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1 [The Military Commission was called to order at 1052, 28 May  
2 2014.]

3 MJ [COL POHL]: The commission is called to order. Trial  
4 Counsel, please account for the members of the prosecution.

5 TC [CDR LOCKHART]: Yes, Your Honor. Good morning.  
6 First, I would like to place on the record that these  
7 proceedings are being transmitted CONUS.

8 We have myself, Commander Andrea Lockhart,  
9 Mr. Mikeal Clayton, Brigadier General Mark Martins, Major  
10 Chris Ruge, Lieutenant Ryan Davis, Sergeant First Class Jason  
11 Keith and Lieutenant Paul Morris.

12 We do have a new member that needs to put their  
13 qualifications on the record, sir.

14 MJ [COL POHL]: Okay. Mr. Clayton?

15 ATC [MR. CLAYTON]: Thank you, Your Honor. Good morning.

16 MJ [COL POHL]: Good morning.

17 ATC [MR. CLAYTON]: I have been detailed to this military  
18 commission by the Chief Prosecutor of the Office of Military  
19 Commissions. I am detailed and qualified under Rules for  
20 Military Commissions 502 and 503. I have been previously  
21 sworn under Rules for Military Commission 807. I have not  
22 acted in any manner that might tend to disqualify me from  
23 participating in this military commission.

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1 MJ [COL POHL]: Thank you. Mr. Kammen, please account for  
2 the members of the defense team that are here.

3 LDC [MR. KAMMEN]: Yes, sir. Commander Brian Mizer, Major  
4 Allison Danel, myself, Richard Kammen, our linguist, Ziad  
5 Naja, Major Thomas Hurley, Captain Daphne Jackson. And Tech  
6 Sergeant Valerie Nixon is not in the room, but I suspect will  
7 be joining us.

8 If I may, Your Honor, Ms. Hollander, who has  
9 previously entered an appearance, is not present because of a  
10 prior order of this court and your continued inaction on the  
11 motion that we heard at last hearing on 178 in which we  
12 requested various witnesses.

13 After -- I know you want to discuss some things with  
14 Mr. Nashiri and then I would like to make a very brief record  
15 regarding the disparity in resources, but ----

16 MJ [COL POHL]: Okay.

17 Mr. Nashiri, as I have told you many times, I am  
18 going to tell you this again for the first session, that you  
19 have the right to be present during all sessions of the  
20 commission. If you request to absent yourself from any  
21 session, such absence must be voluntary and of your own free  
22 will. Your voluntary absence from any session of the  
23 commission is an unequivocal waiver of the right to be present

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1 during that session. Your absence from any session may  
2 negatively affect the presentation of the defense in your  
3 case. The failure to meet with and cooperate with your  
4 defense counsel may also negatively affect the presentation of  
5 your case.

6 Under certain circumstances, your attendance at a  
7 session can be compelled regardless of your personal desire  
8 not to be present. Regardless of your voluntary waiver to  
9 attend a particular session of the commission, you have the  
10 right at any time to decide to attend any subsequent session.  
11 If you decide not to attend the morning session but wish to  
12 attend the afternoon session, you must notify the guard force  
13 of your desires. Assuming there is enough time to arrange  
14 transportation, you will then be allowed to attend the  
15 afternoon session.

16 You will be informed of the time and date of each  
17 commission session prior to the session to afford you the  
18 opportunity to decide whether you wish to attend that session.

19 Do you understand what I just explained to you?

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

21 MJ [COL POHL]: Mr. Kammen, you said you wanted to make  
22 some comment?

23 LDC [MR. KAMMEN]: I don't want to belabor the point, but

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1 I think Mr. Clayton, by our count, is the twelfth lawyer that  
2 the government has detailed to the prosecution team for this  
3 case. We have five lawyers. And so I don't know how many  
4 subsidiary personnel they have behind the scenes, I suspect an  
5 equally -- there is an equally great disparity. And I just  
6 wanted to make a continuing record of the sort of grotesque  
7 disparity between the resources that are available to the  
8 prosecution team and the resources that are -- the limited  
9 resources that have been made available to the defense. And I  
10 think that disparity is demonstrated by the fact that, for  
11 this case, they have 12 lawyers, we have five. Of course,  
12 Commander Mizer will be departing for a period of time. So I  
13 just wanted to make that record.

14           And also, of course, your inaction with respect to  
15 Ms. Hollander aggravates that disparity. Thank you.

16           MJ [COL POHL]: We are going to start with AE 206.

17           ADDC [MAJ HURLEY]: Sir, good morning.

18           MJ [COL POHL]: Good morning.

19           ADDC [MAJ HURLEY]: Sir, as you indicated, we are here to  
20 talk about AE 206. And the relief that is sought by the  
21 defense is the order of production of the entire Senate Select  
22 Committee on Intelligence's report into the Rendition,  
23 Detention and Interrogation program.

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1           Sir, Mr. Nashiri was -- participated in that  
2 program, if we want to use that vague verb, for almost its  
3 entirety.

4           MJ [COL POHL]: Let's assume -- let's assume that it's  
5 discoverable, because I don't think there is much -- as I read  
6 the government's response, the question is who currently owns  
7 the report, who currently can release the report?

8           ADDC [MAJ HURLEY]: Sir, it's the understanding of the  
9 defense that it's currently within the possession, if we want  
10 to use that language, of the United States Senate.

11          MJ [COL POHL]: Do I have authority to order its release  
12 from the senate?

13          ADDC [MAJ HURLEY]: Yes, sir. I would submit you have the  
14 authority to order the government, the United States  
15 Government, to produce a certain document; and that is the  
16 government at large, wherever it finds its constitutional  
17 home, you have the authority to say this information needs to  
18 be produced to these attorneys.

19          MJ [COL POHL]: Okay. Now, currently the report is going  
20 under apparently some sort of classification review.

21          ADDC [MAJ HURLEY]: At least a portion of it is, sir.

22          MJ [COL POHL]: Okay. But that doesn't appear to be the  
23 issue before me. Because many classified documents have been

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1 released to the defense, so it's not a classification issue.

2 ADDC [MAJ HURLEY]: Yes, sir.

3 MJ [COL POHL]: It's a release issue.

4 ADDC [MAJ HURLEY]: All right, sir.

5 MJ [COL POHL]: No, I'm asking you. Isn't that the issue  
6 before me?

7 ADDC [MAJ HURLEY]: Yes, sir. Classified documents have  
8 been released to the defense, yes.

9 MJ [COL POHL]: So the fact that it is undergoing a  
10 classification review, is that relevant to the current  
11 discussion?

12 ADDC [MAJ HURLEY]: Sir, it is absolutely not relevant.  
13 And piggybacking on that question from the court, we are  
14 all -- and I don't want to go through the harangue that we  
15 went through a month ago, and I can tell the commission  
16 remembers it -- we are all people that are qualified and  
17 certified to receive this evidence and we are asking for it.  
18 Which certainly I think the commission's question suggests the  
19 answer, which is it is absolutely discoverable.

20 We are qualified to have it, to receive it, to store  
21 that amount of information, and what we are asking for, sir,  
22 is that you order that it be produced to us so that we can get  
23 it that much sooner so that we can start on the process and

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1 move this case swiftly to trial.

2           And, sir, I received a note from co-counsel and it  
3 reminded me of this fact, that the Senate Select Committee on  
4 Intelligence -- I am going to call it SSCI from now on because  
5 I confuse those words -- the SSCI report is also within the  
6 executive branch for its classification review. So it is the  
7 senate's report to be sure, but that report has also been  
8 shared with members of the executive branch and they are also  
9 doing a classification review of it.

10           MJ [COL POHL]: Does that make the executive branch -- it  
11 gives them authority to release the report?

12           ADDC [MAJ HURLEY]: Sir, it does. It's the understanding  
13 of this defense counsel -- because again, I feel it important  
14 to say that a lot of these rules can evolve over time. But  
15 does it mean that you have the authority to order it? Yes,  
16 sir, you still have the authority to order its production  
17 regardless of if it is owned, to use the parlance of security  
18 personnel, within the executive branch or it is owned, again  
19 to use that parlance, within the legislative branch.

20           MJ [COL POHL]: Okay.

21           ADDC [MAJ HURLEY]: So, sir, again, just to be clear, the  
22 defense is entitled through various portions of the law to  
23 relevant evidence that's material to the preparation of the

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1 defense. It's also material to the preparation of an  
2 extenuation and mitigation case, especially in this case,  
3 which is a capital one.

4           We talked at other times, sir, about what exactly  
5 this is. So first -- so I think it bears understanding or  
6 repeating very briefly how we got to where we are. Certain  
7 actions were taken by members of the executive branch. Those  
8 actions were in accordance with the Rendition, Detention,  
9 Interrogation Program that was all the rage in this last  
10 decade. Reports were generated because that's what members of  
11 the executive branch, whether they are military personnel or  
12 intelligence personnel, they do generate reports and the  
13 program is managed.

14           Now, decades -- decades, sir, I apologize. Years  
15 later, the United States Senate in its oversight capacity  
16 compiled a report because that's what it does or that's a big  
17 portion of what it does, is it oversees the executive branch  
18 and the maintenance of the government.

19           Now, it's got the report itself, which is of  
20 whatever size. We have also been given to understand, sir,  
21 that there is also an executive summary. And that executive  
22 summary summarizes -- it is still fairly long, but it  
23 summarizes what the report, the larger Senate Select Committee

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1 on Intelligence, what that report is. Because as we go down  
2 this road in the back and forth with the government, I think  
3 there may be some discrepancy as to what we are talking about.  
4 So what we want is the big report; not just the executive  
5 summary, but the report in its entirety.

6 Sir, we believe the report -- this report in its  
7 entirety is relevant and material to the defense's case on the  
8 merits in the extenuation and mitigation because it may  
9 contain prior statements of the accused, potential outrageous  
10 government conduct. It may contain evidence that is relevant  
11 to, important and material ----

12 MJ [COL POHL]: Just to be clear ----

13 ADDC [MAJ HURLEY]: Okay, sir.

14 MJ [COL POHL]: Just to be clear, we have a database of  
15 whatever quantity.

16 ADDC [MAJ HURLEY]: Yes, sir.

17 MJ [COL POHL]: That's the evidence.

18 ADDC [MAJ HURLEY]: Yes, sir.

19 MJ [COL POHL]: Then we have the Senate Select Committee  
20 on Intelligence go review this evidence and develop a report  
21 of some size.

22 ADDC [MAJ HURLEY]: Yes, sir.

23 MJ [COL POHL]: And then of the report of some size,

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1 because of course how could that be small, we then do an  
2 executive summary, which may be hundreds of pages in and of  
3 itself.

4 ADDC [MAJ HURLEY]: Yes, sir.

5 MJ [COL POHL]: But the report and the executive summary  
6 are not evidence; they are simply conclusions of somebody who  
7 reviewed the evidence, correct?

8 ADDC [MAJ HURLEY]: Well, sir, the first thing we have to  
9 do -- I haven't seen it. I would be happy to answer that  
10 question as soon as I have reviewed both of those things, the  
11 summary and the SSCI report. It may very well contain  
12 evidence because it would serially -- it would talk about an  
13 analysis -- by the commission's framing you consider evidence,  
14 that bottom part of the pyramid that you just built.

15 So if it repeats it, then we would submit to the  
16 commission, sir, and I think it's plainly true, that it  
17 contains evidence, that the report itself contains evidence.  
18 And not only that, if it isn't just the evidence itself -- and  
19 sir, I can see that you may have a question, I don't mean to  
20 talk ----

21 MJ [COL POHL]: Go ahead. I'm thinking sometimes.

22 ADDC [MAJ HURLEY]: It does contain analysis of what these  
23 reports mean. Sir, just one second.

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1 MJ [COL POHL]: Sure.

2 ADDC [MAJ HURLEY]: Sir, it does contain analysis and,  
3 sir, we would submit that to you also that is evidence and it  
4 may also very well contain -- within the body of the report  
5 itself, it may contain matters which would be admissions of  
6 public officials or an admission that we would seek to have  
7 this -- have admitted in front of this court.

8 MJ [COL POHL]: Okay.

9 ADDC [MAJ HURLEY]: And what is true for the report  
10 itself, sir, is also true for the executive summary. Again,  
11 haven't seen it, don't know, but it may very well contain  
12 evidence in that manner in which the commission has framed it.

13 MJ [COL POHL]: Okay. I understand.

14 ADDC [MAJ HURLEY]: Sir, there has been some discussion  
15 about what amount of information that we have received and  
16 how, again, in the court's framing of this pyramid that we  
17 have been talking about, we have been made privy to some  
18 information on the bottom of it. Well, that's not what we are  
19 here to litigate or discuss, the first, the base of this  
20 pyramid. What we are here to talk about are the second and  
21 third steps of the pyramid, which is the report itself and the  
22 summary, because we want both of those.

23 Another important aspect of this information or why

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1 it's important and material is for us to understand, in order  
2 to conduct an adequate and thorough pretrial investigation of  
3 this case, and some of that has to do between our interaction  
4 with the accused.

5           Now, we certainly understand -- and I am going to  
6 try to go slow here -- we certainly understand that we are not  
7 in any position to divulge classified material that we get  
8 from this commission or from the government to our client.  
9 But what it helps us do and understand are the things -- it  
10 puts what he tells us into perspective. Because, sir, what I  
11 can say, speaking personally and for myself, is that this is  
12 an unusual attorney-client relationship. In those that I have  
13 had in the past, we have a shared military experience through  
14 which I can vet all of the information my client gives me.  
15 That's less possible here, because my client could say things  
16 that literally shock my conscience that I cannot absolutely  
17 believe happened because I just find it to be so fantastical.  
18 But I read in this discovery that fantastical things have  
19 happened.

20           So to get this large volume of information, if it  
21 does nothing else, it develops an understanding of what is  
22 within the realm of possibility. It informs the relationship  
23 as it goes forward. And this is, I would submit to the

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1 commission, and I know it very well understands, an unusual  
2 attorney-client relationship not typically seen in  
3 commission -- or it's typically seen in commissions work  
4 obviously but not necessarily seen in courts-martial practice.  
5 That's an important component and that's an important reason  
6 why we need to discover this.

7           You hear the government say time and again, sir,  
8 well, you know what, they can just turn and talk to their  
9 client. And that is absolutely true, we can turn and talk to  
10 our client. But that discussion needs to be informed as  
11 robustly as possible considering, one, the magnitude of what  
12 the United States Government wants to do to our client, which  
13 is to put him to death, and two, the unusual nature of the  
14 relationship in which we find ourselves in.

15           And sir, a note, and we will get into this in  
16 greater detail I am sure later, but the treatment of other  
17 persons -- because we are going to talk about that second  
18 tier, the report itself, the treatment of other individuals  
19 that may have participated in the RDI program is absolutely  
20 relevant because it will help us -- what happened to this  
21 individual may very well have happened to this other  
22 individual, but the reports, whether it's the underlying data  
23 or whatever, don't necessarily reflect it.

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1           I'm not -- I don't mean to, the defense as a whole  
2 doesn't mean to besmirch anyone's character that has ever  
3 filed a report, but, Your Honor, you know from your extensive  
4 military experience and I know from my far limited -- more  
5 limited military experience, that sometimes reports that are  
6 sent higher are more aspirational than they are truthful. And  
7 the report -- having access to all of this information would  
8 allow us to see where there are potential problems in the  
9 reporting structure.

10           Sir, let's turn to the second. We absolutely  
11 believe that you are entitled to order the production of this  
12 report and that it should be ordered produced for the reasons  
13 that I stated so far and for a couple I have yet to get to.  
14 But the thing that I would like to say, Your Honor, is that  
15 the prosecution's response, while it recognizes that this is  
16 discoverable material, well, it's a cruel joke.

17           The joke part of it is that they say and suggest to  
18 you in Appellate Exhibit 206A that this will be handled in the  
19 future, this will be delivered to us, this summary will get to  
20 you eventually in time. All the while they are urging this  
21 commission to go forward, we need more trial dates, we oppose  
22 any delay, this has got to go forward. But this information,  
23 this relevant, important information as to how your client was

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1 treated for years in the custody and control of the United  
2 States Government, that, that will get to you eventually. Oh,  
3 by the way, we need to get ready to go to court now and any  
4 request for delay is dilatory and we need to go, go, go.

5           That is -- the cruel part of the cruel joke that is  
6 the government's response is that it suggests this belief that  
7 the United States Government itself is going to get it  
8 together and disclose some portion of this report. They very  
9 well know that there has been significant rancor over this  
10 topic. It is an entrenched part of, now, the Washington  
11 culture, and to suggest as they do in Appellate Exhibit 206A  
12 that this will be resolved, all will be made right, it is  
13 coming to you soonest, is -- I would call it Pollyanna, but  
14 they know better. They absolutely know better. And this  
15 report, sir, you should hold the government's feet to the  
16 fire. If they believe that they speak for the United States,  
17 will you speak for them now, too?

18           You need to deliver this report from the people of  
19 the United States, wherever it is in Washington, D.C. in the  
20 Beltway, and give it to us so that we can begin to prepare for  
21 this case -- not begin, so that we can fully adequately  
22 prepare for this case.

23           Sir, I understand that we are going to get into this

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1 a little bit later, so when it comes to the merits and what I  
2 perceive to be the merits of the report, I will table that  
3 discussion, which I templated in here for a later time.

4           Sir, what's important for you to understand is that  
5 this -- what the government wants you to do, if you again look  
6 at Appellate Exhibit 206A is they want you to wait for the  
7 summary of this report. They are going to say, well, we have  
8 given some of this underlying evidence and the wait that we  
9 are building is not for the second block of the pyramid that  
10 we have just built, but it's for the third block, that will  
11 come to you eventually, and then everything will be fine. The  
12 wait, which is an unending wait, not by time X we will get  
13 this resolved for you, Mr. Nashiri, it's whenever it gets  
14 there, whenever they get it together, that's when it's going  
15 to get there. That is -- that unending delay for a summary of  
16 this is not appropriate.

17           And we would submit to the court that if it is a  
18 summary, then it is essentially a globe and that we need  
19 specific -- a specific map, military maps with a lot of  
20 information, much more than you would find in the globe in  
21 order to conduct this defense, and that that wait for the  
22 summary is a wait too long and in vain.

23           Again, sir, what we are asking for you to do is to

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1 release the report to us, to order its release to us in its  
2 entirety. We have security clearances. It's all relevant and  
3 necessary. We have security clearances. We will follow the  
4 law wherever we find it in handling this information. Sir,  
5 please give us this report.

6 MJ [COL POHL]: Thank you. Trial Counsel.

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

8 MJ [COL POHL]: Good morning.

9 TC [CDR LOCKHART]: For all defense counsel's argument,  
10 which much of this was, there is very little facts cited and  
11 very little actual data points to back up his argument, and I  
12 will get to those in a moment.

13 I would like to start with the actual motion and  
14 what it is that the defense is requesting. They are  
15 requesting, as he just said, an order to release the entire  
16 document in its entirety. As all parties know, and we have  
17 extensively litigated, that's not how discovery works. The  
18 government receives information, the government reviews it,  
19 and the government provides that which is relevant and  
20 material to the preparation of the defense. And it is very  
21 interesting that defense counsel, admittedly saying, "I have  
22 never seen the report and I have never reviewed it," somehow  
23 deems that the entire report is relevant and material.

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1           The government has never contended that there are  
2 portions, potentially large portions of the reports, that are  
3 discoverable. But as a starting point, the defense is not  
4 entitled to material that is not relevant and material to the  
5 preparation of the defense. And the way discovery works, and  
6 that you have been exhaustively briefed on, is the government  
7 receives documents, information, photographs, whatever it may  
8 be, and the government makes a determination as to which  
9 portions of that is relevant and material to the preparation  
10 of the defense. Some of that is submitted to Your Honor  
11 through the 505 process which Your Honor reviews as well. So  
12 that's the starting point on that.

13           The second part, as Your Honor rightfully noted,  
14 there are sort of three tiers involved here, and I am just  
15 using the words that Your Honor and defense counsel used. The  
16 bottom is a database of information. And what the defense  
17 counsel has failed to inform the court on is the defense is  
18 already in possession of a large amount of that underlying  
19 information. All the information that was relevant and  
20 material to the preparation of the defense has been provided  
21 to the defense or is a subject of AE 120 which, depending upon  
22 Your Honor's ruling, will be provided to the defense. So  
23 that's the first part, is the actual evidence. This is the

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1 stuff that documents the information that the defense is  
2 seeking.

3           The second part which defense counsel commented on  
4 had to do with analysis. Again, we don't know what's in the  
5 report, so this is just speculation as to what the defense  
6 counsel is arguing and asking for. The government is not --  
7 not certain, and won't know until it is reviewed whether or  
8 not analysis is actually discoverable. What matters is what  
9 occurred, what happened and what experiences were of the  
10 accused. We absolutely dispel this notion of what occurred to  
11 other individuals, and I think that the words that the defense  
12 counsel said was very -- "may very well." That's not the  
13 standard for discovery. What is relevant for the purposes of  
14 mitigation and clemency in this case have to do with the  
15 experiences of the accused, his background, his character, not  
16 other individuals.

17           So when you are looking at this potential report,  
18 which none of the parties here have reviewed, it's not  
19 limitless. And as stated in the government's response, it  
20 is -- we are actively seeking it. There is a very extensive  
21 body of law that talks about "within the arm of the  
22 prosecution." And the prosecution has reached out to  
23 everything within the arm of the prosecution and has reviewed

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1 all that information and provided that to the defense.

2 Now, this is a report that clearly the government is  
3 aware of, we have requested and we are requesting. There has  
4 been no final determination made yet as to what is  
5 discoverable and what's not because it hasn't been reviewed.

6 On the timing aspect of this, as we discussed last  
7 time, the brief was only finalized shortly before the last  
8 hearing. It's still going through review and processes. If  
9 we get a copy of it, we will review it and we will turn over  
10 those portions that are discoverable. As to any argument that  
11 goes over to what portions are discoverable or not, that's an  
12 argument for another day.

13 I will note that it's interesting that the defense  
14 points to this notion that the government is pushing to go  
15 forward to trial, but yet won't get this report. If you look  
16 at all of the continuance requests that have been made by the  
17 defense, none of them had to do with lacking mitigation  
18 material. They had to do with learned counsel's schedule,  
19 they had to do with personal issues on multiple team members.  
20 Those are the continuance requests that the government has  
21 opposed. The defense has not yet filed any continuance  
22 requests having to do with we don't have X amount of  
23 information. And that again is an issue for another day if we

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1 get to that point.

2           So the government would assert that there is this  
3 report; it is not within, under the definition of 701 --  
4 sorry, 703, the possession, custody and control of the  
5 government, which is the prosecution in this case, and the arm  
6 of the prosecution. We don't have it yet. We are actively  
7 seeking to get it. When we get it, we can address any issues  
8 that may arise at that time, but at this point it is simply  
9 not ripe.

10           Subject to your questions, sir.

11           MJ [COL POHL]: Yes. Who owns the report for release  
12 purposes?

13           TC [CDR LOCKHART]: The senate does, sir.

14           MJ [COL POHL]: I notice in your reply, there is no  
15 authority cited one way or the other. Is there any authority  
16 for me to order another branch of the government to release  
17 information?

18           TC [CDR LOCKHART]: There is no authority for you to order  
19 another branch of the government to release the report. You  
20 certainly have other options available. If, for example, it's  
21 deemed that the report is discoverable, obviously Your Honor  
22 has discretion to address it in one way or the other.

23           MJ [COL POHL]: There is a certain amount of do-loop here.

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1 TC [CDR LOCKHART]: A certain amount of what?

2 MJ [COL POHL]: A do-loop. By that I mean if there is no  
3 authority to order it to be released, at least for an in  
4 camera review, how could we know whether it is discoverable?

5 TC [CDR LOCKHART]: Well, if we get to that point, Your  
6 Honor, Your Honor obviously has other remedies. We are simply  
7 not at that point.

8 MJ [COL POHL]: What point are we at? The report is  
9 complete. It is going through classification review as  
10 referenced in another AE.

11 TC [CDR LOCKHART]: Yes, sir.

12 MJ [COL POHL]: The report is complete. It is going  
13 through a classification review. It has nothing to do with  
14 whether or not it is discoverable or not, correct?

15 TC [CDR LOCKHART]: That's my general understanding, sir.

16 MJ [COL POHL]: I am just relying on a pleading in 120  
17 that says that.

18 TC [CDR LOCKHART]: Yes, sir.

19 MJ [COL POHL]: Now the question is, has the government  
20 asked the senate or the committee to release the report in a  
21 classified version to the prosecution for review?

22 TC [CDR LOCKHART]: We are actively seeking it. And this  
23 is what I would submit of where we are at. There is going to

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1 come a point where, if we can't get a copy of it, then that  
2 will be something that needs to be addressed. We are not at  
3 that point yet. We are actively seeking to get it and we are  
4 hopeful to get it. Obviously we don't own it, we can't  
5 control its release, but that is a question for another day.  
6 And if we get to that question for another day, there are  
7 absolute other legal arguments that are involved concerning  
8 privilege, concerning the arm of the prosecution, concerning  
9 that information.

10 In addition, the government asserts -- and again,  
11 not having seen the report -- that when we talked about this  
12 in the habeas setting of one pile of information that  
13 everything comes out of, that information has been reviewed  
14 and searched and provided extensively to the defense. So this  
15 is not some new cachet of information that nobody has  
16 reviewed. What the government has not reviewed is this  
17 report, which may contain analysis, honestly not sure, but  
18 that's a different issue.

19 MJ [COL POHL]: When you say the government is actively  
20 seeking the report, do we have any timeframe on that?

21 TC [CDR LOCKHART]: I don't, sir. We certainly can update  
22 the court periodically, but at this point I don't have an  
23 update right now.

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1 MJ [COL POHL]: Have you gotten an answer from them?

2 TC [CDR LOCKHART]: May I have one moment, sir?

3 MJ [COL POHL]: Sure.

4 TC [CDR LOCKHART]: Sir, what I can represent is that by  
5 20 June, so just several weeks from now, we should be able to  
6 provide the court and the defense an update. And it is the  
7 government's belief that at least the summary, the executive  
8 summary, will be declassified midsummer.

9 MJ [COL POHL]: Again, why do we have to wait for  
10 declassification?

11 TC [CDR LOCKHART]: We don't. That would just give us  
12 access. The bottom line is it's an access issue. Understand  
13 if something has been declassified, we would have access. It  
14 is still an access issue.

15 MJ [COL POHL]: Is a declassification issue connected to  
16 the release issue? You seem to be saying it is.

17 TC [CDR LOCKHART]: If it is declassified, we will have  
18 access to it. That's the only way it's relevant.

19 MJ [COL POHL]: No, I've got that. If it is declassified,  
20 obviously it is easier to retrieve. But what I am saying is  
21 there is nothing to prevent a declassified document from being  
22 released now to people with appropriate clearances and a need  
23 to know, is there?

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1 TC [CDR LOCKHART]: Absolutely not. The government isn't  
2 asserting that. The government is asserting that it is not  
3 within its possession, custody and control.

4 MJ [COL POHL]: That's a different issue, it has nothing  
5 to do with classification.

6 TC [CDR LOCKHART]: Correct.

7 MJ [COL POHL]: Whether it takes months or years.

8 TC [CDR LOCKHART]: Correct.

9 MJ [COL POHL]: You're saying you will know by 20 June to  
10 have a declassification?

11 TC [CDR LOCKHART]: An update.

12 MJ [COL POHL]: From whom?

13 TC [CDR LOCKHART]: From the sources.

14 MJ [COL POHL]: Are you saying an update on the  
15 declassification process?

16 TC [CDR LOCKHART]: On whether or not we can get the  
17 classified document and review it. We will have an update.  
18 I'm not saying we will not have it. We will be in a better  
19 position to articulate a time limit. I'm saying I get it,  
20 there are time limits, and if there comes a point where the  
21 forward progress of this trial is being held up because of the  
22 lack of review, then that's the point where we litigate. You  
23 don't have it. Government, what are the remedies? But we are

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1 not at that point yet.

2 As Your Honor just granted a continuance request  
3 from the last hearing, we do have some time to resolve this.  
4 It's not something that has to be resolved today when we are  
5 not saying that they are not entitled to it. The government  
6 is saying we are actively trying to seek it and we would  
7 simply ask for a little leeway in trying to do that,  
8 understanding that we are still, what, ten months from trial?

9 In addition, it is the government's belief that the  
10 underlying documents, the underlying evidence as Your Honor  
11 categorized, it has already been provided to the defense.

12 Now, we won't know that until we've reviewed that.

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

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

15 MJ [COL POHL]: Defense, anything further?

16 ADDC [MAJ HURLEY]: Yes, sir, I do have additional  
17 remarks. Just capitalizing on what Commander Lockhart just  
18 said -- and I am going to slow down mentally here for a  
19 second.

20 Sir, what she just said is that we are not going to  
21 know whether or not the underlying documents, the bottom of  
22 our pyramid we have already substantially given to the  
23 defense, we are not going to know until we look at the report

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1 itself. And I daresay that those senate investigators did not  
2 have a group of attorneys that were reviewing these documents  
3 for their relevance and materiality to some defense. They  
4 didn't. They were reviewing the documents themselves,  
5 millions of them, a lot of them, and that that formed the  
6 basis -- that comprehensive review formed the basis of the  
7 report. And that's why it's important that we get the report  
8 and we get the report as soon as we possibly can.

9           Sir, on the idea of this evidence, it's when we get  
10 it, we will see it, we will understand it better. But we  
11 submit to the court that in this, a death penalty case,  
12 conclusions of government officials acting in their official  
13 capacity, conclusions of government agencies, whether or not  
14 there was any wrongdoing by the United States Government, all  
15 of those are relevant factors for those members to consider  
16 when they are imposing and deciding on an appropriate  
17 punishment in this case.

18           And, sir, we would also -- I didn't -- we would also  
19 reiterate our point with respect to information on other  
20 conspirators, co-conspirators, that we believe that is  
21 relevant information. I didn't have the chance to review the  
22 order again to refresh my recollection, but I believe that  
23 your order in Appellate Exhibit 120C does indicate that some

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1 information with respect to co-conspirators is relevant and  
2 that, as you would get this document back, as you would  
3 fashion an appropriate remedy to get us this information, that  
4 you would use those benchmarks which you have already  
5 established in the review and in determining what information  
6 makes it to the defense.

7 Sir, do you have any other questions?

8 MJ [COL POHL]: No, I don't. Thank you.

9 Trial Counsel, anything further?

10 TC [CDR LOCKHART]: Just one brief comment, sir. This is  
11 the reason why you can't discuss this in abstract is you need  
12 factual information in front of you in order to argue or  
13 determine what's relevant and material to the preparation of  
14 the defense. And defense counsel is citing that certain  
15 things are or are not without understanding the document  
16 because, again, they haven't reviewed it, we haven't reviewed  
17 it. It's just simply not helpful. This discussion needs to  
18 be for another day, sir.

19 MJ [COL POHL]: Thank you.

20 Let's do 013N.

21 LDC [MR. KAMMEN]: Your Honor, to put this all in the  
22 context, of course, the protective order that the defense is  
23 subjected to requires us to seek permission in the event we

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1 wish to release information, in this case to another court.

2           In, I believe, mid-May, we filed in the United  
3 States District Court for the District of Columbia a  
4 supplemental petition for writ of habeas corpus on behalf of  
5 Mr. Nashiri. So everyone is on the same page, I am  
6 co-counsel, I have sought admission pro hac vice in the  
7 district court. Ms. Hollander is also co-counsel. I presume  
8 my admission pro hac vice has been granted, and so in that  
9 sense I suppose I am engaged in dual representation in that I  
10 represent Mr. Nashiri in two separate forums.

11           The heart of our petition, Your Honor, is asking the  
12 district court to find that this military commission is  
13 without jurisdiction to proceed and that the United States, if  
14 it wishes to try Mr. Nashiri, would have to do so in another  
15 forum, based upon the legal requirement that the crimes  
16 involved be committed during a time of war, a time of  
17 hostilities subject to the law of war. You have decided that.  
18 We believe that the district court has the opportunity to  
19 revisit that, so that's the underlying petition.

20           But the other part of it, Your Honor, is that the --  
21 under *Aamer v. Obama*, the district court has the authority to  
22 deal with deficiencies in the defendant's or Mr. Nashiri's  
23 conditions of confinement. And that is something that you

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1 have repeatedly indicated a reluctance to address unless there  
2 is, and I am paraphrasing what you have said on several  
3 occasions, a clear link between conditions of confinement and  
4 the work of the commission.

5           We have requested and are requesting that a number  
6 of documents which are classified be transmitted under  
7 appropriate conditions to the secure facility maintained by  
8 the United States District Court for the District of Columbia  
9 so that the court may review, under appropriate conditions,  
10 those documents.

11           So what we seek is very limited relief from the  
12 protective order. We do not intend to make anything public,  
13 we do not intend to treat this in any way other than it's  
14 classified material, but our goal, of course, is to release it  
15 to the district court.

16           Now, the district court has a secure facility. They  
17 have -- they deal with -- in habeas they are very, very used  
18 to dealing with classified information, and they do it all the  
19 time, and they do it relatively successfully.

20           MJ [COL POHL]: Is conditions of confinement connected to  
21 your lack of jurisdiction argument?

22           LDC [MR. KAMMEN]: Not specifically, no, but it is a  
23 portion that we believe that -- we believe, Your Honor, that

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1 one of the reasons -- the government of the United States is  
2 asking the district court to abstain and basically say wait  
3 till the commission is complete. We think that, because of  
4 this court's, this commission's reluctance to deal with the  
5 confinement issues, that that is a reason why the commission  
6 should address the merits of our petition. So it's not  
7 directly related, but it's inferentially related.

8 MJ [COL POHL]: Okay. So your substantive habeas relief  
9 requested is based on lack of jurisdiction?

10 LDC [MR. KAMMEN]: Yes.

11 MJ [COL POHL]: Okay. And then you believe the conditions  
12 of confinement are somehow related to the support of why they  
13 should not abstain from getting involved in that?

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

15 MJ [COL POHL]: Okay. Okay. I understand.

16 LDC [MR. KAMMEN]: And the district court may review all  
17 of this and say I continue to abstain or I abstain. The  
18 district court may review all of this and say, well, that's  
19 very interesting, you lose on the merits. Or the district  
20 court may say review all of this, say, well, this gives me  
21 reason to consider the case on the merits because the military  
22 commissions feel they are unable to address conditions of  
23 confinement because ----

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1 MJ [COL POHL]: Have you filed a habeas on conditions of  
2 confinement?

3 LDC [MR. KAMMEN]: Specifically?

4 MJ [COL POHL]: Yes.

5 LDC [MR. KAMMEN]: I don't know whether the original  
6 petition addresses conditions of confinement that was filed,  
7 you know, some years ago. This one does not.

8 MJ [COL POHL]: This is based on a recent decision where  
9 it appears that the habeas door may have been widened?

10 LDC [MR. KAMMEN]: No. And again, Amer changes the  
11 dynamics.

12 But to answer your question specifically, this  
13 petition does not specifically address conditions of  
14 confinement, but we believe that the district court should  
15 have the requested information while considering the  
16 government's, the United States's opposition. That's all it  
17 is. They may decide it's of no consequence, they may decide  
18 it's not useful. But what we think, Your Honor, is that what  
19 should not occur is that this commission should withhold from  
20 another court what is lawfully -- and let me -- the government  
21 kind of says, well, they have no need to know. A United  
22 States District Judge is presumed to have a need to know, is  
23 certainly by statute authorized to receive classified

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1 information.

2           Now, whether it's meaningful to the judge, whether  
3 it is significant, whether it affects his or her -- his  
4 decision, is a different issue, but he certainly has a right  
5 to this information.

6           MJ [COL POHL]: The government seems to say in its reply  
7 that if the district court wants this, they could ask for it  
8 themselves.

9           LDC [MR. KAMMEN]: I suppose. But, I mean, there's --  
10 it's just roadblocks, Your Honor. Essentially what the  
11 government does is impose roadblocks. We are simply complying  
12 with the protective order.

13           MJ [COL POHL]: No, I understand that. But what I am  
14 saying is -- I'm not saying I agree or disagree, I am just  
15 trying to get there. Their position seems to be if the  
16 district court believes the conditions of confinement are  
17 relevant to the issue before them, they could issue their own  
18 order that this evidence be released.

19           LDC [MR. KAMMEN]: Well, why should -- essentially, why  
20 should the habeas case be somehow subject -- you know, the way  
21 district courts work is they look to the litigants to provide  
22 them the information they need, especially when one of the  
23 sides is saying abstain.

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1           What the government is saying is we come in and say,  
2 oh, the conditions of confinement, you need this information.  
3 And then I suspect the other branch of the government who is  
4 arguing in the district court will throw up some impediments  
5 and say, well, they didn't bring it to you. So they are  
6 arguing -- you know, and so you are caught in this Catch-22,  
7 because it won't be these people who aren't going to be, I  
8 don't believe, in the district court.

9           We are simply complying with the protective order.  
10 Again, all we simply want to do is transmit this, under secure  
11 procedures, to a court that is used to handling classified  
12 information so that it can be presented in an appropriate  
13 circumstance, in a classified circumstance, and considered in  
14 a classified portion of an argument that may or may not occur.  
15 You know, so that's the relief we request.

16           And frankly, as a matter of comity between  
17 jurisdictions, it would seem to me that there is no good  
18 reason why this commission should decline to authorize this.  
19 And certainly, Your Honor, with all respect, I don't believe  
20 the government has set forth any good reasons. If the  
21 conditions of confinement are something that will have no  
22 impact on the district court, if this information is something  
23 that will have no impact on the district court, why should

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1 they want to hide it?

2 MJ [COL POHL]: Just to be clear, you are talking about a  
3 declaration from yourself and Commander Mizer and that alone?

4 LDC [MR. KAMMEN]: I believe we requested also that  
5 certain Bates-numbered material also be requested.

6 MJ [COL POHL]: Okay, yes, it's embedded.

7 LDC [MR. KAMMEN]: In the long form 706 as well.

8 MJ [COL POHL]: Okay, yes, it was embedded in your motion.

9 LDC [MR. KAMMEN]: It was beyond the declaration.

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

11 LDC [MR. KAMMEN]: But the declaration would be  
12 significant because we could lay out succinctly why the  
13 conditions of confinement would be important.

14 MJ [COL POHL]: Okay. Thank you. Trial Counsel?

15 ATC [Maj RUGE]: Sir, we are not talking here about  
16 roadblocks or impediments, we are simply talking about  
17 process. And it's a process that is well known to the  
18 litigants in this case and well known to the commission about  
19 how the discovery process works, particularly when we are  
20 talking about classified information.

21 The central issue here, and one that we just can't  
22 step around, is that the defense motion asks this commission  
23 to basically rule on the relevance and necessity of classified

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1 information in another case, happening in another court. That  
2 court has the responsibility, the authority and the ability to  
3 rule on what classified information should be produced from  
4 the government and submitted to that court. In fact, that's  
5 happened in this case, where in AE 143 the defense came to the  
6 commission and said there is a protective order in the habeas  
7 case that prevents the habeas counsel from giving us this  
8 information that we think we need. We need you to order the  
9 government to turn it over. All we are saying is that's how  
10 it works over there as well.

11           If this is relevant and necessary information, they  
12 make the discovery request, they use the discovery process,  
13 they make a motion, if necessary, and that court can pass on  
14 what needs to be produced.

15           As Mr. Kammen correctly points out, there are other  
16 government counsel who are working in that case, who are  
17 representing the interests of the government and have the  
18 responsibility for protecting classified information in that  
19 case. And by asking this commission to allow the transmittal  
20 of classified information to another commission without going  
21 through that process and without allowing the government, who  
22 is aware -- the government counsel who are aware of what  
23 discovery has been produced there and what's necessary for

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1 that case to argue just isn't appropriate and doesn't afford  
2 the appropriate process.

3           Now, the defense counsel correctly points out that  
4 district court judges are presumed to have access, they don't  
5 need clearances, but that doesn't mean that there is a need to  
6 know. The need to know is driven by the necessity and  
7 relevance to that case, and that's something for that judge to  
8 rule on. And according to the pleadings, and I think  
9 according to what Mr. Kammen has said here this morning, they  
10 haven't even asked that judge, they haven't even started to  
11 use that process there.

12           The other thing that I would like to point out is  
13 that this -- the need of another tribunal to access  
14 information or people reaching out to defense counsel in this  
15 case from another tribunal is, in fact, already anticipated in  
16 Protective Order Number 1. Amended Protective Order Number 1,  
17 which is in the record at AE 013M at paragraph 27 specifically  
18 says that if there is an order from another case or a subpoena  
19 from another case, that you bring that to the commission and  
20 that we work it out at that point in time but they are  
21 inverting the process here.

22           The first thing that needs to happen is you need to  
23 go to the other court, use the discovery process, have that

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1 court determine that this is information that needs to be  
2 produced, however -- whatever form that is in, if it is an  
3 affidavit, a statement, some sort of compilation of evidence  
4 they have received, or the 100-plus classified documents that  
5 they are seeking to turn over. And once they have gotten an  
6 order there, then it can be dealt with in that case or that  
7 order can come here, be submitted to the court or the  
8 commission and prosecution in this case and we can work it out  
9 in accordance with the protective order.

10 Pending any questions.

11 MJ [COL POHL]: No questions, thank you.

12 Mr. Kammen.

13 LDC [MR. KAMMEN]: We are not asking you to decide for the  
14 district court what's relevant. He can do that. We are  
15 simply -- and the way it typically works is you offer  
16 evidence, let's just say hypothetically a declaration that  
17 says A, B, C, D and E, and you say we want to offer this  
18 declaration as a reason why you should abstain. And the  
19 government objects and says that's not relevant and the  
20 district court says you are right, that's not relevant, or you  
21 are wrong, I think it is relevant and I am going to consider  
22 it. But typically the way it would work is the district court  
23 would say -- would want the evidence in front of it to make

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1 the determination of relevance.

2           They want, essentially, us to go to the district  
3 court and say, oh, there is all this evidence, we can't tell  
4 you what it is because we are not allowed to describe it, it's  
5 classified, but we think it's relevant and we would certainly  
6 like you to direct the military commission to reveal it.

7           Well, you know, again, that's not typically the way  
8 it works in this situation. Now, certainly if you say that's  
9 what we have to do, what we will advise the district court is  
10 that we requested that this information be transmitted, that  
11 the military commission refused, and that over the objection  
12 of the United States -- the military commission sustained the  
13 objection of the United States and, you know, we will see how  
14 things unfold.

15           But the process, at least as we understand the  
16 process, is that we come to you first under the protective  
17 order and request this permission, which we have done. And  
18 again, this is not some kind of way of avoiding the  
19 classification responsibilities, it's the way of protecting  
20 the classification responsibilities. And it's not asking you  
21 to make a determination. District judges make determinations  
22 all the time about evidence and they may look at the evidence  
23 and say this is not relevant, this doesn't bear on my

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1 decision. But let's at least give the district judge the  
2 opportunity to have this evidence available to him without  
3 these unnecessary steps.

4 But, again, if it is a situation in which you want  
5 us to advise the district court that this request was made and  
6 denied, I mean, certainly we will pursue that.

7 MJ [COL POHL]: Thank you.

8 LDC [MR. KAMMEN]: Thank you.

9 MJ [COL POHL]: Trial Counsel, anything further?

10 ATC [Maj RUGE]: Just very briefly. I don't want to step  
11 on Mr. Kammen's last word, but it's not what the government is  
12 saying. The government is not saying that this is information  
13 that can only come from this commission. What we are saying  
14 is that there is government information that has been produced  
15 through the discovery process, pursuant to this protective  
16 order, for the confines of this case. And that if they want  
17 to get it in another case, they should do just like they did  
18 in 143. And what they should do is go to that court and order  
19 the production in that court, not seek to have this court  
20 order the production for use in another court beyond the  
21 purposes for which it was produced pursuant to the protective  
22 order. That is all.

23 MJ [COL POHL]: Thank you.

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1 LDC [MR. KAMMEN]: I don't believe that's what happened in  
2 143. I think we asked that you order the government, this  
3 government, to allow us to review the habeas material.

4 MJ [COL POHL]: Okay, thank you.

5 Okay. Let's do 266 and then we'll break for lunch.  
6 Is that you again, Mr. Kammen?

7 LDC [MR. KAMMEN]: Let me give you the genesis of 266.  
8 And it sort of bears on a discussion we will probably have  
9 this afternoon regarding 120, but it also bears on a number of  
10 other things that have occurred over the course of this  
11 commission, and at least -- and it also bears on 206 because  
12 of some of the things that were in the newspapers concerning  
13 the CIA's interaction with the senate and staffers and  
14 attempts to influence how the report was generated.

15 And one of the things that we will be discussing and  
16 that has really impacted this commission in many different  
17 ways is the fact that some of the intelligence agencies or  
18 other governmental agencies, in ways that perhaps are publicly  
19 known now and in ways that are not publicly known, it really  
20 sought to control the senate, the senate's report, the senate  
21 staffers, and, in various ways, possibly the work of this  
22 commission. We know about the interruption in the other case.  
23 We know about the fake smoke detectors and all of the many

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1 still-unanswered questions regarding these fake smoke  
2 detectors and the monitoring of counsel and there are numerous  
3 questions that remain unanswered.

4           So one of the things that we have concerns about is  
5 that this agency, perhaps in ways that would not be readily  
6 apparent -- and there is no way to sugarcoat this -- may have  
7 reached out to you in ways that may have seemed appropriate to  
8 you at the time, but may, upon disclosure, be not appropriate.

9           Additionally, as perhaps an excess of caution,  
10 because of the peculiar circumstances that exist here -- and  
11 again, I mean no disrespect to the court, the people who are  
12 transported -- but it is an unusual situation. We all travel  
13 together, we all are sort of in each other's presence in  
14 peculiar ways. And one of the things, of course, that  
15 occurs -- and I understand perhaps why this occurs -- but the  
16 victim family members and the court are somewhat segregated.  
17 It appears to us to be together versus the rest of us, the  
18 prosecution and what have you.

19           And so what we request, Your Honor, is that the  
20 court indicate whether or not there have been ex parte  
21 communications with any governmental agencies. Certainly if  
22 there have been -- we know from filings that there have been  
23 ex parte communications with the prosecution. If there have

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1 been any other briefings that would not be a matter of filing,  
2 if there have been any, well, Your Honor, you need to have  
3 this briefing for whatever purposes, or if there have been any  
4 significant communications with any victim family members, we  
5 believe those should be made somehow a part of the record so  
6 that we would know about those and could take appropriate  
7 action if necessary.

8           If the answer is there have been none, so be it.  
9 You know, I wouldn't ever -- hopefully that would be the case.  
10 But given the history of this case and given the unusual  
11 nature of the circumstances and given the strong interest in  
12 the intelligence agencies in this process, it does occur to us  
13 that there may have been these communications, so we thought  
14 that we should raise this and we think it is appropriate. And  
15 however the court wishes to -- the commission wishes to  
16 respond, whether it's in some sort of written form or orally,  
17 but we think some sort of record should be made as to what, if  
18 any, communications there may have been.

19           We're particularly -- obviously with respect to  
20 other lawyers, that is one situation; with respect to victim  
21 family members, that's another. But if there have been  
22 significant briefings that are different than what we may have  
23 received, I think that would be very, very important, because

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1 those briefings may well -- if they are not accurate and if  
2 people are telling you things that are simply incorrect and  
3 sort of suggesting, well, national security means you need to  
4 do A, B and C, and if that's really not correct, I think that  
5 would be important to know. Thank you.

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

7 Trial Counsel, do you wish to be heard?

8 ATC [LT DAVIS]: Good morning, Your Honor.

9 MJ [COL POHL]: Good morning.

10 ATC [LT DAVIS]: From the outset, it's important to be  
11 clear that the government does not believe that there have  
12 been any improper communications between any agency or any  
13 victim family member in this case with the trial judiciary.  
14 If, and I can't stress how big of an "if" this is, if any of  
15 those types of communications have taken place, then  
16 absolutely this commission should notify the defense, should  
17 notify the prosecution. The government doesn't object to that  
18 whatsoever, as we have stated in our brief.

19 We don't object because that's what the rules  
20 require. The government presumes that the commission is well  
21 aware of what the rules are, of what the statute says when we  
22 talk about Section 949a of the Military Commissions Act, which  
23 requires that -- or which prohibits any person from attempting

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1 to coerce or influence this commission.

2           Your Honor is aware of that. I imagine your staff  
3 is aware of that. If there has been any attempt to influence,  
4 it is certainly -- it makes all the sense in the world to go  
5 ahead and disclose that information. Not only the statute  
6 says that, but the Rules of Court. The Rules of Court  
7 authored by Your Honor and your staff specifically prohibit  
8 ex parte communications.

9           Your Honor is aware of what those obligations and  
10 responsibilities entail, and if those communications have  
11 taken place -- the government does not believe that they  
12 have -- but if they have, then by all means they should be  
13 disclosed.

14           But there is an important distinction to be made,  
15 and that is between ex parte communications that are proper  
16 and those that are improper. When we're talking about  
17 improper ex parte communications, yes, those are the type that  
18 should be disclosed. When we are talking about proper  
19 ex parte communications, meaning those that are laid out in  
20 either the Rules for Military Commissions or the Military  
21 Commissions Act or the Rules of Court, that those are not  
22 discoverable and should not be the subject of a discovery  
23 motion in this case, and they shouldn't be the subject of a

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1 discovery motion in this case because they are simply not  
2 relevant.

3           Communications that follow the rules are not  
4 probative whatsoever of the independence of this commission.  
5 The only thing they are probative of is the fact that the  
6 government or the defense and this commission are following  
7 the rules as laid out by Congress, by the Secretary of  
8 Defense. And that's why the government does not object  
9 generally to the defense motion but has a few specific  
10 objections when it comes to proper ex parte communications,  
11 those that go to administrative, purely procedural and  
12 administrative matters.

13           Rules of Court allow those, so these types of  
14 communications that have to deal only with procedural matters  
15 are not relevant. They are not relevant because, again, they  
16 do not go to whether or not this commission -- they are not  
17 probative of whether or not this commission is an independent  
18 body or not. They are only probative of the fact that all of  
19 the parties are following the rules and the Rules of Court.

20           Second, ex parte submissions, those that are of the  
21 type that you generally see in Article III courts under  
22 18 U.S.C. 3599(f), this is the tool that the defense has used  
23 over and over again in this case, and properly so, to submit,

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1 for example, their ex parte requests for expert -- for expert  
2 assistance when there is a showing of unusual circumstances.  
3 Again, these are things that are designed and contemplated by  
4 the rules, and those types of communications should not be  
5 discoverable because, again, they are not probative of the  
6 independent nature of this commission. They are only  
7 probative of the fact that the rules are being followed in  
8 this case.

9           And the third category that the government objects  
10 to regards ex parte submissions to protect classified  
11 information. Again, under the Military Commissions Act, under  
12 Rule 505, these are communications that are contemplated by  
13 the rules. The government has engaged in this process; the  
14 rules require that the government provide notice to the  
15 defense and has done so in this case. So there are very clear  
16 permissible forms of ex parte communications that should not  
17 be the source of discovery in this situation.

18           The defense reply, however, asks the court to simply  
19 ignore the fact that there are these types of proper ex parte  
20 communications. Ignoring the rules, Your Honor, has never  
21 been a winning argument before any commission or any court,  
22 and it shouldn't be so in this case. There is no unqualified  
23 right for the defense to mine the communications of the trial

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1 judiciary. The information must be relevant, must be material  
2 to the preparation of the defense; and when we are talking  
3 about proper ex parte communications that are contemplated by  
4 the rules, that is not relevant, that is not material to the  
5 preparation of the defense. And so to the extent that the  
6 defense seeks that form of discovery, the government requests  
7 that that aspect of the motion be denied.

8 MJ [COL POHL]: Thank you.

9 ATC [LT DAVIS]: Thank you, Your Honor.

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

11 LDC [MR. KAMMEN]: Your Honor, I'll be brief. Certainly  
12 we are not interested in the content of anything that they  
13 have submitted to you. I mean, if they have submitted  
14 something to you ex parte and provided the de minimis notice,  
15 that's fine. We are not interested in that. We know about  
16 that.

17 As we understand the rules, if there was some  
18 communication regarding procedural matters, I mean, I'm hard  
19 pressed to understand what that would be, given the way in  
20 which things work. But if there were some communications  
21 between the prosecution and the commission regarding  
22 procedural matters that was not disclosed to the defense, I'm  
23 not sure that that would necessarily be appropriate in the way

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1 things work.

2           But again, I mean, I suppose if -- and I am not  
3 suggesting this happened, I'm just -- if, for example,  
4 somebody from the prosecution called you and said, please  
5 don't set this hearing this week because my daughter is  
6 getting married, I'm not sure that's something that shouldn't  
7 be disclosed to the defense that that occurred, but again, I  
8 understand that those things may happen and I wouldn't suggest  
9 those were improper.

10           So I don't know that we are in huge disagreement,  
11 but we are concerned, Your Honor, that -- and again, when they  
12 have submitted stuff to you regarding national security, we  
13 get notice that there has been some kind of submission, and  
14 that presumably appears in the appellate record and so the  
15 propriety of that and the importance of that will be something  
16 that can be considered at some future time.

17           What we -- again, if none of the intelligence  
18 agencies have reached out to you privately, great. If they  
19 have, that ought to be memorialized in some way. There may be  
20 information that you need that would be perfectly appropriate,  
21 but if neither of the parties know that you have received that  
22 information or you were briefed in some particular way that  
23 was designed to make you believe certain things that may not

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1 be correct, that would be important.

2 So that's really what we are getting at. And again,  
3 I don't want to belabor this. I am not accusing anybody of  
4 anything, I don't have any question but what the prosecutors  
5 follow the rules. I don't have any question that any contact  
6 between you and victim family members that may to us lawyers  
7 be improper, is not meant that way. We would certainly like  
8 to know about it if that occurred, and we understand hi, good  
9 morning is not the kind of thing that we are talking about.

10 But again, the intelligence agencies, given the  
11 history of this case, is a different issue. So if there have  
12 been matters that have been presented to you by the  
13 intelligence agencies in one form or another, we think those  
14 should be made, in some way, a part of the record. Thank you.

15 MJ [COL POHL]: Thank you.

16 Trial Counsel, anything further?

17 ATC [LT DAVIS]: No, Your Honor.

18 MJ [COL POHL]: Okay. I am going to issue a written  
19 ruling in this -- on this issue, but I would like to put some  
20 things on the record now because I think it lends itself to  
21 the way this is done.

22 I am not currently aware of any improper ex parte  
23 contact by any member of my staff or myself. Well, I know not

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1 from myself, for my staff. I will go back and make sure that  
2 they understand the rules and that will be included in the  
3 ruling.

4 Now, I do want to address, and I think this is the  
5 easiest way to do it, the victim family member issue. When we  
6 come down from Andrews and back to Andrews, they segregate the  
7 seating. The front of the plane is the victim family members.  
8 Immediately behind them is the trial judiciary, and  
9 immediately behind them is everybody else. And I'm not sure  
10 how that is segregated because I am never back there. I don't  
11 speak to the victim family members. I deliberately sit  
12 against the window with somebody, a member of my staff, on the  
13 aisle.

14 I have never spoken to any of the victim family  
15 members of any substance whatsoever except perhaps an  
16 occasional good morning, excuse me, could I use the bathroom,  
17 and that's it. So I don't know any other way to put this on  
18 the record other than to just say that to that effect.

19 The way the plane is set up is I deliberately make  
20 sure I am not talking to the victim family members. I have  
21 never spoken to any of them in any way, shape or form except  
22 on a rare occasion, a good morning or something along those  
23 lines. Again, like I say, I don't know any other way to put

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1 that on the record other than to just say it and then I will  
2 issue a written ruling and will go back to members of my staff  
3 to make sure that there hasn't been any ex parte contacts that  
4 should not have occurred that I don't know about.

5                   That being said, we will recess for lunch until  
6 1330.

7 [The Military Commission recessed at 1211, 28 May 2014.]

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