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1 [The R.M.C. 803 session was called to order at 1108,
2 27 July 2021.]

3 MJ [Col MILAM]: This commission is called to order. Good
4 morning to everyone. And the accused, Mr. Majid Khan, is
5 present. Good morning, Mr. Khan.

6 ACC [MR. KHAN]: Good morning, sir. How are you doing?

7 MJ [Col MILAM]: I'm fine. Thank you. I appreciate that.

8 And, Colonel Foster, if you would please account for
9 the prosecution team this morning.

10 TC [LTC FOSTER]: Yes. May I advance to the podium, Your
11 Honor?

12 MJ [Col MILAM]: I'm sorry?

13 TC [LTC FOSTER]: May I advance to the podium?

14 MJ [Col MILAM]: Absolutely. And all members of both
15 sides can certainly move around the courtroom. Thank you.

16 TC [LTC FOSTER]: Good morning again, Your Honor.

17 MJ [Col MILAM]: Good morning.

18 TC [LTC FOSTER]: Defense counsel. These proceedings are
19 being transmitted stateside via CCTV to remote viewing sites
20 at Fort Meade, Maryland, and the Pentagon, pursuant to this
21 commission's previous order in Appellate Exhibit 006.

22 The government is represented today by myself, Colonel
23 Walter H. Foster IV, United States Reserve; Major Stephen

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1 Romeo, United States Army; and Lieutenant Thomas Walker,
2 United States Navy. All members of the prosecution team have
3 been detailed by the chief prosecutor Brigadier General Mark
4 Martins pursuant to Appellate Exhibit 003H, dated 16 December
5 2020 in accordance with R.M.C. 503. All individuals are
6 qualified under R.M.C. 502(d) and have been previously sworn
7 by the chief prosecutor in accordance with R.M.C. 807.

8 No member of the prosecution team has acted in any
9 manner which might tend to disqualify them from participating
10 in this proceeding, sir.

11 MJ [Col MILAM]: Thank you, Colonel Foster. I appreciate
12 that.

13 TC [LTC FOSTER]: Defer to the defense at this time.

14 MJ [Col MILAM]: And Colonel Foster, do all members of the
15 prosecution team that are present in court have all the
16 appropriate security clearances?

17 TC [LTC FOSTER]: They do indeed.

18 MJ [Col MILAM]: Thank you.

19 TC [LTC FOSTER]: Also, Your Honor, joined with us at the
20 prosecution table are Master Sergeant April Horn and LN1
21 Terrence Mitchell [sic].

22 MJ [Col MILAM]: Thank you. Thank you very much. And I
23 do want to note that the proceedings are also being

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1 transmitted to remote -- a remote hearing room, or the remote
2 hearing room, which is an extension of the well of this
3 courtroom, which can be utilized on a case-by-case basis to
4 support court administrative operations and the court itself.
5 Thank you.

6 And with that, Mr. Dixon, if you would please account
7 for the defense team.

8 CDC [MR. DIXON]: Thank you and good morning, Your Honor.
9 I'm Wells Dixon from the Center for Constitutional Rights in
10 New York. I'm pro bono counsel for Mr. Khan. Mr. Khan's also
11 represented today by Ms. Katya Jestin of Jenner & Block in New
12 York. She is pro bono counsel as well for Mr. Khan.
13 Ms. Jestin and I have represented Mr. Khan throughout these
14 commission proceedings.

15 In addition, the following members of the defense are
16 also present: Pro bono counsel Ms. Natalie Orpett; pro bono
17 counsel Ms. Nayiri Pilikyan; Major Michael Lyness, detailed
18 defense counsel; Mr. Ian Moss, detailed defense counsel. And
19 I note that Colonel Wayne Aaron, detailed defense counsel, is
20 not present pursuant to Mr. Khan's motion to excuse him from
21 this week's session of hearings. That motion is AE 007M,
22 which Your Honor has granted.

23 All counsel who are present have previously appeared

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1 before this commission on behalf of Mr. Khan except for
2 Ms. Pilikyan. All counsel who are present are qualified under
3 R.M.C. 502. All counsel have previously been sworn pursuant
4 to R.M.C. 807, except for Ms. Pilikyan who has not been sworn.
5 Her detailing information is set forth in AE 007L.

6 No counsel has acted in any manner which might tend to
7 disqualify them from this commission.

8 In addition to counsel, the following members of
9 Mr. Khan's defense team are also present: Mr. Theodore Lange,
10 defense case analyst; Tech Sergeant Shafiyuca Gause, defense
11 paralegal. All members of the defense team possess the
12 requisite security clearances to represent Mr. Khan and
13 participate in these commission proceedings today.

14 Last but certainly not least, also present in the
15 courtroom but not detailed to this case are the chief defense
16 counsel, Brigadier General John Baker of the United States
17 Marine Corps, and Senior Master Sergeant Charles Zaldivar who
18 is a senior enlisted advisor for the military commissions
19 defense organization.

20 Thank you, Your Honor.

21 MJ [Col MILAM]: Thank you, Mr. Dixon. Appreciate it.

22 And, Mr. Khan, I will ask you a couple of questions
23 real quick about Colonel Aaron and his absence. Do you agree

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1 to proceed today and possibly tomorrow, if necessary, without
2 Colonel Aaron being present?

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

4 MJ [Col MILAM]: All right. Thank you. And is this
5 consent to proceed a voluntary decision based on the advice of
6 other members of your defense team who are present here today?

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

8 MJ [Col MILAM]: All right. Thank you. And as Mr. Dixon
9 noted on 23 July 2021 the commission published AE 007N, which
10 is a ruling proving Colonel Aaron's excusal.

11 And, Ms. Pilikyan, if you would please stand up and
12 raise your right hand for me. Do you swear or affirm that you
13 will faithfully perform the duties of assistant defense
14 counsel in this case?

15 CDC [MS. PILIKYAN]: I do.

16 MJ [Col MILAM]: Thank you very much, Ms. Pilikyan. You
17 may be seated. All right.

18 And next what I would like to do is I would like to
19 memorialize several of the rules for Military Commission 802
20 sessions that were conducted by Colonel Douglas Watkins, who
21 was my predecessor on this case, and the subject of these
22 sessions was primarily the government's administrative and
23 logistics plan for the resumption of proceedings in March of

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1 2021 prior to widespread vaccination and then later the
2 conduct of the sentencing hearing when it was set for
3 May 2021.

4 Each conference was held via telephone and present at
5 each were representatives from the defense, including lead
6 counsel, Mr. Dixon, as well as representatives from the
7 government.

8 The prosecution provided the commission and the
9 defense advanced copies of the PowerPoint briefings thus --
10 the prosecution used to present the plan as it was at the time
11 of the particular R.M.C. 802 proceedings or conference. Each
12 set of briefing slides were appended to the record in the
13 AE 052 series in accordance with interim order at AE 052.

14 And, you know what, I'm going to stop for just a
15 second.

16 Mr. Khan, do you understand what R.M.C. 802 is? I'm
17 not trying to put you on the spot. This is your commission,
18 so I -- it's always nice, I think, for the person who is
19 standing trial to understand a little bit about what's going
20 on, but R.M.C., Rule for Military Commission, 802 -- and just
21 like a lot of things in the military there's rules and rules
22 for how we run a court-martial.

23 One of those rules is 802 and that allows the parties

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1 to a court-martial, so the defense and the prosecution, to
2 meet with the judge, usually telephonically, sometimes in
3 person. We met yesterday afternoon in person, and I'll talk
4 about that in a second. But we're allowed to do that off the
5 record so court reporters aren't taking down what we're saying
6 verbatim, certainly. I'm not even sure they took notes
7 yesterday, but they were present. They just didn't do what
8 they're doing today.

9 We're allowed to do that as long as I summarize as
10 best I can what we talked about during those particular
11 conferences, and then I allow each side to comment whether
12 my -- my summary was accurate and then whether they wanted to
13 add anything to what I summarized.

14 So as I said, there were three of those held when
15 Colonel Watkins was the military judge and there was one
16 yesterday afternoon -- actually, I apologize, there were two
17 when I have been detailed as the military judge. One was by
18 telephone, and one was yesterday in the conference room over
19 in another building nearby. So just so you understand when we
20 say 802, that's what we're talking about is one of those
21 conferences, Mr. Khan.

22 So with that being said, I will say that as far as I
23 know the conferences with Colonel Watkins that had the

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1 slides -- and are now, those were made appellate exhibits,
2 that was on 15 October and 15 January; and the 15 October was
3 in 2020 and the one in January was in 2021. So I didn't say
4 that very clearly, but hopefully the record can capture it.

5 I will also note that there was an 802 on
6 February 26th of -- and I think it was 2021. Does that sound
7 correct, Mr. Dixon?

8 CDC [MR. DIXON]: It was 2020, Your Honor, immediately
9 following the end of the last session of hearings in this
10 case.

11 MJ [Col MILAM]: Thank you, Mr. Dixon. I appreciate that
12 correction. That -- as I understand it, that 802 had to do
13 with witness issues, pretrial confinement issues that -- that
14 some of the defense pleadings were not posted to the public
15 website as well as, I believe, one of the judge's rulings,
16 Judge Watkins' rulings as well; and then it also had to do
17 with a medical issue that Mr. Khan had that I understand has
18 been resolved, which is good news.

19 So I'm going to stop at least and let me at least get
20 those three hearings through prosecution and defense and see
21 if I have captured it well enough or if you would like to add
22 anything.

23 So, Colonel Foster, if I may, I will start with you,

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1 please.

2 TC [LTC FOSTER]: I don't have anything to add, Your
3 Honor.

4 MJ [Co] MILAM]: And Mr. Dixon.

5 CDC [MR. DIXON]: Your Honor, just one point of
6 clarification if I may concerning the February 26th, 2020,
7 802. The defense did raise concern about the -- the failure
8 of the Office of Military Commissions to post defense filings
9 in a timely fashion. The concern raised at the time was
10 primarily concerning AE 030, that's the motion to compel
11 production of witnesses and AE 033, the motion for pretrial
12 punishment credit.

13 Your Honor referenced the failure to post a judge's
14 order. That was actually an issue we addressed yesterday and
15 that was 030GG, which was Judge Watkins' ruling on the motion
16 to compel witnesses.

17 So 030 and 033 I think are resolved but there is the
18 persistent problem concerning the failure to post our
19 pleadings and -- and court rulings in a timely fashion. We
20 just think it's important to note that for purposes of
21 transparency.

22 MJ [Co] MILAM]: Okay, thank you. I don't disagree. I
23 mean, I would like to see everything posted publicly as fast

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1 as possible, and I have no doubt that the prosecution team
2 agrees with what I just said.

3 So I -- I guess I'll beg the parties' forgiveness, I
4 don't think I can do anything about it from what I understand,
5 Mr. Dixon. I did ask about it last night. And from what I
6 understand, it is an administrative matter that's outside the
7 purview of the court. And that doesn't mean I'm not
8 sympathetic to what you're saying, I just don't know that I
9 can do anything to affect it.

10 So I may just leave it at that, but I do note it for
11 the record as you did, and I would certainly ask that if -- if
12 they are going through an administrative process so that they
13 can be posted, that that would be done as quickly as possible.

14 And we all work -- well, not everyone works for the
15 government, but a lot of us who wear uniforms work for the
16 government, and we know that many times there's bureaucratic
17 processes that are out of control. So I guess I can only say
18 I'm sorry, but noted for the record, Mr. Dixon. Thank you.

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

20 MJ [Col MILAM]: Thank you. Okay. So thank you. We got
21 through that.

22 Now I'll note that there were two R.M.C. 802
23 conferences since I have been detailed as the judge in this

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1 matter. One was on 10 June 2021, and that was the telephonic
2 one, and defense and trial counsel both were at -- or present
3 on the telephone for that proceeding. Mr. Khan, of course,
4 was not present for that or on the phone for that
5 proceeding -- or conference, I should call it.

6 The purpose of the teleconference was to broadly
7 discuss the Second Amended Pretrial Agreement, which we'll
8 talk about a little later, Mr. Khan, and then begin the
9 process of trying to set the date for the presentencing
10 hearing. And I think we've accomplished that; we've set a
11 date in October for that hearing.

12 During the call and the follow-on e-mails between
13 trial judiciary staff director, the prosecution, and defense
14 counsel, the date of the presentencing was set for 28 to 29
15 October of 2021, and provision was made for a longtime member
16 of the defense team to participate via VTC. So I hope that
17 works out for that particular member and the defense.

18 Also a deadline was set for the filing of necessary
19 motions by the defense to satisfy a condition in the second
20 motion -- or, excuse me, second modification of the pretrial
21 agreement.

22 Finally, on 26 July 2021, so yesterday afternoon, we
23 conducted an R.M.C. 802 conference in the conference room as I

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1 have previously said. That was here at Naval Station
2 Guantanamo Bay, and the defense and trial counsel were present
3 as well as me, and Mr. Khan was not present for that
4 conference. And here's the topics that we discussed in broad
5 fashion.

6 I mentioned that I had seen a few I guess what I'll
7 call typographical errors in the stipulation of fact. That
8 goes way back to 2012. I couldn't find the errors that I had
9 identified previously. I did last night. I don't know that
10 they affect anything, but I want to mention at least where I
11 saw those errors.

12 I think Ms. Jestin yesterday in the 802 found one of
13 them, and I think she correctly identified what it was. But
14 what I would like is if you have a copy, and I guess if you
15 care, paragraph 12 on page 3, the third line down in
16 paragraph 12, it says, "The accused eventually," and then
17 there's -- there's a space, but then it says, "KSM's
18 identity." I think the word "learned" is probably the word
19 that's missing from that.

20 And so, again, I don't know that that matters. I
21 don't think it affects the stipulation of fact. I think I
22 would just note it for the record. And I'll just ask counsel
23 if that's what you think -- if that's a word that you think is

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1 appropriate for that missing space and whether Mr. Khan
2 agrees. I can ask him that, and, of course, counsel can speak
3 with Mr. Khan about that.

4 And while you're -- while maybe you're getting ready,
5 because I kind of caught you off guard with this one, but if
6 you go down to line -- line 7, I think this is the -- the
7 missing word that Ms. Jestin identified. And I thought maybe
8 it would be "the accused" in front of the word "took" on line
9 7. But I think Ms. Jestin had mentioned it might be an "and"
10 that's missing there, which I think either one would suffice.

11 So what I -- there's also some other little typos. I
12 don't think those really matter, some misspellings. I think
13 Thailand is misspelled, not that it matters. Singapore might
14 have a missing letter or two. I don't think that's the end of
15 the world. I don't think that affects anything either.

16 But I think, just so I'm clear and comfortable, the
17 two that I just mentioned are ones that I would at least like
18 counsel to see if you agree with, and then secondly I'll ask
19 Mr. Khan if he agrees as well. Do you need a minute to do
20 that? You probably need to see it, Mr. Khan.

21 ACC [MR. KHAN]: May I be seated or do I have to stand up
22 every time? Do I have to stand up, sir?

23 MJ [Co] MILAM]: No, you don't have to stand up, Mr. Khan.

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1 Thank you.

2 [Counsel conferred with the accused.]

3 ACC [MR. KHAN]: Yes, sir, I read through it.

4 MJ [Col MILAM]: You do agree with those, Mr. Khan?

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

6 MJ [Col MILAM]: Okay. Thank you. And I'll ask the
7 defense first. Normally I would start with the prosecution,
8 but do you agree with those as well, Mr. Dixon?

9 CDC [MR. DIXON]: Yes, sir.

10 MJ [Col MILAM]: How about you, Colonel Foster, please?

11 TC [LTC FOSTER]: Your Honor, we would agree with the
12 court's assessment.

13 MJ [Col MILAM]: Okay. Thank you very much. All right.
14 I appreciate getting through that. That was the first thing
15 we talked about at the R.M.C. 802.

16 The second was I had asked just about Mr. Khan's
17 presence today, was there anything that I should be concerned
18 about as the commission, as to whether he had any problems or
19 worries, concerns about his presence today. I was told no.
20 Obviously there weren't, because you're here, Mr. Khan. So
21 that's good. And so that was the other thing we talked about.

22 We talked about Colonel Aaron's absence. We dealt
23 with that on the record. We -- we discussed which defense

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1 counsel needed to be sworn, and Ms. Pilikyan -- Pilikyan --
2 sorry -- was sworn. So we're good on that.

3 We talked about -- I don't know if we talked about
4 security clearances, but that was addressed by counsel as
5 well.

6 We talked about the second modification to the PTA and
7 then the aspect of the motions that the defense has stated
8 that would be withdrawn.

9 And there were also some motions that were hanging, at
10 least in the commission's thought, with relation to the
11 prosecution motions, and so we just discussed them. We didn't
12 actually get very far in that, and I think we just thought we
13 would leave it to today, and we'll talk about it on the
14 record. But that was at least identified.

15 We talked about -- you know what? I apologize. We
16 talked about the voir dire of me. I think Mr. Moss -- I was
17 told Mr. Moss might ask some questions of me, and of course
18 the prosecution can as well.

19 We discussed something that I -- I'm still torn about,
20 and that was the second modification of the pretrial
21 agreement, which is really the purpose we're here for today,
22 and that is whether the defense, which has a slash, S, and a
23 slash again for their signature, their signatures on the

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1 document, whether that was enough or whether I thought
2 something more should be done and in having the defense
3 counsel sign it actually with a wet signature.

4 You know, there's a lot of opinions on that, and what
5 I'm going to go with is no, that what you've -- you have your
6 name on there. If you don't agree with it, you'll -- you'll
7 tell me sometime a little bit later today, and we can deal
8 with it at that point. But I think -- you know, I like to
9 think of a court as an honorable place, and so you would have
10 certainly told me already if you didn't agree to the second
11 modification. So we'll -- we'll forgo any signatures on it.

12 And I believe that's about all that we discussed at --
13 at that conference yesterday. It was probably enough.

14 But I'll ask Colonel Foster, do you have anything to
15 add or do you have any objection?

16 TC [LTC FOSTER]: Nothing to add, Your Honor. Oh, you did
17 talk about defense counsel getting their SCI read-on. I think
18 that was Ms. Pilikyan was getting a read-on this morning.

19 MJ [Col MILAM]: I think I was told, yes, thank you, that
20 Ms. Pilikyan was going to be read in this morning at around
21 9:00. Was that done, Ms. Pilikyan?

22 CDC [MS. PILIKYAN]: Yes, Your Honor, it was.

23 MJ [Col MILAM]: Okay. Thank you. I appreciate that. So

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1 good. Thank you for that.

2 TC [LTC FOSTER]: Other than that, Your Honor, nothing
3 else.

4 MJ [Col MILAM]: Thank you, Colonel Foster. I appreciate
5 that.

6 And how about Mr. Dixon, anything to add or any
7 objection?

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

9 MJ [Col MILAM]: Okay. Thank you.

10 TC [LTC FOSTER]: Your Honor. One thing. I apologize.
11 We did talk a little bit about the group voir dire motion as
12 well.

13 MJ [Col MILAM]: Thank you. And I kind of lost track
14 because I was looking at Mr. Moss and saying he's going to
15 question me, so I was probably getting nervous already. And I
16 forgot to mention that we did talk about the group voir dire
17 and the concern of counsel that they -- I think just would
18 like to know what -- how it's going to work.

19 And what I intend to do, if you don't mind, is we can
20 take that up after we address the second modification to the
21 pretrial agreement before we knock off for the day, if that's
22 all right. Does that sound agreeable, Colonel Foster?

23 TC [LTC FOSTER]: Sounds good, sir.

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1 MJ [Col MILAM]: Thank you. How about you, Mr. Dixon?

2 CDC [MR. DIXON]: Yes, sir.

3 MJ [Col MILAM]: Okay. Thank you. Okay. Thank you for
4 that.

5 I was detailed to this commission by Colonel Douglas
6 Watkins, who was the Chief Judge of the Military Commissions
7 Trial Judiciary. That happened on 12 May 2021. The detailing
8 was pursuant to Rule for Military Commissions 503. I'm
9 certified and qualified in accordance with Article 21 -- or
10 excuse me, Article 26 of the Uniform Code of Military Justice,
11 as well as Rules for Military Commission 502 and 503. I have
12 previously been sworn under Article 42(a) of the Uniform Code
13 of Military Justice and Rule for Military Commissions 807, and
14 the memorandum detailing me to this case is at Appellate
15 Exhibit 001E, as in echo.

16 As stated in Appellate Exhibit 074, one of the
17 purposes of this hearing is to give counsel the opportunity to
18 question or to challenge me. I am not aware of any ground
19 that might be a challenge or a ground for challenge against
20 me. I do not expect to be called as a witness in this case.

21 I have provided a copy of my biography to the parties,
22 which is marked as Appellate Exhibit 001F, as in foxtrot.

23 At this time I offer voir dire from counsel for both

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1 sides, and I'll start with the prosecution, please.

2 TC [LTC FOSTER]: Thank you, Your Honor. I did have a
3 chance to take a look at your bio -- thank you for that -- and
4 looked at some of the dates, et cetera. So I just have a few
5 questions. Based on our procedural posture, I don't have a
6 ton of questions, and I'll try to go through them as quickly
7 as possible.

8 MJ [Col MILAM]: Thank you. Please.

9 TC [LTC FOSTER]: I note that you're a senior colonel, and
10 as a senior colonel you're probably creeping up on your MRD
11 and retirement date fairly soon.

12 Are you in the process of starting that retirement
13 process or contemplated it or spoken about that issue with
14 anybody to date?

15 MJ [Col MILAM]: No, only my wife.

16 TC [LTC FOSTER]: Fair enough.

17 MJ [Col MILAM]: And I contemplated it in my mind. That's
18 it. But I haven't -- there's no paperwork. I'm still more
19 than one year out, so I -- I think they either notify me about
20 the one-year point or I notify them. But that's coming up in,
21 I think, September 22nd is my -- is my 29th year of -- for
22 their purposes. I have been in longer, but for their purposes
23 for retirement.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [LTC FOSTER]: And do you have one year after that
2 before you reach MRD?

3 MJ [Col MILAM]: Correct. Correct, Colonel.

4 TC [LTC FOSTER]: Thank you. And that kind of sets up
5 really the heart of the question, as you're probably aware,
6 and that is the issue of a case from 2019 out of the Court of
7 Appeals for the D.C. Circuit. Are you familiar with the In
8 Re: Nashiri III case?

9 MJ [Col MILAM]: I am. I'm not very good with case names,
10 but I know what that one is about at least.

11 TC [LTC FOSTER]: And in that case ----

12 MJ [Col MILAM]: If you're talking about -- I'm sorry, if
13 your talking about post employment ----

14 TC [LTC FOSTER]: Thank you. You're absolutely correct.

15 MJ [Col MILAM]: I am familiar with it.

16 TC [LTC FOSTER]: And that sets up the question, because
17 that court determined that a process that had been undertaken
18 by a military judge to seek external employment created an
19 appearance of bias.

20 So I wanted to ask you have you recently or have you
21 currently engaged in a process where you are seeking outside
22 employment from the DoD?

23 MJ [Col MILAM]: No.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [LTC FOSTER]: Okay.

2 MJ [Co] MILAM]: But I will be happy -- I mean, I'll -- I
3 need to be very candid. My intention is to become a farmer.
4 I don't need to apply for that one. But I will also say that
5 I have applied for a job as a judge, as a chief judge at an
6 American Indian reservation in Maine, which is near where --
7 where I'm going -- I plan to settle.

8 TC [LTC FOSTER]: In Maine. That's very interesting since
9 I'm from Maine myself.

10 MJ [Co] MILAM]: There aren't too many of you.

11 TC [LTC FOSTER]: Okay.

12 MJ [Co] MILAM]: That's what I like about the state.

13 TC [LTC FOSTER]: That's right. There's a lot of farming
14 there as well.

15 MJ [Co] MILAM]: So that -- I have applied for a job.
16 it's with the Wabanaki tribe, and it's up in -- way up in
17 Maine near where the house that hopefully is being renovated
18 sometime soon ----

19 TC [LTC FOSTER]: Right.

20 MJ [Co] MILAM]: ---- is located in.

21 TC [LTC FOSTER]: Right, and that's an independent entity
22 not affiliated with the executive branch or the United States
23 Government in any way, correct?

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Co] MILAM]: I'll just tell you I have no idea. I
2 don't think so. The tribe itself is the one that put out
3 the -- the job opening and I saw it in a local paper up in
4 Maine.

5 TC [LTC FOSTER]: *Bangor Daily News*, probably?

6 MJ [Co] MILAM]: No, it was actually the *Quoddy Tides*.

7 TC [LTC FOSTER]: Okay.

8 MJ [Co] MILAM]: Or the *Machias Valley* -- I think it's
9 *Machias Valley News*.

10 TC [LTC FOSTER]: Right. Very good.

11 MJ [Co] MILAM]: It's pretty small. There's only about
12 1400 people up there.

13 TC [LTC FOSTER]: That's right, it is small. But no
14 affiliation that you're aware of with the U.S. government,
15 correct?

16 MJ [Co] MILAM]: I don't think the federal government
17 funds them, but I don't know that. I think it probably is the
18 State of Maine. I know the tribes though have a lot of
19 federal interaction, I just don't know. And I will tell you,
20 they haven't contacted me for an interview. I just threw
21 my -- threw my resume in.

22 TC [LTC FOSTER]: Anything about that process of applying
23 for that job in Maine, would it impair your ability to

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1 objectively, faithfully, and impartially fulfill your duties
2 as a military judge in this case?

3 MJ [Col MILAM]: No. No.

4 TC [LTC FOSTER]: Are you assigned a legal advisor or a
5 clerk?

6 MJ [Col MILAM]: If you mean Mr. Taylor, Mr. Fred Taylor,
7 he's my -- he's my lifeline. He's not here today. But he's
8 my lifeline as a legal advisor, I believe.

9 TC [LTC FOSTER]: I understand. And I'll ask you the same
10 question regarding him. Are you aware of any applications
11 that he's made ----

12 MJ [Col MILAM]: No.

13 TC [LTC FOSTER]: ---- for outside employment?

14 MJ [Col MILAM]: No, not that I know of. In talking to
15 him he intends to stay at this job, I believe, for the next
16 few years, at least, maybe to see some of the cases finally
17 finish.

18 TC [LTC FOSTER]: Is that something that you have an open
19 line of communication about that you've said to Mr. Taylor,
20 hey, Mr. Taylor, if you're going to apply to something ----

21 MJ [Col MILAM]: I just said how much longer are you going
22 to do this job.

23 TC [LTC FOSTER]: Right.

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1 MJ [Co] MILAM]: And he just responded.

2 TC [LTC FOSTER]: You are not aware of anything?

3 MJ [Co] MILAM]: No, no. I am not.

4 TC [LTC FOSTER]: Are you pretty confident that if he was
5 going to apply for something he would let you know and ----

6 MJ [Co] MILAM]: I don't know if he would let me know.
7 We're not that tight. I mean I like him, he's a nice man, but
8 I don't know that he would let me know. I have a feeling he
9 would let everybody know if it was -- because I have a feeling
10 he's very sensitive to that after what happened in the case.

11 TC [LTC FOSTER]: Right. You understand there were
12 significant ramifications for another commission and a number
13 of orders were vacated?

14 MJ [Co] MILAM]: Yeah.

15 TC [LTC FOSTER]: We certainly want to keep the record,
16 you know, clean in this case.

17 MJ [Co] MILAM]: I understand.

18 TC [LTC FOSTER]: I'll shift gears now, sir. I appreciate
19 that.

20 Are you familiar with the accused in this commission
21 in any way?

22 MJ [Co] MILAM]: No.

23 TC [LTC FOSTER]: Anybody that you know, a family member

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1 or a friend, have any personal connection with the accused or
2 this commission?

3 MJ [Col MILAM]: No.

4 TC [LTC FOSTER]: Have you read, seen, reviewed anything
5 regarding this particular commission from an extrajudicial
6 source, newspaper articles, podcasts, newsletters, anything
7 like that?

8 MJ [Col MILAM]: I haven't listened to any podcasts. I
9 think there was one article I may have read on it, and I'm
10 sorry to say I think. That's what my memory serves me when I
11 was first detailed. I didn't have the transcript or anything
12 to look at. And I believe I just put it into a search engine.

13 And -- but I don't even remember what the article --
14 it may have described what Mr. Khan is being accused of or
15 what he's -- maybe not even what he pleaded guilty to.
16 Because sometimes those are not as accurate.

17 So I'm sorry, I'm just trying to be as candid as
18 possible.

19 TC [LTC FOSTER]: Of course.

20 MJ [Col MILAM]: I do not remember what the article was,
21 but I think I looked at an article.

22 TC [LTC FOSTER]: Since you don't remember, you don't
23 remember any expression of any opinion about the commission or

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1 anything of that nature?

2 MJ [Col MILAM]: No, no, I didn't see anything. I think
3 it was very factual.

4 TC [LTC FOSTER]: Okay. Have you ever heard an individual
5 that has expressed an opinion about the commission that --
6 anybody that you've talked to about it?

7 MJ [Col MILAM]: No, and I haven't really talked to too
8 many people about it.

9 TC [LTC FOSTER]: And, you know, based on that article you
10 read, even though you're not really clear on the content,
11 there's nothing based on your review of that article that
12 would impair your ability to objectively, faithfully, and
13 impartially fulfill your duties as a military judge on this
14 commission?

15 MJ [Col MILAM]: No.

16 TC [LTC FOSTER]: Have you expressed any public opinions
17 about this particular commission in any way?

18 MJ [Col MILAM]: No, not really about the commissions at
19 all.

20 TC [LTC FOSTER]: I want to talk to you a little bit about
21 counsel, prosecution counsel, defense counsel. Do you know
22 any members of either of the prosecution or the defense team?

23 MJ [Col MILAM]: No. I see a couple of blue uniforms out

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1 there, but I haven't had the pleasure of meeting those
2 particular paralegals.

3 TC [LTC FOSTER]: I'm going to recite a list of names who
4 you might see on other pleadings that have previously been
5 filed. Specifically some of these have been individuals who
6 have been detailed to this commission and one individual who
7 has been supervising the commission as the chief prosecutor.
8 So I will recite those names and you let me know if those are
9 people you know, sir.

10 MJ [Col MILAM]: Okay.

11 TC [LTC FOSTER]: Major Richard Mitchell of the United
12 States Air Force?

13 MJ [Col MILAM]: No.

14 TC [LTC FOSTER]: Commander David O'Dowd, United States
15 Navy?

16 MJ [Col MILAM]: No.

17 TC [LTC FOSTER]: Major Christopher James, United States
18 Air Force?

19 MJ [Col MILAM]: He -- I know the name, because he's a
20 judge, I believe, right now in the Western Circuit of our
21 judiciary, the Air Force judiciary, and I don't know if I have
22 had e-mail contact. We haven't had any of our typical annual
23 conferences where we would meet, so he's -- he's a new judge,

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1 and I haven't met him yet.

2 TC [LTC FOSTER]: I'll follow up on that a little bit
3 later.

4 MJ [Col MILAM]: Okay.

5 TC [LTC FOSTER]: Lieutenant Colonel Joy Primoli, United
6 States Air Force?

7 MJ [Col MILAM]: I know her from -- we were at the same
8 assignment together. I may have been her supervisor, but I
9 don't remember writing her performance report, but I know who
10 she is. I haven't had contact with her since that assignment,
11 which was in two thousand -- it was between 2011 and 2014, is
12 when that assignment was.

13 She left before I did, and she -- she didn't work for
14 me day to day. In fact, you know what, I didn't write her
15 OPR, her performance report. She worked for AFAFRICA, which
16 is the Air Force Africa region, and I was with USAFE, the
17 United States Air Forces in Europe.

18 TC [LTC FOSTER]: Right.

19 MJ [Col MILAM]: And we also had AFAFRICA within our --
20 our realm. That's probably more than you need to know and it
21 probably -- you know, I now how it gets with military speak.
22 I think peripherally we were what I would call colleagues, but
23 she was also junior in rank to me, so we had discussions.

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1 TC [LTC FOSTER]: Okay. All right, sir, I will move onto
2 the next person on the list, Captain Timothy Keeton, United
3 States Navy?

4 MJ [Col MILAM]: No.

5 TC [LTC FOSTER]: William J. Schneider, Department of
6 defense?

7 MJ [Col MILAM]: No.

8 TC [LTC FOSTER]: Major Matthew Hracho, but it's
9 pronounced Rocco, but it's spelled H-R-A-C-H-O, United States
10 Air Force?

11 MJ [Col MILAM]: That name is familiar. I may have
12 crossed paths. I instructed at the Air Force JAG school and
13 he might have come through there when I was there. That name
14 sounds familiar.

15 TC [LTC FOSTER]: Major David Abdalla.

16 MJ [Col MILAM]: The name is familiar, but I don't -- I
17 can't place that one.

18 TC [LTC FOSTER]: Lieutenant Nathaniel Gross, United
19 States Navy?

20 MJ [Col MILAM]: No.

21 TC [LTC FOSTER]: Lieutenant Michael Hosang, United States
22 Army Reserve?

23 MJ [Col MILAM]: No.

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1 TC [LTC FOSTER]: Ms. Courtney Sullivan, Department of
2 Justice?

3 MJ [Col MILAM]: No.

4 TC [LTC FOSTER]: And the Chief Prosecutor, Brigadier
5 General Mark Martins?

6 MJ [Col MILAM]: No.

7 TC [LTC FOSTER]: Now, you cited Major James, Lieutenant
8 Colonel Primoli and maybe Major Hracho. And you've talked a
9 little bit about how you possibly met them, and you've also
10 outlined the nature of your relationship with them.

11 Any particular opinion about them that would sway you
12 or bias you in any way regarding the commission?

13 MJ [Col MILAM]: No.

14 TC [LTC FOSTER]: Okay. And do any of these past
15 relationships or any current relationships or associations
16 with the individuals that you've cited, would that impair your
17 ability to objectively, faithfully, and impartially fulfill
18 your duties as a military judge in this commission?

19 MJ [Col MILAM]: No.

20 TC [LTC FOSTER]: I'll run through a couple defense names
21 to see if perhaps you know them. Lieutenant Colonel Jon
22 Jackson of the United States Army Reserve?

23 MJ [Col MILAM]: No.

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1 TC [LTC FOSTER]: Lieutenant Commander Tia Suplizio,
2 United States Navy?

3 MJ [Col MILAM]: No.

4 TC [LTC FOSTER]: Lieutenant Commander Jared Henderson
5 [sic] of the United States Navy?

6 MJ [Col MILAM]: No.

7 TC [LTC FOSTER]: Brigadier General John Baker who is the
8 chief defense counsel. I think he's in the courtroom today.

9 MJ [Col MILAM]: No. I just had the pleasure of meeting
10 the general yesterday. But no.

11 TC [LTC FOSTER]: Colonel J.P. Colwell, former chief
12 defense counsel?

13 MJ [Col MILAM]: No.

14 TC [LTC FOSTER]: Relationships with past military judges
15 assigned to this commission. Colonel Douglas Watkins, you
16 mentioned he detailed you to this case, but ----

17 MJ [Col MILAM]: I have talked to him several times on the
18 phone, and I saw him fairly recently at the New Judges Course
19 at the Army JAG school. I think that was in June. And I only
20 shook hands with him and just said, How's it going? So we did
21 not discuss the case at all.

22 TC [LTC FOSTER]: Okay. And you've had some conversations
23 with him, though?

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1 MJ [Col MILAM]: We've had -- yes, on the phone we've
2 talked. Not about this case. I think it was more of -- I
3 think it was more of he wasn't necessarily going to use me as
4 a judge in the military commissions because of my potential
5 retirement date; you know, in other words, it's only about a
6 year away.

7 TC [LTC FOSTER]: Right.

8 MJ [Col MILAM]: And I think there was concern as to why
9 put Milam on a case when he's not going to be able to finish
10 it and it will just cause more problems, more voir dire, stuff
11 like that.

12 And so then this case came up. But we didn't even
13 talk about the case. He just said, Hey, I need you to do this
14 case, and that was all he said about it. "Sorry," I think he
15 might have said. But to me it's a nice opportunity, so --- --

16 TC [LTC FOSTER]: Yeah. He said he needed you to do this
17 case, so that -- you didn't feel pressured in any way?

18 MJ [Col MILAM]: -- oh, no. I think when he said needed,
19 I think he just meant like, hey, I've got on one else in the
20 bullpen. You're going to have to be the guy.

21 TC [LTC FOSTER]: Tag, you're it.

22 MJ [Col MILAM]: Yeah. And I think he thought maybe, you
23 know, because I'm close to retirement that it's just something

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1 I don't need. But I'm in until the day I leave, so whatever
2 they tell me.

3 TC [LTC FOSTER]: Colonel James Pohl, United States Army?

4 MJ [Col MILAM]: No. I only know his name from reading
5 the transcript.

6 TC [LTC FOSTER]: And Colonel Tara Osborn of the United
7 States Army, formerly Tara Hawk?

8 MJ [Col MILAM]: Only from the transcript. I saw Colonel
9 Osborn's name there.

10 TC [LTC FOSTER]: I think you've outlined the
11 relationship -- the contacts between the two judges that you
12 mentioned, Watkins and Pohl. No special relationships with
13 either one of those?

14 MJ [Col MILAM]: No.

15 TC [LTC FOSTER]: Will your relationship, opinion, esteem
16 of, impair or color your ability to reconsider de novo or
17 overturn or amend any of the commission's orders? Of course,
18 we only contemplate a very limited scope of what you'll
19 actually be doing with respect to orders. Anything that would
20 cause ----

21 MJ [Col MILAM]: No.

22 TC [LTC FOSTER]: ---- us any concern?

23 MJ [Col MILAM]: No. Thank you.

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1 TC [LTC FOSTER]: Shift gears a little bit. I'm almost
2 done.

3 Anyone close to you, a family friend, a member of --
4 you know, a member of your family, a trusted colleague, been a
5 victim of terrorism?

6 MJ [Col MILAM]: No.

7 TC [LTC FOSTER]: Okay. I did note from your bio that
8 you've got a couple of deployments.

9 MJ [Col MILAM]: Yes.

10 TC [LTC FOSTER]: I'll talk first about your deployment to
11 Kuwait, I believe in 2002. That was about a six- to
12 nine-month deployment; is that correct?

13 MJ [Col MILAM]: The Air Force doesn't really do six to
14 nine months in the old days. We -- it might have been four.

15 TC [LTC FOSTER]: I did meet a few Air Force folks in Iraq
16 that were on 90-day tours.

17 MJ [Col MILAM]: We don't talk about those guys.

18 TC [LTC FOSTER]: We were jealous.

19 MJ [Col MILAM]: Yeah. Yeah. It causes a little bit of
20 angst between the other services, I'm sorry.

21 TC [LTC FOSTER]: So approximately how many months did you
22 serve in Kuwait?

23 MJ [Col MILAM]: I think about four. It was August

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1 through December. I left before the hostilities.

2 TC [LTC FOSTER]: And I did note that, you know,
3 consistent with your -- with your bio, Your Honor. What were
4 your duties? I think you were in an SJA-type position.

5 MJ [Col MILAM]: I was a staff judge advocate for the
6 wing. They flew A-10s, and it was before all the Marines came
7 in. So a lot of Marines came into al-Jaber Air Base right
8 before the war kicked off.

9 TC [LTC FOSTER]: Did the unit that you supported as an
10 SJA suffer any casualties that could attributed to al Qaeda?

11 MJ [Col MILAM]: No.

12 TC [LTC FOSTER]: Did you witness any attacks, investigate
13 any situations involving terrorism or al Qaeda?

14 MJ [Col MILAM]: No.

15 TC [LTC FOSTER]: I'll switch to your Qatar deployment. I
16 think that was this 2010. Was it another four to six month
17 type?

18 MJ [Col MILAM]: No. That one was for a year.

19 TC [LTC FOSTER]: A year. Okay.

20 MJ [Col MILAM]: That one was a year.

21 TC [LTC FOSTER]: They got you long on that one.

22 MJ [Col MILAM]: Yeah, but we did it as a PCS, so again
23 it's probably still better than you poor guys.

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1 TC [LTC FOSTER]: And similar role as SJA?

2 MJ [Col MILAM]: I was the SJA for the wing at ----

3 TC [LTC FOSTER]: What did that particular wing do? I
4 know -- was it close air support again?

5 MJ [Col MILAM]: No, it's Al Udeid Air Base. They have
6 all kinds of -- I mean you have refueling out of there, but
7 they have all kinds of airframe that come in and out. It's
8 sort of a hub, I would call it, in the Middle East. I don't
9 think that's letting anything out. I think -- in fact, we
10 have families there now, so ----

11 TC [LTC FOSTER]: The same questions I asked you before,
12 Your Honor. Did that unit suffer any casualties as a result
13 of direct action of terrorism?

14 MJ [Col MILAM]: No.

15 TC [LTC FOSTER]: Okay. Nothing to do with al Qaeda?

16 MJ [Col MILAM]: No.

17 TC [LTC FOSTER]: You didn't witness any attacks that
18 were terrorist in nature?

19 MJ [Col MILAM]: No.

20 TC [LTC FOSTER]: Did you investigate any ----

21 MJ [Col MILAM]: No.

22 TC [LTC FOSTER]: Do you have any -- I know this sounds
23 crazy, but I have to ask -- any family members or friends that

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1 are involved in this commission in any way?

2 MJ [Co] MILAM]: No, I do not.

3 TC [LTC FOSTER]: A second to confer with counsel?

4 MJ [Co] MILAM]: Sure. Please. Please.

5 [Counsel conferred.]

6 TC [LTC FOSTER]: We defer to the defense now for their
7 questions, sir.

8 MJ [Co] MILAM]: Thank you, Colonel Foster. Thank you
9 very much. Mr. Moss.

10 DDC [MR. MOSS]: Good morning, Your Honor.

11 MJ [Co] MILAM]: Good morning.

12 DDC [MR. MOSS]: Thank you. Colonel Foster covered quite
13 a bit of ground, so I will be abbreviated.

14 MJ [Co] MILAM]: All right. Thank you.

15 DDC [MR. MOSS]: Thank you very much for your candor and
16 your answers, Your Honor.

17 Just a couple of questions. You noted no prior
18 involvement with the military commissions. But more broadly,
19 Your Honor, have you had any involvement or work done on any
20 issues related to Guantanamo or detainee affairs, more
21 broadly?

22 MJ [Co] MILAM]: No, I have not.

23 DDC [MR. MOSS]: Has Your Honor worked with the Central

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1 Intelligence Agency?

2 MJ [Co] MILAM]: No.

3 DDC [MR. MOSS]: Your Honor, do you have any friends or --
4 family or close friends that have worked or work with the
5 Central Intelligence Agency?

6 MJ [Co] MILAM]: No.

7 DDC [MR. MOSS]: Have you had any ex parte decisions or
8 rulings in this case thus far?

9 MJ [Co] MILAM]: No. Ex parte, I mean there's been some
10 rulings, but those were delivered to counsel. There's been
11 nothing else. And I haven't had any ex parte communications
12 with any party ----

13 DDC [MR. MOSS]: Great, Your Honor.

14 MJ [Co] MILAM]: ---- about the case.

15 DDC [MR. MOSS]: And we understand, and if you could just
16 clarify this from your -- your previous comments, responses to
17 Colonel Foster, you're committed to seeing this case through?

18 MJ [Co] MILAM]: I am.

19 DDC [MR. MOSS]: Okay.

20 MJ [Co] MILAM]: I am.

21 DDC [MR. MOSS]: Give me one second, Your Honor.

22 MJ [Co] MILAM]: I think you've asked that though of all
23 the other judges too. So I just know there's probably some

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1 frustration on everybody's side, but, yes. And I hope we're
2 done in October. That would be the plan for everybody, I
3 think.

4 DDC [MR. MOSS]: Us too, Your Honor, and certainly
5 Mr. Khan.

6 Your Honor, are you concerned that any decisions you
7 may make in this case or any rulings may have an adverse
8 impact on any future employment opportunities?

9 MJ [Col MILAM]: No.

10 DDC [MR. MOSS]: Your Honor, if I may have a moment to
11 confer with counsel.

12 MJ [Col MILAM]: Please.

13 DDC [MR. MOSS]: Your Honor, we don't see any reason to
14 challenge your -- your presiding over these proceedings.

15 MJ [Col MILAM]: Okay. Thank you, Mr. Moss. I appreciate
16 that.

17 And then I'll ask Colonel Foster, do you have any
18 challenge for cause?

19 TC [LTC FOSTER]: No basis for challenge for cause, Your
20 Honor. Thank you for your time.

21 MJ [Col MILAM]: Okay. Thank you, Colonel Foster. All
22 right. Thank you. So we got through that.

23 Does either side need a recess at all or are we ready

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1 to press on?

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

3 MJ [Col MILAM]: A recess?

4 CDC [MR. DIXON]: Yes. Thank you.

5 MJ [Col MILAM]: Okay. How about we shoot for five
6 minutes after 12, so a little more than 10 minutes, if that's
7 enough time. Does that sound like enough time, Trial Counsel,
8 or Mr. Dixon I'll start with you since you're up?

9 CDC [MR. DIXON]: Perfect, Your Honor.

10 MJ [Col MILAM]: Thank you. And Colonel Foster?

11 TC [LTC FOSTER]: Sounds good, sir.

12 MJ [Col MILAM]: Okay. The court's in recess until 1205.

13 [The R.M.C. 803 session recessed at 1154, 27 July 2021.]

14 [The R.M.C. 803 session was called to order at 1208,

15 27 July 2021.]

16 MJ [Col MILAM]: The commission is called to order, and
17 the parties are present. Okay.

18 Mr. Khan, if I could, a few questions for you, please.

19 First, I understand you've had some time to meet with
20 your counsel this morning to discuss the matters that we will
21 be taking up during the session, specifically ----

22 ACC [MR. KHAN]: Yes, I did.

23 MJ [Col MILAM]: I'm sorry?

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1 ACC [MR. KHAN]: Yes, I did, sir.

2 MJ [Co] MILAM]: Okay, I'm sorry. I was talking pretty
3 fast there.

4 So specifically we're going to talk about in a few
5 minutes your second modification to the pretrial agreement.
6 And were you able to discuss that matter with your counsel,
7 Mr. Khan?

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

9 MJ [Co] MILAM]: Okay. Thank you. I do want to advise
10 you once again of your right to attend these sessions, and I
11 think I'm compelled to do so.

12 You have the right to be present during all open
13 sessions of the commission. If you request to be absent from
14 any session, your session [sic] must be voluntary and of your
15 own freewill. Your voluntary absence from any session of the
16 commission is un -- is an unequivocal waiver of your right to
17 be present during that session.

18 Your absence from any session may negatively affect
19 the presentation of the defense in your case. Your failure to
20 meet with and cooperate with your defense counsel may also
21 negatively affect the presentation of your case. Under
22 certain circumstances, Mr. Khan, your attendance at a session
23 can be compelled regardless of your personal desire not to be

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1 present.

2 Regardless of your voluntary waiver to attend a
3 particular session of the commission you have the right at any
4 time to decide to attend any subsequent session.

5 So do you understand those rights that you have in
6 that regard, Mr. Khan?

7 ACC [MR. KHAN]: I understand, sir.

8 MJ [Co] MILAM]: Okay. Thank you.

9 So, Mr. Khan, what I'd like to do now is I would like
10 to go over the terms of the second modification of your
11 pretrial agreement. And the purpose of this review is to
12 ensure that you, the prosecution acting on behalf of the
13 United States Government, and the commission all understand
14 what it says, what obligations it imposes, and what benefit it
15 provides to them and to you. So, basically, I want to make
16 sure that everybody is on the same page as far as the
17 agreement stands and what it states, Mr. Khan.

18 Do you have a copy of the second modification of the
19 pretrial agreement in front of you?

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

21 MJ [Co] MILAM]: Okay. Perfect. Thank you. And that was
22 entered into the record as Attachment B to Appellate
23 Exhibit 012B, as in bravo. And I'll note that the first

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1 modification to the pretrial agreement was entered into the
2 record as Appellate Exhibit 012A, as in alpha.

3 And, Mr. Khan, for our purposes of going over this
4 modification, do you also have a copy of the pretrial
5 agreement and Appendix A for the original? That's a lot of
6 documents, I know.

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

8 MJ [Co] MILAM]: All right. Thank you. So what I would
9 like to do, Mr. Khan, is I would like to quickly go through
10 the second modification with you.

11 And do you -- would you like to read it over again
12 before we do that, Mr. Khan?

13 ACC [MR. KHAN]: No, sir.

14 MJ [Co] MILAM]: Okay. Thank you. So I -- what I would
15 ask, is that your signature on page 2 of the document,
16 Mr. Khan?

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

18 MJ [Co] MILAM]: Thank you. And then I note there are
19 what I'll call electronic signatures of your counsel as well
20 under your signature.

21 And you discussed the terms of the modification with
22 your defense counsel before you signed the document, Mr. Khan?

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

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1 MJ [Col MILAM]: And did they explain the terms of the
2 second modification to your satisfaction?

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

4 MJ [Col MILAM]: All right. Thank you. So if I'm reading
5 the second modification to the pretrial agreement, there's six
6 different areas that were modified, and those are labeled as
7 paragraphs 1 through 6 in the modification. And then there's
8 two paragraphs that are numbered 1 and 2 that deal with the
9 Appendix A to your original pretrial agreement.

10 So as -- as you know, I'm sure, Mr. Khan, there's the
11 pretrial agreement and then Appendix A, which is attached to
12 it -- we do that as separate documents in the Air Force -- or,
13 sorry, in the commissions. And so we'll talk about them
14 separately as well, please.

15 Okay. So what I'd like to do is I would like to go
16 through the first change, and that's -- that's at paragraph 1.
17 And the first change alters how much time can pass between the
18 date that you pleaded guilty and the presentencing hearing.
19 And it started as four years and it was changed to seven years
20 by the first modification to the pretrial agreement, and now
21 it will be nine years under the second modification. So when
22 we conduct the presentencing hearing in October of 2021 it
23 will have been nine years since you pleaded guilty in February

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1 of 2012.

2 Do you understand this change and do you agree to it
3 and this delay, Mr. Khan?

4 ACC [MR. KHAN]: I understand it, sir.

5 MJ [Co] MILAM]: Okay. And that was a bad question by me
6 because ----

7 ACC [MR. KHAN]: I agree.

8 MJ [Co] MILAM]: ---- it was compound. Thank you. You
9 figured it out. I appreciate that. All right. Thank you.

10 So let's look at the second paragraph. The second
11 change stated in the second modification, so, again, what
12 we're looking at, which is Appellate Exhibit 012B, with that
13 second change there are several listed adjustments to
14 paragraph 21 of the original pretrial agreement.

15 First, you waive the right to call live witnesses to
16 testify on your behalf, and you waive the right to present
17 evidence in extenuation and mitigation for the consideration
18 of the panel.

19 So I'm sure your attorneys explained that to you, but
20 essentially you've waived the right of putting on evidence
21 during the sentencing portion of your trial, and my question
22 for you, Mr. Khan, is do you understand that modification and
23 do you agree with it?

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1 ACC [MR. KHAN]: I understand it and I agree, sir.

2 MJ [Co] MILAM]: Thank you, Mr. Khan.

3 The second adjustment that's listed in paragraph
4 number 2 on the second modification is that you agree to
5 file -- you agree not to file, excuse me -- you agree not to
6 file any additional substantive motions as well as you will
7 move the commission to withdraw Appellate Exhibit 030, which
8 is your motion to compel the production of witnesses, and
9 Appellate Exhibit 033, which is your motion for pretrial
10 punishment credit and other related relief.

11 For both of those motions, the military judge at the
12 time ruled partially in your favor. And do you understand
13 that modification, Mr. Khan?

14 ACC [MR. KHAN]: I understand it.

15 MJ [Co] MILAM]: And you agree?

16 ACC [MR. KHAN]: I agree.

17 MJ [Co] MILAM]: All right. Thank you very much.

18 Third -- and this is, again, for the second change,
19 which is paragraph two in the second modification. The third
20 thing you do -- you agree to do is to ask the commission to
21 vacate the favorable ruling at Appellate Exhibit 033K, where
22 the prior military judge, Colonel Watkins, determined that he
23 had the authority to grant pretrial punishment credit for you

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1 if it was appropriate based on evidence that would be
2 presented.

3 Do you agree to that modification, Mr. Khan?

4 ACC [MR. KHAN]: I agree, sir.

5 MJ [Co] MILAM]: And I forgot to ask you first if you
6 understood it.

7 ACC [MR. KHAN]: I understand.

8 MJ [Co] MILAM]: Thank you very much.

9 So the fourth change, or the fourth thing that's
10 discussed in paragraph two of the second modification is that
11 you agree that if you do not grant -- if I do not -- I
12 apologize.

13 You agree that if I do not grant your motions to
14 withdraw Appellate Exhibits 030 and Appellate Exhibit 033, as
15 well as vacate the ruling at Appellate Exhibit 033K, then this
16 modification is void and without effect.

17 I don't intend to do that, Mr. Khan, at this point for
18 sure, but do you understand these actions and how they affect
19 your modification?

20 ACC [MR. KHAN]: I fully understand that.

21 MJ [Co] MILAM]: All right.

22 ACC [MR. KHAN]: Thank you.

23 MJ [Co] MILAM]: Thank you, Mr. Khan. Thank you.

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1 Do you have any questions about any of those four
2 particular points with regard to paragraph 2 on the first page
3 of the second modification, Mr. Khan?

4 ACC [MR. KHAN]: I don't.

5 MJ [Col MILAM]: Thank you. And I'll note for the record,
6 in furtherance of that last provision of paragraph 2 in the
7 second modification, that the defense filed Appellate
8 Exhibit 030RR and Appellate Exhibit 033P, and those motions
9 were not opposed by the prosecution.

10 Trial Counsel, do you still not oppose the relief
11 requested in those two motions?

12 TC [LTC FOSTER]: That is correct, Your Honor.

13 MJ [Col MILAM]: Thank you, Colonel Foster.

14 All right. Mr. Khan, the third change ----

15 CDC [MR. DIXON]: Your Honor.

16 MJ [Col MILAM]: Yes, please. Mr. Dixon.

17 CDC [MR. DIXON]: May I interject? We also filed AE 068C,
18 which is a pending motion. The motion to withdraw AE 068, I
19 was also on unopposed.

20 MJ [Col MILAM]: I'm sorry, what was that Appellate
21 Exhibit, please, Mr. Dixon?

22 CDC [MR. DIXON]: On June 25th, 2021, the defense filed
23 AE 068C, which was a motion to withdraw AE 068, AE 068 was a

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1 motion to preadmit sentencing exhibits.

2 MJ [Col MILAM]: Okay.

3 CDC [MR. DIXON]: We have moved to withdraw that in
4 accordance with paragraph 2 of the second PTA modification,
5 which relates not only to AE 030 and 033, but pending motions.

6 MJ [Col MILAM]: Thank you.

7 CDC [MR. DIXON]: So that was a pending motion.

8 MJ [Col MILAM]: Now I understand. Thank you.

9 CDC [MR. DIXON]: AE 068C is also unopposed by the
10 prosecution.

11 MJ [Col MILAM]: Thank you. I appreciate that. That's
12 correct, Colonel Foster?

13 TC [LTC FOSTER]: That is correct again, sir.

14 MJ [Col MILAM]: Thank you. Okay.

15 So, Mr. Khan, the third change of the second
16 modification to your original pretrial agreement is found at
17 paragraph that's marked number 3 on page 2 of that second
18 modification. It's at the top. It modifies paragraph 22 of
19 your original pretrial agreement.

20 And in this change the government agrees to bring your
21 father, with an additional family member as an assistant, to
22 attend the presentencing hearing we currently have scheduled
23 for October of 2021. Your father and his assistant would have

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1 to meet applicable travel and security requirements associated
2 with travel to Naval Station Guantanamo Bay.

3 And my question for you, Mr. Khan, is is that your
4 understanding of that paragraph?

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

6 MJ [Col MILAM]: And you still agree to it, Mr. Khan?

7 ACC [MR. KHAN]: I agree.

8 MJ [Col MILAM]: Thank you.

9 And, Colonel Foster, is that the government's
10 understanding as well?

11 TC [LTC FOSTER]: It is, Your Honor.

12 MJ [Col MILAM]: Okay. And so the government will work to
13 facilitate that with the defense?

14 TC [LTC FOSTER]: We have undergone that process.

15 MJ [Col MILAM]: Thank you. Thank you very much. Okay.

16 So, Mr. Khan, the fourth change in the second
17 modification is at number 4 on page 2. It will modify
18 paragraph 23 of the original pretrial agreement. And in this
19 change you waive the ability to present the testimony of two
20 previously retained experts or expert witnesses.
21 Additionally, you agree their compensation will be made in
22 accordance with the Regulation for Trial by Military
23 Commission.

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1 And, Mr. Dixon, do you know what -- what provision
2 that is of the regulation offhand? If you don't, that's okay.
3 I have something down, but -- I have paragraph 13-9 at page 53
4 and 54.

5 CDC [MR. DIXON]: If I could have a moment, Your Honor?

6 MJ [Co] MILAM]: Okay. Thank you.

7 You know, I don't think it matters, Mr. Dixon.

8 CDC [MR. DIXON]: Your Honor, I don't have the expert
9 requests that were approved by the convening authority in
10 front of me ----

11 MJ [Co] MILAM]: Okay.

12 CDC [MR. DIXON]: ---- so I can't speak to the particular
13 regulation.

14 MJ [Co] MILAM]: That's okay. Let me ask, though. The
15 defense is comfortable with not having those -- those expert
16 witnesses testify?

17 CDC [MR. DIXON]: Yes.

18 MJ [Co] MILAM]: And Mr. Khan, are you comfortable with
19 not having those witnesses here to testify?

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

21 MJ [Co] MILAM]: All right. Thank you very much.

22 So let's move on, please, to the fifth change, which
23 is paragraph 5 on page 2 of the second modification. And that

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1 will modify paragraph 24 of the original pretrial agreement.
2 And with it, Mr. Khan, you waive the right to present any
3 written statements. And this is consistent with change number
4 2 that we talked about on the first page of the second
5 modification of the pretrial agreement. And that goes with
6 the waiver of the right to present evidence in extenuation or
7 mitigation.

8 I take it, though, Mr. Khan, that you retain the right
9 to make a statement yourself, whether it is oral or in
10 writing; is that correct?

11 Major Lyness, please.

12 DDC [MAJ LYNESS]: Yes, Your Honor. Just to clarify, we
13 don't believe that that provision prevents the ability to do
14 that. That "written" is taken out, but unlike previously
15 provisions which talk about "will not," that this allows
16 Mr. Khan actually a more expansive to present any unsworns,
17 whether that's by video, hypothetically, or sworn statements.

18 So we would read it the other way, that it does not
19 limit Mr. Khan, but, in fact, it could just be more specific
20 to say that, you know, Mr. Khan has the ability to make an
21 oral unsworn or sworn statement, and just kind of clarifying
22 that written language, but it's not prohibiting Mr. Khan from
23 doing that.

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1 And we don't believe that's contradictory to
2 paragraph 2, which is specifically just talking about
3 witnesses and not all matters in extenuation and mitigation,
4 Your Honor.

5 MJ [Col MILAM]: Okay. Okay. So let me see if I can
6 capture that correctly in my mind, at least, and then you fix
7 it, and then I'll ask Colonel Foster and the prosecution how
8 they see it.

9 But what that says to me is -- so now the paragraph
10 will read, "I may submit sworn or unsworn statements during
11 the sentencing hearing." And what you said, Major Lyness, is
12 that that is directly for Mr. Khan to do; they would be his
13 sworn or unsworn statements.

14 DDC [MAJ LYNESS]: I think yes, part A, Your Honor. And
15 then part B, that he could still submit, you know, other
16 documentation and/or present, you know, once again, something,
17 a video by a family member at that point, because as long as
18 it, you know ----

19 MJ [Col MILAM]: Okay. So we -- you do read it broadly.

20 DDC [MAJ LYNESS]: Yes, Your Honor. Sorry to talk over
21 you.

22 MJ [Col MILAM]: No, that's my fault. Please go ahead.

23 DDC [MAJ LYNESS]: To say that he will not submit written

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1 material, which would be in the negative, which would prohibit
2 that. This is opening up all of those things.

3 And I think, Your Honor, the defense is reading it,
4 since the convening authority is limiting his ability to call
5 witnesses in the beginning, that we -- that the CA is still
6 allowing him to present matters in mitigation and extenuation
7 at his sentencing hearing in general and to not completely
8 prohibit Mr. Khan from doing anything at that -- at that
9 hearing. That's the way the defense is reading it.

10 MJ [Col MILAM]: Okay. Thank you, Major Lyness.

11 So Colonel Foster, how do you read it, please?

12 TC [LTC FOSTER]: Your Honor, the prosecution doesn't read
13 it that broadly. We would read it to mean that Mr. Khan has
14 the opportunity to present either a sworn or unsworn
15 statement. We did not anticipate any other extraneous
16 statements coming into evidence, and we would not read it that
17 broadly.

18 MJ [Col MILAM]: Okay. So we don't have a meeting of the
19 minds, it doesn't sound like. How do you want to handle it?
20 Do y'all want to talk about it, or is it -- is it something
21 that's not negotiable, as far as you're concerned?

22 And I'll start -- I'll start with the defense, I
23 guess, please.

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1 DDC [MAJ LYNESS]: Yes, Your Honor. And, you know, I
2 believe we have, you know, explained to the prosecution that
3 we have family member statements that will come in, you know,
4 at that time in matters of mitigation and extenuation, which
5 in my military practice I wouldn't call them unsworn
6 statements as far as this provision is really concerned. But,
7 you know, that is our intent, is to submit family members who
8 are not present, to submit those statements to the -- to the
9 panel for consideration at that time.

10 MJ [Col MILAM]: Okay. So let me ask, just so I
11 understand the parameters, if you don't mind, Major Lyness.

12 So typically we have character letters that would come
13 in in sentencing in a military court-martial; however, the
14 rules of evidence are typically relaxed with regard to
15 foundation, authentication, and hearsay.

16 Are you intending to do letters like that, or are you
17 intending to do affidavits, or are you intending to do a
18 video? I don't know, montage for lack of a better way to say
19 it?

20 DDC [MAJ LYNESS]: The former, as Your Honor laid out,
21 character witness, you know, statements where we would, you
22 know, ask Your Honor to relax the rules for submission to the
23 panel.

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1 MJ [Col MILAM]: Okay. All right. Thank you. I
2 appreciate that.

3 So, Colonel Foster, what is your position, then,
4 please?

5 I assume those would be -- those would be provided in
6 discovery to the government? Major Lyness, sorry, I'm back to
7 you.

8 DDC [MAJ LYNESS]: Yes, Your Honor, I wouldn't describe it
9 as discovery, we would provide it with plenty of lead time for
10 the prosecution to review and so they can have it and they
11 could essentially, you know, rebut as part of their own
12 rebuttal case, if they so choose if there was something
13 contradictory that they see fit.

14 MJ [Col MILAM]: And object to them?

15 DDC [MAJ LYNESS]: And object entirely, yeah.

16 MJ [Col MILAM]: Okay. Thank you.

17 So you've heard that, Colonel Foster. What is your
18 position, please?

19 TC [LTC FOSTER]: Your Honor, I would like to take a few
20 moments to confer with co-counsel and to speak with the chief
21 prosecutor so that we can have a clear way forward.

22 MJ [Col MILAM]: Sure. That's fine. I'll tell you -- I
23 mean, my goal is to get an agreement that's done and figured

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1 out so that when we go into October it's solidified and
2 settled.

3 So I think -- I think one proposition is that they
4 would submit letters to you and then you all have the
5 opportunity to first check the authenticity or what they're --
6 if the person providing the letter knows the facts and
7 circumstances, and then also to object to them for other
8 reasons. But I think you know that already, Colonel Foster.

9 So I think what you want to find out is how far the
10 prosecution wants to go, whether you're going to be adamant
11 that it's only Mr. Khan or whether it's going to be Mr. Khan
12 and we're going to not object or have -- object is the wrong
13 word, but we're not going to disagree with this agreement with
14 that understanding.

15 So I just want to make sure, of course, to have a
16 meeting of the minds. I didn't say that very well, and I
17 apologize. It wasn't very artful. I think you know what your
18 job is so I don't ----

19 TC [LTC FOSTER]: I do, yeah.

20 MJ [Col MILAM]: So how much time would you like?

21 TC [LTC FOSTER]: Can you give us an hour?

22 MJ [Col MILAM]: I can. Does that provide the people a
23 chance to get lunch as well? Defense, I don't know that I

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1 was -- I think we were going to try to press right on through.
2 It doesn't look like that's going to happen. So maybe that's
3 a bonus is that you can get some lunch. I don't know how it
4 works for Mr. Khan.

5 Do y'all provide him with lunch? I think I'll ask
6 Ghost -- do you know, Ghost?

7 **[The military judge conferred with courtroom personnel.]**

8 MJ [Col MILAM]: Okay. All right. Thank you. I
9 appreciate that. Okay. So why don't we do that. Why don't
10 we take an hour and we will be back on the record at 13:30,
11 please.

12 And I might also just say maybe -- maybe you find out
13 what's going on, Colonel Foster, and then you talk with the
14 defense if you're able to get ahold of them and then just kind
15 of see if there's a middle ground or something else and -- and
16 see how this works out, okay?

17 TC [LTC FOSTER]: Yes, Your Honor. I understand.

18 MJ [Col MILAM]: Thank you very much, all of you. I
19 appreciate it. The court is in recess -- or the commission.

20 **[The R.M.C. 803 session recessed at 1231, 27 July 2021.]**

21 **[The R.M.C. 803 session was called to order at 1335,**
22 **27 July 2021.]**

23 MJ [Col MILAM]: The commission is called to order. The

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1 parties are present to include Mr. Khan. Okay.

2 Colonel Foster, if you're ready?

3 TC [LTC FOSTER]: Your Honor, if I may?

4 MJ [Col MILAM]: Yes, please.

5 TC [LTC FOSTER]: I just note that LN1 Sean Spence is in
6 the courtroom with us now this afternoon in lieu of LN1
7 Mitchell.

8 MJ [Col MILAM]: Okay, welcome. Thank you.

9 TC [LTC FOSTER]: I had a chance to speak with co-counsel
10 and also conferred briefly with defense and I just want to
11 make it very clear that with respect to number 5, paragraph
12 number 5 of the second amended PTA, which relates back to
13 paragraph 24 of the previous PTA agreement, that there is a
14 meeting of the minds, okay?

15 We just merely want to clarify -- and we concur and
16 agree that the defendant is allowed to present matters in
17 extenuation and communication. We want a rules-based approach
18 under R.M.C. 1001, because that underpins that concept, okay?
19 Defendant shouldn't -- the accused should not be allowed to
20 just submit anything. Specifically R.M.C. 1001(c)(2)(C)
21 allows the accused to make an unsworn statement that may be
22 oral, written, or both.

23 What concerned the government, Your Honor, was the

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1 discussion about a video presentation, okay? That doesn't
2 seem to be consistent with oral or written. I would concede
3 that there may be a context in which an accused could make an
4 unsworn statement and perhaps dovetail some sort of video
5 within that, within that presentation.

6 And, you know, under R.M.C. 1001(c)(3), rules of
7 evidence are loosened by the military judge. Okay? They can
8 be loosened with respect to matters in extenuation,
9 mitigation, or both, and they can be relaxed. This includes
10 submitting letters, affidavits, other writings, other matters
11 of similar authenticity or reliability.

12 What we're merely asking for is for a rules-based
13 approach, that that be adhered to, and that matters that are
14 presented before this commission have authenticity and
15 reliability. That's it.

16 MJ [Col MILAM]: All right. Thank you. So I take that to
17 mean that you agree with what Major Lyness said, correct? In
18 other words, they'll have documents, maybe a video, I don't
19 know -- and so let me stop -- let me -- while I'm even talking
20 about it, so you're saying they can do a video, but it has to
21 be appended to the unsworn statement. Is that your position,
22 Colonel Foster?

23 TC [LTC FOSTER]: I think it would be subject to review by

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1 Your Honor to ensure that it comports under 1001.

2 MJ [Col MILAM]: Okay, all right. Thank you. So I take
3 that to mean that it's not precluded; that you can submit a
4 video, which might -- might be considered oral and it might be
5 admissible under R.C.M. -- or, sorry, R.M.C. 1001, and we'll
6 just have to take each piece as it comes with whether there's
7 an objection or not and then just a ruling made on the
8 objection.

9 I think that's what you're saying, right,
10 Colonel Foster, is that you want the rules -- the sentencing
11 rule, which is really 1001, to apply to this proceeding?

12 TC [LTC FOSTER]: Exactly, Your Honor ----

13 MJ [Col MILAM]: Okay.

14 TC [LTC FOSTER]: ---- dealing with all, you know, issues
15 related to extenuation and mitigation.

16 MJ [Col MILAM]: Okay. Thank you. And I think that's
17 what you've already said, right, Major Lyness, if I'm correct?

18 DDC [MAJ LYNESS]: Yes, Your Honor, it is. So nothing in
19 this provision contradicts the rules, first and foremost. And
20 second, it is the defense's intent to submit -- have Mr. Khan
21 submit an unsworn statement and letters from his family. In
22 accordance, we proffered an AE 061C, but we have kind of been
23 consistent throughout this process, and that's simply it. So

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1 we have a meeting of the minds, Your Honor. Thank you.

2 MJ [Co] MILAM]: Okay. I mean it sounds like it, with
3 what both sides have said, so I'm comfortable with it.

4 How about you, Mr. Khan, are you comfortable with it?

5 ACC [MR. KHAN]: Pretty comfortable with it, sir.

6 MJ [Co] MILAM]: Okay. Did you say "very" or "pretty"?

7 ACC [MR. KHAN]: "Pretty."

8 MJ [Co] MILAM]: Okay. All right. I'll take that as a
9 yes. Thank you. I appreciate it. Okay.

10 So let me ask this, Mr. Khan. Let me ask a little
11 better question hopefully. Are you agreeable to this
12 particular paragraph in your second modification to the
13 pretrial agreement?

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

15 MJ [Co] MILAM]: Okay. Thank you. All right.

16 Then what I would like to do is look at the sixth and
17 final change for the pretrial agreement that's listed in the
18 second modification to that pretrial agreement. And that's,
19 again, at paragraph 6 on page 2 of the second modification to
20 the pretrial agreement. It modifies paragraph 27 of the
21 original pretrial agreement.

22 And the change brings the timing of any recommendation
23 by the convening authority concerning your condition of

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1 detention to where you will be once the October 21st -- or,
2 excuse me, the October 2021 hearing is concluded. Any
3 recommendation he makes on your condition of detention will be
4 posttrial as opposed to pretrial. Does that make sense to
5 you, Mr. Khan?

6 ACC [MR. KHAN]: Yes, sir, it does.

7 MJ [Co] MILAM]: Thank you. And do you agree to that
8 change?

9 ACC [MR. KHAN]: I agree.

10 MJ [Co] MILAM]: Thank you. All right. So what I would
11 like to do now, Mr. Khan, is take the changes that we've
12 discussed with regard to the pretrial agreement, not the
13 Appendix A, but just the pretrial agreement, and ask you some
14 general questions, please.

15 So do you understand, Mr. Khan, the changes to the
16 original pretrial agreement as I have explained them to you?

17 ACC [MR. KHAN]: I do.

18 MJ [Co] MILAM]: Thank you. And, Mr. Khan, do you agree
19 to the changes to the original pretrial agreement as I have
20 explained them to you?

21 ACC [MR. KHAN]: Yes, I do.

22 MJ [Co] MILAM]: Thank you. And, Mr. Dixon, or whomever
23 on the defense, do you agree to the changes to the original

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1 pretrial agreement as I have explained them and discussed them
2 with Mr. Khan?

3 DDC [MAJ LYNESS]: Yes, Your Honor.

4 MJ [Col MILAM]: Thank you, Major Lyness.

5 And Colonel Foster, or someone on the prosecution
6 team, does the government agree to the changes to the original
7 pretrial agreement as I have explained them and discussed them
8 with Mr. Khan?

9 TC [LTC FOSTER]: They are consistent with said.

10 MJ [Col MILAM]: Thank you, Colonel Foster. All right.

11 Mr. Khan, the second modification to your pretrial
12 agreement also changes two terms in the quantum portion of the
13 agreement, or what we commonly call Appendix A, which was
14 previously marked, as I've stated previously, Appellate
15 Exhibit 013.

16 First, in paragraph number -- that was numbered 1, so
17 it's on page 2 of the second modification, and it's
18 paragraph 1, which is down towards the bottom of that page, on
19 page 2 -- I'm sorry, I lost my spot here.

20 What that paragraph does, Mr. Khan, is it reduces the
21 maximum sentence to confinement that the convening authority
22 can approve from 25 years in the original pretrial agreement
23 down to 14 years. Thus, the way Appendix A will now read with

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1 this second modification is that the convening authority will
2 approve a sentence not exceeding 14 years. Do you understand
3 this first modification to Appendix A of your pretrial
4 agreement?

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

6 MJ [Col MILAM]: Okay. And do you agree with that first
7 modification, Mr. Khan?

8 ACC [MR. KHAN]: I agree.

9 MJ [Col MILAM]: Thank you. So the second one is in
10 paragraph 2 on page 2 of the second modification to the
11 pretrial agreement. That's just down a little bit lower on
12 page 2. And in that paragraph it reduces the number of years
13 discussed in paragraph 3 of the original Appendix A from 19
14 years to 11 years. This paragraph in the original Appendix A
15 spells out the convening authority's discretion to approve a
16 lower sentence for you than what is approved in accordance
17 with paragraph 1 of Appendix A.

18 So two things to note, please, Mr. Khan. First, as I
19 said, it was 19 years and now it's -- it will be 11 years.
20 The second thing to note is that reducing your sentence to 11
21 years, or some number of years less than 14 years, is solely
22 within the discretion of the convening authority if he
23 determines you, quote, provided full and truthful cooperation

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1 amounting to substantial assistance, end quote, in accordance
2 with that paragraph number 3 in the original Appendix A.

3 So I threw a lot at you right there, Mr. Khan. But I
4 think the important thing to take away is the 19 years is
5 reduced to 11, but that 11-year point or -- or some other
6 amount of time between 14 years and 11 years is within the
7 discretion of the convening authority based upon that quote
8 and how he determines you fulfilled that.

9 Does that make sense to you, Mr. Khan?

10 ACC [MR. KHAN]: If I can be candid, I just -- go ahead.

11 CDC [MR. DIXON]: May we interject? Can we have a moment,
12 your Honor?

13 MJ [Co] MILAM]: Sure. And if I misrepresented it, please
14 tell me.

15 CDC [MR. DIXON]: May we have a moment?

16 MJ [Co] MILAM]: Yes, absolutely.

17 **[Counsel conferred.]**

18 CDC [MR. DIXON]: Your Honor, if I may, one point of
19 clarification. Your Honor referenced I believe a range of 11
20 to 14. The way the agreement is written, it is a sentence --
21 an approved sentence not to exceed 11 years with cooperation.
22 Without cooperation, it is an approved sentence of 14 years.

23 MJ [Co] MILAM]: You're correct. I apologize. I do see

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1 what you're talking about, and I think I misread it, Mr. Khan,
2 so thank you. And that's exactly what I want you to do is
3 don't just agree with me just to agree with me, especially on
4 something that important. So I agree.

5 So the convening authority, if he determines, in his
6 sole discretion, that Mr. Khan cooperated in accordance with
7 what -- I won't read out the sentence again, then he has to
8 make it 11 years, not something between 14 and 11. It has to
9 be 11. Is that correct?

10 CDC [MR. DIXON]: Your Honor, not to exceed 11. It can,
11 of course, be less than 11, but not to exceed 11.

12 MJ [Col MILAM]: Okay. Good. I mean, good. So I
13 think -- I think people are thinking through this better than
14 I am, Mr. Khan. I don't disagree with that.

15 But what do you think about that, Colonel Foster?

16 TC [LTC FOSTER]: I think that tracks the agreement, Your
17 Honor.

18 MJ [Col MILAM]: Okay. Thank you. So -- so let me -- let
19 me just say it so it's clear in my mind, Mr. Khan.

20 If the convening authority, in his sole discretion,
21 decides that you have cooperated under the terms of your
22 agreement, then he cannot approve a sentence that exceeds 11
23 years, but this does provide an opportunity for it to be less

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1 than 11 years. Is that your understanding, Mr. Khan?

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

3 MJ [Col MILAM]: Okay. Thank you. And Defense, is that
4 your understanding as well?

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

6 MJ [Col MILAM]: Okay. Thank you very much.

7 And, Colonel Foster, I think we've already said it but
8 I'm going to ask you one more time ----

9 TC [LTC FOSTER]: Still tracking, sir.

10 MJ [Col MILAM]: Okay. Thank you. Good. I appreciate
11 that being clarified for me. So taken as a whole, Mr. Khan,
12 do you understand the second modification to Appendix A of
13 your pretrial agreement?

14 ACC [MR. KHAN]: Affirmative, sir.

15 MJ [Col MILAM]: Thank you. And do you agree with the
16 second modification to Appendix A of your pretrial agreement?

17 ACC [MR. KHAN]: I totally agree.

18 MJ [Col MILAM]: Thank you very much.

19 And, Defense Counsel, do you agree with my
20 interpretation once it was corrected of the second
21 modification to the PTA?

22 DDC [MAJ LYNESS]: Yes, Your Honor.

23 MJ [Col MILAM]: Thank you, Major Lyness.

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1 Do you have any concerns of my inquiry as to
2 Mr. Khan's understanding and agreement with the second
3 modification?

4 DDC [MAJ LYNESS]: No concerns, Your Honor.

5 MJ [Col MILAM]: Thank you, Major Lyness.

6 Trial Counsel, do you agree with my second
7 modification of the pretrial agreement?

8 TC [LTC FOSTER]: I do, Your Honor.

9 MJ [Col MILAM]: Thank you, Colonel Foster.

10 And, Colonel Foster, do you have any concerns with my
11 inquiry as to Mr. Khan's understanding and agreement with the
12 second modification?

13 TC [LTC FOSTER]: He appears to be provident, sir.

14 MJ [Col MILAM]: Thank you. Mr. Khan, are there any
15 additional agreements, oral or written, which are not captured
16 by the original pretrial agreement, the first modification to
17 that agreement, or now the second modification to that
18 agreement? So in other words, has anybody made any promises
19 to you besides what we have in this agreement, these -- these
20 three agreements?

21 ACC [MR. KHAN]: No, they did not.

22 MJ [Col MILAM]: Okay. Thank you. Thank you. And,
23 Mr. Khan, has anyone made any promises or agreements with you

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1 that are not captured by any of these agreements that you have
2 with the government, so it's -- it's a similar question, and
3 maybe it's the same one, and maybe I just read it again.

4 But what I'm really concerned about, Mr. Khan, is that
5 somebody said to you, hey, you sign this and here's something
6 else we'll give you on the side. There's nothing like that,
7 right? That was leading.

8 Is there anything else like that? Let me ask that.

9 ACC [MR. KHAN]: No, sir, nothing.

10 MJ [Col MILAM]: Okay. Thank you. Thank you.

11 Trial Counsel, are there any additional agreements,
12 oral or written, which are not captured by the original PTA,
13 the first modification and now the second modification?

14 TC [LTC FOSTER]: No, there are not, Your Honor.

15 MJ [Col MILAM]: Thank you, Colonel Foster.

16 And, Defense, do you agree with that?

17 DDC [MAJ LYNESS]: Yes, Your Honor.

18 MJ [Col MILAM]: Thank you, Major Lyness. All right.

19 Mr. Khan, I would ask you to please take a couple of
20 minutes to discuss the second modification of the pretrial
21 agreement with your counsel as well as its meaning and effect.
22 So this might seem like overkill, Mr. Khan. I'd just like to
23 make sure that you're still comfortable with it. It's been a

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1 little while since it was proposed. We have discussed it, I
2 understand that, but I just want to make you're comfortable
3 with what you agreed to and you still want to go forward.

4 So if you would just take a moment to discuss that
5 with your defense counsel, and then I'll ask you if you still
6 want to proceed, okay?

7 ACC [MR. KHAN]: Your Honor, I've been through this so
8 many times.

9 MJ [Co] MILAM]: You're not ----

10 ACC [MR. KHAN]: I just want to -- you know, I just ----

11 MJ [Co] MILAM]: That's all right. If you -- if you -- if
12 you have consulted with them and you feel like you have
13 benefitted from their advice and you still want to proceed
14 with the second modification of the PTA, that's good enough
15 for me, Mr. Khan. Is that correct?

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

17 MJ [Co] MILAM]: Okay. All right. Thank you. All right.

18 Then, Mr. Khan, the commission finds that you have
19 knowingly and voluntarily entered into this second
20 modification to the original pretrial agreement, and as such
21 the commission accepts the second modification to the pretrial
22 agreement. Thank you.

23 ACC [MR. KHAN]: Thank you.

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1 MJ [Col MILAM]: And with that, the commission grants the
2 relief requested by the defense in Appellate Exhibits 030RR,
3 Appellate Exhibit 033P, and Appellate Exhibit 068C. Is that
4 correct?

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

6 MJ [Col MILAM]: Thank you. And there may be written
7 rulings on that just to clean -- make sure the record is
8 clean. I'm actually going to talk to Mr. Taylor about that,
9 but I think I'd like to put in a written ruling on it. So
10 that should be coming out in the near future. Thank you.

11 And with the granting of the relief requested in each
12 of these motions, it is the understanding of the commission
13 the requisite actions necessary to complete the second
14 modification and make it enforceable upon the convening
15 authority have occurred.

16 Do the prosecution and defense agree? Colonel Foster?

17 TC [LTC FOSTER]: Your Honor, you also have to vacate
18 AE 033K, sir, the 033K ruling.

19 MJ [Col MILAM]: That was -- was that Colonel Watkins'
20 ruling?

21 TC [LTC FOSTER]: It was.

22 MJ [Col MILAM]: Okay.

23 TC [LTC FOSTER]: Ruling on pretrial punishment.

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1 MJ [Col MILAM]: Thank you.

2 CDC [MR. DIXON]: Your Honor, 033K, vacatur of 033K is
3 encompassed within AE 033P, which Your Honor has indicated you
4 have granted.

5 MJ [Col MILAM]: Okay. Okay. Thank you. If it's not
6 clear for the record ----

7 TC [LTC FOSTER]: I don't disagree, I just wanted to make
8 sure the record is clear, that's all. I'm paranoid.

9 MJ [Col MILAM]: Better safe than sorry. Okay.

10 So now I'll go back to you, Colonel Foster. With the
11 withdrawal of those exhibits as well as the vacation of the
12 commission's ruling at AE 033K, are the following government
13 motions moot? And I have AE 030FF, the government motion for
14 pretrial -- sorry, for partial reconsideration of AE 030M; AE
15 030HH, which is the government motion to reconsider and
16 clarify AE 030GG; AE 060I, which is the government motion for
17 military -- for a Military Commission Rule of Evidence 505(h)
18 hearing; and AE 066, which is the government motion invoking
19 the national security privilege? Are those now moot, Colonel
20 Foster.

21 TC [LTC FOSTER]: Those four are now moot and withdrawn.

22 MJ [Col MILAM]: Super. And, Defense, do you agree with
23 that as well, please?

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1 CDC [MR. DIXON]: Yes, Your Honor, with the one caveat
2 that AE 066 was filed ex parte so we haven't reviewed it, but
3 based on the representations of its content and what we have
4 heard today, we have no objection.

5 MJ [Col MILAM]: Thank you.

6 CDC [MR. DIXON]: We agree it is moot.

7 MJ [Col MILAM]: Thank you. Okay. So those are moot.
8 And I will -- as I said, I'll do a written ruling on all that
9 that hopefully will make it clear for the record. Thank you.
10 All right.

11 So my next thing in my trial guide was is there
12 anything else to take up before we recess, but I think we do
13 have something else, and I think it had to do with the voir
14 dire of the court members.

15 Do we want to take that up now or do we -- is this any
16 reason we shouldn't?

17 Colonel Foster, do you -- do you want to take that up
18 now?

19 TC [LTC FOSTER]: Your Honor, I have no objection to
20 taking it up now, but it might be a better use of our time if
21 we have a clear understanding of Your Honor's way forward as
22 it relates to process and procedure for voir dire of the
23 members before we move into the argument concerning specific

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1 questions and additional ----

2 MJ [Co] MILAM]: Okay.

3 TC [LTC FOSTER]: ---- member instructions.

4 MJ [Co] MILAM]: I don't have a written ruling on that. I
5 saw that Colonel Watkins deferred on it, but my ruling from
6 the bench, which is always dangerous, is that we'll proceed
7 with voir dire like we do in a regular military
8 courts-martial, which is I will ask questions first. I saw
9 the proposed questions that you have for me. And then I will
10 open it up for group voir dire for each side, and then
11 there -- would take up individual voir dire from that point
12 forward. So that would be my process.

13 First, is that agreeable with the parties? I'll ask
14 you first, Colonel Foster.

15 TC [LTC FOSTER]: One moment, Your Honor, please.

16 MJ [Co] MILAM]: Yes.

17 **[Counsel conferred.]**

18 TC [LTC FOSTER]: No issue with that, Your Honor.

19 MJ [Co] MILAM]: I'm sorry?

20 TC [LTC FOSTER]: No issue with that.

21 MJ [Co] MILAM]: Okay. Thank you, Colonel Foster.

22 And, Mr. Dixon, or someone from the defense?

23 DDC [MAJ LYNESS]: Yes, Your Honor. We agree.

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1 MJ [Col MILAM]: Okay. Thank you, Major Lyness.

2 So that being said, do we want to take up the
3 individual questions or would you rather just have me rule on
4 what you've submitted? Have things changed a little bit? I
5 would say probably, since you submitted those or is that ----

6 DDC [MAJ LYNESS]: Your Honor, I think things have changed
7 a little bit, but I think from the defense's perspective we
8 stand on, you know, what we have submitted and we defer to
9 Your Honor to -- you know, to rule on the questions.

10 MJ [Col MILAM]: Okay. Thank you.

11 TC [LTC FOSTER]: Your Honor, I think the scope has
12 narrowed somewhat now based on Your Honor's acceptance of the
13 second PTA. And the government -- we're fine with you ruling
14 on the papers, Your Honor. I don't think it really needs
15 additional argument.

16 MJ [Col MILAM]: Okay. Well, I will tell you my normal
17 course of action is just to let the attorneys go unless
18 there's some question that I really think is outlandish.
19 And -- and you all know, you know, that they shouldn't be
20 harassing questions or things of that nature. They should be
21 something that you're looking for honest-to-goodness bias by
22 one of the court members.

23 I know there's trial technique in there that, you

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1 know, you're trying to persuade them right out of the chute.
2 That -- a certain amount of that is, of course, allowed. But
3 I would just ask you to zero in on what you think is important
4 for bias, and I think that's how I would like to proceed.

5 I don't know that I'm going to preclude any of the
6 questions that were proposed. And if you -- if you -- we can
7 take it up again right before we start, I guess, or you can
8 tell me some now if you really have heartburn about them, but
9 I would probably just say, Prosecution, please proceed and you
10 just ask what you want to ask. And defense, the same, once
11 you get up and do yours. And then we take it individually and
12 we deal with each member that there may be a challenge for
13 cause.

14 Is that -- does that sound agreeable to the parties?

15 TC [LTC FOSTER]: The prosecution is fine with that
16 methodology, Your Honor.

17 MJ [Col MILAM]: Okay. Thank you.

18 DDC [MAJ LYNESS]: Yes, Your Honor.

19 MJ [Col MILAM]: Okay. Thank you. That doesn't preclude
20 you from objecting. It's always a little bit hairy objecting
21 in front of the court members to another side's question
22 that's being asked, but I'm sure you can do it.

23 If I see something really weird -- I'll look at them

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1 again. If I see something really weird in one of those
2 questions that was presented, I'll -- I'll tell you all. But
3 when I looked at them I didn't see anything that was -- I
4 thought was crazy, so to speak, so -- okay.

5 Any other issues that we should take up while we're on
6 the record? This is our opportunity.

7 TC [LTC FOSTER]: Nothing else from the prosecution, Your
8 Honor.

9 MJ [Col MILAM]: Thank you, Colonel Foster.

10 CDC [MR. DIXON]: Nothing from the defense, Your Honor.

11 MJ [Col MILAM]: Okay. Thank you. Well, then I guess --
12 I guess we will be back in October, Mr. Khan, and hopefully we
13 will -- we will be done and your life can proceed from that
14 point on, okay?

15 ACC [MR. KHAN]: Looking forward to it, sir. Thank you.

16 MJ [Col MILAM]: I bet you are. Okay. And I know a lot
17 of other people are here too. Okay. Thank you all very much.

18 Then the court is in recess until our next session in
19 October.

20 [The R.M.C. 803 session recessed at 1400, 27 July 2021.]

21 [END OF PAGE]

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