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1 [The R.M.C. 803 session was called to order at 1302, 2 March
2 2015.]

3 MJ [Col SPATH]: All right. These commissions are called
4 to order. All of the parties who were present before the
5 recess are again present. I indicated I'm hoping we can get
6 to a 505 hearing at the end of the day today on 333. That's
7 my goal. We'll just keep an eye on the time and then leave
8 enough time so we can secure the courtroom and get to that.

9 As we look at the docketing order the next kind of
10 series of motions that are before us are 33 -- hang on one
11 second.

12 ATC [LT MORRIS]: I'm sorry.

13 MJ [Col SPATH]: I can wait a second. All right. 331A,
14 and then 319I and J, and then 328. Those logically seem to
15 connect. They all relate to the ultimate 166 notice and the
16 hearsay motions, so as best we can, we can kind of group that
17 argument together. And then we'll probably take 319F and G
18 together as well once we move down, because that has to do
19 with the 166 hearing as well.

20 I think it's important to start dealing with all the
21 motions that relate to the hearsay hearings that we're going
22 to have, so we can once and for all resolve how we're going to
23 do those, the process we're going to use, so we can move

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1 forward with those evidentiary hearings. I know we have
2 witnesses that we're going to hear probably next time in
3 April, depending on how these rulings go, and so I'd like to
4 get this kind of the road ahead as clear cut as we can do and
5 have some discussion on those.

6 So let's start with 331A. Trial Counsel, you have
7 something to say?

8 DCP [COL MOSCATI]: Thank you, Judge. Just a little more
9 on the order. There was a little discussion by e-mail, Judge,
10 on 319I and J. As you know, they are motions to continue the
11 hearing; and with your ruling this morning, the hearing has --
12 the hearing being the evidentiary portion of the hearing, has
13 been delayed or continued to no sooner than April.

14 They also, for the most part, Judge -- well,
15 certainly 319I, it references, you know, all the other
16 underlying 319 motions, discovery, a motion to compel
17 witnesses. That's really the argument in there. So perhaps
18 319I either, A, doesn't need to be argued or doesn't need to
19 be argued before the underlying F and G, and perhaps even 333,
20 the Brady.

21 I know Mr. Kammen did indicate 319J certainly should
22 be argued in this session, since the interlocutory appeal is
23 still sitting.

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1 MJ [Col SPATH]: And it's possible by April that issue
2 will resolve as well.

3 DCP [COL MOSCATI]: That's correct.

4 MJ [Col SPATH]: It has been argued before the commissions
5 appellate court -- that's right, sorry.

6 LDC [MR. KAMMEN]: It is stayed by the D.C. Circuit Court
7 of Appeals.

8 MJ [Col SPATH]: That's right.

9 LDC [MR. KAMMEN]: So it has not been argued. So quite
10 candidly, we're waiting on a decision from the D.C. Circuit
11 Court of Appeals.

12 MJ [Col SPATH]: That's right. We had the argument at the
13 D.C. Circuit Court of Appeals.

14 LDC [MR. KAMMEN]: Quite honestly, I don't think there is
15 a chance the government's decision will be decided by April.

16 MJ [Col SPATH]: You're right. I forgot it was the D.C.
17 court that heard argument on the composition of the appellate
18 court.

19 DCP [COL MOSCATI]: I might also mention, Judge ----

20 MJ [Col SPATH]: 333, I know we talked about that earlier.
21 There was talk about moving that earlier. I think the reason
22 for that, or the rationale has been moved a bit with the
23 evidentiary hearings being pushed. And because it involves

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1 the closed session, I'm going to hold that until the end of
2 the day. Even if we move through the other motions today,
3 maybe we will do those, depending on how we go.

4 It doesn't make sense to take up 331A, I think,
5 because it's how we're going to conduct the 166 hearing
6 ultimately.

7 DCP [COL MOSCATI]: Yes, Judge.

8 MJ [COL SPATH]: All right.

9 DCP [COL MOSCATI]: And then again, I am not sure that
10 makes sense, but J, the interlocutory appeal, while pending, I
11 might also point out, Judge -- and this is not a final
12 thought, but with only one week, in April the government --
13 and you're going to hear a lot of talk in 331 about how the
14 government believes the hearing should be conducted and in
15 what order and so forth.

16 But we would probably begin with 207 evidence rather
17 than 166 hearsay statements, since we only have a week. So
18 really the 166 might be pushed into May.

19 MJ [COL SPATH]: Understand. All right. Let's start with
20 then 331A. Government, it's your motion, and let's talk
21 through the process.

22 ATC [LT DAVIS]: Yes, sir. Good afternoon, Your Honor.

23 MJ [COL SPATH]: Good afternoon.

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1 ATC [LT DAVIS]: In AE 331A, Your Honor, the government
2 urges this commission to adopt a common sense approach to how
3 we will proceed with these evidentiary hearings on AE 166 and
4 AE 207.

5 MJ [Col SPATH]: You didn't find mine to be common sense?
6 And I'm not picking on you. I'm trying to find a way to do --
7 let me tell you my concerns, and then I am more than willing
8 to listen.

9 Here's my worry. You all have given notice, I think
10 79 hearsay statements, I believe, in 166 and then A, B, and C.
11 My math may be off, but it's around 80 statements. The way I
12 read the hearsay rule is each statement has to come in on its
13 own. I mean, I have to go through an analysis of each
14 statement with some assessment of if it's corroborated, if
15 it's reliable, if the witness is available or not, and then if
16 it's being offered to prove a fact in issue. Fair so far?

17 ATC [LT DAVIS]: Yes, Your Honor, you do have to make an
18 individualized determination with respect to each hearsay
19 statement.

20 MJ [Col SPATH]: And so my worry is initially Colonel
21 Moscatti indicated to me that this is going to take three to
22 four months, and that was based on the two weeks at a time. I
23 know it wouldn't take three to four months in realtime. But I

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1 have to be able to compartmentalize that then across all of
2 that time. I know there's a transcript, and as we talked
3 about, the court reporters do a great job getting the
4 transcript done. But I know you recognize there's something
5 to be said for recency, primacy, and hearing the information
6 and making those assessments.

7 So that's all I was trying to do. But I am more than
8 willing to listen to what we're talking about. I have
9 certainly not made up my mind. I'm just trying to do it in a
10 way that makes sense to me so that I can make findings on all
11 of those hearsay statements and not make errors.

12 ATC [LT DAVIS]: Yes, Your Honor. And certainly no
13 disrespect was made with respect to the common sense approach.
14 The government, this being the government's evidence, does
15 understand how all of these pieces of evidence fit together.
16 That may not be an awareness that Your Honor has as to how
17 this all fits together. That's why the government is making
18 its proposal, can explain how those pieces fit together, what
19 the connections are, and why the government's proposal makes
20 sense. The ----

21 MJ [Col SPATH]: How many witnesses total are you going to
22 call? Is it seven witnesses for the statements?

23 ATC [LT DAVIS]: For the AE 166 series, yes, sir.

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1 MJ [Col SPATH]: All right.

2 ATC [LT DAVIS]: Your Honor ordered the government in
3 AE 331 to identify ten pieces of evidence and ten hearsay
4 witness statements and to provide the foundation for those at
5 an evidentiary hearing. The government responded, provided
6 its framework, which while articulated in its motion,
7 envisions a scenario where a witness would be called to the
8 stand, either on AE 166 or on AE 207, and would testify just
9 once as to every piece of evidence to which that witness is
10 relevant, either a witness statement to which that person is
11 relevant or to all the pieces of evidence to which it is
12 relevant.

13 Now, issues with respect to the convenience of
14 witnesses are not determinative on this issue, but where it's
15 reasonable, this commission should seek to not inconvenience
16 witnesses, again, where it's reasonable to do so; and this is
17 such a situation where it is reasonable and can be done.

18 Just to give Your Honor a couple of examples ----

19 MJ [Col SPATH]: Let me ask this: Do you have 166 handy
20 with you?

21 ATC [LT DAVIS]: I don't, Your Honor.

22 MJ [Col SPATH]: I think somebody's finding it for you.
23 When they find it -- let me highlight what I'm looking at for

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1 you.

2 ATC [LT DAVIS]: Yes, Your Honor.

3 MJ [Col SPATH]: In 166, you gave an example. And it was
4 Al-Akl -- Mr. Al-Akl's statement. And you might remember, it
5 goes through in detail how that statement, that hearsay
6 statement, is going to be corroborated, why you all believe it
7 is reliable. And in the order -- or in the notice to the
8 defense you say you're not going to do that for each
9 statement.

10 Do you think it is fair at one point to have you do
11 that, even if it isn't before -- but during or post your
12 presentation of evidence, is it fair to have you go through
13 and lay this kind of written submission out for each of those
14 statements where you explain why the witness is unavailable,
15 what you've put in front of the court as evidence of where the
16 unavailability comes from, where the reliability comes from,
17 where the corroboration comes from, and what material fact
18 you're demonstrating? I mean, do you think that's a fair
19 request if we -- and this isn't a ruling, as I say so often --
20 but if I agree, you all get to present to me witness testimony
21 in an order that makes sense for you. Is it a fair
22 requirement for me to ask assistance in trying to assess 79 or
23 80 hearsay statements in a construct that we've been given in

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1 this Military Commissions Act?

2 ATC [LT DAVIS]: Yes, Your Honor. The government
3 understands that this is a lot of evidence. As you referenced
4 in some of your statements earlier, this is one of the most
5 complex cases currently ongoing, so there is a lot of evidence
6 due in part to the great work of our federal law enforcement
7 agents back in Yemen in 2000.

8 So there is a lot of evidence. We understand that it
9 is complicated, that there are a lot of things that will need
10 to be kept track of. The government's intent, after
11 presenting all of its evidence, giving the defense the
12 opportunity to respond to that evidence, would provide
13 argument to the commission. And during that argument the
14 government would, whether it be in a written format or not,
15 would certainly marshall all the evidence that has been
16 presented on a particular hearsay statement.

17 So if we've had testimony from five different
18 witnesses, if we've had reference to physical evidence or
19 photos, or whatever the case may be, in summary, similar to a
20 closing argument, the government would marshall all the
21 evidence with respect to a particular piece of evidence or a
22 witness statement to present to the commission. If it's
23 helpful to the commission that that be distilled into writing,

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1 the government will certainly consider that request from the
2 commission or an order from the commission.

3 At the end of the day it is up to Your Honor to
4 determine whether the government has met its burden on the
5 statements to determine whether they're voluntary and
6 reliable. If it assists this commission that we place that in
7 a written format, the government, at the commission's
8 direction, will certainly do so.

9 What we really want to avoid, Your Honor, though, is
10 a couple of things. One, as I had started to indicate, if we
11 take this evidence in chunks, that we could be exposing
12 witnesses to having to come down to Guantanamo Bay on multiple
13 occasions. So, for example, we have a Special Agent Kelly
14 Vanarsdale. And this would be referencing the evidence that
15 was recovered from the USS COLE. She received all of the
16 evidence that was received, that had been collected on COLE.
17 She is the chain of custody witness that, when the evidence
18 got back to the United States, she signed that chain of
19 custody document for well over a hundred pieces of evidence.
20 If we take this evidence, either one at a time or even in
21 chunks of 10 or 20, doing pretty simple math, it's easy to see
22 that she would have to testify on multiple occasions.

23 Similarly, when we're talking about the Yemeni

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1 witness statements, if we take a look at the example of
2 Mr. Robert McFadden, who the government would call as its
3 first witness in hearing on AE 166 to give kind of a broader
4 context of the investigation as a whole, but he was also
5 present for the taking of over 30 witness statements. So if
6 we take those one by one or ten by ten, or whatever parameters
7 the commission sets, one can see how he would have to testify
8 on multiple occasions.

9 Again, this witness issue is not determinative, but
10 where we do have witnesses that are willing to come down and
11 testify, and I think everybody has a preference for live,
12 in-person testimony, that we should certainly take steps to do
13 so.

14 But perhaps even more importantly, and I think most
15 importantly, compartmentalizing, at least in the manner in
16 which the government understands the commission's order, would
17 seriously hamper the government in terms of demonstrating the
18 relevance of the evidence, the reliability of the evidence,
19 and in some situations the voluntariness of the evidence. So
20 just to kind of give that some context, I think the best way
21 to do that is through an example.

22 If we're talking about evidence that was recovered
23 from USS COLE, the government at some point will have to

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1 demonstrate that that evidence meets a minimum threshold of
2 relevance. One piece of evidence, for example one piece of
3 fiberglass that is found on the deck of the COLE is not in and
4 of itself necessarily relevant. It's only relevant or becomes
5 increasingly relevant when considered in the context of the
6 dozen or so other pieces of fiberglass that are also found, in
7 the context of pieces of a motor that are also found.

8 A piece of fiberglass in and of itself in a vacuum is
9 of perhaps some relevance, but for the government to really be
10 able to demonstrate the full relevance of that individual
11 piece of evidence, it's important for the commission to
12 consider essentially the totality of the circumstances. The
13 totality of the evidence will demonstrate the relevance on a
14 particular piece.

15 Further, with respect to the chain of custody even on
16 a particular piece of evidence that might have been recovered
17 from USS COLE, when the government is able to demonstrate that
18 not just for one piece of evidence was a certain procedure
19 followed, but for 50, 60, 70 pieces of evidence the same
20 procedure was followed, that gives the commission more
21 information with which to determine that this -- that the
22 procedures were followed, that the evidence is what it
23 purports to be. So the government really can't

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1 compartmentalize or just have -- just introduce one piece of
2 evidence, hear argument, or even just introduce ten pieces of
3 evidence and hear argument.

4 Similarly, when we're talking about the witness
5 statements under AE 166, the government would also be severely
6 hampered in its ability to demonstrate the voluntariness and
7 the reliability of those statements. Again, one single
8 witness statement in and of itself may not be -- it will be
9 difficult for the commission to determine whether it's
10 reliable without having heard testimony about the remainder of
11 the statements.

12 So if you have one witness statement where a witness
13 identifies the accused at a certain location, the government
14 needs to be able to present evidence as to the other -- and I
15 don't want to just pick a number out of the air, but the other
16 several statements that also witnessed the accused at that
17 particular location. So a scenario in which the government is
18 required to present evidence of one witness statement, the
19 government wouldn't be able to provide the full context that
20 the totality of the circumstances type approach to
21 demonstrating that that statement is indeed corroborated, is
22 reliable.

23 Similarly, on the voluntariness prong of those

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1 statements, one statement in and of itself, while we will have
2 agents to come in to testify that a particular witness
3 appeared healthy, didn't appear to be under any duress, didn't
4 show signs of fatigue or abuse or anything of that matter,
5 when the commission views it in the larger context of not just
6 one witness that was under those conditions, but perhaps
7 dozens of witnesses that also were in that same state where
8 the same procedures had been followed, that also goes to the
9 voluntary piece.

10 So, Your Honor, what the government seeks to do is
11 call a single witness at a time that can provide the full
12 context, that can describe every piece of evidence that they
13 have touched or every witness statement that they observed,
14 and not close the evidence at that point, but to wait for the
15 additional witnesses to come on to describe the evidence or
16 the statements that they observed; and then at the end the
17 government will connect the dots.

18 Now, this is not an unusual method of presenting
19 evidence. In a traditional case, military or otherwise, the
20 government would present all of its evidence. Where the
21 government carries the burden, the government presents all of
22 its evidence, the defense gets the opportunity to respond, and
23 then both sides marshall the evidence at the end so that the

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1 finder of fact can make an appropriate determination. That's
2 all the government is asking in this case.

3 So ultimately Your Honor has the ability to guide how
4 evidence comes in. And if Your Honor saw that the process
5 that the government was proposing was going to damage the
6 process in some way, or handicap the process in some way,
7 certainly it would be your duty to step in. At this stage,
8 Your Honor, we're not there.

9 The government has proposed a reasonable strategy for
10 going forward. We're open to the commission's suggestions as
11 to how to best present that evidence at the end, and we ask
12 that you grant the government's motion not to compartmentalize
13 piece by piece or sets of pieces, but to allow the government
14 to present the full range of corroborating evidence and other
15 relevant evidence that's necessary for the commission's
16 determination.

17 MJ [Col SPATH]: Do you have the argument on 328?

18 ATC [LT DAVIS]: On 328, sir? Yes.

19 MJ [Col SPATH]: You do?

20 ATC [LT DAVIS]: And I will ----

21 MJ [Col SPATH]: I know it's a defense motion, but I want
22 to hear the comment -- not 328, I'm sorry, 319J. My mistake,
23 319J. That's the pending issue before the Court of Military

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1 Commissions Review. Do you have that one?

2 ATC [LT DAVIS]: I do, Your Honor.

3 MJ [Col SPATH]: All right. I know it's a defense motion,
4 but I'm interested in your thoughts. I mean, you see the
5 defense has cited to the rule that for anything to do with
6 Limburg, we're supposed to stay away from it, because it is
7 pending in interlocutory appeal. And so how do you address
8 that with regard to some of the hearsay statements clearly
9 relate to the Limburg?

10 ATC [LT DAVIS]: Yes, Your Honor. And the government does
11 not intend -- those ones that specifically relate to the
12 Limburg, the government does not intend to move forward with
13 the admissibility of those statements until a decision has
14 been rendered by the Court of Military Commissions Review.

15 MJ [Col SPATH]: How about presenting evidence on those
16 statements? Do you think you could present evidence on those
17 statements with that decision pending?

18 ATC [LT DAVIS]: Can I just have one quick moment, Your
19 Honor?

20 MJ [Col SPATH]: You may.

21 [Pause.]

22 ATC [LT DAVIS]: Yes, Your Honor. And Colonel Moscati
23 will be addressing AE 319J as we proceed through the docket,

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1 but it is the government's intention in -- consistent with the
2 commission's order that we address witness statements under
3 166A and 166B, not those -- not the remaining statements that
4 are specifically relevant to the Limburg charges.

5 MJ [Col SPATH]: All right. Understand. Thank you. And
6 we'll come back to that. All right.

7 LDC [MR. KAMMEN]: Let me start and say that we see that
8 there's a real big difference between 207 and 166, if you
9 think 207 is even necessary because ----

10 MJ [Col SPATH]: 207 standard, I assume you agree --
11 depending on what they're going to produce, just standard
12 evidence in admissibility if they can tie ----

13 LDC [MR. KAMMEN]: Right.

14 MJ [Col SPATH]: Okay.

15 LDC [MR. KAMMEN]: So there may be some issues because of
16 the aspect of the Yemenis' involvement in the collection of
17 207, but there will be a certain evidentiary threshold that
18 once they get there, frankly -- we see it a hundred times --
19 is this a true and accurate photograph of whatever? Yes, it
20 is. Did you find this where it is? And so we see the two
21 issues really being somewhat separate.

22 If you said, yeah, you know, I only want to make the
23 evidence clerk come here one time, that doesn't cause a great

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1 deal of grief, to be perfectly honest with you.

2 166, however, is a completely different situation.

3 And excuse me, just so I have the numbers right. Really, the
4 starting point for 166 is 328, the motion for a fair hearing
5 on 166, because you really have to address the Wright
6 versus -- Idaho v. Wright situation. Because in the
7 Idaho v. Wright situation, the U.S. Supreme Court has said
8 that this court can't do exactly what the government wants to
9 do. What the government, it sounds like they want to do, is
10 take a series of statements that individually, for a whole
11 host of reasons that we're going to be getting into over the
12 course of the afternoon, are not reliable or where there's
13 real questions about their reliability, and somehow say if you
14 have 25 unreliable statements, somehow all 25 magically become
15 reliable. And that's fundamentally what the government
16 acknowledges that they want to do.

17 And the fact that they concede that sort of going
18 into an individual statement, or taking in -- you know,
19 dealing with a statement individually minimizes its
20 reliability makes the point. Individually, for a whole host
21 of reasons, these statements are not reliable.

22 Now, let me just put this in a context, very briefly,
23 factual context so you and the observers understand what

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1 happened. After the bombing of the COLE, while a number of
2 agents went to Yemen, they were effectively, for a period of
3 about six to eight weeks, walled off from the investigation by
4 the Yemenis. They literally could not leave the hotel.

5 And so the heart -- and the other thing is that the
6 Yemenis, the Yemeni government basically arrested whole
7 neighborhoods, chucked everybody in jail, men, women,
8 children, and, you know, then would bring them and talk to
9 them, interviewed them under circumstances that we don't know,
10 showed them photographs under circumstances we don't know, and
11 then sort of said you FBI agents can talk to these folks under
12 the auspices and under the supervision and under the eye of
13 the Yemenis. And there's countless documents where the FBI is
14 essentially acknowledging we are there in a secondary role, in
15 the heart of this investigation, to the Yemenis.

16 Now, there are a host of issues with that, not the
17 least of which -- and that will be addressed over the course
18 of the afternoon, is the government after three years has --
19 really after 14 years, has decided that the names of the
20 Yemeni officials who were there when the FBI was questioning
21 people are somehow now classified and that the defense doesn't
22 have a need to know that, an issue that's got to be resolved
23 before we start any of this.

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1 So we also know, Your Honor ----

2 MJ [Col SPATH]: But ----

3 LDC [MR. KAMMEN]: Go ahead.

4 MJ [Col SPATH]: Setting aside the issue of the names -- I
5 know we're going to deal with that with the Brady motion, the
6 issue of the FBI's participation and how the Yemenis treated
7 them and how they were involved in the investigation -- and I
8 could have it wrong, it just seems to me that is what 803
9 envisions, and that's going to be your attack on the
10 reliability of the evidence. It goes to the weight, as I kind
11 of sort through, is the statement reliable such that it comes
12 in under this construct ----

13 LDC [MR. KAMMEN]: Sure, on an individual statement basis,
14 yes.

15 MJ [Col SPATH]: Okay.

16 LDC [MR. KAMMEN]: But at least if Wright, if anything
17 approaching what applies -- let me say this. The government
18 says this isn't unusual, and they're talking about 166, I
19 can't imagine what they're talking about.

20 There is not a court -- a case in recorded American
21 history, since 1776, in which a prosecutor sought to introduce
22 80 hearsay statements that were the heart of its
23 guilt/innocence case, especially in a death penalty case. We

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1 are jumping off an unprecedented legal precipice here.

2 If Idaho v. Wright has any meaning in this court,
3 that should govern what this hearing looks like. And
4 Idaho v. Wright really posits a hearing where the statements
5 are considered individually and the -- you cannot go to other
6 hearsay to corroborate the statements. That's the law.

7 Now, that doesn't mean, let's say that Mohammed
8 Ak1 -- I'm just sort of making a name up -- says he saw
9 somebody who looked like Mr. al Nashiri at such and such
10 location. Okay. We can fight over what that means and the
11 circumstances.

12 MJ [Col SPATH]: Right, and whether or not he's available
13 or not, whether or not ----

14 LDC [MR. KAMMEN]: Whether he is available or not.

15 MJ [Col SPATH]: ---- the government demonstrated
16 unavailability or military intelligence necessity.

17 LDC [MR. KAMMEN]: Absolutely.

18 MJ [Col SPATH]: Whatever that happens to be.

19 LDC [MR. KAMMEN]: Okay. But then if their goal is to,
20 let's say, have Agent McFadden say, essentially, have you
21 concluded that this statement is reliable? Yes. Why? Well,
22 because I learned that FBI did a fingerprint examination of a
23 piece of evidence 1234567, and that turns out to be

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1 Mr. al Nashiri's fingerprint. You know, that would be
2 horribly suspect under Wright, because that's classic hearsay.
3 We don't have the right to question the fingerprint examiner
4 of that -- there may be all kinds of challenges to that, and
5 so that would not be appropriate under Wright.

6 But worse, supposing he says, it goes, well, do you
7 think it's reliable? Yes, because Mohammed Mohammed told us
8 A, B, C, D, and E and the next guy told us D, E, F, G, and so
9 you're getting into these multiple levels of hearsay. And so
10 that's what the government, in my view, clearly posits,
11 clearly anticipates doing. And clearly at the end you will be
12 confronted with this mishmash, an almost overwhelming amount
13 of hearsay. And they'll say to you, well, you see, Judge,
14 here it is, it's all reliable, let it all in.

15 And it's going to be almost impossible to make a
16 principled judgment once we head down that road, so ----

17 MJ [Col SPATH]: I guess that's -- I mean, I know that's
18 kind of the whole point of what we're talking about. I look
19 at 803(b)(2), and what I take from that -- the hearsay, I know
20 you know it well, the hearsay rule, this seems to be an
21 attempt to make residual hearsay -- a residual hearsay rule
22 fit the commission.

23 LDC [MR. KAMMEN]: It's Roberts v. Ohio and that's what

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1 Wright was deciding, and really the standard that Wright
2 posited is the hearsay, these statements would be admissible
3 if cross-examination would be -- of the declarant, not the FBI
4 agent, but the guy who actually supposedly gave the statement,
5 would be of no value.

6 Now, if that's the standard we're working against,
7 you know, one of the things we need to know is what the
8 standard we're working against is. And number two, how does
9 the government get there?

10 MJ [Col SPATH]: So I -- 803(b)(2) I think we both agree,
11 Ohio v. Roberts, it is that in statute -- or, I'm sorry, in
12 the ----

13 LDC [MR. KAMMEN]: Sure.

14 MJ [Col SPATH]: I'm sorry. In the rule of evidence.
15 Sorry. Any concern with it as the construct? I mean, just
16 that construct? I understand just -- the rule itself, do I
17 ignore it in light of Idaho v. Wright?

18 LDC [MR. KAMMEN]: No. I think that your original plan
19 really was in recognition of the best way to do it. And the
20 best way to do it with respect to 166 is to go statement by
21 statement, because that's the way in which you're going to be
22 able to judge each statement on its own rather than getting
23 into the mishmash of, you know, Agent McFadden testifying

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1 about A, B, C, D, E, F and G. And, again, it's just going to
2 be unworkable.

3 MJ [Col SPATH]: And as I read, too, it's got the
4 circumstances surrounding the taking of the statement. No
5 argument that seems pretty straightforward to me, where the
6 statement was made, who it was made to, was it during an
7 interrogation or conversation on the street or something like
8 an excited utterance? That's going to be how the statement
9 came about. That one seems, I think, reasonably
10 straightforward in here.

11 The degree to which the statement is corroborated I
12 think is what you're talking about, and that is that I can't
13 use other hearsay statements to corroborate this hearsay
14 statement.

15 LDC [MR. KAMMEN]: Absolutely.

16 MJ [Col SPATH]: I can use surrounding circumstances --
17 for example, they have the photo book. Is the example in the
18 Akl statement that I was talking about with 166, he picked,
19 allegedly, Mr. Nashiri out of a photo book, and the government
20 has the photo book. Can they bring the photo book, assuming
21 they can lay the foundation for the photo book?

22 LDC [MR. KAMMEN]: Sure.

23 MJ [Col SPATH]: Any problem with that? And I can use

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1 that as I look at that statement.

2 LDC [MR. KAMMEN]: Subject to whatever evidence we might
3 present that ----

4 MJ [Col SPATH]: Absolutely, I just want to make sure
5 we're talking the same thing.

6 LDC [MR. KAMMEN]: ---- that -- but it would be important
7 to know, and let's just say hypothetically, that there's other
8 evidence that Mr. Akl had been shown photographs under some
9 circumstances by the Yemenis that the FBI have no idea about,
10 that obviously could compromise and undermine the reliability
11 of what the FBI agent saw. So subject to our ability to ----

12 MJ [Col SPATH]: Sure. And I won't limit that, of course.
13 Then so in your hypothetical -- I just want to make sure I'm
14 tracking -- Mr. Akl says I picked Mr. al Nashiri out of a
15 photo book that I was shown.

16 LDC [MR. KAMMEN]: Agent McFadden claims Mr. Akl.

17 MJ [Col SPATH]: Right. I can't -- then to corroborate
18 that, Mr. Mohammed told an FBI agent, I too picked Mr. Nashiri
19 out of that same photo book, that's where -- your problem is
20 that.

21 LDC [MR. KAMMEN]: Yes.

22 MJ [Col SPATH]: Okay. I just want to make sure I
23 understand absolutely what we're talking about as we parse

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1 this.

2 LDC [MR. KAMMEN]: Yes.

3 MJ [Col SPATH]: Okay. Sorry.

4 LDC [MR. KAMMEN]: And also Mr. McFadden can't say, well,
5 this identification was some other FBI agent -- we can't get
6 into McFadden testifying about what some unavailable FBI agent
7 would say, you know. And so, you know -- obviously, I'm just
8 using Mr. McFadden as an example. I suppose he can testify as
9 to what he saw. He can't testify to what he learned from
10 someone else's report. So, you know, that's how stringently
11 we would draw it under Idaho v. Wright.

12 MJ [Col SPATH]: And so if we have that framework or that
13 understanding, is there danger to letting the government have
14 the witness, Mr. McFadden, go through here's each statement
15 that I've taken -- 1 to 25 of the government's 79 -- here are
16 the statements I took, here are the circumstances under which
17 I took all 25 of those statements, here's who was in the
18 interview room with me, here's how they appeared during the
19 interview?

20 I mean, whatever it is -- because the burden is --
21 and you're going to have a chance to rebut all of this, but
22 the burden is on the government to demonstrate that
23 reliability and its indicia of reliability, and its

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1 credibility and its corroboration, if there is any -- I mean,
2 is there anything inherently wrong with letting the
3 government, since they have the burden, do it as you will,
4 understanding the legal framework we're going to use to assess
5 each individual statement?

6 LDC [MR. KAMMEN]: You know, frankly, if the legal
7 framework is: Did you interview Mohammed Ak1? Yes, I did.
8 Showing you Government's Exhibit 1, is this the 302 that was
9 prepared? Yes, it is. Is this true and accurate of what you
10 think he said? Yes. Did he identify a photo book? Yes. Can
11 you identify -- and then they call the agent to identify the
12 photo book or however that works out.

13 If it's a very narrow construct, maybe. Maybe. I
14 can just tell you, having seen -- I mean, knowing what -- they
15 don't see this as a narrow construct. They see this as an
16 evidentiary free-for-all in which statement after statement --
17 they've said it, each statement buttresses the others.

18 And so what they're going to say is who cares if the
19 Yemenis held these people in jail for six weeks? Who cares if
20 the Yemenis held their wives in jail for six weeks? Who cares
21 if the Yemenis did we don't know what with their children for
22 six weeks? Who cares that we don't know what was said to
23 these people? You've got seven people who say maybe roughly

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1 the same thing, according to the interpretation put on it by
2 the FBI agents. Remember, these are not verbatim transcripts;
3 these are 302s, which are not prepared to be evidence. And
4 so, you know, that's where they're headed.

5 Now, if you draw the lines quite severely and really
6 enforce it quite severely, then maybe it might become more
7 manageable. But I foresee that this will be, you know, just a
8 constant battle, because I don't think that that's what the
9 government has in mind. And so to our eye, you know, as
10 far -- really, especially at the beginning, is really to do
11 these statements individually.

12 Now, I can concede that there will be times where,
13 you know, the evidence is going to be very similar, and after
14 we've done some of the statements we may revisit it. It may
15 make sense to revisit it. But I think at the beginning it's
16 going to be very, very important.

17 And the other thing is this, and this is the other
18 piece of it: There's going to be some serious challenges
19 individually. I mean, we have evidence on individual -- yeah,
20 we obviously have some sort of group objections and
21 cross-examination about the agents generally -- to the agents
22 generally about what was going on in Yemen. But unlike the
23 government, we have been investigating in Yemen, and we have

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1 significant evidence that bears on individual statements. And
2 that's another reason why these should be done individually,
3 so that you can keep it -- so that if we call a witness who --
4 and I'm just using this as example, says, yeah, I interviewed
5 Mr. Ak1 and here's what he told us, it's not getting lost in
6 this morass, so ----

7 MJ [Col SPATH]: And these comments interrelate, 328 and
8 331A, both the fair hearing and then the government's amending
9 the docketing order or request to amend the docketing order?

10 LDC [MR. KAMMEN]: Right. Absolutely. It's all
11 interrelated. As I said, 207, you know, if you're bound and
12 determined to have a 207 hearing, which frankly strikes us as
13 an extraordinary waste of time, but that's up to you and them.

14 MJ [Col SPATH]: That is coming up in a little while as
15 part of our discussion. We'll talk. When we got 207, I don't
16 have yet, 324, 325, 326 and kind of the serial ----

17 LDC [MR. KAMMEN]: Yeah, but 324, 325, 326 are much more
18 akin to 166 because of the involvement of the Yemenis ----

19 MJ [Col SPATH]: All right. We'll talk about those
20 others.

21 LDC [MR. KAMMEN]: ---- so those are significantly
22 different.

23 I guess to sum it up, our position is, you know, we

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1 think you really -- and I'm not -- we thought your approach
2 was common sense, take the first ten in order or let them pick
3 their first ten, either way.

4 MJ [Col SPATH]: That was the approach, was pick ten and
5 we'll ----

6 LDC [MR. KAMMEN]: Yeah, and we thought that really did
7 make some sense. Frankly, if you structure it the way we
8 want, which is a very tight fence, for lack of a better word,
9 around the government's evidence, that's going to make that
10 even make more sense. The only way their attitude or their
11 process makes sense for them is if it's an evidentiary
12 free-for-all, and that -- frankly, I think that's going to be
13 unfair to the defense, given the magnitude of this hearing,
14 but it's also going to be unfair to you because it's just
15 going to be, you know, a morass.

16 In their one example, and I think it was on Mr. Akl,
17 it was three pages, as I recall, of, you know, how this all
18 interrelates. It was basically it all interrelates because
19 other statements that were taken under the same or more
20 questionable circumstances, maybe support that in some way.

21 MJ [Col SPATH]: All right. Thank you. All right.

22 Trial Counsel, do you agree the construct laid out in
23 803 seems to be Ohio v. Roberts?

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1 ATC [LT DAVIS]: To an extent, Your Honor.

2 MJ [Col SPATH]: Where do you think it differs?

3 ATC [LT DAVIS]: Ohio v. Roberts does not address the
4 intelligence operational factors that are at play. But that
5 aside ----

6 MJ [Col SPATH]: Fair. Okay. That will go toward the
7 availability/unavailability question of the witness. That's
8 how it seemed to be laid out in here, for the intel piece. I
9 just wanted to make sure. The statement is offered as
10 evidence of a material fact, probative, and then we go through
11 2(c) which has the language you're talking about, not
12 available, taking into consideration the physical location of
13 the witness, the unique circumstances of the military and
14 intelligence operations. So that has to do with the
15 availability question, is this military or intelligence
16 operations?

17 ATC [LT DAVIS]: I mean, certainly we will need to prove
18 that a particular witness is unavailable as part of the
19 foundation for a particular witness statement.

20 MJ [Col SPATH]: Okay.

21 ATC [LT DAVIS]: But, Your Honor, I guess as a general
22 matter, the defense argument, which kind of touches on a few
23 different motions that you have before you today, but it's not

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1 a question of the order in which we're going to do things.
2 It's their ultimate opinion that the evidence that the
3 government is going to present is unreliable.

4 And there's a time and place for that argument, and
5 that is down the line, after the evidence has come in, after
6 the government has presented its evidence, after the defense
7 has presented its evidence, the defense will almost certainly
8 get up here and argue that, Your Honor, you should not admit
9 this statement because it's based on hearsay or it's
10 unreliable for some other reason.

11 But that's not the stage that we're at. The stage
12 that we're at is for Your Honor to make a pretrial,
13 preliminary determination as to the admissibility of evidence.
14 So while Mr. Kammen may rely on Idaho v. Wright -- and as an
15 aside on that issue, that was a case only brought to the
16 government's attention yesterday, so the government would
17 request the opportunity to respond to that in writing and
18 supplement our papers. But this is a pretrial determination
19 as to the admissibility of evidence. The applicable rule
20 there ----

21 MJ [Co1 SPATH]: Agree with that, completely agree. And
22 Mr. Kammen conceded somewhat that if it's focused where we're
23 corroborating these statements in a way that seems to be

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1 envisioned by the rule, there's not as much concern.

2 So let me ask you the hypothetical I asked Mr. Kammen
3 as I tried to make sure I understood what we're talking about.
4 If Mr. Akl told Special Agent McFadden I identified
5 Mr. al Nashiri in a lineup, a photo lineup, photo book, and
6 that's the statement you want to offer, that's the hearsay
7 statement that is being offered -- we'll concede for a moment
8 Mr. Akl is unavailable -- can you use as corroboration for
9 that statement Mr. Mohammed told another agent the same thing,
10 I identified Mr. Nashiri out of the photo book?

11 Can you use those two to corroborate each other, or
12 do they each have to stand on their own?

13 ATC [LT DAVIS]: It's the government's position, Your
14 Honor, under 104A that absolutely the government can offer the
15 evidence of another statement, other evidence, even if it's
16 hearsay, to corroborate the particular statement that the
17 government is seeking to admit.

18 MJ [Col SPATH]: Do you think Ohio v. Roberts, the
19 analysis under Ohio v. Roberts, would agree with that?

20 ATC [LT DAVIS]: As far as making a pretrial determination
21 as to that statement, it is the government's position that it
22 would, Your Honor. When we get to ----

23 MJ [Col SPATH]: I would guess that's where the dispute

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1 comes from -- I think, on how the hearing's going to go
2 forward. I'm pretty sure that's where the dispute is, if I
3 were to guess. All right. So under 104, pretrial
4 admissibility, the rules being somewhat relaxed as we
5 discussed except for privilege.

6 What about in front of the members?

7 ATC [LT DAVIS]: In front of the members, Your Honor, it's
8 a completely different story. The example I think Mr. Kammen
9 gave is that we might have a federal law enforcement agent
10 come in and testify as to what the fingerprint examiner would
11 say and to use that as corroboration. This whole question of
12 corroboration is really a pretrial issue to determine the
13 basic admissibility of these statements ----

14 MJ [Col SPATH]: Here's ----

15 ATC [LT DAVIS]: ---- to Your Honor.

16 MJ [Col SPATH]: Say under 207 you have an item on the
17 boat with a fingerprint -- I'm not suggesting you do -- but
18 from the boat near the COLE, and you have Mr. al Nashiri's
19 fingerprint on it. And then you have somebody, Mr. Ak1,
20 saying I saw Mr. al Nashiri touch the boat that was in his
21 yard, and that's what Agent McFadden is going to testify to,
22 are you with me so far? Mr. Ak1 told Agent McFadden I saw the
23 accused touching the boat, and you have an independent

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1 fingerprint examiner saying Mr. al Nashiri's fingerprints are
2 on that boat and you're calling that agent.

3 Do you -- that seems the kind of corroboration we're
4 talking about; you have a separate witness with a fact. I
5 think -- I thought what Mr. Kammen was saying is somebody
6 testifying other than the fingerprint expert about the
7 fingerprint. Make sense?

8 ATC [LT DAVIS]: It does, Your Honor.

9 MJ [Col SPATH]: Okay.

10 ATC [LT DAVIS]: But just to be clear, pretrial the
11 government may rely on -- other than -- one moment, Your
12 Honor.

13 [Pause.]

14 ATC [LT DAVIS]: Just to be clear, at trial if the
15 government is to introduce evidence that there were
16 fingerprints found or that there's any other scientific
17 information that corroborates, the government will bring that
18 witness, that witness will be subject to cross-examination in
19 accordance with all applicable rules. That's the government's
20 intention.

21 At a pretrial hearing, as Your Honor indicated last
22 week, the military judge is not bound by the Rules of
23 Evidence, except for privilege. Those are the rules. Those

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1 are not just the rules here, Your Honor ----

2 MJ [Col SPATH]: We're talking about pretrial
3 admissibility of evidence that's going to go to the court
4 members, which is different. What I was talking about last
5 week was for me to make a motion ruling, in that case on
6 unlawful influence, but any motion ruling. Evidence can come
7 to me in the form of hearsay. Evidence can come to me in the
8 form not necessarily admissible in front of members, e-mail
9 traffic without a witness saying I sent that e-mail, I'm the
10 person who drafted it. The threshold's a little different as
11 we deal with motions.

12 What we're dealing with here is of the 79 statements,
13 what is going to go before the court members as evidence?

14 ATC [LT DAVIS]: Right, Your Honor, and so what would go
15 before the court members would just be that individual
16 statement.

17 MJ [Col SPATH]: Yes, and I have to use 803(b)(2) and all
18 the subparts to analyze each hearsay statement. We agree on
19 that?

20 ATC [LT DAVIS]: Yes, I do, Your Honor.

21 MJ [Col SPATH]: All right. I think we're -- I don't
22 think we're saying the exact same thing, Mr. Kammen, but at
23 least I understand the framework that is put before me, and it

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1 does appear to be Ohio v. Roberts, except the availability
2 determination has some unique aspects that they have put into
3 the rule.

4 ATC [LT DAVIS]: A couple more points, Your Honor. The
5 defense, one, has grossly overstated the conditions under
6 which these interviews have taken place in this recitation of
7 the facts, that witnesses are rounded up off the street and
8 that that applies to every witness statement. That's a gross
9 overstatement of the facts.

10 Two, the government -- I'm sorry, the defense seems
11 to indicate that it has evidence related to its investigation
12 in Yemen, and the government has requested discovery from the
13 defense as to what evidence that may be so that the government
14 isn't surprised, that this isn't a game of gotcha; and those
15 requests have gone unanswered.

16 So if indeed the defense does have evidence that it's
17 going to introduce at these evidentiary hearings, the
18 government would request that the commission direct the
19 defense to provide that discovery.

20 If I could have one moment, Your Honor?

21 MJ [Col SPATH]: You may.

22 [Pause.]

23 ATC [LT DAVIS]: And my cocounsel, Your Honor, has just

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1 asked -- I believe we've covered it, but it is the
2 government's position that when we're talking about these
3 hearings, that when the government begins to introduce its
4 evidence on a particular piece of evidence or a particular
5 witness statement, that the hearing will remain open until the
6 government has presented all of its evidence as to that
7 particular piece of evidence or that particular statement.

8 So that at the end of, say, the April hearing, if we
9 do hear some evidence, that that doesn't close the evidence on
10 that, but that the government have a continual opportunity in
11 subsequent hearings to continue laying the foundation for that
12 evidence.

13 MJ [Col SPATH]: Until you're done with your presentation
14 of evidence on 166?

15 ATC [LT DAVIS]: Yes.

16 MJ [Col SPATH]: Okay. I mean, that I understand. Once
17 the defense -- once the burden shifts to the defense, I want
18 to be able to have the defense then have the opportunity to go
19 forward on what they will, and if possible -- let me ask this.

20 After your presentation, this is a hypothetical, I am
21 able to say with some certainty 15 statements are not close --
22 this is totally a hypothetical. I have not gone through these
23 statements one by one, believe me. I don't have the evidence

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1 to support them, haven't heard any testimony. I only have the
2 notices. I'm just -- so this is not just lowballing or
3 highballing -- just hear me out -- and you all say we rest, we
4 have presented all of the evidence that is going to
5 corroborate, that makes it reliable, that demonstrates
6 unavailability.

7 For efficiency purposes, it would make sense that if
8 I could say five statements or 15 or 20, you're not there,
9 that would obviate the need for defense calling witnesses on
10 those statements. I mean, they would be finished. Do we
11 agree with that.

12 ATC [LT DAVIS]: Yes, Your Honor.

13 MJ [Col SPATH]: Okay. All right. Again, I'm not saying
14 that will happen, just maybe some of them will be obvious at
15 that point, maybe not.

16 ATC [LT DAVIS]: And, Your Honor, if I may, just one
17 additional point of clarification with regard to your order,
18 and understanding that 207 is a carryover from Judge Pohl.
19 But there was a colloquy on the record as to how the
20 evidentiary hearing with respect to those pieces of evidence
21 was going to work, and it's the government's position that
22 what the government would present is simply the chain of
23 custody witnesses. And this actually may get to some of the

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1 concerns that the defense has about hearsay evidence being
2 offered in a pretrial scenario.

3 It's the government's intention to simply lay the
4 foundation from a chain of custody perspective from the time
5 the piece of evidence was collected until it gets to the crime
6 lab for analysis. That's the extent of it.

7 MJ [Col SPATH]: I think on that you're in agreement.
8 Mr. Kammen indicated he had less concern with 207 if it was
9 where did you find this, did you seize these pieces of
10 evidence at the site of the USS COLE, et cetera. I believe he
11 conceded as much.

12 The discovery issue, the only thing I would say, if
13 you believe that there is an issue with discovery, I would
14 file a motion before our next hearing so we can deal with
15 that. It will be fully briefed before we get here in April.

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

17 MJ [Col SPATH]: All right. Thank you. All right.

18 Mr. Kammen, any final comments on these ----

19 LDC [MR. KAMMEN]: Yes.

20 MJ [Col SPATH]: ---- issues?

21 LDC [MR. KAMMEN]: Just so we're clear, obviously our
22 original motion didn't cite Idaho v. Wright, but when you do
23 the minimal amount of research under Roberts v. Ohio you come

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1 to it because Idaho v. Wright is how you do this hearing. It
2 deals with pretrial hearings on admissibility of hearsay
3 evidence.

4 And that's what -- look, you know, it's sort of
5 like -- hearing them talk is like falling down the rabbit
6 hole. Once you admit it, it's going to the members. The
7 members can't apply Idaho v. Wright. So once you say, you
8 know, these however many statements are admissible, the
9 members are going to hear it. So you are the gatekeeper, and
10 it is your responsibility to determine the reliability using
11 the proper legal standards.

12 And, you know, what they're saying, and they say it
13 as clearly as they can, well, you know, okay, we may call
14 McFadden to talk about -- and, again, we've used Mr. Akl. We
15 may talk to him about Mr. Akl, but, boy, you know, if two
16 months later something comes up, we want to -- you know, we
17 don't want Akl closed. So they posit an evidentiary
18 free-for-all where at the end they're able to say, you know,
19 you've got this whole pile of rubbish, but when it's all put
20 together, it's gold. I mean, that's essentially what they're
21 going to ask you to do.

22 And, you know, the other piece of this that I don't
23 know how to put in is, you know, they say, well, we want to

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1 call McFadden, we don't want to inconvenience him. If he's
2 putting in 30 statements -- unless what they may be sneaking
3 up on is you get to hear his direct, live, and the
4 cross-examination is he, oh, doesn't want to come for cross.

5 I mean, I see that coming, and I think that's
6 something you ought to address, that if a witness comes to
7 Guantanamo, he's here for the whole direct and cross, and if
8 direct and cross takes two sessions, he comes back. Or if
9 he's -- if he doesn't want to come twice, he does it all by
10 video conferencing. But I don't think we should be put in the
11 posture of letting the witness choose the circumstances under
12 which he wants to be cross-examined. So I think there's that.

13 But really the more important point is this: You
14 know, Idaho v. Wright tells you what these hearings should
15 look like, unless we are just simply saying American
16 jurisprudence has no place in Guantanamo, other than
17 intelligence, and that -- nothing that really applies here.
18 Unless we're just saying this has no application in
19 Guantanamo, then, you know, that's the law. It was overruled
20 by Crawford, but we're back in a pre-Crawford environment.
21 And so, you know, that's where we're at, and that's the
22 standard that should govern.

23 I know you want them to file a motion, but as we've

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1 been discussing things, I don't know of any of the rules of
2 discovery that require us to reveal impeachment evidence prior
3 to the time a witness testifies.

4 MJ [Col SPATH]: I wasn't suggesting a ruling on any
5 motion.

6 LDC [MR. KAMMEN]: I understand.

7 MJ [Col SPATH]: I'm not taking motions on as we work
8 through this.

9 LDC [MR. KAMMEN]: I understand, but I just want to be
10 real clear that, you know, yeah, if their witnesses lie, there
11 are going to be some surprises for them, absolutely.

12 MJ [Col SPATH]: All right. I think that takes care of
13 331A, 328. 319I and J seem interrelated. I don't know how
14 much argument we need on them, but they are your motions.

15 LDC [MR. KAMMEN]: I don't know that we need argument on
16 319I, but 319J I think we do, and Commander Pollio ----

17 MJ [Col SPATH]: Okay.

18 ADDC [Maj JACKSON]: Your Honor, may we take a comfort
19 break?

20 MJ [Col SPATH]: Sure. Take a break for ten minutes.
21 Commission is in recess.

22 [The R.M.C. 803 session recessed at 1406, 2 March 2015.]

23 [END OF PAGE]

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