

**Military Commissions:  
ISN 10024 Khalid Sheikh Mohammad et. al. Pre-Trial Hearings  
Voir Dire of Judge Col. Matthew McCall  
September 6–10, 2021**

The Chief Trial Judge of the Military Commissions detailed Judge Col. Matthew McCall to the KSM et. al. trial process on August 20, 2021.<sup>1</sup> Judge Col. McCall rotated in to replace the Chief Trial Judge as the sitting judge. The Chief Trial Judge had attempted to detail McCall to the KSM proceedings during the 2020 hearings, but he assumed the position himself when McCall was found to be a few months short of the required two years of experience on the military bench.

During the judge's voir dire, the CMCR (Court of Military Commissions Review) rendered a decision indicating there had not been undue command influence by the Secretary of Defense in responding to a question for clarification from the detailing judge. As a result, the limited number of orders that Judge Col. McCall had issued in the 2020 season were deemed invalid due to his lacking bench experience. This impacted the remaining voir dire.

According to his submitted biography,<sup>2</sup> Judge Col. McCall is presently a sitting trial judge for special and general courts martial worldwide for the U.S. Air Force, based in the Eastern Circuit. He has served at various levels of staff judge advocacy, largely in Japan, Hawaii, and Florida, with a brief stint in Iraq from September 2006 to February 2007.

Defense counsel for Hawsawi was not present to conduct voir dire, so voir dire remains open for challenges.

*Voir Dire:*

<b>Questions:<sup>3</sup></b>	<b>Judge's Answers:</b>
<p>(Judge volunteered the results of his review of government and defense team names for familiarity.) (Judge noted that, upon being selected for the military commissions, he shut down his Facebook and other social media accounts.)</p>	<ul style="list-style-type: none"> <li>• Col. Michael Lewis: Judge practiced in front of Lewis when Lewis acted as a trial judge. They were never friends. “I don't really know him.”</li> <li>• Col. Tom Posch: Attended staff judge advocate courses together. Never socialized.</li> <li>• Col. James Key: Fellow appellate judge and attended military judge course together. Socialized during those weeks, but not friends.</li> <li>• Lt.Col. Daved Cunningham: Was a convening authority while judge was also in Japan. Shared contact once a month to discuss routine ethical filings. Judge also</li> </ul>

1 Detailing document: AE001O “Military Judge Detailing Memorandum” available at [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE001O\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE001O).pdf)

2 Biography: AE001P “Military Judge Bio” available at [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE001P\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE001P).pdf)

3 Questions marked “G” to signify government questioner and “D” to signify defense questioner.

Questions: <sup>3</sup>	Judge's Answers:
	<p>escorted Cunningham while Cunningham investigated a helicopter crash.</p> <ul style="list-style-type: none"> <li>• Maj. Terry Coulter: Both were at several bases together, but never socialized or tried cases against each other.</li> <li>• Lt. Nicholas McCue: Both were senior defense counsels simultaneously but were on opposite coasts and interacted rarely except to confer on areas of law. McCue practiced at a court martial before the judge once. All interactions have been positive, but there has been no socialization.</li> <li>• Maj. Morgan Engling: Worked for the judge as a reservist while judge was a staff judge advocate in Hawaii. Judge respects Engling's professional skills. Last contact was summer of 2019. There was no socialization.</li> <li>• Sr. MSgt. Charles Zaldivar: Worked as a paralegal in several cases the judge also worked. Positive interactions, but not friends and no socialization.</li> <li>• Maj. Sonia Johnson: Chief of Justice to the judge for one year in Hawaii. Close working relationship, and judge was Johnson's rater. No socialization.</li> <li>• Tech. Sgt. Toni Monroe: Functioned as one of judge's paralegals in Hawaii for two years. Judge respected Monroe's work. No socialization.</li> </ul>
<b>By DEFENSE COUNSEL for KSM</b>	
<p>D<sub>KSM</sub>: Timeline of prior events that led to judge recusing himself?</p>	<ul style="list-style-type: none"> <li>• Judge selected for rank of colonel in May of 2020.</li> <li>• When selected for colonel, Col. Brian Watson (Chief Judge of the Air Force) notified judge of selection for military commissions pool.</li> <li>• Sometime after May, Col. Watkins (Chief Trial Judge) selected judge for KSM case.</li> <li>• <i>New York Times</i> profiled the judge and expressed concern about him not having two years on the bench.</li> <li>• Prosecution issued a memo agreeing that the judge did not have two years on the</li> </ul>

Questions: <sup>3</sup>	Judge's Answers:
	<p>bench.</p> <ul style="list-style-type: none"> <li>• Judge reached out to Watkins in question, Watkins expressed confidence in his permission to detail despite this lack.</li> <li>• Judge agreed to wait and see how things panned out.</li> <li>• When authority did not affirm Watkins' assumption, judge offered to recuse himself.</li> <li>• Watkins removed judge and detailed himself.</li> <li>• Judge gained two years of experience and was detailed again. (Judge expressed opinion that he was selected because he is not so senior that his retirement will be immediate. "You know, they want somebody that can give this case the time and attention it needs.")</li> </ul>
<p>D<sub>KSM</sub>: Clarify judge's relationship with Judge Cohen (former commissions judge).</p>	<p>"The Air Force JAG Corps is [...] like a big law firm." The judge acted as prosecutor versus then-Maj. Cohen's defense counsel in the judge's first court martial during 2004, then in several subsequent courts martial. Judge also practiced before Col. Cohen in Cohen's first trial as a judge. Judge and Col. Cohen worked at the same time in Japan and have worked several times in the same court circuit.</p>
<p>D<sub>KSM</sub>: Did the judge and Judge Cohen discuss Judge Cohen's expectations for the commissions when Cohen was detailed to them?</p>	<p>No. Judge Cohen informed the judge, along with the other judges in the same circuit, that he was detailed to the commissions, to allow them to adjust caseloads and schedules.</p>
<p>D<sub>KSM</sub>: Did Judge Cohen update the judge on the progress of the commissions?</p>	<p>"A little. I mean, not really." Judge Cohen once noted that the case had begun taking evidence. When the judge asked Cohen about the case when the judge was detailed to it, Cohen insisted that the judge form his own impressions and make his own decisions.</p>
<p>D<sub>KSM</sub>: After the <i>New York Times</i> article, the judge contacted Judge Watkins, who said he was going to seek clarification?</p>	<p>Yes.</p>
<p>D<sub>KSM</sub>: To the judge's knowledge, Judge Watkins did not inform the defense about the clarification?</p>	<p>Yes.</p>
<p>D<sub>KSM</sub>: In military tribunals, is it common for judges to seek advice on an issue pending before</p>	<p>"It's usually not an issue." "I think it was a novel issue, and that was why. But I don't know. I didn't</p>

Questions: <sup>3</sup>	Judge's Answers:
the commission or court martial without apprising prosecution and defense that the judge is seeking guidance through a formal memo?	ask why.”
D <sub>KSM</sub> : Is it customary that a judge would certify a novel issue to parties for briefing?	Yes. “I think that would make sense.”
D <sub>KSM</sub> : Did the judge continue to issue orders regarding trial scheduling during the clarification time?	Yes.
D <sub>KSM</sub> : The orders were substantive orders for the benefit of the defense to understand authorized types of monitoring?	Yes. “It was a time-sensitive one that needed to be done quickly and so I did it even though I understood there was this potential issue out there.”
D <sub>KSM</sub> : Was the judge aware of the convergence of events where a time-sensitive matter required a ruling at the same time as the government reported an unqualified judge was in place?	Judge was aware, and thought the timing was unfortunate, but determined that if the decision returned that the convening authority had the authority to appoint the judge, his ruling would remain timely and enforceable at least.
D <sub>KSM</sub> : Did the memorandum the government generated influence the SECDEF to tell Judge Watkins that he could not deem the judge qualified?	“I’m not aware of that.”
<b>Interruption:</b> CMCR <sup>4</sup> issued a ruling that ultimately declared that Judge McCall was not qualified the first time that he was detailed. This nullified his rulings from that time period. Voir dire ceased until the next day, to allow all teams to rework their voir dire questions.	
D <sub>KSM</sub> : Why did the judge decide to recuse himself on the basis of the government protest of his qualifications, rather than waiting for a KSM defense team alternative analysis written in response?	Judge did not recuse himself based on government protest. Judge recused himself after seeing that the SECDEF was not going to waive requirement of the two years of bench experience. The timing was simply unfortunate for the government document and defense response.
D <sub>KSM</sub> : How quickly did Judge Watkins share the SECDEF's memorandum with the judge?	Judge recalled a brief delay of a week as Judge Watkins determined whether to have judge recuse himself, or to remove judge from the case.
D <sub>KSM</sub> : Was there any reason, in the three weeks between the SECDEF memorandum and the government filing, for the judge or Judge Watkins to not announce the judge's recusal?	No.
D <sub>KSM</sub> : Was there a reason for the briefing cycle	Judge does not see any harm in allowing the cycle

<b>Questions:<sup>3</sup></b>	<b>Judge's Answers:</b>
not to have been allowed once an adverse party had filed a briefing?	to complete, but he recused himself because he felt comfortable knowing at that point that he could sua sponte recuse himself.
D <sub>KSM</sub> : But the judge did not sua sponte recuse himself?	No.
D <sub>KSM</sub> : Would the judge agree that, to observers, the instance had the appearance of someone else removing the judge while an issue was properly pending?	“I can understand that appearance.”
D <sub>KSM</sub> : Is the judge “really, truly, truly, truly” able to “go back in time” and look at the pleadings filed on behalf of both the prosecution and the defense about his prior lack of requirements and determine whether or not his prior judgment had been too hasty? [Defense argued that perhaps the SECDEF did not have authority in this case, due to the presence of the Rules for Trial by Military Commission (RTMC).]	Yes. “That's a fair question.” “In my ruling, I'll put in there, you know, whether that would have changed my mind at the time.”
D <sub>KSM</sub> : Does the judge feel like he has to make extra effort to assure the government that he does not hold the motions against them?	“Yeah, I don't feel any ill will towards the government. I understood their position. And I don't feel like I need to make up anything to alleviate any feelings on their part.”
D <sub>KSM</sub> : Can the judge listen to sharply critical objections without feeling personally attacked by what the defense says?	Yes. Judge wouldn't take it personally.
D <sub>KSM</sub> : Does the judge see himself as able to agree with the defense that “these proceedings are grotesquely substandard under notions of due process, international law, and, as the Eighth Amendment phrases it, regard for the dignity of human beings?” [Government objects because the question calls for an advisory opinion that does not go to the qualifications or potential bias of the judge.]	Judge overrules the objection, but states that he will not give advisory opinions. Judge will rule as the law requires.
D <sub>KSM</sub> : Would the judge be comfortable with changing the process, if the defense convinced him it was warranted? Even that which Judge Cohen put in place?	Yes.
D <sub>KSM</sub> : Does the judge have any concerns about having zealous advocacy that criticizes the government or military commissions?	No.
D <sub>KSM</sub> : Has the judge been warned against taking this job?	No.

<b>Questions:<sup>3</sup></b>	<b>Judge's Answers:</b>
DKSM: Does the judge view the military commission as vested with inherent authority to serve the ends of justice and prevent the abuse of the defendants?	Yes. "Without a doubt."
DKSM: Is the judge willing to consider Supreme Court or Constitutional authority for providing relief outside of the Rules for Military Commission?	Yes.
DKSM: What impressions did the judge have about torture as related to the defendants, on coming into the case?	Judge was aware there had been waterboarding. The judge does not know what that means, and it is not an area he has studied extensively.
DKSM: Has the judge "read the Senate Select Committee on Intelligence executive summary of the CIA torture program and what Mr. Mohammad went through?"	No.
DKSM: Has the judge had experience, whether education, training, or legal contact, with people who have suffered trauma?	Judge has dealt with military sexual assault cases and the victims thereof.
DKSM: Does the judge have the patience to hear all of the evidence and to consider it?	Yes.
DKSM: Is the judge open to hearing information about long-term implications and effects of torture?	Yes.
DKSM: Is the judge open to and patient with the allegation and support of allegations of outrageous government conduct?	Yes.
DKSM: Does the judge have any reservations about finding the government not permitted to prosecute this case?	"No hesitation, if I'm convinced."
DKSM: What cases primarily made up the judge's practice, other than sexual assault cases?	The majority of the judge's cases have been sexual assaults and drugs, but there have been aggravated assaults, larcenies, and child pornography.
DKSM: Has the judge been involved in any death penalty work?	No. Though, some of the cases that he determined should be passed to the Central Criminal Court of Iraq during Task Force 134 work ultimately resulted in death penalties. However, the Central Criminal Court of Iraq did not come close to "the standard of what we do in the United States."
DKSM: What is the judge's attitude toward the death penalty?	"I see the death penalty as being a valid option for the government. It's lawful, it's legal, from the little I know of it." "We have the Innocence Project and people sometimes on appeal cases,

Questions: <sup>3</sup>	Judge's Answers:
	you know, convictions get overturned. You have to have a higher standard.”
D <sub>KSM</sub> : What does the judge know of the death penalty?	“That for the most egregious cases, sometimes the government seeks death. They view that as when you're looking at what goes into deciding a sentence, that it-- that is justice, that is fair. I think that the quid pro quo is if you're seeking that ultimate sentence, you're going to be held to a higher standard.”
D <sub>KSM</sub> : Does the judge have any difficulty presuming KSM innocent of the charges?	The judge considered whether or not he could be fair, when asked to take this case, and approached it with the question of whether or not he would be willing to defend the accused in this case. He determined that he would be willing to defend the accused, so he considers himself capable of providing a fair trial.
D <sub>KSM</sub> : Is the judge familiar with unitary defense, where there is (an) obligation to investigate and prepare for trial a defense in the findings phase which will not prejudice the sentencing phase?	Yes, but not by that term.
D <sub>KSM</sub> : Has the judge been involved in any cases which are complex and have large amounts of discovery?	Yes. Not on this scale, but the judge has dealt with cases involving multiple accused and multiple victims.
D <sub>KSM</sub> : Has the judge dealt with anything in excess of 600,000 pages of discovery?	No.
D <sub>KSM</sub> : What is the greatest number of defendants or co-defendants the judge has had in a case?	“There was a ring when I was a prosecutor, we were not doing them jointly, but again, you're making sure that everyone was on the same page with discovery and what-not, so I believe there were five.”
D <sub>KSM</sub> : Does the judge understand the scope of mitigation that the defense would have to investigate for introduction into the sentencing phase, in case of a guilty verdict?	“A bit.” The judge expressed eagerness for being educated on same.
D <sub>KSM</sub> : Does the judge understand that in a sentencing phase, the evidence produced is not for whether or not a person should be held accountable, but to what degree a person should be held accountable?	Yes.
D <sub>KSM</sub> : Does it sound to the judge like avoiding responsibility to argue for or allow a life sentence instead of a death sentence?	[Judge did not appear to answer.]
D <sub>KSM</sub> : Is the judge willing to consider political,	Yes.

Questions: <sup>3</sup>	Judge's Answers:
cultural, historical, and religious factors in the extent of mitigation?	
DKSM: Has the judge been involved with cases that used classified information?	Several of the cases sent to the Central Criminal Courts of Iraq had required the declassification of classified information, if the information was to be used with Iraqi authorities, and judge was involved with those. No courts martial had ever required classified information, in the judge's experience.
DKSM: Has the judge ever been involved with a case where information that an accused has not reviewed in the original has been used against that accused?	No.
DKSM: Where was the judge and what did he learn about the event when the 9/11 attacks occurred?	Judge was in Hawaii, having graduated law school and studied for the bar during the spring and summer. He began watching TV coverage with his roommate after both planes had struck the World Trade Center but neither building had collapsed. Judge noted for the court that his brother, with whom he is not close, lived in Queens but had been working in Manhattan that day. The brother was not injured and had not sought mental health treatment.
DKSM: Did the judge learn the identities of the alleged perpetrators?	Yes.
DKSM: Did the judge learn anything about the perpetrators' nationalities or religious affiliations?	Yes, the judge learned that Al Qa'eda had been involved and that the perpetrators had been practitioners of Islam. He believed that several were Saudi nationals.
DKSM: Did the judge have a mental picture of the perpetrators based on this information, prior to seeing their pictures?	No.
DKSM: What does the term "Islamic terrorist" mean to the judge?	Practitioners of Islam committing acts based on their views of their religion.  Judge noted that all peoples have members who view their faiths to require violent acts of them.
DKSM: Before or after 9/11, has the judge had any exposure to Islam from studies or friends?	"Not much. I mean, I'll disclose I'm a Christian. I don't go to church very often. I was an Army brat, so I'm sort of non-denominational in my views, but I'm Christian." "[In college] I was heavily involved in some organizations with some international students [...] I think most of them were from Turkey, but they were from all over the



Questions: <sup>3</sup>	Judge's Answers:
	world and some of them were Muslim.”
D <sub>KSM</sub> : Is the judge aware that the majority of mainstream Americans who are not Islamic view Islam as being hostile to Christianity and Judaism?	“Sure. I mean, I've seen that debate, you know, on op-ed pages and whatnot, so I'm aware of it. But, yeah, I don't believe that. [...] I wouldn't, you know, fall back on stereotypes of, you know, lumping everyone just because they follow a certain religion into like – that they're in a monolithic view.”
D <sub>KSM</sub> : Does the judge have any knowledge or understanding of points of commonality between Muslims and Christians?	Yes. Judge read several books from the chief of staff reading lists prior to deployment. Several were for understanding Sunni, Shia, and links between Judaism, Christianity, and Islam.
D <sub>KSM</sub> : Does the judge have any interpretations as to why the general impression is conflict rather than commonality?	“It just seems like people are always looking to be 'us versus them,' and it's very easy to point out the differences. I mean, that's the protestant versus catholic, shia versus sunni, [...] Christians versus Jews. It's just kind of an unfortunate result of human nature, I think.”
D <sub>KSM</sub> : Nothing about the judge's Christian background influences decision-making?	No.
D <sub>KSM</sub> : [Observer could not parse question, and transcript does not show a question in form or inference. D <sub>KSM</sub> discussed political, religious, and cultural clashes and deprivation of rights, asserting that the trial was political rather than criminal.]	“I'm open to hearing those arguments. I can understand why defense would go there.”
D <sub>KSM</sub> : Judge would allow the defense a level playing field in consideration of arguments that “there's something about these proceedings more than just establishing guilt or innocence?”	“If you could rephrase. I'm not sure I'm following your question.”
D <sub>KSM</sub> : The Authorization for the Use of Military Force (AUMF) allows the U.S. to retain detainees that have been acquitted, so the prosecution is not discussing whether an acquittal would lead to KSM's release or not. [Judge asked if D <sub>KSM</sub> was asking if the judge was willing to explore the results of the court possibly not being a final decision. D <sub>KSM</sub> confirmed. Government noted on record that the issue had already been litigated by Judge Col. Pohl.]	“[T]his may be another question that will come up. So I understand that there can be motions for reconsideration, you know, if there's new law, new facts.”  [D <sub>KSM</sub> spent further time after the judge's answer discussing theory of a political trial.]
D <sub>KSM</sub> : How long was the judge's work with the Central Criminal Court of Iraq?	Five months.
D <sub>KSM</sub> : How did the judge become involved with	From his first duty station in Japan, the judge was

<b>Questions:<sup>3</sup></b>	<b>Judge's Answers:</b>
the Central Criminal Court of Iraq?	deployed to the international zone in Baghdad and assigned to Task Force 134 for detainee operations. There was a board that determined whether a detained person could be released or should be sent with evidence to the Central Criminal Court of Iraq. Once the detainee was sent to the Court, the judge was assigned as part of the Court process and did initial examination of the evidence. If there was enough evidence, the judge passed the case to an Iraqi magistrate. If the Iraqi magistrate convened a hearing, the judge assisted with the questioning of American witnesses.
DKSM: Was the judge in a role of persuading the Iraqi magistrate that there was probable cause?	No, the judge made no argument, simply presented evidence.
DKSM: Did the judge serve out the end of the time on that assignment, or did he ask to leave?	Judge served out, then rotated back to Yokohama. “[A]t the end of my time I could have extended if I had wanted to. My boss back home probably wouldn't have been happy with me.”
DKSM: Did the judge have any awareness of Maj. Gen. Jeffrey Miller's involvement in July 2004 setting up the Multinational Force Iraq?	No.
DKSM: The judge was quoted in the <i>New York Times</i> as having said that he needed to sift through files of 50 detainees to find two that he thought would be convicted.	“I do recall that quote. I don't think that was exactly accurate, but it wasn't too far off.” “I wasn't authorized to release someone, but I could push it into the other pile that would go to this board on determining what to do with these people.”
DKSM: The other 48 did not have the probable cause to move into court?	No.
DKSM: The same article quoted the judge as saying that the other 48 remained in detention. The Iraqi authorities left them in detention?	No, the detainees were in U.S. custody. If not moving on to the Iraqi courts, they went before the board. The board determined whether to detain or release them.
DKSM: A December 2008 report by Human Rights Watch expressed concern that those involved in Central Criminal Courts of Iraq cases were tortured to obtain confessions. Was the judge aware of that going on?	No. Judge has reviewed his memories of the time, and he did not recall any cases that involved interrogation, and none of the people he dealt with were high value. Most of his cases involved evidence found at a checkpoint, and rarely a spontaneous admission at the scene.
DKSM: If the judge had received a case where he suspected or knew the evidence was a result of torture, what would his personal protocol (have) been?	“I would have reported it up my chain, because this was after Abu Ghraib.” “We were tracking that this kind of stuff wasn't going to go on.”

<b>Questions:<sup>3</sup></b>	<b>Judge's Answers:</b>
DKSM: Did the judge have many cases about sexual assault, drugs, or other kinds of assault that involved interrogation?	Yes. "When I first came in as a young trial counsel, and even my early days as defense counsel, when people suspected of a crime were questioned in the military system, they were simply questioned and you had interview notes, and you would maybe get a written statement."
DKSM: Does the judge have experience in cases where new evidence that the statements were coerced would have changed his view of the information?	Yes, as a judge and a defense counsel. Not as a prosecutor.
DKSM: In those instances, did the judge find information on coercion helpful or relevant?	Yes.
<b>By DEFENSE COUNSEL for BALUCHI</b>	
DBaluchi: The judge's brother was in Manhattan on 11SEP2001?	Yes.
DBaluchi: Please elaborate on conversation about 9/11 between the judge and his brother after the event.	In 2013 the judge and his family went to visit his brother in New York. While they walked around and when they went to the World Trade Center where the memorial is, the judge's brother mentioned that he was in Manhattan. The brother described it as a chaotic day, trying to figure out what was going on and get home. The brother lives in Queens.
DBaluchi: Did the judge go to the museum or any of the memorial at the World Trade Center?	Judge went to the footing of the towers that is now a fountain, but not to the museum.
DBaluchi: Please describe any feelings that the site gave the judge.	Sadness at the loss of life.
DBaluchi: Was 2013 the first time the judge talked with his brother about being there? Why such a time delay?	Yes. The judge and his brother are not close. Typically, they have a call once every few months, or exchange text messages about their mother. They might see each other once a year. The judge recalls his mother telling him his brother was all right during the event, while the judge was in Hawaii.
DBaluchi: How does the fact that the judge's brother was close enough to the event that he could have been killed or injured impact the judge?	Judge never considered his brother to be a potential victim, either then or now. Judge feels nothing strong about it because it did not happen.
DBaluchi: Is there anyone else the judge would consider a victim or potential victim that he knows and that would affect him today?	No.
DBaluchi: Does the judge recall any other feelings on 9/11 than sadness, such as anger or the urge to	No. Judge recalls shock but did not find the fact of a terrorist attack occurring in the U.S. surprising.

<b>Questions:<sup>3</sup></b>	<b>Judge's Answers:</b>
find the perpetrators?	
DBaluchi: How did the events of 9/11 play into the judge's decision to join the military?	It did not. The judge's father was in the Army, and the judge realized when he was teaching English in Japan that he still felt very at home on military bases. When he went to law school, he heard about legal careers in the military, discussed the potential with his then-girlfriend, and ultimately joined. 9/11 did not have any impact on the judge's decision to join the military.
DBaluchi: Is there anything about the notoriety of this case that makes the judge feel he is not the best person to sit this bench?	No. Judge considers this just like any other case he has sat. It is not going to put any unusual pressure on him, other than making sure due process is followed.
DBaluchi: Did the judge have any involvement with initial detainee screening or interrogation in Task Force 134?	No.
DBaluchi: Did the judge observe any interrogation or screening in Task Force 134?	No. Judge was the third step, nowhere near the first step in the process.
DBaluchi: What was the timeline between when a detainee was brought to the facility and the magistrate looking at the detainee's case?	Judge didn't know. There was a backlog sometimes, but it was usually quick. Only occasionally would a witness have PCSed from the theater by the time the magistrate heard the case.
DBaluchi: The timeline was not as long as a year?	No.
DBaluchi: Was the timeline more like a few days?	No, more like a few weeks or a month.
DBaluchi: There was a process or attempt to move the process quickly to keep people from languishing forever?	Yes.
DBaluchi: Did the detainees have a right to representation at the Court?	Yes. The detainees also sometimes chose to speak to the magistrate on their own.
DBaluchi: One of the FITREPs about the judge stated he had successfully prosecuted 98 insurgents in Iraq, many with life sentences. Please elaborate.	Judge recalls eight to ten persons got life sentences, and those people were involved in either kidnapping or there was video of them executing Iraqi non-military tanker drivers. However, the judge heard later that those convictions changed to death sentences, and he is not sure how that worked.
DBaluchi: So the judge was actually involved in the process one step back, before there was actually an opportunity to get a life sentence or any other kind of sentence, before the penalty phase?	Yes.
DBaluchi: Was the judge involved in arguing for a	No. "And I didn't even watch the actual trial

<b>Questions:<sup>3</sup></b>	<b>Judge's Answers:</b>
life sentence or any sentence?	itself.”
DBaluchi: Were some of the people involved in Al Qa'eda?	No, not from the judge's cases. None of them were linked to particular groups. A different judge advocate general handled those cases.
DBaluchi: Did the names of any of the military commissions' accused arise during the judge's tenure in Iraq?	“No, not at all.”
DBaluchi: Did the judge recommend any of his cases to be non-referred?	Yes. Judge could decide he did not want to take a case to the Central Criminal Court of Iraq.
DBaluchi: There was no push-back when he did?	No.
DBaluchi: The letter of evaluation says the judge led a team of 13 Arabic linguists. What was his role in that?	“We had linguists that we would take with us. They would help us with some of the evidence coming in. [...] For the most part, they would sit with you in the hearing room at the court and translate whatever we were saying to the magistrates and then back.” Judge was assigned the additional duty of mediating between these civilian translators when they squabbled and in arranging their schedules for work in the court.
DBaluchi: Did the judge ever learn where the linguists came from, whether they worked at other detention facilities, or anything like that?	No. He had learned how some had acquired their linguistic skills, but he never learned about other jobs.
DBaluchi: Did the judge know if the linguists had worked with detainees or been involved in interrogations?	Judge was not aware of the linguists being involved with interrogations. “They were fine for what they were doing [...] Not to disparage their work, but they were lower level.”
DBaluchi: Does anything from the judge's days as a prosecutor on Task Force 134 affect his ability to sit the bench?	No. The judge performed his duty then and does not feel that he can't be fair now.
DBaluchi: Is there a judicial screening process in the Air Force which requires the judge to have been both trial counsel and defense counsel?	No.
DBaluchi: The judge has been both a trial counsel and a defense counsel?	Yes.
DBaluchi: What is the general process for judicial screening in the Air Force?	Once per year, an e-mail would go out for nominations for people interested in different jobs, like staff judge advocacy. Personnel self-nominate for military judgeship. Supervisors submit their thoughts on self-nominees. General experience appears to positively impact chances of being chosen.
DBaluchi: To the judge's knowledge, what does	“I honestly am not sure.” The higher-ups look at

<b>Questions:<sup>3</sup></b>	<b>Judge's Answers:</b>
TJAG certification entail?	personnel to eliminate those with bad temperaments or problems going on the bench. The certification finishes after the subject passes the military judges course.
DBaluchi: When in the process does the Air Force direct the potential judge to attend judicial college?	“It depends. I mean, typically it's early enough in the spring that it's before you PCS and it's at the Army JAG school in Charlottesville, and you know, I forget how many weeks. Four weeks, I want to say.”
DBaluchi: And is the certification any more than just a letter saying the judge has been certified?	“That sounds about right.”
DBaluchi: What is the date that the judge recalls becoming a military judge?	Judge recalls being a military judge when he arrived at Langley on 31JUL2019.
DBaluchi: Was there a robing or investiture?	Judge said the robing/investiture happened at the judge's course in MAY2019.
DBaluchi: When judge nominated himself for judgeship, was he envisioning potentially the military commissions?	“I knew it was a possibility. [...] I thought I had a pretty good chance of making colonel, not to be arrogant. But, so, just knowing the commissions were out there and having-- being aware that military judges had been picked up for that, I thought there was a chance.”
DBaluchi: So when the judge found out he was promoting to O-6, he also found out he might be in the pool of commissions judges?	Yes. Col. Brian Watson (Air Force Chief Judge) called the judge to congratulate him on his promotion and also noted that the judge was going to have his name in for the commissions.
DBaluchi: When was that?	MAY2020.
DBaluchi: And the judge knew Judge Cohen, who retired MAR2020?	Yes.
DBaluchi: When Judge Cohen retired, was the judge thinking of being his replacement?	No.
DBaluchi: Was the judge anticipating being next when Judge Col. Keane came onto the case?	Judge questioned defense to clarify that Judge Keane was the one who was detailed but recused himself after realizing he knew people, then answered that he hadn't been tracking the commissions or any of that, and only heard of it after the fact.
DBaluchi: Chief Judge Watkins contacted the judge shortly prior to detailing him, to ask if he would be willing?	Yes.
DBaluchi: How long after that call was the judge detailed?	“Very soon thereafter.” “It might have been a week at the most.”
DBaluchi: Did Watkins ask the judge how long he	No.

<b>Questions:<sup>3</sup></b>	<b>Judge's Answers:</b>
had been a judge?	
DBaluchi: Did the judge and Watkins discuss qualifications or anything at all?	No.
DBaluchi: When was the first time the judge understood there might be a problem with qualifications?	Judge answered that his awareness first happened when the prosecution noted there was a problem and Carol Rosenberg published an article stating that there was a problem.
DBaluchi: What was the first thing the judge did when he saw Rosenberg's article?	Judge spoke with his staff to evaluate the issue, then spoke with Watkins.
DBaluchi: Please elaborate on the conversation with Watkins.	Judge explained to Watkins everything discussed with the staff, Watkins responded that he thought he had the authority to detail the judge but was requesting clarification because there was ambiguity.
DBaluchi: Did the judge agree with Col. Watkins that Watkins could waive the two-year requirement?	"I thought it was ambiguous, and so I thought it made sense to ask for clarification. And I was willing to stay on the case in the meantime and try to avoid doing anything substantive."
DBaluchi: Was Watkins trying to get the law changed about the two-year requirement, or was he just seeking clarification?	"I think he thought he could waive it, but he wanted clarification on that."
DBaluchi: When did the judge become aware that Watkins actually did send something up?	"Shortly after that, I would say. I don't think it took too long to get something routed."
DBaluchi: Did the judge get a chop on that at all?	No.
DBaluchi: Did Watkins send it to the judge prior to or after sending?	"I don't believe I saw the package itself. I might have."
DBaluchi: When did the judge become aware that the prosecution was talking to Platte Moring about the qualifications?	Judge read about that in a filing recently that had referenced a writ from that time. Judge did not know of the conversations prior to being re-detailed to the case.
DBaluchi: Was there any discussion of whether or not to give Watkins' clarification request memo to the parties at the time?	No, the judge did not think to discuss that. Watkins wasn't the trial judge and wasn't a party, so the situation was unusual.
DBaluchi: When did the judge hear the memo had garnered a response denying the ability to waive qualifications?	Judge did not recall.
DBaluchi: Between being detailed and then removed from the case the first time, the judge believed in his ability to act as judge in order to move the case along?	Yes.
DBaluchi: Once the judge saw the memo response,	Yes.

<b>Questions:<sup>3</sup></b>	<b>Judge's Answers:</b>
that was when he determined to recuse himself?	
DBaluchi: The judge then communicated to Watkins that he wanted to recuse himself?	Yes.
DBaluchi: When was the judge able to communicate that to Watkins?	Judge was unable to recall a particular time or date.
DBaluchi: Did the judge continue making rulings in the case after deciding to recuse himself?	"I don't believe I signed anything after I had made that decision."
DBaluchi: What happened, between the 16 <sup>th</sup> of November when the reply memorandum arrived and the 27 <sup>th</sup> of November when the judge signed his last order?	"Yeah. I'm not sure. I mean, that might have been just when it was getting relayed to me and then I was making up my mind. But I'm not positive."
DBaluchi: What difference did it make at the time that Watkins simply re-detailed himself, rather than letting the judge recuse himself?	It made no difference to the judge at the time.
DBaluchi: Was there any discussion of the judge returning to the commissions bench after he gained his second year of experience?	No. Judge admitted to having the thought and wondering if recusing himself would prevent his re-detailing once he was qualified.
DBaluchi: What has the judge done in the interim between being removed and now being re-detailed to the commissions?	"A lot of Air Force cases. I was just focused on the job; I wasn't on the commissions anymore."
DBaluchi: Was the judge actually taken out of the pool of people considered for the commissions?	Yes.
DBaluchi: When was the judge returned to the pool?	"Shortly before these hearings, sometime this summer."
DBaluchi: When did the judge feel that he had two years of experience?	Judge considered that to be when he reached two years at Langley.
DBaluchi: Was the judge read onto the TS//SCI or TS when he came to the case originally?	No.
DBaluchi: Did the judge have a TS//SCI at all, at the time?	Yes, but it was out of scope because he hadn't been in a billet that required one. Judge noted that he had since been reinvestigated, so it was on its way to reactivation.
DBaluchi: Has the judge now been read into all the necessary programs and compartments?	Yes.
DBaluchi: Has the judge been able to fully dive into things he would want to know about the case?	"I've barely skimmed the surface." "To prepare for these hearings, I've reviewed the charge sheet, [...] the convening order. [...] I have familiarity with a number of the filings to try to figure out what motions to compel and whatnot we might be able to look at. [...] I did go and look at the defense teams' prior ex parte filings on their



Questions: <sup>3</sup>	Judge's Answers:
	defense theories.”
D <sub>Baluchi</sub> : Does the judge intend to have a legal advisor or somebody other than himself rule on the 505 hearings?	No.
D <sub>Baluchi</sub> : Between the judge's removal and his re-detailing, did anyone talk to him about the commissions case?	No. Except that the judicial team asked whether, if he was placed back on the KSM commissions, he would be available in the fall or not. Judge said he answered that he could make himself available.
D <sub>Baluchi</sub> : Has anyone contacted the judge about his role in the commissions, or expectations of the commissions?	No.
D <sub>Baluchi</sub> : Has anyone told the judge to make the case finally get to trial?	No.
D <sub>Baluchi</sub> : Does the judge feel any pressure to make the case come to an end?	No. Judge stated that he would like to see progress and intends to make steps to keep the case active but does not feel pressure to conclude the case.
D <sub>Baluchi</sub> : And does the judge have any difficulty granting a continuance, in the face of this desire to keep progressing?	No.
<b>By DEFENSE COUNSEL for ATTASH</b>	
D <sub>Attash</sub> : Judge's familiarity with Michael Schwartz?	Judge knew Schwartz as an active-duty JAG, but they did not socialize and were not Facebook friends.
D <sub>Attash</sub> : Which deployment was the judge referring to when he discussed his deployment reading list?	Judge noted that it wasn't a deployment reading list, but something he did by his own initiative, seeking out a chief of staff reading list. That list had several Bernard Lewis books on Islam.
D <sub>Attash</sub> : Has the judge read anything on Islam not by Bernard Lewis?	Yes, the judge read a book by an Israeli peace activist called “My Promised Land.”
D <sub>Attash</sub> : Was that author Thomas Friedman?	Yes.
D <sub>Attash</sub> : Did the judge read Lewis' book “What Went Wrong: The Clash Between Islam and Modernity in the Middle East”?	“I think that was one of the ones I looked at, yes.”
D <sub>Attash</sub> : Does the judge recall the book advocating a show of force in the Arab world and Iraq after 9/11, because this was a battle between Christendom and Islam?	Judge did not recall that but recognized the sentiment. “I'm familiar with those type of theories, having heard them.”
D <sub>Attash</sub> : Does the judge remember the book advocating that change be shoved down the throats of Arabs because Arabs only understand force?	No.

<b>Questions:<sup>3</sup></b>	<b>Judge's Answers:</b>
DAttash: Others quoted the author as believing that Arabs need to be struck between the eyes with a big stick. Does the judge agree with that, or the other two principals stated?	No.
DAttash: How does the judge see the relationship between Islam and the rest of the world?	After reading articles from different viewpoints, judge concluded that Islam cannot be viewed as a homogenous bloc. People in different countries, religions, and factions are not monolithic, so some will be more or less tolerant. Judge believes he comes to the bench open minded.
DAttash: Has the judge experienced cases where trauma was experienced by the defendant?	No, the judge did not initially remember any cases. He remembered one where the defendant had been diagnosed with deployment PTSD, which ultimately played into the mitigation phase.
DAttash: Sentencing in the military is done by panel members?	Yes.
DAttash: Is there a list of factors in the UCMJ that the judge is allowed to bring into mitigation before a sentencing panel?	Yes.
DAttash: Is it fair to say the judge is not familiar with capital case law?	Yes.
DAttash: How does the judge plan to educate himself to “be ethically capable of judging this case”?	Judge plans to lean on his staff to bring items of importance to his attention. He also chooses to educate himself by reviewing the case law, learn the material, and use his two years of bench experience to understand the concepts at issue.
DAttash: How many experts did the judge deal with on a regular basis in a court martial?	Judge answered one to two experts per side, but that complicated cases had up to five. <sup>5</sup>
DAttash: Is the judge familiar with the complexities about how experts are to be funded and requested in the military commissions?	Yes. Judge noted that the arrangement is unusual, and that discussions were underway to improve the process.
DAttash: Has the judge researched the certification required of death penalty counsel?	Judge has read through the ABA guidelines and is aware of the additional levels of training for JAGs dealing with death penalty cases.
DAttash: Does the judge intend to make himself familiar with records of obstacles to relationships between defense counsel and clients in the case?	Judge stated no intent to go back and read everything and does not believe such reading to be feasible in a case going on this long. Instead, he stated intent to get “up to speed on the basics, the framework, [...] some fundamental law, [and] some of the other issues.” “The parties can flag it for me, I can go back, and I can review it.” “The

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5 Whether the judge meant “five experts per side” or “five experts total” remains unclear.

<b>Questions:<sup>3</sup></b>	<b>Judge's Answers:</b>
	parties also have the remedy of saying motion for reconsideration.”
DAttash: Were there any turnover notes from Judge Cohen to the judge?	No.
DAttash: Is the judge's “crack trial judiciary staff” briefing him?	Judge asserted that the team is helping him.
DAttash: Is the judge receiving briefings on the history of the case?	Yes, noting that it was only as issues became germane.
DAttash: How did the judge feel about the CMCR essentially calling him unqualified in writing?	Judge was happy with the ruling, and agreed that, at the time, he had been unqualified.
DAttash: How many courts martial did the judge conduct between his removal from the commissions and his reinstatement?	Approximately 15 to 20.
DAttash: What was the most serious charge in any of the courts martial that the judge has tried?	Sexual assault.
<b>By DEFENSE COUNSEL for SHIBH</b>	
DShibh: Has the judge any prior knowledge of the client's problems, health, complaints, and/or behavior during the proceedings?	Judge said not about Bin al-Shibh in particular, but he was aware that various accused have health problems.
DShibh: Will the judge be “willing to entertain requests to intervene and, where appropriate, to intervene when conditions at the camp where Mr. Bin al-Shibh is being held run the risk of interfering with his ability to participate in these proceedings or to cooperate with his defense?”	“I'm aware that there have been issues throughout the time of this commission with, you know, various entities at the confinement facility. But I understand, there's going to be problems. There will be friction sometimes. Where I can assist, I will, if required.”
DShibh: Is the judge's attendance at the National Judicial College's program remote?	Yes.
DShibh: Is the judge open to considering why the case has made so little progress?	“The more I can understand the history of the case and maybe where the case has gotten bogged down, that might help with that.”
DShibh: Is the judge open to the possibility of ruling on evidence that the U.S. government cannot cause the detainees to undergo trial after placing them into an intelligence extraction program?	Yes.
DShibh: Can the judge handle this being a career-defining case that either lionizes him for bringing justice or demonizes him for whiffing an important case?	Yes.
DShibh: How does the judge know that he can withstand that sort of pressure?	“I am in the fortunate position where-- I mean, and this may be somewhere you're going later in questioning, but I'm in the fortunate position that

Questions: <sup>3</sup>	Judge's Answers:
	my military career is basically set. [...] I'm not interested in being a general. I'm not interested in any other jobs." "Even after I retire, whenever that is, [...] I don't plan on any job in the legal profession. I am going to enjoy my time off, enjoy my hobbies, and spend time with my family." "I feel confident that I can stay focused on it and avoid those distractions."
G: Did the judge arrive at his first judge's billet on 31JUL2019?	Yes.
G: Was the judge's first judge's billet at Joint Base Langley-Eustis?	Yes.
G: Was the judge first detailed on 31JUL2019 to the case <i>U.S. vs. AIC Manuel Cueto</i> ?	Judge agreed, correcting that the name was "Manuel Palacios Cueto."
G: Was the judge doing pretrial work on that case within a week of being detailed?	No, the judge said he was trying the actual case within the week.
G: [Counsel provided a copy of the judge's first detailing order to the bench.] Did that document indicate the judge's detailing to the case just referenced?	Yes.
G: Did that document indicate that the trial was to convene on 19AUG2019?	Yes.
G: Was that date set by the judge's predecessor?	Yes.
G: Was that the first day that the judge started gaining what would constitute as military judge experience?	Judge stated that he might have conducted an 802 conference before that, but 19AUG2019 is the safest date.
G: Was the judge able to review the list of 2976 people alleged to have been killed on 9/11 to see if he recognized any of those names?	No, the judge did not check name by name. "I scrolled through it."
G: Did the judge have an opportunity to review Appendix B of all the people alleged to have suffered serious bodily injury?	"In the same manner."
G: "We would ask you, sir, as part of this process, to review that a little more closely to ensure you don't have any awareness. It's our understanding that Judge Keane, who was a military judge who was, I suppose, detailed after you had initially been detailed, did wind up recusing himself because there was someone he was aware of, whether that was on the charge sheet or some other victim. We just want to make sure, for sure	"That's fair. I'll do so."

<b>Questions:<sup>3</sup></b>	<b>Judge's Answers:</b>
that there's no one that you knew that you were close to that may impact your bias or impartiality to preside over this case.”	
G: The judge has no current application for employment at the Department of Justice or the Department of Defense?	Judge confirmed.
G: The judge has no plans for such applications?	Judge confirmed.
G: How long are the judge's orders at Joint Base Langley-Eustis?	Judge noted that the Air Force does not give time-limited orders, that they are open-ended. He noted that he could have been moved in the past summer, but they had not done that. Judge had asked the person in charge of the office that would do so and learned that they understood he was overseeing a complex case, so they did not plan to move him.
G: Is the judge aware of any lists that might exist that would put him on a future assignment?	“Yeah, we don't have anything like that for JAGs.” “Typically, at some point, especially for a colonel, some point in May or June, you'll get a notice that, 'Hey, we want to move you.' If you're lucky, you'll get a call earlier saying, 'Hey, we're thinking about moving you, but there's no guarantee.' But I feel comfortable that they are going to leave me in place.”
G: Should the judge receive such a call; would it be his intention to extend to try to extend?	Judge said yes, he would make clear his preference to stay on the commissions.
G: Is it still the judge's intention to take certain courts martial cases at Joint Base Langley-Eustis?	Yes.
G: Did the judge continue to take courts martial when he was initially detailed to the commissions?	Yes.
G: In the first two months of the judge's initial detailing, did the judge form any legal opinions about the case?	Judge said no, other than the items upon which he made rulings.
G: Did the judge know the names of any of the accused before he was detailed?	Judge had heard of KSM through the press but was not aware of the names of the other four.
G: Are there any experiences in the judge's background that might impact his impartiality, which had not been discussed yet in voir dire?	No.
G: Does the judge have any reason to believe he cannot preside impartially?	No.