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1 [The R.M.C. 803 session was called to order at 0933,  
2 8 September 2016.]

3 MJ [Col SPATH]: These commissions are called to order.  
4 All of the parties who were present yesterday are present. I  
5 notice Mr. al Nashiri is not present this morning.

6 Trial Counsel.

7 TC [MR. MILLER]: Good morning, Your Honor. Lieutenant  
8 Cantil had some interaction this morning with the Staff Judge  
9 Advocate and I think he has a report to make.

10 MJ [Col SPATH]: All right. Lieutenant Cantil.

11 ATC [LT CANTIL]: Yes, Your Honor. The government would  
12 like to call the Major as a witness.

13 MJ [Col SPATH]: You may.

14 MAJOR, U.S. ARMY, was called as a witness for the prosecution,  
15 was sworn, and testified as follows:

16 **DIRECT EXAMINATION**

17 Questions by the Assistant Trial Counsel [LT CANTIL]:

18 Q. Please take a seat.

19 MJ [Col SPATH]: All right. Do me a favor. I know you're  
20 going to ask some questions. Just a couple of things. Are we  
21 transmitting the proceedings today as well?

22 TC [MR. MILLER]: We are, Your Honor.

23 MJ [Col SPATH]: Thank you, no worries. I know it's in

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1 accord with an order that I signed or a couple of orders that  
2 I signed and the other is for everybody, as we go through  
3 this. If you could just remember to speak slowly and into the  
4 microphone, and for everybody else to make sure they push the  
5 buttons on the microphone. And slow down. We got a little  
6 fast yesterday afternoon, evening, but that's to be expected  
7 later in the day.

8 Lieutenant Cantil.

9 ATC [LT CANTIL]: Thank you, Your Honor.

10 Q. Now, Major, are you now the Deputy Staff Judge  
11 Advocate that addresses issues with Camp VII?

12 A. I am.

13 Q. Okay. Did you have the opportunity this morning to  
14 speak with Mr. al Nashiri regarding his rights to attend this  
15 hearing?

16 A. I did.

17 Q. And did he indicate whether he wanted to come?

18 A. So I got to camp, I advised him that he had the  
19 military commission this morning that would start at  
20 0930 hours, asked him if he would be coming to the commission,  
21 and he advised that he did not want to come.

22 Q. Okay. Now, Major, I have in front of me the  
23 statement of understanding of the accused's right to be

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1 present at this commission proceeding.

2 ATC [LT CANTIL]: Your Honor, I've already provided a copy  
3 of this to the defense counsel, and I'll ask that this be  
4 marked as the next Appellate Exhibit in order.

5 MJ [Col SPATH]: We can do that. Just give me one moment.

6 ATC [LT CANTIL]: Yes, Your Honor.

7 MJ [Col SPATH]: It's going to be Appellate Exhibit 360.

8 ATC [LT CANTIL]: May I approach?

9 MJ [Col SPATH]: You may.

10 Q. Now, Major, you provided the accused with a statement  
11 of understanding; is that right?

12 A. That is correct.

13 Q. Can you tell us what that entailed?

14 A. So I was there with the camp interpreter and there's  
15 an English version and there's an Arabic version. And I  
16 advised him that once he indicated he didn't want to come,  
17 that I would read the English version to him in full; that if  
18 he wanted it interpreted, then the interpreter would then read  
19 the entire Arabic version. And Mr. Nashiri just asked for the  
20 Arabic version so he could follow along as I read the English  
21 version to him. So I believe I started reading that at  
22 0716 hours according to the document.

23 Q. And do you believe that he understood his rights?

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1 MJ [Col SPATH]: If you stay, you will probably hear some  
2 guidance here as we talk through my plan.

3 ATC [LT CANTIL]: Your Honor, we just request that -- the  
4 finding that the accused made a knowing, voluntary, and  
5 intelligent waiver.

6 MJ [Col SPATH]: I do, unless there's any additional  
7 evidence. There's a negative from the defense counsel and I  
8 do. Let's -- here's, I think, the general order of march as  
9 broadcast at the end of the session yesterday. I think that  
10 will help with discussions about whether or not your client  
11 wants to attend in the afternoon.

12 We're going to start, of course, with unclassified  
13 oral arguments that we can get to this morning and then we're  
14 going to break around noon for lunch. Any leftover argument  
15 and proceedings on the unclassified AEs we're going to do  
16 right after lunch.

17 At 1500 -- so just before 1500, right around 1430,  
18 because they need about a half hour to set up, we're going to  
19 stop with the unclassified AEs, and at 1500 we'll do the 505  
20 session.

21 So for you, Mr. Kammen, and your client, the  
22 afternoon session that we'll be in will be reasonably short.  
23 In the unclassified environment, it will be from around 1300

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1 to around 1430 and then we'll break. And then at 1500, we'll  
2 do the unclass -- or the classified 505 hearing, specifically  
3 for Appellate Exhibit 333 and Appellate Exhibit 333B. The  
4 defense gave notice of the intent to disclose classified  
5 information related to the 333 series of appellate exhibits.  
6 The government in Appellate Exhibit 333D requested the  
7 commission conduct a hearing to determine the use, relevance,  
8 or admissibility of the classified information noticed by the  
9 defense.

10 So we're going to do that this afternoon. That's  
11 all.

12 Trial Counsel.

13 ATC [LT JOLLY]: Sir, respectfully, we believe we already  
14 had that session in March 2015.

15 MJ [Col SPATH]: I'm going to check. My memory, it is  
16 March '15, so it is 18 months ago. We -- or you over the  
17 lunch.

18 ATC [LT JOLLY]: Yes, sir. I consulted with the record of  
19 that hearing; it was a brief 505, it was not full and robust.  
20 At that time Your Honor had just received a lot of documents  
21 and had not completed a full review, so we would request a  
22 full 505.

23 MJ [Col SPATH]: We will. In fact, that helps. It is the

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1 Brady motion. And that's right, I basically deferred until I  
2 had an opportunity to review all of the pleadings which I had.  
3 Thank you. And thanks both sides.

4           So we do need to continue that discussion because my  
5 discussion was -- I was not prepared to have a full session on  
6 333 back then. That helps. I thought I had gone back and  
7 looked at why we were doing that.

8           Then the second one, there has been no request but it  
9 relates to Appellate Exhibit 092 in the 092 series. Just for  
10 my review, it appears that I might have to discuss a couple of  
11 classified matters. And so to do that first, we need the 505  
12 hearing and then we'll move from there. So that's the second  
13 one.

14           LDC [MR. KAMMEN]: For the record, we agree with respect  
15 to 092. There's absolutely no way to have that discussion  
16 without it being in closed session.

17           MJ [Col SPATH]: That appears to me, too.

18           So that tells me the 505 session on that will be  
19 relatively brief, I believe. The 505 session on 333 might be  
20 longer, but we should be done significantly earlier than we  
21 were yesterday.

22           Do you need some time, General Martins? Because I  
23 can wait.

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1 CP [BG MARTINS]: Your Honor, just on that motion,  
2 although it sounds the parties agree and the bench agrees,  
3 that there's very little that can be argued in open session.  
4 There are questions relating to in camera versus ex parte,  
5 because a good deal of information that was appropriately  
6 provided on this ex parte should not be made merely in camera  
7 in order to protect the information at issue.

8 And so while the use-relevance-admissibility hearing  
9 makes sense, there are issues in addition that at that hearing  
10 should address what part of this can even be done in camera.

11 MJ [Col SPATH]: Understand. Once the classified piece is  
12 done this afternoon, the 505, we're going to stop, because  
13 what I don't want is for people in the back to have to wonder  
14 if they need to come back for an open session. The answer is  
15 no.

16 Then tomorrow morning, whatever we have outstanding  
17 in the unclassified world we will get to, and we'll start up  
18 likely at 9:00. We'll see what time we agree to at the end of  
19 the day. But we'll work through whatever is left over Friday  
20 morning in the unclassified hearings that we've been having,  
21 and then we'll have any 806 hearing after lunch Friday  
22 afternoon. And so that will be around 1300.

23 So that hopefully helps with kind of where we're

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1 going over the next day-and-a-half, two days. I don't know  
2 how long it will take Friday afternoon. We'll have that  
3 hearing if we need to and work as long as we need to.

4 LDC [MR. KAMMEN]: I presume at the end of the  
5 unclassified we'll probably have a discussion on October and  
6 December, because there's some information regarding December  
7 that we need to communicate to the commission. And obviously  
8 none of us have recovered completely from last evening and the  
9 effect that might have on October.

10 MJ [Col SPATH]: That -- yes. So we will discuss that.  
11 That isn't in the formal filings that we had, but my plan was  
12 certainly sometime either late today or tomorrow -- today  
13 before we break for the 505 hearing or tomorrow before we go  
14 into a classified hearing to have a good discussion about the  
15 road ahead as we move towards October and/or December,  
16 depending on how this all plays out. So, yes, we'll have that  
17 discussion as well.

18 So first up is the Appellate Exhibit 348. It is the  
19 Commander Mizer issue. So let me do this. Defense Counsel, I  
20 know you wanted to also comment on my order where I denied  
21 your request for witnesses. So you can do both during this  
22 argument. My first question to you, I know the answer, I  
23 always ask: Before we take argument, do you have any

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1 additional evidence or witness testimony that you want me to  
2 consider other than what I've already ruled on?

3 LDC [MR. KAMMEN]: We have two pieces of evidence that  
4 bear on 348 and 350. They're marked as Appellate Exhibits  
5 350C and D and premarked. But I think they really bear on  
6 both.

7 DDC [LCDR POLLI0]: And, Your Honor, if I may, a copy has  
8 been provided to the prosecution. And if I can just approach,  
9 I will give them to the court reporter.

10 MJ [Col SPATH]: You may. Let me just talk with the court  
11 reporter briefly while you're doing that.

12 [Conferred with courtroom personnel.]

13 DDC [LCDR POLLI0]: And, sir, 350C -- I believe C and D  
14 have been given to the court reporter. Are they now -- have  
15 they been admitted to the record?

16 MJ [Col SPATH]: Close. I have them in front of me. Just  
17 give me another minute to deal with the housekeeping piece and  
18 then we'll move from there.

19 DDC [LCDR POLLI0]: Roger that, sir.

20 MJ [Col SPATH]: All right. So here is what we will do to  
21 make the record clear for both filings and for both arguments:  
22 I have 350C and D in front of me. I do not need another copy.  
23 I will consider them for 348.

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1           But for 348, we're going to mark other copies of  
2 these as 340I, India, and J, Juliet. 348. If I said 349, I  
3 misspoke. I thought I -- it's probably me recovering from  
4 last night's lengthy session. 348I and J. And again, I don't  
5 need another copy of them, I've got a copy up here. But when  
6 you are arguing, Mr. Kammen, 348I and J for this particular  
7 motion.

8           LDC [MR. KAMMEN]: And ----

9           MJ [Col SPATH]: So yes, they have been -- they are in the  
10 record. I will consider them as I work through the motion.

11          LDC [MR. KAMMEN]: And the only other thing, and I'll  
12 simply defer to the commission on how they'd like to proceed,  
13 if -- we are prepared to present a declaration from Mr. Adam  
14 Thurschwell, who was part of the -- I believe it was the Terry  
15 Nichols defense team, the Oklahoma City bombings in federal  
16 court, as to the resources that were available to that team.

17           That's being prepared. If we could go ahead and then  
18 we will supplant the record with that because the commission  
19 seemed, and correctly, wanted as much factual -- wanted the  
20 parties to begin making more factual showings with respect to  
21 our assertions.

22           So we're certainly prepared to do that. If you want  
23 to wait, that's fine; if you accept ----

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1 MJ [Col SPATH]: Well, if you're prepared to present  
2 argument ----

3 LDC [MR. KAMMEN]: Yes.

4 MJ [Col SPATH]: ---- I'd like to do that. And that  
5 declaration will end up being 348K.

6 LDC [MR. KAMMEN]: Okay.

7 MJ [Col SPATH]: Kilo.

8 LDC [MR. KAMMEN]: And -- okay.

9 ATC [LT CANTIL]: Your Honor, I'd just like to note for  
10 the record that the government would object to the  
11 consideration of the number of counsel in other cases. That  
12 is not relevant to the adequacy of counsel in this case and  
13 should not be considered by the court.

14 MJ [Col SPATH]: I understand. And hopefully you all have  
15 figured out, I -- I am going to put it in the record. That  
16 way the record is protected. I'd have to look at it to  
17 determine if it's coming in the record or not, and then you  
18 will know by my findings of fact and conclusions of law how  
19 important I find the evidence that comes to me. That's what  
20 they're for.

21 LDC [MR. KAMMEN]: Well ----

22 MJ [Col SPATH]: But I did talk yesterday about making  
23 assertions without evidence, and so it's nice to have evidence

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1 to assist as I work forward.

2 LDC [MR. KAMMEN]: Right, and that's our goal. And, of  
3 course, you know, quite honestly, as we discussed yesterday,  
4 the ultimate audience is the D.C. Circuit Court of Appeals,  
5 which they may find it quite relevant as to the difference  
6 between how a major death penalty case is treated in the  
7 Article III system versus how a major death penalty case is  
8 treated in the military commissions system. So they may find  
9 it quite a bit more relevant.

10 So may I proceed?

11 MJ [Col SPATH]: You may.

12 LDC [MR. KAMMEN]: Okay. Thank you.

13 I want to be, I mean, honest that this is going to be  
14 one of the more difficult conversations that I've had in my  
15 legal career with a judge. And so I want to preface it by  
16 saying that everything I say, I say with the greatest possible  
17 respect, and it is not meant to be personally insulting. And  
18 I just want to get that out there, because some of what I'm  
19 going to say is -- some people with thin skin might take  
20 offense at.

21 In the last 18 months, obviously, there was a sea  
22 change, as we discussed yesterday, in two respects: Number  
23 one, we know that the D.C. Circuit essentially has abandoned

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1 us to play this all out, and then we'll find out seven, eight,  
2 ten years from now whether this is the -- actually even the  
3 right court to be in. And if it's the right court, then  
4 they'll decide whether or not the procedures were sufficiently  
5 fair and reliable to support any findings and sentence that  
6 may come out of this process.

7 But there's another sea change as well. And that,  
8 unfortunately, concerns the Court of Military Commissions  
9 Review. And obviously the government will disagree, but at  
10 least from our perspective, the CMC maintained its historical  
11 role in this process of being a -- what I will call a faux  
12 court, a Potemkin court that's only mission and only  
13 assignment is to help the prosecution when a judge has the  
14 temerity to say to the prosecution, you're wrong.

15 And that is, of course, what you did in two  
16 decisions, decisions that were amply supported by the  
17 evidence, by the record, and which were pretty summarily, and  
18 under circumstances that, we'll be discussing this later,  
19 really quite peculiar, were reversed.

20 ATC [LT CANTIL]: Your Honor, I'm sorry to interrupt, but  
21 I'm failing to see the relevance to this to Commander Mizer.

22 LDC [MR. KAMMEN]: Well, you said that I could address the  
23 other issue as well.

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1 MJ [Col SPATH]: The other issue, I believe, is the denial  
2 of the two witnesses.

3 LDC [MR. KAMMEN]: Yes.

4 MJ [Col SPATH]: And I think that's where we're going.  
5 Because I did offer you could make comment on I had denied  
6 before we got down here the two witnesses.

7 LDC [MR. KAMMEN]: And with the court's -- the  
8 commission's permission, I'd also sort of like to morph into  
9 332 so we don't have to repeat all of this, because it's part  
10 of the same.

11 And after reading the CMCR's decisions, especially  
12 the second one where you may be the first judge in history  
13 reversed on abuse of discretion ----

14 MJ [Col SPATH]: Oh, I'm not the first, I can assure you.

15 LDC [MR. KAMMEN]: Among the first.

16 MJ [Col SPATH]: I disagree. Having -- I don't have thin  
17 skin, but I do have, I think, the ability to do  
18 self-reflection when I'm overturned, because I have been  
19 overturned not just by the commission's court but by the Air  
20 Force court. I certainly go back and look at kind of the --  
21 my own behavior to see if I could have done something  
22 differently, better, or I feel I was correct. However,  
23 feeling I'm correct doesn't necessarily mean I got the law

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1 right.

2           And I've watched two of my Air Force judges recently  
3 get overturned for an abuse of discretion by an Air Force  
4 court. It happens.

5           LDC [MR. KAMMEN]: Sure. In any event, Your Honor, it  
6 would be easy for a judge in your position to sit back and  
7 say, look, I get the message. The goal here is to keep them  
8 happy. They are the real power in the courtroom. What they  
9 want is what the CMCRC is going to give them, so why go back  
10 and forth. Let me just rule for the prosecution and we'll  
11 keep the train on track. And that would certainly be very  
12 understandable if a judge, without even necessarily  
13 articulating it to the public or to himself, did that.

14           And when I put myself in a judge's shoes, in your  
15 shoes, I could easily see how I would do that. Say, you know,  
16 why -- let's get this over with. And if -- I'll give the  
17 prosecution everything they want, and if I'm -- they're wrong,  
18 the D.C. Circuit in seven years or ten years will tell them  
19 they're wrong; and if they're right, they'll tell them they're  
20 right. And so we -- you know, it makes everyone -- your job a  
21 lot easier because you simply defer to them.

22           We're going to ask you not to do that; and there's  
23 two reasons. The first, if you're going to be a judge, you've

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1 got to be a judge. And the judge should not always defer to  
2 one side, especially when that one side is sometimes wrong.

3           The second, Your Honor, is more theoretical that I'd  
4 ask the commission to consider, and that is, this is really a  
5 historic case. And well after certainly I'm gone and maybe  
6 all of us are gone, people are going to look at this and ask:  
7 How did these people measure up? How did the defense lawyers  
8 do what defense lawyers are supposed to do in an honorable and  
9 honest and aggressive fashion? Did the prosecutors behave  
10 honorably or not? And did the -- was the judge a real judge,  
11 or did the judge, perhaps understandably, abdicate his  
12 responsibilities, given the realities, to the prosecutor?

13           Because part of the reality with the CMC, Your  
14 Honor, is that they have never been -- or very rarely, and I  
15 don't think in any meaningful way, ever been affirmed by the  
16 appellate courts. They are pretty much zero for lifetime in  
17 the D.C. Circuit, which is pretty remarkable for an appellate  
18 court. And that is why we call it a faux court, a Potemkin  
19 court. Its role is to simply fix what the prosecutor wants  
20 fixed. Which brings us to what happened on your rulings on  
21 the witnesses, and, quite honestly, yesterday as well.

22           The 348 involves, under the Hutchins case, two  
23 issues: Number one is their structural error, and number two

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1 is their prejudice.

2           The burden is on us to prove both. And quite  
3 honestly, given that relevance is such a low standard, the  
4 notion that General Baker and Sondra Crosby were not relevant  
5 is frankly absurd.

6           MJ [Col SPATH]: How do you think Hutchins gets you to  
7 them being relevant to the legal issue before the court?

8           LDC [MR. KAMMEN]: Because General Baker, Your Honor, as  
9 the offer of proof suggested, made the decision not to allow  
10 Commander Mizer -- to approve his withdrawal. And his reasons  
11 for that go to both the structural error and the prejudice.  
12 He -- part of his reason for doing that was the prejudice.

13           Similarly, Your Honor, Dr. Crosby -- Hutchins says  
14 you have to look at the -- Hutchins is very clear. The end of  
15 a person's service doesn't necessarily terminate the  
16 attorney-client relationship in all cases.

17           MJ [Col SPATH]: The Navy Marine Court said that ----

18           LDC [MR. KAMMEN]: Yes.

19           MJ [Col SPATH]: ---- and then C.A.A.F. overturned them,  
20 didn't necessarily overturn that language.

21           LDC [MR. KAMMEN]: Didn't overturn that language.

22           MJ [Col SPATH]: Fair.

23           LDC [MR. KAMMEN]: And they did say that it depended on

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1 the robust examination of the circumstances of the case.

2 MJ [Col SPATH]: But then the circumstances they looked  
3 at, much different than this case. But in Hutchins, the  
4 C.A.A.F. court was satisfied because there was still a  
5 civilian counsel on the case -- not a learned counsel, just a  
6 civilian that was hired. There was a detailed military  
7 counsel to replace, which there is, along with another one,  
8 and the counsel there was given more time to prep their case.  
9 And you have conceivably another year or two to prep your  
10 case, given where we're at.

11 LDC [MR. KAMMEN]: Well ----

12 MJ [Col SPATH]: But that's not funny. That's not --  
13 those are the Hutchins' facts.

14 LDC [MR. KAMMEN]: No, I understand. But there's two  
15 other differences, and these differences, with respect, are  
16 significant. Number one, Hutchins was not a capital case.

17 MJ [Col SPATH]: Correct.

18 LDC [MR. KAMMEN]: And number two, the defendant in  
19 Hutchins had not been tortured by the same people who wanted  
20 to kill him, and had not been held in Guantanamo Bay, which we  
21 all know -- in Guantanamo Bay, which we all know has special  
22 circumstance related to that.

23 MJ [Col SPATH]: And on that, I concur. In large part,

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1 that makes some issues here significantly different. But for  
2 the question of counsel, for the question of counsel, while  
3 those may offer flavor to it, and both sides are going to say  
4 different words about those experiences, I get that, we still  
5 have to look at the law that I'm given in support of these  
6 motions and the law that, again, no matter how you feel about  
7 the commissions process, I can't simply walk in and say it's  
8 unconstitutional when, in large part, that battle's been  
9 fought.

10           You can do that early as a judge, but -- and I'll use  
11 Article 120 in the military as an example. Congress has  
12 helped us multiple times with 120. The first time they  
13 altered it, a number of trial judges said it was  
14 unconstitutional. And then C.A.A.F. said, you're wrong. A  
15 trial judge who's following the law cannot come back to that  
16 same issue and say, I still disagree with my appellate court  
17 and I'm going to make a statement.

18           LDC [MR. KAMMEN]: Absolutely.

19           MJ [Col SPATH]: And so I think it's important -- the  
20 cases I've cited and the law dictates how I try to work  
21 through these -- this process.

22           LDC [MR. KAMMEN]: I understand that. But the law with  
23 respect to witnesses, even in the commissions, is not at all

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1 settled. For example, the statute -- the Military Commissions  
2 Act, the statute that should control this, says that we should  
3 have the same access to witnesses as would be available to the  
4 defendant in an Article III court; which nobody who looks at  
5 this system would conclude what exists on the ground is  
6 anything approaching what exists in an Article III court.  
7 Because the rules, which should be subservient to the statute,  
8 have eaten the statute up.

9           Now, the other piece of that is, of course, ideally  
10 in an Article III court, counsel has a right to make a record  
11 for appellate review. And so when Hutchins says there's  
12 supposed to be a robust examination of all of the facts, what  
13 would normally happen is that you would hear the evidence, the  
14 commission -- the judge might say, I hear it; for whatever  
15 reason, I disagree, the law compels me to disagree, but your  
16 record is made.

17           MJ [Col SPATH]: But it allows you to make a record of  
18 facts that are going to assist me in deciding the question  
19 submitted in each case. Because otherwise, you could make a  
20 record of significant facts that are not going to assist the  
21 trial judge in resolving an issue.

22           LDC [MR. KAMMEN]: When -- I hear what you're saying, Your  
23 Honor, but with respect, when the case law says you look at

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1 all of the facts and circumstances in the case, then it should  
2 be up to the litigants as to what they think will assist you.  
3 You may think, this doesn't help me at all. But when you hear  
4 the evidence, you may say, you know, I was wrong.

5 Now, what happened -- and this is perhaps the  
6 troubling part. You ruled against us. That's fine. But  
7 here's how it works in the military commissions system. We  
8 have to go to them; and their default position, for the most,  
9 part is no. So then we come to you. And what happened  
10 yesterday was very troubling, with respect, because you said  
11 no. And we said, okay, we want to make our offer of proof.  
12 And we made the offers of proof. And you turned to them and  
13 said, does that change your mind? And they said no; and you  
14 said, okay, we're done.

15 Yeah.

16 MJ [Col SPATH]: I recognize appearance.

17 LDC [MR. KAMMEN]: That's my word, it's not yours.

18 MJ [Col SPATH]: It was more looking for comment from  
19 them. Yes, I mean, does that change their position? No.

20 LDC [MR. KAMMEN]: And because it didn't change your  
21 position -- their position, it appeared not to change yours.  
22 And that, Your Honor, was troubling to us, but we understand  
23 that.

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1 MJ [Col SPATH]: Understand.

2 LDC [MR. KAMMEN]: Now, the point, Your Honor, is that as  
3 we go forward, there's going to be this constant tension  
4 between their desire to limit and skew the evidence and our --  
5 because here's what happens, and there's two impacts of this  
6 when they deny witnesses that we think are important. They  
7 effectively control our presentation. They effectively  
8 control our ----

9 MJ [Col SPATH]: They do initially, there is no doubt  
10 about that.

11 LDC [MR. KAMMEN]: And when the commission defers to  
12 them ----

13 MJ [Col SPATH]: Oh, I -- that was not deferring.

14 LDC [MR. KAMMEN]: Well, when the commission comes to the  
15 same conclusion, that has the effect of controlling and  
16 shaping our presentation. For example -- and if I can just  
17 allude to 332. If they would have had their way, and maybe  
18 they will, we would have just been allowed to present  
19 Commander -- Mr. Gill, and maybe Lieutenant Colonel Lewis,  
20 neither of whom work for the Office of the Convening Authority  
21 anymore, on an issue where the abuse may still be ongoing. So  
22 their denials of witnesses shape our ability to present our  
23 case.

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1 MJ [Col SPATH]: And I would highlight for you, and I  
2 think this is important, in 332, your witness request for  
3 multiple witnesses, I don't have the numbers up, but it was  
4 five or six ----

5 LDC [MR. KAMMEN]: I think it was closer to ten.

6 MJ [Col SPATH]: ---- had no justification.

7 LDC [MR. KAMMEN]: I know. And ----

8 MJ [Col SPATH]: But -- again, whether we like it or not,  
9 if you request a witness, you're required by the process --  
10 and it's not just this process, it occurs in other  
11 systems ----

12 LDC [MR. KAMMEN]: Well ----

13 MJ [Col SPATH]: ---- you're required to tell them why you  
14 want the witness and what it -- the relevance of the witness.  
15 So if you don't provide any justification, you haven't  
16 followed that process.

17 LDC [MR. KAMMEN]: I understand, but here's ----

18 MJ [Col SPATH]: It's important, though, when you talk  
19 about 332 as if I denied it out of hand.

20 LDC [MR. KAMMEN]: Well ----

21 MJ [Col SPATH]: I didn't have the process followed. And  
22 with the other two witnesses, before we saw Colonel Gill -- or  
23 Commander Gill, that justification didn't assuage me or make

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1 them appear relevant. Not because of what they said, because  
2 of my readings of the pleadings, and it's why I wanted to hear  
3 from Commander Gill. It's also why I mentioned to you that  
4 likely we're going to revisit witness issues after hearing  
5 from Commander Gill.

6 LDC [MR. KAMMEN]: I understand. But let's look -- not  
7 ahead of ourselves, but let's look at the context, because  
8 this is important going forward to really understand what the  
9 rules are.

10 Those ten witnesses were first identified by the  
11 government ----

12 MJ [Col SPATH]: They were.

13 LDC [MR. KAMMEN]: ---- as being relevant and necessary.

14 MJ [Col SPATH]: They were.

15 LDC [MR. KAMMEN]: And so what the rule requires is for us  
16 to go to the government and say to the government, here's why  
17 these witnesses are relevant or necessary.

18 Now, I am told that in court-martial practice, when  
19 the government, prosecution, lists a witness, then essentially  
20 they are fair game; and the representation that we agree with  
21 you that these witnesses are relevant and necessary fulfills  
22 that burden.

23 MJ [Col SPATH]: That is likely a fair impression,

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1 depending on whether or not the trial judge you appear in  
2 front of derives their judicial methodology from following the  
3 rules or from practicing that way. You are correct, there are  
4 some Air Force, and likely Navy, judges who accept the  
5 prosecution's list as fair game.

6 LDC [MR. KAMMEN]: Okay.

7 MJ [Col SPATH]: I will tell you, I know that I don't.  
8 What I expect is for both sides to follow the rules of  
9 procedure as we go forward.

10 LDC [MR. KAMMEN]: But -- and point taken. But part of  
11 the problem with the military commissions system, which again  
12 says we should have the same access as an Article III court,  
13 is only one side has to jump through this hoop. They don't  
14 have -- they don't have to come to me and say, we want to call  
15 Joe Schmoie and do you agree he's relevant.

16 And so I can't -- the impact only goes one way. And,  
17 Your Honor, the reasons for the impact ----

18 MJ [Col SPATH]: It does -- that's only part of that  
19 process, though. You're correct, the government can line up  
20 and walk through the door anybody they think is relevant. You  
21 can file a motion in limine requiring me to hear the testimony  
22 and determine whether or not it is relevant or not  
23 particularly with the fact-finder in a trial, I recognize.

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1 But you can stop it, just it's a different time in the  
2 process. And I recognize you have to go to the person who  
3 owns the purse strings initially and they don't.

4 LDC [MR. KAMMEN]: But we don't even get to present the  
5 witness so you can hear it. They get to stop it before you  
6 even hear it.

7 MJ [Col SPATH]: Except that I allowed you to put on ----

8 LDC [MR. KAMMEN]: Offer of proof.

9 MJ [Col SPATH]: ---- your offers of proof yesterday.

10 LDC [MR. KAMMEN]: That's right.

11 MJ [Col SPATH]: So there is more to it than a simple, you  
12 have to go to them and you're at their mercy, because then you  
13 can come to me. And whether I should or not, I allowed you to  
14 put on an offer of proof after my denial to hear what it was.

15 But I also think the law with relation to the issue  
16 we're talking about, with relation to the issue we're talking  
17 about, and that is the re-ordering of Commander Mizer to your  
18 team, is something that can be decided, at least from what  
19 I've heard so far, without the testimony of General Baker and  
20 without the testimony of Dr. Crosby.

21 LDC [MR. KAMMEN]: Well, and I appreciate that that's your  
22 ruling, and we certainly understand that. But again, given  
23 our responsibility now to create a vibrant and robust record

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1 for appellate review, I hope you will appreciate that another  
2 court with a different view of its responsibilities than the  
3 CMCR might see this in a wholly different light.

4 MJ [Col SPATH]: That is what appellate review is for.

5 LDC [MR. KAMMEN]: I ----

6 MJ [Col SPATH]: And they might. They might. But here's  
7 what both sides don't want ----

8 LDC [MR. KAMMEN]: Right.

9 MJ [Col SPATH]: ---- you don't want me afraid to cause  
10 appellate issues because that means I just rule for the  
11 defense. That's easy, right? You also don't want me afraid  
12 to rule against the government and ----

13 LDC [MR. KAMMEN]: Absolutely. And given -- again, this  
14 is our concern, is given what the clear message from the CMCR  
15 of let's get the train rolling, that is absolutely our  
16 concern. And so when you say to the government, does that  
17 change your mind and it doesn't, so, okay, we're done; or when  
18 you say to the government -- or when you say to us, you have  
19 to jump through a hoop of convincing them that witnesses they  
20 say are ----

21 MJ [Col SPATH]: I don't say that. Congress has said  
22 that, the process ----

23 LDC [MR. KAMMEN]: And what you ----

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1 MJ [Col SPATH]: I don't say that.

2 LDC [MR. KAMMEN]: No, what you say, what you determine is  
3 whether our showing is adequate. And our showing that they  
4 thought the witness was necessary and they thought the witness  
5 was relevant should be adequate, because they know what the  
6 witness is going to say. Why should I provide a synopsis of  
7 what a witness is going to say to the person who already knows  
8 what the witness is going to say? That's simply make work.  
9 That's simply a hoop. And if that's the hoop, that's fine.

10 But I'm going to tell you, because it's going to get  
11 abused, and it's going to get abused over and over and over  
12 again. They'll list witnesses. We'll say, for example, we  
13 think the witness is going to say X, Y and Z. They'll say no,  
14 that's not what the witness is going to say and they'll deny  
15 it. And so, you know, what ----

16 MJ [Col SPATH]: I understand. And we've seen -- and  
17 we've had these discussions in relation to other issues.  
18 Again we're afield of this one, but I -- here I appreciate  
19 this. One is whether or not I'm actually fair and two is the  
20 appearance. We talk about it with UI all the time. We talk  
21 about it all the time. Appearance is critical, not just here,  
22 anywhere, and I understand that.

23 I don't know what to offer you in regard to the

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1 earlier discussion. One, I don't have thin skin and that was  
2 certainly not something that would cause me angst. I  
3 appreciate that there is a concern out there that CMCRC rules  
4 twice against me and maybe a judge says, oh, well, we'll just  
5 move the train forward.

6 That is not my judicial methodology or philosophy.  
7 Mine remains to follow the law that is provided to me, no  
8 matter how I feel in large part about the law that is provided  
9 to me. Again, un -- constitutionality issues aside, and some  
10 other areas where trial judges do get into that, those are the  
11 exception to the rule, especially when there's case law that  
12 resolves those issues. No matter how I feel about that case  
13 law, it is what it is and I have to follow it.

14 I ordered, as you know, a convening authority to  
15 testify that led to a UI ruling that had not a consequence  
16 that I intended or didn't intend -- I didn't think about it --  
17 his removal from that office. In that same motion hearing, I  
18 ordered three service TJAGs to testify that both sides  
19 ultimately determined they didn't need, one of whom was in  
20 response to a motion from you that the defense had said -- or  
21 the government had said no to, and I said, you need to make  
22 that service TJAG available.

23 The only way you're going to know if -- I know you

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1 see that as doing the right thing or the brave thing. I don't  
2 see it as doing any of those things. I see it as following  
3 the law. And the only way you're going to find out if I'm  
4 still going to do that is as we move through the process.

5 LDC [MR. KAMMEN]: Absolutely, but ----

6 MJ [Col SPATH]: But I am aware appearance is critical.  
7 And so yesterday in asking them if they concurred, it was not  
8 in a, since you concur, I'm happy, it was more in a hope of  
9 maybe the government -- if the government got up and said a  
10 we've decided now, General Baker is here, we should call him,  
11 well, that resolves the issue. Because now we have sides in  
12 agreement which is always where it can happen, a good  
13 experience, because it resolves appellate issues down the  
14 road.

15 Not always as good a thing for you, I recognize,  
16 because building a record includes appellate issues. But as a  
17 trial judge, when you can remove appellate issues, you remove  
18 appellate issues.

19 LDC [MR. KAMMEN]: Certainly had the prosecution agreed,  
20 we would have -- that would have been fine.

21 MJ [Col SPATH]: So here a good example is, I'm not  
22 removing appellate issues. If I'm wrong, I've cost the  
23 government years. That's the risk the government is willing

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1 to take. I have cost the government years and I have cost the  
2 taxpayers I don't know how much money because this process  
3 maybe will continue again for all of these people who have  
4 interests in perpetuity.

5 LDC [MR. KAMMEN]: Well, if the D.C. Circuit says we're in  
6 the wrong court ten years from now, who knows what will  
7 happen.

8 And I appreciate what you're saying and I won't  
9 belabor the point, but it does seem to me -- and certainly we  
10 know -- but it does seem to me that on the issue of when they  
11 list witnesses, to tell them here's why we agree that your  
12 witnesses are relevant, and here's what we think the witnesses  
13 are going to say, but you know what the witnesses are going to  
14 say, so why in the world should we have to tell you what you  
15 already know, I understand on the face of it that is what's  
16 required. But their listing of the witness should satisfy the  
17 notion. And our agreement -- because you said you like  
18 agreement -- and our agreement, yes, these witnesses are  
19 necessary and relevant ----

20 MJ [Col SPATH]: But look at it their ----

21 LDC [MR. KAMMEN]: ---- should satisfy that hoop.

22 MJ [Col SPATH]: And looking at their statement with  
23 regard to, again 332, which is a little off track ----

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1 LDC [MR. KAMMEN]: Right.

2 MJ [Col SPATH]: ---- but it was a, they may call those  
3 witnesses; it wasn't that they were going to and it wasn't --  
4 so was it going to be in response to the witnesses you called?  
5 That's -- the vagaries of who's got the burden and how you're  
6 going to do that, their statement of who they were going to  
7 call in 332 was nowhere near as clear as these witnesses are  
8 relevant and necessary. All's they said is we might call  
9 them.

10 And so again, the process in place requires -- and it  
11 has been in place for a while, not just here, requires you to,  
12 when you are going to have witnesses called, provide the  
13 justification.

14 LDC [MR. KAMMEN]: Lesson learned. We'll jump through the  
15 hoops. But I guarantee you, we will be having this discussion  
16 again because the history of my five years in this process has  
17 demonstrated that nothing is good enough for those guys. And  
18 that's the frustration, is it's never going to be enough and  
19 everything is a battle. And our goal at some point, because  
20 we are -- as you sort of alluded to yesterday, now we're  
21 getting into the evidence.

22 And there's -- you know, ideally, whenever this  
23 really starts up again, we're going to be getting into serious

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1 evidentiary motions with serious, serious consequences, and  
2 there are going to be huge battles over witnesses because  
3 their goal is -- I don't want to be polemic and say hide the  
4 truth, their goal is to control the truth. Their goal is to  
5 limit our ability to present the evidence that we want to  
6 present.

7           And advocates do that. Advocates do that. And  
8 advocates with power sometimes abuse that power. And that is  
9 our fear. And so again, when we jump through -- have to jump  
10 through pointless hoops, our concern is that gives the other  
11 side more leverage to abuse their power.

12           Now, the other questions, Your Honor, and then I'll  
13 move on, is everything in the rules also at least pay lip  
14 service to the notion that, when in doubt, witnesses should be  
15 called. The witnesses -- a list of witnesses shall include  
16 name, telephone and location, and a synopsis of the expected  
17 testimony. It doesn't say cheek by jowl, he's going to say A,  
18 B, C, D and E, it's a synopsis. And certainly, we didn't do  
19 that because they know what the synopsis of the testimony is  
20 because it's their witness. But we'll do that in the future.

21           But our concern on the witnesses is that, going  
22 forward what's going to happen is -- time and time again is  
23 our ability to present the evidence to make the appropriate

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1 record is going to get skewed. Because when a witness is  
2 excluded, when you won't hear it, when it is an offer of  
3 proof, that is not as robust and not as vibrant and doesn't  
4 mean as much to an appellate court as when the actual witness  
5 testifies. And so that is our concern going -- going forward.

6 Now, let me turn to 348. And I'll try not to touch  
7 too much on 350, but they really do work together. They're  
8 very interconnected. And again, there's another hard thing  
9 I've got to say, and we need to talk about, you know, the  
10 military success in capital prosecutions.

11 If the CMC is zero for lifetime, the military writ  
12 large, Army, Navy, Air Force, Marines, are pretty close.  
13 They're in the low .100s for batting average. And the reason  
14 for that -- there tends to be two reasons. When you look at  
15 the reversals in military death penalty cases, there tend to  
16 be two reasons. First, Brady violations, which happen time  
17 and time and time again in military death penalty cases. And  
18 they happen in civilian death penalty cases, too. These cases  
19 sometimes bring out the worst in people, and we'll be  
20 discussing that later.

21 But the other and by far the largest reason for  
22 reversals in death penalty cases is ineffective assistance of  
23 counsel. And that stems, Your Honor, from the notion in the

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1 military -- excuse me -- that lawyers are fungible; that a  
2 Commander Mizer is the same as a Major Jones. And a person  
3 with 20 years of national security litigation experience is --  
4 who wears a uniform is exactly the same as a major or captain  
5 three years out of law school who's maybe tried a couple of  
6 sex cases.

7           And the military model is exactly that. Lawyers are  
8 widgets and you can -- when one moves on, you plug the next  
9 one in; and if they're wearing a uniform, it's all good.

10          MJ [Col SPATH]: I do not agree in today's environment  
11 it's as simple as that.

12          LDC [MR. KAMMEN]: Well ----

13          MJ [Col SPATH]: I recognize that lots of people in the  
14 process -- the Navy has career tracks; the other services have  
15 people who have been in military justice for 10, 15, 20 years.  
16 It is certainly a more complex experience because they're  
17 acting under a code that is there in an Article II court for  
18 good order and discipline and its purpose is different. And  
19 you have military exigencies where somebody with 20 years of  
20 that kind of experience may be useful all of a sudden in a  
21 conflict which is critical to good order and discipline; but  
22 we don't replace somebody with 15 years of experience in  
23 military justice with -- with somebody with five.

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1 LDC [MR. KAMMEN]: With respect, that's kind of what's  
2 happened here.

3 MJ [Col SPATH]: That's -- and so there's the question.

4 LDC [MR. KAMMEN]: And that's -- you know, I don't want  
5 to -- look, I have the greatest possible respect for the other  
6 members of our team, the new members of our team. They are  
7 good, solid lawyers. In some cases with more experience than  
8 others of the military people who remain, I think I'm correct,  
9 no murder trials, certainly no capital trials, and not any  
10 national security experience. And so -- and I think I'm  
11 correct when I say that Lieutenant Commander Pollio was  
12 admitted to the bar in 2010 and has done other jobs besides  
13 try cases.

14 So you're not replacing -- you know, what we had,  
15 Your Honor, is that -- and what we had, Your Honor, was, from  
16 Mr. al Nashiri's point of view, started with Lieutenant  
17 Commander Reyes, Major Hurley, Major Daniels, Major Jackson,  
18 and Commander Mizer all gone. All gone. All that experience,  
19 all that case knowledge gone. And we have -- you know, and  
20 this just sounds wrong to say, and then we have Lieutenant  
21 Commander Pollio. And so I just can't say it enough, and it  
22 sounds hollow, and I'm afraid it's going to sound hollow to  
23 them when I say how much I respect and admire them and how

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1 dedicated they are, and they have military trial experience;  
2 but again, without homicide experience, without murder  
3 experience, without capital experience, without national  
4 security experience, it is a different animal.

5           And that's why many states have the requirement that  
6 before you can be second chair on a capital case, you have to  
7 have certainly murder experience, capital -- if not  
8 necessarily the death penalty experience, at least have tried  
9 a murder case before.

10           We were talking -- Lieutenant Commander Pollio and I  
11 were talking and I said, well, I don't want to throw you under  
12 the bus and say it's like trading -- you know, when you  
13 replace Commander Mizer, it's like trading Peyton Manning for  
14 Ryan Leaf. And she said, well, at least give me Tim Tebow.  
15 And, again, this is essentially the model that exists here.  
16 Maybe it doesn't exist that way out in the rest of the  
17 military world, but again, somewhat the commissions are the  
18 poor stepchild of the military system.

19           MJ [Col SPATH]: But for learned counsel, and you know.

20           LDC [MR. KAMMEN]: Well ----

21           MJ [Col SPATH]: But for learned counsel.

22           LDC [MR. KAMMEN]: But for learned counsel. And I'll be  
23 happy to speak to that.

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1 MJ [Col SPATH]: You hear the other argument on the  
2 military side where they don't have learned counsel ----

3 LDC [MR. KAMMEN]: That's true.

4 MJ [Col SPATH]: ---- as a requirement.

5 LDC [MR. KAMMEN]: That is true, Your Honor, but let me --  
6 two things. Number one, you ask not forget, and this was the  
7 importance of 348I and J, the chief defense counsel and the  
8 convening authority have found that learned counsel alone is  
9 not enough and that additional civilian counsel were  
10 necessary -- are necessary to promote continuity. Because the  
11 problem, of course, of the military's people rotating in and  
12 out and leaving the service is not going to end. That is an  
13 ongoing problem that will continue to haunt this commission  
14 and the other commissions.

15 And so we can sit here today and say the team  
16 consists of, you know, John, Joe, Bill, and Sam; and 18 months  
17 from now we may be saying, no, it's Susan, Sally, George,  
18 and -- you know, because things happen and people get  
19 transferred and have to move on or leave the service. So the  
20 chief defense counsel and the convening authority found that  
21 additional civilian GS employees -- this is not volunteers,  
22 this is not pro bono, these are government employees hired to  
23 be part of this team by the convening authority.

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1           Now, I'm going to say something and, you know, this  
2 is where it gets complicated because I can say it and it's a  
3 proffer and I'm happy to support it with additional facts and  
4 evidence if that is necessary. This case has been going on  
5 five years, and I can't begin to tell you -- you have some  
6 idea of the volume of material and investigation and stuff.  
7 And I'm going to tell you, absolutely, to say that one  
8 individual can provide the necessary continuity is ludicrous.  
9 And I would say that about anybody, but I will certainly say  
10 that about myself.

11           The notion that -- even with my experience, maybe,  
12 you know, I'm getting a little long in the tooth, but the  
13 notion that one person can provide the continuity of the  
14 relationship with a lawyer -- and you heard about how  
15 difficult that is because every time you come down here it's a  
16 week, and every -- you know, and it's a couple of days, eight  
17 hours a day to maintain the relationship.

18           And even then, as Dr. Crosby's -- as we proffered, it  
19 is difficult to maintain, to maintain the continuity of the  
20 investigation when investigators come and go, to maintain the  
21 continuity of what motions have been filed and what needs to  
22 be done, and, you know, to maintain all of that, to maintain  
23 the multiple levels of continuity on -- and put that on one

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1 person, absolutely an invitation to disaster.

2           And I -- and I understand there's this notion --  
3 well, you've got a guy in a suit who's learned counsel, we're  
4 good here. And it's not -- in the real world, that's not the  
5 way it works. And so this is the reality. When you have a  
6 guy who's learned counsel and the lawyer's experienced as  
7 Commander Mizer, and adequate support counsel, then you're in  
8 a different situation. But let's come back to, again, the  
9 unique circumstances of this case as it relates to Commander  
10 Mizer. Because we don't have a sergeant or a lieutenant or a  
11 corporal or -- who's charged with a crime and who presumably  
12 has the mental wherewithal and is not afflicted, necessarily,  
13 the way Mr. al Nashiri is.

14           And so when you switch out the lawyers with him,  
15 especially -- or her, especially charged with a more minor  
16 offense, there's an easier transition. That person may  
17 understand, okay, yeah, Captain Jones got transferred. I  
18 understand that's what happens in the military, so now I've  
19 got Captain Johnson. Give me a few weeks, and we're good,  
20 because the case isn't maybe all that complicated. Or maybe I  
21 need a few months.

22           But you're not talking about somebody in that  
23 situation. You're talking about somebody's who's

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1 extraordinarily damaged, who's not from this culture, who  
2 doesn't understand necessarily how this all works, and who  
3 only knows that the one guy he trusted, the guy he had the  
4 most complete trust in is gone. And these other people  
5 disappear, and he was willing to agree to that, but this time  
6 he said no and nobody cared, from his perspective.

7           And we can tell him we cared, and we can say -- you  
8 know, General Baker can say, look, I did everything I could to  
9 stop it, and that's true. I can say, I did everything I did  
10 to stop it, and such as it was, that's true. But at the end  
11 of the day, from his perspective, this is huge.

12           Now, that's really where we come down to is can you  
13 fix this. And I think you can. I think you have the  
14 authority. I mean, Commander Mizer is in the Navy. He's in  
15 the Navy Reserves. And I assume, at a minimum, you have the  
16 authority to tell the Secretary of the Navy, or whoever the  
17 appropriate official is, Commander Mizer should be allowed to  
18 do work on the Nashiri case as part of his Navy Reserve  
19 duties. Now, I think you have that authority, and I think  
20 under Hutchins you have that obligation.

21           I don't want to steal Lieutenant Commander Pollio's  
22 argument other than to say this: In 350, I mean, what we have  
23 is Commander Mizer leaves, the convening authority says we

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1 have to fix the continuity problem, so we'll hire, you know --  
2 we'll hire these two GS civilians and we'll vet them and  
3 they're the right people for these positions, oh, but then  
4 we'll sit on the clearances for a year.

5           And, you know, make no mistake, once we filed this  
6 motion, stuff started to happen. But again, that -- you know,  
7 you talked about in the other cases they give time, and, you  
8 know, that -- that -- we'll have to discuss what that will  
9 look like if that's your solution, because in the other cases  
10 where the defendant is down the street and can come to the  
11 lawyer's office or the lawyer goes to the jail or brig or  
12 whatever it may be called and then goes back to his home or  
13 his office or maybe even flies across the country, it's a  
14 different situation than coming here.

15           That's the bottom line, Your Honor. These two things  
16 are interrelated. You do have the obligation to -- we  
17 believe, to look at the impact on Mr. al Nashiri, the impact  
18 of what happened to him, the impact of his circumstances, the  
19 need for -- his need for stability, his need for continuity,  
20 and obviously, the need to restore Commander Mizer, even in a  
21 limited capacity as part of his Navy Reserve duties back to  
22 Mr. al Nashiri's defense.

23           If I may.

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1 [Pause.]

2 Lieutenant Commander Pollio points out, and I think  
3 it's important, that there are a couple of big differences in  
4 -- and other differences in this case than in Hutchins. The  
5 first of course, in Hutchins, the defendant, at the time his  
6 lawyer left, did not object. And so that's why C.A.A.F. said  
7 it was not structural error and then moved on to prejudice.  
8 But the inference, of course, is that had there been an  
9 objection, that that might have played out differently. And  
10 of course, here there was an objection.

11 We understand that in the -- and we submit, Your  
12 Honor, that in any real world sense, in a major capital case  
13 of the complexity with as many moving parts as this, good  
14 cause looks at more than a statute that says you have two  
15 bodies, you're good. Hutchins says you have to do a complete  
16 analysis based on the facts and circumstances of the case to  
17 determine the impact.

18 And if you accept our offers of proof, when you look  
19 at that complete analysis, there is no question but what there  
20 has been the objection from every player from the defendant,  
21 through me, through the chief defense counsel, an effort to  
22 bring this to your attention before Commander Mizer left, and  
23 at every step there's been as robust an objection as possible.

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1 And when you add that to the circumstances of this case,  
2 there's been huge, huge prejudice.

3 Thank you.

4 MJ [Col SPATH]: All right. Thank you. It is quarter  
5 till 11, so let's take 15 minutes. We'll come back at 11 and  
6 hear trial counsel's argument.

7 Commission's in recess.

8 [The R.M.C. 803 session recessed at 1045, 8 September 2016.]

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