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1 [The R.M.C. 803 session was called to order at 1104,
2 8 September 2016.]

3 MJ [Col SPATH]: This commission is called to order. All
4 of the parties who were present in the last session are again
5 present.

6 Lieutenant Cantil.

7 ATC [LT CANTIL]: Yes, sir. Good morning, Your Honor.

8 MJ [Col SPATH]: Good morning.

9 ATC [LT CANTIL]: I'm going to focus my argument solely on
10 the AE 348 issue because, quite frankly, the defense's
11 denigration of the CMC, this court, and the rules of this
12 court don't deserve or require any further discussion.

13 MJ [Col SPATH]: I did not feel denigrated in the
14 slightest ----

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

16 MJ [Col SPATH]: ---- just to be clear. And I've been
17 overturned before.

18 ATC [LT CANTIL]: Before I jump into my argument, I just
19 want to point out two inconsistencies that the defense team
20 has brought up in the last two days. First, in the argument
21 just a minute ago, Mr. Kammen requested that Commander Mizer,
22 if -- that you order the Secretary of the Navy to put
23 Commander Mizer in a Reserve status for this case.

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1 One, I question the court's ability to do that. I
2 don't know if you can or can't. But what I can direct this
3 court to -- this commission is to General Baker's letter from
4 September 11 of 2015, specifically paragraph 8, where
5 Commander Baker -- or, I'm sorry, Brigadier General Baker, the
6 Chief Defense Counsel, noted Commander Mizer cannot
7 effectively represent Mr. al Nashiri in this capital
8 commission as a drilling Reservist. So that is a direct
9 contradiction of the relief requested by Mr. Kammen just a
10 minute ago.

11 Additionally, yesterday Mr. Kammen said that
12 Commander Mizer was so needed for the appeals during the
13 period of abatement, the trial hiatus, and yet Commander Mizer
14 on cross-examination said twice that there was no case and
15 that was one of the reasons why he decided to leave the
16 defense team at that point, despite the fact that the MCDO
17 represents clients before the CMCR. So there's another
18 contradiction between the importance placed on Commander Mizer
19 by Mr. Kammen regarding the USCMCR litigation.

20 Your Honor, what this motion is about is two key
21 issues. First, whether good cause existed when Commander
22 Mizer severed the relationship with the accused when he
23 voluntarily left active service pursuant to the routine end of

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1 his orders; and second, in the hypothetical scenario where
2 there is no good cause, the second question is to determine
3 whether or not any prejudice resulted from that improper
4 severance that would warrant an abatement of these
5 proceedings.

6 Your Honor, good cause existed when Commander Mizer
7 left active service by the end of his orders. In the United
8 States v. Sprigg, a 2000 Court of Appeals for the Armed Forces
9 decision, the court noted, "absent government misconduct, the
10 routine separation of a judge advocate from active duty
11 normally terminates any attorney-client relationship based on
12 the military status of the counsel."

13 MJ [Col SPATH]: It does. Don't -- Hutchins does change
14 that analysis a little bit, wouldn't you agree?

15 ATC [LT CANTIL]: Yes, Your Honor. I'd like to talk about
16 the facts of Hutchins because I think they are strikingly
17 similar to what we have here.

18 In Hutchins, Captain Bass, a Marine Corps assistant
19 detailed defense counsel, decided to get off of active duty
20 before trial while he was representing Sergeant Hutchins, went
21 on terminal leave, and left active duty, thus severing the
22 attorney-client relationship. The court specifically noted
23 this does not involve governmental action undertaken for the

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1 purpose of altering the composition of the defense team and
2 this is a personnel action initiated by Captain Bass, so it
3 didn't involve any government interference. And that, not the
4 lack of an objection, was the reason the court found there was
5 no structural error in the severance of Commander Mizer.

6 So it wasn't the fact, as the defense posited, that
7 the accused failed to object to Commander Mizer -- or to
8 Captain Bass leaving, it was the fact that it was the personal
9 decision of Captain Bass to leave. That was the reason there
10 was no structural error.

11 So -- and another point about Hutchins, Your Honor.
12 In Hutchins, C.A.A.F. held that highly contextual
13 circumstances may warrant an exception from the general
14 guidance that routine separation severs the attorney-client
15 relationship. But when you look at the things they looked at
16 in determining that, none of those highly contextual
17 circumstances apply here today.

18 The circumstances the court noted were, does this
19 even indicate significant government interests? Well, I'd
20 point the commission to Attachment E of the defense's filing
21 which is a letter from the Deputy Assistant Secretary of the
22 Navy stating the reasons why Commander Mizer would not be
23 reinstated.

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1 Additionally, one of the other factors is
2 cancellation, whether cancellation or postponement of a
3 separation date or recall to service is possible. Again, the
4 Deputy Secretary of the Navy has stated, no, that's not going
5 to happen. Commander Mizer did not consent to further orders
6 and the Chief Defense Counsel said that Commander Mizer cannot
7 fulfill this role in a Reserve status.

8 So when you look at the highly contextual
9 circumstances, none of those exist in this case to depart --
10 or the defense hasn't presented any of these highly contextual
11 circumstances that would warrant a departure from the
12 principle laid out in Hutchins, Spriggs, Hohman and a whole
13 host of C.A.A.F. cases.

14 But even if they could, even if the defense could
15 show there was no good cause ----

16 MJ [Col SPATH]: Let me ask you this: All of those are
17 good cases, certainly the law is relevant. They're all
18 noncapital.

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

20 MJ [Col SPATH]: So in the context of capital litigation,
21 what other factors do you think, if any, are important when
22 assessing good cause?

23 ATC [LT CANTIL]: Your Honor, in the United States v.

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1 Eason, which is a 1972 -- I think it was Court of Military
2 Appeals at that time, they stated that good cause can exist in
3 a capital case. They haven't -- no court has laid out the
4 specific circumstances. But again, I think you have to look
5 at what are the significant government interests. And the
6 letter from the Deputy Assistant Attorney -- or Deputy
7 Assistant Secretary of the Navy lays out those significant
8 government interests.

9 But even if there is no good cause, which I would
10 contend that there is good cause, the second step is to move
11 on to a determination of whether there is prejudice in this
12 case that would warrant an abatement of these proceedings.
13 And the test is whether the -- any hypothetical improper
14 severance resulted in material prejudice to the substantial
15 rights of the accused.

16 And courts in looking at this look at two factors.
17 Those factors are: One, is there enough time -- did the
18 defense team have adequate time to prepare for trial after the
19 departure of the improperly severed attorney? Well, I'd point
20 out that while Commander Mizer left active duty on October 16
21 of 2015, he notified the defense team as early as 14 August.
22 But as he stated yesterday, he notified the defense team and
23 Mr. Kammen much earlier than that.

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1 So Commander Mizer's departure has been on the
2 defense team's radar for well over a year and they've had over
3 a year to adjust for the severance of Commander Mizer and kind
4 of life following Commander Mizer.

5 The second factor that courts look to to determine
6 whether prejudice exists is does the accused have other
7 adequate representation of counsel. And as we talked
8 yesterday in AE 350, this adequate representation is defined
9 in the Rules for Military Commission as well as in federal
10 courts by 18 U.S.C. S 3005 where both courts, here and in
11 federal court, they state that in a capital case, an accused
12 is entitled to a learned counsel and a detailed defense.

13 I'd also note that there's a whole host of federal
14 cases that the courts note that your right to counsel is a
15 function of ensuring an adequate and effective adversarial
16 system. It's not about entitling an accused to a counsel of
17 their choosing, it's about making sure that they have adequate
18 representation for an effective adversarial system.

19 So in Hutchins, when they discussed other adequate
20 assistance of counsel, they were quick to decline any
21 consideration of the departing defense counsel's relationship
22 with the accused in that case. And that is something that the
23 defense has brought up on a number of times, that the fact

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1 that he had a good relationship with al Nashiri is not
2 something that the court in Hutchins considered.

3 So Your Honor, because the termination of the
4 attorney-client relationship was based on Commander Mizer
5 getting off of active duty pursuant to the end of his orders
6 in a routine separation, and because that severance has not
7 resulted in a degree of prejudice to the accused that would
8 warrant an abatement of these proceedings, the defense motion
9 should be denied.

10 Pending any further questions.

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

12 LDC [MR. KAMMEN]: Let me start by saying that I think,
13 based on the remarks of -- I may be mispronouncing his name --
14 Lieutenant Cantil, perhaps we ought to hear from General
15 Baker. Because perhaps General Baker's opinion as to what
16 would be adequate has changed based upon the situation. We
17 obviously can't go back 18 months and -- back in time and say,
18 well, let's keep Commander Mizer on active duty because he's
19 not on active duty, he's in the drilling Reserves.

20 So something is better than nothing. Whether or not
21 that's General Baker's opinion, that is certainly my opinion.
22 And I am a part of this equation as well as the team leader.
23 But you indicated, Your Honor, that you are sort of a rules

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1 guy, and I respect that.

2 And so Rule 505 says, "Subject to this rule, counsel
3 may be changed by an authority competent to detail such
4 persons." That's General Baker. That's the rule. And he
5 didn't do it, he didn't approve it. And so if the rule is
6 what controls as to whether or not there's good cause and the
7 competent authority says no, then where are we?

8 Now, part of it, and I think it was clear from -- I
9 hope it's in the record, I think it's clear from the proffer,
10 and I think it's clear from the supporting documentation that
11 was submitted, both in terms of General Baker's materials
12 going up and my objections and what have you, is part of the
13 consideration was the experience level of the remaining team
14 members. And you say, well, you know, they don't replace
15 senior officers with real junior officers and, as I said, and
16 as we have heard from General Baker, certainly the evidence
17 would have been that that is exactly what -- or largely what
18 happened here.

19 Now, the government says, well, gosh, they had --
20 Commander Mizer said in August of '15 he was going to leave
21 and so this was on their radar. Absolutely. And that is
22 around the time that the process to hire the GS employees
23 began. In fact, I think it had begun before that because, as

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1 I recall the timing, Ms. Spears actually joined the office in
2 August of '15 and Ms. Eliades, I believe, in November of '15.
3 So that process had begun, absolutely.

4 But again, when they don't get their clearances for
5 over a year, you can't hardly say, well, okay, we've got an
6 apples-to-apples situation, because you don't. You're
7 replacing a fully fledged, active member of the team with
8 people who are, in many respects, not able to do -- contribute
9 a lot.

10 To give you an example without getting into anything,
11 there's countless times we'll be having a discussion and then
12 we'll realize that somebody does not have the proper
13 clearance, and so we have to either terminate the discussion
14 or ask them to leave. And you can't have effective
15 preparation as a group in those circumstances.

16 Now, the Hutchins facts are, of course, highly
17 contextual. And Hutchins wasn't a death penalty case. And
18 certainly there is ample authority that the relationship with
19 counsel in the context of a capital case is significant. And
20 so you can't really judge -- you know, the old story is a
21 death penalty case is not a murder case with a much more
22 severe penalty, it is a different animal. A much different
23 animal because of the need for the mitigation investigation,

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1 for the -- the level of stress that it places on the defendant
2 and the lawyers and the defendant's family and all of the
3 participants on the defense side of it. So it is a vastly
4 different animal. And that is, at this juncture, not
5 something that can be doubted.

6 And so a 1972 case, when the death penalty was just
7 sort of either at the beginning -- it may be at the end
8 because it was maybe right about the time Furman was decided,
9 is hardly instructive as to what we know about capital
10 litigation here some 50 years later. And so the notion that
11 there has been no prejudice is not correct.

12 But let's take a look at what the prosecutor said
13 because, as well, the minimum is, in federal court, you get
14 one learned counsel and you get one other lawyer. But that's
15 -- as I said, we will be submitting a declaration from
16 Mr. Thurschwell. And they said, well, that's not relevant.
17 You can't have it both ways. You can't say that's the minimum
18 and then look at what they do in other cases that are somewhat
19 comparable to this and say, well, that doesn't count. And so
20 I think what you will learn from Mr. Thurschwell is that in
21 the Nichols case, I believe they -- and I may well be wrong
22 and -- but they had two learned counsel, four or five
23 associate counsel, countless -- not countless, but several

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1 investigators, one or two mitigation specialists, and almost
2 an unlimited budget. They weren't having to go to the
3 convening authority for nickels and dimes.

4 They also had continuity of all of the lawyers, not
5 just one. It wasn't just Mike Tigar, who was the lead lawyer,
6 it was virtually all of the lawyers stayed on through the
7 whole thing. And so when you look at the federal system,
8 compare apples to apples. Absolutely, the military says, this
9 is the minimum, you got to have learned counsel; you got to
10 have a detailed lawyer. But as General Baker has found and as
11 the convening authority has found, the minimum is not adequate
12 in this case. What's necessary in this case is something far
13 different.

14 I won't belabor the point, we all know where we're
15 at, but to say this: You have the authority. I mean,
16 Commander Mizer is in the drilling Reserves. And I have no
17 question that if you say to whoever the appropriate authority
18 is, this case stops unless Commander Mizer can make it part of
19 his reserve duties to be involved to the extent his reserve
20 obligation allows, that will happen. In the same way when we
21 file motions about clearances, all of a sudden, magically
22 clearances occur.

23 Now, if that happens, we can't hardly say, well, you

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1 gave us what we wanted and so that's not good enough. And so
2 while General Baker's had an opinion, and his opinion might
3 not be his opinion anymore given the change of circumstances,
4 we deal with where we are 18 months later.

5 One final thing, and I'll check with Lieutenant
6 Commander Pollio, the prosecutor said -- well, Commander Mizer
7 said there was no case, he left because there was really no
8 case. I don't think that's quite fair. I think what he said
9 was there was no active commissions case. And I think he said
10 that it was his assessment, because of the structural problems
11 in the CMC, which we believe, parenthetically, and we'll get
12 into this later on, still exist and haven't been fixed, it was
13 his concern that he would be staying on and that the case
14 would never resume. And, of course, that is not what
15 happened, but that was not his position.

16 There is error. The Chief Defense Counsel did not
17 excuse Commander Mizer, and so there is -- Rule 505 was not
18 complied with. There is prejudice. The prejudice is
19 extraordinarily aggravated because of the damage done to
20 Mr. al Nashiri by the very government that now wants to kill
21 him, and that cannot be minimized or overlooked. And so
22 Commander Mizer should be restored to the defense team as his
23 Naval Reserve duties allow.

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1 If I may.

2 [Pause.]

3 Thank you.

4 MJ [Col SPATH]: Thank you. All right. We're going to
5 turn in a moment to 332AA, and that's only because it's the
6 discovery piece. I recognize we're going to have lots more
7 discussion on 332 later during this hearing and as we move
8 forward.

9 DDC [LCDR POLLI0]: Your Honor, if I may, with respect to
10 AE 350, we did enter in those two exhibits. And because of
11 argument and the interplay that that motion has with 348, I
12 would like to take up that motion again just to offer a few
13 brief points.

14 MJ [Col SPATH]: You want to make some additional comments
15 on ----

16 DDC [LCDR POLLI0]: Yes, sir.

17 MJ [Col SPATH]: I'll do that. But you will have an
18 opportunity to reply, of course.

19 DDC [LCDR POLLI0]: Good morning, sir. It has become
20 clear, and I think the briefings themselves made it clear,
21 that AE 350 and the issue of Ms. Spears' and Ms. Eliades's
22 clearance in being able to become full members of the defense
23 team, that motion directly relates and interplays with AE 348,

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1 the severance of Commander Mizer from the defense team.

2 In 348, the government relies and has -- and also in
3 350 routinely recites the statute that says that there's a
4 requirement for one learned counsel and one military counsel.
5 And, you know, that crabbed view is not surprising given this
6 case and the history of this case. However, that statute only
7 establishes a minimum bare threshold and does not address
8 whether or not one learned counsel and one military counsel,
9 in fact, equals effective assistance of counsel. And that is
10 the lens in which these two motions in 350 need to be
11 addressed on, and that is the effective assistance of counsel,
12 regardless this bare minimum threshold established by the
13 statute.

14 And in recognizing this, the rules give and require
15 the Chief Defense Counsel to do a more thorough examination,
16 to not just end where the statute ends. And the Chief Defense
17 Counsel, who can look at each team, each team's needs, each
18 team's counsel, and considering all of those factors, then has
19 the authorization to detail additional not only military
20 counsel but civilian attorneys. And that rule is within the
21 statute itself, MCA 949c(b)(5). It's within the military --
22 excuse me, the military commission rules, that's R.M.C.
23 506(a), and it's also in the Regulations for Trial by Military

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1 Commission, stating that the Chief Defense Counsel may, when
2 appropriate, detail additional, qualified civilian attorneys
3 to perform duties, to include acting as counsel on these
4 cases. And that's R.T.M.C. 9-1.a.5.

5 And in this particular case, the chief defense
6 counsel exercised his obligations and duties and detailed two
7 additional civilian counsel, Ms. Spears and Ms. Eliades, to
8 this case who to date have been unable to become full-fledged
9 members of the defense team.

10 And the loss, unfortunately, of Commander Mizer and
11 the issues that have been addressed by Mr. Kammen in AE 348
12 have only exacerbated the problems that have been raised and
13 addressed in AE 350. And that's all related to this inability
14 and ineffective counsel. The loss of Commander Mizer not only
15 represented a loss of institutional knowledge and team
16 knowledge as to what ----

17 MJ [Col SPATH]: There's no doubt with that, and we talked
18 about that some yesterday. It is important -- the chief
19 defense counsel has also detailed another military
20 counsel ----

21 DDC [LCDR POLLIO]: Correct.

22 MJ [Col SPATH]: ---- along with the two civilians whose
23 clearances haven't been provided. I recognize it's been

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1 approximately a year for the clearances. Using some common
2 sense, if my TOP SECRET security clearance took a week and
3 theirs took a year, it would be a pause. If people we knew
4 just in everyday life, if their security clearance took a
5 month and the two civilians took a year, it causes the
6 appearance issues we've talked about.

7 Security clearances are slow, and that is part of the
8 issue that I was talking about yesterday with the government.
9 They don't own that process the government over here. Big
10 Government owns the process and that was part of the reason I
11 made the comments yesterday. There is no doubt at some point
12 we're going to enter a place where the answer is a pause while
13 we wait for people to get clearances and get up to speed.

14 We have to talk about what we're dealing with here
15 right now and where we're at for trial to look at this
16 ineffective assistance of counsel. We are not near the
17 beginning of trial at this moment. Discovery is still open.
18 We have had that discussion and we need to fix that one, too.
19 That was part of my other opening comments. It needs to get
20 fixed if you want to go to trial. You can't go there if you
21 are still ongoing in discovery.

22 So there's more to it. It's not just that --
23 Commander Mizer's separate. We have already talked 348 and

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1 more to come. But with 350, abating the proceedings when
2 right here, what we're doing right now, are a little more than
3 a handful of pretrial motions, one of which we've already
4 determined is going to wait for resolution until October or
5 December to hear additional argument and likely evidence; the
6 332 issue ----

7 DDC [LCDR POLLIO]: Yes, sir, and ----

8 MJ [Col SPATH]: So where -- think about what we're really
9 doing here today.

10 DDC [LCDR POLLIO]: Sir, if I may, there's a little bit of
11 interplay with the Commander Mizer issue and the ability to
12 form an attorney-client relationship and the solution and a,
13 perhaps, resolution to his loss on the team. And then I'd
14 also -- I would also address some of the issues that you just
15 raised.

16 But I'd like to at least discuss and get on the
17 record the fact that, with relation to the loss of Commander
18 Mizer, those two attorneys that were detailed in part and
19 identified in part to help perhaps assist if Commander Mizer
20 were to leave -- because as trial counsel has alluded to,
21 there was perhaps a duty that we should have seen this
22 coming -- well, in order to fix that, and perhaps it's not a
23 complete fix because, as Mr. Kammen pointed out, Commander

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1 Mizer is Commander Mizer alone, the fact that those two
2 identified attorneys have not been able to meet with their
3 client and to form an attorney-client relationship and
4 identify and address some of the issues that are part of the
5 prejudice caused by Commander Mizer's departure, that is a
6 significant issue that relates to why the defense is
7 requesting an abatement in AE 350.

8 Once Ms. Spears and Ms. Eliades receive their SAP
9 read-ons, they will need time to create that sort of
10 relationship. It does not happen overnight.

11 MJ [Col SPATH]: They will need some time to create a
12 relationship, but I would hope over the last year they're
13 doing what I have done, and that is spending time in an
14 unclassified environment reading thousands of pages that gets
15 you well up to speed on what the trial is about. The
16 relationship with the defense client is important, but there
17 are multiple other factors to look at. And so while I
18 appreciate that not having a clearance is slowing down that
19 relationship by a lot, there's a lot of work they can be
20 doing.

21 We only have two classified areas we're even going to
22 touch upon during this hearing right now. Two. Every other
23 motion we're dealing with is unclassified. Every other one.

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1 And so I have said what I can. I haven't ruled on it
2 yet.

3 DDC [LCDR POLLIO]: Yes, sir.

4 MJ [Col SPATH]: I hope to get you a ruling on 350 sooner
5 than later, but my concern is it's important to look at the
6 whole picture when we're dealing with requests for abatement.

7 DDC [LCDR POLLIO]: Right.

8 MJ [Col SPATH]: And for two people who, yes, they need
9 their clearance, no debate from anybody; however, we also have
10 to look at where we are in the process. If next week we were
11 seating a panel, we're in a much different place. If the
12 severance of Commander Mizer happens on the eve of trial,
13 we're in a much different place because it is all very
14 factually specific and very case specific.

15 DDC [LCDR POLLIO]: Yes, sir. But with all due respect,
16 you cannot separate the attorney-client relationship of the
17 defense team with their client and their ability to prepare a
18 defense for each and every hearing. Those two are part and
19 parcel ----

20 MJ [Col SPATH]: Do you have any case ----

21 DDC [LCDR POLLIO]: ---- to the attorney-client
22 relationship ----

23 MJ [Col SPATH]: Do you have any case, do you have any

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1 case that would stand for that proposition when you're meeting
2 the statutory requirements of what a person is entitled to, do
3 you have any case that says other members detailed to the
4 defense team have to be able to establish an attorney-client
5 relationship and participate in every discussion in order to
6 make the overall representation effective?

7 DDC [LCDR POLLIO]: Sir, I'd be happy to come back and
8 brief you with case law. I think that the rules cited both
9 within the briefs, within the -- and even the trial judiciary
10 rules that if you're detailed counsel, you need to make an
11 appearance in the courtroom and the fact that Ms. Spears and
12 Ms. Eliades cannot make an appearance.

13 MJ [Col SPATH]: I concur with that. I hope I've made
14 that on multiple occasions clear. I understand the difficulty
15 with waiting for the security clearance. But it is very
16 factually dependent on where we are in this timeline of trial
17 and we are, again, a ways away from that experience.

18 DDC [LCDR POLLIO]: And yes, I will come back to that. I
19 think that there's two reasons beyond just where we are in the
20 trial of why this abatement is necessary.

21 One, the attorney-client relationship and the issues
22 caused by the departure of Commander Mizer, the defense team
23 will require an enormous amount of time and effort to repair

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1 that harm. And so, you know, moving this case forward, the
2 need for hearings when we're in this pretrial stage perhaps is
3 secondary to the need for this defense team to be able to make
4 sure that we don't face some of the issues that have been
5 persuasive in the 9/11 case, where every other day we come
6 into court and hear about an attorney getting fired. So I
7 would argue that perhaps that would be more important than
8 some of the issues that are being addressed in these hearings.

9 Additionally, though, the abatement ensures that the
10 issue and that the ball actually does move forward. The
11 timeline is not -- is not coincidental. The defense files a
12 motion on July 8th; on July 9th, Mary Spears gets a phone call
13 to initiate her clearance. And, in fact, today the defense
14 was notified that the Mary Spears clearance has finally been
15 put up for adjudication.

16 Now, that's part of the problem; but the SAP read-on
17 is going to require more. So we asked for an abatement to
18 make sure that that ball continues to move forward. Because
19 not just in this commission, but as we have seen in every
20 other military commission, once there is a threat or a spectre
21 that there might not be a hearing, somehow a clearance and a
22 SAP read-on happens. And if that's what it takes, then that's
23 what it takes.

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1 But more than just making sure that that happens by
2 abating the proceeding, the abatement is required to ensure
3 that there is effective assistance of counsel. Each and every
4 hearing that we have directly impacts the case. On the docket
5 for later on this afternoon is a significant Brady motion.
6 That shapes what this case will be. It shapes the defense
7 strategy moving forward. It shapes the defense's
8 investigation. And that particular motion is classified, and
9 that is a significant part of this case. And while there may
10 be thousands and thousands of pages of unclassified documents,
11 many of which are heavily redacted and incomprehensibly
12 organized, there is a substantial amount of information that
13 is classified.

14 So in order to say that the defense counsel cannot
15 have discussions, cannot formulate strategy, not just for the
16 hearings -- and make no mistake, we may have two days of open
17 hearings, but the hearings that are classified are substantial
18 and significant issues moving forward, and they certainly
19 shape the strategy moving forward, and there is no reason --
20 and indeed, it does become ineffective when half of the
21 defense team cannot participate in that.

22 An abatement for six months after those members --
23 after Mary Spears and after Rosa Eliades receive a SAP read-on

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1 not only will assist in ensuring that they can form an
2 attorney-client relationship and repair some of the damage
3 done with the loss of Commander Mizer, but it ensures that the
4 defense moving forward in each and every hearing can provide
5 an adequate defense.

6 And if I may one moment, Your Honor.

7 MJ [Col SPATH]: You may.

8 DDC [LCDR POLLIO]: Thank you.

9 MJ [Col SPATH]: Thank you.

10 Lieutenant Cantil, any comments.

11 ATC [LT CANTIL]: Just a few very brief comments, Your
12 Honor.

13 I'd just like to focus this commission's attention
14 that what we're talking about here is abatement, whether or
15 not there is reasonable cause to abate the proceedings. We're
16 not talking about ineffective assistance of counsel or
17 anything like that. Lieutenant Commander Pollio just got up
18 here and stated that abatement ensures the ball moves forward.
19 Abatement is the exact opposite of moving the ball forward.
20 Abatement is taking your ball, going home, and locking it in a
21 closet until you get your way. So stalling these proceedings,
22 there's nothing that would suggest remotely that an abatement
23 of these proceedings would ensure that a security clearance

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1 moves along faster or anything of that nature.

2 With regard to the contention about the bare minimum
3 threshold of one learned counsel and one additional counsel,
4 that is not the prosecution team coming up with numbers out of
5 thin air. That's Congress saying that. And while we do not
6 dispute that the Chief Defense Counsel has the authority to
7 appoint other additional counsel as he deems necessary, no
8 one's disputing that, but you don't have to abate the
9 proceedings pending his appointment of the amount of counsel
10 that he deems necessary. That would be reading in a new rule
11 that the Chief Defense Counsel can somehow determine what the
12 minimum required defense counsel for a given team would be,
13 and then you just shut down the proceedings if he doesn't feel
14 like that's enough. That is not the rule.

15 Congress has laid out the rule, the Rules for
16 Military Commission lay out the rule, and that is what we
17 request the commission follow. Thank you.

18 MJ [Col SPATH]: And hopefully I've communicated some of
19 this ----

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

21 MJ [Col SPATH]: ---- here. I've said this before. You
22 are all officers of the court and so, of course, although I
23 don't take proffers of proof when I'm making the rulings, and

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1 I need evidence in the record, when an officer of the court
2 tells me that -- after the motion is filed with a threat for
3 abatement, the next day there's a phone call and over -- just
4 the timing of the movement on a security clearance, appearance
5 is important.

6 And so if there is some movement of the ball because
7 we're having this discussion, that's good. Because I -- the
8 law is clear, learned counsel, detailed military counsel. The
9 law is clear, the law does not guarantee effective
10 representation of a defendant. If it did, we wouldn't have
11 ineffective representation of counsel cases.

12 So when you have the Chief Defense Counsel saying
13 they need more -- I mean, thanks, Congress, for the law, I got
14 it; they need more -- and the process by which they get more
15 takes a year, it makes it difficult to move cases to trial.
16 And that's all -- I know, you know, that's what I'm trying to
17 communicate and I've tried to communicate is, whatever pull
18 you all have out there, I would use it. If publicly the
19 government's going to say they have an interest in moving
20 cases to trial, then all parts of big G need to be moving in
21 that direction or it causes some of the issues that we see
22 here.

23 I concur with what the law says. I also concur that

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1 death penalty litigation is fraught with ineffective
2 assistance of counsel. Mr. Kammen was kind. He didn't say
3 that U.S. v. Witt was overturned because of ineffective
4 assistance of counsel, but it was. And it is an ongoing theme
5 that you see. And there you have -- the law says, here's your
6 minimum. The minimum isn't always enough to get over the next
7 issue, which is effective assistance of counsel. So again,
8 just let's make sure we're helping where we can to move these
9 security clearances forward.

10 As for the abatement issue, I more than understand,
11 that's why I was asking the questions I was about abatement.
12 Abatement is a significant pause that is driven by reasons
13 that rise, right, to a level ----

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

15 MJ [Col SPATH]: ---- that requires the public to pause a
16 trial like this.

17 And I think I've also indicated there are ways the
18 ball can move forward wisely, but things will change as we
19 move further and further, closer to trial with regard to
20 delays, either on security clearance processing or even
21 separation of defense counsel from a team. You can see how
22 that could shift, depending on where we are in the process.
23 Not that this would ever happen, right, but an example would

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1 be in the midst of trial, having the second chair all of a
2 sudden have to leave the team because their orders end, that
3 would be a different discussion, wouldn't it? I don't know
4 what the ruling would be. Huge.

5 ATC [LT CANTIL]: That's obviously not the place we're in.

6 MJ [Col SPATH]: That's not where we are. That's what
7 I've tried to paint clearly for every single person is where
8 we are in this process and what we're doing. But we also need
9 to be very mindful of how long some of this stuff is taking.

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

11 MJ [Col SPATH]: Thank you.

12 ATC [LT CANTIL]: Thank you.

13 MJ [Col SPATH]: You've got the burden so you have the
14 last word, Lieutenant Pollio. I'm sorry, Commander Pollio. I
15 shouldn't demote you at the very least.

16 DDC [LCDR POLLIO]: That's okay, Your Honor.

17 MJ [Col SPATH]: Not at all, you have more experience than
18 that.

19 DDC [LCDR POLLIO]: Sir, part of the reason why two
20 detailed counsel have been on the team and why we are asking
21 for an abatement at this time is so they can fill the void of
22 the continuity of the team. You just referenced that perhaps
23 down the line if the second chair receives orders, that is

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