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1 [The R.M.C. 803 session was called to order at 1001, 17 June
2 2019.]

3 MJ [Col COHEN]: These commissions are called to order. I
4 am Colonel Shane Cohen, United States Air Force. I have
5 replaced Colonel Parrella as the military judge on this
6 commission. I will announce my detailing qualifications after
7 we identify who is here on behalf of the parties.

8 Trial Counsel, will you please identify who is here
9 on behalf of the United States. If any counsel are making
10 their first appearance, please indicate such so that we can
11 get their detailing qualification information and status as to
12 oaths.

13 CP [BG MARTINS]: Good morning, Your Honor.

14 MJ [Col COHEN]: Good morning.

15 CP [BG MARTINS]: Representing the United States are
16 Brigadier General Mark Martins, Mr. Robert Swann, Mr. Clay
17 Trivett, Ms. Nicole Tate, Major Christopher Dykstra, and
18 Captain Jackson Hall. Also at counsel table are paralegals
19 Rudolph Gibbs, Pascual Tavaréz, and Staff Sergeant Clifford
20 Johnson. And present also in the courtroom, Your Honor, are
21 Nicole Taylor and Noelle Smith of the Federal Bureau of
22 Investigation.

23 These proceedings are being transmitted by closed

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1 circuit to locations in the continental United States pursuant
2 to the commission's order.

3 Your Honor, I should add that Captain Hall will place
4 his qualifications on the record at any point at which you
5 direct.

6 MJ [Col COHEN]: Captain Hall, if you would please state
7 your qualifications at this time.

8 Thank you, General Martins.

9 ATC [CPT HALL]: Good morning, Your Honor.

10 MJ [Col COHEN]: Good morning.

11 ATC [CPT HALL]: I am Captain Jackson Hall, and I have
12 been detailed to this commission by the Chief Prosecutor,
13 Brigadier General Mark Martins. I am qualified under Rule for
14 Military Commission 502(d). I have been previously sworn in
15 accordance with Rule for Military Commission 807. I have not
16 acted in any disqualifying manner.

17 MJ [Col COHEN]: Have you been previously sworn?

18 ATC [CPT HALL]: Yes, Your Honor.

19 MJ [Col COHEN]: I will accept that previous swearing.

20 I will start with the first row. Mr. Nevin, would
21 you please indicate for the record who is here on behalf of
22 Mr. Mohammad.

23 LDC [MR. NEVIN]: Yes, Your Honor. David Nevin;

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1 Lieutenant Colonel Derek Poteet, United States Marine Corps;
2 Ms. Leboeuf; Mr. Sowards; and Ms. Radostitz. And Mr. Mohammad
3 is present.

4 MJ [Col COHEN]: Thank you, sir. I appreciate it.

5 Ms. Bormann.

6 LDC [MS. BORMANN]: Good morning, Judge.

7 MJ [Col COHEN]: Good morning.

8 LDC [MS. BORMANN]: On behalf of Mr. Bin'Attash, who is
9 present, myself, Cheryl Bormann; Captain Simon Caine, United
10 States Air Force; and Mr. William Montross.

11 MJ [Col COHEN]: Thank you, ma'am.

12 Mr. Harrington.

13 LDC [MR. HARRINGTON]: Judge, on behalf of Mr. Binalshibh,
14 James Harrington, Wyatt Feeler, Captain John Balouziyeh of
15 United States Army, and Major Virginia Bare, United States
16 Air Force.

17 MJ [Col COHEN]: Thank you, sir.

18 Mr. Connell.

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

20 MJ [Col COHEN]: Good morning.

21 LDC [MR. CONNELL]: On behalf of Mr. al Baluchi, myself,
22 James Connell; and Lieutenant Colonel Sterling Thomas, United
23 States Air Force.

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1 MJ [Col COHEN]: Thank you, sir.

2 Mr. Ruiz.

3 LDC [MR. RUIZ]: Good morning, Judge. Ms. Lachelier --
4 Suzanne Lachelier, Mr. Joseph Wilkinson, Mr. Sean Gleason, and
5 myself are here on behalf of Mr. al Hawsawi.

6 MJ [Col COHEN]: Thank you, sir. I appreciate it.

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

15 Your absence from any session may negatively affect
16 the presentation of the defense in your cases. Your failure
17 to meet with and cooperate with your defense counsel may also
18 negatively affect the presentation of your cases.

19 Under certain circumstances your attendance at a
20 session cannot be compelled regardless of your personal desire
21 -- excuse me, can be compelled regardless of your personal
22 desire not to be present. Regardless of your voluntary waiver
23 to attend a particular session of the commission, you have the

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1 right at any time to decide to attend any subsequent session.

2 If you decide not to attend the morning session but
3 wish to attend the afternoon session, you must notify the
4 guard force of your desires with sufficient time for them to
5 accomplish that desire. Assuming there is enough time to
6 arrange for transportation, you will then be allowed to attend
7 an afternoon session.

8 You will be informed of the time and date of each
9 commission session prior to the session to afford you the
10 opportunity to decide whether you wish to attend that session.

11 I will start with Mr. Mohammad. Mr. Mohammad, do you
12 understand what I just explained to you?

13 ACC [MR. MOHAMMAD]: Yes.

14 MJ [Col COHEN]: Mr. Bin'Attash, do you understand what I
15 just explained to you?

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

17 MJ [Col COHEN]: Mr. Binalshibh, do you understand what I
18 have just explained to you?

19 ACC [MR. BINALSHIBH]: **[Speaking in English]** Yes.

20 MJ [Col COHEN]: Mr. Aziz Ali, do you understand what I
21 just explained to you?

22 ACC [MR. AZIZ ALI]: Yes.

23 MJ [Col COHEN]: Mr. al Hawsawi, do you understand what I

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1 have just explained to you?

2 ACC [MR. AL HAWSAWI]: Yes.

3 MJ [Col COHEN]: Mr. Connell, I will recognize you at this
4 time. Is there something you would like to say on behalf of
5 your client?

6 LDC [MR. CONNELL]: Yes, Your Honor. At this time I
7 request that Mr. al Baluchi be allowed to return to the camp.
8 He has medication that he needs to take.

9 MJ [Col COHEN]: Okay. I will grant that request. We
10 will momentarily take a recess and allow for that to occur.

11 LDC [MR. CONNELL]: Sir, may I address one other quick
12 housekeeping matter while that's being sorted?

13 MJ [Col COHEN]: You may.

14 LDC [MR. CONNELL]: Sir, I wanted to tell you the first
15 time it came up, there has been some confusion about
16 Mr. al Baluchi's name.

17 And so he was born in Kuwait. The way that his name
18 is structured is a given name and then his father's name and
19 then, in some situations, his grandfather's name.

20 So his first name -- like my name is James, his first
21 name is Ali.

22 MJ [Col COHEN]: Okay.

23 LDC [MR. CONNELL]: And then his father was Abdul Aziz

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1 Ali, and his grandfather was Ali Mohammad al Jazmi.

2 So I know that some of the papers reflect Aziz Ali,
3 but Aziz Ali is not really a name; it's sort of the second
4 half of Abdul Aziz Ali. So it is proper to call him
5 Mr. al Baluchi or, if you want, Ali, but Aziz Ali is not
6 really a name, although I fully acknowledge it appears in some
7 of the paperwork in the case.

8 MJ [Col COHEN]: Okay. Mr. Ali would be appropriate?

9 LDC [MR. CONNELL]: Yes.

10 MJ [Col COHEN]: Okay. And everyone agrees that that is
11 who we are talking about if I refer to him as Mr. Ali?

12 LDC [MR. CONNELL]: Yes. He prefers Mr. al Baluchi, and
13 that's what I'll refer to him, but the court -- that is the
14 name on his birth certificate, is Ali.

15 MJ [Col COHEN]: Thank you, sir. I appreciate it.

16 General Martins.

17 CP [BG MARTINS]: Your Honor, if you were to speak to him
18 as Mr. Ali, we don't have an objection to that. We do object
19 to other aliases and so forth being used other than what are
20 on the charge sheet, but Ali is what's in the caption of the
21 charge sheet.

22 Your Honor, we would request that there be a finding
23 that Mr. Ali's departure is knowing, voluntary, intelligent

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1 prior to him actually leaving, having that on the record.

2 LDC [MR. CONNELL]: I concur, sir.

3 MJ [Col COHEN]: What was that, Mr. Connell? I didn't
4 hear that.

5 LDC [MR. CONNELL]: I'm sorry. I just said I concur.

6 MJ [Col COHEN]: Okay.

7 Mr. Ali, I will ask you this question. You said you
8 understood your rights. Is it your desire then to knowingly
9 and voluntarily waive your presence at these proceedings
10 today?

11 ACC [MR. AZIZ ALI]: Yes.

12 MJ [Col COHEN]: All right. Then I find that you have
13 been advised of your rights and that you have knowingly and
14 intelligently and voluntarily waived your right to be present
15 at these proceedings, and I will allow you to absent yourself
16 from today's proceedings.

17 Does that meet to the satisfaction of the government?

18 ACC [MR. AZIZ ALI]: Yes. Yes.

19 CP [BG MARTINS]: Yes, Your Honor. Thank you.

20 MJ [Col COHEN]: Mr. Connell, is that satisfactory to you
21 as well?

22 LDC [MR. CONNELL]: Yes, Your Honor. Thank you.

23 MJ [Col COHEN]: All right. Are there any other requests

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1 among the accused to absent themselves from today's
2 proceedings? I will treat silence as a no unless someone
3 affirmatively states that they wish to absent themselves.

4 LDC [MR. RUIZ]: May we have a moment, Judge?

5 MJ [Col COHEN]: You may, Mr. Ruiz.

6 [Pause.]

7 LDC [MR. RUIZ]: Mr. al Hawsawi would like to be excused.

8 MJ [Col COHEN]: All right. Mr. al Hawsawi, I will ask
9 you the same questions.

10 Once again, did you understand the rights that I
11 previously advised you with respect to your presence here in
12 the courtroom -- in the commission today?

13 ACC [MR. AL HAWSAWI]: Yes.

14 MJ [Col COHEN]: And is it your desire to knowingly,
15 intelligently, and voluntarily waive your absence here
16 today -- excuse me, waive your presence here today?

17 ACC [MR. AL HAWSAWI]: Yes.

18 MJ [Col COHEN]: Okay. Then I make a finding that you
19 have been knowingly, intelligently, and with full knowledge of
20 any impacts that your absence may have on these proceedings,
21 that you are voluntarily making that decision, and I will
22 approve your request.

23 Any objection from the government?

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1 CP [BG MARTINS]: No, Your Honor. It's a bit irregular.
2 I mean, typically we wait until the first recess, but since,
3 you know, we are making an accommodation for this one time for
4 Mr. Ali, no objection.

5 MJ [Col COHEN]: All right. Matters of this should not
6 set precedence one way or the other, but I do understand that
7 there were filings made, and I will summarize those earlier.
8 And based on those filings, the court did find that there were
9 reasons to make reasonable accommodations. I will take up
10 each matter on its own merits each and every time that it's
11 raised here in the commission. All right.

12 All right, then. If there are no other requests,
13 let's go ahead and take a brief recess. We will allow for
14 these gentlemen to be returned, and then we will reconvene.

15 We are in recess.

16 [The R.M.C. 803 session recessed at 1013, 17 June 2019.]

17 [The R.M.C. 803 session was called to order at 1100, 17 June
18 2019.]

19 MJ [Col COHEN]: This commission is called to order.

20 I will briefly momentarily summarize the 802 and then
21 give the parties an opportunity to supplement that summary,
22 but I did want to give everyone an idea of what to expect for
23 the rest of the day as far as timing goes.

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1 I anticipate that with prayer being shortly around
2 1302 hours today, that we will break approximately 1220 to
3 1230 for lunch, reconvene at 1345. If 30 minutes for
4 prayer -- for the afternoon prayer is going to be
5 insufficient, then please let me know before we do.
6 Otherwise, I was anticipating that it would take approximately
7 20 to no longer than 30 minutes to accomplish, and then also
8 time for everyone to travel and obtain lunch, should they
9 choose to do so. So I will reconvene at 1345.

10 We'll then proceed until approximately 1615 hours
11 this afternoon, which should match up with an additional
12 prayer time shortly around that time -- I believe it's at 1626
13 today -- and then we will recess for the day. And then I will
14 get to the rest of it with respect to the marching order,
15 because that will be summarized in the 802.

16 I anticipate, though, that barring an urgent need to
17 use the restroom or something, we will proceed for at least
18 the next 90 minutes in this proceeding.

19 On 16 June 2019, I conducted a conference with trial
20 and defense counsel in accordance with Rule for Military
21 Commission 802. The accused were absent during that meeting.
22 At this conference we discussed the following:

23 First, we conducted introductions. Brigadier General

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1 Martins opted to introduce his team at ----

2 They've asked me to slow down, as I instructed the
3 court reporters to let me know. If they're not recording it,
4 then it is not happening. So I will slow down.

5 General Martins' team -- he opted to introduce his
6 team at the first session, which he has done today. The
7 learned counsel did introduce their team members last night.

8 I informed counsel that I have been detailed to this
9 case and indicated that they would have the opportunity to
10 conduct voir dire of me during this session today. I stated
11 that I intended to continue current court practices to include
12 the recording of the 802 sessions, which we did last night.

13 I mentioned to the parties that I had issued a ruling
14 on Mr. Ali's motion to cancel this week's hearing, which was
15 modified by a subsequent filing by his counsel, based on a
16 medical issue. I indicated that I was willing to provide
17 reasonable accommodations during court; inquired with the
18 prosecution as to whether the guard force would be able to --
19 be able to also provide those accommodations. The prosecution
20 did indicate that the accommodations could be made. He was
21 allowed to stand during the proceedings today, and then we did
22 make the what I understand now to be an unusual step to allow
23 the immediate departure of Mr. Ali and then Mr. Hawsawi rather

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1 than waiting for a lunch break today.

2 I then discussed our anticipated schedule for the
3 week and the sequencing of oral argument. I said that we
4 would devote Monday to voir dire, which we will. And based on
5 several factors such as the delay of the rotator flight, which
6 impacted the travel of Mr. Harrington and his team and the
7 commission's need to review currently filed classified
8 pleadings and notices to include some that just came in,
9 responses, et cetera, that came in over the weekend, I
10 informed the parties that there would not be a court session
11 on Tuesday, and that we could use -- that they could use that
12 time to meet with clients and prepare for the remainder of the
13 week, as I will as well.

14 The prosecution asked if that meant that the guard
15 force did not bring the accused into the courtroom on Tuesday,
16 and I indicated that that would be correct; and that there was
17 a preference that the defense counsel would be able to meet
18 with their clients in their normal meeting areas as opposed to
19 negate the need to bring a guard force to this facility.

20 General Martins, do you think that's going to be
21 something that the government can assist in in making happen?

22 CP [BG MARTINS]: Yes, Your Honor.

23 MJ [Col COHEN]: Thank you. I appreciate that.

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1 Wednesday morning would then be used for any
2 challenges, if there are any. They'll be free to make them
3 this afternoon if there are any challenges, but if you wanted
4 to defer, Wednesday morning would probably be the appropriate
5 time to make those. Then I will consider them. I'm not
6 requesting them; I'm just saying if they happen to come, that
7 probably will be an appropriate time in the schedule to handle
8 them.

9 We will then have unclassified oral argument on the
10 AEs listed on the docket order. Wednesday afternoon, we will
11 conduct a closed M.C.R.E. 505(h) session.

12 I indicated that, depending upon whether or not an
13 existing stay is lifted, we would take the interpreter
14 testimony on Thursday. If the stay is not lifted, I indicated
15 we would continue with the remaining unclassified oral
16 argument.

17 Ms. Bormann requested a delayed start time to allow
18 attorneys to meet with their clients. Given the fact that the
19 802 was on Sunday evening, that sounded like a reasonable
20 request. The prosecution did not object, and the rest of the
21 defense counsel were also in concurrence.

22 Mr. Connell indicated that it would be advantageous
23 to delay hearing unclassified oral argument on the issues for

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1 which 505 notices have been given until after classified
2 argument. That sounded like a reasonable request. It was
3 seconded by Ms. Bormann. The government also agreed that that
4 would be probably the best course of action this week.

5 I then indicated that we would alter the order of
6 march to hear oral arguments on AEs 118N, 530TTT, 628B after
7 the closed 806 session.

8 Mr. Nevin inquired if I would continue the practice
9 of allowing counsel to meet with their clients in the
10 courtroom at the conclusion of each day. I stated that I
11 would allow that practice to continue.

12 Mr. Connell suggested that AE 630F be added to the
13 505(h) hearing. Although that is a filing by Mr. Nevin's
14 team, the court is not opposed to doing that if the parties
15 are ready to proceed along those lines. Mr. Nevin is giving
16 me a head nod that that appears to be something that he's
17 willing to do.

18 Mr. Ruiz inquired as to the status of a ruling on
19 AE 524SSS. I thanked him, and I indicated that I would check
20 into it. I have checked into it, and it's another one that I
21 am willing to put on the docket to address, at least discuss
22 with the parties this week.

23 That is the summary of what I recall occurring at the

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1 hearing last night. Is there anything that the prosecution
2 would like to add to my summary?

3 CP [BG MARTINS]: Your Honor, the government wishes to add
4 nothing.

5 MJ [Col COHEN]: Thank you.

6 Do any of the defense counsel wish to add anything to
7 the summary?

8 Mr. Connell.

9 LDC [MR. CONNELL]: Sir, I don't have anything to add
10 specifically, but just one clarification. My suggestion was
11 that the unclassified arguments be done after the 505(h), not
12 after the closed 806. But it all worked out the way that I
13 was suggesting; I just was clarifying on vocabulary.

14 MJ [Col COHEN]: Thank you. And if I misstated that, it
15 was unintentional. I think the court was tracking the same
16 procedures that the parties were. If I inarticulately
17 misstated that, I apologize.

18 At this time I will state my detailing information
19 and my qualifications, and then we can begin voir dire.

20 I have been detailed to this commission by the
21 Chief Judge of the Military Commissions Trial Judiciary
22 pursuant to R.M.C. 503. Appellate Exhibit AE 001A [sic] is my
23 detailing memorandum.

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1 I am certified and qualified in accordance with
2 Articles 26(b) and (c) of the Uniformed Code of Military
3 Justice, as well as R.M.C. 502 and 503. I have been
4 previously sworn under Article 42(a) of the UCMJ and
5 R.M.C. 807.

6 I have considered my past, my experiences, and I am
7 not aware of any grounds which would be a challenge against
8 me.

9 I have previously provided counsel for both sides a
10 copy of my biography, which is marked as AE 001C [sic], as
11 well as -- and do counsel -- starting with the prosecution, do
12 counsel desire to question or challenge the military judge?

13 MTC [MR. TRIVETT]: Your Honor, not at this time, but we
14 would ask to reserve the right to do so following some of your
15 answers to any questions the defense may have.

16 MJ [Col COHEN]: You may do so.

17 Mr. Nevin, you being in the front row, would you like
18 to begin?

19 Well, one second, Mr. Nevin, if you please. I
20 apologize. I need to cover one thing with Mr. Harrington's
21 team real quick. Thank you.

22 Mr. Harrington, not to put you on the spot, but you
23 indicated earlier that there is a newly assigned major to your

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1 team that we did not currently have a notice of appearance
2 for. Does she intend to make a formal appearance in this
3 trial? If you could just please clarify that. The court
4 reporters brought that to my attention.

5 LDC [MR. HARRINGTON]: Judge, it was my error. She is
6 detailed to our team but is not making a notice of appearance
7 today. She will be in the future but not today. It was my
8 fault. I shouldn't have introduced her that way.

9 MJ [Col COHEN]: Okay. Thank you, Mr. Harrington.

10 Mr. Nevin, thank you for your indulgence. You may
11 proceed.

12 LDC [MR. NEVIN]: Thank you, Your Honor.

13 David Nevin for Mr. Mohammad, and I have some
14 questions. My intention is that all of them flow from the Air
15 Force Uniform Code of Judicial Conduct, which I see marked as
16 AFI 51-110. And the version I have reviewed is dated
17 11 December 2018. And I think the questions, as I look at
18 them, focus primarily on CANON 1, independence of the
19 judiciary, and CANON 3, performing duties impartially and
20 diligently. And within CANON 3, there is CANON 3B(2) which
21 requires maintaining professional competence in the law. And
22 so that's -- at least that's my intention.

23 And I will say, Your Honor, also I have reviewed

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1 your -- the materials you provided, your biography, and made
2 an effort to read some of the things you have written about
3 your scholarly work and also about your previous military
4 experience.

5 And with that I will say, let me begin by asking:
6 Where were you on 9/11? And what, if any, impact did it have
7 on you, individually?

8 MJ [Col COHEN]: Yes, sir. I'll be happy to answer that
9 question.

10 On September 11th, I was actually at Bolling Air
11 Force Base attending a defense counsel orientation course. I
12 had been newly detailed as an area defense counsel for the
13 United States Air Force and was excited to be there and to
14 start those duties.

15 I remember us starting the day, and during a break,
16 the next thing we knew that there was video images of the
17 Twin Towers now being brought down. Obviously went into Delta
18 at that particular time. We didn't do much more training that
19 particular day ----

20 LDC [MR. NEVIN]: Right.

21 MJ [Col COHEN]: ---- but we did continue with the course
22 throughout the week, just not immediately.

23 That's where I was and kind of how that came about.

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1 LDC [MR. NEVIN]: And do you recall the reaction that you
2 had at that time?

3 MJ [Col COHEN]: Uncertainty, a little bit of shock, not
4 really realizing -- you know, initially no one knew whether it
5 was just an accidental plane going into it or whether it was
6 something, you know, intentional.

7 LDC [MR. NEVIN]: Right.

8 MJ [Col COHEN]: When the second plane hit, I think the
9 news started reporting that it was less likely that it was an
10 accident. But no strong emotional reactions at the time. I
11 think it was more of just shock; that, you know, it wasn't
12 something you expected to see on the TV that day.

13 LDC [MR. NEVIN]: Right. And it's somewhat of an unusual
14 situation where all of the people involved in the case,
15 probably to some extent, were witnesses to at least part of
16 the events that bring us here.

17 So I guess I wanted to ask whether at some point,
18 when you realized or whether you heard probably more about how
19 that all happened, whether you had a reaction of anger or
20 revulsion or whatever the right word would be for your
21 feelings.

22 MJ [Col COHEN]: I do not recall ever being angry about
23 anything that happened with September 11th, that being a

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1 response. Shocked is probably, you know, just -- it was --
2 people react to things like that differently. I think mine
3 was just more of shock and more of, you know, uncertainty
4 about, you know, what happened and why it happened and all
5 those kinds of things. But anger is not a word that I would
6 ever say has manifested itself in even thinking about it over
7 the years.

8 LDC [MR. NEVIN]: Did you suffer any property damage or
9 loss in the events of September 11th?

10 MJ [Col COHEN]: I did not. I was actually stationed in
11 Turkey at the time. No family members, close friends,
12 relatives, et cetera were impacted at all by the events of
13 9/11.

14 LDC [MR. NEVIN]: Okay. Do you know anybody who was
15 injured or killed in the attacks of 9/11?

16 MJ [Col COHEN]: To the best of my knowledge, the answer
17 to that is no. There is no one that would come to mind that I
18 could think of that I would have -- now, with your
19 investigations you may find someone, four, five, six removed,
20 but no one that I can recall ever talking to, especially no
21 one that I would consider a close relative, friend, or
22 acquaintance.

23 LDC [MR. NEVIN]: Okay. And so the bottom line that I

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1 want to ask you is whether, as you sit here -- I know you've
2 been a judge for a while, and normally you would have a high
3 degree of separation, let's say, from the events that are
4 being litigated. Are you confident that you don't bring
5 anything that hasn't been disclosed to your position here on
6 the bench this morning?

7 MJ [Col COHEN]: No, sir.

8 I can tell you that although my role now is a judge,
9 had the United States Air Force or the Department of Defense
10 asked me to either sit at your table as a defense counsel as
11 an assignment, or with the prosecution, I would not have
12 hesitated to perform my duties on either side.

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

14 MJ [Col COHEN]: Thank you.

15 LDC [MR. NEVIN]: So I'm interested in just a couple of
16 questions along the lines of independence to ask how you came
17 to the specific job of being a judge in this case and what
18 kinds of information has been provided to you specifically
19 about this case.

20 So I guess my -- maybe the first question would be:
21 How long have you known you were going to be assigned to this
22 case?

23 MJ [Col COHEN]: Sometime -- there were discussions that

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1 it was a possibility that I may be detailed to this case late
2 April. The final decision of where I was anticipating that I
3 would get the detailing memorandum, subject to a final
4 decision being made, was probably mid to late May.

5 And then I found out officially probably a couple of
6 weeks prior to that that once Colonel Parrella had issued some
7 final rulings, that it looked like that I would be, in fact,
8 detailed to be on this case, and I believe that occurred on
9 June 3rd.

10 LDC [MR. NEVIN]: Okay. So it didn't become certain in
11 your mind until something on the order of two or three weeks
12 ago?

13 MJ [Col COHEN]: That is correct. Although there was
14 discussions that it could happen, one, I don't presume
15 anything. People are always welcome to change their minds.
16 But I was asked if it was something that I would be willing to
17 do and dedicate the necessary time to this.

18 I have other duties in the United States Air Force,
19 and so I made sure that the Air Force was, you know, fully on
20 board with the fact that even though I will be moving in to be
21 the Chief Circuit Military Judge of the Eastern Circuit in the
22 Air Force this summer, that this would be my primary
23 responsibility as this is commissioned by the Department of

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1 Defense.

2 And so the Air Force was on board with that decision,
3 and everyone -- that led to me being available.

4 LDC [MR. NEVIN]: So let me make sure I heard what you
5 just said correctly. You're continuing as the Chief Circuit
6 Judge for the Air Force?

7 MJ [Col COHEN]: Of the Eastern Circuit, that is correct.

8 LDC [MR. NEVIN]: For the Eastern Circuit.

9 MJ [Col COHEN]: But this will be my primary
10 responsibility.

11 LDC [MR. NEVIN]: Okay. Will you have other cases that
12 you are serving as a judge?

13 MJ [Col COHEN]: Fortunately, as the Chief Circuit
14 Military Judge of the Eastern Circuit, I detail myself ----

15 LDC [MR. NEVIN]: I see.

16 MJ [Col COHEN]: ---- and so I will have the ability to
17 take cases to help with the workload but to make this my
18 primary responsibility.

19 LDC [MR. NEVIN]: All right.

20 MJ [Col COHEN]: So there may be -- so the answer to that
21 would be: to be determined. If the workload here is so
22 significant, then my workload for the Air Force would be less.
23 The nice thing about this is that I have a pretty robust staff

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1 here with the commission's cases, whereas as an Air Force
2 judge, I do not.

3 LDC [MR. NEVIN]: Right.

4 MJ [Col COHEN]: I write all my own opinions. I do all my
5 own research, all those kinds of things.

6 But I am aware of the commitment, and the Air Force
7 is aware of this commitment as well, and so my full attention
8 is to this matter. I understand the seriousness of what we're
9 doing here.

10 LDC [MR. NEVIN]: Thank you, Your Honor.

11 Being here at all -- I mean, I suppose literally
12 being in this room at all requires you to be read on to -- to
13 have a certain -- to have certain security clearances and to
14 be read on to certain special access programs. Are you read
15 on to those programs? And for how long have you been?

16 MJ [Col COHEN]: I am. I was -- if I misstate a date,
17 it's not intentional. I recall it being sometime between
18 February and April that I was just read on to commission's
19 programs in general, but nothing with respect to a particular
20 case.

21 LDC [MR. NEVIN]: Okay. And, sir, have you undertaken to
22 review discovery or to review pleadings or anything like that?
23 Some -- I asked the question about clearance because some of

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1 it, you would be required to have a clearance to do that.

2 MJ [Col COHEN]: Yes, sir. Obviously, anything that was
3 filed that we intend to take up this week, I have started to
4 review. I think it would have been a waste of everyone's time
5 for me to come in completely without any knowledge of what's
6 taking place ----

7 LDC [MR. NEVIN]: Right.

8 MJ [Col COHEN]: ---- but I have not spent significant
9 time reading prior pleadings and those types of things at this
10 point. Although, I do have a plan in place to go back and to
11 review everything that continues to be -- to be relevant
12 moving forward.

13 LDC [MR. NEVIN]: Okay. Right. And in civilian practice,
14 I've been around situations where judges replaced other
15 judges, but typically those would be cases where the material
16 that had to be brought under control was relatively small; and
17 here, it's anything but small.

18 Is it your -- is it your intention to get your arms
19 around the entire body of the case law that has arisen out of
20 this commission as we go forward?

21 MJ [Col COHEN]: As you understand, and I'm sure all the
22 attorneys here, there is the law of the case, correct. And so
23 I do understand that there are -- there is law of the case.

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1 Obviously, protective orders is one area that I am starting
2 out with with respect to, okay, what are the protective
3 orders? How do those apply? You know, those types of things.

4 LDC [MR. NEVIN]: Right.

5 MJ [Col COHEN]: I do intend to ascertain or review as
6 much of the information as I can. I'm sure, moving forward,
7 with respect to motions, if there's something that occurred
8 three or four years ago that the parties believe is directly
9 relevant to a point they're arguing now, I would expect that
10 the parties would request the court to review any previous
11 rulings.

12 I do not have any current motions to reconsider. And
13 absent a motion to reconsider, it would be atypical for a
14 judge to sua sponte go back and reconsider rulings without
15 something before the court to do so.

16 LDC [MR. NEVIN]: I'm sorry. Did you say there are -- you
17 don't -- what did you say about motions to reconsider? That
18 you do not ----

19 MJ [Col COHEN]: I said absent a motion to reconsider, it
20 is unusual for a judge, even in the middle of taking over a
21 case, to go back and just sua sponte to reconsider. So
22 obviously, if those issues arise and it's allowed pursuant to
23 the rules, I will consider whatever motions are filed.

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1 LDC [MR. NEVIN]: Right. But the military judge is aware
2 that we do have several motions to reconsider that are ----

3 MJ [Col COHEN]: And I am aware, and all of those will be
4 handled in due course.

5 LDC [MR. NEVIN]: You were given the opportunity -- I
6 think it's clear from what you said, you were given the
7 opportunity to turn this assignment down, but you didn't do
8 so; is that correct?

9 MJ [Col COHEN]: That's not the way I would have phrased
10 it.

11 LDC [MR. NEVIN]: Oh, okay. I'm sorry.

12 MJ [Col COHEN]: I think the best way to phrase it was:
13 Do you know of any reason why you couldn't do this? And I
14 thought deep and hard about that. I thought about the
15 commitment that would be required. I thought about the
16 judicial canons that you referenced there. I thought about my
17 own personal thoughts, feelings, biases, et cetera, to the
18 extent that they could exist or may be impactful here.

19 And I made a reasonable decision that no, I think
20 there is no reason why I can't do this. And, in fact, I -- if
21 I thought -- if I had any doubts, I probably would have said
22 no, I don't think I'm the right person for this job.

23 LDC [MR. NEVIN]: Yeah. Okay.

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1 MJ [Col COHEN]: But at the end of the day, that was just
2 simply a question. It was -- I serve -- I serve based on who
3 details me to whatever case, to the same as a Deputy Chief
4 Circuit Military Judge now, I do the same. They assign me a
5 case, and I do the case understanding -- notwithstanding any
6 ethical obligations that I may have to disclose things,
7 et cetera.

8 LDC [MR. NEVIN]: Right. Right. But I guess I was
9 getting at -- I appreciate your answer, but I was -- I think
10 maybe I was getting at an even higher-level idea, which is,
11 that you're not here under protest in any way. You're here
12 voluntarily, I guess is the right way to put it.

13 MJ [Col COHEN]: Yes. To the extent that I have ill will
14 for being detailed to this case, the answer is no.

15 LDC [MR. NEVIN]: Okay. Sir, do you have someone who will
16 write at some point an evaluation of you with respect to your
17 performance here as a military judge?

18 MJ [Col COHEN]: I will have an annual performance report.
19 Whether or not -- well, as this will likely be a significant
20 part of my duties as a military judge, I would be shocked if
21 there wasn't some reference to what I was doing on the -- on
22 the commission in an annual performance report. But that will
23 be controlled solely within the United States Air Force, and

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1 the Department of Defense will not have any signatories to my
2 performance report; it will be the Chief Trial Judge of the
3 Air Force once I move over and then the Judge Advocate
4 General, neither of whom are associated with the commissions.

5 LDC [MR. NEVIN]: So it would be the Chief Trial Judge of
6 the Air Force and the TJAG for the Air Force?

7 MJ [Col COHEN]: That is -- yes. The additional rater
8 will be the Judge Advocate General, unless he has delegated
9 that down to the Deputy Judge Advocate General.

10 LDC [MR. NEVIN]: Okay. And both of those would be in --
11 is that referred to as a rating chain?

12 MJ [Col COHEN]: That is correct, sir.

13 LDC [MR. NEVIN]: All right. Would there be anyone else
14 in the chain so far as you know?

15 MJ [Col COHEN]: No. My current rating chain, as we sit
16 here today, because I have not moved over to the chief's
17 position, is the Chief Circuit Military Judge. My additional
18 rater is the Chief Trial Judge of the Air Force. And then the
19 reviewer, the senior rater, is the Judge Advocate General.

20 LDC [MR. NEVIN]: Right. And this would be the Chief
21 Circuit Judge whom you are replacing?

22 MJ [Col COHEN]: That is correct, he's my current rater.
23 But my performance report for 2019 has already closed out.

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1 LDC [MR. NEVIN]: Okay. Judge Parrella, whom you
2 replaced, was here for a little less than a year. Do you have
3 an understanding of how long you will be our judge and what
4 the factors are that might cause you to stop being our judge,
5 if there are any?

6 MJ [Col COHEN]: Sir, while I wish I had more fidelity --
7 and I don't mean this in any joking manner -- at the end of
8 the day, Article 6 of the Uniform Code of Military Justice
9 allows the Judge Advocate General to assign me at any given
10 point to any particular duty within the JAG Corps. However, I
11 have been a colonel now for essentially three years. I am
12 only one year into my second stint as a military judge.

13 Having been detailed to a court of this magnitude and
14 with the need for some level of continuity, it is at least my
15 hope that the Judge Advocate General of the Air Force would
16 see me fit to leave me on this for some period of time to
17 allow this case to move forward and for some continuity in
18 rulings by the military judge.

19 That being said, it is not my decision. But I am
20 aware of the law that precludes anyone from removing me
21 because of my duties here because they disagree with them
22 because of my responsibilities here as a military judge.

23 LDC [MR. NEVIN]: Right.

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1 MJ [Col COHEN]: In other words, because I may issue an
2 adverse ruling, that cannot impact my career at all. That is
3 against the law.

4 LDC [MR. NEVIN]: Uh-huh.

5 MJ [Col COHEN]: But my hope is that you all will have --
6 both sides, both the prosecution and the defense, will have
7 the continuity that you deserve.

8 LDC [MR. NEVIN]: Thank you, Your Honor.

9 MJ [Col COHEN]: I will say this. I do not reach
10 mandatory retirement for another nine years.

11 LDC [MR. NEVIN]: Sir, has anyone represented to you that
12 you will stay for some particular period of time or that you
13 will not? Have there been any specific representations made?

14 MJ [Col COHEN]: No, sir, none either way.

15 LDC [MR. NEVIN]: So have you discussed -- I want to ask
16 you some questions about who, if anyone, you've discussed the
17 case with. And the military judge may know that there have
18 been other military judges from the Air Force Trial Judiciary
19 who have sat here at the military commissions.

20 So I guess my first question would be whether you've
21 discussed -- would just be in general, has anyone said
22 anything to you about this case, about how it works, about
23 what the goals are? Whether it's benign comments or not

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1 benign comments, has anybody made any representations to you
2 at all?

3 MJ [Col COHEN]: Sir, I've had discussions with my staff
4 as just to the general posture of the case, kind of where
5 we're at, as I discussed motions this week, the fact that
6 there were protective orders, introductions as to, you know,
7 the utilization of 505 hearings, et cetera, how that applies
8 to CIPA, you know, those types of things, all general in
9 nature.

10 To a certain extent, to keep me fresh, I have avoided
11 any significant substantive discussions about evidence at this
12 time other than for those motions that are pending on the
13 docket for this week.

14 LDC [MR. NEVIN]: And you are referring to your staff here
15 at the ----

16 MJ [Col COHEN]: That is correct, those who are assigned
17 to assist me in this case. As far as discussions with other
18 judges about this case, I have not had any discussions with
19 Judge Parrella or Judge Pohl, who I understand was also
20 previously on this case, and at this point do not see the
21 reason why I would. If they've issued a ruling, I'll review
22 their ruling, but I don't have any reason to go back. Even if
23 judicial privilege would apply, I don't anticipate that I

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1 would exercise that at this point.

2 LDC [MR. NEVIN]: Okay. And have you had occasion to
3 discuss the military commissions with Colonel Vance Spath?

4 MJ [Col COHEN]: I know Colonel Spath. We overlapped this
5 last time for a period of approximately three to four months.
6 I was aware that he was on a case down here at the
7 commissions. I did not work directly for him, but he was the
8 Chief Trial Judge of the Air Force when I came back on to the
9 bench in June of 2018.

10 I replaced Colonel Spath in 2010 when I initially
11 came on the bench and was assigned to Travis Air Force Base as
12 part of the Western Region. I think we met for all of an hour
13 that day with a very brief hand-over before he took off to
14 Kadena Air Base to be the Chief Circuit Military Judge of the
15 Pacific Circuit.

16 Our interactions have been primarily as the Chief
17 Trial Judge. When he would be at the Army Judge Advocate
18 General School during the Military Judges Course, I interacted
19 with him during the three-week course in 2016 when I was a
20 potential to come back on to the bench and then was diverted
21 to be the Chief of the Environmental Law and Litigation
22 Division on behalf of the Air Force.

23 And then I attended the course again in 2018, at my

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1 request because of some changes in the Military Justice Act,
2 to make sure that I was -- that I felt comfortable that I
3 understood what those impacts were going to have on the
4 military justice practice moving forward. And so I attended
5 the course again. I am a three-time graduate of the Military
6 Judges Course, and I have never come close to failing so far.

7 LDC [MR. NEVIN]: Have you been to the National Judicial
8 College in Reno?

9 MJ [Col COHEN]: I have. I have attended -- in fact, most
10 recently I attended the Handling Capital Cases Course. I am a
11 graduate of that course from the National Judicial College. I
12 have also attended the Fourth Amendment Course at the National
13 Judicial College.

14 LDC [MR. NEVIN]: When did you attend the Capital Training
15 Course?

16 MJ [Col COHEN]: End of May.

17 LDC [MR. NEVIN]: Of 2019?

18 MJ [Col COHEN]: Correct.

19 LDC [MR. NEVIN]: Okay.

20 MJ [Col COHEN]: About the same time there were
21 discussions that this was likely going to be my detailing.

22 LDC [MR. NEVIN]: Right. Have you, in your discussions
23 with Colonel Spath -- or your interactions with him would be,

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1 I guess, the right way to put it, have you heard him make any
2 comments about the military commissions?

3 MJ [Col COHEN]: I'm sure he -- I was aware that he was
4 down there. He may have made general discussions about GTMO,
5 itself. At the time that I had conversations with General --
6 Colonel Spath at the time, it was post significant press
7 issues and other litigation associated with his case, so
8 Colonel Spath wasn't talking much about what was going on down
9 here with the commissions, to be honest with you. That
10 doesn't mean that there wasn't something, but nothing that I
11 could articulate to you today.

12 LDC [MR. NEVIN]: But you haven't heard him speak
13 disparagingly about the military commissions, I take it?

14 MJ [Col COHEN]: I don't recall him saying anything
15 disparaging about the commissions; and if he did, it would
16 have no bearing whatsoever on me. I'm one who makes up my own
17 mind about things.

18 LDC [MR. NEVIN]: Yes, sir. And I guess the same question
19 about what we call MCDO, the Military Commissions Defense
20 Organization. Did you hear him make any disparaging comments
21 about MCDO?

22 MJ [Col COHEN]: I did not. And like I said, at that
23 particular time, I am aware that there was an issue between

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1 MCDO and Colonel Spath, generally, and he was particularly
2 tightlipped about that.

3 LDC [MR. NEVIN]: Yes. And has Colonel Spath ever been in
4 the position of writing an evaluation about you?

5 MJ [Col COHEN]: He would have been in my rating chain,
6 but he was gone by the time my performance report closed out.

7 LDC [MR. NEVIN]: I see. So does that ----

8 MJ [Col COHEN]: What I am saying is that -- there's two
9 ways to look at that. He was in my rating chain. He would
10 have been my additional rater when I came to the bench in
11 2018, but he never -- there was never any formal documentation
12 of him rating me.

13 LDC [MR. NEVIN]: I see.

14 MJ [Col COHEN]: Because he was gone by -- I think he
15 retired in October or so of last year. I did not attend his
16 retirement ceremony, and my performance report closed out in
17 March. So ----

18 LDC [MR. NEVIN]: March of 2019?

19 MJ [Col COHEN]: That is correct.

20 LDC [MR. NEVIN]: Right. Right. Okay. Yeah, that makes
21 sense.

22 MJ [Col COHEN]: So there are no records, and I've never
23 worked for him. If you consider working for the Chief Trial

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1 Judge of the Air Force as "directly," then I worked for him
2 directly, but there has always been at least one layer of
3 supervision between me and him; and the only time that we
4 overlapped in any type of rating chain would have been this
5 most recent detailing as a military judge.

6 LDC [MR. NEVIN]: And one other Air Force judge we know of
7 who has appeared here is Colonel Shelly Schools. I guess I
8 would sort of ask the same questions that I just asked you
9 about Colonel Spath.

10 MJ [Col COHEN]: Colonel Schools was the additional rater
11 on my performance report that closed out in March of 2019.

12 LDC [MR. NEVIN]: Okay. And has she -- have you had
13 conversations with her about Guantanamo Bay, about the
14 military commissions, about ----

15 MJ [Col COHEN]: We have not. Our discussions have been
16 entirely based on -- well, other than letting her know as a
17 Chief Trial Judge that I was likely to be detailed to this and
18 that I would need to be able to devote, you know, time to this
19 case. But my understanding is that Colonel Schools never
20 actually made an appearance as a judge in the commissions, as
21 far as preparing, so there was really nothing to discuss.

22 I could be wrong, but that shows you the lack of
23 discussions that we have had. I don't know really what her

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1 role was at all in the commissions.

2 LDC [MR. NEVIN]: All right. I appreciate that,
3 Your Honor.

4 So have you discussed your assignment with any
5 Air Force general officer?

6 MJ [Col COHEN]: No, I have not.

7 LDC [MR. NEVIN]: Have you discussed your assignment here
8 with anybody in the Department of Defense General Counsel's
9 Office?

10 MJ [Col COHEN]: I have not.

11 LDC [MR. NEVIN]: And with anyone in the Office of
12 Military Commissions Convening Authority's office?

13 MJ [Col COHEN]: I have not.

14 LDC [MR. NEVIN]: And anybody in the Office of the Chief
15 Prosecutor?

16 MJ [Col COHEN]: I have not.

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

18 The -- I just want to ask you as well briefly about
19 your acquaintance with people. And let me begin with myself.
20 Because I see you went to school in Utah, and I've been living
21 in Idaho, practicing there for 40 years.

22 Have you ever -- do you have any awareness of the
23 legal environment in Idaho or have you come across me or

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1 anything?

2 MJ [Col COHEN]: I do not, sir. I passed -- I graduated
3 law school in 1998 and passed the Utah bar later that year. I
4 was directly commissioned into the United States Air Force
5 shortly thereafter and began my commissioned officers'
6 training in November. Since that time, although I have had
7 times back in Utah, I have never actually practiced law within
8 the state other than presiding over a couple of cases as a
9 judge at Hill Air Force Base.

10 LDC [MR. NEVIN]: And I have delivered a couple of
11 lectures at BYU. And I take it you haven't seen those or been
12 aware of those or anything?

13 MJ [Col COHEN]: Sir, I -- unless you briefed us
14 between '95 and '98, when I was a law student there, in which
15 case I apologize if I don't remember you, but ----

16 LDC [MR. NEVIN]: I'm sure it would have made a powerful
17 impression on you, Your Honor.

18 MJ [Col COHEN]: It may have been one of those days where
19 I was doing a crossword puzzle, sir.

20 But no, I have no recollection; and that's not meant
21 to be a slight at all.

22 LDC [MR. NEVIN]: No, no. I know.

23 MJ [Col COHEN]: I don't think the two of us have ever

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1 interacted.

2 Now, I will say this. I am aware of Lieutenant
3 Colonel Sterling Thomas. We are not friends, not to put a
4 slight at him. We don't have any regular contact or anything
5 like that. But I am aware that he worked for the
6 Environmental Law and Litigation Division around the same time
7 that I did, although we were thousands of miles apart. I was
8 in Dallas, and I think he was in the D.C. office at the time.
9 I'm not sure which D.C. office even at that time because they
10 moved three times over a short period of time.

11 It is possible that I would have -- I could have
12 interacted with him on some environmental issue at that time.
13 And we may have run into some -- each other at a JAG event,
14 but we would definite -- but we don't exchange e-mails,
15 Christmas cards, holiday cards, birthday cards, et cetera.

16 So that would be the -- as I looked at the names of
17 the individuals, as a fellow Air Force officer, I recognized
18 his name, and I knew generally that he had worked for what we
19 called JACE, which is the Environmental Law and Litigation
20 Division. And that was the only name, including all the other
21 Air Force officers that are here, that I recognized.

22 LDC [MR. NEVIN]: Okay. Well, and I'm not as good at
23 gratuitous insults as Mr. Harrington is, but nothing about

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1 your relationship with Lieutenant Colonel Thomas would cause
2 you to be biased against or for the defense in this case?

3 MJ [Col COHEN]: Absolutely not, sir.

4 LDC [MR. NEVIN]: Okay, great. So just to continue down
5 the list of people, I just want to ask if you have a
6 relationship or an acquaintance with General Martins.

7 MJ [Col COHEN]: I do not.

8 LDC [MR. NEVIN]: With Colonel Pat Wells, an Air Force
9 officer who is in the -- who is the chief of staff for the
10 Office of Military Commissions?

11 MJ [Col COHEN]: Okay. So now that you told me him, I do
12 know him. We are not friends, but we did work together within
13 the Civil Law Directorate at the Air Force Legal Operations
14 Agency. We overlapped for, I guess, the two years that I was
15 chief of the Environmental Law and Litigation Division.

16 He handled a completely different portfolio than I
17 did, but we would attend weekly staff meetings together.
18 Other than those weekly staff meetings, though, I don't think
19 we -- we would have infrequent interaction at the best. I've
20 never been to his house. I could not tell you what his phone
21 number is. I don't think we're friends on any social media
22 accounts.

23 So yes, I know him, and it's a professional

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1 relationship, but that would be the extent of it. If you have
2 other questions, I'm happy to answer them, but I'm trying to
3 just give you as much information as I can ----

4 LDC [MR. NEVIN]: No, I appreciate that.

5 MJ [Col COHEN]: ---- because you have mentioned someone
6 that -- I forgot that he had gone over to the commissions.

7 LDC [MR. NEVIN]: And you -- I take it it follows from the
8 other questioning that you haven't spoken to him about the
9 military commissions or anything related to what we're doing
10 here?

11 MJ [Col COHEN]: I have not, nor do I intend to do so.

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

13 Colonel Matt van Dalen, who is also in the Office of
14 the Convening Authority?

15 MJ [Col COHEN]: I do know -- actually, I believe he's at
16 Kirtland Air Force Base these days. I did run into him, I
17 think, after he left the commissions. He was a military judge
18 at the same time. We attended the -- the first time I went to
19 the Military Judges Course, I believe that was in 2010, we
20 were both O-4s being assigned to the -- as judges. So we were
21 some of the more junior judges at the time, I guess you could
22 say. He was senior in grade to me, though, so I think he
23 pinned on lieutenant colonel before I did.

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1 I have had two e-mail correspondence with him,
2 nothing to discuss the outgoings of the military commissions.
3 I think it was, "Hey, I'm PCS'ing. Congratulations. Hope you
4 enjoy your new assignment," and him saying, "Congratulations
5 on your selection as being a judge." That was it.

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

7 Lieutenant Colonel David Cunningham, Deputy Chief of
8 Staff.

9 MJ [Col COHEN]: I hope I don't know him because if I do,
10 I have no recollection.

11 LDC [MR. NEVIN]: All right. Thank you, Your Honor.

12 MJ [Col COHEN]: You're welcome. I have a friend who is a
13 Cunningham, but not David Cunningham.

14 LDC [MR. NEVIN]: All right. Sir, two retired Air Force
15 officers are important factors in this case. Mr. Mohammad was
16 in the CIA's -- what is referred to formally as the RDI
17 program for three -- right at three and a half years before
18 coming to Guantanamo. His treatment there consisted of
19 torture and cruel and inhuman and degrading treatment.

20 That program was operated by two, I believe, retired
21 Air Force officers: James Mitchell and Bruce Jessen. And I
22 know the Air Force is a big place, but given their important
23 role in this case or what will be an important role at some

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1 point I'm sure, I wanted to ask if you were familiar with
2 them, acquainted with them at all.

3 MJ [Col COHEN]: Not that I'm aware of, sir.

4 LDC [MR. NEVIN]: You mentioned the problems that -- the
5 publicly known issue that arose with Colonel Spath, and I
6 wanted to ask if you have read the D.C. Circuit's opinion in
7 the Nashiri case that addresses some of the problems that
8 arose with Colonel Spath.

9 MJ [Col COHEN]: I have read that opinion. And the lesson
10 I took from that is disclose.

11 LDC [MR. NEVIN]: I'm sorry?

12 MJ [Col COHEN]: The lesson I took from that is disclose,
13 which is why I will be very forthcoming with you here today.

14 LDC [MR. NEVIN]: I see. All right.

15 Do you think there is anything that can be -- that
16 you take away, within the Air Force legal community, about
17 involvement in the military commissions? Is there any
18 discernable view of the military commissions that you're aware
19 of within the Air Force legal community generally?

20 MJ [Col COHEN]: Sir, I'm sure there are those who have
21 enjoyed their time with the commissions and those who have
22 not. But as far as a general sentiment within the United
23 States Air Force, I am unaware of any.

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1 LDC [MR. NEVIN]: Okay. That is what I was getting at.

2 Thank you, Your Honor.

3 MJ [Col COHEN]: You're welcome.

4 LDC [MR. NEVIN]: So you mentioned your time at the
5 National Judicial College and also in in-service judicial
6 training, or in military judicial -- because I believe you
7 said that was -- that's an Army program.

8 MJ [Col COHEN]: That is correct. The Army runs the
9 Military Judges Course on behalf of the Department of Defense.

10 LDC [MR. NEVIN]: Okay. Have you received training
11 specifically on the military commissions?

12 MJ [Col COHEN]: I have received -- obviously, I was
13 provided the books and provided a little bit of self-study,
14 and then I have my excellent team here who sits down and
15 explains that. But as far as a formal training course itself?
16 No, sir, I have not.

17 LDC [MR. NEVIN]: Okay.

18 MJ [Col COHEN]: I'm not aware that there is one, but I
19 will ask about it.

20 LDC [MR. NEVIN]: Yeah. Well, I'm not aware either, but
21 if you had that ----

22 MJ [Col COHEN]: No, that's fair question. Like I said,
23 none of these are meant to be, you know, trite at all. I'm

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1 not aware that there is such a course.

2 LDC [MR. NEVIN]: What about ----

3 MJ [Col COHEN]: And based on my experience for the last
4 21 years, is the military usually gives -- issues you orders
5 and expects you then to, you know, to a certain extent educate
6 yourself while providing you some training along the way.

7 LDC [MR. NEVIN]: Right. I asked only because the
8 military commissions are unique in some ways. There are some
9 unique features to the military commissions. And if you
10 had -- if you had been given advice or training about that at
11 any point, I was interested.

12 MJ [Col COHEN]: No, sir. I've obviously taken a look at
13 some of those. I know when I first -- when they asked me,
14 "What do you want?" and I said, well -- I said one of the
15 first things I want is I want a binder with all the cases that
16 have been issued on the military commissions by either the
17 court of -- by the CMC or the D.C. District Court -- or the
18 D.C. Circuit Court of Appeals so that I can actually see what
19 the state of the law is with respect to the military
20 commissions to include going back there.

21 They not only went that far, but they also provided
22 me, you know, cases coming back from the Supreme Court from
23 the 1800s with respect to commissions. And I am in the

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1 process of reviewing all of those, for the very reason that I
2 understand that the law is my job, and I'm going to be
3 proficient in the law that applies to the military
4 commissions.

5 LDC [MR. NEVIN]: Okay. Thank you.

6 MJ [Col COHEN]: You're welcome.

7 LDC [MR. NEVIN]: Have you had training on issues related
8 to classified information? I heard you mention CIPA before.

9 MJ [Col COHEN]: I have, sir. Not only is it part of
10 regular training within the military with respect to
11 classification procedures, et cetera, obviously my bio puts
12 out there, and I'm happy to answer any questions about my time
13 at the Central Criminal Court of Iraq as a liaison officer,
14 assisting in the prosecution of criminal cases there.

15 We -- I was not involved with any Top Secret, but
16 occasionally there were issues with respect to Secret
17 information that may have come across, you know, with respect
18 to some of those cases. Obviously I had to be trained on
19 proper handling procedures, declassification procedures,
20 working with the DCA, you know, all those types of things with
21 respect to declassification. In my normal duties to include
22 those as a staff judge advocate overseas, obviously there are
23 classified documents that you interact even with -- between

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1 agreements between -- you know, that may or may not exist
2 between some countries and others, operations plans, those
3 kinds of things.

4 I won't call myself -- compared to some, but I
5 believe that I have had sufficient training to understand why
6 things get classified and how we're supposed to properly
7 handle those things.

8 LDC [MR. NEVIN]: Right. And I was -- I wanted
9 specifically to ask you about the process by which material
10 which is discoverable but is classified, the substitution
11 process and what we refer to -- I suppose we refer to it
12 generally as the 505 process.

13 MJ [Col COHEN]: Yes, sir.

14 LDC [MR. NEVIN]: Have you -- do you have experience with
15 dealing with that in a courtroom environment?

16 MTC [MR. TRIVETT]: Objection.

17 MJ [Col COHEN]: I have not done ----

18 Yes, sir.

19 MTC [MR. TRIVETT]: Sir, we are just objecting based on
20 the fact this doesn't go to your qualifications or bias.

21 MJ [Col COHEN]: Okay. Mr. Nevin, I will answer the one
22 question briefly, is although I have not done a 505 hearing
23 that would -- this being my first time in a commission, there

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1 would have been no way for me to have particularly done the
2 commissions hearing, but I am familiar with the process and
3 how it is related to CIPA.

4 LDC [MR. NEVIN]: Okay. Thank you, Your Honor.

5 And have you had -- maybe you asked this and I just
6 didn't listen, but have you had particular training on that,
7 on that process of handling classified information in a
8 courtroom environment?

9 MJ [Col COHEN]: Sir, I have been advised of the
10 procedures. I've read them myself, and I do have members of
11 my staff who specialize in that particular area, and I feel
12 that I will be competent to do so.

13 LDC [MR. NEVIN]: Yes, sir. I didn't mean to suggest I
14 didn't think you were. I just wondered if you had been to a
15 course or something like that.

16 MJ [Col COHEN]: No, sir, I have not been to a course.

17 LDC [MR. NEVIN]: So you mentioned before an awareness of
18 the problems, I believe, of unlawful command influence, and we
19 have referred to it as unlawful influence here because the
20 rules are a little different, as I understand it.

21 Is it correct that you have had experience with
22 unlawful influence-type situations?

23 MJ [Col COHEN]: I have, sir; and as a military judge,

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1 I've had to specifically rule on issues of unlawful command
2 influence in the past.

3 LDC [MR. NEVIN]: Right. And are you aware of the ways in
4 which the Military Commissions Act treats command influence or
5 unlawful influence slightly differently than it does in the
6 normal Uniform Code of Military Justice setting?

7 MTC [MR. TRIVETT]: Same objection.

8 MJ [Col COHEN]: Yes, sir, I am.

9 LDC [MR. NEVIN]: All right. And I wondered if you had
10 any involvement in the issues around the Vargas case, which
11 was fairly notorious in the Air Force as I understand it a
12 couple of years ago?

13 MJ [Col COHEN]: No, sir, I had absolutely nothing to do
14 with the Vargas case.

15 LDC [MR. NEVIN]: So you're not familiar with Lieutenant
16 Colonel Christopher Leavey or Colonel Donald Eller?

17 MJ [Col COHEN]: I know both of them, but I was not a
18 military judge at the time.

19 LDC [MR. NEVIN]: Okay. And you haven't discussed their
20 situations with them?

21 MJ [Col COHEN]: No, sir.

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

23 Are you aware of the various allegations and rulings

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1 about unlawful influence that have occurred in this case?

2 MJ [Col COHEN]: Sir, that is not part of the filings that
3 I have reviewed at this point ----

4 LDC [MR. NEVIN]: Okay. Okay. Well ----

5 MJ [Col COHEN]: ---- but I can assure you that for the
6 same reason I would be concerned about it in a military
7 justice case, I will have the same concerns here in this case.

8 LDC [MR. NEVIN]: Right. Thank you, Your Honor.

9 MJ [Col COHEN]: You're welcome.

10 LDC [MR. NEVIN]: I read a scholarly article you wrote
11 about voir dire.

12 MJ [Col COHEN]: Wow. Okay. The fact that you called it
13 "scholarly," I appreciate that. Thank you.

14 LDC [MR. NEVIN]: Well, I read it -- I read it that way.

15 I just wonder if you have read it lately. And if you
16 have, whether there is anything you would change in it or
17 whether it all still looks pretty good to you?

18 MJ [Col COHEN]: It has probably been a few years since
19 I've read that ----

20 LDC [MR. NEVIN]: Yeah.

21 MJ [Col COHEN]: ---- but the general principles that I
22 recall putting on paper about how to effectively use voir dire
23 and how to, you know -- and what appears to be proper use of

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1 voir dire, et cetera, I think I probably would still stick by
2 most of those. If there's anything in particular that gives
3 you pause, I'm happy to address that, but there's nothing that
4 I can think of that would give me pause at this point based on
5 my recollection.

6 LDC [MR. NEVIN]: Well, I was just going to remind you of
7 the heading that was -- that read "Stop Apologizing and Just
8 Focus on Making a Positive First Impression." And possibly I
9 should have done that at the beginning of this, but -- no, but
10 the other thing -- the substantive thing I would ask is
11 whether you've ever looked at the problem or the process of
12 capital -- jury selection in a capital case?

13 MJ [Col COHEN]: I have, sir, and I've already begun to --
14 I mean, I don't want to be too premature. I understand, one,
15 this case has gone on for years, and we don't know how long it
16 is going to, but I can tell you that one of the things that I
17 have already begun to think about, especially in light of the
18 Handling Capital Cases Courses, is how are we going to do
19 that? How are we going to do that on this island? How long
20 is it going to take? How are we going to move members? All
21 of those kinds of things are things that -- because at the end
22 of the day, that's -- the government has to make the major
23 muscle movements, but as the judge, I oversee the process.

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1 And so understanding what the -- what was -- how that process
2 might do and how that may impact us, especially given what
3 happens in state and federal courts, in state courts in
4 particular with the numbers of people that you need to bring
5 in for handling capital cases ----

6 LDC [MR. NEVIN]: Right.

7 MJ [Col COHEN]: ---- a capital case. Hopefully the
8 government is already thinking about those things, and we will
9 have a plan in place should we get to that point. And I say
10 "should" because I don't know what will happen between now and
11 then with the case. But yes, it is something that is on my
12 mind.

13 LDC [MR. NEVIN]: Yes, all right. Thank you, Your Honor.

14 And you've mentioned several times the pendency of
15 this case that has gone on for a long time and so on. I just
16 wanted to ask if you -- one of the things we hear is -- that
17 we do hear frequently is that it has gone on for a long time.
18 And I think if you ask the parties why, you would get
19 different answers depending upon which side of the room people
20 were sitting on. But setting that aside, has anyone said to
21 you your job is to make this move, move faster, that kind --
22 any kind of comment like that?

23 MJ [Col COHEN]: No, sir, in no way, shape, or form.

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1 LDC [MR. NEVIN]: All right. You referred to your service
2 at the Central Criminal Court of Iraq in Baghdad. I believe
3 you were part of Task Force 134.

4 MJ [Col COHEN]: That is correct, sir.

5 LDC [MR. NEVIN]: And I think if I'm correct, that
6 Task Force 134 has -- had some responsibility for detainee
7 operations.

8 MJ [Col COHEN]: They did, sir.

9 LDC [MR. NEVIN]: And I wondered if you had been part of
10 the detainee operations part of that.

11 MJ [Col COHEN]: They did not. But now that you brought
12 it up, I'm happy to give you a brief explanation of what my
13 roles and responsibilities were there and to disclose
14 generally what the types of cases that I handled were.

15 My job as a liaison officer was solely with the
16 Central Criminal Court of Iraq. Although Task Force 134 was
17 much more broader in scope as to what they handled, I had
18 nothing to do with the day-to-day detainee operations,
19 decisions on who was detained, who wasn't, doing security
20 reviews, all that kind of stuff.

21 I did not ask to be detailed to the Central Criminal
22 Court of Iraq; it was just the deployment that I was provided.
23 I could have gone anywhere in the world; that's just where

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1 they sent me. But like every duty that I'm assigned, I did my
2 best while I was there.

3 As a liaison officer, here's how the process worked.
4 If you will indulge me just for a few minutes, and I will let
5 you ask any follow-up questions, but I do think this is -- of
6 all the issues I could see in my background, I thought this
7 is -- probably would be the one where people would want to
8 know the most about.

9 Each week, probably twice a week, we would get black
10 Gorilla Bins that would be brought over to our offices there
11 that were in the -- that were part of the embassy. We were
12 not part of the Department of State.

13 LDC [MR. NEVIN]: Would you say that again? You would
14 get?

15 MJ [Col COHEN]: Black -- they were bins to carry the
16 files, the individual files on the things.

17 LDC [MR. NEVIN]: Ah. You said "Gorilla Bins."

18 MJ [Col COHEN]: Gorilla is a type of brand. I apologize.

19 LDC [MR. NEVIN]: Yes. It just went past me. I'm sorry.

20 MJ [Col COHEN]: All right. No federal endorsement
21 intended. They were just the bin that would come over with
22 files. They were for throughout the country of Iraq.

23 As one of the -- I was at the time I believe the only

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1 0-4 who was acting as liaison officer. Everyone else was 0-3,
2 so I was given the biggest area of responsibility, which
3 included approximately 40 units spread throughout northern
4 Iraq, which was my area of responsibility for cases.

5 I had nothing to do with Special Operations cases.
6 Those were assigned to a completely different attorney that
7 was there. They handled their own cases. I was not involved
8 with theirs. Mine were day-to-day operations being conducted
9 by whether it be 25th ID, you know, platoons, whatever it was.
10 Those were the types of cases that were provided to me.

11 I would then get the files, and then my directive was
12 as follows: Review the file, verify whether or not it meets
13 the minimal standard for presentation to a probable cause
14 hearing to an investigative judge within the Central Criminal
15 Court of Iraq. If it does, you are required to try to see if
16 you can locate the witnesses who can then travel down to
17 testify and any evidence that's associated with that, with
18 that case.

19 If there's a problem that you don't meet the minimum
20 requirements to present something to a probable cause
21 hearing -- I call it the probable cause hearing; that's the
22 best analogy that I can come up with is, "Should this person
23 stand trial for this?" went to an investigative judge.

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1 I wrote up a brief summary what the allegations were.
2 Those were translated. And then once I had the witnesses who
3 had been able to travel down and any evidence to include any
4 photographs or those kinds of things that were presented with
5 the package, I would then take those witnesses to the court
6 and present them to the judge and allow the judge to conduct
7 inquiry with the witnesses.

8 The detainees were always present. They were
9 represented by a defense counsel, free of charge, at the
10 hearing. The judge then conducted the hearing as -- if you
11 understand, it's an inquisitorial system -- with an
12 investigative judge. Then it's sent to a trial judge. And
13 there is an appellate system there, at the time at least,
14 within the Central Criminal Court of Iraq system.

15 The discretion on my part was minimal, I guess is the
16 best way to say it. It either met a minimum standard to
17 present it -- to present it for a probable cause hearing or it
18 didn't. More than not, they did, but not every case did.
19 Sometimes witnesses had redeployed to the United States and so
20 they were unavailable and so therefore couldn't be presented,
21 in which case the file was sent back to Task Force 134 and I
22 had nothing else to do with the case whatsoever.

23 I couldn't create my own evidence at that time. Most

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1 of these cases were months old at the time, so it was either
2 the evidence was existing at the time of the case or it
3 wasn't. But I did sit down and do interviews and some level
4 of trial prep. So to the extent that it's a prosecutorial
5 function, I have no problem saying that it was a prosecutorial
6 function. I was a cog in the wheel of the prosecutorial
7 function that existed there.

8 The majority of our cases were weapons-related cases,
9 possession of hand grenades, possession of more AK-47s than
10 would generally be allotted to an individual there within the
11 country, and/or possession of mortar rounds, large explosives,
12 those types of things. Those could be charged numerous ways.

13 Weapons charges was the majority of the cases that I
14 handled, which is why I mentioned it. Every once in a while
15 you would get something that might qualify under Iraqi law at
16 the time as a terrorism charge.

17 I will talk about one case in particular because I
18 think it would be pertinent to the discussion here, at least
19 for your knowledge. Early on when I arrived there, by chance
20 an Army platoon came across a village where they engaged with
21 armed men who were there. They engaged, they subdued them,
22 and they arrested them.

23 The evidence gathering at the time indicated that

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1 these individuals were purported to be members of al Qaeda;
2 that they were a cell there within the group. They arrested
3 them, detained them, and brought them back. I then presented
4 that case to the Iraqi -- for a probable cause hearing with
5 those gentlemen present. That was the extent of my role in
6 the case.

7 The investigative judge referred it as a terrorism
8 case. That case went to trial. Ultimately they were
9 convicted. These were foreign fighters that -- I call them
10 "foreign fighters," lack of a better word. They were
11 foreigners who had no documentation for their right to be in
12 Iraq at the time. The evidence was suggestive that they were
13 there. And as a result of that, the Iraqis judged the death
14 penalty in that case for those individuals. Whether or not
15 that death penalty was ever executed, whether up -- whether it
16 was upheld on appeal, I don't know. But I do know that there
17 were those who thought that that was a just punishment under
18 those circumstances for those particular individuals.

19 My personal opinion on whether it was just or not?
20 If the law was followed and they voted their conscience, then
21 it's a just. Had they come back with a different decision,
22 that also would have been just. I'm a process person, and I
23 neither advocated for or against any particular charge or any

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1 result in that case.

2 But because it involved al Qaeda, and I'm aware of
3 the gentlemen who are alleged to have been here just
4 generally, even though I don't know their backgrounds, it is
5 one particular case. And that's the only case that I can
6 think of out of that time, and that was my minimal role in it.

7 LDC [MR. NEVIN]: Okay.

8 MJ [Col COHEN]: I served for -- although I deployed in
9 May, by the time I got there, I believe I went from about
10 1 June to 1 October. So my entire time in the country of Iraq
11 was approximately four months.

12 And I was also -- I wouldn't call myself an evidence
13 custodian, but one of the additional duties that I had there
14 was that I was responsible for requesting -- in advance,
15 people would give me their dockets and then I would be
16 responsible for making sure that the evidence showed up in
17 time for the probable cause hearings.

18 As for any other case, I cannot think of any other
19 case -- one is that had absolutely nothing to do with here.
20 I know nothing about the gentlemen here other than their names
21 and supposedly the overall, overarching principle that this is
22 something related to 9/11.

23 LDC [MR. NEVIN]: Right.

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1 MJ [Col COHEN]: That is the extent of my knowledge about
2 this case.

3 Nothing that I did in the Central Criminal Court of
4 Iraq was classified. It was all unclassified information that
5 was presented to the courts. And I learned nothing about any
6 of the gentlemen here facing trial, nor any other high -- what
7 I guess would be the vernacular high-value targets.

8 LDC [MR. NEVIN]: The case that -- where a death penalty
9 was imposed and may have been carried out, you were not part
10 of advocating for or against capital punishment?

11 MJ [Col COHEN]: No, sir.

12 LDC [MR. NEVIN]: It sounds like you were routing cases
13 into the process and then stepping aside from them after that.

14 MJ [Col COHEN]: That is correct, sir.

15 LDC [MR. NEVIN]: Yeah.

16 MJ [Col COHEN]: But as a matter of disclosure, I'm not
17 going to try to hide that from you all. I told you this. One
18 thing I learned -- so if that's a case, it involved al Qaeda.
19 That's what the evidence would suggest. Whether or not it was
20 was not my decision to make. It was irrelevant to the charges
21 that were being -- you know, which were more of like a murder,
22 you know, and terrorism charge, which was the decision that
23 was made at the discretion of the investigative judge.

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1 I did not advocate for charges to be one thing or
2 another. And I had absolutely nothing to do with the case
3 beyond presenting the evidence initially, really making the
4 witnesses and the evidence available for the judge.

5 LDC [MR. NEVIN]: And did you form or express an opinion
6 about whether death was an appropriate punishment in the case?

7 MJ [Col COHEN]: I did not advocate either way. I do know
8 that folks with whom I worked believe that justice was served
9 in the case.

10 Consistent with my philosophy, that can be justice.
11 Something less than death also could have been justice in that
12 case. That would be my personal view. That is ultimately up
13 to the person who has to make that decision; they have to vote
14 their conscience.

15 LDC [MR. NEVIN]: Right.

16 MJ [Col COHEN]: But I did not advocate for it.

17 LDC [MR. NEVIN]: Right. And you weren't the person that
18 made that decision?

19 MJ [Col COHEN]: Absolutely not.

20 LDC [MR. NEVIN]: Yeah. Was that a jury?

21 MJ [Col COHEN]: That would have been -- they do not have
22 a jury system there, sir. It would have been a panel of three
23 judges.

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1 LDC [MR. NEVIN]: Okay. You used the term "I'm a process
2 person." And is that -- could you say what you mean by that?

3 MJ [Col COHEN]: Yes, sir. Unlike -- I can't speak to
4 every judge, but I can tell you that I have had the
5 opportunity of being both a prosecutor and a defense counsel.
6 In fact, probably -- I spent more time as a defense counsel
7 than I did as a prosecutor. I was an advocate at those
8 particular times.

9 When I was a prosecutor, I was -- I vigorously
10 prosecuted cases. When I was a defense counsel, I vigorously
11 defended cases. It's given me a unique perspective in the
12 sense that I understand what it's like to be the government
13 and have that burden of responsibility and the idea of
14 achieving justice from the eyes of the government. I also
15 know what it's like to sit next to a human being and have
16 their life, you know, impacted by the decisions that you make
17 each and every day.

18 When I became a judge initially back in 2010,
19 something went off. And I remember sitting in a course once
20 and wondering why? Why isn't the prosecutor asking this
21 question? Why isn't the defense counsel asking this question?
22 And my internal voice said, "It doesn't matter to you. That's
23 not your role. Your role is to make sure this process is

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1 fair. Let them do their jobs. That's what's the most
2 important thing."

3 And at the end of trial, occasionally jurors will ask
4 me, "Did we do the right thing?" My response consistently and
5 what I believe to my core is, it doesn't matter whether it is
6 a conviction or an acquittal; if they followed the law and
7 they voted their conscience and only based on the evidence
8 that was presented in court, then both are justice. Because
9 that's the system under which we work. That is the process by
10 which we're required to operate.

11 It is up for you all to argue your different
12 perspectives to the trier of fact, whether that be a judge or
13 a jury. But at the end of the day, the process is what
14 matters; and the process has to be fair.

15 LDC [MR. NEVIN]: I appreciate that. Thank you,
16 Your Honor.

17 I take it from what you have said before that you
18 have not been a lawyer or a judge on a capital case, except
19 for the one you just mentioned in Iraq?

20 MJ [Col COHEN]: Right. And I think it would be
21 inappropriate for me to consider myself a counsel on a capital
22 case. No, sir; this will be my first capital case.

23 LDC [MR. NEVIN]: Right.

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1 MJ [Col COHEN]: I will say that beginning in 2003,
2 I began to receive qualifications to become a learned counsel
3 for the Air Force. I received capital training as a defense
4 counsel back in 2003 from the Naval Judge Advocate General's
5 School handling complex cases. That was the first time that I
6 heard the phrase "Death is different." And then we spent the
7 entire week talking about the responsibilities of a defense
8 counsel in handling capital cases.

9 However, capital cases are few and far between in the
10 military, in general, and even more so in the Air Force,
11 although recent history may suggest differently. I was never
12 detailed to a capital case in any form up until this point.

13 LDC [MR. NEVIN]: And then you mentioned also that you had
14 been to the National Judicial College course on the death
15 penalty. Aside from those two trainings, have there been
16 other trainings about capital cases that you've been exposed
17 to?

18 MJ [Col COHEN]: Nothing specifically to capital cases,
19 no, sir.

20 LDC [MR. NEVIN]: And then returning to the NJC, to the
21 National Judicial College course, did you gather from that
22 that there is a separate jurisprudence, let's say, that comes
23 out of the litigation and decision of capital cases,

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1 particularly -- I'm thinking particularly at the United States
2 Supreme Court.

3 MJ [Col COHEN]: Yes, sir. We discussed extensively and
4 I'm also aware just in recent history of United States Supreme
5 Court cases dealing with capital punishment, in particular the
6 two Supreme Court cases that came out with differing opinions
7 as to whether or not a particular religious leader should be
8 allowed to be present in the room when the capital punishment
9 is executed.

10 LDC [MR. NEVIN]: Right.

11 MJ [Col COHEN]: So I'm generally familiar with the
12 jurisprudence along those lines, and it was something that we
13 discussed at the National Judicial College.

14 I don't mean to cut you completely short, but I don't
15 want to let you completely monopolize -- so if we could
16 focus a -- you know, I don't know how they've divvied up, you
17 know, the time per person, but if there are particular
18 questions on the qualifications then -- and I don't mean to
19 cut you short, it's just that there are five different
20 counsel.

21 LDC [MR. NEVIN]: I understand, Your Honor, and ----

22 LDC [MS. BORMANN]: Judge, just for the record, I cede my
23 time to Mr. Nevin because we won't be repeating the same

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1 questions, so you don't have to worry about that.

2 MJ [Col COHEN]: All right. Thank you, ma'am.

3 LDC [MR. NEVIN]: Your Honor, I guess I am really thinking
4 here on this, and I only have -- actually. I only do have a
5 few more questions ----

6 MJ [Col COHEN]: Absolutely, sir. I wasn't trying to cut
7 you off so much as I do want to make sure that everyone gets
8 their fair shot, for lack of a better word.

9 LDC [MR. NEVIN]: Thank you, Your Honor. I was really
10 focused here on CANON 3B(2), maintaining professional
11 competence in the law. And it's just worded that way; I'm
12 not accusing you of being incompetent. I just ----

13 MJ [Col COHEN]: No. I'm aware of that, sir. In fact, I
14 have -- I will tell you, before I tried this case, I
15 reviewed -- once I was detailed, I probably reviewed those
16 judicial CANONS at least two or three more times myself to
17 make sure that I felt that I was ready to take on the
18 responsibilities that are here. No one is ever going to be
19 perfectly ready ----

20 LDC [MR. NEVIN]: Right.

21 MJ [Col COHEN]: ---- but I can tell you you are never
22 going to find someone who is more dedicated or works harder
23 than me.

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1 You may find someone to include yourselves to be more
2 scholarly than I am on a particular area of the law, but I
3 have prided myself now -- and I will continue to do so as I
4 handle this case -- on being one of the hardest working people
5 you have ever met. And I am confident in my abilities to
6 comprehend legal issues, to apply the facts to the law, and to
7 make the tough calls.

8 LDC [MR. NEVIN]: And so my question is -- just a couple
9 more questions on this, in the area of capital punishment.

10 One of the things that comes up a lot is the
11 requirement for heightened reliability in the process. Is
12 that something you're familiar with?

13 MJ [Col COHEN]: I am, sir.

14 LDC [MR. NEVIN]: In general, I mean.

15 MJ [Col COHEN]: Generally -- I don't want to use that
16 word -- I will use the word that came up significantly in the
17 National Judicial College course was, you know, the idea of
18 the super due process.

19 LDC [MR. NEVIN]: Yeah.

20 MJ [Col COHEN]: You're trying to take someone's life.
21 What due process applies is things that we are probably going
22 to argue about over the next few months ----

23 LDC [MR. NEVIN]: Yeah.

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1 MJ [Col COHEN]: ---- as to what applies and what doesn't.
2 I am also aware of rulings that have also been issued. That's
3 one of the reasons why I also wanted to look at all of the
4 D.C. Circuit Court, Court of Appeals cases, the CMCR cases to
5 see what has already been established as the law, and I have
6 done so with respect to those issues.

7 There are still plenty of legal issues, as your
8 briefings recently have demonstrated, as to what is the law
9 that's going to apply to this. Is it just the statutory law?
10 Those types of things. We are all going to have the
11 opportunity to work our way through that process, but I am
12 confident in my ability to do so.

13 LDC [MR. NEVIN]: All right. One other concept that has
14 unique application in capital cases is that of mitigation.
15 Has that been part of the ----

16 MJ [Col COHEN]: Yes, sir. I have received training on
17 mitigation to include, you know, the psychological aspects of
18 mitigation, how that evidence might be presented, what experts
19 might be needed for that type of mitigation evidence,
20 et cetera, as well as evidence in aggravation, what the
21 government may present with respect to evidence in
22 aggravation. And so I am confident in my ability to
23 understand the concepts and that I will be prepared to address

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1 any motions or those types of legal issues that arise in the
2 concept of a mitigation case.

3 LDC [MR. NEVIN]: And I'd like to just ask you the
4 question that I asked Judge Pohl and also Judge Parrella at
5 the beginning: Do you agree that mitigation is a broad
6 concept?

7 And I'll read to you what Judge Pohl said: "As a
8 general rule, mitigation is in the eye of the defense counsel.
9 If you believe something is mitigating, regardless what the
10 government may believe, my instinct is that it will be treated
11 as a mitigating factor for counsel to argue."

12 I think ----

13 MJ [Col COHEN]: Yes, sir. So the idea is do I agree or
14 disagree. My understanding of the law as defined by the
15 Supreme Court and others, to the extent that it is applicable
16 but, if nothing else, for persuasive authority, is that there
17 is broad discretion allowed in a capital case with respect to
18 mitigation, and so I do not disagree with Judge Pohl. For me
19 to make a preliminary ruling as to whether -- a particular
20 piece of mitigation would be inappropriate for me to do at
21 this time but ----

22 LDC [MR. NEVIN]: Right.

23 MJ [Col COHEN]: ---- the idea that I am coming in with

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1 any type of set parameters on what that is, I think that would
2 be contrary to the existing law that, at a minimum, would be
3 persuasive authority in this case.

4 LDC [MR. NEVIN]: And then just the last question on that
5 subject, on the subject of capital jurisprudence: Are you
6 familiar with the ABA Guidelines that govern the obligations
7 and duties of counsel in a capital case? And just generally,
8 are you aware that there's a separate set of rules that apply
9 and that the Conference Committee in the NDAA of 2010 urged us
10 to -- urged the commissions to hold defense counsel to those
11 rules?

12 MJ [Col COHEN]: I am, sir, generally. If you ask me to
13 quote them back to you, I probably couldn't at this time, but
14 I am aware that initially I think they were promulgated --
15 there is at least an '89 version or something along those
16 lines, and in 2000, maybe 2003, they updated those and they
17 gave the qualifications for learned counsel. I am generally
18 aware of those, yes, sir.

19 LDC [MR. NEVIN]: Your Honor, thank you for answering my
20 questions. That's all I have. I appreciate it.

21 MJ [Col COHEN]: Thank you. I appreciate it.

22 LDC [MS. BORMANN]: It's 2:20 [sic]. Do you want me to
23 start or do you want to break now?

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1 MJ [Col COHEN]: Ms. Bormann, let me ask you this
2 question, and Trial Counsel, either one can answer. With
3 respect to prayer at approximately 1:02, how long do we expect
4 that the afternoon prayer will take?

5 LDC [MS. BORMANN]: If you give me a moment, I can give
6 you an answer.

7 MJ [Col COHEN]: All right. Thank you.

8 LDC [MS. BORMANN]: Judge, if we stop now, they will be
9 ready, having had lunch and prayer, by about 1:30.

10 MJ [Col COHEN]: Trial Counsel, is that acceptable to you?

11 CP [BG MARTINS]: Yes, Your Honor.

12 MJ [Col COHEN]: Okay. Then we'll be in recess until
13 1:30.

14 [The R.M.C. 803 session recessed at 1219, 17 June 2019.]

15 [The R.M.C. 803 session was called to order at 1333, 17 June
16 2019.]

17 MJ [Col COHEN]: The commission is called to order. All
18 parties who were present when we recessed are again present.
19 The same is true for the last session.

20 Ms. Bormann, have you ceded all of your time or just
21 a portion of your time?

22 LDC [MS. BORMANN]: Judge, I've ceded just a portion of my
23 time. We don't know each other that well or you would have

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1 not asked that question.

2 MJ [Col COHEN]: All right. You may proceed, ma'am.

3 LDC [MS. BORMANN]: Thank you.

4 Judge, I just want to briefly touch on some things
5 that Mr. Nevin brought up but some questions that I have.

6 So you said that you asked -- your crack staff, I
7 think you called them, had provided you with some background
8 information on things like previous decisions that involve the
9 commissions. And you said they went back to the 1880s --
10 right? -- to give you some governing law?

11 MJ [Col COHEN]: There were some cases there from -- from
12 obviously -- yes, not necessarily these military commissions
13 but just in general or Supreme Court cases dealing with the
14 issue of law of war and military commissions in general.

15 LDC [MS. BORMANN]: Okay. The -- when you were preparing
16 yourself for today and preparing yourself over the last couple
17 of weeks, I realize it's difficult because this case has been
18 going on for eight years, and so I understand it's hard to get
19 a handle on everything. And I appreciate that you're going to
20 take tomorrow to look at some things, but I want to talk about
21 what you've done to prepare yourself slightly differently than
22 Mr. Nevin did.

23 You said -- Mr. Nevin asked you if you had read --

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1 you told Mr. Nevin that you were familiar with UCI -- what
2 they call in the military UCI and what we call UI here.

3 MJ [Col COHEN]: Yes, ma'am.

4 LDC [MS. BORMANN]: And you talked about the fact that you
5 had not read the previous decisions in this case regarding
6 unlawful influence. Did I get that right?

7 MJ [Col COHEN]: That is correct, ma'am. As I was -- a
8 motion along those lines was on the docket for this week, and
9 so I did not -- I made a decision to use my time for focusing
10 on things that were currently pending before me this week.

11 LDC [MS. BORMANN]: Completely understandable, because
12 it's a lot.

13 The prosecution, the last time we were here -- and I
14 know it was a different judge -- spoke about the over 500,000
15 pages of discovery they had tendered thus far. So we agree
16 that the case is massive. And we are, I think, at something
17 like exhibit -- Appellate Exhibit 637 will be the next filing,
18 and then each of those previous ones have many subparts to
19 them, so we're talking about thousands upon thousands of
20 previous motions.

21 MJ [Col COHEN]: Yes, ma'am.

22 LDC [MS. BORMANN]: I understand.

23 On the UI issue, though, specifically, UI, you're

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1 more familiar with it than I am; I am just a civilian lawyer,
2 but I've come to learn about it here. And is it your
3 understanding that UI can be a cumulative process?

4 So, for instance, if a commanding officer makes an
5 offhand comment, just one, it might not rise to the level of
6 UI, but if the commanding officer continues to make statements
7 through a period of time, it can be cumulative in nature. Is
8 that right?

9 MJ [Col COHEN]: Yes, ma'am, in general. I know that even
10 recently with the United States Court of Appeals for the Armed
11 Forces, there have been decisions that dealt with that issue
12 of cumulativeness and whether or not, in the totality of the
13 circumstances, it was apparent UCI.

14 LDC [MS. BORMANN]: Okay, great. In this case, I would
15 ask you, then -- because UI has arisen on numerous
16 occasions -- to read the history because since we understand
17 that it can be cumulative, that's an important aspect of this
18 case.

19 MJ [Col COHEN]: Thank you, ma'am. I will do so.

20 LDC [MS. BORMANN]: On discovery issues, I know you said
21 that you've read the M.C.R.E. 505 process; similar to CIPA but
22 slightly different. And I want to talk a little bit about
23 what you've read. And I know it's only been two weeks, so I

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1 don't expect your answer to be "I read it," but I just need to
2 get to this for the record.

3 Have you read any of your predecessors' -- both of
4 them, Judge Pohl for almost seven years and then
5 Judge Parrella for six or eight months -- have you read their
6 decisions regarding the substitutions and summaries of
7 classified information that they ruled put us in
8 substantial -- gave us substantially the same ability to make
9 defenses as actually having the classified information?

10 MJ [Col COHEN]: Ma'am, I have not read all of those
11 decisions; no, ma'am.

12 LDC [MS. BORMANN]: Okay. Do you intend -- the reason I
13 ask this question -- I should precede my question with a
14 statement. I'm going to ask you a question about reading that
15 information.

16 The reason I ask it is because, like UI, whether or
17 not we are substantially -- have substantially the same
18 ability to prepare and put on a defense is also cumulative,
19 right? So if we'd been given something early on and then
20 something later, together those two things might put us in the
21 position to make an argument. But if the thing we got early
22 on was deficient and the judge expected something to come
23 along later that never did, of course you're going to have to

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1 make the ultimate decision on that.

2 So my question as I stand here now is: Do you intend
3 to review the -- the information submitted by the government
4 that informed the previous substitutions and summaries given
5 to us through the 505 process?

6 MJ [Co1 COHEN]: Ma'am, I intend to review everything that
7 would be relevant to a motion that is currently pending or
8 will be pending before this court -- before this commission,
9 excuse me.

10 LDC [MS. BORMANN]: Okay. So if the issue, then,
11 is having ----

12 MJ [Co1 COHEN]: For example, I know there are filings, at
13 least the Unclass version of filings that have come in. And
14 one of these is going to be the issue, right, as to whether or
15 not you have sufficient information to even move forward with
16 your motions to suppress and those kind of things. The
17 524SSS I believe -- I might have the wrong number, but I think
18 it was one Mr. Ruiz referenced last night and I recounted
19 again this morning, I believe it's along those lines.
20 Obviously, that's something I may need to look back at and see
21 what information has been provided in order to rule on that.

22 And so while I realize that it is a mountain of
23 potential evidence in this case, that is the obligation that I

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1 now have as the judge, is to work my way through those matters
2 on behalf of both the United States of America and the defense
3 teams and the accused in this case.

4 It may take some time. I will take the time that is
5 necessary. But I am going to ask, moving forward, that those
6 of you, particularly the learned counsel who have been on the
7 case, I think, for the entire period, at least for this
8 current version of the commissions, to highlight for me on
9 occasion: Look, this is -- we were -- you know, this ruling
10 came on this date and this particular AE, and we believe all
11 these -- all these may be relevant.

12 No obligation to do so, but it would sure be helpful,
13 as I would expect the government to do the same: We provided
14 the following information under the following rulings, and
15 this is the information we provided. At least then it focuses
16 me on a particular motion.

17 And so I think that working in conjunction with the
18 parties, that I will be able to work my way through those
19 issues and become intelligent to speak and rule on the
20 matters, notwithstanding the fact that I am coming in well
21 into the -- I won't even call it the middle of the case -- at
22 some point in the case.

23 LDC [MS. BORMANN]: Thank you for that answer.

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1 MJ [Col COHEN]: Yes, ma'am.

2 LDC [MS. BORMANN]: On the issue of preparing to rule on
3 various matters that are now before you, you told Mr. Nevin
4 that your staff has provided you a lot of advice. You know,
5 you've never worked with as large a staff as you have here. I
6 think you're going to rue the day that you said that they were
7 a very large staff because I suspect you're going to think
8 eventually they're a very small staff. But nevertheless, when
9 you're dealing with a staff who has preceded you as a judge --
10 I know I am ultimately responsible for the filings that we
11 make. I review everything even though it may have been
12 originally drafted by somebody else.

13 When you are given a ruling -- this goes to the
14 professionalism of your job -- a draft ruling written by
15 somebody who has previous knowledge, how will you know and how
16 will you assess whether or not that individual, your staff
17 member's reckoning/understanding of the law and the facts, all
18 of which preceded you -- maybe the law -- are accurate?

19 MJ [Col COHEN]: Ma'am, I typically review the facts that
20 are doing that. For example, the motion with respect to
21 Mr. Ali, I personally reviewed all the attachments that were
22 provided, those motions prior to my signature going out on it.

23 LDC [MS. BORMANN]: Okay. Terrific. Thank you.

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1 And I just have one more question, I think, unless,
2 of course, Mr. Montross calls me over and tells me otherwise;
3 that is, the law with respect to the commissions. And I am
4 not going to ask you if you've read all of it, because there
5 are the Military Commissions Act of 2009 that's been amended,
6 there is the Manual for Military Commissions, which is the
7 rules; there's the regs; and then, of course, there's varied
8 trial conduct orders and the rules for trial.

9 But I specifically want to draw your attention to
10 R.M.C. Rule 812; and I suspect, although I don't know, that
11 there is a similar rule in the UCMJ. This is a five-defendant
12 case. Have you ever presided over a multi-defendant case?

13 MJ [Col COHEN]: Ma'am, this would be the first joint
14 trial that I have presided over in my tenure as a judge. And
15 I never prosecuted or defended a joint trial in the past. I
16 understand, obviously, that that -- that there are various
17 difficulties associated with that. I also understand that
18 that poses difficulties for you all as well as defense
19 counsel, because the interests of your clients may not always
20 be necessarily aligned.

21 LDC [MS. BORMANN]: Correct.

22 MJ [Col COHEN]: So I will be -- I am generally familiar
23 with some of the general procedures with respect to motion

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1 filing and how you can either opt out or otherwise as treated,
2 those types of things.

3 So I am getting up to speed as quickly as I can, but
4 I do appreciate the unique circumstances. And while I'm not
5 highlighting anything, I'm also aware that both the
6 prosecution and the defense can always file motions to sever
7 offenses if that becomes ever necessary and unwieldy. I'm not
8 soliciting anything or giving any indication how I would rule,
9 but that always exists in any trial where there's joint
10 defendants.

11 LDC [MS. BORMANN]: But I just want to direct your
12 attention to Rule 812 which reads "Joint and common trials,"
13 that's the title. It says, "In joint trials and in common
14 trials, each accused shall be accorded their rights and
15 privileges as if tried separately."

16 And so, in -- since you don't have any experience in
17 multi-defendant joint trials, I would just ask you to review
18 the law to prepare yourself for those issues because they will
19 arise.

20 MJ [Col COHEN]: And I definitely will do so, ma'am. I
21 think that's imperative that I, as the judge, keep my eye out
22 for that.

23 LDC [MS. BORMANN]: Thank you. I have nothing else.

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1 Thank you.

2 MJ [Col COHEN]: Thank you, ma'am.

3 Mr. Harrington.

4 LDC [MR. HARRINGTON]: Judge, you indicated to Mr. Nevin
5 that, I think, your mandatory retirement is nine years away;
6 is that right?

7 MJ [Col COHEN]: That is correct.

8 LDC [MR. HARRINGTON]: Okay. You could leave this case
9 before that, though; is that correct?

10 MJ [Col COHEN]: That is -- that is correct. I guess I
11 could put in retirement paperwork, although I have not done
12 so, nor do I intend to do so at any time in the foreseeable
13 future. And, obviously, the Judge Advocate General, pursuant
14 to his statutory authority, could reassign me to some other
15 case.

16 LDC [MR. HARRINGTON]: Just from our point of view,
17 Judge Pohl left, from our view, very abruptly without any
18 notice, and Judge Parrella was here for a very short time, and
19 we find this very disruptive in terms of understanding a judge
20 and the way they think.

21 So do you have any idea in your mind right now as to
22 how long you would stay with this case or not?

23 MJ [Col COHEN]: If I'm honest, I can't tell you that.

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1 However, I would hope that from -- probably from the
2 prosecution's standpoint and the defense standpoint, that the
3 United States Air Force, in conjunction with the Department of
4 Defense, would find that it's beneficial to both parties or
5 all of the parties here to allow me to stay on this for at
6 least for the foreseeable future, talking in anticipation of
7 years as opposed to months.

8 LDC [MR. HARRINGTON]: Just as a caution, Judge, we
9 usually advise our clients not to start an answer with "If I'm
10 honest," you know.

11 MJ [Col COHEN]: That's fair.

12 LDC [MR. HARRINGTON]: Judge, you mentioned before about
13 your OPRs and that. Is there a category in the rating for
14 someone in your position regarding the saving of government
15 funds or the maximizing of nonuse of government funds or not
16 in your rating?

17 MJ [Col COHEN]: There is no category for that. It could
18 be -- I mean, I guess if -- if I came up with some brilliant
19 idea and save, you know, the Air Force billions of dollars
20 somehow in some process, it probably would be listed on a
21 performance report; but there's no specific category, no, sir.

22 LDC [MR. HARRINGTON]: You understand there may be
23 occasions where we come to you needing to get approval for

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1 funds. I take it you feel no pressure on whether you do that
2 or not?

3 MJ [Col COHEN]: For me, as a young JAG, dealing as a
4 prosecutor, the Air Force's position was, "You can't put a
5 cost on military justice." That is stuck with me now. Now,
6 ultimately whether the convening authority funds something is
7 within the convening authority's discretion, just as it is in
8 a trial by courts-martial.

9 I issue my orders. The convening authority does what
10 the convening authority does. If the convening authority
11 chooses not to follow an order or the government chooses not
12 to follow it, then we deal with remedies, you know, based on a
13 failure to comply with the court order. But saving the
14 government money is not a factor I'm aware of that's
15 enumerated in any of the rules.

16 LDC [MR. HARRINGTON]: And with respect to this case and
17 the length of it, are you aware of the fact that there are
18 many people in the country that are very frustrated or upset
19 with this, including the highest officials in our government,
20 like the President and Congress?

21 MJ [Col COHEN]: Generally, yes, sir, but I have not spent
22 any significant time reading about that, but I would -- just
23 as a person who lives in the United States of America, I'm

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1 generally aware that people would have liked the process to
2 have gone faster than it has.

3 LDC [MR. HARRINGTON]: Do you feel any inherent pressure
4 on you because of outside criticism of the length of the
5 process?

6 MJ [Col COHEN]: Zero.

7 LDC [MR. HARRINGTON]: Okay. Now, Judge, I want to ask
8 you a particular question about me in a comment that you made
9 the other day at the 802, but the preface of it is I don't
10 know if you are aware that we have had a number of instances
11 in this case, for example, the light with the security officer
12 going off where some outside entity set it off; where smoke
13 detectors in the interview rooms turned out not to be smoke
14 detectors but listening devices; several other occasions; but,
15 most importantly, the use by the FBI of informants on my
16 defense team for a long period of time, which is an issue that
17 will be coming to you at some point in time.

18 But you made a comment the other day at the 802
19 regarding granting more time and being down tomorrow because I
20 had come on the rotator to get additional time to talk to my
21 client.

22 My question to you is: How did you know that I had
23 come on the rotator? And how did you know that my purpose was

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1 to spend extra time with my client?

2 MJ [Col COHEN]: I was notified that we probably wouldn't
3 be able to do the 802 by my staff because there was a delay in
4 the rotator taking off the day prior. That was the extent of
5 the conversation, at which point I said, Well, then, it just
6 doesn't make any sense since we don't know what the -- when
7 that departure will take. But that was the extent of it. My
8 staff informed me that the rotator scheduled for Friday had
9 not taken off.

10 LDC [MR. HARRINGTON]: But you made the particular comment
11 that because I needed more time with my client. I'm asking
12 you how that was related to you.

13 MJ [Col COHEN]: Oh, sorry. As a former defense counsel,
14 I assumed you would want to meet with your client upon
15 arrival. There was no intelligence provided to me. It was
16 just -- it may have been an incorrect assumption. If I
17 offended you by thinking you might want some time with your
18 client, I apologize.

19 LDC [MR. HARRINGTON]: No, I'm not offended. That's not
20 the point.

21 MJ [Col COHEN]: That was it. It was the fact that I
22 spent four years as a defense counsel, and immediately prior
23 to trial, I probably would have wanted to spend time with my

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1 client in order to prepare.

2 LDC [MR. HARRINGTON]: Okay. Judge, are you aware of the
3 fact that torture of our clients is a big issue in this case
4 about a lot of things?

5 MJ [Col COHEN]: I understand that the parties will be
6 arguing over whether or not your clients were tortured, yes,
7 sir.

8 LDC [MR. HARRINGTON]: Okay. And have you done any
9 reading or any studying with respect to that aspect with our
10 clients?

11 MJ [Col COHEN]: I have not, sir.

12 LDC [MR. HARRINGTON]: Okay. Have you done any research
13 at all?

14 MJ [Col COHEN]: I have seen some filings. In fact, I
15 think some of the Unclass motions to suppress generally
16 address some of that. But as far as my independent study, I
17 have done zero independent study on that.

18 LDC [MR. HARRINGTON]: Before you came to this, you did
19 nothing; is that right?

20 MJ [Col COHEN]: As far as stuff generally available in
21 the media, open source, that kind of thing? Nonfilings, is
22 that what you are talking about, sir?

23 LDC [MR. HARRINGTON]: Yes.

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1 MJ [Col COHEN]: Yes, I have not done any of it, nor do I
2 intend to.

3 LDC [MR. HARRINGTON]: One of the -- what some people
4 would say is that there are a lot of political aspects to this
5 case. Whether they get in front of a jury or not is another
6 question. But we have a death penalty case with mitigation,
7 and some or all of the accused may put political statements or
8 other information about politics before the jury.

9 Do you have any particular viewpoints about Israel
10 and their conduct in the Middle East?

11 MJ [Col COHEN]: No, sir. I will -- let me -- my last
12 name is Cohen. I don't know if that's the reason why I'm
13 being asked the question, but I have no problem answering the
14 question.

15 I do have some relatives that are Jewish; I am not.
16 I am a member of the Church of Jesus Christ of Latter-day
17 Saints. I believe that all people, men and women, should be
18 able to worship how, where, and what they may. I have no
19 affiliations with the State of Israel, nor do I harbor any ill
20 will towards the religion of Islam.

21 LDC [MR. HARRINGTON]: My question really went more to
22 whether you were Jewish or Christian or Mormon.

23 MJ [Col COHEN]: I understand. I wasn't trying to -- I

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1 just didn't know -- if the basis was that, I wanted to just
2 put that aside because I do realize it is a very Jewish name.

3 LDC [MR. HARRINGTON]: My question was a bigger
4 context ----

5 MJ [Col COHEN]: I understand.

6 LDC [MR. HARRINGTON]: ---- in terms of your particular
7 attitudes, themselves. That's all.

8 MJ [Col COHEN]: No. I recognized that as of '47, it has
9 been recognized as a state. Whether or not that was the
10 correct decision or not, that's not my decision; that was made
11 well before I was born.

12 LDC [MR. HARRINGTON]: Judge, Mr. Nevin asked you whether
13 you had discussed your assignment with other people. My
14 question is a little broader than that.

15 Have you discussed this particular case with other
16 people before you were assigned or not?

17 MJ [Col COHEN]: No, sir. I mean, what do you mean by
18 "discussed"? Did I inform someone that I might be detailed to
19 this case?

20 LDC [MR. HARRINGTON]: No, no. I mean, this case is big.
21 It's national news. It's a big deal. Most people in the
22 country know something about it.

23 MJ [Col COHEN]: Right.

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1 LDC [MR. HARRINGTON]: I'm just asking you what it is that
2 you know about it.

3 MJ [Col COHEN]: What I knew -- and if this makes me a bad
4 officer, I apologize. I have been so focused on all the other
5 things that I have done that I can honestly tell you that
6 other than knowing that these cases were ongoing and they have
7 been ongoing for quite some time and that periodically people
8 would be tasked for a deployment or TDY -- whatever it is
9 classified as -- to come down here, that was the extent of my
10 knowledge about what was going on down here.

11 LDC [MR. HARRINGTON]: Okay. And I think you mentioned
12 that after 9/11 happened, your reaction was just really one of
13 shock; is that right?

14 MJ [Col COHEN]: That's correct.

15 LDC [MR. HARRINGTON]: Did you ever discuss with anybody
16 or harbor thoughts of saying we should go to war with these
17 people, we should get retribution, we should punish them, that
18 kind of thing?

19 MJ [Col COHEN]: No, sir, I don't recall ever having any
20 of those conversations.

21 LDC [MR. HARRINGTON]: Okay. Did anybody say that to you,
22 your fellow military officers?

23 MJ [Col COHEN]: It would not surprise me if someone had

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1 expressed those feelings, but I could not tell you
2 definitively that that occurred.

3 LDC [MR. HARRINGTON]: I take it if they did, it didn't
4 have much of an impression?

5 MJ [Col COHEN]: It had zero impact on me.

6 LDC [MR. HARRINGTON]: Okay. Judge --

7 MJ [Col COHEN]: I think you will find over time that I'm
8 a very independent thinker.

9 LDC [MR. HARRINGTON]: Judge, do you know Colonel Karen
10 Mayberry?

11 MJ [Col COHEN]: I do know Colonel Mayberry
12 professionally.

13 LDC [MR. HARRINGTON]: Okay. Did you know that she was
14 the head of the defense before General Baker in our case? Did
15 you know that?

16 MJ [Col COHEN]: I think I do recall that I had seen that
17 in her bio at some point.

18 LDC [MR. HARRINGTON]: I take it you haven't discussed
19 this case with her ----

20 MJ [Col COHEN]: None at all.

21 LDC [MR. HARRINGTON]: ---- her duties when she was here?

22 MJ [Col COHEN]: No, sir.

23 LDC [MR. HARRINGTON]: Do you know former Judge Jeremiah

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1 Mahoney?

2 MJ [Col COHEN]: I believe that's her husband.

3 LDC [MR. HARRINGTON]: Do you know him?

4 MJ [Col COHEN]: Only from the occasional events that I
5 have seen him and Colonel Mayberry. I never practiced before
6 him when he was an Air Force judge.

7 LDC [MR. HARRINGTON]: The fact that he's the brother of
8 my partner, you wouldn't hold that against me, would you?

9 MJ [Col COHEN]: Absolutely not, sir. I didn't --
10 wouldn't have even known that.

11 LDC [MR. HARRINGTON]: Judge, I don't know how much you
12 have thought about this, but do you have an opinion about
13 whether the United States Constitution applies to these
14 commissions?

15 MJ [Col COHEN]: I have wondered since being detailed to
16 this case what these issues are going to be to include that
17 very one. I have come to no conclusions. And I'm hoping that
18 the parties will help me make that -- make the right decision
19 in this case.

20 LDC [MR. HARRINGTON]: Welcome to the sewer, Judge.

21 What about international treaties like the Geneva
22 Convention, have you reached a decision about whether those
23 apply?

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1 MJ [Col COHEN]: I have not, sir.

2 LDC [MR. HARRINGTON]: Judge, one request that I would
3 make of you -- I think that everybody would make -- is as much
4 as you can, to give us as much advance notice as you can of
5 changes of schedule for these hearings. We have an enormous
6 amount of things to do all the time, and when they are
7 changed, we tend to get it at the very last minute. It just
8 makes things very difficult for all us.

9 MJ [Col COHEN]: I will promise the parties that once this
10 week is over, I am in the process of looking at the calendar
11 for the rest of 2019. I will make my changes, if any, and
12 then we will proceed according to that schedule barring
13 something that precludes us from doing so. I have also begun
14 preliminarily, assuming that I do not recuse myself from this
15 case, of working on a 2020 calendar as well.

16 LDC [MR. HARRINGTON]: Okay. Judge, at the end of this
17 voir dire, there's a matter I need to put on the record. I
18 just ask you for a few minutes to be able to do that at the
19 end of ----

20 MJ [Col COHEN]: Absolutely, sir.

21 LDC [MR. HARRINGTON]: And then lastly, Judge, Mr. Nevin
22 made a comment about my gratuitous humor. I leave it to you
23 to decide whether it's gratuitous or not, but I will tell you

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1 this: That if you come to the court with the belief that
2 Mr. Nevin's humor will be weak, you will never be
3 disappointed.

4 MJ [Col COHEN]: All right. Thank you, Mr. Harrington. I
5 appreciate it.

6 Mr. Connell, I believe you're next.

7 LDC [MR. CONNELL]: Thank you, sir.

8 MJ [Col COHEN]: You're welcome.

9 LDC [MR. CONNELL]: You were asked about your familiarity
10 with Colonel Mayberry. Is there anything about your
11 familiarity with Colonel Mayberry that would have any impact
12 on your impartiality?

13 MJ [Col COHEN]: No. I find her to be a very pleasant
14 person, and my interactions with her have been professional
15 and cordial.

16 LDC [MR. CONNELL]: Okay. And you noted that you had some
17 familiarity or at least knew Lieutenant Colonel Thomas. Is
18 there anything about your knowledge or interaction with
19 Lieutenant Colonel Thomas that would have any impact on your
20 impartiality?

21 MJ [Col COHEN]: No. I have -- I don't have an overly
22 positive or overly negative. He seems like a good fellow
23 officer. Until I have some reason to think otherwise, I will

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1 continue to assume so.

2 LDC [MR. CONNELL]: Thank you. You told Mr. Nevin about
3 your experience as a liaison in Iraq. Is there anything about
4 that experience that would affect your impartiality?

5 MJ [Col COHEN]: No, sir. No, in no way whatsoever.
6 That's why I specifically mentioned that one case, because I
7 think that might be relevant. I wanted you all to know that.

8 LDC [MR. CONNELL]: Thank you, sir.

9 MJ [Col COHEN]: But no, I just did my job. I do not
10 become emotionally attached to my cases. I learned that as a
11 young prosecutor and, in particular, as a defense counsel. I
12 believe that emotions can taint your objectivity, and I just
13 do my job. I have no problem working as a prosecutor, as a
14 defense counsel, or as a military judge.

15 I can tell you this, though. The first time I had to
16 sentence someone and send them to jail myself, I will never
17 forget that feeling and the weight that comes from being the
18 person who has to make that decision. And as I sit here
19 before you today, that is the same weight that I feel. I'm
20 sure this is much bigger and has more gravitas than I am
21 currently anticipating, but I tell you that I feel the weight.
22 And my obligation is to both the prosecution as the
23 United States and the defense in this case, and I will make my

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1 honest endeavorment to make every ruling that I do in
2 accordance with the law based on the facts that are before me.

3 At the end of the day, facts determine the outcomes
4 in accordance with the law, not my personal opinions.

5 LDC [MR. CONNELL]: You told us -- or you told Mr. Nevin
6 a little bit about your -- the training first in 2003 and then
7 more recently you had on capital issues. Would that training
8 have any impact on your impartiality?

9 MJ [Col COHEN]: None, sir.

10 LDC [MR. CONNELL]: Very good.

11 MJ [Col COHEN]: If anything, the most recent training
12 drove home for me the significance of a capital case, again.

13 LDC [MR. CONNELL]: The -- I have one other name for you,
14 sir. Do you -- do you know Ann Marie Sutter?

15 MJ [Col COHEN]: I do know Captain Sutter. She worked for
16 me for approximately a year when I was a staff judge advocate
17 at Yokota Air Base.

18 LDC [MR. CONNELL]: Okay. And I'll report to you, sir,
19 both that she's been promoted -- she is now a major --
20 and ----

21 MJ [Col COHEN]: That is correct.

22 LDC [MR. CONNELL]: ---- she's gotten married and that her
23 last name is now Bush.

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1 MJ [Col COHEN]: Okay.

2 LDC [MR. CONNELL]: Would it have any impact on your
3 impartiality to learn that she is assigned to our defense
4 team, although not in a courtroom role?

5 MJ [Col COHEN]: None whatsoever. In fact, I think I
6 rated her as one of my top litigators.

7 LDC [MR. CONNELL]: And if at some point she were assigned
8 a courtroom role, would that have any impact on your
9 impartiality?

10 MJ [Col COHEN]: No, none -- none whatsoever.

11 LDC [MR. CONNELL]: Thank you, sir.

12 MJ [Col COHEN]: You're welcome.

13 LDC [MR. RUIZ]: May I have a moment, Judge?

14 MJ [Col COHEN]: You may, Mr. Ruiz.

15 [Pause.]

16 MJ [Col COHEN]: Sir, the time is yours.

17 LDC [MR. RUIZ]: Thank you, Judge.

18 Judge, most likely some clarifications here. There
19 was one comment that you made in terms of the timing of your
20 assignment. And you indicated -- and correct me if I'm wrong,
21 because I was trying to take these notes down -- that your
22 assignment came after -- you were waiting after Judge Parrella
23 issued some rulings. Do you remember that, making that

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1 comment?

2 MJ [Col COHEN]: That's correct. My understanding was
3 that the way that went down -- full disclosure, not just
4 divulging any judicial privilege here, just as a matter of
5 timing. My understanding is Judge Parrella had a hearing with
6 you all in May. Obviously, issues that he could rule on based
7 on any arguments that may have been made, it was in the
8 benefit of all parties to go ahead and have him issue some
9 rulings along those lines.

10 Once he had done what he believed he could do prior
11 to his reassignment, then I was detailed to the case.

12 LDC [MR. RUIZ]: Did you have any ----

13 MJ [Col COHEN]: You still have to be the judge of the
14 case to issue those rulings.

15 LDC [MR. RUIZ]: I understand.

16 Did you have any specific insight or information as
17 to what the subject matter that Judge Parrella was ruling on
18 involved?

19 MJ [Col COHEN]: There were no discussions. I was not
20 privy to any -- any of those rulings. I think I have seen,
21 just in relation to some of the recent filings even that
22 issued this week, some of those rulings. That would be the
23 extent.

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1 And when I say "might have," that's a very loose
2 "might have." I can promise you I didn't have any discussions
3 with Judge Parrella, nor has my team bothered to brief me on
4 everything that he ruled on necessarily unless it was relevant
5 to the issues pending on the docket this week.

6 LDC [MR. RUIZ]: I understand.

7 MJ [Col COHEN]: That notwithstanding, like I said, I
8 recognize the law of the case. But the fact that
9 Judge Parrella or Judge Pohl may have felt a particular way
10 about something, I will exercise my independent judicial
11 discretion in ruling on the facts and the law in this case.

12 LDC [MR. RUIZ]: I understand. Thank you.

13 MJ [Col COHEN]: You're welcome.

14 LDC [MR. RUIZ]: Now, in terms of your future assignment,
15 you're going to be the Chief Judge of the Eastern Circuit,
16 correct?

17 MJ [Col COHEN]: That is correct.

18 LDC [MR. RUIZ]: Is it safe to assume that in order to
19 assume that position, you've gotten a new set of orders to
20 assume that particular position?

21 MJ [Col COHEN]: No. That is considered a PCA instead of
22 a PCS, or permanent change of assignment. It's a matter of
23 changing my duty title in the personnel system.

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1 LDC [MR. RUIZ]: I understand. So with that in mind, how
2 much time would you have left on your original orders?

3 MJ [Col COHEN]: I'd have to look at the order, but
4 typically CONUS orders do not have their -- they do not have
5 the same type of time limit. Like, for example, if I would
6 have gone to Japan for an assignment to be the Chief Judge out
7 there, typically it's a three-year assignment if it's
8 accompanied or a two-year assignment if it's unaccompanied.
9 Typically CONUS orders don't have that. And if I've
10 misunderstood -- but I don't believe there's any date on my
11 current orders.

12 LDC [MR. RUIZ]: Understood. What is the normal practice
13 and procedure -- for instance, I think it's very similar to
14 what the Navy was, but for the most part, we understood it's a
15 three-year assignment or a two-year billet, even though it
16 wasn't necessarily put into the orders.

17 MJ [Col COHEN]: So what I understand -- and this is just
18 my understanding from what I have been told. Obviously, there
19 was a desire by -- unrelated to these commissions but just
20 with respect to the military justice system, there was a
21 desire by Congress that the judges would stay on the bench for
22 a longer period of time; that they wouldn't be there for six
23 months and pulled for some other duty, but that you would be

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1 able to grow in your expertise, you know, under -- as a judge.

2 Currently I think we're -- for the most part, we're
3 looking at a minimum of three years as a judge on the bench.
4 Whether I'll get three years plus, you know, in addition to
5 that -- but I also -- I also have the ability to speak with
6 superiors and say, "Hey, we're at a critical juncture in the
7 case, and it makes senses for me to stay on this case for a
8 little bit longer."

9 Now, it's not my choice -- I mean, it's not my
10 decision to make, but I'm confident that the Department of
11 Defense and particularly the United States Air Force would be
12 willing to listen to any concerns that I may have about being
13 removed from the case at a critical juncture.

14 LDC [MR. RUIZ]: Now, do you personally have any
15 expectation as to when you will have that conversation next,
16 or is it more of an open-ended, it might happen at some point
17 in the future?

18 MJ [Col COHEN]: It might happen at some point in the
19 future. While I could not say it's impossible that I will be
20 selected for a new assignment next summer, if I was wagering a
21 bet, I would say it's less likely given that I'm moving into a
22 new duty title this summer as the Chief Circuit Military
23 Judge. More likely than not, I can expect to be there for,

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1 I'm anticipating, at least another two years, if not longer.

2 LDC [MR. RUIZ]: Understood.

3 MJ [Col COHEN]: But that is my opinion, not because I've
4 had a personal conversation with the Judge Advocate General of
5 the Air Force.

6 LDC [MR. RUIZ]: Understood.

7 Now, I know you did talk a little bit about your time
8 and rank. I believe you indicated about how long you have
9 been a colonel.

10 MJ [Col COHEN]: That is correct.

11 LDC [MR. RUIZ]: The question I have is: In considering
12 this assignment, did you consider, think through -- I know you
13 made a mention about how you thought long and hard. You said
14 you thought about your biases, any concerns, and then you
15 assessed at the end of that thought process.

16 Did you in the course of that thought process factor
17 into your analysis how this would impact your particular
18 career progression? In other words, if you are -- if you do
19 have a view towards a star, right, did you factor that in?
20 Did it make a difference or not?

21 MJ [Col COHEN]: It was an easy decision for me. The
22 likelihood that I would get the one star out of the 150
23 colonels is less than 1 percent, so the likelihood -- so I

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1 expect this to have zero impact on my career. I expect that I
2 will retire as a colonel of the United States Air Force.

3 LDC [MR. RUIZ]: Sure. I understand that, and I
4 appreciate that.

5 MJ [Col COHEN]: Absolutely.

6 LDC [MR. RUIZ]: It may be a small percent, but my
7 question really goes to the -- would you like to, you know,
8 put on a star?

9 MJ [Col COHEN]: I will go on the record and say that I am
10 doing what I have always enjoyed. I came into the Air Force
11 to be a litigator, to be involved in the courtroom. The fact
12 that I have been fortunate enough to be blessed with the
13 opportunity to be a military judge for now going into my fifth
14 year and to remain in the courtroom is exactly where I wanted
15 to be.

16 LDC [MR. RUIZ]: So it's fair to say that your track --
17 or your promotion track was not a major factor, even if a
18 significant factor, in your -- in your decision?

19 MJ [Col COHEN]: Zero, sir. It had zero impact on my
20 decision.

21 LDC [MR. RUIZ]: Thank you.

22 And you talked in general terms about if the
23 Air Force was okay with it, right? And I get that because a

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1 lot of times we talk in those terms, the needs of the Navy and
2 the needs of the individual, and if the Navy wants this, if
3 the Navy wants that.

4 I would like to drill down a little bit more into
5 when you say the Air Force, that the Air Force would be okay
6 with me taking on this added responsibility and having had
7 that discussion. When you say that, are you talking about the
8 specific TJAG? Are you talking about other players in the
9 Air Force? Who specifically are you referring to?

10 MJ [Col COHEN]: Right. Well, the -- by statutory
11 authority, the Judge Advocate General of the services can
12 assign the Judge Advocates within the JAG Corps -- the
13 respective JAG Corps to assignments.

14 And so when I say the Air Force, yes, I realize that
15 the Judge Advocate General would get input and advice from
16 others, but I know the Judge Advocate Generals hold that
17 authority under Article 6 very close to the chest, and that's
18 who I would anticipate would make the ultimate decision by
19 statute.

20 LDC [MR. RUIZ]: Did you have any direct communications or
21 did you have to submit any documentation for consideration by
22 the TJAG, or who -- I guess what I am trying to get at is who
23 had that discussion with the Air Force TJAG, right, were

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1 considering ----

2 MJ [Col COHEN]: You are talking about just my nomination
3 process in general?

4 LDC [MR. RUIZ]: Yes.

5 MJ [Col COHEN]: This is what I understand. There is more
6 to it. I am not privy to it. Even coming back to the bench,
7 I obviously had three years as a military judge under my belt;
8 you know, the minimum qualifications at least two years as a
9 military judge. I also had a current TS//SCI clearance, which
10 not every military judge in the Air Force did.

11 Each of the Services is required to make nominations.
12 I was asked, if selected, would I be willing to work on the
13 commissions as I previously discussed. I said yes, if that's
14 -- going back -- if that's what the Air Force needs me to do,
15 then I am willing to fulfill my responsibilities.

16 LDC [MR. RUIZ]: And just before you go on, who asked you
17 that?

18 MJ [Col COHEN]: Judge Spath would have been the Chief
19 Trial Judge at the time. He would have asked me if I had a
20 current clearance. He told me that he was required to submit
21 nominations. I and another judge who has not been -- I am not
22 sure if he has been publicly named or not, so I will leave his
23 name out of it for now, were the two nominees who went to the

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1 TJAG, and they were forwarded to OSD. That was in -- I am
2 guessing that was in September or October of last year that we
3 just became part of the pool of military judges that could be
4 selected for these cases.

5 That was the last thing that I heard about it until
6 we had the joint military judges annual training at MacDill
7 Air Force Base this February when, as just part of all the
8 newly -- the new judges in the pool were sworn in by
9 Colonel Watkins, who is the Chief Judge of the commissions,
10 because we were all there together; it was a joint training.

11 Nothing else until I was told that, Hey, let's go
12 ahead and get you read in, especially since it was much easier
13 for me because I am only a short drive from Langley Air Force
14 Base up to D.C., whereas others may have to travel significant
15 distances.

16 I then went in, got read in to the programs. Nothing
17 else. No decisions were made as to whether I would or would
18 not be read in. I did one orientation visit down here with
19 Colonel Watkins to just see what the facilities were like and
20 those types of things. I believe that happened at the
21 beginning of April in association with the case that he
22 presides over.

23 To be honest with you, I think I know what the name

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1 of that case was, but I'd hate to misstate it, but it was his
2 case. And it was just orientation. I was not involved in the
3 decisions. It was more of just, Hey, here is kind of how
4 things work. I got my badge; you know, those kinds of things.

5 And it was during that trip that I was told, Hey, it
6 looks like we are thinking about possibly putting you on this
7 case. Are you okay with it? Yes, if that's what I need to
8 do.

9 LDC [MR. RUIZ]: That was -- Judge Spath was saying that?

10 MJ [Col COHEN]: No. Judge Spath was long gone by that
11 point. That was Colonel Watkins.

12 LDC [MR. RUIZ]: Okay. Understood. But the initial
13 discussion was with then Chief Judge Spath?

14 MJ [Col COHEN]: Yes. And by "discussion," it was, Do you
15 have a TS//SCI? And would you be willing to be put on the
16 commissions if you were nominated?

17 LDC [MR. RUIZ]: That was actually my next question.

18 MJ [Col COHEN]: That was the extent of the conversation.

19 LDC [MR. RUIZ]: Did you have that personally with him or
20 was that over the phone or via e-mail; do you recall?

21 MJ [Col COHEN]: It was at one of the facilities. We had
22 had an Air Force annual circuit training, so all the judges
23 were there. All the senior defense counsels were there. All

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1 the senior prosecutors, trial counsel were there. At the very
2 end, the last day, before we were getting ready to leave, I
3 was simply asked the question.

4 LDC [MR. RUIZ]: Understood. Okay. Thank you.

5 MJ [Col COHEN]: You're welcome.

6 LDC [MR. RUIZ]: You've been asked a number of questions
7 about knowledge in particular of substantive areas. I think
8 one that may not be -- hasn't been asked is about: Have you
9 had specialized training in the law of armed conflict?

10 MJ [Col COHEN]: I have had training in the law of armed
11 conflict. I have briefed rules of engagement; I -- just, in
12 general, for exercises, things like that. I have also
13 provided regular briefings on -- generally on the law of armed
14 conflict and the Geneva Convention. As far as attending any
15 specialized courses in that, I have not.

16 LDC [MR. RUIZ]: I know you've discussed your relative
17 lack of knowledge in terms of what was going on down here in
18 this particular case, but it's fair to say that you knew that
19 the subject matter was the attacks of 9/11?

20 MJ [Col COHEN]: That is correct.

21 LDC [MR. RUIZ]: And that there was a military commission
22 process with the end result being they were searching for
23 accountability and justice in connection to the 9/11 attacks?

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1 MJ [Col COHEN]: I understand that's the United States'
2 position.

3 LDC [MR. RUIZ]: And you knew that there were certain
4 individuals who were being accused of certain charges; did you
5 know that?

6 MJ [Col COHEN]: Yes, I knew generally that there were
7 five individuals. Until I was detailed to this case, I
8 didn't -- like I say, right or wrong, I couldn't have told you
9 all five individuals' names.

10 LDC [MR. RUIZ]: Sure. Understood.

11 In terms of the participants, the lawyers, I think
12 you've been pretty clear about that. My question is: Did you
13 get any kind of briefing about individual participants, the
14 lawyers, myself, anything about our styles, our personalities?
15 Some like to ingratiate with humor, others perhaps may be more
16 direct. Anything like that?

17 MJ [Col COHEN]: No. I got some general background
18 that -- well, I guess the answer is nothing to that extent.
19 I've seen a little more joviality than I would -- I wasn't
20 sure whether I would -- what kind of reception I would get or
21 how it will go from this point.

22 But I was generally explained who the learned counsel
23 were. I was provided some older picture from an article so I

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1 might be able to put a face to a name. You all probably know
2 where your pictures are and what article that might even be,
3 or maybe you have multiple of them. That would have been the
4 extent of it and then who each of you represent.

5 LDC [MR. RUIZ]: Okay.

6 MJ [Col COHEN]: And then I also was provided the same
7 with respect, for example, with General Martins. I was
8 provided a picture of him so that I would be able to recognize
9 him as well.

10 LDC [MR. RUIZ]: That's all I have, Judge. Thank you.

11 MJ [Col COHEN]: Thank you.

12 The defense having concluded its voir dire, does the
13 government have any questions of the military judge?

14 Sir, is it Trivett or Trivett?

15 MTC [MR. TRIVETT]: It's Trivett, sir.

16 MJ [Col COHEN]: Trivett? All right. Mr. Trivett, the
17 floor is yours.

18 MTC [MR. TRIVETT]: Thank you. And I think it may have
19 been implied by one of your answers, but I just wanted to make
20 it explicit. Being that you're retirement eligible, do you
21 have any current pending applications for civilian employment
22 with the Department of Defense or the Department of Justice?

23 MJ [Col COHEN]: I do not.

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1 MTC [MR. TRIVETT]: Thank you. I have no further
2 questions.

3 MJ [Col COHEN]: Thank you.

4 All right. Mr. Harrington, it seems like it might be
5 a good point at this juncture, then, to allow you to address
6 what -- the issue that you wanted to?

7 LDC [MR. HARRINGTON]: Judge, could I just have a few
8 minutes to talk to my client?

9 MJ [Col COHEN]: You may.

10 LDC [MR. RUIZ]: Judge, in the meantime, may I ask you a
11 procedural clarification?

12 MJ [Col COHEN]: Yes, Mr. Ruiz.

13 LDC [MR. RUIZ]: If you don't mind, it's rather short.
14 Can I -- do you mind if I ----

15 MJ [Col COHEN]: You may do it from there.

16 LDC [MR. RUIZ]: Sure. So you mentioned 524SSS, which was
17 the motion and the ruling that I brought to your attention.

18 MJ [Col COHEN]: Yes, sir. I did ask -- I did get with my
19 staff to look that up last night after you asked me to do so.

20 LDC [MR. RUIZ]: So what I'm hoping to get from you in
21 terms of a little bit more guidance is what you expect from me
22 come Thursday or when we address that motion.

23 Are you going to want to have it argued? Are you

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1 going to want to speak about it generally? I just want to
2 make sure I'm prepared to do what needs to be done with that.

3 MJ [Col COHEN]: Is it acceptable if I send out an e-mail
4 to the parties tomorrow afternoon after I've had an
5 opportunity to spend a little time in the classified realm?

6 LDC [MR. RUIZ]: I have no objection to that.

7 MJ [Col COHEN]: Okay. Then that's what I will do so the
8 government and the defense are prepared to address that
9 matter.

10 LDC [MR. RUIZ]: Thank you.

11 MJ [Col COHEN]: You're welcome. About 802s, I consider a
12 group 802 e-mail discussion to be an 802. I will make it an
13 appellate exhibit. Don't need to comment. It's more of just
14 a notification along those very lines, for example, or I can
15 issue an order, one or the other.

16 I'll talk with my staff as to which way to do it.
17 Typically in a courts-martial, I just make that, but I
18 understand there are procedures here. So whichever way it is,
19 I will either sign an order or an e-mail to notify those as
20 opposed to bringing everybody back to this room for a
21 three-minute conversation to say here's what we're going to
22 do.

23 I recognize that the United States' time and the

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1 defense's time is valuable, as is mine. And so to the extent
2 that we can make things a little bit more expeditious, I will
3 do so.

4 All right. Mr. Harrington, is there anything that
5 you would like to put on the record?

6 LDC [MR. HARRINGTON]: Judge, since the beginning of this
7 case, there's been a recurring issue that has been brought
8 from my attention to the court. It's been in the form of
9 statements to the court, complaints to the court, motions, an
10 order from Judge Pohl. And the motion series is 152. We even
11 had a hearing where Mr. Binalshibh testified in front of the
12 court. And it relates to what he experiences ----

13 MJ [Col COHEN]: Mr. Harrington, I just want to just ask
14 real quick: Is that how he prefers to pronounce his name,
15 Binalshibh?

16 LDC [MR. HARRINGTON]: Yes, Judge.

17 MJ [Col COHEN]: Okay. Then I will do so.

18 LDC [MR. HARRINGTON]: Even though it's Shibh, but Shibh
19 is the way to pronounce it.

20 MJ [Col COHEN]: Okay. Then I will do so.

21 LDC [MR. HARRINGTON]: Thank you. And, Judge, at one
22 point in time Judge Pohl actually entered an order directing
23 the officials at the camp to stop things that Mr. Binalshibh

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1 was complaining about which related to noises, vibrations in
2 the cell, other things that he was experiencing that would not
3 allow him to sleep, caused a great deal of pain and agony to
4 him. And now in the beginning of this year, we have a new
5 symptom that he has reported.

6 We have met with psychiatrists, with a medical
7 doctor. And he complains -- and this is even worse, if you
8 could say it, than the other -- what he experiences, but he
9 experiences itching and sensations of being bit. And it's --
10 the psychiatrist has prescribed medications for him.

11 He has resisted medications for a long time, but in
12 this particular instance, he agreed to take the medications to
13 try and get some relief. The medications are of no help to
14 him and the medical treatment is of no help to him. He's in
15 agony most of the time. He cannot sleep, and this
16 dramatically affects not only him, his health and that, but
17 also it affects our relationship with him because he is
18 constantly experiencing these problems.

19 Some of this relates back to the treatment that he
20 received back in the black sites, which you are going to hear
21 a lot about in the suppression hearings and later part of the
22 case. And he believes that this is like an intentional
23 disorientation of him.

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1 We have examined and they're looking further into
2 other techniques used by government's officials and the
3 military into invading the persons of people and causing these
4 effects. And he wants the court to be aware of this because
5 it is, for him, a very bad health issue. It affects his
6 ability to think, his ability to relate to people, and he
7 struggles mightily with us. He cooperates with us in every
8 way that he can. And he's just begging us to help him, and
9 we've been begging the court to help us. And it requires an
10 independent investigation.

11 The government just denies that it happens. They
12 deny everything about it. They say it's a delusion. The
13 psychiatrist, when we met with him, he said it's real -- it's
14 real for him.

15 MJ [Col COHEN]: Are you okay disclosing that here in an
16 open forum?

17 LDC [MR. HARRINGTON]: Yes. It's all right.

18 MJ [Col COHEN]: All right. With your client's consent?

19 LDC [MR. HARRINGTON]: Right. Yes, Judge.

20 MJ [Col COHEN]: All right.

21 LDC [MR. HARRINGTON]: But anyway, Judge, this is a
22 horrendous situation for him and makes it very, very difficult
23 for us. The difficulty for us is so what? That doesn't

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1 matter. That goes with representing your client.

2 But he wants desperately to get some sort of relief
3 from the court, from anybody else, to stop these problems from
4 happening. And as I said, the itching and the scratching and
5 all the rest of that is extraordinarily difficult for him.

6 You will be hearing more about this later from us in
7 the forms of motions, but he wants -- he wants this to be put
8 on the record and wants you to be aware of it for your
9 consideration of anything that could be done to help his
10 situation.

11 MJ [Col COHEN]: Okay. Thank you, Mr. Harrington. I am
12 aware of it now.

13 General Martins, while I don't task you individually,
14 you do represent the United States of America. To the extent
15 that you've just heard this, if the government would please
16 look into this matter if it's something that you can work with
17 the defense, the government can work with the defense to
18 address. If it becomes a matter of a motion, I will be happy
19 to address that.

20 But at this point it sounds like a particular
21 condition of confinement that I have no motion to review at
22 this time, but I am taking the request and passing it on to
23 the government that it should be at least looked into at this

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1 point in time.

2 Mr. Trivett.

3 MTC [MR. TRIVETT]: Thank you, sir.

4 I certainly don't envy you in having to catch up over
5 the last seven and a half years of litigation. This has been
6 extensively litigated.

7 MJ [Col COHEN]: Okay.

8 MTC [MR. TRIVETT]: There is an order in 152 ----

9 MJ [Col COHEN]: Excellent.

10 MTC [MR. TRIVETT]: ---- that the judge denied. We have
11 looked into it whenever the issue has been brought up. I
12 personally met with his doctor along with Mr. Harrington and
13 Mr. Feeler last time.

14 MJ [Col COHEN]: Okay.

15 MTC [MR. TRIVETT]: I know there were psychotropic
16 medications that were being -- that were being administered at
17 least at that time. The doctor did not believe that he had
18 been on them long enough for them to have any effect. I'm not
19 certain if they have -- if he has yet been on them or if he's
20 even continuing to be on them. We met with the doctor last
21 time we were down for the last session.

22 But this has been looked at extensively. I would
23 just call your attention to the 152 series.

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1 MJ [Col COHEN]: Okay.

2 MTC [MR. TRIVETT]: We can't have -- we certainly looked
3 into this issue when it first arose and then probably the
4 second time and the third time. We can't have the government
5 continuing to do an investigation on something that we're
6 denying exists and that is not happening. And there is
7 certainly no intent to intentionally harass Mr. Binalshibh at
8 all. So I just wanted to bring that to your attention.

9 MJ [Col COHEN]: Absolutely. And I will definitely look
10 at the orders. I wasn't issuing an order here; just more out
11 of just saying, Hey, this appears to be an issue. If it
12 becomes something that I need to rule on, I will do my job
13 accordingly. It seems like this is a little -- it's a little
14 preliminary for me to rule, especially in light of previous
15 orders, but it sounds like the government is aware.

16 MTC [MR. TRIVETT]: Yes, sir.

17 MJ [Col COHEN]: It has been noticed. I have now asked
18 the government to just consider the information that was
19 provided. And then whether or not that's satisfactory, I will
20 find out from the defense via motion or otherwise.

21 MTC [MR. TRIVETT]: Yes, sir. Thank you.

22 MJ [Col COHEN]: All right. Thank you.

23 Mr. Harrington.

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1 LDC [MR. HARRINGTON]: Just one comment, Judge.

2 Mr. Trivett mentioned when we met with the doctor,
3 they were in the early stages of this medication at six weeks
4 ago. The doctor anticipated it would be three weeks before
5 you could see the effect of it. Mr. Binalshibh continued to
6 take the medication and received no relief from it, so we are
7 way beyond the time when if this medication was going to work,
8 it would have worked.

9 MJ [Col COHEN]: I understand. I'm aware of the issues
10 from both sides. Like I say, I rule on issues that are before
11 me. This is not a matter that is ripe for a judicial
12 decision. Nonetheless, I appreciate you bringing it to my
13 attention and informing the United States in this forum.
14 Thank you. All right.

15 General Martins, do you have any challenges for the
16 military judge or do you ----

17 CP [BG MARTINS]: No, Your Honor.

18 MJ [Col COHEN]: No? Okay.

19 Does defense counsel want until Wednesday morning, or
20 are you ready to issue any challenges at this point?

21 Mr. Nevin?

22 LDC [MR. NEVIN]: No challenge, Your Honor.

23 MJ [Col COHEN]: No challenge.

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1 LDC [MS. BORMANN]: Judge, we have no challenge.

2 MJ [Co1 COHEN]: Okay. Mr. Harrington?

3 LDC [MR. HARRINGTON]: We have no challenge, Judge.

4 MJ [Co1 COHEN]: Mr. Connell?

5 LDC [MR. CONNELL]: No challenge, sir.

6 MJ [Co1 COHEN]: Okay. Mr. Ruiz?

7 LDC [MR. RUIZ]: No challenge.

8 MJ [Co1 COHEN]: All right. There being no challenge and
9 me having disclosed those things that I thought the parties
10 would want to know -- obviously it's an ongoing, you know,
11 procedure. If something changes, you're welcome to question
12 me on anything that arises throughout there. I can tell you
13 that I will endeavor to be impartial and unbiased throughout
14 these proceedings.

15 Even though were are getting through a little bit
16 early -- Mr. Ruiz?

17 LDC [MR. RUIZ]: I'm sorry. I wanted to -- I point your
18 attention to 524SSS.

19 MJ [Co1 COHEN]: Yes.

20 LDC [MR. RUIZ]: However 524MMMM is the first motion in
21 that series; SSS is the reply, so in order to give you the
22 greatest context, I would suggest you also look at 524MMMM.

23 MJ [Co1 COHEN]: For the benefit of the parties, I will do

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1 so either this evening or first thing tomorrow morning. And
2 it looked like the parties were in agreement.

3 General Martins, any objection to me simply sending
4 out an e-mail to the government in addition to the defense
5 counsel?

6 CP [BG MARTINS]: Your Honor, we have no objection to
7 that.

8 MJ [Col COHEN]: Okay. And then I notice from the head
9 nods that I am taking as affirmative responses from the
10 defense counsel, they were satisfied with me simply sending
11 out an e-mail as to whether or not that would be on the docket
12 for this week or not. Okay. I'm getting affirmative nods
13 again.

14 Mr. Connell, is that okay with you?

15 LDC [MR. CONNELL]: Yes, sir. Thank you.

16 MJ [Col COHEN]: Okay. Thank you. All right. Then
17 that's what we will -- Mr. Nevin.

18 LDC [MR. NEVIN]: I'd ask you for the accommodation of
19 being able to stay in the courtroom with Mr. Mohammad for --
20 until 1700.

21 MJ [Col COHEN]: Is there any reason why we can't do that?

22 CP [BG MARTINS]: No, Your Honor.

23 MJ [Col COHEN]: Okay. Then there being no reason why we

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1 can't, then the defendants or accused may stay with their
2 defense teams, if that's what they desire to do, until 1700
3 hours.

4 LDC [MS. BORMANN]: Thank you.

5 MJ [Col COHEN]: If there is nothing else, we are in
6 recess until Wednesday morning at 0900 hours.

7 [The R.M.C. 803 session recessed at 1429, 17 June 2019.]

8 [END OF PAGE]

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