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1 [The R.M.C. 803 session was called to order at 0802,
2 27 August 2019.]

3 MJ [LtCol LIBRETTO]: The commission will come back to
4 order. All parties present when the commission last recessed
5 are again present with the exception of the accused who is
6 absent.

7 The commission has been presented Appellate Exhibit
8 161C, statement of understanding of right to be present at
9 commission proceedings and what appears to be a waiver of
10 those rights by Mr. Hadi.

11 Government, is the assistant staff judge advocate
12 available to testify?

13 ATC [MR. SPENCER]: Yes, Your Honor, she is.

14 MJ [LtCol LIBRETTO]: Please proceed.

15 ATC [MR. SPENCER]: Your Honor, the government calls the
16 assistant staff judge advocate to the stand.

17 ASSISTANT STAFF JUDGE ADVOCATE, U.S. NAVY, was called as a
18 witness for the prosecution, was sworn, and testified as
19 follows:

20 **DIRECT EXAMINATION**

21 Questions by the Assistant Trial Counsel [MR. SPENCER]:

22 ATC [MR. SPENCER]: And, Your Honor, consistent with past
23 practice and the protective order in place, this witness is

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1 testifying under pseudonym. I'll note for the record that it
2 is the same assistant staff judge advocate that previously
3 testified in this commission session.

4 Your Honor, may I approach the witness?

5 MJ [LtCol LIBRETTO]: You may.

6 ATC [MR. SPENCER]: I've handed to the witness what was
7 previously marked as Appellate Exhibit 161C, which I retrieved
8 from the court reporter.

9 Q. Ma'am, is this the standard rights advisement that
10 we've previously discussed on the record?

11 A. Yes, it is.

12 Q. And did you present this to the accused this morning?

13 A. I did.

14 Q. Did you go through the same process that you
15 previously testified to?

16 A. Yes, I did.

17 Q. And can you just briefly again describe that process?

18 A. Sure. I asked the defendant in this case,
19 Mr. al-Iraqi, if he would like to have his rights waivers read
20 in English or Arabic or both if he was not attending. He said
21 he was not attending. He only needed it in English. I
22 proceeded to read this to him verbatim and asked if he was
23 willing to sign, and which he did.

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1 Q. If you'd please turn to the second page.

2 A. Yes.

3 Q. That's his signature above the section marked
4 "accused"?

5 A. It is.

6 Q. And did he attach any conditions or other terms to
7 this waiver?

8 A. No. He made no statements.

9 Q. What was his demeanor when you spoke with him?

10 A. It was normal.

11 Q. Did he appear to understand everything that you were
12 saying?

13 A. He did.

14 Q. Did he appear to be in any significant pain which
15 might interfere with his ability to make a decision?

16 A. No, he did not.

17 Q. And is that your signature as the witness?

18 A. It is.

19 Q. Thank you.

20 ATC [MR. SPENCER]: Your Honor, may I approach?

21 MJ [LtCol LIBRETTO]: You may.

22 ATC [MR. SPENCER]: I've retrieved Appellate Exhibit 161C
23 from the witness and returned it to the court reporter. And I

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1 have no further questions. Defense may have some questions.

2 MJ [LtCol LIBRETTO]: Defense, any questions?

3 DDC [MS. HENSLER]: No, sir.

4 MJ [LtCol LIBRETTO]: Does the defense have any evidence
5 for the commission's consideration on the determination as to
6 whether or not the waiver is voluntary?

7 DDC [MS. HENSLER]: Only with respect to the evidence
8 which was presented to Your Honor in conjunction with our
9 argument on voluntariness at large, the record regarding his
10 physical condition and the physical pain and discomfort it
11 requires him to come to court.

12 **EXAMINATION BY THE MILITARY COMMISSION**

13 **Questions by the Military Judge [LtCol LIBRETTO]:**

14 Q. Ma'am, when you had the discussion this morning with
15 Mr. Hadi you indicated he made no statements at all?

16 A. Correct. I think I asked him if he was attending,
17 and he said no. I suppose that would be a statement. And if
18 he needed an English or Arabic -- English only -- or he
19 indicated English only. There was another individual there
20 who said English only and that was it.

21 Q. When you -- did you approach him at his cell?

22 A. No.

23 Q. Where was it whenever you had this conversation with

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1 him?

2 A. It's an exterior portion that's adjacent to the
3 communal portion.

4 Q. And did you see him ambulatory and coming to you to
5 get -- to have this conversation?

6 A. Yes, sir. He walked up with his walker. We went
7 through the soliloquy. He sat while I read it, signed it, and
8 then got back up.

9 Q. And during that period of time, he was able to move
10 about freely and participate in the conversation with you?

11 A. Yes, sir.

12 Q. Thank you. I have no further questions.

13 A. Yes, sir.

14 Q. You may step down and return to your normal duties.

15 **[The witness was excused and withdrew from the courtroom.]**

16 DDC [MS. HENSLER]: Sir, for the record, we do wish to
17 note an objection to moving forward in Mr. al-Iraqi's absence
18 on the basis that he has a constitutional right to participate
19 in these proceedings.

20 MJ [LtCol LIBRETTO]: And you'd agree that he has the
21 right pursuant to the rules to voluntarily absent himself?

22 DDC [MS. HENSLER]: Yes, sir.

23 MJ [LtCol LIBRETTO]: And it's your position that he --

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1 even this morning -- has not done so?

2 DDC [MS. HENSLER]: That's right, sir.

3 MJ [LtCol LIBRETTO]: Do you have any evidence to that
4 effect?

5 DDC [MS. HENSLER]: Yes, sir. The months of evidence
6 we've had in these proceedings regarding his -- his physical
7 condition and the pain and discomfort it causes him to come to
8 court. If it were easy and painless for Mr. al-Tamir to come
9 to court, he would, but he -- he is not. And for that reason,
10 the government hasn't met their burden and we object to
11 proceeding.

12 MJ [LtCol LIBRETTO]: The commission disagrees. The
13 commission finds that based on the testimony of the staff
14 judge advocate, the advice I provided to Mr. Hadi repeatedly
15 throughout the course of these proceedings, the fact that he
16 appeared to be under no physical or mental limitations this
17 morning in his conversations and interactions with the
18 assistant staff judge advocate, and the voluntarily waiver
19 contained in Appellate Exhibit 161C, that the accused has
20 voluntarily waived his right to be present at these commission
21 proceedings this morning.

22 As indicated yesterday, the commission's plan moving
23 forward this morning is to hear argument on Appellate Exhibit

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1 157, the defense motion to dismiss on the basis that the
2 convening authority has a personal interest in the outcome of
3 the military commission. We will move on to taking up
4 argument on Appellate Exhibits 158 and 160, the defense motion
5 to dismiss because the military judge and law clerk sought
6 employment with the DoD and DoJ and the defense motion for
7 Judge Libretto to disqualify himself under R.M.C. 902
8 respectively.

9 Before hearing arguments on those motions, a few
10 housekeeping matters that I need to clear up for the record.
11 At the beginning of this week's commission session, the
12 defense requested that this commission compel Mr. Fred Taylor,
13 another senior attorney advisor that assists me in my duties
14 as the military judge on this commission, to testify in
15 connection with either AE 158 or AE 160 or both.

16 Based on the testimony that I provided through the
17 voir dire process, as well as the testimony of Mr. Blackwood
18 and Captain Waits, who described the operations of the trial
19 judiciary staff, the commission denies the motion to compel
20 Mr. Fred Taylor for additional testimony.

21 As the commission previously noted prior to taking
22 the testimony of Mr. Blackwood's testimony -- I'm sorry,
23 Mr. Blackwood is the very rare instance where a judge allows a

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1 clerk or a legal advisor to testify concerning activities
2 within the chambers. In fact, case law discourages it.
3 Moreover, the commission finds that any testimony that
4 Mr. Taylor might provide would be cumulative with that already
5 on the record.

6 Finally, as to the briefing cycle for AE 165, the
7 defense motion to disqualify Commander Short, Defense, any
8 supplemental filing you wish to file must be submitted by
9 4 September of 2019. Thereafter, counsel will follow the
10 normal timeline set forth within the rules of court and the
11 trial conduct order AE 153 concerning the timing for filing
12 requests for witnesses, discovery, and M.C.R.E. 505 notices.

13 DDC [MS. HENSLER]: Sir, may I be heard on AE 165 -- the
14 AE 165 schedule?

15 MJ [LtCol LIBRETTO]: Go ahead.

16 DDC [MS. HENSLER]: We have requested -- submitted a
17 discovery request to the government for certain evidence
18 regarding the interaction at the center of that motion, and so
19 we would ask that we be permitted to see what flows from that
20 discovery request. And at the moment we formally request that
21 AE 165 be withdrawn, and we plan to refile as soon as
22 possible, hopefully with additional -- with the benefit of
23 additional discovery.

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1 But unfortunately it's impossible for me to say when
2 or how long it will take for that discovery to reach us. We
3 have identified particular items for the government which I
4 can't go into the record on.

5 [Pause.]

6 MJ [LtCol LIBRETTO]: So at this time, it's the defense's
7 request to withdraw the motion currently pending as AE 165?

8 DDC [MS. HENSLER]: That's right. Because of -- we've
9 requested further discovery on the issue.

10 MJ [LtCol LIBRETTO]: The motion to withdraw AE 165
11 pending receipt of additional discovery and the subsequent
12 refiling of the motion is hereby granted. The commission's
13 full expectation is that motion, provided that the discovery
14 that you're seeking is provided sufficiently to inform your
15 motion -- that it be filed in accordance with the motions
16 filing schedule for the next session such that we can take the
17 matter up during the session in October.

18 DDC [MS. HENSLER]: Yes, sir. Thank you.

19 MJ [LtCol LIBRETTO]: Moving on then to argument on
20 AE 157. Before hearing argument, is there any additional
21 evidence that the defense requests to submit?

22 DDC [LCDR MEUSCH]: No, Your Honor.

23 MJ [LtCol LIBRETTO]: Government, any additional evidence

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1 on AE 157?

2 ATC [MR. SPENCER]: No, Your Honor.

3 MJ [LtCol LIBRETTO]: Very well.

4 The commission will now hear argument on AE 157,
5 keeping in mind the limitations imposed by the commission with
6 respect to argument and the general guidance that argument
7 should not simply be a recitation of that which is contained
8 in the written filing.

9 Defense, you may argue.

10 DDC [LCDR MEUSCH]: Your Honor, Lieutenant Commander
11 Meusch for Mr. al-Tamir. I have some exhibits that I would
12 like to display. They've been previously provided to the
13 government and reviewed by the CISO, but I need to offer them
14 to the commission at this time.

15 MJ [LtCol LIBRETTO]: Have they been -- are they
16 attachments to your original filings?

17 DDC [LCDR MEUSCH]: All -- all of them are attachments
18 except for one demonstrative.

19 MJ [LtCol LIBRETTO]: Please approach.

20 [Pause.]

21 MJ [LtCol LIBRETTO]: So the demonstrative is the bulk of
22 what you're requesting?

23 DDC [LCDR MEUSCH]: Yes, Your Honor. I intend to display

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1 all of them.

2 MJ [LtCol LIBRETTO]: Very well. You may proceed.

3 [The military judge conferred with courtroom personnel.]

4 MJ [LtCol LIBRETTO]: To the extent that there are
5 documents that have just been handed to the commission that
6 are not actual attachments to the initial filing in 157, they
7 will be marked during the next recess and attached to the
8 record as Appellate Exhibit 157 -- 1570.

9 DDC [LCDR MEUSCH]: Your Honor, may ----

10 MJ [LtCol LIBRETTO]: You may.

11 DDC [LCDR MEUSCH]: We would request to publish to the
12 gallery.

13 MJ [LtCol LIBRETTO]: Go ahead.

14 DDC [LCDR MEUSCH]: Your Honor, there are few things as
15 fundamental to any system of criminal justice as a fair trial
16 and a fair tribunal. In a military commission, for an accused
17 to get a fair trial and a fair tribunal, it is necessary for
18 the convening authority to be neutral and impartial both in
19 fact and appearance.

20 Unfortunately, as demonstrated in the Appellate
21 Exhibit 157 series and Rear Admiral Reismeier's testimony
22 yesterday, moving forward with this commission where
23 Admiral Reismeier serves as the convening authority will

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1 deprive Mr. al-Tamir of this basic fundamental protection.

2 Unsurprisingly, Admiral Reismeier testified yesterday
3 that his subjective belief is that he can be fair and
4 impartial. In a few moments, the government will likely stand
5 up and argue that he can be fair and impartial, so what's the
6 problem? The problem, Your Honor, is that Admiral Reismeier's
7 subjective claim is not the standard. If it were, he would
8 still be the convening authority in Nashiri and Bahlul.

9 The standards this commission must apply are
10 objective ones, and they center around whether a reasonable
11 person with knowledge of the particular facts and
12 circumstances would impute to Admiral Reismeier a personal
13 feeling of interest in the outcome of litigation in
14 Mr. al-Tamir's case. And for many reasons, Your Honor, a
15 reasonable person would do just that.

16 As a result, Admiral Reismeier is disqualified from
17 service as a convening authority under both the type three
18 accuser standard and the appearance of partiality standard.
19 To that end, it is necessary for this commission to consider
20 Admiral Reismeier's connection to the charges, to the people,
21 and to the legal issues in Mr. al-Tamir's case.

22 First, regarding the charge of conspiracy as a
23 baseline matter, consider the convening authority's action in

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1 Mr. Noor Muhammed's case. This is Appellate Exhibit 157
2 Attachment 0, page 1. On January 9th, 2015, the convening
3 authority dismissed Noor Muhammed's conspiracy conviction,
4 finding it was legal error for the prosecution to try the
5 offense. And the reason why? As the convening authority
6 cited later, he viewed the D.C. Circuit as providing a
7 dispositive ruling on the issue of whether the offense of
8 conspiracy to provide material support to terrorism could be
9 tried before a military commission. As a result, he believed
10 dismissal was required.

11 Stepping back from Noor Muhammed's case, in January
12 of 2015, there was also a charge of conspiracy against
13 Mr. al-Tamir. Admiral Reismeier, of course, was not the
14 convening authority at that time. He was on active duty as a
15 Chief Judge of the Department of the Navy, the department's
16 senior jurist. Fast forward to November 2015, and the
17 circumstances begin to change. Mr. al-Tamir is still charged
18 with conspiracy, but Admiral Reismeier is a retired flag
19 officer in private practice. Notably, Mr. al Bahlul is
20 challenging the constitutionality of his conspiracy conviction
21 before the D.C. Circuit, a challenge that would impact
22 Mr. al-Tamir's case through the Doctrine of Stare Decisis, a
23 doctrine Admiral Reismeier, the former Chief Judge of the

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1 Navy-Marine Corps Court of Appeals, was undoubtedly familiar
2 with.

3 Sometime before November 2015 -- and this is
4 important -- General Martins, the Chief Prosecutor, the person
5 with oversight of the prosecutors at this table, called or
6 e-mailed Admiral Reismeier to invite him to a briefing on what
7 it is only logical to assume was a conspiracy issue before the
8 D.C. Circuit. And as you heard from Admiral Reismeier in his
9 testimony, he was aware that charging conspiracy as a law of
10 war offense was anything but settled as a legal matter. He
11 knew that. And at General Martins' request, Admiral Reismeier
12 traveled to the Office of the Chief Prosecutor to attend the
13 briefing.

14 General Martins was present. A brief was given. And
15 yet the government has produced no records of this meeting in
16 discovery. Appellate Exhibit 157 Attachment K. After
17 huddling with General Martins and members of the Office of the
18 Chief Prosecutor on the issue of conspiracy, the Washington
19 Legal Foundation apparently out of the blue, or maybe at the
20 behest of a retired Navy JAG, contacted Admiral Reismeier,
21 asking him to sign on to an amicus brief in support of the
22 government, and he did.

23 In his sworn testimony, Admiral Reismeier stated that

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1 he stands by the brief. Therefore, Your Honor, consider what
2 that means. On page 4 of the brief it states that it meets
3 your concern that the panel decision in this case would impose
4 unwarranted restrictions on the authority of the elected
5 branches of government to convene military commissions to
6 conduct trials of law of war offenses. That statement of
7 interest is not confined to a single case. It talks about
8 restrictions in military commissions, plural.

9 At the time that Rear Admiral Reismeier advocated for
10 this position, Mr. al-Tamir's conspiracy charge was pending,
11 his case was one of the military commissions, plural. That
12 was referenced in the brief.

13 Notably, as Admiral Reismeier testified, he
14 understood that the issue with conspiracy was anything but
15 settled as a matter of law. Yet he signed onto the brief and
16 supported the government's position. In doing so, he assumed
17 the role of an advocate on an issue of central importance in
18 Mr. al-Tamir's case, the legal validity of the conspiracy
19 charge. And today, even though the law on the conspiracy
20 issue remains unsettled in the appellate courts, Admiral
21 Reismeier stands by the brief.

22 For Mr. al-Tamir this is problematic on two fronts.
23 First, if he is convicted of conspiracy, Mr. al-Tamir is going

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1 to ask for the same relief as Mr. Noor Muhammed. And given
2 Rear Admiral Reismeier's inflexible view in support of the
3 government on this issue, Mr. al-Tamir is not going to get it.

4 Moreover, Admiral Reismeier may try to rely on the
5 D.C. Circuit's opinion, which eventually agreed with his
6 position. And even you, sir, have cited that opinion as
7 controlling precedent.

8 Second ----

9 MJ [LtCol LIBRETTO]: Lieutenant Commander Meusch, before
10 we move on from that argument, I want to ask you -- and I'll
11 phrase it -- frame it in the context of a -- a judge because
12 of the unique nature of our military commission system and the
13 role of the convening authority.

14 But in the context of a judge who is being challenged
15 for disqualification, is it the defense's position that a
16 judge who, let's say, testifies before Congress in support of
17 a legal issue cannot then sit on a case in which that legal
18 issue is addressed?

19 DDC [LCDR MEUSCH]: Your Honor, this may not be directly
20 responsive to your question, but the convening authority is --
21 as the defense has challenged in this case -- it serves a dual
22 function. It's not just the judge, but it has the dual role
23 of both prosecutor and judge. And so ----

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1 MJ [LtCol LIBRETTO]: Can you repeat that?

2 DDC [LCDR MEUSCH]: They serve both a prosecutorial role
3 and a judicial role. That's already been ruled on in this,
4 Your Honor. I understand that the structural challenge was
5 denied. But the position of the defense is that the convening
6 authority does more than just serve in a judicial role.

7 MJ [LtCol LIBRETTO]: But your -- in your argument you use
8 judicial disqualification precedent in support of your
9 arguments. So to the extent that you do so, does a judge who
10 argues or supports a legal position prior to taking the bench,
11 is he disqualified from hearing issues on that very same legal
12 principle later on?

13 DDC [LCDR MEUSCH]: Your Honor, the distinction I would
14 note is in your hypothetical it was taking an issue before
15 Congress or providing testimony, which is not what happened
16 here. It was taking a position in the Superior Court of this
17 commission. And so it would be like the judge going to the
18 Supreme Court and signing an amicus brief, which is a
19 distinction, and it is not something that would be permitted.
20 That is the position of the defense.

21 MJ [LtCol LIBRETTO]: Before they take the bench?

22 DDC [LCDR MEUSCH]: Your Honor, before they were hired to
23 take the bench in relation to a specific case that was pending

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1 at the time.

2 So because Mr. al-Tamir's case was pending at the
3 time that this position was taking -- and the position taken
4 references military commissions, plural, meaning the military
5 commissions presumably in existence at the time that that
6 position was taken -- the position relates to this case, it
7 was taken in the Superior Court, and it would be appropriate
8 under those circumstances for the judge to recuse himself.

9 MJ [LtCol LIBRETTO]: Okay. Thank you.

10 DDC [LCDR MEUSCH]: And the second problem this presents
11 for Mr. al-Tamir is that uncertainty in the law affects plea
12 negotiations. And where the convening authority takes an
13 inflexible stand in support of the government, it enures to
14 the detriment of the accused.

15 Now moving on from the conspiracy issue, that is not
16 the only issue before this commission. There are also other
17 connections that should -- the commission should be aware of.
18 The 2015 briefing, for instance, was not the first time that
19 General Martins and Admiral Reismeier interacted on military
20 commission issues. In 2014, General Martins reached out to
21 Admiral Reismeier for guidance on the timing of proof of
22 jurisdiction.

23 And look at the circumstances in 2014. Rear Admiral

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1 Reismeier is a senior jurist in the Department of the Navy,
2 the second-level supervisor for Mr. Waits, who was the
3 presiding judge in Mr. al-Tamir's case. Notably, in 2014,
4 there is also a DoJ prosecutor providing what Admiral Waits
5 described as extra teeth to the prosecution of Mr. al-Tamir.
6 And yet at the same time Mr. Waits is applying for jobs with
7 the Department of Justice, and Admiral Reismeier is providing
8 guidance on jurisdiction to General Martins.

9 Moreover, and more importantly, at the time that this
10 is happening, none of it is disclosed to Mr. al-Tamir and the
11 defense. And ask yourself, Your Honor, because a reasonable
12 person would, how did General Martins know to call Admiral
13 Reismeier? How did he identify Admiral Reismeier as a subject
14 matter expert that would assist the prosecution?

15 The answer: They worked together on the Detention
16 Policy Task Force in 2009. They interacted with all the
17 relevant stakeholders in military commissions except the
18 individuals accused of crimes. This included the Department
19 of Justice and the CIA on issues such as forum selection.
20 When asked to elaborate on their discussions, Admiral
21 Reismeier noted that he was unable to do so, citing concerns
22 about a deliberative privilege.

23 At some point he succeeded General Martins as the

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1 co-chair of the task force. They conducted a turnover.
2 General Martins presumably provided guidance to Admiral
3 Reismeier, and yet we have nothing turned over in discovery.
4 Presumably there were notes taken at these meetings, records
5 of some kind, an agenda, yet nothing turned over in discovery.
6 So from the perspective of a reasonable person, this is
7 another problematic connection, a connection between Admiral
8 Reismeier and General Martins, on important issues like forum
9 selection that transpired behind the veil of a deliberative
10 privilege.

11 And Admiral Reismeier has more connections to
12 prosecutors in the Office of the Chief Prosecutor. Not only
13 did he mentor the prosecutor in Nashiri, but many years ago he
14 reached out to a talented attorney, who is the prosecutor in
15 this case.

16 And the connections do not stop there. In 2016,
17 General Martins once again contacted Admiral Reismeier and
18 asked for assistance, this time as a mock judge on an issue
19 that involved part and parcel evidence, an issue that could
20 arise in Mr. al-Tamir's case. He went to the spaces of the
21 Office of the Chief Prosecutor. General Martins was there.
22 An attorney representing the government presented argument to
23 him, and he provided guidance to the attorney.

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1 Repeatedly, over the course of several years, Admiral
2 Reismeier has served as the government's subject matter
3 expert. He did this for free; and from the perspective of a
4 reasonable person, he did this because he had a personal
5 interest in supporting the government's position in military
6 commissions.

7 Now let's fast forward to today and how Rear Admiral
8 Reismeier was hired as the convening authority. Notably,
9 General Martins' boss, Jason Foster, was the person who
10 contacted -- or, shall we say, recruited Admiral Reismeier.
11 The first contact came around the same time as Mr. Rishikof's
12 hiring. Admiral Reismeier interviewed for the position. He
13 interviewed with the DoD general counsel. They talked about
14 his background with the military commissions. And in his
15 testimony he describes his characterization of that
16 conversation as something to the effect of his background is
17 what it is.

18 At that time, Mr. Rishikof was hired and Rear Admiral
19 Reismeier went into private practice, where he started
20 advertising his experience with the military commissions to
21 the world. To be sure, he was an attorney for hire and he
22 used his experience with the military commissions as a part of
23 the advertisement, holding himself out as the author of the

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1 legislative draft that became the 2009 Military Commissions
2 Act.

3 Then sometime in the summer of 2018, General Martins'
4 boss, Jason Foster, reaches out to Admiral Reismeier again.
5 Once again, they discuss the possibility of Admiral Reismeier
6 becoming the next convening authority, and in the
7 September/October 2018 time frame he interviews with the DoD
8 general counsel, Mr. Ney. Once again, he discusses his
9 background: It is what it is.

10 To a reasonable person, what does that mean? On the
11 one hand, Admiral Reismeier is a known quantity within the DoD
12 when it comes to the military commissions. He has a public
13 record where he is aligned with the government, worked with
14 General Martins, and held himself out as the author of a
15 legislative draft of the Military Commissions Act of 2009.

16 On the other hand, it does not appear that he
17 disclosed his need for recusal in Nashiri or Bahlul, and as
18 the defense would submit, his need for recusal or
19 disqualification in Mr. al-Tamir's case. This time, however,
20 he was hired. And even then he didn't start right away. He
21 still had cases to finish, and that meant the military
22 commissions had to wait. Mr. al-Tamir's military commission
23 had to wait four months for the government's subject-matter

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1 expert to start as a new convening authority, which begs the
2 question: Why?

3 Was there not someone else with less personal
4 interest and apparent bias who could have started sooner? The
5 government has produced one memo associated with
6 Admiral Reismeier's hiring and nothing more. And I won't go
7 into this too much because it deals with the pending discovery
8 motion, but there must be more. The government notably has
9 identified responsive documents. And to highlight for this
10 commission, in the 9/11 case the judge has ordered additional
11 discovery produced on this issue. That ruling can be found at
12 Appellate Exhibit 637F.

13 Why was it necessary to wait for the government's
14 subject-matter expert? It is not good enough for this
15 commission to simply say it is what it is, not when
16 Mr. al-Tamir's right to a fair trial and a fair tribunal is on
17 the table.

18 We've heard a lot of testimony over the last several
19 days about the musical chairs of military justice, where the
20 uniformed attorneys are always coming and going, moving from
21 prosecutor to defense counsel to judge to appellate judge and
22 then to something else. Admiral Reismeier's service on the --
23 as the convening authority, however, is categorically

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1 different, and as a result, more damaging to Mr. al-Tamir's
2 rights.

3 His service arises in a different system that draws
4 its constitutional power from a different source, the define
5 and punish clause. Accordingly, this commission must take
6 action to ensure Mr. al-Tamir receives the most basic criminal
7 justice protection, a fair trial and a fair tribunal.

8 Under both the type three accuser standard and the
9 appearance of partiality standard, Admiral Reismeier is
10 disqualified from further service as the military commission's
11 convening authority. Because he has not taken the necessary
12 steps to disqualify himself or even read the charge sheet,
13 Mr. al-Tamir moves this commission to dismiss.

14 Pending your questions, Your Honor, I have nothing
15 further.

16 MJ [LtCol LIBRETTO]: Why is dismissal -- assuming that
17 the commission agrees with your argument that the convening
18 authority should be disqualified, why is dismissal the
19 appropriate remedy?

20 DDC [LCDR MEUSCH]: Your Honor, there are -- the defense
21 acknowledges there are options in terms to remedy this.
22 Dismissal is the remedy we've asked for.

23 MJ [LtCol LIBRETTO]: Well, why is that appropriate?

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1 DDC [LCDR MEUSCH]: Yes, Your Honor. And I would -- are
2 you suggesting appropriate in comparison to, say, abatement as
3 a remedy?

4 MJ [LtCol LIBRETTO]: Or disqualification.

5 DDC [LCDR MEUSCH]: So, Your Honor, the concern is -- and
6 it was somewhat highlighted earlier this week, with the
7 judge's reluctance -- Your Honor's reluctance to order, say,
8 the commander to do something, the JDG commander. And so it
9 is unclear that the commission could order the convening
10 authority to disqualify himself.

11 But if the commission views it as having that power,
12 that is the remedy here, is to disqualify Admiral Reismeier as
13 the convening authority. Under R.M.C. 504, though, it -- the
14 procedure that's laid out talks about what amounts to
15 self-disqualification and the forwarding of the charges back
16 to the Secretary of Defense.

17 So that -- for that reason, because he has not taken
18 the appropriate action to R.M.C. 504, dismissal is the
19 appropriate remedy.

20 [Pause.]

21 MJ [LtCol LIBRETTO]: I'm sorry. I'm looking for the area
22 of the Manual that speaks to the self-recusal issue that
23 you're citing. That's certainly true in the case of the

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1 military judge. However, under applicable military law and
2 the Rules for Military Commissions, what language is it that
3 you're pointing to that suggests the military judge does not
4 have the authority to disqualify a convening authority?

5 DDC [LCDR MEUSCH]: Your Honor, the language we're looking
6 at is R.M.C. 504(c)(2), action when disqualified. When a
7 convening authority who would otherwise convene a military
8 commission is disqualified in a case, the charges shall be
9 forwarded to the Secretary of Defense for disposition.

10 The second part of that sentence, "The charges shall
11 be forwarded," it doesn't -- it's in the passive tense, so it
12 doesn't identify that the convening authority must do it. If
13 the -- this commission believes it has the authority to order
14 the convening authority disqualified and direct the charges be
15 sent back -- or sent up to the Secretary of Defense, then that
16 is the appropriate remedy. But given the nature of this rule,
17 it was not clear on its face. Therefore, the defense moves
18 for dismissal.

19 MJ [LtCol LIBRETTO]: Thank you.

20 Trial Counsel, when you're ready.

21 ATC [MR. SPENCER]: Good morning, sir. Mr. Spencer for
22 the government.

23 MJ [LtCol LIBRETTO]: Good morning.

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1 ATC [MR. SPENCER]: Sir, the defense's continued and
2 increasing practice of demonstrating a cavalier attitude with
3 respect to both the facts and the law is deeply concerning.
4 I'll get to specifics on that in a moment.

5 Not just for this motion, but certainly in this
6 instance as well, there is no military case that the defense
7 cites or of which the government is aware that extends the
8 appearance of bias standard, the judicial standard, or the
9 unlawful command influence appearance standard to a convening
10 authority.

11 The cases cited by the defense in its reply, the way
12 that they're cited, frankly, ignores language both behind and
13 in front of the quotes that they point to and take phrases out
14 of context in an attempt to make the point, while ignoring the
15 holdings of the case. And I'm specifically referring to
16 page 3 of the defense reply.

17 In light of that, the government feels an obligation
18 to look at those cases in some detail, more detail than it
19 would have otherwise desired to. The first case that the
20 defense cites at the top of -- the first paragraph of page 3
21 is the case United States v. Davis. And the Davis case, Your
22 Honor, I'm sure you're aware of it. In that case, the
23 convening authority made comments about people convicted and

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1 said if they were convicted, don't come crying to me, or words
2 of that effect. And it was the -- the comments made and the
3 attitude demonstrated by the convening authority with respect
4 to an inelastic view on clemency or post-trial relief that
5 resulted in the -- in the disqualification of the convening
6 authority in that sense.

7 The appearance piece of that appears nowhere in the
8 Davis case. What the Davis case says is that where a
9 convening authority reveals that the door to a full and fair
10 post-trial review is closed, we have held that the convening
11 authority must be disqualified. Statements reflecting --
12 statements reflecting an unwillingness to consider each case
13 fully and individually create a perception that a convicted
14 servicemember will be denied, so the defense conveniently
15 leaves off the first part of that and points to the perception
16 as somehow establishing an appearance standard in the improper
17 accuser realm. But in that case, it was the statements
18 reflecting an unwillingness to consider each case fully that
19 created the perception, and I'll get to why that's important
20 later, but the cases have consistently been clear since the
21 '50s that this is an objective reasonable person test.

22 So the government agrees with the first part of the
23 test as relayed in the oral argument by the defense. It is an

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1 objective standard and there are numerous cases that point to
2 that. Davis being one of them, Dinges, Voorhees, et cetera.
3 But Davis does not stand for the proposition that the
4 appearance standard is the appropriate standard.

5 Nor does the next case cited by the defense,
6 McClenny. McClenny quotes Gordon -- United States v. Gordon,
7 which I'll talk about in a moment, recognizing that the Gordon
8 test was probably the -- one of the earlier references to it
9 being an objective test. The McClenny quote is that in
10 United States v. Gordon, supra, we note the test is objective.
11 It must appear that a reasonable person would impute to him.

12 Now, it's clear in the context of that entire case
13 that the word "appear" in that instance means appear to the
14 court, not an appearance standard that's somehow broader in a
15 different context.

16 We -- and we know this by looking to Gordon because
17 Gordon never uses the word "appear." Gordon simply says we
18 are required to determine under the particular facts and
19 circumstances with which we are dealing, "we" being the
20 appellate court, whether a reasonable person would impute to
21 him a personal feeling or interest in the outcome of the
22 litigation.

23 So those three cases, which is what the defense

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1 points to as establishing this new,
2 never-before-recognized-in-the-military-context appearance
3 test for improper accuser, simply don't say what the defense
4 says they say. The so-called expert report attached to the
5 defense reply authored by, among others, Mr. Eugene Fidell,
6 the defense would argue that -- the defense would argue that
7 that somehow should control or persuade the court. The
8 government is not aware of -- of legal experts being assigned
9 to cases or legal experts outside of the amicus context being
10 used, certainly not in the trial court setting. But let's
11 assume for the sake of argument that Mr. Fidell is an expert.
12 Mr. Fidell is -- I'm sure the commission is aware is a
13 long-time member of the defense bar. He is very well
14 respected within the defense community, but certainly not
15 unbiased. The government's expert in this case would be Judge
16 Baker in the case of United States v. Dinges. Judge Baker
17 with a -- as the commission is probably aware -- a history of
18 service, a history of being neutral and detached as a judge,
19 not biased in one favor -- in the favor of one party or the
20 other.

21 Judge Baker explains this once and for all, that
22 should settle the law once and for all. The defense's reply
23 referenced that this was somehow a red herring. I'm going to

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1 read the exact full quote, which presumably the defense did
2 not look at, and if the -- if the -- the term "red herring"
3 can still be applied to that, then I must not understand what
4 the term red herring means.

5 Judge Baker makes it clear in his concurring opinion
6 in the case of United States v. Dinges. Since its inception,
7 this court has consistently applied a contextual R.C.M. 601
8 test. Now, I'll note for the record that the commission
9 version is in the 500 series, not the 600 series, but it's the
10 same test, the improper accuser test.

11 Judge Baker continues, quote, whether under the
12 particular facts and circumstances a reasonable person would
13 impute to the convening authority a personal feeling or
14 interest in the outcome of the litigation, and he cites --
15 quotes Jeter, which then quotes Gordon. So this is a long
16 history of the -- what the -- what is clear that the test is.

17 Judge Baker continues, the very next sentence,
18 Congress has chosen not to legislate a different, more
19 stringent test, such as those familiar in other contexts,
20 based on the possibility of a conflict or appearance of a
21 conflict. So if the -- the court accepts the attachment and
22 its reply as somehow an expert opinion, the government would
23 propose that the judges -- Judge Baker's expert opinion

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1 carries slightly more weight.

2 Now, coming back to the law, especially with respect
3 to the defense's confusion on the law, I'd like to address a
4 couple of things that the defense raised in its PowerPoint
5 presentation. The defense points to -- and I won't put it
6 back up, but the defense's first slide was a -- a memo by the
7 Convening Authority, Retired General Vaughn Ary, Retired
8 Marine Judge Advocate. In it he writes -- and I'll note on
9 the slide show itself the word "conspiracy" was highlighted.
10 Legal error, conspiracy, and charges were dismissed were
11 underlined. But the full text in context, it appears it was
12 legal error to try the offenses of providing material support
13 for terrorism and conspiracy to provide material support for
14 terrorism.

15 Your Honor, the Noor Uthman Muhammed case was not --
16 the issue wasn't conspiracy. The issue was material support
17 for terrorism. And anyone that's been following the military
18 commissions for the last even couple of years understands that
19 the material support for terrorism piece of it was the
20 linchpin in that case. Because material support for terrorism
21 fell away under the law, of course, conspiracy to commit
22 material support for terrorism also fell away under the law.
23 And that's why those charges were dismissed. It has nothing

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1 to do with the conspiracy charge, per se. It's the underlying
2 charge.

3 Now, I double checked Mr. Hadi's charge sheet a
4 moment ago just to make sure I hadn't missed something. There
5 is no material support for terrorism on the charge sheet for
6 the accused's case. Rather, terrorism, denying quarter, using
7 treachery or perfidy, murder of protected persons, attacking
8 protected property, attacking civilians, attacking civilian
9 objects, and employing poisons or similar weapons, those are
10 the conspiracy charges that relate to this case.

11 Now, the defense tried to make much of the timing of
12 the terrorism -- or, I'm sorry, the conspiracy charge in this
13 case somehow syncing up with -- with Admiral Reismeier's
14 involvement in the amicus brief or the Bahlul brief. Your
15 Honor, it's a matter of record in this commission and to the
16 extent that it was in front of, I believe, Judge Waits, the
17 government would invite the commission to go back and review,
18 if -- if it desires to, the conspiracy issue as it relates to
19 this case.

20 At the time that this -- the conspiracy charge was
21 filed, the defense is accurate in suggesting with its
22 testimony with Admiral Reismeier that the original charges did
23 not include a conspiracy charge. When the government

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1 re-referred new charges and added Charge V, which was the
2 conspiracy charge, the decision in Bahlul had not been made by
3 the D.C. Circuit.

4 That didn't matter. Because in this case the accused
5 committed numerous overt acts after the enactment of the
6 Military Commissions Act of 2006. So under a bridge
7 conspiracy theory, which is well recognized within the law,
8 the outcome of the Bahlul opinion could not have impacted, in
9 any meaningful way, the ability for -- of the government to
10 charge conspiracy. And the convening authority at the time
11 agreed with that, agreed with the bridge conspiracy theory.
12 And this is all outlined in the -- I believe it's the AE 025
13 series, sir, but I may be wrong on the number. So the -- that
14 argument by the defense is, in fact, a red herring.

15 When Bahlul was decided by the D.C. Circuit -- and
16 the defense suggested a couple of times that it was unsettled
17 law. Your Honor, that's simply not true. The law is settled.
18 Bahlul is decided. The Supreme Court denied cert. Did it --
19 did it augment the Hadi case? Potentially. It made one less
20 issue for us to have to litigate fully, although the
21 government may still see litigation on that issue, I suspect,
22 based on the government -- the defense's apparent
23 misunderstanding of the law.

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1 However, the -- in this case, this case did not rely
2 on the outcome of Bahlul. The fact that the current convening
3 authority agreed with a position of the government
4 apparently -- which he didn't even know, frankly, what the
5 position of the government was because he'd never read the
6 government's briefs. What he agreed with was the amicus
7 brief, a position with which the D.C. Circuit largely agreed,
8 according to the witness. The fact that he did that is
9 irrelevant.

10 Every convening authority in the history of the
11 military justice system had to agree with the prosecutor on
12 some level in order for there to be charges referred to a
13 commission or court-martial in the first instance.

14 So this unity of mind or purpose that the defense
15 keeps pointing to is entirely irrelevant. Attorneys --
16 reasonable minds disagree. Attorneys disagree.
17 Admiral Reismeier felt one way about the state of the law;
18 other attorneys felt another way about the state of the law.
19 It went to the D.C. Circuit to decide. They decided it.

20 Admiral Reismeier testified that he goes back to the
21 source every time he does something to verify what the -- what
22 the law is. There's no indication that if the law changed or
23 adapted or somehow became something that was different from

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1 what he had previously -- previously opined, there's no
2 indication that he would not follow the law. To suggest
3 otherwise is both pure speculation and, frankly, somewhat
4 slanderous of someone with a -- a career demonstrating
5 neutrality, fairness, and professionalism.

6 Now, again, the defense in its slide with respect to
7 the timing issue points to Judge Waits being appointed to the
8 commission around the same time that Rear Admiral Reismeier
9 was -- was providing his expert guidance to those who
10 requested it. This commission has already ruled that
11 Admiral Reismeier's testimony was not relevant on the Judge
12 Waits issue, on whether Judge Waits should be recused. Again,
13 Your Honor, a red herring.

14 Finally, with respect to the defense's slide show
15 presentation, the defense -- the last page -- the last slide
16 of that was a -- an excerpt from the law firm's website, the
17 law firm where the convening authority was previously of
18 counsel as a defense counsel. The defense never questioned
19 the convening authority on this matter. There's no evidence
20 before the commission as to who actually authored this
21 information, whether he was aware that it was posted to the
22 website in that form.

23 So the government would aver that this is completely

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1 unreliable in terms of information or alleged conflict or
2 whatever -- why ever the defense wants to use it, because we
3 don't know who authored this. The defense had the opportunity
4 to ask him, they had the opportunity to explore this
5 information as a -- as allegedly an inconsistent statement.
6 They failed to.

7 What the evidence in this case actually showed is an
8 absence of bias, a commitment to neutrality, a commitment to
9 the law, again demonstrated in a 31-year Naval career, most of
10 which were as a judge advocate, from a recognized
11 subject-matter expert within the Navy JAG Corps, who had been
12 both a defense counsel and a trial counsel, who had been a
13 trial judge and an appellate judge, the director of Navy
14 policy for criminal law. Applying equally and providing
15 equally advice to both sides as needed, mentoring individuals
16 on both sides as needed. No bias one way or the other.

17 Did he -- did he share an opinion on a particular
18 state of the law? Yes. And as the judge indicated in his
19 questioning, that's no different than someone who testifies
20 before Congress or writes a law review article or takes any
21 other position on any matter in the law and then later becomes
22 a judge. And even in the higher standard of a judge, that's
23 not disqualifying. That doesn't even rise to the level of

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1 appearance.

2 Why? Because part of what jurists do as their
3 official duties in their official interests involve this very
4 type of behavior. There's been no expression of animus by the
5 convening authority for any person accused, even Nashiri and
6 Bahlul. There's been -- there's no evidence before this
7 commission that this convening authority has ever been biased
8 against any of these individuals. There's no evidence that he
9 will not faithfully execute his post-trial duties. There's no
10 evidence that he will faithful -- not faithfully exercise his
11 duties as convening authority in referring new cases.

12 Your Honor, as the government stated in its response,
13 it's obviously the government's position that the convening
14 authority's decision -- sua sponte decision to recuse himself
15 from the two cases that he recused himself from was overly
16 conservative perhaps. But that should be a further indication
17 of his extreme commitment to fairness. The defense says no,
18 that proves he should recuse himself from all of these cases,
19 which is an absurd result.

20 The government -- or the defense made representation
21 that Jason Foster was General Martins' boss. Your Honor,
22 that's untrue. The defense knows that's untrue. Jason Foster
23 is an attorney with the Office of General Counsel. He works

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1 for a person who could be described as General Martins'
2 reporting senior, but Jason Foster is not General Martins'
3 boss. That's a false statement.

4 The Secretary of Defense is -- is the statutory
5 convening authority unless delegated to lower authority. The
6 Secretary of Defense is also General Martins' boss in that
7 sense. And even in that sense, someone working for the
8 Secretary of Defense who's not in the chain would not be
9 considered his boss.

10 The question that this commission must answer is
11 whether, under the particular facts and circumstances, a
12 reasonable person would impute to the convening authority a
13 personal feeling or interest in the outcome of the litigation.
14 Particular facts and circumstances, not conjecture, not
15 speculation, not false accusation, but the actual evidence.

16 Now defense made repeated references to nothing
17 turned over in discovery. Although the defense motion to
18 compel discovery on this issue is outstanding, the defense
19 when questioned by the military judge indicated that it had no
20 additional evidence to present. Presumably the blame for that
21 would be cast at the government's feet, so I will take just a
22 brief moment to answer that issue.

23 The government did delay, regrettably, in responding

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1 to the discovery request because it was attempting to secure
2 documents and review documents, one of which needed to be
3 cleared before it could be turned over. So the -- the
4 government has responded to that request. It did so after --
5 it was unfortunately not able to do so prior to the defense
6 filing its motion to compel the discovery. But the -- the
7 defense is in possession of the government's response to that
8 as of, I believe, week before last.

9 The defense -- the government has turned over all
10 discoverable relevant information on this issue. The
11 government has no notes or any of the other matters that they
12 alluded to for interviews. The -- any e-mail traffic was
13 reviewed and nothing was discoverable. There is -- the
14 defense can speculate and make baseless allegations all day,
15 but that doesn't create relevance.

16 What the defense has in their possession and -- in
17 terms of the memorandum -- the hiring decision memorandum, the
18 government provided that out of goodwill because it's the
19 government's position that even that wasn't discoverable, but
20 the government was trying to head off any more allegations
21 made without any substance or basis for that. And that is
22 before -- that is what the defense -- I believe they made it
23 as an attachment yesterday with Admiral Reismeier's testimony.

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1 So that's before the commission as well.

2 In that evidence, in the testimonial evidence, there
3 is no indication that Admiral Reismeier has anything other
4 than an official interest in the outcome of this or other
5 military commissions cases that are before him as convening
6 authority.

7 Congress has chosen not to legislate a different,
8 more stringent test such as those familiar in other contexts
9 based on the possibility of a conflict or the appearance of a
10 conflict. We are talking about whether he's an improper
11 accuser or whether he has displayed an inelastic attitude
12 toward post-trial responsibilities.

13 Coming back to the Davis case, sir, that's the crux
14 of Davis. The court makes clear in Davis, our decisions
15 disqualifying convening authorities from post-trial action
16 have fallen into two categories. In the first, the convening
17 authority will be disqualified if he or she is an accuser.

18 We've already -- the commission is already aware what
19 that means. In the second category, this is the CAAF
20 speaking, we have found convening authorities to be
21 disqualified if they display an inelastic attitude toward
22 performance of their post-trial responsibilities, which is
23 exactly what happened in Davis when the convening authority

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1 said, quote, if convicted, don't come crying to me. That's
2 the test, Your Honor, not some made-up test that the defense
3 has failed to substantiate through case law.

4 And under that test, a reasonable person knowing all
5 of the facts, understanding how jurists typically work in
6 terms of opining on things, writing law review articles,
7 et cetera -- and especially in the military context, military
8 jurists who routinely rotate from one position to the next,
9 trial counsel to defense counsel, back to trial counsel,
10 military -- trial counsel to military judge, all the while, as
11 you heard from Rear Admiral Reismeier, going back to the
12 source, going back to the law, applying the unique facts of
13 whatever circumstances are before him, not bringing the fact
14 that he may have just been a trial counsel and now he's
15 presiding over a similar or even related case, but going back
16 to the law and committed to the law in a fair and unbiased
17 application as he has demonstrated repeatedly for decades.
18 That's the evidence before this commission.

19 Finally, Your Honor, the -- the defense being not
20 aware of disqualification suggests to me that they didn't read
21 the full text of the case of United States v. Davis. Clearly,
22 dismissal is not appropriate. It seems that the defense has
23 conceded that. Their analysis on the -- the parallel with

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1 pecuniary interests suggests that they're confusing the
2 Turner v. Safley test with the improper accuser test. But
3 dismissal would never be appropriate in this case, even if he
4 were -- even if he did have an other than professional
5 interest in the outcome of the case, which he does not.

6 Subject to your questions, Your Honor, I have nothing
7 else.

8 MJ [LtCol LIBRETTO]: Just one.

9 Understanding that the government's position is that
10 the recusal -- Rear Admiral Reismeier's recusal in the other
11 cases was prophylactic and unnecessary, given that he did, in
12 fact, recuse himself, and understanding that the government's
13 position is the reason for it was not founded in law, how does
14 the commission distinguish between the two, if those factors
15 that Rear Admiral Reismeier relied upon are insignificant?

16 ATC [MR. SPENCER]: Sir, insignificant in what sense?

17 MJ [LtCol LIBRETTO]: Insignificant in the sense that if
18 they didn't -- if in the reasonable -- well, Rear Admiral
19 Reismeier's reasonable mind, if they caused him to recuse
20 himself, but yet they are so insignificant that the government
21 believes that they shouldn't have caused his recusal, how then
22 standing side by side with this case does the commission not
23 take that into consideration and say, well, if those factors

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1 are insignificant, then you take that out of the equation;
2 i.e., his participation in the moot and things like that?

3 Then if he recused in one case, his personal
4 connection to the case would seemingly be equal in this case.

5 ATC [MR. SPENCER]: I think I understand your question,
6 Your Honor.

7 The answer is that the particular -- specific to
8 those cases, Rear Admiral Reismeier determined that in his
9 mind, a reasonable person might consider that he had an
10 other-than-personal outcome -- interest in the outcome of the
11 case because of the facts as it related to those cases.

12 The government suggests that that was overly
13 conservative, but that was his discretion and his -- and
14 again, demonstrative of his commitment to transparency and
15 fairness.

16 Some -- the government's position is that someone
17 familiar with all of the relevant facts, including military
18 practice, including how the military structure -- the military
19 JAG Corps is structured, the practice of going back and forth
20 between positions, the practice of mentoring, the fact of his
21 position at the time -- which not everyone would have
22 necessarily been aware of until this litigation, that he
23 championed or pioneered the military justice career litigation

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1 track, for example, that he mentored numerous individuals, not
2 just prosecutors or defense counsel -- he felt that
3 potentially, in his mind, specific to those cases, a
4 reasonable person might come down on the other side.

5 Whether that's true or not, we'll never know. But in
6 order to avoid unnecessary litigation in those cases, he chose
7 to recuse himself. That doesn't extend to every other
8 commission case by definition. The facts of those cases were
9 different. He was -- had no involvement in the Hadi case. He
10 had never even heard the name Abd al Hadi al-Iraqi until he
11 came to this commission as convening authority.

12 So he was not aware of anything related to this case.
13 He was not involved in any meaningful way with any counsel in
14 this case. My very limited contacts with him over ten years
15 ago certainly do not imply to anyone with knowledge of
16 reasonable facts, especially if all of the reasonable facts
17 were made aware -- or relevant facts -- that he was -- is
18 biased in favor of me, the -- those cases are separate.

19 He chose to take an overly conservative path, but
20 that -- that is what it is. He was aware of it. He was
21 attempting to be extra, extra cautious or transparent in cases
22 that aren't related directly to this case in any meaningful
23 way, notwithstanding the conspiracy argument that the -- that

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1 the defense clearly misunderstands.

2 MJ [LtCol LIBRETTO]: Let me -- let me -- and that did
3 answer my question. Let me now frame it a little bit
4 differently in light of your argument that they are so
5 separate that the appearance issues that caused Rear Admiral
6 Reismeier to recuse himself in one case should not be
7 attributed to the other.

8 What would the government's position be if Rear
9 Admiral Reismeier's participation in those two cases was
10 perhaps more significant than that? Is it the government's
11 position that even despite those increased -- that increased
12 level of participation, this commission is so separate that
13 Rear Admiral Reismeier would still not be required to be
14 disqualified?

15 And the question is perhaps even better informed by
16 indicating that this is a consolidated disposition authority,
17 consolidated convening authority, who has authority over all
18 of the commissions cases as opposed to perhaps a typical
19 court-martial convening authority, who handles cases that are
20 more routinely separate and distinct from one another.

21 So the question is again, going back to it, if
22 Rear Admiral Reismeier's connection to those two cases -- in
23 other words, if he provided more input than simply sitting on

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1 a moot court or provided more guidance than simply being a
2 mentor to one of the prosecution members, would that
3 disqualify him from sitting as the convening authority on this
4 case?

5 ATC [MR. SPENCER]: I understand your question, Your
6 Honor.

7 I believe the answer is yes, depending on what the
8 nature of those contacts were. The record is clear that he
9 had strictly professional interactions with General Martins.
10 If he and General Martins were drinking buddies and went out
11 on the weekends every night, then that would create, in a
12 reasonable person's mind, the absence of -- or the presence of
13 a possible bias. Right? Or if General -- if the convening
14 authority had, let's say, been hired as a government
15 consultant on a particular case or been hired ----

16 MJ [LtCol LIBRETTO]: Or volunteered.

17 ATC [MR. SPENCER]: ---- to assist -- to volunteer,
18 especially in the first instance as a -- in his official
19 capacity as -- in charge of Navy policy, that -- that
20 instance, in and of itself, does not -- I should step back,
21 Your Honor.

22 He didn't volunteer ever. He was asked. It's not as
23 if he was reaching out to the commissions and saying, "Can I

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1 help you? Can I help you prosecute terrorists?"

2 If he had done that, that may be an indication that
3 he desires a particular outcome in this case. He was asked,
4 because of his status within the JAG Corps community. Even
5 after retirement as a retired judge advocate flag officer, he
6 was asked because of his expertise generally with the
7 knowledge and his knowledge of the facts surrounding the --
8 the drafting and the enactment of the Military Commissions
9 Act.

10 So in response to requests, he provided his
11 expertise. Just his -- as he testified, he would do that for
12 whomever requested his expertise, defense or prosecution, just
13 as he -- in -- in the Code 20 context, he did that routinely.

14 So if the defense had reached out to him in the
15 commissions and said we'd like your expert opinion on X, Y, or
16 Z, it's clear that he would have provided it. He wasn't doing
17 so in a personal capacity. He was doing it with a
18 professional interest in the law and as a member of the
19 retired judge advocate bar as a recognized subject-matter
20 expert within the judge advocate community, specifically on
21 commissions cases given his early involvement in drafting or
22 assisting in the drafting of the Military Commissions Act.

23 Certainly there are instances where if he were more

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1 embedded with the prosecution, then that would create an
2 improper accuser issue. But that's not the facts of this
3 case. He thought that the facts of the other cases were close
4 enough that he wanted to avoid the issue altogether,
5 presumably, which is why he recused himself, even though the
6 government's position is that he didn't need to do that. But
7 he chose to take the high road.

8 Those contacts and connections don't exist in this
9 case, and so under the facts that exist; the relevant facts,
10 not conjecture, there is no improper accuser issue.

11 MJ [LtCol LIBRETTO]: Thank you.

12 ATC [MR. SPENCER]: Thank you.

13 MJ [LtCol LIBRETTO]: Lieutenant Commander Meusch.

14 DDC [LCDR MEUSCH]: Your Honor, if I may, I'd like to
15 respond to a few things.

16 First, the -- Mr. Spencer just -- in describing the
17 type three accuser standard or the R.M.C. 504 standard,
18 described it as other than -- something other than a
19 professional interest. The word "professional" is not the
20 correct one. And this is an important distinction, Your
21 Honor. It's "official." Other than official interest.

22 You can have a personal professional interest, such
23 as if you're in private practice, that would be contrary to

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1 your official interest under the Military Commissions Act and
2 the relevant rules. In terms of the type three accuser and
3 the issues with that, the defense takes exception to the --
4 the statements made by the government regarding the case law.

5 One, to the extent that this commission is left with
6 court-martial precedent as its guide, Gordon is a case the
7 government cited that talks about the standard for R.M.C. 504.
8 And if you look at that, it states the right to an impartial
9 review is an important right which must be recognized. The
10 accused is entitled to have the record reviewed and the limits
11 of the -- of his sentence fixed by one who is free from any
12 connection with the controversy.

13 In Ashby, it talks about the type three accuser and
14 other than official interests, such as ego, family, personal
15 property. These are all things that can give rise to an other
16 than official interest.

17 Second, regarding the statement that the defense made
18 a false statement about General Martins' boss. Your Honor,
19 the defense understands its duty of candor to this court.
20 That is the understanding of the defense, that Mr. Foster is
21 General Martins' boss. And we specifically requested to have
22 General Martins testify where we could ask him that question,
23 but Your Honor denied that motion.

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1 Again, this is not a court-martial, and
2 Admiral Reismeier is not a military commander. While
3 R.M.C. 504 incorporates some of the language from the relevant
4 rules for court-martial, the system is different. It draws
5 its authority from a different source. We're talking about
6 the define and punish clause, about prosecuting foreigners who
7 attacked the United States. This doesn't come under the
8 regulations to provide rules for the land and naval forces.
9 It's not about the United States military keeping its house in
10 order.

11 They're different systems, and they're -- to my
12 knowledge, it is unprecedented within military practice for
13 the Secretary of Defense to go out and hire a convening
14 authority to handle all of the cases in a given jurisdiction
15 under the UCMJ, to find a person who is retired, who holds him
16 out -- holds himself out publicly as the sole author of the
17 Uniform Code of Military Justice and then comes in as the
18 convening authority for all cases. So there are factual
19 distinctions between the two systems that this commission must
20 take into account.

21 Regarding the judicial -- what this court has
22 described as a judicial partiality standard, notably -- and
23 your -- Your Honor, you highlighted this. Admiral Reismeier

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1 applied that standard to himself. That should be the clearest
2 evidence that the standard applies in the context of the
3 convening authority. Whether he decided to apply that
4 standard to himself in this case or not is unclear, especially
5 given the fact that he hasn't even reviewed the charge sheet.
6 It's not clear to the defense that he has gone through the
7 analysis regarding whether disqualification is necessary in
8 this case.

9 In terms of what it means, the judicial nature of a
10 convening authority, the defense would invite the commission's
11 attention to a relatively old case -- very old, Runkle, which
12 was in the Supreme Court in 1887, which was recently cited
13 and -- by the Supreme Court in Ortiz and talks about the
14 Attorney General basically providing guidance to President
15 Lincoln, where they describe the acts of the convening
16 authority as judicial in nature.

17 The idea that a convening authority or someone
18 passing on a sentence or in post-trial review is doing
19 something that's judicial in nature is not new. It's been
20 around for a long time. There may be debate about it, but the
21 idea that a convening authority would apply the judicial
22 recusal standard to himself is certainly within reason under
23 the law.

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1 Finally, Your Honor, I guess as a point of
2 clarification, Mr. Foster is an attorney in the office of Ryan
3 Newman, who the government concedes is Martins' rater boss.
4 So to be clear on that.

5 And finally, regarding the discovery issue briefly,
6 the -- Admiral Reismeier testified that at some point, that
7 there were e-mails in connection with his hiring process.
8 There was contact and -- in connection with the Detention
9 Policy Task Force, there was turnover with General Martins
10 where things would have been produced in connection with that.
11 To the extent that the relevant documents have not been turned
12 over, we can litigate that, I suppose, in the other motion.

13 Pending your questions, Your Honor, that's all I have
14 from the defense.

15 MJ [LtCol LIBRETTO]: Thank you. The commission will
16 stand in recess for ten minutes.

17 [The R.M.C. 803 session recessed at 0923, 27 August 2019.]

18 [The R.M.C. 803 session was called to order at 0935,
19 27 August 2019.]

20 MJ [LtCol LIBRETTO]: The commission will come back to
21 order. All parties present when the commission last recessed
22 are again present.

23 The commission was perhaps a bit remiss in not

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1 addressing Appellate Exhibit 162 prior to taking up argument
2 on that issue, despite asking if there were any outstanding
3 evidence by either side. Nonetheless, just to close the loop
4 on it, with respect to the issues involved with it, that is
5 the discovery of information related to issues with Rear
6 Admiral Reismeier's service as the convening authority.

7 In reviewing it once again just a moment ago, based
8 on the opportunity to ask Rear Admiral Reismeier about all of
9 these things and based on what appears to be no attack on Rear
10 Admiral Reismeier's credibility and reliability insofar as the
11 defense to a very large extent is relying upon his assertions
12 in his various different statements to form the basis for
13 their motion, what is it about the contents of 162 that the
14 defense still believes to be in issue?

15 DDC [LCDR MEUSCH]: Your Honor, to give a specific answer,
16 I would need to go back and review 162. But the general
17 response are, like, the records and communications involving,
18 for instance, the Detention Policy Task Force, the records,
19 agendas, notes, meeting minutes that were included perhaps as
20 his time on the sub-working group, and the records involved in
21 the hiring process.

22 MJ [LtCol LIBRETTO]: Why was his testimony and the
23 opportunity to ask him all of the questions that you might

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1 have not sufficient to satisfy your needs?

2 DDC [LCDR MEUSCH]: Your Honor, he didn't remember
3 everything while he was testifying about things happening
4 several years ago. He did mention and state that there would
5 be additional records.

6 MJ [LtCol LIBRETTO]: Mostly administrative, if not
7 entirely administrative, and trivial in nature. Would you
8 agree?

9 DDC [LCDR MEUSCH]: He did mention those things, yes, sir.
10 But there are certainly other items, and I -- just as an
11 example -- point to the Detention Policy Task Force where he
12 said he could not discuss because of some concern about a
13 deliberative privilege, but also mentioned that there would be
14 records produced in association with that.

15 MJ [LtCol LIBRETTO]: And why are those -- for purposes of
16 the motion in which we're litigating, why would those
17 particular records be material?

18 DDC [LCDR MEUSCH]: Because those records should be
19 examined for any connection between Admiral Reismeier and
20 General Martins as well as for any evidence that could lead a
21 reasonable person to see other unofficial interest in
22 Admiral Reismeier performing the duties of convening
23 authority. And again, that -- that ----

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1 MJ [LtCol LIBRETTO]: Because he was assigned to a task
2 force roughly 13 years ago?

3 DDC [LCDR MEUSCH]: Your Honor, not just any task force,
4 but one that was specifically related to the military
5 commissions insofar as a question before that task force was
6 forum selection. So that relates to the forum that we're in
7 right now.

8 MJ [LtCol LIBRETTO]: Okay.
9 Government?

10 ATC [MR. SPENCER]: Your Honor, it's the government's
11 position that ----

12 MJ [LtCol LIBRETTO]: What have you turned over?

13 ATC [MR. SPENCER]: Your Honor, I don't have that list in
14 front of me. We did turn over the policy memorandum that the
15 defense attached yesterday or made an exhibit yesterday.
16 There was an additional matter -- items that we turned over
17 roughly three to four weeks ago that was responsive, and the
18 remainder of the request asked for things that just weren't
19 relevant or wouldn't produce relevant information, or in the
20 example of e-mails, for example, throughout the hiring
21 process, the government reviewed those and they contained no
22 relevant information.

23 MJ [LtCol LIBRETTO]: And when you say they contained no

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1 relevant information, you're making that conclusion based on a
2 review of the nature. So what was the nature of the
3 communications?

4 ATC [MR. SPENCER]: Your Honor, similar to what Rear
5 Admiral Reismeier testified to was related to logistics,
6 parking, scheduling, access for the interviews.

7 MJ [LtCol LIBRETTO]: So admin and logistics?

8 ATC [MR. SPENCER]: Yes, sir, that's correct.

9 DDC [LCDR MEUSCH]: Your Honor, if I may.

10 MJ [LtCol LIBRETTO]: Go ahead.

11 DDC [LCDR MEUSCH]: The other thing that comes to mind
12 is -- that might be relevant to this is also any type of
13 advanced materials that Admiral Reismeier may have reviewed
14 prior to interacting with the Office of the Chief Prosecutor,
15 specifically in the context of the briefing that was provided
16 on the conspiracy issue and also the 2016 mock -- where he
17 served as a mock judge and there was an argument presented to
18 him by members of the Office of the Chief Prosecutor.

19 [Pause.]

20 MJ [LtCol LIBRETTO]: Trial Counsel, have you reached out
21 to identify -- and I believe Rear Admiral Reismeier even
22 indicated that although he didn't have a present recollection,
23 he would -- he believed he would have likely received

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1 something ahead of his participation in that moot court.

2 Have you reached out in an attempt to use reasonable
3 diligence to locate any responsive materials?

4 ATC [MR. SPENCER]: Sir, any responsive material, if
5 they -- if they ever existed, would either be with Rear
6 Admiral Reismeier, who similar to -- with the defense, he did
7 not -- did not allow himself to be interviewed. We were
8 unable to locate within our holdings that particular briefing.
9 It would have been background information on history and
10 status of the case of that particular case.

11 Rear Admiral Reismeier testified about that exchange
12 in some detail, and defense certainly had access to any
13 information that he would have had access to.

14 MJ [LtCol LIBRETTO]: Okay. With respect to the --
15 generally the topics of this discovery request, by and large
16 the commission finds that the opportunity to inquire with
17 Rear Admiral Reismeier through direct examination yesterday
18 provided the defense adequate opportunity to obtain the
19 information that they seek in another form. That is to say,
20 the defense could have and in some cases did inquire with Rear
21 Admiral Reismeier about the substance of the matters contained
22 within this discovery request.

23 To the extent the defense seeks additional matters

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1 that are in -- or additional matters relative to Rear Admiral
2 Reismeier's connections -- purported connections, that is,
3 with General Martins, the commission finds that Rear Admiral
4 Reismeier's testimony indicated the extent, limited as it may
5 be, of his previous interactions in relationship with General
6 Martins.

7 To the extent that the defense is requesting
8 memorandums and other documents generated by Rear Admiral
9 Reismeier's participation on the various working groups to
10 which he was a part, the commission does not find that
11 material to be relevant or material to the preparation of the
12 defense's presentation of this issue. Moreover, once again,
13 the defense inquired with Rear Admiral Reismeier about the
14 nature of those working groups and have based their arguments
15 accordingly.

16 With respect to the matters involving his hiring to
17 be a convening authority, the commission finds no reasonable
18 basis to believe that anything beyond that which Rear Admiral
19 Reismeier testified to, that is, logistical and administrative
20 exchanges between himself and personnel at the Office of the
21 General Counsel -- the commission finds again that there is no
22 reasonable basis that anything beyond that exists and,
23 therefore, that the motion to compel discovery in that regard

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1 is denied.

2 The only outstanding matter appears to be any matters
3 provided by the prosecution ahead of his participation in the
4 moot court, and the commission will circle back on that after
5 it has an opportunity to review the testimony associated with
6 Rear Admiral Reismeier yesterday and the documents submitted
7 in support of the motions. Beyond that outstanding issue, the
8 motion brought under AE 162 is denied.

9 Regarding AE 157, the commission will take that issue
10 under advisement and issue a ruling in the short-term future.

11 Moving on to the argument of counsel relative to
12 AE 158. It's the commission's understanding that defense
13 would like to take these matters up collectively, that is 158
14 and 160; is that correct?

15 DDC [MS. HENSLER]: Yes, sir, that's correct.

16 MJ [LtCol LIBRETTO]: Okay. Any additional evidence that
17 you'd like to present on these issues?

18 DDC [MS. HENSLER]: No, sir, not at this time.

19 MJ [LtCol LIBRETTO]: Government, any additional evidence
20 that you'd like to present on either of those two issues?

21 ATC [Capt SQUIRES]: No, sir.

22 MJ [LtCol LIBRETTO]: Very well.

23 Defense, you may argue.

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1 DDC [MS. HENSLER]: Sir, I'd like to first note that the
2 transcripts of the testimony pertinent to this motion, other
3 than Your Honor's additional voir dire, were not available
4 when I prepared my argument, so I am doing the best to recite
5 the record to the best of my recollection. And I wanted to
6 put that ----

7 MJ [LtCol LIBRETTO]: Okay.

8 DDC [MS. HENSLER]: ---- out up front.

9 Sir, the theme of this hearing has been, in large
10 part, conflicts, a tangle of sorts of conflicts which came to
11 light only in the wake of the al Nashiri ruling recently.

12 The first conflict at the center of this motion bears
13 a striking resemblance to the fact pattern in that case, so
14 striking, in fact, that as we learned on Saturday when the
15 first judge detailed to this case, Captain Kirk Waits, now
16 retired from the military -- when he heard about the decision,
17 he reached out to the trial judiciary and partially
18 self-disclosed.

19 What did he disclose? He disclosed that he, just
20 like Judge Spath, had applied for a job with the Department of
21 Justice as an immigration judge while serving on a military
22 commission.

23 The dates are noteworthy because unlike in the

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1 al Nashiri case, not much time had passed with respect to the
2 existence of this commission when he applied for the job. He
3 was detailed on June 3rd, 2014, to this commission. On
4 June 18th, 2014, my client was arraigned. Just a few weeks
5 later Captain Waits applied to be an immigration judge in at
6 least 11 cities.

7 Now, he received rejections from a few, but he never
8 heard from others. And for all he knew, as he testified, he
9 was still, quote, under consideration from the time that he
10 submitted those applications until he received a dilatory
11 response from the Department of Justice several years later.
12 Rarely is legal precedent so on point, particularly in this
13 commissions.

14 Now, we also learned that Captain Waits applied for a
15 civilian job in the Department of the Navy. And, sir, the --
16 just as the Department of Justice has an interest and is a
17 party to this case, especially through the detailing of one of
18 its national security division prosecutors early on in the
19 case, the Department of Defense also is a party to this case.
20 And he testified that he applied for the position in or about
21 February of 2016, while he was still detailed to this
22 commission, and he was offered the position after some delay,
23 much to his aggravation, and accepted the job.

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1 And then another judge, Judge Rubin, was detailed to
2 the bench in mid-October. So we argue that given
3 Captain Waits' testimony, he was operating under a conflict of
4 interest for at least 97 percent of the time that he was
5 detailed to this commission from the date that he -- at least
6 the date that he submitted his application to be an
7 immigration judge, just a few weeks after my client was
8 arraigned, up until the time that he left the bench.

9 And it's important to highlight that a finding that
10 Judge Waits was operating under a conflict of interest does
11 not require a finding that he was actually partial while on
12 the bench. When asked that question, he testified that,
13 quote, in the military, we don't think in those terms. In the
14 military, we don't think in those terms. He also said it,
15 quote, never occurred to me. And he said that he'd spoken to
16 other judges about the al Nashiri decision after it was issued
17 in April and it -- and they -- they told him it never would
18 have occurred to them either.

19 But as the military judge well knows, this is not a
20 court-martial. It's a military commission. It's an awkward
21 marriage of military justice, federal court practice, and
22 international law principles, and there's a lot in dispute.
23 But one thing is not in dispute, not any longer, and that is

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1 that -- the law on judicial conflicts of interests. And Your
2 Honor today is presented with a tangle of them.

3 The fact that it may be that this is not a conflict
4 of interest that would dawn on a military judge in the
5 ordinary course is something which the court squarely
6 addressed in the al Nashiri opinion. And I'll quote from the
7 opinion. It's page 240. 921 F.3d, 240. Quote, This much is
8 clear. Whenever and however military judges are assigned,
9 rehired, and reviewed, they must always maintain the
10 appearance of impartiality demanded by Rule for Military
11 Commission 902(a). It would seem, therefore, that some
12 additional encouragement, took more carefully examined
13 possible grounds for disqualification, would be especially
14 appropriate under the circumstances.

15 And, sir, that -- that portion of the decision quotes
16 a Supreme Court case, Liljeberg, which I'll discuss in a few
17 minutes. But it's important to note that, again, Your Honor
18 need not find any malice, any intentional bias, in order to
19 find that Captain Waits was operating under a conflict of
20 interest while he was detailed to this commission. That's not
21 the standard.

22 We understand -- again, even Admiral Reismeier's
23 testimony yesterday was consistent with what Captain Waits

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1 told us. It just -- it didn't -- it didn't dawn on them. It
2 didn't occur to them because this isn't the way that military
3 practice works. But as we know from the Nashiri decision, it
4 is the way that a military commission should work.

5 The second series of judicial conflicts in this case
6 relates to an attorney advisor to this commission from
7 August 2014 or thereabouts to December 2018 or thereabouts.
8 So that's the first -- effectively the first four years of
9 this commission.

10 He testified -- Mr. Blackwood, that is -- that it was
11 his long-term goal to work on national security cases. He
12 was -- he testified he was actively applying for jobs at least
13 as early as winter 2018. He had applied for jobs with U.S.
14 attorney's offices, three-letter agencies. And as we just
15 learned just yesterday, after his testament day -- after his
16 testimony, days after his testimony, that he had even applied
17 for a job with the National Security Division of the
18 Department of Justice. That is the very section of the DoJ
19 which offered up a prosecutor in this case, sir.

20 And I would argue that that renders Your Honor's
21 interrogatories to the individual from the executive office of
22 the United States attorneys now moot. We know that
23 Mr. Blackwood applied for a job with the National Security

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1 Division. And the fact of that employ -- of that job
2 application under the Nashiri decision should be dispositive
3 on that question.

4 Sir, Mr. Blackwood now works as an AUSA on terrorism
5 and national security cases, at least as part of his docket,
6 as part of his portfolio, in the U.S. attorney's office in
7 Kansas City. As references, it's noteworthy that he testified
8 that he provided the names of two judges from this commission
9 and one individual, the dean of his executive LLM program, who
10 is now a judge or a judge-elect on the CMCR. Those were his
11 three references, so he clearly highlighted his work on
12 commissions in applying for a job.

13 He leveraged his experience, as we've seen in his two
14 résumés, his experience in handling classified information, in
15 researching and drafting rulings, to get a job, a job which he
16 actually is performing today. Mr. Blackwood clearly played a
17 significant role in this commission. I'd refer Your Honor to
18 Captain Waits' testimony again.

19 My colleague, Lieutenant Commander Meusch, showed
20 Captain Waits a portion of the transcript from this case,
21 pages 709 to 710. And I'd like to quote from that transcript,
22 sir. Mr. Rushforth, counsel for my client at the time, said,
23 "Let me turn to the subject of 505 ex parte meetings. Those

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1 ex parte -- 505 ex parte meetings that you've held with the
2 prosecution in this case. Have you had such meetings?"

3 Captain Waits responded, "I've had one. Usually
4 the -- my law clerk, Captain Blackwood, is the one who
5 actually physically, you know, has a physical meeting with the
6 prosecutors. I try to avoid those myself. There wouldn't be
7 anything wrong with me doing it, but I'm located, you know,
8 and physically stationed in Naples, Italy. So Captain
9 Blackwood, my law clerk, is the one who normally meets with
10 them."

11 Mr. Rushforth asked, "Do you know how many times
12 Captain Blackwood has met with him?"

13 And Captain Waits responded, "I don't know for sure.
14 I would say probably less than five or six times."

15 And then, sir, the transcript goes on, but
16 Captain Waits estimates that in terms of the quantity of
17 information that would have been reviewed in connection with
18 those meetings, it would have been something in the
19 neighborhood of, quote, probably close to 40 binders.

20 So he, at least in Captain Waits' estimation, played
21 a significant role in the -- in these proceedings,
22 particularly with respect to the very important question of
23 what substitutions the defense receives, substitutions which

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1 are the center of our ability to defend our client against the
2 charges against him, and substitutions which we will not have
3 an opportunity to seek reconsideration of. These are the
4 substitutions that Mr. Blackwood was handling.

5 MJ [LtCol LIBRETTO]: You cannot -- you'd agree that
6 reconsideration would not be appropriate pursuant to the
7 rules, but if this commission took action much like the
8 Nashiri case -- the D.C. Circuit did in the Nashiri case, that
9 would necessarily involve a review of the 505 summaries?

10 DDC [MS. HENSLER]: Sir, Your Honor is correct. We've
11 requested dismissal. There is other relief Your Honor may
12 consider in attempting to cure the taint here. But certainly
13 given then-Captain Blackwood's very significant involvement in
14 the 505 process, we would argue that all of those
15 substitutions be thrown out and we start over. So yes ----

16 MJ [LtCol LIBRETTO]: You agree that Mr. Blackwood is not
17 laboring under any conflicts at the time that those were
18 generated?

19 DDC [MS. HENSLER]: Respectfully, sir, I disagree. Your
20 Honor would not allow me to get into Mr. Blackwood's --
21 Mr. Blackwood's -- for instance, his participation in the
22 executive LLM program. But I will point out, Your Honor, that
23 one of the things that the government recently produced to the

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1 court in an attachment to its filing in the AE 160 series
2 was -- it looked like the handwritten notes from
3 Mr. Blackwood's interview with the U.S. Attorney's office.
4 And there was a reference there, sir, that related to his LLM
5 program and underneath it said that one of his professors was
6 a lawyer at the National Security Division. This was
7 experience he highlighted.

8 It is likely that he talked to these professors about
9 seeking employment at their agencies. Why else would you do
10 an executive LLM program? The point is that the adjunct
11 professors are currently employed in the field in which you
12 seek to seek employment. You are making contacts. And a
13 member of our own team actually did this program and
14 Dean Schenck, Judge Schenck, referred him for an internship at
15 the time with a three-letter agency.

16 That's how it works. And that makes sense. They're
17 expensive programs. If they're not going to help someone who
18 is already working secure better employment in the field in
19 which they seek to work, then there is no point.

20 So sir, I would argue that Mr. Blackwood's conflict
21 began earlier than even winter 2018, but it's also important
22 to note, sir, that much earlier than that -- and Captain Waits
23 was on the case. So we're really talking about a very narrow

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1 window of time.

2 Sir, I'd also like to address Mr. Blackwood's role
3 working with Colonel Rubin. It's noteworthy that there was a
4 difference between the testimony that Mr. Blackwood gave and
5 the sworn affidavit provided by Colonel Rubin. And it also --
6 Colonel Rubin's informed our team, consistent with his
7 affidavit, that he never served as a job reference for
8 Mr. Blackwood. He indicated that he was actually surprised
9 when he heard where he was working because I believe
10 Colonel Rubin's from Missouri, and it would have stuck out to
11 him that he was looking for a job in Kansas City.

12 So Colonel Rubin noted that -- and this is the second
13 page -- excuse me, the second paragraph of his affidavit,
14 which is AE 158F Attachment B that Mr. Blackwood provided
15 day-to-day assistance and counsel to me during the performance
16 of my judicial duties. Mr. Blackwood had a broad range of
17 duties such as conducting legal research, reviewing and
18 managing filings, reviewing classified information, attending
19 conferences and hearings, interacting with counsel and staff,
20 and preparing draft orders and rulings. He was an invaluable
21 sounding board, confidant, and advisor to me.

22 And, sir, this is consistent with the role that a law
23 clerk plays in Article III courts, but even more so here with

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1 a case this large, that as Your Honor has seen from
2 Mr. Blackwood's résumé, the second iteration of it, he
3 highlights only being assigned to work on one commission case,
4 and that is this one. And that makes sense because it is a
5 huge undertaking. And so Your Honor necessarily needs to rely
6 on the assistance of other attorneys in working through the
7 subject matter.

8 Sir, Mr. Blackwood also testified, again, consistent
9 with his first résumé, that his role remained the same -- his
10 role and responsibilities remained the same over the pendency
11 of the -- of his work on the trial judiciary.

12 And given that commissions judges, again, even as
13 Your Honor's voir dire highlighted, are not housed in the
14 trial judiciary and the fact that the trial judiciary staff
15 may out-serve the tender of the military -- tenure of the
16 military judges assigned to these cases, the play -- the role
17 they play is key. They are the institutional knowledge of the
18 commissions. Their role can't simply be sliced out of the
19 proceedings with a -- with an affidavit or with a correct
20 assertion by the judges.

21 Again, that they feel they are responsible for all of
22 their rulings and they take responsibility for all of their
23 rulings, that isn't the standard. The standard is the context

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1 and what a reasonable person would think knowing all of the
2 circumstances.

3 It's the appearance of partiality that matters. And
4 given the tangle of conflicts that we've uncovered during this
5 hearing, the appearance of bias towards the prosecution is
6 pervasive. al Nashiri is instructive. For that reason, we've
7 asked that Your Honor dismiss this proceeding.

8 Sir, the last part of the sort of factual part of my
9 argument relates to Your Honor's voir dire. You are based in
10 Parris Island. You indicated you'd only spent about 20 days
11 in Washington since being detailed to this commission. You
12 indicated you don't have a SIPR terminal and you don't have a
13 P to P account. And that you rely on your clerks for access
14 to classified information.

15 The volume of classified information in the pleadings
16 in this record is enormous. I tried to have two case analysts
17 simply count up the pages that an individual would have to
18 review to -- simply in the matter in the record, and it was in
19 the thousands of pages. We -- and that did not include the
20 ex parte contacts between -- that is permitted between Your
21 Honor and the prosecutors pursuant to Rule 505.

22 So clearly the attorney advisors are playing a
23 significant role in the classified litigation that is the

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1 center of this case. And, Your Honor, structurally they must
2 since, as Captain Waits testified, he was located in Naples at
3 the time; Colonel Rubin was located, I believe, in Georgia at
4 the time that he was detailed to this case, and Your Honor is
5 located in South Carolina.

6 Mr. Blackwood testified that he did not disclose his
7 job search process to the trial judiciary, but when he finally
8 did disclose it, he wasn't screened off the case. It didn't
9 occur to his supervisor, who we all know, Fred Taylor -- and
10 we all know to be a smart, diligent person -- it didn't occur
11 to him to screen him off this commission. It didn't occur to
12 Your Honor to screen him off this commission. Again, it's not
13 the intention that matters, it is the fact of the conflict.
14 The fact of the conflict requires recusal and dismissal.

15 Your Honor does not have to find bad faith. Again,
16 it never -- it might have never dawned on anyone, and it
17 sounds like it never did, but al Nashiri addresses that point
18 head on.

19 MJ [LtCol LIBRETTO]: Well, and al Nashiri discusses it
20 and addresses it head on in the context of a military judge.
21 Now we're imputing al Nashiri's decision to a law clerk, which
22 my review of the applicable case law and advisory opinions is
23 far less narrow than that which the Nashiri opinion seemingly

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1 directs. And that is to say although the case law -- the
2 language used is what a judge cannot do, a law clerk cannot
3 do, or vice versa.

4 But in any event, the law clerks are not bound by the
5 same -- to the same extent at least, you would agree, to the
6 appearance issues that a military -- a judge is.

7 DDC [MS. HENSLER]: So, sir, I understand Your Honor's
8 point. However, given the facts elicited on the record in the
9 past few days and the structure of the military commissions,
10 that distinction does not bear out in the context of these
11 commissions, again, because of the fact that a law clerk is
12 assigned, as in this case, to one commission; he invests all
13 of his time in one commission. The judge and the law clerk
14 are not co-located.

15 Much of the information and pleadings in the case are
16 not even available apparently to the military judge when Your
17 Honor is serving, as you must, in your role as a judge with an
18 active military docket in Parris Island.

19 MJ [LtCol LIBRETTO]: Let's -- let's break that down a
20 little bit because you're -- that is a very broad-brush stroke
21 to paint the picture of the nature of the litigation thus far
22 over the course of the last five years.

23 So while it may be true that during the 505 summary

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1 substitution process Captain Waits, and by way of perhaps
2 judicial efficiency, relied upon heavily Mr. Blackwood to
3 review a lot of those matters and then himself come to a
4 conclusion, the same cannot be said, for instance, for the
5 last year.

6 The nature of the litigation and the amount of
7 classified information that has been involved with that
8 litigation has been significantly less, you'd agree?

9 DDC [MS. HENSLER]: I would agree with respect to, yes,
10 the time that Your Honor has been on the bench. But, sir,
11 Mr. Blackwood's testimony again was that his job search
12 process started earlier than that. It started
13 approximately -- approximately six months before Your Honor
14 was even detailed to this commission. And during the pendency
15 of Judge Rubin's tenure as military judge on this case, there
16 was a significant volume of 505 material.

17 It's also -- and, Your Honor, I think it probably
18 makes sense to move to the Liljeberg factors because they are
19 instructive on what the remedy would be in this case. But
20 because, again, of the way that these commissions work, it's
21 not so easy to simply excise the seven or eight months
22 where -- seven, eight, actually nine months with time on the
23 front end before Captain Waits applied for a job and before

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1 Matthew Blackwood was assigned to this commission and simply
2 move forward.

3 Again, because of the way that the 505 process works,
4 we rely on determinations made by Your Honor and Your Honor's
5 predecessor and we build from there in our litigation.

6 So if there is a -- if there is a taint at the core
7 of those 505 substitutions, if there's a taint in the original
8 rulings, then it necessarily affects the rest of the process.

9 But, Your Honor, I would invite the court to walk
10 with me through the Liljeberg v. Health Services Acquisition
11 Corp. factors in determining -- and this was the case law
12 relied upon in the Nashiri decision, 486 U.S. 847, a Supreme
13 Court case from 1988. These are the factors which should --
14 we assert under Nashiri and under the case law applicable to
15 law clerk judicial conflicts that Your Honor should rely on in
16 fashioning appropriate relief.

17 Sir, the first factor is the risk of the injustice to
18 the parties in the particular case. The second factor is the
19 risk that the denial of relief will produce injustice in other
20 cases. And the third factor is the risk of undermining the
21 public's confidence in the judicial process.

22 With respect to the first factor, the risk of
23 injustice to the parties in the particular case, first let's

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1 look to the injustice to my client, Nashwan al-Tamir. We
2 don't know exactly when the conflict began -- conflict began
3 to infect this case. We know that -- we don't know the date.
4 We know from Captain Waits' testimony that it was sometime in
5 the month or so after my client was arraigned.

6 We also don't know with clear specificity when the
7 second conflict applicable to Mr. Blackwood arose in this
8 case, but based on his testimony, it's on or about winter
9 2018. And that is -- as in January, winter of 2018.

10 Again, we know that Captain Waits applied for an
11 immigration judge a few weeks after detailing and we know that
12 he was under consideration for several years. We know he
13 applied for and accepted a civilian position at DoD while
14 detailed to the case. We also know that Blackwood worked on
15 the case almost from its inception. He testified to the broad
16 nature -- the broad swath of his job responsibilities. And he
17 also testified about being -- his lifelong goal to be a
18 prosecutor.

19 So clearly the injustice to Mr. al-Tamir of moving
20 forward when both of these individuals worked on the case
21 for -- from inception basically would be significant. And the
22 injustice to the government on the other hand would be --
23 would be not significant. It's noteworthy that their

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1 disclosure was late and incomplete.

2 We learned only yesterday, only yesterday, after his
3 testimony, that Blackwood applied for a job at the National
4 Security Division. Sir, I didn't have access to the
5 transcripts of Saturday, and it would have been an act of
6 certainly attorney incompetence to not ask, "And did you apply
7 anywhere else in that period of time?"

8 But I am certain that one of my questions should have
9 elicited the answer, "And I applied for a job at the National
10 Security Division," knowing as an attorney that Mikeal Clayton
11 was -- was an attorney at the National Security Division when
12 this case -- at the genesis of this case.

13 So I don't -- I don't lay that dilatory disclosure at
14 the feet of the government because I do believe that Captain
15 Squires did not know until yesterday, but it is worth taking
16 into consideration when considering any injustice to the
17 government.

18 It's also -- it's also worth referring again to the
19 Nashiri decision -- again, this is on page 240 of the
20 opinion -- to the discussion of the powerful task for -- the
21 powerful case for dissolving the current military commissions
22 entirely. In that section, sir, it talks about the huge
23 remedy which the defense requested again. In that case, they

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1 requested the dissolution of the commission system.

2 But the -- what the panel settled on, which was
3 restarting the clock from 2015, that was also quite a dramatic
4 remedy. And that is -- that is very similar to the remedy
5 that we are asking for here, sir. So this is something surely
6 that this court has the ability to do.

7 The second factor in the Liljeberg analysis is the
8 risk that the denial of relief will produce injustice in other
9 cases. As we know from Nashiri -- and again, as we know from
10 page 240 of Nashiri -- this is a systemic problem. Again, we
11 heard it from multiple witnesses. It just never dawned on
12 them.

13 It isn't how conflicts -- because this isn't how
14 conflicts are dealt with in the military justice system. This
15 again refers us to -- back to that awkward marriage of the
16 military commission system. It may not be how military
17 practice works, but it is how military commissions practice
18 works and should work particularly in light of mandatory
19 authority on the point.

20 Sir, the final factor in the Liljeberg analysis is
21 the risk of undermining the public's confidence in the
22 judicial process. Again, this is where Nashiri comes in.
23 There is very little mandatory authority in the judicial -- in

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1 this particular jurisdiction. We are arguing frequently
2 before Your Honor as to the applicability of the Constitution.
3 We disagree on that point.

4 The district court -- excuse me, the D.C. Circuit has
5 ruled conclusively on this point and done so recently. And
6 for that reason, Your Honor, we are requesting dismissal.

7 MJ [LtCol LIBRETTO]: Okay. Thank you. I'm going to --
8 please stand by a few moments. I want to break it down a
9 little bit. I don't want to in my own mind conflate the two
10 issues between judges and their law clerks.

11 So first I want to high -- ask some questions
12 relative to the basis for disqualification of Captain Waits.
13 A moment ago you highlighted the difference between
14 courts-martial practice and military commissions practice, and
15 apparently, the D.C. Circuit did as well in the Nashiri
16 opinion by seemingly dismissing the case law -- whether or not
17 it was explained to them is another story -- about the nature
18 of military justice practice and CAAF's holdings as what
19 measures were in place that adequately insulates and protects
20 the -- even the appearance of military judges' bias.

21 But bringing it back to the issues that are presented
22 before us. If the Nashiri opinion relies in part on a
23 distinction between military commissions and military justice

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1 practice -- and they cite to Scott, for example, as a case
2 that warranted the conclusion that they came to -- in light of
3 Captain Waits' applications to the Department of the Navy, how
4 should -- why should this commission not rely strictly on
5 military justice practice which seemingly would authorize, if
6 not take issue with, a military judge applying for a position
7 within the Department of the Navy while sitting on the bench
8 and there being no conflict with it?

9 DDC [MS. HENSLER]: Sir, again, this is one of the two
10 conflicts that Captain Waits was operating under.

11 MJ [LtCol LIBRETTO]: Which I'm -- again, I don't want to
12 conflate the issues. I want to parse them out ----

13 DDC [MS. HENSLER]: Yes.

14 MJ [LtCol LIBRETTO]: ---- so we can address them
15 individually.

16 DDC [MS. HENSLER]: Sir, our position is the Department of
17 Defense is a party to this action and that if Captain Waits
18 were applying for civilian positions within the Department of
19 Defense, as we know he did at Code 20, that was something
20 which should have been disclosed to the parties and that
21 didn't happen.

22 And while understanding that military courts may
23 offer justification or may prevent this, it's -- again, the

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1 distinction in Nashiri has been highlighted. Again, this not
2 a courts -- this is not a court-martial, and so we ask that
3 the court rely on the exact same analysis that was relied on
4 for reviewing the role of immigration judges and another party
5 of the Department of Justice.

6 MJ [LtCol LIBRETTO]: My question is a little bit more
7 pointed than that, and it's nuanced in that the Nashiri
8 opinion seems to take the same position that the commissions
9 is different insofar as the Department of Justice in that case
10 was held to be a party.

11 In military practice, the Department of the Navy, at
12 least in the courts-martial that I preside over, is arguably
13 always a party in that they provide prosecutors, defense
14 attorneys, military judges, appellate counsel, court
15 reporters. The entire construct of the military justice
16 system within the Department of the Navy is the Department of
17 the Navy.

18 So in looking at that -- because you've highlighted
19 that as a potential conflict of Captain Waits as well. So why
20 should this commission not apply military justice precedent,
21 despite of Nashiri, for looking at that narrow issue?

22 DDC [MS. HENSLER]: Sir, may I confer with my ----

23 MJ [LtCol LIBRETTO]: You may.

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1 DDC [MS. HENSLER]: ---- much more informed co-counsel on
2 this particular point?

3 [Pause.]

4 DDC [MS. HENSLER]: Sir, the distinction is that military
5 courts are housed within Article I of the Constitution.
6 That's where they find their judicial basis. Whereas the
7 military commissions; as we know, they fall underneath the
8 D.C. Circuit, are housed within the Article III part of the
9 Constitution. That's where they find their genesis. So
10 that's the distinction.

11 But, sir, if that is a point, I would argue based on
12 the record of this proceeding -- and I understand Your Honor's
13 point and I understand the distinction that Your Honor is
14 making. However, under judicial canons, I would argue that
15 you need not reach that point because the factual record in
16 this case now, given Captain Waits' testimony, is that he
17 applied for a job at the Department of Justice within the
18 first few weeks of being detailed to this commission and was
19 under -- operating under that conflict for the remainder of
20 his time.

21 So for that reason Your Honor need not reach the
22 question of whether or not applying for a civilian position at
23 the Department of the Navy is also a conflict.

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1 MJ [LtCol LIBRETTO]: I understand your argument in that
2 regard, but it was raised, so this commission might feel the
3 need to address it.

4 DDC [MS. HENSLER]: Sir, may I be heard just on that
5 point?

6 And I apologize for that. Part of the reason that
7 158 and 160 were separate motions is because of the way that
8 our information about these conflicts was disclosed on a
9 rolling basis. We would have potentially made different
10 decisions about what to raise in motions had we had full
11 information at the time. So ----

12 MJ [LtCol LIBRETTO]: Understood. Thank you.

13 Moving on to the second question. In one of your
14 filings, either the initial motion or perhaps even the reply,
15 you talk about the subplots in the Nashiri decision not
16 driving the conclusion, but rather being talking points of
17 sorts.

18 My question is: I'm sure you've heard the term "bad
19 facts" or "incomplete facts make bad law." In the context of
20 comparing the two cases, the Nashiri case and this case, would
21 you agree that the bad facts, for instance -- and I'm going to
22 make a comparison between the two. The D.C. Circuit seemed to
23 highlight and focus in on the conversations that Judge Spath

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1 was having with counsel at the time where these negotiations
2 were ongoing, such that a reasonable inference could be drawn
3 that he very well was thinking about the very negotiations
4 while he was having these conversations in court, and I think
5 that that was pervasive throughout the opinion.

6 Here, the facts are not the same. Here, it appears
7 that the facts are that Captain Waits, among many members of
8 the judiciary, were unaware until April 19th that this -- that
9 the -- number one, the DoJ would be considered a party in the
10 context of these commissions. Two, that even if the DoJ was
11 considered to be a party within the context of these
12 commissions, the immigration courts, a subagency of the DoJ,
13 would not be. And if the judge, Captain Waits, believed that
14 there were to be a conflict, he would have certainly made that
15 known.

16 Coupled with the fact that as soon as the Nashiri
17 opinion did come out, he, in fact, did make it known, and then
18 this commission, this military judge, took action to ensure
19 that the parties were made aware of Captain Waits'
20 disclosures.

21 So on one hand, we have the bad facts associated with
22 what appears to be or could arguably be an intentional
23 omission or perhaps hiding of certain facts that were being

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1 contemplated at the same time he was making decisions in this
2 case, decisions which were, on their face, arguably -- went
3 against the defense's positions, whereas in this case, you
4 have none of those bad facts.

5 DDC [MS. HENSLER]: Sir, I disagree with Your Honor's
6 characterization of the record as us not having bad facts.

7 We're here today. It's hard to review the record
8 we've all lived through through the lens of the D.C. Circuit.
9 We don't know what they will regard as bad facts.

10 But I think the fact that Mr. Blackwood disclosed the
11 fact that he'd applied for a job in the National Security
12 Division two days after his testimony is a bad fact. I also
13 think that Your Honor's recitation of the facts in the
14 al Nashiri case focus on the second Nashiri factor, which
15 is -- again, the first thing that they looked at was the fact
16 of the application and we have that here in the record. But
17 the bad facts in Nashiri, they revolved mostly around, at
18 least in my understanding of Your Honor's point, that second
19 factor, which is the highlighting of the experience.

20 We do have the highlighting of the experience also in
21 the record here. We have that through Mr. Blackwood's
22 testimony about his -- what he included in his résumés, for
23 instance. The fact that he -- he applied for affirmatively --

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1 this isn't a job -- he didn't apply for a job as an
2 immigration judge. He applied for a job with -- which -- with
3 effectively a member -- a former member of the prosecution.
4 That's a bad fact. And he didn't disclose it. That is a bad
5 fact.

6 With respect to Captain Waits, it's hard to know at
7 the time because -- at the time what happened. Now we're
8 operating four years later. But certainly at the time, he
9 would have been thinking about having applied for a job with
10 11 separate immigration courts because he bothered to do it.
11 So it's impossible for us to know at the time what sort of
12 record would have been made if prior members of the defense
13 team had known that he was operating under a cloud of conflict
14 at the time.

15 So -- so, sir, I'd argue that the record is replete
16 with these bad facts. And we have testimony on these points,
17 but we also have documents, even neutral documents like the
18 job description which was provided, which highlights this was
19 a national security and terrorism prosecution job that
20 Mr. Blackwood applied for.

21 MJ [LtCol LIBRETTO]: That brings me to my next question.
22 You have not addressed Advisory Opinion No. 81.

23 DDC [MS. HENSLER]: Certainly -- and I'm mad at myself

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1 because I meant to bring a copy of that opinion with me to
2 the -- to court today, and I left it back at the Navy Lodge.

3 But certainly that is the legal precedent that we
4 must struggle with the most, as the defense. But, sir, I
5 would argue, one -- number one, unlike Nashiri, it's not
6 mandatory authority that Your Honor can use with which to
7 glean what analysis you should use in approaching this
8 decision of whether or not to dismiss, recuse, or do something
9 else.

10 Second, sir, that ethics opinion, which applies to
11 judicial law clerks in Article III courts, does separate out
12 from its analysis clerks who are -- who have significant
13 contacts with one of the parties and we have those contacts
14 here. And again, we have that from the testimony of
15 Mr. Blackwood. We have that from the voir dire of
16 Captain Waits. And we have that from the affidavit submitted
17 by Colonel Rubin. And, sir, we have that from Your Honor's
18 own voir dire which sets up the structural difficulties
19 presented to a military judge detailed to a case with such a
20 large volume of classified evidence.

21 So, Your Honor, I would argue that both -- it's not
22 applicable, but even if it is applicable, that this is the
23 circumstances highlighted in that opinion where a clerk would

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1 have a duty to disclose.

2 MJ [LtCol LIBRETTO]: Okay. I want to circle back
3 generally on a grander scale now, taking it out of the context
4 of any one individual, but the idea that Nashiri stands for
5 what it stands for; that is, this appearance of conflict.

6 Within the context -- and we can take it -- make a
7 comparison to participants of the Article III courts where,
8 for example, the federal public defenders are selected by an
9 own organization funded by the U.S. courts. Here, if I'm not
10 mistaken, Ms. Hensler, you're paid by the Department of the
11 Defense and trickling down to the department of -- or the
12 Defense Services Organization.

13 So while Nashiri made a point to hold that military
14 commissions are not simply military courts, it would appear
15 that you're laboring under a conflict of interest as well.

16 DDC [MS. HENSLER]: I agree, sir. The entire structure of
17 the military commissions still baffles me, having worked in it
18 for 18 months. But again, I would argue that for this
19 particular conflict, that Your Honor need not reach that
20 question of whether or not everyone in this courtroom is
21 operating under a conflict of interest because -- because we
22 have contacts to the Department of Justice and ----

23 MJ [LtCol LIBRETTO]: Do you believe that you are laboring

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1 under a conflict simply because you are being paid by the
2 Department of Defense?

3 DDC [MS. HENSLER]: No. But particularly since my client
4 is aware of it, and he has -- he has represented to this court
5 that he wanted to appoint me, an employee of the Department of
6 Defense, as his lead counsel. Not a pro bono attorney, who
7 would not be operating under the same conflict, me. So I
8 understand Your Honor's point.

9 Again, the structure of this commission baffles me
10 and the D.C. Circuit even referred to, you know, the troubling
11 status of these commissions within its own sort of
12 jurisprudence. But ----

13 MJ [LtCol LIBRETTO]: But yet the Supreme Court has held
14 that military tribunals, courts-martial, that labor presume --
15 seemingly under the same conflicts are constitutionally okay.

16 DDC [MS. HENSLER]: Sir, I understand your point, but I
17 would argue that Nashiri is mandatory authority on this point
18 and Your Honor need not reach the question of the DoD contacts
19 now that we know more about the DoJ -- the extensive DoJ
20 contacts and we have mandatory precedent on that from the
21 D.C. Circuit.

22 MJ [LtCol LIBRETTO]: My final question, I believe -- I
23 might have one more -- is unlike the Nashiri case where the

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1 record was built after the fact without the opportunity to
2 question the participants that might have been laboring under
3 a conflict here, the parties have been given the opportunity
4 to develop the record. The commission has ensured that the
5 record has been developed such that we are not trying to build
6 facts after the fact to rely upon them to come to a
7 conclusion.

8 Do you think that some of the conclusions and
9 language contained within the Nashiri opinion was based on
10 unknown facts, looking back at action that hindsight could
11 have been addressed more appropriately and in this case are
12 being addressed more appropriately?

13 DDC [MS. HENSLER]: No, sir, because the facts -- the true
14 scope of the facts that would have been knowable in Nashiri
15 aren't knowable because the government didn't disclose.

16 And I would, again, point to the language ----

17 MJ [LtCol LIBRETTO]: The government didn't disclose ----

18 DDC [MS. HENSLER]: The government, even when questioned
19 specifically on whether or not Judge Spath had applied for one
20 of these positions, did not disclose.

21 But, sir, I'd like to point to I'm sure the language
22 Your Honor is aware of. The court's indulgence.

23 [Pause.]

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2 DDC [MS. HENSLER]: Yes. Again, this is page 239 to
3 page 240. "All elements of the military commission system,
4 from the prosecution team to the Justice Department to the
5 CMC to the judge himself, failed to live up to that
6 responsibility. And we cannot dismiss Judge Spath's lapse as
7 a one-time aberration, as al-Nashiri's is not the first
8 meritorious request for recusal that our court has considered
9 with respect to the military commissions proceedings."

10 Your Honor, we cannot ignore the existence -- the
11 fact of the issuance of this Nashiri ruling is essentially a
12 fact witness in this case. It was the issuance of this ruling
13 that led to the disclosure.

14 And we are in a period now where military
15 commissions, military judges in the same role as Your Honor
16 are going to have to interpret this decision and decide what
17 relief is appropriate given what we now know. It's -- again,
18 as I said, it's clear from the witnesses as it was -- as the
19 court addressed in the Nashiri decision, it didn't dawn on
20 them, but that -- but what does that mean to my client? It
21 doesn't fix four years of proceedings which were tainted by a
22 conflict of interest, and that's why we've requested
23 dismissal.

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1 MJ [LtCol LIBRETTO]: Okay. One more question. My last
2 one.

3 Even assuming Mr. Blackwood was laboring under a
4 conflict that should have been disclosed and that should have
5 caused his recusal from participation in this commission, in
6 light of the nature of the issues that have been addressed or
7 were addressed between the time that I took the bench and the
8 time that Mr. Blackwood stopped working on this case
9 altogether, why is this military judge's recusal necessary and
10 appropriate, keeping in mind it has been almost nine months
11 now since Mr. Blackwood has had any participation -- or
12 actually over nine months.

13 DDC [MS. HENSLER]: Sir, there are two things I'd like to
14 say in response to this. One is, first, Your Honor's question
15 reminded me of another point I wanted to make in response to
16 Your Honor's former question about the Nashiri decision and
17 disclosure and the factual record.

18 There's one other fact I'd like to highlight and that
19 is that Mr. Blackwood testified for this court that he'd done
20 work on the Nashiri commission, and that -- as he'd
21 highlighted in his first résumé. And that he was aware that
22 that issue, that litigation, was percolating. He was aware of
23 it and he didn't disclose. So I would ask that the court take

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1 that under consideration.

2 With respect to Your Honor's question about the
3 relief that my client is entitled to, as I stated before,
4 we've requested dismissal given the way that military
5 commissions work. They build upon -- rulings build upon
6 rulings build upon substitutions build upon rulings.

7 If Your Honor is willing to reset the clock to the
8 very beginning without recusing, then I understand that that
9 may be an appropriate form of relief. We've requested
10 dismissal, but I understand -- I understand Your Honor's
11 position, certainly.

12 MJ [LtCol LIBRETTO]: Well, standing alone, AE 160
13 requests the military judge recuse himself based on
14 Mr. Blackwood's -- so putting aside Captain Waits' and what
15 relief may be warranted in that circumstance, AE 160, you've
16 requested the military judge recuse himself.

17 And by way of one of the comments made earlier on
18 this week in the session, it did appear at least -- and I'm
19 happy that you did -- you went back to review what substantive
20 motions were actually resolved by me as the military judge
21 between the time of June and November to December time frame.
22 And I would submit to you I think there was one substantive
23 ruling of any -- well, and that arguably wasn't even

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1 substantive.

2 So based on the status of the case at that time where
3 we were waiting and waiting to proceed with very little
4 activity, why would -- are you suggesting now that your
5 position has changed and recusal would not necessarily be
6 warranted based on that potential conflict with Mr. Blackwood?

7 DDC [MS. HENSLER]: Sir, it's difficult for me to answer
8 that question because it's almost as if the military judge
9 finds -- you, yourself, find your -- yourself in the same
10 position that I have found myself in, which is that I -- I'm
11 late to the game. And the prosecutors over and over and over
12 and over again have said to Your Honor we missed deadlines.
13 We missed deadlines. We have failed to take advantage of the
14 time afforded to this defense team. Tough luck for us that I
15 wasn't here at the time or any of my co-counsel.

16 It is -- the detriment should inure -- excuse me.
17 The penalty should be on my client. And I understand that --
18 that that seems unfair, and that is why we have asked Your
19 Honor to effectively restart the clock.

20 In some instances, Your Honor has -- on our
21 litigation deadlines. In some instances, Your Honor has said
22 yes. In some, you've said no. But it would seem even Your
23 Honor agrees that -- strike that.

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1 It's difficult without starting over. I'll say that,
2 sir. If Your Honor would restart the clock, start from the
3 very beginning, the first three weeks of this case and not
4 recuse, that would potentially be a remedy which would fall
5 within the scope of Nashiri.

6 MJ [LtCol LIBRETTO]: Okay. Thank you, Ms. Hensler.
7 We're going to take a ten-minute recess, and then I will hear
8 argument from the government.

9 [The R.M.C. 803 session recessed at 1045, 27 August 2019.]

10 [The R.M.C. 803 session was called to order at 1058,
11 27 August 2019.]

12 MJ [LtCol LIBRETTO]: The commission will come back to
13 order. All parties present when the commission last recessed
14 are again present.

15 Trial Counsel?

16 ATC [Capt SQUIRES]: Captain Squires for the government.
17 If the commission would permit, I would like to take up the
18 two motions separately, to the extent that I can, AE 160 first
19 just so that I can try to stay organized.

20 MJ [LtCol LIBRETTO]: Go ahead.

21 ATC [Capt SQUIRES]: The defense has walked back their
22 argument significantly from money matters and allegations of
23 personal financial interests to now an accusation of a

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1 conflict of interest. But the defense has never been able to
2 state articulately what that conflict actually is.

3 MJ [LtCol LIBRETTO]: We're talking 160 now?

4 ATC [Capt SQUIRES]: Yes, sir.

5 Mr. Blackwood, during his time as a law clerk on this
6 commission, did not labor under any identifiable or
7 discernable conflict of interest. The defense's accusation
8 appearances is a prophylactic rule meant to inspire the
9 public's confidence in the judiciary. There has been by his
10 way of participation on this case virtually no injustice
11 whatsoever to the accused. All that is present here is a
12 legal question and, in fact, a legal fiction of an accusation
13 that an average citizen would doubt the partiality of the
14 presiding military judge because a former law clerk, who is
15 now no longer on the case, began looking for post-clerk
16 employment.

17 A couple of the specific questions and accusations
18 that the defense has raised here bear mention. The first is
19 the late disclosure by Mr. Blackwood and I guess by proxy the
20 prosecution as to his application for the National Security
21 Division. The defense is correct that it was brought to my
22 attention for the first time yesterday afternoon. It was
23 disclosed within two hours. You know, my apologies for the

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1 delay -- I do have to eat lunch -- but I turned it over as
2 soon as I knew it.

3 It would have been preferable for the government if
4 Mr. Blackwood had stated that -- you know, when he was being
5 examined by Ms. Hensler -- I don't recall the exact question,
6 but my recollection of the record -- and the transcript will
7 speak for itself -- was that he stated I applied to -- all
8 over the place, or words to that effect, and then Ms. Hensler
9 moved on.

10 In any event, it is an extremely rare witness who
11 will purposely withhold information on examination and then
12 call a federal prosecutor and ask him to make sure that the
13 record is clear. It's my, you know, belief and I think the
14 reasonable person viewing his testimony would see that as
15 either an oversight or an inartful answer to an inartfully
16 worded question.

17 In any event, care, diligence, and transparency has
18 been the mantra of the government since we learned of these
19 issues. And I read once -- I'm not sure what case or what
20 wise jurist wrote these words -- that sunlight is the best
21 disinfectant. And if there ever was a cloud or a taint or an
22 infection as the defense claims, I do not think any reasonable
23 person viewing these proceedings now would believe that Your

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1 Honor is disqualified or ever was anything less -- or issued a
2 ruling or order that was anything less than fair, neutral,
3 impartial.

4 The defense highlights two bad facts in their attempt
5 to bring Major Blackwood -- and we'll discuss this later --
6 but also Captain Waits -- within the universe of facts as
7 found by the court of appeals in al-Nashiri. The first is the
8 alleged late disclosure.

9 I don't think, looking back, that there ever was any
10 obligation for Mr. Blackwood to disclose. In fact, the
11 government's, you know, disclosure of this to the defense,
12 which we learned from at some point a member of the trial
13 judiciary staff, may have been unnecessary and dragged
14 Mr. Blackwood through a lot of unnecessary publicity for what
15 are his private affairs.

16 He, as a judicial employee, is -- if not entitled, he
17 is certainly reasonable in his reliance on what are the
18 published ethical advisory opinions on uscourts.gov. I don't
19 know what else is expected of a law clerk other than when he
20 considers searching for other employment to search for the
21 Judicial Conference Committee's Code of Conduct and read the
22 ethical advisory opinions and then strictly abide by them. So
23 there has never been a late disclosure unless there was some

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1 impropriety to disclose.

2 Second, the government disclosed everything it knew
3 when it knew it. If I could -- I would think by this point
4 every time the defense gets an e-mail from me, they have to
5 get a little bit excited because it's some new fact for them
6 to use in these pleadings. But there's no information that it
7 has been withheld ----

8 MJ [LtCol LIBRETTO]: Dispense with the commentary on what
9 the defense may or may not do when they get an e-mail from you
10 and focus on the facts and law that are applicable to the
11 issues before us.

12 ATC [Capt SQUIRES]: Aye-aye, sir. The fact, if -- stated
13 in a better way is absolute transparency.

14 Mr. Blackwood in his résumés did highlight his
15 experience with these commissions and his experience in
16 military law in general. Frankly, I think a reasonable person
17 reading those résumés, in light of the amount of time he spent
18 practicing in national security law, the education he's
19 obtained, would find his résumés not to be boastful, but
20 somewhat reserved and humble to an extent. So there is no --
21 at least in my read of these documents any inference that he
22 was trying to leverage his ability to influence the
23 commission, to the extent that he ever had it, as a way to

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1 obtain employment elsewhere.

2 The defense is now requesting or bartering with the
3 commission that if the military judge will reset everything
4 and vacate all prior orders, that recusal would be
5 unnecessary. That's not the process. If the military judge's
6 neutrality is in question, he shall recuse himself unless the
7 defense waives such recusal. They cannot, you know, trade a
8 remedy that they deem preferable to having this military judge
9 preside.

10 And the government has no interest in any particular
11 jurist presiding over these proceedings. We simply ask that
12 the rules be enforced as written. Appearance is a shared
13 interest. It's shared by the government and the commission.
14 And if the military judge's impartiality is found to
15 reasonably be in question, Your Honor, respectfully, you
16 should recuse yourself and you should also broadly construe
17 grounds for challenge, but you should not step down
18 unnecessarily.

19 We continue to defer to the military judge on the
20 military judge's fitness to serve. We just ask that the law
21 be applied correctly and the statements of law not be parsed
22 simply to the favorable -- the parts the defense deems
23 favorable.

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1 The defense has repeatedly used words like "taints"
2 and "clouds of impartiality," which while rhetorically nice
3 don't clarify why Mr. Blackwood's employment process places
4 the presiding judge's impartiality in question. They've never
5 alleged actual bias either by this court or Mr. Blackwood.
6 Mr. Blackwood has left the case. So if there ever was taint,
7 the taint has been removed.

8 Regarding the application to National Security
9 Division which, as the defense pointed out, is probably the
10 closest he came to the prosecution, Ethical Advisory Opinion
11 No. 74 would guide that. Even if he had been applying to the
12 Office of the Chief Prosecutor directly, he would -- the mere
13 application alone would not be disqualifying. He would have
14 at least required, in order for there to be a conflict, an
15 offer of employment that may be accepted. He was -- he was
16 clear in his e-mail that's attached to the record that he
17 never received any such offer or any word back.

18 He did send out his résumé to a number of different
19 agencies and organizations. There's no evidence whatsoever
20 that he was attempting to use his current position to gain
21 that employment.

22 MJ [LtCol LIBRETTO]: Captain Squires, just briefly so the
23 record can be clear, what e-mail are you referring to?

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1 ATC [Capt SQUIRES]: So I believe 160I is the defense's
2 most recent notice. And we agree with the facts as stated in
3 there, that yesterday at 3 -- I'm sorry, at 1501, we produced
4 additional discovery to the defense, which was an e-mail from
5 Mr. Blackwood to me that he sent or was time stamped 1301
6 yesterday, August 26th.

7 If the commission has not had the opportunity to
8 review that, Mr. Blackwood's e-mail states, "Captain Squires,
9 when Ms. Hensler was listing off places I had applied, she did
10 not mention NSD. Just wanted to make clear that I did apply
11 to the National Security Division at some point in 2018. I
12 never heard back from anyone. Let me know if you have any
13 other questions. VR," for very respectfully, "Matt
14 Blackwood."

15 MJ [LtCol LIBRETTO]: Thank you. Stand by a moment.
16 [The military judge conferred with courtroom personnel.]

17 MJ [LtCol LIBRETTO]: Okay. You may continue.

18 ATC [Capt SQUIRES]: The defense argues that
19 Mr. Blackwood's interests in national security law creates
20 four years of taint. I don't think that's a fair
21 characterization.

22 He did not submit any applications until 2018. The
23 fact that a Marine judge advocate has an interest in a

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1 particular area of law is not sufficient for a reasonable
2 person to believe that that individual is anything less than
3 neutral or, even worse, would attempt to influence the rulings
4 of the commission.

5 A reasonable person also would not doubt the
6 partiality of a law clerk who applied for and completed an
7 educational program such as the George Washington University's
8 LLM program in national security law. First, I believe I
9 heard the defense correctly saying that one of the
10 defense's -- defense counsel in the case went through the same
11 program. If that were true, that defense counsel would also
12 have a -- the same conflict of interest that Mr. Blackwood is
13 alleged to have in this case.

14 Simply put, a judge advocate or civilian attorney who
15 desires to further his education is not in any way indicative
16 of impartiality.

17 As the commission previously pointed out at the time
18 that Mr. Blackwood was searching for other employment and
19 ultimately left the case, there was very little substantive
20 litigation going on for him to influence. We were disputing
21 over docketing continuances, and I believe Ms. Hensler's
22 security clearance, all of which has since been resolved.

23 So if there was error, the appropriate remedy would

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1 be the military judge, who is not alleged to have actual bias,
2 to simply take a fresh look at whatever rulings were issued
3 and determine whether a different relief or reconsideration is
4 warranted. But as I stated, we do defer to the commission.

5 And unless the military judge has further questions
6 on AE 160, I'd like to proceed to 158.

7 MJ [LtCol LIBRETTO]: Not on 160. Thank you.

8 ATC [Capt SQUIRES]: The court of appeals in In re al
9 Nashiri held that under the totality of the circumstances in
10 that case, the military judge's impartiality could reasonably
11 be in question. It did not alter the objective test that is
12 to be applied, and it did not create a sixth enumerated bright
13 line circumstance that would disqualify a military judge in
14 every case. The objective test is still the objective test
15 and the law remains the law.

16 Now, the defense would have the commission hold or
17 believe that whenever a commissions judge applies to DoJ, the
18 remaining circumstances of the case become irrelevant. The
19 totality of the circumstances are replaced by the presence of
20 one. In short, they ask the commission to ignore the forest
21 and obsess over a tree.

22 Perhaps ----

23 MJ [LtCol LIBRETTO]: Didn't the -- Captain Squires,

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1 didn't Nashiri focus on the tree and say this application to
2 the immigration -- to be an immigration law judge is a
3 conflict of interest or the apparent conflict of interest?

4 ATC [Capt SQUIRES]: Yes, sir, it did. And ----

5 MJ [LtCol LIBRETTO]: So how do -- how does this
6 commission get around that starting point?

7 ATC [Capt SQUIRES]: Because there will be cases, unless a
8 new rule is created, in which that circumstance is present,
9 but the totality of the circumstances do not require
10 disqualification. In short, you cannot read the outcome of
11 the totality of the circumstances test to eliminate the test
12 itself.

13 There are cases -- I believe this is one of them --
14 that if a reasonable person were only to know that one fact,
15 they would doubt the partiality of the military judge. But if
16 the reasonable person were fully informed of all the facts, as
17 these proceedings have shed a lot of sunlight on, they would
18 not doubt partiality of the court.

19 It is the totality of the circumstances that matter.
20 And that is a unique individualized test to every case. I
21 struggle to believe that a fully-informed citizen, viewing the
22 totality of the circumstances in which a Navy officer with
23 nearly 30 years of honorable service, had been a federal judge

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1 since 2006, facing statutory retirement, began looking for
2 other judicial positions in the federal government. He was
3 moving or attempting to move from one bench to another.

4 During that process, he never so much as spoke to
5 anyone in the Department of Justice. He never received an
6 offer of employment. He never interviewed. He never
7 negotiated for a salary. His résumé, again, giving his
8 qualifications, was fairly reserved. While on the case, he
9 permitted extensive voir dire. As soon as the opinion was
10 released -- which he describes as monumental -- he
11 self-disclosed. Again, he answered extensive questions from
12 the defense here.

13 There is no ----

14 MJ [LtCol LIBRETTO]: But does -- is it the government's
15 position -- just so I'm clear where your argument is going.
16 Is it the government's position that the Nashiri opinion
17 allows room to determine whether or not there was a conflict
18 on its face despite Captain Waits having applied for the
19 immigration law position? Or is it just a matter of what
20 remedy is appropriate in light of the distinctions between
21 perhaps Nashiri and this case?

22 ATC [Capt SQUIRES]: It's -- it's the former, sir.

23 The Nashiri opinion did not change the totality of

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1 the circumstances test. And if this case, under the totality
2 of the circumstances, would not raise any doubts of the
3 neutrality of the military judge, then the Nashiri outcome is
4 not warranted.

5 Now, certainly the fact of application is a
6 significant factor for the commission to consider, but there
7 are other factors that must be considered. And if this
8 commission in its discretion finds that Judge Waits'
9 neutrality would not be questioned by the fully informed
10 citizen, then Nashiri is distinguishable.

11 MJ [LtCol LIBRETTO]: Stand by just a moment.

12 [The military judge conferred with courtroom personnel.]

13 MJ [LtCol LIBRETTO]: Go ahead.

14 ATC [Capt SQUIRES]: This may speak more to remedy, but
15 the defense has not pointed to a single sentence of a ruling
16 that indicates any actual impropriety. A review of the record
17 reveals that Captain Waits called this case right down the
18 middle, and that ultimately his application to the Department
19 of Justice was of no moment. He took a position with his
20 existing employer in a neutral policy office.

21 MJ [LtCol LIBRETTO]: How does that matter in light of
22 Nashiri? Because, I mean, they made a point to say we don't
23 doubt his impartiality, but the appearance issue is what we

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1 based our decision on.

2 ATC [Capt SQUIRES]: Yes, sir. Well, it bears -- that may
3 bear more on the question of remedy. But if the defense could
4 point to actual issues in the case coupled with the other
5 factors, that fits within the totality of the circumstances.

6 The absence of any accusations of actual impropriety
7 when considered with all of the -- I guess if we're calling
8 them bad facts versus good facts -- when considered with all
9 of the good facts would not be considered by a reasonable
10 person to have any question of a lack of neutrality.

11 I think, speaking to remedy, the requested remedy
12 dismissal is wholly inappropriate, and it would, in fact,
13 undermine a rule which is designed to instill confidence in
14 the judiciary. If a reasonable person would have doubts about
15 Judge Waits' conduct, they would not expect the entire
16 proceedings to merely be dumped. They would expect the
17 commission to correct it.

18 An extreme remedy would do nothing to restore
19 confidence in the citizens -- citizenry of this country, who
20 expect not just neutrality within their courts, but a
21 functional system that is able to identify and correct error
22 where it occurs. The confidence in these proceedings is not
23 increased or protected whatsoever by any rash extremes or

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1 unnecessary windfalls for the parties. In fact, I think many
2 people would be outraged for any criminal case to be dismissed
3 based on a legal fiction like this, where there is no actual
4 bias, conflict, misconduct, whatever you call it, where no
5 ruling was issued in error, where no finding of fact is
6 unsupported, and where three years have passed since the
7 offending judge left the case.

8 If there is error, the commission should/must correct
9 it and proceed on. By our count, there are only four 505
10 motions that were ruled on by Judge Waits. Those are
11 Appellate Exhibits 023E, 023J, 023R, and Appellate Exhibit
12 044. We concede that if the military commission does find
13 Captain Waits to be disqualified, that he certainly may
14 reconsider. And indeed the government, if there is error in
15 this, requests that it be scrubbed from the record as
16 necessary, and we will join any motion by the defense to
17 reconsider those four rulings.

18 Additionally, if the military judge finds
19 Captain Waits to be disqualified, he can set aside those
20 rulings, and the defense can move to compel the underlying
21 discovery and we will go through the 505 process as it need be
22 at the time.

23 The defense cited the Liljeberg case, which stated

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1 clearly that a Draconian remedy is not required in every case
2 and I'd like to point the commission's attention to a second
3 case that was in our brief, and that's United States v.
4 Microsoft, particularly at page 116. Congress delegated to
5 the judiciary the task of fashioning the remedies that will
6 best serve the purpose of the disqualification statute. The
7 purpose is to instill confidence in the justice system and in
8 the judiciary.

9 At a minimum, Subsection 455(a), which is the
10 equivalent to R.M.C. 902(a), requires prospective
11 disqualification of the offending judge. That is
12 disqualification from the judge hearing any further
13 proceedings in the case.

14 By virtue of the timing that this was raised and
15 discovered, that has already happened. Both Captain Waits and
16 Mr. Blackwood are prospectively disqualified. They are no
17 longer on the bench or in chambers.

18 So the question then is, is there any need for
19 retroactive disqualification and in United States v. Microsoft
20 the district -- the Court of Appeals for the District of
21 Columbia Circuit stated that, "Most important, full
22 retroactive disqualification is unnecessary to protect
23 Microsoft's right to an impartial adjudication. The district

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1 judge's conduct destroyed the appearance of impartiality.
2 Microsoft never alleged nor demonstrated that it rose to the
3 level of actual bias or prejudice. There is no reason to
4 presume that everything the district judge did is suspect."

5 Now, the -- the judge in that case had made comments
6 to the press regarding a party to the litigation, so the
7 purpose of disqualification was somewhat different.

8 But if we go through that analysis, the prospective
9 disqualification has already occurred. If there was error, it
10 is no longer present in the case. So the defense would have
11 retroactive disqualification of everything, but they can't
12 explain why. They speak simply in terms of taint and clouds
13 and infections, but they can't point to one error, to one
14 example of actual injustice to the accused, to one ruling,
15 order, sentence, word, to a moment during these proceedings in
16 which anything unfair actually happened.

17 It is a legal fiction designed to instill confidence
18 in the judiciary that the jurists in question are
19 disqualified. There has been no injustice. There has been no
20 prejudice. Indeed, the remedy they request would cause
21 significant injustice to the government, who had no ability
22 whatsoever to prevent this from happening, who were not
23 contributing factors in it. We learned about this well after

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1 the fact, years after it happened.

2 Every party, from this court to the prior judges to
3 the government, have carefully, diligently, and transparently
4 approached this issue. And if there was error, it was
5 innocent and harmless error.

6 And if -- if I may be just permitted one more
7 statement, it's that Judge Waits did nothing unethical. He
8 presided honorably over this commission and throughout his
9 service both as a military judge and as a judge advocate in
10 the United States Navy. It's deeply unfortunate that at the
11 end of the career this happened and he's -- his judicial
12 behavior is called into question.

13 But absent any showing that he did anything wrong
14 during these proceedings other than seek post-employment --
15 post-retirement employment, there is no reason to grant the
16 remedy requested by the defense. It would be in every sense
17 of the word unjust.

18 Barring any further questions of the commission, that
19 is all I have.

20 MJ [LtCol LIBRETTO]: I just want to go back specifically
21 to the issue that I asked initially some questions of you
22 about.

23 And that is the idea that the totality of the

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1 circumstances apply, suggesting that sort of the bad facts
2 that were alluded to earlier in the Nashiri opinion can still
3 open the door to this commission finding that Captain Waits'
4 application to become an immigration law judge does not
5 necessarily require disqualification.

6 How does that square with the language contained
7 within the Nashiri opinion, quote, the fact of Spath's
8 employment application alone would be enough to require
9 disqualification. So while understandably the test may not
10 have changed in the general context of disqualification, it
11 appears that the D.C. Circuit may have just created a new
12 per se disqualification in the context of military judges
13 applying to become an immigration law judge.

14 Is this not a per se rule by virtue of the language
15 that the D.C. Circuit used?

16 ATC [Capt SQUIRES]: I would point the commission to the
17 Supreme Court case of Liteky v. United States for that
18 analysis, specifically footnote 2. There are a list of
19 enumerated rules within -- whether you're looking at
20 subsection 455(b) of the United States Code or R.M.C. 902(b)
21 that enumerates per se bright lines in which the presence of
22 any of those factors are disqualifying.

23 The applicable one raised by the defense in this case

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1 would be Rule 902(b)(5)(B) and the claim that the military
2 judge has an interest in the outcome of the proceedings. The
3 specific rule states that the military judge must recuse if
4 it's known to have an interest, financial or otherwise, that
5 could be substantially affected by the outcome of the
6 proceeding.

7 In Liteky ----

8 MJ [LtCol LIBRETTO]: Isn't (a) just as applicable to the
9 D.C. Circuit's resolution of the issue as -- as the enumerated
10 grounds are? That is to say, the military judge is
11 disqualified in any proceeding in which that military judge's
12 impartiality might be reasonably questioned?

13 ATC [Capt SQUIRES]: Yes, sir. And the D.C. Court was
14 not -- did not actually look at any of the enumerated grounds
15 whatsoever.

16 MJ [LtCol LIBRETTO]: Right.

17 ATC [Capt SQUIRES]: The analysis was specifically under
18 the appearance.

19 MJ [LtCol LIBRETTO]: So why are we going under the
20 specific grounds?

21 ATC [Capt SQUIRES]: If there is a new enumerated ground,
22 then the language of Liteky would apply. So Liteky said
23 subsection (a) goes beyond (b) in another important respect.

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1 It covers all aspects of partiality and not merely those
2 specifically addressed in subsection (b). However, when one
3 of those aspects addressed in (b) is at issue, it is poor
4 statutory construction to interpret (a) as nullifying the
5 limitations (b) provides except to the extent the text
6 requires.

7 The text of the rule requires that any interest in
8 the outcome of the proceedings be one that could be
9 substantially affected by the outcome of the proceeding. So
10 unless the D.C. court was creating an entirely new rule at
11 which -- it would not apply retroactively, you cannot read
12 that opinion to replace the totality of the circumstances with
13 something new.

14 So if -- if, as the defense claims, there was an
15 interest in the outcome of the proceedings and it was a
16 financial interest or otherwise and they said that a dozen
17 times in their brief, I think they've walked that back. It is
18 only disqualifying if it could be substantially affected by
19 the outcome of the proceeding.

20 If it cannot be substantially affected by the outcome
21 of the proceeding and there's no evidence that Judge Waits'
22 employment, prospective employment or otherwise, could be
23 substantially affected, then you don't simply fall back on (a)

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1 as a catch-all. It would be very poor statutory construction
2 to enumerate a list of specific rules and then put a -- a more
3 strict rule above that.

4 And that's what the court in Liteky was saying. You
5 don't go through the analysis of (b) and then say, "Oh, we've
6 passed that test. But we go to the other test."

7 An example would be where the judge has a familial
8 relationship with one of the parties and that -- that's the
9 example they use in the case.

10 So it requires a third-degree familial relationship.
11 And I'm going to confess, I don't know what a third-degree
12 familial relationship would be. I think it would be like a
13 second cousin or a first cousin. But if no person that is a
14 party to the case is within the third degree of the
15 relationship, you cannot then go back to subsection (a) and
16 say, well, the reasonable person would find that a person
17 within the fourth degree of familial relationship would be
18 disqualifying.

19 So in short, the -- the defense is saying that In re
20 Nashiri created a rule that where it is known by the military
21 judge to have an interest, it's disqualified, eliminating the
22 congressionally -- or in this case, the SECNAV instructed
23 language that it requires that it be substantially affected by

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1 the outcome of the proceeding. And I'm not entirely sure if I
2 made that clear.

3 Does the commission have any further questions on
4 that argument?

5 MJ [LtCol LIBRETTO]: Only to the extent it might be
6 unclear in my mind as to where you're going.

7 Are you saying, then, the D.C. Circuit
8 inappropriately did not look to Liteky in conducting its
9 analysis?

10 ATC [Capt SQUIRES]: Well, so the -- one of the
11 significant differences between this case and the D.C. Circuit
12 case in In re al Nashiri is the -- procedurally the way it
13 happened. There was no trial court rulings or facts for an
14 abuse of discretion.

15 The D.C. Circuit was reconstructing the timeline of
16 events based on a FOIA request. And they were very clear that
17 they intended the whole thing to send a message. And so they
18 used language that was very strongly worded and does say the
19 fact of application alone is disqualifying, but they did not
20 expressly overrule the totality of the circumstances test.
21 They did not say that the commission does anything else other
22 than go through the objective test of the reasonable person.

23 So there are circumstances where -- and we completely

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1 agree that it is a significant factor and it may be the
2 dispositive factor. But unless the D.C. Court stated that the
3 totality of the circumstances become irrelevant whenever this
4 one factor is present, that recusal is required, then you
5 can't read that opinion the way the defense has it.

6 And just to reiterate the point, while I want the
7 D.C. Court of Appeals rule -- ruling to be applied correctly,
8 if there is in this commission's mind an appearance or a
9 reasonable question as to Judge Waits' impartiality, we
10 believe that remedy is appropriate and necessary. We do not
11 believe, under any set of facts as pled and supported by the
12 facts of this case, that dismissal or total vacatur or any of
13 these remedies are appropriate or warranted.

14 The remedy is within the court's discretion to impose
15 and it should be one that instills and reinforces public
16 confidence in these proceedings. And I think what any
17 reasonable citizen would expect is a careful, diligent, and
18 efficient, functional court. And the best way to do that
19 would be to reconsider the 505 determinations of
20 Captain Waits. The defense can move for reconsideration of
21 any adverse rulings that they feel were affected by this
22 process. They can keep any favorable rulings that were issued
23 to them. That puts them in a much better place than simply

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1 restarting these proceedings anew.

2 The amount of time that that would unnecessarily
3 waste is -- is extraordinary and unnecessary.

4 MJ [LtCol LIBRETTO]: Two questions along those lines.

5 What is your position -- what is your response to the
6 defense's argument that everything that they've done, whether
7 filed or not filed, has been driven by the 505 process?

8 ATC [Capt SQUIRES]: It's a conclusion without a premise.
9 They can say that, but they can't tell the commission why. In
10 every court, rulings build upon each other. If one ruling
11 that followed another was so connected to it that they can't
12 be divorced or that the outcome would change if the first was
13 affected, the commission can fix that too.

14 But there's -- there's no plausible connection
15 between most of Judge Waits' rulings, which a tremendous
16 amount were purely administrative at that stage of the
17 proceedings, and the motions that they have filed in the past
18 several years. I would -- I'm not going to hazard a guess the
19 amount, but a number of the issues that they complain about
20 that are tainted here have been moot for years.

21 We are still in the pretrial phase of this case.
22 They don't explain in any way how the merits of the case and
23 the determination of guilt or innocence of the accused can be

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1 affected by the -- by the supposed taint.

2 And there is a presumption of impartiality; there is
3 not a presumption or inference of all pervasive infection of
4 the proceedings. I -- tangles can be untangled by combing
5 through the record.

6 MJ [LtCol LIBRETTO]: And isn't that -- but isn't that
7 analysis and that question, whether or not there's actual
8 impartiality, a nonfactor when we're looking at it through the
9 lens of a reasonable person, understanding all the -- all the
10 circumstances would question the -- again, it's that fiction
11 that you might -- that you referred to earlier, but when we're
12 looking at fiction, we're not looking at actual impartiality.
13 You'd agree?

14 ATC [Capt SQUIRES]: Yes, sir.

15 MJ [LtCol LIBRETTO]: So how does that -- how does that
16 argument, how does that analysis support the position when
17 viewed through the lens of Nashiri when we are under the
18 902(a) as opposed to 902(b) where there's an actual conflict
19 of interest insofar as a personal or a financial interest at
20 stake?

21 ATC [Capt SQUIRES]: So Nashiri was -- was written and
22 intended to send a message and I think it's clear that it did.
23 So the remedy imposed was somewhat on the extreme side.

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1 Functionally what is going to happen in that case is
2 those motions are going to be refiled and decided by a new and
3 impartial judge. There's not a lot of difference in that and
4 the presiding judge in this case simply taking a fresh look at
5 the motion.

6 I don't think a reasonable person in light of the
7 accusation against Judge Waits would see, okay, the -- let's
8 use AE 044 as an example. Judge Waits issued Appellate
9 Exhibit 044. If a second judge, with no accusation of bias,
10 no appearance of bias, reads the pleadings, reconsiders it and
11 reaches the exact same conclusion, there is no basis to
12 believe that there is any lack of impartiality existing in the
13 commission.

14 The defense is on virtually the same footing as they
15 would be if it was vacated, set aside, repleaded, reargued, and
16 ruled upon. The -- the significant difference is it would --
17 and probably the reason that it's the preferred remedy is one
18 would take much longer and be much more disruptive to the
19 forward progress of justice.

20 MJ [LtCol LIBRETTO]: Okay. Thank you.

21 ATC [Capt SQUIRES]: Thank you, sir.

22 MJ [LtCol LIBRETTO]: Ms. Hensler?

23 DDC [MS. HENSLER]: Sir, I only have a few points.

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1 First is we've not withdrawn our argument that the --
2 that looking for and applying for a job creates a financial
3 interest in -- when the employer -- prospective employer is a
4 party. That is the crux of the conflict of interest.

5 Second, to embrace the language that Captain Squires
6 used, Nashiri did intend to send a message to us, to this
7 court. And Your Honor seems to understand quite well that it
8 would take a lot of parsing to find that Nashiri does not
9 apply to the circumstances that Your Honor has taken testimony
10 on over the past few days.

11 Sir, I believe Captain Squires started with the quote
12 that sunlight is the best disinfectant. And when he talked
13 about that, he was talking about not the first conflict in
14 this case -- and that's the one involving Captain Waits in a
15 very similar position to Judge Spath -- but to the second
16 conflict, which relates to Mr. Blackwood.

17 He said Mr. Blackwood did everything he should have
18 done. He disclosed. And it would be unusual if one weren't
19 in a posture of full and honest disclosure to reach out to a
20 federal prosecutor and leave a voicemail and send an e-mail.
21 But that's not exactly what happened here.

22 Mr. Blackwood, we were informed, was working as an
23 AUSA, and on a rolling basis we started receiving these

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1 disclosures. Even disclosures from the government about a
2 month ago did not include all of the -- all of the prospective
3 employers that Mr. Blackwood testified about on Saturday.

4 A reasonable person looking at what happened would
5 say we started with a disclosure of an application at a -- for
6 a job in a U.S. -- United States attorney's office. Then we
7 moved on to an application at NCIS. Then we moved on to a
8 late disclosure of an application to NSD, which was, again,
9 the precise party to this proceeding. A reasonable person
10 would say, "What else is there?"

11 And that's why this particular conflict is so
12 problematic.

13 MJ [LtCol LIBRETTO]: The issues that you're pointing to
14 in terms of the continuous and trickling nature of the
15 disclosures, in order for that to actually matter, would you
16 agree that an actual conflict must have existed? Or do you
17 believe that the nature of the trickling disclosures is in
18 itself a conflict of some sort?

19 DDC [MS. HENSLER]: The -- I think your -- the former,
20 sir.

21 MJ [LtCol LIBRETTO]: Okay.

22 DDC [MS. HENSLER]: And finally, sir, you asked both me
23 questions and Captain Squires questions about what remedy Your

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1 Honor should fashion.

2 Given Your Honor's findings on these particular
3 conflicts, I would ask that if Your Honor were to find that
4 Captain Waits alone is -- was operating under a conflict of
5 interest, that -- and seeks to fashion a remedy from there to
6 somehow preserve some of the rulings and 505 disclosures in
7 this case, Your Honor, I would ask that we be permitted time
8 to brief that issue. Because as I have mentioned, in this
9 case because of its -- the central importance of classified
10 evidence, the discovery and rulings and litigation is driven
11 by determinations made very early on, and it would require a
12 lot of parsing for the court to make an -- an informed
13 decision about what to keep and what to throw out.

14 And, sir, even then, I think it would be very
15 difficult to do that and time consuming. It makes more sense
16 if Your Honor is not inclined to dismiss, to simply start over
17 as Your Honor effectively -- and did as Your Honor did when
18 you first were detailed to this case, issue a litigation
19 schedule and let's go.

20 MJ [LtCol LIBRETTO]: Okay. Do you have any additional
21 argument? I've got two follow-up questions for you.

22 DDC [MS. HENSLER]: No, sir, I don't.

23 MJ [LtCol LIBRETTO]: The first -- and it sort of goes

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1 back to the argument of the government counsel that Nashiri
2 was -- intended to send a message, which they explicitly state
3 it was, and what can be gleaned from that intention for future
4 cases -- for the application of it to future cases.

5 Clearly, the D.C. Circuit took issue with two cases
6 that came to it in close proximity to one another, one with
7 the CMCR and now one at the trial level. And they sent a
8 message. My question, perhaps more academic than instructive,
9 but it could be so I'm going to ask it, the -- what judge --
10 if the commission is to take at face value what Nashiri's
11 opinion stands for or apparently stands for at face value and
12 apply it across the board to any case, sort of the bright line
13 per se rule that it purportedly establishes, where does
14 that -- where does that end? Where does the application end?

15 And to use an example from -- perhaps tie it to the
16 D.C. District Court. If a D.C. district court has aspirations
17 to be promoted, if you will, for lack of a better term, to the
18 D.C. Circuit Court -- and we all know who appoints
19 D.C. Circuit Court judges. Isn't there inevitably in any
20 participant in the military justice or criminal justice
21 process -- isn't career aspirations, which would -- is -- what
22 appears to be the case here, where you've got a retiring
23 military judge, aspiring to continue his career as a judge, no

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1 less -- aren't there always those conflicts that but for the
2 unique circumstances of being presented two cases that they
3 took issue with close -- in close proximity to one another and
4 then the arguably aggravating facts associated with the
5 Nashiri opinion -- can't this commission take those matters
6 and fact considerations into account when determining to what
7 extent it ought to apply and sort of take for what it's worth,
8 if you will, the -- the statement in Nashiri that says one
9 equals the other? Application equals disqualification.

10 DDC [MS. HENSLER]: Respectfully, no, sir, as the decision
11 says what it says. And at this point, the question is what is
12 the remedy? And that is where the deliberation -- the
13 difficult deliberation is really -- centers in this case, sir.

14 MJ [LtCol LIBRETTO]: My second question goes to that
15 point, and that is this: The Circuit -- D.C. Circuit took
16 issue with what appeared to them, I believe, by my read of the
17 opinion, an intentional omission or an intentional lack of
18 forthcomingness by the judge in that case in disclosing
19 matters that he was actively engaged with minutes or hours
20 before coming into court and discussing those matters, but
21 leaving out some certain facts.

22 Here, the record is clear. Nothing in this case by
23 way of Captain Waits' testimony and the record in this

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1 commission suggests that he was deliberately avoiding letting
2 people know that, deliberately nondisclosing his applications.
3 As he stated, it just simply didn't occur to him.

4 The fact now that we have a record -- the parties
5 have been given the opportunity to question Captain Waits, to
6 question Mr. Blackwood, to question this military judge -- is
7 that remedy enough? In other words, is it remedy enough in
8 light of the answers and responses to those questions where
9 there is no doubt or at least by way of their -- in their own
10 minds that there was a -- a question of their impartiality or
11 their duty to disclose.

12 And in light of the fact that the parties have had
13 the opportunity to question those witnesses, is that remedy
14 enough?

15 DDC [MS. HENSLER]: No, sir. Because as Your Honor
16 pointed out earlier, I believe in your colloquy with
17 Captain Waits, it's not enough because the purpose of that
18 testimony was not to glean whether or not he was actually
19 partial while on the bench. Certainly if he was, that would
20 be a factor Your Honor could take into account. But the query
21 is into the appearance of partiality.

22 So there's no record. Since it's sort of beside the
23 point, it's not -- it's not central to this -- it should not

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1 be central to this court's determination in light of --
2 particularly in light of mandatory authority.

3 And again, Captain Waits argued he discussed the
4 Nashiri opinion with fellow military judges, I presume. And
5 it was certainly his feeling that the D.C. Circuit got it
6 wrong. But as Your Honor knows, I'm sure from your practice
7 in courts-martial ----

8 MJ [LtCol LIBRETTO]: We apply the law; we don't make it.

9 DDC [MS. HENSLER]: That's -- that's true, sir. And if
10 Your Honor has nothing else ----

11 MJ [LtCol LIBRETTO]: I have none. Thank you.

12 TC [CDR SHORT]: Your Honor?

13 MJ [LtCol LIBRETTO]: Yes.

14 TC [CDR SHORT]: I have one thing left over from
15 yesterday, an open question from Your Honor that I'd like to
16 address. It will take about 30 seconds.

17 MJ [LtCol LIBRETTO]: Go ahead.

18 TC [CDR SHORT]: Yesterday, Your Honor, in connection to
19 the AE 137 motion, you had asked the question about the Bates
20 stamps on page 3 of our reply.

21 MJ [LtCol LIBRETTO]: Yes.

22 TC [CDR SHORT]: Which was Hadi Bates stamps number
23 HADI-4-010235 through HADI-4-010259. Those are, in fact,

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1 detailed photos of the Site A that were provided to defense
2 counsel, Your Honor.

3 Due to the -- I believe they're addressed in AE 138G,
4 Your Honor.

5 MJ [LtCol LIBRETTO]: Okay. Thank you.

6 DDC [MS. HENSLER]: Sir, there's one more housekeeping
7 matter I'd like to put on the record. It relates to a
8 question Your Honor had asked me a few days ago on the record.

9 MJ [LtCol LIBRETTO]: Okay.

10 DDC [MS. HENSLER]: Your Honor had asked the defense to
11 file on its docket the pleadings in a pending habeas petition
12 in the District Court in the District of Columbia.

13 We filed with the court the pleadings associated with
14 the request for a temporary restraining order and also a
15 motion for the lift of a stay which is currently in place in
16 the preliminary injunctions proceeding in that jurisdiction.
17 The defense filed a motion to withdraw -- has officially
18 withdrawn the TRO request as of yesterday, I believe. And if
19 it hasn't been filed on Your Honor's docket, that notice
20 should be filed with the court shortly. The TRO has been
21 withdrawn.

22 MJ [LtCol LIBRETTO]: Formally? Okay. Got it.

23 DDC [MS. HENSLER]: Yes.

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1 MJ [LtCol LIBRETTO]: Thank you.

2 TC [CDR SHORT]: Just to be clear, Your Honor, that's not
3 defense, it was petitioner withdrew.

4 MJ [LtCol LIBRETTO]: I'm sorry?

5 TC [CDR SHORT]: In that court, it was the petitioner, not
6 the defense.

7 MJ [LtCol LIBRETTO]: Okay. I might be confused as to the
8 nature of the litigation. I only had an opportunity to very
9 briefly review it.

10 The petition for the stay was filed by ----

11 TC [CDR SHORT]: Your Honor, it's just that Ms. Hensler
12 referred to it as the defense withdrew. It's -- in the D.C.,
13 in the habeas case, it is the petitioner that withdrew.

14 MJ [LtCol LIBRETTO]: Oh, I gotcha. Okay. Understood.
15 Thank you.

16 DDC [MS. HENSLER]: I am noticed defense counsel in both
17 cases, so it would be me ----

18 MJ [LtCol LIBRETTO]: Okay.

19 DDC [MS. HENSLER]: ---- and additional counsel.

20 MJ [LtCol LIBRETTO]: Okay. Got it. Thank you.

21 All right. Earlier -- yesterday when I indicated
22 what we were going to be taking up today, I stated that which
23 we have taken up already today. I am prepared, if the parties

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1 are prepared, to take a lunch recess and come back and address
2 one additional matter for this afternoon. I will hear the
3 parties' position on that as it may be, and that issue is
4 AE 159, the defense motion to compel discovery of information
5 related to Rear Admiral Ring's statements.

6 If the parties would like to take that up this
7 afternoon, I am happy to do so. If you'd like to wait, in
8 light of the commission's guidance yesterday, until tomorrow,
9 we can take up the three remaining motions at that time.

10 Government, your position?

11 DTC [CDR FLYNN]: Your Honor, the government is prepared
12 to go forward this afternoon.

13 DDC [LT DANIELSON]: Your Honor, Lieutenant Danielson. We
14 would respectfully request to delay that argument until
15 tomorrow. There is a -- an issue regarding the defense's
16 presentation. It's currently under OCA review. We don't
17 expect it to be reviewed completely until tomorrow. We'd like
18 to work those issues out and prepare accordingly.

19 MJ [LtCol LIBRETTO]: Okay. Very well. We'll do that.

20 So tomorrow we will be taking up in this order
21 AE 156, the motion relevant to the testimony of Lieutenant
22 Colonel Martin.

23 Government, he will be prepared to testify at 0-8; is

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1 that correct?

2 DTC [CDR FLYNN]: That's correct, Your Honor.

3 MJ [LtCol LIBRETTO]: Okay. We will roll right into
4 argument on that issue following his testimony.

5 We will then take up the defense motion pertaining to
6 Rear Admiral Ring's statements. And we will conclude this
7 commission session with the defense motion to compel the
8 employment and funding of a defense mitigation specialist.

9 With that, is there anything to take up before the
10 commission stands in recess until tomorrow morning?

11 TC [CDR SHORT]: Nothing from the government, Your Honor.

12 DDC [MS. HENSLER]: No, sir. Thank you.

13 MJ [LtCol LIBRETTO]: The commission is in recess.

14 [The R.M.C. 803 session recessed at 1149, 27 August 2019.]

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