The Military Commission was called to order at 1643, 13 June 2013.

MJ [COL POHL]: Please be seated. Commission is called to order. All parties are again present that were present when commission recessed.

Mr. Kammen, do you wish to be heard further on the monitoring issue?

LDC [MR. KAMMEN]: Very briefly.

MJ [COL POHL]: Okay.

LDC [MR. KAMMEN]: And I don't want to belabor the point. Clearly, the government will disagree, but what I think we've seen here is the perfect example of plausible deniability. This is the magic monitoring machine that nobody knows anything about. Somehow it gets fixed somehow, but nobody ever tells anybody, and certainly, nobody ever tells the people in charge. The guys who aren't here forget to tell Welsh, forgets to tell Tibor, forgets to tell -- everyone forgets to tell, but let's put that to the side.

You know, there's been a lot of talk about lack of trust, and clearly, maybe that goes both ways. Here's what we want that, at least for our purposes, ends this.

We'd like a specific order from the commission to the relevant officials that they are not to monitor
attorney-client meetings. Now, there should be no controversy to that, because they say they don't. So if they're really not doing it, why would they care?

MJ [COL POHL]: Okay.

LDC [MR. KAMMEN]: The other relief we want ----

MJ [COL POHL]: When you say monitor, you're referring to audio monitoring?

LDC [MR. KAMMEN]: Audio monitor or record, or audio record.

MJ [COL POHL]: But we're talking about audio, you understand.

LDC [MR. KAMMEN]: They want to look in and not listen ----

MJ [COL POHL]: Okay. Okay.

LDC [MR. KAMMEN]: That comes to our other issue, but we'll ----

MJ [COL POHL]: Yeah, that's in a minute. Don't get ahead of yourself.

LDC [MR. KAMMEN]: Another time.

MJ [COL POHL]: Okay. Your second request for relief?

LDC [MR. KAMMEN]: The second piece of the relief we want is anytime we are there for an attorney-client meeting, we can, upon request, inspect the premises. He said it would
be all right. So we go there, if we have the slightest bit of question, there's only one place we need to really look. There's a hatch where you can look up, and you can see; there's nothing there, fine. But we'd like to be able to do it. You know, we don't need to make an appointment, if we're there.

MJ [COL POHL]: But this is in the course of another ----

LDC [MR. KAMMEN]: Yeah, if we're there meeting with Mr. Nashiri, and we -- let us look. All they need to do is bring in a stool. It's not even a ladder. They want to put him ----

MJ [COL POHL]: The only thing that causes me pause there is -- I mean, Colonel Bogdan said he doesn't have problem with inspections. It's when you used the term periodic, and then he went back and forth a little bit.

LDC [MR. KAMMEN]: Well, when we pinned him down to the extent we could, he was okay so long as it was happening in conjunction.

MJ [COL POHL]: When you would show up and have a visit and then you would request to inspect, and then -- but there's still got to be a decision point here. What I'm saying is I can't envision every possibility down there.
LDC [MR. KAMMEN]: Well, the decision point would be, it's -- let's say at noon.

MJ [COL POHL]: No, I'm saying is you go for a visit and you want a permission to inspect in the course of a visit ----

LDC [MR. KAMMEN]: Mm-hmm.

MJ [COL POHL]: --- of the ----

LDC [MR. KAMMEN]: ---- of the room we're in.

MJ [COL POHL]: Of the room you're in. Okay. I think I can -- just seems to me is it's -- as I say this, and you're probably going to hear this again in a minute, is I don't run confinement facilities, and it seems to me there's got to be some discretion on that issue that I've got to rely on them. But what I'm saying is if an inspection is requested, if denied, denial be provided in writing with a reason why. Just because they could have logistic issues. I'm not saying that I'm going to do this, but I'm saying if I grant you that relief, they still need to have some -- they may have a reason why that particular time it's not -- and I know what you are thinking to yourself; it's because they have reinstalled it and don't want you to know about it.

LDC [MR. KAMMEN]: Well, that was one of the things that was coming through my mind.

MJ [COL POHL]: I understand.
LDC [MR. KAMMEN]: There were several others, but ----
MJ [COL POHL]: Okay. So that's the two reliefs that you want on this issue.
LDC [MR. KAMMEN]: Yes, because we can spend a lot of time going back.
MJ [COL POHL]: Okay.
LDC [MR. KAMMEN]: Like I say, I think we have seen plausible deniability, but we just want to go forward, and we want to go forward with some certainty.
MJ [COL POHL]: Okay.
LDC [MR. KAMMEN]: And this is what he said he was willing to do.
MJ [COL POHL]: Okay. Commander Lockhart.
TC [CDR LOCKHART]: Yes, sir, thank you.
MJ [COL POHL]: Mr. Kammen has given you an olive branch.
TC [CDR LOCKHART]: Well, partially.
MJ [COL POHL]: Okay. Let me ask you this: Do you object to the order of no audio monitoring of privileged attorney-client communications?
TC [CDR LOCKHART]: I do object to the fact that an order needs to be given. It is something that is not done and are we going to start ordering every legal premise, don't do
this, don't do that? There's no monitoring that's being done.

And what I want to start with -- if you may indulge me for a second, and I promise I will be brief.

The defense's motion was it a motion to abate. They wanted an evidentiary hearing, which they got, and what it establishes is this: I think all parties agree, absolutely, there is no evidence that monitoring of attorney-client meetings happened.

LDC [MR. KAMMEN]: I don't agree, but I agree that's the evidence. I just don't necessarily believe ----

MJ [COL POHL]: I got it.

LDC [MR. KAMMEN]: ---- that it's accurate.

MJ [COL POHL]: I got it.

TC [CDR LOCKHART]: What was shown in the courtroom today with both witnesses and everything that has been presented, is that no monitoring of attorney-client meetings occur. And there's certainly no evidence of anything specific to this case; therefore, an order is unnecessary.

The government would just say that it's not good policy to make orders on things where orders are not needed. Certainly, monitoring does not occur, has not occurred, and will not occur.

MJ [COL POHL]: But Commander Lockhart, the evidence
before me is there's monitoring capability ----

TC [CDR LOCKHART]: Was.

MJ [COL POHL]: Can I finish?

TC [CDR LOCKHART]: Yes, sir.

MJ [COL POHL]: There was. There's some matters before me that there was audio-monitoring capability. There's no evidence before me that that capability was ever used for attorney-client meetings, but there was evidence before me that it was used in some other meeting.

TC [CDR LOCKHART]: And in a consensual format, correct.

MJ [COL POHL]: I understand. I got it.

TC [CDR LOCKHART]: Two different things, sir.

MJ [COL POHL]: I got it. I got it. So it's different than the absence of. There's some evidence of the capability, and no evidence that it was ever used.

TC [CDR LOCKHART]: And on top of that, sir, it no longer exists.

MJ [COL POHL]: But, of course, things at the camp stay the same over time, don't they?

TC [CDR LOCKHART]: Correct, but this has never been an issue.

MJ [COL POHL]: Rules change.

TC [CDR LOCKHART]: But this has never been an issue.

TC [CDR LOCKHART]: So that's the first thing. The second thing is, again, the defense made a motion to abate. There's clearly nothing before this court that would warrant that. The government would obviously urge that that motion be denied.

The second thing -- and I want to make sure that we're clear about this. My understanding of Colonel Bogdan's testimony was that he didn't have any objection to, when defense counsel was there, for them to physically inspect the inside of the actual meeting room.

He had pause when they initially said they wanted to be able to inspect the facility anytime they were there. When Mr. Kammen limited his question to the room that they were already in, if they could look up in the ceiling, that's where he didn't have any problems.

I can imagine it would -- might be very disruptive, especially if other meetings are going around, with other detainees, and that would put a burden on JTF, which the government would not want Your Honor to order.

MJ [COL POHL]: Okay.

TC [CDR LOCKHART]: And the government would suggest this: If the defense wants to inspect that going forward,
that request will be made to JTF. If the defense has any
problems about that -- again, to what Colonel Bogdan agreed --
I am absolutely confident they will bring it to your
attention, and it can be corrected. But let's allow JTF to
run the detention facility, allow them to be able to make good
on the discussions that they had on the stand, very on the
spot with the defense, and let's move on from there, sir.

MJ [COL POHL]: Okay.

TC [CDR LOCKHART]: Thank you, sir.

MJ [COL POHL]: Thank you.

LDC [MR. KAMMEN]: Court please.

MJ [COL POHL]: Okay. Mr. Kamen.

BY LDC [MR. KAMMEN]: In the absence of a court order,
it won't happen. Absent ----

MJ [COL POHL]: Which one are we talking about?

LDC [MR. KAMMEN]: The second.

MJ [COL POHL]: Okay.

LDC [MR. KAMMEN]: And all we'd like is an order.

MJ [COL POHL]: I gotcha.

LDC [MR. KAMMEN]: And to be clear, all we want is to
inspect the room we're in.

MJ [COL POHL]: Okay. And that's -- okay. You have
drifted a little bit away from your motion, but that's as
things have developed, that's what you want to do moving forward. Okay.

Let's move to the spiral notebook. Do you have anything to add? I think we have almost -- I think I understand your position from before.

LDC [MR. KAMMEN]: Well, sure.

MJ [COL POHL]: I'll always give you an opportunity.

LDC [MR. KAMMEN]: I mean, clearly what troubled -- what seems to trouble you is that you feel some obligation to defer.

MJ [COL POHL]: Isn't that the law?

LDC [MR. KAMMEN]: Not completely. You don't ----

MJ [COL POHL]: And I agree it's not completely, but I'm saying -- I believe what I said ----

LDC [MR. KAMMEN]: There may be a presumption of deferral ----

MJ [COL POHL]: Right.

LDC [MR. KAMMEN]: ---- but the presumption of deferral under the law is trumped -- dissipates when what is being enforced is really not rationally related to the goals. And what we know ----

MJ [COL POHL]: Okay. So standing alone, standing alone, without showing -- and you've discussed your prejudice.
I got it. Let me move that.

LDC [MR. KAMMEN]: Sure.

MJ [COL POHL]: So you think standing alone, an Article I judge has the authority to second-guess the opinions of the confinement facility manager -- confinement facility commander under some -- I guess an arbitrary and capricious standard, and if I find it's arbitrary and capricious, even if it has no impact on the trial before me, I have the authority to say, stop doing that.

LDC [MR. KAMMEN]: Well, when it's imposed upon the litigants who appear in the trial before you, it does have an impact, and that's point. That's what gives you -- that's the nexus. This is not random people who are going in. It's the people who are going there to do work in the trial before you.

MJ [COL POHL]: Okay.

LDC [MR. KAMMEN]: And that's the problem. The problem here, Your Honor, is -- you know, is we see it all the time. He's gone, then we have the next guy, and then we have the next guy, and we have all sorts of rules. You've issued orders in two cases. He's -- Woods or whoever the 2011 order was issued. Those are -- you know, we can read those. We can figure out what our obligations are. And everybody else, until him, has figured out what his -- what our obligations
are. He comes in -- and I won't get into all of the other
issues, but he comes in and he sees the world through a very
strange prism, a prism of distrust.

Now, you know, there's -- there's a certain amount
of being offended on the defense side when he says -- the
defense lawyers, two military officers at least, and somebody
who I think has earned maybe a little bit of respect here and
other places, would ever contemplate doing what he suggests.
If he had had any suggestion -- if over the years somebody had
said, you know, that Nashiri team, they're pretty borderline,
or we caught them doing this, we caught them doing that,
that's a different issue. Never been such a suggestion.

So the notion that if somebody's going to, say,
disassemble something and slip it, that these people would
remain secret, silent -- silent? Putting aside the
monitoring, putting aside everything else, I mean, that's part
of the offensive part of this. The other part is, again, we
need some predictability. These rules -- you know, the high
point came, would you permit a binder? Well, I'd have to see
it. Well, you know ----

MJ [COL POHL]: You think that was unreasonable of him?

LDC [MR. KAMMEN]: I'm sorry?

MJ [COL POHL]: Do you think that was unreasonable and
irrational of him to say, I've got to see what you want to
bring in before I know whether you can bring it in?

LDC [MR. KAMMEN]: I think at some point, yes. But
quite candidly, Your Honor, it becomes a moving target. You
go to show up to visit a client and he decides I don't like
that binder. Well, what binder do you like? Well, I'll have
to see it. You're chasing phantoms.

We need to do our work. You've issued the rules.
Commander Woods issued the rules, and now in response to some
unknown, unpublished rule that exists only in Colonel Bogdan's
mind, everyone's disrupted.

MJ [COL POHL]: Okay.

LDC [MR. KAMMEN]: We -- I mean, to cut to the chase,
you have the authority to do this.

MJ [COL POHL]: Okay. Now ----

LDC [MR. KAMMEN]: And we'd ask you to do this.

MJ [COL POHL]: Thank you. Trial Counsel, anything
further, Butch?

ATC [MAJ RUGE]: Yes, sir. As the commission's already
recognized, there is some ample case law on this, and we just
need to recognize that on this subject, the law is what the
law is. It's not what lawyers in this room might deem
reasonable, but the analysis is, it involves deference.
Now, the case law that Mr. Kammen references is all -- if there is an abridgement of any right of a detainee, then the analysis is, is the policy reasonably related to a legitimate security interest. And that's what all of the evidence that was presented by the defense's witness led to. The commander came in and explained exactly why his -- why his policy was related to that interest.

I think really, the issue comes down to -- well, first, starting with the fact that as the commission has recognized, you don't get to that analysis because there's no cognizable prejudice based only on the preference of the defense counsel.

And the last thing I want to say on this is the offensiveness argument I think kind of goes both ways. But what the government finds offensive is the notion that this is all about the defense counsel, and that there is no security interest in the safety of the soldiers who are working inside of that facility, and the detainees whose responsibility -- who the commander has responsibility to make safe inside that facility. And from that -- that is his responsibility, and because that's his responsibility, he needs to maintain that authority as the law describes, and all of the case law we cite in our pleadings.
Anything further?

MJ [COL POHL]: Thank you, sir.

ATC [MAJ RUGE]: Thank you, sir.

MJ [COL POHL]: Last word, Mr. Kammen.

LDC [MR. KAMMEN]: I just want to make it clear. I don't think there's been any suggestion that we would not comply with any -- first, we will comply with anything he orders. But secondly, we have absolutely no desire to do anything that would in any way impact on the safety of anyone. They say take out staples; that's rational, happy to do it. No paper clips; that's rational, happy to do it. So any reasonable request, happy to comply with.

When the request is unreasonable or -- then it becomes a different issue; or arbitrary, capricious, simply whimsical, that's the issue here.

MJ [COL POHL]: Okay. Thank you. One moment.

The next thing I want to address is AE 45, but actually, before we can get to 45, I think we've got to address 153, which is a -- when -- just as a factual predicate so people know where we're at, when the April hearing was postponed, I sent a docketing order for sessions in August, September and October. This is different than the scheduling order, I understand that, but this is obviously a scheduling
issue. And Mr. Kammen filed a response basically asking for all three weeks of hearings to be postponed because of a conflict with another case, correct?

LDC [MR. KAMMEN]: Yes. And for anybody who may be -- this was first -- this conflict was first disclosed to the commission last October in an 802. And I sort of read your order as to ask is that conflict still a conflict, and we provided the evidence that it was. I certainly will keep the commission advised.

MJ [COL POHL]: Now, is -- now, just so it's clear, that you have a case in Indiana ----

LDC [MR. KAMMEN]: Yes.

MJ [COL POHL]: ---- a death penalty case due to start ----

LDC [MR. KAMMEN]: It's not a death penalty case. It is a homicide case.

MJ [COL POHL]: Homicide case, due to start the first week of August.

LDC [MR. KAMMEN]: August 5th.

MJ [COL POHL]: Anticipated to last?

LDC [MR. KAMMEN]: I wasn't the lawyer in the two prior trials.

MJ [COL POHL]: Yeah.
LDC [MR. KAMMEN]: Both of the two prior trials have lasted approximately 90 days.

MJ [COL POHL]: Okay. This is going to be the third time this individual has been tried, so ----

LDC [MR. KAMMEN]: Yeah.

MJ [COL POHL]: You theoretically would think it would take about 90 days again?

LDC [MR. KAMMEN]: Yes, at least, yes.

MJ [COL POHL]: So you want to ----

LDC [MR. KAMMEN]: What I'd like to do in sort of a perfect world would be to set the next court session in early November. Rather, I've had discussions with the government, with the prosecution. If we're going to keep an October date, I'd like to either move it up a week or back a week. Long before this, I made another commitment I'd like to keep, but I understand I can't be greedy, but -- so I'm happy to move it up a week.

MJ [COL POHL]: Okay.

LDC [MR. KAMMEN]: And if that trial is done, certainly, we can keep the October date.

MJ [COL POHL]: Okay.

LDC [MR. KAMMEN]: I'm also happy to keep the September date, and if something happens, we'll notify the commission.
MJ [COL POHL]: When do you -- there are certain notifications -- okay. That's your position. Let me hear what the government has to say and we'll work this out.

Commander?

TC [CDR LOCKHART]: Thank you, sir. It is the government's position that this case and Mr. Kammen's detailing to this case and involvement in this case preceded the Camm trial. I understand that he is scheduled to be in Indiana on 5 August -- Indiana on 5 August. I just do have one point of contention. We did also speak with the prosecutors on that case. The first trial I was told lasted six weeks and the second one three months. It is unknown as to how long it might last.

MJ [COL POHL]: As all trials are.

TC [CDR LOCKHART]: Absolutely, and that goes into part of the government's position. The government's initial position ----

MJ [COL POHL]: Go ahead.

TC [CDR LOCKHART]: Yes, sir. The government's position is that the hearing dates should be kept as they were scheduled, understanding that that presents an issue for Mr. Kammen, but it's one that he took on after his representation here.
MJ [COL POHL]: So let me see if I have got this straight, is Mr. Kammen starts -- your view is he starts this trial in Indiana on the 5th of August, comes down here for hearings, picks the trial back up, comes back and forth, is that ----

TC [CDR LOCKHART]: Well, the government recognizes that the ----

MJ [COL POHL]: Or do I just say this trumps the other one?

TC [CDR LOCKHART]: Our initial position would be, yes, but understanding that, who decides which trial has precedence? We have scheduled hearings. They have a scheduled trial. This is a death penalty case, as the defense has said over and over again, that makes it somehow more important; that that is not a death penalty case, and we have ----

MJ [COL POHL]: But that means is that Mr. Kammen is free to -- to withdraw from that case at this point in time?

TC [CDR LOCKHART]: He certainly could. The government's not going to tell him what he needs to do.

MJ [COL POHL]: No, but I mean, realistically -- okay.

TC [CDR LOCKHART]: He could ask for a continuance in that case, sir, and he has not.
MJ [COL POHL]: And then if he does and the trial is now scheduled for January, and I don't think we're going to be done in January, just -- that's just kind of my instinct, and then he asks for another three months hiatus then and then he asks for another continuance until this is done?

TC [CDR LOCKHART]: That is the government's first position, absolutely.

MJ [COL POHL]: Okay. What is the government's second position?

TC [CDR LOCKHART]: Okay. And one last thing on the first position, if you don't mind, sir.

MJ [COL POHL]: Yes.

TC [CDR LOCKHART]: When he did take the obligations of representing Mr. Nashiri in this case, there were certain rights and acknowledgements that he had to agree to, and one of those specifically said that he would not take any other obligations that would prohibit the forward movement of this case. And what I am seeing is a representation that the Camm case will -- if their trial continues on 5 August, will hinder the forward progress of this case. That is an issue for the government.

If Your Honor is willing to entertain ----

MJ [COL POHL]: Go ahead. I'm listening.
TC [CDR LOCKHART]: Okay.

---- willing to entertain a continuance of some sort, the government would ask that it be narrowly tailored, and the government would ask that only the August hearing be postponed, and that the September and October hearing would still be adhered to. We would also ask that a November hearing would be scheduled now, so everybody has it on the table, and then one of two things could happen.

MJ [COL POHL]: Hold that thought for a second.

Go ahead.

TC [CDR LOCKHART]: Yes, sir. One of two things could happen. The Camm trial starts on 5 August, and as you said earlier, litigation, you never know what happens with schedules. And it may not start on 5 August. It may plead. It may have a continuance. It may get dismissed by the government. There are many things that could happen that are outside of our control. So why cancel the hearings now, not knowing that? That would -- that is the first thing that's important. Keep the hearings intact.

If a need comes later, as we get closer -- I think we're in June right now, still two months away. If we get closer, and it looks as though the Camm trial is going to occur on 5 August, then cancel only the 5 August week, okay?
So then, we sort of see how that trial goes, and maybe for whatever reason this is a speedy trial and it goes quickly and it's over with. And then there's no issues. We can have the September hearing as scheduled.

In addition to that, as what happens with many cases that are lengthy, there could be a request in the Camm case for a week off. And we could come down to GTMO and do important work here, and continue on.

Same thing with October. October, again, government's understanding is one of the iterations of the Camm trial took six weeks, could be over by then. Keep that hearing intact. And then, again, add a November hearing.

If Your Honor is considering allowing delay until the completion of the Camm trial, this is incredibly important to the forward progress of the trial, this trial. Set some deadlines. Have some deadlines during that time period. All law motions must be filed by X date. And we provided in 153 in our response an attachment that would provide -- propose deadlines. All evidentiary motions must be done by this date. All discovery motions must be done by this date.

And understand that Mr. Kammen will be working on the Camm trial, but we have all worked on multiple cases at the same time and, in fact, it's a rarity to only work on one.
In addition to that, defense has two very experienced Air Force defense counsel, and my understanding is two other counsel who assist. I believe one of them was in the courtroom yesterday.

So if Your Honor is willing to entertain not having any hearings during however long the Camm trial goes, we would absolutely urge that deadlines be imposed during that time period. The worst outcome would be to just put this case on hold while there's another case going on, so we're just going to stop all work, and pick it up when it ends.

Then what the government would ask is with those deadlines, let's schedule three weeks in November, come down here and let's hear all of those motions and let's get it done. Because if we don't, that is going to continue to delay this important trial. As I know you're well aware, the government has been asking for a trial schedule for well over a year.

MJ [COL POHL]: And to be fair -- and what's my response usually been?

TC [CDR LOCKHART]: Discovery wasn't done. Absolutely. To be fair. But it is now.

MJ [COL POHL]: It's all done?

TC [CDR LOCKHART]: Yes, sir. We sent a supplement to
our motion, with the caveat that we continue to discover new
discovery, as I ----

MJ [COL POHL]: But not ----

TC [CDR LOCKHART]: ---- I guarantee you we will until
the day of trial.

MJ [COL POHL]: But you're saying that 99% of your
discovery is done.

TC [CDR LOCKHART]: No, it's done.

MJ [COL POHL]: It's 100 percent done?

TC [CDR LOCKHART]: There's newly discovered stuff that
will always be in the pipeline.

MJ [COL POHL]: There's nothing waiting for me in
Washington to do a 505 review on?

TC [CDR LOCKHART]: There is and that's newly discovered
material that made its way through. But that's never going to
end. We will always have cats and dogs because we continue
with our duty to seek for things. We also continue to get
discovery requests from the defense which we respond to.

MJ [COL POHL]: Great.

TC [CDR LOCKHART]: Understand. So what we're at now is
discovery is done. The government is asking for a trial
schedule, and to postpone all forward progress of this very
important case from the time period of now, tomorrow, whenever
we leave here until November is not realistic, and it doesn't help this case move forward.

So on our far end of what we would dislike, meaning no hearings until November, at least set deadlines and let's get motions filed, and schedule three weeks to come down in November. And I will -- I would ask, though, that regardless, none of the hearing dates be cancelled. We all know with all of the people here, if we cancel anything, people's schedules will fill up.

I've got to slow down. I apologize. People's schedules will fill up, and it will be hard to reschedule it.

MJ [COL POHL]: Okay.

TC [CDR LOCKHART]: Thank you, sir.

MJ [COL POHL]: Mr. Kammen. There's a couple things. First of all, is this the only case that you have out there that could cause a similar problem in this case?

LDC [MR. KAMMEN]: Yes. Yes.

MJ [COL POHL]: Yes.

LDC [MR. KAMMEN]: And I want to be forthright, because the undertaking they talk about was executed in 2008, and after that was executed, General Martins, as part of the Obama task force discontinued things for two years. So you can't
ask a private lawyer to sit and say maybe someday they will file this case and I can go back to work. You have to take cases.


LDC [MR. KAMMEN]: So I'm a little offended by the approach of the prosecution, when the reason we're in this position is because they delayed this proceeding for over two years.

MJ [COL POHL]: Okay.

LDC [MR. KAMMEN]: But this is the only other -- the Camm case is the only other major case ----

MJ [COL POHL]: Okay. So once that's done ----

LDC [MR. KAMMEN]: I'm yours.

MJ [COL POHL]: Okay. And from reading the judge's order in the Camm case, he says, 5 August is a real drop-dead start date.

LDC [MR. KAMMEN]: Yes, and in fact, you know ----

MJ [COL POHL]: I'm assume that you know the judge, when he says that ----

LDC [MR. KAMMEN]: Let me share something with you, because at the last pretrial, they had filed this request that sort of said -- ask for a continuance or ask to adjourn one week a month and come here. Putting aside the unrealistic
situation ----

MJ [COL POHL]: Mr. Kammen, you don't even need to
address that.

LDC [MR. KAMMEN]: Okay. I thought I would share with
you kind of the judge's response.

MJ [COL POHL]: Well, I -- yeah. I suspect he would
respond similar like other judges would respond. Okay.

LDC [MR. KAMMEN]: Yes.

MJ [COL POHL]: Here's what I'm going to propose.

There's two issues here. One is a trial schedule.

LDC [MR. KAMMEN]: Sure.

MJ [COL POHL]: I mean, I ----

TC [CDR LOCKHART]: I'm sorry, sir, are we still going
to be heard on the trial schedule? I thought we were just --

I want to make sure we addressed ----

MJ [COL POHL]: I thought you mentioned that last time.

TC [CDR LOCKHART]: We ----

MJ [COL POHL]: You're -- don't -- I'm not deciding
anything. Let me finish, and see where I'm at and then I'll
let you talk, okay.

TC [CDR LOCKHART]: Yes, sir.

MJ [COL POHL]: Much easier that way. Okay. Okay.

On 5 August you're going to start the Camm case,
and so on 5 August, you're going to know whether or not it's an actually going to go to trial as you expect it to be a fully contested jury trial, I suspect.

LDC [MR. KAMMEN]: Yes.

MJ [COL POHL]: That's the current status.

LDC [MR. KAMMEN]: Yes.

MJ [COL POHL]: But you have been a lawyer long enough, to know that can change but that's what you believe it to be. Okay. So I'm going to grant your motion -- understand this -- on the August dates only.

LDC [MR. KAMMEN]: Fine.

MJ [COL POHL]: Okay. If you wish a continuance on the September or October dates, as currently scheduled, okay, because you're in the Camm trial, said request must be filed not later than three weeks before the date, that's to give the government an opportunity ----

LDC [MR. KAMMEN]: All right.

MJ [COL POHL]: Now, we're going to go catch up in November and December.

LDC [MR. KAMMEN]: Okay.

MJ [COL POHL]: Okay. And this is not a trial schedule. This is simply a hearing schedule. If for some reason we can't go in October ----
LDC [MR. KAMMEN]: Could we ----

MJ [COL POHL]: Then the next week I got -- I'm going to be down here the next week anyway.

LDC [MR. KAMMEN]: Could we set then the October date for the week earlier?

MJ [COL POHL]: Any guarantees -- well, my only -- here is my thought and this, I generally don't -- I generally do these in 802s and we put it all on the record, but we're where we're at. My proposal is this, is that we keep the dates as scheduled, with the understanding if you request a continuance because you are still involved in that trial for the September date, and in September you say I'll still be involved, then the October date it is. And my concern with moving that up a week and we're going to be right where we are now anyway. I'd rather keep the October date we have currently, I know it creates a little bit of conflict for you. I want to put in two weeks in November and two weeks in December, okay? Okay. So that would be 4th -- the 4th to the 15th of November and the 9th -- route now, the 9th through the 20th of December. That would put us in December where -- actually perhaps even ahead to where we would have been if we did all of the hearings as normally scheduled because we have gone basically every other month, okay?
LDC [MR. KAMMEN]: I mean -- sure. You know, I would appreciate it if you could consider ----

MJ [COL POHL]: Moving the December up a week?

LDC [MR. KAMMEN]: The October up a week or back two weeks.

TC [CDR LOCKHART]: Your Honor, the government's concern with moving the October hearing date up a week is that if the Camm trial is really going to be three months ----

MJ [COL POHL]: That's my concern also.

LDC [MR. KAMMEN]: ---- that we might miss it.

MJ [COL POHL]: That's my concern also, Mr. Kammen.

LDC [MR. KAMMEN]: That's why I'm thinking if we have it two week later, we're less likely to miss it.

TC [CDR LOCKHART]: That's going to be like the week before we're down here for two weeks.

LDC [MR. KAMMEN]: We're ----

MJ [COL POHL]: Stop, stop, stop. Okay. Okay. As we negotiate schedules, let's do this, and I -- and I fully understand what dates I'm talking about here, so okay.

We move October to begin the 28th of October, okay, for two full weeks. And we go 2 December for two full weeks. Those four weeks are written in stone. I say that like they really are, but as much as we can ----
LDC [MR. KAMMEN]: Fine.
MJ [COL POHL]: ---- with the understanding that September dates and the August dates, the August dates -- your continuance request is granted this time. The September date, we're talking about that triggering mechanism.
LDC [MR. KAMMEN]: Sure.
MJ [COL POHL]: Okay. Okay.
TC [CDR LOCKHART]: Yes, sir.
MJ [COL POHL]: Okay. Now, back to trial schedules.
The government has responded to a request for a trial schedule with a certain -- and again, I know we got dates there, but let's just talk about day one through day whatever rather than -- because as the pleading's filed, I don't believe you filed a response to that.
LDC [MR. KAMMEN]: I thought we did, because it's ----
MJ [COL POHL]: A long time ago.
TC [CDR LOCKHART]: They relied on their initial filing, yes, sir.
MJ [COL POHL]: Okay. Okay.
LDC [MR. KAMMEN]: Nothing in our -- has happened that has made our initial filing, to us, look both unrealistic or unreasonable, given the realities of practicing before the commission, and all of the impediments to ----
MJ [COL POHL]: I got it. Here's what my intent is to be: I'm going to take your two trial schedules, and issue a trial schedule order, and at that time, if you wish respond, which I'm sure you both will, of certain things, because we're -- I'm not pointing fingers or anything else, but we're almost two years after the arraignment, and it seems to me that if discovery is completed, substantive motions should -- systemic motions should have already been addressed or should be almost ready to go, and we should be getting close to evidentiary motions, which we'll quite frankly -- okay. So that's where we're at on this. Any questions?

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

MJ [COL POHL]: Okay.

TC [CDR LOCKHART]: No, sir.

MJ [COL POHL]: Is it all clear? I'll send a docketing order with just the dates out so everybody understands what they are. Your request for the continuance for the August dates is granted. We have four extra weeks that we're going to add on, and September is depending how your trial goes.

LDC [MR. KAMMEN]: Yeah, and as I have said all along, we will keep the commission apprised. If something happens, we certainly notify folks ----

MJ [COL POHL]: Okay.
LDC [MR. KAMMEN]: ---- so you can proceed. My reason -- well, we wanted to respond to your request.

MJ [COL POHL]: Okay. Okay. All's clear?

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

MJ [COL POHL]: So, the only outstanding issue is 92. Is that correct?

TC [CDR LOCKHART]: Yes, sir.

MJ [COL POHL]: And 142 ----

LDC [MR. KAMMEN]: Yes.

MJ [COL POHL]: --- which is part of it, too. I understand.

LDC [MR. KAMMEN]: Yes I'm gathering that 120 is postponed?

MJ [COL POHL]: Yes. Yes. And I think it will become evident why in a second. Okay.

Concerning AE 92, I will have a written order to this effect to put into the record but just for the purposes of this record, I make the following findings: The classified information both parties seek to disclose is relevant and necessary for a fair determination of the issue before the commission. This is an interlocutory legal proceeding and does not relate to evidence the prosecution intends to introduce on the merits of its case. Closure of portions -- a
portion of these proceedings in exclusion of the -- excuse me.

And possible exclusion of the accused is necessary to protect information, the disclosure of which could reasonably be expected to damage national security including intelligence or law enforcement sources and methods.

Now, as far as exclusion of the accused is for purposes of litigating AE 92, and only AE 92, and based on the particular facts that relate to AE 92, and the fact that the accused is not the source of the classified information on AE 92, and not to make a blanket ruling on AE 142, for the purposes of closure under 806 to address 92, and 92 only, and it's no precedent for any other closed session, the commission -- or the accused will not be present for the litigation of the closed session of AE 92.

LDC [MR. KAMMEN]: May I be heard?

MJ [COL POHL]: Yes.

LDC [MR. KAMMEN]: Only for the purposes of making an objection.


LDC [MR. KAMMEN]: Well, if you're not done, then I'll wait.

MJ [COL POHL]: Okay. Back to the findings, because that particular finding that addresses the exclusion of the
accused, I wanted to get to 142. After reviewing the ex parte declarations contained in the various appellate exhibits which are identified in the order, the commission finds the compelling governmental interests that the public disclosure information identified by the -- identified could result in grave damage to national security.

The closure of the proceedings ordered herein is narrowly tailored to protect information that if publicly disclosed would pose a grave danger to national security. Only the portions of the proceedings directly pertaining to the classified information identified by the parties will be closed to the public and a redacted transcript of the closed session excising only classified national security information will be provided in accordance with the Regulation for Trial by Military Commission and Military Commissions Trial Judiciary Rules of Court. The closure of a portion of the proceedings effectively will protect the classified information at issue by not disclosing the information to individuals who do not hold the requisite security clearance or need to know.

Pursuant to M.C.R.E. 505(h) hearing conducted on AE 92 and AE 124 on 11 June 2013 and 12 June 2013, there are no less restrictive means or reasonable alternatives other
than closure of a limited portion of the proceedings that 
would adequately protect the compelling interests in 
protecting this national security information.

The government's interests in national security 
realized by protecting certain classified information 
outweighs both the accused's and the public's interests in the 
right of access to this material and to these proceedings.

Accordingly, the commission orders oral argument 
on AE 92 in a closed session and this session will be limited 
only to evidence and arguments pertaining to the classified 
information described in AE 124, and a full detailed written 
order will be issued forthwith.

Mr. Kammen. Do you wish to object?

LDC [MR. KAMMEN]: With respect, Your Honor, the court's 
ruling and the procedures employed by the court do not comply 
with the Rules 505 under the Military Commission. The 
government has not complied with its obligations of notice in 
any way, shape, or form, and the commission's order, at least 
as it presently stands, is not in compliance with the public's 
interests or the rules.

Specifically, Your Honor, there has been no 
effort, certainly by the government, to tailor the hearing in 
any way to protect the public's right of access or
Mr. Nashiri's access. And given that, Your Honor, we object. Mr. Nashiri may -- I think wants to address the court briefly about his concerns about being excluded from any portion of his death penalty proceedings, but he has certainly asked me to express in the strongest possible, forceful as possible, he does not want to be involuntarily excluded from any portion of this proceeding that could be used to kill him, and I think that that is absolutely an affront in a capital case, to American justice.

I understand the court's position, but we wanted to make that record, and that the exclusion of Mr. Nashiri violates numerous treaty obligations of the United States. It violates the Detainee Treatment Act. It violates, we believe, as we have said, the Military Commissions Act of 2009. It certainly violates Mr. Nashiri's right to be free of cruel and unusual punishment. It violates whatever rights to due process of law he may have in this proceeding, and it violates whatever constitutional rights he may have under the Fifth, Sixth, and Eighth Amendments to the Constitution of the United States.

MJ [COL POHL]: Thank you, Mr. Kammen.

Trial Counsel, do you wish to be heard?

ATC [MS. BALTES]: I do, just because I think it's
important to point out that the government has complied with
everything under M.C.R.E. 505 that is required and in any type
of a proceeding where the use of classified information is
sought by either party. The defendant's reading of the
statute as we discussed yesterday in the 505(h) hearing is
completely inconsistent with both a plain reading of the
statute and federal case law, and the CIPA statute that
governs the classified information in federal court.

In addition, the commission's ruling is completely
consistent with federal court precedent, which has found that
on an interlocutory matter regarding a question of law, a
defendant's rights are not impaired by the exclusion of that
person when classified information is discussed, as long as
their attorneys are present, and in fact have found that the
attorneys can also be excluded for certain ex parte portions,
which is not what the government has requested here and not
what the court has ordered.

MJ [COL POHL]: Thank you.

Mr. Kammen, do you -- your objection is noted for
the record, obviously.

You indicated that your client wished to be heard
on this, but don't -- let me finish, please. He is accused in
this case, he is not the lawyer here. I understand you speak
on his behalf. But I'm aware of no procedure that permits defendants to stand up and talk about what they don't like or do like about the procedures. Are you with me on this?

LDC [MR. KAMMEN]: This is such an unusual procedure.

MJ [COL POHL]: Okay.

LDC [MR. KAMMEN]: And ----

MJ [COL POHL]: I'm just going to say this. I'm just going to say -- you mentioned that in your pleading, and now I want to make sure, I heard you say that, but as it is interpreted as a request for Mr. Nashiri to address the court on this issue, if that's what it is, that request is denied, okay? I just want to -- I think it's only fair to put it on the record rather than have him go from there.

Now, the propose would be to have this hearing tomorrow at 9:00, and as it's the last matter that we have before the commission this week, is there any -- if it is the last matter, I'm just talking about this deals with transportation of the accused, is if it is the only thing we're going to do tomorrow and he's not to be present, I'm going to ask you, Mr. Kammen, do you want him waiting outside or would you like to go back and visit him later on? Let me just -- does anybody think there's going to be any open hearing tomorrow?
TC [CDR LOCKHART]: No, sir.
LDC [MR. KAMMEN]: Apparently not, no.
MJ [COL POHL]: Okay. As I say, the only thing left is 92. Okay? Okay.
LDC [MR. KAMMEN]: Let me ask the government: How long do you think this hearing will take?
ATC [MS. BALTES]: Our presentation will be quite brief.
MJ [COL POHL]: I always hear "quite brief" just seems to me Mr. Kammen.
LDC [MR. KAMMEN]: We'd like to be able, if the court would order the opportunity for us to visit with Mr. Nashiri in the afternoon.
MJ [COL POHL]: Okay. I am sure that we will get done in the morning.
LDC [MR. KAMMEN]: I would think.
MJ [COL POHL]: From looking at it, I think it's not going to take more than an hour and I think that's probably long. And do you have any reason to believe that if you have the afternoon off, there would be any prohibition of you visiting your client?
LDC [MR. KAMMEN]: Well --
TC [CDR LOCKHART]: Sir, we can help facilitate that.
MJ [COL POHL]: Make that happen since he was scheduled
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1 to be here.
2 TC [CDR LOCKHART]: Yes, sir.
3 MJ [COL POHL]: Commission is in recess until tomorrow at 0900.
4
5 [The Military Commission recessed at 1735, 13 June 2013.]