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1 [The R.M.C. 803 session was called to order at 0919, 14 April 2026.]

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

3 Trial Counsel, again, good morning. Could you identify who
4 is here on behalf of the United States and indicate whether they are
5 located here or appearing remotely from the Remote Hearing Room in
6 the National Capital Region?

7 TC [CAPT STINSON]: Yes, Your Honor. Good morning.

8 Just before we go over the accountability script, just to
9 advise the commission that the proceedings are being transmitted via
10 CCTV to public viewing locations in the United States pursuant to the
11 commission's order, AE 028M, dated 22 November 2019, and we confirmed
12 sites are operational this morning.

13 Representing the United States here in Naval Station
14 Guantanamo Bay are all detailed counsel: Myself, Captain Tim
15 Stinson; Mr. John Wells; Lieutenant Colonel James Garrett, United
16 States Army; Commander Charles Roman, United States Navy; Major
17 Kaylyn Krzemien, United States Marine Corps; Captain Kyle Lanning,
18 United States Marine Corps; and Captain Alfonso Perez-Diaz, United
19 States Army.

20 In addition, we're assisted by paralegals and analysts from
21 the team who all have the appropriate clearances to be present in
22 these proceedings, and there are no new members of the prosecution
23 team for these proceedings.

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1 We do have a paralegal and an analyst at the RHR, Your
2 Honor, but no attorneys at the RHR for this week.

3 MJ [COL FITZGERALD]: Thank you, Captain Stinson.

4 TC [CAPT STINSON]: Thank you, Your Honor.

5 MJ [COL FITZGERALD]: Ms. Miller, good morning again.

6 And could you do the same; please account for members of the
7 defense team, including any who are appearing remotely from the
8 Remote Hearing Room?

9 LDC [MS. MILLER]: Yes, sir. All detailed counsel are before
10 Your Honor this morning at Naval Station Guantanamo Bay, including
11 myself, Allison Miller, learned counsel, for Abd al Rahim al Nashiri.

12 Our team consists of Lieutenant Colonel Joshua Nettinga,
13 United States Air Force; Commander Matthew Bartholomaus, United
14 States Navy; Ms. Katie Carmon; Ms. Jessica Manuele; Lieutenant
15 Benjamin Shaver, United States Navy. We are also assisted by
16 paralegals, analysts, and investigators here, appropriately cleared.

17 In the RHR, we have our DISO and one of our resource
18 counsel, Major Ken Hynes.

19 MJ [COL FITZGERALD]: Thank you.

20 So, Counsel, in the past -- and just as a reiteration, in
21 the past, my expectations regarding the use of the Remote Hearing
22 Room have been that the RHR is an extension of the well of this
23 courtroom. Therefore, the only personnel authorized to be in the

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1 Remote Hearing Room during hearings of this commission are those
2 individuals that would be permitted to sit in the well of this
3 courtroom. That would include members of each respective team and
4 their consultants, as well as the chiefs of OCP and MCDO.

5 Anyone who would not ordinarily be authorized to sit in the
6 well of this courtroom are not authorized to view the proceedings
7 from the Remote Hearing Room.

8 The parties understand that guidance?

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

10 MJ [COL FITZGERALD]: Thank you.

11 LDC [MS. MILLER]: Yes, Your Honor.

12 MJ [COL FITZGERALD]: I've also made it clear that I expect
13 all detailed counsel to be here in this courtroom on island and not
14 in the RHR, except in very limited circumstances, which I must
15 personally approve in advance. And we've taken care of that with
16 respect to some party members who will not be here on island for the
17 whole three-week session.

18 In this case, I approved the attendance of everyone from
19 both parties who are attending from the Remote Hearing Room at a
20 later date. Is that accurate still?

21 TC [CAPT STINSON]: That is accurate, Your Honor, yes.

22 MJ [COL FITZGERALD]: Defense?

23 LDC [MS. MILLER]: Yes, sir.

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

2 I will note that Mr. Nashiri is present today.

3 Good morning, Mr. Nashiri. I have a couple monitors between
4 us, so sometimes I may -- you're fine where you're at, but you may
5 see me looking just to make sure you're there and you're not
6 wanting -- oh, I'm sorry. I have to wait.

7 So, Mr. Nashiri, you notice there's a -- I have a monitor on
8 my desk, and you have a monitor on your desk. So in order for me to
9 see you, sometimes I may have to look around the monitor. I'm not
10 looking for anything. I just want to make sure I see you there and I
11 don't see any concerns.

12 So going forward, I want to advise you, as I've done before,
13 of your right to be present and to waive said presence. You have the
14 right to be present during all sessions of the commission. If you
15 request to absent yourself from any session, such absence must be
16 voluntary and of your own freewill.

17 Your voluntary absence from any session of the commission is
18 an unequivocal waiver of the right to be present during that session.
19 Your absence from any session may negatively affect the presentation
20 of the defense in your case. Your failure to meet with and cooperate
21 with your defense counsel may also negatively affect the presentation
22 of your case.

23 Under certain circumstances, your attendance at a session

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1 may be required regardless of your personal desire not to be present.
2 Regardless of your voluntary waiver to attend a particular session of
3 the commission, you have the right at any time to decide to attend
4 any subsequent session.

5 If you decide not to attend the morning session but wish to
6 attend the afternoon session, you must notify the guard force of your
7 desires. Assuming there is enough time to arrange transportation,
8 you will then be permitted to attend the afternoon session.

9 You will be informed of the time and date of each commission
10 session prior to the session to afford you the opportunity to decide
11 whether you wish to attend that session.

12 Now, Mr. Nashiri, do you understand what I have just
13 explained to you?

14 ACC [MR. AL NASHIRI]: Yes, I understand.

15 MJ [COL FITZGERALD]: And, Mr. Nashiri, I didn't check this
16 morning, but did you have an opportunity to speak with your counsel
17 before we begin today?

18 ACC [MR. AL NASHIRI]: Yes.

19 MJ [COL FITZGERALD]: All right. Thank you.

20 And I didn't check with you, Ms. Miller, but -- or anybody
21 on your team. We had talked about time in the morning for you to
22 meet with Mr. Nashiri. Has all that -- did all of that work out
23 today? Any issues?

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1 LDC [MS. MILLER]: It did, sir. No issues.

2 MJ [COL FITZGERALD]: Okay. Thanks. Please let me know if
3 somehow there's a change in circumstances that affects that.

4 LDC [MS. MILLER]: I think you can be sure of that, sir.

5 MJ [COL FITZGERALD]: The commission conducted an R.C.M. -- or
6 R.M.C. 802 session yesterday, 13 April 2026, in this courtroom and
7 all the parties were present.

8 At the time we discussed the following matters that I'll
9 just quickly summarize for the record.

10 We talked about which members of the prosecution and defense
11 team will be present here or at the Remote Hearing Room over the next
12 three weeks.

13 We discussed the defense motion to continue, which we are
14 taking up today.

15 We discussed the defense motion to compel witnesses for
16 merits and sentencing.

17 We discussed the Appellate Exhibit 679V dealing with the
18 defense hearsay, as well as the status of the witnesses for that
19 motion and when we would likely take that motion up.

20 We touched on the 505(h) hearing and how long that might
21 take.

22 We discussed Appellate Exhibit 690 and the possibility of
23 having the convening authority testify during this session. And as

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1 I've been advised today, she's been made aware of the date that we
2 currently have set in the event that she is called as a witness.

3 And we discussed which sessions might need to be closed, and
4 for now it looks like maybe just part of Appellate Exhibit 680.

5 Also, I explained that I will be asking a number of voir
6 dire questions that the parties put down in their own proposed voir
7 dire questions that they submitted to the commission for
8 consideration.

9 And I also explained to the parties that they now have
10 Questionnaire Number 2, which also may contain questions in their
11 proposed voir dire. I didn't say yesterday, so one thing I'd add to
12 that is Questionnaire Number 2 was derived from the questions that
13 were provided when the parties submitted their joint questionnaire.

14 I didn't try to be creative and come up with my own
15 questions. I just wanted to take the questions you wanted to pose to
16 them and put them in a format they could answer. I may have changed
17 them around, I may have merged both the government question and the
18 defense question that seemed to get at the same thing.

19 So I would just ask the parties when you're looking at your
20 plan for your voir dire, to take that under consideration where those
21 questions came from. You're certainly free to tell me that was not a
22 question you were trying to get after something and you need to
23 rephrase it in a different way, but I just want to let you know how I

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1 generated Questionnaire Number 2.

2 We went through that I have two new support team attorneys
3 on my case.

4 And then the government had some prospective questions about
5 how panel members might be selected. And we didn't go into details.
6 I essentially said we were at an interim operation mode right now.
7 I'm waiting for some clarity on some questions I had and that we
8 would have an opportunity at a later session so the parties for their
9 cognizance would be prepared to meet the members as they came in for
10 assembly. Obviously, there's too many for this particular courtroom,
11 so I discussed this briefly, the expectations. And I fielded a
12 couple questions. I think I said I'd essentially take those under
13 guidance, again, because I'm waiting for the logistics folks to give
14 me some more information.

15 My intent is that we're very transparent and you're not
16 operating in the dark or with unknowns. So please be patient with
17 your questions while I'm waiting on some answers, but we will have
18 ample opportunity to discuss that at a later date.

19 Does either party have anything to add to that summary of
20 the 802 session?

21 Government first.

22 TC [CAPT STINSON]: Your Honor, just two minor additions
23 there. I know the 680 potential to be closed.

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1 There's also the 505(h). I think we have that as closed on
2 Monday, just to -- I know we'll advise the public when we get close
3 to that time that that will likely need to be in closed.

4 And then we also discussed the possibility that during these
5 sessions, a member of the prosecution team or two may ask to be
6 excused from some of the arguments while they're working on later
7 arguments during the week and tend to sort of those type of matters.

8 And we do have a request for today for Commander Roman and
9 Lieutenant Colonel Garrett to be excused after the first sessions,
10 Your Honor -- the first argument.

11 MJ [COL FITZGERALD]: After the motion to continue? Or when
12 you say session ----

13 TC [CAPT STINSON]: That's correct, Your Honor. I apologize.
14 After the first argument, the motion to continue.

15 MJ [COL FITZGERALD]: Okay. Thanks. Will you just remind me
16 at that time ----

17 TC [CAPT STINSON]: Absolutely.

18 MJ [COL FITZGERALD]: ---- when you say Colonel Garrett and
19 Commander Roman?

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

21 MJ [COL FITZGERALD]: Okay, thank you. Just remind me. And
22 thank you for that.

23 Anything else from the defense?

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1 LDC [MS. MILLER]: No, sir.

2 MJ [COL FITZGERALD]: Okay. Very well.

3 So the very first thing we are going to take up this morning
4 is the session regarding defense motion to continue, Appellate
5 Exhibit 679Z.

6 Are the parties ready -- are the parties prepared to
7 proceed? Who has this for the government?

8 TC [CAPT STINSON]: I have it for the government, Your Honor.
9 Yes, and we're prepared.

10 LDC [MS. MILLER]: I have it for the defense, and I'm ready,
11 sir.

12 MJ [COL FITZGERALD]: Ms. Miller, thank you.

13 And for the government?

14 TC [CAPT STINSON]: I'm going to argue it, yes, Your Honor.

15 MJ [COL FITZGERALD]: Okay. Am I to understand correctly I
16 have everything from the briefs, no witnesses are being called?

17 LDC [MS. MILLER]: That's correct.

18 TC [CAPT STINSON]: The government doesn't intend to call any
19 witnesses, Your Honor.

20 MJ [COL FITZGERALD]: Very well.

21 So I have 679Z and I have 679JJ, the motion and the
22 response. To help the commission understand where the parties are
23 going, what I'm interested in to focus you is I'm interested in -- it

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1 appears there's multiple bases. So if you could take them one by
2 one.

3 Well, let me ask the parties. Would you like to take up one
4 basis and then allow the government to respond?

5 Or is it your intent, Defense, when you prepared, you were
6 going to do the whole presentation and the government could respond?

7 LDC [MS. MILLER]: Two things. One, we also filed a reply at
8 679MM ----

9 MJ [COL FITZGERALD]: I'm sorry ----

10 LDC [MS. MILLER]: ---- I just wanted to make sure the
11 commission had that as well. It was my intention to do the full
12 presentation. I was expecting, frankly, questions from Your Honor,
13 given that the only thing that Your Honor scheduled for today was the
14 motion to continue. I assumed there were maybe areas that you were
15 hoping we would address. And so I can handle it in any manner the
16 commission prefers.

17 MJ [COL FITZGERALD]: Okay.

18 LDC [MS. MILLER]: But my presentation is meant to be a
19 seamless one.

20 MJ [COL FITZGERALD]: Okay. Very well. And then if that's
21 how you prepared, then I'll do that. And that's helpful because I
22 wanted to know where I should interject with my questions.

23 LDC [MS. MILLER]: Whenever you want, sir.

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1 MJ [COL FITZGERALD]: Thanks.

2 So, Government, that's how you prepared as well?

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

4 MJ [COL FITZGERALD]: Okay. Then we'll proceed that way.

5 And, again, I remind the parties that, you know, I -- the
6 analysis I will do will essentially apply the Miller factors. So
7 keep that in mind that some of my questions will be: How are you
8 applying the various Miller factors to that particular issue? And
9 that's why, if you're going to present at all, each basis should be
10 able to touch on all the Miller factors independently.

11 Does that make sense?

12 LDC [MS. MILLER]: Yes, sir.

13 MJ [COL FITZGERALD]: I wouldn't expect a ruling that says
14 based on all these reasons I'm going to grant a continuance. It may
15 be based on some in part, some I may deny in part. That's why it's
16 helpful to understand, and I think beneficial for you to explain the
17 Miller factors, and all of them, where you think they apply.

18 Okay. Then we are ready to proceed.

19 Ms. Miller, the podium is yours.

20 LDC [MS. MILLER]: Thank you, sir.

21 We did file robust pleadings in AE 679Z, as well as the
22 reply at AE 679MM. And so certainly I'm going to rely on our written
23 pleading and I do not intend to relitigate or reargue everything that

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1 the commission already has before it.

2 And so we did in 679Z address the Miller factors
3 specifically. But I will touch on those as we discuss the particular
4 bases that I'd like to draw Your Honor's attention to.

5 And I think it's helpful for the commission to have an
6 understanding of what the defense's 2025 looked like to sort of set
7 the stage for when I propose that these are bases that rise to the
8 level of good cause for Your Honor to grant what I am considering to
9 be a modest continuance.

10 And, candidly, we had contemplated asking for six months,
11 but that would land us at December 7th. And so a six-month
12 continuance with a trial starting at December -- on 7 December didn't
13 seem prudent or -- I don't know what the right word is -- cost
14 effective. And so that's where the seven months came into play in
15 asking the court to continue the 1 June trial date to 11
16 January 2027.

17 I don't think I need to remind the commission, but I am
18 going to rely on the standard for continuance pretty consistently as
19 I move through this presentation, that the Military Commissions Act
20 of 2009 provides that military judges may grant continuances, and I
21 quote, for reasonable cause to any party for such time and as often
22 as may appear to be just. And so what I am asking of this commission
23 this morning I believe to be both right and just.

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1 But as we sort of set the stage for the argument, in
2 2025 -- and, again, the government pointed out that we had filed 18
3 prior motions for abatement or continuance or the like. And so the
4 commission is certainly aware of some of the struggles that the
5 defense team faced last year.

6 But what I really want to focus on is we had commission
7 hearings here at Naval Station Guantanamo Bay in January, March, May,
8 November, and December.

9 But then there are things that happened that the commission
10 is, of course, not aware of. There was a team of us that came down
11 here, including myself, to visit Mr. Al Nashiri in April of 2025.

12 In July of 2025, we had two sets of teams that came down to
13 see Mr. al Nashiri, one in the middle of July, and then I and some of
14 our support staff came at the end of July. We also had a team that
15 came down here to visit Mr. Al Nashiri at the end of August, the last
16 week of August in 2025. And then I got sick, which is obviously not
17 unbeknownst to this commission, in September of 2025. And I know
18 we've taken testimony -- extensive testimony on my illness, but I
19 can't underscore enough how me being sidelined from September to
20 December of 2025, how that affected the forward progress of this case
21 and affected the team.

22 And obviously, I was not able to visit with Mr. al Nashiri
23 from that visit in August, which I believe the last time I saw him

1 was August 27th until January of 2026.

2 While -- so we were ostensibly here every month, if not
3 multiple times in a month in July. And so in between those visits
4 down here, which are -- they're cumbersome, right? They're not a
5 quick visit. It's not a pop in to see your client for three hours.
6 It is, at the very least, a week-long excursion, if not longer, and
7 just everything that goes into the travel here certainly the
8 commission is aware of. But while we were doing those things, the
9 commission had also issued AE 679 with deadlines.

10 And so, in addition to our responsibility to Mr. al Nashiri
11 in maintaining attorney-client contact, we were trying to fulfill our
12 obligations to this court and meet all of those deadlines.

13 And in all candor, I believe we have filed something every
14 time the commission has set a deadline for us to have filed
15 something, or we've requested extension and complied with the
16 extension if leave was granted. But I don't feel confident -- so,
17 for instance, the commission had a motion deadline in October that
18 Your Honor graciously granted, due to my illness, to two separate
19 deadlines, 20 October and 27 October.

20 And I can't say with confidence that I feel like all of the
21 motions that need to be litigated in this case have been filed, and
22 that's because the vast majority of this team has not reviewed the
23 material associated with this case in any kind of completeness.

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1 We are a team and we are -- I'm not suggesting that every
2 member of this team is going to know 100 percent of this case. But
3 what has happened is, again, in a -- in an earnest effort to try to
4 meet these commission's -- meet Your Honor's deadlines, we have very
5 much siloed; like, this person's going to handle this issue. This
6 person's going to handle this issue. This person's going to handle
7 this issue.

8 And so certainly, I think the court has had the benefit of
9 some articulate arguments on behalf of Mr. al Nashiri. And, you
10 know, for example, certainly Lieutenant Shaver and Ms. Manuele know a
11 great deal about the CSRT because they are litigating those motions
12 before Your Honor. I know very little about the CSRT, and that's not
13 how a team is supposed to work. The purpose of having a team is so
14 that we can all have sort of an equal playing field as far as
15 knowledge so that we can bounce ideas back and forth off of each
16 other. As far as developing strategy for this team moving forward, I
17 don't have the information to do so.

18 And when I was before Your Honor in February of last year
19 asking to continue the 6 October trial date of 2025, I was asking for
20 some uninterrupted time where we could simply learn the facts of this
21 case. And so that's why I wanted to set the stage for Your Honor
22 where we're at, is that we haven't had that. And I don't think ----

23 MJ [COL FITZGERALD]: Counsel?

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1 LDC [MS. MILLER]: Yes, sir.

2 MJ [COL FITZGERALD]: And you can correct me if I'm wrong, but
3 when you say you didn't have uninterrupted time, I believe in May I
4 canceled all the sessions between May and November.

5 LDC [MS. MILLER]: That's true, sir, and that ----

6 MJ [COL FITZGERALD]: And then I specifically said to allow
7 you time where I am not going to interfere so you can focus on your
8 case because now I've given you the deadlines.

9 So when you say you had no uninterrupted time, I expressly
10 gave you uninterrupted time. Am I -- is that not accurate?

11 LDC [MS. MILLER]: Well, I would disagree, sir, respectfully,
12 of course. And that's why I tried to set the stage.

13 We were here in May for hearings. Then we had -- I don't
14 recall June, to be honest. We had two teams come down in July,
15 another team come down in August. And then I would say we had the
16 most substantial deadline thus far. We had to file all motions,
17 including motions in limine, by October.

18 And so we are meeting ----

19 MJ [COL FITZGERALD]: And maybe we just disagree what -- what
20 I meant by uninterrupted time. I canceled all the hearings, so I
21 don't know what neither you nor the prosecution did with that time.
22 That's up to you as learned counsel and your counsel to decide what
23 you want to use it.

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1 But uninterrupted time to me meant the court would not
2 interfere with your time other than here's your deadlines, go
3 forward.

4 What do you think uninterrupted time meant?

5 LDC [MS. MILLER]: I don't disagree with what the court has
6 just asserted, that you canceled hearings and did not require us to
7 be before the commission for hearings.

8 But to meet our obligations to Mr. al Nashiri, to maintain
9 that attorney-client relationship with the -- which the commission
10 has certainly heard substantial testimony about, and also to meet
11 those deadlines, what I'm telling you is that we are reacting to the
12 next thing in front of us.

13 And so instead of sitting down and saying -- like, what I
14 would typically do in a case, I would pull up the indictment or the
15 referral, read the statute -- what statutes is my client charged
16 with. Then I would read the statute book to have a better
17 understanding. Then I would pull up any pattern jury instructions.
18 Then I would do the research into decisional law that's already
19 precedent on the matters.

20 And so I think it's important for the commission to note
21 that we're trying to learn -- and, again, I think the commission is
22 aware of this. With exception of Ms. Carmon and Lieutenant Colonel
23 Nettinga, myself, Commander Bartholomaus, and Lieutenant Shaver were

1 all detailed to this commission in October of 2024 and first appeared
2 before Your Honor in December of 2024. And Ms. Manuele first
3 appeared before Your Honor in January of 2025. So for -- of the six
4 of us currently detailed to this case as litigators, at least half
5 are relatively new to the case.

6 And so what I'm telling the commission is that when I say we
7 didn't have uninterrupted time, I need time where there aren't
8 deadlines that are looming in front of us, massive deadlines.
9 Like -- and that's where now any motion, as I'm reviewing material or
10 any member of our team is reviewing material, and comes across
11 something that's, like, oh, man, I wish I had thought of that before
12 the 27 October deadline, we now have to file a motion for leave -- an
13 MFLOOT, a motion for leave to file a motion out of
14 time -- right? -- because we didn't comply with the commission's
15 motion deadline. And the reality is we hadn't come anywhere close,
16 nor have we now come anywhere close to reviewing even a fraction of
17 the volume of material that exists in this case.

18 And so I mean, we are just shy of about a half million pages
19 of discovery alone, excluding transcripts, pleadings, et cetera.

20 And so to have enough of an understanding for each of us to
21 be able to have a conversation and say, okay, is it a good -- some of
22 these motions were filed before some of us were even members of this
23 team. And we have -- I, as learned counsel, have elected to proceed

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1 with litigating those motions -- excuse me, sir -- and I don't even
2 know if that was the right call because I don't know enough of the
3 material to be designing any kind of my own strategic sort of plan.

4 I am relying on the work of my predecessors and trusting
5 that it is correct. And it may be. It also may not be.

6 And so I know we're going to discuss Ms. Carmon's motion to
7 withdraw, as well as part of this. And I wanted to highlight
8 Ms. Carmon in particular because I don't think it is unbeknownst to
9 anyone in this courtroom that she is very much a leadership -- very
10 much the leadership of this team. She has seemingly an encyclopedic
11 knowledge of this case. I would not disagree that she has the
12 benefit of six years representing Mr. al Nashiri.

13 But why I think Ms. Carmon in particular as an example is
14 important for the commission to continue is that Ms. Carmon began her
15 work on Mr. al Nashiri's case during COVID. And so there were no
16 hearings before this commission. It was one week in January of 2020,
17 and the next set of hearings on Mr. al Nashiri's case were not until
18 September of 2021. And that was related to the microphone
19 litigation. So I would argue an extrinsic matter.

20 And then I believe Judge Acosta set deadlines for the
21 defense team after that. And the motions or motion related to the
22 suppression -- any motions to suppress Mr. al Nashiri's statements
23 were due in March of 2022.

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1 And so Ms. Carmon enjoyed the benefit -- not that I'm in any
2 way suggesting the pandemic was a good thing -- but Ms. Carmon
3 enjoyed the benefit of being able to learn this case for a period of
4 approximately 18 months with no deadlines from the commission and no
5 hearings.

6 And so when I say "uninterrupted time," again, I very much
7 appreciate the commission taking a break and saying do what you need
8 with this time. It was approximately three, four months, but we are
9 still meeting the commission's deadlines.

10 And so, candidly, I feel like the only thing I am doing is
11 addressing the thing that is directly in front of me. There is
12 no -- it is only prospective. The commission has given me a deadline
13 to challenge the preselection process of the member panel. I'm going
14 to address that because that's due 17 March of 2026.

15 And so there is not -- we have not been given the time to
16 learn this material. And certainly, if the commission were to grant
17 Ms. Carmon's motion to withdraw, that is a tremendous loss of
18 institutional knowledge that is going to take us some time to catch
19 up with.

20 Lieutenant Colonel Nettinga is doing his best, but he needs
21 a team. And that's where I'm candidly telling this commission that
22 the rest of us have not had the time to learn the material.

23 Okay. It was brought to my attention -- and this scared the

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1 heck out of me -- is during an 802 talking about the motions that we
2 had filed by the 27 October -- either the 20 or 27 October deadline,
3 Your Honor said -- and I'm paraphrasing, but something to the extent
4 of, frankly, I expected you to file more motions.

5 And I could feel like a chill go down my spine because there
6 was certainly some expectation from the commission that I haven't
7 fulfilled. And frankly, I believe there are a wealth of additional
8 motions that probably need be filed in this case, and I haven't had
9 the opportunity to research those issues.

10 One thing in particular that certainly hasn't been litigated
11 fully that is one of the bases for our motion to continue, and
12 something -- I would like to just briefly touch on the fact that most
13 of the things I'm going to address are things that are beyond the
14 defense's control.

15 And so things for which I am at fault, I will apologize and
16 I will do my best to be better in the future. But many of the things
17 that I am going to address are things that are beyond the defense's
18 control.

19 And so one of the bases is the fact that we have recently
20 had a psychologist, a Psy.D., and a psychiatrist ----

21 MJ [COL FITZGERALD]: I'm sorry, you said ----

22 LDC [MS. MILLER]: Psy.D. versus a Ph.D.

23 MJ [COL FITZGERALD]: Dr. -- okay.

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1 LDC [MS. MILLER]: And so we had -- we do -- I just want to be
2 clear. We do have an M.D., an internist. I believe the commission
3 has heard testimony or certainly is aware of Dr. Sondra Crosby
4 working on the case. And there's also a Ph.D. who has been working
5 on the case.

6 But I think kind of fundamentally doing capital defense or
7 capital work generally, the court and the prosecution and the defense
8 is expected to have a clinical or forensic psychologist, who in this
9 case is a Psy.D., as well as a psychiatrist. I would say that is
10 standard of care.

11 Not that it happens in 100 percent of the cases, but very
12 nearly 100 percent of capital cases you have a forensic psychologist
13 and a psychiatrist working on the case. Dr. Terry Kupers, M.D., is
14 our psychiatrist and Dr. Heather Holmes, Psy.D., is our psychologist.
15 And both -- Dr. Kupers was appointed in August of 2025, Dr. Holmes in
16 November of 2025.

17 Dr. Kupers has been positively adjudicated for a security
18 clearance at this point. He resides in California. He is scheduled
19 to be read on -- he has to come to the National Capital Region to be
20 read on, of course, 23 April.

21 And so I can't even begin to share material with him that is
22 of a classified nature until he has that read-on 23 April.

23 MJ [COL FITZGERALD]: When was he -- his adjudication

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1 completed?

2 LDC [MS. MILLER]: His adjudication? Recently, sir.

3 MJ [COL FITZGERALD]: I may have that. I don't know if it was
4 in your brief or not, that's why I'm just inquiring.

5 LDC [MS. MILLER]: It's certainly in the weekly notices that
6 we've been providing the commission.

7 MJ [COL FITZGERALD]: Was it in March?

8 LDC [MS. MILLER]: I believe so, sir. And so we have been
9 working diligently -- I believe it took six months for his clearance
10 to be adjudicated affirmatively, and then we've been working
11 diligently to do the indoctrination process -- to get through the
12 indoctrination process so that he can begin to review material.

13 And that's a whole separate bases, is that the delay from
14 the convening authority, but I'm going to try to stay somewhat linear
15 before I jump around.

16 MJ [COL FITZGERALD]: You're okay. And I'm trying not to
17 interrupt, but one more point.

18 You say he's going to be read on on 23 April?

19 LDC [MS. MILLER]: Yes, sir.

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

21 LDC [MS. MILLER]: And so certainly -- and that's what -- I
22 don't know, again, if you already know this, please stop me. He will
23 be read on as far as a TS/SCI clearance. We cannot apply for him to

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1 be read on to national programs until he's been read on to the
2 TS/SCI.

3 MJ [COL FITZGERALD]: Will those happen in conjunction?

4 LDC [MS. MILLER]: No, sir. So, like, we -- and that's been
5 the case for all of us. So you go and do the indoctrination process
6 to have the TS/SCI. And then once that's completed, then an
7 application can be submitted for the additional read-on to national
8 programs. And so ----

9 MJ [COL FITZGERALD]: Have you been given a timeline for that?

10 LDC [MS. MILLER]: I have not, sir.

11 MJ [COL FITZGERALD]: How long -- I think you referenced you
12 all went through that?

13 LDC [MS. MILLER]: Yes, sir.

14 MJ [COL FITZGERALD]: What was that ----

15 LDC [MS. MILLER]: It's not ----

16 MJ [COL FITZGERALD]: ---- timeline?

17 LDC [MS. MILLER]: ---- usually lengthy.

18 MJ [COL FITZGERALD]: Days? Weeks? Months?

19 LDC [MS. MILLER]: A week.

20 MJ [COL FITZGERALD]: Okay. Is he going to stay ----

21 LDC [MS. MILLER]: He was -- no, sir.

22 MJ [COL FITZGERALD]: Okay.

23 LDC [MS. MILLER]: I mean, his travel is scheduled in 22

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1 April, out 23 April, because, again, these are things beyond our
2 control. And so I could ask him to stay here indefinitely in the
3 hopes that the national program's read-on happens in the near future,
4 but that's beyond -- that's beyond my control. If I could control
5 that ----

6 MJ [COL FITZGERALD]: Sure.

7 LDC [MS. MILLER]: ---- I would say, Dr. Kupers, I need you to
8 here -- to stay here a week.

9 MJ [COL FITZGERALD]: Is he ready, willing, and able to come
10 back immediately once he is cleared to come get read on to the
11 national program?

12 LDC [MS. MILLER]: That is certainly the hope.

13 MJ [COL FITZGERALD]: From whose end?

14 LDC [MS. MILLER]: Mine.

15 MJ [COL FITZGERALD]: Okay. Have you informed the good doctor
16 of your need for a sense of urgency and maybe this commission's own
17 sense of urgency?

18 LDC [MS. MILLER]: Of course, sir. I think the commission can
19 appreciate, though, that, like, he is not under any obligation to
20 only be working on this ----

21 MJ [COL FITZGERALD]: Sure.

22 LDC [MS. MILLER]: ---- commission's case, and so ----

23 MJ [COL FITZGERALD]: But he is under obligation as a member

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1 of your team to work consistent with my pretrial order for deadlines
2 and dates.

3 LDC [MS. MILLER]: Understood. And we have certainly made him
4 aware of all of the deadlines and dates, but at this point we're just
5 up against it. So let's assume he gets read on 23 April, and then he
6 comes back 30 April for the national program's read-on. We then need
7 to -- he's -- we're still going to have to apply for an APACS
8 clearance for him to travel to Guantanamo Bay, which we are in the
9 process of trying to do as much front-loading as we can, but some of
10 these things, again, are dependent upon him possessing the requisite
11 clearance specifically to see Mr. al Nashiri. But I can't -- like,
12 it's not like he can start reviewing material now, right before he
13 comes down to see Mr. al Nashiri, because most of the material
14 related specifically to what they're calling behavioral health
15 records are classified.

16 And so he is -- and I've never had a doctor in any case meet
17 a client blind. And so there is certainly an expectation that
18 Dr. Kupers and Dr. Holmes eventually would review at least a chunk of
19 the material before coming in to see Mr. al Nashiri. It's not a
20 fruitful visit if they come in and say, like, hi, I know nothing
21 about -- I mean, you know, they certainly have some generalities, but
22 I, you know, know nothing about you psychologically. Let's chat.
23 That's not a good use of anyone's time.

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1 And so I've also never presented a mental health provider to
2 a member panel asking to decide whether my client should live or die
3 who's only met my client once.

4 And so it would certainly be my intention for all of the
5 mental health providers to see Mr. al Nashiri a multitude of times.
6 Mental health ebbs and flows. You could -- like, we have had this
7 conversation. This may be a good day; this may be a bad day.

8 And so while -- if Dr. Kupers is on island for a week, he
9 could certainly see Mr. al Nashiri for more than one day. My
10 intention would be to have Dr. Kupers and Dr. Holmes see
11 Mr. al Nashiri at different points in time. And I certainly wouldn't
12 want them both to be seeing him at the same times. Again,
13 that -- that's ----

14 MJ [COL FITZGERALD]: Let me ask you this. You've probably
15 made Dr. Kupers aware of your -- this motion to continue and that
16 you're trying to seek an enlargement of time before we start trial.
17 Is he aware of that?

18 LDC [MS. MILLER]: He is.

19 MJ [COL FITZGERALD]: And he'll be able to conduct his work,
20 including the read-on and everything else, to -- within that time
21 frame? Has he given you any indication?

22 LDC [MS. MILLER]: Oh, by -- so if the commission were to
23 grant our request for a continuance, by 11 January, I have -- of

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1 2027, I have no reason to think that he would not be able to be -- to
2 complete his work by then.

3 MJ [COL FITZGERALD]: Has he given you any reason that he
4 can't prioritize this, based on the deadlines?

5 LDC [MS. MILLER]: No. He has given me reason now to say I
6 have things that have kind of come to a head right now, not knowing
7 when his adjudication, his security clearance adjudication, was going
8 to come to pass, right?

9 And so there are things that he is doing now that present a
10 conflict that we are trying to deconflict to make this commission a
11 priority. He has given me no indication that he could not prioritize
12 this case and this commission for an 11 January 2027 trial.

13 MJ [COL FITZGERALD]: All right. And we haven't talked much
14 about -- is it Dr. Holmes?

15 LDC [MS. MILLER]: Yes.

16 MJ [COL FITZGERALD]: Okay. With respect to Dr. Holmes, she
17 has the same information, too?

18 LDC [MS. MILLER]: Yes. Yes, sir.

19 MJ [COL FITZGERALD]: Okay.

20 LDC [MS. MILLER]: Yes, sir. I -- and Dr. Holmes and
21 Dr. Kupers are experts who I have worked with in the past, and so,
22 yes, I'm communicating with them. And when they were hired, they
23 were hired with the understanding that Your Honor had set a 1

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1 June 2026 trial date and seemed very serious about it.

2 MJ [COL FITZGERALD]: Okay.

3 LDC [MS. MILLER]: Again, things beyond our control.

4 Dr. Holmes very much thought she had submitted her SF 86, and I
5 don't -- we -- she was appointed in November. The information I have
6 is that they did not reach out to Dr. Holmes to complete her SF 86
7 until January of 2026. She very much believed that she had submitted
8 her SF 86, and I think as evidence of that, and I can certainly
9 provide it to the commission and the government if either party would
10 like, she routinely would send e-mails to who I'm going to call her
11 handler, the person that was tasked with having her do these things,
12 saying where do I submit my fingerprints?

13 MJ [COL FITZGERALD]: Is that a MCDO handler or ----

14 LDC [MS. MILLER]: No.

15 MJ [COL FITZGERALD]: ---- an outside agency handler?

16 LDC [MS. MILLER]: Outside. So the Department of
17 Counter -- The Department of Counterintelligence, excuse me, does the
18 investigation. I don't know if it was WHS or who reaches out
19 initially to say ----

20 MJ [COL FITZGERALD]: Well, that's okay. I just
21 wanted -- when you said "handler," I didn't know if you meant
22 somebody within your organization who was onboarding her ----

23 LDC [MS. MILLER]: No, sir.

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1 MJ [COL FITZGERALD]: ---- or somebody outside the agency.

2 Now I understand.

3 LDC [MS. MILLER]: Outside. That's the problem, and it's a
4 black void for us as far as -- I mean, Mr. Roy, our DISO who's in the
5 RHR, poor Mr. Roy, I'm constantly saying, can you give me an update,
6 and he's, like, I can ask, and they're going to give us the same
7 information, the investigation is ongoing, which has consistently
8 been the response that Mr. Roy has gotten when he makes those asks at
9 my request. But we are, again, and doing that weekly to comply with
10 the commission's directive of supplying weekly notice as to where we
11 are.

12 MJ [COL FITZGERALD]: Okay.

13 LDC [MS. MILLER]: And so I think it was but for a button
14 push, the SF 86 from Dr. Holmes was not submitted in January. Again,
15 I would argue that she very much is trying to do things as diligently
16 and expeditiously. For those of us that don't routinely work for the
17 federal government or the military, a lot of this is very new.

18 But she very much did believe that she had submitted the
19 SF 86 as soon as it was provided to her. She was in constant
20 communication with her handler saying, okay, I understand the next
21 step to be I need to submit my fingerprints. Where do I do that?
22 And she wasn't getting any response.

23 And so I have e-mails from her that she has provided,

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1 constantly e-mailing this person to say, okay, what do I do next?
2 I've been told there's urgency. Where do I submit my fingerprints?
3 And there was nothing responsive saying we don't even have your SF 86
4 for you to go submit your fingerprints anywhere. I think until the
5 government actually provided notice of that in one of those weekly
6 updates that her SF 86 -- trial counsel, I think, mentioned in court
7 that she hadn't submitted it, and that was news to me at that point.
8 And so we are doing everything in our power to diligently move these
9 people through the system, but it is entirely controlled by the
10 government.

11 And I don't mean this prosecution team, certainly. I mean
12 the Government, big G.

13 And that's what -- one of the notes that's also been
14 provided to bring the commission's attention to is that one of the
15 things we don't control is travel to this island. And I've listened
16 to some of the learned counsel from the 9/11 Commission, Mr. Ruiz and
17 Mr. Connell, who have been on those respective commissions 15 and 16
18 years, talk about how the travel to this island has digressed over
19 time. Right? So there used to be these type of flights available
20 with this sort of frequency.

21 And so we are hoping that Dr. Kupers can come down here in
22 May. Certainly, we have the travel for the commission session the
23 16th through the 23rd, but I need Mr. al Nashiri in court as much as

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1 he's physically able to do so during that.

2 And as far as -- I don't -- I don't know the flight
3 schedule, sir, offhand, but if there are not -- and I know 9/11, I
4 believe -- I don't know the flight schedule. I don't want to speak
5 out of turn. But if there are no flights, I can't get Dr. Kupers
6 here.

7 So he may say I'm available this week in May. If there is
8 no flight available, I can't get him here. And that's, again,
9 something that's beyond our control. Once these commission hearings
10 are canceled, OMC cancels the flights almost immediately even if we
11 still wanted to be on island to work or to visit with Mr. al Nashiri.

12 And so, again, that's just something that's beyond our
13 control. And that's -- I'm just looking at now, as I stand before
14 Your Honor, on 13 April with the commission's expectation that we
15 start a trial 1 June, I have one expert who has been adjudicated
16 affirmatively to be read on for TS/SCI who has not reviewed any of
17 the mental health records that exist in this case, which, as the
18 commission can appreciate, are voluminous. My client has been in
19 custody since 2002, and there are records pretty much continuously.

20 And so I don't know -- candidly, I don't know even if we get
21 him read on, even if he stays to do the national programs read-on,
22 when he's going to review the material, when he's going to get down
23 here, how he would visit with Mr. al Nashiri multiple times to

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1 sustain a cross-examination. Again, he would be testifying in
2 mitigation asking, at my request, right? I would be using the
3 testimony from that expert to argue to a member panel of commissioned
4 officers.

5 So in a court-martial -- right? -- you have a member panel
6 of commissioned officers judging one of their own ostensibly. In
7 this commission, we have a member panel of commissioned officers
8 judging the enemy.

9 And I am going to be asking them to return a verdict, if
10 Mr. al Nashiri is convicted, which I am in no way conceding, of life
11 or a sentence less than life.

12 And so for Dr. Kupers to carry any credibility with this
13 jury, because I have no doubt that the prosecution will do a fulsome
14 cross-examination, he needs to see Mr. al Nashiri on more than one
15 occasion.

16 And the same would exist for Dr. Holmes, who has not been
17 adjudicated one way or another as far as her security clearance. The
18 only information I have, as I've indicated, is that her investigation
19 is ongoing. From our perspective, we have done everything we can to
20 expedite that.

21 And we -- again, I pester Mr. Roy frequently to ask for
22 updates, and we get the same nondescript update of the investigation
23 is ongoing.

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1 And I can't give -- I can give the commission sort of an
2 estimate as to -- from TS/SCI to national programs, all of our
3 security clearance adjudications have taken wildly different amounts
4 of time. Myself, Ms. Manuele, Lieutenant Shaver, et cetera,
5 et cetera, Ms. Carmon, we have all taken a different amount of time
6 for that investigation to be completed. And so I have no idea when
7 Dr. Holmes will even be able to be read on, to then review the
8 voluminous mental health records, to then schedule her travel,
9 assuming that it is available, to come to the island to examine
10 Mr. al Nashiri.

11 And so at the very least, when the commission made the
12 reference to "I expected more motions," I also expected more motions
13 and motions that I would routinely file related to my client's mental
14 health. My client is a person who suffers from mental illness. We
15 have certainly discussed PTSD, as well as major depressive disorder,
16 in this courtroom before.

17 And that's pretty much it is I don't know when we are going
18 to be ready with our experts through no fault of the defense. And
19 that sort of leads me to my next point, is we went from Retired
20 Brigadier General Susan Escallier as our convening authority to at
21 least four convening authorities with disparate duty allocations that
22 are somewhat vague to me as far as their understanding, other than I
23 know the deputy secretary is responsible for negotiating any kind of

1 pretrial agreement. And so the secretary's failure to appoint a
2 full-time convening authority has been delaying decisions on defense
3 resourcing extraordinarily.

4 Until yesterday, the Office of the Convening Authority in
5 five months had made one resourcing decision. One in five months.
6 And I think the commission can appreciate that we have submitted far
7 more than one resourcing request to the Office of the Convening
8 Authority.

9 Yesterday we got denials. And the motions to compel are now
10 forthcoming, so it's going to necessitate additional litigation. I
11 find it interesting that we received two additional responses from
12 the Office of the Convening Authority that's seemingly responsible
13 for resourcing requests.

14 We had asked for Lexis AI Protégé. That's been denied. And
15 we also asked for -- and this is something that I've been talking to
16 the commission about; I can remember bringing it up to Your Honor in
17 December of 2024 -- neuroimaging that is consistent with the standard
18 of care of a capital case that's tried in an Article III or an
19 Article IV court before the federal government or a state court in
20 the United States.

21 And so Mr. al Nashiri has had an MRI. It is outdated
22 technology. It would be something that -- it's helpful that you were
23 a Medevac tech as I discuss these issues. The MRI that's on island I

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1 would say at best you would see in an emergency room if you had to do
2 a quick diagnosis, but nothing you would want for any kind of
3 treatment, surgical, and certainly nothing you would use in a
4 forensic capacity.

5 We did submit declarations substantiating as such to the
6 Office of the Convening Authority and those will certainly be
7 included in our motion to compel that neuroimaging, which, again, I
8 do not believe can now occur.

9 I believe it is legally necessary. Especially, I think the
10 commission needs to consider, like, why I'm asking for
11 neuroimaging -- right? -- what we know that Mr. al Nashiri went
12 through in the RDI Program.

13 And so we know he went through walling. We know he went
14 through being placed in a shaking box. We know he has certain
15 symptoms associated with that. It is likely that he suffers brain
16 injury or brain trauma.

17 And so I'm not asking for neuroimaging because it's
18 something we do as a matter of rote course in a capital case. I'm
19 asking for it because it is very likely that Mr. al Nashiri's brain
20 was extraordinarily damaged during the RDI Program.

21 And so we haven't even begun to litigate any kind of
22 affirmative mental health defense, either in first phase or second
23 phase, based on either the testing from Dr. Holmes or from the

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1 evaluation by Dr. Kupers, or the results of neuroimaging that would
2 be consistent with what is standard of care in a capital case, again,
3 in an Article III or Article IV court that I've practiced in in state
4 and federal court.

5 So we have requested PET scans, DTI, specialized DTI with
6 the MRI, and an MRI that is consistent with the current technology
7 that you would have, again, for any kind of treatment for brain
8 injury or that we would use in a forensic capacity. That was denied
9 with little explanation.

10 MJ [COL FITZGERALD]: The neuroimaging request was denied?

11 LDC [MS. MILLER]: Yes, sir. Yesterday.

12 MJ [COL FITZGERALD]: Okay.

13 LDC [MS. MILLER]: So that's what the -- the Office of the
14 Convening Authority, in five months -- I was prepared to argue to
15 Your Honor this morning the Office of the Convening Authority had
16 rendered one decision as far as resourcing request in five months.

17 That number is now three, and two of those resourcing
18 request denials came yesterday, certainly the day before I'm here
19 arguing to continue this trial date.

20 MJ [COL FITZGERALD]: Is the government aware of these
21 denials? I'm presuming they are, but ----

22 LDC [MS. MILLER]: I don't believe so.

23 TC [CAPT STINSON]: I think I heard about the Lexis AI

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1 Protégé. I'm not sure why. I think I may have gotten a copy of
2 that. I'm not familiar with the request for the neuroimaging or the
3 denial, Your Honor.

4 LDC [MS. MILLER]: I think the Protégé was not submitted ex
5 parte. The neuroimaging was submitted ex parte.

6 MJ [COL FITZGERALD]: You're saying it now. That's why -- I
7 just want to be -- it was ex parte before, but now you're saying it,
8 so ----

9 LDC [MS. MILLER]: I have no choice.

10 MJ [COL FITZGERALD]: No, no. I'm just trying to be clear.
11 We're talking about it publicly.

12 LDC [MS. MILLER]: Right.

13 MJ [COL FITZGERALD]: I'm trying to understand what the
14 government does know, so ----

15 LDC [MS. MILLER]: Correct.

16 MJ [COL FITZGERALD]: ---- you're no longer ex parte, but
17 that's why they don't know about the denial.

18 LDC [MS. MILLER]: That's correct, sir.

19 MJ [COL FITZGERALD]: Okay.

20 LDC [MS. MILLER]: And -- yeah, it would not be my practice or
21 preference to discuss the mental health testing that I would like to
22 be done on my client with the entire prosecution team sitting here,
23 but I have no choice.

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1 And so the Office of the Convening Authority was willing to
2 review the request for neuroimaging. And, again, there were three
3 different things we asked for. They were all summarily denied with
4 little explanation. All of that information, again, will be provided
5 to the commission and the government in the motion to compel. But so
6 the Office of Convening Authority was willing to consider that
7 request ex parte.

8 What typically happens is in, like, an Article III court in
9 federal or state court, there is a stand-in entity representing the
10 governmental interest that is not the prosecution. So that if we
11 have to have these conversations with the court -- right? -- that
12 there is -- usually it's the money people -- right? -- that are
13 stand-ins on behalf of the government, so the prosecution isn't
14 getting the benefit of my defense theory or my defense investigation,
15 which I do not believe they're entitled to at this time, but I have
16 no choice. So that's -- that is, I would say, a flaw in the -- in
17 the commission, which certainly is not Your Honor's fault but where
18 we're at.

19 And so, again, things beyond our control are the convening
20 authority's, I would call, negligence in adjudicating our resourcing
21 request. And the -- I think it was a failure by the Secretary of War
22 in not appointing a full-time convening authority just to deal with
23 our resourcing request if there was an expectation, truly, that this

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1 trial would start 1 January -- excuse me -- 1 June 2025.

2 And I certainly don't have any expectation that if we have
3 additional resourcing requests going forward that they're going to be
4 adjudicated any more quickly than has been occurring thus far.

5 I would also argue -- this is my next point -- that what I'm
6 going to refer to -- and I don't mean offense to anyone in this
7 courtroom, but eleventh-hour disclosures by the government -- and I
8 do mean the prosecution -- are impacting greatly the presentation
9 that the defense intends to present to this member panel.

10 In particular, certainly the commission is aware that our
11 commander in chief, the President of the United States, has now made
12 three public statements blaming Iran for the bombing on the USS COLE.
13 In the half million pages, approximately, of discovery that I have on
14 all three platforms, I have no information that Iran is responsible
15 or played a role, and we've had numerous conversations about
16 third-party culpability, et cetera.

17 And so when the President first said that, we were actually
18 here. It was on a Friday, and we woke up Saturday morning, and I had
19 a text from my parents saying the President of the United States, our
20 commander in chief, has just said Iran is responsible for the bombing
21 of the USS COLE as justification for the military operation in Iran.

22 Since then, his -- President Trump's initial statement was
23 that Iran was probably involved. Most recently, the President, in a

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1 nationally televised address, which cut into *Survivor*, which I
2 understand was significant for that to be aired at the time that it
3 was, he has now traveled from "probably involved" to a very strong
4 statement about Iran's involvement in the bombing of the USS COLE.

5 And then in addition to that, members of the United States
6 Senate, which we discussed -- I presume that was in our discovery
7 request, so the commission may not be aware of that.

8 Actually, we -- it's discussed in 6 -- AE 6 -- excuse
9 me -- AE 679Z, that the President has now made three affirmative
10 statements about Iran's involvement, as well as members of the United
11 States Senate.

12 And the response that we received last week was that
13 the -- and I quote -- White House has no responsive information.

14 TC [CAPT STINSON]: Your Honor, I don't mean to interrupt
15 Ms. Miller, but we did receive notification that they're having audio
16 difficulties at the CCTV site at the Pentagon. I'm checking to see
17 whether or not there are individuals there and what the ETA is
18 regarding the -- any technical issues there.

19 But I just wanted to alert the commission that apparently
20 the audio has gone out at the Pentagon. So I just wanted to raise
21 that for your awareness, Your Honor.

22 The government's position is, I think, you know, it's still
23 a public procedure. So I don't think we need to stop, but I just

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1 wanted to make sure folks were aware because I had represented they
2 were operational, but apparently at some point in time the audio went
3 out at the Pentagon. Over.

4 LDC [MS. MILLER]: And I believe there are people there, sir,
5 it's my understanding.

6 MJ [COL FITZGERALD]: Sure. I understand that. It's 1023.
7 I've interrupted you a couple times. I'm trying not to now.

8 LDC [MS. MILLER]: You're fine.

9 MJ [COL FITZGERALD]: And so I think you're on a good glide
10 path. But -- either we can take a recess now, but you're in
11 midpoint, so I don't want to ----

12 LDC [MS. MILLER]: No, that's fine, sir. I'd rather -- public
13 viewing sites ----

14 MJ [COL FITZGERALD]: I can't guarantee we'll get it back up
15 and we'll likely march forward, but we'll just see if we can get this
16 issue addressed.

17 But I know we've been on the record for an hour. You have
18 not been speaking for an hour, but -- so maybe now would be a good
19 time to take a recess.

20 LDC [MS. MILLER]: That's fine, sir.

21 MJ [COL FITZGERALD]: The time is 1024. We'll be in recess
22 until 1034.

23 The commission's in recess.

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1 **[The R.M.C. 803 session recessed at 1024, 14 April 2026.]**

2 **[The R.M.C. 803 session was called to order at 1037, 14 April 2026.]**

3 MJ [COL FITZGERALD]: Commission is called to order.

4 All parties present before the last recess are again
5 present.

6 Defense, you may proceed.

7 LDC [MS. MILLER]: Thank you, sir.

8 MJ [COL FITZGERALD]: Let me put on the record, because I
9 think we did say this on the record, that we thought we lost audio in
10 one of the outlying facilities. We just determined that another
11 commission is going on concurrent with ours. It's they are the
12 commission that lost audio feed, not this one.

13 Now you may proceed.

14 LDC [MS. MILLER]: Understood, sir.

15 We were talking before about the eleventh-hour discovery
16 from the government. And we had discussed Iran, and our commander in
17 chief on a number of occasions now implicating Iran as being involved
18 or responsible for the bombing of the USS COLE, which was news to me
19 until I heard him say it.

20 And I just wanted to put some additional facts about the
21 discovery that we've received and how that process has proceeded thus
22 far. And so I want to say within days of the President's first
23 announcement, which was the early morning hours of the Saturday that

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1 we flew out of here before the last commission -- or the last session
2 of the commission, we had submitted a discovery request to the
3 government asking for whatever intelligence, et cetera, that the
4 White House was relying on in the President's pronouncement. That
5 request from the government was summarily denied.

6 I, in AE 679Z, also mentioned the President at that point
7 had said it twice, as well as the senator mentioned in AE 679Z, that
8 Iran's involvement was going to be a matter that we needed
9 appropriate time to investigate and the requisite discovery that led
10 the President, again, who serves as the commander in chief, to make
11 those statements on a multitude of occasions.

12 And the commission granted that order -- or I think the
13 commission sua sponte ordered the government to provide discovery
14 related to Iran's involvement in the bombing of the USS COLE.

15 What we then received on 10 April was the White House has no
16 responsive information. That information, the thing that we got 10
17 April simply saying the White House has no responsive information to
18 this request, was provided to the government 31 March.

19 And so I don't know why it took 11 days for it to come to
20 the defense. But again, it is now going to necessitate additional
21 litigation. We're not talking about some random person who makes a
22 one-off comment. We are talking about the commander in chief
23 repeatedly suggesting that Iran was responsible for the bombing of

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1 the USS COLE.

2 And so I can't tell the commission exactly what motion I
3 intend to file, but I can tell the commission I certainly intend to
4 litigate it further.

5 I don't think anyone should be satisfied with the White
6 House's response that they have no responsive information. And we
7 can all appreciate how the President's speeches are written. I think
8 this President is known to ad-lib. I have no reason to think he
9 ad-libbed that Iran was responsible for the USS COLE bombing.

10 And so whoever is providing or assisting him in his speech
11 writing certainly had something to base that information on.

12 Also, I got a Post-It when we were discussing travel before
13 and Your Honor's questions about Dr. Kupers and would he be able to
14 stay for the national programs read-on. And I didn't quite
15 understand the Post-It, and so I want to clarify.

16 MJ [COL FITZGERALD]: Didn't understand the ----

17 LDC [MS. MILLER]: The Post-It.

18 MJ [COL FITZGERALD]: Oh, the Post-It. Okay.

19 LDC [MS. MILLER]: My colleague's consultation via Post-It.

20 Travel -- and, again, I think the commission would benefit
21 from knowing just some of these things. Travel takes 30 days lead
22 time for us. And so it is not as simple as saying can you come for a
23 23 April read-on and stay indefinitely?

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1 And so we are at the point now where I can tell the
2 commission affirmatively, based on the fact that it's -- I believe
3 it's 13 April. I've lost track of time. But at this point, we will
4 not be able to get Dr. Kupers read on to national programs until May,
5 knowing that we need 30 days' lead time for travel.

6 MJ [COL FITZGERALD]: Who ----

7 LDC [MS. MILLER]: And that's from the Office of Convening
8 Authority. Again, beyond our control.

9 MJ [COL FITZGERALD]: They require 30 days?

10 LDC [MS. MILLER]: Correct. And I wanted to give the
11 commission one example to illustrate.

12 MJ [COL FITZGERALD]: No, no, I don't need an example. I
13 understand. They're telling you 30 days?

14 LDC [MS. MILLER]: Yes. But I think the commission would
15 benefit from this. Myself, our mitigation specialist, and our
16 investigator traveled to Arizona to conduct an interview
17 March 25 -- 25 March through 27 March.

18 Our mitigation specialist was also working with our team the
19 following work in the National Capital Region. She is located in
20 Florida.

21 She -- and so the hope was -- the 27 March was a Friday.
22 The hope was it would go to Arizona and then all of us would travel
23 back to the National Capital Region together, and then she would be

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1 available 30 March, that Monday, to work with our team through
2 Wednesday when she left.

3 And that travel was not approved. So she had to fly from
4 Florida to Arizona, back to Florida on 27 March, to then return to
5 the National Capital Region from Florida on the 29th of March to then
6 participate with what we had planned for the 30th of March through 1
7 April.

8 And so, like, that is the sort of what I'm going to call
9 nonsense that it takes as far as travel goes. And so it's -- I wish
10 it was as simple as the commission saying can we just have him stay
11 until this is accomplished. It's not. And it's not something I
12 control. If I did, I would 100 percent adopt what the commission was
13 suggesting.

14 And so I just wanted to clarify those two prior points.

15 Along the lines of Iran, certainly I think the commission is
16 aware that our travel is restricted to anywhere in the CENTCOM region
17 at this point. No one on this iteration of the defense team has met
18 any of Abd al Rahim's family in person. They are afraid, they are
19 distrustful with good reason, and we do not have relationships with
20 these people. I believe the last iteration of Mr. al Nashiri's
21 defense team that traveled to the Kingdom of Saudi Arabia was maybe
22 10 years ago.

23 And so we tried to travel to KSA in September, and maybe

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1 days prior -- and our -- again, we don't control our travel, the
2 federal government does. We were flying through Doha in Qatar. And
3 maybe days prior to that travel, Israel launched an attack on Qatar,
4 and so our travel was suspended to the Kingdom of Saudi Arabia.

5 We have submitted requests to travel to the Kingdom of
6 Saudi Arabia, and all we're getting at this point is travel is
7 completely restricted to the CENTCOM region. We have also submitted
8 requests for other international travel that have just remained
9 unadjudicated by the Office of the Convening Authority.

10 In addition to that, the government has now filed notice
11 that they intend to present the testimony of Mr. al Darbi remotely
12 from the Kingdom of Saudi Arabia. And that is the first I am hearing
13 of that because for my tenure, trial counsel has represented that
14 they intended to bring Mr. al Darbi before this commission to testify
15 at Naval Station Guantanamo Bay.

16 And so that notice that they intend to seek his testimony,
17 Mr. al Darbi's, remotely is new and was, unbeknownst to me, frankly,
18 that they even knew where he was.

19 And so we are certainly going to need time to interview
20 Mr. al Darbi. I have no idea what his position is now from when -- I
21 mean, the proffer statements that the government was hoping to
22 introduce were from 2011. The deposition was given in 2017. We're
23 now in 2026.

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1 I have no idea where Mr. al Darbi stands, what his position
2 on his prior testimony is. Obviously, he was given great leniency
3 and repatriated in return for his cooperation with the United States
4 Government.

5 And so we would need to be able to interview Mr. al Darbi,
6 and are certainly requesting that the government facilitate that,
7 presuming that they have knowledge of where he is, based on their
8 notice that they intend to rely on remote testimony, which for the
9 record, I object, but we'll address that, I presume, in a separate
10 proceeding.

11 But we are also going to need someone to be in the presence
12 of Mr. al Darbi if the commission were to grant the government's
13 request to allow Mr. al Darbi to testify remotely from the Kingdom of
14 Saudi Arabia.

15 Again, I would say it would fall below what would be
16 effective counsel to not have someone in the room with Mr. al Darbi
17 while he's testifying, not knowing who else is there, not knowing
18 what information he's being provided. Somebody needs to have eyes
19 on, in the same room, as Mr. al Darbi, given the weight of his
20 testimony.

21 Frankly, the government has little to no evidence about
22 Mr. al Nashiri's involvement in the bombing of the MV Limburg absent
23 Mr. al Darbi. And so he's not an insignificant witness; he's quite

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1 the opposite.

2 And so, again, it would be my intent for someone on my team
3 to travel to the Kingdom of Saudi Arabia, if the commission were to
4 grant the government's request to allow him to testify remotely, much
5 like the government wants their lawyers to be there when their
6 witnesses are testifying from the Remote Hearing Room. If we're
7 going to have this man testifying from the Middle East, we need
8 someone there, and we can't travel to anywhere in the CENTCOM region.

9 Related to the government's eleventh-hour disclosures, we
10 are going to take up AE 689 this commission session that relates to
11 statements made by an alleged co-conspirator, al Hilah.

12 The commission has now read our pleading. I don't mind
13 sharing that that was the nature of our ex parte session, that our
14 theory of defense largely revolved around Mr. al Hilah's involvement
15 in the bombing of the USS COLE. His statements were admitted by
16 Judge Acosta.

17 Again, the commission is aware of the transcript from the
18 hearing. I am not suggesting that any of the prosecutors in the room
19 did so, but my review of that transcript is that the prosecution
20 intentionally withheld or misled the commission when asked if his
21 statements were the product of torture, which we now know that they
22 are. And so there is an absolute bar statutorily set by Congress to
23 the admission of torture-borne evidence.

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1 And so we learned in 2026 that the central piece -- one of
2 the central pieces of our theory of defense is likely not
3 admissible -- not likely, is not admissible.

4 And, again, I've already told the commission that I am
5 relying on -- entirely on the decisions of my predecessors as far as
6 strategy because I have not had the requisite time to review the
7 material. But to the extent that we had a strategy, it was that, and
8 it's gone.

9 And if the government had given us that information years
10 ago, perhaps we would have had the opportunity to reroute our
11 defense. But we're litigating that I believe 21 April before this
12 commission, AE 689.

13 I don't know when the commission intends to rule. We are
14 seeking dismissal, given the extent of the misconduct and the extent
15 of the type of evidence that is now going to be excluded, I presume.

16 And I'm trying to choose my words very carefully because I
17 appreciate that pleading is classified in some extent, or some of the
18 things in the pleading are classified.

19 Along the lines of discovery, we're also litigating AE 599L
20 before the commission this session, which is just to get the
21 commission to enforce its prior order. The commission has already
22 ordered the government to provide the requested material for a
23 particular time frame, and they just haven't.

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1 And so there's a lot of foot stomping that happens about the
2 necessity of this trial occurring 1 June of 2026. And for all the
3 foot stomping, you would think that when we send over discovery
4 requests, they would be granted and acted upon as expediently as
5 possible. And that is not the circumstances we have found ourselves
6 in, sir.

7 Also, in my responsive pleading to the government's response
8 in 679JJ, so AE 679MM, I brought to the commission's attention that I
9 have reinitiated an effort to negotiate this case. Colonel Matthew
10 Lynch has taken over as legal advisor. I believe his title is chief
11 of staff for the Deputy Secretary of War, who, as we have already
12 discussed, is the sole party responsible for negotiating a pretrial
13 agreement in this case.

14 Colonel Lynch has made himself extraordinarily accessible,
15 which I'm incredibly appreciative of. And he was, for the first time
16 ever, able to say, this is why your PTA was rejected, with
17 specificity. This language in the PTA is never going to get past the
18 Deputy Secretary of War.

19 And we have gone back and forth. Myself, Lieutenant Colonel
20 Nettinga, and Lieutenant Shaver met with Colonel Lynch on 25 March.
21 He and I spoke -- nope. We met 12 March. Excuse me.

22 He reached out to me on 25 March asking if we could speak.
23 I was in transit to Arizona. I spoke to him from the Dallas-Fort

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1 Worth Airport. And that's when, on 25 March, Colonel Lynch was able
2 to say, I can tell you, with conclusive nature, this is why your PTA
3 was rejected. This language, never going to get -- never going to
4 happen.

5 The first time that was discussed with Mr. al Nashiri was
6 Sunday. I have had ----

7 MJ [COL FITZGERALD]: This Sunday?

8 LDC [MS. MILLER]: Yes, sir.

9 MJ [COL FITZGERALD]: Thank you.

10 LDC [MS. MILLER]: It's not something that I can certainly
11 send him a letter or avail ourselves to the SVTC to have a
12 conversation of that nature. And frankly, I didn't even know where
13 Mr. al Nashiri -- I mean, the back and forth is not ideal in trying
14 to negotiate a case or prepare yourself for trial. I mean,
15 it's -- you know, to quote my colleague, my friend on the other side,
16 it is harder to walk and chew gum than one might think when it comes
17 to trying to negotiate the case and prepare for trial, and mentally
18 where Mr. al Nashiri needs to be if we're starting a trial, and I'm
19 also having a conversation with him about trying to negotiate a
20 pretrial agreement.

21 So we had the first meeting with Colonel Lynch on 12 March.
22 He and I spoke 25 March. Lieutenant Colonel Nettinga and I spoke
23 with him again 1 April. He and I have been e-mailing since then.

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1 He -- and I'm quoting -- said he is trying to get us some lines in
2 the sand about the language that will pass muster.

3 What I'm sure the commission can appreciate as far as the
4 problem in all of this, is he has limited access to the Deputy
5 Secretary of War. When you make the convening authority the number 2
6 at the Department of War while we're in war, it is very hard to
7 prioritize negotiating this case.

8 And so while I can't say enough positive things about
9 Colonel Lynch and his efforts in transparency, I would also suggest
10 that he has very limited availability to the Deputy Secretary to get
11 us the information that I think he's trying to get us.

12 And so, you know, we've talked about ways to, and I quote,
13 grease the skids to try to accomplish this by 1 June. And given our
14 military's involvement -- I mean, I'm purely speculating -- but given
15 our military's involvement in a number of different excursions around
16 the world and the convening authority for the purpose of negotiation
17 being the Deputy Secretary of War, I just don't know if that's
18 possible.

19 And I think the parties actually agreed upon the sentiment
20 that it would be a real shame to be in trial while both parties and
21 the majority of the victim family members agree that a PTA is in the
22 best interest for resolution in this case simply because we can't get
23 time with the decision-maker.

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1 And so I didn't have much optimism before. Colonel Lynch
2 has restored my optimism, just based on his frankness. It is -- and
3 you know how politics works and dealing with politicians. It is nice
4 to just get a no, yes, we understand, et cetera.

5 Certainly I -- when we talk about the foot stomping about
6 going to trial 1 June, if it happens, I would describe -- the
7 commission asked once of the parties, did you guys conference about
8 this? Before we talked, I think, about the 505.

9 MJ [COL FITZGERALD]: 505(h).

10 LDC [MS. MILLER]: Yeah. Yes, sir. Excuse me. Yes, sir.

11 MJ [COL FITZGERALD]: I think that's the only time I have ever
12 asked that question.

13 LDC [MS. MILLER]: Yes, sir. And we've conferenced on a
14 number of different issues. We're about to undertake a very lengthy
15 motion to compel pretty much all of our witnesses during this
16 commission session.

17 And so I would say the government has reflexively -- my
18 perception -- reflexively refused to produce witnesses, refused to
19 declassify information or pressure the OCAs to act on declassifying
20 information, refused to provide discovery that is clearly relevant,
21 and I would give the Iranian example again.

22 And all of this is just going to lead to more litigation.

23 And so it's either been the prosecution or the Office of the

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1 Convening Authority. So now we have to litigate why does the
2 President keep saying that Iran is responsible. We also have to
3 litigate to get neuroimaging that anyone who understands capital
4 defense and what Mr. al Nashiri in particular has been through in the
5 RDI Program would say anything less than what we requested would
6 amount to ineffective assistance of counsel.

7 And so I want to address the Miller factors. Make sure I
8 got all my notes, sir. We addressed availability of witnesses or
9 evidence, nature of the evidence, substitute testimony or evidence,
10 and possible impact on verdict.

11 In one subsection on page 13 of AE 679Z, I would say the
12 most critical -- well, I don't know how to rank them in level of
13 import, but certainly learning that al Hilah's statements were
14 torture-borne, and our theory of defense being thrown out the window,
15 I would argue the nature of the evidence, substitute testimony or
16 evidence available, and the possible impact on the verdict weighs
17 heavily in favor of the defense.

18 The fact that we do not have evaluating mental health
19 experts, a psychiatrist and a psychologist, M.D., Psy.D., that aren't
20 just necessarily for sentencing -- I did file notice that I intended
21 to rely on an affirmative mental health defense in first phase as
22 well.

23 And so again, nature of the evidence, substitute testimony

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1 or evidence, and possible impact on the verdict, not having those two
2 evaluating experts available, I would argue that that Miller factor
3 weighs heavily in favor of a continuance on behalf of Mr. al Nashiri.

4 MJ [COL FITZGERALD]: Can I ask you this ----

5 LDC [MS. MILLER]: Of course.

6 MJ [COL FITZGERALD]: ---- you said you gave -- you provided
7 the government notice of the affirmative defense related to mental
8 health?

9 LDC [MS. MILLER]: Yes, sir. And we discussed this in the
10 802. I don't know, because I do not have the requisite people on
11 board, right? And so my notice is ostensibly -- I intend to
12 rely on -- I didn't want to waive it. The commission had given us a
13 deadline. And so I filed -- I think it's one sentence. I intend to
14 affirmatively rely on a mental health defense in first phase.

15 MJ [COL FITZGERALD]: Okay.

16 LDC [MS. MILLER]: And I'm paraphrasing, but that's the extent
17 of it.

18 MJ [COL FITZGERALD]: That was my next question is the notice
19 I'm aware of is an abridged notice, short notice based on your lack
20 of folks to sponsor that, for lack of a better phrase.

21 LDC [MS. MILLER]: Correct.

22 MJ [COL FITZGERALD]: So that's the notice I'm aware of.

23 LDC [MS. MILLER]: Correct. And I would say that I have -- I

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1 obviously can't file a pleading that I don't believe has merit. And
2 so I would say I have enough evidence to file that notice pleading in
3 good faith, but I don't have enough evidence to give any more
4 information to the commission or the government ----

5 MJ [COL FITZGERALD]: Okay.

6 LDC [MS. MILLER]: ---- given our circumstances. And so
7 I -- I'm certainly going to argue, when we seek to amend that, if we
8 do, that it's good faith to amend that once our experts are onboarded
9 and have had the requisite amount of time to review the material and
10 evaluate Mr. al Nashiri and do any appropriate testing necessary.

11 Also, as it relates to the availability of witnesses or
12 evidence, nature of evidence, substitute testimony, or evidence and
13 possible impact of the verdict, I don't know who, but somebody is
14 withholding whatever information the President is relying upon in his
15 repeated statements regarding Iran.

16 And Ms. Carmon, I thought, did a very eloquent job in
17 arguing the Capital Jury Project's findings as far as residual doubt
18 and third-party culpability being both reasons for acquittal or
19 lesser verdicts and also sentences less than death in a sentencing
20 phase.

21 And so, again, all we have is that the White House has
22 nothing responsive to our request, despite the fact the President has
23 made those repeated comments, and I would say that those Miller

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1 factors, again, weigh heavily in favor of this commission granting a
2 continuance on behalf of Mr. al Nashiri.

3 We discussed prejudice to the opponent, one of the other
4 Miller factors, which as everyone is aware is a CAAF case that this
5 commission relies upon routinely in adjudicating motions related to
6 continuances.

7 I think it is hard for the government to argue prejudice to
8 the government when intentionally I set out most of the things that
9 I'm talking about are things beyond the defense's control.

10 Some of the things are the prosecution. Some of the things
11 are the Government, big G, Office of Convening Authority, Secretary
12 of War. But when the government is responsible for the need, the
13 prejudice to them becomes a nonexistent consideration, in my opinion.

14 If you create the problem, I don't think you get the
15 latitude to then argue how much you're prejudiced by what I would
16 consider to be a very modest continuance request.

17 The length of the continuance is another Miller factor also
18 addressed in AE 679Z. Again, I was candid with the commission that
19 we had talked about asking for six months, which would land us
20 squarely at 7 December, which didn't seem to make a lot of sense, so
21 we asked for seven months. I think that is reasonable.

22 One of the reasons why these commissions last as long as
23 they do is because life happens. I got very sick. I had a blood

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1 clot in my lung and was not able to travel here.

2 Ms. Carmon is seeking to be excused from this commission,
3 Mr. al Nashiri's longest serving lawyer, and by far, the person who
4 knows the most not only about the facts of the case, but just how to
5 do the things that need to be done before this commission.

6 And so the three things that were addressed, particularly in
7 the time that we asked for, the length of the continuance, were my
8 unavailability due to illness, the time that's going to be necessary
9 to transition Ms. Carmon's responsibilities, and the time necessary
10 for our mitigation experts to conduct their evaluations, once
11 cleared, which have all been addressed.

12 Again, I think that Miller factor weighs heavily in favor of
13 this commission granting a continuance on behalf of Mr. al Nashiri.

14 We address also in AE 679S timeliness of the request and
15 prior notice. In one section, and I don't suspect the government
16 meant it as a positive to suggest that we have moved for continuances
17 or abatements 18 times, but the flip side of that coin is they can
18 hardly argue they're surprised by this request.

19 I think -- and this is outlined in AE 679Z, particularly in
20 view of recent court-ordered joint updates, the breadth of the 505(h)
21 hearing and the seriousness of the matter that's been raised in
22 AE 689 -- I mean, the consequential nature of the outcome of that
23 motion, again, I hardly think anyone in this courtroom could in good

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1 faith say they're surprised by this request.

2 And the timeliness of this request, again, I think is
3 appropriate, given where we are. And we have given extraordinary
4 prior notice about, while we are diligently working to be ready for a
5 1 June trial date, we have failed.

6 One of the other -- and so I -- I think those Miller
7 factors, again, weigh heavily in favor of a continuance being granted
8 on behalf of Mr. al Nashiri.

9 One of the other Miller factors I skipped over was that this
10 motion is being made in good faith, and so that's where I want to
11 end. Since I took over as learned counsel, I have done nothing but
12 try to resolve this case. The first thing I did was meet with the
13 head of OMCP, Rear Admiral Rugh, to discuss how to resolve this case.

14 We submitted a PTA after my second meeting with
15 Mr. al Nashiri, which is extraordinary. And typically when we're
16 negotiating cases of this magnitude, it has been my practice -- I
17 think Ms. Manuele would agree -- that typically we have the
18 prosecutors primed, and -- and this is an unusual system for me
19 because I'm not negotiating with the prosecution. I'm negotiating
20 with some third party. And so myself and lead trial counsel could be
21 in total agreement, but he's not the one that gets to make the
22 decision.

23 So I'm used to being able to walk over to the prosecutor and

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1 say, hey, would you guys take this? But that's not how this system
2 works.

3 And so typically if we have a client who's willing to plead
4 guilty to a sentence that could amount to spending the rest of his
5 life in prison, we have prosecutors primed to have that answer.
6 Like, if he makes the offer, the answer needs to come the next day.
7 We need to be in court doing the guilty plea the next day.

8 And so I don't need to relitigate the fact that it took 14,
9 15 months to even get an answer. And then when we got an answer on
10 the PTA, I asked of trial counsel, is it a no to negotiating or a go
11 to -- a no to this PTA? And the prosecution didn't have that
12 information either, through no fault of their own. They were just
13 told that the PTA was rejected.

14 And that's -- again, until Colonel Lynch assumed the role
15 recently of Chief of Staff, I had no idea why it was rejected and
16 that negotiation was still possible.

17 But as far as a good faith motion for continuance, I think
18 to suggest that I am doing anything other than moving in good faith
19 would belittle the efforts that our team has made to resolve this
20 case since I became learned counsel.

21 It has been my desire, it remains my desire, to negotiate
22 this case via pretrial agreement. I've told the commission that I am
23 cautiously optimistic for the first time in a while.

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1 I also don't fear going to trial. I don't think anyone on
2 this team does. We are all trial litigators. If I can resolve it
3 absent a trial, it's my ethical obligation to do so. The ABA
4 commands that attorneys in my position do everything in their power
5 to resolve a capital case short of a trial where death is a possible
6 penalty, and that has been my intent from day one.

7 But if that is not possible, I'll try this case. I am not
8 someone -- and I don't mean to belittle anybody else. Every -- I
9 can't speak for any other attorney who's strategically representing
10 their clients and their client's best interest in any way otherwise.
11 But none of us seek to be here 15, 16 years from now in the same
12 posture.

13 The person who suffers most is Abd al Rahim al Nashiri. He
14 has been confined -- been confined by the American government since
15 2002 in some of the worst conditions that humanity could
16 ever -- could even concoct.

17 At this point I do not believe that the government can meet
18 its burden of proof beyond a reasonable doubt for a number of the
19 charges.

20 And so he sits in custody waiting for his day in court. And
21 certainly I've had this conversation with Mr. al Nashiri, and he
22 understands that we need more time so that we can effectively counsel
23 him.

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1 He doesn't want to just have a day in court. He wants to
2 have a day in court where he's effectively represented by his
3 court-appointed lawyers. And so he is in agreement with this motion
4 to continue for the reasons that I have discussed.

5 I also, while my responsibility is to Mr. al Nashiri, feel
6 personally a tremendous responsibility to the victims and the victim
7 family members. And I know that's going to be a large part of the
8 government's argument. And I don't take it lightly when I ask for
9 this case to be continued that they too have grown old waiting to see
10 this case end.

11 I would love nothing more than to tell this commission,
12 let's do this June 1. But I firmly believe that to do service to
13 Mr. al Nashiri and to do service to the victims who survived the
14 attack on the COLE and the family members who lost loved ones that
15 this must be done both justly and it must be done right.

16 And I think the only way those things can be accomplished is
17 for this commission to grant us the seven-month continuance that we
18 request.

19 And so as far as good faith for moving for this continuance,
20 again, I would argue that strongly weighs in favor of the defense and
21 this commission granting a continuance on behalf of Mr. al Nashiri.

22 And if I could have just a moment, sir?

23 MJ [COL FITZGERALD]: You may.

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1 LDC [MS. MILLER]: I'm getting a bunch of head nods.

2 Questions from the commission, sir?

3 MJ [COL FITZGERALD]: You're getting a bunch of head nods.

4 They have nothing for you?

5 LDC [MS. MILLER]: Negative. Correct, sir.

6 MJ [COL FITZGERALD]: Okay. I don't at this time.

7 LDC [MS. MILLER]: Thank you, sir.

8 MJ [COL FITZGERALD]: Thank you.

9 Before you begin, Government, Ms. Carmon, can I ask you a
10 question?

11 Now having heard your co-counsel's argument with respect to
12 the motion to continue, and I still have before me your request to
13 withdraw, does the requested continuance, if granted, give you
14 thoughts of reconsidering your request to withdraw in any way? Does
15 it change that in any way?

16 SDC [MS. CARMON]: No, sir.

17 MJ [COL FITZGERALD]: I say that because you made your request
18 months before the motion to continue was filed.

19 SDC [MS. CARMON]: Yes, sir. And we -- "we" being my
20 family -- we have taken steps based on our plan to move out of state
21 that if we were to reverse would be financially problematic.

22 MJ [COL FITZGERALD]: Okay.

23 SDC [MS. CARMON]: Thank you.

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1 MJ [COL FITZGERALD]: Thank you.

2 Government, I'll note the time is 1121. Have you thought
3 that -- do you believe you can conclude roughly around noon? Do you
4 want to recess early?

5 TC [CAPT STINSON]: I think I can conclude by noon, Your
6 Honor.

7 MJ [COL FITZGERALD]: Okay. Government, you may proceed.

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

10 The commission should deny the defense's motion to continue
11 the trial date from 1 June of 2026.

12 And one point that just can't go unresponded to, the
13 individuals who have suffered the most in relation to the delay of
14 this trial is not Mr. Nashiri. It is the victims and the family
15 members of the attacks that Mr. Nashiri and his co-conspirators
16 committed against the USS COLE and the MV Limburg. Those are the
17 individuals who have suffered the most from the extensive delays that
18 have engendered in this commission.

19 So the defense argues several different bases in support of
20 their motion. And Your Honor asked us if we were going to break it
21 up in relation to each of those different bases.

22 I heard a lot from Ms. Miller regarding reasons and
23 rationales for delay. The government's perspective, we did not hear

1 an articulation of reasonable or good cause to again delay the 1 June
2 trial date.

3 The first group of reasons that Ms. Miller refers to in her
4 brief is governmental action, that there was some delay in relation
5 to appointment of a CA, some delays by getting their defense
6 witnesses cleared, a department-wide hiring freeze and the like.

7 We spent a lot of time talking about the defense mental
8 health experts, Dr. Kupers and Dr. Holmes. The defense talks about
9 the use of those experts in relation to the mitigation, explaining
10 some of the mental health challenges for Mr. Nashiri.

11 I would note that Dr. Kupers is on the defense witness list.
12 We're going to be adjudicating a lot of the defense witnesses on
13 their witness list. Dr. Kupers is specifically named. Dr. Holmes is
14 not. That may be because Dr. Holmes doesn't have a clearance yet,
15 maybe some other reasons, I'm not sure.

16 But Dr. Kupers is on that list, has been appropriately
17 cleared, has to get through the read-ons, but there's no reason to
18 suspect that Dr. Kupers will be needed until later in the summer,
19 which will be sufficient time for him to do the evaluation and
20 provide the testimony that he needs to the jury.

21 From the government's perspective, there's nothing in the
22 first category regarding the appointment of a convening authority or
23 the department-wide hiring freeze or security clearances for defense

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1 experts that justify another delay for the victims and the family
2 members of the attack.

3 MJ [COL FITZGERALD]: Well, can I ask you this? How would
4 Dr. Kupers do their -- as what ----

5 LDC [MS. MILLER]: A slight medical issue. Taken care of.

6 MJ [COL FITZGERALD]: I'm sorry?

7 LDC [MS. MILLER]: Having a slight medical issue that we were
8 addressing. It's been taken care of.

9 MJ [COL FITZGERALD]: Do we need to take a recess? It sounded
10 like I just heard yes.

11 **[Counsel conferred.]**

12 MJ [COL FITZGERALD]: Tell you what ----

13 LDC [MS. MILLER]: I apologize for the interruption. There's
14 a corpsman here to give Mr. al Nashiri medication, but Mr. al Nashiri
15 would need to go in the back to have that done.

16 MJ [COL FITZGERALD]: Can you tell me how long? I don't want
17 a lot of the details.

18 LDC [MS. MILLER]: Do you want to wait or ----

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

20 LDC [MS. MILLER]: If they could bring it in here it would be
21 a whole lot easier. But I mean 10 minutes.

22 MJ [COL FITZGERALD]: Sorry to distract you, but as I
23 understand it there's some scheduled medication or requested

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1 medication for Mr. Nashiri we need to take care of. And 10 minutes
2 should take care of that?

3 LDC [MS. MILLER]: That is the goal.

4 MJ [COL FITZGERALD]: Okay. The commission is in recess until
5 1136.

6 **[The R.M.C. 803 session recessed at 1125, 14 April 2026.]**

7 **[The R.M.C. 803 session was called to order at 1139, 14 April 2026.]**

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

9 All parties present before the last recess are again
10 present.

11 Just briefly, it came to my attention that somebody in the
12 courtroom was talking to Mr. Nashiri at the time the government was
13 making their argument. That led to a discussion that there was some
14 medication that Mr. Nashiri needed to take.

15 Rather than discussing it further on the record, we took a
16 recess. I've been informed during the recess that medical care has
17 been taken care of.

18 And I don't know anything about the medication, but
19 Mr. Nashiri is ready to go forward? I don't want to know much more.

20 LDC [MS. MILLER]: That is correct, sir.

21 MJ [COL FITZGERALD]: Okay. Mr. Nashiri, if anything happens,
22 medication may cause an effect, please let Ms. Miller know so she can
23 get my attention if we need to stop the proceedings related to that.

1 Okay?

2 In going on, I told the government I'd interrupted the
3 argument with a question, so I'm just going to ask my question
4 briefly.

5 My question was, you had stated that the defense mental
6 health provider could conduct their consultation without having to
7 delay the trial of 1 June.

8 I guess, in short, how would that look if we're in trial,
9 and my knowledge of the ways of the world and how mental health
10 people work is it requires a lot of face-to-face contact, interaction
11 with Mr. Nashiri. Yet we'll be in trial on 1 June, so how would that
12 work that that could happen simultaneously?

13 TC [CAPT STINSON]: Yes, Your Honor. And the two points
14 there. One is, is that as Ms. Miller was discussing, the principal
15 purpose of Dr. Kupers, and as I understand it, the Psy.D, Dr. Holmes,
16 would be to, in mitigation, explain the impact of Mr. Nashiri's prior
17 treatment on his mental health.

18 The witness summary, the synopsis of expected
19 testimony -- and we'll be addressing that for Dr. Kupers -- is
20 testimony regarding the effects of isolation and solitary
21 confinement, consistent with his declarations in AE 569 and AE 659
22 series.

23 So this is an individual that has previously provided the

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1 commission with declarations regarding the impact of solitary
2 confinement. I understand he may and will need to speak to
3 Mr. Nashiri, but that can occur prior to the mitigation or the
4 presentation of the defense case in chief.

5 We do anticipate -- we filed a trial plan with our list of
6 witnesses. We anticipate -- and it may be an overestimate, but
7 roughly eight weeks of government testimony in our case in chief.

8 And from the government's perspective, that is plenty of
9 time to arrange for on the weekends, off-hours, an evaluation of
10 Mr. Nashiri by Dr. Kupers or other individuals whose primary
11 testimony would be relevant in mitigation for the members. So
12 delaying the trial because of the security clearances or flying back
13 out to get national programs from the government's perspective is not
14 appropriate.

15 The defense really is focusing on Dr. Kupers and Dr. Holmes.
16 But if you look back at the -- the nature of this proceeding, it's
17 been going on for 15 years. And Mr. Nashiri has received other
18 consultations, other individuals, not going to be the witnesses at
19 trial, but he's had extensive consultations. This isn't going to be
20 a blank slate, in other words.

21 And I think Ms. Miller actually referenced that, that those
22 individuals will be reviewing a packet of information before they
23 meet with Mr. Nashiri, and that will be an extensive packet of

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1 information. That's, you know, the -- just the reality of how long
2 this case has taken, that we've gone through numerous iterations of
3 those evaluations.

4 So the government does not believe that that's a
5 justification to delay the 1 June trial date, Your Honor.

6 MJ [COL FITZGERALD]: Thank you. You may continue.

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

8 So they also talk about discovery issues and witness
9 production requests, and I know we're going to be litigating
10 the -- this is the second category of information. And we lay out in
11 our response the Miller factors for each category.

12 The defense talks at one point about it's been over -- or
13 roughly a half million pages of discovery has been provided by the
14 government, and then they talk about the government has denied the
15 majority of our witness requests.

16 And I know we're going to be litigating -- or we're going to
17 be discussing that over the next several days as far as the witness
18 production request. It's an extraordinary witness production
19 request. They are requesting two former presidents, a vice
20 president, numerous cabinet-level officials, and the like.

21 The government will litigate this separately, has agreed to
22 produce roughly 50-some defense witnesses. We've tried to work with
23 the defense on that request. Again, I know we're going to litigate

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1 that later on this week. From the government's perspective, that is
2 not a reason to delay the 1 June trial date.

3 They talk about discovery issues and, again, we have that on
4 the docket next week for 599L. This is not the case that the
5 government did not comply with the commission's order. The defense
6 requested the commission order, hey, give them stuff related to the
7 operations orders, EXORDs, FRAGOs. We provided a lot of discovery in
8 response to that.

9 There was a request that came back. Hey, find these
10 additional documents that are referred to in the documents you
11 provided. And we're going to litigate that. We've looked for those
12 additional documents. Some are outside of the time frame, they're
13 earlier, they're '95 or '96, but the -- CENTCOM doesn't necessarily
14 keep a database going back 20 or 30 years.

15 So we have tried to find those documents, and we can talk
16 about that. We just haven't been able to find those specific
17 documents, despite a reasonable and diligent search.

18 So, you know, this -- again, that's going to be litigation
19 later on. But the government has provided extensive -- I mean, there
20 are complaints about, hey, we couldn't possibly know this entire case
21 because of the volume of discovery, you know, a half a million pages
22 of discovery. Discovery is not, in the government's view, a reason
23 to delay the trial date of 1 June.

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1 And they bring up some late -- I think Ms. Miller referred
2 to it as eleventh hour, because we're scheduled to go to trial on 1
3 June, that al Hilah -- again, we're going to litigate it this
4 session. The government, in its response, indicates when it provided
5 information regarding al Hilah.

6 And, you know, that -- al Hilah's statements have been
7 noticed by the defense. They've noticed three statements from
8 al Hilah, and the government's offered to stipulate to those
9 statements, that if Mr. al Hilah was brought in -- and he was brought
10 in this very commission.

11 He invoked. He took the Fifth. He didn't -- he didn't
12 agree to be deposed in this commission, but the government has agreed
13 to stipulate to those three noticed statements. One of those is in
14 the record. It's the motion for testimonial immunity.

15 But Mr. al Hilah admits to hosting a mujahideen luncheon
16 with Nashiri and the two suicide bombers, Hassan and Nibras. So to,
17 you know, craft your whole defense case around al Hilah is, in the
18 government's view, it's a defense choice, but there's nothing in this
19 recent discovery, again, that would delay a 1 June trial date.

20 The defense has known who al Hilah has been for a very long
21 time. There was an attempt to depose him. He invoked. He
22 wouldn't -- he wouldn't testify. And the government's willing to
23 stipulate to the statements that the defense has noticed regarding

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1 Mr. al Hilah. Again, not a reason to delay the trial date.

2 The defense raises recent statements by President Trump.

3 MJ [COL FITZGERALD]: Well, before you go on, on Hilah, I
4 think ----

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

6 MJ [COL FITZGERALD]: And I'm just going to use the defense
7 phrase, the late notice was something to the effect of learning that
8 it was torture-borne. You didn't address that. What ----

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

10 MJ [COL FITZGERALD]: That seems to be more the crux of their
11 concerns is. I don't know if they -- she -- Ms. Miller referred to
12 it as a surprise, but she then said, in candor to the court and you,
13 that I'm now required to disclose what I disclosed in an ex parte
14 discussion, a key component of their intended defense because they
15 didn't know the information.

16 So would you like to address that?

17 TC [CAPT STINSON]: Yes, Your Honor. And we addressed that in
18 689 in the response about when that discovery was provided, the
19 allegations of Mr. al Hilah during his habeas case about his
20 treatment. And it relates to where he was detained during -- you
21 know, after he was detained by U.S. forces. So we can get into that
22 in the 689 series.

23 So the government has indicated that in certain

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1 circumstances it's not contesting the specifics of treatment at
2 particular locations. I have -- honestly, I think there's been some
3 allegations from the defense regarding the prosecutors deliberately
4 misleading the commission, and I think those allegations are spurious
5 and not accurate.

6 If you read that transcript, the response was the
7 government's not raising that. The government's not objecting to
8 Mr. al Hilah's statements on the basis of 948r. The government did
9 object to the admission of Mr. al Hilah's statements on the grounds
10 that they were a statement against interest.

11 So the government was responding to a question saying, hey,
12 we are not trying to preclude Mr. al Hilah's statements in the
13 commission on a certain basis. We are arguing that this does not
14 qualify under a different hearsay exception. I think that was an
15 accurate statement for the prosecutor to make at that time.

16 He was not trying to preclude a statement coming in on a
17 particular basis. The government was not raising the argument about
18 his treatment. The government was arguing that it's not a statement
19 against interest to qualify for that hearsay exception.

20 So the commission who would approve the 505 summaries, you
21 know, Judge Acosta approved the 505 summaries regarding Mr. al Hilah,
22 he said this is a statement against interest and I'm going to allow
23 it as a statement against interest.

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1 So the defense is now claiming, well, even though the
2 commission ruled in their favor, they're saying, well, we are
3 absolutely precluded from using that.

4 The government's position -- again, I think we'll argue this
5 in 689 -- is we're not saying we're taking that statement. We're
6 willing to stipulate to his expected testimony, stipulate to what he
7 would have said at that deposition. He would have testified
8 consistent with their noticed statements. He would testify tomorrow
9 consistent with their noticed statements. They've got some
10 statements they want to use. If we brought al Hilah in, I will
11 stipulate that he will testify consistent with what you've noticed.

12 That's not 948r. That is a government willing to stipulate
13 that what you want him to say, that's his expected testimony. And
14 we'll instruct the members, like any other stipulation of expected
15 testimony, that I expect that if al Hilah was called and sworn in,
16 this is what he would say, consistent with what the defense has
17 noticed. That's not a 948r in the government's view. That's not
18 prohibited by 948r.

19 So to me, that's the most direct and immediate way. Their
20 complaint is we can't get to the members to say what al Hilah
21 said -- would say, and I'll stipulate to it. If we called in
22 al Hilah right now, he would testify as follows. And we'll just go
23 with their noticed statements.

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1 I don't think they'll want to do that, again, because one of
2 the statements is, hey, I hosted a mujahideen lunch with Nashiri,
3 Nibras, and Khamri, the two suicide bombers. So okay. I mean, I'll
4 stipulate to that all day long.

5 He's going to say some other things. He's going to say that
6 me and Jayul paid off port security to allow a small boat to get into
7 the harbor. Okay. Again, I'll stipulate to that and I'll stipulate
8 it in the sense that if I called him and put him on the stand, he
9 would say that.

10 And I don't think there's any prohibition in 948r for the
11 parties to stipulate that that's his expected testimony.

12 MJ [COL FITZGERALD]: Thank you.

13 TC [CAPT STINSON]: Yes, sir. So -- and then going back to
14 the President's statements, the defense says this is a complete
15 surprise. We disagree with the claim that there has been no mention
16 of Iran in discovery, and we can talk about that. I think there has
17 been some general discovery, not specific to the attack, but general
18 discovery about Iran.

19 But we also point to -- and we indicated this in our
20 response to their discovery request -- there's public information.
21 There are three judgments, I think it's Judge Contreras in all three
22 civil cases against the Republic of Iran by family members of the
23 attack on the USS COLE that detail Iran's long history in support of

1 terrorist organizations.

2 And we also pointed out that two of the defense-noticed
3 witnesses, one expert, a Professor Byman, and Leah Farrall, the
4 author for *The Arabs at War in Afghanistan*, have written on I think
5 Professor Byman's article is called *The Unlikely Alliance Between*
6 *Iran and al Qaeda*. So this should not be a surprise to the defense,
7 that in certain circumstances Iran has supported terrorist groups.

8 And whether that's the old saying "the enemy of my enemy is
9 my friend" or they have certain shared interests or certain shared
10 training or funding and the like, that should not be a surprise to
11 the defense.

12 The commission did order us to look -- we had actually
13 gone -- when we got the defense request to do our due diligence, we
14 did deny it because, again, I don't believe it was relevant, but we
15 did do our due diligence to send a request to see if there are
16 records that we were not aware of or did not have. And as the notice
17 indicates, we were told there were no responsive records from the
18 White House regarding those statements.

19 So there are the public statements. The defense could
20 notice those, they could use those, they could argue those to the
21 members. There's nobody stopping them from doing that.

22 But what additional discovery would they have beyond what
23 has been widely known that -- and publicly known also by their

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1 experts that generally Iran has supported terrorist groups. I think
2 their expert says "an unlikely alliance." I think public statements
3 by former Director of National Intelligence James Clapper called it a
4 marriage of convenience. There's been a lot of public statements
5 about the military leader of al Qaeda at the time of September 11th,
6 Saif al Adel moved to Tehran and is in Tehran still as far as, I
7 think as far as is publicly known.

8 Family members of Usama bin Laden, family members of Khalid
9 Shaikh Mohammad, other members of al Qaeda moved to Iran, maybe under
10 house arrest or things like that. But there's -- I think that's been
11 well known that there is some interaction between the Iranian
12 government and al Qaeda.

13 So from the government's perspective, that should not have
14 been a surprise, nor should it have caused any delay in relation to
15 the trial date.

16 The third category the defense points to is matters outside
17 of everyone's control. And she talks about the health concerns,
18 ongoing conflict in the Middle East, Ms. Carmon also asking to depart
19 the case and the like.

20 But that's the point. Those are outside of everybody's
21 control. And they happen literally all the time. If we delay it
22 seven months or three months or two months, the only thing we can
23 guarantee is that matters outside of our control will likely happen.

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1 And then we'll be back again trying to figure out what's the impact?

2 Do we have to delay trial again?

3 And we'll go back to the first point. Who has suffered the
4 most? The family members of the attacks. Why are we here? You
5 know, this commission exists. This entire apparatus exists to bring
6 justice to those who were killed and the injured and their family
7 members on the attack. To provide a day in court for Mr. Nashiri, to
8 give him that day.

9 And I take Ms. Miller at his **[sic]** word that they are
10 litigators, and we can see that. I mean it's not a lack of motions.
11 I know she said she was, you know, worried about you saying more
12 motions. We're in the 700 series. We've had a lot of motions over
13 the 15 years.

14 They are litigators, and that's very obvious. I think we
15 take them at their word that they will be ready to litigate when the
16 commission says go. And the commission has said we are going to go 1
17 June.

18 Attachment B to our response is a list of all the times the
19 commission has granted extensions. And at times, the defense has
20 requested and the government hasn't opposed reasonable extensions to
21 certain deadlines except for the trial date. We don't want to extend
22 the trial date. Any other deadline Ms. Miller asked, hey, can I get
23 seven more days, or a week here, the government's not going to oppose

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1 that. We're not trying to be unreasonable. But we don't want to
2 lose that trial date.

3 Ms. Miller brings up recommencing plea negotiations. And
4 that very well may be the right way to finally bring resolution.
5 That's not my decision. That's somebody else's decision.

6 But moving the trial date is often a disincentive to those
7 type of things. Having a firm and fixed trial date keeps people's
8 feet to the fire.

9 We've talked to the witnesses. We've put in our trial plan.
10 We've talked to the -- the schedule that we're coming up with. We
11 had our 802 yesterday that the commission mentioned about members.

12 The convening authority has notified the members of the
13 trial date of 1 June to 11 December. They have acted on a
14 significant number of the excusals that are pending before them.
15 We're still waiting on the vicing order, but we are -- we are getting
16 through the excusal requests based on a reasonable trial schedule.

17 This commission has been extremely reasonable with prior
18 requests to extend, and we set a fixed 1 June to 11 December
19 deadline. We've got the members lining up. We've got the members
20 notified, hey, this is the timeline. We sent out the questionnaires.
21 And those individuals need to know, hey, here's the right and left
22 limits. Same with the witnesses.

23 And then from the government's perspective, most

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1 importantly, are the victims and the family members who have been
2 following this case and understand that we are going to trial 1 June
3 of 2026.

4 So for those reasons, Your Honor -- and I'm glad to address
5 any of the Miller factors, but when you -- when you look across all
6 three, the government's perspective is we didn't argue bad faith on
7 the part of the defense. They put a lot up there, a lot of different
8 reasons. But for all of the Miller factors, with the exception of
9 the, you know, arguing bad faith, the government's view is they don't
10 meet any of the Miller factors that would justify -- that would
11 provide good cause to, again, continue the trial date. And I'm glad
12 to go over those sort of one at a time, Your Honor.

13 MJ [COL FITZGERALD]: Where were you -- if you'd like to add
14 it, I don't have any questions in particular about that, but if
15 there's something you would like to add.

16 TC [CAPT STINSON]: Well, I think the two I'd like to focus on
17 in relation to the Miller factors is the availability of witnesses
18 and the evidence. And we see that over the course of this trial, you
19 know, since it's been over 25 years since the attack, the
20 availability of witnesses.

21 Witnesses are aging. You know, witnesses that were in Aden
22 in October of 2000 are now 25 years older than they were at that
23 time. The ability for them to recall, the ability for them -- even

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1 just health issues and the like. We've lost a number of agents that
2 were on the ground. They've passed away over time.

3 We've lost survivors of the attack. I think it's three of
4 our -- in the charge sheet, three of the injured sailors that we have
5 in the charge sheet over time have passed away from the -- you know,
6 just -- just the passage of time.

7 So the availability of witnesses and evidence over time,
8 that's a big prejudice to the government and to the truth-seeking
9 function of -- of this -- you know, of this commission, the whole
10 reason for this commission.

11 And then the surprise. Ms. Miller said nobody would be
12 surprised by this continuance. Well, I'm surprised, Your Honor. The
13 government is surprised. We've been on notice for a long time. The
14 commission, when it granted the continuance from the October trial
15 date, has been very clear and very consistent. We have got to get
16 prepared.

17 Ms. Miller said, well, it was only about three months, you
18 know, when you -- when you canceled the hearings and said, hey, I'm
19 going to give folks time, but it was May to November. That's a
20 six-month time where we decided -- the commission decided still a lot
21 of work to do, but I am not going to require folks to come down here
22 for hearings. I'm going to give that space to allow folks to get
23 ready.

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1 And there are deadlines and people do file motions, but
2 those are the ways in which you get familiar with the case, from the
3 government's perspective. That's what you -- you have to do.
4 There's never going to be a criminal trial where they say we're going
5 to give you six months, and you don't have anything to do.

6 Just -- you know, that -- that's not, in the government's
7 experience, the way these trials work. You normally have multiple
8 cases, and you're juggling those things. And giving six months away
9 from the commission hearings was an appropriate period of time for
10 folks to get ready with the understanding we're going to go 1 June.

11 MJ [COL FITZGERALD]: Thank you. And I think these are quick
12 questions.

13 Does the government use Lexis AI Protégé? I don't know
14 anything about that. Am I using the right term, Lexis AI Protégé?

15 LDC [MS. MILLER]: Yes, sir.

16 TC [CAPT STINSON]: Yeah. I do not use it. I'm pretty sure
17 we do not have it. I mean, I think that was in the balance. I
18 don't -- I don't believe we have Lexis AI.

19 MJ [COL FITZGERALD]: Or anything -- how about just Lexis AI?
20 I don't -- is Protégé a form?

21 TC [CAPT STINSON]: We do not have Lexis AI either. I think
22 we have the LexisNexis, just like what we're -- we're all used to,
23 standard LexisNexis. Yes, Your Honor.

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1 MJ [COL FITZGERALD]: Okay. Ms. Miller said that the defense,
2 when they request travel, are required by the people who handle
3 travel to give 30 days' advance lead time. Is the prosecution held
4 to that same standard?

5 TC [CAPT STINSON]: I haven't traveled a lot, so ----

6 MJ [COL FITZGERALD]: Or maybe you have no familiarity. I
7 don't know.

8 TC [CAPT STINSON]: I have some familiarity. I know we have
9 to get our travel requests in. It's got to go through our operations
10 folks. We have to justify it.

11 I don't -- I don't know of a time where we've asked to
12 travel without, you know, several weeks, likely 30 days in there.
13 But I'm -- I just don't remember seeing something that says you must
14 put this in at least 30 days in advance. So I don't want to misspeak
15 on the record.

16 MJ [COL FITZGERALD]: Do you want to check with your team?
17 They're conferring so ----

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

19 MJ [COL FITZGERALD]: ---- maybe they have more clarity.

20 **[Counsel conferred.]**

21 TC [CAPT STINSON]: Your Honor, we're told the standard
22 generally is to submit requests for travel 30 days in advance. I
23 don't -- I haven't -- we've done some travel as a team. I'd have to

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1 go back and see if there was one where, you know, we were -- had to
2 justify a late submission or something like that.

3 But I think the standard is you're supposed to put in the
4 request to travel with a cost estimate and, you know, sort of the
5 details of your travel 30 days prior to travel. I think -- I think
6 that's -- that's my understanding of the -- the requirements.

7 I don't -- and I don't know if the defense has a different
8 experience. And I don't know whether or not there'd be a
9 circumstance where there's an emergency travel, and you could ask for
10 a waiver of those -- those specific things.

11 MJ [COL FITZGERALD]: I think defense made it clear that they
12 weren't directing the issue at you, but there was some concern raised
13 in respect to requests having to go to the convening authority and
14 how -- the length of time it took to make decisions on that.

15 That is part of their motion. But would you like to address
16 that? Again, not saying you, the prosecutors. I think the defense
17 was very clear she recognizes this third party, the convening
18 authority.

19 TC [CAPT STINSON]: Yes, Your Honor. And defense also
20 referred to, I think, four convening authorities. And just the way
21 that worked is SECWAR delegated to Dep SECWAR with the ability to
22 further delegate except for the negotiation of the PTA.

23 And then Dep SECWAR delegated to the -- I think it was the

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1 Deputy Secretary of Defense for Policy, Eldridge Colby, with
2 instructions that he could further delegate, but he -- but obviously,
3 Dep SECWAR was keeping the PTA stuff.

4 And then Mr. Colby I think went down to Mr. Humire, and then
5 he finally went down to Mr. Dobson, who is the current convening
6 authority for everything other than the resources.

7 So I do think there was some filtering there of folks as it
8 was getting delegated down from the Secretary of War to Mr. Dobson
9 where, you know, it was unclear if that person was going to retain it
10 and do everything or if they were going to delegate it down. And I
11 think now it's at the level where this individual is acting on the
12 requests. And I think Ms. Miller's reflection of, hey, we got a
13 couple in yesterday is sort of showing that, that hey, now that it's
14 to Mr. -- and I think we filed each one of those delegations with the
15 commission. So I think all of them are on the record, the actual
16 language of those.

17 So I do -- I don't disagree that there was some filtering
18 down to it until it was at the place where the individual is going to
19 be able to quickly kind of act on those requests. But it's there
20 now, and they're acting on the requests.

21 MJ [COL FITZGERALD]: But up until now, are you saying you
22 recognize that there were some delays because of that delegative
23 process creating, I don't know, confusion or at least stopgaps from

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1 who was the proper convening authority at this moment to take action
2 on something the defense had filed?

3 TC [CAPT STINSON]: I want to be a little bit careful with
4 that, because I think I've been aware from Ms. Miller sort of
5 relaying to me that there's been some delays in those. Some of the
6 requests have been ex parte, so I was not aware ----

7 MJ [COL FITZGERALD]: What you know of.

8 TC [CAPT STINSON]: ---- of something pending that I could
9 either talk to someone or see if I could move it along.

10 So I don't know the substance or the delay. I have been
11 aware that the defense has expressed concerns about, hey, this seems
12 to be taking longer than it was taking when it was Brigadier General
13 Escallier. So yes, sir.

14 MJ [COL FITZGERALD]: So you recognize that at least was some
15 of their concerns?

16 TC [CAPT STINSON]: I recognize that that's been something
17 that Ms. Miller -- but I can't speak to whether or not
18 that -- because some of those have been ex parte, so I don't know
19 when it was submitted if there was a deficiency in the submission, if
20 there was back and forth with the staff. You know, because, again,
21 those things were ex parte. So I'm not sure ----

22 MJ [COL FITZGERALD]: But the ones you know about, were you
23 seeing anything inconsistent with Ms. Miller's assertion that it

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1 seemed to be taking longer than it was with Ms. Escallier?

2 TC [CAPT STINSON]: I was not seeing anything necessarily
3 inconsistent. I do think that they work relatively quickly in
4 relation to, for example ----

5 MJ [COL FITZGERALD]: Well, what does "relatively quickly"
6 mean?

7 TC [CAPT STINSON]: Well, I mean the examples I have, and this
8 isn't the convening authority, but the clearances, I think Dr. Kupers
9 got cleared in a very quick amount of time, you know, from, you know,
10 the submission of that. I mean, getting a clearance does take some
11 time. They're using different folks now for, you know, their
12 purposes, but I think it takes some time.

13 And this Psy.D., Dr. Holmes, you know, I do think what I've
14 seen is pretty responsive. There was a kerfuffle with where she's
15 getting the fingerprints and did she click submit with the SF 86, but
16 I do think they moved quickly with -- you know, from my perspective
17 with respect to trying to get that paperwork through.

18 MJ [COL FITZGERALD]: And are they doing anything to
19 quickly -- because as I understand it's not been adjudicated. Is
20 that also your understanding with respect to Dr. Holmes?

21 TC [CAPT STINSON]: Yeah, with respect to Dr. Holmes, I think
22 that is still -- as I understand, is still in the investigative
23 phase. So we'll know when it goes to adjudication. And then -- but

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1 I ----

2 MJ [COL FITZGERALD]: So we don't know if anybody in the
3 government is making any effort to prioritize?

4 TC [CAPT STINSON]: I do think they are prioritizing that.
5 But that's one of those where ----

6 MJ [COL FITZGERALD]: Do you know that or ----

7 TC [CAPT STINSON]: ---- we have no idea if they are going to
8 get a clearance. You can't guarantee a clearance.

9 MJ [COL FITZGERALD]: Well, that's the adjudication. Maybe
10 she does and maybe she doesn't. We don't control that.

11 TC [CAPT STINSON]: Yes, sir.

12 MJ [COL FITZGERALD]: But they prioritize where she stands in
13 the queue as far as -- it's a she, correct, Dr. Holmes? **[Microphone**
14 **button not pushed; no audio.]**

15 MJ [COL FITZGERALD]: Where she stands with the adjudication.
16 It seems I keep getting similar responses from -- the defense is
17 getting, yeah, we're working on it. Is the government making any
18 effort to prioritize that, knowing that the other part of the
19 government, you, wish to go to trial on 1 June?

20 TC [CAPT STINSON]: Yes, Your Honor. So we've absolutely
21 spoken to individuals to say we are going to trial 1 June, this has
22 to be expedited. So a hundred percent for ----

23 MJ [COL FITZGERALD]: So they know that?

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1 TC [CAPT STINSON]: They absolutely know that.

2 MJ [COL FITZGERALD]: But have they acted upon that knowledge?

3 TC [CAPT STINSON]: Have they acted on it? My understanding
4 is they have acted on it and they are moving it through, but it
5 hasn't moved from investigation to adjudication at least as far as
6 the last notice to the commission goes.

7 MJ [COL FITZGERALD]: How will we know? It seems like I
8 really get the same answer every time I talk about anybody getting
9 their clearance, like, well, it's moving through the process.

10 TC [CAPT STINSON]: Yes.

11 MJ [COL FITZGERALD]: I've never had anybody tell me they have
12 front loaded that, they have re-prioritized it, it's their number one
13 effort. I've never heard anything analogous to that from anybody in
14 the government other than they're working on it.

15 So I don't know, are we going to be here in the May session
16 still hearing they're working on it with no idea what that means?

17 TC [CAPT STINSON]: Yeah, and I ----

18 MJ [COL FITZGERALD]: They're the government, right? They are
19 part of the government?

20 TC [CAPT STINSON]: Yes, Your Honor. And I do think that's
21 appropriate to be vague in that. Because we have no idea, you know,
22 foreign national connections.

23 MJ [COL FITZGERALD]: So then who bears the onus of the

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1 vagaries if the government says, "We're going to be vague and
2 nebulous, we're not going to give you any more information," even as
3 to how they're processing it. I'm not asking anything about rushing
4 to judgment, rushing to adjudication. I'm just asking is this
5 important enough to them and do they have any assertion or expression
6 to this commission that the government understands its priority with
7 this? Or do they want to come here and say, sorry, we're not going
8 to prioritize you?

9 I don't know. It seems like they're sitting on their hands
10 on that. I can't make anybody do anything, but they're not even
11 giving me any information if they're doing anything.

12 So who bears the burden on that in this motion?

13 TC [CAPT STINSON]: Well, I think the defense has the ultimate
14 burden in relation to the motion.

15 MJ [COL FITZGERALD]: Well, how about ----

16 TC [CAPT STINSON]: We do try to be as transparent as
17 possible.

18 MJ [COL FITZGERALD]: And I think you have been. I'm just
19 saying there's another aspect of the government maybe that is not
20 being as transparent with this commission in trying to be responsive
21 to this motion.

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

23 MJ [COL FITZGERALD]: So how do they meet that burden if the

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1 only information they get is the same information I get? Can I force
2 that information? Can you force that information? Or is the
3 government as a whole going to rely on, we'll get to it when we get
4 to it?

5 TC [CAPT STINSON]: So I would only take issue, respectfully,
6 with that we're going to get to it when we get to it. That's not
7 been the experience in relation to these ----

8 MJ [COL FITZGERALD]: Sure, it has.

9 TC [CAPT STINSON]: ---- this commission over the last few
10 times.

11 MJ [COL FITZGERALD]: Sure, it has. But it has. I don't
12 know -- when I say that I don't mean it facetiously, but I have not
13 been given any information that they recognize this needs to be
14 adjudicated by a very specific time date. I don't know if they have
15 a process for that because nobody has come here and taken the stand
16 to tell me one way or the other, that do they have a process of
17 expediting these.

18 I imagine they do somewhere in the government have a process
19 of expediting them based on mission, needs of the services, needs of
20 the organization, needs of the agency. But nobody has come here to
21 tell me that. That's what I mean by we'll get to it when we get to
22 it.

23 I don't know if they have separate queues, separate lines,

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1 separate processes. And it's fine to tell me they don't, and sorry,
2 she just has to wait in line, but I would think that information
3 would be helpful to everybody.

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

5 MJ [COL FITZGERALD]: So do we know?

6 TC [CAPT STINSON]: It's my understanding they definitely do
7 have an expedited process, and these clearances ----

8 MJ [COL FITZGERALD]: Is Ms. Holmes in the expedited process?

9 TC [CAPT STINSON]: ---- have been placed in the expedited
10 process. Yes, sir.

11 MJ [COL FITZGERALD]: Is she in that expedited process?

12 TC [CAPT STINSON]: That's my understanding, yes, sir.

13 MJ [COL FITZGERALD]: Okay.

14 TC [CAPT STINSON]: And, again, I think it's reflective in the
15 movement of Dr. Kupers through. I know it seems like sitting on
16 their hands. My recollection is the average time from an application
17 to a Top Secret/SCI clearance historically has been 14 to 18 months.
18 Dr. Kupers went through much, much quicker than that. And so I -- I
19 know that's maybe not evidence that you have before you, but I do
20 think it's been clear that they are attempting to move these through,
21 understanding the priority and the trial date, quickly.

22 MJ [COL FITZGERALD]: I think there's some at least assertions
23 by the defense that Dr. Kupers was about six months.

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1 Is that what you had said?

2 LDC [MS. MILLER]: We applied in August. He was adjudicated
3 in March ----

4 MJ [COL FITZGERALD]: Okay.

5 LDC [MS. MILLER]: ---- whatever ----

6 TC [CAPT STINSON]: So nine months.

7 MJ [COL FITZGERALD]: Okay.

8 TC [CAPT STINSON]: Yes, sir.

9 MJ [COL FITZGERALD]: But we just have no status as to where
10 we're at with Ms. Holmes -- or Dr. Holmes. I apologize.

11 TC [CAPT STINSON]: Dr. Holmes, we've been putting that in
12 every time. I think we put it in, hey, this is when the fingerprints
13 came back. Until the fingerprints came back they're not going to
14 kick off their investigation. They've kicked off their
15 investigation, you know, that requires a significant background
16 check.

17 Again, we're talking about TS/SCI and national programs.
18 They do understand it's an expedited request for certain. They are
19 aware of the trial date for sure. So we will continue to update the
20 commission in our weekly notice, but that's what we have.

21 And because, you know, we don't have access to the SF 86,
22 we're not going to know, is this an easy one? Is it a complicated
23 one? Do we have a lot of foreign national connections? Things that

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1 can extend a review are just going to be not known to us.

2 MJ [COL FITZGERALD]: And the same with I think my
3 question -- and maybe you can find some folks more responsive to this
4 question. The read-on time, it looks -- it appears to be at least
5 two read-ons need to be done?

6 LDC [MS. MILLER]: Correct.

7 TC [CAPT STINSON]: I think there's just different equity
8 holders. They do the TS/SCI indoctrination at one point. Then they
9 clear that. I think it can be done very, very quickly. I think
10 Ms. Miller said roughly a week. I think if we know timing, somebody
11 coming in, we can -- we can talk to national programs to make sure
12 someone's available to read them on. But you have to go to
13 the -- the secure facility to get those reads on -- read-ons, yes,
14 Your Honor.

15 MJ [COL FITZGERALD]: Okay.

16 **[Pause.]**

17 MJ [COL FITZGERALD]: I think the rest -- I had some other
18 questions, but I think they'll relate to other motions we're going to
19 take up regarding motions to compel and other matters.

20 Anything else from the defense -- I mean, the government?

21 TC [CAPT STINSON]: Nothing else from the government, Your
22 Honor.

23 MJ [COL FITZGERALD]: Very well. Thank you very much.

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1 TC [CAPT STINSON]: Thank you.

2 MJ [COL FITZGERALD]: And, Defense, I'll note the time is
3 1221. I don't know how long you'll need, but do you --

4 LDC [MS. MILLER]: Ten minutes.

5 MJ [COL FITZGERALD]: Ten minutes. I think what you're
6 telling me is you'd like to do your rebuttal before lunch?

7 LDC [MS. MILLER]: Yes, sir.

8 MJ [COL FITZGERALD]: Okay.

9 **[Counsel conferred.]**

10 LDC [MS. MILLER]: Just a very few points of clarification.

11 The commission asked about Dr. Kupers and how would the
12 government's proposal of starting 1 June allow for Dr. Kupers to do
13 his evaluation -- I'm paraphrasing, but something to that
14 extent -- because obviously we need Mr. al Nashiri for jury selection
15 and the -- and the government's case in chief.

16 And I was very clear in saying that Dr. Kupers is not an
17 expert specifically for sentencing. He is very well and likely going
18 to testify in both merits and in sentencing should we reach a
19 sentencing phase, which was what I proposed to the commission,
20 particularly if the commission denies our motions to exclude
21 Mr. al Nashiri's statements in the CSRT.

22 Dr. Kupers would be relevant in merits phase to challenge
23 the reliability of Mr. al Nashiri's statements. He also needs to

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1 review Camp VII spherical and can't do that without a clearance.

2 And so ----

3 MJ [COL FITZGERALD]: Do you also expect him -- is he serving
4 in a -- just as a witness or consultant capacity as well?

5 LDC [MS. MILLER]: He has served as a consultant. He is -- I
6 would consider him to be one of the foremost experts in this world,
7 but certainly this country, on isolation confinement. And so
8 certainly he has consulted with our team as we've prepared some of
9 the litigation before this commission. As my colleague on the other
10 side indicated, he's prepared declarations that Your Honor has
11 reviewed.

12 MJ [COL FITZGERALD]: During trial, will he be serving as a
13 consultant?

14 LDC [MS. MILLER]: Oh, yes, sir. Yes, sir. Yes, sir. Sorry.
15 I did not understand the question. Yes, sir.

16 MJ [COL FITZGERALD]: It wasn't clear. I apologize.

17 LDC [MS. MILLER]: No, that's my fault. Yes, sir.

18 And, again, there's some things that we're still litigating.
19 And so if I understand the government's proposal as to how we would
20 start 1 June -- with the status of Dr. Kupers, we would be starting 1
21 June not knowing if we had an affirmative mental health defense to
22 raise during the government's case in chief if we followed the
23 government's proposal as to how to start 1 June, given the status of

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1 Dr. Kupers, which I would obviously object to starting a -- a capital
2 trial not knowing if we have an affirmative mental health defense
3 that we intend to put forth in first phase.

4 And certainly, it would affect how voir dire is conducted as
5 well as the cross-examination of the government's witnesses during
6 their case in chief. And so I -- I just -- the government's
7 suggestion I find a little absurd.

8 The members -- the panel members the government also
9 mentioned, their convening -- the convening order and the
10 instructions that have been given to the member panel, as well as the
11 alternates, is that they will be TDY for six months for potentially
12 the next two years.

13 So even if the commission were to grant this continuance,
14 what they have been ordered, or the instructions that has been
15 provided -- the instructions that have been provided -- excuse
16 me -- to the member panel as well as the alternates say TDY for six
17 months, but any time over the -- the next two-year period, so I just
18 wanted to be clear on that.

19 I think the government well laid out the problems with the
20 convening authority as, again, my colleague on the other side was
21 indicating that the secretary delegated to the DEFSEC who delegated
22 to this guy who delegated to that guy who delegated to this guy, I
23 think they made our point.

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1 And I would just note that the commission asked the
2 government, would you agree that there has been a delay with the
3 convening authority, the Office of the Convening Authority responding
4 to the defense request, and the government never answered the
5 commission's question. In fact, the government turned to security
6 clearances.

7 And that's how we then began -- again, my colleague on the
8 other side said I'll use security examples or security clearances as
9 an example -- right? -- and trying to move Dr. Kupers more quickly
10 through the process. But there was never an answer to the commission
11 about the Office of the Convening Authority and the delays that we
12 have.

13 But I think it is self-evident, given the delegation
14 to -- to this guy, to this guy, to this guy, to this guy that, of
15 course, there was going to be delay in that process in getting
16 responses from the Office of the Convening Authority for our
17 resourcing requests.

18 Something I failed to mention during my primary argument,
19 and I'm going to ask leave for the commission to bring it up now,
20 understanding that the government should be given an opportunity to
21 respond to it -- is that I failed to mention that we have filed a
22 mandamus petition in front of the CMCR. I believe the commission
23 received notice of that, as is required by order of this commission.

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1 The mandamus petition -- excuse me -- is about the
2 government's refusal to produce to the commission or the defense
3 classified and unclassified discovery. Additional time is needed to
4 hear that petition. It is purely a legal issue, so none of us are
5 expecting it to take years for the CMCR to resolve this issue, but
6 some time is needed.

7 And if the CMCR were to rule in our favor, some time will be
8 needed to address the outcome, obviously, of that petition. And so I
9 neglected to mention the mandamus petition that is now pending before
10 the CMCR in my initial argument.

11 And the last thing I wanted to say -- and I -- I was trying
12 to be as clear about this as possible. My role in this process is as
13 Abd al Rahim's advocate. That doesn't mean that I don't care or that
14 I'm not considerate or that I don't feel it very deeply how long the
15 victims and the family members of the victims have waited for the
16 resolution of this case. And so to suggest otherwise is just
17 inconsistent with who I am.

18 What I would say to the commission is that -- and I think
19 I'm going to quote Ms. Carmon. She indicated, litigating something
20 beautifully before the commission, that it's all about choices. The
21 government has choices. And the government exercised a choice in the
22 prosecution of Abd al Rahim al Nashiri. Because a federal prosecutor
23 in the Southern District of New York wanted to prosecute

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1 Mr. al Nashiri in 2003, along with several other suspected
2 terrorists, and they were -- that federal prosecutor, who is on our
3 witness list, was told he could not have Mr. al Nashiri because
4 Mr. al Nashiri was in a black site.

5 And so the government could have prosecuted Mr. al Nashiri
6 in 2003. The case would be over. The appellate process would be
7 over. None of us would be here. But the government made a choice to
8 continue torturing Mr. al Nashiri rather than turn him over to the
9 prosecutor who requested him for prosecution.

10 And so I am incredibly sympathetic to what these people have
11 gone through. But the government exercised choices, and now here we
12 are.

13 And so, again, I think the Miller factors, which the
14 commission has relied on heavily in adjudicating past motions for
15 continuances or extensions for time, weigh heavily on the side of the
16 defendant in granting a continuance, sir.

17 MJ [COL FITZGERALD]: Thank you.

18 I'll invite you to respond if you want to the
19 particular -- the writ. I don't know if you have much to say. She
20 didn't address it substantively other than ----

21 TC [CAPT STINSON]: Thank you, Your Honor.

22 Just two quick points. Ms. Miller mentioned that they filed
23 a petition for CMCR. That's not reason to delay the 1 June trial

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1 date. The government's view is that's not a meritorious petition.
2 We'll respond to it in due course. But if folks could delay a trial
3 date, defendants could delay a trial date by filing a petition for
4 mandamus, they would just continue to file that. I'm not suggesting
5 that's the case here, but that is not a basis, that's for the
6 appellate courts to review.

7 We'll respond in time. That should not impact -- the
8 defense has not moved for a stay. The CMCR doesn't have a stay
9 petition before it. So we should move forward with this matter
10 without reference.

11 And the only other thing I'll say is the government does
12 have choices. The government chose to attempt to stop other
13 terrorist attacks. That's a choice that was made back then.

14 But the family members did not have a choice. The people on
15 that ship, on the COLE, did not have a choice when they were attacked
16 by Mr. Nashiri and his al Qaeda co-conspirators. They did not have a
17 choice.

18 We're here now. We have a trial date. And we ought to
19 stick to that trial date.

20 That's all I have, Your Honor.

21 MJ [COL FITZGERALD]: Thank you.

22 Anything else from either party before we recess for lunch?

23 TC [CAPT STINSON]: Nothing else from the government, Your

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1 Honor. Just a reminder that Commander Roman and Lieutenant Colonel
2 Garrett we have asked to be excused for the next session ----

3 MJ [COL FITZGERALD]: Are going to depart. They are excused.
4 If either of you come back while we're still in session, just remind
5 me so I can notice on the record that you have come back.

6 LDC [MS. MILLER]: Judge, can ----

7 MJ [COL FITZGERALD]: The parties yesterday I think in the
8 802, I hope I'm not catching anybody by surprise, I would at least
9 like to contemplate starting 679DD if we've got -- I didn't know how
10 long this would take.

11 TC [CAPT STINSON]: I think that's right. And we spoke -- I
12 think we'll start with the hostilities section in relation to DD.

13 MJ [COL FITZGERALD]: See where we get?

14 TC [CAPT STINSON]: Yes, see where we get.

15 MJ [COL FITZGERALD]: I'm going to give you a little longer
16 lunch. How about back on the record at 1400?

17 TC [CAPT STINSON]: 1400 works for us. Yes, Your Honor.

18 MJ [COL FITZGERALD]: Will that work for the defense?

19 LDC [MS. MILLER]: Yes, sir.

20 MJ [COL FITZGERALD]: All right. Commission is recessed until
21 1400.

22 **[The R.M.C. 803 session recessed at 1233, 14 April 2026.]**

23 **[END OF PAGE]**

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1 **[The R.M.C. 803 session was called to order at 1407, 14 April 2026.]**

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

3 All parties present for the last recess are again present,
4 with the exception of Lieutenant Colonel Garrett and Commander Roman,
5 who have been previously excused from this session.

6 Briefly, we discussed how we're going to proceed, and
7 there's some witnesses I -- in this motion to compel that I'd like to
8 take up so I better understand the motion as well as the government's
9 response.

10 And so the intent was to take up those witnesses,
11 and -- first. And then any witnesses the parties thought I
12 should -- that wish to be heard on we can take up second to that.

13 So the first person I have -- I don't have it enumerated. I
14 have my own enumeration, but I don't think anybody -- there's no
15 agreed-upon enumeration, so I'll just use names.

16 Does that sound accurate?

17 TC [CAPT STINSON]: Yes, Your Honor. And just two quick
18 thoughts on that. One is -- and I spoke briefly with the defense
19 during one of the short recesses in the morning session.

20 The motion to compel was filed under seal. I think the
21 sealing was to protect certain -- like the, to the extent any of them
22 had contact information or the like in there, not necessarily the
23 names. But I spoke to defense, and my understanding is they don't

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1 have an objection to referring to the names on the record even though
2 the motion's filed under seal. I just wanted to flag that.

3 MJ [COL FITZGERALD]: That was going to be my next question,
4 can I refer to them by name since I don't have a common enumerated
5 scheme? So sounds like we're going to use names. Okay.

6 TC [CAPT STINSON]: I think that's right. The numbers should
7 be consistent. We tried to use in our response the numbers
8 articulated by the defense, but I think the names are easy for us.
9 As long as the defense filed it under seal, as long as they don't
10 have an issue with the names, I think that's fine.

11 MJ [COL FITZGERALD]: Very well. Then we shall proceed.

12 The first person I'd like to understand more of -- and
13 I'll -- for your frame of reference, I think, Lieutenant Colonel
14 Nettinga, some of this is because your synopsis was will testify
15 consistent with the public testimony and interview to the 9/11
16 Commission at, and then you gave me the Bates numbers.

17 Remember, the commission doesn't have the Bates numbers, so
18 that's usually where I need help with this. You have a reference
19 document. The government obviously gave you the reference document.
20 I have no knowledge of it.

21 So that's where a lot of these -- so if you have
22 that -- it's a table, for lack of a better term. I'm just going to
23 show you this table.

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1 DDC [Lt Col NETTINGA]: Yes, sir.

2 MJ [COL FITZGERALD]: That's what I'm going to look at. And
3 it's not numbered is, I guess, my point on that.

4 Colonel Nettinga concurred that he understood what I was
5 saying.

6 DDC [Lt Col NETTINGA]: Yes, sir. Just one addition to that.
7 Understanding that the filing here, I think, was 3,000-some-odd
8 pages, we endeavored to anytime there was a Bates number referenced,
9 to include the Bates document in the filing. It should be bookmarked
10 to the individual witness.

11 I'm not going to say we got that with a hundred percent
12 fidelity, but that was our attempt. So it should be in there, but
13 obviously to the extent that you don't have it, I want to ensure that
14 you do have that information. So happy to answer certainly any
15 questions you might have, but hopefully most of those have been
16 included. And if they haven't, then we can get you that.

17 MJ [COL FITZGERALD]: Really, I'm going to ask you to
18 just -- what in that Bates-stamped document do you think is relevant
19 and why you're seeking to compel that witness.

20 DDC [Lt Col NETTINGA]: Yes, sir, I understand.

21 MJ [COL FITZGERALD]: I think you understand what you're going
22 to argue, but I'm just giving you an understanding of why I'm asking
23 for your position on that.

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1 Okay, very well. The first person I have is Secretary Rice.
2 Defense?

3 DDC [Lt Col NETTINGA]: Yes, sir. So Secretary Rice -- just
4 for the commission's understanding, Appellate Exhibit 679DD, the
5 memorandum at issue appears beginning on page 144 of 3,287. And what
6 you'll note about that document, like many of the others in the
7 hostilities realm, certainly, is that this is an MFR that -- from an
8 interview that Secretary Rice gave to the 9/11 Commission, and it is
9 highly redacted.

10 However, in those unredacted portions, she mentions a number
11 of things that I think are relevant to Mr. al Nashiri and his
12 defense.

13 And so the -- the first thing ----

14 LDC [MS. MILLER]: I'm sorry. I have to interrupt. Our
15 client's headset is not working in his adjacent facility.

16 I apologize, Lieutenant Colonel Nettinga.

17 MJ [COL FITZGERALD]: I think I'm going to have to defer to
18 our tech folks, if they can be summoned to help me resolve this
19 issue.

20 **[Pause.]**

21 LDC [MS. MILLER]: Hopefully five to ten minutes. They're
22 aware of the problem. **[Counsel away from podium; no audio.]**

23 MJ [COL FITZGERALD]: All right. You're not in front of a

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1 microphone, so I'll just summarize.

2 Ms. Miller for the defense told me they need about five
3 minutes to resolve the technical issue, so I'm just going to recess
4 us in place.

5 The commission is in recess.

6 **[The R.M.C. 803 session recessed at 1414, 14 April 2026.]**

7 **[The R.M.C. 803 session was called to order at 1439, 14 April 2026.]**

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

9 All parties present before the last recess are again
10 present.

11 Lieutenant Colonel Garrett and Commander Roman are still
12 excused.

13 During the recess -- I may not have put this on the record
14 last time, so it's probably good that I do. Mr. Nashiri had elected
15 to attend the afternoon session from a remote location. That remote
16 location normally allows him to participate or hear the -- hear
17 what's going on in the courtroom, but the headphones, we were
18 alerted, were not working.

19 Working with the tech folks, they are trying to work on it.
20 They don't know if they can get it resolved. They don't want to do
21 anything that will cause us to lose all the audio for the session, so
22 they're doing the things they can do without jeopardizing losing the
23 whole session. So that's where we stand.

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1 As part of that, the defense requested that we conclude at
2 an earlier time than the end of the duty day to allow them to have
3 the opportunity to confer with Mr. Nashiri as to anything he may have
4 missed in the event the audio does not come back on so they can get
5 him up to speed on anything he may have missed, as he's elected not
6 to come back to the courtroom despite knowing that he's not able to
7 listen in.

8 So what I offered the parties is we will recess at some
9 point today earlier than the normal end of the duty day of 1700 so
10 that they can have that conference. And I also want to pass on to
11 the folks that handle things when I normally recess, the standard
12 we've been using is one hour after we recess the defense has that
13 opportunity to speak to Mr. Nashiri again before he departs.

14 We will likely recess before 1700, but I would like
15 Mr. Nashiri available to the defense until they have concluded their
16 conference with him, or 1800, whichever comes first. If there's any
17 question, I will make sure we've got clarification on that before we
18 depart for the evening.

19 But, again, for the folks, the bailiffs, they're going to
20 pass it on to the security team, the defense should have access to
21 their client until 1800.

22 The other thing I discussed while we were in recess, I took
23 the opportunity to share the commission's request of all the

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1 hostilities witnesses. I met with Lieutenant Colonel Nettinga for
2 the defense, Captain Stinson for the government. Ms. Miller was in
3 on part of that, where I said here are the people I want to hear from
4 and in this order.

5 In that conversation, Colonel Nettinga surmised that he may
6 not be able to take up all the persons I asked for in open session.
7 And I said what I would like him to do is go through the names in the
8 order I gave them, and if he tells me he is unable to take that
9 one -- that particular witness up in open session, to request to take
10 it up in closed session, I would grant it and he could just move on
11 to the next person and tell me if they're in open session, present
12 his argument. If they're in closed session, tell me that again and
13 just keep moving down the list.

14 Is that a good summary of what we discussed, Captain Stinson
15 and Colonel Nettinga?

16 TC [CAPT STINSON]: Yes, Your Honor. No objection.

17 MJ [COL FITZGERALD]: All right.

18 DDC [Lt Col NETTINGA]: Yes, sir.

19 MJ [COL FITZGERALD]: Okay. Ms. Miller, did that accurately
20 summarize what we discussed?

21 LDC [MS. MILLER]: It did, sir.

22 MJ [COL FITZGERALD]: Okay, very well. Then we were at
23 Secretary Rice.

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1 DDC [Lt Col NETTINGA]: Yes, sir.

2 MJ [COL FITZGERALD]: Is that somebody we can take up in open
3 session?

4 DDC [Lt Col NETTINGA]: I don't believe that it is, sir.

5 MJ [COL FITZGERALD]: Okay. We'll take that one under
6 advisement until we can go into closed session. Okay?

7 DDC [Lt Col NETTINGA]: I will say -- so I think the next one
8 you wanted to hear from was number 5, which would be Mr. Clarke if I
9 have that right, sir.

10 With respect to Secretary Rice, Mr. Clarke, and a number of
11 others, I do want to highlight for the commission that in AE 703,
12 which was the commission's ruling on the 505 materials that have been
13 discussed thus far, there were 10 MFRs of different potential
14 witnesses that were discussed in 679S.

15 Those areas of information that were discussed in the 505
16 process in those 10 were held by the commission to be relevant and
17 necessary and admissible. At least that's my understanding of all 10
18 of those.

19 And so 10 of those witnesses that we -- that were the
20 subject of 679S are individuals that are on this list. And I will
21 try to highlight that for the commission where necessary, where we've
22 already talked about the substance -- the commission's already made a
23 ruling about the substance of what they are talking about, that that

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1 is, you know, relevant, that the use is proper, and that we should be
2 allowed to get into it.

3 So I will largely rely on what we talked about in that 505
4 hearing and the commission's ruling on 679S unless there are
5 additional things. We can certainly -- probably necessarily need to
6 get into those in a closed session.

7 MJ [COL FITZGERALD]: And I think it will just be helpful, and
8 I don't know -- maybe it is the case in every single one. I don't
9 know if you tell me that they're the sponsoring witness of that
10 document or that document is going to be used to impeach them. I
11 don't -- I don't know.

12 So help me when you frame it and say there's a document.

13 DDC [Lt Col NETTINGA]: Yes, sir.

14 MJ [COL FITZGERALD]: Now we're talking about the witness.
15 What's the nexus between the witness and that document?

16 DDC [Lt Col NETTINGA]: Fully understood, sir, I think, and I
17 will endeavor to do that specifically with respect to Secretary Rice.

18 So the ----

19 MJ [COL FITZGERALD]: You're going back? I'm sorry.

20 DDC [Lt Col NETTINGA]: Yes, I am going back, and I'm -- I
21 think there's something I can do in the open session, so I'm going to
22 endeavor to do that, sir.

23 679S, one of the documents in that exhibit was an MFR of an

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1 interview that Secretary Rice provided to the 9/11 Commission. That
2 is what I referenced to you that begins on page 144 of Appellate
3 Exhibit 679DD. That meeting occurred on the 7th of February, 2004.

4 And the MFR summarizes the statements that Secretary Rice
5 made to the 9/11 Commission. Our intent in calling her is to elicit
6 testimony from her consistent with those statements that are
7 unredacted that were discussed in 679S and that the commission has
8 already made a ruling on in favor of admissibility.

9 MJ [COL FITZGERALD]: Thank you. Anything more on Secretary
10 Rice?

11 DDC [Lt Col NETTINGA]: That's all I have on Secretary Rice
12 for now, sir.

13 MJ [COL FITZGERALD]: Government, is there anything you -- I
14 think this is where I'd like to, instead of waiting until you get
15 through all of them, allow the government to be heard.

16 Would you like to be heard regarding Secretary Rice in open
17 session, Government?

18 TC [CAPT STINSON]: Just briefly, Your Honor. Looking at the
19 document, understanding that we may have to take up some of the
20 specifics in closed session, the government maintains its views
21 consistent with the response that under Rules for Military Commission
22 703, the Secretary of State is neither relevant or necessary for a
23 disputed fact in this commission and does not believe the defense has

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1 met the burden to produce Secretary -- former Secretary Rice.

2 Thank you, Your Honor.

3 MJ [COL FITZGERALD]: Do you need to take up relevant and
4 necessary in closed session, or can you respond to that in open
5 session?

6 DDC [Lt Col NETTINGA]: I think I can respond generally, sir.
7 Certainly, I could respond more specifically in a closed session, and
8 I know that because I've already made those arguments in the closed
9 session in the 505 process with respect to 679S where this was
10 discussed.

11 But certainly her position at the time as National
12 Security -- National Security Advisor, during the transition, she
13 talks about a meeting in early January right after the transition
14 about what the state of play is with respect to United States'
15 efforts against al Qaeda or towards al Qaeda or the priority level
16 that al Qaeda is given at that particular time.

17 She makes a number -- she -- I mean, she is involved in
18 these principal-level discussions as to what the current state is and
19 what any planning efforts -- and those are -- there's more detail in
20 the documents, but what any planning efforts against al Qaeda, what
21 state they're in now, what state they could be in in the future.

22 There's discussions that she has with the CIA director
23 regarding al Qaeda. Again, that's -- I think that's as far as I can

1 probably go. But it is in 679DD, and that's specifically at
2 page 150.

3 And the discussion that they have is quite telling as to
4 what the state is between -- what the state of hostilities is between
5 the United States and al Qaeda, if you look at, again, page 150 of
6 that document.

7 And then if you turn to page 151 -- and, again, we're
8 getting little snippets of this MFR because most of it is
9 redacted -- she comments on the President's direction and the
10 President's -- I may have just said direction, but the President's
11 direction as to what should be done towards al Qaeda. And so that's,
12 again, on page 151 of that document. And what he says is indicative
13 of what the status was at the time in terms of a state of hostilities
14 existing between the United States and al Qaeda.

15 So certainly the information she has is relevant to the
16 existence or, in this case, nonexistence. The evidence she has is
17 that there was not a state of hostilities between the United States
18 and al Qaeda in the early part of 2001 up until 9/11.

19 And, again, that's consistent with the position of a number
20 of these top officials. I'm happy to go generally -- and if the
21 prosecution's response is just going to be general relevance,
22 necessity, and cumulateness as their objection seems to be to the
23 majority of these witnesses, I did not hear them say cumulateness

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1 with respect to Secretary Rice, but the fact that multiple senior
2 officials in the United States Government, to include the presidents,
3 are saying that the United States was not engaged in hostilities with
4 al Qaeda prior to 9/11, that doesn't necessarily make it cumulative.

5 I know we cited to you the Williams case at 3 M.J. 239.
6 It's a Court of Military Appeals case from 1977, talking about the
7 fact that if the testimony of a given witness is material, the live
8 presence of that witness must be furnished or the proceedings abated.
9 And then there are some factors. Of course, it's the judge's
10 determination there. But the idea of cumulateness, one of those
11 factors that the military judge ----

12 MJ [COL FITZGERALD]: They didn't object to cumulative.

13 DDC [Lt Col NETTINGA]: I understand, sir, and I'm -- I know
14 that objection is coming later on, and so I do -- I'm -- I can leave
15 it for now, but ----

16 MJ [COL FITZGERALD]: Why don't we leave it for now ----

17 DDC [Lt Col NETTINGA]: That's fine, sir.

18 MJ [COL FITZGERALD]: ---- since they didn't raise that
19 objection.

20 DDC [Lt Col NETTINGA]: I understand, sir.

21 MJ [COL FITZGERALD]: Let me ask you this. Have you
22 interviewed -- a two-part question. Have you interviewed Secretary
23 Rice, and would she testify consistent with the documents that you've

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1 referenced?

2 DDC [Lt Col NETTINGA]: We have not interviewed Secretary
3 Rice, sir. And I anticipated the commission's question. I will tell
4 you that's the answer for a number of these individuals.

5 We have reached out to the vast majority, if not all of the
6 individuals that are on the defense witness list. Unsurprisingly,
7 the vast majority of them have not deigned to give us an interview.
8 And so I'm left with what they have said publicly or what they have
9 said in discovery to inform what we believe their testimony will be.

10 I certainly have no reason to believe she would testify
11 differently than this. I have -- I have not come across any kind of
12 retraction from her. She did make some public comments in a public
13 testimony before the 9/11 Commission that were consistent largely
14 with the information that is discussed in here.

15 So, again, I have every reason to believe she would testify
16 consistent with the statements she's made here and the statements
17 that she made shortly thereafter when she testified publicly.

18 MJ [COL FITZGERALD]: Very well. Thank you.

19 Ready to move on to the next ----

20 DDC [Lt Col NETTINGA]: Yes, sir.

21 MJ [COL FITZGERALD]: ---- witness you're requesting? And I
22 think it was ----

23 DDC [Lt Col NETTINGA]: Mr. Clarke, number 5.

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1 MJ [COL FITZGERALD]: Mr. Clarke, yes.

2 DDC [Lt Col NETTINGA]: Yes, sir. So this is another one that
3 was discussed at length in the 505 hearing in February, I think.
4 This is -- his statements were the form of a recorded transcript of
5 the interview that he gave to the 9/11 Commission.

6 So it is, you know, 200-some-odd pages, many of which are
7 redacted. But on the unredacted portions, and we went through all of
8 the highlights that's in 679S, we talked about the relevance, the
9 use, the admissibility, the determinations and the commission has
10 made a ruling in 703 that 679S, the information contained in there is
11 relevant and may be used. And so Mr. Clarke's interview is in there
12 as well.

13 The other thing that I will note in -- if you look at
14 page 131, I think you have Appellate Exhibit 679DD in front of you.
15 So in our justification for why we wanted Mr. Clarke, there's a
16 reference to 679I and specifically a memorandum of notification. My
17 understanding of 703 is that the commission has made a determination
18 with respect to at least one of those memorandums of notification
19 that Mr. Clarke was involved in and would testify about.

20 So we would want him to be able to talk about that as well.
21 Again, that's a piece that the commission has found to be relevant
22 and necessary for use based on AE 703.

23 MJ [COL FITZGERALD]: You don't state it because you know I'm

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1 going to probably ask it every time, so feel free to preempt me by
2 just stating it. Have you interviewed Mr. Clarke?

3 DDC [Lt Col NETTINGA]: I have not. We have not, sir.

4 MJ [COL FITZGERALD]: You tried to?

5 DDC [Lt Col NETTINGA]: Yes, sir. I believe -- like, we've
6 instructed our investigative team to make -- I mean, this is before
7 we even filed the witness list, these are the people we want to call,
8 reach out, see who we can talk to. And I know we have not received
9 anything from Mr. Clarke.

10 MJ [COL FITZGERALD]: Okay. Anything else on Mr. Clarke?

11 DDC [Lt Col NETTINGA]: The only other thing I'd have, sir, is
12 he did -- like many of the individuals here, he did write a book.
13 The book -- and I know it's referenced in there. The book is
14 consistent with what he testified to. And he's been very -- he's
15 been very public about his feelings on the administrations, both of
16 them, not being aggressive enough towards al Qaeda.

17 In terms of his relevance and necessity, the position that
18 he had as somebody who served under both administrations, as the
19 counterterrorism czar with the NSC, he was in the position in these
20 principal meetings for the -- really the entire charged time frame of
21 hostilities that the government has listed, 1996 to 2002.

22 I'm not suggesting Mr. Clarke was there the entire time, but
23 a large chunk of that time, both before and after the attack on the

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1 USS COLE, both before and after 9/11. And so he is somebody who has,
2 again, the access and the knowledge to be able to explain what the
3 position of the United States Government was vis-à-vis al Qaeda
4 during that relevant time frame.

5 And, again, his consistent position has been that the United
6 States as a whole did not take the threat seriously enough and were
7 not aggressive enough in going after al Qaeda. And we believe this
8 is evidence to show, based on certainly what happened before 9/11 and
9 the United States response and then what happened after 9/11, that
10 the period before September 11th did not constitute hostilities
11 between the United States and al Qaeda.

12 MJ [COL FITZGERALD]: Some of what you're asking, it seems
13 like you're asking for his opinion. You're telling me he's a fact
14 witness.

15 DDC [Lt Col NETTINGA]: I am asking -- sir, his
16 opinion -- what my point is, his opinion is that the United States
17 was not doing enough. What we intend to ask him about is what was
18 the United States doing. You were in these meetings. You were
19 advising presidents. You were working with the CIA and the DoD to
20 figure out what the proper approach to this problem was.

21 We want to ask him what happened. It's for the jury, the
22 members, to decide whether or not that meets the definition of
23 hostilities once we get that.

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1 MJ [COL FITZGERALD]: I guess still my point is it seems like
2 you're also just seeking his opinion of things, right? And I guess
3 it maybe goes to my larger point is some of these witnesses, it
4 appears you're calling a lot of folks about a deliberative process.
5 That doesn't necessarily negate whether we were engaged in
6 hostilities as defined in the Military Commissions Act.

7 So I'm wondering about the relevancy and materiality of
8 people engaged in the deliberative process about how to engage with
9 al Qaeda or the Taliban or whomever witness -- or whatever
10 circumstance we're talking about with each of these witnesses.

11 How do I strike that balance if -- because the question is,
12 it seems much more simple by the definition of the Military
13 Commissions Act ----

14 DDC [Lt Col NETTINGA]: Yes, sir.

15 MJ [COL FITZGERALD]: ---- than it is by having a bunch of
16 people tell me, I thought we should have done more. I thought we
17 weren't doing enough or -- how does that factor into that being
18 helpful to the trier of fact or being relevant for the trier of fact?

19 DDC [Lt Col NETTINGA]: Yes, sir. What we want to elicit for
20 the jury is what was the United States doing? You were having these
21 discussions about can we do this, should we do this, what actually
22 got done.

23 And the discussions themselves about what could have been

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1 done, what should have -- what options were proposed and what options
2 were rejected ultimately form the basis for the members to have the
3 facts to determine whether or not we were engaged in hostilities.

4 And if I may, sir, when you look at the witnesses that the
5 government is putting up -- and obviously, we're entitled to
6 witnesses to take the stand and to testify in opposition to the
7 government witnesses.

8 They are calling, again, two people who were involved in the
9 deliberative process. They're calling James Baker, who was a legal
10 advisor to the National Security Council ----

11 MJ [COL FITZGERALD]: You mentioned that there are people on
12 both sides that are involved in the deliberative process.

13 DDC [Lt Col NETTINGA]: Yes, sir.

14 MJ [COL FITZGERALD]: But the question is, I don't know why
15 the government is calling those folks. I would hope they would have
16 some reason other than they were involved in the deliberative
17 process.

18 DDC [Lt Col NETTINGA]: Well, they want them to be experts,
19 sir. I mean, we've already -- that issue has been addressed by this
20 commission. Not only are they going to say that these people were
21 engaged in the deliberative process, but that they can also be
22 experts to opine on whether or not there were hostilities going on.

23 Both Mr. Baker and Lieutenant General Wagner, who were folks

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1 involved in these same types of discussions that we are asking to
2 call witnesses, other witnesses who were also involved in these
3 discussions.

4 MJ [COL FITZGERALD]: And so maybe that's my other point is, I
5 understand you want to call people about the deliberative process.
6 But if I end up just having a bunch of people tell me they disagree
7 in the deliberative process, how is that relevant to the definition
8 of hostilities, which is any conflict subject to the laws of war?

9 It seems like a lot of this deliberative process is people
10 deciding how to apply the laws of war, is it not?

11 DDC [Lt Col NETTINGA]: I think it's people deciding whether
12 or not we are going to war. It's to -- how do we address the problem
13 of al Qaeda? Do we address it solely through diplomatic pressure?
14 Do we address it through law enforcement? Do we address it through
15 military force? Those are the discussions that are being had in
16 these meetings.

17 The government wants to focus on the 1998 retaliatory
18 strikes to the embassy bombings to show this is the time that we used
19 military force. And what we are attempting to do for the members is
20 to present the complete picture of times where military force could
21 have been used, where military force was discussed, but ultimately
22 was not used.

23 Because the fact that the United States considered that that

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1 was one of the tools on the table, that this is something that was
2 being discussed but was ultimately not something that was being
3 utilized speaks to the fact that we were not engaged in an ongoing
4 hostilities.

5 One of the criteria for hostilities is the scope, the
6 duration, the intensity. And so I think in order to show what the
7 actual facts on the ground were during that time frame, the testimony
8 of these witnesses is imperative.

9 MJ [COL FITZGERALD]: It seems that's a much narrower
10 definition of hostilities than required under the Military
11 Commissions Act.

12 DDC [Lt Col NETTINGA]: Well, sir, it is a little hard to
13 argue in a vacuum where we don't know what the instruction will be.
14 I understand what the Military Commissions Act says, any conflict
15 subject to the laws of war. But if you look at the conflicts subject
16 to the laws of war ----

17 MJ [COL FITZGERALD]: Any conflict for which the laws of
18 conflict apply.

19 DDC [Lt Col NETTINGA]: Yes, sir.

20 MJ [COL FITZGERALD]: That's a little bit different. And we
21 won't get into ----

22 DDC [Lt Col NETTINGA]: Yes, sir.

23 MJ [COL FITZGERALD]: ---- splitting hairs of it, but isn't

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1 some of this deliberative process about the application of the laws
2 of armed -- or the laws of war? It seems like you're moving the
3 definition closer to there actually has to be some type of kinetic
4 operations going on or kinetic activity or -- but isn't this what
5 they're deciding, how to -- how to apply the laws of war to a
6 circumstance going on?

7 DDC [Lt Col NETTINGA]: I don't think that's what they're
8 doing, sir. I think what they're deciding is how to address the
9 problem with the -- you've got all of the tools that are available to
10 the United States Government, and you've got the individuals in the
11 room who are the principals to effect whatever the President's
12 decision is in the utilization of those tools. One of them is
13 military force.

14 And -- and that was certainly something that was discussed,
15 but they weren't sitting here talking about necessarily the
16 legalities of certain -- this action or that action. That may have
17 been part of it.

18 But they're talking about how do we respond? This
19 is -- this is a threat, right? And we've got this terrorist leader.
20 We've got this terrorist potential group or network. How do we
21 address it?

22 And the obvious response at the time was not we're
23 getting -- we're going to do military force because that's the way to

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1 address this problem because we are engaged in hostilities. There
2 were all of these other pieces that were being ----

3 MJ [COL FITZGERALD]: Are these witnesses going to say that?

4 DDC [Lt Col NETTINGA]: Sir, I believe that is what they're
5 saying in this -- in what we have provided, the snippets that we have
6 been given. They're going to talk about what they were actually
7 doing and what they were talking about, what the different employment
8 methods were for use of force or for other tools of the United States
9 Government.

10 MJ [COL FITZGERALD]: That would be the laws of war.

11 DDC [Lt Col NETTINGA]: Not -- not ----

12 MJ [COL FITZGERALD]: That's what I'm trying to understand.
13 If you're going to employ the military -- right? -- that's one of
14 their options.

15 DDC [Lt Col NETTINGA]: That's one of the options, yes, sir.

16 MJ [COL FITZGERALD]: All right. And so if they're going to
17 talk about the military option, they're talking about applying the
18 laws of war. Can you think of a scenario where they would talk about
19 using the military where they wouldn't apply the laws of war to that
20 method of dealing with this matter?

21 DDC [Lt Col NETTINGA]: Sir, I -- certainly if they are going
22 to -- if they are going to use the military option, they would be
23 talking about whether or not it complied with the laws of war.

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1 But I think, again, one of the things that is
2 discussed -- and, again, I can't get into it here, but in Secretary
3 Rice's -- the MFR, the discussion she's having with George Tenet is
4 not about using the military. It's about another way of addressing
5 the problem that has nothing to do with the application of the laws
6 of war.

7 And so the fact that they were actively exploring these
8 other options and not just going, well, hey, we're in -- we're in
9 war, so we can take out whatever a lawful military target is, that
10 speaks to the fact that we were not actively engaged in hostilities
11 with the scope and the duration necessary to constitute this ongoing
12 state that is required.

13 MJ [COL FITZGERALD]: Required by what?

14 DDC [Lt Col NETTINGA]: I would argue required by the law.
15 And they need to find that there ----

16 MJ [COL FITZGERALD]: Required by what law?

17 DDC [Lt Col NETTINGA]: Sorry?

18 MJ [COL FITZGERALD]: You're telling me it's -- that's part of
19 the discussion because it's required by the law.

20 DDC [Lt Col NETTINGA]: Yes, sir.

21 MJ [COL FITZGERALD]: Required by what law?

22 DDC [Lt Col NETTINGA]: By the Military Commissions Act and
23 the definition of hostilities. Again, we're operating somewhat in

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1 the dark there, but ----

2 MJ [COL FITZGERALD]: Well, it's expressly written into the
3 statute.

4 DDC [Lt Col NETTINGA]: I understand that, sir.

5 MJ [COL FITZGERALD]: But those terms you just used are
6 nowhere in that definition.

7 DDC [Lt Col NETTINGA]: That's correct. We've been -- we've
8 been operating off of definitions that have been given in previous
9 military commissions that all talk about scope, duration, intensity,
10 statements of the leaders on both sides.

11 I mean, that's what we have been operating under, both sides
12 have, in terms of the definition that we believe should apply to
13 these military commissions for the members to determine whether or
14 not there was an ongoing state of hostilities and whether or not the
15 actions that Mr. al Nashiri is charged with were performed in
16 conjunction with or in connection to those hostilities.

17 MJ [COL FITZGERALD]: Okay. I'm not going to belabor this
18 point with every single witness.

19 DDC [Lt Col NETTINGA]: I -- no, I understand, sir. It's -- I
20 think it's --

21 MJ [COL FITZGERALD]: I think early on is a good time to
22 understand where you're coming from.

23 DDC [Lt Col NETTINGA]: Yes, sir.

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1 MJ [COL FITZGERALD]: And I'll certainly hear from the
2 government if they want to respond to any of those questions.

3 I just -- I'm asking in the context of -- it seems like a
4 lot of the witnesses you have on here are part of the deliberative
5 process because nobody's going to say anything very -- no one is
6 going to say, using that definition, we were or were not, right?

7 That's what it appears to be. It's -- because they weren't
8 using this definition during this deliberative process ----

9 DDC [Lt Col NETTINGA]: Correct, sir.

10 MJ [COL FITZGERALD]: ---- would you agree? So no witness is
11 going to absolutely state with any certainty that definition. So
12 we're talking about them having these conversations about how they're
13 going to employ all the means available to the U.S. Government.

14 DDC [Lt Col NETTINGA]: Yes, sir.

15 MJ [COL FITZGERALD]: Does that point make sense?

16 DDC [Lt Col NETTINGA]: Yes. I ----

17 MJ [COL FITZGERALD]: All right. So what I'm asking you
18 about, that's part of this deliberative process. You had talked
19 earlier about cumulative, and I told you you didn't need to because
20 they didn't raise that objection, but cumulative, it comes under
21 M.R.E. 4 -- M.C.R.E. 403.

22 DDC [Lt Col NETTINGA]: Yes, sir.

23 MJ [COL FITZGERALD]: Well, also in there is confusion of the

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1 members.

2 DDC [Lt Col NETTINGA]: Yes, sir.

3 MJ [COL FITZGERALD]: So the concern would be as you talk
4 about these folks involved in this deliberative process that we start
5 confusing the members as to what the element requires of them to
6 prove -- for the government to prove. So ----

7 DDC [Lt Col NETTINGA]: Well ----

8 MJ [COL FITZGERALD]: ---- if all they're going to talk about
9 is deliberative process but not about final decisions being made or
10 they were the decision-maker, why do we need to hear so many people
11 saying we were still trying to decide?

12 It would -- the danger is it confuses the panel members as
13 to what the definition of hostilities is because they're not going to
14 get that definition until the end as part of an instruction. So, I
15 mean, maybe we'll have to sort that out before we start the trial,
16 but...

17 I'm looking at your witnesses. And, like, for example, with
18 Mr. Clarke, he claims the '93 attack must have been done with the
19 help of a particular nation and rejects the CIA's assertion on that.
20 That seems like an opinion as part of this deliberative process.

21 So you can see this very slippery slope of what's he -- what
22 is he going to say that's relevant and necessary to that element if
23 he's just telling -- if you -- if you're calling him to talk about

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1 that opinion?

2 DDC [Lt Col NETTINGA]: Yes, sir. I don't want -- I don't
3 want to interrupt, but I'm happy to jump in whenever.

4 MJ [COL FITZGERALD]: Long pause. It's yours.

5 DDC [Lt Col NETTINGA]: Thank you, sir. So I appreciate the
6 discussion. I think if I could just step back for a minute, and then
7 I will answer your question as best I can, sir.

8 I think one of the unique quirks about the military system,
9 certainly, and the military commission system has adopted that, is
10 that the government can essentially say whatever witnesses they want
11 to call. They can present them without any scrutiny.

12 MJ [COL FITZGERALD]: Well, I don't know what that means.

13 DDC [Lt Col NETTINGA]: They can put their -- they don't have
14 to come to you and justify why they want ----

15 MJ [COL FITZGERALD]: Sure.

16 DDC [Lt Col NETTINGA]: ---- these people -- why they want
17 their witnesses.

18 MJ [COL FITZGERALD]: You're familiar with that system.

19 DDC [Lt Col NETTINGA]: I am, sir. No. And that's
20 what -- but it is a quirk that does not necessarily exist in the
21 civilian system, right? And so what I mean by that, certainly the
22 prosecutors are free to put on the case that they think best meets
23 the elements and the burden that they have.

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1 In the civilian system, defense counsel have their own
2 budget. They can call witnesses. They can get subpoenas. They can
3 do that ex parte without having to go through the government, without
4 having to have an adversarial battle over the witnesses that they
5 think are necessary to present their case.

6 Certainly, there may be a judge involved at times in -- in
7 terms of the -- if there's an ex parte subpoena needed or something
8 like that, but they also have the ability to issue subpoenas.

9 And so what we haven't done is spent much time at all,
10 because it is not required, on talking about what the government's
11 evidence is to meet their burden on hostilities.

12 And so that's why I think it's important to look at
13 Mr. Baker and Lieutenant General Wagner; Mr. Baker, again, being the
14 legal advisor to the National Security Council, so somebody involved
15 in the deliberative process, General Wagner at the time being the J3
16 involved in some of the execution in 1998.

17 Not only does the government intend to call those people to
18 talk about what was done or what was discussed during that time
19 frame, but then they want to have those individuals offer expert
20 opinions as to whether or not what they did at that time constituted
21 hostilities. That is -- that's what we litigated in the Daubert
22 motions with respect to those two individuals specifically.

23 And so we don't have much of a sense of exactly what those

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1 individuals are going to say other than that there was a retaliatory
2 strike and that there were missiles launched in response to the
3 attacks on the embassies, which I said the same thing twice. But
4 that's what they're going to talk about. And then apparently going
5 to be allowed to give expert opinion that what that action is
6 constituted hostilities.

7 What we are seeking to do is to present the full scope. The
8 government has said that hostilities were existing by the nature of
9 their charges between the United States and al Qaeda from 1996 to
10 2002 in the scope of as it pertains to Mr. al Nashiri, not that
11 hostilities ended in 2002.

12 And so they are focused on one pinpoint in time where the
13 military force was applied. And that is consistent with the
14 instruction that has been given in previous military commissions. At
15 what point does the United States decide to use military force to
16 meet the threat?

17 It is a difficult conversation to have here when we
18 don't -- we talk about confusion of the members. But we don't know
19 yet what the members will be instructed, so I can't tailor my
20 argument to how it's going to meet the elements that the members are
21 actually going to have to decide upon.

22 But they are going to have to determine essentially whether
23 we were involved in a noninternational armed conflict at the time.

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1 At least that's the way that we understand the law and the rules as
2 it is.

3 And so in order for them to do that, it is important to
4 understand not just that there was no military response against
5 al Qaeda from the United States from the 20th of August, 1998, until
6 the 7th of October, 2001. Or potentially there were some things
7 right after 9/11.

8 I mean, that is a fact, but that doesn't give them the
9 proper sight picture as to what the -- what was going on internally
10 in the United States Government as to how they were preparing to meet
11 this threat.

12 Were they preparing to use it -- preparing using military
13 force? Were there other considerations that, hey, we actually don't
14 want to use the military force, which would be indicative of we're
15 not engaged in hostilities because that's not the way that we want to
16 approach this.

17 I mean, there's -- there are several instances where the DoD
18 seems, again, in the witnesses we're talking about here, the DoD
19 seems reluctant to want to take any action. And even though they may
20 be talking about, well, collateral damage and things like that,
21 there's a reluctance to using that military tool, whether it's from
22 the DoD or whether it's from the President himself.

23 MJ [COL FITZGERALD]: Wouldn't some of that reluctance be

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1 because they're applying the Laws of Armed Conflict such as
2 targeting, decisions, and identifying, forecast ----

3 DDC [Lt Col NETTINGA]: I think the reluctance would be we're
4 not engaged in a war. And if we do something, if we actually take a
5 military action, that may cause more problems and may enmesh us
6 further in a conflict that perhaps we can avoid by taking these other
7 steps like law enforcement, like diplomatic efforts, covert action,
8 all of those things that are not applying the law of war that are,
9 hey, that's not the tact that we want to take.

10 After September 11th, the decision was clearly made by
11 President Bush, we are going to war. And he said -- and I know you
12 didn't ask about President Bush, but he is on our witness list and he
13 said we were not on a wartime footing prior to 9/11. We weren't.
14 And had I wanted to use the military to go after bin Laden or
15 al Qaeda, like, I would have been laughed at.

16 He recalls a conversation to the 9/11 Commission
17 interviewers between him and Prime Minister Tony Blair at the time
18 right after 9/11 saying, look, my hands were kind of tied prior to
19 this but based on what they've done now, now is the time to go to
20 war. That was a decision point. That was a change in direction by
21 the United States Government.

22 And so I think in order to display and illustrate for the
23 members what was going on between 1998 and September 11th, 2001, in

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1 terms of the United States' response to al Qaeda, the individuals
2 that we have here will testify about the actions that were taken to
3 avoid a further escalation of military involvement.

4 I mean, that's what these individuals are talking about.
5 Like, can we use the CIA? Can we use law enforcement? You know, all
6 of these different tools to avoid a further engagement in a military
7 conflict and actually having, you know, a noninternational or what
8 became an international armed conflict.

9 MJ [COL FITZGERALD]: Thank you. Do you ----

10 TC [CAPT STINSON]: May I just respond briefly to two points
11 on that, Your Honor?

12 MJ [COL FITZGERALD]: My next question is first, Colonel
13 Nettinga, anything else on Mr. Clarke? Because I want to give the
14 government an opportunity to respond.

15 DDC [Lt Col NETTINGA]: I understand, sir. Can I have one
16 moment?

17 MJ [COL FITZGERALD]: You may.

18 **[Counsel conferred.]**

19 DDC [Lt Col NETTINGA]: Thank you, sir. I do not have
20 anything further on Mr. Clarke.

21 MJ [COL FITZGERALD]: Thank you. Again, I'll make it clear,
22 I'm not going to keep belaboring the points. I think Mr. Clarke was
23 a good opportunity to have that discussion and getting your insights

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1 on that, so I appreciate it.

2 DDC [Lt Col NETTINGA]: Yes, sir.

3 MJ [COL FITZGERALD]: Captain Stinson, for the government?

4 TC [CAPT STINSON]: I just wanted to respond, Your Honor, to
5 just two points on that. The government stands by its opposition to
6 Mr. Clarke.

7 The government does believe that in relation to a number of
8 these folks, Secretary Rice, Mr. Clarke, and some others, it is
9 turning into a 9/11 Commission redux.

10 What could we have done different? What should our policy
11 have been? How could we move forward in a different way? Could we
12 have averted 9/11? Should we have been more aggressive or not more
13 aggressive? And the government's position is that's not relevant or
14 necessary or helpful to the members.

15 In relation to Lieutenant General Wagner, he is a fact
16 witness primarily. He's going to talk about the status of forces.

17 The defense requested two individuals, number 15 and 16,
18 that were in similar positions; Lieutenant General Gregory Newbold,
19 who is a J3 for the Chairman of the Joint Chiefs, and General Victor
20 Renuart, who was a CENTCOM J3 in and around that time. So we granted
21 both of those witnesses. So we have one J3; they have two J3s.

22 We did notice a potential expert one, an opinion from
23 Lieutenant General Wagner, but he primarily is going to talk about

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1 the status of forces in the relevant time frame, and that's why he's
2 relevant for us.

3 Judge Baker is going to talk about the decision point of the
4 application of the Laws of Armed Conflict regarding al Qaeda and that
5 conflict. That's the -- that's his primary testimony is that
6 decision point in his role as the advisor.

7 The government believes that the remaining folks here are
8 very deliberative. It is, again -- if you look, most of this is
9 citing to their testimony at the 9/11 Commission report. And I think
10 you could litigate that for the rest of our lives. Did we do enough?
11 What did we know? Did we miss the signals? Should we have been more
12 aggressive? And the like.

13 And, again, the government's view is that the element of
14 hostilities is relatively straightforward under the statute. I know
15 we're -- we have submitted proposed instructions on that, but the
16 deliberative process and could we have done more prior to 9/11, you
17 know, sort of looking back after 9/11, the government believes is
18 going to confuse the members and is not going to be relevant or
19 helpful.

20 And where the defense has identified individuals like
21 General Newbold and General Renuart, you know, we granted those.
22 We've spoken to them now. Again, the defense may want to call
23 someone else. We're willing to work with them, but again, we've

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1 talked to them about, hey, who have you talked to? What are they
2 going to -- you know, what -- who have you interviewed that's coming
3 in? And we're willing to do that.

4 But, to me, from the government's perspective, most of this
5 is more of a discovery or a fishing expedition. For some of the
6 public officials, the defense could request judicial notice of public
7 statements at the time. That's not really a disputed fact at issue
8 as far as what the members need to decide.

9 Obviously, they have to decide whether or not that amounts
10 to hostilities, but it's not a disputed issue that after the embassy
11 bombings, there was kinetic action. After the COLE, there wasn't,
12 and people can make those arguments.

13 But my last point is the defense has brought this up
14 multiple times, that this is a unique circumstance. That in other
15 circumstances, civilian trial, they would have the ability and the
16 funds to bring any witness that they wanted.

17 And just -- if we look back at similar trials in the
18 civilian world, what are the chances that President Clinton,
19 President Bush, and Vice President Gore are going to testify in the
20 Ghailani trial or the Moussaoui trial or any of those trials? It
21 just wouldn't happen.

22 These -- this is an extraordinary request, and from the
23 government's perspective, none of these members -- or none of these

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1 proposed witnesses will help the members in an area that's been
2 elucidated by the defense in their request.

3 That's all we had, Your Honor. Thank you.

4 MJ [COL FITZGERALD]: Thank you. And I got sidetracked a
5 little when I started talking about deliberative process. So another
6 area related to deliberative process is who, in fact, is sitting at
7 this table and deliberating.

8 And so I'm wondering, do you believe any of these witnesses
9 that we've been talking about, either Secretary Rice, Mr. Clarke, or
10 anybody else you may talk about would have executive or other
11 privilege that they could invoke? And have you assessed that?

12 DDC [Lt Col NETTINGA]: Sir, I want to answer the question,
13 but I'd also ask to respond to a couple of points the prosecutor just
14 made.

15 I'm not going to pretend to be an expert on executive
16 privilege. I know that these individuals have certainly made these
17 statements publicly. Some of them. Excuse me.

18 Secretary Rice, for instance, testified. Secretary
19 Rumsfeld, I believe, also testified in front of the public in the
20 9/11 Commission. And so I think to the extent that there may be
21 executive privilege concerns, the fact that those have been discussed
22 in public would waive that privilege. I -- again, but I don't
23 pretend to be an expert on that -- on that privilege.

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1 So there certainly may be waiver issues. I don't know if
2 just talking to the 9/11 Commission itself would constitute a waiver,
3 if there was some sort of a blanket protection given there.

4 So I want to make sure that answers the question the
5 commission asked.

6 MJ [COL FITZGERALD]: It seems you don't know what would
7 happen if I were to grant you these witnesses with respect to them
8 invoking some executive privilege.

9 DDC [Lt Col NETTINGA]: I --

10 MJ [COL FITZGERALD]: And I think part of the problem is
11 I -- we don't know what conversations you're wanting to elicit from
12 them where they could invoke it versus public statements. And I
13 don't know enough about the 9/11 Commission to know if that
14 constituted waiver either, but...

15 DDC [Lt Col NETTINGA]: Understood, sir. And certainly we can
16 put some additional research into that. I think part of the problem
17 that we are having here in terms of how this request for these
18 witnesses has necessarily been framed is because, you're right, the
19 government is right, these are important people. These are people
20 who are not going to answer an e-mail or a phone call probably from
21 most anybody unless they already know the person, right? And they're
22 certainly not going to answer an e-mail or a phone call or, at least
23 as our experience has been, from a defense counsel representing an

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1 accused member of al Qaeda.

2 And so what we have to rely upon and what we believe these
3 witnesses will talk about is the statements we have been provided in
4 discovery or are otherwise available in the public sphere from the
5 9/11 Commission report because that is where these individuals were
6 asked specific questions related to the posture of the United States
7 vis-à-vis al Qaeda during this relevant time frame.

8 So that's what we know. We know these statements that they
9 have given, and we know that there are things that are helpful in
10 there.

11 Our intent in calling these individuals is not to relitigate
12 whether we knew or could have known or should have done something
13 differently. That's not the purpose of this commission. Certainly,
14 I agree with the prosecutor on that.

15 What we want to present to the members is what was happening
16 in these rooms, what actions were taken, what actions were not taken,
17 what actions were proposed and rejected, and the reason for them.

18 That's it. It's the facts on the ground that informed the
19 actions or the inactions of the United States Government.

20 And to answer, I think, an earlier comment or question Your
21 Honor may have made with respect to why are we getting into all of
22 these, you know, other individuals who were in the room or part of
23 the deliberative process, I certainly would agree that the two most

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1 important witnesses to be able to instruct the members as to what the
2 posture of the United States was vis-à-vis al Qaeda before and after
3 9/11 would be the two presidents that we have listed on our witness
4 list and request, which have both been rejected by the prosecution.

5 And something I know you didn't ask about and I'm certainly
6 prepared to address that at a later time, but they are the two most
7 important people as the commanders in chief of the military as to
8 what was the response, what was the posture, what was the state of
9 play and the state of affairs between the United States and al Qaeda
10 during this relevant time frame.

11 It comes back to choices, as we've talked about. And the
12 prosecutor said, well, hey, there's no way that two former presidents
13 and a vice president would have testified in federal court because
14 they wouldn't have needed to.

15 Because what happened, the attack on the USS COLE was a
16 crime, right? Nobody is disputing that it was a crime. The question
17 is whether it belongs in this venue. And the only way it belongs in
18 this venue is if it was connected with or associated with
19 hostilities, which means any conflict subject to the laws of war.

20 And so there needs to have been an ongoing conflict at the
21 time in order for this commission to have jurisdiction, in order for
22 the members to find that an element is met. So when the government
23 itself writes this Military Commissions Act and says that hostilities

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1 is an element that the members must consider and find beyond a
2 reasonable doubt that hostilities existed, certainly the testimony of
3 the commanders in chief during the relevant time frame is paramount.

4 MJ [COL FITZGERALD]: Thank you. The government also stated,
5 and you notice they're also not on my list, I don't remember the
6 numbers, 15, 16, but the ----

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

8 MJ [COL FITZGERALD]: General Newbold, the J3, and General
9 Renuart -- am I saying that name right, Renuart?

10 TC [CAPT STINSON]: I think it's Renuart. Renuart is what I
11 understand, Your Honor.

12 MJ [COL FITZGERALD]: Okay. General Renuart retired, who was
13 the CENTCOM J3. How are they not more on point? And the government
14 is going to produce them.

15 Did I hear that right, the government has agreed to produce
16 them?

17 TC [CAPT STINSON]: We agreed to produce those, yes, Your
18 Honor.

19 MJ [COL FITZGERALD]: They seem to be the counter to the
20 government witnesses you mentioned earlier. How are they not the
21 best evidence? Because it doesn't sound like they'll talk about the
22 deliberative process, at least from your synopsis of those two
23 witnesses, of things other people may have been talking about.

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1 Can you address that? I don't want to skip ahead.

2 DDC [Lt Col NETTINGA]: No, I ----

3 MJ [COL FITZGERALD]: I'm only skipping ahead because I don't
4 need to hear about them since the government is going to produce
5 them.

6 DDC [Lt Col NETTINGA]: Yes, sir.

7 MJ [COL FITZGERALD]: But how does that not answer the mail as
8 to the point you're trying to make?

9 DDC [Lt Col NETTINGA]: Yes, sir. And so it's
10 helpful -- right? -- the fact that we have individuals who were in
11 those positions both before and after 9/11 can talk about the
12 difference, can talk about what was going on, what they were tasked
13 to do, and how those taskings changed.

14 I mean, certainly we believe that those are important and
15 relevant witnesses, which is why we listed them.

16 MJ [COL FITZGERALD]: Have you interviewed them?

17 DDC [Lt Col NETTINGA]: We have talked to General Renuart.
18 And I believe -- I don't believe we've made contact with the other
19 individual.

20 MJ [COL FITZGERALD]: Has he declined the interview or when
21 you say ----

22 DDC [Lt Col NETTINGA]: He has not responded. Most of the
23 time we get silence, sir, I mean, to be frank.

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1 MJ [COL FITZGERALD]: Okay. But at least you did speak to
2 General Renuart?

3 DDC [Lt Col NETTINGA]: Yes, sir.

4 MJ [COL FITZGERALD]: So any of these witnesses you've brought
5 up, and we haven't gotten very far, I know, Secretary Rice or
6 Mr. Clarke, they would be more helpful than General Renuart? Or they
7 would contradict him or impeach? I don't know what you -- he seems
8 to be the person who could answer the mail on that since you have
9 added him to your witness list.

10 DDC [Lt Col NETTINGA]: Yes, sir.

11 MJ [COL FITZGERALD]: Can he not? Because you have him listed
12 as an engaged-in-hostilities witness.

13 DDC [Lt Col NETTINGA]: We do, sir. Yes, sir. And I know
14 that he was responsible for some of the orders that we talked about
15 in the 505 process that this commission has found to be relevant and
16 necessary for our use. And so we'd have him talk about, again, those
17 documents as well as what was going on before and after.

18 But he can -- he can talk about what was going on from his
19 position, and the members can make -- you know, can use that in the
20 evaluation of whether or not that constituted hostilities or when
21 hostilities began.

22 MJ [COL FITZGERALD]: He could also contradict the
23 government's witnesses on those points, correct?

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1 DDC [Lt Col NETTINGA]: He certainly could, sir, yes, sir.

2 MJ [COL FITZGERALD]: And he's your witness. Is that what he
3 intends to do?

4 DDC [Lt Col NETTINGA]: We believe that -- we believe that he
5 will put up evidence that is helpful to Mr. al Nashiri. In terms
6 of -- they were there at different times. And so Lieutenant General
7 Wagner, who, again, we have not spoken to at this point, we have an
8 idea -- we have an MFR where he just kind of goes through a series of
9 documents that the government wanted to get into, largely related to
10 the retaliatory strikes in August of 1998. And so I think he will
11 provide a different perspective. And to the extent that he was in
12 the ----

13 MJ [COL FITZGERALD]: Perspective -- is he a percipient
14 witness or an opinion witness? Maybe that should be my starting
15 point.

16 DDC [Lt Col NETTINGA]: He's a percipient witness, sir.

17 MJ [COL FITZGERALD]: Okay. You said perspective, so I -- is
18 he going to talk about engaging in hostilities?

19 DDC [Lt Col NETTINGA]: I think what he's going to talk about
20 is, what we're going to ask him about, is what were you doing? What
21 was your taskings relative to al Qaeda at this time frame, whenever
22 he's in the relative seat or whatever his perspective was. And I'm
23 using that colloquially. I guess I'm not saying he's testifying as

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1 an expert. Whatever his experience was, whatever facts he
2 experienced prior to 9/11, during his career, whatever -- and what
3 the change was certainly from the position that he held after 9/11 as
4 indicative of, hey, there was a massive change here. And certainly
5 after 9/11, there was a period of hostilities.

6 Again, these are arguments we're making based on the
7 testimony that we believe that he will give. And so it is a
8 different vantage point because he's a different individual,
9 differently placed and different in time from Lieutenant General
10 Wagner.

11 So certainly he's helpful, but I don't believe that that
12 satisfies our responsibility or is sufficient evidence for us to be
13 able to present to the members. Because there's additional
14 information from people who were much higher in the food chain, so to
15 speak, who were the ones making decisions and who were involved in
16 whether or not certain decisions were going to be made and going to
17 be taken.

18 They've granted the J3, but they've denied the Chairman of
19 the Joint Chiefs of Staff and they've denied the CENTCOM commander,
20 and they, you know, so it's -- we only get to hear from, you know,
21 some of the, relatively speaking, lower-ranking generals in the food
22 chain, but we don't get to hear what their superiors thought or
23 ordered or why certain actions were taken and why certain actions

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1 were not taken.

2 And that is all indicative of whether or not we were
3 actively engaged in hostilities. It's the why. Why are things done
4 and why are things not done? That's part of the equation for the
5 members to evaluate what the relationship was between these two
6 parties.

7 MJ [COL FITZGERALD]: Thank you. Anything more on Mr. Clarke?

8 DDC [Lt Col NETTINGA]: No, sir. I don't believe so.

9 **[The military judge conferred with courtroom personnel.]**

10 **[Counsel conferred.]**

11 MJ [COL FITZGERALD]: I'd like to see if we can get through
12 one more. Again, I'm not going to keep belaboring the point. I'm
13 just trying to get an understanding of where these folks fit into the
14 scheme of things.

15 So the next one is number 8, Ambassador Black. Is that
16 something we can take up in open session?

17 DDC [Lt Col NETTINGA]: I believe it's better suited for
18 closed session. What I will say, sir, is that based on his position
19 in the CIA and based on some of the things that we've discussed and
20 have been found relevant and admissible for use in Appellate
21 Exhibit 703 are CIA-produced documents and something that I believe
22 he is well positioned to discuss.

23 MJ [COL FITZGERALD]: Have you interviewed Ambassador Black?

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1 DDC [Lt Col NETTINGA]: We have not, sir. We have not.

2 MJ [COL FITZGERALD]: These questions, you react to me -- it's
3 not caught on the record, but you react like you don't want to hear
4 that question. I feel I have to ask that -- right? -- with every
5 single witness. So have you interviewed him is a starting point to
6 what did he tell you. But if you tell me you didn't interview him I
7 can skip past the what did he tell you.

8 So having not interviewed him, do you know if he can speak
9 to the documents you're -- how is he connected to those documents?

10 DDC [Lt Col NETTINGA]: Yes, sir. And first, I do want to
11 address, I'm not -- my expression is not frustration at you. My
12 expression is frustration with having to put a witness on a list that
13 will not talk to me. And so I mean no disrespect to the commission,
14 sir.

15 MJ [COL FITZGERALD]: I took it with no disrespect. I think
16 you already know the challenges you've had in them not responding. I
17 understand that.

18 DDC [Lt Col NETTINGA]: Yes, sir.

19 MJ [COL FITZGERALD]: I don't know that.

20 DDC [Lt Col NETTINGA]: I understand that.

21 MJ [COL FITZGERALD]: I have to ask.

22 DDC [Lt Col NETTINGA]: I understand. I just wanted to be
23 clear this was not directed at you.

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1 MJ [COL FITZGERALD]: You didn't mean any disrespect
2 whatsoever, and I didn't take it that way.

3 DDC [Lt Col NETTINGA]: Thank you, sir.

4 MJ [COL FITZGERALD]: So going back, you didn't interview him.
5 So how is he connected to these documents that were part of the
6 505(h) that ----

7 DDC [Lt Col NETTINGA]: Yes, sir.

8 MJ [COL FITZGERALD]: ---- I've ruled you can have those
9 documents? How is he connected to those?

10 DDC [Lt Col NETTINGA]: So some of them, he was
11 specifically -- he specifically mentioned -- I think I can do a
12 better job drawing those links in a closed session, sir.

13 MJ [COL FITZGERALD]: In a closed session. Okay, that's fine.

14 DDC [Lt Col NETTINGA]: But again, based on his position
15 within the CIA and his involvement specifically with respect to the
16 al Qaeda problem and the CIA's approach and role in that under the
17 Clinton Administration -- and I know we've talked a lot about
18 that ----

19 MJ [COL FITZGERALD]: Would he have been in a role where he
20 would have applied the laws of war?

21 DDC [Lt Col NETTINGA]: No, sir.

22 MJ [COL FITZGERALD]: So how is he helpful and relevant to you
23 with respect to engagement of hostilities with that definition?

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1 DDC [Lt Col NETTINGA]: Because of the fact that the CIA was
2 prioritized, we believe is indicative that -- in terms of the address
3 to the al Qaeda problem, is indicative of the fact that we were not
4 involved in hostilities. Because if we were involved in hostilities,
5 the argument we will make, is that the DoD would have been the lead
6 agency for going after this problem, or would have been involved
7 planning, doing things that are indicative of being engaged in
8 ongoing hostilities as opposed to it being left to another agency who
9 does not have to apply the laws of war, who operates under different
10 authorities.

11 And certainly that's indicative of the fact that -- that
12 that was the tack of the Clinton Administration with respect to
13 al Qaeda.

14 MJ [COL FITZGERALD]: Certainly they can have operations going
15 on concurrently -- right? -- the CIA and Department of Defense?

16 DDC [Lt Col NETTINGA]: Absolutely, sir.

17 MJ [COL FITZGERALD]: Okay.

18 DDC [Lt Col NETTINGA]: Absolutely. But if you have evidence
19 that there were things going on and that this agency was designated
20 as the lead, and you have evidence that nothing was going on on the
21 other front, right? There's not going to be competing -- well, the
22 DoD was doing this, and the CIA was doing this. We believe the
23 evidence is the CIA was doing some, the DoD was doing not much, and

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1 that that speaks to the fact that there was not ongoing hostilities,
2 certainly in October of 2000.

3 MJ [COL FITZGERALD]: Okay. Do you have more on Ambassador
4 Black?

5 DDC [Lt Col NETTINGA]: Sorry. Not on Ambassador Black, no,
6 sir.

7 MJ [COL FITZGERALD]: Oh. Okay. There was a conference going
8 on, because I was about to ask Captain Stinson if he would like to
9 respond regarding Ambassador Black.

10 TC [CAPT STINSON]: Yeah, just briefly, Your Honor. In
11 relation to Ambassador Black, the government objected as not relevant
12 or necessary under R.M.C. 703. And it sticks by the argument that
13 the defense has not carried the burden to require the production of
14 Ambassador Black.

15 Yes, Your Honor. That's all I have in response to
16 Ambassador Black, Your Honor.

17 MJ [COL FITZGERALD]: There appears to be a memorandum that
18 he's the author of, but we need to take that up in closed session; is
19 that accurate?

20 DDC [Lt Col NETTINGA]: Yes, sir.

21 MJ [COL FITZGERALD]: Okay. Very well. Do you -- I'm not
22 sure that the government gave you much to respond to, but would you
23 like to respond to what they ----

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1 DDC [Lt Col NETTINGA]: No, sir. I don't know that I have
2 anything other than what I've said previously.

3 MJ [COL FITZGERALD]: Tell you what. That went very quickly,
4 so give me one more, Ms. Miller.

5 All right. Thank you. General Shelton.

6 DDC [Lt Col NETTINGA]: Yes, sir. And I believe --

7 MJ [COL FITZGERALD]: And then we will conclude.

8 DDC [Lt Col NETTINGA]: I believe the next two can be quick.

9 MJ [COL FITZGERALD]: Okay.

10 DDC [Lt Col NETTINGA]: At least ----

11 MJ [COL FITZGERALD]: Okay. Very well. We'll take General
12 Shelton and General Zinni.

13 DDC [Lt Col NETTINGA]: Thank you, sir. And there's a
14 specific reason why I wanted to get to General Zinni.

15 With respect to number 9, General Shelton, again, the
16 Chairman of the Joint Chiefs of Staff at the time, his statement was
17 included in the 679S that the commission found in 70 -- AE 703 was
18 relevant and necessary for use. Again, that's the MFR of the
19 discussion that he had with the 9/11 Commission.

20 And so we believe that based on the information he said in
21 there -- and I'm happy to draw some more distinctions, although I
22 know we talked about it at length in February in those 505 sessions,
23 this ----

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1 MJ [COL FITZGERALD]: You want to call him with the statements
2 he made in his own MFR?

3 DDC [Lt Col NETTINGA]: That's correct, sir.

4 MJ [COL FITZGERALD]: Okay.

5 DDC [Lt Col NETTINGA]: Yeah. And again, sir, to -- we're not
6 seeking to ask him whether or not the United States could have done
7 more, should have done more. We're asking him what was going on on
8 the ground, what he did, what he didn't do, what his discussions and
9 involvement were in when and how to apply the military force of the
10 United States.

11 MJ [COL FITZGERALD]: Okay. Government, would you like to
12 respond?

13 TC [CAPT STINSON]: This is specifically in relation to
14 General Shelton?

15 MJ [COL FITZGERALD]: Yes, sir.

16 TC [CAPT STINSON]: So, you know, he's the former Chairman of
17 the Joint Chiefs of Staff. When we were reviewing this, we approved
18 General Renuart and Newbold. Having spoken to General Renuart, I can
19 understand why the defense may not want to call General Renuart. So
20 if they would rather us swap out Shelton for one of those.

21 You know, I'm not in -- I'm honestly not trying not to grant
22 witnesses for the defense to put on the case they want to put on. If
23 they've spoken to somebody and they've got some information that

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1 appears to be relevant and material, we'll work with them.

2 When we looked at the list, we asked, who have you spoken
3 to? Who are the folks? We didn't get anything. So when we went
4 through it, the J3s seemed to line up with Wagner, and so those were
5 the individuals that we approved. I thought that was sufficient.
6 They could talk to the ongoing operations at the time. That seemed
7 to be the relevant issues.

8 Again, I don't believe that the Chairman of the Joint
9 Chiefs, because of his super high level, would be particularly
10 relevant or necessary for the members to hear from. I thought the
11 director of operations made more sense because they'd have
12 more -- sort of a view of the ongoing and active operations at the
13 time, whereas this -- the chairman may be more of a high level policy
14 individual. So that was the thought process there.

15 But, again, we stand by our response. But I am trying to
16 work with the defense if there's somebody on this list that they'd
17 want to swap out. But I don't think you need both the J3 and the
18 Chairman of the Joint Chiefs. I think that would be duplicative,
19 Your Honor. Over.

20 MJ [COL FITZGERALD]: Okay. And I won't require your
21 response. The government's going to rest on their denial, but I will
22 take it under advisement.

23 If you want to confer and come up with a decision based on

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1 the offer the government is making you, please let me know sooner
2 rather than later.

3 DDC [Lt Col NETTINGA]: Yes, sir.

4 MJ [COL FITZGERALD]: I'm not going to give you a firm date,
5 but that may be not to your satisfaction. I'm not telling you you
6 have to. I'm not encouraging you to do one thing or the other, but
7 we don't need to take up the offer here.

8 DDC [Lt Col NETTINGA]: Understood, sir. And our position
9 would certainly be that we want both, but we appreciate the offer,
10 and we will engage with the prosecution on that.

11 MJ [COL FITZGERALD]: And then, lastly, General Zinni.

12 DDC [Lt Col NETTINGA]: Yes, sir. And the reason I wanted to
13 take that up is I realize, I think, in going through the preparation
14 for this, that you do not have the MFR that General Zinni gave.

15 MJ [COL FITZGERALD]: I do.

16 DDC [Lt Col NETTINGA]: Yes, sir. You have it now. It is not
17 included -- let me put it this way -- it is not included in 679DD.
18 That was an oversight, and so I'd like to mark this as the next
19 appellate exhibit for 679.

20 MJ [COL FITZGERALD]: The one I have?

21 DDC [Lt Col NETTINGA]: Yes, sir.

22 MJ [COL FITZGERALD]: You want me to mark this one?

23 DDC [Lt Col NETTINGA]: Yes, sir. I've got copies. I would

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1 like to mark this one.

2 MJ [COL FITZGERALD]: That's what I'm trying to ask.

3 DDC [Lt Col NETTINGA]: Yes, sir.

4 MJ [COL FITZGERALD]: Because I can hand this to the court
5 reporter to have it marked, but I haven't verified it, and I don't
6 know the last time you've touched it.

7 DDC [Lt Col NETTINGA]: I ----

8 MJ [COL FITZGERALD]: So do you have one that you verified and
9 touched that you would like to have marked?

10 DDC [Lt Col NETTINGA]: Yes, sir, I do.

11 MJ [COL FITZGERALD]: Okay. If the court reporter could tell
12 me what the next exhibit -- and I appreciate you providing one to the
13 government. I'll keep this as a courtesy bench copy.

14 DDC [Lt Col NETTINGA]: Yes, sir. And I provided that to the
15 CISO earlier.

16 MJ [COL FITZGERALD]: Tell you what. Go ahead and present
17 what it -- what you want on General Zinni, and as soon as I know the
18 number, we'll put it on the record. But you can proceed with your
19 argument.

20 DDC [Lt Col NETTINGA]: Thank you, sir. And the oversight is
21 just that this is something -- this is not something we received in
22 discovery. This is something that we pulled from the National
23 Archives. And you'll see that it's much less redacted than the

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1 productions we usually get in discovery.

2 But what you'll see in there -- and the reason that I wanted
3 to give this to you at this point in time before we broke for the day
4 is the relevance that General Zinni has to the testimony that he
5 could provide.

6 And so he was the CENTCOM commander. Prior to that, he was
7 the deputy CENTCOM commander from the '90 -- sorry, '96, just after
8 the Khobar Towers attack, he became the deputy commander at CENTCOM,
9 and then he became in August of '97 -- so predating the embassy
10 attacks he became the commander in chief, as they were called at the
11 time, of CENTCOM, and he served in that position until just prior to
12 the attack on the USS COLE. So he left in June of 2000.

13 But he was the individual who made the determination to use
14 Aden as a refueling stop for the Navy. And so I think the idea of
15 his perception of the threat of al Qaeda at the time, the state of
16 play between the United States and al Qaeda based on the fact, in his
17 perspective as the commander in chief of CENTCOM, again, that's the
18 AOR that we're talking about.

19 And he goes into detail as to, hey, this is something we
20 recognized as a threat. It was one threat among many. But there
21 were regional partners who were certainly concerned about al Qaeda
22 and about UBL.

23 He talks a lot about the way in which the OPERATION INFINITE

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1 REACH -- and that is the response, the retaliatory strikes in '98.
2 He talks about how those were not targets developed by the military,
3 or at least not by CENTCOM, but they were targets that were given to
4 him, which is -- he says that's certainly one way that the targeting
5 process works, but normally it's something that they would do kind of
6 organically and inherent to the command, that he had some questions
7 about why those particular things were, those targets were chosen.

8 He talks about on page 6 of that document this idea of what
9 they were going to do and how they were going to try to respond to al
10 Qaeda. And the intelligence that they were getting kind of limiting
11 the options that they had from an operational perspective. That the
12 idea that, you know, just try to go after one man and kill 2,000
13 innocents in the process, that was difficult to do politically prior
14 to 9/11.

15 And so what he's talking about from the facts and
16 information that he was given and was involved in and observed during
17 that time frame is that there is not -- again, the argument that we
18 would make is this is not indicative of ongoing hostilities. That
19 UBL was certainly a threat. They were aware of it. They were trying
20 to figure out how to deal with it. They didn't have the
21 intelligence.

22 But he's not talking about, hey, we're at war or we are
23 engaged in hostilities ongoing with al Qaeda. It's a threat. It was

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1 prior to 9/11, terrorism was seen as strictly a crime as opposed to
2 an act of war prior to 9/11. That's just the reality of the way that
3 the United States dealt with the problem. And I'm not here to say
4 that's right or wrong, but that was the reality.

5 So when you talk about applying the laws of war now to
6 terrorist attacks in a post-hoc rationalization of looking backwards
7 post 9/11, as all of these members, you know, their entire careers
8 essentially will have spanned that universe, that's why it's so
9 important to have the facts and the testimony of these witnesses who
10 were on the ground prior to 9/11 to talk about what was actually
11 going on on the ground and get some fidelity with respect to who UBL
12 was, what was going on between the United States and the terrorist
13 network that he worked with.

14 And this witness is really in prime position to be able to
15 do that. He talks about his perspective being -- or what his -- what
16 he was getting from his superiors, the focus is on getting bin Laden,
17 not about, you know, engaging in war with a terrorist network or
18 engaging in hostilities.

19 It's, hey, we're going to get him. We're going to try to
20 find a way to get him. There are a number of different options that
21 were proposed. Some of them involved military planning, some of them
22 did not. The actions that were actually taken did not involve the
23 military. You know, not that those were certainly significant

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1 actions, but they were actions that were taken.

2 And so I think based on his proximity to the -- being in the
3 AOR and understanding what was going on during the '98 time frame
4 when those strikes are launched, that, again, the government wants to
5 call the J3, he's the commander in chief there of the AOR. And being
6 able, again, to talk about what the facts on the ground were in terms
7 of how that problem -- how the UBL problem was being addressed, I
8 think this is vital information for the members to have to then be
9 able to make the determination as to whether what this -- what
10 General Zinni describes amounts to sustained duration, intensity that
11 is required to constitute a conflict per the hostilities definition.

12 MJ [COL FITZGERALD]: Did you interview General Zinni?

13 DDC [Lt Col NETTINGA]: We have not made contact with General
14 Zinni, no, sir.

15 MJ [COL FITZGERALD]: Thank you.

16 DDC [Lt Col NETTINGA]: And then I'll also note -- sorry, one
17 last thing. Just on page 16 -- I won't take you through the entire
18 document, but you know, he's talking about, quote/unquote, the
19 decision to go to war. And so he's giving details as to how things
20 changed after 9/11.

21 Certainly, again, the argument we would make is that there
22 was not a decision to go to war with al Qaeda or to engage in a
23 conflict that amounts to hostilities prior to 9/11.

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1 MJ [COL FITZGERALD]: Very well. Thank you.

2 679UU is what that document will be marked as.

3 DDC [Lt Col NETTINGA]: Thank you, sir.

4 MJ [COL FITZGERALD]: Government?

5 TC [CAPT STINSON]: Yes, Your Honor. Just briefly.

6 So I think it's very helpful that Lieutenant Colonel
7 Nettinga is putting that document -- I think if the commission
8 reviews that we'll see that this, again, is mostly a review of, you
9 know, what were we doing, should we have refueled in Aden. It's
10 more, in certain respects, an overview of some of the posture of the
11 United States, both before the COLE and then after 9/11.

12 I just refer the commission to page 4 on -- of that
13 document, where it says: After the August 7th, 1998 bombing and the
14 August 20th, 1998 response, the military consistently searched for
15 opportunities to go on the offensive and hit targets based on
16 reliable intelligence. Such intelligence was never achieved for a
17 missile strike or to launch a Special Operations Force mission.

18 So, again, I think the defense has articulated how they
19 would argue to the members about sort of undisputed facts, about
20 their view of whether or not we were engaged in hostilities. But
21 what's missing is, from the synopsis, details about how General Zinni
22 advances that cause. Why is he relevant and necessary beyond
23 Lieutenant Colonel Nettinga's articulate argument about why that

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1 doesn't amount to hostilities? What does he advance that is
2 disputed? What is he going to say that Newbold or Renuart or -- I
3 forget who we just talked about, if they decide to go with the
4 Shelton, General Shelton, what would he say that's different?

5 This document is very much a retrospective of -- I think
6 it's got a whole section on Monica Lewinsky in this document. So to
7 me this isn't particularly relevant or necessary. It's misleading.

8 And one other response, Lieutenant Colonel Nettinga had
9 mentioned that, hey, prior to September 11th it was law enforcement.
10 It was a crime. We were going to do on crime. And as the commission
11 noted, there are multiple tools in the toolbox. After the embassy
12 bombings, it was -- they did respond with TLAMs and the missiles.

13 So those are, from the government's perspective, not
14 disputed facts. We're trying to be reasonable in the witnesses. But
15 again, you're talking about, you know, the individuals that they
16 haven't been able to articulate what in here necessarily advances the
17 argument that they want to make. What would he say that is different
18 or relevant and necessary for the members? And the government stands
19 by its denial in its response, Your Honor. Over.

20 MJ [COL FITZGERALD]: Thank you.

21 Final word?

22 DDC [Lt Col NETTINGA]: Yes, sir.

23 MJ [COL FITZGERALD]: Yes.

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1 DDC [Lt Col NETTINGA]: I would just -- I know you've seen the
2 frustration that I have in not being able to provide additional
3 context or information. I would love to tell you this is exactly
4 what this witness is going to say, and we've talked to him, and the
5 witness is willing. I would love to say all of those things.

6 Again, unsurprisingly, men who have devoted their entire
7 career to protecting the United States and to fighting al Qaeda do
8 not want to do anything that would be seen to help somebody who is
9 that enemy, which does not bode well for a panel of members who are
10 the ones who get to decide whether my client will live or die.

11 But what I would ask you to do, sir, just when you're
12 reviewing this and you're reviewing the other things, is not to be
13 colored by the reason that these MFRs were done. I understand there
14 was a different purpose why these MFRs were produced. They were
15 produced by a commission that was looking at what gaps may have
16 existed, what failures or mistakes may the United States have made in
17 not being able to prevent 9/11.

18 Again, that's not what we're talking about. That's not what
19 we seek to introduce. What we seek to introduce is testimony from
20 the men who were there, who lived it and -- excuse me, I'm
21 sorry -- the men and women who were there. I know we're talking
22 about General Zinni here, but Secretary Rice as well. There's plenty
23 of individuals who can provide the testimony as to what was actually

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1 going on at the time.

2 The members then get to make that determination as to
3 whether or not, based on the entirety of what the United States was
4 doing there, based on whatever involvement the military had, based on
5 the other tools that were used and how they were being used and what
6 decisions were made and why they were made, as to whether or not that
7 constitutes hostilities.

8 And so when the prosecutor brings up page 4, hey, the
9 military was looking for opportunities to go on the offensive and
10 targets, but they never got the chance. They never got the
11 intelligence. They never got the order to actually execute. That's
12 a perfect example that he should be able -- you know, somebody in
13 that position should be able to articulate, from his standing, what
14 was ordered, what wasn't ordered, what did you discuss, what did you
15 plan, how were you getting after this?

16 And then ultimately, the members can decide. Was planning
17 against an effort enough to constitute a conflict subject to the laws
18 of war, which is what hostilities definition is.

19 Some of this evidence, you know, may cut both ways, but
20 the -- we owe it to the members in the search for truth and in trying
21 to get this right to give them the information necessary to make the
22 decision ultimately, and not just, you know, a couple of folks who
23 may have advised the NSC or may have been a J3 at one particular time

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1 in 1998.

2 We owe them, and we owe everyone involved in this process
3 the full facts of what was going on at the time and what the United
4 States was doing and how the military was or was not involved in the
5 effort to get bin Laden prior to 9/11.

6 MJ [COL FITZGERALD]: Thank you.

7 DDC [Lt Col NETTINGA]: Thank you, sir.

8 MJ [COL FITZGERALD]: Does that conclude everything on General
9 Zinni?

10 DDC [Lt Col NETTINGA]: Yes, sir.

11 MJ [COL FITZGERALD]: Very well.

12 And we agreed that's the last one we would take up today,
13 and we will commence tomorrow with General Franks. Is that what you
14 understand is next?

15 DDC [Lt Col NETTINGA]: Yes, sir.

16 MJ [COL FITZGERALD]: Okay. Anything to take up before we
17 recess for the night, Government?

18 TC [CAPT STINSON]: Just briefly. One, the outline of the
19 witnesses for each section was extremely helpful for the hostilities
20 section. So if the commission's contemplating that -- you know, sort
21 of that approach for the other sections, I do think that was very,
22 very helpful.

23 So I just wanted to flag for -- I think some of the bigger

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1 sections like COCOM has 50-some and others, so I know we're going to
2 take up hostilities first thing. Just reflecting on, at least for
3 me, that sort of focus was extremely helpful.

4 And then just to confirm going back to the motion for
5 continuance, I did confirm that the Dr. Holmes' investigation and
6 adjudication were both requested to be expedited. So they were
7 previously requested to be expedited.

8 And I can work with the defense for national programs. If
9 Dr. Kupers is coming in on the 23rd, I think we can put in a request
10 to see if he can knock out both. But that's not for the commission.

11 I'm not certain that he'll be able to do it, but I did just
12 try and close the loop to see if we can expedite that and get it done
13 at the same time. So we'll follow up with the defense on that.

14 MJ [COL FITZGERALD]: I appreciate that. Thank you.

15 Defense, anything?

16 SDC [MS. CARMON]: I have one correction, anticipating that we
17 may reach this tomorrow.

18 MJ [COL FITZGERALD]: You have one correction? I'm sorry.

19 SDC [MS. CARMON]: Yes, to the table that we provided in our
20 motion to compel witnesses.

21 MJ [COL FITZGERALD]: Okay.

22 SDC [MS. CARMON]: And so if I can direct court and counsel to
23 679DD, page 286, and with apologies to everyone, I'm clearly

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1 slipping. The first item under co-conspirators, it notes a
2 percipient witness for an IIR, and then it gives a Bates or an
3 AE number.

4 That is what I had written on the document itself. That is
5 not right. What I am referring to is already in the record at AE 569
6 Attachment C. So it is accurately described in the justification,
7 but where it is in the record is AE 569 Attachment C.

8 MJ [COL FITZGERALD]: Thank you. And we'll endeavor to get
9 you a, for lack of a better term, a focus list for the remaining ones
10 after the engagement of hostilities.

11 Anything else?

12 Just a reminder, and bailiff, the defense has until 1800
13 unless they decide to conclude earlier. Does that still work for the
14 defense?

15 LDC [MS. MILLER]: It does, sir. Thank you.

16 MJ [COL FITZGERALD]: Okay. With that, then, I will see
17 everybody tomorrow morning at 0900.

18 All right. The commission is in recess.

19 **[The R.M.C. 803 session recessed at 1610, 14 April 2026.]**

20 **[END OF PAGE]**