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1 [The R.M.C. 803 session was called to order at 0930,  
2 15 November 2016.]

3 MJ [Col RUBIN]: The commission is called to order. All  
4 parties are again present with the exception of the Military  
5 Judge, Captain Waits.

6 For the record, the Military Judge is now Colonel  
7 Peter S. Rubin, United States Marine Corps. I will announce  
8 my detail information, legal qualifications and status as to  
9 oath after the counsel announce who is here to represent the  
10 government and Mr. Hadi.

11 Trial Counsel, who is here to represent the  
12 government?

13 TC [CDR SHORT]: Good morning, Your Honor. All members of  
14 the government who were present when the commission recessed  
15 are once again present, with the exception of Assistant Trial  
16 Counsel Major Christie Milton. She has moved on to her next  
17 assignment, and we wish to thank her and provide her sincere  
18 thanks for her service.

19 MJ [Col RUBIN]: Thank you.

20 Trial Counsel, would you please state where these  
21 proceedings are being transmitted to by closed-circuit  
22 television?

23 TC [CDR SHORT]: Yes, sir, Your Honor. Sorry about that.

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1 I would like to state that these proceedings are  
2 being transmitted stateside versus [sic] closed-circuit  
3 television to remote viewing sites at Fort Meade, Maryland,  
4 and Fort Devens, Massachusetts, pursuant to the commission's  
5 order, Appellate Exhibit 005I.

6 MJ [Col RUBIN]: Thank you. Who is here to represent  
7 Mr. Hadi?

8 DC [MR. RUSHFORTH]: Your Honor, all counsel who were  
9 present when the commission last adjourned are present. There  
10 are two additional counsel present, Commander Cooper and  
11 Captain Fischer.

12 MJ [Col RUBIN]: Captain Fischer, Commander Cooper, good  
13 morning. If you could, both of you, please state by whom you  
14 have been detailed, your legal qualifications and status as to  
15 oath and whether you have acted in any disqualifying manner.

16 DDC [CAPT FISCHER]: Yes, Your Honor, I have been detailed  
17 to the military commission by the Chief Defense Counsel in  
18 accordance with R.M.C. 503. I am qualified under R.M.C. 502  
19 and have been previously been sworn in accordance with R.M.C.  
20 807. I have not acted in any manner that might tend to  
21 disqualify me in any manner in this proceeding and my document  
22 detailing me as defense counsel is marked as Appellate Exhibit  
23 007K.

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1 MJ [Col RUBIN]: Captain, I assume you have the necessary  
2 security clearances with the appropriate additional  
3 authorizations to fully represent the accused?

4 DDC [CAPT FISCHER]: That's correct, Your Honor.

5 MJ [Col RUBIN]: Have you met with the accused this  
6 morning and formed an attorney-client relationship?

7 DDC [CAPT FISCHER]: Yes, Your Honor.

8 MJ [Col RUBIN]: Thank you.

9 Commander Cooper.

10 DC [CDR COOPER]: Good morning, Your Honor. I have been  
11 detailed to this military commission by the Chief Defense  
12 Counsel in accordance with R.M.C. 503. I am qualified under  
13 R.C.M. 502 and have previously been sworn in accordance with  
14 807. I have not acted in any manner which might tend to  
15 disqualify me in any proceedings, and the document detailing  
16 me as defense counsel is marked as AE 007J.

17 MJ [Col RUBIN]: Thank you, Commander. The commission is  
18 also in receipt of Appellate Exhibits 0530 and R. Thank you.

19 I have been detailed to this commission by the Chief  
20 Judge of the military commissions trial judiciary pursuant to  
21 Rule for Military Commission 503. I am certified and  
22 qualified in accordance with Articles 26(b) and (c) of the  
23 Uniform Code of Military Justice, as well as Rule for

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1 Court-Martial 502 and 503, and I have previously been sworn  
2 under Article 42(a) of the Uniform Code of Military Justice  
3 and Rule for Military Commissions 807.

4 I am not aware of any grounds for challenge against  
5 me. I do not expect to be called as a witness in this case.  
6 I provided a copy of my biography to the parties, marked as  
7 Appellate Exhibit 010A. At this time I invite voir dire from  
8 counsel from both sides. Trial Counsel?

9 TC [CDR SHORT]: Your Honor, we have no voir dire at this  
10 time, but we would like to reserve that right, subject to the  
11 defense questioning.

12 MJ [Col RUBIN]: Very well. Defense Counsel?

13 DC [MR. RUSHFORTH]: Thank you, Your Honor. I would like  
14 to ask you a few questions about some of your former military  
15 assignments.

16 MJ [Col RUBIN]: Very well.

17 DC [MR. RUSHFORTH]: First, you were assigned, as I  
18 understand it, to the United States Marine Corps Special  
19 Operations Command at Camp Lejeune, North Carolina as a Staff  
20 Judge Advocate from February 2006 until June of 2008. Is that  
21 correct?

22 MJ [Col RUBIN]: That is correct.

23 DC [MR. RUSHFORTH]: In general terms, Judge Rubin --

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1 Judge, I may call you from time to time, based on my  
2 experience in various courtrooms, Judge Rubin and I hope  
3 that's acceptable to you.

4 MJ [Col RUBIN]: That's fine. Thank you for asking.

5 DC [MR. RUSHFORTH]: In general terms, Judge Rubin -- and  
6 if I use the term MARSOC, is that a term that you recognize?

7 MJ [Col RUBIN]: Yes.

8 DC [MR. RUSHFORTH]: In general terms, what was the MARSOC  
9 command mission during your tour?

10 MJ [Col RUBIN]: Yes. MARSOC was stood up in February of  
11 2006. Prior to that I was the Staff Judge Advocate for the  
12 4th Marine Expeditionary Brigade. A number of the staff from  
13 4th MEB transitioned over and helped stand up the new MARSOC  
14 command. As the Staff Judge Advocate, I was the principal  
15 legal advisor to the commanding general. It was General  
16 Hejlik. My duties involved everything from routine  
17 administrative matters, criminal matters, command  
18 investigations, operational matters, and everything in  
19 between.

20 DC [MR. RUSHFORTH]: Was General -- was it General Hejlik?

21 MJ [Col RUBIN]: Yes, Dennis Hejlik.

22 DC [MR. RUSHFORTH]: Was he the general during your entire  
23 tour of duty from 2006 through June of 2008?

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1 MJ [Col RUBIN]: Yes, he was.

2 DC [MR. RUSHFORTH]: You say you were the primary legal  
3 advisor to him. Did you have a staff?

4 MJ [Col RUBIN]: I had a deputy and several enlisted  
5 Marines.

6 DC [MR. RUSHFORTH]: During that period, did you have any  
7 other position other than Staff Judge Advocate within MARSOC?

8 MJ [Col RUBIN]: No.

9 DC [MR. RUSHFORTH]: Approximately how many people were  
10 assigned to MARSOC when you were assigned there in February of  
11 2006?

12 MJ [Col RUBIN]: Hard to tell. We were spread out from  
13 East Coast to West Coast. I would put the number in several  
14 hundreds.

15 DC [MR. RUSHFORTH]: Several hundreds?

16 MJ [Col RUBIN]: Yes.

17 DC [MR. RUSHFORTH]: But the headquarters was at  
18 Camp Lejeune?

19 MJ [Col RUBIN]: Correct.

20 DC [MR. RUSHFORTH]: Were you stationed at Camp Lejeune  
21 during this entire two-year period?

22 MJ [Col RUBIN]: Yes.

23 DC [MR. RUSHFORTH]: And can you in general state the

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1 topics, just generally, on which you advised General Hejlik?

2 MJ [Col RUBIN]: Yes. Again, this was a new command. We  
3 didn't have much structure. I handled everything from routine  
4 command investigations, courts-martial cases, administrative  
5 separations, ethics, fiscal issues, personnel issues, and any  
6 other matters that the general may need legal guidance.

7 DC [MR. RUSHFORTH]: It sounds to me, in our parlance in  
8 the civilian world, that you were basically a general  
9 practitioner covering several areas?

10 MJ [Col RUBIN]: That would be an accurate statement, yes.

11 DC [MR. RUSHFORTH]: How often did you advise the  
12 commander, if that's a question that you understand?

13 MJ [Col RUBIN]: I would probably see the general at least  
14 once a week to provide updates as needed. So approximately  
15 once to twice a week I would have interaction with the  
16 commanding general.

17 DC [MR. RUSHFORTH]: How many judge advocates were  
18 assigned to MARSOC during that two-year period?

19 MJ [Col RUBIN]: I believe it was myself and two others.  
20 I had a deputy. There was also another judge advocate that  
21 was assigned to -- it's called the foreign military training  
22 unit. He was a captain. My deputy was a major. So there  
23 were three of us.

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1 DC [MR. RUSHFORTH]: Did you -- were you the head of that  
2 team, as it were?

3 MJ [Col RUBIN]: Yes, I was.

4 DC [MR. RUSHFORTH]: Did you review their work product?

5 MJ [Col RUBIN]: Certainly my deputy, to a lesser degree,  
6 but oftentimes the attorney at the foreign military training  
7 unit, yes.

8 DC [MR. RUSHFORTH]: What MARSOC deployments occurred  
9 while you were assigned there?

10 MJ [Col RUBIN]: There were several. There was Marine  
11 Special Operation Companies that went to Afghanistan. We had  
12 foreign military training units that went to various  
13 locations. The best that I recall, most were in Africa. I  
14 don't believe we had any units in Iraq, though, at the time.

15 DC [MR. RUSHFORTH]: How many deployments to Afghanistan,  
16 as best as you can recall?

17 MJ [Col RUBIN]: During my time, I'd say probably two to  
18 three companies went to Afghanistan.

19 DC [MR. RUSHFORTH]: And how did you support MARSOC and  
20 its mission during that deployment?

21 MJ [Col RUBIN]: The Special Operations Company?

22 DC [MR. RUSHFORTH]: Yes.

23 MJ [Col RUBIN]: I did not.

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1 DC [MR. RUSHFORTH]: Did you have any responsibilities  
2 regarding the company when it was deployed to Afghanistan?

3 MJ [Col RUBIN]: No.

4 DC [MR. RUSHFORTH]: Were you deployed yourself ever to  
5 Afghanistan?

6 MJ [Col RUBIN]: Yes.

7 DC [MR. RUSHFORTH]: During what periods?

8 MJ [Col RUBIN]: 2011 time frame. For a short period of  
9 time I was a military judge at the time, and I was deployed to  
10 preside over courts-martial cases.

11 DC [MR. RUSHFORTH]: How long were you there in  
12 Afghanistan?

13 MJ [Col RUBIN]: Less than 45 days. I want to say  
14 approximately 40 days. We had several cases pending. Many  
15 resolved themselves either at the time I went to Afghanistan  
16 or shortly after I arrived.

17 DC [MR. RUSHFORTH]: Where were you stationed?

18 MJ [Col RUBIN]: I was at Camp Leatherneck, Helmand  
19 Province. We also did a courts-martial case at Forward  
20 Operating Base Nalay, which was in Sangin District. I was  
21 there for approximately one week.

22 DC [MR. RUSHFORTH]: Did you move about the country at  
23 all?

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1 MJ [Col RUBIN]: Not much. It was Camp Leatherneck,  
2 Sangin District, and then I observed an Afghani National Army  
3 court-martial case. I believe that was at Kandahar. So those  
4 three locations are all that I visited.

5 DC [MR. RUSHFORTH]: Did you ever come under enemy fire?

6 MJ [Col RUBIN]: No.

7 DC [MR. RUSHFORTH]: Did you ever -- you have read the  
8 charge sheet in this case, correct?

9 MJ [Col RUBIN]: Yes.

10 DC [MR. RUSHFORTH]: Did you ever in Afghanistan, while  
11 you were deployed there as courts-martial judge, have occasion  
12 to focus on any issue that is an issue in this charge sheet or  
13 any similar issue?

14 MJ [Col RUBIN]: No.

15 DC [MR. RUSHFORTH]: What were the cases that you have  
16 handled while you were there?

17 MJ [Col RUBIN]: Cases out there were military-related  
18 offenses. The contested case we ultimately litigated involved  
19 a Marine who fell asleep at his post. That was the primary  
20 legal issue in all the cases. Other military offenses, I  
21 recall there was a larceny allegation as well.

22 DC [MR. RUSHFORTH]: These were charges against United  
23 States military personnel?

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1 MJ [Col RUBIN]: Correct, United States Marines.

2 DC [MR. RUSHFORTH]: And the observation that you did was  
3 a charge against an officer of the Afghan Army?

4 MJ [Col RUBIN]: Yes. It was an enlisted member of the  
5 ANA charged with dereliction of duty. He was operating a  
6 vehicle, a death resulted, and he was being prosecuted for  
7 that offense.

8 DC [MR. RUSHFORTH]: While you were assigned back -- I'm  
9 talking now back in the United States. While you were  
10 assigned to MARSOC, did that unit work with or collaborate  
11 with or support other outside organizations within the United  
12 States Government?

13 MJ [Col RUBIN]: Not that I know of.

14 DC [MR. RUSHFORTH]: And what I have in mind there is the  
15 FBI, the CIA?

16 MJ [Col RUBIN]: No.

17 DC [MR. RUSHFORTH]: U.S. intelligence agencies?

18 MJ [Col RUBIN]: No. Again, not that I know of.

19 DC [MR. RUSHFORTH]: U.S. DoD units?

20 MJ [Col RUBIN]: Department of Defense units?

21 DC [MR. RUSHFORTH]: Yes.

22 MJ [Col RUBIN]: Yes, I think they fell under an Army  
23 command.

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1 DC [MR. RUSHFORTH]: Did you work with or collaborate with  
2 any non-U.S. Government organizations?

3 MJ [Col RUBIN]: No.

4 DC [MR. RUSHFORTH]: Did MARSOC ever conduct detain,  
5 capture or kill missions in Afghanistan?

6 MJ [Col RUBIN]: I don't know. I assume yes, but I don't  
7 have any specific recollection now about MARSOC activities in  
8 Afghanistan.

9 DC [MR. RUSHFORTH]: Do you know if there were ever any  
10 MARSOC activities in Pakistan?

11 MJ [Col RUBIN]: I have no knowledge of that, no.

12 DC [MR. RUSHFORTH]: In Iran?

13 MJ [Col RUBIN]: I have no knowledge of that.

14 DC [MR. RUSHFORTH]: In Iraq?

15 MJ [Col RUBIN]: I don't recall if we had any teams in  
16 Iraq. We may have been training for that, but I don't  
17 specifically recall.

18 DC [MR. RUSHFORTH]: In Turkey?

19 MJ [Col RUBIN]: No.

20 DC [MR. RUSHFORTH]: Did MARSOC ever conduct any missions  
21 relating to capture, kill, or search for the following  
22 individuals: Usama bin Laden?

23 MJ [Col RUBIN]: I have no knowledge of that.

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1 DC [MR. RUSHFORTH]: Ayman al-Zawahiri?

2 MJ [Col RUBIN]: I have no knowledge of that.

3 DC [MR. RUSHFORTH]: Mohammed Atef?

4 MJ [Col RUBIN]: Again, no knowledge of that.

5 DC [MR. RUSHFORTH]: Rusman Gunawan, also known as Abd  
6 Al-Hadi or Abdul Hadi?

7 MJ [Col RUBIN]: No knowledge of that.

8 DC [MR. RUSHFORTH]: Did MARSOC conduct any missions  
9 relating to the collection of intelligence in Afghanistan?

10 MJ [Col RUBIN]: I assume yes, but I don't know.

11 DC [MR. RUSHFORTH]: You have no knowledge of it?

12 MJ [Col RUBIN]: I have no knowledge of it.

13 DC [MR. RUSHFORTH]: Is the same true with respect to  
14 Pakistan?

15 MJ [Col RUBIN]: Yes.

16 DC [MR. RUSHFORTH]: Iran?

17 MJ [Col RUBIN]: Yes.

18 DC [MR. RUSHFORTH]: Iraq?

19 MJ [Col RUBIN]: Yes.

20 DC [MR. RUSHFORTH]: Turkey?

21 MJ [Col RUBIN]: Yes.

22 DC [MR. RUSHFORTH]: Did MARSOC conduct any investigations  
23 relating to the collection of evidence in any of those

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1 countries?

2 MJ [Col RUBIN]: I have no knowledge of that.

3 DC [MR. RUSHFORTH]: Did you review intelligence reports  
4 of the Taliban or of al Qaeda fighters in Afghanistan?

5 MJ [Col RUBIN]: No.

6 DC [MR. RUSHFORTH]: Did your duties include advising on  
7 the law of armed conflict?

8 MJ [Col RUBIN]: Yes.

9 DC [MR. RUSHFORTH]: And were you aware of tactics or  
10 strategy of the Taliban or of al Qaeda?

11 MJ [Col RUBIN]: No.

12 DC [MR. RUSHFORTH]: So you did not form an opinion as to  
13 whether those tactics or strategy conformed to or were in  
14 violation of the law of war?

15 MJ [Col RUBIN]: That's correct.

16 DC [MR. RUSHFORTH]: Let me move on to the 4th Marine  
17 Expeditionary Brigade, and I think you referred to that as  
18 MEB?

19 MJ [Col RUBIN]: 4th MEB, correct.

20 DC [MR. RUSHFORTH]: So if I say 4th MEB, obviously you  
21 will know what I mean?

22 MJ [Col RUBIN]: Yes.

23 DC [MR. RUSHFORTH]: In general terms, what was the

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1 command mission during your tour?

2 MJ [Col RUBIN]: The command mission of the 4th MEB was an  
3 anti-terrorism unit focused domestically. Within the 4th MEB,  
4 we had the Marine Security Guard Battalion, these are the  
5 marines at the various embassies. We had CBRNE, which is the  
6 chemical/biological group in Indian Head, Maryland. We had  
7 Marine Security Force Companies stationed in various  
8 locations, and we had an anti-terrorism battalion.

9 DC [MR. RUSHFORTH]: You were there between May 2004 and  
10 February of 2006, if I have that correct?

11 MJ [Col RUBIN]: That's correct.

12 DC [MR. RUSHFORTH]: Did you hold any position during that  
13 period other than Staff Judge Advocate?

14 MJ [Col RUBIN]: No.

15 DC [MR. RUSHFORTH]: And approximately how many people  
16 were assigned to the 4th MEB?

17 MJ [Col RUBIN]: It's hard to say. Again, we had a lot of  
18 different groups, but it would probably be in the low  
19 thousands. A thousand plus, maybe.

20 DC [MR. RUSHFORTH]: Were you the Chief Judge Advocate?

21 MJ [Col RUBIN]: Yes, I was the Staff Judge Advocate.

22 DC [MR. RUSHFORTH]: Staff Judge Advocate. If I sometimes  
23 misstate a term, I am still learning terms.

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1 MJ [Col RUBIN]: That's fine.

2 DC [MR. RUSHFORTH]: And how many people were under your  
3 leadership?

4 MJ [Col RUBIN]: I had a deputy, who was a captain. I had  
5 several enlisted paralegals. There was also a captain, a  
6 lawyer, who worked at Marine Security Guard Battalion. We  
7 consulted on legal issues, but I was not in charge of that  
8 lawyer per se.

9 DC [MR. RUSHFORTH]: Who was the commander at 4th MEB?

10 MJ [Col RUBIN]: Major General O'Dell, and after General  
11 O'Dell left we had a colonel; Colonel Sachleben assumed  
12 command.

13 DC [MR. RUSHFORTH]: Were those the two commanders during  
14 your period?

15 MJ [Col RUBIN]: Yes. We also had General Robeson. I  
16 think General O'Dell, General Robeson, and then Colonel  
17 Sachleben.

18 DC [MR. RUSHFORTH]: On what topics did you advise the  
19 commander during your period?

20 MJ [Col RUBIN]: Similar. Sort of the general counsel. A  
21 lot of command investigations, administrative separations,  
22 courts-martial cases, fiscal issues, ethics, and a variety of  
23 legal issues that would come to the commander's attention

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1 where they needed legal advice.

2 DC [MR. RUSHFORTH]: And you were the primary legal  
3 advisor to the commander?

4 MJ [Col RUBIN]: I was.

5 DC [MR. RUSHFORTH]: Did you review the work product of  
6 those who worked under you?

7 MJ [Col RUBIN]: Yes.

8 DC [MR. RUSHFORTH]: Was 4th MEB a deployable unit?

9 MJ [Col RUBIN]: The headquarters was not. We provided  
10 many, many individuals who were individual augments to other  
11 units that deployed with II MEF. There was also talk of the  
12 MEB headquarters going somewhere. We never did. So we were  
13 essentially a nondeployable command, much like the MARSOC  
14 headquarters was a nondeployable command.

15 DC [MR. RUSHFORTH]: I may have asked you this, Judge.  
16 Where was the command located?

17 MJ [Col RUBIN]: That was also in Camp Lejeune, North  
18 Carolina.

19 DC [MR. RUSHFORTH]: Camp Lejeune. And did the 4th MEB  
20 deploy during your time there?

21 MJ [Col RUBIN]: No, not as a MEB.

22 DC [MR. RUSHFORTH]: But did units of the 4th MEB deploy.

23 MJ [Col RUBIN]: Yes, units did, and a number of

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1 individuals did. For example, my deputy deployed down in  
2 Haiti for a period of time, and Iraq. So individual Marines  
3 augmented units that were deploying, but the 4th MEB as a  
4 Headquarters did not deploy.

5 DC [MR. RUSHFORTH]: And did you have responsibilities in  
6 your capacity as legal advisor to the units when they  
7 deployed?

8 MJ [Col RUBIN]: Yes.

9 DC [MR. RUSHFORTH]: For example, when the unit deployed  
10 to Iraq, did you have responsibility to provide legal advice?

11 MJ [Col RUBIN]: I provided legal assistance, essentially  
12 operational law training prior, rules of armed conflict, rules  
13 of war training to those groups that left. Ultimately when  
14 they went in country they fell under a different Headquarters  
15 and provided additional guidance and advice.

16 So I would provide very basic training to Marines  
17 before they left, and that was the extent.

18 DC [MR. RUSHFORTH]: So you would have sessions where you  
19 would provide them more or less a brief seminar on the law  
20 before they took off?

21 MJ [Col RUBIN]: Yes, rules of engagement, the basics,  
22 yes.

23 DC [MR. RUSHFORTH]: Now, during your time at the

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1 4th MEB -- I am going to ask you a similar question to what I  
2 asked before -- did that unit, did 4th MEB collaborate with  
3 any of the organizations I mentioned before, like the FBI, the  
4 CIA, U.S. intelligence agencies?

5 MJ [Col RUBIN]: No, not that I am aware of.

6 DC [MR. RUSHFORTH]: The same would be true for any  
7 non-U.S. Government agency?

8 MJ [Col RUBIN]: Correct. There may have been some  
9 involvement with Homeland Security. Again, we had a  
10 chemical/biological incident response force. They were up in  
11 Indian Head, Maryland. I am sure they coordinated with  
12 Homeland Security and other local U.S. agencies.

13 DC [MR. RUSHFORTH]: During your time at 4th MEB, did you  
14 ever provide legal advice or have an opportunity to or  
15 occasion -- a necessity of studying legal issues regarding any  
16 issues in the charge sheet in this case or any similar issues?

17 MJ [Col RUBIN]: No.

18 DC [MR. RUSHFORTH]: Did 4th MEB conduct any detain,  
19 capture, or kill missions in any of the following countries:  
20 Afghanistan, Pakistan, Iran, Iraq, or Turkey?

21 MJ [Col RUBIN]: Not that I am aware of.

22 DC [MR. RUSHFORTH]: Did the 4th MEB conduct any missions  
23 related to capture or kill exercises or search for the

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1 following individuals: Usama bin Laden, Ayman al-Zawahiri,  
2 Mohammed Atef, or Rusman Gunawan?

3 MJ [Col RUBIN]: No.

4 DC [MR. RUSHFORTH]: Did you ever in your capacity either  
5 at the 4th MEB or earlier in your capacity -- I'm sorry, later  
6 in your capacity at MARSOC, review intelligence reports of  
7 Taliban or al Qaeda fighters in Afghanistan?

8 MJ [Col RUBIN]: No.

9 DC [MR. RUSHFORTH]: Did your duties include advising on  
10 the law of armed conflict?

11 MJ [Col RUBIN]: Yes.

12 DC [MR. RUSHFORTH]: And can you describe -- strike that.  
13 Well, describe, if you will, Judge, your legal duties  
14 regarding the law of armed conflict.

15 MJ [Col RUBIN]: Basic training to Marines and Sailors  
16 going downrange, basic rules of engagement type training. You  
17 know, hourlong sessions, some slides, some vignettes and  
18 scenarios.

19 DC [MR. RUSHFORTH]: Were you generally aware or  
20 specifically aware of tactics or strategy of al Qaeda or the  
21 Taliban?

22 MJ [Col RUBIN]: No.

23 DC [MR. RUSHFORTH]: Did you ever form an opinion as to

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1 whether anything that the Taliban or al Qaeda was doing on the  
2 battlefield or anywhere else, for that matter, was in  
3 violation of the law of armed conflict?

4 MJ [Col RUBIN]: No.

5 DC [MR. RUSHFORTH]: Judge Rubin, I am going to move on to  
6 asking you some questions about relationships.

7 MJ [Col RUBIN]: Very well.

8 DC [MR. RUSHFORTH]: Do you have a past relationship or  
9 any current relationship with the following members of the  
10 Convening Authority: Major General John Altenburg.

11 MJ [Col RUBIN]: No.

12 DC [MR. RUSHFORTH]: Susan J. Crawford?

13 MJ [Col RUBIN]: No.

14 DC [MR. RUSHFORTH]: Bruce MacDonald?

15 MJ [Col RUBIN]: No.

16 DC [MR. RUSHFORTH]: Paul Sanz, Paul Oostburg Sanz?

17 MJ [Col RUBIN]: No.

18 DC [MR. RUSHFORTH]: Major General Vaughn Ary.

19 MJ [Col RUBIN]: No.

20 DC [MR. RUSHFORTH]: Do you have a past relationship with  
21 or any current relationship with any of the currently detailed  
22 trial counsel?

23 MJ [Col RUBIN]: No.

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1 DC [MR. RUSHFORTH]: Do you have a past relationship with  
2 or any current relationship with Brigadier General Martins?

3 MJ [Col RUBIN]: No.

4 DC [MR. RUSHFORTH]: Do you have a past relationship or  
5 any current relationship with Army Captain Khalil M. Tawil?

6 MJ [Col RUBIN]: No.

7 DC [MR. RUSHFORTH]: Have you ever ruled in any case at  
8 any time or provided legal advice at any time on the  
9 admissibility of evidence derived from or through the use of  
10 torture?

11 MJ [Col RUBIN]: No.

12 DC [MR. RUSHFORTH]: How about any -- the same question  
13 regarding the use of evidence adduced through rough handling?

14 MJ [Col RUBIN]: No.

15 DC [MR. RUSHFORTH]: Or any manhandling of the accused?

16 MJ [Col RUBIN]: No. I am sure in criminal cases we have  
17 had motions to suppress statements, none that I recall  
18 involving sort of physical acts.

19 DC [MR. RUSHFORTH]: Do you recall suppression of -- I'm  
20 sorry, strike that.

21 Do you recall having occasion to focus on legal  
22 issues regarding the admissibility of oppressive interrogation  
23 techniques other than physical acts?

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1 MJ [Col RUBIN]: Yes.

2 DC [MR. RUSHFORTH]: Can you describe that for us, please.

3 MJ [Col RUBIN]: These would be failure to provide rights  
4 advisement, lengthy interrogations, lying by investigators in  
5 order to obtain a confession, those types of issues I have  
6 litigated in my past duties as a military judge.

7 DC [MR. RUSHFORTH]: Can you remember any specifics of  
8 those cases?

9 MJ [Col RUBIN]: Yes, some. Yes.

10 DC [MR. RUSHFORTH]: Would you describe those cases for  
11 us.

12 MJ [Col RUBIN]: I recently presided over a sexual assault  
13 case in which the accused alleged that the NCIS, Naval  
14 Criminal Investigative Service, agents employed techniques in  
15 order to obtain a confession, the defense alleged these  
16 techniques were oppressive or overcame the accused's free  
17 will, and we litigated that, that motion.

18 DC [MR. RUSHFORTH]: How did you rule?

19 MJ [Col RUBIN]: I denied the defense motion to suppress  
20 the statements.

21 DC [MR. RUSHFORTH]: And can you tell me why you did?

22 MJ [Col RUBIN]: Yes. I found that the investigators had  
23 not overcome the accused's will, that his decision to speak

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1 with the investigator was a free decision on his part.

2 Essentially that's it.

3 DC [MR. RUSHFORTH]: And on what basis did you make that  
4 finding?

5 MJ [Col RUBIN]: I took testimony from the NCIS agent, I  
6 took testimony from the accused as well, documentary evidence,  
7 and a videotape of the interview, I should add.

8 DC [MR. RUSHFORTH]: Can you name that case for me?

9 MJ [Col RUBIN]: Yes, it is United States v. Rowse.

10 DC [MR. RUSHFORTH]: Rowse spelled?

11 MJ [Col RUBIN]: R-O-W-S-E.

12 DC [MR. RUSHFORTH]: R-O-W-S-C?

13 MJ [Col RUBIN]: S-E.

14 DC [MR. RUSHFORTH]: Oh, S-E. Thank you, Judge.

15 Can you describe any other case?

16 MJ [Col RUBIN]: I am sure that back in my career as a  
17 prosecutor or defense counsel I have litigated the same type  
18 of issues, mostly involving agents, NCIS agents, DIC agents,  
19 or members of the command who neglected to properly advise an  
20 accused of his rights, but no specific recollection of any  
21 other cases.

22 DC [MR. RUSHFORTH]: Do you recall any other case, Judge  
23 Rubin, where you ruled that the defendant or the accused had

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1 not been properly advised?

2 MJ [Col RUBIN]: Yes.

3 DC [MR. RUSHFORTH]: Can you describe that case for us?

4 MJ [Col RUBIN]: Yes. Failure to provide 31(b) rights  
5 advisement. I recall several cases in which either a member  
6 of the command -- mostly a member of the command, usually the  
7 investigative agents, CID or NCIS, do that improperly. But a  
8 number of cases in my past in which a member of a command has  
9 questioned an accused without properly advising him or her of  
10 her -- of their legal right to remain silent. I have  
11 suppressed statements based on that.

12 DC [MR. RUSHFORTH]: Can you remember the names of any of  
13 those cases?

14 MJ [Col RUBIN]: I couldn't tell you, no, off the top of  
15 my head.

16 DC [MR. RUSHFORTH]: Have you ever advocated as counsel in  
17 any case for the admissibility of evidence derived from or  
18 through the use of torture?

19 MJ [Col RUBIN]: No.

20 DC [MR. RUSHFORTH]: Or any kind of rough handling or  
21 manhandling of the accused?

22 MJ [Col RUBIN]: No.

23 DC [MR. RUSHFORTH]: Have you in any of your prior

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1 positions as a military officer been in any way involved with  
2 the advising of the commissions or any commissions personnel  
3 on anything whatsoever?

4 MJ [Col RUBIN]: No.

5 DC [MR. RUSHFORTH]: I am going to move on, Judge, to one  
6 final set of questions.

7 Have you or any member of your family or anyone close  
8 to you personally been the victim of an offense charged in  
9 this case or any offense similar to any of those charged in  
10 this case, including everything within the common allegations?

11 MJ [Col RUBIN]: No.

12 DC [MR. RUSHFORTH]: Have you or any member of your family  
13 or anyone close to you personally been the victim of the  
14 attacks on 9/11?

15 MJ [Col RUBIN]: No.

16 DC [MR. RUSHFORTH]: Have you or any member of your family  
17 or anyone close to you personally been the victim of the  
18 attack on the USS COLE?

19 MJ [Col RUBIN]: No.

20 DC [MR. RUSHFORTH]: Can you give me just one moment,  
21 Judge?

22 MJ [Col RUBIN]: Yes.

23 [Pause.]

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1 DC [MR. RUSHFORTH]: Judge Rubin, did you help form the  
2 operational orders for the deploying companies at either  
3 MARSOC or 4th MEB?

4 MJ [Col RUBIN]: I don't recall doing that, no.

5 DC [MR. RUSHFORTH]: Judge, I don't know if it would be  
6 suitable to you, but I would like to take a ten-minute recess  
7 to confer with my co-counsel in order to determine whether we  
8 have any further questions or any grounds for a challenge.

9 MJ [Col RUBIN]: That's fine. The commission is in  
10 recess. Let's take ten minutes. Please, everyone, carry on.  
11 Thank you.

12 [The R.M.C. 803 session recessed at 1003, 15 November 2016.]

13 [END OF PAGE]

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