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1 [The R.M.C. 803 session was called to order at 1406,
2 17 July 2018.]

3 MJ [COL WATKINS]: Please be seated. This military
4 commission is called to order.

5 TC [CAPT KEETON]: Good afternoon, Your Honor.

6 MJ [COL WATKINS]: Good afternoon.

7 TC [CAPT KEETON]: This commission is convened by
8 Convening Order 12-01 dated 15 February 2012. Copies of this
9 have been furnished to the military judge, counsel, and the
10 accused. It will be attached to the record of trial.

11 The accused and the following personnel detailed to
12 this commission are present: Colonel Douglas K. Watkins,
13 Military Judge; Captain Timothy F. Keeton, trial counsel;
14 Lieutenant Colonel Joy Primoli, assistant trial counsel;
15 Master Sergeant Taclibon and Tech Sergeant Lazzaro,
16 prosecution paralegals. Mr. Chuck Zelnis, deputy chief
17 prosecutor, is present, but not detailed to the prosecution.

18 For the defense we have Lieutenant Commander Jared
19 Hernandez, detailed defense counsel; and J. Wells Dixon,
20 Civilian Defense Counsel; Peter Lang, Defense Intel Analyst;
21 LN1 Martin, a defense paralegal. Colonel Aaron, the deputy
22 chief defense counsel, is present, but not detailed to the
23 defense.

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1 The members are absent. The accused is present.

2 In addition, Mr. William Schneider, Major David
3 Abdalla, Captain Matt Hracho are no longer detailed to this
4 case for the government. Major Chris James is also detailed
5 to the case as assistant trial counsel but is absent from this
6 hearing. Lieutenant Colonel Retired Jackson, Ms. Katya Jestin
7 and Ms. Natalie Orpett are absent from the defense.

8 All trial counsel have been detailed to this military
9 commission by the chief prosecutor. All members of the
10 prosecution are qualified under R.M.C. 502 and have previously
11 been sworn in accordance with R.M.C. 807.

12 No member of the prosecution has acted in any manner
13 that might tend to disqualify us in this proceeding. The
14 detailing document has been marked as Appellate Exhibit 003C.

15 MJ [COL WATKINS]: Thank you, Captain Keeton. Are these
16 proceedings being transmitted by closed-circuit television to
17 CONUS in accordance with the commission's order in Appellate
18 Exhibit 006A?

19 TC [CAPT KEETON]: Yes, Your Honor, they are.

20 MJ [COL WATKINS]: Thank you. Good morning, Mr. Khan.

21 ACC [MR. KHAN]: Good morning.

22 MJ [COL WATKINS]: Mr. Khan, at previous sessions you have
23 indicated that you are fluent in English and you are

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1 comfortable with going forward without an interpreter; is that
2 correct?

3 ACC [MR. KHAN]: That is correct.

4 MJ [COL WATKINS]: Are you able to understand and speak
5 English?

6 ACC [MR. KHAN]: Yes, sir, pretty much.

7 MJ [COL WATKINS]: Do you consent to these proceedings
8 continuing without the service of an interpreter?

9 ACC [MR. KHAN]: Yes, sir.

10 MJ [COL WATKINS]: Thank you very much. Mr. Khan, you
11 were also previously advised about your rights to counsel, but
12 it has been a while and there have been several changes so I
13 would like to cover your rights to counsel with you again.

14 Pursuant to Manual for Military Commissions, you are
15 represented by Lieutenant Commander Jared A. Hernandez, your
16 detailed defense counsel. Do you understand this?

17 ACC [MR. KHAN]: Yes, sir.

18 MJ [COL WATKINS]: Detailed defense counsel is provided to
19 you free of charge; do you understand this?

20 ACC [MR. KHAN]: Yes, sir.

21 MJ [COL WATKINS]: In addition to a detailed defense
22 counsel, you may be represented by qualified civilian lawyers.
23 A civilian lawyer would represent you at no expense to the

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1 government. To be qualified he or she must be a U.S. citizen
2 admitted to the practice of law in a state, district,
3 territory, or possession of the United States or a federal
4 court and not have been the subject of disqualifying action by
5 a bar or other competent authority; be eligible for a Secret
6 clearance or higher, as required; and agree in writing to
7 comply with the orders, rules, and regulations of these
8 military commissions. Do you understand this?

9 ACC [MR. KHAN]: Yes, sir.

10 MJ [COL WATKINS]: The civilian lawyer who represents you,
11 your detailed defense counsel, will continue to represent you
12 as well, unless you specifically waive the right to be
13 represented by detailed defense counsel. Do you understand
14 what I've just told you?

15 ACC [MR. KHAN]: Yes, sir.

16 MJ [COL WATKINS]: Do you have any questions about your
17 right to counsel before this commission?

18 ACC [MR. KHAN]: I just want to say, Your Honor, over the
19 last -- past six years, I've been -- you know, I've been
20 struggling with this whole process and the whole military
21 commission system is pretty stagnant. I call it "cluster
22 covfefe." And obviously that frustration builds up with my
23 attorneys too, and I feel like they have been a little bit

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1 complacent and relaxing at time.

2 For their defense, you know, the system is so, as I
3 said, stagnant, and so I just -- at times I feel like there
4 could be more, like, how you guys say, adroit Philadelphia
5 lawyers, you know. Other than that, I -- I am -- I am a
6 little frustrated, but I am not, like, to the point where I
7 have to relieve them from their duties.

8 As of right now, I still -- I'm really hoping that
9 they will be more advocate for me and work with the
10 prosecutors and achieve -- especially I -- I prefer an
11 amicable milieu and work together. So far that's not the
12 atmosphere that I am in right now. I hear a lot of ominous
13 language from prosecutors all the time, so I don't know where
14 I am standing. I would rather like stand on, like,
15 La Tierra Firme, so -- I think I am rambling.

16 Yes, I am satisfied for right now with my attorney,
17 but I don't know how that's going to process -- process work
18 in future. But I will highly recommend my attorney to work
19 hard and try to work with the prosecutor and resolve this
20 issue. Does that make any sense, Your Honor?

21 MJ [COL WATKINS]: Mr. Khan, thank you very much for that.
22 I understand your frustration. I am sure it's shared by
23 others. And since you do have a pretrial agreement, I think

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1 all of the parties -- and I have conferenced with the
2 attorneys for both sides -- I think all of the parties are
3 working very diligently to get this resolved to everyone's
4 satisfaction.

5 But I will assure you of this: I'm going to do my
6 best to make sure that you're treated fairly and that this is
7 resolved as quickly as possible while protecting your rights,
8 okay?

9 ACC [MR. KHAN]: That's all I am asking. I just want to
10 make sure that some of -- the prosecutor is not berefting me
11 of my rights; they are given to me, like the witness and all
12 that, if they want to go that route. I really appreciate it
13 if you just allow me to have a due process, as transparent as
14 possible, sir. Thank you.

15 MJ [COL WATKINS]: I will do my best to work towards that.
16 Now, any other complaints you have about the system, work
17 through your counsel, and they can bring it to my attention
18 through motions and things like that. But I am working
19 towards your goals of not being frustrated and getting this
20 resolved.

21 I will ask you this again, just so it is clear on the
22 record. I explained your rights to counsel to you. Did you
23 understand all those rights?

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1 ACC [MR. KHAN]: Yes, sir. Yeah. I prefer these lawyers
2 for right now.

3 MJ [COL WATKINS]: Right. Well, based on what you told me
4 today and based on your prior representations, is it your
5 desire to be represented by Lieutenant Commander Hernandez,
6 Ms. Jestin, Mr. Dixon, and Ms. Orpett?

7 ACC [MR. KHAN]: Yes, all of these guys. And plus Jon
8 Jackson, that we have a motion coming and ----

9 MJ [COL WATKINS]: Okay. And by those people alone? Just
10 those -- that group of people?

11 ACC [MR. KHAN]: Yes, sir.

12 MJ [COL WATKINS]: Okay.

13 ACC [MR. KHAN]: And plus one more lawyer that we are
14 expecting, Jon Jackson, right?

15 CDC [MR. DIXON]: Your Honor, I believe Mr. Khan is
16 referring to the pending motion.

17 MJ [COL WATKINS]: Right. Okay. So I listed all those
18 people, and you added Retired Colonel Jackson, and he is the
19 subject of litigation in this hearing. And that team that I
20 listed and that you added to, is that who you want to be
21 represented by?

22 ACC [MR. KHAN]: Yes, sir. Most definitely.

23 MJ [COL WATKINS]: Okay. And Lieutenant Commander

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1 Hernandez, this is your first time on the record, correct?

2 DDC [LCDR HERNANDEZ]: Yes, Your Honor.

3 MJ [COL WATKINS]: Could you please announce your
4 detailing qualifications and whether you have been previously
5 sworn?

6 DDC [LCDR HERNANDEZ]: Yes, Your Honor. Good afternoon.
7 I am Lieutenant Commander Jared Hernandez, JAG Corps, United
8 States Navy. I have been detailed to the military commissions
9 by the Chief Defense Counsel of the Military Commissions
10 Defense Organization. My detailing letter is Appellate
11 Exhibit 007D, as in Delta.

12 I am qualified and certified under Article 27(b) and
13 sworn under Article 42(a). I am qualified under Rule for
14 Military Commission 502 and 503. I have not been previously
15 sworn pursuant to Rule 807, and I have not acted in any way
16 that would tend to disqualify me from these proceedings. I
17 have read all relevant protective orders and signed all
18 relevant memorandums of understanding, sir.

19 MJ [COL WATKINS]: Thank you. Please raise your right
20 hand.

21 [Lieutenant Commander Hernandez was sworn.]

22 MJ [COL WATKINS]: Thank you. Please be seated.

23 I am in receipt of Appellate Exhibits 009B and 009C

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1 requesting that I authorize the absence of Ms. Orpett and
2 Ms. Jestin from this hearing. Absent objection from the
3 government, and based on the representation from those counsel
4 that Mr. Khan would consent to their absence, I granted that
5 request in Appellate Exhibit 009D.

6 Defense, did you secure consent from your client with
7 regard to Ms. Orpett's and Ms. Jestin's absence?

8 CDC [MR. DIXON]: Yes, we did, Your Honor.

9 MJ [COL WATKINS]: And I believe those have been marked as
10 Appellate Exhibit 009E and 009F.

11 Mr. Khan ----

12 ACC [MR. KHAN]: Yes, I concur.

13 MJ [COL WATKINS]: ---- do you have copies of these
14 documents?

15 ACC [MR. KHAN]: No, but I concur. I just signed it.

16 MJ [COL WATKINS]: Okay. That's your signature on these
17 consent forms?

18 ACC [MR. KHAN]: Yes, sir.

19 MJ [COL WATKINS]: Okay. And you do consent to those two
20 ladies or ----

21 ACC [MR. KHAN]: Your Honor, I concur, thank you, and
22 consent.

23 MJ [COL WATKINS]: And them being absent for this hearing

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1 only; is that correct?

2 ACC [MR. KHAN]: That -- yes, sir.

3 MJ [COL WATKINS]: Okay. Thank you.

4 ACC [MR. KHAN]: Thank you.

5 MJ [COL WATKINS]: I believe the government announced that
6 Lieutenant Commander Suplizio is absent. Appellate
7 Exhibit 007B was a motion for Lieutenant Commander Tia
8 R. Suplizio, JAG Corps, United States Navy, to be excused and
9 withdraw from representation. That was filed with the
10 commission on 30 March 2017. That motion was granted by
11 Appellate Exhibit 007C dated 17 April 2017.

12 Mr. Khan, Attachment B to Lieutenant Commander
13 Suplizio's motion to withdraw from representing you was a
14 memorandum from Brigadier General Baker, the Chief Defense
15 Counsel. In that memorandum, General Baker indicated that you
16 did not object to Lieutenant Commander Suplizio's request to
17 withdraw from your case. Is that statement accurate?

18 ACC [MR. KHAN]: Yes, sir.

19 MJ [COL WATKINS]: Defense, am I correct that the record
20 does not contain a similar motion to withdraw with relation to
21 Lieutenant Colonel Jackson?

22 CDC [MR. DIXON]: That is correct, Your Honor, for the
23 reasons that we have identified and explained in Appellate

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1 Exhibit 024A.

2 MJ [COL WATKINS]: Am I also correct in stating that the
3 first notice to this commission that Lieutenant Colonel
4 Jackson had purportedly been excused was in Appellate
5 Exhibit 016R, dated 10 May 2018, your response to the
6 government's request for a trial scheduling order?

7 CDC [MR. DIXON]: I believe that is correct, Your Honor,
8 yes.

9 MJ [COL WATKINS]: And in Attachment C of Appellate
10 Exhibit 024A, Lieutenant Colonel Jackson was purportedly
11 excused on 18 October 2017. Does that sound accurate?

12 CDC [MR. DIXON]: By the chief defense counsel, yes,
13 Your Honor.

14 MJ [COL WATKINS]: Yes.

15 So, Mr. Khan, in Attachment C and Attachment C of
16 Attachment C in Appellate Exhibit 024A, General Baker
17 indicated that you did not object to Lieutenant Colonel
18 Jackson's request to withdraw from your case. Were those
19 statements accurate?

20 ACC [MR. KHAN]: Yes, sir.

21 MJ [COL WATKINS]: Without commenting on the purported
22 authority of the chief defense counsel to unilaterally excuse
23 counsel who have made an appearance before the commission, it

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1 is in direct contravention of Rules for Court 4.2.a.(3) and
2 4.4.b, and in contravention of the prior course of conduct of
3 the parties to this commission. I find that based on Colonel
4 Jackson's retirement from active duty, in reliance upon that
5 purported excusal and with the assent of the accused, the
6 cause does exist for Lieutenant Colonel Jackson's excusal from
7 further representation of the accused.

8 Accordingly, I excuse Lieutenant Colonel Jackson,
9 notwithstanding the defense's failure to comply with Rules of
10 Court 4.2.a.(3) and 4.4.b. I will also note that defense has
11 asserted that this excusal is as detailed counsel and they
12 have reserved the right to move to have him appointed, which
13 is the subject of litigation later this afternoon. All right.

14 Mr. Khan, we've kind of resolved all the prior
15 lawyers and the present lawyers in your case. In the event
16 that counsel might disagree on a matter concerning your
17 representation, I need you to designate the lead defense
18 counsel who will speak for you and the defense team. Whom do
19 you designate as lead counsel?

20 ACC [MR. KHAN]: I'm designating Mr. Wells Dixon.

21 MJ [COL WATKINS]: I'm sorry?

22 ACC [MR. KHAN]: Mr. Wells Dixon.

23 MJ [COL WATKINS]: Mr. Dixon. Thank you.

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1 Do counsel for the defense understand and agree with
2 that designation?

3 CDC [MR. DIXON]: Yes, Your Honor.

4 MJ [COL WATKINS]: And Colonel Hernandez?

5 DDC [LCDR HERNANDEZ]: Yes, Your Honor.

6 MJ [COL WATKINS]: Lieutenant Commander, I'm sorry.

7 DDC [LCDR HERNANDEZ]: Not at all, sir. Yes, sir.

8 MJ [COL WATKINS]: Thank you.

9 The commission also notes that the following person
10 present at the last session is no longer present, Colonel Tara
11 Osborn, Military Judge, who I have replaced.

12 Trial Counsel, can you address the swearing of the
13 court reporter and court security officer?

14 TC [CAPT KEETON]: Your Honor, the court reporter has
15 previously been sworn and the security officer as well, I
16 believe, has previously been sworn.

17 MJ [COL WATKINS]: Both detailed to this military
18 commission?

19 TC [CAPT KEETON]: They are, Your Honor.

20 MJ [COL WATKINS]: Thank you. I have been detailed to
21 this case by the Chief Judge of the Military Commissions Trial
22 Judiciary pursuant to R.M.C. 503. Appellate Exhibit 001C is
23 my detailing memorandum dated 26 April 2018.

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

6 All right. I will now provide the parties an
7 opportunity for voir dire. I'm not aware of any grounds for
8 challenge against me. I have previously provided counsel for
9 both sides a summarized biography that has been marked as
10 Appellate Exhibit 001D.

11 Do counsel for either side desire to question or
12 challenge me?

13 TC [CAPT KEETON]: The government does not, Your Honor.

14 MJ [COL WATKINS]: All right. Defense?

15 CDC [MR. DIXON]: Yes, we do, Your Honor.

16 MJ [COL WATKINS]: You may proceed.

17 CDC [MR. DIXON]: Good afternoon, Your Honor.

18 MJ [COL WATKINS]: Good afternoon.

19 CDC [MR. DIXON]: The defense has received a copy of your
20 biography marked as Appellate Exhibit 001D. I want to ask you
21 some questions about that and some related questions about
22 your background. Before I do that, I will begin by asking
23 whether you know anyone involved in this case.

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1 MJ [COL WATKINS]: I have been involved in a prior
2 commission with Captain Keeton. Are you talking about counsel
3 or witnesses or ----

4 CDC [MR. DIXON]: Counsel, Your Honor.

5 MJ [COL WATKINS]: I know Captain Keeton from a prior
6 commission.

7 CDC [MR. DIXON]: Is that the al Darbi case?

8 MJ [COL WATKINS]: Yes, it is.

9 CDC [MR. DIXON]: Okay. And have you spoken with Captain
10 Keeton or anyone on the prosecution team about this case?

11 MJ [COL WATKINS]: I have not, except in R.M.C. 802
12 conferences.

13 CDC [MR. DIXON]: Okay. And have you had or are you aware
14 of any ex parte communications between the trial judiciary and
15 the prosecution in this case?

16 MJ [COL WATKINS]: I'm not. I'm not aware of that
17 occurring at all.

18 CDC [MR. DIXON]: Okay. Your Honor, from the 802
19 conference, it's my understanding that your legal advisor was
20 a direct supervisor of one of the prosecutors detailed to this
21 case during a deployment overseas in 2014; is that correct?

22 MJ [COL WATKINS]: That's what's been represented. I
23 don't have independent information of that. But my legal

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1 advisor did inform me of that, and then my understanding, the
2 government informed you of that as well.

3 CDC [MR. DIXON]: Okay. And could Your Honor explain for
4 the defense what the legal advisor's role is with respect to
5 this commission?

6 MJ [COL WATKINS]: Yes. There are several legal advisors
7 in trial judiciary, and the person we are speaking about now
8 is assigned to a few commissions cases, not just to this one.
9 Their function is to provide research capability and legal
10 advice to the military judge on a commission, much like a law
11 clerk would for a federal district court judge. And then a
12 big part of their job is to provide logistical and planning
13 assistance for the judiciary.

14 CDC [MR. DIXON]: And, Your Honor, in terms of providing
15 legal advice, would that include recommended rulings on
16 disputed motions or issues before the commission in this case?

17 MJ [COL WATKINS]: Yes.

18 CDC [MR. DIXON]: And, Your Honor, did -- your legal
19 advisor, as I understand it, served on a deployment overseas.
20 Did that deployment involve detainee operations, to your
21 knowledge?

22 MJ [COL WATKINS]: I don't have personal knowledge, but I
23 believe that's correct.

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1 CDC [MR. DIXON]: Can you -- do you have any further
2 information or any further idea of what sort of detainee
3 operations this individual was involved in?

4 MJ [COL WATKINS]: No, I can't say. I'm positive it had
5 to do with detainee operations, and that's the extent of any
6 knowledge I have about that.

7 CDC [MR. DIXON]: Okay. And, Your Honor, was this in
8 Afghanistan?

9 MJ [COL WATKINS]: Yes.

10 CDC [MR. DIXON]: And do you know where in Afghanistan?

11 MJ [COL WATKINS]: No.

12 CDC [MR. DIXON]: Was this at Bagram?

13 MJ [COL WATKINS]: I don't know.

14 CDC [MR. DIXON]: Your Honor, do you believe that the fact
15 that your legal advisor served overseas, was involved in
16 detainee operations, and directly supervised one of the
17 prosecutors assigned to this case creates a conflict of
18 interest or a potential conflict of interest?

19 MJ [COL WATKINS]: I do not believe it creates an actual
20 conflict of interest because I'm not aware of any effect any
21 of that would have on my legal advisor's role to me; and I'm
22 not aware of any ex parte communications with the government,
23 and I would be shocked if they occurred. Knowing my legal

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1 advisor, he's going to perform his functions with the utmost
2 integrity and character; that's my personal belief.

3 I am also -- a potential conflict of interest? I can
4 see why you're asking that, but knowing my legal advisor, I
5 don't think that's possible. I do not know the assistant
6 trial counsel who, I believe, worked under my legal advisor.

7 CDC [MR. DIXON]: Your Honor, our questions are designed
8 to get at this issue specifically. Detainee operations in
9 Afghanistan, as I understand it, frequently involved actual or
10 suspected members of al Qaeda, and depending upon what those
11 detainee operations were or what they might have involved or
12 which agencies may have been involved, the concern is that may
13 create an actual or potential conflict of interest with
14 respect to Mr. Khan, who has pled guilty to a number of
15 offenses, including conspiracy, with respect to al Qaeda.

16 So my question for you is: In light of those
17 concerns, is there a remedy or a solution, other than
18 Your Honor's disqualification from this case, that would
19 address that concern?

20 MJ [COL WATKINS]: Are you asking for an advisory opinion?

21 CDC [MR. DIXON]: I am asking for your opinion,
22 Your Honor. You've indicated, I think, that there may be a
23 potential or an apparent conflict, potentially, if I

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1 understood Your Honor correctly. What I am asking you is if
2 you see a solution to that.

3 MJ [COL WATKINS]: I guess I need to clarify my comment.
4 There's always potential for conflict in any case, given the
5 individuals participating in it, but that's completely
6 theoretical. And that's the way I intended that remark to be
7 taken.

8 CDC [MR. DIXON]: Okay.

9 MJ [COL WATKINS]: I'm not personally aware of any
10 conflict or potential conflict in this case, given the
11 relationship of the legal advisor and the assistant trial
12 counsel.

13 CDC [MR. DIXON]: All right. Your Honor, I have one more
14 question with respect to this topic and then I will move on.
15 My question is: Did your legal advisor work for the Central
16 Intelligence Agency?

17 MJ [COL WATKINS]: I have no knowledge of that.

18 CDC [MR. DIXON]: Okay. Moving on, prior to being
19 detailed to this case ----

20 MJ [COL WATKINS]: Are you moving to a different topic?

21 CDC [MR. DIXON]: To a different topic.

22 MJ [COL WATKINS]: I will state that in the 802 -- I'm
23 getting ahead of myself a little bit -- but since this was

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1 just disclosed to the defense, I advised the defense that if a
2 challenge was made today and denied, that I would allow
3 further questioning at a later date once you've had an
4 opportunity to develop more information about this issue.

5 CDC [MR. DIXON]: Thank you, Your Honor.

6 Prior to being detailed to this case, had Your Honor
7 ever heard of the Center for Constitutional Rights or
8 Jenner & Block, a law firm?

9 MJ [COL WATKINS]: What was the last thing?

10 CDC [MR. DIXON]: The law firm Jenner & Block.

11 MJ [COL WATKINS]: No, sir.

12 CDC [MR. DIXON]: And prior ----

13 MJ [COL WATKINS]: The Center for Constitutional Rights
14 sounds vaguely familiar, but I don't know where I heard that
15 term.

16 CDC [MR. DIXON]: Okay. And prior to being detailed in
17 this case, had you ever heard of Mr. Khan?

18 MJ [COL WATKINS]: Yes. In discussions with the chief
19 trial judge about detailing decisions, I'm sure the name
20 "Khan" came up, but I didn't have any substantive discussions
21 about him.

22 CDC [MR. DIXON]: And since you've been detailed to this
23 case, have you done any research or background reading or

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1 investigation concerning Mr. Khan?

2 MJ [COL WATKINS]: Only the appellate exhibits that have
3 been filed in the case.

4 CDC [MR. DIXON]: Have you read any news reports about
5 Mr. Khan or Googled his name?

6 MJ [COL WATKINS]: No.

7 CDC [MR. DIXON]: And are you otherwise aware that
8 Mr. Khan is from Baltimore, Maryland?

9 MJ [COL WATKINS]: I believe I read that in a pleading.

10 CDC [MR. DIXON]: And are you otherwise aware that
11 Mr. Khan has legal status in the United States?

12 MJ [COL WATKINS]: Yes.

13 CDC [MR. DIXON]: And are you aware that Mr. Khan was held
14 by the Central Intelligence Agency prior to his arrival at
15 Guantanamo in September 2006?

16 MJ [COL WATKINS]: I believe there was a reference to that
17 in a pleading. That would be my only knowledge.

18 CDC [MR. DIXON]: Have you ever litigated or presided over
19 a case in which the Central Intelligence Agency has been
20 involved?

21 MJ [COL WATKINS]: As a defense counsel, I super- -- as a
22 senior defense counsel, I supervised defense counsel involved
23 in an Article 32 investigation with witnesses -- well, I can't

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1 even speak intelligently to that because that Article 32
2 investigation was closed, but I believe there may have been
3 some involvement by that agency, but I wasn't present in the
4 closed sessions.

5 CDC [MR. DIXON]: Did that agency control that
6 investigation in any way?

7 MJ [COL WATKINS]: Not that I'm aware.

8 CDC [MR. DIXON]: And does the CIA have any control or
9 influence over Your Honor or these proceedings?

10 MJ [COL WATKINS]: Not at all.

11 CDC [MR. DIXON]: Are you aware that while Mr. Khan was in
12 CIA custody that he was tortured?

13 MJ [COL WATKINS]: I'm not personally aware of that.
14 You've alleged it in pleadings, I believe.

15 CDC [MR. DIXON]: Has Your Honor read the Senate
16 Intelligence Committee's study of the CIA program?

17 MJ [COL WATKINS]: No.

18 CDC [MR. DIXON]: Have you read the executive summary to
19 that that was publicly disclosed in 2014?

20 MJ [COL WATKINS]: No.

21 CDC [MR. DIXON]: Has Your Honor ever been involved in a
22 case, in any fashion, where the accused was beaten or sleep
23 deprived or stripped naked, waterboarded, or sexually

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1 assaulted?

2 MJ [COL WATKINS]: Not that I'm aware of.

3 CDC [MR. DIXON]: In your opinion, do those things that I
4 have described individually, or in combination, constitute
5 torture under U.S. law?

6 MJ [COL WATKINS]: My opinion?

7 CDC [MR. DIXON]: In your opinion.

8 MJ [COL WATKINS]: I'm not sure that that matters. U.S.
9 law is U.S. law.

10 CDC [MR. DIXON]: Well, if you have a preset notion about
11 whether those things, individually or in combination,
12 constitute torture, that could potentially be an issue in this
13 case.

14 Do you have a preset notion about whether that
15 constitutes torture or not?

16 MJ [COL WATKINS]: I haven't thought about it.

17 CDC [MR. DIXON]: As a lawyer, Your Honor, did you ever
18 represent a cooperating witness?

19 MJ [COL WATKINS]: Yes.

20 CDC [MR. DIXON]: A cooperating witness who cooperated
21 with the United States Government for a period of more than
22 seven years?

23 MJ [COL WATKINS]: No.

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1 CDC [MR. DIXON]: And as a judge, have you presided over a
2 case involving a cooperating witness, someone who has
3 cooperated over a period of many years?

4 MJ [COL WATKINS]: Yes.

5 CDC [MR. DIXON]: Which case was that?

6 MJ [COL WATKINS]: Al Darbi.

7 CDC [MR. DIXON]: Are you aware that Mr. Khan's case and
8 Mr. Darbi's case are different in many important respects?

9 MJ [COL WATKINS]: I can assume that.

10 CDC [MR. DIXON]: Are you aware that Mr. Khan intends to
11 call experts and witnesses pursuant to the terms of his
12 pretrial agreement that may include CIA officials by name,
13 including those individuals who authorized or carried out his
14 torture?

15 MJ [COL WATKINS]: I'm not aware of that. I'm aware of
16 the PTA provisions.

17 CDC [MR. DIXON]: Would you have any hesitation in
18 ordering a witness to appear and testify in this case based on
19 his or her military rank or government position?

20 MJ [COL WATKINS]: Well, that depends. If there is the
21 requisite showings for them to appear, I would not hesitate.

22 CDC [MR. DIXON]: And if the requisite showings were made
23 for an individual to appear, would you have any hesitation to

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1 require a senior CIA official or officials to appear and
2 testify even if those officials had or once had covert or
3 covered status?

4 MJ [COL WATKINS]: No.

5 CDC [MR. DIXON]: Your Honor, have you ever worked for or
6 with the CIA?

7 MJ [COL WATKINS]: No.

8 CDC [MR. DIXON]: Your Honor, have you ever deployed
9 overseas to Iraq or Afghanistan?

10 MJ [COL WATKINS]: Yes.

11 CDC [MR. DIXON]: And where did you deploy?

12 MJ [COL WATKINS]: Taji, Iraq.

13 CDC [MR. DIXON]: And when was that?

14 MJ [COL WATKINS]: I was there for the calendar year of
15 2006. I believe I arrived in Kuwait in 2000 -- December 2005
16 and probably left Kuwait in January of 2007.

17 CDC [MR. DIXON]: When you were deployed to Iraq, were you
18 involved at all in detainee operations?

19 MJ [COL WATKINS]: Yes.

20 CDC [MR. DIXON]: And what was that involvement?

21 MJ [COL WATKINS]: I was a brigade judge advocate, which
22 is the primary legal advisor to a brigade combat team and its
23 commanders. That brigade conducted detainee operations. My

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1 office, under my supervision, cataloged detainees and their
2 statuses and then responded to a joint task force release
3 directive, and I advised my commander on his ability to
4 comment on those release directives to try to override them.

5 CDC [MR. DIXON]: You mentioned release directives. Does
6 that mean that Your Honor was involved in decisions whether to
7 detain or release captured individuals?

8 MJ [COL WATKINS]: No. No, these are persons who were in
9 detention status and then -- I'm sorry, I can't remember the
10 name of the joint task force, but it would state that on such
11 and such date the following detainees were going to be
12 released, and it provided the capturing units to comment on
13 that release and to try to change that from happening.

14 CDC [MR. DIXON]: So did you have a role in determining
15 whether or not an individual who was in detention would be
16 released?

17 MJ [COL WATKINS]: An advice role.

18 CDC [MR. DIXON]: An advisory role? And when you provided
19 advice concerning that issue, did you consider evidence or
20 intelligence from the Central Intelligence Agency?

21 MJ [COL WATKINS]: Not that I'm aware of.

22 CDC [MR. DIXON]: Did you ever help military commanders
23 shape their detention packages in order to avoid releasing an

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1 individual?

2 MJ [COL WATKINS]: I'm not sure what you're implying
3 there.

4 CDC [MR. DIXON]: Did you ever help commanders frame their
5 arguments or their presentation into evidence in such a way as
6 to ensure that the detainee was not released from custody?

7 MJ [COL WATKINS]: I hesitate, because I'm trying to even
8 remember those times. I believe -- I'm trying to remember
9 what would be packaged in a response from the brigade
10 commander. Our fires -- fire and effects officer may have put
11 together an intelligence package for that response.

12 CDC [MR. DIXON]: Would that package have contained
13 information from the CIA or other intelligence agencies?

14 MJ [COL WATKINS]: Not that I recall. This was locally
15 procured intelligence.

16 CDC [MR. DIXON]: Did you ever encounter ----

17 MJ [COL WATKINS]: The JTF would have had national-level
18 intelligence.

19 CDC [MR. DIXON]: Did you ever encounter ----

20 MJ [COL WATKINS]: I can't honestly answer that. I really
21 don't remember. I remember my role as routing those through
22 the levels of command to the brigade commander. I certainly
23 didn't have discussions with any of those commanders about

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1 intelligence, that was not my role, but I really can't recall
2 any of the details of that.

3 CDC [MR. DIXON]: Did you ever encounter a situation where
4 you became aware that a detainee in custody had been tortured?

5 MJ [COL WATKINS]: Yes, by Iraqi officials.

6 CDC [MR. DIXON]: What about by U.S. officials?

7 MJ [COL WATKINS]: I don't recall any.

8 CDC [MR. DIXON]: Okay. Your Honor, do you recall ----

9 MJ [COL WATKINS]: Are you speaking of my time in Iraq?

10 CDC [MR. DIXON]: Correct.

11 MJ [COL WATKINS]: I don't know of any instance of torture
12 by U.S. personnel. I went to several Iraqi detention
13 facilities and -- because of reports of abuse, and I also
14 received reports of abuse in my role as a brigade judge
15 advocate.

16 CDC [MR. DIXON]: Were you able to substantiate those
17 reports of abuse?

18 MJ [COL WATKINS]: That abuse occurred, absolutely.

19 CDC [MR. DIXON]: Thank you, Your Honor.

20 Do you recall doing an interview with the Operational
21 Leadership Experience Project of the Combat Studies Institute
22 of Fort Leavenworth?

23 MJ [COL WATKINS]: I do. I cannot remember a single word

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1 I said during that interview, but I recall that.

2 CDC [MR. DIXON]: There are two sentences from that
3 interview I want to draw to Your Honor's attention.

4 MJ [COL WATKINS]: All right.

5 CDC [MR. DIXON]: Do you recall saying, and I quote, that
6 it's much easier to get emotionally attached to a detention
7 when you own the battle space, end quote? And the second
8 sentence is, detention operations, quote, got pretty emotional
9 with battalion commanders and their S2s, end quote. Do you
10 remember those statements?

11 MJ [COL WATKINS]: Not specifically, but I don't doubt
12 their accuracy.

13 CDC [MR. DIXON]: What did you mean by that? Talking
14 about emotional attachment, what does that mean?

15 MJ [COL WATKINS]: Well, first of all, I did not get
16 emotionally attached. I was speaking of the troops on the
17 ground and their commanders who were in a very, very difficult
18 fight and how they could become emotionally invested in the
19 detention operations, and that's just the human experience.

20 My brigade had an inordinate amount of KIAs, so the
21 troops on the ground would become emotionally invested in
22 detention operations. I tried to be the honest broker in
23 advising those commanders, and enforce the rule of law. I was

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1 not emotionally invested in detention operations. I found it
2 to take up a lot of my time and be very technical and was not
3 emotionally invested at all.

4 CDC [MR. DIXON]: Your Honor mentioned KIAs. I want to
5 ask you one question about that. Did you investigate the
6 deaths of U.S. servicemembers?

7 MJ [COL WATKINS]: I managed Army Regulation 15-6
8 investigations. In the Navy, that would be the equivalent of
9 a JAGMAN, I believe, but they are command level
10 investigations. I would be involved in the appointment
11 process, which was by a roster, generally speaking.

12 Each KIA was investigated by a field grade officer,
13 and I ensured that it was done in a timely manner and that the
14 investigating officer had legal advice and support, but I did
15 not conduct any of the investigations.

16 Once it was complete, I processed it through chain of
17 command when required for recommendations and briefed the
18 brigade commander for decision or for transmittal to a higher
19 commander; and, actually, all the KIAs were to a higher
20 command.

21 CDC [MR. DIXON]: And, Your Honor, these servicemembers
22 who were killed, were they killed in -- by actual or suspected
23 members of al Qaeda?

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1 MJ [COL WATKINS]: I would assume so. I don't remember
2 any details.

3 CDC [MR. DIXON]: And given your experience with detention
4 operations generally and with those investigations
5 specifically, does that impact or shape in any way your views
6 of Mr. Khan or the way in which you would approach this
7 military commission case?

8 MJ [COL WATKINS]: Absolutely not. I take my role as a
9 military judge very seriously, and I am going to ensure, like
10 I told Mr. Khan, that he is going to get a fair commission,
11 which includes a fair judge.

12 CDC [MR. DIXON]: Moving on from this, Your Honor, are you
13 aware that Mr. Khan has pled guilty to offenses that include
14 involvement in the bombing of the JW Marriott Hotel in
15 Indonesia in 2003?

16 MJ [COL WATKINS]: To be honest, I haven't studied the
17 offenses to which he has pled guilty. That sounds vaguely
18 familiar. I have been more concerned, leading up to this
19 session, with procedural issues.

20 CDC [MR. DIXON]: Your Honor, have you ever witnessed a
21 terrorist attack, such as a bombing, or the immediate
22 aftermath of such an attack?

23 MJ [COL WATKINS]: Yes, the -- a long time ago in the

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1 late '80s I was the NCOIC of security aboard the duty train
2 that traveled each night from Berlin to Frankfurt, and a
3 German terrorist organization had detonated an explosive
4 device on our track that caused some damage, very little
5 damage, but it disrupted operations, so I dealt with securing
6 the passengers and to the extent there was any aftermath.

7 CDC [MR. DIXON]: And, Your Honor ----

8 MJ [COL WATKINS]: And this occurred in West Germany, not
9 in East Germany, so the German Polizei handled all of the
10 investigation.

11 CDC [MR. DIXON]: And, Your Honor ----

12 MJ [COL WATKINS]: There is one more, but go ahead.

13 CDC [MR. DIXON]: Did you indicate who committed that
14 terrorist act? I am not sure I heard, I'm sorry.

15 MJ [COL WATKINS]: I believe it was Baader-Meinhof.

16 CDC [MR. DIXON]: Baader-Meinhof.

17 When you were stationed in Berlin, were you aware of
18 another terrorist bombing in April of -- I believe it was 1986
19 of a discotheque in West Berlin?

20 MJ [COL WATKINS]: La Belle. I was the -- I believe I was
21 the second MP to respond to that.

22 CDC [MR. DIXON]: Can you describe what happened in that
23 attack?

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1 MJ [COL WATKINS]: Well, the bomb detonated 45 to 60
2 seconds before I arrived, so I didn't witness it. My
3 understanding is that Libyan nationalists planted a bomb under
4 a raised part of the dance floor, and my understanding is that
5 because of significant overcrowding, that most of the blast
6 was absorbed by a relatively small group of people because
7 they were so jam-packed.

8 And a Turkish woman was killed immediately, and a
9 servicemember was killed. Another one died quite a while
10 later from complications. When I arrived, the club had pretty
11 much emptied out, but there were a lot of people running
12 around with eardrum injuries, missing clothing, blood,
13 confusion, drunkenness.

14 CDC [MR. DIXON]: Your Honor, that was -- am I correct
15 that that was an attack that targeted U.S. service personnel
16 in Berlin?

17 MJ [COL WATKINS]: Yes. Yes.

18 CDC [MR. DIXON]: And that two U.S. service personnel
19 died, as you indicated?

20 MJ [COL WATKINS]: Yes; one immediately, and one after
21 some amputations because of infections.

22 CDC [MR. DIXON]: And more than 70 U.S. service personnel
23 were injured in that bombing; is that correct?

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1 MJ [COL WATKINS]: That sounds right.

2 CDC [MR. DIXON]: Your Honor, how did that experience
3 impact you?

4 MJ [COL WATKINS]: Well, I've pretty much put it out of my
5 mind until you raised it again today.

6 CDC [MR. DIXON]: Did it have any impact on your approach
7 to Mr. Khan or your approach to this case, given that there
8 are serious allegations of terrorist bombing in this case?

9 MJ [COL WATKINS]: No, absolutely not. I'm -- I'm
10 committed to my role in this case, and I will not let any
11 personal feelings, to the extent I have any about that, affect
12 my impartiality or fairness.

13 CDC [MR. DIXON]: Your Honor, have you -- as a consequence
14 of your experience in Berlin, have you been consulted by
15 others in the military or others in the government as an
16 expert on terrorism or as someone who is knowledgeable about
17 terrorism from the time prior to 9/11?

18 MJ [COL WATKINS]: No. I was a staff sergeant with -- I
19 can't even remember if I had a security clearance. I had an
20 investigation for one, but no, I was very -- I was a patrolman
21 when La Belle happened.

22 CDC [MR. DIXON]: Thank you. And did you receive any
23 awards or decorations or anything like that for your

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1 involvement in the response to the La Belle bombing?

2 MJ [COL WATKINS]: It may have played a role, but my award
3 was an end-of-tour award for a meritorious service medal for
4 three years in Berlin.

5 CDC [MR. DIXON]: Okay. And I see you also -- from your
6 biography, you also were awarded a Bronze Star. Can you
7 explain what that was for?

8 MJ [COL WATKINS]: That was not for valor and not for an
9 individual action, but for the performance of my duties over
10 the course of the Europe deployment.

11 CDC [MR. DIXON]: Thank you. Moving on to my final series
12 of questions, it looks from your biography as if you have been
13 in the military for quite a number of years. Have you had a
14 break in service at any point?

15 MJ [COL WATKINS]: I was enlisted on active duty from 1981
16 to 1988. I was in the Texas Army National Guard from 1989 to
17 1995. I received a direct commission back onto active duty I
18 think in December of '95, but I actually reported in January
19 of '96.

20 CDC [MR. DIXON]: And given your length of service, are
21 you currently eligible for retirement?

22 MJ [COL WATKINS]: Yes.

23 CDC [MR. DIXON]: And are you contemplating retirement?

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1 MJ [COL WATKINS]: Not in the near term, but within
2 probably two -- at least two years from now.

3 CDC [MR. DIXON]: Your Honor, if this case were to
4 continue for another two years or so, are you committed to
5 seeing the case through to its conclusion?

6 MJ [COL WATKINS]: I will obey the orders of my detailing
7 from the chief trial judge, but -- well, I'll tell you, I'm
8 committed to resolving this well before two years are up,
9 because I believe that's what Mr. Khan wants and that's in his
10 best interests.

11 CDC [MR. DIXON]: And if the situation should change and
12 Mr. Khan should seek to delay his sentencing for some reason,
13 you know, hypothetically with the content -- with the consent
14 of the government, would that -- would you continue to preside
15 over this case?

16 MJ [COL WATKINS]: I can't make that promise, and I don't
17 know what the future holds in two years for me or this
18 commission or my health or whatever. I can't promise you
19 that. I want to resolve this commission.

20 CDC [MR. DIXON]: What I'm -- what I'm interested in,
21 Your Honor, is whether Your Honor would approach this case,
22 potentially speed this case or make decisions in this
23 case ----

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1 MJ [COL WATKINS]: Oh, I see what you're saying.

2 CDC [MR. DIXON]: ---- in order to resolve it prior to
3 your retirement date.

4 MJ [COL WATKINS]: No, absolutely not. If that's not the
5 right thing to do, I am not going to do it for personal
6 reasons.

7 CDC [MR. DIXON]: And, Your Honor, have you explored or
8 applied for any post-retirement jobs, specifically jobs with
9 the United States Government or in government-related service?

10 MJ [COL WATKINS]: I was hoping to avoid any
11 post-retirement employment, but we'll see how that goes. No,
12 I have not contemplated it or looked into it.

13 CDC [MR. DIXON]: Okay. And do you have any concern,
14 Your Honor, that -- that if you did decide at some point that
15 you wanted to apply for such a position, government-related
16 position, that a ruling in a case like this in favor of
17 Mr. Khan that maybe goes against the government, that that
18 would have any adverse effect on your post-retirement job
19 opportunities?

20 MJ [COL WATKINS]: I've never let my personal wants or
21 desires or needs interfere in my role as a judge, and I
22 specifically -- I think about that all the time and I make
23 sure it doesn't happen.

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1 CDC [MR. DIXON]: Just a few more questions, Your Honor.

2 Do you have any social media accounts open to the
3 public?

4 MJ [COL WATKINS]: I am -- I have a Facebook account.

5 CDC [MR. DIXON]: And do you post or comment on matters
6 related to this case or Guantanamo or terrorism or the Central
7 Intelligence Agency?

8 MJ [COL WATKINS]: No.

9 CDC [MR. DIXON]: I want to ask you a couple of final
10 questions about an issue that underlies this case, certainly,
11 and underlies all of Guantanamo, and has since the prison
12 opened in January of 2002, and that is Islam.

13 My question for you is: How do you feel about Islam?

14 MJ [COL WATKINS]: I think it's been maligned. I think
15 it's legitimate and it's historical. But beyond that, I have
16 no strong feelings about it. I'm not -- I'm a Baptist. I'm
17 obviously not a Muslim. But I have no strong feelings about
18 it. I certainly don't think it should be condemned or
19 denigrated to the extent it has been.

20 CDC [MR. DIXON]: Thank you.

21 MJ [COL WATKINS]: I respect it. There are tenets of it
22 that I respect, but I don't study it or have strong feelings
23 about it.

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1 CDC [MR. DIXON]: Your Honor ----

2 ACC [MR. KHAN]: Hello? Can I ask a couple of questions,
3 please?

4 CDC [MR. DIXON]: Your Honor, Mr. Khan would like to ask a
5 question.

6 MJ [COL WATKINS]: Why don't you consult with him and then
7 we'll see.

8 CDC [MR. DIXON]: All right.

9 [Mr. Dixon conferred with Mr. Khan.]

10 MJ [COL WATKINS]: Mr. Dixon, go ahead.

11 CDC [MR. DIXON]: We're ready to proceed, Your Honor.
12 Thank you for your indulgence.

13 We were talking about Islam and your respect for
14 Islam. My question for you now is: Do you think it is lawful
15 for the United States of America to operate a prison at
16 Guantanamo that is in practice, if not in design, exclusively
17 for Muslims?

18 MJ [COL WATKINS]: I did not know that was the case.
19 I'm ----

20 CDC [MR. DIXON]: Your Honor ----

21 MJ [COL WATKINS]: I am not privy to all of the detainees
22 at GTMO and what their religious affiliations are.

23 CDC [MR. DIXON]: You are not aware that every individual

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1 detained at Guantanamo since it opened is Muslim and only
2 Muslim detainees have been held here?

3 MJ [COL WATKINS]: I was not aware of that. I mean, it
4 doesn't surprise me, but I wasn't aware of it.

5 CDC [MR. DIXON]: Are you aware that the only individuals
6 charged by military commission are Muslim?

7 MJ [COL WATKINS]: No.

8 CDC [MR. DIXON]: Do you think that's lawful or
9 appropriate?

10 MJ [COL WATKINS]: It's very dependent on the
11 circumstances of the detentions. I'm not privy to that
12 information.

13 CDC [MR. DIXON]: Now, Your Honor, did you volunteer for
14 service in the military commissions?

15 MJ [COL WATKINS]: No.

16 CDC [MR. DIXON]: How did your detailing to the military
17 commissions come about?

18 MJ [COL WATKINS]: I was approached by the chief trial
19 judge -- I'm not sure what vetting occurred prior to that --
20 asked if I would consider doing it. I said I would and Army
21 TJAG nominated me.

22 CDC [MR. DIXON]: And one more question, Your Honor,
23 concerning the military commissions. Having been through the

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1 al Darbi case and having been a judge for a number of years
2 and a lawyer a number of years prior to that, do you think
3 it's possible for someone like Mr. Khan to make up for the
4 things that he did nearly 20 years ago? I mean, is the
5 purpose of this commission to simply punish Mr. Khan or is it
6 to try to do some good?

7 MJ [COL WATKINS]: I think Mr. Darbi's case is an
8 excellent example of that, where the government joined in the
9 defense recommendation for the lightest sentence allowable by
10 the pretrial agreement. I absolutely believe this commission
11 is not designed to just punish offenses but to sentence
12 appropriately the accused in light of his offenses ----

13 CDC [MR. DIXON]: Do you think that ----

14 MJ [COL WATKINS]: ---- in light of his background and
15 rehabilitative potential and what are the needs of society and
16 all of the legitimate sentencing principles that are discussed
17 in military courts-martial.

18 I'm committed to that philosophy, and there's been
19 discussion about moving away from that philosophy, and I'm
20 absolutely committed to all of the sentencing principles
21 involved in military courts-martial. So I bring that
22 philosophy with me to the commissions, and I think any panel
23 members that are senior would probably share that philosophy.

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1 CDC [MR. DIXON]: Do you think that a decision to
2 cooperate, a decision by Mr. Khan to cooperate, is a
3 significant factor among those principles that you described
4 and adhere to in terms of rehabilitation and ----

5 MJ [COL WATKINS]: Mitigation?

6 CDC [MR. DIXON]: ---- mitigation, extenuation.

7 MJ [COL WATKINS]: Absolutely. Absolutely.

8 CDC [MR. DIXON]: Thank you, Your Honor. I would request
9 a moment to confer with Mr. Khan and co-counsel before ----

10 MJ [COL WATKINS]: Oh, absolutely. We will do a comfort
11 recess, and if you would like to consult with Mr. Khan, is 15
12 minutes sufficient?

13 CDC [MR. DIXON]: Yes. Thank you, Your Honor.

14 MJ [COL WATKINS]: That's sufficient, Government?

15 TC [CAPT KEETON]: Yes, Your Honor.

16 MJ [COL WATKINS]: The commission is in recess for 15
17 minutes.

18 [The R.M.C. 803 session recessed at 1505, 17 July 2018.]

19 [The R.M.C. 803 session was called to order at 1525,
20 17 July 2018.]

21 MJ [COL WATKINS]: The commission is called to order. All
22 parties present when the commission recessed are again
23 present.

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1 During the recess, I held an R.M.C. 802 session with
2 counsel for both sides present. During that session, the
3 government brought to my attention some concerns about support
4 personnel and shift changes and just wanted me to be aware of
5 that so we could plan around it and not have any unnecessary
6 interruptions.

7 Defense also brought to my attention a minor
8 typographical error in one of their pleadings, and for the
9 government's benefit as well, and corrected that. It had to
10 do with quotation marks, and the error is apparent from the
11 case that is cited and it's of no major consequence.

12 Counsel, have I accurately characterized and
13 summarized that 802 session?

14 TC [CAPT KEETON]: Yes, you have, Your Honor.

15 CDC [MR. DIXON]: Yes, Your Honor.

16 MJ [COL WATKINS]: Do counsel for either side have a
17 challenge for cause to the military judge?

18 TC [CAPT KEETON]: Your Honor, the defense cast a fairly
19 wide net during that voir dire. Nevertheless, the government
20 sees no grounds under R.M.C. 902 for the judge to be
21 disqualified, particularly in light of the fact that the
22 accused has pled guilty to his crimes and he will be sentenced
23 by a military commission, a commission which is further

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1 bounded by a pretrial agreement.

2 MJ [COL WATKINS]: Defense?

3 CDC [MR. DIXON]: Your Honor, we -- with respect, we do
4 have one concern and one objection, but that is in relation to
5 Your Honor's legal advisor. Although we certainly do not wish
6 to impugn his integrity or character in any way, we believe
7 that -- we are concerned about an actual or potential conflict
8 of interest, and we don't believe at this particular point in
9 time that we have sufficient information to satisfy our
10 concerns specifically about his involvement in Afghanistan
11 with detainee operations.

12 Putting that objection and request for that
13 individual to not participate in this case -- putting that
14 aside, based on Your Honor's responses to the questions I have
15 asked today, the defense does not object or seek Your Honor's
16 disqualification from this case.

17 MJ [COL WATKINS]: All right. Your objection is noted.
18 And as I previously stated, given that this disclosure about
19 this relationship was extremely recent -- is that correct?

20 CDC [MR. DIXON]: Yes.

21 MJ [COL WATKINS]: Given there's no challenge for cause, I
22 am certainly not going to recuse myself, but I will entertain
23 future challenges if you deem they are appropriate based on

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1 any information you can get some more fidelity on about that
2 issue.

3 It may be that the issue becomes moot because of
4 assignments. As I stated before, the legal advisor is not
5 solely working on this case or for me. The legal advisors
6 within judiciary are rotated very often, depending upon
7 circumstances and caseload. The issue may become moot, but I
8 will allow you to raise it at the next session if it is not
9 moot.

10 CDC [MR. DIXON]: Your Honor, you have noted our
11 objection. We do move now for this individual not to
12 participate in this case specifically for the reasons that
13 we've outlined. We don't feel we have enough information to
14 satisfy our concerns. I mean, given the allegations, the
15 facts to which Mr. Khan pled guilty, and the lack of
16 information, we object.

17 We do not object or seek Your Honor's
18 disqualification. I want to be very clear about that.

19 MJ [COL WATKINS]: All right. The reason I'm giving you
20 an opportunity to raise this issue at a future date -- and you
21 used the term "potential conflict." The law discusses actual
22 and apparent conflict.

23 I do not believe there's any actual conflict, and I

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1 also don't believe there's any apparent conflict, and that's
2 for a couple of reasons. One is the objection presumes that
3 the assistant trial counsel, who was subordinate to the legal
4 advisor on the deployment, has sway over the legal advisor;
5 and then presumes that the legal advisor has sway over me as
6 the military judge and could improperly influence my rulings,
7 apparently, I assume, to the detriment of the accused.

8 I think a member of the public, knowing how the
9 JAG Corps in a joint environment works, would understand that
10 people very often have working relationships and prior jobs,
11 but that does not necessarily mean that there's even a
12 potential to sway the integrity or opinion of other persons
13 once they go into other jobs. And I think this is really
14 irrelevant discussion in the fact that the legal advisor was
15 the supervisor of the assistant trial counsel. If the roles
16 were reversed, there may be more concern. But as of now, I
17 don't see apparent conflict with the information that's been
18 presented to me.

19 So I note your objection and I overrule it and again
20 invite you to re-raise the issue at a future hearing if you
21 believe it merits re-raising or you've further developed the
22 information involving that relationship.

23 CDC [MR. DIXON]: Thank you, Your Honor.

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1 MJ [COL WATKINS]: You're welcome.

2 As to a few procedural issues, do counsel for both
3 sides understand the provisions of the Manual for Military
4 Commissions concerning safeguarding and securing classified
5 information?

6 TC [CAPT KEETON]: The government does, Your Honor.

7 CDC [MR. DIXON]: Defense as well.

8 MJ [COL WATKINS]: Do you understand that you must, as
9 soon as practicable, notify me of any intent to offer evidence
10 involving classified information so that I may consider the
11 need to close the proceedings?

12 TC [CAPT KEETON]: Yes, Your Honor.

13 CDC [MR. DIXON]: Yes, Your Honor.

14 MJ [COL WATKINS]: As I'm required by the Manual for
15 Military Commissions to consider the safety of witnesses and
16 others at these proceedings, do counsel for both sides
17 understand that they must notify me of any issues regarding
18 the safety of potential witnesses so that I may determine
19 appropriate ways in which testimony will be received and
20 witnesses protected?

21 TC [CAPT KEETON]: Yes, Your Honor.

22 CDC [MR. DIXON]: Yes, Your Honor.

23 MJ [COL WATKINS]: All right. I'd like to briefly cover

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1 the protective orders that I am aware of. The only protective
2 orders which I'm aware of have been marked as
3 Appellate Exhibit 004A on classified discovery material;
4 Appellate Exhibit 010A, courtroom security; Appellate
5 Exhibit 010B, nondisclosure of commission panel members'
6 identities; Appellate Exhibit 010C, sealing classified CIA
7 declarations; Appellate Exhibit 015D, regarding a letter from
8 Mr. Khan to the previous military judge.

9 Have both sides seen these exhibits?

10 TC [CAPT KEETON]: Yes, Your Honor.

11 CDC [MR. DIXON]: Yes, Your Honor.

12 MJ [COL WATKINS]: And is either side aware of any
13 protective orders I have not previously mentioned?

14 TC [CAPT KEETON]: Your Honor, I believe the defense had
15 filed a motion and received one regarding the SSCI report. I
16 will let defense further amplify on that.

17 MJ [COL WATKINS]: I'm sorry, I can't understand you.

18 TC [CAPT KEETON]: The defense had filed a motion
19 regarding a -- that was a preservation motion, so there was no
20 other protective order, Your Honor. I'm sorry.

21 MJ [COL WATKINS]: Do you agree, Defense?

22 CDC [MR. DIXON]: We concur.

23 MJ [COL WATKINS]: All right. Thank you.

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1 I know the accused has been advised previously of his
2 right to be present, but that was some time ago so I would
3 like to address that again.

4 Mr. Khan, you have the right to be present during all
5 sessions of the commission. If you request to absent yourself
6 from any session, such absence must be voluntary and of your
7 own free will. Your voluntary absence from any session of the
8 commission is an unequivocal waiver of the right to be present
9 during that session. Your absence from any session may
10 negatively affect the presentation of the defense in your
11 case.

12 Your failure to meet with and cooperate with your
13 defense counsel may also negatively affect the presentation of
14 your case. Under certain circumstances, your attendance at a
15 session can be compelled, regardless of your personal desire
16 to not be present.

17 Regardless of your voluntary waiver to attend a
18 particular session of a commission, you have the right at any
19 time to decide to attend any subsequent session. You will be
20 informed of the time and date of each commission session prior
21 to that session to afford you the opportunity to decide
22 whether you wish to attend that session.

23 Mr. Khan, do you understand what I've explained to

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1 you?

2 ACC [MR. KHAN]: Yes, sir, I do.

3 MJ [COL WATKINS]: Last night I held an R.M.C. 802
4 conference with counsel for both sides present. During that
5 session, we discussed some mechanics of putting evidence on
6 the motions before the commission. We also discussed the
7 general order of events for today's hearing.

8 Counsel informed me of their intent to go into
9 conference after the 802 conference and then advise me of any
10 new developments today. Defense also informed me of their
11 intent to meet with their client this morning to discuss the
12 excusal of Ms. Orpett and Ms. Jestin, which we've already
13 covered.

14 Before the beginning session today, I held another
15 R.M.C. 802 conference with counsel for both sides present.
16 During that conference, the government stated it intended to
17 withdraw Appellate Exhibit 016Q and enter a joint request for
18 a new trial scheduling order within a day with milestones to
19 follow within about a month.

20 Government, do you have a motion in that regard?

21 TC [CAPT KEETON]: Yes, Your Honor. The government will
22 withdraw AE 016Q and will join the defense in a motion for a
23 trial scheduling order with a proposed sentencing date of

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1 1 July 2019, with milestones to follow thereafter.

2 MJ [COL WATKINS]: And, Defense, based on the government's
3 withdrawal of their motion, do you withdraw 016R?

4 CDC [MR. DIXON]: We do, Your Honor.

5 MJ [COL WATKINS]: Did the government accurately
6 characterize your understanding of the future scheduling in
7 this case?

8 CDC [MR. DIXON]: They have, Your Honor.

9 MJ [COL WATKINS]: Now, Government, is it your position
10 that moving the sentencing date to 1 July '19 would still be
11 in compliance with the pretrial agreement?

12 TC [CAPT KEETON]: We do, Your Honor.

13 MJ [COL WATKINS]: Defense, is that your position?

14 CDC [MR. DIXON]: Yes, Your Honor.

15 MJ [COL WATKINS]: During that 802 session, the government
16 disclosed the relationship between the assistant trial counsel
17 and a legal advisor who is a member of the trial judiciary
18 staff, which has already been discussed on the record.

19 Defense raised for my awareness a delay in posting
20 pleadings and rulings to the public court docket. The
21 government was aware of and acknowledged the problem and
22 stated that OMC was working to resolve that issue.

23 Finally, we had some discussion about Lieutenant

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1 Colonel Jackson's status. I believe that discussion was
2 primarily about defense maintaining their motion to have him
3 brought back onto the case despite their not objecting to his
4 withdrawal as detailed counsel. I believe all of that can be
5 more fully developed in a few minutes when we discuss
6 Appellate Exhibit 025.

7 As far as the 802 sessions last night and earlier
8 today, Counsel, have I accurately characterized and summarized
9 those 802 sessions?

10 TC [CAPT KEETON]: Yes, you have, Your Honor.

11 CDC [MR. DIXON]: Yes, Your Honor.

12 MJ [COL WATKINS]: All right. Appellate Exhibit 024
13 instructed the parties to be prepared to address Appellate
14 Exhibit 016Q, the government's request for the issuance of a
15 trial scheduling order, along with any other motion for which
16 the briefing cycle has been completed. Based on what just
17 occurred, Appellate Exhibit 016Q and R have become moot.

18 Note that the commission is also now in receipt of
19 Appellate Exhibit 025, a defense motion to compel/expedite
20 resources, for which the briefing cycle is complete, so we'll
21 take that up today.

22 Government, are there any additional matters you want
23 the commission to consider during this hearing session?

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1 TC [CAPT KEETON]: No, Your Honor.

2 MJ [COL WATKINS]: Defense, are there any additional
3 matters you want the commission to consider during this
4 hearing session?

5 CDC [MR. DIXON]: No, Your Honor.

6 MJ [COL WATKINS]: All right.

7 CDC [MR. DIXON]: Your Honor, if I may. Sorry. One of
8 the -- we would -- Your Honor had raised the issue of the
9 attachments to the motions as evidence. We would like to take
10 that up.

11 MJ [COL WATKINS]: Yeah, I'll cover that. My question
12 was: Was there any issues outside of Appellate Exhibit -- any
13 issues outside of the motion that's before the court?

14 DDC [LCDR HERNANDEZ]: No, Your Honor, just the
15 attachments to the motion, AE 025.

16 MJ [COL WATKINS]: I got that. We're going to take up
17 that motion in a minute. Are there any other matters that you
18 want the commission to consider during this session?

19 DDC [LCDR HERNANDEZ]: No, Your Honor.

20 MJ [COL WATKINS]: All right. For the record, the motion
21 is Appellate Exhibit 025; 025A is the government response, and
22 025B is the defense reply.

23 Now, to defense's concern, the pleadings contain

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1 enclosures. Do the parties consent to the commission
2 considering the enclosures to the pleadings in deciding this
3 motion?

4 TC [CAPT KEETON]: The government does, Your Honor.

5 CDC [MR. DIXON]: The defense does, Your Honor.

6 MJ [COL WATKINS]: All right. Defense, as to Appellate
7 Exhibit 025, you have the burden of proof and persuasion. Do
8 you have any further evidence on this motion other than the
9 enclosures?

10 DDC [LCDR HERNANDEZ]: No, Your Honor.

11 MJ [COL WATKINS]: Government, do you have any further
12 evidence?

13 TC [CAPT KEETON]: No, Your Honor.

14 MJ [COL WATKINS]: All right. Counsel, I have read the
15 pleadings. Defense, do you wish to be further heard?

16 DDC [LCDR HERNANDEZ]: Yes, Your Honor.

17 MJ [COL WATKINS]: You may proceed.

18 DDC [LCDR HERNANDEZ]: May it please the court. Good
19 afternoon, Your Honor. Lieutenant Commander Jared Hernandez,
20 JAG Corps, United States Navy. I, along with Mr. Wells Dixon,
21 represent Guantanamo's only high-value cooperator, Mr. Majid
22 Khan.

23 Your Honor, before I begin argument, Mr. Khan would

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1 like me to emphasize that he is committed to continuing to
2 work with the government. He has tried to work with the
3 government at every stage in this proceeding and will continue
4 to do so. Unfortunately, we were not able to come to an
5 accord on this particular issue.

6 Your Honor, the court should grant the defense's
7 requested relief for three reasons: One, the resources
8 requested are required for an adequate defense; two, the
9 resources requested are mandated by statute, already approved
10 by the convening authority or uncontested by the government;
11 and three, expediting these resources is in the interest of
12 justice and would avoid further delay.

13 Your Honor, I will focus my remarks on what appears
14 to be the only issue in dispute, that of the impending
15 severance of Mr. Khan's sole statutorily required detailed
16 defense counsel.

17 Your Honor, there is no dispute that in accordance
18 with over half a century of military case law, it is legal
19 error to sever an attorney-client relationship based on
20 financial considerations. There is also no dispute that
21 severing Mr. Khan's attorney-client relationship at this
22 critical stage in litigation would materially prejudice the
23 substantial rights of the accused.

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1 The government's only contention is that its
2 invitation to detailed defense counsel to apply for definite
3 recall orders moots this motion. It does not, Your Honor.

4 As I have indicated in paragraph 21 of my sworn
5 declaration to this court of 13 July, I do not intend to apply
6 for definite recall orders from the United States Navy. Thus,
7 unless the military judge intervenes, the government will
8 unlawfully de facto sever Mr. Khan's attorney-client
9 relationship against his objection on or about 28 September.

10 This will result in the following prejudice,
11 Your Honor: Delay; as it stands now, up to a year of
12 additional delay in this case. The inherent -- number two,
13 the inherent prejudice of severing an attorney-client
14 relationship that is already existing and developed; three, a
15 potentially significant stepdown in experience of Mr. Khan's
16 detailed defense counsel.

17 Mr. Khan will have gone from a detailed defense
18 counsel with over 20 years of military justice experience in
19 Lieutenant Colonel Jackson to a detailed defense counsel with
20 over 10 years of military justice experience to potentially,
21 given the detailing of the Military Commissions Defense
22 Organization, to a detailed defense counsel with just over two
23 years of military experience, period, Your Honor.

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1 MJ [COL WATKINS]: Who is that?

2 DDC [LCDR HERNANDEZ]: Your Honor, that is not included in
3 the chief defense counsel's declaration. That is an averment
4 of counsel entirely. That is not based on the record before
5 this judge.

6 MJ [COL WATKINS]: What do you mean, it's an averment?
7 Have you heard something that somebody is being considered
8 with two years' experience?

9 DDC [LCDR HERNANDEZ]: Yes, Your Honor.

10 MJ [COL WATKINS]: Okay.

11 DDC [LCDR HERNANDEZ]: The Navy is currently at 56 percent
12 manning of the Military Commissions Defense Organization. The
13 next naval officer that will report to the Military
14 Commissions Defense Organization is in November. That
15 particular officer is a Navy lieutenant, sir, an O-3. That
16 particular officer will have just finished his first tour,
17 judge advocate, so he will have spent two years of experience
18 and then be reporting to the Military Commissions Defense
19 Organization.

20 MJ [COL WATKINS]: Why does it have to be a Navy JAG?

21 DDC [LCDR HERNANDEZ]: It does not, Your Honor.

22 MJ [COL WATKINS]: Okay. This is not something you are
23 representing as coming from MCDO but, rather, Navy personnel?

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1 DDC [LCDR HERNANDEZ]: Correct, sir. I am ----

2 MJ [COL WATKINS]: I just want to be clear on what you're
3 telling me, so ----

4 DDC [LCDR HERNANDEZ]: Yes, Your Honor. I, of course, am
5 not the chief defense counsel, and I do not represent the
6 Military Commissions Defense Organization. That is separate.
7 I represent Mr. Khan. So that is merely an averment of
8 counsel based on my knowledge of the detailing -- the
9 detailing cycle for the Navy, sir.

10 MJ [COL WATKINS]: All right. Okay. Thank you.

11 DDC [LCDR HERNANDEZ]: Yes, Your Honor. For those
12 reasons, Mr. Khan respectfully requests that the military
13 judge grant the defense's requested relief and order the
14 convening authority to work to extend the involuntary
15 mobilization orders for Lieutenant Commander Jared Hernandez,
16 JAG Corps, United States Navy, until a sentence has been
17 approved in this case, Your Honor.

18 MJ [COL WATKINS]: All right. I am asking this question
19 to clarify the pleadings. I can only assume what
20 Mr. Khan's -- what is in his best interests from what he
21 stated in court and from reviewing the pretrial agreement and
22 from your representations and pleadings, and I assume that his
23 interests are in -- is in complying with the pretrial

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1 agreement in as speedy a fashion as possible.

2 My question is: With regard to representing his
3 interests, which again appear to be to get the benefit of his
4 pretrial agreement and finish the commission in 2019, what
5 does it matter whether mobilization orders are extended or you
6 volunteer for a period of one year recall to active duty?

7 DDC [LCDR HERNANDEZ]: Yes, Your Honor. First, it would
8 be legal error for this court to consider my rationale.
9 Instead, in accordance with United States v. Eason and
10 about -- over half a century of military case law, this court
11 should look at the government's rationale, which is a clearly
12 impermissible financial motivation.

13 Second, Your Honor, it would be just as easy for the
14 government to extend involuntary mobilization orders,
15 something that it has done for the last 15 years of this
16 mission and as recently as last month in
17 United States v. Nashiri.

18 Third, Your Honor, it is a variety of personal and
19 professional reasons, chief among them is my desire not to
20 remain on active duty after Mr. Khan's representation is
21 complete. As the military judge is aware from his many years
22 of service, once an officer submits to definite recall orders,
23 my concern is that the Navy would be able to continue my

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1 service against my will, Your Honor.

2 My intent is to finish active duty and finish
3 Mr. Khan's representation, but I do not wish to continue on
4 active duty after Mr. Khan's representation, and so that is of
5 paramount personal and professional concern, sir.

6 MJ [COL WATKINS]: Has the Navy -- my understanding, the
7 Navy has invited or authorized an exception to policy to
8 authorize you to volunteer for only one year of recall; is
9 that correct?

10 DDC [LCDR HERNANDEZ]: Yes, Your Honor, that is correct.
11 What is unclear to detailed defense counsel is whether at the
12 end of that one-year definite recall, whether it is the Navy
13 or the officer that could initiate a continuation of that
14 active duty period of time, and so that is the professional
15 concern.

16 But again, Your Honor, it would be legal error for
17 this court to consider my rationale; instead, you must
18 consider the government's rationale in making their personnel
19 decision to not extend the involuntary mobilization orders in
20 this case.

21 MJ [COL WATKINS]: So let's go to U.S. v. Eason. I have
22 to review that again, but did that have to do -- well, tell me
23 your understanding of the facts of that case.

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1 DDC [LCDR HERNANDEZ]: Yes, Your Honor. In Eason, the --
2 forgive me, Your Honor.

3 MJ [COL WATKINS]: That's all right.

4 DDC [LCDR HERNANDEZ]: I ----

5 MJ [COL WATKINS]: I guess my question is: Is it directly
6 on point with the situation we have here?

7 DDC [LCDR HERNANDEZ]: Your Honor, I believe that it sets
8 down the legal consideration that if there is a financial
9 burden associated with providing representation by military
10 counsel to an accused who has already formed an
11 attorney-client relationship, that it is the duty and
12 obligation of the government to shoulder that burden.

13 So I think that it stands for the principle, and then
14 has been repeated often thereafter in military jurisprudence,
15 that it is the government's obligation to preserve and protect
16 the accused's attorney-client relationship and that that
17 should not be lightly interfered with, nor should it be
18 interfered with for financial considerations.

19 When you consider, Your Honor, that the entire
20 expense to come down here to Guantanamo to even hear this
21 motion is actually probably more than the delta between what
22 the government has replied between the two sets of orders, it
23 begins to -- the defense is not alleging structural error; the

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1 defense is not saying that the government is intentionally
2 trying to interfere with the defense composition for Mr. Khan.

3 What the defense is saying is that the de facto
4 severance that will occur 28 September will have the effect of
5 harming the material rights of the accused, Your Honor.

6 MJ [COL WATKINS]: Okay. And another question I had was
7 whether the United States Navy has changed its position with
8 regard to any representations made to you in bringing you back
9 onto active duty through mobilization orders. For instance,
10 did they say orally or in writing that we will extend your
11 mobilization orders after one year?

12 DDC [LCDR HERNANDEZ]: No, Your Honor. When I came on
13 active duty, the United States Navy made no promises about
14 definite recall or involuntary mobilization orders. I
15 was ----

16 MJ [COL WATKINS]: Did they give you an understanding of
17 what might occur?

18 DDC [LCDR HERNANDEZ]: Yes, Your Honor.

19 MJ [COL WATKINS]: And that was recall for a two- to
20 three-year period?

21 DDC [LCDR HERNANDEZ]: Yes, Your Honor. And ----

22 MJ [COL WATKINS]: So you were told we're going to
23 mobilize you for one year, and I guess if it's necessary to

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1 continue on this case, that would be continued through recall
2 orders?

3 DDC [LCDR HERNANDEZ]: Yes, Your Honor. And that
4 representation was that we would continue for two to three
5 years. I engaged in conversation with the detailers in
6 accordance with my first declaration of 1 June to the court.
7 The detailers made clear that they would not settle for
8 anything less than a two-year mobilization -- or, excuse me,
9 two-year recall orders, and that is why I requested, through
10 the chief defense counsel, in accordance with the mobilization
11 orders that I had, to extend the mobilization orders for a
12 period of one year. It comes down to the fact, sir, that I
13 don't want to remain on active duty longer than Mr. Khan's
14 representation.

15 MJ [COL WATKINS]: All right. Just to clarify that, what
16 if I order mobilization for an additional year and the case is
17 finished in six months? Will you petition the Navy to leave
18 active duty?

19 DDC [LCDR HERNANDEZ]: Your Honor, there is a provision in
20 the involuntary mobilization orders that allows the Navy to
21 immediately thereafter sever me from active duty. On both the
22 demobilization and the mobilization orders, the United States
23 Fleet Forces Command has the ability to sever me directly

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1 thereafter, sir.

2 MJ [COL WATKINS]: Okay. Thank you.

3 On an unrelated issue, are you aware of any authority
4 where the commission ordered WHS to hire a GS employee -- and
5 I'm aware of what occurred in another commission, but that's
6 trial level. Do you have any appellate or statutory or
7 regulatory authority for a military judge to order a GS hiring
8 decision?

9 DDC [LCDR HERNANDEZ]: Your Honor, there is no military
10 commission precedent that the defense is aware of. And the
11 defense's requested relief with respect to Mr. Jackson is to
12 order his hiring, as has already been approved by the
13 convening authority, as a part-time GS attorney; merely that
14 he be permitted to rejoin the defense as a telework employee,
15 Your Honor. But no regulation, statute, or case law from the
16 defense, Your Honor.

17 MJ [COL WATKINS]: So to be clear, they've approved his
18 hiring as a part-time GS employee?

19 DDC [LCDR HERNANDEZ]: Your Honor, the convening authority
20 has approved the hiring of a GS ----

21 MJ [COL WATKINS]: A GS employee, or him as a GS?

22 DDC [LCDR HERNANDEZ]: A GS attorney. And I believe the
23 chief defense counsel, Your Honor, in one of the declarations

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1 attached to this filing, has indicated that he has offered
2 Mr. Jackson that position as a part-time GS-15 attorney, and
3 we were requesting as this developed, Your Honor, to have him
4 as a telework attorney.

5 Unfortunately, the convening authority did not meet
6 with the defense and ultimately took the action to deny that
7 request because it was currently under consideration by this
8 military court -- commission, Your Honor.

9 MJ [COL WATKINS]: All right. Now, I know you have been
10 recently detailed, and I'll let Mr. Dixon speak for himself if
11 he chooses to. But I'm a little concerned that Mr. Khan has
12 been represented continuously by civilian counsel for at least
13 six years, and it appears to me that the defense's position is
14 Mr. Khan cannot get a fair sentencing proceeding without
15 Colonel Jackson present. That concerns me, because there's
16 been continuity of counsel.

17 And so my question is: Do you have access to Colonel
18 Jackson's work product and thought processes and strategies
19 and things that have taken place for the last six years?
20 Because that seems to be the position that you're taking, that
21 it's impossible to have a fair trial without Colonel Jackson.

22 DDC [LCDR HERNANDEZ]: Your Honor, may I cede to lead
23 defense counsel to speak to that issue?

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1 MJ [COL WATKINS]: Please.

2 DDC [LCDR HERNANDEZ]: Thank you, Your Honor.

3 CDC [MR. DIXON]: Your Honor, I confess I am not entirely
4 clear about Your Honor's last question with respect to Colonel
5 Jackson's mental thought processes. Could Your Honor restate
6 the question?

7 MJ [COL WATKINS]: Well, do you have access to his work
8 product?

9 CDC [MR. DIXON]: Yes.

10 MJ [COL WATKINS]: Okay. So -- and I assume over the last
11 several years that the defense -- and I don't want to get into
12 any discussions you've had, but you've collaborated over the
13 last six years about trial strategies and negotiations about
14 the pretrial agreement and strategy for the sentencing phase
15 of the commission?

16 CDC [MR. DIXON]: Correct. And if your questions -- if
17 Your Honor's question is whether the defense can simply swap
18 Colonel Jackson, Mr. Jackson at this point, for ----

19 MJ [COL WATKINS]: No, no, no. I'm suggesting that
20 civilian counsel who have been on the case for several
21 years -- for the entirety of the commission, correct?

22 CDC [MR. DIXON]: Right, correct.

23 MJ [COL WATKINS]: They have responsibilities to Mr. Khan

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1 as well in representing him before the commission.

2 CDC [MR. DIXON]: Yes. But Mr. Jackson has talents and
3 skills that we do not have. He is perhaps the most
4 experienced military commission practitioner that I am aware
5 of and certainly has far more years of military courts-martial
6 experience and would serve a very unique role in this case.

7 Colonel Jackson, Mr. Jackson now, was a member of the
8 defense team for a long time. As you heard from Mr. Khan
9 earlier today, it has been his desire to bring Mr. Jackson
10 back in a GS capacity. That effort has been ongoing since
11 2015, as we've laid out in our pleadings, because of the
12 unique role that he serves on the team, because of his unique
13 relationship with Mr. Khan, his knowledge of the case and his
14 knowledge of military practice, both in the courts-martial and
15 in the commission systems.

16 With respect to the convening authority, the
17 convening authority has at long last approved our request for
18 the hiring of a GS-15 attorney. There is no dispute about
19 whether Mr. Jackson is appropriate to fill that role, and
20 indeed, in the government's opposition brief to our motion,
21 indicate that it's perfectly fine to hire Mr. Jackson in a GS
22 capacity. The government also doesn't seem to have any
23 objection to him working part-time, which is consistent with

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1 what we need him for on this case.

2 The only issue, Your Honor, in dispute here is
3 whether he should be permitted to telework, and I will confess
4 again, I don't understand the opposition to that given that
5 Majid Khan is a cooperator and he and Mr. Jackson have been
6 working with the government for quite a long time. I don't
7 understand the opposition.

8 I don't frankly understand, in part, why we all have
9 to fly to Guantanamo to argue about whether he should be
10 permitted to telework. I mean, I confess it seems somewhat
11 ironic to me. But nonetheless, there really is no dispute
12 about him and about his role on our team or whether he should
13 work part-time. It is strictly an issue of teleworking.

14 MJ [COL WATKINS]: Okay.

15 CDC [MR. DIXON]: Does Your Honor have further questions
16 about that or ----

17 MJ [COL WATKINS]: I don't believe so. I do have another
18 question for Lieutenant Commander Hernandez. Thank you for
19 clarifying that for me.

20 CDC [MR. DIXON]: Thank you, Your Honor.

21 DDC [LCDR HERNANDEZ]: Yes, Your Honor.

22 MJ [COL WATKINS]: Lieutenant Commander, I would like to
23 make sure I understand the latest developments as to an

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1 investigator and a DISO. Your position is the convening
2 authority has approved that, appointments for those?

3 DDC [LCDR HERNANDEZ]: Yes, Your Honor.

4 MJ [COL WATKINS]: And I know the timelines are in the
5 pleadings and everything, but is there any update to the
6 status of actually hiring those? I am going to ask the
7 government the same question, so ----

8 DDC [LCDR HERNANDEZ]: Your Honor, I do not know. I do
9 not believe that the Military Commissions Defense Organization
10 has initiated a hiring action yet for either the DISO, the
11 defense information security officer, or the investigator. I
12 believe that it is contained in Mr. Campbell's declaration,
13 how long he estimated it would take to bring them on board.
14 But I do not believe, to the best of my knowledge, that the
15 Military Commissions Defense Organization has yet initiated a
16 hiring action for either of those.

17 I also believe, Your Honor, that there may be an
18 issue of funding of one of the two -- one of the two positions
19 as being unfunded, approved but unfunded. And forgive me,
20 Your Honor, I don't know which of those two positions is or
21 may be unfunded. Forgive me.

22 MJ [COL WATKINS]: No, I understand. I just wanted to see
23 if you knew. I have no further questions. Any other comment?

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1 DDC [LCDR HERNANDEZ]: Yes, Your Honor. I would invite
2 the court's attention not only to United States v. Eason but
3 also United States v. Hutchins, Your Honor. This is a 2011
4 CAAF case that dealt with the severance of a detailed defense
5 counsel. Your Honor, you mentioned about the facts of Eason
6 potentially being inapplicable here. Hutchins, Your Honor,
7 does state that it is legal error to sever the detailed
8 defense counsel solely on the basis of their separation from
9 active duty. Hutchins did test for prejudice, which the
10 defense believes should be done here but also believes is
11 manifest and uncontested by the government.

12 MJ [COL WATKINS]: Does the Marine second chair who was on
13 terminal leave at the last session of -- where it should have
14 been developed on the record; is that correct?

15 DDC [LCDR HERNANDEZ]: Yes, Your Honor, that's correct.

16 MJ [COL WATKINS]: I don't have -- do you have the cite
17 for the government?

18 DDC [LCDR HERNANDEZ]: Yes, Your Honor. That is
19 United States v. Hutchins. That's 69 MJ 478, a 2011 CAAF case
20 that is still good law.

21 Additionally, Your Honor, in Hutchins, you see that I
22 believe it was a captain, a Marine captain, who was replaced
23 by a senior lieutenant colonel Marine there, so he was going

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1 up two pay grades. Obviously we can't guess who may replace
2 me here; however -- or relieve me of my duties as detailed
3 defense counsel, if I am severed; however, in Hutchins as
4 well, they did not have -- Hutchins can be distinguished in
5 that it is a -- this is a military commission case,
6 Your Honor, where the prejudice would be more acute for
7 Mr. Khan to develop an attorney-client relationship with a
8 detailed defense counsel. I am his fourth detailed defense
9 counsel. He would have a fifth if I am relieved, Your Honor.

10 Unlike a military courts-martial where the accused is
11 a member of the military unit and the military society and who
12 would have a greater ability to connect with that counsel,
13 Mr. Khan would have a fifth detailed defense counsel. And he
14 is not a citizen, Your Honor, and the military commissions
15 present a more acute case of prejudice, sir.

16 MJ [COL WATKINS]: I'll have to reread Hutchins, but I
17 believe the error that was committed is -- was on the military
18 judge for not addressing that captain's absence. I know
19 there's some dicta in the case about severance.

20 Well, the government has the citation and I'll review
21 that as well.

22 DDC [LCDR HERNANDEZ]: Thank you, Your Honor.

23 MJ [COL WATKINS]: Thank you.

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1 Government, do you wish to be heard?

2 TC [CAPT KEETON]: Yes, Your Honor.

3 MJ [COL WATKINS]: You may proceed.

4 TC [CAPT KEETON]: Your Honor, I would begin by reminding
5 all parties that this is a guilty plea, uncontested case,
6 governed by a PTA.

7 The motion to compel is not a mechanism for defense
8 to get whatever they want; it's a mechanism for the defense to
9 get whatever they need. And if you look at the pleadings,
10 Your Honor, if you look at the filings in this case, in large
11 part the government has provided that to the defense.

12 Initially the ultimate resourcing issue for the
13 defense seemed to be tied to the timing of this commission,
14 when it was going to begin. The government wanted an earlier
15 date than defense had requested. The government has since
16 acceded to that and provided the defense with the date that
17 they requested. The defense relief, granted.

18 The defense requested a GS position, a GS attorney
19 position. Not all military commissions have a GS attorney.
20 U.S. v. Darbi, for example, they were granted that last
21 December. The defense relief, granted.

22 The defense requested a DISO, a defense information
23 security officer. Relief granted, Defense.

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1 The defense requested an investigator. Relief
2 granted, Defense. They said that they need more time to hire
3 this investigator, 8 to 12 weeks. You provided that today.
4 Relief granted, Defense.

5 MJ [COL WATKINS]: Who said they need 8 to 12 weeks?

6 TC [CAPT KEETON]: That's in the pleadings, Your Honor.
7 Mr. Campbell, who is the MCD0 chief of staff, I think his
8 title is, said that it required 8 to 12 weeks to get these
9 people hired.

10 MJ [COL WATKINS]: I'm just -- maybe your advocacy is too
11 effective. When you said, "Relief granted, defense," I
12 thought -- I mean, this is a function of getting this person
13 to the defense team; it's not their fault that they need 8 to
14 12 weeks, correct?

15 TC [CAPT KEETON]: That's correct, Your Honor. But in
16 their pleadings, they said they would need at least 8 to 12 to
17 get this person hired. And by agreeing to this continuance
18 today, the government has, in essence, given them the 8 to 12
19 weeks that they requested.

20 MJ [COL WATKINS]: Okay.

21 TC [CAPT KEETON]: With regards to Lieutenant Commander
22 Hernandez's orders or his order status, his stated motivation
23 for remaining on orders has been his desire to continue

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1 representation of his client. Since December of last year, he
2 has had a mechanism available known as recall orders.

3 Then he had stated recall orders were too long. He
4 only wants one-year orders. Well, relief granted to defense
5 again. The government has agreed to provide Lieutenant
6 Commander Hernandez with one-year recall orders.

7 Lieutenant Commander Hernandez also mentioned
8 something regarding organizational trust issues with regards
9 to these recall orders. Well, the government has provided an
10 affidavit from an active duty Navy O-6, head detailee, head
11 accessions manager, wherein she states, under oath, that the
12 Judge Advocate General of the Navy himself has said Lieutenant
13 Commander Hernandez, if he applies for them, can have these
14 one-year recall orders. That should satisfy organizational
15 trust issues. Again, relief granted.

16 Four days ago we now learn that the real question
17 Lieutenant Commander Hernandez has with his orders and his
18 real issue with not taking recall orders is this supposed
19 impermissible motivation by the Navy, a funding issue
20 regarding the kind of orders they're going to give him.

21 Your Honor, I am a reservist. I started at military
22 commissions on one-year mobilization orders. Towards the end
23 of that one year I was informed that "You're on full per diem.

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1 Those orders are expensive. If you want to stay around
2 military commissions, you're going to have to go on three-year
3 recall orders."

4 Reserve Army officers, reserve Air Force officers in
5 my office are not on these full-per-diem kinds of orders.
6 Unlike Lieutenant Commander Hernandez, who has been given, in
7 writing, an option of one-year or two-year or three-year
8 recall orders, I and others were not given that option. So
9 not only is Lieutenant Commander Hernandez being treated the
10 same as other Navy reserve officers, he is actually being
11 treated better.

12 The defense has received nearly all they have asked
13 for, and they have certainly received all they, in fairness,
14 need.

15 Now, subject to your questions, Your Honor.

16 MJ [COL WATKINS]: Thank you. When I say "government," I
17 completely understand that you're an agent for OMC
18 prosecution, so I understand that you can't control everything
19 big Government does, but I'm really asking for a status, if
20 you know it.

21 TC [CAPT KEETON]: Your Honor, these -- this is largely an
22 ex parte process. Defense does not copy the prosecution on
23 these requests that they send to the convening authority. If

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1 you have a particular question on status, Your Honor, I could
2 attempt to answer it for you.

3 MJ [COL WATKINS]: Well, that explains a lot. If they're
4 making requests to the convening authority and he is approving
5 them and they're going to another agency for processing and
6 hiring and things like that, you wouldn't have -- be privy to
7 it, but -- well, here's the reason I am asking. Your pleading
8 is silent as to an investigator and a DISO.

9 TC [CAPT KEETON]: Yes, sir.

10 MJ [COL WATKINS]: Are you conceding that those are
11 necessary for the defense?

12 TC [CAPT KEETON]: Well, they have been granted,
13 Your Honor. They have already been granted by the convening
14 authority. The defense's only request -- their requested
15 relief in their motions was for that process to be expedited,
16 the hiring, because it would take an additional 4 to 8 -- or 4
17 to 12 weeks. The government's view is that by giving this
18 8- to 12-week continuance, we have essentially mooted that
19 portion of defense's motion.

20 MJ [COL WATKINS]: Now, this is hypothetical. If that
21 were not the case, are you aware of any authority of a
22 military commissions judge to order those kinds of employment
23 decisions ----

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1 TC [CAPT KEETON]: I am not, Your Honor.

2 MJ [COL WATKINS]: ---- at the trial level?

3 TC [CAPT KEETON]: I am not, Your Honor.

4 MJ [COL WATKINS]: All right.

5 TC [CAPT KEETON]: I can explain -- I mean, it's in the
6 pleadings, Your Honor, but the -- some of the convening
7 authority's rationale for decisions they've made, particularly
8 with ----

9 MJ [COL WATKINS]: Oh, like telework and stuff?

10 TC [CAPT KEETON]: Yes, sir.

11 MJ [COL WATKINS]: Yeah, I -- no, I understand that. All
12 right. I think that's all I had. Thank you.

13 TC [CAPT KEETON]: Your Honor, may I have a moment to
14 consult with co-counsel?

15 MJ [COL WATKINS]: Yes.

16 TC [CAPT KEETON]: Nothing further from the government,
17 Your Honor.

18 MJ [COL WATKINS]: Thank you.

19 Defense, do you have a brief rebuttal argument?

20 DDC [LCDR HERNANDEZ]: Yes, Your Honor. The authority
21 that the defense would offer this commission is R.M.C. 906 to
22 avoid undue delay to the proceedings, Your Honor, to be able
23 to expedite other government entities to provide the necessary

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1 resources for the defense to conduct an adequate defense of
2 Mr. Khan. And so we believe that R.M.C. 906 gives the
3 commission the authority to influence and to order other
4 entities outside of the military commission system to expedite
5 those resources to Mr. Khan, Your Honor.

6 Additionally, the government's argument, both in
7 written pleading and oral argument, was directed at relief
8 that Lieutenant Commander Hernandez had requested. It is
9 important, Your Honor, to consider that it is not I,
10 Lieutenant Commander Hernandez, who asked for this relief; it
11 is Mr. Khan who asked for his attorney-client relationship to
12 be protected and preserved here, Your Honor.

13 So it is not personal in any regard whatsoever;
14 merely it is Mr. Khan's interests who need to be first and
15 foremost before the court, Your Honor.

16 MJ [COL WATKINS]: As they are. Thank you.

17 DDC [LCDR HERNANDEZ]: Thank you, Your Honor.

18 MJ [COL WATKINS]: All right. I'm going to deliberate on
19 the evidence and your arguments. I intend to issue written
20 findings of fact and conclusions of law in the very near
21 future.

22 Is there anything else to take up before the
23 commission recesses?

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1 TC [CAPT KEETON]: Nothing from the government,
2 Your Honor.

3 CDC [MR. DIXON]: Nor from the defense, Your Honor.

4 MJ [COL WATKINS]: I'd like to thank all the parties for
5 your cooperation and patience. The commission is in recess
6 until a date and time to be determined by my trial scheduling
7 order, which is contingent on receipt of new pleadings in the
8 016 series.

9 We are in recess.

10 [The R.M.C. 803 session recessed at 1618, 17 July 2018.]

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