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1 [The R.M.C. 803 session was called to order at 0856,
2 9 November 2018.]

3 MJ [LtCol LIBRETTO]: The commission is called to order.
4 All parties present when the commission last recessed are
5 again present, and it appears that we have another counsel
6 joining the defense team, Ms. Hensler.

7 This morning we received -- the commission received
8 Appellate Exhibit 007CC which is a notice of detailing for
9 Mr. Hadi. And it appears that you have now since formally
10 been detailed to this case; is that correct?

11 DDC [MS. HENSLER]: Yes.

12 MJ [LtCol LIBRETTO]: Okay. If you would, please state
13 orally ----

14 DDC [MR. THURSCHELL]: Judge, may I speak to an objection
15 -- speak to an objection to any proceedings including these
16 going on?

17 MJ [LtCol LIBRETTO]: You will have an opportunity to do
18 so in a moment. Thank you.

19 Ms. Hensler, if you would please state orally for the
20 record who you have been detailed by, your status as to oath,
21 your legal qualifications.

22 DDC [MS. HENSLER]: Your Honor, I have been detailed by
23 the chief defense counsel in accordance with R.M.C. 503. I am

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1 licensed in New York and Washington, D.C. I am qualified
2 under R.M.C. 502(d), and I have not acted in any manner that
3 might tend to disqualify me in this proceeding or elsewhere.
4 I have not been properly sworn in accordance with R.C.M. 807.
5 And my detailing memo has been filed with the commission as of
6 this morning, as Your Honor noted, at AE 007CC.

7 MJ [LtCol LIBRETTO]: Okay. And you said that you had not
8 previously been sworn; is that correct?

9 DDC [MS. HENSLER]: That's correct.

10 MJ [LtCol LIBRETTO]: If you would please raise your right
11 hand.

12 [Counsel was sworn.]

13 MJ [LtCol LIBRETTO]: Thank you very much. You may be
14 seated.

15 I assume, Ms. Hensler, that on previous filings that
16 it appeared that your clearance had not yet been fully
17 adjudicated. It has since?

18 DDC [MS. HENSLER]: Yes.

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

20 ATC [MR. SPENCER]: Your Honor, I don't believe we
21 captured her response because she wasn't pressing the
22 microphone.

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

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1 ATC [MR. SPENCER]: Ms. Hensler wasn't pressing the
2 microphone ----

3 MJ [LtCol LIBRETTO]: Oh.

4 ATC [MR. SPENCER]: ---- in front of her. I just want to
5 make sure that it gets on the transcript.

6 MJ [LtCol LIBRETTO]: Your clearance has been fully
7 adjudicated?

8 DDC [MS. HENSLER]: Yes. That's right, Your Honor. My
9 clearance has been fully adjudicated.

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

11 DDC [MR. THURSCHELL]: May I be heard now, Judge?

12 MJ [LtCol LIBRETTO]: No, you may not. I will give you an
13 opportunity after we get through a few administrative matters
14 this morning.

15 Since the last session a Rule for Military
16 Commissions 802 conference was held at 1210 on 6 November 2018
17 in the judge's chambers. The military judge and both parties
18 were present. The accused was not present.

19 At the last session, right before the recess was
20 taken, Mr. Hadi had a back spasm episode which required his
21 transport to the DACU based on the recommendation of a
22 treating physician at the time. The government indicated that
23 they intended to recommend the neurosurgeon conduct an

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1 examination of the accused that day on 6 November 2018.

2 The defense objected to continuing any further during
3 the November session and requested to go on the record to make
4 several motions and/or objections. The commission instructed
5 the defense to put any such motions or objections in writing.

6 The government indicated that the Joint Task Force
7 has located a bed similar to the one the accused has in the
8 recovery cell that may be suitable to bring into the
9 courtroom. Finally, the commission informed the parties to be
10 prepared to conduct a session on 8 November 2018, pending the
11 recommendation of the neurosurgeon, and to expect further
12 guidance on how to proceed from the commission at a later
13 time.

14 Subsequent to the R.M.C. 802 conference the
15 commission issued AE 125 directing the government to take
16 certain actions with respect to accommodations to ensure the
17 accused's presence at future commission sessions, and also
18 changed the date of this session from 8 November to
19 9 November.

20 The defense -- I'm sorry. Subsequent to that order,
21 the government filed an update with the neurosurgeon's
22 declaration, AE 125G. Subsequent to that, in AE 125H, the
23 government outlined a number of accommodations that I will

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1 have the trial counsel explain for the record in a moment. In
2 AE 125 the defense objected to the accommodations and to
3 proceeding any further.

4 Does either side have anything to correct with regard
5 to the sequence of events that has occurred since the court --
6 the commission went into recess or anything to add?

7 TC [CDR SHORT]: No, Your Honor, nothing from the
8 government.

9 DDC [MR. THURSCHELL]: Judge, we plan to file a
10 declaration that goes into somewhat more detail. I don't
11 recall at the moment what the difference will be, if any, but
12 we want -- in light of our objection to proceeding with 802s
13 that are not transcribed, we are going to file a declaration,
14 a follow-up declaration at some point. I will simply note
15 that.

16 MJ [LtCol LIBRETTO]: Okay. And I will note again, and
17 it's at least one person's observations of the episode that
18 occurred on 6 November as captured in AE 125I, defense
19 objection. Again, the commission ordered the government to
20 come up with a course of action, sort of speak, to ensure the
21 accused can be safely transported to this commission and
22 remain in this commission for future sessions.

23 If you would, please, Government Counsel, identify

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1 for the record what accommodations have been made and will
2 continue to be made throughout the session today.

3 TC [CDR SHORT]: Your Honor, Major Rudy will advise the
4 court.

5 MJ [LtCol LIBRETTO]: Go ahead.

6 ATC [Maj RUDY]: Good morning, Your Honor. Major Rudy for
7 the government.

8 MJ [LtCol LIBRETTO]: Good morning.

9 ATC [Maj RUDY]: Your Honor requested that the government
10 indicate and make certain accommodations for the accused after
11 our previous session. The government filed a notice listing
12 out three specific accommodations, and it has made those
13 accommodations.

14 First, the government has provided the accused with a
15 hospital bed that is functionally the same one that he has in
16 his recovery location, and that one is currently in the
17 courtroom.

18 Second, the government made available to the accused
19 additional medical prescriptions or treatments, for example
20 lidocaine patches and a TENS unit. In addition, the
21 government has placed a corpsman in the immediate vicinity of
22 this courtroom, and that corpsman can monitor the accused's
23 medical condition and offer treatment as necessary.

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1 Finally, Your Honor, the accused was transported here
2 in an ambulance this morning, and that does follow the
3 recommendation of the neurosurgeon in the declaration attached
4 to 125G.

5 MJ [LtCol LIBRETTO]: Thank you, Major Rudy.

6 I will note for the record a few points that the
7 neurosurgeon made in his declaration for the record. On
8 6 November 2018 the treating neurosurgeon of the accused
9 conducted a medical evaluation and submitted a declaration
10 based on his findings.

11 Based on his in-person evaluation conducted over
12 several hours, a review of x-rays and MRI and medical records,
13 the neurosurgeon stated that the patient has healed
14 appropriately and shows no evidence of complications from the
15 surgery or hardware. The patient's strength has returned in
16 all extremities. The patient has healed from the surgery.

17 The evaluation conducted on 6 November required the
18 accused to stand, sit, lie down, and perform other physical
19 movements, during which time he did not suffer any muscle
20 spasms.

21 With regard to the accused's underlying conditions,
22 the neurosurgeon found the accused's underlying spinal
23 condition to be stable. He noted that due to age, personal

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1 history and medical history, the accused may never improve
2 beyond his current condition. The neurosurgeon opined that it
3 is unlikely that transportation away from the accused's living
4 space will cause additional injury to the accused's spine or
5 will affect the degenerative disc disease.

6 With regard to the chronic pain, the neurosurgeon
7 stated that muscle spasms of varying severity are a normal
8 consequence of spinal compression in these types of
9 surgeries and that the level of pain caused by these spasms is
10 subjective. The neurosurgeon recommended JTF-GTMO take
11 additional steps to assist the accused in managing his pain
12 and alternative means for more comfortable transportation for
13 legal, social, or medical purposes.

14 The neurosurgeon noted that there is an increased
15 potential for acute exacerbation if the accused is required to
16 maintain a static position for any extended period of time.
17 He determined that the accused's attendance for commissions
18 proceedings is unlikely to cause new injury or exacerbate the
19 existing conditions as long as the accused is permitted to
20 change positions as needed. However, the symptoms associated
21 with his underlying conditions are unpredictable despite any
22 preventative measures.

23 Mr. Hadi, good morning. Very briefly, I just want to

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1 remind you that in light of your medical conditions and my
2 sincere desire to have you present at all sessions going
3 forward, and to ensure as minimal of discomfort as possible,
4 let your counsel know if you need to take a break at any time
5 or if you need to change position, if you would like to lay in
6 the bed for a certain amount of time or stretch at all.

7 Do you understand, Mr. Hadi?

8 ACC [MR. HADI]: **[Speaking in English]** Yes, I do
9 understand. Thank you.

10 MJ [LtCol LIBRETTO]: Thank you. Mr. Hadi, I understand
11 that you may be under some pain medications or have been
12 taking some pain medications. I don't know exactly what those
13 medications were this morning that you might have taken, but
14 do you understand what's going on at this time and can you
15 fully and competently converse with your counsel during this
16 session?

17 You can?

18 ACC [MR. HADI]: Not fully.

19 MJ [LtCol LIBRETTO]: Not fully. Is that because of the
20 medications that you are on?

21 ACC [MR. HADI]: **[Speaking in English]** Not because of the
22 medication; because of my situation.

23 MJ [LtCol LIBRETTO]: Which situation is that, sir?

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1 ACC [MR. HADI]: I feel like my head is going to explode.
2 My entire body is strained or stretched.

3 MJ [LtCol LIBRETTO]: Okay. Mr. Hadi, in light of your
4 current medical condition -- stand by a moment, please.

5 Mr. Hadi, moving forward -- Mr. Thurschwell, just a
6 moment, please.

7 Mr. Hadi, moving forward, if at any time you need to
8 see a medical provider, just let me know or let your counsel
9 know, and we can take a break to ensure that they can assess
10 you and provide you any accommodations that may be appropriate
11 and reasonable under the circumstances.

12 But moving forward, do you understand what I am
13 saying to you?

14 ACC [MR. HADI]: Yes.

15 MJ [LtCol LIBRETTO]: Okay. Mr. Thurschwell, we left off
16 at the last session with the voir dire portion. I would like
17 to continue with that at this time. And in order to perhaps
18 shorten the line of questioning that you were going into when
19 we recessed at the last session, I will provide a brief
20 overview of my relationship with Lieutenant Colonel Jasper.

21 As indicated at the last session ----

22 DDC [MR. THURSCHELL]: Before you do, Judge, I do need to
23 object. Mr. Hadi is not here voluntarily. It's the

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1 government's burden to establish voluntariness. He is not
2 here voluntarily. That -- even the very brief and inadequate
3 10 or 15 minutes I had to discuss with him what occurred, his
4 reasons for coming, what he believed to be the case about if
5 he didn't come what would happen, makes it clear that he is
6 not here actually voluntarily.

7 He is taking -- he is currently on Percocet, as he
8 was yesterday morning. He is having -- was experiencing very
9 similar feelings and symptoms to what he was feeling yesterday
10 morning. You just heard him attest to the symptoms he is
11 experiencing now.

12 He is only here because he believed that he would --
13 if he did not -- when they showed up with the ambulance bed,
14 if he didn't get in it and come here, you would treat him as
15 voluntarily absent, as you did when he didn't come at the
16 September session.

17 Because he was unable to meet with his attorneys, as
18 we have continually requested, he was unable to get our advice
19 about what his rights were, how he should treat this. Because
20 the -- we were not following the AE 073C, I believe,
21 procedure, he had -- there was no reliable way of knowing
22 whether he was genuinely voluntarily coming or not coming.

23 And so we strongly object to being here, and we

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1 request that the government establish his voluntariness before
2 any further proceedings occur.

3 MJ [LtCol LIBRETTO]: Mr. Thurschwell, I understand your
4 objection. Mr. Hadi is here, and therefore there is no reason
5 or cause for the government to establish voluntariness. In
6 fact, there is no -- much like in any other -- much like that
7 has occurred in this commission session before, an accused can
8 be brought involuntarily, so please proceed with your voir
9 dire at this time.

10 DDC [MR. THURSCWELL]: Judge ----

11 MJ [LtCol LIBRETTO]: Mr. Thurschwell, I'm not going
12 to ----

13 DDC [MR. THURSCWELL]: ---- presence does not demonstrate
14 voluntariness.

15 MJ [LtCol LIBRETTO]: Mr. Thurschwell, I am not going to
16 argue the point with you. We are proceeding with voir dire.

17 And with respect to my relationship with Lieutenant
18 Colonel Jasper, we met in the approximately 2010 to 2011 time
19 frame. He was an indirect supervisor of mine two levels
20 removed. From time to time we would exercise together as we
21 were both stationed at Camp Lejeune, North Carolina. In the
22 context of professional social settings, we would socialize
23 with one another.

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1 Our relationship ended in approximately the 2011 time
2 frame. Since that time I believe I have spoken with him one
3 time, in the roughly 2014 time frame, and beyond that we have
4 had no further contacts since that time.

5 There is nothing about my relationship with
6 Lieutenant Colonel Jasper that would impact my ability to sit
7 fairly and impartially in this commission session.

8 DDC [MR. THURSCHELL]: Thank you, Judge. I would like to
9 turn to your relationship with the Chief Defense Counsel,
10 Brigadier General John Baker.

11 MJ [LtCol LIBRETTO]: Okay.

12 DDC [MR. THURSCHELL]: My understanding is that you
13 worked for him for about three years, 2008-2011 time frame,
14 when he was regional defense counsel. And then later I think
15 he became chief defense counsel of the Marines during that
16 period. Is that true?

17 MJ [LtCol LIBRETTO]: That is accurate.

18 DDC [MR. THURSCHELL]: Okay. And what was your position
19 at that point in relationship to him?

20 MJ [LtCol LIBRETTO]: I was subordinate to him three
21 levels removed. I had a -- well, for a period of time, two
22 levels removed, and then when he became the chief defense
23 counsel, I was three levels removed. But I was a defense

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1 counsel the entire three years under his supervision.

2 DDC [MR. THURSCHWELL]: And as your supervisor, he wrote
3 or signed off on FITREPs or your evaluation forms; is that
4 correct?

5 MJ [LtCol LIBRETTO]: I believe three times.

6 DDC [MR. THURSCHWELL]: Okay. If I -- three times? My
7 understanding, it was four times. Is that possible?

8 MJ [LtCol LIBRETTO]: Three or four, that's possible.

9 DDC [MR. THURSCHWELL]: Three or four. Fair to say they
10 were all superb ----

11 MJ [LtCol LIBRETTO]: They were positive fitness reports.

12 DDC [MR. THURSCHWELL]: Okay. In fact, in 2010 you were
13 selected as defense counsel of the year while under his
14 supervision and evaluation?

15 MJ [LtCol LIBRETTO]: That's correct.

16 DDC [MR. THURSCHWELL]: Okay. Did you socialize with
17 General Baker?

18 MJ [LtCol LIBRETTO]: Only in a professional setting.

19 DDC [MS. HENSLER]: Excuse me, Your Honor.

20 DDC [MR. THURSCHWELL]: Judge, I have been informed that
21 Mr. Nashwan feels like a spasm is coming on.

22 MJ [LtCol LIBRETTO]: Okay.

23 DDC [MR. THURSCHWELL]: I ask for a brief recess so we can

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1 evaluate this and decide how to proceed.

2 MJ [LtCol LIBRETTO]: The commission is in recess. Please
3 have the medical provider enter and assess Mr. Hadi.

4 [The R.M.C. 803 session recessed at 0915, 9 November 2018.]

5 [The R.M.C. 803 session was called to order at 1150,
6 9 November 2018.]

7 MJ [LtCol LIBRETTO]: This commission is called back to
8 order. All parties present when the commission last recessed
9 are again present.

10 Shortly after the commission recessed, a Rule for
11 Military Commission 802 conference was held at 0945 on
12 9 November 2018 in the judge's chambers. The military judge
13 and both parties were present. The treating corpsman was
14 present for a portion of the time. The accused was not
15 present.

16 This conference was held to determine the accused's
17 medical status following the accused's request for a recess.
18 The defense objected and requested the conference be held on
19 the record. The military judge noted the objection but
20 explained the conference was administrative in nature, for the
21 limited purpose of determining the ability to proceed with
22 today's session.

23 The defense noted that the recess was requested due

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1 to the accused experiencing pain. He has since been
2 administered additional medication. He was sleepy at the time
3 and indicated a desire to return to his cell. The defense
4 requested that the accused be transported back out of medical
5 necessity. The government stated immediate transport was not
6 necessary at that point and recommended accommodations to
7 allow a rest in place.

8 The military judge requested the corpsman's presence
9 for the limited purpose of clarifying the accused's medical
10 status. The corpsman indicated that the accused was
11 administered Valium; that as a side effect of that Valium, the
12 accused was experiencing drowsiness, but there was not an
13 emergent necessity for him to return to his cell or to a
14 treatment facility.

15 The military judge informed the parties of my
16 intention for the remainder of the session; that if we were
17 able to go back on the record, we were to continue with the
18 voir dire, possible challenges, and address pending defense
19 counsel excusal issues. I do not anticipate proceeding on
20 today, in light of the accused's discomfort, to substantive
21 issues associated with the motions that have been filed and
22 are pending before the commission.

23 The commission indicated that if the accused was

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1 unable to continue with the proceedings today, that all issues
2 will be addressed at the next scheduled session, to include
3 the continuation of the voir dire process as well as the
4 excusal of counsel issues.

5 The military judge ultimately decided that the
6 accused would be afforded an opportunity to rest in the
7 courtroom with the lights dimmed after the courtroom had been
8 cleared of court personnel and spectators, and a decision to
9 move forward would not be made until after an appropriate
10 amount of rest period had transpired, expected to be at
11 approximately 1100.

12 At 1100 the defense requested an additional 20 to 30
13 minutes, which the commission provided.

14 The defense requested access to the accused during
15 this rest period, and the military judge informed the parties
16 that that is an issue to be worked out amongst themselves.

17 Does either side have anything to add to the summary
18 of the 802 conference?

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

20 DDC [MR. THURSCWELL]: No, Judge.

21 MJ [LtCol LIBRETTO]: Mr. Hadi, good morning once again.
22 Have you had an opportunity since you've woken up to speak
23 with your counsel?

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1 ACC [MR. HADI]: Yes.

2 MJ [LtCol LIBRETTO]: And at this time are you ready to
3 proceed and able to proceed?

4 ACC [MR. HADI]: Yes, but not for a very long time.

5 MJ [LtCol LIBRETTO]: Okay. I understand, Mr. Hadi.

6 At this time we will continue on with the voir dire.
7 Mr. Thurschwell. And perhaps I can expand upon my
8 relationship with Brigadier General Baker, just as I did with
9 Lieutenant Colonel Jasper, to perhaps obviate the need for a
10 running list of questions to the military judge.

11 I served with Brigadier General Baker for a period of
12 approximately three years as a defense counsel in the Eastern
13 Region stationed at Camp Lejeune. At the time he was either
14 the regional defense counsel or the chief defense counsel of
15 the Marine Corps. He wrote on my fitness reports, I believe,
16 three times, although the defense indicated it might possibly
17 be four. In either event, the fitness reports were positive
18 in nature.

19 Since 2011, when I departed the Defense Service
20 Organization, I have on a handful of times interacted with
21 Brigadier General Baker on a professional level to include
22 attending a gathering he held a few years back for judge
23 advocates stationed at Camp Lejeune. But beyond that our

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1 contact has been very limited in nature since the 2011 period.

2 DDC [MR. THURSCHELL]: Thank you, Judge. I just -- I
3 need to note, this is actually -- we are currently in
4 Mr. Al-Tamir's regularly-scheduled prayer time. We discussed
5 that with him, and he said he was willing to put it off to try
6 to get through as much as he could bear to do today. So he
7 made that -- he made that concession.

8 I also need to say, as someone reminded me, he is
9 currently authorized to be moved for a period of between one
10 to five hours was, I believe, the last SMO declaration; and he
11 left his cell at 0740. I understand we're on a different
12 schedule now, but I think we are treading -- if you include
13 transport back to the -- to his cell, we are now treading on
14 that five-hour upper limit, and I just want to note that for
15 the record.

16 MJ [LtCol LIBRETTO]: I understand, Mr. Thurschwell, and
17 I'm going to take into account the accused's health at the
18 time that any decision is made. And I understand the senior
19 medical officer had made that recommendation or indication; I
20 think the last one he did that on was several weeks ago. But
21 in any event, we will go as we go.

22 DDC [MR. THURSCHELL]: Okay. And I appreciate that.

23 And I need to correct one thing I said at the

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1 beginning. I think I said he felt this morning like he did
2 yesterday. What I meant to say was he felt this morning like
3 he felt Tuesday morning before the last session, when he also
4 had taken a Percocet beforehand -- coming.

5 And finally, just prior -- prior to requesting his --
6 the recess today, he told me he was suffering from essentially
7 a stress pain headache emanating from his neck and chest that
8 was radiating up to his head, and his head felt like it was
9 going to explode. And he actually literally couldn't hear at
10 that time, and that was why, when he asked for a recess.

11 MJ [LtCol LIBRETTO]: And we took a recess. And based on
12 your discussions with Mr. Hadi, is he -- are you in agreement
13 with his indication that he is able to, at least for a period
14 of time, continue?

15 DDC [MR. THURSCHWELL]: Judge, he is -- he is willing to
16 put up with the -- you know, with the fact that you are
17 requiring us to continue, and that's -- I think he said that's
18 his outer limit. Our objection to him being here, our
19 objection to not transporting him when he asked our objection
20 to the standard of medical urgency ----

21 MJ [LtCol LIBRETTO]: Your objections are noted on the
22 record.

23 DDC [MR. THURSCHWELL]: ---- stands.

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1 MJ [LtCol LIBRETTO]: My question to you is: At this
2 point, standing here right now, do you have any reservations
3 about proceeding for the limited purposes of what I explained
4 what we would be covering today?

5 DDC [MR. THURSCHWELL]: Judge, I have the reservations
6 that I have already put on the record and they will continue.

7 MJ [LtCol LIBRETTO]: Okay.

8 DDC [MR. THURSCHWELL]: Thank you for that additional
9 information about General Baker. I want to just come back to
10 your selection as -- I think was it Defense Counsel of the
11 Year in 2010? Was that the prize or the award?

12 MJ [LtCol LIBRETTO]: That was the designation, yes.

13 DDC [MR. THURSCHWELL]: And did you talk to General Baker
14 about that beforehand?

15 MJ [LtCol LIBRETTO]: I don't think so.

16 DDC [MR. THURSCHWELL]: Do you have any recollection of
17 him discussing your selection before you were selected?

18 MJ [LtCol LIBRETTO]: I don't.

19 DDC [MR. THURSCHWELL]: Okay. And do you -- are you
20 aware, if not through discussions with him, then knowledge of
21 others, of his role in your being awarded that designation?

22 MJ [LtCol LIBRETTO]: I believe he was the chief defense
23 counsel at the time, so I'm sure he had a lot of input in that

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1 determination.

2 DDC [MR. THURSCHWELL]: I see. And, in fact, is the chief
3 defense counsel the final decision-maker over the award?

4 MJ [LtCol LIBRETTO]: I don't know. It was a regional
5 award, so it might have been the regional defense counsel.

6 DDC [MR. THURSCHWELL]: Okay. And since have you
7 discussed with him or anyone else his role in your selection
8 for that award?

9 MJ [LtCol LIBRETTO]: I have not.

10 DDC [MR. THURSCHWELL]: Okay. Let me turn to what's
11 called the charge-related or other case-related personal
12 relationships to the third degree within the meaning of
13 R.M.C. 902(b)(5). That's what I'm inquiring about first.

14 Did you know -- did you have any relatives who were
15 injured or killed in the Iraqi war?

16 MJ [LtCol LIBRETTO]: No.

17 DDC [MR. THURSCHWELL]: Any friends, close friends?

18 MJ [LtCol LIBRETTO]: No.

19 DDC [MR. THURSCHWELL]: Do you know anyone who was injured
20 or killed in Afghanistan fighting the Taliban?

21 MJ [LtCol LIBRETTO]: Personally, no.

22 DDC [MR. THURSCHWELL]: Personally? Okay.

23 How about fighting al Qaeda in some other context?

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1 MJ [LtCol LIBRETTO]: No.

2 DDC [MR. THURSCHWELL]: All right. Do you know anyone who
3 was injured or killed in the 9/11 attacks?

4 MJ [LtCol LIBRETTO]: No.

5 DDC [MR. THURSCHWELL]: Have you ever had the occasion to
6 study or learn outside of school, routine school studies,
7 anything about Islam?

8 MJ [LtCol LIBRETTO]: No.

9 DDC [MR. THURSCHWELL]: You have not. Jihad?

10 MJ [LtCol LIBRETTO]: No.

11 DDC [MR. THURSCHWELL]: You received no training on that
12 or ----

13 MJ [LtCol LIBRETTO]: I'm sure back in -- just probably
14 the most general of overviews of the culture and the
15 organization, but back when I was an engineer officer in the
16 Marine Corps, back in the 2002 time frame; but of that, I
17 probably remember borderline zero percent.

18 DDC [MR. THURSCHWELL]: Okay. And you were the judge in
19 the case of United States v. Felix; is that correct?

20 MJ [LtCol LIBRETTO]: I was.

21 DDC [MR. THURSCHWELL]: And that was a case involving
22 abuse of Marines by a drill instructor at Parris Island,
23 correct?

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1 MJ [LtCol LIBRETTO]: It was.

2 DDC [MR. THURSCHELL]: And he was abusing Muslim --
3 Muslim Marine trainees, correct?

4 MJ [LtCol LIBRETTO]: Those were some of the charges on
5 the charge sheet.

6 DDC [MR. THURSCHELL]: Okay. And did that case -- was
7 there any testimony in that case about Islam?

8 MJ [LtCol LIBRETTO]: No.

9 DDC [MR. THURSCHELL]: Any testimony about prejudice
10 against Muslims or Islam?

11 MJ [LtCol LIBRETTO]: Beyond -- beyond the government's
12 theory that that was a reason for targeting certain
13 individuals, no.

14 DDC [MR. THURSCHELL]: Okay. Did you -- did you learn
15 anything new about Islam in the course of that trial?

16 MJ [LtCol LIBRETTO]: No.

17 DDC [MR. THURSCHELL]: Okay. So nothing that would make
18 you reconsider your own views about Islam, you didn't.

19 MJ [LtCol LIBRETTO]: No, I don't have any views on it.

20 DDC [MR. THURSCHELL]: All right. So you do not, as you
21 sit there, have any views one way or another about Islam?

22 MJ [LtCol LIBRETTO]: Not at all.

23 DDC [MR. THURSCHELL]: As in relation to any of the other

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1 religions, major religions that you are familiar with?

2 MJ [LtCol LIBRETTO]: Not at all.

3 DDC [MR. THURSCHELL]: I understand in that case that the
4 prosecution requested a seven-year sentence, but the actual
5 sentence imposed by the panel, sentence imposed -- let's leave
6 it at that -- was ten years. Do you recall that?

7 MJ [LtCol LIBRETTO]: I do recall that.

8 DDC [MR. THURSCHELL]: Okay. And was that a panel
9 sentence?

10 MJ [LtCol LIBRETTO]: It was.

11 DDC [MR. THURSCHELL]: All right. Did you have any role
12 in determining the sentence of that case, the ultimate
13 sentence?

14 MJ [LtCol LIBRETTO]: I provided the members instructions
15 on the appropriate considerations, standard considerations
16 that are provided to them in any case.

17 DDC [MR. THURSCHELL]: Okay. And did those
18 instructions -- and I just don't know what the military
19 instructions are, but was there -- was there sort of -- I'll
20 call it for better use -- a better term, a hate crime aspect
21 to the sentencing so that if it was motivated by Islamophobia
22 or prejudice against religion, that that should a factor that
23 they should consider?

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1 MJ [LtCol LIBRETTO]: I do not believe I instructed the
2 panel on that.

3 DDC [MR. THURSCHELL]: Okay. Now, you were also the
4 prosecutor, I believe, when you were -- prior to your serving
5 as judge in the Deptola case. Staff Sergeant Edward Deptola
6 was one of the defendants, and this was, you will recall, the
7 case involving urinating on corpses of Taliban soldiers.

8 MJ [LtCol LIBRETTO]: That's correct.

9 DDC [MR. THURSCHELL]: Were there any Afghan witnesses in
10 that case?

11 MJ [LtCol LIBRETTO]: No. None of the cases went to
12 trial.

13 DDC [MR. THURSCHELL]: I'm sorry?

14 MJ [LtCol LIBRETTO]: None of the cases went to trial.

15 DDC [MR. THURSCHELL]: Okay.

16 MJ [LtCol LIBRETTO]: Well, a contested -- where witnesses
17 were called. There were no witnesses in the case.

18 DDC [MR. THURSCHELL]: All right. Including in any
19 sentencing phase?

20 MJ [LtCol LIBRETTO]: Correct.

21 DDC [MR. THURSCHELL]: All right. And how -- so then I
22 take it there were no actual people who had been affiliated in
23 any way with the Taliban who were witnesses?

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1 MJ [LtCol LIBRETTO]: That's correct.

2 DDC [MR. THURSCHWELL]: Were there any -- did -- did --
3 were you aware as a prosecutor -- well, did you consult with
4 experts or other people knowledgeable about the Taliban in
5 connection with your prosecution of that case?

6 MJ [LtCol LIBRETTO]: No.

7 DDC [MR. THURSCHWELL]: All right. So you did not learn
8 anything about the Taliban separate and independent of what
9 you already knew ----

10 MJ [LtCol LIBRETTO]: No.

11 DDC [MR. THURSCHWELL]: ---- while serving as a
12 prosecutor? All right.

13 There were also -- there were fairly significant
14 unlawful influence issues in that case at one point, correct?
15 Is that correct?

16 MJ [LtCol LIBRETTO]: Allegedly, yes.

17 DDC [MR. THURSCHWELL]: All right. Can you just explain
18 briefly what they were?

19 MJ [LtCol LIBRETTO]: Well, before I do, what is the
20 relevance of that line of questioning?

21 DDC [MR. THURSCHWELL]: Well, sir, this -- this system,
22 the case -- other cases have had a significant degree of
23 unlawful influence litigation, and these are -- and I'll come

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1 back to this -- I mean just inherently politicized cases just
2 because of their origin and the nature of the charges and so
3 on. And there has been -- and I want to ensure that you
4 are -- that you'll be able to call UI when you see it.

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

6 DDC [MR. THURSCHELL]: That you will be able to call
7 unlawful influence when you see it, that you are sensitive to
8 it and will not bend to the kinds of pressures that are
9 applied in significant high profile political cases like the
10 ones that are in this system.

11 MJ [LtCol LIBRETTO]: Okay. I understand your questions.
12 There's nothing about that case, nor any other, and I've been
13 presented a number of cases throughout the years with UCI
14 issues, there is nothing about any of those cases that will
15 prevent me from applying the law as I know it and the facts as
16 I interpret them to this case in any issues that are presented
17 to the commission.

18 DDC [MR. THURSCHELL]: Okay. And so if you are convinced
19 by whatever the relevant standard of proof that unlawful
20 influence has been committed by a high-up -- and they are
21 quite high up, some of the accusations so far -- that you will
22 be -- you will be unhesitatingly willing to provide whatever
23 relief is actually deserved when that is established and

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1 necessary?

2 MJ [LtCol LIBRETTO]: I will faithfully apply the facts as
3 they are presented to the law as I know them and make a
4 determination based on my analysis of them collectively.

5 DDC [MR. THURSCHWELL]: All right. Now, your bio says you
6 were assigned as the assistant operations officer and deployed
7 to Operation Iraqi Freedom during the January to June 2003
8 period. That's accurate, I assume?

9 MJ [LtCol LIBRETTO]: It is.

10 DDC [MR. THURSCHWELL]: Okay. And where were you located?

11 MJ [LtCol LIBRETTO]: I would say 95 percent of the time I
12 was in Kuwait at -- oh, my mind is going blank on the air
13 field that I was at. And on a handful of occasions I had the
14 opportunity to take equipment on a convoy up to southern Iraq.

15 DDC [MR. THURSCHWELL]: Were you involved in combat at any
16 time during that tour?

17 MJ [LtCol LIBRETTO]: I did not personally engage in any
18 combat situations.

19 DDC [MR. THURSCHWELL]: Okay. So you did not fire a
20 weapon at any enemies during that period?

21 MJ [LtCol LIBRETTO]: I did not.

22 DDC [MR. THURSCHWELL]: Did you know -- and I think I may
23 have covered this already, but now we are talking about the

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1 specific tour and time. Were -- do you know any -- did you
2 have any friends who were killed during that period of your
3 tour?

4 MJ [LtCol LIBRETTO]: No.

5 DDC [MR. THURSCHWELL]: Okay. Do you know -- do you
6 know -- do you have any individuals who are within the third
7 degree of relationship who were engaged in active combat in
8 Iraq?

9 MJ [LtCol LIBRETTO]: No.

10 DDC [MR. THURSCHWELL]: Okay. Now, did your assistant
11 operations officer give you any role at all in detainee
12 operations of any kind?

13 MJ [LtCol LIBRETTO]: None at all.

14 DDC [MR. THURSCHWELL]: None at all. So you had no
15 contact with the detainee operations people?

16 MJ [LtCol LIBRETTO]: None.

17 DDC [MR. THURSCHWELL]: Okay. Thank you.

18 Let me -- let me turn to your experience as a judge,
19 to look to -- to talk about qualifications and other issues.
20 I mean, my understanding is your first judicial assignment was
21 in May 2014. I think that's what your bio says. Is that
22 right?

23 MJ [LtCol LIBRETTO]: That is correct.

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1 DDC [MR. THURSCHWELL]: We already discussed the Felix
2 case. Were you involved in other cases that involved foreign
3 nationals in a significant way, as witnesses or like
4 consultant participants?

5 MJ [LtCol LIBRETTO]: The only case I can think of offhand
6 was a bribery/graft case a long time ago that involved some
7 foreign nationals.

8 DDC [MR. THURSCHWELL]: And what -- what nationality were
9 the foreign nationals?

10 MJ [LtCol LIBRETTO]: I think they were Saudi Arabian.

11 DDC [MR. THURSCHWELL]: Okay. And that was as a judge.
12 And did ----

13 MJ [LtCol LIBRETTO]: No, that was not as a judge. I was
14 a defense counsel at the time.

15 DDC [MR. THURSCHWELL]: Oh, a defense counsel. Okay. Now
16 I am actually talking about your judicial experience, but
17 thank you for that.

18 MJ [LtCol LIBRETTO]: Okay.

19 DDC [MR. THURSCHWELL]: Did you ever have a case as a
20 judge with a non-English-speaking accused?

21 MJ [LtCol LIBRETTO]: Yes.

22 DDC [MR. THURSCHWELL]: That required translation?

23 MJ [LtCol LIBRETTO]: Yes.

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1 DDC [MR. THURSCHELL]: And what language was that?

2 MJ [LtCol LIBRETTO]: French.

3 DDC [MR. THURSCHELL]: French. Okay. Was that the only
4 case that you can recall that required translation?

5 MJ [LtCol LIBRETTO]: Off the top of my head, yes.

6 DDC [MR. THURSCHELL]: All right.

7 MJ [LtCol LIBRETTO]: I have only used an interpreter one
8 time in a case as a judge.

9 DDC [MR. THURSCHELL]: Did any of your cases as a judge
10 involve significant amounts of classified evidence?

11 MJ [LtCol LIBRETTO]: No.

12 DDC [MR. THURSCHELL]: Okay. And by "significant," I
13 mean more than, you know, one or two documents that had to be
14 processed in some way.

15 MJ [LtCol LIBRETTO]: No.

16 DDC [MR. THURSCHELL]: No. Did you have any cases like
17 that as -- in any other counsel role, prosecutor or ----

18 MJ [LtCol LIBRETTO]: As a prosecutor.

19 DDC [MR. THURSCHELL]: As a prosecutor you did?

20 MJ [LtCol LIBRETTO]: That's correct.

21 DDC [MR. THURSCHELL]: And what were the facts of that
22 case?

23 MJ [LtCol LIBRETTO]: The ones that you mentioned a moment

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1 ago with the, as they were the termed at the time, the 3/2
2 sniper cases.

3 DDC [MR. THURSCHELL]: I see. And can you just ballpark
4 like how significant was the classified evidence vis-a-vis the
5 actual charges and your ability to make the case that you were
6 making as a prosecutor at that time? Were they critical?
7 Were they like necessary background?

8 MJ [LtCol LIBRETTO]: What is the relevance of this line
9 of questioning?

10 DDC [MR. THURSCHELL]: I just -- I just -- the -- this
11 case, like many others, has, has enormous amounts of
12 classified evidence issues. And some of them are exotic,
13 sophisticated, and, you know -- I don't want to say unique,
14 but we have all gotten a lot better at dealing with them
15 because of our prior -- because of just the buildup of our
16 experience with them.

17 So in terms of your qualifications and ability to
18 carry out this job, I am asking whether -- trying to find out
19 how much experience you have with that.

20 MJ [LtCol LIBRETTO]: If you would, please turn to either
21 the statutory or regulatory matter of disqualification that
22 that goes to.

23 DDC [MR. THURSCHELL]: Okay. Well, it goes to -- it

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1 goes -- well, let me move on. Have you -- it goes to -- it
2 goes to -- it actually will ultimately go to impartiality and
3 bias in a particular way that I'd like to explain. And I can
4 do that now if you would like.

5 MJ [LtCol LIBRETTO]: Very briefly, because I don't see
6 the relevance of that line of questioning. I have been -- I
7 meet all of the statutory and regulatory qualifications to
8 serve as a military judge over this commission just like I
9 have for the last four-and-a-half, going on five years as a
10 military judge. This line of questioning is not relevant in
11 my mind.

12 DDC [MR. THURSCHELL]: Okay. Let me try to explain.
13 Bias can take many forms, and one form it can take is where
14 you respond to rulings, issues that are before you, in a way
15 that because you are -- based on your prior experience, you
16 have a kind of automatic assumption and reactions unconscious,
17 just this is how it's done.

18 And this is what I'm getting at in this sense: This
19 system is not a court-martial, and it is not a federal court.
20 It is a unique animal, if I can call it that, under a unique
21 act, the Military Commission Act, which is not the UCMJ, which
22 itself is passed under a power of Congress, without getting
23 into it, that is not the same power of Congress, everyone

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1 agrees I think on this -- that is the power of Congress that
2 was established -- that was the authorization for the UCMJ.

3 And there have been continuing issues in this case in
4 particular with like, I think, assumptions on the part, not
5 only of the government, but sometimes just automatic and
6 understandable assumptions ----

7 MJ [LtCol LIBRETTO]: Mr. Thurschwell, stand down.

8 DDC [MR. THURSCHELL]: ---- that this is really a
9 court-martial in a different context.

10 MJ [LtCol LIBRETTO]: Okay. I understand that,
11 Mr. Thurschwell. The basis that you indicated that this line
12 of questioning was to pursue was personal bias or prejudice.
13 Do you believe that this goes to a personal bias ----

14 DDC [MR. THURSCHELL]: Yes, I do.

15 MJ [LtCol LIBRETTO]: ---- towards a party? Towards a
16 party?

17 DDC [MR. THURSCHELL]: Yes, I do, Judge, in the sense
18 that Mr. Al-Tamir is not a party -- is not an individual who
19 would ever become -- come before a judge in a court-martial.

20 MJ [LtCol LIBRETTO]: I do not find that this line of
21 questioning is relevant. Move on to your next line of
22 questioning, please.

23 DDC [MR. THURSCHELL]: And I guess if I can ask one more

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1 question of you, just along these lines, which is really
2 whether you believe you can keep an open mind about the fact
3 that this is not a court-martial under its own unique set of
4 laws, and that just because a particular practice seems like
5 it's always the way it's done in courts-martial, it doesn't
6 automatically mean that's how it's done here. That's my
7 question that goes towards bias towards Mr. Al-Tamir who is a
8 defendant here in this system, not in a courts-martial.

9 MJ [LtCol LIBRETTO]: I understand the difference between
10 military commissions and courts-martial, and I will apply the
11 laws that apply to the military commissions.

12 DDC [MR. THURSCHELL]: Okay. Have you had -- have you
13 had any experience with international -- significant
14 international law issues in any of the cases that have been
15 before you?

16 MJ [LtCol LIBRETTO]: No.

17 DDC [MR. THURSCHELL]: All right. Any complex criminal
18 enterprises, in other words, large conspiracies or criminal
19 entities?

20 MJ [LtCol LIBRETTO]: No.

21 DDC [MR. THURSCHELL]: All right. Novel constitutional
22 issues?

23 MJ [LtCol LIBRETTO]: Sometimes the issues that are raised

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1 are novel, but no, not necessarily.

2 DDC [MR. THURSCHELL]: Okay. Let me turn to another
3 area.

4 When did you first become aware that you might be
5 detailed to a military commissions case?

6 MJ [LtCol LIBRETTO]: March or April time frame.

7 DDC [MR. THURSCHELL]: Okay. And who -- how did you
8 learn that?

9 MJ [LtCol LIBRETTO]: The chief trial judge, I believe,
10 informed me that I was a potential nominee.

11 DDC [MR. THURSCHELL]: Okay. And when -- when -- what
12 was the nature of that discussion? Did they discuss the
13 individual case that you might be assigned to -- might be
14 assigned to?

15 MJ [LtCol LIBRETTO]: No.

16 DDC [MR. THURSCHELL]: It was just a discussion about
17 entering the pool of judges eligible?

18 MJ [LtCol LIBRETTO]: That's correct.

19 DDC [MR. THURSCHELL]: All right. So was there any other
20 discussion of any of the issues that might come before
21 you ----

22 MJ [LtCol LIBRETTO]: Not at all.

23 DDC [MR. THURSCHELL]: ---- or the defense or the

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1 prosecution -- okay. And I take it if it was the chief judge
2 at that time, that would have been Chief Judge Pohl; is that
3 accurate?

4 MJ [LtCol LIBRETTO]: Not of the military commissions, the
5 chief judge of the Navy Trial Judiciary.

6 DDC [MR. THURSCHELL]: Oh, okay. And that is because
7 they nominate the candidates for the pool; is that correct?

8 MJ [LtCol LIBRETTO]: Yes.

9 DDC [MR. THURSCHELL]: All right. And when did you learn
10 that you were, in fact, becoming a member of the pool and
11 eligible to be assigned here?

12 MJ [LtCol LIBRETTO]: May or June time frame.

13 DDC [MR. THURSCHELL]: And who informed you of that?

14 MJ [LtCol LIBRETTO]: Ultimately Colonel Pohl did.

15 DDC [MR. THURSCHELL]: Colonel Pohl did. And did he
16 discuss anything about this case or the fact that this would
17 be the case that you would be assigned to?

18 MJ [LtCol LIBRETTO]: Not until after I was nominated for
19 the pool.

20 DDC [MR. THURSCHELL]: Okay. And when he did -- when
21 that subject did come up, did he talk to you about any
22 substantive issues concerning the case?

23 MJ [LtCol LIBRETTO]: He did not.

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1 DDC [MR. THURSCHELL]: Did he talk to you about any
2 issues concerning Mr. Al-Tamir individually.

3 MJ [LtCol LIBRETTO]: He did not.

4 DDC [MR. THURSCHELL]: All right. Did he talk generally
5 about, in any way, about his experience as the trial judge in
6 the 9/11 case or the al Nashiri case?

7 MJ [LtCol LIBRETTO]: He did not.

8 DDC [MR. THURSCHELL]: And so -- and when were you
9 officially detailed to this case? Do you recall? It may be
10 ----

11 MJ [LtCol LIBRETTO]: It may be in June at some point. I
12 don't remember the exact date off the top of my head.

13 DDC [MR. THURSCHELL]: All right. How long are your
14 orders for this detail?

15 MJ [LtCol LIBRETTO]: I don't have orders specific to this
16 detail.

17 DDC [MR. THURSCHELL]: All right. So this is an
18 indefinite -- I mean, is there no term assigned to this
19 particular assignment?

20 MJ [LtCol LIBRETTO]: There is no term -- yeah, I can't
21 quantify in terms of months or years the length of my
22 assignment.

23 DDC [MR. THURSCHELL]: Okay. And what then decides when

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1 you're transferred, detailed, PCS, whatever the relevant
2 terminology is for you, to your next assignment? What's going
3 to determine that?

4 MJ [LtCol LIBRETTO]: I don't frankly know.

5 DDC [MR. THURSCHELL]: Do you know who makes that
6 decision?

7 MJ [LtCol LIBRETTO]: I suspect that it is a discussion
8 amongst a lot of folks up at headquarters about timing, career
9 progression, those sorts of things.

10 DDC [MR. THURSCHELL]: Okay. So you -- as you sit here
11 today, you really don't -- you don't know if and when that's
12 going to happen in the foreseeable future?

13 MJ [LtCol LIBRETTO]: I don't. I suspect it will not
14 happen over the next two years.

15 DDC [MR. THURSCHELL]: Okay. Is that uncertainty about
16 the length of your term going to affect how you treat any of
17 the substantive issues in this case? And by -- I mean that in
18 two senses. One is your concerns about scheduling, either
19 because you decide there's no pressure to do anything or
20 because you think this is -- that in some way that indefinite
21 term affects your decision-making about the pace at which this
22 litigation should occur?

23 MJ [LtCol LIBRETTO]: It will not affect my rulings on

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1 continuances or the scheduling, the litigation schedule --
2 have any impact on that that whatsoever.

3 DDC [MR. THURSCHELL]: And will you let the fact that
4 this is an indefinite term that is not known to you now and
5 beyond your control and in somebody else's control, that that
6 is going to allow you -- affect how you decide substantive
7 issues vis-a-vis defense motions or prosecution motions, out
8 of career concerns?

9 MJ [LtCol LIBRETTO]: Absolutely not.

10 DDC [MR. THURSCHELL]: Okay. Have you given any thought
11 about how being detailed to this case will affect your future
12 assignments or promotion possibilities?

13 MJ [LtCol LIBRETTO]: I have not.

14 DDC [MR. THURSCHELL]: All right. And I take it you will
15 not let any such concern affect either your scheduling or
16 substantive or any other rulings or decisions related to this
17 case?

18 MJ [LtCol LIBRETTO]: I will not.

19 DDC [MR. THURSCHELL]: Okay. And independent of that,
20 again, these are, as I mentioned, highly politicized cases.
21 They are in the press. There are lawyers making wild
22 allegations in news stories occasionally and there are other
23 kinds of political pressures that are brought to bear.

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1 Will you -- and one of those issues that has been
2 prominent and a hot-button political issue is the pace of
3 litigation. Will you allow any of those kinds of public or
4 private individuals talking to you pressures affect how you
5 rule on motions or scheduling?

6 MJ [LtCol LIBRETTO]: No.

7 DDC [MR. THURSCHELL]: Have you discussed this case with
8 anyone since learning you would be detailed as the military
9 judge? And by "discuss," I mean discuss in any -- you know,
10 into the substantive issues, not the fact that you have been
11 detailed.

12 MJ [LtCol LIBRETTO]: No.

13 DDC [MR. THURSCHELL]: Has anyone said anything about the
14 case to you substantively or made suggestions or asked
15 questions, substantive questions about how you might rule?

16 MJ [LtCol LIBRETTO]: No. I will note that I conducted a
17 very, very brief turnover with Colonel Rubin, none of which
18 went into the substance of the issues that he had been
19 presented with or that I might be presented with. It was all
20 administrative in nature. In fact, most of it was discussed
21 about the logistical aspects of coming down to Guantanamo Bay.
22 But beyond that I have had no conversations with anybody
23 regarding any substance or administrative issues, for that

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1 matter.

2 DDC [MR. THURSCHWELL]: Okay. So has anyone discussed the
3 pace of this case, the litigation pace, the delays and stalls
4 that we've -- we've experienced?

5 MJ [LtCol LIBRETTO]: No.

6 DDC [MR. THURSCHWELL]: All right. Has anyone said
7 anything to you -- and by "anyone," let me be more clear. I
8 mean, I'm sure you have substantive discussions with the
9 clerk, the substantive clerk who's worked on [sic] you. But
10 anyone who is not involved in your substantive
11 decision-making -- and I include anyone within the trial
12 judiciary.

13 Has anyone said anything to you about Mr. Al-Tamir's
14 medical condition? Let me be more precise.

15 MJ [LtCol LIBRETTO]: Yes, please.

16 DDC [MR. THURSCHWELL]: Has anyone called into question
17 the reality or seriousness of his condition or symptoms?

18 MJ [LtCol LIBRETTO]: You're saying -- no.

19 DDC [MR. THURSCHWELL]: No one has suggested that his
20 symptoms are less bad than he or his counsel have described
21 verbally or in writing, other than the prosecution who have
22 suggested that?

23 MJ [LtCol LIBRETTO]: No.

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1 DDC [MR. THURSCHWELL]: Has anyone suggested that he is
2 not credible, in other words, his accounts of his pain and
3 symptoms?

4 MJ [LtCol LIBRETTO]: No.

5 DDC [MR. THURSCHWELL]: I include other military judges or
6 anyone, along with the nonsubstantive trial judiciary staff.

7 MJ [LtCol LIBRETTO]: And this doesn't -- this is not
8 limited to the line of questioning that you are pursuing right
9 now, but I want to make clear: I'm not going to discuss any
10 communications nor indicate that I've even had conversations
11 with folks that are assigned to my team, in terms of the
12 judicial staff assigned to this case. So I want to make that
13 clear we are not going down that road at all.

14 DDC [MR. THURSCHWELL]: Understood. And that's why --
15 understood. And that's why I excluded what I think -- the
16 substantive, the staff that's concerned with your substantive
17 judicial decision-making. That's -- I am excluding them,
18 which I take it is what you mean. All right.

19 Judge, are you familiar with the Senate Select
20 Committee on Intelligence report on the CIA Rendition,
21 Detention and Intelligence Program, the torture report?

22 MJ [LtCol LIBRETTO]: I'm aware that it exists. I have
23 never had the opportunity to review it.

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1 DDC [MR. THURSCHELL]: You have never reviewed it. All
2 right.

3 So you have not reviewed the parts that discuss Hadi
4 al-Iraqi, as he is called in that?

5 MJ [LtCol LIBRETTO]: I have not.

6 DDC [MR. THURSCHELL]: Okay. And let me -- let me
7 explain the basis of that question. There is a -- and this
8 goes again to bias and prejudgment.

9 MJ [LtCol LIBRETTO]: Mr. Thurschwell, I just indicated
10 that I have not read it ----

11 DDC [MR. THURSCHELL]: No, I understand. No, I
12 understand that, and I appreciate that. I have a more general
13 question. I have a more general question that's in the same
14 area.

15 MJ [LtCol LIBRETTO]: Okay.

16 DDC [MR. THURSCHELL]: There is a common belief
17 circulating, and that people discuss, that torture matters in
18 the 9/11 case and the Nashiri case, but not in this case.

19 Have you heard anyone mention the fact that this case
20 does not have torture in it, so to speak?

21 MJ [LtCol LIBRETTO]: I haven't had those conversations
22 one way or another.

23 DDC [MR. THURSCHELL]: Okay. Can you keep an open mind

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1 about issues like suppression, regardless of this common and
2 false notion that this case -- torture is not an issue in this
3 case? Can you keep an open mind about the legal issues that
4 may implicate voluntariness, whether or not he was tortured,
5 but also if, in fact, there's evidence that constitutes
6 torture, you will not allow this -- these background
7 assumptions that people have to influence your decision-making
8 on that?

9 MJ [LtCol LIBRETTO]: Again, I have no background
10 assumptions to go off of, which is the basis of your question.
11 However, that being said, I will certainly keep an open mind,
12 evaluate the evidence that's introduced, competent evidence
13 that's introduced, and apply the law as I interpret it.

14 DDC [MR. THURSCHELL]: Okay. And there is another common
15 belief circulating that the death cases, and death cases
16 generally, deserve more serious attention and treatment than
17 noncapital cases.

18 Has anyone suggested to you that the fact that this
19 is the only noncapital commissions case should -- should
20 affect how you make decisions in this case?

21 MJ [LtCol LIBRETTO]: No.

22 DDC [MR. THURSCHELL]: And will you -- without arguing
23 whether the "Death is Different" doctrine applies or not, will

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1 you treat this case less seriously simply because it is not
2 one of the capital cases?

3 MJ [LtCol LIBRETTO]: No.

4 DDC [MR. THURSCHELL]: You will give it the same like
5 attention and regard for accuracy and decision-making?

6 MJ [LtCol LIBRETTO]: I will give it the same attention I
7 do every case that I preside over.

8 DDC [MR. THURSCHELL]: And finally, let me ask you the
9 questions about the bias that goes against -- against the
10 defense.

11 Some commission judges and other commission personnel
12 have used the term, and I quote, defense community, in
13 connection with an idea that the chief defense counsel and
14 members of the Military Commissions Defense Organization are
15 working together to try to undermine the military commissions.
16 Have you heard anyone talk about that notion?

17 MJ [LtCol LIBRETTO]: No.

18 DDC [MR. THURSCHELL]: Have you read any newspaper
19 articles or briefs in which the term "defense community" or
20 equivalent concepts are used in that sense?

21 MJ [LtCol LIBRETTO]: I suppose the only arguable matters
22 that I have reviewed in that regard are the -- those documents
23 associated with the al Nashiri case.

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1 DDC [MR. THURSCHWELL]: Okay. And that was my next
2 question. Are you aware that both the majority and the
3 concurrence in the recent al Nashiri case used the term
4 "defense community" in that broad sense of concerted action by
5 the chief defense counsel and other members of the MCD0? You
6 have read that opinion?

7 MJ [LtCol LIBRETTO]: I read it. I didn't specifically
8 take that away from the -- so I didn't pick up on that,
9 but ----

10 DDC [MR. THURSCHWELL]: Well, let me now focus on the real
11 question, because this is a very real issue about bias against
12 the defense.

13 Do you believe that the MCD0 attorneys and other
14 defense personnel representing Mr. Al-Tamir are doing anything
15 but following their ethical obligations to pursue the best
16 interest of Mr. Al-Tamir alone in this case? Do you have any
17 reason to think that we have another agenda?

18 MJ [LtCol LIBRETTO]: I am sure that the Defense Service
19 Organization and -- well, and specifically as it relates to
20 Mr. Hadi, that you have his interests in mind. Beyond that, I
21 don't have a basis to make an opinion or evaluation one way or
22 the other.

23 DDC [MR. THURSCHWELL]: Well, the question is will you --

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1 will you be able to put aside any presumption or any
2 background thought ----

3 MJ [LtCol LIBRETTO]: I have no ----

4 DDC [MR. THURSCHWELL]: ---- that we are conspiring with
5 the chief defense counsel to bring down the military
6 commissions?

7 MJ [LtCol LIBRETTO]: I have no presumptions or background
8 in that regard.

9 DDC [MR. THURSCHWELL]: All right. And if you hear others
10 suggesting that there is such a defense conspiracy from any
11 source, will you be able to put those suggestions aside and
12 treat the defense personnel individually, with the baseline
13 assumption that we are pursuing our ethical obligation to
14 pursue zealously the best interests of our client and that is
15 the only agenda we have in this case?

16 MJ [LtCol LIBRETTO]: Yes. I will put all extrajudicial
17 comments or suggestions aside.

18 DDC [MR. THURSCHWELL]: Okay. If I might have a moment to
19 consult and then ----

20 MJ [LtCol LIBRETTO]: Please.

21 [Pause.]

22 DDC [MR. THURSCHWELL]: Sorry, Judge, one more question.

23 MJ [LtCol LIBRETTO]: Sure.

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1 DDC [MR. THURSCHELL]: Are you in the zone for promotion
2 at this time?

3 MJ [LtCol LIBRETTO]: I am not.

4 DDC [MR. THURSCHELL]: And do you have an expectation
5 about when you'll be in that zone?

6 MJ [LtCol LIBRETTO]: I think it's three or four years
7 from now.

8 DDC [MR. THURSCHELL]: Three or four years from now?

9 MJ [LtCol LIBRETTO]: That's correct.

10 DDC [MR. THURSCHELL]: Thank you very much, Judge.
11 That's all I have.

12 MJ [LtCol LIBRETTO]: Trial counsel?

13 TC [CDR SHORT]: Yes, Your Honor.

14 In the defense questions, and given your entire
15 background and your knowledge, is there anything that
16 Your Honor is aware, or does this commission feel in any way
17 that you could not faithfully or impartially perform,
18 according to your conscience and the laws applicable to the
19 trials by military commission, all the duties incumbent upon
20 you?

21 MJ [LtCol LIBRETTO]: There is not.

22 TC [CDR SHORT]: That's all we have, sir.

23 MJ [LtCol LIBRETTO]: Great. Thank you.

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1 Does either side have a challenge for the military judge?

2 TC [CDR SHORT]: No challenges from the government,

3 Your Honor.

4 DDC [MR. THURSCHELL]: Judge, if I may have a brief three
5 minutes to consult with my co-counsel?

6 MJ [LtCol LIBRETTO]: Okay. Go ahead.

7 [Pause.]

8 DDC [MR. THURSCHELL]: Judge, we do have one challenge.

9 We -- our fear, based on the -- actually, your relationship
10 with former defense counsel and especially with the chief
11 defense counsel of the Military Commissions who is, you know,
12 the supervisor, the ethical supervisor, of the defense counsel
13 in this case, that it creates an appearance that you may, we
14 fear, be overly concerned with demonstrating that you are not
15 biased against the defense.

16 So it's actually the apparent connections to the
17 defense create a very understandable, not necessarily
18 conscious, desire to be -- make it very, very clear that
19 you're not in the defense camp despite your very close
20 associations with the MCD0 broadly and in this case
21 individually; that is, Lieutenant Colonel Jasper.

22 And so we make that challenge, and we would also
23 request the opportunity to brief it in a timely manner.

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1 That's our request. I'm happy to answer questions if you have
2 them, or however you'd like to proceed.

3 MJ [LtCol LIBRETTO]: Okay. I don't have any questions.
4 Thank you.

5 Well, I do, Mr. Thurschwell, actually. Under
6 R.M.C. 902, what specific grounds are you asserting that are
7 grounds for challenge?

8 DDC [MR. THURSCHELL]: One moment, Judge. It's 902(a),
9 "The military judge shall disqualify him or herself in any
10 proceeding in which that military judge's impartiality might
11 reasonably be questioned," and 902(b)(1), where the military
12 judge has a personal bias or prejudice concerning a party. We
13 believe this falls within the scope of both of those
14 provisions.

15 MJ [LtCol LIBRETTO]: The defense has challenged the
16 military judge based on R.M.C. 902(a), 902(b)(1). The
17 asserted grounds for challenge relate to the military judge's
18 prior relationships with a former defense counsel, Lieutenant
19 Colonel Jasper, which I believe is three to four years removed
20 from this case. Is that correct, Mr. Thurschwell?

21 DDC [MR. THURSCHELL]: I'd have to check my notes, but I
22 think it was 2014, '13.

23 ATC [MR. SPENCER]: Your Honor, it was September of 2015.

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1 MJ [LtCol LIBRETTO]: So September of 2015 is when
2 Lieutenant Colonel Jasper ceased representation of the
3 accused?

4 ATC [MR. SPENCER]: Temporarily in July of '15, and then
5 permanently in September of '15, sir.

6 MJ [LtCol LIBRETTO]: Okay. And also on the basis of the
7 military judge's prior relationships with the chief defense
8 counsel of the military commissions Defense Services
9 Organization, who was at the time of their relationship both a
10 regional defense counsel and then chief defense counsel of the
11 Marine Corps Defense Service Organization.

12 R.M.C. 902(a) provides that "A military judge shall
13 disqualify himself or herself in any proceeding in which that
14 military judge's impartiality might reasonably be questioned."
15 R.M.C. 902(b)(1) indicates that "Where a military judge has a
16 personal bias or prejudice concerning a party or personal
17 knowledge of disputed evidentiary facts concerning a
18 proceeding, the military judge shall also be disqualified."

19 "Military judges should carefully consider whether
20 any of the grounds for disqualification in any case exist.
21 The military judge should broadly construe grounds for
22 challenge but should not step down from cases unnecessarily."

23 I will reiterate that my relationship with both

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1 Lieutenant Colonel Jasper and now Brigadier General Baker were
2 purely professional in nature. In fact, they were a
3 supervising attorney to me, either two steps or three steps
4 removed from my position as a baseline defense counsel
5 stationed at Marine Corps Base Camp Lejeune.

6 My relationship with Lieutenant Colonel Jasper,
7 although I suppose a bit more personal in nature than that
8 with Colonel Baker, now Brigadier General Baker, it did not in
9 any way transform itself into a personal relationship of any
10 sort, a personal social relationship that is.

11 Moreover, our interactions were minimal and, perhaps
12 more importantly, our relationship has all but remained
13 nonexistent since my transfer from the DSO in 2011, save for
14 one, maybe two limited interactions over the last seven or so
15 years. I believe the last time I spoke with Lieutenant
16 Colonel Jasper, it was approximately four years ago.

17 With regard to Brigadier General Baker, although my
18 contact with him has remained a bit more -- a bit, and I use
19 that term literally -- more frequent than that with Lieutenant
20 Colonel Jasper, it too has not in any way been a personal
21 relationship of the sort that would create a bias or even the
22 appearance of bias in a reasonable person.

23 For all practical purposes, my close working

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1 relationship with Brigadier General Baker ended along with my
2 time in the Defense Services Organization back in 2011. I
3 have had very minimal contact with him since that time and
4 only in a professional manner.

5 As to the first ground for challenge, the military
6 judge does not believe based on those facts that a reasonable
7 person would question my impartiality based on those facts.
8 Nor does the military judge believe that a reasonable
9 question -- a reasonable person would believe that because of
10 those remote and now distant -- temporally distant
11 relationships with those two individuals, the military judge
12 would be inclined to side with the government in favor, or in
13 an effort to attempt to distance himself from the defense
14 organization -- organization in his relationship with those
15 two individuals. Likewise, the military judge does not
16 believe that those facts or the argument by the defense
17 demonstrates a personal bias on my part towards either party.

18 I reaffirm that I will preside over this case fairly
19 and impartially, with no extrajudicial or external influence
20 allowing -- being allowed to influence in any way any
21 decisions I make with regard to this case.

22 The defense challenge is denied. You may request
23 reconsideration and brief the issue as you deem appropriate.

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1 DDC [MR. THURSCHELL]: Thank you, Judge.

2 May I have three minutes to consult with my client
3 just to see how he is doing? We're really pushing the time
4 limit. I want to make sure that he is still on board.

5 MJ [LtCol LIBRETTO]: You may.

6 [Pause.]

7 DDC [MR. THURSCHELL]: Judge, Mr. Al-Tamir and we are
8 hoping that this next stage will be brief, but he wants to
9 continue and try to finish.

10 MJ [LtCol LIBRETTO]: Okay. Very good.

11 Moving on to the counsel issues that are currently
12 pending before the commission, in AE 007U and AE 007V, the
13 defense provided notice that the chief defense counsel had
14 excused Captain Jeffrey Fischer and Commander Aimee Cooper as
15 detailed defense counsel in this case. These notices included
16 a signed statement from the accused consenting to their
17 withdrawal.

18 In both instances the excusals were made upon a
19 request to withdraw by counsel. The chief defense counsel
20 found good cause for both excusals under R.M.C. 505(d)(2)(B).
21 The chief defense counsel noted that he took into
22 consideration the opinions of the defense's team -- the
23 defense team's leadership, the consent of the accused for both

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1 withdrawals, along with the applicable rules of professional
2 responsibility, statutes, regulations, and case law.

3 He necessarily also took into consideration the
4 applicable trial management orders and scheduling orders in
5 effect at the time, as well as the status of pending
6 clearances and other factors potentially impacting the ability
7 of additional or substitute counsel to be detailed to
8 participate in the accused's defense.

9 The commission notes that in the case of an attorney
10 separating, retiring, or deactivating from service, good cause
11 is not necessarily automatically present. In certain
12 circumstances counsel may need to explore additional options
13 before terminating the attorney-client relationship. These
14 options may include postponing the date of separation, or
15 serving as defense counsel in a civilian or reserve status.
16 Such options may or may not be feasible in every case or in
17 this case in particular.

18 Mr. Hadi, in the exhibits before the commission, you
19 have signed letters of consent to release Commander Cooper and
20 Captain Fischer. Did you, in fact, sign that document of
21 release?

22 ACC [MR. HADI]: Yes.

23 MJ [LtCol LIBRETTO]: And when you signed that document

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1 consenting to your [sic] release, did you understand the
2 reasons why they were requesting to withdraw?

3 INT: Your Honor, can you please ask the accused to repeat
4 the answer? I did not hear it fully.

5 MJ [LtCol LIBRETTO]: When you signed the letter releasing
6 Commander Cooper and Captain Fischer as your counsel, did you
7 understand the reason why they were asking to be released?

8 ACC [MR. HADI]: As I understood it at that time, that
9 they requested that according to the rules for their movement
10 in the military system.

11 MJ [LtCol LIBRETTO]: And did you understand that you were
12 not required to consent to their withdrawal?

13 ACC [MR. HADI]: As I understood it at that time, my
14 approval or disapproval will not affect their moving.

15 MJ [LtCol LIBRETTO]: Can you repeat that, please?

16 INT: As I understood it at that time, my consent or
17 dissent or unconsent will not affect the fact that they are
18 leaving the case.

19 MJ [LtCol LIBRETTO]: Okay. When you signed the form
20 saying that you would release them, did you, in fact, release
21 them knowing that you didn't necessarily have to?

22 ACC [MR. HADI]: One more the question, if you please?

23 MJ [LtCol LIBRETTO]: When you signed the release form and

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1 consented to them withdrawing from your case, did you
2 understand that you didn't necessarily have to?

3 ACC [MR. HADI]: Is your question that by me signing or
4 not signing will not affect their leaving?

5 MJ [LtCol LIBRETTO]: There are other options that could
6 have been explored and they very well may have, to some
7 extent, been explored to keep them in the military. That not
8 necessarily would have occurred, but it could have been
9 explored.

10 At the time you signed the consent, did you consent
11 to their withdrawal, understanding the nature of why they were
12 requesting to withdraw?

13 ACC [MR. HADI]: As I understood it at that time is that
14 when there is an order for an attorney to leave, my
15 signature -- by me signing or not signing will not necessarily
16 affect that decision.

17 MJ [LtCol LIBRETTO]: Mr. Hadi, that is true to a certain
18 extent. If you had not signed the consent form, they might
19 have still been released from your case. And again, I don't
20 know to what extent other options were explored to have them
21 remain on in the military.

22 But did you understand at least that you could have
23 said no, and with that understanding you did say yes?

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1 ACC [MR. HADI]: I understood that I am able to say no or
2 I can say yes.

3 MJ [LtCol LIBRETTO]: And did you, in fact, consent to
4 Commander Cooper and Captain Fischer being released as your
5 defense counsel?

6 ACC [MR. HADI]: Yes.

7 MJ [LtCol LIBRETTO]: Okay. As an initial matter, the
8 commission notes the recent case of United States
9 v. al Nashiri, wherein the United States Court of Military
10 Commission Review held that after the chief defense counsel
11 makes an initial determination as to good cause as shown on
12 the record, defense counsel also must secure the approval of
13 the military judge before they are excused and released as
14 counsel. I will also note that that case was not yet decided
15 when the chief defense counsel excused Captain Fischer and
16 Commander Cooper from representation in this case.

17 Notwithstanding this holding and the lack of prior
18 approval by the military judge before Captain Fischer and
19 Commander Cooper were purportedly excused, based on the
20 asserted reasons for the excusal of each counsel, the current
21 pretrial posture of the proceedings, the adequate staffing of
22 the defense team, the express consent of the accused knowing
23 he did not have to consent to the excusal, and the good cause

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1 determination made by the chief defense counsel in his role as
2 the supervisory attorney responsible for defense detailing,
3 resourcing, facilitating proper representation of the accused,
4 and regulating the conduct of defense counsel, the commission
5 similarly finds good cause for their excusal and grants each
6 of their requests to be excused.

7 Furthermore, I find that the accused will not be
8 prejudiced by the excusal of these counsel.

9 Additionally, on 26 September 2018, the defense filed
10 an ex parte notice of excusal of Major Kenitra Fewell.
11 Pursuant to request to withdraw by counsel to the chief
12 defense counsel, Major Fewell was excused from representing
13 the accused by the chief defense counsel. The chief defense
14 counsel found good cause for Major Fewell's excusal. In
15 addition, the accused expressly consented to the withdrawal of
16 Major Fewell.

17 Once again, the CMCRC had not yet decided the relevant
18 issues presented in the al Nashiri case and the CDC, once
19 again, purported to take the unilateral action of excusing
20 Major Fewell from further representation of the accused.
21 Major Fewell did not seek permission from the military judge;
22 however, based on the information contained within AE 007W,
23 the commission will consider it to be a request to the

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1 commission.

2 Mr. Hadi, when discussing the request to withdraw
3 made by Major Fewell with your counsel, did you understand why
4 she was requesting to withdraw from representation?

5 ACC [MR. HADI]: Yes, I did understand.

6 MJ [LtCol LIBRETTO]: And did you understand, also, that
7 you did not have to or need to consent to her withdrawal?

8 ACC [MR. HADI]: Yes, I did understand that, too.

9 MJ [LtCol LIBRETTO]: Understanding that you did not have
10 to consent to her withdrawal ----

11 ACC [MR. HADI]: Yes, I understood that. Thank you.

12 MJ [LtCol LIBRETTO]: Okay. Understanding that you did
13 not have to consent to her withdrawal, did you, in fact,
14 consent to her withdrawal?

15 ACC [MR. HADI]: Yes, I did.

16 MJ [LtCol LIBRETTO]: Based on the asserted bases for the
17 excusal of counsel as outlined in the appellate exhibit, the
18 current pretrial posture of the proceedings, the adequate
19 staffing of the defense team, the expressed consent of the
20 accused, and the good cause determination made by the chief
21 defense counsel in his role as the supervisory attorney
22 responsible for defense detailing, resourcing, facilitating
23 proper representation of the accused and regulating the

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1 conduct of defense counsel, the commission grants the request
2 of Major Fewell to be excused. Additionally, I find that the
3 accused will not be prejudiced by the excusal of these
4 counsel.

5 Moving on to the purported excusal of Mr. Rushforth.
6 On 17 October 2018, several days after the al Nashiri decision
7 was issued by the CMC, the defense notified the commission
8 that the chief defense counsel had rescinded Mr. Brent
9 Rushforth's qualification as a civilian defense counsel. The
10 filing by the defense was rejected due to not including the
11 consent for withdrawal apparently signed by the accused that
12 was referenced within the filing. The notice was subsequently
13 refiled on 1 November 2018.

14 Before proceeding further, Mr. Thurschwell, what is
15 the defense team's position as to the current status of
16 Mr. Rushforth relating to his representation of the accused?

17 DDC [MR. THURSCWELL]: Judge, Mr. Rushforth, since early
18 in 2017, has been really unable to assist in the defense of
19 the commission's case in any meaningful manner because of his
20 own personal issues and family issues, and he was excused
21 from -- for I think a blanket excusal for about a year worth
22 of commission hearings from appearing on the basis of those
23 issues.

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1 His status has not changed. We are -- he has not
2 contributed, other than morale, to the work of the defense
3 team since early in 2017, and we are -- we consent to his
4 excusal, and request it, in fact, for his own needs.

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

6 In AE 007AA Attachment B, Mr. Rushforth notified the
7 chief defense counsel of his withdrawal from Form 9-2,
8 Affidavit and Agreement by Civilian Defense Counsel. Pursuant
9 to Form 9-2, Mr. Rushforth was obligated to notify the
10 military judge immediately if he believed he was no longer
11 able to comply with that agreement. I note that Mr. Rushforth
12 executed that form on 14 September 2018 and failed to notify
13 the military judge as required.

14 Implicit in the requirement that counsel immediately
15 notify the military judge of any material change in the
16 information in their application is that the military judge
17 determines whether counsel continues to be qualified.

18 I further note that paragraph 2 of that agreement
19 requires Mr. Rushforth to comply with all applicable
20 regulations and rules for counsel, including any Rules of
21 Court. The Military Commission Rules Of Court 4.2.c. and
22 4.4.b. require any excusal of civilian counsel to be approved
23 by the commission. This was again recently held to be so by

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1 the CMCRC in United States v. al Nashiri.

2 At this point I find that Mr. Rushforth has not yet
3 complied with the requirement of the affidavit and agreement
4 by civilian defense counsel to notify the military judge of
5 any material change in his ability to represent the accused.
6 To the extent that 007AA purports to fill that requirement, I
7 find that Mr. Rushforth has yet to sufficiently articulate why
8 he can no longer comply with the requirements of the affidavit
9 and agreement of civilian defense counsel.

10 I further find that Mr. Rushforth has not yet
11 complied with Rules of Court 4.2.c. and 4.4.b. in the holding
12 by the CMCRC requiring excusal of civilian defense counsel be
13 approved by the military judge.

14 While Mr. Rushforth has been previously excused from
15 attendance at this session of these commissions, the
16 commission finds that Mr. Rushforth as of now remains as
17 counsel for the accused. I note that the accused has
18 expressly consented to Mr. Rushforth's absence from the
19 commission sessions over the last year or so.

20 Mr. Rushforth continues to represent the accused
21 until such time as Mr. Rushforth has complied with the
22 procedural requirements for excusal of counsel and adequately
23 demonstrates good cause on the record for his request to

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1 withdraw, and not until such time as this commission has
2 approved his excusal will it be effective.

3 Regarding the pending excusal -- Mr. Hadi, in
4 Appellate Exhibit 007AA, you have indicated your consent for
5 Mr. Rushforth to be excused from further participation in your
6 case. Did you, in fact, sign a release?

7 ACC [MR. HADI]: Yes, I did.

8 MJ [LtCol LIBRETTO]: And at the time you signed that
9 consent to release, did you understand the reasons why
10 Mr. Rushforth was requesting to be released from
11 representation?

12 ACC [MR. HADI]: Yes, I did understand that at that time.

13 MJ [LtCol LIBRETTO]: Did you also understand that you did
14 not have to consent to his release?

15 ACC [MR. HADI]: Yes, I did.

16 MJ [LtCol LIBRETTO]: Understanding that you did not have
17 to consent to his release, did you, in fact, release him
18 consensually from further representation in your case?

19 ACC [MR. HADI]: Yes, I did.

20 MJ [LtCol LIBRETTO]: Pending additional information
21 provided by Mr. Rushforth, Mr. Rushforth remains of counsel to
22 the accused. If and when that information that more
23 sufficiently demonstrates the good cause that he believes

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1 exists is presented to the commission, the commission will
2 make a determination on his excusal.

3 Moving on to the pending excusal of Mr. Thurschwell,
4 in Appellate Exhibit 007Z, the defense puts forth a notice to
5 the commission that Mr. Thurschwell has requested to withdraw
6 as counsel for the accused, and requests permission to
7 withdraw in accordance with applicable rules of court and
8 legal precedent. The appellate exhibit indicates that the
9 accused has indicated consent to release Mr. Thurschwell from
10 further representation; however, at the time of the filing
11 that consent had not yet been memorialized.

12 Mr. Hadi, have your counsel discussed with you the
13 reasons for Mr. Thurschwell's request to withdraw?

14 ACC [MR. HADI]: Yes. We have discussed it many times.

15 MJ [LtCol LIBRETTO]: And do you understand those reasons?

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

17 MJ [LtCol LIBRETTO]: Do you understand that you do not
18 have to consent to his withdrawal?

19 ACC [MR. HADI]: With respect to him as a civilian lawyer,
20 yes, I do understand.

21 MJ [LtCol LIBRETTO]: I'm sorry, can you repeat that?

22 ACC [MR. HADI]: I understand that as a civilian lawyer,
23 perhaps he has more freedom of movement than as a military

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1 lawyer.

2 MJ [LtCol LIBRETTO]: Okay. And do you understand that
3 you do not have to consent to his withdrawal?

4 ACC [MR. HADI]: Yes, I understand.

5 MJ [LtCol LIBRETTO]: Do you understand that the
6 withdrawal of counsel, based in large part on your consent,
7 will not necessarily, standing alone, alter the litigation
8 schedule proceeding forward with your case?

9 ACC [MR. HADI]: Yes, I understand very well.

10 MJ [LtCol LIBRETTO]: That is to say that your voluntary
11 release of counsel, standing alone, will not be the sole basis
12 for future delays of this commission?

13 ACC [MR. HADI]: Yes, I understand very well.

14 MJ [LtCol LIBRETTO]: The commission just this morning
15 also received a request to withdraw from Major Miller. This
16 request was filed ex parte and under seal and has been marked
17 and attached to the record as Appellate Exhibit 007BB.

18 Major Miller, have you had the opportunity to discuss
19 to any degree your situation with Mr. Hadi?

20 DDC [Maj MILLER]: Yes, Your Honor, I have had a chance to
21 discuss my situation briefly.

22 MJ [LtCol LIBRETTO]: Okay. And based on that discussion,
23 is it your understanding that he is going to consent to your

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1 withdrawal?

2 DDC [Maj MILLER]: Your Honor, if I might have a moment?

3 MJ [LtCol LIBRETTO]: You may.

4 [Pause.]

5 DDC [Maj MILLER]: Your Honor, it's my understanding,
6 based on my conversations, that Mr. Al-Tamir does consent to
7 my withdrawal.

8 MJ [LtCol LIBRETTO]: Okay. Mr. Hadi, are you aware of
9 Major Miller's request to withdraw as counsel in your case?

10 ACC [MR. HADI]: Yes.

11 MJ [LtCol LIBRETTO]: And have you discussed this issue
12 with Major Miller?

13 ACC [MR. HADI]: Yes.

14 MJ [LtCol LIBRETTO]: Have you also discussed this issue
15 with the other counsel assigned to your case?

16 ACC [MR. HADI]: Yes.

17 MJ [LtCol LIBRETTO]: Do you understand that you do not
18 have to consent to her withdrawal as counsel in your case?

19 ACC [MR. HADI]: Yes.

20 MJ [LtCol LIBRETTO]: Do you consent to Major Miller's
21 withdrawal as counsel in your case?

22 ACC [MR. HADI]: Yes, I do consent.

23 MJ [LtCol LIBRETTO]: Having just received Major Miller's

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1 request to withdraw as counsel shortly before coming into the
2 session this morning, and not having adequate opportunity to
3 review all of the contents of that request, the commission is
4 withholding a determination as to granting permission for
5 Major Miller's excusal at this time.

6 Likewise, based on the number of counsel that have
7 since departed in recent past, as well as the unknown status
8 as far as right now of the status pending of incoming counsel,
9 the commission is withholding consent for Mr. Thurschwell to
10 withdraw at this time as well.

11 Those determinations, I suspect, will be made in the
12 near future, and the parties will be notified of the
13 commission's determination. In large part, that is going to
14 be pending some of the other filings that the commission
15 believes are forthcoming as it relates to other counsel being
16 assigned to this case. But until such time as that occurs and
17 the commission has the opportunity to review the documents in
18 further detail, those determinations with respect to
19 Mr. Thurschwell and Major Miller are being reserved.

20 ATC [MR. SPENCER]: Your Honor?

21 MJ [LtCol LIBRETTO]: Yes.

22 ATC [MR. SPENCER]: Your Honor, may the government please
23 be heard briefly on two issues as it relates to the counsel

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1 questions?

2 MJ [LtCol LIBRETTO]: You may.

3 ATC [MR. SPENCER]: Good afternoon, Your Honor. Vaughn
4 Spencer for the government.

5 Your Honor, very briefly, with respect to Captain
6 Fischer and Commander Cooper, the accused answered your
7 questions essentially the same way three times, in saying that
8 whether he agreed to their release or not, it wouldn't have
9 mattered. Now, that's very different than how he answered
10 your questions with respect to Major Fewell, Major Miller,
11 Mr. Thurschwell, and Mr. Rushforth.

12 The problem with the way he answered those questions,
13 Your Honor, I believe him to be sincere. It's not a problem
14 in the way he answered the questions. The problem with the
15 result of that is that it's clear that in his mind the outcome
16 was a fait accompli. This is exactly the scenario in United
17 States v. Hutchins, Your Honor. And I am not attempting to
18 argue 118. I know you've denied oral argument on that, but if
19 it is a fait accompli in his mind, then his consent is not
20 really voluntary.

21 In Hutchins the servicemember consented to the
22 release because he didn't think he had a choice because other
23 options weren't explored, and we know other options weren't

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1 explored in this case, Your Honor, with respect to both
2 Captain Fischer and Commander Cooper. Commander Cooper
3 admitted as such in her letter in which she said she didn't
4 attempt to seek continuance on active duty because of her
5 pushing up against the sanctuary and unsuccess with that in
6 the past on other issues.

7 So if options weren't explored, then options clearly
8 were not explained to the accused which, again, is exactly the
9 scenario on Hutchins that granted relief after the fact on
10 appeal.

11 Now, clearly it was correct, as the commission
12 pointed out to the accused, that it might not matter what he
13 says, but beyond that, the commission still has to make
14 independent findings of good cause. What we have is good
15 cause based on consent, but the consent is not voluntary
16 consent in the government's mind. Additionally, the ----

17 MJ [LtCol LIBRETTO]: Voluntary or knowing?

18 ATC [MR. SPENCER]: Both, Your Honor. Voluntary and
19 knowing are interwoven in this sense. If he thinks the
20 outcome is predetermined, then it doesn't matter whether he
21 says yes or no, and so him saying yes is not voluntary.

22 And in this case the chief defense counsel made his
23 good cause determination based on the consent of the accused.

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1 So it's a problem that can easily be fixed by further inquiry
2 and further findings of good cause by the commission only with
3 respect to Commander Fischer -- I'm sorry, Captain Fischer and
4 Commander Cooper.

5 And the government firmly believes that good cause
6 exists in those cases potentially, but that needs to be made
7 more clear on the record because as it stands we have
8 virtually the exact scenario of United States v. Hutchins,
9 which guarantees relief to the accused on appeal.

10 MJ [LtCol LIBRETTO]: I would not agree with you in that
11 regard, and I believe there are enough distinguishing
12 characteristics between this and Hutchins to separate it from
13 that holding. That was a very unique factual circumstance.

14 I understand the government's concern. I do point
15 out that the accused indicated on the record that he
16 understood that he did not have to consent. I understand the
17 government's concern as it relates to why he maybe chose to
18 consent, but that is separate and apart to some extent as to
19 whether or not he knew he had the right to not consent; and if
20 he had not consented, then some of those options might have
21 been explored further.

22 I understand your concern, and the commission is
23 prepared to develop the record further if necessary -- if it

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1 believes it's necessary. At this point the commission does
2 not believe it's necessary.

3 ATC [MR. SPENCER]: Thank you, sir.

4 MJ [LtCol LIBRETTO]: Are there any matters to take up
5 before this commission stands in recess?

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

7 DDC [MR. THURSCHELL]: One moment, Judge.

8 Nothing from the defense.

9 MJ [LtCol LIBRETTO]: Very well. This commission is in
10 recess.

11 [The R.M.C. 803 session recessed at 1317, 9 November 2018.]

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