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1 [The Military Commission was called to order at 1643, 13 June  
2 2013.]

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

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

8 LDC [MR. KAMMEN]: Very briefly.

9 MJ [COL POHL]: Okay.

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

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

22 We'd like a specific order from the commission to  
23 the relevant officials that they are not to monitor

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1 attorney-client meetings. Now, there should be no controversy  
2 to that, because they say they don't. So if they're really  
3 not doing it, why would they care?

4 MJ [COL POHL]: Okay.

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

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

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

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

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

14 MJ [COL POHL]: Okay. Okay.

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

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

19 LDC [MR. KAMMEN]: Another time.

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

21 LDC [MR. KAMMEN]: The second piece of the relief we  
22 want is anytime we are there for an attorney-client meeting,  
23 we can, upon request, inspect the premises. He said it would

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1 be all right. So we go there, if we have the slightest bit of  
2 question, there's only one place we need to really look.  
3 There's a hatch where you can look up, and you can see;  
4 there's nothing there, fine. But we'd like to be able to do  
5 it. You know, we don't need to make an appointment, if we're  
6 there.

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

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

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

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

20 MJ [COL POHL]: When you would show up and have a visit  
21 and then you would request to inspect, and then -- but there's  
22 still got to be a decision point here. What I'm saying is I  
23 can't envision every possibility down there.

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1 LDC [MR. KAMMEN]: Well, the decision point would be,  
2 it's -- let's say at noon.

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

5 LDC [MR. KAMMEN]: Mm-hmm.

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

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

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

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

23 MJ [COL POHL]: I understand.

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1 LDC [MR. KAMMEN]: There were several others, but ----

2 MJ [COL POHL]: Okay. So that's the two reliefs that  
3 you want on this issue.

4 LDC [MR. KAMMEN]: Yes, because we can spend a lot of  
5 time going back.

6 MJ [COL POHL]: Okay.

7 LDC [MR. KAMMEN]: Like I say, I think we have seen  
8 plausible deniability, but we just want to go forward, and we  
9 want to go forward with some certainty.

10 MJ [COL POHL]: Okay.

11 LDC [MR. KAMMEN]: And this is what he said he was  
12 willing to do.

13 MJ [COL POHL]: Okay. Commander Lockhart.

14 TC [CDR LOCKHART]: Yes, sir, thank you.

15 MJ [COL POHL]: Mr. Kammen has given you an olive  
16 branch.

17 TC [CDR LOCKHART]: Well, partially.

18 MJ [COL POHL]: Okay. Let me ask you this: Do you  
19 object to the order of no audio monitoring of privileged  
20 attorney-client communications?

21 TC [CDR LOCKHART]: I do object to the fact that an  
22 order needs to be given. It is something that is not done and  
23 are we going to start ordering every legal premise, don't do

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1 this, don't do that? There's no monitoring that's being done.  
2 And what I want to start with -- if you may indulge me for a  
3 second, and I promise I will be brief.

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

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

11           MJ [COL POHL]: I got it.

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

13           MJ [COL POHL]: I got it.

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

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

23           MJ [COL POHL]: But Commander Lockhart, the evidence

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1 before me is there's monitoring capability ----

2 TC [CDR LOCKHART]: Was.

3 MJ [COL POHL]: Can I finish?

4 TC [CDR LOCKHART]: Yes, sir.

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

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

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

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

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

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

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

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

22 MJ [COL POHL]: Rules change.

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

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1 MJ [COL POHL]: Okay. I gotcha. Go ahead.

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

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

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

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

21 MJ [COL POHL]: Okay.

22 TC [CDR LOCKHART]: And the government would suggest  
23 this: If the defense wants to inspect that going forward,

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1 that request will be made to JTF. If the defense has any  
2 problems about that -- again, to what Colonel Bogdan agreed --  
3 I am absolutely confident they will bring it to your  
4 attention, and it can be corrected. But let's allow JTF to  
5 run the detention facility, allow them to be able to make good  
6 on the discussions that they had on the stand, very on the  
7 spot with the defense, and let's move on from there, sir.

8 MJ [COL POHL]: Okay.

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

10 MJ [COL POHL]: Thank you.

11 LDC [MR. KAMMEN]: Court please.

12 MJ [COL POHL]: Okay. Mr. Kammen.

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

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

16 LDC [MR. KAMMEN]: The second.

17 MJ [COL POHL]: Okay.

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

19 MJ [COL POHL]: I gotcha.

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

22 MJ [COL POHL]: Okay. And that's -- okay. You have  
23 drifted a little bit away from your motion, but that's as

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1 things have developed, that's what you want to do moving  
2 forward. Okay.

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

6 LDC [MR. KAMMEN]: Well, sure.

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

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

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

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

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

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

17 MJ [COL POHL]: Right.

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

22 MJ [COL POHL]: Okay. So standing alone, standing  
23 alone, without showing -- and you've discussed your prejudice.

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1 I got it. Let me move that.

2 LDC [MR. KAMMEN]: Sure.

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

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

15 MJ [COL POHL]: Okay.

16 LDC [MR. KAMMEN]: And that's the problem. The problem  
17 here, Your Honor, is -- you know, is we see it all the time.  
18 He's gone, then we have the next guy, and then we have the  
19 next guy, and we have all sorts of rules. You've issued  
20 orders in two cases. He's -- Woods or whoever the 2011 order  
21 was issued. Those are -- you know, we can read those. We can  
22 figure out what our obligations are. And everybody else,  
23 until him, has figured out what his -- what our obligations

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1 are. He comes in -- and I won't get into all of the other  
2 issues, but he comes in and he sees the world through a very  
3 strange prism, a prism of distrust.

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

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

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

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

23           MJ [COL POHL]: Do you think that was unreasonable and

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1 irrational of him to say, I've got to see what you want to  
2 bring in before I know whether you can bring it in?

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

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

12 MJ [COL POHL]: Okay.

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

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

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

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

19 ATC [MAJ RUGE]: Yes, sir. As the commission's already  
20 recognized, there is some ample case law on this, and we just  
21 need to recognize that on this subject, the law is what the  
22 law is. It's not what lawyers in this room might deem  
23 reasonable, but the analysis is, it involves deference.

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1           Now, the case law that Mr. Kammen references is  
2 all -- if there is an abridgement of any right of a detainee,  
3 then the analysis is, is the policy reasonably related to a  
4 legitimate security interest. And that's what all of the  
5 evidence that was presented by the defense's witness led to.  
6 The commander came in and explained exactly why his -- why his  
7 policy was related to that interest.

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

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

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1                   Anything further?

2           MJ [COL POHL]: Thank you, sir.

3           ATC [MAJ RUGE]: Thank you, sir.

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

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

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

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

17                   The next thing I want to address is AE 45, but  
18 actually, before we can get to 45, I think we've got to  
19 address 153, which is a -- when -- just as a factual predicate  
20 so people know where we're at, when the April hearing was  
21 postponed, I sent a docketing order for sessions in August,  
22 September and October. This is different than the scheduling  
23 order, I understand that, but this is obviously a scheduling

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1 issue. And Mr. Kammen filed a response basically asking for  
2 all three weeks of hearings to be postponed because of a  
3 conflict with another case, correct?

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

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

12 LDC [MR. KAMMEN]: Yes.

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

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

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

19 LDC [MR. KAMMEN]: August 5th.

20 MJ [COL POHL]: Anticipated to last?

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

23 MJ [COL POHL]: Yeah.

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1 LDC [MR. KAMMEN]: Both of the two prior trials have  
2 lasted approximately 90 days.

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

5 LDC [MR. KAMMEN]: Yeah.

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

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

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

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

18 MJ [COL POHL]: Okay.

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

21 MJ [COL POHL]: Okay.

22 LDC [MR. KAMMEN]: I'm also happy to keep the September  
23 date, and if something happens, we'll notify the commission.

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1 MJ [COL POHL]: When do you -- there are certain  
2 notifications -- okay. That's your position. Let me hear  
3 what the government has to say and we'll work this out.

4 Commander?

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

14 MJ [COL POHL]: As all trials are.

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

18 MJ [COL POHL]: Go ahead.

19 TC [CDR LOCKHART]: Yes, sir. The government's position  
20 is that the hearing dates should be kept as they were  
21 scheduled, understanding that that presents an issue for  
22 Mr. Kammen, but it's one that he took on after his  
23 representation here.

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1 MJ [COL POHL]: So let me see if I have got this  
2 straight, is Mr. Kammen starts -- your view is he starts this  
3 trial in Indiana on the 5th of August, comes down here for  
4 hearings, picks the trial back up, comes back and forth, is  
5 that ----

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

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

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

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

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

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

22 TC [CDR LOCKHART]: He could ask for a continuance in  
23 that case, sir, and he has not.

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1 MJ [COL POHL]: And then if he does and the trial is now  
2 scheduled for January, and I don't think we're going to be  
3 done in January, just -- that's just kind of my instinct, and  
4 then he asks for another three months hiatus then and then he  
5 asks for another continuance until this is done?

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

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

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

12 MJ [COL POHL]: Yes.

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

22 If Your Honor is willing to entertain ----

23 MJ [COL POHL]: Go ahead. I'm listening.

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1 TC [CDR LOCKHART]: Okay.

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

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

10 Go ahead.

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

20 If a need comes later, as we get closer -- I think  
21 we're in June right now, still two months away. If we get  
22 closer, and it looks as though the Camm trial is going to  
23 occur on 5 August, then cancel only the 5 August week, okay?

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1           So then, we sort of see how that trial goes, and  
2 maybe for whatever reason this is a speedy trial and it goes  
3 quickly and it's over with. And then there's no issues. We  
4 can have the September hearing as scheduled.

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

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

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

21           And understand that Mr. Kammen will be working on  
22 the Camm trial, but we have all worked on multiple cases at  
23 the same time and, in fact, it's a rarity to only work on one.

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1 In addition to that, defense has two very experienced Air  
2 Force defense counsel, and my understanding is two other  
3 counsel who assist. I believe one of them was in the  
4 courtroom yesterday.

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

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

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

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

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

23           TC [CDR LOCKHART]: Yes, sir. We sent a supplement to

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1 our motion, with the caveat that we continue to discover new  
2 discovery, as I ----

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

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

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

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

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

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

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

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

19 MJ [COL POHL]: Great.

20 TC [CDR LOCKHART]: Understand. So what we're at now is  
21 discovery is done. The government is asking for a trial  
22 schedule, and to postpone all forward progress of this very  
23 important case from the time period of now, tomorrow, whenever

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1 we leave here until November is not realistic, and it doesn't  
2 help this case move forward.

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

10           I've got to slow down. I apologize.

11           People's schedules will fill up, and it will be  
12 hard to reschedule it.

13           MJ [COL POHL]: Okay.

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

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

18           LDC [MR. KAMMEN]: Yes. Yes.

19           MJ [COL POHL]: Yes.

20           LDC [MR. KAMMEN]: And I want to be forthright, because  
21 the undertaking they talk about was executed in 2008, and  
22 after that was executed, General Martins, as part of the Obama  
23 task force discontinued things for two years. So you can't

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1 ask a private lawyer to sit and say maybe someday they will  
2 file this case and I can go back to work. You have to take  
3 cases.

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

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

9 MJ [COL POHL]: Okay.

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

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

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

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

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

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

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

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1 situation ----

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

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

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

8 LDC [MR. KAMMEN]: Yes.

9 MJ [COL POHL]: Here's what I'm going to propose.  
10 There's two issues here. One is a trial schedule.

11 LDC [MR. KAMMEN]: Sure.

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

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

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

17 TC [CDR LOCKHART]: We ----

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

21 TC [CDR LOCKHART]: Yes, sir.

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

23 On 5 August you're going to start the Camm case,

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1 and so on 5 August, you're going to know whether or not it's  
2 an actually going to go to trial as you expect it to be a  
3 fully contested jury trial, I suspect.

4 LDC [MR. KAMMEN]: Yes.

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

6 LDC [MR. KAMMEN]: Yes.

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

11 LDC [MR. KAMMEN]: Fine.

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

17 LDC [MR. KAMMEN]: All right.

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

20 LDC [MR. KAMMEN]: Okay.

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

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1 LDC [MR. KAMMEN]: Could we ----

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

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

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

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1 LDC [MR. KAMMEN]: I mean -- sure. You know, I would  
2 appreciate it if you could consider ----

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

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

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

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

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

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

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

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

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

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

20 We move October to begin the 28th of October,  
21 okay, for two full weeks. And we go 2 December for two full  
22 weeks. Those four weeks are written in stone. I say that  
23 like they really are, but as much as we can ----

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1 LDC [MR. KAMMEN]: Fine.

2 MJ [COL POHL]: ---- with the understanding that  
3 September dates and the August dates, the August dates -- your  
4 continuance request is granted this time. The September date,  
5 we're talking about that triggering mechanism.

6 LDC [MR. KAMMEN]: Sure.

7 MJ [COL POHL]: Okay. Okay.

8 TC [CDR LOCKHART]: Yes, sir.

9 MJ [COL POHL]: Okay. Now, back to trial schedules.  
10 The government has responded to a request for a trial schedule  
11 with a certain -- and again, I know we got dates there, but  
12 let's just talk about day one through day whatever rather  
13 than -- because as the pleading's filed, I don't believe you  
14 filed a response to that.

15 LDC [MR. KAMMEN]: I thought we did, because it's ----

16 MJ [COL POHL]: A long time ago.

17 TC [CDR LOCKHART]: They relied on their initial filing,  
18 yes, sir.

19 MJ [COL POHL]: Okay. Okay.

20 LDC [MR. KAMMEN]: Nothing in our -- has happened that  
21 has made our initial filing, to us, look both unrealistic or  
22 unreasonable, given the realities of practicing before the  
23 commission, and all of the impediments to ----

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1 MJ [COL POHL]: I got it. Here's what my intent is to  
2 be: I'm going to take your two trial schedules, and issue a  
3 trial schedule order, and at that time, if you wish respond,  
4 which I'm sure you both will, of certain things, because  
5 we're -- I'm not pointing fingers or anything else, but we're  
6 almost two years after the arraignment, and it seems to me  
7 that if discovery is completed, substantive motions should --  
8 systemic motions should have already been addressed or should  
9 be almost ready to go, and we should be getting close to  
10 evidentiary motions, which we'll quite frankly -- okay. So  
11 that's where we're at on this. Any questions?

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

13 MJ [COL POHL]: Okay.

14 TC [CDR LOCKHART]: No, sir.

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

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

23 MJ [COL POHL]: Okay.

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1 LDC [MR. KAMMEN]: ---- so you can proceed. My  
2 reason -- well, we wanted to respond to your request.

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

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

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

7 TC [CDR LOCKHART]: Yes, sir.

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

9 LDC [MR. KAMMEN]: Yes.

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

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

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

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

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1 portion of these proceedings in exclusion of the -- excuse me.  
2 And possible exclusion of the accused is necessary to protect  
3 information, the disclosure of which could reasonably be  
4 expected to damage national security including intelligence or  
5 law enforcement sources and methods.

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

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

16 MJ [COL POHL]: Yes.

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

19 MJ [COL POHL]: Sure yeah. Yeah. Go ahead.

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

22 MJ [COL POHL]: Okay. Back to the findings, because  
23 that particular finding that addresses the exclusion of the

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1 accused, I wanted to get to 142. After reviewing the ex parte  
2 declarations contained in the various appellate exhibits which  
3 are identified in the order, the commission finds the  
4 compelling governmental interests that the public disclosure  
5 information identified by the -- identified could result in  
6 grave damage to national security.

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

21           Pursuant to M.C.R.E. 505(h) hearing conducted on  
22 AE 92 and AE 124 on 11 June 2013 and 12 June 2013, there are  
23 no less restrictive means or reasonable alternatives other

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1 than closure of a limited portion of the proceedings that  
2 would adequately protect the compelling interests in  
3 protecting this national security information.

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

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

13 Mr. Kammen. Do you wish to object?

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

21 Specifically, Your Honor, there has been no  
22 effort, certainly by the government, to tailor the hearing in  
23 any way to protect the public's right of access or

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1 Mr. Nashiri's access. And given that, Your Honor, we object.  
2 Mr. Nashiri may -- I think wants to address the court briefly  
3 about his concerns about being excluded from any portion of  
4 his death penalty proceedings, but he has certainly asked me  
5 to express in the strongest possible, forceful as possible, he  
6 does not want to be involuntarily excluded from any portion of  
7 this proceeding that could be used to kill him, and I think  
8 that that is absolutely an affront in a capital case, to  
9 American justice.

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

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

22 Trial Counsel, do you wish to be heard?

23 ATC [MS. BALTES]: I do, just because I think it's

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1 important to point out that the government has complied with  
2 everything under M.C.R.E. 505 that is required and in any type  
3 of a proceeding where the use of classified information is  
4 sought by either party. The defendant's reading of the  
5 statute as we discussed yesterday in the 505(h) hearing is  
6 completely inconsistent with both a plain reading of the  
7 statute and federal case law, and the CIPA statute that  
8 governs the classified information in federal court.

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

18           MJ [COL POHL]: Thank you.

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

21           You indicated that your client wished to be heard  
22 on this, but don't -- let me finish, please. He is accused in  
23 this case, he is not the lawyer here. I understand you speak

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1 on his behalf. But I'm aware of no procedure that permits  
2 defendants to stand up and talk about what they don't like or  
3 do like about the procedures. Are you with me on this?

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

5 MJ [COL POHL]: Okay.

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

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

14 Now, the propose would be to have this hearing  
15 tomorrow at 9:00, and as it's the last matter that we have  
16 before the commission this week, is there any -- if it is the  
17 last matter, I'm just talking about this deals with  
18 transportation of the accused, is if it is the only thing  
19 we're going to do tomorrow and he's not to be present, I'm  
20 going to ask you, Mr. Kammen, do you want him waiting outside  
21 or would you like to go back and visit him later on? Let me  
22 just -- does anybody think there's going to be any open  
23 hearing tomorrow?

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1 TC [CDR LOCKHART]: No, sir.

2 LDC [MR. KAMMEN]: Apparently not, no.

3 MJ [COL POHL]: Okay. As I say, the only thing left is  
4 92. Okay? Okay.

5 LDC [MR. KAMMEN]: Let me ask the government: How long  
6 do you think this hearing will take?

7 ATC [MS. BALTES]: Our presentation will be quite brief.

8 MJ [COL POHL]: I always hear "quite brief" just seems  
9 to me Mr. Kammen.

10 LDC [MR. KAMMEN]: We'd like to be able, if the court  
11 would order the opportunity for us to visit with Mr. Nashiri  
12 in the afternoon.

13 MJ [COL POHL]: Okay. I am sure that we will get done  
14 in the morning.

15 LDC [MR. KAMMEN]: I would think.

16 MJ [COL POHL]: From looking at it, I think it's not  
17 going to take more than an hour and I think that's probably  
18 long. And do you have any reason to believe that if you have  
19 the afternoon off, there would be any prohibition of you  
20 visiting your client?

21 LDC [MR. KAMMEN]: Well --

22 TC [CDR LOCKHART]: Sir, we can help facilitate that.

23 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  
4 at 0900.

5 [The Military Commission recessed at 1735, 13 June 2013.]

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