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1 [The Military Commission was called to order at 1048, 22 April
2 2014.]

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

6 Just for the way ahead, what we'll do is we'll go
7 for about another hour. We'll break a little bit early for
8 lunch, because then we'll do the 802 and it will give time for
9 people to have lunch and then we'll continue back up about
10 1300.

11 LDC [MR. KAMMEN]: If I may, Your Honor?

12 MJ [COL POHL]: Mr. Kammen.

13 LDC [MR. KAMMEN]: I don't want to belabor this, because
14 hopefully the issue is diffused, but as so often happens
15 when -- I don't know if there's a new group, but we are
16 confronted here in the courtroom with ever-changing rules
17 about Mr. Nashiri. Of course, as the commission is aware,
18 Mr. Nashiri has been coming to court without any incidents
19 since the beginning.

20 At the recess he and I and one of the other lawyers
21 and the interpreter were having a conversation. He was
22 standing, as he has done on numerous occasions. For some
23 reason, there is an undisclosed rule of where he can stand,

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1 but we never knew about it. It almost became a confrontation.
2 It's been diffused. We're not going to ask for your
3 assistance at this time because I think it's resolved
4 administratively, but we did want to at least ----

5 MJ [COL POHL]: Okay. Mr. Kammen, understand there's
6 competing concerns here.

7 LDC [MR. KAMMEN]: Right.

8 MJ [COL POHL]: You have yours.

9 LDC [MR. KAMMEN]: And we're sensitive to those.

10 MJ [COL POHL]: And the guard force has theirs, but I
11 agree with you, that you should at least know what the rules
12 are.

13 LDC [MR. KAMMEN]: Right.

14 MJ [COL POHL]: And understand, the guard force comes and
15 goes. I assume that everybody does everything in good faith
16 until I see to the contrary.

17 LDC [MR. KAMMEN]: I agree. We all understand the
18 dynamics. We have said to everybody, anything we can do to
19 assist you, because we don't want any issues. That's always
20 worked. I think it will work again. But this was of a
21 different magnitude, so I just wanted to put it out there.

22 Thank you.

23 MJ [COL POHL]: All right. Okay.

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1 Which motion would you like to address next?

2 LDC [MR. KAMMEN]: We can do 092.

3 MJ [COL POHL]: 092.

4 LDC [MR. KAMMEN]: We should be very quick.

5 Your Honor, 092 is a secret motion, and we
6 understand that, and we do not intend to in any manner discuss
7 any substance. In the motion before the court, we ask that
8 the government be ordered to provide an unclassified version
9 of 092 that would be releasable to Mr. Nashiri so he could be
10 a full participant in these proceedings.

11 In many ways, Your Honor, this implicates the same
12 values that the commission has under consideration in 181, in
13 which the prosecution takes the position that, by their
14 estimation, 14 percent of the evidence that they regard as
15 necessary and material to the defense cannot be read by or
16 discussed with or shared with or counselled with Mr. Nashiri.

17 And recognizing the fact on the ground of 092's
18 classification we do believe that there is a way in which the
19 government could create an unclassified version that we could
20 discuss with him in order to facilitate his defense, and in
21 order to -- in order to begin to facilitate his defense.

22 The ongoing concern here is that there's two
23 universes of evidence. There's the universe of evidence he's

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1 allowed to see, which -- and then the hugely important
2 universe of evidence he's not allowed to see. And that
3 hugely -- that huge universe of evidence he's not allowed to
4 see renders us ineffective. And so we have to address that at
5 every available opportunity.

6 MJ [COL POHL]: Okay.

7 LDC [MR. KAMMEN]: And that is our concern on this issue,
8 Your Honor.

9 MJ [COL POHL]: Trial Counsel.

10 TC [CDR LOCKHART]: Just very briefly, Your Honor.

11 The issue of whether or not the accused can receive
12 classified information has been litigated in AE 181 to which
13 Your Honor has already issued a ruling. The government
14 submits and did submit in its written briefs that there's no
15 practical way to make this pleading unclassified or releasable
16 to the accused. And other than that, we would rest on our
17 briefs. Thanks.

18 MJ [COL POHL]: Okay. Commander, before you run off, the
19 current state of play of 092 is it's not been given to the
20 defense at this time, correct?

21 TC [CDR LOCKHART]: Correct, sir.

22 MJ [COL POHL]: Okay. And ----

23 TC [CDR LOCKHART]: We've not.

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1 MJ [COL POHL]: ---- we've discussed that in another
2 forum. We don't need to go into that. Okay.

3 TC [CDR LOCKHART]: The defense has -- you're not
4 talking -- are you talking about the motion or the end result?

5 MJ [COL POHL]: The end result.

6 TC [CDR LOCKHART]: Okay. Understood, sir. Correct.

7 MJ [COL POHL]: Okay. Okay.

8 Once they see the end result -- okay.

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

10 MJ [COL POHL]: I got it.

11 LDC [MR. KAMMEN]: I'm beginning to think that this is yet
12 another example of our ineffectiveness. Has the court ruled
13 on 181? Because I don't recall receiving such a ruling.

14 MJ [COL POHL]: I don't believe I have.

15 LDC [MR. KAMMEN]: Well, that's why we were stunned when
16 the ----

17 TC [CDR LOCKHART]: Your Honor, I messed up.

18 MJ [COL POHL]: I have been told I haven't, but -- by
19 people who know, so ----

20 LDC [MR. KAMMEN]: My heart's beating again, because
21 that's a very important motion to us.

22 MJ [COL POHL]: No.

23 LDC [MR. KAMMEN]: And if you had ruled on it and we

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1 hadn't seen it, then ----

2 MJ [COL POHL]: Okay. Yeah. Okay. I got your position
3 on 092. I mean, I got it. I understand.

4 LDC [MR. KAMMEN]: I'm glad one of us does, because based
5 on your colloquy with Trial Counsel ----

6 MJ [COL POHL]: If we need to revisit it in a 505(h)
7 hearing, we can, but I think as things evolve, we'll see where
8 this goes.

9 I'm just very concerned about where you slide into
10 classified areas.

11 LDC [MR. KAMMEN]: I understand.

12 TC [CDR LOCKHART]: Sir, I apologize. I misspoke. I was
13 referring to the motion which had to do with the presence of
14 the accused in the courtroom which was partially ruled upon.
15 That's what I meant. I apologize on misstating the number. I
16 apologize.

17 MJ [COL POHL]: Okay. 178, Commander.

18 DDC [CDR MIZER]: Good morning, Your Honor. We are today
19 essentially where we were at at the February hearing in that
20 we have a denied PAR for Ms. Hollander, and I'll address as
21 Mr. Kammen did, if it's acceptable to the commission, both the
22 witness production and the underlying issue.

23 MJ [COL POHL]: Okay. Just so other people know what

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1 acronyms you're using, PAR?

2 DDC [CDR MIZER]: I'm sorry, Judge. Program Access
3 Request.

4 MJ [COL POHL]: Okay.

5 DDC [CDR MIZER]: And so this is a bureaucratic form that
6 is submitted to the Office of Under Secretary of Defense
7 requesting access to classified information. And this form
8 really governs two things: It is both access to the
9 underlying discovery in this case and then also access to
10 Mr. Nashiri himself, who has classified information, according
11 to the government.

12 It is -- Ms. Hollander, since the beginning of her
13 representation in 2008, has had access to Mr. Nashiri, and it
14 was when we initiated this process to get her more fully
15 involved in the case here, the second half of that PAR, the
16 second half of that request, access to the discovery itself,
17 that triggered this controversy. And so I think that those
18 facts are important.

19 I mean, we have someone who has had an
20 attorney-client relationship unmolested, if you will, from
21 2008 until 2013, 2014, and it was when Ms. Hollander and I
22 took a trip down here in August to introduce me to Mr. Nashiri
23 with someone who has had that long-standing relationship that

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1 we were essentially turned away at the gate out at the camp,
2 and I had to go in without Ms. Hollander. That was the week
3 of August 14th.

4 And the important thing is, Judge, it's
5 Attachment Foxtrot to 178C, and that's the unredacted PAR that
6 is on that motion, and you would see that when we ----

7 MJ [COL POHL]: What's the date of your -- you're
8 referring to?

9 DDC [CDR MIZER]: The ----

10 MJ [COL POHL]: The upper right.

11 DDC [CDR MIZER]: The PAR there, Judge -- I'm sorry, the
12 date of that form, which was approved, was July 18th of '13,
13 it looks like on this form.

14 MJ [COL POHL]: I'm sorry. I'm looking at one, it's an
15 Attachment B.

16 DDC [CDR MIZER]: This is Attachment Foxtrot of 178C,
17 Judge.

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

19 DDC [CDR MIZER]: And so that's the approved form that
20 would have been in place when we were down here. So on paper,
21 at least, she had the approval to come into the camps. That
22 was not -- she was not permitted to come into the camp. And
23 then ultimately we get a modified version of that PAR which is

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1 postdated after our visit -- it's handwritten, it's dated 28
2 August -- and says that her access is now denied because she
3 is pro bono and because she is also engaged in dual
4 representation.

5 So there's now three PARs at issue in this case and
6 there's the initial approval in July of '13 after we come down
7 and get in and are asking anyone what's going on with our
8 attorney-client relationship, we know that it's been approved.
9 We know that individuals in this case, Ms. Flannery within the
10 Department of Defense, have conducted an investigation.
11 There's no concern about Ms. Hollander's security or other
12 risk to national security. That's when the PAR, the original
13 PAR, appears to have been modified with handwriting.

14 This basis is added in, and that's the genesis of
15 these motions, Judge, and that's really what we're trying to
16 get at is who modified the PAR, why, and when. Because we
17 have an attorney who has been a part of Mr. Nashiri's defense
18 team, and in habeas for five years, and what has changed? And
19 it certainly wasn't that she's now pro bono, because she's
20 always been pro bono. And it certainly isn't that she is
21 involved of in dual representation because she has been
22 engaged in representation of Mr. Nashiri both in the habeas
23 case and also in the European Court of Human Rights.

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1 And I would proffer that that's what we believe that
2 this is retaliation for, is Ms. Hollander's participation in
3 the litigation in the European Court of Human Rights, and
4 that's why this PAR was pulled. In fact, she was told that if
5 she would renounce that case, that she would be granted access
6 to Mr. Nashiri.

7 So we believe it's an impermissible purpose that
8 there is interference with the attorney-client relationship.

9 MJ [COL POHL]: In her representation at the European
10 Council of Human Rights, is there any allegation that she
11 disclosed classified information?

12 DDC [CDR MIZER]: None. None whatsoever, Judge. And this
13 would be no different than a habeas lawyer, and I'm sure Your
14 Honor is well aware of that are any other number of lawyers
15 who took up habeas cases. Charlie Swift. I think there are a
16 few legacy cases. And there's that firewall, and any attorney
17 knows that that information is compartmentalized. Judge, I
18 have access to classified information in CIPA cases in federal
19 court and I'm not going to share that with this defense team
20 and I'm not going to share that with these prosecutors or this
21 mission. I mean, any attorney, and certainly someone who is
22 as experienced ----

23 MJ [COL POHL]: Well, let me ask you this: If she is not

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1 going to share the classified information with the European
2 Court of Human Rights, what is her need for it?

3 DDC [CDR MIZER]: Your Honor, her need for the access is
4 here for this case, and so rather than trusting an attorney,
5 as is done in any court in the United States, they simply
6 pulled her access. And let me be precise about this. They
7 haven't pulled her top secret security clearance. They
8 haven't pulled her SCI.

9 So you have to really question how valid is this
10 concern and is this really just targeted at this attorney in
11 this case. She doesn't have a need for classified information
12 to go into the European Court of Human Rights. She is also
13 participating in Mr. Nashiri's habeas case. She doesn't have
14 the need for the classified information from this case to go
15 into that case, nor under the protective orders in that
16 litigation can she disclose to us the habeas classified
17 information within this team.

18 And so, I mean, these are things that we expect
19 attorneys to comply with. There are orders in place to
20 protect the classified information. And someone as
21 experienced and who has handled significant national security
22 cases like Ms. Hollander, the very reason that we've asked her
23 to participate in Mr. Nashiri's defense, is certainly capable

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1 of complying not only with the law but also with the guidance
2 of federal district court, of this commission, Judge, and
3 that's really what we're after here.

4 I mean, at the bottom what we need is an evidentiary
5 hearing to get at exactly what happened. What happened to
6 Ms. Hollander's PAR? We believe that someone is exercising
7 veto power over this PAR. We believe it's probably the CIA
8 and we want to flesh that out, Judge. Because what's
9 important is -- and the prosecution relies on the right cases,
10 and Your Honor did respectfully in the original order here,
11 the Department of the Navy v. Egan, gives the prosecution,
12 gives the government vast discretion in the area of security
13 clearances, but a case that was decided that same time, the
14 Webster v. Doe case, says that that discretion is not absolute
15 and the Doe case is in our pleadings, Judge.

16 In other words, the government is not given a blank
17 check, and we submit that we have already shown enough on the
18 record to show that this was an arbitrary denial of a security
19 clearance. It certainly can't be because she is a pro bono
20 lawyer that she doesn't get access to classified information.
21 That doesn't pass the smell test in this court. It wouldn't
22 pass the smell test in a federal court either.

23 And the facts of Doe I think are interesting and may

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1 be a product of their time, 1988. The plaintiff in that case
2 was a CIA officer who reported his homosexuality to his
3 employer, who promptly pulled his security clearance because
4 the belief was that homosexuality was a threat to national
5 security as recent as 1988.

6 I would submit that that case would be decided very
7 differently today. But the important holding of Webster is
8 that courts can review colorable constitutional claims. The
9 government doesn't get a blank check. They get broad
10 discretion, but not a blank check.

11 MJ [COL POHL]: What's your colorable constitutional claim
12 for Ms. Hollander?

13 DDC [CDR MIZER]: That's an interference with an ongoing
14 relationship, Judge, that's what we've had. She has been
15 Mr. Nashiri's counsel since 2008. She was one of the very
16 first men to meet Mr. Nashiri. What we're concerned about
17 here is that someone is exercising veto power over this
18 defense team and they're not doing it with a valid basis and
19 we believe that we're entitled to a hearing to flesh that out.

20 The form, the second PAR that Your Honor already has
21 before the commission, I think more than meets the minimal
22 threshold to say something's not right, and we have the first
23 PAR that's approved. We come down here, we're literally

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1 turned away at the gate, or at least Ms. Hollander, and when
2 we start complaining about it, someone whites-out
3 "Approved" -- I'm sorry, my speed problem again, Judge --
4 someone whites-out the "Approved," pens in "Denied" and then
5 writes in the basis "pro bono" and "dual representation."

6 MJ [COL POHL]: I think it actually was not a member of
7 the defense team was ----

8 DDC [CDR MIZER]: I think that that's -- I think that
9 that's on there, "Not a member of the defense team, pro bono,"
10 Judge, is the full sentence, and then the second one is "Dual
11 representation."

12 And so I think that we need to find out who wrote
13 that, why they wrote it, are they a lawyer. Do they have any
14 understanding of the concept of dual representation? Which
15 pro bono lawyers can't have security clearance? Why do some
16 lawyers, including those who make appearances in the other
17 case that is ongoing, why do they at the same time have a
18 security clearance, and are also pro bono?

19 Just on its face, Judge, the proffered reasons that
20 are on that PAR, they just don't -- they just don't pass
21 muster, and further investigation is warranted. Certainly, if
22 that PAR had said -- and I don't mean to insinuate anything
23 here, but something along the lines of Webster, that this

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1 individual is a homosexual, certainly the government couldn't
2 come in here and say, look, Judge, there's absolutely nothing
3 that you can do. They're given broad discretion, not a blank
4 check. They can't say that I can't see Mr. Nashiri because
5 I'm wearing white shoes after Labor Day, which, for the
6 record, I am, and pull that off and say that the court has no
7 discretion to do anything about it. Tough, essentially, is
8 what the government's position is in this case.

9 Judge, I think one of the things that the court
10 needs to keep in mind is that all of these cases, Egan,
11 Webster, and -- any number of cases, they're employment law
12 cases. And even in those employment law cases, the Supreme
13 Court is saying, look, it's not a blank check. If there are
14 colorable constitutional claims, the courts do have the power
15 to look and examine that security determination to see if
16 there's something else at play here, Judge, and we believe
17 that we've already demonstrated that.

18 The military cases, the key case here, is the Pruner
19 case, which was cited in Schmidt, which is also in our
20 pleadings of -- both Schmidt and Pruner are in our pleadings.
21 With respect to Schmidt, the Air Force iteration of that
22 case -- the AFCCA is I think how the Air Force folks say that
23 court's name -- and then the COMA case in Pruner and then the

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1 C.A.A.F. case in Schmidt.

2 And Pruner says that military judges like you, Your
3 Honor, can prohibit proceedings if denial of a clearance was
4 arbitrary or unsupported in law. And that's what you're
5 confronted with here. We have an ongoing attorney-client
6 relationship, a sudden denial of access -- not even of a
7 security clearance, but of a PAR, of a SAP program. And
8 really no valid basis given, just tough. Not part of the
9 defense team, pro bono, and then dual representation.

10 This isn't -- I don't need to belabor this point.
11 It's not a civil law case, Judge. Mr. Nashiri is not here
12 claiming that he was fired because of some discrimination
13 purpose like Egan, like Webster. It's a capital case. It's a
14 military commission, and this court has some discretion, and
15 we've made the showing where we should at least have the
16 witnesses on the stand to say, well, no, this is actually
17 perfectly valid.

18 MJ [COL POHL]: When you say witnesses, your request has a
19 whole litany of witnesses there. Other than the
20 decision-maker, are any of the other ones necessary?

21 DDC [CDR MIZER]: I think so, Judge, because I'm not sure
22 how much information -- I'm told that Mr. Verga, the
23 decision-maker, is fairly senior in the Department of Defense,

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1 and I would sincerely question his actual knowledge of any of
2 these facts. My guess would be that one of his underlings
3 made this decision, or at least a recommendation with respect
4 to that decision, and Mr. Verga merely signed off on it.

5 MJ [COL POHL]: But if Mr. Verga -- and I will take your
6 word that he is the decision-maker here -- is the man who
7 actually decided it, who signed it ----

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

9 MJ [COL POHL]: ---- isn't his analysis controlling? If
10 he says -- if he says all I did, hypothetically, somebody
11 handed me a piece of paper and I just signed it, I didn't even
12 bother reading it, wouldn't that be ----

13 DDC [CDR MIZER]: I think that would be sufficient, Judge.
14 So of the key witnesses there, I would submit that it would be
15 Mr. Verga, and then also Stephanie Flannery, who we have
16 submitted also in the papers, one of the exhibits is a letter,
17 an investigation that Ms. Flannery conducted into
18 Ms. Hollander that says everything is good here. She actually
19 flew out to New Mexico, interviewed Ms. Hollander, and said
20 this woman poses no national security threat whatsoever.

21 MJ [COL POHL]: Where do I get to this line where I'm now
22 second-guessing granting of security clearances by -- assuming
23 Mr. Verga is an appropriate person to decide it. That's a

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1 separate issue. If the procedure had been followed, according
2 to security orders and regulations and statutes, and Mr. Verga
3 was the decision -- appropriate decision-maker, okay, how much
4 of this do I go behind to say, well, Ms. Flannery says that
5 Ms. Hollander has no security risk, therefore, I now
6 second-guess Mr. Verga's decision because Ms. Flannery
7 disagrees with him?

8 DDC [CDR MIZER]: Well, Your Honor, I think those are just
9 important facts that just need to go into the record. And as
10 we said multiple times, a lot of this is about making a
11 record. But if you've got a full investigation that says
12 grant this woman access to Mr. Nashiri, she is no security
13 threat whatsoever, and you've got the very questionable
14 digitally signed form approving access, and then after we
15 start making a stink about why are we being denied access,
16 then this whited-out and handwritten form appears, it is -- it
17 is inconsistent.

18 I mean, there's obviously something taking place
19 here that is not being fully explained, and Ms. Flannery, I
20 think, is a key component of that, because she really has the
21 factual background. I mean, she conducted the investigation.
22 I frankly think that we need everyone -- I mean, we are only
23 talking about four or five witnesses, Judge, to come in. And

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1 if they don't know anything, they don't know anything.

2 But somewhere along that chain between Flannery and
3 Verga -- and maybe it was Verga, Judge, I don't know. But
4 that's why we have witnesses that -- that's why we take
5 testimony, is to find out that information. And what,
6 respectfully, Your Honor can't do is just turn a blind eye to
7 the severance of a long-term attorney-client relationship.
8 Because if that's the case, if the government is right, they
9 can pull our PARs, our SAP access one by one, and certainly
10 that would not be acceptable to this commission. And
11 Ms. Hollander is no different.

12 They simply shouldn't be able to exercise veto
13 power, whoever it is, whether it's the prosecution or the
14 equity holders, if you will, in these cases. They don't have
15 veto power. They don't control this courtroom, as Your Honor
16 has dealt with before, and now we have got to actually have
17 push-back on whether or not they control Mr. Nashiri's
18 statutory and constitutional rights.

19 And so we believe that the facts that we've laid out
20 in the pleadings would prove an impermissible interference
21 with those statutory and constitutional rights to counsel,
22 Judge. We believe that on its face these forms don't look
23 proper. They don't look regular. They're not even digitally

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1 signed, the second PAR that is at issue here. That alone
2 appears suspicious. And that we've made the showing that we
3 should have witnesses come before Your Honor and explain
4 exactly why Ms. Hollander continues to have a top secret
5 security clearance, an SCI clearance, but can't do one
6 specific thing with respect to classified information, and
7 that is see Mr. Nashiri and review the discovery in this case.

8 Your Honor, may I have a moment?

9 MJ [COL POHL]: Sure.

10 DDC [CDR MIZER]: Okay.

11 MJ [COL POHL]: Just to be clear, there's two motions.
12 There's the 178 motion and there's a base motion and a motion
13 to compel.

14 DDC [CDR MIZER]: Yes, Your Honor.

15 MJ [COL POHL]: Seeing that your argument is basically
16 intertwined on both of those; is that fair?

17 DDC [CDR MIZER]: Yes, Your Honor. Yes, Your Honor.

18 MJ [COL POHL]: Okay. Trial Counsel?

19 TC [CDR LOCKHART]: Can I have one moment, sir?

20 MJ [COL POHL]: Sure.

21 TC [CDR LOCKHART]: Commander Mizer, do you have that
22 first PAR?

23 [Counsel stepped away from podium; no audio.]

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1 TC [CDR LOCKHART]: Thank you, Your Honor. This also is a
2 supplement filed to the original motion which obviously we
3 took argument on at the previous hearing. Defense states that
4 we're in no different position. Government would state that
5 that's not entirely accurate. What occurred was Your Honor
6 made a ruling and asked her to resubmit -- or encouraged that
7 as a part of the team she could resubmit her request for the
8 PAR, which she did, and it was denied.

9 One of the things that I'd like to discuss is if you
10 could take a look at the different PARs, and I know that we
11 talked about this briefly -- or defense talked about this
12 briefly. There's three of them. And I would just assert that
13 the defense's explanation of how they evolved, it's just not
14 accurate. I believe they think that the date was whited-out
15 and the signature block was whited-out, and that, in essence,
16 the first form, which was dated in July, was then used for the
17 second form, and not a new form was created.

18 Obviously, Your Honor has both of those copies in
19 front of him. We would ask that Your Honor take a look at
20 them. And from the government's perspective, that's not what
21 occurred at all, and it appears to be a new form.

22 Both of them are hand-signed. I know the defense
23 has made some statements that one was electronic and one was

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1 hand-signed, but if you look at both of them, they're both
2 signed. One, the first one was somebody for Mr. Verga, and it
3 clearly has his signature and says, for PV. And the second
4 one is signed by Mr. Verga, and if you look, the way you can
5 tell that wasn't whited-out is if you look at the word
6 "Signature" in his block, that's not whited-out at all. And
7 if you whited-out his initial signature, that term,
8 "Signature" would also have white-out on it.

9 So I would just assert as a starting point that the
10 defense's belief as to how this form was used just on its
11 face, which Your Honor can see without the need of any
12 witnesses, is not accurate. It appears very clearly to the
13 government that a second form was executed and disproved.

14 I think Your Honor hit the nail on the head when the
15 discussion had to do with second-guessing the full
16 investigation of the Department of Defense. There are
17 government agencies and branches that have very specific
18 responsibilities. Obviously, for example, I'm a Judge
19 Advocate General Corps member, and what I do in my
20 professional capacity is where my expertise lies. The same
21 for folks that approve or disprove security clearances. This
22 is what they do.

23 And the defense pointing out that Ms. Flannery

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1 approved this, and then ultimately the person that was the
2 ultimate decision-maker disproved it, really is of no fact or
3 consequence to this issue. What matters is was the process
4 followed. The government asserts that it was. There was a
5 PAR that was submitted. It was routed. And the ultimate
6 person, who has all of the information in front of them, makes
7 a decision.

8 Your Honor had asked the defense earlier about
9 whether certain facts existed, and that's not the purpose of
10 getting into this hearing. We are not here to second-guess
11 was there a reason as to why her clearance was denied.

12 MJ [COL POHL]: If Mr. Verga in the annotation page, you
13 know, where he says, reasons for -- okay. Say he put down a
14 reason that just was factually incorrect. Whatever it is.
15 Let's say she is not a licensed attorney. Whatever. Just a
16 factual incorrect statement.

17 TC [CDR LOCKHART]: Yes, sir.

18 MJ [COL POHL]: Okay. But he's the right guy. He's the
19 guy with the power of the pen on this issue. Can I -- can any
20 court then review, well, wait a minute, this isn't correct?

21 TC [CDR LOCKHART]: Absolutely, sir. And I think there's
22 a process for that, and there's an administrative appeals
23 route that that is challenged. If there was a factually

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1 incorrect assertion, I'm certain the defense would have
2 brought it to the Court's attention.

3 MJ [COL POHL]: Do you consider her -- Ms. Hollander's
4 role as appearing in different fora on behalf of Mr. Nashiri
5 to amount to dual representation as that term is understood?

6 TC [CDR LOCKHART]: Well, first of all, the government
7 contends that she actually represents Mr. Nashiri in this
8 court. As we pointed out in our brief, there are steps that
9 have to occur, including the Chief Defense Counsel certifying
10 her as an appropriate member of the pool ----

11 MJ [COL POHL]: That's not my question. Please just
12 answer my question.

13 TC [CDR LOCKHART]: If she is not representing here, then
14 it isn't dual.

15 MJ [COL POHL]: I got it. But let me go back. A lawyer
16 represents one accused in different fora, civil, criminal, and
17 international. Is that considered dual representation as the
18 term is understood?

19 TC [CDR LOCKHART]: I don't know, Your Honor. I mean, I
20 think it depends on how you define that term.

21 MJ [COL POHL]: That's what I'm asking you. The
22 government's the one that says she is disqualified for dual
23 representation. Is that dual representation that's understood

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1 by the term?

2 TC [CDR LOCKHART]: Since I'm not the one that wrote the
3 term, I'm not certain that I can answer that.

4 MJ [COL POHL]: Let's say a court were to conclude that
5 that's not the common understanding of dual representation.

6 TC [CDR LOCKHART]: Okay.

7 MJ [COL POHL]: That dual representation usually refers to
8 two or more defendants with contrary interests ----

9 TC [CDR LOCKHART]: Right.

10 MJ [COL POHL]: ---- and, therefore, there could be
11 conflict of interest there. That dual representation would
12 not necessarily cover the situation -- again hypothetically
13 here ----

14 TC [CDR LOCKHART]: Right.

15 MJ [COL POHL]: ---- the situation where an attorney is
16 representing the same accused but in different fora.

17 TC [CDR LOCKHART]: Correct. But there could be issues
18 within that dual representation of two courts that has
19 bleed-over of information, bleed-over of facts, of course,
20 information that was shared that could have caused the
21 decision to be made for that, that gets you to the same
22 result.

23 MJ [COL POHL]: Okay. Well, then let me ask you this.

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1 Let's say Commander Mizer is representing Mr. Nashiri in this
2 hearing, as he is, and also is representing Mr. Nashiri in
3 habeas hearings ----

4 TC [CDR LOCKHART]: I don't think he's allowed to as a
5 uniformed military member, sir.

6 MJ [COL POHL]: Go with my hypothetical.

7 TC [CDR LOCKHART]: Okay, sir.

8 MJ [COL POHL]: Just go with my hypothetical. Okay.
9 Let's just say that happened.

10 TC [CDR LOCKHART]: Would that ----

11 MJ [COL POHL]: He's doing it in his -- say that it is
12 permitted. That's not the issue that he's going to get to.

13 TC [CDR LOCKHART]: Okay.

14 MJ [COL POHL]: The issue is would that amount to dual
15 representation.

16 TC [CDR LOCKHART]: I don't know, and I don't know why it
17 would matter.

18 MJ [COL POHL]: Okay. When you say not matter, what?
19 Would that be a basis to turn down -- and we're not talking
20 about turning down clearance here, we're talking about turning
21 down access here, correct? Access to ----

22 TC [CDR LOCKHART]: It's a read-on to a specific program.

23 MJ [COL POHL]: Program. It's access to the

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1 information ----

2 TC [CDR LOCKHART]: Access ----

3 MJ [COL POHL]: ---- in that program as it relates to
4 Mr. Nashiri. Okay.

5 TC [CDR LOCKHART]: And it may be that the shorthand
6 terminology of dual representation has a much more expanded
7 reason, again, for cross-pollination or classified information
8 that, again, we give deference to the person making that
9 decision. They don't have to explain in great detail why a
10 clearance is granted or denied.

11 They simply say that they are the correct person,
12 the process was followed, and they either approved or
13 disproved. And it's very important to note, as Your Honor
14 correctly pointed out, that the standard is, is there a
15 colorable constitutional claim, not simply this, we think it's
16 unfair. It's interesting that every single member of
17 Mr. Nashiri's defense team, with the exception of
18 Ms. Hollander, has been provided the SAP read-on. In fact,
19 two individuals after -- after all of this information started
20 coming to light.

21 So if this argument is that somehow the government
22 is trying to deter Mr. Nashiri from having adequate
23 representation, that just doesn't hold any weight because he

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1 continues to have new counsel detailed and continues to have
2 new counsel provided access to the SAP program. And if we are
3 looking at what the case law says, which is that there is a
4 presumption of regularity, and you look at the fact that all
5 the other members of Mr. Nashiri's defense team have been
6 provided that access, and this one particular person hasn't,
7 decided by a very senior person, with presumably all of the
8 information to know, we presume that that was done regularly,
9 unless there's any information to show otherwise.

10 And the government asserts that the defense, other
11 than these wild accusations, has presented Your Honor with
12 nothing concrete. In fact, when you boil down -- when you
13 drill down and look at what they're considering this altered
14 PAR, it's not. I urge you to look at the first and look at
15 the second. They're clearly two different forms.

16 Your Honor ruled in its initial ruling on 178
17 that -- that the accused was entitled to certain
18 representation. He has that representation. The government
19 is not preventing Ms. Hollander from assisting in any way.
20 The only thing that she does not have access to is the
21 accused, where, again, he has six, I think, other attorneys
22 who have access to him, and a very small subset of the
23 information available, which is the SAP information. She

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1 still has access to all of the classified information that's
2 not SAP, all of the unclassified.

3 So the government is not saying she can't represent
4 him. What the government has said, through its regular
5 process of reviewing security clearances, is that she is not
6 entitled to have access to that information, for the reasons
7 that were decided by the person who's in the position to know.
8 And, again, against any evidence to show why that was done, as
9 Mr. -- as Commander Mizer said, arbitrary and capricious,
10 there's no need to delve further into this.

11 Getting to the witness production motion that I know
12 Commander Mizer discussed, I think, if I understood correctly,
13 I understand he says he wants everybody, but the known
14 universe of potentially relevant is Mr. Verga and
15 Ms. Flannery.

16 Everything that Your Honor needs is in front of him.
17 If we even get to that point, which the government asserts
18 that we don't, there has to be some rise of level. And it's
19 very interesting that the case cited by the defense has to do
20 with a clearance denied for homosexuality, something that is
21 so clearly blatantly in today's world an obvious reason on why
22 you can't deny somebody a clearance, and that's the analogy
23 that's being made here. And the government asserts that we

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1 are so far from that analogy that it doesn't even begin to
2 compare to a colorable constitutional violation.

3 MJ [COL POHL]: If one were to conclude that the proffered
4 reasons in the PAR denial reflect a misunderstanding of what
5 the terms mean, dual representation, and reflects a
6 misunderstanding of the current status of Ms. Hollander as
7 being part of the defense team, is any -- is that reviewable
8 at all at that point?

9 TC [CDR LOCKHART]: I certainly believe that there's an
10 administrative way to challenge that, if you believe --

11 MJ [COL POHL]: Well, I'm not. I'm sure there is. I'm
12 not talking about administrative. I'm talking about me. I'm
13 saying that if one were to conclude that -- I am not saying
14 that I have or haven't. If one were to conclude the proffered
15 reasons weren't valid on their face for whatever reason, am
16 I -- is every court then just stuck because Mr. Verga made the
17 decision and he's the appropriate decision-maker and you can't
18 go behind him?

19 TC [CDR LOCKHART]: No, of course, not, Your Honor. As
20 the case law appropriately points out, that it is not a blank
21 check and if there is evidence that the government is doing
22 something arbitrary and capricious, then that certainly could
23 be reviewed. What we urge in this case here is that we're

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1 nowhere close to that.

2 We have -- and again, from the government's
3 perspective, the first two PARs, that was done, over with.
4 Your Honor issued his order. She made -- although the
5 government doesn't concede that it's an appropriate
6 appearance, but she filed the paperwork and then reapplied.

7 Knowing all of that same information again, it was
8 denied. And on that one, there's no specific reason for it.
9 It would be.

10 MJ [COL POHL]: Which one are you referring to now? Which
11 date?

12 TC [CDR LOCKHART]: I'm sorry. The latest one on ----

13 MJ [COL POHL]: You're not talking about the August one?

14 TC [CDR LOCKHART]: No, the one that was just done
15 recently. It's the attachment to the government's motion.
16 Sorry, the government's supplement response.

17 And if I may one second, grab a copy of it, sir.

18 MJ [COL POHL]: Sure.

19 TC [CDR LOCKHART]: I seem to have misplaced it, sir.

20 MJ [COL POHL]: That's the government supplement?

21 TC [CDR LOCKHART]: Correct.

22 MJ [COL POHL]: Okay.

23 TC [CDR LOCKHART]: That again -- oh, I found it. It was

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1 hiding, sir. I apologize. So this was on 3/10/2014. All of
2 this information was available ----

3 MJ [COL POHL]: Just tell me what exhibit, please.

4 TC [CDR LOCKHART]: I'm sorry, sir.

5 MJ [COL POHL]: What exhibit is it attached to?

6 TC [CDR LOCKHART]: It is 178K.

7 MJ [COL POHL]: Okay. Got it. Go ahead.

8 TC [CDR LOCKHART]: Okay. This again -- this was
9 resubmitted after Your Honor's order. Again, went through all
10 the appropriate people, and it was disproved. There's
11 absolutely no reason on the face of this form to conclude that
12 there was anything arbitrary or capricious about the denial of
13 this. And I think -- I think it's worth pointing out that the
14 folks doing this determination on whether or not Ms. Hollander
15 should have access to this SAP information have much more
16 information available to them than myself, Your Honor, the
17 defense.

18 I mean, they are put in a position -- they are
19 trained in knowing who gets access. And the entire point of
20 the government's motion is that if there is an assumption of
21 reliability in processing these requests, and there's nothing
22 on its face, or nothing in the record that shows that it was
23 anything other than a legitimate, true reason, then there's

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1 absolutely no reason to have an evidentiary hearing, and Your
2 Honor can rule on the pleadings.

3 MJ [COL POHL]: Okay. Thank you.
4 Commander.

5 DDC [CDR MIZER]: Judge, do you have the unredacted
6 version of Attachment B to 178A here? I mean, this is the
7 redacted version that I have. The one that has the
8 handwriting, the explanation.

9 MJ [COL POHL]: It's Attachment B?

10 DDC [CDR MIZER]: It should be Attachment B to 178A, but
11 it should be ----

12 MJ [COL POHL]: Let me make sure. I got a redacted
13 version of ----

14 DDC [CDR MIZER]: That's the August PAR, Judge.

15 MJ [COL POHL]: I have an unredacted version of the August
16 PAR and I have a redacted version of the February PAR.
17 Actually that was signed in March.

18 DDC [CDR MIZER]: But the unredacted version of the August
19 PAR is ----

20 MJ [COL POHL]: I got that. That's the one that you were
21 discussing earlier.

22 DDC [CDR MIZER]: That's the important one, Judge, and
23 prosecution's right. I mean, the signature is original on

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1 there. It's the block next to the signature on that section
2 of the document that is curious. Which it would manually
3 appear that the July PAR, the approved and disapproved block
4 that is immediately to the right of the signature, appears
5 this they just used white-out and whited-out over the approved
6 and checked in disapproved. And so that's what I'm talking
7 about.

8 MJ [COL POHL]: Would it make any difference? I mean,
9 Commander Lockhart spent a lot of time on it, whether it was
10 just whited-out or an original document. Isn't the real
11 relevant facts is that at one point in July somebody signed
12 for Mr. Verga approving it, and then later on in August he
13 revisited it, apparently, and disapproved it? Whether it's a
14 separate document or new documents, does it make much
15 difference?

16 DDC [CDR MIZER]: I think it makes a little bit of
17 difference, Judge.

18 MJ [COL POHL]: Okay.

19 DDC [CDR MIZER]: Particularly because of this presumption
20 of regularity that we're talking about. That's what the
21 prosecution gets up here and talks about is his experts are
22 doing this, well, this doesn't look like an expert job.

23 MJ [COL POHL]: When we were at this issue before, I

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1 believe my initial ruling was, well, is she a member of the
2 defense team or not.

3 DDC [CDR MIZER]: Yes, Judge.

4 MJ [COL POHL]: Okay. I think that was resolved. And now
5 we go to the March PAR. Do you have an unredacted version of
6 the March PAR?

7 DDC [CDR MIZER]: I believe that -- I believe that we do,
8 Judge, but our position with respect to the March PAR is
9 they're just rubber-stamping the process that has occurred
10 before.

11 MJ [COL POHL]: What I'm saying is if there's a factual
12 inaccuracy of the August PAR -- let's assume for the sake of
13 discussion, with no findings, that she is a member of the
14 defense team, and whether she is pro bono or not I'm not sure
15 is of any legal significance. But as a member of the defense
16 team, and that -- that may not have been clear in August, but
17 certainly is now clear in March. If that's no longer on
18 there, then don't you want me to look at the reasons why the
19 March PAR was ----

20 DDC [CDR MIZER]: Well, Judge ----

21 MJ [COL POHL]: There's no point to that.

22 DDC [CDR MIZER]: ---- we'll proffer that the reason was
23 the same as it was in the August PAR, and the March PAR is

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1 just merely rubber-stamping the decision that was already made
2 by someone in August. I didn't honestly expect to submit a
3 PAR request on behalf of Ms. Hollander after we have run afoul
4 of whomever is making this decision that they were suddenly
5 going to change their mind based upon.

6 MJ [COL POHL]: But we are getting back to what your point
7 earlier, though, is that if there's a reason on here that
8 causes the presumption of regularity, if there is some to be
9 rebutted and that reason is no longer on there, shouldn't I be
10 addressing those reasons as opposed to -- I mean, you may say,
11 well, all I did was just the same -- let me go give you an
12 example.

13 Say the March PAR -- and, again, of course, I don't
14 have an unredacted version with me right now. The March PAR
15 has a different reason altogether -- that's perfectly
16 appropriate for denial of a clearance, for whatever reason. I
17 don't want to, you know, impute any type of ill activity by
18 Ms. Hollander, but let's just say there is. Wouldn't that be
19 the controlling rationale that you'd want me to look at as
20 opposed to what they said? Now, if it says the same thing,
21 that's a different issue.

22 DDC [CDR MIZER]: I think it would be relevant, Judge, but
23 Commander Lockhart has provided me with a document. I think

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1 our paralegals have gone off to get it as well.

2 There's no basis provided whatsoever, says just
3 simply access denied. So what it would appear is they've
4 perfected the process finally. Instead of using white-out and
5 handwritten notations on the same form, they have just
6 provided a clear denial, which is going to be more difficult
7 for us to challenge.

8 And so, I mean, they're covering their tracks is
9 essentially what it was. I mean, we have the July form, and
10 then after we get turned away at the gate, they go and
11 actually alter that form, from approved to denied, and then we
12 go through the process again and get just a clean denial. The
13 third time is the charm here for the individuals that are
14 involved in this.

15 MJ [COL POHL]: I'm going to ask her the same question.
16 Is your experience with PARs that they generally put down
17 reasons or they don't put down reasons?

18 DDC [CDR MIZER]: I don't -- I haven't seen a reason
19 provided on any of the PARs that I have been involved with.
20 There certainly wasn't a reason for.

21 MJ [COL POHL]: Of course, you would probably be the ones
22 that were all approved anyway.

23 DDC [CDR MIZER]: Likely so, Judge. I'm not a security

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1 specialist. I do know about the right to counsel, and that's
2 what's being vitiated here by this administrative process. So
3 I think the facts are important.

4 I think one of the other facts is that Mr. Kammen
5 has been involved in dual representation multiple times
6 throughout this litigation. It was the Ninth Circuit case of
7 *Nashiri v. MacDonald*. Just on Monday Mr. Kammen and
8 Ms. Hollander submitted a new habeas petition in the district
9 court for Washington, D.C. And so if this really, truly has
10 any basis whatsoever, Mr. Kammen's access to Mr. Nashiri
11 should be pulled as well.

12 MJ [COL POHL]: How do you ----

13 DDC [CDR MIZER]: That's not going to be, Judge.

14 MJ [COL POHL]: Commander Lockhart didn't really want to
15 answer the question, so I'll ask you the same question. How
16 do you define dual representation?

17 DDC [CDR MIZER]: Judge, it's plainly, and it's in any
18 ethics canon, whether you are a JAG or your state bar, it is
19 one person representing two parties with adverse interests in
20 one case.

21 And so the common example is a divorce. Going in
22 and representing husband and wife in a divorce in a contested
23 divorce, let's say where they're sitting there fighting over

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1 property as divorces -- divorces go.

2 That's dual representation by any meaning of that
3 legal term, which again, we can ask Mr. Verga, if he's the
4 person that put "dual representation" on that form, "Are you a
5 lawyer, sir, what does this mean?"

6 MJ [COL POHL]: If he were to say, I think dual
7 representation also includes representing a client in
8 different fora, even though that may be an incorrect statement
9 of the law, does that make any difference?

10 DDC [CDR MIZER]: Absolutely, Judge. Pruner tells you it
11 does. It says you can intervene in cases. You shall not take
12 a blind eye, if these clearance determinations, the language
13 is arbitrary or unsupported in law. So if he comes in and
14 tells you something that is unsupported in law, then,
15 absolutely, you are not powerless. You can't compel the
16 disclosure of classified information. But what Pruner tells
17 you you can do, is you can tell the prosecutors stop messing
18 with the defense's bench, and you don't get to proceed.

19 I mean, it's an ultimate option. But, Judge, if you
20 were to issue that order, Ms. Hollander would have SAP access
21 this afternoon. I guarantee it. This isn't a major conflict.
22 I'm not exactly sure what the real issue is with
23 Ms. Hollander. I believe it to be her representation in the

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1 European Court of Human Rights based upon conversations that
2 she's had, but it's not a legitimate concern. She is not a
3 security threat. Ms. Flannery tells you that in the documents
4 that are before the commission.

5 We shouldn't have to go in this criminal case
6 through some lengthy administrative process. We shouldn't be
7 having to go through the FOIA process to get discovery. You
8 aren't powerless here, Judge, and I mean that with all
9 respect. You have limitations on your discretion, but Egan
10 and Webster tell you that when they're interfering with
11 constitutional rights, and we've made that colorable
12 constitutional claim here, that you should do something in
13 this case.

14 It's small comfort to Mr. Nashiri to hear the
15 prosecution say, look, Ms. Hollander can participate in the
16 defense team, she can be part -- she can be his lawyer, she
17 just can't come into court -- I mean, I'm not exactly sure
18 what good a lawyer is that can't come into court. She can
19 certainly assist us, but her intent -- and she flew down here,
20 Judge, to come in here and make an appearance. She can't even
21 get into the courtroom.

22 So ultimately you can't allow the government,
23 whether it's the prosecution, the government at large or some

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1 agency within the government, to exercise veto over who sits
2 at that counsel table, particularly when it's arbitrary and
3 unsupported in law, Judge.

4 MJ [COL POHL]: Thank you, Commander.

5 DDC [CDR MIZER]: Thank you.

6 MJ [COL POHL]: Commander Lockhart.

7 TC [CDR LOCKHART]: Can I get the form back? Thank you.

8 I do think it's very important to end on the note
9 that Commander Mizer ended on, is that in the defense's
10 opinion she is not a security threat as he defined by a
11 personnel within the security office, and the defense's
12 opinion is that it's not a legitimate concern.

13 This is a form that's used with every single person
14 that applies for access to the SAP. There's a process in
15 place. There's absolutely nothing that's been shown that's
16 nefarious that's going on. It was routed, and it was
17 disproved. And I again assert that the people in the position
18 to make these decisions have more information in front of them
19 than we do here. And as long as there is no evidence or
20 information showing that there's a colorable constitutional
21 issue, we do presume regularity, and that deference should be
22 given here. We should not be second-guessing the decision on
23 why she is not entitled to this very classified information.

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1 MJ [COL POHL]: Is there a requirement that -- apparently
2 the March PAR does not have a reason for the denial, whereas
3 the August PAR does. Is there a requirement -- again, I only
4 have the redacted version. That was Commander Mizer -- is
5 there a requirement that the reason for denial be put in
6 there?

7 TC [CDR LOCKHART]: It doesn't appear to. It doesn't say
8 why denial. It simply says under 31 "Remarks." I can
9 certainly show you the copy that I have.

10 For example, in the most recent one, which the
11 government submits is the controlling one, it simply has some
12 background information. It doesn't go into any of the other
13 reasoning. And it doesn't appear as though it has to. It
14 says "Remarks." It doesn't say "Basis for approval" or "Basis
15 for denial." It simply says "Remarks."

16 And again ----

17 MJ [COL POHL]: How would I -- how would any court ever
18 look -- look behind the PAR itself, then?

19 TC [CDR LOCKHART]: Well, they would need evidence. So
20 there would need to be actual reasons as to why there was ----

21 MJ [COL POHL]: But -- okay. I'm a little confused here.

22 You say there's no requirement to put down the
23 reasons for the denial on the PAR. Isn't that what you just

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1 told me?

2 TC [CDR LOCKHART]: I said that's what it appears,
3 correct.

4 MJ [COL POHL]: Okay. Okay.

5 And you said earlier that there is a fact pattern
6 that if it were arbitrary and capricious, that it could be
7 looked at by a court.

8 TC [CDR LOCKHART]: If there was any information out
9 there.

10 MJ [COL POHL]: But if the government's position is we
11 don't have to put any information out there, you would never
12 get to the arbitrary and capricious review because there's
13 nothing to review. Is that your position?

14 TC [CDR LOCKHART]: No, that's absolutely not correct,
15 sir. You absolutely could. The defense could be aware of
16 information or proffer information that talks about why ----

17 MJ [COL POHL]: And where would they get said information?

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

19 MJ [COL POHL]: Where would they get this information? I
20 mean, like in this case, for example, you ----

21 TC [CDR LOCKHART]: Absolutely. They could file an appeal
22 through the proper channels and obtain that information. As
23 the defense stated, they did file a FOIA request. They

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1 obtained information. There was nothing that showed that it
2 was arbitrary and capricious. They certainly can challenge it
3 through the proper administrative challenges and determine if
4 there's any further information.

5 But if we, as a judicial system, are going to look
6 at every denial and on its face not give it the credit that
7 it's due and simply say, well, because we don't know the
8 reason, there therefore must be something arbitrary and
9 capricious, that just doesn't even make sense. And, again, I
10 turn to the fact that every other member of the accused's
11 defense team has not had an issue.

12 MJ [COL POHL]: Just so I'm clear, it's your view that
13 there's an admin appeal procedure in place -- admin appeal
14 procedure in place that if they were to appeal this to this
15 appellate authority, the appellate authority would then tell
16 them the reasons for the denial?

17 TC [CDR LOCKHART]: That is my best understanding, and
18 understand I'm not well versed in that process. That's how
19 it's been explained to me, sir.

20 MJ [COL POHL]: Okay.

21 TC [CDR LOCKHART]: I'm just going to end with, again, we
22 looked to these in many aspects, detention operations and
23 such. We leave the decisions made -- to be made to the

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1 experts. So people in the best position to know, and, again,
2 without anything on its face and when the comparison is to a
3 case that was denied because of homosexuality, to this,
4 there's a stark contrast. There is nothing irregular about
5 this denial. And the government would urge, that, A, no
6 evidentiary hearing is necessary, that Your Honor has all of
7 the information on its face, that the controlling PAR is the
8 last one that was issued in March of 2014, and we would
9 request that you deny the government's motion.

10 MJ [COL POHL]: Thank you.

11 TC [CDR LOCKHART]: Thank you.

12 DDC [CDR MIZER]: Your Honor, may I make one factual
13 point? Our security folks just explained this administrative
14 process to me.

15 MJ [COL POHL]: Okay. Generally, I don't give you three
16 bites at the apple, Commander. Keep it short.

17 DDC [CDR MIZER]: It's a little bit hard to communicate in
18 and out of this courtroom. I'll be very brief.

19 There is an administrative process for security
20 clearances, and that's what Egan involves and that's what
21 Webster involves. But I'm told by our security folks that
22 there's no process to appeal denial of a SAP. And so this is
23 unreviewable. There is simply no administrative process.

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1 MJ [COL POHL]: Okay. If both parties -- if either party
2 or both parties believe that's a significant factor ----

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

4 MJ [COL POHL]: Okay. ---- file a supplemental pleading
5 citing the authority for whatever your position is.

6 DDC [CDR MIZER]: Yes, Your Honor.

7 MJ [COL POHL]: I mean, I'd rather do that than say I
8 talked to so-and-so and they said it is. I'm not sure it
9 makes much difference.

10 DDC [CDR MIZER]: Yes, Your Honor.

11 MJ [COL POHL]: But both parties keep coming back. The
12 government relies on it heavily. You're trying to rebut it.
13 I'm saying if there's some authority out there from an appeal
14 from a SAP denial, there should be authority one way or the
15 other.

16 DDC [CDR MIZER]: Judge, I think the authority would be
17 Ms. Flannery, security specialist, could come in here and tell
18 you.

19 MJ [COL POHL]: I think the authority is going to be
20 written down somewhere, not Ms. Flannery coming in and saying
21 you have to.

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

23 MJ [COL POHL]: I'm not saying you have to. Both sides

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1 are citing it. Seems there has to be an authority, executive
2 order, statute, regulation citing this.

3 DDC [CDR MIZER]: To be clear, we think the process is
4 irrelevant to the constitutional question before you.

5 MJ [COL POHL]: Commander, I'm not saying it is.

6 DDC [CDR MIZER]: Yes, Judge.

7 MJ [COL POHL]: I'm saying that you both -- you guys keep
8 mentioning it, and I'm saying if you want to cite me to some
9 authority other than talking to security folks, feel free to
10 do that.

11 DDC [CDR MIZER]: Yes, Your Honor.

12 MJ [COL POHL]: That being said, we are going to take the
13 lunch recess, but what I want to do before then is normally we
14 do the 802 in here on the record. Given the logistics of
15 moving the accused back and forth, I don't want to do this in
16 this period of time, so we're going to do this 802 in my
17 chambers. Take notes if there's something that's said in the
18 802 on the record. We are only going to talk about scheduling
19 issues. And sometimes, as both sides know, I'm not going to
20 follow the normal practice just because of the logistics here
21 now ----

22 LDC [MR. KAMMEN]: ---- to wait and we can just go ahead
23 and do it in here?

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1 MJ [COL POHL]: Well, he needs to eat and things like
2 that. I'm just going to do it. I'm ----

3 LDC [MR. KAMMEN]: He does not eat lunch, so I don't think
4 that's an issue.

5 MJ [COL POHL]: Trial Counsel, do you care?

6 TC [CDR LOCKHART]: I'm not sure I understand the
7 question, sir.

8 MJ [COL POHL]: Okay. Okay. Well, we're going to do it
9 right now. If you want to do it right now, that's fine.
10 Commission is in recess.

11 [The Military Commission recessed at 1154, 22 April 2014.]

12 [END OF PAGE]

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