

1 **[The R.M.C. 803 session was called to order at 0906,**
2 **23 January 2024.]**

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

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

7 TC [COL KRAEHE]: Yes, Your Honor. They are.

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

12 TC [COL KRAEHE]: They are, Your Honor.

13 These proceedings are being transmitted stateside via
14 closed-circuit television to remote viewing sites at Fort Meade,
15 Maryland, and the Pentagon, pursuant to the commission's order,
16 Appellate Exhibit 007.006 and 007.019.

17 MJ [Lt Col BRAUN]: Thank you, Trial Counsel.

18 It's also my understanding that we are not broadcasting to
19 the Remote Hearing Room for this morning; is that a correct
20 understanding?

21 TC [COL KRAEHE]: That is correct, Your Honor.

22 MJ [Lt Col BRAUN]: Counsel for Mr. bin Amin, are all the
23 defense counsel who were present at the close of the previous

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1 commission session again present this morning?

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

3 MJ [Lt Col BRAUN]: Thank you.

4 CDC [MS. FUNK]: Thank you.

5 MJ [Lt Col BRAUN]: Counsel for Mr. bin Lep, same question.

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

7 We are all here. We are also joined by Mr. Aaron Shepard.

8 MJ [Lt Col BRAUN]: Thank you, Counsel.

9 I also note that both counsel are present here in the
10 courtroom -- I'm sorry. I also note that both accused are present
11 here in the courtroom.

12 Before we get underway this morning to discuss some of the
13 administrative matters prior to voir dire, I do want to make the
14 parties aware that based upon a slight shift in prayer times, I'm
15 going to slightly modify the breaks for the sessions this week.

16 As it currently stands, I anticipate taking a lunch recess
17 again at 1130 to 1300. I believe that will accommodate that prayer
18 time that coincides with that recess, as well as give everybody time
19 to attend to any matters they need to over that lunch period.

20 Additionally, for that afternoon recess, my plan is to
21 recess at 1515 and then reconvene at 1545. That appeared to align
22 with the prayer times. However, Defense Counsel, please ensure that
23 my understanding is going to be sufficient for the needs of your

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1 clients.

2 Trial Counsel -- and then a recess at the end of the day at
3 1730, as we had previously discussed.

4 Trial Counsel, any objection to that way ahead?

5 TC [COL KRAEHE]: No objection, Your Honor.

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

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

8 MJ [Lt Col BRAUN]: Thank you.

9 Counsel for Mr. bin Lep.

10 LDC [MR. BOUFFARD]: No objection.

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

12 The commission did have an opportunity to review the flyer,
13 the joint flyer submission of the parties. In response to that
14 submission, the commission provided the parties, which has been
15 marked as an appellate exhibit, a proposed flyer in this for both
16 accused in this commission.

17 In reviewing those flyers, and my findings on the charges
18 and specifications, I found that I had missed excepting out some
19 language, specifically in Charge VIII, the conspiracy charge and its
20 Specification. I do not believe that this amendment is going to
21 impact anything. It's more an administrative oversight on my part.

22 If you notice in the Specification of Charge VIII, it
23 contains the word "three," "each of the three accused." My intent is

1 to except out the word "three" in that last sentence. So it will say
2 "each of the accused," to avoid -- understanding that this was a
3 joint trial originally; we severed one party. I think the language
4 "three" clearly was an omission, needs to be corrected by the
5 commission so it's just not a question in the panel's mind as to who
6 that third person might be.

7 So with that, as to both Mr. bin Amin and Mr. bin Lep, of
8 the excepted word "not guilty" of Charge VIII and its Specification
9 to the -- to Charge VIII and its Specification: Guilty.

10 Does either side have an objection to the court modifying
11 its finding to remove that word "three" as articulated in the
12 Specification of Charge VIII?

13 Trial Counsel?

14 TC [COL KRAEHE]: No objection, Your Honor.

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

16 CDC [MS. FUNK]: No objection, Your Honor.

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

18 LDC [MR. BOUFFARD]: No objection, Your Honor.

19 MJ [Lt Col BRAUN]: Very well.

20 Counsel for Mr. bin Amin and Mr. bin Lep, I'm going to give
21 you a moment now to talk with your clients about what I just
22 discussed. I'm going to then ask them if they understand the change
23 that I've made and that they consent to that change. So please take

1 a moment now in place to do that.

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

3 MJ [Lt Col BRAUN]: Counsel, did you have an opportunity to
4 have that discussion?

5 Counsel for Mr. bin Amin?

6 CDC [MS. FUNK]: I did, Your Honor.

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

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

9 MJ [Lt Col BRAUN]: Mr. bin Amin, your counsel just discussed
10 with you what I previously articulated on the record, specifically
11 that, as reflected in the Specification of Charge VIII, the word
12 "three" appears. Clearly there's only two accused in this case.
13 It's a holdover, if you will, from the previous posture of the case.

14 It's my intent now to except out that word "three," to find
15 you not guilty specifically of that particular word and otherwise,
16 then, find you guilty of the specification to the charge and to the
17 charge as previously articulated by this commission.

18 Did you have an opportunity to discuss this with your
19 counsel just now?

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

21 MJ [Lt Col BRAUN]: Okay. Do you have any questions about
22 that change?

23 ACC [MR. BIN AMIN]: **[Speaking in English]** No, Your Honor.

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1 MJ [Lt Col BRAUN]: Understanding that change, do you desire
2 to make any change as to your previously stated intent to be bound by
3 the pretrial agreement in this case?

4 ACC [MR. BIN AMIN]: **[Speaking in English]** No, Your Honor.

5 MJ [Lt Col BRAUN]: Okay.

6 Mr. bin Lep, I'm going to ask you, in essence, the same
7 questions.

8 Did you have an opportunity to discuss this change I just
9 talked about on the record with your counsel?

10 ACC [MR. BIN LEP]: Yes.

11 MJ [Lt Col BRAUN]: Okay. Any questions about that change?

12 ACC [MR. BIN LEP]: None.

13 MJ [Lt Col BRAUN]: Okay. Do you agree with that change?

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

15 MJ [Lt Col BRAUN]: And understanding that I am making a
16 change to the finding -- to the findings for this court-martial, do
17 you still desire to be bound by the terms of your pretrial agreement?

18 ACC [MR. BIN LEP]: Yes.

19 MJ [Lt Col BRAUN]: Okay. And, Trial Counsel, understanding
20 the nature of this change, I would assume that the convening
21 authority would also concur with remaining bound by the terms of the
22 pretrial agreement?

23 TC [COL KRAEHE]: That is correct, Your Honor.

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1 MJ [Lt Col BRAUN]: Okay.

2 Okay. Counsel, so for the Specification of Charge VIII,
3 this commission, in addition to its previously announced findings on
4 the record, will find the accused guilty, except the word "three," of
5 the excepted word "not guilty," of the charge "guilty."

6 Trial Counsel, do you request to withdraw the word "three"
7 now that the accused has been found guilty of that particularly
8 excepted word, consistent with your previous motion on the charges
9 and specifications?

10 TC [COL KRAEHE]: Yes, Your Honor.

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

13 CDC [MS. FUNK]: No objection, Your Honor.

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

15 LDC [MR. BOUFFARD]: No objection.

16 MJ [Lt Col BRAUN]: Very well, then.

17 Trial Counsel, your motion is granted, with prejudice
18 attaching, consistent with the other -- the corollary motion you've
19 previously made on the record.

20 Okay. So based upon the findings of the commission
21 previously, Trial Counsel, do you desire to have the remaining
22 charges and specifications renumbered 1 through 5?

23 TC [COL KRAEHE]: Yes, Your Honor.

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1 MJ [Lt Col BRAUN]: Okay. Any objection to the renumbering of
2 those charges and specifications so that they run in sequence?

3 Counsel for Mr. bin Amin?

4 CDC [MS. FUNK]: No objection, Your Honor.

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

6 LDC [MR. BOUFFARD]: No objection.

7 MJ [Lt Col BRAUN]: Very well, then. Government, your request
8 to renumber the charges as Charges I through V is granted. The
9 charges are renumbered on the flyers the commission previously
10 provided the parties yesterday.

11 So with that, then, let's take up those flyers provided to
12 the parties by the commission. Any objection to the flyers as
13 provided?

14 Trial Counsel?

15 TC [COL KRAEHE]: No objection, Your Honor.

16 MJ [Lt Col BRAUN]: Counsel for Mr. bin Amin, any objection?

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

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

19 LDC [MR. BOUFFARD]: No objection.

20 MJ [Lt Col BRAUN]: Very well.

21 At this time, Counsel, I would like to take up any
22 additional documentary evidence that can be admitted and dealt with
23 prior to moving into voir dire.

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1 Trial Counsel, we'll start with you. I know there were some
2 matters you wanted to correct from the last time we were on the
3 record.

4 TC [COL KRAEHE]: Yes, Your Honor. We did want to bring to
5 the commission's attention that a vice order was submitted on behalf
6 of the convening authority to the commission. That's Military
7 Commission Convening Order 24-03, dated January 22nd, 2024.

8 MJ [Lt Col BRAUN]: And I was provided that. Thank you.

9 Counsel -- Defense Counsel, were you also provided a copy of
10 that vice order?

11 Counsel for Mr. bin Amin?

12 CDC [MS. FUNK]: We haven't seen it directly, but we are aware
13 of it, Your Honor.

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

15 LDC [MR. BOUFFARD]: The same, Your Honor.

16 TC [COL KRAEHE]: Your Honor, I do have copies available for
17 them right now.

18 MJ [Lt Col BRAUN]: Thank you.

19 Trial Counsel?

20 TC [COL KRAEHE]: Yes, Your Honor. At this time, we would
21 like to ask the court and offer into evidence prosecution exhibits
22 that are marked for identification purposes as Prosecution Exhibit 1
23 through Prosecution Exhibit 30.

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1 MJ [Lt Col BRAUN]: Counsel, Prosecution Exhibits 1 and 3, the
2 Stipulations of Fact, I believe, have already been admitted into
3 evidence.

4 TC [COL KRAEHE]: And we are admitting 2 and 4, Your Honor.

5 MJ [Lt Col BRAUN]: So you're requesting to -- I'll give you a
6 moment, Counsel.

7 TC [COL KRAEHE]: We're not -- we're omitting -- not admitting
8 2 and 4.

9 MJ [Lt Col BRAUN]: Okay. Understood on that.

10 And Prosecution -- as previously stated, Prosecution
11 Exhibits 1 and 3 are admitted into evidence.

12 So, then, as it pertains to Prosecution Exhibits 5
13 through ----

14 TC [COL KRAEHE]: 30, Your Honor.

15 MJ [Lt Col BRAUN]: Trial Counsel, can you provide me a
16 working copy of those exhibits?

17 TC [COL KRAEHE]: May I approach, Your Honor?

18 MJ [Lt Col BRAUN]: Please. And if you want to ----

19 TC [COL KRAEHE]: And, Your Honor, these have all been
20 provided to defense counsel, and we have reached agreement as to
21 their admission.

22 **[Pause.]**

23 MJ [Lt Col BRAUN]: Counsel for Mr. bin Amin, any objection to

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1 what the government has offered as Prosecution Exhibits 5 through 30?

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

3 MJ [Lt Col BRAUN]: Okay. Counsel for Mr. bin Lep, any
4 objection to what has been offered by the government as Prosecution
5 Exhibits 5 through 30?

6 LDC [MR. BOUFFARD]: No objection.

7 MJ [Lt Col BRAUN]: Okay. Understanding there's no objection,
8 I am going to take a recess shortly here just to ensure that I've
9 reviewed all of these -- there's a couple that I don't believe the
10 commission has seen -- before I provide ruling on the admission of
11 these particular exhibits.

12 TC [COL KRAEHE]: Yes, Your Honor.

13 And I did want to note for the record that admission of the
14 victim impact statements, which I would argue also includes related
15 photographs of victim members' families, is specifically required
16 under the pretrial agreement. The parties have agreed that that
17 evidence will come in for purposes of sentencing.

18 MJ [Lt Col BRAUN]: Understood that that -- and the commission
19 is aware of that term, Counsel. Thank you for highlighting it. The
20 commission also wants to ensure compliance with Rule for Military
21 Commissions 1001, as well as the applicable rules, Military
22 Commission Rules of Evidence.

23 Any additional exhibits, Trial Counsel, that can be marked

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1 at this time?

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

3 MJ [Lt Col BRAUN]: Okay.

4 Counsel for Mr. bin Amin, any documentary evidence we can
5 take up at this time?

6 CDC [MS. FUNK]: At this time, Your Honor, pursuant to the
7 court's order, we're offering for admission Defense Exhibit (AMI) A
8 through Y with two corrections.

9 As to A, the unsworn statement of Mr. Mohammed Farik
10 bin Amin, that is a total of five pages, not 10 pages. As to T,
11 Mr. bin Amin family photos, there are 12 pages of photos and not 15.

12 MJ [Lt Col BRAUN]: Thank you, Counsel.

13 Trial Counsel, any objection to what has been offered as
14 Defense Exhibits A through Y, and Defense Exhibits (AMI) A through Y?

15 TC [COL KRAEHE]: No objection, Your Honor.

16 Okay. Counsel ----

17 LDC [MR. BOUFFARD]: Briefly, Your Honor, for record purposes,
18 we also do not object.

19 MJ [Lt Col BRAUN]: Counsel, have originals of those exhibits
20 been provided to the court reporter and marked?

21 CDC [MS. FUNK]: They've been provided via e-mail, Your Honor.

22 MJ [Lt Col BRAUN]: Okay. So how I'm going to ensure clarity
23 of the record, what we're going to do is just -- I'm going to have

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1 you walk through -- it appears that there's -- is there an index,
2 Counsel?

3 CDC [MS. FUNK]: There's an index in the motion, but
4 otherwise, no, Your Honor.

5 MJ [Lt Col BRAUN]: So what we'll do, then, just to kind of
6 try and keep things moving along and for clarity of the record, I'm
7 just going to have you describe generally each exhibit and then the
8 number of pages, and then the Defense (AMI) exhibit letter that's
9 attached to it.

10 I think that will get us to where we need to be for this
11 particular moment.

12 Then on the break, I just ask to have you ensure that the
13 court reporter has the original of the documents and we're all
14 complete on the recordkeeping side of things.

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

16 For the record, A, unsworn statement of Mr. Mohammed Farik
17 bin Amin, five pages.

18 B is character affidavit from Madam Fatimah Binte Shakmin,
19 three pages.

20 C, character affidavit, Mr. bin Amin Anan -- excuse me.
21 Mr. Amin bin Anan, two pages.

22 D, character affidavit, Madam Siti Norhayati, two pages.

23 E, character affidavit, Madam Ainita Binte Amin, two pages.

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1 F, character affidavit, Madam Mahawa Binti Dahalan, two
2 pages.

3 G, character affidavit, Ms. Noradilah Mohd Nor, two pages.

4 H, client letter to Mr. Kennedy, one page.

5 I, client letter to Mr. Kesab, one page.

6 J, client letter to Captain Franz, two pages.

7 Kite, client letter -- kilo, excuse me. Apologies. No
8 prior service, Your Honor.

9 MJ [Lt Col BRAUN]: Understood, Counsel.

10 CDC [MS. FUNK]: I'm doing my best.

11 K, client letter to Chief Petty Officer Kelly Alston, two
12 pages.

13 L, client letter to Tech Sergeant Bailey, one page.

14 M, client letter to Ms. Funk and Lieutenant Colonel Higgins,
15 two pages.

16 N, client letter to parents, two pages.

17 O, client letter to parents, two pages.

18 P, client letter to parents, one page.

19 Q, client letter to parents, two pages.

20 R, client letter to parents, two pages.

21 S, client letter to parents, three pages.

22 T, Mr. bin Amin family photos, 12 pages.

23 U, camp photos, nine pages.

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1 V, United Nations Human Rights Report, 23 pages.
2 W, drawings by Mr. Mohammed Farik bin Amin, 14 pages.
3 X, report and curriculum vitae of Dr. Hawthorne E. Smith,
4 that is 54 pages.

5 And, Y, excerpts from the Senate Select Committee on
6 Intelligence Report, 20 pages.

7 MJ [Lt Col BRAUN]: Thank you, Defense Counsel.

8 Seeing no objection to what has been offered as Defense
9 Exhibits (AMI) A through Y, those defense exhibits are admitted.

10 Anything additional, Counsel for Mr. bin Amin?

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

12 MJ [Lt Col BRAUN]: Thank you.

13 Counsel for Mr. bin Lep?

14 LDC [MR. BOUFFARD]: Sir, we will have one exhibit. And I'm
15 happy to have it marked now, but we are not asking that it be
16 admitted yet. We'll need to make copies, and it is not necessary
17 until the end.

18 And for planning purposes, this is the unsworn statement of
19 Mr. bin Lep; and my preference would be that once he completes
20 reading that to the panel, that it then be published to them.

21 MJ [Lt Col BRAUN]: Yes. And, Counsel, that's absolutely your
22 prerogative if you want to move to admit at that time ----

23 LDC [MR. BOUFFARD]: Sure.

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1 MJ [Lt Col BRAUN]: ---- in the proceeding, that is fine. I'd
2 just ask that you -- to try and economize time, not necessitate
3 necessarily a recess after you move, if you could coordinate with the
4 other parties to ensure that they have an opportunity to, as much as
5 makes sense for your presentation of your evidence and ability to
6 look at that ahead of time, that would be appreciated.

7 LDC [MR. BOUFFARD]: Absolutely, sir. Would you like me to
8 have it marked now?

9 MJ [Lt Col BRAUN]: We can take up -- if you're going to admit
10 it later, we'll just take up the marking and admission later. If you
11 want to get with the court reporters over a recess, though, and just
12 have that -- the document itself marked, please do so. That would be
13 helpful.

14 LDC [MR. BOUFFARD]: Perfect.

15 And, Your Honor, I know you're about to get into voir dire
16 here shortly. May we be heard prior to you beginning that?

17 MJ [Lt Col BRAUN]: Yes. And now would be the time, Counsel.

18 LDC [MR. BOUFFARD]: So we wanted to advise the court that the
19 three parties got together over the weekend. And we are all in
20 agreement that as to a certain number of panel members, we have been
21 able to identify through their questionnaires sufficient challenges
22 for cause that we all three agree on them and agree that they should
23 not be on the panel. And this was in the interest, you know,

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1 primarily of streamlining, but also certainly in the spirit of
2 cooperation in this case.

3 Having said that, we're obviously going to then do whatever
4 the court wants to do. It's my opinion that, at least as to the
5 members whose numbers I can give you, there needs to be no other time
6 necessarily spent on them unless the commission deems it necessary.

7 So I'm standing by to read those numbers into the record, if
8 you wish, or to do whatever you need, Judge.

9 MJ [Lt Col BRAUN]: One moment, Counsel.

10 LDC [MR. BOUFFARD]: Oh, and if I may, Judge, just to put a
11 foot stomp on that, not only do we believe that we've developed those
12 challenges via the questionnaires, but we also believe that there is
13 no live questioning of those witness -- those witnesses that would be
14 likely to rehabilitate.

15 MJ [Lt Col BRAUN]: And how we're likely going to handle that,
16 just so -- while I'm referencing a couple matters of law here from
17 the bench, the commission needs to ensure that a complete record's
18 made. And that's going to be the basis of any challenge for cause,
19 and it sounds like that's where we're going here.

20 So insomuch as client member -- or client data sheets or
21 questionnaires or wherever this information's coming from to create
22 that factual basis for the commission, the parties will be able to
23 articulate that, but we're probably going to need to be prepared to

1 mark those particular questionnaires or data sheets or whatever it
2 may be as appellate exhibits so that they do exist in the record.

3 I anticipate the parties may want to talk about them. I'm
4 going to want to look at them to make sure that I understand the
5 basis for challenge for cause.

6 The question really right now is a sequencing question as it
7 pertains to the rules on when this challenge is best taken up. So as
8 I consult the rules here on that particular matter, I'd just ask
9 counsel to kind of be prepared to move forward in that direction.

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

11 **[Counsel conferred.]**

12 MJ [Lt Col BRAUN]: Okay. Counsel, commission's looking at
13 R.M.C. 912, Challenge of Selection of Members, Examination and
14 Challenge of Members, specifically subsection (f), Challenges and
15 Removal for Cause, subpart (2), which talks about -- it's actually
16 titled "when made," the timing and consideration that the commission
17 is currently considering.

18 When you look at subpart (A), it states: Upon completion of
19 examination under Section (d) of this rule and presentation of the
20 evidence, if any, on the matter, the parties may elect to make those
21 challenges.

22 (B) seems inapplicable at this point, because it just talks
23 about matters that may be ground for challenge that would arise later

1 in the proceeding.

2 The court notes that -- or the commission notes that in this
3 case, however, the panel members, to some extent, have already been
4 questioned; and that was done through a pretrial questionnaire, which
5 is contemplated by the rule in subsection (a), part (1), discussing
6 questionnaires. So the commission, for purposes of that rule,
7 believes that some questioning has occurred.

8 Additionally, acknowledging that the military judge
9 exercises a pretty broad discretion as to the manner and method of
10 the questioning of panel members for purposes of exercise of
11 challenge by the parties, whether that be cause or peremptory. The
12 commission has some ability to modify the process within the confines
13 of the rules to meet the end intent, which is to seat an
14 appropriately impartial panel for this commission.

15 The commission's concern is, perhaps, without having the
16 benefit of the positions of the parties on individual members at this
17 time, that should the commission not entertain the parties' request
18 at this time, it may result in a scenario where a identified member,
19 perhaps, during group voir dire, could disclose additional
20 information which could risk tainting the entire panel, which would
21 be very chaotic to the proceeding itself, requiring the convening
22 authority to detail new members, getting members here.

23 So based upon that, the commission interprets the use of

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1 questioning as articulated in Rule 912, subpart (f), part (2),
2 subsection (F); part (2), subpart (A), to envision questioning to
3 discuss pretrial questionnaires.

4 Do the parties have a position with regard to the
5 language -- and I'll give you an opportunity if you need to -- the
6 language the commission's referring to, and its interpretation of the
7 commission's ability to entertain those causal challenges at this
8 time, based upon the information already provided by the members to
9 the parties?

10 Trial Counsel?

11 TC [COL KRAEHE]: Your Honor, the government offers nothing
12 further. We believe your interpretation of the rule is correct.

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

14 CDC [MS. FUNK]: We agree with the government, Your Honor.

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

16 LDC [MR. BOUFFARD]: Sir, we do, too.

17 In particular, the concerning potential harm, as you've
18 noted, of members who we have already identified as inappropriate to
19 be seated, essentially tainting the rest of the members.

20 So the only other thing I would add is that there is no
21 chance that we are going to break quorum or anything like that. We
22 will have a panel even if all these people were excused this minute.
23 So we're just standing by.

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1 MJ [Lt Col BRAUN]: So, then, what I would like to do is,
2 Defense Counsel, since you have brought this to the attention of the
3 commission, I'm going to have you identify those numbers for the
4 panel members that raise -- or that the parties agree raise basis for
5 cause -- a challenge for cause, excuse me.

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

7 Those members in response to your description, Judge, are:
8 Number 2, number 6, number 7, number 8, number 10, number 15,
9 number 18, number 20, and number 23.

10 MJ [Lt Col BRAUN]: Trial Counsel, do you concur with those
11 particular panel members articulated by counsel for Mr. bin Lep?

12 TC [COL KRAEHE]: Yes, Your Honor. We concur.

13 MJ [Lt Col BRAUN]: Counsel for Mr. bin Amin, do you also
14 concur with those panel members?

15 CDC [MS. FUNK]: We do, Your Honor.

16 MJ [Lt Col BRAUN]: Okay. So, then, what we're going to do,
17 Counsel for Mr. bin Lep, is I would like to step through the causal
18 basis of challenge. If we're relying upon a questionnaire, which I'm
19 assuming we are, we'll need to mark that as the next appellate
20 exhibit in line for that particular member. We can step through them
21 individually to ensure the creation of a complete record.

22 LDC [MR. BOUFFARD]: Sir, I believe copies of those are coming
23 from the government that are clean copies. Would you like to defer

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1 this until we have those, and can all look at the same document?

2 MJ [Lt Col BRAUN]: So the commission absolutely will need to
3 look at that document. So I'm not going to proceed without having
4 that information in front of me, as I think that's going to be
5 necessary for the commission to make an informed ruling on the
6 counsels' positions regarding any causal challenge.

7 Trial Counsel, understanding that you're going to have those
8 copies made, how long would we require to get that information to the
9 commission?

10 TC [COL KRAEHE]: 15 minutes, Your Honor.

11 MJ [Lt Col BRAUN]: Okay.

12 TC [COL KRAEHE]: We have someone working on it right now,
13 Your Honor.

14 MJ [Lt Col BRAUN]: Thank you, Trial Counsel.

15 Before we recess for those 15 minutes, though, while trial
16 counsel is working to get those matters produced, I would like to
17 take up the voir dire questions I provided to the parties in advance,
18 which have been marked as an appellate exhibit, to ascertain whether
19 there are any objections to those questions.

20 They were taken, as I had previously discussed, both from
21 the standard questions provided in the military judge's benchbook, as
22 well as the submissions of the parties. Those are the -- as provided
23 to the parties, those are the questions that the commission will ask

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1 the panel members as we sit here right now.

2 Trial Counsel, have you had an opportunity to look at those
3 voir dire questions, and do you have any objection?

4 TC [COL KRAEHE]: Your Honor, we have reviewed the voir dire
5 questions, and the government has no objections.

6 MJ [Lt Col BRAUN]: Counsel for Mr. bin Amin, same questions.

7 Have you had an opportunity to review those questions, and
8 do you have any objections?

9 CDC [MS. FUNK]: We've had the opportunity to review the
10 questions, and we do not have any objections.

11 MJ [Lt Col BRAUN]: Thank you.

12 Counsel for Mr. bin Lep?

13 LDC [MR. BOUFFARD]: We have reviewed. We have no objection.

14 MJ [Lt Col BRAUN]: Very well.

15 Then just for planning purposes, as I did not receive
16 advance questions from any party, the intent of the commission, after
17 we step through these causal challenges, is to call the members,
18 place them under oath, ask the standard questions.

19 Then we will recess, determine what individual voir dire may
20 be necessary based upon the information the parties have both from
21 the questionnaires and the commission's questions to the members, and
22 then we'll step through that individual voir dire member by member.

23 As a reminder to the parties, the commission will require a

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1 party to articulate its basis for recalling a member. So it's going
2 to be a little more involved than "we would like to recall Member
3 Number 4." It's going to be -- the expectation will be "recalling
4 Member Number 4 to discuss topic X" so that the commission
5 understands what the parties plan to individually voir dire each
6 member about.

7 Do all parties understand the commission's way ahead and
8 have any -- or do any parties have any questions? Better way to ask
9 that.

10 Trial Counsel?

11 TC [COL KRAEHE]: No questions from the government, Your
12 Honor.

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

14 CDC [MS. FUNK]: No questions.

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

16 LDC [MR. BOUFFARD]: No questions.

17 MJ [Lt Col BRAUN]: Then with that, this commission's in a
18 15-minute recess.

19 **[The R.M.C. 803 session recessed at 0950, 23 January 2024.]**

20 **[END OF PAGE]**

21 **[The R.M.C. 803 session was called to order at 1022,**
22 **23 January 2024.]**

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

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1 parties that were present when the commission recessed are again
2 present.

3 Trial Counsel, were you able to provide the court reporter
4 the questionnaires of the individuals identified by counsel for
5 Mr. bin Lep?

6 TC [COL KRAEHE]: Yes, Your Honor. We were.

7 MJ [Lt Col BRAUN]: It's my understanding that those
8 questionnaires were marked as Appellate Exhibit 93, is that correct,
9 in that series?

10 TC [COL KRAEHE]: Yes, Your Honor.

11 MJ [Lt Col BRAUN]: So in an attempt to make this easiest,
12 what I'm going to do is discuss them in numeric order, starting with
13 lowest and going to the highest number. To do that, I'm going to
14 identify the number and its appellate exhibit, and then from that
15 point forward, I will refer to them only by their number. I think it
16 just makes it a little easier for all of us.

17 So Appellate Exhibit 093.001 will be the questionnaire for
18 Panel Member Number 2.

19 93.002 will be the questionnaire for Panel Member Number 6.

20 93.003 is going to be the questionnaire for Panel Member
21 Number 7.

22 93.004 is going to be the questionnaire for Panel Member
23 Number 8.

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1 93.005 is going to be the questionnaire for Panel Member
2 Number 10.

3 93.006 is going to be the questionnaire for Panel Member
4 Number 15.

5 93.007 is going to be the questionnaire for Panel Member
6 Number 18.

7 And 93.008 is going to be the questionnaire for Panel Member
8 Number 20.

9 93.009 is going to be the questionnaire for Panel Member
10 Number 23.

11 Okay. Then what I'd like to do is just start with Panel
12 Member Number 2.

13 Counsel, if you want to articulate the basis for challenge
14 for cause as it relates to Panel Member Number 2.

15 DC [LtCol HIGGINS]: Judge, Panel Member Number 2 has a
16 longstanding history as an intelligence officer, perhaps 28 years.
17 We would challenge for cause on the basis of 912(f), actual and
18 implied bias.

19 She comes from the intelligence community. She served in
20 combat twice during that period, and one was actually during the time
21 that our clients were captured. So she would be subjected to several
22 classified briefs and information that she can't even really share
23 with us.

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1 She was also a standing panel member in eight
2 courts-martial. She sent a team down to GTMO, I assume, based on her
3 MOS, that it was intelligence related. Given her prominence in the
4 intelligence community, her rank, and experience, it would give
5 actual, if not at least implied, bias that she would be a leader and
6 an authority on intelligence collection, and also have an opinion,
7 having been in combat against the war on terrorism in the roles that
8 she had. And so we would ask that she be striked **[sic]** for cause:
9 Inelastic opinion, inability to render a fair sentence, and her
10 position -- longstanding position in the intelligence community and
11 contacts therein.

12 Thank you.

13 MJ [Lt Col BRAUN]: Counsel for Mr. bin Lep, anything
14 additional as it relates to Panel Member Number 2?

15 LDC [MR. BOUFFARD]: No, sir. As to Panel Member Number 2, we
16 concur with team bin Amin. We have nothing to add.

17 MJ [Lt Col BRAUN]: And, Trial Counsel, do you object to the
18 defense counsel challenge for cause as it relates to Panel Member
19 Number 2 based both actual and implied bias?

20 TC [COL KRAEHE]: No, Your Honor. The government does not
21 object.

22 MJ [Lt Col BRAUN]: Very well, then. The court will take that
23 under advisement, and I'll explain to the parties why that may be.

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1 In accordance with the rules, the court does not retain the
2 authority to excuse a panel member until such time as assembly. We
3 have not made it to assembly yet. It is the court's intent to hear
4 the parties' positions, ask any questions the court may -- the
5 commission, excuse me, may have of the parties at this time to get
6 all the facts out there.

7 The commission will then move forward with all panel members
8 to assembly. We'll place all panel members under oath. We'll then
9 recess the panel members to provide a ruling based upon the parties'
10 stated challenges. Then we'll call in those members who are being
11 excused, should the commission decide to grant any of those
12 challenges, and excuse those members at that time.

13 That seems to be -- while a little difficult logistically,
14 that seems to be the best way, in the commission's impression, to
15 avoid the potential danger of tainting the entire panel while also
16 trying to economize our time as best we can and comport with the
17 rules as provided to this commission.

18 Understanding that, I guess, any objection to that approach,
19 Trial Counsel?

20 TC [COL KRAEHE]: No objection, Your Honor.

21 MJ [Lt Col BRAUN]: Okay. Counsel for Mr. bin Amin, any
22 objection to that, that way ahead?

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

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1 MJ [Lt Col BRAUN]: Thank you.

2 Counsel for Mr. bin Lep?

3 LDC [MR. BOUFFARD]: Not at all, Your Honor. Thank you.

4 MJ [Lt Col BRAUN]: Okay. Very well, then.

5 We'll move on to Panel Member Number 6, whichever party
6 wishes to articulate that objection -- or that challenge, excuse me.

7 DC [LtCol HIGGINS]: Judge, Panel Member Number 6
8 expressed an -- also expressed close contacts with friends in the
9 intel community, and has served with the intelligence community;
10 again, subjected to briefs that not even she can share the details of
11 those briefs.

12 She worked for the Trump administration, which I don't think
13 I have to tell the court the actual bias of at least the Trump
14 administration for Guantanamo and keeping it open and putting more
15 bad guys in there. So working for the Trump administration, I would
16 submit that she would be more inclined to adopt a -- at least an
17 implied bias against our clients.

18 I see that she attended a religious-based institution,
19 Liberty University, I believe his name is Jerry Falwell, who is also
20 extremely conservative. And so, I mean, you could assume that also
21 that one who would select a university like that tends to have a more
22 conservative view, which again goes with the Trump administration
23 information.

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1 She's also a sexual assault victim, and it's not clear
2 whether she received her day in court as a victim. And so that might
3 tend to lend itself to some implied biases about a victim getting
4 their day in court and rendering a sentence to that end.

5 I see that there are some -- she's in postpartum, and there
6 are some concerns that she has with accommodations that are going to
7 be required in order to continue in the proceedings, which may be,
8 frankly, distractions that will interfere with her ability to pay
9 attention and hear all the facts.

10 For those reasons, we ask that Member Number 6 be stricken
11 for cause for implied bias.

12 MJ [Lt Col BRAUN]: Counsel for Mr. bin Lep, anything
13 additional? Do you join in the challenge for cause, and do you have
14 anything additional you'd like to add?

15 LDC [MR. BOUFFARD]: We do join in the challenge. We have
16 nothing to add.

17 MJ [Lt Col BRAUN]: Excuse me, and in the challenge. Thank
18 you.

19 Trial Counsel?

20 TC [COL KRAEHE]: Your Honor, while we may not agree with all
21 the bases for the challenge for cause, we believe there is sufficient
22 bases. And, for that reason, we will not oppose the challenge for
23 cause.

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1 MJ [Lt Col BRAUN]: Very well. The court will consider the
2 challenge for cause based upon implied bias as it relates to Panel
3 Member Number 6.

4 Moving on to Panel Member Number 7.

5 DC [LCDR CURTIS]: Your Honor, prospective member number 7,
6 while a pilot himself who was deployed in support of Operation Iraqi
7 Freedom and Enduring Freedom, he also is married to an intelligence
8 officer and has listed that his close personal friend is an employee
9 of the CIA.

10 In support of his operations, which he listed as being from
11 2007 until 2021, notwithstanding all of the intelligence briefs that
12 he received during those operations, he also has extensively listed
13 his recreational reading, which for the most part, for purposes of
14 this case, concerns Al Qaeda, Afghanistan, the Taliban.

15 And he kind of goes on and on to describe his -- like I
16 said, not just his formal training in these subjects, but also what
17 appears to be a vested personal interest in topics that will be
18 touched upon in our proceedings.

19 He also had a response in his questionnaire about the
20 SSCI Report, which has been admitted as evidence in the sentencing.
21 And he quite specifically wrote the, quote/unquote, alleged enhanced
22 interrogation.

23 We found that particularly problematic due to his close

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1 personal friend being in the CIA and him choosing to use the word
2 "alleged" for the CIA's term "enhanced interrogation," which is the
3 legal term for those actions.

4 So, for those reasons, Your Honor, we believe that
5 prospective juror number 7 should be stricken for cause, not just
6 because he might be privy to information outside of this case that
7 bears on the evidence they will be reviewing, but also due to his
8 close proximity to actors and groups that might be touched upon and
9 criticized in these proceedings.

10 MJ [Lt Col BRAUN]: Thank you, Counsel.

11 Counsel for Mr. bin Lep?

12 LDC [MR. BOUFFARD]: Sir, we join and have nothing to add.

13 MJ [Lt Col BRAUN]: And I apologize, Counsel for Mr. bin Amin.
14 Was that actual bias? Implied bias? What was the basis of the
15 challenge?

16 DC [LCDR CURTIS]: Apologies, Your Honor. Both actual bias
17 and implied bias. I also believe I touched upon Rule for Military
18 Commission 912(f)(1)(F), as it talks about any parties who have
19 potentially investigated offenses charged. In that we don't know the
20 substantive information contained in the intelligence briefs, we can
21 cross-reference the time frames of, for example, this juror's
22 participation in those briefings with reports of investigation that
23 have manifested themselves in evidence we're presenting in the

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1 sentencing.

2 MJ [Lt Col BRAUN]: Thank you, Counsel.

3 Trial Counsel, objection to defense counsel's challenge to
4 Panel Member Number 7 based upon actual and implied bias?

5 TC [COL KRAEHE]: Your Honor, the government does not object.

6 MJ [Lt Col BRAUN]: Very well.

7 Then moving on to Panel Member Number 8.

8 DC [LCDR CURTIS]: Your Honor, we would like to strike Panel
9 Member Number 8 for cause under grounds of both actual and implied
10 bias again.

11 This panel member is a career intelligence officer for the
12 Navy. She expressed that she has a family member who is, in fact, an
13 Army Judge Advocate who works for the military commissions.

14 She also explained that in preparation for military
15 commissions in November of 2023, she received cultural awareness
16 training. And so as that bears on her bringing in outside knowledge
17 or taking any preparation specifically for these proceedings, we find
18 that to be improper.

19 This potential panel member is currently a member of the
20 Joint Staff (J2), so the director at Foreign Intelligence, and
21 formerly worked on the Joint Intelligence Office and PACOM, which
22 I'll note has now been properly renamed as INDOPACOM, as it does
23 encompass some of the areas of the crimes that we're talking about

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1 today in sentencing.

2 So to the extent that her relationship with the Army Judge
3 Advocate who works for the military commissions, the way that she
4 prepared intentionally for these proceedings and also her former
5 internship at the Federal Bureau of Investigation which, while not
6 party to the proceeding, may be implicated in the sentencing
7 evidence, we move to strike this juror.

8 MJ [Lt Col BRAUN]: Thank you, Counsel.

9 Counsel for Mr. bin Lep?

10 LDC [MR. BOUFFARD]: Sir, we join and have nothing to add.

11 MJ [Lt Col BRAUN]: Trial Counsel?

12 TC [COL KRAEHE]: No objection, Your Honor.

13 MJ [Lt Col BRAUN]: Very well. The commission will consider
14 the challenge to Panel Member 8 under actual implied -- actual and
15 implied bias. Excuse me.

16 And on to Panel Member Number 10.

17 DC [LtCol HIGGINS]: Judge, after further consideration, the
18 defense for Mr. bin Amin has no challenges for cause on that
19 particular member.

20 LDC [MR. BOUFFARD]: And we concur as well, Your Honor.

21 MJ [Lt Col BRAUN]: Trial Counsel, any matters you want to
22 bring forward at this time as it relates to Panel Member Number 10?

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

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1 MJ [Lt Col BRAUN]: Then Panel Member Number 15.

2 DC [LtCol HIGGINS]: Your Honor, Panel Member Number 15 has a
3 very interesting reading and movie list, which suggests that he has a
4 particular interest in the war on terror. None of the reading list
5 is defense-friendly, I'll say that. It's all lauding the United
6 States -- readings and books about, you know, lauding the United
7 States for the war on terror and the stance that it's taken, the
8 battle, the fight, the struggle.

9 I did not see any books that would suggest that he's a
10 neutral person who can put aside any hostility towards the accused
11 for what they've been -- what they've pled guilty for, or develop an
12 inelastic opinion concerning the sentence.

13 Given that, and that his close mentor is a law enforcement
14 individual, we would move to strike for cause this member for implied
15 bias.

16 LDC [MR. BOUFFARD]: We join and have nothing to add, Your
17 Honor.

18 MJ [Lt Col BRAUN]: Thank you, Counsel.

19 TC [COL KRAEHE]: And no objection from the government, Your
20 Honor.

21 MJ [Lt Col BRAUN]: Very well. The court will take under
22 consideration the challenge for cause based upon implied bias as it
23 relates to Panel Member Number 15.

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1 Moving on to Panel Member Number 18.

2 DC [LtCol HIGGINS]: Judge, we're moving to strike Member
3 Number 18 for actual and implied bias.

4 He actually expressed a strong-hold belief about Muslims.
5 He's conducted actual ops against Al Qaeda, again, that he can't
6 share with us in open court. The reading list is very similar to
7 jury member number -- or Member Number 15, lauding the struggle and
8 the race against terrorism.

9 He spent 10 years, and this is a quote, conducting
10 ops -- I'm sorry -- conducting ops against terrorism. The quote is
11 that -- is: To kill and capture terrorists.

12 In addition, Panel Member Number 18 has an impacted
13 vertebrae, which prevents long sit -- long periods of sitting. As we
14 know, this will entail long periods of sitting, and that will
15 be -- undoubtedly be a distraction.

16 So we move to strike Panel Member Number 18 for actual and
17 implied bias.

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

19 LDC [MR. BOUFFARD]: Your Honor, we join. The only thing to
20 add is that this panel member specifically said or admitted to bias
21 against terrorists. You know, the concern is he's not going to
22 entertain the possibility that an accused in a commission may not be
23 a terrorist.

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1 MJ [Lt Col BRAUN]: Is that based upon the very last question
2 of the questionnaire?

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

4 MJ [Lt Col BRAUN]: Okay.

5 Trial Counsel?

6 TC [COL KRAEHE]: No objection, Your Honor.

7 MJ [Lt Col BRAUN]: Very well. The court will take under
8 consideration counsel's challenge to prospective Panel Member
9 Number 18 based upon actual and implied bias.

10 Moving on, then, to Panel Member Number 20.

11 DC [LCDR CURTIS]: Your Honor, we'd like to strike Panel
12 Member Number 20 for cause for both actual and implied bias.

13 Panel Member Number 20 participated as a pilot in Operation
14 Allies Refuge in 2021. That operation entailed what was essentially
15 the fall of Kabul. And he specifically participated in the, I'd say,
16 toppling of the Kabul airport.

17 So in that same vein, he's expressed a vested interest in
18 media regarding the escape from Kabul is one of the ones he listed, a
19 documentary that does not take, I guess, a positive light on what's
20 happening in that region and that time particularly with the Taliban,
21 or express any type of flexibility.

22 It's also inferred that if he participated in these
23 operations, he, while I did not see him in this documentary, likely

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1 knows or served with many of the people who provided that commentary
2 on which this challenge is based as far as it concerns his interest
3 in that media.

4 Panel Member Number 20 also replied that he has read the
5 SSCI Report, which is part of the evidence in this sentencing case.
6 While it is over 700 pages in full, he repeatedly said he didn't have
7 any opinion about the report.

8 We find that to be just a little troubling because we would
9 expect that there would be some type of opinion if he was interested
10 enough in reviewing. But, again, we do not have any further
11 information on that.

12 The last part of the questionnaire for member 20 we believe
13 is grounds for striking for cause is that he stated that his
14 preconceived beliefs about individuals charged in military
15 commissions, he believes that they have done something worthy of
16 being in Guantanamo Bay.

17 So we see that as, not only as he stated, his preconceived
18 belief, but as potentially inflexible opinion, and that he has made
19 conclusions about what Guantanamo Bay entails, and -- **[microphone**
20 **button not pushed; no audio.]** -- who are here.

21 For those reasons, Your Honor, we move to strike Member
22 Number 20 for both actual and implied bias.

23 LDC [MR. BOUFFARD]: Sir, we concur, and have nothing to add.

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1 MJ [Lt Col BRAUN]: Trial Counsel?

2 LDC [MR. BOUFFARD]: Pardon me. We join.

3 TC [COL KRAEHE]: No objection, Your Honor.

4 MJ [Lt Col BRAUN]: Very well. The commission will take under
5 consideration the challenge for cause under actual and implied bias
6 for Panel Member Number 20.

7 Finally, Counsel, Panel Member Number 23.

8 DC [LtCol HIGGINS]: Your Honor, we move to move **[sic]** Panel
9 Member Number 23 for implied bias based on the association with Megan
10 Gentry, who is the chief litigation support for the Office of
11 Military Commissions -- or, I'm sorry, chief prosecutor, prosecutor's
12 office.

13 MJ [Lt Col BRAUN]: Counsel, where in the questionnaire, if
14 you could just give me a page number, if you have it available.

15 LDC [MR. BOUFFARD]: It's question 22, Your Honor.

16 MJ [Lt Col BRAUN]: Because it's divided into parts, do you
17 know which page that's on, or which part it's in?

18 LDC [MR. BOUFFARD]: Page 10.

19 MJ [Lt Col BRAUN]: Page 10. Thank you.

20 LDC [MR. BOUFFARD]: Or 13 of 17.

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

22 LDC [MR. BOUFFARD]: We join, and nothing else to add, sir.

23 TC [COL KRAEHE]: And no objection from the government, Your

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1 Honor.

2 MJ [Lt Col BRAUN]: Okay. Any other matters that we can take
3 up at this time prior to my calling the members?

4 Trial Counsel?

5 TC [COL KRAEHE]: Nothing from the government, Your Honor.

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

7 CDC [MS. FUNK]: Nothing, Your Honor. Thank you.

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

9 LDC [MR. BOUFFARD]: Nothing, Your Honor. Thank you.

10 MJ [Lt Col BRAUN]: Bailiff, please call the members.

11 **[The R.M.C. 803 session recessed at 1049, 23 January 2024.]**

12 **[The military commission was called to order at 1056,**

13 **23 January 2024.]**

14 MJ [Lt Col BRAUN]: You may be seated. This commission is
15 called to order.

16 Members of the commission, I'm Judge Braun, the military
17 judge who will be presiding over this military commission.

18 In a moment, trial counsel will explain how this commission
19 was convened. They will introduce the parties, and then counsel will
20 ask you to take an oath regarding the performance of your duties as a
21 member.

22 Once counsel does that, I will provide you some preliminary
23 instructions. There are several documents in a folder in front of

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1 you that we are going to review shortly. Until then, I ask that you
2 leave those folders closed and follow along with trial counsel's
3 announcements and my preliminary instructions.

4 Trial Counsel.

5 TC [COL KRAEHE]: Your Honor, the court is convened by
6 Military Commission Convening Order Number 23-01, Office of Military
7 Commissions, Office of the Convening Authority, dated 17
8 November 2023, as amended by 23-02 and 23-03, copies of which have
9 been furnished to each member of the court.

10 The accused and the following persons detailed to this
11 military commission are present: Lieutenant Colonel Wesley A. Braun,
12 military judge; Colonel George Kraeche, U.S Army, trial counsel;
13 Lieutenant Colonel Goewert, Christopher, U.S. Air Force, assistant
14 trial counsel; Lieutenant Commander Jeffrey Larson, United States
15 Navy, assistant trial counsel.

16 And if defense counsel would please announce the persons
17 detailed to this commission on behalf of the defense.

18 CDC [MS. FUNK]: Certainly.

19 I'm Christine Funk. To my left is Lieutenant Colonel
20 Chantell Higgins, and to her left is Lieutenant Commander Crystal
21 Curtis.

22 LDC [MR. BOUFFARD]: First, good morning. My name is Brian
23 Bouffard. I'm here with Mr. Aaron Shepard ----

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1 MJ [Lt Col BRAUN]: Counsel, if we could please -- thank you.

2 LDC [MR. BOUFFARD]: Probably need to do that, don't I?

3 I am here with Mr. Aaron Shepard; Major Jason Cordova, U.S.
4 Air Force; Lieutenant Jennifer Joseph, JAG Corps, U.S. Navy;
5 Lieutenant Commander Matthew Anderson, JAG Corps, U.S. Navy; and
6 Ms. Nessma Bashi.

7 MJ [Lt Col BRAUN]: Okay. And, Counsel -- Trial Counsel,
8 before we move forward, I want to make a correction on the record
9 here. This court-martial, I believe, was convened by Convening Order
10 Numbers 23-01, dated November 17, 2023, as modified by Order 23-02,
11 dated 13 December 2023 -- excuse me -- the original convening order
12 is 21-01, dated 21 January 2021. That was modified further by
13 Convening Order 23-01, dated 17 November 2023, further modified by
14 Convening Order 23-02, dated 13 December 2023, further modified by
15 24-02, dated 12 January 2024, and Order 23 -- 24-03, dated 22
16 January 2024.

17 TC [COL KRAEHE]: Yes, Your Honor.

18 MJ [Lt Col BRAUN]: If you may proceed -- you may proceed,
19 Trial Counsel.

20 TC [COL KRAEHE]: The members are present. The prosecution is
21 ready to proceed with trial in the case of the United States v.
22 Mohammed Nazir bin Lep; Mohammed Farik bin Amin.

23 MJ [Lt Col BRAUN]: The members of the court will now be

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1 sworn. All persons in the courtroom, please rise.

2 TC [COL KRAEHE]: Do you swear or affirm ----

3 MJ [Lt Col BRAUN]: Counsel, on the --

4 Members, if you could raise your right hand, please.

5 **[Panel members were sworn.]**

6 MJ [Lt Col BRAUN]: The commission is assembled.

7 Members, it's appropriate that I give you some preliminary
8 instructions. My duty as military judge is to ensure this commission
9 is conducted in a fair, orderly, and impartial manner in accordance
10 with the law. I preside over open sessions, rule upon objections,
11 and instruct you on the law applicable to this case.

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

18 At a session held earlier, the accused pled guilty to the
19 charges and specifications which you have before you. I have
20 accepted that plea and entered findings of guilty. Therefore, you
21 will not have to determine whether the accused is guilty or not
22 guilty, as that has been established by their pleas.

23 Your duty is to determine an appropriate sentence. That

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1 duty is a grave responsibility requiring the exercise of wise
2 discretion. Your determination must be based upon all the evidence
3 presented, and the instructions I will give you as to the applicable
4 law.

5 Since you cannot properly reach your determination until all
6 the evidence has been presented, and you have been instructed, it is
7 of vital importance that you keep an open mind until all the evidence
8 and instructions have been presented to you.

9 Counsel soon will be given an opportunity to ask you
10 questions and exercise challenges. With regard to challenges, if you
11 know of any matter that you feel might affect your impartiality to
12 sit as a court member, you must disclose that matter when asked to do
13 so.

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

17 Any matter that may affect your impartiality regarding an
18 appropriate sentence for the accused is a ground for challenge. Some
19 of the grounds for challenge would be: If you were an accuser of any
20 offense charged; if you have investigated any offense charged; or if
21 you have formed a fixed opinion as to what an appropriate punishment
22 would be for either accused.

23 To determine if any grounds for challenge exist, counsel for

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1 both sides are given an opportunity to question you. These questions
2 are not intended to embarrass you, and they are not an attack upon
3 your integrity. They're asked merely to determine whether a basis
4 for challenge exists.

5 If at any time after answering these questions you realize
6 that any of your answers were incorrect, you recognize a witness
7 whose name you did not previously recognize, or you think of any
8 matter that might affect your impartiality, you have a continuing
9 duty to bring that to the attention of this commission. You do that
10 simply by raising your hand and stating only that you have an issue
11 to discuss with the commission. I will then follow up with you
12 individually as necessary.

13 It is no adverse reflection upon a member to be excused from
14 a particular case. You may be questioned either individually or
15 collectively but, in either event, you should indicate an individual
16 response to the question asked. Unless I indicate otherwise, you are
17 required to answer all questions.

18 You must keep an open mind throughout this trial. You must
19 impartially hear the evidence, the instructions on the law, and only
20 when you are in your closed session deliberations may you properly
21 make a determination as to an appropriate sentence after considering
22 all the alternate punishments of which I will later advise you.

23 You may not have a preconceived idea or formula as to either

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1 the type or amount of punishment which should be imposed, if any.

2 Counsel are given an opportunity to question all witnesses.
3 When counsel finished, if you feel there are substantial questions
4 that should be asked, you will be given an opportunity to do so.
5 There are forms that will be provided for your use if you desire to
6 question any witness.

7 You are required to write your question on the form and sign
8 legibly at the bottom. This method gives counsel for both sides, and
9 me, an opportunity to review the question before they are asked since
10 your questions, like counsel's questions, are subject to objection.

11 I will conduct any needed examination.

12 There are a few things you need to keep in mind with regard
13 to questioning:

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

16 Second, counsel have interviewed the witnesses and know more
17 about this case than we do. Very often they do not ask a question
18 that may appear to us to be obvious because they're aware this
19 particular witness has no knowledge on that subject.

20 Third, when posing a question, do not include your rationale
21 for asking the question. For example, you shouldn't say, "I was
22 curious because witness A said something different." Just provide
23 the question, and I will determine whether it is a permissible

1 question.

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

7 Until you close to deliberate, you may not discuss this
8 commission with anyone, even amongst yourselves. You must wait until
9 you are all together in your closed-session deliberations so that all
10 panel members have the benefit of your discussion.

11 During the course of the trial, including all periods of
12 recess and adjournment, you must not communicate with anyone about
13 the case, either in person or by e-mail, blog, text message, posting
14 on Reddit, or other forms of social media. Posting information about
15 the case on Facebook, for example, is considered a form of
16 communicating about the case.

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

20 Do not consult any sources of law or information, written or
21 otherwise.

22 Do not conduct your own investigation or research. For
23 example, you cannot consult the Manual for Military Commissions, the

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1 Manual for Courts-Martial, dictionaries or reference materials. You
2 may not search the Internet, Google the witnesses to learn more about
3 them, review a Wikipedia entry, or consult a map or satellite picture
4 to learn more about any alleged crime scene.

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

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

11 I may not repeat these matters to you before every recess or
12 adjournment, but I ask that you keep them in mind throughout the
13 trial.

14 I will try to estimate the time needed for recesses or
15 hearings outside of your presence. I will tell you frequently their
16 duration is extended by consideration of new issues arising in those
17 particular hearings. I ask for your patience and understanding
18 regarding these matters, as that patience and understanding greatly
19 contributes to an atmosphere consistent with the fair administration
20 of justice.

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

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1 you has an equal voice and vote with the other members in discussing
2 and deciding all issues submitted to you. However, in addition to
3 the duties of the other members, the senior member will act as your
4 presiding officer during your closed-session deliberations.

5 This general order of events can be expected at this
6 commission: Questioning of the members, challenges and excusals,
7 presentation of evidence, closing arguments by counsel, instructions
8 on the law, your deliberations, and announcement of the sentence.

9 The appearance and demeanor of all parties to the commission
10 should reflect the seriousness with which the trial is viewed.
11 Careful attention to all that occurs during the trial is required of
12 all parties.

13 Therefore, if it becomes too hot or cold in this courtroom,
14 or if you need a break because of drowsiness or for comfort reasons,
15 please tell me so that we can attend to your needs and avoid
16 potential problems that might otherwise arise.

17 Similarly, if you run out of paper or need another writing
18 instrument to permit you to continue taking notes, please raise your
19 hand and tell me so that I can attend to your needs.

20 Each of you may take notes, if you desire, and use them to
21 refresh your memory during deliberations. However, your notes may
22 not be shown or read to other members. These notes are merely your
23 personal notes to assist you in jogging your own memory regarding

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1 what happened in open court.

2 At the time of any recess or adjournment, you should leave
3 your notes in the deliberation room. Your notes, along with any
4 exhibits, should not be taken from this courtroom, which will include
5 your deliberation area.

6 One other administrative matter: If during the course of
7 the trial it is necessary for you to make any statement, if you would
8 preference that statement by stating your member number, that will
9 make it clear on the record which member is speaking.

10 You will see sitting in front of me are two court reporters.
11 Their responsibility is to create an accurate record of everything
12 that transpires inside this courtroom while we are on the record.
13 While each of you have identifiers in front of you, the court
14 reporter will only have the audio recording available when preparing
15 the transcript. When you identify yourself before speaking, it
16 greatly assists the court reporter with the task of transcription in
17 a much more efficient manner.

18 Are there any questions of any panel members at this time?

19 Seeing none.

20 Members, at this time I want you to look inside those
21 folders in front of you. Inside you are going to find multiple
22 documents.

23 First, I want you to examine the documents on the left side

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1 of your folders. These are convening orders. I want you to examine
2 those convening orders and ensure that your name is correctly
3 reflected on one of the convening orders.

4 If not, I need you to raise your hand. If you've finished
5 locating your name and your information on the convening order,
6 please look up at me so that I know you have completed your review.

7 **[Pause.]**

8 MJ [Lt Col BRAUN]: All members have complied with my
9 direction.

10 Before I have you look at the other documents in that
11 folder, commonly referred to as the flyer, I want to provide you some
12 orientation to this military commission.

13 As you may have noticed when you entered the courtroom,
14 there are two accused in this military commission. To my right,
15 seated at the two rows of tables closest to me, is the defense team
16 for Mr. Mohammed Farik bin Amin, as well as Mr. Mohammed Farik
17 bin Amin on the far right of that front table.

18 At the next two table -- rows of tables behind
19 Mr. bin Amin's defense team is Mr. Mohammed Nazir bin Lep. Because
20 there are two accused in this military commission, you will see two
21 sets of charges on two individual flyers. You can identify easily
22 which flyer belongs to which accused based upon the caption in the
23 top left-hand corner of that particular flyer.

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1 While each flyer may look similar, they are not identical.
2 So it is important that you review both flyers thoroughly and
3 carefully.

4 So at this time I want you to look at those two flyers in
5 the right-hand side of your folders, review the charges and the
6 information provided, and then look up at me when you are done.

7 **[Pause.]**

8 MJ [Lt Col BRAUN]: Trial Counsel, you may announce the
9 general nature of the charges.

10 TC [COL KRAEHE]: Your Honor, the general nature of the
11 charges in this case are: Murder in violation of the law of war;
12 intentionally causing serious bodily injury; destruction of property
13 in violation of the law of war; conspiracy; and accessory after the
14 fact.

15 The charges were preferred by Megan L. Gentry, Office of
16 Military Commissions, and referred for trial by the Office of
17 Military Commissions Convening Authority on 21 January 2021.

18 If any member of the court is aware of any matter which he
19 or she believes may be ground for challenge by other sides, such
20 matters should now be stated.

21 Your Honor, there was a negative response from the panel
22 members.

23 MJ [Lt Col BRAUN]: Thank you.

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1 Panel members, now that I've given you initial instructions,
2 there are some matters that I need to take up outside your presence.
3 I anticipate this will be a fairly brief recess, just for your kind
4 of planning purposes.

5 Then given the hour, and I will talk with you later this
6 afternoon about kind of how I will sequence events, as best I can, to
7 accommodate both our lunch period and where we will start and break
8 for each day, as well as comfort recesses.

9 But based upon that, then, when we come back, what I
10 anticipate doing, after I take care of those matters outside of your
11 presence, is recall everybody, and then place this commission into a
12 recess so that everybody can get some lunch. Then we will reconvene
13 after that to proceed with group voir dire, the questioning portion
14 that I had referenced to earlier.

15 So just as much as that may help you, I think this next
16 recess will take absolutely no more than 10 minutes.

17 So with that, Panel Members, I'm going to have you retire to
18 the deliberation room.

19 **[Panel members withdrew from the courtroom.]**

20 **[END OF PAGE]**

21 **[The R.M.C. 803 session was called to order at 1131,**
22 **23 January 2024.]**

23 MJ [Lt Col BRAUN]: Please be seated. This commission will

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1 again come to order. Parties are present. Members are absent.

2 Counsel, taking up defense counsel's motions to strike panel
3 members 2, 6, 7, 8, 15, 18, 20, and 23, and opposing counsel's lack
4 of objection to that motion to strike for cause under both generally
5 implied and actual bias, but as more fully articulated on the record
6 as to each member, that motion will be granted.

7 With that, what I plan to do is re-call those particular
8 members. I will excuse them and caution them and then have them
9 depart. I will then re-call the rest of the panel, and then we will
10 recess for lunch. I plan to get back onto the record to 1300 to move
11 directly into group voir dire.

12 Any objection to that way ahead?

13 Trial Counsel?

14 TC [COL KRAEHE]: No objection, Your Honor.

15 MJ [Lt Col BRAUN]: Defense counsel for Mr. bin Amin?

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

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

18 LDC [MR. BOUFFARD]: No objection.

19 MJ [Lt Col BRAUN]: Very well.

20 And, actually -- okay.

21 With that, Bailiff, I'm going to have you re-call the
22 following panel members: Panel member 2, 6, 7, 8, 15, 18, 20, and
23 23. And if you could please have them join us.

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1 [Pause.]

2 [Panel Members 2, 6, 7, 8, 15, 18, 20, and 23 entered the courtroom.]

3 [The military commission was called to order at 1136,

4 23 January 2024.]

5 MJ [Lt Col BRAUN]: This commission will come to order.

6 Parties are present. In addition, panel members 2, 6, 7, 8, 15, 18,

7 20, and 23 are also present.

8 Panel Members, I am excusing you from further service in
9 this military commission. In doing so, though, I want to give you a
10 little bit of guidance and caution here.

11 Because you're being excused, you will have no further
12 obligations to this commission. In the event that you are asked
13 about your service in this commission, I'm going to remind you of the
14 oath that you took just a few moments ago.

15 Because none of you have been part of any deliberations, you
16 may discuss all of your involvement in this commission, including
17 your personal observations in the courtroom, the process of how a
18 commission functions as you've seen it so far.

19 However, I'm going to instruct you to refrain from having
20 those discussions with one another, the members who have remained,
21 counsel for either side, or anyone else until the trial has ended.

22 I also remind you of the protective order that was issued by
23 this commission in AE 0006.006 (TJ). That was the order that

1 specifically protected the identity of the members of this
2 commission. That orders remains in effect. So I'm going to ask that
3 you continue to comply with its directives until and unless directed
4 otherwise by a -- by a court or commission.

5 Do you all understand my instruction?

6 Okay. That's an affirmative response from the panel members
7 present.

8 With that, then, Panel Members, I'm going to have you depart
9 the courtroom with thanks for coming here with us today and
10 participating in the process up until this point. You are excused.

11 **[Panel Members 2, 6, 7, 8, 15, 18, 20, and 23 withdrew from the**
12 **courtroom.]**

13 MJ [Lt Col BRAUN]: You may be seated.

14 Bailiff, if you could please re-call the remaining members.

15 **[Pause.]**

16 **[Panel members entered the courtroom.]**

17 MJ [Lt Col BRAUN]: This commission will again come to order.
18 Parties are present. Panel members are present.

19 Panel Members, as I indicated, I'm going to recess for
20 lunch. We will reconvene at 1300 today. I just ask that you be
21 prepared in the deliberation room for us to get back onto the record,
22 then, at 1300. As promptly as I can get us going, I intend to do so.

23 With that being said, I just want to remind you of the

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1 caution I gave you just a few moments ago: Specifically, that during
2 periods of recess or adjournment, you are not to communicate with
3 anyone about this commission or this case. Moreover, you may not
4 conduct any type of research into any matters that you may be aware
5 of as part of your participation in this commission.

6 Do all panel members understand my instruction?

7 That's an affirmative response from all panel members.

8 Do all panel members agree to follow my instruction?

9 That's an affirmative response from all panel members.

10 Very well. With that, then, this commission is in recess
11 until 1300.

12 **[The military commission recessed at 1143, 23 January 2024.]**

13 **[The military commission was called to order at 1307,**
14 **23 January 2024.]**

15 MJ [Lt Col BRAUN]: This commission is called to order. All
16 parties that were present when the commission last recessed are again
17 present.

18 Members are also present.

19 Panel Members, good afternoon. I'm going to ask you some
20 preliminary questions. Now, clearly there's a lot of you up there,
21 and there is one of me sitting here. So I'm going to lay down a
22 couple ground rules to try and make this a little more efficient,
23 frankly, for myself and counsel, as we are going to be taking notes

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1 as to your responses to my various questions.

2 So how we're going to step through this is I'm going to ask
3 you a series of questions, and I'm going to ask you to respond to my
4 questions in a couple of ways. The first is through an exaggerated
5 head nod, and the second is through either raising or not raising
6 your hand; and this is how we're going to do this.

7 So if you have an affirmative or a "yes" answer to one of my
8 questions, what I want is an exaggerated north/south and then raise
9 your hand. You will then hear me capturing those responses on the
10 record. Once I capture your response, you can put your hand down and
11 you can quit nodding your head.

12 If you have a "no" answer to my question, I just want to get
13 a really exaggerated no or east/west. That hopefully will help.

14 If at any point, however, you notice I'm intently staring at
15 you, it's not to make anybody uncomfortable. It's because I probably
16 haven't captured your answer. So if you notice that, please just
17 help me out by affirming your answer for me, and I think that will
18 make it as easy as it can be with the number of panel members we have
19 here this morning.

20 Do all panel members understand my instruction?

21 There we go. That was an affirmative response from all
22 panel members. We got there.

23 So now I also want to remind you of one additional matter.

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1 You are required to answer my questions unless I direct otherwise,
2 and I ask that your answers be individual answers. So answer for
3 yourself.

4 If there are additional matters that you feel need to be
5 discussed based upon my question, you can simply raise your hand. I
6 will identify you, and you can let me know that there may be an
7 additional matter that you would like to discuss, and then we can
8 take that matter up individually with you so that we have a little
9 more smaller group to have that conversation.

10 So with that, Panel Members, we'll start with the first
11 question.

12 Does anyone know either of the accused?

13 That's a negative response from all panel members.

14 Does anyone know any person named in any of the
15 specifications or the common allegations located on the flyer?

16 And before you answer that, I'll remind you, the flyer was
17 the document with the charges and specifications I had you review
18 earlier today in your folders. So if you need to look at that,
19 please feel free to do so at this time.

20 Okay. That is a negative response from all panel members.

21 The trial counsel is going to read a list of potential
22 witnesses in this case. Afterwards, I will ask if anyone knows any
23 of the potential witnesses in this case.

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1 Trial Counsel, please proceed.

2 TC [COL KRAEHE]: Your Honor, the potential witnesses in this
3 case are: Matthew Arnold, Frank Heffernan, Bonnie Hall, Susanna
4 Miller, Solomon Miller, Chris Snodgrass, Susan Snodgrass, Piers
5 Gambrini, Maggie Stephens, Eleni Panagoulas, and Mary Panagoulas.

6 And there are a couple of defense witnesses as well: Faizal
7 bin Amin and Fadil bin Amin.

8 MJ [Lt Col BRAUN]: Panel Members, does anyone know any of the
9 potential witnesses that trial counsel just mentioned?

10 That's a negative response from all panel members.

11 Having seen the accused and having read the charges and
12 specifications, does anyone feel that you cannot give each accused a
13 fair trial for any reason?

14 Okay. That's an affirmative response from Panel Member
15 Number 4 and a negative response from all other panel members.

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

18 That is a negative response from all panel members.

19 Since you filled out your questionnaires, have you seen,
20 heard, or read anything about this case or either accused,
21 Mr. Mohammed Farik bin Amin, also known as Zubair, or Mr. Mohammed
22 Nazir bin Lep, also known as Lillie?

23 That is a negative response from all panel members.

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1 Since you filled out your questionnaire, have you seen,
2 heard, or read anything about Mr. Encep Nurjaman, also known as
3 Hambali?

4 That's a negative response from all panel members.

5 Since you filled out your questionnaire, have you seen,
6 heard, or read anything related to military commissions at U.S. Naval
7 Station Guantanamo Bay or about detainees there?

8 That is a negative response from all panel members.

9 Since you filled out your questionnaire, have you accessed
10 the Office of Military Commissions website at www.mc.mil?

11 That's a negative response from all panel members.

12 Has anyone or any member of your family, or anyone close to
13 you personally, ever been charged with an offense similar to any of
14 those charged in this case?

15 That's a negative response from all panel members.

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

19 That is a negative response from all panel members.

20 Has anyone or any member of your family, or anyone close to
21 you personally, ever been affected by any of the bombings mentioned
22 in any of the charges?

23 That's a negative response from all panel members.

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1 Has anyone or any member of your family, any professional
2 colleague, or anyone close to you personally, been involved in the
3 investigation or prosecution of any of the bombings mentioned in the
4 charges?

5 That's a negative response from all panel members.

6 Does anyone have any strongly held opinions or beliefs about
7 the United States Government's treatment of Muslims after
8 September 11th, 2001?

9 That's a negative response from all panel members.

10 Has anyone formed any strongly held opinions or beliefs
11 about Muslim individuals?

12 That's a negative response from all panel members.

13 Has anyone formed any strongly held opinions or beliefs
14 about Malaysians or Indonesians, or other East Asian citizens?

15 That's a negative response from all panel members.

16 Does anyone believe that members of law enforcement or
17 members of the intelligence community are more credible or
18 trustworthy than average individuals who may not be a government
19 agent?

20 That's a negative response from all panel members, with the
21 exception of Panel Member 11, 9, 4, and 1.

22 Does anyone have any particularly strong views or opinions
23 on the Blue Lives Matter movement?

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1 That is a negative response from all panel members.

2 Is any member of the panel in the rating chain, supervisory
3 chain, or chain of command of any other member?

4 That is a negative response from all panel members.

5 Now, for most of you, you are going to be junior to at least
6 one other member on the panel. So with that in mind, let me ask you:
7 Would you feel inhibited or restrained in any way in performing your
8 duties as a panel member, including the free expression of your views
9 during deliberation, because another member holds a position of
10 authority over you?

11 That is a negative response from all panel members.

12 Similarly, all of you, except for one, will have somebody
13 senior in rank to you on the panel. So with that in mind, let me ask
14 you this question: Will you be embarrassed or restrained in any way
15 in the performance of your duties as a panel member if a member over
16 whom you hold a position of authority should disagree with you?

17 That is a negative response from all panel members.

18 Has anyone had any dealings with any of the parties to the
19 trial, to include myself or counsel, that might affect your
20 performance of duty as a commission member in any way?

21 That is a negative response from all panel members.

22 Does anyone have any reservations about active duty military
23 attorneys representing detainees who have pled guilty to charges such

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1 as those involved in this case?

2 That is a negative response from all panel members.

3 Members, for scheduling purposes, you can expect that I will
4 generally direct we start at about 0900 and end no later than 1730,
5 with a lunch recess from about 1130 to 1300, similar to what we have
6 done so far today.

7 I will also attempt to take a short comfort recess about
8 every hour we're on the record, moving that ever so slightly to try
9 and make breaks make sense as the proceeding underlies so that I'm
10 not creating weird gaps.

11 Finally, there will be a scheduled recess from around 1515
12 to 1545 every day we are on the record.

13 Again, I'm going to adjust those times as I think it's
14 appropriate, based upon kind of my experience of how these
15 proceedings typically unfold so that I can best economize our time
16 together.

17 Understanding my projected daily schedule, does anyone know
18 of anything of either a personal or professional nature that would
19 cause you to be unable to give your full attention to these
20 proceedings throughout the trial?

21 That is a negative response from all panel members.

22 Did anyone undergo any exceptional hardships in order to
23 travel here, here being U.S. Naval Station Guantanamo Bay, Cuba, to

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1 serve on this panel?

2 That is a negative response from all panel members.

3 It is a ground for challenge that you have an inelastic
4 predisposition towards the imposition of a particular punishment
5 based solely on the nature of the crimes for which the accused are to
6 be sentenced.

7 Does any member, having read the charges and specifications,
8 believe that you would be compelled to vote for any particular
9 punishment solely because of the nature of the charges?

10 That's a negative -- that's a positive response from Panel
11 Member Number 5, and a negative response from all other panel
12 members.

13 Implicit bias is defined by the American Psychological
14 Association as a negative attitude, of which one is not consciously
15 aware, against a specific social group.

16 Do you agree to actively work to counteract any implicit
17 bias you may have and remain impartial and fair as a member in this
18 commission and consider only the evidence presented to you and the
19 instructions I will provide you in reaching appropriate sentences for
20 each accused in this proceeding?

21 That's an affirmative response from all panel members.

22 Okay. Panel Members, this next question contains a little
23 bit of a prelude to it, and it's rather long. So I just want you to

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1 sit back and listen, and pay attention. It's a little involved. And
2 then once I get through that prelude, I'm going to ask you a
3 question, ask you to answer that question.

4 Panel Members, you will be instructed in detail before you
5 begin your deliberations. I will instruct you on the full range of
6 punishments up to the maximum punishment. You should consider the
7 entirety of that available range of punishment.

8 "Consider" does not necessarily mean that you would vote for
9 that particular punishment. "Consider" means that you will think
10 about and make a choice in your mind one way or the other as to
11 whether that's an appropriate punishment.

12 Each member must keep an open mind and not make a choice,
13 nor foreclose from consideration any possible sentence, until the
14 closed session for deliberations and voting on the sentence.

15 Can each of you follow that instruction?

16 That is an affirmative response from all panel members.

17 Can each of you be fair, impartial, and open-minded in your
18 consideration of an appropriate sentence as to each accused,
19 understanding the nature of the charges involved?

20 That's an affirmative response from all panel members.

21 Can each of you reach a decision on sentence on an
22 individual basis for each accused in this particular case and not
23 solely upon the nature of the offenses to which each accused have

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1 been convicted?

2 That is an affirmative response from all panel members.

3 Is any member aware of a matter that might raise a
4 substantial question concerning your impartiality or participation in
5 this trial as a panel member?

6 That's an affirmative response from Panel Member Number 4
7 and a negative response from all other panel members.

8 Panel Members, those are the entirety of the questions I
9 have for you at this time.

10 There's going to be a couple matters that I want to consider
11 outside of your presence. This is going to be a little longer of a
12 recess than the previous 5- to 10-minute one I took, just for your
13 planning purposes.

14 During -- after that recess, some of you may be re-called to
15 individually discuss matters with you. I want to let you know that
16 if you are re-called for individual questioning, I'm just going to
17 ask that you come into the courtroom and just have a seat in the
18 front row, kind of in the middle. No need to return to your assigned
19 seat, if you will.

20 Once we've finished that questioning, I'm going to have you
21 then return to the deliberation room with potential instructions to
22 have somebody else come out and join us.

23 I'm going to instruct you not to discuss what we talk about

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1 in those individual sessions with the rest of the panel members.

2 Do all members understand my instructions?

3 That's an affirmative response from all panel members.

4 With that, Panel Members, then, please return to the
5 deliberation room.

6 **[The members withdrew from the courtroom.]**

7 **[The R.M.C. 803 session was called to order at 1325,**

8 **23 January 2024.]**

9 MJ [Lt Col BRAUN]: This commission will again come to order.

10 Parties are present. Members are absent.

11 Parties, I can provide you -- based upon the responses, I'm
12 not sure it would be necessary to provide an extended recess to allow
13 the parties to combine their notes; however, I realize that there's
14 more than just the group voir dire questions that the parties may
15 want to consider in determining who may need to be re-called for
16 individual questioning.

17 If it is helpful, I'm willing to provide the parties an
18 opportunity for a brief recess in place to crosstalk if they think
19 that that would help expedite matters.

20 So with that -- otherwise, I would just intend to hold a
21 10-minute recess to allow the parties to collect what they need to,
22 knowing we would come back on the record to identify those members
23 who need to be re-called and for what purposes.

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1 Trial Counsel, do you have a preference on how we proceed?

2 TC [COL KRAEHE]: Your Honor, I believe a recess is
3 appropriate at this time. And I think 10 or 15 minutes should be
4 sufficient time to discuss these matters with defense counsel.

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

6 CDC [MS. FUNK]: We'd ask for 15, but on the higher end; but
7 yes, thank you.

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

9 LDC [MR. BOUFFARD]: We concur.

10 MJ [Lt Col BRAUN]: Okay. Very well, then. This commission's
11 in a 15-minute recess.

12 **[The R.M.C. 803 session recessed at 1327, 23 January 2024.]**

13 **[The R.M.C. 803 session was called to order at 1347,**
14 **23 January 2024.]**

15 MJ [Lt Col BRAUN]: This commission will come to order.

16 All parties are present. Members are absent.

17 Before I get into who the parties would like to re-call, I
18 want to draw the parties' attention to the convening orders for this
19 commission, specifically the language contained at the bottom of
20 Military Commission Convening Order 23-02. I believe it also is
21 included in -- and it is -- in Military Commission Convening
22 Order 23-01.

23 I note that the two latest convening orders do not modify

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1 this language, so I think it's appropriate for consideration by the
2 commission. But in that language, it states that -- first, it
3 provides some instructions as it pertains to before assembly.

4 We're clearly after assembly, so that's not applicable. But
5 after assembly, it states the number of primary -- if the number of
6 primary members falls below five members required for a quorum,
7 sufficient number of alternate members will be detailed to ensure
8 quorum.

9 Insomuch -- and then there's follow-on language. Insomuch
10 as that language articulates, it is the commission's interpretation
11 that we currently have the primary panel members. We will engage in
12 challenges of those primary panel members until we've exhausted those
13 challenges for cause.

14 The parties will then be permitted to exercise their
15 peremptory challenge. After the exercise of that peremptory
16 challenge, if we still have at least five primary panel members
17 available, no alternate members would be designated as primary
18 members, if you will.

19 If, for some reason, after the exercise of all those
20 challenges we fall below the quorum requirement to five, the
21 commission would then move or designate the next -- or the first
22 alternate member, if you will, based upon numeric order, lowest to
23 largest, the first of the alternates numerically to the primary panel

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1 and continue until that primary contains the minimum quorum of five
2 members.

3 As it pertains to alternates, the convening order also
4 contains language that states that all alternates -- all additional
5 alternates in excess of the first three shall be excused. If
6 alternate members remain after challenges, the first three alternate
7 members shall be retained. All additional alternates in excess of
8 the first three shall be excused.

9 So given the use of the word "if," the commission views that
10 as the commission impaneling, if you will, three alternate members if
11 three alternate members remain at the conclusion of the exercise of
12 all challenges. So any members that would exist in excess of those
13 three alternate members would then be excused by the commission.

14 I want the parties to have the benefit of that
15 interpretation before we go into the exercise of any challenges so
16 that the parties can fully and meaningfully exercise their challenges
17 as they see fit, understanding the impact that that may have on both
18 the primary and the alternate members.

19 Are there any questions, or does anybody object to the
20 court's interpretation of the language contained in the convening
21 orders and the commission's way ahead?

22 Trial Counsel?

23 TC [COL KRAEHE]: No questions, Your Honor. And no

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1 objections.

2 MJ [Lt Col BRAUN]: Thank you.

3 Counsel for Mr. bin Amin?

4 CDC [MS. FUNK]: Nothing. Thank you.

5 MJ [Lt Col BRAUN]: Thank you.

6 Counsel for Mr. bin Lep?

7 LDC [MR. BOUFFARD]: We're good with that too, sir.

8 MJ [Lt Col BRAUN]: Outstanding, okay.

9 So, with that, Trial Counsel, do you request individual voir
10 dire? And if so, what is the member's number and then reason?

11 TC [COL KRAEHE]: Your Honor, the government does not request
12 individual voir dire.

13 MJ [Lt Col BRAUN]: Counsel for Mr. bin Amin, do you request
14 individual voir dire of any panel member? If so, which member by
15 number and then for what reason?

16 DC [LtCol HIGGINS]: Judge, we do request individual voir dire
17 on Panel Member 4 -- I'm sorry -- Panel Member 1, Panel Member 9, and
18 Panel Member 11. The reason being is the question -- I won't say it
19 was inartfully drafted, because I don't want to insult the court, but
20 I think we probably had some input in that.

21 But the fact of the matter is I believe that the members
22 panel, given the credibility of intelligence officers and their
23 research and information that they receive, that they may have been

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1 answering that question based on the fact that intelligence officers
2 do generally have more information than the average person. So we'd
3 like to make that clarification.

4 MJ [Lt Col BRAUN]: Okay. So you'd like to re-call Panel
5 Member Number 1 to ask about the affirmative response to my question
6 number 16 regarding members of law enforcement or members of the
7 intelligence community being more or less credible or trustworthy
8 than the average individual?

9 DC [LtCol HIGGINS]: That's correct.

10 MJ [Lt Col BRAUN]: Okay. Any other reason you'd like to
11 re-call Panel Member Number 1, Counsel?

12 DC [LtCol HIGGINS]: No, Your Honor.

13 MJ [Lt Col BRAUN]: Okay. And before we move to on to your
14 other members, Counsel, Counsel for Mr. bin Lep, do you have anything
15 you would like to talk to Panel Member Number 1 about in addition to
16 what has already been articulated?

17 LDC [MR. BOUFFARD]: Not in addition to, sir.

18 MJ [Lt Col BRAUN]: Okay. Then moving on to Panel Member
19 Number 9, I believe you said, Counsel?

20 DC [LtCol HIGGINS]: Yes, Your Honor. For the same reasons.

21 MJ [Lt Col BRAUN]: Okay.

22 LDC [MR. BOUFFARD]: Same response, sir.

23 MJ [Lt Col BRAUN]: And then Panel Member Number 11.

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1 DC [LtCol HIGGINS]: Same thing, sir.

2 MJ [Lt Col BRAUN]: Okay.

3 LDC [MR. BOUFFARD]: And same response.

4 MJ [Lt Col BRAUN]: Any other individuals you'd like to

5 re-call?

6 Counsel for Mr. bin Amin?

7 DC [LtCol HIGGINS]: No, Your Honor.

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

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

10 MJ [Lt Col BRAUN]: Okay.

11 So the commission intends, in addition to Panel Members 1,
12 9, and 11, to re-call Panel Member Number 4, as Panel Member Number 4
13 answered affirmatively to my question regarding: "Having seen the
14 accused and having read the charges and specifications, does anyone
15 feel they cannot give each accused a fair trial?"

16 Additionally, Panel Member Number 4 answered in affirmative
17 to the very question that counsel for Mr. bin Amin is re-calling
18 Panel Members 1, 9, and 11.

19 And, finally, this panel member articulated that he
20 has -- he's aware of a matter that would raise a substantial question
21 concerning his impartiality or participation in this trial.

22 The commission feels it's necessary to re-call that panel
23 member to get additional information as to those questions.

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1 Counsel for Mr. bin Lep?

2 LDC [MR. BOUFFARD]: Sir, as to both Members 4 and 5, I
3 believe we may have an agreement by all parties that they should also
4 be struck for cause at this time.

5 MJ [Lt Col BRAUN]: Okay. Well, would you like to make that
6 motion at this time, and then I can get the parties' position on the
7 record?

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

9 MJ [Lt Col BRAUN]: Okay.

10 Trial Counsel, counsel for Mr. bin Lep has requested Panel
11 Member Number 4 be excused for cause based upon his responses to my
12 questions 4, 16, and 28.

13 Do you object to a challenge for cause?

14 TC [COL KRAEHE]: No objection, Your Honor.

15 MJ [Lt Col BRAUN]: Okay.

16 Counsel for Mr. bin Amin, any objection?

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

18 MJ [Lt Col BRAUN]: Okay. Very well.

19 Then that causal challenge is granted. Panel Member
20 Number 4 will be excused.

21 And then, I believe, Panel Member Number 5, Counsel; is that
22 correct?

23 LDC [MR. BOUFFARD]: Yes, sir, based on inelastic attitude

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1 towards sentencing.

2 MJ [Lt Col BRAUN]: I believe that was my question Number 23.

3 Yes.

4 Trial Counsel, any objection to defense counsel's motion to
5 excuse Panel Member Number 5 based upon cause given his response to
6 my question number 25 -- 23, excuse me, regarding inelastic
7 predisposition towards sentence?

8 TC [COL KRAEHE]: No objection, Your Honor.

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

10 CDC [MS. FUNK]: No objection, Your Honor.

11 MJ [Lt Col BRAUN]: Okay. Without objection, Panel Member
12 Number -- that request will be granted. Panel Member Number 5 will
13 be excused.

14 Anything further, then, before I re-call Panel Member
15 Number 1, Trial Counsel?

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

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

18 CDC [MS. FUNK]: Nothing, Your Honor.

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

20 LDC [MR. BOUFFARD]: Nothing, Your Honor.

21 MJ [Lt Col BRAUN]: Bailiff, if you could please have Panel
22 Member Number 1 join us.

23 **[Panel Member 1 entered the courtroom.]**

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1 **[The military commission was called to order at 1358,**
2 **23 January 2024.]**

3 MJ [Lt Col BRAUN]: Please be seated.

4 Thank you for joining us, Panel Member Number 1. We just
5 have some additional follow-up questions based upon the group
6 questioning we had earlier.

7 Counsel, if you want to proceed.

8 DC [LtCol HIGGINS]: Good afternoon, ma'am.

9 MEMBER 1: Good afternoon.

10 DC [LtCol HIGGINS]: I have to be way over here.

11 During the voir dire questions, the judge asked you did
12 anyone believe that members of law enforcement or members of the
13 intelligence community are more credible or trustworthy than the
14 average individual who may not know -- or may not be a government
15 agent.

16 I just wanted to seek some clarification on that and
17 understand your answer is all.

18 MEMBER 1: Okay. I answered yes.

19 As a law enforcement or intel, I do believe you are more
20 credible based on what you do and the knowledge that you have in your
21 day-to-day activities. So that's why I answered yes.

22 DC [LtCol HIGGINS]: When you say more credible, do you mean
23 more truthful, or that they have more information?

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1 MEMBER 1: They have more information.

2 DC [LtCol HIGGINS]: So are you able to judge the credibility
3 of law enforcement against the facts of the case and give a sentence
4 that is appropriate to whatever crime Mr. bin Amin has pled guilty to
5 rather than just assuming that everything that the law enforcement or
6 the government agents are saying is true?

7 MEMBER 1: Yes.

8 DC [LtCol HIGGINS]: Thank you, ma'am.

9 MJ [Lt Col BRAUN]: Counsel for Mr. bin Lep, do you have any
10 additional questions you'd like to ask?

11 LDC [MR. BOUFFARD]: No questions. Thank you, ma'am.

12 MEMBER 1: Sure.

13 MJ [Lt Col BRAUN]: Trial Counsel?

14 TC [COL KRAEHE]: I have no questions, Your Honor.

15 DC [LtCol HIGGINS]: Sorry, Your Honor. I think the ma'am had
16 something else she wanted to say.

17 MEMBER 1: I have nothing. I'm just waiting on you, Judge.

18 DC [LtCol HIGGINS]: Okay. Okay.

19 MJ [Lt Col BRAUN]: I do have a question for you.

20 So clearly you're going to potentially hear from multiple
21 witnesses. Those witnesses may, in some way or another, contradict
22 themselves, each other, other pieces of evidence.

23 As a panel member, one of your duties is to discern and

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1 weigh that information that you have available to you, apply it to
2 the instructions I give you, and find the appropriate sentence for
3 the accused based upon that evidence you have been provided.

4 Do you understand that?

5 MEMBER 1: I do, Judge.

6 MJ [Lt Col BRAUN]: Okay. So based upon that, it's not
7 expected that you give all information equal weight; however, it is
8 expected that you would use the same standards in weighing and
9 evaluating all of that evidence and the testimony of the witnesses as
10 placed before you.

11 Do you believe that you can do that and not give any one
12 particular witness' statements more or less credibility based upon
13 their status or station in life, or perhaps their particular duties?

14 MEMBER 1: I do.

15 MJ [Lt Col BRAUN]: Okay. Any reservation that you could not
16 do that?

17 MEMBER 1: I have no reservations.

18 MJ [Lt Col BRAUN]: Outstanding.

19 Does my question prompt any additional questions from
20 counsel?

21 DC [LtCol HIGGINS]: No, Your Honor.

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

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

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1 MJ [Lt Col BRAUN]: Okay. Very well.

2 Ma'am, I'm going to have you return to the deliberation
3 room. I ask that you not discuss what we talked about in this
4 session with any of the other members.

5 If you could please have Panel Member Number 9 join us.

6 MEMBER 1: Yes, Judge.

7 MJ [Lt Col BRAUN]: Thank you.

8 **[Panel Member 1 withdrew from the courtroom.]**

9 MJ [Lt Col BRAUN]: Okay. Please be seated.

10 And for purposes of individual voir dire, I'm going to ask
11 that -- I'm not going to require that the commission be brought to
12 attention for the entry and exit of individual members. We'll just
13 do that for panel members as a whole. I think that's appropriate
14 under the circumstances.

15 **[Panel Member 9 entered the courtroom.]**

16 MJ [Lt Col BRAUN]: Please have a seat. Thank you for joining
17 us, Panel Member Number 9. We just have some additional follow-up
18 for you based upon the group conversation earlier.

19 Actually, and could I have you move to the seat with the
20 microphone? It makes it a little easier for us. Thank you.

21 Counsel?

22 DC [LtCol HIGGINS]: Good afternoon. I just have some -- one
23 follow-up question, or maybe it might turn into two, but I just

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1 wanted to clarify one of your answers that you gave to the judge
2 earlier during the voir dire questioning.

3 The question was: Does anyone believe that members of law
4 enforcement or members of the intelligence community are more
5 credible or trustworthy than the average individual who may not be a
6 government agent?

7 I just wanted to ask you to clarify what you meant by your
8 answer.

9 MEMBER 9: Yes, ma'am. As a member of the intelligence
10 community, I know that I have access to additional information that
11 others may not, and I'm trained in analytic standards. So I answered
12 in the affirmative on that based off of the intelligence community.
13 I don't have exposure to law enforcement.

14 DC [LtCol HIGGINS]: So does that same hold true to the
15 truthfulness and the integrity of the government agents as well?

16 MEMBER 9: I would say that's an individual matter. But as a
17 community, I know that the intelligence community is trained to
18 analytic standards that speak to credibility.

19 DC [LtCol HIGGINS]: Just one more question. So given that,
20 can you agree that if you're selected as a member of this panel that
21 you will evaluate the evidence and be able to determine the
22 appropriate sentence for Mr. bin Amin?

23 MEMBER 9: Yes, ma'am.

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1 DC [LtCol HIGGINS]: Thank you.

2 MJ [Lt Col BRAUN]: Counsel for Mr. Bin Lep?

3 LDC [MR. BOUFFARD]: No questions, sir. And thank you.

4 MJ [Lt Col BRAUN]: Trial Counsel?

5 TC [COL KRAEHE]: No questions from the government, Your
6 Honor.

7 MJ [Lt Col BRAUN]: I just have a couple of follow-up
8 questions for you.

9 MEMBER 9: Yes, sir.

10 MJ [Lt Col BRAUN]: So one of your duties as a court member is
11 to weigh the evidence that you're provided in determining what an
12 appropriate sentence is based upon that evidence.

13 Do you understand that?

14 MEMBER 9: Yes, sir.

15 MJ [Lt Col BRAUN]: So it is possible that you will have
16 multiple pieces of evidence, and they may not all directly agree with
17 each other and actually may be in conflict. The weight that you give
18 those individual pieces of evidence is something that's within your
19 discretion as a court member.

20 Do you understand that?

21 MEMBER 9: Yes, sir.

22 MJ [Lt Col BRAUN]: So it's not expected that you give all
23 evidence the same weight. However, what is expected is that you will

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1 use the same standards in weighing the weight that you -- weighing
2 and evaluating all of that evidence in determining how that impacts
3 your decision on sentence.

4 Do you understand that?

5 MEMBER 9: I do, sir.

6 MJ [Lt Col BRAUN]: Okay. Based upon that, can you agree to
7 give -- to use the same standards in weighing and evaluating the
8 evidence before you and not give any particular testimony or evidence
9 more weight simply because of that individual's standing, status,
10 job, position in life?

11 MEMBER 9: Yes, sir.

12 MJ [Lt Col BRAUN]: Any reservation that you could not apply
13 that principle?

14 MEMBER 9: None, sir.

15 MJ [Lt Col BRAUN]: Very well. Did my questions prompt any
16 additional questions?

17 Counsel?

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

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

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

21 MJ [Lt Col BRAUN]: Very well.

22 Panel Member Number 9, I'm going to have you return to the
23 deliberation room. I ask that when you're in there you not discuss

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1 what we've talked about in this session with those panel members who
2 remain.

3 And if you could please have Panel Member Number 11 join us.

4 MEMBER 9: Understood, sir. Thank you.

5 MJ [Lt Col BRAUN]: Thank you.

6 **[Panel Member 9 withdrew from the courtroom.]**

7 **[Pause.]**

8 **[Panel Member 11 entered the courtroom.]**

9 MJ [Lt Col BRAUN]: Thank you for joining us, Panel Member
10 Number 11. We just have some additional follow-up based upon the
11 group questions we asked earlier.

12 Counsel?

13 DC [LtCol HIGGINS]: Good afternoon. I just have one
14 follow-up question about one of the questions that the judge asked
15 you during voir dire. Just seeking clarification is all.

16 The judge asked: Does anyone believe that members of law
17 enforcement or members of the intelligence community are more
18 credible or trustworthy than the average individuals who may not be a
19 government agent?

20 Can you clarify what you meant by when you said "yes"?

21 MEMBER 11: Absolutely -- **[microphone button not pushed; no**
22 **audio.]**

23 MJ [Lt Col BRAUN]: Panel Member Number 11, can you push the

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1 button on the microphone? And make sure the light's on before you
2 talk.

3 MEMBER 11: The light's actually going -- oh, it's the
4 opposite. Sorry.

5 MJ [Lt Col BRAUN]: There we go.

6 MEMBER 11: As a member of the intelligence community, I
7 just -- I feel like that they have credible facts. They're seeing
8 more of a big picture than somebody would, you know, just a normal,
9 regular citizen would.

10 DC [LtCol HIGGINS]: So it doesn't necessarily mean that they
11 are more truthful?

12 MEMBER 11: Absolutely. I don't think that it -- you know,
13 just because you aren't in the community that you're going to peddle
14 falsehoods. I just -- they usually have more facts or -- are well
15 known.

16 DC [LtCol HIGGINS]: Thank you.

17 MEMBER 11: Thank you.

18 MJ [Lt Col BRAUN]: Defense Counsel?

19 LDC [MR. BOUFFARD]: Nothing, sir.

20 MJ [Lt Col BRAUN]: Thank you.

21 Trial Counsel?

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

23 MJ [Lt Col BRAUN]: So I do have a couple follow-on questions

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1 based upon your response.

2 So one of your duties as a panel member is to weigh and
3 assess the evidence in front of you in determining what an
4 appropriate sentence is. There is the possibility that you may have
5 multiple pieces of evidence that conflict or contradict in some way.

6 By necessity, you don't -- you wouldn't be expected to
7 provide the same weight to all of those individual pieces of evidence
8 given, you know, that they would potentially be in contradiction with
9 each other in some way. That being said, it is expected that you
10 would apply the same standards in weighing all the evidence before
11 you.

12 And does all that make -- does that make sense?

13 MEMBER 11: Absolutely, sir.

14 MJ [Lt Col BRAUN]: Okay. So understanding that, could you
15 agree to use the same standards in weighing and evaluating the
16 evidence in front of you and not give more or less weight to a
17 particular piece of evidence, especially as it relates to testimony
18 because that evidence comes from somebody of a particular duty or
19 station in life or rank or position or something, some characteristic
20 like that?

21 MEMBER 11: Absolutely, sir.

22 MJ [Lt Col BRAUN]: Any question in your mind whatsoever that
23 you would not be able to apply the same standards in weighing

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1 evidence?

2 MEMBER 11: No, sir.

3 MJ [Lt Col BRAUN]: Do my questions prompt any additional
4 questions of counsel?

5 DC [LtCol HIGGINS]: No, Your Honor. Thank you.

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

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

8 MJ [Lt Col BRAUN]: Okay. Outstanding.

9 Thank you very much for your time, Panel Member Number 11.
10 I'm going to have you return to the deliberation room. I ask that
11 while you're in the deliberation room you not discuss what we've
12 discussed in this session with the other panel members.

13 Thank you.

14 MEMBER 11: Thank you, sir.

15 **[Panel Member 11 withdrew from the courtroom.]**

16 MJ [Lt Col BRAUN]: Okay. Panel Member Number 11 has
17 departed.

18 Trial Counsel, do you have any challenges for cause?

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

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

21 CDC [MS. FUNK]: No, Your Honor. I apologize. I got some
22 fake news there.

23 We do not have any other strikes for cause.

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1 MJ [Lt Col BRAUN]: Okay. Thank you, Counsel.

2 Counsel for Mr. bin Lep?

3 LDC [MR. BOUFFARD]: No challenges, sir.

4 MJ [Lt Col BRAUN]: Trial Counsel, do you have any peremptory
5 challenges?

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

7 MJ [Lt Col BRAUN]: Counsel for Mr. bin Amin, do you have any
8 peremptory challenges?

9 CDC [MS. FUNK]: Yes, Your Honor. We submit we would like to
10 peremptorily challenge Number 10.

11 MJ [Lt Col BRAUN]: Trial Counsel, any matter you'd like to
12 place on the record regarding Mr. bin Amin's peremptory challenge
13 against Panel Member Number 10?

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

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

16 LDC [MR. BOUFFARD]: Sir, we are aware of our right to
17 exercise a peremptory challenge. We are going to waive that.

18 MJ [Lt Col BRAUN]: Okay.

19 Counsel's peremptory challenge exercised against Panel
20 Member Number 10 is granted. Panel Member Number 10 shall be
21 excused.

22 **[Pause.]**

23 MJ [Lt Col BRAUN]: Okay. Based upon the instructions

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1 contained in the convening order and those members who remain, it
2 appears that the following members would be primary panel members:
3 Number 1, 3, 9, 11, and 12.

4 And our alternate members would be: Panel Member 13, 14,
5 and 16.

6 Panel Members 17, 19, 21, and 22 would be excused as excess
7 alternate members.

8 Do the parties concur with the court's interpretation of the
9 convening orders, the exercises for challenge, and those panel
10 members that remain?

11 Trial Counsel? If you need a moment ----

12 TC [COL KRAEHE]: Just one moment, Your Honor.

13 **[Counsel conferred.]**

14 TC [COL KRAEHE]: Your Honor, the government concurs.

15 MJ [Lt Col BRAUN]: Counsel for Mr. bin Amin, do you concur?

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

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

18 LDC [MR. BOUFFARD]: We concur.

19 MJ [Lt Col BRAUN]: It is also the commission's intention to
20 inform Panel Members 13, 14, and 16 that they are indeed alternate
21 members as the convening orders identified the panel into primary
22 versus alternate.

23 In that instruction, the commission will notify them that

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1 they have been designated as an alternate member. They will have the
2 same duties as other members. They will observe the same proceeding,
3 pay attention to all of my instructions, and have the ability to ask
4 questions if they desire.

5 Explain to them that should a member be excused due to
6 illness or some other reason, that they may become a primary member;
7 and then to inform them that, unless later designated as a primary
8 member, they would not participate in deliberations or vote on a
9 sentence, just to place the grouping that they saw in the convening
10 order into some context for those panel members.

11 Trial Counsel, do you object to the commission informing
12 those alternate members at this time of their status, if you will?

13 TC [COL KRAEHE]: No objection, Your Honor.

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

15 CDC [MS. FUNK]: I apologize, Your Honor. I'm unable to put
16 my hands on that exact document. I want to make sure I heard you
17 correctly.

18 Are you saying that the juror -- the panel members have
19 already received a document listing primary and alternate
20 designations?

21 MJ [Lt Col BRAUN]: Yes. If you look at the convening orders,
22 23-02, 23-01 specifically, you'll see that there are -- well, in
23 actuality, based upon the way that the vicing -- no. If you look at

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1 23-02, I believe ----

2 CDC [MS. FUNK]: Actually, Your Honor, I can see it in 22-01
3 on page 2.

4 MJ [Lt Col BRAUN]: Yeah. Do you see the reference ----

5 CDC [MS. FUNK]: I do.

6 MJ [Lt Col BRAUN]: ---- I'm talking about?

7 CDC [MS. FUNK]: I do, and I see it's in actually both, 22-01
8 and 22-02.

9 Normally I would object to jurors being advised that they're
10 merely an alternate; however, since the cat's out of the bag, I have
11 no objection.

12 MJ [Lt Col BRAUN]: Okay.

13 LDC [MR. BOUFFARD]: We also have no objection, sir.

14 MJ [Lt Col BRAUN]: Okay.

15 So for a way ahead, I'm going to call the members, announce
16 for them those that have been excused, identify the primaries,
17 alternates, provide the instruction I just provided the parties, as
18 well as then place the -- retire the panel to the deliberation room.
19 There are some administrative matters that they need to attend to at
20 that time.

21 While that's happening, then, I believe that would be an
22 appropriate time to take up the prosecution exhibits I have not
23 preadmitted at this time, absent -- assuming the parties are prepared

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1 to talk about that particular matter.

2 I do appreciate that there's a 1515 recess, but I think we
3 can get some work done before we hit that point.

4 Trial Counsel?

5 TC [COL KRAEHE]: I concur, Your Honor.

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

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

8 MJ [Lt Col BRAUN]: Counsel for ----

9 LDC [MR. BOUFFARD]: No objection.

10 MJ [Lt Col BRAUN]: Awesome.

11 With that, bailiff, please call the Members.

12 **[Panel members entered the courtroom.]**

13 **[The military commission was called to order at 1421,**

14 **23 January 2024.]**

15 MJ [Lt Col BRAUN]: This commission will come to order.

16 Parties are present. Members are present.

17 Members, shortly I will announce those members who are being
18 excused. As I mentioned earlier, it's no adverse reflection upon a
19 member to be excused from a particular case.

20 For those members who have been excused, let me advise you
21 of one matter. In the event you are asked about your service on this
22 commission, I remind you of the oath that you took.

23 Because none of you have been part of any deliberations, you

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1 may discuss all of your involvement in this commission, including
2 your personal observations in the courtroom and the process of how a
3 military commission functions.

4 However, I instruct you to refrain from having those
5 discussions with one another, the members who have remained, counsel
6 for either side, or anyone else until the trial has ended.

7 I am also reminding you of the protective order that was
8 issued by this court in AE 0006.006 (TJ), a copy of which you've
9 previously been provided. Specifically, I want to draw your
10 attention to that order as it relates to protecting the identity of
11 the members of this commission. That protective order remains in
12 place, and you are not to reveal the identities of the members of
13 this commission unless directed to do so by this commission or
14 another court of competent jurisdiction.

15 Are there any questions as to my directions so far, Panel
16 Members?

17 That's a negative response from all panel members.

18 Members, the following panel members have been excused:
19 Panel Member Number 4, Number 5, Number 10, Number 17, Number 19,
20 Number 21, and Number 22.

21 The following persons will be primary members on this panel:
22 1, 3, 9, 11, and 12.

23 The following persons will be alternate members on this

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1 panel: Member 13, 14, and 16.

2 Members 13, 14, and 16, you have been designated as an
3 alternate member of this commission. As an alternate member, you
4 have the same duties as the other members. You must observe the same
5 proceeding, pay attention to all of my instructions, and you have the
6 ability to ask questions.

7 Sometimes during a commission a member might be excused due
8 to illness or some other reason. If that occurs, you may be
9 designated as a primary member. Unless you are later designated as a
10 primary member, you will not participate in the deliberations or vote
11 on a sentence.

12 Panel Members, we are now going to take a recess to allow
13 the courtroom to be adjusted and to accommodate the changes to the
14 panel I just announced. Additionally, there are some administrative
15 matters that will be brought to your attention in the deliberation
16 room to continue your participation as members of this commission.

17 For those of you who have been excused, this concludes your
18 service to this commission with my thanks and appreciation for your
19 time today.

20 With that, Panel Members, you are excused. Please return to
21 the deliberation room.

22 **[Panel members withdrew from the courtroom.]**

23 **[The R.M.C. 803 session was called to order at 1426,**

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1 **23 January 2024.]**

2 MJ [Lt Col BRAUN]: This commission will again come to order.

3 Parties are present. Members are absent.

4 Trial Counsel, appreciating where we are at in this
5 proceeding, before we take up the matter of the preadmission of your
6 prosecution exhibits, when we conclude with that, would you be ready
7 to begin your sentencing case in chief, or will you require a recess
8 for the day to resume tomorrow morning?

9 I know it's just about 1430 right now, so we do have some
10 daytime left to conduct some business, but I appreciate witnesses may
11 be involved, so...

12 TC [COL KRAEHE]: Yes, Your Honor. We would actually request
13 a recess for the day so that we can have the time to prepare our
14 witnesses for testimony starting first thing in the morning.

15 MJ [Lt Col BRAUN]: Okay. Thank you, Trial Counsel.

16 Then let's move into the taking up of Prosecution Exhibits 5
17 through 30 for identification. I did have an opportunity to review
18 those exhibits.

19 Defense Counsel, it's my understanding that you had no
20 objection at the time these were offered earlier today. Is that
21 still the case?

22 Counsel for Mr. bin Amin?

23 CDC [MS. FUNK]: Your Honor, if we may be heard on a separate

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1 issue?

2 As the court is aware, our exhibits have not yet been
3 marked. It would be our request that all of the exhibits go to the
4 panel together, and so we would start testimony this afternoon.

5 I am aware of at least 11, probably closer to 15, written
6 statements that have already been provided to us. I think in the
7 interest of fairness, we should break and then give the jurors their
8 reading materials, give them three hours to review all of the
9 exhibits, and then proceed with -- and do that tomorrow morning.

10 MJ [Lt Col BRAUN]: Okay. Just so I'm tracking the request,
11 take up the preadmission matter right now, and then today provide the
12 panel members copies of all the exhibits or tomorrow morning provide
13 them an opportunity to review all the exhibits, give them some time
14 to conduct that review, and then move forward with the taking of any
15 evidence in the government's case in chief? Is that the request?

16 CDC [MS. FUNK]: Well, I can't speak to whether or not the
17 government might have some witnesses who would be able to testify
18 today. I know the government has been meeting with them regularly,
19 so ----

20 MJ [Lt Col BRAUN]: And, Counsel, if it helps, I believe the
21 government's request is to, once we resolve this matter, to recess
22 for the day and then resume tomorrow morning. However, given we're
23 all here and on the record, the commission is going to take up the

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1 preadmission matter, because that is still outstanding, as well as
2 there was some discussion about how witness testimony may be
3 presented in the commission, and the commission wants to get a clear
4 understanding of that before we -- so if there's an issue, we can
5 take it up now as opposed to taking time away from us tomorrow.

6 CDC [MS. FUNK]: So to be clear, we don't have any issue with
7 the preadmission. It's -- rather, it's the publication to the jury
8 that we would request a different perspective on.

9 Thank you.

10 MJ [Lt Col BRAUN]: And it wasn't the intent of the commission
11 to publish anything. Actually, it wasn't the intent of the
12 commission, based upon trial counsel's position, to start their
13 sentencing case today. We would pick up tomorrow morning with that.

14 Does that resolve your concern?

15 CDC [MS. FUNK]: It does, Your Honor. Thank you.

16 MJ [Lt Col BRAUN]: Okay.

17 TC [COL KRAEHE]: To be clear, Your Honor, we are not seeking
18 publication today. I discussed this with Ms. Funk during a recess,
19 and I think it's fair that if we do publish them en masse to the
20 panel, we do so for both sides at the same time.

21 So we'll be publishing these to the panel as they're
22 introduced through the witnesses. And then obviously at the end
23 they'll have all the exhibits to consider during their deliberations.

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1 MJ [Lt Col BRAUN]: Okay. Thank you, Trial Counsel.

2 Counsel for Mr. bin Lep, anything additional or perspective
3 on the way ahead?

4 LDC [MR. BOUFFARD]: No. Just to be clear, sir, as to
5 admission of the prosecution exhibits, we have no objection as to the
6 scheduling/publication matter. With respect, we take no position on
7 that.

8 MJ [Lt Col BRAUN]: Thank you, Counsel.

9 And, Counsel for Mr. bin Amin, still correct, no objection
10 to Government -- or to Prosecution Exhibits 5 through 30 for
11 identification?

12 CDC [MS. FUNK]: That's correct.

13 MJ [Lt Col BRAUN]: Okay. Trial Counsel, I want to direct
14 your attention to --

15 TC [COL KRAEHE]: I'm sorry to interrupt, Your Honor. We
16 actually had one late exhibit come in. It is another victim impact
17 statement. I do apologize for the late request that it be admitted,
18 but I believe we have a statutory and, more importantly, a moral
19 obligation to make sure that every victim who wishes to be heard is
20 heard. This came in late last evening, and we did want to amend our
21 witness list to include this one last victim impact statement.

22 I have already provided copies of it to defense counsel. I
23 believe they have no objection to its admission. So we do have one

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1 last one to add.

2 MJ [Lt Col BRAUN]: When was this provided to defense counsel?

3 TC [COL KRAEHE]: During, I think, the lunch recess or right
4 afterwards.

5 MJ [Lt Col BRAUN]: Defense Counsel, did you receive -- well,
6 let's identify this for the record.

7 Counsel, I note that PE 30 has already been marked for the
8 record, so the next prosecution exhibit in line is going to be PE 31.

9 Has that been marked by -- has your exhibit been marked by
10 the court reporter?

11 TC [COL KRAEHE]: Not yet, Your Honor.

12 MJ [Lt Col BRAUN]: Okay. Then let's do that at this time.
13 That document is going to be marked as PE 31 for identification.

14 How many pages is it, Counsel?

15 TC [COL KRAEHE]: The exhibit itself is just one page, Your
16 Honor -- it's two pages, Your Honor.

17 May I approach, Your Honor?

18 MJ [Lt Col BRAUN]: Please. If you can ensure the court
19 reporter has the original, and that I am provided a working copy of
20 PE Exhibit 31 for identification.

21 **[Pause.]**

22 MJ [Lt Col BRAUN]: Counsel, on the copy provided to the court
23 reporter that I'm looking right now -- looking at right now, excuse

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1 me, I want to be clear for the record.

2 Prosecution Exhibit 30 is your index. Prosecution
3 Exhibit 31 is going to be the additional character letter, two pages.

4 So they were marked -- they were premarked accidentally.
5 I'm guessing that was just an administrative oversight. That's
6 simple enough, but I just want to make sure everybody is aware of
7 what we're referencing when we're referencing these exhibits, as
8 Prosecution Exhibit 30 has already been identified for the record as
9 a document.

10 Defense Counsel, before I take up your matter, have you seen
11 what I have as Prosecution Exhibit 31 for identification? It is a
12 two-page document. It appears to be a character letter and a photo
13 collage on the second page.

14 Have you seen that document?

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

16 MJ [Lt Col BRAUN]: Okay.

17 Counsel for Mr. bin Lep, have you also seen that document?

18 LDC [MR. BOUFFARD]: We have, Your Honor.

19 MJ [Lt Col BRAUN]: Okay.

20 CDC [MS. FUNK]: Your Honor, while it was given to my team
21 before lunch, I just had an opportunity to view it now.

22 I saw the statement earlier, and I agree with the government
23 that there's both a legal and a moral obligation to listen to any and

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1 all victims who wish to be heard in this matter.

2 However, as to the second page of the exhibit, I do object.
3 I think it is -- there are photos and there is commentary, and I
4 think it is designed to inflame the passions of the jury. I think
5 that it is -- well, it lacks foundation also. But mostly my concern
6 is that this second page is not a statement from a victim, per se,
7 and I don't think it qualifies.

8 MJ [Lt Col BRAUN]: Okay. Thank you, Defense Counsel.

9 Counsel for Mr. bin Lep, do you object to Prosecution
10 Exhibit 31 for identification, the character statement?

11 LDC [MR. BOUFFARD]: We do not, sir.

12 MJ [Lt Col BRAUN]: So, Trial Counsel, I'll have you respond
13 to defense counsel's objection to Prosecution Exhibit 31 for
14 identification as it relates to page 2. I believe the basis was
15 authentication of foundation, as well as a 403 argument that it would
16 inflame the passions of the sentencing authority.

17 TC [COL KRAEHE]: Your Honor, the second page is merely
18 photos. They're not graphic in any manner. They're just photos of
19 the faces of a number of the people who are presumably victims of the
20 October 12th bombings.

21 I think the photos have to be understood in the context of
22 the victim impact statement that the photos were sent along with. I
23 think it's pretty clear what these photos are. They're just

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1 photographs of the victims.

2 As for the commentary at the bottom of this photo collage,
3 there's nothing inflammatory about it. It just says "We will not
4 forget you" or "The last time we saw you, October 12th, 2002." It's
5 a fairly anodyne statement, given the circumstances.

6 The names of the victims have already been -- well, they're
7 part of the charging document. A memorial to the victims, a
8 photograph of that, has already been entered into evidence, I
9 believe. And this is really not a lot different other than that it
10 somewhat personalizes the names by showing faces.

11 I believe these are faces. It's logical, anyway, that these
12 are faces of the Australian victims. That seems to be the logical
13 conclusion to be made based on the victim impact statement itself.

14 But, Your Honor, I think this is -- it's relevant evidence.
15 It's in the context of a victim impact statement. And I think,
16 actually, under the pretrial agreement it could be considered part of
17 the victim impact statement. It's not unduly prejudicial by any
18 means.

19 So I think it should come into evidence, Your Honor.

20 MJ [Lt Col BRAUN]: How about the Military Commission Rule of
21 Evidence portion of defense counsel's objection: Foundation,
22 authentication? I think you hinted at that in your response of "I
23 think we can assume that these are photos of." I think -- I think

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1 that directly echoes defense counsel's objection.

2 I believe the rules of evidence do apply to 1001 -- evidence
3 offered under M.C.R.E. 1001, at least at this point in the
4 proceeding.

5 TC [COL KRAEHE]: Well, Your Honor, technically, the -- for
6 foundational purposes, to get all of these photographs in evidence,
7 you might actually need quite a number of different witnesses to come
8 forward, victim family members for each one of these individuals.
9 That does not seem reasonable.

10 I think this --

11 MJ [Lt Col BRAUN]: Counsel, don't the foundational -- don't
12 those rules apply?

13 TC [COL KRAEHE]: They would apply, Your Honor.

14 MJ [Lt Col BRAUN]: I appreciate that it would be difficult to
15 lay the foundation potentially for this. I think there's a couple
16 ways one could potentially do that.

17 Not having the facts in front of me and not knowing the
18 source of this page, but ultimately the commission's left in the
19 position of determining whether this fits within the admissibility
20 parameters of 1001, part of which is the Military Commission Rules of
21 Evidence.

22 So that's the part I'm trying to step through.

23 TC [COL KRAEHE]: Your Honor, it may be possible through one

1 of the witnesses that we do have designated to lay the foundation for
2 admission of these photographs.

3 So perhaps at this time I could just ask that this -- that
4 the second page of this exhibit be marked for identification
5 purposes, and I could take up laying the foundation for it later.

6 But we do ask that the victim impact statement itself, the
7 first page of Exhibit 30 **[sic]**, be admitted into evidence. As to
8 that, I don't believe there's any objection.

9 MJ [Lt Col BRAUN]: Okay. Defense Counsel, as it pertains to
10 page 1 of Prosecution Exhibit 31 for identification, is there an
11 objection to that?

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

13 MJ [Lt Col BRAUN]: As I understood your objection, it was
14 merely page 2 of Prosecution Exhibit 31 for identification; is that
15 correct?

16 CDC [MS. FUNK]: That is correct.

17 MJ [Lt Col BRAUN]: Okay. So, then, how we are going to
18 handle this is Prosecution Exhibit 31 for identification will not be
19 admitted into evidence.

20 Trial Counsel, I'm going to have you mark page 1 of
21 Prosecution Exhibit 31 for identification as Prosecution Exhibit 32
22 for identification. It will be a one-page document consisting only
23 of that letter. And then the court will consider Prosecution

1 Exhibit 32 for identification as it takes up the rest of the
2 prosecution exhibits for purposes of sentencing.

3 On that note, Trial Counsel, I want to direct you to
4 Prosecution Exhibit 25 for identification. While there was not a
5 defense objection, and the commission views as taking that matter
6 under consideration, the commission notes in the second-to-last
7 paragraph on page 2 of 2 of Prosecution Exhibit 25 for identification
8 the sentence that starts "I asked the judge."

9 Trial Counsel, is that an impermissible sentencing
10 recommendation?

11 TC [COL KRAEHE]: Well, Your Honor, that kind of statement is
12 consistent with victim impact statements I have heard my entire
13 career. So I would say no, I don't believe that is an impermissible
14 request.

15 I think that's exactly the kind of thing one often hears
16 from victims, is a request that the maximum punishment be imposed or
17 some other punishment. That is not unusual in the context of a
18 victim impact statement.

19 MJ [Lt Col BRAUN]: While I do appreciate there is some
20 discretion the commission must apply in ascertaining what is and is
21 not a -- either a flat-out sentencing recommendation or a euphemism
22 for certain types of sentences often seen in military courts-martial
23 as euphemisms for discharge typically where you see this problem,

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1 here what we have is a statement asking the judge to place the full
2 and maximum sentence possible.

3 That seems to be a request for the maximum punishment
4 authorized that the panel would be instructed upon as opposed to
5 severe punishment or something a little more nebulous that isn't
6 directly directing the panel upon the sentence they should adjudge.

7 And do you see that differently, Trial Counsel?

8 TC [COL KRAEHE]: I do, Your Honor, but I can accept that
9 reasonable minds might differ.

10 MJ [Lt Col BRAUN]: Okay.

11 Counsel for Mr. bin Amin, I appreciate you had no objection
12 to this exhibit, and you may not have any objection based upon the
13 court's identification of this line. But I did want to at least get
14 any perspective as to this particular issue you may have.

15 CDC [MS. FUNK]: I appreciate that, Your Honor. And we have
16 been in communication with the government regarding some other
17 letters that make recommendations for one thing or another, not quite
18 as boldly as this one.

19 So I -- I would not object if the court is inclined to take
20 out that sentence.

21 I also am aware, and we've discussed this last week ----

22 MJ [Lt Col BRAUN]: Counsel, do you object to that sentence?

23 CDC [MS. FUNK]: I do object to that sentence.

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1 MJ [Lt Col BRAUN]: Okay.

2 CDC [MS. FUNK]: And I also want to call to the court's
3 attention -- and I know we discussed my concerns about the letters
4 last week -- reading of a statement prior to the testimony of the
5 victims.

6 MJ [Lt Col BRAUN]: And we will -- yes, Counsel,
7 that's -- after I have handled the preadmission, I want to get some
8 clarity on the government's intent on that so that we can resolve any
9 outstanding issues on that today so that all the parties have a way
10 ahead -- a clear way ahead tomorrow and can do any adjusting they may
11 need to do ultimately.

12 Anything further, Counsel for Mr. bin Amin?

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

14 MJ [Lt Col BRAUN]: Thank you.

15 Counsel for Mr. bin Lep?

16 LDC [MR. BOUFFARD]: Yes, sir. May I make a brief commented
17 on this?

18 MJ [Lt Col BRAUN]: You may.

19 LDC [MR. BOUFFARD]: We believe that after two decades of
20 delay in this case, these victims have every right to be heard and to
21 be heard completely. To the extent that this sentence is
22 objectionable, we waive objection to it on that basis.

23 MJ [Lt Col BRAUN]: Okay.

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1 LDC [MR. BOUFFARD]: Thank you, Judge.

2 MJ [Lt Col BRAUN]: Thank you.

3 TC [COL KRAEHE]: Your Honor, I'd also like to note that the
4 defense has requested an instruction that will instruct the panel as
5 to how to consider the victim impact statements. And I think that
6 that instruction -- we're still working out the particulars of it,
7 but I think that that will resolve any of these issues and make clear
8 to the panel what kinds of information they should give credibility
9 to or consider in the context of the victim impact statements.

10 MJ [Lt Col BRAUN]: Okay. So for the court to properly
11 consider that instruction and determine whether that cures a
12 potential impermissible sentencing recommendation, the court
13 needs -- the commission, excuse me, needs to see that instruction.

14 I'm going to place the commission in a 10-minute recess.
15 I'm going to ask the parties to get together and finish the work that
16 they have on that particular tailored instruction and provide it to
17 the bailiff to provide to me in chambers so that I may examine it.

18 When we come back on the record, then I will have the
19 benefit of that additional information to determine whether, in the
20 commission's perspective, that revolves the matter. And then the
21 commission can rule appropriately based upon all of the government's
22 prosecution exhibits for identification.

23 Is there anything further, then, that we can take up before

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1 I place this commission into that recess?

2 Trial Counsel?

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

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

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

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

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

8 MJ [Lt Col BRAUN]: Very well. This commission's in a
9 10-minute recess.

10 **[The R.M.C. 803 session recessed at 1449, 23 January 2024.]**

11 **[The R.M.C. 803 session was called to order at 1507,**
12 **23 January 2024.]**

13 MJ [Lt Col BRAUN]: This commission will come to order. The
14 parties are present. Members are absent.

15 During the recess the parties did provide me, through the
16 bailiff, a copy of a draft sentencing -- I'm assuming sentencing
17 instruction here that discusses specifically victim impact testimony
18 and places it -- or attempts to place it into some context for the
19 sentencing authority.

20 The commission will reserve ruling on the appropriateness of
21 that tailored instruction until we're at the point in the proceeding
22 where the commission has the benefit of the evidence presented, just
23 to ensure that the instruction appropriately fits the case based upon

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1 the evidence that does come out.

2 But thanks to the parties for their work in getting that to
3 the commission, as it did answer some questions and provide some
4 context to the commission.

5 I am going to have that draft instruction marked as the next
6 appellate exhibit in line, and I'm handing the original to the court
7 reporter for that purpose.

8 Having considered the information contained in the proffer
9 of the tailored instruction provided by the parties, as well as the
10 position of the parties, and the law as it pertains to permissible
11 statements made in victim impact evidence governed by 1001 as
12 aggravation evidence, also ----

13 CDC [MS. FUNK]: Excuse me, Your Honor, I apologize.

14 I have some additional information about my prior motions.

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

16 CDC [MS. FUNK]: At this time we are withdrawing our request
17 to remove either the language referenced in this statement, as well
18 as withdrawing our request to remove the photographs.

19 In speaking with the government, I have been informed that
20 the United States of America is taking the position that my objecting
21 to those exhibits is a violation of our pretrial agreement. While I
22 think that reasonable minds can differ on whether or not it's an
23 actual violation, we need to agree to the government's satisfaction.

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1 So we are withdrawing our request to remove those from the
2 jury's view. Thank you.

3 MJ [Lt Col BRAUN]: Okay. So you are removing your objection
4 as it pertains to Prosecution Exhibit 25 for identification, as well
5 as Prosecution Exhibit -- it actually would be 30, the complete -- or
6 I'm sorry, 31, the two-page copy of the victim statement to include
7 the second page of pictures.

8 Am I understanding that correctly, Defense Counsel?

9 CDC [MS. FUNK]: You are, Your Honor.

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

11 So based upon that, Trial Counsel, is the commission correct
12 in assuming that you would move to admit Prosecution Exhibit 31, and
13 not Prosecution Exhibit 32?

14 TC [COL KRAEHE]: That is correct, Your Honor.

15 MJ [Lt Col BRAUN]: Okay.

16 Appreciating the time, appreciating the statement just made
17 by defense counsel, and the inquiry the commission has gone into with
18 regards to the understandings of the parties as it pertains to the
19 pretrial agreement, I am going to at this point take the recess that
20 I normally have scheduled for 1515 to 1545 to review the pretrial
21 agreement and determine if further inquiry is required, based upon
22 statements of counsel, and how these objections have been placed on
23 the record, removed from the record, to ensure that the commission

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1 does not have a concern regarding the understanding of the terms of
2 the pretrial agreement.

3 The regularly scheduled recess should give the commission
4 enough time to conduct that inquiry, come back on the record, and
5 determine whether or not it feels additional questioning is required
6 of the parties, to include Mr. bin Amin himself, as it would be his
7 agreement that is now being discussed.

8 I would encourage counsel for Mr. bin Amin to talk with
9 Mr. bin Amin about that.

10 Trial Counsel, I would encourage you to ensure that you have
11 the understanding of the convening authority, who is the party of the
12 agreement with Mr. bin Amin, and any attenuant positions that -- any
13 associated, excuse me, positions that the convening authority may
14 have, so that you can speak on behalf of the convening authority as
15 it pertains to that term of the agreement.

16 The commission, once it's satisfied of that requirement,
17 will then go into the actual consideration of the matter at bar,
18 which is the preadmission of the government's exhibits, prosecution
19 exhibits.

20 Is there anything else we can take up, then, before I recess
21 this commission until 1545?

22 Trial Counsel?

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

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1 MJ [Lt Col BRAUN]: 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, then. This commission's in
6 recess until 1545.

7 **[The R.M.C. 803 session recessed at 1513, 23 January 2024.]**

8 **[The R.M.C. 803 session was called to order at 1550,**
9 **23 January 2024.]**

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

11 Parties that were present when the commission recessed are
12 again present. Members remain absent.

13 Counsel, before we continue with consideration of the
14 pretrial agreement, it's my intent to call in the members and recess
15 them for the day. I don't see a need, based upon where we're at in
16 this proceeding and where we're going ahead, to have them waiting in
17 the deliberation room unnecessarily.

18 Does any party have any objection to that approach?

19 Trial Counsel?

20 TC [COL KRAEHE]: No objection, Your Honor.

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

22 CDC [MS. FUNK]: No objection, Your Honor.

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

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1 LDC [MR. BOUFFARD]: No objection.

2 MJ [Lt Col BRAUN]: Very well, then.

3 Bailiff, please call the members.

4 **[The military commission was called to order at 1552,**

5 **23 January 2024.]**

6 **[Panel members entered the courtroom.]**

7 MJ [Lt Col BRAUN]: This commission will come to order.

8 All parties are present, to include the members.

9 Panel Members, there's some additional work that I'm going
10 to take up -- or some additional matters I'm going to take up outside
11 of your presence.

12 Based upon where we are at right now, I don't anticipate we
13 will get back on the record today. So instead of having you waiting
14 back in the deliberation room, I think this is a good opportunity to
15 send you home for the day.

16 We will pick up tomorrow morning at 0900. So you can plan
17 on -- if you could please be back in the deliberation room ready to
18 go at 0900, I will endeavor to make sure we get on the record as
19 close to 0900 as I can.

20 Before I excuse you, though, I do want to remind you of some
21 matters. First, as I advised you earlier, during the course of this
22 trial, to include this overnight recess -- and, Members, you will
23 notice I pause from time to time. It is an administrative piece of

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1 this proceeding that sometimes I talk too fast and I need to slow
2 down a little bit. So if I take an unusual pause, that is what's
3 going on there, just to demystify what's going on.

4 So during the recess, any recess, but include this recess
5 overnight, you must not communicate with anyone about this case.
6 Should someone want to communicate with you about this case, you are
7 directed to tell them to stop, to remove yourself from the situation,
8 and report that matter to me at our -- immediately at our next open
9 session.

10 Do all panel members understand my instruction?

11 That's an affirmative response from all panel members.

12 Do all panel members agree to follow my instruction?

13 That's an affirmative response from all panel members.

14 Additionally, I want to remind you of the caution that I
15 gave you earlier that you may not conduct any research about this
16 case. So don't consult the Manual for Courts-Martial, the Manual for
17 Military Commissions, Wikipedia, Google, any law dictionary, regular
18 dictionary, or other reference materials to learn about this case,
19 about any of the names of witnesses you may have heard as related to
20 this case, or any other matter related to this case.

21 Finally, I caution you that while you may not communicate
22 about this case, communication does include posting on the Internet,
23 Facebook, Reddit, texting, talking with spouses, anything like that.

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1 So please don't discuss the case. Please don't conduct any
2 external research.

3 Do all panel members understand my caution?

4 That's an affirmative response from all panel members.

5 Do all panel members agree to follow my caution?

6 That's an affirmative response from all panel members.

7 Very well, then, Panel Members. That will conclude what I
8 require of you today. Please be ready to proceed tomorrow morning at
9 0900. Thank you.

10 You are excused.

11 **[Panel members withdrew from the courtroom.]**

12 **[The R.M.C. 803 session was called to order at 1555,**
13 **23 January 2024.]**

14 MJ [Lt Col BRAUN]: This commission will again come to order.

15 The parties are present. Members are now absent.

16 Counsel, I want to draw your attention to the pretrial
17 agreement in the case of United States -- in the commission of the
18 United States v. Bin Amin, specifically paragraph 10 of that
19 agreement that discusses in the sentencing proceeding of the case,
20 the government and Mr. bin Amin may present evidence consistent with
21 the term of paragraph 10, subject to any rulings by the military
22 judge regarding matters in aggravation and extenuation of mitigation.
23 Mr. bin Amin agrees to allow the government to offer his signed

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1 Stipulation of Fact and live testimony or written statements from
2 victims and/or their families.

3 It continues on to discuss limitations for the defense as
4 far as witnesses they may call as it pertains to sentencing.

5 There's additional terms in there regarding notice that the
6 parties will provide to each other regarding the evidence that will
7 be provided. The minimum of notice -- that Mr. bin Amin agrees that
8 this provision does not interfere with his ability to present an
9 effective and complete case in extenuation and mitigation as
10 permitted by R.M.C. 1001.

11 During the inquiry last week, we had actually a more
12 detailed discussion specifically about paragraph 10. I had the
13 parties provide me their understanding of paragraph 10, how that
14 relates to defense's ability to object.

15 My recollection was that at that time it was explained to me
16 by the parties, and agreed to by the parties, that defense objections
17 were largely limited to format vice substance.

18 Is my recollection correct?

19 I'm going to start with you, Counsel for Mr. bin Amin.

20 CDC [MS. FUNK]: I recall a discussion last week about
21 evidence submissions. I apologize. I'm not sure what you mean by
22 format.

23 MJ [Lt Col BRAUN]: The mode by which the government -- I

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1 think the question at the time was the mode by which the government
2 wished to introduce the information, via sworn statement, unsworn
3 statement. I believe that was at the time what the commission was
4 focused on. You had raised a concern about that.

5 The commission wanted to ensure that it understood what the
6 parties had agreed to. And at that time it was that format versus
7 the substance of the statement itself discussion that occurred. It
8 was the commission's understanding that the defense could object to
9 the format, i.e., a sworn statement, unsworn statement, the mode of
10 presentation vice the contents or the substance of the statement
11 itself.

12 Is that understanding correct?

13 CDC [MS. FUNK]: No, Your Honor. It is not.

14 MJ [Lt Col BRAUN]: Okay.

15 CDC [MS. FUNK]: But what I can tell you is our positions have
16 evolved since our discussion last week.

17 Our team has been working with the government closely. We
18 had some concerns about some of the written statements that were
19 submitted, where there would be live testimony with language similar
20 to the language in Exhibit 30 -- no -- I think it was 25.

21 MJ [Lt Col BRAUN]: Okay.

22 CDC [MS. FUNK]: Talking about ----

23 MJ [Lt Col BRAUN]: And that was the statements that the

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1 commission was asking whether or not was a recommendation as to
2 sentence by a victim?

3 CDC [MS. FUNK]: Correct.

4 MJ [Lt Col BRAUN]: Okay.

5 CDC [MS. FUNK]: And it is my understanding that, based on our
6 concerns, the government has gone to the victim family members who
7 are here and asked them to consider changing certain language. And
8 it's my understanding that that's been accomplished.

9 MJ [Lt Col BRAUN]: Okay.

10 TC [COL KRAEHE]: Your Honor, if I may be heard on this
11 matter?

12 MJ [Lt Col BRAUN]: You may, but one moment, Counsel.

13 I have a follow-on question, because I want to make sure I
14 understand defense's position first, and then I'm going to come back
15 to you, Trial Counsel. So if you could please hold on to your
16 comment.

17 Okay. So, Defense Counsel, what is your understanding as to
18 the agreement between the government and the defense as outlined by
19 paragraph 10 of the pretrial agreement? Because I think we can all
20 agree that the commission has a responsibility to ensure that the
21 understandings of all parties of this agreement, specifically the
22 accused and the convening authority, are in alignment.

23 Counsel also signed this agreement.

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1 So I have to make sure there's a meeting of the minds and be
2 satisfied that there's a meeting of the minds.

3 CDC [MS. FUNK]: Understood, Your Honor.

4 It is my understanding, after additional conversations with
5 the government, that paragraph 10 indicates that it is not okay to
6 object to foundation in the submission of statements, but that 403
7 objections are available to us.

8 And I will now sit down and defer to the government because,
9 based on our conversations during the break, I think that they can
10 more accurately address the issue.

11 MJ [Lt Col BRAUN]: Okay. I can appreciate that. However,
12 it's still important for the commission to make sure that everybody's
13 on the same page, and that everybody agrees to the same terms, and
14 agreed to the same terms in this agreement when it was entered
15 between the convening authority and the accused.

16 So I'm going to come back to make sure that we are indeed
17 there. Because if we're not, then the commission, I think, is
18 responsible for ensuring that this proceeding complies with
19 R.M.C. -- with the rules provided in the manual.

20 Trial Counsel.

21 TC [COL KRAEHE]: Your Honor, defense counsel has accurately
22 characterized what that provision of the pretrial agreement is
23 intended to mean.

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1 I think previously she somewhat overstated the government's
2 position with respect to that by asserting that the pretrial
3 agreement required them to waive all objections to admission of
4 victim impact statements. In fact, they may object as to matters
5 such as 403, but not as to foundation.

6 I also wanted to advise the commission that we are now
7 taking the position and will withdraw the photograph that is attached
8 to Prosecution Exhibit ----

9 MJ [Lt Col BRAUN]: Prosecution Exhibit 31?

10 TC [COL KRAEHE]: ---- Prosecution Exhibit -- I think it's 32
11 now.

12 MJ [Lt Col BRAUN]: 31 contains the photographs, 32 does not.

13 TC [COL KRAEHE]: Okay. So we'll withdraw 31, Your Honor.

14 We will also agree to redaction of Prosecution Exhibit 25,
15 the statement regarding the recommendation of sentence.

16 MJ [Lt Col BRAUN]: Okay. Before I get to the prosecution
17 exhibit -- and thank you, Trial Counsel. I want to work through this
18 issue by issue here.

19 So as it pertains to paragraph 10 of the pretrial agreement
20 between the United States and Mr. bin Amin, it is the commission's
21 understanding that the parties -- this form versus substance -- and I
22 apologize. That is inartful. Those are my words, not necessarily
23 the words that the parties used late last week.

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1 The position of the parties is and has been that
2 Mr. bin Amin, through his defense counsel, can object to government
3 sentencing exhibits based upon Military Rule of Evidence 403, but is
4 waiving foundational objections to those exhibits; is that accurate?

5 TC [COL KRAEHE]: That is correct, Your Honor.

6 MJ [Lt Col BRAUN]: Okay. Mr. bin Amin, is -- excuse me.
7 Counsel for Mr. bin Amin, is that also your understanding?

8 CDC [MS. FUNK]: It is my understanding. And we have
9 previously indicated to the prosecution that we will not be making
10 foundation objections.

11 MJ [Lt Col BRAUN]: Correct. And insomuch as one was made,
12 you withdrew it. I understand that now, and that places that into
13 better context for the commission, so thank you.

14 **[Pause.]**

15 Counsel for Mr. bin Amin, have you had an opportunity during
16 the break to discuss paragraph number 10 of the agreement with your
17 client, Mr. bin Amin?

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

19 MJ [Lt Col BRAUN]: Okay. Mr. bin Amin, I have been
20 discussing paragraph 10 of your pretrial agreement with your counsel
21 and trial counsel.

22 Counsel, can we make sure Mr. bin Amin has a copy of his
23 pretrial agreement? And if we could show him specifically paragraph

1 number 10.

2 Okay. I want you to take a look at paragraph number 10.
3 Look up at me when you're done. I know you've read this before, but
4 I want you to read it again and look up at me when you're done.

5 **[Pause.]**

6 MJ [Lt Col BRAUN]: Okay. Mr. bin Amin, paragraph number 10
7 discusses sentencing evidence, specifically sentencing evidence that
8 your counsel can admit on your behalf explaining extenuation and
9 mitigation as applied to sentence, the sentencing proceedings of this
10 case. And also paragraph 10 discusses what the government can
11 introduce as matters in aggravation as to the offenses to which you
12 have pled guilty.

13 Do you understand that?

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

15 MJ [Lt Col BRAUN]: Now, what I've been talking about with
16 counsel, your defense counsel and trial counsel, is how this term of
17 your agreement operates, because it became -- based upon what has
18 happened today, I had questions as to whether there was an
19 understanding between the parties that was shared.

20 Counsel have provided me information that states that while
21 you have waived the right to object to foundational issues as it
22 applies to evidence, you have not waived your right to object to the
23 government's sentencing evidence as it applies to what we call

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1 Military Rule of Evidence -- or, I'm sorry, Military Commission Rule
2 of Evidence 403, sometimes colloquially called -- referred to as a
3 balancing test. It's a rule that allows the commission to determine
4 the probative value of certain types of evidence and contrast that
5 with prejudicial effect that that evidence may have in a proceeding.

6 It's a lot of legal terms, and I apologize, but have you had
7 an opportunity to discuss that matter with your defense counsel?

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

9 MJ [Lt Col BRAUN]: Okay. In agreeing to waive the making of
10 any foundational objections to the government's evidence, you are, in
11 essence, giving up the right to have me determine whether the
12 government's evidence is admissible based upon certain Military
13 Commission Rules of Evidence.

14 Do you understand that?

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

16 MJ [Lt Col BRAUN]: Okay. And in doing so, that means that I
17 don't get to make that determination which, based upon how I rule,
18 could have excluded certain pieces of government sentencing evidence.

19 Do you understand that?

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

21 MJ [Lt Col BRAUN]: Okay. So that, in essence, alleviates the
22 government's requirement that they would have to introduce evidence
23 to prove that the evidence they're offering is admissible for a

1 sentencing proceeding.

2 You understand that?

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

4 MJ [Lt Col BRAUN]: Okay. And, additionally, by waiving that
5 right, you may be waiving -- you would be waiving any additional
6 review of my decision on whether or not that evidence is admissible
7 by an appellate court or higher level.

8 You understand that?

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

10 MJ [Lt Col BRAUN]: Okay. Did you understand all of those
11 matters at the time you entered into your pretrial agreement?

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

13 MJ [Lt Col BRAUN]: Okay. Based on our discussion, do you
14 have any questions as to this provision of your pretrial agreement?

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

16 MJ [Lt Col BRAUN]: With the clarification and discussion we
17 just had about this term of your pretrial agreement, do you wish to
18 remain bound by your pretrial agreement?

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

20 MJ [Lt Col BRAUN]: Trial Counsel, have you discussed this
21 matter with the convening authority?

22 TC [COL KRAEHE]: Not since the pretrial agreement was
23 originally approved.

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1 MJ [Lt Col BRAUN]: Was this the understanding of the
2 convening authority at the time you discussed this with the convening
3 authority, basically when the pretrial agreement was approved?

4 TC [COL KRAEHE]: That is my understanding. Yes, Your Honor.

5 MJ [Lt Col BRAUN]: Okay. Do the parties feel additional
6 inquiry is required as to this matter?

7 Trial Counsel?

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

9 MJ [Lt Col BRAUN]: Defense Counsel?

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

11 MJ [Lt Col BRAUN]: Very well. Based upon this additional
12 clarification, I do find that the parties do have a meeting of the
13 minds as to the operation of the terms contained in paragraph 10. I
14 find that the accused shares in that understanding with the convening
15 authority.

16 I find that the accused has properly entered into his
17 pretrial agreement and find that it does not violate notions of
18 fairness or public policy or otherwise violate the Rules for Military
19 Commissions.

20 Based upon that, I see no need to open the providency
21 inquiry as to the offenses to which the accused has pled guilty or
22 otherwise change any findings in this military commission.

23 Having resolved that matter, now I would like to turn my

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1 attention -- our attention, excuse me, to the government exhibits.

2 So, Trial Counsel, as it relates to Prosecution Exhibit 25
3 for identification, you are going to redact on page 2 of 2 of
4 Prosecution Exhibit 25 for identification the sentence: I ask the
5 judge to place the full and maximum sentence possible to these two
6 terrorists who, by their own admission, participated in the most
7 savage destruction of life possible.

8 Is that correct?

9 TC [COL KRAEHE]: That is correct, Your Honor.

10 MJ [Lt Col BRAUN]: Okay. Defense Counsel, understanding that
11 Prosecution Exhibit 2 for identification will be redacted in this
12 manner -- or I'm sorry -- Prosecution Exhibit 25 for identification
13 will be redacted in this matter, do you have any objections to
14 Prosecution Exhibit 25?

15 CDC [MS. FUNK]: I do not, Your Honor.

16 MJ [Lt Col BRAUN]: Okay. So, Trial Counsel, what I'm going
17 to have you do is accomplish that redaction during the recess -- the
18 extended recess overnight and provide it to the court reporter. That
19 redacted version is going to be marked as Prosecution Exhibit 34.

20 TC [COL KRAEHE]: Yes, Your Honor.

21 MJ [Lt Col BRAUN]: Counsel for Mr. bin Lep, I appreciate you
22 had no objections to Prosecution Exhibit 25 for identification. But
23 appreciating that redactions are going to occur, it's going to be

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1 reidentified -- it's going to be identified with those redactions as
2 Prosecution Exhibit 34 for identification.

3 Do you have any objections?

4 LDC [MR. BOUFFARD]: We do not, sir.

5 MJ [Lt Col BRAUN]: Thank you.

6 MJ [Lt Col BRAUN]: Just for clarity of the record, Defense
7 Counsel for Mr. bin Amin, any additional objections to the
8 government -- the prosecution exhibits for identification we've been
9 discussing?

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

11 I will direct your attention to last week when we were
12 indicating to the court that we would have an objection to people
13 reading other people's statements.

14 Given this understanding of the pretrial agreement, we will
15 not be objecting to foundation. We will not be objecting to
16 witnesses reading other -- excuse me -- witnesses reading other
17 victim family member statements.

18 MJ [Lt Col BRAUN]: I appreciate that, Defense Counsel. Hold
19 on to that. I'm getting to that next. I'm going to step through
20 this topically as best I can to make sure that the record is as clear
21 as possible.

22 So we will come to that next. But absent that, any
23 objection to what -- the prosecution exhibits that have been

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1 identified?

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

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

4 Counsel for Mr. bin Lep?

5 LDC [MR. BOUFFARD]: No objection.

6 MJ [Lt Col BRAUN]: Thank you.

7 Okay. So based upon lack of objection and the commission's
8 review of the prosecution exhibits, Prosecution Exhibits 5 through
9 24, 36 through 39, 32 -- I'm sorry, 26 through 29, 32, and 34 for
10 identification will be admitted as Prosecution Exhibits 5 through 24,
11 26 through 29, 32, and 34.

12 Trial Counsel, I appreciate that you may have an updated
13 exhibit that you -- or I'm sorry -- index that you may want to mark.
14 We can take that up first thing tomorrow morning to address that
15 particular exhibit. Please ensure that it's marked before we go on
16 the record and ensure that opposing counsel have seen it before we
17 move to admit that, please.

18 TC [COL KRAEHE]: Your Honor, do you want the exhibit list
19 itself to be made a prosecution exhibit?

20 MJ [Lt Col BRAUN]: If the prosecution plans on publishing it
21 to the panel, yes.

22 TC [COL KRAEHE]: Okay. Then, we'll also be offering a
23 Prosecution Exhibit 35, which will be the list.

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1 MJ [Lt Col BRAUN]: So we don't have that right now. I'm
2 guessing you're probably going to have to make some adjustments to
3 it. So I'm going to identify that, and then take that up for
4 admission tomorrow morning when we actually have the document, and
5 opposing counsel have the opportunity to review that document so that
6 they can object if they feel appropriate.

7 TC [COL KRAEHE]: We will sort that out, Your Honor.

8 MJ [Lt Col BRAUN]: Okay.

9 The last matter I wanted to take up, then, has to do with
10 the testifying -- government witnesses who are testifying. The
11 commission has come to appreciate through the parties that there may
12 be a request -- and the government, I think you raised this initially
13 during an R.C.M. 802 conference, that there may be a request to have
14 the victims make unsworn-type statements, or something to that
15 effect.

16 I want to ensure that the record is clear as to what the
17 government is requesting to do so that we can take that matter up
18 now, hopefully sort it before we have the panel here tomorrow
19 mornings.

20 So, Trial Counsel, I guess the easiest place to start would
21 be what witnesses do you plan on calling? Because I don't believe
22 the witness list that the commission has is completely accurate,
23 given the names you provided this morning during voir dire.

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1 TC [COL KRAEHE]: Your Honor, the names that we provided
2 through voir dire this morning are the only witnesses that the
3 government intends to call. They are all victim family members.

4 They are: Matthew Arnold, Frank Heffernan, Bonnie Hall ----

5 MJ [Lt Col BRAUN]: Counsel, I apologize. I'm going to have
6 you slow down.

7 TC [COL KRAEHE]: I'm sorry.

8 MJ [Lt Col BRAUN]: That's all right.

9 TC [COL KRAEHE]: Susanna Miller.

10 MJ [Lt Col BRAUN]: Please start over. Matthew ----

11 TC [COL KRAEHE]: Matthew Arnold.

12 MJ [Lt Col BRAUN]: Okay.

13 TC [COL KRAEHE]: Frank Heffernan, Bonnie Hall, Susanna
14 Miller, Solomon Miller, Chris Snodgrass, Susan Snodgrass, Piers
15 Gambrini, Maggie Stevens, Eleni Panagoulas, and Mary Panagoulas.

16 Your Honor, each of these victim family members have written
17 a victim impact statement. Those victim impact statements have been
18 admitted into evidence. And it is our request, Your Honor, that they
19 each be able to read their victim impact statements to the panel,
20 largely in lieu of a question-and-answer format, although I will be
21 providing some context for these victim impact statements through
22 question and answer.

23 I will also give them an opportunity, just as kind of a

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1 closing statement, to add anything at the end of their victim impact
2 statement to give these victim impact statements further context.

3 The reasons we're asking for this is because, first of all,
4 these victim impact statements will be in evidence, and I think for
5 that reason alone, it is proper for them to be able to read them to
6 the panel. And because reading them to the panel in the limited
7 question-and-answer format does give the victim impact statement some
8 context that they don't have just in and of themselves.

9 It is extremely difficult for a victim of the crimes that we
10 are here to sentence, Your Honor, very difficult for them to write a
11 victim impact statement. It makes them relive the experiences they'd
12 rather forget. And nonetheless, it is a lot easier for them to read
13 a victim impact statement than it would be to undergo a full-blown
14 question-and-answer examination about their loss and about the impact
15 that it's had on their lives for the last 20 years.

16 So in large respect, we're asking that the victims be
17 allowed to read their victim impact statements because it's easier on
18 them, and they deserve that as victims.

19 MJ [Lt Col BRAUN]: Okay.

20 TC [COL KRAEHE]: Also, we believe that allowing them to read
21 their victim impact statements limits undue disruption. These are
22 very emotional matters that they will be addressing.

23 MJ [Lt Col BRAUN]: Counsel, what disruption?

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1 TC [COL KRAEHE]: Disruption that would come from just the
2 emotions. These people are very angry about what happened to their
3 loved ones. By having a victim impact statement for them to read, it
4 focuses them on reading that.

5 It also limits undue surprise. We know what's in these
6 victim impact statements. These victim impact statements have been
7 shared with the defense. In fact, the defense has pointed out parts
8 of the victim impact statements they find objectionable, and we have
9 thus been able to take -- modify the victim impact statements to
10 address the objections that the defense has.

11 In a question-and-answer session, there is more room -- the
12 victims would be given more leeway to stray off course and to get
13 into areas that might not be permissible under the rules, and would
14 get into areas that would be more prejudicial to the defense. It
15 would be less easy to control.

16 So by allowing the victims to read their victim impact
17 statements, we are actually limiting the opportunity for prejudice to
18 the defense.

19 It also creates efficiencies, Your Honor. The victim impact
20 statements are concise. It will take only 15 to 20 minutes,
21 probably, for each victim to read their victim impact statement;
22 whereas, a full examination and possible cross-examination of each of
23 the witnesses -- and I want to say these witnesses do not deserve to

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1 be examined like a witness. They do not deserve to be cross-examined
2 like a witness.

3 They deserve to have their say in the manner in which they
4 want to say it. And we have assured that the manner in which they
5 want to make their victim impact statements will not cause prejudice,
6 it will not cause disruption, and it will be efficient.

7 If there's any concern that them reading their victim impact
8 statement would somehow be cumulative, we believe it would not be
9 cumulative. These victims -- there's only 11 of them, 11 victims
10 representing, I think, eight or nine of the 202 people who were
11 killed.

12 MJ [Lt Col BRAUN]: Doesn't that address the other 403 factor,
13 though, the time -- the time needed to present the evidence versus a
14 cumulative?

15 TC [COL KRAEHE]: Well, Your Honor, what would be cumulative
16 is having victim family members for each -- I don't even think this
17 would be cumulative. It would not be cumulative to have a victim
18 family member for each of the 202 murdered or each of the hundreds
19 who were injured. That would not be cumulative.

20 What we have here is the opposite of cumulative. We have
21 only 11 people for hundreds of murdered victims, for hundreds of
22 injured victims, and for thousands of people who have been impacted
23 by this crime; only 11 people to speak for them.

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1 And so there is no danger of cumulative evidence here. It's
2 quite the opposite. The panel is not going to get anywhere near the
3 full picture of the impact that this has had on the victims. Nowhere
4 near.

5 And so allowing these victims the courtesy of reading their
6 own statements, which they wrote through tears reliving these awful
7 memories, is the least we can do. And it is consistent with the
8 rules, and I think it is consistent with just common decency to allow
9 them to read their victim impact statements.

10 And the defense doesn't object to this. I think they see
11 the merit in our arguments, and they see that this is going to be
12 efficient, and it's not going to prejudice their clients.

13 In fact, it's going to prejudice their clients far less, and
14 it's going to be far more efficient, and it's going to be far less
15 disruptive than if we went through a full direct and
16 cross-examination.

17 So that's the reason, Your Honor, that we want and we're
18 requesting that the victims be able to read their victim impact
19 statements.

20 MJ [Lt Col BRAUN]: Okay.

21 TC [COL KRAEHE]: We still allow cross-examination, Your
22 Honor. They have agreed to waive it, but that's their choice, Your
23 Honor. And we think that that is a fair resolution of this issue,

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1 and it's a decent one.

2 MJ [Lt Col BRAUN]: Okay. So, Counsel, to break this apart
3 here, are you requesting the witness -- the victim witnesses be
4 unsworn or sworn? And I may have missed that.

5 TC [COL KRAEHE]: Your Honor, I believe the rules require them
6 to be sworn.

7 MJ [Lt Col BRAUN]: Well, I would concur with that, and that's
8 why I'm asking the question.

9 So appreciating the mode of questioning of witnesses, as I
10 read the rules, defense counsel would be entitled to
11 cross-examination. Whether they choose to exercise that is within
12 their prerogative. But I think it's inappropriate, and I am not
13 willing to not allow them the opportunity. I think it would
14 violate -- it will violate the rules.

15 So as far as that goes, defense counsel will have that
16 opportunity of any witness called, as is standard in any criminal
17 proceeding that I've ever participated in.

18 As it relates to reading the statements versus a limited
19 question and answer, that was the part I was a little unclear on,
20 because you had indicated that you will be asking some questions of
21 the witnesses but request that they read their statements.

22 Can you explain to me which you're proposing to do? Because
23 those are two different things.

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1 TC [COL KRAEHE]: Well, Your Honor, I'm going to put them on
2 the stand. I'm going to swear them in. I'm going to ask them their
3 names. I'm going to ask them where they're from. I'm going to let
4 them know that they will be offering evidence regarding matters that
5 they may find very difficult to relive, to recount, that if they need
6 any -- a break, if they become too emotional to go on, to let me
7 know.

8 I will ask them whether they provided the government any
9 photographs of their loved ones. I will show them those photographs.
10 These photographs have been admitted into the evidence. I will ask
11 for those photographs to be published to the panel so they can see
12 for themselves who some of the victims of this murder were.

13 MJ [Lt Col BRAUN]: Okay. And I'm going to jump in there. So
14 are we not publishing all the exhibits, then, at the same time to the
15 panel?

16 TC [COL KRAEHE]: There's no need to, Your Honor. We can
17 publish them as they come in, and then there will be some exhibits
18 that need to be published to the panel as --

19 MJ [Lt Col BRAUN]: Okay. Because we talked about this before
20 the recess, and I thought at that time we were going to publish all
21 the exhibits at the same time to the panel and all the parties were
22 on board with that.

23 TC [COL KRAEHE]: I believe Ms. Funk objected to that unless

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1 she were able to publish all her exhibits to the panel at the same
2 time.

3 MJ [Lt Col BRAUN]: Correct, all the admitted exhibits being
4 published at the same time. Are you -- and it's fine. How you
5 present your case is a tactical decision to each side. I'm just
6 trying to make sure I understand what the proposal is here from the
7 government so that I know how to anticipate we move forward tomorrow
8 with publishing things.

9 Does the government desire to publish its exhibits -- some
10 of its exhibits, at least, with the witness? You have the witness on
11 the standard. Did you provide some photos previously marked as
12 Prosecution Exhibit 3? Show them, publish them. Is that what you
13 are ----

14 TC [COL KRAEHE]: Exactly, Your Honor.

15 MJ [Lt Col BRAUN]: ---- you were discussing?

16 Okay.

17 TC [COL KRAEHE]: And then I will ask them whether they were
18 asked to write a victim impact statement. They will say yes. I will
19 show them the victim impact statement. Is this the victim impact
20 statement that you wrote? Yes, it is. Could you please read that to
21 the panel?

22 I suppose I could at that time publish the victim impact
23 statement to the panel so that they can read along. They will finish

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1 reading the victim impact statement.

2 After that I will ask them whether there is anything they
3 would like to add regarding the matters that they addressed in their
4 victim impact statement and whether the trauma that they suffered as
5 addressed in the victim impact statement is ongoing.

6 And that will be my examination, Your Honor.

7 MJ [Lt Col BRAUN]: Okay.

8 TC [COL KRAEHE]: Very short, centered on the victim impact
9 statement, really for no other purpose other than to frame the
10 reading of the victim impact statement.

11 If they are reading the victim impact statement of another
12 person or showing photos of another victim, then that will be the
13 same process for that as well.

14 MJ [Lt Col BRAUN]: Okay. So some of these witnesses will
15 read statements of individuals that are not themselves?

16 TC [COL KRAEHE]: That's correct, Your Honor, relatives who
17 are unable to be here. We have a limited capacity to accommodate all
18 the victims. And so these victims, as I said, are speaking for not
19 only their own family members, but for all the other victims that are
20 unable to be here.

21 MJ [Lt Col BRAUN]: Counsel, I'm confused on the "the
22 government has a limited capacity to accommodate victims."

23 TC [COL KRAEHE]: Your Honor, there's just so much room for

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1 all of them.

2 MJ [Lt Col BRAUN]: Okay. Counsel, thank you for walking me
3 through it. That helps me understand exactly what you're trying to
4 do, and that's what I need to understand to appropriately determine
5 what the commission is going to permit.

6 The final question I believe I have at this time is: What
7 rule or law is the government relying upon? Because, generally
8 speaking, when we talk about examination of witnesses, the strong,
9 strong preference is that witnesses testify from memory.

10 There are, of course, exceptions to that. Refreshing
11 recollection, prior statements, under certain circumstances that can
12 be admitted as substantive evidence.

13 What authority are you relying upon for the commission to
14 authorize the reading of a statement in military commission? And I
15 don't necessarily need to address the third-party piece right now,
16 but just generally.

17 TC [COL KRAEHE]: Your Honor, they're adopting a prior
18 statement.

19 MJ [Lt Col BRAUN]: Okay. But that's different than reading
20 it in court, though. You can adopt a statement and not read it in
21 court.

22 TC [COL KRAEHE]: Well, Your Honor, it would be no different
23 than if a witness wrote a letter and the letter comes into evidence,

1 probably through the witness. Once it's in evidence, you ask the
2 witness to read the letter so that it is published to the jury, or
3 the panel. And then offer some context for when the letter was
4 written, why it was written, and what it means, the significance of
5 that letter to the witness -- or a text, or an e-mail, or maybe a
6 business document, same thing.

7 It comes under the rule for adopted statements, Your Honor.
8 And no rule prohibits it, Your Honor.

9 And, Your Honor, we believe that allowing this is consistent
10 with the purposes for allowing victim impact statements, to begin
11 with.

12 MJ [Lt Col BRAUN]: How so? And I want -- I want counsel to
13 use 1001, as that is where a victim statement comes in under the
14 manual.

15 I appreciate that it's a matter of evidence in aggravation.
16 And I'm looking at 1001 Subsection (b) subparagraph (2). In
17 addition, evidence in aggravation may include evidence that the
18 accused intentionally selected a victim -- actually, it's not the
19 correct provision I'm looking for.

20 There we go. Evidence in aggravation includes, but is not
21 limited to: Evidence of financial, social, psychological, medical
22 impact on, or cost to any person or entity who was the victim of an
23 offense.

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1 TC [COL KRAEHE]: Your Honor ----

2 MJ [Lt Col BRAUN]: So I appreciate it's evidence in
3 aggravation. I'm 100 percent understanding that, that portion of
4 your argument.

5 TC [COL KRAEHE]: Yes, Your Honor. And writing a victim
6 impact statement is itself traumatic.

7 Having to come into court and read it in front of the people
8 who committed the crimes is, in itself, traumatic. Far less
9 traumatic than being subject to a direct examination and possible
10 cross-examination. But even so, there is -- the evidence of just
11 reading it is evidence of aggravation, because you can see for
12 yourself in the demeanor, and in the reaction, and in the emotions of
13 the witness, how this crime has caused them and continues to cause
14 them emotional, psychological impact.

15 MJ [Lt Col BRAUN]: Well, Counsel, to some extent I think
16 you're conflating weight with evidence in aggravation.

17 I appreciate what you're saying, but some of that goes to
18 weight that the sentencing authority or a fact-finder would use to
19 assess the weight they want to give particular evidence.

20 What I'm trying to determine here is what rules permit the
21 mode of interrogation, or lack thereof -- and I use the word
22 "interrogation" because that's what the rules use -- for a witness.
23 And specifically here we're talking about victims who are presenting

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1 evidence in aggravation under 1001(b)(2).

2 That's a question that the commission has to answer.

3 TC [COL KRAEHE]: Your Honor, I believe it is answered by
4 Rule 1001(b)(2).

5 MJ [Lt Col BRAUN]: Okay.

6 TC [COL KRAEHE]: And I believe it is -- there are also
7 regulations on victim impact statements and -- that give victims the
8 right to participate in these proceedings. I do not have the cite
9 for you at this time, but the purpose of these regulations, I would
10 venture to guess, are to allow the victims to have a voice in these
11 proceedings.

12 Victims have rights, too, and one of those rights is to
13 participate in a proceeding. I think exercise of those rights are
14 only meaningful if they are construed in a way that limits further
15 emotional or psychological impact on the witness.

16 Really, we're just asking for an accommodation that is not
17 objected to, that is not inconsistent with the rules or common sense;
18 that does minimize the emotional impact of having a victim come and
19 have their say in a proceeding that involves crimes that resulted in
20 the death and suffering of a loved one. That's all we're asking for,
21 Your Honor.

22 MJ [Lt Col BRAUN]: Thank you, Trial Counsel.

23 Defense Counsel, you've had the benefit of hearing the

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1 process in which trial counsel's proposing that these victim
2 statements be provided into evidence, largely through a narrative
3 form of testimony, I guess would be the way I would describe it, to
4 include the victim reading the statement into evidence, be that a
5 statement of their own or a statement of a third party.

6 Do you have an objection to the approach proposed by trial
7 counsel to the commission?

8 CDC [MS. FUNK]: Your Honor, not only do I not have an
9 objection, I support the government's plan. Grief is really hard.
10 And sometimes everything you plan to say just flies out of your head.
11 And I've read these victim statements, and it is clear that they have
12 sat down and thought about what they wanted to say.

13 I think the best way for them to be able to convey what they
14 want to say is to read a prewritten statement. Thank you.

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

16 LDC [MR. BOUFFARD]: We have not yet objected to any mode or
17 content of victim testimony, and we do not object now.

18 MJ [Lt Col BRAUN]: Okay. Thank you, Counsel.

19 Counsel, I am going to take a recess to examine 1001 to
20 determine what confines this commission operates within as it
21 pertains to the government's proposed way ahead, as it pertains to
22 both actual adopted statements of witnesses, as well as statements of
23 third parties, because I think those are two different things that

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1 will need to both be answered, and hopefully give the trial counsel a
2 way ahead so that tomorrow, if adjustment is needed, you have time to
3 do that overnight.

4 Before we do that, Trial Counsel, have you been able to
5 identify any of the regulations that you cited or the authority
6 regarding your proposed way ahead with regard to the victim
7 statements? I know you didn't have them when were you arguing, but I
8 was hoping maybe during the break somebody at the table was able to
9 identify those.

10 TC [COL KRAEHE]: If I can identify that authority, and it's
11 such a short time, Your Honor, I will.

12 MJ [Lt Col BRAUN]: Okay. If you could just send word back to
13 the bailiff that you have that information for me, I can come out
14 with the benefit of all the parties, and we can review that
15 information together so everyone's on the same page.

16 TC [COL KRAEHE]: Yes, Your Honor.

17 MJ [Lt Col BRAUN]: Is there anything else we can take up,
18 then, before I recess this commission?

19 Trial Counsel?

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

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

22 CDC [MS. FUNK]: One moment, Your Honor.

23 **[Counsel conferred.]**

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1 CDC [MS. FUNK]: We have nothing further, Your Honor. Thank
2 you.

3 MJ [Lt Col BRAUN]: Thank you, Counsel.
4 Counsel for Mr. bin Lep?

5 LDC [MR. BOUFFARD]: Nothing from us, sir.

6 MJ [Lt Col BRAUN]: Very well. This commission's in recess.

7 **[The R.M.C. 803 session recessed at 1643, 23 January 2024.]**

8 **[The R.M.C. 803 session was called to order at 1721,**
9 **23 January 2024.]**

10 MJ [Lt Col BRAUN]: This commission will come to order.

11 Parties are present. Members are absent.

12 The commission's been asked by the government to permit
13 victims of a crime to read statements both of their own and of third
14 parties that relate to the financial, social, psychological, and
15 physical harm suffered by victims.

16 The commission first notes that no party here has been able
17 to squarely identify rules that expressly permit such an approach.
18 The commission also acknowledges that while it has been invited to
19 explore a lack of prohibition as an approach, the commission's not
20 inclined to do that outside of the normal confines of the law.

21 The commission appreciates the gravity of the decision it's
22 been asked to make and, more importantly, how that decision will
23 impact victims of the crimes to which the accused stand convicted.

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1 The commission, though, has an obligation to comply with the Rules
2 for Military Commissions as they exist.

3 While the parties have provided the commission arguments,
4 some good argument based in policy on their positions, this
5 commission does not enjoy the benefit of applying the law as it may
6 want to see it or what the commission may think best applies to this
7 particular situation.

8 The commission is not a legislative authority, nor is it
9 appropriate for the commission to write new rules from the bench.
10 The commission applies the rules as they exist at this time to this
11 proceeding based upon the facts provided to it.

12 In coming to its decision today, the commission did review
13 Chapter 16 provided to it, which discusses the Victim and Witness
14 Assistance Program. The commission notes within that information,
15 which I'm going to have marked as the next appellate exhibit in line,
16 paragraph 16-6, part (d)(13) states that: Notification to victims of
17 the opportunity to be present to the court at sentencing in
18 compliance with applicable law and regulations, as well as a
19 statement to the impact -- the victim has a right to make a statement
20 of the impact of the crime of the victim -- of the crime on the
21 victim, excuse me, including the financial, social, psychological,
22 and physical harm suffered by the victim.

23 The commission notes that the context of that statement

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1 deals explicitly with rights provided by trial counsel or designee to
2 victims and witnesses. The commission does not find that this
3 document in and of itself gives the commission authority to otherwise
4 change standing rules of interrogation of witnesses or presentation
5 of evidence.

6 The commission also finds that, based upon 1001, as we've
7 been discussing, victims do have the right to prevent -- to present
8 matters in aggravation through trial counsel as part of trial
9 counsel's sentencing case.

10 The commission does find in reviewing the Military
11 Commission Rules of Evidence that it does have the authority to
12 control and exercise discretion on the control of the interrogation
13 of witnesses. See M.C.R.E. 611.

14 In this instance, considering the position of the parties
15 articulated on the record, the nature of the evidence involved, and
16 the availability of the proponent to be available for
17 cross-examination, the commission will permit witnesses under oath to
18 testify and, as part of that testimony, read their own statements as
19 part of the greater examination by counsel.

20 In reaching this conclusion, the commission notes that the
21 statements to be read are already matters admitted into evidence,
22 will be available to the members as they deliberate as evidence, and
23 are matters that the witness has personal knowledge of.

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1 Additionally, the commission notes that that personal
2 knowledge can be tested as any other evidence of testimony is
3 presented at a criminal proceeding, specifically through the crucible
4 of cross-examination, if so desired by opposing counsel. That
5 ensures the commission that the reliability of the evidence necessary
6 under the Military Commission Rules of Evidence will be satisfied and
7 that that evidence would be admissible and appropriate under the
8 circumstances.

9 The commission will not permit witnesses to read impact
10 statements written by other witnesses or third parties. This is
11 because the author of those statements are not available for
12 cross-examination or examination by the commission, and the
13 recitation is being done by individuals who would lack sufficient
14 personal knowledge as to the underlying statements.

15 Permitting such statements to be read during sworn testimony
16 would be inconsistent with the protections just described and
17 contained throughout the Military Commission Rules of Evidence.
18 Additionally, see, generally, Military Commission Rules of Evidence
19 602.

20 So based upon the commission's interpretation of the rules,
21 applying them to the facts at bar, the commission finds that it will
22 permit victims to read their own statements as part of a greater
23 cross-examination -- or a greater examination by trial counsel. That

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1 will be done under oath. Those witnesses will be available for any
2 cross-examination that opposing counsel may want to participate in.

3 Parties will not be -- witnesses will not be allowed,
4 however, to read statements of third parties. Those statements will
5 still be admitted as evidence, have been admitted as evidence, and
6 will be available to the panel for sentencing deliberations as
7 evidence. The parties are free to use them in that fashion.

8 I believe that resolves the issue presented to the
9 commission by the parties.

10 Trial Counsel, do you concur?

11 TC [COL KRAEHE]: I have nothing further, Your Honor.

12 MJ [Lt Col BRAUN]: Okay. Counsel for Mr. bin Amin, do you
13 have questions or do you believe this resolves the matter?

14 CDC [MS. FUNK]: Your Honor, I just want to make sure that the
15 record is clear. We have withdrawn our request to prohibit
16 third-party statements to be read.

17 MJ [Lt Col BRAUN]: And that is understood by the commission
18 in reaching its determination.

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

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

21 LDC [MR. BOUFFARD]: We understand that this does resolve the
22 issue, yes, sir.

23 MJ [Lt Col BRAUN]: Okay. Are there any other matters, then,

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1 we need to take up before we recess for the evening?

2 Trial Counsel?

3 TC [COL KRAEHE]: No, Your Honor. Thank you.

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

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

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

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

8 MJ [Lt Col BRAUN]: Okay. So my intent is to recess until
9 0845 tomorrow morning to give us an opportunity to resolve the -- at
10 least the index that trial counsel is going to mark and admit at that
11 time, as well as take care of any other matters that may arise
12 overnight.

13 It is the intent of the commission to then move on to the
14 record at 0900 to begin the taking of evidence as part of the
15 government's case in presentencing.

16 Is that amenable to the parties?

17 Trial Counsel?

18 TC [COL KRAEHE]: Yes, Your Honor.

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

20 CDC [MS. FUNK]: It is, Your Honor.

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

22 LDC [MR. BOUFFARD]: Yes, Your Honor.

23 MJ [Lt Col BRAUN]: Very well, then. This commission's in

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1 recess until 0845 tomorrow morning.

2 **[The R.M.C. 803 session recessed at 1730, 23 January 2024.]**

3 **[END OF PAGE]**