[The R.M.C. 803 session was called to order at 0906, 5 August 2014.]

MJ [Col SPATH]: All right, these commissions are called to order. All parties present before we recessed last night are again present. Again, good morning, everybody.

I just want to make sure again that the earphones for the translator and Mr. al Nashiri are working. Positive from both, thank you.

All right. Before we start with the motion this morning, I just want to start with a couple of comments and then we will move on to some of the motions.

Regarding Appellate Exhibit 305, I worked last night on developing a ruling for that. A written ruling will be marked and attached to the record as the appropriate appellate exhibit, but I wanted you all to know the ruling so we can move along.

So as I mentioned, the formal ruling will follow, but in short the defense motion for me to rule on all of the outstanding motions is granted. However, I am not going to be hearing additional argument, evidence or testimony on any of those motions unless the record isn't sufficient for me to make the ruling as I review the record, and if that occurs I will notify both sides and we will schedule any required

1 hearings.
2 Now, additionally, of course, as discussed in
3 Military Commission Rule of Court 3.5.e, either side can
4 certainly file a reconsideration motion if new facts or law,
5 not known or in existence at the time of the filing, become an
6 issue. So you will see a written motion to follow of that,
7 but that will be the substance of my ruling. So frankly,
8 granted in part, denied in part is probably more accurate. I
9 will rule on all of the outstanding motions.
10 Yesterday there was a significant amount of
11 discussion about resourcing and some discussion of a
12 willingness of both sides to exchange information in that
13 regard, but there is no formal motion pending before the court
14 about that particular issue. So I am not going to issue any
15 kind of ruling or any kind of order absent a formal briefing
16 cycle in that regard. If you all desire to share information
17 without any involvement from me, feel free. That doesn't
18 bother me at all, of course, and you don't have to include me
19 in any kind of exchange of information like that.
20 For the defense, I know you know this, but as a
21 remainder, if you have any requests of assistance, be it
22 consultants, investigative support, whatever it is, file the
23 request with the convening authority and just follow -- I have

1 been reading through the record on the process that's already
2 been established, and that includes, of course, any kind of
3 constructive denials. If the convening authority denies or
4 constructively denies, feel free to file the appropriate
5 motion with me or the commission as soon as you can, and I
6 will be more than happy to get involved and then rule on those
7 motions. It's kind of where we are at right now.
8 For 277, I have not come to a ruling with relation to
9 the classified issues discussed yesterday. I hope to do that
10 today during the lunch recess, and if that's the case, I will
11 get that to you, and then we will take up that argument
12 tomorrow, if it's appropriate. So that's my hope for 277.
13 More to come on 284. I really am trying to get you rulings
14 and information as I can in the order I think is most helpful.
15 I think first up this morning is 278, but I thought I
16 saw somebody stand up on the trial side.
17 TC [MR. SHER]: I just wanted to put on the record that
18 these proceedings are being transmitted CONUS.
19 MJ [Col SPATH]: We thank you. We will skip over 277 and
20 go to 278, which is a defense motion to compel. So let's
21 start there.
22 Mr. Kammen.
23 LDC [MR. KAMMEN]: Good morning, Your Honor.

1 MJ [Col SPATH]: Good morning.
2 LDC [MR. KAMMEN]: 278, Your Honor, as you know and so the
3 public is aware, requests the commission to order the
4 Secretary of Defense to do what Congress has already ordered
5 him to do, and that is to publish protocols for the method and
6 manner and procedures that will be followed in the event that
7 Mr. Nashiri is convicted beyond a reasonable doubt and
8 sentenced to death by the members.
9 MJ [Col SPATH]: Let me ask, just timing-wise for this
10 motion, and I will likely let you make your comments, because
11 I have read through and I understand -- I understand where you
12 are coming from in large regard. But as for the motion
13 itself, the timing of it seems to me it's more of an
14 evidentiary or instructional issue in this forum. And what I
15 mean is, as I read your motion and the response, if your
16 client is acquitted or acquitted of any of the offenses that
17 carry a capital punishment, this issue isn't before me. It
18 just doesn't matter to me.
19 LDC [MR. KAMMEN]: Sure.
20 MJ [Col SPATH]: And what I gather from your motion is
21 ultimately you want to be able to present evidence to the
22 court members. Either DoD does not know what they are going
23 to do, so how is that not cruel and unusual, or what they plan

1 to do they have never practiced, so how is that the not cruel
2 and unusual, or what they plan to do is cruel and unusual
3 because of the way they described it. I know I am
4 summarizing.
5 LDC [MR. KAMMEN]: It's a little different in two regards.
6 I mean, you are right, but there is more. In the first place,
7 at least under what -- the kind of voir dire we think should
8 take place, one of the subjects of voir dire is about this.
9 If I may, Your Honor, one of the realities of death
10 penalty litigation, and we sort of touched on it yesterday, is
11 people don't think about it and there is this tendency to
12 intellectualize it. You know, we are going to sentence him to
13 ten years, we are going to kill him. It's just words. But
14 it's real and it's got to be real in this courtroom. All of
15 us, every one of us who are part of this at some point in the
16 future may pick up the newspaper and read today is the day
17 this is going to happen.
18 If I can share, if you don't mind, I mean, when I
19 started doing this work one of my mentors in this was a fellow
20 by the name of Millard Farmer, who at that time was one of the
21 real giants in the death penalty community. And what he said
22 to me is, "Look, Rick, any time you take one of these cases,
23 you have to be prepared to go see your client die, because he

1 may want you to be there." So it's very, very real and it's
2 got to be real. So it's part of the voir dire process.
3 MJ [Col SPATH]: And that's what I was asking. I agree
4 with you on that, that it is something that's real. That's
5 why we have a capital referral. And it is something to be
6 talked about. What I am trying to do, again, I understand
7 there are lots of reasons to make comments in here, and I
8 don't want to cut everybody off and I haven't and I know I
9 won't. But I want to make sure where I am ruling and what I
10 am focusing toward is the right question.
11 So along with, if we get to sentencing as a matter in
12 mitigation and extenuation, depending upon what's disclosed,
13 you want to be able to talk to the court members about the
14 method or mode of any execution to get their feelings on that?
15 LDC [MR. KAMMEN]: Yes. Absolutely.
16 MJ [Col SPATH]: Okay.
17 LDC [MR. KAMMEN]: The truth is, I mean, it's particularly
18 important now, I mean, in state courts, and even in the
19 federal court, there are procedures. We know today that in
20 Indiana, for example, if a person receives a death sentence,
21 that will be implemented by some form of lethal injection.
22 What we don't know and what's particularly important
23 in today's environment are the details, what are the

1 protocols, because as we have seen in at least two recent
2 instances when states have tried to essentially jury-rig
3 protocols, they have had executions that have by any standard
4 been, you know, just horrifying. You know, a fellow took two
5 hours -- it took two hours to kill a guy in Arizona. It took
6 close to an hour in Oklahoma.
7 And so if the Department of Defense, for example,
8 were to say we are going to use the Arizona procedure, members
9 may well say, look, I am comfortable with the death penalty,
10 you know, and I'm in the military and so killing people is
11 part of the deal in certain circumstances, but I'm not
12 comfortable doing it this way. They have got to know, we all
13 have to know, but especially them, what they are signing up
14 for, and it's particularly important.
15 Now, the other piece of this is, you know, as it
16 stands right now -- who knows what it will be next week or
17 next year, you know -- it's against the law, at least
18 according to Judge Pohl's order, for the Department of Defense
19 to move Mr. Nashiri for any purposes to the United States. So
20 presumably all of this would have to occur, you know, ten, 15,
21 20 years when the appellate process is done, here in
22 Guantanamo Bay. Well, you know, no offense to folks, but
23 things don't really work very smoothly here, and, you know,

1 they are getting better because our people have been coming
2 here longer, but we all see the kind of momentary or not so
3 momentary interruptions.
4 So essentially, you know, Congress, when they passed
5 this, instructed the Secretary of Defense to utilize, you
6 know, to publish these regulations. It didn't say, you know,
7 wait until the process is over. It said publish them. And
8 the Secretary of Defense should publish them, and I think the
9 commission has the authority to order the Secretary of Defense
10 to publish them.
11 Now, the prosecution -- and you sort of touched on
12 this -- says, well, two things, number one, it's not ripe, but
13 they say it will be ripe, as I understand their pleadings, you
14 know, when an execution date is set. So essentially they say,
15 well, let's not defer this piece of it for a few months or
16 even a year, let's defer it for however long it would take
17 before I gather what we would call the real execution date is
18 set. If he receives the death sentence, you may be required
19 to set a date of execution. But given the appellate process
20 those aren't real dates. And those of us who get immersed in
21 all of this, we talk about well, there are dates and then
22 there are real dates, and I don't know which they are talking
23 about. But in any event, if it's after the trial, then, of

1 course, the members are deprived of that knowledge, and to the
2 extent it is mitigating, we are deprived of the mitigation.
3 The other, anticipating their argument, is they say
4 this just isn't mitigating. Well, as I understand their
5 argument, they are essentially saying things in the future
6 cannot be mitigating, and they cite a number of the very early
7 federal death penalty cases, which if you look at the dates
8 those cases were decided, they were in the very early days,
9 the mid '80s and the early '90s, not anything in the more
10 recent, because what we know now in the federal system is that
11 things in the future, lack of future dangerousness, that
12 essentially the jury does not need to kill a person to protect
13 society is a mitigating circumstance. And it is routine in
14 appropriate cases for the parties to litigate that in terms of
15 what are the conditions of confinement, where will the
16 defendant be housed if he is not sentenced to death, what will
17 that look like, how restricted will he be, all of the things
18 that people would want to know if they are deciding is the
19 only way to protect, you know, in this case the United States,
20 to keep the United States safe, to kill Nashiri. So it's
21 clearly -- what happens in the future is clearly mitigating.
22 The notion that, well, the manner of execution can't
23 be mitigating, again, that's an individual judgment that the

1 individual jurors may make, and certainly there are jurors who
2 may well say in the civilian context, and clearly, and I don't
3 mean this critically, in the military context, look, I'm good
4 with killing. You know, that's part of the military. It's
5 what we do to our enemies and that's fine, but I may not be
6 good with doing it this way to this person under these
7 circumstances, because it is way different than the
8 battlefield. It is way different than an air strike. It is
9 way different than something that happens out of the military
10 operational necessity.
11 So for all of these reasons, Your Honor, we think
12 that it is incumbent upon the commission to order the
13 Secretary of Defense to do his job, to do the job that
14 Congress ordered him to do, and that is to publish these
15 protocols.
16 MJ [Col SPATH]: Is it appropriate for me to do -- if it
17 was something I would rule on, is it something where I would
18 order the Secretary of Defense to do that, or is it something
19 that we would discuss how we would frame the voir dire
20 questions to any potential commission members or court
21 members?
22 LDC [MR. KAMMEN]: Well, I think it's the former, for this
23 reason: Again, what we want to do, what I think is important

1 for all of us to understand is this is not an intellectual
2 process. Part of the holding of Caldwell v. Mississippi,
3 which precludes prosecutors from saying, oh, don't worry about
4 giving a death sentence, there is an appellate process and the
5 appellate courts will sort it all out, is it minimizes the
6 jury's responsibility.
7 The point of all of this is to really help us all
8 understand the reality of this process. Now, let's just say
9 that the protocols say that it is going to be -- that the
10 manner of execution will occur in Guantanamo Bay and that it
11 will happen by a, you know, one-drug manner of execution.
12 Well, the questioning is far different than if it is
13 just this sort of intellectual construct based on we don't
14 know what's going to happen. Those are two far different
15 questions. One sanitizes, if you will, the process. Yeah,
16 they are going to kill him, we don't know how. And I don't
17 have any question that the prosecutors would say, yeah, and it
18 will be humane, it will be painless, it will be nice, it will
19 all be good. And the fact is how can we argue to the contrary
20 because we don't know. And so that's the reason why we need
21 to know. It's not just framing the questions, it's -- I think
22 everybody needs to know what it is that we are really involved
23 with here.

1 So unless you have any other questions.
2 MJ [Col SPATH]: I was looking at a couple of the cases
3 you had cited.
4 This seems one of those -- I hate to adopt words like
5 "unique," but it seems like one of the aspects of the
6 commission process. When you are practicing in a state that
7 allows capital punishment, you know the method that that state
8 uses because they have published it.
9 LDC [MR. KAMMEN]: Right.
10 MJ [Col SPATH]: Unlike, it appears the Air Force, as I
11 was reading your motion, which has yet to publish anything in
12 that regard.
13 LDC [MR. KAMMEN]: Right.
14 MJ [Col SPATH]: So I take it that's part of the issue
15 here, is the Secretary of Defense has yet to explain how the
16 commissions process, if he were to be convicted and then
17 sentenced to death, how they are going to carry that out.
18 LDC [MR. KAMMEN]: Right.
19 MJ [Col SPATH]: I don't have any questions yet, any more
20 than that.
21 LDC [MR. KAMMEN]: Let me just anticipate -- you are going
22 to hear this a lot. And so part of the problem with the
23 commissions, and it happens in virtually every context in

1 every day. Yesterday we complained about sort of the -- all
2 of a sudden the changing rules as to what we were allowed to
3 wear to a client visit. I don't want to belabor that point,
4 other than the prosecutor gave us guidelines that really don't
5 say anything about this. So it's all a matter of
6 interpretation. They makes things ----
7 MJ [Col SPATH]: The only thing I would say on that, yes,
8 and I agree it could be that part of that I think is
9 bureaucracy in general, because when I have gone to other
10 confinement facilities or other places where I have to get
11 through security, it does seem as if the rules can change
12 depending upon the person in charge and the proclivities of
13 the person running it at that moment. Not just here, that
14 seems to happen ----
15 LDC [MR. KAMMEN]: Absolutely, but the difference of here
16 is the changeover in personnel is every nine months, and so
17 the rules change every nine months, rather as opposed to the
18 sheriff -- you know, the sheriff is re-elected or not
19 re-elected and there is a new sheriff, and so four years you
20 have a change.
21 You know, again, we are digressing a little bit, but
22 it is the nature of military command to do something and so if
23 X was the standard for me to do something, it's got to be X

1 plus 10 percent. So it is this constant, you know, change to
2 the point where -- you know, I have been to, you know,
3 facilities all over the country, and the first time I have
4 ever had a problem with cufflinks or spiral notebooks or all
5 of that.
6 But the point is it is such a changing environment
7 and they are making it up as they go along. And that's really
8 the ultimate point of much of what happens here is they -- you
9 know, they have this statute and they have these -- you know,
10 the statute says Secretary of Defense do these things, and
11 they don't happen, and, you know, the statute says -- and we
12 will be discussing this, you know, provide certain kinds of
13 resources, but then the regulations walk those back. And so
14 there is this constant tension. But the starting point, of
15 course, is for the Secretary of Defense to do his job, and
16 that is publish these regulations, and then we can see where
17 we are in terms of framing questions and dealing with these
18 other issues.
19 MJ [Col SPATH]: Thank you.
20 TC [MR. SHER]: Good morning, Your Honor.
21 MJ [Col SPATH]: Good morning.
22 TC [MR. SHER]: As Your Honor identified and as the
23 defense identified, the issue simply isn't ripe. It's

1 potentially going to be many years until this issue even fully
2 comes to fruition, and whatever the protocols today ----
3 MJ [Col SPATH]: I agree that any sentence to execution is
4 years in the future. I think everybody here, being
5 practitioners in a system, know that, no matter the system. I
6 think the question is when does it become ripe. Is it ripe
7 before we start to question potential court members? Is it
8 ripe at sentencing to allow the defense to present evidence --
9 potential evidence in extenuation of mitigation? Or is it
10 never ripe for me to worry about because who knows what's
11 going to happen 10, 15 or 20 years down the road?
12 TC [MR. SHER]: That's right, Your Honor, it's not ripe
13 until the point that the accused is unanimously convicted of a
14 capital offense, and only after the members make the requisite
15 findings, and only after they unanimously sentence the
16 accused. Not until that point, and to the point there is a
17 scheduled date, does the manner in which a sentence will be
18 carried out become ripe and they are not binding. That's just
19 what the district court found in Maryland in Higgs v. U.S. 711
20 F. Supp. 2d 479 at page 556, where the court held resolution
21 of the issue must await imminent application of the challenged
22 procedure. There the defendant did not have a scheduled
23 execution date and the court found there was no immediate

1 dilemma compelling ----
2 MJ [Col SPATH]: Absolutely. So that is for the actual,
3 that is for the actual execution itself. Hard to complain
4 about how you are going to be executed before your date is
5 scheduled and your method or mode of execution is confirmed.
6 TC [MR. SHER]: Absolutely right.
7 MJ [Col SPATH]: What about with court members, in trying
8 to death qualify potential members? What if your question to
9 them is, does it matter the mode of execution? Does it matter
10 if it is lethal injection or hanging? And two court members
11 say you know what, if it's hanging I could never even vote for
12 death, I couldn't do it.
13 TC [MR. SHER]: That's not appropriate for members,
14 Your Honor, because it's not -- the protocols and procedures
15 are not appropriate mitigation. They don't relate in any way
16 to the character or background or in any way to something
17 unique to the accused or to his moral culpability.
18 MJ [Col SPATH]: I am not talking yet mitigation or
19 extenuation, I am talking to qualify -- are there any cases
20 out there where you can't ask the court members --
21 I have to slow down. I had more coffee this morning.
22 I will go slower.
23 TC [MR. SHER]: I will try as well.

1 MJ [Col SPATH]: What I am trying to figure out is when
2 you talk to the court members to death qualify them, do we
3 have any body of case law where it is not appropriate to talk
4 to them about the potential methods and get their feelings
5 about them, and if you have a court member who just says there
6 is no way method X, I would ever vote for death, I would ever
7 be here?
8 TC [MR. SHER]: Because it is an issue that would never go
9 before them, because it's a legal question appropriate for the
10 judge and not the members. It is not something that should be
11 raised in voir dire, Your Honor. And there is good reason for
12 that, because again, whatever the protocols are today, they
13 very well could change by the time anyone is truly considering
14 carrying out the sentence. And to the extent there are
15 developments between sentencing and the carrying out of a
16 sentence, medical developments or scientific developments, the
17 government must be amenable to its protocols evolving to
18 meeting those up-to-date developments, and that's what the
19 Supreme Court said in Baze v. Rees 553 U.S. 35 at 52 where the
20 court held the government may not refuse to adopt alternative
21 methods of execution in the face of documented advantages to
22 reduce the risk of pain. It's not appropriate for the members
23 to be asked at voir dire or to consider in mitigation

1 protocols or procedures that may not be in place by the time
2 the sentence is possibly going to be carried out.
3 MJ [Col SPATH]: Let me switch from kind of going through
4 the questioning of our court members, potential court members,
5 to sentencing. I am looking at some of the cases even cited
6 in your brief. It talks about the broad -- again I recognize
7 some cases that C.A.A.F. has almost say "unfettered." I don't
8 necessarily like that term, but what it means to me is a
9 pretty wide-ranging ability to put on mitigation evidence.
10 And one of the quotes is "any evidence the sentencer could
11 reasonably find that it warrants a sentence less than death."
12 And what I am trying to wrap my head around is,
13 realizing protocols can change, is it reasonable for court
14 members to wonder about the mode and method currently in place
15 on a person?
16 TC [MR. SHER]: I'm sorry, the mode or method is either
17 lawful or it's not lawful. That's just it. And legal
18 questions like that are not appropriate for the members.
19 MJ [Col SPATH]: Regardless, couldn't a panel member,
20 couldn't that reasonably impact them when it comes to voting
21 on a sentence? Does that make sense? Couldn't that, as we
22 are discussing sentencing and mitigation, couldn't the current
23 method or things that have happened that they are familiar

1 with in the news recently, couldn't that reasonably impact
2 their ability to vote for or against death?
3 And I think I am asking because maybe we are
4 charting -- maybe we are charting not new law because of the
5 commissions, but because of the incidents the defense talks
6 about, does it change kind of the landscape of mitigation
7 evidence to it's hypothetical cal, don't worry about it.
8 TC [MR. SHER]: It doesn't, Your Honor. Again, the mode
9 or method -- I fall back on what I just said, the mode or
10 method is either lawful or not, and legal questions like that
11 are not appropriate for the members. They will have the
12 option to consider both at the merits phase and at the
13 sentencing phase all of the appropriate facts that a
14 fact-finder should consider. But the mode and method of an
15 execution that's not scheduled of an accused who is presumed
16 innocent until proven guilty beyond a reasonable doubt,
17 until -- to borrow a phrase from my co-counsel yesterday,
18 until a parade of ifs come to fruition, it's not something
19 that the members should be considering.
20 MJ [Col SPATH]: How about a lack of mode or method and a
21 lack of any -- let's say the defense -- I deny the motion to
22 order the Secretary of Defense to do what it does appear
23 probably should have been done, but regardless, it's not done

1 yet, I decline to issue that order, is it fair then to allow
2 the defense to ask the court members about that in voir dire,
3 that is, here we are supposed to have a mode and method in
4 place at least in theory, he has been told to do so through
5 statute, hasn't done it yet, it's something -- I am just
6 curious about your feelings about somebody not following an
7 order, not doing that even though they have been told. Isn't
8 that fair for ----
9 TC [MR. SHER]: I would disagree he hasn't followed an
10 order. He has to put together those procedures at the
11 appropriate time. I mean, quite frankly ----
12 MJ [Col SPATH]: Maybe the appropriate time is after a
13 death sentence has been adjudged.
14 TC [MR. SHER]: That's absolutely right, after it has been
15 adjudged, after an accused has been sentenced. Not until a
16 point where there is an actual date is there a reason for
17 whatever that method is to be challenged, and the defense will
18 have the opportunity to challenge it. I mean, there is a
19 process in place for the defense to do so, but arguing to the
20 members who should not be considering those legal questions is
21 simply not appropriate.
22 MJ [Col SPATH]: Both of you, I know this -- don't take
23 what I say up here as an opinion. Really I am just asking

1 questions so that later on I can try to figure out the right
2 answer.
3 TC [MR. SHER]: Yes, sir. May I have one minute?
4 MJ [Col SPATH]: You may. Thank you.
5 TC [MR. SHER]: If you don't have any other questions,
6 Your Honor?
7 MJ [Col SPATH]: No, thank you.
8 TC [MR. SHER]: Thank you.
9 MJ [Col SPATH]: Defense?
10 LDC [MR. KAMMEN]: You know, if we were saying we want to
11 know the protocols so we can challenge them, then they might
12 have some merit, their argument might have some merit, because
13 a challenge -- I mean, let's say that they said, well, you
14 know, this is Guantanamo, we don't really have all of this, so
15 we are just going to hang somebody, we are going to take him
16 out to a big tree and hang him. Fine, we may not have
17 standing at this juncture to challenge that. That may be a
18 fight that does properly have to come later.
19 But at least, as you say, in terms of what might be
20 called death qualifying, or what we prefer to call life
21 qualifying ----
22 MJ [Col SPATH]: And I'm just using the term that all the
23 courts use.

1 LDC [MR. KAMMEN]: We are all familiar with the term. No
2 problem.
3 In terms of qualifying jurors, is -- at that point we
4 would say, look, things could change, but right now if you
5 impose a sentence of death, you are imposing a sentence where
6 they will at some point in the future, maybe five years, maybe
7 25 years, take him out to a tree on the top of the hill at
8 Guantanamo and hang him, and they know what they are signing
9 up for. And as you well say, some jurors may say, you know,
10 that's not what I joined the military for, this is not what I
11 am about. I'm not interested in being part of this, and so I
12 can't participate.
13 But it's got to be real. It can't be this sort of
14 intellectual, sanitized system; and that's going to be a
15 fight. You know, I understand the prosecutors consideration
16 the more sanitary it is, the more it is an intellectual
17 construct, the easier it is for somebody to say, well, you
18 know, all these folks in the back of the room, all my command,
19 the convening authority who hand-picked me, all of these folks
20 really have me here to impose a sentence of death, and if it
21 is wrong, somebody else later on will sort it out.
22 Well, that's not the way the system is supposed to
23 work, and so it's not supposed to be this sanitized,

1 intellectual system. Each of the jurors is asked to make --
2 and this is what gets lost. Each of the jurors is asked to
3 make an individual moral decision as to whether or not to kill
4 a person, and that individual moral decision involves a
5 weighing of the evidence to be sure.
6 But even if the evidence -- if they find that the
7 aggravation beyond any question outweighs the mitigation, a
8 properly instructed jury may conclude that as a matter of
9 mercy -- an individual juror may conclude that as a matter of
10 mercy he or she is not going to vote for death, and that is
11 absolutely the law and that is absolutely their right.
12 And if one of the things that makes them say I'm not
13 going to vote for death because, I'm going to show mercy
14 because I don't want to be part of this, that is absolutely
15 appropriate and correct. And any argument that that's not --
16 that jurors can't show mercy is simply incorrect.
17 It comes down to what are the appropriate facts to --
18 I'm sorry. I'm sorry. It comes down to what are the
19 appropriate facts for the members to consider. And certainly
20 in voir dire, as you know, it gets into a wide-ranging
21 discussion about what it is we are talking about. And as your
22 article says -- because, as you said, some of the questioning
23 was 30 or 40 minutes and some of the questioning was half a

1 day, and so these are extensive, extensive discussions, and
2 that's not unusual.
3 But part of the discussion, you know, we have all had
4 jurors say, "Well, you know, I have never really thought about
5 it. How do they do it?
6 Well, "Jeez, I don't know" is a whole lot different
7 than strap him on a table and put poison in his arm or they
8 strap him to a table and electrocute him. Given what Congress
9 ordered, we should be in a position to have a fact-based
10 conversation, not one of speculation. Thank you.
11 TC [MR. SHER]: Your Honor, the defense identifies no case
12 that stands for the proposition that the protocols are proper
13 mitigation, and that's because they are not, and that's
14 because they are not unique to the accused or his moral
15 culpability. To the extent members make individualized
16 assessments, those assessments are to the accused, they are to
17 his background, they are to his character, they are to the
18 nature of the offenses, his moral culpability, other things
19 unique to the accused, not to legal questions that are not
20 appropriate for the members. Matters of clemency, those are
21 for the convening authority, those are not for the members.
22 That's a separate issue. Thank you.
23 MJ [Col SPATH]: We're going to move on to 279. Just give

1 me a couple of moments. Who on the defense side has 279?
2 DDC [Maj DANELS]: Good morning, Your Honor.
3 MJ [Col SPATH]: Good morning.
4 DDC [Maj DANELS]: Major Allison Danels, United States Air
5 Force.
6 In AE 279, Your Honor, the defense is requesting that
7 you compel the additional funding of Mr. Ahmad Assed so he can
8 continue assisting the defense as a cultural consultant in
9 this case. So far his assistance has been focused on our
10 mitigation efforts in Saudi Arabia.
11 As a starting point, Your Honor, I think it's
12 important to acknowledge that the military commission process
13 is fraught with inefficiency. It is not a criticism of the
14 system, it is an observation of the system. And given the
15 inefficiency of the process, it's important to keep in mind
16 that that is the context in which we are forced to represent
17 Mr. al Nashiri in this death penalty case.
18 MJ [Col SPATH]: I don't know if it's efficient or
19 inefficient. I have yet to find any bureaucratic process to
20 be particularly efficient, sometimes by design because bad
21 decisions can get made with speed, and sometimes not by
22 design. So I recognize the process may be slow, but it is the
23 process.

1 So you have gone to the convening authority in this
2 case; is that correct?
3 DDC [Maj DANELS]: Yes, Your Honor.
4 MJ [Col SPATH]: And you have asked for 175 hours at this
5 point?
6 DDC [Maj DANELS]: Yes, Your Honor.
7 MJ [Col SPATH]: Let me look through the request. I don't
8 want you to disclose anything more than you feel comfortable
9 disclosing, if you can tell me why you feel you need the
10 175 hours.
11 DDC [Maj DANELS]: Yes. I would ask the court's
12 indulgence in just giving a little background understanding
13 into why despite the use of I think approximately 400 hours
14 thus far by Mr. Assed, the defense is requesting an additional
15 175 hours.
16 MJ [Col SPATH]: Sure.
17 DDC [Maj DANELS]: I also think it's important to note
18 that the defense has never said that we are not resourced. In
19 discussing the resource issue, it's more than a numbers issue.
20 It's not about how many bodies are on the defense side, it's
21 about the adequacy of the resources. So lots of times it's
22 oh, we have -- and I am just putting a number out there, you
23 have 55 people on your team. Well, that's of no consequence

1 if what we need is a person, that none of those 55 people --
2 if it's a role that none of those 55 people can fill.
3 So by way of background, it's important to understand
4 when it comes to mitigation, I think that there perhaps is a
5 fundamental understanding on the part of the convening
6 authority with regard to what mitigation is and what a
7 mitigation, an effective mitigation investigation requires.
8 Not only that, it's the context in which this mitigation
9 investigation is forced to occur.
10 First and foremost, Mr. al Nashiri grew up in Saudi
11 Arabia. Mecca, Saudi Arabia. So we will start with Saudi
12 Arabia. The Kingdom of Saudi Arabia is an extremely closed
13 society, very different from the United States. So you can't
14 have an effective discussion about what is required to do an
15 effective mitigation investigation through the American lens
16 of things, because it is not the United States. So to think
17 of it like the United States would be the first mistake.
18 Additionally, the way in which religion controls in
19 that society is unlike the United States. There is no freedom
20 of religion. And what I mean by that, other religions are
21 practiced there privately. There is no public practice of any
22 other religion. Islam is the religion practiced there. And
23 the practice of Islam has significant implications on various

1 aspects of society. The five times a day of prayer, nothing
2 else happens during prayer time. There is no business
3 conducted. No one is driving. There is nothing else going on
4 during prayer time.
5 So when the defense goes over to do its mitigation
6 investigation in Saudi Arabia, those are -- that is the
7 context. I mean, it can't go quickly just because the society
8 doesn't operate that way. So that has to be sort of in the
9 background of understanding why 400 hours so far has not been
10 enough.
11 Additionally, the manner in which the citizens deal
12 with the government is very different than the United States.
13 We just have a level of comfort and confidence in challenging
14 or going against something that we think that is opposite of
15 what the government believes. That's a level of comfort that
16 we have there. That doesn't necessarily exist in Saudi
17 Arabia. So to overcome that, if it is even ever -- if we are
18 ever even able to overcome it, it requires significant rapport
19 building and time spent with the family, the friends, the
20 neighbors of Mr. al Nashiri, all people who are a part of his
21 life story, which we are charged with fully and thoroughly
22 investigating.
23 Another aspect is just because you are born in Saudi

1 Arabia doesn't make you a Saudi citizen. So there are
2 implications Mr. al Nashiri's family are Saudis of Yemeni
3 descent. Some of his family members do not hold Saudi
4 passports, so there is a fear potentially if you don't have a
5 passport and you do something that they don't like, they can
6 send you away, because it doesn't matter that they were born
7 there, they don't hold a Saudi passport. So those are
8 concerns.
9 Other concerns is just this whole concept of
10 mitigation. I mean, you take this concept that's not fully
11 understood by even Americans and you transpose it to this
12 society that is completely different from our own and you have
13 to make them understand what mitigation is, why it's
14 important, why we are there, why we are doing these
15 interviews. The types of questions that we ask are probing.
16 Furthermore, we also have to explain, because they have
17 questions about the military commission process and the
18 differences that they perceive between this and a real court
19 in the United States of America. So it's not a quick process.
20 Furthermore, Mr. al Nashiri's family lives in Mecca,
21 Saudi Arabia, the holiest city in the religion of Islam.
22 Non-Muslims are not allowed to travel there, which means that
23 our mitigation specialist, who is not a Muslim, and

1 Mr. al Nashiri's defense counsel are not allowed to travel to
2 Mecca to meet with Mr. al Nashiri's family.
3 Mr. Assed is Muslim. He has knowledge of cultural --
4 culture in the Middle East as well as cultural and religious
5 considerations and things that have to be kept in mind in
6 dealing with, not just Mr. al Nashiri's family, but the people
7 from the Ministry of Interior who host us when we go there.
8 So he has insight into the religious and cultural aspects that
9 no other person on the defense team has.
10 He has traveled with the defense team on two
11 occasions to Saudi Arabia. In addition to being Muslim, he
12 speaks Arabic fluently. Ms. Rickert does not, our mitigation
13 specialist. None of the attorneys on the defense team speak
14 Arabic. And there are also sort of religious subtleties that
15 can be easily misinterpreted. And just the manner in which
16 you deal with people based on how pious or conservatively you
17 believe based on outward appearance they may practice their
18 faith.
19 So there is like debunking those myths, because
20 sometimes it means something, sometimes it means nothing at
21 all. For instance, a woman who chooses to wear the niqab,
22 which her face is completely covered and she chooses to cover
23 her hands, from the outside looking in you may believe that

1 that means that she is ultra-conservative in her religious
2 practice, and a lot of times it just means that that's just
3 how the family has chosen to be culturally. It doesn't have
4 any implication as to the way the religion is practiced.
5 And so in having discussions with the family, you get
6 to know those type of subtleties and the true implications of
7 those things so that there isn't a misunderstanding and so
8 that you deal with the family in a respectful and
9 understanding way as not to be off-putting. And these are the
10 ways in which Mr. Assed has assisted and can continue to
11 assist the defense team.
12 And to be clear, Mr. Assed is not a mitigation
13 specialist, so it takes a significant amount of
14 precoordination and continued coordination even once you are
15 in Saudi Arabia with regard to the different things that the
16 defense is required to do and investigate through its
17 mitigation efforts. So he sort of has to be back-briefed of
18 all of these important things that have to be asked and leads
19 that have to be followed once he goes to Mecca, and then he
20 has to come back and provide information to the defense team
21 and the mitigation specialists, and then it's just -- it's a
22 constant process. Mitigation operates that way in the United
23 States of America.

1 And also with regard to Saudi Arabia, there is an air
2 of artificiality to it all. We go there for a specific period
3 of time, and there is an attempt to sit and visit with the
4 family almost every day of that period, whereas in the United
5 States you wouldn't consume a two-week period of a family's
6 life because you would have an opportunity to go back another
7 time fairly easily and talk to Mom and Dad, and maybe Mom and
8 Dad can, say, bring the brothers and sisters to the next
9 interview. So it's a highly organic process that has to
10 operate in this unique circumstance of Saudi Arabia.
11 And there is no other person on the defense team who
12 can assist the defense in the way that Mr. Assed can. Yes,
13 the defense has requested an investigation -- I'm sorry, a
14 consultant with regard to Saudi Arabia, Mr. Haykel. It's
15 mentioned in the government's response. But neither the
16 defense nor the convening authority contemplated utilizing
17 Mr. Haykel in that manner, which is evidenced by the very fact
18 that he was only approved for 24 hours of consultation. That
19 would not have even been enough time for him to make even a
20 trip to Saudi Arabia without trying to request additional
21 resources.
22 So just the fact that we have a mitigation
23 specialist, an assistant mitigation specialist, a consultant

1 for Saudi Arabia, an investigator in Yemen, which by the way
2 is a fact investigator, not a mitigation investigator, none of
3 those people were hired to perform in the role of Mr. Assed,
4 and, quite frankly, many of them cannot perform in that role
5 because they are either non-Muslim or they do not speak
6 Arabic.
7 So, I mean, there are many aspects to the mitigation
8 investigation that, absent the assistance of Mr. Assed, that
9 the defense just frankly cannot accomplish. Mitigation can't
10 be done over the phone, over the Internet. They have to be
11 in-person, face-to-face conversations. So that's the context
12 in which we are coming, requesting additional funding for
13 Mr. Assed, so he can continue to assist in this mitigation
14 investigation. And also sort of a way to explain why
15 400 hours -- almost 400 hours, which I can understand seems
16 like a lot, why wouldn't you have been able to do it? These
17 are the reasons why, it's a slow process, and why we need the
18 additional 175 hours, so that he can continue with this
19 process.
20 So absent any further questions ----
21 MJ [Col SPATH]: I just want to make sure I understand the
22 scope of this request. It's 175 hours and it encompasses a
23 trip to D.C. to meet with, I assume, the defense team and then

1 a trip to Saudi Arabia and maybe Yemen, depending, which would
2 be about ten days for both trips or 20 total? Is that what
3 you are asking for?
4 DDC [Maj DANELS]: Yes, Your Honor.
5 MJ [Col SPATH]: And the hours at this point are an
6 additional 175 -- or 125, sorry, and I think it's $178 an
7 hour, correct?
8 DDC [Maj DANELS]: Yes, Your Honor. It's $125 an hour.
9 MJ [Col SPATH]: $125 an hour, I understand, and it's
10 175 hours right now.
11 DDC [Maj DANELS]: Yes, sir.
12 MJ [Col SPATH]: And you may come back for more hours. I
13 assume this is potentially something else to be seen.
14 I know currently he has worked almost 400 hours.
15 DDC [Maj DANELS]: Yes, sir.
16 MJ [Col SPATH]: I think it's 396. Are you seeing
17 benefits? Are you seeing results? And, again, I don't want
18 to know the what. I just want to make sure you see something
19 happening as you are spending the time and the money.
20 DDC [Maj DANELS]: Yes. Yes, Your Honor, absolutely.
21 MJ [Col SPATH]: I don't have any other questions right
22 now. Let me see what the government has to say. Thank you.
23 DDC [Maj DANELS]: Thank you.

1 ATC [LT MORRIS]: Good morning, Your Honor.
2 MJ [Col SPATH]: Good morning.
3 ATC [LT MORRIS]: In response to your question of what are
4 you going to do with the 175 hours, defense counsel's response
5 was, well, Your Honor, this is a highly organic process. You
6 need to think like somebody from Saudi Arabia. Thinking like
7 a United States citizen won't get you through this highly
8 organic process.
9 The Rule for Military Commissions 703(d) contemplate
10 a process, a process in which defense counsel grounds their
11 request in specificity, in which they demonstrate relevance
12 and actual necessity.
13 MJ [Col SPATH]: Well, let me ask. I'm reading their
14 requests. They have a number attached to their motions. It
15 seems to me what they are trying to do is build a mitigation
16 case in a capital case, and they have some interest in
17 interacting with and hopefully in their case getting some
18 testimony, if there is a conviction, or some information from
19 Mr. al Nashiri's family, fair?
20 ATC [LT MORRIS]: Yes, Your Honor.
21 MJ [Col SPATH]: So this seems -- the last motion is a
22 little more complicated, it will take me a lot more time to
23 figure out, but this one seems pretty straightforward in

1 regards to what the defense is doing, their expert consultant
2 is attempting to do, and where they are trying to go.
3 ATC [LT MORRIS]: Under the canopy though of mitigation
4 evidence, that doesn't give them the right to a blank check
5 for anybody under that canopy. And what the government is
6 saying at the outset, Your Honor, is that we fully recognize
7 their need to develop a case in mitigation, but as stewards of
8 the taxpayers' money, we have to look at the requests and ask
9 the question 400 hours into this ----
10 MJ [Col SPATH]: Stop. I am looking out at what we spent
11 to travel here and to travel back. We chartered a plane. And
12 I'm not being facetious. I concur in the steward of the
13 taxpayer dollars. We have full-time employees down here so
14 that we can attempt to try these detainees. They are looking
15 for 175 hours at this point for somebody that is interacting
16 directly with a capital defendant's family, not trying to
17 figure out protocols of execution, not traveling to interview
18 people that he has never met, not attempting to do a number of
19 other things but interact directly with his family who live in
20 a place that they can't go to.
21 So I am just -- I am really trying to get how much
22 more specificity. I'm not going to make them lay out what
23 they are going to talk to the family about.

1 ATC [LT MORRIS]: I understand what you are saying,
2 Your Honor, and to start -- the government's position is not
3 that it's unreasonable for them to have 175 hours towards
4 mitigation. They bang this drum of disparity ----
5 MJ [Col SPATH]: They already have had far more than
6 175 hours, I understand that.
7 ATC [LT MORRIS]: Not just within this consultant, they
8 have had 1700 hours for Ms. Rickert. And in reasons asking
9 for her they said it's her cultural awareness specifically
10 within the military.
11 So what we have to do, Your Honor, is look at their
12 mitigation team as a whole, look at the individuals that have
13 already been funded to them. It's not 175 hours that we are
14 trying to deny them of, it's that we are 400 hours into one
15 individual on their mitigation team, which includes a
16 mitigation specialist, an assistant mitigation specialist ----
17 MJ [Col SPATH]: Agreed.
18 ATC [LT MORRIS]: ---- individuals that are involved
19 specifically -- yes, sir.
20 MJ [Col SPATH]: Agreed, and I recognize that their
21 mitigation team is larger than Mr. Assed. I recognize that.
22 I just think as I look at this request, this seems a little
23 more unique. Ms. Rickert seems more like the standard

1 mitigation specialist, who are no doubt expensive in capital
2 cases, but I think everyone would agree she can't go interview
3 Mr. al Nashiri's family where they are currently located, his
4 immediate family, and they may not be willing to talk to her
5 for the obvious reasons that the defense has mentioned to us.
6 ATC [LT MORRIS]: We would be removing, Your Honor, the
7 justification or part of the justification in which they
8 originally requested Ms. Rickert, but that aside, they have
9 requested consultants specifically for countries, for Yemen,
10 for Saudi Arabia, and those consultants have been granted to
11 them and hours have been granted to them, and if they need
12 more hours they can come back. But all the government ----
13 MJ [Col SPATH]: But they did that here. They came back
14 and they said not 400 more hours, not 800 more hours and not a
15 blank check, 175 hours, a trip to D.C. for a few days and then
16 a trip back to Saudi to continue to develop -- again, in any
17 capital case the accused's direct family would seem to be the
18 most obvious of where a mitigation package is going to come
19 from. I think we all know that.
20 ATC [LT MORRIS]: Yes, Your Honor. It seems then there
21 are two ways forward at this point. We either look at what
22 the rules -- what the law in Freeman, the case that they cite
23 that says that you must show -- you must, as the moving party

1 must show what assistance this expert is going to provide.
2 It's not the assertion that they are going to travel somewhere
3 or do something hypothetical, it's you must show. And then
4 further -- yes, Your Honor, you must show -- in Bresnahan
5 there is a three-prong test which requires even more
6 specificity to say what it is exactly that you are going to
7 do. And the Bresnahan court says that mere speculation on
8 what an expert consultant is going to do is not sufficient to
9 fund an expert.
10 So two ways forward. We can either require defense
11 counsel to, with some level of specificity, and if not to the
12 government for reasons of their desire to develop their case
13 in mitigation, then to Your Honor in ex parte format, which
14 they are allowed to do, but to show with specificity how
15 this -- what has he done? We are 400 hours, Your Honor, into
16 this, and they should have a quantifiable, a good idea of what
17 he has done and what is left to accomplish.
18 MJ [Col SPATH]: As officers of any court, isn't part of
19 that the question I asked, have you seen results in the areas
20 that you were asking for provided to you? And the defense
21 counsel said yes, we have.
22 So I am going to follow up and have them detail for
23 me all of those results?

1 ATC [LT MORRIS]: Not the past results, but they should --
2 with that in context, with a quantifiable idea of what he has
3 done, they should have some idea of what is left to do, per
4 the case law, per the Rules For Military Commission, per even
5 the regs, 13-9, that says approval of funding comes --
6 approval of the services comes first and then funding follows
7 that.
8 So all the government is asking is that we hold them
9 to what the case law, what the rules, what the regs hold them
10 to in ex parte format to Your Honor before just -- the reasons
11 that they have articulated, that this is an organic process in
12 their brief, that he may do certain things, he may require a
13 trip to Saudi Arabia. I mean, these type of hypotheticals do
14 not really ----
15 MJ [Col SPATH]: Here it says he will. He will travel to
16 Saudi Arabia and continue meetings with -- I mean, the request
17 seems pretty clear at least for the 175 hours. I know you all
18 don't work for the convening authority. I recognize the
19 setup. My question -- I struggle because as I work through
20 the record, and I continue to do that, I read more last night,
21 the defense has attempted to go to the convening authority
22 with ex parte submissions and the convening authority has
23 declined, which is fine, and then they are going to end up

1 here, of course.
2 And the convening authority has invested in this a
3 great deal of money and chosen to refer this as a capital
4 case. I'm not a great fan of the "death is different"
5 expression. I know it was in an article. I recognize that it
6 has been attributed to me, but it didn't come from me
7 originally. It is said all the time in courts.
8 And if the convening authority believes the best
9 approach is to try this as a capital case, that's fine, but
10 they should be prepared to spend the kind of money that a
11 capital case requires, and when you have a capital case that
12 involves somebody from an overseas country, it's going to cost
13 more.
14 ATC [LT MORRIS]: This is demonstrated by the robust
15 funding that the convening authority has already provided
16 specifically within mitigation to the defense counsel. The
17 convening authority recognizes this. The convening authority
18 has funded the defense in this regard and the convening
19 authority ----
20 MJ [Col SPATH]: I assume there you are speaking about
21 learned counsel, the funding of that. They are required to do
22 that.
23 ATC [LT MORRIS]: No, not the learned counsel. I am

1 speaking specifically within regards to the mitigation effort,
2 with consultants that have been funded. And to be fair to the
3 convening authority, to say that he doesn't want to be behind
4 the full force of the defense's mitigation is not in any way
5 accurate to the record -- and I am not saying that you are
6 saying this, but in defense counsel's argument the convening
7 authority told defense counsel please come back to me and
8 invited them to come back to them and give them specific
9 reasons, if you look at his response.
10 MJ [Col SPATH]: And, again, I am just looking at the
11 reasonableness standard, and as I said yesterday, both the
12 fairness of a process and the appearance. Here we have a
13 request for a limited set of hours with a purpose, and tied to
14 what is pretty critical mitigation and extenuation in a
15 capital case, that is the family from which the defendant or
16 the accused comes from.
17 So I am just -- believe me, I am not trying to
18 indicate any request that comes in I will approve, you should
19 get ready to spend an unlimited amount of money. But what I
20 am trying to do is figure out this request particularly, where
21 have they failed when they said what they are looking for,
22 where they are looking for it, who they hope to talk to and
23 why their current mitigation team is ineffective in that

1 regard.
2 ATC [LT MORRIS]: The government expresses concern,
3 Your Honor, that the level of specificity that they have given
4 to you is not adequate per the case law, per the rules. And
5 when I listened to defense counsel, what I heard is that they
6 need an interpreter, they need somebody that speaks Arabic.
7 When you look at their motion it talks about his status as a
8 male.
9 And the government's position is that those things in
10 and of themselves -- we certainly invite them to articulate
11 actual needs, but those things in and of themselves do not
12 amount to what we should be funding in a mitigation effort.
13 Thank you.
14 MJ [Col SPATH]: Thank you. Any additional comments?
15 DDC [Maj DANELS]: Ms. Rickert is our mitigation
16 specialist. Ms. Rickert, along with defense counsel, owns the
17 responsibility of conducting the mitigation investigation.
18 Ms. Rickert is not Muslim. Ms. Rickert is one of the best --
19 is a nationally recognized mitigation specialist. She is
20 extremely competent in her job as a mitigation specialist.
21 However, because of where the mitigation resides she is not
22 able to effectively perform in that role without assistance of
23 Mr. Assed.

1 Ms. Rickert has used quite a few hours for mitigation
2 because she is unfamiliar with the culture, because she
3 doesn't know the history of Saudi Arabia, she doesn't know
4 things about the Islamic faith. Part of her job is to get to
5 understand those things. That takes time.
6 MJ [Col SPATH]: We are not dealing with a request for her
7 yet.
8 DDC [Maj DANELS]: Understood. I only bring that out
9 because they pointed out the fact that she has used 1740 hours
10 of time with regard to her pieces of this mitigation
11 investigation.
12 MJ [Col SPATH]: Do you know how many hours she has left?
13 DDC [Maj DANELS]: I don't, and I can certainly provide
14 that information to the court. I can get that information on
15 a recess and provide it to the court.
16 MJ [Col SPATH]: Again, it's not a suggestion that the
17 convening authority is not funding things. The defense has
18 mentioned today, Ms. Rickert is a good example, we can debate
19 I think underresourced, overresourced, equitably resourced, it
20 doesn't matter. What matters to me is 175 hours for Mr. Assed
21 and so it is important to me, you all are in the best position
22 to tell me this, are you getting from him results? Maybe not
23 that you expected; you never know what you are going to find

1 when you go look. But are you getting results that are
2 assisting Ms. Rickert in her efforts?
3 DDC [Maj DANELS]: Absolutely, Your Honor.
4 MJ [Col SPATH]: Does he believe he can continue that if
5 he continues as a consultant with the additional hours?
6 DDC [Maj DANELS]: Yes, Your Honor. I think there is also
7 some more important background information that the commission
8 should be made aware of. When the defense went on the second
9 trip to Saudi Arabia, one of the things that we requested was
10 a female linguist.
11 As good stewards of the government's money, we
12 requested to utilize an individual who lived in Saudi Arabia
13 so that the cost of travel from the United States to Saudi
14 Arabia was not an issue. Furthermore, the hourly rate
15 requested of that individual, it is the defense's belief, was
16 significantly less than what the government would have been
17 charged for someone provided under the contract to provide
18 linguists.
19 That request was denied, and because of the timing of
20 the denial, we traveled to Saudi Arabia without a female
21 linguist. And the reason why that's important is because of
22 the interaction between men and women in that society. So in
23 order for members of the defense team to communicate with

1 female members of Mr. al Nashiri's family -- and I did not
2 mean to suggest that the family is unwilling to talk to us.
3 There have been members of the family who traveled to neutral
4 ground in Saudi Arabia to meet with members of the defense
5 team, but it's for those members who are unable to do it for
6 health reasons, work reasons, other obligations that prevent
7 them from traveling to meet us.
8 At any rate, we traveled without the assistance of a
9 female linguist, which severely hampered our ability to
10 communicate with the female members of Mr. al Nashiri's
11 family, which is a part of the reason why there has to be a
12 third trip to Saudi Arabia. We didn't have the female
13 linguist that we requested, so we went there without one. So
14 work that could have been accomplished on the second trip we
15 were not able to accomplish because we were not provided a
16 resource that we needed.
17 And it's not just about meeting with family -- sorry,
18 Your Honor. Where Mr. al Nashiri went to school is in Mecca.
19 We cannot bring the school, the neighborhood to where we are
20 in Saudi Arabia. Someone has to be able to go to the facility
21 and make observations about it, ask around, all the things
22 that are required in a typical mitigation investigation.
23 School records are a significant part of a person's life

1 story, and there are things that can be found in school
2 records that are indicative of things that make compelling
3 arguments in mitigation. We cannot go there. Mr. Assed can.
4 And as far as us providing further specificity, if
5 Your Honor needs further specificity, the defense is willing
6 to provide that information ex parte.
7 Barring any other questions, Your Honor, the defense
8 rests.
9 MJ [Col SPATH]: Thank you.
10 ATC [LT MORRIS]: Nothing from the government, Your Honor.
11 MJ [Col SPATH]: Thank you. All right. This would
12 probably be a good place to take the first recess, and then we
13 will come back and take up with Appellate Exhibit 280. Let's
14 try to come back at 1030 or close to it.
15 Commission is in recess.
16 **[The R.M.C. 803 session recessed at 1021, 5 August 2014.]**
17 **[END OF PAGE]**
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