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1 [The R.M.C. 803 session was called to order at 0905,
2 6 November 2014.]

3 MJ [Col SPATH]: The commission is called to order. All
4 the parties who were present before our recess last night are
5 again present.

6 TC [MR. SHER]: Your Honor, the United States needs to
7 place on the record that these proceedings are being
8 transmitted back to the United States.

9 MJ [Col SPATH]: Thank you.

10 TC [MR. SHER]: Also, the government today is being
11 represented Brigadier General Mark Martins, Colonel Moscati,
12 Lieutenant Brian Davis, Major Winston McMillan, and myself,
13 Justin Sher. Lieutenant Paul Morris is not here today.

14 MJ [Col SPATH]: Oh, I missed one. You're right. Okay,
15 thank you.

16 TC [MR. SHER]: Lastly, the United States Government
17 would like to provide you with an update on AE 284. And
18 Colonel Moscati will provide that update.

19 MJ [Col SPATH]: Great. Good morning, Colonel Moscati.

20 DCP [COL MOSCATI]: Good morning, Your Honor. Again,
21 Judge, can we ask that you account for the accused's presence?

22 MJ [Col SPATH]: I did it yesterday. Do you want me to
23 do it every day? No?

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1 CP [BG MARTINS]: Just on the record today, the accused
2 is present.

3 MJ [Col SPATH]: The accused is present. If he was not
4 present, I thought we were going to demonstrate a process if
5 he was not present. I will try to figure out how to keep
6 everybody happy. If he's not present, I'll make sure we do an
7 inquiry every single time, all right?

8 LDC [MR. KAMMEN]: And if he's not present, we'll tell
9 you.

10 MJ [Col SPATH]: I'll notice.

11 Colonel Moscati.

12 DCP [COL MOSCATI]: Thank you, Judge. I would like to
13 update the commission on the status of the 284 motion. We
14 have had consultation and discussion with the defense
15 attorney, Mr. Kammen, and have learned some new information as
16 well, Judge, as you asked yesterday.

17 The Government, Judge, has been going through a
18 long review of the conditions in the camps, and obviously ----

19 MJ [Col SPATH]: Government being big Government, as
20 opposed to the prosecution team?

21 DCP [COL MOSCATI]: I've heard the term, sir, "big G."

22 MJ [Col SPATH]: All right. I just want to make sure --
23 so the government or the people who have been running the camp

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1 have been going through a review?

2 DCP [COL MOSCATI]: Yes. It's a continuous process to
3 ensure fair treatment and conditions and that the big
4 Government, the United States, takes those obligations very
5 seriously, Judge, and is always looking at how to improve
6 conditions under the various authorities that apply.

7 In doing that, Judge, there has been some change
8 and evolution of the communication capabilities at the camp
9 and what detainees will be permitted to do. I think you've
10 seen in the course of this litigation, Judge, from the
11 beginning, that's been ongoing, and it's, again, always to
12 improve conditions, if that can be done under the security
13 concerns and so forth in the camp.

14 So, Judge, we have learned there is a change in
15 policy, Your Honor, that is going to allow a direct
16 interactive communication between HVDs and family members.
17 That is expected to be operational and implemented by the end
18 of the year. And there certainly are technological aspects to
19 that, Judge, that have to be worked out, so that, you know,
20 could slide right a little bit, but that is the goal. It does
21 reflect a change in policy, again, to provide detainees, you
22 know, privileges that meet the requirements of the camp,
23 Judge, and that's really been a large part of the process.

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1 So in discussions with Mr. Kammen, Judge, I think
2 it's the recommendation of both parties that this motion be
3 held in abeyance until this is implemented. Again, we expect
4 that to be by the end of the year. We will keep updates to
5 the commission on that, but there would be no need to call
6 witnesses or continue litigating the motion.

7 MJ [Col SPATH]: Great. Thank you all for getting that
8 information. Let me see if Mr. Kammen has any comments.
9 Thank you.

10 LDC [MR. KAMMEN]: Certainly we agree that in light of
11 this, it wouldn't be a wise use of anyone's time to litigate
12 something that apparently is resolved.

13 There's two things I wanted to put on the record.
14 The first is several -- being involved in this litigation for
15 several years, one of the things I understand is that the
16 policy that exists today can change tomorrow. This is a
17 really, really big deal. Obviously, we've been litigating
18 this fiercely for six months or more. It's not a big deal for
19 the lawyers; it's a really big deal for the client, and it's a
20 really big deal for his family.

21 And in the way that this information helps morale,
22 attorney-client relationships, if there is a change in policy,
23 if all of a sudden somebody, somebody -- not these guys, I

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1 understand -- somebody else says, well, never mind, that would
2 be extraordinarily damaging. And I just think, you know, that
3 needs to be publicly stated so that -- one of the histories of
4 this is, well, we'll change things willy-nilly; and we can
5 speculate as to the reasons, but that would be a really big
6 problem. So I just wanted to -- I know there's nothing you
7 can do about it, nothing they can do about it.

8 The other thing is this -- and I take everybody
9 here at their word -- but in looking back at this, we're very
10 troubled by the October 6th filing which attributes certain
11 things to Admiral Cozad that, you know, if he said them, and I
12 assume he did, that's troubling because they're -- yeah, what
13 he said is this absolutely can't happen, and if they were
14 planning for it to happen, that should have been disclosed.

15 But there's no reason at this point to look back.
16 It's troubling. It's troubling that it's only after you grant
17 witnesses that -- and that's sort of typical of Guantanamo Bay
18 litigation, is that that happens. But we are where we need to
19 be. And so that's the important ----

20 MJ [Col SPATH]: And you agree with the proposal that we
21 hold the motion in abeyance?

22 LDC [MR. KAMMEN]: Absolutely. If this happens, we're
23 happy, and so ----

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1 MJ [Col SPATH]: All right. And so, Government, just
2 keep me posted on if it looks like it's going to be the end of
3 '14 or early in '15, and we'll just go with it.

4 LDC [MR. KAMMEN]: In the event it doesn't happen, then
5 we'll probably want to have a rather lengthy evidentiary
6 hearing as to both when this planning began and why it didn't
7 happen.

8 MJ [Col SPATH]: And I haven't issued a ruling. I was
9 getting close, obviously, so I think you have some idea,
10 absent a change in facts, where we were heading.

11 LDC [MR. KAMMEN]: Right.

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

13 LDC [MR. KAMMEN]: Thank you.

14 MJ [Col SPATH]: Government.

15 DCP [COL MOSCATI]: Judge, I just want to briefly
16 address the suggestion that anything changed because the
17 commission was close to a ruling. As I explained, Judge, this
18 has been going on for quite some time; months, if not a year
19 or more, Judge. This is something the United States decided
20 to do well before there was any litigation. It's been
21 ongoing, it's complicated, and if we need to drill down into
22 the timeline ----

23 MJ [Col SPATH]: We don't right now.

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1 DCP [COL MOSCATI]: ---- the policy was evolving and
2 going to change, and actually had changed prior to the last --
3 or yesterday's court proceedings.

4 I think the Judge also asked for an update on how
5 Mr. al Nashiri received notification and why.

6 MJ [Col SPATH]: That was going to be part of the
7 evidentiary hearing. I was going to grant that witness along
8 with at least one other, as I discussed yesterday. I believe
9 that that has been resolved by this.

10 DCP [COL MOSCATI]: It has been resolved, Judge.

11 MJ [Col SPATH]: I don't want to cause anybody any
12 grief. If it was on purpose, not on purpose, a mistake, not a
13 mistake, doesn't matter unless it comes before me as a motion.
14 I'm glad that big Government, the defense community and all
15 are resolving this in a way that causes me to be able to focus
16 on other motions. So hopefully that's the case and we'll move
17 forward and that -- it will be in abeyance, and ultimately
18 maybe it will be moot.

19 DCP [COL MOSCATI]: Thank you, Judge.

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

21 I think 277, is it Kilo, is next? And I don't
22 want to steal your thunder, I just -- I think I know the
23 landscape. You're welcome -- as you know, I'll give you both

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1 the opportunity to say all you want to. I know I'm not the
2 only person who's listening, so I recognize both sides.

3 But what I understand is now since I made -- we
4 had this discussion at the first motion hearing; and that is,
5 at least for expert assistance, you have to go to the
6 convening authority first. You went to the convening
7 authority, I believe in August, and there was a denial in
8 October.

9 LDC [MR. KAMMEN]: Correct.

10 MJ [Col SPATH]: And so part of your motion is now
11 coming to me to issue an order if I disagree with what the
12 convening authority has done. So I know you want to talk
13 about that.

14 The other question was the indifference to medical
15 care. Is that still something I should -- because I didn't
16 issue a ruling on that part of it yet; I just focused on the
17 convening authority process.

18 LDC [MR. KAMMEN]: Right.

19 MJ [Col SPATH]: Is that still part of this or ----

20 LDC [MR. KAMMEN]: Well, it is, but that would require
21 an evidentiary hearing, and that is sort of caught up in our
22 request to revisit 205.

23 MJ [Col SPATH]: All right. I agree. I think 205 is

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1 pretty clearly focused on the medical care, the indifference
2 to medical care allegation from you, and so I agree with you.

3 LDC [MR. KAMMEN]: And so part of the evidence, if we
4 are allowed to re-hear 205, is things that we -- you know,
5 we've learned essentially since, as a result of this, that
6 apparently -- and this is all we've learned from newspapers --
7 there was an MRI machine that was supposed to come to
8 Guantanamo, then about the time we filed the request for the
9 MRI, somebody made the decision, well, let's move it somewhere
10 else. So that strikes me as indifference to medical care, and
11 that would be among the things.

12 It would also -- there would also be evidence that
13 the failure to have an MRI machine, given the population in
14 Guantanamo, is -- represents the kind of indifference. And
15 there's just ample evidence that's now coming forward in Judge
16 Kessler's court and this court that Guantanamo, the medical
17 care in Guantanamo is -- has all kinds of permutations, many
18 of which are not driven by medical needs.

19 MJ [Col SPATH]: And I want to make sure, because this
20 is one of the motions where I have to make sure my brain is
21 well divided, because there are ex parte aspects to it that I
22 have now seen.

23 LDC [MR. KAMMEN]: Yes.

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1 MJ [Col SPATH]: The denial by the convening authority,
2 the government did get a copy of that, correct, the actual
3 denial?

4 LDC [MR. KAMMEN]: Yes.

5 MJ [Col SPATH]: Okay. I thought so. You had some
6 attachments to your request that were the ex parte piece.

7 LDC [MR. KAMMEN]: And those were on the
8 mitigation/justification side of it.

9 MJ [Col SPATH]: Yes. And so, good.

10 LDC [MR. KAMMEN]: And that's really what I want to
11 focus on. Because in the discussion we had earlier, as you
12 said -- I mean, I think we were on the same page -- this is a
13 pretty garden variety mitigation request in a capital case.
14 The importance of it, as we said to the convening authority,
15 and we cited a litany of cases in our request to the convening
16 authority, that part of our obligation under U.S. Supreme
17 Court precedent is to conduct a thorough and complete
18 mitigation evaluation.

19 And there is case after case after case after case
20 that has been reversed by the appellate courts because the
21 defense lawyers didn't do the thorough mitigation
22 investigation or made a request for resources that was then
23 denied.

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1 MJ [Col SPATH]: It was -- now that I've caught up in
2 reading on United States v. Witt, it was part of the initial
3 overturning of the sentence there.

4 LDC [MR. KAMMEN]: And that's one of the -- one of the
5 reasons I was glad that, you know, the defense lawyers at
6 Warner Robins asked you to read Witt, because those folks who
7 are not necessarily familiar with capital litigation don't
8 often understand the realities.

9 When this case is over, another group of lawyers
10 are going to come in, and they're going to review everything
11 we've done, and they should; and they're also going to review
12 everything the government has or hasn't done. And so what
13 happens when -- as what happened in Witt, where at least the
14 allegation was the defense had this information about his
15 motorcycle accident and made the decision, well, that can't be
16 important, here we are ten years later and it is really
17 important.

18 So the fact of the matter is that very often you
19 do things and make requests for resources both to dot the I's
20 and cross the T's, but it is professionally irresponsible not
21 to. And frankly, with all respect to the convening authority,
22 it is prosecutorially irresponsible for the convening
23 authority to say no. Because some day, Mr. Nashiri is going

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1 to get an MRI. It may be prior to this trial or it may be
2 after this trial. But if it's after this trial and it
3 demonstrates organic -- or brain damage, then we've all
4 probably wasted an enormous amount of time, money and energy.

5 Now, as I read the government's response, and I
6 don't want to -- you know, I don't want to tread anywhere near
7 thin ice -- they suggest, well, even if there's brain damage,
8 we don't necessarily know what caused it. Well, we can have
9 that fight later on. But in terms of suspicion, and this is a
10 realistic request, Dr. Crosby has said it's something that
11 should be done as part of the medical needs but also
12 mitigation needs. I mean, you can't -- on one level, you
13 can't really separate them. On the other -- let me just say
14 it like this.

15 Most of the EITs, we can't discuss. We certainly
16 can discuss waterboarding; and waterboarding is simulated
17 drowning, and drowning causes brain damage. So just based on
18 what is publicly available, there would be reason to suggest
19 potential brain damage that needs to be investigated.

20 The only other thing I'll say is this: That if
21 you look at the -- what we're learning from the National
22 Football League, things as inconsequential -- not
23 inconsequential, as four years in the NFL can produce profound

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1 and lasting brain damage which shows up on an MRI for people
2 who appear to be not only perfectly healthy, but huge
3 specimens of athletic ability; and yet, you know, at 36 or 37
4 after their NFL careers are over, they have these symptoms.
5 So, you know, we need this resource.

6 Now, the convening authority's response, as I
7 understand it, is, well, we gave you a psychologist, jeez,
8 that should be good enough, which of course is not in
9 compliance with Supreme Court precedent and, you know, is just
10 again setting up the whole problem. But as I said when we
11 were here before, you know, because the government's response
12 before was, well, go get a dedicated neuropsychologist and,
13 you know, go through that before you go to the MRI.

14 And as I told the court then, well, you know, to
15 do that, and to really dot all the I's and cross all the T's,
16 you need a U.S. citizen who speaks Arabic, who is a
17 neuropsychologist, who is willing to become involved and wants
18 to endure the process of getting a security clearance. And
19 those people are, as we say, thin on the ground. In fact, you
20 know, when I sort of put out the word that we were looking for
21 this, the comments I got back is, yeah, does he, you know,
22 have to have red hair, too? I mean, you know, it's
23 literally that unusual.

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1 Now, we have found a person, and we can start on
2 that process. That's about a nine-month process. If
3 everything goes perfectly, that's a nine-month process. And,
4 you know, then once he gets through all that process, then we
5 have to -- you know, he has to come down here and do his work
6 and do the evaluation.

7 And at the end of the day, he's still going to say
8 we ought to get an MRI, because here's what will happen in the
9 litigation environment. The government will find somebody to
10 say -- you know, he says X, they'll find somebody who will say
11 Y. And it will come down to, well, you didn't get an MRI, did
12 you? And, you know, then it will -- so at the end, we're
13 going to be -- this isn't going to go away.

14 On the other hand, let's say you order this and it
15 happens and it shows up brain damage. Then we don't need to
16 do this other piece, because then you have proof of the
17 damage, and then the only question is how, a much simpler
18 question as a practical matter.

19 So it really is the most efficient way to move
20 ahead, recognizing, of course, that the government will have
21 to jump through whatever hoops it has to jump through to get
22 one here or -- I assume get one here, because -- so that's
23 where we are.

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1 But putting the medical situation aside, it's
2 really, as you said, I think, in our first colloquy to the
3 government, this is a pretty garden variety mitigation
4 request. In the typical death penalty case, this wouldn't
5 even make anyone break a sweat in -- most federal courts are
6 in relatively large cities. The judge would say to the
7 defense, okay, you go find the hospital that will do it.
8 That's a few phone calls. We need him taken to, you know,
9 Indianapolis General Hospital. Marshals, you take him at this
10 time, and you make sure all the security issues are taken care
11 of. We all move on.

12 You know, this is not a big deal in a mainland
13 court. It's too bad that it's a big deal here, and too bad
14 that it's probably extraordinarily expensive here and
15 time-consuming here and difficult here. But that's the choice
16 the government made when they chose to litigate here.

17 And, you know, under the statute, we're supposed
18 to have the same access to resources that we would have in
19 federal court, and there is no question that in a federal
20 district, U.S. District Court, we would get an MRI for
21 mitigation purposes.

22 And just to flesh that out and then I'll sit down,
23 it should be clear, but mitigation is not an excuse for the

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1 crime. And I want that to be clear. It is both an
2 explanation of the offense, how did this person come, who has
3 been convicted -- not suggesting that Mr. Nashiri will
4 necessarily be convicted -- how did he come to be in this
5 place? And secondly, whether or not the members, in their
6 individual exercise of moral responsibility, should kill him.
7 And post-offense acts bear on that, bear on it greatly under
8 U.S. Supreme Court precedent.

9 And so if, in fact, it is the United States that
10 caused the brain damage, number one, that might be grounds for
11 dismissal. But assuming it's not necessarily grounds for
12 dismissal, it might also be grounds on which the commission
13 might say, well, this is not an appropriate case for the death
14 penalty, we're going to strike it, and there was a little of
15 that discussion yesterday.

16 But to get past that, it's also mitigation because
17 the members may well conclude, I'm not going to pile on like
18 this, I'm not going to be part of this. So it's clearly
19 mitigating, and this is the most efficient way to resolve
20 this.

21 Now, it is the government's right -- if the MRI
22 shows nothing, it doesn't mean the issue's closed because
23 there's ample observable evidence of potential brain damage.

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1 But it is the most efficient way and it may well end up saving
2 us a lot of time. Thank you.

3 MJ [Col SPATH]: Thank you.

4 Colonel Moscati.

5 DCP [COL MOSCATI]: Judge, the issue before the court
6 and the problem in Mr. Kammen's argument is that it's not
7 medically indicated. Dr. Crosby speculates that possibly an
8 MRI would show brain damage.

9 MJ [Col SPATH]: Here's -- just here's the issue I have,
10 and I can't talk to you about it. I have more knowledge of
11 other filings. So I just am struggling with -- here's my --
12 let's pretend for a moment we're not at Guantanamo, which I
13 know is difficult, but for a moment we're doing this court in
14 the military, anywhere else, or we're doing it in a federal
15 courtroom.

16 That's the law we need to focus on, and that is:
17 Is the expert assistance that the defense is requesting
18 material to their preparation? And part of that focus has to
19 be on their mitigation case because you all assume we're going
20 to get to a mitigation case. I mean, that is the whole reason
21 we're here is because you want to get to sentencing. And I
22 have no comment on that. I understand.

23 So if we get to mitigation, the defense has given

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1 me a large number of cases. I did not read all 77 at this
2 point. I have gone through a lot of those cases, though. And
3 then the Witt appellate discussion, again, I didn't read the
4 briefs, I just read the initial overturning and then the more
5 recent affirming. And the defense in the cases that were
6 cited were constantly critiqued for not following these leads
7 in a death penalty case. I mean, they were.

8 That's what all of those cases stand for, is there
9 was evidence of trauma, just evidence of trauma, and Witt --
10 in as a little as a motorcycle accident, in the other cases
11 more significant evidence, falls when they were younger, not
12 connected with the crime or anything, just falls when they
13 were younger, falls off their bikes, motorcycle accidents, car
14 accidents, sports injuries. And the defense in those cases
15 were constantly critiqued for not following up on that, and
16 the injury to the government is all those family members got
17 to go do that trial a second time.

18 I mean, that's the risk you're buying. All of the
19 family members got to go do those trials a second time. I
20 have never been through something like that, so I can't speak
21 out of sympathy. But for empathy just as a human being, which
22 judges are, I think that's what we're trying to avoid here.
23 We don't want to do it a second time. We want to do it once.

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1 And so any comments on that? Just that body of
2 case law is what I'm focused on. And again, I'm not saying
3 any one of those cases said you have to do an MRI, you have to
4 do -- it's not so much what you have to do as the defense has
5 to follow up on that stuff. And if they don't, there's no
6 doubt what the end result is. So they are trying to follow up
7 on it. So how should they follow up on it?

8 DCP [COL MOSCATI]: They are trying to follow up, Judge.
9 And the follow-up or what they do and the way you have to
10 rule, Judge, is in accordance with the facts and the law
11 before you. We're governed by the Military Commissions Act of
12 2009. We're governed by the procedures in there. We're
13 governed by the facts in this case in this courtroom.

14 MJ [Col SPATH]: But for the Military Commissions Act,
15 does anything in the Military Commissions Act of 2009 -- does
16 anything in there suggest that the defense burden in a capital
17 case developing extenuation and mitigation is different than
18 in federal practice?

19 DCP [COL MOSCATI]: No, Judge, but they still have to do
20 it in accordance with the law and the procedure that governs
21 this court.

22 And I want to go back to the procedure for a
23 second, Judge. You did rule in AE 277H. You indicated, as

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1 Mr. Kammen was arguing, that you had not ruled on the medical
2 side of this; you have. You indicated that the defense did
3 not establish that the care provided to the accused is
4 inadequate, nor is it established that the detaining power has
5 shown a deliberate indifference to serious medical needs. As
6 such, the request is denied.

7 So you denied on that ground.

8 MJ [Col SPATH]: On that ground, I did. The defense is
9 not --

10 DCP [COL MOSCATI]: I understand, Judge. You also said,
11 hey, Defense, under the procedure you're asking for expert
12 assistance. I actually would call it resource assistance,
13 Judge.

14 MJ [Col SPATH]: I think that's fair.

15 DCP [COL MOSCATI]: But go to the commission and ask
16 whether you can have this, and you said the matter was
17 not properly before you ----

18 MJ [Col SPATH]: Two different issues. One was the
19 request that was premature to me for the resource assistance
20 or expert assistance. That was premature, there is no doubt
21 about that. I think we can all agree that is no longer
22 premature for the commission because the defense counsel went
23 to the convening authority, submitted their request and

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1 whatever with their request, and that request was denied.

2 DCP [COL MOSCATI]: We do agree, Judge.

3 MJ [Co1 SPATH]: Okay.

4 DCP [COL MOSCATI]: So it is now properly before you.

5 MJ [Co1 SPATH]: That is ripe.

6 The other issue, frankly, was wrapped up. I did
7 deny based on the evidence I had before me at that point,
8 because the evidence presented under this motion, the defense
9 did not carry their burden to demonstrate to me that it was a
10 deliberate indifference not to provide an MRI based on that
11 motion.

12 205 is a different issue. We've asked to reargue
13 that, I've got that. But under the motion, based on the
14 evidence I had, I do not disagree with what you're telling me.
15 The filings I had from the defense, the evidence that came in
16 from Dr. Crosby, I did not find medical indifference, you're
17 right.

18 DCP [COL MOSCATI]: So you used the term, Judge, it
19 wasn't ripe before. It is ripe. The commission has come back
20 and denied that request.

21 And frankly, Judge, the commission came back and
22 denied the request for a lot of the reasons that the
23 government has cited in its pleadings and argued to you in

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1 August. One, that it's not medically necessary. It wasn't
2 sufficiently shown ----

3 MJ [Col SPATH]: Different ----

4 DCP [COL MOSCATI]: That's one of the reasons.

5 MJ [Col SPATH]: I understand. Not the commission, the
6 convening authority.

7 DCP [COL MOSCATI]: I'm sorry.

8 MJ [Col SPATH]: That's okay. I've not denied the
9 request for an MRI or whatever other services might be needed
10 for a mitigation case. I'm just trying to deal with the
11 convening authority's action and figure out -- my goal here is
12 for you all to try this case once. That's an important goal.

13 DCP [COL MOSCATI]: So I want to go to, again, the
14 medical facts that are before you, Judge. I can't speak to
15 the other cases that were cited by the defense. I don't know
16 all the facts of those cases.

17 But in this case, Judge, Dr. Crosby said first,
18 Judge, that neuropsychological testing is what is the first
19 test that ought to be done and what's indicated. She
20 indicated that there was possible memory loss associated with
21 PTSD. The government, as you know, Judge -- you have a
22 declaration from the senior medical officer. He disputes
23 that. He is responsible for the accused's medical treatment.

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1 He's reviewed all of the medical records, and he's concluded,
2 Judge, that this is not medically, clinically indicated.

3 He's also said, Judge -- and this is the evidence
4 before you, Judge, not what Mr. Kammen would like the evidence
5 to be, the evidence before you is that an MRI cannot and would
6 not show when any brain injury or memory loss occurred. It's
7 not the proper test.

8 MJ [Col SPATH]: Correct, it will not show that. I
9 agree.

10 DCP [COL MOSCATI]: Neuropsychological testing is how
11 you test for memory loss. There's other treatments as
12 indicated by the senior medical officer's declaration, Judge.

13 So you cannot establish through an MRI when any
14 injury may have occurred, why it occurred, how it occurred.
15 None of that is indicated. And that goes to this, you know,
16 mitigation evidence, Judge. For it to be relevant and
17 helpful, there has to be a sufficient connection to the
18 argument they're trying to make. An MRI, and possibly TBI,
19 traumatic brain injury, is not going to be shown by an MRI.

20 So if they couch it as a discovery argument,
21 Judge, that they have a right to this as mitigation evidence,
22 again, they have to have that right under the rules that
23 exist, Judge. And if this medical test is not going to give

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1 them -- in a sufficient way, is not going to give them the
2 information they want to argue, then it doesn't fall under
3 that category. Then it's not discoverable.

4 Also, Judge, they're asking the government to go
5 find or create mitigation evidence when, again, there's
6 insufficient medical facts to justify that. I really think,
7 Judge, ultimately the relief requested does come back to --
8 does come back to whether the government is displaying a
9 deliberate indifference to serious medical needs. Because
10 ultimately ----

11 MJ [Col SPATH]: I don't. I completely disagree with
12 that at this point. For this motion, I do not agree with
13 that. It is, is the defense entitled to the -- you can call
14 it whatever you want, the assistance that they've requested in
15 developing their mitigation case, because the government has
16 chosen to make this a capital case. The standards are
17 different.

18 It's hard to just discount the cases that I'm
19 reading about ineffective assistance of counsel because
20 defense counsel doesn't follow -- it has nothing to do with
21 the timing of the injury. I don't care -- first off, I don't
22 know if there is injury, we concur. Second, I don't care
23 about the timing right now. If it was while in U.S. custody,

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1 I'm sure the defense counsel will suggest that's a significant
2 mitigator. Got it.

3 If it was before he was in U.S. custody and when
4 he was 12 years old, because this is a capital case, the
5 defense has to go figure that out. They have to figure that
6 out. That is their requirement. And that is not because I
7 like that or don't like it; that's because there's a long
8 history of cases about capital litigation where that is one of
9 the ways that the defense counsel are found to be ineffective
10 consistently.

11 DCP [COL MOSCATI]: But it's their burden, Judge. In
12 bringing the motion, it's their burden to bring sufficient
13 facts before you to trigger that relief. And they have not
14 brought sufficient facts. They haven't come close to bringing
15 sufficient facts before you.

16 It's a theory. It's a theory built on a theory.
17 It's, I believe he has PTSD -- this is Dr. Crosby -- I've seen
18 memory loss. The SMO says there has been no memory loss,
19 there's no record of memory loss, there's no reports of memory
20 loss, there's never been a claim of memory loss. And,
21 therefore, Judge, the SMO charged with his medical care is
22 finding no medical reason to do these tests.

23 And if -- again, if there are any tests to be

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1 done, Judge, initially, neuropsychological testing is what
2 should be done. Dr. Crosby agrees with that and said that in
3 the first place, Judge. Thank you.

4 MJ [Col SPATH]: Thank you.

5 LDC [MR. KAMMEN]: Let me just respond, because I sense
6 that you do understand the issues. But to make the record as
7 clear as possible, the prosecution says you should rely on a
8 medical doctor here at Guantanamo whose brief was not to
9 conduct an adequate trauma investigation.

10 And as 205 -- even on the limited evidence that
11 Judge Pohl permitted, it became clear beyond any dispute that
12 the -- one of the ways in which the medical care in Guantanamo
13 is deficient is that it is the practice of people who know
14 that the defendant has PTSD to not do the fundamental building
15 block of a PTSD treatment, which is find out the source of the
16 trauma. They bury their heads in the sand and don't look
17 there, the 706 board that the government requested, three not
18 majors, who had a brief to avoid the truth. But people who
19 looked for the truth concluded that Mr. al Nashiri suffers
20 from chronic, complex, untreated PTSD, and they attributed it
21 to his time in CIA custody. Common sense tells us, based on
22 what we know publicly, that there is ample reason to believe
23 that what occurred in CIA custody could have caused brain

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1 injury. You know, for them to argue that is -- is so
2 frustrating because, you know, they claim they're preparing
3 these summaries, and if these summaries you're reviewing are
4 anything close to adequate, they've got to be all full of
5 stuff.

6 You know, we'll do whatever you want. If you want
7 us to spend nine months going through this process, we're
8 happy to do it, and we'll go to the convening authority and
9 request this other expert, and we'll get turned down, and
10 we'll come back here, and then we'll -- ideally you'll approve
11 it. And if you do, we'll start on the process of getting
12 clearance. And that's something that will probably need to
13 happen anyway, but I suggest we do the easy thing first. The
14 MRI is a far easier process, and it may obviate the need for
15 this other.

16 And so, you know, he's right, it may not show
17 anything. Not all brain injury is detectable. But it is the
18 most efficient way, because if we have a brain injury, then
19 the question is when and how and who, not whether. And that's
20 standard garden variety mitigation stuff.

21 So, you know, this is -- you know, you're
22 absolutely right. I mean, you know, you said one thing
23 yesterday, that it's hard, I know, to get your head around how

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1 perverse it is in this environment. You said obviously, you
2 know, I know, you know, folks in the back, victim family
3 members, certainly want this over, and we understand that and
4 really respect that more than perhaps they give us credit for.
5 But then you said, well, I'm sure Mr. Nashiri wants this over.

6 You know, the government's made it very clear, no
7 matter even if he's acquitted, he's not getting out. So the
8 equation is somewhat different for him. I mean, he's doing
9 life in Guantanamo whether there's a trial, not a trial. You
10 know, this is all somewhat a different equation. But that's a
11 different litigation that we've already had, and that question
12 has been answered.

13 The fact is, we have this obligation. You have an
14 obligation. The truth is, they have an obligation. It is
15 surprising to me that the convening authority doesn't
16 understand, having authorized this, and I know it's not this
17 guy, but, you know, when you take the job, I assume you learn
18 something about what it is you're supposed to do.

19 And, you know, it's real simple. You know this.
20 You want to make this a death penalty case? Bring your
21 checkbook, because these are not cheap. And there's going to
22 be other requests, and there are going to be more, and it --
23 you know, you want to save money? Withdraw death. And that's

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1 not, you know, some kind of threat. That's just the nature of
2 capital litigation.

3 So, you know, we understand this is complicated.
4 We understand this is expensive. We understand this is hard
5 to do. But that's their choice. They chose Guantanamo, and
6 they chose not to bring an MRI machine here, and that's a
7 choice they made. But this is something, as you said last --
8 it's garden variety stuff. Thank you.

9 MJ [Col SPATH]: Thank you, Mr. Kammen.

10 Colonel Moscati?

11 DCP [COL MOSCATI]: Judge, as the commission well knows,
12 argument is not evidence.

13 MJ [Col SPATH]: I do indeed.

14 DCP [COL MOSCATI]: I urge you, Judge, to compare the
15 argument of Mr. Kammen with the facts before you in the two
16 declarations, and I think you'll find, Judge, there is no way
17 you can reach the conclusion that there's sufficient evidence
18 that they've met their burden.

19 They're asking for relief in a motion. They have
20 the burden, Judge. They have to meet that burden. That's how
21 you get relief in law. They haven't come close to it, Judge.
22 It's argument, and that's all it is, Judge. And we believe if
23 you apply the facts and the law ----

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1 MJ [Co1 SPATH]: Do we agree that the submissions that
2 are ex parte, that are not statements of Mr. Kammen, they are
3 statements of other people -- I do have to read those and
4 consider those because they went to the convening authority.
5 Do we at least agree on that as an evidentiary standard?

6 DCP [COL MOSCATI]: Yes, Judge. Yes, Judge.

7 MJ [Co1 SPATH]: And I know you're working in a vacuum
8 with those, I do.

9 DCP [COL MOSCATI]: Thank you, Your Honor.

10 MJ [Co1 SPATH]: Thank you.

11 All right. I think that -- it's quarter to 10:00.
12 We could be done if we talk about the outstanding, I believe
13 it is 320? 319. I was close. 319. That's right, 320 was
14 the ROT review. 319.

15 I believe if we discuss 319, we could see if it's
16 going to be a short discussion. If it's going to turn into a
17 long discussion, we can take a break at the appropriate time.

18 Government, you have the burden on --

19 DCP [COL MOSCATI]: We do, Judge.

20 MJ [Co1 SPATH]: So you're first.

21 Hold on, I think we might take a comfort break,
22 which is fine.

23 LDC [MR. KAMMEN]: May we have the end of next week to

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1 see if we want to file? Because we sort of hurried up the
2 argument on 277. We may want to file a very brief additional
3 response.

4 MJ [Col SPATH]: For 277?

5 LDC [MR. KAMMEN]: Yes. The MRI.

6 MJ [Col SPATH]: The MRI, the one we're talking about --
7 I'm reading through.

8 LDC [MR. KAMMEN]: They filed a response and we didn't
9 have a chance to file a reply. Our judgment was that the
10 argument wasn't going to change, but we may want to file a
11 response, and that may potentially be a classified response
12 just -- but we'll have it -- we'll either do it by the end of
13 next week, or we will notify the commission we're not going
14 to.

15 MJ [Col SPATH]: All right.

16 Do we need -- we don't need a break yet? Just let
17 me know if we decide we need a break.

18 Okay, Colonel Moscati.

19 DCP [COL MOSCATI]: Thank you, Judge. On 319, I want to
20 first acknowledge your docketing order, Judge, that indicated
21 that argument would be limited to the mechanics of an
22 evidentiary hearing.

23 MJ [Col SPATH]: Yes. 319 is how the government is

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1 proffering hearsay statements and, under the rules of the
2 commission, allowed as long as they are -- you can demonstrate
3 their reliability. Understand. And we kind of want to figure
4 out how to go. So kind of the status where we're at is the
5 government has provided notice of the statements they want to
6 offer, and they have provided a list of -- I don't remember if
7 it was seven or nine witnesses. There was a list of
8 witnesses -- I think it was seven -- that they then want to
9 call to establish the reliability of the statements they're
10 offering. Fair?

11 DCP [COL MOSCATI]: Yes, Judge.

12 MJ [Col SPATH]: And the defense counsel responded.
13 There has been some litigation about the legality of those
14 kind of residual hearsay statements, for lack of a better
15 place to put them at the moment. There has been some
16 litigation about the constitutionality of and the
17 appropriateness of allowing in those statements. Those have
18 all been resolved, frankly.

19 Now we're dealing kind of with how you're going to
20 get there, demonstrating the reliability, and then the defense
21 demonstrating their unreliability when we turn to their case.
22 So I think still in agreement?

23 DCP [COL MOSCATI]: Yes, Judge.

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1 MJ [Col SPATH]: All right. It's a good morning, then.

2 DCP [COL MOSCATI]: I just wanted to make sure, Judge,
3 that we definitely were going to be limited to the mechanics
4 of ----

5 MJ [Col SPATH]: We're not going to go back and discuss
6 whether or not the commission is allowed to introduce hearsay
7 statements in the method in which the Military Commissions Act
8 envisions them. That, in my view, has been done. If there's
9 new case law, if something happens in the District Court or
10 the Circuit Court that becomes relevant, we can have a
11 discussion again if there's new law.

12 But, correct, we're working on the mechanics of an
13 evidentiary hearing to move this forward.

14 DCP [COL MOSCATI]: Well, as you mentioned, Judge, the
15 government has indicated we would call seven witnesses. And
16 those seven witnesses, Judge, we believe, will provide -- and
17 we do have the burden, and we acknowledge that, will meet the
18 burden under the Act and under Military Commission Rule of
19 Evidence 803(b).

20 If I could go through that fairly quickly, Judge,
21 what we have to show and what you would have to find, Judge,
22 is taking into account all the circumstances surrounding the
23 taking of the statement, to include whether the statement is

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1 corroborated, the indicia of reliability within the statement
2 itself, and whether the will of the declarant was overborne,
3 voluntariness, Judge.

4 You would have to determine that the statements
5 offered are evidence of a material fact, probative of that
6 fact, and that the witness is not available as a practical
7 matter, and that all of that serves the general purposes of
8 the rules of evidence and the interest of justice.

9 MJ [Col SPATH]: Pretty similar to a residual hearsay
10 analysis.

11 DCP [COL MOSCATI]: It is, Judge.

12 MJ [Col SPATH]: Crawford isn't the same, but
13 pre-Crawford -- Crawford has messed up military practice in
14 some way, but similar to a residual hearsay analysis. Fair?

15 DCP [COL MOSCATI]: Yes, Judge.

16 MJ [Col SPATH]: All right.

17 DCP [COL MOSCATI]: As you've mentioned, this
18 commission -- in AE 109F(4), this commission has ruled that
19 that rule is sufficient and fair. And so that's where we are,
20 is the government makes its hearsay notices, files its hearsay
21 notices.

22 So the government has indicated we'll bring seven
23 witnesses forward, Judge. These witnesses will cover all of

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1 those bases, I'll say.

2 Now, there are 71 hearsay statements to be
3 admitted, Judge, and we've also listed, obviously, in our
4 pleading, the type of corroborating evidence that we will
5 offer to support those 71 statements. But those seven
6 witnesses, Judge, were there, were present, can describe the
7 circumstances, can describe what occurred, who else was
8 present, where it occurred, the conditions, et cetera,
9 et cetera.

10 MJ [Col SPATH]: Concur. When you all are putting on
11 your case in chief, I agree that what you're telling me is you
12 believe those seven witnesses will get you over the line of
13 demonstrating the statements were made, who they were made to,
14 and the circumstances of when they were made. And then the
15 corroborating evidence will give it the reliability to make
16 those statements admissible.

17 No dispute there. In fact, I think the defense
18 agrees not -- I understand they're admissible or you're going
19 to get over that hurdle, but I think the process -- we're in
20 agreement so far.

21 So, I guess, here's my question: How do we start
22 this? And I have a suggestion, which is you all have a burden
23 in discovery, you're officers of the court, and you tell me

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1 you're complying with it and I take you at that word. I think
2 you all know that.

3 And so you need to ensure that you're meeting your
4 discovery obligations and providing discoverable information
5 to the defense in relation to these statements. That seems
6 fair and pretty easy. And hopefully that has been done or is
7 being done with diligence.

8 DCP [COL MOSCATI]: Let me address that, Judge, because
9 that is one of the issues raised in the defense motion.

10 MJ [Col SPATH]: Correct. They want evidence of this
11 conspiracy.

12 DCP [COL MOSCATI]: Well, Judge, in respect to the
13 hearing itself, if I read their motion properly, they've
14 complained of redacted copies of FBI 302s. And in fact,
15 Judge, the government did initially produce redacted copies,
16 in a very limited way, but redacted copies of the FBI 302s.
17 So those 302s, Judge, are proper Jencks Act material, are
18 statements of the witnesses we will be calling. As the court
19 knows, Jencks Act material is not due until a witness has
20 testified. However, we do intend to provide that ahead of
21 time.

22 At the time the discovery took place, the general
23 discovery, Judge, the government did have good reason to

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1 redact the information that was redacted. In short, Judge, it
2 was law enforcement sensitive information. There are
3 agreements between the U.S. Government and foreign
4 governments, and it was properly redacted.

5 The government is going to relook that, Judge,
6 before the hearing. We are going to relook it and see, now
7 that we're proceeding to a hearing and we have some new
8 discovery obligations attendant to that hearing, we are going
9 to relook that. I don't think, Judge, that that should slow
10 anything down.

11 Getting back to mechanics, the government in its
12 motion has asked for at least 45 days' notice to notify
13 witnesses, make arrangements for them to get here, and so
14 forth. So that is likely to take us beyond the December
15 hearing. There is nothing scheduled at present in January, so
16 that likely would take us to the February hearing.

17 MJ [Col SPATH]: And here is my offer. You all wanted
18 45 days, so I was more than willing to attempt to get there in
19 December. You're telling me that you can't get there, and we
20 had the same discussion about timing yesterday. Same --
21 absolute same consideration for you all.

22 I understand the burden you're under and what
23 you're trying to get through and the amount of evidence and

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1 the amount of statements. I get it. And so if December
2 doesn't work, you have your 45 days, and so it looks like a
3 February timeline, but that will be focused on your
4 presentation of your case in chief -- that's not the right
5 term, but you understand -- in the motion, your case in chief
6 for why those statements should be admissible. So your
7 witnesses, your corroborating evidence, and I think that will
8 take a good part of the February hearing, frankly.

9 DCP [COL MOSCATI]: We believe, Judge, it will take a
10 very good part of the February hearing and probably go beyond.
11 We actually have estimated to include, obviously,
12 cross-examination and so forth, translation, but we have -- we
13 expect the hearing may go four to six weeks.

14 Now, again, the recommendation to the court is,
15 Judge, that in that first week we're going to learn a lot
16 about, you know, the procedure and how quickly we're going to
17 go and so forth. So another thing mentioned in our motion,
18 Judge, is we want to do this in a logical, orderly way, and of
19 course there's the issue of, you know, bringing witnesses to
20 the island and so forth.

21 So we are going to bring a -- we would propose,
22 Judge, to bring a, you know, chunk of witnesses. It could be
23 all seven, it might be four, but that initial week, that first

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1 week that we do this, have witnesses who are related,
2 connected to what they're going to be talking about. And
3 we'll see how that goes in that first week, and that is going
4 to give us, all of us, the parties and the commission, a good
5 idea of what's left and how fast we proceed and so forth.

6 So we do think it will go beyond an initial week,
7 Judge, and -- but then we're all going to have a lay of the
8 land and hopefully be able to go a little faster and know how
9 this is going to occur. And again bring, with notice, Judge,
10 no surprises, with notice, letting the defense know, you know,
11 which statements we're going to be addressing, which witnesses
12 will be here and so forth. We'll then be able to proceed
13 quicker in ensuing sessions.

14 So those are the mechanics the government
15 envisions, Judge. We do intend to bring the witnesses to the
16 island. There could be, and I can't speak to it right now,
17 Judge, there could be an exception. But if there is an
18 exception, again, ample notice and so forth. And frankly,
19 that's not our intent. We do intend to bring all the
20 witnesses we can to the island.

21 MJ [Col SPATH]: So after we get through your seven
22 witnesses and your corroborating evidence, however long that
23 takes, and maybe there's times we can come down for more than

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1 just the one week, maybe we can do two weeks with enough
2 notice. We have to look at all the other calendars.

3 Here's the question. You all sit down, you're
4 finished with your case in chief. The defense then does get a
5 turn to go.

6 DCP [COL MOSCATI]: They do.

7 MJ [Col SPATH]: They do. So that's going to be the
8 following sessions. So I think we're going to first have to
9 have a session to sort out what witnesses, if any, they get to
10 bring. Because they -- if we're doing it in a court where we
11 were just there constantly, you know how it would go. You
12 would put on your evidence subject to cross-examination, then
13 the defense will put on their evidence subject to
14 cross-examination. You have the burden, you'll get to go last
15 if you have any rebuttal evidence, and then move on to a
16 ruling. That's quite a long process based on what you're
17 telling me. I mean, I see that, and I think we agree in
18 basics on the mechanics.

19 Currently the way we're postured, you all gave
20 notice of seven witnesses. They'll all be here because you
21 can produce witnesses. The defense asked for ----

22 LDC [MR. KAMMEN]: 40.

23 MJ [Col SPATH]: ---- 40, you agreed to seven, but

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1 they're the exact same seven you were going to call. And I
2 would just say that that -- these are not -- these weren't
3 swipes.

4 When I talked to you about you need to talk to
5 them about medical issues yesterday, or vice versa, they're
6 not meant to be attacks on you all. It's to make this process
7 work better. You all can understand because you have all been
8 in the courtroom a long time. If I were a practitioner and I
9 asked for some witnesses outside of the seven you asked for
10 and you denied every one, I might begin to believe that you're
11 not willing to produce witnesses for the defense.

12 I mean, it is a mere -- it does show when the only
13 witnesses you produce are the seven you said, I'll produce.

14 DCP [COL MOSCATI]: May I respond, Judge?

15 MJ [Col SPATH]: You may. Can you understand, the
16 appearance -- again, appearance is everything. I remind
17 myself of that every single day. All you do is watch me walk
18 around Guantanamo and the most I'll do is wave at people
19 because I am afraid of the appearance of having a
20 conversation. I mean, appearance is everything.

21 I would ask you -- you can say what you're about
22 to say. I would just ask you to go look at the 40-plus
23 witnesses, just go look again and see, since the defense

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1 witnesses aren't for a number of months from now, are any of
2 those something you could agree to? Maybe they're not and
3 we'll have to sort it out.

4 That's going to require, though, a motion hearing
5 in between your case in chief, your case in chief -- I know
6 that's the wrong term, but you understand what I am talking
7 about -- for the motion. We're going to have to come here in
8 between to battle out witness production issues. And so if
9 there's any ability to come to any agreement, I would
10 encourage it.

11 DCP [COL MOSCATI]: Judge, the government is in complete
12 agreement with that.

13 MJ [Col SPATH]: Good.

14 DCP [COL MOSCATI]: As you said, procedurally we filed
15 our notice, they filed their request for witnesses, we filed
16 our response. There has not been a motion to compel. We are
17 more than happy to sit down with the defense and discuss those
18 witnesses.

19 Obviously our response, Judge, did set forth
20 reasons under the rules, under the military commission rules,
21 why we didn't think they had -- we had to produce those
22 witnesses for them. In large part, Judge, it relates to them
23 being cumulative. That is a legal, recognized ----

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1 MJ [Col SPATH]: It absolutely is. But I -- counsel
2 appear before me every single time with this question, when is
3 it cumulative? Two witnesses saying it, probably not. With
4 three witnesses, same. Twelve witnesses saying the same
5 thing, that's easy for me. But there is a lot of gray in
6 between what's cumulative and what is maybe a witness having a
7 different memory of that session. I don't know in these
8 statements -- I do know when the statements are alleged to
9 have been taken. If there are three witnesses in the room and
10 one witness says X happened, and one witness says Y happened,
11 that's typical standard impeachment evidence.

12 So I just -- I really just -- all I'm asking is,
13 since we have a number of months between here and there, is
14 have a good discussion with each other, and if you get
15 nowhere, there will be a motion to compel. And then we'll go
16 through each of those witnesses in discussion here in the week
17 in between when you all finish putting on your evidence of
18 corroboration and the statements, and when the defense starts
19 putting on their witnesses and corroboration to attack it.

20 That's all. Does that make sense?

21 DCP [COL MOSCATI]: I can assure the commission, Judge,
22 we will go through that process.

23 MJ [Col SPATH]: I just -- I think it will help. Maybe

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1 it will help, again, building a bridge. I do not expect --
2 you are diametrically opposed again on the end result of this
3 trial. I more than understand that. That makes complete
4 sense. That's how an adversary system works.

5 But an adversary system works really well when you
6 are fighting the battles that need to be fought aggressively
7 and appropriately, and then we're dealing with these
8 discussions as best we can; not here with me deciding them
9 every single time, but you all coming to some common-sense
10 agreements if you can. That's all.

11 DCP [COL MOSCATI]: And I will suggest, Judge, we will
12 approach Mr. Kammen in time to do this so that if there is a
13 need for a motion to compel, it can be filed, responded to,
14 replied, et cetera, and be ready for oral argument in
15 December. So there should be no loose ends after December,
16 obviously pending your ruling on that potential motion to
17 compel. But we will do that in time ----

18 MJ [Col SPATH]: The issue might be, and I mean this,
19 based on your presentation of your seven witnesses and all,
20 the analysis could change as to what witnesses are then
21 required by the defense or not. Because, for example, on
22 cross-examination, Witness A might say you're right, Witness B
23 is going to say that I concur, it did happen that way. And

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1 maybe the defense goes, you know what, we don't need witness B
2 anymore. That happens in practice all the time. On cross
3 they admitted the impeaching evidence, we're happy.

4 So the playing field could change from your
5 presentation of evidence to what the defense actually needs
6 for witnesses or say they need for witnesses. Pretty standard
7 in dealing with these, I think. Not necessarily residual
8 hearsay statements, but just in normal practice in the
9 courtroom.

10 So just, I would be open and flexible that that
11 target may move, depending on how your presentation of
12 evidence goes and their cross-examination goes.

13 DCP [COL MOSCATI]: Yes, Judge. Any further questions
14 regarding the mechanics of the hearing, Judge?

15 MJ [Col SPATH]: I don't. I think we all agree -- I
16 know we suspended it, but there is always the desire, and I
17 understand, to kind of move towards trial. I mean, this alone
18 tells me we're not sticking anywhere near the original trial
19 schedule, right? We're not going to start seating a panel
20 early in 2015.

21 DCP [COL MOSCATI]: Well, that was suspended by your
22 one ----

23 MJ [Col SPATH]: It was, but I had some feedback that

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1 you all thought I was not pushing this to trial, and I'm
2 just -- we all seem to be talking about the same thing, which
3 is you all don't want to do this in December, you want to do
4 it in February. That's fine. You know, that's three months
5 down the road, and we're into early 2015 at that point.

6 I just want you all to understand when I suspended
7 that, it wasn't because of a lack of a desire to move the case
8 forward. It is recognizing of the limiting factors that we're
9 all working under, and this process alone is going to take
10 some months.

11 DCP [COL MOSCATI]: It is, Judge. And the government
12 would be open, Judge, to more than one week at a time.

13 MJ [COL SPATH]: That's what we need to look for.
14 Probably not in February, because you have put your finger on
15 it exactly, which is we need to see how this unfolds, because
16 we're going to be dealing with witness testimony, witness
17 travel, and logistics for here that maybe they're used to
18 here, but maybe they're not. I don't know.

19 I think we need to kind of test the waters and see
20 how that's all going to go, and then maybe we look towards
21 March and see what the litigation calendars look like and kind
22 of move from there. And maybe we can take a bigger chunk and
23 get finished a little faster, because I understand the desire

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1 to move this forward.

2 DCP [COL MOSCATI]: Thank you, Your Honor.

3 MJ [Col SPATH]: All right. So I think the schedule
4 makes sense, at least the plan. I think we're in agreement,
5 so that's helpful. Let me turn it over to Mr. Kammen for any
6 comments, and then I think we're finished for this part.

7 LDC [MR. KAMMEN]: At the risk of sounding sarcastic, I
8 was wondering if we were going to get to participate in this.

9 MJ [Col SPATH]: Well, they had the burden, Mr. Kammen.
10 I had to let him go.

11 LDC [MR. KAMMEN]: I understand.

12 MJ [Col SPATH]: I let you all go first so many times.

13 LDC [MR. KAMMEN]: I understand. No, that's fine.

14 But here's where we see this. Because the
15 discovery failures are more than the government's saying, oh,
16 well, at some point we will provide them with redacted --
17 unredacted statements. We've been asking for these unredacted
18 302s for two years.

19 MJ [Col SPATH]: I agree. I understand. But here's the
20 question. Given what we just talked about ----

21 LDC [MR. KAMMEN]: We can't be ready by February.
22 That's the problem. Let's say they give -- we need -- from
23 the unredacted 302s, we need 60 days.

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1 The other problem is this: We've requested on two
2 or three occasions with two or three of their seven witnesses,
3 we requested interviews. Those interviews were absolutely
4 undermined by the prosecution. The information we needed to
5 conduct an adequate defense, the prosecution -- the witnesses
6 said we'll answer and the prosecution said do not answer their
7 questions.

8 So we need to reinterview those people without
9 prosecutorial interference. We need to -- if they'll let us
10 interview these seven people without prosecutorial
11 interference, we can maybe move this along.

12 But the other part of this is with some of their
13 corroboration they say comes from Walid Bin'Attash, who is a
14 high-value detainee held in conjunction with the 9/11 case,
15 who may have been in CIA custody. If they're going to use
16 anything from Bin'Attash as corroboration before this hearing
17 ever begins -- because if any one of these seven witnesses
18 goes, well, Bin'Attash told us this, we need all the
19 Bin'Attash discovery of what happened to him in CIA custody.

20 That's the -- to have this hearing to say we're
21 going to call Ali Soufan, and, oh, you get to cross-examine
22 him, but you don't have this information, just guts our -- any
23 right to cross-examination.

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1 I don't know how long this process takes. I don't
2 know if it's included in what you're doing on 120. 120 as it
3 stood required evidence of coconspirators. My guess is, if
4 they're really complying with their 120 obligation on
5 Bin'Attash, that's 100,000 pages.

6 The other thing we have to do, Your Honor, before
7 we can be prepared, is we have to go into the other case and
8 try to get the other judge to change the protective order so
9 that we can talk to Mr. Bin'Attash's lawyers, because right
10 now they're prohibited from talking to us about stuff that
11 clearly is germane now. Because they may know stuff that we
12 need to know in order to demonstrate if there is a failure of
13 discovery. And so this is extraordinarily way more complex
14 than they want to make it.

15 Additionally, Your Honor -- and this is, you know,
16 what -- what we know is that many, if not all, of the hearsay
17 witnesses from Yemen were arrested -- arrested, were chucked
18 in a Yemeni jail for months prior to being allowed to have any
19 even sort of remote contact with the FBI. We need to know how
20 long those people were in the Yemeni jail, whether their
21 families were in the Yemeni jail, what the jail conditions
22 were like, what they were housed in, all information that
23 these prosecutors claim the FBI didn't get.

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1 Now, if that's true, that the FBI said we have
2 this major investigation involving the deaths of 17 American
3 servicemen and the injury to 35 or 40, plus the residual
4 devastation to their families, if the FBI really said, we're
5 going to go in there and commit investigative malpractice, we
6 might as well know about it now because we're all wasting our
7 time. But if the FBI didn't commit investigative malpractice
8 in this major case, they've got the obligation to give us that
9 stuff. And we've been asking for it for two and a half years,
10 and their position is -- their position is no. Not no, let's
11 talk about it; no, heck no, quit bothering us.

12 MJ [Col SPATH]: And part of this process, it's
13 difficult because, as I said, the hearing might unfold in a
14 way that, on cross, you're getting some of this information.

15 LDC [MR. KAMMEN]: Yeah, but the problem, Your Honor, is
16 this: That relies on the integrity of these people. And we
17 need to know in advance whether they're being truthful or not.

18 MJ [Col SPATH]: Concur. Concur. With a lot of leeway
19 to recall and treat them as hostile witnesses to come back to
20 deal with them. As you know, to either deal with the
21 discovery piece or the admissibility piece, ultimately I'm
22 going to have to hear -- I'm going to have to hear the -- I
23 can't resolve discovery issues based on assertions, and I

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1 can't resolve the admissibility of this based on assertions.

2 LDC [MR. KAMMEN]: Well, Your Honor, we have provided
3 the commission with ex parte, with evidence about the -- what
4 the Yemenis did. We've provided that ample, and we've
5 provided it to Judge Pohl as well, so there is -- and we're
6 happy to direct you to information that is in the record, or
7 re-provide it to you, that demonstrates beyond any real
8 dispute what the Yemenis did.

9 And what the Yemenis did was brutal and, you
10 know -- and so if the FBI -- if the Yemenis are torturing
11 people or beating people up or hitting them with cattle prods
12 or simply saying, you're in jail and your family's in jail,
13 and we'll let you out when we're good and ready, that bears on
14 the witness' credibility, and we have the right under 403 to
15 all of that information. We've requested it, and the
16 government says, eh, too bad, so sad. All of this we need
17 before ----

18 You know, let's say, you know, Ali Soufan
19 testifies, he says, oh, everything is great. Everything's
20 great. Well, it makes a lot better presentation if we're able
21 to confront him with evidence that everything wasn't great
22 right then as opposed to six months later when they finally
23 decide to give it to us.

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1 So, you know, Your Honor, what we need really in
2 our view before this hearing can begin, and we've been saying
3 this for two years, and, you know, maybe the prosecution is
4 going to have a change of heart. I'll be surprised. Because,
5 as I said yesterday, the history of this case has been they go
6 out and give speeches about how it's all wonderful, and then
7 they come in court and it is absolute scorched earth. And
8 that -- you know, that's been since the beginning. Maybe that
9 will change.

10 We need unredacted 302s. We need the information,
11 all the information about the Yemenis and about the Yemeni
12 investigation in the custody of the United States Government,
13 more than the FBI. If the CIA has information about the
14 Yemeni investigation, we need it. If DoD has information, if
15 NCIS has information, we need it. We need all of that, not
16 just the FBI, but we definitely need the FBI.

17 And if the FBI committed investigative
18 malpractice, we need somebody from the FBI to come in and say,
19 we made a decision not to get this information, we don't know
20 anything about how these people were treated. So maybe then
21 we can save ourselves months. Because if the FBI didn't get
22 this information, it seems to me you can't possibly find their
23 will wasn't overborne.

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1 We need the ability to interview their seven
2 witnesses without their interference. They can be there, but
3 they can't be telling people don't answer that question,
4 especially when the question is: What happened in Yemen?
5 Where did the investigation take place? What do you know?
6 What did you see? What did you do? So we need the ability to
7 conduct those interviews without their interference. We need
8 the Bin'Attash torture information.

9 The other thing that I think we need, that we view
10 as important to this, is what is their obligation to
11 demonstrate unavailability? Based on their motion, it appears
12 that what they think their -- what they think demonstrates
13 unavailability is General Martins wrote a letter to somebody
14 in Yemen who didn't respond or responded negatively, and that
15 carries the day. Well, in any real court, that wouldn't even
16 come close to carrying the day.

17 If they have investigators in Yemen, the way we
18 do, I mean, they know that some of these witnesses, in fact,
19 may well be available. Now, they're not willing to come to
20 Guantanamo. You will not get a Yemeni to come to an American
21 institution. You will not, you know -- they're afraid of
22 being swept up.

23 But the notion that all these witnesses are not

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1 unavailable is simply, we believe, untrue. But they at least
2 have to demonstrate what efforts they have made not to contact
3 the Yemeni government, because the Yemeni government has all
4 kinds of interest, in our view, towards hiding the truth.
5 What they need to demonstrate is what efforts they made to
6 contact witness number one and witness number two and witness
7 number three. So, you know, we've -- you know, we think that
8 that is important.

9 And the other thing, Your Honor, is this: We need
10 the evidence of the -- from, as I said, from all the sources
11 within the Yemeni government of the United States -- of the
12 Yemeni government's motives in the year 2000, and depending on
13 what happens in the -- well, to the extent that any of this
14 may bear on the Limburg, depending on what happens in the
15 Limburg, the Yemeni government's motives in those years to
16 undermine the investigation.

17 We know that at least in Ali Soufan's book he
18 talks about significant and substantial interference by the
19 Yemeni government, and my guess is that the book is the tip of
20 the iceberg. So we need all of that prior to the commencement
21 of the hearing.

22 I see you're looking in a book, so you probably
23 have some questions.

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1 MJ [Col SPATH]: I'm just working through it.

2 LDC [MR. KAMMEN]: Okay.

3 MJ [Col SPATH]: It's -- I'm working through it. I'm
4 trying to figure out -- I'm just trying to figure out the best
5 way forward so that if we're going to be ----

6 LDC [MR. KAMMEN]: Here is my suggestion, and I
7 really -- I mean, we understand this is going to happen, so
8 that's fine. And when it happens, we'd like it to move as
9 efficiently as possible, recognizing this is not going to be
10 an efficient process.

11 Really, from our perspective, the most efficient
12 way is for them to give us the discovery, let us do the
13 witness interviews, then we start the hearing, as opposed to
14 essentially doing this on the fly. Because, you know, all
15 that's going to happen is this -- and, you know, we may get
16 some of the discovery and say, okay, we knew that, so no big
17 deal. Or that's what we suspected, so okay.

18 But supposing they give us something, and we go,
19 whoa, that requires investigation. Well, investigating under
20 the restrictions that we're required to operate under is no
21 easy task. Just, you know, all -- most of the investigation
22 is outside of the United States. To jump through the hoops we
23 have to jump through to go to London are extraordinary, not to

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1 mention if we needed to go to the Middle East where some of
2 these witnesses probably are, and recognizing that Yemen's off
3 the chart. I mean, you know, our investigator in Yemen can do
4 work and we can task him to do work, but, you know, obviously
5 at this point that's certainly not safe.

6 But, you know, it doesn't help us and it doesn't
7 aid in doing this if after a witness has testified they say,
8 oh, by the way, here's this discovery and then we say, okay,
9 we need 90 days, and then we want to call him back. That's
10 just going to make this go longer and longer.

11 The most efficient way is they give us the
12 discovery -- this is discovery they should have given us two
13 years ago. They give us the discovery, let us analyze it, let
14 us see what we need to do -- let us see what we need to do,
15 and then we can figure out the best way forward. But until
16 they give us this discovery, which is a lot -- I mean, I don't
17 have any illusions, if they fulfill their burden, it's going
18 to be a lot. And a lot of it's going to be classified with
19 the problems that that creates, and just the logistical
20 problems, how do you use it, you know, who you can share it
21 with, all of that. You know, once we have that piece of it,
22 then we can figure out the timing of the rest.

23 But it's really unfair to say, well, let's start

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1 the hearing when you're not prepared, and then we'll kind of
2 get you up to speed as the government chooses. The
3 cross-examination of these witnesses is a big piece of this,
4 and it shouldn't be kind of a piecemeal kind of a thing. You
5 know, so that's really what we think is the most, the most
6 efficient way.

7 To tell you, I suppose, in the interest of
8 disclosure, I mean, we do have an investigator in Yemen. The
9 conditions in Yemen are such that it's difficult for him to do
10 work, but, you know -- and so we understand that this is no
11 easy factor. But, again, this is a factor the government
12 brought on itself by choosing to wait 12 years, because
13 Mr. Nashiri was in U.S. custody in 2002. And had he been
14 brought to the United States and prosecuted in New York, the
15 equation and the political situation in Yemen would have been
16 much different.

17 But, you know, that's -- and I'm really being
18 serious. You know, I suspect -- you know, and they're
19 whispering, they're thinking this is just about delay, this is
20 just about throwing up roadblocks. If they're serious about
21 doing this fairly, we're going to get this information. And
22 you might as well give it to us now, let us do our jobs and
23 then have this hearing. That's really the most efficient way

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1 forward.

2 And if they're not going to give us the
3 information, okay, say they're not going to give us the
4 information, then we'll figure out where we are at that point.
5 But that's really resolving this -- these discovery issues,
6 getting the discovery, allowing us to do our work, really to
7 us is the best way forward.

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

9 Colonel Moscati?

10 DCP [COL MOSCATI]: Judge, as Mr. Kammen tends to do, he
11 is greatly overstating these discovery concerns, Judge. As
12 you already recognized when I was up here previously, the
13 government knows and understands its discovery obligations.
14 We take them seriously. We have complied with them. At all
15 stages of these proceedings we continue to do so, we will
16 continue to do so.

17 And if Mr. Kammen feels that the government has
18 undermined witness interviews, he should bring a motion and he
19 should produce evidence, and he should put witnesses on, and
20 it should be proved to you, not just argued and asserted.

21 MJ [Col SPATH]: We probably concur on that. It's just
22 the process will move that much slower.

23 DCP [COL MOSCATI]: There has been, Judge, discovery

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1 ongoing in this case prior to the current incarnation of the
2 case. There has been -- the bulk of the government's
3 discovery was made more than two years ago, Judge.

4 To get up here and say to you now, look, all this
5 work we have to do, we don't have time, we couldn't possibly
6 do it, there have been years to do this kind of thing, Judge.
7 This isn't new. It isn't new that there was going to be
8 hearsay evidence offered by the government. Our first notice,
9 Judge, was, I believe, in August of 2013, and that wasn't news
10 then either.

11 So, Judge, to say it just can't -- Mr. Kammen's
12 talking out of both sides of his mouth, Judge, to say, I want
13 to move these proceedings along, Judge, we want to get to
14 trial, and then to come up and say, I'm not ready, I can't do
15 this. How many times has that been heard?

16 As far as the 302s, Judge, I already indicated we
17 are re-reviewing that, we are looking at that. The
18 government, if -- if under the applicable authorities and so
19 forth we can make them unredacted, we will, and we will do
20 that in November, Judge. So that is more than 60 days --
21 that's what he asked for. That's more than 60 days before the
22 hearing beginning in February. As far as some of those
23 redactions, Judge, I already indicated they involve law

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1 enforcement sensitive information.

2 The assertion that we're interfering with
3 interviews, that's not fair either, Judge. What happens in
4 those interviews -- and by the way, Judge, Mr. Kammen -- there
5 have been two interviews by the defense of one of the co-case
6 agents, Mr. McFadden, Special Agent McFadden, and Mr. Kammen
7 was not at either one of them. So to present facts and
8 argument to you, the government did this, the government did
9 that, he wasn't even there.

10 MJ [Col SPATH]: I assure all of you, I am very good
11 at -- your arguments are helpful. The record, particularly
12 the record -- and that is the statements I have, the
13 attachments I have, the prior testimony, that is where I go
14 look to start to sort through this. So I understand both
15 sides ----

16 DCP [COL MOSCATI]: When the ----

17 MJ [Col SPATH]: ---- like to argue.

18 DCP [COL MOSCATI]: Thank you, Judge. When defense --
19 the government has always -- has and will always make
20 available witnesses for defense interviews.

21 MJ [Col SPATH]: So let me just ask. Let's go through
22 them, because I think we need to do that. We're focused right
23 now on seven witnesses -- that's what we're focused on, your

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1 notice of seven witnesses that you're going to call to prove
2 these statements. That's what we're focused on.

3 So unredacted 302s, you're working towards that.
4 That's what you're telling me, correct?

5 DCP [COL MOSCATI]: Yes, Judge.

6 MJ [Col SPATH]: All right. Again, the discovery
7 obligations are what they are. Down the road -- as officers
8 of the court, I believe you all comply with the rules of
9 discovery. If there's motions to compel, I'll resolve them.
10 If down the road you didn't comply with your discovery
11 obligations, we all know the end result. Depending on how
12 serious the violation is, you do this again, based on if
13 there's any conviction. We all know that. So it's on you.
14 Go forth, make sure you do.

15 If you're going to provide unredacted 302s, sooner
16 is better than later. If you're not going to provide them,
17 let them know so he can file a motion and we can work
18 through the process.

19 Have you asked all of the agencies, have you done
20 the requests?

21 DCP [COL MOSCATI]: That has been part of our PSR
22 request process, Judge.

23 MJ [Col SPATH]: Okay.

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1 DCP [COL MOSCATI]: We've reported to the court on that.

2 MJ [Co1 SPATH]: Are there any outstanding in that
3 regard?

4 DCP [COL MOSCATI]: Not with foreign governments.

5 If I could have a moment?

6 MJ [Co1 SPATH]: Sure.

7 DCP [COL MOSCATI]: Not with respect to foreign --
8 there's nothing outstanding with respect to foreign
9 governments. There is that request alluded to by Mr. Kammen
10 from the chief prosecutor to Yemen. An invitation is part of
11 our motion, Judge, but an invitation to produce the Yemeni
12 witnesses.

13 As far as -- and that goes to unavailability,
14 Judge ----

15 MJ [Co1 SPATH]: I was going to go to the next two,
16 we're not even going to get to that yet. I've got the rule.

17 DCP [COL MOSCATI]: That goes to admissibility. We're
18 only talking about the mechanics of the hearing.

19 MJ [Co1 SPATH]: We are. To interview the seven
20 witnesses -- obviously there have been some interviews, maybe
21 or maybe not effective, I've got that. If those witnesses are
22 going to testify and the defense wants to interview them prior
23 to the hearing here, are you all going to assist with that?

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1 DCP [COL MOSCATI]: We are, Judge.

2 MJ [Col SPATH]: All right. That leaves us with
3 Bin'Attash. I don't know the answer to that one. If he's the
4 corroboration, there is likely some merit that there is a lot
5 of discovery that's going to have to occur in relation to that
6 individual. Do we agree with that?

7 DCP [COL MOSCATI]: Yes, Judge.

8 MJ [Col SPATH]: If that's the corroboration.

9 DCP [COL MOSCATI]: It's a misstatement to say there's
10 been none.

11 MJ [Col SPATH]: You all know your discovery obligation
12 also, that's it. Seems pretty straightforward. Reading the
13 record, I know Colonel Pohl said he was a simple soldier,
14 that's his answer. That's mine, too. Everyone here is
15 smarter than me about this. I am a simple judge; I am going
16 to work through this trial like any other trial I sit on. I
17 recognize there's comments about a real court. This is -- the
18 court is as real as it is made by statute.

19 I didn't write the statute, I can assure both of
20 you. I'm not suggesting I would write it the same or
21 different. I'm working under the statute that convened this
22 court. And the rules suggest that -- the rules of evidence
23 are very similar, with marked differences in hearsay and some

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1 others, they're very similar to the federal rules of evidence.

2 So the protections are there. The ability to make
3 motions are there. I'm going to work through this and come up
4 with a mechanics order, and there will likely be some
5 timelines associated with that. And I recognize argument for
6 argument's sake, I promise you, and evidence for evidence's
7 sake.

8 DCP [COL MOSCATI]: Thank you, Judge. There is nothing
9 that will prevent this hearing from going forward in February,
10 Judge. The government urges the commission -- and I know we
11 don't have to, Judge -- to set some, you know, marks on the
12 wall, plenty of time. This is plenty of time, November to
13 February, to get this process started and proceed in an
14 orderly and fair fashion.

15 There has been sufficient discovery, there will be
16 more, and there will be a court session in December. If
17 anyone feels differently, again, bring a motion, present
18 evidence to the court, prove your point with evidence, and you
19 will rule, Judge, and we will have a hearing in February.

20 MJ [Col SPATH]: And then just logistically, Bin'Attash
21 being part of the corroboration, is it statements that people
22 heard him make -- that's how I take it -- as opposed to
23 statements he's going to come here to make? Or are you

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1 planning on making him one of your seven witnesses?

2 DCP [COL MOSCATI]: We don't, Judge.

3 MJ [Col SPATH]: I didn't think so. I would envision
4 that he's going to be on a list forthcoming to testify as part
5 of the battle against the admissibility of those statements.
6 That's my guess. So I'd start thinking through your response
7 to that, and then if by some chance that were granted, the
8 significant logistical issues that are going to come with
9 that.

10 DCP [COL MOSCATI]: Yes, Your Honor. Thank you.

11 MJ [Col SPATH]: Just trying to get the logistics out
12 there because there are going to be a lot of them.

13 Thanks, Colonel Moscati. Much appreciated.

14 Mr. Kammen.

15 LDC [MR. KAMMEN]: I'm unclear, so perhaps you can help
16 me. I'm happy to bring a motion about the prosecutorial
17 interference.

18 MJ [Col SPATH]: I think you have to in some regards
19 because ----

20 LDC [MR. KAMMEN]: But here's the thing ----

21 MJ [Col SPATH]: ---- there's no evidence before me.

22 LDC [MR. KAMMEN]: ---- if they're going to let us
23 interview these people again and we can start this process,

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1 fine, you know. And I've heard him say -- if they're going to
2 let us -- if they're going to make these witnesses available
3 for the interviews prior to February -- I don't want to be
4 down here in February working nights trying to get ready for
5 the next day. If that's going to happen, we don't need to
6 mess around with a motion to compel.

7 If their position is you had your one shot at
8 McFadden and Soufan and we're sorry, but if you didn't get
9 that done you've got to file -- we'll do that. But then
10 we're -- but I'm going to tell you they won't like the list of
11 witnesses they're going to get. So before we get to the
12 merits, we'll have the fight over witnesses.

13 MJ [Col SPATH]: I concur. You will.

14 LDC [MR. KAMMEN]: So I'm trying to find out what their
15 position really is.

16 MJ [Col SPATH]: What I heard them say is they're going
17 to make the witnesses available for another interview. If
18 that's the case, see how that interview goes. And if that's
19 not the case, you should know, I would hope, before we move
20 towards a December hearing, let me know, file a motion,
21 because that's what I heard.

22 LDC [MR. KAMMEN]: Well, I heard him say he would make
23 the witnesses available at Guantanamo.

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1 MJ [Col SPATH]: I did not hear that.

2 LDC [MR. KAMMEN]: Maybe I misheard.

3 MJ [Col SPATH]: I did not hear that. I heard if the
4 witnesses were going to be here to testify, they were going to
5 be made available to you for an interview.

6 LDC [MR. KAMMEN]: Right.

7 MJ [Col SPATH]: If there were problems at that
8 interview ----

9 LDC [MR. KAMMEN]: If there are future problems, then we
10 will bring a motion. But I don't want to relitigate something
11 that happened two years ago.

12 MJ [Col SPATH]: I understand.

13 LDC [MR. KAMMEN]: I'm happy to do it, but I don't think
14 they're going to like where that would head.

15 You know, here's what's gone on here. And I
16 understand what they're doing is, oh, yeah, you'll get all
17 this discovery but, you know, we're not -- we want to start
18 the hearing. And that's been the history of withhold,
19 withhold, withhold and then push on the other to affect our
20 preparation. We're willing to shoot towards February.

21 MJ [Col SPATH]: And here --

22 LDC [MR. KAMMEN]: I just want to be ----

23 MJ [Col SPATH]: I don't know the scope of discovery

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1 that's been provided. I have not seen all of discovery
2 provided.

3 LDC [MR. KAMMEN]: Well, let me tell you, if they -- we
4 know, and I don't want to go beyond this, we know beyond
5 dispute that the government had exculpatory evidence in the
6 first iteration of summaries and withheld it. We know that.

7 I suspect there is a lot more. And recognizing
8 that some of this occurred before Colonel Moscati joined -- I
9 don't dispute his good faith, but it's -- I want to make it as
10 clear as possible, and I hope they're paying attention, what
11 we need and what we consider exculpatory is Yemeni
12 interference with the investigation, Yemeni treatment of these
13 witnesses, and Yemeni -- the possibility, let me try and --
14 the fact, any information known to the United States of
15 America that the Yemeni government or people in the Yemeni
16 government were complicit in the bombing of the USS COLE.
17 That is the realm of exculpatory information we seek.

18 We have on numerous occasions advised the
19 prosecution of this, but if there's any mistake, that's what
20 we consider to be exculpatory in our theories of defense. So
21 if they say they've complied with it now, we know that's
22 wrong. If in the future -- we suspect there's a lot of stuff
23 out there.

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1 But let's work forward. You know, if they're
2 willing to set some dates for interviews, you know, we can
3 start to work towards that. You know, if we don't have to
4 come here in December and litigate a motion to compel, you
5 know, I'm wondering what there really is on the docket for
6 December, but we can address that in the future.

7 MJ [Col SPATH]: I'm sure we will see it develop over
8 the next few weeks, I have a feeling.

9 LDC [MR. KAMMEN]: Okay. Well, in any event -- but we
10 see, again, the logical way forward is discovery, and then
11 starting the hearing, so ----

12 MJ [Col SPATH]: All right. Thank you, Mr. Kammen.

13 Colonel Moscati, I think you get the last word
14 today.

15 DCP [COL MOSCATI]: You stole my line, Judge. I'm not
16 really a fan of the last word, and I don't really -- I think
17 it would be an exercise in futility to try to get the last
18 word on Mr. Kammen.

19 But just to clarify, Judge, the witness request.
20 You know what I was saying. As you know, Judge, the
21 commission, and Mr. Kammen knows, we can make efforts to make
22 witnesses available. Witnesses have their own freewill of
23 whether they are available, want to be available, what they'll

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1 say, what they'll answer, et cetera. So if we get witness
2 requests, we will endeavor to make those witnesses available.

3 MJ [Col SPATH]: That's what I heard you say.

4 DCP [COL MOSCATI]: Thank you, Judge.

5 MJ [Col SPATH]: That's exactly what I heard you say.

6 So I'm sure requests will be forthcoming, and your efforts
7 will be forthcoming.

8 DCP [COL MOSCATI]: Thank you, Judge.

9 MJ [Col SPATH]: All right. As I did last time, I don't
10 think we need an 802 necessarily to wrap this up, I don't
11 think. Everything seems reasonably -- I was going to say
12 resolved, but that's not true, but it seems reasonably clear
13 to me.

14 As I did last time, I think you'll see rulings on
15 motions reasonably quickly. One is in abeyance, like 284, I
16 get that, the Skype issue. A number of these I'll give some
17 direction and move quickly and try to get them out to you
18 quickly because I think that helps you all figure out where
19 we're at as we move forward into December. Some of those
20 might drive other motions to reconsider and things like that
21 in December. So I want to get those done for you.

22 There are a few outstanding or -- a few
23 outstanding from earlier that I haven't gotten to yet. I

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1 tried to get through the backlog that had built. I'm sorry I
2 didn't get through all of it. I will do my best to continue
3 to catch those up, understanding that we're also doing the 505
4 review. And we've made that a pretty good priority because we
5 want to get the information from you all that you've given us,
6 thank you, over to you all because that would help discovery,
7 too. And that slow-down was ours. I did have an ex parte
8 session to assist me with understanding the theory behind it,
9 and that's how I'm reviewing those, and we're getting through
10 them now. So I appreciate everybody's time and all the
11 efforts that are being made on the 505 stuff.

12 Right now we're set for December. I know there
13 will be motions. We'll see where we're at, if we're here in
14 December or not. And then we have the calendar going out, I
15 understand that. That I would -- those are markers on the
16 wall, but they're just that right now. Those were put out
17 there, but if we find we're moving into that hearing, maybe
18 we'll figure out a way to stay for more than a week and keep
19 going later -- not February, like I said, but later. So a
20 little flexibility there. Because you've put the Air Force on
21 this case, flexibility is the key. So I need you guys to keep
22 an eye on that as we move forward. And I'll do my best to
23 update that calendar as events intervene or interfere.

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1 LDC [MR. KAMMEN]: The only thing with respect to that
2 is it would be helpful for the defense, if you're considering
3 expanding one of the hearings, to find out before you do that
4 if there's anything unique. Because setting aside a week a
5 month for all of us, you know, the military people have
6 military obligations that they have to then fulfill in the
7 other three weeks. We have case-related obligations as well,
8 and, you know, frankly, some people have lives.

9 And, you know, it's just to the extent you can
10 say, hey, we're thinking of doing this ----

11 MJ [Col SPATH]: Yes. Notice forthcoming where we have
12 any of those issues. Because if this moves to trial, there
13 will be extended sessions at some point. I've been trying to
14 put my brain around just the mechanics of that, frankly, just
15 thinking ahead for logistics. So yes, notice forthcoming if
16 we're looking at extending it, but if it makes sense to stay a
17 little longer and get that done, a piece of logic, then we'll
18 try to do that. So notice forthcoming.

19 I appreciate everybody's efforts, as always. I
20 appreciate your work. I appreciate the efforts at civility in
21 here. I notice it and appreciate it. Just try to keep that
22 up when I'm not around. I will see you all when we get a
23 chance. I think that's it.

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1 We're in recess.

2 [The R.M.C. 803 session recessed at 1051, 6 November 2014.]

3 [END OF PAGE]

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