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1 [The R.M.C. 803 session was called to order at 1423,
2 5 November 2014.]

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

5 I should have identified -- I'm so used to trial
6 counsel identifying parties in the courtroom every time I
7 start something, I didn't even do it this morning. So we have
8 had some changes; I know we had somebody else identify
9 themselves earlier, Major McMillan. I will identify who is
10 here; there were some differences between the hearings when we
11 were here last in August and now.

12 Mr. Sher is here, Colonel Moscati, Brigadier
13 General Martins, then Major McMillan, Lieutenant Davis, and
14 Lieutenant Morris for the Government. And then on the
15 defense, we have Mr. Kammen, Major Dannels, Captain Jackson,
16 and Major Hurley for Mr. al Nashiri.

17 LDC [MR. KAMMEN]: Yes, Your Honor. Thank you.

18 MJ [Col SPATH]: Sorry, don't let me forget that again.
19 Like I said, I'm so used to trial counsel helping me out. You
20 reminded me of the other process, General Martins, don't be
21 shy. I know you're not. Let's make sure we keep track of the
22 record and know who's here.

23 Let's move on to 3- -- I know it was together on the

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1 scheduling order or docketing order, but I know the government
2 asked to argue 314 and 315 separate, which is fine. And then
3 315H was part of 315 as well, remember, so we can probably
4 deal with the 315 series together.

5 Defense counsel, I am going to start with you based
6 on how it is styled and then the government has the burden, I
7 realize, for a standard motion to suppress, I get that. And
8 the government has the burden to demonstrate voluntariness at
9 some point. I think everybody agrees with that.

10 But given where we are with this, I'm going to have
11 you all start talking about this particular motion to suppress
12 because of its timing and what you are arguing.

13 So focus on 314, which I know you are ready to do.

14 ADDC [Capt JACKSON]: Yes, Your Honor. I was going to
15 say, our arguments are largely similar in 314 and 315, so I
16 will start off with 314, and then you may just end up hearing
17 the same thing again in 315 or just ----

18 MJ [Col SPATH]: That's okay or we can -- I can keep it
19 separate. I will let you talk for a minute. I'm sure I will
20 have some questions.

21 ADDC [Capt JACKSON]: Yes, Your Honor. In starting with
22 314, 314 is the defense motion to suppress based on the
23 McNabb-Mallory standard. Generally what it does is renders

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1 inadmissible any confessions or admissions that are obtained
2 in violation of the presentment requirement.

3 Now, you were talking earlier about the standard of a
4 motion to suppress right now, and this is really just our
5 motion to compel the witnesses. Your Honor, this is a theme
6 that we talked about earlier today -- I'm trying to count how
7 many times and I cannot -- with the standard for compelling
8 witnesses in this tribunal.

9 We work in an adversarial system, and when there are
10 facts that are contested or when the parties, as we do
11 frequently, do not agree on what the underlying factual
12 circumstances are that form the basis of these motions, that's
13 where the witnesses come in. That's the way our system is
14 designed.

15 Specifically when it comes to this motion, we are
16 talking about the so-called clean team statements that were
17 taken by Mr. -- taken from Mr. al Nashiri in the
18 January-February 2007 time frame. And without getting into
19 the basis of the underlying motion and just trying to focus
20 right now on the witnesses, the defense has the burden to be
21 able to show the need for the witnesses right here.

22 But ultimately when are you looking at the
23 voluntariness, when you are looking at the facts and

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1 circumstances surrounding the level of detention that
2 Mr. Nashiri was receiving at a given time, when you are
3 looking at the manner in which the statements were taken, and
4 the totality of the circumstances, all of that lends to the
5 defense being able to call and question witnesses.

6 Now, in the government's brief, they make the
7 distinction of Mr. al Nashiri being held for crimes triable by
8 a federal tribunal as opposed to being held by a lawfully
9 detained law of war detainee -- or law of war detainee
10 lawfully held. And in order to be able to flesh out that
11 distinction, the defense needs to be able to call these
12 witnesses and ask what the circumstances were surrounding this
13 detention.

14 Now, one of the things that the government does in
15 their brief, Your Honor, is they compare the detention of
16 Mr. al Nashiri as to that of the Alvarez-Sanchez case, and
17 again, that is a factual determination in order to be able to
18 compare what was going on in Alvarez-Sanchez versus what was
19 going on with Mr. al Nashiri, not only in 2007, but in all the
20 times of his detention leading up to this.

21 Part of the government's argument is that there is a
22 distinction that, once he became in DoD custody, that it was a
23 different type of custody, but we need to know what were those

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1 circumstances. How were they different from the four years
2 that he spent in CIA custody? And the people that can tell us
3 that are the witnesses that we've identified.

4 Now, one of the other things that we have been seeing
5 in these motion to compel witnesses type of litigation is the
6 government is going to say, you know what, Your Honor, you
7 really don't need to hear evidence, you really don't need to
8 hear witnesses. Everything we say here, proffers by counsel,
9 you can do it on facts. However, if you are inclined to
10 disagree with this, then these are the witnesses that we are
11 willing to let the defense talk to right now. It is that very
12 one-sided sense of litigation that has been their strategy
13 throughout this entire proceeding.

14 They don't want to bring any witnesses or -- in this
15 case, and I will do a caveat, we understand many of these
16 witnesses are civilians and there are other means they can
17 testify. The defense, of course, would prefer live testimony,
18 as we believe that is more compelling; however, we understand
19 and we would be willing to accept the alternative of some sort
20 of virtual VTC-type testimony. So with that public disclaimer
21 out there, it seems that the government only wants to call the
22 witnesses that are the poster children for the RDI program and
23 for the FBI, the witnesses that are going to say the things

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1 that are beneficial to the government's case.

2 When we look to the actual witness requests that were
3 submitted by the defense for 314, focusing -- well, it was the
4 same witness request submitted for 314 and 315. But when you
5 are looking at the actual witnesses that the government agreed
6 that they were going to call and the ones that they said they
7 were not, well, the underlying justification for not calling
8 the Air Force OSI agent was that the testimony was going to be
9 cumulative.

10 Well, in this type of litigation where, as the
11 defense conceded in our brief, we have not had the opportunity
12 to exhaustively interview and talk to each of these witnesses,
13 we have no idea until they actually testify ----

14 MJ [Col SPATH]: Slow down just a lit bit.

15 ADDC [Capt JACKSON]: Yes, Your Honor.

16 MJ [Col SPATH]: Just a little bit, okay?

17 ADDC [Capt JACKSON]: It's flashing between slow down and
18 go.

19 MJ [Col SPATH]: That's okay. That is just a reminder to
20 slow down. It will flash for a little while, while they catch
21 up.

22 ADDC [Capt JACKSON]: We're talking about the cumulative
23 nature of certain testimony, Your Honor.

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1 Until the defense has had the opportunity to
2 exhaustively interview these witnesses that have not been made
3 completely available to the defense, we are not in the
4 position to judge what is cumulative at this point in time
5 until these people are called to testify or until we actually
6 hear what their testimony will be. And it is those types of
7 nuances and those types of details that are going to be
8 absolutely critical in demonstrating the totality of the
9 circumstances and the facts and circumstances surrounding his
10 detention and surrounding the statements that were taken.

11 If you look at the government's brief, numerous times
12 they reiterate the colloquy that happened between
13 Mr. al Nashiri and the people. And you know what, Your Honor,
14 I'm talking about the underlying brief of their response to
15 314, not their ----

16 MJ [Col SPATH]: I may have what they are saying wrong,
17 but it appears to me the government is saying the cart is a
18 little before the horse, presentment rights don't attach to
19 your client in the same way they would attach to somebody who
20 was apprehended by federal authorities ----

21 ADDC [Capt JACKSON]: Correct.

22 MJ [Col SPATH]: ---- because of his status. So while he
23 was in nonfederal custody and in DoD custody, where does this

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1 right to presentment come from? Legally, a law question as
2 opposed to a fact question, I think I have that right from
3 their side, where does that right come from?

4 ADDC [Capt JACKSON]: And, Your Honor, when you said a
5 second ago that he was not in federal custody, well, I think
6 that's an area ----

7 MJ [Col SPATH]: How about federal law enforcement?

8 ADDC [Capt JACKSON]: I think that is still an area of
9 contention between the parties, where if we would bring the
10 witnesses we would be able to ask these questions. If you
11 were doing this investigation, if you were doing this
12 interrogation, what was the means to the ends here? Is this
13 for something -- is this for a federal litigation? Is this
14 for the purposes of -- because if we are looking to ----

15 MJ [Col SPATH]: I believe -- I don't know if it is all of
16 these witnesses or some number of these witnesses, sooner or
17 later the burden is going to shift over to the government to
18 demonstrate the admissibility of their evidence. We are
19 heading towards that reasonably quickly.

20 They are going to have to demonstrate that any
21 statements taken by your client are admissible. And, again,
22 I'm not suggesting that we are going to talk Fifth Amendment
23 at the moment, but I know we are going to talk voluntariness.

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1 It is conceded as much in the briefs.

2 And so what I'm trying to figure out is this
3 presentment right, is it a question of law when presentment --
4 does it attach to an unprivileged enemy belligerent, and what
5 case says it does? And if it does, when does it attach?
6 Just, again, purely legal, not as it applies in this
7 particular case, not as it applies to your client, just as we
8 talk about the law and where we are at, does it apply to
9 unprivileged enemy belligerents?

10 ADDC [Capt JACKSON]: Well, Your Honor, I think that goes
11 back to the type of detention at the time. Or it is the
12 government's position that our client was detained for law of
13 war purposes and not for purposes triable by federal offenses.
14 And that there is a distinction there, Your Honor -- without
15 getting into the actual underlying merits, the distinction
16 there calls for not just proffer by counsel and saying, oh,
17 well ----

18 MJ [Col SPATH]: I agree. If it is a factual issue, more
19 than your proffer is required. If I'm reading the
20 government's response correctly, the government is just saying
21 we -- all we are saying, it is a question of law, and the
22 right to presentment attaches at a particular time that is
23 identifiable in the law; again, for anybody, not your client,

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1 just in a general sense, that right attached at a particular
2 point, and your client didn't have that right until charges
3 showed up in 2011.

4 ADDC [Capt JACKSON]: I think, Your Honor, they are saying
5 he didn't have that right and we are saying he did.

6 MJ [Col SPATH]: Then that's my question. So what law --
7 what case law or what law are you relying on where that right
8 attached before preferral of charges?

9 ADDC [Capt JACKSON]: I'm thinking the best way to respond
10 to actually answer your question, Your Honor, without
11 answering the merits and getting into the merits argument, but
12 I think it is a factual distinction in that given -- let's
13 see, how do I say this -- the evidence defense seeks to be
14 able to present through the witnesses would show that the
15 manner, the level of custody and what was going on at the time
16 would cause presentment rights to happen sooner rather than
17 when the government alleges they happened in 2011.

18 And I do believe it is a mixed question there, Your
19 Honor, because there is guidance out there that talks about,
20 you know, using the actual preferral of charges or, you know,
21 what happens with -- what happens at that moment of
22 attachment. But also I believe, based on the disagreement
23 between the parties of what the purposes of the detention was

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1 at the time, needs to be fleshed out before we are able to
2 actually get to that other question. Let me see if I can give
3 you an example, Your Honor.

4 At the time of -- generally speaking, if we've got a
5 detainee that is being held for law of war detention, and the
6 purpose behind those interrogations for that given amount of
7 time where he was in CIA custody -- we are not conceding to
8 this, but for intelligence purposes to keep that person off of
9 the battlefield so they just don't go and engage in
10 hostilities again ----

11 MJ [Col SPATH]: In accordance with the authorization for
12 the use of force?

13 ADDC [Capt JACKSON]: Correct. Correct.

14 MJ [Col SPATH]: Okay.

15 ADDC [Capt JACKSON]: But at the point where -- and
16 federal custody is federal custody, Your Honor, just -- that
17 is the defense's position, he has been in federal custody
18 since 2002, custody of the United States Government.

19 MJ [Col SPATH]: That is where I keep coming back to what
20 case are you relying on that suggests somebody captured -- I'm
21 not going to say on the battlefield -- somebody captured in
22 accordance with our use of military force authorization and
23 then held for a period of time before we even, by the way, had

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1 a commission process set up as we have seen -- I'm just trying
2 to figure out what you are relying on to get that right of
3 presentment to attach, that's all.

4 ADDC [Capt JACKSON]: Even before, when you said we had a
5 military commissions process, that he was already in United
6 States custody, and then that transfer that brought him to a
7 different type of United States custody, like what was the
8 purpose, being that he was arguably or assuming in this
9 case -- not that we are conceding this -- being held for those
10 purposes, law of war and detention.

11 At that point in that transfer when he was brought
12 here to Guantanamo Bay and interviewed again, after four
13 years, after all of that interrogation, at that point what was
14 the shift then where those rights did not attach? And you
15 really need to get into what was going on from the moment he
16 left the other custody, how he got here, what were the
17 conditions when he got here, where there was this shift where
18 all of a sudden the United States Government swoops in and say
19 we are different people, everything is cool, we are going to
20 take this additional statement. But apparently everything is
21 voluntary and ----

22 MJ [Col SPATH]: No doubt -- again, no concern about the
23 voluntariness. I think the government knows the burden

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1 ultimately, if those statements are coming here to be
2 determined, if they come into court or not -- or before the
3 commission or not, the government will have to demonstrate
4 they're voluntary. Lots of case law helping me with --
5 helping me to figure out voluntary or not. Mine is --

6 ADDC [Capt JACKSON]: We're not there just yet.

7 MJ [Col SPATH]: Right, working on the presentment piece.
8 You think it's a mixed question of law and fact as to when
9 that right attached.

10 ADDC [Capt JACKSON]: At the very least, Your Honor, yes.

11 MJ [Col SPATH]: And if the law -- if it attached, then it
12 was violated because there was no presentments ----

13 ADDC [Capt JACKSON]: Correct.

14 MJ [Col SPATH]: ---- until 2011.

15 ADDC [Capt JACKSON]: And, Your Honor, it's of note that
16 the presentment requirement is designed to protect exactly
17 what happened in this case. I mean, the United States
18 Government made a calculated, cold-hearted decision to try him
19 in a military commission, to not have him -- to not give him
20 his presentment rights after he had been in the United States
21 custody for that amount of time.

22 Like there was a lot of -- this was not a
23 spur-of-the-moment decision. There was clearly discussions

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1 and planning and calculation that went into what forum he was
2 going to be tried in, what rights were going to be there, and
3 how they could circumvent that system, because clearly they
4 were already -- slowing down -- in violation of the
5 presentment requirement because he had been in U.S. custody
6 for so long.

7 MJ [Col SPATH]: Well, that's certainly your argument. I
8 wouldn't say it is clear, that is why we are here.

9 Let me ask this: When we ended up with the Military
10 Commissions Act in 2006 in its current form -- I know it went
11 through some refocusing in 2009, but in '06 we have the
12 Military Commissions Act. Does that abrogate this whole
13 discussion of presentment rights because your client's
14 presentment rights are defined in the Military Commissions
15 Act?

16 ADDC [Capt JACKSON]: Well, Your Honor, they wrote the
17 statute to match what they were doing already. I mean,
18 basically they knew where they wanted these trials to be held.
19 They had the option of taking him to the Southern District of
20 New York. There was an indictment in the Southern District of
21 New York. The FBI did the original investigation where they
22 knew that there was a chance that this case was going to go to
23 the Southern District of New York, or at least some federal

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1 system, not a military commission system.

2 But in 2006, after he had been in U.S. custody for
3 four years, they had to fix it. They wrote a statute to match
4 the activity that had already gone on to make sure that he was
5 tried by a military commission and that everything that had
6 been done for the last four years could be blessed by the
7 government. And, of course, we would need to be able to
8 discuss that further, but right now we are talking about -- we
9 are sort of talking about witnesses. We are talking about
10 witnesses.

11 MJ [Col SPATH]: We are talking about production of
12 witnesses.

13 ADDC [Capt JACKSON]: Yes, we are talking about production
14 of witnesses.

15 MJ [Col SPATH]: On that issue, presentment. And then we
16 will talk about it in relation to Miranda in a minute.

17 ADDC [Capt JACKSON]: Correct, we are talking about
18 witnesses for presentment.

19 But some of the questions that need to be answered,
20 since it is the defense position that this is a mixed question
21 of fact and law, are, you know, the conditions of detention
22 prior to his statement. Like when he first arrived here, and
23 this has been in the briefs, it talks about the different

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1 commanders that were in charge in 2006, who left in 2006, who
2 got here in 2007 during the actual time of the statement.
3 And, you know, there are two different individuals, but the
4 underlying purpose is still clear, that entire process defines
5 the conditions of confinement and the conditions of the
6 detention, the type of detention that Mr. al Nashiri was in
7 when he got here in 2006 and at the time in 2007.

8 I stated earlier the purpose behind the statement,
9 like why was this interrogation done. It was done with an eye
10 towards litigation and what that looked like, what types of
11 discussions were going on as to where this man was going to be
12 held, where he was going to be tried. At what level of the
13 hierarchy or the pecking chain was actually giving those
14 orders. Was it the people that were actually in the room
15 taking the clean team statements?

16 And if so, we don't want to just hear from the poster
17 children, the ones who have been the face of the validation of
18 this process the entire time. Those are the people that the
19 government wants to give us. That's the testimony that, oh,
20 okay, we don't think that they need testimony, but if you
21 think that they need evidence, here, put these people on.
22 That's not the way that this litigation should go, and it's
23 not the standard that should be set forth in deciding who gets

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1 to come as witnesses here on out through the rest of this
2 litigation. It's the people that have been hidden, have been
3 pushed to the background, that have not been able to speak and
4 whose statements are not on the record that are going to
5 really be able to shape what that detention looked like, what
6 that interrogation looked like and the other discussions that
7 were going on outside of that room. Because it wasn't just
8 limited to discussions that were in that room with
9 Mr. al Nashiri at that given time. It is everything that led
10 up to the calculus of getting him there at that moment.

11 I think I already talked about the government's
12 argument that these witnesses are going to be cumulative, but
13 ultimately, Your Honor, we need the witnesses. In order for
14 us to actually shape what the facts look like here, we need
15 the witnesses, and not just the witnesses that the government
16 wants to give us. We need to be able to put these people on
17 the stand. It is -- the hallmark of our adversarial process
18 is to be able to cross-examine these witnesses; that we are
19 not just getting up here relying on certain papers and -- it's
20 motions, it is motions hearings, it is motions practice.

21 So we are able to do this right now and get the
22 actual landscape of his type of detention, the conditions of
23 the confinement before we even get to voluntariness, and what

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1 was going on to show that we believe that the presentment
2 rights attached long before those charges were referred in
3 2011.

4 MJ [Col SPATH]: Okay. Thank you.

5 ADDC [Capt JACKSON]: That's right.

6 MJ [Col SPATH]: We will come back to 315 in a minute. I
7 know they will be similar, but ----

8 ADDC [Capt JACKSON]: Okay, Your Honor.

9 TC [MR. SHER]: Your Honor was right, this is a question
10 of law. The underlying defense motion presents a question of
11 law, and the answer to that legal question is the same in
12 military commissions as it is in federal civilian courts. No
13 accused ----

14 MJ [Col SPATH]: Let me ask this -- is there any
15 dispute -- I made comments about voluntariness, assuming you
16 are going to offer some of these statements -- is it CSRT?

17 TC [MR. SHER]: Yes.

18 MJ [Col SPATH]: ---- to CSRT or clean team members,
19 whatever you call them, would you agree that you all have the
20 burden to demonstrate those statements are voluntary in
21 nature?

22 TC [MR. SHER]: Yes, the government has the burden to
23 demonstrate the voluntariness in this context. That only

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1 comes up in the presentment context if there was some
2 presentment violation or not.

3 MJ [Col SPATH]: Correct, okay.

4 TC [MR. SHER]: Which there's not.

5 MJ [Col SPATH]: Assuming there's not, no dispute,
6 ultimately the burden shifts to you to demonstrate
7 voluntariness and admissibility of your evidence.

8 TC [MR. SHER]: Correct. The government has the burden to
9 demonstrate voluntariness, that's absolutely correct.

10 MJ [Col SPATH]: Okay.

11 TC [MR. SHER]: The Supreme Court established a
12 bright-line test, Judge, Your Honor, and that is a duty to
13 present a person to a federal magistrate does not arise until
14 the person has been arrested for a federal offense.

15 And in all of the presentment cases, it all revolves
16 around when the accused is arrested and charged with a federal
17 offense. And in this context, the accused was detained in
18 federal custody pursuant to the AUMF, not charged. There is
19 no dispute -- actually no dispute the accused was in federal
20 custody in 2007 when he was interviewed by law enforcement.
21 There is no dispute the accused was not charged with a federal
22 crime in 2007 and there is no dispute the accused was not
23 presented to a federal judge in 2007. There was no one to

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1 present him to. He was being detained under the AUMF, not
2 pursuant to charges where he could be presented on them.

3 Because there -- because those facts are not in
4 dispute, there is no need, there is no relevance to any
5 witness testimony. No amount of witness testimony can change
6 the analysis.

7 MJ [Col SPATH]: He was presented to the CSRT in 2007, do
8 I have that right?

9 TC [MR. SHER]: Correct, Your Honor.

10 MJ [Col SPATH]: That was as an unlawful combatant.

11 ATC [MR. SHER]: That's correct, Your Honor.

12 MJ [Col SPATH]: Okay.

13 ATC [MR. SHER]: The defense put a good amount of time
14 talking about how some of the witnesses they requested are --
15 they can't possibly be cumulative, but defense did not talk
16 about how those witnesses could have a positive impact on the
17 defense's presentation of the issue and how it could help Your
18 Honor resolve the question, the legal question presented by
19 the defense.

20 The defense team didn't seek to interview those
21 witnesses, but the defense has sought to interview other
22 witnesses. And they have, in fact, interviewed those other
23 witnesses, some of them twice. They could have sought to

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1 interview some of these other witnesses to see if there was
2 anything helpful, anything relevant, and they didn't. In this
3 context, there is nothing relevant.

4 Again, Your Honor, in 2007 the accused was in federal
5 custody as a law-of-war detainee pursuant to AUMF does not
6 create presentment rights and that lawful detention does not
7 prevent federal investigators from meeting with the accused.
8 There may be other processes available to the accused if he
9 wants to challenge or at that time he wanted to challenge that
10 detention.

11 MJ [Col SPATH]: You guys talked about habeas rights.
12 There had to be some habeas rights because I have seen habeas
13 petitions. I have been reading a lot of them recently.

14 TC [MR. SHER]: That's correct. The CSRT was another
15 process which the accused participated in relating to his
16 detention at that time. So he was -- the accused was lawfully
17 detained, not charged with federal crimes, and there was no
18 presentment rights attached at that time. Thank you.

19 MJ [Col SPATH]: Captain Jackson?

20 ADDC [Capt JACKSON]: Yes, Your Honor.

21 MJ [Col SPATH]: In general, I don't need a list, but have
22 you been able to or have you had access to interview any of
23 the clean team members?

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1 ADDC [Capt JACKSON]: That was part of the thing that I
2 was going to say, Your Honor. So clean team members -- and I
3 don't know if we should go into specific ones we have already
4 spoken with. Yes, we have ----

5 MJ [Col SPATH]: You have had some ability ----

6 ADDC [Capt JACKSON]: We have had some ability to
7 interview members, some members of the clean team.

8 Just in general to respond to, you know, the
9 government's assertions about who we have and have not
10 interviewed, if Your Honor would like an ex parte presentation
11 of what witnesses we have attempted to interview and the
12 responses we have gotten, how many walls that we have run
13 into, be it intentional or just unavailable, the defense would
14 be very happy to provide that to you, Your Honor. And so
15 witnesses that the defense has talked to and not talked to is
16 not for a lack of trying.

17 In addition, for the witnesses that the defense has
18 talked to -- and I'm not saying that they should not be there,
19 that the government, the prosecution, should not have a
20 representative in the room during those witnesses -- witness
21 interviews. It is defense position we prefer to do those
22 witness interviewed without the government present. Not only
23 for the obvious reasons, Your Honor, but in addition because

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1 even having certain representatives from the prosecution team
2 present, they have caused certain interruptions in our work,
3 in our witness interviews, where witnesses have been directed
4 not to answer certain questions, and what they would and will
5 not answer. And these witnesses -- not because the witness is
6 unable to or unwilling to answer the question, but because
7 interference from third parties that have been present in
8 those interviews.

9 So there are certain interviews that have been done,
10 to what extent, multiple times, how granular the details are
11 because -- I mean, Your Honor, you have been present in many a
12 witness interview, and the devil is in the details. And when
13 you can actually drill down to those details, it can make a
14 night and day difference in your case. Those are the types of
15 details that we have not been able to get for a number of
16 reasons, some because the witnesses have refused to meet with
17 us, and some because there has been interference with the
18 witness interviews themselves.

19 So going back to the definition or the question of
20 whether or not he was arrested or charged, again, Your Honor,
21 there is much more that goes on in the determination of
22 whether or not he was being held for federal offenses rather
23 than when the charges came out, and those are the questions

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1 that we want to be able to ask those witnesses.

2 Subject to your questions, Your Honor.

3 MJ [Col SPATH]: No, thank you.

4 ADDC [Capt JACKSON]: Thank you.

5 MJ [Col SPATH]: Government, any follow-up?

6 TC [MR. SHER]: No, Your Honor.

7 MJ [Col SPATH]: All right. Don't go far, you are back
8 for 315. This turns to witness production, and the witness
9 production has to do with whether or not Miranda attached.

10 ADDC [Capt JACKSON]: Correct, Your Honor. And, Your
11 Honor, the defense would like to incorporate all its previous
12 arguments for 314 into 315.

13 MJ [Col SPATH]: I understand.

14 ADDC [Capt JACKSON]: That may streamline this process
15 just a tad bit.

16 But in terms of Miranda ----

17 MJ [Col SPATH]: Any -- and, again, probably you all feel
18 like I'm asking you more questions this time. I know the last
19 time it was the opposite. Most of these motions you've got
20 the burden on, at least at this point; that is probably why
21 you are getting more questions.

22 ADDC [Capt JACKSON]: Okay, Your Honor.

23 MJ [Col SPATH]: The question again is going to be about

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1 case law or something developed particularly -- does Miranda
2 apply to unlawful belligerents? And that's because the
3 government's position is again, a question of law, we are not
4 there yet. They have the burden if the statements are
5 voluntary or not whether or not they are admissible, we
6 conceded that we talked about it. But where there is no
7 attachment, where there is no right to a Miranda warning, how
8 can Miranda attach?

9 ADDC [Capt JACKSON]: Well, Your Honor, one of the -- some
10 of the people we wanted to talk to in our motion to compel
11 witnesses were -- it rotated around or revolved around the
12 Bybee memo, and the questions while they were actually going
13 through this process as to whether or not Miranda even
14 applied, and in reading all of this documentation, you will
15 see that there were certain facts and circumstances,
16 standards, you know, certain ways that this memo should be
17 applied, and it didn't get applied the way it should have in
18 this case.

19 We have examples of, you know, the lead agent that
20 was over this entire investigation who was giving Miranda
21 warning in Yemen at the time of the offense. So then you
22 fast-forward to 2007, and after all of this back and forth,
23 seeking guidance and, you know, it is laid out very plainly,

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1 we want to know why they didn't follow their own guidance. We
2 want to be able to ask those questions. We want to be able to
3 flesh out the distinction between Mr. al Nashiri and the
4 circumstances that are set up in the Bybee memo.

5 Because again, what we have here is a calculated
6 decision at the highest levels to avoid federal courts at all
7 costs so that none of these protections applied, and we need
8 to be able to explore that in order to be able to meet the
9 bare minimum of our level of representation in this case, be
10 able to explore why they didn't follow their own guidance.

11 And if they get to set up the guidance, then decide
12 they are just not going to follow it, which is another theme
13 that we -- that seems to be pervasive throughout this entire
14 case, we need to be able to hold them accountable for it and
15 be able to ask those hard questions that the government
16 doesn't want asked.

17 And, again, Your Honor, this is the types of details
18 that we really need to be able to get into to actually
19 litigate the underlying motion of 315. I mean, the Miranda
20 standard, once we get there, is a totality of circumstances so
21 that's a very fact-intensive type of inquiry. And we have
22 identified specific witnesses that have knowledge in their
23 areas of expertise that can go towards those details that we

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1 need.

2 Again, it is not just the witnesses the government is
3 willing to bring forth, it is not just the poster children of
4 the RDI program and Mr. Nashiri's detention. It is the
5 witnesses that got pushed to the side that they don't want us
6 to hear from them.

7 MJ [Col SPATH]: I will say this, I have benefit in my
8 divided brain -- I have been through a lot of the 505 stuff.
9 I can assure you all are getting information on the
10 non-poster-children of the program. I know that for a fact,
11 just because I'm working through that process.

12 So our fault because we haven't gotten that
13 information to you, we are working to do that. But the
14 government -- again, I don't want to get into the matters -- I
15 have the benefit of knowing they are identifying people who
16 would not be described, I don't think, as the poster children
17 for the process.

18 My focus again is nothing in the Military Commissions
19 Act suggests that Miranda applies. Do we agree with that? Or
20 we don't? By its own terms -- by the terms of the statute,
21 Miranda -- and I'm using that as the rights we are all
22 familiar with, because while it is a totality of the
23 circumstances analysis, the Supreme Court has made Miranda a

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1 fairly black and white experience, right? I mean, if you are
2 in custodial interrogation, your right to Miranda attaches,
3 and then the wording of the rights pretty well spelled out,
4 everybody has a card with those rights on them.

5 But here we are dealing with a different issue; and
6 that is, again, voluntariness. Got it. Ultimately the
7 government has to demonstrate that. Whether that is easy or
8 difficult, they will figure it out.

9 But where do you get your client's Miranda right?

10 ADDC [Capt JACKSON]: Well, Your Honor, you just brought
11 something to mind that answers in a roundabout way your
12 question about custodial interrogation. And we believe that
13 we fall outside of the auspices of -- the government's
14 response was that there is no custodial interrogation that
15 warrants -- as defined by Miranda in this case. And that,
16 again, is a factual inquiry.

17 MJ [Col SPATH]: But they don't rely, though, on a factual
18 inquiry. They rely on, based on the definitions provided by
19 the statute in 2006, your client's status as determined by the
20 CSRT as an unprivileged enemy belligerent, Miranda doesn't
21 apply. So again, it is a straight-up question of law, so no
22 witness is necessary from you-all and no witness necessary
23 from you-all. It is just a legal analysis for that question,

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1 the motion you filed. I mean, that is the government's
2 position, I'm pretty confident.

3 And so that is what I'm trying to figure out, is
4 where do you get the -- where in the law, where in the case
5 law, where in the law are you finding Miranda rights attach to
6 your client?

7 ADDC [Capt JACKSON]: But, Your Honor, it was the
8 government's deliberate intention to circumvent the system to
9 avoid the attachment of Miranda rights in this case.

10 MJ [Col SPATH]: But they gave -- I mean, maybe. I don't
11 know.

12 ADDC [Capt JACKSON]: We will be able to flesh that out
13 with the witnesses, Your Honor.

14 MJ [Col SPATH]: But they gave your client rights in the
15 sense statements have to be voluntary before they are
16 admissible, and voluntariness is defined as a totality of the
17 circumstances. It looks a lot like what the Fifth Amendment
18 looked like, and does look like, though we don't say Fifth
19 Amendment rights. I'm trying to figure out what rights they
20 were trying to avoid.

21 ADDC [Capt JACKSON]: Your Honor, they specifically
22 avoided certain rights of Mirada, like telling him he has the
23 right to a lawyer, for instance, which is a huge one

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1 considering if we get into the merits that Mr. al Nashiri,
2 even in the colloquy that they included in their briefing, was
3 saying he knew the legal process was going to start, that he
4 was interested in the legal -- he wanted a lawyer. And so if
5 we want to talk about what they were trying to not give him,
6 that was a glaring omission that really needs to be fleshed
7 out.

8 Subject to your questions, Your Honor.

9 MJ [Col SPATH]: That's it. Thank you.

10 ADDC [Capt JACKSON]: Thank you.

11 MJ [Col SPATH]: Trial Counsel.

12 ATC [LT DAVIS]: Your Honor correctly characterizes the
13 government's argument at this stage with regards to the motion
14 to compel witnesses. This is simply a question of whether
15 Miranda rights -- or whether Miranda is required for unlawful
16 enemy belligerents in Guantanamo Bay. It is a black-and-white
17 issue. It is a legal issue.

18 And Your Honor has all the resources before him that
19 he needs in order to resolve this important question. Your
20 Honor has the statute which provides clear language that
21 Miranda doesn't apply. You have the parties' pleadings. You
22 have the rules that sets out a test different than Miranda,
23 but rather one of voluntariness, a totality of the

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1 circumstances. Those are the resources that Your Honor should
2 focus on in resolving this purely legal question.

3 Witnesses are not needed. Witnesses are only needed
4 when there is factual disputes, and the only relevant fact on
5 this issue is whether Miranda rights were given or not. And
6 the parties don't disagree about that. Miranda would require
7 that he be notified of his right to counsel, of his right to
8 remain silent and that his statements could be used against
9 him in court. The government concedes, both parties agree he
10 was not advised of his right to counsel. While the government
11 certainly argues that these were voluntary statements within
12 every meaning of the word, it did not meet the Miranda
13 requirement.

14 So the question that Your Honor has to answer is
15 simply whether Miranda is provided to law of war detainees in
16 Guantanamo Bay. That is a legal question that does not
17 require -- does not require witnesses.

18 The defense seems to be extending the scope of this
19 argument, wants to have more of an argument, call witnesses to
20 discuss voluntariness. As Your Honor correctly pointed out,
21 that is really a question for another day. The government
22 does have that burden, the government will prove that these
23 statements were absolutely voluntary; that the accused agreed

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1 to meet with the law enforcement agents; that the accused was
2 given breaks, told that the law enforcement agents were at his
3 pleasure. This was a voluntary statement. But, again, that
4 is a question for another day, a question that the government
5 will answer in due time.

6 Now, to get to the -- and perhaps to explain how this
7 truly is a question of law, getting into a little bit of the
8 substance on AE 315, the defense is asking the commission to
9 find a Miranda right, and it does that despite clear language
10 in the statute as well as the M.C.R.E. and the fact that --
11 also despite the fact that no commission or court has ever
12 found that Miranda rights applied to unlawful enemy
13 belligerents in Guantanamo Bay.

14 Your Honor asked the defense what their authority
15 was, where do they find the authority to say that Miranda
16 applies. And if Your Honor -- I fully expect that you have --
17 if Your Honor reads through the statute, you will find no
18 reference whatsoever to Miranda. The applicable section being
19 section 948r which talks about the statements need to be
20 probative, they need to be reliable, and they need to be
21 voluntary. You do not see any of the Miranda language
22 included in that particular aspect.

23 We talked about -- we talked earlier about a DoD

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1 directive, and Mr. Kammen suggested that the people who wrote
2 that were big boys and girls, and if they wanted to include
3 certain language in there, they would have included it. The
4 same rule applies to Congress. This is a simple question of
5 statutory interpretation. If Congress had intended to include
6 Miranda rights, they would have done so explicitly. In this
7 situation, they did not. It is not just that they were silent
8 on the issue.

9 Going to -- going to section 948b(d), this is where
10 Congress, through the statute, says that certain rights that
11 would be applicable at courts-martial are not going to be
12 applicable in military commissions. Specifically addressed in
13 that are Article 31(b), I think 31(a), (b) and (d).

14 So what you have Congress saying specifically is that
15 rights against self-incrimination, those type of rights, 31(b)
16 rights, are not required, are not applicable. So if those
17 rights therein contained -- specifically 31(b), the right to
18 remain silent, the fact that your statements can be used
19 against you -- if those aren't applicable, you can never have
20 Miranda warnings because Miranda requires both of them, both
21 of those things in addition to.

22 So what we are really doing here is we are reading
23 the statute as a harmonious whole, and you will see throughout

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1 the statute that there is an indication, a strong indication,
2 clear language that Miranda rights do not apply.

3 There is one more example which is in -- and this is
4 all cited in our brief, Your Honor, but section 949a(b)(3),
5 that is what gives the Secretary of Defense the ability to
6 create rules that would allow for the admissibility of
7 statements even if they are the subject of compulsory
8 self-incrimination.

9 Well, those two things just aren't consistent. You
10 can't argue that there is no Miranda rights and then that
11 Congress specifically said, Secretary of Defense, you can
12 create rules that would completely undermine that. Those two
13 things are not consistent. We have to read the statute as a
14 whole. The indication is clear that Miranda was not
15 contemplated.

16 So to overcome that, given that there is no clear
17 language, given that there is no statutory support for
18 Miranda, the defense would need to raise a constitutional
19 challenge. And again, this goes to Your Honor's question of,
20 well, what authority do you have to say Miranda applies? We
21 didn't get much of an answer on that. And that is, frankly,
22 because there isn't. In the defense's brief, they refer to
23 Boumediene. Boumediene is a narrow case that only extended

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1 the rights to habeas. Our Superior Courts have consistently
2 limited Boumediene just to that fact and not extended any
3 additional constitutional rights to Guantanamo Bay detainees.

4 But perhaps even more importantly, another canon of
5 statutory interpretation is constitutional avoidance, that
6 Your Honor doesn't need to reach a question of the Fifth
7 Amendment when the statute itself provides all of the due
8 process rights that the accused requires to have a fair trial.
9 Those are included. There is the right against compulsory
10 self-incrimination, and there is a whole host of rights that
11 will ensure that; so, therefore, you don't reach that
12 constitutional question.

13 So what have I been talking about? I have been
14 talking about the law. I have been talking about the statute,
15 a little bit about Boumediene, a little bit about the
16 Constitution. These are questions of law, they are not
17 questions of fact.

18 The government fully expects there will be
19 evidentiary hearings in the future to discuss voluntariness,
20 to discuss whether, under the totality of the circumstances,
21 these statements were voluntary. That point is not now. Your
22 Honor can find as a matter of law Miranda does not apply in
23 military commissions under the clear language of the Military

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1 Commissions Act.

2 MJ [Col SPATH]: Thank you.

3 Captain Jackson.

4 ADDC [Capt JACKSON]: Thank you, Your Honor.

5 Your Honor, the prosecutor said it very aptly. He
6 said what am I talking about up here. He was in the merits,
7 and we are not there. Right now we are talking about ----

8 MJ [Col SPATH]: I think, to be fair, he was in the law
9 of -- that's what I'm trying to figure out is what witnesses
10 can help me when the prosecution -- I think he just said it,
11 no Miranda rights were given, your client was never
12 Mirandized. I think everybody on the government side would
13 nod their head in agreement, never Mirandized.

14 And so what question -- what can the witnesses assist
15 me with on that issue when they have agreed, no, Miranda
16 rights weren't given? So the Military Commissions Act is the
17 first place I'm going to look, isn't it?

18 ADDC [Capt JACKSON]: Yes, Your Honor. But there is also
19 other guidance out there that was given to them at the time
20 such as the Bybee memo and asking those questions as to, well,
21 if this was the guidance that were given, why was this
22 guidance no longer followed? And we don't have the answers to
23 that, Your Honor.

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1 So even in the government's brief, they go into the
2 fact that Mr. al Nashiri was not in custody for purposes of
3 Miranda and what the facts look like for custody as
4 purposes -- custody for the purposes of, you know, Miranda,
5 where Miranda would apply. My wording is very off when it
6 comes to that right now.

7 And they go into the facts of that or the types of
8 inquiry that would need to be done, the facts that you would
9 have to find. Again, Your Honor, those are facts. And so
10 they want to say, oh, this is purely a question of law, ignore
11 the Bybee memo, ignore why they didn't ask Miranda -- didn't
12 give Miranda rights, ignore all of those other things because
13 you can answer this without the facts. Which is not the case,
14 because in their next -- in the next part of their brief, they
15 talk about, oh, but, Your Honor, if you get to the facts,
16 these are the things you would need, and the defense doesn't
17 meet its burden as far as these facts are concerned. And
18 those are the things that we need answered in order to go
19 forward.

20 An assertion that he wasn't in custody for purposes
21 of -- wasn't in custody for Miranda to apply, we said in our
22 brief it is clearly absurd. And the government comes back and
23 they talk about the types of circumstances that would warrant

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1 it and why Miranda protections apply in certain circumstances
2 and how those circumstances and those facts don't apply to the
3 custody that our client was in at the time. Now, we can't
4 jump to that type of conclusion in saying that he doesn't meet
5 that standard if we are not able to flesh out what was going
6 on at the time and everything surrounding that actual
7 interrogation.

8 They talk about, you know, the shock factor and
9 pressures to be to be released. Well, if we look to what was
10 going on at the time our client went from secret custody for
11 four years, whisked down here to Guantanamo Bay to this new
12 set of people that are coming in and saying, hey, we are your
13 friends, we are at your pleasure, come talk to us. And one of
14 the issues is whether or not he should feel any type of
15 compulsion to talk to them based on the fact that he might get
16 out; that after all of these years of being held incommunicado
17 and being tortured, physically, emotionally, sexually,
18 everything else that happened ----

19 MJ [Col SPATH]: That is a great argument.

20 ADDC [Capt JACKSON]: This is out.

21 MJ [Col SPATH]: That is a great argument when we get to
22 voluntariness, so I would keep that one. That is a good
23 argument. Again, I am not ruling on anything, just I would

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1 make the same argument when you get there. That is all to do
2 with voluntariness.

3 The government conceded, again, no Miranda rights
4 were given here. So I'm trying to figure out what question of
5 fact I'm looking at. Maybe what I'm hearing is, based on the
6 conditions here, it was custodial interrogation.

7 ADDC [Capt JACKSON]: Correct.

8 MJ [Col SPATH]: And so I should look into that. But
9 then, of course, my question is: Even if it is custodial
10 interrogation in the sense that he certainly wasn't free to
11 leave and they were asking questions that may have been
12 intended to elicit an incriminating response, do the rights
13 attach to an unprivileged enemy belligerent subject to the
14 commissions? Do they?

15 And can I figure that out from the law or do I need
16 the facts for that, because all of that has been conceded?

17 ADDC [Capt JACKSON]: Your Honor, I guess whether or not
18 he was subject to the military commissions or subject to a
19 Federal Court like the Southern District of New York ----

20 MJ [Col SPATH]: But he is not -- he was not. I
21 understand that he was named as an unindicted co-conspirator.
22 I got that. But he didn't go there. He came here.

23 ADDC [Capt JACKSON]: And that is the calculated decision

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1 that they made, Your Honor, in order to fix all of those
2 underlying problems; for instance, the presentment issue, the
3 Miranda rights, they wanted to avoid all of that. They wanted
4 to avoid federal court at all costs. And in order for us to
5 be able to even get that on the record at this point in time,
6 we need those witnesses.

7 MJ [Col SPATH]: Okay.

8 ADDC [Capt JACKSON]: Thank you, Your Honor.

9 MJ [Col SPATH]: Final comments?

10 ATC [LT DAVIS]: Yes, Your Honor. I believe it goes
11 without saying, out of an abundance of caution, the
12 commission -- I believe the commission understands our
13 argument is this gets resolved as a matter of law, Miranda
14 does not apply under Military Commissions Act. If, however,
15 Your Honor does find that Miranda applies, then the government
16 would raise a question, a factual question as to whether the
17 accused was in custody which would require an evidentiary
18 hearing, the taking of testimony.

19 But there is no point in taking that testimony,
20 calling witnesses, if Your Honor, as you should, finds that
21 Miranda does not apply in this context ----

22 MJ [Col SPATH]: That is how I took your brief. Position
23 number one, Miranda is irrelevant for what we are doing here

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1 in these commissions. That is your first position, I assume?

2 ATC [LT DAVIS]: Yes, sir.

3 MJ [Col SPATH]: If I were to find Miranda somehow
4 attaches or somebody is entitled to Miranda rights, then we
5 are going to have to deal with factual issues, underlying
6 conditions of custody, if there was even custody.

7 ATC [LT DAVIS]: Correct, Your Honor.

8 MJ [Col SPATH]: That is how I took your motion.

9 ATC [LT DAVIS]: Thank you.

10 MJ [Col SPATH]: You are welcome, thank you. All right.

11 We still have a bit to go, and I'm hoping there is
12 going to be some discussion on the Skype issue. Strongly
13 hoping that we can get a little resolution.

14 LDC [MR. KAMMEN]: Your Honor, we attempted to have a
15 discussion at the recess and trial counsel indicated that they
16 weren't prepared to discuss it at that time.

17 MJ [Col SPATH]: All right. And, again, I think the issue
18 is if we can come to agreement, great, we can deal with it
19 tomorrow. If we can't, understand it will be on the docket in
20 December -- December, an order to follow. And I don't know
21 the identity of the one witness, but I made clear that the
22 person who made that comment certainly would be somebody I
23 think I need to hear from, and then somebody who is --

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1 understands why those particular restrictions are put on HVDs.
2 And it has to be a person who is well situated to talk about
3 it, and I don't know who that is.

4 LDC [MR. KAMMEN]: Again, I appreciate the commission's
5 position. In federal court, given the representations they
6 met, we would be allowed to subpoena Admiral Cozad, and that
7 would be the witness we'd like.

8 MJ [Col SPATH]: Again, I understand. You were going to
9 say?

10 TC [MR. SHER]: Your Honor, the government needs some time
11 just to identify who those people are. That is all we
12 expressed to counsel earlier.

13 MJ [Col SPATH]: Got it. That's why I didn't -- I don't
14 know if we can get there tomorrow or not, I understand that.
15 It's just that we are here; I'm trying also to continue to
16 move forward.

17 I don't want to come back tomorrow if we don't have
18 to. On the other hand, I'm not comfortable we will get
19 through everything. Because we still have arguments on 319,
20 320, 321.

21 LDC [MR. KAMMEN]: 277.

22 MJ [Col SPATH]: 277, and I believe that's it. I'm just
23 trying to figure out the wisest way forward. I know

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1 Mr. Taylor is going to have a conversation with the government
2 because we have gone through so many of your submissions. I
3 want that conversation to happen, too, because that will move
4 that process along pretty well, and we will finish up, I think
5 everything that we have, I'm hoping, tomorrow afternoon and
6 Friday. But I think having the conversation now will help you
7 kind of see just what issues there are and, frankly, not very
8 many. All right. Let's go a little out of order.

9 I believe the arguments on 320 should be pretty
10 short, and that has to do with halting the process of
11 authenticating the transcript. So who's got that one?

12 Mr. Kammen.

13 LDC [MR. KAMMEN]: Let me be as brief as possible.
14 Military lawyers tell me that in the normal military case,
15 this process would take place at the end of the proceedings.
16 For reasons that are completely unclear, all of a sudden there
17 has been all this, we have to have this done. Nobody has
18 explained to us why there is any importance to this. There
19 doesn't appear to be any importance to it. We can't see any
20 importance to it. And to be quite frank, we don't have the
21 resources to do it.

22 And I'm going to be as blunt as I know how to be. If
23 you want to have hearings, we are happy to have hearings. If

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1 you want us to authenticate a transcript, we are happy to
2 authenticate a transcript. But we can't do both. We don't
3 have the bodies. This is the stuff that lawyers need to be
4 doing, the people who are part of the hearings need to be
5 doing it. If I argue the motion, then that's -- it makes
6 sense for me to authenticate that part of it; if Captain
7 LaSalle or Captain Jackson argued a motion or Major Danel's or,
8 when he comes back next week, Commander Mizer.

9 So we can all spend our time going over there and
10 doing all of this, and if we don't have hearings in December,
11 we can maybe get it done. But if we are going to have
12 hearings in December, we aren't going to go over there and do
13 motions and authenticate transcripts. We just don't have the
14 resources and the time to do it.

15 And I'm happy to make a further showing to you in
16 camera and ex parte, but, you know, we have huge
17 responsibilities with respect to our obligations to litigate
18 things. You want to keep things moving, and we understand
19 that, and so, you know, we just can't do it all.

20 And they've got 10, 15 lawyers on their team. As
21 best as we can count, I can identify 12 lawyers who are
22 presently part of the prosecution team. They come and go. We
23 don't see them all at the same time. You know, we have to be

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1 here every time, we have to be involved all the time, there is
2 four and a half of us right now, soon to be five.

3 We've got the CMCR next week, that has been a huge
4 undertaking. We don't know what is going to come as a result
5 of that. We have matters pending in federal courts because
6 there are some serious questions about legitimacy of the CMCR
7 and we are trying to litigate those. I mean, we just don't
8 have the time, Your Honor.

9 Like I said, I'm happy to make an in-camera, ex-parte
10 showing of the reasons.

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

12 ATC [LT MORRIS]: Your Honor, good afternoon.

13 MJ [Col SPATH]: Good afternoon.

14 ATC [LT MORRIS]: For the context of those that may not
15 understand this pleading, may not have read it, the pleading
16 comes out of the Convening Authority and Office of Court
17 Administration's responsibility that they will maintain and
18 create a complete record of trial.

19 MJ [Col SPATH]: No doubt about that. No doubt about
20 that. Is there anything -- I'm reading the rule. I assumed
21 it matched, it does very closely, the rules for court. I know
22 why we had to authenticate based on the arguments with what
23 was dismissed, there is no doubt about that because we had to

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1 get that portion of the record up for the appellate court.
2 That's easy, I don't think there was any dispute over that
3 fact.

4 I guess the question is -- you also practice in the
5 military. You know that, in large part, we do the records
6 post-event.

7 ATC [LT MORRIS]: Correct, Your Honor, yes.

8 MJ [Col SPATH]: So here now we are starting to do the
9 record mid event and I just -- you have a defense counsel
10 saying we don't have the time right now. Isn't this something
11 we could all agree on and go, no, you don't have the time
12 right now, as officers of the court and because this is
13 becoming a trust zone, whether you two like it or not, they
14 have said they don't have the time.

15 ATC [LT MORRIS]: And it's -- as Your Honor said,
16 typically this happens at the end of a trial. But if you look
17 at the rule, Rule For Military Commission 1104(a) it says it
18 shall be authenticated by the military judge who presided over
19 that portion of the hearing. So as of the summer ----

20 MJ [Col SPATH]: Right. So Mr. Pohl -- Colonel Pohl
21 clearly presided over a large portion of the pretrial motions.

22 ATC [LT MORRIS]: Right. So Colonel Pohl is no longer
23 presiding over the hearing, the convening authority is acting

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1 responsibly because the rule contemplates that it's possible
2 the military judge may not be able to authenticate that. So
3 what they did is they reached out to defense counsel again.
4 It really bears stating, it is a misstatement to say that in
5 the e-mail of the Office of Court Administration defense
6 counsel saying there is 4500 pages of transcript that need to
7 be authenticated, that that is the first time they've heard
8 about this.

9 They have continuously over the last 10 sessions,
10 after every session, when it was 100 pages post arraignment,
11 when it was 300 pages, when it was 600 pages, after every
12 hearing that we had, they were sent an e-mail saying that the
13 transcript is ready for you to review. Consistent with the
14 case law that we provided to you in U.S. v. Credit, it only
15 has to be a defense counsel present during that time, and that
16 person can go and spend a day or two authenticating the
17 transcript.

18 I've been involved in this process in the hearings
19 that I have attended, and I can attest that we have superb
20 court reporters that provide a superb product, and it helps to
21 do this soon after you are in the hearing because your memory
22 is jogged by reading it.

23 Defense counsel, with 10 of those invitations,

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1 including from last June until February of this year when
2 there was an eight-month delay for professional reasons,
3 another trial that learned counsel was on, for personal
4 reasons, any of the attorneys that were involved in any of the
5 hearings -- and we've looked back, and that was a minimum of
6 four attorneys at each of the hearings -- any of those could
7 have taken the one or two days to certify -- to have an
8 opportunity to certify that entire hearing.

9 And that's what the rules say. The rules say it, the
10 case law says it, the defense counsel, unless unreasonable
11 delay shall result, shall be given an opportunity, and they
12 have been given copious opportunities. They still are given
13 an opportunity now. They can still take part in this. But
14 they have put off every one of those invitations, haven't
15 responded to it, and are now asking for either a six-week
16 delay or asking for us to halt proceedings altogether is just
17 not an accurate or a reasonable request for relief based on
18 what the facts are before us.

19 And beyond that, the rules contemplate that if
20 defense isn't -- doesn't take advantage of that opportunity,
21 but later after trial counsel has reviewed the transcript,
22 after the military judge reviewed the transcripts, the rules
23 state defense can come back even after the authentication and

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1 provide an addendum to the transcript that goes up. And rules
2 contemplate that, case law contemplates that, and that's
3 additional opportunity if they choose not to take advantage of
4 this opportunity.

5 The government's position is the convening authority
6 is acting responsibly, we understand why they did what they
7 did. Now that Colonel Pohl is no longer involved, they took
8 it upon themselves to say, okay, now is an appropriate time,
9 he's finished presiding over this, to authenticate this
10 portion of the transcript. And defense counsel over the last
11 three years has chosen to not be involved in the process. But
12 at this point to say that they don't have the time is not a
13 fair representation of where we have been over the last three
14 years.

15 MJ [Col SPATH]: Were you you making an effort to
16 authenticate all through those three years?

17 ATC [LT MORRIS]: My understanding, and obviously this is
18 an e-mail that was provided from the OCA to defense counsel,
19 the government had already certified its part -- is that
20 anything that Judge Pohl was presiding over, per the rule,
21 that they would now seek to authenticate that part ----

22 MJ [Col SPATH]: I understand that.

23 ATC [LT MORRIS]: ---- authenticate that.

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1 MJ [Col SPATH]: I understand. I'm saying when you did
2 the arraignment, I understand that a record was prepared, but
3 was the record sent to defense counsel for authentication at
4 that point?

5 ATC [LT MORRIS]: Because of -- yes, Your Honor.

6 MJ [Col SPATH]: Reading and certifying for eventual
7 certification?

8 ATC [LT MORRIS]: Because of the classification nature of
9 some hearings, there was an e-mail sent by the OCA in late
10 2011 post arraignment saying here's the way forward. We
11 encourage you to take advantage, we are going to let you know
12 after every hearing that ----

13 MJ [Col SPATH]: The record is there for review.

14 ATC [LT MORRIS]: ---- available, come into our location,
15 we are not going to be able to send them out to you. And we
16 will accommodate you as you need to be accommodated, send one
17 attorney that was there at the hearing to take part in this.

18 And they received e-mails from ----

19 MJ [Col SPATH]: I understand that. My question is: At
20 that point, were they being told we are going to authenticate
21 the record prior to the proceeding completing?

22 ATC [LT MORRIS]: Not authentication because at that
23 point, obviously, Colonel Pohl ----

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1 MJ [Col SPATH]: Colonel Pohl was still going to stay on
2 the case.

3 ATC [LT MORRIS]: ---- was going to preside.

4 Correct, Your Honor.

5 MJ [Col SPATH]: Okay. So whether or not they should or
6 shouldn't have taken advantage of reading it to certify it
7 through the process, it just seems to me it changed a little
8 bit with Colonel Pohl departing the case and myself being
9 detailed to the case, and that is, now we are going to
10 authenticate all that has gone before, correct?

11 ATC [LT MORRIS]: That is correct.

12 MJ [Col SPATH]: So here is what I'm asking, and this
13 is -- I understand capital litigation is contentious, I do.
14 We are not going to be done with this in six weeks or 12
15 weeks, frankly, maybe probably not 18. You get the idea.

16 And so the defense has said, can we have just a break
17 in authenticating this? Can't you-all go to the commission
18 and go -- nothing to do with whether they should or shouldn't
19 have, right now is a busy time.

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

21 MJ [Col SPATH]: And the defense feels overwhelmed because
22 they have the appellate process going on, and yes, I guess,
23 they are challenging the makeup of the appellate court as

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1 well, fine. You all have the appellate process going on. And
2 we are here over the next few weeks, because we are here now
3 and we are going to come back early December.

4 I'm just asking, if we come down here and we get on
5 the record and fight about some of this stuff, is this going
6 to make a difference in the processing of this case if the
7 defense is given for this six or 12 weeks, as opposed to,
8 gavel down, we are finished, and the defense says, "It will
9 take me two years to read it, I can't get it done." What are
10 we talking about? That is what I'm asking.

11 ATC [LT MORRIS]: Yes, Your Honor. The government
12 understands Your Honor's position. What we are stating ----

13 MJ [Col SPATH]: It's not a position yet.

14 ATC [LT MORRIS]: What we are stating, what we needed to
15 respond to was what we considered to be an inappropriate
16 request for relief that we would somehow come to an all-stop
17 at this point because they failed to take any advantage of any
18 of the opportunities.

19 MJ [Col SPATH]: Well, an all-stop in the proceedings or,
20 hey, give us time to read the record and we will get it done.

21 ATC [LT MORRIS]: The government is heavily leaning that
22 it is inappropriate to consider all stop. If Your Honor ----

23 MJ [Col SPATH]: I think you can tell a little bit about

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1 where I'm going. I would rather not stop the process. What
2 I'm trying to say is do I have to enter an order or is this
3 something that you-all can approach the OCA with, look, here
4 is where we are at, not getting done anytime soon, Colonel
5 Pohl is not going away anytime soon, he is tied up in his own
6 litigation, can the defense just have some extra time? Is
7 there a reason the whole thing needs to be authenticated for
8 everything Colonel Pohl was on in the next six weeks? Maybe
9 the answer is yes and I'm missing something.

10 Here is really, no kidding, what I'm asking, and both
11 sides do this. Today, when you-all had an issue about
12 medication, frankly, you-all should approach the government
13 and talk to the government, see if that could be resolved.
14 I'm glad it got resolved through my use, and you-all frankly,
15 when you heard that somebody had apparently told
16 Mr. al Nashiri that he was going to get a call home, you
17 should have told the defense and it might have changed the
18 defense's tone and tenor in how they took the news when they
19 heard the news.

20 You all can talk off the record about stuff that
21 seems reasonable -- and this is not because of the Skype call
22 comment. I don't think you all could resolve that one without
23 some help from me and probably not without some more help.

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1 Some of this stuff it seems you can resolve. We are not going
2 to stop. This process needs to move along. Your client wants
3 it to move along in some respects just because being dragged
4 over here to go through the process. It can't be fun. The
5 people here want it resolved. The government wants it
6 resolved, I know that.

7 There is a pressure to get this resolved. So if the
8 defense comes to you as officers of the court and say, look,
9 we need six weeks or 12 weeks, we will read it and get it
10 authenticated, can't you all go to the commission and see if
11 the OCA will give us a hand and waive it without me having to
12 get involved and enter an order? It is just a question.

13 ATC [LT MORRIS]: Certainly. And the government's
14 response, the government partners with Your Honor's sentiment
15 that partnership and cooperation between the parties on issues
16 we can agree with is something that we have been involved with
17 and we are committed to. But when defense's pleading requests
18 an all-stop, then it is incumbent upon the government to
19 suggest and to ----

20 MJ [Col SPATH]: Absolutely.

21 ATC [LT MORRIS]: ---- present before Your Honor the
22 correct facts and say that is not the correct relief they are
23 asking. But as to what Your Honor is stating, the government

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1 hears what you are stating, and certainly there are more
2 pressing things than this. However, the rule does ----

3 MJ [Col SPATH]: I'm not saying it is not pressing. I'm
4 not saying the rule doesn't allow it. I'm not saying I don't
5 understand it. Colonel Pohl is off the case and two years of
6 delay or a year of delay, it is going to be harder for him to
7 authenticate the record. Time will go by, no doubt about
8 that.

9 All I'm saying, given right now the litigation pace
10 seems a little high because of the appellate process and
11 because of the times we are set to come down here over the
12 next couple of months, and frankly at the end of January as
13 well, we are at a high litigation pace. Is there some wiggle
14 room on the part of the OCA or is there not, and they are
15 going to require me to enter an order on this, in which case I
16 will.

17 ATC [LT MORRIS]: Understood.

18 MJ [Col SPATH]: That's all. Thank you. And not picking
19 on your presentation. I understand what you are saying, I do.

20 Mr. Kammen, anything else?

21 LDC [MR. KAMMEN]: Very briefly. I really do hear what
22 you are saying about the need to communicate, and the only
23 thing I would say to you is this: You have been involved in

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1 this case for six months or less.

2 MJ [Col SPATH]: Less.

3 LDC [MR. KAMMEN]: We've been dealing with this
4 prosecutor's office and the OCA for as much as four or five
5 years. And the history of this litigation has been the
6 default position of this prosecutor and the default position
7 of the OC -- of the Office of the Convening Authority is no.

8 And frankly, given the hoops we have to jump through
9 to accomplish anything, it is proven -- now maybe there will
10 be a change with some change in personalities, but I'm
11 skeptical. It has proven to simply be a waste of time because
12 you go and they say, well, we will get back to you and then
13 it's, oh, no. So then you've just wasted the time.

14 So it needs to be -- for example, Captain Jackson,
15 you know, was very delicate about the interviews. But the
16 interviews, we spent -- people from our team spent days with
17 the prosecutor saying to FBI agents, don't answer that
18 question, that is out of bounds, exactly the kind of stuff we
19 will be fighting about in 319.

20 And so, you know, again, the default position of
21 these guys has been no, and after a while you just figure
22 well -- so I hear what you are saying. We will try to do
23 better for our part.

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1 But you do need to understand that what we see
2 publicly, what the public sees and what occurs in this
3 courtroom -- you know, they go out and say this is all
4 wonderful and good, and in the courtroom it has absolutely
5 been scorched earth for the last four years. And so that's --
6 you know, that's the back story. And that's part of the
7 reason that you are coming into this and it is so unimaginably
8 contentious.

9 The other thing is the Office of the Convening
10 Authority is very much part of the prosecution team, and their
11 default position has been no and, you know -- and has been to
12 put up impediments at every stage rather than assist us. So,
13 you know, part of the reason we don't have the time to mess
14 around with the record is because everything takes so much
15 time, and, you know, that's just the fact.

16 Now, let me be real clear, and I think you can see
17 this. I don't see the litigation -- you know, once we get
18 into next year, I don't see it slowing down. And so, you
19 know, nobody wants to hear this, but if you are going to say
20 this authentication in six months is really important, let's
21 do it now, let's just get it done. Forget about December, you
22 know, we will do what we need to do to get it done and then it
23 will be done. Because it is not going -- we are not going to

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1 have more time once we get into these other issues, and that's
2 the only thing I wanted to say is, you know, we can see the
3 handwriting on the wall.

4 We are getting into the major, huge, complicated
5 issues that are going to take -- given their lack of
6 resources, we have extraordinary amounts of time and
7 commitment. We are not going to have the time to go running
8 over there for a day or two. You know, he makes it out like
9 take a day or two. We don't have a day or two to spend
10 dealing with that. We just don't, and I don't see that
11 happening in the next -- in the foreseeable future.

12 So we understand your position. We will try to do
13 better. I don't -- you know, until somebody explains to us
14 what the rush is, you know, our time is best served if we are
15 going to go forward, going forward with litigation, not going
16 forward with this other stuff.

17 MJ [Col SPATH]: I agree with that.

18 LDC [MR. KAMMEN]: That is all.

19 MJ [Col SPATH]: Thank you.

20 LDC [MR. KAMMEN]: I'm standing here because I'm not sure
21 which one you will do next.

22 MJ [Col SPATH]: I was going to see if trial counsel has
23 any final comments.

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1 ATC [LT MORRIS]: Nothing based on that, Your Honor.

2 TC [MR. SHER]: Your Honor.

3 MJ [Col SPATH]: Mr. Sher.

4 TC [MR. SHER]: Regarding the commission's admonition
5 regarding the Skype issue, the government learned yesterday it
6 needed time to investigate it to look into what the details
7 were, frankly, would be imprudent for us to go running to
8 defense before we learned what was happening ----

9 MJ [Col SPATH]: Not an admonition. Not an admonition.
10 An understanding likely, if that event happened, the person
11 best situated to know about it was their client, and likely he
12 was going to share that with his counsel. We all know that
13 just from normal practice. I know things here aren't always
14 as normal, but he was probably going to share that with his
15 counsel. So his counsel was going to hear about it.

16 And these are opportunities for you -- capital
17 litigation -- again, you all have more experience, I
18 understand that. But capital litigation is almost always
19 contentious, no doubt about that. And it is an adversarial
20 system. We heard that earlier, yes, it is. But we've always
21 prided ourselves on some of the civility that is hard to get
22 to here sometimes. And that is why I gave both examples to
23 show both sides can work a little harder -- not an admonition.

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1 I mentioned to them about the medication this morning, the
2 best place really to go was to you all. I didn't have to do
3 anything. I just asked you guys to do it and it got done.

4 But because of the -- this is not pointing fingers --
5 the fractious relationship which is apparent in the 4500 pages
6 that I have read -- I've read some portions much closer than
7 others, but because of that, it is difficult for both of you
8 to kind of do that. I think you can do it on some of the
9 smaller issues.

10 I'm not suggesting we are going to come to agreement
11 on Skype calls. I'm not suggesting we are going to come to
12 agreement on who needs to be here for voluntariness. I got
13 that. That is why I get to sit here and I will figure all
14 that out. But I'm suggesting there are minor things we can
15 come to agreement on probably without the commission being
16 involved. Then you all can build enough of a relationship so
17 that this is ----

18 TC [MR. SHER]: A trust zone.

19 MJ [Col SPATH]: A trust zone, there it is. And there is
20 always going to be contention, no doubt about it because your
21 two sides are diametrically opposed to what you want at the
22 end of this. Got it.

23 TC [MR. SHER]: We agree. There is no need for

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1 unnecessary contention ----

2 MJ [Col SPATH]: That is what I'm after.

3 ATC [MR. SHER]: ---- talk to them.

4 MJ [Col SPATH]: That is what I'm after; no adversarial,
5 no admonition, not a critique, and it is observing, after a
6 short period of time. Here again, I spent a lot of time
7 reading it, and you can see some of the fracture and it is not
8 that you-all need to always get along. It is just that we
9 can -- both sides indicated a desire to move this case
10 forward. And frankly, this case has been -- whatever process
11 we are going to go through, it needs to move forward because
12 it has been there for a long time. Lots of people, all
13 involved in this, probably deserve some closure. That is all
14 I'm saying.

15 TC [MR. SHER]: Thank you, Your Honor.

16 MJ [Col SPATH]: All right. 321. Let's deal with 321.
17 Then we will probably break to deal with -- the hearsay
18 discussion might take us a while is why I'm pushing that off.
19 Not only the arguments behind it, but then if we start
20 discussing how we are actually going to proceed with
21 evidentiary hearings and the like.

22 LDC [MR. KAMMEN]: So you are clear, we think there are
23 things to discuss before we get to the discussion of how to

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1 proceed.

2 MJ [Col SPATH]: I do.

3 LDC [MR. KAMMEN]: As you can tell, the fractiousness
4 extends in large measure to what we see as the prosecution's
5 lack of good faith compliance with their discovery
6 obligations.

7 MJ [Col SPATH]: So I envision that the hearsay piece is
8 going to take some time tomorrow. What I would like to do, I
9 want to spend more time. That's the motion I spent the least
10 amount of time on. I just haven't dug into that one as much
11 as would I like to before we talk about it, and I also want to
12 give you all a chance to meet with Mr. Taylor, talk about the
13 stuff that you need to talk about with the classified
14 disclosures.

15 And I would like you-all -- again, we may not be able
16 to deal with the evidentiary hearing, but you-all may be able
17 to talk and at least start to figure out is there any
18 agreement or -- and if there is not, that's fine. I can issue
19 an order as to who has to be here. Maybe you-all can talk and
20 come to even small pieces of agreement, and it still may
21 require an order. Got it. But I would like all that to kind
22 of happen tonight so I know the status so we can deal with
23 that.

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1 Let's talk 321.

2 ADDC [MAJ HURLEY]: Yes, sir. And certainly to go over
3 for my own sake and yours and the benefit of everyone else,
4 321 is a motion filed by the government, they were asking
5 you -- sir, can you hear me okay?

6 MJ [Col SPATH]: I can. I'm good.

7 ADDC [MAJ HURLEY]: Fine. Okay.

8 They asked you to review and submit a questionnaire,
9 to review a questionnaire, and ultimately to submit that to
10 the members that are on the current Military Commission
11 Convening Order.

12 MJ [Col SPATH]: Yes.

13 ADDC [MAJ HURLEY]: In turn, we've asked for a delay in
14 responding to the motion itself to AE 321. And more than that
15 four-week delay, a larger delay in responding to this notion
16 of a questionnaire, whether or not now is the appropriate time
17 for you or this commission -- either of the parties or this
18 commission to take up the notion of a questionnaire.

19 So what we would say is that we've talked a lot --
20 first off, now that we've reviewed sort of the standing, Your
21 Honor, I'm happy to hold myself out in this dawning era of
22 comity between the parties, that if there is a discussion the
23 government wants to have as to how we want to structure this

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1 questionnaire and over the course of some months because we
2 are not backing off on the need for a longer time to respond
3 to this, we're certainly happy to do that and to reach some
4 sort of negotiated settlement with respect to this particular
5 issue. But while we are here and while it is on the docket,
6 we will respond.

7 MJ [Col SPATH]: I assume your -- I mean, the basic is a
8 little premature on the questionnaire, given that we are not
9 quite here with court members yet, and we still have some
10 hearings that we have to deal with with voluntariness, we have
11 evidentiary hearings. We have a number of things that are
12 going to take a few trips down here; is that fair?

13 ADDC [MAJ HURLEY]: Yes, sir, that is fair. I think that
14 adequately states where we are at just because it deals with
15 what -- how we are going to draft, and you know, sir, as an
16 experienced advocate, as all of us know in this room, that
17 what we know about the entirety of the evidentiary picture
18 informs even, you know, the questions that perhaps aren't even
19 related to it.

20 It is of a piece, and as we are talking about the
21 clean team statement, you know, and if we are going to -- we
22 will no doubt on the questionnaire, as we will do in our
23 extensive attorney-conducted voir dire, we are going to have

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1 questions about that confession.

2 Now we have motions out there right now questioning
3 the legitimacy and admissibility of that. There is one motion
4 that we have all recognized that is to come with respect to
5 its voluntariness. And if we followed the government's
6 timeline, if we included in the questionnaire now, if we
7 responded inside of a month, it is going to have a question to
8 the effect of -- don't hold me to this -- if someone is
9 tortured and then they confess, does that give you some
10 question as to the voluntariness of that confession.

11 Obviously, I have never been great at drafting voir dire
12 questions, I have been told time and again. But the substance
13 of it is there, and it is important and would be important to
14 include in the questionnaire.

15 MJ [Col SPATH]: The evidentiary landscape is likely going
16 to shape some of the voir dire.

17 ADDC [MAJ HURLEY]: Absolutely.

18 MJ [Col SPATH]: Fair statement? I hope all sides agree
19 with that.

20 ADDC [MAJ HURLEY]: I think the evidentiary landscape --
21 or the defense contends that the evidentiary landscape should
22 also affect this questionnaire. Because it is implicit ----

23 MJ [Col SPATH]: That is what I meant. I was including

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1 this in voir dire just because the members are all going to
2 fill this out. I assume we all anticipate member
3 questionnaires are a good way to go in this particular case.

4 ADDC [MAJ HURLEY]: Absolutely, sir, and another
5 assumption, operating assumption from the defense perspective
6 is, sir, that we want to limit the number of times we submit
7 questionnaires. So it can't be that we are -- good news,
8 members, it is Monday and you get your 35th questionnaire as
9 part of your duties in U.S. v. Nashiri.

10 That is not -- that is not the way to go, certainly
11 not what either party wants, and why we believe that a delay,
12 an extensive delay, is appropriate. Your Honor, we
13 anticipate -- and what I don't want you to hear from the
14 defense is that there is no solution.

15 We anticipate -- again, this is not -- this is if we
16 can't negotiate a settlement between the parties, but we
17 anticipate there will come a time where there is an 85 to 90
18 percent solution as to what evidence is going to be admitted
19 to the members, and as we complete that evidentiary picture,
20 you and both parties, primarily the government, are going to
21 be involved in an extensive discussion about how the members
22 will be administered here on Guantanamo Bay as they are
23 participating in this case. That is the time, sir, we would

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1 submit to you that, again, if we just have to resolve 321 in
2 the pleadings, that's the appropriate time to resolve it.

3 And, sir, just to continue on, again, if we had to
4 submit questions to the government now, you know, one question
5 or a series of questions would be about potential witnesses
6 that we would list, because that is what is required. We
7 would have to say what witnesses do we want to call. There
8 are a goodly number of witnesses we will want to call that
9 will be known to the members: President Bush, Vice President
10 Chaney, Secretary Rice, Chief of Staff of the Vice President,
11 David Addington; and the list goes on. And all those
12 individuals have done us the favor, have done the public a
13 favor of drafting an autobiography.

14 So they have sought the attention of the public, they
15 may well have it. And in gathering information from potential
16 members as to what they think of those individuals is going to
17 be -- is going to be important. And those are the sorts of
18 questions that we would want to submit and to have on the
19 questionnaire.

20 MJ [Col SPATH]: It would seem this is probably a great
21 way to capitalize on the discussion we just had. The case we
22 talked about earlier that I'm dealing with, Robins, those
23 parties have only been battling one another for a little over

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1 a month and a half. So their relationship is young, and they
2 are in that early stage. They came to me with a pretrial
3 order, the government submitted the order, defense objected.
4 I asked them if they could work it out, and lo and behold they
5 came to me with an order and I signed the order. And it was
6 remarkable that it didn't actually require a whole bunch of
7 time on the record.

8 And I see that with the questionnaire. There are a
9 lot of red lines between what could be asked and couldn't be
10 asked, but I think there could be discussions between the two
11 sides to see if there is any comity, any common ground, any
12 areas of agreement while I figure out what an appropriate time
13 is for when the questionnaire should be due. It was due under
14 the old litigation schedule. The old litigation schedule, it
15 can't possibly be in existence right now because we are
16 sitting in November, discovery is still open because we are
17 dealing with the 120 issue -- we are getting it out now, and I
18 don't know how much more is coming -- and then we have the
19 rendition and Senate report discovery issue.

20 Maybe there is not a whole bunch more to come. Maybe
21 it's all cumulative, I don't know. I'm waiting for the
22 government in those updates. But all that is driving this a
23 little bit to the right, by definition, so it makes sense that

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1 the questionnaire timing would go to the right. It should be
2 that easy. And then you-all can see if you can come to any
3 agreements on the questionnaire submitted to me; and if you
4 can, I am happy to work through and discuss voir dire
5 questions.

6 ADDC [MAJ HURLEY]: Yes, sir, if I may tax your
7 patience ----

8 MJ [Col SPATH]: Sure.

9 ADDC [MAJ HURLEY]: ---- just to put one additional bit of
10 information and that is we have been granted a jury
11 consultant. And that person has yet to come fully up to speed
12 with respect to read-ons and security clearance she has to do.
13 That is a significant factor that we wouldn't like to go
14 forward, any farther forward than we are now until she is
15 fully up to speed, can participate with us.

16 MJ [Col SPATH]: Who granted that? Did the OCA grant it?
17 It wasn't granted by the court.

18 ADDC [MAJ HURLEY]: As I understand, it was granted by
19 Colonel Pohl.

20 MJ [Col SPATH]: Granted by Colonel Pohl -- I've got nods,
21 okay. I promise, I read the 4500 pages, but some is more
22 relevant to what we are talking about here. In others, it is
23 a lot of reading to back and forth with ----

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1 ADDC [MAJ HURLEY]: Yes, sir. Adding that to the
2 complexity or ----

3 MJ [Col SPATH]: Sure.

4 ADDC [MAJ HURLEY]: ---- to the equation as we work to
5 resolve this. Sir, do you have any other questions? I think
6 that concludes my remarks with respect to AE 321A.

7 MJ [Col SPATH]: I don't.

8 Trial Counsel, any comments? You get this one.

9 ATC [Maj McMILLAN]: Good afternoon, Your Honor. Yes,
10 sir, I have this one. We submitted AE 321 because of the
11 previous established milestones. So from our position, it was
12 reasonable to go ahead and submit a proposed members
13 questionnaire, keep this trial moving forward or keep moving
14 towards trial with this in light of the previous exchange that
15 you've had on AE 320 with the defense counsel.

16 We are -- we can submit a proposed questionnaire if
17 we have new milestones, and that is what we are asking for at
18 this point. We have started this dialogue with the
19 questionnaires over a year ago, and we would like to continue
20 the dialogue and reach a proposed members questionnaire. That
21 facilitated the reason why we're here and the reason why we're
22 litigating this.

23 MJ [Col SPATH]: Absolutely. And you've heard -- if they

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1 have a jury consultant, that will impact what their
2 questionnaire -- I would think they are going to get some
3 input on what their questionnaire, slash, voir dire would look
4 like, and I think we should give them that opportunity since
5 we gave them the jury questionnaire -- I mean, we gave them
6 the jury consultant.

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

8 MJ [Col SPATH]: And I haven't been asked to reconsider
9 that. That seems to be moving forward at this point. We
10 should give them that opportunity at this point.

11 The evidentiary motions -- I think everyone agrees
12 the evidentiary motions are going to drive the substance of
13 what we are going to ask members, is that fair, something we
14 can agree on?

15 ATC [Maj McMILLAN]: I think we can agree on it to the
16 extent you have seen in the red-lined edits, we do -- the
17 filing from the government, we do have a disagreement on that
18 as to how case-specific information needs ----

19 MJ [Col SPATH]: Absolutely. The format, the -- yes, the
20 formulation of the question and the wording you can use, no
21 doubt there is going to be some dispute.

22 But I just -- in a general sense if, for example, the
23 clean team statement comes in, probably they are going to want

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1 to talk about the concept of that statement in a general
2 sense.

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

4 MJ [Col SPATH]: And vice versa. If it doesn't come in,
5 probably all of you are going to have to change how you ask
6 questions based on kind of what the state of the evidence is.

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

8 MJ [Col SPATH]: That is all I'm saying, not specific
9 questions. In a general sense, the landscape that we go
10 through here over the next few months as we resolve all these
11 outstanding motions is ultimately going to impact what voir
12 dire looks like in this case.

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

14 MJ [Col SPATH]: And I owe you a realistic litigation
15 schedule. I know that. The problem has been trying to get
16 one. We can put out a marker like we tried do, I can do that,
17 and it promptly falls apart as things come up.

18 Great example, not a critique, the appellate issues
19 going on now that we have on the motion to dismiss. If the
20 District Court steps in because of the federal litigation and
21 disbands the appellate court, and then they are working on
22 redetailing that appellate court, that process is not going to
23 happen very quickly, is my guess. Do you know what I mean?

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

2 MJ [Col SPATH]: There is a lot of outstanding markers
3 that will impact the litigation schedule, because we can't do
4 anything with the issue of the Limburg. No issues with that,
5 it is just that we are on a hold for that, and I don't know if
6 that hold is, hey, next week the appellate court will hear it
7 and we're going to get a ruling, or that hold is, oh, next
8 week we will not hear arguments on it, we will go back to,
9 what we're going to do is to have an appellate process, then
10 hear arguments on it maybe, and maybe appeal from that. That
11 is all I'm saying; it is difficult to give a realistic
12 litigation schedule, but I owe you one.

13 All I'm asking, if you all can start a dialogue on
14 what voir dire -- some things you already know what it is
15 going to look like. There's some basic questions you're going
16 to ask every court member that comes in here: Political
17 leanings, where they have been assigned, family structure, all
18 the like. Bumper stickers on the car, I got it. I just think
19 if you-all can start working towards that, understanding a new
20 date is going to come out with voir dire, at least the
21 questionnaire should be submitted to the commission. Make
22 sense?

23 ATC [Maj McMILLAN]: Yes, Your Honor, we will continue to

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1 work on it and await that deadline you are going to set, sir.

2 MJ [Col SPATH]: I think next week will help us. We'll
3 have a better idea of what holdup -- how much time we'll have
4 with the appellate litigation sometime next week. I hope that
5 will give us a better idea. As the 120 stuff comes through
6 and gets turned over to the defense, that will start moving
7 that issue off of holding us up into something that is moving
8 us forward. And the hearsay motions that we are going to talk
9 about tomorrow will also help us figure out kind of our road
10 ahead in regard to that litigation, which is probably going to
11 be a couple of sessions down here, at least.

12 All right. Any other comments?

13 ATC [Maj McMILLAN]: No comments.

14 MJ [Col SPATH]: Thanks.

15 Trial Counsel, start time tomorrow? 9:00 seems to
16 work well. I don't know if there is any -- and I will ask
17 over here? Absolutely.

18 [Counsel stepped away from podium; no audio]

19 LDC [MR. KAMMEN]: Those consultations were less than
20 fruitful. They were certainly cordial.

21 MJ [Col SPATH]: Cordial is all we need. Cordial is good.
22 I'm going to leave you to see if you can be more fruitful
23 while we're on recess. Does 9:00 work tomorrow? I don't know

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1 if that time is very good, or if you want it earlier or later.
2 9:00?

3 TC [MR. SHER]: That works for us.

4 MJ [Col SPATH]: 9:00, okay. We will come out and deal
5 with hearsay at 9:00, and I'd like an update if we have had
6 movement whether or not we can come to any agreement before I
7 issue an order. That order won't take me long to issue once I
8 depart here once I get an agreement. I would like to see
9 where we are at. 277K, thank you, we will deal with that
10 tomorrow as well.

11 General Martins.

12 CP [BG MARTINS]: Your Honor, I wasn't clear on your last
13 comment about issuing an order. Was that relating to ----

14 MJ [Col SPATH]: The Skype issue and the evidentiary
15 hearing. If we can't come to any agreement, I'm going to aim
16 to make that one early so we deal with that one next in
17 December. I want -- that one needs to be off the docket. We
18 have had it on the docket for a long time.

19 All right. I will see you all tomorrow morning at
20 9:00. We are in recess.

21 [The R.M.C. 803 session recessed at 1611, 5 November 2014.]

22 [END OF PAGE]

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