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1 [The R.M.C. 803 session was called to order at 0900,
2 9 September 2016.]

3 MJ [Col SPATH]: This military commission is called to
4 order. Good morning, everybody. All of the parties who were
5 present yesterday are again present, and Mr. al Nashiri is
6 here today as well.

7 Good morning. I presume we are also transmitting
8 these proceedings.

9 TC [MR. MILLER]: Yes, Your Honor. They are -- thank you.
10 They are being transmitted via CCTV to two remote locations in
11 the U.S. in accordance with the order.

12 [Col SPATH]: All right. Thank you very much.

13 First I want to summarize. We had a very brief 802
14 conference yesterday. It was right after we finished the 505
15 session. What we discussed was the calendar going forward.
16 We didn't make any decisions. I just showed the parties the
17 court calendar, which weeks were open, and which weeks we
18 could be here.

19 And my discussion was, I wanted to make sure that if
20 we keep the week in October, we're using it fully. If we need
21 to move that week to the right by a week, two, or three so
22 we're here and working, that works fine. And if we want to do
23 a two-week session instead of a one-week session, that works

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1 as well. With the understanding that in 2016, my plan remains
2 to be down here for two more week-long sessions or a single
3 two-week session.

4 There was also some discussion with the defense about
5 the office move and the timing of the office move, and it may
6 or may not shift a little bit. Again, that was the extent of
7 the 802 discussions that I feel we need to put on the record,
8 but I'm going to check with both sides first.

9 Trial Counsel, do you want to add anything to my
10 summary of the 802?

11 TC [MR. MILLER]: No, Your Honor.

12 MJ [Col SPATH]: Defense Counsel, do you want to add
13 anything to the summary?

14 LDC [MR. KAMMEN]: There was a discussion of the week of
15 the 24th -- weeks of the 24th and 31st. I advised the
16 commission that I was absolutely unavailable those weeks.
17 So ----

18 MJ [Col SPATH]: I wasn't pushing any particular week,
19 Mr. Kammen. I was just showing you what weeks are open on the
20 calendar.

21 LDC [MR. KAMMEN]: We do have additional information
22 regarding the office move, if you want to hear that now.

23 MJ [Col SPATH]: Let's do that first, yes.

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1 LDC [MR. KAMMEN]: Your Honor, General Baker is here, but
2 I think, to make a long story short, he's been advised
3 yesterday by the Office of the Convening Authority that the --
4 they must have been listening in -- the move is supposed to
5 occur the week of December 17th. And I'm advised, and if you
6 want to ask General Baker for additional details, that
7 essentially the two weeks prior to that the office will be --
8 will not be able to function because of packing, moving,
9 boxing things up, disconnecting computers, that sort of thing.

10 So that's my general understanding, and that seems to
11 be as firm a date as things are in this system.

12 MJ [Col SPATH]: Well, for moving government offices, it's
13 not this system, it's D.C. and moving government offices.

14 LDC [MR. KAMMEN]: Absolutely.

15 MJ [Col SPATH]: That I don't attribute to the commission
16 process, for sure. But I understand. So let me just ask from
17 the government. General Baker is here. There was some
18 discussion about whether or not we wanted to call him as a
19 witness or have him speak. You let me know, and we can ----

20 TC [MR. MILLER]: Good morning, Your Honor. Thank you. I
21 see no need to call the general. He was kind enough to meet
22 with me this morning and provide me with the same
23 documentation I believe he has provided to Mr. Kammen as well

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1 as Your Honor.

2 MJ [Col SPATH]: Perfect.

3 TC [MR. MILLER]: My understanding from reading it is the
4 move is actually going to take place the week of the 12th
5 through the 16th and not the 17th. Am I incorrect on that?
6 It's an e-mail that I have.

7 MJ [Col SPATH]: If that's the case, that's the week that
8 currently we are scheduled to be here.

9 TC [MR. MILLER]: I see the general nodding in agreement.
10 Is that correct?

11 LDC [MR. KAMMEN]: Yeah. I misspoke. I misspoke.

12 MJ [Col SPATH]: That's okay. So it is the week currently
13 on our calendar for the al Nashiri hearings.

14 LDC [MR. KAMMEN]: Yes.

15 MJ [Col SPATH]: Thank you.

16 TC [MR. MILLER]: My understanding is he received this
17 information today, so it's the most current.

18 MJ [Col SPATH]: Thank you. Then, please, let's -- I
19 don't want to do anything with that week quite yet because I
20 want, again, both sides to have an opportunity to talk about
21 what weeks are open on the calendar.

22 What may be a reasonable alternative so that we can
23 work forward -- I recognize that the weeks of the 24th and the

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1 31st defense counsel is unavailable, and they were not on any
2 kind of scheduling order so I don't expect anything to change
3 about that, and no decisions today. Just look at the week of
4 November 7th and, frankly, the week of the 14th. We don't
5 have to come down over the weekend before.

6 We can travel on the Monday if we need to, and then
7 that week in November leading to Veterans Day, we can work on
8 332 and arguments on motions related to the Limburg that have
9 been unmooted, in all likelihood. We're going to get some
10 input on that in a little while but ---- and the following
11 week, I recognize Hadi is on the calendar.

12 I don't know for sure because I'm not the judge in
13 Hadi. I asked the trial judiciary just for an impression of
14 how many days Hadi is going to take that week; and the
15 impression right now is not much. Maybe a day, maybe two.
16 And so we have some flexibility to be in court four, five,
17 six, days, seven days, in that two-week window of time. And
18 so that would give October to you all to work on discovery.
19 It would give October to you all to get any legal motions
20 filed that we can deal with, possibly, and it would allow us
21 some time to work on 332 and the road ahead.

22 So we don't need to decide at this moment. I just
23 offer you that. It seems to make some sense, so that we use

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1 our time.

2 The other piece is yesterday afternoon we conducted
3 the two 505(h) -- we conducted a 505(h) session regarding two
4 appellate exhibits. Based on that hearing, I'm deferring my
5 ruling on the use, relevance, or admissibility of the
6 classified information we discussed for now.

7 So there's not going to be a closed session pursuant
8 to R.M.C. 806(b)(2) this afternoon. There's no need for it
9 this afternoon. What we're going to do is keep moving through
10 the unclassified appellate exhibits and take care of other
11 pending unclassified matters. It was also my understanding
12 that the government was going to provide the commission and
13 the defense an update on the status of discovery this morning
14 and hopefully provide a realistic estimate of when the
15 government expects discovery to close.

16 General Martins or Mr. Miller, I don't know who is
17 going to take that, but if one of you want to talk about that.

18 TC [MR. MILLER]: Your Honor, General Martins will, but
19 before we do that, I just ----

20 MJ [Col SPATH]: Make sure you get up near the microphone.

21 TC [MR. MILLER]: I'm sorry, Your Honor.

22 MJ [Col SPATH]: That's all right.

23 TC [MR. MILLER]: General Martins is going to address that

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1 issue. I -- just for one clarification, we were just talking
2 about possible dates in November. Does that mean that you
3 would -- we would not come here in October?

4 MJ [Col SPATH]: It does. If we're going to be here for
5 portions of those two weeks, that satisfies my desire to keep
6 the number of weeks that we had scheduled, but it also allows
7 us, I think, time to work on discovery, work on the security
8 clearance issue, and use as many days in there as we can for
9 outstanding legal issues.

10 TC [MR. MILLER]: Thank you for that clarification. I
11 appreciate it, Your Honor. Thank you.

12 MJ [Col SPATH]: General Martins.

13 CP [BG MARTINS]: Good morning, Your Honor.

14 MJ [Col SPATH]: Good morning.

15 CP [BG MARTINS]: What I'd like to do is provide an update
16 on discovery and put it in some context here, first by giving
17 an overall report on discovery being provided, and that has
18 been provided, and then I'd like to focus in on efforts to
19 comply with the commission's order in Rule 120AA of June 2014
20 and offer some projections that I believe are realistic, and
21 then try to also then put that into the context of the
22 scheduling issues we've been having here that I know are
23 important to everybody and how they impact upon other

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1 litigation.

2 So first, overall discovery. The volume thus far
3 that's been produced, and this is mostly unclassified, is
4 about 265,000 pages of discovery. And walking through the
5 categories in Rule for Military Commission 701, the referral
6 binder package that was received, many hundreds of pages of
7 discovery. And then most of that 265,000 is in the area of
8 records associated with R.M.C. 701(c), so material provided
9 that's in our possession, custody, and control that may be
10 material to the preparation of the defense, rebuttal of the
11 prosecution's case, or to sentencing.

12 And then we have provided material under Rule 701(e)
13 in Brady in the areas of exculpatory or mitigating evidence
14 that are covered in there, and this includes hundreds of pages
15 of some policy memos and OLC memos. So some of this starts
16 relating also, of course, to the rendition, detention,
17 interrogation information that's covered under 120AA.

18 So now let me turn to that, that second point, the
19 120AA. Since June of 2014, we have been working seven days a
20 week to try to comply with the ten categories in the
21 commission's order, and we have done that, including all
22 holidays, and have been treating it in our office as if it's a
23 deployment. The -- I won't say it's around the clock, but it

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1 is seven days a week, including holidays, with folks reviewing
2 the many documents that need to be reviewed.

3 I set an objective of 30 September of this year to
4 have complied with 120AA, and the parallel order in the 9/11
5 case. They've adopted this commission's construct in their
6 Appellate Exhibit 397F earlier this year. So we set that
7 objective of 30 September. And I have -- if we continue our
8 work with that operational tempo we've had -- in fact, we've
9 increased it during this month and last month to even a higher
10 tempo -- I have tempered optimism we're going to achieve that,
11 even as of today, with some reports I received last night and
12 some additional coordinations that had to happen.

13 As part of this, we have reviewed the full study of
14 the Senate Select Committee on Intelligence's study into the
15 CIA's former rendition, detention, interrogation program. We
16 got access to that study as part of the 120AA effort in
17 February of last year and have just recently completed that
18 review and all of the necessary checks associated with
19 reviewing that full study.

20 And importantly, the defense is in possession, since
21 120AA came out, since December of 2014 now -- so 120AA came
22 out in June of 2014. Since December of 2014, the defense has
23 been in possession of the information I stated. Also, the

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1 previous substitutions that had been approved by Judge Pohl,
2 which were just under 900 pages, 888 pages of substitutions,
3 in ten separate installments.

4 In addition to that, they've had the great amount of
5 information regarding the RDI program that's included in the
6 Senate study's executive summary. Now, to be clear on this,
7 I'm stating there are verifiable pieces of that that will
8 relate to statements of relevant facts, stipulations, if we
9 agree the underlying information is accurate. And because we
10 viewed all of the underlying information, we will be prepared
11 to stipulate to much of that. And in addition, all of that
12 was declassified and has been available to -- for the defense
13 to discuss with their client the different aspects of that.

14 So that's part of the framework associated with all
15 of this, was the declassification of nearly 500 pages of an
16 executive summary of the report. And that's been part of the
17 holistic process by which we've analyzed the information at
18 issue.

19 So turning now to the ten paragraphs of the --
20 they're really subparagraphs of paragraph 13 of the
21 commission's order in 120AA, and I can report volume of pages
22 that are either in the pipeline or have already been
23 delivered. And with regard to the -- to all ten paragraphs,

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1 the amount of material that has been produced, and that has
2 already been -- gone through a request for substitutions and
3 other relief with the commission and has been produced to the
4 defense, and this is as against eight of the ten categories
5 now you've approved and -- provided protective orders and
6 approved 219 pages as against paragraphs -- subparagraphs
7 13.a, b, c, d, f and g, and then i and j.

8 So you've -- the statements of the accused and
9 co-conspirators piece you've not yet provided under the
10 ten-category framework. And nor have any of the orders
11 included the SOPs and guidance in subparagraph 13.e. So all
12 but 13.e and h, they've received some information amounting to
13 219 pages.

14 Now, let me now go through what's coming. There are
15 multiple thousands of pages total associated with the ten
16 paragraphs that are coming. You know, you've got a
17 significant amount of that being reviewed now and you will be
18 reviewing the adequacy of the substitutions, looking at the
19 originals and determining if more needs to be produced.

20 Our expectation, our reasonable expectation, based on
21 looking at this and the process, of course, subject to what
22 you approve, Your Honor, is that for subparagraphs 13.a and b,
23 these are a chronology of the accused's detention within the

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1 program and the conditions of transport, A and B, a small
2 number of pages, because this is mostly just a chronology
3 that's been ordered by the commission.

4 And then let me just go to paragraphs i and j, 13.i
5 and j, and this is the requests to employ enhanced
6 interrogation techniques, if any, and the approvals of those,
7 also a relatively small number of pages, because it deals with
8 the -- whether or not requests happened and whether they were
9 approved. And only a small number of pages thus far of those
10 have been provided.

11 In the area of e, this is SOPs and guidelines. There
12 will be hundreds of pages, we expect, based on what we have
13 submitted and are going to be submitting between now and
14 September 30 to you.

15 In the area of statements of the accused and
16 co-conspirators, paragraph 13.h, that will be into the many
17 hundreds of pages, potentially more than 1,000, in that
18 subparagraph alone. Hundreds of pages of 13.c, conditions of
19 confinement, and hundreds of pages of synopses regarding
20 persons who had direct and substantial contact, their
21 employment and training records pertinent to their work in the
22 program.

23 So again, overall, either in the request phase with

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1 you or coming your way very soon, multiple thousands of pages
2 associated with the ten paragraphs. So that, again, with the
3 bottom line being I'm -- I have tempered optimism that we're
4 going to get through all of that, we're going to have to you
5 by September 30 or we will deliver some records, additional
6 records, to the defense prior to September 30, and that we
7 will be in compliance with 120AA, and thus -- you know, we've
8 given you 46 notices as to our status on that. You get them
9 every two weeks, Your Honor, as you know, under the 120
10 series.

11 So my expectation, based on what we're doing, again,
12 tempered optimism, is the 47th will be our last such report,
13 and that we will have complied with 120AA and our other
14 affirmative discovery obligations. Acknowledging, of course,
15 even though we will be complete with our affirmative discovery
16 obligations, there's still litigation pending relating to
17 discovery. We certainly understand there may be motions to
18 compel. You're still going to have to review this, and you --
19 you know, it's going to take time to go through what we have
20 been spending a lot of time gathering, and we fully appreciate
21 that. But by September 30, we're going to be saying we are in
22 compliance with regard to 120AA.

23 And, again, I'm not stating we've provided witness

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1 specificity. We're not at that point yet from either side to
2 name our witnesses, and thus comply with Jencks or Giglio, but
3 at this point those discovery obligations in 701 and the ones
4 I've mentioned under the 120 series met.

5 So that's the basic report, Your Honor. And then to
6 speak about how this bears upon trial scheduling, we have
7 previously provided trial schedules. There was some
8 commentary on this yesterday from defense counsel.

9 When 120AA was decided back in June, we were thinking
10 toward a trial date. That order changed the process and then,
11 of course, we were in -- we had a stay of proceedings related
12 to the appeals, and so this commission stated that those
13 circumstances caused it to not -- to dismiss -- I think you
14 dismissed as moot that, for the time being, that scheduling
15 effort, which was certainly appropriate.

16 But to understand, I mean, 13.h, in particular in
17 that order, is a very expansive view of the prosecution's
18 requirement to produce statements. I mean, these are
19 statements not specifically associated with the offenses, and
20 some context related to that is appropriate at this point.

21 We felt we had complied with the statements
22 requirement in particular. We did seek reconsideration in
23 part of the order in 120, the original order 120C, and the

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1 commission did grant, in part, that. But there was, you know,
2 still in that order a very burdensome -- the 120H paragraph.
3 And we've obviously deliberated on it, you know, considered
4 our avenues of recourse and so forth, decided not to appeal
5 that, and have been dutifully trying to comply with all of
6 that since that time.

7 So just putting that in perspective on the scheduling
8 now at the point where we are, I believe you are going to need
9 some time to go through this material, as is the defense, but
10 that we have done our due diligence in finding all of those
11 statements and considering their discoverability, and then
12 providing you the originals and offering you a substitute that
13 we believe protects the national security information while
14 providing the accused, as you must find, is -- could
15 substantially -- is in substantially the same position to make
16 a defense as he would have been with the original information.

17 So subject to your questions, Your Honor, that's my
18 report.

19 MJ [Col SPATH]: Let me take a look at my notes. So
20 delivery to me on or about 30 September, at least for the 120
21 piece, you believe.

22 CP [BG MARTINS]: Yes, my -- as of today, with three weeks
23 to go, I have tempered optimism we're going to get there. We

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1 are going to, by 30 September, be able to say no more of the
2 notices to the commission that you ordered in December of
3 2014, of which we were up to 47, and we are in compliance with
4 120AA, and our affirmative discovery obligations otherwise.

5 MJ [Col SPATH]: Do you have an estimate -- and you may
6 not, but an estimate of pages in 47, the last notice? Do you
7 have -- how many more pages are heading my way?

8 CP [BG MARTINS]: Multiple thousands. And of course,
9 you're viewing the original. What I was providing ----

10 LDC [MR. KAMMEN]: Excuse me, sir. What was the answer to
11 that? I didn't hear it.

12 MJ [Col SPATH]: Multiple thousands.

13 CP [BG MARTINS]: Multiple thousands.

14 MJ [Col SPATH]: Multiple thousands.

15 CP [BG MARTINS]: Multiple thousands. And, again, the
16 page numbers you are getting, you are seeing the original.

17 MJ [Col SPATH]: Yes.

18 CP [BG MARTINS]: The numbers that I was giving before is
19 what they're receiving.

20 MJ [Col SPATH]: I'm just trying to understand.

21 CP [BG MARTINS]: I was trying to provide an estimate so
22 people -- parties and commission could sort of understand
23 what's coming their way. So multiple thousands coming your

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1 way.

2 MJ [Col SPATH]: Of the -- as it's been the original, the
3 produced redactions and then what it looks like in the
4 redacted form?

5 CP [BG MARTINS]: Yes. And then they'll receive the
6 summarized version that has the discoverable information in
7 it, and that, too, will be multiple thousands. Yours will be
8 greater because you will be seeing the originals and the
9 substitutes.

10 MJ [Col SPATH]: Then you had moved and made a comment
11 about witness lists, and then any discovery that may flow from
12 that ----

13 CP [BG MARTINS]: Right.

14 MJ [Col SPATH]: ---- because of Giglio and Jencks and the
15 others. Do you have an idea of when your team will be in a
16 position to provide the defense with things like that, a
17 witness list, a realistic witness list?

18 CP [BG MARTINS]: Well, again, these are trial rights and
19 Jencks is a trial right. So we are -- the commission is
20 setting the time, place and manner of discovery at this point,
21 Your Honor, and we are engaged in that. We're complying with
22 this stage of 120AA, and affirmative discovery to this point.
23 You've been making statements to the effect of one to two

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1 years.

2 We have a good feel for our case and have provided
3 them extensive discovery on the case, but we're in a position
4 pretty rapidly to provide witnesses and so forth; but we,
5 frankly, believe we ought to be litigating this.

6 MJ [Col SPATH]: It wasn't a request to do it right now,
7 it was more of a -- here's what I'm trying to get a feel for:
8 We are in the discovery phase still, clearly, just based on
9 our discussions here. And when I say one to two years, it
10 is -- I'm guessing, but I'm trying to use kind of the
11 experiences I've have thus far and how long things take ----

12 CP [BG MARTINS]: Sure. Sure.

13 MJ [Col SPATH]: ---- and a feel for moving forward.
14 Because getting it to us is half the battle. And then it
15 moves over to the OCAs after it comes out of our office to
16 determine if they're going to comply with the changes, if any,
17 that I've made.

18 Do we have a feel for their timeline? Because I've
19 reviewed thousands of pages, and we've sent them back.

20 CP [BG MARTINS]: Now, Your Honor, the requests for
21 substitutions of the relief come to you. We provide you the
22 summary, and then at some point you determine if the summary
23 is adequate.

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1 MJ [Col SPATH]: Yes.

2 CP [BG MARTINS]: The ----

3 MJ [Col SPATH]: I was given suggested changes. Some.
4 Again, I don't want to comment on how many or how little, but
5 it's just in general we've made some suggested changes to some
6 of the requests that have come to us, and the trial judiciary
7 has come back with those. And I know they have to go to the
8 OCAs for their decision. They don't have to comply, we know
9 that.

10 What I'm trying to figure out is, when are they going
11 to do that so that information goes to the defense?

12 CP [BG MARTINS]: Your Honor, I would ask you to review
13 our requests, which are ex parte requests, perfectly allowed
14 and authorized under the statute.

15 MJ [Col SPATH]: Absolutely.

16 CP [BG MARTINS]: Would ask that you please review those
17 and consider them. And ----

18 MJ [Col SPATH]: We do.

19 CP [BG MARTINS]: ---- and I think you're -- I hope you're
20 seeing there's a promptness and a responsiveness to the
21 inquiries related to the material.

22 So the government is seized to this. We want to
23 provide the information that's required for this commission to

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1 go forward that allows the accused to make legally cognizable
2 defenses, rebut our case, or provide a sentencing case, and
3 we're just committed to it.

4 So I would ask that you review what we provide, and
5 we will remain very attentive to, you know, issues the
6 commission raises in this -- in that ex parte process, and
7 will enable you, as you have already, ultimately conclude that
8 the substitution is adequate and sign a protective order and
9 make the finding that they are in substantially the same
10 position.

11 So I think this is a major milestone in completion,
12 and it does extend also to our other affirmative discovery
13 obligations that are appropriate for this point in the
14 discovery process that the commission is now seized of as well
15 and managing, in terms of time, place and manner of discovery.

16 Subject to any further questions -- if I may, just as
17 I was hearing the summarization of the 802, the commission is
18 still envisioning two single-week sessions in this calendar
19 year, correct?

20 MJ [Col SPATH]: I am envisioning some combination of two
21 weeks, be it the originally scheduled weeks, but I'm not sure
22 how effective our first week is going to be if we don't
23 identify what we're going to do in that week. Then the week

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1 of December where we just talked about that, where we have a
2 conflict, it appears.

3 CP [BG MARTINS]: I understand. We have offered some
4 alternatives to that second week, but I just wanted to see if
5 I'm understanding.

6 MJ [Col SPATH]: Mine was a proposal that we could travel
7 down here once and be here for two weeks, which would give --
8 which would give myself satisfaction that I set out a
9 three-week schedule, a relatively reasonable schedule for
10 2016, and I just want to comply with the intent of that, if I
11 can, as I indicated to Mr. Miller a moment ago.

12 And so I offered up, as one reasonable alternative,
13 Veterans Day week and the week after, which takes into account
14 the move so that they're not trying to do multiple things and
15 we don't have the move stress upon them, and takes into
16 account that we need to figure out a battle plan for 332 so
17 that we effectively use our time here with any witness
18 testimony and any other issues with that, plus fully brief and
19 respond to issues related to the Limburg.

20 And so if it makes more sense to use two weeks
21 together, I hesitate to say save the taxpayers money -- I have
22 no idea if that does or not, and there's not a study -- but it
23 does save wear and tear on everybody traveling because we're

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1 here for an extended period of time. It was an offer. I'm
2 hoping you all will talk about it and let me know how it
3 sounds, but that was it. Right now, October is on the
4 board ----

5 CP [BG MARTINS]: I understand.

6 MJ [Col SPATH]: ---- and so is December.

7 CP [BG MARTINS]: Your Honor, just in context of the
8 discovery, and I'm trying to provide information to the
9 commission to assist in its scheduling of things in light of
10 the discovery information update that I just provided, the
11 session -- series of sessions, 17 to 21 October would seem to
12 enable some digestion on your part of the material coming your
13 way with regard to discovery now.

14 MJ [Col SPATH]: Yes. I plan to use my time ----

15 CP [BG MARTINS]: Right.

16 MJ [Col SPATH]: I want to be -- General Martins, I think
17 you know this. I have been very responsive when your material
18 has flowed to me. And so I -- I'm not trying to get in -- I'm
19 not getting into any of the ex parte discussions. We all know
20 the process that's unfolding.

21 CP [BG MARTINS]: Right.

22 MJ [Col SPATH]: But it has occasionally taken some
23 lengthy period of time when there have been suggested

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1 revisions to get an answer back. And it's not from you. I
2 recognize that. This is not a "it's you." What I'm asking
3 is, coming to us is only part of the battle. If I agree with
4 your substitutions, sign the protective order and the
5 information moves to the defense, that's great.

6 It's when we have questions or minor issues, or major
7 issues or wholesale revision, I'm not saying which ones they
8 are, because I'm not suggesting you're not complying. I'm
9 just saying that when we have those changes, it has
10 occasionally taken OCAs a really long time to respond to you
11 all. And I presume it's them, because I know if they
12 responded to you all, you would come to us quickly.

13 CP [BG MARTINS]: Your Honor, I wasn't -- I was making no
14 commentary. You're clear ----

15 MJ [Col SPATH]: I understand.

16 CP [BG MARTINS]: ---- we're hard at work at this
17 material, as all of we are.

18 MJ [Col SPATH]: So in October, I plan to use my time in
19 October to start, if not work through, what I'm getting from
20 you all, as I have as every notice has come in, to work
21 through that. And I plan to do that. And I have people who
22 are going to help me with their initial review so I can do my
23 review. We really are working to get those back to you as

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1 quickly as we possibly can. Mine was more directed at,
2 getting it to us is half of that concern.

3 CP [BG MARTINS]: Understand. But yet, when you do get us
4 material that you've cleared on, we are then putting Bates
5 numbers on it and getting it out to them.

6 MJ [Col SPATH]: Absolutely.

7 CP [BG MARTINS]: I was merely making the comment in the
8 context of this discussion that, from the point of view on
9 discovery, the volume of material that has come to you that --
10 we know there is some of this -- that is being pretty close to
11 being ready to go. Because there's been that back and forth
12 that we've talked about, it's been ongoing, that we believe
13 that the October week can be well spent, that there's
14 nondiscovery-related things and stuff on the docket that's
15 been discussed here that could be done.

16 And then, you know, we have our eyes on other weeks
17 in November, December -- October, November, and December,
18 hopefully getting actually some space between the October 17
19 to 21 week. Our view at this point is two consecutive weeks,
20 maybe there's not enough unclassified material on the docket.
21 So, the -- and the -- and that the schedule on -- that you've
22 laid out for 2017 will enable us to then get into any
23 contested issues, again relating to discovery and the

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1 scheduling framework.

2 MJ [Col SPATH]: Yes. So hopefully I was clear. My
3 proposal to you all again is we see December's going to be a
4 problem. It appears there may be an issue. My worry is that,
5 based on what's in front of me currently and that I know --
6 I'm guessing, I think is percolating, just based on what's
7 being filed, which hasn't been very much, I'm not sure if
8 October 17th we're going to have five days worth of work. But
9 I know we have five days worth of work out there, with 332,
10 all of the now needing to be argued Limburg motions that were
11 mooted, all of the motions that have been infected by the
12 Limburg ruling that we haven't issued yet.

13 I know there's some discussion we can have on the
14 record. And so if it looks like we have eight days that we
15 could be on the record, it might behoove us to put those all
16 together, which again complies with my intent to have two
17 weeks in 2016, as was clear from the scheduling order, and
18 then multiple weeks as we move forward into 2017. That's all
19 I was suggesting for both sides.

20 CP [BG MARTINS]: Understand.

21 And are you planning to do the discussion of the
22 Limburg and those other motions that were affected?

23 MJ [Col SPATH]: Yes. If we have time at the end today,

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1 I'm certainly hoping we can do that, and I think we will.

2 LDC [MR. KAMMEN]: Does that mean that the Nabisco motion
3 has been denied?

4 MJ [Col SPATH]: No.

5 LDC [MR. KAMMEN]: Oh, well, there's no reason to have
6 that discussion until you've ruled on Nabisco.

7 MJ [Col SPATH]: Well, there is, because we don't have to
8 do things sequentially. We can -- you can tell me how we
9 think the Limburg being currently back in front of the court
10 is going to be affected. If I grant Nabisco, that
11 discussion -- again, we will have wasted some time, but for
12 processing a case forward, this is not unusual.

13 LDC [MR. KAMMEN]: Fine. I was just trying to see where
14 we were.

15 MJ [Col SPATH]: This is not unusual. I'm just trying to
16 talk about issues that may or may not be useful for me. I
17 have not ruled on Nabisco. I have not given it any more
18 thought than yesterday's conversation in front of the court.
19 I have not spent any time on that.

20 LDC [MR. KAMMEN]: Okay. And when I -- when he -- when I
21 have a chance, we'll address it.

22 MJ [Col SPATH]: All right.

23 CP [BG MARTINS]: Your Honor, we would move that we

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1 continue to discuss the effect of those rulings on the
2 commission's orders.

3 MJ [Col SPATH]: All right. Thank you, General Martins.

4 LDC [MR. KAMMEN]: I gather that the response to your
5 question was when will you have discovery, the answer is we
6 still don't know. And let me see if what I heard -- let me
7 tell the court what I heard in all of the word salad is
8 General Martins says, and it sounds about right, that they
9 have produced 265,000 pages of unclassified material. That
10 number sounds about right.

11 I will tell you that that has been a major, major
12 administrative problem, because the formats in which they
13 produced it are -- there is no order to them. And so one
14 document, if you will, might contain ten different subjects or
15 ten different interviews. And so segregating those out,
16 organizing them. The other part of that is that there are
17 multiple copies of the same interview, with different
18 redactions.

19 And so figuring out, if you will, which is the most
20 expansive or combining them, has been an issue. And we have
21 been trying to have, and have -- with our limited staff -- we
22 don't have 25 paralegals. We don't have anywhere near enough
23 bodies to organize this.

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1 And now I will tell you that when we're here, we're
2 not doing that. So time here that is not constructive is
3 destructive to our ability. So I just want to get that out
4 there.

5 I'm unclear with what he said about Brady material,
6 whether they -- it was lost in all of the words. Do they
7 think they've complied with Brady or not? Because if they do,
8 then the next time we're here, a robust and perhaps
9 evidentiary hearing on 332 or other motions, will be
10 necessary. If they haven't ----

11 MJ [Col SPATH]: 333.

12 LDC [MR. KAMMEN]: I'm sorry, 333.

13 MJ [Col SPATH]: That's all right. I just wanted to
14 make sure.

15 LDC [MR. KAMMEN]: If they haven't, then we're saying, no,
16 we're still figuring that out, then there's no reason to do
17 that. As I'm understanding the process, and I hope you will
18 correct me if I'm wrong, they submit material to you. They
19 submit the original document, the underlying documents from
20 the black sites and wherever, their proposed substitutions,
21 and then something that shows what we would get, and you kind
22 of compare all of those.

23 If you don't think they're adequate, you make some

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1 kind of revisions, send it back to them, they go back to the
2 OCA and see if the OCA will accept your revisions. Is that
3 about how this seems to work?

4 MJ [Col SPATH]: Seems like a fair summary.

5 LDC [MR. KAMMEN]: Okay.

6 MJ [Col SPATH]: Right. Is it -- it's not largely -- it's
7 in compliance with 120 and 505 and ----

8 LDC [MR. KAMMEN]: Sure. No. I just want to make sure
9 how ----

10 MJ [Col SPATH]: ---- how it works.

11 LDC [MR. KAMMEN]: I'm -- see if we're all -- so it seems
12 to be based on your questions that the two points of
13 difficulty are them getting the substitutions to you, because
14 they've been working on it for two years now, and then when
15 you do them, they go and there seems to be, in some cases,
16 some significant delay with the OCA.

17 So what I'm hearing from all of this is they're going
18 to get you multiple thousands of pages by the end of
19 September.

20 MJ [Col SPATH]: Yes.

21 LDC [MR. KAMMEN]: And that then you will have the
22 obligation to go through multiple thousands of pages, decide
23 whether they are adequate. If you decide they're adequate,

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1 you will tell them; if you decide they're inadequate, they go
2 back. So the bottom line, what I'm hearing is that we have no
3 idea when we're going to get it. And when we're going to get
4 it is the critical piece of this.

5 MJ [Col SPATH]: I understand that. What I heard ----

6 LDC [MR. KAMMEN]: I know you understand that.

7 MJ [Col SPATH]: I do. Absolutely.

8 LDC [MR. KAMMEN]: I don't think they understand that.

9 MJ [Col SPATH]: General Martins, part of what he said,
10 and correct me if I'm wrong, is they're going to give you some
11 things directly that don't go through the 505 process. I did
12 hear that, and I see a head-nod from General Martins.

13 So some is coming directly to you without me being in
14 the middle ----

15 LDC [MR. KAMMEN]: Okay.

16 MJ [Col SPATH]: ---- and then some is coming to me
17 through the 505 process because of 120 and the order in 120.

18 LDC [MR. KAMMEN]: Now, I just want to comment ----

19 MJ [Col SPATH]: Let me just -- General Martins, did I
20 summarize that correctly?

21 CP [BG MARTINS]: Yes. Since counsel made a couple of
22 comments during my presentation, just to correct, our point
23 is, right now, you don't know what you don't know.

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1 September 30, you're going to have an opportunity and a better
2 ability to estimate, Your Honor. And since you set the time,
3 place, and manner of discovery, September 30 is an important
4 date.

5 MJ [Col SPATH]: That's what I took from that.

6 CP [BG MARTINS]: We understand that totally.

7 LDC [MR. KAMMEN]: Fine. I understand that, too. But we
8 get to play in this game, too, to a very limited degree. And
9 to the limited degree that anyone -- that the defense makes a
10 difference in all of this, at some point we're going to get
11 the material. And the bottom line is, we don't know when that
12 is, and I understand that.

13 MJ [Col SPATH]: As the final, that's correct. I think
14 that is an accurate conversation, and it seemed to recognize
15 that your receipt of discovery is already generating and will
16 generate more motions ----

17 LDC [MR. KAMMEN]: Absolutely.

18 MJ [Col SPATH]: ---- more motions to compel and other
19 motions.

20 LDC [MR. KAMMEN]: Absolutely. Absolutely. Well, I'll
21 make room for the possibility that this group of substitutions
22 was more meaningful than the last group of substitutions. But
23 the last group of substitutions even Judge Pohl found were so

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1 ridiculous that that was what the genesis of 120 was. And so
2 maybe these are better. I'm hopeful they'll be better, but
3 I'll suspend -- we'll just see. We'll just see where we're
4 at.

5 Now, it's unclear to me whether these substitutions,
6 and what's coming, also include information from the full SSCI
7 report, because they indicated, and I think our -- at some
8 point we're under an obligation to not only review what was
9 generated pursuant to 120, but to review the SSCI report and
10 find the exculpatory evidence within that. And I -- he says
11 he's finished reading it. Just happened to get done because,
12 you know -- and but we -- and I'm assuming that whatever's
13 coming includes that.

14 Now, perhaps he misspoke, because he seemed to
15 indicate in his remarks that the information underlying the
16 executive summary was available to us, the information that is
17 footnoted in the executive summary is available to us, and
18 that is completely incorrect. What is available to us is the
19 executive summary, much of which is redacted, including
20 information pertaining to Mr. al Nashiri.

21 And the importance of this, Your Honor, is that
22 Mr. al Nashiri's detention in the CIA facilities is its own
23 volume within the SSCI report, I understand.

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1 So there should be a huge amount of material from the
2 SSCI report. Now, maybe that's subsumed within the other
3 stuff. Don't know.

4 The other thing that is peculiar to me, but -- is,
5 you know, Jencks and Giglio, in a real court, are discovery
6 matters.

7 MJ [Col SPATH]: Let me just say ----

8 LDC [MR. KAMMEN]: So when the prosecutor says,
9 essentially, I'm not going to tell you, that was a very polite
10 way of saying none of your business is when I'm going to give
11 you Jencks -- when I'm giving them Jencks and Giglio material.

12 MJ [Col SPATH]: Mr. Kammen, let me just say, I did not
13 take it that way. Two things.

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

15 MJ [Col SPATH]: Jencks, Giglio, and Brady are trial
16 rights and the government has an obligation to comply by
17 trial. They are trial rights and they are discovery
18 obligations. They absolutely do.

19 LDC [MR. KAMMEN]: Right.

20 MJ [Col SPATH]: But -- and I appreciate your frustration
21 with the commission process. This is an Article II court, and
22 I know you don't mean the disrespect, but it is as real as any
23 other Article II court. It is different than an Article III

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1 court. That's a fact. And that's the system within which I
2 work.

3 LDC [MR. KAMMEN]: And if I may ----

4 MJ [Col SPATH]: I expect the government to comply with
5 Jencks, Giglio, and Brady and I expect them to do it before
6 this case gets to trial.

7 LDC [MR. KAMMEN]: Well, may I?

8 MJ [Col SPATH]: You may.

9 LDC [MR. KAMMEN]: First, let me say nothing I say about
10 the system is meant to disrespect.

11 MJ [Col SPATH]: I know. I appreciate your frustration
12 with the process.

13 LDC [MR. KAMMEN]: But in any event, a great judge working
14 in a system that is hopelessly flawed can do no better than
15 the system, and this system is hopelessly flawed. But the
16 important thing is -- and so I want to make sure that we're
17 all on the same page here, because the Jencks and Giglio
18 material, if they really -- and Brady material, if they really
19 comply with their obligation, should be tens of multiple
20 thousands of pages. And in a court that has some fidelity to
21 procedures, Article II or Article III, we wouldn't be getting
22 that two weeks before trial, we would be getting that ----

23 MJ [Col SPATH]: We won't here.

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1 LDC [MR. KAMMEN]: ---- six months or a year before trial.

2 MJ [Col SPATH]: You're not going to get it two weeks
3 before trial here.

4 LDC [MR. KAMMEN]: No. I'm concerned we're going to get
5 it two weeks after the trial begins here.

6 MJ [Col SPATH]: If that were to occur, I have enough
7 impact there. They have a discovery obligation to allow you
8 to prepare for trial. And they have indicated they're
9 complying with it. They're officers of the court, and they
10 will comply with it. And if things happen like that, we'll
11 resolve them together.

12 LDC [MR. KAMMEN]: Now, so let me just say with respect to
13 scheduling, obviously everything's a moving target here,
14 because if all of a sudden September the 5th we get 2,000
15 pages of RDI material that has to be read in a SCIF in, you
16 know, Washington, D.C., we may have some views on what the
17 best use of our time is.

18 We're not really in a position to discuss scheduling
19 dates other than the two weeks that are already set because
20 we've got multiple team members. I don't know what
21 commitments people have made.

22 MJ [Col SPATH]: And, again, my -- the dates that we are
23 placing right now are to deal with motions. They are not to

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1 deal with an attempt to ----

2 LDC [MR. KAMMEN]: Yeah, I understand that.

3 MJ [Col SPATH]: This is truly to continue to resolve
4 things like motions to compel and the Brady allegations when
5 they become ripe. Truly, that's all they're for.

6 LDC [MR. KAMMEN]: I understand. But again, given
7 somewhat really limited resources, and given the change and
8 given if we're melding new people in and all of that, how we
9 utilize our time is -- you know, it's three-dimensional chess.
10 If we're here, we can't be doing necessary work there. If
11 we're in court and we're in the middle of the stresses of a
12 hearing, it's difficult to introduce the -- Mr. al Nashiri to
13 new people.

14 And given the fact that our ability to come here to
15 see him is limited by commissions flights, but availability of
16 staff -- I mean, we've had times when we've been told when
17 we're available to come and they say, we can't accommodate a
18 visit because we can't accommodate a visit.

19 So it's -- it's not as simple. These things aren't
20 as simple. And so with -- again, we understand the
21 commission's position, but in terms of, you know, moving
22 things to November for a couple of weeks, I just don't know
23 other people's availability, and, you know, it's not just me.

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1 You know, I can be available, but if other people aren't
2 available, that impacts our abilities to do stuff. That's all
3 I want to say.

4 Again, I recognize it's your view that, if you will,
5 the new people don't really need to be involved in sort of
6 this phase of the litigation. But the truth is, once they're
7 involved, they do. And, you know ----

8 So I guess where we are, Your Honor, is a firm, we
9 don't know when discovery is going to be complete, and that's
10 fine. You know, I did want to acquaint the court with what --
11 and this is in one of our motions, essentially with the
12 unclassified -- you know, sometimes in -- and it may be the
13 way they get the information.

14 Maybe the FBI's the people who took it and threw it
15 up on the steps and let random pages fall and then scanned it
16 and then gave it to us. But I don't know that I've ever seen
17 a production in a major case that is so disorganized, where
18 the information comes in such an unusable fashion that is so
19 time intensive to make it usable. And that has just been an
20 absolute ongoing nightmare of a problem for us.

21 Okay. So we don't know where we are. And if I may,
22 while we're -- I'm here -- did you have any questions
23 about ----

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1 MJ [Col SPATH]: I don't. Thank you.

2 LDC [MR. KAMMEN]: Turning just to cleanup, we provided
3 a -- the government a copy of what we have marked as 348K,
4 which is the declaration of Adam Thurschwell, we referred
5 to -- if I may.

6 MJ [Col SPATH]: You may, thanks.

7 LDC [MR. KAMMEN]: Just so the bottom line on it is in --
8 Mr. Thurschwell was part of the Nichols and McVeigh teams, and
9 he makes reference to the fact that in Nichols' team there
10 were two essentially learned counsel, one very experienced
11 lead lawyer, and up to 13 additional attorneys working on
12 Mr. McVeigh's team. And he describes why the McVeigh case,
13 even as complicated as it was, was not nearly as complicated
14 as this case.

15 Nichols had two learned counsel, and Mr. -- and three
16 other lawyers, experienced lawyers, including Mr. Thurschwell.
17 And then two other lawyers joined the team for limited periods
18 of time.

19 And then in the Moussaoui case, there were six
20 attorneys of record, all of whom stayed through the case. And
21 then there was a mega case litigator who oversaw the
22 activities, over 100 lawyers contracted at government expense,
23 to deal with the unclassified discovery.

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1 So what they did in Moussaoui was essentially
2 outsource what we're having to do in-house to deal with the
3 unclassified discovery and put it in a database that makes it
4 usable. And they also had -- he goes on about the
5 investigators. And, of course, we've previously advised the
6 commission and asked the commission to intervene with the
7 transfer of one of our senior investigators, which the
8 commission felt it was unable to do. And so the rolling over
9 of people is more than just lawyers in a way that impacts
10 things.

11 And so while it may look to the public that this is
12 sort of a well-put-together and well-funded operation, in
13 fact, it's considerably understaffed, underfunded, and really,
14 in our view, and we'll be dealing with this in the future,
15 inadequate. But the Mizer motion is an attempt to remedy part
16 of the issue.

17 Yesterday also you asked General Martins about if
18 there were other cases in respect to the Nabisco, and he cited
19 you to Johnson v. Eisentrager.

20 TC [MR. MILLER]: Your Honor, are we getting -- starting
21 to reargue motions?

22 LDC [MR. KAMMEN]: No.

23 TC [MR. MILLER]: I thought we closed out the argument

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1 yesterday.

2 LDC [MR. KAMMEN]: Well, no, we indicated we would look at
3 that case.

4 MJ [Col SPATH]: I do like when both of you rule for me.

5 All right. I will give you all an opportunity to
6 respond. As we've moved through the process, both sides have
7 taken multiple opportunities to share. So Mr. Kammen, you can
8 finish your comments.

9 Trial Team, you will have an opportunity to respond.

10 LDC [MR. KAMMEN]: I just wanted to point ----

11 MJ [Col SPATH]: I understand.

12 LDC [MR. KAMMEN]: ---- and we'll provide a copy.

13 MJ [Col SPATH]: I've already -- you can just tell me what
14 you want to say.

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

16 Reading from the first paragraph of the opinion, "The
17 prisoners had been convicted of law of war by engaging and
18 permitting or ordering continued military activity against the
19 United States."

20 So it was not a situation where these people were on
21 trial for things they did against U.S. -- against non-U.S.
22 interests. So I just wanted to make sure that -- and we can
23 provide -- if -- I know you have access. We just wanted to

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1 clarify that point. And I'm sure General Martins didn't have
2 a total recall of the case, because otherwise he wouldn't have
3 cited it.

4 MJ [Col SPATH]: And it was really an off-the-cuff
5 question from me.

6 LDC [MR. KAMMEN]: Sure. No, but I think it's the germane
7 question. Because I think what -- and I don't want to belabor
8 the point, but what we were trying to express was what they
9 want to do is something completely unprecedented, to make him
10 the policeman for the world.

11 MJ [Col SPATH]: All right.

12 LDC [MR. KAMMEN]: Thank you.

13 MJ [Col SPATH]: Thank you. There was a wide range of
14 discussion topics there, so if you want to talk any more about
15 discovery, Brady, the cases, or anything else, General
16 Martins.

17 CP [BG MARTINS]: Your Honor, I think the discovery
18 discussion has given you what you need for scheduling.

19 MJ [Col SPATH]: Let me ask the one question brought up.
20 You had indicated Giglio and -- can I presume that the Brady
21 motion isn't quite ripe yet as well as you finalize discovery?

22 CP [BG MARTINS]: Correct.

23 MJ [Col SPATH]: That helps. And I know you mentioned

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1 Jencks in that conversation as well. Okay. Thank you.

2 CP [BG MARTINS]: On the cases, Mr. al Nashiri is charged,
3 among other things, with regard to the Limburg, in the context
4 of and associated with hostilities and seeking to retaliate
5 against the United States. So he's specifically charged with
6 this, in Charge IV, Specification 2, in connection with the
7 Limburg now. So he's accused, and we will prove that this was
8 part of a personally controlling and directing against the
9 United States over a period of many months until his capture
10 al Qaeda's terrorist boats operation; and that is hostilities
11 against the United States. It does involve activities
12 allegedly off the coast of Yemen, in this case, the port of
13 Al Mukallah, highly trafficked sea lane.

14 The accused and ultimately convicted in Eisentrager
15 were operating in China, and they were charged with, after
16 Germany had surrendered, continuing hostilities against the
17 United States. And that involved all kinds of then collateral
18 damage against civilians and other things that make war
19 horrific. It's part of the war crime. It's a pretty good
20 analogy and I'm not backing away from that case at all.

21 Yamashita went a little bit different, but you were
22 kind of asking about kind of overseas reach of commissions.
23 Yamashita is being tried as a result of activity in Manila.

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1 Now he's not an unprivileged belligerent, but it is the use of
2 a military commission. So those are just example of how those
3 cases are comparable to this one.

4 MJ [Col SPATH]: Thank you, General Martins.

5 We'll take a break here in a minute. Let me give you
6 two rulings. They're not going to be in full form. I just
7 want to let you know where I'm going so you're not surprised
8 at all when you see the rulings come out, and then we'll come
9 back and start up with 352.

10 With regard to Appellate Exhibit 333, at least right
11 now what we're going to do is defer. It's not ripe. We just
12 heard from General Martins. We still have discovery ongoing.
13 It may or may not impact Brady. Again, as officers of the
14 court, I completely believe, until I see evidence otherwise,
15 that the government will comply with Brady, Giglio and Jencks.

16 And they recognize that. We are not two weeks out
17 from trial; we are a significant distance. But we will deal
18 with the Brady motion once it is ripe, and we'll have a full
19 evidentiary hearing. That's why I deferred on the classified
20 piece as well. Makes sense, because there may be more
21 classified information based on the final disclosures that you
22 all want to add in to that motion. So I -- that one is not
23 ripe, so it's deferred at this time.

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1 With regard to Appellate Exhibit 350 specifically,
2 it's the only one that I've come to any conclusions on. It
3 has to do with the security clearance piece. It was a motion
4 to abate the proceedings. The motion to abate the proceedings
5 at this point is denied. Much of that has to do with where we
6 are in the process, as we have highlighted over this week for
7 everybody. And that is, we are at the -- maybe towards the
8 end of the discovery process, but we are nowhere near the
9 trial process.

10 I won't put a time on it, because I have no idea.
11 What I do know is at this point, your motion to abate is
12 denied. And I have indicated to the government where they can
13 help with their contacts with the security clearances, that
14 would be helpful. And based on what I'm hearing, that seems
15 to be occurring, and I appreciate that. So if we can get
16 those two defense members cleared, and then appropriately read
17 in, so they can become fully contributing members of the
18 defense team.

19 That does not mean you cannot re-file, of course,
20 depending on what occurs as we move forward. But just as of
21 right now, your motion is denied. There will be a written
22 ruling to follow, as you would expect, but that way people
23 know -- that's the only conclusions I've come to. I haven't

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