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1 [The Military Commission was called to order at 0906, 19
2 February 2014.]

3 MJ [COL POHL]: Commission is called to order. Trial
4 Counsel, same parties present that were present when the
5 commission recessed?

6 DTC [CDR LOCKHART]: They are, sir.

7 MJ [COL POHL]: Okay, Mr. Kammen. Where are we at with
8 your continued representation?

9 LDC [MR. KAMMEN]: Well, with Mr. Nashiri for several
10 hours on -- may I?

11 MJ [COL POHL]: Sure, go ahead.

12 LDC [MR. KAMMEN]: We met and I want to thank,
13 certainly, Trial Counsel and the Staff Judge Advocate for
14 assisting us on Monday. We were able to meet with Mr. Nashiri
15 under better circumstances on Monday and we met with him at
16 length Monday and Tuesday. I believe the issues are resolved.
17 I mean, we've been told they are resolved.

18 MJ [COL POHL]: Resolved which way?

19 LDC [MR. KAMMEN]: Resolved in he would like me to
20 continue.

21 MJ [COL POHL]: Okay.

22 LDC [MR. KAMMEN]: I suspect for the record you may want
23 to discuss ----

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1 MJ [COL POHL]: I will. Thank you. Okay.

2 TC [CDR LOCKHART]: Sir, if we could just briefly place
3 on the record that these proceedings are being transmitted
4 back to CONUS.

5 MJ [COL POHL]: Thank you.

6 Mr. Nashiri, do you wish that Mr. Kammen stay as
7 one of your defense counsel?

8 ACC [MR. NASHIRI]: Yes. Yes. If you would like, Your
9 Honor, to give me just couple of minutes to make a comment
10 here?

11 MJ [COL POHL]: In reference to what?

12 ACC [MR. NASHIRI]: I just would like to discuss it, if
13 you let me.

14 MJ [COL POHL]: Mr. Kammen, since this deals with the
15 right to counsel issue, I generally limit, you know, what can
16 be said by the accused, but since -- but it appears to be
17 relevant to the right to counsel issue.

18 LDC [MR. KAMMEN]: Based on our discussions, I don't
19 think it will go into anything classified. I think it is
20 germane.

21 MJ [COL POHL]: Okay. Yes, Mr. Nashiri, you may.

22 ACC [MR. NASHIRI]: First of all, Your Honor, I would
23 like to apologize for delaying our sessions here, and I think

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1 I am the most one who is going to get influenced by delaying
2 this court. But there were some matters that I should agree
3 with Mr. Rick in that regards.

4 I believe we are here in a very unique and strange
5 court. Mr. Rick cannot provide me with an Arabic attorney,
6 Mr. Emad Assad. And I believe that too many lawyers as well,
7 they cannot be present here, like Madam Nancy and Madam
8 Daphne.

9 I believe there are too many laws to hinder
10 applying those laws here, makes me have a doubt in the ability
11 of our lawyers to represent me. And especially when my
12 attorney tries to talk to me, and when he tries to say to me
13 that there are too many classified or secret sessions. But
14 the issue is that he cannot tell me what happened during those
15 closed, classified sessions. So how do you think this court
16 might rule in its sessions on a capital penalty while the
17 accused did not know what happened during those secret
18 sessions?

19 That made me think a lot, Your Honor, to halt and
20 to stop this court or withdraw from it and think of different
21 lawyers to represent me here. But during the last two days, I
22 discussed too many matters with my representatives here, my
23 defense team, and I figured out that it's better for me and

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1 for my interest for my defense team to continue representing
2 me in this court.

3 Thank you, Your Honor, for listening to me.

4 MJ [COL POHL]: Okay. Mr. Kammen, I'm not going to get
5 in a discussion with your client as to various rules.

6 LDC [MR. KAMMEN]: Sure.

7 MJ [COL POHL]: I understand your position on these in
8 that -- about the closed sessions, about the classified
9 evidence rules and, quite frankly, your defense team has
10 objected to most, if not all of them.

11 LDC [MR. KAMMEN]: Sure.

12 MJ [COL POHL]: And you are doing all you can, that it's
13 not the attorneys' fault, defense counsels' fault of what the
14 rules are. If there is anyone, it is the system as understood
15 by the judge who makes the rulings. So again, I don't want to
16 get into a discussion with your client on this.

17 LDC [MR. KAMMEN]: Right.

18 MJ [COL POHL]: But it is, quite frankly, not defense
19 counsels' -- defense counsel want to control what they can
20 control, but those rules, again, you've made issues where we
21 will litigate some of these going forward, but the use of
22 closed sessions and the use of classified evidence is a
23 Court-decided decision and, quite frankly, defense counsel

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1 have all objected to it so it really doesn't make any
2 difference who the defense counsel is since it is not his
3 decision.

4 I'm explaining that to you, as I think you
5 understand. I don't want to get into a position where we
6 discuss with your client. I just want to put that on the
7 record.

8 LDC [MR. KAMMEN]: Right. If I may, I won't belabor the
9 point. I think we all know where we are at. I mean, when you
10 take a person who is severely traumatized and put them in a
11 situation where there is the kinds of secrecy, there is just
12 impediment after impediment to trust issues.

13 And one of the ongoing dilemmas I think in all of
14 these cases from what I read in reading the transcripts is
15 that there is this difficulty of the lawyers -- or the clients
16 ultimately putting a great deal of trust in their lawyers.
17 And there is a huge number of structural impediments to that.
18 I don't want to belabor those. We have discussed them. We
19 will be discussing them.

20 But I would like to say that I suspect -- and
21 we've explained to Mr. Nashiri that you are not going to
22 entertain, you know, sort of serial motions to fire lawyers.
23 And that's been part of our discussion, is that, you know,

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1 these decisions have to be relatively final.

2 But, I mean, that's -- that's the genesis of the
3 problem is the structural impediments to trust.

4 MJ [COL POHL]: I understand. I think we all understand
5 that. I just wanted to put to you the fact that however --
6 what one considers a structural impediment is certainly not
7 caused by any defense counsel.

8 LDC [MR. KAMMEN]: Yes, we understand that. But if you
9 put yourself in the client's shoes, I mean, you know, if the
10 lawyer, for example, can't even get a phone call to his
11 parents, and it may be the judge's decision, but he sees the
12 lawyers -- it is hard for him to see the lawyers as
13 necessarily having any real power. And if they don't have any
14 power, for some people it morphs into how can I trust them.
15 So that is the genesis.

16 MJ [COL POHL]: Okay.

17 LDC [MR. KAMMEN]: I appreciate the court giving us the
18 time to work through this problem. As I said I appreciate the
19 assistance of Trial Counsel in working with the Staff Judge
20 Advocate in creating an atmosphere where we can have these
21 discussions both here and at the camp ----

22 MJ [COL POHL]: Okay.

23 LDC [MR. KAMMEN]: ---- in appropriate situation. So

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1 thank you.

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

3 What I want to next address is the accused's right
4 to be present, and then we will discuss the -- I think the
5 only outstanding attorney issue deals with Ms. Hollander, is
6 that the correct name?

7 LDC [MR. KAMMEN]: We would like to discuss, at least
8 for the record, the situation regarding Captain Jackson.

9 MJ [COL POHL]: Okay. I thought we had talked about
10 that the other day, but you wanted to be heard more on that?

11 LDC [MR. KAMMEN]: We do.

12 TC [CDR LOCKHART]: Your Honor, the government would
13 just object to rehashing motions that have already been ruled
14 on that the defense did not request oral argument on. We have
15 a lot of important things to do this week, and it has already
16 been decided by Your Honor.

17 MJ [COL POHL]: Got it.

18 Mr. Nashiri, I want to discuss with you, as we
19 have done in the past each session, about your right to be
20 present. I know you have heard this before. I'm sure you
21 probably remember, but it is important I do it each time.

22 You have the right to be present during all
23 sessions of the commission. If you request to absent yourself

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1 from any session, such absence must be voluntary and at your
2 own free will. Your voluntary absence from any session of the
3 commission is unequivocal waiver of your right to be present
4 during that session.

5 Your absence from any session may negatively
6 affect the presentation of the defense in your case. Your
7 failure to meet with and cooperate with your defense counsel
8 may also negatively affect the presentation of your case.

9 Under certain circumstances your attendance at a
10 session can be compelled regardless of your personal desires
11 not to be present. Regardless of your voluntary waiver to
12 attend a particular session of the commission, you have the
13 right at any time to decide to attend any subsequent sessions.

14 If you decide not to attend the morning session
15 but wish to attend the afternoon session, you must notify the
16 guard force of your desires. Assuming there is enough time to
17 arrange transportation, you will then be allowed to attend the
18 afternoon session.

19 You will be informed of the time and date of each
20 commission session prior to the session -- prior to the
21 session to afford you the opportunity to decide whether you
22 wish to attend that session.

23 Do you understand what I've just explained to you?

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1 ACC [MR. NASHIRI]: Yes. Yes. I understood everything,
2 Your Honor. Thank you.

3 MJ [COL POHL]: Okay. Mr. Kammen, on the Captain
4 Jackson absence, as Trial Counsel pointed out, that's all
5 been -- there is a record already made of that, of your
6 objection to her absence. There has been a ruling on that.

7 Did you request -- are we going to hear oral
8 argument on something that's already decided for which no oral
9 argument was requested?

10 LDC [MR. KAMMEN]: Well, Your Honor, the problem, of
11 course, is that there is a rule that requires her to be here.
12 And because of the Court's ruling we don't understand now what
13 the rules are regarding the requirement of counsel, defense
14 counsel to appear.

15 MJ [COL POHL]: Okay, let's review where we are at,
16 okay? Okay. We last met in June. Then because you had
17 another case, the August session was canceled, the September
18 session was canceled, the October session was canceled, okay?
19 We had a scheduled -- we had a scheduled session for December,
20 okay? Back in June when Commander Reyes left, Captain Jackson
21 made her first appearance, correct?

22 LDC [MR. KAMMEN]: Yes.

23 MJ [COL POHL]: Yeah, come up there. Okay.

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1 At that time she was pregnant.

2 LDC [MR. KAMMEN]: Yes.

3 MJ [COL POHL]: Okay. At that time defense said there
4 would be no delays caused by the replacement of Commander
5 Reyes with Captain Jackson, correct?

6 LDC [MR. KAMMEN]: I think it was Commander Mizer.
7 Commander Mizer ----

8 MJ [COL POHL]: I don't believe Commander Mizer was on
9 the record then.

10 LDC [MR. KAMMEN]: He was not but we knew that
11 Commander -- Lieutenant Commander Reyes was leaving and it was
12 never suggested that Captain Jackson would be replacing
13 Lieutenant Commander Reyes.

14 MJ [COL POHL]: Okay. I was only dealing with the
15 people that actually were here. Back to the chronology.

16 Then in December that hearing was canceled because
17 she was going to have the baby. She was detailed to this case
18 in the middle of the case being pregnant, okay?

19 LDC [MR. KAMMEN]: I don't think she was pregnant at the
20 time she was detailed but ----

21 MJ [COL POHL]: Let me put it this way. She made her
22 first appearance in this case -- we are talking about
23 appearance issues only -- here when she was pregnant.

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1 LDC [MR. KAMMEN]: Yes.

2 MJ [COL POHL]: She requested -- we postponed the
3 December hearing so she could have the baby. That request
4 what granted. Then she requested that -- apparently there is
5 an Air Force instruction that permits Air Force -- I'm not
6 sure if it applies to fathers also, but for the sake of this
7 discussion we will say mothers -- six months after giving
8 birth they have, cannot be forced -- I'm paraphrasing -- the
9 instruction to go TDY or to PCS so you can spend time with
10 your child, okay?

11 She requested another six months delay in these
12 proceedings, of course, for that instruction. That would put
13 us at least until June. Again, I'm not sure necessarily when
14 the baby was born. So that's where we are at. Then they
15 said -- then she requested, okay -- and that was denied
16 because, and there is a ruling that says what this is -- I
17 don't want to paraphrase my own ruling -- that is a choice in
18 my view she is making, therefore she is voluntarily choosing
19 not to be here.

20 Then she files another motion, a motion to compel
21 the Convening Authority to pay for her child and a caregiver
22 down here so she can attend the hearing. And on that motion
23 that was filed after the other one, the other one I decided a

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1 long time ago and there was no authority in the motion,
2 because I don't think there is any, that would permit said
3 payment. And so that was denied.

4 And that's where we are at right now. You have
5 Mr. Nashiri here with three other attorneys and yourself.
6 Captain Jackson has chosen not to be here in my view. And we
7 can't just keep stopping this case because of personal desires
8 of counsel, and that is how I treated this. That is what the
9 record says. That is what the ruling said. If you want to be
10 heard, go ahead.

11 LDC [MR. KAMMEN]: Thank you. And very briefly I think
12 the problem, Your Honor, is this. The rule -- and, of course,
13 none of us wrote the rules.

14 The rules provide that defense counsel must attend
15 all sessions of court unless there is prior authorization not
16 to attend from the accused. There was no such authorization.
17 That made it incumbent upon the defense to request the
18 continuance, which the Court has the discretion, given the
19 circumstances, to deny.

20 As I recall the record, and it's not a big point,
21 is that the -- I think the motion for continuance may have
22 been filed in November. I think the court on its own granted
23 the motion not based upon Captain Jackson's situation, but for

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1 other reasons. But be that as it may, no question November
2 and December were postponed.

3 Once the court denied the motion for continuance
4 the defense -- and this was ----

5 MJ [COL POHL]: For the February sessions?

6 LDC [MR. KAMMEN]: Yes.

7 MJ [COL POHL]: Based on Captain Jackson?

8 LDC [MR. KAMMEN]: Yes.

9 The defense felt it was incumbent and required
10 to try to create a situation where this would be workable.
11 And the situation -- I mean, so we are clear, it wasn't that
12 we hire a caregiver here in Guantanamo. It was that a seat on
13 the plane that was not full be allocated to a relative of
14 Captain Jackson's who -- and the baby, who obviously wouldn't
15 take up its own seat, to fly here to Guantanamo, and then the
16 minimal cost of whatever it would cost to house those
17 individuals. So essentially what we were requesting would
18 have cost the government virtually nothing.

19 MJ [COL POHL]: Mr. Kammen, it is not a question of how
20 much. The question is this, is the government, you know --
21 perhaps this is not necessarily clearly understood. The
22 government is only permitted to spend money in an authorized
23 manner. And I look at your motion to compel, and I'm looking

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1 for the fiscal authority to pay for that. It doesn't make any
2 difference if it is \$10 or \$10,000. There must be fiscal
3 authority that permits expenditure of U.S. Government funds
4 for the said activity. Is there any for this? And the
5 answer, you've provided none.

6 LDC [MR. KAMMEN]: It seems to me that the Court -- if
7 the Court says I have no authority to do this, and there is
8 this rule that says defense counsel, all defense counsel have
9 to be there, if that is really the choice, then it seems to me
10 that the only other alternative is to continue the
11 proceedings.

12 MJ [COL POHL]: Or Captain Jackson can make other
13 arrangements like other soldiers, sailors, airmen, marines do
14 all the time with family care plans to have her child taken
15 care of in some other manner.

16 LDC [MR. KAMMEN]: Well, in this ----

17 MJ [COL POHL]: When soldiers deploy, they don't bring
18 family members with them. They have to make other
19 arrangements, so ----

20 LDC [MR. KAMMEN]: Right.

21 MJ [COL POHL]: So I'm saying in my view she had other
22 options. I'm not going to get into her personal business.
23 I'm not going to get into any of that stuff because it is not

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1 appropriate. I'm simply saying when you say the only
2 alternative is continuance ----

3 LDC [MR. KAMMEN]: Or fund these. Essentially, what --
4 as I understand it she was being forced to choose between her
5 obligations here and the health of her child, and that is not
6 a situation -- as I understand the regulations -- and perhaps
7 one of the military people is in a better position to address
8 this -- as I understand the regulations, the reason she can't
9 be ordered is to avoid these first six months and the health
10 of the child issues and having to make these choices. After
11 six months, send her anywhere you want. But it is in that six
12 months that the military recognizes are critical, at least
13 between a mother and infant.

14 And so, you know, we were trying to accommodate
15 everybody. And, again, I disagree. I think had you ordered
16 that Captain Jackson be given a seat on the plane or the
17 caregiver be given a seat on the plane, they would have been
18 on the plane, they would have had housing, I think, had you
19 ordered it. But if you felt you didn't have the authority, so
20 be it.

21 But, you know, again, there is this rule, and the
22 rule doesn't appear to make attendance optional.

23 MJ [COL POHL]: So where is she?

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1 LDC [MR. KAMMEN]: Well, if you are saying -- she
2 couldn't afford to come here on her own. She doesn't have the
3 money to come here on her own.

4 MJ [COL POHL]: No. No.

5 LDC [MR. KAMMEN]: And she can't bring the baby here
6 under the rules of Guantanamo. And she is under -- as we said
7 in our motion, she's under an order to continue ----

8 MJ [COL POHL]: Mr. Kammen, the record speaks for itself
9 as to what I ruled on this. So I got that. Okay.

10 But let's again be clear. She made an appearance
11 in this case knowing that she was going to give birth
12 relatively soon, true?

13 LDC [MR. KAMMEN]: Yes.

14 MJ [COL POHL]: Okay. Okay. And she wasn't part of the
15 team in court prior to June 2013, so from arraignment of
16 November of 2011 until June 2013 she never appeared in this
17 court. She made one appearance and now has -- I say chosen,
18 you say forced, we can agree to disagree, but the record
19 speaks for itself, the ruling speaks for itself ----

20 LDC [MR. KAMMEN]: Okay.

21 MJ [COL POHL]: ---- and I'm not going to change it.

22 LDC [MR. KAMMEN]: I understand. Captain Mizer --
23 Commander Mizer handed me a note but if he can simply address

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1 these ----

2 MJ [COL POHL]: No, one attorney per issue.

3 LDC [MR. KAMMEN]: Well, let me just say then -- I hope
4 I get this right -- she could not be forced to deploy. And
5 the fact that we are at Guantanamo, as any other TDY, she
6 can't be forced to deploy here. She is not required to make
7 these arrangements here. Apparently the situation here is
8 different.

9 And we tried to accommodate her needs, we tried to
10 accommodate the Court's needs, and we tried to recognize that
11 there is this rule. So we -- everyone is trying to do their
12 best, and I'm not suggesting that's not, but we think, Your
13 Honor, that the court had the authority to order the Convening
14 Authority to give her a seat on a plane that was not full, or
15 give the caregiver a seat on a plane that was not full and
16 provide a few meals and perhaps lodging in a cuzco. So all of
17 this could have been accommodated.

18 And just so the record is clear, Mr. Nashiri has
19 not authorized Captain Jackson to be absent.

20 MJ [COL POHL]: Okay. Thank you.

21 LDC [MR. KAMMEN]: Thank you.

22 MJ [COL POHL]: Again in this case, there are two
23 rulings on this issue that have already been issued. They

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1 will remain as I have stated in the past.

2 That brings us to Ms. Hollander issue. Is that
3 the correct name, Commander?

4 ADDC [CDR MIZER]: Mizer is my last name, Your Honor.

5 MJ [COL POHL]: I know are you not Ms. Hollander.

6 ADDC [CDR MIZER]: Hopefully not. Hollander. Nancy
7 Hollander is her name, Judge I will address -- would you like
8 Ms. Hollander come in and enter her appearance now?

9 MJ [COL POHL]: Not now. Let's see if she is qualified.

10 ADDC [CDR MIZER]: Okay.

11 TC [CDR LOCKHART]: Your Honor, just from the
12 government's perspective so we are clear what is occurring, I
13 understand this issue is fully briefed and ruled upon. Are we
14 going to reread argument that has already been briefed and
15 argued?

16 MJ [COL POHL]: I'm not sure, I'm not sure the issue
17 that was briefed is the issue that is squarely before me now.

18 I want -- so whether it is or not, I'm going to
19 address it now with the commander.

20 TC [CDR LOCKHART]: I understand, sir. And if -- I
21 think it might be helpful if we had some clarification as to
22 what the current ruling says. I think there was some
23 disagreement between the defense and the government as to the

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1 interpretation of your ruling and obviously it would be
2 helpful to come from you.

3 MJ [COL POHL]: I got it. The issue, as I see it right
4 now, is that Ms. Hollander entered an appearance.

5 ADDC [CDR MIZER]: Yes, Your Honor.

6 MJ [COL POHL]: So the question is, because I think the
7 other issue dealt with camp visitation more than -- which
8 was -- am I correct?

9 ADDC [CDR MIZER]: Well, Your Honor, it really is an
10 interference with attorney-client relationship that is at
11 issue ----

12 MJ [COL POHL]: Okay.

13 ADDC [CDR MIZER]: ---- both presently now and with ----

14 MJ [COL POHL]: If Ms. Hollander is not a commissioned
15 defense counsel, do I have authority to determine whether or
16 not she is entitled to visit the accused for some other legal
17 reason?

18 ADDC [CDR MIZER]: Your Honor, she is part of the
19 defense team, and so yes, we believe that you do have the
20 authority, particularly when the government is acting
21 arbitrarily as they have done with respect to the clearance of
22 Ms. Hollander, excuse me.

23 MJ [COL POHL]: Okay. Now, that brings the issue

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1 squarely to the one I thought was before us.

2 ADDC [CDR MIZER]: Yes, Your Honor.

3 MJ [COL POHL]: In your view, what is Ms. Hollander's
4 status as part of Mr. Nashiri's defense team in this
5 commission?

6 ADDC [CDR MIZER]: She is a member of Mr. Nashiri's
7 defense team as counsel, Your Honor. She has submitted her
8 appearance, she signed the memorandum of understanding in
9 compliance with this Court's order, and so we would ask that
10 Ms. Hollander be allowed to come in and enter an appearance
11 and participate in these proceedings.

12 MJ [COL POHL]: Is there any -- is she fully qualified
13 to do that?

14 ADDC [CDR MIZER]: Well, Your Honor, she is fully
15 qualified with the exception of the government's declination
16 to read her on to the SAP program that would allow her to
17 speak with Mr. Nashiri.

18 MJ [COL POHL]: Okay. Let me then move to a separate
19 issue ----

20 ADDC [CDR MIZER]: Yes, Your Honor.

21 MJ [COL POHL]: ---- then we will come back to that. If
22 she is not read on, or until she is read on, is she permitted
23 to come into the courtroom to ----

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1 ADDC [CDR MIZER]: The prosecution informs me that she
2 is not. And if that is the case we believe under the
3 precedent we have cited to Your Honor, in addition with -- to
4 another case, United States v. Pruner, which I can provide a
5 copy to the court, it is at 33 MJ 272, that your option, Your
6 Honor, once she is counsel, is to abate proceedings in this
7 case until she is authorized to meet with Mr. Nashiri and to
8 speak with Mr. Nashiri.

9 The government's arbitrarily interfering with the
10 attorney-client relationship here.

11 MJ [COL POHL]: Let me ask you another question. There
12 is currently four defense counsel here. There's a fifth one
13 as was discussed who is also representing Mr. Nashiri. Is it
14 your view that when another counsel who is added to the case
15 that the case -- then the whole case is abated until that
16 counsel gets clearance?

17 ADDC [CDR MIZER]: No. No, Your Honor, it is my view --
18 and I think if I may, Your Honor, just have a few moments to
19 lay out the facts ----

20 MJ [COL POHL]: Sure.

21 ADDC [CDR MIZER]: ---- that I think are relevant for
22 the record.

23 Foremost, Ms. Hollander has at all times held a

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1 valid TS/SCI clearance.

2 MJ [COL POHL]: I think you got the cart ahead of the
3 horse. My question is when was she assigned to appear in this
4 case?

5 ADDC [CDR MIZER]: In the military sense, Your Honor,
6 she has been a member of the defense team since the 2008 case,
7 so she entered an appearance in the 2008 case, she's met with
8 Mr. Nashiri numerous times between 2008 and 2012. In fact,
9 she is the longest-standing member of Mr. Nashiri's defense
10 team along with Commander Reyes.

11 MJ [COL POHL]: If she is such an essential member of
12 the defense team, why am I hearing this issue in February 2014
13 when arraignment occurred November 2011?

14 ADDC [CDR MIZER]: Precisely because the government
15 interfered with her attorney-client relationship without
16 explanation in May of 2013, Your Honor.

17 MJ [COL POHL]: No, no, no, no, no.

18 ADDC [CDR MIZER]: Yes, Your Honor.

19 MJ [COL POHL]: Our chronologies are off. My question
20 is -- you said she is part of Mr. Nashiri's defense since '08
21 I believe?

22 ADDC [CDR MIZER]: Correct.

23 MJ [COL POHL]: My question is where was she in November

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1 of 2011? Where was she in all of 2012?

2 ADDC [CDR MIZER]: I think underlying the issues are, it
3 is our firm belief that once you are counsel of record you had
4 to appear at every -- at every hearing.

5 After Your Honor ruled with respect to Captain
6 Jackson, and we understand that we have a fundamental
7 disagreement with respect to that, now Ms. Hollander can make
8 appearances and assist with Mr. Nashiri's defense team. The
9 funding, Your Honor, with respect to the ACLU, would not
10 permit her to be here at all hearings. She will come in and
11 assist us with hearings when we have classified motions on the
12 docket. And we expect her to give a nuanced assistance to the
13 defense team in the same manner that Ms. Baltes has previously
14 assisted with the prosecution team.

15 Now, knowing that she doesn't have to be here, in
16 addition that Mr. Nashiri is willing to have her appear and
17 waive her appearance, we believe that she needs to be here and
18 that the government is interfering with her security
19 clearance.

20 MJ [COL POHL]: But she has currently not been read on
21 to the SAP program.

22 ADDC [CDR MIZER]: She hasn't, Your Honor. I think some
23 of the key facts are that she was read on to the SAP program

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1 in 2008, and she has met with Mr. Nashiri all the way up until
2 May of 2013.

3 Now, the intervening thing we think happened was
4 in 2011 she entered an appearance in the European Court of
5 Human Rights on behalf of Mr. Nashiri. And it was at that
6 point in May of -- excuse me, Your Honor, what I referenced
7 May of 2013, it is May of 2012 -- excuse me, May of 2013
8 Ms. Hollander was turned away at the meeting location.

9 On June 11 ----

10 MJ [COL POHL]: Just a second.

11 TC [CDR LOCKHART]: Sorry, Your Honor, I just have an
12 objection to the fact that basically Commander Mizer is
13 providing evidence or testimony or facts that have not been
14 established. If Your Honor wants to hear them, we completely
15 understand, but just understand there is nothing that
16 established these facts as accurate and true.

17 MJ [COL POHL]: Commander, I understand that. I got it.
18 It is a proffer, I got it. Go ahead.

19 ADDC [CDR MIZER]: Yes, Your Honor. With respect to 11
20 June 2013, Ms. Flannery of the Secretary of Defense Office of
21 Special Security conducted a security investigation into
22 Ms. Hollander at her office in -- actually at an Air Force
23 base in New Mexico, and the conclusion of that report was that

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1 Ms. Hollander is no more a threat to national security than
2 any other attorney with a current SCI SAP clearance assigned
3 to OMC.

4 MJ [COL POHL]: Commander, let me -- perhaps we can cut
5 to the chase here, because the fundamental issue is who
6 decides whether or not somebody is read on to the program?

7 ADDC [CDR MIZER]: The Executive Branch decides that,
8 Your Honor.

9 MJ [COL POHL]: Okay. Is there any authority for a
10 judge to second-guess that decision?

11 ADDC [CDR MIZER]: Yes there is, Your Honor. It is
12 Pruner case I just mentioned, it is 33 MJ 272. The pertinent
13 section at the end of the case a -- it's a COMA case from
14 1991. The quote is: "If the clearance is denied, then the
15 military judge can conduct an in camera hearing to determine
16 whether denial of such clearance was arbitrary or
17 unsupportable in law. If the denial is found by the military
18 judge to be arbitrary or unsupportable in law, then the judge
19 can use his judicial power to abate the proceedings until a
20 clearance is issued."

21 MJ [COL POHL]: Okay.

22 ADDC [CDR MIZER]: So that is really what is at issue
23 here, Your Honor.

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1 MJ [COL POHL]: Okay. So let's just focus on that.

2 So as I understand it -- I want to give the
3 government a chance in a second. But it strikes to me the
4 real issue before me is that she currently, having been not
5 read on to the SAP program, is not authorized to talk to the
6 client, correct? So the impediment is the decision not to
7 read her on to the SAP program for whatever reason.

8 And what you are basically asking me to do is to
9 review that decision to see if it is arbitrary or capricious,
10 and, if so, to fashion appropriate remedy, if not, well --
11 decide and fashion an appropriate remedy.

12 ADDC [CDR MIZER]: That's right, Your Honor. At the
13 very bottom of the issue, we need at the very least to have an
14 evidentiary hearing. Because if you look at the -- the PARs
15 that are attached to the pleadings -- and I'm referencing
16 Attachment B of 178A and then -- I apologize, Judge --
17 Attachment B of 178A and then it is Attachment F of our reply.

18 If you compare the two PARs, you have one that is
19 dated in July, so with respect to Ms. Hollander she had an
20 approved PAR in July reading her on. Now, the thing that you
21 have to keep in mind, Judge, is that there's two separate
22 handling programs. One allows you to meet with Mr. Nashiri,
23 and the other program allows you to review the discovery in

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1 this case.

2 Now, Ms. Hollander had -- at all times had the
3 access to meet with Mr. Nashiri. It was when we contemplated
4 her taking on this greater role that we asked her to be able
5 to -- we filed the second request that she be allowed to also
6 review the discovery in this case.

7 And so that went up, and it was approved in July.
8 So Ms. Hollander and I then came down the week of August 14th
9 so that she could introduce me to Mr. Nashiri, and we were
10 turned away again at the gate. We asked for the records on
11 this, and no one would provide them to us.

12 MJ [COL POHL]: But -- and that was back because she had
13 not been -- their records down here indicated that she was not
14 authorized because she had not been read on.

15 ADDC [CDR MIZER]: Your Honor, she had been read on, and
16 if you actually look at the documents, the one that is dated
17 28 -- it is dated 28 July.

18 MJ [COL POHL]: Commander, you've somewhat confused me
19 now.

20 ADDC [CDR MIZER]: Okay.

21 MJ [COL POHL]: She has a TS/SCI clearance, correct?

22 ADDC [CDR MIZER]: Yes, Your Honor.

23 MJ [COL POHL]: You told me she has been read on to the

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1 program.

2 ADDC [CDR MIZER]: To meet with the client, yes, Your
3 Honor.

4 MJ [COL POHL]: Okay. So what doesn't she have the
5 government said she needs?

6 ADDC [CDR MIZER]: So what happened, Judge, is that we
7 applied, she had the program to meet the client. When we
8 applied in July of 2013 for her to review the discovery, it
9 went up and was approved. It was approved in July of 2013.
10 We came down to meet with the client, were turned away at the
11 gate even though all the paperwork says that she had an
12 approved program at that point.

13 Two weeks after our meeting and after we started
14 complaining about it, we get this altered PAR, ultimately
15 through discovery we get that the government submitted in its
16 pleading. The government didn't submit in its pleading the
17 original approval. They only submit this altered PAR which is
18 quite literally whited out. The approval is quite literally
19 whited-out. It said disapproval and instead of digital
20 signature on the original document there is a handwritten
21 signature by Peter Verga, and it lists two reasons why
22 Ms. Hollander no longer can meet the client or review the
23 discovery in this case.

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1 MJ [COL POHL]: Okay.

2 ADDC [CDR MIZER]: So that's the issue, Judge.

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

4 ADDC [CDR MIZER]: That is the current status. She is
5 not read on, and this is important, Judge, the two reasons she
6 can't meet with the client or review discovery in this case,
7 according to whomever wrote this document and we don't know,
8 which is why we need to have this evidentiary rehearing.

9 MJ [COL POHL]: Commander -- Commander, it's -- okay.
10 Right now you are not asking me to make a ruling on whether or
11 not she should have been read on and the PAR should have never
12 been altered. I'm not in that position currently.

13 What you're really asking right now, whatever
14 reasons are on there, the question is, is it my authority to
15 review to begin with.

16 ADDC [CDR MIZER]: And you have it, Judge.

17 MJ [COL POHL]: I know your position is I do. It seems
18 to me that is the issue before me.

19 ADDC [CDR MIZER]: Yes, Your Honor.

20 MJ [COL POHL]: If you want to read it, you can, but I
21 don't see how that moves anything along. The question before
22 me, the way I understand it currently, and again I'm not sure
23 if it's OMB or whomever, says she is not authorized to meet

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1 with the client or review the discovery pursuant to the piece
2 of paper we just referred to.

3 What you are asking me to do is conduct an
4 evidentiary hearing and decide whether that decision is
5 arbitrary and capricious, saying I do have the authority to
6 fashion appropriate remedy if I do so find, correct?

7 ADDC [CDR MIZER]: Your Honor, I submit this is
8 arbitrary even on its face. The two reasons for her not to
9 have clearance is she is dual representation and she is pro
10 bono.

11 Judge, you know full well, including the 9/11
12 case, there are counsel who appear with full SAP read on who
13 both meet with the client and review discovery that aren't
14 getting paid.

15 MJ [COL POHL]: The pro bono thing is -- although the
16 dual representation is ----

17 ADDC [CDR MIZER]: Is equally specious, Judge. She is
18 not representing two parties in a divorce, she is representing
19 one party in two cases. That's not dual representation as
20 that is traditionally understood.

21 MJ [COL POHL]: Dual representation has been an issue in
22 this case before, but it wasn't dual representation in this
23 case.

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1 Okay. Let me hear what the government has got to
2 say.

3 ADDC [CDR MIZER]: Yes, Your Honor.

4 MJ [COL POHL]: Commander?

5 TC [CDR LOCKHART]: Good morning.

6 MJ [COL POHL]: Good morning.

7 TC [CDR LOCKHART]: I want to start by correcting some
8 factual inaccuracies. I believe that the defense stated that
9 in its attachment, which was the initial PAR approving
10 Ms. Hollander's read-in, that it was electronically signed.

11 I would just invite Your Honor's attention to
12 Attachment F. There is clearly a handwritten signature on it.
13 It's the exact same as the one that was submitted by the
14 government as Attachment B to the motion. They are both
15 handwritten, signed. There is nothing different going on
16 about the process.

17 In addition, the defense made a comment that the
18 government hadn't introduced that as an exhibit. It was
19 because it was already before Your Honor in their motion.
20 There was certainly no need to attach it again.

21 The second factual inaccuracy has to do with the
22 SAP briefings, and I think maybe this is a nuance that the
23 defense doesn't understand, is initially all counsel were

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1 provided a handling brief, and that's correct. And you will
2 see that's noted on Attachment F to the defense's motion.

3 Once this case goes forward and discovery is
4 provided, the handling brief is no longer an acceptable way to
5 meet with the client, to access everything. You have to have
6 the full briefing. So at the point -- and you will probably
7 remember when this occurred back in early 2012 when all of the
8 defense team was provided that brief, that is a different
9 brief that then gives them access to discovery and the ability
10 to discuss that discovery with their client to the extent they
11 can't obviously by the applicable rules and to be fully
12 availed to everything.

13 It is interesting to note that when they made that
14 request for that briefing, they never requested that
15 Ms. Hollander receive that briefing. And I think Your Honor's
16 point was well taken, that since November 9th of 2011 we have
17 never heard about Ms. Nancy Hollander representing the accused
18 except for the motion in which the defense requested that she
19 be appointed as an expert.

20 If you are requesting somebody to be appointed as
21 an expert, it doesn't logically follow that she is already a
22 part of the defense team. You can't have it both ways. You
23 can't be an appointed counsel and an expert to be paid by the

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1 government.

2 And if Your Honor recalls, in that motion that's
3 exactly what the defense wanted. They wanted Ms. Hollander to
4 be paid separately by the government to be an expert.
5 Logically reasonable deduction tells you that at that point,
6 if they wanted her to be an expert and paid, she wasn't
7 representing Mr. Nashiri.

8 On top of that, we are now here in February of
9 2014, and this is the first appearance where she has stated
10 through her papers, I understand, filed in December that she
11 actually represents him. 2008, that is a different commission
12 as this commission here.

13 I would also like to invite Your Honor's attention
14 to the case cited by the government which is the Department of
15 Navy v. Egan. It is a Supreme Court case, obviously means it
16 is controlling, and they specifically don't want trial courts
17 or judges to get into an evidentiary hearing on why a
18 clearance was granted or not.

19 The case that the defense brought to our attention
20 this morning, the Pruner case, is a Court of Military Appeals
21 case. And the facts here are very slightly different, and I
22 think it's important to point them out. In that case the
23 defense counsel refused to provide the government any

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1 information to run the background necessary to get a
2 clearance. He didn't want to provide anything. And at a
3 minimum the judge said provide your name, social security
4 number and date of birth. He wouldn't do that. The
5 government then denied the clearance.

6 What the court held was that the judge has the
7 right to make sure that that process, not the decision, the
8 process was not arbitrary or unsupported by law, and the
9 government absolutely contends that this process was followed.

10 Ms. Hollander applied for a clearance, recognizing
11 that she didn't have the proper clearance to meet with the
12 accused, and recognizing that she didn't have the proper
13 clearance to receive discovery. She applied, investigation
14 occurred, it was initially granted, and then it was denied.
15 Decisions are changed all the time. It doesn't mean anything
16 nefarious is going on. And we provided the official
17 documentation with the signature of the person in charge of
18 making that decision at that time denying her clearance.

19 What, if any, review is to occur, what Your Honor
20 can review is whether or not the government followed the
21 process, which means there was an actual document saying that
22 her clearance was denied. It's as simple as that. There is
23 absolutely no authority to go in and conduct a

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1 re-investigation of her background or circumstances as to why
2 a clearance was granted or denied. And that's not why we are
3 here.

4 In addition to that, as Your Honor pointed out in
5 his ruling, she is not a required counsel. As Your Honor
6 pointed earlier, they have a full plethora of attorneys
7 representing the accused here.

8 So, Your Honor, the government would urge you to
9 stand on the ruling that's occurred. If she makes the
10 appearance this morning, if she puts her records on, she can
11 certainly apply now. She is counsel. The decision may stand,
12 the decision may change, she can follow the process. If her
13 clearance is denied, that paperwork will be resubmitted, I'm
14 certain by the defense, and you can review it to determine
15 whether the process was followed.

16 It's not to get into an evidentiary issue or
17 hearing to nitpick every detail. It is a very important
18 reason on why those decisions on whether or not people get
19 clearances is left to those in the position best to know, and
20 the Supreme Court noted that in the Egan case. Thank you.

21 MJ [COL POHL]: Thank you. Commander.

22 TC [CDR LOCKHART]: That commander?

23 MJ [COL POHL]: That commander. Sorry.

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1 TC [CDR LOCKHART]: Gotcha.

2 ADDC [CDR MIZER]: Your Honor.

3 MJ [COL POHL]: This starts out as AE 178.

4 ADDC [CDR MIZER]: Yes, Judge.

5 MJ [COL POHL]: And the 178 was consider Ms. Hollander
6 an expert consultant. That's what 178 started out as.

7 ADDC [CDR MIZER]: That was the case, yes, Your Honor.

8 MJ [COL POHL]: In your reply, you said she entered
9 notice of appearance in December of '13. So just so I'm clear
10 is, the issue in 178 was access by an expert consultant. Now
11 it has morphed into a consultant, slash, defense counsel.

12 ADDC [CDR MIZER]: Yes, Your Honor, with respect -- I
13 believe I explained the reasoning behind that change. I mean,
14 once Your Honor took the position that he did with Captain
15 Jackson, which again has never been my understanding of
16 military law and the requirement of counsel to be present. I
17 mean no disrespect to Your Honor's ruling. Don't want to
18 rehash it.

19 MJ [COL POHL]: If everyone agreed with every one of my
20 rules, I would be very surprised, but go ahead.

21 ADDC [CDR MIZER]: Yes, Your Honor. I think simply the
22 issue here is Commander Lockhart, the prosecution and I
23 disagree on the facts, and we disagree on the fact that there

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1 needs to be an evidentiary hearing here.

2 MJ [COL POHL]: What would be the purpose of an
3 evidentiary hearing that's not contained in the pleadings?

4 ADDC [CDR MIZER]: To determine whether or not this
5 denial of access was arbitrary, whether or not the government
6 is arbitrarily interfering with the right to counsel, and we
7 believe they are, Judge.

8 MJ [COL POHL]: Okay. And it seems to me that following
9 the logical process here, the issue before me is whether or
10 not you are entitled to said evidentiary hearing to see -- to
11 inquire on to whether or not it was appropriately denied.

12 ADDC [CDR MIZER]: Yes, Your Honor.

13 MJ [COL POHL]: And the second part would be to have
14 said hearing.

15 ADDC [CDR MIZER]: Yes, Your Honor.

16 MJ [COL POHL]: Okay. Let me -- let me just ask you
17 this. Do you believe the hearing portion of that -- that
18 reading all of 178 has been briefed sufficiently to get a
19 ruling? Again, because it's in there, but it's not -- I'm not
20 sure it's -- I just want to make sure you have had an
21 opportunity to fully brief the -- your position on why a
22 hearing is required.

23 ADDC [CDR MIZER]: Your Honor, I think with the addition

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1 of the Pruner case, I think Your Honor has all the authority
2 before it that the Court needs or the Commission needs to make
3 a decision in this case.

4 We believe that at the very minimum it would be an
5 abuse of discretion not to have an evidentiary hearing in this
6 case. Quite simply, the government gives too much authority
7 to Egan. I mean, just last year in Rattigan v. Holder, the
8 D.C. Circuit interpreted Egan to bar judicial review of
9 adverse employment actions based upon the denial of security
10 clearance. Judge, I don't need to tell you this isn't a Title
11 VII case or denial of employment action. We are talking
12 interference of attorney-client relationship. That's really
13 what is at issue here.

14 From the documents that the court has before it
15 this is a very arbitrary decision, the very narrow category of
16 circumstances and facts already before the court where this
17 court can and must investigate exactly why Ms. Hollander's
18 attorney-client relationship is being frustrated in this case.

19 MJ [COL POHL]: Essentially the hearing would be to
20 address the reasons for the denial.

21 ADDC [CDR MIZER]: The facts and circumstances around
22 this, Your Honor. You have a very bizarre situation, right?
23 You have one government official saying she is a loyal

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1 American and there is no reason to take away her access. You
2 have got a fully approved access form that you have before
3 you, Your Honor. You have Ms. Hollander and I going down to
4 visit the client and being turned away with no documentation
5 or explanation whatsoever, and two weeks later after we
6 complain about this, we get an altered PAR essentially to
7 cover the tracks, what it looks like.

8 So that is what we need to look into, who knew it,
9 when did they know it, and why.

10 MJ [COL POHL]: Okay. But right now she is not
11 qualified to, does not meet the qualifications to talk with
12 the client and appear before the commission?

13 ADDC [CDR MIZER]: That is correct, Your Honor. We
14 would ask for permission for her to come and enter her
15 appearance. I believe that the government's position is she
16 then has to leave the courtroom. We obviously would object to
17 that.

18 MJ [COL POHL]: I have her appearance letter. I'm not
19 sure what is accomplished by that exercise.

20 ADDC [CDR MIZER]: Very well, Your Honor.

21 MJ [COL POHL]: Trial Counsel, I will ask you the same
22 question; it is a process question. Does the government
23 believe their position has been fully briefed on the issue of

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1 whether or not this court has authority to conduct a hearing
2 into the reasons why Ms. Hollander is no longer -- or is not
3 cleared?

4 TC [CDR LOCKHART]: Yes, Your Honor.

5 MJ [COL POHL]: Okay. So I can rule based on what I
6 have right now, fine.

7 Secondly is, does the government anticipate,
8 given -- and I may have misunderstood what you said, something
9 earlier. Does the government anticipate that if she were to
10 resubmit or re-look at this, that the answer would not change?

11 TC [CDR LOCKHART]: I'm honestly not in a position to
12 decide that. She certainly can resubmit it. I think Your
13 Honor's order said we would process it, and we absolutely
14 will. I'm not the decider and I'm not involved ----

15 MJ [COL POHL]: I understand that.

16 TC [CDR LOCKHART]: ---- in any of that.

17 MJ [COL POHL]: I understand that. Okay. Here's --
18 thank you.

19 TC [CDR LOCKHART]: One thing I would like to add, Your
20 Honor.

21 MJ [COL POHL]: Sure.

22 TC [CDR LOCKHART]: Commander Mizer made some reference
23 to the fact that the PARs that were attached to the government

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1 motion was altered. There is absolutely -- there is no
2 evidence before Your Honor to indicate that, and that just
3 imputes all sorts of things so ----

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

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

6 MJ [COL POHL]: So the way ahead on this issue is I will
7 make a ruling in due course on whether or not there should be
8 a hearing, and we will have that hopefully in sufficient time.
9 If such a hearing needs to be conducted, we will do it at the
10 next session.

11 Secondly is that what I'm hearing the government
12 tell me is that there will be a re-look on this issue with
13 Ms. Hollander now that she's been -- entered an appearance.

14 TC [CDR LOCKHART]: I'm saying that she is welcome to
15 submit an application the same way she did before.

16 MJ [COL POHL]: I'm saying I don't know where that is,
17 but if she needs to do something first, Commander, have her do
18 that.

19 ADDC [CDR MIZER]: Yes, Your Honor.

20 MJ [COL POHL]: If it makes the issue go away, then the
21 issue goes away, okay? I believe that takes us through the
22 attorney issues.

23 TC [CDR LOCKHART]: Yes, sir.

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1 ADDC [CDR MIZER]: Your Honor, if it's possible could we
2 have the evidentiary hearing next week, I mean, because what
3 we are dealing with is ongoing interference with
4 attorney-client relationship. That's really what the issue
5 is. And I mean ----

6 MJ [COL POHL]: Commander, I'm going to be in court from
7 today until we leave on Thursday, okay?

8 ADDC [CDR MIZER]: Yes, Your Honor.

9 MJ [COL POHL]: I try to be expeditious in my rulings,
10 but I'm not sure I can be that fast. Understand the concern,
11 but, you know, you want -- we had to discuss this. There was
12 a question what the issue really was. It is highly unlikely I
13 will reach a final decision before that to permit that.

14 ADDC [CDR MIZER]: Yes, Your Honor, just as long as the
15 record is clear that the defense position is we have to abate
16 proceedings without Ms. Hollander present.

17 MJ [COL POHL]: Okay.

18 TC [CDR LOCKHART]: Just to make the record clear, Your
19 Honor, you actually already ruled in the ruling that the
20 abatement was denied.

21 MJ [COL POHL]: Okay. That brings us to 197. Defense,
22 your motion ----

23 LDC [MR. KAMMEN]: Before we address that, may we just

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1 do one housekeeping detail?

2 MJ [COL POHL]: Sure.

3 LDC [MR. KAMMEN]: That is with respect to 216, a motion
4 we filed regarding General Martins' status. So the record
5 will reflect ----

6 MJ [COL POHL]: Okay.

7 LDC [MR. KAMMEN]: ---- in the most recent defense
8 authorization, Congress passed a law ----

9 MJ [COL POHL]: Okay. Mr. Kammen, let's -- since we are
10 talking about attorney issues anyway, I will move that
11 issue -- it wasn't on my list. But let's talk about 216.

12 LDC [MR. KAMMEN]: That is what I wanted to do.

13 MJ [COL POHL]: I know, you said -- you made it a
14 housekeeping thing. It is going to be more than a
15 housekeeping thing.

16 LDC [MR. KAMMEN]: Okay.

17 MJ [COL POHL]: I didn't want to minimize the issue. Go
18 ahead.

19 LDC [MR. KAMMEN]: It may be simply housekeeping for the
20 moment. As the record reflects, Congress passed a law -- I
21 believe it was in December -- and part of the law indicated
22 and Congress mandated that the position of Chief Prosecutor
23 and the position of Chief Defense Counsel be of equal rank,

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1 and that any variations from that, there had to be a waiver.

2 Now, this is all part of a congressional
3 recognition. We believe that since the 2009 act there has not
4 been an equality of arms between the defense and the
5 prosecutorial resources ----

6 MJ [COL POHL]: Mr. Kammen, just stick with the statute.
7 You are reading congressional intent, and that ----

8 LDC [MR. KAMMEN]: The statute requires ----

9 MJ [COL POHL]: I got that. But you are saying this
10 reflects unequal arms ----

11 LDC [MR. KAMMEN]: The statute requires, Your Honor ----

12 MJ [COL POHL]: No, I got that. But it is the other
13 point, the editorial comment about what you think this is
14 recognition of ----

15 LDC [MR. KAMMEN]: No, Your Honor, because the statute
16 requires by February 26th there has to be a report to
17 Congress, I believe by the Secretary of Defense, as to how
18 there will be equality of arms regarding resources. So it is
19 not just about rank, it is about resources. And that's the
20 importance of the statute.

21 MJ [COL POHL]: But the issue before me is simply ----

22 LDC [MR. KAMMEN]: The issue before you and the
23 housekeeping is it is required for General Martins to appear,

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1 as we pointed out in our motion, a waiver. I believe it was
2 on Monday we were provided with a waiver, apparently signed by
3 Secretary of Defense Hagel, waiving this requirement for 180
4 days. And we simply wanted to make that ----

5 MJ [COL POHL]: Okay.

6 LDC [MR. KAMMEN]: ---- a part of the record.

7 MJ [COL POHL]: Since there is a written waiver, it does
8 turn into a housekeeping issue.

9 LDC [MR. KAMMEN]: Yes.

10 MJ [COL POHL]: Trial Counsel, do you have copy of said
11 waiver?

12 TC [CDR LOCKHART]: Yes, Your Honor. It has been
13 provided to the defense and court reporter marked AE 216A.
14 Your Honor?

15 MJ [COL POHL]: Yes.

16 TC [CDR LOCKHART]: I would like to address one thing on
17 that issue if I may, Your Honor.

18 MJ [COL POHL]: Go ahead. Commander, you are the
19 one ----

20 TC [CDR LOCKHART]: This has to do with timing. This is
21 the appropriate time to bring it up, the motion having to do
22 with Captain Jackson and this motion AE 216 defense labeled as
23 an emergency motion or emergent motion. And we are seeing a

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1 repetitive pattern by the defense where they are waiting until
2 the last minute to file things and then urging the commission
3 to either rule upon them or add them to the docket or shorten
4 the government's response time, which did occur in AE 208.

5 We just urge the commission to please have the
6 defense stick to the rules, stick to filing things when they
7 know about it and not labeling things emergency when they are
8 not. The NDAA was passed in late December, and they filed
9 this seven days before the hearing as an emergency motion.
10 There was nothing new about this.

11 MJ [COL POHL]: Okay. Commander, because I hear this
12 all the time, let me just make it clear, is that normal
13 briefing procedures will be followed unless I don't think they
14 should be. That is the way it is going to work.

15 This issue was on the 26th of December 2013, the
16 President signed the NDAA talking about this issue about who
17 should be -- whatever it is. Okay. Congress passes that law,
18 the President implements it. Defense doesn't raise it until
19 February. I got it. But you could have looked it up
20 yourself, and this deals with qualifications of counsel, okay,
21 so I made a decision that we have to address that issue.

22 Now, there are other -- there is these things
23 about Captain Jackson filed at the last minute on the motion

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1 to compel.

2 TC [CDR LOCKHART]: It was, and she had been pregnant
3 for quite some time at the time it was filed.

4 MJ [COL POHL]: I got it. But I decided, given the
5 nature of that motion, I would do an expeditious briefing
6 schedule and decide.

7 TC [CDR LOCKHART]: And we appreciate it, sir, we do.

8 MJ [COL POHL]: I ----

9 TC [CDR LOCKHART]: I don't want to waive the objection,
10 sir.

11 MJ [COL POHL]: First of all, I'm not sure you have any
12 cognizable objection if I decide a briefing schedule should be
13 different.

14 Secondly, I understand this. It is just like the
15 discussion I had with Commander Mizer on the issue about
16 having a hearing, is that that issue was, as before the court,
17 they will get a ruling in due course. I understand.

18 I'm not going to penalize a party for late filing
19 by the other party. But there are going to come times when I
20 will want an expeditious briefing schedule or I may simply
21 decide without it. That is what judges do. I understand your
22 position.

23 TC [CDR LOCKHART]: Completely understand.

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1 MJ [COL POHL]: I heard it before. I don't need to hear
2 it again. Anything further? Okay.

3 Mr. Kammen.

4 LDC [MR. KAMMEN]: And I don't know -- we addressed this
5 in the 802, again in terms of timing. Before we turn to 197
6 we believe that 205 dealing with the quality of the medical
7 care provided to the accused and 217 which is a classified
8 motion but relates to that, those issues should be addressed.

9 MJ [COL POHL]: Now, have they been fully briefed?

10 LDC [MR. KAMMEN]: I believe that the matters --
11 everything regarding 205 has been fully briefed. The only
12 thing that perhaps is outstanding is the government's response
13 to a motion to compel witnesses. That may not have been fully
14 briefed, but unless the government advises that they are
15 planning on reconsidering their denial of witnesses, I don't
16 know that there's -- that seems to me more form than
17 substance.

18 They have denied the witnesses, and they've set
19 out their reasons for denial. And that's why we filed the
20 motion to compel. And I doubt that their reasons for the
21 denial will change -- or I doubt that they will change their
22 position. So I think that that has been fully briefed.

23 TC [CDR LOCKHART]: And, Your Honor, this is exactly

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1 what we are talking about. It has ----

2 MJ [COL POHL]: Stand by, Commander, you will get your
3 chance. Are you done, Mr. Kammen?

4 LDC [MR. KAMMEN]: With respect to 217, I'm -- I believe
5 they have filed a response to that, but I'm perhaps incorrect
6 in that. But given the nature of it, it is ----

7 MJ [COL POHL]: I got it.

8 LDC [MR. KAMMEN]: ---- it is quite important.

9 MJ [COL POHL]: I understand your position.

10 Okay, Commander, now.

11 TC [CDR LOCKHART]: Two things, Your Honor. Both 205
12 and 217 have not been fully briefed. All the facts that are
13 in 205 and 217, without getting into details, have been known
14 to the defense for quite some time. They chose to file it
15 when they did. The government is exercising its -- I won't
16 say rights because obviously the Court has discretion in
17 changing that, but the laid-out court schedule.

18 I think it's incredibly unfair of the defense to
19 say that just because we filed a response to their request for
20 witnesses it has been fully briefed. It hasn't. We have
21 certain nuances we would like to point out in our response to
22 witnesses to compel, and 217 was only filed I think five days
23 before we traveled down here, and that response has not been

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1 filed as well. And that one actually does take a lot of
2 coordination.

3 So again we would urge that there is nothing
4 emergent on these; they have known about these facts. We
5 would ask the motions that have been filed, some of them for
6 years, be heard first and that these are just added in the
7 normal order.

8 MJ [COL POHL]: Okay.

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

10 MJ [COL POHL]: Here is what I will do. Mr. Kammen you
11 want to be heard?

12 LDC [MR. KAMMEN]: No, I mean ----

13 MJ [COL POHL]: It's -- let me look at the filings. I
14 will see whether I think they have been fully briefed or not.
15 If we need to address it I will tell you first thing tomorrow
16 what we are going to do on it.

17 I have stacks of filings, and I know the idea
18 whether it is fully briefed or not may be in the eye of the
19 beholder. Let me take a look at it. I suspect -- 217 was
20 filed five days ago and I doubt very much that would be fully
21 briefed. Let me look at 205. Again, I want to make sure of
22 what I have and then I will make a decision.

23 LDC [MR. KAMMEN]: No, 217 ----

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1 MJ [COL POHL]: What I'm saying, Mr. Kammen, is let me
2 take a glance at what you have given me to see where we are in
3 the briefing schedule, and, again, we have had a very long
4 break in this case ----

5 LDC [MR. KAMMEN]: No, I understand.

6 MJ [COL POHL]: ---- so things filed at the last minute
7 causes me pause, unless there is a good reason why it should
8 have been filed at the last minute, that it should be put to
9 the head of the line.

10 I understand your position on these two particular
11 ones. And again give me a chance to take a look at them. I
12 will get back to you.

13 LDC [MR. KAMMEN]: What's critical to us is that these
14 are addressed at this session. I mean, the quality of the
15 accused's medical care is -- has been an issue, will continue
16 to be an issue. If he is, as we believe, receiving ----

17 MJ [COL POHL]: I understand.

18 LDC [MR. KAMMEN]: ---- hugely substandard medical care
19 that bears upon everything.

20 MJ [COL POHL]: Basically what you are asking me to do
21 is address 205 in this session. Let me see where they are in
22 the briefing schedule, what I have, and I will make a decision
23 whether I will hear them this time or next time, okay?

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1 That brings us to 197, but rather than doing that
2 right now, let's go ahead and take the morning break. The
3 commission is in recess for 15 minutes, then we will reconvene
4 at 10:30.

5 [The Military Commission recessed at 1014, 19 February 2014.]

6 [END OF PAGE]

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