

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The Military Commission was called to order at 1045, 23 April
2 2014.]

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

6 We have 224, 225 and 226, which are discovery
7 motions. Commander, let's start with 224.

8 DDC [CDR MIZER]: Thank you, Your Honor.

9 With respect to this motion, we're requesting
10 discovery of information surrounding the facts and
11 circumstances of the death of Abdul Aziz Bin Attash. And for
12 point of reference, he is one of the dead witnesses who is
13 purportedly going to testify before this commission as
14 outlined in AE 166.

15 I won't delve into the argument here, because I
16 think that we're going to get into it in depth with respect to
17 Appellate Exhibit 240 later today or in a session later this
18 week, but the reason for the defense request related to 240
19 is -- I think it's publicly known that when the Ethiopian army
20 went in to Somalia in 2007 to unseat the Union of Islamic
21 Courts, and then again in 2011 to unseat the group that that
22 had metastasized into, Al-Shabaab, that the United States was
23 a silent partner in both of those military actions, providing

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 support to the Ethiopian army, which ultimately ended, I'll
2 say, Abdul Aziz Bin Attash's life. And I think it's relevant
3 for the reasons stated in 240 that we have access to those
4 events.

5 MJ [COL POHL]: How do you respond to the government's
6 response saying they just don't have this information?

7 DDC [CDR MIZER]: Well, Your Honor, I find it incredible.
8 I take the prosecutors at their word.

9 MJ [COL POHL]: But apparently their incredible word.

10 DDC [CDR MIZER]: Well, Your Honor, I think there are
11 agencies that do things, including lie to federal prosecutors.
12 I think that was demonstrated in the Moussaoui case which is
13 reported.

14 MJ [COL POHL]: I got it. Let's assume that's true.

15 DDC [CDR MIZER]: Yes, Judge.

16 MJ [COL POHL]: Let's assume this information is out there
17 and the stakeholders of the information are lying to the
18 government ----

19 DDC [CDR MIZER]: Yes, Judge.

20 MJ [COL POHL]: ---- or to the prosecutors about that
21 information.

22 DDC [CDR MIZER]: Yes, Judge.

23 MJ [COL POHL]: Okay. How is the government supposed to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 get that information to you?

2 DDC [CDR MIZER]: Well, it eventually comes out, Judge. I
3 think all we would ask for is an order to where we could come
4 back to a court at a later date, whether it be the C.M.C.R. or
5 the D.C. Circuit, and ask for sanctions, which is exactly what
6 happened in the Moussaoui case when it turned out the evidence
7 that the U.S. Attorneys said in good faith didn't exist did in
8 fact exist in the bowels of the Central Intelligence Agency.
9 So I -- a lot of these motions, I think, are going to be
10 efforts to preserve these issues in case these documents do
11 eventually surface.

12 I just think -- I find it simply incredible that in
13 the United States government there is no information on the
14 facts and circumstances of the death of a member of al Qaeda,
15 and particularly one with the last name Bin Attash. I just
16 don't believe it, Judge.

17 And in essence I think the best legal analogy I can
18 give you with respect to the Ethiopian army is somewhat akin
19 to the Fourth Amendment jurisprudence where the FBI goes into
20 the FedEx shop and says, open the box and then comes into
21 court and says I didn't uncover the pound of cocaine that was
22 in the box, the FedEx man did it.

23 And we believe that that -- that is an appropriate

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 analogy for the invasion -- the two invasions of the Ethiopian
2 army into Somalia, and we believe we should get at least the
3 discovery into this to determine whether or not we can file an
4 additional motion.

5 That's all I have, Judge, absent any questions.

6 MJ [COL POHL]: Okay. So basically, the government --
7 okay. Fine. Let me hear what the government has got to say.

8 DDC [CDR MIZER]: And I think part of the problem, too,
9 Judge, is that we have repeatedly -- and the U.S. Attorney's
10 office does this occasionally as well, where they say, look,
11 we are just the U.S. Attorney's office. We don't have it.
12 However, we, the government, is supposed to know what they,
13 the government have. And you will see this, even if you want
14 to go to the 45 series recently where they filed a notice of
15 discovery that they, the government, just found from the
16 government. So there's this sort of shell game that goes on
17 as well.

18 And so it's just simply an order that they speak for
19 the United States, in fact, and the United States must produce
20 the information. And if it turns out later that it's there,
21 we'll be asking for sanctions.

22 MJ [COL POHL]: Now, they in their response say they did a
23 prudential search request.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DDC [CDR MIZER]: Yes, Your Honor. And, again, I ----

2 MJ [COL POHL]: I mean, the basic -- they have the
3 double -- they have two arguments here, and I understand that
4 one argument is just not material for the preparation of the
5 defense.

6 DDC [CDR MIZER]: Yes.

7 MJ [COL POHL]: I'm not even addressing that.

8 DDC [CDR MIZER]: Right.

9 MJ [COL POHL]: Because the first issue is does the
10 evidence exist. They have done a PSR. They say they have got
11 nothing back on it.

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

13 MJ [COL POHL]: And, therefore, in their view they don't
14 have anything to give you that's not already in open-source
15 media.

16 DDC [CDR MIZER]: And if that, in fact, turns out to be
17 the case, I guess simply what we're trying to do at this stage
18 is preserve that issue, that we've come in here and asked for
19 it.

20 MJ [COL POHL]: You have come in and asked for it, and
21 their position is that it does not exist ----

22 DDC [CDR MIZER]: When it turns out that it does, in fact,
23 exist, we'll be seeking a remedy.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: You keep saying that you want some order
2 from me for sanctions. I'm not sure what ----

3 DDC [CDR MIZER]: Judge, I'm not asking you for sanctions.
4 Just that we've met our burden under 701 to get this evidence.

5 MJ [COL POHL]: Okay.

6 DDC [CDR MIZER]: And you're not going to give it to us
7 because the government has demonstrated ----

8 MJ [COL POHL]: Well, I get ----

9 DDC [CDR MIZER]: Excuse me. I'm sorry.

10 MJ [COL POHL]: Let me just make it clear. Is what you're
11 asking me -- just that we've made it clear. You're asking for
12 a written ruling with a finding that the government says it
13 doesn't exist because on discovery issues, if it doesn't
14 exist, whether it's material to the preparation of the
15 defense, you don't even get there, do you?

16 DDC [CDR MIZER]: Your Honor, I don't know that you need
17 to have a written ruling, but I think that in 240, we've
18 demonstrated a legal basis as to why it would be relevant.

19 MJ [COL POHL]: Okay.

20 DDC [CDR MIZER]: And if Your Honor were to find that it
21 would be relevant that it does not exist, I think that that
22 would be a sufficient finding.

23 MJ [COL POHL]: Okay. We'll get back to that when we get

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 to 240. But as we're thinking about that, it's difficult to
2 establish relevancy of proffered evidence sometimes without
3 knowing what the evidence actually says.

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

5 MJ [COL POHL]: So what I'm saying is you've given me a
6 profer of what you think this evidence may show on its
7 relevance basis.

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

9 MJ [COL POHL]: But I'm not sure, and I will certainly
10 listen to argument whether I can then make a finding except
11 for something, if this is true, then it would have been
12 material to the preparation of the defense, is the best I can
13 get you.

14 DDC [CDR MIZER]: Yes, Your Honor, and that would be
15 sufficient that we have met the low threshold under 701 ----

16 MJ [COL POHL]: Understand. Okay.

17 DDC [CDR MIZER]: ---- that is evidence is relevant for
18 purposes of 240, if that makes sense.

19 Thank you, Judge.

20 MJ [COL POHL]: Yes. Commander Lockhart.

21 TC [CDR LOCKHART]: Thank you, Your Honor.

22 I mean, I do think that your last statement was
23 right on, the fact that you can't determine if something is

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 relevant, typically, without having reviewed it or knowing
2 what it is. The government submits that no order is necessary
3 in this case. As we've discussed numerous times in the past
4 about discovery, the obligation is the government's, and no
5 order is necessary saying that something is in fact
6 discoverable if it doesn't exist.

7 MJ [COL POHL]: But I could make a ruling saying that
8 basically the defense has asked for production of certain
9 evidence and make a finding that, based on the government's
10 representations, said evidence doesn't exist. Motion denied.

11 TC [CDR LOCKHART]: You certainly could say that, Your
12 Honor.

13 MJ [COL POHL]: Isn't that what you want me to say?

14 TC [CDR LOCKHART]: Yes, sir. Then I've clearly misspoken
15 to what I was trying to say.

16 MJ [COL POHL]: Okay.

17 TC [CDR LOCKHART]: Is there's no -- if I understood what
18 the defense wants, they want an order saying that if the
19 evidence did exist, it is relevant and would need to be turned
20 over so that they can somehow then use it later if this
21 magical document does surface, and the government submits that
22 that's not necessary.

23 We have asserted in our written pleadings, which is

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 a part of this record -- I'm reasserting now in oral
2 argument -- that we have searched for this information and
3 there is nothing going to his purported death. And it's
4 interesting that what is referred to about his death is from a
5 news article from "The Long War Journal." And that's the only
6 reporting of his death. He may be dead. He may not.

7 In our notice, in our hearsay notice, we said that
8 we believed he was dead based upon this article, but this is
9 the information that is before us. The government asserts
10 there is no information surrounding this issue.

11 MJ [COL POHL]: Just so I'm clear -- and this is a side
12 issue today, but may come up later on -- would this be an
13 example of established unavailability of a particular
14 declarant by the newspaper article saying he is dead?

15 TC [CDR LOCKHART]: Not necessarily, sir. I mean, I
16 certainly think there's ways to prove unavailability that have
17 to do with trying to locate an individual, and getting no
18 response. You know, mailing to the last known address,
19 showing up at somebody's door, not being able to find any
20 information on somebody ----

21 MJ [COL POHL]: Okay.

22 TC [CDR LOCKHART]: ---- potentially, and again ----

23 MJ [COL POHL]: We don't need to go down this road, but

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the concept of mailing something or knocking on somebody's
2 door in Yemen or some other area strikes me as a little
3 different than doing the same thing in New York, but that's
4 okay. That's a side issue we don't need to get into.

5 TC [CDR LOCKHART]: And I absolutely agree with that, Your
6 Honor.

7 Proving unavailability, which is an argument we're
8 going to get into later ----

9 MJ [COL POHL]: That's right. I don't want to go down
10 that road. Just when you mentioned it, I was just curious,
11 but ----

12 TC [CDR LOCKHART]: Yes, sir.

13 MJ [COL POHL]: ---- let's come back to this one.

14 TC [CDR LOCKHART]: And the -- the government's not
15 conceding that even if this information existed, it would be
16 relevant, and we're going to get into that discussion later on
17 in 240, and I think it would be an applicable ----

18 MJ [COL POHL]: Okay.

19 TC [CDR LOCKHART]: ---- discussion then.

20 The state of this particular motion that is before
21 Your Honor, and just this particular motion, is the defense is
22 requesting certain information. The government in its
23 discovery obligations is certifying that it has searched for

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 this information, and it has not found any of this
2 information. Certainly, if something happens later, which the
3 government strongly does not believe is going to occur, the
4 defense can seek out whatever remedies it desires.

5 I can tell you what the government has done. The
6 government has searched for this information and has found
7 nothing on point with this information. It can't even do a
8 relevance determination because the documentation does not
9 exist.

10 And I will end on one point. This notion of the
11 government is limiting itself somehow to looking into case
12 files of the prosecutor is frankly -- is frankly strange.
13 Based upon all of the pleadings that have been put forth
14 before Your Honor and explaining the extensive process to
15 which the prosecution office has affirmatively searched out
16 for discovery, and there are going to be documents that are
17 going to be found at a later date through other types of
18 investigative steps and searching -- and I know Commander
19 Mizer brought up an issue that's -- we're litigating for
20 another day. But this notion that we are confining ourselves
21 to looking in the prosecution's desk is just -- it's unfounded
22 and baseless, based upon all of the pleadings that's been
23 before Your Honor and all of the discussions that we've had.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Simply put, the government has searched for this
2 information. I'm asserting today, as I did in the written
3 pleadings, the government has nothing responsive on this
4 issue, and we're not conceding that if we did it would be
5 relevant.

6 MJ [COL POHL]: Thank you.

7 Commander, anything further?

8 DDC [CDR MIZER]: Nothing further, Judge.

9 MJ [COL POHL]: Okay. 225. Mr. Kammen.

10 LDC [MR. KAMMEN]: 225, Your Honor -- and we're going to
11 be revisiting a lot of these themes. And in some respects,
12 they have been touched on earlier today and throughout this.
13 And really they stem from the lack of any meaningful power the
14 defense has in terms of accessing evidence, and frankly -- and
15 I know the prosecution will disagree -- the prosecution's
16 crabbed view of their discovery obligations.

17 And let me be specific, because there have been
18 several instances where the government has said, oh, we've
19 given you everything, and then we make a more specific
20 request, and they say, oh, well, why didn't you ask for that,
21 and they produce it. And so a general Brady request that
22 might be adequate in a federal district court or in state
23 court, we think, under the proceedings here and the crabbed

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 view, is simply not adequate, so we have to make a number of
2 very specific Brady requests.

3 And the Brady request we are making here, Your
4 Honor, stems from an unclassified FBI something -- I'm not
5 even sure what to call it, but it is Bates No. 43496,
6 entitled -- dated August 2, 2005, entitled, "Kuwaiti
7 Authorities Arrest Persons Possibly Involved in the USS COLE
8 and Limburg Attacks."

9 And the FBI goes on to say that in 2002, Kuwaiti
10 authorities arrested four individuals identified as -- and
11 I'll provide the spellings to the court reporters later,
12 because it's not going to be pretty -- Mohsen al Fadli, who
13 the FBI described as a top al Qaeda leader in the Gulf Region;
14 Adel Buhaimeid, and in parentheses, Adel Yousef Bu Hemaïd,
15 close parentheses, a former military officer; Mohammed
16 al Mutairi, parentheses, Mohammed Jamaan Safaq Al-Mutairi,
17 close parentheses; an Awqaf official, and Maqbul Al-Maqbul,
18 and in parentheses, Maqboul Fahad Fahhad al Maqboul, a former
19 Interior Ministry official.

20 The FBI goes on to say that the four were charged
21 with joining a foreign nation's military and endangering
22 Kuwait's political relations, and additional charges against
23 others were filed. And it goes on to talk about these people

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 being part of al Qaeda and their connection to the COLE and
2 Limburg attacks.

3 It says al Fadli was connected to the COLE and
4 Limburg attacks, after lengthy interrogations presumably of
5 those individuals, and al Fadli identified the bomber of the
6 Limburg as a Yemeni, Shihab Al-Yamani, and he was identified
7 as collecting funds.

8 Essentially, what we have, Your Honor, is the FBI
9 saying that Kuwait prosecuted in Kuwait people who may well
10 have committed the COLE and Limburg bombings, which, of
11 course, is what Mr. al Nashiri is charged with, and for which
12 the government of the United States wants to kill him, if he's
13 convicted.

14 We requested information of the government, and
15 you've seen the response, which is kind of interesting because
16 it is not, geez, we'll give you everything, but it's, geez,
17 we'll give you what we think you're entitled to, and, oh, by
18 the way, we've given you everything you're entitled to. And
19 those documents are classified, so I can't really discuss
20 them, but trust me, they are not responsive at all to this,
21 with one exception. And the one exception is we want an
22 unredacted copy of one of the documents, and the government
23 opposes even that.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Now, the government's response essentially comes
2 down to two things. Number one, we've given it to you, and in
3 order to accept that, we have to believe that when the FBI --
4 because this document I was reading from, at the end -- and,
5 again, it's difficult to know what this document is,
6 whether -- it looks like a press release until you get to the
7 end, and then it is the request -- the request is it is kindly
8 requested that your agency provide legal and investigative
9 documents from the Kuwait files which particularly reference
10 USS COLE plot and the following persons. The same
11 individuals.

12 So we all know to whom this was sent, what agency.
13 There is attached to it -- again, and these are unclassified
14 documents -- a document dated -- also dated August the 8th,
15 2005. And the synopsis of the document is to request approval
16 of LHM -- I don't know what that is -- to be sent to
17 Legat Riyadh, to request and obtain legal and investigative
18 documents from the Kuwait files with reference to the USS COLE
19 plot, again in regards to these four Kuwaitis, who were
20 prosecuted in Kuwait.

21 So as best I can tell, the United States Federal
22 Bureau of Investigation was asking their representative -- and
23 they properly have representatives in Saudi Arabia to get this

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 information from some, perhaps, Saudi files having to do with
2 Kuwait.

3 Now, common sense would tell us that if they were
4 requesting it of the Saudis, they requested it of the
5 Kuwaitis. And the government's position seems to be, well,
6 yeah, maybe these requests were made of the Saudis and the
7 Kuwaitis, and who knows who else, but those two governments
8 told the United States nothing. Essentially, dismissed out of
9 hand and didn't respond in any way.

10 Well, I simply don't accept that that's what
11 happened. Again, I make room for the possibility other
12 agencies are not being forthcoming, but I also make room for
13 the possibility -- and this is part of the ongoing issue. The
14 government says, oh, we do all of this stuff, but then when
15 you ask them, show us what you did, did you ask the right
16 questions, it's you don't have any right to know.

17 So they say they sent out a prudential search
18 request. Because of the nature of this, we're required to
19 accept that. But if that's true, then essentially the FBI
20 sends out these requests that bureaucratically disappear.
21 Well, that, I know from my experience, is probably not the
22 case, and the government sends out these prudential search
23 requests that either don't ask for the right stuff or nobody

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 pays attention to.

2 We've made this request before, and we'll continue
3 to make it. In my experience -- and this is, you know,
4 experience that -- you know, sometimes agencies respond better
5 to court orders. Because sometimes federal agencies and state
6 agencies may want to say, well -- to a prosecutor, you
7 don't -- just tell them no. Maybe even they think in good
8 faith that they're just saying, well, you know, we've looked.
9 We looked in the file cabinet. We couldn't find anything.
10 Then all of a sudden they get an order from a judge, and that
11 changes the conversation.

12 And so what we have consistently requested, and we
13 would request again, is an order directing the United States
14 and its various agencies to make a diligent search and produce
15 this information. And we'd like that order from you. Because
16 frankly, an order from a judge carries a lot more weight than
17 a request from a prosecutor.

18 Now, the other thing in the government's response
19 that is troubling, is they say, well, you've -- you've gotten
20 everything you're entitled to. Well, what we've gotten is not
21 responsive to this unclassified document. There's nothing
22 about what we've gotten that is responsive to that at all.
23 But then they also, if you read their response, say, well, but

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 you also haven't shown with particularity what more should be
2 out there. Well, of course, we can't. And this is the -- I
3 call it the whack-a-mole theory of complying with discovery
4 obligation that they've used. It's, well, you can't really
5 tell us what you want, and if you can't tell us what you want,
6 then -- tell us what you want, then you've got what you've
7 got. Deal with it.

8 Again, what we want is evidence that Mr. al Nashiri
9 is innocent, and it's evidence that we clearly know the FBI in
10 2005 believed existed because they sent, that we know of, at
11 least one reference to the Saudi government for information,
12 and common sense tells us they would have sent a similar
13 request to the Kuwaiti government for that information.

14 And, again, I find it difficult to believe that both
15 of those other friendly governments would have said to the
16 United States, too bad, we're not going to give it to you.
17 And if that is the response, then surely that response exists
18 somewhere.

19 MJ [COL POHL]: Just so it's clear, you're asking for the
20 information in U.S. files?

21 LDC [MR. KAMMEN]: Yes.

22 MJ [COL POHL]: Not anything in the Kuwaiti ----

23 LDC [MR. KAMMEN]: No, no, but -- you know, I don't want

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 to -- here's what's coming.

2 MJ [COL POHL]: No, but I just -- that's referenced in
3 the ----

4 LDC [MR. KAMMEN]: Yeah, I mean -- and, again, you know,
5 it's the how can I -- you know, it's how much work -- how
6 inefficient can we make this process work? Because again,
7 they take the position we, the government of the United
8 States, are not obligated to produce what is in other
9 countries' files. That's true.

10 But they also take the position, we're not obligated
11 to ask, because certainly there's nothing that suggests that
12 in looking at their -- as they view their discovery
13 obligations, if the Kuwaitis have evidence that Mr. al Nashiri
14 is innocent, they view it as part of their obligation to find
15 that out.

16 So, you know, what we want is what we know and
17 common sense tells us exists in the U.S. files. That may well
18 lead us in other directions. But if they persist in the "No,"
19 they persist in the "It ain't there," then our next obligation
20 under the Sixth Amendment will be to come back to you and
21 we'll have this same -- maybe a different fight -- about
22 letters rogatory to be directed to the Saudis and the Kuwaitis
23 for evidence of our client's innocence.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Why haven't you already filed such a
2 motion?

3 LDC [MR. KAMMEN]: Because frankly, Your Honor, in the
4 interest of money, time, the important thing is to see what
5 they have, first. If they actually have it, then it's ----

6 MJ [COL POHL]: Even if they did have it, don't you think
7 you would want to at least ask the Kuwaiti government what
8 they have? Why would you assume that the U.S. has all of the
9 information?

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

11 MJ [COL POHL]: I mean, you're talking about piecemeal
12 litigation here. And I understand your issue here ----

13 LDC [MR. KAMMEN]: Well, Your Honor, you know, we don't
14 have the resources to do all of these things at once. You
15 know, we filed over 100 motions because we're trying to -- we
16 were trying to keep up with the motions, the law motions
17 deadline. We're trying to prepare for, you know, a trial date
18 that is completely unrealistic. We're trying to keep 100
19 different balls in the air.

20 I'm sorry we didn't have the opportunity to ask for
21 letters rogatory when the United States refuses to follow its
22 discovery obligation, but we just haven't had the time to do
23 it.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Okay.

2 LDC [MR. KAMMEN]: Now, if that's our fault, it is yet
3 another ----

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

5 LDC [MR. KAMMEN]: No, no, let me just finish.

6 ---- example of how the defense is ineffective and
7 how Mr. al Nashiri is not receiving effective assistance of
8 counsel.

9 MJ [COL POHL]: Do you feel -- if that's true, do you feel
10 you must leave the case, then? I mean ----

11 LDC [MR. KAMMEN]: Not yet.

12 MJ [COL POHL]: Okay. But, I mean -- so don't -- you
13 stand up there and say that ----

14 LDC [MR. KAMMEN]: Well, no, I understand ----

15 MJ [COL POHL]: Well, no, you just said he's getting
16 ineffective representation, but I'm going to keep representing
17 him.

18 LDC [MR. KAMMEN]: We're doing the best we can, Your
19 Honor, but when you say how come you haven't done
20 something ----

21 MJ [COL POHL]: Right. It's a logical question.

22 LDC [MR. KAMMEN]: ---- I have to answer your question.

23 MJ [COL POHL]: But that -- we have gone on a different

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 issue altogether.

2 Mr. Kammen, if you believe you're ineffective, can
3 you continue to represent him.

4 LDC [MR. KAMMEN]: At this point, yes. But as we have
5 said before, that ----

6 MJ [COL POHL]: Stop. My first question was -- it was a
7 compound question, so let me break it up.

8 Do you believe you're ineffectively representing
9 Mr. Nashiri as of today?

10 LDC [MR. KAMMEN]: No, because I think that by
11 requesting -- I think -- well, let me answer your question
12 this way: There are circumstances in this commission, and in
13 the way this commission is structured, and in the policies of
14 the United States that render any lawyers ineffective.

15 MJ [COL POHL]: Okay. But -- so that's not personal,
16 professional to you and your team. It's systemic to the
17 system ----

18 LDC [MR. KAMMEN]: Absolutely.

19 MJ [COL POHL]: ---- that's handcuffing you to present.
20 That's a systemic issue, not a personal/professional issue?

21 LDC [MR. KAMMEN]: Correct.

22 MJ [COL POHL]: Okay. Got it.

23 LDC [MR. KAMMEN]: Okay.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Back to the issue before us.

2 LDC [MR. KAMMEN]: The issue before us, Your Honor, is
3 very simple.

4 The most efficient way to do this is for an order to
5 the United States and all of its agencies to produce this
6 exculpatory information. The notion you have all you're
7 entitled to is, in this context, frivolous, because this --
8 you can't have anything more dramatic and more important. If
9 they got the wrong guy, and if the right guys were prosecuted
10 and for whatever reasons released in Kuwait, isn't that
11 something we should all know?

12 And you know, this -- all this you haven't asked
13 right, you didn't do this, you didn't do that, we've filed,
14 we've done the best we can ----

15 MJ [COL POHL]: But if they have evidence of -- actual, as
16 you characterize it, evidence of actual innocence, you don't
17 have to request that. They have to give that to you.

18 LDC [MR. KAMMEN]: Well, in this commission, Your Honor,
19 we have to request it.

20 MJ [COL POHL]: Okay. Well, I mean, but I'm saying under
21 any reading -- fair reading of Brady and its progeny ----

22 LDC [MR. KAMMEN]: That's true, Your Honor, and, again, I
23 don't want to -- I mean, let's just say ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Well, let's be -- also be realistic here.
2 Or if they had such evidence and didn't disclose it, this case
3 would not do very well on appeal.

4 LDC [MR. KAMMEN]: If it were discovered later ----

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

6 LDC [MR. KAMMEN]: ---- and what happens, of course -- and
7 this is what happens, and it happens routinely in capital
8 cases, is prosecutors make the calculated decision to withhold
9 it, trusting that it will never be discovered. And, again,
10 I'm not suggesting that's happened here, but they do it under
11 circumstances where the universe of the information may exist
12 in their files and a county sheriff's file. I conceive and I
13 have heard of federal prosecutors in other situations, and the
14 one that comes to mind is the Stevens case in the District of
15 Columbia where federal prosecutors made a calculated decision
16 to withhold exculpatory information that was in FBI files, and
17 that ended up, you know, where Senator Stevens, after he died,
18 ended up essentially being exonerated. So it happens.

19 And it's -- you know, and, again, and I can see
20 federal agents without telling prosecutors, saying, well, boy,
21 this whole military commissions has been going on for two
22 years, if we come up and give them information that they got
23 the wrong guy, that's going to make folks look bad. So, I

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 mean, it happens for a whole host of reasons.

2 MJ [COL POHL]: Okay.

3 LDC [MR. KAMMEN]: So to suggest that, well, just -- you
4 know, but ----

5 MJ [COL POHL]: No, I understand your point. I'm just
6 saying that ----

7 LDC [MR. KAMMEN]: Ultimately, Your Honor, the point that
8 has to be made, and then I'll sit down, is that in the way
9 this plays out, the United States takes the position that you
10 have to make specific requests. If you don't ask the right
11 question, then you -- you know, so what we just want is the
12 order, and what we also want is a direction: Go back and ask
13 again.

14 We'd be happy to sit down with them and help them
15 draft the prudential search request, so that we would be
16 satisfied that they're asking for the right stuff, you know --
17 but it is not plausible that this -- these requests have gone
18 unanswered, and so that's why we come to this commission for
19 assistance.

20 MJ [COL POHL]: Thank you.

21 Commander Lockhart.

22 TC [CDR LOCKHART]: Thank you, Your Honor.

23 As we've discussed many times before, no order is

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 necessary, and frankly, I find Mr. Kammen's comments
2 inappropriate. There has been no evidence in this case of
3 anything other than the government providing discovery, both
4 through knowing its obligations of what's discoverable and
5 requests from the defense.

6 This idea that somehow the government would not turn
7 over information of actual innocence is just preposterous.
8 It's clearly discoverable information. It's clearly
9 information that, if it existed, would be provided. I want to
10 start with two factual things that I think Mr. Kammen got very
11 wrong.

12 The first, I would invite Your Honor's attention to
13 Attachment B to the government -- or to the defense's filing,
14 so it's AE 225, Attachment B, of course and this is the
15 government's response. And although Mr. Kammen stood up here
16 and said we were playing whack-a-mole and that they weren't --
17 that the government said it wasn't providing things and they
18 weren't asking in the right way, I would invite Your Honor's
19 attention to the third paragraph, which specifically says we
20 have provided you with everything that's relevant and material
21 to the preparation of the defense. We further provide them
22 specific Bates stamp numbers which we're under no obligation
23 to do, but to point them in the direction of where this

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 evidence -- sorry, this discovery was contained, so that they
2 could then refer to that. At no point does the government say
3 that this information is not discoverable.

4 The second factual assertion that I think that I'd
5 like to refer Your Honor to, and I'm not sure if you would
6 like a copy of this report for insertion in the record of
7 trial. I know Mr. Kammen read from it, and ----

8 MJ [COL POHL]: I want if you want to make it an exhibit,
9 go ahead. I mean, I don't ----

10 TC [CDR LOCKHART]: I can refer to it without doing so.
11 It's specifically Bates stamp numbered in the defense's
12 request and the defense request for an unredacted copy of
13 Bates stamp numbers, and the last three are 439 through 497.
14 And when you actually look at the report, there are very few
15 redactions and the only redactions are administrative routing
16 information by the FBI. The actual report is ----

17 MJ [COL POHL]: For purposes of a complete record, let's
18 go ahead and make that an exhibit. That will be
19 Two-Twenty ----

20 TC [CDR LOCKHART]: May I approach the court reporter,
21 sir?

22 MJ [COL POHL]: ---- 225C. You don't need to provide it
23 to the court reporter right now. Just so it's been -- since

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 there's been reference to it, it's easier to make sure that we
2 put it at the ----

3 TC [CDR LOCKHART]: I would note at the bottom that the
4 Bates ----

5 MJ [COL POHL]: Mr. Kammen, that's the same report that
6 you referred to?

7 LDC [MR. KAMMEN]: [Microphone button not pushed; no
8 audio].

9 MJ [COL POHL]: Push the button.

10 LDC [MR. KAMMEN]: Thank you. It's not the same, but it's
11 associated with, and I'll ----

12 MJ [COL POHL]: Okay. If you wish to supplement the
13 record with another report ----

14 LDC [MR. KAMMEN]: No. I mean, I think that what she has
15 is the cover letter for the report.

16 MJ [COL POHL]: Okay.

17 TC [CDR LOCKHART]: I actually have both, sir, and it's
18 specifically, -- if you look at paragraph 2, the relief -- I'm
19 sorry, the -- specifically what the defense is requesting on
20 page 6 of its motion, it says, Bates stamp number -- and I can
21 read them all out, but the last three are 493 through 497, and
22 those are the exact pages I have here.

23 MJ [COL POHL]: Okay.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [CDR LOCKHART]: So it's specifically the documents
2 referenced by the defense.

3 If you read the first page, it's very clear what the
4 is that's being submitted. It's a lead, it's a lead
5 investigative request to a foreign government.

6 INT: Your Honor, counsel is going too fast.

7 TC [CDR LOCKHART]: It's a lead, which means it's an
8 investigative request to a foreign government. That's what
9 she said. Or it could be within the United States. This one,
10 as Mr. Kammen pointed out earlier, was to a foreign
11 government. That means it's a request for information.

12 And if you read the document carefully, which I
13 would urge Your Honor to do, it states the information that's
14 being used in this request for information, the FBI never
15 received a response on this, and if they had, that would have
16 been included in discovery. That would have been included in
17 discoverable information, if it had any information pertaining
18 to the innocence of the accused or the charged offenses or
19 anything potentially mitigating.

20 MJ [COL POHL]: Is there any evidence that the FBI
21 received any response?

22 TC [CDR LOCKHART]: They did not, Your Honor.

23 MJ [COL POHL]: Do they normally send requests for

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 information, and they don't close the loop, say "None
2 provided" or "No response" or anything?

3 TC [CDR LOCKHART]: It happens, sir.

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

5 TC [CDR LOCKHART]: The reason why this is important is
6 the defense has asked for three things in its motion, and then
7 that's on page 6.

8 Paragraph 1, the government has already provided.
9 Paragraph 2, or number 2, is an unredacted copy. And
10 certainly, Your Honor, you're welcome to review this. The
11 only information that's redacted out is administrative routing
12 material by the FBI. If you look at the meat of it, the body
13 of it, there's nothing redacted out. The government, as we've
14 previously litigated, only turns over information that's
15 relevant and material to the preparation of the defense.
16 Those administrative matters would not be the case here.

17 And, again, paragraph 3, any and all responses. And
18 as the government asserted in its motion and asserts here, we
19 can't turn over what we don't have. I will offer this up now
20 to promote efficiency, because apparently that's -- I find it
21 interesting, and I just have to note this, that Mr. Kammen
22 talked about the inefficiency of things, and yet this initial
23 request for discovery was made by the defense and responded to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 by the government more than five months prior to the filing of
2 this motion.

3 MJ [COL POHL]: Let me ask you a question, Commander. The
4 basic request deals with a trial in Kuwaiti of other people
5 alleged to be involved in some of the activity that's the
6 basis of the charge in this case, correct?

7 TC [CDR LOCKHART]: No, sir. I would actually contend
8 that that's an interesting reading of this by the defense.
9 They're associated with it. That doesn't say that they --
10 there's any -- there's nothing that shows that -- there's
11 nothing in the discovery of the government that shows that
12 these four individuals were involved with the bombing.

13 And I understand that there's a lead out for
14 information that says that. Any information that is known,
15 including -- and I understand it's a press release article,
16 but including what's available on public source does not have
17 anything that goes to the fact that these individuals were, in
18 fact, the ones responsible for bombing ----

19 MJ [COL POHL]: I'm not -- I'm not -- again, I'm not going
20 down -- involvement in the bombing by some doesn't exclude
21 involvement in the bombing by others.

22 TC [CDR LOCKHART]: Correct.

23 MJ [COL POHL]: It might. It might not. I've got all of

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that.

2 TC [CDR LOCKHART]: We've turned over everything.

3 MJ [COL POHL]: My question is: The government is aware
4 that there's allegations out there that these four individuals
5 were involved in some way, shape or form with the two bombings
6 that are the subject of this commission?

7 TC [CDR LOCKHART]: Not the four individuals, sir. I
8 think -- I believe that there's one individual of the four,
9 potentially two, but not all four of them.

10 MJ [COL POHL]: Okay. But what I'm saying is, would
11 that -- as I'm getting to my real question, assuming that
12 there's -- so you did have some evidence out there that other
13 individual or individuals may have been involved in the
14 activities involving Mr. Nashiri as alleged by the government?

15 TC [CDR LOCKHART]: No, sir. And if I can explain. In
16 the other discovery that's provided that Mr. Kammen referred
17 to that he believes is classified -- and it may be, I haven't
18 looked at it recently -- it explains in more detail what their
19 suspected involvement was, and it had nothing to do with the
20 actual bombing; nothing to do with the preparations of that.

21 And, again, if there was any information that they
22 were involved that was in the possession of the government, it
23 certainly would be provided.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 That being said ----

2 MJ [COL POHL]: But I'm getting to my final question,
3 which is really my real ----

4 TC [CDR LOCKHART]: Sure.

5 MJ [COL POHL]: But you referred to a discovery request.
6 There's no requirement for such a request if it's Brady
7 material, is there?

8 TC [CDR LOCKHART]: No, sir. And in fact that information
9 was previously provided before that request.

10 MJ [COL POHL]: Okay. That's just -- okay. I just want
11 to make it clear that no matter whatever -- whatever
12 requirement of discovery requests may be for particularity
13 that may be out there in other materials, when it comes to
14 Brady materials, government doesn't have to wait ----

15 TC [CDR LOCKHART]: Of course not, sir.

16 MJ [COL POHL]: ---- doesn't have to wait for a request.
17 It just has to provide it.

18 TC [CDR LOCKHART]: Of course not, sir. In fact, this
19 material was provided a year and a half, two years ago, long
20 before their request for follow-up on this information. And
21 if the government was in possession of additional information
22 on this topic, we would have an affirmative obligation
23 regardless of any defense request to provide it.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: So just to -- so I understand the
2 government's position, is on the three items that are
3 specifically in the motion, item one has been provided and
4 there is no other evidence responsive to that request.

5 TC [CDR LOCKHART]: Yes, sir.

6 MJ [COL POHL]: Item two will not be provided because the
7 redactions are only administrative ----

8 TC [CDR LOCKHART]: Yes, sir.

9 MJ [COL POHL] ---- in nature.

10 And item three is either responded to by items one
11 and two, or doesn't exist.

12 TC [CDR LOCKHART]: Correct, sir.

13 MJ [COL POHL]: Got it.

14 TC [CDR LOCKHART]: And, again, to promote economy here,
15 the government does not object to letters rogatory being sent
16 to either of these ----

17 MJ [COL POHL]: Let's just deal with the issue in front of
18 me.

19 TC [CDR LOCKHART]: Just trying to move it along so we
20 don't have to litigate this again in three months.

21 MJ [COL POHL]: If they file requests for letters rogatory
22 and the government says there is no opposition, I can sign it
23 without a hearing.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [CDR LOCKHART]: Yes, sir. I will also note ----

2 MJ [COL POHL]: Let's not go down that road right now
3 because it's not the issue before me.

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

5 MJ [COL POHL]: It's not the issue before me.

6 TC [CDR LOCKHART]: I do want to clarify and I will have
7 this, obviously, document as an attachment to the record that
8 there is certainly references in here that they were connected
9 to the attacks.

10 The key word, though, is that connected. And then
11 there's a further statement that says they both played a
12 significant role in the bombing. Understand that this is a
13 lead. There's no underlying information of where that
14 information came from, how it was obtained. This is simply
15 what the government has in its possession, and any other
16 information was provided to the defense.

17 The government asserts that this commission should
18 not issue orders for the government complying with discovery
19 obligations. We've complied in this case. There's no need to
20 issue ----

21 MJ [COL POHL]: So similar to the other issue is when I
22 get to number three, the government is comfortable with the
23 finding that this does not exist, and ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [CDR LOCKHART]: Yes, sir.

2 MJ [COL POHL]: ---- in the U.S. government?

3 TC [CDR LOCKHART]: Yes, sir.

4 MJ [COL POHL]: Okay. Don't forget to give the exhibit to
5 the court reporter.

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

7 MJ [COL POHL]: Don't forget to give the exhibit to the
8 court reporter.

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

10 MJ [COL POHL]: Unless Mr. Kammen needs to refer to it.

11 LDC [MR. KAMMEN]: I would, please. May I have it?

12 Based on -- let me say, the prosecution in its
13 response did identify several documents that were provided in
14 discovery which they claim are germane to the August 2nd
15 things sent to Legat Riyadh. And like I say, while we don't
16 have this, I have trouble imagining that somebody in the FBI
17 didn't say, well, while we're sending stuff out, let's send it
18 to Kuwait. But we don't have anything sent to Kuwait, which
19 again, I have to believe exists somewhere in the files of the
20 United States somewhere.

21 All of the information, Your Honor, that they refer
22 to in the Bates numbers predates this by years.

23 MJ [COL POHL]: What is the "this"? You say it predates

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 this by years. I'm not sure what the "this" is.

2 LDC [MR. KAMMEN]: Predates this request by years. I
3 can't ----

4 MJ [COL POHL]: The FBI request.

5 LDC [MR. KAMMEN]: Yes.

6 MJ [COL POHL]: Okay. I wasn't clear whether you meant
7 the FBI request.

8 LDC [MR. KAMMEN]: It has nothing to do with the FBI
9 request. I can't go into it because it's classified.

10 MJ [COL POHL]: I got it.

11 LDC [MR. KAMMEN]: The notion that this is somehow
12 responsive, that that information is somehow responsive and
13 elucidates on the unclassified documents we've been discussing
14 is just -- it's absurd. What they have said is, well, gosh,
15 the FBI has this information, and they thought it important
16 enough to send out at least a request to the Saudis, but
17 golly, Your Honor, we don't know what information it is. Now,
18 those were, as I understood her exact words, we don't know
19 what it is. Reliable, unreliable, good, bad. Well, we don't
20 have that information. We don't have whatever the FBI used.
21 I mean, maybe it was a press release from a Saudi news -- or a
22 Kuwaiti newspaper. I don't know. That's -- so we don't know
23 where the -- this came from.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 But what we do know, Your Honor, is the FBI thought
2 it was important enough to send it out at least to one foreign
3 government, and I have to believe more than one. And then
4 when they got the response -- or then when apparently they
5 were met by silence, kind of said, oh, well, never mind. Who
6 cares?

7 I mean, if that's the way this happened, that's
8 fine. I mean, it is what it is. It's not fine; it's actually
9 kind of shocking. But if that's what really happened, that's
10 what really happened.

11 But again, I just -- my experience is that FBI
12 agents don't draft, you know, requests to foreign governments.
13 And the document the prosecutors were referring to, which ----

14 MJ [COL POHL]: Mr. Kammen, I want to make sure I
15 understand this. That request went to Saudi Arabia or Kuwait?

16 LDC [MR. KAMMEN]: The -- what we have went to Saudi
17 Arabia.

18 MJ [COL POHL]: Okay.

19 LDC [MR. KAMMEN]: We don't have anything ----

20 MJ [COL POHL]: Okay. So and your -- just so I understand
21 your position, since they sent a request to Saudi Arabia, they
22 must have sent a request to Kuwait ----

23 LDC [MR. KAMMEN]: Yes.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: ---- even though you have no evidence of
2 such request, just a surmise.

3 LDC [MR. KAMMEN]: Yes, because ----

4 MJ [COL POHL]: Or logical, and then it flows from there
5 about getting something back.

6 LDC [MR. KAMMEN]: Sure. Because what I say is -- and the
7 reason I say this, and just so we're all clear, the document
8 I've been referring to -- it's the same. They're just in
9 different order.

10 MJ [COL POHL]: Okay. Okay.

11 LDC [MR. KAMMEN]: Okay. In any event, the -- again,
12 Kuwaiti authorities arrest persons possibly involved in the
13 USS COLE and Limburg attacks. Now, again, I don't know if
14 this is a press release. I don't know what this is. I'll --
15 I think it would be helpful to make it a part of the record,
16 and I'll do that.

17 Well, it's actually part of it, the government. So
18 it will be ----

19 MJ [COL POHL]: That's included in the government
20 exhibits ----

21 LDC [MR. KAMMEN]: Yes.

22 MJ [COL POHL]: ---- of 225C.

23 LDC [MR. KAMMEN]: Yes.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Go ahead.

2 LDC [MR. KAMMEN]: Bates No. 43496 and 97, is what I'm
3 reading from.

4 MJ [COL POHL]: Okay.

5 LDC [MR. KAMMEN]: You know, now, maybe they just wanted
6 headlines. Maybe there's -- you know, in the end maybe they
7 were making stuff up. But I don't think that's the way it
8 works. I think that when they send out whatever this is to
9 whoever it was sent to, it's because they thought these guys
10 had possibly been involved in the USS COLE attacks.

11 And when they sent stuff to Riyadh, which, you know,
12 I have no way of knowing whether -- gosh, let's send something
13 to our representatives in another country and ask them to ask
14 the other government for information, I don't know if that
15 happens once a day, once a week, once a month, or once a year.
16 But I assume, based upon the care they want this commission to
17 use with respect to the letters rogatory, that this is
18 something that the FBI uses some caution, is not just done
19 willy-nilly.

20 And, again, if it is the fact that the FBI sends out
21 this -- you know, if it is the fact they didn't send it to
22 Kuwait, if that's really -- fine. And if the government of
23 the United States prosecutors will stipulate that the same FBI

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that was -- that investigated the COLE bombing was so
2 inefficient that it couldn't think to send a request about a
3 Kuwaiti court to Kuwait, we'll accept that. But I kind of
4 doubt that's their position.

5 And so, you know, that's where we are. And I
6 understand the prosecution says, well, gosh, we've given it
7 all. But if you look at their response, that's not really
8 quite what they say. They say, and I'm looking at page 5, the
9 government provided the defense with all the information that
10 in their view -- and remember, their notion is, they say in
11 their response on page 4, they regard it as their job to
12 figure out what's useful for us.

13 They -- it's what they say. It is their job to
14 decide will this be helpful for the defense, will this be
15 useful for the defense. They consider the -- the government
16 considers several factors in determining whether information
17 is discoverable. So they regard this as, okay, we're the
18 gatekeepers. And we make the decision that we know better
19 than the defense what the defense can use. Now, you know, I'm
20 not going to comment further on the problems with that kind of
21 attitude when it's in an adversarial system, because in an
22 adversarial system people want to win.

23 The government goes on to say the government must

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 produce material -- material presentation to the defense, and
2 then they say, if it's in our possession. They obviously, you
3 know, can't give it if it's in the possession of the Kuwaitis.
4 We accept that. And, you know, so it's, well, we've given
5 them everything that's material, which isn't exactly to our
6 eye, and maybe our eye is somewhat jaundiced in this, that
7 that isn't exactly we've given them everything. It's, well,
8 we have given them everything we think is material. And then
9 they, of course, talked about the Bates numbers, and, again,
10 the Bates numbers clearly are not responsive -- you know, is
11 nothing from the Kuwaitis or the Saudis or anything else.

12 You know, and then they say, well, the only
13 example -- and then they say, well, again, they haven't
14 responded with enough precision. And, again, quoting from
15 their pleading, the only example provided by the defense is
16 the request for the Kuwaiti files. Well, I don't know what
17 else to request, I mean, because that's what they requested.
18 So I don't know what else to request.

19 Again, Your Honor, they don't want an order, and I
20 understand why they wouldn't want an order, but our problem,
21 of course, is that we -- again, I think an order is going to
22 be a lot more useful to getting other agencies to pay
23 attention than a request from a prosecutor. And so that's the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 tension. That's where we are.

2 MJ [COL POHL]: Mr. Kammen -- and, again, I think it's a
3 relatively -- not the major point, but one of your requests is
4 for an unredacted copy of the Bates Nos. 493 through 497. The
5 government says that's administrative FBI routing data. It
6 strikes to me as you could either accept that explanation or I
7 could have them give me a -- an unredacted copy and confirm
8 that.

9 LDC [MR. KAMMEN]: Yeah. We would prefer that -- you just
10 can't tell, because if it may say that -- and there's two
11 areas specifically ----

12 MJ [COL POHL]: No, but just -- but they say it's
13 irrelevant and unnecessary, but I'm just simply saying I can
14 just look at the unredacted copy ----

15 LDC [MR. KAMMEN]: Sure.

16 MJ [COL POHL]: ---- and decide whether it meets it or
17 not. It just strikes to me as ----

18 LDC [MR. KAMMEN]: But again ----

19 MJ [COL POHL]: Understanding that I'm not the defense
20 counsel. I understand that.

21 LDC [MR. KAMMEN]: No, no. But I mean, look, if it is --
22 like there's one section that says approved by, and that's
23 redacted. Well, putting aside the pointlessness of that, I

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 don't know that we could necessarily -- you know, I haven't
2 really thought it through. It may be that if that individual
3 is amenable to a conversation, we could call him up and say,
4 hey, did the Saudis really not respond to this? And if he
5 said, oh, no, we got 1,000 pages, I'm surprised you don't have
6 it, that would be perhaps germane.

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

8 LDC [MR. KAMMEN]: So that's where we are on that, Your
9 Honor. Thank you.

10 MJ [COL POHL]: Thank you.

11 TC [CDR LOCKHART]: I offer both of these.

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

13 TC [CDR LOCKHART]: I'm going to offer both of these, the
14 press articles. I can get you copies afterwards.

15 LDC [MR. KAMMEN]: Yeah, I know. I'm just reading them.

16 Your Honor, I don't -- she is going to offer some
17 exhibits. I don't -- I think that's perfectly appropriate. I
18 would like the opportunity after she is done to respond in
19 light of this.

20 MJ [COL POHL]: Okay. We'll see.

21 LDC [MR. KAMMEN]: I can respond now or ----

22 MJ [COL POHL]: Let's hear from the commander first and
23 then go from there.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [CDR LOCKHART]: I'd like to offer two additional
2 documents just in light of Mr. Kammen's statements. These are
3 just two open-source press articles that talk about the
4 Kuwaiti trial or charges of these individuals that were
5 mentioned in the lead. And the sole purpose for offering it
6 is to show the date. These individuals in Kuwait were either
7 arrested or charged in the time frame of December 2002. Both
8 of them are dated December 17, 2002. And the reason why I
9 think that's relevant in light of Mr. Kammen -- of what
10 Mr. Kammen said is he indicated that the other previous
11 discovery about these individuals predated the request of the
12 FBI. And I think that logically makes sense.

13 This event occurred where they were arrested in late
14 2002. There was some reporting gathered, which, again, was
15 provided to the defense long before their discovery request.
16 And then in 2005, in August of 2005, the FBI sent a lead,
17 apparently as a follow-up on this. So chronologically, I
18 think it makes sense.

19 MJ [COL POHL]: Now, you said -- you have some objection
20 to the admissibility of evidence itself? You said -- you
21 indicated you had an objection to these being put in the order
22 altogether?

23 LDC [MR. KAMMEN]: I mean, for the purposes of this ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Motion.

2 LDC [MR. KAMMEN]: ---- hearing. This motion.

3 MJ [COL POHL]: What's your objection?

4 LDC [MR. KAMMEN]: Sorry?

5 MJ [COL POHL]: What is your objection?

6 LDC [MR. KAMMEN]: No, I don't have an objection. I'm
7 sorry, no.

8 MJ [COL POHL]: Okay. I misunderstood. Okay. They'll be
9 labeled. Staple them together as one exhibit. It will be
10 225D.

11 TC [CDR LOCKHART]: Yes, sir. Again, government is not
12 asserting whether or not the information in here is accurate
13 or not, it's just to show the time frame of when these events
14 occurred.

15 MJ [COL POHL]: I got it. I will give it the weight a
16 press release should receive.

17 TC [CDR LOCKHART]: I understand, sir.

18 The other point is that we -- this commission
19 litigated the idea and the notion about the redacted
20 information long ago. I think it was about two years ago.
21 And the government certainly doesn't object to Your Honor
22 reviewing this document and determining that, but we did
23 litigate the issue of Your Honor reviewing every single time

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the government produces a document that might have some ----

2 MJ [COL POHL]: I recall the litigation on it ----

3 TC [CDR LOCKHART]: Yes, sir.

4 MJ [COL POHL]: ---- so ----

5 TC [CDR LOCKHART]: Okay.

6 MJ [COL POHL]: And you are correct, is that I don't
7 generally review every piece of redacted evidence, but ----

8 TC [CDR LOCKHART]: Yes, sir. We have no objection to
9 your reviewing this, none whatsoever.

10 MJ [COL POHL]: Okay. Let me ask you this: What is the
11 government's position of why it's redacted?

12 TC [CDR LOCKHART]: It's actually routine what the FBI
13 will redact before making a document public.

14 MJ [COL POHL]: Okay. That's fine. You've told me what
15 they did do. That's not a legal position.

16 TC [CDR LOCKHART]: That's not relevant.

17 MJ [COL POHL]: It's a relevance issue.

18 TC [CDR LOCKHART]: That's correct.

19 MJ [COL POHL]: It's not a classification issue. It's
20 just not relevant.

21 TC [CDR LOCKHART]: Yes.

22 MJ [COL POHL]: And you are correct that as a general
23 practice the government did -- just because it's blacked out

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 doesn't mean I'm going to review every blacked-out piece of
2 evidence.

3 TC [CDR LOCKHART]: That's correct, sir, and we're not
4 revisiting that.

5 MJ [COL POHL]: And I'm going to going to revisit it.

6 TC [CDR LOCKHART]: And there's no objection from the
7 government on that.

8 MJ [COL POHL]: Let me ask you: If the issue is only
9 relevance, why don't you just give him a redacted copy and an
10 unredacted copy and get me out of this altogether, if all it
11 is is relevance? If all it is is relevance, if it's not PII,
12 it's not classified.

13 TC [CDR LOCKHART]: Law enforcement sensitive, sir. It's
14 not classified, it's law enforcement sensitive.

15 MJ [COL POHL]: Okay. That's different than simply
16 relevance.

17 TC [CDR LOCKHART]: Well, it's not relevant, and on top of
18 that, we don't want to turn it over because it's law
19 enforcement sensitive.

20 MJ [COL POHL]: Submit it under seal, and I will look at
21 it and decide whether or not it should be given to the
22 defense.

23 TC [CDR LOCKHART]: The document in question, Mr. Kammen

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 made a copy about the approved by, it has on there who it's
2 drafted by. The defense can certainly request to interview
3 that person. That person's name is out there. I'm going to
4 go back to it and close and be brief, and hopefully whatever
5 rebuttal will stick to the points that I've just made.

6 There's no necessity for an order here. The
7 government has complied with its obligations. It's well aware
8 of its obligations. If there's anything that goes to the
9 specific category that Mr. Kammen referred to, the innocence
10 of the accused, if anything exists, that certainly is an
11 obligation that is not required to have a request. The
12 government would turn that over. The government has provided
13 over 229,000 pages of discovery. We're a well aware of what
14 our obligations are, and, as such, no order is necessary.

15 May I give these to the court reporter?

16 MJ [COL POHL]: Sure. Mr. Kammen, do you want to be heard
17 only on 225D?

18 LDC [MR. KAMMEN]: Absolutely.

19 MJ [COL POHL]: Okay. I'll let you do that, because it's
20 new, but we're not revisiting the others. Okay.

21 LDC [MR. KAMMEN]: According to the press release, which I
22 am gathering the prosecutors say may be part of the genesis of
23 the request to Riyadh for information, Mohsen al Fadli was

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 arrested in Kuwait last month, and last month would be
2 November of 2002. Interior ministry officials said last month
3 that his arrest had helped foil a plan for a car bomb attack
4 on a hotel in Yemen where Americans were staying.

5 They said -- and he -- I presume "he" is al Fadli,
6 also provided information about the suicide bombing of the
7 COLE two years ago and the attack on the French supertanker
8 Limburg off Yemen in October. I will check, but I don't
9 believe we have anything relating to those alleged statements.
10 And then it talks about some other Kuwaitis and the trial
11 being suspended to allow further questioning of the men.

12 But it goes on to say, Kuwait is a major American
13 ally in the region and is seen as a major launching pad for
14 any attack on Iraq. Of course, that was in the run-up to the
15 Iraq war.

16 MJ [COL POHL]: Commander?

17 TC [CDR LOCKHART]: Sir, we're really getting into -- as I
18 asserted, we're not offering it for any of the facts. It's a
19 press release, and to go through the factual assertion of
20 whether the press release is accurate or not, that doesn't
21 seem like a wise use of time.

22 MJ [COL POHL]: Well, you chose to put it in. If he wants
23 to respond, he can. Objection is overruled. Go ahead.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. KAMMEN]: You know, and I guess that's really the
2 point here, is what's really out there? Are we really to --
3 and I am going to close with this -- are we really to believe
4 that the FBI never asked the Kuwaitis -- are we really to
5 believe that the FBI, which was investigating the COLE bombing
6 and was the primary agency to investigate the COLE bombing,
7 didn't go to the Kuwaitis and say what did these guys tell
8 you? And didn't go to the Saudis, and for some reason if they
9 went to the Saudis about these people in 2005, I mean, was
10 this -- maybe this was just, gosh, somebody found these press
11 releases in 2005 and said, wow, somebody else -- somebody
12 confessed? Maybe we ought to ask? And -- but let's ask the
13 Saudis. Let's not ask the Kuwaitis, who took the confessions.

14 I mean, that's the problem here. And, you know,
15 that's why we're frustrated, because it flies in the face of
16 what trained investigators investigating a major case would
17 do. And that's why we want that.

18 And the last point, Your Honor, is this -- and I
19 made this before, I'm sure I'll make it again. They say you
20 don't need to order us, but -- because we've done it all.
21 Well, then, how does an order hurt them? An order gives us a
22 huge measure of protection. And if they've complied, they've
23 complied. So, you know, we ask for something that has no

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 consequence to them but it has a huge benefit to us in the
2 future when, if it turns out the FBI said, oh, yeah, we had
3 this stuff, but nobody asked, right, then we say, well, they
4 never gave you this court order?

5 Well -- so the order is significant from our
6 perspective of course and at least based on their description,
7 has no impact whatsoever other than they'd rather not be
8 subject to a court order. Thank you.

9 MJ [COL POHL]: Thank you.

10 We'll take the lunch recess soon. Just for the way
11 ahead, we'll reconvene at about 13 -- we'll reconvene at 1300.
12 We'll go to about 1500, and at which time we will -- we will
13 conduct a closed session -- classified session under ----

14 LDC [MR. KAMMEN]: Because of some needs we have ----

15 MJ [COL POHL]: ---- 505(h).

16 LDC [MR. KAMMEN]: Because of some needs we have in
17 preparation for tomorrow, could we quit at about 1430, because
18 our expert needs to meet with Mr. Nashiri, and from the
19 guards' perspective, they like to be done.

20 MJ [COL POHL]: Okay. But let's make it -- didn't we quit
21 early yesterday so she could talk to him?

22 LDC [MR. KAMMEN]: No, we quit -- yeah, we quit at ----

23 MJ [COL POHL]: You mean earlier than I was going to go.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. KAMMEN]: Okay. Well, we quit a half hour early,
2 maybe. If you don't want to, fine. As long as they'll
3 be ----

4 MJ [COL POHL]: I mean, my intent is just -- just to do it
5 is we will clear the courtroom and then do the 505(h) hearing
6 as quickly as possible, as long as it takes. And if you want
7 Mr. Nashiri to stay in the holding cell during that period of
8 time and she can talk to him there, that's fine.

9 LDC [MR. KAMMEN]: And as long as she has permission --
10 they'll probably need an hour or so, as long as she has
11 permission. As long as they don't come and snatch him away.

12 MJ [COL POHL]: Okay. Well, I'm not going to adopt your
13 verbiage ----

14 LDC [MR. KAMMEN]: I understand.

15 MJ [COL POHL]: ---- simply this: We will go to 1500.

16 LDC [MR. KAMMEN]: Fine.

17 MJ [COL POHL]: At 1500, Mr. Nashiri will be escorted back
18 to the holding cell. The courtroom will be cleared. We will
19 conduct a 505(h) classified hearing.

20 LDC [MR. KAMMEN]: Fine.

21 MJ [COL POHL]: If you need some time until about -- you
22 say she needs an hour, they will keep him there available to
23 her, assuming that there's no reason she can't interview him

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 there ----

2 LDC [MR. KAMMEN]: Yeah, she can --

3 MJ [COL POHL]: ---- no earlier than 1630. Okay?

4 LDC [MR. KAMMEN]: Perfect.

5 MJ [COL POHL]: Sir?

6 CP [BG MARTINS]: Your Honor, I just wanted to clarify.

7 You're saying today we would go into a hearing under 505(h).

8 You initially had mentioned session. I just want to clarify,

9 there's no intent ----

10 MJ [COL POHL]: No.

11 CP [BG MARTINS]: It's going to be on use, relevance,
12 admissibility.

13 MJ [COL POHL]: It's just going to be a 505(h) hearing to
14 determine whether or not we need to go to a closed 806 session
15 later on down the road.

16 CP [BG MARTINS]: Thank you, Your Honor.

17 MJ [COL POHL]: I sometimes mix those terms. I don't mean
18 to cause confusion.

19 That being said, the commission is in recess until
20 1300.

21 [The Military Commission recessed at 1159, 23 April 2014.]

22 [END OF PAGE]

23

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT