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1 [The Military Commission was called to order at 0900, 22 April  
2 2014.]

3 MJ [COL POHL]: Commission is called to order. It appears  
4 that all the same defense counsel are present as the last time  
5 we met; is that correct, Mr. Kammen?

6 LDC [MR. KAMMEN]: Yes, sir, absent Ms. Hollander and  
7 Captain Jackson, over defense's objection.

8 MJ [COL POHL]: Well, of course, Ms. Hollander is another  
9 issue altogether, but Captain Jackson is not here.

10 LDC [MR. KAMMEN]: Yes.

11 MJ [COL POHL]: Okay.

12 LDC [MR. KAMMEN]: And if I may, Your Honor, I'd like to  
13 apologize on behalf of the defense for our mistake yesterday.  
14 I'm not using this as an explanation. Mr. Nashiri had sent  
15 word that he wanted to meet with the defense lawyers after we  
16 arrived. We were doing that at 1600, and quite honestly,  
17 collectively spaced your order. It's completely our fault.

18 We take, you know -- I just wanted to apologize,  
19 because I hope you understand that that's not the way we do  
20 business.

21 MJ [COL POHL]: I understand, Mr. Kammen, and I appreciate  
22 the apologies, and that's why there's erasers on pencils,  
23 because sometimes people make mistakes.

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1 Trial counsel, who is here for the government?

2 TC [CDR LOCKHART]: We have myself, Commander Andrea  
3 Lockhart, Mr. Justin Sher, Brigadier General Mark Martins,  
4 Lieutenant Bryan Davis, Lieutenant Evan Seamone, Lieutenant  
5 Paul Morris, we have a linguist, Mr. Forrest Smith. In the  
6 back we have Special Agent Nick Pham.

7 If I could also place on the record that the  
8 proceedings are being transmitted back stateside.

9 MJ [COL POHL]: Thank you. Mr. Nashiri, as we do every  
10 time we start these hearings, I want to go over your right to  
11 be present, your right to waive said presence. You have the  
12 right to be present at all sessions of the commission. If you  
13 request to absent yourself from any session, such absence may  
14 be voluntary and of your own freewill. Your voluntary absence  
15 from any session of the commission is an unequivocal waiver of  
16 your right to be present during that session.

17 Your absence from any session may negatively affect  
18 the presentation of the defense in your case. Your failure to  
19 meet with and cooperate with your defense counsel may also  
20 negatively affect the presentation of your case. Under  
21 certain circumstances your attendance at a session can be  
22 compelled regardless of your personal desire not to be  
23 present.

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1           Regardless of your voluntary waiver to attend a  
2 particular session of the commission, you have the right at  
3 any time to decide to attend any subsequent session. If you  
4 decide not to attend the morning session but wish to attend  
5 the afternoon session, you must notify the guard force of your  
6 desires. Assuming there is enough time to arrange  
7 transportation, you will then be allowed to attend the  
8 afternoon session.

9           You will be informed of the time and date of each  
10 commission session prior to the session to afford you the  
11 opportunity to decide whether you wish to attend that session.  
12 Do you understand what I just explained to you?

13           ACC [MR. AL NASHIRI]: Yes, I understood everything.

14           MJ [COL POHL]: Thank you. Defense, you want to start  
15 with 084.

16           LDC [MR. KAMMEN]: Your Honor, I think there are at least  
17 two other motions that impact on 084. The first is, I  
18 believe, 084H which is a motion to compel the production of  
19 evidence, documentary evidence, and I believe 084I -- I could  
20 be wrong in the number -- of the motion to compel the  
21 production of witnesses.

22           Tangentially bearing on this is 266, a motion  
23 dealing with questions about other governmental agencies, and

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1 whether there has been contact with the commission. And I  
2 don't know if the court wants to address these along with 084  
3 or deal with the motions to compel, and then deal with 084.  
4 So let me start with dealing with the motions to compel.

5           And I have to say, Your Honor, that I think one of  
6 the omissions in the drafting of the military commissions law  
7 is that it didn't contemplate, when it looked to federal law,  
8 what would happen in the event there were allegations of a  
9 conflict in a motion to recuse, and especially questions  
10 regarding production of evidence.

11           Under 28 U.S.C. 144, given the magnitude of the  
12 conflicts that are alleged, and given the magnitude of the  
13 unlawful command influence that we believe is involved here,  
14 quite candidly, Your Honor, under 144, another judge would be,  
15 using the military parlance, detailed to hear the motions, the  
16 motion -- you wouldn't have a motion to compel witnesses.  
17 They would just be subpoenaed and would come, subject, of  
18 course, to a motion to quash. And you would have the hearing,  
19 and then the other judge would decide yes, there's a conflict,  
20 the judge should be recused, or no, there isn't, but you  
21 wouldn't have a judge under these circumstances presiding over  
22 his own recusal motion.

23           And so we just want to put that out there, that

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1 certainly, there is -- seems to be nothing in the military  
2 commissions statute that contemplates that, but I don't think  
3 there's anything in the military commissions statute that  
4 would have precluded that. And we think, of course, that the  
5 magnitude of the conflict is that the witnesses that we want  
6 you to hear, and the evidence we want to produce, both for you  
7 and for the record, will demonstrate even more conclusively  
8 the magnitude of the conflict and the overwhelming appearance  
9 of impropriety that mandates recusal.

10           And so we're all on the same page, we believe that  
11 under both federal law, which at least theoretically the  
12 commissions look to, or military law, which in some  
13 circumstances the commissions look to, the presumption -- when  
14 there is a demonstration of the magnitude of the conflict here  
15 and the command influence here, is the presumption is that  
16 recusal is the appropriate step.

17           Under *Miller v. United States* at 24 MJ 615, avoiding  
18 the appearance of impropriety under military law is as  
19 important as the impropriety itself. And of course, in  
20 *Ligon v. The United States*, federal courts have said virtually  
21 the same thing, and that of course, is essentially the  
22 premises of *Caperton v. Massey*, cited in our briefs, the  
23 decision of the United States Supreme Court.

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1           The evidence we want to present and the witnesses we  
2 want the record to hear and the commission to hear will make a  
3 compelling record, supporting, if it needs support, our  
4 motion. And yet we understand, sort of, the magnitude and  
5 really the conflict for you to grant this, and hear this  
6 evidence, and hear this witnesses, then gets into how that all  
7 plays out in the event that the motion to recuse is granted,  
8 and the sort of effects that has. And I don't want to belabor  
9 the financial impact. We've dealt with that. But it's there  
10 and it can't be -- we can't pretend it's not there. And that  
11 of course is the heart, that is one of the problems here.

12           And, again, I don't want to belabor this point, but,  
13 you know, I'm told that the actions of the convening authority  
14 that we challenge, that we discovered since we were here,  
15 essentially amount to a \$30,000 a year raise. And so the  
16 public can do the math.

17           Our motion and our request for witnesses involves  
18 the appearance of impropriety. It involves improper unlawful  
19 command influence, and it involves the failure of the military  
20 commissions bureaucracy to follow the statute, literally from  
21 the beginning, in creating the military commissions. And  
22 they're -- and so, as I said, it is our view that recusal is  
23 mandatory under federal law. It's mandatory under military

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1 law. And in U.S. v. Conley, 4 MJ 327, the military courts  
2 affirmed that there is a -- the standard is a liberal grant in  
3 favor of recusal because the perception of independence is  
4 critical.

5           And then, of course, we would cite the commission  
6 to -- I believe it's Department of the Navy and Marine  
7 Corps v. Carlucci 26 MJ 308, which again says in the strongest  
8 possible terms, whenever there is a potential challenge to  
9 the -- and even the appearance of a lack of independence,  
10 recusal is the preferred course.

11           Well, what do we want in terms of the records?  
12 Well, obviously, the first thing we've requested is the  
13 officer record brief that pertains to you. Secondly, and  
14 perhaps most critically, are the officers' evaluations, the  
15 fitness reports. Who does those? Who has been doing those  
16 for the past -- since 2007? Has it been the convening  
17 authority? Has it been somebody within the military chain of  
18 command? What have they referred on? How have they known?  
19 Most of the time it is a direct supervisor who has  
20 face-to-face responsibility for judging the performance of a  
21 subordinate. I don't know that that exists here. We don't  
22 know.

23           And so is whoever is doing that reaching out to the

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1 convening authority? Is the convening authority perhaps the  
2 person who's doing your fitness reports. Again, we don't  
3 know, and that's the evidence that we think is significant.  
4 We also think it's significant to have the dates, the dates  
5 this process began. We know, of course, the date of your  
6 appointment as chief judge. We don't know the dates of the  
7 various reappointments. We don't know the dates of -- on  
8 which your contract, your year-to-year contract, was renewed,  
9 and we don't know the circumstances relating to those  
10 renewals.

11           One of the things that has become apparent from the  
12 letter, which we found, was that the convening authority in  
13 2007 clearly -- you know, the statute provided that the pool  
14 of potential candidates for chief judge was the pool of people  
15 who could be judges before the military commissions.

16           Well, was that a bench of one, or was that a bench  
17 of 100? I think that would be significant information to  
18 judging the propriety of what the convening authority did.

19           Additionally, Your Honor, at the time in 2010 when  
20 Admiral MacDonald wrote the letter in violation of Article 26  
21 extolling your virtues and pretty much laying out the game  
22 plan, which was that you would be chief judge and come sitting  
23 judges on military commissions, that, you know -- again, was

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1 there only a pool of one, or was there a pool of 20? And so  
2 those are the records that we think that we need.

3 Now, we believe we know what the evidence will show,  
4 so we make this request in good faith. But, you know,  
5 obviously we don't have access to these records, and frankly,  
6 we have no power to subpoena them. We have no power. And so  
7 we come before you, despite the conflict, asking you to order  
8 production of all of these records.

9 That's the same thing with respect to our motion  
10 regarding witnesses. And the starting point, of course, with  
11 respect to witnesses, again, is the defense has no power in  
12 this commission. The defense can ask the prosecution to --  
13 for witnesses. The prosecution opposes them, and so we are  
14 required to come to you.

15 And so while we're discussing the various witnesses,  
16 I want to make it clear that this is not an offer of proof in  
17 the event that the commission denies the request for  
18 witnesses. We would certainly like to make an offer of proof  
19 either before or after we argue the merits of the motion.  
20 But, you know, the people that we believe need to testify  
21 regarding this record are Judge Barbara Crawford, who was the  
22 convening authority in 2007, and who appointed you in 2007.

23 Our knowledge of the world, Your Honor, and our

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1 knowledge of -- collective knowledge of the military world,  
2 both in terms of the defense and people we have spoken to,  
3 tells us that this appointment didn't happen in a vacuum, that  
4 there were conversations prior to that, that there were  
5 conversations about what was expected, about how long the  
6 commissions would go on, about what the role of the chief  
7 judge would look like, and what the responsibilities would be.

8           There's also another important question that really  
9 needs to be addressed, Your Honor, and this is -- complicates  
10 all of this. This is why I referred to a failure of the  
11 bureaucracy.

12           It's not even clear that Judge Crawford had the  
13 authority to appoint you as chief judge. The 2006 Military  
14 Commissions Act regarded -- required the Secretary of Defense  
15 or his designee to appoint the judge. But the regulations  
16 saying that the convening authority could appoint the chief  
17 judge were not signed by the Secretary of Defense. As we  
18 drill down into it, they were signed by an Under Secretary of  
19 Defense who -- it's not clear what his authority was in all of  
20 this.

21           And, you know, this may be hypertechnical, but when  
22 you're creating a legal system out of whole cloth and Congress  
23 passes a statute that says things have to be done in a certain

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1 way, when the bureaucracy doesn't follow the congressional  
2 mandate, that becomes significant, because it may well affect  
3 the validity of the various steps along the way. And as -- it  
4 appears that that may well be the case here.

5           So the question is for Judge Crawford, had she  
6 received any written authority from the Secretary of Defense.  
7 In our FOIA request -- which perhaps should have included  
8 that, we think it was broad enough that it did include that --  
9 no such designation was provided. Now, you know, it's been  
10 six years, but again, this is a significant, significant  
11 issue.

12           With respect to Admiral MacDonald, that issue exists  
13 sort of on steroids, because by the time Admiral MacDonald --  
14 in 2010 when Admiral MacDonald wrote the letter which violates  
15 Article 26, by this time the 2009 Military Commissions Act had  
16 been passed. And so whatever the law was, and whatever the  
17 regulations may have been in 2006 in purporting to implement  
18 the 2006 law, by 2009 we're dealing with a completely  
19 different statute and that statute is completely clear as the  
20 2006 statute is. The Secretary of Defense or his designee  
21 shall appoint the chief judge. Nothing about the convening  
22 authority, and certainly, again, there is nothing suggesting  
23 that Admiral MacDonald had the authority to appoint you as

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1 chief judge.

2 Now, beyond those questions, which is serious,  
3 serious questions, you know, the military people I've spoken  
4 to certainly within the team, and outside the team, tell us  
5 that when people come to get a new position in the military,  
6 it's not like all of a sudden you get orders that say, okay,  
7 your next job is this, that generally at a certain level, at  
8 least according to the people I have spoken with, there are  
9 communications with whoever is responsible.

10 You know, Lieutenant Commander Reyes, before he  
11 left, there were numerous communications with his detailing  
12 people about would you be interested in going to school and  
13 all of that. So it wasn't like all of a sudden he got  
14 accepted into Harvard and then got his orders. This was a  
15 process, and I'm told that this is a process that is fairly  
16 typical.

17 So quite candidly, Your Honor, when -- 2010, when it  
18 came time for you to retire, common sense tells us that there  
19 had to have been conversations either with you or with people,  
20 do you want this job? You've served. You've served  
21 honorably. You know, lots of military officers, when it comes  
22 time to retire, move on. They move on to greener or different  
23 pastures. And so, you know, do you want this job? Here's

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1 what you may be getting into. Here's the situation.

2           And when we read the letter, Your Honor,  
3 Admiral MacDonald wrote, and we read it critically, with the  
4 anticipated renewal of commissions trials, his experience,  
5 both as a sitting judge in several commissions cases, and as  
6 chief judge, will be crucial to achieving a vibrant renewal of  
7 the trial process.

8           Now, I perhaps am wrong, but at least in our  
9 collective memory, and in the institutional memory of the  
10 Office of Chief Defense Counsel, we're aware of no prior  
11 commissions case, and there weren't very many in 2010 --  
12 Hamdan, I think, Bahlul, Hicks, maybe one or two others -- in  
13 which you had sat as judge.

14           That tells us, Your Honor, that it was contemplated  
15 by the convening authority in 2010 that the circumstances that  
16 exist here and that have existed since 2011 were contemplated  
17 in 2010, that you would be appointed as chief judge, and that  
18 you would then appoint yourself to one or more of the  
19 significant commissions cases that were about to be filed,  
20 which everyone perhaps knew were about to be filed in 2010.

21           And as we point out in our brief, that's significant  
22 because at least in 2010 the one case that everyone agreed was  
23 headed for a military commission was the Nashiri case. There

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1 was at least, to our knowledge, while he is an unindicted  
2 co-conspirator in the Southern District of New York, unlike  
3 the 9/11 case where the government had filed a sealed  
4 indictment against the five 9/11 co-conspirators, there was no  
5 such situation.

6           So we -- we believe that Admiral MacDonald should be  
7 called to testify to flesh out those conversations and to  
8 flesh out what he meant by that letter. Because under  
9 military law that letter is profoundly significant, and it is  
10 under the Mabe case, under Weiss, under Graf, the clearest  
11 influence of improper command influence. It is the convening  
12 authority undermining the Weiss doctrine by essentially  
13 appointing you as the judge in this case.

14           Now, similarly, we would need to hear from the  
15 present convening authority, Mr. -- and I may be  
16 mispronouncing this -- Oostburg Sanz. You know, he took over.  
17 You are on this year-to-year contract. Again, what  
18 communications are there? Do they call you every year, say do  
19 you want to be renewed? You know, are you happy in this? Is  
20 this something you want to do?

21           Do they send a similar letter to the people in the  
22 Army who are in charge of your status? We think he's doing a  
23 great job. He's the greatest thing since sliced bread. The

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1 world can't -- military commissions can't exist without him.  
2 Again, all of that would be tremendously significant to  
3 fleshing out the appearance of impropriety that just permeates  
4 all of this.

5           Lieutenant -- we need to hear from Lieutenant  
6 General Dana Chipman, who we are told and we know had to  
7 approve every transfer and every appointment from 2008 to  
8 2013. So General Chipman would have known and been  
9 instrumental in this process of appointing you as chief judge  
10 in 2007, the reappointment in 2010, and the -- perhaps the  
11 various other appointments and renewals of your contract along  
12 the way.

13           We don't know if he is your rating officer, or who  
14 is your rating officer. And, again, to what extent -- to the  
15 extent he may be, you know, what input did he get? When we  
16 discussed this the last time, and I -- I'll refer to this in a  
17 few minutes, of course, the question is does he receive calls?  
18 Does he receive calls from the convening authority? Does he  
19 receive letters from the convening authority? Does he receive  
20 calls from General Martins?

21           As you said last time, well, anybody can call  
22 anybody. That's true. But when some people do it, that is a  
23 violation of Article 26. And that is what certainly happened

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1 with Admiral MacDonald and may well -- we don't know what's  
2 going on since then.

3           And finally, Your Honor, we need to hear from  
4 Colonel David Diner, who -- Admiral MacDonald's letter,  
5 because of his position, would have been routed to Admiral --  
6 to Colonel Diner. And among the issues that affect Colonel  
7 Diner and Lieutenant General Chipman, Your Honor, is after the  
8 receipt of this letter and this request, did any military  
9 ethics boards -- did any military ethics advisors, were they  
10 consulted? Did this trouble anybody? Did anybody say, given  
11 the mandate of Article 26 as it exists in the Military  
12 Commissions Act, given this letter, is this a violation of the  
13 mandate? Is this a violation of the Mabe doctrine? Is this a  
14 violation of the Weiss doctrine? Is this a violation of the  
15 Graf doctrine? If this was considered and rejected, that  
16 would be important to know. If it wasn't considered, that  
17 would be important to know.

18           If people were just indifferent to it or didn't care  
19 because of the pressure to start the military commissions  
20 process, that would be important to know. All of these  
21 things, Your Honor, are important to know.

22           So I don't know if you -- I'm happy to proceed with  
23 the balance of the argument, or if you want to address this

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1 issue first.

2 MJ [COL POHL]: No, go to the -- if you want to -- I have  
3 read your briefs.

4 LDC [MR. KAMMEN]: Right.

5 MJ [COL POHL]: So if you wish to go ----

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

7 MJ [COL POHL]: ---- to the substantive argument, you can  
8 again, if you want to. Don't assume you're going to get -- I  
9 mean, assume both ways. You may win or lose. So on the  
10 production issue -- so if you wish to address the other  
11 argument, your request for oral argument on the substantive  
12 motion itself ----

13 LDC [MR. KAMMEN]: Yes.

14 MJ [COL POHL]: ---- then feel free to do it.

15 LDC [MR. KAMMEN]: Okay. Well, I don't want to belabor  
16 the point. The stand where there's a colorable appearance of  
17 impropriety under Carlucci, under Miller, under Connelly,  
18 recusal is mandatory.

19 And if you think about it, under normal  
20 circumstances, that makes a lot of sense. The appearance of  
21 impropriety -- I mean, the one thing we want, I think it's in  
22 Weiss, where the court said, you know, judges have to appear  
23 above this, have to -- like Caesar's wife.

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1           And in the federal system, of course, you know,  
2 federal judges, yeah, there's a question of where this might  
3 be improper. I've got lots of cases. I'll recuse myself. In  
4 the military system, that's the situation. Why have this  
5 fight?

6           Now, I don't know that anything's different in the  
7 commissions. There are other commissions judges. And so it  
8 would be -- I understand it would be disruptive, and I  
9 understand that, given everything, it would not be a good  
10 moment. But again, in the long term it would seem to me that  
11 given the preference for recusal when there is the type of  
12 conflict here and the type of command influence here, that  
13 recusal is mandatory.

14           Now, you know, in some respects the problem is  
15 complicated, but I've tried to simplify it as best I can. And  
16 as we see it, and I'll try not to repeat myself too much, the  
17 problem is multifaceted and comes down to essentially three  
18 simple points.

19           First, the question is: Did the convening authority  
20 ever have the authority to appoint you as chief judge or  
21 retain you as chief judge? That's a profoundly important  
22 question, because it really goes to, in many respects, the  
23 vitality and validity of this whole process. If by -- in

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1 their efforts to get this process moving they didn't dot the  
2 I's and cross the T's, they didn't follow the law ----

3 MJ [COL POHL]: Mr. Kammen, is that part of the recusal  
4 motion or is that something else altogether?

5 LDC [MR. KAMMEN]: We think it's part of the recusal  
6 motion in this case. Perhaps if you don't recuse, to make the  
7 record clear, we may have to visit it in another context, but  
8 we think it's part of it in this case.

9 MJ [COL POHL]: Okay.

10 LDC [MR. KAMMEN]: The second, of course -- the second  
11 issue is that the convening authority violated Article 26 by  
12 writing the letter that is Exhibit A in our motion. Because  
13 by any fair standard that is a comment on your fitness, and  
14 using the language of Article 26. And to talk about how  
15 critical you were to the resumption of the military  
16 commissions and the resumption of the trial process, and, as I  
17 said, by, you know, saying, well, you can serve on -- as chief  
18 judge and on commissions cases, when again the only case that  
19 was really in the pipeline at that time was the Nashiri case,  
20 and possibly the 9/11 case, and given the impact of  
21 retirement/recall status. All of that is profoundly  
22 important.

23 And, again, the final thing, Your Honor, and I think

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1 this is part of the reason that in the federal system another  
2 judge would hear this, because there's just no way to make  
3 this not difficult, is the failure by the prosecution, by the  
4 convening authority, and quite candidly, Your Honor, to  
5 disclose the letter that Admiral MacDonald wrote, and there  
6 was ample opportunity for that to have been disclosed well  
7 prior to that being discovered through the FOIA request.

8           Each of us in the legal system at times have an  
9 obligation of full and complete disclosure. Certainly lawyers  
10 have an obligation at times to say to a client, before you  
11 hire me, before I become involved in your case, you need to be  
12 aware that I have this relationship and this relationship  
13 should be -- could be a conflict, might be a conflict, is a  
14 conflict. Some conflicts can't be waived. Some conflicts are  
15 so powerful that the lawyer has to say to the client, I'm  
16 sorry, I can't serve.

17           Now, I'm struck by the difference, and, if I may, a  
18 week ago I appeared in federal court in Indiana. A client was  
19 being sentenced on a drug case. Prosecutor and I were there.  
20 The client was there. He was in custody. Ten minutes before  
21 the proceeding is supposed to begin, the judge's clerk says,  
22 the judge would like to see you in chambers.

23           And the judge said, look, I've been reviewing your

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1 client's presentence report. I think that 25 years ago I may  
2 have represented your client's father. I'm not sure. Might  
3 be a different guy, but there's facts in the presentence  
4 report that make me believe that this was your client's  
5 father, and I want to -- if I did, it was on a criminal case,  
6 and as I recall, the person I represented was a guy who was in  
7 and out of jail a fair amount.

8           So I wanted everyone to have that information. So  
9 government, if that is a problem for you, I'll step aside.  
10 Defense, if that's a problem for you, I'll step aside. You  
11 know, we -- I spoke to the government, said no, it's not a  
12 problem. I spoke to my client. Yes, it was his father. No,  
13 it was not a problem. Are you sure? Yes. You know, once the  
14 judge sentences you, it's too late. Not a problem.

15           You know, that's the way it's supposed to work, and  
16 that's the way it typically works in my experience, certainly  
17 in federal court, certainly in state court, and I am told by  
18 the military lawyers in the typical military courtroom, that  
19 would occur.

20           Now, back when Mr. Nashiri was arraigned, we can  
21 only speculate in what way the arraignment would have been  
22 different, and the voir dire would have been different, had we  
23 known at that time about the letter from the convening

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1 authority to -- requesting your appointment. That would  
2 certainly have been something we would have questioned about.  
3 And had we not questioned about it and, you know, if it was  
4 out there and we sit silent, then of course at some point  
5 there is a waiver. Because once it's out there and -- it's  
6 like the federal judge in Indiana, once he says, look, here's  
7 the situation, if you go -- you know, he didn't say this, but  
8 everyone knew -- if you go ahead, you can't complain if you  
9 don't like the sentence later on.

10           You know, a year ago when we raised this issue in a  
11 much more -- less focused way, again, the prosecutor had the  
12 opportunity to say, look, defense, just so we're all playing  
13 with the same information, here's this letter written on  
14 behalf of Judge Pohl. The convening authority knows what's  
15 going on. They could have advised us, and, of course, you  
16 could have advised us.

17           But instead we had a rather lengthy argument, a  
18 rather -- in some circumstances almost a heated exchange  
19 between you and I over some issues, and yet this was never  
20 mentioned. And quite candidly, Your Honor, it was and would  
21 have been huge. And, you know, we said, well, we had  
22 additional voir dire and you said, well, no voir dire is going  
23 to be allowed. You had your shot. You had your shot at the

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1 arraignment.

2 Well, at that point, of course, we didn't have these  
3 new facts. We only knew the broad outlines. We didn't know  
4 the effect to which the convening authority had intervened in  
5 this process, and so it had a greater presumption, if you  
6 will, of regularity than it does now.

7 But, you know, there is the one colloquy again  
8 that -- between you and I, when you said, look, we don't know,  
9 again, who rates, you know, whether General Martins calls your  
10 superiors and, you know, who -- you know, this was in the  
11 context in the military framework, as I said at the time, and  
12 the civilian area takes on a different tone, so I don't mean  
13 it pejoratively. In the military context, we are told  
14 everybody is owned by or is in some unit, and so we asked the  
15 question essentially who owns you, and the response we got was  
16 really rather obfuscating. It wasn't I'm part of the Second  
17 Circuit or the Fourth Circuit or this or that. It was the  
18 Department of Defense.

19 Well, who in the Department of Defense? That's a  
20 big organization. And then it became -- there was no clear  
21 answer. And when we said, well, you know, how do we know  
22 General Martins isn't calling and giving -- giving this -- you  
23 know, he's great, he's not so great, we liked this ruling, we

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1 didn't like this ruling. If you decide to retain him, you  
2 need this information, and your response was, well, anyone can  
3 call anybody.

4 Well, that's not completely true, Your Honor. I  
5 can't call -- I mean, I can call Mr. Oostburg Sanz. He's not  
6 going to return my call. I can call Judge Crawford. She's  
7 not going to return my call. Anyone can place a call, but the  
8 question is, can you complete the call? And we don't know  
9 whether or not these letters are an ongoing process, whether  
10 every year there is a letter from the convening authority to  
11 whoever, essentially saying thumbs up or thumbs down on the  
12 renewal of the contract.

13 And, again, had this letter been disclosed by any of  
14 the people who could have disclosed it, well, then events at  
15 the arraignment and events a year ago play out. But whether  
16 people didn't think it was important, whether people forgot  
17 about it, whether or not it was just a calculated decision --  
18 well, hopefully the defense will never find out about it. A  
19 decision was made, and it was kept secret, and not discovered  
20 through disclosure, the kind of disclosure that the Mabe court  
21 tells us is expected of military judges, but rather through a  
22 FOIA request, and quite candidly, Your Honor, this failure of  
23 disclosure really permeates everything.

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1           The Mabe case talks about a very similar situation  
2 where what is this the military call to serve, this personal  
3 sense of justice, and I'm misstating the language. But, of  
4 course, in Mabe there was communications from a superior to a  
5 subordinate judge basically complaining about -- sort of  
6 saying, look, people in this area, commanders in this area are  
7 complaining about your sentences. Wildly inappropriate.

8           And the judge in that -- and the Mabe court said  
9 this is an absolutely improper command influence. But what  
10 the judge did there was make immediate disclosure. He made  
11 immediate disclosure to the other judges. He made immediate  
12 disclosure to every litigant who appeared in front of him so  
13 that everybody could know, and litigants could choose, you  
14 know, given that, yes, I agree to go ahead. Given that, with  
15 all respect, we'd rather have somebody else. But it was the  
16 complete disclosure that -- I'm looking for the right word --  
17 that worked against Mabe ultimately because they said, yes,  
18 there's unlawful command influence. It is horrible, but it  
19 was mollified, if you will, by the disclosure. Different  
20 circumstances here.

21           Now, the second issue, of course, is -- and we  
22 touched on this -- is, again, whether or not the convening  
23 authority had the authority to appoint you as chief judge and

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1 to reappoint you. And the starting point of this discussion,  
2 Your Honor, really is the Weiss case out of the U.S. Supreme  
3 Court.

4           At its core in Weiss, the entire military justice  
5 system was being challenged because there was a question about  
6 to what extent military judges were independent of the  
7 command. And, of course, historically, up until 1968,  
8 military judges were not independent of the command. The  
9 military judges were essentially beholden to the command. You  
10 know, as it was described, and I've read, prior to 1968, you  
11 know, the convening authority appointed the judge, the  
12 convening authority appointed the jury, the only person who --  
13 the only lawyer, if the judge wasn't a lawyer, and he didn't  
14 have to be, the law officer, so there might be a prosecutor,  
15 and the defendant, for his lawyer, might -- you know, might  
16 have a lawyer, might have a supply clerk. You just didn't  
17 know.

18           Well, that was all changed in '68 and changed by the  
19 revisions to the court-martial system, but even then there was  
20 this question. And in Weiss the Supreme Court said that the  
21 military justice system was acceptable, and one of the reasons  
22 it was acceptable in the context of the military need was that  
23 the judge was not appointed by or beholden to the convening

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1 authority.

2           And the court in Weiss focused on Mabe and Graf, the  
3 cases that had been decided, and also focused on the fact that  
4 the military appellate courts, the Court of Appeals for the  
5 Armed Forces, was aggressively, as evidenced by Mabe and Graf  
6 and Mitchell, protecting the independence of the judge.

7           Of course, here we have no -- this doesn't go to the  
8 military -- the Court of Appeals for the Armed Forces, this  
9 goes to a new court with -- how do we say this politely -- a  
10 rather checkered track record in the few cases it's handled,  
11 the court of military commissions review. So they've taken  
12 the check, if you will, out of the system to this other court.  
13 But when Congress passed the military commissions Act in 2006,  
14 and this is significant, it replicated Article 26 with the  
15 only -- with hardly -- with no meaningful distinction.

16           Now, one of the ongoing battles we have throughout  
17 this that we have when we were here in February that I'm sure  
18 we'll have as this all unfolds, is the statute says one thing,  
19 and at least the statute appears that Congress tried to get  
20 this right. They wanted Article 26. They wanted the  
21 convening authority out of the judge selection business. They  
22 wanted the defendant to have the right of subpoena power.  
23 They wanted the defendant to have the same access to resources

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1 without having to fight with the prosecutors. That's what --  
2 and we've had this fight in a number of different contexts.

3           And so the statute says one thing, but then the  
4 regulations -- the bureaucracy attempts to claw those back,  
5 claw those rights back. And that's what happened in 2006 and  
6 '07. The statute says the chief judge is appointed by the  
7 Secretary of Defense or his designee. The regulations -- and,  
8 again, not signed by the Secretary of Defense -- say, well,  
9 the chief judge will be appointed by the convening authority.

10           Now, Congress knew the difference. Congress could  
11 have said that itself but it didn't. And that is significant,  
12 because essentially in that clawback what the -- what the  
13 military was doing by regulation was abrogating Weiss and  
14 going back to the 1968 system where the convening authority is  
15 now picking the judge, and that is the problem here. But the  
16 regulations in our view can't trump the statute, and the  
17 statute clearly did not give the convening authority to  
18 appoint the chief judge without the designation. And, again,  
19 we don't believe any such designation exists.

20           As I said earlier, in the 2009 act, it was a  
21 wholesale change because of the huge deficiencies in the 2006  
22 iteration of the military commissions. And, again, Congress  
23 tried to get it right, tried to improve it, did improve it

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1 perhaps in some respects. Somebody like me couldn't have been  
2 here in 2006. But the regulations, again, worked to try to  
3 claw that back.

4 Well, they didn't really -- they didn't really -- I  
5 don't think there are any regulations now that would allow the  
6 convening authority to do what he did. And of course, you  
7 know, the prosecutors, in their response, talk about the 2007  
8 regulations without sort of recognizing that those are 2007  
9 regulations that were effectively abrogated by the 2009  
10 statute.

11 So in 2010 when Admiral MacDonald is writing the  
12 letter that is a violation of Article 26, completely and  
13 wildly improper. And as I said, according to Mabe and Graf  
14 and Mitchell and the other cases, the third rail of military  
15 justice, unlawful command influence.

16 Now, so the record -- I mean, I think the record is  
17 clear, but it needs to be said, in my opinion, the convening  
18 authority has this prosecutorial function. He's the guy who  
19 decides, yes, the charges should be -- move ahead, and, most  
20 importantly, yes, the case should be a death penalty case.

21 Now, not getting into hyperbole, he is the guy who  
22 opens the death factory. And he's appointing you, and making  
23 it clear as can be to the bureaucracy, I want this guy. I

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1 want this guy for this case that's going to be coming up soon.  
2 In fact, he's the only guy I want. Nothing could be clearer  
3 than that's what was going on. And, again, it's clearly  
4 contemplated not only that you will be the chief judge, but  
5 that you will then appoint yourself to one or more of the  
6 major commissions cases.

7           Now, again, I don't want to belabor the point of  
8 your year-to-year status, but last week Commander Mizer and I  
9 spoke to a law school class at Yale University. The professor  
10 is Professor Eugene Fidell, who I've come to understand is  
11 really one of the major scholars of military justice, and, in  
12 fact, many of the cases that I've cited were cases on which he  
13 was counsel.

14           And as Professor Fidell calls it, you know, your  
15 year-to-year contract is what is known, at least in some  
16 places in the military, as a one-year leash. His words. And  
17 that's the perception, and the reality is, Your Honor, that  
18 the criticism, of course, of military justice sometimes is  
19 that judges aren't tenured. That military judges aren't  
20 tenured in the way federal judges are, even state judges may  
21 serve from election to election, and that carries a host of  
22 problems. The military judges aren't tenured.

23           But, of course, your situation is even more

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1 precarious, and as judge -- as Professor Fidell points out, by  
2 international law standards, the notion of an untenured judge  
3 who serves on a one-year contract doesn't even begin to  
4 measure up to international law standards, and frankly, we  
5 don't believe it measures up to any standards in any American  
6 court, military or civilian.

7           You know, all of this is important, Your Honor,  
8 because, as the court said in *United States v. Lewis* at 63 MJ  
9 405, neither the government nor the defense in a court-martial  
10 is vested with the power to detail or select military -- the  
11 judge. And yet in *Fernandez*, of course, the military justice  
12 system -- and the military courts said that what we all know  
13 is that in referring a case for trial, a convening authority  
14 functioning -- and certainly in requesting death, a convening  
15 authority is functioning as a prosecutor. All of this, at a  
16 minimum, is about perception. And I don't know that it's  
17 coming as any surprise to say that increasingly the military  
18 commissions appear to the public to be extraordinarily  
19 damaged.

20           Again, as I recognize the events of the last week in  
21 another case are different in some respects than what we're  
22 arguing today. But in response to what occurred last week,  
23 Professor Fidell was quoted in *The New York Times* as saying

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1 essentially it appears there are three benches here, and this  
2 is a quote from Professor Fidell: There's the person  
3 pretending to be the judge on the bench, and then the folks  
4 behind the scenes, who are really calling the shots. The  
5 public perception, with all respect, Your Honor, is that this  
6 is not an independent military judiciary in this court.

7           And part of the public perception, Your Honor, is  
8 the letter that was written by Admiral MacDonald. It is  
9 without a doubt, and by any standard of discussion, a report  
10 on your fitness, as prohibited by Article 26, and the Mabe and  
11 Mitchell case and Graf make it clear that that is the case.  
12 And the prosecution's attempts to characterize this as benign  
13 or just administrative stuff is frivolous.

14           And as I work towards the closing, Your Honor,  
15 supervising judge and particularly a chief judge -- this is  
16 language from Mabe -- cannot preserve the integrity and  
17 independence of the judiciary as he is preserved -- perceived  
18 to be a conduit for commanders.

19           Recusal is warranted if impartiality may be  
20 reasonably questioned, and as Mabe talks about the failure of  
21 disclosure bears heavily on that. It took a FOIA request,  
22 Your Honor, for us to determine that the convening authority  
23 was touching the third rail of military justice rather than

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1 the prosecutor or the convening authority or the commission  
2 telling us what was going on.

3 And so there are serious questions that need to be  
4 answered. We think the safest course -- we understand it is  
5 disruptive. We understand that in the short run people will  
6 see this as they're -- you know, another failure of military  
7 commission, but we think recusal, under military law, under  
8 federal law, under international law, is mandatory.

9 If you believe it is not, then we believe, at a  
10 minimum, we should -- we should have the right to present the  
11 witnesses and evidence that we have requested.

12 If I may have just one moment, Your Honor.

13 I don't have anything else.

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

15 Trial Counsel?

16 TC [CDR LOCKHART]: Good morning, Your Honor.

17 MJ [COL POHL]: Good morning.

18 TC [CDR LOCKHART]: Not only is recusal not necessary  
19 here, it's not appropriate. I'd like to sort of focus back  
20 onto the motion because I think Mr. Kammen sort of went into  
21 50 different directions on 50 different topics.

22 There's two different things that I'd like to  
23 discuss first that he brought up that are sort of tangential

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1 to this motion, but I think is worth speaking about.

2           The first is this notion having to do with witness  
3 production somehow being different in federal court. And  
4 while the procedure may be different, i.e., in federal court,  
5 a subpoena is issued, and then the person getting the subpoena  
6 has the ability to do a motion to quash, and in military  
7 commissions, the defense requests the witness from the  
8 government. In the end, the same decision is made, which is  
9 the judge, albeit a federal judge or a military commissions  
10 judge or a military court-martial judge, makes the  
11 determination whether or not that witness is relevant and  
12 necessary for whatever matter happens to be before the  
13 commission.

14           So I would take note that while, yes, there's some  
15 procedural differences, the end result is the guy in the robe  
16 or the gal in the robe is making the call, and that is no  
17 different whether it be in a military commissions, a federal  
18 court, or a military court-martial. And I say that because  
19 it's important when we talk about the motion to suppress.

20           The second issue that I think is important in  
21 addressing is this notion that this document was somehow kept  
22 from the defense. Nothing could be further from the truth.

23           One, the defense never asked for anything on this.

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1 It is not apparently relevant in the fact that this is a  
2 purely administrative document, which if the defense had taken  
3 five minutes to call the chief of personnel plans and training  
4 office, could have discovered that these routinely come in for  
5 individuals that are asked to be placed on a recall or  
6 retiree -- retired recall status. There's a form that they  
7 have to follow, and that is all standardized.

8           So the defense has the rules. They've clearly read  
9 them. It says the Secretary of Defense or his designee can  
10 appoint the chief judge, and there's nothing that has been  
11 magically withheld. This information has always been out  
12 there.

13           Now, I'd like to focus very quickly on what the  
14 point of this motion is. We've already litigated this. We  
15 spent several hours litigating this two or three sessions ago.  
16 Actually, probably more than that, as it's AE 084. There's  
17 nothing new.

18           This is a supplement to the defense's original  
19 motion which Your Honor already ruled upon, and the status and  
20 the question to be asked is whether there's actual impropriety  
21 or conflict, or whether there's an appearance of. That  
22 question has been asked. It has been answered and it has been  
23 looked at in detail. This letter, which is again an

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1 administrative request that has to be made in order for  
2 somebody to be placed on a retired recall status is the only  
3 bit of new information. And yet the defense is requesting  
4 evidence, not even discovery, but evidence to be put forth  
5 before Your Honor which includes the OERs and the officer  
6 record briefs based solely on this document. The defense is  
7 also requesting witnesses -- I think there's five or six --  
8 five that would testify again to this same matter.

9           What's important about the motion for production of  
10 witnesses -- and, again, if we talk about, again, that Your  
11 Honor is the one making the decision on whether these  
12 witnesses are relevant or necessary is, by the defense's own  
13 admission, they don't know what these witnesses are going to  
14 say. And if you look at their brief, and they give the very  
15 brief proffer, none of that information is relevant to the  
16 determination that needs to be made in the supplement for  
17 AE 084. Government would assert that it wasn't -- wouldn't  
18 have been relevant prior to in the original 084, but it's  
19 certainly not relevant to the supplement.

20           They -- the defense continues to say they'd like to  
21 ask and find out about communications. That's not the purpose  
22 of this hearing. This is not a discovery session. It's not  
23 the ability to put somebody under oath and ask them whatever

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1 questions they want. The purpose of this is -- and the  
2 defense fails to follow this in almost every witness  
3 request -- is they have to give an actual proffer that they  
4 believe to be true or they believe that a witness will say in  
5 order to satisfy their burden of relevant and necessary for  
6 the purpose of hearing testimony.

7 The defense has alleged in several briefs that they  
8 have the right to make a record, and they certainly do, and  
9 it's called written pleadings.

10 They have the ability to put whatever information  
11 that they believe serves as a factual background in their  
12 written pleadings. If they fail to do so, that's on them.  
13 They don't then get to call witnesses in order to do that.

14 They also don't then get to stand up here orally and  
15 proffer what each witness would say. That is not the purpose  
16 of this hearing.

17 I would like to say as well that Mr. Kammen  
18 continued to refer to this appearance of impropriety. It's  
19 very clear when reading their briefs and reading this new  
20 document that is a supplement, there is no appearance of  
21 impropriety. Mr. Kammen comments that the general public sees  
22 these hearings as -- as damaged. There's absolutely no  
23 evidence of that before this commission. And what we have is

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1 a military judge who has ruled for the defense and for the  
2 government, against the defense and against the government.  
3 We've gotten rulings that go both ways, witnesses and  
4 resources, that have been granted.

5           It appears as though the argument is actually one  
6 more of a systemic challenge, not particular to Your Honor,  
7 but more of the way that the system is set up, it can't be  
8 impartial. The way the system is set up, that there is always  
9 going to be this appearance of impropriety. And I would  
10 assert to Your Honor that has been litigated with the UCI  
11 motion that was filed both twice -- earlier and one last  
12 session -- that talks about the set-up of the convening  
13 authority. The defense has brought not one shred of evidence  
14 to show any biased conflict or impropriety on Your Honor's  
15 behalf.

16           One second, Your Honor.

17           MJ [COL POHL]: Sure.

18           TC [CDR LOCKHART]: And, Your Honor, I will just close  
19 with that -- this -- this has been extensively briefed twice.  
20 We would rest on our briefs on the remainder of the argument.

21           Thank you, Your Honor.

22           MJ [COL POHL]: Mr. Kammen, anything further?

23           LDC [MR. KAMMEN]: I just think the -- I don't want to

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1 get, you know, bogged down in the lack of subpoena power,  
2 because it is completely different. The prosecution says,  
3 well, they don't give us a written proffer. You know -- and I  
4 mean, that's, of course, part of the problem is sometimes  
5 witnesses won't talk to you, and you subpoena them to court  
6 anyway. And so it's this whack-a-mole theory of law that the  
7 prosecution uses that if you don't know what the people who  
8 won't talk to you will say, then you can't get at the truth.

9           These people don't return our calls, Your Honor.  
10 They're not interested in talking to the defense. And so in a  
11 federal court if a witness were to -- in a similar situation,  
12 if you had this in a federal court and I subpoenaed  
13 Admiral MacDonald and Admiral MacDonald came in to a federal  
14 judge and said, sure, I was part of this, sure, I wrote this  
15 letter, but I don't -- my testimony is not relevant, that  
16 wouldn't pass the straight-face test. Of course it's  
17 relevant. It may not be what they want to hear. It may not  
18 be what will help them, but nobody can doubt that the people  
19 who appointed you to these positions have relevant information  
20 about that process.

21           Nobody can doubt that the guy who writes the letter  
22 saying I want Judge Pohl to preside as chief judge on these  
23 upcoming trials -- nobody can say he doesn't have relevant

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1 information. And the fact that we can't tell the tittle and  
2 jot of what he's going to say doesn't make his testimony less  
3 relevant.

4           And so when they say it's the same, that's nonsense.  
5 It's not the same. And that comes back to the clawback.  
6 Congress suggested in the Military Commissions Act that the  
7 access to the witnesses be the same. It's this whole -- going  
8 through the prosecutor is the regulations. The fact that we  
9 can't bring witnesses here is the regulations. It's not the  
10 statute. And, again, they say, well, we don't know what  
11 the -- we can't tell you what these records will show.  
12 Because we don't have subpoena power, we can't subpoena  
13 records.

14           In federal court, we could send a subpoena duces  
15 tecum to whoever and get all of the records. We don't have to  
16 go through the prosecutor. And if we sent a letter to the  
17 convening authority -- subpoena duces tecum to the convening  
18 authority, give us everything, they file a motion to quash,  
19 and -- you know, and maybe -- and the judge probably says give  
20 them everything. Not what happens here where we have to go  
21 through them and they say, well, you don't know what's in the  
22 records so what you want is not relevant.

23           It's the same -- I mean, you know, it is the same

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1 fight over and over again. I don't know in what world a  
2 letter saying to Colonel Diner, we need this guy to serve as  
3 chief judge and as judge on the commissions is some kind of  
4 standardized form. It doesn't look like a standardized form  
5 to me. We want him put on retired recall status with the  
6 benefits and obligations that brings because he's good for us,  
7 because we want to kill Nashiri, and we're about to open the  
8 death factory, and this guy is instrumental to it, and we want  
9 him. That's what that letter is.

10           And for them to characterize it as administrative --  
11 in Mabe they tried to characterize those as administrative,  
12 and the Mabe court rejected that, said this isn't  
13 administrative. This is unlawful command influence. And  
14 maybe it's not intentional and maybe people were acting in  
15 good faith, but it still has this appearance of impropriety.  
16 And in Mabe it was mollified by disclosure and here it was  
17 not.

18           Now, they say that's the only bit of new information  
19 is that 2010 letter. We don't know that's all that's out  
20 there. That's all we've been able to find. That's all that's  
21 been produced in a FOIA request. We don't know if we had  
22 subpoena power what would be produced.

23           And so they haven't -- you know, they -- if they've

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1 done that analysis, they certainly haven't shared it with us,  
2 and I think they would be obligated to do so. So my guess is  
3 that neither of us know what else is out there.

4 Now, again, and I don't -- somehow we are  
5 ineffective because we can't make the proper showing, and, you  
6 know, there are a lot of reasons why, and we've dealt with  
7 them, why we're ineffective. Some of them are systemic. Some  
8 of them are the lack of resources. Some of them are this  
9 procedure where we can't show what we don't know and because  
10 we don't know it, we can't show it. But I'll leave that for  
11 future courts to decide.

12 On one hand, Your Honor, the prosecutor is right,  
13 and on one hand, quite candidly, she is wrong. To the extent  
14 that we challenge the systemic -- the question -- the problems  
15 in 2007 and 2008 and 2009 and the claw-backs, that is  
16 systemic. That's absolutely correct.

17 That is a systemic challenge. Because if this -- if  
18 Judge Crawford didn't have the authority to appoint you, if  
19 they got it wrong from the very beginning when they tried to  
20 create this system, so be it. That's something that needs to  
21 be exposed to the light of day.

22 If Admiral MacDonald didn't have the authority to  
23 name you as chief judge and everyone was just in a hurry as

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1 they were creating this new system, so be it. That needs to  
2 be exposed to the light of day. And if it turns out that this  
3 system was built on a foundation of not sand but quicksand,  
4 that's because they were trying to create a new system, a  
5 system that, in our view, is -- well, I think we know what --  
6 how we feel about all of this.

7 But, Your Honor -- and we've had this discussion,  
8 and it's been an ongoing discussion. And the problem, Your  
9 Honor, is that at the end of the day, you know, since the very  
10 beginning of this commission there has been this tension  
11 between the statute and the convening authority and how we get  
12 resources.

13 And I don't want to revisit that other than to say  
14 she says, well, you know, what does this all have to do with  
15 Judge Pohl. Well, if we look at 114 where you ruled about  
16 resources, and that ruling didn't last one iteration of a  
17 resource request, it was never -- there was never an order  
18 saying disregard my prior order, it was just -- well, we got  
19 rulings saying disregard my prior order because we're going  
20 back to the old way.

21 Well, again, the convening -- you know, this has  
22 been a big -- an ongoing battle between us and the convening  
23 authority as a result of the clawback. And so when orders are

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1 written and then, you know, they're -- you just have to ask  
2 some difficult questions.

3           You know, it comes down to this. It really comes  
4 down to this. We can forge ahead. We can have a trial in  
5 December. You can sit as the judge. At some point somebody's  
6 going to look at this and say, man, that letter just was  
7 beyond what is appropriate and the wiser course would have  
8 been for the judge to recuse himself.

9           And because we don't have confidence in this system,  
10 we have to reverse this case. Or caution and discretion can  
11 be the better part of valor. There can be this momentary  
12 disruption and the momentary whatever, but at least this  
13 problem can be behind us, and us being the military  
14 commissions process, and this process -- this -- somebody who  
15 is not burdened, who is not appointed by the convening  
16 authority, who is not appointed by the person, who is not  
17 lobbied for by the person, who wants to kill Nashiri, can be  
18 the judge.

19           In any military court, Your Honor, and I'm told, and  
20 in any federal court I am certain, recusal would be the  
21 mandatory and preferred course. And nothing's different here.

22           Thank you.

23           MJ [COL POHL]: Commander Lockhart, last word.

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1 TC [CDR LOCKHART]: No, sir. Thank you.

2 MJ [COL POHL]: Commission believes the record speaks for  
3 itself. The defense motion for production of witnesses and  
4 other evidence is denied. The defense motion for the judge to  
5 recuse and/or disqualify himself is also denied. A written  
6 ruling to that effect will be issued in due course.

7 What's next motion you want to address? Or do you  
8 want to take a break?

9 TC [CDR LOCKHART]: That would be great, sir.

10 MJ [COL POHL]: Okay. Just beforehand, I got --  
11 everybody's got the docketing order of kind of a list. I  
12 don't know whether you want to put 205 a little further ahead  
13 because there's a witness issue with that, so I just throw it  
14 out to you. Talk to each other. I'm flexible for whatever  
15 order you want.

16 TC [CDR LOCKHART]: We need to have a 505(h) on that  
17 particular witness.

18 MJ [COL POHL]: On that witness. Okay.

19 TC [CDR LOCKHART]: But Wednesday or Thursday works fine.

20 MJ [COL POHL]: Let's do this, we'll go with the  
21 nonclassified. We'll just pick up wherever we are at. And  
22 then today at the end, let's do an 802 -- or let's do an 802  
23 at lunch, and we can kind of go through the order of

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1 scheduling and things like that, okay?

2 TC [CDR LOCKHART]: Yes, sir.

3 MJ [COL POHL]: Commission is in recess for 15 minutes.

4 [The Military Commission recessed at 1024, 22 April 2014.]

5 [END OF PAGE]

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