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1 [The R.M.C. 803 session was called to order at 1004, 7
2 September 2016.]

3 MJ [Col SPATH]: All right. This commission is called to
4 order. Looking out to see, I know we have new counsel on both
5 sides, so why we don't just start with you.

6 Trial Counsel, who is here to represent the
7 government?

8 TC [MR. MILLER]: Good morning, Your Honor. My name is
9 Mark Miller. I have been detailed to the military commissions
10 by the chief prosecutor's office of the military commissions,
11 appearing as a special trial counsel as a representative from
12 the United States Department of Justice. I'm qualified under
13 the Rules for Military Commissions, Rule Number 502(d) and
14 have been previously sworn in accordance with the Rule for
15 Military Commission 807. I have not acted in any manner which
16 might tend to disqualify me from these proceedings.

17 These proceedings are being transmitted via CCTV to
18 two remote locations, Fort Meade and Norfolk in the United
19 States in accordance with your order dated 12 January 2015, AE
20 028J.

21 Present for the prosecution, Your Honor, are all
22 members detailed by General Martins' detailing memo, AE 338B,
23 dated 13 January 2016, and they are all present here today

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1 with the exception of Lieutenant Colonel Winston McMillan.
2 Those persons present, Your Honor, are Brigadier General Mark
3 Martins, Lieutenant Paul Morris. Lieutenant Jonathan Cantil.
4 Lieutenant Cherie Jolly. Also assisting the government and
5 sitting at the table will be Sergeant Vanessa Pichon,
6 Mr. Forrest Parker Smith, and Mr. Louis Marmo. Thank you,
7 Your Honor.

8 MJ [Col SPATH]: Thank you very much, Mr. Miller.

9 CP [BG MARTINS]: Your Honor, the technicians are asking
10 whether your mic is fully functional.

11 MJ [Col SPATH]: It's not. I haven't been down here in a
12 while and forgot all about it. Thank you.

13 All right, let me turn now to the defense and
14 Mr. Kammen, if you would go through your team. Thanks.

15 LDC [MR. KAMMEN]: Since we were last here, Your Honor, do
16 you want to go through the absences or those who are present?

17 MJ [Col SPATH]: You can go through both. I know you want
18 to and it's part of the motions we're going to deal with, so
19 please do.

20 LDC [MR. KAMMEN]: Well, present is myself, Richard
21 Kammen, and Lieutenant Commander Jennifer Pollio. We were
22 both present the last time the commission convened, which I
23 believe was approximately 18 months ago.

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1 Not present from the last time the commission
2 convened is Major Thomas Hurley, who was transferred, left
3 with the consent of Mr. al Nashiri. He was transferred and
4 now has actually left the military, completed his active
5 service. Major Daphne Jackson, who was transferred and left
6 the team with the consent of Mr. al Nashiri.

7 And at the time Major, now Lieutenant Colonel Allison
8 Daniels, whose duties were transferred and has left the team
9 with the consent of Mr. al Nashiri.

10 Also absent is Commander Brian Mizer, who -- to whose
11 termination, if you will, Mr. al Nashiri did not consent, and
12 neither did the chief defense counsel, but he is not present
13 here today.

14 Paralegal is assisting us also. And that's all we
15 got.

16 MJ [Col SPATH]: Let me go through Mr. al Nashiri's rights
17 to be present and his ability to waive his presence if he
18 wants to. I'm now going to advise the accused of his right to
19 be present and his right to waive such presence.

20 Mr. al Nashiri, you have the right to be present
21 during all sessions of the commission. If you request to
22 absent yourself, such absence must be voluntary and of your
23 own free will. Your voluntary absence from any session of the

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1 commission is an unequivocal waiver of the right to be present
2 during the session. Your absence from any session may
3 negatively affect the presentation of the defense in your
4 case. Your failure to meet with and cooperate with your
5 defense counsel may also negatively affect the presentation of
6 your case. Under certain circumstances your attendance at a
7 session will be compelled regardless of your personal desire
8 to be present -- or at your personal desire not to be present,
9 sorry.

10 Regardless of your voluntary waiver to attend a
11 particular session of the commission, you have the right at
12 any time to decide to attend any subsequent session. If you
13 decide not to attend the morning session but want to come for
14 the afternoon session, you must notify the guard force of your
15 desires. Assuming there's enough time to arrange
16 transportation you will be allowed to attend the afternoon
17 session. You will be informed of the commission session to
18 afford you the opportunity to decide whether you wish to
19 attend each session.

20 Do you understand what I have explained to you?

21 Thank you. That's a positive from Mr. al Nashiri.

22 In the past you've indicated that you do not desire
23 for the commission to schedule breaks in the hearing to

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1 accommodate prayer times. I just want to double-check. Is it
2 still your preference that we don't take prayer breaks or do
3 you want to take the prayer breaks?

4 To not -- to continue to not break for prayer time;
5 is that correct? Yes. Thank you.

6 I want to talk a little bit about the non-802
7 session. Part of it is, for people who are watching or
8 listening, is to understand what an 802 session is. And what
9 it is is an administrative, off-the-record hearing where I
10 have an opportunity to meet the parties who I haven't met
11 before in a slightly less formal environment than in here up
12 on the bench, and there's a few of you, and also to discuss
13 scheduling and the order of events as we go through this.

14 We don't have to have them. We can do them on the
15 record. And if we do have them, I'll summarize them on the
16 record, as I've done. The other part of that is, Mr. Kammen,
17 you and I had an agreement that those 802 sessions that I had
18 would be just like that, which are informal, they would remain
19 informal, and they would be discussions of upcoming events. I
20 wouldn't rule in 802 sessions. I wouldn't provide any matters
21 of substance. And in the past, you have agreed that that has
22 occurred as we have done the 802s.

23 And I hope I haven't done anything -- I know we had

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1 an 802 in the 18-month break that we had court reporters for,
2 and I allowed the court reporters for that one so it was
3 recorded, and that was because the parties hadn't spoke in so
4 long together in an 802. I assume there's been lots of
5 discussion outside the 802s between the parties. I haven't
6 had any.

7 So I just -- I offer you -- again, Mr. Kammen, my
8 practice, I have no idea how other judges handle 802s, nor am
9 I going to comment on it. Mine really are informal, as they
10 have been in the past, and an opportunity for me to continue
11 to forge what I think is important, and that is, civil
12 behavior between the two sides because it's expected from
13 everybody in any court. And that's all my goal was, as you
14 know, from now over two years ago when I first came down here,
15 and it is my goal as we go forward to continue.

16 And, again, we don't have to have them, Mr. Kammen.
17 I'm happy to just do this on the record as we kick off each
18 session, but I would hope we could get back to those. And I
19 know you want to comment, so I'll let you.

20 LDC [MR. KAMMEN]: I appreciate the events last week got a
21 little complicated, but there's been two sea changes that
22 really drove, at least, our feelings that for the present
23 these matters should be on the record.

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1 The first, of course, is the decision by the
2 D.C. Circuit that essentially tables all consideration of
3 these proceedings until after there is a trial, and -- you
4 know, and then, you know, seven, ten years from now, it will
5 get to the D.C. Circuit Court and they'll decide what is fair.

6 And among the ways in which we analyze that decision,
7 it is really incumbent on us to create as robust a record as
8 possible of the many problems that we see in this process.
9 And, again, that means no disrespect to Your Honor, but this
10 process, as we have said from the beginning, is just not a
11 real process.

12 And so the other issue, Your Honor, and there's no
13 way to sugar-coat this, but in the last 18 months there have
14 been some rather troubling developments regarding ex parte
15 communications, ex parte communications with at least your
16 predecessor, if not you, by -- between -- and the government
17 and ex parte communications between the government and the
18 C.M.C.R.

19 MJ [Col SPATH]: On that first one, I want to make clear,
20 I have not spoken to anyone. I do not know if the trial
21 judiciary has had communications with both sides because I
22 don't see those communications. I don't want to.

23 I have not spoken with -- I'm trying to see if I've

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1 even walked into a representative of the government in the
2 last 18 months and even said hello. That's why I'm looking at
3 everybody's face. I haven't spoken to any of you off the
4 record, and I wouldn't.

5 If I walked by you, I will say "hi" and be pleasant
6 as is, I think, important. But I have not spoken with
7 anybody. And I know that the trial judiciary staff who works
8 with me to help me with the significant amount of paperwork,
9 discovery and the like, may have conversations with you all
10 that I'm not privy to, but they're well aware of their
11 responsibilities and I haven't had any concerns.

12 I recognize the other issue, the C.M.C.R., not that
13 there were ex parte communications, but that that's an issue
14 that we're going to deal with here as well that we'll talk
15 about. But I just want to be clear on the record, I have not
16 spoken with any of you.

17 LDC [MR. KAMMEN]: I understand and I appreciate that, but
18 given, again, the sea change in the last 18 months, we just
19 felt it was best that at least this 802 be on the record. You
20 know, there's really significant issues and the order of
21 issues is really significant and we just felt it was best that
22 this be on the record. So I appreciate your concern.
23 Obviously, our desire is to have this as collegial as

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1 possible, recognizing, of course, that it's a capital case,
2 and recognizing, of course, that now the D.C. Circuit Court
3 has placed an even greater responsibility on us to demonstrate
4 essentially how flawed this system is. So thank you.

5 MJ [Col SPATH]: No, I understand. And let me just ask
6 trial counsel if you have any comments you want to make
7 regarding the 802 issue.

8 TC [MR. MILLER]: Simply, it would be our preference, Your
9 Honor, that we continue to do it in an informal manner.
10 Having been involved in capital litigation of significant
11 amount, I think those sorts of informal meetings are very
12 helpful in moving forward, so it would be our preference to
13 continue in that manner. Thank you.

14 MJ [Col SPATH]: And I will offer them -- I do not take
15 any offense, Mr. Kammen, at all to what you are doing. We
16 have talked about it in here multiple times. For anybody
17 watching, these 802 sessions are as simple as they were just
18 here and what we're about to do, which is to talk about the
19 order and the filings so that we can come up with a plan that
20 makes sense. And, again, this is not a comment on how other
21 judges do them or don't, I don't know, I'm not privy to their
22 courts. I just know that mine are informal, because I follow
23 the rule.

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1 But I do want to talk -- first, I want to talk about
2 the scheduling orders. I did issue two: For 2016 and for
3 2017. AE 2030 and then AE 356. No one has filed any formal
4 objections to the scheduling orders that I have received, and
5 so I'm going to -- I'm going to talk more about what I kind of
6 expect we can do, if anything, in October, what I expect we
7 can do, which should be more in December and, frankly, what I
8 expect that we can do, which should be significantly more in
9 March. And some of that is going to be an expectation on the
10 government -- not you all particularly, but with your help,
11 and we'll talk more through that -- about moving the discovery
12 after it goes through the trial judiciary and it goes back to
13 the OCAs, they need to do something.

14 And I recognize you all don't own them. I just
15 recognize that it's difficult for me to put out a trial
16 scheduling order when discovery is ongoing in a case. We need
17 to get to a point where discovery is closed and the
18 classification reviews are done and that information gets over
19 to the defense.

20 And so I know you all are engaged in, that but I
21 just -- we need to come up with a plan. So we'll talk some
22 more about that. But I haven't had any formal objections yet,
23 and we tried to balance the need for the appellate process

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1 that I know is ongoing in some areas, plus the discovery that
2 is ongoing so that we're not here and you all can comply with
3 all of that, but with an eye towards moving this forward. I
4 had no idea it was going to be an 18-month break from the last
5 time to this time for us to continue to move forward.

6 So we issued those. Then I issued some rulings this
7 week. The -- I know that you've seen them, or I hope that
8 you've seen them. I just want to make sure. Appellate
9 Exhibit 092W, that's a classified ruling. AE 332GG was a
10 ruling on a defense motion to production of witnesses for
11 332X. Appellate Exhibit 348F was a ruling on a defense motion
12 to produce witnesses as well and 355D was a ruling on the
13 government's filing to file a supplement to Appellate Exhibit
14 355A and I denied that. I also denied the two defense motions
15 that I just referenced.

16 So this is where I'm at for my thoughts this week.
17 If anyone has any significant disagreement with kind of the
18 order of motions, we can talk through them. But if we were
19 sitting together, this is what I would suggest: One is a
20 discussion in here on the record of the effect that the
21 commission's review or the C.M.C.R. decisions had on my prior
22 rulings. Because there have been some, right? I mooted some
23 things that we're going to have to re-examine. So I think we

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1 have to have that discussion and figure out what the effects
2 are of the C.M.C.R. decisions on my rulings and on any prior
3 mooted rulings.

4 And I figure we'll take up oral arguments of the
5 nonclassified Appellate Exhibits. We're going to need to have
6 a couple of closed sessions for classified information.
7 Hopefully we can do it at the end of the day today so we can
8 do the 505 piece so we can move forward. That's just a
9 general thought and we'll talk some more. And then we'll come
10 back to deal with any oral arguments that we have left
11 outstanding on the classified exhibits. Then my thought would
12 be if we're going to do a closed classified session we'll do
13 it at the end of the process, so that when everybody departs
14 they know we're not going to come back on the record in a
15 nonclassified setting and it will be clear to the people who
16 came down what we're doing.

17 So that's my thought in general. That's just the
18 general order of events that I see. And then I have some
19 detail about it, but first let me just ask: In general, does
20 that make sense? Trial Counsel?

21 TC [MR. MILLER]: Yes, it does, Your Honor.

22 MJ [Col SPATH]: Okay. Defense counsel.

23 LDC [MR. KAMMEN]: Generally, yes. We would prefer that

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1 the two hearings, unclassified hearings regarding counsel, I
2 think it's 348 and the motion, maybe 351 regarding the
3 security clearances for Ms. Spears and Eliades be the first
4 two things that be considered.

5 MJ [Col SPATH]: Before even we start talking about the
6 impacts of the C.M.C.R. decisions?

7 LDC [MR. KAMMEN]: Yes.

8 MJ [Col SPATH]: I understand.

9 LDC [MR. KAMMEN]: The C.M.C.R. is considerably more
10 complicated in our view, I know the government disagrees, for
11 two reasons: Number one, the issue of the ex parte
12 communications, which the government acknowledges that they
13 had with the C.M.C.R., and the issue of production of those.
14 We really need to see those. The government describes them as
15 purely administrative, and I'll make room for the possibility
16 that that's correct. But if they're not, if they are
17 something -- administrative may be in the eye of the beholder,
18 and if they're not genuinely administrative, then that raises
19 a whole host of issues, not the least of which is the spectre
20 of unlawful influence on the C.M.C.R. or attempts to influence
21 the prosecution.

22 The other piece of that, of course, is the grant
23 of -- I don't know if it's called certiorari in the military

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1 system, but the grant of review in the United States v.
2 Dalmazzi which again I know the government disagrees, but we
3 think, depending on that ruling, could essentially be a ruling
4 that the judges to the C.M.C.R. who decided the appeals were
5 not really C.M.C.R. judges. And, you know, obviously, the
6 effect of that is pretty significant. So I'm not completely
7 certain, given these -- at least in our mind, these questions,
8 that dealing with the effect of your rulings is necessarily as
9 paramount as you may think they are, but we're certainly happy
10 to have that discussion this week. It's just we may be ending
11 up revisiting them later on.

12 Certainly having the 505 today is fine, having the
13 closed session, I assume that pertains to AE 092, at the end
14 of the proceedings is fine.

15 Our view, of course, within -- is that -- and it's
16 really important to us, and really to Mr. al Nashiri, that the
17 motion concerning Commander Mizer be the first thing that is
18 heard.

19 MJ [Col SPATH]: All right. And so we'll probably take up
20 that first. I know that's an issue that we have. Let me tell
21 you what I believe is not only fully briefed but expected so
22 everybody knows the unclassified issues we're going to argue.
23 One was just referenced. That's AE 348. That is the defense

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1 motion to abate the proceedings pending current Commander
2 Mizer being restored to the defense team. And I had that
3 first on my list of unclassified AEs to be argued already.

4 AE 350 is the defense motion to abate proceedings
5 until other members of the defense team receive appropriate
6 security clearances and read-ons.

7 Then we have a couple in the 332 series, AE 332AA and
8 X. We have a defense motion to compel discovery related to
9 defense 332X, which I think we need to take up before we deal
10 with 332X, and then 332X is the defense renewed motion to
11 dismiss for unlawful command influence.

12 We also have Appellate Exhibit 351, that's a defense
13 motion to dismiss Charge IV, Specification 2, and Charge V,
14 the overt act 26 and Charges VII through IX, and that's in
15 relation to the recent Supreme Court case RJR Nabisco v.
16 European Community. We also have Appellate Exhibit 352, a
17 motion to dismiss by the defense because the convening
18 authority has a dual judicial and prosecutorial role that the
19 defense alleges violates due process or in the alternative a
20 request to abate the proceedings until the convening authority
21 is removed from those roles.

22 Then we have Appellate Exhibit 335C, Charlie, defense
23 motion to compel witnesses to testify at a hearing on 335,

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1 defense motion to suppress custodial statements made by Mr. al
2 Darbi.

3 We also have Appellate Exhibit 355. It's not on the
4 original docketing order, but it is fully briefed, and that's
5 the defense motion to compel discovery, the ex parte
6 communications with the USMCR.

7 The government objected to adding that, and the
8 defense hasn't filed a reply brief yet, so the first statement
9 I would make is -- I believe it's ready to be argued, because
10 it's fully briefed. And, again, in the interest of resolving
11 issues that are outstanding, my plan is to take argument on
12 that. So we can do that towards the end. That's why it's
13 listed last. We can do that. What I want to make sure is,
14 defense counsel, you're not going to file a reply brief, so
15 that the government objection, while noted, I'm not waiting
16 for the reply brief.

17 LDC [MR. KAMMEN]: And you shouldn't because it's not
18 coming.

19 MJ [Col SPATH]: Okay. That is what I want to make sure.
20 Then Appellate Exhibit 355 will be our last one for the
21 unclassified series.

22 We also have two classified motions that we need to
23 first have the 505 hearing and then see where we're going to

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1 go. One is Appellate Exhibit 333, that's the Brady v.
2 Maryland motion to dismiss, and Appellate Exhibit 092S.
3 That's a defense motion to abate proceedings and for
4 appropriate relief due to the destruction of evidence that's
5 referenced in the original Appellate Exhibit 092.

6 Those are the two classified issues that we'll work
7 through. Again, hopefully, we can come up with a time to deal
8 with that this afternoon.

9 So before we talk about the impact on my rulings
10 already and the ones I've mooted, why don't we take argument
11 up, while we're here this morning, on the one that is -- has
12 been referenced by the defense as most important to them and
13 we talked about that in the 802 session we did have that was
14 recorded, and that's the defense motion to abate proceedings
15 until we get Commander Mizer back. Defense Counsel, you may
16 argue.

17 Let me ask first before you argue, and I recognize, I
18 know what part of your answer will be. Do you have any
19 additional evidence or witnesses on this motion ----

20 LDC [MR. KAMMEN]: Yes.

21 MJ [Col SPATH]: ---- other than what I have already ruled
22 on?

23 LDC [MR. KAMMEN]: Yes, because we wanted to present

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1 Commander Mizer to testify. And also, we understand your
2 rulings with respect to General Baker and Dr. Crosby, we'd
3 like to make offers of proof with respect to their
4 anticipated -- what their testimony would be in order to
5 complete the record.

6 MJ [Col SPATH]: You did that in the filing. I mean, you
7 had a summary of what ----

8 LDC [MR. KAMMEN]: I know, but ----

9 MJ [Col SPATH]: ---- what you thought you would tell us.

10 LDC [MR. KAMMEN]: The summary is incomplete because the
11 summary, by the rule, is only necessary to demonstrate general
12 relevance and general necessity. The offers of proof would be
13 somewhat more detailed and we think are important to flesh out
14 the record, again for appellate review.

15 MJ [Col SPATH]: And then you want to also have Commander
16 Mizer testify?

17 LDC [MR. KAMMEN]: Yes. And I understand -- the
18 government didn't oppose that, and I understand some
19 arrangements may have been made. I'm not sure of what those
20 arrangements are.

21 MJ [Col SPATH]: Let me just check on that piece first.
22 How are we doing? Is that unopposed and is Commander Mizer
23 available?

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1 ATC [LT CANTIL]: Your Honor, the government was
2 informed -- sorry. Your Honor, the government was informed
3 by Commander Mizer ----

4 LDC [MR. KAMMEN]: He's holding a sign for you. Oh, I'm
5 sorry. Okay.

6 ATC [LT CANTIL]: All set? The government was informed by
7 Commander Mizer that the defense did not intend to call him as
8 a witness. We've provided the various forms. He's --
9 Commander Mizer is within 30 miles of the VTC site; however,
10 because we were informed by Commander Mizer via e-mail that
11 he -- that the defense informed him that they did not intend
12 to call him as a witness, he is not currently at the VTC site,
13 and ----

14 MJ [Col SPATH]: Just have to get him. So it's unopposed
15 and it appears there may have been some confusion with reading
16 e-mail traffic. So we'll just get it resolved. Since it's
17 unopposed, we'll have Commander Mizer available to testify
18 either later this morning or early this afternoon.

19 So let's start then with the discussion of General
20 Baker and Dr. Crosby.

21 LDC [MR. KAMMEN]: Okay. Lieutenant Commander Pollio will
22 make the proffer with respect to General Baker and I'll make
23 the proffer with respect to Dr. Crosby.

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1 DDC [LCDR POLLIO]: Good morning. Had Brigadier General
2 Baker been called to testify to the stand, it's the defense's
3 belief that he would have proffered the following testimony:
4 I am the chief defense counsel, commanding officer of the
5 Military Commission Defense Organization. As a commissioned
6 marine officer, I was selected for the funded law program and
7 have now been serving as a judge advocate ----

8 MJ [Col SPATH]: Just slow down a little bit.

9 DDC [LCDR POLLIO]: Yes, sorry.

10 ---- and have been serving as a judge advocate in the
11 Marine Corps for 19 years. Like many military attorneys, I've
12 held a variety of positions, including chief defense counsel
13 of the Marine Corps. I have extensive experience in criminal
14 litigation under the UCMJ and military law.

15 In 2015, the Secretary of Defense began the selection
16 process for the next chief defense counsel of the military
17 commissions. Unlike in the past, the future selectee for this
18 position would be promoted to flag officer to comply with the
19 equal resourcing and comity provisions envisioned under the
20 Military Commissions Act.

21 Given the responsibilities and rank of the chief
22 defense counsel, the services implemented a board to vet
23 potential candidates. The process was rigorous and an

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1 important part of that process was ensuring that the Secretary
2 of Defense could rely upon the judgment and experience of the
3 next chief defense counsel.

4 I was selected to become the chief defense counsel in
5 June of 2015. I was then promoted to the rank of Brigadier
6 General and began my duties as the chief defense counsel.

7 In that capacity, I am responsible for the proper
8 resourcing of all defense teams in the MCD0 organization and
9 responsible for the detailing of qualified counsel to all
10 cases. I must make my decisions based on all of the facts and
11 circumstances of each particular case, each particular
12 detainee, and each particular lawyer.

13 Immediately upon assuming the duties of the chief
14 defense counsel, I identified significant resourcing issues at
15 MCD0, many of which were reoccurring issues also raised by my
16 predecessors. Importantly, there remains a big problem in the
17 lack of qualified military counsel provided by the services to
18 MCD0. Many billets remain vacant. Many are gapped for
19 several months at a time. And, generally speaking, the
20 services have not provided consistent manning resources to
21 MCD0, perhaps due to other demands on the services.

22 In order to address this resourcing failure, my
23 predecessors and I continued to request additional civilian

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1 counsel. These billets are necessary in order to adequately
2 resource the defense teams in these complex national security
3 cases in which many of our clients are facing a possible death
4 sentence; however, even the hiring of civilian counsel has
5 created its own significant difficulties in obtaining
6 requisite clearances.

7 For example, both Mary Spears and Rosa Eliades were
8 hired on serve on the al Nashiri team approximately one year
9 ago, completed their initial SF86 security questionnaire over
10 a year ago, have yet to be fully cleared or have been able to
11 meet with their client, Mr. al Nashiri.

12 In any event, though, given that this process is run
13 by the Secretary of Defense and under the auspices of a
14 military hearing, military lawyers are still very much
15 required. The withdrawal of counsel and my role in that
16 process has been addressed by myself and my office prior to
17 the attempted withdrawal of Commander Mizer.

18 The issue first arose in the U.S. v. Hadi Al Iraqi
19 case. In that case I researched statutes and rules governing
20 the detail and removal of the counsel. It became abundantly
21 clear that the chief defense counsel has the ultimate
22 responsibility for the resourcing and manning each defense
23 team. I make these determinations consistent with the Rule

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1 for Military Commission, R.M.C. 505(d)(2)(B).

2 I take significant note of the fact that once an
3 attorney-client relationship has been formed between the
4 accused and the detailed defense counsel, an authority
5 competent to detail such counsel may then excuse or exchange
6 counsel, but only upon the request of the accused or upon
7 application of withdrawal of such counsel or for good cause.

8 In making this decision on good cause, I look at the
9 matter of the attorney-client relationship, and it is
10 particularly important in the military commissions cases given
11 the damaged nature of our clients.

12 I also drew on the body of case law under the UCMJ,
13 which provides guidance on this matter, particularly the cases
14 of the United States v. Hutchins and the United States v.
15 Hohman. In this case, when Commander Mizer requested to
16 withdraw, I once again had to make a detailed assessment with
17 all of the information available to me specifically as the
18 chief defense counsel on whether or not good cause existed to
19 permit this severance of such an important client
20 relationship. I considered many factors, including our JAG
21 rules of professional responsibility that state that counsel's
22 request to withdraw from representation may be approved if it
23 can be accomplished without adverse interest on the client.

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1 In this case, I then requested input from the learned
2 counsel to determine what the impact on the interests of
3 Mr. al Nashiri might be if Commander Mizer were to withdraw.
4 Mr. Kammen advised that, in his opinion, the loss of Commander
5 Mizer would have a severe adverse impact on Mr. al Nashiri and
6 his interests, and would also be a great detriment to the
7 entire team and its mission.

8 In addition, I took great significance in the fact
9 that Mr. al Nashiri did not consent to Commander Mizer's
10 withdrawal. In the past, he has agreed to the withdrawal of
11 counsel, so his opposition to Commander Mizer's withdrawal
12 highlights the impact this would have on the entire team and
13 his case. Additionally, there were other significant team
14 losses that adversely impacted the institutional knowledge and
15 drain on this particular team.

16 So in reviewing all of these factors, I made the
17 determination that no good cause existed to sever the
18 attorney-client relationship, and, thus, denied Commander
19 Mizer's request to withdraw from the case. Because Commander
20 Mizer had demobilization orders, I then took several steps to
21 try to prevent this demobilization. The deputy general
22 counsel for personnel and health policy strongly supported
23 this request; however, ultimately, Commander Mizer did

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1 demobilize.

2 Today, as of this hearing, I still do not believe
3 that good cause exists to sever the relationship between
4 Commander Mizer and Mr. al Nashiri. Today I would also not
5 consent to Commander Mizer's withdrawal. I have met with
6 Mr. al Nashiri, his team of lawyers, and understand the
7 demands of this case. This team still faces significant
8 issues, and Ms. Spears and Ms. Eliades still have not been
9 fully read on to the SAP program and therefore cannot form an
10 attorney-client relationship.

11 Therefore, I find good cause for Commander Mizer to
12 withdraw does not exist and that he should continue to
13 represent Mr. al Nashiri.

14 Additionally, Your Honor, we have two exhibits that
15 we would like to enter in as the next appellate exhibits in
16 order for this particular series of motion. A copy of them
17 has been provided to trial counsel in this case. One is an
18 e-mail documentation from -- that originated from Mr. Paul
19 Koffsky. That is the deputy general counsel that I referenced
20 in the proffer, and that is an e-mail string related to the
21 endorsement of Brigadier General's request that Commander
22 Mizer not be demobilized. That would be one of the -- the
23 next Appellate Exhibit in order.

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1 The additional Appellate Exhibit in order that we
2 would like to enter into the record for appellate review is
3 the actual memorandum provided by Mr. Kammen to Brigadier
4 General Baker on the impact of the potential withdrawal of
5 Commander Mizer from the defense team. Brigadier General
6 Baker, in the proffer that I provided, referenced this
7 memorandum and he did reference it in some of the other
8 exhibits that are part of the appellate record; however, the
9 actual memorandum from Mr. Kammen as of right now is not a
10 part of the record. And we would like to offer that in as the
11 next Appellate Exhibit to ensure the record is complete.

12 MJ [Col SPATH]: Have you provided a copy to the
13 prosecution?

14 DDC [LCDR POLLIO]: Yes, Your Honor, we have.

15 ATC [LT CANTIL]: I was just going to answer yes, Your
16 Honor.

17 MJ [Col SPATH]: Thank you. Give me just one second.
18 It's going to be in the 348 series. I just want to make sure.
19 Looks like it's going to be 348G and then H. So the first
20 e-mail that you discussed is going to be 348G, and then the
21 second is 348H.

22 DDC [LCDR POLLIO]: Roger that, sir. May I approach to
23 give a copy?

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1 MJ [Col SPATH]: You may.

2 DDC [LCDR POLLIO]: Thanks. And I have provided the court
3 with the e-mail, which will be AE 348G, and a copy of the
4 memo, which will now be AE 348H.

5 MJ [Col SPATH]: Thank you.

6 DDC [LCDR POLLIO]: That's it. Thank you, sir.

7 MJ [Col SPATH]: Just let me ask the government a couple
8 of questions. Focused only on the offer of proof, I don't
9 want to have argument on the motion yet, but let me ask a
10 couple of questions regarding the offer regarding General
11 Baker and then a couple of questions just about the security
12 clearance issue, or at least a couple of comments that
13 hopefully are going to be helpful. I think you're going to be
14 arguing the motion, is that right, Lieutenant Jolly?

15 ATC [LT CANTIL]: Lieutenant Cantil, sir.

16 MJ [Col SPATH]: Lieutenant Cantil. I'll get you guys
17 straight. Come on up here.

18 So here's the first question, and that is: Do you
19 believe that General Baker's testimony, based on that offer of
20 proof, is necessary for me to decide this motion?

21 ATC [LT CANTIL]: No, Your Honor.

22 TC [MR. MILLER]: Your Honor, may, before we start, I
23 think as a housekeeping matter, he has to put his

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1 qualifications on the record.

2 MJ [Col SPATH]: I didn't know if you had done that when
3 you did yours. If you would, go through your qualifications
4 and your details.

5 TC [MR. MILLER]: I apologize for not doing it earlier.

6 ATC [LT CANTIL]: My name is Jonathan Cantil. I have been
7 detailed by the chief prosecutor of the Office of Military
8 Commissions. I'm detailed and qualified under the Rules of
9 Military Commissions 502 and 503. I have previously been
10 sworn under Rules of Military Commissions 807 and I have not
11 acted in any manner that would tend to disqualify me in this
12 proceeding.

13 MJ [Col SPATH]: All right. Thank you, Lieutenant Cantil.
14 Not arguing the motion, I think you get where my question is
15 focused.

16 ATC [LT CANTIL]: Yes.

17 MJ [Col SPATH]: Why do you think that offer of proof is
18 necessary or at least in support of it?

19 ATC [LT CANTIL]: First, Your Honor, no one disputes that
20 Brigadier General Baker wants Commander Mizer to remain as
21 counsel. That's not in dispute in this proceeding.
22 Therefore, his testimony is unnecessary here. Furthermore,
23 whether or not Brigadier General Baker wants Commander Mizer

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1 to remain as defense counsel has no bearing on whether good
2 cause existed when Commander Mizer voluntarily severed his
3 attorney-client relationship with the accused by leaving
4 active duty, and additionally it has no bearing on whether any
5 prejudice resulted from any hypothetical improper severance.

6 MJ [Col SPATH]: All right. The other piece of that, and
7 obviously part of that has been dealt with in a ruling I've
8 already made.

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

10 MJ [Col SPATH]: The other part of that is with regard to
11 the security clearances, and it's probably nothing you can
12 answer here, but it certainly is -- what we talked about
13 earlier, and that is that the prosecution indicates, and I
14 understand that they want this to move forward into trial at
15 some point, and we have competing problems with getting us to
16 trial that I recognize are outside, necessarily, of the
17 control of the prosecution. But I also recognize that there's
18 some impressive figures on both sides. And on your side, you
19 have General Martins and you now have somebody from the
20 U.S. Attorney's office. I just need you all to communicate.
21 The security clearance issue needs to be a priority for
22 somebody because the defense needs to know if they're going to
23 get the clearance or not get their clearance.

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1 I also recognize the timing. It can take a year. I
2 heard it's been a year. Took about a year for me to get mine.
3 I got it. Just in order to truly say to the public we're
4 trying to move this forward, we need to move this forward in
5 ways that we can sooner than later. And I don't know if that
6 helps or not, but at some point, we're going to get to a point
7 where we can't go anywhere and we sit in a period of abatement
8 rather than in a period of -- well, abatement earlier because
9 of waiting for the military review.

10 I mean, I know you know what I'm trying to say.

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

12 MJ [Col SPATH]: So if that helps at all. I find that in
13 some places if I make a suggestion it happens fast, and in
14 some places it doesn't happen that fast, and I have no idea
15 here if that will help you at all, but it needs to move along
16 in a way that demonstrates other agencies' dedication to move
17 the process forward, or it sends the opposite.

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

19 MJ [Col SPATH]: All right. We'll talk more about -- I
20 assume you're going to argue the motion as well?

21 ATC [LT CANTIL]: That's correct.

22 MJ [Col SPATH]: We'll talk again as we move through the
23 wickets. And is somebody out making sure that Commander Mizer

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1 has been told he needs to make his way? I see a head nod.

2 ATC [LT CANTIL]: Thank you.

3 MJ [Col SPATH]: Thank you.

4 Mr. Kammen, I know you're going to talk about
5 Dr. Crosby's proffer.

6 LDC [MR. KAMMEN]: Dr. Crosby's proffer really goes to the
7 element of prejudice, Your Honor.

8 If called to testify, Dr. Crosby would testify as
9 follows: My name is Sondra Crosby. I am a physician
10 specializing in internal medicine. My resume has previously
11 been presented to this commission in conjunction with my prior
12 testimony in this case. I have been recognized and qualified
13 as an expert in this case and in other cases throughout the
14 United States.

15 My medical practice is dedicated to treating various
16 physical and emotional ailments that afflict victims of
17 torture. In that regard, I have treated victims of torture
18 both in the United States and in other countries and
19 locations, including, but not limited to, Liberia, Rwanda,
20 Syria, Bosnia, and of course, several detainees incarcerated
21 in Guantanamo Bay.

22 I've examined Mr. al Nashiri on three occasions. I
23 most recently saw him two weeks ago when I spent approximately

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1 ten hours with him. I have not been able to treat him due to
2 a lack of cooperation from JTF authorities and physicians, and
3 an unexplained interruption of my clearance that prevented me
4 from seeing Mr. al Nashiri for over a year.

5 I have previously testified in this commission that,
6 in my expert opinion, Mr. al Nashiri suffers from complex PTSD
7 resulting from the physical, psychological, and sexual torture
8 inflicted upon him by the United States at the CIA black
9 sites. That is still my opinion. Indeed, in my opinion,
10 Mr. al Nashiri may be one of the most damaged torture victims
11 that I have ever examined.

12 I have also testified, and it remains my opinion,
13 that in the ten years Mr. al Nashiri has been in Guantanamo,
14 he has not received treatment for the complex PTSD for which
15 he suffers. This failure to provide treatment is important in
16 this context because it impacts upon his relationships with
17 defense counsel. A necessary part of treatment for one
18 suffering from complex PTSD, indeed PTSD in general, is being
19 in a safe space. A safe space is one in which there are
20 efforts to avoid intentional or unintentionally triggering
21 flashbacks and other symptoms of PTSD associated with the
22 events associate -- which caused the PTSD.

23 Based upon the executive summary of the SSCI report,

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1 it appears that a part of the so-called RDI program was to
2 keep detainees in a constant state of change. That is, they
3 were faced with constantly changing personnel and living
4 situations. In short, the detainee could not control any
5 facet or matter of their lives. They were also routinely
6 humiliated. The conditions that the -- at Camp VII, with the
7 routine changing of the guard force, the routine changing of
8 policies, and the periodic humiliations, continually --
9 continuously trigger Mr. al Nashiri's complex PTSD.

10 Once again, he is placed in the situation where he
11 has no control or ability to make decisions in his own life.
12 Simply put, from a perspective of treating complex PTSD,
13 Camp VII is not a safe space. Among the symptoms of complex
14 PTSD are hypervigilance and an inability to trust other
15 individuals. These work together in that the hypervigilance
16 makes it more difficult for the person suffering from complex
17 PTSD to trust those around him.

18 When an individual is finally able to break through
19 that distrust, to whatever degree possible, that relationship
20 becomes particularly strong and important. In my opinion,
21 Mr. al Nashiri displays extreme hypervigilance and distrust of
22 those around him, including members of his defense team.

23 This has been exacerbated by the constant churning of

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1 defense lawyers. First, I am aware, and Mr. al Nashiri has
2 mentioned, that Ms. Hollander is no longer able to see him and
3 that the judge refused to assist him when there was an
4 unexplained interruption in her security clearance. In my
5 ability -- in my opinion, his ability to retain lawyers who he
6 trusts is important to him.

7 My opinion is that whether or not to object to his
8 lawyer's departure is one of the few areas of control that
9 Mr. al Nashiri has in his life. That is why, in my opinion,
10 his objection to the departure of Commander Mizer is so
11 significant. He was attempting to exercise what little
12 control he has, and even that was taken from him.
13 Accordingly, to attempt to exercise control over the one thing
14 he can control and have that effort rejected is,
15 understandably, extraordinarily frustrating to him.

16 Since this has occurred, I am aware that he has and
17 may continue to lash out at his remaining lawyers. I am aware
18 that Mr. al Nashiri had the most trusting relationship with
19 Commander Mizer; which is not to say it is a relationship of
20 complete trust, it is only the most trusting relationship. I
21 am of this opinion based on my observations of Mr. al Nashiri
22 with his defense team, including his interactions with
23 Commander Mizer, and with Mr. Kammen.

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1 Indeed, while Mr. al Nashiri appears to respect
2 Mr. Kammen, in my view he does not trust Mr. Kammen as fully
3 as he did Commander Mizer, and Mr. Kammen does not certainly
4 enjoy Mr. al Nashiri's trust as Commander Mizer did.

5 It is my opinion that the loss of Commander Mizer to
6 Mr. al Nashiri's defense is extremely prejudicial. There are
7 several factors and reasons that perhaps explain why
8 Mr. al Nashiri was break -- why Commander Mizer was able to
9 break through Mr. al Nashiri's hypervigilance and gain his
10 limited trust. First, al Nashiri -- Mr. al Nashiri recognized
11 Commander Mizer's extraordinary courtroom skills. He saw
12 Commander Mizer as being the true leader of the defense team
13 and the architect of the limited successes that the defense
14 has had.

15 Mr. al Nashiri believes that Commander Mizer was
16 personally responsible for the successes on the Limburg
17 motions and believes that had Commander Mizer argued those
18 motions in the C.M.C.R., the result of that case would have
19 been different. In addition to those somewhat tangible
20 factors, there are the intangible characteristics that
21 Commander Mizer alone possesses that allowed Mr. al Nashiri to
22 trust him personally.

23 Because of the extreme hypervigilance and the

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1 feelings of loss occasioned by Commander Mizer's departure, it
2 is, in my opinion, difficult for Mr. al Nashiri to have a
3 solid working relationship with his present and future
4 lawyers. It is my opinion that they will need extraordinary
5 amounts of time and skill to overcome the distrust and that
6 still might be unsuccessful.

7 For example, Mr. Kammen has worked without
8 Mr. al Nashiri for several years, and the relationship between
9 the two is hardly stable. Indeed, in the past months I am
10 aware that Mr. al Nashiri has threatened to fire Mr. Kammen,
11 which in my opinion is a direct result of the loss of
12 Commander Mizer, and I believe still remains a possibility.

13 I know that there are new lawyers who may join
14 Mr. al Nashiri's defense. In some cases, and in Mrs. Spears
15 and Ms. Eliades, they have not been able to meet with
16 Mr. al Nashiri. Further, Mr. al Nashiri knows that there are
17 many other demands on his lawyers besides what occurs in the
18 hearings. And he has no idea of how these lawyers, especially
19 lawyers he has never met, respond to those demands.

20 Overall, he is not confident in these new lawyers and
21 at times I understand that he has questioned their very
22 existence. In any event, it is my opinion that he does not
23 believe anyone will be an acceptable substitute to Commander

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1 Mizer. And if they are not introduced to him under
2 extraordinarily sensitive circumstances when he meets them, is
3 he likely to lash out or otherwise reject them.

4 It is my opinion that if Commander Mizer is returned
5 to the defense team in some role, even in a limited capacity,
6 many of the problems I have described may become less of an
7 issue, although they certainly may not completely go away.

8 If Commander Mizer is not referred to the defense --
9 is not returned to the team, I would anticipate ongoing
10 conflicts between Mr. al Nashiri and his remaining team
11 members. Indeed, should there become future turnover, which
12 there undoubtedly will be, the problems will become even more
13 serious.

14 And that would be Dr. Crosby's testimony, Your Honor.

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

16 LDC [MR. KAMMEN]: You bet.

17 MJ [Col SPATH]: Lieutenant Cantil, same question that you
18 had last time. Do you believe that that -- now that you've
19 heard the offer of proof, do you think that alters the
20 necessity for her testimony at this hearing?

21 ATC [LT CANTIL]: No, Your Honor, it does not. And I'd
22 like to start off by saying that the adequacy of the medical
23 care, which was much of the proffered testimony, has been

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1 fully briefed, including testimony by Dr. Crosby herself, and
2 ruled upon by Your Honor when he denied the defense motion in
3 that issue.

4 And for the purposes of this hearing, Dr. Crosby's
5 testimony is irrelevant to the two central issues. That's,
6 one, whether there was good cause when Commander Mizer severed
7 the attorney-client relationship by leaving active duty; and
8 two, whether prejudice exists from my hypothetical improper
9 severance, assuming there is no good cause.

10 And I'd direct the court's attention to Hutchins
11 where the court in Hutchins declined to consider -- there it
12 was a captain was the assistant detailed defense counsel. The
13 court declined to consider Captain Bass's positive
14 relationship with the accused there. So the testimony about
15 the -- you know, whether the accused wants Commander Mizer is
16 something courts have declined to consider previously.

17 MJ [Col SPATH]: Again, we'll have argument on the motion
18 soon. Thank you.

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

20 MJ [Col SPATH]: Do we have any update on Commander
21 Mizer's availability? Just for timing.

22 ATC [LT CANTIL]: Not yet, Your Honor, but we're working
23 on it.

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1 MJ [Col SPATH]: All right. Important to take that up.
2 Before we move into argument on this motion, we can turn our
3 attention, I believe, to argument on another motion. Give me
4 just a second to move my notes around.

5 That's 350. That is the security clearance
6 discussion.

7 DDC [LCDR POLLIO]: Your Honor, would it be possible for a
8 brief health and comfort break as well as to make sure that we
9 have all of the information available, given that the schedule
10 was a little uncertain this morning?

11 MJ [Col SPATH]: It was. Let's -- we'll do this: If
12 Commander Mizer is available when we come back, we'll take his
13 testimony. If he isn't, we'll deal with evidence, witnesses,
14 and argument on Appellate Exhibit 350, that's the security
15 clearance issue that we've already started to discuss.

16 Why don't we take 15 minutes. Court's in recess.
17 Thanks. Please carry on, everybody. Thank you so much.

18 [The R.M.C. 803 session recessed at 1100, 7 September 2016.]

19 [END OF PAGE]

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