[The R.M.C. 803 session was called to order at 0905, 2 November 2026.]

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

Government, if you could announce who's present for the prosecution and who's absent.

TC [CDR TRIVETT]: Yes, sir. Good morning.

MJ [COL FITZGERALD]: Good morning.

TC [CDR TRIVETT]: Representing the United States today in the courtroom in Guantanamo is myself, Mr. -- Commander Clay Trivett; Lieutenant Colonel Michael Ross; Commander Joshua Sargent; Major Kaylyn Krzemien; and Mr. John Wells.

Currently excused to be absent is Lieutenant Colonel James Garrett, Commander Charles Roman, and Major Alfonso Perez-Diaz.

We have no one representing the United States from the Remote Hearing Room today.

MJ [COL FITZGERALD]: Thank you.

And, Defense? Good morning, Ms. Miller. I assume it's going to be you, Ms. Miller?

LDC [MS. MILLER]: Yes, sir. Good morning, again, sir.

Allison Miller, learned counsel on behalf of Mr. Abd al Rahim al Nashiri. I'm joined by Mr. Casey Secor; Lieutenant Colonel Joshua Nettinga, United States Air Force; Ms. Jessica Manuele; Lieutenant Benjamin Shaver, United States Navy; all in Naval

Station Guantanamo Bay. And Commander Matthew Bartholomaus is present from the Remote Hearing Room. And we are also accompanied by analysts, paralegals, investigators, and a DISO.

MJ [COL FITZGERALD]: Thank you.

The first thing I want to confirm is the parties received notice from me in response to a motion regarding the chiefs from your respective office and their deputies, whether they can be in the well of the courtroom. Any questions about that instruction?

I think there was some confusion on what I received, what I requested back, and a motion that was filed, but I'm happy to answer anything if I could.

LDC [MS. MILLER]: I don't have any questions. I object.

MJ [COL FITZGERALD]: To what?

LDC [MS. MILLER]: The chief defense counsel not be allowed in the well of this courtroom. But, also, I wanted to clarify ----

MJ [COL FITZGERALD]: Generally or specifically? Because my instruction back to you is they're not barred from the courtroom other than during voir dire.

LDC [MS. MILLER]: Correct. And I anticipated our chief defense counsel, Brigadier General Jonathan Vaughn, being in the courtroom, the well of this courtroom for voir dire to participate in voir dire with our team. So I object.

I understand the commission's ruling, but I object.

MJ [COL FITZGERALD]: Very well.

LDC [MS. MILLER]: And then, did I understand the government to say that their deputy chief prosecutor was present from the Remote Hearing Room?

MJ [COL FITZGERALD]: You did.

LDC [MS. MILLER]: And so I ----

MJ [COL FITZGERALD]: That's why I want to make sure that there's no ambiguity as to what is allowed and not allowed.

LDC [MS. MILLER]: Then I would object to him being in the Remote Hearing Room.

MJ [COL FITZGERALD]: I'm not sure I understand the basis. What I -- what I said is the chiefs and their deputies can be in the RHR, they cannot be in the well of the courtroom present here at Naval Station Guantanamo Bay.

LDC [MS. MILLER]: I understand what the commission said, but that's not how the Remote Hearing Room works. By all understanding, it's an extension of the well of this courtroom. So if we're no longer pretending that that's not Virginia, then I think ----

MJ [COL FITZGERALD]: Okay.

LDC [MS. MILLER]: ---- we need to readdress that. But if it's an extension of the well, then I believe the commission's order barring the chiefs and the deputies should extend to the extension of the well.

MJ [COL FITZGERALD]: Very well.

Government, do you wish to be heard?

TC [CDR TRIVETT]: Sir, we believe you're -- we're in compliance with your order.

MJ [COL FITZGERALD]: Very well. And my order will stand. Ordinarily they would be allowed in, but it is my desire to ensure that the members, when they come forward, know who's in this courtroom and not be concerned as to parties in the courtroom who will not be recognized on the record, especially in light of the fact that both of them are general officers not detailed to this case. That they're providing assistance to counsel, which they can do from the RHR, they can be in the RHR.

But I don't want the members having any concern or questions or distractions by the fact that two -- a flagged officer and a general officer are sitting in the well with no stated purpose. That's it. And it's just for voir dire.

Once we start, they're more than welcome to sit in the back of the well in the appropriate uniform for the well, which is their respective service dress uniform, and we will go from there.

So your objection is noted. You had two objections. Both of your objections are overruled.

Anything else on that particular matter? Very well.

TC [CDR TRIVETT]: Not from the government, sir.

MJ [COL FITZGERALD]: Now that we've clarified that, anything else we need to take up before we call the members?

LDC [MS. MILLER]: We have a number of things. We have objections to the flyer as was provided, and we have two objections to the questions that the military judge intends to ask.

We also object to entering a plea at this point because we have a number of pending motions which, I have to be honest, if our effort is to get this case to trial, which has been everyone's stated intent, the fact that we have to file motions for leave -- to file motions out of time that the commission suggested would be an appropriate remedy in lieu of a motion to continue is a bit frustrating, but -- so I don't know which the commission would like to address first.

But those are the three buckets, I would say, of objections that the defense needs to address prior to bringing the members in, sir.

MJ [COL FITZGERALD]: Well, we'll take -- we'll take them in any order that you want. I'm not sure what you meant by enter a plea. Pleas have been entered.

LDC [MS. MILLER]: Okay.

MJ [COL FITZGERALD]: I don't know if -- unless there's a change in pleas. I don't think that's what you're telling me.

LDC [MS. MILLER]: No, sir.

MJ [COL FITZGERALD]: But pleas have been entered, so I don't need another entry of pleas.

LDC [MS. MILLER]: Okay. R.M.C. 905 reads that certain motions are to be filed prior to the entry of a plea, and so I assumed the commission was going to make inquiry as to how the accused pled this morning ----

MJ [COL FITZGERALD]: Oh ----

LDC [MS. MILLER]: ---- and given that we have motions that are still in the process of being filed, we object to entering any formal plea beyond what has already been entered, which obviously predates my role on this case.

I would say my standard procedure is I expected a not guilty plea to be entered at arraignment, but R.M.C. 905 does read, again in paraphrase, that certain motions are to be filed prior to the entry of a plea, which is what led me to assume there was going to be a separate colloquy this morning, sir.

MJ [COL FITZGERALD]: I couldn't tell you how they do it in other jurisdictions, but in military typically it's either done at arraignment or the judge allows deferral of pleas to a later date. As I understand it, I'd have to look in the record when that happened, but Mr. al Nashiri entered a plea of not guilty to all charges and specifications, and so there's no amended plea as I understand it.

So pleas have been entered. So I believe that's what the rule is referring to in 905, is sometime prior to entering those pleas, whether it was at arraignment or a date set by the judge.

LDC [MS. MILLER]: It's just somewhat confusing how a motion to suppress or a motion for sanctions would be entered prior to the entry of a plea at arraignment, but ----

MJ [COL FITZGERALD]: And I think that's why -- and if I recall correctly, in this case pleas were not entered at arraignment, they were entered at a later date. But that's usually why the defense, at least in a military court-martial setting, will ask to defer pleas. But sometimes they'll enter their plea at arraignment. That's up to counsel.

I just understand it was done, so we don't need to redo that.

So having resolved that issue, I don't intend to take new pleas unless they're amended pleas.

But what's the next thing? We're jumping around a little bit from your list, but I'm happy to take them in the order that you want to present them.

LDC [MS. MILLER]: Sure. On the flyer, we would object to three things in particular, and they're not small.

One, all of the aliases alleged to belong to Abd al Rahim al Nashiri being listed to the member panel. I would object to the

aliases being provided to the member panel until the government has established evidence that connects Mr. al Nashiri to those aliases.

I think the commission can appreciate that it is extremely prejudicial in a charging document for -- I don't know the exact number, but a dozen-plus aliases, I think it's even more than that, to be read to the member panel, some of which we dispute, some of which we do not believe there will be evidence to support, but the prejudicial value certainly exceeds any probative value of the prospective members of the panel being informed at this juncture that Mr. al Nashiri has these number of aliases.

I don't expect any of these people are going to have personal knowledge of Mr. al Nashiri beyond what they may know about the COLE case generally. And so providing all of those aliases doesn't help to educate them about the case. It just serves to prejudice them that he may be someone who used dozens of aliases. And, again, I think the government needs to prove that first.

And so that is my first objection to the flyer as it is written.

MJ [COL FITZGERALD]: Government, do you want to take up -- they have three pieces to this objection. Do you want to take them up one at a time and be heard? I think maybe it's easier for the record if we do that.

TC [CDR TRIVETT]: Whatever your preference is, sir.

MJ [COL FITZGERALD]: Why don't -- so why don't we take it up. The first objection is the -- I think it's Attachment A. I may have my attachments out of order. I'm sorry, appendix. I said "attachment."

We're talking about Appendix A, the list of al Nashiri aliases. They're objecting to that inclusion in the flyer. And just so I can be clear, I think the Navy Marine Corps refers to it as a cleansed charge sheet.

So just there's no confusion, I understand what you say if you say cleansed charge sheet. And I hope you understand what I mean when I say flyer, so...

I don't know what the Air Force calls it.

TC [CDR TRIVETT]: Yes, sir. In the Navy, we call it cleansed charge seat, but I'm tracking.

Appendix A is part of the charge ----

MJ [COL FITZGERALD]: You can have a seat and I'll let him speak, just so I know who I'm talking to. Thank you.

TC [CDR TRIVETT]: Appendix A is part of the charge sheet. Just like the rest of the charge sheet, these are allegations. We have to prove beyond a reasonable doubt everything within -- within the charge sheet.

It is our intention to present evidence during the case in chief on Mr. Nashiri's various aliases and the variations of the

spellings of many of the same names. All right?

If you look at the first one, the "Abd al Rahim Hussayn Muhammad Abda al Nashiri," and then all of those beneath those are some -- we will be presenting evidence on how names are variated throughout the culture.

So it's our intention to prove beyond a reasonable doubt that these are his aliases. We plan to do so at trial. We do not believe we are required to do so before trial. It's no different than any other part of the charge sheet. It was appended to the charge sheet. It is part of the charges that were referred to this commission.

MJ [COL FITZGERALD]: Very well.

Defense?

LDC [MS. MILLER]: Yes, sir. I would disagree with the government's assertion. All of the charges and specifications refer to Abd al Rahim Hussayn Muhammad al Nashiri. None of the charges refer to him as any a/k/a's or any aliases. And so to suggest that the aliases are part of the charges is, in fact, an inaccurate description of the referral.

And so I don't have any objection to Mr. al Nashiri being referred to Abdul al Rahim Hussayn Muhammad al Nashiri. But there is no purpose -- again, if the government had put all of the a/k/a's or aliases because they believed he was committing that charge under a

different name, if they had put it in the charge or specification, I think I -- my position would be different, but they didn't. They only charged him by that name. So then to suggest the aliases are part of the charges, I would disagree with.

MJ [COL FITZGERALD]: Each specification appears to list the name followed by a parenthetical, "See Appendix A for a list of aliases."

LDC [MS. MILLER]: Sure. But they didn't say -- like, for instance, they didn't say in the Limburg charges that was committed by Mullah Bilal or any of the other aliases. It's just it was committed by Abdul al Rahim Hussayn Muhammad al Nashiri, and there's a list of aliases.

Certainly the commission still has to consider whether that information is necessary and probative for the member panel at this point. And so my understanding of the purpose of the flyer or the cleansed charge sheet -- and I would disagree that this is cleansed as far as the aliases still being included -- is to put the member panel or prospective member panel on notice of what the accused is charged with. They don't need to know 10, 20, 30 aliases to be put on notice.

And so to the extent that there is probative value, it is far outweighed by the prejudicial value at this point. If the government establishes all of those aliases, so be it.

MJ [COL FITZGERALD]: Were you able to find any authority in military case law that the commission should conduct a 401, 402, 403 analysis as to the presentation of the flyer or charge sheet to the members?

LDC [MS. MILLER]: Not in the military, no, sir. I also don't think military case law is binding on this commission. I think the D.C. Circuit is binding, and certainly there is case law that aliases on a information or indictment would serve -- would be prejudicial.

MJ [COL FITZGERALD]: Okay. Understood. Your second issue?

LDC [MS. MILLER]: Second issue, sir, is I have objections to two questions in ----

MJ [COL FITZGERALD]: Wait a minute. You -- I thought you ----

LDC [MS. MILLER]: Oh, I'm sorry. We're still on the flyer. You're right.

MJ [COL FITZGERALD]: You said you had three parts to the flyer.

LDC [MS. MILLER]: You're right. I apologize. Thank you for correcting me, sir.

I'm objecting to the inclusion of any charges reference the MV Limburg on the flyer. We have a, again, motion for leave to file out of time a motion to sever the Limburg charges.

And so at this juncture, given the political hostilities

that exist in Saudi Arabia, the uncertainty as to whether Mr. al Darbi is going to be able to testify before this commission, it is extremely prejudicial to hold up a charge sheet with nine charges versus six, three of those charges having occurred after 9/11/2001, when without Mr. al Darbi, I think both sides would concede the government cannot meet the elements of those charges related to the Limburg to prove their case.

I think the likelihood of Mr. al Darbi testifying is almost nonexistent. It depends largely on the cooperation of the Kingdom of Saudi Arabia who, I understand, is in hostilities with the Houthis at this point, in addition to the sort of climate in the Middle East with our war with Iran.

So I am asking the commission, in an abundance of caution, to not include the charges related to the Limburg because, again, I think the odds of the government being able to meet those charges is almost nonexistent because Mr. al Darbi will not end up being a participant in these case -- in this case. And that -- and then we're in a potential situation to mis-try the case.

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

And before I forget, those microphones are so low for you. Going forward, anybody who wants to use the podium, just tell me you want to use the podium so you don't have to speak from a half-bowing position. And I should have offered that to you, Ms. Miller. But

going forward, you can certainly just step to the podium.

TC [CDR TRIVETT]: So the M/V Limburg charge is part of the al Qaeda Boats Operation, which is Overt Act 26 in the charged conspiracy. We've asked for a Pinkerton theory of liability. We do not believe that Mr. al Darbi's presence is required to convict Mr. al Nashiri of the conspiracy to attack the M/V Limburg or as a principal in the M/V Limburg.

We also do not share in any way the defense counsel's pessimism that Mr. al Darbi will be made available to testify. We are continuing to work that through the highest levels of the U.S. Government. We believe he will be made available to testify. We have not gotten formal notification yet from the Kingdom of Saudi Arabia on that, but that's the most recent tentative information we have, is that he will be available.

So we do not share in any of the defense's pessimism in regard to Mr. al Darbi but we do not think Mr. al Darbi's presence is the sole determining factor as to whether or not we continue to go forward on both the conspiracy charge, and that's Overt Act 26, or charging Mr. Nashiri as a principal in those attacks.

MJ [COL FITZGERALD]: Very well.

Defense?

LDC [MS. MILLER]: Certainly, Mr. al Nashiri could still be found guilty of conspiracy without number 26. So that could be

excised relatively easy. The government could still present whatever evidence they believe implicates Mr. al Nashiri as to the conspiracy charge. I guess I just vehemently disagree or I don't know the evidence that the government has that would implicate Mr. al Nashiri in committing the Limburg charges beyond Mr. al Darbi's testimony.

And even in the government's recitation, they said it's being worked through the highest channels and we haven't gotten any formal -- I can't recall the exact word -- any formal assertion or any formal guarantee that Mr. al Darbi will be made available for this trial. And they may not share my pessimism, I would call it realism.

But the government cannot represent that Mr. al Darbi is going to be present. And, again, either I don't know the evidence, which I have certainly averred that I don't know the evidence, but I disagree with the government's assertion that they will be able to prove the Limburg charges absent Mr. al Darbi.

MJ [COL FITZGERALD]: Okay. Before I get -- I'm going to take a moment to tell you it's awfully distracting when your paralegals walk all the way up to the front while I'm speaking to counsel. Not faulting you. Not faulting you. If they want to come in here, they can deliver something to the back row, not to the front row, and it especially becomes true when members are here.

The only movement I -- and I'm not telling counsel they

can't come up and hand a note to other counsel, but it's just people coming into the courtroom. It draws my attention. I recognize I'm operating in an environment with no less than four security personnel as well as a bailiff, so I know there's going to be some of movement, but any other movement is distracting.

So just ask them to practice tactical patience if the matter's not urgent. If it's urgent, they should deliver it to somebody in the back row where, for example, Mr. Wells is who will -- who will deliver it to the front row. But thank you.

So let me ask you -- finish with your thought.

[Counsel conferred.]

MJ [COL FITZGERALD]: Mr. Wells, I'm not designating you as the message recipient. You just happened to be sitting in that last row by example.

MATC [MR. WELLS]: Sir, thank you. We've worked out with the paralegals that ask to bring it to me first so I can look at it before we walk up. Thank you, sir.

MJ [COL FITZGERALD]: Appreciate it.

Yes, Ms. Miller.

LDC [MS. MILLER]: I apologize, sir. I was reminded that the government filed notice 19 October, that they had not received a response as to the Kingdom of Saudi Arabia's willingness to cooperate with scheduling interviews of Mr. al Darbi for either side ----

MJ [COL FITZGERALD]: You're talking about the -- just so I can be clear, I didn't receive a separate notice. You're talking about in the weekly status notification?

LDC [MS. MILLER]: No, I believe the commission directed the government ----

MJ [COL FITZGERALD]: Oh, okay. I'm just making sure I understand what notice you're talking about ----

LDC [MS. MILLER]: Yeah, the commission directed ----

MJ [COL FITZGERALD]: ---- in response to my specific query.

LDC [MS. MILLER]: Correct. And I'm paraphrasing because I don't have it in front of me. But ostensibly, the government represented that they had not received a response on our ability or the government's ability to interview Mr. al Darbi or their intention to have him testify via from the -- the embassy in the Kingdom of Saudi Arabia. And so, again, I don't -- I wouldn't describe my attitude as pessimistic. It's reacting to the government's inability to ensure that this man is going to participate in this trial, and so I don't think what Commander Trivett just said to the court accurately reflects what the government has pled.

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

Let me ask you this: I don't remember the appellate exhibit number, but early in litigation there was a motion to sever this particular offense, so your new basis is unrelated to the old basis?

It's not a reconsideration of the old basis.

LDC [MS. MILLER]: That's correct, sir.

MJ [COL FITZGERALD]: Okay. I don't even remember that basis anymore, but what it seems what you're telling me is you -- the defense's position is a contemporaneous unavailability of a witness means the government shouldn't be able to pursue that charge.

LDC [MS. MILLER]: Yes, sir.

MJ [COL FITZGERALD]: Okay.

[Pause.]

MJ [COL FITZGERALD]: So I -- well, you were here. You've never missed a session. So earlier in a session Colonel Nettinga brought up what I believe is a similar issue or the same issue with respect to a motion to continue. And as I had that very good discussion with Colonel Nettinga, I said it seems like what you're asking me to do is front load an R.C.M. **[sic]** 917 determination. I don't know that -- I'm sorry. That's military parlance. 917 is a failure to state -- or failure to -- not failure to state an offense.

LDC [MS. MILLER]: Like a directed verdict.

MJ [COL FITZGERALD]: Directed verdict. I'm trying to remember the term you use in civilian courts. And I asked if there's any authority that -- where a court should take up, essentially in a pretrial setting, something that is best resolved through a 917 process. Meaning after the government has rested its case at the

earliest versus before the government begins its case.

LDC [MS. MILLER]: I think the answer is twofold. One, I think if there's no evidence to support a charge, the commission is -- any court, Article I or Article III, is always empowered to dismiss a charge if the government can't meet the evidence and can't demonstrate they could meet the evidence, but I would ----

MJ [COL FITZGERALD]: But you think -- you think I can do that sua sponte?

LDC [MS. MILLER]: No, I'm not asking you to do it sua sponte, I'm moving the court to do that.

MJ [COL FITZGERALD]: True.

LDC [MS. MILLER]: But I'm actually not asking the commission to do that, to be clear. We're not asking the commission to enter a directed verdict or to dismiss the charges at this point. We're asking the commission to sever the charges based on, I think, a very good-faith belief that Mr. al Darbi is not going to be able to testify and that the government is not going to be able to meet the elements of the charges related to the M/V Limburg.

If I was just coming in here -- I don't also remember -- I don't know if I ever knew why they moved previously to sever the Limburg, but I don't believe it was based on Mr. al Darbi's unavailability. And so ----

MJ [COL FITZGERALD]: I don't -- I don't recall that being the

reason either.

LDC [MS. MILLER]: Right. I'm almost positive it was not. But, again, the government's representation in their written pleadings is that they have received no response, and at least what Commander Trivett said here is that they've received no assurance at this point but it's being worked through the upper echelons of our government.

I'm going to posit that the Kingdom of Saudi Arabia is busy dealing with other things, as is the United States of America. But what we're asking is to sever these charges until the government can give this commission actual assurance that Mr. al Darbi will be participating in this trial.

MJ [COL FITZGERALD]: Okay. And if I recall -- Commander Trivett, you can correct me if I'm wrong -- thank you, Ms. Miller -- what you told me is twofold.

One, you're still working that through, so you haven't reached a conclusion as to your desire to have Mr. al Darbi testify. But secondly, you would still proceed on this charge in the absence of Mr. al Darbi being able to testify?

TC [CDR TRIVETT]: That's correct, sir.

MJ [COL FITZGERALD]: Okay.

And your third thing, Ms. Miller?

LDC [MS. MILLER]: We're asking that anything that was derived

from Khallad Bin'Attash's statement that's contained in a charge or specification on the flyer be removed from the flyer or the cleansed charge sheet.

Again, we were in the process, because we focus on form over substance in this court, that we're in the process of filing a motion for leave to file out of time a motion for reconsideration regarding the admissibility of Mr. Bin'Attash's statement. Certainly that is a central piece of evidence in this case.

I would love to know the answer of that prior to the commencement of voir dire. But, obviously, this commission is aware that the judge presiding over the charges related to Khallad Bin'Attash, Judge Schrama, has suppressed his statement and, in doing so, indicated he had evidence that this commission did not.

And so we have repeatedly asked the government who indicated -- I believe my recollection -- I'm sure I'll be corrected if I'm wrong -- is that we indicated we were going to file a motion to compel the WBA, the Walid Bin'Attash suite of litigation, as well as the closed arguments from Mohammad, et al, which I believe can be found at AE 631. And the government indicated that we do not need to file the motion to compel because they were voluntarily going to comply.

Very recently I have sent Commander Trivett a number of e-mails. One e-mail I sent went unanswered. Then I sent another

e-mail to which Commander Trivett indicated that, again, they intended to voluntarily provide that information. I have not received the pleadings, the classified pleadings or the closed hearing argument.

We did receive a couple of what I would consider to be extraneous in-court filings. One is a case that has been highlighted, and so we got the in-court submission of the case that was highlighted. And we received a picture from a book that I'm unfamiliar with. And then we received AE 631WWW that the government has invoked national security privilege over.

And so we are moving, at the commission's suggestion, for the discovery violation as a sanction for Khallad Bin'Attash's statement to be ruled inadmissible. And so now we have to go through the process of filing MFLOOT, which again, I would ask the commission if the goal is to get to trial ----

MJ [COL FITZGERALD]: We'll get to that. I know that's going to be asked. If you just stick to Part 3 ----

LDC [MS. MILLER]: Okay.

MJ [COL FITZGERALD]: ---- of your matter related to the flyer.

LDC [MS. MILLER]: So we're in the part of the process of filing a Motion for Leave to File Out of Time, a motion to reconsider the admissibility of -- no. It's not even a motion to reconsider. I

apologize, because at this point it is a motion to exclude Khallad Bin'Attash's statement as a sanction for the government's discovery violation.

And so until that is litigated, I don't think this member panel should be advised as to any of the charges, specifications, or the overt acts in the conspiracy that relate to Khallad Bin'Attash's statement or evidence derived from Khallad Bin'Attash.

MJ [COL FITZGERALD]: So as I understand, then, your -- the premise for the discovery request is in ruling on suppression of a statement by Khallad Bin'Attash, the judge of the other commission said he relied on matters -- I can't remember how you phrased it, matters that the Nashiri -- the al Nashiri team didn't rely on?

LDC [MS. MILLER]: You didn't have the benefit of, sir.

MJ [COL FITZGERALD]: Oh.

LDC [MS. MILLER]: And so Judge Schrama -- and I'm paraphrasing. I don't have the opinion in front of me, so ----

MJ [COL FITZGERALD]: That's a challenge for both of us.

LDC [MS. MILLER]: Please excuse that it's not a direct quote. But Judge Schrama said something to the extent of I'm relying on the evidence -- because my understanding is the government relied heavily on Your Honor's ruling in Mohammad, et al in saying this matter has already been litigated before Judge Fitzgerald and he has ruled Khallad Bin'Attash's statement admissible.

MJ [COL FITZGERALD]: In this ----

LDC [MS. MILLER]: In ----

MJ [COL FITZGERALD]: Just so I can be -- again, not being able to avail myself of that particular ruling -- and to be clear, I don't read Judge Schrama's rulings generally. He and I have not even had a brief hello in the last two months, so I have no other information other than what the parties give me. So I'm -- that's why I'm asking these questions, to make sure I understand it.

Was this ruling on a motion filed by the defense on behalf of Khalid -- Khallad Bin'Attash ----

LDC [MS. MILLER]: Yes, sir.

MJ [COL FITZGERALD]: ---- to suppress their own client's statement?

LDC [MS. MILLER]: Correct.

MJ [COL FITZGERALD]: Okay.

LDC [MS. MILLER]: And Khallad Bin'Attash made three statements ----

MJ [COL FITZGERALD]: That part I'm tracking.

LDC [MS. MILLER]: Okay.

MJ [COL FITZGERALD]: I just want to make sure I understand the context of -- he wasn't doing a derivative statement regarding any of the four -- I think there are five, correct me if I'm wrong -- five co-accused joined in that case.

LDC [MS. MILLER]: One has been severed, sir. So four co-accused.

MJ [COL FITZGERALD]: So ----

LDC [MS. MILLER]: Ramzi Binalshibh is ----

MJ [COL FITZGERALD]: ---- this was not filed by any of the other parties to suppress as derivative evidence the statement of Khallad Bin'Attash?

LDC [MS. MILLER]: That's correct.

MJ [COL FITZGERALD]: Okay. Thank you.

LDC [MS. MILLER]: But where I would distinguish -- and I think I know where the commission is going is ----

MJ [COL FITZGERALD]: I just don't know that. I wasn't necessarily going anywhere.

LDC [MS. MILLER]: Okay. Well, but, again, at this point we are asking the -- I heard the commission. I took very detailed notes. The commission denied our motion to continue. Lieutenant Colonel Nettinga outlined a number of discovery violations, and the commission interrupted Lieutenant Colonel Nettinga to say certainly a motion to continue is not the only remedy available to the defense. And so we heard you.

We received your order denying the motion to continue after 6:00 p.m. this past Friday. And so we spent all weekend listening to the commission and trying to file these motions. The earliest that

could be done to request a designator was this morning. And now we are being told we need to file Motions for Leave to File Out of Time all of these motions.

But at this point we're not talking about derivative evidence or the evidence of the actual perpetrator. We are talking about suppressing Khallad Bin'Attash's statement as a sanction for the discovery violation that the government has committed in repeatedly representing they were going to provide AE 631, the entire suite of litigation because Judge Schrama specifically said that in suppressing Mr. Bin'Attash's statement, he had evidence available to him that Your Honor did not have available to you.

So whether that relates to Khallad as the actual perpetrator or derivative evidence, I still think if there's evidence that the commission considered -- can I have a moment, sir?

MJ [COL FITZGERALD]: Briefly.

[Counsel conferred.]

LDC [MS. MILLER]: I appreciate the clarification from my colleague.

So there's more to it. Obviously, we've requested -- I'm sorry, sir. Are you ----

MJ [COL FITZGERALD]: One of your counsel has disappeared from the Remote Hearing Room, so...

I don't -- he has returned. I just looked and he was gone,

so I didn't know what happened. You may proceed.

LDC [MS. MILLER]: There's more to it. I apologize. I neglected to mention this.

So obviously we have asked the government for the AE 631 suite for Mohammad, et al., but there's also in our commission discovery was ordered in AE 120AA that the government has owed us for some time. And so the motion to exclude Khallad's statement doesn't just relate to AE 631 from another commission. It relates to pleadings filed in this commission.

And so, to be quite frank, Lieutenant Colonel Nettinga wrote it, is obviously more familiar with it than I am. What I know is that we are missing discovery that has been owed to us for a significant period of time. The commission said in lieu of a continuance, there were other available remedies. We are seeking as a sanction for the government's flagrant discovery violations an exclusion of Khallad Bin'Attash's statement, and I don't believe voir dire should begin because that could become a central feature of voir dire. And I don't think the member panel should be advised as to anything that relies on Khallad Bin'Attash's statement until that is litigated.

MJ [COL FITZGERALD]: And when you say that, is there language in any particular specification that you think, or are you just saying as a general concept that the charge exists because it's

solely based on derivative statements of Khallad Bin'Attash?

LDC [MS. MILLER]: There's a lot in the flyer, or the cleansed charge sheet, that relies on Khallad Bin'Attash's January 2007 statement ----

MJ [COL FITZGERALD]: Relies on but there's no -- just so I can be clear, there's no language in here that are statements of Khallad Bin'Attash in any of the specifications.

LDC [MS. MILLER]: If I could read his handwriting.

[Counsel conferred.]

LDC [MS. MILLER]: I got -- I got that. I got it. I got it.

If I don't have it, I will ask for a moment to confer with counsel.

It relates to the overt acts in the conspiracy. Some of them are very specific like Khallad Bin'Attash said X or this conversation happened between Khallad Bin'Attash and Abd al Rahim al Nashiri. So some are very clearly ----

MJ [COL FITZGERALD]: Okay.

LDC [MS. MILLER]: ---- things that are derived from Mr. Bin'Attash's statement.

MJ [COL FITZGERALD]: Just so I can be clear, there's no statement to excise from any specification.

LDC [MS. MILLER]: May I have a moment, sir?

MJ [COL FITZGERALD]: I've looked at them, I've read them,

I've studied them, and I don't remember anything that I would say that sounds like a statement from Khallad Bin'Attash.

[Counsel conferred.]

LDC [MS. MILLER]: The commission's understanding is correct.

MJ [COL FITZGERALD]: Okay.

LDC [MS. MILLER]: There's nothing that says "Khallad Bin'Attash says." However, there is very clear overt acts in the conspiracy that if you went through them, it relates to almost direct quotes from Khallad Bin'Attash's statement.

And so to elicit or to suggest or to provide those to the member panel, I mean, this is a hefty, I think we would agree, referral with nine charges, some having multiple specifications, all of the aliases, and now we are litigating as a sanction Khallad Bin'Attash's statement being excluded, the government's discovery violations, and we're putting the cart before the horse. We're going to tell the member panel that this is the information that my client's charged with, most of it, or a chunk of it, derived from Mr. Bin'Attash's statement, when that very well could be a sanction that the court imposes, and there is no way to unring that bell.

MJ [COL FITZGERALD]: Understood.

Commander Trivett? I point to you, but you -- you know you're free to defer to somebody else, so...

TC [CDR TRIVETT]: Yes, sir. I understand that.

So there is no open motion right now for a discovery violation against the United States in regard to Khallad Bin'Attash's statements. It is not accurate that we didn't turn over anything within AE 631. We turned over all of the unclassified stuff as soon as we could. We committed to turning over -- I'm going to slow down -- to turning over classified information. Your Honor indicated you wanted to make that a priority last week. We informed everyone to make it a priority. My understanding is it just came out of the data transfer process and that we are going to disclose that hopefully as early as today.

We do not concede that it's a discovery violation in any way. I can't speak intelligently on AE 120AA because I wasn't prepared to have to do that today because there is, again, no motion. It's always dangerous for the government when we're made to on the fly litigate discovery where we have to go through an archeological dig to explain what we did, what we had, and how many documents that we may have disclosed and why we believe we've satisfied our discovery obligation in that regard.

So the issue of Judge Schrama's ruling, I just want to make clear, is that this court owes the same level of deference to that opinion as he gave to yours. I know he said that he believes he had a greater record than you. I don't know what evidence he had of what record you had. We certainly didn't present what record you had.

The defense counsel didn't present what record you had.

And I would invite the commission to actually read the opinion, because it's primarily focused on conditions of Guantanamo and his determination that those conditions remained coercive even after they got to Guantanamo, as well as the lack of formal Miranda and the types of warnings that he believes were necessary to make the statement voluntary.

At the end of the day I believe Your Honor's opinion, looking at the record you had in front of you on Guantanamo and on whatever admonishments were provided from the FBI agents simply came to different conclusions.

So I would invite the commission to read that if you're considering whether or not there is actually any validity to the fact that they might not have had every single piece of evidence we ever turned over to Khallad Bin'Attash during the 12 years of pretrial litigation in 9/11, and say how would this change Judge Schrama's opinion based on the fact that he simply relied on GTMO being continued coercive.

Did not analyze in any way, like Your Honor did, the actual statements that Mr. Bin'Attash was making. We certainly argued them, all of the statements that he was making right before and then right after that first interview with Special Agent Gaudin and Special Agent McFadden.

So I believe you have all of the information that you needed to make your decision. I don't know why Judge Schrama believed that there was some level of record that you didn't have. They may have made more vociferous arguments but I don't know what he's referencing or what the evidence he has of that to begin with.

And it's not accurate to say that we relied heavily on what you argued -- or I'm sorry, what you ruled in your ruling but we did have your ruling prior to making the arguments this summer in 9/11. And it was in response to a Khallad Bin'Attash defense statement saying no court would ever admit such a statement. Like, they filed that, and they filed that after you had already ruled that the statement was voluntary in this case.

So we certainly called Judge Schrama's attention to it. We were going to play it straight up and just argue for the voluntariness. We think that the statements are over the top voluntary for Mr. Bin'Attash. That said, I made that argument to Judge Schrama. He didn't accept that argument. We stand by that argument, and we believe that that argument carried the day in this case, and that you should give him the same level of deference that he gave you in his opinion.

It's two judges looking -- looking at very similar evidence and coming out the other way, which happens from time to time in court systems.

So we don't concede that there is any discovery violation in regard to the -- to the suite of information we provided. We hope to have that to them today. We don't believe it's a central tenet to voir dire in any way. It's simply going to be part of the additional evidence that we use to prove our case in chief beyond a reasonable doubt.

I just want to check my notes, sir, and make sure I'm not missing anything.

[Pause.]

TC [CDR TRIVETT]: Subject to your questions, that's all I have.

MJ [COL FITZGERALD]: Just want to be clear, Commander Trivett, you are also counsel on that case?

TC [CDR TRIVETT]: Yes, sir.

MJ [COL FITZGERALD]: So you have that familiarity as well?

TC [CDR TRIVETT]: I argued it from this podium ----

MJ [COL FITZGERALD]: Just what I thought I understood you ----

TC [CDR TRIVETT]: ---- a couple months ago.

MJ [COL FITZGERALD]: ---- to be saying. Okay.

TC [CDR TRIVETT]: Yes, sir.

MJ [COL FITZGERALD]: I just want to make sure the record is clear ----

TC [CDR TRIVETT]: Yes, sir.

MJ [COL FITZGERALD]: ---- that I understand it and that's what you did say.

TC [CDR TRIVETT]: Yes, sir.

MJ [COL FITZGERALD]: So, okay. Thank you. I have no further questions other than that.

That is the three parts objection to the flyer.

LDC [MS. MILLER]: May I respond briefly, sir?

MJ [COL FITZGERALD]: Briefly.

LDC [MS. MILLER]: When the government says there's no pending motion before this commission to exclude Mr. Bin'Attash's statement, again, Your Honor ruled past business hours that the continuance motion was denied. I conferenced the government Saturday morning on all of the motions we intended to file and so the government has been well aware that we intended to seek a sanction for a discovery violation related to Khallad Bin'Attash since Saturday morning.

Secondly, I don't think the United States of America, particularly when it's the same prosecutor, gets to take contrary positions. And so I don't have the benefit of being ----

MJ [COL FITZGERALD]: I think I heard him say he took the same position in both cases.

LDC [MS. MILLER]: No. He just said you're not bound by Judge Schrama's order, yet ----

MJ [COL FITZGERALD]: No, two judges took contrary positions but ----

LDC [MS. MILLER]: Correct.

MJ [COL FITZGERALD]: ---- not -- not the government. The government argued for its submission and has to live with one judge's ruling that is just different from this court's ruling.

LDC [MS. MILLER]: If I could please finish, sir.

What Judge -- or, excuse me, what Commander Trivett just said was you owe Judge Schrama's order the same deference he gave yours. The United States of America did argue, in the course of the motion to suppress Khallad Bin'Attash's statement, that that matter had already been decided by Your Honor.

I don't have the benefit of being Matthew Engel. I don't have the benefit of having been there. I don't have the benefit of the closed transcripts or the classified pleadings. But what has been represented to me, to the extent that it could be, given that much of this happened in a classified setting, is that the United States of America, led by Commander Trivett, relied on Your Honor's ruling to some extent to argue to Judge Schrama that he should deny Mr. Bin'Attash's motion to suppress his statements.

And so now the government is in here saying you are not bound by Judge Schrama's decision or you owe it as much deference as he gave yours when they took a contrary position in front of Judge

Schrama.

And so I do not believe the United States of America, specifically the same prosecutor, can take a difference -- a different stance in front of one commission versus the other.

MJ [COL FITZGERALD]: Thank you.

Anything else? That should -- that concludes the three parts to your objection regarding the flyer.

[Counsel conferred.]

LDC [MS. MILLER]: I have nothing related to the flyer, sir.

MJ [COL FITZGERALD]: Okay.

LDC [MS. MILLER]: Any additional.

MJ [COL FITZGERALD]: What is your next matter?

LDC [MS. MILLER]: I have two objections to the proposed military judge voir dire. One is to question 20. And I appreciate that the commission took this question from the Benchbook, but I'm asking for a deviation, slight deviation.

20 reads: The accused has pled not guilty to all charges and specification and is presumed to be innocent until his guilt is established, which certainly suggests to me that his guilt being established is a foregone conclusion.

Later in these you say, "unless his guilt is established." And so I would ask that "until" be amended to "unless" is my first objection, sir.

MJ [COL FITZGERALD]: Government?

TC [CDR TRIVETT]: One second, Your Honor. I want to identify exactly where it is in your questions.

MJ [COL FITZGERALD]: Oh, I'm sorry. It was military judge question number 20.

TC [CDR TRIVETT]: I believe question 20 is a correct statement of the law. If it's consistent with how it's normally instructed when we have sailors and soldiers and Marines, that we would request no deviation.

LDC [MS. MILLER]: There's no harm or prejudice to the government to changing that to "unless." I mean, they -- there's no -- there's no conceivable argument that the government could posit that would prejudice them by making that "unless his guilt is established by legal and competent evidence."

To the contrary, there is prejudice to the defense because that question suggests that it is but a matter of time until his guilt is established. It's also inconsistent with later questioning instructions the commission gives. And so to ----

MJ [COL FITZGERALD]: Can you point to where that is?

LDC [MS. MILLER]: If I can have just a moment, sir?

MJ [COL FITZGERALD]: You may.

[Counsel conferred.]

LDC [MS. MILLER]: I believe it's in the closing instructions,

which I do not have before me.

[Pause.]

MJ [COL FITZGERALD]: The closing instructions given by the military judge to the -- to the members?

LDC [MS. MILLER]: Yes, sir.

MJ [COL FITZGERALD]: Okay. I'll take a look at that. Are you aware of any case law where anybody's, in particular, raised this issue with that instruction?

LDC [MS. MILLER]: Haven't even researched it, sir. I haven't had time.

MJ [COL FITZGERALD]: I would tell you I'm not. And after six and a half years on the bench, and serving with numerous members of the Military Benchbook Committee, I'm also not aware it's even been brought up informally or formally through the Benchbook Committee discussion.

But I'll take your question under advisement. I'd like to see the instruction you're comparing it to.

LDC [MS. MILLER]: I'll find it, too, sir.

MJ [COL FITZGERALD]: Don't worry. I'm not going to wait for it. I think I can find it pretty quickly. I just -- I don't have it on me and it's a pretty quick Control-F function. But thank you.

LDC [MS. MILLER]: Yes, sir.

MJ [COL FITZGERALD]. Is that it on that objection?

LDC [MS. MILLER]: That's it on objection to question 20.

MJ [COL FITZGERALD]: Your next objection?

LDC [MS. MILLER]: It's to question 35, sir. The first two full paragraphs: It is a ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime or crimes for which the accused to be sentenced if found guilty. And what that means, member -- members, is that you believe that the commission of crime X must always result in crime Y.

My argument is that the commission is either telling these members how to get on the jury by not answering. This would be a cause -- I read that as -- let me start over.

This would be a cause challenge that would excuse you from service in this commission. And so you are either instructing these members how to get off or how to get out of service as a prospective member of this panel by giving that information. You -- I've never -- as many state courts as I've practiced in, in federal jurisdictions, I have never seen a commission or a court define to the jury what would constitute being a cause challenge ostensibly.

And so you're either telling people how to get off. Or if people want to get on to convict my client and kill him, you are telling them how to not answer the question in such a way that could result in them being excused for cause.

And so I think those two paragraphs are inappropriate and put the thumb on the scale in favor of both conviction and capital punishment, which SCOTUS has talked about on a number of occasions being impermissible, and I'd ask that those two paragraphs -- I don't think they're necessary. I don't think they inform the commission as to these members' ability to be fair and impartial.

MJ [COL FITZGERALD]: And I can't speak to maybe any analog in federal or state court, but you did provide me three binders of voir dire and challenge case law. And a lot of the cases talk about the unique nature of a military panel in -- in discussing challenges, both actual and implied, and about the concept of inelasticity in, you know, members. So giving them that explanation, you're saying, reads as an instruction the way it's written?

LDC [MS. MILLER]: Yes, sir. That is what I am saying.

I agree that's the standard that's set in military court. And I think that's going to be, probably, a tension that we butt up against throughout the course of this trial, is that the commission defers to courts-martial. This is not a court-martial.

MJ [COL FITZGERALD]: I'm aware of it. That's why I said you gave me a bunch of case law. And most of it in the military setting, this instruction seems to go to that concept of inelastic predisposition for actual and implied bias challenges. So it seems that's where it's drawn from.

LDC [MS. MILLER]: I understand where the commission draws it from. I think that in an abundance of caution we attempted to give the commission a fulsome read of case law that would support our position, both from the military, since the commission tends to defer to it, as well as from the D.C. Circuit and the United States Supreme Court, which I think is actually binding on this commission.

MJ [COL FITZGERALD]: Well ----

LDC [MS. MILLER]: And so ----

MJ [COL FITZGERALD]: Was there any other case law -- I can't think of -- you gave me the binders and I reviewed it. I couldn't -- I can't contemplate any case in there that spoke to this particular issue.

LDC [MS. MILLER]: And I was told you weren't going to review the binders unless we drew the commission to ----

MJ [COL FITZGERALD]: Oh. I don't know who told you that. You gave them to me, so ----

LDC [MS. MILLER]: Your attorney, sir.

MJ [COL FITZGERALD]: My apologies that there may be some confusion. Probably what they wanted you to be aware of ----

[Counsel conferred.]

LDC [MS. MILLER]: Sorry. May I have one more second, sir?

[Counsel conferred.]

LDC [MS. MILLER]: You're going to administer an oath to these

prospective members. And the first part of that oath, which I would argue pertains particularly when they're prospective panel members in the voir dire process is: Do you swear or affirm that you will answer truthfully the questions concerning whether you should serve as a member of this military commission.

There's a case that was provided to Your Honor, U.S. v. Webster, found at 102 F.4th 471 from the D.C. Circuit from 2024 that say: Steps that encourage candor strengthen the voir dire process.

And I don't think that anyone's disputing that. But when you're giving an instruction to people that says, if you have an inelastic view, you cannot serve as a juror -- and I don't want to paraphrase. I do want to quote: It is a ground for -- it is a ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment.

All of these prospective member panels are commissioned officers in the military who will take very seriously the instruction and orders of this commission. And so when you are saying that it is a ground for challenge to your service, your inability to serve this mission if you have an inelastic predisposition, you are discouraging candor to this commission.

And so I would argue that the goal here is to find out how these jurors, how these prospective panel members feel about particular punishments without the commission saying: If you answer

this way, you will be challenged for cause.

And I am not aware of ever, in any single case, where a court has instructed a prospective juror that this would be a way for you to be excused or this would be a reason for you to be excused. And so that's why we're asking for those two paragraphs to be omitted, sir.

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

TC [CDR TRIVETT]: Yes, sir. We believe they should remain in. It's part of the military judge's capital Benchbook. We don't believe it's improper in any way to ask them or to inform them, consistent with, you know, Rule 912 in regard to a challenge of selection of members.

These are the rules set forth for challenges for cause. The rules for the death penalty provisions within military commissions are based on the same ones that are in courts-martial. We just had a final approved death warrant in a case that was tried in 2009. We see no reason to deviate in any way from what's in the Benchbook.

MJ [COL FITZGERALD]: Very well. Thank you.

Ms. Miller? Do you want to respond or are you ready to move to your next objection?

LDC [MS. MILLER]: I mean, to the extent they're relying on the Hasan case, that is being challenged in federal court. And again, I just -- I find it disingenuous to say ----

MJ [COL FITZGERALD]: Is it being challenged on that issue? I don't know ----

LDC [MS. MILLER]: It's going to be challenged on a bevy of issues. I don't know that the federal habeas has been filed at this point, sir.

It is my understanding in military justice that you cannot raise an objection in federal court until the government sets the date for your execution. So we suspect his lawyers will argue vigorously in federal court on his behalf. But I think ----

MJ [COL FITZGERALD]: But it wasn't objected in the previous courts that have concluded their appellate review?

LDC [MS. MILLER]: I don't know, sir. But my primary point, though, is I don't know how the government can say with a straight face it is a ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment and then it goes on to say is: What that means, members, is that you believe that the commission of crime X must always result in punishment Y.

There are plenty of people, justifiably so, that believe if you take a life, your life should be taken. We hear "an eye for an eye" all the time. And what that instruction tells those people is that their view invalidates them from service as a prospective -- or as an actual panel member in this case.

And, again, your job is to -- is to ferret out whether these people can be fair and impartial, not because they say they can be fair and impartial, but based on the totality of their answers.

And so it doesn't help the commission to ferret out what the truth is, the prospective members' ability to be fair and impartial, to tell them that if they think one thing means the punishment must be this is disqualifying.

MJ [COL FITZGERALD]: Thank you.

Any other objections or -- I'm sorry. You sat down, so I believe you're concluded with objection to question number 35?

LDC [MS. MILLER]: That's correct, sir.

MJ [COL FITZGERALD]: Any other objections?

LDC [MS. MILLER]: Not to your questions but I have other objections to raise, sir.

MJ [COL FITZGERALD]: All right. Your next objection? I'm going to take these under advisement, so -- we'll get them resolved. I'm not going to hold them in abeyance for any length of time, but I'd like to know all the objections.

LDC [MS. MILLER]: Certainly we're still objecting to proceeding based on all of the grounds that were laid out in AE 732, the motion to continue. I appreciate the commission has already ruled, and I'm not attempting to relitigate it, but I want an objection to be on the record to proceeding this morning.

I also want to ----

MJ [COL FITZGERALD]: So, just so I can be clear, I've ruled on the motion to continue, so you're objecting to proceeding on the grounds for which I denied your motion to continue.

LDC [MS. MILLER]: I am. I -- in an effort to make sure that issue is preserved, because I've been burned on this before, I think it is prudent of me to say before we bring in the member panel, I object, I'm not prepared. I am stipulating that I will be ineffective in my counsel of Mr. Nashiri and that it will harm him and prejudice the outcome in this case.

MJ [COL FITZGERALD]: Very well.

LDC [MS. MILLER]: And -- but I did want to say to you, sir, because I think part of the commission's response to the defense's argument was that we were here two business days before the commencement of trial, and why didn't we tell you back in -- back in April, I believe, when you granted ----

MJ [COL FITZGERALD]: It seems you're trying to relitigate that motion.

LDC [MS. MILLER]: I'm not. What I'm -- I'm telling the commission is I'm at a crossroads and that I am trying to meet the commission's order to proceed this morning with voir dire of these prospective panel members.

I also am a member the Florida Bar, as is Ms. Manuele, which

has very strict rules as to what is necessary to provide in particular thorough and prepared representation. And if counsel cannot provide that thorough and prepared representation, mandatory requirements for withdrawal.

I do not want to withdraw from this case, sir. I want to try it, preferably when I'm prepared to do so. And so I am trying to meet the commission's orders and also follow my ethical obligations as a member the Florida Bar, but, most importantly, my ethical obligations to Mr. al Nashiri.

And so I am not waiving any of my prior objections to proceeding this morning. But, I also should say I haven't had an opportunity to discuss with Mr. al Nashiri what any of this means, what the prospect of withdrawal would mean should the commission grant it or not ----

MJ [COL FITZGERALD]: I just want to interrupt, because it appears you're objecting to continuing on, but now you're discussing withdrawal which would be something different.

LDC [MS. MILLER]: Again, I'm not moving to withdraw. I am trying to forecast for the commission so that there is no argument that we're taking the commission by surprise.

What I am suggesting, without waiving any prior arguments -- again, I want to make the comission as aware of information as I possess it -- is that, again, in trying to meet the

commission's order and my ethical obligations -- again, I'm not waiving any prior objections, but I am prepared to go forward with voir dire this morning, still subject to all the objections we raised in AE 732 and we've raised this morning.

What I'm asking the commission to remain open-minded to or to consider is that we will be filing a motion to prolong the period from the impanelment of the jury to the commencement of merits.

So in your order you said no less than 14 days, I believe, sir, and so what I wanted ----

MJ [COL FITZGERALD]: 14 days from impanelment?

LDC [MS. MILLER]: Yes, sir.

MJ [COL FITZGERALD]: I don't have it in front of me, but I believe that was my order.

LDC [MS. MILLER]: Yes, sir.

MJ [COL FITZGERALD]: No less than to be -- it wasn't a hard -- we agree it wasn't a hard-fast 14 days. It was no less than 14 days.

LDC [MS. MILLER]: I'm looking at my colleague. Yes, sir.

MJ [COL FITZGERALD]: Okay.

LDC [MS. MILLER]: And so what I wanted to forecast to the commission is that -- again, not waiving any prior objections, but I am prepared to start voir dire.

What I am going to ask of the commission at some

point -- and so the government and the commission are on notice -- is to extend that period of time well past 14 days to allow from impanelment. And so then we don't have 200-plus people waiting around, we have 18.

But I wanted to let the commission know that, again, in my efforts to fulfill my duty to this commission, as well as to my client, and my ethical obligations as a member the Florida Bar, I'm ready to start voir dire. But I would ask the commission to at least remain open-minded about the prospect of a lengthier continuance between the impanelment and the beginning of the merits phase so that we can attempt to be prepared to meet the government's evidence and merits.

MJ [COL FITZGERALD]: Well, I'm not sure if you're inviting discussion, but I'll certainly provide it because I don't think the government necessarily needs to be heard.

I think the standard I've tried to set -- and it maybe doesn't always come across -- that I always say take a moment to confer with counsel, opposing counsel, and then come to me with anything that you're at an impasse.

And so that's my -- that was always my attempt to always be open-minded to anything, that I wanted the parties to see if they could work things out, and then only come to me if they have an impasse. That's the nature of motions practice.

Is that what you mean, or are you asking something different from my open-mindedness?

LDC [MS. MILLER]: Well, I ----

MJ [COL FITZGERALD]: I don't have a motion before me is why ----

LDC [MS. MILLER]: That's true. Again, because we had a conversation about surprise, and that was part of the comission's order, is I wanted to make sure that everybody was on notice that we are going to go forward pursuant to the comission's order with voir dire this morning, subject to all our objections.

However, we are going to be asking the commission at some point to grant a lengthier break between the impanelment of this jury and the beginning of merits.

MJ [COL FITZGERALD]: Okay.

LDC [MS. MILLER]: I certainly hope the government agrees. I -- maybe I am a pessimist, but I don't remain optimistic on that one.

MJ [COL FITZGERALD]: Well, I asked you not to be a pessimist. And I asked you to keep in mind that I think that's why I wanted to be clear. I think I said no earlier than 14 days. That was to give the government notice so they could start informing witnesses: Here's the earliest we would expect to go, unless the judge says otherwise.

So I think that's the flexibility I did allow for. So I'll leave it at that since I don't have a motion in front of me, that I think I've done everything I can to posture. I'm aware circumstances, events, for both sides, logistics, weather, geopolitical events may cause delays that I can do nothing about.

So I just want to be clear when you ask me to be open-minded, I think I have been and I've set in place rules going forward that provide for that open-mindedness. So it's there. It's available to you.

LDC [MS. MILLER]: Thank you, sir. I just, again, wanted to make sure everyone was on the same page.

And then lastly, I am going to ----

MJ [COL FITZGERALD]: So can I go back to just -- I just want to ----

LDC [MS. MILLER]: I need to ask the commission to take a recess for Mr. al Nashiri.

MJ [COL FITZGERALD]: That's what I was going to ask for.

LDC [MS. MILLER]: He needs to use the restroom to come back.

MJ [COL FITZGERALD]: Okay. I wanted a comfort break as well. And I think what I'd like to do is send the panel away until 1300 as well. They're here in the facility and sitting in ----

LDC [MS. MILLER]: Fine with the defense, sir.

MJ [COL FITZGERALD]: Okay. Any objection from the

government?

TC [CDR TRIVETT]: We defer to you, sir.

MJ [COL FITZGERALD]: All right. Well, thank you.

I'm trying to make sure. I have to put everything on the record because this bailiff is going to inform handlers. So I -- that's why I want to make sure I say it on the record.

So I'm going to release the members until 1300 so we can resolve these issues. There's nothing else to tell the members other than they are not to be -- they are not needed here until any earlier than 1300.

So whoever you've got to pass that information on to, Bailiff.

LDC [MS. MILLER]: And I know that we need to take a recess. My last question was: Would the commission authorize us to file our motions without filing a motion for leave to file out of time?

MJ [COL FITZGERALD]: Yeah. I think there's some back-and-forth that I -- when we come back from this recess, I will lay out my expectations to be clear.

What I'm worried about is the telephone game, which I think was part of the issue with where the chiefs of your respective offices could be. The motion you filed was -- it seemed to suggest I banned them from the well in perpetuity, which I didn't. So I want to be clear you hear it from me on the record my expectations,

because I don't think you have them yet. So we'll take that up in 15 minutes.

The commission is in recess until 1036.

[The R.M.C. 803 session recessed at 1021, 2 November 2026.]

[The R.M.C. 803 session was called to order at 1048, 2 November 2026.]

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

All parties present before the last recess are again present.

I'd asked the defense briefly before we came on the record if they had completed the objections they wanted to raise and they informed me they have.

We still need to take up the issue of forthcoming motions and how I'm going to address that, and the government also wanted to be heard.

Can we take up the government's matter first?

Commander Trivett.

TC [CDR TRIVETT]: Yes, sir. So we have people back in our trailer researching the record, but when the accused was arraigned, which is at transcript page 51, he deferred pleas at that time. And then on 4 June 2026, the defense filed a notice of intended pleas, but it looks like, at least from what we can tell, there was no formal entry of plea.

So we wanted to raise that to the commission.

MJ [COL FITZGERALD]: I stand corrected. Very well.

So that may be where we were at a gap of understanding, so...

LDC [MS. MILLER]: Correct. And that's what -- my understanding but not as clearly articulated as Commander Trivett was that we did defer because Rule 9- -- R.M.C. 905 says: Prior to the formal entry of a plea the motions have to be filed.

MJ [COL FITZGERALD]: So we still need to take that up?

LDC [MS. MILLER]: Yes, sir.

MJ [COL FITZGERALD]: Okay. I presume they're not going to change. Is that something -- to be candid, I did not prepare that part of the script, so I want to make sure I get it accurate. It's a pretty simple part of the script but is that something we can take up prior to calling the members at 1300?

LDC [MS. MILLER]: I'm going to not enter a plea. So if Your Honor asks me, I'm going to say I'm deferring entering the plea until we have the opportunity to file the motions that need to be filed prior to the entry of the plea pursuant to R.M.C. 905.

MJ [COL FITZGERALD]: I think I'll address that by -- I'm granting you -- your request to file those motions, because I've been operating under the belief that you had already entered pleas anyway. So that's not the impasse. I promise. Does that make sense? You're

not going to file ----

LDC [MS. MILLER]: Yes.

MJ [COL FITZGERALD]: ---- to have this commission say, sorry, you're late, you've already entered pleas. So I don't intend to do that.

LDC [MS. MILLER]: As long as we're on the same page on that one.

MJ [COL FITZGERALD]: It was this court's misapprehension I think because we've had so many discussions about not pleading to any of the charges specifications that I just presumed and it was wrong for me to presume. I had one note that pleas were entered and I probably clearly wrote that note inaccurately. I think I was basing it on the notice, not -- that was obviously a judge's well before me.

So, okay. I will take that up prior to calling the members at 1300.

LDC [MS. MILLER]: Understood, sir.

MJ [COL FITZGERALD]: And I intend to do it similar to the Benchbook because I want you to have the opportunity to advise Mr. al Nashiri that that's coming. And in all these years ----

LDC [MS. MILLER]: Understood, sir.

MJ [COL FITZGERALD]: ---- he had -- nobody's advised of him of that, so...

LDC [MS. MILLER]: No one has advised him of that, sir.

MJ [COL FITZGERALD]: Okay. So thank you, Commander Trivett. It's good probably that we had this discussion to avoid that issue.

Let me try to take up these issues one at a time.

LDC [MS. MILLER]: Before you do that, may I ask one question?

MJ [COL FITZGERALD]: Yes, ma'am.

LDC [MS. MILLER]: It sounded like you were allowing us to file the motions without filing the Motion for Leave Out of Time?

MJ [COL FITZGERALD]: I'll just -- you're waiting with bated breath on how I was going to proceed.

LDC [MS. MILLER]: Well, I was going to have -- right, I was going ----

MJ [COL FITZGERALD]: At least Colonel Nettinga is. And I understand it. So I understand the system we've had has worked well for 15 years, but I think, to use the Clausewitz phrase, "the fog of war," as we approach a trial time and things are happening in rapid succession that there's a dialogue that keeps happening between counsel and my staff and there's some inconsistencies and I don't want to assign blame or responsibility to anybody.

So here's what I'm telling you, as I understand it, and so that my staff understands it: The time for motions has passed pursuant to pretrial order. In going forward, I'm treating every motion as if it's out of time. But you do not have to file a separate motion for leave to explain why you want to file the motion.

But I would ask that you state your good-cause basis as to why this motion is out of time. It seems on the matters we've discussed, you have a basis for why you filed it out of time.

But I'm granting you that but I can still take up whether -- and the government can take up in their response, because they now see your rationale for why you believe they have good cause, they can take it up in any response to why they think this matter was already resolved in another motion, or why I shouldn't take it up. So that's what I'm asking. File it, but in the -- in the early portion of your filing explain to me why I'm receiving this now after the time to file motions.

That's it. Simple enough?

LDC [MS. MILLER]: Yes, sir.

MJ [COL FITZGERALD]: Okay. And the same goes for the government as well. And if you -- because, obviously, I would take that up, whether I agree if the government objected to it or if the commission found that it's out of time, I can at least go by your rationale if I don't believe I need to get to the substantive issues.

Okay. That being resolved...

First, I'll take up the objections related to the flyer.

As a general principle, the flyer, or as the Navy Marine Corps refers to it as the cleansed charge sheet, is the final official document listing the charges and specifications the members

will consider as -- as the commission's -- I'm sorry. I'll start over because I should have spoken slower for our interpreters.

The flyer, or as the Navy Marine Corps refers to it, the cleansed charge sheet, is the final official document listing the charges and specifications the members will consider as this commission's fact-finder and, if applicable, sentencing. It accounts for all amendments to the military commission Form 458, which is the initial formal charge sheet. As such, this court does not apply a 401, 402, or 403 analysis to that.

There are procedures in place if the flyer needs to be amended, for example, if charges are dismissed or other exceptions and substitutions accounting for amendments or changes to the charge sheet can be addressed with the members who will be given instruction not to consider anything no longer before them as the fact-finder. And the court will rely on the precedents in those procedures for resolving those type of matters.

Having heard both from the defense and the government, the court overrules the objections as to the three matters raised by the defense with respect to the final charge sheet, now referred to as the flyer or cleansed charge sheet. The flyer is trial-ready to present to the assembled members.

With respect to question number 20 -- and although the parties didn't give it to me, I take the moment to read the

Merriam-Webster dictionary definitions for "unless" and "until." The defense's objection is to the use of the word "until," which Merriam-Webster defines as: Until indicates continuance to a specified time. It marks how long a situation lasts before stopping or changing at a precise moment.

The definition of "unless" in Merriam-Webster states that: Unless is a conjunction, meaning except on the condition that or if not. It is used to introduce a requirement or an exception that changes the outcome of a situation.

To avoid any confusion, the commission sustains that objection and will amend the script to use the word "unless" in place of the word "until," and will certainly pass that recommendation on to the Military Benchbook Committee as well.

With respect to the defense objection to question 35 of the military judge's questions for members, the commission gave great consideration to the concerns raised by the defense that in their interpretation and reading is that providing that instruction and definition to the members discourages candor.

The commission finds, by past practice and the nature of the voir dire and the intention of the parties to conduct vigorous voir dire and the defense's position that they intend to conduct vigorous individual voir dire of every member -- I think I captured that accurately -- the members know they're under oath to answer

honestly. And any discouragement of candor, which the court finds would be minimal if -- to the members taking anything I'm saying as a discourage or an encourage, discouragement or encouragement of how they should respond to that question, but that any reading similar to how the defense reads is best cured through ensuring the vigorous individual voir dire practice of the parties. The case law is replete with lengthy discussions about multiple members and their inelasticity or elasticity in how they predispose sentence.

So that objection is overruled. And the commission will provide it as written into the procedural guideline or script that I have provided to the parties.

Have I answered all your objections, Ms. Miller? Is there anything you need clarity on?

LDC [MS. MILLER]: Yes. The only thing I wanted to clarify is your order that we went back and forth about impanelment and the start of the government's case in chief says within 14 days.

MJ [COL FITZGERALD]: Does it really? I did not go back and read that. I don't disagree with you.

LDC [MS. MILLER]: I'm glad that was your reaction.

MJ [COL FITZGERALD]: I believed I -- my intent was to read that expansive, not restrictive. It may have been because at the time I wrote that I wasn't concerned about holidays and things like that.

So I'm being very clear and candid to you. My intention is to be expansive, if necessary, because situations and circumstances may require it and so the parties should go forward. I still invite you to speak to the government and present any impasse to me.

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

MJ [COL FITZGERALD]: Thank you for that clarification.

Anything else?

[Counsel conferred.]

LDC [MS. MILLER]: Nothing from the defense, sir.

MJ [COL FITZGERALD]: Anything else from the government?

TC [CDR TRIVETT]: No, sir.

MJ [COL FITZGERALD]: So if I understand correctly, then at 1300 I will take Mr. al Nashiri's pleas. So you have the next two hours to advise him of that. And then I will call the members in for assembly.

Is that where we're at?

TC [CDR TRIVETT]: Government believes so, sir.

LDC [MS. MILLER]: I believe so as well.

MJ [COL FITZGERALD]: There's some hesitation which I'm concerned about, because I'd like to recess until 1300 if there isn't.

LDC [MS. MILLER]: I think that's where we're at. Still objecting to proceeding.

MJ [COL FITZGERALD]: Objection noted. But we are still proceeding.

Then this commission is in recess until 1300.

[The R.M.C. 803 session recessed at 1102, 2 November 2026.]

[The R.M.C. 803 session was called to order at 1306, 2 November 2026.]

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

All parties present before the last recess are again present.

Prior to continuing on, I'd like to discuss what was brought up off the record with counsel, with government present. It started with asking if Mr. al Nashiri's attorneys had an opportunity to explain to Mr. al Nashiri that -- because pleas had never been entered that that will be the first thing I take up, which led to a discussion of the requirements of R.M.C. 905, essentially that all motions must be submitted prior to entry of pleas. And the defense, for lack of a better term, wanted assurances this was not -- that rule was not a bar for them to submit motions that they'd already discussed with the commission that they intended to file.

My explanation was entry of pleas is no longer -- not no longer -- is not a bar to filing the motions discussed in this session and I think probably going back to the previous session they have leave of court to do so. Any other motions not discussed, we

will need to take up whether they are barred by the entry of plea.

Is that your understanding? It's not, apparently.

LDC [MS. MILLER]: I thought that R.M.C. 905 was not going to be used as a bar to filing any motions going forward. We would have to establish good cause for why they were out of time ----

MJ [COL FITZGERALD]: Okay.

LDC [MS. MILLER]: ---- but I didn't think it would be 905 because we've tendered a plea.

So we have obviously contemplated some motions. We've sought designators from your office. There may be additional motions ----

MJ [COL FITZGERALD]: They're not time barred by the rule but they may be barred if there's no good cause. Is that our agreement? Or understanding, not agreement. You don't have to agree.

LDC [MS. MILLER]: I have to -- right, I have to establish good cause as to why they're being filed when they are.

MJ [COL FITZGERALD]: And what I've asked is that you preemptively tell me you have good cause for the filing so the government doesn't stand on that procedural basis and then I just send it back to you to tell me the good cause. We're just trying to bypass that so that -- but the government can articulate their position both procedurally and substantively.

LDC [MS. MILLER]: That I agree with.

MJ [COL FITZGERALD]: Sorry. I probably said that very inartfully. That is our understanding.

Government, is that your understanding now as well?

TC [CDR TRIVETT]: That is our understanding, sir.

MJ [COL FITZGERALD]: Okay, very well.

And then the further discussion was to make sure prior to enter of pleas is the defense has initially said they weren't going to enter pleas but now I understand it was because they were concerned about the time bar of R.M.C. 905.

I've eliminated that as the concern and Ms. Miller advised me that she has spoken to Mr. al Nashiri, is ready to enter pleas?

LDC [MS. MILLER]: Yes, sir.

MJ [COL FITZGERALD]: Okay. Very well.

The accused and defense counsel, please rise.

[All persons did as directed.]

MJ [COL FITZGERALD]: Mr. al Nashiri, how do you plead? Your defense counsel, Ms. Miller, will speak for you.

LDC [MS. MILLER]: Not guilty.

MJ [COL FITZGERALD]: To clarify, when you say not guilty, do you mean to all charges and their specifications, not guilty?

LDC [MS. MILLER]: Yes, sir. And I do want to be clear. Mr. al Nashiri has a very limited understanding of these charges and it is his firm belief that the first time he's been advised of the

charges was in the lunch break today.

So given that, I am tendering not guilty pleas to all charges and the specifications on his behalf.

MJ [COL FITZGERALD]: Thank you. You may be seated.

[All persons did as directed.]

MJ [COL FITZGERALD]: Start with the Government.

Government, anything else before we call the members?

TC [CDR TRIVETT]: No, sir.

MJ [COL FITZGERALD]: Defense, anything else before we call the members?

LDC [MS. MILLER]: We continue to object, but nothing further.

MJ [COL FITZGERALD]: Very well. Your objection is noted.

Bailiff, please call the members.

[The R.M.C. 803 session recessed at 1310, 2 November 2026.]

[The military commission was called to order at 1312, 2 November 2026.]

[Panel Members entered the courtroom.]

MJ [COL FITZGERALD]: The court is called to order.

TC [CDR TRIVETT]: This commission is convened by Military Commission Convening Order Number 11-02, Office of Military Commissions, Office of the Convening Authority, dated 28 September 2011, as amended by Military Commission Convening Order 25-01, dated 14 October 2025; as further amended by Military

Commission Convening Order 26-01, dated 13 April 2026; as further amended by Military Commission Convening Order 26-02, dated 22 September 2026; as further amended by Military Commission Convening Order 27-01, dated 16 October 2026; and as finally amended by Military Commission Convening Order 27-02, dated 1 November 2026, copies of which have been furnished to each member of the commission.

The accused and the following persons detailed to this commission are present:

Colonel Matthew Fitzgerald, Military Judge.

Trial Counsel, myself, Commander Clayton Trivett; Colonel (Retired) John Wells; Commander Brandon Sargent, JAG Corps, U.S. Navy; Lieutenant Colonel Michael Ross, Judge Advocate, United States Army; and Major Kaylyn Krzemien, U.S. Marine Corps.

The defense counsel currently present are: Ms. Allison Ferber Miller, Learned Counsel; Lieutenant Colonel Joshua P. Nettinga, U.S. Air Force; Ms. Jessica Manuele, Defense Counsel; Commander Matthew Bartholomaus, JAG Corps, U.S. Navy; Lieutenant Benjamin Shaver, JAG Corps, U.S. Navy; and Mr. Casey Secor, Defense Counsel.

As to the commission members, everyone other than the first 18 members listed as either primary or alternate members on Military Commission Convening Order 27-02 are absent. All others are present.

The prosecution is ready to proceed with trial in this case

of the United States v. Abd al Rahim Hussayn Muhammad al Nashiri.

MJ [COL FITZGERALD]: The members of the court will now be sworn. All persons in the courtroom, please rise.

[Panel members sworn.]

TC [CDR TRIVETT]: Affirmative response, all members.

MJ [COL FITZGERALD]: Please be seated.

[Panel members did as directed.]

MJ [COL FITZGERALD]: The court is assembled.

Members of the commission, it is appropriate that I give you some preliminary instructions.

My duty as the military judge is to ensure that this trial is conducted in a fair, orderly, and impartial manner in accordance with the law. I preside over all sessions, rule upon objections, and instruct you on the law applicable to this case.

You are required to follow my instructions on the law and may not consult any other source as to the law pertaining to this case unless it is admitted into evidence. This rule applies throughout the trial, including closed sessions and periods of recess or adjournment. Any questions you have of me should be asked in open court.

As court members, it is your duty to hear the evidence and determine whether the accused is guilty or not guilty and, if you find him guilty, to adjudge an appropriate sentence.

Under the law, the accused is presumed to be innocent of the offenses. The government has the burden of proving the accused's guilt by legal and competent evidence beyond a reasonable doubt.

A reasonable doubt is an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must exclude every fair and reasonable hypothesis of the evidence except that of guilt.

The fact that charges have been preferred against this accused and referred to this commission for trial does not permit any inference of guilt.

You must determine whether the accused is guilty or not guilty based solely upon the evidence presented here in court and upon the instructions I will give you.

Because you cannot properly make that determination until you have heard all of the evidence and received the instructions, it is of vital importance that you keep an open mind until all of the evidence has been presented and the instructions have been given.

I will instruct you fully before you begin your deliberations. I may repeat some of the instructions which I will give now or possibly during the trial.

Bear in mind that all of these instructions are designed to assist you in the performance of your duties as court members.

The final determination as to the weight of the evidence and the credibility of the witness -- witnesses in this case rests solely upon you. You have the duty to determine the believability of the witnesses.

In performing this duty, you must consider each witness' intelligence and ability to observe and accurately remember in addition to the witness' sincerity and conduct in court, friendships, prejudices, and character for truthfulness.

Consider also the extent to which each witness is either supported or contradicted by other evidence, the relationship each witness may have with either side, and how each witness might be affected by the verdict.

In weighing a discrepancy by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate lie.

Taking all of these matters into account, you should then consider the probability of each witness' testimony and the inclination of the witness to tell the truth.

The believability of each witness' testimony should be your guide in evaluating testimony rather than the number of witnesses called.

Counsel will soon be given an opportunity to ask you questions and exercise challenges.

With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a member of this commission, you must disclose that matter when asked to do so.

Bear in mind that any statement you should -- let me start over.

Bear in mind that any statement you make should be made in general terms so as not to disqualify other members who hear the statement.

Any matter that might affect your impartiality is a ground for challenge.

Some of the grounds for challenge would be if you were the accuser in the case, if you had been an investigating or preliminary hearing officer as to any offense charged, if you had formed or expressed an opinion as to the guilt or innocence of the accused.

To determine if any grounds for challenge exist, counsel for both sides are given an opportunity to question you. These questions are not intended to embarrass you. They are not an attack upon your integrity. They are asked merely to determine whether a basis for challenge exists.

If at any time after answering these questions you realize that any of your answers were incorrect, you recognize a witness

whose name you did not previously recognize, or you think of any matter that might affect your impartiality, you have a continuing duty to bring that to the attention of the court.

You do that simply by raising your hand and stating only that you have an issue to discuss with the court. I will then follow up with you individually as necessary.

It is of no adverse reflection upon a member to be excused from the commission.

You may be questioned either individually or collectively, but in either event, you should indicate an individual response to the question asked.

Unless I indicate otherwise, you are required to answer all questions.

You must keep an open mind throughout the trial.

You must impartially hear the evidence, the instructions on the law, and only when you are in your closed-session deliberations may you properly make a determination as to whether the accused is guilty or not guilty or, as to an appropriate sentence if the accused is found guilty of any offense.

With regard to sentencing, should that become necessary, you may not have any preconceived idea or formula as to either the type or the amount of punishment which should be imposed if the accused were to be convicted.

Counsel are given an opportunity to question all witnesses. When counsel are finished, if you feel there are questions you should -- that should be asked, you will be given an opportunity to do so prior to any witness being permanently excused.

The way we handle this is to require you to write out the question and place your identifier number legibly at the bottom. This method gives counsel for both sides and me an opportunity to review the questions before they are asked since your questions, like the question of counsel, are subject to objection.

There will be forms provided for your use if you desire to question any witness. I will conduct any needed examination.

There are a couple of things you need to keep in mind with regard to questioning.

First, you cannot attempt to help either the government or the defense.

Second, counsel may have interviewed the witnesses and know more about the case than we do. Very often they do not ask what may appear to us to be an obvious question because they are aware that this particular witness has no knowledge on the subject.

Rules of Evidence control what can be received into evidence. As I indicated, questions of witnesses are subject to objection. During the trial, when I sustain an objection, disregard the question and answer. If I overrule an objection, you may

consider both the question and answer.

Until you close to deliberate, you may not discuss this court-martial -- I'm sorry -- this commission with anyone, even amongst yourselves.

You must wait until you are all together in your closed-session deliberations so that all panel members have the benefit of your discussion.

During the course of the trial, including all periods of recess and adjournment, you must not communicate with anyone about the case, either in person or by e-mail, blog, text message, or any form of social media.

Posting information about the case on a Facebook page, for example, is considered a form of communicating about this case.

You must also not listen to or read any accounts of the case or visit the scene of any incident alleged in the specifications or mentioned during the trial.

Do not consult any source of law or information, written or otherwise, as to any matters involved in this case, and do not conduct your own investigation or research. For example, you cannot consult the Manual for Courts-Martial or the Manual for Commissions, dictionaries, or reference materials, search the Internet, Google the witnesses to learn more about them, review a Wikipedia entry, or consult a map or satellite picture to learn more about the alleged

crime scene.

During any recess or adjournment, you must also avoid contact with witnesses or potential witnesses in this case, counsel in this case, and the accused.

If anyone attempts to discuss this case or communicate with you during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session.

I may not repeat these matters to you before every recess or adjournment but keep them in mind throughout the trial.

We will try to estimate the time needed for recesses or hearing outside of your presence. Frequently, their duration is extended by consideration of new issues arising in such hearings.

Your patience and understanding regarding these matters will contribute greatly to an atmosphere consistent with the fair administration of justice.

While you are in your closed-session deliberations, only the members will be present. You must remain together and you may not allow any unauthorized intrusion into your deliberations.

Each of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you.

However, in addition to the duties of the other members, the senior member will act as your presiding officer during your closed-session deliberations and will speak for the court in

announcing the results.

This general order of events can be expected at this commission:

Questioning of court members, challenges and excusals, opening statements by counsel, presentation of evidence, substantive instructions on the law to you, closing arguments by counsel, procedural instructions on voting, your deliberations, and announcement of findings.

If the accused is convicted of any offense, there will also be sentencing proceedings.

The appearance and demeanor of all parties to the trial should reflect the seriousness with which this trial is viewed.

Careful attention to all that occurs during the trial is required of all parties. If it becomes too hot or too cold in the courtroom, or if you need a break because of drowsiness or for any other comfort reasons, please tell me so that we can attend to your needs and avoid potential problems that might otherwise arise.

Each of you may take notes if you desire and use them to refresh your memory during deliberations but they may not be read or shown to other members. At the time of any recess or adjournment you must leave your notes secured in the deliberation room.

One other administrative matter: If during the course of the trial it is necessary that you make any statement, if you would

preface the statement by stating your identifier number, that will make it clear on the record which member is speaking.

Members, are there any questions?

It appears not. A negative response from all members.

Members, at this time please take a moment -- well, let me back up. You have a folder in front of you. Is that -- does anybody not have a folder in front of them?

Negative response from the members.

I would like you to open up that folder and you'll see a document that states "Charges and Specifications." I'll refer to it as two different things, what we call the cleansed charge sheet or the flyer. It's the same thing.

Anybody not see that document in their folder?

Again, negative response from the members.

Please take a moment to read the charges and specifications on the flyer provided to you. Please take your time, and when you are done, please look up so I know that you are.

[Panel members did as directed.]

[Pause.]

MJ [COL FITZGERALD]: Does any member still require more time?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from the members.

Next, Members, on the other side of that folder should be

the convening order that you're probably familiar with that brought you here. What I'd like you to do is if you could pull the top one, it should have your name on it. Please ensure that your name is correctly reflected on the convening order. If it is not, please let me know.

Did any member not find their name correctly reflected on the convening order?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from all members.

Before we proceed, I want to bring up two housekeeping matters.

You will notice as you look out at the prosecution and defense in front of you that are members of the Navy are wearing the white service uniform.

TC [CDR TRIVETT]: Summer whites, sir.

MJ [COL FITZGERALD]: Summer whites.

You were directed, if you're in the Navy, to come in the service blue uniform? Is that ----

TC [CDR TRIVETT]: Service dress blues, sir.

MJ [COL FITZGERALD]: Thank you. I'm an Army man, so I apologize that I don't get the uniforms straight.

What I want you to understand is they are in the appropriate uniform as directed by this commission, meaning me. You are also in

the right uniform as directed by me. Somehow the communication got crossed. I own that. That's my mistake. But I don't want you to draw any adverse inference from the fact that you see members from both sides wearing a different uniform that you were -- you were required to be in. We will correct that at a later time. But just so, you know, everybody here is in the right uniform.

Can you agree not to draw any adverse -- well, let me ask you this.

First, I'm going to have you hold up your paddle. If everybody -- everybody should have a paddle on there with a number. If you could just hold it up -- now's a good time to cover that -- with the number facing the attorneys and me.

[Panel members did as directed.]

MJ [COL FITZGERALD]: All right. Parties agree, you see all numbers 1 through 18?

TC [CDR TRIVETT]: Government agrees, sir.

MJ [COL FITZGERALD]: Very well. Now you can put them back down.

So I was going to give this instruction later, but because I brought this up, can the members agree not to draw an adverse inference that the members -- or the parties in front of you may be wearing a different uniform than you? Can you draw no adverse inference from that throughout these proceedings and believe that

they're somehow in the wrong uniform? If you -- if you can just set that aside and draw no adverse inference from it, then please raise your paddle with the number facing out.

[The members indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative response from all members. Thank you.

The other thing I want to draw your attention to is, I looked around and I see some -- most of the folks here have water bottles. I see that they brought water bottles out for you, and that's perfect. Some people prefer something caffeinated and that's understandable.

If you have -- all I ask is that you bring a covered coffee container, probably some instruction you've received from various conference rooms you've been in. And I prefer that that container also have no writing or markings or indications. If we need to get something for you to cover that up, we certainly -- the members that handle you, the administrators, will certainly get you something to cover that up. But you are welcome to bring a covered hot beverage container if you so desire through the -- throughout these proceedings.

Any questions about that instruction I can help you with?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: It appears not. Negative response from

the members.

Trial Counsel, you may announce the general nature of the charges.

TC [CDR TRIVETT]: The general nature of the charges in this case are as follows:

One specification of using treachery or perfidy in violation of 10 U.S.C. 950t, listed offense number 17.

One specification of murder in violation of the law of war, as set forth in 10 U.S.C. 950t, listed offense number 15.

Two specifications of attempted murder in violation of the law of war, as set forth in 10 U.S.C. 950t, listed offense number 28.

Two specifications of terrorism in violation of 10 U.S.C. 950t, listed offense number 24.

One specification of conspiracy in violation of 10 U.S.C. 950t, listed offense number 29.

One specification of intentionally causing serious bodily injury in violation of 10 U.S.C. 950t, listed offense number 13.

One specification of attacking civilians in violation of 10 U.S.C. 950t, listed offense number 2.

One specification of attacking civilian objects in violation of 10 U.S.C. 950t, listed offense number 3.

One specification of hijacking or hazarding a vessel in violation of 10 U.S.C. 950t, listed offense number 23.

The charges were preferred by Captain Edward Regan, JAG Corps, United States Navy, and forwarded to the convening authority with recommendations as to the disposition by the chief prosecutor of the Office of Military Commissions.

The records of this case disclose no apparent grounds for challenge of any member of the commission. However, if any member of the court is aware of any matter which he or she believes may be a ground for challenge by either side, such matter should now be stated.

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response all members.

MJ [COL FITZGERALD]: Members, before I or counsel ask any questions, it is appropriate that I give you some additional instructions. You may consult the flyer in your folder as well.

This is a capital murder case. I want to direct your attention specifically to the capital offenses in the Specification of Charge I, using treachery or perfidy; the Specification of Charge II, murder in violation of the law of war; Specification 1 of Charge IV, terrorism; Specification 2 of Charge IV, terrorism; the Specification of Charge VII, attacking civilians; and the Specification of Charge IX, hijacking or hazarding a vessel.

If the accused is convicted of any of these capital offenses by a unanimous vote, then the commission may have the option, but is

not required, to impose the death penalty.

In the sentencing phase of the trial, the death penalty is a permissible punishment only if:

One, the members unanimously find beyond a reasonable doubt that one or more aggravating factors exists, and;

Two, the members unanimously find that any and all extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, to include any aggravating factors.

If you unanimously find those two items, the death penalty will be a possible punishment, but only if you then vote unanimously to impose death. You must bear in mind that even if death is a possible sentence, the decision whether or not to vote for the death penalty is within the discretion of each member.

If the accused is convicted of any of the six aforementioned capital offenses, but the vote for conviction is not unanimous, the death penalty may not be adjudged.

Because one possible punishment for some of the charged offenses is death, it will be necessary to ask you questions regarding your views concerning the death penalty. This inquiry has no relationship at all to whether or not the accused is guilty or not guilty of any offense. As I stated before, the accused is presumed innocent of these offenses.

Before counsel asks you any questions, I will ask some

preliminary questions. As we've already gone through, I won't ask you to do it again, but you each have a paddle. That is how you give responses. If you have an affirmative response to any question, please raise the paddle and continue to hold it up until I have acknowledged your paddle number.

Counsel may have questions for you as well, and the same standard applies when they ask you questions.

Counsel and I will need to make precise and accurate notes of each of your responses, so I thank you in advance for your patience with this process as we account for everybody.

So just if you wouldn't mind, just hold it up firmly -- not right now, but when the question is asked, just hold it up until you say affirmative response from number 1 or 18. That when you hear your number, that's your signal you may set it down.

Counsel will -- I ask counsel to help me if I went too fast for you. I'll try to go slow enough, but if I get ahead of you, please just let me know.

Question 1: Does anyone know the accused?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from all members.

For this next question, I'm going to again have you review the flyer. I'm going to ask you if you know any person named in the flyer. So after you have reviewed the flyer, please look up so I

know you're prepared for that question.

[Panel members did as directed.]

MJ [COL FITZGERALD]: Any members still need more time to review the flyer?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from members.

Having reviewed the flyer, does anyone know any person named in any of the specifications?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from all members.

At this time, the trial counsel is going to read a list of the potential witnesses in this case. The bailiff will now provide each of you a list of the potential witnesses so you may follow along as they are read to you.

Did we prepare that?

TC [CDR TRIVETT]: I have them, sir.

MJ [COL FITZGERALD]: Oh, thank you. Could you hand them to the bailiff?

Defense, did you have an opportunity to review the witness list?

LDC [MS. MILLER]: Yes, sir.

MJ [COL FITZGERALD]: Thank you.

If you wouldn't mind handing it to the bailiff.

TC [CDR TRIVETT]: Which bailiff, sir?

[Trial Counsel did as directed.]

MJ [COL FITZGERALD]: Bailiff, if you can just hand it to the first one on each side and they can -- do you need nine for each row?

[Bailiff did as directed.]

MJ [COL FITZGERALD]: Is there a member who does not have a list of the potential witnesses?

Everybody has it now? All right.

So, Members, after all the potential witnesses are announced, I will ask you if anyone knows any of the potential witnesses in this case. If it helps in answering the question about your knowledge of any potential witness, you may mark on this form, but please be advised that I will be collecting them back from you today and marked ones will be destroyed by the court reporter.

Again, you do not need to respond to each witness but only at the conclusion of all the potential witnesses will the question be asked.

Government.

TC [CDR TRIVETT]: The following witnesses may testify in this military commission:

Paul Abney, John Adams, Timothy Adams, Ali Hamza Ahmed Suleiman al Bahlul, Ahmed Haza al Darbi, Ahmed Abdulla al Hasani, Ghaleb al Qamish, Salim Alwan, Christian Anglin, Robert Antoon,

Hubert Ardillon, Helvia Arzate, Mikhail Avramov, Derek Bailey, Dean Baker, James Baker, Ammar Barghouty, Abdul Rahman Ali Barman, Patrick Beldon, Peter Bergen, Walid Bin'Attash.

Page 2: Cofer Black, Larry J. Bloodsaw, Jr., Morgan Bodie, Barbara Bodine, Steve Bongardt, Holly Bratcher, Alice Brown, Kevin Brown, Daniel Byman, Gary Campbell, Taniyka Campbell, Steven Campman, Amber Carr, Ann Chamberlain Vanleer, Stephen Charman, Micah Childers, Asparuh Rumenov Chorbadzhiev, Margaret Clarino, Richard Clarke, Cathy Clements, Damien Corsetti, Dina Corsi, Sondra Crosby, Edmond Cronin, George Crouch.

Page 3: Justin Crowe, David Cudmore, Alan Cullison, Danielle Daniels, Mark Darwin, William Davitch, Aimen Dean, Bernard DeLury, David Dipaola, Mary DeRosa, Marc Dolphin, Deborah Doran, Adam Drucker, Timothy Eerenberg, Mark Fallon, Leah Farrall, Frank Fawcett, Paul Fennewald, Alan Ferrel, D.J. Fife, Russell Fincher, Kevin Finnerty, Constance Fisher, James Fitzsimmons, Tommy Franks.

Page 4: Shannon Freymiller, Daniel Gaston, Stephen Gaudin, Brian Getson, Alan Giusti, David Glazier, Yahya Goba, Eric Greenberg, Richard Grimmett, David Hackmeyer, Matthew Harper, John Henderson, Kenneth Hieb, James Hodgson, Robert Holley, Heather Holmes, Atanas Hristov, Joseph Huffman, Gavreil Penchev Iliev, Karl Inderfurth, Safa Ismael, Cedric Jegou, Bruce Jessen, Jennifer Keenan, David Kelley.

Turning to page 5: Andre Khoury, Steven Kleinman, Tracy

Kneisler, Evan Kohlmann, Karen Koursberg Lowe, James Karska, Steven Krueger, Terry Kupers, Elizabeth Lafountaine, Daniel Lakemacher, Nelly Lahoud, Joseph Landers, Didier Le Ny, Michael Leone, Bob Lessemun, Kirk Liphold, Vincent Lisi, Lisa LoCascio, Kathy Lopez, Keith Lorensen, Waleed Mahdi, Leona Mansapit, Mark -- Michael Marks, Lionel Martin, Marty Martin.

Turning to page 6: Abubakr Marzouk, Robert McFadden, Garrett McKenzie, Steve Metz, Daniel Meyers, Flagg Miller, Jeffrey Miller, John Miller, James Mitchell, Raymond Mooney, Kelly Mount, Robert Mulry, Kelly Murphy, Gregory Newbold, Robert Board Newman, Georgi Nikolaev, David Oberholtzer, Murat Ocalan, Thomas O'Connor, Chris Oleschlegel, Craig Olson, Alexander Otte, Rashid Daoud Owhali, Brady Palmerino, Charles Parker.

Turning to page 7: James Parlier, Rafael Perl, Chris Peterschmidt, Thomas Pickering, Velichko Georgiev Radev, Karl Reich, Gary Reinecke, Victor Renaurt, Jr., Jane Wolfe Rhodes, Jose Rodriguez, William Rodriguez, Glenn Roessler, Elizabeth Flammia Rosato, William Ruark, Kelsey Ruddick, George Sadek, Matthew Saigger, Jack Salata, Isaam Saliba, James Salter, Jonathan Scharten, Dayna Better Sepeck, Susan Sevareid, Sami Shava, Alex "Atef" Shafik.

Turning to page 8: Hugh Shelton, Robert Sibert, Gordon Snow, Ali Soufan, Frances Stewart, Tyrone Summers, Christina Sun, Monty Swank, Shawn Sylvester, Karen Thurman, Cruz Tovar, Kelly

Baribeau Vanarsdale, Robert Wagner, Sammy Wakesa, Leo West, Mark Whitworth, Patrick Williams, Karl Steven Wingate, Daniel Withers, John Wixted, Denise Woodfin, Bob Woodward, Aaron Zelin, Zhivko Zhelyzkov, Anthony Zinni, Abu Zubaydah, Adnan Zulfiqar.

That concludes the reading of the intended witnesses, Your Honor.

MJ [COL FITZGERALD]: Thank you.

Members, having heard all the witness names, does anyone know of -- does anyone know any of the potential witnesses in this case?

[Panel Member 7 indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative response from Member Number 7. Negative response from all other members.

Counsel, we didn't discuss that. I'm just going to ask them those names now, who they are.

Member Number 7, you said you knew at least one person?

MEMBER 7: **[Microphone button not pushed; no audio.]**

MJ [COL FITZGERALD]: Say again?

MEMBER 7: Kevin Brown, sir.

MJ [COL FITZGERALD]: We don't have a microphone in front of you and I realize that's something we're trying to figure out, but bear with me.

You said Kevin Brown; is that accurate?

MEMBER 7: Yes, sir.

MJ [COL FITZGERALD]: So the affirmative response from Panel Member Number 7 is enumerated as No. 29, Kevin Brown. Were there any other persons you recognized?

MEMBER 7: No, sir.

MJ [COL FITZGERALD]: Very well.

Negative response from Panel Member Number 7 to any other members.

And at this time if you could take those witness lists and pass them to your right to the last member, I will have the bailiff retrieve those. Just the witness list.

Everything in your folder, please keep there.

[Panel members did as directed.]

MJ [COL FITZGERALD]: So I'm going to ask the bailiff, one -- he's going to do two things. He's going to hold on to them, but he's also going to count to make sure we have all 18.

[Bailiff did as directed.]

MJ [COL FITZGERALD]: Thank you. He's informed me he has all 18. So he's going to hold on to them and they'll get destroyed whether you put notes on them or not. Thank you for that.

Moving on to our questions, Members.

Having seen the accused and having read the charges and specifications, does any member believe that you cannot give the

accused a fair trial for any reason?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from the members.

Does anyone have any prior knowledge of the facts or events in this case?

[Members 8 and 17 indicated an affirmative response. Negative response from the remaining members.]

MJ [COL FITZGERALD]: I have affirmative responses from Number 8 and 17. Oh, tell you what. If you could hold them back up, I think maybe ----

If counsel will bear with me, indulge me, I think what I want to ask is -- and there may be some confusion. It doesn't matter where that knowledge came from, news, history, any personal knowledge that you have from any source.

[Members 12 and 16 indicated a negative response. Affirmative response from the remaining members.]

MJ [COL FITZGERALD]: Very well. So I have affirmative response from all members except 16. Am I just not seeing -- I'm sorry -- and Number 12. I apologize.

So I will say it again. Affirmative response from all members except 12 and 16. Is that counsel's observation as well?

TC [CDR TRIVETT]: Yes, sir.

LDC [MS. MILLER]: Yes, sir.

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

You may put the paddles down.

[Panel members did as directed.]

MJ [COL FITZGERALD]: Members, this case has received attention in the media. Is there any member who has seen or heard any mention of this case in the media?

[Members 2, 4, 8, 10, 11, and 13 indicated an affirmative response. Negative response from the remaining members.]

MJ [COL FITZGERALD]: So I have affirmative responses from 4, 8 -- affirmative responses from 2, 4, 8, 10, 11, and 13.

Members, regarding that question, the media and media reporting, is there any member who has participated in any military operation that received press coverage? Just any operation generally.

[Members 8, 11, 12, and 13 indicated an affirmative response. Negative response from the remaining members.]

MJ [COL FITZGERALD]: I have an affirmative response from 8, 11, 12, 13.

To those who have been in an operation that received press coverage, with respect to that coverage, did any member find that the press coverage was 100 percent accurate and complete?

[Members 8, 11, 12, and 13 indicated a negative response. Affirmative response from the remaining members.]

MJ [COL FITZGERALD]: So negative responses from Members 8, 11, 12, and 13.

Is there any member who believes that merely because the press reports something it is, in fact, the truth?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from all members.

I apologize. I skipped a question.

To those -- no, I did ask that question. I apologize.

Do all members agree with the proposition that press reports of military affairs or about any kind of event may be incorrect or inaccurate?

[The members indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative response from all members.

Is there, then, any member who believes that the reports that he or she received from the media about this case are always complete, accurate, and truthful? And this is for Members 8, 11, 12, and 13.

I'll repeat it again. Is there, then, any member who believes that the reports that he or she received from the media about this case are always complete, accurate, and truthful?

[Members 8, 11, 12, and 13 indicated a negative response. Affirmative response from the remaining members.]

MJ [COL FITZGERALD]: Negative response from Members 8, 11,

12, and 13.

Again, this is for Members 8, 11, 12, and 13.

For any member who has seen mention of this case in the media, will you put aside all the matters which you have heard, read, or seen in the media and decide this case based solely upon the evidence you receive in this court and the law that I instruct you?

[Members 8, 11, and 13 indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative response from 8, 11, and 13.

Now, I just want to be accurate. So your response is negative to that, Member Number 12?

MEMBER 12: Oh, I'm sorry. Can you say that again?

MJ [COL FITZGERALD]: Do you want me to repeat it again?

MEMBER 12: Yes, sir.

MJ [COL FITZGERALD]: And I realize now we've been going for over an hour and it may be time -- we'll probably take a recess. If the parties don't mind, we'll take a break after this question.

For Member Number 12: For any member who has seen mention of this case in the media, will you put aside all the matters which you have heard, read, or seen in the media and decide this case based solely upon the evidence you receive in this court and the law as I instruct you?

[Member 12 indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative response from Number 12. So

that is affirmative response from 8, 11, 12, and 13.

So, Members, we're going to take a brief recess. I know I need at least 15 minutes but please tell your bailiff if you need longer because I realize we have a limited amount of facilities to accommodate 18 people. I don't mind if we take longer. We're trying to figure out the timing of things, but for now I'm going to put us in recess until 1435.

The commission is in recess.

[Panel Members withdrew from the courtroom.]

[The military commission recessed at 1420, 2 November 2026.]

[The R.M.C. 803 session was called to order at 1438, 2 November 2026.]

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

All parties present before the last recess are again present. The members are absent.

Defense has asked to address something with the commission before we call the members.

LDC [MS. MILLER]: I have a few things, sir. The most recent thing is I'm going to object to the commission interjecting with a single member who you believe gave the wrong answer.

So, for instance, when you asked number 12, or any member who has seen mention of this case in the media, will you put aside all the matters which you have heard, read, or seen in the media and

decide this case based solely upon the evidence you receive in this court and the law as I instruct you? And only four members, 8, 11, 12, and 13 had answered affirmatively to the media. And then only three members answered affirmatively to that question, 8, 11, and 13. And then Your Honor went to 12 specifically and re-asked her that question.

And what you don't realize or maybe -- I don't think your intentions ----

MJ [COL FITZGERALD]: Can I address that?

LDC [MS. MILLER]: Pardon?

MJ [COL FITZGERALD]: Can I address that?

LDC [MS. MILLER]: Sure.

MJ [COL FITZGERALD]: When I said "affirmative response from 12 members" I had a reaction from her. That's why I asked for the question, because now I was confused what her answer was. It wasn't that she didn't respond. It was that how she responded to, so that's an affirmative response from Number 12.

And I can't describe the look, but it seemed like a look of bewilderment, that -- so that's why I wanted to make sure I had the right answer. The way they're spaced, I thought maybe I missed her raising her hand, so I didn't know what her bewilderment was that I failed to account for her.

But that's why I did it. So I wanted it clear on the record

it was her demeanor that caused me to ensure she understood the question.

LDC [MS. MILLER]: I'm not suggesting that the commission had mal-intentions in doing so ----

MJ [COL FITZGERALD]: I know you're not, but you didn't put that on the record that I looked at her demeanor.

LDC [MS. MILLER]: But I -- but I didn't see that look, nor do I suspect Juror Number 9, he I'm sure didn't see that look.

MJ [COL FITZGERALD]: Juror Number -- I don't know if he saw that. I don't know.

LDC [MS. MILLER]: Right. But that's the point. So you are now signifying to the other jurors -- right? -- who didn't see the response that you saw that if a response is given contrary to the one that the court expects, it's wrong. And so that's what you saw, something that you observed in Juror 12 ----

MJ [COL FITZGERALD]: I understand. Your objection is noted.

LDC [MS. MILLER]: Okay. And so I would just ask that we follow up with anybody who gives an idiosyncratic answer that perhaps you notice a response or one of us notices a response inconsistent with what we believe their intention to communicate ----

MJ [COL FITZGERALD]: Again, it wasn't the response that was inconsistent. It was when I asked her if she was giving an affirmative response by not raising her paddle ----

LDC [MS. MILLER]: Correct.

MJ [COL FITZGERALD]: ---- or negative, I can't remember exactly how that -- she had a different answer than the others, so I wanted to assure I understood her answer.

LDC [MS. MILLER]: Sure. You certainly didn't say "I saw something Juror Number 12 on your face," and so now what the other jurors who may not have seen that same reaction that the commission did, what they may ----

MJ [COL FITZGERALD]: Okay. I understand your point.

LDC [MS. MILLER]: Okay.

MJ [COL FITZGERALD]: Objection noted.

LDC [MS. MILLER]: Okay. And so then I'm also asking that the flyers be removed from their folders. I don't know if their folders ----

MJ [COL FITZGERALD]: Be removed ----

LDC [MS. MILLER]: Well, so we're not giving them the witness list to keep. That is being collected from them. I'm asking that the flyer's the same. They be asked to read the flyers, the questions regarding the flyers be asked of them, and then the flyers be removed, similar to how the commission is treating the witness list.

MJ [COL FITZGERALD]: Your request is denied.

LDC [MS. MILLER]: I'm asking that in the course of moving, I

can see the handcuffs that are on the floor ----

MJ [COL FITZGERALD]: We'll correct that. I did not know.

LDC [MS. MILLER]: Okay. So I ----

MJ [COL FITZGERALD]: Can we ----

LDC [MS. MILLER]: I'm asking all -- there's five, so I'm asking that all five be removed.

MJ [COL FITZGERALD]: Can we take a short recess so I can see what you're seeing? I don't ----

LDC [MS. MILLER]: Sure.

MJ [COL FITZGERALD]: In the meantime, please pass that on to the sergeant of the guards. We won't need them in the United States v. Al Nashiri commission, at least rows 2, 3, 4, and 5. Right? Do you agree? We don't need 2, 3, 4, and 5.

LDC [MS. MILLER]: And 1.

MJ [COL FITZGERALD]: 1 is a different scenario because I don't know the SOP regarding the one where the accused sits. I don't disagree with you they should not be visible. I want to check with the SOP that governs that before I make a decision.

LDC [MS. MILLER]: Okay.

MJ [COL FITZGERALD]: So I agree with you 2, 3, 4, 5 should be removed. They shouldn't be here; they don't serve a purpose in this commission. They may in other commissions.

I need to wait to hear mention from the guard force.

Do they have a directive? What is that directive? And how can we accomplish the goal of not making those restraints visible to the members? I agree with you on that.

LDC [MS. MILLER]: All right.

MJ [COL FITZGERALD]: I just don't know how we accomplish that consistent with the SOP. We'll get that fixed. I didn't check that. I didn't realize that.

In military courts-martial we don't have them observable from the moment we call members either, so I'm a whole -- hundred percent in agreement with you. I just don't know what the remedy is.

LDC [MS. MILLER]: Understood, sir.

MJ [COL FITZGERALD]: Thank you.

LDC [MS. MILLER]: Then lastly, on page 9, subparagraph 2, when you are giving instructions as to how the calculation to reach a death verdict is given, you read: The members unanimously find that any and all extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances to include any aggravating factors.

All the non-enumerating circumstances were stricken. What Rule 1004 specifically reads that only the enumerated, I would say statutorily enumerated, but enumerated by rule factors are to be considered in aggravating the sentence to death.

And so I think that is inaccurate. It should just read:

Substantially outweighed by any aggravating factors, period.

MJ [COL FITZGERALD]: I'll take that under advisement. I'd have to read that rule -- I'm not disagreeing with you. You asked me to review a rule and how that -- I didn't modify that instruction is I guess my main point. I went with it so I want to compare the rule to the Benchbook, why was that created? Is it an artifact that shouldn't be here? We'll get that addressed.

And I can certainly address that with the members to clear up any misunderstanding they may have if that's accurate.

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

And then my last request is the government gave a different oath than is written in your script. I believe the oath the government gave is the one from the Benchbook, but we did have a demonstrative made of the oath in the script as the commission provided it, and so I'd ask in the future that the government stick to the script that the commission provided ----

MJ [COL FITZGERALD]: I thought they ----

LDC [MS. MILLER]: No, they did our ----

MJ [COL FITZGERALD]: I didn't do a verbatim check but what did they miss?

LDC [MS. MILLER]: They -- well, no, they added. R.M.C. 807 includes also an affirmative duty to keep the secrecy of the ballots that's not included in the instruction that is in the instructions

that the commission provided. I said that backwards.

[Pause.]

LDC [MS. MILLER]: The one that's in your instructions is from R.M.C. 807. I may have said that backwards. The one from the Benchbook also includes additional information about the members' duty to keep the secrecy of the votes -- I'm paraphrasing -- and that is the oath that the government read to these prospective members, which is inconsistent with the oath that the commission had written in these instructions.

[Pause.]

MJ [COL FITZGERALD]: So you're saying -- the government may be able to help me. So you're saying that they read the oath that's in R.M.C. 807? Is that what you're saying?

LDC [MS. MILLER]: Again, I think I have it backwards. This is the one from the Benchbook.

I'll retract that. I think I have that backwards, sir.

R.M.C. 807 and the Benchbook are different oaths.

[Pause.]

MJ [COL FITZGERALD]: I'm still not sure. The one I'm looking at, at least in my copy of my procedural guidelines, seems to be consistent with R.M.C. 807. But you're saying they said something -- the government gave a -- rendered a different oath?

LDC [MS. MILLER]: R.M.C. 807 and the Benchbook are different

oaths.

MJ [COL FITZGERALD]: Ah, understood. Okay.

LDC [MS. MILLER]: And I -- I may have it backwards.

MJ [COL FITZGERALD]: I didn't think ----

LDC [MS. MILLER]: They may have given the one in the instructions, which is from the Benchbook, versus R.M.C. 807. I thought it was the other way around.

MJ [COL FITZGERALD]: I think the only distinction is "court-martials" has been replaced by "military commission."

But, Government, can you assist me in understanding what you believe you read?

TC [CDR TRIVETT]: Sir, I read right from page 2 verbatim of you're a-3 preliminary instructions that you issued.

MJ [COL FITZGERALD]: And so, Defense, what is -- what do you believe occurred?

LDC [MS. MILLER]: I believe I was wrong, sir.

[Counsel conferred.]

[The military judge conferred with courtroom personnel.]

LDC [MS. MILLER]: I will retract that line of commentary. I think I was wrong, sir.

MJ [COL FITZGERALD]: So let me ask you because I think -- and I failed to do this earlier -- you had some demonstrative aids you were going to use in voir dire. In talking to my staff, one of them

was the oath. Have I created ----

LDC [MS. MILLER]: Correct.

MJ [COL FITZGERALD]: ---- a concern for you?

LDC [MS. MILLER]: No, sir. It's fine, sir.

MJ [COL FITZGERALD]: I don't know what's fine. So I want to be clear on the record. The proper oath was rendered to the members.

LDC [MS. MILLER]: The one from the Benchbook, yes, sir, that's in your instructions.

MJ [COL FITZGERALD]: And, again, the difference between the Benchbook, DA PAM 27-9, and mine is the interchange of replacing "court-martial" with "military commission" or "commission." That did happen. I'm the one, I think the only one, that accidentally said the word "court-martial" at some other point, but not in the oath.

Have I created an issue regarding your demonstrative ----

LDC [MS. MILLER]: No.

MJ [COL FITZGERALD]: ---- that I can assist you with?

LDC [MS. MILLER]: No, sir. I think I misheard.

MJ [COL FITZGERALD]: Okay.

The other thing is, it was brought to my attention was concerns about where you were navigating in the well. Has that been resolved to your satisfaction?

LDC [MS. MILLER]: No. I can't see around ----

MJ [COL FITZGERALD]: Okay.

LDC [MS. MILLER]: ---- Mr. Trivett at all, and so I'm going to move to the back.

MJ [COL FITZGERALD]: So just a reminder -- and I'll pass this on to the guard -- R.M.C. 801 gives me the authority once the trial started -- I know the guards may have a different directive, but counsel are free to move about and navigate in a way so that you can see all 18 members, consult with your counsel. I know at one point you came and sat on the opposite end of the table.

LDC [MS. MILLER]: **[Microphone button not pushed; no audio.]**

MJ [COL FITZGERALD]: Rather irregular, but -- but permissible for the purpose of voir dire. So the guard force should be aware of that, that the parties are going to move around. But -- so I noticed you moving around and other people can move around. I'm not interfering with that. You want to present yourself to the members in the way you want to, and you certainly want to be able to see them, so...

I can't do much about the size of that podium. I realize it's a monster. And by "monster," I mean it's a large podium, and the government has no choice but to assume a large amount of visible space. So just please go wherever you -- you can address your needs to be able to see every member.

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

MJ [COL FITZGERALD]: And I will take caution. I understand

your -- your concerns. I want to make it clear that it was a reaction of my question of trying to capture her response that she gave me a look of bewilderment. That's why I re-read the question. But I understand your concern that another member may see that differently. And I'll take caution if I need to do that again. And I'll make it clear on the record why I'm -- if I need to do it, why I'm doing it.

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

MJ [COL FITZGERALD]: Thank you.

The other thing I want to address, noting it's 1453, we did get a late start today. Nobody's fault. We got a late start today, so I'm trying to figure out calculations in my head.

I'm about to advise the members -- you've read my procedural guidelines -- that I intend to keep any session with members between 0900 and 1700. I realize they've probably had a long day, too. You certainly have had a long day.

I intend to recess at 1700. Why I say that is I believe I will complete my voir dire, the government will start their voir dire, and we may run into a time of 1700. But I want to send the message very clearly, 1700 is our stopping point.

If for some reason the government finishes before 1700 and you tell me you don't want to start because you don't want an interrupted voir dire, then we'll just recess before 5:00.

Fair enough for the parties going forward?

LDC [MS. MILLER]: Yes, sir.

MJ [COL FITZGERALD]: Okay.

TC [CDR TRIVETT]: Yes, sir.

MJ [COL FITZGERALD]: Okay. Anything else I can address before we call the members?

LDC [MS. MILLER]: Nothing from the defense, sir.

TC [CDR TRIVETT]: Not from the government, sir.

MJ [COL FITZGERALD]: Very well.

And I didn't address this when I overruled your objection with respect to the witness list. The flyer is something the members are permitted to have. The witness list is not, but I gave it to them as an aid in hearing a list that took several minutes to get through that I didn't want them to just have an auditory reference. I wanted them to have a readable reference, but they're not entitled to that. That's why I took it away.

LDC [MS. MILLER]: My concern with the flyer is only -- obviously there's 26 overt acts. And so understanding how memory works, as they listen to evidence, when they go back and take a break, if they're reading that flyer over and over and over again ----

MJ [COL FITZGERALD]: The flyer should be ----

LDC [MS. MILLER]: Is in here?

MJ [COL FITZGERALD]: Yes, ma'am.

LDC [MS. MILLER]: Okay.

MJ [COL FITZGERALD]: I understand now your concern. They can certainly take it back, but they did not take it back. And I'm not going to instruct them to take it back.

It's been my experience that members rarely do take the flyer back. They want to take a recess just like everybody else and not think about things. But I know because there's so much information in there, I can't take it away from them when I'm specifically going to say "You may refer to it." I think I'm pretty much done asking them to refer to it, but they may do so on their own.

I understand your concern. If you want, I'll contemplate that they shouldn't take it back.

LDC [MS. MILLER]: Just don't want it constant -- I think at some point our concern is that what is in the flyer will replace what's in the actual testimony.

MJ [COL FITZGERALD]: I understand your concern.

LDC [MS. MILLER]: Okay.

MJ [COL FITZGERALD]: Let me think about it. But, again, it's been my experience they rarely do take it back.

LDC [MS. MILLER]: Understood.

MJ [COL FITZGERALD]: But your concern was they did take it

back and they may be studying it and ruminating over it and you don't want them to do that.

LDC [MS. MILLER]: That's right, sir.

MJ [COL FITZGERALD]: Fair enough.

LDC [MS. MILLER]: And then I'd ask, lastly, that the cuffs be removed prior to their return.

MJ [COL FITZGERALD]: That's -- so I'm about to take a recess so I can see what you're speaking of ----

LDC [MS. MILLER]: Okay.

MJ [COL FITZGERALD]: ---- and speak to the guards, because hopefully they've gotten some guidance while we've been talking through other things.

Government, do you have any objection to us removing the cuffs 2 through 5? And then we'll take up number -- row number 1. But at a minimum, they need to be covered or in such a place they're not visible to the members.

You would agree with that, wouldn't you?

TC [CDR TRIVETT]: I would agree with that, sir.

MJ [COL FITZGERALD]: Okay. All right. We'll fix that. And I apologize. That's not something we thought about doing beforehand.

The commission is in recess.

[The R.M.C. 803 session recessed at 1456, 2 November 2026.]

[END OF PAGE]

[The R.M.C. 803 session was called to order at 1507, 2 November 2026.]

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

All parties present before the last recess are again present. The members remain absent.

During the last session, the defense brought up a concern, which was unopposed by the government, if I understood correctly, to remove the restraints that are configured into this courthouse from rows 1 through 5; 2, 3, 4, and 5 I did order because they're not necessary for this commission.

The guard force checked and verified that they could remove the ones in row 1, the one seated where Mr. al Nashiri is seated. They've been removed, so there are no shackles present. There is a chain bolted and the guards did their best to remove them from visibility as best we could. We also checked from the vantage point of the members, and it doesn't look like they can see it.

I want to bring it -- make it clear on the record I appreciate the defense bringing that to our attention. That's something in normal military court-martial practice we wouldn't see, but we certainly wouldn't want restraints ever visible at any proceeding. So I appreciate that being brought to the commission's attention.

We've been in a pretrial mode so long that sometimes we have

to resolve issues on the fly, and appreciate the parties being amenable to that.

Anything else before I call the members?

LDC [MS. MILLER]: No, sir.

TC [CDR TRIVETT]: Not from the government, sir.

MJ [COL FITZGERALD]: Thank you.

And my last point on the Member 12 issue, I'm going to think about reworking that portion of my script. I think I probably created some confusion. It was the first question where I said this question is only for the persons who affirmatively responded to the other question.

That may have caused some of the confusion and I wanted to cure that. Defense's concerns about that and objections are well received. So I may do that. If I do do that for chalk two in going forward, I will provide that to the parties with my revised, and certainly appreciate any input you want to give me on that to avoid that confusion.

And then with that, I don't know if I put it on the record. We discussed that I'm going to recess for the evening at 1700 as close to on the dot as we can, and so the parties should let me know if -- how they want to proceed if it looks like it runs up against their time to avoid an uninterrupted party voir dire, including you, Government.

TC [CDR TRIVETT]: Yes, sir. I actually had an alibi, sir.

MJ [COL FITZGERALD]: Yes, sir.

TC [CDR TRIVETT]: In question 14 which you're about to come to, it references adjudged punishments in any U.S. Army court-martial. I wasn't sure if that was the intent of the question or if that should also be switched. So I just -- I just identified that as I was looking at the next couple questions.

MJ [COL FITZGERALD]: You know what that was? That was in relation to -- and it's come up in discussion, but I probably intended to have a R.M.C. 803 discussion with the parties. That was my attempt to ask the most innocuous way I could a question about United States v. Hasan without tainting the members.

As soon as they tell me, "Yep, I'm very familiar with something being in the media," they'll raise their hand, and then you can call them back for individual voir dire. What case was it? What did you hear? That's it.

So it's -- I -- but I wanted to keep it broad enough that it could be any court-martial. They may come back and say, "I'm at Fort Rucker and I heard about this court-martial in the local newspaper."

Does that make sense?

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

MJ [COL FITZGERALD]: Okay. Thank you. So I'm still going to ask it.

[Pause.]

MJ [COL FITZGERALD]: Very well. With that, then, since court is in session, we'll now call the members.

[Pause.]

MJ [COL FITZGERALD]: I think there may be disconnect from me calling the members to when they actually get retrieved, so stand by, everyone.

[The R.M.C. 803 session recessed at 1512, 2 November 2026.]

[The military commission was called to order at 1513, 2 November 2026.]

[Members entered the courtroom.]

MJ [COL FITZGERALD]: Please be seated, everyone. Thank you.

And just for the record, all parties present before the last recess again are present, and the members are now present.

So, Members, I'm going to continue on with my questions.

Is any member aware of any public comments made by any uniformed or civilian military leader regarding the military commissions, any matter before it, the military commissions generally, or anything about this commission specifically?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from the members.

Is any member aware of any public comments made by any uniformed or civilian military leader regarding the carrying out of

the adjudged punishment in any U.S. court-martial -- I'm sorry, U.S. Army court-martial?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from the members.

Has anyone or any member of your family ever been charged with an offense similar to any of those charged in this case?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from all members.

Has anyone or any member of your family or anyone close to you personally ever been the victim of an offense similar to any of those charged in this case?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from all members.

How many of you are serving as court members for the first time, including as members of a court-martial?

[Members 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 17, and 18 indicated an affirmative response. Negative response from the remaining members.]

MJ [COL FITZGERALD]: Number 2, Number 4, Number 5, Number 6, Number 7, Number 8, Number 9, Number 10, Number 11, Number 12, Number 14, Number 15, Number 17, and Member Number 18.

If I understood it right, then, the negative responses would have been Number -- Member Number 1, Number 3, Number 13, and

Number 16. Did I leave anybody out?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from the members.

Can each of you who has previously served as a court-martial member put aside anything you may have heard in any previous proceeding and decide this case solely on the basis of the evidence and the instructions as to the applicable law?

[Members 1, 3, 13, and 16 indicated an affirmative response. Negative response from the remaining members.]

MJ [COL FITZGERALD]: Affirmative responses from Members 1, 3, 13, and 16. Thank you.

The accused has pled not guilty to all -- all charges and specifications and is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt. Does anyone disagree with this rule of law?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from all members.

Can each of you apply this rule of law and vote for a finding of not guilty unless you are convinced beyond a reasonable doubt that the accused is guilty?

[The members indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative response from all members.

You are all basically familiar with the military justice

system, and the commission in this regard is similar, meaning you know that the accused has been charged and his charges have been forwarded to the convening authority and referred to trial. None of this warrants any inference of guilt.

Can each of you follow this instruction and not infer that the accused is guilty of anything merely because the charges have been referred to trial?

[The members indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative responses -- I'm getting some quizzical looks from several members. Do you want me to repeat the question?

[The members indicated an affirmative response.]

MJ [COL FITZGERALD]: You are all basically familiar with the military justice system, and the commission in this regard is similar, meaning you know that the accused has been charged and his charges have been forwarded to the convening authority and referred to trial. None of this warrants any inference of guilt.

Can each of you follow this instruction and not infer that the accused is guilty of anything merely because the charges have been referred to trial?

[The members indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative response from all members.

On the other hand, can each of you vote for a finding of

guilty if you are convinced that, under the law, the accused's guilt has been proved by legal and competent evidence beyond a reasonable doubt?

[The members indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative response from all members.

Members, as I told you earlier, if the accused is convicted of any of the following offenses by unanimous vote, the Specification of Charge I, using treachery or perfidy; the Specification of Charge II, murder in violation of the law of war; Specification 1 of Charge IV, terrorism; Specification 2 of Charge IV, terrorism; the Specification of Charge VII, attacking civilians; and the Specification of Charge IX, hijacking or hazarding a vessel or aircraft, that one of the possible punishments may be death.

Is there any member who, due to religious, moral, or ethical beliefs would be unable to vote for a finding of guilty even if you are convinced that, under the law, the accused's guilt has been proved by legal and competent evidence because death may be a possible punishment?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from all members.

Does each member understand that the burden of proof to establish the accused's guilt rests solely upon the prosecution and the burden never shifts to the defense to establish the accused's

innocence?

[The members indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative response from all members.

Does each member understand, therefore, that the defense has no obligation to present any evidence or to disprove the elements of the offenses?

[The members indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative response from all members.

Has anyone had any legal training or experience other than generally received by military personnel of your rank or position?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from all members.

Has anyone had any specialized law enforcement training or experience, to include duties as a military police officer, off-duty security guard, civilian police officer, correctional institutions, or comparable duties, other than the general law enforcement duties common to military personnel of your rank or position?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from all members.

The next question first requires an instruction. I previously advised you that it's your duty as court members to weigh the evidence and to resolve controverted questions of fact. In doing so, if the evidence is in conflict, you will necessarily be required

to give more weight to some evidence than to other evidence. The weight, if any, to be given all of the evidence in this case is solely within your discretion, so it is not required nor expected that you will give equal weight to all of the evidence.

However, it is expected that you will use the same standards in weighing and evaluating all of the evidence, and the testimony of each witness, and that you will not give more or less weight to the testimony of a particular witness merely because of that witness' status, position, or station in life.

Here is the question: Will each of you use the same standard in weighing and evaluating the testimony of each witness and not give more or less weight to the testimony of a particular witness because of that witness' status, position, or station in life?

[The members indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative response from all members.

And this next question I'm going to ask each of you to open your folder and take out the military commission convening orders. And for this you'll need to -- each of you to review each person named in the order, not just the 18 that are present today.

As you read the names, ask yourself if you currently or at any previous time been in the rating chain, supervisory chain, or chain of command of any other member included in that entire military commission convening order.

Take your time and look up when you are finished, and then I'll ask the group.

[Panel members did as directed.]

MJ [COL FITZGERALD]: Does any member still need more time?

[Members 7 and 9 indicated an affirmative response. Negative response from the remaining members.]

MJ [COL FITZGERALD]: Affirmative response from Number 7. Take your time. And from Number 9. Take your time.

[Panel members did as directed.]

MJ [COL FITZGERALD]: Does any member still need more time?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from the members.

The question for you, Members: Is any member of the court now or previously in the rating chain, supervisory chain, or chain of command of any other member on the military commission convening order?

[Members 7, 15, and 16 indicated an affirmative response. Negative response from the remaining members.]

MJ [COL FITZGERALD]: Affirmative response from Number 7, Number 15, and Number 16.

Counsel, is the intent to take up any follow-up questions to that in individual voir dire?

TC [CDR TRIVETT]: Yes, sir.

MJ [COL FITZGERALD]: Very well.

LDC [MS. MILLER]: That's fine, sir.

MJ [COL FITZGERALD]: Very well. And negative response from all the other members.

For the next question, Members, I invite the attorneys, the lead counsel, to come to the podium to briefly introduce themselves and their respective teams, starting with the government and then the defense.

And if the parties could also account for the attorneys by name who are absent today so at least there's a name recognition considered.

TC [CDR TRIVETT]: Sir, I have that as question 33. I'm not sure that 31 and 32 were yet asked.

MJ [COL FITZGERALD]: Those are the ones I would ask in -- that's why I was asking.

TC [CDR TRIVETT]: Oh, I'm sorry. I misunderstood. I thought the question was whether we were going to follow up with the affirmatives.

MJ [COL FITZGERALD]: Ordinarily those questions would -- the questions from the court would also be asked in individual voir dire.

TC [CDR TRIVETT]: Understood, sir.

MJ [COL FITZGERALD]: My real question was: Did you want them to identify those people now? But it seems like we can just take

that up in individual voir dire.

TC [CDR TRIVETT]: Yes, sir.

MJ [COL FITZGERALD]: I apologize.

TC [CDR TRIVETT]: Sorry for the misunderstanding.

MJ [COL FITZGERALD]: Okay. I think we're all in agreement. So I apologize for the way they're numbered that that probably does confuse you.

But, Commander Trivett, you may proceed.

TC [CDR TRIVETT]: Thank you, sir.

So I introduced some people earlier when I was up here, but I'm going to reintroduce them and then -- and then state the names of some of those counsel that are simply not here yet but who will be part of the trial.

So myself, my name is Commander Clayton Trivett. I'm in the JAG Corps, U.S. Navy. We have Commander Brandon Sargent, JAG Corps, U.S. Navy.

MJ [COL FITZGERALD]: You are also free to stand if you -- the one you introduce them. If you want to briefly stand so they can see you.

TC [CDR TRIVETT]: Lieutenant Colonel Michael Ross, U.S. Army; Major Kaylyn Krzemien, U.S. Marine Corps; and Mr. John Wells who's a retired colonel from the Army JAG Corps. So those are the attorneys present for the prosecution today in the courtroom.

Also not present is Lieutenant Colonel James Garrett, JAG Corps, U.S. Army; Commander Charles Roman, JAG Corps, U.S. Navy; and Major Alfonso Perez-Diaz, JAG Corps, U.S. Army.

MJ [COL FITZGERALD]: Ms. Miller, for the defense.

LDC [MS. MILLER]: Good afternoon. I am Allison Ferber Miller. I'm learned counsel defending Abd al Rahim al Nashiri. I'm accompanied by Mr. Casey Secor; Lieutenant Colonel Joshua Nettinga, JAG Corps, U.S. Air Force; Ms. Jessica Manuele; Lieutenant Benjamin Shaver, JAG Corps, U.S. Navy.

And then we also have a Remote Hearing Room. Commander Matthew Bartholomaus is part of our defense team joining us from the Remote Hearing Room this week, JAG Corps, U.S. Navy.

MJ [COL FITZGERALD]: Thank you, Ms. Miller.

And thank you, Commander Trivett.

Members, having been introduced to the attorneys before you, has anyone had any dealings or interaction with any of the parties to the trial, to include me and counsel, which might affect your performance of duty as a court member in any way?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from all members.

Members, for the next question I want to advise you of the following:

This trial may take several months. You may have been

informed it will take -- it will be four to six months, but there's no way to forecast this, including whether it may take longer than four to six months.

I intend to have the commissions recess for a week for Thanksgiving and the December holidays, similar to the time frame most people are accustomed to in military service. The commission will not hold session with members on federal holidays.

Further, I intend to have the commission recess on a semi-regular basis every four to six weeks so that everyone may travel to their duty stations and homes to attend to matters there.

Commission sessions will ordinarily follow normal duty hours of 0900 to 1700 hours for members, with short comfort breaks and lunch recesses every day.

The commission does not intend to have sessions with members on weekends.

Knowing all of this, does anyone know of anything, of either a personal or professional nature, that would cause you to be unable to give your full attention to these proceedings throughout the trial?

[Members 4, 6, 7, 8, 9, 11, 12, 13, 15, and 18 indicated an affirmative response. Negative response from the remaining members.]

MJ [COL FITZGERALD]: Affirmative response from Members Number 6 -- I'm sorry, 4, 6, 7, 8, 9, 11, 12, 13, 15, 18.

Negative response from all other members.

Members, the next series of questions involve presentencing proceedings.

It is a ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime or crimes for which the accused is to be sentenced if found guilty.

What that means, Members, is that you believe that the commission of crime X must always result in punishment Y.

Does any member, having read the charges and specifications, believe that you would be compelled to vote for any particular punishment if the accused is found guilty solely because of the nature of the charges?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from all members.

As I told you earlier, if the accused is convicted of any of the following capital offenses by unanimous votes, Specification of Charge I, using treachery or perfidy; the Specification of Charge II, murder in violation of the law of war; Specification 1 of Charge IV, terrorism; Specification 2 of Charge IV, terrorism; the Specification of Charge VII, attacking civilians; the Specification of Charge IX, hijacking or hazarding a vessel, that one of the possible punishments is death.

Is there any member, due to religious, moral, or ethical beliefs, who would be unable to give meaningful consideration to the imposition of the death penalty?

[Member 11 indicated an affirmative response. Negative response from the remaining members.]

MJ [COL FITZGERALD]: Affirmative response from Number 11. Negative response from all other members.

Is there any member who, based on your personal, moral, or ethical values, believes that the death penalty must be adjudged in any case involving the aforementioned six capital offenses?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from all members.

This next question also requires an instruction: If sentencing proceedings are required, you'll be instructed in detail before you begin your deliberations. I will instruct you on the full range of punishments. You should consider all forms of punishment within that range.

Consider does not necessarily mean that you would vote for that particular punishment. Consider means that you think about it and make a choice in your mind, one way or another, as to whether that's an appropriate punishment.

Each member must keep an open mind and not make a choice nor foreclose from consideration any possible sentence until the closed

session for deliberations and voting on the sentence.

Here's the question: Will each of you follow this instruction, to keep an open mind and not make a choice nor foreclose from consideration any possible sentence until the closed-session deliberations and voting on the sentence?

[The members indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative response from all members.

Can each of you be fair, impartial, and open-minded in your consideration of an appropriate sentence if called upon to do so in this case?

[The members indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative response from all members.

Can each of you reach a decision on sentence, if required to do so, on an individual basis in this particular case, and not solely upon the nature of the offense or offenses of which the accused may be convicted?

[Member 5 indicated a negative response. Affirmative response from the remaining members.]

MJ [COL FITZGERALD]: Affirmative response from all members except Member 5. Negative response from Member 5.

Is any member aware of any matter that might raise a substantial question concerning your participation in this trial as a court member?

[The members indicated a negative response.]

MJ [COL FITZGERALD]: Negative response from all members.

During the course of this trial the accused has the right to not attend any part of these proceedings. If that should happen, I will instruct you to draw no adverse inference or speculate as to why he is absent.

Can each of you follow that instruction, if given?

[The members indicated an affirmative response.]

MJ [COL FITZGERALD]: Affirmative response from all members.

Do counsel for either side desire to question the court members?

Government?

TC [CDR TRIVETT]: The government does, sir.

MJ [COL FITZGERALD]: Do we need to take a recess? I don't recall now.

Let me ask the members real quick.

Members, do you have a need for a recess before the government begins their ----

[The members indicated a negative response.]

MJ [COL FITZGERALD]: I'm seeing a negative response from the members.

You may -- you may proceed, Government.

TC [CDR TRIVETT]: Just like the judge's questions, it was our

intent to ask either yes-or-no questions so you could raise your paddle if "yes" and keep your paddle down if "no."

I hope that none of these are too confusing and don't call for a yes-or-no answer, but if so, we can clarify.

The first questions I would like to ask are about military commissions knowledge generally that you may have.

The phrase "War on Terror" has been part of our national discussion for many years and it can bring up strong emotions. Does any member have such firmly held personal or political beliefs about the War on Terror that it would interfere with your ability to be a fair and impartial member in this specific case?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Presidents William Clinton, George W. Bush, Barack Obama, Joseph Biden, and Donald Trump and their administrations may be mentioned during the course of this trial.

Do any of you hold such strong or deeply held personal feelings about any of these Presidents and/or their administrations, that your personal feelings could potentially influence how you interpret evidence, judge a witness' credibility, or view the prosecution's case?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

This next set of questions is going to be of your knowledge of commission personnel and your affiliations with the judge or any of his trial judiciary staff.

So Colonel Matthew Fitzgerald, U.S. Army, is detailed as the military judge for this military commission. He is supported by attorneys, clerks, and support staff that will be in the courtroom.

Does any member have a prior affiliation with Colonel Fitzgerald?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Does any member know Colonel Fitzgerald professionally or personally?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Would Colonel Fitzgerald's rank or branch of service impact your decision-making process in this case in any way?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Ms. Sarah Jammeh, Mr. Daniel Brookhart, and Ms. Cassandra Resposo are the attorneys who will be supporting Judge Fitzgerald during this military commission. I believe they're all present in the front court of the courtroom.

Does any member have a prior affiliation with any of these

individuals?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Do any of you know me or any commission personnel you see today, either socially or professionally?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

And then I'll ask a series of questions about whether you have any affiliations or knowledge of anyone within the convening authority's office.

The convening authority in this case is the Deputy Assistant Secretary of War for Homeland Defense, Dr. Gregory Johnson. Does any member know him professionally or personally?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Will his title or position have any impact on your decision-making in this case?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

The former convening authority in this case was Brigadier General Susan Escallier from the U.S. Army JAG Corps. Does any member know Brigadier General Escallier professionally or personally?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Will her rank have any impact on your decision-making in this case?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

I'm going to ask you some affiliations with prosecuting attorneys, none of the attorneys that are currently in the courtroom. The Chief Prosecutor in this case is Rear Admiral Aaron C. Rugh, JAG Corps, U.S. Navy. Does any member know Rear Admiral Rugh professionally or personally?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Will his rank have any impact on your decision-making process in this case?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

A former Chief Prosecutor in this case is Brigadier General, retired now, Mark S. Martins, Judge Advocate, U.S. Army. He appeared on record in this case for many years. Does any member know Brigadier General Martins professionally or personally?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Will his prior participation and/or rank in this case impact

your decision-making process in this case?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Does anyone know any current or former members of the Office of the Chief Prosecutor?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

I'm going to ask you now some affiliations with defense attorneys and whether there are any affiliations.

The Chief Defense Counsel in this case is Brigadier General Jonathan H. Vaughn, U.S. Marine Corps. Does any member know General Vaughn professionally or personally?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Will his rank have any impact on your decision-making process in this case?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

A former Chief Defense Counsel in this case was Brigadier General Jackie L. Thompson, Jr., Judge Advocate, U.S. Army. Does any member know Brigadier General Thompson professionally or personally?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Will his rank have any impact on your decision-making process in this case?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

I know that Ms. Miller just introduced her team. Did any of you know any of her members of her team either professionally or personally before you saw them today?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Does anyone know any current or former members of the Military Commission Defense Organization?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

I'm going to ask you some questions about the Office of Military Commissions and the Office of the Convening Authority.

The Office of Military Commissions and the Office of the Convening Authority provide resources and support to the other components of the military commissions.

Does any member know any current or former members of the Office of Military Commissions?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Does any member know any current or former members of the

Office of the Convening Authority?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Has any member had contact with anyone either in the Office of Military Commissions or the Office of the Convening Authority prior to being nominated or selected to serve as a military commission member?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Does any member know or are you otherwise personally acquainted with any other member of the commission panel other than those that you may have seen this morning or in the courtroom this afternoon?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Without getting into any specific details, does any member have a health matter that would be aggravated by service on this commission or that would interfere with your ability to be present every day and serve as a commission member considering the length of time we anticipate the trial to last?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Does any member take medication that would make it difficult

to concentrate or otherwise be attentive during the proceedings or during deliberations?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

I'm going to transition now to a couple of questions about potential prior knowledge of the case.

So on 7 April 2025, this commission issued a second written questionnaire for each prospective member to fill out with instructions that you may not discuss this military commission with anyone. Upon receipt of the questionnaire, has any member of the panel obtained any information about this case from any source whatsoever such as news reports, online articles, or conversations?

[Member 8 indicated an affirmative response. Negative response from the remaining members.]

TC [CDR TRIVETT]: Negative response, all members excepting Number 8.

After filling out the second questionnaire, has any member posted on social media anything related to this case or about your potential service for this military commission?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Other than logistical matters, has any member heard any facts about this case since you arrived on Guantanamo Bay prior to

coming into this commission today?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Do you or a person close to you have a pending criminal case involving offenses similar to those on the charge sheet?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Has any member ever interacted with law enforcement authorities, such as the Federal Bureau of Investigation or the Naval Criminal Investigative Service?

[Members 8, 11, 12, and 13 indicated an affirmative response. Negative response from the remaining members.]

TC [CDR TRIVETT]: Negative response, all members excepting 8, 11, and 12 and 13.

This the next set of questions is about expert witnesses.

Is there any member of the panel who would automatically discount or refuse to consider an expert witness' opinion simply because their area of expertise is in a social science such as history, economics, or political science rather than a physical science like chemistry or biology?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

In this case, the military judge may qualify and permit

witnesses to testify as experts based on their practical training and field experience rather than formal academic degrees.

Would any member automatically give more weight to an expert's opinion solely because they possess academic credentials rather than practical field-based experience?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

If qualified by the military judge, is there any member who would be unable or unwilling to evaluate an experience-based expert's opinion on its own merits, applying the same standards of credibility as you would to any other witness?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Have you, or anyone close to you, such as a relative or a close friend, ever received formal training in or had any firsthand experience with the handling or detonation of explosives?

[Member 7 indicated an affirmative response. Negative response from the remaining members.]

TC [CDR TRIVETT]: Negative response, all members, excepting Number 7.

For Number 7, you will likely hear lay witness and expert witness testimony in this case about explosives.

Can you decide this case solely on the evidence presented

here in this courtroom and not rely on any outside personal knowledge or information you may have about those specialized fields?

[Member 7 indicated an affirmative response.]

TC [CDR TRIVETT]: Affirmative response, Number 7.

Members, you are also likely to hear expert testimony in this case, for instance, regarding DNA and fingerprints. We all have personal experiences, training, or things we've learned from media outside of court.

Will each of you be able to decide this case solely on the evidence presented here in this courtroom and not rely on any outside personal knowledge or information you may have about these specialized fields?

[The members indicated an affirmative response.]

TC [CDR TRIVETT]: Affirmative response, all members.

This next set of questions is about the burden of proof.

The military judge will instruct you that the prosecution's burden of proof is beyond a reasonable doubt. That is, the evidence must leave you firmly convinced of the accused's guilt. Is there any member of the panel who would hold the prosecution to a higher standard of proof such as absolute certainty solely because of the serious nature of the terrorism charges?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

The accused has an absolute right to remain silent. The military judge will instruct you not to draw any inference adverse to the accused if he chooses not to testify as a witness. If applicable, the commission will instruct you that you must disregard the fact that the accused has not testified.

Is there any member who feels that he or she could not follow this instruction?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

All that being said, if the accused should decide to testify, you are to judge his credibility in the same way as any other witness. That is, you should consider what he has to gain, his demeanor, and whether his story makes sense.

Would any member have any reservations in doing this should the accused testify?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Evidence may be direct or circumstantial. The value of any piece of evidence is not based on whether it is characterized as direct or circumstantial. The commission will instruct you that you should give all the evidence the weight and value you believe it deserves.

Is there any member who would refuse to return a verdict of

guilty based solely on circumstantial evidence even if that evidence convinced of you the accused's guilt beyond a reasonable doubt?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Based on the anticipated evidence in this case, the military judge will likely provide you with specific legal instructions on the law of conspiracy. Is there any member of the panel who would be unable or unwilling to follow the military judge's instructions on conspiracy as a general matter?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Under the law of conspiracy as applied in the military commission, a defendant may be held responsible for the crimes committed by other members of the conspiracy, even if the defendant did not personally commit those acts. Would any member have a moral, ethical, or other objection that would prevent you from applying that principle if the evidence warrants it?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

The military judge is the gatekeeper of evidence. During this trial, the military judge may rule that certain out-of-court statements can be admitted into evidence as an exception to the evidentiary rule against hearsay. If the judge instructs you that a

particular out-of-court statement is admitted into evidence under an exception to the rule against hearsay, can you follow that instruction and give that out-of-court statement the weight you believe it deserves?

[The members indicated an affirmative response.]

TC [CDR TRIVETT]: Affirmative response, all members.

In this case, you will hear that some evidence was collected outside the territorial jurisdiction of the United States by a foreign country operating under its own laws, customs, and procedures.

Is there any member who believes that such evidence is automatically unreliable?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Is there any member who believes that evidence is automatically unreliable if it was not collected using U.S. law enforcement procedures?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

If instructed by the military judge on how to evaluate chain of custody, is there any member who would be unable or unwilling to apply those instructions to evidence gathered by a foreign police department?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

This next set of questions are concerning the nature of the charges.

Would any member's personal views concerning U.S. counterterrorism policy make it difficult to set those views aside and decide this case based solely on the evidence and the law presented in this courtroom?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

If the military judge instructs you that the laws of the United States apply to the specific charges in this case, is there any member who would refuse to apply those laws simply because the alleged conduct occurred outside the United States?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

Do any members believe that their current views or beliefs concerning the Central Intelligence Agency would affect your judgment in assessing the evidence in this case regardless of the commission's instructions?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

There may be evidence obtained from recordings of

conversations through the use of recording devices. Would you have any reservations in considering this evidence in arriving at a decision concerning the guilt or innocence of the accused?

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

This next set of questions is your views on punishment.

As the military judge will instruct you, this trial will be conducted in two potential phases. The first one is called the guilt phase, and the second one is called the presentencing phase.

The first is the guilt phase. During this first phase, your sole responsibility is to decide whether the prosecution has proven the accused guilty of the offenses charged based on the evidence beyond a reasonable doubt.

Can each of you focus exclusively on that question and to put aside any and all consideration of potential punishment or sentencing until we reach the second phase?

[The members indicated an affirmative response.]

TC [CDR TRIVETT]: Affirmative response, all members.

In the second phase, the presentencing phase, you will hear two types of evidence. The prosecution will present evidence in aggravation. The defense may present evidence in mitigation, though it has no obligation to do so.

Mitigating evidence can be anything about the defendant's

character, background, or circumstances of the crime that might call for a sentence less than death.

Can each member keep an open mind and withhold making any final decision on punishment until after you have heard all of the evidence, both aggravating and mitigating, and all of the judge's instructions on the law?

[The members indicated an affirmative response.]

TC [CDR TRIVETT]: Affirmative response, all members.

Without getting into detail -- and this is my last question -- is there anything about your possible service on this commission that you should or wish to discuss with outside the presence of other members? If so, please raise your hand or your paddle.

[The members indicated a negative response.]

TC [CDR TRIVETT]: Negative response, all members.

That was all the questions that we had for general voir dire, Your Honor.

MJ [COL FITZGERALD]: Thank you, Government.

Ms. ----

[Counsel conferred.]

MJ [COL FITZGERALD]: I presume you're conferencing on the question I'm probably about to ask you.

LDC [MS. MILLER]: Yes, sir.

MJ [COL FITZGERALD]: Do you have an answer?

LDC [MS. MILLER]: I would prefer to start general voir dire tomorrow, sir.

MJ [COL FITZGERALD]: Very well.

Members, we thank you for your patience today.

Right now, Member Number 1, I believe you're my senior member of this panel. Usually that makes you the spokesperson of a group. What I'd like to know, if you have any questions for the commission tomorrow, bring them in, concerns you'd like to raise, comfort issues you'd like to raise, anything I can do to assist you through this process. You can certainly raise them through the able-bodied people that are handling everything for you, but if you feel that you're not getting a response in a way you'd like, please let me know.

I did speak to you, you could bring a hot caffeinated beverage -- just make sure it's a closed container -- for tomorrow's proceedings.

And this is my general admonishment every day is you should not discuss your knowledge in this case, answers and responses given in this voir dire with anybody, to include unit members, family members, and especially the other panel members while we're still working through this process. What that means is I -- you're going to contact people back home, you're going to let them know things,

but please don't discuss the knowledge of this case, the information in this case, or your duties in this case with any of those members other than the logistical information you need to provide people both in your family and your units.

Can all of you follow that instruction? If you raise your paddle, that helps.

[The members indicated an affirmative response.]

MJ [COL FITZGERALD]: Thank you. I have affirmative response from all members.

Members, we are in recess until 0900 tomorrow morning.

[Members withdrew from the courtroom.]

[The military commission recessed at 1607, 2 November 2026.]

[The R.M.C. 803 session was called to order at 1608, 2 November 2026.]

MJ [COL FITZGERALD]: The members have departed. Is there anything we need to take up on the record?

TC [CDR TRIVETT]: Not from the government, sir.

LDC [MS. MILLER]: Your Honor agreed -- this one, of which I am certain -- Your Honor agreed to change "until" to "unless" ----

MJ [COL FITZGERALD]: Did I --

LDC [MS. MILLER]: ---- and still said "until."

MJ [COL FITZGERALD]: I can make that correction tomorrow. I apologize.

LDC [MS. MILLER]: I didn't think it was intentional, sir.

MJ [COL FITZGERALD]: No, it wasn't. I certainly wrote it in my notes, but I didn't correct it in my procedural guideline. I apologize. It was certainly not intentional. I will correct that with the members tomorrow. And I'll ----

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

MJ [COL FITZGERALD]: ---- make sure they understand. I understand these words mean two different things, so I need you to have the right word. Again, my apologies.

Nothing else?

[Counsel conferred.]

LDC [MS. MILLER]: No, sir.

MJ [COL FITZGERALD]: 0900 tomorrow. Carry on.

[The R.M.C. 803 session recessed at 1609, 2 November 2026.]

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