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1 [The R.M.C. 803 session was called to order at 0901, 3 March  
2 2015.]

3 MJ [Col SPATH]: All right. These commissions are called  
4 to order. All parties present before the last recess are  
5 again present. All right.

6 I know we need to work through what's left on the  
7 docket. I just want to make sure we do it in a way that makes  
8 sense and allows us to use our time when we are here. I  
9 haven't given a ruling yet with regard to any classified  
10 information that needs to be used in argument in 319 and 333.

11 And so I guess what I would ask the parties is, is  
12 there any unclassified argument that you are ready to provide?  
13 I certainly will take it. But I need some time to spend with  
14 AE 337, the government's ex parte submission, because I know  
15 it interrelates with those.

16 It took some time to get it printed, but I've got it  
17 now, and I'm working through it. But I'm certainly willing to  
18 listen to any unclassified arguments if we have anything  
19 additional to offer.

20 So let me ask the defense first: On 319 in an  
21 unclassified argument, any arguments on 319 at this time?

22 ADDC [Maj JACKSON]: Your Honor, for a little  
23 clarification, so -- it is the defense request we wait until

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1 we get additional guidance as to what would be limited in our  
2 argument.

3 MJ [Col SPATH]: Okay.

4 ADDC [Maj JACKSON]: This is for 319.

5 MJ [Col SPATH]: I understand. That makes sense.

6 ADDC [Maj JACKSON]: I believe that the government may  
7 have an update on the status of some of the things we were  
8 talking about yesterday in our closed session that they are  
9 going to provide you with, but I think they may have to  
10 provide that in closed session as well.

11 MJ [Col SPATH]: I understand. Thank you.

12 ADDC [Maj JACKSON]: Thank you, Your Honor.

13 MJ [Col SPATH]: For 319, Government, any comments on  
14 that?

15 DCP [COL MOSCATI]: No. That is essentially correct. I  
16 think we are talking about 319F, Judge, and there was -- I'll  
17 call it a 505(g) proffer yesterday, and I think we planned  
18 that when we go to 505 we would discuss that proffer.

19 MJ [Col SPATH]: You have some additional information you  
20 are going to provide in that session?

21 DCP [COL MOSCATI]: Yes, Judge.

22 MJ [Col SPATH]: All right. So we will take that up then.

23 Then we have 333, and I know there -- I don't know if

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1 you want to bifurcate your arguments, Defense Counsel, because  
2 I know there's a significant part that you want to argue in a  
3 classified environment and then there's some in an  
4 unclassified environment. If you don't want to bifurcate them  
5 in distance by a long way, we don't have to do it right now.  
6 But if you want to provide unclassified argument on 333, I'm  
7 willing to take that now. Your choice.

8 LDC [MR. KAMMEN]: Defer to you. I mean, we would prefer  
9 to do them ----

10 MJ [Col SPATH]: Closer together.

11 LDC [MR. KAMMEN]: ---- closer together. But if you feel  
12 like you want to hear the -- [no audio] -- today we are  
13 prepared to go ahead.

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

15 DCP [COL MOSCATI]: Which, of course, Judge, that would  
16 require your written findings prior thereto.

17 MJ [Col SPATH]: Not for the unclassified. Understand.  
18 For any classified argument, yes, I understand that. And I  
19 don't have those yet. And the government talked in detail  
20 about the need to look at 337 in conjunction with 333, so I'm  
21 going to do that and take some time to do that. All right.

22 That leaves 327 currently outstanding. I just want  
23 to have a conversation about it, make sure we are on the same

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1 page. So, Government, for 327, that is the motion to suppress  
2 statements by Mr. Badawi -- is that pronounced reasonably  
3 correct? Okay -- to federal agents.

4 Let me ask this: Trial Counsel, is that part of your  
5 166 series of hearsay statements?

6 ATC [LT DAVIS]: Yes, Your Honor, it is.

7 MJ [Col SPATH]: So with 327, it appears to me that as we  
8 work through the 166 evidentiary session we're going to deal  
9 with this motion to suppress, in conjunction with that.

10 Commander Mizer, you're nodding.

11 DDC [CDR MIZER]: That's correct, Judge. That is what we  
12 anticipated, is working out the witnesses for 166, and then  
13 this would be addressed as an additional matter with those  
14 foundational witnesses.

15 MJ [Col SPATH]: All right. So I don't need argument on  
16 that right now. That is how I took it. I assumed that is  
17 going to be a hearsay submission and it was incorporated in  
18 the 166 notices, and we are still -- we are trying to work  
19 through how we are going to do the 166 hearing and the timing  
20 of it as we move forward.

21 Then we have 335. That appears to me to be  
22 different. Trial Counsel, that's a motion to suppress  
23 statements, custodial statements made by Mr. al Darbi to

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1 federal law enforcement agents. It is my understanding that  
2 he may well be a witness during your case; is that accurate?

3 ATC [LT DAVIS]: That's accurate, Your Honor.

4 MJ [Col SPATH]: And so just for framework, I know there  
5 is some discussion in the motions about who has the burden and  
6 the like. Do you agree, Trial Counsel, just as a general  
7 frame work you have the duty to demonstrate the admissibility  
8 and relevance of any evidence that you are going to offer  
9 during your case in chief?

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

11 MJ [Col SPATH]: That seems, I think, pretty standard,  
12 that you are going to have to demonstrate that your evidence  
13 is admissible and is relevant to the matter at hand. And  
14 so the defense has objected to that, and I have read through  
15 your submissions, but it appears to me that we are going to  
16 have to do that in an evidentiary session based on the  
17 submissions. All right.

18 ATC [LT DAVIS]: Two points, Your Honor. One, the  
19 government sees this as a purely legal question which does not  
20 require evidentiary hearing, and certainly there's nothing  
21 stopping us from proceeding with that argument at this time.

22 We did receive a motion to compel witnesses yesterday  
23 after 5:00 p.m., understanding that this was a motion that was

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1 filed on 16 January. So the defense has known since  
2 16 January that it was going to request these witnesses but  
3 yet waited two months, a week after this particular motion was  
4 scheduled to be argued, to file that motion to compel  
5 witnesses. Which at best is questionable timing, but at worst  
6 seems to be an effort to prolong these proceedings, to push it  
7 down the road until another hearing. That is simply not  
8 necessary at this point, especially understanding that this is  
9 a purely legal question.

10           These witnesses are irrelevant to the resolution of  
11 this. The commission can simply consider the rule at play,  
12 which is a basic question of standing here, to deny the  
13 defense motion.

14           MJ [Col SPATH]: It is a question of standing in part, but  
15 isn't it also a question of what derivative evidence is under  
16 the Military Commissions Act? I mean, what that means?

17           ATC [LT DAVIS]: Your Honor, referring specifically to the  
18 rules of evidence are clear, that an accused can only  
19 challenge ----

20           MJ [Col SPATH]: Not counting that, Mr. al Darbi's  
21 statements -- Mr. al Darbi 's statements, the initial  
22 statements you are not offering, right? I think you've made  
23 clear, you are not planning on offering those, correct?

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1 ATC [LT DAVIS]: That's correct, Your Honor.

2 MJ [Col SPATH]: So he is going to come in, testify again  
3 about what he perceives, or he's going to tell me, and I  
4 assume -- again, I'm not making any finding of fact; I  
5 understand we have not had evidence why yet. There was a  
6 voluntary interview later in time that he engaged in with law  
7 enforcement, and he made some statements.

8 ATC [LT DAVIS]: Your Honor, the witness would not need to  
9 refer to a subsequent statement. The witness is going to be  
10 on the witness stand testifying as to his recollection of  
11 events, not a recollection of a particular interview.

12 MJ [Col SPATH]: All right. Understand. With regard to  
13 the motion to compel witnesses, let me just take argument on  
14 this motion. I'm interested in hearing it, so I will hear  
15 from defense first, then turn it over to you. So let's deal  
16 with 335 and get that one closed up for this session.

17 ADDC [LCDR POLLI0]: Good morning, sir.

18 MJ [Col SPATH]: Good morning.

19 ADDC [LCDR POLLI0]: With respect to AE 335, the motion to  
20 suppress statements or testimony from Mr. al Darbi, first and  
21 foremost, Mr. al Darbi's testimony relates solely to Motor  
22 Vessel Limburg. That issue is pending an interlocutory  
23 appeal, so that at this moment it is not appropriate to hold

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1 any session related to Mr. al Darbi's statement because that  
2 relates solely to charges that are pending in interlocutory  
3 appeal that the government chose to seek, knowing full well  
4 the ramifications of choosing to seek an interlocutory appeal.  
5 So at this point, holding any session related to his statement  
6 is barred by the rules.

7           Going on ----

8           MJ [Col SPATH]: Hang on for that, then, because that's an  
9 important step number one.

10          ADDC [LCDR POLLIO]: Yes.

11          MJ [Col SPATH]: So let me chat with the government on  
12 that issue. If we have more argument, we will come back to  
13 you.

14                 Trial Counsel, you heard the initial discussion; that  
15 is, the al Darbi statement relates to M/V Limburg.

16          ATC [LT DAVIS]: Your Honor, this is clearly a new  
17 argument that is being advanced by defense counsel. If we  
18 could just have a moment to discuss that?

19          MJ [Col SPATH]: You may.

20          ATC [LT DAVIS]: Thank you.

21 [Pause.]

22          ATC [LT DAVIS]: Your Honor, it is the government's  
23 position that we can move forward with this argument

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1 regardless of the status of the Limburg charges. This  
2 eventual testimony of Mr. Darbi, that the government would  
3 call Mr. Darbi as a witness, it has separate relevance apart  
4 from any Limburg charges, goes to the government's -- goes to  
5 the conspiracy charge which is still before the -- still  
6 before the commission. So it is the government's position,  
7 Your Honor, we can move forward in the general theory of  
8 liability for all the charges, Your Honor.

9 MJ [Col SPATH]: I'm not ruling on that issue yet. I  
10 understand that. And so if my ruling relates to the Limburg  
11 piece, you will know that, because the ruling will be pretty  
12 truncated, and it will be that we're going to hear additional  
13 evidence and argument.

14 Now let's move on to other argument, Defense Counsel,  
15 with regard to Mr. al Darbi.

16 ADDC [LCDR POLLI0]: Your Honor, with regards to the  
17 questionable timing of the motion to compel witnesses, we  
18 filed the motion on 16 January, response was 27 January, reply  
19 was 2 February, followed request for witnesses. As is the due  
20 course in this trial, witnesses were not relevant. There is  
21 nothing to see here. Everything exists in a vacuum, in a  
22 tunnel vision, and it is the government's position that  
23 testimony is completely unrelated to torture that occurred

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1 earlier. And that's why we need the witnesses.

2 We filed the motion yesterday. There are a lot of  
3 moving parts. We are far from trial. There is in no way any  
4 danger that we are affecting the trial schedule by having this  
5 issue come up later. When you look at the rules of motion  
6 practice, the idea is to effectively ID issues and efficiently  
7 handle them. We are still well within that bounds, Your  
8 Honor, looking at the rules that require motions be filed  
9 before trial, responses and replies in a timely manner. We  
10 are raising these issues as they come up and trying to deal  
11 with them in an appropriate fashion.

12 It's just unfathomable that the government says  
13 questionable timing on a motion to compel witnesses for an  
14 issue that is related directly to the Motor Vessel Limburg  
15 when they have an interlocutory appeal and then, you know,  
16 file a 337 notice on an issue that impacts the entire case a  
17 week before we come down here. So that's just unfathomable.

18 But the issue is that we are going in a timely  
19 manner, we are proceeding with the rules, and that there is no  
20 harm in dealing with this.

21 MJ [Co1 SPATH]: All right. Let's talk, then, about  
22 Mr. al Darbi's statements. The government has conceded that  
23 any discussions with and interviews of him in -- I think it is

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1 2002, they are not planning on offering.

2 ADDC [LCDR POLLIO]: Of course they won't, sir.

3 MJ [Col SPATH]: I mean, but they've conceded it.

4 ADDC [LCDR POLLIO]: Yes.

5 MJ [Col SPATH]: It seems the Military Commissions Act  
6 acknowledges that there were methods used that I know some  
7 have called torture, some have called enhanced interrogation.  
8 Whatever it is, the government has conceded we are not  
9 offering those statements.

10 ADDC [LCDR POLLIO]: Correct.

11 MJ [Col SPATH]: All right. So how do we get to -- and  
12 again, I still -- I'm going to have a discussion with the  
13 government about demonstrating relevance and admissibility of  
14 evidence. That is their burden in every case for every bit of  
15 evidence they are going to offer. But how do I get to  
16 suppression, which is how your motion is entitled ----

17 ADDC [LCDR POLLIO]: Yes, sir.

18 MJ [Col SPATH]: ---- of Mr. al Darbi's testimony Monday?

19 ADDC [LCDR POLLIO]: Sir, that is why we need an  
20 evidentiary hearing on this matter. The government has the  
21 burden of proving attenuation of the taint on this. It  
22 is ----

23 MJ [Col SPATH]: What taint? From his earlier torture in

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1 2002?

2 ADDC [LCDR POLLI0]: Absolutely, sir. It is the defense's  
3 position that the torture in 2002 and the statement provided  
4 in 2002 and the ongoing treatment of Mr. al Darbi while  
5 detained in various places, among them here, still constitutes  
6 the use of torture or enhanced interrogation methods and is  
7 related to how the government is able to call Mr. Darbi as a  
8 witness.

9 And that will be further fleshed out in an  
10 evidentiary hearing. It will be premature to -- for the  
11 government to say -- you know, put blinders on the court and  
12 say it doesn't matter. And we need to flesh that out. And it  
13 does go directly to the voluntariness and to whether or not  
14 his testimony would be permitted under the MCA.

15 MJ [Col SPATH]: Different from the interrogation piece,  
16 does he have standing to -- I understand we are going to talk  
17 about whether or not his statement is derivative of, as  
18 defined by the Military Commissions Act, the interrogation.  
19 But does he have standing to submit a motion to suppress?  
20 Does Mr. al Darbi have any standing to make it a motion to  
21 suppress?

22 ADDC [LCDR POLLI0]: We are filing this motion to suppress  
23 on behalf of Mr. al Nashiri. Mr. Nashiri has standing under

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1 the MCA to file this motion because the rule prevents any use  
2 of any evidence, any statements, anything derived from  
3 torture, from being used against him. And so it is our belief  
4 that Mr. Nashiri does have standing to file this motion.

5 MJ [Col SPATH]: All right. You can keep going.

6 ADDC [LCDR POLLI0]: And so I guess to sum it up, sir, we  
7 are so far from the beginning of trial that this motion is  
8 filed in a timely manner. And in any event, it is the defense  
9 position the interlocutory appeal from the Motor Vessel  
10 Limburg clearly prevents us from holding a session on this  
11 statement. Which the government has had this statement for  
12 years, and it is clearly related to the Limburg, and there is  
13 no way that they could be surprised by this.

14 Thank you.

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

16 Trial Counsel. Sorry, I want to make sure we agree  
17 on the -- just the initial part. I want to hear your comments  
18 on the 948r and the torture piece or the interrogation piece.  
19 But as a preliminary matter, ultimately if you all say we are  
20 going to call Mr. al Darbi and he is going to testify, if the  
21 defense objects to that -- switch hats for a moment, pretend  
22 we are sitting in a court-martial -- typically I would have a  
23 39(a) session and we would either have the witness testify or

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1 have a stipulation so I can sort through if the evidence is  
2 relevant and admissible for the members. We concur with that?

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

4 MJ [Col SPATH]: And you all would have to demonstrate  
5 that evidence is relevant and admissible?

6 ATC [LT DAVIS]: Yes, Your Honor, like any other witness.

7 MJ [Col SPATH]: Right, standard practice. If there is no  
8 objection, we call the witness. If there is an objection, we  
9 deal with it in a session outside the hearing of the members  
10 and we work through those admissibility issues.

11 ATC [LT DAVIS]: Right. But the point, Your Honor, is we  
12 can deal with these issues pretrial so we are set up for  
13 success when we actually get to trial.

14 MJ [Col SPATH]: Absolutely. Okay.

15 ATC [LT DAVIS]: And the fact that this can be resolved as  
16 a purely legal matter at this stage so that both parties are  
17 aware of what the evidence is going to be at trial has value.

18 MJ [Col SPATH]: It does. So whether or not -- whether or  
19 not there is standing, whether or not the 948r applies to  
20 subsequent statements, I agree, all of those things we can  
21 resolve initially. But as for the scope of his testimony and  
22 all, maybe we can resolve it pretrial, but that is not a  
23 question of law. That's a question of admissibility, what he

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1 is actually going to testify to.

2 ATC [LT DAVIS]: Yes, Your Honor. And as a  
3 co-conspirator, the government's confident his testimony will  
4 be relevant, will be admissible, and that there will be no  
5 further challenges -- should not be further challenges.

6 MJ [Col SPATH]: All right. I understand that. I  
7 understand that. And the other piece I want to make sure we  
8 are clear on is just that you've characterized it as a late  
9 request for witnesses. The request for the production of  
10 witnesses to deal with this issue, if the issue relates purely  
11 to the question of law, maybe it can be dealt with without  
12 witnesses. If it relates more to the admissibility or  
13 relevance of the testimony, maybe we have to hear from  
14 witnesses.

15 I assume -- regardless of whether the notice is later  
16 not, what's the remedy ultimately on whether or not we produce  
17 those witnesses? If it is a question of law, they are not  
18 relevant, easy. But if it is not a question of law  
19 ultimately, what is the remedy? Do I tell the defense you  
20 can't put on evidence in a capital case?

21 ATC [LT DAVIS]: Your Honor, the government simply brings  
22 this to the commission's attention that this -- that this is a  
23 practice that should not be tolerated in military commissions.

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1 These issues are too important to leave things to the last  
2 minute, to drop a motion a week after the hearing has even  
3 started, especially on a motion as an attempt to move a motion  
4 to another hearing on a motion where those witnesses are not  
5 even arguably relevant on a question of law.

6 It is simply, Your Honor, to bring it to the court's  
7 attention. Your Honor should address this motion now just as  
8 you would -- just as you would in the future, take argument on  
9 it as the government has requested, and we will move along.

10 MJ [Col SPATH]: All right.

11 ATC [LT DAVIS]: But one point, Your Honor, on the  
12 evidentiary hearing and on the witnesses. The witnesses that  
13 the defense seeks to call are those witnesses who were present  
14 during the 2002 interview of Mr. Darbi. The government argues  
15 that those witnesses are irrelevant, again to the legal  
16 question. Taken in the light even most favorable to the  
17 defense as to what the conditions of that interrogation was or  
18 whether they were involuntary is irrelevant to resolving this  
19 issue of whether derivative evidence of Mr. Darbi's statement  
20 can be suppressed.

21 MJ [Col SPATH]: All right. So all the witnesses  
22 requested in the motion to compel relate to the 2002 time  
23 period of interviews?

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

2 MJ [Col SPATH]: All right.

3 ATC [LT DAVIS]: So, Your Honor, the government would  
4 request that you simply follow the plain language of the rule,  
5 the plain language of M.C.R.E. 304(a)(5), which states that  
6 evidence derived from a statement that would be excluded as  
7 involuntary may not be received in evidence against an accused  
8 who made the statement.

9 MJ [Col SPATH]: That tracks the M.R.E. as well. That is  
10 pretty close; is, in fact, the Rule of Evidence we have in the  
11 military.

12 ATC [LT DAVIS]: Yes, Your Honor, and that is the language  
13 that was curiously absent from the defense's motion when they  
14 cite to 304(a)(5). They simply say evidence derived from an  
15 involuntary statement may not be received against the accused,  
16 leaving off the operative language in the rule which is that  
17 against an accused who actually made the statement.

18 So yes, Mr. Nashiri has standing to challenge  
19 evidence that may be derived from allegedly involuntary  
20 statements that he has made, but he does not have standing to  
21 challenge evidence that is derived from involuntary statements  
22 of other witnesses.

23 Now, the defense, perhaps identifying that its

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1 initial argument in its motion under 304(a)(5) was -- would  
2 probably fall on deaf ears, then retreats in its reply to  
3 address it. And we heard similar things in argument here  
4 under 948r, which states that no statement obtained by the use  
5 of torture or cruel, inhumane or degrading treatment shall be  
6 admissible.

7 MJ [Col SPATH]: I assume we agree that applies outside of  
8 Mr. al Nashiri. That applies to anybody's statements coming  
9 here to testify?

10 ATC [LT DAVIS]: Yes, Your Honor. So for example, if  
11 Mr. Darbi was on trial, he could raise this question as to the  
12 admissibility of his own statements, certainly. But the  
13 important language here is that the statement was actually  
14 obtained by the use of torture, cruel, inhumane or degrading  
15 treatment.

16 MJ [Col SPATH]: And if Mr. Darbi is on trial, he can  
17 raise it in relation to any of these techniques used against  
18 Mr. al Nashiri back in 2002, 2003, whatever years. You can  
19 raise it against ----

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

21 MJ [Col SPATH]: ---- you do have standing to assert that  
22 statement comes from this treatment.

23 ATC [LT DAVIS]: Yes, Your Honor. But the distinction is

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1 that's not what we are talking about here. We are not talking  
2 about suppressing the 2002 statement of Mr. al Darbi. The  
3 government has represented that it has no intention of  
4 offering that evidence. What is at issue here and what the  
5 defense has raised is evidence derived from that statement,  
6 which then implicates M.C.R.E. 304(a)(5).

7 But if the defense wants to make the argument that  
8 this is all subsumed under 948r, one, that would leave  
9 M.C.R.E. 304(a)(5) completely inoperative, but we would just  
10 urge the court to take a plain-language reading of the  
11 statute, 948r, which is that no statement obtained by torture  
12 can be admissible, and ----

13 MJ [Col SPATH]: It does that say 948r(a), and it says no  
14 statement obtained is admissible.

15 ATC [LT DAVIS]: Yes, Your Honor. And applying that plain  
16 language to what we have here with the defense seeks to  
17 suppress is, one, the 2000 statement of the accused as well as  
18 future testimony of Mr. Darbi. To say that those statements  
19 taken five -- well, in one case five years later, testimony  
20 that is going to happen at least 12 to 13 years later was  
21 actually obtained by the mistreatment of Mr. Darbi, under a  
22 plain-language reading of that, it is simply not -- is not  
23 applicable to the statements that we are talking about.

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1           The 2000 statement -- 2007 statement of Mr. Nashiri  
2 was taken by FBI agents where he was advised of his rights.  
3 Your Honor has this statement in front of him. That is not a  
4 statement obtained by the mistreatment ----

5           MJ [Col SPATH]: We haven't figured that out yet.

6           ATC [LT DAVIS]: ---- of Mr. Darbi.

7           MJ [Col SPATH]: Of Mr. Darbi. We have to figure that  
8 out.

9           ATC [LT DAVIS]: There is a separate question as to  
10 whether the accused can move to suppress that based on his own  
11 treatment. But whether that is, whether that was -- that  
12 statement was obtained by the mistreatment -- alleged  
13 mistreatment of Mr. Darbi. A plain-language reading of that  
14 indicates that it is not.

15           And if we are talking about Mr. Darbi's eventual  
16 testimony where he is now represented by counsel, would be in  
17 this courtroom being questioned by attorneys with Your Honor  
18 here to suggest that any statement or any testimony that he  
19 would give in that context would be obtained by his  
20 mistreatment back in 2002, again, under a plain-language  
21 reading, under a plain-meaning analysis, Your Honor, I think  
22 that demonstrates 948r does not apply.

23           And this is -- this is consistent with case law cited

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1 in the government's motion. Which if we are to -- if there is  
2 not just a plain meaning of 948r, if we have to try to  
3 determine what exactly 948r means, we look to the case law.  
4 Case law is clear on this issue of standing that an accused  
5 does not have a right to stand in the shoes of someone else  
6 whose rights may have been violated, and that ----

7 MJ [Col SPATH]: I think I agree with that concept. Let  
8 me ask -- this is a hypothetical. It's -- and I don't know if  
9 there is any authority one way or another, so maybe you can  
10 help me, or at least we can discuss it. No evidence to this  
11 fact whatsoever.

12 Hypothetically, Mr. al Darbi comes in and says, "My  
13 statement in 2007 and my testimony now, I would never be  
14 saying these things but for my treatment in 2002." If that  
15 happens, do I analyze this under 948r? Does that make sense?  
16 The question -- maybe you don't like the fact pattern. I'm  
17 just trying -- I mean, if Mr. al Darbi comes in and says all  
18 of these statements are brought about because of my treatment  
19 in 2002?

20 ATC [LT DAVIS]: Yes, Your Honor, that would be a  
21 different analysis. And I have no indication that will be the  
22 case.

23 MJ [Col SPATH]: Different analysis.

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1 ATC [LT DAVIS]: And I have no indication that will be the  
2 case here. The whole question is it derived ----

3 MJ [Col SPATH]: Obtained from ----

4 ATC [LT DAVIS]: ---- obtained from. And I think the  
5 clear answer from the witness would be that it's not. But the  
6 government agrees that would be the correct analysis of that.

7 MJ [Col SPATH]: And nothing do with the motion to  
8 suppress or standing in a 304 world from the accused in this  
9 case?

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

11 MJ [Col SPATH]: Okay.

12 ATC [LT DAVIS]: Your Honor, again, just as a matter of  
13 law, whether we are applying M.C.R.E. 304(a)(5), whether  
14 applying the statute or applying the case law cited in the  
15 government's brief, there is no standing for Mr. Nashiri to  
16 stand in the shoes of Mr. Darbi to raise questions of the  
17 voluntariness of that statement to challenge derivative  
18 evidence, that statement. There is simply no support for it.

19 Witnesses are not needed to resolve this issue. This  
20 should be resolved as a matter of law so that both parties can  
21 be on notice as to what the evidence will be when we get to  
22 trial, to pave the way, and so that we can actually move this  
23 case forward, Your Honor.

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1 MJ [Col SPATH]: Thank you.

2 ATC [LT DAVIS]: Thank you.

3 MJ [Col SPATH]: And just for party accounting, for the  
4 open session yesterday, General Martins, you were here. For  
5 the 505 session General Martins wasn't here. General Martins  
6 is here now, and that is likely very clear on the record. I  
7 know in the 505 session we were missing a party. The last  
8 open session everybody was with us.

9 Defense Counsel?

10 ADDC [LCDR POLLIO]: Yes, sir, I would just like to  
11 highlight a couple of things. One, the government repeatedly  
12 talked about Mr. al Darbi as a co-conspirator. Co-conspirator  
13 to what? To the Motor Vessel Limburg and to the conspiracy  
14 charge? Which, once again, Your Honor, shows that all of this  
15 is intertwined with the government's interlocutory appeal with  
16 the Motor Vessel Limburg. The co-conspirator theory of  
17 liability encompasses that. And that goes back to my argument  
18 yesterday with the AE 166, so I won't dwell on that too much.  
19 But, once again, here we are confronted with this is all one  
20 big pile. This -- the Motor Vessel Limburg is related to all  
21 of this.

22 Secondly, Your Honor, a lot of this shows why an  
23 evidentiary hearing on this matter is required. The

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1 government's contention is that the torture is completely  
2 unrelated to time now, and that is not the case. And at an  
3 evidentiary hearing the defense will be able to present  
4 testimony to show how, when a person is tortured, that doesn't  
5 magically disappear from their mindset, that that's going to  
6 follow them throughout everything and it is going to impact  
7 the voluntariness of any present-day statement as well. And  
8 that again goes to the need ----

9 MJ [Col SPATH]: Doesn't that have to do with a fact  
10 witness, first and foremost? Again, the government is going  
11 to have to demonstrate Mr. al Darbi's testimony is relevant  
12 and admissible. And if he comes in and says I was involved  
13 with your client regarding X, Y, and Z, and it is clear  
14 through that evidentiary hearing these are voluntary  
15 statements, this is my recollection, I'm going to have other  
16 witnesses come in and talk about how he was treated in 2002  
17 and how, despite what he is telling me, somehow or another  
18 these statements are now being obtained from treatment in  
19 2002.

20 ADDC [LCDR POLLI0]: And, sir, at that evidentiary hearing  
21 it may not just be these witnesses related to the 2002  
22 statement. The defense may present other evidence related to  
23 that. But those 2002 witnesses are necessary.

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1 MJ [Col SPATH]: But that is my question. If Mr. al Darbi  
2 comes in and says I'm doing this voluntary, this is my  
3 recollection, these statements, this is my memory -- how he  
4 was treated may absolutely be fodder for cross-examination, it  
5 might be relevant for the way to give his testimony. I mean,  
6 there is lots of ways that information may be admissible.

7 But I'm just asking in general, if Mr. al Darbi comes  
8 in in their evidentiary session -- they already said they have  
9 to demonstrate -- if you all object ultimately to his  
10 testimony, they have to demonstrate admissibility and  
11 relevance. If he comes in and says I'm testifying  
12 voluntarily, this is what I remember, this is how your client  
13 was involved, do I need testimony from -- who can testify that  
14 his statement is obtained from torture better than  
15 Mr. al Darbi?

16 ADDC [LCDR POLLI0]: Well, if Mr. al Darbi comes into the  
17 courtroom and he knows that the only option is to testify or  
18 face indefinite detention here in Guantanamo, that certainly  
19 needs to be fleshed out.

20 MJ [Col SPATH]: It will be, probably in front of the  
21 members. But 948a(r) doesn't seem to implicate that piece,  
22 does it?

23 ADDC [LCDR POLLI0]: We would argue that it does. I mean,

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1 948r is a much broader Congress-created remedy than, you know,  
2 anything that comes from court-martial practice or anything  
3 that you might see in federal court. Because the use of  
4 torture, or as we now call it, "enhanced interrogation  
5 methods" ----

6 MJ [Col SPATH]: I think we call it torture now. I think  
7 we did call it "enhanced interrogation method," and I think  
8 now, more often than not, people refer to it as "torture."

9 ADDC [LCDR POLLIO]: Yes, it is refreshing we are now  
10 honest about what we did.

11 In any event, Your Honor, the law that was created by  
12 Congress was a much broader remedy. It specifically is  
13 designed to keep out any evidence that was obtained through  
14 the use of torture. The plain-language meaning of derivative  
15 evidence is evidence that came from something. What did it  
16 come from? It came from torture. That is what the statute  
17 was designed to prevent.

18 Using the government's logic, the government says,  
19 well, there's no standing here, there is no problem with using  
20 any evidence from torture. That frustrates the importance and  
21 the meaning of the statute. Under the government's logic ----

22 MJ [Col SPATH]: And I didn't take the government's  
23 argument to be that. I took the government's argument to be

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1 motions to suppress under 304 and citations to 304 are easily  
2 resolved by me. It is a question of law. And your client  
3 does not have standing to assert 304 rights in relation to  
4 Mr. al Darbi, and 304 is clear about that.

5           However, 948a, or r(a), clearly applies to statements  
6 for Mr. al Darbi. And if they are retained by torture or  
7 degradation or inhumane treatment, they are not admissible.  
8 And if they are not, they may be admissible. Again, the  
9 government has to demonstrate that prior to testimony.

10           ADDC [LCDR POLLI0]: Well, Your Honor, we think that the  
11 rule that is created within the rules do contemplate standing.  
12 I mean, it says statements from other persons than the  
13 accused. Again, we are looking here at evidence whether it is  
14 testimony, a statement. If it comes from torture, it is  
15 contemplated that the accused would have the ability to argue  
16 that.

17           MJ [Col SPATH]: 948r(a) says exactly that.

18           ADDC [LCDR POLLI0]: And we would argue, Your Honor, that  
19 the Rule 304 also says that when it says that statements from  
20 persons other than the accused produced by torture or coercion  
21 methods, we would argue that that necessarily includes  
22 derivative as well, although it may be a little bit more  
23 spelled out specifically to the accused.

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1           It is the defense's position that Rule 304 does  
2 contemplate any evidence, any statements, any testimony that  
3 would be derived from torture, and to inject a standing  
4 requirement would frustrate the intent. The intent here is to  
5 keep out any evidence that was obtained from torture. Under  
6 the government's theory, if they torture person A, B and C, as  
7 long as they use that against person D, then that's fine,  
8 because person D can't complain against torture from  
9 persons A, B and C.

10           MJ [Col SPATH]: Again, I don't think that's what the  
11 government is saying. 304(a)(1) tracks 948r(a), that's the  
12 same analysis, and the government is conceding that.  
13 Absolutely anything obtained by torture, they agree, or  
14 inhumane treatment or degrading treatment, they can admit by  
15 both statute and now this Rule of Evidence.

16           And I think -- and I'm sure the government will talk  
17 about this if I've got it wrong, but I think they are  
18 concurring with that wholeheartedly. And so if A, B and C are  
19 tortured and those statements then are obtained, the  
20 government is conceding we can't offer those statements  
21 against D. But if A, B and C, later in time say despite what  
22 happened to me, I want to talk, it is voluntary and I have  
23 knowledge, where do you get the exclusionary right for that?

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1           ADDC [LCDR POLLI0]: Again, sir, that is why an  
2 evidentiary hearing is necessary. A victim of torture is  
3 probably not the best witness to say whether or not what the  
4 effect of him might be or whether or not he is actually here  
5 voluntarily, especially in the system that we are operating in  
6 where your option is you take a pretrial agreement and agree  
7 to testify, quote/unquote, voluntarily, or you sit here and  
8 face indefinite detention. We have to have the evidentiary  
9 hearing to determine that, the voluntariness of that  
10 subsequent statement, and to flesh out that that is derived  
11 from the previous statement and that there is no attenuation  
12 in between the two.

13           And so again, Your Honor, first and foremost, it is  
14 the defense's position here that we have seen how intertwined  
15 this is with the Motor Vessel Limburg, and so we should not be  
16 really holding a session on that matter. And then, of course,  
17 we believe that the statute itself and then R.C.M. 304(a)(3)  
18 which clearly contemplates statements from other persons than  
19 the accused does give Mr. Nashiri standing on this matter and  
20 that we need an evidentiary hearing and we will need the  
21 witnesses to fully flesh this matter out.

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

23           Trial Counsel.

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1 ATC [LT DAVIS]: Barring any further questions, Your  
2 Honor, the government doesn't have anything further.

3 MJ [Col SPATH]: Did I characterize what you were saying  
4 fairly in my questions?

5 ATC [LT DAVIS]: You did, Your Honor.

6 MJ [Col SPATH]: Okay. I know there is some discussion of  
7 248H, but I think we are waiting to get some information  
8 approved for use in a presentation. Is that accurate,  
9 General Martins?

10 CP [BG MARTINS]: Your Honor, I think we have gotten  
11 through all the stops. There was one page in one of the -- I  
12 think it is 248N, it has now been marked. That's the one page  
13 that I can't show.

14 MJ [Col SPATH]: Okay.

15 CP [BG MARTINS]: I have gotten the needed guidance. Does  
16 that track with the court's ----

17 MJ [Col SPATH]: What I will do, we will take a break  
18 before I take argument on that. I feel it will be a longer  
19 argument based on the submission. I looked at it briefly. We  
20 will take a short break before we do that, and then if that's  
21 true we will take that up.

22 For both sides -- and I think it is going to -- this  
23 is going to be an interesting event when we get to trial, and

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1 so we have to remember the rules of court which track the  
2 procedural rules or the manual anticipate a variety of people  
3 having input before we display nonclassified information. And  
4 they anticipate 24 hours' notice. And we have had a couple  
5 times here -- and this is not fault; I know it is a fluid  
6 process -- where we've gone to the OCAs to get them to approve  
7 things and they are doing it I think as quickly as they can,  
8 so we can demonstrate some visibility on the process.

9           Hopefully we are going to have a lot of common sense  
10 from both sides in recognizing that as we move forward --  
11 because there is going to be a lot of documents. But  
12 hopefully frankly we, we will have a lot of recognition of  
13 that from the OCAs. It is a public trial, and a lot of this  
14 information is in the public sphere. Some of this stuff is  
15 common sensical for release and it should take moments to look  
16 at, and not 24 hours. And at trial, if we have to stop every  
17 time something surprises us for a 24-hour break, we will be  
18 here for two decades because trials are fluid and we all know  
19 it. I mean, they just are.

20           So I think for both sides you all work as you can,  
21 please. It helps. And I encourage the OCAs to also  
22 understand the flexibility that is going to be required in  
23 trial because things happen and they happen fast. As we have

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1 seen here just in this evidentiary hearing this week and last  
2 week and the timing that has moved, so -- all right.

3 I know we discussed 206. Let me do this. 336 seems  
4 easy. I think we have gotten arguments in. 336 is another  
5 motion in limine type argument. The government wants to put  
6 on evidence, it seems, to track with 324, 325 and 326, which  
7 is a preadmission session for additional information.

8 Trial Counsel, do I have that correct?

9 ATC [Maj McMILLAN]: Yes, Your Honor.

10 MJ [Col SPATH]: All right. Any additional comments on  
11 it? I assume the law is the same and the argument is the same  
12 we heard yesterday on those three.

13 ATC [Maj McMILLAN]: Your Honor, the law is the same, the  
14 argument is the same. You have our pleading on the matter.  
15 We don't believe that any further argument is necessary.

16 MJ [Col SPATH]: And then let me turn over to defense.  
17 Same ----

18 LDC [MR. KAMMEN]: What does that pertain to? We don't  
19 have that.

20 MJ [Col SPATH]: 336, Trial Counsel?

21 ATC [Maj McMILLAN]: It is a motion in limine to preadmit  
22 evidence from the Al-Burayqah residence.

23 MJ [Col SPATH]: It was one that I was pulling it up now

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1 myself. It was one that we could take up here because it was  
2 briefed.

3 LDC [MR. KAMMEN]: It is the same situation that we had  
4 before. If you are going to do this, so be it. But I just  
5 have to perhaps editorialize. It is very frustrating to us  
6 when the government comes in, you know, they have -- their  
7 default position on witness request is no. We can speed this  
8 along and just skip the step where we go to them and ask for  
9 witnesses because that just builds in a denial.

10 It would be far more efficient, if they are really  
11 interested in efficiency, given the way they litigate, to just  
12 come directly to you and skip the perfunctory denial. Well,  
13 it is very frustrating to us when they say, oh, you are  
14 slowing the process down when they want to build in now the  
15 fourth major evidentiary pretrial hearing so that in the event  
16 you exclude evidence, they have a right to take an  
17 interlocutory appeal. I mean ----

18 MJ [Col SPATH]: Fortunately, only for significant or  
19 material evidence.

20 LDC [MR. KAMMEN]: Well, their view is we are going to  
21 see. I mean, look, I don't want to -- you know, we are going  
22 to get into this. What we repeatedly have, Your Honor, is  
23 government relitigating motions to reconsider when there is no

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1 new facts or no new law.

2           You know, the rules in this commission only apply on  
3 one side. Their attitude is we get to relitigate everything,  
4 we can appeal everything, we can do everything. And yet  
5 somehow the delay is on us, and, frankly, it is just very,  
6 very frustrating. But ----

7           MJ [Col SPATH]: The law argument, same?

8           LDC [MR. KAMMEN]: Absolutely.

9           MJ [Col SPATH]: Okay. Trial Counsel, any additional  
10 comments?

11          ATC [Maj McMILLAN]: No, no additional comments.

12          MJ [Col SPATH]: All right. And then another one that was  
13 talked about was 207F. 207F is a motion to compel witnesses  
14 to testify at the 307 hearing. It's a defense counsel motion  
15 to compel witnesses.

16                I just want to make sure I have the landscape on  
17 207F. Here is where I think we are at. If we do the  
18 preliminary evidentiary hearing on 207, the government has the  
19 initial burden to demonstrate admissibility of their evidence.  
20 After the government puts on, in whatever order we do it,  
21 either item by item -- we have had that discussion. I know it  
22 is outstanding -- item by item, or each witness testifies  
23 about all the items -- and there was some concession by the

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1 defense on 207. That might make more sense than in 166  
2 because of the nature of the motion.

3 And so after the government is done, I envision you  
4 all will have an opportunity to attack the admissibility and  
5 the chain of custody of those exhibits, of course, before  
6 there is a ruling, if we do the preliminary -- and right now  
7 we are set to do that and some discussion about doing that in  
8 April. That seems to be where we are at with 207F.

9 Defense Counsel, certainly I will listen to anything.  
10 I realize that we will have to litigate the motion if the  
11 current construct survives, and that is we have to litigate  
12 most witnesses you ask for here first. We are going to have  
13 to do that. But do you agree with kind of the framework we  
14 are in right now?

15 ADDC [MAJ HURLEY]: Yes, Your Honor, we do.

16 MJ [Col SPATH]: Any comments you want to make on the  
17 record now about 207F, understanding again we are not just  
18 going to have the government present their side and it's  
19 admissible, and we hear nothing from you all. I mean, the  
20 plan for you all to be able to attack weight, admissibility,  
21 things like that. Good to hear from you this week, Commander  
22 Hurley.

23 ADDC [MAJ HURLEY]: Sir, it's my pleasure to be heard

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1 from.

2 Sir, what's normally also dimmed my artillery  
3 hearing ----

4 MJ [Col SPATH]: Or Major Hurley.

5 ADDC [MAJ HURLEY]: That's fine, sir. I've been called  
6 worse. What's dimmed my normally bad artillery hearing is a  
7 sinus infection. Please make sure, as I'm sure you will, to  
8 make yourself known by sight or sound if you have a question.

9 Sir, briefly on 207, I think the commission has  
10 sufficiently recapped the landscape. What we want to do, what  
11 defense is requesting to do, is to have produced Mr. Donald  
12 Sachtleben who was at the time the Supervisory Special Agent  
13 for the Laboratory Explosives Unit and was intimately  
14 involved, repeatedly intimately involved in the search, the  
15 collection, and the categorization of, of evidence from the  
16 USS COLE, not only where it was moored in Yemen, but also as  
17 it was going through the refurbishing process in Pascagoula,  
18 Mississippi.

19 We believe in talking to Mr. Sachtleben, interviewing  
20 him as well as producing him for this commission, will help  
21 inform the commission as to its many evidentiary rulings that  
22 it is going to have to make under AE 207.

23 Sir, I think what complicates this, and why the

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1 commission necessarily has to be involved a little bit more  
2 than it is normally is, as you've gathered from our pleading,  
3 Mr. Sachtleben is incarcerated. And not only is he  
4 incarcerated, but he is represented. I can tell you, sir, and  
5 you've been around this long enough to know that if you are  
6 represented, then it is going to take some intervention in  
7 order to get -- if I were putting myself in the shoes of that  
8 criminal defense attorney, my position or my client, in order  
9 to get my client to talk.

10           And so that's what we are coming to the commission to  
11 do. It is clear from the record, from what we've been given,  
12 that Mr. Sachtleben was intimately involved in this, and what  
13 we are looking for is your intervention so we can produce this  
14 evidence and give to the commission a complete evidentiary  
15 picture.

16           And, sir, again, you know, it falls on me to repeat  
17 what you have heard often from the defense in this last few  
18 days, is that we go through the process of asking for someone  
19 whose title is, not kidding, Supervisory Special Agent for the  
20 explosives unit who was present in 2000 and present, you know,  
21 as the evidence is being categorized. And the government  
22 wants to narrow the window down -- the prosecution wants to  
23 narrow the window down to, well, did he collect these

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1 particular bits of evidence, or was he involved that chain?  
2 And that overly restrictive reading is very frustrating and  
3 very delaying.

4           So, sir, what we are asking to do, and what we thank  
5 the commission for its time to give us the opportunity to do  
6 in this hearing, is to specifically ask you we need your help  
7 so that we can -- as we litigate 207, we are able to do that  
8 with a complete -- the commission is able to do that with a  
9 complete understanding of the facts.

10           MJ [Col SPATH]: Thank you.

11           ADDC [MAJ HURLEY]: Thank you.

12           ATC [Maj McMILLAN]: Your Honor, in short, we see it  
13 differently. We ask, first of all -- and we ask this  
14 commission to go back to the rule for R.M.C. 703 for the  
15 requirements of producing a witness. We don't believe that  
16 Mr. Sachtleben is relevant for these pretrial hearings on  
17 admissibility of the evidence. He is not relevant, he is not  
18 necessary. His testimony would be cumulative with the other  
19 witnesses' testimony that is being offered.

20           We are going to produce -- or, excuse me, we may call  
21 54 witness whose are going to testify to the evidence that's  
22 going to be offered. These witnesses are the individuals who  
23 are involved the chain of custody. Mr. Sachtleben was not

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1 involved with the chain of custody, the storage, the handling,  
2 the collection. He is not on the -- he did not transport any  
3 of the 176 pieces of physical evidence at issue. He is not --  
4 he is not relevant in those areas where we are going to be  
5 producing these items of evidence.

6           And this is not about narrowing the proceedings, but  
7 is about stating what we are going to do with the pretrial  
8 hearings on the admissibility of the evidence, and that is  
9 present a chain of custody, and we are going to show the items  
10 are relevant. And Mr. Sachtleben does not have a role in that  
11 as far as the chain of custody goes.

12           The defense has not articulated how Mr. Sachtleben is  
13 going to somehow attack the credibility of the chain of  
14 custody or somehow show that that evidence is, you know, not  
15 reliable. What they have said simply is he is a Supervisory  
16 Special Agent. He was onboard the COLE.

17           MJ [Col SPATH]: While they were collecting evidence.

18           ATC [Maj McMILLAN]: While they were collecting evidence.

19           MJ [Col SPATH]: Does he supervise the people collecting  
20 the evidence?

21           ATC [Maj McMILLAN]: He was. In his capacity in a  
22 managerial capacity, yes, Your Honor, so he was doing that.

23 He was ----

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1 MJ [Col SPATH]: Did he provide any direction while he was  
2 there on the collection of evidence?

3 ATC [Maj McMILLAN]: We are dealing with experienced, very  
4 experienced evidence collection/handling.

5 MJ [Col SPATH]: Not my question. Was he providing  
6 direction on what evidence to collect and how to collect  
7 evidence?

8 ATC [Maj McMILLAN]: He was providing direction with how  
9 the -- how the initial -- how the evidence searches would go,  
10 whether it be top to bottom, fore or aft of the ship as far as  
11 what items were collected. We do not believe that he had  
12 input or was telling specific agents you will collect this,  
13 you will not collect that, you know, how ----

14 MJ [Col SPATH]: How long had he been supervising the  
15 agents who were collecting the evidence?

16 ATC [Maj McMILLAN]: To my knowledge -- and I don't want  
17 to give an exact number because I'm not familiar with his role  
18 with the 54 agents that came on, so I can't speak to that.

19 I can say with certainty that some of the agents, he  
20 had, you know, several months of supervisory over them. But I  
21 would be guessing as to the whole, the entire 54 who were on  
22 board the ship collecting.

23 MJ [Col SPATH]: All right. And this isn't a ruling. I

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1 haven't -- I'm just working through -- this is for the  
2 preliminary admissibility of evidence. This is what I'm  
3 talking about what is likely to occur, and that is that the  
4 defense is then going to want to attack this in front of the  
5 members as well.

6 ATC [Maj McMILLAN]: And, Your Honor, if I may continue  
7 with this. I said before that these were -- these are very  
8 experienced collectors. These are not, you know, individuals  
9 coming onboard the ship who were just seeking guidance in what  
10 they were going to do. The collectors themselves ----

11 MJ [Col SPATH]: Let me cut -- it is going to be easy.  
12 You all have the initial burden, so he is not going to be here  
13 for your presentation if you don't want him to be, or I'm not  
14 going to make any efforts to make him available for your  
15 initial presentation. The burden is on you.

16 After that finishes, if the defense is able to  
17 demonstrate they don't have the experience you are talking  
18 about, they did rely on him, he did give guidance, he was  
19 involved in selecting pieces of evidence to be seized or in  
20 giving guidance on how to seize it, his relevance is likely  
21 going to increase.

22 ATC [Maj McMILLAN]: It may, Your Honor.

23 MJ [Col SPATH]: That is it. So all I'm telling you,

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1 then, is what will then happen is we will have this hearing  
2 after your hearing. We will do this again -- since you all  
3 aren't conceding it, you don't have to. We will do this  
4 again. And then we will determine if he is relevant or not;  
5 and if he is relevant, then we will produce him. That will be  
6 at another hearing. And then we will finally get through the  
7 admissibility of the 207 items which are the ones the defense  
8 conceded are likely the easiest of the preadmission sessions.

9 I'm just -- again, I'm just suggesting to you all, it  
10 is the timing piece of the case. It is going to take longer  
11 if he becomes relevant. At this point the issue is not ripe.  
12 I think what the defense -- all they are suggesting is if you  
13 produce him at the initial hearing, maybe we can do this all  
14 at once and we can have this hearing in a week or two weeks,  
15 as opposed to three months or six months depending on how long  
16 it drags out, over how many sessions it drags out. Because we  
17 have other hearings that are held in this courtroom we have to  
18 coordinate around. That's all they are saying.

19 And if you all don't agree to his production, I don't  
20 need to hear it right now, it is not ripe. And that, frankly,  
21 is going to be the ruling until after the 207 presentation is  
22 done by you all. If I can rule on the evidence and it is not  
23 relevant, we won't hear from him. If it is, like I said --

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1 but I know what we will do, we will be doing this evidentiary  
2 hearing post your -- I mean, we will be doing this motion  
3 hearing post your evidentiary submission on 207.

4 ATC [Maj McMILLAN]: I understand, Your Honor. We  
5 understand your position. We will argue it another time.

6 MJ [Col SPATH]: It's not even a position, it's just  
7 common sense to me. You all have the burden on 207 initially  
8 over to you. It is not ripe yet, so we will deal with it that  
9 way sequentially as we work through it. All right.

10 Defense Counsel, any other comments?

11 ADDC [MAJ HURLEY]: No, sir, not based on what you just  
12 said.

13 MJ [Col SPATH]: All right. Then I know we have  
14 outstanding discussion about 206. That's the Senate report, I  
15 know.

16 Let me just ask this: Government, this is -- is the  
17 information that you are reviewing in 206 and that we are  
18 working towards getting through the same information that you  
19 are working through in 120? I don't want to talk substance,  
20 obviously, but is it the same information?

21 CP [BG MARTINS]: Your Honor, yes. In short, we are using  
22 the framework in 120 which was intended to focus our discovery  
23 into those ten paragraphs and the four theories of relevance

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1 that the judge recognized. We are certainly using that, and  
2 we are also just remaining attuned to everything that could be  
3 material.

4 MJ [Col SPATH]: And I -- also I know there was an order  
5 out. You are attuned to the changes in classification and  
6 things like that and going back through?

7 CP [BG MARTINS]: Correct.

8 MJ [Col SPATH]: All right. All right. So 206, any  
9 comments on 206, Mr. Kammen? I think we are ongoing.

10 LDC [MR. KAMMEN]: Well, we are ongoing, but there are a  
11 couple of problems, and it sort of relates to 333, but it  
12 really relates to the overarching problem, is that the  
13 government's view of what is exculpatory is so crabbed and  
14 narrow and myopic that what we now know, and it will be  
15 addressed more fully in 333, is that they simply overlook  
16 obvious pieces of exculpatory evidence.

17 One of our sort of emergency requests -- all we want  
18 at this point is this, for you to have -- you, the Court, to  
19 have in its possession a copy of the SSCI report. The reason  
20 we made this request is because there is, according to the  
21 newspapers, an effort by the Senate now that there is a change  
22 in leadership and apparently certain factions of the  
23 government are trying quite desperately to suppress the truth

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1 of the torture, to claw back the report that is in the hands  
2 of the Executive Branch, and I gather at least the prosecution  
3 has a copy.

4 I don't want their copy to go back to the Senate. It  
5 needs to be with the court. If they rule, as they will, that  
6 there is nothing in there that could be material to the  
7 defense, that their crabbed view of 120 is all we need to see.  
8 We want that report in your possession so that you can make an  
9 independent review.

10 If you conclude they're right, fine. Then it remains  
11 in the record for appellate review. Then the Court of Appeals  
12 will look at that and look at what the government does produce  
13 and the manner they produce it and the various ways in which  
14 torture will impact this case, and they will decide were you  
15 right. They will decide were they withholding exculpatory  
16 evidence and were you right.

17 If you conclude no, prosecution, you are wrong, then  
18 you can, you can figure out how best to get it to us. But at  
19 this juncture what we need is that it is the court, not the  
20 prosecution -- that the court at least have a copy of it. And  
21 because their view of their obligation of relevance, we've  
22 seen that week after week after week and time after time, as  
23 late as ten minutes ago, their view of relevance is so narrow,

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1 so crabbed, so myopic, that we feel we need protection. And  
2 all we seek now is you have a copy of it.

3 How that gets used later on will play out. Maybe  
4 they will prove me wrong. Maybe at the end of the day the  
5 discovery that we finally get when we get 120, we'll say, oh,  
6 wow, how wonderful. I'm skeptical. Based on the very little  
7 we have reviewed, I'm very skeptical. Based on the other  
8 issues we are seeing with respect to Yemen, I'm skeptical.

9 But at this point I just don't want it to disappear  
10 and then the prosecution come in and say, well, the Senate  
11 wanted it back and so we had to give it back, and so I'm  
12 sorry, military commission, but you have to do without.

13 So that's all we are seeking in this. How it plays  
14 out, it will play out in the fullness of time, and at least  
15 this way everybody is protected. If you have it, then the  
16 government, the prosecution is protected as well. If you have  
17 it, the appellate court is protected. If you have it, our  
18 interests are protected. That is all we seek is that a copy  
19 of it be in the possession under seal, not shown to us until  
20 the appropriate time of the entire, complete, unredacted  
21 Senate report on torture.

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

23 CP [BG MARTINS]: I thought I would come to the lectern.

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1 May take a few minutes, Your Honor. Good morning.

2 MJ [Col SPATH]: Good morning.

3 CP [BG MARTINS]: We oppose this piece of relief counsel  
4 is seeking. We don't have the report. We are reviewing it,  
5 as we reported. It is the Senate's -- continues to be the  
6 Senate's document, and we are reviewing it onsite under  
7 appropriate security protocols. It would turn the normal  
8 discovery process upsidedown if you became this agent of  
9 discovery here.

10 The prosecution, we understand our obligations in the  
11 thousands of pages you have been reviewing that have been  
12 structured through the 120 process. Counsel can make  
13 allegations about cramped and so forth, but we are faithfully  
14 carrying out those obligations, and we will continue to do so.

15 MJ [Col SPATH]: Counsel.

16 CP [BG MARTINS]: I'm sorry.

17 MJ [Col SPATH]: I have got 11 sets of 120 discovery. We  
18 still have some outstanding. We will try to get through more  
19 this week to continue that process. But there have been a lot  
20 of documents sent my way, for sure, under 120.

21 CP [BG MARTINS]: Counsel spoke to concerns over not  
22 getting things, continue -- and they have sought the ability  
23 to talk to their client about things and ask more pointed

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1 questions, figure out pieces that might be material and  
2 helpful to how they present the case, continue to do that. If  
3 we get specific discovery requests, we are going to be hunting  
4 those down and see if, you know, if we have discoverable  
5 information in that area.

6           They have the ability to go to you to articulate  
7 theories of relevance and have done so as we understand it,  
8 ex parte, as has been described. That is the way the process  
9 is supposed to work. We would submit that it is working, and  
10 important evidence, all of the -- what our obligations are  
11 under the enumerated categories in 701 and the appropriate  
12 case law in Brady and Giglio are being complied with. So we  
13 oppose this. Thank you.

14           MJ [Col SPATH]: Thank you, General Martins.

15           Mr. Kammen.

16           LDC [MR. KAMMEN]: I'm really stunned to hear  
17 General Martins say that the Department of Defense doesn't  
18 have a copy of this, because they do. It has widely been  
19 reported that multiple copies were given to the Department of  
20 Defense. That is why the Senate is trying to claw it back.  
21 So if they haven't gotten a copy from the Department of  
22 Defense, it is because they have made the judgment tactically  
23 not to get a copy.

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1           It has been widely reported, Your Honor, that  
2 Senator Feinstein provided copies to the Department of  
3 Defense. And, in fact, in other litigation here at Guantanamo  
4 when the government -- and in other litigation in other  
5 federal courts, when the Department of Justice has filed  
6 pleadings allegedly saying this does not reside in the  
7 Executive Branch, those pleadings have been withdrawn because  
8 that's not true. So if the General hasn't gotten his own  
9 copy, it is because he's chosen not to, and that troubles us.

10           We just want this to protect our appellate rights.  
11 He is going to come in here, sure as can be, and say, well,  
12 you've got what you've got, Your Honor. We've drawn a line in  
13 the sand, and, oh, by the way, it is not ours. And then we  
14 are going to be denied any opportunity to have the appellate  
15 court review that. And you are going to be denied any  
16 opportunity for you to review it.

17           And so, you know, frankly, you know, they filed a  
18 pleading, and my -- I'm maybe not as precise as some. Based  
19 on what he said is the pleading may be -- my impression of the  
20 pleading was they had a copy of it. Now, they are saying,  
21 well, no, we don't really have a copy of it, we have access to  
22 it. Well, you can look at the pleading and see, but certainly  
23 my memory of it.

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1           But like I say, Your Honor, the Executive Branch has  
2 copies of this report. If this prosecutor has chosen not to  
3 get it, that is a willful choice on his part, which is  
4 troubling. You have the authority to order the Executive  
5 Branch to produce a copy to you to be held under seal. That  
6 was our request.

7           And that's the request we asked you to make, order --  
8 not the prosecution, order the Executive Branch to produce a  
9 copy under seal to be held under seal so that it can be used  
10 for appellate purposes, if nothing else. That doesn't stand  
11 anything on its head, because what would happen under normal  
12 circumstances, Your Honor, when we've -- and we have moved to  
13 produce the entire unredacted report. And so what would  
14 happen under normal circumstances, the government says it is  
15 not discoverable, you review it in camera ideally, and then if  
16 you say we agree with the government, it is held under seal  
17 for the appellate court.

18           This is just a way of getting it to the place so that  
19 we are not dealing with a governmental shell game of find the  
20 report. Is it here? Is it here? Is it here? Is it here?  
21 Oops, it's gone.

22           All we want right now is for this commission to have  
23 a copy in its possession under seal. That protects them, it

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1 protects you, it protects us. And frankly, it is troubling  
2 that they don't want you to be protected. It is troubling  
3 they don't want us and our appellate rights to be protected.  
4 And all of this other talk is just talk. It has got to be  
5 some place where it is preserved for the record.

6 And so the order we ask is that the commission order  
7 the Executive Branch of the United States to produce, under  
8 seal, a copy, a complete, full, unredacted copy of the entire  
9 Senate Select Committee on Intelligence torture report. How  
10 it plays out in the future, events will determine. But you  
11 have the authority to do that. And since it apparently is not  
12 in their possession, then you have the responsibility to issue  
13 that order.

14 Thank you.

15 MJ [Col SPATH]: General Martins, any final comments?

16 CP [BG MARTINS]: As there were some factual items  
17 mentioned, Your Honor, I thought I would just correct the  
18 record.

19 In our notice, 206Q of 20 February, the prosecution  
20 has begun its efforts to review the full study for potentially  
21 discoverable information. On 18 February the Senate Select  
22 Committee on Intelligence authorized the Office of the Chief  
23 Prosecutor of Military Commissions to review the full study.

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1 And we are reviewing it. This is not unprecedented to have to  
2 go to site and review files and we are doing in a systematic,  
3 very careful way in accordance with the guidance from the  
4 commission in 120.

5 We do oppose this, references to what I'm willfully  
6 doing or not doing. I happen to be the authority on that, and  
7 I could do without some of those, but I imagine that is going  
8 to be a pattern in this. So we do oppose it and believe that  
9 the process we have now is in accordance with the rules. We  
10 are following it. Specific discovery requests can be made.

11 We had reference, you know, to colorful metaphors. I  
12 will use an old one. This is not going to become -- it can't  
13 become, Your Honor -- you cannot let it become a fishing  
14 expedition into an area that still has very, very sensitive  
15 information that really saves lives. And 500 pages of the  
16 summary, the most important pieces have already been provided.  
17 They are fully usable now by the accused with counsel. This  
18 characterization just no longer holds water.

19 Thank you.

20 MJ [Col SPATH]: You may. Again, I will give  
21 General Martins the last word, if there is more.

22 LDC [MR. KAMMEN]: That's fine. Two things.

23 Well, first, the obvious, if the government has it

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1 and it is exculpatory, they have -- it doesn't make a  
2 difference what part of the government. Now, we acknowledge  
3 that if -- and this is our concern, is that the Senate will  
4 claw back all the copies and it becomes far more difficult for  
5 the commission to order the Senate to produce something than  
6 the Executive Branch.

7           That's why we characterize this as an emergency  
8 request, because we want the -- don't want it to go back. You  
9 know, I will take him at his word that the Senate authorized  
10 him to read it. But there are copies of this in the Executive  
11 Branch. That has been widely reported, and the Department of  
12 Justice has acknowledged that. So you have -- right now the  
13 time to order that is right now.

14           And the other thing is, what we know from the 500  
15 pages -- you know, it is his characterization that that's the  
16 biggest part of it. It's not. That's the problem. I can't  
17 go further than to say it's not. That's why the whole report  
18 is so important. What was reduced public -- was produced  
19 publicly nobody ever claimed was all of it.

20           And, you know, when they say, well, that's -- you  
21 know, they basically say we're the government, they have all  
22 they need. Well, they don't -- in a fair system, they don't  
23 get to determine what we need. We determine it, and then you

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1 determine it.

2           Now finally we accept General Martins, oh, yeah, this  
3 is so critical and so sensitive about things that happened  
4 years and years ago. But remember, we all have clearances  
5 here, and we all respect our obligation under those  
6 clearances. So I resent the fact that General Martins would  
7 somehow suggest that we are not sensitive to the importance of  
8 this. We are.

9           We don't want it in our possession right now -- I  
10 mean, we do believe we should get it, but right now all we  
11 want it is in your possession. And I guess maybe what he is  
12 saying is he doesn't trust you either. I don't think that, I  
13 hope not, but all we want is it in your possession, and we  
14 want you to order the Executive Branch to produce it.

15           Thank you.

16           MJ [Col SPATH]: General Martins, over to you.

17           CP [BG MARTINS]: Very briefly. We are not denying that  
18 there have been statements, and Senator Feinstein in her cover  
19 letter did mention sending some copies to the Executive  
20 Branch. We have gotten access through those who continue to  
21 exercise ownership over the document. And this -- you know,  
22 this notion that we are not going to turn over things. If we  
23 find something we are going to turn it over.

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1 I do need to address, though, this continuing theme  
2 that we are denigrating their protection of classified  
3 information by saying that an increased number of people who  
4 may see a document increases the risk. This is a very  
5 fundamental principle, and counsel's lack of understanding of  
6 it actually really concerns me by his continuing to refer to  
7 it.

8 In addition to a clearance, there is a requirement  
9 for a need to know. And it is well understood that if you  
10 increase the number of people who know a very sensitive fact,  
11 you exponentially increase the chances through good faith  
12 efforts and people doing their jobs. And in this case you  
13 have somebody who has got an adversarial position to the  
14 government carrying out his obligations faithfully. I'm not  
15 second-guessing that.

16 But to fail to understand that basic piece of how we  
17 protect secrets is itself an indicator of why this shouldn't  
18 be done. Because if counsel has got that view that, hey,  
19 anybody who has a clearance could know it, he is  
20 misunderstanding a very fundamental principle.

21 So we stand by our position. Thank you.

22 MJ [Col SPATH]: All right.

23 LDC [MR. KAMMEN]: Unless things have changed, I think we

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1 have been determined to have a need to know so ----

2 CP [BG MARTINS]: That's not correct.

3 MJ [Col SPATH]: Got it. Got the arguments. Thank you.

4 Takes care of 206.

5 We have 248H. That's going to be lengthy -- a  
6 lengthier argument. What I will do is take a break. We can  
7 see if it has been cleared appropriately. We can do this  
8 before lunch. If it hasn't been cleared, we will do it after  
9 lunch or later in the week. I need to get an update, and it  
10 is a good time to take a break as well. Take ten minutes. We  
11 will see where we are at.

12 Commission is in recess.

13 [The R.M.C. 803 session recessed at 1023, 3 March 2015.]

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