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1 [The R.M.C. 803 session was called to order at 0903,
2 13 December 2021.]

3 MJ [COL ACOSTA]: Commission is called to order. Good
4 morning, Government.

5 TC [MR. MILLER]: Good morning, Your Honor.

6 LDC [MR. NATALE]: Good morning, Your Honor.

7 MJ [COL ACOSTA]: Good morning, Mr. Nashiri.

8 TC [MR. MILLER]: Your Honor, these proceedings are being
9 transmitted via CCTV to the locations in the United States
10 pursuant to your order, AE 028M, dated 22 November 2019.

11 Present for the government, as identified in the
12 detailing memorandum dated 20 September: Myself, Mark Miller;
13 Mr. John Wells; Lieutenant Commander Cherie Jolly; Lieutenant
14 Commander Keven Schreiber; and Major Michael Ross. Also
15 present for the prosecution here at GTMO are Mr. Pascual
16 Tavares-Patine, Mr. Forrest Parker Smith, and Ms. -- excuse
17 me, Master Sergeant Laura Speranza, Staff Sergeant Carlos
18 Salazar. And I believe Chief Kenneth Traylor will also be
19 coming in and out of the courtroom today as necessary.

20 Present in the back of the courtroom, Your Honor, is
21 Special Supervisory Agent -- Case Agent Luke Hardison and his
22 assistant, Kymberleigh Albites of the Federal Bureau of
23 Investigation. Present in the RHR at a location in the

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1 United States are Major Steven Romeo and Sergeant Maria Young.

2 All persons have the necessary clearances, Your Honor.

3 Thank you.

4 MJ [COL ACOSTA]: Defense?

5 LDC [MR. NATALE]: Good morning, Your Honor.

6 MJ [COL ACOSTA]: Good morning.

7 LDC [MR. NATALE]: Anthony Natale on behalf of
8 Mr. Nashiri. Present in the courtroom is Captain Mizer,
9 Ms. Carmon, Ms. Morgan, our interpreter. And I believe that,
10 as need be, the following individuals will be coming in and
11 out: Ms. Janes, Mr. Hoffmann, Mr. Dolphin, and Mr. Roy. In
12 the RHR we have Commander Piette and Ms. Pinate.

13 All of these individuals have all of the proper
14 classification and are allowed to be present in these
15 proceedings.

16 MJ [COL ACOSTA]: Thank you, Mr. Natale.

17 This morning, for the -- on the calendar we're taking
18 up AE 437. I also asked Mr. Powell to discuss with you the
19 potential of taking up the severance issue, which the parties
20 had indicated that they are able to argue later today. That's
21 an order to begin with the next set of defense motions
22 regarding locations and medical records, starting tomorrow
23 and any -- given that a portion of that may extend into a

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1 closed session, I wanted to be able to either take a break
2 tomorrow at some point during that, do the closed session in
3 the afternoon, if necessary, or do the closed session on
4 Wednesday, to give people enough notice that there will be a
5 closed session. Okay.

6 Now we're taking up the defense motion to suppress the
7 DNA reference sample and the subsequent comparison due to a
8 Fourth Amendment violation. We've already talked about the
9 issues around that, and I decided -- my decision was
10 to conduct the hearing.

11 Government, assuming for the sake of argument that the
12 burden has shifted, are you prepared to proceed?

13 TC [MR. MILLER]: Yes, Your Honor. The government calls
14 Sheldon Beddo. Mr. Beddo, Your Honor, is in the RHR.

15 MJ [COL ACOSTA]: Thank you.

16 TC [MR. MILLER]: Sir, can you hear me?

17 MJ [COL ACOSTA]: Mr. Beddo, can you please stand, raise
18 your right hand, take off your mask. You're going to be
19 sworn.

20 **SHELDON BEDDO, civilian, was called as a witness for the**
21 **prosecution, was sworn, and testified as follows:**

22 TC [MR. MILLER]: You're going to have to speak into the
23 microphone. Do you ----

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1 MJ [COL ACOSTA]: I don't believe the sound is on.
2 Government, whoever's -- oh, we have sound now. Go ahead.

3 WIT: I do.

4 TC [MR. MILLER]: We'll try again.

5 SHELDON BEDDO, civilian, was called as a witness for the
6 prosecution, was sworn, and testified as follows:

7 TC [MR. MILLER]: All right. Please be seated.

8 DIRECT EXAMINATION

9 Questions by the Trial Counsel [MR. MILLER]:

10 Q. If you would, please, state your name for the record.

11 A. Sheldon J. Beddo.

12 Q. Would you spell your last name please, sir?

13 A. B-E-D-D-O.

14 Q. Sir, I'm going to ask you a little bit about your
15 background. Did you attend university?

16 A. Yes, I did.

17 Q. And where did you go and what degree did you obtain?

18 A. I attended New Mexico State University, and I obtained
19 a bachelor of criminal justice.

20 Q. Subsequent to your college career, did you have
21 occasion to become a member of the NCIS?

22 A. Yes, I did.

23 Q. And when did that occur, sir?

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1 A. I was hired in December of 1989.

2 Q. And what was your first assignment?

3 A. My first assignment was the office in Long Beach,
4 California.

5 Q. Prior to becoming an agent, did you receive any
6 training?

7 A. Yes, I did.

8 Q. And what training did you receive?

9 A. I attended the Federal Law Enforcement Training Center
10 in Glynco, Georgia.

11 Q. And just generally, and briefly, what sort of training
12 did you -- particularized training did you receive?

13 A. Sure. So I attended the special agents basic
14 investigator course, so it was training in investigation
15 generally.

16 Q. Did any of that training include evidence gathering?

17 A. Yes, it did.

18 Q. Did it also include the processing of prisoners that
19 might come into your custody?

20 A. Yes, it did.

21 Q. Now, you indicated your first assignment was Long
22 Beach?

23 A. That's correct.

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1 Q. How long did you remain there?

2 A. I was in Long Beach approximately six years.

3 Q. And from there, where did you go?

4 A. The NCIS office in the Republic of Panama.

5 Q. All right. And did you have a series of overseas
6 assignments?

7 A. Yes, I did.

8 Q. I want to jump ahead to 2006.

9 A. Okay.

10 Q. Where were you stationed or what was your duty station
11 at that time?

12 A. In 2006 I was in Guantanamo Bay, Cuba.

13 Q. Had you ever been to Guantanamo Bay, Cuba, before
14 that?

15 A. Yes, I was. I had been there once before.

16 Q. And was that a TDY assignment?

17 A. That's correct, yes.

18 Q. 2006, what was your position, what were your duties,
19 what were your responsibilities?

20 A. I was the resident agent in charge of the DoD's
21 Criminal Investigative Task Force at Guantanamo Bay.

22 Q. What we commonly refer to as CITF?

23 A. Yes, that's correct.

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1 Q. And what was your -- what were your duties? What were
2 your responsibilities?

3 A. So as the RAC, my duty was to ensure the efficient
4 administrative and operational execution of the office there
5 and be the -- the face for CITF on the island.

6 Q. Could you describe the office itself, how many agents
7 you had?

8 A. Well, that rotated. Most of the agents were there on
9 a TDY basis. They rotated in and out. But there was some
10 permanent party terms of analyst and some administrative staff
11 that was there permanently. But generally, we had an office
12 of probably around 10 -- 10 to 12.

13 Q. Do you remember the names of the agents who were your
14 permanent agents staffing your office?

15 A. John Chestnut was -- was there permanently. I'm
16 sorry. I don't remember some -- many of the other names.

17 Q. All right. Now, if I use the term HVD, do you
18 recognize that term?

19 A. Yes.

20 Q. All right. And what does that term mean to you?

21 A. High-value detainee.

22 Q. Now, as to the CITF organization, your specific
23 organization or agency on island, did you or any of your

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1 permanent agents investigate any of the HVDs?

2 A. No, we did not.

3 Q. Did you have authority to question the HVDs?

4 A. No, we did not.

5 Q. Did somebody else have the authority to do that?

6 A. Yes.

7 Q. Now, I want to direct your attention to November 30th
8 of 2006. Did you have occasion to order that certain
9 processing of detainees occur?

10 A. Yes, I did.

11 Q. I want to jump back just a little bit before it
12 occurred. What caused you to enter that directive?

13 A. So a group of high-value detainees had -- had arrived
14 in Guantanamo Bay, and we needed to process them as part of
15 the -- the arrest or the arrival process.

16 Q. Was that the normal process at Guantanamo?

17 A. Yes, it was.

18 Q. And did you do it or did you assign agents to do it?

19 A. I assigned team members to do it.

20 Q. Do you recall what team members you assigned to do it?

21 A. Yes. John Chestnut, George Boyles, and Leona Mansapit
22 were the ones that I had asked to do this.

23 Q. And were you present when the actual processing

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1 occurred?

2 A. Yes, I was.

3 Q. And do you remember where it occurred?

4 A. It was on Guantanamo Bay, but it was a camp that I
5 was -- a location I was not familiar with.

6 Q. Could you describe the building itself in which it
7 occurred?

8 A. Sure. There was -- there were multiple buildings set
9 up as I -- in like a semicircle construct, kind of metal
10 structures.

11 Q. All right. And how did the -- if you could, describe
12 the -- were there processing stations, or how did it occur?

13 A. Yes. There were stations that -- that were arranged.

14 Q. Was there any questioning of detainees that occurred?

15 A. No, there was not.

16 Q. Were there any other agencies, if you recall, that
17 assisted you in this processing?

18 A. The FBI, agents from the FBI office at Guantanamo Bay
19 were out there that evening with us as well.

20 Q. And what was their purpose in being there?

21 A. They provided some technical equipment to aid in the
22 processing, the -- the arrest processing.

23 Q. Now, as to the processing itself, what sort of

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1 information or what sort of sampling was done that evening?

2 A. Yeah. So we were taking what we call major case
3 fingerprints as well as DNA samples.

4 Q. Were photographs also taken?

5 A. Yes.

6 Q. And what eventually happened, if you know, to those
7 major case prints?

8 A. Those were -- two things. They were entered into our
9 investigative database, and then they were sent to CITF
10 Headquarters at Fort Belvoir.

11 Q. Now, during the course -- you said you were present
12 during the processing procedures themselves?

13 A. Yes, I was.

14 Q. All right. Did any persons, any of the detainees,
15 complain about any mistreatment that was occurring during the
16 processing?

17 A. No, not that I'm aware of.

18 Q. And did you observe any mistreatment?

19 A. No, I did not.

20 Q. Now, who did the actual buccal swabbing of the
21 detainees?

22 A. John Chestnut.

23 Q. And why was Mr. Chestnut or Agent Chestnut chosen to

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1 be that individual to do that particular task?

2 A. So John had been down in Guantanamo Bay with CITF
3 for -- for a long time, and he had done it on all prior
4 detainees that had arrived.

5 Q. Do you remember approximately how many detainees were
6 there?

7 A. Fourteen.

8 Q. Fourteen?

9 A. Yes, sir.

10 Q. All right. The processing that occurred that
11 particular evening, was it much different from the processing
12 that you would normally do for any person taken into custody
13 by CITF or NCIS?

14 A. No, it wasn't.

15 Q. Nothing extraordinary about it?

16 A. No, sir.

17 Q. Would it be a fair statement to describe it as sort of
18 a -- as to these 14, an assembly line-type operation?

19 A. Yes, sir.

20 TC [MR. MILLER]: Your Honor, permission to use the ELM0.
21 I have a copy of an evidence receipt which has been previously
22 marked by your staff as AE 437C, as in Charlie. It can be
23 displayed to the witness, but it cannot be displayed to the

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1 public, I've been informed.

2 [The military judge conferred with courtroom personnel.]

3 TC [MR. MILLER]: May need a little assistance getting
4 this on the ELMO.

5 Q. Can you see that now?

6 A. Yes, I can.

7 Q. All right.

8 TC [MR. MILLER]: Thank you to the AV staff, Your Honor.
9 I would have ----

10 Q. Do you recognize this document?

11 A. Yes, I do.

12 Q. What do you recognize it to be?

13 A. This is an evidence custody document that we used at
14 CITF.

15 Q. And is this the one that was used by your staff on
16 that date, November 30th of 2006?

17 A. Yes, it is.

18 Q. And do you recognize John Chestnut's signature at the
19 bottom?

20 A. Yes, I do.

21 Q. All right.

22 TC [MR. MILLER]: I ask that this be accepted into
23 evidence at this time, Your Honor. Move for its admission.

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1 DC [MS. CARMON]: No objection, Your Honor.

2 MJ [COL ACOSTA]: Admitted for the purposes of this
3 motion.

4 TC [MR. MILLER]: Your Honor, I have no further questions
5 of this witness.

6 MJ [COL ACOSTA]: Defense, cross?

7 **CROSS-EXAMINATION**

8 **Questions by the Defense Counsel [MS. CARMON]:**

9 Q. Good morning, Mr. Beddo.

10 A. Good morning.

11 Q. In 2006 you said that you were assigned as the
12 resident agent in charge of CITF in Guantanamo Bay; is that
13 correct?

14 A. Yes, it is.

15 Q. And CITF is the investigative body for the Department
16 of Defense?

17 A. It was one of them, yes.

18 Q. Let me jump to 30 November 2006. That is the date in
19 which the 14 high-value detainees were -- had their DNA swabs
20 taken; is that right?

21 A. Yes, ma'am.

22 Q. Now, that effort was handled in concert with the
23 Federal Bureau of Investigation; is that correct?

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1 A. Yes, ma'am.

2 Q. Now, I think you had mentioned that those major case
3 prints, the fingerprints of the high-value detainees, that
4 they were going into your investigative database and then
5 being sent to your headquarters; is that right?

6 A. Yes, ma'am.

7 Q. The DNA samples that were taken, those were being sent
8 to the FBI Laboratory; is that correct?

9 A. I think we sent those to CITF Headquarters.

10 Q. Before you did the DNA swabbing or before your agents
11 participated in that on 30 November 2006, were you given a
12 briefing as to who was arriving -- or, excuse me, who would be
13 swabbed that day?

14 A. Yes.

15 Q. And you were given a briefing in connection or in
16 concert with the Federal Bureau of Investigation? They would
17 have also attended that briefing?

18 A. I don't recall how that -- the mechanics of how that
19 happened.

20 Q. Suffice it to say that the actual swabbing and taking
21 of the major case prints was done in concert with the FBI; is
22 that right?

23 A. Well, the CITF agents took the prints and the swabs.

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1 Q. And you said that the FBI assisted in these efforts
2 earlier; is that right?

3 A. Yes.

4 Q. Now, in the briefing that you received prior to your
5 agents' participation on 30 November 2006, were you told who
6 would be present as far as the detainees?

7 A. Well, we knew the -- we knew the ISN numbers of who we
8 were working with.

9 Q. And were you also told that the Federal Bureau of
10 Investigation had multiple items of interest at their
11 laboratory that would need to be compared to these major case
12 prints and DNA samples?

13 A. I don't recall any information like that.

14 Q. Were you aware that at some point these major case
15 prints and these DNA samples would be sent for comparison
16 purposes to the Federal Bureau of Investigation Laboratory?

17 A. So no, I -- no, I was not -- I did not receive a
18 briefing on where they would be sent after we took them, other
19 than to CITF Headquarters.

20 Q. And CITF Headquarters is where, sir?

21 A. At the time it was at Fort Belvoir.

22 Q. Did you have occasion to work with NCIS Agent
23 McFadden?

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1 A. I know Bob McFadden. I worked with him very briefly.

2 Q. And was he present in Guantanamo Bay on

3 30 November 2006?

4 A. Not that I know of.

5 Q. Sir, are you aware that Mr. al Nashiri is an -- was an
6 unindicted co-conspirator in the Southern District of New York
7 as of 2003?

8 A. No, I'm -- was I aware of that at the time? Is that
9 your question?

10 Q. Were you aware of it in 2006? Yes, sir.

11 A. No.

12 Q. My next question is not asking for locations or
13 details, sir, so let me just preface it that way.

14 You are aware, however, that Mr. al Nashiri and the
15 other 13 high-value detainees had been in United States
16 custody for years before 30 November 2006; is that right?

17 A. I really don't know where they were at before I saw
18 them on Guantanamo Bay.

19 Q. I'm not asking you for where, and I -- let's be clear.
20 I don't want to know where. All I want to know is if you were
21 aware that these gentlemen had been in United States custody
22 somewhere prior to November 2006.

23 A. I never received a briefing on whose custody they were

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1 in at what time. Generally, I knew that at some point they
2 came into U.S. custody as they were brought into Guantanamo
3 Bay.

4 Q. And let me take the United States out of it, then.
5 You were aware that these gentlemen were in custody somewhere
6 with someone prior to November 2006; is that correct?

7 A. Well, I knew at some point they came into somebody's
8 custody because they arrived at Guantanamo Bay.

9 Q. In November 2006, how long had you been assigned at
10 Guantanamo Bay?

11 A. I arrived there sometime in the summer of 2005 or
12 maybe July 2005, roughly.

13 Q. And so you had been in Guantanamo Bay roughly 15, 16
14 months at the time that these high-value detainees arrived in
15 2006; is that correct?

16 A. Generally, yes.

17 Q. You were aware then that the base was readying to
18 receive these 14 high-value detainees in November 2006,
19 correct?

20 A. There was a time where I became aware that they were
21 preparing to receive them.

22 Q. And as the Resident Agent in Charge, you would have
23 been part of the conversations in readying your agents to take

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1 part in the reception; is that right?

2 A. Yes.

3 DC [MS. CARMON]: The court's brief indulgence, please?

4 MJ [COL ACOSTA]: You may.

5 [Pause.]

6 DC [MS. CARMON]: Thank you, Mr. Beddo, and thank you,
7 Your Honor. I have nothing further.

8 MJ [COL ACOSTA]: Government, redirect.

9 **REDIRECT EXAMINATION**

10 **Questions by the Trial Counsel [MR. MILLER]:**

11 Q. Just a couple questions. As to the agents under your
12 direct supervision, Boyles, Mansapit, Chestnut, were they
13 responsible in any way for any kind of investigation of the
14 high-value detainees?

15 A. No, they were not.

16 Q. Was that done by other agents, other entities?

17 A. Yes, it was.

18 Q. So when you were asked whether or not you helped
19 prepare for the arrival of the detainees, other than the
20 processing, fingerprinting, photographing, and buccal swabs,
21 did you have any active participation in the investigation of
22 those high-value detainees?

23 A. No, we did not.

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1 TC [MR. MILLER]: I have nothing further, Your Honor.

2 Thank you.

3 MJ [COL ACOSTA]: Permanent for the purposes of this
4 motion?

5 TC [MR. MILLER]: Yes, Your Honor.

6 **[The witness was warned, permanently excused, and withdrew**
7 **from the RHR.]**

8 MJ [COL ACOSTA]: Government?

9 TC [MR. MILLER]: The government next calls George Boyles.
10 Your Honor, while we are awaiting the witness, I think
11 as the other motion responses and filings, the court indicated
12 that it would consider the attachments and filings thereto,
13 and I'd ask that the court ----

14 MJ [COL ACOSTA]: Yes, I ----

15 TC [MR. MILLER]: ---- would do that in this also.

16 MJ [COL ACOSTA]: Defense?

17 DC [MS. CARMON]: Yes, sir. Thank you, Your Honor.

18 MJ [COL ACOSTA]: All right.

19 TC [MR. MILLER]: Thank you, Judge.

20 MJ [COL ACOSTA]: And as before, I'll consider all of that
21 in addition to the evidence taken today and the argument of
22 counsel in resolving those issues. Thank you.

23 TC [MR. MILLER]: Thank you, Your Honor.

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1 [Pause.]

2 TC [MR. MILLER]: Sir, if you'd step forward to that
3 chair, please. If you would remain standing, please, and take
4 off your mask and raise your right hand.

5 **GEORGE EARL BOYLES, civilian, was called as a witness for the**
6 **prosecution, was sworn, and testified as follows:**

7 TC [MR. MILLER]: Please be seated.

8 **DIRECT EXAMINATION**

9 **Questions by the Trial Counsel [MR. MILLER]:**

10 Q. State your name for the commission, please.

11 A. George Earl Boyles, B-O-Y-L-E-S.

12 Q. Sir, I believe you entered the Army in 1988; is that
13 correct?

14 A. That is correct.

15 Q. And what were your immediate duties, assignments,
16 responsibility?

17 A. I was a military policeman.

18 Q. At some point did you become a special agent at CID?

19 A. I did. 1988.

20 Q. All right.

21 A. Or 1998, I'm sorry.

22 Q. Prior to becoming a special agent with CID, did you
23 receive any training or go through any courses?

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1 A. I did. I attended the United States Army Criminal
2 Investigation Command apprentice special agent course.

3 Q. And how long a course is that?

4 A. It was 21 weeks.

5 Q. Okay. And among the topics that were covered, did
6 you -- were you taught anything about crime scene processing
7 or prisoner processing?

8 A. Crime scene processing, fingerprinting, interrogation,
9 interviews, yes.

10 Q. All right. At some point, did you have occasion to
11 come to Guantanamo Bay?

12 A. I did, yes.

13 Q. In 2006?

14 A. Yes, sir.

15 Q. And in what capacity?

16 A. I was the operations officer for the detachment here
17 of the Criminal Investigation Task Force.

18 Q. What we commonly call CITF?

19 A. That's correct.

20 Q. And what were your duties, what were your
21 responsibilities?

22 A. I was the operations officer. Had responsibility for
23 the day-to-day supervision of the special agents that were

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1 assigned to the task force permanently here on station. I
2 assisted with operational activities, arranging for other
3 agents visiting here to do work, making their arrangements of
4 housing, transportation, et cetera.

5 Q. And how long did you remain here?

6 A. I was here for one year.

7 Q. All right. And after that ----

8 A. I ----

9 Q. ---- where did you go?

10 A. I went back to my next permanent duty station at
11 Fort Bragg, North Carolina.

12 Q. And there you were the special agent in charge,
13 correct?

14 A. That's correct.

15 Q. All right. And you retired in 2008?

16 A. Yes, sir.

17 Q. And you are now a special agent with the VA Office of
18 Inspector General?

19 A. Yes, sir.

20 Q. I want to direct your time -- direct your attention,
21 excuse me, to the time while you were here in GTMO. First
22 off, at any point during your stay here or your assignment
23 here, did you have occasion to interview any HVDs?

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1 A. I did not.

2 Q. All right. Now, you were one of how many permanently
3 assigned agents to CITF here on island?

4 A. At the time I was here, I don't remember the exact
5 number, but I believe we had seven or eight agents that
6 worked -- worked for us permanently here on station.

7 Q. And did you know Agent Mansapit?

8 A. Yes.

9 Q. And what about Agent Chestnut?

10 A. Mr. Chestnut, yes.

11 Q. All right. I want to direct your attention
12 specifically now to 30 of November 2006. Did you have
13 occasion to be involved in the processing of some detainees
14 that particular day?

15 A. Yes, I did.

16 Q. How is it that you came to be involved in the
17 processing of those individuals?

18 A. I was notified, I believe, by my supervisor, the
19 resident agent in charge of the task force here, Mr. Beddo,
20 that we would be processing some detainees that day.

21 Q. Had you received any other briefing prior to him
22 assigning you these taskings?

23 A. Not that I recall, no.

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1 Q. All right. And did he tell you with whom you would be
2 working?

3 A. Within our task force?

4 Q. Right.

5 A. Yes.

6 Q. And who was those -- who were those individuals?

7 A. Agent Mansapit and Mr. Chestnut.

8 Q. Do you recall, if you can, to describe the building in
9 which this processing occurred?

10 A. I don't recall the description of the exterior of the
11 building. I recall that we were in a -- a room within the
12 building where we set up a few workstations, processing
13 stations for -- for processing the detainees.

14 Q. When you say workstation processing, if you could,
15 please, be more specific. Places where you could do the
16 fingerprinting?

17 A. Yes. I believe we had two -- two separate locations
18 set up for taking major case fingerprints, myself and Agent
19 Mansapit. And then there was another location for, I think,
20 taking DNA samples, that I recall.

21 Q. And who took the DNA samples?

22 A. That was Mr. Chestnut.

23 Q. And how were the detainees brought into the room?

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1 A. I recall they were brought in under escort.

2 Q. Let me stop you there. When you say under escort, who
3 was doing the escorting?

4 A. The guard force here, presumably military police that
5 was on the -- the guard force permanently assigned here.

6 Q. So they were brought in -- were they all brought in at
7 once?

8 A. No. I believe they were brought in, I believe at
9 most, two at a time, so that the two stations for taking major
10 case fingerprints were -- were filled at any given time.

11 Q. And when you were done taking the prints, taking the
12 buccal swabs, taking photographs, what next happened to these
13 detainees?

14 A. They were taken back out of the room under escort.

15 Q. While in your presence, were any of them ever
16 questioned?

17 A. No.

18 Q. While in your presence, did any of them complain about
19 the processing itself?

20 A. No.

21 Q. Did you see any mistreatment of any individuals during
22 the processing?

23 A. I did not.

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1 Q. All right. Approximately how long did it take for
2 each individual detainee to be processed?

3 A. Taking a set of major case fingerprints take anywhere
4 between five and ten minutes, and then a DNA sample. I can't
5 imagine that they were in the room for more than 15 minutes.

6 Q. What happened to the, I'm going to call it evidence,
7 the buccal swabs, the major case prints? Was there an
8 evidence custodian? Was somebody responsible for this?

9 A. The DNA samples were collected on a standard -- I
10 believe at the time an Army CID evidence form. The major case
11 fingerprints, if I recall, were uploaded into our major case
12 reporting system that we were using at the time.

13 Q. And was the processing that occurred that day
14 consistent with how it would work generally at CID or CITF?

15 A. My experience prior to that was with Army CID in a
16 more traditional law enforcement setting, and that would have
17 been exactly the same, minus the escorts.

18 Q. Were you ever contacted by any other agency about what
19 occurred on this evening?

20 A. No.

21 Q. Do you remember if there were any other agencies, the
22 FBI or anybody else, present that evening?

23 A. I don't recall specifically. We're -- we worked

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1 closely with the -- with the FBI. There may or may not have
2 been an FBI agent present that evening. I don't recall
3 specifically.

4 Q. And approximately how many detainees do you recall
5 being processed that evening?

6 A. I think there was about 15.

7 Q. All right. As to the information itself, obviously
8 you had to put a name or an ISN number on the major case
9 prints, correct, cards?

10 A. Correct.

11 Q. How did you obtain that information?

12 A. Again, I don't recall specifically, but I believe they
13 were identified to us by ISN and last name as they were -- as
14 they were brought to us under escort.

15 Q. So the information was provided to you by somebody
16 else other than the detainee himself?

17 A. Yes.

18 Q. All right.

19 TC [MR. MILLER]: Nothing further, Your Honor. Thank you.

20 MJ [COL ACOSTA]: Defense, cross?

21 **CROSS-EXAMINATION**

22 **Questions by the Defense Counsel [MS. CARMON]:**

23 Q. Good morning, sir.

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1 A. Good morning, ma'am.

2 Q. You mentioned that the high-value detainees had been
3 brought to you and they were already assigned ISNs, some
4 numeric identifier; is that right?

5 A. Yes.

6 Q. And that numeric identifier also corresponded with a
7 name; is that correct?

8 A. I believe that's -- yes.

9 Q. And specifically, the name of the high-value detainee
10 in front of you?

11 A. Yes.

12 Q. And so before you began to take major case prints and
13 DNA samples, these men had already been identified to you; is
14 that right?

15 A. Before I actually started taking the prints, yes,
16 because I would have had to have had something to put on the
17 prints themselves, yes.

18 Q. And when you say something to put on the prints,
19 something, some identifier to tell people who it -- who those
20 prints belonged to; is that right?

21 A. Name and ISN, yes.

22 Q. Okay. You had mentioned that your experience was in
23 more of a traditional law enforcement setting through CID at

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1 the Army; is that right?

2 A. Yes, correct.

3 Q. I'd like to ask you just a couple of questions about
4 your experience in processing prisoners, please.

5 The processing, in a traditional law enforcement
6 setting like you mentioned, that begins after someone is
7 arrested; is that correct?

8 A. The experience I had specifically with taking major
9 case fingerprints would have been and was, in my experience
10 with Army CID, subsequent to an interview; not necessarily
11 after an arrest, but while being brought to our office for --
12 for interview. If they were the subject of an investigation
13 at that time, after the interview we would obtain major case
14 fingerprints, record photograph, sometimes DNA sample at that
15 time.

16 Q. And that is because this person is a suspect or the
17 subject of your investigation; is that right?

18 A. That is correct.

19 Q. And part of the reason to do major case prints or a
20 DNA swab is, one, to make sure we have a firm identity of this
21 person; is that right?

22 A. That's correct.

23 Q. And so I believe you discussed when you took these

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1 major case prints in 2006, you did upload them to your
2 database; is that correct?

3 A. I believe that's correct, yes.

4 Q. And so, again, that is to make sure that the person
5 who says his name is Harry Smith is actually Harry Smith; is
6 that right?

7 A. Not necessarily. That would have been just to have
8 a -- a record of them memorialized in some place for record.

9 Q. And memorialized insofar as these prints belong to
10 this person, correct?

11 A. Yes, correct.

12 Q. Thereby cementing the identity that you have?

13 A. Correct.

14 DC [MS. CARMON]: The Court's brief indulgence, please.

15 MJ [COL ACOSTA]: You may.

16 [Pause.]

17 Q. Sir, you mentioned, again, in your traditional law
18 enforcement capacity, that the people that you would be taking
19 major case prints from or DNA swabs from would be the suspect
20 or the object of your investigation, right?

21 A. Yes, ma'am.

22 Q. Have you ever booked someone in that traditional
23 sense, done major case prints or DNA swabs, four years after

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1 that person has been in custody, continuous custody?

2 A. No, ma'am.

3 Q. Thank you, sir.

4 DC [MS. CARMON]: I have nothing further. Thank you,
5 Judge.

6 TC [MR. MILLER]: No further questions, Your Honor. Thank
7 you.

8 MJ [COL ACOSTA]: Permanent for the purposes of the
9 motion?

10 TC [MR. MILLER]: Yes, Your Honor.

11 **[The witness was warned, was permanently excused, and withdrew**
12 **from the RHR.]**

13 MJ [COL ACOSTA]: Government?

14 TC [MR. MILLER]: The government calls Leona Mansapit.
15 Ma'am, if you'd step up to the chair, please. Remain
16 standing. Please raise your right hand. First off, could you
17 take off your mask?

18 WIT: Yes.

19 TC [MR. MILLER]: Thank you. I'm sorry. Raise your right
20 hand.

21 **LEONA LYNN MANSAPIT, civilian, was called as a witness for the**
22 **prosecution, was sworn, and testified as follows:**

23 TC [MR. MILLER]: Please be seated.

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1 WIT: Mask back on?

2 MJ [COL ACOSTA]: No, you can leave your mask off during
3 your testimony. Thank you.

4 DIRECT EXAMINATION

5 Questions by the Trial Counsel [MR. MILLER]:

6 Q. Would you state your name for the record, please, and
7 spell your last name.

8 A. Full name, Leona Lynn Mansapit, last name
9 M-A-N-S-A-P-I-T.

10 Q. All right. Ma'am, I'm going to ask you a little bit
11 about your background. You attended university; is that
12 correct?

13 A. Yes, sir.

14 Q. All right. And where did you go and what degree did
15 you receive? Bachelor's?

16 A. My bachelor's degree I received from the Columbia
17 College University out of Missouri.

18 Q. And your degree?

19 A. Bachelor's of criminal justice administration.

20 Q. All right. And did you do any graduate work?

21 A. Yes, sir.

22 Q. And could you relate what that is?

23 A. I have a master's of science in forensic science from

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1 George Mason University.

2 Q. Now, you joined the Army, it's my understanding, in
3 1997; is that correct?

4 A. Yes, sir.

5 Q. All right. And what were your duties initially, and
6 responsibilities?

7 A. When I first came in the Army I was a military police
8 officer for about five years.

9 Q. And then what position did you assume?

10 A. And then I became a special agent with the Criminal
11 Investigation Division for the U.S. Army.

12 Q. And when did that occur? What year?

13 A. That was in 2003.

14 Q. Did you receive any training prior to becoming a CID
15 agent?

16 A. Yes.

17 Q. Could you describe that please.

18 A. I went to the special agent course at Fort Leonard
19 Wood, Missouri. That was four months long.

20 Q. And did you receive training in evidence processing,
21 evidence collection?

22 A. Yes, sir.

23 Q. And would that include fingerprinting?

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1 A. Yes. Yes.

2 Q. Jumping ahead to 2006, where was -- what was your
3 duties? What was your responsibilities? What was your
4 position?

5 A. I was assigned with the Criminal Investigation Task
6 Force here at GTMO. I was the operations officer, or NCOIC,
7 if you will, conducting scheduling, logistics. I was the
8 evidence custodian, processing, collecting, and shipping them
9 out from GTMO to our headquarters, and a number of other
10 things I had to do as part of the operations cell.

11 Q. All right. Did you work with an individual by the
12 name of Chestnut?

13 A. Yes, sir.

14 Q. All right. What about Boyles?

15 A. Yes, sir.

16 Q. Who was your immediate supervisor?

17 A. It was Mr. Boyles.

18 Q. And who was actually in charge of the entire office?

19 A. That was Mr. Sheldon Beddo.

20 Q. How long did you remain here at GTMO?

21 A. I was here for one year exactly.

22 Q. 2008, I think you were promoted; is that correct?

23 A. Yes, sir.

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1 Q. And could you describe what rank you achieved at that
2 time?

3 A. I became a warrant officer for the Army.

4 Q. I think it was a Warrant Officer 4; is that correct?

5 A. I am currently a Chief Warrant Officer 4, yes.

6 Q. All right. Now, you indicated that you received your
7 master's in forensic science; is that correct?

8 A. Yes, sir.

9 Q. Are you familiar with buccal swabs?

10 A. Yes.

11 Q. And what are they, just for the record?

12 A. Buccal swabs is sample from the mouth of an
13 individual, collecting a sample of their DNA profile.

14 Q. And how is that done?

15 A. With a sterilized Q-tip or a swab tip and dried and
16 secured and processed through a lab.

17 Q. Is the swab rubbed inside an individual's mouth?

18 A. Yes, that's exactly how.

19 Q. Is it painful?

20 A. No, sir.

21 Q. All right. I want to direct your attention to the
22 time you were at GTMO, specifically November of --
23 November 30th of 2006. Do you recall being involved in the

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1 processing of some high-value detainees?

2 A. Yes, I remember.

3 Q. And how did you come to be involved in that particular
4 processing?

5 A. Mr. Beddo had tasked myself, along with Mr. Boyles and
6 Mr. Chestnut, to process these high-value detainees as they
7 came into the camp.

8 Q. Had you received any kind of briefing regarding these
9 individuals prior to that evening?

10 A. No, other than that they were high-value detainees,
11 and I didn't know any more than that.

12 Q. So you knew nothing about them, who they are or what
13 they allegedly had done?

14 A. Not specifically, no.

15 Q. Had you ever -- while your time here at GTMO, had you
16 ever interviewed a high-value detainee?

17 A. No.

18 Q. So on that particular evening, if you could, please,
19 describe first how you prepared to process these individuals,
20 what steps you took prior to their arrival?

21 A. We had the fingerprinting cards, which that was my
22 responsibility. I fingerprinted half of the detainees that
23 came through. The buccal swabs were being conducted by

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1 somebody else, I believe Mr. Chestnut.

2 But as far as me preparing for the fingerprints, it
3 was just standard fingerprint cards with their names. I don't
4 know if there were -- the names were on there or the ISN
5 numbers were on there. But as far as preparing, it didn't
6 take much because they're just fingerprint cards.

7 Q. Could you describe the room or the location -- the
8 interior I'm talking about now of where this actually took
9 place?

10 A. The location was kind of like in a -- like a trailer,
11 a hut. It wasn't a very large space, but it was enough space
12 for all of us to be in there and, I guess, funnel the
13 detainees through one at a time. And they would come in
14 already shackled on their wrists and feet -- or ankles.

15 And I remember specifically I had to make them sit
16 down -- for my station, sit in a chair because the table was
17 low, and fingerprinting them from standing up was kind of
18 uncomfortable. So I had them sit down and had them
19 fingerprinted on the table for -- at that level. And that was
20 it.

21 Q. Did you speak or interview any of the detainees that
22 evening?

23 A. No.

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1 Q. Did any of the other CITF agents, either Boyles or
2 Chestnut, do that in ----

3 A. No.

4 Q. ---- your presence?

5 A. No, no.

6 Q. Did any of the detainees complain to you about the
7 processing procedures themselves?

8 A. No, sir.

9 Q. And did you see anybody that was mistreated while in
10 your presence?

11 A. No, sir.

12 Q. About how long did it take to process a detainee?

13 A. No more than four minutes, four or five minutes, with
14 fingerprinting them themselves for myself.

15 Q. Who brought them into the room?

16 A. They were escorted by the military police.

17 Q. And who escorted them out?

18 A. The military police, yeah.

19 Q. And approximately how many persons were processed that
20 evening?

21 A. About 14, sir.

22 Q. Would it be a fair statement that it was a -- what I
23 would call an assembly line-type operation?

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1 A. Yes. Yes, sir.

2 Q. Do you recall any other agencies being present that
3 evening?

4 A. Other than the CITF agents?

5 Q. Yes.

6 A. There was probably an FBI agent in the room, but I
7 don't remember who that was. They were just present.

8 Q. You indicated that you did half of the fingerprinting.
9 Who did the other half of the fingerprinting?

10 A. That was Mr. Boyles, George Boyles.

11 Q. So you and Boyles were doing the fingerprinting, and I
12 take it Chestnut was doing the ----

13 A. The buccal swabs, yes, sir.

14 Q. As evidence custodian, did you take possession of the
15 fingerprints when you were done?

16 A. I don't remember what happened with the fingerprints
17 when I was done with them.

18 Q. All right.

19 A. Yeah.

20 Q. Do you know what eventually happened to them, where
21 they went?

22 A. They probably -- I would assume they would go into
23 their case file, which is kind of routine for those items.

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1 Q. Was there anything unusual about the processing that
2 took place that evening based on your experience as an agent?

3 A. No. It was very routine other than -- I mean, the
4 timing of it was in the evening, but that's the only reason
5 why it really sticks -- stuck out to me.

6 Q. All right.

7 TC [MR. MILLER]: I have nothing further, Your Honor.
8 Thank you.

9 MJ [COL ACOSTA]: Would you repeat that last answer,
10 please.

11 WIT: That the -- it was unusual just because of the
12 timing. It was in the evening time, so that was the only
13 thing that stuck out to me ----

14 MJ [COL ACOSTA]: Thank you. All right.

15 WIT: ---- so ----

16 MJ [COL ACOSTA]: Defense, cross?

17 DC [MS. CARMON]: No, Your Honor. No questions. Thank
18 you.

19 MJ [COL ACOSTA]: Permanent for the purposes of this
20 motion, Government?

21 TC [MR. MILLER]: Yes, Your Honor. And the government has
22 no further evidence.

23 MJ [COL ACOSTA]: All right.

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1 [The witness was warned, was permanently excused, and withdrew
2 from the courtroom.]

3 MJ [COL ACOSTA]: Defense, any evidence to present?

4 DC [MS. CARMON]: No, Your Honor, just argument.

5 MJ [COL ACOSTA]: All right. Government, are you prepared
6 to argue?

7 TC [MR. MILLER]: Other than the -- other than the
8 argument that's already been made, Your Honor, about standing.

9 As to the processing itself, as the pleadings and
10 exhibits that have been attached thereto, it indicates that
11 this processing was done pursuant to a standard protocol that
12 was done -- or in operation at the particular time. It makes
13 sense that coming into a prisoner of war facility, law of war
14 facility, that you would naturally be processing these
15 particular individuals.

16 At best, the individuals would be entitled to a
17 protection where the actions taken by the government were
18 reasonable. The particular -- this particular process, they
19 were in, they were out. There was nothing unusual about the
20 processing. The processing was done in a professional and, as
21 we said, kind of an assembly-line fashion. So under those
22 circumstances, it was a reasonable situation.

23 Plus, as to a suspicion of the search, the law is

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1 pretty clear too as reasonableness. Reasonableness really is
2 sort of the key to all what occurred here. I think under the
3 circumstances, under the applicable case law, and based on our
4 arguments that what was done here was entirely proper. It
5 would have been actually unusual not to process prisoners
6 coming into this place, taking this sort of information.

7 So other than that, Judge, the government has nothing
8 else to offer.

9 MJ [COL ACOSTA]: All right. Defense, argument?

10 DDC [CAPT MIZER]: Judge, I think I can be equally brief.

11 It's not lost on the commission that Mr. al Nashiri
12 had been in custody since October of 2002. Your Honor has
13 seen quite literally reams of paper as to what was known about
14 Mr. al Nashiri, who he was, what was done to him.

15 The idea that four years into this process that this
16 is a routine booking procedure, it was anything but that,
17 Judge. I mean, I think that you heard one of the witnesses
18 say -- and I would have been shocked had he said anything
19 else, they'd never booked someone after they've been in
20 custody for four years.

21 Judge, we referenced the indictment of Jamal Badawi
22 and Fahd al Quso, May 15th, 2003. Then Attorney General John
23 Ashcroft announces that indictment, and on page 2 of that

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1 indictment are the names of the unindicted co-conspirators,
2 Mr. Bin'Attash, and then also Mr. al Nashiri. Now, they're
3 not indicted, and we can speculate as to why, but the Attorney
4 General, I presume, knew exactly where those two individuals
5 were. The indicted individuals were still free in Yemen.

6 But it was no mystery as to who these individuals
7 were. You heard the testimony that they came in with ISN
8 numbers, with their full names, and they sat down and went
9 through a process, we submit, that was to gather evidence
10 untainted by this prior experience, the prior four years,
11 under the pretense, if you will, of a -- of a booking
12 procedure. Mr. al Nashiri had been booked years before by the
13 United States government. And again, there was no mystery as
14 to who he was at this point, his identity.

15 And, Judge, we cited the Maryland v. King case. And
16 Mr. Miller is absolutely right, it's a minimal intrusion.
17 What the Supreme Court stamped off on 2013 was that minimal
18 intrusion at the time of booking. This was something far
19 different than a routine booking, Judge, and I won't belabor
20 that point.

21 We rest on the papers and the evidence presented.

22 MJ [COL ACOSTA]: Any rebuttal, Government?

23 TC [MR. MILLER]: Nothing further, Your Honor. I believe

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1 it's been fully briefed.

2 MJ [COL ACOSTA]: Okay. All right. Before we move into
3 the next issue, we'll take a 20-minute recess. The
4 commission's in recess.

5 [The R.M.C. 803 session recessed at 1002, 13 December 2021.]

6 [The R.M.C. 803 session was called to order at 1023,
7 13 December 2021.]

8 MJ [COL ACOSTA]: The commission is called to order.
9 Government, all parties present as before?

10 TC [MR. MILLER]: Yes, Your Honor.

11 MJ [COL ACOSTA]: Defense?

12 LDC [MR. NATALE]: Yes, Your Honor.

13 MJ [COL ACOSTA]: All right. We're taking up now AE 432,
14 the defense motion to sever offenses. Defense?

15 DDC [CAPT MIZER]: Good morning again, Your Honor.

16 MJ [COL ACOSTA]: Good morning. And before you start,
17 just so that there's no -- no evidence to present on this
18 issue, correct?

19 DDC [CAPT MIZER]: No, Judge. We would ask the commission
20 to consider the pleadings. The only addition that we would
21 have is I think that the pleadings in the 168 and 241 series,
22 which was the ----

23 MJ [COL ACOSTA]: Give me the second number again. I'm

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1 sorry.

2 DDC [CAPT MIZER]: I think it's 168 and 241.

3 MJ [COL ACOSTA]: 241.

4 DDC [CAPT MIZER]: And we'll double check that for Your
5 Honor. But those were the series where Judge Spath initially
6 dismissed the MV Limburg charges.

7 MJ [COL ACOSTA]: Right, and then the CMCR, then they
8 got ----

9 DDC [CAPT MIZER]: Yes.

10 MJ [COL ACOSTA]: ---- reinstated.

11 DDC [CAPT MIZER]: They were reinstated by the CMCR. But
12 I think that those pleadings are also relevant, and we would
13 ask the commission to take those under consideration.

14 MJ [COL ACOSTA]: Government?

15 ATC [LCDR JOLLY]: No objection, sir.

16 MJ [COL ACOSTA]: Thank you, Government.

17 You may proceed.

18 DDC [CAPT MIZER]: Judge, we're seeking severance of the
19 charges involving the COLE and the Limburg in order to prevent
20 a manifest injustice under R.M.C. 906(b)(9). I know that it
21 is not lost on the commission that this is an incredibly
22 complex case; I would submit the most complicated case in U.S.
23 history. I know the 9/11 case often gets that credit, but I

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1 think that this case is even more complex.

2 I mean, you have certainly the classification; you
3 have the fact that it is a 20-year-old offense; these offenses
4 occurred in Yemen; we have discovery in French, Arabic, and
5 Bulgarian; you have the classification issues, Judge. And
6 then relevant for today is the law of war rubric that this
7 commission must operate under.

8 This commission only has jurisdiction for war crimes,
9 Your Honor. Going back to Winthrop, of the three types of
10 military commissions, again, this is a law of war commission.
11 And as a plurality of four justices in the Hamdan case before
12 the Supreme Court held, again, military jurisdiction is
13 limited to offenses that occur in the war, and the plurality
14 added the requirement of "on the battlefield."

15 And again, that is one of the things that makes this
16 case so complicated as we will ultimately litigate and have to
17 instruct a members panel as to Yemen and whether or not it is
18 on the battlefield and when the war in this case began.

19 It's buttressed by statute, Judge, not just Colonel
20 Winthrop's treaty -- treatise, excuse me, but 10 U.S.C.
21 950p(c) sets the jurisdictional limits of this commission,
22 which deal with the existence of hostilities and then also a
23 nexus to hostilities.

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1 Judge, when we litigated Hamdan and then Bahlul a few
2 months later, the instruction that was given to the members
3 panel -- and this is set forth in AE 617K of the Mohammed
4 military commission, where Colonel Parrella, when he was the
5 presiding judge there, adopted the instruction for the 9/11
6 case. And so you now have this same instruction in the older
7 legacy military commissions, if you will, and then the 9/11
8 case, which is now before this commission.

9 And the instruction, Judge, says that: With respect
10 to each of the offenses listed as objects in the specification
11 charges, the government must prove beyond a reasonable doubt
12 that the offense took place in the context of and was
13 associated with armed conflict. In determining whether an
14 armed conflict existed between the United States and al Qaeda
15 and when it began ----

16 MJ [COL ACOSTA]: If you could slow down.

17 DDC [CAPT MIZER]: Understood, Judge.

18 MJ [COL ACOSTA]: Go ahead.

19 DDC [CAPT MIZER]: ---- you should consider the length,
20 duration, and intensity of the hostilities between the
21 parties; whether there was a protracted armed violence between
22 the government authorities and organized armed groups; whether
23 and when the United States decided to employ the combat

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1 capabilities of its armed forces to meet the al Qaeda threat;
2 the number of persons killed or wounded on each side; the
3 amount of property damage on each side; statements of the
4 leaders of each side indicating their perceptions regarding
5 the existence of an armed conflict, including the presence or
6 absence of a declaration to that effect. And then it ends
7 with the sentence "and any other facts and circumstances you
8 consider relevant to the existence of the armed conflict."

9 And so, Judge, what we're asking Your Honor to do is
10 to bifurcate this case into two buckets, if you will: The
11 charges involving the USS COLE and those charges involving the
12 French supertanker MV Limburg in 2002.

13 As you know, severance is governed by a three-part
14 test, identified first by the -- by the CAAF in the Marine
15 capital case, United States v. Curtis, adopted in Giles and
16 Southworth and a few other cases that are in the pleadings.

17 The first test is whether the -- the first factor
18 under the Giles test, Judge, is whether the evidence of one
19 offense would be admissible proof of the other. And as just
20 one example, Judge, you know, for Charge IX, which deals with
21 the MV Limburg, hazarding a vessel is not admissible, or
22 wouldn't be admissible, say, against Charge I which is -- is
23 perfidy.

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1 With respect to the second factor, we think that there
2 is grave danger of crossover evidence in this case. Simply
3 put, and I think that this is recognized on the charge sheet
4 where Admiral MacDonald, who was the convening authority at
5 the time, dismissed charges related to the COLE because, as a
6 matter of lawful -- or, excuse me, as a matter of
7 international law and the law of armed conflict, the COLE is a
8 military target. And that is a distinction between these two.

9 I asked Your Honor to consider AE 168 and 241 because
10 the defense would also submit, Judge, that if the government's
11 correct and a state of armed conflict existed since 1996, if
12 France was a party to that conflict, which is their theory
13 that was litigated in the 168 and 241 series, that oilers are,
14 in fact, also lawful targets. And that's going to have to go
15 to a members panel. And, you know, years ago when we were
16 litigating that, Judge, you know, we pointed out that in the
17 South Pacific, Chester Nimitz was sinking Japanese oilers.
18 Oil is ammunition, Judge.

19 And again, the government brought this case in a law
20 of war commission, not in federal district court, and in many
21 respects, it is putting a round peg -- or a square peg into a
22 round hole. And it's the -- it's you, Your Honor, with
23 assistance from the parties, that are going to have to

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1 instruct a panel as to those complex concepts under the law of
2 war.

3 Now, Judge, a warship is a lawful target. But to be
4 charged with a war crime, attacking that lawful target must
5 occur during the war. And we cited the decision in
6 al Nashiri II, the abstention, which was resolved by the
7 D.C. Circuit on abstention grounds, which is not foreign to
8 Your Honor.

9 You know, your PFC at Fort McNair can't go to federal
10 district court under Councilman and Noyd v. Bond because of
11 the robust procedures of military courts and the civilian
12 courts will typically abstain, absent a lack of personal
13 jurisdiction in those cases, Judge.

14 But importantly, and what is going to make this
15 difficult and why these offenses should be separate is, again,
16 not all violence constitutes war. And I'll stick with
17 World War II as an example. Last week we had the 80th
18 anniversary of the attack on Pearl Harbor. I think most
19 Americans would now agree that Pearl Harbor begins -- or,
20 excuse me, World War II, at least for the United States,
21 begins on December 7th, 1941. But that wasn't the first time
22 that the Japanese attacked American forces.

23 December 12th, 1937, as the Japanese forces were

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1 attacking Nanking, there was an American warship by the name
2 of USS PANAY escorting three Standard Oil tankers outside of
3 Nanking, and it came under attack by Japanese aircraft. Two
4 American sailors were killed and the PANAY was sunk.

5 World War II didn't start in 1937, Judge, because of armed
6 violence between the Empire of Japan and the United States.

7 It is those factors, which actually come from a case
8 called Tadic out of the ITCY dealing with ethnic cleansing in
9 Bosnia and Serbia, and the debate that occurred in the ITCY as
10 to what Tadic had done. Was it part of an armed conflict,
11 rounding up civilians, ethnically cleansing them from their
12 homes? And you can see the organization and intensity test in
13 Tadic, why that is perhaps easier in the context of, say,
14 going into a city of 5,000 people with tanks, heavy weapons,
15 and committing atrocities, why that is probably an easier call
16 as to whether armed conflict occurs or, as the ITCY said,
17 sporadic violence and mere terrorism, which under the IHL, or
18 International Humanitarian Law, are distinct from war crimes.

19 Judge, Judge Spath dismissed the MV Limburg charges as
20 one of the first things that he did in this case. And again,
21 I reference you to those pleadings because the Limburg is a
22 French ship carrying Iranian oil on a Malaysian contract off
23 the coast of Yemen where a Bulgarian is killed. And I think

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1 that your highly educated, as CAAF says blue ribbon panel so
2 often, is rightly going to wonder what is America's role in
3 prosecuting crimes against French and Bulgarian -- French
4 property and Bulgarian citizens.

5 At the same time, Judge, I think some of us were in
6 uniform before 9/11. I think as the dissent in Nashiri II
7 says, that most Americans are likely going to think that, in
8 the same way that December 7th, 1941 is the start of
9 World War II, that September 11th, 2001, is the start of the
10 war with al Qaeda.

11 Now, under that Tadic intensity test, I think it's an
12 open question as to how long that war, as a matter of law, not
13 as a matter of rhetoric, such as the war on poverty or the war
14 on drugs, but how long that actual shooting war, as required
15 under International Humanitarian Law, continues. That is very
16 relevant for the 9/11 case but it's also very relevant for
17 this case, because it would be an entirely viable defense and
18 the one that Mr. al Nashiri pursued in federal district court
19 and was told he had to raise that subject matter jurisdiction
20 challenge here.

21 But it would be an entirely complete defense to stand
22 in front of the members and simply say that the attack on the
23 USS COLE happened outside of a period of armed conflict. That

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1 doesn't mean that the government couldn't prosecute the case,
2 but it can't prosecute it here at a law of war commission.

3 That becomes complicated and the risk of spillover
4 when the government charges a post-9/11 offense, which has
5 nexus problems, Judge -- as I mentioned, the French
6 connection, if you will, for lack of a better phrase -- and
7 that this is going to be a confusing mess; that one of the
8 offenses has no connection to the United States whatsoever,
9 arguably occurs after the war begins, and another offense is
10 of grave concern to the United States but where hostilities
11 hadn't yet commenced. It is sporadic violence, the embassy
12 bombings, the attack on the USS COLE, and that as a matter of
13 law, it's -- and again, not all armed violence constitutes war
14 or war crimes. And it's that explanation that is going to
15 have to go to a jury.

16 And Judge Spath was convinced, Judge, that there
17 wasn't jurisdiction over those French charges. And he was
18 reversed on the -- on the CMC's belief that that wasn't
19 subject matter jurisdiction argument. Now, we would submit
20 that 84 days later, the D.C. Circuit makes clear that it is
21 subject matter jurisdiction, and it's just left there.

22 Unfortunately, one of the -- one of the flaws,
23 respectfully, of this system is, unlike the UCMJ, the CMC is

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1 the last word until direct appeal. We don't have the ability
2 to go to the D.C. Circuit and say, did you get it right?

3 But we have pretty much the next best thing with
4 Nashiri II in the government going to the D.C. Circuit saying,
5 look, the CMCJ just said that this is not subject matter
6 jurisdiction. You don't even need to get to the -- the
7 abstention under Councilman, but the D.C. Circuit saying it's
8 absolutely subject matter jurisdiction and under Councilman
9 the military commission gets the first shot. He's got to go
10 through the military commission.

11 Judge, we think that this is akin to the Giles case.
12 Then I submitted to you Judge Spath's ruling in the Wilson
13 case, which is the Air Force's most recent capital case. And
14 in that case, Judge, Judge Spath actually trifurcated the
15 case. There was a felony murder charge where a Senior Airman
16 Wilson and his friend decided to defraud USAA. And so they
17 went to set fire to Airman Wilson's apartment and his friend
18 tragically set himself on fire and burned up in the apartment.

19 And so there was all this litigation, Judge, in that
20 case as to whether or not felony murder could be capital.
21 And, you know, I think it's pretty clear on 118(1), but when
22 you start getting into 118(4) -- and so I mention that for the
23 similar types of complexities and whether or not these are

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1 properly charged as capital offenses. And you have two
2 different buckets here, very similar to Wilson than the
3 premeditated murder that was the principal offense in Wilson.
4 And I think the parallels there are fairly stark.

5 With that, Judge, unless you have any other questions,
6 we believe that it would be a manifest injustice if these
7 charges aren't severed, and we would proceed, hopefully, with
8 a case about the COLE and then secondarily with a case
9 regarding the Limburg.

10 MJ [COL ACOSTA]: Are some of the issues that you're
11 talking about really just, as the CMCRC has stated, questions
12 of fact for the -- are we not straying into the same area that
13 got the -- Judge Spath's Limburg dismissal, where we're
14 straying into the court answering a question of fact, an issue
15 of fact that should be sent to the panel? Is that not the
16 same thing that you're asking me to do here?

17 DDC [CAPT MIZER]: I don't think that I am, Judge. The
18 problem is forecasting this. It's a matter of instruction.
19 And, I mean, we both can look at the evidence as ----

20 MJ [COL ACOSTA]: Right. It's a ----

21 DDC [CAPT MIZER]: ---- as we understand it.

22 MJ [COL ACOSTA]: It's a matter of instruction, which is
23 exactly where, you know, the -- some of this has traditionally

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1 been -- or courts have said that's where you can resolve some
2 of these things, is on the instruction, right?

3 DDC [CAPT MIZER]: That's absolutely right, Judge, but one
4 of the factors is whether or not you can pull that off ----

5 MJ [COL ACOSTA]: Whether it's possible for us.

6 DDC [CAPT MIZER]: ---- essentially Giles -- right, Judge.

7 MJ [COL ACOSTA]: And I know that you're not saying
8 whether or not I -- whether or not any -- any -- I'm not
9 taking it that way so just -- but whether or not any judge can
10 write the right -- the correct or most helpful -- because
11 instructions, right, are to help the panel be able to make the
12 decisions they need to make to be helpful to them, in making
13 the decisions they need to make, to frame them.

14 And you're saying that it's maybe not possible because
15 of the -- the intertwined nature of the two things and whether
16 or not you can separate, even if it's -- even if your argument
17 is only about spillover from one to the other.

18 DDC [CAPT MIZER]: Yes, Judge. And I think, respectfully,
19 if anyone can solve it, it is that blue ribbon panel. But I
20 think what you're building here is an impossible thicket of
21 instructions, where the danger of spillover is too great;
22 that -- where you're talking about post-conflict offenses,
23 pre-conflict offenses, lawful targets, nonlawful targets,

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1 attacks on civilians. And at the end of the day, the risk is
2 that the members are going to say it's all part of a -- all
3 part of a war, and he's just guilty of everything.

4 And under those cases, Giles and Curtis, we believe
5 that there would be a manifest injustice, in the same way that
6 Giles -- you know, it's a rehearing for a urinalysis offense
7 and they throw on perjury. And the CAAF says that that
8 unrelated offense at the initial court-martial shouldn't have
9 been tried. There should have been severance in that case.

10 And we think that the offenses here, particularly in a
11 law of war context, are sufficiently different, that they
12 should be severed, Judge.

13 MJ [COL ACOSTA]: All right. Thank you, Counsel.

14 DDC [CAPT MIZER]: Thank you.

15 MJ [COL ACOSTA]: Government? If you could give me just
16 one finish [*sic*] to finish my notes here.

17 All right, Government. Whenever you're ready.

18 ATC [LCDR JOLLY]: Yes, sir. Thank you.

19 Sir, not only can it be done, it has been done. Using
20 the exact same instruction that Captain Mizer just read for
21 you, it was used both in Bahlu and Hamdan. It was affirmed
22 as appropriate. It is currently being contemplated, I
23 believe, in the 9/11 case. I know that's not evidence before

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1 us.

2 But the intensity and organization test established at
3 Tadic, that's T-A-D-I-C, is further refined in Lubanga,
4 L-U-B-A-N-G-A, and that's actually an ICTR; that's the
5 International Criminal Tribunal for Rwanda.

6 And so that test was applied by members in Bahlul,
7 who's a named co-conspirator of the accused, who was tried for
8 very similar offenses involving attacks on the embassies, the
9 attack on USS COLE, creating the propaganda video for
10 USS COLE. His charges are from the '90s through December I
11 think of 2001 or 2002, but it absolutely spanned 9/11. Both
12 pre and post 9/11, same type of offenses. Named
13 co-conspirator here, same evidence, some of the same
14 witnesses. Ali Soufan testified in that case.

15 And the members were able to conclude in Bahlul, with
16 detailed findings, and this is on mc.mil; you can look it up
17 on the website, AE 074. They've crossed out things. They've
18 written down things. Making very specific findings, because
19 they are thoughtful, and they followed the commission's
20 instructions.

21 And the instruction could be what Captain Mizer read.
22 We haven't gotten that far in the litigation yet, sir, but it
23 could be that, and the members could render the same very

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1 clear findings in this case. So to suggest that severance is
2 required to prevent manifest injustice ignores the facts, and
3 it ignores the history of international law, frankly.

4 The defense motion in 432 talks a lot about improper
5 bootstrapping. You can't have some massive, horrific event
6 and then subsequently look back at things prior to that event
7 and determine whether or not you have jurisdiction. But
8 that's absolutely what the courts did in both ICTY and ICTR in
9 the face of horrifying violence. And we're talking genocide;
10 we're talking rape; we're talking civilian neighbors shooting
11 up each other's houses. The United Nations Security Council
12 issued resolutions forming both of these courts, the
13 International Criminal Tribunal for the Former Yugoslavia and
14 the International Criminal Tribunal for Rwanda.

15 And the court was faced with assessing, in the face of
16 this violence, were these state actors, which is admittedly
17 much easier to determine. Was it a violation of the law of
18 war if you've got two state actors? But who are the
19 participants? What are the crimes? What's the method of
20 warfare? What's being used?

21 Now, if it's just a civilian with some sort of
22 automatic weapon shooting up his neighbor's house, even though
23 you've got state actors and state-supported groups locally

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1 blowing up bridges, blowing up buildings, was that neighbor
2 firing his weapon on his neighbor's house, did he actually
3 qualify for the court's jurisdiction? We haven't gotten there
4 yet, sir, in this litigation, but that's the sort of stuff
5 that those tribunals had to look at.

6 In ICTR, you've got people driving thousands of
7 civilians into like a coliseum where the civilians are being
8 murdered. It's genocide. Did that offense qualify? Was that
9 enough? The individuals perpetrating those offenses, did they
10 wear uniforms? Did they carry their arms openly? No. But
11 the panels in each of these, and even up on appeal -- because
12 that's where a lot of this precedent comes from, the appeals
13 from the original trial for both ICTY and ICTR -- had to look
14 at that, consider all those factors and make those
15 determinations.

16 Sir, the members are going to have to do the exact
17 same thing here. But these aren't most Americans, as Captain
18 Mizer just qualified them. These are going to be seasoned
19 military professionals, armed with the evidence that we
20 actually admit in this case, not just speculation, evidence
21 that we admit and the instructions that you provide. So it's
22 important to think about, well, what is that evidence and what
23 are these charges here before we talk about severing.

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1 This isn't like Wilson, which is a 2016 case which
2 Captain Mizer forwarded via e-mail to the court on Saturday, I
3 would submit improperly without counseling, in violation of
4 the Rules of Court. It wasn't a proper supplement to his
5 pleading. And it is a trial decision by a military judge,
6 your predecessor, sir, whose post-November 2015 decisions were
7 vacated by our appellate court. So I would respectfully ask
8 that you give that opinion and that decision to -- to sever
9 those separate charges the due weight that it deserves.

10 But the charges here are conspiracy, as well as the
11 underlying offenses. So it's not just murder in violation of
12 the law of war, perfidy. It's conspiracy to commit murder,
13 conspiracy to commit terrorism. And we have numerous overt
14 acts. And just like in Bahlul, they start in the '90s. But
15 it's that agreement that's important.

16 So the agreement in the '90s, we're going to engage in
17 a boats operation. Now, that's not the government's phrase,
18 "boats operation." That's al Qaeda's phrase. It wasn't
19 isolated attacks. Now I'm going to attack this military
20 vessel, now I'm going to attack a civilian vessel. It was we
21 want to attack simultaneously multiple vessels. And while
22 they were not able to successfully accomplish
23 near-simultaneous attacks, this was one big operation, the

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1 boats operation. And the evidence will show that.

2 The accused's co-conspirator, Khallad Bin'Attash, told
3 the FBI in 2007, in very detailed terms, how he and the
4 accused met with Usama bin Laden in the '90s, how Usama wanted
5 to have an attack on the boats operation. He also had the
6 planes operation, but obviously we're not talking about the
7 attacks of 9/11 here, just the boats operation. The
8 preparation and planning that went into that, the acquiring of
9 civilian vessels.

10 It's an important character distinction here I would
11 like to make, because Captain Mizer was talking about
12 privileged belligerency. Is it a proper military target?
13 USS COLE is a military vessel. Would be a proper military
14 target, arguably, depending on the circumstances, if it's
15 another state actor and following the principles that we
16 respect in Geneva, for example, arms open, wearing a uniform.

17 Here you've got preparations in the '90s to find the
18 best kind of boat that will blend in with the local Yemen
19 fishing industry. Different cities have different kinds of
20 boats, so they have to get the right kind of boat. Then they
21 need to load it with explosives. But it turns out that
22 explosives are actually really heavy, so the first time they
23 try to hit an American vessel, they see it comes down the Red

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1 -- they see it coming through Egypt, they see it coming into
2 Aden, and they know she's going to refuel there. So they try
3 to launch the boat at Nashiri's direction, the accused's
4 direction. They launch this boat. And she's so heavy, she
5 gets stuck in the sand.

6 So learning from this, they drag the ship out -- we've
7 got hearsay statements to this effect. It will be evidence in
8 this case, hopefully -- and they retrofit the ship. So now
9 they've got to remove compartments from the inside of it and
10 load the explosives just so, so that the ship doesn't sink and
11 get stuck in the sand when they launch her.

12 The evidence will show the accused admits to testing
13 those explosives at sea after the effect to make sure that the
14 salt water didn't render the explosives harmless. He tested
15 it. He learned from it. That's January of 2000.

16 Now we get to October of 2000, and the properly
17 retrofitted ship that looks just like a civilian ship is being
18 helmed by two locals who are dressed like civilians. And, in
19 fact, they go so far as to shave their faces so they look more
20 like civilians. And they ram that vessel into the side of
21 USS COLE when she's refueling and detonate their explosives.

22 We have a United States sailor who will testify that
23 he waved at them. He was actually on watch, saw the ship

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1 approaching, and was growing concerned. He was going to
2 raise -- raise the alarm, but then the suicide bombers waved
3 at him. He waved back. And the ship hit.

4 The evidence is going to show that following that
5 successful attack that murdered 17 sailors, the accused was
6 with Usama bin Laden, and he heard about the successful attack
7 while he was with Usama bin Laden. It was about midnight, and
8 they heard about it on the radio. And Usama bin Laden turned
9 to the accused and congratulated him twice. Usama bin Laden
10 personally congratulated the accused.

11 So learning from this, they try to expand their
12 operation. Do it again, hit something bigger. We're still
13 doing the boats operation. Ultimately, it results in a very
14 similar attack on MV Limburg. What looks like a civilian
15 boat, the perpetrators are dressed like civilians, hit the
16 boat amidships, try to blow it up. Now, oil doesn't catch
17 fire. So she was -- so she was sinking, but she did not
18 explode.

19 It's one common conspiracy. The overt acts leading up
20 to it, it's also 404(b) evidence, motive, opportunity, intent,
21 preparation, plan, knowledge. The evidence of the attack on
22 USS COLE is also evidence that's admissible and against the
23 MV Limburg charges because that's really how the severance

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1 argument works. It doesn't -- it doesn't go the other way so
2 much as, oh, well, can we take the MV Limburg attack and use
3 that as evidence against Nashiri for the earlier-in-time
4 offenses. It's are the earlier-in-time offenses admissible
5 evidence against the Limburg? And here they absolutely are
6 because we still have to prove hostilities.

7 MJ [COL ACOSTA]: Well, it's not propensity. You're not
8 clearly asking for any type of a propensity-type instruction.
9 You're asking ----

10 ATC [LCDR JOLLY]: No, sir.

11 MJ [COL ACOSTA]: ---- for admissible to show how they
12 planned the first one and how they planned ----

13 ATC [LCDR JOLLY]: Absence of mistake, planning,
14 preparation ----

15 MJ [COL ACOSTA]: ---- the second one, right?

16 ATC [LCDR JOLLY]: Yes, sir, and it's all part of the same
17 conspiracy. And I'm not saying that we're offering it right
18 now for that purpose, but I'm saying that it could be and we
19 just haven't argued it yet. My point is it's for the factors
20 because I don't think we're actually fighting about the Curtis
21 or the Giles factors, what are -- what's the appropriate test
22 here. I'm submitting that it could be.

23 It's not -- it's not the perjury charge for the

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1 offender taking the stand in her first trial denying her
2 involvement in the -- the drug offenses or that she -- that
3 she knowingly took the drug, and then later at her rehearing,
4 that perjury charge being added.

5 And there it was important because the instruction was
6 confusing. The members actually had questions about the
7 instruction and they asked for clarification. And rather than
8 providing it, the military judge read the exact same
9 instruction. And so the members -- and it was clear in the
10 appellate opinion, the court talked about the members very
11 clearly deduced that this was a rehearing, or retrial, and
12 that she had lied before, which suggested that she was guilty.
13 It's -- so that was -- that was the problem in that case, sir.

14 And I would submit, sir, that here we don't have that
15 issue. It's admissible evidence. There -- but there's no
16 danger of confusion. We know in Bahlu that the members
17 actually concluded that the accused was guilty for both pre-
18 and post-9/11 offenses.

19 MJ [COL ACOSTA]: For you and the government, is this a --
20 this is essentially comes down to questions of -- of fact ----

21 ATC [LCDR JOLLY]: Yes, sir. I agree with that.

22 MJ [COL ACOSTA]: ---- right? Not questions of law.

23 ATC [LCDR JOLLY]: Yes, sir. And as far as the

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1 jurisdictional argument is concerned, our read of ----

2 MJ [COL ACOSTA]: Let me -- let me ask the same question:

3 Are there any questions of law on this, or is it only

4 questions of fact? Which is the government's position?

5 ATC [LCDR JOLLY]: In the defense motion, sir? I just

6 want to make sure ----

7 MJ [COL ACOSTA]: Yeah. Is this an issue on the

8 severance?

9 ATC [LCDR JOLLY]: Fact.

10 MJ [COL ACOSTA]: It's all fact?

11 ATC [LCDR JOLLY]: Yes, sir.

12 MJ [COL ACOSTA]: Nothing related to law. So I don't have

13 a question of law to resolve that I can resolve ahead of time.

14 These are all questions of fact to be resolved by the

15 factfinder?

16 ATC [LCDR JOLLY]: It could be a -- a question of fact and

17 law of can the commission craft an instruction that would be

18 clear enough to members to render findings. I mean, that --

19 that could be the question of -- a combined question of fact

20 and law.

21 But the basics of it, sir, no, it's a question of

22 fact. We have evidence from the '90s forward that we believe

23 is all admissible, so I think it's just a question of fact.

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1 And as far as the appellate issues are concerned, that
2 was the issue, is the government did not present evidence here
3 at the trial level on the interlocutory matter; and rather the
4 government wanted to wait because it is a question that the
5 members have to find beyond a reasonable doubt for each
6 offense. It's an element. And so the government wanted to
7 wait until its actual presentation of its case.

8 MJ [COL ACOSTA]: The issue of whether or not
9 hostilities ----

10 ATC [LCDR JOLLY]: Yes, sir, absolutely.

11 MJ [COL ACOSTA]: ---- existed at the time?

12 ATC [LCDR JOLLY]: Yes.

13 MJ [COL ACOSTA]: That's where the CMCR ----

14 ATC [LCDR JOLLY]: Yes, sir.

15 MJ [COL ACOSTA]: ---- sent it back down?

16 ATC [LCDR JOLLY]: Yes, sir.

17 MJ [COL ACOSTA]: What about the defense's position that
18 that's essentially been decided to be an issue that -- that
19 they say that the D.C. Circuit says is a jurisdictional
20 question that could be answered by the court?

21 ATC [LCDR JOLLY]: My understanding, sir, was the issue of
22 whether or not the timing was appropriate, whether it was
23 appropriate to seek it on an interlocutory issue as opposed to

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1 post-trial. And that's my read, sir ----

2 MJ [COL ACOSTA]: Okay.

3 ATC [LCDR JOLLY]: ---- can we do it beforehand.

4 If I may have just a moment, sir?

5 MJ [COL ACOSTA]: You may.

6 ATC [LCDR JOLLY]: I don't have anything further, pending
7 your questions, sir.

8 MJ [COL ACOSTA]: I have none. Thank you. Defense?

9 DDC [CAPT MIZER]: So Judge, it's -- the case is even more
10 complex than when I left. Commander Jolly argues components
11 of the law that I think will be in dispute when we go to the
12 instructions phase, which, again, augers towards severance in
13 this case.

14 The law of armed conflict at sea, Judge, as governed
15 by the 1936 London Naval Protocols, which is, predates Geneva,
16 and I'll give you an example. You as a soldier, Judge, can't
17 engage in false flag. Aircrews can't do that, but naval crews
18 absolutely can.

19 As a matter of law, treachery is permitted in the law
20 of naval warfare. Perfidy is not. And I'll give you an
21 example. When I was an assistant federal public defender in
22 EDVA we were assigned a Somali pirate, three of them. And
23 these pirates had sailed up on the USS ASHLAND in the dark to

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1 purportedly take that ship, and most of the pirates were
2 promptly vaporized with a five-inch gun after opening fire on
3 the ASHLAND.

4 And we were left wondering initially in that case who
5 would shoot an RPG at an American warship. And in
6 discovery -- and this is no secret -- we were informed that
7 the ASHLAND was using deceptive lighting, which is treachery
8 permissible under the law of war. And what the ASHLAND and
9 antipiracy operators in the Red Sea are doing is they are
10 disguising American warships as oilers, as civilian ships, to
11 lure pirates into combat where they can be then either
12 captured or killed. There's no requirement -- I would
13 disagree -- that naval crews wear uniforms, unlike aircrews or
14 ground fighting forces, Judge.

15 And so there are important distinctions that, again,
16 if the government wants to shoehorn this into a law of armed
17 conflict case, that there are a myriad of legal issues that
18 are now going to be presented and going to have to be
19 instructed with respect to the members and even more than are
20 probably even apparent once we get into the actual evidence
21 and facts of this case.

22 Judge, my colleague from the government is right about
23 the Bahlu case. But I think the important thing about the

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1 Bahlul case when it was tried up the hill in the fall of '08
2 is that the defense counsel, Major Frakt, followed his
3 client's advice and boycotted the entire proceeding. There
4 was nothing challenged there. There was no litigation over
5 anything.

6 And that's -- that's relevant in a number of respects,
7 first and foremost here, that it provides probably little
8 guidance or little help as a stamp of what a commission should
9 look like. And I've, frankly, lost count as to the number of
10 Bahlul decisions. It might even be 15 or 16 Bahluls at this
11 point.

12 Most notably, the D.C. Circuit split on whether the
13 charge of conspiracy was, in fact, a war crime. And they
14 dismissed two of the three charges in Bahlul but allowed the
15 case to proceed against Bahlul on the charge of conspiracy
16 because it's not plain error, again, because he boycotted,
17 we -- they allow that conviction to stand.

18 And so as I stand here today, the conspiracy charge
19 that my colleague discussed may not be a war crime. And we've
20 litigated that issue before and it is certainly something that
21 is preserved for appeal. But we would submit that bifurcating
22 that conspiracy, as we set out in the pleadings with those
23 overt acts related to the Limburg and the COLE, is the most

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1 viable option under the Giles test.

2 And, Judge, for each of those overt acts, the members
3 are going to have to be instructed: Was the violence
4 organized? Was it intense? The Tadic, Bahlu, Hamdan
5 instruction. And to go through that and many of the various
6 facets of this case, we submit, will result in a manifest
7 injustice.

8 Absent further questions, Judge, I have nothing
9 further.

10 MJ [COL ACOSTA]: All right. Thank you, Counsel.

11 Government, you're indicating that you wish to
12 respond.

13 ATC [LCDR JOLLY]: Yes, sir. Thank you. Briefly. I just
14 want to clarify.

15 Bahlu, yes, did not challenge jurisdiction or the
16 elements. He admitted his involvement and -- with
17 demonstrative aids involving a paper-like origami of a ship
18 that he used. And this is Defense Exhibit A, page 5 of 6 in
19 the Bahlu record that's on mc.mil, sir. He did participate.
20 He did admit his culpability. So just to clarify that piece
21 of it.

22 MJ [COL ACOSTA]: Well, I think the defense's point was
23 that his defense counsel didn't participate; is that correct?

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1 DDC [CAPT MIZER]: Yes, Judge. I think he also, if I
2 recall, threw a paper airplane at the members that said 9/11
3 on it. He was pretty belligerent during those proceedings.
4 So we wouldn't dispute ----

5 MJ [COL ACOSTA]: Bahlul participated obviously, but
6 Bahlul's defense counsel -- counsel did not ----

7 ATC [LCDR JOLLY]: Thank you, sir.

8 MJ [COL ACOSTA]: ---- is what the defense counsel pointed
9 out.

10 ATC [LCDR JOLLY]: Thank you.

11 MJ [COL ACOSTA]: Thank you. All right. That concludes
12 what we had on the schedule for today. And tomorrow we have
13 on the schedule to pick up with -- what I'll just call the
14 Crosby area. It's my understanding that the parties believe
15 that largely that will be able to be conducted in an open
16 session, despite previous discussions of it -- discussions
17 about certain topics that might require it to be closed, given
18 descriptions of certain things and layout, et cetera.

19 And that's what I'm trying to make sure that we have
20 enough time -- if we start tomorrow, we're going to have
21 enough time, if we need to go closed, to handle all of those
22 motions tomorrow?

23 Defense, do you believe that we -- and, Ms. Morgan,

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1 you can come up to the podium so you don't have to crouch over
2 co-counsel there.

3 DDC [MS. MORGAN]: Thank you, Your Honor. From the
4 defense perspective, obviously trying really start to stay
5 right of that line for classification. I think my best guess
6 is there is going to be a little bit of Dr. Crosby's testimony
7 that's going to require us being closed, if I'm making the
8 right guess on the way that the government seems to be
9 treating force protection today. So I just want to flag that,
10 that I think that there's going to be at least a little piece.

11 But, yes, I think that her testimony can be -- her
12 direct can be accomplished in the morning, and so ----

13 MJ [COL ACOSTA]: And that's on every motion that she's
14 required for. I'd like to do that, to the greatest extent
15 possible, instead of you calling her multiple times on the
16 multiple different motions.

17 The reason we put all of those motions together was so
18 that we could only call her the one time. And I don't want to
19 go through the ----

20 DDC [MS. MORGAN]: I think that's right, Judge. And I
21 think the commission has previously recognized her as an
22 expert. I would expect that that is still the case, that that
23 would be -- you know, she's still recognized as an expert for

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1 the purposes of her testimony. That should save us some time.

2 Although, I do anticipate she has not previously been
3 recognized as an expert in internal medicine, so I am going to
4 ask that the commission recognize her in that specialty. I
5 will lay the appropriate groundwork. I can't imagine that's
6 going to be particularly controversial, but that should
7 eliminate some of the time of her testimony.

8 I think my direct will be wrapped up on all of the
9 motions in the morning, save for a small amount of testimony
10 that I think has to occur in a closed hearing.

11 MJ [COL ACOSTA]: So you believe some of your direct of
12 her will occur in a closed ----

13 DDC [MS. MORGAN]: Judge, I'm trying to be -- yeah, I'm
14 guessing. You know, and I really am trying to stay to the
15 right of this. It has to do with the number of guards that
16 were present during one of her meetings with my client. Based
17 on what the government's current treatment of classified
18 information is, I think that has to be closed. I don't want
19 to get this wrong.

20 MJ [COL ACOSTA]: To the extent that it's possible for you
21 to confer with opposing counsel on that issue ahead of time to
22 discuss the area that you wish to go into, again, in an effort
23 to keep as much in this open forum as we possibly can before

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1 we go into the closed session, I'd like you to do that.

2 DDC [MS. MORGAN]: Certainly.

3 MJ [COL ACOSTA]: Which -- who for the government is
4 handling those Crosby motions?

5 ATC [LCDR JOLLY]: I am, sir.

6 MJ [COL ACOSTA]: Okay. So if you could consult with
7 Commander Jolly to coordinate that topic ----

8 DDC [MS. MORGAN]: Copy all.

9 MJ [COL ACOSTA]: ---- and let me know by the end of the
10 day whether or not we need to do it so that we can set up to
11 do -- the issue will be then conducting your -- the direct in
12 open that we can, the cross in open that we can, and then
13 going into the closed session for the closed direct and cross
14 there. I'll keep those issues as separate as possible, but
15 I'd like to do as much in one -- in one session open, and then
16 we'll close. Because I know she's testifying on, I think,
17 three -- is it three or four?

18 DDC [MS. MORGAN]: It's four, Your Honor.

19 MJ [COL ACOSTA]: Four.

20 DDC [MS. MORGAN]: And three -- let me see if I can get
21 all the numbers right. 359, 367, 371, her direct will be
22 entirely open. The area that could get into, again, that
23 small amount of classified information, would be on 398.

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1 MJ [COL ACOSTA]: Okay.

2 DDC [MS. MORGAN]: And it won't be, you know, a protracted
3 amount of information. And I will get with Commander Jolly to
4 see that -- you know, make sure we're all on the same page.

5 MJ [COL ACOSTA]: Okay. And if we can handle those four
6 tomorrow, to the greatest extent we can, we'll talk about what
7 we're going to cover after that tomorrow. I think there's
8 about four issues that I think that we can get into, that we
9 can get completed, or inquire into before we leave, to the
10 extent that -- I'm just trying to use the space.

11 Again, the reason that we have the full time, and I
12 thought I'd put enough in here to fully occupy us. It turns
13 out that we're going a little bit more quickly than perhaps
14 anticipated, and that's just based upon my experience, that I
15 generally -- sometimes it does take actually longer once we
16 get down here. So plan on doing all of those tomorrow.

17 Before we leave here, there's one question, the issue
18 of the -- and thank you. I think I'm done ----

19 DDC [MS. MORGAN]: Copy, Judge.

20 MJ [COL ACOSTA]: ---- with what you were saying.

21 Government, the issue of the deposition officer, I
22 know that that has not been completed yet, and I don't know
23 who's going to -- who can address the deposition officer

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1 appointment.

2 There has been no deposition officer appointed yet for
3 the one ordered by the -- by the commission, correct?

4 MATC [MR. WELLS]: Your Honor, that's my understanding.
5 I'll check today and ask -- give you an update this week.

6 MJ [COL ACOSTA]: Okay. I'll make it easy for you. What
7 I'd look for, then, is -- forgive me for -- I just blanked on
8 the date that I ordered the -- stated that could go forward.

9 What I'd like, then, is by -- by the first week in
10 January, the first week after the -- the first Monday after
11 the New Year's holiday, if I haven't gotten an update -- you
12 can update me this week as far as what you have. If you don't
13 have one by then, then that -- the next date that I want an
14 update is the first business week in January -- the first
15 business day in January after the holiday.

16 To the extent that you have that -- that you have it,
17 I want it provided to the commission and to the defense as far
18 as the -- the -- whether or not it's been done. And then
19 after that, if you could -- I want a status update every two
20 weeks after that as to whether or not one has been appointed,
21 okay? Just to -- I know that that can help motivate things.

22 MATC [MR. WELLS]: Yes, Your Honor.

23 MJ [COL ACOSTA]: Okay. Thank you.

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1 All right. Is there anything else that I -- anything
2 else that I need to take up today? Government? Government
3 is -- has -- defense?

4 LDC [MR. NATALE]: No, Your Honor.

5 TC [MR. MILLER]: Just briefly, Your Honor.

6 MJ [COL ACOSTA]: Yes, please.

7 TC [MR. MILLER]: I don't know if it's on the court's
8 calendar to discuss or to argue AE 445 this week. I know that
9 the court has indicated at least in -- that's a due process
10 motion by defense counsel.

11 I think the court has already indicated that it will
12 await decision before deciding 437, based on what the en banc
13 D.C. Circuit will do. And the government also sort of made a
14 constitutional avoidance argument in 354. I was wondering
15 whether or not the court wanted to table that motion or any
16 argument thereon until there was a decision made by the
17 D.C. Circuit.

18 MJ [COL ACOSTA]: Whether or not I receive argument for
19 it, I may reserve ruling until I have ----

20 TC [MR. MILLER]: Okay.

21 MJ [COL ACOSTA]: ---- until that additional guidance
22 comes out. There's no -- no trial court wants to get ahead of
23 an appellate court that is actively hearing the -- largely the

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1 same issue. But it doesn't mean that I can't hear your
2 argument so that I have that in the bank, so to speak, so that
3 in case we get to that -- a decision that could impact that
4 comes out, and if I need to hear supplemental briefing after
5 that -- depending on what the decision is, obviously, I
6 mean ----

7 TC [MR. MILLER]: Uh-huh.

8 MJ [COL ACOSTA]: ---- I don't -- I'm never comfortable
9 guessing how another -- how they're going to go or what issues
10 they will touch on or not, and I'm not going to do that. I
11 will wait for that to come out. And if -- if additional
12 briefing is required after, if I do receive argument on that
13 issue, I'll -- I will -- I will ask for it, because it could
14 definitely impact it, depending on which areas they seem to
15 touch, whether it's a complete issue or partial issue or --
16 so, yes. But I may very well take it up just to get your
17 argument on the record now. But not today.

18 TC [MR. MILLER]: Okay.

19 MJ [COL ACOSTA]: Okay.

20 TC [MR. MILLER]: I had understood that. Thank you, Your
21 Honor.

22 MJ [COL ACOSTA]: All right. Thank you.

23 TC [MR. MILLER]: Nothing further from the government.

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1 MJ [COL ACOSTA]: All right. Thank you, Government.

2 All right. I know that it is early in the day, but I
3 think that we -- there's some -- I think I have enough for
4 today and then we can pick up tomorrow with a full day of
5 the -- the four AEs that we're going to take up then.

6 Be prepared to take up -- and those issues, I will
7 give you notice to -- of the other issues that we -- we are
8 going to take up before that occurs so that you're prepared.
9 It's nothing that's not fully briefed, obviously. Defense,
10 I'm looking at you because these are your motions. So that
11 it's nothing that you haven't fully briefed, but I want you to
12 be prepared to present those arguments when I give you that
13 time to make the most use of the time that we have here.

14 LDC [MR. NATALE]: We appreciate that.

15 MJ [COL ACOSTA]: All right. Thank you.

16 All right. Until 0900 tomorrow, the commission is in
17 recess.

18 [The R.M.C. 803 session recessed at 1116, 13 December 2021.]

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