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1 [The R.M.C. 803 session was called to order at 1051, 4 August
2 2014.]

3 MJ [Col SPATH]: This commission is called to order. All
4 parties present before the recess are again present.

5 Defense Counsel.

6 LDC [MR. KAMMEN]: I guess at some point we need to talk
7 about the Witt case. When you saw the motion to recuse, I
8 mean, did you have any reactions to that?

9 MJ [Col SPATH]: No. That was Commander Mizner, Mizer?

10 LDC [MR. KAMMEN]: Mizer.

11 MJ [Col SPATH]: I had not met him. I did not know he was
12 involved in the appellate process with Witt.

13 LDC [MR. KAMMEN]: I mean, it's just very recent. I mean,
14 to be fair, he has some personal issues, family issues that
15 required him to take a hiatus from this. He hopes to be back
16 in November. He has accepted employment with the Air Force, I
17 think as a civilian appellate counsel. He has commenced those
18 duties, and among his responsibilities is pursuing the further
19 appeals on behalf of Airman Witt.

20 As he looked at the briefs that have been filed and
21 he looked at sort of the information, he realized that one of
22 the big issues in the case were the allegations of plain error
23 based on prosecutorial misconduct. So this was like uh-oh,

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1 so, you know ----

2 MJ [Col SPATH]: My reaction was in that case -- I wish
3 you had been there, because you will just have to rely on what
4 I tell you, and that is frankly there was no reaction. Witt
5 was tried almost ten years ago. It was 2005. It has been in
6 the appellate process for a while, and it was one case.
7 Obviously it was a longer case, but it was a single case, and
8 I haven't paid that much mind to it.

9 Somebody sent me the Air Force court opinion when it
10 came out a month ago or a month and a half ago. Somebody sent
11 me the document so I could see it. I haven't read it yet.

12 LDC [MR. KAMMEN]: When you got the motion to recuse,
13 which basically reraises this context, the allegations that
14 have been raised on the appeal. And let me, if you don't
15 mind, share with you, I mean over the course, certainly any
16 lawyer, there is going to be times when somebody will
17 criticize you. Sometimes my first reaction is, well, looking
18 back on it, that's fair. Sometimes my first reaction is less
19 charitable, and even to become kind of angry. And I am just
20 kind of curious what your reaction was.

21 MJ [Col SPATH]: Nonexistent in the sense of any personal
22 anger or upset about the continued appellate process in Witt.
23 As I read the motion -- because, again, I haven't read the --

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1 the appeal was a number of pages long, the court opinion, so I
2 haven't read it.

3 As I read the motion, and it had quotes from the
4 transcript, I assume, I'm not going to for a moment concede
5 oh, that's plain error now that I have read it. I have seen
6 that before. As someone involved in a trial that went on for
7 a lengthy period of time, are there things that I probably
8 could have done better? Absolutely. I feel that in
9 everything I do every day of my existence. I'm always willing
10 to learn. But as adults in a criminal process, it does not
11 bother me that people are looking back about the work I have
12 done and then are representing their clients one way or the
13 other.

14 LDC [MR. KAMMEN]: Okay. Well, I'm sure he will, you
15 know, vigorously pursue that in that forum.

16 MJ [Col SPATH]: He should. He is required to zealously
17 pursue that in that forum, and that causes me -- as I sit here
18 today, the Witt case outcome has no bearing for me. I
19 recognize the people involved in that case on both sides who
20 are personally connected feel much differently about that. I
21 know that. But as a prosecutor, and that was my role then,
22 that case is -- that's behind me.

23 LDC [MR. KAMMEN]: I guess, I mean, cutting to the chase,

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1 the concern, of course, is you see this guy who is saying all
2 these things about you to this other court, and now he is here
3 saying do this, don't do that. How do you separate them? I
4 mean, how do you ----

5 MJ [Col SPATH]: I don't know how, just because I don't
6 understand how lawyers' brains work. I just know we are
7 trained to do it. I know the end result is that causes me
8 zero worries. It won't cross my mind. I don't mind that he
9 is zealously representing somebody on appeal who I prosecuted,
10 and my guess is if we could go out and study other trial
11 judges, this is probably not an uncommon occurrence across the
12 world, that there is an appellate process that involves
13 somebody he might see in the courtroom.

14 It just -- I hate to say it doesn't interest me, it's
15 just not something I am worried about at all.

16 LDC [MR. KAMMEN]: Well, okay, let me ask it this way, and
17 then maybe we will move on.

18 But let's assume just for the sake of this question
19 that the appellate courts, because I think there is rehearing
20 of rehearing, because I think there has been a change over in
21 the court, so the appellate court says Commander Mizer, you
22 are right, this either conviction or death sentence should be
23 set aside because we now find, based on your advocacy, that

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1 the prosecutor committed plain error misconduct. How are you
2 going to feel about that when the guy who threw you under the
3 bus legally is there before you now in this capacity?

4 MJ [Col SPATH]: I know you know this. Given the number
5 of trials as a judge and a prosecutor and a defense counsel
6 years ago, your term, "being thrown under the bus," not mine.

7 LDC [MR. KAMMEN]: Sure.

8 MJ [Col SPATH]: Somebody representing somebody on appeal
9 and saying things about me, about how I practiced in that
10 court, happens all the time. It just does. The appellate
11 court -- I have been overturned. I have had dinner with the
12 appellate judge who has overturned my case because we happened
13 to be friends separate from anything. He certainly didn't
14 mind overturning a trial that I sat on as a trial judge, and I
15 didn't spike his food because I was frustrated with his
16 decision. It didn't come up.

17 LDC [MR. KAMMEN]: But did you want to?

18 MJ [Col SPATH]: Didn't even want to. It didn't come up
19 in conversation. Probably because of both our jobs, frankly,
20 we both knew it should not come up in conversation.

21 The same here. Because of our roles in here, I
22 probably won't go over and say congratulations, but that's
23 because we are here in trial together and I try to avoid

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1 contact with you all. But away from here, and I can say this
2 not in a hypothetical sense, it occurred. Witt's sentence was
3 set aside initially with the first rehearing.

4 LDC [MR. KAMMEN]: Right.

5 MJ [Col SPATH]: The personnel involved in that on both
6 sides and I know each other. I didn't want to say anything
7 ugly about one side or the other. It didn't matter. It was
8 interesting in the law, but I saw the impact it had on me, and
9 there just wasn't one.

10 LDC [MR. KAMMEN]: And one of the things that came up in
11 Cron was the thing that I think that one of his defense
12 lawyers had also been part of his appellate team, and they
13 indicated, at least according to the opinion, that they were
14 thinking of filing the same motion, made the decision not to.

15 MJ [Col SPATH]: You saw that discussion in the record,
16 yes. And I can share with you from the record and from that,
17 initially they were thinking about making a recusal motion,
18 and it was for that same reason. McCue, Major McCue was on
19 the Witt appellate team that was working on that first appeal.

20 We never got to a ruling because ultimately they
21 didn't file the motion. You probably saw the discussion. I
22 think it was highlighted in your motion, because initially
23 they indicated they were going to waive the motion. And I

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1 said, no, you are not going to waive that motion. Your client
2 is entitled to a judge who is unbiased, period, either
3 actually biased or gives the appearance of being biased. And
4 they knew that. And so they didn't file the motion.

5 You also of course saw in the affidavit they don't
6 regret not filing the motion because they on their own came to
7 the conclusion that I was well situated to try that case. So
8 Major McCue is maybe best to ask. Maybe you already have. I
9 hope he would tell you that I have treated him like I have
10 treated everybody else in that courtroom and that there was no
11 issue with his work on Witt, because there wouldn't have been
12 and there wasn't.

13 LDC [MR. KAMMEN]: I mean, certainly the fact that there
14 is a pretrial agreement puts that in a different light, and
15 not an unfavorable light. I mean, I want to be clear.

16 MJ [Col SPATH]: Probably it does. And it probably
17 changed. I don't want to say it changed whether or not they
18 would file it or not. It probably changed their strategic
19 discussions amongst themselves, sure.

20 LDC [MR. KAMMEN]: But given the fact here, of course,
21 that there is no pretrial agreement, death is still very much
22 on the table, there is this underlying issue how do you
23 compartmentalize, I mean, how ----

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1 MJ [Col SPATH]: I don't even need compartments for that
2 one. That's the price of doing business as a prosecutor and a
3 trial judge and a defense counsel. People second guess my
4 decisions all of the time, and sometimes they agree with me
5 and sometimes they don't. That's it.

6 They disagree with me in here. I've had trial
7 defense practitioners and trial practitioners on the
8 prosecution side, when I make a ruling, have reacted poorly
9 and I have moved on with it. It doesn't bother me. People
10 will disagree with me in this case no matter what I do, and
11 that's the price of doing business.

12 But on the one, you just have to trust, have faith or
13 deal with the actual bias piece. There is none. I have zero
14 concerns. The compartmentalized -- if you build a continuum
15 of what I would have to compartmentalize, somebody who hurt me
16 personally, I mean, truly hurt me or my family, it would be
17 difficult to have them practice in front of me. Somebody
18 saying that I did something poorly, unprofessionally or
19 whatever in a trial, it just happens so often, not because I
20 am doing things, I don't think, poorly and unprofessionally.
21 That's the price of doing business.

22 LDC [MR. KAMMEN]: Looking back on, when you saw those
23 allegations in the Witt -- I mean, in the motion, I mean, did

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1 you read any of the Witt briefs that were filed over the
2 years?

3 MJ [Col SPATH]: I was involved with a post-trial hearing
4 in Witt at Leavenworth that had to do with some of those
5 allegations and the record of trial and whether or not it was
6 verbatim or substantially verbatim. I believe that was in
7 2009. And there I was acting in my capacity again as a
8 prosecutor because it was a post-trial hearing. I did not
9 attend either of the appellate arguments in Witt, and I did
10 not read the briefs filed on either side for those two
11 hearings. I have not read or reviewed it.

12 As I mentioned, somebody did send me the decision.
13 It may have been one of the appellate judges, it might have
14 been a friend -- I don't remember, it just showed up in my
15 e-mail -- and I haven't read it yet.

16 LDC [MR. KAMMEN]: A couple of sort of Witt-related
17 questions. Who is the government's blood spat -- I mean, you
18 wrote the article, "Is Death Different?"

19 MJ [Col SPATH]: No, if that were so. My name is on the
20 article along with two other people, and I was the senior
21 person signing on that article, so I did as much work as you
22 would expect, which is I certainly was involved.

23 And I am not minimizing an article I wrote. It was

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1 something I was involved in. But a vast portion of the
2 crafting and drafting of that article were done by the two
3 junior trial counsel, of course.

4 LDC [MR. KAMMEN]: Who was the blood splatter expert on
5 behalf of the government?

6 MJ [Col SPATH]: It was a civilian from New York.

7 LDC [MR. KAMMEN]: Paul Kish?

8 MJ [Col SPATH]: Yes.

9 LDC [MR. KAMMEN]: In the article you talked about sort of
10 the emotionally charged nature at the trial, and of course
11 death penalty trials, that's the nature of it. Of course,
12 there one of the reasons you moved to the Bibb County
13 courthouse was the fact that you needed to separate the victim
14 family members from the two or three families that were
15 involved, and then from Airman Witt's family.

16 As a judge, how do you keep that emotion from
17 influencing the members.

18 MJ [Col SPATH]: That's an interesting question. The voir
19 dire process has to help us with that. It does, as we
20 identify who is well suited to be on a panel.

21 The indication that Witt was emotionally charged had
22 to do with -- you said it -- the people who were involved
23 around it who were directly impacted on both sides, and they

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1 were emotionally very vested, as you would expect. The
2 evidence presentation to the court members was -- I would
3 think it was graphic. There was a tape-recording involved.
4 There were photos involved. I would think it was graphic.

5 The judge there I know from the record watched the
6 members and made comments about their reaction to things. So
7 the best I can do is that, is through the voir dire process
8 identify people who are best suited to be here, and then we
9 have to pay attention to them. Everybody is going to have
10 reactions to evidence in some way. I mean, that happens as
11 you go through a trial. It's just reminding them to keep an
12 open mind and to hear the evidence and to be fair, and if they
13 can't, we have to let them go.

14 LDC [MR. KAMMEN]: That's true, but then once they are
15 there and you have -- I mean, in Witt's case, I am sure this
16 profound grief, and then on the other side of the courtroom, I
17 mean, one of the things that I have learned over the years is
18 that everybody loses somebody in these cases. Private Witt,
19 had he gotten a life sentence, is largely gone to his family,
20 not the same way as the people that were killed to be sure,
21 but there is just grief throughout this whole process.

22 The reality, though, is in the real world the victim
23 family members' grief is given, maybe quite properly, greater

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1 weight. How do you prevent that from skewing, if you will,
2 beyond where it should? And I'm not saying it has no place in
3 this, because we know it does. It just doesn't -- how do you
4 prevent that?

5 MJ [Col SPATH]: The best I can say is every criminal
6 trial feels serious to the participants involved in it. There
7 are level -- certainly someone who is involved in a murder
8 case is probably different than larceny, I understand that, or
9 some kind of sexual assault offense. I mean, there are
10 different levels.

11 The best we can do is empanel a jury, or here
12 commission members or panel members, through that process and
13 remind them over and over again about the need to follow the
14 law as they are instructed. But we do that in every court
15 every day throughout this country.

16 LDC [MR. KAMMEN]: But here is the difference in a death
17 penalty case, at least from our perspective. At the end of
18 the day the decision whether to impose death is this
19 individual moral choice each particular juror is making. They
20 can follow the law and at the end of the day they get to this,
21 you can follow the law and say I am so overwhelmed by the
22 survivors' pain that I want to impose death, or you can follow
23 the law and say I am putting that pain, which is real and

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1 genuine, in a different place, I'm recognizing it, but that's
2 not going to be the dominant factor in my decision. Both
3 people are following the law.

4 So how do you -- I mean, it's more than following the
5 law. And let me just share with you my concern, how it bears
6 on here. I don't dispute -- I mean, we know that there is a
7 number of people who come here routinely, and to a limited
8 extent we have contact with them. I suspect the victim impact
9 piece in the trial, if Mr. al Nashiri is convicted, will be a
10 significant portion of the government's presentation.

11 Because of the circumstances, because we are here in
12 Guantanamo, it's going to be a very skewed and one-sided
13 situation, because my guess is that the government will make
14 it virtually impossible for Mr. Nashiri's family to really
15 present evidence. So it's going to be very, very skewed. And
16 our fear, quite candidly -- I mean, I am jumping out of Witt.
17 Our fear is that that skewing process is going to be a big
18 piece of this.

19 How do you as a judge keep that from happening?

20 MJ [Col SPATH]: And I hate to keep saying this, but I
21 really -- it's the best I can do in this seat. There is a set
22 of rules that is given to us, and there is a law that has been
23 given to us that we will do our best to interpret and follow.

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1 I mean, I have told you, and I mean this, it has to
2 be a fair process, at least as I sit here, for both sides.

3 LDC [MR. KAMMEN]: One of the things in the article you
4 talked about was sort of ending each day on an emotionally
5 charged point to sort of send the members home. Do you happen
6 to remember what those kinds of things were?

7 MJ [Col SPATH]: No. I know that discussion. Keep in
8 mind I was a trial practitioner.

9 LDC [MR. KAMMEN]: Right.

10 MJ [Col SPATH]: And this was a strategy decision as a
11 prosecutor. Hopefully the defense community was having that
12 same discussion as to what they were trying to do through the
13 trial. And that article is written to assist trial, and I
14 mean both sides, practitioners to think about things you don't
15 necessarily think about in a lengthy case.

16 And so I do remember that we specifically worked to
17 not be talking about something at the end of the day that
18 would be perceived as boring, but that would keep people's
19 interest. I could not tell you what each day ended on at this
20 point. I couldn't. I know the audiotape was the last part of
21 the prosecution case. I remember that.

22 LDC [MR. KAMMEN]: Well, after you -- at any point have
23 you -- I mean, have you looked back on the Witt case and

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1 second guessed yourself at all and said, well, maybe they've
2 got a point, maybe I pushed too hard here?

3 MJ [Col SPATH]: Have I done that personally? No, I have
4 not. I -- like every trial I tried to learn from it. That
5 article was the result of that. We looked back. I am
6 confident there must have been a point where I said, oh, we
7 probably could have done this or we might have done this. I
8 don't know.

9 LDC [MR. KAMMEN]: Even more, was there a point where you
10 said, wow, looking back on this, there was a point where I
11 wish I had done this or where I wish I hadn't done that?

12 MJ [Col SPATH]: I knew other people were truly going to
13 look at the record and look at the presentation and figured
14 out if the process worked or not, because that's what happens.

15 LDC [MR. KAMMEN]: And so no harm to Commander Mizer when
16 he comes in here?

17 MJ [Col SPATH]: He is an officer of the court. I will
18 treat him both by appearance and without thought as everybody
19 else that's here. Really, I can't even envision that Witt
20 will cross my mind when he is here. It does now, because we
21 are talking about it. But when he stands up in a week, a
22 month, a year from now, if I stay here, and talks, I am not
23 going to be thinking, oh, Witt. I am going to be listening,

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1 and listening to him like I would listen to anybody in this
2 room as an officer of the court with absolutely no different
3 feeling.

4 LDC [MR. KAMMEN]: Here is the last question, because it
5 is really the 60 -- clearly the allegations in Witt are that
6 there was prosecutorial overreach, and that I understand is
7 going to be argued forcibly -- forcefully in the remaining
8 appellate process, and I'm not even completely clear how many
9 more levels there are. I think there are two or three.

10 MJ [Col SPATH]: Right. So the Air Force Court and then
11 we have C.A.A.F. and then the Supremes, which I assume would
12 look at a death penalty case, and any number of appeals
13 probably in that process.

14 LDC [MR. KAMMEN]: So I hear what you are saying about
15 actual bias. But how about the appearance of bias? Because
16 that was what the Cron situation was as well. And so what's
17 your response to that?

18 MJ [Col SPATH]: For the appearance of bias piece, it's
19 important that it's a member of the public who is
20 disinterested in the proceedings ----

21 LDC [MR. KAMMEN]: Right.

22 MJ [Col SPATH]: ---- who knows all of the facts, and,
23 frankly, can understand our mindset as practitioners or the

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1 trial judge.

2 Understanding that appellate work and attacks on
3 decisions at the trial level are made in the normal course of
4 business, the best that I can do is tell you that any trial
5 judge should expect again to be second-guessed. They should
6 embrace it, frankly. It's how our system works. And there is
7 no harm to it. That's why our system is so robust, and that's
8 why, again, I'm not speaking necessarily here at this moment
9 how do I do that.

10 The reason our justice system writ large works so
11 well is because we are able to handle things like that and not
12 take it personally. It just doesn't matter. What mattered to
13 me was as a trial practitioner doing what I thought was right,
14 but somebody thinking I didn't, that's okay. More than okay.
15 Expected.

16 LDC [MR. KAMMEN]: But how do you put it aside when that
17 same guy is here in front of you?

18 MJ [Col SPATH]: Easily. Again, easily. I haven't -- as
19 I said, this isn't just a hypothetical in the sense that I
20 have been around people who have suggested I did something
21 poorly in the courtroom or I could have done something better.
22 I have not only spent time with them, I'm still friends with
23 them.

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1 And it goes to your question earlier about if I have
2 friends who have a particular religious persuasion. I have
3 had friends who are defense counsel, trial counsel, trial
4 judges, and we have done battle in that sense in the courtroom
5 on every side of the question, and there is no animus there.

6 LDC [MR. KAMMEN]: I guess the one difference is this, and
7 maybe -- we have all been in situations where, yeah, we argue
8 about A, B and C in court and then maybe sit down afterwards
9 and have a beer.

10 But it's different when it's I think, "You, Kammen,
11 did this thing wrong, and I think you really messed up." And
12 then it's not two lawyers arguing and moving on, it's I think
13 you did something wrong. And so in that way it's also not the
14 same as a judge. I mean, yeah, judges get second-guessed all
15 the time. It's a little less likely that lawyers, prosecutors
16 get second-guessed as frequently. It happens mainly in death
17 penalty cases, and people react differently to it. Some are
18 comfortable with it, and some are not.

19 MJ [Col SPATH]: That's probably very fair. I think as
20 prosecutors, I think they get second-guessed more than you are
21 suggesting, at least in our fairly robust practice in the Air
22 Force and in the Army.

23 I have had some number of cases overturned by the

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1 appellate courts as a prosecutor, and they suggested that I
2 did things wrong in those, and the appellate court apparently
3 agreed with that. I don't always agree with the appellate
4 court, but I don't have to.

5 LDC [MR. KAMMEN]: Sure.

6 MJ [Col SPATH]: I listen to them and I follow what they
7 tell me after that, be it as a trial practitioner or a trial
8 judge.

9 That's why I think the appearance piece is so
10 critical, and that is you would have to be an individual not
11 connected to this case, so a member of the general public who
12 not only knows all the facts but understands my mindset.

13 Commander Mizer should continue to zealously
14 represent Witt, and it causes me not even a moment hesitation,
15 and I would tell you if it did.

16 LDC [MR. KAMMEN]: Okay. And it won't cause you any
17 hesitation here?

18 MJ [Col SPATH]: Not at all.

19 LDC [MR. KAMMEN]: Well, we talked a little earlier that
20 you were a defense lawyer. How many trials as a defense
21 lawyer did you actually try? Rough.

22 MJ [Col SPATH]: I have a list of all the trials I have
23 done as a practitioner. I was at Ramstein Air Base and it was

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1 for one year. We did more trials back in that time. I would
2 guess in the range of 25 to 30.

3 LDC [MR. KAMMEN]: What's the most serious? Any murder
4 cases?

5 MJ [Col SPATH]: No murder cases. Sexual assault cases.
6 Probably the most serious, child -- child sexual assault cases
7 as well.

8 LDC [MR. KAMMEN]: As a defense lawyer, did you ever
9 witness anything that you thought -- any behavior by
10 prosecutors you thought was improper?

11 MJ [Col SPATH]: Yes.

12 LDC [MR. KAMMEN]: As a judge, have you seen -- and I am
13 not going to ask you to name names -- stuff that you are
14 sitting there saying, wow, I think this is beyond what's
15 appropriate?

16 MJ [Col SPATH]: Have I seen that?

17 LDC [MR. KAMMEN]: Uh-huh.

18 MJ [Col SPATH]: Yes.

19 LDC [MR. KAMMEN]: What's your responsibility as a judge
20 when you see it?

21 MJ [Col SPATH]: Let me answer it this way: My
22 responsibility -- there is a wide range of how judges conduct
23 trials out there, of course. There are some who are more

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1 involved without objections from either side than there are
2 others. The Court of Appeals for the Armed Forces has made
3 pretty clear that, at least in the courts-martial process, our
4 job is more than calling balls and strikes. Again, that is
5 from my -- the court I have to follow in that environment.

6 It is important to me that the process is actually
7 fair and is perceived as fair, but it's also important for me
8 to let both sides try their case and understand that as
9 adults -- and I don't mean in a bad way -- I mean trial
10 practitioners with a great deal of experience, that you all
11 recognize when it is time to object or come to me for
12 assistance, and it's an important balance.

13 My job, again, is to make sure it is fair, but it's
14 perceived as fair, and somewhere along that continuum to try
15 to do that. And frankly that changes. I have been in
16 courtrooms where there are inexperienced counsel on both sides
17 who are doing things that are going to cause that case to be
18 overturned because they have no idea what they are doing, and
19 I have been in cases where there is a lot of experience on
20 both sides where they are doing things where it causes me to
21 wonder, but I recognize they are experienced and I have to
22 trust that they know what they are doing and why they are
23 doing it, and then just again try to walk that line and

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1 balance, has to be fair, has to be perceived as fair.

2 LDC [MR. KAMMEN]: Well, when you see -- here is what I
3 hear you saying, and tell me if it's -- because some judges
4 say -- and I have had judges say to me, look, the Rules of
5 Evidence are not self-executing. You know, somebody has got
6 to object. If people don't object, this is not my job.

7 Other people, other judges say, well, if I think the
8 lawyer is not objecting because he is making a strategic
9 choice, I am likely to sit back. If I think the lawyer is not
10 objecting because he doesn't know what he or she is doing, I
11 may become more involved. And I am hearing that is sort of
12 your approach.

13 MJ [Col SPATH]: I think you are hearing it is very much a
14 case-by-case basis and that my approach varies depending on
15 what is going on in the courtroom, the experience level of
16 both sides, and how egregious what I perceive is happening is
17 happening.

18 I think a great hypothetical, no matter the
19 experience level, the right to remain silent and the right not
20 to be heard in a court and not have it held against you is
21 fairly sacrosanct and a pretty bright-line rule. So I would
22 be more apt to step in if I thought that was occurring, even
23 if there was silence from everybody. It's just really one of

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1 those bright-line rules. Versus maybe hearsay or relevance
2 that's close to the lines, I might not step in here because of
3 the experience level.

4 LDC [MR. KAMMEN]: Well, don't confuse age with ability,
5 Your Honor.

6 MJ [Col SPATH]: I don't. I did not suggest that the
7 inexperienced crowd were young. But very much a case-by-case
8 basis to try -- again, I really try to stay focused on a fair
9 process that's perceived as fair.

10 LDC [MR. KAMMEN]: And on the other side of that, I mean,
11 we have talked about prosecutorial misconduct. How do you see
12 your role -- and maybe you have answered this -- preventing
13 ineffective assistance of counsel?

14 MJ [Col SPATH]: I think I have. I think the role is the
15 same, which is to ensure the process is perceived as fair, you
16 all have to be perceived as effective. But the line for where
17 ineffective assistance of counsel falls, Strickland suggests
18 it's low and the cases after it suggest it's reasonably low,
19 what do you do with that? I don't know. It's a case-by-case
20 process where all as I can do is ensure that Mr. al Nashiri
21 and the government have a fair process in place and that it is
22 perceived as being a fair commission process for
23 Mr. al Nashiri.

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1 LDC [MR. KAMMEN]: Let me ask you this: In your
2 conversations with Judge Pohl did you guys -- because he has
3 left it to you to determine, I guess, how to implement his
4 order under 120CC. I mean ----

5 MJ [Col SPATH]: Yes, that's how I read the detailing
6 order, is that one is left to me.

7 LDC [MR. KAMMEN]: Did he discuss with you how he
8 envisioned that to be implemented?

9 MJ [Col SPATH]: He did not.

10 LDC [MR. KAMMEN]: So he just wrote this vague order and
11 says you're on your own?

12 MJ [Col SPATH]: I'm not going to adopt the word "vague."
13 I will say he wrote the order and left it to me to enforce.

14 LDC [MR. KAMMEN]: And he didn't give you any guidance as
15 to how?

16 MJ [Col SPATH]: He did not.

17 LDC [MR. KAMMEN]: Well, you know, one of the sort of
18 judicial philosophy is in my experience there are, you know,
19 some judges who are comfortable with saying, government, you
20 guys get to determine sort of what's discoverable, I'm going
21 to trust you, government, to be making judgments. Other
22 judges strike the balance of, well, give the defense
23 everything and then let them sort it out because they are in

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1 the best position to make the judgments as to how to proceed,
2 what's genuinely exculpatory, that sort of thing.

3 Where do you fall on that continuum, if we could ask?

4 MJ [Col SPATH]: I don't know. I don't know. My guess is
5 depending on the day, counsel who have appeared before you
6 will tell you I fall on different places on that continuum. I
7 say that in all seriousness. It's probably driven by their
8 point of view at that moment. I can't give you an advisory
9 opinion on what I will do with a discovery question.

10 I can tell you this. I got the 700 series in large
11 part that relate to discovery and some other rules that do,
12 and I will follow those.

13 LDC [MR. KAMMEN]: Of course, the problem is those rules
14 are somewhat ambiguous, and I guess, you know, one of the
15 other things is, and I think we will be -- did you give any
16 thought to how you were going to rule on those ex parte
17 things, which I assume are 505 issues, or things submitted by
18 the government without really understanding our theories of
19 defense or mitigation and how that would influence the quality
20 of those substitutions, if substitutions are appropriate?

21 MJ [Col SPATH]: I have not yet.

22 LDC [MR. KAMMEN]: One of the -- let me ask you this, and
23 this is a general. Judge Pohl, rightly or wrongly, saw his

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1 power as being really quite limited, didn't have really the
2 power to challenge when the government interfered with the
3 right to counsel, didn't have the power to effect medical
4 care, doesn't have the power to compel witnesses to come to
5 Guantanamo. He saw his powers as quite limited.

6 Have you given any thought to whether you agree with
7 that lack of power?

8 MJ [Col SPATH]: I have not. I have not. I am making
9 myself familiar with where the case is currently postured, and
10 I will take what motions come to me, and I think you will then
11 get an idea of where I am. I just haven't given it any
12 thought.

13 LDC [MR. KAMMEN]: Because one of the issues, of course,
14 is -- that affects this, I mean is, at least in our view, that
15 the government is sort of -- the government, big G, not these
16 guys, uses this whole classification sort of to, not so much
17 to really genuinely keep secrets, but to avoid embarrassment,
18 to hide things from the public, that sort of thing. And do
19 you see, as a judge, you have any ability to look behind those
20 decisions? Or do you just have to accept what other agencies
21 do?

22 Because that affects the very legitimacy of this if
23 it's all -- if the heart of it, is it done in secret and is

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1 really not very transparent, then, you know ----

2 MJ [Col SPATH]: Again, I can't give you an idea of how I
3 might rule on something, and I know you are not asking that.

4 LDC [MR. KAMMEN]: Right.

5 MJ [Col SPATH]: I can just tell you that based on the
6 motions that come here, I feel very limited to follow the law.
7 And again here I know we will debate as to what law is
8 applicable; I get that. I mean, I feel compelled to follow
9 the law. I think that's a good thing in my chair, I do. If
10 the law leads me to look behind the curtain, I am not
11 uncomfortable with that.

12 LDC [MR. KAMMEN]: In 2000 you were -- in October of 2000,
13 I think you were at Charlottesville at the ----

14 MJ [Col SPATH]: That's right. I was at the Army
15 JAG School from 2000 to 2001.

16 LDC [MR. KAMMEN]: And what was going on at the
17 JAG School -- I mean, because at least in the government's
18 view we were at war then in what way was the JAG School
19 different from being at peacetime?

20 MJ [Col SPATH]: In 2000?

21 LDC [MR. KAMMEN]: Yes.

22 MJ [Col SPATH]: I assume that is in response to the
23 incident here, is that ----

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1 LDC [MR. KAMMEN]: No, it's in response that the
2 government takes the position that the United States has been
3 at war since 1996. I'm curious what the JAG School was doing
4 differently since we were apparently on a war footing.

5 MJ [Col SPATH]: I will tell you this: I don't think this
6 relates at all to bias here. I can't imagine. Here, bottom
7 line, the JAG School, when I got there in August until I
8 departed before September 11th of 2001 -- I left in June or
9 July -- conducted itself the same way through that process.

10 There was some security at the JAG School. I just
11 don't know how long it had been there. There was a guard or a
12 counter at the door that I had to show my ID to when I
13 arrived, and people manned that with security throughout my
14 year there. And then there were some cement barricades placed
15 somewhere in the parking lot. That's all I remember.

16 LDC [MR. KAMMEN]: No barbed wire, no gun emplacements,
17 nothing like that?

18 MJ [Col SPATH]: No, and not when I was just back there
19 for the Judges Course.

20 LDC [MR. KAMMEN]: What experience, over the course of
21 your career, have you had with people who are -- suffer from
22 PTSD?

23 MJ [Col SPATH]: Some. More, more over the last portion

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1 of my career than the beginning portion.

2 LDC [MR. KAMMEN]: Are you familiar with what's
3 appropriate treatment for PTSD, what would be appropriate
4 medical care for somebody who suffered from chronic complex
5 PTSD?

6 MJ [Col SPATH]: I have as a trial judge heard testimony
7 from competing experts about PTSD, treatment methods, how to
8 diagnose it and those types of things.

9 LDC [MR. KAMMEN]: Okay. I mean, in this context one of
10 the overarching issues is certainly what we perceive as the
11 lack of quality medical care, which bears on the commissions
12 because it affects a whole host of issues dealing with access
13 to counsel, right to counsel, ability to assist.

14 Do you think that you have the authority to deal with
15 medical care issues, or is that a place where -- or have you
16 given it any thought, I think is a fair we question.

17 MJ [Col SPATH]: I think that's the better question. I
18 have not had to deal with it as a trial judge yet in this
19 case. I don't know.

20 LDC [MR. KAMMEN]: Have you had to deal with it as a trial
21 judge in other cases? And let me make it broader, issues of
22 medical care, issues of conditions of confinement, issues of
23 the kinds of things in a serious case that really do impact

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1 the relationship between the lawyers and the clients and the
2 clients and the court?

3 MJ [Col SPATH]: Yes, in the sense that I have been
4 involved with assisting in other cases and other fact
5 patterns -- they are all different -- but assisting defense
6 counsel have access to their clients and in pretrial
7 conditions in civilian confinement facilities where counsel
8 came to me for some type of relief and action, I have been
9 involved.

10 LDC [MR. KAMMEN]: Is it fair to ask what you did?

11 MJ [Col SPATH]: I followed the law.

12 LDC [MR. KAMMEN]: I understand.

13 MJ [Col SPATH]: So the answer is different. In some
14 cases there was no relief that I thought I could give. In
15 some cases there was relief that I gave that either or both
16 sides disagreed with.

17 LDC [MR. KAMMEN]: Can you -- if it is public, can you
18 give me an example of a time when you gave the relief?

19 MJ [Col SPATH]: I can't give you a specific name of a
20 case because I can't remember it. I can just tell you that it
21 was between 2009 and 2012, later in that process, so probably
22 between '10 and '12 in the Pacific region, but ----

23 LDC [MR. KAMMEN]: Do you remember what you did? I mean

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1 just ----

2 MJ [Col SPATH]: I know in one case I ordered release from
3 pretrial confinement because of the conditions of the
4 confinement off base.

5 LDC [MR. KAMMEN]: So they were so egregious that the only
6 way to get around it in that case was to order that individual
7 released?

8 MJ [Col SPATH]: Yes, in a general sense. And I know that
9 there was either a sanity board request that -- at any rate,
10 we ended up having another sanity board ordered and some
11 testing that they were not willing to do that I ordered. I
12 remember that fairly specifically.

13 LDC [MR. KAMMEN]: I think we are about done here.

14 Were any of your family in law enforcement?

15 MJ [Col SPATH]: No. Just making sure as I go through --
16 I'm an only child, so it's a short check through my brothers
17 and sisters. No law enforcement in my family.

18 LDC [MR. KAMMEN]: If you can, why did you go to law
19 school? What moved you to this?

20 MJ [Col SPATH]: I don't know. I made that decision when
21 I was young, and I stuck with it.

22 LDC [MR. KAMMEN]: I made that decision when I was 15 and
23 realized that I couldn't be a doctor because I couldn't do

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1 algebra.

2 MJ [Col SPATH]: I was younger than that, and it just kind
3 of became what I was going to do.

4 LDC [MR. KAMMEN]: What do you like about being a lawyer?

5 MJ [Col SPATH]: That one I probably am not going to
6 answer because I think it would offend -- I don't know. I
7 have enjoyed working in criminal law and trial work. That's
8 what I have done. And probably that's why I went to law
9 school, if I were to really think about it. I haven't thought
10 about it in so long.

11 LDC [MR. KAMMEN]: And if you don't mind me asking, why
12 did you join the Air Force?

13 MJ [Col SPATH]: I don't mind you asking. My family has
14 limited military connection. It was an opportunity for me to
15 get in the courtroom as a practitioner earlier than it was
16 going to occur in other places that I was looking.

17 LDC [MR. KAMMEN]: Okay.

18 MJ [Col SPATH]: And my plan was to be in for three or
19 four years and depart.

20 LDC [MR. KAMMEN]: That certainly worked well.

21 MJ [Col SPATH]: And here I am.

22 LDC [MR. KAMMEN]: Let me have just a moment, please.

23 I am told I have no other questions. Thank you.

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1 MJ [Col SPATH]: All right. Any questions?

2 TC [MR. SHER]: We have no questions, Your Honor.

3 MJ [Col SPATH]: The timing just works out that we are
4 probably going to break for lunch so I can look through --
5 there is the motion filed for me to recuse myself. So I
6 assume that that motion is on the table and that you are
7 asking me to recuse myself?

8 LDC [MR. KAMMEN]: Yes. I mean, the motion has been
9 filed. We are not withdrawing it.

10 MJ [Col SPATH]: We have a little time. Do you want to
11 make any comments on it?

12 LDC [MR. KAMMEN]: Your Honor, I don't want to belabor the
13 point. The issue, of course, is certainly at this juncture
14 the appearance of impropriety. You indicated that it was your
15 supposition, which certainly is ours, that you were selected
16 because of your experience in the Witt case. There are
17 these ----

18 MJ [Col SPATH]: I didn't even say "supposition." I said
19 "guess." I just said "I would guess," because I had no idea.

20 LDC [MR. KAMMEN]: That's certainly our guess.

21 And our concern, of course, is twofold. Certainly,
22 as you said, the Witt case was tried nearly ten years ago, and
23 we have sort of a greater fund of knowledge now as to what --

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1 as to what are the proper arguments a prosecutor should make.
2 And certainly, and I'm not asking you to agree, some I think
3 very compelling arguments have been made in the Witt case that
4 some of the things the prosecution did were sort of beyond
5 what was -- way beyond what was appropriate.

6 Our concern is that no matter how human, how much --
7 none of us are as good at compartmentalizing as we think that
8 we are. And rather than get halfway down the road and say,
9 you know, every time that Mizer guy stands up I can't -- I see
10 red, maybe the safest course is to simply not go down there.
11 There are a lot of other judges.

12 You know, we understand your thinking, but there is
13 the appearance and there is so much burdening these
14 commissions anyway, why add to it.

15 But beyond that, we will simply defer to the record.

16 MJ [Col SPATH]: Thank you. Trial Team?

17 ATC [LT DAVIS]: Good morning, Your Honor. Lieutenant
18 Davis for the government.

19 Your Honor, from the government's perspective there
20 are simply no grounds for recusal in this case. Your Honor
21 has taken an oath to impartially carry out the duties of
22 military judge in this case, and you have allowed, liberal
23 voir dire. We have now been at it for a couple of hours this

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1 morning, and certainly the appellate record won't be able to
2 reflect, but from the government's position, certainly your
3 willingness to engage in these conversations, your candor and
4 your genuine remarks about your ability to maintain a sense of
5 impartiality certainly comes through to the government and, I
6 believe, comes through to anybody who would be watching, or
7 even a reasonable person.

8 That, Your Honor, combined with what is a strong
9 presumption that a judge is impartial and that the party
10 seeking to establish bias must overcome a very high hurdle.
11 The defense has not gotten to that point in this situation.
12 And we take a look at kind of what the baseline on recusal is,
13 again understanding that strong presumption that a judge is
14 impartial, but you take a look at Rule 902 and the various
15 factors there, which Your Honor certainly doesn't -- those
16 factors do not apply to Your Honor. You haven't acted as
17 counsel or legal officer in this case, you haven't been a
18 witness in this case, you are certainly qualified under the
19 rules, and you don't really have a relationship to any party
20 in this proceeding.

21 I guess the crux of the issue though is, is there any
22 bias that stems from your participation in the Witt case, and
23 that seems to be what the defense is primarily focusing on.

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1 As a preliminary matter, the government's position is that
2 that is entirely speculative, that that conflict could even
3 arise in this case. The government looks at it as a parade of
4 ifs, if you will, and even from the defense motion and their
5 argument, this is a conflict that only may arise in the
6 future, one, presuming that Commander Mizer returns to this
7 case. In Mr. Kammen's words it was a hope that he will return
8 to this case sometime in November.

9 In the defense motion they talk about the Air Force
10 Court of Appeals and the posture of the Witt case and whether
11 or not Commander Mizer would actually have to allege some of
12 the things we discussed was going to be contingent upon what
13 the ruling of the Air Force Court of Appeals was going to be.
14 Again, an if.

15 If Commander Mizer actually enters an appearance in
16 that case, and we don't have any evidence to suggest that he
17 has done that, and then if he actually decides to raise the
18 issues, feels those have merit, that is the only way that even
19 on a -- at its most basic level that that conflict could
20 arise. If any of those things a fail to occur, then
21 Your Honor would be making a decision here based on facts that
22 just will not come to be.

23 So it's kind of a ripeness argument, Your Honor, kind

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1 of an argument of speculation, which motions to recusal -- as
2 the discussion of the rules say, a motion to recusal shouldn't
3 focus on speculation or innuendo. And from the government's
4 position that's essentially what is going on here.

5 The government takes the commission at its word.
6 When you discussed kind of the reasonable person standard, I
7 think that was -- the government believes that was well
8 stated. It would require a person to understand your mindset.
9 It would require a person to understand the nature of that --
10 of the alleged conflict. It would require a person to
11 understand your background, your experience, and as you
12 indicated, your mindset.

13 And I think the United States v. Cron situation is
14 really emblematic of that and emblematic of your approach,
15 where there was a -- you serving as the trial judge, a defense
16 attorney that actually had alleged errors on the appellate
17 record in Witt, which is different than, again,
18 Commander Mizer, who has yet to do that. But that defense
19 attorney did not feel compelled to raise that argument against
20 you. That's not even kind of a reasonable person standard,
21 that's a person that knows you, knows the situation and knows
22 that you would not hold that against them. So I think that's
23 actually a fine example.

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1 And we get kind of lost in hypotheticals sometimes,
2 but that's a real application, that if kind of your general
3 person of the public knew that factual scenario, that we
4 wouldn't even have this appearance of bias.

5 So, Your Honor, either from an actual bias, your
6 answers on the record don't demonstrate any kind of actual
7 bias either in this Witt context or in relationship to a
8 relationship to the convening authority which you have
9 indicated is not, a relationship to the prosecution, which you
10 have noted. Certainly there are none of those aspects of
11 actual bias? And from a reasonable person standard,
12 Your Honor, those who have observed your answers in the
13 courtroom, the genuine nature with which you gave those
14 answers and the thoughtfulness and consideration there
15 certainly would not have any question that you can carry out
16 those duties.

17 One final point, Your Honor. The defense -- just
18 kind of procedurally, the defense did file a motion in this
19 case for recusal. The government did not have an opportunity
20 to file a written response, so we would just reserve that
21 right to do so in the future. We don't believe that it's
22 necessary at this point, but we would just reserve that
23 opportunity.

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1 Absent any questions, Your Honor, that's all I have.

2 MJ [Col SPATH]: No questions. If you decide you want to
3 file a written response, let me know and we will append it to
4 the appellate exhibit. Thank you.

5 It's your motion. I will allow you the last word,
6 Mr. Kammen.

7 LDC [MR. KAMMEN]: I will be very brief.

8 Commander Mizer, just procedurally, there is no
9 question he is employed by the Air Force. I can assure the
10 court of that. He is working on the Witt case. I can assure
11 the court of that. Based on my conversations with him, I can
12 assure the court that he is part of their new motion to
13 reconsider the issue of prosecutorial misconduct will be a
14 significant issue, as it has been throughout the case.

15 It was our judgment, Your Honor, rightly or wrongly,
16 that if we waited until Commander Mizer comes back in
17 November, then the government would be saying in some way you
18 have waived it because you didn't raise it promptly; you knew
19 these things were going to happen. To a certain extent, yes,
20 he is not back. We expect him to be back. You know, I am
21 certainly familiar enough with how the services work that his
22 anticipated coming back in November, things move sometimes
23 slower than we hope.

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1 So I hope he will be back in November. At this
2 juncture I don't have any reason to think that he won't be
3 coming back. And, again, all these other things have not
4 happened because those briefs haven't been filed and that sort
5 of thing, but I'm assured they are going to. So in terms of
6 ripeness, if we are going to have a change in judge, let's
7 have the change now. If we wait until November and then we
8 are into January or February and then all of a sudden you go,
9 aha, then we have lost six months. So timing-wise, that's
10 what drives it.

11 But again, you know, we certainly would not have
12 grounds to argue actual bias. There is this appearance, and I
13 agree it requires you to look in your mind and heart and make
14 an appropriate judgment.

15 MJ [Col SPATH]: All right. Thank you.

16 LDC [MR. KAMMEN]: Thank you.

17 MJ [Col SPATH]: Let me get a feel. My plan is to come
18 back after lunch, issue a ruling and then either move on or
19 not.

20 Defense Counsel, how long do you think you need for
21 the lunch recess? I just don't know the logistics well enough
22 to know yet, so that's why I am asking. An hour or an hour
23 and a half?

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1 LDC [MR. KAMMEN]: Generally both sides, with Judge Pohl,
2 it's been an hour. I suspect -- I can't speak for the
3 government. I mean, today certainly an hour, because there
4 is -- you know, there is a fairly limited selection. I'm not
5 sure how they do it with respect to the observers and how they
6 handle that. I suspect, especially this week, which will
7 probably move relatively quickly, assuming we move on
8 tomorrow, and if we are here Wednesday an hour and a half
9 would probably be appropriate.

10 MJ [Col SPATH]: Trial Counsel, any comments?

11 TC [MR. SHER]: Your Honor, that works for us. An hour is
12 fine, and we are ready to proceed.

13 MJ [Col SPATH]: It's going to be just over an hour today
14 because I want to look at my notes. Let's come back at 1300
15 on the record, and we will start then.

16 The commission is in recess. Thank you.

17 [The R.M.C. 803 session recessed at 1157, 4 August 2014.]

18 [END OF PAGE]

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