

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 0945, 4 April 2024.]

2 MJ [COL FITZGERALD]: The commission is called to order.

3 Government, can you account for your personnel?

4 TC [CAPT STINSON]: All parties present are again present,  
5 with the exception of the FBI OGC representative who was previously  
6 in the RHR for the testimony of the FBI witnesses is not in the RHR,  
7 Your Honor. Over.

8 LDC [MR. NATALE]: Good morning, Your Honor. All of the  
9 people who have previously been announced here in the courtroom in  
10 Guantanamo are present. We also have General Thompson, the Chief  
11 Defense Counsel, who will be attending from the RHR.

12 MJ [COL FITZGERALD]: Thank you for that.

13 Could the gentlemen in the IT Department -- I'm seeing the  
14 good morning screen, but not the RHR screen. I'll proceed while you  
15 work on that, if you could.

16 First thing I'd like to put on the record is I held a  
17 conference with counsel before we came out here to raise a concern.  
18 I don't want to say much for the defense. I'll just -- if I can just  
19 briefly summarize it.

20 There's some concerns. I think the friction point, I guess,  
21 is between -- I have a motion before me related to unshackling. I  
22 also have some authorities pursuant to the SOP regarding what I can  
23 and cannot do regarding shackling during client meetings with -- with

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the attorneys.

2           So that may be creating a little bit of friction, I think  
3 is, well, I could act now, but I haven't acted in accordance with the  
4 SOP. And the reason is because I don't want to blur the lines  
5 between what I could do according to the SOP -- and I think based on  
6 what Colonel Kane told me, he agreed with that and the parties also  
7 agreed with that position.

8           Prior to exercising that authority, I wanted to complete the  
9 motions process, hear arguments, and then  
10 contemplate what I want to do long term, not just short term.  
11 Because what I don't want is to go two steps forward and one step  
12 back, which I don't think would be beneficial to anybody.

13           And, Mr. Nashiri, first, good morning.

14           So it wouldn't be beneficial to the defense team if they  
15 didn't have some clear guidance on what they could and could not do,  
16 and especially thinking prospectively into the future, noting that we  
17 will -- at least according to the docket, we'll be back here in a  
18 month.

19           So what I want to make sure is that I dotted my Is, crossed  
20 my Ts so that I don't exercise my authority in a way that we're back  
21 to guessing what it -- what my authority is in the May session.

22           And so I -- I asked Mr. Natale to explain that to his  
23 client. And I understand the frustration that sometimes things just

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 don't move as fast as people would like. Human speed is obviously  
2 very different than judicial speed. And it's purposeful, not  
3 unintentional, and not meant to be prejudicial in any sense.

4 But as part of the discussion, Mr. Natale wanted to be able  
5 to express some thoughts from the defense on that particular issue.  
6 And the government had some concerns, and I'm going to let the  
7 government be heard on that as well. In fact, I'll let the  
8 government be heard on that first, if you don't mind, because I had  
9 already essentially articulated I would allow Mr. Natale to speak to  
10 the court -- to the commission on that particular issue.

11 But -- and, Government, you -- before he did that you would  
12 have an opportunity to present your position on that. Do you desire  
13 to do so, Government?

14 TC [CAPT STINSON]: Yes, Your Honor. Just to restate for the  
15 record, this is a pending motion before the commission. The defense  
16 presented the evidence related to the motion. The commission's  
17 entertained arguments, and it's currently pending before the  
18 commission.

19 So the government does believe it's inappropriate to allow  
20 effectively additional argument after the close of motion while it's  
21 being considered by the commission.

22 Thank you. Over.

23 MJ [COL FITZGERALD]: And, again, Mr. Natale, I'm going to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 give you a moment to speak. And what I informed the  
2 government -- both parties of during the 802, is this is a little bit  
3 of a hybrid. I have authorities available to me under the SOP in  
4 question, which I could respond to now. And I have a motion before  
5 me on essentially the same issue.

6 So I would like to combine those two issues. And that's  
7 probably what is slowing things down, maybe to the consternation and  
8 frustration of Mr. Nashiri. Again, not intentional, but I respect  
9 the position of the government that there's a motion before me. I  
10 should trust that motion.

11 However, there's an SOP that says I can take certain actions  
12 and I could take them now. I just want to make sure, as best we can,  
13 that they're in concert, they're consistent, and whatever that  
14 position is, that Colonel Kane has an opportunity to act and react to  
15 it.

16 Because part of what I recognize is -- I'm not trying to be  
17 cynical. I don't think he's necessarily going to challenge it. He's  
18 been very clear with me, he sees why I have authorities. But what I  
19 also heard from him is a lot of these decisions that may be made by  
20 me that otherwise would belong to him and his staff impact his  
21 resourcing and his manning.

22 So that's what I also have to take in consideration as well  
23 as the overarching reason he has an SOP, and that is he has the

27248

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 plenary authority to ensure the security of the camp, security of the  
2 personnel, security of the accused, security of non-staff, such as  
3 the attorneys who want to meet with their client. So he has an  
4 overarching larger concern than the particular matter that's before  
5 the court.

6 So recognizing all the equities in play, I don't necessarily  
7 take this as a -- what Mr. Natale wants to argue is reopen the  
8 litigation on the motion, but where we stand now with can I exercise  
9 that authority and why have I not done so.

10 So, Mr. Natale, you can also correct anything if you think I  
11 have misstated anything from our conversation, but otherwise you are  
12 also free to present what you want on the particular issue.

13 LDC [MR. NATALE]: Thank you, Your Honor.

14 This is not an attempt to reargue or to relitigate something  
15 which is pending, this is to bring to all parties. There's more to  
16 the effective operation of a court system. And a big part of it is  
17 the attorney-client relationship. And I'm not going to go on about  
18 what happened, how it happened, and the difficulties. But in order  
19 to have trust in an attorney, in order for a person to feel that his  
20 attorneys are listening to him, hear him, and present it, it's  
21 crucial.

22 And in this particular case, the reason why I brought this  
23 to the attention of the court is because the only reason why

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Nashiri came here today, knowing he would be shackled, is because  
2 he wanted to say ----

3 TC [CAPT STINSON]: I'm just going to just renew the  
4 objection, because now it seems like we're introducing additional  
5 facts in relation to that motion, Your Honor. So that's,  
6 again -- that's the similar objection. That's why we don't normally  
7 go over those things when there's a pending motion, Your Honor, but  
8 this now seems to be introducing what Mr. Nashiri was willing to do  
9 or not do today in relation to the motion. Over.

10 MJ [COL FITZGERALD]: Your objection is noted. I don't  
11 believe I'm taking evidence, but ----

12 LDC [MR. NATALE]: This is ----

13 MJ [COL FITZGERALD]: Mr. Natale, whatever you're going to  
14 say, if that helps inform you.

15 LDC [MR. NATALE]: That's fine. I'm just -- I'm reporting  
16 based on what I think is important to report. And it -- it is the  
17 reality. And that is that -- because he wanted to do this, and it is  
18 crucial.

19 He is confronted with the situation where he feels that he  
20 is being treated so unfairly when all other people are not suffering  
21 the same and that this -- and the reason why I stand is this affects  
22 my ability and my team's ability to provide the effective  
23 representation. And it prevents the court from, I think, having a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 process, which is your duty to control, which minimizes the  
2 unnecessary and expedites the necessary.

3 I am not arguing for you to rule one way or another. This  
4 is a notice opportunity to say these things have real consequences,  
5 real consequences which not only Mr. Nashiri suffers, we suffer.

6 And, yes, when I say "we," it's not just the defense. There  
7 are ways to do things which allow for the process to go forward  
8 without having unnecessary things interfere and distract us from the  
9 task.

10 I have talked to Mr. Nashiri, and he has indicated that even  
11 though he would have the option of possibly writing something out and  
12 submitting it, he feels that it is important that he speak directly  
13 to you. And I have told him -- and I'm sure Your Honor will tell  
14 him -- that whatever he says could be used against him and all of those  
15 things. But it's important to him, and it's important for the issue  
16 which goes beyond merely shackling. That is, the effective  
17 assistance of counsel in a death penalty case, and that the whole  
18 process goes the way it needs to go consistent with why things  
19 happen, why they don't happen, and that we are in an unfortunate but  
20 unique and, at this moment, unjust situation for Mr. Nashiri.

21 I know that he would like to say something to you, Judge. I  
22 ask that you allow him to do that orally since we have explained to  
23 him the opportunity, the pros and cons of doing it orally, that he

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 could do it in writing. But he has insisted that I request you and  
2 that he be allowed to briefly speak to you about his concerns with  
3 his defense and with the situation he faces.

4 Thank you.

5 MJ [COL FITZGERALD]: Thank you, Mr. Natale.

6 TC [CAPT STINSON]: Your Honor, the government would object at  
7 this point. They had the opportunity if they wanted to put  
8 Mr. Nashiri on the stand. He could have testified. He doesn't have  
9 an opportunity to present unsworn information to the court in  
10 relation to a motion that's pending before the commission. The  
11 government thinks that is not proper.

12 MJ [COL FITZGERALD]: Thank you. So, I want to be clear that  
13 the reason I just noted the objection and didn't rule on it is, I  
14 considered the points that Mr. Natale wanted to raise is -- and maybe  
15 I wasn't as clear. But, again, I said this was a hybrid issue.

16 I have the authority under the SOP to do so now,  
17 notwithstanding there's a motion before me. So I don't take those as  
18 evidence, anything being said or argument in support of the motion,  
19 but a -- an ask of the court in regards to exercising my authority  
20 under the SOP separate from the motion. The two will essentially be  
21 combined.

22 I'd like to take it under advisement right now, Mr. Natale,  
23 whether I'll allow Mr. Nashiri to speak to the court on this matter

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 because of that constraint of what am I taking this for. What I  
2 would like to do is proceed on with what we have on the docket and  
3 give me some time to think about that before hearing from Mr. Nashiri  
4 and placing that on the record.

5 So I could take it under advisement until we completed the  
6 argument on the two matters we have on the docket and then we can  
7 take that up again.

8 LDC [MR. NATALE]: Your Honor, may I have a moment to speak to  
9 Mr. Nashiri?

10 MJ [COL FITZGERALD]: And that's what I'd like, to give you a  
11 moment to do.

12 **[Counsel conferred with the accused.]**

13 LDC [MR. NATALE]: Your Honor, thank you for the indulgence.  
14 The concern is that Mr. Nashiri will know one way or another whether  
15 you are going to allow him to address you today. Because he is -- it  
16 is a pressing matter, and it will continue throughout the day.

17 I understand, and I could be wrong, what you were saying is  
18 that you will consider him talking to you, but that you wanted more  
19 time, but we would get at least a ruling from the court today as to  
20 whether he can talk to you or not today.

21 The concern he has is that it will be put off and he will  
22 never be able to express and that his lawyers have not done anything  
23 to allow him to express himself, but also to be a meaningful

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 participant in this case.

2 MJ [COL FITZGERALD]: Thank you, Mr. Natale. So here ----

3 TC [CAPT STINSON]: Your Honor, may the government be heard  
4 just briefly?

5 MJ [COL FITZGERALD]: Briefly.

6 TC [CAPT STINSON]: The proper way for him to be -- express  
7 himself, would be to take the stand in support of that proceeding.

8 MJ [COL FITZGERALD]: Understood. Thank you.

9 And so I granted some latitude in the fact that I'm trying  
10 to address an immediate issue regarding my authorities under the SOP  
11 separate from the rulings on the motion before the court.

12 LDC [MR. NATALE]: Yes.

13 MJ [COL FITZGERALD]: But I don't want to keep extending that  
14 latitude in a way that I can't reel it back in.

15 So Mr. Nashiri has elected to assert his positions and his  
16 rights through counsel. That started way back before any of us were  
17 here. That's -- he's elected to have attorneys represent his  
18 interests. And thus far in my short time in the briefings I've read  
19 and the pleadings I've read, I've seen nothing but zealous  
20 representation. I'm sure that zealous representation is going to  
21 continue.

22 Our system allows certain opportunities to be heard. And as  
23 the government mentioned, the opportunity to be heard is -- would

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 have been during the motion and in very certain conditions. So  
2 allowing him to speak to the court now would not comport to those  
3 conditions. So his desire to speak has to give away to our process  
4 and our procedures and his choice to be represented by counsel in  
5 presenting his matters.

6 So I'm not inclined at this time to allow him to speak  
7 directly to the court, which is what he's asking. So he gets to  
8 speak to the court through attorneys. And I believe I heard from all  
9 the attorneys, and I've heard now from two attorneys on this  
10 particular matter.

11 So I think I've heard enough as far as how I can exercise my  
12 authority under the SOP. And I've heard enough evidence, and we've  
13 closed and buttoned up the issue on the motion. So I don't think  
14 hearing from Mr. Nashiri will necessarily add anything that you  
15 haven't presented to me and I haven't heard already in the argument  
16 on the motion.

17 So I'm going to deny the request to allow him to speak  
18 orally to the court because our process just doesn't allow for it  
19 unless the defense wants to reopen that particular motion and put  
20 evidence before the court.

21 LDC [MR. NATALE]: Your Honor, the position which I have  
22 articulated is our intent to provide the court with notice of the  
23 circumstances and the situation which are currently going on, which

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 interferes with not only our ability but I think will proceed to  
2 interfere with and impede an open and transparent handling of this  
3 case.

4 This is not a desire to reopen the case. This is a desire  
5 of putting notice. In over 40 years, I have found that, at least in  
6 my practice, judges like to be given a heads-up, and oftentimes given  
7 an opportunity, along with the prosecution, to see what can be done  
8 to avoid further problems.

9 The purpose of this is to provide that heads-up and not to  
10 try to spring or sandbag the court. This is not done for any  
11 nefarious reason. In fact, if that were the case, I could very well  
12 have handled this very differently. That is not how I want to handle  
13 it. And that's why this is a notice to preside to the court, to give  
14 the court notice as to what is going on and the basis of something.

15 And to the degree that you're the judge, whatever you decide  
16 you want to do with it, but yet we should have the opportunity to  
17 provide you with that notice if you want that notice. That's all  
18 that this is.

19 We're not trying to reopen anything. We're not trying to do  
20 any of that. I don't know how clearer I can make it why what I am  
21 doing is being done now.

22 Thank you.

23 MJ [COL FITZGERALD]: Very well. I appreciate your points.

27256

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Thank you very much.

2 It's not been an argument. But, Government, anything else  
3 you'd like to be heard on on that particular matter?

4 TC [CAPT STINSON]: Nothing on that, Your Honor.

5 MJ [COL FITZGERALD]: Very well. If nothing else on that  
6 particular matter, one -- and I don't know if I had this very  
7 clearly, so this may be helpful to me at least in the duration of the  
8 time we're here in April and also to set things -- set conditions for  
9 May.

10 I know Colonel Kane spoke without specificity to the changes  
11 in security posture when it's an unshackled versus a shackled visit.  
12 Can somebody report back to the court on if there were change of  
13 conditions from shackled to unshackled, what resources change for him  
14 in the short term? Meaning the rest of this week, and also thinking  
15 about planning for May.

16 If I had that information, it may be helpful. Because even  
17 though I have that authority, I don't resource and man, even with  
18 that authority. So I'd like to know that information.

19 So if that could be passed on to somebody to tell me,  
20 because I don't think Colonel Kane could speak to the specificities.  
21 He relies on his staff and the SMEs that make that determination.

22 Government?

23 TC [CAPT STINSON]: Yes, Your Honor. But that goes to our

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 earlier concern about -- Colonel Kane testified, he testified  
2 extensively. I do think that was in the record. I think he  
3 testified extensively about the additional guard force that would be  
4 required. That was in the closed session. So we can't really get  
5 into detail here, Your Honor. But I do think he testified about  
6 that.

7 And, again, the concern is now, to the point, we seem to be,  
8 you know, reopening or ----

9 MJ [COL FITZGERALD]: No, I'm not reopening. You keep telling  
10 me I'm reopening, and I've made it very clear I'm not reopening. I  
11 have an authority that I can exercise contemporaneous to these  
12 proceedings. Colonel Kane agreed I could.

13 So I'm trying to see what I can do now. I'm not saying I  
14 will, but I need information. And that was -- one of the questions I  
15 did have was what information would I be privy to to help me make any  
16 decisions. Because if I'm stepping somewhat into the shoes of  
17 Colonel Kane under the authority he's allowed me to step into, how do  
18 I make a decision that he uses a team and SMEs in making that  
19 decision, how would I make that decision? So that's essentially what  
20 I'm asking you is: Could I have some information to help me maybe  
21 make that decision?

22 So again, I'm not going to the motion. I'm going to the  
23 exercise of authority currently. No different than if I said we're

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 going to start the proceedings at 0900. That's within my authority,  
2 but sometimes I still have to ask my staff do we have all the  
3 resources to start at 0900 or do we need to start earlier or later.

4 So I'm asking in the same vein of if I would ask something  
5 about any other proceedings of these -- or procedures of this  
6 proceeding.

7 But, Government?

8 TC [CAPT STINSON]: Yes, Your Honor. I think that goes to the  
9 government's point in the -- not trying to reargue the motion, but  
10 that goes to the point about deference to the commander. But we'll  
11 take that as a request for information and we'll see ----

12 MJ [COL FITZGERALD]: I am showing deference to the commander  
13 when I asked him, "I have authority."

14 TC [CAPT STINSON]: Understood, Your Honor.

15 MJ [COL FITZGERALD]: And so that -- and my authority is  
16 within the deference he's given me, because I'm asking it, not my  
17 judicial authority, my authority under his SOP. So that to me is  
18 showing deference to -- I wouldn't -- my question to the defense was:  
19 You're not asking for anything more than what's in the SOP, correct?  
20 And they said correct.

21 So it would be very different if I said I -- and I realize  
22 there's another commissions going on where maybe an order was issued  
23 inconsistent with the SOP. I'm not trying to do that at this point.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 And I don't think that is the defense's ask at this point.

2 So I'm deferring to Colonel Kane's SOP where he has granted  
3 me authority, but that's all the sentence says is "unless otherwise  
4 ordered by the military judge." What I'm asking is what conditions,  
5 circumstances, TTPs, do I need to consider in exercising that  
6 authority if I am to share and assume some risks of the JTF  
7 commander.

8 So -- but thank you, Government.

9 TC [CAPT STINSON]: Understood, Your Honor. We'll take that  
10 as an RFI.

11 MJ [COL FITZGERALD]: Do you have somebody who can get that  
12 information to me?

13 TC [CAPT STINSON]: Yeah, we have someone who will try and  
14 track that down, Your Honor.

15 MJ [COL FITZGERALD]: I recall Colonel Kane's testimony but I  
16 don't remember if he spoke with specificity rather than generalities.

17 TC [CAPT STINSON]: Understood, Your Honor.

18 MJ [COL FITZGERALD]: Thank you.

19 LDC [MR. NATALE]: Your Honor, we'd like to be able to have  
20 access to that same information.

21 MJ [COL FITZGERALD]: No, no. I want it presented. The  
22 government's going to present it to you and they're presenting it to  
23 me so I can at least make a determination.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. NATALE]: Thank you, sir.

2 TC [CAPT STINSON]: Your Honor, we would just ask Lieutenant  
3 Huston, who's one of the detailed counsel, if she can depart. She'll  
4 actually try and track that information down.

5 MJ [COL FITZGERALD]: I saw some legalmen. But, Defense, any  
6 objection? I think Lieutenant Huston is going to make it more of an  
7 imperative. I think this is why they want a lawyer tracking that  
8 information down. I don't mind doing -- letting her doing that.

9 LDC [MR. NATALE]: I have no ----

10 MJ [COL FITZGERALD]: All right. Lieutenant Huston, you  
11 are ----

12 CDC [MR. NEVIN]: ---- if the information is available, sure.

13 MJ [COL FITZGERALD]: Okay. Lieutenant Huston, you are  
14 excused from these proceedings. You may come back in five minutes,  
15 you may come back in an hour, I don't know, but feel free to come  
16 back in and we'll announce when you've returned on the record.

17 ATC [LT HUSTON]: Thank you, Your Honor.

18 MJ [COL FITZGERALD]: I won't interrupt an argument, but as  
19 soon as we can we'll announce that you've returned and come back on  
20 the record.

21 ATC [LT HUSTON]: Yes, sir.

22 MJ [COL FITZGERALD]: Yes, ma'am. Thank you.

23 Anything else on that particular issue?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [CAPT STINSON]: Nothing from the government, Your Honor.

2 LDC [MR. NATALE]: Nothing from the defense.

3 MJ [COL FITZGERALD]: It's 1020. I think we had a lot of  
4 stall. I'm not -- I'm trying to use a very neutral term. We had a  
5 lot of stall when people were waiting in the courtroom and about to  
6 hear argument.

7 Do either party want a quick recess for a comfort break  
8 prior to beginning that? I'd hate to think somebody has been sitting  
9 around and waiting for an hour and a half to be heard on the argument  
10 and didn't take a chance for a comfort break.

11 LDC [MR. NATALE]: Your Honor, that would be greatly  
12 appreciated.

13 TC [CAPT STINSON]: Concur, Your Honor.

14 MJ [COL FITZGERALD]: Very well. Commission is in recess  
15 until 1030.

16 **[The R.M.C. 803 session recessed at 1019, 4 April 2024.]**

17 **[The R.M.C. 803 session was called to order at 1037, 4 April 2024.]**

18 MJ [COL FITZGERALD]: The commission is called to order.

19 Government, could you account for your team.

20 TC [CAPT STINSON]: All detailed personnel are present with  
21 the exception of Lieutenant Huston, Your Honor.

22 MJ [COL FITZGERALD]: Who had been previously excused.

23 Mr. Natale?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. NATALE]: Everyone is present from the defense as  
2 previously mentioned.

3 MJ [COL FITZGERALD]: Thank you. And I notice Mr. Nashiri,  
4 who was present in the courtroom for the last session, is not present  
5 for this session. Would you like to address that, sir?

6 LDC [MR. NATALE]: Yes, Your Honor. I had an -- we've talked.  
7 He wants to be present remotely, which he intends to do and which he  
8 wants to continue to do. I explained to him all of his rights, that  
9 if he wants to change, he can change, you know, as far as whether he  
10 wants to come in or not.

11 He acknowledges to me that this is what he wants to do is to  
12 attend, but to be able to attend by listening remotely.

13 MJ [COL FITZGERALD]: Very well. Thank you. Then the  
14 commission finds that he's done so voluntarily and of his own free  
15 will.

16 Just to summarize what we said prior to coming on the  
17 record, I -- I'm contemplating addressing the issue of shackling and  
18 unshackling for the remainder of the time here. I'm waiting for some  
19 information on how any decision would impact force security postures  
20 pursuant to Colonel Kane's SOPs and guidance and best practices of  
21 proceedings.

22 So we're waiting on some information to come back. And I  
23 asked if the parties were okay, because I think if we're going to put

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that on the record, and we intend to put that on the record, that  
2 would have to be in a closed session.

3 But what I would like to do is maybe have that information  
4 given to me in chambers and that same information given to the  
5 parties individually so that we all have the same common operating  
6 picture. But it would allow me to make my assessment about any  
7 change in conditions immediately known so that any reshaping or  
8 retooling of the security posture could be affected, if that can be  
9 done, or we can address whether it can or can't be done at that time  
10 as well.

11 And the parties didn't have objection to me receiving that  
12 information in chambers, provided that they also receive that same  
13 information through their sources. Am I stating that accurately?

14 LDC [MR. NATALE]: Yes, Your Honor.

15 TC [CAPT STINSON]: Yes, Your Honor.

16 MJ [COL FITZGERALD]: Okay. Thanks. And, again, whatever we  
17 receive we'll put on the record in the closed session. But in order  
18 to, again, just to immediately make that decision, we'll see if we  
19 can work around -- not work around -- have that information prior to  
20 our ability to put that on the record. Because I think we've waited  
21 long enough to hear the arguments I need to hear on two unrelated  
22 matters to that particular issue.

23 And are the parties ready to proceed?



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 TC [CAPT STINSON]: Yes, Your Honor. I think we have 481  
2 first and then 482, if that works for Your Honor. Over.

3 MJ [COL FITZGERALD]: Very well. Who am I going to hear from?  
4 Ms. Carmon?

5 ATC [LTC GARRETT]: Lieutenant Colonel Garrett, sir. Colonel  
6 Garrett, sir.

7 MJ [COL FITZGERALD]: Colonel Garrett and Ms. Carmon. Very  
8 well.

9 DC [MS. CARMON]: Yes, sir. On both 481 and 482.

10 MJ [COL FITZGERALD]: You have both of them? Okay. Very  
11 well. Then you may proceed.

12 So, Colonel Garrett -- and I say this in kindness because I  
13 was also given the same reminder. You and I speak with a certain  
14 speed that's hard on the interpreters. So I'm -- sir, you have some  
15 prepared remarks. So I just ask you when you go to your prepared  
16 remarks that you remember you read faster than you speak and give the  
17 interpreters an opportunity to catch up.

18 And I say that now because I just don't want to interrupt  
19 you while you're speaking, if that makes sense, so...

20 ATC [LTC GARRETT]: I'll do my best, Your Honor.

21 MJ [COL FITZGERALD]: I've received the same admonishment  
22 myself, so -- and with that, you may proceed.

23 ATC [LTC GARRETT]: Good morning, Your Honor.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL FITZGERALD]: Good morning.

2 ATC [LTC GARRETT]: Colonel Garrett on behalf of the United  
3 States.

4 The government requests the military interrogators  
5 declaration, filed yesterday at AE 481AAA, be considered by the  
6 commission. It took a while to get through security review, but we  
7 gave notice to the commission and to the defense in February. The  
8 commission should consider the declaration because it is relevant and  
9 probative.

10 Now, to the suppression argument. The government requests  
11 that the commission deny the relief requested in AE 481, the  
12 suppression of all statements made by Mr. Salim Ahmed Hamdan after  
13 December 2001. That would be a draconian result that did not even  
14 happen in Mr. Hamdan's own trial.

15 The government intends to offer two statements by Mr. Hamdan  
16 in the case against Mr. Nashiri. And both of those statements were  
17 admitted in Mr. Hamdan's trial.

18 In AE 166, the government noticed those statements with AE  
19 166 corrected copy at 17, as well as AE 139 -- excuse me -- AE 319A  
20 Attachments B-51 and B-52.

21 The first statement stems from a series of interviews that  
22 Special Agents Ammar Barghouty, George Crouch, and Ali Soufan  
23 conducted at Guantanamo Bay between 26 June 2002 and 9 July 2002.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 The second statement comes from an interview that Special Agent  
2 Soufan conducted at Guantanamo Bay in August of 2002.

3 Now, the request for suppression is based on -- based upon  
4 10 U.S.C. 948r, as well as the motion cites to the due process clause  
5 of the Fifth Amendment.

6 The government relies on its written brief submitted at AE  
7 481YY, and I will not cover every point in that written argument at  
8 this time. Both the government and defense submitted robust written  
9 arguments for your consideration, and I would like to highlight for  
10 the commission some key takeaways and principles as you review those  
11 submissions.

12 First, the admissibility of Hamdan's statements to Special  
13 Agents Barghouty, Crouch, and Soufan, is governed by  
14 M.C.R.E. 304(a)(3). And that is, A, the totality of the  
15 circumstances renders the statement reliable and possessing  
16 sufficient probative value. The interest of justice would be served  
17 by admission of the statement into evidence, that's second. And  
18 third, the statement was not obtained through the use of torture or  
19 cruel, inhuman, or degrading treatment.

20 Now, for the purposes of a suppression motion, the third  
21 prong is what is the governing statute. It reiterates 948r.

22 For the suppression motion to succeed, Your Honor, it has to  
23 be a credible allegation of torture. And there's no credible

27267

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 evidence that Mr. Hamdan was subjected to torture, cruel, inhuman, or  
2 degrading treatment.

3           The standard was even higher in his own trial for  
4 voluntariness. And there is the principle that individuals whose  
5 rights are at stake should litigate those matters. The government  
6 has demonstrated by significantly more than preponderance of the  
7 evidence that the statement was not obtained by torture, cruel,  
8 inhuman, or degrading treatment.

9           Now, the commission heard from the following individuals:  
10 Lieutenant Colonel (Ret.) Hank Smith, Special Agent Ali Soufan,  
11 Special Agent George Crouch, Special Agent Ammar Barghouty,  
12 Mr. Anthony Cardon, and Mr. Mark Fallon.

13           During this litigation series, the defense evidence consists  
14 of trying at every turn to connect the Hamdan evidence to alleged  
15 torture, inhuman, or degrading treatment by the U.S. Government, and  
16 it failed at every turn.

17           Lieutenant Colonel Hank Smith is a special forces war hero  
18 that protected Mr. Hamdan, and he testified his group was under the  
19 operational control of CENTCOM. There was no abuse during the  
20 interrogation that occurred while in his custody and conducted by a  
21 military interrogator.

22           There's no evidence that Hamdan's prior time in custody  
23 influenced Hamdan's later cooperation with Agents Barghouty, Crouch,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 and Soufan. I ask the commission to please see the written argument  
2 and Attachment E.

3 Special Agent Cardon had a smaller role, but he also saw  
4 nothing at the detention facility or during the interviews that would  
5 indicate abuse, mistreatment, or coercive interrogation techniques.

6 Mr. Mark Fallon testified that it was sometime after 24  
7 September 2002 that he observed a change with interrogation practices  
8 towards SERE techniques. Specifically, Mr. Fallon testified that  
9 interrogation practices changed after an action memo was signed on 27  
10 November 2002, long after the humane and rapport-based Hamdan  
11 interview.

12 Mr. Fallon testified that the change occurred with  
13 Mr. al Qahtani, not Mr. Hamdan. And all of those places of testimony  
14 from Mr. Fallon are in the brief with transcripts for you to review,  
15 Your Honor.

16 Again, under M.C.R.E. 304, the third prong is what is at  
17 issue here today. We'll address the remaining prongs in May for  
18 admissibility. The third prong, again, being whether the statement  
19 was obtained by the use of torture, cruel, inhuman, or degrading  
20 treatment, the facts reveal, and the evidence, that -- to the  
21 contrary. Mr. Hamdan was imposing his will to the greatest extent  
22 possible during his interviews with the FBI agents. His decision to  
23 cooperate with the FBI had nothing to do with coercive treatment

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 while in U.S. custody. Mr. Hamdan's cooperation arose from  
2 traditional rapport-based interview techniques.

3 The government argument showing how the government has met  
4 its burden under this third prong are explained in much more  
5 abundance in the written brief.

6 Very briefly, Your Honor, as to the second reason listed by  
7 the defense for the suppression, being the due process clause of the  
8 Fifth Amendment, this comes to standing, Your Honor. In short, with  
9 regards to the Fifth Amendment, the defense can't assert the rights  
10 of another. And that's Alderman v. United States, citation 394 U.S.  
11 165. It's a 1968 case. As well as Douglas v. Woodford, 316 F.3d  
12 1079. It's a Ninth Circuit case from 2003.

13 Lastly, Your Honor, as the Supreme Court has stated:  
14 Suppression is never our first impulse. It is always the last  
15 resort. And that is citing Utah v. Strieff -- that's S-T-R-E-I-F-F  
16 **[sic]** -- at 136 S.C. 2056, that's quoting Hudson v. Michigan, 547  
17 U.S. 586, a 2006 case.

18 But the Supreme Court says: There are societal costs to  
19 suppressing relevant, reliable, and probative information.

20 Which, again, that's fully addressed in our written brief  
21 and we will -- can argue further at the -- in May, or if the court  
22 wants to hear more on the other prongs here today.

23 MJ [COL FITZGERALD]: Can I interrupt you briefly? I don't

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 want to interpose those two arguments, so if you can just stick to  
2 481. I know we're going to take up another related matter in May,  
3 but if you just stick to the 481.

4 Sorry to interrupt you. I just want to give you some  
5 guidance.

6 ATC [LTC GARRETT]: Yes, Your Honor. I am ----

7 MJ [COL FITZGERALD]: What I'm saying is I won't ask you any  
8 questions about the other one.

9 ATC [LTC GARRETT]: Okay. Thank you, Your Honor.

10 For these and the reasons articulated in the written brief  
11 at AE 481YY, the government requests the commission deny the relief  
12 requested in AE 481, the suppression of all statements made by  
13 Mr. Salim Ahmed Hamdan after December 2001.

14 Thank you, Your Honor.

15 MJ [COL FITZGERALD]: Thank you, sir.

16 Defense, you may proceed.

17 DC [MS. CARMON]: Good morning, Your Honor.

18 MJ [COL FITZGERALD]: Good morning.

19 DC [MS. CARMON]: Your Honor, let me begin with the  
20 government's submission yesterday of AE 481, I believe that's AAA,  
21 which is the supplemental evidence that they wish the commission to  
22 consider. It is our request that the commission decline to consider  
23 the submission that came in yesterday.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 I direct the commission to transcript at 26342. That is the  
2 day that former Commission Judge Acosta ordered the written argument  
3 briefing in lieu of oral argument, and did so by asking that both of  
4 those briefs come in on the same day. And he noted that this was not  
5 a new briefing cycle, this would stand in the shoes of oral argument.

6 And we did that for a couple of reasons. One, as we were  
7 litigating 481 during that last commission session, the government  
8 was producing to us pretty extensive classified discovery that they  
9 had just gotten cleared.

10 We were able to use it with the witnesses that were before  
11 the commission, but there were extensive reports in a statement  
12 admitting relevant facts that at least the defense wanted to use in a  
13 final argument and have a little bit more time to digest. And so  
14 you'll find a lot of those attachments at our final argument brief.  
15 And we also knew that the commission was winding down, and we  
16 believed this to be our opportunity to finalize argument on 481.

17 I recognize that at our R.M.C. 802 the commission allowed  
18 the government to supplement with -- at that point I think they said  
19 it was an affidavit. I recall that there was a due date of 1 March  
20 for the government and a due date of the defense reply 15 March, so  
21 that each party could have a fair opportunity to reply, respond,  
22 consider the evidence before argument before the commission today.  
23 And so it is late coming.



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1           The other issue, Your Honor, in using the unclassified  
2 portions of the affidavit at 481AAA, the affiant says that this  
3 person met with Hamdan between five and 20 times. Is that six or is  
4 it 19? I think that's a substantive difference. The FBI  
5 participated with this person in interrogations. No names are given.

6           We are able to marry the affiant to the signee of AE 481KK.  
7 That is a defense exhibit that was submitted in court. But that's  
8 it. We don't have any other memorandums for record with this  
9 person's name on it. And so not only is it late coming, I don't  
10 think it's particularly relevant or helpful to the commission.

11           Again, no dates of interrogation are given, no identities of  
12 the FBI agents that participated. And quite frankly, it's a little  
13 bit of a -- a useless document, at least in the defense view, without  
14 the opportunity for cross-examination, to elicit what I think would  
15 be relevant and helpful information for the commission.

16           And so it's for those reasons that we ask the commission to  
17 exercise its discretion in declining to consider that new evidence.

18           In turning to AE 481 in total, the defense filed a  
19 classified brief at 481XX. And so my remarks this morning are going  
20 to keep them unclassified, and I'm going to refer the commission to  
21 record cites where I think helpful information that supports our  
22 contentions is found but cannot be discussed in this forum in detail.

23           The question I think for the commission here is: Can the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 government meet their burden to demonstrate that -- and I'm going to  
2 quote -- there exists a break in the stream of events sufficient to  
3 insulate the statements from the effect of all that went before?

4 And that's Karake, which is a D.C. District Court opinion  
5 that's cited extensively in our briefing, citing Clewis v. Texas,  
6 which is a 1967 Supreme Court case.

7 The government I think wishes to focus the commission on the  
8 two sets of summarized statements that were taken from Mr. Hamdan  
9 while he was at GTMO. And that one block is a statement that was  
10 taken 26 June to 9 July 2002, memorialized in an FBI 302, which we  
11 heard time and is again is a summary of the agent's notes of a  
12 meeting, not a verbatim recitation of a statement.

13 And the second statement the government wishes to offer is  
14 the 6 August 2002 statement given to Agent Soufan, again, a  
15 summarized FBI 302. This is not a verbatim. The statement does not  
16 contain Mr. Hamdan's signature that he reviewed and signed off on it.  
17 These are two summaries. But I think my point here is that the  
18 commission should look broader.

19 And I think there are three themes that I want the  
20 commission to keep in mind when you're reviewing our extensive brief  
21 at 481XX. And the first of those is that, despite the government's  
22 protestations, this is one long, very detailed, very coercive  
23 interrogation that began the day that Mr. Hamdan was captured and

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 concluded long after, unfortunately, the statements that the  
2 government seeks to offer.

3 And I -- forgive me. [REDACTED]

4 [REDACTED] Mr. Hamdan is captured 24  
5 November 2001. He is captured in Takhteh Pol. He is interrogated  
6 immediately there. [REDACTED]

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 After he is elsewhere, he is taken to Bagram. I would  
11 direct Your Honor to 48100 for the description of how Mr. Hamdan  
12 arrived at Bagram and the condition that the military interrogators  
13 found him in. Mr. Hamdan is at Bagram for 30 days.

14 The defense possesses at least 19 intelligence information  
15 reports. You can find those numbers at AE 481K Attachment V.

16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED] So  
20 he's there in Bagram for 30 days. And the record cite is in our  
21 brief.

22 The commission has heard extensive testimony as to what  
23 Bagram was like from Mr. Damien Corsetti, a military intelligence

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 interrogator. And that is 28 April 2022 is when Mr. Corsetti  
2 testified. And, obviously, a bunch of those details appear in our  
3 brief.

4           Once Mr. Hamdan arrives at Kandahar, there are at least ten  
5 intelligence products that are produced and they are mostly being  
6 produced by FBI agents. And that becomes important because the  
7 statements that the government wishes to offer are also elicited by  
8 FBI agents. And I think what's important to note -- and there are  
9 cites in our brief here where you can compare the information -- is  
10 that in all of these places Mr. Hamdan is basically asked to repeat  
11 the same information again and again and again. It's the same  
12 information. He's asked to look at the same photographs.

13           And so by the time he arrives in Guantanamo in May of 2002,  
14 he's got it down pat.

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 [REDACTED]

20 [REDACTED] A [REDACTED]

21 [REDACTED] product references seven prior interviews. That is AE  
22 481KK.

23           And then we come to 26 June, which is the first day that the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 FBI is going to take Mr. Hamdan's statement and interrogate him.  
2 It's the night that the FBI begins. It is the first day of the first  
3 set of statements that the government is offering in this case, in  
4 their case in chief. [REDACTED]

5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]

8 [REDACTED] He meets with the FBI. And between 26 June and 9 July,  
9 which is the first set of 302s here [REDACTED]

10 [REDACTED].

11 And the through line, Agent Crouch, who is one of the agents  
12 who is interrogating Mr. Hamdan, he admits to reading and reviewing  
13 existing intelligence and information given by Hamdan. And that is,  
14 sir, the transcript of Agent Crouch's testimony at 25553 through '59.  
15 And, in fact, you'll read that when first approached, Mr. Hamdan  
16 says: You need to go and read the file. I've already told you all  
17 of this. Again, reiterating that he has been routinely and  
18 repeatedly interrogated, has given the same information.

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 And so the detention doesn't change. The conditions rarely

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 change. The personnel, they're all American. They don't change in  
2 any significant way. And the coercive environment does not change at  
3 all.

4 And how do we know about the coercive environment? Well, we  
5 have Mr. Corsetti's testimony, obviously, about what Bagram was like  
6 during that time period. But we have uncontroverted and unrebutted  
7 testimony from Mr. Hamdan himself.

8 And I offer this to Your Honor as the -- sort of the second  
9 theme I'd like for you to you keep in mind as you're reading. The  
10 government itself offered no evidence that Kandahar was a lovely  
11 place, that Bagram was a lovely place, that elsewhere prior to his  
12 arrival at Bagram was a lovely place. But the person who did is  
13 Mr. Hamdan himself.

14 He testified in his trial at AE 480K Attachment R. And if  
15 Mr. Hamdan is truly unavailable, then that testimony from his trial,  
16 which is at AE 480K Attachment R, is admissible as an exception to  
17 hearsay through Military Rule of Evidence 804 small B, (b) (1),  
18 because he was subject to cross-examination on the very topics about  
19 which he would be testifying in this case. And so -- and that  
20 requires that the declarant be unavailable.

21 And so if, in fact, Mr. Hamdan is unavailable, which means  
22 the government's statements that they're offering might come into  
23 evidence and we might still be trying to suppress them, which I

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 recognize is AE 319, which we'll take up in May, but if he is  
2 unavailable, that testimony comes in as an exception to the hearsay  
3 rules and is unrebutted by the government.

4           And so we have Mr. Hamdan's own words about what those  
5 conditions were like, and they were horrific. And so not only is he  
6 being continually interrogated by familiar faces in very austere  
7 conditions, he is being beaten and blindfolded. And you can read the  
8 details in our brief as each place he travels to, there is a  
9 description from Mr. Hamdan himself about the inhumanities he suffers  
10 there.

11           And the third point that I'd like Your Honor to keep in mind  
12 is that the bulk of the government's evidence in this case -- I mean,  
13 166 is over 100 separate hearsay declarant statements that they wish  
14 to offer in their case in chief. The bulk of those witnesses are lay  
15 witnesses from Yemen, but a very important contingent are  
16 co-conspirators like Mr. Hamdan.

17           And, again, Mr. Hamdan's statements -- and I use the word  
18 statement and I shouldn't because that's not what it is. At AE  
19 319MM, page 922, you will find the FBI 302 that summarizes  
20 Mr. Hamdan's interactions with FBI agents between 26 June and 9 July  
21 of 2002.

22           And at AE 319MM page 945, you will find the summary of  
23 Mr. Hamdan's interaction with FBI Agent Ali Soufan on 6 August 2002.



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1           Now, what's important about these summaries and the  
2 testimony that were Mr. Hamdan to be declared unavailable and these  
3 agents called to give that testimony, what's important there, I  
4 think, is that these potentially tie Mr. al Nashiri into the  
5 conspiracy as early as 1996. And so that's obviously one of the  
6 bigger charges. I believe it's Charge V in the charge sheet.

7           Mr. Hamdan's -- at least the summary of Mr. Hamdan's  
8 statements, as contained in the 302, contain multiple inculpatory  
9 statements he attributes to Mr. al Nashiri. It contains observations  
10 of Mr. al Nashiri using explosives at some point. And it contains  
11 observations and interactions with Mr. al Nashiri as early, as I  
12 said, as 1996.

13           And so these are consequential statements. But this is a  
14 capital prosecution where the government seeks an irreversible  
15 punishment. And the prosecution of a capital case -- and I  
16 quote -- requires a greater degree of accuracy and fact finding than  
17 would be true in a non-capital case. And that is Gilmore v. Taylor,  
18 508 U.S. 333, 1993. And you will hear -- I'm afraid you may get sick  
19 of hearing this refrain over and over, but death is different.

20           In this capital prosecution where the government's case in  
21 chief and likely statements to support aggravation may come from the  
22 summary of a statement given by a declarant 20 years ago, we must be  
23 sure that that evidence is accurate and that it matches the

27280

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 heightened reliability required in both the fact finding and  
2 sentencing phases of a capital prosecution.

3 And so, sir, I think any procedure which permits these  
4 summaries that are tainted by cruel and unusual punish -- excuse me,  
5 that's the Eighth Amendment -- by cruel and inhumane treatment, by  
6 degrading treatment, by legally prohibited treatment, any admission  
7 of those statements that are likely the product of that fails to meet  
8 the need for heightened reliability and fails to meet the process  
9 required in a capital prosecution.

10 And so I think in 481XX, our brief lays out all the facts  
11 this commission needs to follow Mr. Hamdan's trail of mistreatment  
12 from 24 November 2001 all the way through the statements that the  
13 government alleges they want to admit ending in 6 August 2002.

14 And when you follow that trail, see his mistreatment, you  
15 realize that there is nothing that happened between tip to tail to  
16 break the chain. And there is no way that the government can prove  
17 to this commission that the statements that they wish to enter are  
18 sufficiently isolated from the effect of the ones that went before.

19 And so we submit to Your Honor that you should deny the  
20 government's request, one, to admit or have you consider 481 AAA, and  
21 that you should grant the defense's request that you find that these  
22 statements are inadmissible against Mr. al Nashiri in this capital  
23 case.

27281

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Thank you, sir.

2 MJ [COL FITZGERALD]: Thank you, ma'am.

3 Colonel Garrett, you wish to be heard again? On 481,  
4 correct?

5 ATC [LTC GARRETT]: Yes, Your Honor.

6 Your Honor, to start off with, I'll address some of these  
7 administrative issues that counsel mentioned, referencing transcript  
8 26342 about written argument that would be finalized. Yes, we all  
9 planned for Judge Acosta to rule on this matter, and he didn't. And  
10 after he retired, I believe the commission reached out to the parties  
11 and asked if there's anything else the parties would like the new  
12 judge to hear. And, again, Judge Acosta didn't rule on it.

13 So that mindset of on that day, on that transcript, things  
14 have evolved because the litigation didn't end. Also included with  
15 the declaration we provided is an explanation of why this was later.  
16 We have a declaration of -- of the efforts to find the military  
17 interrogator, and it just couldn't be done.

18 Additionally, the accused's LHM in this case was suppressed  
19 after all of this. And another reason to come back and ask the  
20 parties, is there anything you'd like the commission to consider, the  
21 government took that opportunity. We decided, you know, we want to  
22 look for that -- that interrogator one more time, see if we can find  
23 that individual. And so that -- that factored in as well.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1           As far as the due date being 1 March, Your Honor, that was  
2   in an 802. It was not put in your order. We apprised the court as  
3   well as defense as to the progress of that declaration. So that was  
4   not -- and we've informed the court on multiple occasions that we  
5   were still trying to get it cleared for release. So that 1 March was  
6   not a part of your order, Your Honor.

7           With regards -- defense counsel brought up a couple things  
8   that I think are -- must be addressed with regards to not relevant or  
9   helpful. It's absolutely relevant or helpful. The -- the defense is  
10   trying to point to -- they know -- they know that the interrogations  
11   by the FBI agents were done properly, so they're trying to look  
12   backwards. And they have alluded in their arguments leading in this  
13   litigation to these interrogations by other people. And so we're  
14   filling that -- that gap of information that leads right up to the  
15   interviews by the FBI agents.

16          With regards to there being no dates, nothing in discovery,  
17   that's one of the reasons we -- it took a while to be able to file  
18   this to the commission and provide it to the defense is because of  
19   the name of the individual. And so the way it is filed, defense  
20   should be able to look through discovery and understand who this was  
21   about with dates and substance of those previous interrogations.

22          Defense has at least six memorandums for record that detail  
23   the contents of this individual's interrogations. And they have the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 means to go over that now.

2 The military interrogator's declaration should be considered  
3 because it is relevant and probative. Because they know the FBI  
4 Agents Soufan, Barghouty, and Crouch did not coerce Mr. Hamdan in any  
5 fashion, they argue that those statements were not sufficiently  
6 attenuated from earlier intelligence interrogations, which maybe  
7 possibly could have been coerced. The defense argument is based on  
8 conjecture and innuendo without evidence. And the military  
9 interrogator's declaration is evidence that addresses those points.

10 Of note, I ask the commission to look at the last paragraph  
11 of page 5 in the defense filing AE 481XX. That is important because  
12 leading up to the FBI interviews at issue in this suppression motion,  
13 the military interrogator interviewed Mr. Hamdan between five and 20  
14 times. The military interrogator provides the purpose of those  
15 interviews and context about the setting and conditions of those  
16 interviews.

17 The military interrogator describes how Mr. Hamdan was  
18 allowed comfort and prayer breaks, food items [REDACTED]  
19 [REDACTED] that it was a comfortable room with water. The military  
20 interrogator's approach emphasized humane treatment. That was a key  
21 point from the Army Field Manual. The military interrogator observed  
22 Mr. Hamdan [REDACTED]  
23 with the interrogators.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1           At all times the interview team paid attention to the  
2 conditions of the detainee; for example, whether he was alert, not  
3 tired, or drowsy, and well nourished. The military interrogator  
4 emphasized that the guards did not mistreat or soften up the  
5 detainees prior to an interrogation, and that any sort of  
6 mistreatment would have been reflected in the memorandum for records  
7 I referenced a moment ago.

8           The military interrogator has no awareness of Mr. Hamdan  
9 being treated poorly at GTMO. And Mr. Hamdan never complained about  
10 his treatment. Any supportive -- any sort of complaint or awareness  
11 of mistreatment would have been in their memorandums.

12           The defense is speculating about some nefarious actor that  
13 may have interrogated Mr. Hamdan leading up to the Hamdan statements  
14 at issue. This is actual evidence the commission should consider.  
15 The military interrogator only saw Mr. Hamdan treated with dignity  
16 and respect.

17           Now, this declaration is consistent with the testimony of  
18 the defense witness, Mr. Mark Fallon, the deputy commander of the  
19 Criminal Investigations Task Force, or CITF, at the time of the  
20 statements at issue.

21           Mr. Fallon testified that he was unaware of any allegations  
22 of abuse of Mr. Hamdan at Guantanamo Bay. He also testified that the  
23 Army Field Manual interrogation protocols were human and rapport

## UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 based. He testified that as far as he knows, Mr. Hamdan was treated  
2 humanely in his interrogations. However, Mr. Fallon wasn't in the  
3 room. The military interrogator was actually there and adds  
4 information to the totality of circumstances leading up to the two  
5 statements at issue here. The declaration is relevant and probative  
6 for the commission to consider.

7 Now, I mention that the standard here is the third prong.  
8 This is a suppression motion, and defense went into a lot of other  
9 prongs of the -- the other two prongs in her argument. And so I'm  
10 going to address some of those points.

11 Defense started talking about the issue of whether the will  
12 was overborne, which is standard for the accused. I like to -- and  
13 she did so by talking about how Mr. Hamdan said go read the file. I  
14 don't want to talk to you. Go read the file. He had given many  
15 interviews beforehand; that's in both arguments.

16 But when you look at the ruling in AE 467, again, the  
17 suppression of the accused's LHM, that's important here. Although  
18 the government is appealing that ruling, one of the issues that we  
19 have a problem with is the notion that the only way to know whether  
20 it's voluntary is when someone invokes their right not to participate  
21 in an interview. But be that as it may, even with that current law  
22 of the case, the point that defense counsel highlights shows that  
23 Mr. Hamdan refused to speak with these agents. It shows that -- that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 break in the stream that defense counsel mentioned. He refused.  
2 Pound sand. Go read the file. I refuse to speak to you. And I  
3 quote: I don't care what you say. I don't care who you are.  
4 Everything that I said is already in the file. Go read the file.

5 That's also in our brief. It's transcript 25045.

6 Special Agent Crouch described Mr. Hamdan as not necessarily  
7 combative, but certainly not cooperative. Although the FBI agents  
8 tried to break the ice by mentioning people they all knew, Mr. Hamdan  
9 would not budge. That's at transcript pages 25045 through '46.

10 Mr. Hamdan defiantly stated: I don't trust Americans. All  
11 of you guys are a bunch of liars, and I will never deal with you.  
12 That's transcript pages 25046.

13 Mr. Hamdan said: I don't have to say anything to you.  
14 Transcript 25045. These are not the words of a man whose will has  
15 been overborne. It's not the will of a man who can't give a  
16 voluntary statement because of torture.

17 The defense talked about a couple of other issues that I'm  
18 going to kind of combine because they're related. And that has to do  
19 with the -- in his own words, the evidence in his own words that  
20 defense would like for you to consider as well as the  
21 death-is-different argument.

22 Well, the evidence in his own words were considered at his  
23 trial. And with death is different, defense counsel cited to Gilmore



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 which -- about greater degree of accuracy. Gilmore is a case about  
2 sentencing.

3 Defense noticeably ignores the issue of standing.  
4 Mr. Hamdan fully litigated the suppression motion of all his  
5 statements, not just two, all of them in his own trial when he was  
6 the defendant, and these two statements were admitted in his own  
7 commission case. They were found to be voluntary, a higher standard.  
8 But defense, because of death is different, they want a higher  
9 standard of review in this commission as a third party, when they  
10 don't have standing.

11 To do what the defense wants could create an absurd result.  
12 Can you imagine the defense counsel going to his convicted client  
13 behind bars, in large part because of his own statements, and tell  
14 them that another defendant had those same statements suppressed in  
15 another case because they were deemed not voluntary. Too bad for  
16 you. Too bad we didn't have that judge in our case.

17 No. That is why there is a -- there's generally a non-party  
18 issue preclusion in our judicial system. No one looked at each of  
19 those statements more closely than the commission in Hamdan's trial.  
20 And that is addressed in Taylor v. Sturgell, 553 U.S. 880, a matter  
21 that has been adjudicated by a competent court and may not be pursued  
22 further by the same parties.

23 Lastly, Your Honor, with regards to attenuation. Defense



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 thinks it's enough to allege that prior intelligence interviews  
2 occurred, that anything intelligence is tainted, but they provide no  
3 evidence as such. This military interrogator provides evidence to  
4 the contrary. The filing that we've already submitted, the evidence  
5 in the court provides evidence to the contrary.

6 Just because interviews occur seeking intelligence does not  
7 mean they were tortured. It does not mean that that third prong that  
8 is the standard here today to suppress the statement was violated.

9 From capture until release, Mr. Hamdan was in the control of  
10 the U.S. military. And as all the witnesses said, he was treated  
11 well. There's absolutely no evidence that he was tortured.

12 May I have a moment, Your Honor?

13 MJ [COL FITZGERALD]: You may.

14 **[Counsel conferred.]**

15 ATC [LTC GARRETT]: Thank you, sir.

16 MJ [COL FITZGERALD]: Thank you, sir.

17 If the parties are okay with this, what I'd like to do is  
18 break for lunch now. I know we took up some time this morning on  
19 some other matters, so we got off to a late start, but I think the  
20 last couple of days I've been pushing lunch to the right. I think  
21 I'd like to push it a little bit to the left today and return at 1300  
22 hours for the conclusion of the arguments. And then, again, we'll  
23 take up the other matters.

27289

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 I will note, because I don't want to forget, that Lieutenant  
2 Huston returned about 1108, but then she left again about 1124. She  
3 was here on the record just briefly. I imagine she's still running  
4 her task to ground. I just want to note that for the record. I told  
5 her she could come back when she was here. I didn't expect her to  
6 leave but she did. So she's probably completing that task. But in  
7 the event that nobody else saw her come and go, I did. So I just  
8 want to note that.

9 Anything else we need to take up while we're on the record?

10 TC [CAPT STINSON]: Nothing from the government, Your Honor.

11 LDC [MR. NATALE]: Nothing from the defense, Your Honor.

12 MJ [COL FITZGERALD]: Very well. Then the commission is in  
13 recess until 1300 hours.

14 **[The R.M.C. 803 session recessed at 1132, 4 April 2024.]**

15 **[The R.M.C. 803 session was called to order at 1310, 4 April 2024.]**

16 MJ [COL FITZGERALD]: The commission is called to order.

17 Government, can you account for your party?

18 TC [CAPT STINSON]: All personnel detailed to the case are  
19 here, Your Honor, and in the RHR.

20 MJ [COL FITZGERALD]: I will note that Lieutenant Huston was  
21 not here at the last session when we went into recess, but she is  
22 here now, so.

23 Defense, can you account for all members of the defense?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. NATALE]: Yes, Your Honor, with the exception of  
2 General Thompson who is no longer in the RHR.

3 Your Honor, I'd also like to inform the court that, as you  
4 can see, Mr. Nashiri is not physically present but he is monitoring  
5 the situation from the -- remotely, and he is still in a capacity to  
6 contact us if he so desires. And this is a voluntary decision on his  
7 part.

8 MJ [COL FITZGERALD]: Thank you. I appreciate that,  
9 Mr. Natale.

10 Briefly, in an 802 we discussed some orders of march.  
11 Earlier we had talked about I had gained some information when I took  
12 a tour of the facility with respect to AE 563. My initial words to  
13 the parties was I didn't take any information; I wasn't briefed on  
14 anything. And then it dawned on me, I actually did ask a question  
15 and received an answer.

16 I don't know at the end when I write my essential findings  
17 of facts and conclusions that I will rely on it, but I certainly  
18 wanted the parties to know I had that information. In the event that  
19 I would rely on it, you ought to have known where it came from.

20 And the other thing we -- what we brought up was rather than  
21 have a likely two- to five-minute closed session today and put a lot  
22 of mechanics into works just for a short session, that we're going to  
23 move that discussion until tomorrow prior to the defense putting on

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 their ex parte presentation to me at 0900, we're going to take that  
2 matter up.

3 So the government, you know, with much appreciation from the  
4 commission, has agreed to come in at 0900 tomorrow morning to  
5 participate in that. We'll go to the defense ex parte presentation  
6 and then proceed on from there, all in closed session.

7 And with that, we are ready to proceed with arguments in  
8 Appellate Exhibit 482.

9 TC [CAPT STINSON]: Thank you, Your Honor. Captain Stinson on  
10 behalf of the United States.

11 The government requests that the commission deny the relief  
12 requested in AE 482, suppression of the statement of al Owhali.

13 As you heard in AE 481, the Supreme Court has taught that  
14 suppression is a last resort, never our first impulse, and that the  
15 statements at issue are consequential statements. Both of those  
16 things are true, Your Honor. And they're important to remember  
17 because the government has and retains the burden of proof beyond a  
18 reasonable doubt for all elements of all charges throughout all  
19 stages of this proceeding. And there is a significant societal cost  
20 when you suppress information and evidence from the members.

21 It's the people's evidence. When you deny the members the  
22 opportunity to hear the critical evidence, that enacts a societal  
23 cost. And that's particularly true here when we're talking about

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 singular events. These are attacks by al Qaeda and the defendant,  
2 Mr. Nashiri's role in relation to al Qaeda, directly related to an  
3 overt act regarding the overarching conspiracy with al Qaeda. And it  
4 shows and it reflects his involvement back with al Qaeda into the  
5 1990s.

6 It's also important because one of the elements, and the  
7 commission heard argument about this earlier in the week, that an  
8 element of each offense is that the offense take place in the context  
9 of and associated with hostilities. Well, the 1998 embassy bombings  
10 are a critical piece of the campaign by al Qaeda to attack America  
11 and American interests. They were coordinated and complex attacks.  
12 They required multiple parties with varying roles in the attacks.

13 Mr. Nashiri's role in relation to providing travel  
14 documentation for one of the perpetrators of the attack in Kenya  
15 shows his relationship and involvement with al Qaeda and in relation  
16 to the hostilities that they carried forward at the direction of  
17 their leader, Usama bin Laden, to attack Americans everywhere and  
18 anywhere they find them, military or civilians alike.

19 So what is the basis for suppression here, Your Honor? It's  
20 10 U.S.C. 948r, and it's unique to the military commissions. It is a  
21 statutory exclusionary rule. And that states that the commission  
22 should not accept into evidence statements obtained by torture,  
23 cruel, inhuman, or degrading treatment. I think the parties agree

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that's the standard that's applicable for a motion to suppress.

2 But it has to be a credible allegation, Your Honor. There's  
3 got to be some allegation of torture, cruel, inhuman, or degrading  
4 treatment. And the government submits that in relation to al Owali,  
5 there is simply no credible allegation that the statement was  
6 obtained through torture, cruel, inhuman, or degrading treatment.

7 Uniquely, Your Honor, there may be some case or some  
8 instances where there are statements where there is a credible  
9 allegation in relation to that, but it does not exist in relation to  
10 al Owali.

11 If you look at paragraph 24 of Owali's own 2000 affidavit,  
12 in his criminal trial, when his life was on the line, when he had the  
13 opportunity to state what happened to him during his time in custody,  
14 paragraph 24 he states: I was never actually physically tortured  
15 during this time.

16 There is simply no credible evidence that al Owali was  
17 subjected to torture, cruel, inhuman, or degrading treatment. The  
18 only evidence submitted by the defense on this point is a  
19 self-serving affidavit from Owali 25 years after he murdered over  
20 200 Kenyans and numerous Americans.

21 And, again, Your Honor, that statement was held to be  
22 voluntary, which was a higher standard, in his own criminal trial for  
23 the crimes that he committed.

## UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1           The government asserts the commission deny the motion to  
2 suppress on that basis alone, that there is simply no evidence to  
3 raise an allegation that he was subjected to torture, cruel, inhuman,  
4 or degrading treatment. On the other hand, Your Honor, the  
5 government has demonstrated, by significantly more than a  
6 preponderance of the evidence, that the statement was not obtained by  
7 torture, cruel, inhuman, or degrading treatment. And we point to the  
8 detailed findings of the district court in the Second Circuit, and  
9 this is outlined in the government response to the motion to suppress  
10 at AE 482I. But the district court found that al Owali's decision  
11 to speak with U.S. officials, quote, was not the product of any  
12 duress, threat, promise, or coercion by his interrogators.

13           And by contrast, al Owali regarded his sessions as a,  
14 quote, cat-and-mouse game between trained professionals. And the  
15 cite for that is 552 F.3d 177, 190 to 191.

16           In addition, in this commission the government has provided  
17 the testimony of the following individuals: FBI Special Agent Steve  
18 Bongardt, FBI Special Agent Steve Gaudin, FBI Special Agent John  
19 Anticev, a stipulation of expected testimony from [REDACTED]  
20 [REDACTED], and Kenyan CID inspector, Mr. Sammy Wekesa.  
21 And that testimony was consistent, clear, and compelling.

22           Owali was well treated during his time in custody. None of  
23 those individuals saw any mistreatment of al Owali during his time

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 in custody.

2 He did have to move from prison facility to prison facility.  
3 It was in a foreign country. Mr. Wekesa's testimony was credible,  
4 consistent, and clear. He oversaw those facilities. He understood  
5 the need to protect individuals in custody. And Mr. Owhali was well  
6 treated during that entire time.

7 The defense evidence will also point to -- defense is likely  
8 to point to a Stipulation of Fact that upon entering into New York,  
9 he took an X-ray at the Metropolitan Corrections Center and it  
10 revealed a -- not compound, a simple fracture of his right wrist.

11 What was the likely source of the injuries? It was the bomb  
12 blast, Your Honor. It was the fact that he drove in a truck with  
13 1,000 pounds of TNT, and that bomb was detonated while he was in  
14 close proximity. He did run behind a pillar, but he was in close  
15 proximity to that massive bomb blast that destroyed the building  
16 behind the embassy. And you heard the testimony of Inspector Wekesa  
17 to that point.

18 In addition, Detective Wekesa testified about being in a car  
19 about two blocks away and that the impact of that bomb blast, feeling  
20 his car shake. Well, of course, he got injured. He was in the truck  
21 with the bomb. He may have ran behind a pillar, but of course he was  
22 injured in that blast.

23 And here, Your Honor, you say a picture is worth a thousand



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 words. And they documented, in the government's view, in good detail  
2 the progression of Mr. al Owhali while he was in custody in Kenya.  
3 So I'm going to show a couple of pictures on the ELMO during the  
4 argument. Hopefully it will come up.

5 MJ [COL FITZGERALD]: Again, just for the commissions, not for  
6 the ----

7 TC [CAPT STINSON]: Yeah, I'm sorry, Your Honor. Just for the  
8 commission and the folks in the room, not to be published to the  
9 gallery.

10 So this is a photo taken, it's in the record, taken on  
11 August 12th. And you heard testimony that the explosion was on the  
12 7th. He's taken into custody on the 12th. So this is five days  
13 after the bomb blast, and you'll see his right wrist in that picture,  
14 Your Honor.

15 The hair is shaven around the injury. It looks like an  
16 extensive injury, it looks like there's been some stitches applied.  
17 In the government's view, it looks like it's swollen during this  
18 photo, Your Honor.

19 If you look at the next photo, Your Honor, is of his left  
20 hand. Again, it shows an injury from the bomb blast on August the  
21 12th. Again, if you compare those two photos, this wrist is not  
22 swollen, Your Honor.

23 Then as we progress through his time in custody, we have

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 several pictures in the -- what's been referred to as the lineup or  
2 identification parade.

3 I represent to Your Honor that Mr. al Owhali is the  
4 individual, the fifth one in from either end and looking at the  
5 camera at this time.

6 The next picture is a similar one. He does have his hands  
7 together in front of him at that time. Again, he's looking upwards.  
8 But he is holding his hands in front of him, including, it appears to  
9 be, his right hand over his left, Your Honor.

10 MJ [COL FITZGERALD]: Captain Stinson, if you wouldn't mind me  
11 interrupting you, especially in relation to the two sets of photos  
12 now, you haven't identified which exhibits you're showing. So it may  
13 not make clear on the record.

14 TC [CAPT STINSON]: Oh, I apologize, Your Honor.

15 MJ [COL FITZGERALD]: The first two photos had some  
16 similarities and the second have some similarities, so I just wanted  
17 to be clear on the record. So would you mind going back to  
18 the -- and you don't have to go through your argument again on them  
19 but just in the sequence here you put the photos thus far.

20 TC [CAPT STINSON]: Yeah, I apologize, Your Honor. So the  
21 first photo of the right wrist is Appellate Exhibit 482P, as to Papa,  
22 page 11 of 27.

23 The second photo is Appellate Exhibit 482P, page 14 of 27.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1           The third photo was Appellate Exhibit -- and this is the  
2 first of the lineup parade, Your Honor -- is 482P, page 22 of 27.

3           And then the last one I had put on there, Your Honor, was  
4 482P, 20 of 27.

5           MJ [COL FITZGERALD]: 20?

6           TC [CAPT STINSON]: Page 20 of 27, Your Honor, yes.

7           MJ [COL FITZGERALD]: I appreciate that.

8           TC [CAPT STINSON]: Next, Your Honor, it's Appellate  
9 Exhibit 480E, page 317 of 782. This is a photo that was described  
10 during the testimony of Mr. Owhali with Special Agent Gaudin that  
11 occurred later in time from the identification parade, Your Honor.  
12 And just two more photos, Your Honor.

13           I'm going to show 480E, page 305 of 782. This is a photo  
14 that has been described of Mr. Owhali in a victory pose or a boxing  
15 pose in his cell.

16           And finally, Your Honor, it's 480E, page 315 of 782. It's a  
17 photo of Mr. al Owhali in restraints on his journey back to  
18 America -- or to America. Sorry.

19           And if you look at the progression of these photos, Your  
20 Honor, it's very consistent with the Stipulation of Fact which shows  
21 that there was a broken wrist, but at the time it was reviewed, the  
22 medical individuals who reviewed it looked and said that, you now,  
23 the approximate date of that injury -- and you'll see that in the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Stipulation of Fact; there's a little bit of dispute about that, but  
2 it dates back to approximately the date of the bombing, in the  
3 government's view, and that there is some calcification showing  
4 healing of that wrist.

5 And if you look at those photos in progression from the date  
6 he is put into custody with a very significantly swollen right wrist,  
7 until the date he departs, smiling at the camera, in restraints but  
8 on his way back to America, it is clear to the -- and believe it is  
9 clear in the evidence, Your Honor, that he broke his wrist because of  
10 the bomb blast, and it was healing in time and it was discovered when  
11 he -- when he entered into America at the Metropolitan Correction  
12 Center.

13 And he was in his cell in that victory pose, Your Honor,  
14 because he wanted to be a hero. He wanted to go to America and be on  
15 trial like Ramzi Yousef.

16 So what other evidence has the defense submitted? Again,  
17 this is the June 6, 2023 declaration from Mr. Owhali. That is simply  
18 not a credible allegation. 25 years later, now we remember that we  
19 heard our wrist snap? We didn't remember that during the entirety of  
20 your criminal trial? You didn't put that in your 2000 affidavit in  
21 your own criminal trial? But 25 years later, all of a sudden we  
22 remember that we heard our wrist snap. And that is simply not a  
23 credible allegation.

27300

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1           The government noticed Mr. Owhali's statement at AE 166B,  
2   the 1998 FBI 302 which identified Nashiri -- well, Bilal, Mr. Nashiri  
3   using his alias of Bilal, an individual who helped on the travel  
4   documents.

5           How do we know that was reliable? Well, there are several  
6   reasons, Your Honor. We have the testimony of numerous FBI agents,  
7   the Stipulation of Expected Testimony of the [REDACTED]  
8   [REDACTED], and the testimony of Sammy Wekesa. And we heard that that  
9   information provided by Owhali was important to the investigation.

10          You heard Special Agent Anticev say he provided a telephone  
11   number. We went to the Kenyan telephone company, and were able to  
12   find out he called a safe house in Yemen. And then we were able to  
13   ask him who else called that safe house in Yemen. And we were able  
14   to start to piece together the pieces of this very complex and  
15   coordinated attack.

16          In addition, if you look at the notice statement, it  
17   provides a detailed rundown of the bombing of the embassy, and it  
18   provides important and critical information about al Qaeda generally.

19          So we know from the text of the statement itself, the fact  
20   that it was -- resulted in the conviction and consecutive life  
21   sentences of Mr. Owhali, that it was a reliable statement. And we  
22   know he said it in 1998.

23          And how do we know for sure that that's exactly what he said

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 in 1998 about Mr. Nashiri? Because in the June 2023 affidavit  
2 provided to this court, Owhali says: That's exactly what I said. I  
3 did say that Nashiri helped me with the travel documents.

4 But in his declaration he now says he concocted that story  
5 to divert attention away from bin Laden.

6 Was he lying then? Is he lying now? Well, Your Honor, that  
7 is a quintessential issue for the members. The members get to weigh  
8 credibility. The members will get instructed by the commission. And  
9 they should get the opportunity to receive the evidence, weigh the  
10 credibility, and determine whether or not Owhali was lying then or is  
11 he lying now.

12 But we know the answer. Al Owhali is clearly lying now. He  
13 says he tried to deflect blame away from bin Laden because of a  
14 missile plot that Nashiri allegedly was involved in, moving missiles  
15 into Saudi Arabia. That was an al Qaeda plot. And how do we know  
16 that was an al Qaeda plot? Well, if the commission -- we'd direct  
17 your attention to AE 482T, as in Tango, which is a May 1998 interview  
18 with the leader of al Qaeda, Usama bin Laden. This is months before  
19 the embassy bombing.

20 And Usama bin Laden tells the world, through ABC News, about  
21 the missile plot. He says the Saudi Arabian government captured a  
22 few months ago in Ramadan a number of missiles which they didn't  
23 report. The missiles including anti-aircraft missiles, SAM and

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Stinger missiles. Can the Saudi government explain to its people  
2 when a SAM missile is launched against a passenger airplane with 250  
3 soldiers aboard? That's Usama bin Laden. He's telling the world  
4 that was an al Qaeda plot.

5 We have a retroactive justification from Mr. Owhali saying,  
6 oh, I was trying to divert attention away from bin Laden. And it  
7 simply is not credible, exactly like the rest of Owhali's  
8 declaration.

9 We also know it's not credible because he says I was trying  
10 to divert attention away from al Qaeda, and I direct your attention  
11 again to the FBI 302 that was noticed in this case. During the -- he  
12 identifies numerous people in that 302. He talks extensively about  
13 the camp. He talks extensively about bin Laden.

14 Special Agent Dolphin on the stand yesterday said, oh, this  
15 is the name, there's a name. I think it was Bin'Attash. Bin'Attash  
16 might have helped with the travel documents.

17 Well, if you look in that 302, he talks a lot about Khallad  
18 Bin'Attash. Khallad Bin'Attash is the individual who was instructing  
19 Azzam, the suicide driver, the bomber, Mr. Nashiri's cousin, and  
20 Owhali, about the final planning and preparation of the embassy  
21 attack. He didn't say in his 302 that Khallad helped him with the  
22 travel documents because Nashiri helped him with the travel  
23 documents. And he identifies photos of both Nashiri and Khallad.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1           And in addition, Your Honor, he provided a tip about an  
2   upcoming attack as part of his negotiations to try to move the trial  
3   to America, to face his enemy, and to become a hero like he viewed  
4   Ramzi Yousef as being.

5           Now, if Mr. Owhali is unavailable at trial, for whatever  
6   reason, the defense would be free to offer that declaration in their  
7   case if they so chose. And the same exact standard would apply.

8           The government's offering the -- this statement as -- from  
9   Owhali. And if he's unavailable -- Your Honor, I know we're going to  
10   argue admissibility next month. This is really only about  
11   suppression. But the same standard would apply.

12           But those statements are important, critical information  
13   from people who were on the ground who were known to be members of  
14   al Qaeda, one of the bombers of the embassy in Kenya. And he's  
15   provided important and critical information regarding the defendant.  
16   And the government and the members should not be deprived of that  
17   critical and important information.

18           Some passages of the recent June 6th affidavit cannot pass  
19   without some comment. Point to page 3 of the 2023 affidavit, and  
20   this is in the fourth bullet. And here al Owhali is talking about  
21   the Kenyan victims of the embassy explosion. It states: The FBI  
22   showed callous disregard for their humanity and disrespect to their  
23   families.



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1           That's in the affidavit that's been submitted in this  
2   commission. And that's from the man who murdered those 200 Kenyans.  
3   And he has the unmitigated audacity to claim that the FBI showed  
4   callous disregard for their humanity and disrespected their families.

5           The government's view, the commission should not give one  
6   ounce of credibility to the declaration of that convicted murderer.  
7   He wasn't trying to protect bin Laden or his other brothers. He had  
8   a warped and distorted view of heroism, in the government's view.  
9   After he survived the bomb blast and he was disappointed that he had  
10  not died in the bomb blast, he wanted to become a hero.

11          Look at paragraph 9 of his 2000 affidavit, he talks about  
12  having a trial in America like Ramzi Yousef. If you killed 200  
13  people and injured thousands of others, you don't get to be a hero.

14          We heard testimony yesterday about people rushing to the  
15  embassy, going inside the embassy, bringing people outside,  
16  neighboring folks all coming around, taking the injured, taking them  
17  to hospitals, including one of the bombers in al Owhali. Some good  
18  Samaritan picked him up and took him to the hospital. That is  
19  heroism.

20          In addition -- well, sorry. Al Owhali is not a hero. He  
21  ran away from the truck that he delivered, a truck designed to  
22  murder, maim, and destroy. And that's exactly what it did. And you  
23  heard the testimony of Sammy Wekesa. Not only did it have that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 intent of destruction at the American embassy, Inspector Wekesa  
2 testified that there was a teachers union building directly behind  
3 the embassy that completely collapsed.

4 The defense argues time and again that the evidentiary  
5 standard should be heightened for a death penalty case, but there is  
6 no bill of particulars plus, motion to compel plus, or motion to  
7 suppress plus.

8 The standards are critical for sure. And we would cite to  
9 United States v. Tsarnaev, 142 S.C. 1024, 2022, where the Supreme  
10 Court rejected the argument that evidentiary standards should be  
11 applied differently in capital cases because death penalty  
12 proceedings are special. Death is different for sure and it is  
13 imperative to follow the standards accurately. But this does not  
14 change the evidentiary rules.

15 So we end as we began. Suppression is never our first  
16 impulse. It is always the last resort and that's citing back to  
17 Utah v. Streiff. The members deserve to hear the critical evidence  
18 that the government has accumulated. It's our burden. It's beyond a  
19 reasonable doubt. It is the highest burden, and we welcome that  
20 burden. But we need the important evidence here from al Owali in  
21 relation to meet that burden.

22 And in conclusion, the commission should deny the defense  
23 motion to suppress the statement of al Owali and we can litigate

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 whether the statements qualify for admissibility purposes next month,  
2 Your Honor.

3 MJ [COL FITZGERALD]: Thank you, sir.

4 Defense, are you prepared?

5 DC [MS. CARMON]: Thank you, sir.

6 I'd like to begin with something that Captain Stinson said  
7 when comparing the affidavit from 2000, which is AE 482 Attachment C,  
8 and the recently filed affidavit. He said, is he lying then or is he  
9 lying now? And went on to describe how the members should get to  
10 weigh Mr. Owhali's credibility. And I don't get to say this often,  
11 but we're in heated agreement on that. The members absolutely should  
12 get to weigh his credibility.

13 And how does that happen functionally? Mr. al Owhali is  
14 before them. They observe his demeanor. They observe the words he  
15 uses, how he acts. They act as the factfinder as to whether or not  
16 he is being truthful, but that is done by observing the man himself,  
17 not words on a page.

18 And I'd be remiss if I did not start -- and I recognize that  
19 we have 319 yet before us in May, but we don't get here to the motion  
20 to suppress if Mr. al Owhali is available, because if he is, there's  
21 no hearsay to offer and there's no hearsay to suppress.

22 Mr. al Owhali is and remains in the custody of the United  
23 States Government via the Bureau of Prisons. He is no longer at the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 administrative maximum facility, supermax as it's known. He is now  
2 housed in a lower classification at United States Prison Florence.  
3 And this is easy to do, Your Honor.

4 The commission has subpoena power through R.M.C. 703(e)(2).  
5 And certainly I can tell Your Honor from experience, if the United  
6 States Government wants an incarcerated witness to testify in a case,  
7 it happens. The United States Marshal Service makes it happen. The  
8 Bureau of Prisons makes it happen.

9 And if, in fact, Mr. al Owhali's presence were to be  
10 compelled in the National Capital Region, there have been multiple  
11 terrorism cases tried in the Eastern District of Virginia and  
12 Alexandria. Zacarias Moussaoui comes to mind as perhaps the most  
13 notable. And so certainly the Alexandria facility has the ability to  
14 hold someone like a Mr. al Owhali.

15 And so I recognize that we are going to get more into  
16 whether or not he is available as a practical matter pursuant to the  
17 language of the rule in 319, but it's a first step here because we're  
18 not moving to suppress a statement if it's not offered. And if it's  
19 not admissible, well, then he's available to come and give it  
20 himself.

21 In AE 482, we have moved to suppress Mr. al Owhali's  
22 proffered statements by the government. And, again, to couch the  
23 misstatements, it is a bit of a misnomer. These are summaries that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 an agent had made after interactions with Mr. al Owhali from 22 to 25  
2 August 1998. We've moved to suppress those pursuant to M.C.R.E. 304,  
3 10 U.S.C. 948, and the Constitution.

4 Obviously, as Captain Stinson agreed, the government bears  
5 the burden here.

6 I want to direct Your Honor's attention briefly to 10 U.S.C.  
7 948r, which then directs us to 42 U.S.C. 2000dd, which is the  
8 Detainee Treatment Act, defining cruel, inhuman, degrading treatment  
9 that prohibits obtaining statements in a manner that would violate  
10 the Fifth, Eighth, and Fourteenth Amendments to the Constitution of  
11 the United States.

12 And so I just would like to put us in the context -- I see  
13 you. I'm sorry. I will slow down.

14 I would like to frame our conversation with that authority.

15 And just a note before I leave about the statement itself.  
16 Mr. Al Owhali's statement can be found at AE 319MM, page 1528. And,  
17 again, that is the FD-302 -- or excuse me, the FBI 302 that  
18 summarizes the statements he gave between 22 and 25 August 1998.  
19 That is a 17-page statement.

20 Mr. al Nashiri's alias appears twice in that statement. One  
21 sentence on page 6, which is the sentence about the provision of the  
22 passport that Mr. al Owhali recants, and one is an identification of  
23 a photograph of Mr. al Nashiri. That's it.

27309

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1           And so that's what we're talking about here. And just a  
2 reminder to the commission in 4820, which was our motion to compel  
3 witnesses in support of the defense's motion at AE 482, the prior  
4 military judge made no findings as to Mr. al Owhali's availability.  
5 And so that is still certainly a live issue.

6           Now, Mr. al Owhali himself describes an emotional and tense  
7 atmosphere during interrogation. And interrogation begins  
8 immediately. He's captured 12 August. There is an attempted  
9 interrogation in English that does not go very far. The female  
10 interpreter that we've heard a little bit about is procured that day,  
11 and he is interrogated 12, 13, 14, 17 -- there is an identification  
12 parade -- 21, 22, 23, 24, and 25 August.

13           Now, Mr. Wekesa himself described the carnage of the bombing  
14 yesterday. And his description was difficult to listen to. And so I  
15 think that's important in thinking about what the emotions might be  
16 in the interrogation room from people who have witnessed that and  
17 people who believe they might have someone who has -- and maybe the  
18 only survivor who's got the information that they need and perhaps  
19 might be a suspect in helping them solve who committed such carnage.

20           I'll refer Your Honor back to the transcript of Agent Gaudin  
21 at 19162. Agent Gaudin says that he could overhear [REDACTED]  
22 and Mr. Owhali at times raising voices and said, quote, at times it  
23 was getting heated.



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Transcript at 22614, Agent Bongardt says that he heard a  
2 loud noise and believed that it was Agent Anticev who either threw a  
3 book or slapped a book.

4 We heard Agent Anticev Wednesday, yesterday, say that he  
5 slammed his hand on the table at times. He believed the female  
6 interpreter, who was behind the partition, flinched. He said he  
7 thought that because he heard a noise and saw the curtain rustle. He  
8 describes -- Agent Anticev describes that Agent Gaudin was with him  
9 during that incident.

10 And the question was asked to Agent Anticev, "Is that the  
11 loud noise?" And I think it would be a mistake to believe there was  
12 only one. Because at AE 344A Attachment C, that female interpreter  
13 discloses what she heard. And she said across the partition she  
14 heard so much banging that, quote, I jumped and I ran out and I was  
15 shaking.

16 And when she came back, Mr. Owali was saying to her:  
17 Sister, sister, please tell them to stop beating me.

18 She also says that the interrogators told her they were just  
19 swatting mosquitos. And she talks in her statement about hearing  
20 good-cop/bad-cop rhetoric, which is corroborated by [REDACTED]  
21 [REDACTED] expected testimony at AE 482Q.

22 Agent Gaudin described for the commission in his testimony  
23 that same incident where the female interpreter runs away. In his

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 version, he is sitting with her. The partition separates the female  
2 interpreter from the agents and Mr. al Owhali. Agent Gaudin puts  
3 himself behind the partition with the interpreter and says that he  
4 has to go bring her back and calm her down so that she can continue.

5 In AE 482Q, that's [REDACTED] testimony, he says: I  
6 slapped the table a lot. And he describes an incident that Agent  
7 Gaudin grabbed Owhali by the shoulder and [REDACTED] had to tell him to  
8 back off.

9 And so Mr. Al Owhali, in his affidavit, does describe a  
10 tense interrogation. He describes raised voices, banging, shouting.  
11 That is consistent with what we know from the evidence, and it makes  
12 logical sense, that emotions are heightened and this is a tense  
13 environment that is not the kind and quiet, colloquial chat that some  
14 of the agents, I think, hoped to portray.

15 There are over 200 people dead. At this time I think they  
16 are still collecting survivors and bodies from the street. This is a  
17 tense environment. And the fact that it is tense in the  
18 interrogation room is logical.

19 And so he's interrogated for almost two weeks straight. He  
20 is always interrogated in the presence of Kenyan CID officers. That  
21 is the transcript at 18897 and 19153. And I quote: We never spoke  
22 to him without Kenyan CID officers in the room.

23 Most of the witnesses were asked, "Well, did Mr. al Owhali



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ever make complaints? Did he ever say they were beating him?"  
2 Again, using common sense here, if your abusers are with you in the  
3 room while you're speaking to these Americans, I don't think it's  
4 illogical that you would not complain directly in front of the people  
5 who are hurting you.

6 And the other point is that he is held incommunicado for  
7 those 14 days. There is no testimony that he speaks with any family  
8 members, any friends, no counsel, and no consular representation.  
9 And so he is alone. And the only people he sees are the Americans  
10 and the Kenyans who retain custody of him.

11 We know that he was held at the airport police station for  
12 at least a couple of days. And then Agent Gaudin testified, and so  
13 did Agent Bongardt, that Mr. al Owali was held in the sub-basement  
14 of the Kenyan CID Headquarters. They describe a sleeping mat and  
15 some blankets. And Agent Gaudin actually testified that he peeked in  
16 on Mr. al Owali a couple of times. And that's transcript at 18897.

17 And so I -- I don't know what cell the Americans were being  
18 led to believe Mr. al Owali was staying in if the CID, in fact, does  
19 not have any cells at its headquarters as Mr. Wekesa recounted. But  
20 the fact remains that there are major gaps in testimony about Mr. Al  
21 Owali's conditions and his treatment other than Mr. Al Owali's  
22 allegations himself.

23 Mr. Wekesa attended one interrogation and never saw where

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. al Owhali was held. Mr. Anticev attended one interrogation,  
2 never saw where Mr. al Owhali was held.

3 And we've had testimony from the other agents that no one  
4 was guarding him at night. And certainly Americans were not staying  
5 overnight at either the Kenyan CID Headquarters or a police station.  
6 So no one knows what's happening to him overnight.

7 And I'd submit to the commission that Mr. Al Owhali's  
8 allegations of mistreatment are consistent with his allegations of  
9 mistreatment from 2000.

10 MJ [COL FITZGERALD]: And I'd like to pull his statement at AE  
11 482 Attachment C and use the document camera, not for public display,  
12 sir.

13 And so I'd just like to read the next couple of lines from  
14 where Captain Stinson stopped. He says -- this is Mr. al Owhali's  
15 2000 affidavit: At the prison, a Kenyan officer hurt my right wrist  
16 with handcuffs. This occurred a day or two before I spoke -- and I'm  
17 going to turn the page -- with Mr. Fitzgerald, who is the U.S.  
18 Attorney, during that period in the middle of captivity. I believe  
19 that my right wrist -- or excuse me -- my wrist was broken, so I  
20 suffered pain when I moved it and developed a numbness which I  
21 experience today.

22 And so no, he does not say the word "snap." But he  
23 absolutely describes the injury caused by the Kenyan CID officers

27314

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that he describes fully in the 2023 affidavit.

2 He was cleaned up. His stitches were removed prior to the  
3 identification parade where he's going to be brought into public.  
4 That's corroborated by Agent Gaudin's testimony. That's transcript  
5 at 18903.

6 His statements about the Kenyans hurting his arms are also  
7 corroborated by the female interpreter's statement that he screamed  
8 and asked for them to stop. And the FBI emphasized that his trial in  
9 Kenya would be closed in total darkness, unlike a trial in the United  
10 States. And that's corroborated by Agent Bongardt's testimony at  
11 transcript 22632.

12 And I'd like to use the document camera again.

13 This is Agent Bongardt describing his interaction with  
14 Mr. al Owali and Agent Steve Gaudin. And he says: Steve  
15 says -- and that's -- when he's speaking, he's talking about Steve  
16 Gaudin -- says there's enough evidence here for them in our belief is  
17 to convict you and no one will ever know your story. Or you can come  
18 to the United States, you can tell us your story and al Qaeda and  
19 their grievance and why this happened.

20 And the next line is key: And he -- who is  
21 Mr. al Owali -- said okay. He basically agreed.

22 And so this is Steve Gaudin telling him, hey, if we leave  
23 you here, nobody's going to know about this. And I think it's all

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the more important when you realize that "no one will ever know your  
2 story" could mean very innocently there's not going to be any media  
3 here, nobody's going to publicize this. But this occurs during the  
4 same time that this photograph is leaked to the Kenyan police -- or  
5 excuse me, to the Kenyan media and appears in the Kenyan newspaper.

6 I'm going to recall this exhibit and place down AE 480E.  
7 That's page 305.

8 This ends up on the front page of the *Daily Nation*. I'll  
9 refer Your Honor to the transcript at 19174 and '75. Both Agent  
10 Gaudin and Agent Bongardt confirm this. And Agent Bongardt notes  
11 that during this period, this is the photograph which he describes as  
12 the "hooray pose" that he saw. Neither agent took this photograph  
13 and neither agent is able to explain who took this photograph or how  
14 it got out to the media. But this is occurring at the same time as  
15 his captivity, as his continued interrogation.

16 And so couple this with "no one will ever know your story."  
17 There's clearly media presence happening here. "No one will ever  
18 know our story" means a lot more than just there's not going to be  
19 any media to cover this.

20 And so finally, Mr. al Owhali breaks on the 21st. This is  
21 five days after he begins the interrogation -- or excuse me, this is  
22 nine days later. He's been interrogated for five days. He's  
23 injured. He's not spoken to anyone except for these interrogation

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 sessions. And, again, he's told by the FBI that the only way he gets  
2 a fair trial is in the U.S. and otherwise no one's going to know your  
3 story.

4 And Steve Bongardt testified -- Agent Bongardt testified  
5 that he had concerns once that photograph had leaked to the media.  
6 His concern was -- and this is a quote -- once he had admitted to  
7 killing 200-plus Kenyans, we needed to get him out of there. He had  
8 concerns for his safety. That is the transcript at 22640.

9 And he further says: And so now we knew and the Kenyans  
10 knew that he had admitted to killing them -- this is after Mr. Owhali  
11 breaks on the 21st -- and we were concerned generally in any  
12 situation, in any scenario, I think, in any country, and at least  
13 when it's not our country and we know how we're going to protect the  
14 suspect.

15 And so he is concerned enough about leaving Mr. al Owhali in  
16 Kenyan custody in the middle of this now-confession after nine days  
17 of being held incommunicado and the fact that this has leaked into  
18 the newspaper. He is expressing concerns about leaving Mr. al Owhali  
19 in the custody of the people who, as alleged by Mr. al Owhali and  
20 corroborated by other evidence in the case, are abusing him.

21 In talking about Mr. Al Owhali's injuries, he's obviously  
22 injured in the bomb blast. We do not dispute that at all. He's  
23 taken to the hospital. He has treatment on his hands, his back, his

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 head. He's got stitches. And I do want to show this one photograph.  
2 I believe government counsel showed it as well. This is 482P. This  
3 is Attachment B and this is the photograph of Mr. Al Owhali's right  
4 wrist with the stitches. And government counsel rightly noted how  
5 swollen this wrist is.

6 And so it is undisputed that when Mr. al Owhali is booked  
7 into New York, his wrist is broken. There were X-rays taken on 4  
8 September that confirmed that. What is in question is the date of  
9 that fracture. And this is, again, at 482P Attachment B, which is  
10 the photographs of the injuries.

11 The defense expert, as stipulated, did not see any callous  
12 formation, and so dates the fracture as most likely two to three  
13 weeks old. And so that puts that fracture during the time  
14 Mr. al Owhali was in Kenyan custody.

15 The government expert did see calcification and believed the  
16 fracture to be a bit older, but to have occurred at three weeks prior  
17 at a minimum, most likely four to five. But three weeks would have  
18 been approximately 16 August while Owhali was in the custody of the  
19 Kenyans.

20 And so what is certain here is that at the hospital that  
21 Mr. al Owhali finds himself at on 12 August -- or excuse me -- after  
22 the bomb blast on the 7th of August, that he receives stitches in his  
23 right wrist, he receives stitches in his left hand, he receives

27318

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 stitches on his forehead, and he receives stitches in his back.

2           What he does not receive is any sort of dressing on this  
3 arm, a splint, a cast, which would indicate a broken arm from the  
4 bomb blast that would give us certainty as to when it happened. And  
5 we submit to you that it happened, as Mr. al Owhali described in both  
6 of his affidavits, corroborated by both of those and these photos, is  
7 that it happened at the hands of the Kenyans. And, again, also  
8 corroborated by what the female interpreter was hearing and the  
9 concerns that she had.

10           I think what the evidence shows, as presented in AE 482, is  
11 a 14-day period where Mr. al Owhali is moved around from place to  
12 place. He's not given anyone to speak with other than interrogators,  
13 both Kenyan and American. He is injured. He is being yelled at,  
14 perhaps having a water bottle thrown at him. He is being -- the  
15 table is being pounded in front of him. This is not the polite chat  
16 that agents wish to portray. And as he is about to break after nine  
17 days of interrogation, Agent Bongardt says to him, hey -- or excuse  
18 me -- Agent Gaudin says to him, as reported by Agent Bongardt: You  
19 can stay here and nobody will ever know your story. Or you can come  
20 to the U.S. and tell it.

21           And I think when combined with the injuries, with the  
22 coercive environment, with the austere conditions, and with the abuse  
23 that he is telling you that he suffered -- and the government says,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 oh, it's a self-serving declaration -- is that because he's the  
2 defendant in his own case? I mean, self-serving declaration, anybody  
3 who makes a declaration who's not subject to the crucible of  
4 cross-examination, sure. You could characterize it as that.

5 The point of this is that what he says in 2023 is  
6 corroborated by what he said in 2000. And the government makes much  
7 of, well, he had -- he was on trial for his life. He should have  
8 taken the full opportunity to give every single detail then. I don't  
9 want to speculate the conversations that he was having between his  
10 lawyer in 2000.

11 What I can tell Your Honor is that the motion to suppress  
12 his statement filed by his lawyer in 2000 dealt with the advice of  
13 rights form that Mr. al Owali received in its deficiency because it  
14 was not traditional Miranda. And, in fact, the district court agreed  
15 with Mr. Al Owali's lawyer and suppressed all statements up until 22  
16 August. And, again, on the issue of Miranda, found that the advice  
17 of rights given by the United States attorney that was present on 22  
18 August met the standard, while the statements prior to that did not.

19 And so I think it would not behoove us to speculate as to  
20 what conversations happened between Mr. al Owali and his lawyer and  
21 whatever strategy they pursued in 2000. But what Your Honor can see  
22 is where he alleges the abuse and how it happened is consistent with  
23 what he said in 2000.



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1           And if there are questions about whether or not he is  
2   telling the truth, well, there's a cure for that. And it's the  
3   crucible of cross-examination by either party. And so if that is an  
4   available option, obviously we don't need to do this, right? If his  
5   statement is not going to come in because he is available to come  
6   give it himself, then there is no attendant motion to suppress.

7           But on the issue directly before Your Honor, I think you  
8   have enough to find that Mr. Al Owhali's statement was borne of the  
9   legally prohibited conduct as described in 10 U.S.C. 948r and to  
10   suppress those statements given 22 to 25 August in 1998.

11           And if Your Honor would indulge me for just one moment.

12   **[Counsel conferred.]**

13           DC [MS. CARMON]: Thank you, sir.

14           MJ [COL FITZGERALD]: Thank you.

15           Government, you may proceed.

16           TC [CAPT STINSON]: Thank you, Your Honor. Just a few quick  
17   points to address in the defense counsel's argument.

18           Availability is a determination to be made at the time of  
19   trial, and the government agrees with the defense on that. If the  
20   witness is available, as determined by the commission, then we'll  
21   bring the witness in. If al Owhali's available, we'll bring him in.  
22   We'll put him on the stand. But there are a lot of reasons an  
23   individual might not be available at the time of trial.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1           Your Honor set a trial date -- anticipated trial date in  
2   2025, so we'll get there when we get there. The rules require us to  
3   provide notice in advance of trial if we're relying potentially on a  
4   particular rule of evidence. We provided that notice. It's fair to  
5   litigate here. They brought a motion to suppress this critical  
6   evidence, and the motion should be denied at this time.

7           Again, Your Honor, we're going to next month talk about the  
8   reliability of the statement. We'll look at 803. We'll look at the  
9   first two prongs of 304. But what's before Your Honor now is the  
10   motion to suppress based on 10 U.S.C. 948r and references to the  
11   Fifth Amendment of the United States Constitution.

12           And as the government argued in AE 481, that's black-letter  
13   law that one individual can assert the constitutional rights of  
14   another individual. And that's -- Rakas v. Illinois is a case that  
15   stands for that, and Alderman v. United States. Here there is a  
16   statutory provision that gives an individual an ability to suppress a  
17   statement, and that's 10 U.S.C. 948r, but it's only where it's  
18   torture, cruel, inhumane -- or inhuman or degrading treatment.

19           And we heard a lot about the time -- from defense counsel  
20   talked about it being emotional and intense. And, in fact, in Mr. Al  
21   Owhali's most recent declaration, he says: I had a near-death  
22   experience. I was upset.

23           A near-death experience? He drove a truck bomb to an

27322

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 embassy and killed over 200 people. And he comes in and talks about  
2 his own near-death experience and how upsetting that was. Talk about  
3 they were playing good cop and bad cop. That's not torture, cruel,  
4 inhuman, or degrading treatment. That is good investigative work.  
5 And it was critical investigative work.

6 Again, Your Honor, this was the first coordinated attack  
7 outside the United States by al Qaeda, two different countries had  
8 simultaneous attacks. The officers were attempting to get additional  
9 information, perhaps to solve this crime and to stop other attacks by  
10 an organization that had publicly stated that their goal was to kill  
11 all Americans, civilian and military, wherever they could find them.

12 So were there some tense environments? Did they play good  
13 cop/bad cop? Special Agent Anticev said he slapped the table. Is  
14 that torture, cruel, inhuman, or degrading treatment? Not even  
15 close.

16 Defense counsel talks about him being held incommunicado.  
17 Again, Your Honor, this gets back to the normal course is not a  
18 motion to suppress somebody else's statement. That's normally a  
19 personal right. The suppression of the statement was dealt most  
20 comprehensively and most thoroughly, as it should have been, in  
21 Mr. Al Owthali's criminal trial in the Southern District of New York.

22 And in relation to the allegation of incommunicado  
23 detention, we point the court to the Second Circuit opinion at 552

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 F.3d at 188 where the court talks about incommunicado doesn't mean  
2 solitary confinement, that it was a detention that was pursuant to  
3 the Kenyan law. So you can see that detail. But that was addressed  
4 in detail by the Second Circuit in Mr. Owhali's case, as it should  
5 have been.

6 In relation to the interpreter, the question of the  
7 interpreter, we point the court to Judge Duffy's decision at 691 F.  
8 Supp. 2d at 446 where he noted that the interpreter leaving the area  
9 was because of the noise and some fear that an individual who was  
10 suspected of being a member of al Qaeda was on the other side of that  
11 curtain. She feared for her safety, frankly, Your Honor.

12 You also heard about the photograph of al Owhali in the  
13 victory pose and that it leaked to the news. There is no evidence,  
14 and it would defy common sense, that al Owhali was aware of what was  
15 in the newspaper. And Special Agent Gaudin's and Special Agent  
16 Bongardt's reaction to that is not inappropriate or evidence of  
17 torture, cruel, inhuman, or degrading treatment. It is reflective of  
18 the reality, that we should move this individual back to the United  
19 States as quickly as we can.

20 And why does he want to go to the United States? Again,  
21 Your Honor, it's because he wants to be famous. He wants to be like  
22 his hero, Ramzi Yousef, and become on trial and get known as a member  
23 of al Qaeda.

27324

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1           And defense counsel made those points, that the agent said:  
2   Hey, nobody's going to hear your story. There's not going to be  
3   media here.

4           That did feed into his desire to become a hero, to become  
5   well known. That's not torture, cruel, inhuman, or degrading  
6   treatment. That is simply effective police work that led to critical  
7   and important information specific to the embassy attacks, but also  
8   much broader, specific to the -- generally to the al Qaeda  
9   organization, their methods of operation, their training, their  
10   camps, individuals involved, including Bin'Attash and including  
11   critical -- critically, Mr. Nashiri.

12           Defense counsel does cite to the 2000 affidavit and reads  
13   that obviously accurately, Your Honor. And note what  
14   the -- Mr. Owali says: At the prison Kenyan officer hurt my right  
15   wrist with handcuffs. The right wrist that's reflected in the  
16   photograph that we've shown, that was swollen from the injuries he  
17   sustained at the bomb blast.

18           And it probably would have been better if the Kenyan  
19   hospital had put a splint on that broken right wrist on August  
20   the 7th. But they might have been a little bit busy. There was just  
21   a massive bomb explosion that killed over 200 people and injured  
22   thousands of others. They stitched him up. They did care of him.  
23   Did they miss a broken wrist? That's possible. But, Your Honor,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that is not torture, cruel, inhuman, or degrading treatment.

2 Finally, Your Honor, the Stipulation of Fact regarding the  
3 X-ray and the injury, you have the testimony of the -- both the  
4 government and the defense witnesses, again, that were sort of in  
5 detail in the criminal trial in the Southern District of New York,  
6 and just refer that to your attention.

7 I think the evidence there is clear that while there is some  
8 dispute about the exact timing, as they go through that testimony it  
9 becomes clear, Your Honor, that the most likely time of that injury  
10 was August 7th at the time of the blast.

11 With that, Your Honor, if I could just have a moment to ----

12 MJ [COL FITZGERALD]: You may.

13 **[Counsel conferred.]**

14 TC [CAPT STINSON]: So, again, Your Honor, this -- our written  
15 brief at 481I does address sort of all three prongs of 304, but  
16 that's a rule of admissibility. I think because we're addressing  
17 admissibility in the May hearings, this argument was really focused  
18 on that third prong and whether it's torture, cruel, inhuman, or  
19 degrading treatment.

20 So in conclusion, Your Honor, I think there is not a  
21 credible allegation that Owhali was subjected to torture, cruel,  
22 inhuman, or degrading treatment, and substantial evidence from the  
23 government that he was well treated during that time and that

27326

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the -- and as the district and Second Circuit held in Owhali's  
2 criminal trial, the government believes the members should have the  
3 opportunity to hear this critical evidence, Your Honor.

4 MJ [COL FITZGERALD]: Thank you, sir.

5 TC [CAPT STINSON]: Thank you.

6 MJ [COL FITZGERALD]: So I believe the only thing I'm still  
7 waiting for today -- because, obviously, everything that's on the  
8 schedule is completed. The only thing I was waiting for is a little  
9 more information regarding security postures. And, again, I think we  
10 agreed that we would get the information today and if we needed to  
11 put it on the record in a classified setting -- and I don't think we  
12 can take it in any other capacity -- we would do that tomorrow as  
13 well.

14 Do we know if we have some fidelity on the information?

15 TC [CAPT STINSON]: We have some fidelity. You had mentioned  
16 that perhaps an in-chambers briefing, and that would be Lieutenant  
17 Huston, Captain Lanning, and myself, and defense counsel and we could  
18 just give you a short out-brief of what we learned during the breaks,  
19 Your Honor.

20 MJ [COL FITZGERALD]: Do you want to take that up now? We'll  
21 take a recess and convene in chambers?

22 TC [CAPT STINSON]: That makes sense to the government, Your  
23 Honor.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL FITZGERALD]: Very well. So here's what I will say:  
2 Although we're done with everything scheduled, this information would  
3 help drive the -- would help drive a decision I need to make, and I  
4 may make that decision today, and I would come back on the record and  
5 put that on the record today.

6 So I'm offering that for the public if they want to stick  
7 around a little longer. I can't tell you how long, I believe we will  
8 probably have everything resolved within this hour, prior to 1500, so  
9 about 40 minutes. I don't think I need much more than that. So I  
10 offer that.

11 We'll likely be back on the record shortly. But in the  
12 meantime, commission is in recess until such time.

13 **[The R.M.C. 803 session recessed at 1419, 4 April 2024.]**

14 **[The R.M.C. 803 session was called to order at 1456, 4 April 2024.]**

15 MJ [COL FITZGERALD]: The commission is called to order.

16 Government, if you could account for your party.

17 TC [CAPT STINSON]: All detailed members are present, Your  
18 Honor.

19 MJ [COL FITZGERALD]: Thank you.

20 Defense?

21 LDC [MR. NATALE]: Your Honor, all detailed members are  
22 present except General Thompson is not here, but all the rest are  
23 here.



UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL FITZGERALD]: All right. Thank you. And with respect  
2 to Mr. Nashiri?

3 LDC [MR. NATALE]: Mr. Nashiri is -- is in the remote location  
4 where he can attend the -- and understand what's going on. And he  
5 understands fully that he could at any time request to be brought in,  
6 and that this is all done voluntarily by Mr. Nashiri.

7 MJ [COL FITZGERALD]: Thank you. And just to be clear, you  
8 said General Thompson was not here. He was attending from the Remote  
9 Hearing Room. You're telling me he's no longer in the Remote Hearing  
10 Room?

11 LDC [MR. NATALE]: That's what -- I apologize for not being as  
12 articulate as I should.

13 MJ [COL FITZGERALD]: It's okay. And just so I'm clear, he's  
14 also not detailed to this case. I appreciate you -- it's good to  
15 have a clarity in the record, but he also is not detailed to the  
16 case.

17 LDC [MR. NATALE]: You think I would have known the terms of  
18 art by now.

19 The chief defense counsel, who was here early in the day in  
20 the RHR, is not here now.

21 MJ [COL FITZGERALD]: Thank you.

22 I held a brief 802 -- well, maybe it wasn't so brief. I  
23 held an 802 with the counsel in chambers. Not all were present.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Present were Captain Stinson, Captain Lanning, Lieutenant Huston for  
2 the government; and for the defense, Mr. Natale and Lieutenant  
3 Commander Piette. And I think that was it.

4 And we discussed the AE 563 issue regarding unshackling.  
5 And I was given some general information regarding the change in the  
6 force manning needs of the JDG and JTF commander, Colonel Kane, if I  
7 were to exercise my authority pursuant to his SOP to allow unshackled  
8 visit between Mr. Nashiri and his defense counsel tomorrow. I was  
9 made aware of that.

10 And what I ordered is that Mr. Nashiri be permitted to have  
11 an unshackled opportunity to meet with his counsel tomorrow, which is  
12 the last day we're in session. So that will happen tomorrow.

13 And for guidance, the only guidance I want to  
14 give -- because I don't want to interfere with the details or the  
15 eaches of how that gets done, but my only direction was that it  
16 should be pursuant to the practices, SOPs, TTPs used at the last  
17 session in which the defense met with Mr. Nashiri unshackled as just  
18 their general guidance. That posture worked. There were no reports  
19 that posture didn't work.

20 So that's the starting point. I can't tell Colonel Kane how  
21 to do it otherwise, if he wants to go greater or under, but that's at  
22 least a starting point for the security posture he should use. So  
23 that's my only guidance for tomorrow.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1           The other thing I brought up is in reviewing the SOP that  
2 grants me that authority is -- it's written -- at least from the  
3 commission's viewpoint, it's written with some ambiguity as to how  
4 I -- or what are the parameters in which I can exercise that  
5 authority.

6           The narrower view would be I can exercise that authority  
7 anytime I am holding hearings. The greater, expansive view of that  
8 would be anytime the defense intends to meet with their client. I  
9 can interpret the SOP, but I'd rather not interpret the SOP without  
10 at least giving Colonel Kane an opportunity to review that and  
11 determine what he believes his own SOP contemplates.

12           So I'm going to give the government an opportunity to go  
13 back, because I recognize that the attorneys representing the  
14 government here are not the legal advisors to Colonel Kane; he has  
15 his own staff for that. So that it may be a meeting with a lot of  
16 lawyers is what I presume. I won't interfere with that, but I would  
17 like that discussion to be had with Colonel Kane as how he interprets  
18 his SOP.

19           I'm fully cognizant that Colonel Kane took command just a  
20 little over a month ago. So this may be the first time he's had to  
21 address his own SOP in its application, not just from a procedural  
22 standpoint.

23           So it's something he may need to meet with his -- he gave me

27331

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

## UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 a litany of people he seeks advice from on his staff. So I'm going  
2 to give him that opportunity to do that. And what I advised the  
3 parties so that they can -- one, Mr. Natale can inform his client  
4 going forward, and so the government can project going forward,  
5 especially when it comes to manning and force posture and force  
6 strength protection issues, so that everybody can contemplate what my  
7 authorities are.

8           Here's what I believe my authorities are. I can issue an  
9 order, like I've done for tomorrow, for the May session that will  
10 start the day of hearings and conclude the day of hearings if it's  
11 the narrower view of the SOP in interpretation. However, having been  
12 a defense counsel myself, I'm aware that defense is going to want to  
13 meet with their client prior to that hearing and maybe after that  
14 hearing.

15           So what I'm curious about is what Colonel Kane thinks about  
16 my ability inside his SOP to grant an -- grant permission for the  
17 defense to meet with their client unshackled outside of the dates set  
18 for hearing. The government's position was I should defer to the JTF  
19 commander, so I'm attempting to do that.

20           I think we can all retrieve -- achieve greater results if I  
21 can stay with -- inside his SOP, because that gives predictability  
22 and easier guidance for everybody if I'm within the SOP. It does not  
23 mean I can't exercise my authority outside the SOP, as I'm aware at

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 least one other judge appears to have done that. I'm not trying to  
2 disagree with that Judge. He has other equities to weigh.

3 So that's where I stand right now. And what I said I would  
4 like to do is issue an order at least two weeks out from the next  
5 session. And that should give Colonel Kane at least some planning  
6 time, depending on what that order may say. At a minimum, he should  
7 contemplate I will issue the order for the times of the hearing. But  
8 I believe the defense is probably going to ask for at least some days  
9 before that hearing so they have an opportunity to consult with their  
10 client and their client can consult with them freely and openly.

11 So what I don't want to have is a back and forth that the  
12 shackles come out sometimes and the shackles go away sometimes under  
13 how I would like to go forward. To me the shackles would come out  
14 and be used if there was a change in conditions that warranted.

15 And what I heard in the hearing was no change in condition  
16 specific to this case, specific to this accused that would warrant  
17 the shackles being used, at least during the times I'm ordering  
18 unshackled visitation or consultation.

19 I want to also make clear that my order -- and the defense  
20 concurred with this in the 802 -- my order does not preclude the JDG  
21 or the JTF commander, Colonel Kane, if he receives a report, any  
22 SITREP of conditions that warrant him using his security posture to  
23 shackle the accused based on situations reported to him and

27333

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 consistent with maybe this SOP or whatever other SOP may apply, and  
2 the defense is aware of that as well. And I don't think that's  
3 really a change from past practices where he's been unshackled. It  
4 would -- it's incumbent upon the accused to ensure that he doesn't  
5 put himself in a position where shackles would be presented again as  
6 the means of ensuring security.

7 So make sure Colonel Kane understands that I'm not taking  
8 away his authority if he receives a change-in-conditions report.

9 So having said all that, that's my order.

10 Government, do you wish to be heard on that? Any clarity  
11 you seek?

12 TC [CAPT STINSON]: No clarity on the order itself. Just a  
13 restate that I think he likely receives change-in-condition reports  
14 every single day. So just want to ----

15 MJ [COL FITZGERALD]: Absolutely.

16 TC [CAPT STINSON]: ---- restate that. Over.

17 MJ [COL FITZGERALD]: Thank you.

18 LDC [MR. NATALE]: And, Your Honor, I understand that those  
19 change-in-condition reports, if they ever occur, would be also  
20 distributed to us from the defense.

21 MJ [COL FITZGERALD]: Thank you. And it seems we -- we're all  
22 in agreement of where we're going to be tomorrow, and then we'll take  
23 up after tomorrow at a later date.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. NATALE]: Yes, sir.

2 MJ [COL FITZGERALD]: Thank you. Anything else to take up  
3 while we're on the record?

4 TC [CAPT STINSON]: Nothing else for the record. I'm just  
5 being reminded, Your Honor, that those reports are personal to the  
6 commander, yeah. So not necessarily for sharing with either  
7 prosecution or defense counsel.

8 MJ [COL FITZGERALD]: I don't -- let me make sure I'm clear.  
9 I don't know how those reports get distributed, but the information  
10 from the reports. Obviously, if defense shows up and their client is  
11 shackled again, they're going to receive some type of information of  
12 why he's been placed in shackles and that it's outside of their  
13 control.

14 I just wanted to be clear that my -- nothing about my order  
15 says he can't use his discretion having received a report.

16 TC [CAPT STINSON]: Understood, Your Honor.

17 MJ [COL FITZGERALD]: Okay. Thank you.

18 If there's nothing else, then the commission will stand in  
19 recess until 0900 tomorrow morning.

20 **[The R.M.C. 803 session recessed at 1508, 4 April 2024.]**

21 **[END OF PAGE]**