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1 [The R.M.C. 803 session was called to order at 0912, 17 May
2 2016.]

3 MJ [CAPT WAITS]: The commission is called to order.
4 Trial Counsel, can you please state for the record who is here
5 to represent the United States?

6 TC [MR. VITI]: Good morning, Your Honor. [Inaudible]
7 once again present with the exceptions of deputy trial counsel
8 Lieutenant Colonel David Long and lead paralegal Sergeant
9 First Class Richard Lukas. Both have moved on to new
10 assignments and we thank them for their service.

11 In addition, new counsel have been detailed to the
12 government, and they are now present. Representing the
13 government today are myself, Felice John Viti, Assistant
14 United States Attorney for the District of Utah; Deputy Trial
15 Counsel, Commander Douglas Short, United States Navy;
16 Assistant Trial Counsel, Commander Kevin Flynn, United States
17 Navy; Assistant Trial Counsel, Lieutenant Commander Vaughn
18 Spencer, United States Navy; Assistant Trial Counsel, Major
19 Kristy Milton, United States Marine Corps. Also present at
20 counsel table are Sergeant First Class William Andreu,
21 United States Army; and Ms. Lindsey Spitler.

22 All trial counsel have been detailed to this military
23 commission by the chief prosecutor in accordance with the Rule

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1 for Military Commissions 503. All members of the government
2 are qualified under the Rule for Military Commission 502(d)
3 and have been previously sworn in in accordance with Rule for
4 Military Commission 807.

5 No member of the government has acted in any manner
6 which might tend to disqualify us in this proceeding. The
7 detailing document has been marked as Appellate Exhibit 003D.

8 Finally, I'd like to state these proceedings are
9 being transmitted stateside via CCTV to remote viewing sites
10 at Fort Meade, Maryland and Fort Devens, Massachusetts
11 pursuant to the commission's order Appellate Exhibit 0051
12 [sic].

13 MJ [CAPT WAITS]: Thank you, Mr. Viti. Because I'm going
14 to ask the same question in a few moments of the accused, I
15 want to make it clear for the record who the lead counsel is
16 for the government. My understanding is that's you; is that
17 correct?

18 TC [MR. VITI]: That's correct, Your Honor, although this
19 morning Lieutenant Commander Spencer will be arguing the 015K
20 motion.

21 MJ [CAPT WAITS]: Very well.

22 TC [MR. VITI]: Your Honor, I want to correct the record.
23 I apologize. Appellate Exhibit with respect to the

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1 broadcasting or transmission of these proceedings is 005I,
2 rather than 1. I apologize.

3 MJ [CAPT WAITS]: Okay. Thank you.

4 And who's going to be speaking for the defense this
5 morning?

6 DC [MR. RUSHFORTH]: Judge, Brent Rushforth for the
7 defense.

8 MJ [CAPT WAITS]: Okay, Mr. Rushforth. Could you please
9 approach the podium and inform the commission who's here to
10 represent the defense this morning?

11 DC [MR. RUSHFORTH]: Judge, Major Hall is actually going
12 to perform that service for the court.

13 MJ [CAPT WAITS]: All right. Major Hall, please.

14 As the prosecution did, if you could go ahead, either
15 you or the individual counsel themselves who are now detailed,
16 someone needs to put the detailing information, legal
17 qualifications, status as to oath, and whether anyone has
18 acted in any disqualifying manner. So I'd appreciate it if
19 either you or your co-counsel could do that at this time.

20 DDC [MAJ HALL]: Yes, Your Honor.

21 MJ [CAPT WAITS]: Thank you.

22 DDC [MAJ HALL]: All members of the defense have been
23 detailed to this military commission by the Chief Defense

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1 Counsel, Brigadier General Baker. In accordance with R.M.C.
2 503, we are qualified under R.M.C. 502 and we have been
3 previously sworn in accordance with R.M.C. 807. We have not
4 acted in any manner that might tend to disqualify us in these
5 proceedings and the document detailing is marked as AE 007.

6 MJ [CAPT WAITS]: Okay. At this time, Mr. Rushforth, I
7 would like for you to put your qualifications on the record,
8 and I will swear you unless you have previously been sworn in
9 by the military commission.

10 DC [MR. RUSHFORTH]: To my knowledge, Judge, I have not
11 been previously sworn. I am a civilian attorney that has been
12 admitted to the practice of law in the State of California,
13 the District of Columbia, many district, federal district
14 courts throughout the country, many courts of appeal, federal
15 courts of appeal and state courts of appeal throughout the
16 country, and the United States Supreme Court.

17 I am a citizen of the United States and I am not
18 subject to any disqualifying action by a Bar or other
19 competent authority. I hold a top secret security clearance.
20 I have agreed in writing to comply with the orders, rules, and
21 regulations of these military commissions and, Your Honor, I
22 have not yet been sworn.

23 MJ [CAPT WAITS]: Very well. You are qualified in

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1 accordance with Rule for Military Commission 502(d), to your
2 understanding; is that correct?

3 DC [MR. RUSHFORTH]: That's correct, Judge.

4 MJ [CAPT WAITS]: Very well. Then I will swear you at
5 this time.

6 [Mr. Rushforth was sworn.]

7 DC [MR. RUSHFORTH]: I do.

8 MJ [CAPT WAITS]: Very well. Thank you.

9 All right. Mr. Rushforth, thank you.

10 At this time I am going to be addressing the accused.
11 I know it came up yesterday in our R.M.C. 802 conference that
12 the accused has expressed a desire to be referred to by
13 another name. The government stated that they wanted to check
14 into the fact that, to their knowledge, he had, he had been
15 deposed in some type of federal proceeding and he swore --
16 took an oath using a certain name. The government wanted to
17 check that out before we began, referring to your client by
18 the name that you said he's requesting to be referred by.

19 The commission will also note for the record that at
20 arraignment in this case -- prior to arraignment in this case
21 there was a Rule for Military Commission 802 conference held
22 with counsel at which the commission asked by what name the
23 accused wanted to be referred in the commission, and the

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1 commission was informed that the name was "Mr. Hadi."

2 So, we've been doing that for almost two years.

3 DC [MR. RUSHFORTH]: I understand, Judge. If I may be
4 heard briefly.

5 MJ [CAPT WAITS]: You may, as soon as I'm finished
6 talking.

7 DC [MR. RUSHFORTH]: Okay. Sorry.

8 MJ [CAPT WAITS]: So I will continue to refer to him as
9 "Mr. Hadi" until such time as this issue is resolved. I've
10 been doing it for two years. I'm not going to deviate in the
11 middle of these proceedings based on a request that I've had
12 less than 12 hours to consider and to which the government
13 says that they have -- they may have input.

14 So I will hear you.

15 DC [MR. RUSHFORTH]: Your Honor, I have not much to say
16 except that we will refer to my client, our client, as
17 Mr. Nashwan al Tamir. That's his name. And I think it would
18 lead to less confusion in the record if the court referred to
19 him by the same name we refer to him, and if the prosecution
20 did.

21 I understand it's certainly the court's prerogative
22 not to do that. It's the prosecution's prerogative probably
23 not to do that. At some point, prosecution is going to have

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1 to prove that this is the -- this fellow is the Mr. Hadi
2 al-Iraqi that all of these allegations have been made against,
3 and they're going to have to prove that to the jury. But we
4 intend to refer to him by his name, which is Nashwan al Tamir.

5 MJ [CAPT WAITS]: Okay. I guess I'm not going to try and
6 prevent you from doing that. But as I said, I will continue,
7 until this issue is resolved, to refer to him by the name that
8 he said he wanted to be referred to by at the beginning of
9 this commission and by which he has been referred throughout
10 these proceedings. So I'm not saying that's permanent, I'm
11 just saying we haven't had time to figure it out yet.

12 DC [MR. RUSHFORTH]: I understand, Your Honor. I
13 understand exactly what you're saying. Thank you.

14 MJ [CAPT WAITS]: Okay. Thank you.

15 All right. Mr. Hadi, pursuant to the Manual for
16 Military Commissions, at this time it's the commission's
17 understanding that you are represented by Major Robert
18 Kincaid, Major Wendell Hall, Lieutenant Commander Keith
19 Lofland, who are your detailed counsel. I'll get to
20 Mr. Rushforth in a moment.

21 I'm just going to go back through your rights to
22 counsel with you, which I realize I've already done several
23 times in this case, but there's an entirely new group of

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1 people sitting at your counsel table, so we have to go through
2 this once again.

3 In addition to the military counsel that I just
4 listed, who the commission has received notice of detailing
5 for, you may also request another military lawyer, a different
6 military lawyer, to represent you. If that person that you
7 request is reasonably available, then that person would be
8 appointed to represent you. This is referred to as
9 "individual military counsel" in the rules for military
10 commissions.

11 If you are represented by counsel of your own
12 selection, you would normally lose the services of your
13 currently detailed three defense counsel. You may, however,
14 request that your currently detailed counsel, either one or
15 more of them, continue to represent you along with the counsel
16 that you request, and, at that point, the Chief Defense
17 Counsel, in his sole discretion, could grant or deny your
18 request.

19 Do you understand your right to individual military
20 counsel that I just described to you?

21 ACC [MR. HADI]: Yes. Yes, I do understand.

22 MJ [CAPT WAITS]: Okay. I'm having -- the monitor in
23 front of the accused is kind of blocking my view of his face.

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1 Is there any way we can turn that a little more out so that I
2 can actually see him? Someone?

3 If it could just be pulled forward on the table a
4 little bit so that the angle is not blocking. Can he see it
5 now?

6 Okay. Mr. Hadi, can you see the monitor?

7 ACC [MR. HADI]: I do see the monitor now, yes.

8 MJ [CAPT WAITS]: Okay. All right. Now, Mr. Hadi,
9 detailed defense counsel are provided to you free of charge,
10 at no cost to you. Do you understand that?

11 ACC [MR. HADI]: Yes, I do understand.

12 MJ [CAPT WAITS]: In addition to military defense counsel,
13 you may be represented by a qualified civilian attorney. A
14 civilian attorney would represent you at no expense to the
15 United States. To be qualified, the civilian attorney must be
16 a United States citizen, admitted to practice law in a state,
17 district or territory or possession of the United States, or a
18 federal court. He or she may not have been the subject of any
19 disqualifying action by a Bar or other competent authority.
20 He or she must be eligible for a secret clearance, or higher,
21 as required. And he or she must agree in writing to comply
22 with the orders, rules, and regulations of these military
23 commissions.

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1 Now, Mr. Brent Rushforth has been retained and, as
2 you just saw a few moments ago, he entered his appearance as
3 civilian counsel on your behalf on this basis. If a civilian
4 lawyer does represent you, your detailed defense counsel, the
5 three that I've already mentioned, will continue to represent
6 you as well, unless you specifically waive the right to be
7 represented by your detailed military counsel.

8 Do you understand everything that I have just
9 explained?

10 ACC [MR. HADI]: I do understand.

11 MJ [CAPT WAITS]: Very well.

12 And do counsel, specifically defense counsel,
13 understand and agree with -- well, I'm sorry.

14 All right. Now, Mr. Hadi, based upon prior
15 proceedings of this commission, and including your release of
16 your prior detailed counsel, that is, Lieutenant Colonel
17 Jasper and Major Stirk, the counsel currently seated at the
18 defense table have been detailed to represent you and Mr. --
19 it's the commission's understanding that Mr. Rushforth has
20 also been retained to represent you.

21 So the commission finds that your counsel have been
22 changed, at your request, pursuant to Rule for Military
23 Commission 505(d)(2)(B)(i). Do you, in fact, desire to be

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1 represented by the counsel currently seated at your table?

2 That is Mr. Rushforth, Major Kincaid, Major Hall, and

3 Lieutenant Commander Lofland?

4 ACC [MR. HADI]: Yes, I do like that.

5 MJ [CAPT WAITS]: Okay. So the commission finds that that
6 is the accused's election.

7 Mr. Hadi, at this time, as I stated earlier to
8 Mr. Viti, the commission requires that one member of your
9 defense team be designated as the lead counsel.

10 DDC [MAJ KINCAID]: Your Honor, the accused would like to
11 add something to your last question by whom he wishes to be
12 represented.

13 MJ [CAPT WAITS]: Okay.

14 ACC [MR. HADI]: There are other attorneys who are -- who
15 have not finished all the procedures yet and I can give their
16 names right now.

17 MJ [CAPT WAITS]: You may give me the names.

18 ACC [MR. HADI]: Ms. Moore and Mr. Chemerinsky and
19 Mr. Szymanski.

20 Sorry, the second name was Chemerinsky and the third
21 is Syzmanski. Mr. Palmer.

22 MJ [CAPT WAITS]: Okay, how many was that?

23 ACC [MR. HADI]: Four.

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1 MJ [CAPT WAITS]: I'm going to ask you, Mr. Kincaid --
2 there's four? Okay.

3 I want you to provide -- after we go off the record,
4 Major Kincaid, I want you to provide those names to the court
5 reporters and the proper spellings of their names, all right?

6 DDC [MAJ KINCAID]: Yes, Your Honor.

7 MJ [CAPT WAITS]: All right. I hear your request,
8 Mr. Hadi. The fact is under the Rules for Military
9 Commissions, you're entitled to one attorney. You have one,
10 two, three, four now. So this might be the subject of future
11 litigation, but at this time the commission finds that you are
12 properly represented and the proceedings of the commission
13 will move forward today.

14 All right. I don't think it's likely that we're
15 going to have more than this one session today during the two
16 days that we're scheduled to be here in Guantanamo. However,
17 I'm going to, at this time, advise the accused of his right to
18 be present and his right to waive his presence in this
19 commission.

20 So, Mr. Hadi, you have the right to be present during
21 all sessions of the commission. If you request to be absent
22 from any session, such absence must be voluntary and of your
23 own free will. Your voluntary absence from any session of the

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1 commission is an unequivocal waiver of the right to be present
2 during that session. Your absence from any session may
3 negatively affect the presentation of the defense in your
4 case. Your failure to meet with and cooperate with your
5 defense counsel may also negatively affect the presentation of
6 your case.

7 Under certain circumstances, your attendance at a
8 session can be compelled regardless of your personal desire
9 not to be present. Regardless of your voluntary waiver to
10 attend a particular session of the commission, you have the
11 right at any time to decide to attend any subsequent session.
12 If you decide, for example, not to attend a morning session
13 but wish to attend an afternoon session, you must notify the
14 guard force of your desire to do that. Assuming there's
15 enough time to arrange your transportation, you will then be
16 allowed to attend the afternoon session.

17 You will be informed of the time and date of each
18 commission session, prior to the session, to afford you the
19 opportunity to decide whether you wish to attend that session.

20 Do you understand what I explained?

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

22 MJ [CAPT WAITS]: Very well.

23 DC [MR. RUSHFORTH]: Judge, may I note an objection for

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1 the record.

2 MJ [CAPT WAITS]: Yep.

3 DC [MR. RUSHFORTH]: My objection is Your Honor's finding
4 the client is adequately represented by this team. I
5 understand the commission's rule. I object to the rule. And
6 as Your Honor noted, this is likely to be the subject of some
7 litigation down the road.

8 MJ [CAPT WAITS]: All right. Your objection is noted for
9 the record.

10 All right. At this time the commission is going to
11 summarize to Rule for Court-Martial 802 conferences that have
12 been held since the last session of this commission. The
13 first one was a telephonic conference held on the 18th of
14 November of 2015. At that telephonically were present Major
15 Kincaid and Brigadier General Baker, the Chief Defense Counsel
16 for the defense. For the prosecution, also by phone, were
17 Mr. Viti, Lieutenant Colonel Long -- who is no longer on the
18 case -- Commander Flynn, Lieutenant Commander Spencer, Major
19 Milton, Lindsey Spitler, and Sergeant First Class Lukas.

20 Present from the trial judiciary were myself; Captain
21 Blackwood, the clerk; Mr. Taylor; Mr. Lavender, who is the
22 courtroom security officer; Jeff Strotman; and Chief Petty
23 Officer Brenda Carr of the trial judiciary staff.

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1 At that 802 conference, I discussed the defense's
2 compliance with Appellate Exhibit 053B which were the notice
3 requirements in regard to detailing of counsel. The defense
4 stated at that time that they did not have a full team in
5 place and that they were in the process of retaining pro bono
6 civilian counsel.

7 General Baker indicated that he had identified two
8 pro bono attorneys and had reached an agreement with those
9 attorneys. He opined at that time that Mr. Rushforth would be
10 the lead counsel on the case. He stated that he was not
11 conflicted in the case and that the other attorney could
12 possibly only be advisory counsel.

13 The government agreed that the commission needed to
14 wait for civilian counsel to be retained before the commission
15 moved forward. The government requested that the commission
16 order deadlines for civilian counsel to complete certain
17 things. The government and the defense agreed that 1 January
18 of 2016 was an appropriate date for civilian counsel to
19 complete his -- in the case of Mr. Rushforth, his SF-86 to get
20 the process of his clearance started.

21 The government inquired about the defense signing of
22 the standard MOU. The defense indicated that all three
23 current defense counsel had signed and that -- and the

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1 military judge, I, informed them that they had to provide a
2 copy to [REDACTED] and also the courtroom security
3 officer.

4 I told -- I stated that there would be a hearing in
5 January to put all of this information on the record, which
6 obviously did not happen, because I'm doing it now. I stated
7 that an order would be forthcoming that would require
8 briefings from counsel on the right to civilian counsel, which
9 I do not think was ever followed up on.

10 I stated that I was aware that we had a conflict with
11 the Easter holiday for the March hearing and that I would
12 adjust that. Finally, the government requested that it be put
13 on the record that the accused had agreed with the delays to
14 allow time to obtain civilian counsel for his case.

15 Do counsel for either side wish to add anything to
16 the commission's summary of that 802 conference at this time?

17 Mr. Viti?

18 TC [MR. VITI]: Thank you, Your Honor. I think the only
19 thing that I recall our notes reflect is that there was an
20 agreement among the parties that we didn't have to wait for
21 the other counsel, the counsel that were mentioned by General
22 Baker, that we would -- once Mr. Rushforth was read on and
23 prepared, this commission would move forward.

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1 MJ [CAPT WAITS]: Okay. And the defense? Major Kincaid?

2 DDC [MAJ KINCAID]: Yes, Your Honor. The defense does not
3 agree with that recollection. In fact, we've maintained, both
4 in telephonic communications with Mr. Viti back in November,
5 again at the 802 and again in our motion in the conference
6 statement, that our position was that the accused is entitled
7 to his defense team and that we did not agree that only
8 Mr. Rushforth was to be the person we were waiting on.

9 In fact, the court's minutes indicating that there
10 might be a brief on the accused's rights to counsel selection
11 indicates that there was, in fact, some dispute over how long
12 we would have to wait for security clearances and whatnot to
13 be processed for all of his counsel, including at the time the
14 other civilian that had been identified by General Baker.

15 MJ [CAPT WAITS]: Okay. All right. Well, obviously
16 that's one more indication that this issue will have to be
17 resolved through pleadings. And the commission will make its
18 ruling at the appropriate time based on those pleadings.

19 All right. So the second R.M.C. 802 conference that
20 the commission needs to summarize is from last night,
21 yesterday evening, that's 16 May 2016 at 1700 up in Building
22 AV34. All the parties who are present here in the commission
23 today that have been put on the record were present for that

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1 conference.

2 I had counsel and the other administrative staff
3 introduce themselves to one another and give a brief summary
4 of where they came from and how they arrived at their
5 assignments here related to this commission.

6 I discussed many administrative issues that would be
7 addressed on the record, such as putting all the new counsel
8 on the record and having the accused elect counsel, which has
9 already been done today.

10 As I've already stated, Mr. Rushforth brought up the
11 fact that the accused wants to be called by -- wanted to be
12 referred to by a different name than he has been up to this
13 point in the commission. The government suggested that the
14 military judge address footnote 25 of Appellate Exhibit 055E
15 related to unlawful influence on the record today.

16 The defense, as has already been noted, raised the
17 issue that they have two more litigation attorneys as well as
18 two more advisory counsel that they would like to have brought
19 onto the case, which we've already discussed a little bit on
20 the record today.

21 The commission -- I discussed the -- what I consider
22 to be the way ahead in this case in terms of a pre-litigation
23 schedule to include a schedule for milestones related to a

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1 personal jurisdiction hearing, which is where the substantive
2 business of this commission ended last fall. The defense
3 stated that they may be -- they may be withdrawing that motion
4 that was filed by the prior counsel.

5 I instructed the parties for both sides that I wanted
6 them to meet with one another to agree on what the future
7 milestones of this commission should be for a pre-litigation
8 schedule. I asked them to discuss realistic time lines. I
9 stated that the milestones must include, as I've stated, a
10 personal -- a schedule for litigation of the issue of personal
11 jurisdiction.

12 I inquired of the government how much more classified
13 discovery was going to be forthcoming, and, based on their
14 proffer, the court -- the commission estimated that -- and
15 Mr. Viti agreed, that they were a little over three-quarters
16 of the way through production of classified discovery in this
17 case, which, for the record, is being reviewed by the
18 commission.

19 We discussed whether Mr. Rushforth had signed the
20 MOU. He stated that he had, but the courtroom security
21 officer had not received a copy yet. Do we have a copy now?

22 Now we do have a copy, so that issue is put to bed.

23 And finally, Mr. Rushforth stated that he intended to

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1 voir dire the military judge at today's hearing.

2 So do counsel for either side wish to add anything to
3 the commission's summary of last night's 802 conference?

4 TC [MR. VITI]: Yes, Your Honor. Just for clarity of the
5 record, the -- that portion of the classified information that
6 the commission is reviewing encompasses the 25 percent and not
7 the 75 percent.

8 MJ [CAPT WAITS]: Okay. Anything from the defense to add
9 to the commission's summary of the 802 conference?

10 DDC [MAJ KINCAID]: Yes, Your Honor. Point of
11 clarification with respect to the defense's probability of
12 withdrawing the motion on personal jurisdiction. It would be
13 withdrawn without prejudice to refileing it, because different
14 team theories at the time of filing are now involved, given we
15 have a new team.

16 MJ [CAPT WAITS]: Okay. I guess there's no reason for me
17 to discuss the -- I guess, the procedural -- the commission
18 did make one preliminary ruling on the motion as originally
19 filed, because it had to do with, you know, another -- a
20 requesting. It was styled as a request for an Article 5,
21 Category 5 hearing tribunal to determine the status, a status
22 hearing tribunal.

23 The commission already ruled that that would not be

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1 the avenue for resolution of the issue of personal
2 jurisdiction. So I guess I'm going to go ahead and say it
3 now.

4 That much -- as far as the commission is concerned,
5 that much is decided, so I'm not going to revisit the issue of
6 how the issue of personal jurisdiction is going to be
7 litigated or resolved. It's going to be through a personal
8 jurisdiction hearing. So to the extent that you intend to
9 go -- you know, to rewind back to the possibility of an
10 Article 5 tribunal, that's not going to happen.

11 So if your intention is to withdraw it and refile
12 under some theory that includes the personal jurisdiction
13 hearing in the form of a motions hearing, then I don't think I
14 can allow you -- I don't think I can deny you that
15 opportunity. I will give you that opportunity based on the
16 fact that we have a whole new table of newly detailed defense
17 counsel, and I will give you the opportunity to do that within
18 that framework.

19 So I hope that that was where you intended to
20 proceed.

21 DDC [MAJ KINCAID]: Your Honor, the defense's
22 understanding of that particular ruling is that, consistent
23 with case law from the Supreme Court, that this commission

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1 could make that finding, that it didn't need a separate
2 Category 5 tribunal.

3 Our intent is not necessarily at this time to upset
4 that finding as law of the case. However, once we get our
5 international law expert on board as well as our
6 constitutional law expert, we may file a motion to reconsider
7 the law of the case with that respect.

8 The part that we want to withdraw is the rest of it
9 going forward, hearing witnesses -- yeah, hearing witnesses,
10 taking evidence with respect to personal jurisdiction, which
11 would allow this commission to then make that finding.

12 MJ [CAPT WAITS]: Okay. I don't know if I'm following
13 you, but this is all tentative at this point. I put what I --
14 I put my position on the record. So, I guess at this point I
15 will wait for your pleadings.

16 DDC [MAJ KINCAID]: Yes, sir.

17 MJ [CAPT WAITS]: Okay. Does the government have anything
18 they want to put on the record related to the issue of
19 personal jurisdiction of the commission over the accused?

20 TC [MR. VITI]: Yes, Your Honor. With respect to the
21 withdrawal of motions, we agree with this commission that
22 anything that has already been decided is law of the case, and
23 we would oppose any withdrawal of such decision -- or motions

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1 leading to decisions of this commission.

2 With respect to any motions for reconsideration, if
3 they meet the basis, the legal basis, the statutory basis and
4 the rules, certainly, and if this court so decides, we'll
5 abide, obviously, by that decision.

6 But at this point we want to note our objection that
7 we will not -- we will oppose any attempt to withdraw any
8 motions for which this commission has already decided.

9 MJ [CAPT WAITS]: Okay. And I guess at this point I want
10 to add, I want to add one other thing that may -- well, that
11 will inform the commission -- the government, frankly, of the
12 commission's position moving forward.

13 The government, in its original attempt to establish
14 personal jurisdiction over the accused of this commission,
15 expressed in many pleadings that they intended to use the
16 opportunity also for the purpose of pre-admission of evidence
17 for the merits of the commission. And frankly, I think that
18 was part of what led to the fact that that attempt to go
19 forward with that fell apart.

20 I think it was overly ambitious at that stage of the
21 proceedings. I think it was somewhat of a distraction. I
22 understand the rationale, I've said, you know, in many
23 courts-martial where I've allowed pre-admission of evidence.

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1 But never, obviously, to the extent -- given the volume of
2 evidence that we're talking about in this commission.

3 I understand the inconvenience to witnesses and the
4 fact that people might have to testify more than once between
5 the interlocutory matters of the commission and the merits of
6 the commission, but I think that's just going to have to be
7 something that the government's going to have to abide -- have
8 to live with, frankly. I want the issue of personal
9 jurisdiction to be a much more refined and abbreviated,
10 frankly, process.

11 So I see you nodding your head and I like that. I'm
12 glad we're apparently on the same page on this. And I hope
13 that that will also inform the defense in terms of what they
14 propose as the way ahead in any new pleading that you intend
15 to file on the issue of personal jurisdiction. Okay?

16 Major Kincaid.

17 DDC [MAJ KINCAID]: Yes, Your Honor ----

18 MJ [CAPT WAITS]: Mr. Viti, do you have anything you want
19 to say first since this is more directed to you?

20 TC [MR. VITI]: Thank you, Your Honor.

21 Your Honor hit the nail on the head. We have been
22 discussing as a team the wisdom of trying to attempt both the
23 personal jurisdiction hearing and the pre-admit motions, and a

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1 lot of it was based on the convenience to the witnesses.
2 However, we have been -- I think we are at the point,
3 especially after Your Honor's suggestion, that we will
4 decouple those two issues, but we would ask Your Honor to keep
5 an open mind that if we do wish to present or pre-admit
6 evidence, that it be closer -- if Your Honor is inclined to do
7 it, closer to the time that this commission, the members are
8 called, and we're -- we have a better idea of the charges, how
9 they're going to shape up, and what evidence we need to
10 produce.

11 So I would ask Your Honor that we will not at this
12 point withdraw those pre-admit motions, although we very well
13 may, but have those hearings at a separate time from the
14 personal jurisdictions hearings and closer in time to the
15 trial of this matter.

16 MJ [CAPT WAITS]: Yeah, I will keep an open mind about
17 that. As I said, I'm not saying that I'm averse to all
18 pre-admissions. I'm just saying it wasn't working -- I don't
19 think it was efficient to, as you said, couple them with the
20 issue of the personal jurisdiction hearing.

21 So I will keep an open mind about the subject of
22 pre-admission before the merits of the commission, but I don't
23 think I'm going to budge on the joining of pre-admission

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1 motions with the jurisdictional hearing. Okay?

2 Major Kincaid.

3 DDC [MAJ KINCAID]: Sir, given that I confused the court
4 in my prior statement to the court, and given what you just
5 said, I just want to confirm that all the parties are in
6 agreement that there has not yet been a decision on personal
7 jurisdiction, only that this commission has the authority to
8 render that decision.

9 MJ [CAPT WAITS]: Yeah, I mean you would have seen
10 probably a relatively lengthy opinion if the commission had
11 already found that personal jurisdiction had been proven.

12 DDC [MAJ KINCAID]: I agree, Your Honor. But ----

13 MJ [CAPT WAITS]: I don't think that's subject to dispute
14 by anybody.

15 DDC [MAJ KINCAID]: I will just say that there have been
16 conversation between the parties that that was a point of
17 contention, which is why I made the statement I made. But now
18 that it's been resolved, I'm satisfied, Your Honor.

19 MJ [CAPT WAITS]: Okay. I find it a little hard to
20 believe that the government has represented to anyone that
21 they believe that they had proven personal jurisdiction.

22 Mr. Viti?

23 TC [MR. VITI]: No, Your Honor. In fact, we'd like that

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1 hearing. We would hope that hearing would come in July or
2 September. But absolutely not.

3 I think what our position is that maybe Rule 5 of the
4 Geneva Conventions do not apply and it is proven via a
5 jurisdictional hearing.

6 MJ [CAPT WAITS]: Okay. Well, I'm not going to go back
7 and try and recall what my preliminary ruling on how personal
8 jurisdiction was going to be proven said. I haven't reviewed
9 it lately, so I'm not going to opine on whether Article 5
10 applies or not. It was just not the ruling of this commission
11 that this was going to be something that would be ordered
12 because there were other legal ways under case law for
13 jurisdiction to be proven. And the avenue that we are going
14 to proceed under is by preliminary pretrial motions
15 hearings -- evidentiary hearings to give the government the
16 opportunity to prove that jurisdiction. Okay?

17 All right. I think we spent enough time on that
18 issue.

19 So at this point, Mr. Rushforth, you stated at the
20 802 conference last night that you wanted the opportunity to
21 voir dire me. I'm going to give you that opportunity, but not
22 yet, because I think one of the related issues to that voir
23 dire is a request that the government made, which I also noted

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1 in the summary of the 802 conference, that the government
2 wanted the commission to comment on footnote 25 of your motion
3 to continue this hearing. Appellate Exhibit 055E. That
4 footnote says, "Arguably, the failure of a military judge to
5 rule favorably for an Accused on this motion, given the facts
6 of the proposed amendments in question, is itself evidence of
7 unlawful influence by various members of the Executive Branch
8 acting in concert to effectuate unlawful influence on the
9 Commission's proceedings in direct violation of 10
10 United States Code 949b, and the Military Commissions Act."

11 Trial Counsel, what is the issue -- would you like to
12 be heard on this before I talk?

13 TC [MR. VITI]: Your Honor, the only thing -- sorry, Your
14 Honor.

15 The only thing I'd like to add is that in the body of
16 the motion, on page 16 of that motion, the defense did indeed
17 identify the military judge as part of the -- as an Executive
18 Branch official and not independent of the Convening
19 Authority. It gives a little context to that footnote.

20 MJ [CAPT WAITS]: Okay. What I will say about that
21 footnote, since the government's asked me to comment on it,
22 is, first of all, I base my rulings in any proceeding,
23 including this commission, on the law and the rules as they

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1 exist, not on what they may be in the future.

2 Second, for the record, I have not acted in concert
3 with anyone, and in particular, in denying the defense's
4 motion to continue the hearing, to hear the defense's motion
5 for a continuance. I have always and will continue to act
6 independently, as is my judicial duty.

7 I denied the defense's motion because the defense
8 failed to meet its burden, not because of any outside
9 influence by anyone. In an abundance of caution, for the
10 record, I find that the defense has not raised even some
11 evidence, the standard, of the specter of any appearance of
12 unlawful influence in connection with the proposed amendments
13 to the Military Commissions Act.

14 The defense's primary point of contention in their
15 motion is that the proposed amendments seek to alter rulings
16 already made by military commissions judges, and yet their
17 pleading does not provide any evidence or examples of any
18 proposed changes that would do this. Likewise, the defense
19 cites no proposed amendments that have anything to do with the
20 subject of continuances.

21 Third, the proposed amendments described by the
22 defense, whatever they are, are just that, proposed. They are
23 part of the legislative process and, at that, a preliminary

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1 stage of the legislative process and, thus, not ripe for
2 discussion.

3 The defense cites no legal authority for the concept
4 of so-called UI by statutory amendment. I am keenly aware of
5 my role as the last sentinel in protecting the commission from
6 unlawful influence. This is no more evident than in the fact
7 that I have already found apparent unlawful influence by a now
8 former Convening Authority in this case last year, a fact not
9 mentioned by the defense.

10 Finally, as a procedural matter, the issue of
11 unlawful influence was not appropriate for a continuance
12 motion. The issue of unlawful influence is always ripe for a
13 party to raise whenever it occurs. However, based on the
14 rules of this court, that's the type of motion that should be
15 raised in a motion for appropriate relief, not a motion for a
16 continuance.

17 Does that satisfy the government in terms of their
18 requested comment that I make on that portion of the defense's
19 motion that was denied?

20 TC [MR. VITI]: Yes, Your Honor. Thank you.

21 MJ [CAPT WAITS]: Does the defense want to put anything on
22 the record based on my statement?

23 DC [MR. RUSHFORTH]: Only, Your Honor, that we reserve the

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1 right to make an appropriate motion regarding unlawful
2 influence in the future if we perceive it, and we intend to do
3 that.

4 MJ [CAPT WAITS]: As I said, when unlawful command
5 influence is raised, there's never an inappropriate time to
6 bring it to the commission's attention. However, I would ask,
7 as with all things, that you style your motions appropriately;
8 that you file them under the proper guise, and that you are
9 discreet in the way that you bring matters to the attention of
10 the court.

11 DC [MR. RUSHFORTH]: Understood, Your Honor.

12 MJ [CAPT WAITS]: I don't want -- I don't want any more of
13 this throw everything but the kitchen sink at the commission
14 in a motion that is styled something that has nothing to do
15 with what the substantiveness of the motion is. It's hard to
16 do business that way.

17 DC [MR. RUSHFORTH]: Understood, Your Honor.

18 MJ [CAPT WAITS]: Okay. All right. So now I will open
19 the floor for voir dire by the defense. And if the government
20 has any follow-up voir dire, then they're welcome to bring it
21 to the commission.

22 Hold on one second, Mr. Rushforth.

23 All right.

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1 DC [MR. RUSHFORTH]: Your Honor, as I said to Your Honor
2 last night when we held our conference, in the almost 50 years
3 I have been practicing law, I have never examined a judge. So
4 I guess if you do this long enough, there's always a first.
5 So I approach this, I hope, in the proper spirit, Your Honor,
6 and thank you for allowing me the opportunity to do it.

7 MJ [CAPT WAITS]: That's part of our system.

8 DC [MR. RUSHFORTH]: Your Honor, do you have a past
9 relationship with or any current relationship with the
10 following individuals: Major General John D. Altenburg?

11 MJ [CAPT WAITS]: No.

12 DC [MR. RUSHFORTH]: Susan J. Crawford?

13 MJ [CAPT WAITS]: No.

14 DC [MR. RUSHFORTH]: Bruce E. MacDonald?

15 MJ [CAPT WAITS]: Well, I mean, he was the Judge Advocate
16 General of the Navy, and I've been in the Navy JAG Corps for
17 almost 29 years now. So I was a Judge Advocate during his
18 tenure as the Judge Advocate General of the Navy. I never
19 worked directly for him in any capacity in any of his
20 positions in the Navy. I knew him as the Judge Advocate
21 General.

22 I was an executive officer of a -- what was called a
23 trial service office at the time that he was the Deputy Judge

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1 Advocate General of the Navy, but I didn't really have any
2 direct dealings with him.

3 So I know him. I've never worked directly for him.
4 Obviously, he was very high on my chain of command at one
5 point in my Navy career.

6 DC [MR. RUSHFORTH]: Have you ever had a personal
7 relationship with him?

8 MJ [CAPT WAITS]: No.

9 DC [MR. RUSHFORTH]: Do you currently have any kind of
10 professional relationship with him?

11 MJ [CAPT WAITS]: No.

12 DC [MR. RUSHFORTH]: Paul Oostburg.

13 MJ [CAPT WAITS]: Don't. I know who he is. I have
14 never ----

15 DC [MR. RUSHFORTH]: I'm sorry, Paul Oostburg Sanz.

16 MJ [CAPT WAITS]: I've never met him. I know he's the
17 Convening Authority. I've never had a conversation with him.
18 I have no personal relationship with him. And I don't even
19 know anyone who knows him.

20 DC [MR. RUSHFORTH]: Do you have a past relationship or
21 any current relationship with any of the currently detailed
22 Trial Counsel?

23 MJ [CAPT WAITS]: I -- when I was first detailed to be --

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1 when I was first sworn and detailed to be a military judge,
2 Lieutenant Commander Spencer was assigned to, I believe, the
3 region legal service -- defense service -- then the Navy Legal
4 Service Office in Jacksonville. He was about -- he was on the
5 verge of leaving there when I came in as a military judge. He
6 never did any cases before me. I met him and we made small
7 talk and he left that command and we never had a, any
8 professional interaction until now.

9 DC [MR. RUSHFORTH]: And do you have any personal
10 relationship now?

11 MJ [CAPT WAITS]: No. Hold on one second. He wants to
12 say something.

13 ATC [LCDR SPENCER]: Your Honor, just to add for the
14 record that I was also present at the change of command with
15 Captain Alex Whitaker when you took over as commanding officer
16 legal.

17 MJ [CAPT WAITS]: Oh, you were. But he was not a
18 prosecutor or a defense counsel who appeared before me at that
19 time. So I only knew him socially, if even that. I recall
20 maybe a couple of conversations with him.

21 ATC [LCDR SPENCER]: Sir, that's correct. I had already
22 PCS'd given my relationship with Captain Whitaker.

23 MJ [CAPT WAITS]: You came back for the change of command.

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1 ATC [LCDR SPENCER]: Already at the Justice School at that
2 point for six months.

3 MJ [CAPT WAITS]: Okay.

4 DC [MR. RUSHFORTH]: Do you have a past relationship or a
5 current relationship with Brigadier General Mark Martins?

6 MJ [CAPT WAITS]: I do not.

7 DC [MR. RUSHFORTH]: Do you have a past relationship with
8 or any current relationship with Army Captain Khalil Tawil?

9 MJ [CAPT WAITS]: I don't even know who that is.

10 DC [MR. RUSHFORTH]: Okay. Have you had any discussions
11 with Mr. Fred Taylor, who we learned yesterday at the
12 conference was previously on the Nashiri team, about the
13 Nashiri case?

14 MJ [CAPT WAITS]: I mean, I probably have, but nothing --
15 nothing that would influence my ability to be an impartial
16 judge in this commissions case.

17 DC [MR. RUSHFORTH]: Have you discussed with him his role
18 that he played on that team?

19 MJ [CAPT WAITS]: I know what role he played on that team.
20 I mean, he was on -- he was assigned to the Office of Military
21 Commissions trial judiciary. So he was a legal advisor to the
22 military judge and continues to be for the Nashiri case.

23 DC [MR. RUSHFORTH]: He continues at this point to be?

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1 MJ [CAPT WAITS]: Yeah. I mean, it's not -- his primary
2 duty is as chief of staff for the Office of Military
3 Commissions trial judiciary, but I believe he continues to
4 serve as a legal advisor to the judge in that case.

5 DC [MR. RUSHFORTH]: Have you spoken to him about any
6 potential conflict between the Nashiri case and this case?

7 MJ [CAPT WAITS]: No.

8 DC [MR. RUSHFORTH]: To your knowledge, Judge, how many
9 people in the trial judiciary office were previously active in
10 any active case, either in a defense or prosecution role?

11 MJ [CAPT WAITS]: None that I know of. To my knowledge,
12 none.

13 DC [MR. RUSHFORTH]: To your knowledge, how many people in
14 the Convening Authority's office were previously in any active
15 case either in a defense or prosecution role?

16 MJ [CAPT WAITS]: I wouldn't have any way of knowing that.

17 DC [MR. RUSHFORTH]: Let me turn to the subject of 505
18 ex parte meetings, those ex parte -- 505 ex parte meetings
19 that you have held with the prosecution in this case. Have
20 you had such meetings?

21 MJ [CAPT WAITS]: I've had one. Usually the -- my clerk,
22 Captain Blackwood, is the one who actually physically, you
23 know, has a physical meeting with the prosecutors. I try to

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1 avoid those myself. There wouldn't be anything wrong with me
2 doing it, but I am located -- you know, I'm physically
3 stationed in Naples, Italy, so Captain Blackwood, my clerk, is
4 the one who normally meets with them.

5 DC [MR. RUSHFORTH]: Do you know how many times Captain
6 Blackwood has met with them?

7 MJ [CAPT WAITS]: I don't know for sure. I would say
8 probably less than five or six times.

9 DC [MR. RUSHFORTH]: And have you discussed each of those
10 505 ex parte meetings with Captain -- is it Captain Blackwood?

11 MJ [CAPT WAITS]: Captain Blackwood. Only to the extent
12 of, you know, did you talk to them? Have they taken the --
13 have they taken my -- you know, the input that I've had on the
14 proposed summaries, substitutions, and redactions, have
15 they -- have you given them back to them for consultation with
16 the OCAs?

17 DC [MR. RUSHFORTH]: Do you know how many pages of
18 documents either you or Captain Blackwood have reviewed?

19 MJ [CAPT WAITS]: No. Not off the top of my head. I
20 would say -- I mean, I think in terms of binders, and I would
21 say at this point probably close to 40 binders.

22 DC [MR. RUSHFORTH]: And do you have an estimate as to how
23 many pages of documents there are in each of those binders?

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1 MJ [CAPT WAITS]: No.

2 DC [MR. RUSHFORTH]: Big, fat binder?

3 MJ [CAPT WAITS]: They vary.

4 ATC [LCDR SPENCER]: Your Honor, may I be heard briefly?

5 MJ [CAPT WAITS]: Sure.

6 ATC [LCDR SPENCER]: Your Honor, the government has
7 already ruled, I think multiple times, that under 505 such
8 procedures are allowed. Therefore, questioning relative to
9 what those procedures -- attempt to pierce those procedures,
10 find out the volume of what was discussed, is improper.

11 MJ [CAPT WAITS]: Okay. Yeah, I'm not really sure what
12 the relevance and need of this line of questioning is,
13 Mr. Rushforth.

14 DC [MR. RUSHFORTH]: Well, Your Honor, to me it's entirely
15 new that a judge meets with the prosecution ex parte and
16 agrees to do stuff to documents. And consequently, I'm the
17 author of these questions and I think it potentially --
18 whether it's in accordance with the rules or not, potentially
19 does reflect prejudice, in my view.

20 MJ [CAPT WAITS]: Prejudice -- well, we're talking about
21 my ability to sit as an impartial judge in this case.

22 DC [MR. RUSHFORTH]: That's correct.

23 MJ [CAPT WAITS]: So you're going to have to tie your

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1 questions to that issue. It's not -- this can't be like a
2 discovery session on how does the 505 process work. Because
3 it's authorized by the manual. And, for the record, it's odd
4 to me, too. Until I became a commissions judge, I never had
5 an ex parte hearing with counsel in any court-martial.

6 Mr. Viti.

7 TC [MR. VITI]: Yes. And for the record, Your Honor, the
8 505 which refers to CIPA, the Classified Information
9 Procedures Act, has been in effect since the early 1980s, I
10 believe. There are many, many cases as we have cited in
11 our -- I think they were replies now to the defense motion --
12 I'm sorry, responses to a motion for a 505 hearing.

13 I would suggest that maybe we all reread those
14 replies, those cases, and we familiarize ourselves with
15 ex parte hearings with respect to classified information.
16 And, in fact, it's not only classified information. I believe
17 the rules for court-martial do allow ex parte hearings with
18 respect to other information regarding discovery, as does Rule
19 16 of the Federal Rules of Criminal Procedure.

20 MJ [CAPT WAITS]: Right.

21 DC [MR. RUSHFORTH]: Well, I appreciate Mr. Viti's advice
22 and I will, in fact, go back and study these rules, Judge, and
23 will dispense with any more questions about 505. I'm

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1 extremely uncomfortable with this procedure. The -- and I
2 don't know, maybe I'm bound by it. I don't know whether I am
3 or not as a defense counsel -- as lead defense counsel in this
4 case. I don't like it and if I can attack it, I'm going to
5 attack it.

6 MJ [CAPT WAITS]: That's your prerogative. I'm just
7 following the law.

8 DC [MR. RUSHFORTH]: How many ex parte meetings have you
9 conducted with the prosecution in this case?

10 MJ [CAPT WAITS]: One, and it was here in this courtroom
11 very -- it was after I reviewed the first, I'll call it a
12 "batch" of classified material.

13 DC [MR. RUSHFORTH]: And was the defense notified?

14 MJ [CAPT WAITS]: Yes.

15 DC [MR. RUSHFORTH]: Have you ever ruled in any case at
16 any time as a judge on the admissibility of evidence derived
17 through torture?

18 MJ [CAPT WAITS]: No.

19 DC [MR. RUSHFORTH]: Have you ever ruled on the
20 admissibility of evidence derived through enhanced
21 interrogation techniques?

22 MJ [CAPT WAITS]: No.

23 DC [MR. RUSHFORTH]: Have you ever ruled on the

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1 admissibility of evidence educed through so-called "rough
2 handling"?

3 MJ [CAPT WAITS]: No.

4 DC [MR. RUSHFORTH]: Have you ever advocated as counsel in
5 any case the admissibility of evidence educed through torture?

6 MJ [CAPT WAITS]: No.

7 DC [MR. RUSHFORTH]: Or through enhanced interrogation
8 techniques?

9 MJ [CAPT WAITS]: No.

10 DC [MR. RUSHFORTH]: Or through rough handling?

11 MJ [CAPT WAITS]: No.

12 DC [MR. RUSHFORTH]: What is your relationship, if any,
13 with Chief Judge Pohl?

14 MJ [CAPT WAITS]: He is the, obviously the chief judge of
15 the military commissions trial judiciary. I've had, you know,
16 numerous conversations with him, particularly when I first was
17 detailed as a military judge regarding, you know, logistical
18 procedures of hearing commissions cases in Guantanamo.

19 I wouldn't say we're friends. We haven't socialized
20 together. We may have eaten a couple of meals together here
21 in Guantanamo when our times overlapped.

22 To at how little interaction I have with Judge Pohl.
23 It's, frankly, rare.

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1 DC [MR. RUSHFORTH]: Do you understand that he would make
2 the final decision on any motion by any party to recuse you
3 from this case?

4 MJ [CAPT WAITS]: No, I didn't understand that. That's a
5 decision I would make for myself.

6 DC [MR. RUSHFORTH]: Would he review it?

7 MJ [CAPT WAITS]: No.

8 DC [MR. RUSHFORTH]: It was recently reported, in fact, in
9 the *New York Times* that ----

10 MJ [CAPT WAITS]: You're talking about Judge Pohl?

11 DC [MR. RUSHFORTH]: Yeah.

12 MJ [CAPT WAITS]: Okay.

13 DC [MR. RUSHFORTH]: ---- that Chief Military Judge Pohl
14 was authorized to -- or authorized evidence to be deleted or
15 destroyed if it was physical evidence. To your knowledge,
16 does it or could it involve the accused in this case? Was
17 that -- did you understand that question?

18 MJ [CAPT WAITS]: No. Can you please repeat that
19 question?

20 DC [MR. RUSHFORTH]: It's been reported that Judge Pohl
21 authorized destruction of evidence in another case, and the
22 report is that it's physical evidence. Do you know whether
23 that physical evidence has any bearing on this case?

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1 MJ [CAPT WAITS]: Number one, I didn't know anything about
2 that article. Number two, I didn't know that -- I mean, if
3 it's true that he authorized that, and so I would have no way
4 of knowing whether it had anything to do with the evidence in
5 this case.

6 DC [MR. RUSHFORTH]: So you ----

7 MJ [CAPT WAITS]: He didn't talk to me about it.

8 DC [MR. RUSHFORTH]: That was my next question.

9 MJ [CAPT WAITS]: No. The last time I talked to Judge
10 Pohl, just to give you a little context of how infrequent our
11 contacts are, was at the joint military judges' annual
12 training in -- at the Air Force JAG school in Montgomery back
13 at the beginning of February. And that was with, you know,
14 every military -- every trial military judge from all the
15 services. And even at that, in a four-day period, I think I
16 talked to him one time ----

17 DC [MR. RUSHFORTH]: Have you ever talked to ----

18 MJ [CAPT WAITS]: ---- for about ten minutes maybe.

19 DC [MR. RUSHFORTH]: And have you ever talked to him about
20 the destruction of evidence in this or any other case?

21 MJ [CAPT WAITS]: No.

22 DC [MR. RUSHFORTH]: Have you ever had any discussions,
23 whatever, with any military judge about the charges and common

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1 allegations against the accused in this case?

2 MJ [CAPT WAITS]: I have had conversations with maybe
3 probably Judge Pohl about the idea of common allegations. I
4 mean, judges -- there's nothing wrong with judges asking each
5 other professional questions.

6 DC [MR. RUSHFORTH]: I wasn't suggesting that there is.

7 MJ [CAPT WAITS]: So I think I have with Judge Pohl,
8 because I believe that in the KSM case there was -- there were
9 common allegations alleged in that case, also.

10 DC [MR. RUSHFORTH]: Have you had discussions with Judge
11 Pohl, and maybe you just answered this, about the motions,
12 issues, or allegations in the 9/11 cases?

13 MJ [CAPT WAITS]: No.

14 DC [MR. RUSHFORTH]: Have you ever authorized the
15 destruction or deletion of evidence in this case?

16 MJ [CAPT WAITS]: I mean, part of the, you know, process
17 of the 505 involves deletions of -- I mean, I'm not revealing
18 anything here.

19 Mr. Viti?

20 DC [MR. RUSHFORTH]: Outside the 505 ----

21 MJ [CAPT WAITS]: Outside the 505 context, no.

22 DC [MR. RUSHFORTH]: Okay. Have you participated in
23 presenting or commenting on any of the amendments to the

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1 Military Commission Act, any of the proposed amendments?

2 MJ [CAPT WAITS]: No. Honestly, the only one I knew of is
3 the one that was mentioned in the government's response to
4 your continuance motion, the one about the using magistrates
5 to hear motions which, frankly, I think is completely
6 misplaced and useless, because that's not why the commissions
7 don't move forward. It's not because military judges don't
8 hear motions when they're filed.

9 So that's -- of the one proposed amendment that I
10 know anything about, I think it's useless.

11 DC [MR. RUSHFORTH]: You and I agree on that, Your Honor.

12 If I may have just a moment?

13 MJ [CAPT WAITS]: Sure.

14 [Pause.]

15 DC [MR. RUSHFORTH]: Nothing further, Your Honor. I again
16 thank Your Honor. I have voir dired a lot of jurors but never
17 a judge, and I appreciate your patience.

18 MJ [CAPT WAITS]: Okay, thank you.

19 Do you have any challenge? I guess I should ask;
20 that's what I normally ask at the end of voir dire.

21 DC [MR. RUSHFORTH]: Not at this time, Your Honor.

22 MJ [CAPT WAITS]: Very well.

23 Does the government wish to make any follow-up voir

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1 dire or new voir dire? However you want to do it.

2 TC [MR. VITI]: Your Honor, we would just note that we had
3 addressed this issue in our response to 055E, stating in that
4 response that the defense asserted, without any factual basis,
5 that this commission would -- if it ruled against the accused
6 in its motion or deny its motion, that this court would
7 arguably be violating the regulation for trial -- military
8 commission 11-1, its oath.

9 And the only thing I would ask is does this
10 commission feel in any way that it could not faithfully or
11 impartially perform, according to your conscience and the laws
12 applicable to trials by military commission, all the duties
13 incumbent upon you as a military judge to this military
14 commission? Is there anything that you're aware of?

15 MJ [CAPT WAITS]: Absolutely not.

16 TC [MR. VITI]: Thank you, Your Honor.

17 MJ [CAPT WAITS]: No doubt in my mind.

18 Okay. Would somebody get me another bottle of water,
19 please?

20 All right. So ----

21 TC [MR. VITI]: Your Honor, just while we have this bit of
22 a break, Your Honor had asked the accused regarding who is to
23 be his lead counsel or who he chose to be his legal counsel.

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1 I don't recall if the accused responded. I believe that ----

2 MJ [CAPT WAITS]: How did that happen?

3 TC [MR. VITI]: -- there was an interruption by one of the
4 counsel.

5 MJ [CAPT WAITS]: I don't recall an answer to that
6 question either. And I don't recall what the interruption
7 was. But yeah, thank you. I want to get back to that.

8 All right. Mr. Hadi, as I said to the prosecution, I
9 needed to know who they designated -- who was designated as
10 lead counsel. I also need you to tell me -- oh, yeah, I
11 remember what it was. It was Major Kincaid saying that
12 Mr. Hadi wanted to add to -- add something to my question of
13 who he wanted to be represented by in this commission, and
14 that's when he added that there were four other people who he
15 wanted to be represented by. That's the point which the
16 commission was interrupted on this question.

17 The question is, Mr. Hadi, first of all, there is one
18 person who has to be designated as lead counsel. That person
19 is ultimately answerable to the commission on behalf of the
20 entire defense. So at this time, I want to ask you to
21 designate lead counsel and tell me who that person is who will
22 speak for you and your defense team.

23 ACC [MR. HADI]: As for the lead defense counsel, I choose

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1 Mr. Rushforth.

2 MJ [CAPT WAITS]: Mr. Rushforth. Thank you. Okay. Thank
3 you, Mr. Hadi.

4 And do defense, do you -- Mr. Rushforth, is that your
5 understanding and do you agree with that?

6 DC [MR. RUSHFORTH]: It is my understanding, Your Honor,
7 and I do agree with it.

8 MJ [CAPT WAITS]: Very well. All right.

9 So now we're going to move on to hearing the motion,
10 Appellate Exhibit 015K. We've been going for an hour and
11 20 minutes. We forgot to talk about the prayer schedule
12 today. It looks like the next one is not until 1257, so I
13 think we're still good. Is that good?

14 That's a yes. I'm getting a nod yes from Major
15 Kincaid.

16 Okay. So who has the burden on the motion in
17 Appellate Exhibit 015K?

18 ATC [LCDR SPENCER]: Your Honor, prior to answering that
19 question, which I presume Mr. Rushforth is about to, is it
20 possible to take a brief recess? I anticipate this next
21 portion might go at some length and rather than interrupt
22 either party ----

23 MJ [CAPT WAITS]: Okay. Is that good with the defense?

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1 DC [MR. RUSHFORTH]: Fine with us, Judge.

2 MJ [CAPT WAITS]: Okay. Then we'll take a -- given the
3 logistics of the commission, I'm going to say we're going to
4 be in recess until 1040. That's about 17 minutes. That's
5 probably reasonable, isn't it?

6 So the commission is in recess until 1040.

7 [The R.M.C. 803 session recessed at 1023, 17 May 2016.]

8 [END OF PAGE]

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