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1 [The Military Commission was called to order at 0914,
2 22 February 2014.]

3 MJ [COL POHL]: The commission is called to order. This
4 is a closed hearing pursuant to Commission Rule 806(b)(2).
5 The required findings necessary for having such a closed
6 session is AE 128A.

7 Trial Counsel, please account by name who is
8 present for the government today.

9 TC [CDR LOCKHART]: Yes, sir. It's myself, Commander
10 Andrea Lockhart, Mr. Justin Sher, Brigadier General Mark
11 Martins, Lieutenant Bryan Davis, Major Evan Seamone, Sergeant
12 First Class Jason Keith, Lieutenant Paul Morris, Mr. [REDACTED]
13 [REDACTED] and Ms. Manmeet Cozzens.

14 Additionally, we do have two personnel -- I
15 apologize, sir, they are outside the courtroom. We have some
16 guards outside the courtroom.

17 MJ [COL POHL]: Okay. And they have all the requisite
18 TS clearance?

19 TC [CDR LOCKHART]: They do, yes, sir.

20 MJ [COL POHL]: Defense, I recognize that Mr. Nashiri is
21 not here today.

22 LDC [MR. KAMMEN]: Yes, he does not waive absence. We
23 object to his absence.

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1 MJ [COL POHL]: Okay, thank you. I thought you would
2 want to put that on the record. And can you please account by
3 name all the members of the defense who are here at this time?

4 LDC [MR. KAMMEN]: I'm Richard Kammen, Commander Brian
5 Mizer, Major Allison Danelis, Major Thomas Hurley, Tech
6 Sergeant Valerie Nixon.

7 MJ [COL POHL]: Okay. Trial Counsel, who are all these
8 people to the right of my bench?

9 TC [CDR LOCKHART]: Those are the stenographers, sir.

10 MJ [COL POHL]: Okay. Okay. And they have all been
11 cleared also?

12 TC [CDR LOCKHART]: Correct.

13 LDC [MR. KAMMEN]: Everybody present to the right of the
14 bench is a stenographer and has no other position; is that
15 correct?

16 TC [CDR LOCKHART]: Correct, they are just
17 stenographers.

18 MJ [COL POHL]: Okay.

19 TC [CDR LOCKHART]: They were present at the last
20 hearing as well.

21 MJ [COL POHL]: Okay. I don't want to minimize their --
22 when you say "just a stenographer."

23 TC [CDR LOCKHART]: I didn't mean "just."

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1 MJ [COL POHL]: But that is a role.

2 And, Mr. Kammen, all the members of the defense do
3 have appropriate clearance for this hearing?

4 LDC [MR. KAMMEN]: That is my understanding, yes, sir.

5 MJ [COL POHL]: Okay. We are here to discuss AE 120,
6 which is a discovery motion. As a discovery issue the legal
7 standard is material to preparation of the defense. Anybody
8 disagree with that?

9 TC [CDR LOCKHART]: No, sir.

10 LDC [MR. KAMMEN]: No, sir.

11 MJ [COL POHL]: And it seems to me, and I will certainly
12 listen to a counterargument, that the defense has submitted a
13 discovery motion, the government opposes it. We agree what
14 the legal standard is. By filing said motion, it tells me the
15 defense says we want this, and so ----

16 LDC [MR. KAMMEN]: It's not a matter of want. It's a
17 matter of what we like, anything ----

18 MJ [COL POHL]: I got it. What I'm saying is your
19 motion speaks for itself, why you need it. And so the
20 question -- I'm just trying to do the order of argument here.
21 So it strikes to me -- unless you want to be heard more than
22 what is in your motion. Like I said, I think it kind of
23 speaks for itself. You say you need this for your defense?

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1 LDC [MR. KAMMEN]: Well, Your Honor, in a capital case
2 we have certain ethical responsibilities that we are required
3 to perform. Without this material, frankly, we are all
4 wasting our time here because we are not in a position to
5 provide effective assistance of counsel.

6 MJ [COL POHL]: Okay.

7 LDC [MR. KAMMEN]: So it is not just, geez, we'd like
8 it. It's ----

9 MJ [COL POHL]: No, I didn't ----

10 LDC [MR. KAMMEN]: Using the military parlance, it is
11 mission critical. If we don't have it ----

12 MJ [COL POHL]: I didn't mean to say that or imply that.
13 What I simply -- I was just trying to get this started out, is
14 that you've indicated what you want, and I understand why you
15 think you need it. And now the question to the government is,
16 as we go line by line, why they object to it.

17 LDC [MR. KAMMEN]: Okay.

18 MJ [COL POHL]: Otherwise, I don't know why we would be
19 here.

20 LDC [MR. KAMMEN]: And I just want to ----

21 MJ [COL POHL]: No, but I understand your position,
22 though.

23 LDC [MR. KAMMEN]: This is -- I'm understanding there

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1 will be no public hearing on 120; is that correct?

2 MJ [COL POHL]: On the classified portions of 120.

3 LDC [MR. KAMMEN]: Well, I understand, but -- okay.

4 MJ [COL POHL]: If there is an unclassified portion we
5 can discuss in a public hearing, the answer is yes.

6 LDC [MR. KAMMEN]: Okay, fine. Thank you.

7 MJ [COL POHL]: Thank you. Trial Counsel, the way I'm
8 going to do this is -- because I don't know any other way to
9 do it, is we'll go paragraph by paragraph, and then you will
10 tell me why you're opposing the first one, and then, Defense,
11 similarly you will reply paragraph by paragraph.

12 LDC [MR. KAMMEN]: Sure.

13 MJ [COL POHL]: Go ahead.

14 TC [CDR LOCKHART]: Thank you, Your Honor. If we could
15 start with AE 120 paragraph (a), which is the relief
16 requested.

17 MJ [COL POHL]: Uh-huh.

18 TC [CDR LOCKHART]: So the defense has requested all
19 materials in the government's possession relating for the
20 planning for and transfer of Mr. Nashiri to and from any CIA
21 blacksite.

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1 So they have the conditions of transport to the
2 extent that they were documented. Anything that we had that
3 related to Mr. Nashiri and specific to him, [REDACTED]
4 [REDACTED] was provided to the defense.

5 MJ [COL POHL]: Okay. Although we just ----

6 TC [CDR LOCKHART]: I'm sorry, sir?

7 MJ [COL POHL]: Okay. We discussed this earlier, okay?
8 We are going to go through this today, just as I said we are
9 going to.

10 TC [CDR LOCKHART]: Right.

11 MJ [COL POHL]: But I want a specific
12 paragraph-by-paragraph submission by the government of what
13 you have already given him.

14 TC [CDR LOCKHART]: Yes, sir.

15 MJ [COL POHL]: I know you are going to tell me it
16 orally, but then ----

17 TC [CDR LOCKHART]: And we are going to do that by
18 categories. I am not going to list out every document, but to
19 the extent that ----

20 MJ [COL POHL]: Listen to what I just said. I want a
21 specific paragraph-by-paragraph listing of what you gave them.
22 Now, if paragraph 2(c) is you say see paragraph 2(a), that is
23 responsive, that is fine. But do you understand what ----

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1 TC [CDR LOCKHART]: I don't, sir.
2 MJ [COL POHL]: Okay.
3 TC [CDR LOCKHART]: May I ask a question?
4 MJ [COL POHL]: Sure.
5 TC [CDR LOCKHART]: I just want to understand the
6 distinction. Are you saying that you want us to do Bates
7 stamp number 5 contains [REDACTED]
8 MJ [COL POHL]: I want you -- you just started out your
9 presentation by saying ----
10 TC [CDR LOCKHART]: Correct.
11 MJ [COL POHL]: ---- we have given him this already in
12 response to 2(a).
13 TC [CDR LOCKHART]: Correct.
14 MJ [COL POHL]: Okay. I want all that in writing
15 paragraph by paragraph.
16 TC [CDR LOCKHART]: Sir, I'm not trying to be dumb here.
17 I'm trying to understand: Do you want the words I just said,
18 meaning ----
19 MJ [COL POHL]: I want a responsive thing, you know ----
20 TC [CDR LOCKHART]: I'm trying to comply with your
21 order, and I need to understand it, sir.
22 MJ [COL POHL]: Okay, okay. Let me explain it to you.
23 If you say we gave them Bates stamp X, that ain't going to cut

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1 it. These are in words, the request.

2 TC [CDR LOCKHART]: Okay.

3 MJ [COL POHL]: I want a response in words ----

4 TC [CDR LOCKHART]: I understand.

5 MJ [COL POHL]: ---- just like you gave me on the first
6 one.

7 TC [CDR LOCKHART]: Absolutely, sir.

8 MJ [COL POHL]: Okay. Now, Mr. Kammen, you were
9 standing?

10 LDC [MR. KAMMEN]: I want to make clear, because as I
11 heard her words come out of her mouth, my response was
12 unprintable. If she contends that they have given us all of
13 [REDACTED] ----

14 MJ [COL POHL]: Right.

15 LDC [MR. KAMMEN]: ---- that needs to be in writing, and
16 I think they should identify by Bates number what specific
17 [REDACTED] they have in mind. Because what they have -- the
18 [REDACTED] they have given us cannot possibly be all the
19 [REDACTED]

20 MJ [COL POHL]: Okay, okay. Make sure -- let me make
21 sure I'm clear on this, okay? Okay.

22 When I say answer in words, okay, that does not
23 mean you don't also give them the Bates stamp number. I do

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1 not want an answer with a Bates stamp, with me, alone.

2 TC [CDR LOCKHART]: Can I be heard on that issue, sir?

3 MJ [COL POHL]: Sure.

4 TC [CDR LOCKHART]: Okay. When the government provides
5 discovery to the defense, it is not the government's job to
6 determine what category the defense would find that in. And
7 this one is easy. [REDACTED]

8 [REDACTED]
9 [REDACTED] That is
10 easy.

11 MJ [COL POHL]: Okay.

12 TC [CDR LOCKHART]: When we get to some of the other
13 ones, there's lots of information out there that certainly has
14 provided, but going through and finding every Bates stamp
15 number of anything that -- that would be the government's
16 interpretation, it might not be complete, it might not be what
17 the defense wants.

18 I would submit that it's fair to say we have
19 complied by providing all the statements.

20 MJ [COL POHL]: If you -- okay. Every trial I have ever
21 conducted, okay, when this type of issue comes up, there is
22 simply a response in writing to the defense request. If you
23 respond in writing what you have given them, and then after

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1 they get it they want more definition of exactly what they
2 got, we will get -- we will cross that bridge then.

3 TC [CDR LOCKHART]: Okay. Yes, sir.

4 MJ [COL POHL]: You say you want to respond -- and,
5 again, I can't anticipate every possibility of the form of
6 evidence or whatever it is. But I just want -- since you
7 started out your discussion of we have given them X, I need to
8 know what X is ----

9 TC [CDR LOCKHART]: I understand, sir.

10 MJ [COL POHL]: ---- and to go from there.

11 TC [CDR LOCKHART]: And just to start with, when they
12 filed this initial request -- and I understand that this is a
13 bit old, this was filed in 2012 -- the government did do that.
14 The government absolutely responded back, we provided this, we
15 didn't provide this, we need to get this document. And we
16 will certainly go through that.

17 MJ [COL POHL]: Just give me a current update.

18 TC [CDR LOCKHART]: And I will update it. I will do
19 what Your Honor wants.

20 MJ [COL POHL]: Okay. Great.

21 TC [CDR LOCKHART]: Okay. So back to 120 ----

22 MJ [COL POHL]: Just a second -- okay. Go ahead.

23 TC [CDR LOCKHART]: ---- (a), it is the government's

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1 assertion that everything else -- so they want again all,
2 which the government's starting position is that these
3 requests are overbroad. And if I can say just a few things on
4 that, I think it will help put context to all of these
5 arguments.

6 This request that has to do with classified
7 information is very similar to what the government would
8 require on a 505 notice and what the commission has deemed in
9 the past in this commission is necessary, and that is to
10 specify with specificity what it is that they are looking for.

11 When they say they want all materials in the
12 government's possession relating to the planning for and
13 transfer of Mr. Nashiri, first of all, the government is not
14 aware as to where the outer bounds are, the inner bounds, what
15 that exactly means.

16 Second of all, "all" is not discoverable. What is
17 discoverable is what is relevant and material to the
18 preparation of the defense, and the defense has the burden of
19 demonstrating why that is so.

20 If the government reviews something and makes a
21 determination that in its determination it's not relevant and
22 material to the preparation of the defense, the defense then
23 has the burden of demonstrating why.

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1 And the government would assert in this entire
2 motion request with some exceptions -- there are some that are
3 specified, but most of these -- there is 53 out of the
4 70-some-odd statements that include the words "all," "any" and
5 "everything," and that doesn't let the government know what it
6 is that the defense wants.

7 A perfect example -- I know we talked about this
8 the other day -- was they want all the information having to
9 do with the treatment. So the government provided it. The
10 defense came back after that and said, you know what, we
11 really need [REDACTED]
12 [REDACTED] we would like that. The
13 government provided that.

14 So it has to be this specificity, because with
15 these broad categories, two things happen. One, the
16 government doesn't know and should not be in a position of
17 interpreting what the defense means; and second of all, if the
18 defense asks for something specific, the government has the
19 right to apply M.C.R.E. 505 in doing a balancing.

20 And if -- if that information or the release of
21 that would be of concern to national security, the government
22 has the right to offer adequate substitutions, which obviously
23 Your Honor reviews and either approves or disapproves. If the

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1 category is so broad, the government doesn't have the ability
2 to do that. The defense must request specific things.

3 So getting back to (a), they want all materials
4 for the planning and transfer. The first assertion is
5 anything that the government deemed relevant and material in
6 the preparation of the defense has been provided, and of
7 course we will put this in writing and provide it. [REDACTED]

8 [REDACTED]
9 [REDACTED] and we did an exhaustive search.

10 We also provided any documentation, so if it
11 said -- and I'm just paraphrasing here, I'm not using an
12 actual example -- if it said during transit X, Y, Z with
13 Nashiri and it had to do with conditions of confinement, we
14 provided that. The government would assert that all the
15 administrative and logistical matters that pertain to that,
16 they are not discoverable.

17 Do you have any questions on (a), sir?

18 MJ [COL POHL]: No.

19 TC [CDR LOCKHART]: Okay. On paragraph (b), the defense
20 requested again all personnel documents relating to the staff,
21 lawyers, medical and mental health personnel and
22 administrators while he was in CIA blacksite in any foreign
23 nation.

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1 That category in itself, the defense has not
2 demonstrated why that is relevant or material to the
3 preparation of the defense. The defense has said in previous
4 arguments that they have the right to do their own
5 investigation, and they want to contact these people and
6 interview with them and maybe find something out. That is not
7 what the standard of discovery is.

8 They have to be able to show more than mere
9 theoretical relevance according to Yunis. They have to be
10 able to show why that information is material to preparing the
11 accused's defense, and the government asserts in that section
12 that that whole section as a category is not discoverable.

13 Paragraph (c) is any and all documents, records,
14 communications and reports in the possession of a foreign
15 country that serve as a transit point or host to any facility
16 that can be requested through the Treaty on Mutual Assistance
17 in Criminal Matters.

18 Several things, and I realize that this motion was
19 written quite some time ago. This commission already ruled on
20 information that is in possession of a foreign government. We
21 don't have compulsory process over that. We don't have the
22 assistance of an MLAT. The information that is discoverable
23 per the rules and the case law is material that is in

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1 possession of the government, that's the first point.

2 The second point is, again, the defense has not
3 demonstrated what the relevance is of needing -- again, any
4 and all documents, records, communications and reports. I'm
5 not even sure what that means, what it is that they are
6 looking for. It is such a broad, vague request.

7 If the defense were to come back and say, hey, on
8 this particular time according to this particular thing that
9 we read, we would like that, then the government could
10 actually address it. But it's not reasonable to have the
11 government try and guess as to what the defense wants.

12 And to any extent the defense tries today in this
13 hearing to further clarify what they want, the government
14 would assert that they should do a written submission with a
15 narrowing class or more specificity.

16 MJ [COL POHL]: Okay. You have done the first three.
17 Let me hear from the defense on the first three.

18 TC [CDR LOCKHART]: Yes, sir.

19 LDC [MR. KAMMEN]: As a starting point, despite what the
20 prosecution wants to pretend, we have not only a right, but an
21 ethical obligation to do our own investigation.

22 And in many respects the material that we seek
23 is -- we need it because of the overarching elements of

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1 secrecy. [REDACTED]

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16 Had the government complied with its discovery
17 obligation, they would have provided us with that information
18 already. It would still be classified, but at least we would
19 then know then what to do. And I just use that as an example.

20 What we need is the information from which we can
21 do our investigation into the manner and treatment of
22 Mr. Nashiri from 2002 to 2006, and that treatment, as best as
23 we know, [REDACTED]

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1 [REDACTED] There may have been others, but we
2 believe that at least based on the knowledge that has been
3 coming since then, he was in those various places.

4 Well, take for example -- let's pretend, for
5 example, and I don't know this to be the case, that
6 Mr. Nashiri was [REDACTED] The
7 circumstances of that transfer are an important piece of
8 information which we would need for our investigation.
9 Because every place he was is essentially equivalent to a
10 prison in which a client has been housed. And in a death
11 penalty case, the client's behavior and treatment in prison is
12 germane to a penalty phase.

13 And so what we were asking for is all of the
14 things so that we could begin to find out what the truth is.
15 They may give it to us and say, okay, here's the planning
16 documents, and here are the photographs, and here's the
17 flight. You know, it's flight XYZ, and it landed and took off
18 from here. That may foreclose our need to do any more
19 investigation, because we would know and we could piece it all
20 together.

21 Now, with respect to [REDACTED]
22 [REDACTED]
23 [REDACTED]

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5 [REDACTED] It is clear they are sort of picking and
6 choosing. So when they say they have given us all, that's
7 just not true. It's they have given us all they want to give
8 us.

9 And I don't believe for a second that the agencies
10 that were responsible didn't document this in far greater
11 detail, so -- I just need to put that out there, that what
12 they claim is -- in the fullness of time will be revealed not
13 to be correct. Whether the fullness of time will be during
14 the pendency of this case or in future post-conviction
15 litigation remains to be seen.

16 Now one of the reasons -- things we asked for is
17 the agreements between the United States and the host
18 governments for their participation. That's discoverable
19 because it's mitigating.

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22 [REDACTED] that is
23 mitigating in the context of this case. And it may well be --
and it certainly in our view would be admissible as mitigating

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1 evidence. And so all of that is material relevant to the
2 mitigation case and material to the preparation of that case.

3 Now, in Section (b) what we want, Your Honor, are
4 the names of the people who participated in the torture. What
5 we want, Your Honor, are the names of witnesses, witnesses who
6 participated in the torture.

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13 What could possibly be more mitigating than that?

14 And if a doctor was part of that, if a
15 psychologist was part of that, and they were being paid by the
16 United States, that is mitigating in the context of a case
17 where the United States is now seeking to kill the guy they
18 did it to. If a lawyer was there saying, based upon guidance
19 that we now know has been discredited, you can do X or you can
20 do Y, that's mitigating, Your Honor. A juror hearing that
21 might well conclude, you know, the United States behaved so
22 badly, we don't want to kill this guy.

23 And (c) ----

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1 MJ [COL POHL]: Okay. But let's come back to (b) for
2 just a second. As worded, it appears to me that the request
3 is not limited to personnel that were there, it's the
4 personnel that were -- were -- I'm not sure what it is limited
5 to. Do you see you where I'm seeing that? The way you worded
6 this is you are asking for -- and I'm trying to understand
7 what your wording is. I'm not making a decision on this,
8 understand that.

9 LDC [MR. KAMMEN]: Come on, we all know how this is
10 going to turn out. Let's not kid ourselves.

11 MJ [COL POHL]: Mr. Kammen, if you want to believe that,
12 that is up to you. But let's -- we are going to do this the
13 way it should be done.

14 My only question is, is that is there any
15 geographic or temporal limit on who these people should be?
16 Do you see where this is worded -- you seem to be saying you
17 want to know who was there on the ground during the incident,
18 but the way it is worded, it would appear to be if a lawyer
19 was, for example, in Washington involved somehow in the
20 process, you would want that also. And maybe ----

21 LDC [MR. KAMMEN]: Sure, if he was involved in the
22 process, absolutely. If a lawyer sitting in Washington ----

23 MJ [COL POHL]: Okay. Okay.

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1 LDC [MR. KAMMEN]: ---- and says, [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 MJ [COL POHL]: Okay. Okay. I just want to clarify
5 that. So anybody who was involved in individual
6 interrogations as opposed to the program of ----

7 LDC [MR. KAMMEN]: Anyone who was involved with respect
8 to the entire CIA rendition program pertaining to Mr. Nashiri.

9 MJ [COL POHL]: Okay, I understand.

10 LDC [MR. KAMMEN]: I mean, you know, what they did to
11 Khalid Shaikh Mohammad is Khalid Shaikh Mohammad's problem.
12 We don't care about that.

13 MJ [COL POHL]: I got you.

14 LDC [MR. KAMMEN]: What they did to Nashiri -- now,
15 there is going to be a lot of overlap, I suspect, but what we
16 are interested in is what was done to Nashiri, who
17 participated, who witnessed it, who approved it.

18 MJ [COL POHL]: So -- so we are talking about assuming
19 there needed to be coordination outside of the site where he
20 is actually at, if there was such coordination, that would be
21 the type of information that you want.

22 LDC [MR. KAMMEN]: Sure.

23 MJ [COL POHL]: You said go back to wherever, legal,

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1 medical, intelligence personnel and say, yeah, here's your
2 plan, go execute it.

3 LDC [MR. KAMMEN]: Yeah.

4 MJ [COL POHL]: Okay, I got it. I'm just trying to
5 understand the scope of your request. Go ahead.

6 LDC [MR. KAMMEN]: On (c) -- and some of this is an
7 overlap because, you know, it's -- the government sort of
8 litigates in this scorched earth policy, either you are --
9 either the requests are too broad, they are not specific
10 enough, they are not detailed enough.

11 And let me give you an example. The prosecutor
12 alluded to it. They claim to have given us some stuff.

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21 So but at this time in 2012 we were doing what
22 happens in normal courts, when you make a discovery request --
23 and, you know, you frankly make it as broad as possible so

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1 that you encompass everything, as opposed to having engaged in
2 this sort of discovery hunt-and-chase and whack-a-mole and
3 gamesmanship that exists here.

4 And some of this may well overlap with -- I'm
5 telling you that because I recognize some of this may overlap
6 with number 2, it may not -- or number (b), it may not. I
7 don't know if for reasons of plausible deniability the CIA
8 decided, well, let's leave the records [REDACTED] I don't
9 know to what extent -- [REDACTED]

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17 MJ [COL POHL]: So for this -- for this particular one
18 which is in possession of a foreign government, you would want
19 the government -- the U.S. government to make such a request
20 [REDACTED]

21 LDC [MR. KAMMEN]: Yes, yes, absolutely.

22 MJ [COL POHL]: Okay.

23 LDC [MR. KAMMEN]: And from [REDACTED]

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[REDACTED]

[REDACTED] And, you know, we will
address that sort of ----

MJ [COL POHL]: Okay.

LDC [MR. KAMMEN]: So those are the first three. I can
keep going or ----

MJ [COL POHL]: Why don't you keep going, and then I
will break it off and give the government a chance to speak.

LDC [MR. KAMMEN]: You know, it's another request
for ----

MJ [COL POHL]: I mean, Delta kind of speaks for itself.

LDC [MR. KAMMEN]: Yeah, I don't know what's
particularly complicated about this one. Everybody who
participated in any way with Mr. Nashiri in terms of his
transportation to a foreign country, given the sort of bizarre
world in which we operate, [REDACTED], including
their employment records, disciplinary records, records of
complaints made by or against these employees and training
records.

[REDACTED]

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14 MJ [COL POHL]: Echo doesn't apply, since it's a ----

15 LDC [MR. KAMMEN]: I'm sorry, sir.

16 MJ [COL POHL]: I said Echo is unclassified.

17 LDC [MR. KAMMEN]: Right.

18 MJ [COL POHL]: So I just want to discuss the classified
19 provisions. So let's go to (f), and then I will let the
20 government respond.

21 LDC [MR. KAMMEN]: Well, okay.

22 MJ [COL POHL]: If you want to be heard on these
23 things ----

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1 LDC [MR. KAMMEN]: No, no, no.

2 MJ [COL POHL]: I mean, some of these kind of speak for
3 themselves. The response I expect to hear from the government
4 again and again is overbroad and nondiscoverable ----

5 LDC [MR. KAMMEN]: Right.

6 MJ [COL POHL]: ---- but I will let them articulate
7 that.

8 LDC [MR. KAMMEN]: You know, okay, (f) is -- again, it
9 may be that it was nongovernment officials who were part of
10 this. I don't know who built these places. We know that
11 there were photographs. We know that at some point videos
12 were made because we know they were destroyed. I don't know
13 if those were government agents who were doing that, you know,
14 contractors. We don't know.

15 So this is an effort to avoid the government
16 coming in saying, well, we didn't give it to you because you
17 didn't ask for contractors. You know, you didn't play
18 whack-a-mole right. We filed a 70 -- well, that's ----

19 MJ [COL POHL]: That is unclassified.

20 LDC [MR. KAMMEN]: Unclassified.

21 MJ [COL POHL]: Go ahead and go to (h), because that
22 will finish paragraph 2.

23 LDC [MR. KAMMEN]: Well, you know, in the interest of

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1 being ----

2 MJ [COL POHL]: Actually, paragraph (h) is----

3 LDC [MR. KAMMEN]: You know, the government is now
4 saying that all of these specific requests are unclassified.
5 I understand what you have before you, and until yesterday I
6 believed everything in this was classified. The government
7 has given us what was published on the commissions website,
8 and apparently after filing, some relevant official decided
9 all of these requests were unclassified.

10 MJ [COL POHL]: Well ----

11 LDC [MR. KAMMEN]: Now, let me be honest, I think it is
12 better to be discussing it here because ----

13 MJ [COL POHL]: No, but let me stop you right there.

14 LDC [MR. KAMMEN]: Okay.

15 MJ [COL POHL]: Commander, the document I have in front
16 of me for 120 is marked "Top Secret" with markings all the way
17 through. Has that changed?

18 TC [CDR LOCKHART]: It is not changed. That was what
19 the defense had marked it when they wrote it. It went through
20 a classification review, as all of these documents, and it was
21 published on the public site, what, a year and a half ago. I
22 provided the court a copy of that yesterday, I provided the
23 defense with a copy of it. But it has been available to all

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1 parties since then.

2 MJ [COL POHL]: Let me -- let me make sure I understand.

3 TC [CDR LOCKHART]: Correct.

4 MJ [COL POHL]: I have in front of me a -- because I'm
5 not sure -- well, okay. We discussed the other day at the
6 505(h) hearing what was classified. I was given 120 actually
7 electronically then, and now I have a hard copy with the
8 markings that are on it. Are you telling me is -- that the
9 redacted version is all unclassified?

10 TC [CDR LOCKHART]: No, sir, it's not all unclassified.
11 There are still portions of it that are classified, and what I
12 explained in the 505(h) the other day was it is the defense's
13 justification and reasoning from their notice that's
14 classified. They have to be able to apply that argument to
15 each of these categories, whether the requested information is
16 classified or not, if their rationale for requesting it is
17 classified. That's what makes the discussion classified.

18 MJ [COL POHL]: Got it. Okay. Got it. Okay. I
19 understand. Okay.

20 TC [CDR LOCKHART]: So I understand you skipped over the
21 one about the statements. I would guess that the defense
22 wants to discuss classified information related to that. I
23 could be wrong.

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1 MJ [COL POHL]: Okay, I understand. Okay. Do you
2 understand where we are at? As I understand it, is the
3 marking is on the original document ----

4 LDC [MR. KAMMEN]: Sure.

5 MJ [COL POHL]: ---- the information itself may not be
6 classified, but the reason to discuss it is.

7 LDC [MR. KAMMEN]: Sure.

8 MJ [COL POHL]: I mean, you already referenced ----

9 LDC [MR. KAMMEN]: Right.

10 MJ [COL POHL]: ---- certain sites ----

11 LDC [MR. KAMMEN]: There is all manner of reason. You
12 can't really have this discussion in the abstract because it
13 is so fact specific.

14 MJ [COL POHL]: Okay. Okay, so let's -- let's go back
15 to Echo. And, again, you know, Mr. Kammen, I will -- if you
16 wish to discuss each one, that's fine ----

17 LDC [MR. KAMMEN]: Well, I mean ----

18 MJ [COL POHL]: ---- but if it speaks for itself and you
19 prefer to add ----

20 LDC [MR. KAMMEN]: Yeah, but apparently it is too
21 complicated for the prosecution, because at least they seem to
22 say, well, that is overbroad, all statements obtained from
23 interrogations.

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1 But we also want, Your Honor, because -- I mean,
2 we now have the summaries. We know that the summaries are
3 false. I can't say that clearly enough. The summaries they
4 provided are false. We can prove in some cases the summaries
5 are false.

6 I don't know whether they are false because they
7 were given to the prosecution who just said okay or whether
8 the -- I don't know how they came to present to you false
9 summaries, but they have.

10 MJ [COL POHL]: Let's just back up ----

11 LDC [MR. KAMMEN]: So if I may ----

12 MJ [COL POHL]: No, but before, I want to clarify, is
13 that I don't review a summary for whether or not it's true or
14 false. I review a summary to see if it is an appropriate
15 replacement for the underlying document.

16 LDC [MR. KAMMEN]: Right, I know that.

17 MJ [COL POHL]: Okay. So when you say the summary is
18 false, I'm assuming you are assuming it is factually false.

19 LDC [MR. KAMMEN]: Yes.

20 MJ [COL POHL]: Okay. But you understand that's --
21 okay, just so we are not conflating these ideas, the summary
22 could be very well -- could be a factual falsehood, I mean,
23 but that's not -- do you understand the summary is based on

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1 the underlying document; if the underlying document is false,
2 the summary will be false too.

3 LDC [MR. KAMMEN]: Exactly.

4 MJ [COL POHL]: That is the sense you are talking about.

5 LDC [MR. KAMMEN]: Yeah.

6 MJ [COL POHL]: Okay. I got you.

7 LDC [MR. KAMMEN]: No, and I don't know who prepared the
8 underlying documents, I don't know how this happens.

9 MJ [COL POHL]: Uh-huh.

10 LDC [MR. KAMMEN]: But we know that somehow the
11 summaries are false, in some cases they are misleading, in
12 some cases they are just clearly omitting things that are out
13 there and are publicly known and that the CIA acknowledges.

14 MJ [COL POHL]: Okay, I'm with you. Go ahead.

15 LDC [MR. KAMMEN]: So because we have no confidence in
16 this process, we need not only the, you know, statements, we
17 need the underlying documents, but also, Your Honor, we need
18 the reports that were produced.

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That's

5 mitigating. So all the underlying documents are mitigating or
6 potentially mitigating.

7 Now, apparently the government would say, well,
8 you can't tell us for sure that it's material, and so you
9 don't get it until you can tell us for sure, which is, of
10 course, the whack-a-mole theory of criminal prosecution. We
11 play hide the ball, and then when you can't tell us where we
12 have hidden the ball, you don't get the ball. I mean, that's
13 the kind of gamesmanship that prosecutors in Texas and
14 Mississippi and other places that want to hide exculpatory
15 evidence, that's the game they play.

16 Skipping ahead to (g), again for the purposes of
17 completeness, we had filed a request for discovery -- and
18 while we are on the subject of discovery, Your Honor, because
19 the prosecution is going to talk about how they -- let me
20 start over, thank you.

21 MJ [COL POHL]: Okay.

22 LDC [MR. KAMMEN]: While we are on the subject of
23 discovery, because I'm sure that the prosecution is going to

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1 tell you again how much they understand their options -- or
2 their obligations, we went back and went through all the
3 discovery and responses filed in -- since the inception of the
4 case because, you know, part of the gamesmanship here is
5 everything is scorched earth. We file a request for
6 discovery, they oppose, we have to come into court, we have to
7 litigate. Everything generates more and more litigation.

8 In our discovery request the prosecution has
9 opposed or not filed or filed a response that is basically
10 nonresponsive, we don't understand it, or filed no response,
11 or has claimed, well, we will get that to you when the
12 protective order is signed, but we still don't have it. Over
13 80 percent of the items we have requested have not been
14 complied with.

15 And so, you know, part of the reason is when you
16 have to come to court you want to be as broad as possible so
17 maybe we can get this thing on track. So, you know, we can go
18 through it, but it's -- you know, their default position is
19 no. Their default position for everything is no.

20 Let's see, where was I?

21 MJ [COL POHL]: I think we are up to Golf. I think
22 that's actually ----

23 LDC [MR. KAMMEN]: Yeah, and so we had requested 75

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1 items, with the exception of the listed items 3, 14, 20, 27,
2 and 32. I don't know today whether -- you know, I know they
3 said they would produce them. I don't know today whether they
4 actually did. There has been a lot of times they have said
5 they'd produce stuff that they never do, or you know, they say
6 it is still forthcoming.

7 So, you know, for example, we over -- and this is
8 a completely different topic. Over a year -- excuse me. Over
9 a year ago we filed in response to your ruling a discovery
10 request during -- dealing with hostilities. Still not
11 complied with.

12 So, again, you know, they said they would comply
13 with this, but I want to be candid that I don't know to what
14 extent they have actually -- I just don't have that
15 information in front of me.

16 You know, (h) is just an effort to overcome the
17 gamesmanship because the government is -- when we talk about
18 the government, to be clear, we are not talking about the
19 prosecution.

20 Under Kyles v. Whitley they have an obligation to
21 go out and hunt for material. The prosecution -- now they
22 have talked about this, we have done this, we send out these
23 prudential search requests. And we said, well, let us see

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1 them. Because if the prudential search requests are the kind
2 of thing a responsible prosecutor would be sending out, great.

3 If they are asking for the right material and the
4 agency is coming back and saying we don't have it. Fine, then
5 we know where we are at. And when the information ultimately
6 surfaces, as it will, we will at least know it is not their
7 responsibility.

8 But their position is, well, you can't see the
9 prudential search requests, which tells me that what they are
10 sending out is vague stuff. And I'm cynical, you are right.
11 I don't trust them, you are right.

12 And they are -- and so if you send out a vague
13 search request to an agency that doesn't want to give you the
14 information to begin with, that's easy. Well, we sent out the
15 search request, we got nothing, but if you don't request stuff
16 specifically -- so all this is is an effort to try and make
17 sure that, you know, for future purposes nobody can say, well,
18 you didn't make it clear that you were referring to more than
19 the prosecution.

20 And to make it -- and we've had this discussion
21 before. You so far have declined to order them to do
22 something. You said please do it, they recognize their
23 obligation. Well, it seems to me that if they are under an

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1 order, then when they don't have it, then when it surfaces
2 later on, then when we find out that, yeah, the government did
3 have it, then at least we know where to put the
4 responsibility. And that's, I think, going to be an important
5 situation in the years to come, is to figure out where to put
6 the responsibility for the hiding of exculpatory evidence.

7 Now, the balance of the motion, well, is argument,
8 you know ----

9 MJ [COL POHL]: Yeah, which you've somewhat incorporated
10 already. I mean, you ----

11 LDC [MR. KAMMEN]: Somewhat. I mean, I can go on and on
12 and on about the specifics, because, you know, Your Honor,
13 again, I just can't overstate this. You know, in the
14 approximately 18 months since this was filed, I mean, clearly
15 everyone's knowledge, at least on one side of the room, has
16 expanded in terms of what's involved here. But what's
17 involved here is -- is breathtaking. It is absolutely
18 breathtaking and shameful, and that's mitigating in the
19 context of this case.

20 And it's -- you know, we have this obligation, and
21 this impacts everything, because one of the mitigating factors
22 we may offer is that the guy in court is not the guy that was
23 arrested. The guy that was arrested is dead. They killed

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1 him. They haven't killed his body, but they've killed whoever
2 that guy was. Because that's what this program was designed
3 to do, it was designed to turn people into a state of learned
4 helplessness where they were powerless to say no to government
5 agents.

6 Now, that affects a lot of things that are coming
7 over the pipe, because what the government -- well, I mean, a
8 lot of other areas of litigation beyond mitigation are
9 affected by this as well. So all of this is germane --
10 certainly germane to mitigation, and certainly germane to the
11 presentation of Skipper evidence as we've set out.

12 But it's also potentially germane to litigation
13 over the admissibility of the clean team statement, which the
14 government now says -- since 2012 has said they are going to
15 try to do. So all of this has -- it is certainly admissible,
16 and I can go on at length about why it is admissible in
17 terms -- or at least why we need to do the investigation, but
18 perhaps it's -- and if you want me to, you know.

19 At this juncture, you probably have some sense of
20 what you would like to hear next, so ----

21 MJ [COL POHL]: Okay. Well, I understand we have kind
22 of gone through all the categories, and you have kind of
23 incorporated your argument into the categories, and I have the

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1 pleading. So let me do this. Let me hear what the government
2 has got to say, and then if you wish to add any closing things
3 on it -- I think I clearly understand your position.

4 Commander.

5 TC [CDR LOCKHART]: Thank you, Your Honor. I feel
6 compelled to address some of these sweeping statements that
7 the defense has been making. I certainly take exception to a
8 lot of their characterizations about what the government is
9 doing or not doing.

10 We have heard continually the last few days about
11 this game of whack-a-mole, and it's just a bad analogy. The
12 defense talked about the fact that they came back and
13 requested further clarification on something and that that was
14 evidence that it's this game and that there is gamesmanship,
15 and that just isn't present here.

16 There is absolutely no evidence before this
17 commission that the government has done anything but complied
18 with all of its discovery obligations. The government has
19 sent out to many, many organizations very specific requests
20 which we don't need to litigate today because we already
21 litigated and Your Honor already decided. And we've got this
22 information, and we have culled through it, and we have
23 provided to the defense what is appropriate mitigation

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1 discovery.

2 And I want to address something that the defense
3 keeps referring to about what is proper mitigation. There's
4 two things here. The defense is saying that proper mitigation
5 in a federal court has to do with his incarceration and
6 treatment while in custody. If the government provides notice
7 of the aggravating factor of future dangerousness, that does
8 come into play in federal court.

9 But in federal court the standards are very clear
10 and they have been very clear. They go to the character,
11 nature, and background of the accused. They also go into the
12 circumstances of why the crime was committed.

13 The military court-martial system and the military
14 commission broadens that, and as we discussed at one of the
15 previous hearings, that broadened category also allows
16 information to be considered by the members in clemency.

17 And so this notion of this stuff being admissible
18 in federal court, there are certain instances where that
19 occurs and certain instances where it doesn't. It is by no
20 means a free-for-all, and discovery is limited. It is
21 not ----

22 MJ [COL POHL]: It is your -- just so I understand
23 because you just said it, is the rules in federal court may be

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1 more limited than the rules here.

2 TC [CDR LOCKHART]: Correct.

3 MJ [COL POHL]: Just to make sure I understand. We had
4 this discussion before ----

5 TC [CDR LOCKHART]: Correct. Absolutely, sir.

6 MJ [COL POHL]: ---- how the accused has been treated in
7 custody and how he has conducted himself in custody since 2002
8 to the date of trial. If the defense wishes to present
9 evidence in that, are you saying that they -- they consider --
10 let's say they arrive, that they believe that is mitigating
11 evidence. Do you believe that they don't have the right
12 to ----

13 TC [CDR LOCKHART]: That is not what I'm saying at all,
14 sir.

15 MJ [COL POHL]: Okay.

16 TC [CDR LOCKHART]: The government has not said that and
17 is not saying. What we are saying is there are limits. It is
18 not boundless. And I wanted to make sure that we firmly
19 rooted where the authority was for that type of evidence.

20 So, yes, there may be evidence -- and obviously we
21 are not going to have an evidentiary discussion on what is
22 admissible and what's not today. What we are talking about is
23 what discovery is necessary for the defense to be able to

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1 fulfill that portion of it.

2 And the government absolutely takes exception to
3 this notion that potential or actual criminal conduct of third
4 parties is proper mitigation evidence. It is just not,
5 and ----

6 MJ [COL POHL]: Let me make it clear, okay? I'm not
7 agreeing or disagreeing with that statement, okay, okay? But
8 if you are going to deny discovery by saying that disciplinary
9 actions against employees, for example, is not mitigation
10 evidence, put that in writing, okay? Are you with me on this.

11 TC [CDR LOCKHART]: I'm with you, sir. Correct.

12 MJ [COL POHL]: What I'm saying, you are making a
13 decision -- I'm not saying it is a right decision or a wrong
14 decision, but you as the government are making a decision of
15 what you think is appropriate discovery -- or appropriate
16 mitigation evidence in denying a specific discovery request
17 because you say it's not mitigation evidence.

18 TC [CDR LOCKHART]: Okay.

19 MJ [COL POHL]: If that is your position, make sure you
20 articulate it.

21 TC [CDR LOCKHART]: I absolutely will. And if I can
22 finish, I will get to where I'm trying to get to, because that
23 is not what I'm saying.

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1 What I'm saying is the defense continues to stand
2 up and say all of these categories, and we need to do our own
3 investigation because this is proper mitigation evidence. And
4 I have to go back to their actual request, because Mr. Kammen
5 stands up here and says that, well, what we really meant and
6 this and that, and he sort of said he wants the names of all
7 people. But that is not what the request says. And if you
8 look at it, they want absolutely everything, all documents,
9 recording, communication plans, list of personnel, and that's
10 not a proper discovery request.

11 So for Mr. Kammen to stand up here and say that,
12 well, what we really meant, it is not the government's job to
13 determine what it is that the defense really means. Put pen
14 to paper and say I want a list of names of people that
15 interacted with the accused on such and such a dates,
16 whatever. And I'm not saying that we are conceding that is
17 appropriate, but that is a response that the government can
18 actually respond to.

19 And as Your Honor noted, I think it was in (b) or
20 (c), the question was very confusing. There was no
21 understanding of where the bounds were. So I have to go back
22 to the first point of it's very unfair and puts the government
23 at a disadvantage of trying to understand what the defense

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1 wants without some sort of specificity. And it is not a game
2 of whack-a-mole, it is a game of common sense. Ask for what
3 you want and be specific. And that is simply what the
4 government is asking on those broad categories.

5 And for the defense to stand up on every single
6 issue and say, well, it is mitigating and it goes to
7 mitigating, that is not what proper mitigation evidence is.
8 We have all read the cases. We all know what the parameters
9 are. And if Your Honor would like us, in renewing what our
10 updated pile of discovery has been provided, I certainly can
11 say that that's not proper mitigation evidence, I'm happy to
12 put that on there.

13 We have done that in our request. We have said it
14 is not relevant and material to preparation of the defense nor
15 is it proper mitigating, and you will see that in our
16 government response.

17 MJ [COL POHL]: When you respond it is not relevant and
18 material to the preparation of defense, I am to assume that
19 that means you -- when you say that, that you are also saying
20 it is not relevant or material to the preparation of a defense
21 mitigation case, correct?

22 TC [CDR LOCKHART]: No, no, we say it twice. We
23 say ----

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1 MJ [COL POHL]: No, you just said it once.

2 TC [CDR LOCKHART]: No, no, we said it twice. In our
3 response it says not relevant and material to the preparation
4 of defense. That goes to the guilt phase.

5 MJ [COL POHL]: Okay.

6 TC [CDR LOCKHART]: And then we also say, furthermore,
7 it's not mitigating evidence or mitigating discovery.

8 MJ [COL POHL]: Is there anything in the category that
9 is not relevant to material preparation of the defense but is
10 mitigating?

11 TC [CDR LOCKHART]: There could be, sir.

12 MJ [COL POHL]: Okay. I got it.

13 TC [CDR LOCKHART]: I mean, again ----

14 MJ [COL POHL]: That is why I need to see your response.

15 TC [CDR LOCKHART]: And the response is attached to the
16 government's -- or the defense motion.

17 MJ [COL POHL]: And I want -- again, we've talked about
18 what I want. Go ahead.

19 TC [CDR LOCKHART]: We will do an updated one, but we do
20 have a response, and you will see that it specifically lays
21 out what the government ----

22 MJ [COL POHL]: I got you.

23 TC [CDR LOCKHART]: ---- has contentions with.

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1 Just again because I want to cover some broad
2 topics that Mr. Kammen covered, is the defense is requesting
3 the names of any country that Mr. Nashiri may have been held
4 at, and we have submitted and we continue to submit that the
5 name of the country or whatever particular location is not
6 relevant for the purposes of what occurred.

7 What is relevant is what occurred to the accused.
8 It is not relevant what plans happened, what procedures were
9 in place, what somebody's opinion was. At the end of the day
10 when you boil it down, what matters is what happened to the
11 accused.

12 As the defense says -- has always said, it is an
13 individualized sentencing in a death penalty case, and it goes
14 to the individual. And the individual here is Mr. Nashiri,
15 and what matters is what happened to him.

16 And the example I always like to use is this: If
17 there is an SOP out there, standard operating procedure, on
18 how to interview somebody and if the standard operating
19 procedure says, before you interview somebody you must buy
20 them a large cheese pizza and a Diet Coke, and the interviewer
21 goes and doesn't do that, it is not relevant. What matters is
22 during that interview what occurred, what happened to that
23 person. If he ----

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1 MJ [COL POHL]: If the interrogator doesn't follow the
2 directions that he has been given by superiors, and -- you
3 don't think that's relevant as to ----

4 TC [CDR LOCKHART]: It doesn't matter as to what
5 happened. And this is an example of how.

6 MJ [COL POHL]: If the U.S. government has a procedure
7 in place of how to interrogate a detainee, okay, and U.S.
8 government employees violate that by doing more extensive
9 interrogation, more detrimental to the detainee, and therefore
10 wasn't following the guidance, the fact that they weren't
11 following the guidance in your view is irrelevant, it is just
12 what they did.

13 TC [CDR LOCKHART]: By your argument, if they did follow
14 the guidance, then nothing wrong was done.

15 MJ [COL POHL]: I didn't say that.

16 TC [CDR LOCKHART]: No, but I'm saying that's the
17 counterargument. That is why it doesn't matter. What matters
18 is what was done to him.

19 If he was waterboarded, regardless of whether the
20 government said it is right or wrong, is that going to change
21 the nature of the ability to present that to the members? It
22 is not. What matters is what was done to him, regardless if
23 somebody said it was okay or not.

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1 And on top of that, in addition to that we have
2 provided the defense with any unauthorized techniques that
3 have been done. They are declassified. They are in the
4 unclassified OIG report, and they have been provided to the
5 defense.

6 MJ [COL POHL]: On this accused?

7 TC [CDR LOCKHART]: Yes, sir.

8 MJ [COL POHL]: Specifically?

9 TC [CDR LOCKHART]: Yes, sir.

10 MJ [COL POHL]: You say that's all been declassified?

11 TC [CDR LOCKHART]: Correct, sir.

12 MJ [COL POHL]: All the EITs are declassified?

13 TC [CDR LOCKHART]: No, the two that are un -- you were
14 just talking about unauthorized conduct. There were -- there
15 was an instance of unauthorized ----

16 MJ [COL POHL]: I'm with you. Okay.

17 TC [CDR LOCKHART]: ---- conduct with the gun and the
18 drill, and all of that information was -- the fact that that
19 occurred was declassified. It is in the unclassified OIG
20 report. That and additional information on that topic were
21 provided to the defense.

22 MJ [COL POHL]: Okay. Go ahead.

23 TC [CDR LOCKHART]: In essence, one of the things that

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1 the defense is asking the commission to do is to allow the
2 government to double-check the government's work -- I'm sorry,
3 to allow the defense to double-check the government's work.

4 As we've talked in many of these discovery
5 motions, it is the duty of the government, and unless there is
6 some reason to think that something is amiss, if the defense
7 has exculpatory information that they believe the government
8 has not provided, then that duty ends with the government. We
9 have the obligation, and we fulfill that obligation. They
10 don't get a right to double-check, especially if the
11 information is classified.

12 They don't have the right to go do an
13 investigation and to be told classified information in order
14 to do that to ensure that the government has -- has fulfilled
15 its duty. It doesn't work that way. There is an assumption
16 of regularity of report.

17 And if I find it interesting -- and Mr. Kammen
18 stood up here and gave you some information and some facts on
19 a couple different topics that are not before the commission,
20 there is no evidence of them. Mr. Kammen has said that the
21 summaries, and by that he meant the underlying reports, were
22 false. If he has reason to believe that, he certainly can
23 present that information, A, to the government or, B, to the

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1 commission, and we can examine that. Right now there is
2 absolutely no reason to believe that any of the information
3 provided is false.

4 On top of that, if they believe that, and that
5 information is offered, they have the right to rebut that
6 information with the accused, with any information that they
7 believe that it is false. They do not have the right to
8 double-check the government's work, and they certainly don't
9 have the right to do their own independent investigation.
10 They have the right to discovery of evidence that is relevant
11 and material to the preparation of defense, and mitigating.

12 MJ [COL POHL]: They don't have the right to do their
13 own investigation?

14 TC [CDR LOCKHART]: They do, but they don't have the
15 right to access to classified information in order to do that,
16 which the government has deemed that the defense does not have
17 a need to know. For example, a location, they do not have
18 that right.

19 And as was presented in the 505 submissions, the
20 starting point was all of the information which was contained
21 in the underlying cables. The government prepared an adequate
22 substitution which gave the defense an ability to prepare.
23 Those were submitted to Your Honor, and they were approved.

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1 And that -- some of that logistical information was removed.

2 MJ [COL POHL]: Let's say for an example there is a 505
3 summary that excluded a location, okay, okay? And then now I
4 have this discovery request to litigate, and I look at the
5 discovery request and I say, well, you know, maybe they should
6 know that location, okay? I think we discussed this earlier
7 when we were talking about the reconsideration issue.

8 So if I rule on the 505 -- excuse me, on the
9 discover request and say, yeah, Government, tell them that
10 location, that's okay, isn't it?

11 TC [CDR LOCKHART]: You absolutely can. But you
12 haven't. My point is to this ----

13 MJ [COL POHL]: No, I know I haven't. I know I haven't.

14 TC [CDR LOCKHART]: Of course you can, sir.

15 MJ [COL POHL]: I just want to make it clear that when
16 we discuss the reconsideration issue, this exact point came
17 up ----

18 TC [CDR LOCKHART]: Correct. Yes.

19 MJ [COL POHL]: ---- that the rules say you cannot
20 request reconsideration, but the discovery rules basically can
21 end-run around that if the defense so uses it that way or I do
22 it sua sponte. I got you. Go ahead.

23 TC [CDR LOCKHART]: And at the point that the 505

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1 submissions were made, the defense had been given an
2 opportunity to present its view of the case ----

3 MJ [COL POHL]: I got it. I was there. Go ahead.

4 TC [CDR LOCKHART]: I'm glad to hear that, sir.

5 May I have one moment so I can get some water?

6 MJ [COL POHL]: Sure.

7 TC [CDR LOCKHART]: I also want to address Mr. Kammen's
8 assertion that whatever it was that we provided was not
9 complete, and this was specific to [REDACTED]

10 [REDACTED]

11 The government has provided everything that is in
12 its possession, and the government concurs that [REDACTED]

13 [REDACTED] are discoverable. The

14 government is not aware of anything other than what it has
15 provided the defense.

16 And then I would like to address (b). We talked
17 about briefly the names of people who participated in
18 interviews. And, again, Mr. Kammen sat up here and said all
19 that they wanted was the names and explained why they were
20 relevant, and he might have continued on.

21 But it is important to note they didn't just ask
22 for the names. They wanted employment records, which there is
23 just no relevance to that, disciplinary records, records of

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1 complaints made or against these employees, training records
2 of these employees.

3 The government would assert that if the defense
4 believes, based upon one of the summaries provided, that there
5 is further information that is needed from a particular
6 individual, they simply need to request it. But giving a
7 personnel record of a lawyer sitting in Washington, D.C. so
8 the defense can go on a fishing expedition, it is not rooted
9 in the law, it is not rooted in the rules, and it's not
10 reasonable.

11 MJ [COL POHL]: Let me -- let me ask you this. We are
12 not at this point yet, but at some point in time the
13 government is going to offer statements of the accused, true?

14 TC [CDR LOCKHART]: The government has provided notice
15 to the defense that it may ----

16 MJ [COL POHL]: Just answer my question, Commander.

17 TC [CDR LOCKHART]: I don't know if we are going to
18 offer it at trial. I mean, if that is the answer you want, we
19 may, we may not.

20 MJ [COL POHL]: Okay.

21 TC [CDR LOCKHART]: I assume there will be a motion to
22 suppress, yes, sir.

23 MJ [COL POHL]: Okay. Okay. But what I'm saying is,

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1 okay, there are statements of the accused made while in CIA
2 custody.

3 TC [CDR LOCKHART]: Correct.

4 MJ [COL POHL]: There are statements made by the accused
5 subsequent to that, whether it was a clean team statement or
6 whatever.

7 TC [CDR LOCKHART]: And a CSRT, yes sir.

8 MJ [COL POHL]: And there is a CSRT statement, okay,
9 okay.

10 If the government -- well, the defense has to
11 operate on the proposition, since you have given them notice,
12 that the government intends to introduce those latter two
13 categories.

14 TC [CDR LOCKHART]: Correct.

15 MJ [COL POHL]: Okay.

16 TC [CDR LOCKHART]: And they can file a motion to
17 suppress.

18 MJ [COL POHL]: I got it. Okay. But what I'm saying is
19 to file a motion to suppress, a clean team statement would
20 have to relate back to the conditions of ----

21 TC [CDR LOCKHART]: Correct.

22 MJ [COL POHL]: ---- the original statement.

23 TC [CDR LOCKHART]: Yes, sir.

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1 MJ [COL POHL]: Therefore, who conducted the original
2 interrogation obviously could be important.

3 TC [CDR LOCKHART]: It could be. The government is not
4 contesting that.

5 MJ [COL POHL]: Okay. So you don't have any problem
6 giving them that name, but ----

7 TC [CDR LOCKHART]: No, I'm not saying we are going to
8 give them the name. They have the right to interview that
9 person potentially, depending on whether or not there is
10 vagueness in the statement, whether they have follow-on
11 questions. They certainly can make the request.

12 MJ [COL POHL]: Let me make sure I understand your
13 position. Mr. Nashiri is -- is interrogated using an EIT by
14 Agent A.

15 TC [CDR LOCKHART]: Okay.

16 MJ [COL POHL]: Mr. Nashiri is then interrogated by a
17 clean team from the FBI or wherever they came from by Agent B.
18 Okay. Are you saying that when the government -- if defense
19 wants to suppress the statement to Agent B, that they don't
20 have any right to discuss with Agent A how his was -- how his
21 interrogation was ----

22 TC [CDR LOCKHART]: That is not what I said, sir. You
23 asked if they are entitled to his name and I said no, not

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1 necessarily. There are ways -- and we certainly have the
2 right to employ M.C.R.E. 505 that will allow the defense
3 contact with necessary and relevant witnesses without
4 providing a name.

5 MJ [COL POHL]: Okay.

6 TC [CDR LOCKHART]: And what the defense asked for is a
7 list of names of all those individuals and that.

8 MJ [COL POHL]: So your response is -- on that issue,
9 your response back to defense is we will give them contact
10 information with them without supplying PII.

11 TC [CDR LOCKHART]: No, that is not my response, sir.

12 MJ [COL POHL]: What is your response, then?

13 TC [CDR LOCKHART]: My response is if you identify a
14 particular day that you want to discuss with somebody ----

15 MJ [COL POHL]: How do they know? How do they know.

16 TC [CDR LOCKHART]: They tell us the Bates stamp number.
17 On Bates stamp number 556 there was an interview with the
18 accused. We have some follow-up questions for the people who
19 were present. And then ----

20 MJ [COL POHL]: Let me make sure I've got the
21 government's position here, is you are saying that they have
22 in the discovery knowledge of every single interview of the
23 accused?

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1 TC [CDR LOCKHART]: They have knowledge -- and I want to
2 break this into two things so that we are clear. They have
3 every single interview that occurred where EITs were applied,
4 yes.

5 MJ [COL POHL]: What about interviews that were non-EIT.

6 TC [CDR LOCKHART]: After the EIT period, they have
7 every interview where Nashiri discussed anything that was
8 relevant to the charges, co-conspirators, anything pertaining
9 to this case.

10 MJ [COL POHL]: Okay.

11 TC [CDR LOCKHART]: So they can look at all of that and
12 come back to the government and say we need follow-up on this
13 information.

14 MJ [COL POHL]: And if there is any other interviews
15 that are not included in that universe you just described,
16 they obviously would not be able to give you specificity
17 because they don't know the dates of those?

18 TC [CDR LOCKHART]: Correct. But they did not include
19 any mistreatment, and they did not include any discussions
20 with anything relevant to this case.

21 MJ [COL POHL]: Okay. I'm just trying to understand the
22 government's position.

23 TC [CDR LOCKHART]: So, for example, three years after

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1 EITs ended -- and this is just an example -- if Mr. Nashiri
2 was shown a photograph of Bob Smith and he failed to identify
3 who Bob Smith is, Bob Smith has nothing to do with this case,
4 no treatment occurred. That statement was not provided.

5 MJ [COL POHL]: Okay.

6 TC [CDR LOCKHART]: And just to close up on that
7 particular one, which was (b), again, if the defense requests
8 additional information based upon discovery already provided,
9 the government would ask that the defense provide a specific
10 request.

11 This occurred having to do with a psychological
12 interview which the government has not reviewed. The defense
13 said we would like to talk with the psychologist who was
14 present. That's the proper format of doing it. They clearly
15 know how to do it, they did it, and that will be followed up
16 upon.

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23 They have the right to inspect any physical

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1 evidence upon request, and certainly we have mounds of
2 evidence that the defense still has not requested to review.
3 And they can do that. It is unfair to put that back on the
4 government, to affirmatively go to the defense.

5 I think the new categories that I have not
6 addressed start with (d), sir.

7 MJ [COL POHL]: Uh-huh.

8 TC [CDR LOCKHART]: And (d) again has the names, contact
9 information, position, and dates of employment of anyone
10 involved in interrogation, transportation, or detention of the
11 accused.

12 Again, just looking at the plain writing on the
13 defense's request, I'm not sure what the parameters are.
14 Involved in the detention, does that mean a person back in
15 Washington, D.C.? It appears from what Mr. Kammen told you a
16 few minutes ago that it does. That request in itself is just
17 simply not clear.

18 And as we just talked about, if the defense has a
19 specific person that they would like to -- if the defense has
20 a specific person that they would like to talk to, they can
21 make that request. And understand, the government has the
22 right to apply M.C.R.E. 505 in balancing that type of access.
23 We may have agents that are still actively working, and that

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1 is something that needs to be protected.

2 I do think it is important as well to reiterate
3 the fact that the defense has access to the accused. They
4 certainly can get information. They have been provided all
5 the statements of the accused in an unclassified FOUO setting
6 that they can talk to him about, and that is an important
7 area. They can talk to him about potential mitigation.

8 Moving on to (e), to Echo, we have provided, as we
9 just stated, the categories of information, the statements of
10 the accused that are pertinent to this case, whether it be
11 pertinent to the case in chief or pertinent to mitigation.

12 The interrogation plans, interrogation logs, agent
13 notes, frankly are not relevant, for one, and some of them
14 don't exist. And it sounded like Mr. Kammen wanted to rehash
15 the entire 505 process. He again requested access to the
16 underlying cables, which we have already litigated. So that
17 seems as though part of this request has already been
18 litigated.

19 In Foxtrot, the defense asks for, again, all
20 companies and contractors, including but not limited to
21 builders, utility providers, audio and video service
22 providers, maintenance and cleaning service providers, and
23 terms of agreements with third parties and so on. They have

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1 again yet to identify why that is discoverable, other than
2 they want to conduct their own mitigation investigation.

3 And it is interesting because Mr. Kammen said it
4 three or four different times, and he kept saying it's their
5 obligation. There is no case law rooted that when the
6 information is classified that the government has to produce
7 that in order to allow the defense to participate -- or to
8 conduct their own investigation into classified matters.

9 It's honestly up to you, sir. If you want to go
10 through the entire 75-line-item discovery, we can. I will
11 submit this in a totality, that at the time that this was
12 responded to in 2012, everything that was relevant or material
13 to preparation of the defense in the case in chief or
14 mitigating was provided. Some of that was provided through
15 the 505 process.

16 The line items that the government said at the
17 time they would retrieve and then provide to the defense if
18 discoverable have been reviewed and they were not
19 discoverable. One of them was -- just as an example, one of
20 them was a publicly available DoJ report on FBI detainee
21 treatment. It was publicly available. We reviewed the
22 portions that were redacted, and none of them had anything to
23 do with this case or the accused or anything of that such. So

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1 we certainly will provide for Your Honor's direction an
2 updated version of that and certainly articulate what it goes
3 to and what it doesn't.

4 There are two issues that came up that have to do
5 with requests for psychological information, and I do think
6 it's important to discuss briefly. The government, upon
7 receiving those types of requests, asked the defense whether
8 or not it wanted us to review the psychological information
9 that is out there.

10 To date, as we have noted to the commission, this
11 prosecution team has not reviewed any of the psychological
12 records whether it be -- in any time of his custody. We, as
13 Your Honor knows, in 2002 filed a request for a scheduling
14 order so that we could get a firewall attorney. We would
15 assert that those two issues would be better addressed to --
16 since they are discovery issues on a psychological matter,
17 they would be better addressed to a firewall attorney,
18 especially since, and rightfully so, the defense does not want
19 the government to review those records at this time. Does
20 that make sense, sir?

21 MJ [COL POHL]: I understand.

22 TC [CDR LOCKHART]: Okay. Can I have one moment, sir?

23 MJ [COL POHL]: Sure.

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1 TC [CDR LOCKHART]: One of the things that Mr. Kammen
2 requested was the disciplinary records of all of the --
3 everybody who ever came in contact with the accused. [REDACTED]

4 [REDACTED]
5 Again, I want to reiterate that any information
6 that had to do with any unauthorized treatment of the accused
7 was provided in the context of this was what occurred, [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 I want to touch briefly about the discovery that
11 Mr. Kammen brought up about hostilities, simply because I
12 don't want it to go unanswered. The defense requested this
13 information some time ago. The government has been in very
14 regular contact with the defense, updating them as to the
15 status. It is information that was requested by the defense
16 and is being -- was gathered, which took some time, it was
17 reviewed, and it is being processed for clearance. That was
18 at the request of the defense. And so the government has been
19 working on that and has been updating the defense regularly
20 with the status of that.

21 And lastly, you know, the fact that the defense
22 has access to Mr. Nashiri, the person that was present during
23 all of this treatment, he absolutely has and -- has the right

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1 to and actually has talked to the defense team about his
2 treatment. And the defense absolutely can file a request
3 based upon any information that he provides for follow-up with
4 the government.

5 The government reviews all of the records in its
6 possession and has turned over everything that is relevant and
7 material to the preparation of the defense. If the defense
8 believes, and this is what the case law says, that there is
9 additional information that is not contained in those reports,
10 they can obtain this information from their client and they
11 certainly can request to the government for follow-up on that.
12 To date, the defense has not.

13 I want to touch back on the foreign government
14 information. First of all, I disagree with Mr. Kammen's
15 assertion about what is mitigating and what is not. We
16 litigated this issue about foreign government information.
17 It's been well settled. If we don't have compulsory process
18 over it, we can't get it. The obligations go to what is in
19 the possession and control or custody of the government.

20 MJ [COL POHL]: Can you ask?

21 TC [CDR LOCKHART]: I'm sorry, sir?

22 MJ [COL POHL]: Can you ask?

23 TC [CDR LOCKHART]: If it were something that were to be

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1 deemed as relevant and material to the preparation of the
2 defense or mitigating, [REDACTED]

3 [REDACTED]

4 But for information that is not relevant or
5 material to the preparation of the defense or mitigating,
6 there's -- there's -- the government would assert that that is
7 not an appropriate route to take.

8 This whole category -- and this is what I will end
9 on, that the defense has requested, and this is briefed in the
10 government's response, that goes to logistical and
11 administrative matters, historically when you read all the
12 case law, when you look at the rules, that type of information
13 is not discoverable.

14 What is, again, discoverable is what occurred to
15 the accused, what treatment, what statements he made to the
16 accused. This logistical matter of, okay, so one individual
17 had a 4.0 on his evaluation, it is not relevant. The flight
18 manifest, it is not relevant.

19 The routine ways of setting things up -- I think
20 they wanted contracts and agreements. Those are logistical
21 matters that don't go to what is actually mitigating, and they
22 certainly would not be proper to be presented to a members
23 panel.

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1 And in making a determination on what is actually
2 discoverable, we hope that Your Honor will focus in on that.
3 It is individualized to the accused. And the government
4 absolutely asserts that to date they have -- the government,
5 we, have provided everything that relates to this category,
6 and we have reviewed the information that has been provided.

7 May I have one second, Your Honor?

8 MJ [COL POHL]: Sure.

9 TC [CDR LOCKHART]: Thank you, sir.

10 MJ [COL POHL]: Thank you. Mr. Kammen, I will give you
11 the last word.

12 LDC [MR. KAMMEN]: Thank you. In the prosecution's
13 response, we heard about five conflicting positions, and
14 that's been the problem since the beginning, and that's why I
15 refer to this, as you know, whack-a-mole, which I agree it is
16 one thing -- that is probably not the best analogy.

17 Perhaps we can call it the Texas prosecution
18 compliance with discovery. You recall the prosecutor in Texas
19 who went to prison, because after framing and -- after not
20 giving discovery about a guy's innocence, he got him a death
21 sentence -- he got him sent to prison for life. Turned out
22 they had been withholding discovery. And that prosecutor
23 ultimately pled guilty to obstruction of justice because he

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1 had violated an order of the court. So maybe we will just
2 continue to refer to this as the Texas method of discovery
3 compliance.

4 We have to start from the proposition, Your Honor,
5 that at the heart of this, assuming for the sake of the
6 discussion, the best possible set of circumstances, that the
7 prosecution only gets the material that they are provided by
8 other agencies and that they then try to do this, we have to
9 start from the proposition that the -- at least one of these
10 other agencies has acknowledged lying to three federal courts,
11 the 9/11 Commission, and now the United States Congress. So
12 you think for a second that agency is going to worry about
13 lying to these guys? That's the problem here.

14 They say, well, trust us. But, you know, the
15 starting point, of course, is even if they were behaving in
16 good faith, we don't have any reason to trust the people that
17 they say they're trusting. So they are right, we want to
18 double-check, absolutely. That is our obligation.

19 Now, they say -- prosecutor says, you don't have a
20 right to double-check when it is classified. Well, the
21 government made a decision, and they can end this in a second.
22 They made the decision they want to kill Mr. Nashiri. And
23 because they want to kill Nashiri, that gives us certain

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1 rights. And one of the rights is to do this kind of
2 investigation. They don't want us to do the investigation?
3 Fine. Withdraw the death request.

4 But you can't have it both ways. You can't say we
5 have got all this classified stuff, we acknowledge it is
6 potentially mitigating, we are not going to give it to you
7 because it is classified, and too bad, but, oh, we still want
8 to go kill him. It doesn't work that way in any other place
9 in America.

10 Now, one of the documents we noticed -- and this
11 just demonstrates kind of the Texas prosecutor aspect of all
12 of this. The government says just tell us -- refer to a
13 document and tell us what it is you want. Well, I'm referring

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

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4 Now, you know, that's why we asked for all of it.
5 That is why we asked for everything. I don't know how much
6 more -- how difficult this can be to understand. That's why
7 we wanted it all, and we continue to want it all.

8 Now, the fundamental disagreement -- well, one of
9 the fundamental disagreements seems to be that their view of
10 all of this is they get to decide -- I mean, you know, look,
11 they get to decide what witnesses, what resources we have
12 access to, they get to decide what witnesses we get to have,
13 and now they get to decide what mitigation case we get to put
14 on. You know, in their view, it is really their determination
15 as to what we get to present. If we think it is relevant to
16 your mitigation case, we will give it to you. If we don't
17 think it is relevant to your mitigation case, we won't, too
18 bad. Sorry, Mr. Nashiri, you gotta die.

19 You know, and really the more intellectually
20 honest thing would be for the commission to simply dismiss
21 everyone on the defense side, appoint two or three
22 prosecutors, move them over there, let them put on the show
23 General Martins wants, because really they want to control the

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1 defense presentation as well.

2 Because on the one hand, she says, yeah, the
3 military version of this is broader than federal court, and,
4 of course, what we are referring to is not federal court, but
5 what the Constitution requires. She says the military version
6 of this is broader than federal court. True. Military
7 members have the right to exercise clemency. Absolutely true.
8 They too have the right to exercise -- but any jury has the
9 right to exercise clemency because, as a matter of grace, they
10 choose not to sentence to death.

11 But, of course, their attitude is, well, yeah, the
12 military jury has the right, but that's not material if we
13 don't say it is material, and, you know, we don't say that --
14 we don't think this is material. If he was tortured, that's
15 maybe not material. They are back and forth on all of this.

16 The starting point, Your Honor -- and let's be
17 honest about -- because, you know, we filed this request in
18 December -- or in September of 2012. It is not like they came
19 back and say, look, we will give you the names of people. If
20 you have a specific reason to want their personnel records, we
21 will discuss it. That -- you know, that's not what happened.
22 What happened was, no, not going to happen, not giving it to
23 you, you are not entitled to it.

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1 Now, when they get in front of you and they say,
2 well, maybe, you know, if they ask and they do it this way and
3 we jump through the hoops -- but I'm going to tell you what is
4 going to happen, we are going to be back here in six months
5 having basically the same discussion.

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10 You hit on it. One of the reasons we need the
11 plans, operations, and procedures, the planning, is to see if
12 it was followed. If there is an SOP as to how you are going
13 to do a torture and it wasn't followed, that would be really
14 important to know.

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[REDACTED]

Now, that's what we know about. That's what we know about. The government is very clear that what's been publicly released, and there is no question about it, is not even the tip of the iceberg of the torture to which Mr. Nashiri was subjected.

[REDACTED]

But, again, their response is not going to happen, we are not giving you anything. We are going to use the Texas method.

[REDACTED]

And, again, if we weren't playing using Texas rules, what would have happened is, oh, and by the way, here's the information, all the information we have pertaining

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1 to [REDACTED]

2 I mean, it shouldn't be difficult to understand
3 that we would want that. And it shouldn't be difficult for a
4 prosecutor who is really attempting to use their procedures
5 and comply with their obligation to know that that's something
6 that needs to be produced.

7 But instead they say, we'll wait until you ask the
8 right question, and then they give us [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] But I'm not clear.

12 Of course, the problem is we can't show -- and
13 this is something we will address in something else. We can't
14 show [REDACTED] to our client, so how do we ask him [REDACTED]

15 [REDACTED] So, I mean, again the
16 whole, you know, problem, I mean, it exists at every level.

17 You know, if it is the position of this commission
18 that the government is -- controls everything, the government,
19 the prosecution controls everything, controls our ability to
20 prepare a defense, controls our ability to prepare a
21 mitigation case, you know, say so. If it's the position that
22 we don't have the right to do any kind of independent
23 investigation and, you know, that the government can deprive

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1 us that right, say so.

2 But otherwise, enter an order directing them to
3 produce information. Enter an order. Be a judge and enter an
4 order saying, Government, give them these things if you have
5 them. And be specific. And if they give it to us, fine.
6 Then they have complied with the order. And if they say we
7 can't, that's fine, and we have a record. And then when it
8 turns out they could have, at least we know what happened.
9 And if they couldn't have, they couldn't have.

10 But the starting point for this is an order, a
11 direction to the prosecution, like every other court in
12 America when there is a discovery. You will produce this
13 information or you won't. And if the decision is you won't,
14 that's fine, and, you know, then we will know where we are at
15 and we can proceed accordingly.

16 But this is information we need. It is
17 information we need in order to prepare a defense. It is
18 information we need in order to comply with our ethical and
19 constitutional obligations. It is information that
20 ultimately, in anything that approaches a fair death penalty
21 trial, the members are going to need. Are they going to need
22 all of it? No. But are they going to need some of it? Yes.
23 And can we begin to make a principled distinction when the

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1 opposition is in control? No.

2 You know, if we were to say, for example -- and I
3 will close on this. If we were to -- you know, let's say you
4 give us the flight manifest, and then we come to trial and we
5 say we want to put the flight manifest into evidence. The
6 government might probably say, what's the relevance of that?
7 How does that advance the case? You may well conclude they
8 are right, doesn't advance the case.

9 So not everything we get will necessarily be
10 produceable or, you know, would be evidence; but everything we
11 get gives us the universe to make -- to do what lawyers do,
12 and that's make the kind of judgments that lawyers make as to
13 how best to present the case. And that's all we want in this
14 case. Excuse me.

15 Thank you, Your Honor. I don't have anything
16 else.

17 MJ [COL POHL]: Thank you, Mr. Kammen. I said I would
18 give Mr. Kammen the last word, but I will -- do you have
19 anything you wish to add that you have not already said?

20 TC [CDR LOCKHART]: I don't, sir.

21 MJ [COL POHL]: Thank you. Okay. Then we will recess.
22 The commission is in recess.

23 [The Military Commission recessed at 1105, 22 February 2014.]

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