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1 [The R.M.C. 803 session was called to order at 1447, 4 August  
2 2014.]

3 MJ [Col SPATH]: The commissions are called to order. The  
4 parties present before the recess are again present.

5 TC [MR. SHER]: Your Honor.

6 MJ [Col SPATH]: Yes.

7 TC [MR. SHER]: One scheduling issue. If you would be  
8 amenable, Your Honor, the parties would prefer to have a  
9 505(h) at the conclusion of today's session.

10 MJ [Col SPATH]: We want to try to do that today?

11 TC [MR. SHER]: Yes, sir.

12 LDC [MR. KAMMEN]: Yes, that probably makes the most  
13 sense, if we quit a little bit earlier. There is one other  
14 matter that is not on the record that we need to address that  
15 has to do with the client visits here; we need some guidance  
16 also.

17 MJ [Col SPATH]: I understand. Any idea how long you  
18 believe the 505 hearing would take?

19 LDC [MR. KAMMEN]: If we do both issues, from the  
20 defense's point of view, I can't imagine more than half an  
21 hour. I mean, it's not that complicated.

22 TC [MR. SHER]: That sounds right, sir.

23 MJ [Col SPATH]: All right. Let's do this. Let's take up

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1 120BB, see if we have enough time to work through that. And  
2 let me ask, with regard -- I think you have answered it. If  
3 we deal with both issues, it's going to be Appellate Exhibit  
4 277 and 284; is that accurate?

5 LDC [MR. KAMMEN]: Yes.

6 MJ [Col SPATH]: What we will try to do is let's take up  
7 120BB, we will turn to the other issue you just alerted me to  
8 with regard to the client issue, and then we will kind of move  
9 from there probably into a 505 hearing, and it seems to make  
10 some sense.

11 120BB, Defense.

12 LDC [MR. KAMMEN]: In some respects, Your Honor, 120BB may  
13 be moving towards mootness, but since it's going to impact  
14 scheduling discussions and some of the other discussions, it's  
15 probably useful to proceed. If I might, just a little bit of  
16 history.

17 Way back when, after we filed 120 and then the  
18 government -- probably actually before we filed 120 the  
19 government indicated that with respect to certain classified  
20 materials it intended to present summaries, not for the  
21 purposes like CIPA would have for the jury, but the summaries  
22 would replace the actual discovery for the defense. So what  
23 the defense would get was not the underlying evidence, and

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1 then the fight would be about what the members saw. Here we  
2 would get the sanitized evidence.

3           And one of the differences -- you know, the  
4 prosecution routinely says, well, 505 is very similar to CIPA,  
5 which is true in the sense that a map that takes you to Quebec  
6 is similar to a map that takes you off a cliff; they are both  
7 maps. There is just a huge difference. And one of the huge  
8 differences in the military commissions 505 is that, at least  
9 on the face of it, once the military judge approves the  
10 summaries, he is prohibited from reconsidering that decision.

11           And we raised that with Colonel Pohl, whose  
12 workaround -- and he acknowledged it was a workaround -- was  
13 that we could ask for more discovery. And so, instead of  
14 saying these submissions are inaccurate or, quite candidly, as  
15 we have argued publicly, they are false, and we can  
16 demonstrate that they are false, the response was we could ask  
17 for more discovery. And that essentially was the genesis of  
18 120.

19           But a part of that, of the consideration of the  
20 summaries is that before they are to be approved, the military  
21 judge -- and I am reading from 505, it looks like (4)(C) --  
22 (2)(C), it's called "Action By Military Judge," and  
23 essentially it says you can substitute a summary or substitute

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1 a statement "if the military judge finds that the summary,  
2 statement, or other relief would provide the accused with  
3 substantially the same ability to make a defense as would  
4 discovery of or access to the specific classified" documents.  
5 So in other words, what you approve has to essentially not  
6 harm the defense.

7           And so the prosecutor talked in his last argument  
8 about the 4,000-page ex parte submission. And if I may, the  
9 reason it was so long is at that time we -- number one, we had  
10 no discovery. And essentially we said will you even tell us,  
11 give us the ballpark of what these submissions pertain to so  
12 we at least have some idea what it is?

13           Because Colonel Pohl's response was you file your  
14 ex parte. And we said, well, what are these summaries about?  
15 Can you even get us in the ballpark? And the response was no.  
16 And so we had to file a response to pleadings that we had  
17 never seen, and we didn't even know the subject matter of the  
18 pleadings. And so frankly that is why that document was so  
19 long, was because we didn't have any idea what it was that was  
20 at issue.

21           Now we know generally what the summaries presumably  
22 pertain to, and, of course, we have additional discovery and  
23 we have a better idea of how this all impacts on our defense.

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1 And so for that reason one of the things floating out there is  
2 a request by the defense that before you consider these  
3 summaries, whatever it is they are submitting, we have the  
4 opportunity to submit to you a much more focused and much more  
5 precise, you know, statement of our theories of defense in  
6 mitigation as well as -- and this is perhaps not as clearly  
7 set out in our motion -- an explanation of why the summaries  
8 we have gotten so far are wholly deficient and in no way  
9 enable us to make a defense or mitigation.

10           So as you look at the adequacy of the summaries you  
11 are going to be getting, you know, and I don't know that you  
12 would do this, but let's just say that the summaries -- and  
13 let me give you an example.

14           If I were making up -- let's say that the fact in  
15 question was on August 1st, Richard Kammen went from  
16 Indianapolis to Washington, D.C.; on August the 2nd he went  
17 from Washington, D.C. to Guantanamo Bay, Cuba and he spent a  
18 week in Guantanamo Bay, Cuba visiting a client, arguing  
19 motions and appearing before a military commission. Let's say  
20 those were what the classified document showed. The summary  
21 would probably read, "Sometime in the middle of 2014 Richard  
22 Kammen went from one place to another," end. And, of course,  
23 the differences are huge.

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1           So that's kind of the overarching problem here, is  
2 that the summaries so far we have gotten have been, for  
3 litigation purposes, virtually useless, and we need to show  
4 that to the commission in some way.

5           Now, to talk to the heart of our motion -- and,  
6 again, if we are all on the understanding, and I know this was  
7 discussed yesterday in the 802, that the January and February  
8 dates are not realistic, then we are less concerned about the  
9 government's position of, well, we really can't be bound by a  
10 timeline because we are dependent on other folks. You know,  
11 we understand that to some degree or another, because of the  
12 way they have chosen to abdicate their responsibilities to  
13 other agencies, they regard them -- their hands are tied, and  
14 we accept that that's their position.

15           So if it is their position of if our hands are tied,  
16 we can't move any faster than these other agencies move, we  
17 have no control over these other agencies, so be it, as long  
18 as we understand that there are certain things we can't go  
19 ahead with until the universe of discovery concerning the RDI  
20 program is complete.

21           And when we were arguing the government's motion to  
22 reconsider, General Martins said, you know, Judge, what we  
23 want, and I'm paraphrasing, is a lengthy interactive process

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1 between the commission, the defense, and the government, in  
2 which this all somehow works out. And if that's where we are  
3 headed, that's fine, so long as we all understand that we  
4 don't want to be in the position of the government coming in  
5 with this next round of whatever it is they are coming, saying  
6 here it is, here is what you have gotten, let's have the trial  
7 in a month. Because what they want is an interactive  
8 back-and-forth, and when you read General Martins' remarks,  
9 that's what he wanted.

10 Now, our preference, quite candidly -- and this, you  
11 know, is -- let's make this simple. We all have adequate  
12 clearances. Give us the stuff. Give us what was ordered by  
13 Colonel Pohl in 120, and they have moved to reconsider it, and  
14 he has ruled on that. Give us that underlying information,  
15 and then let's make the fight about what are the classified --  
16 whatever goes to the jury.

17 Well, you know, they don't want to do that, and, of  
18 course, we have repeatedly asked for direction, and we think,  
19 quite candidly, 120CC orders them to do that. They disagree,  
20 and that's a fight that we will be having over the next few  
21 months.

22 But the question is whether or not we are on your  
23 timeline or theirs. We think it would be helpful to set some

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1 sort of suspense dates. I think it would be helpful to them  
2 because whoever it is they need to go to, if they say to  
3 whoever, we need a decision by January the 30th, my experience  
4 is that they will have a decision one way or the other by  
5 January the 30th, and I'm just picking that date arbitrarily.  
6 I mean, if we are talking October the 15th, dates tend to get  
7 decisions.

8           You know, the prosecutor talked about the SSCI  
9 report, which is -- again, and I don't fault anybody, but it's  
10 a little bit misleading, because on the one hand they talk  
11 about the SSCI report as somehow going through  
12 declassification as you read about in the newspapers. Well,  
13 what's going through declassification as we read about in the  
14 newspapers is the 400-page executive summary, and it's not  
15 just the military commissions that are subject to this heavily  
16 redacted situation. Apparently, at least according to the  
17 newspapers, what they sent to the Senate was totally  
18 unworkable, and now they are going through, and that fight is  
19 going to continue.

20           That is the reason why -- and this is a matter  
21 Colonel Pohl had under advisement and certainly one we would  
22 probably ask you to hear again, was a motion asking the  
23 commission to request or order the United States Senate to

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1 produce to the parties the full, unredacted SSCI report so  
2 that we could review it and then have a later fight over what  
3 would or wouldn't be admissible.

4           So, you know, frankly, Your Honor, what we would --  
5 what we are asking with respect to the compliance date with  
6 120CC is that the commission -- and we would certainly work  
7 with the government -- sit and have a series of dates so we  
8 are working not towards, jeez, when will somebody get around  
9 to it, but to give them the opportunity to say to the people  
10 they have to deal with, "The judge has ordered us to do stuff  
11 by this date. You guys need to do stuff by this date and keep  
12 this moving."

13           We certainly understand their not wanting to be --  
14 their hands to be tied, but again, it does seem to me, so long  
15 as we are all understanding that they can't have it both ways.  
16 They say they want to move expeditiously. Well, the most  
17 expeditious way would be to give us all this stuff and then  
18 have the fight about what happens at the trial. They don't  
19 want to do that, that's fine, but let's at least have some  
20 dates that move the situation along.

21           Again, the other piece of this is I don't want to be  
22 working against a January or February trial date as long as  
23 that is not realistic. And once we perhaps solve that

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1 problem, then these other dates we can begin to work towards.

2 Thank you.

3 MJ [Col SPATH]: Trial Counsel?

4 CP [BG MARTINS]: Good afternoon, Your Honor, and may it  
5 please the commission, there may be some areas of agreement  
6 here, but I do want to provide an alternative account of some  
7 of the historical matters, some of the characterizations  
8 defense counsel made.

9 The commission has clearly seized on this as part of  
10 a scheduling discussion. I think you have mentioned an  
11 interest in scheduling, and I see the connection certainly  
12 between this motion and the 45 series. We were under a  
13 current scheduling order in 45, and Mr. Kammen referenced some  
14 of this as well, so I will make my remarks to try to fit in  
15 with that decision-making construct that you have.

16 We surely acknowledge the commission's responsibility  
17 and authority to regulate the time, place and manner of  
18 discovery. We note that we are under an order from the judge  
19 from June in Appellate Exhibit 120AA, and we are working seven  
20 days a week since -- actually since Appellate Exhibit 120C was  
21 issued in April, on April 015th. Counsel on both sides have  
22 referred to the connections between that original order and  
23 then the one the judge issued.

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1           The judge issued a ten-paragraph structure to focus  
2 parties, to assist in reconciling differences to develop the  
3 schedule, and the approach by which we would both protect  
4 sources and methods, the fundamental purpose of the classified  
5 information procedures in both the Military Commissions Act  
6 and under federal law, and ensure that the accused receives  
7 all noncumulative, relevant, helpful-to-the-defense  
8 information in discovery. And we are getting about that.

9           I wish to note that in addition to having approval  
10 received based on requests from the defense that  
11 Mr. al Nashiri be able to participate in the defense and be  
12 able to view discovery, sought and obtained approval for a  
13 substantial amount of material to be made available as display  
14 only under existing regulations for how those markings work  
15 and what they mean, and that much of that material has been  
16 turned over as of 20 June.

17           My co-trial counsel mentioned ongoing efforts with  
18 regard to declassification, which is eventually going to have  
19 the same additional effort of making more material available,  
20 not merely display-only material, but material that's fully  
21 declassified available, and that that actually was undertaken  
22 as acknowledged by a White House counsel, correspondence with  
23 Senate committee chairs, Oversight Committee chairs for the

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1 purposes of facilitating fair military commissions trials. So  
2 any sense that this is a stonewalling effort or an effort to  
3 drag feet is just simply undercut, vitiated entirely by the  
4 facts and the record of the case.

5 I also note that of the thousands of pages of  
6 classified discovery that has been provided to the defense  
7 over a thousand pages unprompted by judicial action had to do  
8 with the Central Intelligence Agency's former Rendition,  
9 Detention and Interrogation Program. So it dealt specifically  
10 with the matters at issue here.

11 I would also point to paragraphs already cited by  
12 defense counsel, paragraph 6 of Appellate Exhibit 120C and 14  
13 of 120AA, where the judge refers to many paragraphs of a  
14 75-paragraph original defense request of August 2012 that the  
15 government has provided information for. So it is very  
16 important to understand this backdrop of effort.

17 I don't acknowledge that this necessarily has to be a  
18 lengthy, in terms of months, process. I did quote federal  
19 courts that deal with CIPA, and I was referring to the Fourth  
20 Circuit in the case of Moussaoui, one of the more important  
21 cases.

22 Again, Your Honor, in talking about other circuits,  
23 the authority, I would submit, has a slightly stronger force

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1 in our court than merely persuasive authority. The  
2 D.C. Circuit cases we pay particular attention to. They are  
3 binding. But because of the statutory reference in 10 U.S.C.  
4 Section 949p-4, to practice in federal courts there is an  
5 express incorporation by reference of practice, general  
6 practice in federal courts, citations to major CIPA cases in  
7 other circuits thereby take on an added significance. So when  
8 I cite to Moussaoui, an important Fourth Circuit case, I would  
9 submit it has a slightly more important role for us in  
10 examining it, given the statutory pointer that we get from  
11 Congress.

12 And in Moussaoui the court does refer to an  
13 interactive process. Elsewhere courts have referred to a  
14 painstaking, tedious process. I don't disagree with that.  
15 That doesn't mean it needs to take months. It certainly means  
16 time must be spent in SCIFs working with this material, no  
17 doubt about it, and that is what's necessary both to protect  
18 national security and to ensure a fair trial.

19 The protection of national security is not some  
20 hand-wave and an excuse based on embarrassment, as counsel I  
21 think suggested at one point in voir dire. You see -- the  
22 judge sees a declaration. We are required by  
23 Section 949p-4(a) to provide one, and we have. We have

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1 provided several. That is the discipline and the process.

2 It's not based on embarrassment.

3           And, in fact, the first determination a judge must  
4 make is whether that invocation of privilege has merit. You  
5 don't go further to the noncumulative, relevant, helpful  
6 standard under the statute, which is a quote from the Yunis  
7 case, the leading case in this area in the D.C. Circuit,  
8 unless you find that our invocation of privilege does have  
9 merit. And I would ask, upon reading those declarations, that  
10 you reaffirm that and determine whether they have merit.

11           So this is not about excuses for embarrassment. This  
12 is about protection of national security information, and yet  
13 at the same time providing an accused noncumulative, relevant  
14 information that is helpful to the defense within the meaning  
15 of the Yunis case and other applicable precedents.

16           The way in which that reconciliation of those  
17 interests is met is that Congress has given you, Your Honor,  
18 as you know, very important powers to approve, upon looking at  
19 the underlying information, substitutions and other relief in  
20 the context of discovery and in the context of hearings and  
21 matters later down the road that involve witnesses, additional  
22 language you see in Section 6 of CIPA. Our Section 6 of  
23 course is 949p-6 of alternative procedures.

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1           So that language of substitutions -- summaries,  
2 substitutions, admissions of relevant facts, and then  
3 alternative procedures, those are the mechanisms that the  
4 judge can use. And he may also come up with CIPA-like  
5 remedies that don't quite fit any of those. The case law is  
6 quite clear. And that's the way in which the defense is  
7 placed in substantially the same position as they would have  
8 been or they too would have received the original information.

9           Defense counsel muddied the water a little in a few  
10 ways that I would like to try to straighten out. He referred  
11 to litigation we have had previously in this case regarding  
12 what is codified in 10 U.S.C. Section 949p-4(c), this  
13 reconsideration paragraph, and he was citing to the 505, the  
14 Military Commission Rule of Evidence implementation of that in  
15 our military commission rules, which is identical.

16           And it is true that Section 4 of the federal 1980  
17 CIPA statute used in federal court does not have that, but it  
18 is federal practice to not allow the government's opportunity  
19 to protect classified information by requesting substitutions  
20 and other relief to be vitiated by a request for  
21 reconsideration. What that is intended to do is to ensure  
22 that that opportunity to declare the harm to national  
23 security, if a judge is about to do something and order the

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1 release of something, that the government has that opportunity  
2 to come in and ask for the relief, given opportunity under the  
3 statute, that it can't be vitiated or circumvented by a  
4 reconsideration process where the government is out of the  
5 loop. That's the purpose of that.

6           And because the Military Commissions Act of 2009,  
7 when this first appeared, occurred after the 1980 statute, it  
8 is a practice in federal court now. There is some  
9 countervailing authority that the defense has used in prior  
10 oral argument that the government would submit and believe the  
11 decisions of the court indicate is unavailing. There is a  
12 Libby case that is cited, which is inapposite because of its  
13 involvement of an accused who already knew the information  
14 because he was someone with a clearance. There was a lot of  
15 litigation on that, and we can refer you to the prior portions  
16 of the transcript where that's litigated.

17           The point to make here is that this practice is  
18 completely consistent with federal court. We are guided by  
19 that, and we submit that the court is guided by it, and the  
20 law is the appropriate way to ensure a fair trial while also  
21 protecting national security. Congress says that the American  
22 people deserve all of that. They deserve that we protect our  
23 national security even as we are trying cases, and that's what

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1 CIPA is intended to do.

2           So the reconsideration aspect is qualified, if you  
3 will, by the opportunity of the defense to make ex parte  
4 presentation to the judge of its theories and acquaint the  
5 judge, who is going to see the underlying material. Allow me  
6 to put a side note in this comment to another remark of  
7 defense counsel that was incorrect, which was that it is  
8 unusual in federal practice for defense counsel not to be  
9 seeing the underlying material and that the exercise in  
10 CIPA -- I thought I heard the suggestion that the exercise of  
11 CIPA in federal court was merely one of what is kept from the  
12 panel or the jury. That is simply not the case. It's a  
13 fundamental misunderstanding of the protections in the statute  
14 to say that.

15           The substitutions and other relief authorized under  
16 statute by the government are very much to prevent even  
17 individuals who may be cleared for some purpose from receiving  
18 other information. This is very clear in a series of cases  
19 that a security clearance doesn't mean you have access or a  
20 need to know for other purposes. We cite the case of  
21 El-Mezain, I'll spell M-E-Z-A-I-N, as the most recent case  
22 where this is clear. The clearance of defense counsel while  
23 clearly reflecting their probity and professionalism, and we

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1 don't in any way rely on argument that they are not going to  
2 be professional here, we rely -- the CIPA statute simply does  
3 not authorize turning over discovery to defense counsel, and a  
4 continued suggestion in that regard indicates a level of  
5 misunderstanding that in some way justifies the rule on why we  
6 shouldn't be buying into that.

7           So Your Honor, we would agree that certain changed  
8 circumstances that were the basis and cited by the court as  
9 the basis in part for 120AA, some of those new circumstances  
10 that were the authority that it quoted or the basis it quoted  
11 for granting the motion to reconsider and then, while  
12 retaining the ten-category construct, which the government  
13 agreed with and did not oppose, that in issuing that order  
14 acknowledged some of these changed circumstances, we agree  
15 with defense counsel that those do impact scheduling.

16           The government would submit the best approach to  
17 this, in light of the fact that we are in a seven-day-a-week  
18 process to comply with the judge's order while also complying  
19 with the responsibility, which we haven't in any way abdicated  
20 our responsibility to protect national security information,  
21 is that we provide the court an update on the 9th of September  
22 as to where we are. As I have mentioned, you have before --  
23 or the commission has before it the first installment of

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1 requests for substitutions. This relates to what are  
2 paragraphs now 13(a), (b) and (c) -- and again this is  
3 connected to defense counsel's request for the ex parte  
4 submission. I will make a remark about that in a moment, on  
5 our position on it.

6           But we would submit that by 9 September you will have  
7 received additional requests for substitutions as to more of  
8 those paragraphs, and then we can also provide an update to  
9 the court as to our likelihood of providing additional  
10 requests that fill out the compliance with all ten paragraphs,  
11 and believe that's suitable relief at this point in light of  
12 the fact that we have been, I believe, clearly showing an  
13 intent to comply in good faith with the order in light of a  
14 changing environment.

15           You know, there is a piece of impact on this that  
16 comes from that Senate Select Committee on Intelligence  
17 Report, the one purpose of which has expressly been indicated  
18 by both branches as involving these very commissions, and that  
19 that's not a bad thing for these commissions. By the defense  
20 counsel's own request, he stated, if I might cite in the  
21 transcript, you may have reached this point, Your Honor. This  
22 is the unofficial unauthenticated transcript at 3276, "This  
23 isn't something secret that happened to somebody else, this is

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1 stuff, this stuff happened to him." This was defense counsel  
2 hoping to get more access of his client.

3 MJ [Co1 SPATH]: Pause for a second.

4 CP [BG MARTINS]: Sure. Are we caught up?

5 MJ [Co1 SPATH]: We are caught up. Thank you.

6 CP [BG MARTINS]: So we would ask for a 9 September date.

7 Let me please address in closing, Your Honor, the  
8 defense counsel's request for an ex parte submission. We  
9 don't oppose this. We oppose the requested relief -- and this  
10 is, I think, 120EE -- of a 60-day pause to do nothing but  
11 that. And a request I believe is also in there implicitly to  
12 not have proceedings in September in accordance with the  
13 current schedule, which I believe is Appellate Exhibit 045FF,  
14 and we would oppose that.

15 I would note -- although I have not seen the  
16 affidavit in agreement, the regulation for trial requires that  
17 qualification of learned civilian counsel involves the  
18 completion of an affidavit in agreement that pledges this case  
19 to have -- to be the focus of defense counsel's work, and that  
20 that's what we are about here.

21 Such a presentation, which is not unprecedented for  
22 this very commission -- there was a prior one we understand --  
23 the judge indicated an understanding of four theories of

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1 relevance. He noted for the first time in 120AA, this is  
2 actually a paragraph that's not in the earlier version, but he  
3 identified theories that have been discussed because this is a  
4 key piece of the noncumulative relevant helpful analysis is  
5 what are the facts of consequence to the determination of the  
6 action in basic relevance determination.

7           And the four theories, Your Honor, to review were the  
8 mitigation standard, which we have discussed under Rules for  
9 Military Commission 1001(c) and 1004 is a broad standard. It  
10 goes even to matters that might be involved in a  
11 recommendation by the fact-finder and the sentencing  
12 authority, the panel, as to clemency. This is a quite broad  
13 notion as we all know, so-called Skipper evidence, future  
14 dangerousness evidence of the accused's conduct in detention,  
15 an outrageous government conduct motion under substantive due  
16 process theory and law.

17           And then finally a litigation of whether statements  
18 subsequent to instances of mistreatment would be voluntary  
19 under a totality of the circumstances. This is 10 U.S.C.  
20 Section 948r, that whole body of litigation, a totality, would  
21 make prior conditions -- and these are the four theories the  
22 judge already indicated he acknowledges. Although those  
23 remain something it is important to have a nuanced and

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1 detailed understanding of to determine whether substitutions  
2 place the defense in substantially the same position.

3           So we agree with all of that, disagree with the  
4 timeline, and believe we ought to use this week for the judge  
5 to become -- be made familiar with that, and should there be a  
6 need later, the judge could entertain another presentation.

7           Should that kind of thing be of interest to  
8 Your Honor, we note that in Section 4 there is authority --  
9 express authority for the government also to make a  
10 presentation, to make clear the harms to national security,  
11 the reason why these things are not in any way idle and  
12 authorized. And this is why it is an iterative process  
13 because, Your Honor, you are getting both sides when both  
14 sides are not able to talk to one another about pieces of  
15 this, and that makes it inherently iterative. It doesn't have  
16 to be as lengthy as defense requests, and so we would ask for  
17 that 9 September date. And we will defer, with your leave,  
18 Your Honor, a discussion of more scheduling matters as we get  
19 to the 045, Appellate Exhibit 045.

20           Subject to your questions, Your Honor.

21           MJ [Col SPATH]: No, thank you very much.

22           Defense Counsel.

23           LDC [MR. KAMMEN]: I hardly know where to begin.

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1 MJ [Col SPATH]: Let me just say I think earlier you asked  
2 if I was one who was going to sit back and allow you all to  
3 talk or if I was going to be engaged in a lot of questions.

4 I think today you have learned that I am willing to  
5 let you, in some respect, drift away from the subject matter.  
6 I think it's important for an open discussion, and I am more  
7 than willing to give you the same courtesy again to educate  
8 me.

9 LDC [MR. KAMMEN]: Well, you know, part of this is because  
10 there is a lot of history here. There is a lot of history,  
11 and also there is a lot of interrelationship, because things  
12 that deal with what can be displayed to him also deal with  
13 120, which deals with 181, much of which really needs to be  
14 discussed in a classified setting or in a closed session. I  
15 mean, a great deal about 181, for example, needs to be  
16 discussed in a closed setting. We may get to 281, 291 dealing  
17 with display to Nashiri this week. I am not clear whether  
18 some of that needs to be discussed in a closed setting.

19 All of that is -- bears on 120 because the government  
20 says, oh, well, we are really trying hard, and I don't doubt  
21 that. I also don't doubt that they are not free agents. I  
22 have seen prosecutors who would say to other agencies here are  
23 your choices, you give us the stuff, you give it to us by this

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1 date, or we will suffer the consequences. That's not the way  
2 this prosecution has chosen to proceed.

3           Let me just say, you know, we didn't raise this whole  
4 issue in our -- of the classification, and, you know, here is  
5 one of the anomalies. They say, well, you have the right  
6 to -- we don't get to the issue of substitutions if you  
7 conclude that the claim of national security is not for -- is  
8 to avoid embarrassment and other improper claims, which is an  
9 interesting concession on the part of the government and the  
10 first time they have made that concession in this. But here  
11 is the problem with that concession. They refuse to allow,  
12 even in a classified setting, any analysis of whatever  
13 declarations you have seen. So we have no idea what it is  
14 they are saying to you.

15           I will say this, and this will be discussed probably  
16 in a classified setting: On other motions when we have seen  
17 their declarations, they are ludicrous and laughable. And I  
18 suggest that if we saw their declarations in this case, they  
19 would be equally ludicrous and laughable. And if we had  
20 secret hearings about the contents of those declarations, I  
21 suspect the commission would understand that the whole point  
22 of all of this is to avoid embarrassment. But that's just my  
23 supposition because I haven't seen it.

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1 I think, Your Honor, we know it's to avoid  
2 embarrassment because of the repeated dishonesty by other  
3 agencies to other courts, 9/11 Commission, Senate, and sort of  
4 go on and on and on. If you're really -- again, if you are  
5 really being honest with a court, you don't need to mislead  
6 them.

7 Now, the prosecutor says, well, we have given them a  
8 thousand pages. A thousand pages that are largely useless,  
9 but they have given us a thousand pages. But the working fund  
10 of knowledge Mr. Nashiri -- it's public -- was in CIA custody  
11 for four years and we know that they generated way more than a  
12 thousand pages.

13 According to published reports, and I don't know that  
14 this is accurate, I have no way of knowing, is that the Senate  
15 Select Committee reviewed 6 million pages. If 10 percent of  
16 those applied to Nashiri, that's 600,000 pages, and they cull  
17 them down to a thousand and they say this is good? This isn't  
18 even close to being good. And, again, what we have is,  
19 frankly, junk. It's useless. It's Kammen went -- in the  
20 middle of 2014, Kammen went from one place to another place.

21 Now, the prosecutor says, oh, well, all of this  
22 reconsideration is just sort of the way it works. Well, it's  
23 not the way it works. I have done national security cases.

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1 Other people we have talked to have done national security  
2 cases. It's just not the way it works in a federal court.

3 The rule provides that the only person who can't seek  
4 reconsideration of your 505 decisions is the accused. You  
5 know, under the rule, once you make the decision that these  
6 are adequate, we maybe can ask for more discovery, but we  
7 can't ask you to reconsider even if we can demonstrate that  
8 those summaries are false, which they are.

9 Now, and so that's the reason why we said to Judge  
10 Pohl and we are saying to you we want to do this ex parte  
11 submission. And the prosecutor says, oh, yeah, we are happy  
12 to do it, just get it done in three days. It's taken us three  
13 months to get some of this discovery together, but you get  
14 your ex parte submission done in three or four days.

15 Well, it's not that simple. It's not that simple  
16 because, first, we want to make sure it's correct. Secondly,  
17 we are not limited to the theories that Judge Pohl approved.  
18 You know, there were other theories that have been discussed,  
19 and we certainly want you to understand how those theories  
20 interplay.

21 And third, as I said, we want to demonstrate to you  
22 in advance of your consideration why the summaries we have  
23 received are useless and why, if the government, as I predict

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1 they will -- and, again, I don't think it's them. I think  
2 it's other folks -- if they go down the same road, we are just  
3 going to have maybe another thousand pages of equally useless  
4 summaries. And they are going to come in and say to you, as  
5 they said to Judge Pohl up until the time when he said no,  
6 this is good. They wanted to go to trial and kill Nashiri on  
7 stuff they now acknowledge was useless. They don't  
8 acknowledge it was useless. They acknowledge, based upon  
9 Judge Pohl's ruling, that it was inadequate.

10 Now, that's not a simple process. It's not me doing  
11 other stuff. This is me and the rest of the team devoting  
12 virtually full time to creation of this report. Given the  
13 fact that they have other military duties to do that take them  
14 away from the work, that this has to be done in a SCIF, it has  
15 to be done in Washington, it's just not a simple process.  
16 Because we would want to go through these summaries and show  
17 you why they are inadequate and how they relate to the  
18 defense.

19 And so, you know, I mean, essentially what the  
20 government says is give us as much time as we want, because  
21 they are not even going to get back to you and show you where  
22 they are until September the 9th, but hurry up on the part of  
23 the defense. And that's the problem we have with that.

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1           Now, in terms of postponing the September situation,  
2 I don't know -- obviously once you decide 305 we may be in a  
3 little bit different position. I am not sure what there would  
4 necessarily be in September. I mean, there are a few things,  
5 some of which we may reach because, you know -- but I don't  
6 know that we are going to have all that much to deal with in  
7 September. So this strikes me as a better use of everyone's  
8 time, but be that as it may.

9           Let me just talk about two other things and then I  
10 will sit down. In an earlier argument the prosecution talked  
11 about how they have somehow counted up and there are 22  
12 members of the defense team and, wow, it's relatively equal.  
13 Well, yeah, if you count all the experts who have been -- we  
14 have been allowed to hire for discrete purposes, yes, maybe  
15 there are 22 people, if you count experts.

16           If you count paralegals, if you count real lawyers,  
17 you know, as best as we can count -- and one of the things we  
18 would invite you to do, at one point Judge Pohl ordered both  
19 sides to submit to him and to each other a list of the people  
20 who were working on the case and their roles. At that point  
21 it was -- the prosecution team was about twice the size -- and  
22 I'm talking trial team, lawyers and paralegals, was about  
23 twice or a little bit more.

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1           We have lost lawyers because of actions of the  
2 commission and actions, frankly, of the government. Theirs  
3 continues to grow. By our count -- you know, and we can't --  
4 what they do is they have a new detailing memorandum, you  
5 know, every session and some people are added, some people  
6 drop off, and that is certainly fine. But I think the people  
7 who drop off don't necessarily -- aren't necessarily  
8 disappearing from the case.

9           For example, one of the early civilian prosecutors,  
10 the early trial counsel was a fellow by the name of  
11 Mr. Mattivi, who we understood had gone back to Kansas and was  
12 no longer involved with the case. But at least in e-mail  
13 correspondence with Commander Lockhart, she indicated that  
14 Mr. Mattivi still remains a part of the prosecution team and I  
15 presume at trial will come back.

16           We don't really know how many people they have got,  
17 but we do know how many lawyers we have got, and they are  
18 frankly all in this room. And with the other responsibilities  
19 the military folks have and the legitimate demands on their  
20 time and our other obligations to Mr. Nashiri and  
21 investigative obligations and other travel that are  
22 case-related, this is a huge project, and it's not one that's  
23 likely to be adequately done in the three or four days or the

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1 week or ten days the prosecution thinks is appropriate. We  
2 just don't have the resources.

3           And, you know, we can certainly prepare something.  
4 It would be more efficient -- and I don't know, I have seen  
5 judges handle it different ways. If we have got time, we  
6 would be happy to meet with you ex parte and share with you  
7 some of the things, the obligations we have and why some of  
8 these things take so much time and why we are making this  
9 request. And we are not making the request just to be  
10 stalling, we are making the request because we want to do it  
11 right.

12           Let me close with this, because the prosecutor talked  
13 about they will give us noncumulative stuff and stuff that's  
14 helpful to the defense. I mean, I have two thoughts with  
15 respect to that. They can't possibly know, I don't know that  
16 anyone on the prosecution team has defended a death penalty --  
17 has defended a death penalty case, and certainly not a death  
18 penalty case involving the complicated issues that are  
19 involved here, so they can't possibly know what would be  
20 helpful to the defense. They can't possibly know, beyond the  
21 big broad-brush strokes, the nuance of what we need.

22           But one of the problems and one of the requests that  
23 cause the motion that Captain Jackson argued is in the

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1 unclassified discovery, and we direct your attention to  
2 AE 120Z with Attachments C through P, we listed the hugely  
3 cumulative nature of discovery that's been provided. For  
4 example, we counted one statement by one witness that the  
5 government provided us 17 times. Well, so they say we have  
6 given you x-thousand pages. Yeah, well, 17 of which were a  
7 40-page statement by the same witness. So you have 17 times  
8 40 and that's however many pages.

9           So, I mean, part of the problem is that there may be  
10 these nuggets of stuff that they have that they have buried  
11 among all the other, and perhaps that was an effort to be  
12 overinclusive. And I don't know, but all of this is  
13 interrelated, Your Honor.

14           What we never got, though, was -- you know, I guess  
15 where we are is this. Their opening is give us till  
16 September the 9th, and then we will let you know where we are.  
17 And if that's the starting point, that's fine. You know, if  
18 that's the starting point and we know where we are in  
19 September, you know, great. You know, that's the start of a  
20 timeline.

21           What we would say is, okay, give us till -- you know,  
22 whatever they are doing on their end is fine. Give us until  
23 October the 1st, and we will have our ex parte submission to

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1 you, and then you can begin reviewing whatever it is you have  
2 received or perhaps will receive with at least the knowledge  
3 of the ex parte submission and our explanation as to why at  
4 least the summaries we have received so far are wholly  
5 inadequate. And if that's the starting point for this  
6 discussion, I think that that would be useful.

7 Thank you.

8 CP [BG MARTINS]: Would you mind if I respond, Your Honor.

9 MJ [Col SPATH]: I do not.

10 CP [BG MARTINS]: I think it is quite useful, actually. I  
11 think there seems to be a couple of motions possibly here in  
12 this that we could join with on defense counsel's part.

13 We welcome the idea of a look at the resources.  
14 Let's just make it comprehensive. Don't limit it to a list of  
15 names of people involved in the case, but let's look at the  
16 entire spectrum of resources, including contracted resources.  
17 We don't seek this information as a matter of course involving  
18 the defense. There have been a couple of places that we will  
19 submit with authority and argument in such a submission to  
20 you, if you ask us to show you our resources.

21 But there have been occasions where the litigation  
22 has resulted in the commission seeing all the resources  
23 available to the defense and we don't -- we are not dismissive

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1 of their challenges and the need for resources, but we do  
2 submit that the equitable resourcing standard that is in the  
3 National Defense Authorization Act, which echos language in  
4 the original Military Commissions Act, is the right standard.  
5 It doesn't mean equal resourcing, it acknowledges the  
6 differences between the prosecutorial function and the defense  
7 function. But we would welcome that because we think this is  
8 so much a premise of defense argument with regard to discovery  
9 that we probably need to get into that sooner or later.

10           And we don't seek it. The convening authority  
11 doesn't, as a matter of course, provide that kind of  
12 information in terms of hours authorized for different types  
13 of resources and experts, but if they want to go there, we are  
14 pleased to go there, and we are -- not in a dismissive way.  
15 We realize it is an important aspect.

16           I wanted to state that this ex parte submission, we  
17 would think that every moment we could use close to SCIFs  
18 altogether is valuable, and I wasn't saying they could  
19 complete that exercise this week, but that can also be done,  
20 of course, Your Honor, back in the National Capital Region.

21           MJ [Col SPATH]: I didn't take it that way, by the way. I  
22 took it that if we end up finishing this on Wednesday, it  
23 leaves us some time we could continue to work this week, but I

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1 certainly don't expect it to be done this week. I already  
2 know that, based on what I have heard myself.

3 CP [BG MARTINS]: The issue that he began with related to  
4 reconsideration and this being inherently unfair. You are  
5 seeing the underlying information. That's the key piece of  
6 the process that I am not sensing and understanding from on  
7 the other side. And you see what the summary is of and you  
8 have some understanding of theories. I wasn't saying that the  
9 four theories were exhaustive.

10 Finally, the reason we seek this 9 September date,  
11 Your Honor, is that before calling off these other milestones  
12 that are quite valuable, end of September for submission of  
13 evidentiary motions, voir dire question list, initial question  
14 list and questionnaires, these milestones that are in 045FF,  
15 we should see what the impact is of this last piece of  
16 discovery. That's what's outstanding, and we have this  
17 ten-category construct to seek to meet it.

18 By preserving those milestones, there is a lot of  
19 business I submit we could do. The counsel, co-counsel  
20 mentioned 166. We have long ago provided a notice of the  
21 intent to use probative, reliable, corroborated, lawfully  
22 obtained hearsay under the statute and have litigated the  
23 standard under which that would be litigated for

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1 preadmissibility ----

2 MJ [Col SPATH]: I'm sorry, just slow down for a moment.

3 CP [BG MARTINS]: ---- and we could do that, and we could  
4 deal with matters that were collected prior to the date of  
5 capture.

6 So, I mean, we would offer that the way to approach  
7 other matters scheduled is if there is a showing that this is  
8 connected to the outstanding discovery issues, then we  
9 determine -- Your Honor determines to put it off, but until  
10 then we can continue with a long-standing requirement to have  
11 had legal motions submitted. We should be seeing the end of  
12 those. One would think after multiple extensions, including  
13 one last year for months to enable learned counsel to try  
14 another case that was quite indulgent of the commission. So  
15 we have had a number of extensions. I am not saying they  
16 weren't in the interest of justice -- they were by the ruling  
17 of the court -- but we can do other things while we continue  
18 to press on these outstanding discovery matters, Your Honor.

19 Thank you.

20 LDC [MR. KAMMEN]: We really will be brief. I just wanted  
21 to say one thing. You know, General Martins keeps talking  
22 about the ten-paragraph construct, and certainly that's a big  
23 piece of this. But as Captain Jackson reminds me and as she

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1 discussed with the court in paragraph 6 of 120C, paragraph, I  
2 think, 14 in 120AA, their obligations are greater than the  
3 ten-paragraph construct. So it relates back to the 75 items,  
4 and, you know, it's -- whatever is ordered there. So it's not  
5 just the ten paragraphs.

6 I'm not sure what General Martins was proposing. If  
7 he is proposing that we keep the September 30th date for  
8 evidentiary motions, yeah, we have been working on the  
9 challenge to 166. That's going to require a huge, huge  
10 hearing, and I suspect there will be at least, unless the  
11 regime has changed, a rather significant dispute over what  
12 witnesses will be necessary. And so that is two huge pieces  
13 of litigation, which we are happy to file and proceed with,  
14 but we can't then be working on the ex parte stuff.

15 We can file -- we can certainly file the challenge --  
16 you know, the request for hearing on 166, and I suspect there  
17 may be a couple of other evidentiary motions, but those also  
18 will require evidentiary hearings that will require a certain  
19 amount of preparation, a certain amount of investigation,  
20 assembling and adducing and putting together, if you will,  
21 orders of proof, that sort of thing. And, again, it's just a  
22 bodies issue, Your Honor. We don't have the bodies to prepare  
23 ex parte summary and prepare this litigation.

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1           Now, we are happy to keep the September 30 date. I  
2 mean, you know, we have started on that process. It's not  
3 like we haven't been working. But if you say okay, starting  
4 today you need to do this -- you know, if you say starting  
5 today you have got a month to, you know, do the ex parte  
6 submission, then that makes it difficult to have the adequate  
7 motions done. So, I mean, again, all of these things are  
8 interrelated.

9           And, again, I am just struggling with the fact that  
10 the government -- you know, Judge Pohl issued his initial  
11 order in April, and it wasn't like it was a secret, what was  
12 ordered. And, you know, they could have gone -- and maybe  
13 they did go to whoever they had to go to and say, fellas, one  
14 way or the other we are going to have to be giving stuff up.  
15 Instead, apparently they chose to -- you know, they chose to  
16 relitigate. That's fine, that's their -- but we have known  
17 since June, I think, is when 120 -- his motion to reconsider.

18           So here we are now in early August, so at least a  
19 month and a half, and now they are saying, well, give us until  
20 September and then we may know where we are. And that's fine.  
21 If that's what it takes, that's what it takes. All we ask is,  
22 if you will, the same leeway.

23           Now, one other thing and then I will sit down, and

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1 that is, you know, the prosecutor said yes, this might be  
2 helpful to give up and everybody tell you sort of what their  
3 assets are, and as long as we are comparing apples and apples,  
4 that will be great. But we want to know how many agents spent  
5 how many man-years in the 11 years before this case got filed  
6 working on this case, because that may make our two and a half  
7 investigators that we have got look, put that into context.

8           So as long as we have an apples-to-apples comparison,  
9 and as long as we know all of the people in the Justice  
10 Department and all of the people in the Department of Defense  
11 who are available to assist the prosecution and other  
12 agencies, happy to do it. But it's got to be -- all we want  
13 is apples to apples.

14           Thank you.

15           MJ [Col SPATH]: Thank you.

16           CP [BG MARTINS]: Nothing further, Your Honor.

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

18           I know there was one other issue you wanted to take  
19 up, I think, with regard to your client specifically. Can you  
20 give me an idea of what the issue is?

21           LDC [MR. KAMMEN]: We would like some kind of written  
22 guidance from whomever -- I guess it's the -- I am not sure  
23 from who, as to the -- what we are allowed to wear into a

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1 visit here at the ELC, because there is frankly a change in  
2 universe. You know, sometimes we can take pens in, sometimes  
3 we can't.

4           And we will comply with whatever is reasonable,  
5 but -- for example, today we showed up and there were two new  
6 requirements of things we couldn't take in that have never  
7 come up in the last two and a half years ----

8           MJ [Col SPATH]: I don't want to pry if you don't want to  
9 tell me. Can you give me an idea of what the items are?

10          LDC [MR. KAMMEN]: I don't want to make more out of it,  
11 but it is just sort of indicative. I couldn't wear cufflinks  
12 because apparently somehow somebody has decided cufflinks are  
13 dangerous. I don't know because we have no explanation.  
14 Major Daniels was not allowed to -- couldn't go in because she  
15 was told for the first time you can't wear earrings.

16           It's this constantly changing universe of rules, and,  
17 you know, it would just be helpful to everybody if there were  
18 some sort of written rule so that we know when we show up,  
19 here is the rule, and everyone is on the same page. And let  
20 me just say that I think the -- some of the people tried to  
21 resolve this informally and couldn't, and that's why we are  
22 bringing it to the commission's attention. I understand that  
23 the people here are largely just following orders, but, you

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1 know, if there is some rule so that we don't have this, you  
2 know, kind of ongoing guesswork, that would be very helpful.

3 TC [MR. SHER]: Your Honor, the government will certainly  
4 get some written guidance.

5 MJ [Col SPATH]: That makes it easy, I think. I was going  
6 to ask. Again, I try to use practice at least some  
7 guidelines, as we all do, as to what we are normally involved  
8 with. And usually what I would do, if I was at a base dealing  
9 with a trial there, I would ask that the prosecutors work with  
10 the defense and then work with the facility here. I more than  
11 recognize the rules are different, and I recognize that it's a  
12 unique structure where they maintain the detainees, I get  
13 that. But if you can work -- see if you all can come to some  
14 resolution and assistance together, and if you need my  
15 assistance after that, I will be happy to engage if it is  
16 appropriate. Does that make sense?

17 TC [MR. SHER]: Yes, sir.

18 MJ [Col SPATH]: Let me know tomorrow, and we will see if  
19 they are going to work for it, and we will see if we get  
20 forward motion.

21 LDC [MR. KAMMEN]: No problem.

22 MJ [Col SPATH]: Thank you.

23 LDC [MR. KAMMEN]: No problem, thank you.

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1 MJ [Col SPATH]: I know the last piece is a 505 hearing.  
2 It probably makes some sense for us to recess anyway and then  
3 do that, that way everyone who has to leave can leave.

4 I recognize that you object. I have seen that  
5 already, that you object because your client is not able to  
6 currently attend those hearings. I assume that is a standing  
7 objection.

8 LDC [MR. KAMMEN]: It is, and, you know, one of the things  
9 that's peculiar about all of this is on the one hand the  
10 government says, well, you can display stuff to Nashiri, and  
11 on the other hand we have sort of he can't be here even when  
12 some of those issues are being discussed, and that's one of  
13 the peculiarities to all of this to which we object.

14 MJ [Col SPATH]: Understand.

15 What I won't do is make any kind of change in that  
16 process here from the bench without having some time to more  
17 fully develop my knowledge of what has transpired before, and  
18 I'm not suggesting I would make a change after I reviewed it  
19 either. At this point I know that that is the standard and  
20 the order that's in place, and we are going to keep that in  
21 place today, and we will proceed then into the classified  
22 portion of the hearing.

23 I think you all know this. Let's keep that as

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1 focused as we can on the material that absolutely has to be  
2 discussed in a classified setting because it is more important  
3 that this be open and so that everybody sees what is going on  
4 and transpiring here than anything else, notwithstanding and  
5 balancing, of course, national security. I understand that.

6 I want to make sure what we discuss in here is truly  
7 the classified parts, because we need to do that in this  
8 setting, so we can get everybody back in here in a public  
9 forum quicker, and I know you all know that just, again, based  
10 on what I have seen so far.

11 So we will keep those discussions very focused, and I  
12 know you all will make the courtroom appropriate while we take  
13 a break. Is 15 minutes -- does that work for both sides?

14 LDC [MR. KAMMEN]: It does. We typically would meet with  
15 Mr. Nashiri at the end of court. I don't know when they are  
16 planning on taking him. If we could meet with him now, which  
17 might take a few more extra minutes?

18 MJ [Col SPATH]: That works for me, rather than have them  
19 stay to transport him back to where he goes. I don't mind  
20 that. Let me check.

21 [Pause.]

22 MJ [Col SPATH]: All right. We were having a brief  
23 recording issue. Just to make sure they got everything,

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1 again, I know the parties know this. I was just letting the  
2 parties know. I would like to keep this hearing as focused as  
3 we possibly can on the classified issues so we can reopen the  
4 hearing, which will end up being tomorrow based on what time  
5 it is.

6 Absolutely you can meet with your client now. If you  
7 would -- Mr. Taylor will be around. As soon as you are ready  
8 and after that meeting is done, we will come back in here,  
9 deal with the classified piece of this and then recess for the  
10 night. So I will wait to hear from you all as to when you are  
11 ready to go. Does that work?

12 LDC [MR. KAMMEN]: Yes, thank you very much.

13 MJ [Col SPATH]: Government good? Thank you.

14 Court is in recess.

15 [The R.M.C. 803 session recessed at 1603, 4 August 2014.]

16 [END OF PAGE]

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