

1 **[The R.M.C. 803 session was called to order at 1015,**
2 **18 January 2024.]**

3 MJ [Lt Col BRAUN]: This commission is called to order.

4 Trial Counsel, are all the government counsel that were
5 present at the close of the previous session again present this
6 morning?

7 MDTC [Lt Col GOEWERT]: They are, sir.

8 MJ [Lt Col BRAUN]: And, Trial Counsel, can you please affirm
9 that these proceedings are being transmitted by closed-circuit TV to
10 the United States in compliance with the commission's order in
11 Appellate Exhibit 0007.006 (TJ)?

12 MDTC [Lt Col GOEWERT]: Your Honor, these proceedings are
13 being transmitted stateside via closed-circuit television
14 transmission to remote viewing sites at Fort Meade, Maryland, and the
15 Pentagon pursuant to this commission's order.

16 MJ [Lt Col BRAUN]: And I don't believe we are transmitting to
17 the Remote Hearing Room; is that correct, Trial Counsel?

18 MDTC [Lt Col GOEWERT]: That's correct, Your Honor.

19 MJ [Lt Col BRAUN]: Counsel for Mr. bin Amin, are all defense
20 counsel who were present at the close of the previous session present
21 here again this morning?

22 CDC [MS. FUNK]: Yes, Your Honor.

23 MJ [Lt Col BRAUN]: And counsel for Mr. bin Lep, are all

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1 defense counsel who were present yesterday at the recess again
2 present today?

3 LDC [MR. BOUFFARD]: Yes, sir. Mr. Shepard remains absent,
4 with my approval and the approval of Mr. bin Lep, and he continues to
5 waive his absence ----

6 MJ [Lt Col BRAUN]: Okay.

7 LDC [MR. BOUFFARD]: --- waive his presence.

8 MJ [Lt Col BRAUN]: Thank you.

9 Mr. bin Lep, I want to talk with you again about that,
10 similar to the conversations we had at the beginning of the session
11 yesterday and the day before.

12 I note that Mr. Shepard, one of your detailed defense
13 counsel, is again absent for the proceeding this morning. Again, I
14 remind you that under the Rule for Military Commissions, you
15 generally have the right to have all of your detailed military -- all
16 of your detailed defense counsel present for commission's
17 proceedings, and that would include this proceeding this morning.

18 Do you understand that?

19 ACC [MR. BIN LEP]: Yes, I understand.

20 MJ [Lt Col BRAUN]: Do you have any questions about your right
21 to have your detailed defense counsel present for this proceeding?

22 ACC [MR. BIN LEP]: No.

23 MJ [Lt Col BRAUN]: Do you consent to the absence of

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1 Mr. Shepard from the proceeding here today of the commission?

2 ACC [MR. BIN LEP]: Yes, I agree.

3 MJ [Lt Col BRAUN]: And have you had an opportunity to discuss
4 that with your defense counsel that are present here?

5 ACC [MR. BIN LEP]: Yes, I have.

6 MJ [Lt Col BRAUN]: Has anyone made any threats or promises in
7 any way to get you to agree to the waiver of Mr. Shepard for today's
8 proceeding?

9 ACC [MR. BIN LEP]: Nobody.

10 MJ [Lt Col BRAUN]: Very well. I find that Mr. bin Lep has
11 knowingly, intelligently, and voluntarily waived his right to have
12 Mr. Shepard present for the proceeding here today.

13 I also note for the record that he is represented by
14 detailed counsel present here in the courtroom; and, therefore, under
15 the Rules for Military Commissions, this proceeding can continue with
16 the absence of Mr. Shepard, and his absence is approved by the
17 commission.

18 I also note that both accused are present here this morning
19 in the courtroom.

20 When we recessed last evening, Trial Counsel, I requested
21 that you confer with the convening authority to determine, based upon
22 the findings entered by the commission, whether the convening
23 authority wished to remain bound by the terms of the two pretrial

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1 agreements in this commission.

2 Have you had an opportunity to consult with the convening
3 authority?

4 MDTC [Lt Col GOEWERT]: Yes, we have, Your Honor. We provided
5 the convening authority the findings of this commission.

6 MJ [Lt Col BRAUN]: And has the convening authority provided a
7 position regarding whether the convening authority would like to
8 remain bound by the terms of the pretrial agreement?

9 MDTC [Lt Col GOEWERT]: Yes, Your Honor. We provided the
10 convening authority's memorandum to this commission and to the
11 parties this morning after she signed it, and that memorandum was
12 signed on January 18th and states her intention not to withdraw or
13 terminate the pretrial agreement based on this court's ruling ----

14 MJ [Lt Col BRAUN]: Okay.

15 MDTC [Lt Col GOEWERT]: ---- or its findings.

16 MJ [Lt Col BRAUN]: Thank you. And I note that that has been
17 marked as Appellate Exhibit 0089.007 (Gov) for the case United States
18 v. Bin Amin and marked as Appellate Exhibit 0090.007 (Gov) for United
19 States v. Bin Lep.

20 I also note that the memo itself captures the caption for
21 both cases in this commission. That document is a one-page document.

22 Trial Counsel, did you provide a copy of this document to
23 both defense teams in this commission?

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1 MDTC [Lt Col GOEWERT]: Yes, Your Honor.

2 MJ [Lt Col BRAUN]: Counsel for Mr. bin Amin, have you had an
3 opportunity to review this appellate exhibit?

4 CDC [MS. FUNK]: I have, Your Honor.

5 MJ [Lt Col BRAUN]: Any questions regarding this appellate
6 exhibit?

7 CDC [MS. FUNK]: No. Thank you.

8 MJ [Lt Col BRAUN]: Have you had an opportunity to discuss
9 this appellate exhibit with your client?

10 CDC [MS. FUNK]: I need a moment.

11 **[Pause.]**

12 CDC [MS. FUNK]: We have, Your Honor.

13 MJ [Lt Col BRAUN]: Okay. Counsel for Mr. bin Lep, same
14 question: Have you had an opportunity to review Appellate Exhibit
15 0090.007?

16 LDC [MR. BOUFFARD]: We have, sir.

17 MJ [Lt Col BRAUN]: Okay. Have you had an -- do you have any
18 questions about that appellate exhibit?

19 LDC [MR. BOUFFARD]: No questions or concerns, sir.

20 MJ [Lt Col BRAUN]: Have you had an opportunity to discuss
21 that appellate exhibit with Mr. bin Lep?

22 LDC [MR. BOUFFARD]: Yes, sir.

23 MJ [Lt Col BRAUN]: Mr. bin Amin and Mr. bin Lep, I have

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1 entered a finding of guilt that was inconsistent with the plea you
2 entered and inconsistent with your pretrial agreement. In accordance
3 with the language of your agreement, I find it appropriate to ask
4 whether you desire to remain bound by the terms of your pretrial
5 agreement.

6 What I just discussed with your counsel is a memorandum
7 signed by the convening authority, a party to your pretrial
8 agreement, stating that the convening authority desires to continue
9 to be bound by the pretrial agreement. Before I ask you whether you
10 would like to remain bound by the terms of your pretrial agreement, I
11 want you to take a moment to discuss my question with your defense
12 counsel one last time.

13 Please take as much time as you need. And if you require a
14 recess, please let me know and I will provide you a recess to have
15 whatever conversation you need to have with your counsel about the
16 contents of the convening authority's memorandum, as well as any
17 terms of your pretrial agreement.

18 When you are done conferring with your counsel, please look
19 up at me so that I know we can proceed.

20 **[Counsel conferred with the accused.]**

21 MJ [Lt Col BRAUN]: Mr. bin Amin, have you had an opportunity
22 to discuss both the convening authority's position to your pretrial
23 agreement and the question about what -- have you discussed the

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1 convening authority's pretrial -- the convening authority's position
2 as to your pretrial agreement, and whether you wish to remain bound
3 by the terms of your pretrial agreement with your defense counsel?

4 ACC [MR. BIN AMIN]: **[Speaking in English]** Yes, Your Honor.

5 MJ [Lt Col BRAUN]: And, Mr. bin Lep, same question to you.
6 Have you had an opportunity to discuss this matter with your defense
7 counsel?

8 ACC [MR. BIN LEP]: Yes, sir.

9 MJ [Lt Col BRAUN]: Mr. bin Amin, do you have any questions
10 about either the convening authority's memorandum or about any term
11 in your pretrial agreement?

12 ACC [MR. BIN AMIN]: **[Speaking in English]** None, Your Honor.

13 MJ [Lt Col BRAUN]: And, Mr. bin Lep, the same question to
14 you.

15 ACC [MR. BIN LEP]: None, sir.

16 MJ [Lt Col BRAUN]: Mr. bin Amin, do you wish to remain bound
17 by the terms of your pretrial agreement?

18 ACC [MR. BIN AMIN]: **[Speaking in English]** Yes, Your Honor.

19 MJ [Lt Col BRAUN]: And, Mr. bin Lep, do you wish to remain
20 bound by the terms of your pretrial agreement?

21 ACC [MR. BIN LEP]: Yes, Your Honor.

22 MJ [Lt Col BRAUN]: Okay. Trial Counsel, do you have a motion
23 you would like to make at this time?

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1 MDTC [Lt Col GOEWERT]: Yes, Your Honor.

2 At this time the United States would make a motion and moves
3 to dismiss:

4 The Specification 2 of Charge I;
5 Specification 1 and 2 of Charge II, and Charge II;
6 Specification 2 of Charge III;
7 Specifications 1 and 2 of Charge IV, and Charge IV;
8 Specifications 1 and 2 of Charge V, and Charge V;
9 Specifications 1 and 2 of Charge VI, and Charge VI;
10 And Specification 2 of Charge VII.

11 We move to dismiss those without prejudice, to ripen into
12 prejudice upon the completion of the acceptance by the convening
13 authority of the waivers of appeals after action.

14 MJ [Lt Col BRAUN]: Inasmuch as the findings of guilt entered
15 by this commission pertain -- excepted specific language, Trial
16 Counsel, do you also request to withdraw and dismiss all excepted
17 language that remains on the charge sheet?

18 MDTC [Lt Col GOEWERT]: Yes, Your Honor.

19 We similarly move to withdraw and dismiss under those same
20 terms all the excepted language that remains outstanding on the
21 common allegations and in the Charge IX.

22 MJ [Lt Col BRAUN]: Very well.

23 Well, Defense Counsel, any objection?

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1 Counsel for Mr. bin Amin?

2 CDC [MS. FUNK]: No, Your Honor.

3 MJ [Lt Col BRAUN]: Counsel for Mr. bin Lep?

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

5 MJ [Lt Col BRAUN]: Very well.

6 The government motion to withdraw and dismiss

7 Specification 2 of Charge I;

8 Charge II and its specifications;

9 Specification 2 of Charge III;

10 Charge IV and its specifications;

11 Charge V and its specifications;

12 Charge VI and its Specifications;

13 And Specification 2 of Charge VII, along with all excepted

14 language that remains on the charge sheet without prejudice, with

15 prejudice ripening upon the completion -- upon acceptance of waiver

16 of appellate review -- excuse me -- upon acceptance of waiver of

17 appeal after action, is granted.

18 With that, Prosecution Exhibits 1 and 3 are admitted into

19 evidence.

20 Trial Counsel, I did not admit into evidence specifically

21 Prosecution Exhibits 2 and 3. These were the translations of

22 Prosecutions 1 and -- excuse me. I did not admit into evidence

23 Prosecution Exhibits 2 and 4, as those are the translations of

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1 Prosecution Exhibits 1 and 3, respectively.

2 Is the government requesting that the commission admit those
3 translations into evidence, or merely marking them for purposes of
4 inclusion in the record, understanding they're translations?

5 MDTC [Lt Col GOEWERT]: No, Your Honor. We don't see any
6 reason to admit them into evidence or provide them to the panel.
7 When we move an index into evidence, we will just make a notation as
8 to those spaces in the record.

9 MJ [Lt Col BRAUN]: Okay.

10 And, Counsel, feel free to request any instruction you may
11 want to request the members perhaps disregard the out-of-sequence
12 numbers, and the commission will take that up at that time.

13 MDTC [Lt Col GOEWERT]: Yes, Your Honor. Thank you.

14 MJ [Lt Col BRAUN]: Counsel for Mr. bin Amin, same question:
15 Any objection or request with regard to Prosecution Exhibits 2 and 4,
16 the translations?

17 CDC [MS. FUNK]: No, Your Honor. Thank you.

18 MJ [Lt Col BRAUN]: Okay. Counsel for Mr. bin Lep?

19 LDC [MR. BOUFFARD]: No, Your Honor. Thank you.

20 MJ [Lt Col BRAUN]: Mr. bin Amin and Mr. bin Lep, we now enter
21 the sentencing phase of the trial where you have the right to present
22 matters in extenuation and mitigation; that is, matters about the
23 offenses or yourself which you want the commission to consider in

1 deciding your sentence.

2 In addition to the testimony of witnesses and the offering
3 of documentary evidence, you may testify under oath as to these
4 matters, or you may remain silent, in which case the court members
5 may not draw any adverse inference from your silence.

6 On the other hand, if you desire, you may make an unsworn
7 statement. Because the statement is unsworn, you cannot be
8 cross-examined on it; however, the government may offer evidence to
9 rebut any statement of fact contained in an unsworn statement. An
10 unsworn statement may be made orally, in writing, or both. It may be
11 made by you, by your counsel on your behalf, or by both.

12 Do you understand these rights, Mr. bin Amin?

13 ACC [MR. BIN AMIN]: **[Speaking in English]** Yes, Your Honor.

14 MJ [Lt Col BRAUN]: And do you understand these rights,
15 Mr. bin Lep?

16 ACC [MR. BIN LEP]: I understand.

17 MJ [Lt Col BRAUN]: Counsel, is there any documentary evidence
18 on sentencing which could be marked and offered at this time?

19 TC [COL KRAEHE]: Your Honor, we would ask that the exhibits
20 that we submitted to the commission for preadmission be entered at
21 this time.

22 MJ [Lt Col BRAUN]: And can we identify those exhibits for the
23 record?

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1 TC [COL KRAEHE]: We don't have that list with us at this
2 time, Your Honor.

3 MJ [Lt Col BRAUN]: Well, as those matters have been
4 preadmitted, it's pretty -- it will be a pretty fast process to
5 identify them at the next session. So we can defer that. It sounds
6 like there may be a change that needs to be made to an index as well.
7 So that's -- I think that is sufficient.

8 There was the outstanding matter of one exhibit that was not
9 preadmitted by order of the commission that the government had
10 presented to the commission.

11 Does the government want to take up that specific exhibit at
12 this time?

13 TC [COL KRAEHE]: Your Honor, we will -- the government will
14 withdraw that exhibit.

15 MJ [Lt Col BRAUN]: Okay.

16 Counsel for Mr. bin Amin, are there any document -- is there
17 any documentary evidence on sentencing which could be marked and
18 offered at this time?

19 CDC [MS. FUNK]: Your Honor, on 29 December of 2023, we
20 submitted a motion in limine to pre-admit a series of sentencing
21 exhibits. Last night, after close of business, we filed a
22 supplemental motion to pre-admit some additional items of evidence,
23 some of which we came to an agreement with that were originally in

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1 dispute; some things which were originally classified that have now
2 become unclassified; and there are, I believe, a few things that we
3 did not previously submit but had placeholders for.

4 I don't -- because I'm here and not on my Internet, I don't
5 know if that supplemental filing has officially been accepted for
6 filing at this time, but those are the exhibits we intend to offer.

7 MJ [Lt Col BRAUN]: Okay. I don't believe, because of the
8 time of the submission, that we're in a position -- I'm not in a
9 position to rule on those at this particular time. I'm going to need
10 an opportunity to ensure that I've fully reviewed them so that we can
11 have a discussion.

12 Insomuch as any conversation that needs to happen with the
13 government, though, to try and -- it sounds like the parties have
14 already been working to resolve any objections that may exist to
15 those exhibits. That would be very much appreciated as it will
16 expedite, then, at the next proceeding any pre-admission matters we
17 can take up.

18 CDC [MS. FUNK]: It is my understanding that we are in
19 agreement on all of the exhibits. Thank you.

20 MJ [Lt Col BRAUN]: Thank you.

21 Counsel for Mr. bin Lep, any documentary evidence on
22 sentencing which could be marked and offered at this time?

23 LDC [MR. BOUFFARD]: No, sir.

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1 MJ [Lt Col BRAUN]: Okay. So with that, just a couple matters
2 I want to take up with the parties.

3 Now that we have findings entered and the charges resolved,
4 all outstanding charges resolved, I'm going to request that the
5 parties provide an updated flyer by COB today so that we can all have
6 an opportunity to look at that.

7 I know that that was -- based upon previous filings, there
8 were some positions the parties have taken; and if there is still an
9 objection, we will need to take that up on the record, and I'm
10 cognizant of that.

11 Additionally, Trial Counsel, do you have an update as to the
12 status of defense witnesses? I know there were two, I believe, that
13 were awaiting a decision on a visa.

14 Can we take that up now? Is there an update?

15 TC [COL KRAEHE]: Your Honor, the only update I can provide is
16 that, as of yet, the visas have not been issued. We are doing
17 everything we can to expedite that, but we cannot say whether those
18 visas will be issued in time for the witnesses to be able to travel
19 here.

20 MJ [Lt Col BRAUN]: Okay. Has the government worked with
21 defense counsel to determine whether there is a suitable alternate
22 plan in place? It would seem prudent, where we are at right now,
23 based upon the date and the proposed litigation schedule that now is

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1 the time to start making arrangements for an alternate COA, should
2 that be needed.

3 TC [COL KRAEHE]: Your Honor, we are making arrangements for a
4 number of alternative courses of action should we not be able to
5 obtain their visas in time. These have been ongoing discussions, but
6 we're still doing everything we can to exhaust the visa option; and
7 we'll await word from defense counsel as to whether they're just
8 going to pursue the alternatives.

9 MJ [Lt Col BRAUN]: Okay.

10 Counsel for Mr. bin Amin, any context you can provide the
11 commission on -- as it pertains to this very matter?

12 CDC [MS. FUNK]: Your Honor, I'm sure you can imagine how
13 frustrated we are and how disappointed we are. We have been working
14 very hard to provide what is needed to the government.

15 We first made an inquiry of the government as to
16 transporting our witnesses back in October. We were provided
17 documents that our witnesses needed to fill out in early December.
18 We've been in communication with both our witnesses, the Malaysian
19 embassy in the United States, and the United States embassy in Kuala
20 Lumpur.

21 Our most recent e-mail communication from the United States
22 embassy in Kuala Lumpur indicates that they were under the impression
23 the witnesses need to be here on January 25th, which is false, and

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1 that things are -- and I'm quoting here -- in processing.

2 I know that this court is well aware that one cannot simply
3 fly into Guantanamo on any given day and, instead, we have a very
4 limited schedule. So it had been our -- the information we were
5 communicating was they needed to be on a plane by the 18th, which is
6 not going to happen.

7 We had originally planned to bring them down on the OMC
8 flight. Our next best hope is the rotator next Tuesday.

9 So we are continuing to communicate with our witnesses, and
10 we are continuing to attempt to impress upon the United States
11 embassy the urgency of processing the visas. They met to get their
12 visas last Friday, the 12th, and we continue to be hopeful, as well
13 as frustrated.

14 MJ [Lt Col BRAUN]: Okay. Thank you. Thank you for the
15 update.

16 I was tracking, I think, based upon previous information
17 from the parties, three business days. I think that, as I look at
18 the calendar, would have put us to today?

19 CDC [MS. FUNK]: That is correct. And that is what we were
20 told. And, technically, because we're talking about Malaysia, it
21 would have put us to last night, because they are ahead of us. And
22 much to our disappointment, that did not happen.

23 MJ [Lt Col BRAUN]: Okay. I would just ask that the parties

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1 continue to try to work together as best they can to ensure that
2 whatever information is needed is transmitted and at least some
3 thoughts are given to alternate forms, if appropriate.

4 And we can take that up on the record if we need to. I
5 don't necessarily want to get into that right now. But just -- I ask
6 the parties to continue to work in good faith to try and resolve this
7 as best as they can.

8 Trial Counsel, have there been any changes to the convening
9 order for this commission or any vicing orders to the members
10 detailed to this commission based upon the most recent convening
11 order, 23-02?

12 MDTC [Lt Col GOEWERT]: There was, Your Honor, and it was
13 provided to the commission.

14 MJ [Lt Col BRAUN]: A vicing -- was it a vicing order,
15 Counsel?

16 MDTC [Lt Col GOEWERT]: It's an excusal of the members, sir.

17 MJ [Lt Col BRAUN]: Okay. Then the last item I wanted to take
18 up pertains to voir dire. The commission has the parties' joint
19 proposal for group voir dire.

20 Before we start to discuss that, do the -- does any party
21 desire to conduct group voir dire?

22 I know counsel for Mr. bin Amin had placed in the joint
23 submission a request to reserve time to conduct group voir dire.

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1 Government, do you anticipate conducting group voir dire?

2 TC [COL KRAEHE]: No, Your Honor.

3 MJ [Lt Col BRAUN]: Counsel for Mr. bin Amin, do you -- what
4 is your position regarding group voir dire of the members? I plan to
5 ask my questions to the panel first, and then I will make time
6 available if the parties request group voir dire.

7 Are you requesting group voir dire?

8 CDC [MS. FUNK]: At this time, yes, Your Honor. Obviously, we
9 reserve the right to change our minds if we feel that the court's
10 questioning is sufficient, but at this time we would like that
11 opportunity.

12 MJ [Lt Col BRAUN]: Okay. Then what I'm going to ask is that
13 you provide the commission by 1700 hours local tomorrow those group
14 voir dire questions so that the commission can have an opportunity to
15 review them. Then if there's any matters that we need to take up,
16 opposing counsel can review them as well.

17 Then when we come on the record, we can address any
18 outstanding questions regarding -- or objections, or questions that I
19 may have regarding your questions, and be able to move forward.

20 CDC [MS. FUNK]: When we prepared our suggested group voir
21 dire questions for the court, we included all the questions we wanted
22 to ask.

23 MJ [Lt Col BRAUN]: Oh, okay.

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1 CDC [MS. FUNK]: In my memory, the court indicated earlier
2 this week that they were not inclined to ask all of the questions
3 that we had submitted.

4 So if the court is willing to share the questions that they
5 want to ask, that would give me the opportunity to weigh and balance
6 whether or not the rest of the questions that we had submitted are
7 questions that we would like to pursue.

8 MJ [Lt Col BRAUN]: Okay.

9 CDC [MS. FUNK]: Thank you.

10 MJ [Lt Col BRAUN]: That helps.

11 And we are going to -- my intent is to talk about some of
12 those proposed questions here shortly. I'm just trying to understand
13 where the parties are at first before we get to that stage.

14 Counsel for team bin Lep -- excuse me -- team bin Lep, are
15 you requesting the opportunity to conduct group voir dire?

16 LDC [MR. BOUFFARD]: No, sir. Generally, our intent, as third
17 in line, is to ask follow-up questions, if at all.

18 MJ [Lt Col BRAUN]: Okay.

19 Okay. So with regard to the proposed group voir dire
20 questions provided to the commission captured in Appellate Exhibit
21 0078.003, I have some questions as it pertains to the specific voir
22 dire questions.

23 But as a baseline for all the parties, the baseline the

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1 commission used -- is going to use will be the standard voir dire
2 questions that are contained in the military judge's bench book.
3 There are some minor alterations: At times changing court-martial to
4 commission or court members -- or court panel to panel members,
5 things like that, to accommodate the different format we're in.

6 Aside from those modifications, there were some specific
7 questions that the parties provided that were not captured by the
8 standard questions the commission intends to ask that the commission
9 wanted to ask the parties about.

10 The first has to do with the question involving implied
11 bias. It's noted as questions 10 and 11 on the joint notice, the
12 appellate exhibit I referenced. What is the purpose of that
13 question?

14 Trial Counsel, I will start with you.

15 MDTC [Lt Col GOEWERT]: Your Honor, since this was a joint
16 submission, that was not our question.

17 MJ [Lt Col BRAUN]: Okay. Counsel for team bin Amin?

18 CDC [MS. FUNK]: Certainly, Your Honor.

19 It's well known that all of us have implicit biases. Most
20 of the time we're not particularly aware of them.

21 I do believe that by bringing up the question and asking
22 people to think about it, that they can think about what sort of
23 biases they may have: As military members looking at somebody who is

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1 accused of an attack against the United States or coalition partners;
2 someone who is most likely of a different faith than at least the
3 majority of the members; what they may think about myself as an
4 American woman, who is not a practicing Muslim, covering my hair out
5 of respect for my client.

6 I think that those are things that need to be discussed.
7 I'm not anticipating that anyone would outright say, well, yes,
8 I -- I mean, we do have some jury questionnaires that actually do
9 indicate some very clear biases, but I think that there's a benefit
10 to having -- not necessarily, you know, individual intense
11 cross-examination-type questions, but rather broad-strokes questions
12 about -- that just get people to start thinking about whether or not
13 they have implicit biases, and obtaining their commitment to be
14 mindful of that with themselves and each other during jury
15 deliberations.

16 MJ [Lt Col BRAUN]: So if the questionnaires address this, is
17 this an appropriate question for group voir dire?

18 CDC [MS. FUNK]: I don't think the questionnaires do address
19 it. I think it was -- I think there's one response in particular
20 that I am thinking of that indicated not an implicit bias, but just a
21 real clear, based on their occupation and what they've been doing for
22 the last 10 years, that would indicate -- what I'm talking about in
23 the group questionnaire is much more subtle than the broad

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1 questionnaire that was -- the written questionnaire that was given to
2 them, so I would like to explore it.

3 MJ [Lt Col BRAUN]: Okay. Because the question as provided to
4 the commission is two questions: Do you understand that all people
5 have implicit bias? And then the next question is: Do you agree
6 that you must actively work to counteract that implicit bias while
7 being asked to remain impartial and fair?

8 So if I'm understanding your position correctly, the purpose
9 of this group question is to bring the matter of implicit bias
10 explicitly to the front of mind of the panel members and ensure that
11 they are, one, aware of it, and, two, will be aware of it and will
12 work to ensure that they're not applying bias otherwise in their
13 deliberative process.

14 Am I -- and I'm not trying to put words in your mouth. I'm
15 just trying to make sure I'm understanding your position correctly,
16 as it pertains to this question.

17 CDC [MS. FUNK]: You are understanding my position correctly.
18 And, frankly, in retrospect, that is not a very well-worded question.
19 And so I will probably work on some questions of my own for group
20 questioning that are more specific to things like religion, and bad
21 choices, and covering my hair, and things of that nature.

22 MJ [Lt Col BRAUN]: Okay.

23 Counsel for Mr. bin Lep, any additional commentary you'd

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1 like to add as it pertains to these two particular questions?

2 LDC [MR. BOUFFARD]: No, sir. Thank you.

3 MJ [Lt Col BRAUN]: Okay. Then I want to move on to question
4 number 14 in the joint submission.

5 The question reads: Do you have views or opinions about the
6 United States Government's treatment of Muslims after September 11th,
7 2001?

8 Trial Counsel, once again, I'm going to start with you on
9 each one of these. Do you -- what is the purpose of this question?

10 MDTC [Lt Col GOEWERT]: Your Honor, again, as a joint
11 questionnaire, it's not our -- not our question.

12 MJ [Lt Col BRAUN]: Okay.

13 MDTC [Lt Col GOEWERT]: We just submitted those to the
14 commission.

15 MJ [Lt Col BRAUN]: I appreciate it's a joint questionnaire,
16 so the source of questions may vary. I have no problem with one
17 party deferring to another party to just keep things moving along. I
18 just want to make sure I give everybody an opportunity.

19 Counsel for Mr. bin Amin?

20 CDC [MS. FUNK]: We think it's an important question. There
21 are some people in this country who are appalled by the treatment of
22 Muslims after 9/11. There are other people that are 100 percent
23 unaware of the treatment of Muslims after 9/11. There are some

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1 people that, for example, support President Trump's Muslim ban.
2 There are others that feel very strongly that that was inappropriate.

3 People's opinions on that sort of thing matter to us, as
4 representing an individual who is a practicing Muslim. So we think
5 it's an important question.

6 MJ [Lt Col BRAUN]: What bias are you trying to uncover with
7 that question, right? Because that is the purpose ultimately of voir
8 dire is to determine whether a member has an inflexible position
9 based upon bias that would make them unsuitable to sit on a military
10 commission.

11 What bias are you looking for with this question?

12 CDC [MS. FUNK]: So the easiest and I think most stark
13 example, although it's not the only answer -- frankly, I don't think
14 it is an answer that I expect, but if you don't ask, you don't know.
15 If someone were to say, for example, we think -- or I think -- if a
16 juror were to say, I think those black sites should have remained,
17 and I think that those people that were picked up by the United
18 States and put in black sites should have been killed by the United
19 States Government, that is important information when we are
20 evaluating someone's suitability to sit in judgment and to come up
21 with a sentence for our client.

22 MJ [Lt Col BRAUN]: How does that question elicit that answer?

23 CDC [MS. FUNK]: I don't know that it does, Your Honor.

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1 MJ [Lt Col BRAUN]: And that's the difficulty that I'm seeing
2 right now ----

3 CDC [MS. FUNK]: Well, we could ----

4 MJ [Lt Col BRAUN]: ---- on that question.

5 CDC [MS. FUNK]: We could certainly word it more harshly.

6 I mean, if the court would rather have the question say: Do
7 you have views or opinions about the United States Government's
8 systematically disappearing people in various parts of the world and
9 throwing them in dungeons and prisons and kept in darkness or light
10 24 hours a day, strip them naked, chain them to walls, engaged in
11 conduct that deliberately was designed to be painful?

12 I mean, we could do it that way. We were trying to be a
13 little more subtle about it.

14 MJ [Lt Col BRAUN]: Well, Counsel, I mean, the challenge here
15 is the parties were asked to submit proposed questions. Those are
16 the questions that the commission's reviewing.

17 So that's what I'm doing right now, reviewing the questions
18 that have been provided to the commission to determine whether
19 in -- the commission views them as appropriate questions to determine
20 whether a challenge exists for a particular member and applying the
21 standards given to the commission by law.

22 So I'm trying to connect the questions to that very purpose.
23 So that is -- that is why we're engaging in this conversation right

1 now.

2 And, based upon this, I likely will modify some of the
3 questions to try and either word them a little more carefully or what
4 I might determine to be more artful or appropriate for the commission
5 based upon that standard.

6 Anything further, Counsel?

7 CDC [MS. FUNK]: No. Thank you, Your Honor.

8 MJ [Lt Col BRAUN]: Counsel for Mr. bin Lep, anything
9 regarding question 14?

10 LDC [MR. BOUFFARD]: Specifically, no, sir.

11 If I may, I'd like to make a general comment, which will
12 sort of apply to everything, and that is, just, I'd like it clear for
13 the record that our approach not only to voir dire, but also this
14 entire process, and our approach that will be seen at sentencing is
15 based on our team's and my assessment of what a proper, zealous
16 representation of Mr. bin Lep requires.

17 I say that only to make it clear that our silence should not
18 be taken to indicate that we don't care about these issues. These
19 are intentional decisions we have made and are making.

20 MJ [Lt Col BRAUN]: And I appreciate that there are tactical
21 decisions that are made by both teams, all parties to litigation,
22 this litigation or any other litigation. But I appreciate the
23 commentary, Counsel.

1 Okay. I want to move on to, then, question 15: Do you have
2 any -- the question reads: Do you have any particularly strong
3 feelings or opinions on the current Israeli/Palestine conflict?

4 Trial Counsel, what is the purpose of this question?

5 MDTC [Lt Col GOEWERT]: Your Honor, thank you. It's not our
6 question.

7 MJ [Lt Col BRAUN]: Okay. Counsel for Mr. bin Amin?

8 CDC [MS. FUNK]: It -- may I have a moment?

9 MJ [Lt Col BRAUN]: You may.

10 **[Counsel conferred.]**

11 CDC [MS. FUNK]: Without going into my own opinions on the
12 matter, Your Honor, I do read, and there are allegations
13 that -- regarding terrorism involved in this conflict. We are
14 concerned about members being mindful of current affairs and leaning
15 towards holding people who are terrorists for a longer period of time
16 rather than a shorter period of time, and we just wanted to explore
17 how that may -- how the current conflict and their opinions on the
18 current conflict may influence or bias them in one way or another
19 when it comes to coming up with an appropriate sentence and whether
20 or not it's appropriate to recommend clemency based on extenuation or
21 mitigation facts.

22 MJ [Lt Col BRAUN]: Is that an appropriate consideration for
23 the panel members, clemency, a process that exists outside of the

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1 commission itself? It's a post-trial -- I'm assuming you're talking
2 about the convening authority's ability to grant clemency.

3 CDC [MS. FUNK]: Actually, I'm talking about the jury's
4 ability to recommend clemency.

5 MJ [Lt Col BRAUN]: Okay.

6 CDC [MS. FUNK]: They're entitled under the rules -- in fact,
7 they're instructed under the rules to consider facts in mitigation
8 and extenuation, both for the purpose of sentencing, but also for the
9 purpose of making a recommendation of clemency.

10 MJ [Lt Col BRAUN]: Okay. So it's that recommendation that
11 you are trying to inquire into with this question?

12 CDC [MS. FUNK]: Correct.

13 MJ [Lt Col BRAUN]: Okay. Thank you.

14 Counsel for Mr. bin Lep, anything additional you'd like to
15 add on this particular matter -- this question?

16 LDC [MR. BOUFFARD]: No, sir. Thank you.

17 MJ [Lt Col BRAUN]: Okay. The next question I actually want
18 to advance to regards the questions -- it's question 21 in the joint
19 submission, and there's numerous subparts to it.

20 In essence, the question is asking whether anybody served as
21 a panel member at a court-martial or military commission or a member
22 of a jury in a civil proceeding, whether that be criminal or, I'd
23 assume, truly civil.

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1 And then it asks basically follow-on questions as to those
2 who had previously -- those who answer in the affirmative, then it
3 tries to determine what type of proceeding they had sat on.

4 Based upon my review of the questionnaire, this question's
5 already been asked via the questionnaire. So I'm not quite sure why
6 it would be helpful to ask that question again in the group voir dire
7 session.

8 I know that's a standard group voir dire question, because
9 we generally in military practice don't use questionnaires for most
10 cases. So that may have been just an oversight of the parties, but
11 I'm not inclined to ask repetitive questions. The whole point of the
12 questionnaire was to try and give the parties advance information
13 about the members.

14 Trial Counsel, can you provide some insight?

15 MDTC [Lt Col GOEWERT]: We don't need to duplicate that
16 question, Your Honor.

17 MJ [Lt Col BRAUN]: Okay. Counsel for Mr. bin Amin?

18 CDC [MS. FUNK]: Agreed, Your Honor.

19 MJ [Lt Col BRAUN]: Okay. Counsel for Mr. bin Lep?

20 LDC [MR. BOUFFARD]: No, Your Honor.

21 MJ [Lt Col BRAUN]: Okay. Then I'm going to strike that
22 particular question.

23 The next question is question 23, and the concern is

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1 actually similar. Again, this is a standard question that's
2 generally asked in courts-martial, and I think that's how it made it
3 onto this list.

4 The question reads: Has anyone had any specialized law
5 enforcement training or experience to include duties as a military
6 police officer, off-duty security guard, civilian police officer, or
7 comparable duties, other than the general law enforcement duties
8 common to military personnel of your rank and position?

9 When I looked at the questionnaire, and I believe it's
10 part 9, question 1, that question's asked of the members -- or of the
11 prospective panel in that particular question. My inclination is,
12 similarly, not to re-ask that question, as the parties should already
13 have that information available to them.

14 Trial Counsel, do you have a position regarding question 23
15 on the joint submission?

16 MDTC [Lt Col GOEWERT]: No, Your Honor. We don't see any
17 reason to duplicate questions.

18 MJ [Lt Col BRAUN]: Okay. Counsel for Mr. bin Amin?

19 CDC [MS. FUNK]: We not only do not see a reason to duplicate
20 questions, we would specifically request that we don't duplicate
21 questions. We're fine with taking it out.

22 MJ [Lt Col BRAUN]: Outstanding. Thank you.

23 Counsel for Mr. bin Lep?

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1 LDC [MR. BOUFFARD]: Concur with all that, sir.

2 MJ [Lt Col BRAUN]: Great.

3 Question 24, do you -- it reads: Do you believe that
4 government -- excuse me.

5 Do you believe that government agents are more credible or
6 trustworthy than average individual -- I think it means to say
7 "individuals." Do we anticipate any government agents testifying?

8 MDTC [Lt Col GOEWERT]: Your Honor, we do not.

9 MJ [Lt Col BRAUN]: Okay. Based upon that, is this question
10 still required?

11 MDTC [Lt Col GOEWERT]: Not from us, Your Honor.

12 MJ [Lt Col BRAUN]: Okay. Counsel for Mr. bin Amin?

13 CDC [MS. FUNK]: Normally, this is a question that we ask
14 before a jury trial, right? But in this particular case, one of our
15 concerns or one of our -- when -- under the Rules of Military
16 Commission when asking for or considering mitigation, extenuation,
17 and possibly recommending clemency, the things that the jury can
18 consider include: Pretrial punishment; the nature and length of the
19 confinement; how people were treated, specifically the accused was
20 treated, or now the defendant, was treated while in United States
21 custody; and it is an unfortunate but true part of our history that
22 United States Government officials engaged in conduct that was
23 abusive and shameful.

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1 If somebody believes that if the CIA does it that it's just
2 okay because it's the CIA that did it, that is a bias that I would
3 like to be able to explore.

4 MJ [Lt Col BRAUN]: Okay. Counsel for Mr. bin Lep?

5 LDC [MR. BOUFFARD]: Nothing to add, sir.

6 MJ [Lt Col BRAUN]: Question 26: Does anyone have any close
7 familial or personal relationships with anyone in the intelligence
8 community? And then it continues in parenthetical, CIA, FBI, DIA,
9 NSA, ONI, et cetera.

10 I note on the questionnaire, the joint questionnaire,
11 Part 9, questions 3 and 4 actually cover this very thing. It
12 actually breaks it down a little more succinctly.

13 Based upon that, I'm not inclined to ask that particular
14 question because the parties should already have that information,
15 actually more clear information, I think, based upon the
16 questionnaire than what this will provide.

17 Any objection to the commission not asking that question?

18 Trial Counsel?

19 MDTC [Lt Col GOEWERT]: No, Your Honor. Thank you.

20 MJ [Col McCALL]: Counsel for Mr. bin Amin?

21 CDC [MS. FUNK]: No.

22 MJ [Lt Col BRAUN]: Counsel for bin Lep?

23 LDC [MR. BOUFFARD]: No, sir.

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1 MJ [Lt Col BRAUN]: Thank you.

2 So for question 30, which is the question that asks whether
3 anyone recognizes any of the parties to this case, what I intend to
4 do is I'm going to modify that, use the standard question that asks
5 it in a slightly different way, and I think in a more helpful way,
6 asking if anyone has had any dealings with any of the parties to the
7 trial, to include myself and counsel, which might affect their
8 performance as a commission member in any way. By necessity, if they
9 have that impression, they would have recognized the very same
10 people. I think it will provide the parties a better opportunity.

11 So when you see that, know that that is the change that I'm
12 going to make to that question.

13 I also am going to rearrange -- towards the end there's a
14 question about -- question 36: Does anyone have any reservations
15 about active duty military attorneys representing detainees? I'm
16 going to move that question to correspond with the, "Have you had any
17 dealings with the parties to this commission?" It just topically
18 makes more sense.

19 Okay. So those were the questions that I specifically
20 wanted to ask the parties about. You will notice that in some of
21 these questions I have slightly modified -- I will have slightly
22 modified the language. Generally, that modification is to often more
23 closely align with the standard question because, based upon my

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1 review, the standard question just seems to ask the question in a way
2 that would elicit a meaningful answer as opposed to a yes or no from
3 a panel member, or at least identify an area that it would be
4 appropriate for individual voir dire based upon the panel member's
5 response.

6 So you will see some of that in the proposed voir dire that
7 the commission's going to provide.

8 So those were the matters that I had to address this morning
9 before I recess -- place this commission into a more extended recess.
10 Before I do so, though, I want to give the parties an opportunity to
11 raise any additional matters they think we can take up at this time.

12 Trial Counsel?

13 TC [COL KRAEHE]: No, Your Honor. We would just like to know
14 whether you want to go back on the record to address the flyer, or
15 whether we just -- if you just prefer that we submit that.

16 MJ [Lt Col BRAUN]: So I'd prefer it be submitted first, and
17 then I can make a determination on whether I think we need to come
18 back on the record.

19 Additionally, should counsel for Mr. bin Amin decide they do
20 want to submit some individual -- or I'm sorry -- some group voir
21 dire from their perspective, that may also necessitate, in my
22 opinion, a reconvening so that we could discuss any matters, to try
23 and economize the time once we have a panel here so that we can move

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1 straight into voir dire.

2 But as of right now, I'd just ask that that be submitted.

3 And then I can make a determination, try and use the parties' time to
4 the best of my ability.

5 TC [COL KRAEHE]: Nothing further, then, Your Honor.

6 MJ [Lt Col BRAUN]: Okay. Anything further, counsel for
7 Mr. bin Amin?

8 CDC [MS. FUNK]: I have a housekeeping question in preparation
9 for my jury selection chart.

10 Where will we put 24 people?

11 MJ [Lt Col BRAUN]: Good question. So there are actually 24
12 chairs right now in the panel box.

13 CDC [MS. FUNK]: Okay.

14 MJ [Lt Col BRAUN]: So they will ----

15 CDC [MS. FUNK]: Two rows?

16 MJ [Lt Col BRAUN]: Yes, ma'am.

17 CDC [MS. FUNK]: Okay. Thank you.

18 MJ [Lt Col BRAUN]: Anything else?

19 CDC [MS. FUNK]: Not at this time. Thank you.

20 MJ [Lt Col BRAUN]: Counsel for team bin Lep?

21 LDC [MR. BOUFFARD]: Your Honor, just so that we're clear,
22 would you like us to remain prepared to come back on the record
23 today?

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1 MJ [Lt Col BRAUN]: It will not be today --

2 LDC [MR. BOUFFARD]: Thank you.

3 MJ [Lt Col BRAUN]: Because I will want to review the flyer
4 before, so that if I do reconvene I can at least direct the parties'
5 attention a little bit as to what we will discuss so the parties can
6 be prepared and we can use the time well.

7 LDC [MR. BOUFFARD]: Thank you, sir. And we would just
8 suggest, if it's welcomed, that maybe that could be an 802 instead of
9 a full-record session, at least to start.

10 MJ [Lt Col BRAUN]: That will -- that's absolutely something I
11 will take under advisement. I think it will depend upon the nature
12 of the questions. I don't want to have an 802 conference and then
13 just necessitate that we come on the record anyway, so -- but I will
14 absolutely give that consideration in making that determination.
15 Thank you, Counsel.

16 Anything further?

17 LDC [MR. BOUFFARD]: No, sir.

18 MJ [Lt Col BRAUN]: Very well, then. This commission stands
19 in recess.

20 **[The R.M.C. 803 session recessed at 1110, 18 January 2024.]**

21 **[END OF PAGE]**