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1 [The R.M.C. 803 session was called to order at 10:20,

2 13 October 2026.]

3 MJ [COL FITZGERALD]: This commission is called to order.

4 Government, if you wouldn't mind announcing who is here for
5 the government, including who is in the Remote Hearing Room.

6 MTC [CDR TRIVETT]: Yes, sir. Representing the United States
7 today and appearing at Guantanamo Bay Naval Station are the following
8 detailed counsel: Myself, Commander Clay Trivett, U.S. Navy;
9 Lieutenant Colonel James Garrett, U.S. Army; Commander Charles Roman,
10 U.S. Navy; Lieutenant Colonel Michael Ross, U.S. Army; Commander
11 Brandon Sargent, U.S. Navy; Major Kaylyn Krzemien, U.S. Marine Corps;
12 Major Alfonso Perez-Diaz, U.S. Army; Mr. John Wells, Department of
13 Defense.

14 United States currently isn't represented by anyone in the
15 Remote Hearing Room, but I would note that Captain Stinson, who is no
16 longer detailed to the case, has agreed to stay on as resource
17 counsel until his orders expire. So we would ask for permission that
18 he be permitted to remain in there as resource counsel.

19 MJ [COL FITZGERALD]: That permission is granted.

20 Can you tell me who else is in the RHR?

21 MTC [CDR TRIVETT]: Yes, sir. So we have Special Agent James
22 Hodgson, who we had just informed the commission we had designated
23 under Rule 615, as well as a Navy paralegal and contractor analyst

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1 assisting Captain Stinson.

2 MJ [COL FITZGERALD]: So it appears there are four people.
3 The camera angle has shifted since I was here last, so I just want to
4 make sure there's nobody off the camera.

5 MTC [CDR TRIVETT]: No, sir. I don't believe so.

6 MJ [COL FITZGERALD]: Okay. Thank you.

7 MTC [CDR TRIVETT]: These proceedings are being transmitted
8 via closed-circuit television to public viewing locations in the
9 United States pursuant to the commission's order, AE 028M dated 22
10 November 2019.

11 Sir, we would request that Mr. Wells be permitted to leave
12 at -- between 1150 and 1200 today to coordinate with the chief
13 prosecutor.

14 MJ [COL FITZGERALD]: Coordinate something for the commissions
15 or ----

16 MTC [CDR TRIVETT]: Yes, sir. In relation to this case with
17 the chief prosecutor.

18 MJ [COL FITZGERALD]: Oh, okay. That request is granted.

19 Just Mr. Wells? Did I hear that correctly?

20 MTC [CDR TRIVETT]: Yes, sir.

21 MJ [COL FITZGERALD]: All right. Thank you. And good
22 morning, Mr. Wells.

23 Ms. Miller, could you let me know who is here and the

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1 RHR -- and, again, I'd -- the camera angles have shifted since the
2 last time we were here. If you could account for those folks in the
3 RHR as well.

4 LDC [MS. MILLER]: Yes, sir. I prefer the podium.

5 On behalf of Mr. Abd al Rahim al Nashiri, myself, Learned
6 Counsel Allison Miller; Lieutenant Colonel Joshua Nettinga, United
7 States Air Force; Commander Matthew Bartholomaeus, United States Navy;
8 Ms. Jessica Manuele; Lieutenant Benjamin Shaver, United States Navy;
9 Mr. Casey Secor.

10 All detailed counsel are present before Your Honor at Naval
11 Station Guantanamo Bay. We are assisted in this courtroom by one
12 paralegal.

13 In the Remote Hearing Room we are also assisted by an
14 analyst, a paralegal, and our DISO.

15 MJ [COL FITZGERALD]: Thank you.

16 LDC [MS. MILLER]: Thank you, sir.

17 MJ [COL FITZGERALD]: I'll just go through the orders of the
18 things included in the final pretrial management conference. One is
19 preliminary instructions. And I don't think it's been filed, but I
20 did receive a defense request for amended preliminary instructions.

21 LDC [MS. MILLER]: It has been filed as of this morning.

22 MJ [COL FITZGERALD]: Okay. You wouldn't happen to know the
23 number, would you?

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1 LDC [MS. MILLER]: Yes, sir. It's AE 705F.

2 MJ [COL FITZGERALD]: Thank you. So I have that.

3 Government, are you intending to request any deviations from
4 the -- what we call the benchbook script?

5 MTC [CDR TRIVETT]: We're not requesting any deviations, sir,
6 but we do have objections to certain requests that the defense have
7 made in their filing.

8 MJ [COL FITZGERALD]: Okay. Are you going to file something
9 or ----

10 MTC [CDR TRIVETT]: We anticipated bringing it up on the
11 record today, sir.

12 MJ [COL FITZGERALD]: Okay. We can do that. I read what you
13 sent, I think, as a Word document? I remember opening it as a Word
14 document. But you would have filed it as a PDF.

15 LDC [MS. MILLER]: Correct.

16 MJ [COL FITZGERALD]: Did you make any further amendments from
17 the Word document to the PDF?

18 LDC [MS. MILLER]: No, sir.

19 MJ [COL FITZGERALD]: Okay.

20 LDC [MS. MILLER]: I apologize. I should have sent it ----

21 MJ [COL FITZGERALD]: That's fine.

22 LDC [MS. MILLER]: ---- to Your Honor as a PDF.

23 MJ [COL FITZGERALD]: I didn't have your official filing, but

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1 if you didn't make any deviations, I think I can at least take up a
2 discussion as to -- because you red-lettered everything that you were
3 requesting.

4 LDC [MS. MILLER]: That's correct, sir. But I also contacted
5 your staff. And we're not in a position to proceed until the
6 commission resolves AE 703H. It is the defense's supplemental 505(g)
7 notice.

8 The government, in its response, argued alternative
9 positions, one was which was a request for an M.C.R.E. 505(h)
10 hearing. We are joining in that request. 505(h) -- excuse me. Make
11 sure I have this correct.

12 505(h)(1)(B), Conduct of Hearing: Upon a request by either
13 party under Military Commission Rule Evidence 505(h)(1)(A), the
14 military judge shall conduct such a hearing and shall rule prior to
15 conducting any further proceedings.

16 And so we are ready to proceed with that M.C.R.E. 505(h)
17 hearing once we switch into a closed session, sir.

18 MJ [COL FITZGERALD]: Government, do you wish to be heard?

19 ATC [CDR ROMAN]: Yes, Your Honor.

20 MJ [COL FITZGERALD]: Good morning. And just as a reminder,
21 the well is yours. And as we get ready to go to trial, the well is
22 yours. You don't have to ask permission to come to the podium if
23 that's where you'd rather be heard from. I don't draw any umbrage if

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1 you stay at your counsel table. But I noticed anybody over a certain
2 height probably struggles to stand before the court and speak into
3 the microphone. Do whatever makes you comfortable.

4 LDC [MS. MILLER]: And I just want to add, obviously, a
5 standing objection to proceeding while Mr. al Nashiri's competency is
6 still in question. I think we made that clear when we were before
7 the commission last time. We continue to object to proceeding until
8 the issue of Mr. al Nashiri's competency is resolved.

9 MJ [COL FITZGERALD]: Thank you. Your objection on that is
10 noted.

11 I believe that I said good morning. But if I didn't, good
12 morning, Commander Roman.

13 ATC [CDR ROMAN]: Good morning, sir.

14 The defense is half right. We, in the alternative -- in the
15 last paragraph before the conclusion of our response to 703H, the
16 defense's request for supplemental, in the alternative, after
17 considering all of the various reasons that we explained to the
18 commission why their filing was in error in accordance with the Rules
19 of Court, in the interests of the prior rulings from the commission
20 speaking about when a supplemental would be appropriate, and it's
21 just when -- after the commission considers those, if it is going to
22 accept the supplemental filing, that we then request the opportunity
23 to be heard and get more granular, objecting to the lack of

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1 specificity, once again, of a 505(g) notice, this now being the
2 seventh supplemental, the eighth time that they've submitted a 703G
3 notice.

4 So it's a little bit cart before the horse to say that the
5 government is so requesting a hearing. We are requesting that
6 the -- and we have noticed our responses and objections to the filing
7 in and of itself, and only after -- in the abundance of caution or,
8 again, in the alternative, should the commission find that it is
9 accepting and does not find that the filing is improper, that we
10 would then move toward a -- or request a 505(h) hearing.

11 So it's not one before the other. It's in the process of
12 the response and objections that we are asking the commission to
13 consider all of the reasons and all of the case laws and all of the
14 rules that we've stated. And then, only then, if that is not
15 convincing, that then the government then would request an
16 (h) hearing.

17 MJ [COL FITZGERALD]: So a conditioned request?

18 ATC [CDR ROMAN]: Yes, sir.

19 MJ [COL FITZGERALD]: Or a conditional request?

20 ATC [CDR ROMAN]: Yes, sir.

21 MJ [COL FITZGERALD]: Okay. Very well.

22 Let me -- who has this motion for the defense?

23 Colonel Nettinga, good morning.

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1 DDC [Lt Col NETTINGA]: Good morning, sir.

2 MJ [COL FITZGERALD]: Do you wish to be heard? Yes, I
3 understood your colleague said you had joined in the government's
4 request, but the government is telling me it's a conditioned request
5 or a conditional request.

6 DDC [Lt Col NETTINGA]: We do make that request, sir.

7 MJ [COL FITZGERALD]: Okay. Unconditionally?

8 DDC [Lt Col NETTINGA]: Unconditionally, yes, sir. I believe
9 that that's the next step after the 70 -- excuse me, the 505(g)
10 request. The government has indicated they want the hearing. We
11 agree that that hearing is necessary. Whether they're doing it
12 conditionally or unconditionally, we believe that that's the next
13 step and appropriate for consideration.

14 MJ [COL FITZGERALD]: Let's back up to 505(h)(1)(A), which
15 says within the time specified by the military judge for the filing
16 of a motion under the section, either party may request the military
17 judge conduct a hearing.

18 Was this request made within the time specified by this
19 commission?

20 DDC [Lt Col NETTINGA]: It was not, sir. You gave a deadline,
21 I think, eight months before trial. The rule also says within 30
22 days before trial, which we did comply with. Certainly, I understand
23 the way that the rule is constructed.

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1 MJ [COL FITZGERALD]: What rule are you -- what rule is that?

2 DDC [Lt Col NETTINGA]: 505(h)(1)(A) or (g). I don't have the
3 rule in front of me. But I know that it says within the time
4 specified by the military judge or within 30 days prior to the start
5 of trial.

6 MJ [COL FITZGERALD]: Well, it doesn't say that in (h)(1)(A).
7 That's what I was asking about. But you're citing to another rule?

8 DDC [Lt Col NETTINGA]: I believe it's 505(g), sir. Again,
9 I -- so excuse me. (g)(1) -- 505(g)(1)(A).

10 MJ [COL FITZGERALD]: It says that the accused shall, within
11 the time specified by the military judge, or when no time is
12 specified, within 30 days before trial.

13 DDC [Lt Col NETTINGA]: Yes, sir. And then the rule
14 continues: Whenever the accused learns of additional classified
15 information, the accused reasonably expects to disclose or to cause a
16 disclosure of, et cetera.

17 MJ [COL FITZGERALD]: So when did you learn this?

18 DDC [Lt Col NETTINGA]: As we were preparing for trial
19 and ----

20 MJ [COL FITZGERALD]: No, that's telling me when you surmised
21 your use of it. But when did you learn of it, discovered, had it
22 provided to you? Is this something you were given?

23 DDC [Lt Col NETTINGA]: When we learned that we reasonably

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1 expected to disclose it or to cause the disclosure is when we filed
2 the notice, sir. I don't believe that the rule contemplates when it
3 was given over to us by the prosecution.

4 As we've talked about, this case involves a historic amount
5 of classified discovery. I think we've notified you on a number of
6 different occasions that no member of the defense team has had the
7 ability to review all of that evidence. Certainly that speaks to our
8 inability to proceed to trial and our lack of preparation, not
9 through any fault of ours, but just through the volume of materials,
10 that we are not prepared to proceed to trial.

11 But as we continue to try and to look at statements made by
12 the government witnesses, most of whom will not agree to interviews
13 with us, and we think about what we might want to cross-examine these
14 individuals on, we find additional information in those files that we
15 think, you know, this may come up in the cross-examination.

16 And frankly, I would fully expect with witnesses testifying
17 for the prosecution that -- who will not talk to us and who we have
18 never had an ability to speak to and who have not prepared written
19 statements or anything of that nature, that once they testify in
20 trial, we will discover there are things that are classified that now
21 we need to bring up and give 505 notice of because we need it to
22 impeach the witness. We could not have anticipated that ahead of
23 time because we have not been able to speak to the witness.

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1 So I do see this as an ongoing issue. And I think that the
2 rule contemplates that.

3 MJ [COL FITZGERALD]: But you bring up the point where the
4 rule contemplates that based on somebody's testimony. But you're
5 telling me, then, that all those words in 505(g) really mean nothing,
6 right? Why have a rule that says within 30 days before trial? Why
7 have that rule if you're telling me it's all inconsequential at the
8 end of the day because I'm going to need it anytime I tell you I need
9 it.

10 DDC [Lt Col NETTINGA]: Sir, I think the rule says whenever
11 the accused learns of additional information that the accused
12 reasonably ----

13 MJ [COL FITZGERALD]: Sure.

14 DDC [Lt Col NETTINGA]: ---- expects to disclose ----

15 MJ [COL FITZGERALD]: But don't you have to read that in
16 context of the whole rule, right? When the military judge sets a
17 date to hear this or there's no time specified within 30 days, but we
18 can negate that because there was a time specified for it.

19 DDC [Lt Col NETTINGA]: Yes, sir, there was. I agree.

20 MJ [COL FITZGERALD]: So when the context of that rule, when
21 it says such notice -- I'm sorry -- whenever the accused learns of
22 additional classified information. We can't ignore the word
23 "additional," right? So it seems like ----

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1 DDC [Lt Col NETTINGA]: I think the "additional" modifies the
2 initial filing within 30 days or at the time specified by the
3 military judge. So I'm not ignoring ----

4 MJ [COL FITZGERALD]: Sure.

5 DDC [Lt Col NETTINGA]: ---- what the "additional" obligates.

6 MJ [COL FITZGERALD]: Whenever the accused learns of
7 additional classified information. "Learns of" and "additional" seem
8 to have some import.

9 DDC [Lt Col NETTINGA]: Yes, sir. When we learn ----

10 MJ [COL FITZGERALD]: I'm not trying to disagree with you.
11 I'm trying -- the government has basically said our request for a 505
12 hearing is conditional.

13 DDC [Lt Col NETTINGA]: I understand.

14 MJ [COL FITZGERALD]: I'm just walking through the conditions
15 to get to a 505 hearing.

16 DDC [Lt Col NETTINGA]: Understood, sir.

17 MJ [COL FITZGERALD]: So help me understand where you're at.

18 DDC [Lt Col NETTINGA]: Yes, sir. And I appreciate parsing
19 the language of the rule. I think that that's appropriate and
20 important. And so I think what it clearly says here, and the
21 position of that sentence that begins, "whenever the accused learns
22 of," being after the 30 days prior to trial or the time set by the
23 military judge, when the accused learns of additional classified

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1 information -- so information that was not initially noticed in those
2 30 days or the time set by the military judge -- that the accused
3 reasonably expects to disclose.

4 So while we may have conceptually known of the discovery in
5 that -- you know, and I think the government gave you a chart there
6 in terms of when they actually, in their motion to essentially reject
7 the notice, of when they provided the discovery that's at issue in
8 this additional 505 notice.

9 So you can say, well, the defense had constructive notice of
10 it at that point in time. At that point in time, we did not know
11 that we reasonably expected to use it and to disclose it at trial.
12 And as we continue to prepare for trial, that is when these things
13 become relevant and necessary and we realize, hey, in order to
14 conduct a full cross-examination of this witness, we may need to
15 disclose this information. We need to have this available to us.

16 And because of the classification and the rules, we are
17 prohibited, again, by the classification, from just cross-examining
18 the witness based on a piece of discovery that we have. We have to
19 go through this process.

20 And so I think the rules do allow for that iterative process
21 based on the way witnesses testify, based on preparation and
22 discovery within our own files of information that may not have
23 seemed important or relevant at the time or we didn't recognize the

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1 importance or relevance or, frankly, nobody on the current team had
2 the ability to get to it prior to filing.

3 And so I think if we're going to say that, hey, the defense
4 is now prohibited from any additional classified information or going
5 through this process, I think that does an enormous disservice to the
6 interests of justice and prevents Mr. al Nashiri from having a full
7 and fair trial here.

8 MJ [COL FITZGERALD]: But even in our general understanding of
9 the Rules of Evidence, your time to prepare for trial is the time to
10 resolve matters in pretrial litigation. You would agree with that at
11 least as a general premise, right?

12 DDC [Lt Col NETTINGA]: Yes, sir.

13 MJ [COL FITZGERALD]: That's why we do that.

14 DDC [Lt Col NETTINGA]: Yes, sir.

15 MJ [COL FITZGERALD]: And then -- so 505 is another layer of
16 that.

17 DDC [Lt Col NETTINGA]: Yes, sir.

18 MJ [COL FITZGERALD]: In fact, a discussion in 505(h) talks
19 about 505 does not change the general applicable evidentiary rules of
20 admissibility but, rather, alter the timing of rulings as to
21 admissibility. So that seems to be a construct of importance, too.

22 And if you'd like to address it. Again, I'm not trying to
23 disagree with you. I'm walking through the conditions because the

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1 government has taken the position that a 505 hearing is a conditional
2 request.

3 You've now joined in that request but you've made it
4 unconditional. I've got to take up both. So I'm making you -- even
5 though you've requested unconditionally, I'm walking through the
6 government's conditions.

7 So isn't that accurate, though? The 505 is not about
8 admissibility. It's about the timing of when you can bring up these
9 issues for admissibility so we can resolve them before trial.

10 DDC [Lt Col NETTINGA]: Yes, sir. I think it certainly speaks
11 to trying to resolve these matters before trial. I think that that
12 is clear. And we did file this 30 days prior to the start of trial.

13 I understand that the judge -- that you sent a different
14 deadline. I recognize that, sir. But ----

15 MJ [COL FITZGERALD]: That's why the 30-day rule doesn't
16 apply.

17 DDC [Lt Col NETTINGA]: I ----

18 MJ [COL FITZGERALD]: You've moved on to the next thing, which
19 is new additional information that we reasonably expect as the
20 defense to raise ----

21 DDC [Lt Col NETTINGA]: Yes, sir. My ----

22 MJ [COL FITZGERALD]: ---- regardless of the 30-day rule.

23 DDC [Lt Col NETTINGA]: My point in that is that we filed it

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1 30 days before trial. Whether that number is in the rule or not,
2 whether that's operative or not, we filed it 30 days before trial
3 while we are still in a pretrial posture to attempt to resolve these
4 issues.

5 I only bring up the witness testimony because I do see this
6 continuing to be a problem as the witnesses continue to testify,
7 particularly when they refuse to speak with us.

8 MJ [COL FITZGERALD]: And we can certainly take that ----

9 DDC [Lt Col NETTINGA]: Yes, sir.

10 MJ [COL FITZGERALD]: ---- that motion on -- I think you're
11 already well prepared to litigate when you don't realize a witness is
12 going to say that and now you need to impeach, rebut, refresh.
13 There's a lot of things you may want to do with classified
14 information.

15 So we can take that up when that happens. But we're still
16 in the pretrial posture, not the trial posture of where you
17 need -- may need to raise that.

18 DDC [Lt Col NETTINGA]: Understood, sir. And I think, again,
19 based on the rule we have recognized that we reasonably tend
20 to -- that we reasonably expect to introduce or disclose this type of
21 information based on our crafting of cross-examinations and
22 understanding, trying to understand what these witnesses are going to
23 say.

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1 And so we're -- again, we're attempting to do that now. We
2 expect that regardless of what -- I'll use Mr. McFadden as an example
3 because I think that several of the first documents in there would be
4 relevant to him, as we indicated.

5 I think that regardless of how Mr. McFadden testifies -- and
6 he did refuse an interview with us -- regardless of how he testifies,
7 the documents -- some of the documents in there are documents that we
8 would intend to use to impeach him. And some of these documents are
9 about the status of the investigation.

10 So, again, I'm not here to question why things are
11 classified. I have no control over what the government chooses to
12 classify or declassify, other than that they seem to be able to
13 declassify whatever they want to use. And anything that we want to
14 use has to go through this process, even though we may be talking
15 about similar types of information.

16 But the information in there -- again, this is not a case
17 where we've got -- in the Air Force we call them reports of
18 investigation -- right? -- where you have a law enforcement
19 investigation, there's a nice report that's written up, it's got all
20 the witness statements attached. And that's the packet that you
21 would tend to review as maybe the first thing that you look at in a
22 case.

23 Here we've got a wide-ranging dump of documents given

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1 piecemeal to us by the government over a span of years and different
2 iterations of the defense team.

3 This iteration of the defense team that is preparing for
4 trial recognizes that it reasonably intends to disclose this
5 classified information for the purpose of defending Mr. al Nashiri,
6 and we should be allowed to do so.

7 MJ [COL FITZGERALD]: Consistent with the rules.

8 DDC [Lt Col NETTINGA]: I believe that we are acting
9 consistent with the rules, sir.

10 MJ [COL FITZGERALD]: Okay. You do agree that whatever you
11 want to do has to be consistent with the Rules of Evidence.

12 DDC [Lt Col NETTINGA]: Certainly. I can't introduce any
13 evidence that I want if it's inadmissible or ----

14 MJ [COL FITZGERALD]: Including M.C.R.E. 505. That's a rule.

15 DDC [Lt Col NETTINGA]: I fully understand that, sir.

16 MJ [COL FITZGERALD]: Okay.

17 DDC [Lt Col NETTINGA]: And, again, for me to think for the
18 reasons articulated, we have complied with the rule when we recognize
19 this additional information, additional to our initial filing, which
20 did comply with the military judge's deadline, when we recognize this
21 additional information and that we intend to cause the disclosure of
22 that information through our cross-examination or as otherwise noted
23 in the motion, we need to provide notice of that, which is what we

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1 did.

2 MJ [COL FITZGERALD]: But, again, provide the notice
3 consistent with the rules.

4 DDC [Lt Col NETTINGA]: Again, sir ----

5 MJ [COL FITZGERALD]: And that's your interpretation, you've
6 done so consistent with the rules?

7 DDC [Lt Col NETTINGA]: Absolutely.

8 MJ [COL FITZGERALD]: Okay. Because I think the government
9 may take umbrage with that because they've referred to this being
10 your seventh or eighth notice, and they don't consider it timely.
11 So ----

12 DDC [Lt Col NETTINGA]: I'm sure they don't, sir. I'm sure
13 that anything that I get up here and say is going to be ----

14 MJ [COL FITZGERALD]: Just let me ask that question. I just
15 said do you want to address that?

16 DDC [Lt Col NETTINGA]: Yes, sir.

17 MJ [COL FITZGERALD]: So ----

18 DDC [Lt Col NETTINGA]: Do I want to address that the
19 government disagrees?

20 MJ [COL FITZGERALD]: Yeah, that they took umbrage. They said
21 this is the seventh or eighth notice and part of their -- me walking
22 through the conditional wickets is I don't need to hold a 505 hearing
23 because you haven't comported to the rules in your notice.

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1 DDC [Lt Col NETTINGA]: Yes, sir.

2 MJ [COL FITZGERALD]: Do you want to address that? Again,
3 because we're just talking about the conditions to get to 505(h).

4 DDC [Lt Col NETTINGA]: I understand, sir. And I guess
5 I'm ----

6 MJ [COL FITZGERALD]: Well, let me -- can I put it this way?
7 How about this? Whatever notice we're on, I don't know, I don't keep
8 track of the numbers per se, but your filing is under the guise of
9 this is a pretrial notice and we think we've comported with the rules
10 to give us this notice -- to give the commission this notice.

11 DDC [Lt Col NETTINGA]: Yes, sir.

12 MJ [COL FITZGERALD]: Should the commission contemplate any
13 other pretrial notice under 505?

14 DDC [Lt Col NETTINGA]: Additional to the one that we ----

15 MJ [COL FITZGERALD]: So here's where I'm at. You've told
16 me -- and I don't disagree with you, and I think we're going to
17 probably take it up -- witnesses who have been unavailable to you for
18 witness preparation, they may say some things -- common sense would
19 say they know things that are classified information, and you may
20 want to cross them, impeach them, refresh their memory, whatever you
21 want to do. We can take that up as it happens -- right? -- and
22 circumstance dependent. But here we're just talking about any
23 pretrial notice, an opportunity to be heard, and hold a 505(h)

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1 hearing.

2 Is the defense, between now and when we start trial,
3 anticipating any more notices?

4 DDC [Lt Col NETTINGA]: Before we start jury selection, sir,
5 or before we start -- I mean, we've got less than a week before that.
6 So I want to make sure I understand the parameters.

7 MJ [COL FITZGERALD]: That would be the trial when we assemble
8 the members and we are proceeding to trial.

9 DDC [Lt Col NETTINGA]: I don't anticipate --

10 **[Counsel conferred.]**

11 DDC [Lt Col NETTINGA]: I don't anticipate filing another
12 supplemental 505(g) notice between today and Monday, October 19th.

13 MJ [COL FITZGERALD]: And so any other notices, then, would
14 have to be taken up based on the assertions you're making that you're
15 concerned that you may have to give further 505 notices dependent on
16 a witness' testimony?

17 DDC [Lt Col NETTINGA]: I'm not -- I guess I don't accept
18 that -- we are still struggling to learn and know the evidence that
19 exists in discovery in this case, sir. I mean, that is just a
20 baseline of understanding.

21 MJ [COL FITZGERALD]: But that would be true of every case in
22 every situation, right? I know you're -- you can tell me ----

23 DDC [Lt Col NETTINGA]: It has never in my life been like

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1 this, sir.

2 MJ [COL FITZGERALD]: I'm aware of that.

3 DDC [Lt Col NETTINGA]: Okay.

4 MJ [COL FITZGERALD]: And -- but you have a team of lawyers
5 singularly focused on this case.

6 DDC [Lt Col NETTINGA]: Yes, sir.

7 MJ [COL FITZGERALD]: And the -- and so I'm just trying to get
8 a good measure of how many times do you think I will have to take
9 this matter up in pretrial? Because I think if I don't have to, it
10 bends in your favor.

11 DDC [Lt Col NETTINGA]: I understand, sir.

12 MJ [COL FITZGERALD]: That you've done your best to prepare.
13 I will take up good cause, and you didn't know or couldn't have known
14 or didn't surmise, and you'll tell me why. But it should be very
15 fact and circumstance and maybe witness dependent. I'm prepared for
16 that and I think the government is prepared for that.

17 But I'm trying to resolve all the pretrial matters so that
18 we can keep advancing to the date set for trial. That's all I'm
19 asking.

20 DDC [Lt Col NETTINGA]: I understand, sir. What I can tell
21 you right now as I stand here is that I don't have any documents or
22 classified information that I know of right now that I know will be
23 the subject of a supplemental 505 filing.

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1 MJ [COL FITZGERALD]: Okay.

2 DDC [Lt Col NETTINGA]: Will I go and go down a rabbit hole
3 this evening and find something? That's certainly possible. But I
4 don't have ----

5 MJ [COL FITZGERALD]: But that is always possible.
6 That's -- I guess that's my point. In every case, in every trial,
7 there's always the possibility of turning over one more stone.

8 DDC [Lt Col NETTINGA]: Yes, sir.

9 MJ [COL FITZGERALD]: And at some point you just have to go to
10 trial.

11 DDC [Lt Col NETTINGA]: Well, there's a difference here, sir.
12 Because in any kind of other normal case, I can uncover that stone.
13 I can continue to investigate the case ----

14 MJ [COL FITZGERALD]: And that's the "knew" or "should have
15 known." I agree with you. That's the we didn't know or couldn't
16 have known or shouldn't have known, whatever, and we can take that
17 up. But ----

18 DDC [Lt Col NETTINGA]: Right. But -- so, again, if I may,
19 sir, have access to the record, if nothing else. In any other case
20 where that happens, if I find something, I can use it. I don't even
21 have to necessarily tell the government, depending on what it is,
22 because we don't have to deal with this world of classification.

23 Here, I'm not even necessarily talking about uncovering a

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1 stone on my own. I'm looking at uncovering stones within the files
2 that we currently have that I have not been able to get to in my
3 diligent, full-time preparation of this case.

4 And so the problem is, is that we can't just find something
5 and go, okay, well, when -- we'll put this in Mr. McFadden's file or
6 put it in Agent Soufan's file. When that individual testifies, we'll
7 have that ready for cross-examination. Because if it is classified,
8 we have to go through this process. Or, you know, the
9 alternative -- right? -- is that ----

10 MJ [COL FITZGERALD]: Well, you -- if I understand what you're
11 saying, and having been on the defense side, if I have things that I
12 know I need in preparation for a witness, I can put it in that file.
13 Maybe I use it, maybe I don't. And if I put something in that file
14 that I know is classified, it's still put in that file before trial.

15 DDC [Lt Col NETTINGA]: Sure.

16 MJ [COL FITZGERALD]: I just know I have another step as I
17 just -- in the discussion of 505, that this is an admissibility
18 question. I mean, not an admissibility question, but a timing of
19 when you raise this issue. So ----

20 DDC [Lt Col NETTINGA]: I understand, sir.

21 MJ [COL FITZGERALD]: So, again, it's -- I think we're saying
22 the same thing. In your preparation for trial, you may come across
23 something, but that's no different than any other trial.

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1 And so I think the government, in fairness, ought not to
2 keep getting notices because you're continuing to do trial
3 preparation in a way that seems contrary to the rules of 505.

4 DDC [Lt Col NETTINGA]: Well, I think that there's a couple of
5 ways that we can do this. In that scenario -- and I have one
6 additional scenario I need to raise to the court's attention. But in
7 that scenario where we're talking about the cross-examination of a
8 government witness, my belief -- and maybe this is wrong -- is that
9 the government would want to know that information sooner rather than
10 later and that the court would want to know that information sooner
11 rather than later so that we can resolve the issue rather than
12 Mr. Soufan testifies and then we come to you with a list of 25
13 documents that we say, hey, you know what? He just testified and
14 these all contradict him, and let's go through a 505 process.

15 My thought, in an effort not to hide the ball and in an
16 effort to comply with the strictures of the rules as they exist,
17 would be that we would want to provide that information to try to
18 streamline things and to do that before the witness testifies.
19 Again, I could be wrong, and if the court directs otherwise, we're
20 certainly willing to follow that.

21 But the other piece I want to direct the court's attention
22 to, and this is evident in the filing that we made, is that there
23 is ----

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1 MJ [COL FITZGERALD]: Which -- the filing we're talking about?

2 DDC [Lt Col NETTINGA]: Yes, sir.

3 MJ [COL FITZGERALD]: Okay.

4 CDC [MR. NEVIN]: The 703, I believe it's H.

5 ---- is that a lot of these relate to cross-examination of
6 potential witnesses. And I think we've noticed that with
7 particularity. There are other documents that we may want to
8 introduce in our case in chief that we find.

9 And so, again, we can take that up prior to our case in
10 chief, after the government's case is presented, and say, well, hey,
11 now that we've -- now that they've presented all of their evidence
12 and we know what it is, we have this additional information that we
13 need to go through the 505 process on because it rebuts part of the
14 government's case.

15 Again, the timing is everything there. But it -- again, if
16 the court wants to wait for those markers in time, we can do that.
17 But we're trying to give advance notice here so that we can go
18 through the process as streamlined and with as much advanced notice
19 to all parties as possible.

20 MJ [COL FITZGERALD]: Okay. Would you mind if I let the
21 government be heard?

22 DDC [Lt Col NETTINGA]: Not at all, sir.

23 MJ [COL FITZGERALD]: I think I understand everything you

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1 said.

2 DDC [Lt Col NETTINGA]: Thank you, sir.

3 MJ [COL FITZGERALD]: Appreciate it.

4 Commander Roman, do you wish to be heard on any of that?

5 ATC [CDR ROMAN]: When talking about the filing of 703H, we
6 stand on our briefing. But we're also forgetting that this is
7 a -- now a supplemental that is seeking to notify and have the
8 commission rule when the commission has made its deadline in January
9 of this year.

10 And so this -- so the fact session was done in such a way to
11 show that it's not a new idea. The defense has sought leave of court
12 or permission from the court in the -- orally or in contemplation of
13 new discovery production, has sought leave to supplement its notice.

14 The reason for an idea of supplementation having to
15 be -- receive leave of court is because it can -- it allows the
16 government to be conferenced on that, and it allows the military
17 commission to rule and to provide the permission to supplement.

18 But at this point, the government is understanding that the
19 505(g) notice issue is going to not be resolved. We agree with the
20 commission that these issues need to be resolved pretrial.

21 To leave it open to the defense's subjective understanding
22 of learning of additional information when they've had it for years
23 and, in fact ----

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1 [Counsel conferred.]

2 ATC [CDR ROMAN]: The -- some of the documents that it's
3 noticed for in its 505(g) supplement were some of the same documents
4 that were initially noticed and filed for in February of this year
5 under AE 634.

6 If it's the defense's subjective understanding and learning
7 of new evidence, we will never resolve this pretrial. It will be the
8 continual drip of, "I just found it out, Judge. Now we have to
9 stop -- hold, stop, and discover" -- or I'm sorry. We need to
10 articulate and have the commission rule on relevance and necessity.
11 And if it so does -- if it does rule, then the government is required
12 to seek any kind of remedy so that the defense is put in
13 substantially the same situation as if they had the classified
14 information.

15 And I want to point out, you know, the iterative process is
16 not free reign to continually provide and notify the commission and
17 the government of classified information it seeks to disclose. The
18 iterative process solely has been used and understood for
19 alternatives to full declassification of classified informations in
20 conjunction with the OCA's determination with a proper declaration
21 for use at trial.

22 It is not a open sign for the defense to continually come
23 back and come back and come back to the commission. And in this

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1 case, come back to the commission without leave of court to file a
2 supplement, according to the rules -- and forgive me, but I believe
3 it's 3.73, the rules on supplementing filings, which do require.

4 And it's not an option. These are the rules that all
5 parties have to abide by. And there's a reason for that. It is to
6 adhere to the military judge's Trial Conduct Order, but also to allow
7 the government to have the benefit of conferencing to see if there's
8 resolution that can be made short of litigation, and also to
9 understand that the commission should be afforded the opportunity, as
10 it's stated in -- and this is in our filing -- has clearly, multiple
11 times, asked the defense to show and to provide the reasons why this
12 wasn't filed in the first place, wasn't noticed in the first place.
13 How was this newly discovered? So that the commission can be aware
14 before allowing an additional supplement to be, kind of, now in the
15 seventh time to supplement against, and understanding why they
16 couldn't meet the first deadline that the commission ordered for
17 505(g) notices.

18 So to resolve this issue, it's not -- it's not an idea that
19 there's a streamlining effort. The government simply does
20 not -- according to our filing, this (g) notice is improper and it
21 frustrates the iterative process by taking it and ballooning the
22 opportunity for the defense to come back time and time again and
23 claim a subjective new discovery of information that's classified,

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1 which has been provided to them many years in -- many years ago.

2 So for these reasons, and we stand on our pleading, it is a
3 conditional request. Should the commission disagree with our
4 position that the filing is improper, that is the only condition that
5 we have. If the commission deems the filing of the notice to be
6 proper, then that and only then would we request an (h) hearing.

7 Pending your questions, sir, that's all I have.

8 MJ [COL FITZGERALD]: No further questions.

9 ATC [CDR ROMAN]: Thank you.

10 MJ [COL FITZGERALD]: Defense, do you have anything else to
11 add?

12 DDC [Lt Col NETTINGA]: Sir, I'm certainly happy to answer any
13 questions you might have.

14 MJ [COL FITZGERALD]: I don't have any questions.

15 DDC [Lt Col NETTINGA]: If you don't have any, I will just
16 point out -- I mean, when we're talking about the rules of practice
17 before a military commission, supplemental filing is defined at
18 paragraph 3.3.1.5, talks about a motion or a response, not a
19 notification.

20 I believe the government just filed a notification and said,
21 "Oh, we didn't even need to conference this because it's a
22 notification, not a -- not a motion or a response."

23 And so, again, I don't think that, even with that -- I don't

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1 think that we violated that procedural rule. And certainly there's
2 nothing in M.C.R.E. 505 that talks about needing anyone's permission
3 to file it, again, because it does contemplate an iterative process
4 that is not just good for the government, but that applies to the
5 defense as well.

6 As the defense continues to prepare for trial, as rulings
7 come down which shape the evidence that may be admitted or may not be
8 admitted, we're going -- and as we continue to try to prepare and get
9 ready for trial, we're going to find things. And we're going to give
10 notice consistent with the rule. Because it's only if we do not give
11 notice, again, per the rule in (g), that 505(g) -- that this evidence
12 can be precluded.

13 And so, again, there's other reasons in the rules why ----

14 MJ [COL FITZGERALD]: It's bifurcated -- right? -- or
15 concomitant. You've got a notice requirement but you made a request
16 for a hearing.

17 DDC [Lt Col NETTINGA]: I understand, sir.

18 MJ [COL FITZGERALD]: They can't be separated. So are you
19 saying that's not a distinction with a difference by saying, well,
20 we've given notice and -- because a request is not a notice. To make
21 that notice and to use it, you have to have a hearing.

22 DDC [Lt Col NETTINGA]: Yes, sir.

23 MJ [COL FITZGERALD]: And you have to request that hearing.

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1 That's -- so I guess I'm lost on the "notice" part. I didn't read
2 the rule. You cited it to me and I'll go look at it again later.

3 DDC [Lt Col NETTINGA]: I understand sir.

4 MJ [COL FITZGERALD]: But you said this is not a -- this is a
5 notification.

6 DDC [Lt Col NETTINGA]: It is a notice. I mean, that's
7 a -- 505(g)(1) ----

8 MJ [COL FITZGERALD]: Sure.

9 DDC [Lt Col NETTINGA]: ---- talks about noticed by the
10 accused.

11 MJ [COL FITZGERALD]: Okay.

12 DDC [Lt Col NETTINGA]: And so that's what we have done.

13 MJ [COL FITZGERALD]: But also requested a hearing under
14 505(h).

15 DDC [Lt Col NETTINGA]: Again, I'm joining the government's
16 request for a hearing. We -- because the way that it works is we say
17 we -- as I understand 505 -- and I'm not going to pretend like I'm an
18 expert on this made-up rule, sir, but as I understand it, 505 ----

19 MJ [COL FITZGERALD]: I'm not sure what you mean by a made-up
20 rule. It's a rule.

21 DDC [Lt Col NETTINGA]: Sure. I ---- --

22 MJ [COL FITZGERALD]: What do you mean by "made-up rule."

23 DDC [Lt Col NETTINGA]: It was made up for the military

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1 commissions based on CIPA, I understand that. This is ----

2 MJ [COL FITZGERALD]: Okay.

3 DDC [Lt Col NETTINGA]: What I'm trying to say, sir, is I've
4 done ----

5 MJ [COL FITZGERALD]: It's a real rule. You don't mean a
6 made-up rule ----

7 DDC [Lt Col NETTINGA]: I've done a couple of courts-martial.
8 This isn't -- there's a different rule for that.

9 MJ [COL FITZGERALD]: Okay.

10 DDC [Lt Col NETTINGA]: That's all I'm trying to say. I was
11 glib, and that's where that came from, sir.

12 MJ [COL FITZGERALD]: All right.

13 DDC [Lt Col NETTINGA]: But as I understand this rule, we give
14 notice, and the government can either say, "Hold on, we need a
15 hearing to determine this stuff," or they can say nothing and we can
16 just go ahead and introduce the information, whether it's a closed
17 session or not, because that's the information that we have.

18 If it's classified and we don't have any kind of
19 declassification, we would have to do that in a closed session. But
20 we give the notice that we intend to do this. And if they want to
21 object to it ----

22 MJ [COL FITZGERALD]: Sure.

23 DDC [Lt Col NETTINGA]: ---- that's when they file the

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1 (h) hearing.

2 MJ [COL FITZGERALD]: But that's why we have time constraints
3 on this -- right? -- because to give notice to allow the opportunity
4 for the other party to address what you've noticed ----

5 DDC [Lt Col NETTINGA]: I fully understand.

6 MJ [COL FITZGERALD]: ---- in a pretrial format, which we're
7 doing now ----

8 DDC [Lt Col NETTINGA]: Yes, sir.

9 MJ [COL FITZGERALD]: ---- at a late hour where the rules
10 don't contemplate it, my Trial Conduct Order, my pretrial orders
11 didn't contemplate it, this is a late ask. So that's what I'm trying
12 to address.

13 And if you tell me we're done with the late asks, that's
14 helpful. Again, reserving your right to raise issues that come up
15 when a witness is on the stand, but I'm talking in a pretrial
16 litigation opportunity setting.

17 DDC [Lt Col NETTINGA]: I ----

18 MJ [COL FITZGERALD]: Do we believe we're done with notices?

19 DDC [Lt Col NETTINGA]: I don't have any pending ones at this
20 time, sir. We put everything in there that we knew about at the
21 time. And if we come across additional information at whatever time
22 that is or whatever the commission -- if the commission says wait
23 until the witness testifies and then bring up that stuff, then we can

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1 do that. Otherwise, I think we would continue to give notice ----

2 MJ [COL FITZGERALD]: Okay.

3 DDC [Lt Col NETTINGA]: ---- as we come across ---- --

4 MJ [COL FITZGERALD]: And if I were to grant this hearing, you
5 wouldn't take that as precedent that you can keep doing further
6 notices, pretrial notice.

7 DDC [Lt Col NETTINGA]: Sir, I certainly understand and would
8 believe that every request would be treated independently. I don't
9 see this as precedential, other than that the rule does contemplate
10 that we need to bring this up when we find it and when we believe
11 that we're going to disclose it. And so if the government then wants
12 an (h) hearing, they can request that. But if they don't, we just
13 say we're going to use this information with this witness, and we're
14 allowed to do so if there's no objection or request for an
15 (h) hearing.

16 MJ [COL FITZGERALD]: Okay. I see where the parties are at.

17 DDC [Lt Col NETTINGA]: Thank you, sir.

18 MJ [COL FITZGERALD]: All right. 703H was not the first thing
19 I was going to address, but I believe we've now addressed it. I will
20 take that under advisement.

21 If I were to grant a 505(h) hearing, I believe there's
22 time to -- I don't have much else I'm anticipating this week other
23 than what we've already determined we're going to take up this week,

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1 but -- so be prepared -- I haven't ruled, but be prepared to take up
2 a 505(h).

3 Are you going to call any witnesses, or is this -- we just
4 need a hearing to go over the documents and just we're done?

5 DDC [Lt Col NETTINGA]: Yes.

6 MJ [COL FITZGERALD]: Okay. Be prepared. Again, I haven't
7 ruled, but I don't want the next thing to be -- is, well, we need
8 time to prepare. Prepare as if we're going to have a 505 hearing in
9 the event I grant one.

10 LDC [MS. MILLER]: Your Honor, may I address a different
11 issue?

12 MJ [COL FITZGERALD]: Related to that or ----

13 LDC [MS. MILLER]: No, sir.

14 MJ [COL FITZGERALD]: Okay. You may.

15 LDC [MS. MILLER]: One of the findings of fact that the
16 commission made regarding Mr. al Nashiri's mental competence in
17 appointing the 706 Board was that counsel had never brought it to the
18 commission's attention concerns about his mental or physical health.
19 And that is my fault. I think we've put a glossy sheen on what is
20 not.

21 And so at this time, I would like to put on the record that
22 Mr. al Nashiri, as I look at him, appears unwell. Before Your Honor
23 took the bench, he had a corpsman come in and deliver medication for

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1 a migraine headache that he is suffering from.

2 He's ashy in color. He's obviously struggling with his
3 sinuses. I believe the commission can likely hear him blowing his
4 nose and clearing his throat, which is a consistent problem. It
5 affects his ability to concentrate in court. It's why we've asked
6 the commission for leave for him to walk around, which the commission
7 has only granted him to stand up and shuffle from foot to foot. We
8 described it as being like a penguin.

9 MJ [COL FITZGERALD]: I described it as being like a penguin?

10 LDC [MS. MILLER]: I described it to Mr. al Nashiri as being
11 like a penguin. And so I believe there is evidence that needs to be
12 on the record. And it is my fault that it hasn't been done before,
13 that Mr. al Nashiri is not physically well and is not mentally well.
14 And I wanted to put those observations on the record at this time for
15 the commission's benefit.

16 MJ [COL FITZGERALD]: Thank you. And I would -- remember,
17 we're in a -- we're essentially in an 802 on the record -- an 803.
18 You should reiterate that information. I'm hearing it. I'm
19 acknowledging it, but if we take that up in another forum, either a
20 909 or a 706 related proceeding. So you're going to repeat, I know.

21 LDC [MS. MILLER]: Don't worry, sir.

22 MJ [COL FITZGERALD]: Even if it's just you tell me to
23 re-acknowledge what you had told me in this session, I will. But I

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1 just want to make it clear because I'm not going to ask the
2 government necessarily to respond now. They may want to respond if
3 we take that matter up.

4 LDC [MS. MILLER]: Understood. I just didn't think the
5 commission -- and maybe you were aware that the corpsman had come in.

6 MJ [COL FITZGERALD]: I was.

7 LDC [MS. MILLER]: Okay.

8 MJ [COL FITZGERALD]: And I'll just put on the record, when I
9 arrived and we were ready to come out, I was advised there was a
10 change in the regimen of how medicine was being handled. And they
11 were waiting on a corpsman, issues whether the corpsman could come in
12 the courthouse or Mr. Nashiri needed to return to the alternative
13 site. So I realize we started about 15 minutes late while all that
14 was getting resolved.

15 And we may need to take that up to make sure we have a plan
16 in place going forward, too. So I did grant some time to make sure
17 that got resolved. And I think when I came in here, I saw the
18 corpsman, so -- or I think.

19 LDC [MS. MILLER]: He was leaving when you came in, sir. Yes,
20 sir.

21 MJ [COL FITZGERALD]: Very well. Thank you for advising me of
22 that.

23 So I'm going to take 703H under advisement, and I'm going to

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1 return back to preliminary instructions. I think that's where I was
2 when you brought up -- somebody brought up 703H.

3 LDC [MS. MILLER]: I guess that's my -- the commission has put
4 great emphasis on us following the rules, and the rules say that the
5 M.C.R.E. 505(h) hearing shall be conducted before any other
6 proceedings.

7 And so I appreciate the commission would like to address
8 other things, but that's not what the rule contemplates. And so we
9 are ready to proceed with the 703 -- on AE 703H, the 505(h) hearing
10 now.

11 MJ [COL FITZGERALD]: If I were to grant it.

12 LDC [MS. MILLER]: Yes, sir.

13 MJ [COL FITZGERALD]: And that's what I mean. I'm going to
14 take it under advisement, whether I'm going to grant it or not. So
15 I'll proceed on with the other matters and then come back to 703H.

16 LDC [MS. MILLER]: I object, but I understand.

17 MJ [COL FITZGERALD]: Okay.

18 Preliminary instructions. I think where I last left it, I
19 received a Word document version from the defense, and they
20 subsequently filed it in an appellate exhibit, 705F. I've had a
21 chance to review.

22 Government, I don't know if you've had a chance to review
23 it, if you wish to be heard on it?

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1 TC [CDR TRIVETT]: Yes, sir.

2 MJ [COL FITZGERALD]: And you have not -- before I forget,
3 Government, you have not provided me and you don't intend to provide
4 a request to deviate from the standard benchbook instructions?

5 TC [CDR TRIVETT]: No, sir. With the exception of the
6 reasonable doubt instruction, which is tied into our response to
7 this.

8 MJ [COL FITZGERALD]: Understood. Okay. Very well.

9 And I don't know who the author is. Is this you,
10 Ms. Miller?

11 LDC [MS. MILLER]: It is, sir.

12 MJ [COL FITZGERALD]: Okay. I'll hear from Captain Trivett,
13 and you can be prepared to respond. I'm sorry.

14 LDC [MS. MILLER]: Commander.

15 MJ [COL FITZGERALD]: Commander Trivett.

16 TC [CDR TRIVETT]: Yeah, I don't think the Captain Trivett
17 thing is going to happen.

18 MJ [COL FITZGERALD]: It was Mr. Trivett up until this
19 morning. So, I note for the record, you're now appearing in the
20 uniform of a naval officer. So I'm not used to calling you by your
21 rank. So I apologize.

22 TC [CDR TRIVETT]: No worries.

23 MJ [COL FITZGERALD]: And I'm used to calling Captain Stinson

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1 who sits in that seat. So I think I just glommed too many things
2 together there. But welcome.

3 TC [CDR TRIVETT]: As an initial matter in response to the
4 preliminary instructions, when looking at the Army benchbook, A-3
5 indicates its preliminary instructions. And then all of the
6 instructions that fall under 8-3-1-2 in sequence actually bring us
7 all the way through to the end of findings. And we didn't anticipate
8 that that was what the judge indicated he wanted to discuss when he
9 was discussing preliminary instructions.

10 So we really believe that it's only appropriate at this time
11 in the proceedings to go through A-3-2, which just is the end of voir
12 dire. So to the extent that the defense requested anything after the
13 voir dire portion with their red marks and line-throughs, we just
14 think it's premature.

15 MJ [COL FITZGERALD]: Can I just say real quick ----

16 TC [CDR TRIVETT]: Yes, sir.

17 MJ [COL FITZGERALD]: ---- and that is my fault. Judges in
18 military courts-martial are not used to having robust discussion
19 about our instructions. So when I think preliminary instructions,
20 colloquially in my head, because that's the only person I can talk to
21 in my chambers in a military courts-martial, I was looking at
22 instructions up to impanelment.

23 So I apologize to the defense. Nobody asked for

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1 clarification, I didn't provide that clarification. So I can
2 understand why somebody thought it was a preliminary discussion of
3 the holistic instructions.

4 LDC [MS. MILLER]: I apologize for the interruption.

5 Mr. al Nashiri needs to return to the alternate site ----

6 MJ [COL FITZGERALD]: Okay.

7 LDC [MS. MILLER]: ---- to watch these proceedings. He's not
8 well enough to stay in court, sir.

9 MJ [COL FITZGERALD]: Very well. Tell you what, why don't we
10 take a recess, then.

11 The commission is in recess.

12 **[The R.M.C. 803 session recessed at 1115, 13 October 2026.]**

13 **[The R.M.C. 803 session was called to order at 1133,**
14 **13 October 2026.]**

15 MJ [COL FITZGERALD]: This commission is called to order.

16 All parties present before the last recess are again
17 present. Mr. Nashiri is attending from the alternate site.

18 And I think where I last left it was I had mentioned that it
19 was -- my guidance was probably a little faulty when I talked about
20 preliminary instructions. I should have clarified. The part of the
21 instruction that go up to impanelment, that's what I meant by
22 preliminary instructions so that you could look at the military
23 judge's voir dire, preliminary instructions to the members as they're

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1 being seated through assembly to impanelment, and where it gets
2 turned over to the parties for individual voir dire, and then when we
3 take up challenges.

4 So I know there were some notes about later discussions
5 after impanelment. We don't need to take those up now.

6 I will mention if I think, if I remember right, there
7 was -- it's in the section where we discuss instructions. And
8 anybody familiar with the military courts-martial practice knows
9 that's a very robust on-the-record discussion about instructions.
10 And so we can take all that up at that time.

11 But anyway, if that helps gives you any guidance, Commander
12 Trivett.

13 TC [CDR TRIVETT]: Yes, sir. Thank you.

14 All right. So the first -- and we could just go comment by
15 comment. There's not all that many.

16 MJ [COL FITZGERALD]: Okay.

17 TC [CDR TRIVETT]: The first defense comment on page 2 where
18 they would like to include the words "and closed sessions," we have
19 no objection to that change.

20 MJ [COL FITZGERALD]: I'm probably just going to say "any
21 sessions."

22 TC [CDR TRIVETT]: Yes, sir. That's fine. We have no
23 objection.

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1 MJ [COL FITZGERALD]: I don't know -- I don't know if the
2 members will understand what "open" and "closed" means. I get
3 very -- you know, they hear "adjourned," "court is closed," so they
4 may get very confused. But if I just say "any sessions," I think
5 we'll be fine. But thank you for pointing that out. I've never had
6 that actually come up before. So I will pass that on to the
7 Benchbook Committee, so.

8 TC [CDR TRIVETT]: Yes, sir. The next red lines are on the
9 same page, sir. And we don't think it's appropriate to put in
10 lesser-included offenses or the spillover instruction on 7-17 in the
11 preliminary instructions. We believe that it's more appropriate to
12 have those in the instructions prior to deliberations.

13 MJ [COL FITZGERALD]: And I will take both of those in
14 consideration. That's how I read it. There was a little bit of
15 discussion about LIOs, or lesser-included offenses, and then what
16 appear to be a -- what we call the spillover instruction. But
17 understood.

18 TC [CDR TRIVETT]: Sir. All right. And then when I rose from
19 the table on the "reasonable doubt" definition, and understanding
20 that Your Honor is Navy -- Army and that you're using Army benchbook,
21 we do believe the Army is the only service that deviates from the
22 firmly convinced standard. And we would request that the firmly
23 convinced standard be used, understanding that all of them have

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1 obviously undergone appellate scrutiny and been approved. So this
2 isn't really a legal issue as much as it's an equity issue.

3 We would ask that the firmly convinced language used from
4 the Navy in their reasonable doubt be used here. Obviously, if the
5 sailors of the USS COLE were being prosecuted in courts-martial, that
6 would be their standard that the government would have to prove
7 beyond a reasonable doubt. So we believe the firmly convinced
8 standard which is used by both Navy and Air Force would be the
9 appropriate reasonable doubt standard to be instructed.

10 MJ [COL FITZGERALD]: Okay. And I think you've -- have you
11 had a chance to look at -- what I looked at as models is United
12 States v. Hamdan and I think United States v. Bahlul, they appear to
13 use the Army definition. But I -- and I don't think they used
14 "firmly convinced." Do you know if they did? Do you recollect?

15 TC [CDR TRIVETT]: I don't know off the top of my head, sir.

16 MJ [COL FITZGERALD]: Okay. I will take that under
17 advisement. But I don't know if the defense wanted some time to
18 think about that. It wasn't in your considerations, but ----

19 LDC [MS. MILLER]: No, we did pick Army because tracking
20 Bahlul and Hamdan.

21 MJ [COL FITZGERALD]: Okay. So I would just say that's the
22 references I used when I was -- I haven't put out to you what
23 instruction I'm going to use ----

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1 TC [CDR TRIVETT]: Yes, sir.

2 MJ [COL FITZGERALD]: ---- but I will certainly take it under
3 advisement that the Air Force, Navy, and Marines use the "firmly
4 convinced" language in their instruction.

5 TC [CDR TRIVETT]: Thank you.

6 All right. Page 5, toward the top, it's the second,
7 "counsel may have interviewed the witnesses." That's a
8 defense-proposed addition that we have no objection to.

9 MJ [COL FITZGERALD]: And I understand that. I think that
10 makes sense under -- I think the defense has asserted numerous times
11 that they have not been able to or have not interviewed a lot of
12 folks. So, again, something I've never contemplated, but I
13 don't -- I don't see an issue with that.

14 TC [CDR TRIVETT]: All right. And we note that at the bottom
15 of page 7, Your Honor will likely have to put the charges and
16 specifications there. Where it says, "This is a capital murder case.
17 I want to direct your attention specifically to the capital offenses
18 in," and then state the charges and specifications for which the
19 sentence of death may be adjudged.

20 So having that language in there, which is seemingly
21 contemplated already, would make it cumulative below in their next
22 changes on page 8.

23 And then for all of the changes, starting with paragraph,

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1 "If and only if you find Mr. Nashiri guilty" and then, "Many people
2 have strong feelings," all the way to 8-3-1, we object as just
3 cumulative, that it's redundant with the paragraph directly above.

4 MJ [COL FITZGERALD]: So if I'm -- all the red-lettered
5 paragraphs?

6 TC [CDR TRIVETT]: Correct.

7 MJ [COL FITZGERALD]: Okay.

8 TC [CDR TRIVETT]: Yes, sir. So we would impose that ----

9 MJ [COL FITZGERALD]: Before I say that, in your filing, did
10 you keep those words red-lettered in your attachment?

11 LDC [MS. MILLER]: Yes, sir.

12 MJ [COL FITZGERALD]: Okay. Then I'm just going to refer them
13 again to the red-lettered language that the government didn't show an
14 objection to. Okay.

15 TC [CDR TRIVETT]: And those were all the ones through A-3-2,
16 which is voir dire.

17 MJ [COL FITZGERALD]: Okay.

18 TC [CDR TRIVETT]: All the others we're objecting to as just
19 being premature at this point.

20 MJ [COL FITZGERALD]: I concur on that.

21 TC [CDR TRIVETT]: Okay.

22 MJ [COL FITZGERALD]: Defense, I note the language you have in
23 there. If you want to be heard, that's fine. I don't think you need

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1 to. I'm going to take it under advisement. I've been working on my
2 own draft of that because I have to. It's by necessity. So I will
3 certainly consider what you've written compared to what I think ought
4 to be said. And my hope is to share that with you in the next day or
5 two.

6 So that -- I want you to have what I'm going to say so you
7 can follow along everything that the members will hear and then,
8 again, raise any other concerns you have. I know this is an
9 iterative process at times, too. Sometimes you just have to hear it
10 and say it out loud a couple times to think that doesn't sound right.

11 So my hope is -- and I think I've got my draft at about a
12 95 percent solution, but I wanted to wait until after this
13 discussion.

14 So all your comments and notes are very helpful to making
15 sure I get that completed and understand maybe your concerns that you
16 want to raise in that process.

17 TC [CDR TRIVETT]: Yes, sir. And thank you.

18 And at least in regard to identifying which charges are
19 capital, I want to just refer back and for the notice and for any new
20 counsel, at AE 182 was the government's notice of intent to seek the
21 death penalty. And we specifically listed Charge I, using treachery
22 or perfidy; Charge II, murder in violation of the law of war; Charge
23 IV, and both specifications thereunder, of terrorism; Charge VII,

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1 attacking civilians; and Charge IX, hijacking or hazarding a vessel
2 or aircraft as capital offenses. Although conspiracy would have
3 otherwise qualified as a capital offense, we have not charged it that
4 way, nor did we give notice of it in that respect.

5 So just AE 182, it's a 5 November 2013, notice of intent to
6 seek the death penalty against Mr. Nashiri. I just wanted to call
7 your attention to it in the event that that's helpful in filling out
8 that portion.

9 MJ [COL FITZGERALD]: It is, and I'm looking right at it right
10 now. And one thing I will share with you is I'll probably remind the
11 members at this point they can pull out the flyer and we'd refer to
12 the flyer, too. They're not used to speaking in court language, so I
13 think it will be helpful.

14 So I hope the parties don't have an objection to that when I
15 tell the members if you would like to pull out your flyer and use
16 that as a way of following along.

17 TC [CDR TRIVETT]: Yes, sir.

18 So those were all the comments that I had on the preliminary
19 instructions, sir. We have other comments related to this and other
20 parts of the pretrial management conference. But for that -- for
21 this purpose, these are all the comments we had.

22 MJ [COL FITZGERALD]: Okay. Thank you.

23 TC [CDR TRIVETT]: Thank you, sir.

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1 MJ [COL FITZGERALD]: Anything else from you, Defense?

2 LDC [MS. MILLER]: Just as far as the section -- my copy,
3 unfortunately, is not page numbered. Hold on one moment, sir.

4 It's on page 6, where I have inserted in red, "using
5 treachery or perfidy," the charges that Commander Trivett just
6 indicated are punishable by death, I believe there was a similar
7 bracket there where it is the intent of the benchbook instructions to
8 insert the charges that could be punishable by the death penalty.
9 And I just neglected to include them in the paragraph above. That's
10 my fault. I just missed that one.

11 And I just wanted to remind the commission, which I'm sure
12 Your Honor is aware of, that the benchbook specifically says
13 that -- not bound to the script and that there is no standardized set
14 of instructions -- excuse me: No standardized set of instructions
15 can cover every situation arising. Special circumstances will
16 invariably be presented requiring instructions not dealt with in this
17 benchbook.

18 And that's very much true as we get later in the benchbook,
19 particularly the sentencing section is tailored for UCMJ and talks
20 about possible punishments being, like, demotion in rank, et cetera.
21 But so, the changes that I've suggested, I think, encompass the
22 spirit of the benchbook and also are in line with more standard
23 federal and state jury instructions in a capital case. And so I'd

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1 ask that you accept all of our proposed suggestions.

2 MJ [COL FITZGERALD]: Okay. Thank you. And if I can assuage
3 you of any concerns, as we go through this process, especially those
4 critical times where instructions are important in regards to the
5 military benchbook, you'll hear it referred to colloquially as a
6 script. And I would tell you it's not a script. Any young counsel
7 before me will often get confused because I will speak
8 extemporaneously because I don't like the language my peers have
9 chosen to put into the script.

10 So I'm very comfortable with the fact that we can deviate
11 from it. I think the Air Force has used the phrase, instead of a
12 script, they call it a procedural guideline. A DA PAM is generally a
13 guideline. So I will stick to the spirit of what is being said and
14 the sequence of what is being said to make sure I say all the things
15 I'm required to say, but you will always be permitted to provide
16 input where you think it's helpful or necessary as we use it here in
17 a commission versus a court-martial.

18 So does that help at least understand how we're going to go
19 forward?

20 LDC [MS. MILLER]: Yes, although you freelancing the jury
21 instructions makes me a little nervous.

22 MJ [COL FITZGERALD]: No, no. I ----

23 LDC [MS. MILLER]: Okay.

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1 MJ [COL FITZGERALD]: I just -- -- I don't -- if there is very
2 specific things, I say them very specifically. But I don't -- like,
3 for example, when I dismiss a witness, I don't read the scripted
4 language every single time.

5 So I -- trust me as best you can that I know when I need to
6 stick to very specific language, and that is usually instructions.
7 But when I ask a witness to sit down, the difference between a
8 ten-year-old on my witness stand, a mother and a soldier is probably
9 going to come out a little differently to make sure they understand.

10 LDC [MS. MILLER]: Understood, sir.

11 MJ [COL FITZGERALD]: That's all I meant, so -- but thank you.

12 If there's nothing else -- and I know I still owe you, and
13 you should get it shortly, is my review of your voir dire. So I'm
14 just moving on to the next thing, voir dire.

15 You'll get two things, the voir dire I approved for you, and
16 I'm going to give you my voir dire. And I stick pretty close to the
17 procedural guidelines, except where some of them maybe they didn't
18 make sense of how they get used. I'm more than happy to discuss why
19 I changed that if we need to. For example, one of the questions
20 I -- looking at the fellow panel members, have you -- is any of them
21 in your rating chain. I've got to change that a bit to I'm going to
22 ask you to look at the flyer, and there's 200 people on there, and go
23 through each name, and do you recognize anybody else from that. So

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1 that's going to be a little cumbersome, and I've got to change that
2 to reflect that.

3 But I want to get you what I intend to ask in voir dire,
4 because I noticed, at least what I received in proposed voir dire
5 from the parties, a lot of them were duplicative of my questions.
6 And I'm just going to put in my response that's an MJ question
7 already.

8 I don't want you to ask my questions over again. Don't
9 change them, nuance them, to where now the members are confused,
10 "Wait, didn't I already answer that question?"

11 So you're going to get -- I'm either going to allow that
12 question, not allow that question, or approved if amended.

13 So -- but I can tell you this, I was satisfied with the bulk
14 of the questions. I think probably the bulk of my responses are,
15 "I've already asked that question." But -- and I think I received an
16 amended voir dire filed or proposed additional questions?

17 LDC [MS. MILLER]: Well, there is something I would like to
18 address as it relates to voir dire.

19 The government filed AE 704D yesterday, and they called it a
20 bench brief. And Commander Trivett, when he was Mr. Trivett, asked
21 this commission for leave to file a bench brief, which I interpret as
22 law we think is relevant for this commission to consider as we embark
23 on this voir dire process, law we relied upon in crafting our

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1 questions, et cetera.

2 I don't know if the commission has had opportunity to review
3 AE 704D, but it is a question-by-question objection to the defense
4 proposed voir dire questions that we submitted 8 April 2026 pursuant
5 to the commission's order in AE 679.

6 And so the commission also wrote a proposed voir dire
7 regarding the 8 April 2026 deadline: Each party will submit to the
8 commission their respective proposed general voir dire questions.
9 Objections to an opposing party's proposed voir dire questions shall
10 be filed with the commission -- and this is -- this part's in
11 bold -- not later than 20 April 2026.

12 And so to the extent that the government -- I mean, I've
13 heard a lot of griping -- and that's what -- I think we should both
14 be careful, both parties, about throwing barbs about late notices or
15 late filings. I do not have an objection to the government's
16 supplemental pleading with additional voir dire. I intend to file
17 one similarly today.

18 I do have an objection to the court reading any of AE 704D
19 related to the government's objections to the questions that were
20 proposed by the defense pursuant to your order 8 April of 2026. The
21 government had until 20 April 2026 to respond.

22 The defense did respond and object to some of the
23 government's questions. The government did not. And, therefore,

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1 their objections are waived.

2 And so calling it a bench brief is incredibly disingenuous
3 when it is a literally question-by-question objection to the
4 defense's voir dire that I have spent months working on, and we are
5 now six days away from starting voir dire.

6 MJ [COL FITZGERALD]: Thank you. I've had the chance to read
7 both your submission and the government's. And I didn't read them as
8 objections. I didn't read them as objecting to either side's voir
9 dire. I took them as what I allowed the parties to do, submit bench
10 briefs for my consideration as far as the standing case law regarding
11 the challenges.

12 I didn't take them -- I didn't read them with the view that
13 they're objections and they won't be treated as objections. I know
14 that's your view. I'm just telling you I'm not treating them as
15 objections.

16 If I allow a question or disallow a question, it's within my
17 discretion. So I'm -- I certainly will consider that, but I didn't
18 consider those to be objections in the same way that I did receive
19 defense objections timely.

20 LDC [MS. MILLER]: Defense -- right. Defense timely submitted
21 objections by -- I believe we submitted them on 20 April of 2026.
22 But I believe the government titled it "Objections" and then went
23 through each question, like, number 69 and why it was objectionable

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1 in the government's view.

2 MJ [COL FITZGERALD]: Oh, did -- and maybe I read something
3 different. I read ----

4 [Pause.]

5 [Counsel conferred.]

6 LDC [MS. MILLER]: It starts out, I would say, as arguably a
7 bench brief. But on page 31, subsection 6: The prosecution's
8 renewed specific objections to defense group voir dire questions in
9 AE 704, based on R.M.C. 912(f)(1)(N) and standards for member
10 qualification in capital litigation outlined above.

11 And then they go literally question by question.
12 Subsection A is questions 1 through 13. Subsection B is Question 14.
13 Subsection C is questions 15 through 18. And so ----

14 MJ [COL FITZGERALD]: You say that started on page 31?

15 LDC [MS. MILLER]: Yes, sir. And so I ----

16 MJ [COL FITZGERALD]: So I -- can I -- I'd just add I don't
17 think I remember reading 30-some pages. So I must have just read the
18 first part of it.

19 I received yours, and what I started doing was just pulling
20 up the case law to make sure -- that's what I took both of them for.
21 You're right. If those -- if they're filing objections and they were
22 untimely, they're untimely.

23 LDC [MS. MILLER]: So I'm asking the commission to disregard

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1 pages 31 on as not timely ----

2 MJ [COL FITZGERALD]: Untimely objections? Granted if they're
3 untimely and there are objections. I just didn't read that far into
4 it. I apologize. Again, I just -- I started pulling the case law
5 just to make sure I was familiar with them, Peters, Keago, and all
6 the other cases. Because I think at some point I switched to yours
7 because it was just an easy-to-follow footnote. And I go, oh, I
8 think the government cited to the same cases. So, again ----

9 LDC [MS. MILLER]: Just one thing. They specifically say
10 renewed objections.

11 MJ [COL FITZGERALD]: Okay.

12 LDC [MS. MILLER]: They're not renewed.

13 MJ [COL FITZGERALD]: Okay. Let me take a look at it, but let
14 me hear from the government first if I missed something.

15 Government?

16 TC [CDR TRIVETT]: Yes, sir. I just want to clarify for the
17 commission. On AE 704B on 20 April 2026, we filed our notice of
18 objections to defense proposed voir dire in 704.

19 Page 31 on is just a reiteration of those, now supported
20 with any of the case law that's above in the bench brief.

21 MJ [COL FITZGERALD]: Okay.

22 TC [CDR TRIVETT]: So it's the same objection. We preserved
23 the objection. We're renewing the objection based on the law that we

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1 were filing in the trial brief. So that's the government's position
2 on that.

3 MJ [COL FITZGERALD]: Okay. So it -- you're saying there's no
4 new objections in your filing yesterday? Okay.

5 TC [CDR TRIVETT]: That is correct.

6 MJ [COL FITZGERALD]: All right. Okay. I understand the
7 parties' position on it. Let me go back and look. It was a lot of
8 information I was digesting yesterday.

9 And what I wanted to do is ensure I pulled up the case law.
10 And I -- my apologies. I don't think I read that far into the
11 government's, because I spent some time making sure I
12 understood -- defense provided not a brief, but a spectrum? Can I
13 call it a spectrum?

14 LDC [MS. MILLER]: I'd call it a chart.

15 MJ [COL FITZGERALD]: A chart, okay. So I was reviewing the
16 chart to make sure I understood its construct. And I said, well, I
17 think I'll better understand it if I just look at the footnotes for
18 your construct.

19 And that's what I spent a bulk of my time doing, making sure
20 I understood the case law for every footnote on that chart. By then
21 it all made sense, and then I was going to go back to the
22 government's, so -- but I hear you. If there's an untimely objection
23 raised, it's untimely. I will note that. But the government's

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1 position is they're not untimely, that they were filed in 704B. So I
2 will compare the two and proceed on from there.

3 But, also keep in mind that it's within the court's
4 discretion whether I allow you to ask or not ask a question. You
5 will have an opportunity before we begin that to object, and we can
6 take up any objection, any question that you feel I should not have
7 omitted or objections to where I say "approved with an amendment," if
8 I tell you to change the language, for example.

9 All right. My hope is to have that all to you by tomorrow.

10 So anything else on voir dire?

11 LDC [MS. MILLER]: No, other than we intend to also submit a
12 supplemental voir dire pleading today.

13 MJ [COL FITZGERALD]: Today? That will be ----

14 LDC [MS. MILLER]: Yes, sir.

15 MJ [COL FITZGERALD]: So I will definitely hold in reserve
16 until I get your supplemental.

17 LDC [MS. MILLER]: Thank you, sir.

18 MJ [COL FITZGERALD]: Commander Trivett?

19 TC [CDR TRIVETT]: Yes, sir. I had several questions relating
20 to voir dire.

21 MJ [COL FITZGERALD]: Sure.

22 TC [CDR TRIVETT]: Is this the appropriate time to ----

23 MJ [COL FITZGERALD]: I'm sorry. Yeah, we can take those up.

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1 Just as a reminder, Government, I know you have this cart
2 with all your materials on it. I presume you'll move that before we
3 seat members? Well, how about, I'm directing you to move it before
4 we seat members.

5 TC [CDR TRIVETT]: Okay. That's fine, sir. I mean, can we
6 keep it in the courtroom ----

7 MJ [COL FITZGERALD]: Keep it in the courtroom, but I ----

8 TC [CDR TRIVETT]: ---- back near those chairs?

9 MJ [COL FITZGERALD]: Yep, just move it out from in front of
10 the members.

11 TC [CDR TRIVETT]: Yes, sir.

12 MJ [COL FITZGERALD]: All right. Thank you.

13 TC [CDR TRIVETT]: Understood.

14 So understanding, sir, that we're going to do this in
15 flights of, I believe, 18 -- I think that's what you said?

16 MJ [COL FITZGERALD]: Correct.

17 TC [CDR TRIVETT]: I want to make sure that I'm prepared to
18 start correctly, not only on Monday, but on each of the flights.

19 So in the preliminary instructions, you ask the bailiff to
20 call the court members. You indicate that they're seated, that the
21 court is called to order. And then I'm responsible for reading the
22 convening order information set forth in the instructions.

23 So the two questions I had was: Is that indeed where we're

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1 going to be starting on Monday?

2 And if so, I would think that I would have to reread that to
3 each of the flights.

4 MJ [COL FITZGERALD]: Yes.

5 TC [CDR TRIVETT]: Like, we would start brand-new on each of
6 the flights, even if in Flight 1 we've identified three or four
7 qualified jurors, that they'll then be excused and then we'll start
8 all over again with the next flight.

9 Is that how Your Honor is envisioning it?

10 MJ [COL FITZGERALD]: I do.

11 TC [CDR TRIVETT]: Okay.

12 MJ [COL FITZGERALD]: Every flight has to get the same
13 information. And I don't see a reason not to. So, yeah, we'll start
14 with, "Bailiff, call the core members. You may be seated. Court is
15 called to order." And this is where you talk about the military
16 commission convening orders, announce who the parties are, who's
17 absent.

18 TC [CDR TRIVETT]: Okay. And then we'll swear each flight.

19 MJ [COL FITZGERALD]: Yeah. But the only thing I will change
20 is I only say "The court is assembled" to the first group. So I
21 don't have flight assemblies. Does that make sense?

22 TC [CDR TRIVETT]: No, I understand that.

23 MJ [COL FITZGERALD]: Okay.

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1 MTC [MR. TRIVETT]: Yes, sir.

2 MJ [COL FITZGERALD]: I'll just say, "Please be seated" after
3 you swear each group in, and then I go into the preliminary
4 instructions.

5 TC [CDR TRIVETT]: Yes, sir. Okay.

6 MJ [COL FITZGERALD]: And right now, as I understand it, while
7 we're at it, I have Military Commission Convening Order Number 25-01,
8 14 October '25, as amended by MCCO 2601 dated 13 April 2026, as
9 amended by MCCO 26-2 dated 22 September 2026. And I believe there's
10 at least one more vicing order coming.

11 TC [CDR TRIVETT]: Yes, sir. That's my understanding.

12 MJ [COL FITZGERALD]: Okay.

13 TC [CDR TRIVETT]: And so I'll run through the whole
14 iteration, not just the most recent.

15 MJ [COL FITZGERALD]: Okay.

16 TC [CDR TRIVETT]: Yes, sir.

17 The additional question that my paralegals are asking, I
18 think we left it as an open question as far as who's putting together
19 the members' folders last time. I don't know if Your Honor has a
20 definitive answer on that yet.

21 MJ [COL FITZGERALD]: Okay. I don't know who that gets
22 delegated to. Ultimately, if the government doesn't do it, the
23 government is responsible for making sure that the right information

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1 is in the folders. And, Defense, please pick somebody on your team.
2 My military personnel, they know that.

3 I'm going to ask defense, "Have you had an opportunity to
4 review every folder to your satisfaction" as well, just to make sure
5 there's nothing stray in there.

6 So if it's not somebody on your team that does it, if you
7 would check with the OCA to say who did that? And then you just do
8 the same thing and verify that it was done properly.

9 TC [CDR TRIVETT]: Yes, sir. We'll certainly verify. I just
10 want to make sure we're not responsible for building. So if the
11 Office of Court Administration ----

12 MJ [COL FITZGERALD]: It's my understanding they're
13 doing ----

14 MTC [MR. TRIVETT]: They're going to do it?

15 MJ [COL FITZGERALD]: ---- the heavy lift and that you're just
16 doing the review piece, so.

17 TC [CDR TRIVETT]: Understood. Thank you, sir.

18 And I think the defense has indicated a potential use of
19 demonstrative aids during jury selection. I just wanted to call that
20 to your attention and see if that's approved for both parties.

21 MJ [COL FITZGERALD]: This is the first I'm hearing of that.

22 So is it the intent of the parties to use demonstratives
23 during voir dire?

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1 LDC [MS. MILLER]: Yes. It was also my intent for them to be
2 here, but they did not fit in my car.

3 MJ [COL FITZGERALD]: So ----

4 LDC [MS. MILLER]: I was going to show them to the
5 commission ----

6 MJ [COL FITZGERALD]: Oh.

7 LDC [MS. MILLER]: ---- and counsel today. They did not fit
8 in my car, and so my investigator is bringing them down Saturday.

9 MJ [COL FITZGERALD]: Have you shown it -- so I take it,
10 Government, you haven't seen it?

11 TC [CDR TRIVETT]: We haven't seen it yet, sir.

12 MJ [COL FITZGERALD]: Tell you what, show each other the
13 demonstratives you would like to use. This is, again, as we go into
14 the trial the well is yours. So I'd like to see if the parties can
15 work out an agreement. And I just don't want any unfair surprise or
16 any need to litigate. But if I need to litigate, we'll take it up
17 when we can.

18 So can you -- I don't think we're going to be on the record
19 tomorrow. So can you make time to see each other's exhibits?

20 LDC [MS. MILLER]: Sure. **[Microphone button not pushed; no**
21 **audio.]** But I can certainly ----

22 MJ [COL FITZGERALD]: Oh, it won't be here until Saturday?

23 LDC [MS. MILLER]: We have poster boards.

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1 MJ [COL FITZGERALD]: Oh, okay.

2 LDC [MS. MILLER]: But they didn't fit in my car, and so
3 I couldn't get them ----

4 MJ [COL FITZGERALD]: Oh, not your car here?

5 LDC [MS. MILLER]: My car at the NCR.

6 MJ [COL FITZGERALD]: Understood.

7 LDC [MS. MILLER]: I couldn't get them -- sorry. I could not
8 get them to Joint Base Andrews.

9 MJ [COL FITZGERALD]: Okay. Can you just conference with the
10 government and tell them what it is you intend to use ----

11 LDC [MS. MILLER]: Yes, sir.

12 MJ [COL FITZGERALD]: ---- and maybe give some visual
13 reference to it?

14 LDC [MS. MILLER]: Absolutely. And I did make Commander
15 Trivett aware that we intended to use demonstratives, which is ----

16 MJ [COL FITZGERALD]: Okay.

17 LDC [MS. MILLER]: ---- why he's aware of that.

18 MJ [COL FITZGERALD]: And it sounds like the defense -- I'm
19 sorry. It sounds like the government would also like to use
20 demonstratives? Or I'm not sure. Did I miss that?

21 TC [CDR TRIVETT]: We're undecided at this point.

22 MJ [COL FITZGERALD]: Okay.

23 MTC [MR. TRIVETT]: I just wanted to make sure if, in fact,

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1 the judge would permit it, we'll consider it.

2 MJ [COL FITZGERALD]: If the parties can reach an agreement, I
3 don't have an issue. If you present it to me, it's an issue of first
4 impression. I don't know if I've ever seen it. That's why I'm
5 hoping the parties can work this out.

6 TC [CDR TRIVETT]: Yes, sir.

7 MJ [COL FITZGERALD]: Because my default would be to tell you,
8 no, then neither side can use it. But please work out an agreement.
9 It's important -- right? -- if you think there's some visual
10 references that would help the members understand your voir dire
11 questions, so.

12 TC [CDR TRIVETT]: Thank you.

13 In regard to the folders for members, you had directed both
14 parties to come up with an alphabetized list of the witnesses.

15 MJ [COL FITZGERALD]: Uh-huh.

16 MTC [MR. TRIVETT]: Our interpretation of that is that you
17 wanted one full list of both the government and the defense and not
18 to split it up. Is that accurate?

19 MJ [COL FITZGERALD]: It would be an aggregate list of every
20 witness, regardless of the party that was going to call them. Is
21 that what you're saying?

22 TC [CDR TRIVETT]: That's our understanding of the direction.

23 MJ [COL FITZGERALD]: Yeah.

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1 TC [CDR TRIVETT]: I just ----

2 MJ [COL FITZGERALD]: Correct. And I think we settled on
3 alphabetically ----

4 TC [CDR TRIVETT]: Yes, sir.

5 MJ [COL FITZGERALD]: ---- as well, but I need both parties
6 to assure that they've covered all the names. That is one thing that
7 will deviate from the procedural guidelines, because I'm going to ask
8 each member that it be published to them so that they can just follow
9 along.

10 TC [CDR TRIVETT]: Yes, sir.

11 MJ [COL FITZGERALD]: There's so many names, that if they can
12 just follow them, especially Arabic names which are not easy on the
13 ears for people who don't speak it or hear it often, may
14 sound -- they may sound too similar. But if they see the name, it's
15 helpful.

16 And so when we get to that point -- and, again, you're going
17 to have my script, so I'm going to tell you I changed some language.

18 In fact, it's question number 3 of the military judge's voir
19 dire: The Trial Counsel are going to read a list of the potential
20 witnesses in this case. The bailiff will now provide each of you a
21 list of the potential witnesses so you may follow along as they are
22 read to you.

23 So I'm just adding that language so the bailiff knows what

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1 to do, so we know we have 18. And I'll instruct them you don't have
2 to circle any, because as soon as you see a name or see -- if you see
3 20 names you know, you're just going to raise your hand at the end of
4 the list, and then you'll call those people back in individual voir
5 dire and say who on that list did you -- so that way they don't have
6 to circle or name or remember anybody until they come back for
7 individual voir dire.

8 Does that make sense?

9 TC [CDR TRIVETT]: Makes sense, sir. And so it's your intent
10 to read them?

11 MJ [COL FITZGERALD]: No, no. Did I skip it? The trial
12 counsel is going to read a list of the potential witnesses. So it
13 doesn't have to be -- it's a long list, I'm certain, so it doesn't
14 have to be the person doing voir dire if you want assistance from
15 somebody. I can just say "a trial counsel" or "the government."

16 TC [CDR TRIVETT]: Okay. That's fine, sir.

17 MJ [COL FITZGERALD]: Okay.

18 TC [CDR TRIVETT]: I just want to make sure.

19 MJ [COL FITZGERALD]: And the point I want to make is you
20 don't have to pause and wait for an answer after every witness.
21 You'll just go through them. And I'm going to add some language, I
22 think, that says: You don't have to circle any name. It doesn't
23 matter how many names. At the end I'm going to ask you: Did you

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1 recognize any name or names? Just raise your hand.

2 TC [CDR TRIVETT]: Yes, sir. All right. So in discussing
3 this with the chief prosecutor, what we intend to do is we're going
4 to update our detailing order to be specific for voir dire.

5 MJ [COL FITZGERALD]: Detailing order?

6 TC [CDR TRIVETT]: The detailing order for our prosecutors.

7 MJ [COL FITZGERALD]: Okay.

8 TC [CDR TRIVETT]: We're going to get an updated detailing
9 order over the next couple of days that's going to be solely for the
10 team responsible for doing voir dire and then anything, obviously,
11 that has to get litigated during the period of time prior to
12 assembly.

13 So I wanted to just give you a heads-up that that's coming.

14 MJ [COL FITZGERALD]: Okay.

15 TC [CDR TRIVETT]: It's going to be a smaller group. It's
16 going to be four attorneys. The other attorneys aren't going to be
17 present on island. They're going to be doing other things for the
18 case with the anticipation that they're going to be detailed back
19 following voir dire.

20 MJ [COL FITZGERALD]: So you're not adding four people. Four
21 alternate people will be here for the voir dire process?

22 TC [CDR TRIVETT]: So for the voir dire it's going to be
23 myself, Commander Sargent, Lieutenant Colonel Ross, and Major

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1 Krzemien. We'll be the voir dire team.

2 MJ [COL FITZGERALD]: Okay.

3 TC [CDR TRIVETT]: We are going to have someone detailed from
4 the Department of Justice Capital Crimes section. That will be
5 coming as a special appointment from the Attorney General.

6 MJ [COL FITZGERALD]: Okay.

7 TC [CDR TRIVETT]: We're going to need to request that he be
8 present from the RHR beginning next week and that he be excused on
9 the Friday of next week. We'll put this all in writing, sir. I just
10 wanted to ----

11 MJ [COL FITZGERALD]: I'm tracking.

12 TC [CDR TRIVETT]: I wanted to inform you so you're not
13 surprised when you see it.

14 MJ [COL FITZGERALD]: Okay. That reminds me, there's a point
15 when I ask the members do they know anybody here -- I -- in my normal
16 military court-martial practice is I ask the sides to introduce
17 themselves briefly to the members at that time. And so however you
18 want to do that, I want you to prepare for that, right?

19 So, Ms. Miller, if you want to stand up and say everybody's
20 name, and if you could just stand up briefly. It may not happen
21 here, but some people may know you visually but not know you by
22 name -- right? -- especially military people.

23 So keep that in mind that that's something I do. I know in

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1 your individual voir dire, you can still do another introduction.
2 You can change it up a little bit since I've already required you to
3 do that.

4 But I just think it helps the members when I say "do you
5 recognize anybody" to have a good visual of all the people. You may
6 also have to refer to people, then, who are not present ----

7 TC [CDR TRIVETT]: Yes, sir.

8 MJ [COL FITZGERALD]: ---- just by name. Okay.

9 Okay. I think I understand everything you're saying.

10 TC [CDR TRIVETT]: And, again, I think we discussed this last
11 time. We just want to make sure we're all on the same page as far as
12 what's going to be in the folder for the members. We're going to
13 have the cleansed charge sheet or what you guys in the Army call
14 flyer. We're going to have that list of witnesses. We're going to
15 have the convening order as well.

16 MJ [COL FITZGERALD]: The -- it will be the convening order
17 and the three -- at least three vicing orders.

18 TC [CDR TRIVETT]: Yes, sir. So all convening orders and
19 vicing orders.

20 And was Your Honor contemplating anything other than those
21 items?

22 MJ [COL FITZGERALD]: You said flyer, correct?

23 TC [CDR TRIVETT]: Yes, sir.

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1 MJ [COL FITZGERALD]: Okay. Nope, that was it. And, in fact,
2 I'll make sure they know it. Ordinarily we -- in a court-martial, we
3 would already have the panel member questionnaire forms, but we don't
4 need those for -- until impanelment. You know, the questions if they
5 had for any witness.

6 TC [CDR TRIVETT]: Okay.

7 MJ [COL FITZGERALD]: Ordinarily we would already have them in
8 there because the trial would start, you know, roughly the next day
9 or the day after. I'm going to make sure they're not in there, but
10 they'll be well provisioned once we get to opening statements.

11 TC [CDR TRIVETT]: Okay. So you're not anticipating them
12 having either questionnaire during the ----

13 MJ [COL FITZGERALD]: No, no, no, no. I'm sorry. See, this
14 is where it gets confusing. Not referring to their panel member
15 questionnaires, but questions the panel -- you know, at some point
16 after a witness, I say, "Members, do you have any questions for the
17 witness?"

18 TC [CDR TRIVETT]: Yes, sir.

19 MJ [COL FITZGERALD]: Those forms will not be in there for the
20 purpose of -- up to impanelment. And then I know we're going to have
21 their panel member questionnaires available for them. If you had
22 questions about a particular member, say "I'm looking at your panel
23 member questionnaire that you filled out," we'll have those available

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1 for the parties to use for individual voir dire.

2 TC [CDR TRIVETT]: So the commission will have those
3 available. You're not anticipating us ----

4 MJ [COL FITZGERALD]: Correct. Because we're going to use the
5 ones in the record.

6 Is that the parties' understanding? Not your copy, but the
7 copy in the record.

8 Ms. Miller?

9 LDC [MS. MILLER]: You're not giving a copy to the actual
10 member?

11 MJ [COL FITZGERALD]: No. We'll have them here available.
12 And if you say, "Panel Member 18, I want to ask you about questions
13 from your questionnaire," you would hand them the one we have on the
14 record. So I apologize for my confusion.

15 LDC [MS. MILLER]: Understand.

16 MJ [COL FITZGERALD]: I don't want you handing one with your
17 notes or highlighting or anything like that and confusing them
18 because the first question would be, like, "I didn't highlight any of
19 this."

20 You will be able to use what we have. I think for version
21 control, it's important to use what they filed responsively.

22 TC [CDR TRIVETT]: Yes, sir.

23 MJ [COL FITZGERALD]: So I apologize. The panel member

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1 questionnaire is used for two different things.

2 TC [CDR TRIVETT]: Are we going to have placards with their
3 numbers on it?

4 MJ [COL FITZGERALD]: It's my understanding -- what I've
5 requested is the Army, a lot of the judges in their courtrooms have
6 auctioneer paddles with numbers. And I have not seen anything other
7 than the mockup, but each panel member will have a -- so they'll just
8 hold up their -- a paddle with their identifying number since we're
9 not using their name.

10 I think that makes it easier for the parties to say
11 affirmative response from Member 2, 9, 11, and 18. It helps us avoid
12 inadvertently using a name.

13 TC [CDR TRIVETT]: Yes, sir.

14 MJ [COL FITZGERALD]: I presume they're here and ready to go,
15 so I will double-check how they've got those numbered. The mockup
16 would -- again, what you would see in an auction, so very visible
17 from anywhere in the courtroom.

18 TC [CDR TRIVETT]: Thank you, sir.

19 There's actually a pending ruling, sir, in AE 690 on
20 Article 25, Defense Allegation of Improper Venire Selection. Are we
21 anticipating getting a response to that prior to beginning voir dire?

22 MJ [COL FITZGERALD]: Yes.

23 TC [CDR TRIVETT]: One additional question, sir, on who's

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1 preparing the seating chart for the members. Is that something the
2 court's doing?

3 MJ [COL FITZGERALD]: It's my understanding the Office of
4 Court Administration is doing it, and one of the court reporters just
5 verified that as well.

6 TC [CDR TRIVETT]: Thank you.

7 MJ [COL FITZGERALD]: And from our previous discussion, it was
8 my understanding that the flights would come in in numerical order.
9 So as they would come in and sit down, their marching order would be
10 first row -- if we had two rows, for example, 1 through 9. Second
11 row would be 2 through 18.

12 I have not seen the seating charts, but that is my
13 understanding how they'll come in, that we've agreed we're not for
14 the purpose of assembly through impanelment seating anybody as the
15 president or the senior member in a left/right configuration for
16 assembly. Just simply coming in in the order that they're in the
17 CMC0 [sic].

18 TC [CDR TRIVETT]: Yes, sir. I believe that is shared by the
19 parties. So thank you.

20 MJ [COL FITZGERALD]: And I understand I've taken under
21 advisement a defense objection to what we'll do at impanelment with
22 the impaneled members.

23 TC [CDR TRIVETT]: Understood.

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1 So does the commission envision us filing as a notice the
2 joint witness list, the numbered joint witness list that will go in
3 the flyer? We've coordinated with defense counsel. We sent it to
4 them yesterday. They have to obviously look through it and make sure
5 that all their witnesses are identified. But then should we file it
6 as a notice? How would you like us to get it to the court?

7 MJ [COL FITZGERALD]: I think that makes sense, yep, to file
8 it as a notice. I can tell you this, I cannot independently verify
9 everybody because it's potential witnesses. So I strongly encourage
10 the parties to -- right? -- flyspeck that list to make sure all your
11 potential witnesses are on there. And obviously, things change in a
12 trial, but if you know them, please verify them.

13 TC [CDR TRIVETT]: So there was a joint excusal request that
14 the defense and the prosecution sent to the convening authority that
15 got acted upon. We think it's appropriate that at some point on the
16 record the judge ascertains from the defense counsel that that was by
17 consent.

18 Only because you don't have it in front of you right now, it
19 was just an agreement from the parties. We worked to get to
20 agreement on, I believe, 40 -- I believe the number is 47 ----

21 MJ [COL FITZGERALD]: Okay.

22 TC [CDR TRIVETT]: ---- witnesses that have been excused.
23 The vicing order will indicate, the next vicing order will

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1 indicate what's necessary. I just don't think you have it in front
2 of you.

3 MJ [COL FITZGERALD]: I don't. And probably what I will do is
4 add that language to my preliminary script to give to the parties. I
5 think the appropriate time to probably ask that question is after
6 we -- prior to assembly, somewhere I will put that language in there
7 to make sure that we do have the right people assembled by
8 appropriate excusals, including the ones that were done jointly by
9 consent.

10 Is that your understanding as well, Ms. Miller?

11 LDC [MS. MILLER]: Yes, sir.

12 MJ [COL FITZGERALD]: Okay. Thank you for reminding me. I
13 will add that -- I will add that to the script.

14 TC [CDR TRIVETT]: Yes, sir.

15 All right. Sir, I believe that was all the questions that
16 we had in relation to voir dire. We have some additional questions
17 based on some of the other topics you identified.

18 MJ [COL FITZGERALD]: So here's what I don't think I will
19 know. And so if I can just ask this. I think the last joint notice
20 from the parties this week said that there were six other excusals
21 being acted upon separate from the joint excusals that were acted
22 upon with the convening authority.

23 So I don't know if I'll be able -- because I think what will

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1 happen is, my guess, is I will get another vicing order that will
2 combine those two things. So I don't necessarily know who was
3 excused by order of the convening authority's independent operation
4 and which was done by the joint consent of the parties' request.

5 So just be mindful of that. When you get the next vicing
6 orders, look for your 46, 47, and make sure they're all accounted
7 for. And I would ask the defense to do the same.

8 TC [CDR TRIVETT]: Yes, sir.

9 LDC [MS. MILLER]: Sir.

10 MJ [COL FITZGERALD]: Okay.

11 TC [CDR TRIVETT]: Thank you, sir.

12 MJ [COL FITZGERALD]: Defense. Ms. Miller?

13 LDC [MS. MILLER]: I have just a couple logistical questions
14 and an objection to something that Commander Trivett just brought to
15 everyone's attention.

16 I think both Commander Trivett and I agreed that we wanted
17 to address the prospective panel members from the lectern rather
18 than ----

19 MJ [COL FITZGERALD]: Oh, yes.

20 LDC [MS. MILLER]: And I don't intend to speak over the
21 government to the prospective panel members. And so I'm
22 requesting -- and maybe this is an IT request if the commission's in
23 agreement, either like a lavalier microphone so I can walk or to

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1 move the lectern, so it's not -- I mean ----

2 MJ [COL FITZGERALD]: Your request is granted by me ----

3 LDC [MS. MILLER]: Okay.

4 MJ [COL FITZGERALD]: ---- provided the technicians can get
5 you that.

6 LDC [MS. MILLER]: Perfect.

7 MJ [COL FITZGERALD]: I don't know what they have available
8 and can put in place. In a court-martial we have that availability,
9 so I hadn't thought about that. But from my perspective, whoever's
10 asking, I'm granting it.

11 LDC [MS. MILLER]: I'm just looking, I mean ----

12 MJ [COL FITZGERALD]: And I would say that for both parties.
13 You don't have to be relegated to the podium if you choose to move
14 closer. The only thing I'd just ask is neither party block any other
15 member of the opposing counsel from being able to observe the
16 members, nor me. So think about that where you're going to use your
17 demonstratives, that place them in such a manner that the members can
18 obviously see it, opposing counsel can see it, and I can see it.

19 LDC [MS. MILLER]: No, I'm not going to put them directly in
20 front of opposing counsel.

21 MJ [COL FITZGERALD]: I appreciate that. Thank you.

22 TC [CDR TRIVETT]: Yes, sir. We can confirm that lapel
23 microphones are available. This lectern, though, can't be moved.

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1 MJ [COL FITZGERALD]: I know the lectern can't be moved.

2 LDC [MS. MILLER]: Okay.

3 MJ [COL FITZGERALD]: And that was a source of my frustration
4 for you very early on but -- other than pivoting it.

5 LDC [MS. MILLER]: Right over there.

6 MJ [COL FITZGERALD]: But if we can get microphones so that
7 you can move about freely in the well, and it's really -- because
8 it's really important that the court reporters be able to pick you up
9 if you move.

10 LDC [MS. MILLER]: I was contemplating that. And as I stand
11 here, I mean, this -- the lectern obviously turns. I understand now
12 that it cannot be physically moved. But I won't -- like, if
13 prospective Panel Member 9 is seated in the far right corner of the
14 box, I will be speaking right now, like, directly over Lieutenant
15 Colonel Garrett's head. And I would prefer not be speaking over the
16 government ----

17 MJ [COL FITZGERALD]: Sure.

18 LDC [MS. MILLER]: ---- to these prospective panel members.

19 Secondly, I know the commission doesn't like to be
20 double-teamed, I believe is the word you used. And so I was just
21 going to let you know in advance, at least for the first flight, I
22 intend to do the questioning of the prospective panel members.
23 Mr. Secor will argue cause challenges.

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1 MJ [COL FITZGERALD]: Will argue what?

2 LDC [MS. MILLER]: Will argue any challenges for cause.

3 MJ [COL FITZGERALD]: Oh. Oh, okay. I think, yeah, whoever
4 can assist you in voir dire, if you want to have other people and
5 defer to them, that's fine. My double-teaming is more when you're
6 speaking to the commission or speaking to a witness. So ----

7 LDC [MS. MILLER]: Okay.

8 MJ [COL FITZGERALD]: But if I can accommodate you -- because
9 it's going to be long sessions. And I don't want anybody's voice
10 going out. So however you need assistance and if you're going to use
11 demonstrative, if you need other people to assist you. The only
12 thing I ask is one question -- one person questioning at a time.
13 That's the only double-team rule that still applies. But whoever can
14 assist you in all the other things, that's fine.

15 LDC [MS. MILLER]: And we may change who's questioning. Not
16 "may." I anticipate us changing per flight.

17 MJ [COL FITZGERALD]: Sure.

18 LDC [MS. MILLER]: But the intention is one person will
19 question per flight and then one person will argue any challenges for
20 cause per flight.

21 MJ [COL FITZGERALD]: Yep. And same, also when we get to
22 individual voir dire, if you want to switch attorneys, if you call 1,
23 3, and 5, for example, and you want to handle person 1, Mr. Secor

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1 wants to handle person 3, I'm fine with that, too.

2 LDC [MS. MILLER]: Okay.

3 MJ [COL FITZGERALD]: It's just one at a time. And if you
4 need somebody, for example, Ms. Manuele has Member Number 3 and you
5 know you want to ask Member Number 3 about his questionnaire, send
6 somebody up to come get that questionnaire, make sure you have it
7 ready. However you want to do that. So the double-teaming is about
8 speaking.

9 Help each other out. It's going to be long. It's going to
10 be a lot. And however I can assist you, I'd like to be able to.

11 LDC [MS. MILLER]: And so that's my -- thank you, sir. That's
12 my objection to what Commander Trivett just made known to both the
13 commission and opposing counsel, that they intend to do rotating
14 detailing orders, for lack of a better way to put it.

15 I think the commission is aware of my frustration that I
16 have not had latitude as learned counsel to not have people before
17 Your Honor without leave of the commission. That Your Honor has
18 required every detailed member of -- excuse me -- every detailed
19 member of the defense team to be present for every session of
20 this -- every hearing of every session of this commission absent any
21 leave or reprieve to attend from the Remote Hearing Room.

22 And that has, frankly, limited my ability to detail resource
23 counsel who were hired in that role who I'd very much like to serve

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1 in discrete functions throughout the course of this trial. But I
2 have not been able to detail them because the commission has been
3 steadfast in, once detailed, the expectation is that you will be
4 present for every session -- every hearing of every session of this
5 commission.

6 And I understand that the commission has granted some
7 latitude to excuse people lately where necessary. But I have people
8 who cannot be here for the entirety of the trial. And so while I
9 think the commission has certainly been gracious with granting leave
10 lately, if I detail those people and for some reason the commission
11 were to deny my request for them to not be here, we're in a real
12 predicament.

13 And so I've had to choose to not detail otherwise available
14 people that I would use for very discrete purposes throughout the
15 trial.

16 And I don't know that we have the same option as the
17 government to detail and undetail and detail and undetail. And so I
18 would say there is a real lack of parity where all detailed counsel
19 right now -- there are six detailed counsel -- will be present in
20 front of this commission for the entirety of voir dire when not all
21 members of the defense team will be participating in voir dire.

22 And the government has the option to do some sort of
23 alternate detailing order for voir dire and ostensibly overcome the

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1 commission's directive that all detailed counsel be present short of
2 Your Honor granting leave for those people to be absent.

3 So instead of the government asking Your Honor for leave to
4 not have people here for voir dire, they're just going to undetail
5 people that have previously been detailed. If I knew that was an
6 option ----

7 And my second objection is that I totally agree with the
8 commission that, particularly in the military, I have learned it
9 seems like everybody of a certain rank kind of knows everybody within
10 a service, but may not know by name but would know by face. And so I
11 think there's a real problem if we select a jury without having the
12 vast majority of the prosecution's legal team present, even if their
13 names are provided to counsel, we select a panel to try this case,
14 and then the rest of the prosecution team walks in and somebody says,
15 "Oh, man, I didn't recognize Lieutenant Colonel Garrett's name. But
16 now seeing him, he and I were wherever together."

17 And so, again, it seems to put the government at a real
18 advantage and the defense at an unequal disadvantage when we have
19 been operating under the commission's guidance, to my frustration,
20 which I think the court understands ----

21 MJ [COL FITZGERALD]: Well aware.

22 LDC [MS. MILLER]: ---- that if you're detailed, you're here
23 all the time. And so, I guess, is that something the commission's

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1 going to allow, that I can detail and undetail people for discrete
2 purposes throughout the trial?

3 MJ [COL FITZGERALD]: Well, I'll try to be cautious. But this
4 is the first I'm hearing about it, too. But I think there's a
5 distinction to the government -- I mean, in the military, we talk
6 about a lot of times the fungibility of prosecution versus the
7 defense. It's not just the detailing. It's the undertaking of
8 representation of the accused which bears heavier consequences than
9 just the detailing issue.

10 I'm going to contemplate what I'm going to receive from the
11 government. I'm going to contemplate your objections to it. I would
12 ask the parties to confer. If you think you can benefit from some
13 flexibility going forward at trial, then let's have that discussion.

14 LDC [MS. MILLER]: Okay.

15 MJ [COL FITZGERALD]: I'm open to it. But you understand that
16 my concern, at least in the pretrial format, is everybody who is a
17 member here had to be able to undertake the representation of the
18 accused.

19 We've had several hearings where you've talked about the
20 need for face to face. And my concern very early on were people
21 coming and going when I've ordered people to island. Not you. You
22 shook your head like ----

23 LDC [MS. MILLER]: One time you said that your fear was it was

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1 just going to be you, me, and Captain Stinson. Do you recall saying
2 that?

3 MJ [COL FITZGERALD]: Something to that effect.

4 LDC [MS. MILLER]: Yes.

5 MJ [COL FITZGERALD]: If I didn't rein in an overliberal use
6 of excusals. So -- but as you've noted, as we've moved closer to
7 trial, I've given some more flexibility so folks can do other things.

8 But I understand your concerns. I understand your
9 frustration. But can -- again, confer with the government, make sure
10 you understand exactly what they're trying to do. I've explained to
11 you why I think there's a prosecutorial difference from a defense.
12 But I'm willing to hear you if you think other folks can assist you,
13 as long as we can reach a common understanding of what that means.
14 It was much harder to do that in a pretrial posture. In a trial
15 posture, as long as we have a common understanding of what it means
16 to represent your client.

17 LDC [MS. MILLER]: That's what -- I don't think there's -- I
18 mean, I would include the entirety of the defense team. There is no
19 one in this room that takes the representation of Mr. al Nashiri more
20 seriously than we do. And that's ----

21 MJ [COL FITZGERALD]: Nobody's disagreeing with you.

22 LDC [MS. MILLER]: Right. And so I would never sacrifice his
23 representation by having people here sort of willy-nilly. It would

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1 be for ----

2 MJ [COL FITZGERALD]: That's not what I was trying to say. It
3 was -- but you understand that on the defense side that that is part
4 of the role, is you undertake representation. I put those rules in
5 place so that we could move this case and advance it to trial.

6 We are now at trial. So if I need a different rule in place
7 and a different standard in place, I'm welcoming that discussion.

8 LDC [MS. MILLER]: Okay.

9 MJ [COL FITZGERALD]: And this is new to you because you just
10 got informed by this. Tell me how I can help you, because we are
11 here. We are at trial.

12 LDC [MS. MILLER]: One thing I would say, at the very least
13 the government needs to show pictures of all of their detailed
14 counsel who aren't going to be present as they mention their names.

15 MJ [COL FITZGERALD]: This is where I want you to confer with
16 the government.

17 LDC [MS. MILLER]: Okay.

18 MJ [COL FITZGERALD]: I understand what you're saying, but I
19 think we have some other methods of dealing with that. Because,
20 remember, one of the other instructions, again, if you haven't looked
21 over the preliminary instructions ----

22 LDC [MS. MILLER]: Oh, I've read them.

23 MJ [COL FITZGERALD]: I know you've read them but not to this

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1 focal point, is I believe I remind them if you recognize somebody
2 later, you must bring it to the attention of the commission. So I
3 can add some language in there: You are not seeing all attorneys who
4 are before you, which may include you. Somebody may not be
5 physically present. I don't know.

6 But if you do recognize somebody or if you hear -- if you
7 see a witness, says, "Well, I didn't recognize his name, but now he's
8 on the stand, I totally know who that guy is," then they would bring
9 that to the attention of the court and we potentially would have to
10 open up voir dire as to how they know them and under the
11 circumstances.

12 So we have methods for that. But, again, if you can confer
13 with the government to see if you can reach a resolution.

14 LDC [MS. MILLER]: And so -- understood, sir.

15 MJ [COL FITZGERALD]: We're doing a lot of thinking on the
16 fly, and I'm trying to avoid that.

17 LDC [MS. MILLER]: Right.

18 MJ [COL FITZGERALD]: But what I want you to know is I'm open
19 to suggestions.

20 LDC [MS. MILLER]: Okay. And so that's what I mean. If we go
21 through all of the prospective panel members in the last vicing
22 order, that's 13 flights. And so that's one of the things that I
23 wanted to bring up, is that the government's anticipated ----

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1 MJ [COL FITZGERALD]: Okay.

2 LDC [MS. MILLER]: ---- case in chief is also listed as 13
3 weeks. And the government's proposal suggests that we instruct the
4 member panel that they will be here approximately four to six months,
5 which seems woefully short, given their proposed case in chief and
6 the maximum possibility for voir dire.

7 MJ [COL FITZGERALD]: I don't -- I've never used the phrase
8 "four to six months."

9 LDC [MS. MILLER]: That was in ----

10 MJ [COL FITZGERALD]: And I -- I know. But I have to inform
11 the panel. And so part of my -- again, you'll receive my procedural
12 guidelines is to tell them here's what I expect. We'll be here every
13 duty day, roughly 0900 to 1700, a lunch recess. And I think you want
14 to know that, too.

15 I don't intend to hold open session with members on the
16 weekends. I intend to take appropriate holiday breaks and allow you
17 time to go home and see your families at a measured pace. I don't
18 know what that's going to be yet.

19 And I anticipate this trial will take at least four to six
20 months, is probably the phrase I was going to use, but possibly
21 longer, and you should anticipate it taking longer.

22 That's a question I ask them when I say, "Is
23 this -- anything in your life going to distract you knowing all that

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1 information?"

2 So, again, I've never used the phrase "four to six." I will
3 probably borrow from it to say "at least four to six." Does that
4 make sense?

5 LDC [MS. MILLER]: It does, sir.

6 MJ [COL FITZGERALD]: But you should anticipate longer. The
7 same thing I do in a court-martial. The parties tell me this is
8 going to take three to five days, but we may be here next week. We
9 may be here on the weekend, all those kind of things. So I'm going
10 to just borrow language I'm comfortable using, not the weekend part.

11 But I can assure you my intent is to hold no open session
12 with he members on the weekends, so.

13 LDC [MS. MILLER]: And that's my sort of last -- may I
14 make -- I have one clarification. You are amenable to some sort of
15 guarantee from the commission as we enter a trial phase that detailed
16 defense counsel could be excused?

17 MJ [COL FITZGERALD]: Yes.

18 LDC [MS. MILLER]: Okay.

19 MJ [COL FITZGERALD]: Again, I think the distinction I want to
20 make clear is there's an undertaking of representation risk, right?
21 So -- and that's something you have to work out with your client that
22 is out of my purview. That's -- do you understand why I worry about
23 the risk I take if your client says, "Well, I'm not going forward if

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1 Lieutenant Colonel Nettinga is not sitting in that chair on Monday,"
2 that creates hardships for the commission and the government and the
3 members.

4 So it's things like that that -- I'm just using your name as
5 an example, Colonel Nettinga, but -- right? I have to think about
6 those things, and that's what's different for the government because
7 they have nobody who could do that.

8 LDC [MS. MILLER]: I understand. I would just note that my
9 client doesn't know who the majority of the team is at this point.

10 The last request I had was related to scheduling. And to
11 borrow from the commission's words, you said, "I don't want to be
12 bound by any kind of schedule."

13 MJ [COL FITZGERALD]: Correct.

14 LDC [MS. MILLER]: And, sir, with -- I'm anticipating the
15 trial lasting more like eight to ten months. I have to see a
16 physician every 30 days.

17 MJ [COL FITZGERALD]: You have to -- oh.

18 LDC [MS. MILLER]: See a physician every 30 days, who cannot
19 prescribe medication outside of the state of Maryland. And so short
20 of me lying and pretending that I'm doing a telehealth visit in
21 Maryland, I don't know how that's feasible.

22 I know I'm not the only person on my -- on the defense team
23 that has similar issues. We also have folks that need to pick up

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1 prescriptions that are only available 30 days. And I can tell you
2 now, from a tremendous amount of experience, you cannot get your
3 prescriptions filled at the hospital at Naval Station Guantanamo Bay,
4 particularly as a civilian.

5 And so while I understand the commission's -- I think what
6 I'm perceiving it as the commission wants to break when it's natural.
7 If voir dire takes two weeks versus ten, that's when the commission
8 would break. I understand that.

9 But I think we -- I'm respectfully requesting that you do
10 actually implement a schedule that allows for us to attend to medical
11 appointments, prescription refills, familial obligations,
12 understanding how long we're going to be here. And I understand that
13 it may not fall at opportune times to break when we've scheduled it,
14 but I think that both parties, as well as the member panel, would
15 benefit from knowing we're going to go for three weeks and take a
16 week off or whatever the commission is. I only offer that as
17 suggestion.

18 MJ [COL FITZGERALD]: And the heuristic I'm trying to use is
19 about every three to four weeks throughout the trial. What's hard
20 for me to say is the third week of October, the fourth week of
21 October. I can say about the third or fourth week of October I
22 intend to take a recess, depending where we're at.

23 For example, I don't want to stop a witness' testimony. I

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1 don't want to stop in the middle of a flight of voir dire. So things
2 like that. That's what I mean by natural breaks. I'm trying to
3 measure both things at once. Where is the natural break and where
4 does it fit in so I don't exhaust anybody? And I'm thinking that is
5 somewhere between three to five weeks.

6 I think that's the best I can offer you right now until we
7 get going. And maybe I can make adjustments as we go, and it can be
8 more static versus dynamic. I just can't give you those assurances
9 now.

10 I think you used the phrase "amenable to guarantee." I'm
11 amenable to working within the parameters I have. But I don't -- I
12 can't -- I don't want to guarantee a week unless it's a holiday,
13 right? Then I'm going to work with that, Thanksgiving, the Christmas
14 and New Year's break. But it's hard to do that otherwise.

15 And I think the parties can help me as best they can because
16 they know their witnesses. When the government calls their witness,
17 I won't know if he's going to be on that stand for two hours or two
18 days or two weeks. That's the challenge for the commission is to
19 turn it over to the parties.

20 And maybe the parties can work that out and say, how long do
21 you think your direct and cross are going to be? Maybe you know
22 better than I do, and I certainly think you will, to say we don't
23 think we're going to get past this person in the next three to four

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1 weeks. Then we can work something out.

2 LDC [MS. MILLER]: I think you can appreciate, it's -- I mean,
3 I have -- and you're aware, I have had specialists bend over backward
4 to accommodate me within the last week. And so trying to get
5 doctors' appointments on a week's or several days' notice is
6 impossible.

7 And so you are -- I understand the court's intent, and I
8 don't mean to be dramatic by saying this, but you are jeopardizing
9 the health of the participants by not giving us a firm schedule where
10 we can schedule medical appointments and prescription refills and the
11 like. I mean, that's just -- I mean, it's just not going to be
12 practically possible to say, "Hey, I'm going to be back Monday. Can
13 you see me?"

14 And so I'd ask the commission to consider that we're all
15 trying to do the best we can. But given the longevity of this case,
16 I think keeping everybody healthy is in everyone's best interest.

17 And so I would only use it as persuasive. I understand the
18 commission is certainly not bound by any other judge in this
19 commission system's rulings, but Judge Schrama has done a very
20 detailed order for the 9/11 trial.

21 MJ [COL FITZGERALD]: But he hasn't had to execute it. That's
22 the difference, right?

23 LDC [MS. MILLER]: Sure, sure.

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1 MJ [COL FITZGERALD]: And I can't speak for him, but he just
2 has taken a different approach of how he intends to go to trial in, I
3 believe, the summer of 2028. I've never spoken to him about it or
4 his schedule or his staff about his schedule.

5 I've tried to operate with the concept of flexibility. And
6 I take everybody's equities, concerns, to heart. And it's helping me
7 be informed and making good, informed decisions.

8 And that's why I say, I think as things go, it will be
9 easier to do that, to say, okay, I think we've understood the battle
10 rhythm we have before us and let's make some adjustments.

11 But I think out the gate what I'm trying to say is around
12 three to four weeks I'm going to look to the folks to schedule
13 transportation and movement and let people know.

14 LDC [MS. MILLER]: I am getting a note that there is a
15 restroom break needed.

16 MJ [COL FITZGERALD]: Oh, okay. I -- we will take -- I'm
17 trying to remember where we're at.

18 Well, I would tell you this. I have covered everything I
19 want to cover. So I don't know if we need another short recess if I
20 can say we can recess for the day while I try to determine the
21 704 -- I'm sorry, the classified ----

22 LDC [MS. MILLER]: Defense is done. We're good recessing for
23 the day.

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1 MJ [COL FITZGERALD]: Okay. But I don't want to rush -- I
2 don't want to sound impertinent. You've raised all your issues. I'm
3 telling you I've taken them all under advisement. I know they're
4 serious. I know they're real. But it's a lot of balancing of
5 matters. So don't think they're being ignored or slighted.

6 All right. Commander Trivett.

7 TC [CDR TRIVETT]: Yes, sir. I just had one follow-up
8 question in relation to voir dire.

9 So for the individual voir dire, is the intent to just have
10 each member sit in that very first chair? That might be the easiest
11 to be able to not have that concern.

12 MJ [COL FITZGERALD]: I think so. My only consideration is
13 where that microphone gets put. But as long as that -- I don't know
14 if it's embedded into the table. But if it's not embedded, that's
15 the easiest place to put members is -- and that's what I do in my own
16 courtroom, just take them to the first seat, so ----

17 TC [CDR TRIVETT]: Yes, sir.

18 MJ [COL FITZGERALD]: And I think that does avoid the issue.
19 And we will hopefully get an answer on the movable mic, for what lack
20 of -- somebody called it by its brand name.

21 TC [CDR TRIVETT]: Yes, sir. We for sure have one.

22 MJ [COL FITZGERALD]: Okay.

23 MTC [MR. TRIVETT]: We've practiced with it for our opening.

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1 So it's here. It works.

2 MJ [COL FITZGERALD]: All right. It is approved for all
3 parties, so -- but one person on the mic at the time, so.

4 Okay. If there's nothing else, then the commission will
5 stand in recess until further order.

6 **[The R.M.C. 803 session recessed at 1244, 13 October 2026.]**

7 **[END OF PAGE]**