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1 [The R.M.C. 803 session was called to order at 0905, 4 August
2 2014.]

3 MJ [Col SPATH]: All right, this military commission is
4 called to order.

5 Let me do this. Let me just make sure the earphones
6 are working for the translators and for Mr. al Nashiri. They
7 appear to be. Thank you.

8 All right. I'm going to start with the trial team or
9 the prosecution team, if we can just account for the parties
10 and if I need to I will administer any oaths I need to go
11 through. So trial counsel if you would.

12 TC [MR. SHER]: Good morning, Your Honor. First the
13 government needs to place on the record that these proceedings
14 are being transmitted CONUS. Representing the government is
15 Brigadier General Mark Martins, Mr. Mikeal Clayton, Colonel
16 Robert Moscati, Lieutenant Bryan Davis, Lieutenant Paul
17 Morris, myself, Mr. Justin Sher, and then we have Master
18 Sergeant Mark Truman and Mr. Forrest Smith.

19 MJ [Col SPATH]: All right. Thank you. Colonel Moscati,
20 have you appeared before?

21 DCP [COL MOSCATI]: I have not.

22 MJ [Col SPATH]: If you would -- I will administer your
23 oath. If you would go through your detailing, sorry.

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1 DCP [COL MOSCATI]: Judge, I have been detailed to this
2 military commission by the chief prosecutor of the Office of
3 Military Commissions. I am detailed and qualified under Rules
4 for Military Commissions 502 and 503. I have been previously
5 sworn under Rules for Military Commission 807. I have not
6 acted in any manner that might tend to disqualify me from
7 participating in the military commission.

8 MJ [Col SPATH]: All right, and your detailing we have
9 marked as Appellate Exhibit 312. Thank you. I think it's
10 probably obvious the way we started the proceedings, but the
11 members are absent at this point.

12 All right. Defense Counsel, Mr. Kammen, if you
13 would, please, let's do the same thing.

14 LDC [MR. KAMMEN]: My name is Richard Kammen. I am
15 learned counsel. Major Allison Daniels, obviously our
16 linguist, Mr. al Nashiri, Major Thomas Hurley, Captain Daphne
17 Lasalle and Tech Sergeant Valerie Nixon are present in the
18 courtroom. It is Captain Daphne Jackson.

19 MJ [Col SPATH]: All right. And I don't think we have
20 anybody who hasn't appeared before.

21 LDC [MR. KAMMEN]: That's correct, Your Honor. Commander
22 Mizer is currently separated. He expects to return. He is
23 not present. And Ms. Nancy Hollander who has entered an

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1 appearance is precluded because of some rulings by
2 Colonel Pohl, but she, in fact, will be on the island and if
3 permitted would appear if she was allowed to.

4 MJ [Col SPATH]: With regard to Commander Mizer, have you
5 talked to your client about not having him here for these
6 proceedings?

7 LDC [MR. KAMMEN]: Yes, that was discussed with him the
8 last time we were in court, and it has also been discussed
9 with him over -- since the last time we were in court as well.

10 MJ [Col SPATH]: All right, thank you.

11 Colonel Vance H. Spath, United States Air Force,
12 Military Judge. I mentioned yesterday in my other job, in my
13 current capacity I am the Chief Trial Judge of the Air Force.
14 I have been detailed to this case by the Chief Judge of the
15 Military Commissions Trial Judiciary, pursuant to Rule for
16 Military Commission R.M.C. 503.

17 I am certified and qualified in accordance with
18 Article 26(a) and (b) of the Uniform Code of Military Justice
19 as well as R.M.C. 502, 503, and I have previously been sworn
20 under Article 42(a) of the Uniform Code of Military Justice
21 and R.M.C. 807. My detailing order is appended to the record
22 as Appellate Exhibit 302. A copy has been provided to parties
23 for both sides.

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1 My detailing instructions currently state that
2 Colonel Pohl will issue orders on all motions that were fully
3 briefed and argued through the May 2014 hearings, except for
4 Appellate Exhibit 207, which is a government motion in limine
5 for the commission to admit evidence.

6 I will review -- I just need to speak slow. I will
7 remind myself or be reminded as we go forward.

8 I will review and issue appropriate orders for
9 Appellate Exhibit 207 and the three ex parte motions pending
10 currently before the commission. Specifically the following
11 were pending as of the date of my being detailed: Appellate
12 Exhibit 269, defense ex parte in camera motion for a 16th
13 protective order pursuant to the MCA 10 U.S.C. Section 949p-4
14 and Military Commission Rule of Evidence 505 filed April 11,
15 2014; Appellate Exhibit 274, government ex parte in camera
16 request for 17th protective order, classified, filed April 11,
17 2014; and Appellate Exhibit 275 government ex parte in camera
18 request for 18th protective order, classified, filed April 11,
19 2014.

20 Having said all of this, one of the outstanding
21 motions that you all know currently before the commission is
22 Appellate Exhibit 305, which is a defense motion for a fair
23 hearing on all outstanding motions pending before the military

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1 judge, the present military judge, which seeks to change those
2 detailing instructions I just described for you.

3 Mr. Nashiri, as Colonel Pohl has talked to you at the
4 start of each session, I just want to go over your right to be
5 present here and your right to waive your presence here if you
6 desire.

7 You have the right to be present at all sessions of
8 this commission. If you request to absent yourself from any
9 session, such absence may be voluntary and of your own free
10 will. Your voluntary absence from any session of the
11 commission is an unequivocal waiver of your right to be
12 present during the session. Your absence from any session may
13 negatively affect the presentation of the defense in your
14 case. Your failure to meet with and cooperate with your
15 defense counsel may also negatively affect the presentation of
16 your case. Under certain circumstances your attendance at a
17 session can be compelled regardless of your personal desires
18 to be present or not.

19 Regardless of your voluntary waiver to attend a
20 particular session of the commission, you have the right at
21 any time to decide to attend any subsequent sessions. If you
22 decide not to attend the morning session, but want to attend
23 the afternoon session, notify the guard force of your desires.

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1 Assuming there is enough time to arrange for transportation,
2 you will be allowed to attend the afternoon session.

3 You will be informed, of course, of the time and date
4 of each commission session prior to the sessions to afford you
5 the opportunity to decide whether you wish to attend each
6 session.

7 Do you understand what I have explained to you?

8 ACC [MR. NASHIRI]: Yes, I understood everything.

9 MJ [Col SPATH]: Thank you.

10 I am not aware of any grounds for challenge against
11 me. However, and I have previously provided counsel, sorry,
12 for both sides a summarized biography, and we have marked that
13 already as Appellate Exhibit 307. I also know there has
14 already been a motion though for me to recuse myself, and so I
15 certainly, as I have said, will take questions and challenges.

16 Trial Team, do you have any questions or challenges?

17 TC [MR. SHER]: No, Your Honor.

18 MJ [Col SPATH]: Defense team?

19 LDC [MR. KAMMEN]: Good morning. Obviously we do have
20 some questions. Let me say as a civilian, this is kind of an
21 awkward situation because normally we don't get to ask
22 questions of the judge, but in thinking about this, I just
23 want to say that if the roles were reversed, I would not

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1 ask -- I will try not to ask any questions I would be
2 uncomfortable being asked if I were in your situation.

3 MJ [Col SPATH]: Let's do this. Truly, it will not offend
4 me, whatever questions you have of me. Whether or not I will
5 answer them or not, different issue, but no offense taken for
6 any questions. In my other job I ask counsel for both sides
7 at each trial if they have questions of me, and not every
8 time, but certainly people take -- not advantage in a bad way,
9 but advantage of that opportunity in a good way. So I'm open
10 to any questions.

11 LDC [MR. KAMMEN]: Well, the first, of course, is: Can
12 you summarize the various conversations you had with
13 Colonel Pohl prior to, I guess, accepting the -- making the
14 decision to accept this appointment?

15 MJ [Col SPATH]: I can. I have a couple of notes in that
16 regard. I was notified of my assignment to the Air Force
17 judiciary as the Chief Judge in March of 2014. Soon after
18 that I went to a joint conference with all of the trial judges
19 from each service. The current Air Force Chief Judge at the
20 time, Colonel Allred, approached me about the fact that the
21 Air Force needed to provide three names of people who would be
22 available to serve as commission judges and that he had
23 typically put himself on that list because he was in D.C. and

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1 he was the Chief Judge. And he told me that Colonel Pohl was
2 the Chief Judge of the commissions and he reintroduced me to
3 Colonel Pohl. I had met him years ago as a trial judge in the
4 Army. I don't remember any conversations with him of any sort
5 at that point. It was in passing.

6 Colonel Pohl at that point indicated that they needed
7 to get the detailing memo through our judge advocate
8 reasonably quickly because all of the judges we had currently
9 offered from the Air Force were either PCS'ing, they were
10 either PCS'ing or they were retiring. And so I talked with
11 the person I was replacing and we came up with a few names,
12 and frankly I picked some of the more experienced judges I had
13 available, one, the European Chief Judge to be, one who is now
14 out west as the Chief Judge, and myself.

15 Mr. Pohl -- or Colonel Pohl and I spoke at the
16 conference, and he told me then that he was planning on
17 removing himself from one of the cases he currently had
18 pending, and I am confident that he mentioned the name
19 Mr. al Nashiri to me, but we did not discuss the case at that
20 point in any detail.

21 That was the extent of the conversation at that
22 conference. I then worked with Colonel Allred, and we put
23 together a list of names, my name on it, and our judge

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1 advocate signed it.

2 LDC [MR. KAMMEN]: Excuse me. That was in March of this
3 year?

4 MJ [Col SPATH]: That was in March.

5 LDC [MR. KAMMEN]: Thank you.

6 MJ [Col SPATH]: I believe I was detailed as the Chief
7 Judge in April, and I believe our Judge Advocate General
8 allowed the memo allowing the three of us to be available in
9 May. It may have been June, but I believe it was May of '14.

10 In April I went to the Judges Course at the Army
11 JAG School. I had been there before, but I went down for the
12 full three weeks, and Colonel Pohl came down. And since I had
13 been detailed as trial judge and I was on that list of names
14 that had either been signed or was already being recommended,
15 he told me again his plan was to remove himself from this case
16 and then to have me take over.

17 Later that day -- he was only down at that course for
18 two days, maybe. We did not go out to dinner. I don't know
19 him that well. We didn't socialize. I met him where I was
20 staying, and he administered me the oath that we talked about
21 earlier, that I was sworn before the commissions. He
22 administered me that oath. We talked then for approximately
23 15 minutes. And what we specifically talked about, the bulk

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1 of our conversation was travel to and from Guantanamo Bay and
2 that it was unique, as I have now experienced, coming here and
3 leaving here. And we discussed the setup of the courtroom. I
4 had never been here before and I have never been connected
5 with a commissions case in any capacity before, so he just
6 discussed the courtroom.

7 Purposefully, on his part and mine, we didn't discuss
8 specifics of this case, with one exception: He told me the
9 plan that he was going to rule on motions that he had already
10 heard or would hear up through I believe May of '14.

11 LDC [MR. KAMMEN]: May I interrupt just to clarify? When
12 he issued the oath, was that so you could be a commissions
13 judge or essentially the judge on this case?

14 MJ [Col SPATH]: That was the required oath to be a
15 commissions judge, and I had already been detailed as a trial
16 judge by our Judge Advocate General at that point.

17 So I knew his plan was to then issue a detailing memo
18 at some point, which he did and is now on the record, and that
19 he was going to, his plan was to rule on outstanding motions,
20 except for the ones I discussed for you a little while ago. I
21 didn't offer him an opinion one way or the other. He was the
22 chief commissions judge and he said, frankly, here is my plan,
23 detailing memo to follow, and that was it. I then got the

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1 detailing memo. We have not talked any more than that about
2 this case.

3 LDC [MR. KAMMEN]: Did he say why he was picking you as
4 opposed to ----

5 MJ [Col SPATH]: I did not volunteer, and that has nothing
6 to do with this process or for us being here. I do have a
7 job. I have a full-time job that I am doing while I am here,
8 like many of us, so it is not unusual. I know you practice
9 too away from here. We have other things we are doing.

10 LDC [MR. KAMMEN]: Not anymore.

11 MJ [Col SPATH]: I knew that this was going to be a
12 significant period of time if I stayed on the case.

13 We have a very limited pool of people in the Air
14 Force who have been involved with any type of capital
15 litigation, and so he didn't say to me, and I haven't guessed,
16 as to why that decision was made. I was on the list of
17 nominees from the Judge Advocate General by my choice and
18 Colonel Pohl picked me. He certainly knew my background in
19 some regard, I would think. So that is my assumption as to
20 why ultimately I ended up here.

21 LDC [MR. KAMMEN]: In that conversation did you discuss
22 your experiences in the Witt case at all.

23 MJ [Col SPATH]: We did not. I have never talked to

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1 Colonel Pohl about Whit. I am positive I have not.

2 LDC [MR. KAMMEN]: Was he teaching there at the Judges
3 Course or was he just there to visit you, to meet with you.

4 MJ [Col SPATH]: He did not teach at the Judges Course.
5 He may have had a breakout with the Army judges, because all
6 of the services' new judges are there. He may have had a
7 breakout with them. I am sure he was there for a purpose, but
8 he did not teach us.

9 LDC [MR. KAMMEN]: And in your discussions of the case,
10 did he -- I am not suggesting this would have been improper --
11 discuss any of the dynamics, any of the personalities, any of
12 the sort of hot issues that are floating around in all of
13 this?

14 MJ [Col SPATH]: Not that I recall. We did not discuss
15 counsel. He mentioned lead counsel for both sides by name.
16 It may have been in response to a question I asked. I may
17 have asked out of curiosity as to if I knew somebody. I did
18 not know if it was Army, Air Force. I happened to know the
19 Chief Defense Counsel for the commissions, Karen Mayberry, so
20 I may have asked or he may have volunteered. So I had heard
21 your name, and I had heard General Martins' name, but nothing
22 about personality.

23 LDC [MR. KAMMEN]: Okay. Was he generally complimentary?

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1 MJ [Col SPATH]: He was not complimentary or derogatory.
2 He was pretty neutral. He just indicated who the parties
3 were.

4 LDC [MR. KAMMEN]: I will live with that. Fair enough. I
5 am sure General Martins will too.

6 So you haven't had any conversations with
7 Colonel Pohl since?

8 MJ [Col SPATH]: We have not talked since. We haven't
9 talked at all. I have been to where Mr. Taylor works, the
10 senior attorney -- I have been to the offices once, and
11 Colonel Pohl was not there, so we didn't have an opportunity
12 to see each other.

13 I'm trying to remember if there was even any e-mail
14 traffic in the detailing. He was probably on an e-mail that
15 included me when I was detailed, but again, there was no
16 discussion about any outstanding issues in this case.

17 LDC [MR. KAMMEN]: Did he happen to say why he wanted to
18 continue to exercise the authority by ruling on the number of
19 outstanding -- I mean, these outstanding motions?

20 MJ [Col SPATH]: He did not. It really was, he said,
21 "Here is my plan for my involvement. You will be detailed,"
22 and then I saw the detailing memo.

23 LDC [MR. KAMMEN]: Either before or after being detailed,

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1 what conversations have you had with either the convening
2 authority or any member of the convening authority staff
3 concerning the case?

4 MJ [Col SPATH]: I don't know -- I couldn't tell you
5 currently the name of the convening authority. I have heard
6 it. I don't remember. I believe it's a civilian currently.
7 I have no idea what he looks like. I was in their offices one
8 time to do the SAP read-in. So we went to the office.
9 Somebody from the judiciary accompanied me there, and they
10 just described for me what the Mark Center was like and what
11 it was like to get in there. I had never been there before.
12 And it was everything that it was promised.

13 And then I went to their offices. I didn't get a
14 tour of the offices. We were there a little early, and I was
15 waiting to get my in-brief from a civilian female who came in
16 to do that. And while I was there I saw somebody I knew, Mike
17 Breslin, who is on his way out, and so he and I spoke for
18 approximately ten minutes, but it was catching up. I didn't
19 know he was there. I didn't know he worked for the
20 commissions, which gives you an idea of how little interaction
21 we have had over the years. I just knew him from his time in
22 the Air Force as a Colonel. So we spoke about those things.

23 He asked why I was there. I told him I had been

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1 detailed to this case. He said -- I remember him clearly, he
2 said, "Welcome, it will be an interesting experience," and
3 that was the extent -- he knew I wouldn't talk about it and I
4 didn't want to talk about it.

5 He introduced me to a retired Navy captain. I don't
6 remember his role there. We said hello. He mentioned that I
7 had taken -- I had been detailed to this case, and again we
8 didn't speak about the case, and that was it.

9 LDC [MR. KAMMEN]: Okay. Well, let me just ask: Have you
10 had any conversations with either General Martins or any
11 member of his staff concerning the case?

12 MJ [Col SPATH]: No. In fact, I had not -- I have not met
13 General Martins before. As far as I know, I don't know him
14 personally. I just don't remember. And I had to ask
15 Mr. Taylor on the plane -- I hate to admit some of my own
16 ignorance. I had to ask Mr. Taylor on the plane for facial
17 recognition of you and General Martins. He was in uniform, it
18 was easier yesterday. But I didn't know either of you at that
19 point.

20 LDC [MR. KAMMEN]: I think in fairness we were all trying
21 to figure out who you were, so everyone was doing that.

22 MJ [Col SPATH]: I think so. So I had not met him before
23 and I have not talked with him.

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1 LDC [MR. KAMMEN]: Or any member of his staff?

2 MJ [Col SPATH]: I am confident that I have spoken to
3 people who have been assigned to the prosecution writ large
4 over the years because Air Force members have gone there to
5 work, never about this case or any knowledge of this case, and
6 nothing recently.

7 LDC [MR. KAMMEN]: Have you had any conversations with
8 Colonel Mayberry generally about the commissions, and I
9 suppose in fairness specifically about this case?

10 MJ [Col SPATH]: No. We have run into each other over the
11 last almost two years now that I was back in D.C. at Air Force
12 functions, and I knew her husband quite well, a retired judge
13 in the Air Force.

14 So we would talk not about her job, and not because I
15 wouldn't have, it just -- her husband and I were catching up.
16 Yesterday at the airport I purposely went over and said hello
17 to her. She shook my hand. She said, "Welcome aboard" and I
18 said, "I think you're welcome," and then I went back to the
19 room that they had me in, and I stayed there.

20 LDC [MR. KAMMEN]: Obviously you have indicated you had
21 the SAP briefing, and I don't want to get into that. Other
22 than that, have you been briefed concerning any matters
23 particular to this case by the CIA or any other governmental

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1 agencies?

2 MJ [Col SPATH]: No. And without discussing any of the
3 briefing, the SAP briefing was a very general briefing. My
4 in-brief for my clearance was not specifically related to this
5 case, but just about dealing with those matters in general,
6 and I have not talked to any other interested party or agency.

7 LDC [MR. KAMMEN]: In your discussions with Colonel Pohl,
8 did he discuss with you -- for example, there was the issue
9 about the interruption of one of the other cases from some
10 outside agency where it became clear that an outside agency
11 was -- at least at one point had the ability to monitor the
12 proceedings and actually interrupt the proceedings. Did he
13 discuss any of that with you?

14 MJ [Col SPATH]: He did not. I believe that -- I don't
15 know the case name. I don't know what it related to. I just
16 believe in discussing with the judiciary, it's been mentioned
17 to me that there was an issue in a case where somebody felt
18 like classified information was being discussed, but no
19 details and no specifics.

20 And it was more of a, "When you are up there on the
21 bench, you need to pay attention to the lights," and those
22 things, and that was it.

23 LDC [MR. KAMMEN]: Now, have you had any briefings beyond

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1 the SAP briefing with anybody from either the Department of
2 Defense, other than what we have discussed, or the FBI?

3 MJ [Col SPATH]: No.

4 LDC [MR. KAMMEN]: Just for our clarification, who is --
5 does your fitness reports?

6 MJ [Col SPATH]: My fitness reports currently are written
7 by the Judge Advocate General of the Air Force. So that's
8 General Chris Burne. His last name is B-U-R-N-E.

9 LDC [MR. KAMMEN]: And so using the military parlance,
10 everyone has got to be owned by somebody. Who owns you, the
11 Judge Advocate General of the Air Force?

12 MJ [Col SPATH]: He does.

13 LDC [MR. KAMMEN]: I'm gathering that you want to continue
14 your job as the Chief Judge of the Air Force as well as this
15 position; is that correct?

16 MJ [Col SPATH]: I do what I'm told, and I recognize as a
17 trial judge I'm in charge of the courtroom when I am in it in
18 my other job. I am quite confident, when somebody tells me
19 this is your duty, I do it.

20 LDC [MR. KAMMEN]: Sure. But I just want -- apparently
21 your instructions, if I am understanding you correctly, are
22 you will do this job, but you are also keeping your Chief
23 Judge job. And what kind of obligations generally do you have

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1 as the Chief Judge? I mean, will you be trying other cases?

2 MJ [Col SPATH]: I will be trying other cases as long as
3 they don't conflict with the timing of this case. I detail
4 the judges to all of the trials they have in the Air Force,
5 but I have somebody who does the detailing for me. So I hate
6 to say that it is a figurehead position, but it is a lot of
7 administrative work that I do by e-mail.

8 LDC [MR. KAMMEN]: Are you presently assigned to any
9 other -- I will call them regular Air Force cases?

10 MJ [Col SPATH]: I have two currently on my docket. I
11 delayed one into September, and I believe I just delayed the
12 other one, I just haven't set the date yet.

13 LDC [MR. KAMMEN]: And do you anticipate those cases will
14 go to trial or can you tell?

15 MJ [Col SPATH]: Yes, they should. I anticipate they
16 will.

17 LDC [MR. KAMMEN]: How much longer do you have before you
18 retire?

19 MJ [Col SPATH]: Great question. Statutorily, seven and a
20 half years. Absent a selective early retirement board or some
21 unforeseen circumstance, that's how long I can stay.

22 LDC [MR. KAMMEN]: I mean, there is no way to escape this
23 in talking about your views on the death penalty. Clearly

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1 given the fact that you were the Chief Prosecutor in the Witt
2 case, you were not opposed to the death penalty, and that's
3 certainly fine, but can you tell us what your views on the
4 death penalty are?

5 MJ [Col SPATH]: I don't think I will describe them. I
6 think it's fair for everyone to know I am reading the
7 transcript, of course, of this trial. Now that I am detailed
8 to it, I think it's important to know what has occurred ----

9 LDC [MR. KAMMEN]: In fairness, you told us that yesterday
10 in the 802.

11 MJ [Col SPATH]: And I am a good part through, and I saw
12 these questions of Colonel Pohl. So I thought about it for
13 the obvious reason; I figured that we would have the
14 discussion. I would dispute that because I was the trial
15 counsel and the Chief Prosecutor on Witt, that makes me not
16 opposed to the death penalty.

17 As an attorney on both sides, I have represented and
18 dealt with viewpoints that I don't necessarily agree with or
19 disagree with. If you have looked through any of the news
20 reports from the Witt case or seen that, you will see that I
21 have gone through what I would call, what many people have
22 gone through, and that is a struggle with something as serious
23 as capital punishment. So it's just not a simple answer.

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1 What I know is that as a prosecutor I tried to do and
2 I hope I did the right thing when I tried a capital case. Had
3 I been appointed to the defense, I would have defended
4 Airman Witt as aggressively as I prosecuted him. Sitting
5 here, I'm just going to follow the law as best I can interpret
6 it, and that's it.

7 LDC [MR. KAMMEN]: I understand that, and I really do
8 respect what you just said. The reason we ask on a little
9 more personal level is because in my experience how a judge
10 sees the death penalty bears on how the law gets interpreted,
11 because at the end of the day a lot of these decisions are
12 judgment calls.

13 So if you don't mind, can you flesh out a little bit
14 more your personal views? And I don't doubt you struggled
15 with it because it is a serious, serious situation.

16 MJ [Col SPATH]: That's it. I'm not inclined to describe
17 my personal feelings. I will tell you that I have the
18 concerns that many people have. The cost, if it is
19 administered fairly and racially neutral or not, and of course
20 I am not immune to seeing the DNA testing that the Innocence
21 Foundation or that -- I know it's the attorney from the O.J.
22 case has been involved in. I have seen all that.

23 And that's why certainly if I stop and -- wherever in

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1 my personal life to have a discussion about it maybe, I would
2 come to some conclusions. But because of my role as a judge,
3 and I had been a judge in the past in the Air Force for a few
4 years, I really don't discuss -- and I hate to say I try not
5 to form opinions, but that really is what I do until I hear
6 information and evidence. I haven't given it much thought.

7 I know those issues are there, and I would think
8 about -- if we had a discussion, I would probably give them
9 lots of thought, but ----

10 LDC [MR. KAMMEN]: Quite honestly, what I am trying to do
11 is have this conversation.

12 MJ [Col SPATH]: I am not comfortable to get into really
13 my personal viewpoints because I am comfortable that,
14 regardless of how I feel internally about any issue -- you can
15 take any hot topic issue currently -- abortion is a great
16 one that is a hot topic -- that when people ask me my personal
17 opinion on that outside the courtroom I tell them I don't have
18 one, which shocks people, I know I don't have a personal
19 opinion or bias in my mind one way or the other.

20 If our country believes the death penalty is
21 appropriate, and I am a trial judge, that's it.

22 LDC [MR. KAMMEN]: Well, let me ask you this, because as a
23 trial judge there are a lot of things that a judge can do. I

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1 mean, let's be honest. If a judge believes the particular
2 individual should receive a death sentence, if he or she
3 thinks, wow, this thing is so bad, the law is sufficiently
4 fluid that there is a lot they can do to influence that
5 judgment.

6 So how do you reconcile -- I mean, how do you see
7 your responsibilities as a judge presiding over a death
8 penalty case, especially -- well, let's just say over a death
9 penalty case.

10 MJ [Col SPATH]: I think I see it exactly as I tell the
11 fact-finders, because here it will be -- if we get there, it
12 will be court members or commission members who are the
13 fact-finders. And I tell them, and we have to hope that they
14 can do this, to keep an open mind throughout the process.

15 And that's all I can offer you, is we are supposed to
16 be better at segregating, separating, putting everything into
17 boxes and not thinking about it or having it contaminate.
18 Judges are people too, even federal judges who -- and I'm not
19 one -- who occasionally believe they can do it even better
20 than I can.

21 I do the best I can to keep an open mind, and I am
22 comfortable that if I found myself making conclusions that I
23 shouldn't, I would recuse myself. And I have recused myself

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1 from -- not any capital cases yet, I haven't had that many,
2 but I have recused myself from trials before at the beginning
3 and at some point during.

4 LDC [MR. KAMMEN]: Let me ask you: Have you been the
5 judge on any prior capital cases?

6 MJ [Col SPATH]: I was the judge on one that started as a
7 capital case. It was U.S. v. Cron, I know it looks like
8 "Cron," but it's C-R-O-N.

9 LDC [MR. KAMMEN]: I am familiar with the Cron case.

10 MJ [Col SPATH]: I was the trial judge on that. It was
11 referred as a capital case and then ultimately there was a
12 pretrial agreement in the case so the individual could go
13 judge alone, and I was the fact-finder and the sentencing
14 authority.

15 LDC [MR. KAMMEN]: And did the pretrial agreement then
16 contemplate that the death penalty would be off the table?

17 MJ [Col SPATH]: It did. It removed the capital aspect of
18 that case, which is the only reason I could have been the
19 fact-finder. It took that off the table.

20 LDC [MR. KAMMEN]: And I'm gathering that essentially the
21 agreement was you will go judge alone -- is it Spath? Is that
22 how you pronounce it?

23 MJ [Col SPATH]: It is.

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1 LDC [MR. KAMMEN]: Judge Spath will be the judge, and
2 death will be off the table? Is that it?

3 MJ [Col SPATH]: Yes. There were many terms in the
4 agreement, as you can imagine, but that was the important
5 aspect for both sides.

6 LDC [MR. KAMMEN]: Other than the Cron case, any other
7 capital cases?

8 MJ [Col SPATH]: Not yet. There is one percolating in the
9 Air Force that may or may not be referred as capital, and so
10 maybe in a few months that answer will be different, but right
11 now no, I am not detailed to any others.

12 LDC [MR. KAMMEN]: When you were a defense lawyer, did you
13 work on any capital cases?

14 MJ [Col SPATH]: No.

15 LDC [MR. KAMMEN]: Do you see a case involving -- look,
16 the Witt case was obviously very, very serious, Senior
17 Airman Witt killed two individuals, almost killed a third,
18 usually brutal crimes, no question about that.

19 For you as the prosecutor, if you don't mind me
20 asking, what made that more aggravated than other intentional
21 premeditated murders?

22 MJ [Col SPATH]: That, I won't answer. It will have no
23 impact here. The Witt case you describe in your words as

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1 exceptionally aggravating. My job was to prosecute that case,
2 and that was what I was detailed to do, and I did.

3 LDC [MR. KAMMEN]: But did you see that, I mean, as more
4 aggravated than -- I mean, it's hard to say this, and people
5 who aren't lawyers maybe don't -- you know, when it comes from
6 a defense lawyer it reinforces their belief we are just
7 bottom-feeders, but when they say, well, is it worse than
8 other double murders?

9 MJ [Col SPATH]: And I mean this completely. The
10 convening authority and my boss detailed me to do that trial,
11 and I did all I could to ensure that the result was what the
12 convening authority wanted because I believed that was -- I
13 wasn't being asked to do anything unethical or illegal, and so
14 I did what I could for my client, the convening authority.

15 So as a prosecutor, did I look at it to build a trial
16 strategy, to figure out what made this something that a jury
17 would find upsetting? Of course. But in my own brain I was
18 just doing my job. And I haven't really thought about it any
19 more than that.

20 LDC [MR. KAMMEN]: Okay. Now, of course, you mentioned
21 the convening authority, and the convening authority here -- I
22 mean, the military commissions are this sort of weird animal.
23 The convening authority here decided the case should be

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1 referred, the case should be referred as capital. He
2 essentially controls all of this.

3 I know it's different in your other job, but is there
4 any way in which the convening authority is your boss or your
5 client here?

6 MJ [Col SPATH]: No. Not at all. And I feel no -- I
7 assume the prosecution team, they are different in that they
8 don't directly work for the convening authority. I think -- I
9 haven't really thought it through. But I assume the
10 prosecution team is working to do what their client wants them
11 to accomplish, as are you.

12 I don't work for the convening authority. He cannot
13 direct me to do anything.

14 LDC [MR. KAMMEN]: Do you know whether he solicited
15 judge -- I mean, what we know in some of the litigation over
16 Colonel Pohl was Colonel Pohl was essentially solicited by the
17 convening authority to take the position of Chief Judge, and
18 quite frankly, it's no secret, we kind of believe that the
19 convening authority said, "Oh, and by the way, detail yourself
20 to these, to the Nashiri and to the 9/11 cases."

21 To your knowledge, did the convening authority
22 request you to be the judge on this case?

23 MJ [Col SPATH]: I have no knowledge of that. I don't

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1 know. I don't think so, but it's a guess.

2 LDC [MR. KAMMEN]: How do you see your role -- I mean,
3 here, you know, this is a terrorism case, you know, there are
4 a lot of different considerations, you know, some allegedly
5 dealing with national security and all of this other.

6 How do you see your role as a judge in a terrorism
7 case versus a more traditional case?

8 MJ [Col SPATH]: I view my role the same. I view this as
9 a -- I know we call it a commission, and I understand the
10 rules are a bit different, but I view my role to ensure that
11 both sides have a fair process. I'd say fair trial, but it's
12 a commission process, so to ensure that both sides have a fair
13 process.

14 LDC [MR. KAMMEN]: If you read Judge Pohl's voir dire, he
15 described himself as a process guy, and then of course then
16 the next question was, "Well, okay, but what happens if the
17 process is taking you to an unfair place?" And that's really
18 one of the places, you know, Colonel Pohl didn't go. So let
19 me ask you that question.

20 You know, I mean, obviously General Martins
21 disagrees, but there is much about this that we think is
22 grotesquely unfair. Now, what happens if this process -- if
23 following the process takes you to a place you think is really

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1 not fair?

2 MJ [Col SPATH]: I don't know. I have reviewed the
3 Military Commissions Act and I have reviewed the rules of
4 evidence and then our rules of procedure, rules of the court
5 as they are called. Nothing at this point stands out to me as
6 unethical or illegal, where I read it and I said, "I can't
7 believe that's part of the process."

8 In application could that happen? Maybe. And what I
9 would say to you is what I would say in any trial case, if I
10 felt it was incredibly unfair, I would recuse myself, which is
11 what I would do in my other job.

12 LDC [MR. KAMMEN]: Well, actually, to be fair, we would
13 hope you will say, well, if it is incredibly unfair we will
14 either find a way to make it fair or not proceed with the
15 case, as opposed to just you quitting.

16 MJ [Col SPATH]: We are in a hypothetical world. It
17 depends on the hypothetical. If it is a ruling on a motion or
18 something, I am going to do the best I can to interpret the
19 law and apply it. It would have to be an outlandish
20 hypothetical, and I don't want to get into hypotheticals, but
21 somebody directing me to come to a result, that's not going to
22 happen.

23 LDC [MR. KAMMEN]: I guess, let me be fair. I don't think

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1 anybody is going to call you on the phone and say we want you
2 to do this and such, but I think that there are -- and General
3 Martins disagrees, I think the problem is the rules are
4 structured in a way that it's very, at least in our view, very
5 one-sided. So you can follow the rules, but the rules take
6 you to a one-sided situation.

7 And so I guess the question is: Do you see any
8 responsibility of the judge, if you will, to recognize that,
9 and if it is unfair, legitimately unfair, to somehow either
10 make it fair or strike the rule or do what you have to?

11 MJ [Col SPATH]: I see my role as a trial judge to enforce
12 the rules that are given to me and to apply them as best I
13 can, not to assist either side, and I have tried to do that on
14 every case I have sat on. I hope I have done that. I am sure
15 in every case one side or the other has disagreed with some of
16 what I have done, I am confident, but that's all I can tell
17 you I will try to do.

18 LDC [MR. KAMMEN]: I mean, the difference here, of course,
19 is we are all figuring this out as it goes along. So you
20 don't have the same history here that you have in other cases.
21 A lot of times we can't show you precedent because there is
22 none. A lot of times -- and frankly in our view one of the
23 frustrations is at least it's easy for a judge to say well,

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1 there are three bodies of law, there is commissions law, there
2 is federal law, and court-martial law, and let's pick the one
3 that's best for the government. And I am not suggesting you
4 would or wouldn't do that, but that's part of the frustration.

5 MJ [Col SPATH]: I understand. For both sides, that is
6 certainly not anything that I would do or plan to do. I plan
7 on looking to the law that is binding on me initially, like
8 any court of practice, and then if there is nothing, hopefully
9 there is some persuasive authority out there from either side
10 in any of the other places we can look.

11 LDC [MR. KAMMEN]: Let me ask you this. For a person who
12 is, let's say, convicted of terrorism, you know, orchestrating
13 the deaths of U.S. service personnel, could a sentence other
14 than death be full and fair justice?

15 MJ [Col SPATH]: Yes, of course. Yes.

16 LDC [MR. KAMMEN]: Why do you say that?

17 MJ [Col SPATH]: Because going through this process, if
18 you were to ask a panel member that, if they were to say
19 death, no matter what, after a conviction, they would be
20 excused.

21 LDC [MR. KAMMEN]: Okay. Go ahead.

22 MJ [Col SPATH]: I have to slow down.

23 LDC [MR. KAMMEN]: Welcome to Guantanamo.

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1 MJ [Col SPATH]: And I would think that would have to
2 apply to any trial judge. There are no preconceived end
3 states. We will work through the motions, we will work
4 through findings, and if there is a conviction, we will work
5 through the sentencing process.

6 LDC [MR. KAMMEN]: Okay. Let me ask you this. I mean,
7 have you read about the case at all in the newspapers, in
8 articles?

9 MJ [Col SPATH]: I did not know who Mr. al Nashiri was
10 alleged to be prior to my detailing and getting in touch with
11 the commissions, and I hate to say that. Maybe I should,
12 maybe I should have had a better idea of who we had or who we
13 thought we had at Guantanamo Bay. I didn't.

14 So do I know about the incident with the COLE,
15 inasmuch as it was in the news back in 2000? Yes. And I am
16 confident that I paid attention to it in the news back then in
17 the sense that it was a news event. But really, before my
18 detailing to this, had no idea.

19 LDC [MR. KAMMEN]: And I'm not suggesting it's improper,
20 in fact ----

21 MJ [Col SPATH]: No, I'm telling you I think I feel maybe
22 I should have done more reading or paying more attention to
23 current events, but ----

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1 LDC [MR. KAMMEN]: Since you were detailed, have you read
2 any news accounts, any articles, any of the stuff that's out
3 there that's been published about the case?

4 MJ [Col SPATH]: Specifically on purpose I have not.
5 Another trial judge mentioned to me that there was a blog out
6 there that if I wanted to find out what was going on at the
7 trial I could go look at, and I believe it's Lawfare blog. I
8 did not go look at it.

9 What I did was talk to Mr. Taylor and work to get
10 access to the transcripts, which I found out were in the
11 public domain and I could have been reading all along.

12 LDC [MR. KAMMEN]: How far are you, by the way?

13 MJ [Col SPATH]: About halfway through.

14 LDC [MR. KAMMEN]: I am impressed. A lot of reading.

15 One of the -- along the way somebody said to me that
16 one of the things that might be significant to the members is
17 what's in the best interests of the United States as to how
18 this case should turn out.

19 What do you think would be in the best interests of
20 the United States for how this case should turn out?

21 MJ [Col SPATH]: I have no idea.

22 LDC [MR. KAMMEN]: It's clear you have struggled with
23 this, and I appreciate your candor. In your mind what are the

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1 justifications for the death penalty?

2 MJ [Col SPATH]: That one I am going to decline to even --
3 I am not going to answer it, and I have not given that any
4 thought recently in any form. I just haven't.

5 LDC [MR. KAMMEN]: Do you think that deterrence -- that
6 the death penalty is really any kind of a deterrent?

7 MJ [Col SPATH]: I don't know.

8 LDC [MR. KAMMEN]: As you know the world, what do you
9 think, if anything, is the value of an execution of an
10 individual 20, 25 years after the event?

11 MJ [Col SPATH]: I don't know. I have never thought about
12 it.

13 LDC [MR. KAMMEN]: What are your views on Islam? Let me
14 ask it another way. That was a bad question.

15 What's your knowledge of Islam?

16 MJ [Col SPATH]: Reasonably poor, to be frank.

17 LDC [MR. KAMMEN]: Okay. "Reasonably poor" means
18 different things to different people.

19 MJ [Col SPATH]: I'm not going to discuss my religious
20 background in any way.

21 LDC [MR. KAMMEN]: I am not going to ask.

22 MJ [Col SPATH]: I did not go to school learning anything
23 about Islam. I did not take religious studies. I have not

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1 done some of the reading -- our chief of staff has a reading
2 list for the Air Force where they have a number of books that
3 include books about 9/11 or acts that are alleged to be
4 terrorism. I have not read them.

5 LDC [MR. KAMMEN]: Would you mind, do you happen to
6 remember the titles of those books?

7 MJ [Col SPATH]: I don't. But it's easy to find online.
8 The chief of staff's reading list for the Air Force, and I
9 hate to say here in public that I haven't read the chief of
10 staff's reading list, but I haven't. And a lot of that is
11 because of my job.

12 I try to, as best I can, insulate myself so I don't
13 come to decisions or make conclusions. It is probably
14 frustrating for those who live with me, but I find it's a good
15 way to practice.

16 LDC [MR. KAMMEN]: Do you know anything about Islam at
17 all, I mean, any of the basic tenets?

18 MJ [Col SPATH]: I am sure I do. This is what I can tell
19 you for this job, it will not impact me at all in any decision
20 that I make here.

21 LDC [MR. KAMMEN]: I'm not suggesting it would. I am just
22 curious sort of, I suppose, to be fair how much we have to
23 educate you, you know, what you know about this.

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1 Let me ask you this: Do you have any friends who
2 happen to be Muslim?

3 MJ [Col SPATH]: Yes.

4 LDC [MR. KAMMEN]: Have you spent any time in the Middle
5 East?

6 MJ [Col SPATH]: Yes. I was deployed.

7 LDC [MR. KAMMEN]: Well, beyond being deployed -- and I
8 think as, I recall reading your record, it was in Afghanistan.

9 MJ [Col SPATH]: I was deployed to Bahrain briefly and
10 then to Uzbekistan and then from Uzbekistan to Afghanistan.
11 Otherwise, I have not traveled or been in the Middle East.

12 LDC [MR. KAMMEN]: You know, some people have this view
13 that people who are Muslims are overcommitted to their faiths,
14 other people -- you know, what's your view of people who are
15 Muslim and their intersection with their religion?

16 MJ [Col SPATH]: I will just say this: I am confident
17 that in every faith there are people who are on one extreme or
18 the other in how they practice, and I think that is across the
19 board. And in faith I include people who have no faith; there
20 are probably extremes there as well in how people conduct
21 themselves. But I don't have any opinion as it relates to
22 that particular religion.

23 LDC [MR. KAMMEN]: Okay. How do you feel about at least

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1 what appears to be the fact that in many respects or in many
2 places within the United States there are sort of stricter
3 security measures about people who are Muslim than there might
4 be about non-Muslims? How do you feel about that?

5 MJ [Col SPATH]: I don't know if that's true. I haven't
6 really given that any thought. I can't imagine how it would
7 impact me here.

8 LDC [MR. KAMMEN]: Of course, one of the things that has
9 been argued, and I suspect will come up, is that essentially
10 this is a court that is reserved only for Muslim men. And so
11 to the extent that, if you will, it is born of animus, it does
12 come up. And so I guess ----

13 MJ [Col SPATH]: There is nothing from my prior life
14 experience that has caused me to come to any conclusions about
15 that. I know there is, I believe, a selective prosecution
16 motion that we are going to discuss here. The best I can do
17 is take the law I am given that either is binding on me or
18 hopefully offers me some insight and apply it.

19 LDC [MR. KAMMEN]: Do you know anyone who died on 9/11?
20 I'm not going to ask you to say names or anything like that.

21 MJ [Col SPATH]: I don't believe I did. Maybe somebody
22 who I had known in the past and I didn't realize, but no.

23 LDC [MR. KAMMEN]: I suspect for all of us 9/11 changed

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1 our lives hugely. How did it change yours, other than
2 obviously you went off to war as a result of it?

3 MJ [Col SPATH]: I deployed. That was the significant
4 life-changing event in that regard.

5 LDC [MR. KAMMEN]: Other than that, any?

6 MJ [Col SPATH]: No, and that deployment was 90 days or
7 less. So I have not sacrificed or been sent away as much as
8 many people in this room, frankly. I don't want to minimize.
9 It was an event in our national psyche that everybody paid
10 attention to. I know that. I didn't know anybody, as far as
11 I know. I was in Colorado when it occurred, so I was far
12 away, and I had a deployment where I was home before the
13 holidays.

14 LDC [MR. KAMMEN]: When you were there, I mean, did you
15 see any combat?

16 MJ [Col SPATH]: No. I was in Kabul early in November of
17 2001, but no.

18 LDC [MR. KAMMEN]: And are you in a position to talk about
19 what your job was?

20 MJ [Col SPATH]: A lawyer. We did standard advice to
21 commander type stuff.

22 LDC [MR. KAMMEN]: As you are aware, one of the issues
23 that sort of permeates this case is what I will describe sort

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1 of generally as torture. As you know the world, do you think
2 that the torture that was inflicted upon Nashiri is
3 mitigating?

4 MJ [Col SPATH]: I don't know. I'm not going to concede
5 that term or what happened yet or anything of the sort. If it
6 is a mitigating factor and we get to that point in the trial,
7 the court members will be told that much.

8 LDC [MR. KAMMEN]: Well, so you don't have any views one
9 way or the other where -- as to whether or not torture
10 inflicted on -- or let's just say abuse inflicted on Nashiri
11 by the United States after they captured him would be
12 mitigating, would bear against ----

13 MJ [Col SPATH]: I have not started to come to those
14 conclusions because nobody here has asked me yet. Again, I am
15 making myself familiar with this process by reading the
16 transcript. I'll deal with the motions as they come to me,
17 but I really have not started to deal with that particular
18 aspect yet because I'm just going to take what is given to me
19 to make decisions on.

20 LDC [MR. KAMMEN]: Well, you know, and this is going to
21 sound argumentative. It's not meant that way. I mean, I
22 guess part of the reality of coming in late is there is a
23 certain institutional history here. I mean, for example,

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1 Judge Pohl pretty much took the position, well, if the defense
2 thinks it's mitigating, it's mitigating and it will be an
3 issue for the members.

4 I may be overreacting, but I am hearing something
5 different from ----

6 MJ [Col SPATH]: I don't think you are. If you get to
7 sentencing, the law is pretty clear on the breadth of what you
8 all can make arguments to the members is mitigating. Some
9 would say unfettered. There are some C.A.A.F. cases that
10 have suggested it is unfettered. In previous rulings, I
11 think that's basically how I have dealt with it. I am not
12 going to suggest how I would rule on anything yet in this
13 case, of course, or give any rulings in a hypothetical sense.

14 But in that case there is a pretty good set of, if
15 not case law from the commissions, certainly case law similar
16 to this process that gives the defense wide latitude in what
17 they are going to present -- wider latitude, I would suggest,
18 than maybe you can find outside of this process in what you
19 can present.

20 LDC [MR. KAMMEN]: Okay, fair enough. So for example, you
21 would at least make room for the possibility that the defense
22 could present the fact that the people who ordered and
23 inflicted the torture will not be punished or -- in any way is

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1 potentially mitigating?

2 MJ [Col SPATH]: I could make room for any possibility
3 based on my time on the bench and as a litigant in criminal
4 trials.

5 LDC [MR. KAMMEN]: Now, have you ever dealt before as a
6 judge where there have been circumstances where the government
7 knowingly and intentionally destroyed evidence? I don't mean
8 the government, these guys. I mean the big G government,
9 other governmental agencies.

10 MJ [Col SPATH]: I don't remember. I have dealt with
11 motions where there were allegations of either lost or
12 destroyed evidence. I'm just trying to remember ultimately
13 what the outcome was. Nothing stands out.

14 I have dealt with it in other cases, usually with
15 something like recordings. I remember there was a recording,
16 I think an audio recording and DNA, but I don't remember the
17 specifics after that. I don't remember if it was intentional
18 or unintentional or what occurred as a result of that, and it
19 was two different cases.

20 LDC [MR. KAMMEN]: Well, are you familiar -- have you read
21 anything or just generally become familiar with the fact that
22 in violation of at least one court order, if not two, agencies
23 of the government intentionally destroyed evidence, at least

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1 the defense would contend is extraordinarily exculpatory?

2 MJ [Col SPATH]: I am becoming familiar with the record.
3 I am becoming very familiar with the record. I'm trying not
4 to speed read to catch up, but take my time to catch up so
5 that I know what has occurred.

6 LDC [MR. KAMMEN]: But beyond what may or may not be in
7 the record, you don't recall any of the public discussions
8 about the CIA's destruction of the torture tapes?

9 MJ [Col SPATH]: I don't.

10 LDC [MR. KAMMEN]: Now, it has certainly been discussed on
11 the record, whether you have gotten there or not, the CIA has,
12 I think, admitted lying to at least two, if not three,
13 different federal judges, the 9/11 Commission. At least
14 according to current press reports they have lied to Congress.
15 They have spied on Congress, and they have apparently lied
16 repeatedly in recent months to the public.

17 What steps, if any, do you think you can take as a
18 judge to keep the CIA from lying to you?

19 MJ [Col SPATH]: I don't know. And I'm not conceding -- I
20 just don't know. We will have to see or cross that bridge if
21 and when we get to it here.

22 LDC [MR. KAMMEN]: I mean, I guess the question that I am
23 really asking is this: If I put myself in your shoes, in a

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1 typical case if a governmental agency says X, I'm inclined to
2 accept X as being true. Here we have a governmental agency
3 that repeatedly has lied to everybody, you know, the
4 9/11 Commission, federal judges, Congress.

5 So the question is do they get the presumption of
6 honesty, or do they now come before this commission with a
7 presumption of dishonesty, which I think is a really important
8 question?

9 MJ [Col SPATH]: I am not going to answer the question
10 specifically. If I were the fact-finder, I would look at the
11 instructions on credibility of witnesses, and for the
12 fact-finders here, ultimately that's what I will instruct them
13 on.

14 So in your hypothetical there is not a presumption of
15 belief. What there is is you have to assess the credibility
16 of each witness who comes to testify before you, and then
17 there are a number of ways to assess that credibility to
18 assist you.

19 In your hypothetical, a government agency says
20 something and we believe it. If that hypothetical changes,
21 where any government agency were to testify and they were to
22 be impeached by demonstrations of prior acts of untruth or
23 impeachment because of prior inconsistent statements, one

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1 would think the fact-finder would use that in assessing their
2 credibility because the instructions tell them to.

3 LDC [MR. KAMMEN]: Let me explain why this is important,
4 not to the members, but to you. We are going to be dealing a
5 lot in the next few months with production of materials that
6 ultimately go back to Judge Pohl's order in 120CC. The
7 prosecutors and I differ on what that order means and what it
8 says, but ultimately they are going to provide you with
9 information, they are going to say this is -- this is
10 adequate. The problem is the source of that information we
11 believe is extraordinarily untrustworthy, not because it's
12 them, but because of the people who they deal with.

13 And so that's the problem. It's not really a
14 members' call initially, it's a judge call. Because if you
15 accept their views, that takes us one place. If you have a
16 presumption of dishonesty which we believe the CIA has
17 merited, that takes us to a different place. And so ----

18 MJ [Col SPATH]: I would say this. For motions practice,
19 for the motions before me, ultimately I will have to make
20 determinations about credibility of evidence and witnesses,
21 and I will do that the same as I would for any agency or
22 person who comes before me.

23 I do not have a preconceived belief that anyone who

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1 comes in here is automatically telling the truth or not
2 telling the truth. So I will assess it based on the evidence
3 that I get and the record before me.

4 LDC [MR. KAMMEN]: I guess the question is, because --
5 again because of the kind of particular way this all works, do
6 you think you have any independent responsibility to ensure
7 you are not being lied to by an agency of the government, or
8 is it incumbent upon us to somehow prove to you that you are
9 being lied to?

10 MJ [Col SPATH]: It's incumbent upon me to ensure that the
11 process is fair. That's probably the best I can do with that
12 question. And so I haven't seen that yet, because I haven't
13 been here yet to receive evidence.

14 I certainly am paying attention to the record that's
15 been developed, as I know you would want me to. I'm doing
16 that. And I'm confident that that record will bring me to
17 some conclusions at some point, particularly if I rule in your
18 favor on 305, because I will be ruling on motions that are
19 still open.

20 I can just tell you I am going to keep an open mind
21 and deal with both sides as fairly as I possibly can.

22 LDC [MR. KAMMEN]: We asked Judge Pohl this question: The
23 Convention Against Torture that the United States has signed

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1 requires individuals with knowledge of torture to report that
2 to appropriate national and international bodies so they can
3 take action. After you hear evidence concerning the torture
4 inflicted on Nashiri by the U.S., would you be willing to
5 report those individuals, recognizing two things: Number one,
6 it would create huge havoc potentially in their lives, and
7 frankly probably would be the end of your military career, as
8 I understand the world?

9 MJ [Col SPATH]: That was early in the record, so I have
10 read, of course, his response as you discussed this with him,
11 and the answer is the same. I follow the law. And so if A
12 and B -- if all of A as you say is true, A is true, B is true,
13 C is true, and here is the required outcome -- and again I am
14 not using your hypothetical in filling in that math
15 equation -- I am going to follow the law.

16 And worries about -- we all care, of course -- we all
17 care in some respect about a career. I mean, of course, every
18 single person here wants to do well, define that as you will,
19 in their career. I have done well, and if my career -- here
20 is the bottom line. I am not getting promoted again. I know
21 that. My next ceremony is going to be a retirement in the Air
22 Force. There is no promotion ceremony in my future. I know
23 that to be a fact so I'm not worried about that. And my

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1 career in the Air Force is shorter than it is longer now
2 because I have been in a bit over 20 years, and I know that
3 too.

4 My superiors and my current superior always say speak
5 the truth and speak truth to power. So that's hopefully
6 what -- I take that seriously. Maybe that's why they made me
7 the Chief Trial Judge, maybe it's not, but I feel very
8 comfortable that I don't have a bias for either side. I have
9 a real desire to ensure a fair process and a fair
10 administration of the rules.

11 LDC [MR. KAMMEN]: And I mean, let me just -- I mean,
12 there is obviously a conflict to be fleshed out as to what the
13 power of a commissions judge -- what real power the
14 commissions judge has. Judge Pohl had a pretty limited view
15 as to what his real power was.

16 But I mean, let me -- I'm not going to play hide the
17 ball. At some point presumably we are going to get far enough
18 along that among the people we are going to ask you to assist
19 us in bringing here are people such as former Vice President
20 Cheney, former Secretary of Defense Rumsfeld, Condoleezza
21 Rice, possibly former President Bush to provide testimony.
22 How do you feel about that?

23 MJ [Col SPATH]: Regardless of who or what they are, I'm

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1 going to follow -- the rules regarding witness production and
2 whether or not they are relevant and material are pretty
3 similar to what I do every day. I know we keep saying this
4 process is unique. It is unique. But the rules that they
5 have crafted are in large part straight from the Rules for
6 Courts-Martial.

7 LDC [MR. KAMMEN]: That's true. The difference is perhaps
8 the prosecution here takes a much different view of what is
9 relevant than from what I understand in my limited experience
10 as well is typically in prosecutions.

11 MJ [Col SPATH]: They may or may not be. I don't know.
12 What I will tell you is ----

13 LDC [MR. KAMMEN]: If you read the transcript, you know.

14 MJ [Col SPATH]: I know that there is not always a lot of
15 agreement between the two sides, but that doesn't lead me to
16 anything except there is not a lot of agreement between the
17 two sides.

18 I will do the best I can to interpret that rule
19 fairly or those rules there involved fairly for both sides.

20 LDC [MR. KAMMEN]: You said you have agonized about the
21 death penalty. Do you think the death penalty process can be
22 abused?

23 MJ [Col SPATH]: I will say I didn't say "agonized." I

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1 think I said "struggled."

2 LDC [MR. KAMMEN]: Struggled, okay.

3 MJ [Col SPATH]: I don't know. I haven't given that issue
4 thought. Again, I want to make sure that wouldn't impact me
5 here, but I haven't given it thought. I don't know.

6 LDC [MR. KAMMEN]: I guess the question is do you think a
7 judge has a -- I guess an independent responsibility to
8 prevent the system from being abused if he or she concludes it
9 is?

10 MJ [Col SPATH]: Yes, that's fair. The judge has a
11 responsibility to ensure the process is not abused by either
12 side. Absolutely.

13 LDC [MR. KAMMEN]: I don't know if this has come up, but
14 have you given any thought about sort of the institutional
15 decision to use military commissions to prosecute people
16 rather than Article III courts or courts-martial, all of which
17 would have some form of jurisdiction?

18 MJ [Col SPATH]: I have not. I have stayed out of any of
19 that debate. Frankly, I assume it's a policy choice by the
20 government and I haven't given it any thought.

21 LDC [MR. KAMMEN]: Well, let me ask you this. What
22 experience, if any, have you had with how things work in
23 Article III courts in terms of resources, in terms of access

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1 to evidence, in terms of the defense's ability to adduce
2 evidence?

3 MJ [Col SPATH]: Anecdotal. I have a couple of friends in
4 different roles in Article III courts, to include a district
5 judge. So nothing to do with any particular trial, but just
6 in a general sense I have certainly had discussions about we
7 do it this way and he or she has indicated we do it this way.
8 So familiarity by discussion with people involved with the
9 process.

10 LDC [MR. KAMMEN]: Because one of the ongoing disputes, I
11 mean, certainly you have probably come to this piece already,
12 is at least the Military Commissions Act says that the defense
13 should have access to evidence, paraphrasing -- I am not sure
14 of the exact language -- essentially similar to or identical
15 to that that would exist in an Article III court.

16 One of the ongoing disputes, of course, is that the
17 regulations promulgated by the Secretary of Defense walked
18 that back. And so there is this question -- so I guess the
19 question is have you given any thought to which trumps, the
20 statute or the regulations? I mean, are you going to be
21 comfortable telling the Secretary of Defense I don't care
22 about your regulations?

23 MJ [Col SPATH]: I am comfortable that -- I haven't given

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1 it any thought yet. I haven't prejudged anything. I am quite
2 comfortable that I know I was taught statutory interpretation.
3 I have gone back to look at it again to make sure I understand
4 what I was taught. I am open to what both sides have to tell
5 me, and then I am going to do my level best to follow that
6 path where it leads me. I'm not worried about who is offended
7 by that decision.

8 LDC [MR. KAMMEN]: The other thing, and I'll tell you
9 this -- I mean, just look at sort of the disparity, the DoD or
10 at least the NDAA, at least the most recent NDAA says that
11 there should be equality of resources, and I will tell you
12 that there is absolutely not equality of resources.

13 What do you think the responsibility is of the judge
14 to ensure that there is equality of resources?

15 MJ [Col SPATH]: My responsibility is a fair process. I
16 think -- I hope I have said that a number of times, so that's
17 what I offer.

18 LDC [MR. KAMMEN]: Could you flesh that out?

19 MJ [Col SPATH]: It will be a case-by-case and a
20 request-by-request decision. Judge Pohl has made some, so as
21 you have requests for my assistance, we will deal with them
22 each as they come in.

23 LDC [MR. KAMMEN]: But institutionally, the problem is

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1 institutionally there is this huge disparity of resources.
2 And you think as a judge -- do you just see your role as just
3 this case or -- and obviously this is the only case you have
4 in front of you. It's a little different than Judge Pohl who
5 sort of had universal jurisdiction.

6 But do you think you have any obligation to provide
7 equality of resources in this case? Because I'll tell you,
8 part of the issue is, you know, just the lack of -- I mean,
9 there are probably lawyers queuing up to work for the
10 prosecution, and from what I understand, the services are
11 somewhat less -- you know, it's unclear that people are being
12 sent to the defense by the various services. And so there is
13 this -- you know, they can't order people to come, so there is
14 just not enough bodies and enough qualified bodies.

15 I mean, do you see any role there in an individual
16 case?

17 MJ [Col SPATH]: I'm not trying not to answer. I'm
18 just -- it's very difficult to work with hypotheticals. I
19 don't know. Your team, because some people aren't here, seems
20 reasonably robust as I look out at it, but that would be a
21 quality call as well. I look to both sides, and there seems
22 to be a lot of people here. I don't know.

23 And so if you present me evidence that shows that you

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1 are underresourced and incapable of performing the duties that
2 are required of you, I am going to look at that to figure out
3 how to assist with that, of course. But it's hard in a
4 hypothetical sense to figure that out. Does that help make
5 sense?

6 LDC [MR. KAMMEN]: I'm gathering I'm hearing you say that
7 you will look at systemic issues of underresourcing?

8 MJ [Col SPATH]: I'm going to look at ----

9 LDC [MR. KAMMEN]: If they are presented to you.

10 MJ [Col SPATH]: I'm going to follow the rules as best as
11 I can interpret them, and I do rule based on evidence that I
12 see here in court. And so I can assure you I will do that.

13 What I can't do is give -- and I am not suggesting
14 that you are asking me to, and I'm not saying anything I hope
15 that's being taken this way, but I can't give advisory
16 opinions, and I wouldn't.

17 LDC [MR. KAMMEN]: I understand. Let me turn -- do you
18 want to keep going or do you want to take a break.

19 MJ [Col SPATH]: I'm okay.

20 TC [MR. SHER]: We are okay, Your Honor.

21 MJ [Col SPATH]: Let's keep going.

22 LDC [MR. KAMMEN]: I'm getting a request for a break.

23 MJ [Col SPATH]: That's okay. We have been in here for an

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1 hour and a half. Why don't we come in at -- does 10:45 work
2 for both sides? It's just under 20 minutes?

3 TC [MR. SHER]: Yes, Your Honor.

4 LDC [MR. KAMMEN]: Yes. Perfect.

5 MJ [Col SPATH]: The commission is in recess. Thanks.

6 [The R.M.C. 803 session recessed at 1033, 4 August 2014.]

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