at 227, note 2 (applying a totality of the circumstances test to recuse a trial judge in a criminal case), *Furst*, 886 F.2d at 583 (same).

⁷⁸ The Defense is aware that government prosecutors not appearing in court also work on this case; the Defense is not apprised, however, of the specific additional number of NSD prosecutors who fit in that category.

⁷⁹ App. 94-97 (Transcript, 1445-46) (where a prosecutor with the NSD Counter Terrorism Section demonstrated on the record in this case her awareness that third parties were able to control the live-feed to the courtroom, unbeknownst to the judge himself); see also, Classified Addendum.

“seamlessly integrat[ing] himself as a full-fledged counterterrorism prosecutor”⁸⁰ and working specifically with the FBI and CIA.⁸¹ He had the requisite clearances to come and go from the headquarters of that office.⁸² He worked “hand in hand” with prosecutors on the cases to which he was assigned.⁸³ During that same time period, the same office was supporting the capital prosecution of Mr. al Hawsawi and the co-accused. Now, attorneys from that office, who worked for that office when Colonel Parrella was there and were prosecuting this case at that same time, are appearing before him as they continue to prosecute this case. The claim that there were in essence two separate prosecutor’s offices is not in congruence with the facts as they appear to be. That is, on information and belief, Mr. Groharing, Ms. Baltes and Ms. Korczynski have actively prosecuted both NSD terrorism cases and the Military Commission prosecution on-going below; the prosecution itself acknowledged the free flow of counsel between NSD and the Commission prosecution team, during voir dire.⁸⁴ Petitioner’s defense team is unaware of the prior or current existence of any Memoranda of Agreement that would delineate the bright line demarcation that Judge Parrella seeks to advance. Ultimately, these prosecutors are in the best position to affirm or deny to this Court the breadth and extent of their involvement in NSD and Military Commissions prosecutions.⁸⁵

In a very recent state capital case, the Florida Supreme Court remanded for review of claims challenging a judge’s failure to recuse herself.⁸⁶ The judge was to review petitioner Reed’s post-conviction claims, although she had been a capital prosecutor in the office that

⁸⁰ App. 96-97 (AE 595B)

⁸¹ See Attachment C.

⁸² App. 153 (Transcript, 20557).

⁸³ App. 153-154 (Transcript, 20557–58).

⁸⁴ App. 88-89 (Transcript, 20566 -20567); App. 85 (AE 003D).

⁸⁵ See App. 6 (AE 595O, at 3).

⁸⁶ *Reed v. Florida*, Case No. SC17-896 (Fla. Sup. Ct., Nov. 15, 2018) (per curiam).

prosecuted Reed, at the same time his case was on post-conviction review.⁸⁷ On that basis, Reed moved to recuse the judge from considering his claims. Although the judge had not actually prosecuted the case herself, the Florida Supreme Court found that Reed’s post-conviction litigation had taken place during a time when the judge was a prosecutor in the same capital prosecution office that was opposing him, and she was “working with the attorneys who prosecuted petitioner and represented the State in collateral proceedings.”⁸⁸ Even though the judge herself was not assigned as a prosecutor on Reed’s case, the Florida Supreme Court ordered her recused, finding that the judge “was actively prosecuting capital cases during the period when Reed’s prosecution was ongoing.”⁸⁹ The court took into account “the unique aspects of death penalty cases,” in deciding that the case must be assigned to a new judge.⁹⁰ The parallels between this Florida case and Judge Parrella’s former role as a “seamlessly integrated” prosecutor with the National Security Division – a division that focuses on the prosecution of international terrorism cases – are unmistakable. Colonel Parrella was actively prosecuting terrorism cases for the NSD, while NSD prosecutors were pursuing the present capital cases against Mr. al Hawsawi. Given this relationship, and the well-recognized, unique demands of death penalty prosecutions, Judge Parrella’s recusal is required.

There is even more, however, than Judge Parrella’s tenure at NSD to consider. Judge Parrella also has a personal connection with a long-standing prosecutor on this case, Mr. Groharing. That prosecutor has been associated with the prosecution, first as a Marine lawyer like Colonel Parrella himself,⁹¹ and then (since at least 2012 when the present charges were

⁸⁷ *Id.* at 2.

⁸⁸ *Id.* at 3.

⁸⁹ *Id.* at 6.

⁹⁰ *Id.*

⁹¹ See Att. D, Memorandum dated 16 May 2008, Office of the Chief Prosecutor, detailing Maj. Jeffrey D. Groharing, USMC (*United States v. Mohammed, et al.*, AE 14).

referred), as a NSD Counter Terrorism Division prosecutor. The two have known each other as Marine lawyers,⁹² in social settings,⁹³ and participated together for two consecutive years on a four-person Marine team racing a military endurance challenge.⁹⁴ This competition was specifically designed to engender a bond of camaraderie and teamwork, forged through the crucible of shared experience in competition. A fact reflected in the event's billing as presenting "no better way to build camaraderie and teamwork than [enduring] a collective physical and psychological beating."⁹⁵ Colonel Parrella acknowledged the teamwork and camaraderie these events developed.⁹⁶ On information and belief,⁹⁷ Mr. Groharing is the prosecutor on this case chiefly charged with interfacing with the various agencies (particularly the NSA and CIA) and the military judge in *ex parte* proceedings under M.C.R.E. 505 process.⁹⁸

Federal courts' application of the ABA Canon of Judicial Conduct is instructive here.⁹⁹ In *Preston v. United States*, the court reversed a verdict when a judge failed to recuse himself under circumstances where the association with his prior law firm was less clear than Colonel Parrella's association here, with the NSD.¹⁰⁰ There, the judge had been of counsel at a firm representing a company that was not even a party to the wrongful death case before the judge. The company was potentially responsible for indemnifying the government, which was a party to

⁹² App. 100-101; 103-111; 88-89 (Transcript, at 20455-57; 20502-10; 20566-67).

⁹³ App. 107-111 (Transcript 20506 - 20509).

⁹⁴ *Id.*

⁹⁵ Watkins, J., "The Call of the Wild," Military Times, Oct. 20, 2008.

⁹⁶ See Facts Section, paragraph g., *citing* Transcript, at 20506.

⁹⁷ The defense is aware, from observation in court, that Mr. Groharing handles the vast majority of open and closed session arguments that address classified matters, including the CIA's Rendition, Detention and Interrogation program.

⁹⁸ *Cf. Williams*, 136 S.Ct. at 1907 - 08 (Recognizing that inadvertent improper influence arises when a former prosecutor moves to the bench. The Supreme Court ruled an appellate judge should have recused himself from reviewing a trial court's findings of *Brady* violations made against a former prosecutor he had supervised before becoming an appellate judge; the Court found that "it would be difficult for a judge in [that] position not to view [...] findings as a criticism of his former office.")

⁹⁹ See generally, 28 U.S.C. § 455(a), (b).

¹⁰⁰ *Preston v. United States*, 923 F.2d 731 (9th Cir. 1991).

the case, if the government was found liable in the case before the judge.¹⁰¹ The court ruled that the mere fact that the judge's former firm represented the company while he was at the firm, and that the company could be adversely affected by the verdict, created an appearance of bias which warranted recusal.¹⁰² The appellate court, even though it recognized that the judge conducted the trial professionally, ordered a new trial; it did so because it found that under the facts presented, a reasonable person would question the impartiality of the judge.¹⁰³

The facts are far stronger here. In the present instance, the judge's association with one party is not as removed as it was in the *Preston* case. Colonel Parrella is directly connected to the NSD – and the NSD is a party in this case as the prosecuting entity whose specific mission explicitly encompasses supporting the prosecution of this case.¹⁰⁴ Colonel Parrella prosecuted for the NSD while it was prosecuting Mr. al Hawsawi here; he was a “seamlessly integrated”¹⁰⁵ as prosecutor in that office, not merely ‘of counsel,’ as the judge was in *Preston*. The NSD is a litigation engine just as a law firm is; Colonel Parrella worked for and supported that engine, as it materially supported the prosecution of this case. Without question, Colonel Parrella “was associated with a lawyer who participated substantially as a lawyer in the matter during such association.”¹⁰⁶ The assertion that, as a government prosecutor, this rule does not apply here,¹⁰⁷ is incorrect. The Department of the Navy's Rules of Professional Responsibility incorporate the

¹⁰¹ *Id.* at 734.

¹⁰² *Id.* at 734–35.

¹⁰³ *Id.* at 734, note 4.

¹⁰⁴ See Dept. of Justice, National Security Division, “About the Office,” available at: <https://www.justice.gov/legal-careers/job/law-student-volunteer-springsummerfall-counterterrorism-section> (listing as the NSD's first mission: “The Section's responsibilities include: i. investigating and prosecuting domestic and international terrorism cases...”)

¹⁰⁵ App. 96-97 (AE 595B).

¹⁰⁶ App. 148-151 (ABA Model Code of Judicial Conduct, Rule 2.11(A)(6)).

¹⁰⁷ App. 12 (AE 595O, at 9).

ABA Code of Judicial Conduct,¹⁰⁸ and the Code is clear that recusal is required under these circumstances.¹⁰⁹

The standard Judge Parrella advanced in his ruling below ignores the Rules of Professional Responsibility and the ABA Code of Judicial Conduct; instead, he would require a demonstrated “aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.”¹¹⁰ That language, however, comes from a concurring opinion, in a non-capital case; and, the decision in that case was also modified. Over time, since the Court used the language that Judge Parrella chose to rely on to deny Petitioner’s motion for recusal, the Supreme Court has recognized that higher requirements, aimed at eliminating even the appearance of judicial bias, are driven by state practices and professional standards developed.¹¹¹ Judge Parrella did not heed the Court’s directive that “[o]ne must also take into account the judicial reforms the States have implemented to eliminate even the appearance of partiality.”¹¹² The Court specifically references the ABA Code of Judicial Conduct and its test for the appearance of impartiality: “whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”¹¹³ Conspicuously, Judge Parrella’s ruling also ignores the most recent Supreme Court decision in the line of cases addressing the appearance of judicial bias, *Williams v. Pennsylvania*.¹¹⁴ In *Williams* – which is a capital case -- Justice Kennedy emphasized the

¹⁰⁸ See Dept. of the Navy, Judge Advocate General Instruction 5803.1E (2015), Reference (k).

¹⁰⁹ App. 148-151 (ABA Model Code of Judicial Conduct, Rule 2.11(A)(6)).

¹¹⁰ App. 12 (AE 595O, at 9) (the Ruling omits a citation. The quote is found in *Liteky v. United States*, 510 U.S. 540, 558 (1994), and comes from a concurring opinion (Kennedy, J.)).

¹¹¹ *Caperton v. AT Massey Coal Co Inc.*, 556 U.S. 868, 888 (2009).

¹¹² *Id.*

¹¹³ *Id.*, citing ABA Model Code of Judicial Conduct, Canon 2A, Commentary (“whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”)

¹¹⁴ *Williams*, 136 S.Ct. 1889.

necessity for the “appearance of neutrality,”¹¹⁵ and expounded on the value of the appearance of neutrality as “not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication.”¹¹⁶

What Judge Parrella’s ruling disregards ultimately, in addition to the capital context of the case below, is “[t]he greater context of the Military Commission process.”¹¹⁷ The fact that the legitimacy of the system is in serious doubt is central to the inquiry at hand.¹¹⁸ The facts here conclusively establish the appearance of bias. Applying the test military and federal courts have set for identifying a due process violation in the appearance of bias,¹¹⁹ here a reasonable person looking at the circumstances would question the judge’s impartiality; the circumstances present here, with Colonel Parrella sitting as judge, offer less than “full public confidence” in the integrity of it process.¹²⁰ “Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.”¹²¹ Judge Parrella’s continued presence on the bench will irreparably compromise the legitimacy of these proceedings. Each ruling will be scrutinized, not only on the letter of the law, but on whether it was the product of improper interests. Ultimately, the legitimacy of this trial will be compromised.

¹¹⁵ *Id.* at 1909.

¹¹⁶ *Id.*

¹¹⁷ *Bahlul*, 807 F. Supp. 2d at 1123.

¹¹⁸ See Anderson, S.R., “*Something Is Rotten with the State of Military Commissions*,” Lawfare, Mar. 2, 2018, available at <https://www.lawfareblog.com/something-rotten-state-military-commissions> Alliance for Justice, “*Will Military Commissions Act Gain Legitimacy?*” July 7, 2009 (commenting on Senate hearing that led to the 2009 amendments to the Military Commissions Act), available at <https://www.afj.org/blog/will-military-commissions-act-gain-legitimacy>

¹¹⁹ See *Sullivan*, 74 M.J. at 453; *Philip Morris*, 156 F. Supp. 3d 36.

¹²⁰ See *Williams*, 136 S.Ct. at 1907.

¹²¹ *Id.*

C. The Extensive Ex Parte Communication Which this Case Engenders Between the Judge and the Prosecution, Itself, Warrants Recusal Given Colonel Parrella's Associations with the Prosecution.

Under Military Commission Rule of Evidence 505, the judge is solely responsible for the numerous *ex parte* reviews of classified information that prosecutors, including NSD prosecutors, provide to him. These *ex parte* sessions offer the prosecution a unique opportunity to engage with the judge and advocate for the Government's position regarding discovery, without the presence of any defense advocate. In these *ex parte* sessions, because of the absence of the defense, it is the judge's – here Colonel Parrella's – singular and critical responsibility to assess the legal sufficiency of the government's classified discovery productions, and to determine the adequacy of any summaries the government seeks to offer as substitutes for classified information.¹²² In this role, the judge stands in the shoes of defense counsel, and must advocate for the defense's interests to engage the prosecution regarding the discovery in question.

The volumes of information associated with this case which the government deems classified means that the prosecution makes regular and extensive use of the *ex parte* process, under Military Commission Rule of Evidence 505. The extent of *ex parte* hearings between the judge and the prosecution in this case is of concern under any circumstance. It is exponentially so here, because of Colonel Parrella's associations with NSD, and with Prosecutor Groharing. As noted in the facts of this Petition, the prosecution has filed 116 *ex parte* proceeding requests under M.C.R.E. 505¹²³ -- proceedings which under Rule 505 a judge must grant, and in which the judge must serve as the guard of the constitutional rights of the defense. The Sixth Circuit has

¹²³ App. 234-236 (also available at www.mc.mil).

emphasized the special nature of this role, in the context of reviewing a trial court's *ex parte* decisions under the Classified Information Procedures Act:

Rather than neutrally deciding disputes with an open record based on the adversarial process, we must place ourselves in the shoes of defense counsel, the very ones that cannot see the classified record, and act with a view to their interests. Acting as if we were in essence standby counsel for the defendants, we must determine what may be 'relevant and helpful' to them.¹²⁴

A judge at an *ex parte* hearing where the defense is excluded is therefore in the critical position of having not only to weigh the information the prosecution presents, but of protecting the defense's interests, because of the defense's absence. The judge must thus be more than impartial: the judge must be an advocate who looks out for the defense's interests in examining prosecution redactions of information from discovery documents. The judge must challenge the adequacy of prosecution proposed summaries for classified evidence. Due Process requires not only that the judge be sufficiently detached from the prosecution, but that it appear to the accused and the public that the judge can conduct such *ex parte* hearings in an appropriate manner that protects the defense. Highlighting the peculiarity of these classified information *ex parte* hearings between the court and the prosecution, the Sixth Circuit noted "[t]his is not a position that we relish."¹²⁵

And now, Mr. al Hawsawi and his defense team, as well as the public, must accept that Colonel Parrella, the former NSD prosecutor who worked "hand in hand" with the FBI and CIA,¹²⁶ who routinely ran, hiked, biked, paddled with one of the case prosecutors with the single objective of building camaraderie and teamwork, will sit as a bulwark for the defense in the countless *ex parte* proceedings to come. Whether one labels the facts here as presenting actual

¹²⁴ *United States v. Amawi*, 695 F.3d at 471.

¹²⁵ *Id.*

¹²⁶ App. 153-154 (Transcript, 20557-58).

bias or apparent bias -- bias is present. The judge's impartiality must be beyond reproach, and that goal is simply unachievable here. Colonel Parrella must be ordered recused.

D. Colonel Parrella Has Conflicting Duties of Loyalty and Professional Responsibility That Require His Recusal.

Colonel Parrella's impartiality is compromised because he owes NSD, a former client, a continuing duty of confidentiality.¹²⁷ He himself acknowledged having a continuing duty of loyalty to keep the FBI's confidences, learned while he worked with NSD.¹²⁸ The same FBI that infiltrated 9/11 defense teams. And the same FBI whose agents conduct, in connection with Petitioner's interrogation, is now in question.¹²⁹

Judge Parrella reiterates this duty in his ruling, although he seeks to minimize it by confining it to an on-going duty to protect classified information.¹³⁰ Not only does he fail to address the professional responsibilities he retains because he served at NSD, but he entirely disregards that the FBI had a role in the CIA-run black sites,¹³¹ that the FBI was present and was involved in developing intelligence. These issues are and will be central to the prosecution of Petitioner's case. Indeed, these issues are integral to Judge Parrella's predecessor's Order suppressing the statements the FBI obtained from Petitioner and his co-accused; this is the same suppression order Judge Parrella has now acquiesced, at the prosecution's request, to reconsider.¹³²

Because of his service at the NSD, Judge Parrella has knowledge of information and processes about that client. Under the Rules of Professional Conduct, he has the obligation not to

¹²⁷ See Center for Professional Responsibility, American Bar Association, Annotated Model Rules of Professional Conduct, Rule 1.9 (Duties to Former Clients) (7th ed. 2011).

¹²⁸ App. 87 (Transcript, 20564).

¹²⁹ See Classified Appendix; App. 163-198 (AE 524LL).

¹³⁰ App. 7-8 (AE 595O, at 4-5).

¹³¹ SSCI Executive Summary, at 31 (reporting on the conduct of FBI interrogations at "Detention Site Green.")

¹³² See AE 524NN, Government Motion to Reconsider AE 524LL (filed 22 Aug. 2018).

disclose, to the disadvantage of the NSD, any of the information and processes he learned while working there.¹³³ For example, if the prosecution asserts a position on behalf of NSD, and Colonel Parrella knows differently based on other information he learned while working at NSD, he cannot use that other information he knows to rule against the Prosecution. Colonel Parrella's professional ethical obligations to the NSD, his former client, inherently prevent him from acting independently and impartially as a judge on this case because that former client, the NSD, is a party now appearing before him. These duties of professional responsibility underscore the concrete problems, as well as the appearance of bias, that now would infect this case and will continue, if Colonel Parrella is not recused.

Aggravating the concern, and despite his after-the-fact attempt to change the record,¹³⁴ Judge Parrella also acknowledged during *voir dire* that he has an on-going duty of loyalty to the FBI to protect information he learned about, or from, that agency while working with NSD.¹³⁵ As detailed above moreover, the CIA is directly implicated in Mr. al Hawsawi's imprisonment and torture, and has a particular interest in discovery matters related to this case.¹³⁶ The challenge entailed in Colonel Parrella maintaining his continuing duty of loyalty, while attempting to sit as an impartial judge who also appears impartial, was spotlighted during *voir dire*; Colonel Parrella could not answer direct questions about a document examination he conducted at a CIA facility, while he was with the NSD.¹³⁷ He declined to answer questions about that document review,

¹³³ See Dept. of the Navy, Judge Advocate General Instruction 5803.1E, ¶1.8(b):

No covered attorney shall: [...] use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by these Rules.

¹³⁴ App. 7-8 (AE 5950, at 4-5).

¹³⁵ App. 87 (Transcript 20564)

¹³⁶ See e.g., Mazzetti, M., Hulse, C., "Inquiry by CIA Affirms It Spied on Senate Panel," New York Times, July 31, 2014 (detailing how "the CIA penetrated a computer network used by the Senate Intelligence Committee in preparing its damning report on the CIA's detention and interrogation program."), available at <https://www.nytimes.com/2014/08/01/world/senate-intelligence-committee-cia-interrogation-report.html>.

¹³⁷ See App. 13 (Transcript, at 20563 – 65).

even a question as simple as whether or not he had unescorted access to the CIA offices.¹³⁸ With a sitting judge having dual obligations of loyalty, the judge's impartiality might reasonably be questioned.¹³⁹ Colonel Parrella's on-going duty of loyalty to the CIA and the NSD is in conflict with his duties as a judge to remain impartial and fair, and to avoid the appearance of bias. The constitutionally necessary appearance of impartiality cannot exist under these circumstances.

E. Conclusion: Colonel Parrella's Recusal is Required to Protect Due Process.

The legitimacy of the Military Commissions has been in question since their incipience.¹⁴⁰ The CIA's control of the courtroom in Guantanamo,¹⁴¹ the FBI's infiltration of the defense,¹⁴² the monitoring of defense counsel meetings,¹⁴³ have only fueled the controversy surrounding commissions.¹⁴⁴ In this environment, the analysis must consider what Judge O'Toole highlighted in recusing himself from the CMCR, "the greater context of the Military Commission process,"¹⁴⁵ and the loss of what public confidence there is in the integrity of the

¹³⁸ *Id.*

¹³⁹ *Liljeberg*, 486 U.S. at 858–62.

¹⁴⁰ *See, e.g.*, Corn, G.S., Hansen, V., "Military Commissions: War Crimes Courts or Tribunals of Convenience?" *Jurist*, Feb. 21, 2007, available at <https://www.jurist.org/commentary/2007/02/military-commissions-war-crimes-courts/>; Wittes, B., "Trial by Fire: How Military Commission Work, and Why They Fail," Brookings Institution, Feb. 14, 2008, available at <https://www.brookings.edu/opinions/trial-by-fire-how-military-commissions-work-and-why-they-fail/>

¹⁴¹ *See* Sorkin, A.D., "A Red Light at Guantanamo," *The New Yorker*, Jan. 29, 2013, available at <https://www.newyorker.com/news/daily-comment/a-red-light-at-guantanamo> (commenting, "The military-tribunal system has undergone a few revisions since the early Bush years, mostly thanks to the Supreme Court, but the government is still pretty much making it up as it goes along, in a way that is painful to watch.")

¹⁴² App. 91-93 (AE 292H, Order).

¹⁴³ Finn, P., "At Guantanamo, microphones hidden in attorney-client meeting rooms," *Washington Post*, Feb. 12, 2013, available at https://www.washingtonpost.com/world/national-security/2013/02/12/812c7662-7552-11e2-95e4-6148e45d7adb_story.html?noredirect=on

¹⁴⁴ *See* Rosenberg, C., "Guantanamo Judge Furious After Surprise Censorship During 'Black Sites' Testimony," *Miami Herald*, Jan. 29, 2013 (reporting judge's, observers' reaction to extra-judicial control of courtroom "live" feed to the public), available at <https://www.businessinsider.com/guantanamo-censorship-of-cia-black-site-testimony-carol-rosenberg-miami-herald-2013-1>; Rhode, D., "Special Report: How a 5-minute phone call put 9/11 trial on hold for more than a year," *Reuters*, Oct. 2, 2015 (reporting on challenge of proceeding with this case due to delays caused by FBI infiltration into defense team), available at <https://www.reuters.com/article/us-usa-gitmo-trials-specialreport/special-report-how-a-5-minute-phone-call-put-9-11-trial-on-hold-for-more-than-a-year-idUSKCN0RW1N120151002>

¹⁴⁵ *Bahlul*, 807 F. Supp. 2d at 1123.

system. “[T]he appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part.”¹⁴⁶

The import and complexity of the present case cannot be blithely cast aside. . The impact of decisions made now will reverberate later. The consequences of Colonel Parrella failing to recuse himself are significant, since a new trial is the appropriate remedy for the failure to recuse a judge where there is an appearance of bias.¹⁴⁷ The Fifth Circuit’s admonition is appropriate to highlight at this juncture:

the unfairness and expense which results from disqualification . . . can be avoided in the future only if each judge fully accepts the obligation to disqualify himself in any case in which his impartiality might reasonably be questioned.¹⁴⁸

Whether examined individually or in the aggregate, the facts here demand recusal.¹⁴⁹ To ignore the reasonable questions about his impartiality that Colonel Parrella’s association with NSD raises is to invite the strong possibility that this highly complex and already lengthy case will have to be retried in the future.¹⁵⁰

“[M]ilitary judges serve as the independent check on the integrity of the court-martial process. The validity of this system depends on the impartiality of military judges in fact and in appearance.”¹⁵¹ Federal and military courts apply an objective standard for determining where there is an appearance of bias, asking whether a reasonable person, knowing all the circumstances, would conclude that the military judge’s impartiality might reasonably be

¹⁴⁶ *Williams*, 136 S.Ct. at 1909.

¹⁴⁷ *Id.* (reviewing a state Supreme Court decision and holding that “an unconstitutional failure to recuse constitutes structural error, even if the judge in question did not cast a deciding vote.”)

¹⁴⁸ *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1115 (5th Cir. 1980).

¹⁴⁹ See *Laureano-Perez*, 797 F.3d at 74; *Bremers*, 195 F.3d at 227, note 2; *Furst*, 886 F.2d at 583.

¹⁵⁰ *Williams*, 136 S.Ct. at 1909 - 10 (“When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.”)

¹⁵¹ *Hasan*, 71 M.J. at 418–19.

questioned.¹⁵² The law also provides that the rules for recusal must be broadly construed as they are intended to promote public confidence in the integrity of the military judicial process.¹⁵³ A reasonable person examining the circumstances described here would conclude that the judge's impartiality is reasonably in question. Given the mandate to construe the rules broadly, the military judge should be recused.

//s//
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Learned Defense Counsel for
Mr. al Hawsawi

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¹⁵² *Sullivan*, 74 M.J. at 453; *Philip Morris*, 156 F. Supp. 3d 36.

¹⁵³ *See Sullivan*, 74 M.J. at 453–454.

CERTIFICATE OF COMPLIANCE WITH RULE 15(g)

This brief complies with the type-volume limitations of Rule 15(g) because it does not exceed 14,000 words. This brief contains 10,890 words.

 //s//

WALTER B. RUIZ
Learned Defense Counsel for
Mr. al Hawsawi

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered via electronic mail to the prosecution on the 27th day of November 2018. The Classified Addendum and Appendix were delivered by hand on this same date.

 //s//
WALTER B. RUIZ
Learned Defense Counsel for
Mr. al Hawsawi



OMC-TJ

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

MEMORANDUM FOR: CONVENING AUTHORITY, OFFICE OF THE MILITARY COMMISSIONS

SUBJECT: *UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI*

DATE: 8 April 2012

In accordance with Rule for Military Commissions 503(b)(1) of the Manual for Military Commissions, I am hereby detailing myself, effective this date, to *United States v. Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi BinalShibh, Ali Abdul Aziz Ali, Mustafa Ahmed Adam al Hawsawi*.

A handwritten signature in cursive script, appearing to read "James L. Pohl".

JAMES L. POHL
COL, JA, USA
Chief Judge
Military Commissions Trial Judiciary



OMC-TJ

27 August 2018

MEMORANDUM FOR COLONEL KEITH A. PARRELLA, USMC

SUBJECT: *UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI*

1. In accordance with Rule for Military Commissions (R.M.C.) 503(b)(1) of the Manual for Military Commissions, you are hereby detailed as the military judge, effective this date to *UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI*.
2. On 30 September 2018, the term of my current voluntary retiree recall will expire. I have made a personal decision not to request an additional voluntary retiree recall and thus I will leave active duty after 38 years. To be clear, this was my decision and not impacted by any outside influence from any source. Given my departure from active duty it is appropriate to detail a new military judge to this case. The detailing decision memorialized herein was made solely by me in my capacity as Chief Trial Judge of the Military Commissions.
3. A copy of this detailing memorandum will be marked as an appellate exhibit and placed in the record of trial.

//s//
JAMES L. POHL
COL, JA, USA
Chief Judge
Military Commissions Trial Judiciary

cc:
Convening Authority, Military Commissions
Chief Defense Counsel, Military Commissions
Chief Prosecutor, Military Commissions

*Deleted additional language "you are hereby" from paragraph 1.

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1 [R.M.C. 803 session was called to order at 0903, 10
2 September 2018.]

3 MJ [Col PARRELLA]: Good morning. This commission is
4 called to order. I, Colonel Keith Parrella, United States
5 Marine Corps, have replaced Colonel Pohl as the military
6 judge. I will announce my detailing and qualifications after
7 we identify who is here on behalf of the parties.

8 Trial Counsel, if you'd please identify who is here
9 on behalf of the United States.

10 CP [BG MARTINS]: Good morning, Your Honor. Representing
11 the United States: Brigadier General Mark Martins, Mr. Robert
12 Swann, Mr. Edward Ryan, Mr. Clayton Trivett, Mr. Jeffrey
13 Groharing, Ms. Nicole Tate, Major Christopher Dykstra, Major
14 Benjamin Mills, Captain Neville Dastoor. Also present,
15 Mr. Dale Cox, Mr. Pascual Tavaréz, Staff Sergeant Jeffery
16 Furr, and present in the courtroom also for the Federal Bureau
17 of Investigation, Kimberly Waltz and Brianna Hearn.

18 Your Honor, these proceedings are being transmitted
19 by closed-circuit television to locations in the continental
20 United States pursuant to an order of the military commission.
21 Your Honor, I'd like to note that Major ----

22 LDC [MS. BORMANN]: Judge, I'm sorry, to interrupt.

23 CP [BG MARTINS]: ---- Mills and Captain Dastoor ----

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1 LDC [MS. BORMANN]: Judge, I'm sorry to interrupt, but we
2 can't hear back here because one of the translated headphones
3 seems to be on maximum audio, and so we're unable to hear.

4 MJ [Col PARRELLA]: Okay. Trial Counsel, if you'd just
5 hold on one moment. Is there an IT person in the courtroom?

6 LDC [MR. RUIZ]: **[Microphone button not pushed; no audio.]**

7 MJ [Col PARRELLA]: I'm sorry, Mr. Ruiz. I can't hear
8 you.

9 LDC [MR. RUIZ]: I just got them. So they're working on
10 it. We need the translator to speak so that we can monitor
11 the volume.

12 MJ [Col PARRELLA]: Translator, if you could translate my
13 words.

14 LDC [MR. RUIZ]: I believe we've resolved the issue,
15 Judge.

16 MJ [Col PARRELLA]: Mr. Ruiz, does it seem to be working
17 now?

18 LDC [MR. RUIZ]: Yes, I think it has been resolved.

19 MJ [Col PARRELLA]: Okay. General Martins, if you could
20 please continue.

21 CP [BG MARTINS]: Your Honor, I will go ahead and
22 re-announce that these proceedings are being transmitted by
23 closed-circuit television to locations in the continental

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1 United States pursuant to the commission's order, and would
2 like to note that Major Mills and Captain Dastoor need to
3 place their qualifications on the record for the commission.

4 MJ [Col PARRELLA]: Thank you, General Martins.

5 At this time, why don't we go ahead and have Major
6 Mills and Captain Dastoor place their qualifications on the
7 record.

8 ATC [Maj MILLS]: Good morning, Your Honor.

9 MJ [Col PARRELLA]: Good morning.

10 ATC [Maj MILLS]: I'm Major Benjamin Mills, and I have
11 been detailed to this commission by the Chief Prosecutor,
12 Brigadier General Mark Martins. I am qualified under Rule for
13 Military Commission 502(d), and I have been previously sworn
14 in accordance with Rule for Military Commission 807. I have
15 not acted in any disqualifying manner.

16 MJ [Col PARRELLA]: Thank you, Major Mills.

17 ATC [Maj MILLS]: Thank you, sir.

18 ATC [CPT DASTOOR]: Good morning, Your Honor.

19 MJ [Col PARRELLA]: Good morning.

20 ATC [CPT DASTOOR]: Captain Neville Dastoor. I've been
21 detailed to this commission by the Chief Prosecutor, Brigadier
22 General Mark Martins. I'm qualified under Rule for Military
23 Commission 502(d), and I've been previously sworn in under

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1 Rule for Military Commissions 807. I've not acted in any way
2 that might disqualify me from these proceedings.

3 MJ [Col PARRELLA]: Thank you, Captain Fastoor [sic].

4 ATC [CPT DASTOOR]: Thank you, Your Honor.

5 CP [BG MARTINS]: Your Honor, if I may, I probably haven't
6 been saying it clearly enough. The last name is Dastoor with
7 a D, delta.

8 MJ [Col PARRELLA]: I understand, and that's my mistake.
9 Thank you for correcting me.

10 So Major Mills and Captain Dastoor, I understand
11 you've been previously sworn. I'm going to go ahead and swear
12 you nevertheless. If you'd please stand, raise your right
13 hand.

14 [Counsel was sworn.]

15 MJ [Col PARRELLA]: Thank you. Mr. Nevin, will you please
16 indicate for the record who is here on behalf of Mr. Mohammad?

17 LDC [MR. NEVIN]: Your Honor, David Nevin for Mr. Khalid
18 Shaikh Mohammad; and Lieutenant Colonel Derek Poteet, U.S.
19 Marine Corps; Ms. Denny Leboeuf; Mr. Gary Sowards; Ms. Rita
20 Radostitz; and Your Honor, Mr. Mohammad is present.

21 MJ [Col PARRELLA]: Thank you, Mr. Nevin.

22 Ms. Bormann?

23 LDC [MS. BORMANN]: Judge, on behalf of Mr. Bin'Attash,

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1 myself, Mr. Edwin Perry, Mr. William Montross, Captain Brian
2 Brady, Major Matthew Seeger.

3 Judge, we will be asking to excuse probably Major
4 Seeger, although it may be Captain Brady, later on during the
5 morning to attend to other matters. I just want to let the
6 court know.

7 MJ [Col PARRELLA]: Okay. Mr. Harrington?

8 LDC [MR. HARRINGTON]: Judge, for Mr. Binalshibh, James
9 Harrington, Navy Captain Mishael Danielson, and Alaina
10 Wichner.

11 MJ [Col PARRELLA]: And, Mr. Harrington, it's my
12 understanding that this is Lieutenant Danielson's first
13 appearance?

14 LDC [MR. HARRINGTON]: It is, Judge, and he needs to have
15 his credentials put on the record.

16 MJ [Col PARRELLA]: Okay. Lieutenant Danielson, if you'd
17 please state your qualifications for the record.

18 ADC [LT DANIELSON]: Good morning, Your Honor.

19 MJ [Col PARRELLA]: Good morning.

20 ADC [LT DANIELSON]: Sir, I am Lieutenant Mishael
21 Danielson, Mishael is spelled M-i-s-h-a-e-l, JAG Corps, United
22 States Navy. I've been detailed to this case now in hearing
23 by Brigadier General John G. Baker, United States Marine

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1 Corps, the Chief Defense Counsel. I'm also qualified and
2 certificated under Article 27(b) and sworn under Article 42(a)
3 of the Uniform Code of Military Justice. I'm also qualified
4 and certified, sir, under Rules 502 and 503 of the Rules for
5 Military Commission.

6 I have not acted in any way that might tend to
7 disqualify me in these proceedings, sir.

8 MJ [Col PARRELLA]: Lieutenant Danielson, please raise
9 your right hand.

10 [Counsel was sworn.]

11 MJ [Col PARRELLA]: Thank you, Lieutenant Danielson. You
12 may have a seat.

13 ADC [LT DANIELSON]: Thank you, sir.

14 MJ [Col PARRELLA]: Mr. Connell?

15 LDC [MR. CONNELL]: Good morning, Your Honor.

16 MJ [Col PARRELLA]: Good morning.

17 LDC [MR. CONNELL]: On behalf of Mr. Al Baluchi is myself,
18 James Connell, and Captain Mark Andreu of the United States
19 Air Force. All other attorneys for Mr. al Baluchi have been
20 excused by previous order of the military commission.

21 MJ [Col PARRELLA]: Thank you.

22 Mr. Ruiz.

23 LDC [MR. RUIZ]: On behalf of Mr. al Hawsawi, Ms. Suzanne

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1 Lachelier, Lieutenant Colonel Jennifer Williams, Major Joseph
2 Wilkinson, Lieutenant Commander Dave Furry, and myself.

3 MJ [Col PARRELLA]: Thank you, Mr. Ruiz.

4 And for the record, is there anyone here from the
5 chief defense counsel's office? Is it Commander Wall?

6 DCDC [CDR WALL]: Yes, Your Honor, Commander Wall, Deputy
7 Chief Defense Counsel.

8 MJ [Col PARRELLA]: Thank you.

9 I will now advise the accused of their right to be
10 present and their right to waive said appearance. You have
11 the right to be present during all sessions of the commission.
12 If you request to absent yourself from any session, such
13 absence must be voluntary and of your own free will. Your
14 voluntary absence from any session of the commission is an
15 unequivocal waiver of the right to be present during that
16 session.

17 Your absence from any session may negatively affect
18 the presentation of the defense in your case. Your failure to
19 meet with and cooperate with your defense counsel may also
20 negatively affect the presentation of your case. Under
21 certain circumstances, your attendance at a session can be
22 compelled regardless of your personal desire not to be
23 present.

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1 Regardless of your voluntary waiver to attend a
2 particular session of the commission, you have the right at
3 any time to decide to attend any subsequent session. If you
4 decide not to attend the morning session but wish to attend
5 the afternoon session, you must notify the guard force of your
6 desires. Assuming there is enough time to arrange
7 transportation, you will then be allowed to attend the
8 afternoon session. You will be informed of the time and date
9 of each commission session prior to the session to afford you
10 the opportunity to decide whether or not to attend that
11 session.

12 Mr. Mohammad, do you understand what I've just
13 explained to you?

14 ACC [MR. MOHAMMAD]: Yes.

15 MJ [Co1 PARRELLA]: Mr. Bin'Attash, do you understand what
16 I have just explained?

17 ACC [MR. BIN'ATTASH]: Yes. Yes, but I would like to put
18 on the record my objection to the attorneys.

19 MJ [Co1 PARRELLA]: I understand that you've had
20 objections to your attorneys, and I will afford you an
21 opportunity to put that objection on the record. But you
22 understand also the court's -- the commission's position on
23 your attorneys as well; is that correct?

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1 ACC [MR. BIN'ATTASH]: Yes.

2 MJ [Col PARRELLA]: So, Mr. Bin'Attash, is there anything
3 that you want to tell the commission that you haven't already
4 stated previously?

5 DC [MR. PERRY]: Judge, I need to interject. This is
6 Edwin Perry, defense counsel for Mr. Bin'Attash.

7 If we're going to go into a more detailed complaint,
8 there is an order by the commission, 380Z, that that needs to
9 be in an ex parte closed session.

10 MJ [Col PARRELLA]: I understand. Mr. Perry, what I'm
11 going to try to ascertain at this point in time, if this is
12 just the same standing objection that he's voiced in the past.
13 Is there any issue with me proceeding with that question?

14 DC [MR. PERRY]: If you ask that question, that would be
15 fine. If it -- if he goes into a more detailed complaint,
16 then we need to go into a closed session because it involves
17 privileged material.

18 MJ [Col PARRELLA]: I understand.

19 So, Mr. Bin'Attash, what your counsel has just
20 indicated is that if you want the commission to be aware that
21 you have a standing objection to your counsel, I understand
22 that objection and we can proceed. If there's something else
23 that you want to tell the commission that is new or different,

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1 then we need to do that in a separate hearing. Do you
2 understand?

3 ACC [MR. BIN'ATTASH]: Yes. The attorneys would like to
4 have a closed session because they don't want the world to
5 hear their scandals. But I don't have details to put on the
6 record, only objection to my defense team that I have because
7 they are working for their own interests and not my interests.
8 This is all I have.

9 MJ [Co1 PARRELLA]: I understand.

10 Mr. Binalshibh, do you understand what I have
11 explained to you?

12 ACC [MR. BINALSHIBH]: Yes, I understood.

13 MJ [Co1 PARRELLA]: Mr. Ali, do you understand what I've
14 explained for you?

15 ACC [MR. AZIZ ALI]: Yes.

16 MJ [Co1 PARRELLA]: Mr. al Hawsawi, do you understand what
17 I've explained to you?

18 ACC [MR. AL HAWSAWI]: Yes. And I would like to leave
19 now.

20 MJ [Co1 PARRELLA]: Okay. Mr. al Hawsawi -- at this point
21 in time, Mr. al Hawsawi ----

22 LDC [MR. RUIZ]: Judge ----

23 MJ [Co1 PARRELLA]: ---- I will require you to remain in

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1 the courtroom. You can leave after this session of court is
2 complete. Do you understand?

3 ACC [MR. AL HAWSAWI]: Why is that? I was able to move at
4 any time.

5 MJ [Col PARRELLA]: Okay. I'm going to go through some
6 additional information. If at that point in time when we take
7 our first recess you would like to leave the courtroom, I will
8 allow you to do so. But as this is our first session of
9 court, you're going to remain here until we're done with that
10 first session of court.

11 ACC [MR. AL HAWSAWI]: I've heard my entire rights, and I
12 have the right to leave the court right now.

13 MJ [Col PARRELLA]: I understand what you're saying. It's
14 not going to happen.

15 All right. On 8 September 2018, I conducted an
16 R.M.C. 802 conference with both trial and defense counsel.
17 The accused were absent. At this conference, we discussed the
18 following:

19 First, we conducted introductions. I informed
20 counsel that I'd been detailed to this case and indicated that
21 they would have the opportunity to conduct voir dire of me
22 during this session. I indicated that I would only allow one
23 counsel per party to conduct this questioning. I also

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1 indicated that I am granting AE 595 and provided all parties a
2 copy of my unobserved fitness report covering the portion of
3 time I conducted a Commandant of the Marine Corps Fellowship
4 at the Department of Justice. That fitness report has been
5 marked as AE 595B and inserted into the record.

6 I would like to make it clear that I am granting the
7 motion and providing this information in order to expedite
8 these proceedings, but my ruling should in no way be
9 interpreted as the commission's position as to the
10 appropriateness of the parties seeking discovery related to
11 the military judge.

12 As to AE 595A, I am not going to order the discovery
13 requested, but invite counsel to ask questions related to the
14 matter during voir dire.

15 I also indicated that I intended to follow the
16 previous military judge's practice of requiring all accused to
17 be present for the first day of each session. I also
18 indicated that I intend to continue the practice of timing
19 breaks to coincide with prayer time to the extent practicable.

20 Upon inquiry from Mr. Connell, I also indicated that
21 I would continue the practice of recording the 802 sessions
22 and that counsel may make particularized requests for
23 transcripts of those sessions.

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1 Upon inquiry from Mr. Nevin, I indicated I would also
2 continue the practice of allowing defense teams to meet with
3 their clients for a reasonable time after the conclusion of
4 the afternoon session.

5 Thereafter, we discussed the tentative order of march
6 for this week's sessions and generally adopted the order of
7 march proposed by Mr. Connell in AE 591L, with a few
8 exceptions. I indicated we would start with voir dire and
9 challenges of the military judge, followed immediately by
10 AE 591F, Mr. Hawsawi's motion to abate the proceedings. After
11 AE 591F, we will take up the discovery motions. If we still
12 have time, we will take up the unclassified portions of the
13 UCI motions.

14 Tuesday's session will begin with an in camera
15 session pursuant to M.C.R.E. 505(h). We will tentatively plan
16 to begin an unclassified session on Tuesday at 1400 which will
17 extend through Wednesday, wherein we will take up any
18 remaining unclassified issues. On Thursday, we will conduct a
19 closed session pursuant to R.M.C. 806.

20 Do counsel for any of the accused have any additions
21 or corrections to the commission's summary of the R.M.C. 802
22 conference, or does the trial counsel have any corrections or
23 additions to the R.C.M. [sic] 802 conference?

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1 Start with the trial counsel.

2 CP [BG MARTINS]: Your Honor, the government has no
3 additions.

4 MJ [Col PARRELLA]: Mr. Nevin.

5 LDC [MR. NEVIN]: Just to clarify, when will we begin with
6 the closed session, the closed 505 session on Tuesday?

7 MJ [Col PARRELLA]: That will be at 0900.

8 LDC [MR. NEVIN]: At 0900, all right. Thank you, Your
9 Honor.

10 MJ [Col PARRELLA]: Mr. Connell, you're standing.

11 LDC [MR. CONNELL]: Yes, sir, I was taking up your
12 invitation to comment on the 802.

13 MJ [Col PARRELLA]: Please.

14 LDC [MR. CONNELL]: Yes. The -- one other matter is that
15 I inquired of the military commission whether it would
16 continue the practice of not shackling the defendants without
17 some particularized cause, and the military commission
18 indicated that it would continue the prior practice on that
19 topic.

20 MJ [Col PARRELLA]: That is ----

21 LDC [MR. CONNELL]: The second is that I gave notice at
22 the 802 hearing that Lieutenant Doug Newman would be available
23 for interview on Sunday; the government took up that

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1 opportunity and some other counsel. I also indicated that I
2 would be making advance 914 disclosures upon requests. The
3 government made that request and I made the advanced 914
4 disclosures.

5 MJ [Col PARRELLA]: Thank you, Mr. Connell.

6 Ms. Bormann?

7 LDC [MS. BORMANN]: Thank you, Judge. So my recollection
8 of the 802 conference with respect to AE 595A was that you
9 indicated that you were not going to be granting it prior to
10 voir dire, which will occur this morning; but I did not
11 understand that you were denying it in toto. Is that your
12 ruling? I don't have a written -- I understood it that you
13 were going to hold it in abeyance until after voir dire and
14 then rule on it based on what happened.

15 MJ [Col PARRELLA]: Ms. Bormann, I think that's a correct
16 summation. I think that the issue will largely become moot
17 based on questions. If it's not, I will formally rule on it
18 at that point in time.

19 LDC [MS. BORMANN]: Thank you.

20 MJ [Col PARRELLA]: You're welcome.

21 I've been detailed to this commission by the Chief
22 Judge of the Military Commissions Trial Judiciary pursuant to
23 R.M.C. 503. Appellate Exhibit 001A is my detailing

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1 memorandum.

2 I am certified and qualified in accordance with
3 Articles 26(b) and (c) of the Uniform Code of Military Justice
4 as well as R.M.C. 502 and 503. I've been previously sworn
5 under Article 42(a) of the UCMJ and Article 807. I am not
6 aware of any grounds for challenge against me.

7 I have previously provided counsel for both sides a
8 copy of my biography, which is marked as Appellate
9 Exhibit 001B, as well as my fitness report from my time as a
10 Marine Corps Fellow at the Department of Justice, which is
11 marked as AE 595B.

12 Do counsel desire to question or to challenge the
13 military judge? Trial Counsel?

14 MTC [MR. TRIVETT]: Not at this time, sir, but we would
15 like to reserve the opportunity to do so based on answers to
16 questions that the defense may ask.

17 MJ [Col PARRELLA]: Okay. Mr. Nevin?

18 LDC [MR. HARRINGTON]: Excuse me. Could I just -- with
19 respect to the voir dire, could I just put a procedural
20 question on the -- before you?

21 MJ [Col PARRELLA]: Yes.

22 LDC [MR. HARRINGTON]: Judge, as you're going to find out,
23 this case has many unexpected twists and turns, and your voir

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1 dire creates one that we didn't really fully identify until
2 yesterday. But it deals with an issue that goes back to 2014
3 and '15 and -- when a Special Review Team was appointed by --
4 to replace the trial counsel because of an issue with respect
5 to my team and to me individually.

6 And I don't want to go into that in front of you
7 right now with trial counsel here. I think I need to put it
8 on the record in front of you, and it's my position that
9 there's certain questioning that needs to be done of you for
10 which the Special Review Team really should be here because it
11 deals with information which directly relates to them, and
12 also much of the information is -- has been classified as a
13 result of the national security investigation that was
14 conducted with respect to me and several other members of our
15 team.

16 So at some point in time, I think we either have to
17 abate the proceedings here and get them there or figure out a
18 way to -- for how we're going to handle that particular issue,
19 so ----

20 MJ [Col PARRELLA]: Okay. Well, Mr. Harrington, I -- if I
21 understand what you're asking of the commission, it's that you
22 believe that based on information, that some of this
23 questioning needs to take place in the presence of the Special

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1 Review Team?

2 LDC [MR. HARRINGTON]: If you don't want them here, Judge,
3 and want to do it without the trial counsel here, we're not
4 going to object to that. But if the government thinks that
5 they need to have a presence here for it, then that's
6 something that they need to address.

7 MJ [Col PARRELLA]: Okay. What we're going to do,
8 Mr. Harrington, is we're going to go ahead and proceed with
9 the questions. As you know, the rules allow counsel to
10 challenge the military judge based on subsequent evidence at
11 basically any point going forward.

12 But we'll go ahead and proceed with the questioning,
13 and if there's still an issue out there, then what I'd ask is
14 that you go ahead and put it in writing so that the commission
15 can consider it and take appropriate action. Thank you.

16 Mr. Nevin?

17 LDC [MR. NEVIN]: Thank you, Your Honor. David Nevin on
18 behalf of Mr. Khalid Shaikh Mohammad.

19 Sir, the -- as you know, this is a case that arises
20 out of the events of September 11th, 2001, and as well I'll
21 represent to you that the defendants, all but -- in
22 particular, Mr. Mohammad, are devout Muslims, so I have a
23 couple of questions that arise out of those two facts.

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1 The first is to ask you what knowledge you have of
2 the religion of Islam.

3 MJ [Col PARRELLA]: So, Mr. Nevin, I am not going to go
4 into a detailed explanation of my knowledge of Islam. I will
5 simply state that there is nothing about my personal beliefs
6 of Islam that will infect or affect my impartiality to sit
7 here as a military judge.

8 LDC [MR. NEVIN]: Okay. And so just to make sure I
9 understand the scope of your ruling, would you tell us whether
10 you have made any particular study of the religion of Islam,
11 such as, you know, in schooling or some kind of -- something
12 other than just a passing awareness?

13 MJ [Col PARRELLA]: I have not. I have never taken a
14 religious course. I have some general knowledge of religions,
15 including Islam. I don't recall ever reading a book
16 particularly about Islam. I've read books that include some
17 explanation of it, but I couldn't tell you off the top of my
18 head what they were. So I don't have any sort of special
19 knowledge or background or expertise on Islam.

20 LDC [MR. NEVIN]: Okay. And I understood your remark --
21 or the remark you made previously about affecting your ability
22 to sit simply to mean that you don't have any particular
23 animus against the religion or any feeling about its

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1 legitimacy or anything that would directly affect how you look
2 at these proceedings. Do I have that right?

3 MJ [Col PARRELLA]: That's correct. Not at all.

4 LDC [MR. NEVIN]: All right. So may I ask where you were
5 on September 11th of 2001?

6 MJ [Col PARRELLA]: I was actually on my way to the
7 airport in San Diego for a temporary active duty sort of
8 assignment.

9 LDC [MR. NEVIN]: And I am guessing you -- the plane that
10 you were planning to get onto never took off?

11 MJ [Col PARRELLA]: Correct. I never made it even to the
12 terminal. As I recall, I ran into folks exiting the terminal
13 still in the parking lot. They said that the airport was
14 closed. I turned around and drove back to the base. At the
15 time I was stationed at the air station at Miramar.

16 LDC [MR. NEVIN]: And you were -- that's at a time when
17 you were serving as -- I believe you served as defense
18 counsel -- sorry, regional defense counsel and also trial
19 counsel for a while there at Miramar, correct?

20 MJ [Col PARRELLA]: I was serving at the time as the
21 senior defense counsel.

22 LDC [MR. NEVIN]: And that was -- the trip you had planned
23 at that time was for some kind of temporary duty; I know it

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1 was an official military trip that was going on, not a
2 personal ----

3 MJ [Col PARRELLA]: Correct.

4 LDC [MR. NEVIN]: Okay.

5 MJ [Col PARRELLA]: My recollection is it was to see a
6 client who was incarcerated in a civilian penitentiary.

7 LDC [MR. NEVIN]: I see. And were you able to make that
8 trip at a later time?

9 MJ [Col PARRELLA]: I was not.

10 LDC [MR. NEVIN]: May I ask whether persons close to you
11 within the third degree of -- let's say within the third
12 degree of relationship were affected by the events -- directly
13 affected by the events of September 11th?

14 MJ [Col PARRELLA]: No.

15 LDC [MR. NEVIN]: Okay. And what about friends?

16 MJ [Col PARRELLA]: No.

17 LDC [MR. NEVIN]: Were any such persons injured in the
18 events of September 11th, either in New York, in Northern
19 Virginia, or in Pennsylvania?

20 MJ [Col PARRELLA]: No. I don't have any friends who I
21 would say were any sort of victim to either of those
22 instances. The only one I know who was injured was a former
23 boss of mine who was counsel, or still is counsel, to the

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1 Commandant of the Marine Corps, and he was injured in 9/11.
2 But I don't have any personal relationship with him. He was
3 essentially the boss of an organization I worked with for a
4 few years.

5 LDC [MR. NEVIN]: Could you say who that person was, sir?

6 MJ [Co1 PARRELLA]: [REDACTED].

7 LDC [MR. NEVIN]: Say it again?

8 MJ [Co1 PARRELLA]: [REDACTED].

9 LDC [MR. NEVIN]: All right. Thank you.

10 What about property damage, loss of -- loss of
11 property or income, anything like that among your friends or
12 relations within the third degree?

13 MJ [Co1 PARRELLA]: No.

14 LDC [MR. NEVIN]: All right. Are you familiar with the
15 Code of Conduct for United States Judges?

16 MJ [Co1 PARRELLA]: To some extent.

17 LDC [MR. NEVIN]: Is that something that you -- I take it
18 you are a United States judge. Is that something that you
19 have consulted at any time in the past?

20 Here's my -- the reason for the question. I was --
21 my intention was to ask you if there are any aspects of the
22 disqualifications within the Code of Conduct for United States
23 Judges that would require your disqualification.

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1 MJ [Col PARRELLA]: I'm not familiar. So to answer your
2 question, obviously a military judge. I don't recall
3 reviewing that as part of the training I received as a
4 military judge, so I'm not probably prepared to tell you
5 whether I've looked at each factor that's in there.

6 LDC [MR. NEVIN]: Do you hold membership in any
7 organization that practices invidious discrimination on the
8 basis of race, sex, religion, or national origin?

9 MJ [Col PARRELLA]: No.

10 LDC [MR. NEVIN]: I mean, for example, an exclusive
11 country club, a particular club, something like that.

12 MJ [Col PARRELLA]: No.

13 LDC [MR. NEVIN]: And, Your Honor, I will consult the Code
14 if we take a break and perhaps ask you some more specific
15 questions. I meant to exclude with one question several
16 questions and I didn't anticipate that the military commission
17 wouldn't be familiar with that.

18 May I ask, you have -- I believe you said you were
19 sworn, and I think you're referring to the oath under
20 949g(a)(1). You have taken that oath?

21 MJ [Col PARRELLA]: I have.

22 LDC [MR. NEVIN]: And when did you take that oath?

23 MJ [Col PARRELLA]: I believe it was the same day that I

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1 was detailed, 27 August.

2 LDC [MR. NEVIN]: May I ask who administered it?

3 MJ [Col PARRELLA]: Colonel Pohl.

4 LDC [MR. NEVIN]: And where was that done?

5 MJ [Col PARRELLA]: It was not done in person. He sent me
6 a written copy of the oath. He then called me, he read the
7 oath over the phone as I stood, and then I signed the oath and
8 sent it back to him.

9 LDC [MR. NEVIN]: Was anyone present in the room with you
10 when you took the oath?

11 MJ [Col PARRELLA]: No.

12 LDC [MR. NEVIN]: And do you hold a TS//SCI clearance?

13 MJ [Col PARRELLA]: To the best of my knowledge, I do.

14 LDC [MR. NEVIN]: And when would that clearance have
15 become effective, sir?

16 MJ [Col PARRELLA]: I don't know. I will tell you I
17 recently went through a reinvestigation. I'd previously held
18 TS//SCI, but as you know, it expires periodically.

19 LDC [MR. NEVIN]: Yes, I know.

20 MJ [Col PARRELLA]: So I just went through -- when I say
21 just, I reinitiated the investigation in approximately June of
22 2017, so I don't know when it was finished.

23 LDC [MR. NEVIN]: Could I ask when you first learned that

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1 you would be detailed to this present case?

2 MJ [Col PARRELLA]: Officially, 27 August. I did have a
3 couple telephone communications with Judge Pohl where he
4 indicated that he was considering detailing me. I think the
5 earliest of those was probably sometime in middle or late
6 July.

7 LDC [MR. NEVIN]: Sir, it's been reported to me, or to us,
8 that you made a remark on the record in another case in early
9 August that you were being detailed to this case, and I
10 believe that was August the 3rd. Is that your -- do you
11 recall what I'm referring to?

12 MJ [Col PARRELLA]: I recall. I've heard the same. I did
13 not make any remark on the record about anything related to
14 the commissions.

15 LDC [MR. NEVIN]: Right.

16 MJ [Col PARRELLA]: I think what -- or the genesis for
17 that was during an 802 conference I had with counsel ----

18 LDC [MR. NEVIN]: Yeah.

19 MJ [Col PARRELLA]: ---- related to a murder case at
20 Camp Lejeune, I informed the counsel that it was possible I
21 might get detailed -- and my recollection was that I said to
22 an OMC case, not a specific case -- and that that might
23 jeopardize my ability to detail myself to the murder case.

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1 LDC [MR. NEVIN]: And I'll just represent that the parties
2 recall that you made reference to KSM, the KSM case, which is
3 a common abbreviation for my client's name. Do you recall
4 making that remark?

5 MJ [Col PARRELLA]: I don't recall making that comment. I
6 can't, obviously -- it was not a recorded session, like our
7 802s here, but I don't recall it and I don't think I would
8 have used those initials. I think OMC I probably would have
9 said, just to give context, but I don't recall ever saying
10 KSM.

11 LDC [MR. NEVIN]: Okay. Are you familiar with those
12 initials or that -- I guess that's not an acronym, but you are
13 familiar with that terminology?

14 MJ [Col PARRELLA]: I am now, certainly.

15 LDC [MR. NEVIN]: Okay. And may I ask, was that a murder
16 case to which you were contemplating detailing yourself, was
17 that a capital case?

18 MJ [Col PARRELLA]: It was not.

19 LDC [MR. NEVIN]: Okay. So if I understand correctly,
20 because your periodic reinvestigation was begun in June of
21 2017, that would be on the order of a year before you -- a
22 question of your being detailed to this case would have come
23 up. So that reinvestigation would have been separate from

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1 this case, am I right?

2 MJ [Co1 PARRELLA]: Completely separate.

3 LDC [MR. NEVIN]: Yeah. Okay. And are you saying that
4 the reinvestigation was completed in June of 2017 or that it
5 was begun then?

6 MJ [Co1 PARRELLA]: Begun.

7 LDC [MR. NEVIN]: And do you know when it was completed?

8 MJ [Co1 PARRELLA]: I do not.

9 LDC [MR. NEVIN]: Has it been completed?

10 MJ [Co1 PARRELLA]: The best of my knowledge.

11 LDC [MR. NEVIN]: Okay. So have you been read into the
12 specific programs that relate to this case? And I won't say
13 those, but there are ----

14 MJ [Co1 PARRELLA]: I have.

15 LDC [MR. NEVIN]: ---- there are ACCMs and there are
16 special access programs. So you have been read into those?

17 MJ [Co1 PARRELLA]: Yes.

18 LDC [MR. NEVIN]: And when did that occur, sir?

19 MJ [Co1 PARRELLA]: Middle of August.

20 LDC [MR. NEVIN]: And where did that occur?

21 MJ [Co1 PARRELLA]: In Washington, D.C.

22 LDC [MR. NEVIN]: So if I understand correctly, you would
23 not have been able to begin reviewing certain materials

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1 related to this case, at the TS level anyway, and certainly
2 with respect to the SAP and the ACCM, you wouldn't have been
3 able to begin reviewing those until mid-August of 2018.

4 MJ [Col PARRELLA]: Correct. And I'll just go ahead and,
5 I think, jump ahead, Mr. Nevin, and tell you that I didn't
6 review any materials related to this case prior to being
7 detailed, which was on the 27th of August.

8 LDC [MR. NEVIN]: And have you been reviewing materials
9 since that time?

10 MJ [Col PARRELLA]: I have.

11 LDC [MR. NEVIN]: I may have asked you when you were
12 formally notified that you were being -- that you were, in
13 fact, being detailed, but you mentioned as well that you had
14 conversations with Judge Pohl. And by Judge Pohl, I'm
15 referring to Judge James Pohl, the Chief Judge of the Military
16 Commissions. You had conversations with him, I believe you
17 said, in late July?

18 MJ [Col PARRELLA]: That's my best estimate of when the
19 conversation took place, correct.

20 LDC [MR. NEVIN]: And did -- and he advised you that he
21 was considering detailing you to this case, I take it, is
22 what ----

23 MJ [Col PARRELLA]: Correct.

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1 LDC [MR. NEVIN]: ---- happened?

2 And did he gave you the option to say, don't detail
3 me? I mean, in other words, my question is, was it, I'm
4 detailing you, period, end of story, or was it, what do you
5 think or something like that?

6 MJ [Co1 PARRELLA]: I don't specifically recall. But my
7 understanding of the process is I'm one of a pool of nominees
8 that are nominated by the service judge advocates to
9 potentially be detailed to the Office of Commissions and that
10 the chief judge retains the ability to detail who they deem
11 fit.

12 So with that, when he indicated his potential
13 decision to detail me, we may have discussed some of the
14 potential issues that I have in terms of future orders and
15 things of that nature ----

16 LDC [MR. NEVIN]: Yes, sir.

17 MJ [Co1 PARRELLA]: ---- but ultimately, I didn't push
18 back, if you will.

19 LDC [MR. NEVIN]: Yeah. Really -- and I want to ask you
20 about those orders, but that was really my question. Were you
21 open or willing to be appointed or were you appointed against
22 your -- over -- against your will, so to speak?

23 MJ [Co1 PARRELLA]: I guess, as a Marine, we do -- we

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1 follow orders. I expressed reservations about some of the
2 time constraints with future orders, but ultimately, I didn't
3 push back, I guess, if that answers your question.

4 LDC [MR. NEVIN]: Yes, sir, it does. Thank you.

5 And just to then return to the question of how you
6 got into the pool in the first place, I take it you were
7 nominated by the TJAG, if that's the right term, for the
8 Marine Corps; is that correct?

9 MJ [Col PARRELLA]: I believe my nominee -- or I was
10 nominated by the TJAG upon the recommendation of the Chief
11 Trial Judge of the Navy.

12 LDC [MR. NEVIN]: I see. So that would be the TJAG for
13 the -- and the military judge will perhaps understand that I'm
14 a civilian, and so I find my way as best I can in some of
15 these areas. But would that have been the TJAG of the Navy,
16 or the -- or is there a TJAG in the Marine Corps as well?

17 MJ [Col PARRELLA]: Of the Navy.

18 LDC [MR. NEVIN]: Of the Navy. Okay.

19 And do you know when that occurred, sir?

20 MJ [Col PARRELLA]: I don't know when the nomination was
21 made. All I know is that the chief trial judge contacted me
22 when I was still in my former billet and indicated they
23 intended to nominate me. I would estimate that was probably

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1 around May of 2018.

2 LDC [MR. NEVIN]: Ah. Okay. And at that time, you were
3 SJA of the 2nd Marine Division, correct?

4 MJ [Col PARRELLA]: That is correct.

5 LDC [MR. NEVIN]: At Camp Lejeune.

6 MJ [Col PARRELLA]: Correct.

7 LDC [MR. NEVIN]: Right. Okay. Thank you, sir.

8 So I wanted to just ask you a question or two, and
9 you answered some of this at the 802. And I'm referring
10 specifically to your stating that until things change, you
11 would maintain the status quo that Judge Pohl had maintained,
12 and I appreciate that.

13 I wanted to ask whether you had any particular -- and
14 this is an extraordinary case, sir, and there's a lot of
15 discovery material in it, and there are many, many complex
16 issues, and you're, of course, coming into it, let's say, in
17 the middle. Do you have a particular plan for how to deal
18 with that, with that problem?

19 MJ [Col PARRELLA]: Not yet.

20 LDC [MR. NEVIN]: Okay.

21 MJ [Col PARRELLA]: I mean, I will just tell you simply, I
22 obviously am aware of the complexity of this litigation, the
23 fact that this case has been going on for a long period of

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1 time. However, I have been detailed, and I will do my best to
2 apply the law every day that I'm sitting up here as the
3 military judge.

4 LDC [MR. NEVIN]: Yes, sir. And I think there are
5 several -- there are several areas of the law that will be
6 applicable to this case that require a comprehensive knowledge
7 of everything that's happened in the case. For example, the
8 most obvious example is the substitution process for
9 classified information, when the government comes to you and
10 says, here's the original. Here's the substitution that we
11 plan to give to the defense. And in our view, this puts the
12 defense in the same position that they would have been to make
13 a defense as access to the original would have. That's a
14 determination that will require you to know everything that's
15 come before us, since all of that will inform the defense's
16 ability to make a defense.

17 So -- and there are other examples. The Brady
18 analysis is cumulative, for example, in determining whether
19 information under Brady has to be produced, so it requires you
20 to know what else has been produced and so on.

21 Is -- do you have a plan for how -- or I think it
22 will take a long time for anyone to get all the material under
23 control.

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1 MJ [Col PARRELLA]: I understand, Mr. Nevin, and -- so
2 this sort of goes to, I think, qualifications. There is
3 certainly going to be -- whenever somebody like the military
4 judge or perhaps some other party is introduced to a case
5 that's been ongoing, there's going to potentially be some
6 delay as that individual gets up to speed. I will not allow
7 the fact that I'm just coming into this case -- or at least I
8 will do my best to mitigate against any disruption. If I need
9 to slow the pace of litigation down so that I can get up to
10 speed to feel comfortable that I'm making the right decision,
11 I will do so.

12 But to the extent that we're starting to get down the
13 road of qualifications, I'll simply say, I'm qualified
14 pursuant to R.M.C. 502 and 503, I've been detailed by a
15 competent authority, and we're moving out.

16 LDC [MR. NEVIN]: But the military judge doesn't fail to
17 recognize that there are unique complexities in this case
18 that -- at least on behalf of Mr. Mohammad, I do respectfully
19 ask that -- that you become aware of everything that's
20 pertinent and relevant in the case before you -- and,
21 honestly, I considered asking you to not hold this voir dire
22 until that had been accomplished, until you had absorbed
23 everything. And I do ask on behalf of him that you absorb

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1 everything before you begin making substantive rulings. I
2 think it's critically important, it's a capital case and so
3 on.

4 MJ [Col PARRELLA]: I understand, and as I just
5 articulated, I will not rush. I do not feel pressured to
6 rush. I will set the pace such that I feel comfortable in
7 every decision that I make that I understand the issues, the
8 background, understanding that might be a quite intensive
9 process of review, before I make any substantive decisions.

10 LDC [MR. NEVIN]: Yes, sir. Thank you. I appreciate
11 that.

12 I will say that in civilian courts where I have
13 practiced, when a judge replaces another, it is typical for
14 the parties to ask, as they wish, for the new judge to review
15 decisions that the prior judge made. And I guess my question
16 would be: Have you replaced judges before? Do you have a
17 particular practice that you follow in that respect?

18 MJ [Col PARRELLA]: I have replaced judges before, and
19 typically, I do review all of the materials, past rulings,
20 that are still applicable or may impact the trial.

21 LDC [MR. NEVIN]: All right. Thank you, sir.

22 I wanted just to take a minute to make sure I
23 understood your background, and I'll do this -- I'll do this

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1 quickly, but I want to make sure that I'm not making any
2 errors. I appreciate your -- or whoever filed 001B filing it
3 so that we had that information. But there were some parts of
4 it that I didn't completely understand.

5 I take it you have -- you graduated from law school
6 in '98, and that's 20 years ago and a few months. And that of
7 that 20 years, you have -- and I couldn't tell whether it was
8 three or four years of law school. There was some indication
9 that it might have been '94 to '98 that you were in law
10 school.

11 MJ [Col PARRELLA]: It was three years, but again, I'm
12 going to ask you: What's the relevance of this to
13 impartiality or bias?

14 LDC [MR. NEVIN]: I want to ask you -- I want to be clear
15 what time you have spent as a military judge and what time you
16 have spent as a trial lawyer, and -- because it is -- because
17 of the complexity and size of this case, I'm interested in
18 knowing exactly what your experience has been as a trial
19 lawyer and as a military judge.

20 MJ [Col PARRELLA]: I understand the concern that you have
21 and maybe the curiosity, but what I don't see is the relevance
22 towards my impartiality or bias. And I can certainly
23 understand from where you're seated, just the reservations

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1 about what -- you know, qualifications, time, experience,
2 those things.

3 But like I said, the rules are clear about what the
4 qualifications are for a commissions judge, so unless the
5 question is about my qualifications as a commissions judge or
6 about my impartiality or bias, I'd ask that you please move
7 on.

8 LDC [MR. NEVIN]: Yes, sir. And let me just say -- and
9 I'm -- I will move on, of course. But it's not just
10 qualifications. It's also whether there is any ground for
11 disqualification under the rules that apply to judges and ----

12 MJ [Col PARRELLA]: And sorry to cut you off, Mr. Nevin,
13 but then I'd welcome a particular question if there's
14 something in my biography; that was the purpose of me
15 providing it. If there's something in there that causes you
16 to be concerned about an area of disqualification, I certainly
17 welcome those questions.

18 LDC [MR. NEVIN]: Yes, and the question would be whether
19 the -- whether you have sufficient experience to discharge the
20 duties of a military judge effectively and fairly and
21 efficiently. And I don't see how I can ask you that -- I can
22 assess that -- and frankly, sir, you have been a judge for a
23 relatively short period of time, and everybody tells me that

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1 you're very -- that you come up to speed very quickly, which I
2 appreciate.

3 But it's an extraordinary case. The judge who is
4 leaving had some decades of experience as a judge. And it --
5 I mean no disrespect to you. I just think it's a fair line of
6 inquiry to say how much time have you spent in the courtroom?
7 Have you ever handled a capital case? Have you ever been a
8 judge in a murder case and questions of that sort. And I
9 don't intend to ----

10 MJ [Co1 PARRELLA]: So, Mr. Nevin, I take no disrespect
11 from the questioning. I certainly -- like I said, I
12 understand why you would ask those questions from your
13 position. I certainly understand also that I'm replacing a
14 judge who had been a trial judge substantially longer and had
15 a lot more experience than I.

16 However, the detailing authority, who happens to be
17 that same judge, selected me to be assigned to this case.

18 LDC [MR. NEVIN]: Yes, sir.

19 MJ [Co1 PARRELLA]: The qualifications, as I read them,
20 are that you're a trial judge for at least two years. I
21 provided my bio so that you would see that I've met those
22 qualifications. I mean, I certainly understand the complexity
23 just from the short time I've been a part of this case and

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1 will do my very best.

2 But I don't see the relevance of continuing to go on
3 and ask questions that simply highlight this is a complex case
4 that requires, you know, experience. I've met the experience.
5 So I'd ask again, unless it goes to impartiality or bias or if
6 you have a question that you think disqualifies me or pertains
7 to those qualifications set forth in the rules, let's move on.

8 LDC [MR. NEVIN]: Okay. And again, my specific question
9 would be the military judge's capability to handle this case
10 as a military judge. And I believe that would disqualify you
11 if, for whatever reason, you were incapable of doing that.

12 MJ [Col PARRELLA]: I would agree. If I felt I did not
13 have the requisite qualifications, then I would be required to
14 disqualify myself.

15 LDC [MR. NEVIN]: All right. And, sir, just to make my
16 record, let me ask you specifically: Will you say how many
17 cases you have tried to verdict as a lawyer or as a judge?
18 And I recognize that might be a ballpark answer.

19 MJ [Col PARRELLA]: Right. So the best I can do for you,
20 Mr. Nevin, is in terms of trying cases -- and I think this is
21 just a summary of what's in the biography -- I spent
22 collectively about six years on active duty as a litigator and
23 probably took well over 100 trials to verdict. Two years as a

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1 military judge, maybe 20, 30, 40, I honestly don't know. And
2 in there, as you can see, there is also several years where I
3 spent supervising counsel as they performed those functions.

4 LDC [MR. NEVIN]: Right. Okay. Thank you.

5 So more than 100 trials in which you were the lawyer
6 taken to verdict and ----

7 MJ [Col PARRELLA]: Correct. And I can't -- I mean, I
8 don't know if you're asking me to distinguish between what we
9 would consider members trials or jury trials vice a verdict,
10 you know, through a guilty plea or some other avenue.

11 LDC [MR. NEVIN]: I'm sorry. I meant to specifically
12 focus on trial to members, a jury trial in my parlance.

13 MJ [Col PARRELLA]: I have no idea, Mr. Nevin. It's not
14 something I kept track of. I probably could go back and add
15 that up ----

16 LDC [MR. NEVIN]: Yeah.

17 MJ [Col PARRELLA]: ---- but I'm not going to because,
18 again, I don't think it's relevant.

19 LDC [MR. NEVIN]: Yes, sir, I understand.

20 And that more than 100 number was not isolated to
21 members, that was ----

22 MJ [Col PARRELLA]: Probably not.

23 LDC [MR. NEVIN]: Okay. And did you, as a trial lawyer,

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1 as a judge, handle murder cases?

2 MJ [Col PARRELLA]: As a prosecutor, yes. I should say
3 that I briefly practiced civilian -- in civilian jurisdiction
4 before coming into the Marine Corps. For a period of time, I
5 was essentially assisting through law school, so I would call
6 it an internship ----

7 LDC [MR. NEVIN]: Yeah.

8 MJ [Col PARRELLA]: ---- or however you want to call it, a
9 job ----

10 LDC [MR. NEVIN]: Yeah.

11 MJ [Col PARRELLA]: ---- where I worked with a civilian
12 state practitioner doing criminal defense. I did actually
13 work on a couple capital cases while working with his office.
14 Again, I did some as a prosecutor in the military, and I can't
15 recall if I ever did one as a defense counsel. I did not do
16 one as a military judge.

17 LDC [MR. NEVIN]: Referring to murder cases?

18 MJ [Col PARRELLA]: Correct.

19 LDC [MR. NEVIN]: Okay. And if I could just ask you
20 briefly, was the case when you were acting -- you would have
21 been acting as an intern when you were in law school with
22 the -- with the private firm?

23 MJ [Col PARRELLA]: Correct.

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1 LDC [MR. NEVIN]: Was that case tried?

2 MJ [Col PARRELLA]: There were two of them. One of them
3 did go to trial.

4 LDC [MR. NEVIN]: While you were interning?

5 MJ [Col PARRELLA]: Yes.

6 LDC [MR. NEVIN]: Okay. And did I understand you
7 correctly that those were both capital cases?

8 MJ [Col PARRELLA]: They were.

9 LDC [MR. NEVIN]: Okay. And what about multidefendant
10 cases? Have you been involved in multidefendant cases?

11 MJ [Col PARRELLA]: Yes.

12 LDC [MR. NEVIN]: And roughly how many?

13 MJ [Col PARRELLA]: Again, we're getting into
14 qualifications, Mr. Nevin. I'm trying to be patient here, but
15 I'm not going to repeat the same thing over. We need to move
16 on past qualifications. So if there's a particular question
17 that you think pertains to qualifications, please ask it.

18 LDC [MR. NEVIN]: Yes, sir. And I can really only say
19 what I said before, which is, that if for whatever reason a
20 military judge is -- it's not within the scope of that
21 person's experience to actually handle the case effectively or
22 competently, that's a fair area of questioning. It -- under
23 the code of judicial conduct for U.S. judges and ----

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1 MJ [Col PARRELLA]: I just don't see how you'd ask that
2 question at this stage in the proceedings. So again, you
3 retain the ability to challenge the military judge. It's an
4 ability you retain even after we finish this voir dire here
5 today. So if you have a question right now that you think
6 pertains to that issue, then I'm happy to entertain it.

7 LDC [MR. NEVIN]: Do you -- does your experience in
8 capital cases extend beyond those two when you were a law
9 student?

10 MJ [Col PARRELLA]: The case I prosecuted in the military
11 began as a capital case. It was ultimately later handled
12 through a plea agreement where the accused pled noncapital,
13 obviously.

14 LDC [MR. NEVIN]: So have you studied the law of capital
15 punishment?

16 MJ [Col PARRELLA]: Not extensively.

17 LDC [MR. NEVIN]: And you, I'm sure, would recognize that
18 there is a separate body of jurisprudence that comes out of
19 the U.S. Supreme Court and -- as well as in the state courts,
20 but important for us, the Supreme Court, that deals
21 specifically with capital cases?

22 MJ [Col PARRELLA]: I'm aware.

23 LDC [MR. NEVIN]: Yeah. And is that -- has that been a

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1 part of the work that you have done coming up to speed on this
2 case since you were detailed? In other words, becoming
3 acquainted with that area of the law?

4 MTC [MR. TRIVETT]: Objection, relevance.

5 MJ [Col PARRELLA]: I'll answer the question, Mr. Nevin,
6 simply to say that I have not attended any specific training
7 to capital litigation at this point in time. I am, of course,
8 aware that this is a capital case, and that factors into my
9 decision that you ultimately addressed as to whether I believe
10 personally that I'm qualified and whether I should recuse
11 myself for that purpose.

12 LDC [MR. NEVIN]: Okay. And you do not.

13 MJ [Col PARRELLA]: I do not believe that ----

14 LDC [MR. NEVIN]: Right.

15 MJ [Col PARRELLA]: ---- I'm unqualified.

16 LDC [MR. NEVIN]: Yes, sir. One of the questions that I
17 asked Judge Pohl during the voir dire process was about his
18 understanding of the concept of mitigation, and I wanted to
19 ask you the same question. It's important to us in this case.

20 I'll represent to you that Mr. Mohammad spent three
21 and a half years in the CIA's RDI program, which is -- during
22 which he was tortured, and so the question of mitigation is
23 important to us. Is that an aspect of capital jurisprudence

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1 that the military judge has studied?

2 MJ [Co1 PARRELLA]: I certainly have studied that in the
3 past with respect to capital litigation and when I worked as a
4 defense counsel or assisting defense counsel on capital
5 litigation, but I understand, obviously, the concept of what
6 mitigation is and believe it is obviously important.

7 LDC [MR. NEVIN]: As Judge Pohl phrased it, he said
8 basically whatever you think is mitigating, what the defense
9 thinks is mitigating is and that he would treat it that way.
10 Would you -- does that ----

11 MJ [Co1 PARRELLA]: I agree with that statement.

12 LDC [MR. NEVIN]: All right. Thank you.

13 Do you -- have you handled cases that are comparable
14 to this case in terms of the amount of discovery that's at
15 issue in previous cases?

16 MJ [Co1 PARRELLA]: I don't believe that question is
17 relevant, Mr. Nevin, for the reasons I've already stated.

18 LDC [MR. NEVIN]: And so may I ask if you are familiar
19 with the American Bar Association Guidelines for the
20 appointment and performance of defense counsel in death
21 penalty cases?

22 MJ [Co1 PARRELLA]: Not intimately.

23 LDC [MR. NEVIN]: And did you consider that those were

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1 applicable when you were acting as a defender in the capital
2 cases you referred to?

3 MJ [Col PARRELLA]: I don't see the relevance of this
4 question.

5 LDC [MR. NEVIN]: The -- Your Honor, the -- in this
6 particular case, Congress has mandated the consideration of
7 the ABA Guidelines by the conferee's mandated consideration of
8 that in the formation of the Regulation for Trial by Military
9 Commission, and I simply wonder if that is part of what the
10 military commission has considered.

11 MJ [Col PARRELLA]: So, Mr. Nevin, I will follow every
12 law, rule, and regulation that's applicable to this military
13 commission. If that's applicable to this military commission,
14 then I will follow it to the best of my ability.

15 LDC [MR. NEVIN]: Sir, I will represent to you that the
16 American Bar Association offered to train members of the trial
17 judiciary in the military commissions in 2011 on the
18 Guidelines, and this would be a neutral organization, the
19 American Bar Association. Is that something that the military
20 judge would be willing to entertain?

21 MJ [Col PARRELLA]: I'm not ----

22 MTC [MR. TRIVETT]: Objection, relevance.

23 MJ [Col PARRELLA]: Sustained.

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1 LDC [MR. NEVIN]: Is this your first trip to
2 Guantanamo Bay?

3 MJ [Col PARRELLA]: Yes, it is.

4 LDC [MR. NEVIN]: Could you say to us what you know about
5 the rules? Have you read the Military Commissions Act, for
6 example, the Manual for Military Commissions? Are you
7 familiar with these areas of the law?

8 MJ [Col PARRELLA]: I am.

9 LDC [MR. NEVIN]: And you mentioned that you had spoken to
10 Judge Pohl about the -- about being detailed. Could you
11 describe that conversation, please?

12 MJ [Col PARRELLA]: I will simply say that we did not
13 discuss any substance of the case. The decision -- or the
14 discussion was brief, and it was related to the fact of him
15 providing notice that he was considering detailing me to this
16 case.

17 LDC [MR. NEVIN]: Have you spoken to other persons about
18 this case?

19 MJ [Col PARRELLA]: I don't know who you're referring to,
20 Mr. Nevin.

21 LDC [MR. NEVIN]: I'm referring to anyone, Your Honor.

22 MJ [Col PARRELLA]: As you're aware, Mr. Nevin, there's
23 a -- the trial judiciary has legal advisors. Of course, I've

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1 spoken to other folks about this case.

2 LDC [MR. NEVIN]: Yes.

3 MJ [Col PARRELLA]: So you're going to have to narrow down
4 that question.

5 LDC [MR. NEVIN]: Okay. Have you spoken to, let's say,
6 anyone at the Pentagon about this case?

7 MJ [Col PARRELLA]: No.

8 LDC [MR. NEVIN]: Secretary of Defense or acting general
9 counsel?

10 MJ [Col PARRELLA]: No one.

11 LDC [MR. NEVIN]: No one.

12 And apart from your legal advisor and staff, of
13 course, has anyone else spoken to you about this case?

14 MJ [Col PARRELLA]: No.

15 LDC [MR. NEVIN]: Do you have any -- do you come here with
16 any kind of expectation about what you should or ought to be
17 accomplishing here?

18 MJ [Col PARRELLA]: Not at all.

19 LDC [MR. NEVIN]: Do you -- one of the things we hear
20 frequently is that there is -- that there has been a lot of
21 delay in this case. Do you -- are you aware of that?

22 MJ [Col PARRELLA]: Other than simply the fact that this
23 case has been going on as long as it has, not specifically,

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1 no.

2 LDC [MR. NEVIN]: Do you see that -- do you take it that
3 your job here is to make the case move more quickly?

4 MJ [Col PARRELLA]: No.

5 LDC [MR. NEVIN]: Okay. So no one has suggested to you
6 that that would be something you should do?

7 MJ [Col PARRELLA]: Not at all.

8 LDC [MR. NEVIN]: All right. Do you have particular
9 experience with the law of armed conflict, sir?

10 MJ [Col PARRELLA]: I have served in operational billets
11 that have entailed the knowledge of the law of armed conflict.

12 LDC [MR. NEVIN]: Have you thought about or formed or
13 expressed an opinion about whether the United States was
14 involved in an armed conflict subject to the laws of war on
15 September 11th, 2001?

16 MJ [Col PARRELLA]: Not specifically that I can recall.

17 LDC [MR. NEVIN]: Okay. Well, sometimes you say "no," so
18 I ask: Is there -- is there an occasion where ----

19 MJ [Col PARRELLA]: Well, I'm hesitant to say it's never
20 happened. I was a student at the Army's Judge Advocate School
21 for a year.

22 LDC [MR. NEVIN]: Right.

23 MJ [Col PARRELLA]: Is it possible that there was a

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1 discussion about that during an operational international law
2 class? It is possible. I just don't simply have a
3 recollection of it.

4 LDC [MR. NEVIN]: Okay. And is that -- but that's -- is
5 that something you formed an opinion on?

6 MJ [Col PARRELLA]: No.

7 LDC [MR. NEVIN]: I wanted to ask you some questions about
8 595B. That's your fitness report out of the Commandant of the
9 Marine Corps Fellowship Program. Could you say what you did
10 on that, during that time?

11 MJ [Col PARRELLA]: Yes. So the Fellowship Program is
12 part of Marine Corps University. Every year they select a
13 handful of officers to serve as Fellows at different agencies
14 and corporations and think tanks. I was selected to be the
15 Fellow for the Department of Justice. With that, I was
16 assigned to the National Security Division, and within that,
17 the Counterterrorism Section.

18 So I think in the exhibit itself, you probably have
19 an explanation of what the -- that -- those duties entailed.
20 I will say that it was distinct from being a hired Department
21 of Justice employee in the sense that the Marine Corps mandate
22 was that I essentially bring something back to the
23 organization, so I observe, attempt to attend meetings as

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1 frequently as possible, maybe provide some information to the
2 Department of Justice about what DoD's mission is and answer
3 any questions that they may have as well.

4 LDC [MR. NEVIN]: Did you participate in the litigation of
5 a specific case?

6 MJ [Col PARRELLA]: I did. I can't tell you what those --
7 I just don't recall what those cases were.

8 LDC [MR. NEVIN]: So it was more than one case?

9 MJ [Col PARRELLA]: It was more than one case. I was
10 always co-detailed, so I was never assigned a case to myself.
11 I was always co-detailed with an existing or a permanent
12 employee of CTS so that I could essentially assist and
13 observe.

14 LDC [MR. NEVIN]: Yeah. And you appeared on the record, I
15 believe?

16 MJ [Col PARRELLA]: I never ----

17 LDC [MR. NEVIN]: I'm sorry. When you say detailed ----

18 MJ [Col PARRELLA]: Yeah, I never made an appearance in a
19 courtroom while I was at the Department of Justice.

20 LDC [MR. NEVIN]: I see. Could you say who you worked
21 with there?

22 MJ [Col PARRELLA]: I was assigned cases with a handful of
23 attorneys. The only -- I would say, most frequently would be

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1 [REDACTED], who I think his name appears on the report, and a
2 gentleman by the name of [REDACTED].

3 LDC [MR. NEVIN]: I'm sorry, would you say that again?

4 MJ [Col PARRELLA]: [REDACTED].

5 LDC [MR. NEVIN]: Okay. Did you become acquainted with
6 any of the persons who are appearing here as trial counsel
7 today?

8 MJ [Col PARRELLA]: I know Mr. Groharing from his time
9 going back to when he served on active duty in the Marine
10 Corps, and I did have occasion to see him at social functions,
11 going-away, Christmas party. So maybe two or three times
12 throughout that year I saw him in a going-away or social
13 situation while there.

14 LDC [MR. NEVIN]: Was he associated with the National
15 Security Division and the Counterterrorism Section?

16 MJ [Col PARRELLA]: I believe he was and that he was on
17 detail to here, but I don't -- I don't know. And he didn't
18 maintain a presence at the Department of Justice while I was
19 there ----

20 LDC [MR. NEVIN]: Okay.

21 MJ [Col PARRELLA]: ---- other than those sort of
22 appearances for social situations.

23 LDC [MR. NEVIN]: I wanted to make sure I understand what

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1 you just said. You said he was detailed "here," meaning to
2 the military commission?

3 MJ [Col PARRELLA]: It's my understanding.

4 LDC [MR. NEVIN]: From DoJ?

5 MJ [Col PARRELLA]: Correct.

6 LDC [MR. NEVIN]: Okay. But he was in that section. It's
7 just -- if I understand you, what you're saying correctly, he
8 was in that section. You just don't work with him directly?

9 MJ [Col PARRELLA]: I don't know that I can answer that
10 question because I don't know for sure. I believe the answer
11 is yes.

12 LDC [MR. NEVIN]: Okay. What about other persons
13 associated with the military commission -- with military
14 commissions at NSD Counterterrorism?

15 MJ [Col PARRELLA]: I don't believe I've met anybody when
16 I was at DoJ who was working on the commissions.

17 LDC [MR. NEVIN]: Michael Lebowitz?

18 MJ [Col PARRELLA]: Doesn't ring a bell.

19 LDC [MR. NEVIN]: Okay. Joanna Baltes?

20 MJ [Col PARRELLA]: Doesn't ring a bell either.

21 LDC [MR. NEVIN]: Okay. Mr. Trivett?

22 MJ [Col PARRELLA]: I don't think so. It's possible he
23 may -- I may have met him at -- again, at a social function,

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1 but I never worked with him.

2 LDC [MR. NEVIN]: Okay. Mr. Ryan?

3 MJ [Col PARRELLA]: I don't believe so.

4 LDC [MR. NEVIN]: Okay. Could you -- did you receive
5 particular training to do the work that you did there at the
6 National Security Division?

7 MJ [Col PARRELLA]: No.

8 LDC [MR. NEVIN]: Did you read materials to get yourself
9 up to speed? For example, did you read the 9/11 Report?

10 MJ [Col PARRELLA]: I did not read the 9/11 Report. The
11 only thing I remember reading to sort of get up to speed was
12 the statutes related to CIPA.

13 LDC [MR. NEVIN]: Did anybody offer you training about --
14 about international terrorism, let's say, for want of a better
15 way of phrasing it?

16 MJ [Col PARRELLA]: No.

17 LDC [MR. NEVIN]: And did you read materials that were
18 related to that?

19 MJ [Col PARRELLA]: No.

20 LDC [MR. NEVIN]: I know that in the process of working on
21 cases like that, that it becomes important to know the kind of
22 general milieu of international terrorism. Was that the case
23 for you and did you make -- did you make any effort to educate

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1 yourself in that area?

2 MJ [Col PARRELLA]: Not independent effort. I mean, other
3 than my just base knowledge of the subject matter from my
4 times in DoD, I don't recall any specific trying to get up to
5 speed on the topic.

6 LDC [MR. NEVIN]: Have you reviewed or discussed the
7 statements that the men in this case made at any time?

8 MJ [Col PARRELLA]: No.

9 LDC [MR. NEVIN]: You spent time as a commander of a
10 regional group, I believe, Western -- it's Region 8, if I'm
11 remembering correctly.

12 MJ [Col PARRELLA]: That's correct.

13 LDC [MR. NEVIN]: And that's Central Europe, is it not?

14 MJ [Col PARRELLA]: Yes, it is.

15 LDC [MR. NEVIN]: And that was the -- because the Marine
16 Corps has as one of its responsibilities protection of
17 United States embassies, correct?

18 MJ [Col PARRELLA]: That is correct.

19 LDC [MR. NEVIN]: All right. So you had then command of
20 the Marines who were protecting the embassies in Region 8?

21 MJ [Col PARRELLA]: Yes.

22 LDC [MR. NEVIN]: Right. And my understanding was that
23 you lived in Germany during that period.

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1 MJ [Col PARRELLA]: Yes.

2 LDC [MR. NEVIN]: Okay. And, of course, one of the -- one
3 of the issues for protection of United States embassies would
4 be threat from terrorism. And I take it you were aware of
5 that threat and would have educated yourself about the extent
6 of it. Would that be correct?

7 MJ [Col PARRELLA]: To a limited extent. The way that the
8 program is designed is the Marines, when they're at embassies
9 and consulates, are actually under the operational control of
10 the regional security officer within the Department of State.
11 Our job is to ensure that the Marines are adequately trained,
12 that they're doing okay, that the State Department is abiding
13 by the MoU that we have for the Marine security program.

14 LDC [MR. NEVIN]: Are you aware of what's been referred to
15 as the East Africa Embassy Bombings that occurred in 1998?

16 MJ [Col PARRELLA]: Other than just media accounts, no.

17 LDC [MR. NEVIN]: Okay. And you didn't receive any
18 information during your time as a commander regarding those
19 events?

20 MJ [Col PARRELLA]: No.

21 LDC [MR. NEVIN]: And did you -- when you say media
22 accounts, can you be more specific what you're referring to
23 there?

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1 MJ [Co1 PARRELLA]: Just general media accounts, probably
2 back when the incident occurred. I never reviewed, to my
3 knowledge, any classified material while in command at
4 Region 8.

5 LDC [MR. NEVIN]: I will tell you that the government
6 relies in large part or in -- to a certain degree on the --
7 those attacks as part of its argument that there were, indeed,
8 hostilities subject to the law of war on September 11th. So I
9 asked the question whether there's anything in your background
10 that would -- any information that you would have had on that
11 subject as you come here to the bench today.

12 MJ [Co1 PARRELLA]: No.

13 LDC [MR. NEVIN]: I take it we're going to be having
14 argument on motions later today. I believe maybe there's a
15 motion to abate until you have come up to speed, so -- so
16 maybe we won't.

17 But I'm interested to know what you've read about the
18 case at this point. We have some 20,000 pages of transcripts.
19 Have you read -- have you read those or any portion of them?

20 MJ [Co1 PARRELLA]: I have read portions. Yes, I have.

21 LDC [MR. NEVIN]: Have you read -- did you read the prior
22 voir dire?

23 MJ [Co1 PARRELLA]: Some of them.

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1 LDC [MR. NEVIN]: Okay. What about motions arguments?

2 MJ [Co1 PARRELLA]: I've read portions of the transcript
3 that included motions arguments. Again, I've read portions of
4 the voir dire. I've read pleadings applicable to what we're
5 going to do in this session of court or this docket order.

6 LDC [MR. NEVIN]: Okay. But not the whole ----

7 MJ [Co1 PARRELLA]: No.

8 LDC [MR. NEVIN]: And could you say how much of the whole
9 you've read at this point?

10 MJ [Co1 PARRELLA]: I can't.

11 LDC [MR. NEVIN]: Okay. And what about the pleadings in
12 the case? Have you read the pleadings in the case?

13 MJ [Co1 PARRELLA]: Not all of them.

14 LDC [MR. NEVIN]: Could you give us an idea of
15 what percentage?

16 MJ [Co1 PARRELLA]: Mr. Nevin, I'm not going to. I mean,
17 obviously, there is a voluminous amount of material. I've
18 read as much as I can, given the time constraints that I've
19 had; and again, done everything I could to ensure that I'm at
20 least able to preside and understand the issues and rule on
21 the law to the best of my ability. And so that's the extent
22 of which I'm going to answer that question.

23 LDC [MR. NEVIN]: Well, okay, Your Honor. Did I

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1 understand you to say that you did not begin reading materials
2 until the 27th, until you were detailed on the 27th?

3 MJ [Col PARRELLA]: That's correct.

4 LDC [MR. NEVIN]: So something on the order of ten days
5 ago?

6 MJ [Col PARRELLA]: Yeah. It's possible when I went up
7 for the read-in that I might have reviewed a few matters, but
8 I don't recall doing much. I think maybe I reviewed the
9 protective order when I was up there in the middle of August.
10 But that would have been the earliest I would have reviewed
11 anything related to the case.

12 LDC [MR. NEVIN]: And when you say the protective order,
13 what are you referring to?

14 MJ [Col PARRELLA]: Protective order, I believe it's
15 Appellate Exhibit 013BBBB.

16 LDC [MR. NEVIN]: Protective Order #1.

17 MJ [Col PARRELLA]: Correct.

18 LDC [MR. NEVIN]: And have you read protective orders --
19 have you read other protective orders?

20 MJ [Col PARRELLA]: I have since then.

21 LDC [MR. NEVIN]: Okay. And could I ask, have you read
22 the 505 materials, meaning the government's submissions and
23 proposed substitutions and the military judge's rulings?

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1 MJ [Col PARRELLA]: I'm going to ask you to move on,
2 Mr. Nevin. I mean, if there's a particular thing that you're
3 concerned that I might have formed an opinion, you can ask
4 that question. But I will tell you that I have not formed any
5 opinions, I haven't reviewed or pre-reviewed any materials
6 that have caused me to form an opinion about how any
7 particular issue should be resolved at this point.

8 LDC [MR. NEVIN]: No, but -- and again, Your Honor, I'm
9 just -- the reason for the inquiry is just to know what your
10 state of knowledge is because that shapes the way we argue the
11 case, the way all the parties would argue the case. And --
12 obviously, so that's the reason for the question.

13 MJ [Col PARRELLA]: Again, I can understand your -- why
14 you'd want to know that. But since it's not relevant to my
15 impartiality or bias, I'm going to ask you to move on.

16 LDC [MR. NEVIN]: Okay. So let me just run down this list
17 quickly and ask you, have you read any of the cases of the
18 United States Supreme Court or of the courts of appeals that
19 directly relate to military commissions cases?

20 MTC [MR. TRIVETT]: Objection, relevance.

21 MJ [Col PARRELLA]: Yeah, I will briefly state that I have
22 not -- not that I can recall. It's possible, but again, we're
23 going to move on.

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1 LDC [MR. NEVIN]: All right. And I understand, Your
2 Honor. I just -- I have to ask.

3 Have you read any of the journalism related to this
4 case?

5 MTC [MR. TRIVETT]: Same objection.

6 MJ [Co1 PARRELLA]: I'll answer that briefly just because
7 it's potentially related to why we're going through this
8 question. I generally have not. I think that one of the
9 attorney advisors provided me an article that was probably
10 authored in 2012 or '13 that just had pictures of the trial
11 participants, and I think that's why it was provided, is to
12 put a face and a name together. That's the extent of the
13 media I reviewed.

14 LDC [MR. NEVIN]: Okay. What about books?

15 MJ [Co1 PARRELLA]: No.

16 LDC [MR. NEVIN]: And there have been many books, of
17 course, but you're saying you have read none of them?

18 MJ [Co1 PARRELLA]: I've never read a book particularly
19 about this case or that I can recall specifically about 9/11.
20 There may have been books that tangentially mentioned 9/11,
21 but not specifically anything about this case.

22 LDC [MR. NEVIN]: All right. What about movies or
23 documentaries?

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1 MJ [Co1 PARRELLA]: No.

2 LDC [MR. NEVIN]: And in particular, you've not seen *Zero*
3 *Dark Thirty*?

4 MJ [Co1 PARRELLA]: I have seen *Zero Dark Thirty*.

5 LDC [MR. NEVIN]: *Doctors of the Dark Side*?

6 MJ [Co1 PARRELLA]: No.

7 LDC [MR. NEVIN]: Could you say what impact *Zero Dark*
8 *Thirty* had on you?

9 MJ [Co1 PARRELLA]: Not a significant impact.

10 LDC [MR. NEVIN]: Sir, do you have information about the
11 CIA torture program at all? And I'll just represent to you
12 that this -- for example, there has been a book entitled
13 *Enhanced Interrogation* written by one of the people who
14 designed the program. Have you read that book?

15 MJ [Co1 PARRELLA]: I have not.

16 LDC [MR. NEVIN]: Okay. And do you have any other
17 knowledge or information about the torture program?

18 MJ [Co1 PARRELLA]: No.

19 MTC [MR. TRIVETT]: Objection as to form.

20 LDC [MR. NEVIN]: And in particular, have you read the
21 executive summary of the SSCI report on the torture program?

22 MJ [Co1 PARRELLA]: Hang on one second, Mr. Nevin.
23 Trial Counsel?

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1 MTC [MR. TRIVETT]: We object to this line of questioning
2 based on form. Calls for a legal conclusion.

3 MJ [Col PARRELLA]: Okay. I'll allow the question.
4 Mr. Nevin, just repeat that last question.

5 LDC [MR. NEVIN]: The question was whether you had read
6 the -- or all or any part of the executive summary of the
7 Senate Select Committee on Intelligence's report released
8 December 9 of 2014 regarding the torture program.

9 MJ [Col PARRELLA]: I have not.

10 LDC [MR. NEVIN]: And have you read any of the Office of
11 Legal Counsel memoranda that relate to the torture program?

12 MJ [Col PARRELLA]: I have not.

13 LDC [MR. NEVIN]: Okay. Have you formed or expressed an
14 opinion about whether the torture was justified under the
15 circumstances?

16 MJ [Col PARRELLA]: No.

17 LDC [MR. NEVIN]: That's all I have. Thank you, sir.

18 MJ [Col PARRELLA]: You're welcome.

19 Ms. Bormann?

20 LDC [MS. BORMANN]: Judge, if you will bear with us and we
21 can go a little out of order, we just received -- given the
22 line of questioning that Mr. Nevin just gave, we sent
23 Captain Brady to retrieve a copy of the JAG rule that applies

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1 to you, so if you can give us a moment just to look at that
2 and maybe Mr. Harrington could go first, that would be great.
3 It literally was just delivered.

4 MJ [Col PARRELLA]: Okay. In the meantime,
5 Mr. Harrington, would you like to proceed?

6 LDC [MR. HARRINGTON]: Judge, do you know what implicit
7 bias is?

8 MJ [Col PARRELLA]: Mr. Harrington, I want to know where
9 we're going with this, so why don't we just get to where we're
10 going. I'm not going to answer that question.

11 LDC [MR. HARRINGTON]: All right. Well, Judge, you
12 recognize that sometimes we don't necessarily understand our
13 own biases?

14 MJ [Col PARRELLA]: I understand.

15 LDC [MR. HARRINGTON]: Okay. And that so you understand
16 that some of these questions that we might ask you is really
17 going to that and to understand not just what you might say to
18 us, "I don't have any bias against somebody," that there may
19 be some things that you're not even aware of that you have
20 bias. That's really what we're trying to get at.

21 MJ [Col PARRELLA]: And I understand that, Mr. Harrington.
22 So again, I understand the purpose of this portion, I believe
23 in it, and I want to be as transparent as possible. But I'm

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1 going to try to keep us limited to areas that are pertinent
2 per the rules.

3 So things like qualifications, unless it's calling
4 into question my qualifications per the rules, we're simply
5 just not going to go down that. Matters that pertain to my
6 impartiality or bias I certainly will entertain. I'll
7 entertain questions that perhaps reveal an implicit bias.

8 LDC [MR. HARRINGTON]: But the rule -- the qualifications
9 in the rules also take into account the perception that the
10 public and everybody else has about the court.

11 MJ [Col PARRELLA]: I understand.

12 LDC [MR. HARRINGTON]: Okay. Judge, after -- you
13 testified about where you were when 9/11 happened. What was
14 your reaction after 9/11 happened?

15 MJ [Col PARRELLA]: That's difficult for me to remember
16 the exact emotions, so I will say that I probably felt similar
17 to what everybody else felt in the country. But I don't have
18 any feelings here today as I sit here, which I think is what's
19 pertinent, that came about as a result of that experience that
20 caused me to feel that I cannot be impartial or unbiased.

21 LDC [MR. HARRINGTON]: Do you have different feelings
22 about it today than you did back at 9/11?

23 MJ [Col PARRELLA]: I don't know. It's possible. I mean,

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1 I imagine that time has an impact on the way people feel about
2 certain events.

3 LDC [MR. HARRINGTON]: Well, you just mentioned that you
4 had the feelings that everybody else has. I don't know what
5 that means. What does that mean? What did everybody else
6 feel? We're trying to find out what you felt about it.

7 MJ [Col PARRELLA]: Okay. I'll briefly answer this,
8 Mr. Harrington, and then we're going to move on, because I
9 don't think that my feelings back, you know, in 2000 -- I
10 think what is pertinent is what my feelings are here today as
11 I sit as the military judge.

12 I think the feeling is -- of the country, if you want
13 me to try to ascribe, you know, what that was, I think it was
14 probably anger and just shock.

15 LDC [MR. HARRINGTON]: Thank you.

16 MJ [Col PARRELLA]: So I think my feelings were probably
17 similar, but again, I'm somewhat speculating because it's been
18 a long time. As I sit here today, I feel that I can be
19 impartial and unbiased.

20 LDC [MR. HARRINGTON]: All right. Did you ever express to
21 anybody what you thought should happen to the people who were
22 responsible for what happened on 9/11?

23 MJ [Col PARRELLA]: Not that I recall.

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1 LDC [MR. HARRINGTON]: Has anybody ever told you that
2 you've heard say that these people should be killed, they
3 should be tortured, they should be -- anything?

4 MJ [Col PARRELLA]: Not that I recall, no.

5 LDC [MR. HARRINGTON]: You've never had a conversation
6 with anybody like that?

7 MJ [Col PARRELLA]: Not that I can recall, no.

8 LDC [MR. HARRINGTON]: And you were in the Marines then;
9 is that right?

10 MJ [Col PARRELLA]: I was.

11 LDC [MR. HARRINGTON]: And have been since?

12 MJ [Col PARRELLA]: I have.

13 LDC [MR. HARRINGTON]: Did you ever hear anybody say that
14 these men deserve the death penalty?

15 MJ [Col PARRELLA]: When you say "these men," I assume
16 you're referring to the accused?

17 LDC [MR. HARRINGTON]: Yes.

18 MJ [Col PARRELLA]: No.

19 LDC [MR. HARRINGTON]: Have you ever expressed an opinion
20 about whether they deserve the death penalty or any other
21 punishment assuming they're convicted?

22 MJ [Col PARRELLA]: No.

23 LDC [MR. HARRINGTON]: After you were detailed to this

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1 position by Judge Pohl, did you tell others that you were
2 detailed to this position?

3 MTC [MR. TRIVETT]: Objection, asked and answered.

4 MJ [Col PARRELLA]: I'm going to sustain the objection. I
5 don't see the relevance of this.

6 LDC [MR. HARRINGTON]: Did you ever express any opinion
7 about this job and what it would entail to anybody else?

8 MJ [Col PARRELLA]: Pertinent to this? To Judge Pohl.

9 LDC [MR. HARRINGTON]: Now, you said that you haven't
10 really discussed, let's say, the nuts and bolts of this case
11 with Judge Pohl; is that correct?

12 MJ [Col PARRELLA]: That's correct.

13 LDC [MR. HARRINGTON]: Is there some rule that prohibits
14 you from doing that?

15 MJ [Col PARRELLA]: I think that Judge Pohl's concern was
16 essentially ensuring that I remained impartial as I went
17 through the voir dire process.

18 LDC [MR. HARRINGTON]: Do you intend to talk to him after
19 the voir dire process?

20 MJ [Col PARRELLA]: If he -- if he avails himself, then I
21 may talk to him, certainly. But I haven't arranged for that
22 or prearranged for that conversation to take place.

23 LDC [MR. HARRINGTON]: Have you given that any thought?

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1 MJ [Col PARRELLA]: We're not going to go there. I don't
2 see the relevance of it.

3 LDC [MR. HARRINGTON]: When you said that you, as a law
4 school intern, participated in two capital cases, what did you
5 do?

6 MTC [MR. TRIVETT]: Objection, relevance.

7 MJ [Col PARRELLA]: Overruled. I'll answer the question.

8 So primarily, I assisted in preparation of pleadings.

9 LDC [MR. HARRINGTON]: For pretrial motions I take it?

10 MJ [Col PARRELLA]: Yes.

11 LDC [MR. HARRINGTON]: Did any of those deal with the
12 sentencing phase of the case?

13 MJ [Col PARRELLA]: It's likely. I don't recall.

14 LDC [MR. HARRINGTON]: Judge, I take it that in your
15 experience as both a trial lawyer and as a judge that you've
16 participated in jury selection, is that right, or member
17 selection?

18 MJ [Col PARRELLA]: Yes.

19 LDC [MR. HARRINGTON]: Okay. And have you studied about
20 capital jury selection at all?

21 MJ [Col PARRELLA]: Have I studied about it?

22 LDC [MR. HARRINGTON]: Yes.

23 MJ [Col PARRELLA]: I think I've made -- answered

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1 Mr. Nevin's questions regarding -- I haven't attended any
2 capital litigation courses, so I don't know what is meant by
3 "studies," so the answer is likely no, if -- to your question.
4 I mean, it's possible I've studied it at some point in time,
5 but not that I can recall.

6 LDC [MR. HARRINGTON]: Have you made any decisions about
7 what the procedures or forms are going to be for the jury
8 selection in this case?

9 MJ [Co1 PARRELLA]: No.

10 LDC [MR. HARRINGTON]: Have you thought about it?

11 MJ [Co1 PARRELLA]: No.

12 LDC [MR. HARRINGTON]: Have you made any decisions or
13 thought about the amount of time it would take to pick a jury
14 in a capital case?

15 MJ [Co1 PARRELLA]: Not specific to this case.

16 LDC [MR. HARRINGTON]: And are you familiar with the
17 concept of a death-penalty-qualified jury?

18 MJ [Co1 PARRELLA]: Yes.

19 LDC [MR. HARRINGTON]: Okay. What does that mean to you?

20 MTC [MR. TRIVETT]: Objection.

21 MJ [Co1 PARRELLA]: Yeah, sustained.

22 LDC [MR. HARRINGTON]: And how did you learn about that?

23 MJ [Co1 PARRELLA]: I don't recall where I -- where I

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1 learned about it. I mean, at some point in my training or my
2 experience.

3 LDC [MR. HARRINGTON]: And can you tell me: Do you know
4 as you enter this case whether the United States Constitution
5 applies to these proceedings?

6 MTC [MR. TRIVETT]: Objection.

7 MJ [Col PARRELLA]: Mr. Harrington, what this feels like
8 is a quiz of the military judge. I'm not going to do it.
9 I've expressed my qualifications on the record. I've
10 indicated what those qualifications are. You all have the
11 copy of the rules.

12 So again, if the question pertains to what those
13 qualifications are, if you have a reason to believe that I am
14 not qualified, or again, if it goes to my impartiality or
15 bias, I will answer the question. But I'm not going to stand
16 up here and be quizzed. So please ask your next question.

17 LDC [MR. HARRINGTON]: Okay. Judge, if I could just
18 state, we are given a very brief notice that you are assigned
19 to this case, and the standard apparently that is being
20 imposed on us is that it's just this very narrow thing. You
21 meet this tiny little few sentences of what it is to be
22 qualified and, therefore, you can do the case.

23 This is not a normal case. This is a death penalty

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1 case.

2 MJ [Col PARRELLA]: I understand, Mr. Harrington, but ----

3 LDC [MR. HARRINGTON]: It's a heightened standard of due
4 process.

5 MJ [Col PARRELLA]: I understand. However, I didn't make
6 those rules. I'm just simply applying the rules that were --
7 that are in the statute and in the regulations. So those are
8 the qualifications that they deemed appropriate for a military
9 judge, and that's why I'm adhering to those standards.

10 I can only assume if Congress wanted to make a
11 detailed analysis of qualifications part of the process, then
12 they would have inserted that into the statute.

13 LDC [MR. HARRINGTON]: Can you tell us, Judge, how long
14 you've been detailed to this case?

15 MJ [Col PARRELLA]: Yes, since August 27th.

16 LDC [MR. HARRINGTON]: And for what period of time? How
17 long? Indefinitely or a specific period of time?

18 MJ [Col PARRELLA]: Until I'm replaced, so indefinitely.

19 LDC [MR. HARRINGTON]: All right. Because we were told
20 that you were only here for a year or ten months or something
21 like that. Is that the case or not?

22 MJ [Col PARRELLA]: So I think what you're referring to is
23 that just prior to my detailing to this case, I was selected

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1 through the Marine Corps process for a command which is slated
2 to begin in the summer of 2019. To the best of my knowledge,
3 I plan on receiving orders to report to that command. So if
4 that were to transpire, then obviously whoever is detailed as
5 the next chief trial judge will have to replace me.

6 LDC [MR. HARRINGTON]: Okay. I take it that's something
7 you don't have control of? The Marines decide that; is that
8 right? You go where you're told; is that basically it?

9 MJ [Col PARRELLA]: Well, I don't know that that's the
10 Marines. In terms of detailing me here, that would -- or to
11 replace me or the decision to replace me would be by the chief
12 trial judge, and I don't know that there's been one that's
13 been appointed to replace Judge Pohl. The Marine Corps would
14 have to issue me orders, yes, from my current duty assignment.

15 LDC [MR. HARRINGTON]: Judge, in terms of the panel that
16 might be selected for this case, has anyone discussed with you
17 about the cost and time and expense and inconvenience to panel
18 members?

19 MJ [Col PARRELLA]: No.

20 LDC [MR. HARRINGTON]: Okay. Is that a concern of yours?

21 MJ [Col PARRELLA]: Not at this juncture.

22 LDC [MR. HARRINGTON]: Would you have any concern about
23 the fact that we might not be able to impanel a jury from the

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1 first panel that's sent here?

2 MJ [Col PARRELLA]: I don't have a concern about that at
3 this juncture.

4 LDC [MR. HARRINGTON]: Does that mean that you haven't
5 really given it any thought or ----

6 MJ [Col PARRELLA]: I haven't given it a tremendous amount
7 of thought, Mr. Harrington, at this point. But it's not a
8 concern for me right now.

9 LDC [MR. HARRINGTON]: Have you given any thought, Judge,
10 to the -- I take it from your previous answer that the answer
11 would be no -- is that -- the amount of time that would be
12 allowed for the questioning of panel members?

13 MJ [Col PARRELLA]: No.

14 LDC [MR. HARRINGTON]: Or the form, whether defense
15 counsel will be allowed to do that?

16 MJ [Col PARRELLA]: I think the answer will remain no,
17 Mr. Harrington. So let's just move on, if we could.

18 Mr. Harrington, if I may ask how many more questions
19 you anticipate. I think we're at the point where it's
20 probably appropriate we take a recess.

21 LDC [MR. HARRINGTON]: Why don't we do that, Judge. I
22 have a few more.

23 MJ [Col PARRELLA]: The commission ----

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1 LDC [MR. RUIZ]: Judge, if I may. Back here, Judge.
2 Judge, I just want to make sure that -- normally, the guard
3 force needs you to affirm that Mr. Hawsawi can go back to the
4 camp, so I'm asking that you please do that.

5 MJ [Col PARRELLA]: Yes. So at this recess, Mr. Hawsawi
6 can return to the camp.

7 LDC [MR. RUIZ]: Thank you.

8 MJ [Col PARRELLA]: All right. Commission is in recess.
9 [The R.M.C. 803 session recessed at 1038, 10 September 2018.]
10 [The R.M.C. 803 session was called to order at 1056, 10
11 September 2018.]

12 MJ [Col PARRELLA]: This commission is called back to
13 order. All parties present when the commission recessed are
14 again present, with the exception of Mr. Hawsawi, who has
15 voluntarily absented himself from the commission.

16 Mr. Harrington, you may proceed.

17 LDC [MR. HARRINGTON]: Yes, Judge. Just a few more
18 questions, Judge.

19 Judge, were you an attorney on a prosecution of a
20 material support of terrorism case?

21 MJ [Col PARRELLA]: I did work on some cases while I was
22 at the Department of Justice that would have involved those
23 charges, correct.

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1 LDC [MR. HARRINGTON]: Okay. And was the person who was
2 the subject of that charge, was there a particular
3 organization that they were alleged to have been a member of,
4 if you recall?

5 MJ [Col PARRELLA]: Yes.

6 LDC [MR. HARRINGTON]: What was that?

7 MJ [Col PARRELLA]: So I worked on several cases while I
8 was at the Department of Justice. Again, like I indicated, I
9 was co-detailed. Some of those cases had been around for a
10 long time when I was co-detailed, and probably most of them
11 were still around when I left at the end of the ten-month
12 duration of my Fellowship.

13 Generically, organizations to which those individuals
14 belonged included primarily, I would say, ISIS, or ISIL, as
15 well as organizations like al-Shabaab. I think I even worked
16 a little bit on a case involving the FARC at that time.

17 LDC [MR. HARRINGTON]: I take it those cases were
18 relatively recent, though, right, since they were still active
19 cases? Is that right? Yes? No?

20 MJ [Col PARRELLA]: I don't know that I can answer that
21 other than to say that I was there, as you know, from 2014 to
22 2015.

23 LDC [MR. HARRINGTON]: Judge, are you a member of any

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1 organizations, either military or nonmilitary, where you feel
2 that you would have any obligation whatsoever to explain any
3 actions that you take in this case?

4 MJ [Col PARRELLA]: No.

5 LDC [MR. HARRINGTON]: Judge, this morning when I got up
6 earlier, I said that we have this bit of a complicated
7 procedure, and I'm not sure what the extent of your knowledge
8 of this issue is because you're so new to the case and that,
9 but in -- AE 292 is the motion series where the Special Review
10 Team was appointed, and we are preparing something in writing
11 to give you some background and try and identify the issue for
12 you.

13 But the initial procedural question is, whom should
14 we serve with this? The trial counsel has been walled off
15 from it, so they normally don't get any of the pleadings. And
16 I didn't explain it to you in detail this morning because
17 they -- because they are here. So the question becomes, is
18 this just an ex parte filing with you? Do we serve the ----

19 MJ [Col PARRELLA]: I think -- so as I understand the
20 nature of this, it would be questions you want to pose to the
21 military judge as part of voir dire that you need to -- or
22 feel you need to file ex parte. Is that a correct summary,
23 Mr. Harrington?

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1 LDC [MR. HARRINGTON]: They don't have to be ex parte,
2 they just need to be ex parte from the trial counsel. They
3 have walled themselves off and have not participated in any of
4 the proceedings we had with the Special Review Team. But the
5 Special Review Team does obviously have an interest in it, I
6 assume, because we're going to be asking questions about them
7 and some of the people that they work with.

8 MJ [Col PARRELLA]: So what I would advise you to do is
9 please file it in writing. If you feel that you need to
10 request it to be ex parte, then please do so, just like you
11 would any other ex parte matter, and I will take it under
12 consideration.

13 LDC [MR. HARRINGTON]: And service on the SRT, yes or no?
14 Do you want to decide that with our ex parte pleading?

15 MJ [Col PARRELLA]: Yeah, I'll decide that when you file
16 the pleading.

17 LDC [MR. HARRINGTON]: Okay. Thank you.

18 MJ [Col PARRELLA]: Thank you, Mr. Harrington.

19 Ms. Bormann, are you prepared to proceed?

20 LDC [MS. BORMANN]: We are, Judge. It will be
21 Mr. Montross.

22 MJ [Col PARRELLA]: Thank you.

23 DC [MR. MONTROSS]: Good morning.

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1 MJ [Col PARRELLA]: Good morning.

2 DC [MR. MONTROSS]: In order to be detailed to serve as
3 the judge on the 9/11 trials, you had to be a military judge;
4 is that correct?

5 MJ [Col PARRELLA]: Yes.

6 DC [MR. MONTROSS]: Okay. I would like to approach and
7 have something marked for identification. I'm going to ask
8 you some questions about a JAG instruction and also the -- and
9 also the judicial canons. May I approach?

10 MJ [Col PARRELLA]: You may.

11 MTC [MR. TRIVETT]: Sir, we have not received a copy of
12 this.

13 DC [MR. MONTROSS]: I understand that. As I was about to
14 say, Ms. Bormann is giving copies to trial counsel as well as
15 giving copies to the other defendants and their counsel.

16 MJ [Col PARRELLA]: Okay.

17 DC [MR. MONTROSS]: May I approach?

18 MJ [Col PARRELLA]: You may.

19 [The military judge conferred with courtroom personnel.]

20 [Pause.]

21 DC [MR. MONTROSS]: Your Honor, if I may ask, and I'll
22 certainly give you an opportunity to look at them, how
23 JAG Instruction 58 ----

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1 LDC [MR. RUIZ]: I'm sorry, Judge. We still have not
2 received a copy. We would like a copy.

3 LDC [MS. BORMANN]: That's correct, Judge. Our copier was
4 having difficulties, so we're a copy short. I'm happy to
5 provide Mr. Ruiz my copy, if he needs it. It's the JAG rules
6 that apply to him too.

7 MJ [Col PARRELLA]: All right. Let's please ensure that
8 he has a copy. It looks like Mr. Connell just handed Mr. Ruiz
9 a copy. Is that correct, Mr. Ruiz?

10 LDC [MR. RUIZ]: Yes, sir. I'm reviewing them now.

11 [Pause.]

12 MJ [Col PARRELLA]: Okay, Mr. Montross, you may proceed.

13 DC [MR. MONTROSS]: Your Honor, first as a procedural
14 question, I handed up two documents to you. The first
15 document is entitled JAG Instruction 5803.1E.

16 Just for the record, could you tell me what
17 designation that has received?

18 MJ [Col PARRELLA]: I'm sorry. I don't understand your
19 question.

20 DC [MR. MONTROSS]: As an exhibit number. I'm sorry, Your
21 Honor.

22 MJ [Col PARRELLA]: 595C.

23 DC [MR. MONTROSS]: 595C. And, Your Honor, I also handed

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1 up from the code of judicial -- from the Canon of Judicial
2 Conduct a number of rules. Is it safe to say that is AE 595D,
3 as in delta?

4 MJ [Col PARRELLA]: That's correct.

5 DC [MR. MONTROSS]: Okay. Thank you.

6 Sir, I'm asking if you would agree with me -- or in
7 your previous work as a military judge, are you familiar with
8 JAG Instruction 5803.1E, as in Edward?

9 MJ [Col PARRELLA]: Yes.

10 DC [MR. MONTROSS]: And you agree that that instruction
11 covers you; is that fair to say?

12 MJ [Col PARRELLA]: That is fair to say.

13 DC [MR. MONTROSS]: Okay. Sir, I was wondering -- I'm
14 going to ask you if you can please turn to page 6. There's a
15 middle of the page, Roman numeral -- I mean, Arabic numeral 7,
16 "Judicial Conduct." If I may just briefly read that.

17 "To the extent that it does not conflict with
18 statutes" ----

19 MJ [Col PARRELLA]: Mr. Montross, I'm sorry to cut you
20 off. I can read that. Let's proceed.

21 DC [MR. MONTROSS]: Do you agree that the American Bar
22 Association Model Code of Judicial Conduct applies to your
23 role here at the 9/11 military commission?

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1 MJ [Col PARRELLA]: Well, it appears from the reading of
2 this to the extent it doesn't conflict with the other
3 statutes, regulations, or rules.

4 DC [MR. MONTROSS]: Okay. Do you believe it conflicts
5 with any other statute, regulation, or rule?

6 MJ [Col PARRELLA]: I'd -- not to my knowledge.

7 DC [MR. MONTROSS]: Sir, I'm going to ask you then to look
8 at AE 595D, as in delta, Rule 2.5: Competence, Diligence, and
9 Cooperation.

10 MJ [Col PARRELLA]: Okay.

11 DC [MR. MONTROSS]: Okay. Do you agree that a judge
12 should perform judicial and administrative duties competently
13 and diligently?

14 MJ [Col PARRELLA]: What's the relevance of this?

15 DC [MR. MONTROSS]: Your Honor, if you look at the comment
16 to Rule 2.5, it says, "Competence in the performance of
17 judicial duties requires the legal knowledge, skill,
18 thoroughness, and preparation reasonably necessary to perform
19 a judge's responsibility of judicial office."

20 I would like to ask you questions about your capital
21 legal knowledge, your skill, your thoroughness, and the
22 preparation that you've done not only in general, but specific
23 to the motions that are in front of you during this week of

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1 hearings. What pages of the transcript you read, what
2 documents you reviewed, what pleadings, what attachments. And
3 I would suggest that the comment of Rule 2.5 specifically
4 grants me the authority to ask you those questions.

5 MJ [Col PARRELLA]: Okay. I disagree, Mr. Montross, and I
6 understand that's your position and perhaps the position of
7 other counsel. The commission's position is that the
8 qualifications are stated, and I believe it's the discussion
9 to Rule 902 that indicates that the military judge can place
10 limits on the presentation of evidence, scope of the
11 questioning, and argument.

12 And I'm simply just not going to go down the rabbit
13 hole of the questions and answers about my qualifications. I
14 think I've been pretty up front about the fact that I
15 recognize that I don't have the experience of my predecessor;
16 nevertheless, my predecessor is the one who selected me from a
17 pool of nominees. Those nominees were screened by the service
18 judge advocate. I've met all of the qualifications, to the
19 best of my knowledge, that are set forth in R.M.C. 502 and
20 503.

21 I have considered sort of the breadth of the task
22 that faces me, and I think I've made it clear that I will not
23 be rushed, I will not feel any pressure to rush, and I will

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1 take whatever time is necessary to ensure that I fully
2 understand the issues before the commission before I make any
3 ruling on the subject matter.

4 What I will not do is I will not go through in detail
5 to specify what I did or did not do to prepare for today's
6 hearing. As we address each appellate exhibit, hopefully
7 throughout the week, if I have questions, I will ask them. If
8 I need to take things under advisement, I shall do so.

9 So with that in mind, I'd ask you to please continue
10 with your next question.

11 DC [MR. MONTROSS]: My next question would be: Is it your
12 position, therefore, Your Honor, that outside of Rule 502 and
13 Rule 503 of the military commission that there is no place
14 during voir dire to ask you questions regarding your
15 obligations under the Model Code of Judicial Conduct?

16 MJ [Col PARRELLA]: My position is with respect to
17 qualifications, you can ask me questions regarding my
18 qualifications that are set forth in the rules.

19 The rule -- or comment to Rule 2.5 reading this, to
20 me, does not go beyond what's in 502 and 503. It's basically
21 a tenet that's applicable to whatever case I'm assigned, and I
22 understand the complexity and the -- sort of the history of
23 this case enough to know the task at hand.

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1 DC [MR. MONTROSS]: I understand you understand. The
2 point of voir dire, though, is for us to understand. So I'm
3 asking specifically then: You referenced the comment to Rule
4 2.5. Am I not permitted to ask, then, any questions about
5 your capital legal knowledge other than what has been asked by
6 Mr. Nevin?

7 MJ [Col PARRELLA]: I believe that I've already answered
8 as much as I can answer. So I don't know that there's any
9 good in asking me. You're welcome to ask me questions if it's
10 relevant to my impartiality or bias or, you know, maybe a
11 strong feeling I may have on capital punishment. But as to my
12 qualifications to sit on a capital case, the answer is no.

13 I think we've addressed that topic. And again,
14 you're welcome to challenge the military judge in that
15 respect, but I don't see the productivity in asking further
16 questions on that.

17 DC [MR. MONTROSS]: One other question. Does the Code of
18 Judicial Conduct provide supplemental or additional
19 obligations in your view beyond what is required by Rule 502
20 and Rule 503?

21 MJ [Col PARRELLA]: I think that's sort of an advisory
22 question. I'm not going to answer the question. Let's ask
23 your next question.

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1 DC [MR. MONTROSS]: Okay. I'd like to ask you some
2 questions about your time at the Department of Justice
3 beginning in 2014.

4 Just to be clear, your biography indicates you
5 started in July of 2014, though your fitness report seems to
6 indicate the end of June 2014. I am a civilian, and I'm
7 certainly not versed in military fitness reports. When did
8 you start at the Department of Justice?

9 MJ [Col PARRELLA]: So it would have been in July. The
10 reason for the reference to June on the fitness report is
11 because in the military, you don't want gaps in your fitness
12 reports. So the date of June would reflect when my previous
13 fitness report had ended. In all likelihood, in the interim
14 period, there was probably annual leave or some other event.

15 DC [MR. MONTROSS]: Okay. Were you familiar with the
16 Fellowship position before you actually were assigned it?

17 MJ [Col PARRELLA]: I was selected for the Fellowship
18 in -- sometime around December or January of the year
19 preceding. That's when the message comes out that indicates
20 who is selected for what Fellows.

21 Now, I believe I was the third person. It was a
22 relatively new Fellowship, so I think I was the third person
23 to hold that position from the Marine Corps. And I believe

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1 sometime in the late spring, I probably did speak with my
2 predecessor just to get an idea of what the Fellowship
3 entailed.

4 DC [MR. MONTROSS]: Okay. Did you actively seek out that
5 assignment to work with DOJ?

6 MJ [Col PARRELLA]: No. It was -- it's assigned as part
7 of a board selection process.

8 DC [MR. MONTROSS]: Okay. Did you indicate it as a
9 preference?

10 MJ [Col PARRELLA]: My recollection -- so we do submit a
11 questionnaire prior to that board. I believe my top
12 preference was to attend top-level schools, so there's sort of
13 the dichotomy of you can either be selected to attend a war
14 college or a similar type school or a Fellowship. I believe
15 the War College was my first preference. I don't know if I
16 put specifically Department of Justice as a preference.

17 DC [MR. MONTROSS]: Now, the Fellowship, when you obtained
18 it and you started in July of 2014, was your working office in
19 Washington, D.C.?

20 MJ [Col PARRELLA]: It was. It was in the Department of
21 Justice main building.

22 DC [MR. MONTROSS]: Okay. And in the Department of
23 Justice main building, was -- not the -- a little bit broader

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1 than Counterterrorism Section, but the National Security
2 Division, was that housed in its entirety at main Justice?

3 MJ [Col PARRELLA]: I don't know.

4 DC [MR. MONTROSS]: Okay. Was the Counterterrorism
5 Section housed in its entirety at main Justice?

6 MJ [Col PARRELLA]: Honestly, I don't know.

7 DC [MR. MONTROSS]: Okay. How many attorneys were in the
8 Counterterrorism Section of the National Security Division of
9 the Department of Justice when you started there in July of
10 2014?

11 MJ [Col PARRELLA]: I don't know.

12 DC [MR. MONTROSS]: Do you have an estimate?

13 MJ [Col PARRELLA]: My best estimate would be maybe 60 or
14 70, but I never had occasion to be at a meeting or some sort
15 of gathering with all the other attorneys.

16 DC [MR. MONTROSS]: Okay. The -- you provided to us on
17 Saturday a fitness report which you have also placed into the
18 record. Is that correct, Your Honor?

19 MJ [Col PARRELLA]: Correct.

20 DC [MR. MONTROSS]: Okay. Now, in the report, there's
21 also a letter that's from [REDACTED]. Is that
22 correct?

23 MJ [Col PARRELLA]: Yes.

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1 DC [MR. MONTROSS]: Okay. [REDACTED] indicates that
2 upon your arrival, you "straightaway assumed all the duties
3 and responsibilities of a DOJ counterterrorism prosecutor and
4 immediately became an integral part of the DOJ's
5 counterterrorism mission."

6 I understand that you said before that the duties and
7 responsibilities of a DOJ counterterrorism prosecutor are
8 self-evident in the letter. But frankly, Your Honor, I'm not
9 seeing it. So can you explain to me what your duties and
10 responsibilities were?

11 MJ [Col PARRELLA]: So I think if you look at page 1 of
12 AE 595B, and specifically under Block B where it indicates the
13 billet description, I will tell you that that's probably my --
14 the best description that I can offer of what my role was as a
15 CMC fellow to the Department of Justice.

16 DC [MR. MONTROSS]: Can you explain to me how so quickly
17 you were seamlessly integrated as a full-fledged
18 counterterrorism prosecutor? What does that mean?

19 MJ [Col PARRELLA]: Well, that would be a great question
20 for [REDACTED].

21 DC [MR. MONTROSS]: Okay. Well, it's also -- you just
22 read to me part of the billet description, and that's actually
23 on your fitness rep report. It's not the letter from

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1 [REDACTED], it's on the fit rep. So it's under "DIRECTED
2 AND ADDITIONAL COMMENTS." So that's where I'm asking it from.

3 MJ [Col PARRELLA]: Well, those directed comments are also
4 not prepared by me. Those are prepared by the gentleman who
5 signs in Block J, which is [REDACTED].

6 DC [MR. MONTROSS]: Do you believe that you seamlessly
7 integrated yourself as a full-fledged counterterrorism
8 prosecutor upon your arrival?

9 MJ [Col PARRELLA]: I would have to say it was probably a
10 little less than seamless and that I was not quite ready or at
11 the capability or competency of those who are permanent
12 employees of the Department of Justice.

13 DC [MR. MONTROSS]: Well, I'm brand new to this case, too,
14 so I feel the same way actually right now. So let me ask you,
15 though, you said in terms -- you described your billeting as
16 Part B. When you're integrated, do you have access to the
17 same information as all the other counterterrorism prosecutors
18 in that section?

19 MJ [Col PARRELLA]: I had a security clearance that
20 allowed me access to the material that I needed to know.

21 DC [MR. MONTROSS]: What was your security clearance at
22 that time?

23 MJ [Col PARRELLA]: TS//SCI.

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1 DC [MR. MONTROSS]: Okay. So you would have access to the
2 same information and databases as anyone else who had TS//SCI
3 clearance in the Department of Justice at that time; is that
4 fair to say?

5 MJ [Co1 PARRELLA]: I don't know.

6 DC [MR. MONTROSS]: Okay. Now, you said before that, when
7 you first got there, that one of the things you did was you
8 observed and attended meetings as often as possible. Is that
9 right?

10 MJ [Co1 PARRELLA]: That's a fair statement, yes.

11 DC [MR. MONTROSS]: All right. There would be staff
12 meetings from -- for all the attorneys in the Counterterrorism
13 Section that you would attend?

14 MJ [Co1 PARRELLA]: No.

15 DC [MR. MONTROSS]: Okay. What meetings would you attend?

16 MJ [Co1 PARRELLA]: So within the Counterterrorism
17 Section, there were sections within the section.

18 DC [MR. MONTROSS]: Okay.

19 MJ [Co1 PARRELLA]: I don't remember the billet, I think
20 it's maybe deputy chief. So that individual would hold maybe
21 weekly meetings; I attended a few of those.

22 DC [MR. MONTROSS]: I'm sorry. You said weekly, sir?

23 MJ [Co1 PARRELLA]: I think they were weekly.

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1 I attended meetings related to cases that I was
2 working on at various times and places. I never attended,
3 that I recall, a regularly occurring meeting within the
4 organization that was hosted by anybody. I might have sat in
5 on a meeting once, somebody within the National Security
6 Division's, you know, front office, but not that I can -- I
7 certainly didn't do it on a recurring instance, and I can't
8 even recall a specific instance.

9 DC [MR. MONTROSS]: Okay. Would there be documentation at
10 the Counterterrorism Section about the meetings that you
11 attended and who was present at these meetings?

12 MJ [Col PARRELLA]: I highly doubt it. I don't recall
13 ever signing anything.

14 DC [MR. MONTROSS]: Okay. Would there have been e-mail
15 notifications or counter notifications inviting you to staff
16 meetings or team meetings?

17 MJ [Col PARRELLA]: No.

18 DC [MR. MONTROSS]: You indicated that there were sections
19 within the Counterterrorism Section of the National Security
20 Division. What sections did you work in?

21 MJ [Col PARRELLA]: I don't recall the designation. So
22 all I can say is that I recall the initial team lead, for lack
23 of a better word, was [REDACTED]. And then he departed at

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1 some point in time, and I believe his replacement was [REDACTED]
2 [REDACTED].

3 DC [MR. MONTROSS]: [REDACTED] who? I'm sorry, Your Honor.

4 MJ [Col PARRELLA]: [REDACTED].

5 DC [MR. MONTROSS]: Could you estimate a spelling for me?

6 MJ [Col PARRELLA]: I really can't. I don't recall. I
7 mean, it may be [REDACTED] -- I don't know. I would just be
8 guessing as well.

9 DC [MR. MONTROSS]: You also, though, indicated that you
10 were co-detailed, I believe, to a number of cases while you
11 were at the National Security Division; is that right?

12 MJ [Col PARRELLA]: Yes.

13 DC [MR. MONTROSS]: Would you have been detailed to cases
14 that were potentially in different units or subsections of the
15 Counterterrorism Section itself? Is that question clear
16 because if not, I can try and rephrase.

17 MJ [Col PARRELLA]: Yeah, it is clear. I think for the
18 most part, most of my -- I can only recall being detailed to
19 cases within my section.

20 DC [MR. MONTROSS]: Would there be memorialization or
21 records of what cases specifically you worked on or touched
22 during your time at the Counterterrorism Section?

23 MJ [Col PARRELLA]: I don't think it was ever

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1 memorialized. It was certainly not a written detailing. It
2 was a very sort of informal process because, again, they sort
3 of knew I was there for a very limited amount of time and that
4 I was there for a different purpose than the other attorneys
5 who were permanently assigned to the unit.

6 DC [MR. MONTROSS]: [REDACTED] also, though, indicated
7 in his letter that "Furthermore, Lieutenant Colonel Parrella
8 prepared memoranda on topics of current relevance to
9 counterterrorism prosecutors, which were widely distributed
10 and read within CTS."

11 So first, I'm going to ask you: What was the topics
12 that you prepared memorandum on?

13 MJ [Col PARRELLA]: I can't remember what their reference
14 was to that in terms of me preparing a particular memorandum
15 related to maybe a topic that the -- that I had submit --
16 background from the Marine Corps. It's possible that I
17 prepared something that was related to a topic that -- to give
18 the Department of Justice attorneys maybe some better context
19 or understanding of how DOD, or specifically the Marine Corps,
20 did something, but I can't recall those memorandum.

21 I think perhaps what he's primarily related to is
22 there's memorandum that are prepared within in the regular
23 course of business within CTS, and I assisted in the

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1 preparation of those memoranda.

2 DC [MR. MONTROSS]: But you have no independent
3 recollection of what the topics of current relevance to
4 counterterrorism prosecutors were that you prepared the
5 memorandum on?

6 MJ [Col PARRELLA]: I don't, but I do know that they
7 weren't related to anything involving the Office of
8 Commissions or this case.

9 DC [MR. MONTROSS]: Okay. Was there anything related to
10 al Qaeda or any organization that was potentially associated
11 with al Qaeda?

12 MJ [Col PARRELLA]: No. I have no special background or
13 information or knowledge about al Qaeda or any of the other
14 terrorist organizations.

15 DC [MR. MONTROSS]: Or just not even relying on your
16 special background, but just as a young, talented attorney who
17 is in this Fellowship who would have access to databases and
18 information, were you asked to prepare any memorandum that
19 dealt with al Qaeda at all?

20 MJ [Col PARRELLA]: No.

21 DC [MR. MONTROSS]: Were you asked to prepare -- did you
22 write any memorandum that dealt with the intersection of
23 classification issues and the ability to present evidence in

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1 an open courtroom?

2 MJ [Col PARRELLA]: No. And I feel confident in saying
3 that because I was learning the process myself.

4 DC [MR. MONTROSS]: [REDACTED] also -- [REDACTED], I'm
5 sorry, also indicated that you "drafted legal memoranda and
6 recommendations for the Assistant Attorney General that
7 assessed the prosecutorial merit of terrorism cases." Is that
8 referring to John Carlin as the Assistant Attorney General?

9 MJ [Col PARRELLA]: I don't know. The best I can recall,
10 I only met Mr. Carlin once, perhaps twice in the entire year.

11 DC [MR. MONTROSS]: Okay. Do you know if he was the
12 Assistant Attorney General at the time?

13 MJ [Col PARRELLA]: I believe he was the Assistant
14 Attorney General. He was in charge of the National Security
15 Division ----

16 DC [MR. MONTROSS]: Correct.

17 MJ [Col PARRELLA]: ---- I do know that.

18 DC [MR. MONTROSS]: Yes. So you were preparing memorandum
19 for the individual who was in charge of NSD?

20 MJ [Col PARRELLA]: I was preparing memorandum that I
21 understood was going to be approved by somebody in his office.
22 I can't tell you whether it was specifically approved by him
23 or one of his deputies.

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1 DC [MR. MONTROSS]: When [REDACTED] indicates that you
2 prepared memorandum and recommendations for the Assistant
3 Attorney General, you have no reason to believe that he's
4 making an inaccurate statement ----

5 MJ [Col PARRELLA]: Not at all.

6 DC [MR. MONTROSS]: ---- that is actually going to the
7 Assistant Attorney General or perhaps to Mr. Carlin?

8 MJ [Col PARRELLA]: It could have very well. I have no
9 reason to doubt it. I just don't know whether it went to him
10 or -- my understanding is his deputies or assistants signed
11 off on a lot of that material.

12 DC [MR. MONTROSS]: Okay. And what was the subject matter
13 of the legal memorandum that you submitted to the Assistant
14 Attorney General for the National Security Division?

15 MJ [Col PARRELLA]: So there was probably more than one.
16 I'm assuming what he's referring to is, again, in the regular
17 course of business, I assisted in reviewing memoranda. To my
18 recollection, it primarily involved things such as search
19 warrant authorizations for cases that were being investigated
20 by assistant U.S. Attorneys in the various districts. If they
21 had a certain triggering event, nexus to terrorism, or some
22 other reason, then they would come through CTS. They would be
23 reviewed, memoranda was then prepared which would then be

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1 forwarded up to the chain of command.

2 DC [MR. MONTROSS]: As part of authorizing the search
3 warrants, were you making determinations or recommendations or
4 assessments about whether or not a person was or was not a
5 member of a terrorist organization?

6 MJ [Col PARRELLA]: No, I don't recall doing that. It was
7 primarily just a recommendation as to whether there was
8 probable cause.

9 DC [MR. MONTROSS]: Okay. [REDACTED] also indicates
10 that you wrote other court documents involving the prosecution
11 of high-level international and domestic counterterrorism
12 targets.

13 Who were the high-level international
14 counterterrorism targets that you prepared court documents
15 involving?

16 MJ [Col PARRELLA]: I honestly don't remember any
17 particular name. They were individuals, to my knowledge, that
18 were domestic -- living domestically and being investigated by
19 domestic law enforcement agencies. They may have had a nexus
20 with the intelligence community, but they were primarily --
21 this was in preparation for prosecution in the Article III
22 courts.

23 DC [MR. MONTROSS]: Okay. Any understanding then why

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1 [REDACTED] would write that you prepared court documents
2 involved in the prosecution of high-level international
3 targets? He does mention domestic, and I hear Your Honor.

4 But do you have any indication or understanding why
5 [REDACTED] would also write in this letter that becomes part
6 of your fit rep, apparently, that you were involved in the
7 prosecution of high-level international targets?

8 MJ [Col PARRELLA]: I mean, it's certainly possible that
9 one of the individuals that I was assisting on may have been
10 located OCONUS, overseas. I just don't have a specific
11 recollection of it.

12 I do recall, though, that none of the cases that I
13 was working on involved anything other than Article III courts
14 that had no workings with the OMC or the 9/11 case.

15 DC [MR. MONTROSS]: Okay. When you were present at the
16 Counterterrorism Section, did you attend any trainings or
17 speeches by individuals who were involved in the military
18 commission cases?

19 MJ [Col PARRELLA]: No, not that I recall.

20 DC [MR. MONTROSS]: Okay. Present at the same time, at
21 DOJ in the Counterterrorism Section when you were there, was
22 Mr. Trivett; is that right?

23 MJ [Col PARRELLA]: It's possible. Again, I don't recall

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1 if I've met him. The only one I specifically know I know is
2 Mr. Groharing.

3 DC [MR. MONTROSS]: Okay. Do you have any recollection of
4 meeting or speaking to Mr. Edward Ryan while you were at DOJ?

5 MJ [Col PARRELLA]: I don't.

6 DC [MR. MONTROSS]: Did you ever see General Mark Martins
7 while you were there?

8 MJ [Col PARRELLA]: I did not.

9 DC [MR. MONTROSS]: Okay. So Mr. Groharing -- Air Station
10 Miramar, you were a defense attorney at Air Station Miramar;
11 is that correct, sir?

12 MJ [Col PARRELLA]: I was a defense attorney and a
13 prosecutor at Miramar. I know Mr. Groharing, I believe at the
14 time he was at the recruit depot. My recollection is I first
15 met him through a mutual friend. I didn't have very much
16 interaction with him while we were both in the San Diego area,
17 however.

18 DC [MR. MONTROSS]: When were you together in the
19 San Diego area?

20 MJ [Col PARRELLA]: It would have been roughly late '90s,
21 early 2000 time frame.

22 DC [MR. MONTROSS]: Okay. Was Mr. Groharing -- were you
23 at Air Station Miramar when 9/11 happened, sir?

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1 MJ [Col PARRELLA]: I was stationed ----

2 DC [MR. MONTROSS]: You were at the airport, but you were
3 stationed there is my understanding; is that fair?

4 MJ [Col PARRELLA]: Yes, that's correct.

5 DC [MR. MONTROSS]: Was Mr. Groharing also at Air Station
6 Miramar at that time?

7 MJ [Col PARRELLA]: No. He was stationed at the recruit
8 depot, which is in downtown San Diego.

9 DC [MR. MONTROSS]: Okay. When he was at the
10 recruitment -- was he ever at Air Station Miramar with you?

11 MJ [Col PARRELLA]: Not as assigned personnel. So it's
12 possible if he were in a defense counsel billet and we had a
13 conflict case, he may have come up to Miramar to participate
14 in a trial, but he was never assigned there, to my knowledge.

15 DC [MR. MONTROSS]: Okay. So the place that you worked at
16 Air Station Miramar, was that called the law center or was it
17 called LSSS?

18 MJ [Col PARRELLA]: I think at the time -- and this --
19 there's been a reorganization. At the time, it was referred
20 to as a Joint Law Center.

21 DC [MR. MONTROSS]: Okay. Did there -- during that time
22 that you were at the Joint Law Center, did Mr. Groharing ever
23 have an office there or was he a presence in the law center?

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1 MJ [Col PARRELLA]: No.

2 DC [MR. MONTROSS]: Okay. Did you have any social
3 interaction with Mr. Groharing when you were at Air Station
4 Miramar?

5 MJ [Col PARRELLA]: In that time frame, not that I
6 specifically recall. It is likely that it did occur because,
7 as you may know, the Marine Corps is a relatively small force,
8 so the number of judge advocates is somewhat limited. So we
9 have an annual Marine Corps Ball celebration. It is possible,
10 and maybe probable, that at some point in the time that we
11 were both in San Diego, we attended the same ball.

12 As I said, my recollection is that I was introduced
13 to him through a mutual friend, but I don't have any specific
14 recollection of any social events back in that time frame
15 where we hung out together. I think it was mostly -- I would
16 describe it as just an acquaintance.

17 DC [MR. MONTROSS]: So would you be willing to share with
18 me who was the mutual friend that you two had?

19 MJ [Col PARRELLA]: So an active-duty Marine judge
20 advocate who was stationed where he was in San Diego at the
21 time, who I believe I met because he was also in a defense
22 billet. So we probably met at some defense training on the
23 West Coast.

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1 DC [MR. MONTROSS]: And who was that? I'm sorry.

2 MJ [Co1 PARRELLA]: [REDACTED].

3 DC [MR. MONTROSS]: Is that [REDACTED], sir?

4 MJ [Co1 PARRELLA]: Yes.

5 DC [MR. MONTROSS]: And in terms of -- besides sporadic or
6 rare social events, did you have any other interaction with
7 Mr. Groharing?

8 MJ [Co1 PARRELLA]: Not in that time period.

9 DC [MR. MONTROSS]: Okay. When was the next time period
10 that you had interaction with Mr. Groharing?

11 MJ [Co1 PARRELLA]: I do recall in 2007 and '8, I believe,
12 Mr. Groharing and I participated in an Armed Forces athletic
13 event. It was an active-duty services competition, I believe
14 hosted by the MWR in Norfolk, Virginia. The event took place
15 in West Virginia.

16 And for those two years, the -- each service would
17 put forward teams. There were two years in 2007, 2008 where
18 we participated on the same team. And my recollection, it was
19 a two-day event.

20 DC [MR. MONTROSS]: That was the team that was named the
21 Dale Milton Racing Team; is that correct, sir?

22 MJ [Co1 PARRELLA]: That is correct.

23 DC [MR. MONTROSS]: Okay. Also on that team was

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1 Captain [REDACTED]; is that right?
2 MJ [Col PARRELLA]: That's correct.
3 DC [MR. MONTROSS]: Who is Captain [REDACTED] to you?
4 Is he a friend?
5 MJ [Col PARRELLA]: He was a neighbor.
6 DC [MR. MONTROSS]: Okay.
7 MJ [Col PARRELLA]: He's also a friend.
8 DC [MR. MONTROSS]: Who lived next door to you?
9 MJ [Col PARRELLA]: Yes.
10 DC [MR. MONTROSS]: Okay. Also on the team was a
11 Major [REDACTED].
12 MJ [Col PARRELLA]: [REDACTED], correct.
13 DC [MR. MONTROSS]: Okay. And that wasn't correct, but
14 thank you for saying it was correct. Was she a friend of
15 yours as well?
16 MJ [Col PARRELLA]: She was a -- I think you could call
17 her that, it was fair to say. We simply went to the JAG
18 school, the Army JAG School together.
19 DC [MR. MONTROSS]: Okay.
20 MJ [Col PARRELLA]: It wasn't somebody who I regularly
21 spoke to other than just a casual acquaintance.
22 DC [MR. MONTROSS]: Okay. At that point in time,
23 Major Groharing was a member of your team as well, of that

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1 team?

2 MJ [Col PARRELLA]: He was.

3 DC [MR. MONTROSS]: Four people, including yourself, on
4 that team in total.

5 MJ [Col PARRELLA]: Correct.

6 DC [MR. MONTROSS]: Okay. Did you pick the team members?

7 MJ [Col PARRELLA]: I believe I was the one who organized
8 it or signed us up, but I don't recall if I selected them or
9 how I came to -- to ----

10 DC [MR. MONTROSS]: Well, one of ----

11 MJ [Col PARRELLA]: ---- how it came to be that
12 Mr. Groharing ended up on the team, so ----

13 DC [MR. MONTROSS]: Well, two of them are friends of
14 yours, one of them was a neighbor. How does Major Groharing
15 end up on this team for two years?

16 MJ [Col PARRELLA]: A good question. So -- so we
17 obviously were in it to win, so the selection ----

18 DC [MR. MONTROSS]: I'm sorry?

19 MJ [Col PARRELLA]: In it to win.

20 DC [MR. MONTROSS]: Okay.

21 MJ [Col PARRELLA]: So the selections were based upon just
22 reputation of ability.

23 DC [MR. MONTROSS]: Okay. And for two years, this team

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1 was joined together ----

2 MJ [Col PARRELLA]: Yes.

3 DC [MR. MONTROSS]: ---- for training and racing purposes?

4 MJ [Col PARRELLA]: Not training, just the race.

5 DC [MR. MONTROSS]: Okay. How many races did you engage
6 in?

7 MJ [Col PARRELLA]: Just the one.

8 DC [MR. MONTROSS]: There is an article in the *Army Times*
9 dated October 20th, 2008, called "The Call of the Wild" that
10 says there's perhaps no better way to build camaraderie and
11 teamwork than to receive a collective physical beating,
12 referring to that race in Fayetteville, West Virginia. Did
13 you feel that your team had camaraderie and teamwork?

14 MJ [Col PARRELLA]: Yes.

15 DC [MR. MONTROSS]: You finished second, right?

16 MJ [Col PARRELLA]: So I'm going to try to speed things
17 along here, Mr. Montross. I think obviously what you're
18 interested in is my relationship with Mr. Groharing. So I
19 would describe it as friendly, I would describe that we got
20 along well during those times, we competed together. However,
21 that was the extent of the relationship. And honestly, since
22 that point in time, I've seen him a couple times, both at my
23 time at Department of Justice. I also do believe we attended

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1 another Marine Corps Ball ceremony together at some time when
2 I was at the Department of Justice, so that would have been
3 about 2014. But since then, I don't have any sort of regular
4 communication.

5 I have no recollection of ever discussing this case,
6 the details or substance of this case with Mr. Groharing. I
7 was aware that he was working or assigned to this case, but we
8 never discussed the nuances or issues or substance of it; nor
9 do I feel that his assignment as a trial counsel will in any
10 way affect my impartiality or bias. I am quite capable of
11 disagreeing with anything that he says, and I will not give
12 his arguments any additional weight over anyone else in this
13 courtroom.

14 DC [MR. MONTROSS]: Before today, before we started
15 talking about Mr. Groharing, it was the questioning that first
16 elicited that there was any relationship with Mr. Groharing
17 today in this courtroom. Did you feel under the Code of
18 Judicial Canon [sic] any obligation to disclose that you knew
19 Mr. Groharing prior to today ----

20 MJ [Col PARRELLA]: No, for the very reason ----

21 DC [MR. MONTROSS]: ---- and that you had spent two years
22 on a team with him where you were racing together and that you
23 had served together -- or you had been together both at Air

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1 Station Miramar back in the late 1990s, early 2000s?

2 MJ [Col PARRELLA]: The reasons I just stated, I don't
3 feel it has any impact on my impartiality or bias or causes me
4 any cause for disqualification, which is what I would have
5 certainly disclosed had I felt that. I was quite confident
6 that it would come up during the question and answer portion;
7 and had it not, I would have brought it up myself.

8 DC [MR. MONTROSS]: Okay. Do you accept that, regardless
9 of whether you feel that it was even relevant to a possible
10 motion for disqualification or if there's no basis for
11 disqualification, that the Code of Judicial Conduct still
12 requires that you should disclose on the record information
13 that the judge believes the parties or their lawyers might
14 reasonably consider relevant to a possible motion for
15 disqualification even if the judge believes there is no basis
16 for disqualification?

17 MJ [Col PARRELLA]: Let's go with your next question,
18 Mr. Montross.

19 DC [MR. MONTROSS]: Okay. May I have one moment, Your
20 Honor?

21 MJ [Col PARRELLA]: You may.

22 [Pause.]

23 DC [MR. MONTROSS]: I appreciate your indulgence. Two

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1 further questions.

2 Your Honor, I know this is not on the docket, so
3 perhaps the answer may be self-evident, but are you -- or have
4 you read specifically the pleadings in AE 425?

5 MJ [Col PARRELLA]: I don't know that I -- it's possible,
6 but since it's not on the docket order, I also don't see the
7 relevance.

8 DC [MR. MONTROSS]: Okay. Are you aware, okay, in that
9 series, that Mr. Groharing's credibility is placed at issue in
10 AE 425?

11 MJ [Col PARRELLA]: I was not aware of that.

12 DC [MR. MONTROSS]: Okay. Thank you.

13 MJ [Col PARRELLA]: You're welcome. Mr. Connell, but
14 before you go, since it was raised by Mr. Montross, I'll also
15 just indicate that I do know General Baker, so if anybody
16 wants to question in that respect, I'll be happy to inform you
17 how I know General Baker.

18 Mr. Connell.

19 LDC [MR. CONNELL]: Do you like him, sir?

20 MJ [Col PARRELLA]: He seems like a good guy.

21 LDC [MR. CONNELL]: Good morning, Your Honor.

22 MJ [Col PARRELLA]: Good morning.

23 LDC [MR. CONNELL]: And I want to thank you for your

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1 commitment to candor during this process which cannot be
2 pleasant, and certainly unique. I've never seen anything like
3 it outside of this case, though I understand it's a routine
4 part of military practice.

5 I'd like to begin -- my questions will fall into two
6 main categories. The first is I'd like to follow up on some
7 of the answers you've given this morning, and then, second,
8 I'd like to ask some questions related to the appearance of
9 bias under 902(b)(1).

10 Sir, you told Mr. Harrington that you had been
11 selected through a Marine Corps process for a billet beginning
12 in the summer of 2019. Could you explain that in a little
13 more detail for the record?

14 MJ [Col PARRELLA]: Yes. So command selection is also a
15 board-driven process. The board convened, I want to say,
16 sometime in July, and the results come out usually shortly
17 thereafter. I want to say it was early August the results
18 came out this year. I was selected for a command that -- they
19 always select command a year out, so presumably the change of
20 command will be sometime during the summer of 2019.

21 I've indicated my intent to accept the command.
22 That's a requirement under the applicable MARADMIN or message,
23 and from here on out, then I wait for orders to be produced.

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1 LDC [MR. CONNELL]: And I just want to make sure I
2 understood. That was past tense; you have indicated your
3 intent to accept that command?

4 MJ [Col PARRELLA]: Yes.

5 LDC [MR. CONNELL]: Okay. And am I correct that that
6 command involves embassy security in some way?

7 MJ [Col PARRELLA]: Yes.

8 LDC [MR. CONNELL]: And what is the command which you have
9 indicated your intent to accept?

10 MJ [Col PARRELLA]: Marine Corps Embassy Security Group.
11 So it's the same, in essence, command I held as a lieutenant
12 colonel. The difference being now instead of being one
13 region, it's the group. So it's the individual who will
14 command all of the regions.

15 LDC [MR. CONNELL]: All Marines responsible for embassy
16 security throughout the world?

17 MJ [Col PARRELLA]: Yes.

18 LDC [MR. CONNELL]: Okay. So you would be the commander
19 of that unit; is that correct? Is that fair to say?

20 MJ [Col PARRELLA]: Yes.

21 LDC [MR. CONNELL]: Okay. And what I understood you to
22 say was that you have done everything that you can or that
23 you -- all of your responsibilities to accept that command

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1 have been fulfilled. You now wait, and the Marine Corps will
2 decide who they're going to place in the billet? Is that fair
3 to say?

4 MJ [Col PARRELLA]: The decision's been made. That was
5 the board process. So I have been selected for that position.
6 So ----

7 LDC [MR. CONNELL]: You're just waiting for orders?

8 MJ [Col PARRELLA]: Yes.

9 LDC [MR. CONNELL]: Okay. So it's your personal
10 expectation as you sit here today that in the summer of 2019,
11 you will be placed in a new billet responsible for worldwide
12 embassy security?

13 MJ [Col PARRELLA]: Yes.

14 LDC [MR. CONNELL]: Okay. And who makes that decision?
15 Who is responsible for issuing those orders?

16 MJ [Col PARRELLA]: In terms of issuing the orders, the
17 orders come from an entity called Manpower. So Manpower
18 within the Marine Corps will be responsible for actually
19 issuing those orders.

20 LDC [MR. CONNELL]: And as far as Manpower goes, that's
21 nondiscretionary to them, correct? They're not making a
22 decision as to Colonel Parrella and whether he's a good
23 person. That decision has already been made?

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1 MJ [Col PARRELLA]: Yes.

2 LDC [MR. CONNELL]: So as far as Manpower goes, that is a
3 nondiscretionary decision?

4 MJ [Col PARRELLA]: Yes.

5 LDC [MR. CONNELL]: So unless something highly unusual
6 happens, you will be issued orders for that new assignment
7 effective January -- summer of 2019?

8 MJ [Col PARRELLA]: That's my belief.

9 LDC [MR. CONNELL]: Okay. Sir, I heard you mention to
10 Judge Harrington [sic] that there was no chief judge at
11 present. Did I understand that correctly?

12 MJ [Col PARRELLA]: That's my understanding.

13 LDC [MR. CONNELL]: And so I take it to be that you did
14 not assume Military Judge Pohl's chief judge duties as well as
15 his responsibilities in this courtroom?

16 MJ [Col PARRELLA]: I hope not.

17 LDC [MR. CONNELL]: Okay. Very good.

18 The -- moving on to another section, you told
19 Mr. Nevin that -- and you just explained to me that you had
20 been responsible for a region of embassy security; and for
21 purposes of the record, Marines provide security to embassies
22 throughout the -- U.S. embassies throughout the world under
23 the supervision of the regional security officer of the

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1 Department of State under a memorandum of understanding with
2 the Marine Corps; is that a fair summary?

3 MJ [Col PARRELLA]: That's a fair summary.

4 LDC [MR. CONNELL]: Okay. And in that -- what was your --
5 as the commander of that region, what was your actual
6 responsibility? What were your day-to-day duties like?

7 MJ [Col PARRELLA]: So there's terminology in the Marine
8 Corps we use for OPCON, meaning operational control ----

9 LDC [MR. CONNELL]: Yes, sir.

10 MJ [Col PARRELLA]: ---- and ADCON, administrative
11 control.

12 LDC [MR. CONNELL]: Yes.

13 MJ [Col PARRELLA]: I retained ADCON, so I had
14 administrative control over the Marines, meaning I was
15 responsible for ensuring that they were qualified, trained,
16 properly supervised in the sense that they were within the
17 detachment. The primary, I think, role was to ensure that we
18 were executing an inspection program.

19 So to ensure that we're giving the service we've
20 promised to the Department of State, we have officers who go
21 out to those detachments routinely, they conduct inspections
22 of those detachments and ensure that they're providing the
23 service we've advertised to the Department of State.

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1 But in terms of OPCON, operational control, that all
2 is retained by the regional security officer.

3 LDC [MR. CONNELL]: In that position, did you deal
4 directly with embassy staff?

5 MJ [Col PARRELLA]: I did. So primarily, I would do that
6 in the sense of I would also do visits of the detachments
7 during those visits. I would usually as part of that visit
8 have a meeting with the regional security officer as well as
9 the embassy staff just to ensure that, again, as the customer,
10 they were satisfied with the service we were providing.

11 LDC [MR. CONNELL]: In your role, did you either deal
12 directly with the embassy staff or have site visits in
13 Afghanistan?

14 MJ [Col PARRELLA]: No.

15 LDC [MR. CONNELL]: In that role, did you deal directly
16 with embassy staff or have site visits in Morocco?

17 MJ [Col PARRELLA]: No.

18 LDC [MR. CONNELL]: Poland?

19 MJ [Col PARRELLA]: Yes.

20 MTC [MR. TRIVETT]: Objection.

21 MJ [Col PARRELLA]: Basis?

22 MTC [MR. TRIVETT]: Relevance to the qualification.

23 LDC [MR. CONNELL]: Your Honor, in an unclassified way, I

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1 can state that I am exploring whether there is a basis for a
2 challenge under 902(b)(1), personal knowledge. I do not
3 intend to inquire further in this setting.

4 MJ [Col PARRELLA]: Okay. And I will just state again
5 that at no time during my tenure as the commanding officer at
6 Region 8 did I ever have any opportunity to -- I don't even
7 recall reading anything classified. I never had any
8 discussions with regional security officers about a threat
9 emanating from any organization related to this case.

10 LDC [MR. CONNELL]: I understand that, sir.

11 MJ [Col PARRELLA]: My focus was in Central Europe and
12 Central Europe alone.

13 LDC [MR. CONNELL]: In Central Europe? All right.

14 And so -- so the answer to Poland was yes?

15 MJ [Col PARRELLA]: That was part of my region.

16 LDC [MR. CONNELL]: All right. And was Romania part of
17 your region?

18 MJ [Col PARRELLA]: Yes.

19 LDC [MR. CONNELL]: Was Lithuania part of your region?

20 MJ [Col PARRELLA]: No.

21 LDC [MR. CONNELL]: Thank you. Sir, I heard you tell
22 Mr. Nevin that, in your role as regional -- what was the
23 title? I'm sorry. I apologize for the ignorance.

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1 MJ [Co1 PARRELLA]: Region 8 ----

2 LDC [MR. CONNELL]: Region 8 command ----

3 MJ [Co1 PARRELLA]: ---- commanding officer.

4 LDC [MR. CONNELL]: Region 8 commanding officer.

5 In your role as Region 8 commanding officer, you did
6 not -- I understood you to tell Mr. Nevin that you did not
7 receive any information specific to the East Africa Embassy
8 Bombings, the most serious breach of embassy security ever in
9 United States history. Was that accurate?

10 MJ [Co1 PARRELLA]: Yes.

11 LDC [MR. CONNELL]: You didn't train on it?

12 MJ [Co1 PARRELLA]: So the Marines may have trained on it.
13 The Marines go through a schoolhouse that's designed to
14 prepare them for their duty as a Marine security guard. The
15 commanding officer does not receive any said training. So we
16 don't receive any training specific to the embassy security
17 program before assuming command.

18 LDC [MR. CONNELL]: Thank you, sir.

19 And I heard you mention to Mr. Montross that it would
20 be appropriate to ask questions about strong feelings about
21 capital punishment, so I'll ask: Do you have any strong
22 feelings on capital punishment?

23 MJ [Co1 PARRELLA]: No, I -- what's pertinent is,

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1 regardless of what my personal opinions may or may not be, I
2 will apply the law as it is, not as to what I think it should
3 be. But I have no strong feeling that would prevent me from
4 doing just that.

5 LDC [MR. CONNELL]: Thank you. All right.

6 Sir, the second part of my questioning relates to
7 AE 595B, the fit rep. Do you have that in front of you, sir?

8 MJ [Col PARRELLA]: I do.

9 LDC [MR. CONNELL]: And, sir, for the record, a
10 United States Marine Corps fitness report is essentially a
11 statement of what your duties are and how well you fulfilled
12 those duties, especially in relationship to other Marines, for
13 purposes of eventual consideration for promotion and other --
14 or commendation, correct?

15 MJ [Col PARRELLA]: That is correct. I will just note,
16 though, that if you look at Block 5 ----

17 LDC [MR. CONNELL]: Yes, 5b.

18 MJ [Col PARRELLA]: ---- on the first page that this is a
19 nonobserved fitness report. So because it was an academic
20 setting, or the Fellowship program is considered an academic
21 setting, we do not rate markings, the normal markings that you
22 would receive. That's why it's two pages as opposed to the
23 normal, I believe, seven pages.

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1 LDC [MR. CONNELL]: I understand, sir. And that -- in
2 block I, there is a reference to the unique circumstances of
3 this CMC fellow TLS assignment, and that's -- those are the
4 unique circumstances that you describe; is that correct, sir?

5 MJ [Co1 PARRELLA]: Yes.

6 LDC [MR. CONNELL]: The -- there is a concern in fitness
7 reports articulated in the Commandant's guidance about
8 inflationary markings. They don't want, you know, everybody
9 to be the top Marine that anybody has ever rated. Is that
10 fair to say?

11 MJ [Co1 PARRELLA]: That's fair.

12 LDC [MR. CONNELL]: So there's a commitment on the part of
13 the raters to accurately reflect the -- both the
14 responsibilities and the performance of those responsibilities
15 by the Marine at issue. Is that fair to say?

16 MJ [Co1 PARRELLA]: Yes.

17 LDC [MR. CONNELL]: And the reason for that is
18 institution-wide because the Marine Corps as an institution
19 needs to know who its best are so that it can promote them?

20 MJ [Co1 PARRELLA]: Yes.

21 LDC [MR. CONNELL]: So with that in mind, does Section B
22 accurately describe the billet and the duties that you
23 performed?

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1 MJ [Col PARRELLA]: It does to a point. I -- billet
2 descriptions are typically generic, meaning that this may be a
3 very similar template that's used for all Fellows. Obviously,
4 it's tailored to the specific Department of Justice Fellowship
5 at issue. It's not an indication that I performed all of
6 these duties; it's just an indication of what the billet
7 description broadly stated is.

8 LDC [MR. CONNELL]: I see.

9 MJ [Col PARRELLA]: So normally ----

10 LDC [MR. CONNELL]: It's the type of duties which would be
11 performed by this Fellowship.

12 MJ [Col PARRELLA]: So normally, if it were an observed
13 fitness report, Block C would be filled out, which would
14 include the more detailed, specific accomplishments, basically
15 what you did during the time period set forth.

16 LDC [MR. CONNELL]: Thank you, sir.

17 So let me ask you with respect -- and I'm going to
18 refer to subsection B, and it has a number of individual
19 bullets, nine individual bullets. I'll try to walk through
20 those and tell you where I am as best as possible.

21 What is the TLS part of CMC? I take it CMC is
22 Commandant of the Marine Corps. What does TLS stand for?

23 MJ [Col PARRELLA]: Top-level school.

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1 LDC [MR. CONNELL]: Top-level school. And what does that
2 mean, top-level school?

3 MJ [Col PARRELLA]: It's just a generic term that's used
4 to describe school opportunities that are slated for typically
5 lieutenant colonels.

6 LDC [MR. CONNELL]: Which was your rank at the time of
7 this Fellowship?

8 MJ [Col PARRELLA]: Yes.

9 LDC [MR. CONNELL]: All right. In the second bullet, the
10 billet description states that the Fellow will "serve as a
11 counterterrorism prosecutor within CTS/NSD." CTS stands for
12 Counterterrorism Section, right?

13 MJ [Col PARRELLA]: Yes.

14 LDC [MR. CONNELL]: And NSD stands for National Security
15 Division?

16 MJ [Col PARRELLA]: Yes.

17 LDC [MR. CONNELL]: And it says -- and so I'm going to
18 stop there and just do the org chart for a second. Within the
19 Department of Justice are a number of divisions, correct?

20 MJ [Col PARRELLA]: Yes.

21 LDC [MR. CONNELL]: National security being one of those?

22 MJ [Col PARRELLA]: Yes.

23 LDC [MR. CONNELL]: Others might be tax or civil or

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1 criminal, et cetera.

2 And under the National Security Division, there are a
3 variety of sections, and one of those is the Counterterrorism
4 Section; is that fair to say?

5 MJ [Col PARRELLA]: That's my understanding, yes.

6 LDC [MR. CONNELL]: And did I correctly understand you to
7 tell Mr. Montross that the -- there were further subsections
8 within the Counterterrorism Section?

9 MJ [Col PARRELLA]: I don't know if there are formal sort
10 of subsections. I just know that while I was there, they
11 divided into sort of teams.

12 LDC [MR. CONNELL]: Sure.

13 MJ [Col PARRELLA]: So that there was a deputy chief, if
14 you will, somebody below [REDACTED] who provided some aspect
15 of supervision to the CTS attorneys that were working on that
16 particular team.

17 LDC [MR. CONNELL]: Sure. That makes sense.

18 The -- did your team have a name?

19 MJ [Col PARRELLA]: No. I don't believe they had names.
20 They might have been numerically designated was my
21 recollection, and I don't know what number it was.

22 LDC [MR. CONNELL]: Were you on a single team or were you
23 a floater among teams?

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1 MJ [Col PARRELLA]: Same team generally throughout the
2 time. Like I said, the section chief changed, but I was -- I
3 think my recollection was is I was always on the same team.

4 LDC [MR. CONNELL]: All right. And you gave us a ballpark
5 estimate earlier that there were somewhere between 60 and 70
6 attorneys in the Counterterrorism Section as a whole. Just
7 for reference, how many attorneys were on your team?

8 MJ [Col PARRELLA]: Maybe a dozen.

9 LDC [MR. CONNELL]: Okay. The second sentence in bullet 2
10 of Section B states that you work with partners -- or that the
11 fellow will work with partners in the intelligence community,
12 including FBI, CIA, NSA, and DOD.

13 As fellow, did you work with partners in the FBI?

14 MJ [Col PARRELLA]: I did work with partners in the FBI.
15 I don't recall working with anyone -- any person within the
16 CIA. I do recall doing some document review at one of their
17 facilities. I don't recall anybody or any interaction with
18 the NSA.

19 LDC [MR. CONNELL]: And DOD, of course, were your
20 colleagues on the ----

21 MJ [Col PARRELLA]: Yes.

22 LDC [MR. CONNELL]: ---- from the Marine Corps?

23 All right. The eighth bullet -- no, excuse me, the

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1 ninth bullet states that you will inform -- or the fellow will
2 inform DOJ and interagency partners on the MAGTF, M-A-G-T-F,
3 concept. What is that?

4 MJ [Col PARRELLA]: Marine Air-Ground Task Force.

5 LDC [MR. CONNELL]: And what is its relevance? What is
6 it?

7 MJ [Col PARRELLA]: What it is is it's the way the Marine
8 Corps fights. It just simply means that we don't have just
9 one subset of skills. We bring a ground element, an air
10 element, and a logistics element together. That's all that
11 means.

12 LDC [MR. CONNELL]: Okay. The remainder of bullet nine
13 states that you will build relation -- that the Fellow will
14 "build relationships at DOJ."

15 Do you feel that you accomplished that task?

16 MJ [Col PARRELLA]: I hope so.

17 LDC [MR. CONNELL]: Okay. "And build relationships at DOJ
18 and the interagency." Do you see that, "interagency" used as
19 a noun?

20 MJ [Col PARRELLA]: I see that.

21 LDC [MR. CONNELL]: All right. And in the United States
22 Government, "the interagency" is generally referred to -- it
23 could have a lot of meanings, but in this context, it means in

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1 the intelligence community, correct?

2 MJ [Col PARRELLA]: I don't know that that was what that
3 was meant. Like I said, the Fellowship program sends Marine
4 Corps Fellows to a wide variety of organizations. We would
5 consider that interagency, so anything from Department of
6 Homeland Security to State Department, and I think even the
7 Department -- the Department of Commerce we sent a fellow to
8 as well as a variety of think tanks. So in our parlance,
9 that's what that refers to, not specifically the intelligence
10 community.

11 LDC [MR. CONNELL]: Okay. So I'd like to turn your
12 attention to Block I on the second page. You were asked
13 earlier about the integrating yourself, seamlessly or
14 otherwise, as a full-fledged counterterrorism prosecutor. You
15 understood that to mean that you had the responsibilities that
16 other line prosecutors within the National Security Division
17 had. Would that be fair to say?

18 MJ [Col PARRELLA]: No, I don't think it is. I think
19 it's -- it would be -- it wasn't my understanding of my role
20 being there. My understanding was I was not there to just be
21 an extra asset for CTS, NSD, DOJ. My role was to be a
22 representative of the Marine Corps, to glean some knowledge
23 that I could potentially bring back to the Marine Corps, share

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1 some knowledge that might benefit the Department of Justice,
2 and help communication between the two agencies.

3 LDC [MR. CONNELL]: You were functioning as an attorney,
4 fair to say?

5 MJ [Col PARRELLA]: I was, yes.

6 LDC [MR. CONNELL]: Right. And you had a duty of loyalty
7 to your client, at this point the United States ----

8 MJ [Col PARRELLA]: Yes.

9 LDC [MR. CONNELL]: ---- correct?

10 And in Block I, although not usual -- you know, not
11 as in depth as it would normally be in the Marine Corps, is a
12 description not of the fellow generally but of your specific
13 performance; would you agree with that?

14 MJ [Col PARRELLA]: Oh, yes. This is -- this was
15 designed, and it's -- again, I think I mentioned earlier,
16 authored by the gentleman who signs the certification on
17 Block J, but it's designed to be a comment of what I did.

18 Now, I will say it's out of the ordinary for there to
19 be direct and additional comments on an unobserved fitness
20 report. I think this was just an attempt by Department of
21 Justice, knowing that this was going to be part of my
22 permanent military record, to say some things that showed
23 gratitude for the time I spent there.

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1 LDC [MR. CONNELL]: No doubt. You don't want a blank
2 fitness report even if it -- you know, in your record.

3 And so the rater states, "Of note, he," meaning you,
4 "worked directly with DOJ prosecutors and interagency partners
5 in building solid cases against high-level international and
6 domestic terrorism targets."

7 My question for you is: What interagency partners
8 did you work with?

9 MJ [Col PARRELLA]: Just the ones we just referred to.

10 LDC [MR. CONNELL]: Which is?

11 MJ [Col PARRELLA]: FBI.

12 LDC [MR. CONNELL]: FBI, CIA, at least at document level,
13 and Homeland Security?

14 MJ [Col PARRELLA]: I don't recall specifically working
15 with Homeland Security. It is possible. Again, I don't
16 recall working with anybody at NSA. It is possible that
17 somebody might have been in the room or there might have been
18 a document that emanated from them.

19 LDC [MR. CONNELL]: Okay. When did you leave the
20 Department of Justice?

21 MJ [Col PARRELLA]: Sometime in June of 2015. According
22 to this, June 30th. So that's ----

23 LDC [MR. CONNELL]: Fair enough.

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1 MJ [Co1 PARRELLA]: ---- my best guess.

2 LDC [MR. CONNELL]: So between summer 2014 and summer
3 2015, you mentioned to Mr. Nevin attending some social
4 events -- "social functions," excuse me, was your phrase. Do
5 you recall that?

6 MJ [Co1 PARRELLA]: Between the summer of 2014 and summer
7 of 2015? I don't recall that.

8 LDC [MR. CONNELL]: While you were at Department of
9 Justice?

10 MJ [Co1 PARRELLA]: Yes. During the -- in that year, I do
11 recall there were -- well, for one, there's a traditional
12 annual Marine Corps Ball celebration. There is also, I think
13 within CTS while I was there, there was -- every time somebody
14 would leave or come, there would be some sort of informal
15 social gathering.

16 LDC [MR. CONNELL]: Sure. Kind of standard government
17 get-together. There might be a cake?

18 MJ [Co1 PARRELLA]: Yes.

19 LDC [MR. CONNELL]: You know, there might be a happy hour,
20 something like that?

21 MJ [Co1 PARRELLA]: Yes.

22 LDC [MR. CONNELL]: Okay. So when you told Mr. Nevin that
23 you had seen Mr. Groharing at social functions two to three

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1 times over the course of your Fellowship, were those sort of
2 social functions -- I got the Marine Ball, but the other one
3 or two ----

4 MJ [Col PARRELLA]: Yes.

5 LDC [MR. CONNELL]: ---- those were CTS social functions,
6 correct?

7 MJ [Col PARRELLA]: Yes.

8 LDC [MR. CONNELL]: And if I understand what you're
9 saying, they're not necessarily formal like they rented a
10 conference room for them, but there was some kind of
11 get-together within the CTS office. Is that fair to say?

12 MJ [Col PARRELLA]: Usually it was a gathering that would
13 take place after the close of the regular business day. It
14 might last an hour, hour and a half. My recollection of the
15 instances applicable to Mr. Groharing was that my interaction
16 with him would have been no more than 10, 15 minutes.

17 I was, at the time, living at a location where I had
18 to commute, so I was usually anxious to get on the train
19 before it got too late.

20 LDC [MR. CONNELL]: Sure. They were Counterterrorism
21 Section social functions, however, though?

22 MJ [Col PARRELLA]: Yes.

23 LDC [MR. CONNELL]: Okay. And you told Mr. Nevin that you

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1 may have met Mr. Trivett at a social function. That would
2 also be one of these Counterterrorism Section get-togethers?

3 MJ [Col PARRELLA]: Yes. And that's complete speculation.
4 I don't recall meeting anyone else, but I don't want to say
5 definitively that I didn't because it's possible that
6 Mr. Trivett or Mr. Ryan or someone else might have come to one
7 of those. I just have no recollection of meeting anyone else
8 on the team.

9 LDC [MR. CONNELL]: And just so she doesn't feel left out,
10 did you ever meet Ms. Tate?

11 MJ [Col PARRELLA]: Not to my knowledge.

12 LDC [MR. CONNELL]: Okay. The -- sir, I -- well, I have
13 two other questions. The first is, you began by saying that
14 you also know General Baker. Is there anything that you think
15 that we should know about your relationship with General
16 Baker?

17 MJ [Col PARRELLA]: So as I think I indicated earlier,
18 we're a small organization. I served in Okinawa, Japan from
19 2002 to 2005. During that time period or a portion of that
20 time period, General Baker was a military judge, so I did have
21 occasion to practice in front of General Baker. I think I was
22 a defense counsel. I'm almost positive I was a defense
23 counsel during the duration of that time.

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1 Other than that, yeah, I would -- I would, of course,
2 see him at various trainings or social functions, say hello.
3 But I have no special friendship or regular communication with
4 him on any level.

5 I will say the last time I recall actually seeing him
6 was he came to Camp Lejeune shortly after being promoted and
7 hosted a social function. I was one of maybe 30 people who
8 attended. It lasted no more than two hours.

9 LDC [MR. CONNELL]: All right. Are you aware, sir, that
10 the Office of the Chief Prosecutor -- excuse me.

11 You've used the phrase -- and I know that I said I
12 was almost done, which I am, but I do have a couple of
13 questions. You've used the initials OMC a few times. What do
14 you understand to be the scope of OMC?

15 MJ [Col PARRELLA]: When I say -- in the context I've used
16 "OMC" or "Office of Military Commissions," what I'm saying is
17 I haven't -- when I've used that terminology -- been involved
18 in any of the cases that are currently or have been in the
19 past before a commissions.

20 LDC [MR. CONNELL]: Are you aware that the Office of the
21 Chief Prosecutor, which is a subset of the Office of Military
22 Commissions, and elements of the FBI, including the FBI agents
23 who are here today, elements of the CIA, and a number of other

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1 interagency partners together form a thing called the
2 High-Value Detainee Prosecution Task Force?

3 MJ [Col PARRELLA]: I'm not aware of that.

4 LDC [MR. CONNELL]: Have you ever sent an e-mail or have
5 anyone send on your behalf an e-mail to any of the ptf.org
6 e-mail addresses of the prosecution?

7 MJ [Col PARRELLA]: Not that I can recall, no.

8 LDC [MR. CONNELL]: So what I hear you saying, sir, is
9 that you were not aware that the -- and are you aware that
10 that High-Value Detainee Prosecution Task Force includes
11 elements of the Counterterrorism Section?

12 MJ [Col PARRELLA]: I was not aware of how it was
13 organized or structured. Like I said, I was aware that
14 Mr. Groharing was on detail and working with cases related to
15 the commissions, but I -- as to how it is structured or how
16 the -- how prosecutors and civilian prosecutors are selected,
17 I don't know and did not know.

18 LDC [MR. CONNELL]: Okay. And I want to ask this final
19 question, sir, in fairness and in respect for your candor
20 during this process.

21 If you were a reasonable person out in the public
22 with knowledge of all the facts and you knew that the new
23 judge in a case within the past few years had worked for the

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1 exact office which is involved in the prosecution of the case,
2 would you consider that to be the appearance of impartiality?

3 MJ [Col PARRELLA]: Well, I think the obvious answer here,
4 Mr. Connell, is in this particular situation with me, if I
5 did, then I would be having to consider whether I should
6 recuse myself, and perhaps recuse myself.

7 I have considered the appearance aspect of my
8 detailing to this case, but in light of the open opportunity
9 I've given everybody in this courtroom to question me about my
10 time there, and hopefully candid answers, I think that it
11 overcomes any possible appearance issue about my brief time at
12 the Department of Justice. I think there's some key
13 distinctions between what a Marine Corps fellow did or does
14 and a -- perhaps a member of the Department of Justice who's
15 hired to work and prosecute in that agency.

16 So the answer to your question is no, I don't think
17 there's an appearance issue at this point in time. But
18 perhaps you or one of your associates, fellow counsel, will,
19 of course, have an opportunity to continue to present evidence
20 that may change my mind. In other words, I'm open to
21 consideration.

22 LDC [MR. CONNELL]: Thank you, sir.

23 MJ [Col PARRELLA]: You're welcome.

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1 All right. Counsel, I think in light of the time,
2 what we'll go ahead and do is we'll go ahead and take a recess
3 for lunch. Unless I've miscalculated, I believe, Mr. Ruiz,
4 you are the last counsel left to conduct voir dire, unless the
5 government chooses to ask any follow-on questions.

6 So we will go ahead and recess until 1330. This
7 commission is in recess.

8 [The R.M.C. 803 session recessed at 1214, 10 September 2018.]

9 [The R.M.C. 803 session was called to order at 1332,
10 10 September 2018.]

11 MJ [Col PARRELLA]: Good afternoon. This commission is
12 called back to order. All parties present when the commission
13 recessed are again present.

14 Mr. Ruiz, I believe we are to you for your
15 opportunity to question the military judge.

16 LDC [MR. RUIZ]: Judge, I want to go back to the subject
17 of your selection for assignment to this military commission.
18 As I understand it, at the time you were working as a staff
19 judge advocate, correct?

20 MJ [Col PARRELLA]: Not at the time of my detailing. I
21 think that the nomination process probably began while I was
22 still working as a staff judge advocate.

23 LDC [MR. RUIZ]: And can you just elaborate briefly on

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1 what your duties and responsibilities were as the staff judge
2 advocate at the time?

3 MJ [Col PARRELLA]: Primarily to provide legal advice in a
4 number of areas to the Commanding General, 2nd Marine
5 Division, as well as his commanders and staff.

6 LDC [MR. RUIZ]: Okay. And can you remind me of how it
7 was that your name came up? It seems to be -- I'm trying to
8 understand how you're working as a staff judge advocate. We
9 know that our services have active judiciaries with Navy,
10 Marine Corps, Air Force, Army, who are active judges, military
11 judges, both active and reserve. So it seems a little bit
12 unusual that, rather than picking from a pool of those
13 candidates, they would reach out to somebody who is working in
14 a different capacity as a staff judge advocate.

15 So my question to you, what I'm trying to really kind
16 of understand is: How did that come about? How was it that
17 your name came up out of that pool or that landscape of other
18 military judges who presumably could have been named?

19 MJ [Col PARRELLA]: So in order to -- I would assume, and
20 I'm making some assumptions here, that in order to have been
21 considered as a nominee, it was because by May time frame, May
22 of 2018, I had orders to go back to the trial judiciary. So I
23 would presume that the decision or my selection as a nominee

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1 was made after and with the knowledge that I was heading back
2 to the trial judiciary.

3 LDC [MR. RUIZ]: And by that, you mean the Navy-Marine
4 Corps Trial Judiciary?

5 MJ [Col PARRELLA]: I do.

6 LDC [MR. RUIZ]: I understand.

7 And did anybody have a conversation with you at that
8 point about the possibility of coming to the military
9 commissions? I'm trying to pinpoint the earliest date that
10 you remember that possibility coming about.

11 MJ [Col PARRELLA]: So the decision for me to return to
12 the Navy-Marine Corps Trial Judiciary was made before and, I
13 believe, independently of any thought of nominating me to be a
14 member of the commissions.

15 LDC [MR. RUIZ]: So your end of tour would have been 2016
16 as a staff judge advocate or 2017? I'm trying to figure out
17 when your end of tour would have been.

18 MJ [Col PARRELLA]: My end of tour would have been just
19 this last summer when I did, in fact, change jobs, which was
20 the summer of 2018.

21 LDC [MR. RUIZ]: Summer 2018. And then you were slated to
22 come to the Navy-Marine Corps Judiciary? I guess I'm trying
23 to place that into context that you also talked about

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1 follow-on orders in 2019 in the summer. So it seems like a
2 short amount of time. If you were going to, in fact, be
3 assigned to the Navy-Marine Corps Trial Judiciary, it seems
4 that that was going to be a compressed time period. It seems
5 out of the ordinary itself.

6 MJ [Col PARRELLA]: I understand. I'll try to explain it
7 to you in sort of chronological order ----

8 LDC [MR. RUIZ]: Sure.

9 MJ [Col PARRELLA]: ---- so you -- to elaborate. So
10 sometime, I think, in the winter of 2017 to '18, I was
11 informed that I would be moving from the Marine Corps Division
12 Staff Judge Advocate job to resume duties as a military judge
13 within the Navy-Marine Corps Trial Judiciary.

14 Sometime in the late spring -- I think around May --
15 there was discussions -- they informed me that they were
16 considering or were nominating me to be a part of the pool.
17 The command selection board didn't even convene until July of
18 2018, so after I had already essentially checked in and
19 started my duties or resumed duties as a military judge.

20 LDC [MR. RUIZ]: Understood. Understood. I got it. That
21 helps. Thank you very much.

22 I think you've clearly indicated that it is your
23 understanding that those orders will be forthcoming in 2019,

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1 summer time frame?

2 MJ [Col PARRELLA]: Yes.

3 LDC [MR. RUIZ]: Do you have any guarantee that that's, in
4 fact, the case?

5 MJ [Col PARRELLA]: I don't have any guarantees, it is the
6 military, but I have nothing to suggest that anything to the
7 contrary will occur.

8 LDC [MR. RUIZ]: So I know you did indicate that you had a
9 conversation with Judge Pohl. Part of that conversation
10 included you expressed some reservations about follow-on
11 orders. Was that topic discussed further than that, in terms
12 of was there any -- not guarantee, but was there any
13 assurances that you would be able to follow on and a
14 replacement would be found?

15 MJ [Col PARRELLA]: Not to that discussion, no, because
16 obviously he's -- he is completely separate from any
17 decision-making within the Marine Corps. The extent of the
18 conversation was just me simply letting him know that I was
19 being considered for command and then a subsequent
20 conversation where I informed him that I had, in fact, been
21 selected for command. All of that transpired prior to his
22 decision to detail me to this case.

23 LDC [MR. RUIZ]: Okay. Have you received any assurances

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1 from anyone at all, Marine Corps ----

2 MJ [Col PARRELLA]: I have received no communication,
3 either favorable or negative, with respect to the upcoming
4 summer.

5 LDC [MR. RUIZ]: Understood. With respect to the
6 fellowship program that you have discussed, you've talked
7 about the selection. You've talked about the assignment and a
8 little bit about the selection process. I get -- I get the
9 concept of the selection board. We have those in the Navy as
10 well.

11 But it is correct that you have to, to some degree,
12 make an affirmative action to be considered for particular --
13 particular fellowships, right? I think you indicated there
14 was different ----

15 MJ [Col PARRELLA]: It's more of the opposite. You have
16 to affirmatively decline to be considered. So if you're a
17 lieutenant colonel in the Marine Corps and not otherwise
18 disqualified for some other reason, you will be considered for
19 top-level school unless you affirmatively withdraw your name
20 from consideration.

21 LDC [MR. RUIZ]: Understood. And when -- that part of
22 that consideration, do you get to submit -- I think you may
23 have talked about this. You get to submit preferences within

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1 the different organizations that are part of the program?

2 MJ [Col PARRELLA]: Yes. And my recollection is that it's
3 broken down into -- because the same board selects folks for
4 top-level schools, war colleges and things of that nature, as
5 well as fellowships.

6 So my recollection was the questionnaire gave you the
7 option to state your preference for both. I remember stating
8 preferences for certain war colleges. The fellowships, I
9 don't recall. I would assume that I put down the Department
10 of Justice just because the logical link between attorneys and
11 the Department of Justice, but I couldn't tell you how I
12 ultimately stated my preferences on that questionnaire.

13 LDC [MR. RUIZ]: So to your knowledge, does the selection
14 process -- let's say, for instance, that there are a number of
15 preferences you can -- one, two, three. We have a similar
16 process in the Navy in terms of billets and assignments. It's
17 called Apply. We submit a number of billets that we -- our
18 preferences. However, if those are taken up, then billets
19 that are not -- have not been submitted by us, preferences,
20 may also be considered if we've elected for that option.

21 So is there a -- is there such a procedure in the
22 fellowship program, to your knowledge, where you would have
23 been considered for an organization that you would not have

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1 submitted to, or submitted a preference for?

2 MJ [Col PARRELLA]: So my understanding in the Marine
3 Corps is that the board who does the selections is
4 predominantly focused on who is going to have an opportunity
5 for top-level school, period. The selection rate, I want to
6 say, the year I was selected was somewhere around 17 percent
7 of eligible lieutenant colonels, and only after they've
8 selected those individuals did they even consider where to
9 actually send them.

10 So during the sort of indoc for fellowships, what
11 they told us, that those that had been selected, is that the
12 vast majority of the effort goes into selecting who gets
13 top-level school, only a minute level of effort goes into
14 actually placing who goes to what agency, because from the
15 Marine Corps's perspective, I think that's a secondary issue.

16 LDC [MR. RUIZ]: So to the best of your recollection, did
17 you express a preference in any way, shape, or form for -- or
18 an interest in going to the Department of Justice?

19 MJ [Col PARRELLA]: I think it's probably a fair
20 assumption that I did put Department of Justice somewhere on
21 my one through five or one through three or whatever it may
22 have been.

23 LDC [MR. RUIZ]: And what is it about the Department of

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1 Justice that would have interested you and led you to express
2 an interest in that as an option, were you to be selected?

3 MJ [Col PARRELLA]: So all of the other fellowships are
4 open to Marines who hold any MOS; that's our Marine
5 Occupational Specialty or Military Occupational Specialty.

6 The Department of Justice, because of the nature of
7 the mission, has basically -- and again, this was at least
8 when I was there, this may have changed -- expressed a
9 preference to the Marine Corps that they only send attorneys.
10 So at the time the board was doing the selection process, the
11 Department of Justice fellowship was earmarked just for judge
12 advocates. So that's why I think I probably would have put it
13 down as a preference because, as a judge advocate, it fit.

14 LDC [MR. RUIZ]: I understand.

15 And just from looking at the timeline, is it a fair
16 assumption to say that you're retirement eligible?

17 MJ [Col PARRELLA]: I am.

18 LDC [MR. RUIZ]: Okay. And in thinking about the -- once
19 you hit retirement eligibility, from time to time you start
20 thinking about the future, down the road. As you sit here
21 today, can you tell us if you would exclude the Department of
22 Justice as a potential employer in your future endeavors?

23 MJ [Col PARRELLA]: I have no current desire or preference

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1 to seek employment at the Department of Justice. I can't go
2 so far because I think it would be speculative on my part to
3 say that that would never change.

4 LDC [MR. RUIZ]: I understand.

5 And the same question with respect to the Federal
6 Bureau of Investigation, for instance, as an in-house legal
7 counsel, but it could also apply to any other appropriate
8 positions.

9 MJ [Col PARRELLA]: Same answer.

10 LDC [MR. RUIZ]: Okay. The National Security Agency?

11 MJ [Col PARRELLA]: I mean, same answer.

12 LDC [MR. RUIZ]: I understand. Now, you've indicated that
13 you did not feel pressured to rush, and there's also been
14 significant questioning about the level of material, the time
15 of litigation, and the efforts and preparations that you've
16 made in trying to undertake this mission.

17 You did, however, indicate that you're qualified and
18 we're moving out. What do you mean by "We're moving out"?
19 What are you trying to say when you made that comment earlier
20 on today?

21 MJ [Col PARRELLA]: What I'm trying to say is that I've
22 looked at the rules; my interpretation is that I meet the
23 qualifications. I was detailed to the case by an individual

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1 who was aware of my qualifications, as well as sort of the
2 issues that we've discussed with my career and the timelines
3 associated with that. What I mean is that, aside from that,
4 I'm not going to answer a litany of questions about how much
5 more qualified Judge Pohl was or any other judge in the
6 military because I was the one that was detailed to this case.

7 LDC [MR. RUIZ]: Sure.

8 MJ [Col PARRELLA]: So as such, I intend to do the best of
9 my ability for the time that I remain detailed to this case.

10 LDC [MR. RUIZ]: I understand.

11 So the "moving out" answer caught my attention
12 because it seemed to be a judgment or a decision that you seem
13 to have made that we are moving forth, predetermined, based on
14 your exposure to the case and what you know of the case.
15 That, in my mind, raises a concern and the question which is,
16 the artificial -- or the expediting of a case for the sake of
17 expediting of a case. And that's where the question goes to.

18 And I think you've answered that a number of times,
19 but I just want to make sure that it's clear that you have no
20 influence whatsoever on you that delaying this case, if that's
21 what's necessary, would somehow detrimentally affect you or
22 your career progression.

23 MJ [Col PARRELLA]: Not at all. And I have had no

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1 conversations with anybody, Judge Pohl included, about a need
2 to move at a certain speed, to getting a certain amount done.
3 And certainly if anything changes about my answers, if I feel
4 any outside pressure or influence, I will certainly let
5 everybody in this commission know that so that you have an
6 opportunity to again ask questions.

7 LDC [MR. RUIZ]: Have you -- I understand feeling not
8 pressured or that any influence impacts you. It's a little
9 bit different from talking about being exposed to such
10 influence. My next question goes to that specific point.

11 Have you had the opportunity to be exposed to any
12 comments, conversations, articles, any -- anything that talks
13 about the pace of this case, whether it's too fast, whether
14 it's too slow; commentary, whether by colleagues, family,
15 friends? It's a rather broad question here. Have you been
16 exposed to ----

17 MJ [Col PARRELLA]: I think I understand the question. In
18 terms of exposure, I'm aware -- and I don't remember which AE
19 I was reading, but I came across previous litigation in this
20 commission about pressure that may have been applied upon the
21 judiciary with respect to moving locations down here. So in
22 terms of exposure, I'm aware that there has been litigation in
23 the past, and my reading of it is it didn't go well for the

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1 government in attempting to apply that pressure.

2 LDC [MR. RUIZ]: In your time in the Department of
3 Justice, did you ever overhear any conversations or were part
4 of conversations where there were comments about the pace of
5 the litigation in this case?

6 MJ [Col PARRELLA]: No.

7 LDC [MR. RUIZ]: Anywhere else, have you ever been a part
8 or privy of such conversations?

9 MJ [Col PARRELLA]: No.

10 LDC [MR. RUIZ]: Upon learning that you would be detailed
11 to this case, has anybody inquired about your work on this
12 case or expressed an opinion regarding the state of this case
13 in terms of the pace of the current litigation?

14 MJ [Col PARRELLA]: No. I mean, I'm -- obviously when I'm
15 answering these, I'm excluding just internal conversations
16 I've had with members of the trial judiciary; but I'll say
17 quite clearly nobody has attempted to influence or pressure or
18 suggest that I should speed up in any fashion.

19 LDC [MR. RUIZ]: Sure. And the question was also intended
20 to include, as I said, particularly during your time in the
21 Department of Justice, any conversations that may have been
22 had regarding the 9/11 case, the conduct of this prosecution,
23 the pace of the case, any critical comments about the case

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1 itself.

2 MJ [Col PARRELLA]: I don't recall, Mr. Ruiz, any
3 discussions while I was at the Department of Justice about the
4 progress of this case, the speed of the case. The issue I
5 just referred to, I probably -- just because the convening
6 authority at the time, as you know, was a former Marine, I
7 think I might have read an article in the newspaper about it.
8 But I don't recall specific discussions or remember having an
9 opinion one way or the other as to it because I just simply
10 didn't know enough about it.

11 LDC [MR. RUIZ]: And just since you mentioned the prior
12 convening authority, did you have any conversations with the
13 prior convening authority ----

14 MJ [Col PARRELLA]: No.

15 LDC [MR. RUIZ]: ---- that you know of?

16 MJ [Col PARRELLA]: Not since he left active duty.

17 LDC [MR. RUIZ]: I understand. Okay.

18 Your fitness report in Block 4 references how your
19 time at the Department of Justice would also increase your
20 professional portfolio.

21 MJ [Col PARRELLA]: I'm sorry. Could you say which
22 Block 4 you're referring to?

23 LDC [MR. RUIZ]: Sure. Yes. It's page 5 of -- page 5 of

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1 5 at the bottom, and it says -- it's Block 4, REVIEWING
2 OFFICER COMMENTS.

3 MJ [Col PARRELLA]: Are you looking at 595B, Mr. Ruiz?
4 Because I see that as a four-page document.

5 LDC [MR. RUIZ]: It is a four-page document, yes. I'm
6 sorry. And it's page 2 of that four-page document, but it
7 says page 5 of 5 in terms of the actual fitness report at the
8 bottom.

9 MJ [Col PARRELLA]: Okay. I see where you are.

10 LDC [MR. RUIZ]: All right. So the REVIEWING OFFICER
11 COMMENTS in Block 4.

12 MJ [Col PARRELLA]: And what was your question again?

13 LDC [MR. RUIZ]: It makes a statement about how your time
14 at the Department of Justice also increased your professional
15 portfolio. And my question is: Do you feel, as you sit here,
16 Judge, that your assignment to this military commission will
17 likely similarly increase your professional portfolio?

18 MJ [Col PARRELLA]: No. I haven't really honestly given
19 it consideration, nor do I really ----

20 LDC [MR. RUIZ]: Before you took this position, you did
21 not -- and having been in the military, where we think about
22 our future assignments quite a bit, so prior to taking on this
23 monumental case, you did not give any consideration how it may

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1 impact your career positively or negatively?

2 MJ [Col PARRELLA]: No, not really. Honestly, Mr. Ruiz,
3 I've come to the realization I'm probably about as far as in
4 this organization promotion-wise as I'm ever going to be and
5 don't really care how this is viewed by entities within the
6 Marine Corps one way or the other. I think I've indicated
7 earlier I certainly didn't volunteer for this, but I will do
8 the job to the best of my ability.

9 As to Block 4, I see the comments and, you know, this
10 is, as I said, an unobserved fitness report. I don't even
11 think I met the individual who authored that. It's something
12 that's comments that are provided by Marine Corps University.

13 LDC [MR. RUIZ]: So let me ask you that question, because
14 I think this is perhaps a -- I was going to say
15 service-specific, but unlike Mr. Nevin, I understand that the
16 Marine Corps is a part of the Navy. And so while you guys do
17 things a little bit differently, we do have some experience
18 with fitness reports.

19 At least in the Navy, we tend to have a pretty
20 interactive process when we write our fitness reports. It
21 tends to be pushed down to the level of the person actually
22 being reviewed. Many times we're asked to provide a working
23 draft. And certainly the reviewer and the -- finally the

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1 signing official ultimately determines what stays and what
2 goes.

3 So am I to understand that in this particular fitness
4 report, you did not have any input into the information or you
5 had some input or what exactly did -- what process -- what
6 part did you take in this process?

7 MJ [Col PARRELLA]: Yeah, so my recollection was that my
8 input was very minimal. My -- I believe my predecessors had
9 had this actually written as an observed fitness report, and I
10 elected to go unobserved to put it more in line with all of
11 the other fellowships and all of the other top-level school
12 situations, but I don't recall.

13 I'm relatively certain, looking at this, that
14 [REDACTED] probably authored what he has signed as authoring
15 and probably provided input as well, or maybe not, for the
16 colonel, [REDACTED], because again, I never met this individual,
17 but there was a civilian who is assigned to Marine Corps
18 University who probably -- who is our direct liaison who
19 probably prepared the comments for the colonel to sign as
20 well.

21 LDC [MR. RUIZ]: You did, however, have an opportunity to
22 review this document and to review the information. Block 6,
23 in fact, provides an opportunity to indicate if you disagree

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1 with the information provided within the fitness report, you
2 could, in fact, make a comment or a statement relating to the
3 substance contained in the fitness report, correct?

4 MJ [Col PARRELLA]: Only if it's adverse.

5 LDC [MR. RUIZ]: Sure. But I'm inferring in that
6 possibility the opportunity to review the report and determine
7 if you want to make a statement concerning the report.

8 MJ [Col PARRELLA]: Correct. But in Block 6, and I
9 think -- when you read that in conjunction with the applicable
10 order, Block 6 only applies in the case that the fitness
11 report is marked as an adverse report, which then affords
12 the ----

13 LDC [MR. RUIZ]: I see.

14 MJ [Col PARRELLA]: ---- Marine report an opportunity to
15 respond.

16 LDC [MR. RUIZ]: So did you not see this fitness report
17 before it made its way into your record?

18 MJ [Col PARRELLA]: It's possible I did. I honestly don't
19 recall.

20 LDC [MR. RUIZ]: Okay. At the time you were rated in this
21 report, you were a lieutenant colonel, correct?

22 MJ [Col PARRELLA]: That's correct.

23 LDC [MR. RUIZ]: And you are now a colonel?

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1 MJ [Co1 PARRELLA]: Correct.

2 LDC [MR. RUIZ]: When did you promote in relation to when
3 this report was written?

4 MJ [Co1 PARRELLA]: My date of rank is 1 September 2017.

5 LDC [MR. RUIZ]: Okay. So subsequent to this fitness
6 report?

7 MJ [Co1 PARRELLA]: Correct.

8 LDC [MR. RUIZ]: Prior to your consideration for
9 promotion, did you scrub your military record, including your
10 fitness reports?

11 MJ [Co1 PARRELLA]: Where are we ----

12 MTC [MR. TRIVETT]: Objection, relevance.

13 MJ [Co1 PARRELLA]: ---- going with this, Mr. Ruiz?

14 LDC [MR. RUIZ]: So what I'm trying to understand here is
15 you've indicated to some extent that you really didn't have an
16 interactive process in working -- or any information that's
17 contained in this report. I want to ask you a follow-up
18 question about the fully integrated language as a prosecutor.
19 And so it makes a difference for me whether somebody just
20 wrote this report, inserted it into your service record, and
21 you never saw it and it went up for promotion and then you
22 were promoted, or you actually took an interactive part in
23 this process, looked at the fitness report, noted any

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1 discrepancies and your understanding of what that language
2 meant. It makes a difference in my question and where I go
3 with the question or don't go with the question.

4 So if you tell me I never saw this, I have no idea
5 who wrote it ----

6 MJ [Col PARRELLA]: It's possible I saw it, Mr. Ruiz, but
7 keep in mind, that I don't think anybody who wrote it,
8 including myself as the recipient, anticipated back in 2015
9 that I would find myself sitting here having folks scrutinize
10 the adjectives that were used in this report.

11 LDC [MR. RUIZ]: Sure.

12 MJ [Col PARRELLA]: You know, at the end of the day it was
13 an unobserved report, which I'm not sure how it is in the
14 Navy, but in the Marine Corps it means that the report doesn't
15 carry any weight with the board or doesn't carry significant
16 weight with the board because it's unobserved. It doesn't
17 have rating marks.

18 So the bottom line is -- and I think I've articulated
19 this before: Nobody in the Department of Justice had the
20 ability to influence my career in a professional standpoint
21 other than perhaps calling up and saying I wasn't showing up
22 to work. There was no rating, per se, that they were doing.

23 LDC [MR. RUIZ]: But certainly if it had been an adverse

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1 report or even nonobserved and they included negative language
2 in this fitness report, you would agree that that would have
3 been a cause for concern for you as you were being considered
4 for promotion, right?

5 MJ [Co1 PARRELLA]: That is -- that is true. It could be
6 a cause for concern. But as I've stated, I think -- I think
7 I've described it ad nauseam, sort of my role at the
8 Department of Justice. So let's get to a question that if you
9 want to ask more questions or something has triggered a
10 question for you, let's get there, please.

11 LDC [MR. RUIZ]: Sure. So the fully integrated piece, you
12 were -- you had the requisite security clearance to access
13 privileged documents with the Department of Justice?

14 MJ [Co1 PARRELLA]: Yes. If I -- on a need-to-know basis.

15 LDC [MR. RUIZ]: Did you have your personal swipe card
16 that could have ingress and egress from the facilities without
17 being escorted?

18 MJ [Co1 PARRELLA]: Yes.

19 LDC [MR. RUIZ]: Okay. So at least you had that level of
20 trust and you were integrated to that extent?

21 MJ [Co1 PARRELLA]: Yes.

22 LDC [MR. RUIZ]: And you worked hand in hand with the
23 Department of Justice prosecutors to carry out the mission of

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1 the office?

2 MJ [Co1 PARRELLA]: Yes.

3 LDC [MR. RUIZ]: In doing that, you prepared or reviewed
4 search warrants, correct?

5 MJ [Co1 PARRELLA]: Yes.

6 LDC [MR. RUIZ]: As well as a number of other legal issues
7 as they related to the work of the Department of Justice and
8 further its counterterrorism mission?

9 MJ [Co1 PARRELLA]: Yes.

10 LDC [MR. RUIZ]: Okay. I think what you have indicated is
11 that you were not -- you were never given a case, a standalone
12 case, by yourself. You were co-detail, which seems the
13 standard operating procedure, correct?

14 MJ [Co1 PARRELLA]: Yes.

15 LDC [MR. RUIZ]: But you did have some discretion in terms
16 of your ability to provide input on the case. Did you have
17 discretion in terms of providing recommendations for
18 disposition of cases or how legal issues ought to be handled?

19 MJ [Co1 PARRELLA]: I had input, yes.

20 LDC [MR. RUIZ]: All right. Okay.

21 Mr. Harrington asked you a question, Judge, about how
22 you felt when 9/11 happened, and your response was that
23 similar to what everybody else felt in the country. I feel it

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1 is fair to say that many people in this country felt that
2 whoever committed the 9/11 acts should die and pay for those
3 acts with their lives?

4 MJ [Col PARRELLA]: I'm not going to speculate on that.
5 Let's ask the next question, please.

6 LDC [MR. RUIZ]: Well, I'm not asking you to speculate.
7 You did indicate that you felt how the country felt ----

8 MJ [Col PARRELLA]: I think I ----

9 LDC [MR. RUIZ]: ---- so you did speculate.

10 MJ [Col PARRELLA]: ---- prefaced that by saying that's my
11 assumption. I don't know -- obviously know how the rest of
12 the country felt other than from general media reports and
13 things and my take from those reports were that the two
14 predominant emotions were anger and shock.

15 LDC [MR. RUIZ]: Sure. So you're a citizen; you're a
16 member of our military, our fighting force. When that
17 happened, did you feel they needed payback and they should
18 die?

19 MJ [Col PARRELLA]: I'm not going to answer the question.
20 We're just rehashing what I've already stated.

21 LDC [MR. RUIZ]: Why not, Judge?

22 MJ [Col PARRELLA]: The answer is no. As I've said before
23 and I'm going to say one last time, there's nothing about my

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1 experiences either on 9/11 or since that causes me to believe
2 that I cannot be impartial and unbiased with respect to this
3 commission.

4 LDC [MR. RUIZ]: Yes, sir. I believe the quote was "It's
5 possible that my feelings have changed," was your response to
6 the line of questioning from Mr. Harrington. That's a little
7 bit different and that's the answer I want to explore.

8 When you say it's possible my feelings have changed,
9 it's difficult to assess that answer without truly
10 understanding what your feelings were, which is what I was
11 trying to gather.

12 MJ [Col PARRELLA]: And to the best of my recollection,
13 what I said was is probably anger and shock. I don't have a
14 specific recollection of it. And, you know, what I said is I
15 think over due course of time, those emotions may have, you
16 know, waned just with the passage of time.

17 But as I sit here today, which is what I think is
18 relevant, there's nothing about my past experiences that I
19 feel will affect those two important factors.

20 LDC [MR. RUIZ]: So if a jury were being selected to sit
21 as an impartial and fair juror and they indicated that they
22 felt anger or shock, they wanted these men dead or whoever
23 committed these acts to die, but they said that now everything

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1 was fine, they feel ----

2 MJ [Col PARRELLA]: I'm going to stop you there because
3 I've never said that I ever expressed any desire for these men
4 to die. In fact, I think I said the opposite, that I have
5 never said that. I don't recall ever -- ever uttering those
6 words or feeling that way because, frankly, this case -- at
7 the time of 9/11, I don't think those facts -- a lot of those
8 facts were known, essentially. So ----

9 LDC [MR. RUIZ]: I understand that.

10 MJ [Col PARRELLA]: ---- I just want to make it clear for
11 the record. So what's your next question?

12 LDC [MR. RUIZ]: What I'm trying to get you to answer,
13 Judge, directly and honestly, quite frankly, is: Did you feel
14 that whoever committed these acts on 9/11 should pay a price
15 and should be either eradicated, should be brought to justice?
16 This is a reasonable question to ask in this case. I'm not
17 just kind of pulling it out of nowhere, certainly since you're
18 going to sit and you're going to be calling the balls and
19 strikes.

20 If, in fact, you did espouse such an opinion, it may
21 very well have waned over time, but then it goes to the
22 weight, right, not necessarily the relevancy. But if, in
23 fact, you or if a prospective juror felt that way, it's

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1 something that we need to be able to assess. We need to be
2 able to think through and then determine if we want to make a
3 challenge based on that. And, quite frankly, it just seems
4 like if you asked me how I felt, I would say yes.

5 MJ [Col PARRELLA]: So, Mr. Ruiz, what's your question?

6 LDC [MR. RUIZ]: My question is, Judge: Did you feel that
7 whoever committed these acts on 9/11 or shortly thereafter
8 should pay a price; that there should be some retribution;
9 that maybe they should die; that we should bomb them, whoever
10 they were, after we found out who they were? Did you have
11 those kinds of feelings? You're a member of our military, a
12 citizen, an American.

13 MJ [Col PARRELLA]: I have no specific recollection of
14 having those feelings. Is it possible? It's possible. I'm
15 just speculating, Mr. Ruiz. It was a long time ago.

16 LDC [MR. RUIZ]: A pretty significant act. Pretty
17 significant ----

18 MJ [Col PARRELLA]: I understand, but I'm, as a judge,
19 very confident I can leave my personal feelings, whatever they
20 might be on any particular topic, whether it be capital
21 punishment or any other topic, outside and apply the law as I
22 believe it to be inside this connection.

23 LDC [MR. RUIZ]: I understand that. But I still don't

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1 know what your personal feelings are. I mean, I know you're
2 saying you can put them aside.

3 MJ [Co1 PARRELLA]: And I don't think it's relevant the
4 way you're -- your line of questioning, so I'm not going to
5 answer. Let's move on.

6 LDC [MR. RUIZ]: So your personal feelings on how you felt
7 about 9/11 case are not relevant because you can put them
8 aside?

9 MJ [Co1 PARRELLA]: Okay. So you're not correctly
10 summarizing. I've answered that question; and for those
11 reasons, I'm not going to answer it again.

12 LDC [MR. RUIZ]: Okay. The -- a little bit more about
13 your document review. I think you indicated you conducted a
14 document review at a CIA facility or a warehouse?

15 MJ [Co1 PARRELLA]: Correct.

16 LDC [MR. RUIZ]: Can you tell us a little bit more about
17 that?

18 MJ [Co1 PARRELLA]: No.

19 LDC [MR. RUIZ]: Is that because you don't want to or you
20 just don't remember or you've got a duty to protect that
21 information?

22 MJ [Co1 PARRELLA]: I don't remember. I don't remember
23 which case it was. And yeah, I honestly don't know that I

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1 could give you much details, and to the extent I might be able
2 to, they are probably classified.

3 LDC [MR. RUIZ]: I understand.

4 So as you sit here as a member -- as a judge on this
5 case, you do still have an obligation to protect classified
6 information that may have come from the CIA?

7 MJ [Col PARRELLA]: Yes. I mean, as far as I know, that
8 obligation hasn't ended.

9 LDC [MR. RUIZ]: And the obligation would also extend to
10 any privileged communications, work product that you worked on
11 during your time with the Federal Bureau of Investigation?
12 You still have a duty of loyalty and confidentiality to that
13 organization, correct?

14 MJ [Col PARRELLA]: Yes.

15 LDC [MR. RUIZ]: In terms of the -- I understand you don't
16 remember much about the CIA facility. Do you remember if you
17 had to be escorted or if you had the opportunity to enter that
18 facility say, for instance, with your own swipe card or if
19 there were particular procedures ----

20 MTC [MR. TRIVETT]: Objection, relevance.

21 MJ [Col PARRELLA]: Sustained. Let's move on, Mr. Ruiz.

22 LDC [MR. RUIZ]: Judge, this goes to a challenge based on
23 your alignment with a party to this litigation. The CIA's

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1 involvement in this case is extensive and well documented. To
2 the extent that you were embedded with the Department of
3 Justice and had ease of access to CIA facilities, it's
4 directly relevant to the questions that I'm asking. I don't
5 see how that couldn't be more relevant.

6 MJ [Col PARRELLA]: Because I've answered the question
7 several times now about my relationship with any of those
8 agencies, the extent that I had any involvement with those
9 agencies, what that involvement was, and all of what I did or
10 didn't do while I was at the Department of Justice.

11 LDC [MR. RUIZ]: Well, the question was: Did you have
12 access to their facility without an escort? Could you come
13 and go as you pleased?

14 MJ [Col PARRELLA]: But that's -- I don't see that as
15 relevant, so we're going to move on. I've described my
16 relationship with that agency, what it was and what it wasn't.
17 So whether I had access to the facility unescorted or escorted
18 I don't see as relevant.

19 LDC [MR. RUIZ]: Okay. Judge, at one time you were
20 deployed in support of Operation Iraqi Freedom II, correct?

21 MJ [Col PARRELLA]: That's correct.

22 LDC [MR. RUIZ]: During that deployment, did you have an
23 opportunity to work with detainee populations?

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1 MJ [Col PARRELLA]: I did not.

2 LDC [MR. RUIZ]: All right. Did you have any advisory
3 role or any role in regards to detention operations?

4 MJ [Col PARRELLA]: I did not.

5 LDC [MR. RUIZ]: Did you form any opinions regarding any
6 detainees that were taken in by U.S. forces?

7 MJ [Col PARRELLA]: No.

8 LDC [MR. RUIZ]: Okay. May I have a moment?

9 MJ [Col PARRELLA]: You may.

10 [Pause.]

11 LDC [MR. RUIZ]: That's all I have, Judge. Thank you.

12 MJ [Col PARRELLA]: Thank you, Mr. Ruiz.

13 Trial Counsel, any questions for the military judge
14 in light of counsel's questions?

15 MTC [MR. TRIVETT]: Good afternoon, Your Honor.

16 MJ [Col PARRELLA]: Good afternoon.

17 MTC [MR. TRIVETT]: I just have one question and one
18 clarification for one of your answers earlier. Mr. Nevin
19 asked you about DoJ personnel you had contact with. I'd like
20 to add one name to that list to see if you had any contact
21 with a Ms. Kiersten Korczynski while you worked at the
22 Department of Justice Counterterrorism Section.

23 MJ [Col PARRELLA]: Is she a former Navy judge advocate?

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1 MTC [MR. TRIVETT]: Yes, sir.

2 MJ [Col PARRELLA]: My recollection was that she joined
3 CTS while I was there, I want to say in the latter half of the
4 year while I was there. So I did meet her. I never worked on
5 a case with her.

6 MTC [MR. TRIVETT]: Anything about your relationship with
7 her that would affect your ability to sit impartially on this
8 case if she were to be detailed to this case by the chief
9 prosecutor?

10 MJ [Col PARRELLA]: Absolutely not.

11 MTC [MR. TRIVETT]: And one clarification. Mr. Nevin
12 asked questions about the law of capital punishment earlier,
13 and you started a response by saying "I don't believe," and
14 then you paused and then you said "I'm qualified."

15 Now, I heard it and understood to mean that you
16 believed you were qualified to sit on this case. But if I
17 heard it correctly, the record might indicate that you said "I
18 don't believe I'm qualified." I just wanted to clarify that
19 you believe that you're qualified to sit on this case,
20 including with the answer to that question.

21 MJ [Col PARRELLA]: Yes. And if I started a half of a
22 sentence and didn't finish it, then I can see how that would
23 happen, so that was certainly not my intent. I do believe I

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1 am qualified to sit on this case with the full understanding
2 that this is a capital case.

3 MTC [MR. TRIVETT]: Thank you, sir. No further questions.

4 MJ [Col PARRELLA]: Do any counsel desire to challenge the
5 military judge? Trial Counsel?

6 MTC [MR. TRIVETT]: No, sir.

7 MJ [Col PARRELLA]: Mr. Nevin?

8 LDC [MR. NEVIN]: Your Honor, I make the motion today that
9 the military judge recuse yourself from the case. I think
10 it's probably a motion that should be briefed and presented to
11 you more thoroughly, but I want to articulate it today because
12 I know the military judge intends to continue and -- if you
13 deny this motion, to hear additional arguments on other
14 motions, and I want to present this motion prior to your doing
15 that, so it will be perhaps somewhat incomplete. But it's
16 basically on four grounds.

17 The first is that the ABA -- the ABA Code of Judicial
18 Conduct -- and I cited the rules of the code of conduct for
19 United States judges, but they essentially provide the same
20 thing. And counsel previously pointed out to you that the
21 JAG Instruction makes the ABA Model Code of Judicial Conduct
22 applicable to you.

23 And the matter that I -- the matters that I sought to

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1 question you about regarding the number of trials you had been
2 involved in, your experience with capital cases, and the rest,
3 all of those, as I articulated to you previously, would have
4 gone to your competence to serve as a judge in this case.
5 Rule 2.5 of the ABA code says that "A judge shall perform
6 judicial and administrative duties competently and also
7 diligently." And the comment to the rule says that
8 "competence in the performance of judicial duties requires the
9 legal knowledge, skill, thoroughness, and preparation
10 reasonably necessary to perform a judge's responsibilities of
11 judicial office."

12 And meaning no disrespect previously and none now, as
13 someone who's been struggling with this case for something
14 like ten years and is aware of the complexity of it, I think
15 it was reasonable for us to -- and it falls under the -- the
16 rubric of competence. And I know based on your record, no one
17 would say in a general sense that you're not a competent
18 person. Clearly, you are.

19 But these were the kinds of questions that were
20 necessary for us to get at the question of whether you are
21 competent in this specific case, and your refusal to fully
22 answer those questions leaves me in the position of just
23 pointing out that you have a relatively short period of time

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1 of experience as a judge. And I believe it is the minimum
2 under the statute, I acknowledge; but this is not a
3 minimum-type case, if you understand my point.

4 And I wanted to pursue that, and my inability to
5 pursue that leaves me in the position of feeling that to
6 protect Mr. Mohammad's interests, I need to articulate that
7 motion to disqualify you or recuse you on those grounds.

8 The second ground is -- comes also from the Code of
9 Conduct for U.S. Judges, and I will just say that -- point you
10 to Canon 3 of the Canons of Conduct, 3 -- Canon 3(c)(1) and
11 subsection (b) states that "The judge shall disqualify himself
12 or herself if the judge served as a lawyer in the matter in
13 controversy" -- and I recognize you don't -- you have not done
14 that, but it says, "or a lawyer with whom the judge previously
15 practiced law served during such association as a lawyer
16 concerning the matter."

17 And I call your attention, and I -- to your remarks
18 previously that you practiced law for a year at the -- at DoJ
19 in the fellowship program and that persons you practiced law
20 with there were lawyers in the present case. And I hadn't
21 thought of Ms. -- of Ms. Korczynski, but I do believe that
22 Mr. Groharing was part of that organization, as were very
23 possibly Mr. Trivett, Mr. Ryan, and Ms. Tate.

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1 And I will confess to not knowing the precision of
2 their assignments and who their employer is and what their
3 associations are, but I believe -- and I will say on
4 information and belief I believe that they are a part of that
5 organization. And so I think it is correct to say that you
6 previously practiced law with those persons and that, while
7 you were practicing law with them, they served as lawyers in
8 this case. And that would -- that is a mandatory
9 disqualification. A judge shall disqualify himself or
10 herself.

11 I was struck by Mr. Connell's question of you that --
12 and I will submit to you the idea of an appearance -- the
13 appearances to the average person that you come out of an
14 organization which is dedicated in the way that organization
15 is dedicated, having worked with some of these people --
16 although I recognize you didn't work on an actual case with
17 them, if I -- at least that's how I understand your remarks --
18 but now you're on the bench going to decide this case. And so
19 for -- that's the -- all of that amounts to the second ground
20 for disqualification.

21 The third is what appears to be the high likelihood
22 that you'll be leaving within a year, and I think you've
23 stopped short of saying that that is a certainty, but it

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1 sounds like it's something awfully close to a certainty, and I
2 ask that you -- my last ground has to do with the amount of
3 work that has to be done in order for you to be in a position
4 to competently decide questions in this case. But I don't
5 know how much work that is, but I know it is a monumental
6 amount of work.

7 And the idea that you're going to do it now for
8 however long it takes to do that and then leave and someone
9 else is going to come in and do it all over again strikes me
10 as a diseconomy of the first water, and so I don't -- I don't
11 know exactly what rule that would come under, but I submit to
12 you that you should recuse yourself from handling this case
13 unless and until it is clear that your next assignment, the
14 assignment that's been described as not going to arise or that
15 you formally state in some way that you will decline it if it
16 does arise.

17 And then finally, and the reason that I'm
18 articulating the motion now -- or these motions now is that I
19 ask that you take no action on this case beyond ruling on this
20 motion for disqualification and conducting this voir dire
21 until every substantive element of this case has been read and
22 reviewed and understood by you.

23 And I respectfully suggest that it should not be --

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1 these things do not exist in isolation, and it is not
2 appropriate in a capital case, and particularly a capital case
3 of this magnitude that the whole world is watching, to simply
4 come up to speed over time while simultaneously ruling on
5 motions as they come up based on, you know, your good-faith
6 understanding of their scope.

7 I think it requires more than that, and I ask that
8 you -- it wouldn't be a recusal, obviously, it would be
9 something on the order of an abatement, that you not take
10 further action in the case until you can tell us that you have
11 read everything that's necessary to understand the full scope
12 of this case.

13 MJ [Col PARRELLA]: Mr. Nevin, on that note, can you cite
14 for the commission any authority for the proposition that a
15 judge who is inheriting a case must conduct a review of every
16 page, every pleading that's transpired so far?

17 LDC [MR. NEVIN]: Give me a second. And I -- Your Honor,
18 I'll say I do request the opportunity -- unless you are going
19 to grant the motion from the bench, I do request the
20 opportunity to brief this to you.

21 But I did take a look just over the last couple of
22 days at a series of cases that hold that in civilian courts,
23 at least, when one judge replaces another, there -- it is open

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1 for the judge to reconsider all of the materials -- all of the
2 decisions, I'm sorry, that the prior judge made. And it's
3 implicit in that that until the judge is in a position to
4 understand all of those motions, that's a duty that can't be
5 carried out.

6 I think the cases that are in front of me -- at this
7 point I can't cite cases to you that stand for that
8 proposition, but I'll make every effort to do so if you'll
9 give me time to brief this.

10 But let me say also that I believe that that would
11 come within the requirement of the rule that I just read you
12 about competency, that that would include -- and I'm reading
13 from the comment of Rule 2.5 of the ABA Model Code of Judicial
14 Conduct. It would include -- "competence would include the
15 legal knowledge, skill, thoroughness, and preparation
16 necessary to perform a judge's responsibilities of judicial
17 office." And I am submitting to you that that kind of review
18 of the water that's gone under the bridge, particularly in
19 this case, would be a requirement for preparation.

20 That's all I have. Do you have questions for me,
21 sir?

22 MJ [Col PARRELLA]: I do not. Thank you, Mr. Nevin.

23 LDC [MR. NEVIN]: Okay. And, Your Honor, I don't move to

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1 disqualify you lightly. I mean no disrespect. I appreciate
2 your hearing me out.

3 MJ [Co1 PARRELLA]: Mr. Nevin, I assure you none taken.
4 As I indicated when you were asking your questions, I
5 understand your interests in asking those questions. And
6 again, it's my ultimate goal to be as open and transparent as
7 possible, but no disrespect or any sort of thing taken by
8 either your questions or your challenge.

9 Ms. Bormann?

10 LDC [MS. BORMANN]: Good afternoon, Judge.

11 MJ [Co1 PARRELLA]: Good afternoon.

12 LDC [MS. BORMANN]: We adopt what Mr. Nevin has so ably
13 argued. However, we are asking for an opportunity to brief
14 it. We're in a unique position where we are currently
15 developing a factual record and evidence outside of the
16 record, and so we'll be filing a brief forthwith and
17 supplementing the record.

18 Unless you have any questions?

19 MJ [Co1 PARRELLA]: No questions. Thank you, Ms. Bormann.

20 LDC [MS. BORMANN]: Thank you.

21 MJ [Co1 PARRELLA]: Mr. Harrington?

22 LDC [MR. HARRINGTON]: Judge, I adopt the arguments of
23 Mr. Nevin and Ms. Bormann.

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1 And, Judge, I would make a request of the court. The
2 first thing I asked the court was a question about implicit
3 bias. I would ask the court to get a transcript of today's
4 proceedings and read your answers. And in particular, I'd
5 like the court to read the answers which you gave about your
6 recollection of yourself right after 9/11.

7 And I think we talked about the appearance to the
8 public of the perception of bias in this particular case. And
9 I think I speak for myself, but almost everyone that I know
10 could tell you exactly where they were and exactly how they
11 felt after 9/11, and that everybody talked to other people and
12 that everyone heard people's opinions about retribution,
13 punishment, revenge, and all sorts of things. And it's
14 just -- it's hard to believe that anybody who is serving in
15 the United States Marine Corps, which is at the forefront of
16 our military force, would not have encountered that. It just
17 seems to me to be incredulous.

18 And with respect to one of the arguments that
19 Mr. Nevin made, I would ask the court to reserve decision on
20 the one about practicing law with somebody who is involved in
21 the prosecution of this case. And that will be developed
22 further in the motion that we file with the court and in the
23 issues related to AE 292. And the department that you were in

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1 for the -- when you were at the Department of Justice, a
2 number of people who were involved in the investigation in 292
3 and involved in the -- not only investigation by the FBI, but
4 also an investigation for prosecution that was carried out by
5 the Department of Justice and by one of the United States
6 Attorneys assigned to it. So I would ask the court to hold
7 your judgment until you see that and we develop that record
8 further. Thank you.

9 MJ [Col PARRELLA]: Thank you, Mr. Harrington.

10 Mr. Connell?

11 LDC [MR. CONNELL]: Sir, Rule for Military Commission
12 902(d)(2) gives the right to present evidence in support of a
13 challenge to qualification or bias before the military judge
14 rules. We'd request the opportunity to take advantage of
15 that. We have some investigation to conduct based on your
16 answers today and we will act with dispatch in doing so.

17 MJ [Col PARRELLA]: I understand. And I think the
18 discussion section right above that indicates that this issue
19 can be raised at any time, and an adverse ruling initially --
20 not indicating that's where I'm going, but if I were to rule
21 adversely, that that doesn't preclude you from doing
22 subsequent investigation, finding evidence, presenting the
23 evidence, and bringing the issue up again.

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1 LDC [MR. CONNELL]: Sir, I take your point. But I will
2 make the additional observation that (d)(2) has an ordering
3 aspect to it, which is that there -- there shall -- "each
4 party shall be permitted to question the military judge and to
5 present evidence regarding a possible ground for
6 disqualification before the military judge decides the
7 matter." So it seems to me that contemplates at least a
8 reasonable opportunity to develop the factual basis.

9 MJ [Col PARRELLA]: And what do you opine, Mr. Connell, is
10 a reasonable opportunity? You're welcome to stand there,
11 whichever your preference is.

12 LDC [MR. CONNELL]: Yes, sir. I didn't want you to take
13 any disrespect from me being at the table.

14 What -- I think what you're asking me is how long do
15 I feel that that investigation would require?

16 MJ [Col PARRELLA]: Not specifically yours, but I'm asking
17 you what do you opine is a reasonable opportunity to present
18 evidence? Obviously, the fact that I've been detailed to this
19 case has been known now since August 27th. The bio, I
20 believe, was provided shortly thereafter. So it's, I think,
21 disingenuous to say there hasn't been an opportunity to do
22 some investigation. Clearly some counsel have done so.

23 LDC [MR. CONNELL]: Absolutely, sir. And the, you know,

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1 Google-level investigation is something that we were able to
2 do while preparing for this hearing. And the details of your
3 connection to the Department of Justice National Security
4 Division Counterterrorism Section, of course, were not
5 forthcoming until Sunday when you very -- in a spirit of
6 candor, which I appreciate, provided us your fit rep. And we
7 have already begun making some phone calls based on your
8 answers this morning.

9 I would say that four weeks would be a reasonable
10 time. And then if you set a briefing schedule, that means
11 that the issue can be argued and finally dealt with at the
12 next hearing.

13 MJ [Col PARRELLA]: Okay. I understand. Thank you.

14 Mr. Ruiz.

15 LDC [MR. RUIZ]: Judge, on behalf of Mr. al Hawsawi, I'm
16 going to ask to reserve our right to challenge the military
17 judge at a latter time. I'm also not explicitly at this time
18 joining Mr. Nevin's argument, although I'm not unjoining it
19 either. I simply want to have an opportunity to digest the
20 arguments, the answers by the commission, and do some research
21 on our own, put together this in a pleading, and submit it to
22 the military commission.

23 I do, however, want to specifically join the portion

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1 of Mr. Nevin's argument where he requested no additional
2 business be conducted until this issue has been resolved, and
3 Mr. Connell's request for a reasonable opportunity to conduct
4 follow-up investigation based on today's questions and
5 answers.

6 My suggestion to the court would be that you set a
7 briefing schedule for these challenges. We intend, in quite
8 candor, to submit this to you. If we were required to go
9 through hearings this week, our timeline would be sometime
10 next week, depending on how quickly we can move on our
11 research and integrate questions and answers; but also
12 independent judgment. We want to do this sooner rather than
13 later, but we do want to do it in an orderly fashion that we
14 can put together our best argument for why we do or do not
15 have a concern at this point.

16 But for now, we'd like to reserve with an explicit
17 joinder to the request to delay the proceedings until the
18 issue is fully briefed and resolved and we've had just an
19 additional amount of time to conduct follow-up investigation
20 based on some of the questions and answers today. Thank you.

21 MJ [Col PARRELLA]: Thank you, Mr. Ruiz.

22 Trial Counsel, would you like to be heard on this?

23 MTC [MR. TRIVETT]: Sir, R.M.C. 902(b) sections (1)

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1 through (3) list the grounds for disqualification of a
2 military judge. Whether or not there's personal bias or
3 prejudice, personal knowledge of disputed evidentiary facts;
4 whether the military judge act as a counsel, SJA, or convening
5 authority to any of the offenses charged or the case in
6 general; whether or not the judge was a witness in the case;
7 whether he forwarded charges; or whether he's expressed an
8 opinion on guilt or innocence of the accused.

9 For the many hours that you were questioned by
10 defense counsel this morning, the prosecution sees no grounds
11 under which you are required to recuse yourself.

12 I wanted to address some specifics that Mr. Nevin
13 indicated in his motion. In regard to the ABA Code of
14 Judicial Conduct, if you look at R.M.C. 902, if you look at
15 28 U.S.C. 455, which is the federal standard, the ABA Code of
16 Judicial Conduct, and the Model Code Conducts and the Canons
17 of Judicial Ethics, they're all based on the same principles,
18 but they're certainly not and don't use verbatim language. We
19 would ask that any analysis that you do, whether it be here
20 today or later in writing, that you consider all of those
21 standards. And the prosecution believes that all of those
22 standards, if analyzed, still serve as no grounds for you to
23 recuse yourself as the military judge.

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1 We're going to have to have an opportunity, clearly,
2 if the defense counsel are going to file motions on this, to
3 respond in writing. But there's some things that we don't
4 want to concede up front, and we want to make sure that the
5 record is clear on that.

6 The code of conduct that Mr. Nevin spoke about
7 regarding working in the same practice of law with another
8 lawyer we're not certain applies to government lawyers.
9 Obviously, there's always going to be exceptions to certain
10 government employment. The Department of Justice is one of
11 the largest law firms in the world. Where that would stop,
12 whether that would be at the National Security Division level,
13 at the Counterterrorism Section level, or would it include all
14 of the U.S. Attorneys' offices in the 93 various offices
15 around the states?

16 So we certainly don't concede that that canon applies
17 to federal government employment. We would like the
18 opportunity to brief that, but we certainly didn't want the
19 military judge to consider his work at CTS under that canon
20 without having the opportunity to brief that piece of it.

21 What we can say as officers of the court and having
22 worked at the Department of Justice Counterterrorism Section
23 since 2009 is that all of the attorneys that are detailed to

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1 the case currently are assigned from Counterterrorism Section
2 to the Department of Defense and work in the Office of the
3 Chief Prosecutor. The case is not being prosecuted out of the
4 Department of Justice. It is being prosecuted by the
5 Department of Defense out of the Office of the Chief
6 Prosecutor. We do not have information regarding this case,
7 certainly none of the detailed attorneys at this time, over on
8 government servers at the Department of Justice where you may
9 have had access to them.

10 LDC [MR. RUIZ]: Judge, I object to that representation
11 without -- that's testifying. If Mr. Trivett wants to
12 testify, I would like to cross-examine him.

13 MJ [Col PARRELLA]: Mr. Ruiz, the objection is overruled.
14 I understand that it's argument. Please continue.

15 MTC [MR. TRIVETT]: Thank you, sir.

16 Mr. Nevin seemed to indicate that you were leaving
17 within a year was a legitimate ground to recuse yourself. I
18 do not believe that that is the state of the law. Obviously,
19 as an officer in the military, the needs of the service will
20 dictate whether or not you get those orders.

21 And ultimately whether you do or whether you don't,
22 you're assigned here for the purposes of being the military
23 judge as long as those orders shall run, and that would not be

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1 a ground to disqualify any military judge. It's not how the
2 government works. That's certainly not how the military
3 works. And whether it's economical or not isn't a grounds for
4 recusal.

5 Mr. Nevin seemed to indicate that abatement was a, I
6 guess, alternate relief that he asked for in his oral motion
7 to recuse. We would oppose abatement as well. I think the
8 military judge rightly pointed out whether or not there was
9 any authority that an abatement must occur until you've read
10 every last jot and tittle of a record that is almost
11 20,000 pages long and filings to date over the last six years
12 that number well into the thousands. That's not a grounds for
13 abatement.

14 The competency issue is not set forth in the ABA Code
15 of Judicial Conduct. Also would not require that. The
16 Navy-Marine Corps Trial Judiciary has found you competent to
17 serve as a judge. You have satisfied all of the requirements
18 of the Military Commission Act in regard to your experience,
19 and, therefore, your leaving, or this request that you have to
20 read everything beforehand is simply not a grounds for
21 recusal, and that we should continue to move on with the
22 remainder of the docket.

23 Mr. Connell has had a reasonable opportunity to

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1 investigate. I think what you will see when you do review
2 most of the record and most of the documents is that the
3 defense is never going to be satisfied with their level of
4 investigation. It's not uncommon in death penalty
5 jurisprudence for defense counsel to seek delay at every
6 opportunity for it's in their clients' best interest. I'm not
7 disparaging anyone, but it is a strategy that we've seen for
8 the last six years.

9 And we believe that there is no need for a further
10 defense investigation. You have been forthright in your
11 answers. You have been accommodating in requests for
12 reasonable discovery, and you have answered all of the
13 defense's questions that were relevant, sometimes several
14 different times, although they were the same question.

15 So we believe at this point in time there's no
16 grounds for recusal and that we should move on with the
17 remainder of the docket for the rest of the week.

18 Subject to your questions, sir.

19 MJ [Col PARRELLA]: I have none. Thank you.

20 Mr. Nevin?

21 LDC [MR. NEVIN]: Thanks, Your Honor. And perhaps this
22 will be self-evident, but Rule 902 clearly sets out some
23 grounds for disqualification, but it doesn't say these are the

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1 only grounds that you possibly can consider, no other grounds
2 shall be considered.

3 That's why the ABA Code of -- that's why the
4 JAG Instruction says that the ABA Code of Conduct applies
5 unless it's directly inconsistent with something else. And if
6 the rule -- if Rule 902 said, "You shall not consider anything
7 except the grounds in this rule," then I think counsel would
8 have a point. But that's not what it says.

9 There's certainly not an exception for government
10 service on the face of the rule that I quoted to you about
11 practicing law with someone who is a member of the -- who's
12 litigating in the case. It could be either side, obviously.
13 It doesn't contain that.

14 And I understand that if you had a friend who was in
15 the United States Attorney's -- who was a line attorney in the
16 U.S. Attorney's Office in Idaho, let's say, which is where I'm
17 from, and if someone were saying disqualify because of that, I
18 understand that it might look a little different.

19 But here you're working -- you were working as a
20 prosecutor in the same division and in the same section. And
21 I recognize there may be subsections, but now we have narrowed
22 the obviously vast Department of Justice down to a pretty
23 narrow subset. And I certainly think that would be an

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1 appropriate thing to address in briefing. But I see nothing
2 in the rule -- I'll represent to you that there is nothing in
3 the rule that makes an exception for the situation that is
4 presented by these facts.

5 I thought -- I hear counsel saying whether it's
6 economical or not is not a ground for relief, and I believe I
7 said that recusal -- that I had some hesitation about the
8 concept of recusal as such. But I think it does go -- the
9 question of your leaving in a year or having to choose within
10 a year between staying here to complete this situation on the
11 one hand or on the other take -- and in the process, really,
12 is what I mean, forgoing a really important opportunity seems
13 to me to put you in something in the nature of a conflict kind
14 of situation, that that would be a difficult decision to make.

15 And I have heard counsel again and again speak to the
16 economy, to the need for judicial economy, the need to -- and
17 really in the same breath, counsel is telling you that we seek
18 delay at every opportunity.

19 I will say again what's maybe obvious on the record,
20 is that we understand that this is -- you've been detailed to
21 this case and you are a person who -- if I understand
22 correctly, it's not a year; it's 11 months -- who may well
23 leave within 11 months. And I would think maybe if I -- what

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1 I wanted was delay, I would be better off saying, "Yeah, sure,
2 stay around, and we'll jump through all these hoops again 11
3 months from now." And because that will provide a lot of
4 delay. But I'm really coming at this from the opposite
5 standpoint.

6 And, finally, I'm not asking for abatement until
7 every last jot and tittle is brought under control by you.
8 What I said was -- or what I intended to say was that until
9 you have everything that's important substantively under
10 control, I respectfully suggest you shouldn't be entering
11 rulings or hearing argument or evidence on the case.

12 It is a cumulative whole, this case, in many ways,
13 and sure, there's a motion here or a small matter there that
14 you don't have to spend hours reading about. I would concede
15 that there probably are such things. But there are many, many
16 things that, I think, for you to understand the flow and the
17 thrust of the case and what's fair to both sides, that you
18 have to have brought it all under control.

19 And I don't mean -- I was going to say I'm sorry that
20 you're in this position. I don't mean that. I just -- I
21 recognize it's a huge task, and so it's not that. But I just
22 think how can it be otherwise? How can you not be responsible
23 to know everything important substantively about this case,

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1 this capital case, largest in the history of our country,
2 before you enter rulings? And that's the basis for the -- and
3 I think it's a motion to abate, actually. But anyway, thank
4 you, Your Honor.

5 MJ [Col PARRELLA]: Thank you, Mr. Nevin. Okay.

6 I think we're at a logical place here to take a brief
7 recess. Court is in recess until 1500.

8 [The R.M.C. 803 session recessed at 1444, 10 September 2018.]

9 [The R.M.C. 803 session was called to order at 1503,
10 10 September 2018.]

11 MJ [Col PARRELLA]: This commission is called back to
12 order. All parties present when the commission recessed are
13 again present.

14 All right, Counsel. So here's what I'm going to do.
15 I'm going to take the arguments of counsel, give it careful
16 consideration this evening, take the matters under advisement.

17 As a result, what I am going to do to our order of
18 march is I'm going to flip tomorrow's sessions. So we will
19 start tomorrow at 0900 with an unclassified session. Assuming
20 that I deny defense's motions, we will then proceed at 1400 --
21 or, excuse me, 1330, which is what I approximate to be when we
22 will resume the afternoon session, that will then be the
23 closed session to take up the 505(g) notices.

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1 Any questions from counsel?

2 LDC [MR. CONNELL]: Sir, my only question is procedural.

3 The closed session is tomorrow afternoon at 1330, not
4 at 1400?

5 MJ [Col PARRELLA]: Correct. I anticipate, and of course
6 this is subject to change, but to maintain a sort of
7 consistent afternoon or lunch recess for lunch to accommodate
8 the prayer schedule, so normally we'll try to get to 1200 to
9 1330. So whenever we start that afternoon session, whether it
10 be 1330 or 1400, it will be a closed session.

11 Mr. Harrington?

12 LDC [MR. HARRINGTON]: Judge, just to update you on the
13 filing that we talked about this morning, we're just getting
14 an AE number now. We hope to get it filed this afternoon,
15 so ----

16 MJ [Col PARRELLA]: Thank you.

17 LDC [MR. HARRINGTON]: Okay.

18 MJ [Col PARRELLA]: Okay. There being no other questions,
19 this commission is in recess until 0900 tomorrow morning.

20 [The R.M.C. 803 session recessed at 1505, 10 September 2018.]

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1 [The R.M.C. 803 session was called to order at 0903,
2 11 September 2018.]

3 MJ [Col PARRELLA]: The commission is called to order.
4 Trial Counsel, are all the government counsel who
5 were present at the close of the previous session again
6 present?

7 CP [BG MARTINS]: Good morning, Your Honor. They are.

8 I have one other item relating to attendance, Your
9 Honor, before we finish accounting for the parties.

10 Your Honor, this morning is September 11th. I wanted
11 to advise the commission that family members of the 9/11
12 fallen, as well as one survivor of the attacks, will be moving
13 quietly from a point just outside the courtroom to their seats
14 in the gallery behind the glass and back between now and 10:28
15 this morning. Without in any way interrupting these military
16 justice proceedings, they understandably wish to observe in
17 relative quiet and privacy the different events of the
18 sequence of the morning of September 11th 17 years ago as
19 those impacts and moments of death occurred.

20 No disrespect is intended to the commission. We
21 don't request nor do they any pause in the proceedings, and
22 the security personnel have been informed.

23 MJ [Col PARRELLA]: Thank you, General Martins.

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1 Defense, are all the defense counsel who were present
2 at the close of the previous session present today?

3 Mr. Nevin?

4 LDC [MR. NEVIN]: Yes, Your Honor.

5 MJ [Col PARRELLA]: Ms. Bormann?

6 LDC [MS. BORMANN]: No, Judge. Major Seeger is attending
7 to other duties.

8 MJ [Col PARRELLA]: Mr. Harrington?

9 LDC [MR. HARRINGTON]: Same, Judge. We're all here.

10 MJ [Col PARRELLA]: Mr. Connell?

11 LDC [MR. CONNELL]: Good morning, Your Honor.

12 MJ [Col PARRELLA]: Good morning.

13 LDC [MR. CONNELL]: All same counsel are present.

14 MJ [Col PARRELLA]: Mr. Ruiz?

15 LDC [MR. RUIZ]: Judge, Lieutenant Colonel Williams is
16 attending to other duties this morning; otherwise, everyone
17 else is here.

18 MJ [Col PARRELLA]: Thank you.

19 I note that all five accused are absent this morning.

20 Trial Counsel, do you have a witness to testify as to
21 the absences of the accused?

22 CP [BG MARTINS]: We do, Your Honor.

23 Major, would you please proceed to the witness stand,

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1 raise your right hand for the oath.

2 MAJOR, U.S. ARMY, was called as a witness for the prosecution,
3 was sworn, and testified as follows:

4 DIRECT EXAMINATION

5 Questions by the Chief Prosecutor [BG MARTINS]:

6 Q. Are you the assistant SJA, Major?

7 A. Yes, sir.

8 Questions by the Trial Counsel [MR. SWANN]:

9 Q. Major, I have in front of me what has been marked as
10 Appellate Exhibit 597. Let's start with 597, the waiver by
11 Khalid Shaikh Mohammad. Did you have occasion to advise him
12 of his right to attend today's proceedings?

13 A. I did.

14 Q. What time did you do that?

15 A. At 0637.

16 Q. Did you use a form in advising him of his right?

17 A. I did. The form ----

18 Q. And that form is in front of you?

19 A. Yes, sir.

20 Q. And did you read the form in English or in Arabic?

21 A. I read the form in English, and there was no Arabic
22 interpretation because he did not want one.

23 Q. All right. I have that form in front of me. Did he

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1 indicate whether he wanted to attend this morning's
2 proceedings?

3 A. He indicated he did not want to attend the
4 proceedings this morning.

5 Q. All right. I also have a notation there that
6 apparently he will be attending his legal meetings at another
7 location this morning?

8 A. That's right. Yes, sir.

9 Q. All right. Do you believe that his waiver was
10 voluntary?

11 A. I do.

12 Q. Appellate Exhibit 597A, consisting of three pages,
13 the waiver for Walid Mohammad Salih Mubarak Bin'Attash. Did
14 you have occasion to advise him of his right?

15 A. I did.

16 Q. Did you use the English or the Arabic form?

17 A. I read it in English, and then he had an interpreter
18 read it in Arabic.

19 Q. Did he indicate that he understood his rights?

20 A. He did.

21 Q. And do you believe -- first of all, is his signature
22 on Appellate Exhibit 597A?

23 A. It is. It is contained on the Arabic version only

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1 because he did not want to sign the English version.

2 Q. Do you believe he understood his rights?

3 A. I do.

4 Q. And did he waive those rights?

5 A. He did.

6 Q. 597B, consisting of three pages, the waiver for Ramzi
7 Binalshibh. Did you read the form in English or in Arabic?

8 A. I read it in English only.

9 Q. Did he indicate that he did not need the form read in
10 Arabic?

11 A. He did. He indicated he did not need an Arabic
12 interpretation.

13 Q. Is his signature on Appellate Exhibit 597B?

14 A. It is.

15 Q. And do you believe he understood his right to attend
16 this morning's proceedings?

17 A. I do.

18 Q. With respect to 597C, consisting of three pages, the
19 waiver for Ali Abdul Aziz Ali. Did you read this form in
20 English or in Arabic?

21 A. This form was read in English only.

22 Q. Did he indicate whether he understood his right to
23 attend?

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1 A. He did.

2 Q. Is his signature on page 2 of this document?

3 A. It is.

4 Q. And do you believe that he waived his right to attend
5 this morning?

6 A. He did.

7 Q. And, finally, Mustafa al Hawsawi, three-page
8 document, 597D. Did you read the form in Arabic or in
9 English?

10 A. I read the form in English and he had an Arabic
11 interpretation.

12 Q. Did you read the form exactly as it appears in front
13 of you and me?

14 A. Yes, sir, verbatim.

15 Q. Did he have any questions?

16 A. He did not have any questions.

17 Q. Do you believe he understood his right to attend this
18 morning's proceedings and voluntarily waived his right?

19 A. I do, and I think he voluntarily waived his right.

20 Q. Okay. I understand he will be attending other legal
21 meetings this morning?

22 A. He will be.

23 Q. Thank you.

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1 A. No problem.

2 TC [MR. SWANN]: I have no further questions. Thank you,
3 Your Honor.

4 MJ [Col PARRELLA]: Thank you, Trial Counsel.

5 Do any defense counsel have any questions of this
6 witness?

7 LDC [MR. NEVIN]: Your Honor, David Nevin on behalf of
8 Mr. Mohammad. And I just will advise the military commission
9 I would like to ask this witness to state her name because I
10 object to the anonymous testimony.

11 MJ [Col PARRELLA]: Your objection is overruled.

12 Do you have any -- counsel have any questions for
13 this witness?

14 LDC [MS. BORMANN]: Judge, I have no questions, but I join
15 Mr. Nevin's objection.

16 MJ [Col PARRELLA]: Understood.

17 Mr. Harrington?

18 LDC [MR. HARRINGTON]: No objections, Judge. Join in the
19 request.

20 MJ [Col PARRELLA]: Mr. Connell?

21 LDC [MR. CONNELL]: Your Honor, I would further ask the
22 witness her unit under R.T.M.C. 20-7, and I'd like to be heard
23 on the anonymous testimony objection. I do that because this

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1 is the first time that you've heard it from us, Your Honor.

2 Normally it's a much more abbreviated process.

3 MJ [Col PARRELLA]: Mr. Connell, what was the citation
4 again, please?

5 LDC [MR. CONNELL]: R.T.M.C. 20-7.

6 MJ [Col PARRELLA]: Okay. What I'm going to ask you to do
7 is go ahead and, if you have an objection to -- I understand
8 this has been routine practice. I'd ask you to go ahead and
9 brief the issue.

10 LDC [MR. CONNELL]: I'm happy to do so, sir.

11 MJ [Col PARRELLA]: Mr. Ruiz?

12 LDC [MR. RUIZ]: No questions. We also join.

13 MJ [Col PARRELLA]: Okay. Thank you. You may step down,
14 Major.

15 WIT: Thank you.

16 [The witness was excused.]

17 MJ [Col PARRELLA]: The commission finds that
18 Mr. Mohammad, Mr. Bin'Attash, Mr. Binalshibh, Mr. Ali, and
19 Mr. Hawsawi have knowingly and voluntarily waived their right
20 to be present at today's session.

21 The first item we're going to take up is the court's
22 ruling as to the defense motion for the judge to disqualify or
23 to recuse himself from this commission.

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1 The defense moves this commission to disqualify or
2 recuse myself as the military judge based upon four primary
3 claims:

4 One, my qualifications, which they argue are
5 insufficient in light of ABA Code of Judicial Conduct 2.5,
6 made applicable based upon JAG Instruction 5803.1E.

7 Two, that Canon 3 of the Code of Conduct for
8 United States Judges requires me to disqualify myself due to
9 my tenure as a Marine Corps Fellow at the Department of
10 Justice.

11 Three, the fact that my time at the Department of
12 Justice creates a situation wherein the military judge's
13 impartiality might reasonably be questioned.

14 And, four, the fact that I am slated to assume
15 command in the summer of 2019, and as a result it would be
16 inefficient for me to remain on the case.

17 Based upon the evidence before the commission,
18 including the lengthy voir dire of the military judge, I make
19 the following findings:

20 As to my qualifications, Congress and the Executive
21 Branch have expressly enumerated the requisite qualifications
22 for a military judge to preside over a military commission.
23 Those qualifications are set forth at 10 U.S.C.

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1 Section 948j(b), R.M.C. 502(c) and Section 6-3 of the
2 Regulation for Trial by Military Commission. As indicated on
3 the record, I possess the requisite qualifications as set
4 forth within the law and regulations applicable to this
5 commission.

6 Specifically, despite ample opportunity to question
7 the military judge, no evidence was presented to suggest that
8 I wasn't a commissioned officer of the Armed Forces serving on
9 active duty, a member of the bar of a federal court, or a
10 member of the highest court of a state or the District of
11 Columbia, certified to be qualified for duty under
12 10 U.S.C. 826, otherwise known as Article 26 of the Code, by
13 the Judge Advocate General of the Armed Forces of which I am a
14 member; in possession of a Top secret security clearance; and
15 with at least two years of experience as a military judge
16 while certified and qualified for duty as a military judge in
17 general courts-martial.

18 As Congress established the Military Commissions Act
19 in part for the express purpose of trying this case and these
20 accused, this commission can reasonably infer that Congress,
21 and subsequently the Executive Branch agencies charged with
22 implementing the Military Commissions Act, specifically
23 considered the requisite qualifications for a military judge

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1 knowing the possible complexity associated with trying a
2 high-profile capital case involving international law and the
3 handling of classified evidence. Even with all of these
4 issues in mind, Congress and the Executive Branch established
5 the qualifications that we have before us without exception
6 for the particular nuances of this case.

7 While I am aware of the challenges of assuming the
8 role of military judge at this stage in the proceedings,
9 having considered my obligations under ABA Model Code for
10 Judicial Conduct, I do believe I possess the requisite skill
11 and competence to diligently perform the duties of military
12 judge in this commission.

13 As also indicated to counsel, the commission will
14 ensure it moves at an appropriate pace to allow the military
15 judge to become fully apprised of the history and background
16 related to any issue before it before making a substantive
17 ruling. No outside entity has attempted to influence this
18 commission into abiding by any particular timeline.

19 I decline, however, to take the defense's suggestion
20 that I abate the proceedings until such time as I've reviewed
21 the transcript and pleadings related to this commission. I am
22 aware of no such requirement for a military judge to perform
23 this task and am confident in my ability to be prepared to

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1 address the issues before me as those issues arise.

2 I do not find that my prior tour as a Commandant of
3 the Marine Corps Fellow at the Department of Justice results
4 in a situation wherein my impartiality as a military judge
5 might reasonably be questioned pursuant to R.M.C. 902(a).

6 To mitigate any appearance issue, I provided the
7 parties my fitness report associated with the Department of
8 Justice tenure and attempted to candidly answer the defense's
9 questions for several hours in open court. Nevertheless, I do
10 not think that any of the answers to those questions might
11 result in a situation wherein my impartiality might be
12 questioned nor do I find that my tenure at the Department of
13 Justice meets any of the specific grounds for disqualification
14 set forth at R.M.C. 902(b).

15 In reaching this conclusion, I make the following
16 findings:

17 One, I do not have a personal bias or prejudice
18 toward any party, nor do I possess personal knowledge of
19 disputed evidentiary facts concerning this proceeding as a
20 result of my time at the Department of Justice.

21 Two, I did not act as counsel on this matter or any
22 other commissions case in any capacity while at the Department
23 of Justice. Additionally, I did not have professional

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1 interaction with any of the Department of Justice attorneys
2 assigned to this commission while serving as a Fellow at the
3 Department of Justice.

4 Three, I have not expressed an opinion concerning the
5 guilt or innocence of the accused.

6 Four, as already noted, I am qualified under
7 R.M.C. 502(c) and detailed to this commission pursuant to
8 503(b).

9 And, five, neither I nor any relation to me is a
10 party, a witness, or otherwise has an interest that could be
11 substantially affected by the outcome of the proceeding.

12 Further, I note the following additional facts
13 specific to my tenure at the Department of Justice:

14 First, I was never employed by the Department of
15 Justice, but rather worked there pursuant to a memorandum of
16 understanding between the Marine Corps and the Department of
17 Justice. My tenure was limited to an academic year and was
18 part of the Marine Corps' established Fellowship program which
19 involved sending senior officers to government agencies,
20 private corporations, and various think tanks in order to
21 observe, inform, and exchange ideas.

22 Second, I did not undergo any type of hiring process
23 or training within the Department of Justice.

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1 Third, I was not evaluated by any Department of
2 Justice employee, nor did I -- any Department of Justice
3 employee have the ability to influence my evaluation or career
4 in a negative way. The Fellowship fit rep, which has been
5 marked as Appellate Exhibit 595B, is what we term an
6 unobserved fitness report, meaning that although the DoJ
7 employee's name appears on the report, there are no markings
8 associated with the report.

9 Now, as is evident from Appellate Exhibit 595B, the
10 writer can still provide comments that become part of my
11 official personnel file, but those comments could not have
12 been made negative without a specific enumerated reason as set
13 forth in the applicable Marine Corps order.

14 Fourth, I was always co-detailed to Department of
15 Justice cases, meaning I always worked alongside another
16 Counterterrorism Section attorney.

17 And, fifth, to the best of my knowledge, I never
18 worked on any matter involving 9/11 or any other commissions
19 case.

20 Although not a specific ground for disqualification,
21 the defense has asked that I disqualify myself or, in the
22 alternative, abate the proceedings because I am currently
23 slated to assume command in the summer of 2019. As I

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1 indicated in my answers during voir dire, the Chief Judge's
2 decision to detail me to this commission was made after the
3 public announcement of my selection for command. I can
4 assume, therefore, that Judge Pohl took this fact into
5 consideration when making his detailing decision. As such, I
6 see no valid reason why I should not proceed to the best of my
7 abilities until such time that this case is concluded or I am
8 properly relieved.

9 As such, the defense motion for the military judge to
10 disqualify or recuse himself is denied. Likewise, the defense
11 motion to abate the proceedings while counsel submit written
12 pleadings in furtherance of their motion to recuse the
13 military judge is denied.

14 The commission will, however, pursuant to
15 R.M.C. 902(d) allow counsel to move the commission for
16 reconsideration based upon the discovery of additional
17 evidence. The commission is not, however, going to abate or
18 postpone this proceeding while the parties seek to gather
19 additional evidence.

20 Additionally, the counsel -- the commission will
21 allow Mr. Harrington, pursuant to his request, to submit
22 written matters ex parte related to his concerns in the AE 292
23 series as they relate to voir dire. It's my understanding

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1 that Mr. Harrington has done so; however, the commission has
2 been unable to, so far, review those documents.

3 LDC [MR. HARRINGTON]: Excuse me, Judge.

4 MJ [Co1 PARRELLA]: Mr. Harrington.

5 LDC [MR. HARRINGTON]: We were advised that apparently we
6 didn't get the AE number on time yesterday, so -- but the
7 supplement that we filed has been filed, has been accepted for
8 filing this morning, so ----

9 MJ [Co1 PARRELLA]: Thank you, Mr. Harrington. That's my
10 understanding as well. I did inquire just before coming on
11 the record, and it's my understanding they've been received.
12 So at the first opportunity, I will review those pleadings
13 that you've submitted.

14 Mr. Ruiz?

15 LDC [MR. RUIZ]: Judge, if you're finished, may I be
16 heard?

17 MJ [Co1 PARRELLA]: You may. Mr. Ruiz, before you begin,
18 is your desire to be heard on the court's ruling?

19 LDC [MR. RUIZ]: Yes.

20 MJ [Co1 PARRELLA]: Do you have a question about the
21 court's ruling?

22 LDC [MR. RUIZ]: I do not. I want make sure the record
23 correctly points out Mr. al Hawsawi's position, not in terms

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1 of relitigating it. But your recitation was framed in terms
2 of the defense motion, and I understand why you framed it as
3 such; however, because this is a co-accused case and there are
4 nuances in the positions that the parties take, I want to take
5 this opportunity to make sure that, following your recitation,
6 it is crystal clear what Mr. al Hawsawi's position is on
7 the -- on the issue.

8 As I indicated yesterday, we were not moving at the
9 time to recuse and have not actually moved on behalf of
10 Mr. al Hawsawi for your recusal. We did not also explicitly
11 join Mr. Nevin's or other counsel's motion to recuse you. So
12 to the extent the record may reflect to an observer in the
13 future or somebody reviewing this record that we did, in fact,
14 make such a motion, we have not.

15 That is not to say, as I indicated yesterday, that we
16 unjoined, simply that we were reserving our opportunity to
17 actually move to recuse you at a later time. Of course, that
18 is also contemplated by the rules. However, to the extent
19 Mr. al Hawsawi chooses to move to recuse you at a later time,
20 it would not be a motion for reconsideration in our view, as
21 we have not yet moved, and that's a -- that's a nuance that I
22 want to make sure is clear with the court.

23 While we all may sit on this side of the aisle, we

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1 all do have independent positions and procedural postures that
2 illustrates just such an event. So I wanted to make sure that
3 was clear on the record, and that that remains our position.

4 MJ [Col PARRELLA]: I understand, Mr. Ruiz. And I did
5 record that yesterday, that you reserved your right to
6 challenge the military judge. I do recall that you did
7 specifically join that we take up no additional matters until
8 taking this issue up.

9 LDC [MR. RUIZ]: That's right.

10 MJ [Col PARRELLA]: It is noted for the record. Thank
11 you.

12 LDC [MR. RUIZ]: Thank you.

13 MJ [Col PARRELLA]: All right. So before we proceed, my
14 intention to is take up first AE 591F; but before we do, there
15 is one administrative matter the commission needs to take up.

16 The commission was informed last night that, due to
17 current -- the current projected storm track of Hurricane
18 Florence, that the chartered aircraft that was originally
19 scheduled to take us back to Virginia on Saturday will likely
20 be unable to fly between Thursday and Sunday. As such, the
21 options would be to depart tomorrow, that being Wednesday, or
22 depart sometime next week after Monday. And departing next
23 week, I'm told, is contingent upon aircraft availability.

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UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

United States,)	
)	SCHEDULING
Appellant)	
)	ORDER
v.)	
)	
Khalid Shaikh Mohammad)	
)	
Walid Muhammad Salih)	
Mubarek Bin ‘Attash)	
)	
Ramzi Bin al Shibh)	
)	
Ali Abdul-Aziz Ali AKA)	
Ammar al Baluchi, and)	
)	
Mustafa Ahmed Adam al)	
Hawsawi,)	USCMCR Case No. 17-003
)	
Appellee)	November 17, 2017

On November 14, 2017, Appellee Al Baluchi requested “an additional thirty days to respond to the appellant’s brief.” Al Baluchi Motion at 1. On November 15, 2017, Appellant opposed the request for an extension.

On November 17, 2017, on behalf of the U.S. Court of Military Commission Review, I requested that the Secretary of Defense designate an Acting Chief Judge to appoint judges to the panel for this case. App. A. The briefing schedule is suspended until further notice. Once a panel is appointed, a new scheduling order will be issued.

FOR THE COURT:

Mark Harvey
Mark Harvey
Clerk of Court, U.S. Court of Military
Commission Review



**United States Court of Military Commission Review
One Liberty Center
875 N. Randolph Street, Suite 8000
Arlington, VA 22203-1995**

November 17, 2017

MEMORANDUM THRU DEPARTMENT OF DEFENSE GENERAL COUNSEL
FOR SECRETARY OF DEFENSE

Request appointment of an Acting Chief Judge for the U.S. Court of Military Commission Review (CMCR) for the case of *United States v. Khalid Shaikh Mohammad, et. al.*, CMCR 17-003 for the Government's pending appeal and any ensuing period during which the Chief Judge and the Deputy Chief Judge are unable to act with respect to this case. *See* Regulation for Trial by Military Commission, para. 25-2d.

On August 9, 2017, the Court of Appeals for the District of Columbia Circuit disqualified Deputy Chief Judge Scott Silliman from participation in any appeal involving Khalid Shaikh Mohammad and vacated a previous decision of the CMCR in an appeal brought by the Government. *In re Mohammad*, 866 F.3d 473 (D.C. Cir. 2017). The Government's appeal must be heard by the CMCR *de novo*. The other two CMCR Judges on the panel who heard and decided this appeal were Chief Judge Paulette V. Burton and Judge James Wilson Herring, Jr. Chief Judge Burton and Judge Herring subsequently recused themselves from further participation in *United States v. Khalid Shaikh Mohammad, et. al.* Because of Chief Judge Burton's recusal and Deputy Chief Judge Silliman's disqualification, a panel to hear the pending appeal cannot be appointed unless you appoint an Acting Chief Judge for *United States v. Khalid Shaikh Mohammad, et. al.* *See United States v. Roach*, 69 M.J. 17 (CAAF 2010). This request also asks that any appointment of an Acting Chief Judge extend for the period in which the Chief Judge and Deputy Chief Judge cannot act on behalf of the Court with respect to case of Khalid Shaikh Mohammad.

There are two CMCR Judges available for this assignment: Judge William B. Pollard, III (Sworn as USCMCR Judge: September 14, 2012) and Judge Larss G. Celtnieks (Sworn as USCMCR Judge: September 23, 2015).

FOR THE COURT:


Mark Harvey
Clerk of Court, U.S. Court of Military
Commission Review



UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

Ammar Al Baluchi,)	
)	MEMORANDUM TO
Petitioner)	THE PARTIES
)	
v.)	
)	
United States,)	May 23, 2018
)	
Respondent)	CMCR Case No. 18-003

On May 17, 2018, Petitioner Al Baluchi sought a writ of mandamus requesting that the Court “prevent the further destruction of material evidence crucial to the guilt-innocence and sentencing phases of the pending military commission trial of Mr. al Baluchi” by staying the Government’s further destruction of a “black site” that he asserts is evidence material to his defense. Pet. for Extraordinary Relief 1, 5-6 (May 17, 2018). This motion was followed the next day by motions for (1) a 90-day extension of the Military Judge’s April 20, 2018 stay pending this Court addressing the mandamus petition, and (2) an order addressed to the Military Judge directing him to release relevant classified documents to our Court. Pet. Mot. for Stay 2 (May 18, 2018); Pet. Mot. for Release of Classified Records 1-2 (May 18, 2018).

From the papers submitted to us, the “black site” at issue is a CIA detention facility where, it appears, the Government held Al-Baluchi. Pet. for Extraordinary Relief 9. “Between June 2014 and February 2016, the Government ‘decommissioned’ the black site to some extent” and the facility was partially destroyed. Pet. for Extraordinary Relief 7, 18. The Military Judge had stayed the further destruction of this site until April 20, 2018, when he vacated the stay effective May 20, 2018, thereby allowing the Government to resume the destruction of the decommissioned “black site” facility. Appellate Exhibit 052SS (Sup) 1. On May 18, 2018, the Military Judge extended the stay until June 19, 2018, “to allow completion of the briefing cycle” for a motion for a further stay pending before the Commission. *Id.*

At this time, our Court can resolve uncontested motions. However, it cannot address the merits of the issues raised by Petitioner. Deputy Chief Judge Scott Silliman is disqualified from hearing matters related to Khalid Shaikh Mohammad. *See In re Khalid Shaikh Mohammad*, 866 F.3d 473 (D.C. Cir. 2017). Subsequently, he recused himself from all matters related to *United States v. Khalid Shaikh Mohammad, et al.* Chief Judge Paulette V. Burton and

Judge James W. Herring, Jr. were on the panel with Deputy Chief Judge Silliman that heard the appeal in *Khalid Shaikh Mohammad* that lead to Deputy Chief Judge Silliman's disqualification. Both have recused themselves from all matters involving that case. Petitioner is a co-defendant in *Khalid Shaikh Mohammad*. This leaves only Judge William B. Pollard, III and Judge Larss G. Celtnieks available to consider the present petition and contested motions. By statute, our panels must be "composed of not less than three judges on the Court." 10 U.S.C. § 950f(a). Thus, the Court lacks a quorum.

Moreover, only the Chief Judge and the Deputy Chief Judge have the authority to appoint panels even if three judges were available. See *Manual for Military Commissions* (2016 rev. ed.), Rule for Military Commission 1201(b)(5); Regulation for Trial by Military Commission (2011 ed.), ¶¶ 25-2d, 25-2e; Rules of Practice for the U.S. Court of Military Commission Review (Feb. 3, 2016), Rule 4. Accordingly, without a panel appointment, no single judge can act on the motions before the Court. See Rules of Practice for the U. S. Court of Military Commission Review, Rules 4(b), 21(f).

Our Court has notified the Department of Defense that additional appellate judges are needed, and an Acting Chief Judge must be designated to appoint the panel(s) for appeals related to *Khalid Shaikh Mohammad*. The Department of Defense has informed the Court that several military and civilian nominees are currently under consideration.

Petitioner is entitled to have our Court hear and decide the matters that he has put before it. As it stands, however, our Court cannot act in contested matters related to *Khalid Shaikh Mohammad*, which includes the present appeal, until more judges are added to this Court and an Acting Chief Judge is appointed who can designate a panel.

FOR THE COURT:


Mark Harvey
Clerk of Court, U.S. Court of Military
Commission Review

Colonel Keith Parrella

Colonel Keith A. Parrella entered the Marine Corps through the Platoon Leaders Class accession program. In December 1994, he graduated from Arizona State University with a bachelor of science in Justice Studies and was commissioned a second lieutenant in the U.S. Marine Corps Reserve. Second Lieutenant Parrella attended law school at Arizona State University College of Law where he was a member of the Law Review and the Order of the Barristers. He graduated law school *cum laude* in May 1998, and was admitted as a member of the Arizona Bar in October 1998.

After completing training at the Basic School in Quantico, Virginia and the Naval Justice School in Newport, Rhode Island, Captain Parrella reported for duty with 3rd Marine Aircraft Wing, MCAS Miramar, San Diego, California. While at MCAS Miramar, Captain Parrella served as defense counsel, senior defense counsel, and senior trial counsel. In May 2002, Captain Parrella received orders to 3rd Force Service Support Group (FSSG), Okinawa, Japan. During his three years in Okinawa, Captain Parrella served as senior defense counsel and military justice officer. While in Okinawa, Captain Parrella deployed as an individual augment to 1st FSSG (Fwd) in support of Operation Iraqi Freedom II.2. In Iraq, Captain Parrella served as the military justice officer overseeing the prosecution of all Marine cases in Iraq from September 2004 to February 2005. He was promoted to the rank of major in January 2005.

In July 2005, Major Parrella reported to the U.S. Army Judge Advocate General's Legal Center and School in Charlottesville, Virginia, as a member of the 54th Graduate Course. He graduated in May 2006 with an LL.M. in Military Law specializing in contract and fiscal law. Major Parrella then reported to the Eastern Area Counsel Office, Camp Lejeune, North Carolina as a contingency contract and fiscal attorney. Between 2007 and 2008, Major Parrella deployed to the Regional Contracting Center, Camp Fallujah, Iraq where he provided contract and fiscal law support to II MEF (Fwd).

In July 2009, Major Parrella transferred to Marine Corps Installations East as the Deputy Staff Judge Advocate. After just 75 days, he volunteered to serve as the Judge Advocate for the 24th Marine Expeditionary Unit (MEU) to fill an unanticipated vacancy. In January 2010, Major Parrella deployed with the 24th MEU on board USS NASSAU in support of Operation Unified Response in Haiti and Operation Enduring Freedom in the Gulf of Aden. While deployed, Major Parrella also served as the MEU Executive Officer.

In August 2010, Major Parrella undertook the duties as Officer-in-Charge, Legal Services Support Section, 2nd Marine Logistics Group, Camp Lejeune, North Carolina. In this capacity he supervised approximately 35 judge advocates and 40 support staff charged with providing military justice support to over 30,000 Marines and Sailors. In January 2011, he was promoted to the rank of lieutenant colonel.

In July 2012, Lieutenant Colonel Parrella assumed command of Region 8 (Central Europe), Marine Corps Embassy Security Group, Frankfurt, Germany. As Region 8's Commanding Officer, he led approximately 160 Marine Security Guards posted at 19 U.S. Embassies and

Consulates throughout central Europe and the Balkans. In July 2014, Lieutenant Colonel Parrella was selected for the Commandant of the Marine Corps' (CMC) Fellowship program in fulfillment of his top-level school requirement. As a CMC Fellow, Lieutenant Colonel Parrella worked in the Department of Justice's (DOJ) National Security Division as a Counterterrorism Prosecutor and with the Office for Overseas Prosecutorial Development Assistance and Training (OPDAT) within DOJ's Criminal Division.

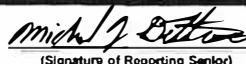


In July 2015, Lieutenant Colonel Parrella assumed duties as Deputy Circuit Military Judge, Eastern Judicial Circuit, Navy/Marine Corps Trial Judiciary, located on board Camp Lejeune, North Carolina. After serving two years as a military judge, in July 2017, Lieutenant Colonel Parrella was assigned as the Staff Judge Advocate, 2nd Marine Division on board Camp Lejeune, North Carolina. He was promoted to the rank of colonel in September 2017. In July 2018, Colonel Parrella commenced his current duties as the Circuit Military Judge of the Eastern Judicial Circuit, Navy/Marine Corps Trial Judiciary.

His personal decorations include the Meritorious Service Medal x 5, Navy & Marine Corps Commendation Medal x 2, Navy & Marine Corps Achievement Medal, and Humanitarian Service Medal.

USMC FITNESS REPORT (1610)								DO NOT STAPLE THIS FORM	
NAVMC 10635 (Rev. 7-11) (EF)									
PREVIOUS EDITIONS WILL NOT BE USED									
FOUC - Privacy sensitive when filled in.									
COMMANDANT'S GUIDANCE									
<p>The completed fitness report is the most important information component in manpower management. It is the primary means of evaluating a Marine's performance and is the Commandant's primary tool for the selection of personnel for promotion, augmentation, resident schooling, command, and duty assignments. Therefore, the completion of this report is one of an officer's most critical responsibilities. Inherent in this duty is the commitment of each Reporting Senior and Reviewing Officer to ensure the integrity of the system by giving close attention to accurate marking and timely reporting. Every officer serves a role in the scrupulous maintenance of this evaluation system, ultimately important to both the individual and the Marine Corps. Inflationary markings only serve to dilute the actual value of each report. Reviewing Officers will not concur with inflated reports.</p>									
A. ADMINISTRATIVE INFORMATION									
1. Marine Reported On:									
a. Last Name	b. First Name	c. MI	d. SSN	e. Grade	f. DOR	g. PMOS	h. BILMOS		
PARRELLA	KEITH	A	[REDACTED]	LTCOL	[REDACTED]	4402	4402		
2. Organization:									
a. MCC	b. RUC	c. Unit Description							
J59	54008	CMC FELLOW-MARINE CORPS UNIVERSITY, USDOJ NATIONAL SECURITY DIVISION							
3. Occasion and Period Covered:									
a. OCC	b. From	To	c. Type	4. Duty Assignment (descriptive title):					
TR	20140628	20150630	N	CMC FELLOW-TLS-USDOJ NATIONAL SECURITY DIVISION					
5. Special Case:									
a. Adverse	b. Not Observed	c. Extended	6. Marine Subject Of:				7. Recommended For Promotion:		
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	a. Commendatory Material	b. Derogatory Material	c. Disciplinary Action	a. Yes	b. No	c. N/A	
			<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
8. Special Information:									
a. QUAL	N	N	d. HT(in.)	[REDACTED]	g. Reserve Component	[REDACTED]	9. Duty Preference:		
b. PFT	[REDACTED]	e. WT	[REDACTED]	h. Status	[REDACTED]	a. Code b. Descriptive Title			
c. CFT	[REDACTED]	f. Body Fat	[REDACTED]	i. Future Use	[REDACTED]	1st	[REDACTED]		
						2nd	[REDACTED]		
						3rd	[REDACTED]		
10. Reporting Senior:									
a. Last Name	b. Init	c. Service	d. SSN	e. Grade	f. Duty Assignment				
DITTOR	M	CIV	XXXXXXXXXX	GS15	COUNTERTERRORISM PROSECUTOR				
11. Reviewing Officer:									
a. Last Name	b. Init	c. Service	d. SSN	e. Grade	f. Duty Assignment				
ERDELATZ	SE	USMC	[REDACTED]	COL	CHIEF OF STAFF, MCU				
B. BILLET DESCRIPTION									
<p>-Represent the Marine Corps as a CMC-TLS Fellow to the U.S. Department of Justice (DOJ), National Security Division (NSD), Counterterrorism Section (CTS).</p> <p>-Serve as a counterterrorism prosecutor within CTS/NSD. Work with partners in the intelligence community including FBI, CIA, NSA, and DOD.</p> <p>-Participate in projects of special interest to DOJ, DOD, and the Marine Corps.</p> <p>-Broaden mutual engagement opportunities, understanding and knowledge between DOJ and USMC.</p> <p>-Pursue ongoing research and analytical studies.</p> <p>-Learn about DOJ and the interagency process, particularly in Washington D.C.</p> <p>-Share developmental experiences with appropriate Marine Corps detachments and commands.</p> <p>-Serve as a liaison between USMC, particularly Judge Advocate Division, and DOJ/NSD.</p> <p>-Inform DOJ and interagency partners on the MAGTF concept and build relationships at DOJ and the interagency in accordance with USMC Campaign Plan Annex V: Interagency Integration Strategy.</p>									
C. BILLET ACCOMPLISHMENTS									

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Adobe LiveCycle Designer

1. Marine Reported On:				2. Occasion and Period Covered:		
a. Last Name	b. First Name	c. MI	d. SSN	a. OCC	b. From	To
PARRELLA	KRITH	A	[REDACTED]	TR	20140628	20150630
I. DIRECTED AND ADDITIONAL COMMENTS						
<p>This is a non-observed report due to the unique circumstances of this OMC Fellow/TLS assignment. As detailed in the attached letter, LtCol Parrella seamlessly integrated himself as a full-fledged counterterrorism prosecutor within the U.S. Department of Justice's National Security Division. Of note, he worked directly with DOJ prosecutors, and interagency partners, in building solid cases against high level international and domestic terrorism targets. The immediate scope and scale of his immense contribution to the National Security Division's mission directly reflects upon his skill as a lawyer, as well as his judgment, wisdom, and exceptional ability to strive in the interagency environment. He is a natural leader in or out of the uniform.</p>						
II. CERTIFICATION						
<p>1. I CERTIFY that to the best of my knowledge and belief all entries made hereon are true and without prejudice or partiality and that I have provided a signed copy of this report to the Marine Reported on.</p>				 (Signature of Reporting Senior)		2 0 1 5 0 6 3 0 (Date in YYYYMMDD format)
<p>2. I ACKNOWLEDGE the adverse nature of this report and</p> <p><input type="checkbox"/> I have no statement to make</p> <p><input type="checkbox"/> I have attached a statement</p>				(Signature of Marine Reported On)		[] [] [] [] [] [] [] [] (Date in YYYYMMDD format)
REPORTING OFFICER COMMENTS						
1. OBSERVATION:		<input type="checkbox"/> Sufficient <input checked="" type="checkbox"/> Insufficient		2. EVALUATION:		
				<input type="checkbox"/> Concur <input type="checkbox"/> Do Not Concur		
3. COMPARATIVE ASSESSMENT:		COMPARATIVE ASSESSMENT				
Provide a comparative assessment of potential by placing an "X" in the appropriate box. In marking the comparison, consider all Marines of this grade whose professional abilities are known to you personally.		DESCRIPTION				
		THE EMINENTLY QUALIFIED MARINE		<input type="checkbox"/>		
		ONE OF THE FEW		<input type="checkbox"/>		
		EXCEPTIONALLY QUALIFIED MARINES		<input type="checkbox"/>		
		ONE OF THE MANY HIGHLY QUALIFIED		<input type="checkbox"/>		
		PROFESSIONALS WHO FORM THE MAJORITY OF THIS GRADE		<input type="checkbox"/>		
		A QUALIFIED MARINE		<input type="checkbox"/>		
		UNSATISFACTORY		<input type="checkbox"/>		
4. REVIEWING OFFICER COMMENTS: Amplify your comparative assessment mark; evaluate potential for continued professional development to include: promotion, command, assignment, resident PME, and retention; and put Reporting Senior marks and comments in perspective						
<p>As noted by the RS and amplified in the attached letter, LtCol Parrella was a totally professional representative of our Judge Advocate Corps, specifically, and our Marine Corps, in general. He excelled across the board in this demanding assignment and contributed directly to the goals of the Commandant to increase USMC contact and integration with the Interagency. Accordingly, he provided connectivity between key HQMC departments and the Department of Justice while increasing his professional portfolio. While labeled a fellowship, as a OMC Fellow, he contributed as a true ambassador for the Marine Corps, influencing senior leadership within the USMC and DoD on a wide variety of strategic, national and international legal counterterrorism issues.</p>						
5. I CERTIFY that to the best of my knowledge and belief all entries made hereon are true and without prejudice or partiality.				 (Signature of Reviewing Officer)		2 0 1 5 0 7 0 2 (Date in YYYYMMDD format)
6. I ACKNOWLEDGE the adverse nature of this report and				<input type="checkbox"/> I have no statement to make		<input type="checkbox"/> [] [] [] [] [] [] [] [] (Date in YYYYMMDD format)
<input type="checkbox"/> I have attached a statement				(Signature of Marine Reported On)		(Date in YYYYMMDD format)
ADDENDUM PAGE						
ADDENDUM PAGE ATTACHED: <input checked="" type="checkbox"/> YES						
NAVMC 10835 (Rev. 7-11) (EF)			FOR OFFICIAL USE ONLY - Privacy sensitive when filed in.		PAGE 3 Of 6	

Parrella, Keith A.

20140628-20150630 TR



U.S. Department of Justice

National Security Division

Washington, D.C. 20530

Brigadier General Helen G. Pratt
Commanding General, Education Command
President, Marine Corps University
2076 South Street
Quantico, VA 22134

05 June 2015

Dear Brigadier General Pratt:

It is my distinct pleasure to highlight some of the many contributions that Lieutenant Colonel Keith Parrella made to the Department of Justice (DOJ) during his tenure this past year as a Commandant of the Marine Corps (CMC) Fellow in DOJ's National Security Division (NSD). Lieutenant Colonel Parrella was assigned to work in the Counterterrorism Section (CTS) of NSD, which is the headquarters component of DOJ that is responsible for the investigation and prosecution of international terrorism matters.

Immediately upon his arrival, Lieutenant Colonel Parrella straightaway assumed all the duties and responsibilities of a DOJ counterterrorism prosecutor and immediately became an integral part of the DOJ's counterterrorism mission. He demonstrated a keen aptitude for DOJ's national security mission and the interagency process, provided guidance in highly sensitive FBI operations, and drafted legal memoranda and recommendations for the Assistant Attorney General that assessed the prosecutorial merit of terrorism cases. Furthermore, Lieutenant Colonel Parrella prepared memoranda on topics of current relevance to counterterrorism prosecutors, which were widely distributed and read within CTS. Additionally, he participated in various facets of litigation. Among other things, he drafted and reviewed motions filed before United States District Courts under the Classified Information Procedures Act, criminal complaints, indictments, search warrants, and other court documents involving the prosecution of high level international and domestic counterterrorism targets. Given the sensitive nature of terrorism cases, much of the material is classified, which adds a substantial level of complexity to the process.

Lieutenant Colonel Parrella performed his duties with the consummate skill of a seasoned prosecutor. His analysis of legal issues was insightful and unfailingly sound. He exhibited excellent judgment. His written work product was always thoroughly researched and exceedingly well written, and his outstanding written skills were matched by his oral communication skills. Moreover, he showed great initiative and devised creative solutions to

Parrella, Keith A.

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complex issues. He continually looked for opportunities to further contribute, and when an opportunity presented itself, he immediately engaged.

At a personal level, Lieutenant Colonel Parrella always demonstrated a collegial, professional, and mature attitude. His outgoing personality and "can do" attitude impressed the prosecutors with whom he worked. He garnered the absolute trust and confidence of his fellow counterterrorism prosecutors and DOJ leadership.

It is worth noting that Lieutenant Colonel Parrella continuously strove to refine the Fellowship program to better meet the goals and objectives of both DOJ and the Marine Corps. Building upon the recommendations of his predecessor, he successfully broadened the scope of the Fellowship by spending his last few weeks working at the Office of Overseas Prosecutorial Assistance and Training within the Criminal Division of DOJ. As a result, he set the stage for future Fellows to gain additional insight from another division within DOJ. Although Lieutenant Colonel Parrella is only the third Marine Corps Fellow to work at NSD, I am aware of the intense screening and selection process for this Fellowship and can confidently say that Lieutenant Colonel Parrella left those within DOJ impressed with the consistent excellence demonstrated by Marine judge advocates.

In sum, DOJ benefited greatly from the outstanding service of this remarkably skilled Marine officer and lawyer. His immediate, positive, and consistent contributions to the accomplishment of CTS' missions are a direct reflection of his talents as a lawyer, his leadership ability, his judgment, and his extraordinary ability to cohesively work as part of an interagency team. I would highly recommend him for any organization – either within the Marine Corps or outside of it. His presence here at NSD will be sorely missed by all.

Sincerely,



Michael J. Mullaney
Chief, Counterterrorism Section
National Security Division
United States Department of Justice

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 595G</p> <p>RULING</p> <p>Defense Motion to Compel Material and Information Related to the Qualifications of Judge Keith Parrella</p> <p>and</p> <p>Defense Request for Voir Dire of Military Judge in a Closed <i>Ex Parte</i> Hearing</p> <p>10 October 2018</p>
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1. Procedural Background.

a. On 27 August 2018, the undersigned was detailed as the Military Judge to preside over this Commission.¹ On the same day, the Trial Judiciary provided the parties with a summarized biography of the newly-detailed Military Judge.²

b. On 7 September 2018, Counsel for Messrs. Hawsawi and bin ‘Attash filed motions seeking to compel the production of various documents for potential use in conducting voir dire of the Military Judge.³ Mr. Hawsawi appeared to seek this information directly from the Military Judge, while Mr. bin ‘Attash sought it from the Government.⁴ In conference with the Defense,

¹ AE 001A, Memorandum for Colonel Keith A. Parrella, USMC, dated 27 August 2018.

² AE 001B, Summarized Biography of Colonel Keith Parrella, dated 27 August 2018.

³ AE 595 (MAH), Defense Motion to Compel Discovery for Voir Dire of Colonel Parrella, filed 7 September 2018; AE 595A (WBA), Defense Motion to Compel Material and Information Related to the Qualifications of Judge Keith Parrella, filed 7 September 2018.

⁴ See AE 595 (MAH), para. 2 (stating that Mr. Hawsawi “seeks the production” of certain information regarding the Military Judge, without reference to any prior discovery requests upon the Government or desire to compel compliance with such requests); AE 595A (WBA), para. 2 (stating that Mr. bin ‘Attash “moves [the] Commission to compel the Government to provide discovery related to the qualifications of [the Military Judge].”)

the Government deferred to the Military Judge on both motions⁵ and filed no responsive pleadings.

c. On 8 September 2018, this Commission provided the parties with copies of the United States Marine Corps Fitness Report and Memorandum pertaining to the Military Judge's 2014-15 Fellowship with the National Security Division of the United States Department of Justice (DOJ).⁶ During hearings on 10 September 2018, the Commission noted on the record that this partial grant of the Defense request was given, not because the Defense was entitled to discovery from the Military Judge, but in an effort to promote expeditious resolution of any concerns of the parties.⁷

d. The parties then conducted a lengthy voir dire, in which they questioned the Military Judge about his DOJ fellowship and other subjects.⁸ Upon conclusion of voir dire the Military Judge was challenged by all Accused except for Mr. Hawsawi (who, having declined to join the challenge, reserved the ability to challenge independently following further investigation).⁹

e. On 11 September 2018, Counsel for Mr. bin al Shibh filed AE 595E (RBS) and AE 595F (RBS), *ex parte* under seal pleadings requesting separate closed, *ex parte* voir dire of the Military Judge regarding certain classified matters pertaining to the AE 292 series (which involved appointment of a Special Review Team and activities of the Federal Bureau of Investigation).¹⁰

⁵ AE 595 (MAH), para. 7; AE 595A (WBA), para. 9.

⁶ AE 595B.

⁷ Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 10 September 2018 from 9:03 A.M. to 10:38 A.M. at p. 20416.

⁸ Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 10 September 2018 from 9:03 A.M. to 10:38 A.M. at p. 20420 (start of voir dire); Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 10 September 2018 from 1:32 P.M. to 2:34 P.M. at p. 20568 (end of voir dire).

⁹ Transcript at pp. 20579-20580.

¹⁰ AE 595E (RBS), Defense Request for Voir Dire of Military Judge in a Closed, *Ex Parte* Hearing, filed 11 September 2018; AE 595F (RBS), Notice of *Ex Parte*, Under Seal Filing, filed 11 September 2018. The latter filing is a notice pursuant to Military Commission Rule of Evidence 505(g)(1).

f. On 11 September 2018, the Commission, from the bench, denied both the Defense challenge and a Defense request to abate until the Military Judge had more fully reviewed prior pleadings and transcripts in the case.¹¹ The Commission, however, noted it would permit motions to reconsider denial of the Defense challenge, if warranted by new information.¹² The Commission also recognized any future challenge brought by Mr. Hawsawi would not be considered a request for reconsideration, and acknowledged receipt of AE 595E and F.¹³

g. The Commission subsequently reviewed AE 595E, AE 595F, the AE 292 series, and several related Special Trial Counsel detailing memoranda.¹⁴

2. Findings of Fact. Having thoroughly examined AE 595E, AE 595F, and the related pleadings referenced above, I find that at no time before, during, or after my 2014-2015 DOJ fellowship, did I have (1) any involvement with or knowledge of the incidents and/or inquiries referenced in those pleadings; and/or (2) any personal and/or professional relationship with any person referenced in those pleadings.

¹¹ Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 11 September 2018 from 9:03 A.M. to 10:22 A.M. at pp. 20599-20605. As an aside with regard to the challenge, the Commission notes that, while the parties cited to 28 U.S.C. § 455, that statute does not apply to a military commission judge. *See Khadr v. U.S.*, 62 F.Supp.3d 1314, 1318-1320 (C.M.C.R. 2014) and *U.S. v Rachels*, 6 M.J. 232, 234 (C.M.A. 1979) (determining, based on analysis equally applicable here, that C.M.C.R. and court-martial judges, respectively, are not “judge[s] of the United States” to whom 28 U.S.C. § 455 would apply). For military commission judges, the relevant standard is established by Rule for Military Commission (R.M.C.) 902, which is essentially the same as its court-martial counterpart, Rule for Courts-Martial (R.C.M.) 902. The highest military appellate court has held the general recusal standard of R.C.M. 902 to be largely the same as that of 28 U.S.C. § 455, however, which presumably would apply to the R.M.C. as well. *See U.S. v. Mitchell*, 39 M.J. 131, 143 (C.M.A. 1994) (noting the general judicial disqualification standard under R.C.M. 902 “is the same” as 28 U.S.C. § 455, “upon which [R.C.M. 902] is based”—though the unique purposes and context of courts-martial must be appropriately considered. *Id.*)

¹² Transcript at p. 20605.

¹³ Transcript at pp. 20606-20608.

¹⁴ Specifically: AE 003C, Special Trial Counsel Detailing Memorandum for Litigation of AE 292, filed 16 April 2014; AE 003F (GOV), Special Trial Counsel Detailing Memorandum for Litigation of AE 292 and All Defense Motions and Requests That Have the FBI Investigation as Their Factual Predicate, filed 24 July 2014; AE 003K (GOV), Special Trial Counsel Detailing Memorandum, filed 17 October 2016; and AE 003L (GOV), Special Trial Counsel Detailing Memorandum, dated 28 October 2016.

3. Law.

a. **Burden of Proof.** As proponents of the various motions at issue here, the relevant Accused bear the burden of proving by a preponderance of the evidence any facts prerequisite to the relief sought. Rules for Military Commissions (R.M.C.) 905(c)(1)-(2).

b. **Discovery and Witness/Evidence Production in Military Commissions Generally.**

The Military Commissions Act 2009 provides the accused a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.¹⁵ The R.M.C. require the Prosecution to produce evidence that is “material to the preparation of the defense.”¹⁶ Furthermore, “[e]ach party is entitled to the production of evidence which is relevant, necessary and noncumulative.”¹⁷ Evidence is relevant when it “contribute[s] to a party’s presentation of the case in some positive way on a matter in issue.”¹⁸ These authorities do not grant the Defense an unqualified right to discovery merely because the Defense has requested it.¹⁹ Without a justiciable theory of relevance to justify compelling production, the defense is not entitled to the production.²⁰

c. **Discovery from the Military Judge.** The parties have presented no applicable authority establishing that the parties have a right to compel discovery from the Military Judge in this context. To the extent it exists, relevant precedent indicates the opposite is generally true.²¹

¹⁵ See 10 U.S.C. § 949j.

¹⁶ R.M.C. 701(c)(1).

¹⁷ R.M.C. 703(f)(1).

¹⁸ R.M.C. 703(f)(1) Discussion.

¹⁹ See *United States v. Agurs*, 427 U.S. 97, 106 (1976) (“[T]here is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor.”)

²⁰ *United States v. Graner*, 69 M.J. 104, 108 (C.A.A.F. 2010).

²¹ “No reported case could be found where a judge was required to submit to discovery in connection with a motion for his or her disqualification.” *Disqualification of Trial Judge for Cause*, 50 Am. Jur. Proof of Facts 3d 449 § 41 (Sep 2018). There is, on the other hand, persuasive authority indicating the parties have no right to such discovery. See, e.g., *Cobell v. Norton*, 237 F.Supp.2d 71 (D.D.C. 2003) (in denying motion to depose Special Masters, noting “this Court knows of no case in which a court has authorized discovery to be taken upon judicial officers.” *Id.* at 102); *Cheeves v. Southern Clays, Inc.*, 797 F.Supp. 1570 (M.D. Ga. 1992) (finding, in the context of a motion to disqualify a judge pursuant to 28 U.S.C. §§ 144 and 455(a), that “compulsory discovery process addressed to the

d. **Ethical Disclosure Requirements.** Applicable ethical standards state that the undersigned judge “should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.”²²

4. **Analysis.**

a. **Further Discovery.**

(i) The undersigned Military Judge is fully aware of his ethical obligation to make appropriate disclosures to the parties regarding potential bases for disqualification. All such information has been disclosed. Should the undersigned become aware of any additional such information in the future, it will be made fully available to the parties as soon as practicable.

(ii) The parties may certainly draw the Commission’s attention to specific categories of information they believe the Commission should consider in making these evaluations. The Commission may voluntarily provide to the parties background information thus requested, in order to expeditiously identify and resolve any potential areas of concern. However, motions to compel discovery from the Military Judge in relation to disqualification matters assert no enforceable right of the parties; accordingly, subject to any voluntary disclosures by the Military Judge, any such motions will be denied.

presiding judge in aid of a motion to disqualify that judge . . . is not available to a litigant.” *Id.* at 1583); *Terrazas v. Slagle*, 142 F.R.D. 136 (W.D. Texas 1992) (subpoenas of sitting judges’ law clerks quashed, as permitting their testimony regarding alleged undisclosed improper third-party communications would “usurp[the] . . . authorities and responsibilities” by which those judges “ha[d] already determined there [was] no basis to require their recusal.” *Id.* at 140); *Brown v. American Bicycle Group, L.L.C.*, 224 Cal.App.4th 665 (2014) (“[W]e are aware of no authority [supporting] the proposition that a trial judge is required to make disclosures . . . in order to enable a party to file a . . . challenge.” *Id.* at 672 (internal quotes and cites omitted)).

²² American Bar Association, Model Code of Judicial Conduct Rule 2.11, Comment 5 (Feb 2007) (made applicable by R.M.C. 109 and U.S. Dep’t of Navy, JAG Instruction 5803.1E, Subj: Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General ¶ 7 (20 Jan 2015)).

(iii) To the extent the motions are construed as Defense motions to compel discovery from the Government regarding the Military Judge, in light of the voir dire conducted by the parties and materials already voluntarily disclosed, the Commission finds no sufficient showing that any of the materials thus sought would be reasonably likely to contain relevant, necessary, noncumulative information.

b. **Mr. bin al Shibh's Request for Additional Voir Dire in a Closed, *Ex Parte* Hearing.** Based on the findings of fact in paragraph 2, I conclude there is at present no need to conduct additional voir dire on any matter relating to AE 292, in either open or closed session. Mr. bin al Shibh will be provided the opportunity to submit additional potentially-relevant information for consideration, however, as directed below.

5. **Ruling.**

a. To the extent the Defense at present moves the Commission to provide and/or compel any discovery regarding the Military Judge beyond that already voluntarily disclosed, that motion is **DENIED**.

b. Mr. bin al Shibh's motion for additional voir dire in a closed, *ex parte* hearing is **DENIED**. However, if Mr. bin al Shibh is aware of any person(s) relevant to the events described in the AE 292 series not named in the pleadings described in paragraph 1.g, above, he may submit the names of any such person(s) *ex parte* and under seal for appropriate consideration by the Commission **not later than 17 October 2018**.

So **ORDERED** this 10th day of October, 2018.

//s//
K. A. PARRELLA
Colonel, U. S. Marine Corps
Military Judge

b. Insufficient justification for seizure, search and/or confiscation of computer.

There is no good reason to support the seizure, search and confiscation of extremely sensitive attorney-client privileged material, or to suspect that Mr. Mohammad has acted improperly in any way with respect to his laptop computer. The government's claim, read for all it is worth, is that a writing by a co-defendant was found in Mr. Mohammad's legal bin. The writing is apparently thought to describe a method for altering the function of a laptop. There is no evidence that these materials were intentionally provided to Mr. Mohammad; that if they were, Mr. Mohammad requested them (indeed, the sequence of events suggests that he was not even aware that the letter had been placed in his legal bin); or that Mr. Mohammad intended to alter the functioning of his own computer. None of these facts justify the seizure, search or confiscation of Mr. Mohammad's virtual law office.

Indeed, the only purportedly concrete evidence proffered by the government to suggest that the defendants have succeeded in reconfiguring their laptops to enable them to communicate with the outside world is the publication of "the actual letter" from Mr. Mohammad to President Obama on an al Qaeda website in September 2017. AE 350F (GOV) at 13. As evidenced by Attachment D to the government's pleading, however, the contents of the "actual letter" was readily available to any jihadist bloggers who might also be readers of the Miami Herald, as of February 2017. Moreover, by appending Attachment D, which includes a link to the full 18-page letter, the prosecution has ensured that the "actual letter" will have an even wider potential readership than that commanded by as-Sahab.

c. The government cannot be trusted to conduct a restricted search of sensitive attorney-client privileged materials.

Even if a forensic review of Mr. Mohammad's laptop were justified (which it is not), the government has long since forfeited any claim that it may be relied upon to do so and also protect Mr. Mohammad's attorney-client communications. On the contrary, throughout this case the government has taken at best a cavalier attitude toward the defense function, ignoring the military commission's orders in the process, generally without any serious resulting sanction. There is little reason to suppose that it could be trusted to conduct a limited search in such a sensitive environment.

At the outset of this case, in October of 2011 JTF-GTMO seized and read all of Mr. Mohammad's legal materials, without a warrant or a court order, without notifying or consulting counsel, and without participation even by the guard force's own SJA. The seizure and review was conducted upon no particular probable cause or other suspicion, but rather to establish a "baseline."¹² See also AE 032¹³; AE 168¹⁴; AE 401.¹⁵ Improper intrusion into detainees' legal materials has continued throughout the course of this case. In March of 2013 the Military Commission ruled, "[w]ithout finding there was any specific breach of attorney-client privilege in regard to the inspection of the legal bins in February 2013, *there is an obvious need to institute procedures that obviates that risk.*" AE 144D¹⁶ at 2 (emphasis added). The Military Commission then specifically ordered that "[e]xamination of the legal bins by the guard force will be limited to review for appropriate markings, scanning for classification marking of written

¹² Testimony of CPT Thomas Welsh, JTF-GTMO SJA, 12 February 2013, Unofficial/Unauthenticated Tr., pp. 1955-65.

¹³ AE 032, Joint Defense Motion for Appropriate Relief to Protect Right to Counsel by Barring Invasion of Privileged Attorney-Client Communications, 11 May 2012.

¹⁴ AE 168(AAA), Defense Motion to Compel Discovery Related to Convening Authority "Baseline Review" and Legal Mail Policy Communications, 4 June 2013.

¹⁵ AE 401(WBA), Motion to Dismiss Because the United States Conduct of Continuous Abrogation of the Attorney-Client Relationship Has Irretrievably Damaged Mr. bin 'Atash's Ability to Work with Counsel, 15 January 2016.

¹⁶ AEI44D, RULING, Joint Defense Supplemental Memorandum in Support of Proposed Interim Order Regarding Seizure and Inspection of Accused's Legal Materials, 25 March 2013.

materials, and inspection for contraband.” AE 144D at 2. This led to the issuance of AE 144E,¹⁷ Interim Order, which in turn became incorporated into AE 018U. Similar intrusions into attorney-client privileged materials nonetheless occurred in 2014 and 2015, and continue. *See, e.g.,* AE373(AAA)¹⁸; AE 018PP¹⁹; AE18QQ²⁰; AE008(WBA) at 11-19; AE133(WBA Sup)²¹; AE155A²²; AE 401(WBA).

In early 2013 it developed that the government had intruded upon defense IT systems, resulting in the loss of electronic files, real-time monitoring of defense internet searches, and intrusion and seizure of some 540,000 defense emails, *see generally*, AE 154,²³ AE 155A at 3-16; AE 177,²⁴ AE 173.²⁵

As described in the AE 133-series pleadings JTF-GTMO placed listening devices disguised as smoke detectors in the meeting room in which Mr. Mohammad and his co-Defendants meet with their defense teams. If the listening devices indeed had a benign purpose counsel would have been provided advance notice of their presence, but as the Commission held,

¹⁷ AE 144E, INTERIM ORDER Regarding Seizure and Inspection of Accused's Legal Materials, 25 March 2013.

¹⁸ AE 373 (AAA), Defense Motion to Dismiss For Government Intrusion Into Attorney-Client Relationship, 21 September 2015.

¹⁹ AE18PP(MAH), Defense Motion for Government to Show Cause For Its Violation of AE 018U, 12 February 2015.

²⁰ AE 018QQ, Mr. Mohammad's Supplement to AE 018PP(MAH), Defense Motion for Government to Show Cause For Its Violation of AE 018U, 29 April 2015.

²¹ AE 133 (WBA Sup), Walid bin 'Attash's Supplement to Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in Any Location, Including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings, 6 February 2013.

²² AE I55A (WBA,KSM,RBS,MAH), Defense Motion to Abate Proceedings due to the Government's Violation of Privilege as it Pertains to Electronic Files, Communications, and Investigation, 12 April 2013.

²³ AE 154, Government Notice Of Events Related to Protection of Privileged Materials, 8 April 2013.

²⁴ AE177 (WBA), Defense Motion to Compel Production of Discovery of Information Related to Government Intrusion Into Electronic or Physical Spaces Containing Defense-Related and/or Defense-Produced Materials , 19 June 2013.

²⁵ AE 173(WBA), DEFENSE MOTION TO COMPEL THE PRODUCTION OF WITNESSES LISTED IN DEFENSE REQUEST FOR PRODUCTION OF WITNESSES, DATED 31 MAY 2013, TO TESTIFY AT MOTION HEARING 17-21 JUNE 2013 AND IN SUBSEQUENT HEARINGS, 12 June 2013.

“CAPT Welsh [the JTF-GTMO SJA] concurred with the Defense proposition that the microphones in the ECHO II rooms were not apparent as such and could have been mistaken for smoke alarms.” AE 133QQ at 9-10. The Military Commission also conceded that CAPT Welsh was “unable to offer an explanation” for the requirement in meeting protocols that counsel give advance notice of “the language to be used during attorney-client meetings,” 133QQ at 10 – other than that doing so would prepare the guard force to monitor the meetings in real time. Indeed, despite repeated assurances that attorney-client meeting rooms managed by JTF-GTMO provide a genuinely confidential environment within which Commission defendants may meet with their defense teams,²⁶ recent developments in *United States v. al Nashiri* reveal that these assurances were false. *See also* AE 530D²⁷ at pp. 4-5.

Testimony in the AE 133 series also revealed that the entire courtroom was essentially a “sound field,” with “23 microphones located throughout the ELC Courtroom and the audio from these microphones feeds into one of eight (8) channels which are recorded by the court reporting software system.” AE 133QQ at 7. The “‘pre-gated’ feed, going to the court reporters, translators, *and the OCA*, may transmit background voices and discussions, depending on the volume of any particular voice and the number of people being picked up by different unmuted microphones.” 133QQ at 8 (emphasis added). In other words, the OCA had engineered the ability to listen in on the confidential communications among defense teams and clients.

²⁶ *E.g.*, “[n]o entity of the United States Government is listening, monitoring or recording communications between the five Accused and their counsel at any location.” AE 133A, Government’s Response To Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings, 7 February 2013, at 2.

²⁷ AE530D(AAA), Motion for Amended Order, 25 October 2017.

The government's efforts to exploit attorney-client communication and to chill the defense function have not been limited to a refusal to respect the privacy of Mr. Mohammad's legal materials and consultations with counsel. As described in the AE 292²⁸ series pleadings, the United States obtained confidential defense materials by secretly interviewing Mr. Mohammad's assigned translator under cover of a ruse that the interview was part of the process of reauthorization of the translator's security clearance. This was unmistakably a first step in an effort to infiltrate Mr. Mohammad's defense team to obtain protected information, an infiltration what was actually accomplished with respect to the team of a co-defendant.

A similar effort was revealed when, as described in the AE 350²⁹ series pleadings, on 9 February 2015, Mr. bin al Shibh rose in open Commission proceedings to object to the presence on his team of his government-provided interpreter explaining "the problem is I cannot trust him because he was working at the black site with the CIA and we knew him from there."³⁰ Other accused also recognized the interpreter, Tr. 8248-50, whose presence the government has since acknowledged, *See* AE 350N,³¹ p. 2.

As described in the AE 460³²-series pleadings, the government accepted Mr. Mohammad's former DISO as a confidential informant, took statements from him regarding confidential attorney-client privileged information, and thereafter proposed that he be returned to the defense team to serve as a DISO on a temporary basis.

²⁸ AE292, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, 13 April 2014.

²⁹ AE350(GOV), Government Unclassified Notice Of Classified Filing, 10 February 2015.

³⁰ Unofficial/Unauthenticated Transcript, 9 February 2015, at 8248-50 (last accessed 2 November 2017).

³¹ AE 350N (GOV), Government Response To Defense Motion to Compel Access to Information Necessary to File Supplement to AE 350C (AAA), 26 May 2015.

³² AE 460 (GOV STC), Government Notice by Special Trial Counsel of Letter to Defense Requesting Defense Remediation of Material Obtained Outside of the Discovery Process, 19 October 2016.

As set out in the AE 283³³ series pleadings, the government also effectively severed Mr. Mohammad's relationship with his co-lead military defense counsel, by unilaterally reassigning counsel to a separate billet; and, as alleged in the AE 406³⁴ series pleadings, effectively denied him the assistance of his assigned translator for an extended period, by suspending his security clearance without explanation.

The government has also repeatedly initiated investigations into and leveled baseless allegations of serious criminal and administrative wrongdoing against defense counsel in an obvious effort to chill the defense function. *See, e.g.*, AE 018Y³⁵ series (false allegations of violating communication rules); AE 292 series (infiltration and investigation of defense teams by Federal Bureau of Investigation); AE 350 series (alleging violation of ethical duty to properly vet defense personnel); AE 532³⁶ series (false allegations of willful disclosure of classified information); 460³⁷ series (false allegations of improper intrusion into protected computer systems); *United States v. Kiriakou*, Case No. 1:12MJ33 (United States District Court for the Eastern District of Virginia), Affidavit in Support of Criminal Complaint and Arrest Warrant, 23 January 2012, pp. 3-5 (detailing three-year FBI investigation focusing on counsel, but concluding that "no laws were broken by the defense team.").

³³ AE283 (Mohammad), Notice of Governmental Directed Severance of the Attorney-Client Relationship, 13 March 2014.

³⁴ AE 406 (Mohammad), Defense Motion to Abate Proceedings Immediately until the Government Restores to the Assigned Defense Team Interpreter the Security Clearance Required to Serve as an Interpreter, 5 February 2016.

³⁵ AE 018Y, Government Emergency Motion for Interim Order and Clarification that the Commission's Order in AE018U Does Not Create a Means for Non-Privileged Communications to Circumvent the Joint Task Force Mail System, 28 February 2014.

³⁶ AE 532 (GOV STC), NOTICE OF UNDER SEAL EX PARTE FILING BY SPECIAL TRIAL COUNSEL, 27 October 2017.

³⁷ AE 460 (GOV STC), Government Notice by Special Trial Counsel of Letter to Defense Requesting Defense Remediation of Material Obtained Outside of the Discovery Process, 19 October 2016.

In myriad other ways the government has consistently refused to honor the letter or the spirit of the mandate of the Sixth Amendment that Mr. Mohammad receive constitutionally effective assistance of counsel. *See, e.g.*, AE 160³⁸ (Prosecution inappropriate access to Learned Counsel billing statements, leading to the issuance of Protective Order #3³⁹ directing that “the Convening Authority shall not disclose to the Prosecution or to the public any information” relating to compensation or activities of defense counsel or defense experts); AE 207⁴⁰ (describing Prosecution effort to intimidate Mitigation Specialist testimony in collateral proceeding); AE 254QQQ,⁴¹ pp. 7-10 (implementation of a policy to prevent witnesses assigned to JTF-GTMO from sharing information with the Defense in order “to protect national security”); AE 356(AAA)⁴², att. B (blocking access of cleared military defense counsel to SIPR and JWICS networks).

It is hard not to see the heavy hand of the CIA behind many of these incidents and their chilling effects. As the Military Commission put it, “[a]s to the role of the CIA, their interest in this case is well known” AE 133PP⁴³ at 6. In the infamous “red light” incident, the CIA unilaterally closed the courtroom by stopping the external feed during the remarks of defense counsel.⁴⁴ “This closure of the proceeding was not ordered or approved by the Military Judge or the Court Information Security Officer (CISO),” AE 133QQ at 1, and was in any event

³⁸ AE160(AAA), Defense Motion To Compel Convening Authority to Prevent Prosecution Access to Defense Team Claims for Compensation, 10 May 2013.

³⁹ AE 160C, PROTECTIVE ORDER #3 to Protect Defense Teams Claims for Compensation, 23 August 2013.

⁴⁰ AE 207 (WBA), Mr. bin ‘Attash’s Emergency Motion to Delay due to Learned Counsel’s Duty to Protect Learned Counsel’s Duty to Protect Privileged Information, 16 August 2013.

⁴¹ AE 254QQQ (GOV), Government Response To Defense Motion to Compel the Production of Information Requested in its Discovery Request of 4 December 2014 (DR-031-MAH), 8 April 2015.

⁴² AE356(AAA), Mr. al Baluchi’s Motion to Compel Production of Discovery Regarding Revocation of Access to Classified Networks, 6 April 2015.

⁴³ AE 133PP, RULING, Mr. Mohammad’s Motion for Reconsideration of AE 133II Order Denying Defense Motion to Compel Discovery Related to Courtroom #2 Audio System, 29 September 2016.

⁴⁴ Unofficial/Unauthenticated Transcript, p. 1445, 28 January 2013.

unjustified by the remarks of counsel. *Id.* This not only “established that an OCA monitors the proceedings in real-time ...” AE 133QQ,⁴⁵ at 7, but also required the Military Commission to order that the CIA’s ability to close the proceedings unilaterally be terminated.⁴⁶

Also presumably at the direction of the CIA, the Government has consistently utilized byzantine and ever shifting positions regarding classification to impede defense efforts. *See, e.g.*, AE 009⁴⁷ (government reliance on “presumptive classification,” a non-existent classification category); AE 274B⁴⁸ (documenting shifting scope of classification); AE 118⁴⁹ (Defense not provided with resources to comply with classification requirements of Protective Order No. 1).

Not content with simply chilling defense efforts, and as described in the AE 425 series, the CIA simply resorted to destroying important exculpatory evidence under cover of a public order guaranteeing that the evidence would be preserved absent further notice to the parties (AE 080G⁵⁰), and in blatant disregard of a secret classified Order that prior notice of the destruction be given (AE 052EE⁵¹).

Finally, the government’s disregard of Mr. Mohammad’s rights includes the political branches, as illustrated by the Unlawful Command Influence which pervades the case. In late

⁴⁵ AE 133QQ, RULING, Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings, 30 November 2016.

⁴⁶ The clear directive was issued on 31 January 2013; see Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al. (2) Hearing Dated 1/31/2013 from 9:01 AM to 9:22 AM at pp. 1720-1721.

⁴⁷ AE 009, Mr. al Baluchi’s Motion to End Presumptive Classification, 17 April 2012.

⁴⁸ AE 274B, RULING, DEFENSE MOTION TO CHALLENGE “CLASSIFICATION GUIDANCE FOR CENTRAL INTELLIGENCE AGENCY (CIA) RENDITION, DETENTION, AND INTERROGATION (RDI) PROGRAM INFORMATION,” 9 April 2015.

⁴⁹ AE118 (WBA, AAA), Motion to Abate Proceedings Pending Compliance with Protective Order #1, 9 January 2013.

⁵⁰ AE080G, ORDER, Joint Defense Motion To Preserve Evidence of Any Existing Detention Facility, 19 December 2013.

⁵¹ AE 051B/052EE, Ex Parte/ Under Seal CLASSIFIED ORDER, 4 June 2014.

2014 the then Convening Authority, unsatisfied with the pace of litigation, reassigned the military judges involved in the case to Naval Station Guantanamo Bay, Cuba until the trial was complete. AE 343.⁵² The Military Commission rightly saw that the CA’s order “goes to the very heart of the trial process,” and responded by abating the proceedings until the order was withdrawn. AE 343C.⁵³ *See also* AE 344⁵⁴ (analyzing Change 1 under 10 U.S.C. § 948j(f)). UCI nonetheless has pervaded and continues to pervade the case. No less a figure than the President of the United States recently referred to the present proceedings as “a joke and a laughingstock.”⁵⁵ In the *United States v. al Nashiri* case the Military Judge recently found the Chief Defense Counsel guilty of contempt and sentenced him to confinement and a fine for doing his duty – before, in the words of the Hon. Royce Lamberth, United States District Judge, the Department of Defense managed to “clean up its own act” and suspend imposition of Gen. Baker’s sentence pending review.⁵⁶ *See also United States v. al Nashiri*, AE339⁵⁷ and AE 389⁵⁸

⁵² AE 343(Mohammad, bin ‘Atash, bin al Shaibh, al Baluchi), Defense Motion to Dismiss For Unlawful Influence on Trial Judiciary, 30 January 2015.

⁵³ AE 343C, RULING, Defense Motion to Dismiss For Unlawful Influence on Trial Judiciary, 25 February 2015.

⁵⁴ AE 344(Mohammad, bin ‘Atash, bin al Shibh, al Baluchi), Defense Motion to Dismiss For Convening Authority Review of Trial Judiciary Effectiveness and Efficiency in Violation of 10 U.S.C. § 948j(f), 30 January 2015.

⁵⁵ Following the attack in New York City, on 1 November 2017, President Trump held a press conference:

That was a horrible event, and we have to stop it and we have to stop it all. We also have to come up with *punishment that’s far quicker and far greater* than the punishment these animals are getting right now. They’ll go through court for years. At the end they’ll be, who knows what happens? We need quick justice and we need strong justice...much quicker and much stronger than we have right now. *Because what we have right now is a joke and it’s a laughingstock* and no wonder so much of this stuff takes place.

(Emphasis added). Although it was unclear from these press conference comments whether or not the President was referring to the need for “quicker and stronger” justice in Federal court or military commissions, he expanded on the meaning of his comments the next day using Twitter: “Would love to send the NYC terrorist to Guantanamo but statistically that process takes much longer than going through the Federal system... .”

⁵⁶ *See* <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article182644776.html>, last accessed 06 November 2017.

⁵⁷ AE 339L, Defense Notice of Excusal of Learned Counsel, Richard Kammen, 13 October 2017; AE 339K, Defense Notice of Excusal of Assistant Defense Counsel, Rosa Eliades, 13 October 2017; and AE 339J, Defense Notice of Excusal of Assistant Defense Counsel, Mary Spears, 13 October 2017.

⁵⁸ AE 389, Defense Motion to Abate Proceedings Pending the Detailing of Learned Counsel, 16 October 2017.

series litigation. *See also, e.g.*, AE 363⁵⁹ (Unlawful influence of defense counsel by Joint Chiefs of Staff).

For all these reasons, the time has long since passed when the Military Commission can trust the government to respect the privacy of Mr. Mohammad’s legal materials. Moreover, it was no doubt the prosecution’s implicit acknowledgment of the defense’s justified concerns in this regard that led it to agree that possible deviations from the computer protocols would be remedied in a manner that did not rely on the government’s good faith or ability to resist once again intruding into protected defense communications. The prosecution should not be allowed to employ a “bait and switch” approach that enables it to obtain access to sensitive communications that the defense never would have stored on the defendants’ laptops had it been evident it was vulnerable to such intrusion.

d. Previously agreed procedures for review of Defendant laptops.

More to the point, the government recently proposed a procedure to be followed in the event that a Defendant’s laptop is found to be in non-compliance with the Military Commission’s directives, which decidedly does not entail seizure, search, or confiscation by the government. The proposed agreement for the delivery of the new computers to the Defendants in 2016 contained the following provision relating to wireless and Bluetooth capability:

⁵⁹ AE363 (Mohammad et al.), Joint Defense Motion to Compel Discovery Regarding Unlawful Influence of the Office of the Chairman of the Joint Chiefs of Staff Over the Office of the Chief Defense Counsel, 30 June 2015.

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE 555EEE RULING Mr. al Baluchi's Motion to Dismiss For Unlawful Influence over Convening Authority and Legal Advisor 10 January 2019
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1. Procedural History.

a. On 9 February 2018, Mr. Ali (a.k.a. al Baluchi) moved to dismiss all charges,¹ claiming (1) the terminations of Mr. Harvey Rishikof and Mr. Gary D. Brown from their positions as Convening Authority (CA) and CA’s Legal Advisor, respectively, had been in retaliation for certain decisions in those capacities; and (2) the terminations, therefore, constituted unlawful influence (UI) over Messrs. Rishikof and Brown by then-Secretary of Defense (SecDef) James N. Mattis² and then-Department of Defense Acting General Counsel (DoD AGC) William S. Castle.³ The Government responded on 26 February 2018, arguing the Defense had not met its initial burden and, in any event, had not alleged acts constituting UI.⁴

¹ AE 555 (AAA), Mr. al Baluchi’s Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor, filed 9 February 2018, p. 1.

² The Commission takes judicial notice that SecDef Mattis submitted a letter of resignation on 20 December 2018, and no longer served as SecDef as of 1 January 2019. See Jeremy Diamond, et al., *Mattis quits, says his views aren’t ‘aligned’ with Trump’s*, <https://www.cnn.com/2018/12/20/politics/donald-trump-james-mattis-out/index.html> (last updated 21 December 2018, 4:46 PM); Holly Rosenkrantz, *Trump ousts Mattis 2 months early, taps Shanahan as acting defense secretary*, CBS News Online, <https://www.cbsnews.com/news/trump-expected-to-order-mattis-to-leave-job-immediately-appoint-patrick-shanahan-defense-secretary/> (last updated 23 December 2018, 4:02 PM). As Mr. Mattis was SecDef throughout the events relevant to this motion series, for simplicity he will be referred to by that title herein.

³ The Commission notes Mr. Castle relinquished the AGC role in August 2018. See fn 26, *infra*, and accompanying text. However, as he was AGC throughout the events relevant to this motion series, for simplicity he will be referred to by that title herein.

⁴ AE 555A (GOV) (Corrected Copy), Government Response To Mr. Ali’s Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor, filed 26 February 2018 (original filed 23 Feb 2018), para. 3.

b. Since the initial motion and response, filings in this series have been many and voluminous.⁵ The parties have presented witness testimony and engaged in substantial argument regarding many of the procedural and substantive issues identified. The Commission has considered all of the filings,⁶ argument, and evidence in the AE 555 series. This ruling will address the following:

(i) AE 555P (GOV),⁷ a motion by the Government for the Commission to reconsider a prior order (AE 555O).⁸ The only remaining question in that motion is whether the Commission should fully grant reconsideration by permanently rescinding its directive in AE 555O for the Government to (1) disclose the CA's monthly status reports, and (2) produce Mr. Rishikof to testify.⁹

⁵ The filings include declarations submitted by Secretary Mattis, AGC Castle, and Messrs. Rishikof and Brown, filed at the Commission's request. AE 555B, Trial Conduct Order: Mr. al Baluchi's Motion to Dismiss For Unlawful Influence Over Convening Authority and Legal Advisor, dated 27 February 2018; AE 555E (GOV), Government Notice Of Declarations Requested By The Military Commission, filed 19 March 2018, Attach.'s B (hereinafter, "Mattis Declaration"), C (hereinafter, "Castle Declaration"); AE 555G, Notice of Receipt: Declaration of Harvey Rishikof and Gary D. Brown, filed 20 March 2018, Attach. A (hereinafter, "Rishikof & Brown Declaration 1"); AE 555L, Notice of Receipt: Second Declaration of Harvey Rishikof and Gary D. Brown, filed 30 April 2018, Attach. A (hereinafter, "Rishikof & Brown Declaration 2").

⁶ This includes Mr. Mohammad's recent supplement, and the Government's response. AE 555CC (KSM Sup), Mr. Mohammad's Supplement to AE 555CC, filed 2 January 2019; and AE 555DDD (GOV), Government Response To AE 555CC (KSM Sup), Mr. Mohammad's Supplement to AE 555CC (KSM), filed 4 January 2019. The Commission's analysis herein is unaltered even when assuming the facts proffered in Mr. Mohammad's latest supplement are accurate. *See* fn 25, 33, *infra*. Accordingly, the Commission finds no Defense reply to the Government's response to be necessary.

⁷ AE 555P (GOV), (U) Government Combined Motion To Reconsider AE 555O, Order, Defense Motion to Compel Discovery Regarding the Firing of the Convening Authority and Legal Advisor, and (U) Response To AE 555 (AAA 2nd Sup), AE 555 (KSM 2nd Sup) Defense Supplemental Motions to Dismiss for Unlawful Influence Over the Convening Authority and Legal Advisor, filed 6 June 2018.

⁸ AE 555O, Order: Defense Motion to Compel Discovery Regarding the Firing of the Convening Authority and Legal Advisor, dated 23 May 2018.

⁹ In AE 555O, the Commission granted Defense motions (a) to compel production of certain materials, and (b) to compel production of Messrs. Rishikof and Castle as witnesses, while (c) denying a request to compel production of Mr. Brown. AE 555O, para. 4. The Government in AE 555P (GOV) moved the Commission to reconsider that ruling regarding (a) certain specified documents (the CA's monthly status reports and Tabs 4-7 of the December 2017 Management Memorandum) and (b) both witnesses. AE 555P (GOV), para. 2. On 21 June 2018, following *in camera* review of the documents, the Commission issued an interim ruling in which it (a) directed production of the memo tabs, but (b) granted reconsideration regarding the CA's monthly status reports and the witnesses, while (c) deferring final ruling regarding those reports and witnesses. AE 555S, Interim Ruling: Government Motion To Reconsider AE 555O, Order, Defense Motion to Compel Discovery Regarding the Firing of the Convening Authority and Legal Advisor, dated 21 June 2018, para. 5. On 1 November 2018, the Commission issued a further ruling in which it directed the production of Mr. Castle, but continued to defer with regard to the status reports and

(ii) AE 555 (AAA 2nd Sup),¹⁰ AE 555R (AAA),¹¹ and AE 555CC (AAA),¹² in which Mr. Ali moved to compel certain witnesses;

(iii) AE 555GG (KSM),¹³ Mr. Mohammad's motion for a conclusion of law regarding whether the Defense has met its initial burden of production regarding UI; and

(iv) AE 555 (AAA), the base motion seeking dismissal based on alleged UI.

c. Further oral argument is unnecessary for the Commission to resolve these matters.¹⁴

2. Findings of Fact. The Commission makes the following findings of relevant fact based on the evidence presented; the undisputed assertions of the parties; and/or, where appropriate, the assumption that certain Defense allegations are true.

a. On 3 April 2017, Mr. Harvey Rishikof was designated as CA and Director, Office of the CA (OCA).¹⁵ On 28 April 2017, Mr. Gary Brown was appointed as CA's Legal Advisor.¹⁶

b. On 5 May 2017, Mr. Rishikof met with then-Deputy Secretary of Defense (DepSecDef) Robert O. Work and informed him of a perceived need for realignment of

Mr. Rishikof. AE 555AAA, Ruling: Government Motion To Reconsider AE 555O, Order, Defense Motion to Compel Discovery Regarding the Firing of the Convening Authority and Legal Advisor, dated 1 November 2018, paras. 5-6. Mr. Castle testified on 13 November 2018 by video teleconference (VTC). Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 13 November 2018 from 9:03 A.M. to 9:36 A.M. at p. 21128 (start of AGC Castle's testimony). (Note that, for brevity's sake, subsequent cites to the unofficial transcript in this ruling will simply be by page number, e.g., "Transcript 21128.")

¹⁰ AE 555 (AAA 2nd Sup), Mr. al Baluchi's Second Supplement to Mr. al Baluchi's Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor, filed 21 May 2018, para. 4, Attach. B. This supplement had been filed prior to the Commission's initial ruling regarding certain discovery requested by the Defense (AE 555O); however, as the briefing cycle for the supplement was not complete, the Order did not address it. AE 555O, fn 8.

¹¹ AE 555R (AAA), Mr. al Baluchi's Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the Pending Interlocutory Question in AE 555 (AAA), filed 18 June 2018.

¹² AE 555CC (AAA), Mr. al Baluchi's Second Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the Pending Interlocutory Question in AE 555 (AAA), filed 26 July 2018.

¹³ AE 555GG (KSM), Motion for a Conclusion of Law that the Defense Has Provided 'Some Evidence' Of Unlawful Influence in the Firing of the Convening Authority, filed 29 August 2018.

¹⁴ The opportunity to present oral argument regarding pretrial motions is afforded at the sole discretion of the Military Judge. R.M.C. 905(h); R.C. 3.5.m.

¹⁵ The SecDef memorandum designating Mr. Rishikof as CA was signed 4 April 2017, but by its terms was effective as of 3 April 2017. AE 555P (GOV), Attach. K, Tab B, Tab 1; Mattis Declaration para. 3.

¹⁶ AE 555A (GOV), p. 3; AE 555P (GOV), Attach. I.

authorities and additional spending associated with military commissions.¹⁷ DepSecDef Work subsequently “requested [Mr. Rishikof] provide his views on paths forward in a written document,” and the two “had a mutual understanding that [as] Mr. Work was Mr. Rishikof’s direct supervisor . . . no formal coordination was expected.”¹⁸

c. Sometime in May 2017, Mr. Rishikof informed the Chief Defense Counsel (CDC), Military Commissions Defense Organization, that he wished to meet with Learned Counsel to discuss, *inter alia*, potential for pretrial agreements (PTAs).¹⁹ On 30 May 2017, Messrs. Rishikof and Brown met with the CDC and six learned counsel, and Mr. Rishikof “invited interested defense counsel to contact him regarding plea negotiations.”²⁰ On 27 June 2017, Messrs. Rishikof and Brown discussed potential for a PTA with Counsel for Mr. Mohammad.²¹

d. On 6 July 2017, Messrs. Rishikof and Brown met with then-DepSecDef Work and his incoming replacement, Mr. Patrick Shanahan,²² and briefed them on the possibility of resolving the cases by PTA²³ and the perceived need for realignment of military commissions authorities.²⁴

¹⁷ AE 555BB (KSM AAA), Mr. al Baluchi’s and Mr. Mohammad’s Combined Position Regarding Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor and Related Pleadings, filed 25 July 2018, pp. 18, 32; AE 555CC (AAA), Attach. B, pp. 3, 12.

¹⁸ AE 555CC (AAA), Attach. B, pp. 3, 13; *see also* Transcript 20801-03 (Defense investigator describing interview in which former DepSecDef Work said “he gave direct instructions to . . . Mr. Rishikof[] to report only to him on paths forward [regarding] the suggested reorganization . . . of OMC,” and email in which former DepSecDef Work said that because he “did not want a lot of chatter” in DoD, “I would not have expected [Mr. Rishikof] to discuss this across the department, given the political ramifications[, a]nd if he had not discussed things with the GC, I would have . . . called a meeting to discuss.”)

¹⁹ AE 555BB (KSM AAA), pp. 18, 28.

²⁰ AE 555BB (KSM AAA), p. 28; AE 555CC (AAA), Attach. B, p. 3; AE 555UU (AAA), p. 4.

²¹ AE 555BB (KSM AAA), pp. 9, 28.

²² DepSecDef Work relinquished the office to Mr. Shanahan on 19 July 2017. AE 555T (GOV), Government Response To Mr. Ali’s Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the Pending Interlocutory Question in AE 555 (AAA), filed 2 July 2018, p. 6; AE 555EE (GOV), Government Response To Mr. Ali’s Second Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the Pending Interlocutory Question in AE 555 (AAA), filed 9 August 2018, p. 4.

²³ AE 555BB (KSM AAA), p. 28; AE 555UU (AAA), Mr. al Baluchi’s Closing Argument Memorialized for AE 555P (GOV), AE 555R (AAA), and AE 555CC (AAA), filed 27 September 2018, p. 4.

²⁴ AE 555BB (KSM AAA), p. 32.

e. On 15 August 2017, counsel for Mr. Mohammad forwarded a proposed PTA to the OCA.²⁵

f. On 27 August 2017, Mr. Castle was appointed as Principal Deputy General Counsel (PDGC) for the DoD, and assumed the role of DoD AGC the same day.²⁶

g. In early September 2017, during a routine meeting, Mr. Castle's staff advised him that Messrs. Rishikof and Brown had requested to meet with him.²⁷ Mr. Castle asked OGC attorneys for background information, and was told about some issues with the CA.

At that time, I had little specific knowledge about the ongoing Military Commissions. Prior to holding that meeting, I spoke to attorneys within [OGC about] what Mr. Rishikof and Mr. Brown might want to discuss. I recall that around this time I asked for and received OGC attorneys' view of Mr. Rishikof and Mr. Brown's performance in managing the OMC. Their general view was that Mr. Rishikof and Mr. Brown alternated between not coordinating administrative aspects of their jobs and coordinating in a needlessly disruptive and divisive manner. This caused me to question whether Mr. Rishikof and Mr. Brown were the right individuals to manage . . . OMC.²⁸

The specific performance issues cited by the OGC attorneys included an attempt to use unauthorized air transportation to U.S. Naval Station, Guantanamo Bay (NSGB) and a change to boat transportation at NSGB that had resulted in cancellation of a commissions hearing session.²⁹

Mr. Castle's staff also advised him that (1) the CA was exploring potential non-capital PTAs with the Defense,³⁰ a process that was "well under way;"³¹ (2) it was imperative he not

²⁵ AE 555VV (KSM), Mr. Mohammad's Closing Argument Memorialized for AE 555P (GOV), AE 555R (AAA), and AE 555CC (AAA), filed 27 September 2018, p. 15. In his recent supplement, Mr. Mohammad cites to a prior proffer of this fact made on the record and, in light of the Government's contesting of that proffer, argues that the testimony of Mr. Rishikof is necessary to establish it. AE 555CC (KSM Sup), pp. 1-2. Accepting that proffered fact as true, however, will not change the decision the Commission renders here. Accordingly, the Commission has entered a finding of fact consistent with the Defense proffer, and finds Mr. Rishikof's testimony in that regard unnecessary.

²⁶ Castle Declaration para. 3; Transcript 20902, 21131, 21137. He remained AGC until August 2018, after which he continued to serve as DoD PDGC. Transcript 21131.

²⁷ Transcript 21170-74.

²⁸ Castle Declaration, para. 10.

²⁹ Transcript 21175-76.

³⁰ That is, "agreements to take the death penalty off the table in exchange for a guilty plea and life in prison." Transcript 21335.

³¹ Transcript 21174, 21360.

substantively discuss or attempt to influence those negotiations in any way;³² and (3) the Defense had indicated they would not agree to any PTA unless the CA first obtained concurrence from the Department of Justice (DOJ).³³

h. The requested meeting with Mr. Rishikof was held sometime in late September or early October 2017.³⁴ During that meeting, AGC Castle shut down any substantive discussion of PTAs in order to avoid UI issues: “[A]nytime [Mr. Rishikof] would try and bring up anything . . . to do with plea agreements, I . . . literally would physically wave him off. I mean, I was literally moving my arms back and forth saying, ‘That is not my business. That is . . . what you do. I don’t have any role in that.’”³⁵

i. On 29 September 2017, Messrs. Rishikof and Brown met with counsel for Mr. Ali to discuss “possible disposition” of the case, to include potential for a PTA.³⁶

³² Transcript 21174 (“[My staff] explained to me what the [CA] was, and they explained . . . Mr. Rishikof was actively exploring the possibility of [PTAs] . . . and they also explained to me the concept of [UI] and how it was absolutely essential that I not discuss . . . plea agreements with him at all.” *Id.*); Transcript 21301 (AG Castle testifying that “my staff was very . . . concerned about me saying anything or doing anything that would have to do with a UI,” and that “I was not supposed to say anything that could be construed one way or the other as supporting or not supporting” PTA negotiations. *Id.*)

³³ Transcript 21302, 21306, 21345, 21360-61, 21368. The Commission notes that, in his supplement to AE 555CC, Mr. Mohammad proffered (and cited to prior proffers made by him on the record) that (1) he “caused a confidential . . . proposed PTA . . . to be served on Mr. Rishikof on August 15, 2017, and (2) that, while that document “did not require that the Attorney General sign the document,” it did “require that the [CA] *agree that Mr. Mohammad would not be prosecuted elsewhere.*” AE 555CC (KSM Sup), pp. 1, 5-6 (emphasis added). Even assuming those proffers to be true, they do not materially contradict AGC Castle’s testimony that he and other OGC attorneys were advised (and in fact believed) that Defense Counsel in this case would not accept a PTA absent some formal affirmation that DOJ would not prosecute. Accordingly, the Commission is not persuaded that Mr. Rishikof’s testimony is needed to resolve any perceived inconsistency between these proffers and AGC Castle’s testimony.

³⁴ Transcript 21170, 21179-80. Sometime in the fall of 2017, AGC Castle’s staff also arranged a brief introductory meeting between him and the Chief Prosecutor. Transcript 21325-26. AGC Castle ultimately met with the Chief Prosecutor “a couple of times,” and could not recall details of what was discussed, though the focus was apparently on a military commissions case other than this one. Transcript 21356-60. AGC Castle did not meet with the Chief Defense Counsel. Transcript 21360.

³⁵ Transcript 21301.

³⁶ AE 555BB (KSM AAA), pp. 29-30; AE 555CC (AAA), Attach. B, pp. 5, 10.

j. In early- to mid-October 2017, Attorney General (AG) Jeff Sessions called SecDef Mattis's office to express his position regarding the conclusion of PTAs in this case.³⁷ Secretary Mattis was called out of a meeting with high-level DoD officials (including AGC Castle) to take AG Sessions's call.³⁸ Shortly after, AGC Castle was called out to join Secretary Mattis.³⁹ AGC Castle did not know why Secretary Mattis had been called out.⁴⁰ After AGC Castle arrived in Secretary Mattis's office, the AG was connected via speakerphone.⁴¹ The SecDef had difficulty determining the nature of the AG's concerns.⁴² AG Sessions stated he wanted "no deal."⁴³ Secretary Mattis asked AGC Castle, "What is [AG Sessions] talking about?"⁴⁴ AGC Castle replied that he "didn't entirely understand what was going on."⁴⁵ However, certain at least that DoD had concluded no recent agreements that would substantially involve the AG, AGC Castle confirmed to Secretary Mattis that there was "no deal."⁴⁶ The call was very brief—about 3 or 4 minutes⁴⁷—after which the SecDef and AGC Castle returned to the original meeting.⁴⁸ They did not substantively discuss the AG's call again.⁴⁹ Though AGC Castle gleaned the AG's call was in some way related to terrorism,⁵⁰ the specific source of his consternation was sufficiently unclear that AGC Castle did not immediately understand the "deal" referred to was potential

³⁷ AE 555BB (KSM AAA), pp. 7, 31; AE 555EE (GOV), p. 7; AE 555UU (AAA), pp. 4-5, 12; AE 555WW (GOV), Government Written Memorialization of Its Intended Oral Argument, filed 27 September 2018, p. 19; AE 555ZZ (KSM), Mr. Mohammad's Response to AE 555WW (GOV) Government Written Memorialization of Its Intended Oral Argument, filed 11 October 2018, p. 3; Transcript 20803-20806, 21186-88. Secretary Mattis was SecDef throughout the course of events at issue here. Mattis Declaration para. 3; fn 2, *supra*.

³⁸ Transcript 21186-87.

³⁹ Transcript 21186-88.

⁴⁰ Transcript 21187.

⁴¹ Transcript 21315-17, 21362.

⁴² Transcript 21190.

⁴³ Transcript 21188, 21317, 21331-32, 21363.

⁴⁴ Transcript 21190, 21331.

⁴⁵ Transcript 21190.

⁴⁶ Transcript 21191-93, 21318-20, 21331-32, 21364.

⁴⁷ Transcript 21192, 21318, 21364.

⁴⁸ Transcript 21332.

⁴⁹ Transcript 21333. Secretary Mattis never communicated with Mr. Rishikof or Mr. Brown directly regarding this, or any other, matter. Rishikof & Brown Declaration 1, para. 4.

⁵⁰ Transcript 21317-18.

PTAs in this case.⁵¹ AGC Castle did not suspect this until after he returned to his office and discussed the matter with other OGC attorneys.⁵² He subsequently directed his staff to arrange a meeting with Mr. Rishikof (described in more detail below), at which he would discuss the importance of coordination within the department, but not the substance of any PTAs.⁵³

k. On or about 16 October 2017, AGC Castle and Deputy General Counsel-Legal Counsel (DGC (LC)) Robert Easton met with Messrs. Rishikof and Brown.⁵⁴ They informed Messrs. Rishikof and Brown of the call by AG Sessions to SecDef Mattis⁵⁵ and expressed concern⁵⁶ that OGC had not been informed of the CA's contacting DOJ to discuss pleas.⁵⁷ Messrs. Rishikof and Brown advised AGC Castle that they had attempted to brief him on prior occasions regarding their activities, but had been ignored.⁵⁸ AGC Castle repeatedly asked Mr. Rishikof, "Who authorized you to go over and speak to [DOJ]?"⁵⁹ Mr. Rishikof responded that DepSecDef Shanahan had authorized the contact.⁶⁰ AGC Castle stressed that "all of our ships have to be heading in [*sic*] the same place at the same time," by which he meant "we need to be properly coordinating what's going on."⁶¹ When Mr. Rishikof attempted to substantively discuss potential PTAs at the 16 October meeting, however, AGC Castle changed the subject to

⁵¹ Transcript 21191-92, 21319-20, 21364. During his testimony, AGC Castle stressed that, given the breadth of his portfolio, a "deal" between the DoD and DOJ could mean any number of things. Transcript 21191, 21320.

⁵² Transcript 21193-97, 21334-35, 21365.

⁵³ Transcript 21199-21200.

⁵⁴ AE 555BB (KSM AAA), pp. 7, 31; AE 555CC (AAA), Attach. B, pp. 5, 10, 15; AE 555UU (AAA), p. 5.

⁵⁵ AE 555BB (KSM AAA), pp. 7, 31; AE 555CC (AAA), Attach. B, p. 5, 10, 15; Transcript 20804, 21198.

⁵⁶ Apparently this concern was of a sufficient degree that Messrs. Rishikof and Brown perceived AGC Castle as being "clearly agitated" or "angry" about the incident. AE 555CC (AAA), Attach. B, pp. 5, 15; Transcript 20804.

⁵⁷ Transcript 20805-06, 20897-98, 20903; AE 555CC (AAA), Attach. B, pp. 1, 5, 11, 15 (anticipating testimony that AGC Castle "said . . . the DOD all needs to move together and the OGC needs to be informed." *Id.*) AGC Castle and Mr. Easton also expressed concern about Mr. Rishikof engaging in uncoordinated direct contact with members of Congress. AE 555CC (AAA), Attach. B, pp. 5, 10.

⁵⁸ Transcript 20805-06.

⁵⁹ Transcript 21199, 21349.

⁶⁰ Transcript 21199.

⁶¹ Transcript 21199-21200.

avoid intruding on the CA's authority (as was his consistent practice in conversations with Mr. Rishikof when the subject arose).⁶²

1. Shortly after the 16 October 2017 meeting, AGC Castle met with DepSecDef Shanahan, and asked whether he had in fact authorized Mr. Rishikof to contact DOJ.⁶³ The DepSecDef stated that he had.⁶⁴ While AGC Castle had begun seriously considering seeking Mr. Rishikof's termination from the CA position due to "improper coordination because of the [AG] phone call," upon learning the DepSecDef had authorized contact with the DOJ, he decided this was not an appropriate basis for termination.⁶⁵ At Mr. Rishikof's request, AGC Castle then arranged for a meeting between Messrs. Rishikof and Brown, the DepSecDef, and himself.⁶⁶

m. At that meeting, which occurred on or about 18 October 2017, Messrs. Rishikof and Brown briefed the DepSecDef and AGC Castle on various Commissions-related issues, to include potential pursuit of PTAs in this case.⁶⁷ Specifically, they briefed on three proposed overall courses of action (COAs) for future management of the military commissions writ large, which were: (1) resolving cases by means of PTA; (2) reorganizing various DoD entities to consolidate commissions-related functions under the authority of the CA; or (3) continuing with the status quo.⁶⁸ Before the meeting, AGC Castle advised DepSecDef Shanahan to be in "receive mode," meaning "to not indicate approval or disapproval of anything that [Mr. Rishikof] had to

⁶² Transcript 20903-04, 21301, 21349-50, 21353, 21371-72. During this meeting, DGC (LC) Easton asserted that OGC "own[s] commissions," a remark he would clarify and apologize for on 27 October 2018 (stating he only meant the OMC structure had been set up by OGC). AE 555BB (KSM AAA), p. 31; AE 555CC (AAA), Attach. B, pp. 5-6, 11, 15-16; Transcript 20806. (AGC Castle remembered that Mr. Easton made the "ownership" remark, but was unable to recall if it was at the 16 December 2017 meeting. Transcript 21200-01. The Commission will assume the Defense assertions in this regard are accurate.) Sometime in October 2017, Easton was replaced as DGC (LC) by Mr. Ryan Newman. AE 555 (AAA 2nd Sup), Attach. B, p. 4; AE 555R (AAA), Attach. B, p. 4.

⁶³ Transcript 21202.

⁶⁴ Transcript 21202.

⁶⁵ Transcript 21202.

⁶⁶ Transcript 21202.

⁶⁷ AE 555P (GOV), Attach. D; AE 555BB (KSM AAA), pp. 33-34; AE 555CC (AAA), Attach. B, p. 6; Transcript 21203.

⁶⁸ Transcript 21203.

say, especially when it came to [PTAs].”⁶⁹ DepSecDef Shanahan followed that advice, saying very little during the meeting.⁷⁰

n. “Sometime before Thanksgiving” of 2017, as part of internal OGC discussions regarding the management of Military Commissions as a whole, AGC Castle again began to consider whether Mr. Rishikof should be terminated.⁷¹ In Mr. Castle’s words, “all of these different . . . concerns . . . were still out there . . . dealing with fast boat [and] other issues. . . . I’m really starting to be concerned that things are not going well. So we then spun up again the possibility of . . . terminating Harvey.”⁷² AGC Castle asked his subordinate counsel to consider the issue of replacing Mr. Rishikof as CA, and the subject was discussed at a number of internal OGC meetings.⁷³

o. On 1 December 2017, Messrs. Rishikof and Brown again met with counsel for Mr. Mohammad to discuss the potential for a PTA.⁷⁴

p. On 12 December 2017, the CA’s office submitted for DepSecDef signature a memorandum, subject: “Oversight and Management of Military Commissions.”⁷⁵ The body of the memo read as follows:

⁶⁹ Transcript 21204.

⁷⁰ Transcript 21204.

⁷¹ Transcript 21207-08.

⁷² Transcript 21206.

⁷³ Transcript 21208-09.

⁷⁴ AE 555BB (KSM AAA), pp. 9, 31.

⁷⁵ AE 555P (GOV), Attach. D. Also on 12 December 2017, OCA returned charges in *U.S. v. Encep Nurmajen, a.k.a. Hambali* (hereinafter, “*U.S. v. Hambali*”), “because the transmittal package lacked the required coordination with [the Office of the Director of National Intelligence (ODNI)] and also included no supporting evidence.” AE 555P (GOV), p. 370 of 425. On 15 December 2017, the Office of the Chief Prosecutor (OCP) asked OCA to dismiss the charges without prejudice in order to allow OCP to re-prefer. AE 555P (GOV), pp. 370-371 of 425. OCP forwarded this second set of charges to OCA for referral on 19 December 2017. AE 555P (GOV), p. 393 of 425. On 21 December 2017, Messrs. Rishikof and Brown met with outgoing DGC (LC) Newman and discussed, *inter alia*, OCA’s anticipated return of the *Hambali* charges to OCP. AE 555CC (AAA), pp. 14, 19, 24 of 33. On 22 December 2017, OCA returned the *Hambali* charges to OCP “because they lacked the required ODNI coordination.” AE 555P (GOV) p. 371 of 425. On 4 January 2018, Messrs. Rishikof and Brown met with (DGC (LC)) Newman and discussed, *inter alia*, the return of the *Hambali* charges. AE 555CC (AAA), pp. 5, 19, 24 of 33.

1. In our prior meeting with you in October 2017, we discussed the three courses of action to address Military Commissions cases at [NSGB]: (1) Continue the status quo at ever-increasing costs presently over \$100M per annum; (2) Consolidate authority for more cohesive operations; (3) *Entertain guilty pleas, speeding resolution of the cases and bringing closure to the victims and families. We have continued to press ahead on COA (3) (and will update you)*, but at this point are recommending you sign the attached memorandum for COA (2), consolidating control over Military Commissions in order to significantly improve the effectiveness of the Commissions mission moving forward. See Tab 1.

2. The attached draft memorandum for your signature at Tab 1 would greatly improve the ability of Military Commissions to carry out its core functions and operate with a unity of effort and authority. This memo would restore the status quo that existed at the outset of the Commissions and is similar to memoranda issued by prior Deputy Secretaries of Defense in May 2014 and May 2008 (see Tab 2). For various reasons, the authorities have eroded over the last sixteen years. The memo for your signature addresses the areas of concern such as lack of coherent C2; growing personnel, transportation, and infrastructure costs; protracted timeline of past and future litigation; an aging and resource-demanding detainee population; ballooning prosecution and defense costs; and national security implications which both slow information flow and increase costs due to spills or unauthorized disclosures of classified information.

3. Also attached is an appendix of substantiating documentation outlining in more detail the various issues and suggestions for improvement. I look forward to discussing this issue with you. My sense is that the sooner the memorandum is executed the better for the process, given the situation we now find ourselves in.⁷⁶

The packet, which was approximately 65 pages long, contained no reference to PTAs in this case beyond the italicized language above (emphasis added by the Commission).⁷⁷ This brief mention of PTAs essentially repeated information the DepSecDef and AGC had already known for some time.⁷⁸ Provided in the packet was a memorandum for DepSecDef signature that, had it been signed, would have had immediate and substantial cross-cutting effects within DoD on supervision, coordination, manpower, resourcing, and funding related to the military

⁷⁶ AE 555P (GOV), Attach. D (emphasis added).

⁷⁷ *Id.*

⁷⁸ The DepSecDef was aware of potential PTAs as of 6 July 2017—over 5 months before the 12 Dec 2017 memorandum was signed. *See* para. 2.d, *supra*. AGC Castle's staff made him aware of potential PTAs in this case virtually on his arrival at DoD OGC—certainly not later than September 2017. *See* para. 2.g, *supra*. Calculating from mid-September 2017, AGC Castle had already known of potential PTAs in this case for nearly three months.

commissions.⁷⁹ No advance copy was provided to DoD OGC.⁸⁰ There is no indication that any substantial, formal coordination with DoD OGC and potentially affected stakeholders had taken place before the memo was submitted for signature.⁸¹ The Office of the DepSecDef returned the

⁷⁹ See AE 555P (GOV), Attach. 's D-G. For example, the proposed DepSecDef memo stated that “[a]ll DoD organizations will provide sufficient manpower and resourcing assistance to the Military Commissions . . . as outlined in the attached document.” *Id.* (emphasis added). The attachment was a table of recommended changes to the DoD military commissions structure writ large. AE 555P (GOV), Attach. D, Tab 3. It expressly purported to make the CA supervisor of OCP; make the CA “sole ‘owner’” of military commissions-related Detainee Affairs, Periodic Review Board, prosecution, information technology, security, and personnel functions; and directed reallocation of considerable DoD funding to military commissions efforts (to include approximately \$27 million in construction). *Id.*; see also Transcript 21244 (AGC Castle’s testimony that the memorandum would have effectuated “a whole series of changes” that amounted to “fundamentally . . . reorganiz[ing]” the OCA and related organizations). At least one longtime OCA senior staff member (the Deputy Chief of Operations) apparently recognized the profound degree of authority the memorandum would have placed under Mr. Rishikof, colloquially referring to the document as the “King Me” memo. Transcript 20813, 72, 83-84.

⁸⁰ Transcript 21246, 21351-52; Castle Declaration para. 11.a.

⁸¹ There were apparently a number of meetings between OCA and OGC in which they discussed the realignment of authorities the 12 December 2017 memo was eventually drafted to effectuate. See AE 555BB (KSM AAA) (asserting “Mr. Rishikof and/or Mr. Brown had no less than twenty-five in-person and electronic meetings with members of OGC between 28 April 2017 and the submission of the memorandum in December 2017,” and that “[m]any of these . . . addressed” the three COAs recited in the memorandum. *Id.* at pp. 32-33); AE 555CC (AAA), Attach. B, pp. 6, 11, 16 (anticipating testimony that Mr. Rishikof discussed the forthcoming memo with DoD OGC personnel in several teleconferences prior to the memorandum’s submission); Transcript 20807, 20909 (Defense investigator relaying statement by Mr. Brown that “The predominant method [OCA used] to keep [OGC] informed . . . was a weekly . . . video teleconference.” *Id.* at 20807); see also Rishikof & Brown Declarations 1 and 2 (describing weekly meetings and status reports). AGC Castle acknowledged in his testimony that Mr. Rishikof “was always talking about” and “advocating for his COAs;” that while he “[didn’t] know the specifics,” there was “constant communication” between OCA and OGC, to include weekly meetings; and that Mr. Rishikof might well have advised AGC Castle at some point that he planned to reduce those COAs to “some sort of written document.” Transcript 21205, 21243-44, 21353. There are also indications that OCA personnel discussed the proposal with at least some non-OGC stakeholders in various calls and meetings. See, e.g., AE 555BB (KSM AAA), pp. 18, 32 (noting Messrs. Rishikof and Brown discussing need for reorganization with former DepSecDef Work); AE 555CC (AAA), Attach. B, p. 12 (anticipating Mr. Brown would testify that “he discussed the changes proposed in the 13 December 2017 memorandum extensively with representatives of affected organizations.” *Id.*). However, it is notable that in the wake of the memorandum’s rejection, an OGC attorney apparently suggested to Mr. Rishikof that he begin having regular monthly meetings with stakeholders from the organizations that would have been affected by the memorandum (AE 555CC (AAA), Attach. B, pp. 7, 17 (anticipated testimony of Mr. Rishikof))—which indicates that such regular broad-based coordination had not been conducted before. Significantly, Messrs. Rishikof and Brown themselves expressly acknowledged they had not formally staffed the document, claiming they viewed it as a mere “vehicle to begin discussions” (despite the profound effects it would have had), which therefore did not require formal staffing. Rishikof & Brown Declaration 2, para. 1.b; fn 79, *supra*. In short, nothing presented materially conflicts with AGC Castle’s declarations that “Mr. Rishikof and Mr. Brown never provided DoD OGC a copy [of the 12 December 2017 memo] in advance of its submission to DepSecDef” and that they “failed to appropriately [*i.e.*, formally] coordinate with any of these potentially impacted entities in advance of submitting the memorandum.” Castle Declaration, para. 11.a-b. During his testimony before the Commission, AGC Castle stressed the significance of this failing, stating unconditionally that he viewed it as a “major process foul.” See fn 187, *infra*.

memorandum unsigned, and advised AGC Castle that the CA “[had] submitted a memorandum . . . directly to the DepSecDef without prior notice to OGC.”⁸²

q. On 15 December 2017, AGC Castle drafted and signed a memorandum to the SecDef, subject: “Plan for the Disposition of Future Unprivileged Enemy Belligerent Cases.”⁸³ The document provided “a four-part plan for current and future legal actions involving unprivileged enemy belligerents.”⁸⁴ The first proposal was to replace the military commissions CA and Legal Advisor,⁸⁵ in order to “enhance the prospect for a cohesive effort for the disposition of pending cases”⁸⁶—a reference to AGC Castle’s concern regarding lack of sufficient coordination by Mr. Rishikof.⁸⁷ The proposal states that the CA “serves at the pleasure of the Secretary and can be removed at any time,” and that the CA’s legal advisor “can be removed . . . by the General Counsel.”⁸⁸ The proposal makes no apparent reference to PTAs.⁸⁹

r. On 4 January 2018, DGC (LC) Newman drafted an action memorandum for consideration by AGC Castle, recommending termination of Mr. Brown and subsequent appointment of Acting Legal Advisors.⁹⁰ The proffered rationale for the action was “[t]o effectuate a more cohesive effort by the [DoD] for the administration of military commissions.”⁹¹

⁸² Transcript 21352; Castle Declaration para. 11; AE 555P (GOV), Attach. D, Tab 1.

⁸³ AE 555DD (GOV), Government Reply to AE 555W (WBA); AE 555X (RBS); AE 555BB (AAA, KSM) Defense Response to Government’s Motion to Reconsider AE 555O, Order, Defense Motion to Compel Discovery Regarding the Firing of the Convening Authority and Legal Advisor, filed 6 August 2018, Attach. L.

⁸⁴ AE 555DD (GOV), Attach. L, p. 1. The copy of this document provided by the Government is heavily redacted, based on a Government assertion that the redacted portions “are not relevant to the Unlawful Influence allegation in this case.” AE 555DD (GOV), fn 1. The Prosecution was apparently conveying an assertion of privilege made by DoD OGC, as OGC, not the Prosecution, had redacted the document based on grounds of both privilege and relevance. Transcript 21341-43.

⁸⁵ AE 555DD (GOV), Attach. L, pp. 1, 2.

⁸⁶ AE 555DD (GOV), Attach. L, p. 1.

⁸⁷ Transcript 21221.

⁸⁸ AE 555DD (GOV), Attach. L, p. 2.

⁸⁹ During his testimony, Mr. Castle answered in the affirmative when asked if “one of the provisions” of the December 15, 2017 memorandum noted “the Secretar[ial] . . . authority to take away the [PTA] power of the [CA].” Transcript 21365. This appears to have been in error, however, as no such provision is apparent in the document.

⁹⁰ AE 555D (GOV), Attach. C.

⁹¹ *Id.*

The memorandum specified that the Acting Legal Advisors “will inform and coordinate with the [DGC (LC)] on all matters of law and policy that may require the attention of the DoD [GC], except . . . those . . . that impact the Office of the [CDC].”⁹² The document does not mention PTAs.

s. By early January 2018, OGC was actively searching for an interim or successor CA.⁹³ As part of this process, AGC Castle had engaged in at least three preliminary conversations about the role with a potential candidate: RADM James E. McPherson.⁹⁴ In one of these conversations, however, AGC Castle mentioned as a concern the unexpected phone call by AG Sessions to Secretary Mattis.⁹⁵ Concerned RADM McPherson might misconstrue this comment as disagreement with Mr. Rishikof’s pursuit of PTAs (rather than his failure to notify OGC of his engagement with DOJ), AGC Castle ceased considering RADM McPherson as a candidate.⁹⁶ By 12 January 2018, AGC Castle had decided instead to recommend Mr. James M. Coyne as Mr. Rishikof’s successor.⁹⁷

t. On 12 January 2018, AGC Castle drafted an action memorandum for consideration by SecDef Mattis recommending Mr. Rishikof’s removal.⁹⁸ The memorandum recommended the Secretary rescind Mr. Rishikof’s designations as CA and Director, terminate his DoD employment, and designate Mr. Coyne to act in his stead.⁹⁹ The basis cited for the action was

⁹² *Id.*

⁹³ Transcript 21254 (AGC Castle noting that he’d engaged in conversation with at least one potential successor CA prior to 12 January 2018).

⁹⁴ Transcript 21253-54.

⁹⁵ Transcript 21240-43.

⁹⁶ Transcript 21242-43, 21337-39 (AGC Castle’s testimony that “I told [RADM McPherson] . . . why [Mr. Rishikof] was . . . talking to the Department of Justice,” but “shortly thereafter . . . realized . . . that could be misinterpreted as . . . coming down or trying to push the scales . . . one way or the other on PTAs,” such that he determined to “find somebody else.” *Id.* at 21339); AE 555DD (GOV), paras. 3.k-l.

⁹⁷ AE 555DD (GOV), Attach. D.

⁹⁸ *Id.*

⁹⁹ *Id.*

“[t]o effectuate a more cohesive effort by the [DoD] for the administration of military commissions.”¹⁰⁰ The document did not mention PTAs.¹⁰¹ On or about that same day, however, AGC Castle withdrew this memorandum before action.¹⁰² AGC Castle directed the memorandum’s withdrawal because (1) having little or no military justice experience, his understanding of UI was limited, and (2) he “didn’t think the information [he] was getting on the law regarding UIs was complete.”¹⁰³ In order to ensure the legal footing of the proposed termination was sound, AGC Castle “created [a] panel . . . of experts” to reexamine the matter.¹⁰⁴ Two weeks later (26 January 2018), this panel would produce for AGC Castle a memorandum (discussed in greater detail below) advising that termination of Mr. Rishikof was legally supportable.¹⁰⁵ When Mr. Rishikof was ultimately terminated, AGC Castle “completely disregarded” the 12 January 2018 memorandum in recommending that action, and instead, relied solely on the 26 January 2018 “panel of experts” memorandum.¹⁰⁶ Regardless, as noted above, the 12 January 2018 memorandum makes no reference to PTAs.

u. On or about 23 January 2018, Messrs. Rishikof and Brown held a conference call with ADM Kurt W. Tidd, the then-Commander of U.S. Southern Command (CDR, USSOUTHCOM), in which they sought (among other things) more recent imagery of the Expeditionary Legal Center (ELC) at NSGB.¹⁰⁷ The most current imagery then available was 10 years old,¹⁰⁸ and

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² AE 555DD (GOV), p. 11. The Government initially asserted this to be the case “on information and belief.” *Id.* This assertion was later confirmed by AGC Castle, who testified that he “pulled down” the memo for further consideration due to concerns regarding its legal footing. Transcript 21230-36.

¹⁰³ Transcript 21228.

¹⁰⁴ Transcript 21228, 21230-33.

¹⁰⁵ AE 555DD (GOV), Attach. E. This matter is discussed in greater detail below. *See* para. 2.w, *infra*, and accompanying text.

¹⁰⁶ Transcript 21228.

¹⁰⁷ AE 555 (AAA 2nd Sup), p. 10, Attach. B, pp. 1-3, 5; AE 555R (AAA), Attach. B, pp. 1-3, 5; AE 555BB (KSM AAA), pp. 5, 37; AE 555CC (AAA), Attach. B, p. 2; AE 555UU (AAA), p. 12; Transcript 20816-24.

¹⁰⁸ Transcript 20815.

Mr. Rishikof believed having up-to-date imagery would help in his efforts to obtain additional facilities funding.¹⁰⁹ More recent imagery was not forthcoming.¹¹⁰ ADM Tidd neither prohibited Messrs. Rishikof and Brown from continuing to seek updated imagery, nor encouraged them to do so.¹¹¹ At the time of the conference call (and at present), the Regulation for Trial by Military Commission (R.T.M.C.) stated with regard to the CA's responsibilities: "Communications to the Commanders of the Combatant Commands, except in unusual circumstances, shall be transmitted through the Chairman of the Joint Chiefs of Staff."¹¹² There is no indication that OCA personnel coordinated with the Office of the Chairman of the Joint Chiefs of Staff prior to initiating direct contact with CDR, USSOUTHCOM.

v. On or about 24 January 2018, Messrs. Rishikof and Brown held a conference call with Rear ADM (RADM) Kevin Lunday, U.S. Coast Guard (USCG), and requested he obtain updated ELC imagery for them.¹¹³ Mr. Rishikof made no apparent effort to determine whether there were any specific coordination or approval requirements with regard to USSOUTHCOM or CDR, NSGB; rather, he assumed "all relevant coordination [would] be handled by parties with relevant subject matter knowledge."¹¹⁴ RADM Lunday first checked whether existing current imagery of the ELC already existed within USCG and certain other U.S. Government entities; it did not.¹¹⁵ RADM Lunday then reached out to RADM Peter J. Brown, who was at that time the commander of USCG District 7 (the USCG operational subdivision containing NSGB), for assistance.¹¹⁶ On

¹⁰⁹ Transcript 20814.

¹¹⁰ AE 555 (AAA 2nd Sup), p. 10; Rishikof & Brown Declaration 2 para. 1.a; AE 555CC (AAA), Attach. B, p. 2; Transcript 20817.

¹¹¹ AE 555 (AAA 2nd Sup), p. 10; AE 555CC (AAA), Attach. B, p. 2; Transcript 20817-21.

¹¹² R.T.M.C. (2011) para. 2-3.a(16).

¹¹³ AE 555 (AAA 2nd Sup), p. 10; AE 555BB (KSM AAA), p. 5, 37-38, Attach's L-M; AE 555CC (AAA), Attach. B, p. 7; AE 555UU (AAA), pp. 12-14; Rishikof & Brown Declaration 2 para. 1.a; Transcript 20824-31, 20838-52.

¹¹⁴ AE 555CC (AAA), Attach. B, p. 7.

¹¹⁵ Transcript 20840-41.

¹¹⁶ Transcript 20842.

or about 26 January 2018, pursuant to the request made to RADM Lunday, a DoD employee aboard a USCG helicopter photographed the ELC.¹¹⁷ While it remains somewhat unclear from the record whether this action was, in fact, properly authorized,¹¹⁸ any ambiguity regarding this issue is not germane to the Commission’s ultimate analysis.¹¹⁹

w. On 26 January 2018, Mr. Chris Jenks, Special Counsel to the DoD General Counsel,¹²⁰ submitted a memorandum to AGC Castle, subject: “Legal Considerations on Potential Military Commissions Personnel Action.”¹²¹ The most salient parts of the memorandum for purposes of this matter are recited below; a comprehensive summary is not provided.

(i) The memorandum was a report of a group of legal expert consultants assembled at AGC Castle’s request.¹²² The report was “inten[ded] and expect[ed] . . . [to be] a confidential communication made for the purpose of . . . formulat[ing] legal advice.”¹²³

¹¹⁷ AE 555 (AAA 2nd Sup), p. 10; AE 555BB (KSM AAA), pp. 5, 38-40; Attach’s L-M; AE 555UU (AAA), pp. 12-14; Transcript 20824-31, 20838-52.

¹¹⁸ A Defense investigator providing a proffer of expected testimony for the Defense stated that: (a) RADM Lunday and the then-Chief of Incident Management for USCG District 7 told him the USCG had authority to conduct the flight and no USSOUTHCOM policies had been violated; (b) the then-commander of JTF-GTMO (RADM Edward Cashman) said he had been unaware of the overflight and that USSOUTHCOM would have had to authorize it; and (c) the CA’s Office apparently coordinated the action with OMC-South Security personnel and JTF-GTMO Public Affairs (who RADM Cashman acknowledged had some role in approving photography of NSGB facilities). Transcript 20826-28, 20841-42, 20844-46, 20850-52. The investigator’s notes (which were received as an exhibit during his testimony) indicate that on 25 January 2018 the Naval Station Guantanamo Bay (NAVSTA GTMO) Public Affairs Officer (PAO) notified a number of people—including a Washington Headquarters Service security representative and two USSOUTHCOM PAO personnel—of the overflight. AE 555SS (WBA), In-Court Submission (Defense Investigator’s Notes), filed 12 September 2018, p. 325 of 341. It is not clear, however, whether any of these USSOUTHCOM personnel could authorize the overflight or aerial photography of the ELC, or whether they obtained or arranged such authorization. Neither Mr. Rishikof nor Mr. Brown themselves received any complaints following the 26 January 2018 overflight. Rishikof & Brown Declaration 2, para 1.a.

¹¹⁹ See para. 5.g, *infra*.

¹²⁰ The “Special Counsel to the DoD General Counsel” is a law professor hired annually by DoD OGC as a special assistant to the GC. Transcript 21172.

¹²¹ AE 555DD (GOV), Attach. E.

¹²² AE 555DD (GOV), Attach. E, para. 1.

¹²³ AE 555DD (GOV), Attach. E, para. 1.

It provided (1) advice as to how to replace Mr. Rishikof while minimizing legal and public relations risk, and (2) an assessment of associated legal risks.¹²⁴ The report recognized that the primary potential risk of this action was “subsequent allegation of [UI],” because “there are indications [the CA] may entertain a [PTA] if offered by an accused.”¹²⁵

(ii) The report also (a) noted Mr. Rishikof had “displayed questionable judgment . . . temperament and . . . decision making” from the beginning of his tenure;¹²⁶ (b) noted AGC Castle “spoke with the CA on several occasions but did not discuss PTAs;”¹²⁷ (c) recognized the CA’s independent authority to conclude PTAs absent Secretarial withholding;¹²⁸ (d) cited failure to provide notice of engagement with DOJ, the 12 December 2017 memo, the ELC imagery request and several other instances of poorly-coordinated actions as reasons justifying the CA’s removal;¹²⁹ and (e) noted that a potential replacement CA had been dropped from consideration specifically due to concern that a conversation with AGC Castle regarding the AG Sessions phone call might be interpreted as asserting a restriction on CA authority to enter PTAs.¹³⁰

(iii) Ultimately, the report concluded that “you may appropriately recommend that the Secretary rescind Mr. Rishikoff’s [*sic*] designation . . . and designate someone else.”¹³¹ The report also cautioned, “in order to minimize . . . risk of misperceptions . . . you should . . . clarify[] to the Secretary the factors you did and did not consider . . . and . . . advise the Secretary [of] factors [he] should and should not consider.”¹³² The memo also recommended AGC Castle

¹²⁴ AE 555DD (GOV), Attach. E, para. 1.

¹²⁵ AE 555DD (GOV), Attach. E., para. 2.

¹²⁶ AE 555DD (GOV), Attach. E, para. 3.e.

¹²⁷ AE 555DD (GOV), Attach. E, para. 3.g.

¹²⁸ AE 555DD (GOV), Attach. E, para. 3.g.

¹²⁹ AE 555DD (GOV), Attach. E, paras. 3.i, 3.j(1), (3).

¹³⁰ AE 555DD (GOV), Attach. E, paras. 3.k-l. This refers to AGC Castle’s conversations with RADM McPherson, which are the subject of separate findings, above. *See* para. 2.s, *supra*.

¹³¹ AE 555DD (GOV), Attach. E, para. 2.

¹³² AE 555DD (GOV), Attach. E., para. 2.

“[c]ontinue the approach of not saying anything to [potential successor CAs] about the potential performance of judicial or quasi-judicial actions as Acting CA.”¹³³

x. On or about 2 February 2018, AGC Castle briefed DepSecDef Shanahan and the Chief of Staff (CoS) regarding his intent to (a) seek removal of the CA from SecDef, and (b) terminate Mr. Brown’s appointment as Legal Advisor.¹³⁴ In a supporting memorandum to the DepSecDef, AGC Castle cited a litany of badly-coordinated actions by the CA, including the 12 December 2017 memorandum and the ELC imagery request.¹³⁵ He primarily referenced those events in his verbal briefing to the DepSecDef and CoS.¹³⁶ In the memorandum, AGC Castle recommended Mr. Rishikof be removed “because of his escalating pattern of either not properly coordinating actions or coordinating in a manner that is needlessly disruptive,” and remarked that “[i]f we don’t replace [him], it is not a question of if he will do something that jeopardizes the conduct of the military commissions, but when.”¹³⁷ By this, AGC Castle meant that Mr. Rishikof “was a loose cannon[,]that we did not know what he was going to do, and that . . . he was not properly coordinating.”¹³⁸

y. Shortly after briefing the DepSecDef and CoS, AGC Castle submitted to the DoD Executive Secretariat an action memorandum for Secretary Mattis’s consideration,¹³⁹ subject: “Removal of Mr. Harvey Rishikof as Convening Authority for Military Commission and Designation of an Acting Convening Authority.”¹⁴⁰ AGC Castle recommended this action “[t]o

¹³³ AE 555DD (GOV), Attach. E., para. 8.a.

¹³⁴ AE 555DD (GOV), Attach. F; Transcript 21272-74.

¹³⁵ AE 555DD (GOV), Attach. G.

¹³⁶ Transcript 21276-78. AGC Castle did not have personal knowledge of the ELC imagery request and its circumstances, but relied on the reports of subordinate senior counsel regarding CAO activities. Transcript 21290-95.

¹³⁷ AE 555DD (GOV), Attach. G.

¹³⁸ Transcript 21275.

¹³⁹ AE 555DD (GOV), Attach. G; Castle Declaration para. 3; Transcript 21281.

¹⁴⁰ AE 555P (GOV), Attach. K.

effectuate a more cohesive effort by the [DoD] for the administration of military commissions.”¹⁴¹ AGC Castle noted that, in making this recommendation, he considered Mr. Rishikof’s “professional judgment, temperament and decision-making,” but “not . . . his performance of any judicial or quasi-judicial actions.”¹⁴² In the memorandum, AGC Castle advised SecDef Mattis to do the same in deciding whether to follow that recommendation.¹⁴³ In accordance with DoD staffing procedures, the action memo was submitted for the SecDef’s signature through the Executive Secretariat, and the DepSecDef and CoS (with the benefit of AGC Castle’s earlier input) briefed Secretary Mattis and obtained his decision.¹⁴⁴ AGC Castle did not, to his recollection, personally brief the SecDef on the matter.¹⁴⁵

z. On 3 February 2018, SecDef Mattis signed memoranda removing Mr. Rishikof’s designations and replacing him with Mr. Coyne as Acting CA and Director, OCA, pending designation of a new CA.¹⁴⁶ In doing so, Secretary Mattis relied on the supporting information and advice provided by AGC Castle, as conveyed by the DepSecDef and Chief of Staff.¹⁴⁷ On 5 February 2018, AGC Castle signed the memo terminating Mr. Brown’s employment and appointment as CA’s Legal Advisor.¹⁴⁸

aa. On 5 February 2018, Messrs. Rishikof and Brown were notified of their dismissal by AGC Castle.¹⁴⁹ The notifications did not list any reasons for the terminations, nor were any

¹⁴¹ *Id.*

¹⁴² AE 555DD (GOV), Attach. G.

¹⁴³ *Id.*

¹⁴⁴ Transcript 21281.

¹⁴⁵ Transcript 21281, 21287.

¹⁴⁶ AE 555DD (GOV), p. 77-78, 92 of 117; Castle Declaration para. 3.

¹⁴⁷ Mattis Declaration para. 5-6; AE 555P (GOV), Attach. K; Transcript 21281.

¹⁴⁸ AE 555DD (GOV), p. 94 of 117. Secretary Mattis had no involvement in Mr. Brown’s termination. Mattis Declaration para. 9.

¹⁴⁹ Rishikof & Brown Declaration 1, p. 1.

recited by AGC Castle.¹⁵⁰ On the same day, Mr. Mark W. Toole was appointed acting Legal Advisor for this case.¹⁵¹

bb. There is no indication that any person in authority over either Mr. Rishikof or Mr. Brown at any point throughout their tenure discouraged them from exploring potential PTAs with Defense Counsel in this case.¹⁵²

cc. On 6 August 2018, Mr. Coyne in a sworn declaration stated:

I have had no discussions with anyone, to include personnel from the DoD Office of the General Counsel (to include the former Acting General Counsel, William Castle), the Office of Secretary of Defense (to include the Secretary of Defense), the Office of the Deputy Secretary of Defense (to include the Deputy Secretary of Defense), or personnel from the Executive Branch officials outside of DoD (to include the Attorney General of the United States), regarding the topic of entering into pre-trial agreements in any present or future Military Commission case, to include *United States v. Mohammad, et al.* When I assumed my current duties, I had no awareness of whether there had been any consideration by my predecessor of plea agreements in *United States v. Mohammad, et al.*, or any other active military commission case prior to my appointment.¹⁵³

The parties have neither asserted nor presented evidence that counsel for the Accused have approached OCA regarding potential PTAs since Messrs. Rishikof's and Brown's termination.

¹⁵⁰ AE 555DD (GOV), pp. 77, 94 of 117; Rishikof & Brown Declarations 1 and 2.

¹⁵¹ AE 555DD (GOV), p. 47 of 117.

¹⁵² See Rishikof & Brown Declaration 1 para. 2, 7 (Speculating that a long list of actions they undertook as CA and Legal Advisor, to include guilty pleas, might have been the motivation for their firing, but acknowledging that “[t]here was never any attempt made at any time to approach us about any issue concerning out duty performance during our tenure,” and that “[i]t is unknown to us if [these actions] played a role in our removal”); Rishikof & Brown Declaration 2 (stating nothing that contradicts the language quoted above); Transcript 21349 (AGC Castle noting his reluctance to “have much contact” with the CA about issues, due to concerns about UI).

¹⁵³ AE 555DD (GOV), Attach. M, para. 2. The Commission takes notice of the facts that (1) Mr. Coyne retired from his position as General Counsel for the Defense Logistics Agency (DLA) in mid-August 2018, and (2) on 9 August 2018 was replaced as CA / Director, OCA by his successor at DLA, Ms. Melinda L. Perritano. Chris Erbe, *DLA General Counsel Coyne retires after 38 years with DoD*, <http://www.dla.mil/AboutDLA/News/NewsArticleView/Article/1601330/dla-general-counsel-coyne-retires-after-38-years-with-dod/> (14 August 2018); SecDef Memorandum, Subj: Removal of Designation as Convening Authority for Military Commissions, dated 9 August 2018 (removing Mr. Coyne's designations); SecDef Memorandum, Subj: Designation of Melinda L. Perritano as Director of the Office of the Convening Authority for Military Commissions, dated 9 August 2018; SecDef Memorandum, Subj: Designation of Melinda L. Perritano as Convening Authority for Military Commissions, dated 9 August 2018.

dd. On 11 and 12 September 2018, Lieutenant Douglas R. Newman, U.S. Navy, an investigator supporting Mr. Ali’s Defense Team, testified before the Commission regarding the anticipated testimony of persons he had interviewed.¹⁵⁴ Based on his demeanor and the manner and content of his testimony, the Commission found this witness to be highly credible.

ee. On 13 November 2018, AGC Castle testified before the Commission.¹⁵⁵ Based on his demeanor and the manner and content of his testimony, the Commission found this witness to be highly credible. AGC Castle expressly reaffirmed under oath the statement made in his 29 January 2018 memorandum to Secretary Mattis that, in advising Mr. Rishikof’s removal, he “considered Mr. Rishikof’s professional judgment, temperament, and decision-making. . . . not . . . his performance of any judicial or quasi-judicial actions.”¹⁵⁶

3. Law.

a. **Burden of Proof.** Generally, a party moving the Commission for relief bears the burden of proving any prerequisite facts by a preponderance.¹⁵⁷ This applies to all motions addressed by this ruling, save for the motion to dismiss based on UI. The burden for that motion is described in the discussion of law regarding UI, below.

b. **Reconsideration.** The Commission may reconsider any ruling prior to authentication of the record of trial, except the equivalent of a finding of not guilty.¹⁵⁸ Either party may move for reconsideration, but grant of the request is in the Military Judge's discretion. Generally, reconsideration should be based on a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed. Reconsideration may also be appropriate to

¹⁵⁴ Transcript 20768-20956.

¹⁵⁵ Transcript 21128-21377.

¹⁵⁶ Transcript 21376-77.

¹⁵⁷ R.M.C. 905(c)(1)-(2).

¹⁵⁸ R.M.C. 905(f).

correct a clear error or prevent manifest injustice.¹⁵⁹ Motions for reconsideration are not appropriate to raise arguments that could have been, but were not, raised previously and arguments the Commission has previously rejected.¹⁶⁰ Nor are motions for reconsideration appropriate for the proffer of evidence available when the original motion was filed, but, for unexplained reasons, not proffered at that time.¹⁶¹

c. Unlawful Influence.

(i) **UI Generally.** UI is prohibited by section 949b of the Military Commissions Act of 2009 (M.C.A. 2009), which states in pertinent part: “No person may attempt to coerce or, by any unauthorized means, influence . . . the action of any convening . . . authority with respect to their judicial acts.”¹⁶² This language mirrors that of Article 37 of the Uniform Code of Military Justice (U.C.M.J.), which addresses Unlawful Command Influence (UCI).¹⁶³ UCI is the court-martial equivalent of UI, and is substantially similar (save that UCI can only be committed by persons subject to the U.C.M.J.).¹⁶⁴ Accordingly, military UCI case law (discussed further below) provides a useful framework for analyzing UI claims.¹⁶⁵

¹⁵⁹ See *U.S. v. Libby*, 429 F. Supp. 2d 46 (D.D.C. 2006); *U.S. v. McCallum*, 885 F. Supp. 2d 105 (D.D.C. 2012).

¹⁶⁰ See *U.S. v. Booker*, 613 F. Supp. 2d 32 (D.D. C. 2009); *U.S. v. Bloch*, 794 F. Supp. 2d 15, 19 (D.D.C. 2011).

¹⁶¹ See *Bloch*, 794 F. Supp. 2d at 19-20.

¹⁶² 10 U.S.C. § 949b(a)(2). The statute prohibits a much broader range of UI than that directed at CAs; however, the quoted language is that germane to the issues raised here. The Commission notes that, while the various Defense motions are styled as motions to dismiss based on UI of the CA *and his legal advisor*, neither party has identified any authority specifically extending UI protections to the latter. By contrast, the M.C.A. 2009 elsewhere expressly protects “the military commission [and] any member, military judge, *or counsel thereof*” from UI with regard to their functions, including any findings or sentence adjudged. 10 U.S.C. § 949b(a) (emphasis added). 10 U.S.C. § 949(a)(2)(B), on the other hand, protects “convening, approving, or reviewing authorit[ies],” but makes no reference to their counsel. At present, the Commission assumes (without so deciding) (a) that the M.C.A. 2009’s protection of CAs from UI extends equally to a CA’s primary legal advisor, or at least (b) that evidence of UI directed at the CA’s legal advisor may be evidence of UI directed at the CA.

¹⁶³ Article 37, U.C.M.J. states in pertinent part: “No person subject to [the U.C.M.J.] may attempt to coerce, or, by any unauthorized means, influence the action of . . . any convening . . . authority with respect to his judicial acts.” 10 U.S.C. § 837(a).

¹⁶⁴ *Id.*

¹⁶⁵ See 10 U.S.C. § 948b(c) (stating that military appellate precedent is persuasive authority before M.C.A. 2009 military commissions).

(ii) **UCI Generally.** UCI has long been characterized as “the mortal enemy of military justice,”¹⁶⁶ as it tends to denigrate both critical rights of the accused¹⁶⁷ and public confidence in the military justice system as a whole.¹⁶⁸ There are two overall types of UCI—actual and apparent¹⁶⁹—and the litigation framework for each differs somewhat.

(iii) **Actual UCI.** Actual UCI “occur[s] when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case.”¹⁷⁰ If an accused makes a sufficient initial showing of UCI, the burden shifts to the Government to disprove the UCI, or show it to be harmless.

[T]he military judge engages in a two-stage process to permit the parties to establish the factual predicate related to any issues of unlawful command influence. The military judge initially requires the defense to carry the burden of raising an unlawful command influence issue. This threshold showing must be more than mere “command influence in the air” or speculation. But because of the congressional prohibition against unlawful command influence and its invidious impact on the public perception of a fair trial, we have stated that this threshold is low. The test is “some evidence” of facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings.

If the military judge concludes that the defense has raised the issue of unlawful command influence, the burden shifts to the government to show either that there was no unlawful command influence or that the unlawful command influence did not affect the proceedings. [There are] three options available to the government: The Government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence.¹⁷¹

¹⁶⁶ *U.S. v. Reisbeck*, 77 M.J. 154, 166 (C.A.A.F. 2018) (quoting *U.S. v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)).

¹⁶⁷ *U.S. v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

¹⁶⁸ *U.S. v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006) (noting that “vigilan[ce] in protecting a court-martial from improper influence” was necessary to “foster public confidence in court-martial proceedings.” *Id.* at 20) (quoting *U.S. v. Rosser*, 6 M.J. 267, 273 (C.M.A. 1976)) (internal quotation marks omitted).

¹⁶⁹ “Congress and [the Court of Appeals for the Armed Forces] are concerned not only with eliminating actual [UCI], also . . . even the appearance of [UCI] at courts-martial.” *U.S. v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (quoting *Rosser*, 6 M.J. at 271) (internal quotation marks omitted); see also *U.S. v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017) (“Two types of unlawful command influence can arise in the military justice system: *actual* unlawful command influence and *the appearance of* unlawful command influence.” *Id.* at ___, *6 (slip op.)(emphasis in original)).

¹⁷⁰ *Barry*, 70 M.J. at 77 (quoting *Boyce*, 76 M.J. at 247) (alteration in original).

¹⁷¹ *Harvey*, 64 M.J. at 18 (internal footnotes omitted; some internal quotation marks omitted).

If the Government is unable to do so, the Military Judge must craft an appropriate remedy.¹⁷²

(iv) **Apparent UCI.** The litigation framework for apparent UCI is similar, but there are key differences.

[U]nlike actual unlawful command influence, where prejudice to the accused is required, no such showing is required for a meritorious claim of an appearance of unlawful command influence. . . . [I]t is sufficient for an accused to demonstrate the following factors in support of a claim of an appearance of unlawful command influence: (a) facts, which if true, constitute unlawful command influence; and (b) this unlawful command influence placed an “intolerable strain” on the public’s perception of the military justice system because “an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.”

In light of these two factors, the following process ensues when an appellant asserts there was an appearance of unlawful command influence. The appellant initially must show “some evidence” that unlawful command influence occurred. This burden on the defense is low, but the evidence presented must consist of more than “mere allegation or speculation.”

Once an appellant presents “some evidence” of unlawful command influence, the burden then shifts to the government to rebut the allegation. Specifically, the government bears the burden of proving beyond a reasonable doubt that either the predicate facts proffered by the appellant do not exist, or the facts as presented do not constitute unlawful command influence. If the government meets its burden, the appellant’s claim of unlawful command influence will be deemed to be without merit and no further analysis will be conducted.

If the government does not meet its burden of rebutting the allegation at this initial stage, then the government may next seek to prove beyond a reasonable doubt that the unlawful command influence did not place “an intolerable strain” upon the public’s perception of the military justice system and that “an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.” If the government meets its evidentiary burden at this stage of the analysis, then . . . no relief [based on] appearance of unlawful command influence [is merited].¹⁷³

Again, if the Government is unable to refute the claim, the Military Judge fashions an appropriate remedy.¹⁷⁴

¹⁷² *Id.* at 21 (noting trial judge was responsible to provide an appropriate remedy for actual UI).

¹⁷³ *Boyce*, 76 M.J. at ____, *10-12.

¹⁷⁴ *Lewis*, 63 M.J. at 416.

(v) **Judicial Acts.** As with UCI, UI is actionable only “with respect to [a CA’s] judicial acts.”¹⁷⁵ With regard to the scope of the term “judicial acts,” the Commission finds the following discussion by the Court of Military Appeals (C.M.A.) instructive:

In military law, the convening authority performs a number of judicial functions. Initially, he has been authorized . . . to appoint and convene courts-martial, including the appointment of the judicial officers necessary to the conduct thereof. . . . [to] decide[] whether to refer charges to trial and the grade of courtmartial [*sic*] to which the charges should be referred. Prior to trial, any defense or objection which is capable of determination without trial of the issue may be raised by reference to the convening authority. Subsequent to trial, he is empowered to act on the findings and sentence of the court-martial, and while he may approve only such findings of guilty and the sentence, or such part or amount of the sentence, as he finds correct in law and fact, he may, in the exercise of his discretion, disapprove a finding and sentence for any reason or for no reason.¹⁷⁶

The Commission finds it appropriate to rely on this language as an instructive (though not exhaustive) list of examples of judicial acts in which a CA may engage. Mere administrative, organizational and/or resource management decisions, on the other hand, do not rise to the level of “judicial acts,” even if they may have some measure of practical impact on litigation of a particular case or cases.¹⁷⁷

¹⁷⁵ 10 U.S.C. § 949b(a)(2); 10 U.S.C. § 837(a).

¹⁷⁶ *U.S. v. Nix*, 36 C.M.R. 76, 78-79 (C.M.A. 1965)(internal cites omitted). Note that the C.M.A. also gave the court-martial CA’s grant or denial of search authorizations as an example of a “judicial act.” *Id.* This was not included in the quoted language above, however, as military commission CAs are not empowered to approve searches.

¹⁷⁷ See, e.g., *Ayestas v. Davis*, ___ U.S. ___, 138 S.Ct. 1080 (2018) (noting that “[a]dministering judicial operation[s] requires many ‘decisions’ in the ordinary sense . . . about such things as facilities, personnel, equipment, supplies, and rules of procedure,” and that it would be “absurd to suggest” that every such decision is “made in a judicial capacity.” *Id.* at ___, 1090); see also *U.S. v. Williams*, 28 C.M.R. 789 (1959) (Air Force Board of Review’s act of forwarding a request for a psychiatric examination “as an administrative matter,” where there was “no assignment or issue raised before the Board,” was “not a judicial act” of the board. *Id.* at 792). The Commission expressly declines to adopt the Defense’s proposed *Murray’s Lessee*-based definition of judicial acts (see AE 555J (AAA, KSM), Mr. al Baluchi’s and Mr. Mohammad’s Reply to Government Combined Response, filed 10 April 2018, p. 12 (citing *Den ex dem. Murray v. Hoboken Land & Improvement Co.* (“*Murray’s Lessee*”), 59 U.S. 272 (1856))). The Defense asserts that this case stands for a principle that would require treating as a judicial act any decision of the CA “that involves inquiry into the existence of facts and the application of law thereto.” Transcript 19630. This would essentially rewrite 10 U.S.C. 948b(a)(2) to reach virtually *any* act of the CA, rather than his genuinely *judicial* ones. The Commission declines to find that the statute was intended to be so broad.

d. **Discovery and Witness Production.** With regard to this subject, the Commission adopts and incorporates the discussion of law from its 23 May 2018 Order in this series (AE 555O).¹⁷⁸

4. Analysis: Judicial Acts.

a. Over the course of litigation, the Defense has claimed that (1) a number of decisions involving Messrs. Rishikof and/or Brown were “judicial acts;” (2) their termination was motivated by one or more of those decisions; and (3) their terminations therefore constituted UI. The Commission finds, however, that the Defense has identified here only two matters genuinely qualifying as “judicial acts:” (1) Mr. Rishikof’s discussion of the potential for PTAs in this case; and (2) his refusal to refer charges in *U.S. v Hambali*. In the Commission’s view, the other matters identified by the Defense are ancillary administrative decisions not falling within the ambit of “judicial acts” for UI purposes.

b. Regarding the *Hambali* charges, the Commission finds their rejection, while a judicial act, is not an act *in this case*—and is therefore not an appropriate basis for relief here.¹⁷⁹ The only “judicial act” forming a possible basis for a UI claim in this case is discussion of potential

¹⁷⁸ AE 555O, para. 2.

¹⁷⁹ The Defense asserts the CA’s rejection of the *Hambali* charges is relevant as potential circumstantial evidence of UI, in that it tends to show, *e.g.*, (a) animosity between OCP and Messrs. Rishikof and Brown, and/or (b) a willingness or tendency on the part of senior DoD officials to engage in improper retaliatory behavior. To the extent this may be so, the Commission will give such information the weight and consideration it is due. These considerations do not, however, transform the rejection of the *Hambali* charges into an appropriate independent basis for relief in this case. Furthermore, the Commission notes that, well before the initial return of the *Hambali* charges on 12 December 2017, OGC had been seriously considering Mr. Rishikof’s removal. *See* para. 2.n, *supra* (finding AGC Castle had tasked OGC personnel to look into the possibility, in his words, “before Thanksgiving” of 2017). As early as October 2017, AGC Castle had already expressed serious concerns regarding the CA’s poor coordination. *See* para. 2.k, *supra*. AGC Castle’s 15 December 2017 memo regarding future disposition of commissions cases, signed three days after the *Hambali* charges’ first return, makes no mention of them. AE 555DD (GOV), Attach. L. Similarly, DGC (LC) Newman’s 4 January 2018 action memo concerning removal of Mr. Brown (drafted the same day he met with Messrs. Rishikof and Brown regarding the *Hambali* charges, and only two weeks after the new charges were returned by OCA) makes no mention of *Hambali*, instead repeating the coordination-focused “cohesive effort” language of AGC Castle’s 15 December 2017 memo, and expressly stressing that the CA “will inform and coordinate with” OGC. AE 555DD (GOV), Attach. C. In short, whatever their relevance, there is no indication the *Hambali* charges factored into any decision regarding Messrs. Rishikof and Brown’s termination (or at least nothing amounting to more than speculation).

PTAs. Accordingly, the Commission concludes the Defense could not have met their initial burden of proof with regard to UI unless and until they made a sufficient showing (in light of all available information) that the termination of Mr. Rishikof and/or AGC Castle was, at least in part, due to their discussion of potential PTAs with counsel for the Accused in this case.

5. Analysis: Proof of UI.

a. Having determined that there is only one “judicial act” at issue here (potential PTA discussions), the Commission will next address whether remediable UI associated with this act has been shown. The Defense argues, in essence, that (1) Mr. Rishikof and Mr. Brown were terminated due to their having discussed potential PTAs regarding the Accused in this case, and (2) that the reasons advanced by Secretary Mattis and AGC Castle are pretextual. The evidence presented by the Defense in this regard is largely speculative. Even assuming *arguendo* that the Defense has made its required initial showing of UI, however, the full evidence before the Commission demonstrates beyond reasonable doubt that there was none.

b. Leaving aside the long, complex mesh of crisscrossing meetings, messages, and memoranda that ultimately resulted in the terminations of Messrs. Rishikof and Brown, two critical overarching facts remain: (1) Mr. Castle became aware of the pursuit of pleas in this case virtually upon his arrival at DoD (and his staff even before that);¹⁸⁰ and (2) they could at any time have simply asked the SecDef to limit or withhold the CA’s authority to conclude such agreements.¹⁸¹ Furthermore, DoD OGC was well aware that DOJ did not support the agreements,

¹⁸⁰ See para 2.g, *supra*.

¹⁸¹ R.M.C. 705(a) (“Subject to such limitations as the [SecDef] may prescribe, an accused and the [CA] may enter into a [PTA] in accordance with this rule.” *Id.* (emphasis added); R.T.M.C. para. 12-1. The Defense argues that, despite the language of R.M.C. 705(a) and R.T.M.C. para. 12-1, there is in fact no authority to withhold PTA authority from the CA, because (a) the UI provisions of the M.C.A. 2009 protect the CA’s “judicial acts” from such interference, and (b) R.T.M.C. para. 12-1 reserves PTA decisional authority to “the sole discretion of the [CA] who referred the case to trial.” AE 555BB (KSM AAA), pp. 47-49 of 467. In light of the clear language of R.M.C. 705(a) and R.T.M.C. § 12-1, the Commission finds there is no merit in these arguments. Even assuming *arguendo* that there was, it is clear AGC Castle and his subordinate counsel believed the SecDef had the power to withhold PTA

which made it highly unlikely the Defense would follow through with them (given their negotiating posture).¹⁸²

c. The Defense advances the theory that AGC Castle and other OGC attorneys wished to prevent Messrs. Rishikof and Brown from securing guilty pleas with unacceptable terms, and that to attain this end they had the duo pretextually fired. However, such a scheme would have been wholly unnecessary, given (1) the known and readily-available avenue of having the SecDef partially or entirely withhold the CA's power to enter into PTAs (which would have required action at no higher a level than firing did),¹⁸³ and (2) the strong unlikelihood of any PTA's successful conclusion, given DOJ's clear non-concurrence and the Defense's negotiating posture.¹⁸⁴

d. Given the speculative nature of the Defense's evidence of any such intent, to believe senior DoD officials would willfully violate the law, perjure themselves, and risk potentially upending a historic capital trial in this manner—when (1) a known and completely safe alternate method was readily available, and (2) the Defense's own negotiating posture already rendered the risk of unacceptable PTAs essentially nil—simply beggars credence. Viewed through this lens, the actions of AGC Castle and his associates are entirely consistent with the Government's claimed motivation, specifically: (1) that they sought termination of Messrs. Rishikof and Brown due to duty performance issues having nothing to do with PTA negotiations, while (2) taking careful steps to avoid any actual or apparent UI from arising due to their knowledge that such negotiations were ongoing.

authority. *See, e.g.*, AE 555DD (GOV), Attach. E; Transcript 21267. Accordingly, nothing Defense offers in this regard undercuts the Commission's finding that AGC Castle and his subordinates would have seen no need to pursue a high-risk avenue to prevent PTAs when, in their view, low- or no-risk methods to do so were readily available, and PTAs were highly unlikely in any event.

¹⁸² *See* paras. 2.g, j-k, *supra*.

¹⁸³ R.M.C. 705(a); R.T.M.C. para. 12-1.

¹⁸⁴ *See* paras. 2.g, j-k, *supra*.

e. The Commission is likewise unpersuaded that AG Sessions' displeasure with a proposed PTA spurred Secretary Mattis or AGC Castle to commit UI. The evidence indicates that both were initially caught off guard by AG Sessions's mid-October 2017 phone call—not knowing what the AG was referring to when he said he wanted “no deal.” Even upon learning the call related to pretrial negotiations in this case, neither Secretary Mattis nor AGC Castle gave any indication they were displeased, beyond AGC Castle expressing dissatisfaction at what he perceived as a lack of appropriate coordination. Neither AGC Castle nor any other entity took action after this October 2017 phone call to derail the pretrial negotiations; rather, AGC Castle made overt efforts to keep at arms' length from discussions with the CA on the topic. Finally, any argument that the SecDef, when presented by his senior staff with discrete, specific justifications for Mr. Rishikof's termination that were unrelated to PTAs, instead based his decision on a brief, vague telephone conversation from several months prior, raises no doubt that may be described as “reasonable.”

f. The Commission finds beyond reasonable doubt that, whatever their motivations may have been, AGC Castle and the other OGC personnel who coordinated the firing of Messrs. Rishikof and Brown were not prompted to do so by the potential for conclusion of PTAs in this case; nor did they say or do anything that Messrs. Rishikof and Brown could have misconstrued as discouraging them from pursuing such agreements.¹⁸⁵ The Commission also finds beyond reasonable doubt that SecDef Mattis's 3 February 2018 decision to terminate Mr. Rishikof was

¹⁸⁵ Messrs. Rishikof and Brown themselves had no clear idea as to why they were terminated, and claimed to have received no negative feedback or discouragement whatsoever during their tenure. Rishikof & Brown Declaration 2, para. 1.c. The only contrary indication is a Defense proffer that, if called, Messrs. Rishikof and Brown would essentially confirm Mr. Castle's testimony that, at their 16 October 2018 meeting, he expressed dissatisfaction regarding OCA's failure to coordinate with OGC regarding contact with DOJ. AE 555BB (KSM AAA), pp. 5, 15 (stating that, if called, Messrs. Rishikof and Brown would testify that “Mr. Castle was clearly agitated” about AG Sessions's call, “wanted to know why Mr. Rishikof was coordinating with people . . . in the DOJ” and “said that the DOD all needs to move together and the OGC needs to be informed.” *Id.*). The Defense investigator's testimony was consistent with this proffer. Transcript 20805-06.

based on the rationale presented to him at that time, and not on a brief, vague phone call from AG Sessions that occurred three months before. Furthermore, the Commission finds beyond reasonable doubt that no objective, disinterested observer, fully informed of the relevant facts and circumstances, would harbor any significant doubt about the fairness of these proceedings. Accordingly, neither actual nor apparent UI has been shown.

g. To the extent the Defense contests the facts underlying the incidents relied on by the SecDef and AGC Castle as the bases for termination of Messrs. Rishikof and Brown (*e.g.*, the coordination of Mr. Rishikof's 12 Dec 2017 memo and the ELC imagery request), the Commission finds that, given (1) the evidence that the terminations were not predicated on PTAs; (2) the lack of any other relevant judicial act of the CA on which UI could have been based; and (3) the equivocal (at best) evidence of any impropriety in those asserted bases (which are themselves *non-judicial acts*),¹⁸⁶ to the extent these events may be relevant, they provide no evidence of any pretext that is sufficient to warrant any differing result or further inquiry.¹⁸⁷

¹⁸⁶ See paras. 2.p, u-v, *supra*.

¹⁸⁷ The Commission finds very credible the assertions of AGC Castle that the inadequate coordination of the 12 December 2017 memo was a primary factor motivating the termination of Messrs. Rishikof and Brown. In his testimony before the Commission, Mr. Castle emphatically affirmed his statement that, informal discussion of a potential implementing document notwithstanding, given the need in DoD for thorough advance coordination of significant actions, Mr. Rishikof's failure to provide DoD OGC an advance copy of the 12 December 2017 memorandum and formally staff it with affected stakeholders was "a huge process foul." Transcript 21245-48. Messrs. Rishikof and Brown themselves expressly acknowledged that formal coordination had not occurred, claiming they thought it premature because the memorandum was just "a vehicle to begin discussions." Rishikof & Brown Declaration 2, para. 1.b; *see also* Transcript 20910. This view is neither reasonable nor credible, however, in light of the immediate, profound effects the memorandum would have had, had it been signed. *See* fn 79, *supra*. This also undercuts any assertion this memorandum would have been subject to any invitation by DepSecDef Work for Mr. Rishikof to submit "his views on paths forward in a written document" for which "no formal coordination was expected." *See* para. 2.b, *supra*. The 12 December 2017 memorandum went far beyond merely expressing "views on a path forward"—it would have immediately implemented an aggressive strategy of consolidation of authority and resources under the CA. This is further underscored by the memorandum's rejection. Furthermore, to the extent Mr. Rishikof may have been given such dispensation, AGC Castle was apparently not aware of it. Defense proffers indicate OGC was rebuffed regarding such concerns with statements that DepSecDef was the CA's direct supervisor, not by reference to any special dispensation by the DepSecDef regarding staffing. AE 555CC (AAA), Attach. B, pp. 3, 10, 14, 20. Even senior OCA staff apparently found direct, informal coordination between the CA and DepSecDef highly unusual (*See* Transcript 20815, 20875-77, 20879-82). Even assuming AGC Castle mistakenly believed Messrs. Rishikof and Brown owed OGC greater coordination than DepSecDef Work would have in fact required, any such erroneous belief would still be consistent with his asserted bases for termination. In

h. Based on evidence adduced (a significant portion of which was received after AE 555O, the Commission's interim ruling on discovery), there is no reasonable likelihood further discovery or testimony will produce information relevant and necessary to resolution of this matter. Accordingly, (1) no proper basis for any of the relief requested by the Defense exists; and (2) reconsideration of the Commission's earlier ruling in that regard is appropriate.

6. Ruling.

a. That portion of AE 555P (GOV) previously deferred is now **GRANTED**. The Commission will compel production of neither the CA's monthly status reports nor Mr. Rishikof's testimony.

b. AE 555GG (KSM) is **DENIED**. Resolution of this matter does not require the Commission to make a definitive ruling as to whether the Defense met its initial burden of production, as the evidence in any event demonstrates beyond reasonable doubt that there was no UI.

c. The relief requested in AE 555 (AAA), AE 555 (AAA 2nd Sup), AE 555R (AAA), and AE 555CC (AAA) is **DENIED**.

January 2018, when he sought the CA's termination, AGC Castle would first provide an advisory memorandum to DepSecDef Shanahan in which he listed the 12 December 2017 memo as one supporting reason—undercutting any notion AGC Castle in fact believed the DepSecDef would have been satisfied with the 12 December 2017 memorandum's coordination. AE 555DD (GOV), Attach. F. Regardless, by the time the 12 December 2017 memorandum was submitted, DepSecDef Work had been replaced by DepSecDef Shanahan, rendering Mr. Work's informal views regarding workplace coordination requirements of limited relevance. DepSecDef Shanahan's administrative staff apparently had received no instruction that the CA was empowered to submit memoranda of this nature for his signature without formal, documented staffing through OGC—as they rejected the 12 December 2017 memorandum packet without action, and alerted AGC Castle. Castle Declaration para. 11; AE 555P (GOV), Attach. D, Tab 1; Transcript at p. 21352.

d. All requests for oral argument in this series, to the extent not already granted, are
DENIED.

So **ORDERED** this 10th day of January, 2019.

//s//
K. A. PARRELLA
Colonel, U. S. Marine Corps
Military Judge

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 579L</p> <p>RULING</p> <p>Motion to Dismiss All Charges For Unlawful Influence by Director of Central Intelligence Agency</p> <p>3 December 2018</p>
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1. Procedural Background.

a. On 14 June 2018, Mr. Mohammad filed a motion to dismiss all charges and specifications with prejudice or, in the alternative to remove death as a possible punishment. The motion was based on alleged actual and apparent unlawful influence (UI) arising out of statements made by Ms. Gina Haspel, the current Director of the Central Intelligence Agency (CIA), during her confirmation hearings in May 2018 and a series of tweets by the President of the United States related to those confirmation hearings.¹

b. The Government opposed the motion, arguing the Defense failed to meet its initial burden of raising some evidence of UI.²

c. The Defense replied on 5 July 2018, arguing that even if the comments of Director Haspel and the tweets of the President are found not to constitute actual UI, they “clearly create an appearance of unlawful influence” and should therefore result in corrective action by the Commission.³ Additionally, the Defense posited that the cumulative effect of the Director’s

¹ AE 579 (KSM), Motion to Dismiss all Charges for Unlawful Influence by Director of Central Intelligence Agency, filed 14 June 2018 at 1-2.

² AE 579A (GOV), Government Response to Defense Motion to Dismiss all Charges for Unlawful Influence by Director of Central Intelligence Agency, filed 28 June 2018 at 5.

³ AE 579B (KSM), Mr. Mohammad’s Reply to the Government’s Response to Defense Motion to Dismiss all Charges for Unlawful Influence by Director of Central Intelligence Agency, filed 5 July 2018 at 5.

testimony and Presidential tweets coupled with “years of prejudicial statements made to the public, military members, commission personnel and potential members by government officials” warrants “dismissal of all charges, or in the alternative, removing the death penalty as a potential punishment.”⁴

d. Unclassified oral argument on the base motion was held on 23 July 2018.⁵ After conducting an in camera Military Commission Rule of Evidence (M.C.R.E.) 505(h) hearing on 24 July 2018 to determine the use, relevance, and admissibility of classified information previously noticed by the Defense,⁶ the Commission found the noticed classified information was relevant and decided to hear oral argument regarding the information at a later date.⁷ Although classified oral argument was scheduled for 25 July 2018, it was postponed at the request of the Defense after the Government provided additional classified discovery related to the AE 579 series.

e. Thereafter, the Commission granted a Defense request for leave to file a supplement to the original filing. On 7 September 2018, Mr. Mohammad filed a classified pleading citing to discovery provided by the Government to the Defense regarding Director Haspel to argue that she made changes to classification guidance, which have adversely impacted Defense Counsel’s ability to investigate the case, thereby resulting in “unlawful influence” over the Defense Counsel’s judgment.⁸

⁴ *Id.* at 5-6.

⁵ Unofficial/Unauthenticated Transcript of the *U.S. v. Khalid Shaikh Mohammad, et al*, Motions Hearing, dated 23 July 2018 from 9:07 A.M. to 4:11 P.M. at pp. 19931-19944.

⁶ *See* AE 579D, Ruling, Pursuant to Military Commission Rule of Evidence 505(h) and Rule for Military Commissions 806(b)(2), dated 25 July 2018 at 1.

⁷ *Id.* at 2-3.

⁸ AE 579 (KSM Sup), Supplement to Mr. Mohammad’s Motion to Dismiss all Charges for Unlawful Influence by Director of Central Intelligence Agency, filed 7 September 2018.

f. The Government opposed the supplement, arguing the information contained therein was irrelevant to the instant motion.⁹

g. The Defense reply, citing to *United States v. Barry*,¹⁰ a recently-decided case from the Court of Appeals of the Armed Forces (C.A.A.F.), argued “the professional judgement” of Defense Counsel in this case “has been and continues to be unlawfully influenced” by subordinates of Director Haspel.¹¹

h. Defense Counsel requested further oral argument.¹² The Government opposed the granting of oral argument, averring that it was unnecessary because the facts and legal contentions were adequately presented in the material before the Commission.¹³

i. On 5 November 2018, the Defense filed a motion¹⁴ to compel the production of Director Haspel and “any and all individuals who serve as ‘the original classification authority assigned to provide classification guidance or review any information in this case’” as witnesses on the UI motion.

j. On 12 November 2018, the Commission heard unclassified oral argument on both the AE 579 (KSM) base motion and supplement thereto, as well as AE 579J (KSM), the motion to compel the production of witnesses.¹⁵ Classified oral argument was held on 16 November 2018 in a closed session.

⁹ AE 579G (GOV), Government Response to Supplement to Mr. Mohammad’s Motion to Dismiss all Charges for Unlawful Influence by Director of Central Intelligence Agency, filed 20 September 2018.

¹⁰ 78 M.J. 70 (C.A.A.F. 2018).

¹¹ AE 579H (KSM), Mr. Mohammad’s Reply to AE 579G (GOV) Government Response to Supplement to Mr. Mohammad’s Motion to Dismiss all Charges for Unlawful Influence by Director of Central Intelligence Agency, filed 27 September 2018.

¹² AE 579 (KSM Sup) at 9 and AE 579H (KSM) at 5.

¹³ AE 579G (GOV), at 3.

¹⁴ AE 579J (KSM), Mr. Mohammad’s Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the Question in AE 579 (KSM), filed 5 November 2018.

¹⁵ Unofficial/Unauthenticated Transcript of the *U.S. v. Khalid Shaikh Mohammad, et al.* Motions Hearing, dated 12 November 2018 from 10:48 A.M. to 11:21 A.M. at pp. 21017-21038.

2. Findings of Fact.

a. The Commission accepts the undisputed facts as set forth in subparagraphs (a)-(c) and (e)-(f) of paragraph 5 of AE 579 (KSM).¹⁶ The Commission further accepts the readily verifiable facts alleged in paragraph 4 of AE 579A (GOV) regarding the colloquy between Director Haspel and Senator Richard Burr during her 9 May 2018 confirmation hearing.¹⁷

b. The Commission accepts as fact the information in the discovery provided by the Government to the Defense identified in AE 579 (KSM Sup) regarding Director Haspel.

c. Although the Director of the CIA is an original classification authority (OCA), the Commission accepts the Government assertions that she “is not, nor has she ever been, the original classification authority assigned to provide classification guidance or review any information in this case.”¹⁸

d. Certain members of each of the Defense teams have been granted Top Secret – Special Compartmented Information (TS-SCI) Clearances and access to Special Access Program (SAP) information relevant to the CIA Rendition, Detention, and Interrogation (RDI) Program.

e. The Government has provided the Defense voluminous classified and unclassified discovery related to the Accuseds’ time in the CIA RDI Program. On many occasions, however, the Government invoked the National Security privilege in order to withhold some of the requested information through the process mandated by 10 U.S.C. § 949p-4 and M.C.R.E. 505(f)(2). In most of those instances, after careful review and comparison of the information sought to be withheld with the information proposed to be provided to the Defense, the

¹⁶ AE 579 (KSM) at 2-4.

¹⁷ AE 579A (GOV) at 3-4.

¹⁸ AE 579G (GOV) at 2. *See also* AE 579A (GOV) at 10.

Commission authorized the Government to produce to the Defense various summaries and substitutions of classified information related to the CIA RDI Program.¹⁹

¹⁹ See e.g., AE 542O, Order, Government Motion to Request Substitutions and Other Relief Regarding Classified Continuing and Trial Discovery, dated 21 August 2018; AE 542J, Order, Government Motion to Request Substitutions and Other Relief Regarding Classified Continuing and Trial Discovery, dated 26 July 2018; AE 308RRRR, Order, Government Motion to Request Substitutions and other Relief from Ordered Discovery of Classified Information So As to Comply With Paragraphs 2.c. and 2.h. of AE 397, dated 31 August 2017; AE 308OOOO/AE 497B, Order, Government Motion to Request Substitutions and other Relief from Ordered Discovery of Classified Information So As to Comply With Paragraphs 2.b., 2.c., 2.e., 2.h., and 2.j. of AE 397 and Defense Motion to Compel Production of Durham Investigation Documents, dated 17 July 2017; AE 308MMMM, Order, Government Motion to Request Substitutions and other Relief Regarding Classified Information Responsive to Paragraphs 2.b, c, e, h, and j of the Commission's Ten-Category Construct, dated 13 June 2017; AE 308LLLL, Order, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2.c. of the Commission's Ten-Category Construct, dated 7 June 2017; AE 308III, Order, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2.h. of the Commission's Ten-Category Construct, dated 19 May 2017; AE 308HHHH, Order, Government Amendment to Government Motion to Request Substitutions and other Relief Regarding Classified Information Responsive to Paragraphs 2.d., 2.f., and 2.g. of the Commission's Ten-Category Construct, dated 19 May 2017; AE 308CCCC, Order, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2.h. of the Commissions Ten Category Construct, dated 19 April 2017; AE 308BBBB, Ruling, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2.h. of the Commissions Ten Category Construct, dated 19 April 2017; AE 308AAAA, Order, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2.h of the Commission's Ten-Category Construct, dated 19 April 2017; AE 308VVV, CORRECTED Order, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2.h of the Commission's Ten-Category Construct, dated 6 March 2017; AE 308NNN, Order, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2.h. of the Commission's Ten-Category Construct, dated 18 January 2017; AE 308KKK, Order, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2h of the Commission's Ten-Category Construct, dated 17 January 2017; AE 308JJJ, Order, Government Motion to Request Substitutions and other Relief from Ordered Discovery Of Classified Information Responsive to Paragraphs 13.i. and 13.j. Of the Al Nashiri Ten-Category Construct, dated 17 January 2017; AE 308III, Order, Government Motion to Request Substitutions and other Relief from Ordered Discovery Of Classified Information Responsive to Paragraphs 13.e. Of the Al Nashiri Ten-Category Construct, dated 12 January 2017; AE 308HHH (Corrected Copy), Ruling, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2h of the Commissions Ten Category Construct, dated 12 January 2017; AE 308GGG, Ruling, Government Motion and Memorandum for A Protective Order Pursuant to the Military Commissions Act of 2009, 10 U.S.C § 949-4, § 949-6 and M.C.R.E. 505, dated 12 January 2017; AE 308BBB (Corrected Copy), Ruling, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2h of the Commissions Ten Category Construct, dated 3 January 2017; AE 308AAA (Corrected Copy), Ruling, Government Motion to Request Substitutions And other Relief from Classified Information Responsive to Paragraph 2.h. of the Commissions Ten Category Construct, dated 3 January 2017; AE 308ZZ (Corrected Copy), Ruling, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2h of the Commissions Ten Category Construct, dated 29 December 2016; AE 308V, Order, Government Motion to Request Substitutions and other Relief from Ordered Discovery of Classified Information Responsive to Paragraphs 13.a. and 13.b. of the Al Nashiri Ten-Category Construct, dated 4 August 2016.

3. Law - UI.

a. “No person may attempt to coerce or, by any unauthorized means, influence ... the action of a military commission under this chapter or any member thereof in reaching the findings or sentence in any case.”²⁰ The UI standard set forth in the Military Commissions Act (MCA) mirrors the Unlawful Command Influence (UCI) standard articulated in the Uniform Code of Military Justice (UCMJ)²¹ with the exception that the UCMJ prohibition applies to persons subject to the UCMJ, while the MCA prohibition applies to any person. Notwithstanding this distinction, the decades of military case law applying the UCI standard provide a useful framework for analyzing the present motion.

b. UCI is actionable as either actual or apparent UCI. In order for an accused to prevail on a claim of actual UCI, he or she must meet the burden of demonstrating “facts, which if true, constitute [UCI] and that the alleged [UCI] has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.” A claim of apparent UCI, on the other hand, only requires that the defense show “(a) facts, which if true, constitute unlawful command influence; and (b) this unlawful command influence placed an ‘intolerable strain’ on the public's perception of the military justice system because ‘an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.’”²²

c. In *United States v. Stoneman*, the C.A.A.F. set forth the following analytical framework for resolving claims of actual UCI at trial:

At trial, the initial burden is on the defense to “raise” the issue [of UCI]. The burden of proof is low, but more than mere allegation or speculation. The quantum of evidence required to raise unlawful command influence is “some evidence.”

The defense must show facts that, if true, constitute unlawful command influence, and it must show that the unlawful command influence has a logical connection to

²⁰ 10 U.S.C. § 949b(a)(2).

²¹ 10 U.S.C. § 837.

²² *United States v. Boyce*, 76 M.J. 242, slip op at 9 (C.A.A.F. 2017).

the court-martial in terms of potential to cause unfairness in the proceedings. If the defense shows such facts by “some evidence,” the issue is raised.

Once the issue is raised, the burden shifts to the Government. The Government may show either that there was no unlawful command influence or that any unlawful command influence did not taint the proceedings. If the Government elects to show that there was no unlawful command influence, it may do so either by disproving the predicate facts on which the allegation of unlawful command influence is based, or by persuading the military judge that the facts do not constitute unlawful command influence. The Government also may choose to not disprove the existence of unlawful command influence but to prove that it will not affect the proceedings. Whichever tactic the Government chooses, the quantum of evidence required is proof beyond a reasonable doubt.²³

d. The C.A.A.F.’s analytical framework for resolving apparent UCI is similar, except the Government, if it “does not meet its burden of rebutting the allegation at this initial stage,” must “prove beyond a reasonable doubt” that the alleged apparent UCI did not place “an intolerable strain on the public’s perception of the military justice system” and that “an objective, disinterested observer, fully informed of all the facts and circumstances would not harbor a significant doubt about the fairness of the proceedings.”²⁴

e. Recently, in *United States v. Barry*, the C.A.A.F. held that “unintentional” improper manipulation of the criminal justice process can constitute actual UCI.²⁵ Due to the extraordinary nature of the UCI in *Barry* and because the case was on appeal, the C.A.A.F. held that no other remedy that could “eradicate” the UCI and “ensure the public perception of fairness in the military justice system.” Accordingly, because the error could no longer “be rendered harmless,” the C.A.A.F. found the unintentional UCI warranted the “drastic remedy” of dismissal with prejudice.

²³ *U.S. v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002), affirmed, 61 M.J. 210 (C.A.A.F. 2005), citing *U.S. v. Biagase*, 50 M.J. 143, 150-151 (C.A.A.F. 1999) (internal citations omitted).

²⁴ *Boyce*, slip op at 12.

²⁵ 78 M.J. 70 (C.A.A.F. 2018).

4. Law - Classified Information.

a. "Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information." 10 U.S.C. § 949p-1(a). The military judge, in assessing the accused's discovery of or access to classified information, may authorize the United States to delete or withhold specified items of classified information, and/or substitute a summary for classified information. *See* 10 U.S.C. § 949p-4(b); *see also* M.C.R.E. 505(f)(2)(A).

b. The military judge shall permit the trial counsel to request authorization to delete, withhold, or substitute in the form of an ex parte presentation to the extent necessary to protect classified information. *See* 10 U.S.C. § 949p-4(b). "The military judge shall permit the trial counsel to make a request for an authorization under M.C.R.E. 505(f)(2)(A) in the form of an ex parte presentation to the extent necessary to protect classified information." M.C.R.E. 505(f)(2)(B).

c. The military judge shall grant the request of the trial counsel if the military judge finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information. *See* 10 U.S.C. § 949p-4(b); *see also* M.C.R.E. 505(f)(2)(C).

d. "An order of a military judge authorizing a request of the trial counsel to substitute, summarize, withhold, or prevent access to classified information under this section is not subject to a motion for reconsideration by the accused, if such order was entered pursuant to an ex parte showing under this section." M.C.R.E. 505(f)(3).

5. Law – Witness and Evidence Production.

a. The MCA provides the accused a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. See 10 U.S.C. § 949j. Rule for Military Commissions (R.M.C.) 703, patterned after Rule for Courts-Martial 703, provides that “[e]ach party is entitled to the production of any available witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.” See R.M.C. 703(b)(1); see also R.M.C. 701(c)(1). Testimony is relevant when a “reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence.” M.C.R.E. 401.

b. The Defense bears the burden of showing the relevance and necessity of the witnesses it seeks to compel. R.M.C. 905(c)(1) and (2).

c. A Defense witness will be produced over Government objection if the witness is relevant and necessary for resolution of an issue properly before the Commission. R.M.C. 703(c)(2)(D).

d. The Commission need not take evidence of matters when, assuming the facts the evidence would establish are true, the Commission would not grant relief. *Bonin v. Calderon*, 59 F.3d 815, 838 (9th Cir. 1995) (evidentiary hearing not necessary if even if the facts as alleged are true the movant would not be entitled to relief).

6. Analysis.

a. Actual UI as to Military Judge and Members.

(1) The Defense has failed to meet its initial burden of showing “some evidence” that Director Haspel’s Senate testimony constituted UI. A link between the Director’s comments

and this Commission simply does not exist. Her remarks were made in response to a direct question posed to her during a Senate Confirmation hearing. Testifying as an intelligence officer, she stated conclusions drawn by the intelligence community as to facts which Mr. Mohammad readily acknowledged during a combatant status review tribunal.²⁶ The presumption of innocence is a concept germane to criminal trials, not Congressional testimony.

(2) No evidence exists to suggest that Director Haspel, either intended to, or had the unintentional effect of, influencing any aspect of this Commission or its participants.²⁷ Given the nature and context of her testimony, this Commission does not find that the Director's comments constituted actual UI.²⁸

(3) Further, no evidence supports the existence of any potential for prejudice related to her comments – as is required for actual UI to exist. First, Director Haspel's comments will not impact the military judge's impartiality. Second, this Commission has yet to set a timeline associated with the selection of members and trial. In all likelihood, ample time will elapse between her testimony and trial to eliminate any potential influence on the opinion of the finder of fact. The prospect that this brief testimony will be recalled by a member some months or years hence when a panel is actually seated, and that it will furthermore be given any credence, is beyond speculative. The Director's comments were obviously not aimed at influencing the Commission and, if they had been, their timing and obscurity would certainly have made them ineffective in accomplishing such an aim. Unlike the situation in *United States*

²⁶ AE 579A (GOV), Attach. B.

²⁷ *United States v. Newbold*, 45 MJ 109 (finding no UCI because the commander who made derogatory comments was not a convening authority, did not provide members for the panel, and no allegation that accused was deprived of witnesses).

²⁸ Although the Director could have eliminated even the potential of UI by prefacing her comments with the word "allegedly," the fact that she did not do so is unpersuasive. Likewise, President Trump's tweets relating to the confirmation hearings, issued both before and after the Director's testimony, do not alter this Commission's analysis.

v. *Barry* wherein no remedies were available for the unintentional influence, in the unlikely event a potential member of this Commission does recall either Director Haspel's testimony or the President's tweets relating to that testimony, such a potential unintentional influence can be adequately addressed through *voir dire*.²⁹

b. **Actual UI as to Defense Counsel.** The Defense next argues that Director Haspel's confirmation testimony constitutes an attempt to unlawfully influence Defense Counsel in the exercise of their professional judgment through her role as OCA for certain classified material. The Commission finds this argument to be without merit. First, most of the classification guidance at issue in this case was issued prior to the Director's confirmation. Second, the Commission has accepted the Government proffer that Director Haspel is not the OCA assigned to review any information in this case. Third, the Defense has not presented evidence that the comments of the Director in any way inhibited or negatively affected the Government's discovery practice. Fourth, to the extent Director Haspel oversees classification review in her capacity as the Director of the CIA (as described in footnote 8 of AE 579B (KSM), Director Haspel testified under oath that she would "ensure that the CIA continues to provide appropriate assistance to the Chief Prosecutor."³⁰ Fifth, the fact that information has been classified by an OCA does not, in and of itself, preclude that information from being subject to discovery. Sixth, the Commission, through its detailed involvement in the summary and substitution process is keenly aware of the classified information which the Government seeks to withhold through its invocation of the National Security Privilege and has only authorized summaries or substitutions

²⁹ The Commission previously recognized that there exists the "potential for statements and other sources of public information, made outside the Commission process, to taint the panel." See AE 031BBB, Order, Joint Defense Motion to Dismiss for Unlawful Influence at 17, dated 5 April 2016. Accordingly, the Commission indicated it would "afford the Defense the opportunity to address the need for expanded *voir dire* and liberal challenges when the issue of seating the panel is properly before the Commission" and noted that the "Commission will be continually attentive" throughout the trial "as to any inklings" of UI.

³⁰ AE 579B (KSM) at 3, fn 8.

that provide the Accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information.

c. **Apparent UI.** For the reasons stated above, this Commission also does not find the comments of Director Haspel to constitute apparent UI. Her remarks during the Senate confirmation hearing are sufficiently attenuated to this Commission – both in context and in timing with relation to the eventual trial – such that it does not place an intolerable strain on the public’s perception of either the military commissions system in general or this Commission in particular. Given the nature, context, and timing of the Director’s remarks, an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of this proceeding.

d. **Cumulative Effect of Various Statements.** Because the Defense has failed to show that Director Haspel’s testimony (or the tweets by the President in support of her nomination) amounted to some evidence of UI, it is unnecessary to address the cumulative impact of statements made by various high level government officials at this time. No such statements have influenced the military judge in this case. If, between now and the time of trial, there are further statements made by Government officials that raise concerns of actual or apparent UI on potential members, the Commission will take any necessary corrective action and allow the parties expanded *voir dire* of potential members and liberal challenges when the issue of seating the panel is properly before the Commission.

e. **Defense Motion to Compel Production of the CIA Director and Other Original Classification Authorities.** The Commission does not find the testimony of Director Haspel or other OCAs necessary to resolve the issues raised in AE 579 (KSM) or its supplement. This ruling on the base UI motion renders the Defense motion to compel witnesses moot.

7. Ruling.

- a. The Defense motion in AE 579 (KSM) is **DENIED**.
- b. The Defense motion in AE 579J (KSM) is **DENIED**.

So **ORDERED** this 3rd day of December, 2018.

//s//
K. A. PARRELLA
Colonel, U. S. Marine Corps
Military Judge

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 615B</p> <p>ORDER</p> <p>Expedited Briefing Schedule and Deferral of Ruling on Motion to Suspend Briefing Deadlines</p> <p>11 January 2019</p>
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1. On 9 January 2019, Mr. bin ‘Attash moved the Commission to conduct a thorough inquiry into actual and/or potential attorney conflict of interest based on facts alleged in the motion, and to cancel proceedings pending the outcome of the inquiry.¹ This filing was served on the Defense Teams and the Government Special Trial Counsel (STC), but was not served on the Prosecution.²

2. On 11 January 2019, Mr. Mohammad moved the Commission to suspend all briefing deadlines pending resolution of the issue raised by Mr. bin ‘Attash in AE 615 (WBA).³ This filing was served on the Defense Teams and the Government STC, but was also not served on the Prosecution.⁴

3. Findings.

a. The Commission finds an expedited briefing schedule on the issue raised by Mr. bin ‘Attash in AE 615 (WBA) is in the interest of judicial economy, and that the Government STC is the appropriate counsel to represent the United States for this motion.

¹ AE 615 (WBA), Defense Motion to Conduct Thorough Inquiry into Actual and/or Potential Attorney Conflict of Interest Pursuant to R.M.C. 901 and Holloway v. Arkansas, 435 U.S. 475 (1978) and to Cancel Proceedings Pending Inquiry, filed 9 January 2019.

² See AE 003L (GOV), Special Trial Counsel Detailing Memorandum, filed 28 October 2016.

³ AE 615A (KSM), Motion to Suspend Briefing Deadlines Pending Resolution of AE 615, filed 11 January 2019.

⁴ See AE 003L (GOV), Special Trial Counsel Detailing Memorandum, filed 28 October 2016.

b. The Commission also finds there is no immediate need to suspend the pending filing deadlines in this case or to hear oral argument on Mr. Mohammad's motion.⁵

4. Order.

a. Mr. Mohammad's request for oral argument is **DENIED**.

b. Mr. Mohammad's motion to suspend briefing deadlines pending the resolution of the issue raised in AE 615 (WBA) is **DENIED**.

c. The Government STC response to AE 615 (WBA) is due **No Later Than (NLT)**

17 January 2019.

d. Any Defense reply to the Government response is due **NLT 23 January 2019.**

e. Parties submitting any filings in the AE 615 series shall provide a notice of such filings to the Prosecution.

So **ORDERED** this 11th day of January, 2019.

//s//
K. A. PARRELLA
Colonel, U. S. Marine Corps
Military Judge

⁵ Of note, Mr. Mohammad's most immediate concern was that his reply to AE 555DDD was due 11 January 2019. That reply, however, is rendered moot by the Commission's Ruling in 555EEE issued 10 January 2019.