[ARGUMENT NOT YET SCHEDULED]
UNITED STATES COURT OF APPEALS
***for the* District of Columbia Circuit**

In re: ABD AL-RAHIM HUSSEIN AL-NASHIRI,	)	No. _____
	)	**PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION**
	)	Dated: October 4, 2018

Michel Paradis
CAPT Brian Mizer, USN, JAGC
LT Alaric Piette, USN, JAGC
U.S. Department of Defense
Military Commission Defense Organization
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Counsel for Petitioner

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

I. Parties and *Amici* Appearing Below

1. Abd Al-Rahim Hussein Al-Nashiri, *Appellee*
2. United States of America, *Appellant*

II. Parties and *amici* Appearing in this Court

1. Abd Al-Rahim Hussein Al-Nashiri, *Petitioner*
2. United States of America, *Respondent*

III. Rulings under Review

This case involves a petition for a writ of mandamus and prohibition to the Department of Defense and, in the alternative, to the United States Court of Military Commission Review, which issued an order denying the relief requested on September 28, 2018 (Attachment A).

IV. Related Cases

This case has not previously been filed with this court or any other court. Petitioner has a habeas petition in the United States District Court for the District of Columbia, Case No. 08-1207.

Dated: October 4, 2018

/s/ Michel Paradis
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JURISDICTION

This Court has exclusive supervisory jurisdiction over military commission proceedings under the Military Commissions Act of 2009, 123 Stat. 2190 and the United States Court of Military Commission Review pursuant 10 U.S.C. § 950g. This Court has the remedial authority to issue all writs necessary and appropriate in aid of that jurisdiction pursuant to 28 U.S.C. § 1651.

RELIEF SOUGHT

Petitioner, Abd Al Rahim Hussein Al-Nashiri, asks this Court to issue a writ of mandamus and prohibition directing the vacatur of the orders convening the military commission convened to try him due to judicial misconduct that has irreparably harmed his ability to mount a defense and the public integrity of a capital trial. In the alternative, he asks this Court to direct the vacatur of all orders entered by the military commission judge whilst he was under a concealed and disqualifying ethical conflict, including but not limited to, all orders presently under review by the Court of Military Commission Review (CMCR). In the alternative, and at a minimum, he asks this Court to direct the CMCR to order an evidentiary hearing to ascertain the full scope and effect of the misconduct.

ISSUES PRESENTED

This petition seeks to remedy disqualifying judicial misconduct in a capital case. On February 21, 2018, the United States took an interlocutory appeal to the United States Court of Military Commission Review (CMCR) from an order of abatement issued by military commission judge Col Vance Spath, USAF, in the capital military commission convened to try Petitioner. In September 2018, while this appeal was pending, Petitioner discovered that for at least a year prior, Col Spath had been secretly negotiating future employment with the Justice Department as an immigration judge, a position he ultimately obtained on September 28, 2018.

During these secret negotiations, Col Spath conducted Petitioner's trial under what he described as an "aggressive schedule" that appears to have been driven by a now obvious goal: to rush Petitioner's capital trial to completion so that Col Spath could retire from the military at full pension and assume additional employment in the Justice Department. When Col Spath confronted obstacles to this goal, he took a series of then-inexplicable actions in favor of haste that resulted in the collapse of Petitioner's longstanding defense team, the wrongful imprisonment of a Marine Corps Brigadier General, and a total breakdown in the public reputation of the proceedings. As all of this transpired, Col Spath routinely delivered stream-of-consciousness rants, often addressed directly to the public,

against the "defense community," "fake news," the American Bar Association, and the media coverage of his behavior.

Having discovered the previously undisclosed ethical conflict, Petitioner asked the CMCR to dismiss, to vacate the orders previously issued by Col Spath whilst he was under this disqualifying conflict and, in the alternative, to order discovery to ascertain the full scope of Col Spath's misconduct. In a two-page order, the CMCR denied all relief citing Petitioner's purported failure to bring forward evidence that Col Spath had, in fact, engaged in the misconduct alleged (*i.e.* negotiated for employment with the Justice Department).

Col Spath's secret negotiation for employment with the Justice Department violated long-settled, bright-line rules governing judicial conduct. Given the active and continuous role of the Justice Department in prosecuting Petitioner's case and given the evident effect those secret negotiations had on Col Spath's behavior toward Petitioner, Col Spath's misconduct was disqualifying and prejudicial. Petitioner therefore asks this Court to issue a writ of mandamus and prohibition directing any one of three alternative forms of relief stated above to remedy the irreparable harms he has already suffered and to protect the integrity of this country's judicial proceedings.

STATEMENT OF FACTS

A. Background of the military commission proceedings convened to try Petitioner.

In 2008, the Department of Defense issued orders pursuant to the Military Commissions Act of 2006, 120 Stat. 2600, directing that Petitioner to stand trial before a military commission for his alleged involvement in plots to bomb the USS COLE in Yemen in October 2000 and a French oil tanker in Yemen in 2002. These initial charges carried the death penalty and mirrored a capital indictment that has been pending in the Southern District of New York since 2003 in which Petitioner is named as an unindicted co-conspirator. *United States v. al-Badawi, et al.*, No. 98-CR-1023 (S.D.N.Y., unsealed May 15, 2003). The 2008 military commission was disbanded in 2009 following President Obama's taking office and the initiation of an agency review of the military commissions. In 2011, the Department of Defense issued Military Commission Order 11-02 (September 28, 2011) pursuant to the Military Commissions Act of 2009, 123 Stat. 2190 §§ 1801-1807 (codified at 10 U.S.C. §§ 948a, *et seq.*), directing that Petitioner again stand trial before a military commission on substantively identical charges.

Since 2008, the military commission proceedings against Petitioner have been plagued by irregularity, political interference, and delay, including three interlocutory appeals brought by counsel for the prosecution to the Court of Military Commission Review (CMCR). Petitioner's case has proceeded fitfully

over the past decade for a number of reasons. But the root cause of most of these issues is the fact that Petitioner was held incommunicado in secret "black sites" as part of the CIA's Rendition, Detention, and Interrogation Program for four years. During this time, he was subjected to "total darkness…loud continuous noise, isolation, [] dietary manipulation…[t]hey were kept naked, shackled to the wall, and given buckets for waste…there is no question that [Petitioner] was 'waterboarded' … forced into 'stress positions' … menaced with a handgun … There is also evidence [Petitioner] was, in fact, forcibly sodimized, possibly under the pretext of a cavity search." *In re Al-Nashiri*, 835 F.3d 110, 141-42 (D.C. Cir. 2016) (Tatel, J., dissenting).

Over the course of the past decade of proceedings, three different military commission judges have presided over Petitioner's case. Relevant here, on July 10, 2014, the Chief Judge of the Military Commissions Trial Judiciary assigned Col Vance Spath, USAF, to preside over Petitioner's military commission. On August 6, 2018, Col Spath was replaced by Col Shelly Schools, USAF, after it was publicly announced that Col Spath would be retiring from the Air Force, effective November 1, 2018. Carol Rosenberg, *New Air Force colonel to preside in Guantánamo's stalled USS Cole case*, MIAMI HERALD (August 9, 2018).

B. Col Spath refuses to address a microphone discovered in attorney-client meeting spaces.

On June 14, 2017, the Chief Defense Counsel of the Military Commissions Defense Organization (MCDO), BGen John Baker, USMC, issued a memorandum advising defense counsel that the meeting spaces in which military commission defendants met with their lawyers could not guarantee confidentiality.[1] He cautioned counsel to "not conduct any attorney-client meetings at Guantanamo Bay, Cuba until they know with certainty that improper monitoring of such meetings is not occurring." He then continued:

> At present, I am not confident that the prohibition on improper monitoring of attorney-client meetings a GTMO as ordered by the commission is being followed. My loss of confidence extends to all potential attorney-client meeting locations at GTMO. Consequently, I have found it necessary as part of my supervisory responsibilities under 9-1a.2 and 9-1a.9 of the Regulations for Trial by Military Commission to make the above-described

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[1] The Chief Defense Counsel is an office created by Congress, 10 U.S.C. § 948k(d), to administer the provision of legal defense services to defendants before military commissions. The Chief Defense Counsel is a general officer nominated by the President and confirmed by the Senate, 161 Cong. Rec. S4555 (daily ed., Jun. 23, 2015) (confirmation as Chief Defense Counsel and Brigadier General), after being selected by a joint selection board. Under the applicable regulations, the Chief Defense Counsel serves in a role similar to that of a federal district judge under the Criminal Justice Act, respecting the supervision of defense counsel who appear before military commissions. *See* Reg. T. Mil. Comm. 9-1, *et seq*. He is the sole actor within the military commission system empowered to assign defense counsel (a process called "detailing"), to supervise defense counsel, and to excuse defense counsel. R.M.C. 505(d)(2).

> recommendations to all MCDO defense counsel. Whether, and to what extent, defense teams follow this advice is up to the individual defense team.

Brig. Gen. John Baker, USMC, *Improper Monitoring of Attorney-Client Meetings* (June 17, 2017) (Attachment C). This action was taken in light of a long history of intrusions by government agents into the attorney-client confidentiality of military commission defendants.[2]

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[2] In October 2011, for example, the JTF-GTMO guard staff confiscated privileged legal materials from the detainees' cells. The Legal Department at the Naval Base read defense counsel's correspondence and in January 2012, the Chief Defense Counsel issued an ethics instruction prohibiting defense counsel from using the Guantanamo legal mail system for privileged communications as incapable of safeguarding attorney client-privileged communications. As a consequence, defense counsel were unable to exchange confidential written communications with their client for almost two years until a consent order regarding privileged written communications management was entered.

Even attorney-client work product has not been immune from improper intrusion. In March 2013, defense counsel discovered, through a series of IT-related failures, that some unknown amount of privileged work product had been provided to counsel for the prosecution, IT personnel not bound by non-disclosure agreements, and other unknown entities in the government. It was also discovered, despite assurances to the contrary, that active content monitoring of defense counsel's internet usage was being undertaken on a government-wide basis. As a consequence of this and other similar episodes, the Chief Defense Counsel issued an ethics instruction prohibiting defense counsel from using Department of Defense computer networks, including email, to transmit privileged or confidential information. Efforts to mitigate the risk of improper disclosure more than tripled the amount of time necessary to draft and file pleadings. And the previous military commission judge presiding over Petitioner's case was forced to abate the proceedings for two months as a result.

After receiving this memorandum, Petitioner's former military commission defense counsel filed a motion with Col Spath seeking permission to notify Petitioner of BGen Baker's concerns. Col Spath denied Petitioner's motion on the ground that he was not authorized to approve the disclosure of classified information and because counsel for the prosecution "as officers of the court, have represented facts which negate what the Defense seeks to disclose to the Accused." AE369OO (July 7, 2017).

Petitioner's former counsel subsequently discovered evidence that unambiguously contradicted the prosecution's previous assurances. The precise factual basis for this representation remains classified and is contained in the attached Dolphin Declaration. Declaration of Marc Dolphin (August 4, 2017) (Attachment E). Petitioner's undersigned counsel can represent, based upon later public admissions by counsel for the prosecution in the course of litigation, however, that a hidden microphone was discovered in his attorney-client meeting room. CMCR Case 18-002, Appellant's Opposition to Appellee's Motion to Dismiss for Want of Jurisdiction under 10 U.S.C. § 950d (March 5, 2018).

This was not the first time an undisclosed microphone was discovered in Petitioner's attorney-client meeting spaces. In December 2012, military commission defense counsel traced the brand name of one of the smoke detectors in the attorney-client meeting rooms to a private surveillance company. *See*

AE149C (May 16, 2013). This "smoke detector" was, in truth, a disguised microphone connected to a nearby "listening room."

Upon discovering this most recent hidden microphone and other facts described in the Dolphin Declaration, Petitioner's former counsel again sought relief from Col Spath. Petitioner moved for discovery, an evidentiary hearing, and orders preventing further intrusions. Petitioner's counsel also sought, in the interim, permission to conduct attorney-client meetings in a designated area of the ELC, where confidentiality could be more reasonably assured.

On September 20, 2017, Col Spath denied Petitioner's requests for discovery and other relief. These rulings remain classified. However, it can be stated publicly that Col Spath concluded, as a matter of law, that Petitioner's entitlement to attorney-client confidentiality extended *only* to the prohibition on counsel for the prosecution using his attorney-client communications as evidence. In other words, Col Spath determined that Petitioner had no expectation of confidentiality when conferring with counsel, except insofar as his communications might be used against him in the military commission proceedings. And because of Col Spath's previous rulings, Petitioner's counsel could not inform Petitioner of the broader risks to confidentiality they had discovered.

C. Col Spath attempts to countermand BGen Baker's excusal of civilian counsel.

Mr. Richard Kammen, Petitioner's former learned counsel,[3] brought Col Spath's orders to BGen Baker, the Chief Defense Counsel. BGen Baker reviewed both Col Spath's classified orders as well as the underlying classified facts. Pursuant to his obligations as a member of the Indiana Bar, Mr. Kammen also sought an expert ethics opinion from Prof. Ellen Yaroshefsky, the Howard Lichtenstein Distinguished Professor of Legal Ethics and Executive Director of the Monroe Freedman Institute for the Study of Legal Ethics at Hofstra University School of Law. He provided her with an unclassified version of the history of government interference in attorney-client relationships within the military commissions and general representations facts contained in the Dolphin Declaration. Prof. Yaroshefsky, in turn, concluded that Mr. Kammen's continued representation of Petitioner was unethical:

> You cannot, consistent with your ethical obligation continue to represent [Petitioner]. Rule 1.16(a)(1) of Professional Conduct mandates that you withdraw from representation. It provides that a lawyer "shall withdraw from representation of a client if the representation involves a violation of the rules of professional conduct or

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[3] Under the Military Commissions Act and the rules governing military commissions, defendants are entitled to counsel learned in the law of capital litigation in "any case" in which the death penalty is sought R.M.C. 506(b); see also 10 U.S.C. § 949a(b)(2)(C)(ii).

> other law." You are required to withdraw as his counsel because continued representation will result in a violation of IRPCs and MRPCs 1.1, 1.3., 1.4 and 1.6.

AE389, Attachment C (October 16, 2017).[4]

On October 6, 2017, Mr. Kammen and two other civilian defense counsel submitted applications to BGen Baker to withdraw from representing Petitioner on the grounds that their continued involvement in this case violated the ethical rules to which they are subject. AE389, Attachment C (October 16, 2017). Under the unique rules the Secretary of Defense has promulgated to govern military commissions, the Chief Defense Counsel is given the sole authority to supervise and excuse defense counsel after an attorney-client relationship has been formed. R.M.C. 505(d)(2) (2010). Pursuant to that authority, BGen Baker determined that good cause existed and granted these applications, specifically referencing the classified information to which he was privy. AE389, Attachment C (October 16, 2017); AE389C (October 24, 2017). BGen Baker then filed a notice with the Convening Authority (the Department of Defense official responsible, *inter alia*, for the funding of the military commissions) that he had "begun the process of locating a qualified outside learned counsel to serve as [Petitioner]'s learned

[4] All unclassified pleadings are available at http://www.mc.mil and filed according to Appellate Exhibit (AE) numbers.

counsel and I will submit a request for funding approval as soon as I have identified such counsel." AE389, Attachment C (October 16, 2017).

The excusal of civilian counsel left Petitioner represented by LT Alaric Piette, USN, a Navy Judge Advocate, who graduated from law school in 2012, has no capital litigation experience, and has never tried a homicide case.[5] On October 13, 2017, LT Piette filed notices with the military commission of the civilian counsels' excusal. LT Piette also moved to continue proceedings until BGen Baker had located new learned counsel. AE389 (October 16, 2017).

Col Spath denied LT Piette's motion to continue and on the morning of October 31, 2017, Col Spath convened a hearing of the military commission at which he ordered BGen Baker to testify about his decision to excuse Mr. Kammen and Petitioner's other civilian counsel. BGen Baker objected to providing testimony beyond the documentary record, asserting attorney-client and deliberative process privilege. Col Spath then attempted to order BGen Baker "to rescind the direction you gave when you excused both learned outside – appointed

[5] Due to separate rules governing the ethical supervision of military officers, LT Piette submitted a separate request for ethics advice to the Navy Judge Advocate General, which had not yet rendered its opinion at the time Petitioner's civilian counsel requested to withdraw.

learned counsel and the two civilians." Trans. 10042.[6] When BGen Baker asserted that this order was *ultra vires*, Col Spath became irate, refused to accept pleadings or argument from BGen Baker, and stated explicitly, "I'm denying you the opportunity to be heard." Trans. 10054. Col Spath then held BGen Baker in contempt, ordering him confined for 21 days and to pay a $1,000 fine. BGen Baker subsequently obtained a writ of habeas corpus in the U.S. District Court for the District of Columbia vacating Col Spath's order as unlawful. *Baker v. Spath*, __ F. Supp. 3d __, 2018 WL 3029140 (D.D.C. June 18, 2018).

The following day, Mr. Kammen filed a federal action seeking, *inter alia*, to enjoin his involuntary recall to Petitioner's case. *Kammen v. Mattis*, No. 1:17-cv-03951 (S.D. Ind., filed November 2, 2017). And on November 3, 2017, the district court granted Mr. Kammen's request for a temporary restraining order. *Kammen v. Mattis*, No. 1:17-cv-03951, Dkt. 15 (S.D. Ind., November 3, 2017).

D. Col Spath orders that military commission hearings continue in the absence of learned counsel.

From the bench, Col Spath announced his intention to continue to move forward with the case, including through trial and capital sentencing, regardless of

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[6] Petitioner has included all cited to excerpts of the record of trial sequentially as Attachment D. All other unclassified transcripts of proceedings are available at http://www.mc.mil.

whether Petitioner was represented by learned counsel or anyone other than LT Piette. Trans. 10048. This urgent press forward was to meet what Col Spath described as his "aggressive 2018 calendar year schedule, with significant time to be spent here at Guantanamo Bay," Trans. 12344, which he had issued on April 11, 2017. AE203Q (April 11, 2017).

From November 2017 through February 2018, Col Spath proceeded apace with his "aggressive schedule," including the holding of evidentiary hearings, the testimony of witnesses, and the ruling on the admission of evidence. Col Spath also relieved the prosecution of any further discovery obligations relating to Petitioner's treatment in U.S. custody, Trans. 10585, despite the fact that on September 1, 2017, counsel for the prosecution represented that it was unlikely to meet its obligations to produce such discovery until the middle of 2018. AE203S (September 1, 2017).

All the while, Petitioner was represented solely by LT Piette, who respectfully declined to take substantive positions or to cross-examine witnesses in the absence of learned counsel. In support of his position, LT Piette submitted an affidavit from Ms. Emily Olsen-Gault, Director and Chief Counsel, ABA Death Penalty Representation Project, who explained the need for learned counsel at all critical stages of a death penalty case. AE389K, Attachment B (November 6, 2017). On November 6, 2017, Col Spath *sua sponte* ordered Prof. Yaroshefsky and

Ms. Olsen-Gault to testify from a video-teleconference site in Virginia. Ms. Olsen-Gault testified about the ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* and reiterated her view that LT Piette was not competent to represent Petitioner without the assistance of learned counsel under the ABA Guidelines.

During subsequent hearings, Col Spath repeatedly berated LT Piette for refusing to proceed in the absence of learned counsel and repeatedly voiced his personal "frustration" with an ill-defined group that he and the prosecution derisively called "the defense community." *See*, *e.g.*, Trans. 11538. This defense community, he contended, were "just violat[ing] orders willy-nilly," *id*. 12370, and attempting to mount a "revolution to the system." *Id*. 12373.

Col Spath's expressed animus toward the "defense community" prompted him to summarily rule against Petitioner and anyone else he deemed complicit in the "defense community" without reviewing their pleadings. For example, at the outset of a hearing on Monday, February 12, 2018, Col Spath addressed the issue of a subpoena he issued for two of Petitioner's former counsel to appear. Represented by outside counsel, those attorneys moved to quash the subpoena and Col Spath, from the bench, refused to even accept their pleadings, stating "the docketing order I think was a fair indication that I'm not granting any motion to quash." Trans. 11536. Col Spath continued, stating "I'm not accepting those. I've

already seen them. There's nothing new." *Ibid*. While Petitioner takes no position on the propriety of his former counsel being subpoenaed in this fashion, he does feel compelled to note that counsel for the prosecution responded to this remark by stating, "Sir, about these third-party filings … I understand that you're not going to accept them, but I do believe there is new information in there that should concern the commission." *Id*. 11537.

Col Spath then engaged counsel for the prosecution in a stream-of-consciousness colloquy that veered between the rudiments of his authority as a military commission judge, to Petitioner's former attorneys' employment by the federal government, to the efforts of Petitioner's then-lone trial attorney, LT Piette, to secure replacement learned counsel. Trans. 11538-70. Col Spath even mocked the then-classified and still unexplained discovery of the microphone in Petitioner's attorney-client meeting room as "fake news," addressing the public directly and casting Petitioner's former attorneys as fabricating the impetus for their withdrawal. *Id*. 11558.[7]

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[7] This was despite the former Convening Authority's recommendation to "the Joint Detention Group that a 'clean' facility be designated or constructed which would provide assurances and confidence that attorney-client meeting spaces are not subject to monitoring." Harvey Rishikof, Convening Authority, Memorandum for BGen John G. Baker, Chief Defense Counsel (November 21, 2017) *available at* https://www.documentcloud.org/documents/4273591-Convening-Authority-memo-for-Brig-Gen-John-Baker.html.

Col Spath, for his part, was candid about how personally invested he had become in Petitioner's case saying, "And in the spirit of full disclosure, there are days, right, where this is tough work. And it would be a lot easier for me to say I'm going home, which is exactly, by the way, what happened on this side, which is so frustrating: I'm going home." Trans. 11552. And before turning to the taking of testimony, Col Spath again harangued LT Piette for refraining from taking substantive positions in the absence of learned counsel:

> MJ [Col SPATH]: Again, I've ruled on that. And I've ruled – first, there are jurisdictions that disagree with you, you know that.
>
> DDC [LT PIETTE]: Uh-huh.
>
> MJ [Col SPATH]: Flat out. There are jurisdictions that frankly do not buy into this ABA requirement – a policy group – this ABA requirement – and it's not even a requirement, a guideline of capitally qualified counsel. There are jurisdictions who believe that is not helpful for a variety of reasons, many of them political, frankly, and you know that.

Id. 11568.

Addressing the refusal of Petitioner's former counsel to return to the case, Col Spath initially stated that he was not going to issue "any rulings from the bench on this issue today, because I want to reflect, and reflect in the right state of mind." Trans. 11719. Later that same afternoon, however, Col Spath announced, "I'm going to issue warrants of attachment [ordering U.S. Marshalls to arrest

Petitioner's former counsel] – I plan to do it tomorrow – to have them brought sometime on Thursday or Friday." *Id*. 11910.

This order to arrest Petitioner's former counsel was covered in the press. *See*, *e.g*., Carol Rosenberg, *Military Judge Wants Civilian Attorneys Arrested for Quitting USS Cole Case*, MIAMI HERALD (February 13, 2018). The following day, however, Col Spath denied having ever made this remark and lashed out at the media for its coverage:

> And yes, I use CAAFlog. I don't read the comments and I tend not to read the analysis; I don't need their help, because some people suggest it has a bias. … So I was a little surprised last night when I opened it to find this case making their – the top of the banner, and noticed very quickly that it said that I had ordered, or was going to order today, writs be issued against civilians to be dragged to GTMO. Imagine my surprise. Fortunately, there was a link to figure out where in the wide, wide world of sports is that coming from.
>
> And it's coming from a [Miami Herald] reporter who we brought down here and we bring down here willingly, and you know, put up, who got it wrong. I said very clearly yesterday I want draft writs so I have options as I figure out what to do, and I hadn't made a decision yet. I don't know if I could have been more clear.
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> ***
>
> I have no control. But it's just always remarkable to me that words matter and accuracy matters when we are dealing with significant issues that affect people. … In that same article, again, talks about the secret court. I look out at all the people we bring. We haven't had a classified session in months.

Trans. 11924-25. In response to follow-on press reporting fact-checking his denial, Col Spath returned to the issue the next day and claimed that his statement was misheard by the press and the court reporter, stating, "I've had a chance to listen to audio, I actually know what I said, which is, of course, what I think you all heard, 'if I issue the subpoenas,' but [the public] can't listen to audio because we don't put the audio out there." *Id*. 12286.

Col Spath openly recognized that he was acting outside of his "lane" as a presiding judicial officer:

> But I've got to tell you I feel like I'm in the wilderness on the – fighting this particular issue because it's not my fight. I am attempting to do what I can, but really, what are you all doing to – what are you all doing to make sure the people who are doing this are held responsible? I can't do it, 'that's clear. And again, is it in my lane? How much is in my lane?

Trans. 11551-52. And he admitted that he was consciously trying to be careful about what he said on the record so as to not end up like "the military judge in a courts-martial, *Hassan*, [who took] on a battle that was not his, right, the beard issue, and ultimately [had] to recuse himself." *Ibid*. Yet the day after this remark, he demanded testimony from a senior Pentagon official about "the clear evidence of [defense] misconduct in all of these cases[.]" *Id*. 11911.[8] This senior Pentagon

[8] It is unclear to what Col Spath was referring when he said, "all these cases." Col Spath and the prosecution have endeavored to paint the current dysfunction in

official testified, however, that it was Department of Defense policy to respect to the professional judgment of BGen Baker as the Chief Defense Counsel.

On February 16, 2018, Col Spath began the day's hearing with a thirty-minute invective. "Over the last five months – yes, my frustration with the defense has been apparent. I said it yesterday and I'll continue to say it. I believe it's demonstrated lawlessness on their side; they don't follow orders." Trans. 12364-65. Instead of *bona fide* legal questions, Col Spath characterized ongoing disputes over the lawfulness of his orders, such as the jailing of the Chief Defense Counsel, as personal attacks. "I'm not ordering the Third Reich to engage in genocide," he complained. "This isn't My Lai, or My Lai." Trans. 12369.

"These last few months," Col Spath continued, "I think we can all say, have demonstrated significant flaws within the commission process, particularly within the defense organization, and it demonstrates an organization intent on stopping the system, not working within the system that they signed up to work

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Petitioner's case as a consequence of MCDO's "mismanagement" or what Col Spath later described as its effort to foment a "revolution to the system." Trans. 12373. There are at least ten other active cases under the supervision of the MCDO that are in various stages of trial and post-trial proceedings. The Chief Defense Counsel has refused to allow defense counsel withdraw, even with the consent of the accused, when he determined that no good cause had been shown. *See United States v. Mohammed, et al.*, AE380SS (June 28, 2016). If there is some vast "defense community" conspiracy, there is no indication that it has affected any of these other cases, which are proceeding in the ordinary course.

within." *Id*. 12372. He even accused the Deputy Chief Defense counsel of wearing a "contemptuous" uniform at a hearing earlier in the week, specifically the Army's Class "B" uniform: "I'm not oblivious; I know what that says. What little respect you have for the commission is obvious. A short-sleeve shirt, no tie, not coat; I get it. That's the message. That's been the message from the defense for five months. And it's well received. I got it. I've heard you." Trans. 12366. This was despite the fact that the Deputy was *required* to wear his Class B uniform in commission proceedings under the governing rules because the Deputy was not appearing on behalf of an accused.[9]

Concluding the proceeding, Col Spath again reiterated how personally invested he had become in the disputes over his authority within the military commission process. "I've got to tell you," he admitted, "after 26 years of service, it's shaken me more than I would have expected." Trans. 12373.

E. Abatement and relevant proceedings in the Court of Military Commission Review.

At the conclusion of the hearing on February 16, 2018, Col Spath ordered an indefinite abatement of proceedings:

> We're done until a superior court tells me to keep going. It can be CMCR. It can be the Washington – or the District

[9] *See* Chief Defense Counsel Policy Memorandum 5-15 Ch. 5, MCDO Uniform and Civilian Attire Policy for Military Personnel §1(b) (May 18, 2017).

> in D.C. They're all superior to me. But that's where we're at. We need action. We need somebody to look at this process. We need somebody to give us direction. I would suggest it sooner than later, but that's where we're at.
>
> ***
>
> We are in abatement. We're out. Thank you. We're in recess.

Trans. 12377.

On February 21, 2018, the prosecution gave notice of its intent to seek an interlocutory appeal to the Court of Military Commission Review (CMCR). In its opening brief, counsel for the prosecution asked the CMCR to affirm three of Col Spath's orders and to vacate a fourth.[10] Various motions and pleadings have been filed in that proceeding, including challenges to subject-matter jurisdiction, which have not yet been ruled upon and which are not relevant to the relief Petitioner seeks in the instant petition.[11]

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[10] Counsel for the prosecution asked the CMCR to: 1) affirm Col Spath's ruling, that the military commission judge, not the Chief Defense Counsel, should be the excusal authority for defense counsel; 2) affirm Col Spath's ruling that learned counsel was only necessary to the "extent practicable"; 3) affirm Col Spath's ruling that the absence of counsel was a strategic choice by the defense; and 4) overturn Col Spath's abatement order. *See* CMCR Case 18-002, Brief On Behalf Of Appellant (March 5, 2018).

[11] Petitioner challenged the CMCR's subject-matter jurisdiction over 1) the abatement order, insofar as abatement orders are not within the narrow categories of claims over which the CMCR is given interlocutory appellate jurisdiction by 10 U.S.C. § 950d, 2) counsel for the prosecution's request to have the CMCR to *affirm* orders issued by the military commission in its favor, and 3) the appeal writ

Relevant here, on September 13, 2018, Petitioner moved, *inter alia*, to dismiss after it was discovered that Col Spath had been operating under a disqualifying ethical conflict at the time he entered the orders under review. This disqualification, in turn, required the vacatur of his orders dating back potentially 742 days and therefore included the orders ostensibly giving rise to the CMCR's subject-matter jurisdiction. The reason for the disqualification was that Col Spath had, unbeknownst to counsel for Petitioner, been pursuing a position as an immigration judge at the Executive Office for Immigration Review (EOIR) for at least the previous year. At no time, however, did Col Spath disclose this fact.

Petitioner's counsel first heard credible reports that Col Spath was pursuing such employment in July 2018 and sent counsel for the prosecution a discovery request to determine if the rumors were true. The prosecution denied the discovery request, asserting that Petitioner failed to prove that the Justice Department had hired Col Spath as an employee. "This request," counsel for the prosecution asserted, "is wholly conclusory in nature and *fails to provide any evidence or proof in support*." Government Response to Defense Request for Discovery (September 5, 2018) (Attachment B) (original emphasis). "Based on its review of the

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large, due to a jurisdictional defect in the underlying convening order that was created by the Supreme Court's intervening decision in *Lucia v. SEC*, 138 S.Ct. 2044 (2018).

unsubstantiated assertions provided in the Defense discovery request, the Government finds no reasonable objective basis to question the impartiality of the former presiding Military Judge and therefore no cause to act on the request." *Ibid*.

Five days after tendering this negative response, Attorney General Sessions greeted his newest employees at a public ceremony in which he hailed "the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review."[12] In his remarks, the Attorney General warned the new immigration judges of the "good lawyers" who would come before them representing non-citizens, "just like they do in federal criminal court,"[13] and likened these defense lawyers to "water seeping through an earthen dam to get around the plain words of [immigration law] to advance their clients' interests."[14] The Attorney General then attended a reception with these new employees, where a press photographer captured the Attorney General standing next to Col Spath, who is pictured below wearing a dark suit and blue tie:

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[12] *Available at* https://www.justice.gov/eoir.

[13] The Attorney General's reference to criminal defense attorneys appears to have been unscripted as it does not appear in his prepared remarks, *available at* https://www.bing.com/videos/search?q=attorney+general+remarks+to+largest+class+of+immigration+judges.

[14] *Available at* https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history.

Carol Rosenberg, *Controversial Guantánamo judge joins Jeff Sessions in immigration judge ceremony*, MCCLATCHY (September 14, 2018).

According to an EOIR press release, this most recent group of immigration judges completed the appointment process in an average of "approximately 266 days, down from an average of 742 days just one year ago."[15] Col Spath was therefore potentially negotiating for this employment for the final two years he was presiding over Petitioner's military commission.

Petitioner contended below that the public record was sufficient to establish that Col Spath was proceeding under an undisclosed conflict or, at a minimum, the appearance of a disqualifying conflict. Petitioner further recognized that due to the

[15] *Available at* https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-largest-immigration-judge-investiture-least.

prosecution's refusal to turn over discovery, the record was still uncertain respecting the precise dates and terms on which Col Spath applied, interviewed, and accepted employment as an immigration judge. Petitioner therefore asked, in the alternative, that the CMCR compel discovery relevant to the question of Col Spath's employment negotiations. This would, Petitioner contended, establish with certainty which rulings were tainted by the undisclosed conflict.

Counsel for the prosecution opposed this motion and contended that the issue was not properly before the CMCR, insofar as there had been no hearing below and that Petitioner was not entitled to raise issues in an interlocutory appeal taken under 10 U.S.C. § 950d. Counsel for the prosecution also contended that there was "no authority" for the proposition that "an Executive Branch judge applying for another judicial position is automatically disqualified from Appellee's case from the moment of application" or that "automatic disqualification is required when the same federal department employs both the prosecution counsel and the judge." C.M.C.R Case No. 18-002, Appellant's Opposition to Motion to Vacate Rulings and Compel Discovery, at 13 (September 18, 2018). The prosecution disputed whether Col Spath had applied to be an immigration judge and "[e]ven if it is true that Judge Spath is now, after retiring from active duty, associated with an Executive Branch agency other than DOD, such employment does not mean that he would have lacked the impartiality to preside over a DOD-

convened Commission." *Id*. at 24. Finally, it contended that Petitioner's motion should be construed as a petition for an extraordinary writ and denied because Petitioner's entitlement relief was not clear and indisputable. *Id*. at 25-26.

On September 28, 2018, the CMCR denied all relief. In a two-page order, the CMCR held:

> Appellee does not indicate when Judge Spath allegedly negotiated with DOJ for employment. We take judicial notice that Judge Spath is scheduled to retire from the Air Force on November 1, 2018. None of appellee's contentions were raised before the military commission because the case has been abated. Thus, we have no factual record or findings of the military judge at the trial level to support appellee's allegations for this Court to review.

CMCR Case No. 18-002, Order (September 28, 2018) (Attachment A). Without further analysis, the CMCR concluded that Petitioner had failed to demonstrate a "clear and indisputable" right to relief under *Cheney v. U.S. District Court*, 542 U.S. 367, 381 (2004). The same day as the CMCR issued its order, the Justice Department announced that "Attorney General Jeff Sessions appointed Vance H. Spath to begin hearing cases [before the Arlington Immigration Court] in October 2018." Department of Justice, Press Release: EOIR Swears in 46 Immigration Judges, at 11 (September 28, 2018).[16]

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[16] *Available at* https://www.justice.gov/eoir/page/file/1097241/download

REASONS FOR GRANTING THE WRIT

In the military commission context, the All Writs Act empowers this Court to "issue all writs necessary or appropriate in aid of our jurisdiction such that we can issue a writ of mandamus *now* to protect the exercise of our appellate jurisdiction *later*." *In re Al-Nashiri*, 791 F.3d 71, 75-76 (D.C. Cir. 2015) (internal quotations omitted) (original emphasis). In particular, this Court has reaffirmed "Mandamus is an appropriate vehicle for seeking recusal of a judicial officer during the pendency of a case, as ordinary appellate review following a final judgment is insufficient to cure the existence of actual or apparent bias— with actual bias ... because it is too difficult to detect all of the ways that bias can influence a proceeding and with apparent bias because it fails to restore public confidence in the integrity of the judicial process." *In re Mohammad*, 866 F.3d 473, 475 (D.C. Cir. 2017) (cleaned up).[17]

While mandamus is often described an "drastic and extraordinary remedy reserved for really extraordinary causes," *Cheney*, 542 U.S. at 380 (cleaned up), questions of judicial disqualification present a special case in the law of mandamus. This is because questions of judicial ethics cast "a shadow not only

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[17] This brief uses (cleaned up) to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. OF APPELLATE PRACTICE AND PROCESS 143 (2017).

over the individual litigation but over the integrity of the federal judicial process as a whole. … In recognition of this point we have been liberal in allowing the use of the extraordinary writ of mandamus to review orders denying motions to disqualify." *Union Carbide v. U.S. Cutting Service*, 782 F.2d 710, 712 (7th Cir. 1986); *see also In re IBM*, 618 F.2d 923, 926-27 (2d Cir. 1980); *In re United States,* 666 F.2d 690, 694 (1st Cir. 1981); 9 MOORE'S FEDERAL PRACTICE ¶ 110.13[10]. In fact, when matters of judicial disqualification arise, some circuits hold that a litigant is obliged, on pain of waiver, to petition for mandamus. *See*, *e.g.*, *United States v. Horton*, 98 F.3d 313, 316 (7th Cir. 1996).

On the merits, writs of mandamus turn on the three factors enumerated in *Cheney*, 542 U.S. at 380-81. And here, all three factors are readily satisfied. *First*, the issuance of the writ is the only means by which Col Spath's disqualifying conduct can be remedied. *Second*, Col Spath clearly and indisputably disqualified himself from presiding over Petitioner's military commission when he 1) failed to disclose his intent to retire; 2) secretly negotiated employment with the Justice Department; and 3) expressed and acted upon his acknowledged bias, indeed animus, against Petitioner's counsel. *Third*, issuance of the writ under these circumstances is not only appropriate, but necessary, to protect the the integrity of the judicial system.

I. THERE IS NO OTHER ADEQUATE MEANS OF OBTAINING RELIEF.

This Court has consistently recognized that challenges to a judge's fitness can and should be raised as via a writ of mandamus at the earliest opportunity. *Mohammad*, 866 F.3d at 473; *see also In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006) (mandamus disqualifying a special master); *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004) (same); *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003) (mandamus disqualifying a court monitor). This is because "[w]hen the relief sought is recusal of a disqualified judicial officer … the injury suffered by a party required to complete judicial proceedings overseen by that officer is by its nature irreparable." *Cobell*, 334 F.3d at 1139. And it is this "irreparable injury that justified mandamus." *Al-Nashiri*, 791 F.3d at 79.

Leaving these issues to the future appellate review is especially inadequate here given the current state of proceedings before the CMCR. The CMCR is presently reviewing the merits of a number of Col Spath's rulings in the context of the prosecution's third interlocutory appeal in this case. If Col Spath was disqualified due to bias, the very rulings under review are a nullity, thereby mooting the CMCR's continuing review of their merits.

As apparently contemplated by the CMCR, however, the question of whether Col Spath was disqualified from issuing those orders in the first place must wait an eventual remand after the CMCR has passed on the soundness of

those orders. Should the CMCR affirm some or all of Col Spath's rulings on the merits, Petitioner will then have to persuade the military commission judge to vacate and reconsider orders that the CMCR will have already concluded were correct. It is not even clear what rules would govern such an exercise. And assuming the military commission judge treats the CMCR's merits rulings as controlling, Petitioner will permanently lose the opportunity to litigate those issues fully and fairly before a neutral judge and fact-finder.

II. PETITIONER'S ENTITLEMENT TO RELIEF IS CLEAR AND INDISPUTABLE.

A. Secretly pursuing employment with the Justice Department whilst serving as a judge in a high-profile criminal case involving the Justice Department creates a disqualifying conflict of interest.

The disqualification of a judge is governed by an objective test that is satisfied whenever there is a reasonable "appearance of partiality ... even though no actual partiality exists." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988). In evaluating whether there is such an appearance of partiality, "any doubts must be resolved in favor of recusal." *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003).

When a judge pursues post-judicial employment, numerous canons of judicial conduct regulate the unique risks that such a job search poses to the public trust in the judicial system. The pursuit of employment necessarily threatens the

"public's confidence in the integrity and impartiality of the judiciary" because of a judge's natural temptation to stay in the good graces of prospective employers. Code of Conduct for United States Judges, Canon 2A (2014). The pursuit of employment impairs a judge's ability to give their judicial duties "precedence over all other activities" because the timetables for scoring the best job may not coalesce with the timetables that justice requires for the cases already on the docket. *Id*. Canon 3. The pursuit of employment, particularly with large government employers, also puts the judge at risk of altering their behavior to curry favor with parties or firms who are likely to have an interest in matters before their court. *Id*. Canon 4D.

These risks not only undermine the judge's personal integrity but the public's perception the judge's integrity. That is why there are strict, bright-line ethical standards governing judges contemplating post-judicial employment. The Guide to Judiciary Policy (2014) states, for example, "After the initiation of any discussions with a law firm,[18] no matter how preliminary or tentative the

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[18] As the Code on Judicial Policy itself states, the use of the phrase "law firm" is intended to "apply to other potential employers" without distinction. *See also United States v. Sells Engineering, Inc.*, 463 U.S. 418, 471 (1983) (Burger, C.J., dissenting) (describing the Justice Department as the country's "largest law firm"); *Scott v. United States*, 559 A.2d 745, 750 (D.C. 1989) (en banc) ("Nor does it change simply because the prospective employer is a component of the Department of Justice; the negotiations at issue for employment with a unit directly linked to

exploration may be, the judge should recuse on any matter in which the firm appears. Absent such recusal, a judge's impartiality might reasonably be questioned." 2B Guide to Judiciary Policy, Committee on Codes of Conduct Advisory Opinion No. 84: Pursuit of Post-Judicial Employment (2016). Furthermore, the Guide makes clear that:

> [A] judge should refrain from negotiating with a firm, if the firm's cases before the court are of a character or frequency such that the judge's recusal (which would be required) would adversely affect litigants or would have an impact on the court's ability to handle its docket. In such cases, judicial duties would have to take precedence over the legitimate personal interest in post-judicial employment.

Ibid. To that end, "A judge should not explore employment opportunities with a law firm that has appeared before the judge until the passage of a reasonable interval of time, so that the judge's impartiality in the handling of the case cannot reasonably be questioned." *Ibid*.

The Guide then sets out detailed steps a judge seeking future employment must take to protect the integrity of the proceedings before them as well as the reputation of the judicial system more broadly. A judge contemplating future employment must:

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the prosecutor's office are ethically analogous to negotiations for employment with a large private law firm.").

> 1) "make[] known a future retirement or resignation date;"
>
> 2) refrain from "attend[ing] meetings or engag[ing] in communications with the judge's future employer concerning the employer's business" and, in particular, social functions because "attending social functions sponsored by a future employer gives rise to an appearance of impropriety; and
>
> 3) recuse and transfer cases involving prospective employers if doing so can be done without imposing an undue burden on litigants. And if such recusal would cause an undue burden, "a judge should not negotiate for future employment with a firm."

Ibid.; *see also United States v. Mikhel*, 889 F.3d 1003, 1028 (9th Cir. 2018) (crediting the actions of a district judge who "promptly and clearly disclosed the alleged grounds for recusal to the parties; [whose] only contact was with a local screening committee; [who] stated he would not seek remuneration for the position, and [where] there was no opportunity for him to negotiate salary, bonuses, or the like; his application was never considered on its merits by the Department of Justice or White House Counsel's office; and he immediately withdrew his application when defendants filed their motion [objecting].").

As this Court is well-aware, these standards apply and recusal is the norm when a sitting judge is simply up for another judicial appointment. The Chief Judge of this Court, the Honorable Merrick Garland, recused himself from all cases, including cases on which he had already heard oral argument, for the year after President Obama nominated him to the Supreme Court. The Honorable Brett

Kavanaugh has also recused himself from pending cases since his nomination to the Supreme Court by President Trump.

Similarly, magistrate judges up for re-appointment are required recuse themselves from any case involving a firm, institutions, or attorneys participating in a Merit Selection Panel. That includes not simply the lawyers themselves but, "where the United States Attorney or the Federal Public Defender serves on the panel, … all cases (criminal and civil) involving that attorney and that attorney's office due to the direct supervisory role those officials have over the attorneys and the cases in their respective offices." 2B Guide to Judiciary Policy, Committee on Codes of Conduct Advisory Opinion No. 97: Disqualification of Magistrate Judge Based on Appointment or Reappointment Process (2009).

In addition to the basic norms of judicial conduct, a litigant has a constitutional right to judicial officer unbiased by the unique pressures of a job search as a clearly established matter of due process. A judge's concern with future employment prospects is likely to create "a possible temptation to the average man as a judge … not to hold the balance nice, clear, and true between the State and the accused[.]" *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Such a bias, if uncorrected, "denies the latter due process of law." *Ibid*. In assessing whether such a bias exists, "The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be

neutral, or whether there is an unconstitutional potential for bias." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (cleaned up). And the appearance of such a bias is self-evident when the parties or subject-matter of a case have had or will have a "significant and disproportionate influence" on the judge's immediate career prospects. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009).

Recusal in such circumstances is also the explicit requirement of the Manual for Military Commissions (2011), promulgated by the Secretary of Defense. Rule for Military Commission (R.M.C.) 902 lays out two standards for the disqualification of a military judge. The first, like the federal rules, disqualifies any judge from "any proceeding in which that military judge's impartiality might reasonably be questioned." R.M.C. 902(a). And specific to the particular issue here, the R.M.C. states that disqualification is required where a military judge has "an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding[.]" R.M.C. 902(b)(5)(C). In the post-judicial employment context, such interests can arise either because of how the timetables governing a military commission judge's existing judicial duties might impair the availability of other employment opportunities or because of how the perception of a military commission judge's performance in a particular proceeding might appeal to or discourage a prospective employer.

Unsurprisingly, in cases where these standards have been breached – even inadvertently – the decisions of reviewing courts have been exacting. The leading case is the Seventh Circuit's decision in *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985); *see also DeNike v. Cupo*, 958 A.2d 446, 455 (N.J. 2008) (quoting *Pepsico* to hold that employment negotiations with a lawyer representing one of the parties, even after all substantive decisions had been rendered, is improper because "*any* sort of employment negotiations with a party— 'preliminary, tentative, indirect, unintentional, [or] ultimately unsuccessful' —right before or during a pending matter, reasonably call into question a judge's impartiality.") (original emphasis).

In *Pepsico*, a district judge had hired a headhunter to pursue future employment opportunities on his behalf and had specifically instructed the headhunter not to pursue firms appearing before his court. Unbeknownst to the judge and in direct violation of his instructions, the headhunter had made preliminary inquiries with a firm that was appearing before the judge. After the judge refused to recuse himself upon learning of the incident, claiming the breach was accidental, the Seventh Circuit issued a writ of mandamus directing the judge's recusal. "The dignity and independence of the judiciary," the Court held, "are diminished when the judge comes before the lawyers in the case in the role of a suppliant for employment." *Pepsico*, 764 F.2d at 461.

Courts have held to the same standard when sitting judges seek government employment. In *Scott*, the en banc District of Columbia Court of Appeals vacated an attempted murder conviction where counsel for the prosecution had been assigned by the U.S. Attorney's Office for the District of Columbia and the judge was separately seeking employment in the Justice Department's Executive Office for the United States Attorneys. *Scott*, 559 A.2d at 748. The position in the Executive Office was administrative/managerial and involved no role in Departmental litigation. Nevertheless, Judge Rodgers wrote for a unanimous court that vacatur was required because, "Our criminal justice system is founded on the public's faith in the impartial execution of duties by the important actors in that system." *Ibid*. Citing *Pepsico*, the Court held that negotiating with "a component of the Department of Justice," and in particular "a unit directly linked to the prosecutor's office," created an incurable appearance of partiality. *Id*. at 750.

B. Col Spath violated every standard and rule governing the pursuit of employment by a sitting judge.

First, Col Spath gave no notice at any point prior to his departure that he was seeking employment from the Justice Department. In fact, at no point did Col Spath even make known the fact that he intended to retire. Counsel for Petitioner only learned of this in July 2018, after media reports of his imminent departure and accompanying rumors that he had been hired as an immigration judge.

Second, Petitioner acknowledges that it is presently unknown what meetings or communications Col Spath had with the Justice Department. It is also unknown the extent to which Col Spath touted his service as a judge on the Guantanamo military commissions in selling himself as a good candidate for immigration judge. But given that Col Spath received the very job he was pursing, those meetings and communications must have taken place. And what is known for sure is that at the very time counsel for the prosecution denied Petitioner's request for discovery, Col Spath was preparing to be feted by Attorney General Sessions at a ceremony for new Justice Department employees.

Third, and most significantly, Col Spath did not recuse himself, despite the Justice Department's deep involvement in Petitioner's trial, Attorney General Sessions' intense and publicly stated interest in the proceedings,[19] and the routine appearance of Justice Department attorneys and officials before him. *See*, *e.g.*,

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[19] *See*, *e.g.*, *Sessions Affirms Use of Prison; Attorney General Sessions Visits Guantanamo Bay Prison*, Associated Press (July 8, 2017); Memorandum for Trial Counsel (July 9, 2018) (disclosing Attorney General Sessions' complaints to Defense Secretary Mattis about plea negotiations in the capital military commissions that could have resulted in foregoing the death penalty) *available at* https://www.documentcloud.org/documents/4615017-The-Defense-Attorney-s-request-for-testimony.html; Sen. Jeff Sessions, Letter to President Obama, 2010 WLNR 584318 (January 10, 2010) (Urging the president to send the so-called "Christmas Bomber" to Guantanamo and "to pursue trial by military commission-an option you have determined appropriate for other terrorists, such as Abd al-Rahim al-Nashiri who was responsible for the U.S.S. Cole bombing.").

Trans. 11053 (announcing Justice Department attorneys, including attorneys from the FBI at counsel table); *Id*. 10015 (same); *cf*. R.M.C. 103(24)(B) (defining "party" as "Any trial or assistant trial counsel representing the United States, and agents of the trial counsel when acting on behalf of the trial counsel with respect to the military commission in question."). In fact, at the time Col Spath entered his order of abatement, the lead prosecutor in Petitioner's case was Mark Miller, an Assistant U.S. Attorney.

Rather than recuse himself or evaluate whether his future employment plans might cause an undue burden to the military commission system or the parties, Col Spath kept his plans secret. He ordered what he described as an "aggressive schedule" in April 2017. And he then committed to a pursuit of haste at all costs that was inexplicable given the seriousness of the issues he confronted.

In June 2017, BGen Baker, in his role as Chief Defense Counsel, advised all MCDO attorneys not to "not conduct any attorney-client meetings at Guantanamo Bay, Cuba until they know with certainty that improper monitoring of such meetings is not occurring." Given BGen Baker's supervisory authority over Petitioner's former counsel, they did the responsible thing and requested modest discovery and a hearing to assess the danger to Petitioner's entitlement to attorney-client confidentiality. Col Spath denied these motions so that the case could proceed rapidly to trial.

In August 2017, Petitioner's former counsel discovered a hidden microphone in their attorney-client meeting spaces as well as other facts detailed in the Dolphin Declaration. This discovery confirmed, if not exceeded, the worst of BGen Baker's stated fears. Petitioner's former counsel again sought reasonable remedies and Col Spath denied these motions so that the case could proceed rapidly to trial.

In October 2017, Petitioner's former civilian counsel were forced to withdraw from the case. They followed the governing rules for how to do so and did so with the express authorization of BGen Baker. Petitioner's only remaining attorney, LT Piette, asked for a brief period of delay, so that new death penalty qualified counsel could be hired. Col Spath denied this motion so that the case could proceed rapidly to trial, despite the fact that Petitioner was, as a practical matter, unrepresented.

In November 2017, after BGen Baker refused to rescind his excusal orders for Petitioner's former lawyers, Col Spath unlawfully ordered BGen Baker to be arrested and threatened Petitioner's former lawyers with the same. Col Spath then continued to proceed through a series of hearings so that the case could proceed rapidly to trial, despite the fact that Petitioner was, as a practical matter, unrepresented.

From November 2017 through February 2018, Col Spath proceeded as rapidly as he could to trial, presiding over a series of one-sided hearings, issuing numerous rulings, and making international headlines by railing against "the defense community," aping political talking points about "fake news," and attacking the press for reporting accurately on his increasingly erratic behavior. Only after senior Department of Defense officials refused to support his vendetta against the so-called "defense community" did Col Spath take a moment to pause and, the following day, abate the proceedings in Petitioner's military commission.

No reasonable person could observe Col Spath's mad rush and ensuing courtroom histrionics and not suspect that they were at least influenced by his then-secret pursuit of employment. Even in the most forgiving light, a reasonable observer, aware of all the facts, would conclude that Col Spath's haste and his open "frustration" at being stymied in that haste reflected a desire to wrap up a high-profile case quickly, so that he could retire on a full pension and move on to a desirable position in the Arlington Immigration Court.

A reasonable observer, aware of all the facts and aware that Col Spath was secretly negotiating for an appointment from Attorney General Sessions, could also readily conclude that Col Spath was acting as a suppliant. As an immigration judge, Col Spath "shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe[.]" 10 U.S.C. § 1101(b)(4). Attorney

General Sessions chuckled during his remarks as he quoted that very provision to Col Spath and his fellow immigration judges on September 10, 2018.[20] Given the immigration policies being pursued by the present Attorney General, a reasonable observer, knowing all the facts, could readily conclude that Col Spath's injudicious behavior was, in fact, a kind of audition for a prospective employer whom he suspected would value his ribald invocations of "fake news," his contempt for the press and the American Bar Association, and his willingness to take on the "defense community;" the same amorphous group that Attorney General Sessions presumably warned future immigration judges would try to be like "water through an earthen dam" of the immigration laws.

Indeed, a reasonable observer, aware of all the facts, would rightfully suspect that Col Spath's secrecy regarding his career plans, in violation of settled rules regarding post-judicial employment specifically and the regulatory requirements governing military commissions more generally, evidenced a consciousness of guilt. *Cf. United States v. Clark*, 184 F.3d 858, 869 (D.C. Cir. 1999). Had Col Spath disclosed his intent to retire as a military commission judge and pursue employment as an immigration judge, a reasonable observer today

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[20] *Available at* https://www.bing.com/videos/search?q=attorney+general+remarks+to+largest+class+of+immigration+judges at 4:30-41.

would not be justified in suspecting the worst. Had Col Spath acted like the district judge in the *Mikhel* case, Petitioner and the public alike would have confidence that any taint his career ambitions may have put on his rulings over the past two years would have been cleansed by the ordinary checks and balances of the adversarial process. Instead, a reasonable observer, aware of all the facts known today, would have to conclude, based if nothing else on his secrecy, that Col Spath's reckless and often bizarre behavior was at least influenced by the secret employment negotiations he was undertaking with the Justice Department.

No reasonable observer could view Col Spath's conduct, knowing all the facts, and see a neutral judge. Whether Col Spath was privately motivated by his desire to move on to greener employment pastures or some other factors is irrelevant. Col Spath appeared biased and the most obvious explanation for that bias, beginning with the promulgation of his "aggressive schedule" on April 11, 2017, through his ordering the arrest of BGen Baker, through his abatement of proceedings in February 2018, was his private professional interests. That appearance is fatal as a matter of judicial ethics, military law, and due process. "An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice

are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams*, 136 S. Ct. 1909-10.

The precise reasons the CMCR refused to grant Petitioner any remedy for Col Spath's behavior are difficult to discern from its sparse two-page order. It appears, at least in part, that the CMCR did not credit Petitioner's central claim: that Col Spath had, in fact, been seeking a job with the Justice Department whilst presiding over Petitioner's case. Counsel for the prosecution dismissed this contention as "conclusory," and when reciting the facts relating to Col Spath, the CMCR merely takes judicial notice of the fact that he is "scheduled to retire from the Air Force on November 1, 2018," making no mention of his current employment as an immigration judge. The CMCR erroneously appeared to believe that because the facts surrounding Col Spath only came to light after the interlocutory appeal was already pending, there was "no factual record or findings of the military judge at the trial level to support [Petitioner's] allegations for the Court to review."

As an initial matter, this is not true. Even if Col Spath's precise job plans were uncertain at the time the CMCR ruled, the fact that Col Spath concealed his intention to retire would establish a prima facie claim of judicial misconduct. Col Spath failed to "make[] known a future retirement or resignation date" at a time when that fact would have prompted any reasonable observer to inquire into his

long-term career intentions as he unlawfully imprisoned and threatened to imprison lawyers he believed to be impeding his "aggressive schedule." Those job plans are now a matter of public record, just as subject to judicial notice as Col Spath's imminent retirement from the Air Force.

Furthermore, the fact that Petitioner's case was on appeal when the facts came to light is irrelevant. A litigant has an obligation, on pain of waiver, to raise judicial disqualification issues "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *Apple v. Jewish Hosp. and Medical Ctr.*, 829 F.2d 326, 333 (2d Cir.1987).

As this Court held in *Microsoft*, pertinent disqualification questions not only can be, but necessarily must be, addressed for the first time on appeal where, as here, the judicial officer in question "ensured that the full extent of his actions would not be revealed until this case was on appeal." *United States v. Microsoft*, 253 F.3d 34, 108 (D.C. Cir. 2001); *see also Ligon v. City of New York*, 736 F.3d 118, 124 (2d Cir. 2013) (disqualifying a district judge when the bases for disqualification could be ascertained from the judge's conduct on the record and uncontested media reports). As in *Microsoft*, Col Spath concealed the facts giving rise to his disqualification, those facts only came to light on appeal, and those facts are no longer in reasonable dispute: Col Spath concealed his intent to retire; he concealed his active pursuit of employment with the Justice Department; and he

failed to recuse himself despite the routine appearance of Justice Department attorneys before him, the Justice Department's active role in prosecuting Petitioner's case, and Attorney General Sessions' keen interest in the military commission prosecutions generally, and Petitioner's case specifically.

C. The only adequate remedy to cure the structural error in this case is to vacate the proceedings below.

Col Spath's misconduct in this case violated clearly established rules governing judicial conduct, the Secretary of Defense's clear rules governing judicial disqualification in military commissions, and Petitioner's clear constitutional right to an unbiased judge. Given Col Spath's actual and demonstrated bias on the record, given his deliberate concealment of facts that could have allowed this issue to be aired far earlier, and most crucially given the prejudice that resulted from Col Spath's misconduct, the only adequate remedy is the vacatur of Petitioner's current military commission prosecution (in effect, dismissing the current iteration of this prosecution without prejudice).

Vacatur of proceedings has been ordered to remedy far less egregious judicial misconduct than what is now before this Court. In *Williams*, 136 S. Ct. at 1909, the Supreme Court vacated an appellate court decision due to the disqualification of a single member of the panel to have decided the case. In *Liljeberg*, 486 U.S. at 862, the Supreme Court upheld as "well supported" the

Circuit's conclusion that only a new trial could remedy a district judge's *inadvertent* breach of the conflict of interest rules necessitating his disqualification. In *United States v. Donato*, 99 F.3d 426, 438 (D.C. Cir. 1996), this Court reversed a conviction where a judge's "comments, combined with the near-constant criticism of the defendant's counsel, raise[ed] in us a serious doubt as to whether this defendant received a fair trial." In *Mohammad*, 866 F.3d at 477, this Court vacated appellate proceedings in which a member of the CMCR was disqualified even though it was probable that a "reasonable person would disregard [the judge's] violation of Rule 902(b)(3)." And in *Scott*, 559 A.2d at 756, the D.C. Court of Appeals vacated an attempted murder conviction because a judge who secretly was pursuing employment in the Justice Department at the very same time that the Justice Department was prosecuting the defendant "require[d] a new trial in order to assure the continued public confidence in the integrity of the judiciary."

Here, the vacatur of Petitioner's current military commission prosecution is the only way to remove the taint of misconduct and cure the structural error of Col Spath's actual and apparent bias during critical stages of this capital case. Unlike *Microsoft*, where the influence of the district judge's disqualifying conduct pertained to and therefore could be remedied by the vacatur of his remedial orders only, the taint of Col Spath's disqualifying conduct was pervasive and irreparably prejudicial. Because Col Spath never announced his intention to retire and seek

employment with the Justice Employment, there is no way to date with certainty when he decided to parlay his work as a military commission judge into his current position. That uncertainty is precisely why the Supreme Court held disqualifying bias of the kind at issue here was structural error requiring vacatur. *Williams*, 136 S. Ct. at 1909.

But even if this Court were to limit the tainted period back to April 11, 2017, when Col Spath issued his "aggressive schedule," his rulings since that time have caused irreparable harm that can only be remedied if Petitioner's case is given a fresh start. Foremost, Col Spath's conduct on the bench during this period provoked the collapse of Petitioner's capital defense team. Mr. Kammen had served as Petitioner's learned counsel since 2007. His involuntary severance from Petitioner's trial defense team and his absence for the past year is structural error that is irreparable. *See United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

The only adequate remedy, therefore, is to vacate the proceedings below. Doing so will not result in Petitioner's release from custody. It will not even prevent the government from prosecuting Petitioner, either by charging him a third time before a military commission or proceeding on the indictment already pending in the Southern District of New York. Instead, it will ensure a clean slate and restore the public's confidence that even in the prosecution of our nation's enemies, the judiciary's commitment to neutrality is non-negotiable.

D. In the alternative, this Court should vacate all of Col Spath's orders tainted by the period of misconduct.

In the alternative, this Court should order the vacatur of all orders entered by Col Spath from the time he began his pursuit of post-judicial employment with the Justice Department. At present, that precise date is unknown. However, such an order should encompass all orders presently under review by the CMCR. For the reasons stated above, the current appeal before the CMCR is inseparable from the misconduct at issue. Vacating the orders underlying that appeal will moot the prosecution's interlocutory appeal and return this case to the military commission in Guantanamo. At that time, the current military commission judge will have the opportunity to undertake an appropriate evidentiary hearing to ascertain the extent of the rulings that must be vacated and rule afresh on any issues that remain outstanding as a result.

E. At a minimum, this Court must direct the CMCR to conduct a proper inquiry into Col Spath's misconduct.

Finally, and at a minimum, this Court should vacate the CMCR's denial of Petitioner's motion with instructions to conduct an appropriate evidentiary hearing. Because questions of recusal must be addressed "at the earliest possible moment," *Apple*, 829 F.2d at 333, appellate courts sometimes must order additional factfinding when the record below is insufficiently developed. *See*, *e.g.*, *Gonzalez v. Pliler*, 341 F.3d 897 (9th Cir. 2003) ("[u]nless the court is able to determine

without a hearing that the allegations are without credibility or that the allegations if true would not warrant a new trial, an evidentiary hearing must be held."); *Easley v. University of Michigan Bd. of Regents*, 853 F.2d 1351, 1358 (6th Cir. 1988) (ordering an evidentiary hearing for the purposes of enlarging the record regarding the nature of the district judge's affiliations and associations with the law school and "whether, because of such associations, Judge Feikens' impartiality in this matter might 'reasonably be questioned.'"). The question of Col Spath's disqualification goes squarely to the continuing validity of the orders the CMCR is presently reviewing. If those orders are invalid, the CMCR not only risks wasting judicial resources by deciding issues that are moot, it risks permanently prejudicing Petitioner's ability to litigate those issues before a neutral trial judge.

Though the CMCR claimed in its order that it was not in a position to ascertain additional facts, this contention is belied by the CMCR's own conduct during this appeal. In response to a motion to dismiss for lack of subject-matter jurisdiction, the CMCR issued an order specifically directing the filing of declarations by Petitioner's counsel, counsel for the prosecution, and Col Spath to establish additional extra-record facts. CMCR Case No. 18-002, Order (March 22, 2018). Just as the CMCR deemed those facts necessary to evaluating whether the prosecution's interlocutory appeal was properly before it, it can readily ascertain additional facts relating to the validity of the orders under review.

Very few relevant facts remain presently unknown. The only continuing uncertainties are what date Col Spath decided to retire, what date he began to pursue employment in the Justice Department, and what meetings and communications he undertook to achieve that goal. All of those facts are readily ascertainable from a declaration from Col Spath.

To the extent other facts remain relevant or questions of credibility arise, the CMCR is also empowered to order a hearing – known in military law as a *DuBay* hearing – where any necessary findings of fact can be made. *See*, *e.g.*, *United States v*. *Quintanilla*, 56 M.J. 37, 81 (C.A.A.F. 2001) (ordering a *DuBay* hearing on a question of judicial disqualification). The CMCR has already ordered such a hearing in another case, where the validity of a pending appeal was at issue. *United States v*. *Qosi*, CMCR Case No. 17-001, Order (June 19, 2017).

If the CMCR genuinely lacks the "factual record and findings of the military judge at the trial level to support [Petitioner's] allegations for this Court to review," it should stay further proceedings on the prosecution's interlocutory appeal and develop the necessary factual record. That is the only way that it can fulfill its responsibility to ensure that the "shadow [is] dispelled at the earliest possible opportunity by an authoritative judgment either upholding or rejecting the challenge." *Union Carbide*, 782 F.2d at 712.

III. ISSUANCE OF THE WRIT IS IN THE PUBLIC INTEREST.

This Court has previously recognized that the issuance of mandamus is appropriate in cases of actual or apparent bias because confidence in the integrity of the judicial process "is irreparably dampened once 'a case is allowed to proceed before a judge who appears to be tainted.'" *Al-Nashiri*, 791 F.3d at 80 (citing *In re Sch. Asbestos Litig.*, 977 F. 2d 764, 776 (3rd Cir. 1992)). Indeed, it is the "third *Liljeberg* factor—the risk of undermining the public's confidence in the judicial system—that is most affected by the military judge's refusal to recused [himself] in this case." *United States v. McIlwain*, 66 M.J. 312, 315 (C.A.A.F. 2008).

"[A] military judge is charged with making a number of decisions, any one of which could affect the members' decision as to guilt or innocence, or with regard to the sentence." *McIlwain*, 66 M.J. at 315 (citing *Quintanilla*, 56 M.J. at 41). Here, in addition to the rulings the prosecution seeks to have ratified, Col Spath heard testimony from his fellow employees at the Justice Department and made numerous evidentiary rulings based upon that testimony in the months Petitioner's case rushed forward without learned counsel. "Every time the military judge made a decision," he exercised discretion—a discretion that was biased in fact or in appearance. *Ibid.* "This could not help but to produce a corrosive impact on public confidence in the military justice system." *Ibid.*; *see also United States v. Vargas*, 2018 CCA LEXIS 137 (A.F. Ct. Crim. App. 2018) (dismissing court-

martial without prejudice where military judge's failure to recuse "could cast doubt in the mind of the public on the fairness of other rulings by the military judge[.]").

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *Jenkins v. Sterlacci*, 849 F.2d 627, 631 (D.C. Cir. 1988) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). Petitioner submits Col Spath was biased against him "in fact or apparently." *Al-Nashiri*, 791 F.3d at 79. This Court must "put a stop to it, via mandamus[.]" *Ibid*. ("[I]f prejudice exist[ed], it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.") (citing *Cobell*, 334 F.3d at 1139).

CONCLUSION

For the foregoing reasons, Petitioner respectfully petitions this Court to issue the writ of mandamus ordering the relief requested.

Respectfully submitted,

Dated: October 4, 2018

/s/ Michel Paradis
Michel Paradis
CAPT Brian Mizer, USN, JAGC
LT Alaric Piette, USN, JAGC
U.S. Department of Defense
Military Commission Defense Organization
1620 Defense Pentagon
Washington, DC 20301

Counsel for Petitioner

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitations imposed by Fed. R. App. P. 32(a)(7)(B) as augmented by Petitioner's motion to exceed the type-volume limitations, because:

[X] this brief contains 12,659 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

[ ] this brief uses a monospaced typeface and contains ____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font size and Times New Roman type style; *or*

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Dated: October 4, 2018

Respectfully submitted,

/s/ Michel Paradis
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2018, I caused copies of this Petition for Writ of Mandamus and Prohibition and its attachments to be served on the following counsel via the following email addresses at their request:

Joseph Palmer joseph.palmer@usdoj.gov

Danielle Tarin danielle.tarin@usdoj.gov

The only exception to the foregoing is Attachment E, the Declaration of Marc Dolphin (August 4, 2017), which due to its classification as SECRET was delivered to the Court Security Officer for filing in this Court and service on all necessary parties pursuant to the Amended Protective Order for Habeas Cases Involving Top Secret/Sensitive Compartmented Information and Procedures for Counsel Access to Detainees at the United States Naval Station in Guantanamo Bay, Cuba, in Habeas Cases Involving Top Secret/Sensitive Compartmented Information, Case Nos. 08-MC-442-TFH (Dkt. Nos. 1481 and 1496) & 08-cv-01207-RJR (Dkt. Nos. 79 & 80) (D.D.C. 9 January 2009).

Dated: October 4, 2018

/s/ Michel Paradis
Michel Paradis (D.C. Bar #499690)
U.S. Department of Defense
Military Commission Defense Organization
1620 Defense Pentagon
Washington, DC 20301

Counsel for Petitioner

ATTACHMENTS

A. CMCR Case No. 18-002, Order (September 28, 2018)

B. Government Response to Request for Discovery (September 5, 2018)

C. Brig. Gen. John Baker, USMC, *Improper Monitoring of Attorney-Client Meetings* (June 17, 2017)

D. *United States v. Al-Nashiri*, Transcript of Proceedings (excerpts)

E. Declaration of Marc Dolphin (August 4, 2017) (SECRET)

[ARGUMENT NOT YET SCHEDULED]
UNITED STATES COURT OF APPEALS
***for the* District of Columbia Circuit**

In re: ABD AL-RAHIM HUSSEIN AL-NASHIRI,	No. _____ **ATTACHMENTS TO PETITIONER'S PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION** Dated: October 4, 2018

Michel Paradis
CAPT Brian Mizer, USN, JAGC
LT Alaric Piette, USN, JAGC
U.S. Department of Defense
Military Commission Defense Organization
1620 Defense Pentagon
Washington, DC 20301

Counsel for Petitioner

ATTACHMENT

A

UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

United States,	)	ORDER
	)	
Appellant	)	DISQUALIFICATION OF MILITARY JUDGE AND DISCOVERY
	)	
v.	)	
	)	
Abd Al-Rahim Hussayn Muhammad Al-Nashiri,	)	September 28, 2018
	)	
Appellee	)	CMCR Case No. 18-002

BEFORE:

BURTON, PRESIDING Judge
SILLIMAN, POLLARD Judges

On September 13, 2018, appellee moved this Court as follows: (1) to vacate the rulings of Judge Vance Spath, the military judge who held pretrial hearings for several years in Al-Nashiri's case; and (2) to compel discovery relating to disqualification of Judge Spath and his successor military judge. Appellee Mot. 1 (Sept. 13, 2018).

Appellee claimed that Colonel Spath negotiated for employment with the Department of Justice (DOJ) while presiding over Al-Nashiri's case. *Id*. at 2. Appellee further alleges that the DOJ has employed Judge Spath as an administrative judge (AJ) at the Executive Office for Immigration Review (EOIR). *Id*. at 4. Appellee argues that because of this Judge Spath has a conflict of interest and should have disqualified himself.

On July 18, 2018, appellee filed a discovery request seeking information about Colonel Spath's post-active duty employment discussions with the DOJ. *Id*. at App. A. On August 6, 2018, the Chief Trial Judge of the Military Commissions replaced Colonel Spath as the military judge in Al-Nashiri's case with Colonel Shelly W. Schools. *Id*. at App. C. On August 13, 2018, appellee filed another discovery request seeking information about the relationship with and communications between Judge Spath and Judge Schools. *Id*. On September 5, 2018, appellant declined to provide discovery. *Id*. at App. B.

Thus, appellee contends, the judge's orders for some undefined period should be vacated and that the government should be ordered to produce the discovery requested.

Appellant urges our Court not to grant appellee's motion "because there is no underlying ruling or order from the Commission below. Additionally, ruling on these issues would inherently require this Court to make extensive findings of fact because there is no record for this Court to examine." Appellant Resp. 11 (Sept. 18, 2018). Appellant also challenges the premise of appellee's argument that there is automatic disqualification when an Executive Branch judge seeks employment as a judge in another Executive Department. *Id*. at 13-16. Appellant further argues that the participation of a DOJ attorney in the prosecution of Appellee's case is irrelevant because the Chief Prosecutor, a general officer appointed by the Secretary of Defense, is responsible for the supervision of all attorneys who prosecute military commission cases, including attorneys detailed from the DOJ. *Id*. at 21 (citing 10 U.S.C. § 948k(a) and (d)(1); Reg. for Trial by Military Commission, Ch. 8). Thus, according to appellant, DOD, not DOJ, is the agency responsible for the prosecution of Al-Nashiri. *Id*. at 19-20.

In a verbal ruling on February 16, 2018, Judge Spath abated Al-Nashiri's case indefinitely. Tr. 12,298-99. Appellee does not indicate when Judge Spath allegedly negotiated with DOJ for employment. We take judicial notice that Judge Spath is scheduled to retire from the Air Force on November 1, 2018.[1] None of appellee's contentions were raised before the military commission because the case has been abated. Thus, we have no factual record or findings of the military judge at the trial level to support appellee's allegations for this Court to review.

Upon consideration of appellee's motion, appellant's response, appellee's reply, and the documents submitted, appellee has not shown a "clear and indisputable" right to relief. *Cheney v. U.S. District Court*, 542 U.S. 367, 381 (2004) (internal quotation marks omitted). Appellee has not shown that "a reasonable and informed observer would question the judge's impartiality." *SEC v. Loving Spirit Foundation, Inc*., 392 F.3d 486, 493 (D.C. Cir. 2004) (internal quotation marks omitted). It is

ORDERED that appellee's motion is **DENIED**.

FOR THE COURT:

Mark Harvey
Clerk of Court, U.S. Court of Military Commission Review

[1] Carol Rosenberg, "Frustrated USS Cole case judge retiring from military service," Miami Herald (July 5, 2018), https://www.mcclatchydc.com/latest-news/article214354414.html.

ATTACHMENT

B

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	**Government Response to Defense Request for Discovery** 5 September 2018

1. For the reasons below, the Government denies the Defense request of 13 August 2018 (copy enclosed) to preserve and to discover information regarding the supervisory or other relationship between the former military judge and the prospective detailed military judge announced on 6 August 2018.

2. Neither the existence of a senior-subordinate relationship by military rank or position or unit of assignment, nor a direct supervisory responsibility, establish the existence of the appearance of a conflict of interest in the impartial and unbiased execution of judicial responsibilities, even where a subordinate military judge must rule on controversial matters that may implicate his or her former superiors. *See United States v. Norfleet*, 53 M.J. 262 (2000).*

3. When the Commission re-opens for trial conduct, the detailed Military Judge will be available to the Defense at which time it may request to *voir dire* the military judge, seek the items identified in paragraph 3 of the its discovery request and thereafter challenge for recusal. Accordingly, unless ordered by the Commission, the Government will not seek to preserve nor disclose the information and documents identified in paragraph 3 of the Defense request.

John B. Wells
for
Mark A. Miller
Trial Counsel

* *See also* the Government's denial response to the Defense discovery request of 18 July 2018 suggesting, without reasonable proof, a conflict of interest in the former presiding Military Judge's post-retirement employment (which is incorrectly identified in this subject discovery request as a Defense discovery request dated 10 August 2018).

DEPARTMENT OF DEFENSE
MILITARY COMMISSIONS DEFENSE ORGANIZATION
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

13 Aug 2018

MEMORANDUM FOR Trial Counsel

From: LT Alaric Piette, JAGC, USN, Detailed Defense Counsel

SUBJECT: DEFENSE REQUEST FOR DISCOVERY OF AND PRESERVATION OF MATERIALS AND COMMUNICATIONS REGARDING THE SUPERVISION AND CONTACT BETWEEN COLONEL VANCE SPATH AND COLONEL SHELLY SCHOOLS ICO *UNITED STATES V. AL-NASHIRI*

1. Mr. Al-Nashiri is currently facing charges resulting from his alleged involvement in al-Qaeda and its alleged attack on the USS COLE (DDG-67). The Convening Authority for Military Commissions referred the charges capitally, and Mr. Al-Nashiri faces a potential death sentence if convicted of the alleged offenses. Pursuant to 10 U.S.C. § 949j, Rules for Military Commission 701(c)(1) and 701(e)(l)(C), and the Due Process Clause of the United States Constitution, Mr. Al-Nashiri, through counsel, requests the government furnish all documents and/or information and/or communications (in hardcopy or digital) in its possession, or known or discoverable by the government, which are material to the preparation of Mr. Al-Nashiri's defense. This request (and all future and past requests) include a request that all material currently (or originally) in digital form be produced in the raw digital form without alteration to the content or metadata.

2. On 6 August 2018, Colonel James Pohl, USA, Chief Trial Judge of the Military Commissions, detailed Colonel Shelly W. Schools, USAF, as the new military judge in this case. Colonel Schools served as a military judge for three of the last four years, and she was subject to Colonel Spath's rating and supervision during the time period in which Colonel Spath was both the Chief Trial Judge of the Air Force and likely suffering from a conflict of interest in this case (see *Al-Nashiri* discovery request dated 10 August 2018). If so, Colonel Schools may be laboring herself under an apparent or actual conflict, especially if asked to find that her direct supervisor and rater acted improperly.

3. In light of the facts stated above, the defense requests the following be preserved and produced as discovery:

a) All material pertaining to the supervision of Colonel Schools by Colonel Spath;
b) All materials regarding any and all ratings and/or endorsements and/or recommendations of Colonel Schools by Colonel Spath including the documents themselves;
c) All communications between Colonel Schools and Colonel Spath of a supervisory and/or advisory character;
d) All communications between Colonel Schools and Colonel Spath regarding the Military Commissions and/or this case;
e) All materials related to Colonel Spath's involvement in Colonel Schools' selection to serve on the Office of Military Commissions Trial Judiciary;
f) All materials or communications regarding any knowledge Colonel Schools had of Colonel Spath's post-retirement employment search; and

g) Any and all materials, records, and/or communications regarding Colonel Schools' opinions, perceptions, commentary, etc., of the current abatement in this case.

4. Thank you for your prompt attention to this matter. If you have any questions about this request or would like to discuss it further, please feel free to contact me.

Respectfully submitted,

/s/ Alaric Piette
ALARIC PIETTE
LT, JAGC, USN
Detailed Defense Counsel

The above discovery request was delivered to trial counsel via email on 13 August 2018.

ATTACHMENT C

DEPARTMENT OF DEFENSE
CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

14 June 2017

MEMORANDUM FOR CHIEF PROSECUTOR FOR MILITARY COMMISSIONS
COMMANDER, JOINT TASK FORCE GUANTANAMO

SUBJECT: Improper Monitoring of Attorney-Client Meetings

This memorandum is to advise you that due to recently received information I have recommended to Military Commissions Defense Organization (MCDO) defense counsel, to include Learned Counsel, that they not conduct any attorney-client meetings at Guantanamo Bay, Cuba (GTMO) until they know with certainty that improper monitoring of such meetings is not occurring. On 30 November 2016, the Military Judge in *United States v. Khalid Shaikh Mohammed et al.* ordered that intrusive monitoring (i.e., listening and audio and video recording) of attorney-client meetings be formally prohibited in the standard operating procedures for Joint Task Force Guantanamo (JTF-GTMO) and the Joint Detention Group (JDG). The Military Judge further ordered that defense counsel must be advised in advance if a meeting with an accused is to be monitored. The Military Judge issued these orders because he recognized the legitimate concerns of defense attorneys that attorney-client meetings at GTMO were being improperly monitored by government personnel.

At present, I am not confident that the prohibition on improper monitoring of attorney-client meetings at GTMO as ordered by the commission is being followed. My loss of confidence extends to all potential attorney-client meeting locations at GTMO. Consequently, I have found it necessary as part of my supervisory responsibilities under 9-1a.2 and 9-1a.9 of the Regulation for Trial by Military Commission to make the above-described recommendation to all MCDO defense counsel. Whether, and to what extent, defense teams follow this advice is up to the individual defense team.

If you wish to discuss this matter I can be reached at 571-256-9780 or john.baker@osd.mil.

J. G. BAKER
Brigadier General, U.S. Marine Corps
Chief Defense Counsel for
Military Commissions

cc:
DGC (P&HP)
CA
All Defense Cousnel

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. **KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 133QQ** **RULING** **Emergency Defense Motion** to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings **30 November 2016**

1. During a session of the Commission on 28 January 2013, audio and video transmissions between the Expeditionary Legal Center Courtroom (ELC Courtroom) (a.k.a Courtroom #2) and the public viewing areas[1] were cut[2] after one of the Defense Counsel referenced the title of an unclassified motion.[3] This closure of the proceeding was not ordered or approved by the Military Judge or the Court Information Security Officer (CISO.)[4] The hearing was suspended until ELC Courtroom personnel could reset video and audio transmissions of the hearing.

[1] The public viewing areas include the public seating in the ELC Courtroom galley and closed circuit TV sites authorized by the Commission. *See*: AE 007 Government's Motion For Public Access To Open Proceedings of this Military Commission Via Closed-Circuit Television Transmission to Remote Locations, filed 19 April 2012, *et seq.*; AE 022, Defense Motion To Grant Public Access to Commission Designated Broadcast Sites, filed 4 May 2012, *et seq.*; AE 033, Government's Motion For Public Access To Open Proceedings of this Military Commission Via Closed-Circuit Television Transmission to Remote Locations, filed 11 May 2012, *et seq.*; AE 068, Amended Order, Public Access To Open Proceedings of this Military Commission Via Closed-Circuit Television Transmission to Remote Locations, dated 24 August 2012.

[2] The physical manifestation of halting the transmission is the triggering of a red light on the bench thus later references in argument and pleadings to a "red light" is a cryptonym for a cessation of the public transmission.

[3] Unofficial/Unauthenticated Transcript of *the Khalid Shaikh Mohammed et al.* (2) Hearing Dated 10/19/2012 *(sic)* from 1:31 PM to 2:46 PM at p. 1445. *NOTE*: the correct date of the session is 01/28/2013 from 1:31 PM to 2:46 PM.

[4] At the session of the Commission the next day the military judge stated on the record:

> Yesterday during the close of the hearing, or close to the close of the public hearing, the red light went on and the feed was discontinued to the general public. The purpose of the 40-second delay, which for those who are watching on television, is designed to prevent spillage of classified information. That is its sole purpose. In accordance with that, there are various guidance given to the court security officer of when that light should go on or not. However, only the judge has authority to close the courtroom accordance with the Rule For Military Commission 806.

2. **Procedural Background**:

a. On 31 January 2013, the Defense filed a motion[5] raising concerns that their attorney-client oral communications were being monitored both in the ELC Courtroom, and in client interview rooms located at the detention center (identified as "ECHO II.") In support, the motion offered a number of vignettes leading to the Defense supposition there was "credible circumstantial evidence that their privileged conversations are being monitored and recorded by the Government, to include the Joint Task Force (JTF) and Joint Detention Group (JDG) at Guantanamo; and/or other government agencies (OGA), to include the Central Intelligence Agency (CIA)." The Defense contended the Fifth, Sixth, and Eighth Amendments to the U.S. Constitution, Section 949s of the Military Commissions Act of 2009, and Common Article 3 of the 1949 Geneva Conventions "entitled the Accused to representation by competent counsel, and placed upon the Government the burden of demonstrating why "they are not entitled to such protections during these proceedings." Asserting the Accused, if detained in a "civilian facility" and awaiting trial on capital charges could not "legally" be subjected to monitoring, and there is no legitimate government interest served by monitoring attorney-client communications, the Accused sought, as relief, a Commission order:

> So when this happens, the explanation is given to me, and I decide whether or not it is appropriate that that particular information should have been held in a closed session. It is not the court security officer's decision or anybody else's whether a particular session or part of a session is closed. Again, the 40-second delay is a prophylactic measure to avoid a more difficult unringing of the bell if improper information is disseminated.
>
> In this particular case, Mr. Nevin's comment that resulted in the interruption I find is not a valid basis for the court to have been closed. Accordingly, I will summarize what Mr. Nevin said in open court that was basically the part that the general public missed. Basically he simply reiterated the caption in a particular appellate exhibit that is unclassified, specifically 080 Joint Defense Motion to Preserve Evidence of Any Existing Detention Facility. And again, closure of the court is not the decision of anybody but the military judge.

See Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 1/29/2013 from 9:09 AM to 10:08 AM.

[5] AE 133 (KSM et al), Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings, filed 31 January 2013. *NOTE*: this motion was originally filed as a classified filing but, after review, is now unclassified; *see* http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE133(KSM%20et%20al)).pdf.

> protecting and ensuring their ability to exercise their rights to communicate and consult in private with their respective counsel, their other defense team members and persons necessary to their legal representation; and specifically prohibiting the Government and all others operating with its knowledge, irrespective of whether it is with the Government's direction or control; and/or any individuals or agencies with official access to Guantanamo Bay Naval Base, Guantanamo Bay, Cuba, from electronically monitoring and/or recording any of the Accused's communications with defense personnel at any time, to include during legal visits and Commission proceedings, and to abate Commission proceedings until such time as this matter is properly resolved.

b. On 6 February 2013, Mr. bin 'Attash filed a supplement[6] to the original Defense motion and, in addition to reiterating the relief sought earlier, expanded Defense concerns to add suspected monitoring in the holding cells adjacent to the ELC Courtroom.

c. On 6 February 2013, the Defense filed a motion[7] to permit them to listen to the official court reporter audio recordings of the proceedings to ascertain whether the court reporter audio feeds provided a capability to overhear in-court conversations between Counsel and the Accused. The Government response[8] imposed no objection to the Defense request but cautioned there was no segregation between the recorded tracks of the various courtroom microphones, thereby permitting any Counsel, if there were in fact any spillage, to hear whatever might have been captured from conversations of the other parties. The Commission granted the motion to review the audio recordings and reiterated the concerns of the Government.[9]

d. The response[10] of the Government to the initial Defense motion (AE 133), filed on 7 February 2013, asserted:

> No entity of the United States Government is listening, monitoring or recording communications between the five Accused and their counsel at any location.

[6] AE 133 (WBA Sup), Walid bin 'Attash's Supplement to Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings, filed 6 February 2013.
[7] AE 133E, Joint Motion to Review Court reporter Audio Recordings, filed 6 February 2013.
[8] AE 133I, Government Response to Joint Motion to Review Court reporter Audio Recordings, filed 7 February 2013.
[9] AE 133NN, Order, Joint Defense Motion to Review Court Reporter Audio Recordings, dated 23 May 2014.
[10] AE 133A, Government's Response to Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings, filed 7 February 2013.

And later:

> The Prosecution states unequivocally that the evidence presented in regard to AE 133 and as a matter of fact, that Counsel's privileged communications with the Accused are not being listened to, monitored or recorded by the United States Government.

The Government asked the Commission to deny the Defense motions as they failed to offer any credible evidence to support their contentions.

e. By way of reply[11] the Defense reaffirmed their belief that actions of the Government infringed upon the Accused's right to "effective assistance of counsel." The Defense also expanded their requested relief, seeking (1) a meeting location "free of any microphones, particularly any which may be lined to recording devices;" (2) a specific prohibition on the "flow of the unfiltered audio feed to the OCA or anyone else;" and (3) a requirement that the Government "prove that any evidence it proposes to use is derived from a legitimate source wholly independent of the information disclosed in the recorded conversations."

3. **Oral Argument**. The Defense requested argument in the original motion and the supplement thereto,[12] a request reiterated by the Government in their response.[13] A decision to grant oral argument on a written motion is within the sole discretion of the Military Judge.[14] Throughout the course of these proceedings both parties have advanced their respective positons, both directly[15]

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[11] AE 133Q (KSM et al), Defense Reply to AE 133A Government's Response to Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings, filed 12 February 2013 (classified). An unclassified, redacted, copy of the pleading is found at http://www mc mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE133Q(KSM%20et%20al)).pdf.

[12] AE 133 (KSM et al) and AE 133 (WBA Sup).

[13] AE 133A.

[14] Military Commissions Trial Judiciary Rule of Court 3.5 m (1 September 2016).

[15] Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 10/19/2012 (sic) from 1:31 PM to 2:46 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 1/29/2013 from 9:09 AM to 10:08 AM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 1/31/2013 from 9:01 AM to 9:22 AM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 1/31/2013 from 9:40 AM to 10:19 AM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 1/31/2013 from 10:40 AM to 11:25 AM; Unofficial/Unauthenticated Transcript of *the Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/11/2013 from 9:02 AM to 10:12 AM; Unofficial/Unauthenticated Transcript of *the Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 9:02 AM to 10:07 AM; Unofficial/Unauthenticated Transcript of

and indirectly,[16] a number of times. Further oral argument is not necessary for the Commission's consideration of the issue before it. The request for [further] oral argument is **DENIED**.

4. **Findings of Fact**:

a. In rendering this Ruling the Commission considered the pleadings of all parties; the exhibits[17] submitted to the Commission for consideration, and the declarations,[18] depositions, or stipulations of expected testimony,[19] or testimony from pertinent witnesses.[20]

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the *Khalid Shaikh Mohammed et al*. (2) Hearing Dated 2/12/2013 from 10:25 AM to 11:42 AM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 1:00 PM to 2:37 PM; Unofficial/Unauthenticated Transcript of *the Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 2:47 PM to 5:19 PM; Unofficial/Unauthenticated Transcript of *the Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/13/2013 from 10:28 AM to 12:02 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/13/2013 from 1:02 PM to 2:36 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/14/2013 from 4:04 PM to 5:43 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al*. (2) Motions Hearing Dated 8/22/2013 from 12:00 PM to 12:43 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al*. (2) Motions Hearing Dated 8/22/2013 from 2:18 PM to 4:28 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Motions Hearing Dated 12/18/2013 from 9:03 AM to 10:32 AM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al* (2) Hearing Dated 5/31/2016 from 3:28 PM to 4:17 PM; and sessions, closed pursuant to Military Commission Rule of Evidence 505 (h) to address classified issues, on 28 January 2013; 20 June 2103; and 16 December 2013.

[16] e.g. *See*: AE 284 (WBA), Defense Motion to Compel the Production of Information Related to the Monitoring and/or Collection of Attorney-Client Privileged Information, filed 26 March 2014; AE 292, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, filed 14 April 2014; and AE 367 (MAH), Motion to Dismiss Because National Security Considerations Make a Fair Trial Impossible, filed 22 July 2015. *See also*: Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Motions Hearing Dated 6/16/2014 from 9:05 AM to 11:05 AM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al*. (2) Motions Hearing Dated 8/14/2014 from 11:18 AM to 1:00 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al* (2) Hearing Dated 2/11/2015 from 10:00 AM to 11:15 AM.

[17] **Exhibits**:
Attachment B, AE 133 (WBA Sup), MEMORANDUM FOR Commander, JTF-Guantanamo Joint Detention Group, dated 19 May 2008, SUBJECT: Military Commissions Counsel Visitation of Detainees Practices Guide (Buzby Memo);
Attachment C, AE 133 (WBA Sup), MEMORANDUM, dated 27 December 2011, SUBJECT: Order Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions;
AE 133T (AAA), ELC Courtroom Wiring Schematic;
AE 133U (KSM), p. 1, Email [redacted] Capt Thomas J. Welsh, dated October 12, 2012, 12:56 PM; Subject: Re Question Regarding Monitoring Attorney Client Meetings;
AE 133U (KSM), pp. 2-8, Email from Paul W. Rester [redacted] dated August 05, 2008, 12:22; Subject: Re U.S. May Have Taped Visits To Detainees;
AE 133U (KSM), p. 9-11, Email [redacted] CAPT Patrick McCarthy, dated May 08, 2008, 2:45; Subject: eavesdropping article;
AE 133U (KSM), pp. 12-14,Email from CAPT Patrick Rabun [redacted] dated March 08, 2012, 6:37 AM; Subject: FW HOT (unclassified);
AE 133U (KSM), p. 15, Email from CAPT Thomas J. Welsh to COL John Bogden, dated February 05, 2013, 1:33 PM; Subject: JDG Order On Monitoring;
AE 133U (KSM), pp. 16-17, Email from CAPT Thomas J. Welsh to COL John Bogden, dated February 08, 2013, 9:38; Subject: FW Request for Interview;
AE 133U (KSM), p. 18, Email from COL John Bogden to CAPT Thomas J. Walsh, dated February 04, 2013, 9:24 AM; Subject: RE Declarations Regarding Issues We Discussed Thursday With Prosecutors;

b. As to the ELC Courtroom:

(1) A session of the Commission held on 28 January 2013 was temporarily halted when the sound and video feeds of the proceedings going to the public viewing areas were suspended by a third party, not the military judge. The ELC Courtroom is a Sensitive Compartmentalized Information Facility (SCIF).[21] Access to the courtroom is controlled at all times.[22] Closed circuit audio and video (CCTV) feeds of the proceedings in the ELC Courtroom are transmitted to locations on the U.S. Naval Station, Guantanamo Bay Cuba (GTMO),[23] and viewing locations in the United States.[24] The CCTV feeds, both at GTMO and within the United States, are viewed on a 40 second delay ordered by the Commission.[25] The CCTV feed is also monitored in real-time by the court interpreters to provide simultaneous translation and by an

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AE 133V (KSM), Photograph;
AE 133U (KSM), Extract (pp. 9-10) JTF-GTMO-CDR (memo) Subject: Order Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions;
AE 133X (MAH), Joint Task Force Guantanamo (Web Capture) www.jtfgtmo.southcom.mil;
Attachment B, AE 133Z (Mohammad), Louroe Electronics AP-2/AP-4/AP-8 Audio Monitoring Base Station Installation and Operating Instructions;

[18] **Declarations**:
Attachment B, AE 133A (Sup), Declaration of Maurice Elkins, dated 7 February 2013;
Attachment C, AE 133A (Sup), Declaration of Col John V. Bogdon, dated 7 February 2013;
Attachment D, AE 133A (Sup), Declaration of [redacted] dated 7 February 2013;
Attachment B, AE 133S (KSM), Declaration of CDR James R. Longo, dated 12 February 2013;
Attachment B, AE 133A (Sup), Declaration of CAPT Eric Schneider, Director, J-2, dated 13 February 2012.

[19] **Deposition/Stipulation**:
United States v. Jawad, AE 109, Deposition of CAPT Patrick M. McCarthy, United States Navy;
Stipulation of Ms. Sadiq, Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al. (2) Hearing Dated 2/12/2013 from 1:00 PM to 2:37 PM, at p. 1954;
AE 133BB (MAH), Stipulation as to Visitation Log. *See*: Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et a*l. (2) Hearing Dated 2/14/2013 from 4:04 PM to 5:43 PM at pp. 2653 – 2654.

[20] AE133R, Government Updated Notice of Witness Availability for 11-14 February Hearings, filed 12 February 2013.

[21] To the Commission's knowledge this is the only United States trial court so configured; the United States Foreign Intelligence Surveillance Court (FISA Court) meets in a "secure" environment but is not a criminal trial court in the classic sense. *See* Rule 17(b), United States Foreign Intelligence Court Surveillance Court Rules of Procedure.

[22] Attachment B, AE 133A, dated 7 February 2013.

[23] ELC Media Center, Building AV-29 Building AV-34" and spaces in the ELC assigned to the OMC-CA, OCP, OMCD, the OMC Special Security Officer ("SSO,") the court interpreters, and the Data Trailer.

[24] The CCTV feeds are transmitted specified locations within the United States so that victim family members, first responders, the media, and members of the public may watch the proceedings. *See*: AE 007 *et seq*; AE 022, *et seq*; and AE 033 *et seq*.

[25] Para 8a(3), AE 013P (KSM), Protective Order #1, To Protect Against Disclosure of National Security Information, dated 6 December 2012 and subsequent amendments to the original order.

Original Classification Authority to conduct classification review.[26] There is a device (euphemistically referred to as the "red button") that terminates any transmission feed from the courtroom. The Judge and the CISO have the ability to terminate transmissions of the proceedings, both audio and video.[27] The Commission has previously determined

> the brief delay is the least intrusive and least disruptive method of meeting both responsibilities. The delay permits the Commission to assess and remedy any negligent or intentional disclosure of classified information without unduly impacting on the ability of the public and press to fully see and understand what is transpiring.[28]

In accordance with the Commission's Order of 29 January 2013,[29] there is no longer a third-party capability to terminate the transmissions.[30] The incident, however, both established that an OCA monitors the proceedings in real-time and served as the predicate for Defense concerns as to their communications with the Accused.

(2) In 2011, the court reporter recording system was upgraded to insure the court reporters could identify who was speaking for the trial record when more than one participant was speaking at the same time. The "For The Record" (FTR) system is the standard for court reporting and is the same system used to record and prepare a record of trial in courts-martial and most courts throughout the United States.[31] There are 23 microphones located throughout the ELC Courtroom and the audio from these microphones feeds into one of eight (8) channels which are recorded by the court reporting software system. One channel is for the microphones located on the counsel tables for the five Defense teams. When the system is active, the base of each microphone has a green light indicating that it is "hot" (i.e., live), unless a "mute" button is pushed; when the mute button is pushed, no audio transmits from that microphone. There is also a

[26] Attachment B, AE 133A; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 9:02 AM to 10:07 AM at p. 1862.
[27] *Id.*
[28] AE 013O, Ruling, Government Motion To Protect Against Disclosure of National Security Information, dated 6 December 2012.
[29] The clear directive was issued on 31 January 2013; *see* Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 1/31/2013 from 9:01 AM to 9:22 AM at pp. 1720-1721.
[30] Attachment B, AE 133A.
[31] Attachment D, AE 133A.

mute button on the computer panel touch-screens on each counsel table. If only the touch-screen mute button is pushed, the counsel table microphones will not amplify or broadcast in the courtroom, and will not send audio to the CCTV transmission. However, they will still feed audio to the court reporter recording system, the translators, and the OCA.[32] If the individual microphone is not muted, it is activated by a voice tone of a specified decibel level (the "gate."). If the tone is "gated" (i.e., meets or exceeds the decibel threshold), it is heard in the courtroom and made part of the record of trial. If the audible is below the threshold, it is "pre-gated," meaning the "pathway will pick up even a low tone, maybe not with clarity, but it will pick it up."[33] The gated feeds, whether in real-time or on 40 second delay, transmit the audio that is heard in the courtroom.[34] The "pre-gated" feed, going to the court reporters, translators, and the OCA,[35] may transmit background voices and discussions, depending on the volume of any particular voice and the number of people being picked up by different unmuted microphones.[36] All Counsel were provided briefings on the necessity of muting the counsel table microphones and were advised that failure to do so could result in ungated discussions being recorded by the court reporters FTR system.[37] As a reminder, there are signs on both the doors the ELC Courtroom and the counsel tables warning Counsel of the need to "mute microphones for sidebar conversations."[38] The Accused were afforded the opportunity to listen to the court reporter recordings to ascertain if the pregated feed provided a capability to overhear in-court

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[32] Attachment B, AE 133A; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 9:02 AM to 10:07 AM at pp. 1861-1862.
[33] Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 9:02 AM to 10:07 AM at p. 1854.
[34] *Id.*
[35] Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 9:02 AM to 10:07 AM at p. 1866.
[36] Best summed up by Mr. Connell during questioning:
Q…the filtered or gated audio that we hear contains less sound information than the audio flow, the pre-gated audio flow that the three entities receive, correct?
A. Depending on the volume in which you are speaking, yes.
Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 9:02 AM to 10:07 AM at p. 1862.
[37] Attachment D, AE 133A.
[38] *Id.*

conversations between Counsel and the Accused.[39] The Commission is unaware if the opportunity was ever taken or, if it was, what it indicated.

c. As to the Holding Cells adjacent to the ELC Courtroom:

Defense Counsel have the opportunity of meeting with the Accused prior to or immediately after proceedings. Meetings occur either in the ELC holding cells, which provide a private meeting area, or in the ELC Courtroom. In the ELC holding cells there is camera coverage for security monitoring only; there are no audio capabilities or listening devices in the ELC holding cells.[40]

d. As to the interview rooms at ECHO II:

(1) Captain (CAPT) Thomas J. Welsh, U.S. Navy (USN), Staff Judge Advocate, JTF-GTMO testified[41] the issue of being able to monitor meetings in the interview rooms at ECHO II first came to this attention in January 2012. ECHO II is used for multiple purposes, including attorney-client meetings, meetings between the International Committee of the Red Cross (ICRC) delegates and detainees, and for some medical meetings where specialists meet with the detainees on specific issues. He was unaware any previous use for ECHO II or who controlled it before it came under the control of JTF-GTMO. In January 2012 there was a meeting between a detainee and his defense counsel, prosecutors, and law enforcement officials. CAPT Welsh walked into the control room and saw a law enforcement official with headphones listening to the meeting. There was also a video monitoring capability. Prior to that time he had not known there was the capability to audio monitor at the facility. Later he queried the previous Joint Detention Group commander about the monitoring capability; the commander's response indicated that there was an ability to do so, but it was not used to monitor attorney-client meetings. CAPT Welsh concurred with the Defense proposition that the microphones in the

[39] AE 133E.
[40] Attachment B, AE 133A.
[41] Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 1:00 PM to 2:37 PM at pp. 1954-2029; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 2:47 PM to 5:19 PM at pp. 2030–2062.

ECHO II rooms were not apparent as such and could have been mistaken for smoke alarms. Upon further questioning by the Defense, CAPT Welsh stated he had no prior knowledge about the monitoring capability before his arrival; his predecessor did not convey any information about monitoring during the short period of turning over responsibilities; and after the discovery in January 2012, he made no further inquiry into the matter until the defense in this case brought it to his attention in October 2012. The Defense also questioned CAPT Welsh whether the requirement to identify the language to be used during attorney-client meetings was a precursor to being able to monitor meetings. CAPT Welsh testified the requirement was not enforced but was, to his belief, initiated to make sure that translation capabilities were available for counsel. When asked why such a capability would be needed unless the Government was going to monitor the conversation, CAPT Welsh was unable to offer an explanation, but did not agree that it was meant to enable audio monitoring of such meetings.

(2) In an affidavit,[42] Commander (CDR) John Longo, USNR, special investigator for the Defense Team representing Mr. Mohammad, stated he conducted an interview with CAPT Eric Schneider, USN, J2 Director, JTF-GTMO, on 11 February 2013. The purpose of the interview was to elicit CAPT Schneider's knowledge of video and audio surveillance equipment located at Camp Echo II. In his affidavit, CDR Longo stated that CAPT Schneider confirmed the J2 is responsible for all audio and video surveillance equipment located at Camp Echo II. He advised that he has been in his current assignment as the J2 Director at GTMO for approximately three weeks, and was briefed by his predecessor in regard to this audio and video surveillance equipment. In conclusion CDR Longo wrote that CAPT Schneider "advised that to his knowledge, no recording of the audio or video takes place, though monitoring of both … has taken place during attorney client meetings in Echo II for force protection purposes only." By affidavit, executed in response to that of CDR Longo, CAPT Schneider filed a "responsive"

[42] Attachment B, AE 133S (KSM).

declaration.[43] After reviewing CDR Longo's statement, CAPT Schneider disagreed with the statement that attorney-client meetings are monitored by both video and audio means for force protection and stated he was unaware of any such monitoring both from his own knowledge and from having checked this with his predecessor.

(3) In his affidavit,[44] and during his testimony,[45] Colonel (COL) John V. Bogdan, Commander, JDG, JTF-GTMO, Guantanamo Bay, Cuba, avowed he had the responsibility to facilitate meetings between detainees and their Defense Counsel. These meetings took place in individual meeting rooms at ECHO II. These meeting rooms are also used for purposes other than attorney-client meetings. Each of the rooms in ECHO II is equipped with video cameras to facilitate remote video monitoring (real-time ability to watch or listen) for security purposes by the guard force. This enables the guards to respond instantly in the event a detainee attempts to harm himself or another individual in the room. There is no capability to record (electronically save) audio or video from the meetings, and additional equipment would need to be installed in order to do so. Guard force personnel are trained and directed to not listen to conversations between attorneys and detainees. He was not aware of any instance, either before or during his tenure as commander, in which guards or other personnel have monitored or recorded, whether intentionally or unintentionally, meetings between detainees and attorneys. Meetings between detainees and the ICRC are not recorded. He has also issued written guidance to the JDG regarding the monitoring of Attorney-Client Meetings and ordered that all audio capability be disconnected.[46]

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[43] Attachment B, AE 133A (Sup).
[44] Attachment C, AE 133A (Sup).
[45] Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al*. (2) Hearing Dated 2/13/2013 from 10:28 AM to 12:02 PM pp. 2169-2247; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al*. (2) Hearing Dated 2/13/2013 from 1:02 PM to 2:36 PM at pp. 2248-2294.
[46] JTF-GTMO-CJDG MEMORANDUM FOR ALL PERSONNEL ASSIGNED TO THE JOINT DETENION GROUP (JDG), dated 4 February 2012; Subject: Monitoring of Attorney-Client Meetings, Attachment I, Government Response (Attachment I, AE133A).

(4) The deposition[47] of CAPT Patrick M. McCarthy, USN, was taken pursuant to an order by Judge Henley, in *United States v. Jawad,* to ascertain "his knowledge, if any, of video teleconferences involving Brigadier General (Brig. Gen.) Thomas Hartman (former Legal Advisor to the Convening Authority), other General Officers and senior JTF-GTMO and United States Southern Command (SOUTHCOM) officials in which Military Commission cases were discussed." At the time of the deposition CAPT McCarthy was the JTF-GTMO Staff Judge Advocate.[48] During the deposition, upon cross-examination by Col Morris, the (then) Chief Prosecutor, CAPT McCarthy addressed issues of contention between himself and Brig. Gen. Hartman. One of the issues brought up, pertaining to the motion now before this Commission, went to "access to videotapes of foreign delegations meeting with their nationals," addressed in order for the prosecution to perform due diligence in providing discoverable information for the defense.[49] The responses of CAPT McCarthy in this context would support the contention that there is, or was at that time, an ability to make and retain audio and visual records of meetings in ECHO II.

(5) The Commission has looked at the picture[50] of the microphone in an ECHO II room and concurs that, with casual observation, it can be mistaken for a fire alarm. No representation was made by the Accused that it was actively claimed to be such by the JDG.

(6) As a sworn officer of the Commission, the Chief Prosecutor, Brigadier General Mark Martins, USA, has avowed that, "No entity of the United States

[47] *United States v. Jawad*, AE 109, Deposition of CAPT Patrick M. McCarthy, United States Navy. The Commission was requested to take judicial notice of this deposition. See AE 133, para 4a.
[48] CAPT McCarthy was a predecessor to CAPT Welch in this position.
[49] *See* AE 062, *United States v. Khadr,* Government Response to Defense Special Request for Relief from the Terms the Protective Order, filed 23 January 2008, and AE 306, *United States v. Khadr*, Notice of Defense Motion To Compel Production of Video and/or Audio Recordings of Interrogations of the Accused and Photos of Accused, filed 4 March 2008. The fact that some interviews and meetings with Accused could be audio and/or videotaped does not appear to be a particularly heavily guarded fact.
[50] AE 133V (KSM).

Government is listening, monitoring or recording communications between the five Accused and their counsel at any location."[51]

5. **Law**:

a. As a basic proposition the Defense has asserted the Government bears the burden of demonstrating why the Accused are not entitled to protection of their communications with Defense Counsel.[52] Rule for Military Commissions (R.M.C.) 905(c)(2) directs that, except as otherwise noted in the Manual for Military Commissions, the burden of persuasion for any motion lies with the moving party. The Defense contends constitutional protections entitle the Accused to their requested relief as a matter of right, thereby requiring the Government to prove a negative. This begs the question actually before the Commission - factually whether there was any infringement at all of the right to protected communications. To this end, since the Defense supposition does not go to what must be proven to convict, the Defense must show, by a preponderance of evidence, an actual, improper, inhibition of communication has occurred. *See*: *United States v. Hsia*, 81 F.Supp.2d 7, (D.D.C. 2000) citing *United States v Kelly,* 790 F.2d 130 (D.C.Cir.1986).

b. Assuming, *arguendo*, that the Defense assertions are supported by facts in the record, the Supreme Court, in *Weatherford v. Bursey*, 429 U.S. 545 (1977), set forth the factors the Defense must satisfy to show a cognizable infringement of a protected right. To do so, the Defense must show (1) evidence used at trial that was produced directly or indirectly from an intrusion; (2) the intrusion by the government was intentional; (3) the prosecution received otherwise confidential information about trial preparations or defense strategy as a result of the intrusion; or (4) the information was used in any other way to the substantial detriment of the defendant. *United States v Kelley*, 790 at 137. To establish a *prima facie* showing of prejudice the Defense must show the Government acted affirmatively to effectuate their intrusion. *Weatherford*

[51] AE 133A.
[52] AE 133 (KSM et al), para 3.

at 558. Further, the result of any such intrusion must work to the "substantial" detriment of the Accused, a standard requiring demonstrated use of "confidential information pertaining to defense plans and strategy, and from other actions designed to give prosecution an unfair advantage at trial." *US v Danielson* 325 F.3d 1054 (9th Cir. 2003).

6. **Analysis and Ruling**.

a. As to the ELC Courtroom:

(1) There is no specific prohibition against an individual, with the appropriate need to know, from monitoring the Commission proceedings, either through physical presence in the courtroom or electronically, in the manner being challenged by the Defense. For example, a motion has been filed for the Chief Defense Counsel to be physically present in the courtroom during classified sessions in furtherance of his duties[53] and the Government has routinely had law enforcement members of their team observing the proceedings from within the courtroom.[54] The error on the OCA's part was their unauthorized interruption of the proceeding; not their having followed the trial in real time in performance of their responsibilities to be mindful of national security interests and so advise the CISO when appropriate. The crux of the issue before the Commission lies in whether "pre-gated" information from the court reporting system was being used to assist the Government in the prosecution of this case. Evidence before the Commission has shown the pre-gated feed is the one used by the OCA to follow the proceedings.

(2) The Defense assertion in this regard fails at least two requirements of the "Kelly" test. First, there has been no proof offered that the pre-gated feed captures any retrievable information, confidential or otherwise. The Defense was provided the chance to test the system, and apparently decided to forgo that opportunity. More importantly, there is no evidence that the alleged intrusions, assuming they occurred, were intentional. The "pre-gated" feed is part and

[53] AE 013HHHH (AAA), Mr. al Baluchi's Motion to Modify Third Amended Protective Order #1 to Allow Chief Defense Counsel to Review Classified Information, filed 17 September 2015.
[54] *See, e.g.*, Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al. (2) Hearing Dated 2/12/2013 from 9:02 AM to 10:07 AM at p. 1836.

parcel of the court reporting system; there is no evidence selection of the FTR system was done as a means to provide the Government the ability to eavesdrop.[55] In fact, the contrary is shown. Counsel were warned[56] of the consequences of not muting their microphones both during courtroom technology training and by signs placed on the door to the ELC Courtroom, and at the counsels' tables, to remind them of the need to mute the microphones to preserve confidentiality.[57] This can hardly be construed as a covert intrusion when the Defense was both on notice as to the possibility and had the power to mute the system if they believed it compromised confidentiality.

(3) The Defense has not shown their attorney-client communications in the ELC Courtroom are being purposely intruded upon; or, in fact, whether any such intrusion has occurred at all. Accordingly, the Defense motion to deny the OCA the ability to monitor the proceedings in real time is **DENIED**.

b. As to the ELC Courtroom holding cells: Evidence indicated the Government has the ability to video monitor the holding cells, but nothing was adduced to indicate there was an ability to monitor conversations between Defense Counsel and client in the cells. The Defense has not shown their attorney-client communications were being intruded upon in the ELC Courtroom holding cells. As to that aspect of their motions, the specific relief sought is **DENIED**.

c. As to the interview rooms at ECHO II: The Government had the ability to monitor, by both audio and visual means, meetings in the interview rooms at ECHO II. The Commission understands why the uninitiated could mistake the system for doing so was a fire or smoke alarm. Evidence of record shows these rooms were used for a number of functions besides attorney-

[55] Ms. [redacted] affidavit indicates it is a commonly used system. *See* Attachment D, AE 133A.
[56] *Id.*
[57] A "low tech" solution to the problem was instituted; now instead of having to turn the microphones off to mute them they have to be turned on to be active. See: Unofficial/Unauthenticated Transcript of *the Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/11/2013 from 9:02 AM to 10:12 AM at p. 1824.

client meetings. There was, however, no evidence offered[58] indicating Defense Counsel were purposely misled as to the function of these "fire alarms" nor, from information provided in other cases, was the fact that there was audio and video monitoring capability a closely held secret. The Government did provide evidence that they were aware of the responsibility to respect attorney-client privileged meetings in ECHO II. Their witnesses uniformly indicated that no audio monitoring of meetings between the Accused and their attorneys occurred. Evidence of the capability to monitor does not by itself establish the fact or probability of abuse or misuse of that capability, especially where there are unrelated legitimate reasons for the capability's presence. As to this portion of the motion by the Defense, the specific relief sought is **DENIED**.

d. An overarching remedy sought by the Defense is that the Government be required to "prove that any evidence it proposes to use is derived form a legitimate source wholly independent of the information disclosed in the recorded conversations." While this relief would be appropriate had a substantial infringement of the privilege been sufficiently shown, the facts as developed do not warrant this drastic relief. The Defense motion in this regard is **DENIED**.

e. The Defense is correct in asserting the attorney-client privilege is sacrosanct, and while a breach of such privilege was not demonstrated by the issues and facts before the Commission at this time, the Commission recognizes the Defense concern about protecting that privilege. The Commission is all too aware that, with continual changes in the personnel comprising JTF-GTMO and the JDG, what has been done right at one point may become a historical notation, especially after several changes of the guard force. To address these concerns, the motion of the Defense for a prophylactic remedy is **GRANTED** as set forth in paragraph Seven (7) of this Order.

7. **Order**. The Commission directs that the salient points of the directive issued by COL Bogden be formally made part of the standard operating procedures for JTF-GTMO and the JDG. Further,

[58] Defense Counsel proffered that a guard had assured them the device was a smoke detector and not a listening device, however no evidence was provided to support this contention. *See:* Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al*. (2) Hearing Dated 2/11/2013 from 9:02 AM to 10:12 AM at p. 1807.

when new Defense Counsel are being shown or briefed on the interview rooms at ECHO II, they must be specifically made aware of the monitoring capability and its uses. Lastly, if a meeting with an Accused involving Defense Counsel (e.g., a plea negotiation) is to be monitored, the Defense Counsel involved will be advised in advance of the monitoring.

So **ORDERED** this 30th day of November, 2016.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge

ATTACHMENT D

[Tr. 3120 - 3122]

MJ [COL POHL]: So let me go through the 505 procedure and then we say the initial thing is whether or not, again applying the standard, but they say -- defense says we want to discuss this with our accused to prepare for his defense, is that part of the 505 procedure also?

ATC [MR. SHER]: It is not.

MJ [COL POHL]: Okay. So the first time the accused would hear this evidence would be in court during the case in chief? Is that the government's position?

ATC [MR. SHER]: Well, it is with the exception of, again, I mean, stuff that he knows he can talk about with them.

MJ [COL POHL]: Okay.

ATC [MR. SHER]: Which really narrows the subset of ----

MJ [COL POHL]: I got your position. Let me ask you about the second part though, because you carefully used the word "case in chief." How about presentencing, does the government intend to use any classified information in presentencing that ----

ATC [MR. SHER]: No, the government is not going to rely on classified information.

MJ [COL POHL]: So when you said your case in chief, you're saying -- I understand, Mr. Sher, you're going to be

held to this. You're saying the government does not intend to use any classified information in its case in chief or in its presentencing presentation?

ATC [MR. SHER]: That's correct.

MJ [COL POHL]: Okay.

ATC [MR. SHER]: May I have one second, sir?

MJ [COL POHL]: Sure.

ATC [MR. SHER]: The reality is, Your Honor, there's a very small set of -- a small subset of information that may not be shared with the accused. Again, he can access all of the discovery that's not classified, and only 14 percent of what's produced is classified. And the accused can talk, again, with his attorneys about whatever information he knows.

That narrow limitation on the accused's right to learn classified information from his attorneys does not deny him right to counsel. The Fourth Circuit found that in Moussaoui, which was a capital case. They found it in Abu Ali. Second Circuit came to the same conclusion in Embassy Bombings, and, again Marzook is another instance, pretrial hearings, suppression hearing where the government produced documentary and testimonial evidence outside the presence of the accused.

The defense hasn't cited to any case where any

court has sanctioned the government by dismissing the capital referral because an uncleared accused can't access classified information. The only case they cited today was the Gardner v. Florida case. A jury sentenced an accused to life, the trial judge increased that punishment to death on his own based on information never shared with the accused, never shared with his lawyers. They had zero opportunity to explain or work through that issue. That is not the case here. The accused has at least five cleared defense counsel that are representing his interests and that can access the classified information.

In Abu Ali, which is a Fourth Circuit case I think in 2008, the court didn't allow the accused or his uncleared counsel to attend hearings involving classified information, they didn't allow his -- the accused or his uncleared counsel, which were his lead counsel, to review classified information or to cross-examine government witnesses that were relating classified information, relating to classified information. Rather, the accused had to have his cleared defense counsel do so.

Your Honor, the statute's clear, the accused may not access classified information pretrial. He is in no different a position than a criminal defendant tried in

[Tr. 6498 - 6512]

[Tr. 6498 - 6512]

previous substitutions that had been approved by Judge Pohl, which were just under 900 pages, 888 pages of substitutions, in ten separate installments.

In addition to that, they've had the great amount of information regarding the RDI program that's included in the Senate study's executive summary. Now, to be clear on this, I'm stating there are verifiable pieces of that that will relate to statements of relevant facts, stipulations, if we agree the underlying information is accurate. And because we viewed all of the underlying information, we will be prepared to stipulate to much of that. And in addition, all of that was declassified and has been available to -- for the defense to discuss with their client the different aspects of that.

So that's part of the framework associated with all of this, was the declassification of nearly 500 pages of an executive summary of the report. And that's been part of the holistic process by which we've analyzed the information at issue.

So turning now to the ten paragraphs of the -- they're really subparagraphs of paragraph 13 of the commission's order in 120AA, and I can report volume of pages that are either in the pipeline or have already been delivered. And with regard to the -- to all ten paragraphs,

the amount of material that has been produced, and that has already been -- gone through a request for substitutions and other relief with the commission and has been produced to the defense, and this is as against eight of the ten categories now you've approved and -- provided protective orders and approved 219 pages as against paragraphs -- subparagraphs 13.a, b, c, d, f and g, and then i and j.

So you've -- the statements of the accused and co-conspirators piece you've not yet provided under the ten-category framework. And nor have any of the orders included the SOPs and guidance in subparagraph 13.e. So all but 13.e and h, they've received some information amounting to 219 pages.

Now, let me now go through what's coming. There are multiple thousands of pages total associated with the ten paragraphs that are coming. You know, you've got a significant amount of that being reviewed now and you will be reviewing the adequacy of the substitutions, looking at the originals and determining if more needs to be produced.

Our expectation, our reasonable expectation, based on looking at this and the process, of course, subject to what you approve, Your Honor, is that for subparagraphs 13.a and b, these are a chronology of the accused's detention within the

program and the conditions of transport, A and B, a small number of pages, because this is mostly just a chronology that's been ordered by the commission.

And then let me just go to paragraphs i and j, 13.i and j, and this is the requests to employ enhanced interrogation techniques, if any, and the approvals of those, also a relatively small number of pages, because it deals with the -- whether or not requests happened and whether they were approved. And only a small number of pages thus far of those have been provided.

In the area of e, this is SOPs and guidelines. There will be hundreds of pages, we expect, based on what we have submitted and are going to be submitting between now and September 30 to you.

In the area of statements of the accused and co-conspirators, paragraph 13.h, that will be into the many hundreds of pages, potentially more than 1,000, in that subparagraph alone. Hundreds of pages of 13.c, conditions of confinement, and hundreds of pages of synopses regarding persons who had direct and substantial contact, their employment and training records pertinent to their work in the program.

So again, overall, either in the request phase with

you or coming your way very soon, multiple thousands of pages associated with the ten paragraphs. So that, again, with the bottom line being I'm -- I have tempered optimism that we're going to get through all of that, we're going to have to you by September 30 or we will deliver some records, additional records, to the defense prior to September 30, and that we will be in compliance with 120AA, and thus -- you know, we've given you 46 notices as to our status on that. You get them every two weeks, Your Honor, as you know, under the 120 series.

So my expectation, based on what we're doing, again, tempered optimism, is the 47th will be our last such report, and that we will have complied with 120AA and our other affirmative discovery obligations. Acknowledging, of course, even though we will be complete with our affirmative discovery obligations, there's still litigation pending relating to discovery. We certainly understand there may be motions to compel. You're still going to have to review this, and you -- you know, it's going to take time to go through what we have been spending a lot of time gathering, and we fully appreciate that. But by September 30, we're going to be saying we are in compliance with regard to 120AA.

And, again, I'm not stating we've provided witness

specificity. We're not at that point yet from either side to name our witnesses, and thus comply with Jencks or Giglio, but at this point those discovery obligations in 701 and the ones I've mentioned under the 120 series met.

So that's the basic report, Your Honor. And then to speak about how this bears upon trial scheduling, we have previously provided trial schedules. There was some commentary on this yesterday from defense counsel.

When 120AA was decided back in June, we were thinking toward a trial date. That order changed the process and then, of course, we were in -- we had a stay of proceedings related to the appeals, and so this commission stated that those circumstances caused it to not -- to dismiss -- I think you dismissed as moot that, for the time being, that scheduling effort, which was certainly appropriate.

But to understand, I mean, 13.h, in particular in that order, is a very expansive view of the prosecution's requirement to produce statements. I mean, these are statements not specifically associated with the offenses, and some context related to that is appropriate at this point.

We felt we had complied with the statements requirement in particular. We did seek reconsideration in part of the order in 120, the original order 120C, and the

commission did grant, in part, that. But there was, you know, still in that order a very burdensome -- the 120H paragraph. And we've obviously deliberated on it, you know, considered our avenues of recourse and so forth, decided not to appeal that, and have been dutifully trying to comply with all of that since that time.

So just putting that in perspective on the scheduling now at the point where we are, I believe you are going to need some time to go through this material, as is the defense, but that we have done our due diligence in finding all of those statements and considering their discoverability, and then providing you the originals and offering you a substitute that we believe protects the national security information while providing the accused, as you must find, is -- could substantially -- is in substantially the same position to make a defense as he would have been with the original information.

So subject to your questions, Your Honor, that's my report.

MJ [Col SPATH]: Let me take a look at my notes. So delivery to me on or about 30 September, at least for the 120 piece, you believe.

CP [BG MARTINS]: Yes, my -- as of today, with three weeks to go, I have tempered optimism we're going to get there. We

are going to, by 30 September, be able to say no more of the notices to the commission that you ordered in December of 2014, of which we were up to 47, and we are in compliance with 120AA, and our affirmative discovery obligations otherwise.

MJ [Col SPATH]: Do you have an estimate -- and you may not, but an estimate of pages in 47, the last notice? Do you have -- how many more pages are heading my way?

CP [BG MARTINS]: Multiple thousands. And of course, you're viewing the original. What I was providing ----

LDC [MR. KAMMEN]: Excuse me, sir. What was the answer to that? I didn't hear it.

MJ [Col SPATH]: Multiple thousands.

CP [BG MARTINS]: Multiple thousands.

MJ [Col SPATH]: Multiple thousands.

CP [BG MARTINS]: Multiple thousands. And, again, the page numbers you are getting, you are seeing the original.

MJ [Col SPATH]: Yes.

CP [BG MARTINS]: The numbers that I was giving before is what they're receiving.

MJ [Col SPATH]: I'm just trying to understand.

CP [BG MARTINS]: I was trying to provide an estimate so people -- parties and commission could sort of understand what's coming their way. So multiple thousands coming your

way.

MJ [Col SPATH]: Of the -- as it's been the original, the produced redactions and then what it looks like in the redacted form?

CP [BG MARTINS]: Yes. And then they'll receive the summarized version that has the discoverable information in it, and that, too, will be multiple thousands. Yours will be greater because you will be seeing the originals and the substitutes.

MJ [Col SPATH]: Then you had moved and made a comment about witness lists, and then any discovery that may flow from that ----

CP [BG MARTINS]: Right.

MJ [Col SPATH]: ---- because of Giglio and Jencks and the others. Do you have an idea of when your team will be in a position to provide the defense with things like that, a witness list, a realistic witness list?

CP [BG MARTINS]: Well, again, these are trial rights and Jencks is a trial right. So we are -- the commission is setting the time, place and manner of discovery at this point, Your Honor, and we are engaged in that. We're complying with this stage of 120AA, and affirmative discovery to this point. You've been making statements to the effect of one to two

years.

We have a good feel for our case and have provided them extensive discovery on the case, but we're in a position pretty rapidly to provide witnesses and so forth; but we, frankly, believe we ought to be litigating this.

MJ [Col SPATH]: It wasn't a request to do it right now, it was more of a -- here's what I'm trying to get a feel for: We are in the discovery phase still, clearly, just based on our discussions here. And when I say one to two years, it is -- I'm guessing, but I'm trying to use kind of the experiences I've have thus far and how long things take ----

CP [BG MARTINS]: Sure. Sure.

MJ [Col SPATH]: ---- and a feel for moving forward. Because getting it to us is half the battle. And then it moves over to the OCAs after it comes out of our office to determine if they're going to comply with the changes, if any, that I've made.

Do we have a feel for their timeline? Because I've reviewed thousands of pages, and we've sent them back.

CP [BG MARTINS]: Now, Your Honor, the requests for substitutions of the relief come to you. We provide you the summary, and then at some point you determine if the summary is adequate.

MJ [Col SPATH]: Yes.

CP [BG MARTINS]: The ----

MJ [Col SPATH]: I was given suggested changes. Some. Again, I don't want to comment on how many or how little, but it's just in general we've made some suggested changes to some of the requests that have come to us, and the trial judiciary has come back with those. And I know they have to go to the OCAs for their decision. They don't have to comply, we know that.

What I'm trying to figure out is, when are they going to do that so that information goes to the defense?

CP [BG MARTINS]: Your Honor, I would ask you to review our requests, which are ex parte requests, perfectly allowed and authorized under the statute.

MJ [Col SPATH]: Absolutely.

CP [BG MARTINS]: Would ask that you please review those and consider them. And ----

MJ [Col SPATH]: We do.

CP [BG MARTINS]: ---- and I think you're -- I hope you're seeing there's a promptness and a responsiveness to the inquiries related to the material.

So the government is seized to this. We want to provide the information that's required for this commission to

go forward that allows the accused to make legally cognizable defenses, rebut our case, or provide a sentencing case, and we're just committed to it.

So I would ask that you review what we provide, and we will remain very attentive to, you know, issues the commission raises in this -- in that ex parte process, and will enable you, as you have already, ultimately conclude that the substitution is adequate and sign a protective order and make the finding that they are in substantially the same position.

So I think this is a major milestone in completion, and it does extend also to our other affirmative discovery obligations that are appropriate for this point in the discovery process that the commission is now seized of as well and managing, in terms of time, place and manner of discovery.

Subject to any further questions -- if I may, just as I was hearing the summarization of the 802, the commission is still envisioning two single-week sessions in this calendar year, correct?

MJ [Col SPATH]: I am envisioning some combination of two weeks, be it the originally scheduled weeks, but I'm not sure how effective our first week is going to be if we don't identify what we're going to do in that week. Then the week

of December where we just talked about that, where we have a conflict, it appears.

CP [BG MARTINS]: I understand. We have offered some alternatives to that second week, but I just wanted to see if I'm understanding.

MJ [Col SPATH]: Mine was a proposal that we could travel down here once and be here for two weeks, which would give -- which would give myself satisfaction that I set out a three-week schedule, a relatively reasonable schedule for 2016, and I just want to comply with the intent of that, if I can, as I indicated to Mr. Miller a moment ago.

And so I offered up, as one reasonable alternative, Veterans Day week and the week after, which takes into account the move so that they're not trying to do multiple things and we don't have the move stress upon them, and takes into account that we need to figure out a battle plan for 332 so that we effectively use our time here with any witness testimony and any other issues with that, plus fully brief and respond to issues related to the Limburg.

And so if it makes more sense to use two weeks together, I hesitate to say save the taxpayers money -- I have no idea if that does or not, and there's not a study -- but it does save wear and tear on everybody traveling because we're

here for an extended period of time. It was an offer. I'm hoping you all will talk about it and let me know how it sounds, but that was it. Right now, October is on the board ----

CP [BG MARTINS]: I understand.

MJ [Col SPATH]: ---- and so is December.

CP [BG MARTINS]: Your Honor, just in context of the discovery, and I'm trying to provide information to the commission to assist in its scheduling of things in light of the discovery information update that I just provided, the session -- series of sessions, 17 to 21 October would seem to enable some digestion on your part of the material coming your way with regard to discovery now.

MJ [Col SPATH]: Yes. I plan to use my time ----

CP [BG MARTINS]: Right.

MJ [Col SPATH]: I want to be -- General Martins, I think you know this. I have been very responsive when your material has flowed to me. And so I -- I'm not trying to get in -- I'm not getting into any of the ex parte discussions. We all know the process that's unfolding.

CP [BG MARTINS]: Right.

MJ [Col SPATH]: But it has occasionally taken some lengthy period of time when there have been suggested

revisions to get an answer back. And it's not from you. I recognize that. This is not a "it's you." What I'm asking is, coming to us is only part of the battle. If I agree with your substitutions, sign the protective order and the information moves to the defense, that's great.

It's when we have questions or minor issues, or major issues or wholesale revision, I'm not saying which ones they are, because I'm not suggesting you're not complying. I'm just saying that when we have those changes, it has occasionally taken OCAs a really long time to respond to you all. And I presume it's them, because I know if they responded to you all, you would come to us quickly.

CP [BG MARTINS]: Your Honor, I wasn't -- I was making no commentary. You're clear ----

MJ [Col SPATH]: I understand.

CP [BG MARTINS]: ---- we're hard at work at this material, as all of we are.

MJ [Col SPATH]: So in October, I plan to use my time in October to start, if not work through, what I'm getting from you all, as I have as every notice has come in, to work through that. And I plan to do that. And I have people who are going to help me with their initial review so I can do my review. We really are working to get those back to you as

quickly as we possibly can. Mine was more directed at, getting it to us is half of that concern.

CP [BG MARTINS]: Understand. But yet, when you do get us material that you've cleared on, we are then putting Bates numbers on it and getting it out to them.

MJ [Col SPATH]: Absolutely.

CP [BG MARTINS]: I was merely making the comment in the context of this discussion that, from the point of view on discovery, the volume of material that has come to you that -- we know there is some of this -- that is being pretty close to being ready to go. Because there's been that back and forth that we've talked about, it's been ongoing, that we believe that the October week can be well spent, that there's nondiscovery-related things and stuff on the docket that's been discussed here that could be done.

And then, you know, we have our eyes on other weeks in November, December -- October, November, and December, hopefully getting actually some space between the October 17 to 21 week. Our view at this point is two consecutive weeks, maybe there's not enough unclassified material on the docket. So, the -- and the -- and that the schedule on -- that you've laid out for 2017 will enable us to then get into any contested issues, again relating to discovery and the

[Tr. 10015 - 10017]

[The R.M.C. 803 session was called to order at 1001, 31 October 2017.]

MJ [Col SPATH]: This commission is called to order.

Trial Counsel, Mr. Miller, let's account for the government representatives and make any announcement regarding the transmission of these proceedings.

TC [MR. MILLER]: Good morning, Your Honor. Present for the prosecution are Brigadier General Mark Martins; myself, Mark Miller; Colonel John Wells; and Major Michael Pierson.

In addition to detailed counsel, we have at the counsel table Master Sergeant Vanessa Pichon, who is one of our paralegals; Staff Sergeant Kevin Creel, again, a paralegal; and our analyst, Parker Smith.

Additionally seated in the back, Your Honor, we have Patrick O'Malley of the Federal Bureau of Investigation, Joseph Castellano of the Federal Bureau Investigation, and Supervisory Special Agent Amanda Strickland.

These proceedings are being transmitted by closed-circuit television to the locations authorized in your order. Thank you.

MJ [Col SPATH]: Thanks, Mr. Miller.

Lieutenant Piette, I see that learned counsel, Mr. Kammen, and the two assistant defense counsel, Ms. Eliades

and Ms. Spears, are absent. Do you have any other members of the defense team you need to account for on the record other than yourself?

DDC [LT PIETTE]: Yes, Your Honor. Present for Mr. al Nashiri are myself, Lieutenant Alaric Piette, JAG Corps, United States Navy. I'm a lawyer within the meaning of Article 27(b) of the Uniform Code of Military Justice. In addition, we have present Ms. Brandi Janes; Ms. Kristina Hon; Tech Sergeant Travis Gale; Mr. Roosevelt Roy; and the translator. Additionally present is Brigadier General John Baker, United States Marine Corps; Colonel Wayne Aaron, United States Army; and Mr. Phil Sundel.

MJ [Col SPATH]: With regard to General Baker, Colonel Aaron and Mr. Sundel, are they of record for Mr. al Nashiri?

DDC [LT PIETTE]: No, Your Honor. They are -- Brigadier General John Baker is the chief defense counsel.

MJ [Col SPATH]: I understand. Is he entering an appearance for Mr. al Nashiri or not?

DDC [LT PIETTE]: No, Your Honor.

MJ [Col SPATH]: Okay. And the same for the other two?

DDC [LT PIETTE]: Yes, Your Honor.

MJ [Col SPATH]: All right. Thanks.

Mr. al Nashiri, I'm going to talk to you about your

rights to be present and your right to waive your presence at any hearing.

You have the right to be present during all sessions of a commission; this includes any contempt proceedings against anyone. If you request to absent yourself from any session, such absence must be voluntary and of your own free will.

Your voluntary absence from any session of the commission is an unequivocal waiver of your right to be present during the session. Your absence from any session may negatively affect the presentation of the defense in your case. Your failure to meet with and cooperate with your defense counsel may also negatively affect the presentation of your case.

Under certain circumstances your attendance at a session can be compelled regardless of your personal desire not to be present. The proceedings today constitute one of those occasions, as we are going to be discussing the circumstances that have led to you being in court without your outside appointed learned counsel, Mr. Kammen, and two other members of your defense team.

Do you understand what I have explained to you so far?

[Tr. 10041-10043]

MJ [Col SPATH]: And you filed it with your name.

CDC [BGen BAKER]: -- in response to a request from you -- yes, absolutely.

MJ [Col SPATH]: With your name.

CDC [BGen BAKER]: And in any pleading that anybody files, the lawyer that files that does not become a witness.

MJ [Col SPATH]: You're not an attorney of record.

CDC [BGen BAKER]: Your Honor, this was filed in response to your invitation.

MJ [Col SPATH]: If you wanted to. You also have sent e-mails to General Martins ----

CDC [BGen BAKER]: Absolutely.

MJ [Col SPATH]: ---- that have been attached. You also have excused counsel. Not privileged there. Maybe some of the discussion you had with those counsel, they may or may not be privileged. That's a debate we could probably have. But I don't care what your discussions were. I don't plan to ask you about your discussion.

I plan to ask about the affirmative acts you took in this case that are public knowledge and have been reported both in the press and here through e-mail. That is not privileged. Those are acts you took affecting this case.

And again -- and I plan to issue you an order from

the commission. You can choose to accept it or not and go from there, but we're not going to spend all day doing this.

CDC [BGen BAKER]: Your Honor, again, under Rule 501(b)(1) I refuse to appear as a witness.

MJ [Col SPATH]: All right. So, I'm ordering you to testify. You are refusing to come up here, take the oath, and testify; is that accurate?

CDC [BGen BAKER]: That is accurate; yes, sir.

MJ [Col SPATH]: All right. I'm also ordering you to rescind the direction you gave when you excused both learned outside -- appointed learned counsel and the two civilians. Are you refusing to comply with that order as well? You excused them; you released them.

CDC [BGen BAKER]: Yes, sir.

MJ [Col SPATH]: I'm ordering you to send them a note saying you are not releasing them. I can't order Mr. Kammen here. I know that. I know you've got two DoD employees that work for you. I know what their government contract says. But that is your choice as their supervisory attorney, and everybody can deal with that, including your supervisor.

My question to you is: I'm ordering you to send them a memo telling them their withdrawal is not approved because you don't have the authority.

CDC [BGen BAKER]: Oh, I'm definitely not going to ----

MJ [Col SPATH]: Okay.

CDC [BGen BAKER]: ---- I am definitely not -- Your Honor, Rule 5-0 -- I understand your ruling. I understand your ruling.

MJ [Col SPATH]: You don't, because you haven't done anything to fix the ruling. How does this normally work? I issue a ruling. You disagree with it -- or you all disagree with it and we go to the appellate court and they tell me I'm right or wrong. They do it every week. And I'm okay with it. That is the normal process.

You interpreted a rule, and now there are two rulings from this commission that tell you you got it wrong.

CDC [BGen BAKER]: Your Honor, if your -- if your order to me is to -- I want to make sure that I understand what -- your order to me. If your order to me is, General Baker, you must rescind your action that you took on October 13th ----

MJ [Col SPATH]: Yes.

CDC [BGen BAKER]: ---- whatever the date -- whatever the correct date is, excusing learned counsel and assistant defense counsel, I refuse to follow that order.

MJ [Col SPATH]: And you are also refusing to testify.

CDC [BGen BAKER]: Yes, sir, pursuant to ----

[Tr. 10047 - 10049]

gave to have a filing by 1600. And I want to give the court a heads up that it is my position, it is the defense's position that right now Mr. al Nashiri has the statutory right to learned counsel at all ----

MJ [Col SPATH]: You can stop. It says to the extent practicable. I've already interpreted the statute. I mean, that's simple for me. To the extent practicable he can have learned counsel on matters of capital litigation.

What I'm talking about is a filing telling me what our proposed way ahead is now that he is not here. And what I'm talking about is your ability to do cross-examinations, which you have done before, direct examinations, which you have done before, and pretrial information and motions, which you have done before.

If I'm wrong, your client will get a windfall because I have ordered us to move forward without learned counsel. But if you refuse, you too, at noon tomorrow, will be here for a contempt hearing.

DDC [LT PIETTE]: Yes, Your Honor.

MJ [Col SPATH]: It's that simple. I've already interpreted, and there will be a ruling, based on the government's filing, about the ability to have learned counsel.

The chief defense counsel has decided that Mr. al Nashiri does not need defense counsel here. That's his choice. To the end -- in his filing, said it is not practicable to get them here. Well, the law discusses just that. It isn't practicable, and we are not going to wait right now.

Hopefully, by the time we get to any findings case, we will have learned counsel to assist you, or more counsel. But we are going to continue to move forward. And if we need to come back and redo some things, we've got all the time in the world, as we've demonstrated for the last nine years.

So again, you are detailed counsel, and I have interpreted the rule. So you can defy the order to be here; you can sit here and do nothing. I would read Strickland and some other cases where we have had defense counsel who feel like you do, a judge's ruling was unfair and they didn't like it so they didn't engage in an opening statement, closing argument, crosses of witnesses, directs of witnesses, or filing motions. And the appellate court said that is a strategy. It's a strategy that may well work, but it didn't work here, and they didn't find the counsel ineffective.

So that is your choice, and that is your issue.

DDC [LT PIETTE]: Yes, I understand, Your Honor. And as

the only counsel in this room who has been detailed specifically to defend Mr. al Nashiri, I aim to defend him. And I cannot do that without a learned counsel because, by statute, he has to have one.

MJ [Col SPATH]: We have already dealt with that.

DDC [LT PIETTE]: Yes, Your Honor.

MJ [Col SPATH]: The issue is resolved. You are welcome to file a writ. You've got your chief appellate counsel here, apparently, to make an appearance on the record to a case that he's not detailed to. I would file a writ, and maybe the C.M.C.R. will step in quickly, or maybe they won't. Maybe three weeks from now they will step in and say, Spath, you got it wrong again, like I have twice already. Sorry. And we will come back and do it again.

But again, your order is easy. We will be here Thursday -- we will be here at noon tomorrow and we will be here Thursday with the government's witness, who flew down here on an airplane. You can engage in the direct or you can waive it affirmatively on the record. But again, I would read those cases after Strickland, understand where we are at, and understand that I find learned counsel are not practicable in the near term, if ever, by the actions of General Baker.

And again, maybe you have set your client up for

[Tr. 10053 - 10055]

Just some general comments about yesterday and the process that brought us here. We already went through the findings of fact yesterday, but as they indicated, I've ruled on two occasions that General Baker acted in a manner outside his authority.

His decision to approve a requested release of counsel for good cause, or release counsel for good cause shown on the record, as stated by him, was unreviewable and unilateral, and that flies in the face of commonsense judicial review, as far as we can tell, every states' bar rules, court precedent and two orders of the commission.

For defense counsel to have the authority stated by the chief defense counsel would effectively give the defense counsel the ability to dismiss any commission case or any criminal case at any stage in the process for any reason when they determine good cause, and then refuse to testify in court to even explain what the good cause shown is, other than what is submitted in written form.

CDC [BGen BAKER]: Your Honor, at this point I want to object to the proceedings.

MJ [Col SPATH]: General Baker, you're not a party of record and we're moving forward. You need to take your seat.

CDC [BGen BAKER]: I just want ----

MJ [Col SPATH]: General Baker, you need to take your seat.

CDC [BGen BAKER]: I again object. This court does not have personal jurisdiction over me.

MJ [Col SPATH]: I appreciate that. We certainly have considered that, and I disagree. And I'm not even going to go through why I disagree with that. I would suggest reading 950t and the language that precedes every single rule until you get to (31) and (32).

CDC [BGen BAKER]: Your Honor, I just want to make sure that you are denying me the opportunity ----

MJ [Col SPATH]: I'm denying you the opportunity to be heard. Thank you. It's a summary proceeding.

CDC [BGen BAKER]: I understand. I just want the record clear. There's things that I want to say, and you're telling me that I cannot say them.

MJ [Col SPATH]: General Baker, this is the last chance. I don't want to -- this is really not a pleasant decision. And I know that some of you might think that this is fun or lighthearted, right? I've heard commentary out around the base. Alls you've got to do is get on the Internet. None of this is fun. None of this is easy.

I have spent a lot of time reviewing the rules that

apply to this commission, and I appreciate -- General Baker, no more. Sit down, please.

CDC [BGen BAKER]: Your Honor, I have spent a lot of time, too.

MJ [Col SPATH]: I have spent a lot of time as the judge. And any system of justice understands that, except apparently participants in the commission, about following orders and following a process. I know there's a habeas filed. If we get the suspension in here in time, I'll stop.

Do you know what I won't do? I won't tell that judge I'm not going to follow your order, because I know better. I'm going to ignore that order and press on because I disagree with you. That's not going to happen. And so if that order comes in and this is suspended, I will stop.

CDC [BGen BAKER]: Your Honor, again, I request to be heard.

MJ [Col SPATH]: General Baker, I don't want to have to have you removed.

CDC [BGen BAKER]: I got it, sir.

MJ [Col SPATH]: And I don't want to add to the contempt findings.

This is a difficult, unpleasant decision, and frankly, it's an affront to the process of justice that we

[Tr. 11052 - 11054]

those occasions, as we're going to be discussing the circumstances that have led again to you being in court without your learned counsel and the defense team.

Do you understand what I've explained to you thus far?

ACC [MR. AL NASHIRI]: Yes. Yes.

MJ [Col SPATH]: And that's a yes. Thank you.

For everybody in the audience, we had an 802 session back at Andrews Air Force Base, or Joint Base Andrews, at the terminal, where we discussed some of the issues we're going to deal with as we move forward. I asked the government at that 802 session to subpoena Ms. Eliades and Ms. Spears since they are not here despite multiple orders to be here.

I asked the defense counsel about any detailed counsel to the case. And defense counsel let me know that he's the only detailed counsel to this particular case.

I discussed also securing Mr. Koffsky to come testify -- I'll add some more to that based on some e-mail traffic -- but at the 802, I just asked for him to be contacted to provide some testimony. I asked if Mr. al Darbi was available, and I -- the government indicated he was, and I covered how many witnesses we were going to call each day.

Trial Counsel, do you want to add anything to my

summary of the 802?

TC [MR. MILLER]: Nothing from the government. Thank you, Your Honor.

MJ [Col SPATH]: Defense Counsel?

DDC [LT PIETTE]: Defense concurs. Nothing to add.

MJ [Col SPATH]: All right. Let's deal with the parties.

Trial Counsel, if you would cover the parties -- I believe they're the same parties who were present last time -- and then whether or not you are transmitting.

TC [MR. MILLER]: Good morning, Your Honor. These proceedings are being transmitted via CCTV to locations in the United States pursuant to the commission's order.

Present for the United States are Brigadier General Mark Martins; myself, Mark Miller; Colonel John Wells; and Major Michael Pierson. Also present is Mr. Forrest Parker Smith, Master Sergeant Vanessa Pichon, and Staff Sergeant Kevin Creel. Present in the back of the courtroom are supervisory -- excuse me, are OGC lawyer Patrick O'Malley; Joseph Castellano of the FBI. No other further persons are here. Thank you.

MJ [Col SPATH]: Thank you.

Defense Counsel, do you want to cover who's here for you?

DDC [LT PIETTE]: Yes, Your Honor. Good morning. Present for the defense on behalf of Mr. al Nashiri is myself, Lieutenant Alaric Piette, and Ms. Brandi Janes, civilian. Also present with the MCDO, but not directly representing Mr. al Nashiri, is Colonel Aaron.

MJ [Col SPATH]: All right, thanks. All right. So since we had the 802, a couple of things have transpired. One is we received a brief related to the DoD civilians, and it was a motion to quash the subpoena. I had a chance to look at it today. And so while I recognize it did not receive an AE exhibit ahead of time, I've already indicated we're going to accept it so that we can kind of move forward and figure out the road ahead. And I communicated that to the staff.

Once we accepted it, I read it. And in general, my plan is to establish a briefing cycle and then work to have their attendance secured at either the February or March sessions. I more than recognize that I asked the government on Wednesday to secure their attendance for Friday, and it was short notice. And so understanding that sometimes people don't like to be notified that they're going to have to show up and testify in a day or two and the issues at hand, I don't have any concerns with securing their attendance later in time.

[Tr. 11536 - 11570]

the government last time to work to secure their attendance to testify. That process got underway. While that was going on, we got third-party filings, which I accepted the first time where the civilians through counsel made various arguments to either quash the subpoena or alter the attendance requirements or something like that.

It was pretty clear by the end of the session that I wanted them to come and testify, as was made absolutely clear when I issued the docketing order. The docketing order I think was a fair indication that I'm not granting any motion to quash. I am certainly amenable to working on their schedule to have them come testify by VTC to a point, but they need to be here.

In response to the docketing order, we received proposed third-party filings that, frankly, were a cut-and-paste from the original third-party filings with the very same arguments, so I'm not accepting those. I've already seen them. There's nothing new. So there's going to be no new briefing order, no new briefing cycle. We've already covered this.

And so, Trial Counsel, any updates on -- to -- are they going to show up at the Mark Center? Do we need to subpoena them again?

MATC [COL WELLS]: Your Honor, briefly, we have no indication from the individuals that they will comply with the subpoenas which are, as written, to appear at the Mark Center to be ready to testify at 10:00 tomorrow, Tuesday, with the change in events. You were not scheduled to convene at that time until 1300. But I think a reasonable interpretation is to be ready at the Mark Center and wait further instructions to be ready to testify. That's where we are.

Maybe a further inquiry with their supervisor would be important. Also with Lieutenant Piette, since you have not released any of the defense counsel, he should know where they are, and if he needs to, he should communicate with them and find out exactly what their plans are.

Sir, about these third-party filings, 393, I understand that you're not going to accept them, but I do believe there is new information in there that should concern the commission. They have attached an agreement of responsibilities to that which neglects to include the two required provisions that are specified in the regulation: one is to follow all rules and regulations, and number two, to comply with all orders of this commission.

So that agreement is something that the prosecution has not seen, other components of the government have not

seen. This is within the MCDO files and seems to be out of compliance with the regulation for their qualifications. And so an appropriate inquiry with them personally would be prudent, and the reason why they should appear as witnesses. And then number two, also with their supervisory chain. So I think that is more concerning, and the government would like an opportunity to make that on the record ----

MJ [Col SPATH]: You all are welcome -- you all are welcome to file whatever you think is appropriate. I will accept your filings as a party standing by. But as for any more third-party -- third party filings with the same arguments that we've already spent a whole session discussing, I'm not interested.

If there's a reason to quash the subpoena, i.e., it's oppressive in some manner to have them travel to the Mark Center close to where they work, I'd be interested. But I haven't heard any of that. I just keep hearing the same thing, I don't have the authority, which I do. And the defense community can unilaterally act and it's unreviewable, even though I disagreed with that. And again, not a single appellate court has said differently yet. They have been remarkably silent, so ----

MATC [COL WELLS]: Yes, sir. And to comment on that point

then, this filing in 393 from Ms. Eliades and Spears where the requested relief is that you accept that filing in lieu of their appearance to discuss good cause on the record, you've rejected that, will not accept those filings.

You want them personally to appear. We've issued a subpoena. They should appear at the Mark Center at 10:00 tomorrow. We've requested that the VTC suite be made available. If the commission gives us other orders and directions about their appearance time, we will modify that appropriately.

MJ [Col SPATH]: I think -- it appears tomorrow there's going to be some use of this facility by another court proceeding. And so kind of two things: 10:00 tomorrow is what the subpoena says. It's reasonable for them to be there at 10 in accordance with the subpoena, even though we shouldn't have to subpoena DoD employees that taxpayers pay for. But separate from that whole effort, it's reasonable they'll be there at 10:00 tomorrow. I imagine we won't get to them until sometime after 10 because the schedule for tomorrow is that other proceeding to be here from 8 to 10. So however long it takes to get them out and get us in, hopefully by 11, we'll get started.

MATC [COL WELLS]: Okay, sir.

MJ [Col SPATH]: If they're not there, different issue, and then we can talk through our next steps, which we've been down this road before. If that's the next step, that's the next step.

MATC [COL WELLS]: All right, sir. Thank you.

MJ [Col SPATH]: All right. All right, Colonel Aaron, if you could, could we chat for a few minutes? Same as last time, I just -- I want to get some updates and make sure I understand where we're going.

I assume you're still the Acting Defense Counsel -- Chief Defense Counsel in this case?

DCDC [COL AARON]: I am, Your Honor. Before we start, I would like to start, again, by saying that I'm here voluntarily to answer what questions I feel that I can answer from the court. But I renew my objection to the court's opinion that it can order me to be here and would ask the court to state on the record the basis upon which it believes it can order me to be here.

MJ [Col SPATH]: I would do this. If you don't think I have the authority, don't show up. Orders are -- orders are presumed to be lawful. That's -- I think we learned that early on in our military careers. They're presumed to be lawful. And you violate them at your own risk. So if you

don't want to be here, leave. We'll figure out what happens.

DCDC [COL AARON]: Your Honor, I'm trying to cooperate and ----

MJ [Col SPATH]: Right.

DCDC [COL AARON]: ---- assist the court in understanding the situation.

MJ [Col SPATH]: Right. And that's why I said last time, it's not meant to be -- I'm not going to explain, justify, and debate why I think I have authority as a commissions judge to compel the attendance of somebody who has supervisory responsibilities over this team. If there comes a point where you think I'm wrong and it's worth taking that risk, then don't show. I wouldn't advise it, but I'm not your lawyer. I'm doing the best I can with the tools I have or I don't have, so ----

DCDC [COL AARON]: I understand your position, Judge.

MJ [Col SPATH]: With regard to Ms. Eliades and Ms. Spears, I assume you're familiar with civilian witnesses in government employ and their requirements to make themselves available for this process and their supervisor's role in that process.

DCDC [COL AARON]: I am.

MJ [Col SPATH]: And so are you assisting the

prosecution -- and them, frankly -- in understanding -- I didn't write 13-4, and I didn't write those rules. But are you helping communicate that particular issue to these two counsel?

DCDC [COL AARON]: Your Honor, I think there's room for interpretation as to what 13-4 provides, and I certainly disagree with what I think is a superficial reading and understanding of that that Colonel Wells has proffered.

The issue is -- is significantly more difficult when dealing with a situation such as this where the witnesses are unwilling to appear, have sought, through a legal process, to have that subpoena quashed, and are represented by counsel in that effort. There's a number of employment-related legal issues that greatly complicate the simplistic approach that I can simply order them to be here and the concept that my order would have any significance, whatsoever, on their intention of what to do.

MJ [Col SPATH]: No, and I appreciate that. Mine wasn't a request for you to order them. I mean, again, I think you can read this a few ways, but it does say, "Civilian employees of the United States can be required to testify incident to their employment with appropriate travel orders issued for this purpose," and you don't need a subpoena.

DCDC [COL AARON]: And, Your Honor, I have provided for travel orders to be issued for them and to have them put on the manifest on the flight down here. Obviously, they have not done so.

MJ [Col SPATH]: No, I appreciate that. That helps. So it seems to me you are, within the rules, at least, trying to communicate to them what their requirements may be.

Colonel Wells?

MATC [COL WELLS]: Your Honor, if I could, I don't think there's been an inquiry whether or not he's communicated with them.

MJ [Col SPATH]: Well, and I'm walking a cautious line. I don't want to get too much into what the communications may or may not be yet.

The other is, as a supervisory attorney -- we all have these rules. As the supervisory attorney with responsibilities over anyone, so if you have supervisory responsibilities over Lieutenant Piette, for example, as the chief defense counsel, do you agree one of those responsibilities is that he conforms, or any of those who work for you conform with their Rules of Professional Responsibility?

DCDC [COL AARON]: I would say so, yes.

MJ [Col SPATH]: All right. It appears the Army Rules of Practice -- or the Army Rules of Professional Responsibility, your bar rules, Ms. Eliades' and Ms. Spears' bar rules all say the same thing, word for word, so I think yes. And I've been through the when ordered by a tribunal to continue representation or to be somewhere, Rule 1.16, which is the same for everybody, whether you like it or not, you're supposed to show up.

So -- and I get they're not coming. But part of that responsibility, when you read through that is, if you are released, or believe you don't have to be there, you have some requirement to work some kind of turnover with the people who you've left behind. Ms. Yaroshefsky said as much. It doesn't contemplate you just walk away and never return a phone call.

And so have you communicated to them their need to be working a turnover with Lieutenant Piette -- because, like it or not, he's here, they're not -- and to make sure that they are doing what they can to assist him, because he's still here representing Mr. al Nashiri.

DCDC [COL AARON]: I believe they understand their responsibilities in that regard.

MJ [Col SPATH]: As their supervisory attorney in relation to this case, have you ensured they understand their

responsibilities?

DCDC [COL AARON]: I would say that I have.

MJ [Col SPATH]: Have you detailed any other defense counsel to this case yet?

DCDC [COL AARON]: I have not detailed any counsel.

MJ [Col SPATH]: And, I don't know, what are we, four months into this? Are you going to detail any counsel, or are you just going to leave Lieutenant Piette sitting there?

DCDC [COL AARON]: Judge, it is the longstanding practice of chief defense counsel before me and myself in this case to fulfill our responsibility to make resources available to the team. I have made resources available. And consistent with the longstanding approach of the organization, it is the learned counsel's responsibility and right to determine whether or not they want counsel detailed and when and what counsel they want.

And without learned counsel, the most important resource that is necessary for the continuation of this capital case, we are not in a position to determine whether or not counsel should be detailed or not. Those resources are available and, upon learned counsel indicating their desire, I stand prepared to detail counsel to the case.

MJ [Col SPATH]: Well, I guess my question would be that I

recognize that with learned counsel here, they have unique -- they have a unique role to play under the rules. Mr. Kammen didn't excuse Ms. Eliades or Ms. Spears. General Baker decided to excuse Ms. Eliades and Ms. Spears.

I mean, the way it could have been done for those two, pretty clearly, was Mr. Kammen could have excused those two and then, at least in his world, asked General Baker to excuse him. But instead what happened is the three of them went to General Baker, and they were all three excused. Not by learned counsel.

Again, for the two DoD civilians -- I know you recognize that distinction -- they were excused, no matter how the learned counsel felt, because he never told us how he felt. And those three walked away. And two military lawyers at least, and another, I think, civilian were still detailed to this case. So you just told me that learned counsel would be the ones to undetail them, and you undetailed them.

DCDC [COL AARON]: Sir, learned counsel indicate their desire when we provide -- make resources available, if they would like them detailed. The chief defense counsel, yes, signs the memo detailing or undetailing them, but in accordance with the wishes and desires and the stated preference of the learned counsel.

MJ [Col SPATH]: Well, I understand, but after the learned counsel left and said he had no more responsibilities in this case, are you saying he then communicated that you should undetail the two detailed military defense counsel and the civilian?

DCDC [COL AARON]: Judge, the situation ----

MJ [Col SPATH]: No, I just want to understand. You told me learned counsel decide. Okay. He was gone. And when he left, in his wake there were other counsel detailed to this case.

DCDC [COL AARON]: And I had no way of knowing, without learned counsel, whether those counsel would be acceptable on the case. And in order to maintain the status quo, and not to allow the court to lock the defense team in by requiring their appearance, I undetailed them.

Your Honor, I have an independent responsibility to exercise my judgment to determine which members -- which attorneys would best constitute a team for this client, and by ordering attorneys who had not yet met with the client and entered into an attorney-client relationship with the client, you were thereby interfering with my ability to exercise my independent judgment as to what attorneys would best constitute the team for this client.

MJ [Col SPATH]: Well, did you consult with the learned counsel to see if this is the best idea?

DCDC [COL AARON]: Your Honor, as you know, I don't have learned counsel to consult with.

MJ [Col SPATH]: Right. So learned counsel need to be there to figure out whether or not you're going to detail them or keep them. But without any consultation with learned counsel or any -- did you make an effort to consult with legal counsel? I've said he's still detailed. So did you pick up the phone, send him an e-mail and tell him, what do I do here? You've walked away and left me with nobody. What do I do here?

DCDC [COL AARON]: Your Honor, we obviously have a difference of opinion as to the status of Mr. Kammen.

MJ [Col SPATH]: Colonel Aaron, stop that. We do have a difference of opinion. But the way court systems work is judges rule and then people follow those rulings, or they go and appeal, and then an appellate judge or judges agree or disagree with me, and then we respond to those.

The way court systems do not work anywhere in the United States, and, frankly, almost every other country -- the way court systems don't work is when parties disagree with the judge, they say I disagree. Thanks for your input. We don't

agree. And they just march on in that direction without something else. That's why we have 62 appeals. That's why we have courts that we can appeal to. That's why we have higher-level courts.

I mean, so the fact that you and I disagree is irrelevant to the conversation. My conversation is, you told me you need learned counsel to figure out what to do with this stuff for every decision, even though, again, that's not exactly what the law says in many jurisdictions, but okay.

I'm just trying to figure out when you made the decision to undetail them, all of the resourcing for the team except for Lieutenant Piette and the mitigation specialist who we know is here helping. Unlike mitigation specialists, when you undetailed those three attorneys, did you consult with learned counsel to figure out if that was a good plan or not?

DCDC [COL AARON]: I did not feel I had a learned counsel with which -- whom I could consult, Your Honor.

MJ [Col SPATH]: Okay.

MATC [COL WELLS]: Your Honor, if the prosecution could be heard on that point?

MJ [Col SPATH]: You'll be heard, I promise. I'm just trying to figure out the lay of the land. It certainly seems obvious to me, but that's where we're at.

Okay, Colonel Aaron, as always, I appreciate you coming to chat. Thank you.

Trial Counsel, come on up.

MATC [COL WELLS]: Your Honor, the prosecution would request that you inquire of Colonel Aaron again on this point. The defense filing, AE 389 Attachment C, is a letter from Brigadier General Baker to the convening authority explaining that Mr. Kammen would remain on the case and available for the transition of other learned counsel and that he may bill for that. So it cannot be that the defense is without learned counsel.

Additionally, you have ruled that they are not released until they have a discussion with you about good cause, and that's what you're seeking from Ms. Eliades, Ms. Spears, and from Mr. Kammen. So it seems to be an inconsistent position from Colonel Aaron. And maybe he's uninformed that General Baker has filed this with the convening authority indicating that learned counsel will still remain. Additionally, it seems to be that the current military defense counsel, Lieutenant Piette, has learned counsel available to him to consult and advise him about the approach.

So it's clear that the approach, at least from

Colonel Aaron, if he believed that he made an independent decision, is to gut the defense of any other military defense counsel to assist and he is blocking communications and failing to communicate with learned counsel.

Sir, do you have any questions of me on that?

MJ [Col SPATH]: I don't. For the record, I mean, yes, that appears obvious to the court. I've made comments before. It appears to be a strategic decision to under-resource and make it appear as if this team is under-resourced.

But let me ask this for the government. I view my responsibility to be neutral, most importantly, and to attempt to move a process fairly through any -- whatever justice process we're in. If I'm, you know, home station through a courts-martial, if I'm here through the commission, fairly -- right? -- and judiciously, and the fair administration of justice -- and that's the charter, and we all know that. So I'm trying to do that.

But I've got to tell you I feel like I'm in the wilderness on the -- fighting this particular issue because it's not my fight. I am attempting to do what I can, but really, what are you all doing to -- what are you all doing to make sure the people who are doing this are held responsible? I can't do it, that's clear. And again, is it in my lane?

How much is in my lane?

And I'll be very open with both sides. I went home. I was trying to review -- I mean, obviously I'm spending a lot of time reviewing my cases to figure out my options. I watched the military judge in a courts-martial, Hassan, take on a battle that was not his, right, the beard issue, and ultimately have to recuse himself.

And so a judge's responsibility is, one, right, recuse yourself if you have to. But the responsibility is to remain with the case and not recuse yourself if you don't have to, whether you like it or not, right? The presumption is non-recusal unless there's a reason to recuse yourself. And that is for a good purpose, because otherwise, if judges don't like a process they'll just walk away. I'm going to recuse myself. And in the spirit of full disclosure, there are days, right, where this is tough work. And it would be a lot easier for me to say I'm going home, which is exactly, by the way, what happened on this side, which is so frustrating: I'm going home.

MATC [COL WELLS]: Yes, sir.

MJ [Col SPATH]: So what are you all doing?

MATC [COL WELLS]: Yes, sir. What the response to that would be, number one, always the interest of the accused to

have proper counsel. The court must remain neutral, detached, and objective. I think that you are on pace with everything that you've done to make the appropriate inquiries and put in place the appropriate mechanisms to request voluntary compliance by civilian counsel and learned counsel.

And as you do that, new information comes out. For example, in the filings from Ms. Eliades and Ms. Spears, they present their agreement of responsibilities, which indicates pretty shocking and appalling mismanagement by the MCDO chain of command by not having them obligated with two essential requirements to appear in front of this court, is to comply with rules, regulations, and with orders and directives from this commission as to the conduct of proceedings.

So with that, I think it's dawning on us since last Friday in that filing that supervisors, Mr. Koffsky, perhaps the Navy JAG, and others, should take a closer look, as the prosecution is interested in getting to the evidence of the case. We have an obligation for the family members and the victims, and for justice. We have an obligation to make sure that the accused has proper counsel that's required under the law. So we should not rush to judgment. We should proceed at the proper pace.

And we also know that the individuals involved, the

learned counsel and the two civilian counsel, have options to pursue collaterally, which they've indicated that they would. There are other options that this commission has, considering their failure to respond to the subpoena. I know the chief prosecutor and the trial counsel in our matter will have a discussion with the convening authority's office and, if need be, to the Office of General Counsel to talk to the next higher superior.

So all of these are going forward to implement the commission's instructions and directives. But there seems to be a fundamental defect in the Military Commission Defense Organization that they believe they do not have to follow the orders. General Baker spoke in front of this commission and said, "I am not an enforcement mechanism," but clearly the rules and regulations place that on the whole organization and its members, including the chief defense counsel.

But here you have a writing now in 2015, as early as that, that General Baker should have reviewed, and it clearly neglects to include that provision. So I think we have some professional mismanagement, and inquiry is appropriate.

Sir, that's all I can say at this point.

MJ [Col SPATH]: Well, I think they're important inquiries, because I think we all know if we don't resolve

these issues this time, even if we get another -- another -- because the other learned counsel is still detailed to this case, based on my rulings and the lack of any other court saying differently, it seems obvious.

But when we get another learned counsel, we all know what can happen six, seven, eight months in, middle of trial, day before trial starts, we do this again. And we sit around and we talk about how we are -- you know, defense counsel is looking into other options. How long are we going to look? This case has been pending for years.

And so as I've said, we are moving forward. If I were the defense community, I would resource the team. If I were the defense community, I would recognize my obligations.

MATC [COL WELLS]: Sir ----

MJ [Col SPATH]: But I have to stay in my lane, too. How much can I order it? I ordered detailed counsel to make an appearance, and you saw what happened. They undetailed them ----

MATC [COL WELLS]: Yes, sir.

MJ [Col SPATH]: ---- without consulting learned counsel.

MATC [COL WELLS]: Well, yes, sir, and I think that's their choice.

MJ [Col SPATH]: And in a federal filing -- looking at it,

I forgot -- in a federal filing, the defense community told a federal judge, We can have learned counsel assigned to the case in 30 days. That's in a federal filing to a federal district judge. We're 120 days out. I wonder if they've gone back and amended the filing to let the judge know, well, when we said 30, we meant probably a year because that's since, of course, come to pass.

MATC [COL WELLS]: Sir, we will look at that point.

MJ [Col SPATH]: There are many out there. Again, I can't refer a case to DoJ. If I could, I would, because walking away from your representational responsibilities wholesale, after being paid the kind of money that somebody was paid, seems to me to be something I'd look into. But again, I can't refer a case. I work really hard to stay in my lane.

MATC [COL WELLS]: Yes, sir. I think at this point the commission is still in a fact-finding mode, requesting the three counsel to show cause on the record and have a discussion. Some of their bases for withdrawal may be incorrect.

You've already heard testimony from Professor Yaroshefsky that she was not advised that there was an outstanding ruling or request from the defense to use the courtroom or other parts of the ELC to conduct attorney-client

meetings. It seems that that was pivotal and material, because she said he had no further options based on the information presented to her. But if she had had knowledge of that other option, she might not have walked down the analysis of a mandatory withdrawal, but a voluntary withdrawal.

At the end of the day, though, if you disagree with commission rulings and you do have an ethical conflict, the rules do say if the commission issues an order that you are retained, then you are retained; and there's strong case law that provides the attorneys protections against claims of unethical conduct in that circumstance.

So we are doing everything we can first and foremost to save the learned counsel and the DoD civilian counsel from an adverse finding of fact that they've walked away and abandoned their client. So the prosecution would suggest we're still in that process, sir. And ultimately, I believe if they will not participate, you will be bound to make specific findings of fact as to their conduct before this commission.

We have made a filing suggesting that there's ways to disqualify them and bar them from further proceeding here, and that would be adverse. And we've suggested that in that case, to preserve objectivity, you would refer that to the chief

judge. I don't think we're there at that point yet; that's just a procedural suggestion. You're still doing fact-finding. After all, nobody knows this case better than the attorney who has served Mr. Nashiri for eight years, Mr. Kammen, going forward.

So while we pause to have MCDO explore their ability to create dysfunction in the commission by their conduct, you should maintain the course that you're doing right now and make the appropriate inquiries of both the defense and the government and the prosecution pointedly and directly, and we will respond to them, sir.

MJ [Col SPATH]: Just a couple points. Just for the withdrawal in this case, I just want to be clear that I have made more than one factual finding: Not only was there not a basis for withdrawal in this case, but that there was no intrusion into attorney-client conversations in this case. That's not a conversation on any other case pending down here. I have no idea. I don't care, frankly.

In this case, having access to everything, classified and unclassified, I've made a finding that there's no intrusion. Now, fake news. If you don't want to listen, I can't help, right? I mean, I can only say it. If you don't believe findings of fact from a court and you think I'm part

of the -- part of the effort, well, I can't fix that. But I've made those findings. They're clear.

So I think my question -- yes, there are some mechanisms for me. But again, I'm trying to maintain my own impartial and neutral and objective behavior. And if I -- clearly, if -- you've seen me withhold moving into contempt proceedings with the civilians, DoD, and the learned counsel. And I think and it's obvious why I am doing that, because that will cause a conflict likely with their client and a conflict between -- a perceived conflict between the bench and those counsel, and that can lead to recusal.

There's federal case law about judges who engage in contempt proceedings, about lawyers appearing in front of them in the middle of the trial, even if there's not the actual, right, lack of fairness from the judge, the public may perceive, because it's adversarial. And so you're right, that's why I'm really trying to walk slowly through the process. But it's also why there's some responsibility on your side to be taking whatever actions you believe are appropriate to make this move.

Because I agree, slow, steady, working through this process makes sense. But I know that if I am the public or a family member or an alleged victim, or, frankly, the accused,

we've had slow, steady progress for a long time.

MATC [COL WELLS]: Yes, sir.

MJ [Col SPATH]: And so there's always going to be appropriate progress, but we need to continue to make progress, because that is important to the administration of justice. It is.

And the only other point I make is for Ms. Yaroshefsky, I haven't finished some findings of fact I'm going to make, but she did testify that even if the facts were different, her opinions, frankly, were her opinions and she may not have changed it, for what it's worth.

MATC [COL WELLS]: Yes, sir.

MJ [Col SPATH]: It's interesting testimony.

MATC [COL WELLS]: From the prosecution's perspective, we believe we're still at the process and procedure to explore good cause on the record for withdrawal, whether it's mandatory or voluntary. Contempt proceedings or disbarment from the commission is not really before you at this point.

MJ [Col SPATH]: Not yet.

MATC [COL WELLS]: We -- we -- there could be explanations from counsel as to their belief and their good faith belief. Could be some misunderstanding from Ms. Eliades and Ms. Spears. If they signed the agreement that was presented

to them by the chief defense counsel or others in there, then they have a right to rely on that. But you would also think that they would read the rules and the regulations and the preamble to the Model Rules of Ethical and Professional Conduct, which say that you do comply with the commission's rulings. It does ----

MJ [Col SPATH]: It's Rule 1.16(d) in both of their jurisdictions, Indiana and Illinois, in mine, I think probably in all of ours, frankly, but the ones that matter, the same rule.

MATC [COL WELLS]: Sir, and so the underlying matter about their problem with a meeting place to exchange confidential information here at Guantanamo and the chief defense counsel's letter that they seem to rely on, you know, the answer to that with Ms. Yaroshefsky is, did not know that they had requested for another location, said that it exhausted.

But the answer to that would be: Your Honor, we cannot meet at the location that the Joint Task Force has provided us. We cannot exchange information with our client in that environment. We need your assistance to help otherwise.

And you have authority, which could include to the government: I am not going forward. We are abating these

proceedings until that is fixed, which could -- is an option for you. I'm not suggesting that that would be appropriate in that circumstance at this point.

I do believe that the location for attorney-client meetings has been changed in JTF, and the commander has designated a new location, which I believe that Lieutenant Piette and his client have used and met. It's in addition to the option at AV-34, so there's another location. So that underlying problem seems to have been resolved.

MJ [Col SPATH]: If there was -- well, let me make sure, because my understanding is the underlying problem was more of a perception of concern. If you all have any evidence of intrusions into attorney-client meetings that have occurred, I'm confident, as officers of the court, you'd be communicating that to me.

MATC [COL WELLS]: Sir, absolutely.

MJ [Col SPATH]: Okay.

MATC [COL WELLS]: My comments are as to the problem as the defense has articulated in their latest filing from Ms. Eliades and Spears, it was their perception of ----

MJ [Col SPATH]: I just want to make sure we're clear. I know you all know your obligations, like the defense community. If you all are aware ----

MATC [COL WELLS]: Yes, sir.

MJ [Col SPATH]: ---- of intrusions into attorney-client matters, and especially any intrusions you are aware of or received, you would let me know.

MATC [COL WELLS]: Sir, absolutely. The -- we need the counsel here to converse with you and discuss all issues.

Sir, that's all we have.

MJ [Col SPATH]: All right. Thank you.

MATC [COL WELLS]: Thank you.

MJ [Col SPATH]: Lieutenant Piette, I've just got a couple questions, if you don't mind. Mine has to do with just training. I know self-help leads, again, people who don't take the time to understand the proceedings to chuckle and think that's funny. I don't think it's funny.

Self-help, of course, in the case law, as opposed to just some whim where I've made up the words, has to do with a lawyer who is in an untenable position, whether they like it or not, working to take care of the issues at hand. And again, the public -- I suggest it all the time, I take the time to actually read the cases that are relevant before I comment on them, but that won't happen.

So have you made any efforts to go to training?

DDC [LT PIETTE]: Yes, Your Honor. As you know, I have an

ethical obligation to do that, and it's just a moral obligation as well, so yes. This court can expect, probably before the next hearings, to have a motion regarding that, since some of the trainings conflict with some of our scheduled times, absolutely.

MJ [Col SPATH]: And that's what I was going to recommend to you. I am amenable, as you continue to get ready -- I recognize you don't agree with it, but you seem to recognize -- agree or not, we seem to be moving forward.

So if there are courses -- so I went out and looked. I know there's the Fundamentals of Federal Capital Defense Practice in Atlanta April 30th to May 2nd. National Capital Voir Dire Training in Boulder in May. So there's a whole host of them.

So what I offer to you is -- you might not agree with the comment, but if MCDO is just not going to resource you and leave you to work with your mitigation specialist and your paralegal and nobody else, or whatever other experts you have, I'm amenable to taking off some time for training. So I know you'll let us know what courses and things those would be.

Without -- without telling me any conversations -- I know you know that -- have you reached out to Mr. Kammen or Ms. Eliades to receive assistance from them? And I pick

Ms. Eliades particularly because she appears to be capitally qualified. So have you reached out to Mr. Kammen or Ms. Eliades particularly to receive assistance in this case turnover to you?

DDC [LT PIETTE]: Yes, Your Honor, they've been available for turnover.

MJ [Col SPATH]: Okay. And I'm not going to ask. I would suggest communicating with MCDO. Maybe you are. But they seem to have a lot of lawyers. I know al Hadi has quite a few who have managed to come down here on island.

So if you want more help, even outside the courtroom, the resources exist, and that organization has the resourcing requirement for you. So just -- I would take advantage of it.

DDC [LT PIETTE]: Yes, Your Honor. And I can speak to that briefly, because it seems a lot of what's on the record about resourcing and how we use it on the al Nashiri defense team is just a lot of speculation.

As Colonel Aaron said, he's made resources available, and resources are available, so -- and we are utilizing those resources; however, there's a difference between using even other counsel as resources and having them detailed. The -- and frankly, because of the way things are right now, essentially I am acting or de facto team lead, so nobody gets

detailed or undetailed without kind of my say-so right now.

And the response of undetailing the attorneys, to your order, while it's been portrayed as kind of a strategic decision because it -- to some people, I guess think it maybe looks better to have me sitting here alone as some sort of strategy, when, in fact, it might look better to have four military attorneys in the uniforms of three different services, all of them standing behind the position that we cannot take a position until we have learned counsel. If anything, that would look better.

So the -- this isn't a strategic decision. I think no attorney, no lawyer would trade the presumption of innocence for the standard of review in post-conviction for nothing more than the appearance of unfairness. That's absurd. So the response of undetailing those attorneys was, rather than getting into sort of a sideshow issue about whether or not you can order them to appear in court, it was easier to just undetail them and avoid that.

But we still do have the resources, and no attorneys who are not capitally qualified are going to be detailed until we have somebody actually on the case, not just on turnover, but actually on the case who can advise and assist Mr. al Nashiri, as is statutorily required from a learned

counsel perspective.

MJ [Col SPATH]: Again, I've ruled on that. And I've ruled -- first, there are jurisdictions that disagree with you, you know that.

DDC [LT PIETTE]: Uh-huh.

MJ [Col SPATH]: Flat out. There are jurisdictions that frankly do not buy into this ABA requirement -- a policy group -- this ABA requirement -- and it's not even a requirement, a guideline of capitally qualified counsel. There are jurisdictions who believe that is not helpful for a variety of reasons, many of them political, frankly, and you know that.

Here I have told you I don't read the statute the way you do. I read it the way it's written. But most importantly, I've ruled on it. So you're making your decision in the face of a ruling that has yet to have any success by any appellate court telling me I've read it wrong or I've implemented it wrong.

And what I have said to you is we're going forward, and we're going forward right now with evidentiary matters that any trial lawyer understands because it's real evidence. At some point that's going to change, as you can tell by my scheduling order.

And so in the face of that, you continue to opt to hang your hat on capitally qualified learned counsel are required; and I've told you they're not. And so that's why, yes, it appears strategic, because I've already ruled on it. If you disagree, get some help and go get a stay. Get some help and get a writ filed. Get some help and get an appellate judge to step in.

So far those efforts seem to have met with silence -- seem to have been met with silence, and that's why I believe your decision is, one, strategic -- and again, that's a finding, and I'm going to continue to make it; and two, it's in the face of a ruling adverse to you. So if you don't -- if you don't want more assistance in the courtroom, that -- and you believe that's your decision as lead counsel, okay.

All right. Well, we've certainly talked about this enough. We've gone an hour without a witness, so we're going to get to that next.

Trial Counsel, let me just ask government one other thing. We had to deal with the declassification, to the extent possible, of the issue surrounding this alleged intrusion. Are we working to declassify this information with the appropriate authorities?

MATC [COL WELLS]: Your Honor, we are.

MJ [Col SPATH]: Okay.

MATC [COL WELLS]: We're in discussions with them. I would say that this depends on the specific facts and that you would find -- we would like an opportunity at the appropriate stage to make suggested findings of fact to the commission.

I would, as I stand here at the podium, suggest that perhaps the classified information that's been alluded to is a red herring because there is no intrusion. You found it. You reviewed everything that affects this accused in the location that the command had designated for him to have attorney-client meetings.

To the extent that the defense objects to that, the command has responded and provided them a new location that may be to their liking.

MJ [Col SPATH]: No, I understand. But again, part of this is in this spirit of full disclosure, right, the openness of the process. My hope is, again, to the -- first off, the government has a duty anyway, right, to the extent possible, declassify information.

MATC [COL WELLS]: That can be used at trial or the commission.

MJ [Col SPATH]: Here I'm looking in relation to this issue ----

MATC [COL WELLS]: Yes, sir.

MJ [Col SPATH]: ---- for the public, more is better ----

MATC [COL WELLS]: Sir ----

MJ [Col SPATH]: ---- on this specific issue.

MATC [COL WELLS]: Understood. As you know, the chief matter that arose related to another detainee and another location that did not involve the command designation, and it was nested in the AE 369 series with Mr. al Darbi. And so the prosecution's view is that this issue was raised in that series by the defense to avoid the cross-examination of Mr. al Darbi and have to confront him while he is still available and he isn't serving the rest of his sentence with the Kingdom of Saudi Arabia.

So he is available for that purpose ----

MJ [Col SPATH]: You've already -- you already got to my last note that I had to ask: Is Mr. al Darbi still here and available for cross-examination?

MATC [COL WELLS]: Yes, sir.

MJ [Col SPATH]: Lieutenant Piette, if you decide you want to engage in any cross-examination this week, just need to let us know.

DDC [LT PIETTE]: Understood, Your Honor.

MATC [COL WELLS]: Sir, nothing further.

[Tr. 11718 - 11720]

representation of their client. And it causes problems with the representation of their client that then probably lead to good cause and conflict.

As adverse things happen when people are arrested typically, or apprehended, or transported to testify, adverse things happen to your security clearance, adverse things should happen to your employment. Those aren't helpful if we're trying to maintain a relationship.

But, on the other hand, if the intent is never to help and never to come back, well, then, the answer is that that's not one of the concerns, right? It's doing the right thing for the commission. So we'll talk through it.

MATC [COL WELLS]: Sir?

MJ [Col SPATH]: More soon. We've got witnesses, we're going to deal with those, and then we'll have some more conversation about this today.

MATC [COL WELLS]: Yes, sir. And just to depart on this, we will continue to pursue the supervisory chain. At one time you had the inclination to request Mr. Koffsky ----

MJ [Col SPATH]: More than inclination, that I want to hear from him. He, too, doesn't want to just show up. We want to go through this process of send me your questions. Well, we don't really want to send you questions; that's not

how it works. There are lots of reasons I shouldn't have to do this. Well, okay.

This behavior by the civilians makes his testimony even more relevant than it was before, when I already thought it was relevant. And if there's intransigence there, who's next? And who's going to show up? Or are we just down here truly on an island with nobody willing to come speak to this, deal with it, and assist?

So you can tell right now I'm a little frustrated. And so, because judges are human, I'm going to take a deep breath, listen to the testimony that we had planned for today, ponder kind of what the options are as we move forward, and have some discussions about that. There will not be any rulings from the bench on this issue today, because I want to reflect, and reflect in the right state of mind. I find that helpful all the time.

So why don't we get to those witnesses and we'll move forward. Trial Counsel.

TC [MR. MILLER]: Thank you, Your Honor. The government calls Jeff Miller.

MJ [Col SPATH]: And while we await Mr. Miller -- Mr. Miller, let me ask you a question. Yesterday, maybe I misunderstood you or -- were you saying we weren't going to be

finished by the end of Friday, or you were saying we're probably not going to need Friday for witnesses?

TC [MR. MILLER]: Probably not going to need Friday.

MJ [Col SPATH]: Okay. That helps just with some options on Friday with some of these other issues that are kind of swirling around us. I misunderstood you or we weren't clear, but got it.

TC [MR. MILLER]: Sir, if you would step forward to the jury box, remain standing. Would you raise your right hand, sir, please.

JEFFREY R. MILLER, civilian, was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the Trial Counsel [MR. MILLER]:

Q. Please be seated and, if you would, please, state your name for the record.

A. Jeffrey R. Miller.

Q. And I believe you have testified at least two times here before the commission; is that correct?

A. Yes, sir.

Q. And you are a special agent with the Federal Bureau of Investigation?

A. I am.

[Tr. 11909 - 11912]

MJ [Col SPATH]: Regarding materiality, that's for me, frankly. I've said they've not been excused. And in order for me to determine if good cause exists, I have to hear from them, because they've provided little. What I have is a statement from Yaroshefsky addressed to Mr. Kammen; doesn't even talk about them.

I have a statement from General Baker, pretty minimal in facts, as to why he excused three counsel. And frankly, if General Baker is to be believed, you could excuse the defense counsel who's sitting here by his same analysis, and he's still sitting here, which tends to undermine that. So of course they're material.

So I can understand, is Lieutenant Piette different somehow? Or we've just left him here? Making it much more strategic and much more visible that we've under-resourced the defense team. So of course they're material. So it looks to me like so far we've complied.

The witness clearly refused, through counsel, because I saw the e-mail. And the Attorney Fox said they're not showing. And I assume he can speak for them since he's their attorney. And so I can't see a valid excuse. Again, the e-mail that I was shown said I lack jurisdiction; I don't. And that the -- having to appear at the Mark Center by VTC for

DoD civilians employed in D.C. would be oppressive, with no evidence to the contrary.

So what I would like is some homework overnight. Would you at least craft the two writs. Because I'm going to issue warrants of attachment -- I plan to do it tomorrow -- to have them brought sometime on Thursday or Friday.

Also -- again, I don't know yet. I really do mean I'm going to pause overnight to take some time to work through the different options and to make sure that I am proceeding in a manner that is judicious and fair, and not based on any frustration, because sometimes it is easy to feel some frustration, and I find it's best to take a pause.

But inquire into Mr. Koffsky's availability this week. We've discussed it with him. We've given some warning to him. For him -- if you all can work it out that there's VTC capability in the Pentagon that satisfies the crowd here, he doesn't even have to go to the Mark Center. And I'm pretty confident there is. But what we need are: What are his windows of availability? Or do we also need to also subpoena him? In which case we'll go through the process.

But first I need to know is -- I know he wants interrogatories. I know he wants us to send the questions. That's not going to happen. I want to know what he's doing to

assist in getting these witnesses here; what he's doing to assist in resourcing this team; does he know what's going on; what does he believe his role is; and what's he doing about the clear evidence of misconduct in all of these cases? That's -- I mean, I think we all know what I want to talk to him about. It should be easy, frankly, for -- if he's engaging with legal counsel, for them to help him in the areas that I have questions about.

And as always, I take privilege seriously. If he's concerned about privilege, just tell me in answer to -- just pause before you answer the question and we'll work through it. I'm not ordering him to appear yet. What I want to know is if I order his appearance, is he available any time tomorrow or Thursday or Friday, or are we going to have to go down this road of subpoenas?

So if you could give me some updates on that tomorrow, and again, if you guys could draft like you did last time we went through this, I would sure appreciate drafts for the warrants so we can issue the writs.

MATC [COL WELLS]: One moment, sir.

MJ [Col SPATH]: Please.

[Pause.]

MATC [COL WELLS]: All right, sir. I just conferred with

co-counsel to make sure that I understood your intent and your directions. And we also discussed to make sure that we filed with the court and with the defense the necessary paperwork that supports the questioning you just had of me of whether or not the warrant was properly issued and all other instructions and fees were tendered. We understand that, sir, and we will move forward.

MJ [Col SPATH]: All right. The other -- because I'm certainly not communicating with any of these people. I want to make sure that we have communicated clearly to their attorneys and them, I denied their motion to quash. I said it in here. I heard myself say it. I double checked. I was pretty clear.

But separate from that I issued a scheduling order telling them to be here after we had gone through one round of briefing, which reasonably you can read that I denied their motion to quash. But then I remember on Monday -- I didn't remember. I read the record again. I know I said on Monday. It's denied, and I rejected the second set of filings ----

MATC [COL WELLS]: Yes, sir.

MJ [Col SPATH]: ---- because I've already given them a briefing cycle. So did you communicate that clearly to their attorney? And I hope you did, and do it again.

[Tr. 11924 -11925]

point. Sunday the weather looks better. But that affects everybody who has travel plans on Saturday, and I know that. So no decisions. Just -- it came to me as I was working through it.

This next part, I want to talk through. I pulled up my notes. It's some frustration over -- it's not frustration. It's just -- it's a lack of clarity from people who talk about this process, and I think it's important to be clear as we work through these difficult decisions that are affecting this commission.

Not that anyone cares about my reading habits, but I do professional reading typically in the evening a couple days a week. Makes sense to me.

And yes, I use CAAFlog. I don't read the comments and I tend not to read the analysis; I don't need their help, because some people suggest it has a bias. But what I appreciate about them is they tell me what cases have been decided, what cases are of interest. And then I can click on those links and go right to the case and I can read the case law, right, from CAAF or from AFCCA, or from the Supreme Court, and I can keep track of even cases that are affecting us. Seems like a reasonable one-stop shopping mechanism.

So I was a little surprised last night when I opened

it to find this case making their -- the top of the banner, and noticed very quickly that it said that I had ordered, or was going to order today, writs be issued against civilians to be dragged to GTMO. Imagine my surprise. Fortunately, there was a link to figure out where in the wide, wide world of sports is that coming from.

And it's coming from a reporter who we brought down here and we bring down here willingly, and you know, put up, who got it wrong. I said very clearly yesterday I want draft writs so I have options as I figure out what to do, and I hadn't made a decision yet. I don't know if I could have been more clear.

So I'll say it again, I said yesterday I haven't decided yet to issue any writs. If they're issued, they're not being brought to GTMO. Anybody paying attention to this process knows that, right?

In the case of the two civilians, they're going to be brought -- get this -- from where they work in D.C. or in the D.C. area to another building in the D.C. area for a VTC. To figure that out you just have to read the rules, that's it, and report correctly.

Again, you don't have to; I have no control. But it's just always remarkable to me that words matter and

[Tr. 12285 - 12287]

replete with me stating that they have abandoned their client and they have refused orders, now refused a subpoena, refused to resource, undetailed -- Mr. Koffsky didn't know the timing of that, right? -- undetailed detailed defense counsel as soon as I said they should make an appearance or would make an appearance.

MATC [COL WELLS]: Sir, I would suggest this: I'm not sure when he actually undetailed them. I'm not sure the pointed question to Colonel Aaron was asked.

MJ [Col SPATH]: It was asked. He was very -- he was very up front when he talked to me last time. I asked him, "Did you undetail them after I gave you -- or that order came out?" And he said, "Yes."

MATC [COL WELLS]: I missed that point, but you ----

MJ [Col SPATH]: He was very clear.

MATC [COL WELLS]: Sir, I would suggest that the commission has important power still to implement, fact-finding to do. It seems that it has been exhausted with Mr. Koffsky, exhausted with Colonel Aaron, perhaps exhausted with the two employees. There are other options that relate to writ of attachment. You said that you were going to cautiously consider those. I'm not suggesting that that's appropriate in this circumstance.

MJ [Col SPATH]: That's right. And I -- I thought I was very clear, right? Apparently there is a lot of confusion about "I'm going to think about it overnight."

MATC [COL WELLS]: Correct, sir.

MJ [Col SPATH]: And now that I've had a chance to listen to audio, I actually know what I said, which is, of course, what I think you all heard, "if I issue the subpoenas," but can't listen to audio because we don't put the audio out there.

But, most importantly, I'm going to think about it overnight. And I am pausing on issuing those writs, because I have every belief that they are enforceable. I think there's no doubt you all can get the marshals, we can get the civilians, we can make them travel all of 10 miles, right, in this oppressive world to the Mark Center, testify, refuse to testify, do whatever it is they're going to do. We could do that. That guarantees a conflict with their client -- it does -- because of the adverse, right, responses to people who have to be apprehended because they avoid showing up for court. It has adverse consequences to them. It relates to the representation of this client.

So if I'm them, of course, what do you do? You turn around and go, well, there's good cause. I mean, there's good

cause. If nothing else, this has become a different kind of relationship with our client. And that's why I have paused on issuing those writs. Because can I blow it up and get rid of them? Yes. But is that the right answer when they have an attorney-client relationship with a person nobody's bothered to get any input from, except for me ----

MATC [COL WELLS]: Yes, sir.

MJ [Col SPATH]: ---- that has been presented to me about what does he want in all this. Does he want Mr. Kammen back?

And this -- this belief that he doesn't know what the issue is -- he was in here for Ms. Yaroshefsky's testimony. He's been in here for multiple discussions, when he chooses to come, about what the underlying issue is. He knows it has to do with intrusions into attorney-client discussions. He knows that. So this belief that he hasn't been informed is wrong, and we all know that.

MATC [COL WELLS]: He's in the hands of his attorneys, sir.

MJ [Col SPATH]: And where is his input? Does he want Ms. Eliades released? Does he want Ms. Spears released? You heard his answers, I can't make them come here. Well, that's self-evident.

MATC [COL WELLS]: I think important findings would be

[Tr. 12343 - 12345]

The only reasonable explanation is Lieutenant Piette said he remained on the case in order to continue to represent his client and that his client had some representation. He made a choice according to what he has said in here.

General Baker also left every other defense team across the commissions intact, which indicates to me none of them have asked for a release, based on all of this information. What this shows me is it's more information that General Baker, Mr. Kammen, and the two DoD learned counsel's actions are both arbitrary and purposeful. They are directed at stopping or mortally harming these proceedings.

This commission continues to find, as supported by significant evidence, this course of conduct shows a strategic, concerted effort by the Military Commissions Defense Office, which is different than Lieutenant Piette, a strategic course of conduct by the Military Commissions Defense Office to undermine the commissions process and attempt to halt the only commissions case entering the evidence pretrial admissions stage -- capital commissions case entering the pretrial admissions stage.

All of this has occurred, also, as the commission was approaching the deposition cross-examination for Mr. al Darbi who, according to the defense, is the only eyewitness and most

critical government witness, after months of preparation time provided at defense request to prepare that cross-examination, and delays at defense request to prepare that cross-examination.

This decision was also made very soon after the commission issued what some have called an aggressive 2018 calendar year schedule, with significant time to be spent here at Guantanamo Bay, to which learned counsel immediately expressed tremendous reservation, despite an employment contract that indicates he has to comply by those schedules.

After multiple refusals to appear by learned counsel and DoD civilian counsel, the commission ordered all other detailed counsel who had yet to make an appearance to do so at the next scheduled commission proceedings. That would have been January 2018. Immediately after that order the acting chief defense counsel for this case released all those counsel from representing the accused. Of note, when he testified, he did mistakenly identify how many counsel were released; Lieutenant Piette properly pointed out actually three were released, not the two military counsel, leaving the accused with a single detailed defense counsel. Of note, it's the least experienced. If you go look at the three who were detailed, compare them to Lieutenant Piette, as much as I

appreciate Lieutenant Piette and have empathy, those three have more experience, and MCDO released them rather than have them make an appearance.

As we learned this week, the detailed defense counsel was comfortable in taking part in that decision regarding the release of additional counsel and determining this was the right course of action in a capital case, although he will not take any other action in this capital case, for the most part. His explanation was better one attorney saying nothing in court than more than one just doing the same. But what that ignores is each defense counsel's independent duty to advocate and represent for their client zealously.

What it does is it shows a coordinated plan on behalf of the defense community to not defend their client in court when given the opportunity to do so. It shows a refusal to acknowledge a ruling by the commission that at the time we're going to move forward with pretrial admission of real evidence.

As I said multiple times, I believe the way the statute is written and it is to be applied here, defense counsel -- or the accused, rather, is entitled to learned counsel to the greatest extent practicable, and that learned counsel is not practicable in this proceeding at this time.

[Tr. 12363 - 12377]

MJ [Col SPATH]: All right. I do find the absence is voluntary and knowing. There's the form that is read and then signed, so there's certainly an acknowledgment of the rights. And there's nothing written on this one, unlike the one we saw on Monday, which was a little different for the first time, about the mode of transportation.

I do believe the mode of transportation likely factors into a voluntary, knowing decision to absent yourself from the commissions. I would encourage, to the extent possible, after all of this, to file pleadings to deal with that. That's the right road ahead as we try to figure out what to do -- to do with this.

I don't have a lot to say. One is in relation to this alleged intrusion issue. I mentioned yesterday that -- in the morning, that after I had made the best effort I could to shed some sunlight on what is classified, both sides approached my CISO to see if he would assist, because it was my CISO who went to work with the OCAs to get things, to the extent possible, reviewed, so I could read them to the public, because the public has an interest in this. That was my goal.

And as I said yesterday when both sides approached my CISO and said can you help, of course he called me and said, "Is this something I can do?" And I said, "Please, to the

extent you can, assist."

In the theme I have said, I think, for four years, no good deed goes unpunished. The defense gave him some things to see if he could get declassified. The government objected to it last night and said, "That's not the full story. Lieutenant Piette needs to submit more."

I'm out. We're out of the business. My CISO is not helping. So the defense counsel, unfortunately, you're going to have to work through the government in the normal process of declassification, and you all can get things declassified. I've asked you for five months, I'm asking you again, to the extent possible, declassify matters surrounding the alleged intrusion.

I keep getting asked what. I would declassify all of it. That's what. I keep saying it. So I'll say it again. But we're out of the business. The e-mail back from the government had to do with we're objecting to the process. There's no process. It was a favor. And so now it's not a favor. My CISO is not doing it. So work through the process. Good luck. Because in five months nothing got declassified.

And here we are. Over the last five months -- yes, my frustration with the defense has been apparent. I said it yesterday and I'll continue to say it. I believe it's

demonstrated lawlessness on their side; they don't follow orders; they don't follow direction; they don't obey commission regulations, or rules, or subpoenas, as we saw.

And I keep getting asked for more and more findings. I don't know what more findings to make. The record conclude -- the record contains findings. You don't have to put it on paper. We make this process as cumbersome as we can. I don't know why. I have said on the record, multiple times, I've entered findings of fact. They've been in writing, they've been verbal, they've been communicated. They're there. They're there.

I held a general officer in contempt. That should have stood out. And it's ongoing. And I said yesterday, I'm not oblivious to Colonel Aaron's, frankly, contemptuous behavior the first time he appeared before me when I asked him to come up here; when he scoffed at my authority and said I don't know what -- how you can make me. Well, that's the theme over here, frankly. But I'm not going to waste time on another contempt proceeding if ultimately I have determined it incorrectly. That's why we have appellate courts. And so I am waiting and continue to wait.

Frankly, I've been -- I've been in courts for 26 years. I've been involved in courts-martial. I was very

lucky in the Air Force to be involved in courts throughout my career, unlike so many advocates. I know a lot of them come in to do that and they don't get to. I've never seen a judge advocate show up in Class B's time after time. I'm not oblivious; I know what that says. What little respect you have for the commission is obvious. A short-sleeve shirt, no tie, no coat; I get it. That's the message. That's been the message from the defense for five months. And it's well received. I got it. I've heard you.

But I'm not going to waste time. I'm not going to get in the mud. I mentioned the Hassan case the other day, right, that judge got in the mud all about whether or not we should shave the beard, and of course ended up having to recuse himself. Because when you get in the mud, you get dirty. It doesn't work.

And I'm not saying I never have in my 26 years. I've come close to it here occasionally, getting dragged into it, into debates, or what I really said or what's going on. It's easy to do because we're all human. I know we all like to think that judges aren't human, too, but we are, and I know that.

And I tell my staff all the time, we can't get in the mud. You have to, have to, have to stay above the fray and

try to navigate the rules. Not about me. I'll tell you, it was a sleepless night. The -- I laid out kind of what I thought my options were yesterday. I thought about them again last night. I thought about them overnight. I wrote and rewrote what I was going to do. I went to the gym. I thought maybe the treadmill would either calm me down -- which it has, of course. Give me more -- more reflection. It did. And I went back and looked again, and looked again.

Yesterday's remark by Mr. Koffsky was incredibly telling, wasn't it? "The devil is in the details." The details are pretty straightforward. I mean let's keep in mind that a witness who is the principal deputy to the general counsel wears three or four hats, all acting or whatever, very serious positions, said apparently that there's a bar rule I'm unaware of, and that is you can disobey court orders if you don't think they're ethical.

I went and looked last night. I went and reread the New York ones, because I was surprised by that. And clearly he was, too, because I asked him to give me the rule, and then it became, well, it depends on the question and what the order is. So then, of course, I gave him the hypothetical -- it's pretty simple -- subpoenas, rightfully served, as the government has indicated, on two DoD civilians. That

hypothetical doesn't seem very hard to me. Subpoenas rightfully served on two DoD civilians that they ignored. And the answer was the devil's in the details. Remarkable. Which tells you how infected the process is and how far it goes within the Department of Defense that owns the process. And again, you all can have opinions about whether or not DoD should own the process. I've said it before, go vote. I mean, I've got nothing there. But that's what he said yesterday, right? A duty to violate orders, an ethical duty.

So again, like I said, I went and read my bar rules. I was shocked. What I have found again in mine is what I have found in everybody's who is here, is the ethical duty to zealously represent your client, and -- again, 1.16(d) seems pretty standard. It's in the Model Rules. Law students know it, and it's in every state that matters to this proceeding. I haven't looked at all 50 states; looked at mine.

But even if good cause is shown -- it doesn't even say to who, right? Even if good cause is shown, if a tribunal orders you to continue, you will continue. So even if you feel you have an ethical conflict, even if you've demonstrated it, good cause shown, you've convinced somebody I have good cause, your bar rules say too bad if you're ordered to keep going. Got to keep going.

Because there's lots of reasons for that, right? What if we're on the eve of trial? What if we've invested seven years and 1.8 million dollars in your representation? What if? What if? I mean, you can think of all the hypotheticals.

What I think is happening is that Mr. Koffsky is conflating military orders with orders from a tribunal or military court. That's what I think is happening, and it's easy to do because DoD owns this process. So it's -- you could conflate those. I don't think it's correct. But I hope cool minds reflect on what my orders have been. I'm not ordering the Third Reich to engage in genocide. This isn't My Lai, or My Lai.

You know what this is? Comply with subpoenas; comply with your bar rules. And as the chief defense counsel, you are responsible to ensure that people who work for you obey the orders of the commission. Those are the extent of my orders. Not war crimes, people.

It's just stunning where we have come. And if you do conflate them, if you want to go out and look at military orders -- just again, for the people here who are unfamiliar with our process, you can defy a military order that you think is illegal. Illegal, by the way. However, if you go look at

Article 92 of the UCMJ, the discussion about it and then the case law that follows, orders are presumed to be lawful. You violate them at your own risk, and commanders have broad discretion in giving those orders.

Because can you imagine what the Department of Defense would look like if we just violated orders willy-nilly as we went through the process? It would be quite a sight the next time we actually have an armed conflict that we are fighting, which we are, by the way. Imagine what it would be like out there on the battlefield. Because we've seen what it would be like here in the commissions. Frankly, by the Military Commission Defense Office and their representatives.

Courts and tribunals require adherence to the law, we know that. They're different than military orders. As the General Baker issue unfolded, everybody in here knows the right process, and people back there, if they think about it, will know it right away.

I issue many orders in a court that people disagree with. And so what people do in that circumstance is they either ask for a continuance so they can go file a writ, and we see that with our special victims counsel, we see that from defense counsel, and frankly even from the government occasionally, if it's not an Article 62 kind of appeal, right?

They ask, can we have time so we can go to a superior court and file an emergency writ. And then my answer to them is yes or no, and I've given different answers on different occasions.

When my answer is no, remarkably, counsel show up the next day and keep going forward. You know what they're also doing? Filing a writ. They're dual tracking, and they're off trying to get help from that appellate court to see if that court will stay the proceeding. And that has happened to some of the judges who work for me; the appellate court has stepped in and stopped them. Or, of course, I pause and I say, "Sure, go file your writ, I'll wait and see what they say. I'm interested," because I recognize the authority of appellate courts and courts that are superior to me.

We all saw what happened here. General Baker didn't do that. He simply defied the order and said I'm not doing it. And I believe, as the commission, I know why he wouldn't do that. Because if he went to an appellate court or a superior court about the issue at hand, who excuses counsel, and then what do you do in the face of excusing counsel with a tribunal that orders continued representation and a clear mandate in your bar rules, he would have lost. I don't know if that's cynical or not; I think it's reality.

I also think it's why the civilians, the two DoD civilians have yet to file anything in federal court to stop the writs, as Mr. Kammen did moments after I indicated I might require his appearance at the Mark Center. And I believe that is because they don't mind being taken to the Mark Center to testify. It will empower the behavior that has been demonstrated by MCDO, and it will continue to undermine a process they signed up to work within. Not work for, work within. They all signed up to work within the rules that were given, and they knew what the rules were when they signed up for it, and they continue to ignore them.

And again, alls I've done is order people to follow the Regulations for the Military Commission, the Manual, the statute, their bar rules, and comply with properly issued subpoenas.

These last few months, I think we can all say, have demonstrated significant flaws within the commission process, particularly within the defense organization, and it demonstrates an organization intent on stopping the system, not working within the system that they signed up to work within. If you look at their employment contracts, if you look at their rules, if you look at the standards, if you look at the Regulations for Trial by Military Commission, they all

agree they will follow them. And what they are doing is not, of course. What they're doing is engaging in revolution to the system. And they've demonstrated it completely, repeatedly, and publicly with little response, encouraging them to continue to demonstrate it repeatedly, publicly, and constantly.

I've got to tell you, after 26 years of service, it's shaken me more than I would have expected. I've spent 26 years trying to adhere to the law. I'm sure I've made mistakes. I've spent 26 years believing that adherence to the law, whether I agree or disagree with it, absent the most extreme of circumstances, is required of the participants. It's what let me be both a prosecutor and a defense counsel. Because it's not that I agree with my clients, support my clients, agree with their life choices -- and this is clients on both sides, because we have clients on both sides -- it is because my ethical responsibilities are to my client, and it is what has allowed me to do that.

And so when I've disagreed with a judge, I have marched on, assessing all of the responses I might have, head for the appellate court, attempt to change the system with elected officials outside of the, like, everyday process, of course, and comply with the order. Frankly, it's what called

me to criminal law all those years ago. It allowed me, as I said, to be both a defense counsel and a prosecutor, and follow the calling to be a judge. It's been the strength of our system for hundreds of years, and it demonstrates why our system is better.

Probably rose-colored glasses. Thought about that last night, too. I took a moment to clean them; they're not as rose-colored today. And it's been pretty shaken, and it might be time for me to retire, frankly. That decision I'll be making over the next week or two. I think it might be here, because I've never seen anything like it. I'll just ponder it as we go forward.

But, as for going forward, I talked yesterday about all the different options I have, and I weighed through them. We need action from somebody other than me, and we're not getting it. This morning's debacle, frankly, about working with the CISO shows it. We're going to continue to spin our wheels and go nowhere until somebody who owns the process looks in and does something.

I've been thinking about how to resolve the apparent standstill while getting Mr. al Nashiri adequately resourced defense, which he had, consistent with what you see in the Military Commissions Act of 2009. I've reviewed all the

pleadings again regarding Brigadier General Baker, Colonel Aaron, the prosecution's efforts, the testimony of Mr. Koffsky. I mean, I went through it all again to figure out where we are and what we could do to fix this.

Yesterday I listed kind of questions that we need answered, frankly, from a court superior to me. And again, I would have hoped we had started that process. Maybe we have and I haven't seen it, but I don't think so. There's a little bit of it in General Baker's filings in federal court, but not much. That's mostly focused on the contempt issue.

If General Baker's reading the statute correctly and the Manual correctly, he can excuse counsel at any time and we'll be right back here next time. Again, I don't believe he is. Doesn't matter.

We need somebody to tell us, is that really what that says, despite, obviously, every other court system in America thinking differently, despite the clear intent of when people make an appearance, despite the clear difference of learned counsel. Maybe I'm wrong, but nobody's asked anybody in any appellate court or court above me.

And then, of course, the other issue is learned counsel. Is Lieutenant Piette right, that he gets them all the time? Because that's what he thinks, right? He's said

that over and over. Any questions? Nope, can't do it without learned counsel, even though I've ruled you don't get learned counsel. Nope.

Because again, the efficient administration of justice means we do this one time, not twice, if we can help it; and that everybody who has an interest doesn't travel down here for the next 25 years doing this. Because that's what we keep doing.

So hopefully somebody is going to take action. I am abating these proceedings indefinitely. I will tell you right now, the reason I'm not dismissing -- I debated it for hours -- I am not rewarding the defense for their clear misbehavior and misconduct. That would be the wrong answer. But I am abating these procedures -- these proceedings indefinitely until a superior court orders me to resume.

And whatever that looks like, either myself or my successor will pick it up and start going. If it is -- the superior court tells me next week, Spath, you abused your discretion, get to work, I'll get to work, or whoever takes my place. Hopefully the appellate court will give us some guidance. Maybe they'll say Lieutenant Piette, you're stuck. Colonel Spath got the law right, you don't get learned counsel if it's not practicable, and it's not practicable. Get to

work. And then Lieutenant Piette can sit there and not ask questions from now until we finish the trial.

But that's where we're at. We're done until a superior court tells me to keep going. It can be CMCR. It can be the Washington -- or the District in D.C. They're all superior to me. But that's where we're at. We need action. We need somebody to look at this process. We need somebody to give us direction. I would suggest it sooner than later, but that's where we're at.

The March hearing, obviously, isn't going to happen, I don't think. Again, maybe I'm wrong. Maybe we'll have quick guidance from CMCR, and then we'll be here in March.

As I said, I follow the law. I follow orders. I don't just disobey them at will, scoff at the process; but we do have a situation where people are. They've demonstrated it, and we can't fix it without somebody getting involved.

I have great empathy to everybody involved; I really do. I mean that across the board, everybody. It's a lot of work, a lot of time, a lot of effort. It is -- it's not easy.

So that's what I meant when I said filings might not be particularly helpful for a little while, Lieutenant Piette.

We are in abatement. We're out. Thank you. We're in recess.