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1 [The R.M.C. 803 session was called to order at 1052,

2 19 November 2025.]

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

4 All parties present before the last recess are again

5 present.

6 I'll also announce for the record, Mr. al Nashiri -- first,
7 good morning -- is present in the courtroom today. I believe that's
8 the only change.

9 But, Government, you -- I believe you had something you
10 wanted to put on the record?

11 TC [CAPT STINSON]: Yes, Your Honor. Just briefly. The CCTV
12 sites are up and operational this morning. Just wanted to make sure
13 I put that on the record. Thank you.

14 MJ [COL FITZGERALD]: Thank you.

15 I think the first thing, we're going to take up Appellate
16 Exhibit 588. And I think the last thing we discussed essentially in
17 the 802 was who would go first, meaning who had the burden. And
18 there seemed to be a disagreement.

19 Did that get resolved by the parties during the recess or is
20 that something we need to take up?

21 ATC [CDR ROMAN]: No, it was not discussed by the parties,
22 Your Honor.

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

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1 ATC [CDR ROMAN]: It is something that we'd like to be heard
2 on, Your Honor.

3 MJ [COL FITZGERALD]: Okay. Would you like to go first,
4 Commander Roman?

5 ATC [CDR ROMAN]: Yes, Your Honor.

6 **[Pause.]**

7 ATC [CDR ROMAN]: Good morning, Your Honor.

8 MJ [COL FITZGERALD]: Good morning.

9 ATC [CDR ROMAN]: As we've briefed legal challenges to
10 personal jurisdiction, we've -- the government accepts that it's a
11 burden on the government to prove personal jurisdiction, but the
12 government, and the commission, has assessed and addressed legal
13 challenges to personal jurisdiction in several motion series
14 previously: AE 046 and 047 contesting alienage; AE 104A, Note 1,
15 showing why a challenge to hostilities does not implicate personal
16 jurisdiction; and AE 168H and 241D.

17 The government's identified and received testimony and a
18 myriad of exhibits that establish jurisdiction over the accused. So
19 what we're talking about here, as it was addressed in the U.S. v.
20 Lindh case, 212 F. Supp. 2d 541 at 557, it's the accused that would
21 bear the burden of establishing an affirmative defense that he is
22 entitled to lawful combatant immunity.

23 And so for those reasons, the government believes it is the

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1 defense's -- the defense's burden to show why that immunity attaches.

2 Pending your questions, sir, that's all I have on the
3 burden.

4 MJ [COL FITZGERALD]: But that's not the motion before this
5 court. You're saying that they improperly styled a -- their pleading
6 for the court? I'm not sure exactly what you're saying. I have
7 before me a motion to dismiss for lack of personal jurisdiction.

8 ATC [CDR ROMAN]: Correct. And in that -- in that, the
9 argument is that the privileged combatant belligerent status should
10 be presumed and determined before the charges are sworn in this -- in
11 this commission.

12 Therefore, because of the alleged ability to claim
13 privileged belligerent status, personal jurisdiction under the
14 Military Commissions Act does not apply. I believe I've -- that's
15 the characterization, as succinct as I can make it, that the defense
16 is moving the court.

17 MJ [COL FITZGERALD]: Okay. Well, let me hear from the
18 defense, then.

19 ATC [CDR ROMAN]: Thank you, sir.

20 DDC [Lt Col NETTINGA]: Sir, as you correctly pointed out,
21 Lindh, the case cited by the prosecutor, is inapposite here. That
22 involved an affirmative defense. This is not that. Lindh was also a
23 federal case where the issue of the personal jurisdiction we are

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1 dealing with here was not before that court. So it's just wholly
2 apples and oranges there.

3 I'd direct the court to your ruling in 588C where you
4 specifically cited the rule that in a case for a motion to dismiss
5 for lack of jurisdiction, the burden of persuasion shall be on the
6 prosecutor. That's R.M.C. 905 -- let's see -- (c) (2) (B).

7 So I don't think that there's really an issue here. The
8 fact that we may have brought other motions in the past that also
9 deal with personal jurisdiction does not somehow flip the burden to
10 us now.

11 MJ [COL FITZGERALD]: Very well. Thank you.

12 DDC [Lt Col NETTINGA]: Thank you, sir.

13 MJ [COL FITZGERALD]: In fact, that was the ruling in -- or
14 what the commission stated in its ruling in 588C. So while not
15 conclusive, and I'll certainly contemplate the argument raised by the
16 government as to that -- this more aptly should have been styled as a
17 motion regarding an affirmative defense, that's not what they defense
18 filed and that's not the burden that the court indicated it would
19 address in 588C.

20 So, Government, I'm going to place the burden on you, at
21 least for the purpose of who is going first today. So, Government, I
22 will allow you to go first.

23 Am I clear that -- I'm not ruling that -- I'm not saying

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1 when I rule I will necessarily find that is the burden. I will
2 contemplate all that in the final ruling.

3 ATC [CDR ROMAN]: Yes, Your Honor. Thank you.

4 The -- from the government's perspective, again, not to
5 reiterate, but we have provided numerous exhibits in this motion
6 series as well as others that we have identified just previously,
7 witness testimony that establishes not only -- that establishes
8 personal jurisdiction.

9 And given the history of the case, four commission judges,
10 multiple appellate judges, personal jurisdiction has not been
11 attacked in this way until now. And personal jurisdiction is
12 something that courts and military -- and judges of all courts
13 satisfy and must be satisfied with at all times.

14 And the defendant's brief seems to have a concession that
15 their client is a member of al Qaeda and, in so doing, speaks
16 to -- and after the presentation this morning, we look forward to
17 hearing today -- that there is a commingling or a connection, I
18 believe, with regard to al Qaeda and Taliban.

19 This is a -- this is -- this is a distinction without a
20 difference. The United States and the international community have
21 continuously understood that al Qaeda and the Taliban are not
22 afforded privileged belligerent status.

23 Specifically with al Qaeda, as it stands, the commission has

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1 heard arguments and had statements from numerous al Qaeda
2 co-conspirators that identify the accused as a member of al Qaeda,
3 both in the Boats Operation and generally. He either personally, or
4 by direction, engaged in and supported hostilities. They show that
5 he purchased vehicles used in the conspiracy in and around Yemen;
6 purchased a boat used with a failed attack on the USS SULLIVANS; and
7 an attack on the USS COLE that killed 17 sailors; that the accused
8 acquired explosives and arranged for the videotaping of the COLE
9 attack.

10 More importantly, the commission has also heard the
11 accused's own statements made in his Combatant Status Review Tribunal
12 that, by themselves, provide the commission with sufficient
13 information to find that jurisdiction exists.

14 He admits to knowing Jamal al Badawi and asking him to
15 purchase the attack boat. He admits to knowing the COLE suicide
16 bombers, who are also known al Qaeda operatives. He admits to
17 purchasing explosives. He admits to working with Usama bin Laden,
18 the leader of al Qaeda, and receiving thousands of dollars from him.
19 The accused even explained, "If I need money, I would just go ask him
20 for it and he would give it to me."

21 Your Honor, you've also heard testimony from Special Agent
22 Bob McFadden. He explained the connections of al Qaeda to be
23 determined based on how trusted the accused was. The accused claims

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1 that he directed -- had direct access to Usama bin Laden, the head of
2 al Qaeda, the most wanted man at the world -- the most wanted man in
3 the world at the time.

4 So the accused is obvious -- was trusted to have the ability
5 to communicate and meet with the leader of al Qaeda, trusted enough
6 with bin Laden to liberally give him money and funds. The logical
7 conclusion is that the accused was part of al Qaeda.

8 And, therefore, under the MCA, the government argues he
9 fulfills all three prongs; specifically, that he was a member of
10 al Qaeda; conducted hostilities against U.S. -- United States and
11 their partners; and aided and supported terrorist activities against
12 the United States and their partners.

13 The defense mentions in their brief a parenthetical in the
14 MCA that reads: The term unprivileged belligerent means an
15 individual -- parenthetical -- other than a privileged belligerent,
16 who has engaged in hostilities against the U.S. or purposely
17 materially supported hostilities, or was a member of al Qaeda.

18 I believe the contention from the defense is that that
19 parenthetical assumes that there was a international armed
20 conflict -- or I'm sorry -- that al Qaeda was, at some point in time,
21 understood to be engaged in an international armed conflict.

22 Because al Qaeda is not a member -- is not a state, is not a
23 nation, it is therefore unable in the customary law of war to be

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1 afforded engaging in an international -- not by geographic, and I'm
2 saying this almost for my own benefit -- but international conflict,
3 international in that regard.

4 Therefore, by membership of al Qaeda, the parenthetical is a
5 null set with regard to that third -- that third prong.

6 And the first two prongs, then, were also to engage in or to
7 cut out others who may have had multiple identification -- multiple
8 memberships that were not al Qaeda but were involved in terrorist
9 activities and hostilities against the United States and coalition
10 partners.

11 Talking to and understanding the -- and maybe simplifying
12 the determination of how and when and why belligerents are given
13 either a privileged or unprivileged status, we need to discuss the
14 Geneva Convention -- I'm sorry, the Third Geneva Convention of 1949,
15 also known as the Geneva Convention over prisoners of war.

16 And in so doing, the analysis starts with determining what
17 kind of conflict is being discussed. The law classifies conflicts as
18 either an international armed conflict, an IAC, or as a
19 noninternational armed conflict, or a NIAC. As I said previously,
20 the law classifies that a conflict at the time that is a NIAC cannot
21 be afforded prisoner of war status immunity.

22 Once this is determined, if it is, in fact, a NIAC, it would
23 be superfluous to address whether the Third Geneva Convention

1 Article 4 categories and qualifications are addressed.

2 Nevertheless, it may be necessary and it might educate and
3 bring the court some clarity on this issue because the government,
4 along with all -- many governments across the -- all over the world
5 have -- and I'm not aware and the defense has not shown any court or
6 jurisdiction or nation that has afforded Taliban or al Qaeda a
7 privileged combatant status.

8 There have been cases in civil courts across the United
9 States, Germany, United Kingdom where Taliban members were prosecuted
10 for murder or attempted murder, conspiring to commit violence,
11 planned violence, and directed at U.S. and coalition troops on the
12 battlefield.

13 Some of these we've already talked about, like the United
14 States v. Lindh case, United States v. Hamidullin; recently, the
15 United States v. Najibullah case.

16 These cases that have proceeded to judgment show the
17 manifest difference between a privileged and unprivileged
18 belligerency status in terms of the force that comports to the laws
19 of war.

20 Privileged are protected by combatant immunity while
21 unprivileged never are. Repeat again, to date, there has not been
22 any case that has yielded a ruling by applying combatant immunity to
23 the Taliban, nor any court anywhere has recognized Taliban in title

1 to POW status and the accordant combat immunity.

2 So accordingly, it's assessing the nature of the alleged
3 armed conflict must be the first step.

4 Addressing the conflict classification under Article 2 of
5 the Third Geneva Convention is where we start. This is decisively
6 answered and decisively answers the question of combat immunity in
7 the government's perspective.

8 Combat immunity requires the existence of an IAC under
9 Article 2. Only an IAC triggers the application of the entirety of
10 the Third Geneva Convention, including Article 4, which is the
11 gatekeeper because it assesses POW status to an Article 5 tribunal
12 for determination whether or not there is doubt as to the
13 determinations in the Article 4.

14 If by contrast the conflict falls under the scope of Article
15 3 of the Third Geneva Convention, a NIAC, it is textually and legally
16 impossible to reach the POW qualification provisions in Article 4.

17 The government has argued that the conflict in Afghanistan
18 was not of an international character and, therefore, fell within the
19 scope of Geneva Conventions -- Third Geneva Convention Article 3, not
20 Article 2.

21 As a result, the accused cannot legally qualify as a POW and
22 enjoy combat immunity whether as al Qaeda or as the Taliban.

23 And this is instructed by a litany of decisions by the

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1 President of the United States as informed by his OLC, as the Office
2 of Legal Counsel, the Department of Justice in 2002, as well as the
3 international community for the Red Cross in June of 2002, agreeing
4 all that the conflict in Afghanistan was a NIAC.

5 Now, the defense has pointed to a number of documents, a
6 number of connections where they are logically leaping to say that
7 because of in concession, the accused, as a member of al Qaeda,
8 through that membership was then part of a force under the Taliban
9 who was -- and this is another leap -- afforded this immunity because
10 of its status in the country of Afghanistan at the time of -- you
11 know, of the time alleged in this charge sheet.

12 And they are -- further may look at the President's
13 proclamation and they point to documents this morning and I guess and
14 they'll discuss them now that point to intelligence assessments,
15 turnover, notes, predecisional memos and papers.

16 The government stands by the President's proclamation in
17 February of 2002 as informed by the legal -- Office of Legal Counsel
18 memo, which was republished in 2012. And the government's contention
19 is that it is still the policy of the United States, that the Taliban
20 is not afforded privileged belligerent status.

21 Now, the Executive is given due deference to make these
22 determinations, but the process and the deference is also something
23 that is weighed by courts who are competent to make these

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1 determinations as well. And for that matter, we will -- we'll
2 continue on the explanation of Third Geneva Convention.

3 MJ [COL FITZGERALD]: Before you do that, I have a question.
4 You've been referring to the defense's argument as making large
5 logical leaps, but it's a bit confounding that the definition of an
6 unprivileged enemy belligerent is anybody who's not a privileged
7 belligerent.

8 I don't know how that's too large of a leap when the
9 definition of the thing that gives you jurisdiction is they're not a
10 thing that wouldn't give jurisdiction. I think it's a fair argument
11 by the defense to posit this interesting -- you're a member of
12 something because you're not a member of something else and then
13 gloss over how he's not a member of something else, which you've kind
14 of done.

15 There are eight enumerated categories of people who are
16 privileged belligerents.

17 ATC [CDR ROMAN]: Right.

18 MJ [COL FITZGERALD]: And you didn't tell me anything about
19 who would be a privileged belligerent, why he wouldn't be classified
20 as such. So it seems like you're also making a large logical leap to
21 just skip over the very definitions we've been given in subsections 6
22 and 7 regarding privileged belligerents and unprivileged
23 belligerents.

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1 Am I making sense?

2 ATC [CDR ROMAN]: I think so, sir. And I'd be happy to get to
3 it.

4 MJ [COL FITZGERALD]: Well, that's where we're at.

5 ATC [CDR ROMAN]: Yes, sir.

6 MJ [COL FITZGERALD]: I was waiting for you to get to it, but
7 I'll just ask you.

8 ATC [CDR ROMAN]: Okay.

9 MJ [COL FITZGERALD]: So can you give examples of privileged
10 belligerents in these contexts?

11 ATC [CDR ROMAN]: Examples of privileged belligerents?

12 MJ [COL FITZGERALD]: Again, because the definition of
13 unprivileged enemy belligerents -- and I'll agree with you that it's
14 in a parenthetical, but it seems an incredibly important
15 parenthetical, is it's somebody other than a privileged belligerent
16 who does certain actions.

17 ATC [CDR ROMAN]: Correct.

18 MJ [COL FITZGERALD]: So I guess, because the actions they
19 talk about in A, B, and C, at least two of the three, could be done
20 by privileged belligerents, right?

21 ATC [CDR ROMAN]: Correct. And I would argue ----

22 MJ [COL FITZGERALD]: And that's a parenthetical of
23 importance. I don't think putting in parentheses is this is a small

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1 thing to worry about, which is normally what we think about in
2 parentheticals. This seems to be a very important thing because it's
3 saying privileged belligerents could engage at least two of those
4 three things and have protection.

5 ATC [CDR ROMAN]: Well, yes.

6 MJ [COL FITZGERALD]: We can argue about that, the last one,
7 regarding membership in al Qaeda. But at least those two things,
8 privileged belligerents can certainly engage in hostilities against
9 the United States and its coalition partners. Would you agree?

10 ATC [CDR ROMAN]: Yes, Your Honor.

11 MJ [COL FITZGERALD]: And a privileged belligerent could
12 purposely and materially support hostilities against the United
13 States or its coalition partners. Would you agree?

14 ATC [CDR ROMAN]: Yes.

15 MJ [COL FITZGERALD]: So that's why, I guess, it seems you've
16 glossed over this thing by just telling me they've made too large of
17 a leap by responding with another large leap of ----

18 ATC [CDR ROMAN]: No, Your Honor.

19 MJ [COL FITZGERALD]: ---- of the definitions before me, that
20 if you're telling me he's an unprivileged enemy belligerent, I've got
21 to start with the definition. How is he not a privileged
22 belligerent?

23 ATC [CDR ROMAN]: Okay.

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1 MJ [COL FITZGERALD]: That would be part of your burden.

2 ATC [CDR ROMAN]: As part -- as a member of al Qaeda, which
3 we've walked over.

4 MJ [COL FITZGERALD]: Okay.

5 ATC [CDR ROMAN]: And then if there is ----

6 MJ [COL FITZGERALD]: You said all three. You didn't rest on
7 he's a member of al Qaeda and we rest. We have jurisdiction.

8 You said he fits all three categories, that he engaged in
9 hostilities, that he provided support, and that he's a member of
10 al Qaeda. So I don't want to gloss over -- at least -- but
11 because -- if the government's proclaiming your position is we have
12 jurisdiction because of all three prongs, well, let's talk about
13 those first two prongs, which could include a privileged belligerent
14 as well as an unprivileged belligerent.

15 ATC [CDR ROMAN]: Yes, Your Honor. I think with regard to
16 prong 1, I mean, as I've elicited the evidence that we are -- and the
17 charges alleged that we have shown that he has -- and we'll prove at
18 trial that he has engaged in hostilities, if a privileged
19 belligerent -- and I think a good example would be an Iraqi soldier
20 who is also a member of al Qaeda, let's say.

21 MJ [COL FITZGERALD]: Well, do you have the eight categories
22 that are provided for in the Convention?

23 ATC [CDR ROMAN]: Say it again?

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1 MJ [COL FITZGERALD]: That's the definition -- right? -- a
2 privileged belligerent, one of the eight categories enumerated in
3 Article 4. So can you articulate it in a way that is cabined by the
4 very definition you've been given, that he doesn't fit one of those
5 eight enumerated categories in the Convention?

6 ATC [CDR ROMAN]: Yes, sir. And that's the ----

7 MJ [COL FITZGERALD]: That would seem to be the simplest
8 thing.

9 ATC [CDR ROMAN]: Would that -- they would be part of a high
10 contracting party to the Convention in Article 2. If you're a
11 high -- if you're part of the armed force of the high contracting
12 party, it is an international conflict and you are afforded
13 privileged belligerent status.

14 MJ [COL FITZGERALD]: And the government posits that he's not.

15 ATC [CDR ROMAN]: Correct.

16 MJ [COL FITZGERALD]: Okay. The next one? If you need a
17 moment ----

18 ATC [CDR ROMAN]: No, and this is -- this is ----

19 MJ [COL FITZGERALD]: I'm not trying to give you a pop quiz.
20 If you need to go grab those eight enumerated -- if you have them,
21 great.

22 ATC [CDR ROMAN]: Okay.

23 MJ [COL FITZGERALD]: I just want to make sure.

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1 ATC [CDR ROMAN]: So that's the part of the analysis that we
2 believe -- that the government believes is the start of the analysis.
3 Is it Article 2? Is he part -- is he part of a nation of the
4 contracting partners? Okay. If not, then it is not an international
5 conflict and, therefore, he is under Article 3.

6 However, Article 4 has enumerated categories that inform,
7 and is a gatekeeper to, the Article 5 tribunal decision. This is
8 where we come into whether there's doubt and a belligerent is
9 afforded a hearing or a tribunal to determine status.

10 In a mixed idea, like the Iraqi soldier who, according to
11 Article 4, Subsection 2, is of a force that is commanded by a person
12 responsible for their subordinates. Having a fixed, distinctive
13 signature -- sign recognizable at a distance under the Hague Fourth
14 Convention, that's generally understood to be uniform or some time of
15 insignia and marker on the weapon, on the vehicle that they are
16 utilizing, that they carry arms openly, and, importantly, that the
17 conduct of their operations was in accordance with the laws and
18 customs of war. Here, the accused does not fit any of those except
19 potentially carrying arms openly.

20 Under the idea of the Taliban -- and it is in the OLC memo,
21 it is in the ICRC letter -- the Taliban has not -- was not shown to
22 have any centralized command. It was more of a localized militia
23 that went after internal targets.

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1 I think the defense was talking about how the 55th Brigade
2 was talking and attacking the Northern Alliance. The Northern
3 Alliance was a -- are forces and members of a warlord type of
4 construct in Northern Afghanistan, internal. Again, not external
5 with two member states, therefore a NIAC and unprivileged
6 belligerency would be according.

7 But going to the other -- not having a fixed distinctive
8 sign or recognized the -- the ICRC letters, as well as the Taliban
9 code of conduct, not only talks about how they -- and this gets to
10 the laws of war, but encouraged and directed their members to not
11 wear any kind of identifiable uniform in order for them to get close
12 to the enemy without being detected, which, under the fourth one,
13 conducting operations in accordance with the laws and customs of war
14 is perfidy. It also talks about executing of prisoners.

15 These are things that run afoul of the Article 4 criteria
16 for determining whether someone would be a privileged belligerent.
17 And the government would posit that the Taliban in general and the
18 al Qaeda -- and al Qaeda also have been found throughout courts
19 throughout many jurisdictions that they fail on -- in that criteria.

20 Does that answer Your Honor's question?

21 MJ [COL FITZGERALD]: If you believe you've answered my
22 question, then you can move on.

23 ATC [CDR ROMAN]: Thank you, Your Honor.

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1 MJ [COL FITZGERALD]: But thank you.

2 ATC [CDR ROMAN]: So I'd like to just talk about the armed
3 conflict in Afghanistan was not -- it was a noninternational armed
4 conflict. And this is established -- I want to talk about the ICRC
5 letter in -- in June of 2002.

6 And this predates when the accused was arrested. This also
7 is after the President George W. Bush issued his proclamation as
8 informed by the Office of Legislative -- I'm sorry -- Legal Counsel.

9 That letter to British Parliament shows that only Article 3
10 applies to members of the Taliban engaging in a NIAC in Afghanistan.
11 The defense in their briefing may talk about Article 4A.3., members
12 of a regular armed force who profess allegiance to a government
13 other -- an authority not recognized by the detaining power.

14 To be clear, the Taliban does not meet the requirements of
15 Article 4A.3. And it's because that the requirements of 4A.3. and
16 4A.1. that do not -- and they talk about the regular Army and regular
17 force. They don't identify the same criteria as 4A.2. because it is
18 common parlance in international humanitarian or law of war that an
19 armed force constitutes the criteria. A.2. talks specifically in new
20 terms in 1949 about militia and volunteer courts -- militia and
21 volunteer corps. Those criteria, though, is not logical and it
22 is -- as it is expounded in the OLC memo are imbued on the terms of
23 art in A.1. and A.3. that they, of course, regular Army would not be

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1 held to a lesser standard if these didn't apply for militia and
2 volunteers.

3 So the certain bedrocks of law of war determination of
4 status remain strong in the foundation. And that's the two-part
5 requirement for prisoner of war qualification and legitimate claims
6 to combat immunity. First, that the alleged criminal misconduct
7 occurred in a context of an IAC; and second, that the individual
8 asserting combat immunity meets the POW qualifications in
9 Article -- in Article 4.

10 Here there really is no general issue of a POW status and
11 combat immunity. The government believes that the court can resolve
12 this motion based solely on the grounds of identifying that either of
13 the groups were properly under Article 3.

14 But if needed for further inquiry, the government reaches
15 Article 4 and understands that the accused does not fit into any of
16 the criteria of Article 4. Any claim that he does is meritless, as
17 the Taliban did not come even remotely close and certainly not
18 al Qaeda, to meeting the requirements for POW status.

19 The government would also rest on its -- on its briefing
20 that the -- that this commission is qualified and able, as other
21 courts have done, to determine any and all of the issues of personal
22 jurisdiction to include prisoner of war status.

23 And I think the last thing is, just to reiterate, that the

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1 definition of the -- and this is from Major Geoffrey Corn in his
2 book, *To Be Or Not to Be, That is the Question. Contemporary*
3 *Military Operations in Status of Captured Personnel*. This is
4 contained in the OLC memo that: Part and parcel of the definition of
5 a regular armed force, it is unreasonable to believe that a member of
6 the regular force could not conduct -- could conduct military
7 operations in civilian clothing while a member of militia or
8 resistance group cannot. Should the member of the regular forces do
9 so, it is likely they would lose their claim to immunity.

10 MJ [COL FITZGERALD]: Commander Roman, you have to remember
11 that when you read, our habit is to read faster than we speak. There
12 are some yellow lights that flash, should be on your screen. That's
13 flashing for your edification that you're going too fast for our
14 translators.

15 ATC [CDR ROMAN]: My apologies. I didn't see -- I didn't know
16 what you were referencing to with the light. Now I see it.

17 MJ [COL FITZGERALD]: So if you can do me a favor, because
18 they're ensuring Mr. al Nashiri understands everything you're saying,
19 would you mind going back to where you began reading. And, again,
20 just read it slow. Same thing I think I told Major Krzemien
21 yesterday, at least pause after every sentence and keeping in mind
22 those translators really appreciate in their exhaustive efforts to
23 keep up with you. Thank you.

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1 ATC [CDR ROMAN]: Yes, Your Honor.

2 So starting again, Major Corn writes: Arguably, part and
3 parcel of the definition of a regular armed force, it is
4 unreasonable -- I'm sorry. I'll start again.

5 The four Hague conditions which are a part of
6 Geneva Convention Article 4A.2. -- and this four-part test has its
7 origin in the Hague Convention going back to -- I believe it's 1907.

8 But, "Those four criteria arguably are part and parcel of
9 the definition of a regular armed force. It is unreasonable to
10 believe that a member of a regular armed force could conduct military
11 operations in civilian clothing while a member of the militia or
12 resistance groups cannot. Should a member of the regular armed
13 forces do so, it is likely that he will lose his claim to immunity
14 and be charged as a spy or an illegal combatant."

15 The defense brief talks a lot about Article 5, so I'd like
16 to just touch on that. Article 5 is the part of this Convention that
17 speaks to whether there's doubt as to a status a tribunal should be
18 afforded the detainee.

19 Simply put, that is only afforded if there's any doubt as to
20 the preceding sections that we've just walked through. So if there's
21 any doubt, if there's a mixed idea, that and only that would
22 then -- Article 4 is the gatekeeper to an Article 5 determination.
23 Whereas here, we don't get past Article 3 in either of the

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1 organizations that are alleged to have -- that the accused has been a
2 member of.

3 Again, this membership is -- and what I meant by a logical
4 leap is assuming -- I mean, every -- it assumes that because
5 al Qaeda, members of al Qaeda supported some units in furtherance of
6 the Taliban in Afghanistan, ergo all al Qaeda are really supporters
7 and agents of al Qaeda -- of Taliban, but that doesn't follow.

8 There has been no allegation specifically or no evidence or
9 statement, including by the accused himself, that he is a member of
10 the Taliban or of this 55th Brigade.

11 Further, in furtherance of, as the defense points out,
12 fighting the Northern Alliance in Northern Afghanistan, it is tenuous
13 to then say he is acting as agent of a indigenous force in
14 Afghanistan when perpetrating terrorist attacks in the Gulf of Aden
15 half a world away.

16 The -- so when there is no doubt as to an alien enemy
17 unprivileged belligerency, Article 5 does not apply. Here,
18 the -- here, the government has provided that he engaged in
19 hostilities against the United States and coalition partners. He
20 purposely and materially supported hostilities against the United
21 States and was part of al Qaeda at the time of the offense.

22 The government postulates by all of the exhibits that we
23 have submitted in this series, as well as the other series

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1 identified, has met its burden to find personal jurisdiction. No
2 court in this -- in the commissions or in the appellate level has
3 questioned personal jurisdiction.

4 The commission has full authority to decide matters of
5 personal jurisdiction before it. And the record is full of the
6 evidence establishing that.

7 For these reasons, the government -- the commission should
8 deny the defense motion.

9 Pending your questions, Your Honor.

10 MJ [COL FITZGERALD]: No, sir. I have none. Thank you very
11 much.

12 ATC [CDR ROMAN]: Thank you.

13 MJ [COL FITZGERALD]: Colonel Nettinga, I noticed you also
14 looked at the clock. Tell me where you think we stand with your
15 presentation.

16 DDC [Lt Col NETTINGA]: Sir, I do think I'm going to be
17 talking for a little bit up there. I say that colloquially. I'm
18 going to be talking for a while. I would at least request a comfort
19 break if that -- I think probably a lunch break now is appropriate,
20 but I defer to the court. If we can take a comfort break ----

21 MJ [COL FITZGERALD]: Okay.

22 DDC [Lt Col NETTINGA]: ---- and you want to keep pressing, I
23 can do that, too.

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1 MJ [COL FITZGERALD]: Noting what we still have remaining for
2 the day, do the parties see any concerns that we'll run out of time
3 today with what we still have on the docket?

4 LDC [MS. MILLER]: And, Your Honor, I wanted to address AE 624
5 with you, sir.

6 MJ [COL FITZGERALD]: Well, let me resolve my matters, then
7 I'll ask you as I ----

8 LDC [MS. MILLER]: That's what's left for this afternoon.

9 MJ [COL FITZGERALD]: I understand it. Let me address this
10 first, then I'll let you speak. Okay?

11 So I'm going to ask the government first. Government, do
12 you have any concerns with what we still have remaining on ----

13 TC [CAPT STINSON]: No -- well, excuse me, Your Honor. I
14 think we'll be able to get through 588 and 624 today in a timely
15 manner in the afternoon.

16 We do intend to bring, pursuant to the commission's order,
17 Mr. Bahlul over tomorrow morning, per our schedule, so that's an
18 additional matter. I know there's been a third-party motion filed in
19 relation to that. But with the commission's order to produce him
20 during the November sessions, it's our intent to bring him over
21 tomorrow morning.

22 We still have Friday, so we have -- if the testimony kind
23 of, you know, builds up on that, we still have Friday as an escape

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1 valve, although I think the other three witnesses -- Detective
2 Lantry, who's here, Special Agent Lee, and Special Agent
3 McFadden -- I honestly anticipate their testimonies will be
4 relatively brief. That's the government's intent, anyway.

5 So even with that shift -- the only reason I bring that up
6 is if we were ending a little bit earlier today I was going to offer
7 Detective Lantry for this afternoon just to give us a little bit of
8 extra space there. But I think even -- even with that, knowing that,
9 I think we'll be fine tomorrow. So from the government's
10 perspective, I think we're on track for today and the rest of the
11 docket.

12 Over.

13 MJ [COL FITZGERALD]: Thank you. That's helpful.

14 Colonel Nettinga, do you want me to defer to -- because I
15 think both of you need to answer. You know what you have left, but
16 do you want me to defer to Ms. Miller at this time? Or are
17 you -- however you want to handle it.

18 DDC [Lt Col NETTINGA]: If I could add a couple of things ----

19 MJ [COL FITZGERALD]: Sure.

20 DDC [Lt Col NETTINGA]: ---- and then, yeah, I know that
21 Ms. Miller has things to add as well.

22 I would just add, I think based on what I have, it's not
23 going to -- you know, it's not going to push until 4:00 just based

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1 on ----

2 MJ [COL FITZGERALD]: Okay.

3 DDC [Lt Col NETTINGA]: ---- me or this or anything like that.

4 I do want to point out just -- and we talked with the
5 prosecution about this. We are not prepared to take up Detective
6 Lantry today.

7 MJ [COL FITZGERALD]: Okay.

8 DDC [Lt Col NETTINGA]: That's also me, and so I just -- I'm
9 not prepared to do that. That was ----

10 MJ [COL FITZGERALD]: Okay.

11 DDC [Lt Col NETTINGA]: So, in our mind, we have 588 left and
12 624 left today. And I know Ms. Miller now can talk about ----

13 MJ [COL FITZGERALD]: Okay.

14 DDC [Lt Col NETTINGA]: ---- what her time expectations are.

15 MJ [COL FITZGERALD]: Sure. Thank you.

16 Stand by, Ms. Miller. I'm going to speak to somebody on my
17 staff before you, if that's okay.

18 LDC [MS. MILLER]: Yeah, of course, sir.

19 **[The military judge conferred with courtroom personnel.]**

20 MJ [COL FITZGERALD]: Okay. Now your turn, Ms. Miller.

21 LDC [MS. MILLER]: We may have the opposite problem as far as
22 who has the burden, in that both Mr. Wells and I believe that we
23 share respective burden **[microphone button not pushed; no audio.]**

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1 for -- as kind of a mixed-burden issue. The government would
2 certainly have the burden to prove admissibility under 948r or
3 M.C.R.E. 304.

4 As to any other grounds, I acknowledge that I carry the
5 burden. I anticipate my argument on the other grounds lasting 15
6 minutes, and I would like the commission to hold me to that. While
7 I'm certainly not saying that as precedential moving forward, but I
8 do not believe there is a path to legitimacy for al Darbi's
9 deposition based on what I intend to raise on my -- in my argument.

10 And so Mr. Wells has provided a tremendous amount of
11 information that he appears to intend to rely on. And I think that
12 if the commission were to allow me to go first, it may render us at
13 an impasse or what Mr. Wells intended to present as unnecessary.

14 And so I'm requesting -- this may be an odd request as well.
15 I acknowledge that I carry the burden on grounds for exclusion other
16 than 948r or M.C.R.E. 304, like to argue my bases for exclusion
17 first, which I believe will last 15 minutes and may render Mr. Wells'
18 argument unnecessary.

19 MJ [COL FITZGERALD]: I believe I'm picking up what you're
20 putting down, but I'm going to ask Mr. Wells if he has any input at
21 this point.

22 MATC [MR. WELLS]: Your Honor, if Ms. Miller is suggesting
23 that the defense does not contest that the statement that Mr. Darbi

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1 provided under oath in front of Mr. Nashiri with his own counsel
2 present is not the result of torture under 948r or coercive
3 circumstances, cruel, inhuman, degrading treatment under
4 M.C.R.E. 304(a)(3), then I really have no further argument.

5 But I think she is still continuing to press that she's
6 alleged a valid objection to the statement that Mr. Darbi made as
7 subject to 948r, torture, cruel, inhuman, degrading treatment, and
8 also 304. If that is the case, then the government does bear the
9 burden on that piece.

10 I have no objection if she wants to take first her primary
11 argument and then allow the government to go second if she's still
12 raising some aspect of torture, cruel, inhuman, degrading treatment,
13 Your Honor.

14 MJ [COL FITZGERALD]: Ms. Miller, do you concur with that
15 summary from Mr. Wells? Go ahead.

16 LDC [MS. MILLER]: I concur with the summary. And I think he
17 and I may be in agreement to allow me to go first, and then hopefully
18 clarify any issues that the government would feel that they would
19 need to address in response to my argument.

20 MJ [COL FITZGERALD]: That sounds -- I just got a thumbs up
21 from Mr. Wells that it ----

22 LDC [MS. MILLER]: I can see him.

23 MJ [COL FITZGERALD]: Okay. It appears that there's some

1 agreement of how we're going to proceed on AE 624.

2 So remind me of that in case I forget, but I think I
3 understand, Ms. Miller, you will start. And it sounds like you will
4 also potentially finish with different argument.

5 Is that accurate?

6 LDC [MS. MILLER]: Yes. There is no order validating this
7 deposition, and so I think we're at an impasse as to how we get
8 around that. I'll certainly expand on that argument.

9 But I'm not waiving any of the arguments that we've raised
10 in our briefs. As the commission is well aware, we had a motion
11 deadline at the time of 6 October, and so wanted to make sure we were
12 comprehensive in our briefing as to all objections that could be
13 raised.

14 But based on the government's response to 624, they
15 provide -- the government provides this commission no path to
16 legitimacy as it relates to the admission of this deposition. Again,
17 so I think my argument will be relatively limited.

18 And in an ideal world, I would have suggested we reconcile
19 that issue and then, if the commission somehow disagrees with the
20 defense's position, take up the other issues.

21 I'm prepared to argue everything today. But, again, I think
22 the primary issue is there is no order authorizing the deposition of
23 Mr. al Darbi. It has been vacated. I have, again, about 15 minutes

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1 of argument on that issue that I think leaves us at an impasse, and
2 need not address the other issues.

3 MJ [COL FITZGERALD]: Okay. It sounds like I will take up all
4 the arguments in due course. I don't think I intend to issue any
5 kind of interim ruling that would leave the parties in a position not
6 to have to argue anything secondary.

7 So we'll take up all the arguments. And I think the way you
8 laid out, and Mr. Wells agreed to, work sufficient to that end.

9 So that's how we'll proceed on AE 624. So thank you.

10 LDC [MS. MILLER]: And may I ask a question, sir? Do you
11 prefer be provided as far as case law or written documents? Do you
12 prefer to be provided copies of those things or they be placed on the
13 ELMO?

14 MJ [COL FITZGERALD]: I like them on the ELMO. You'll see I
15 wear glasses. That's just for reading. The ELMO is helpful because
16 it's up on the monitor and I don't need my glasses to read them and I
17 think it's helpful. And we are in an open session, so the public is
18 entitled to see them as well.

19 LDC [MS. MILLER]: Understood.

20 MJ [COL FITZGERALD]: Okay. Thank you. Anything else?

21 LDC [MS. MILLER]: Nothing from me, sir.

22 MJ [COL FITZGERALD]: Very well.

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

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1 MJ [COL FITZGERALD]: Very well. The commission's in recess
2 until 1300 hours.

3 **[The R.M.C. 803 session recessed at 1146, 19 November 2025.]**

4 **[The R.M.C. 803 session was called to order at 1306,**

5 **19 November 2025.]**

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

7 All parties present before the last recess are again
8 present. The defense has informed me Mr. Nashiri -- al Nashiri has
9 elected to attend from the alternate site due to some discomfort
10 issues.

11 Is that accurate? I don't want to go too much into the
12 detail but I think that's what you were saying.

13 DC [MS. MANUELE]: Yes, Your Honor. That's correct.

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

15 I believe where we're at is defense has argument on 588?

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

17 MJ [COL FITZGERALD]: You may proceed.

18 DDC [Lt Col NETTINGA]: Good afternoon, sir.

19 MJ [COL FITZGERALD]: Good afternoon.

20 DDC [Lt Col NETTINGA]: The government bears the burden to
21 establish jurisdiction. The prosecutor in their initial argument
22 talks about the fact that terror suspects are routinely prosecuted in
23 courts around the world and within courts in the United States.

1 That's absolutely true. And there is absolutely nothing that
2 prevents the United States from prosecuting Mr. al Nashiri in a
3 federal court in the United States based on the allegations that they
4 have brought against him.

5 But that is not the question in 588. That's not the
6 question before you, sir. The question is whether or not there is
7 jurisdiction here in the military commission system.

8 So we're not talking about combatant immunity, right? Those
9 courts that have dealt with that issue, those federal courts aren't
10 assessing whether somebody is a POW. It is an affirmative defense,
11 which means that the defense bears the burden of establishing that.

12 That's not what we're talking about here today. And I want
13 to be clear that that is not the argument of 588.

14 And it's not the argument of 588 because at the time of the
15 majority of the allegations that the government has brought in this
16 case, there was no conflict. There was no armed conflict. And so we
17 are not arguing combatant immunity, certainly prior to 2001,
18 September 11th.

19 But even so, we are not arguing that -- that is not the
20 motion that we have brought here for combatant immunity for the
21 charges involving the Limburg.

22 Certainly at some point in time, as I discussed earlier,
23 there was an armed conflict between the United States and al Qaeda

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1 and the Taliban. And before the invasion by the United States,
2 the -- al Qaeda and the Taliban had merged, melded, however you want
3 to say it. There was a -- there was a deep relationship between the
4 two.

5 And at the time, prior to the allegation, they were engaged
6 in fighting the Northern Alliance in terms of actual combat and those
7 sorts of things. But post-invasion, they had a new -- again,
8 according to them, they had a new enemy -- right? -- and that enemy
9 was the United States or coalition forces.

10 And that's the conflict that we are talking about because
11 that's the context for which -- when -- under which -- during which
12 Mr. al Nashiri was captured. And that is the ultimate question
13 before you, is what was the status? What was the state when he was
14 captured? What was going on?

15 And so in order for the government to establish jurisdiction
16 and that burden that they have, there is a question ----

17 MJ [COL FITZGERALD]: Keep going.

18 DDC [Lt Col NETTINGA]: I'm sorry, sir. It looked like people
19 were waiting for you for a ----

20 MJ [COL FITZGERALD]: Keep going.

21 DDC [Lt Col NETTINGA]: The question of jurisdiction often
22 arises after charges have been sworn. In the course of a trial, that
23 there's different ways that that can come about.

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1 But for the Military Commissions Act -- under the Military
2 Commissions Act, jurisdiction needs to be established before charges
3 can be preferred. And so that's what we're talking about when we're
4 talking about this privileged status versus a nonprivileged status.

5 And I'm going to go through the rules. I know you talked
6 about it a little bit with the prosecutor. But this is a threshold
7 determination baked into the Military Commissions Act of 2009, that
8 in order for someone to be chargeable under that Act, that individual
9 needs to be established to be a nonprivileged individual.

10 And the presumption, under international law and under
11 domestic law and regulation, is that an individual who is captured is
12 entitled to those protections. In order for that presumption to be
13 under -- overtaken, that presumption of privileged, there needs to be
14 an Article -- something consistent with an Article 5 determination.
15 And that's Article 5 of the Third Geneva Convention. And we'll talk
16 a little bit more about how that works its way into domestic practice
17 and domestic law and regulation.

18 So with respect to al Qaeda and the Taliban, we talked about
19 it I think a little bit in the closed session, but President Bush
20 tried to make this determination prospectively. In February of 2002,
21 he made the announcement that neither al Qaeda nor the Taliban were
22 going to be entitled to POW status, making the distinction between
23 the two, that there were different statuses involving those two

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1 groups. But he made that status decision.

2 That's not what the law says. That's not what the Geneva
3 Conventions say and that's not what Army Regulation 190-8 say, that
4 this can be a broad pronouncement that can be made by a leader.
5 There are interpretations and discussions accompanying the
6 Geneva Conventions that talk about that that's not how this is done.
7 This is done not by an individual. This is not done by fiat. This
8 is done through an individualized determination for each individual
9 who is captured.

10 So when you're talking about the -- the melding or the merge
11 of al Qaeda and the Taliban, that's important for part of this
12 analysis.

13 The United States was well aware of the relationship between
14 the Taliban and al Qaeda. Again, that's most of the subject of what
15 we talked about in the closed session. Certainly there is ample
16 evidence -- and I know one of the -- one of the things we talked
17 about, and I'd like to talk about specifically here, are -- is a memo
18 from the U.S. Department of State detailing the lengths of ties
19 between the country of Afghanistan, which was ruled de facto by the
20 Taliban, even if it was not recognized by the United States, and
21 al Qaeda in terms of financial support, logistical support, armed
22 support. All of these things were taking place, and that was well
23 known to U.S. intelligence agencies at the time.

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1 So the nature of the links between those two, it goes to the
2 extent to which al Qaeda was part of the Taliban for the purposes of
3 the Geneva Conventions.

4 And what I'd like to do quickly is show you Article 4 of the
5 Third Geneva Convention on the ELMO here. And I know you talked
6 about this with the prosecutor as well. And I just want to clarify
7 what the argument is that we are making.

8 And so the argument that we're making and the reason why we
9 spent this time talking about the links between al Qaeda and the
10 Taliban, and we are making the argument that this would fall under
11 Article 4A.1., so that the members of an armed forces of a party,
12 which would be the Taliban, the party being Afghanistan as a
13 signatory to the Geneva Convention, as well as members of militias or
14 volunteer corps forming part of such armed forces, and that is where
15 al Qaeda would fit in. That's the argument that we are making.

16 I'll go ahead and retrieve that.

17 Now, the prosecutor is right that the Third Geneva
18 Convention and Article 4 only apply if we are talking about an
19 international armed conflict. And this is where the record -- the
20 historical record, not necessarily the record for this commission,
21 but the historical record -- is littered with various opinions as to
22 what type of a conflict this was, how to interpret it, what
23 protections individuals were entitled to.

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1 In other words, there was a whole lot of doubt about how to
2 process this type of an armed conflict and the individuals who were
3 detained as a result of it. And that question of doubt is going to
4 become important. You're going to hear that again as we talk later
5 on here.

6 So there's a lot of doubt going on, and there's really a lot
7 of doubt when it comes to even what the United States' official
8 position is. We talked about the pronouncement from President Bush,
9 and the prosecutor said that was based on an OLC memo. I believe
10 that's cited in our materials.

11 That memo was rescinded. I can't find anywhere that it was
12 reinstated. It was rescinded in 2009 with the change of
13 administration. And I don't know why it would have been reinstated
14 in 2012, as the prosecutor suggests, under that same administration,
15 but I don't -- anyway, I don't have evidence to support that. What I
16 do have is that that seems like it was the position of the United
17 States at one point and then that position was rescinded.

18 But what I also want to draw your attention to is in that
19 same time frame, so just a couple of months later, June 8th of 2002,
20 there was another OLC memo with a different position from the United
21 States as it comes to how this conflict was defined.

22 I'm going to go ahead and place this on the ELMO. I don't
23 believe this has been attached anywhere. It may have been cited and,

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1 I apologize, I don't have the citation. So I believe this will just
2 have to be for the parties and the judge as opposed to the
3 members -- or excuse me -- as opposed to the members of the public.

4 But what you have, here again, from that same time frame,
5 when it comes to the legal authority to detain an individual, Jose
6 Padilla, who was alleged to be a member of al Qaeda and whether or
7 not he could be detained by the military or by civilian authorities,
8 the deputy attorney general says, well, this is an international
9 armed conflict -- okay? -- it goes further.

10 I'm retrieving that. And I'm going to go ----

11 MJ [COL FITZGERALD]: Can I have you leave it up there just
12 briefly?

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

14 MJ [COL FITZGERALD]: Thank you.

15 **[Pause.]**

16 MJ [COL FITZGERALD]: Thank you.

17 DDC [Lt Col NETTINGA]: Yes, sir. And I'm looking at page 8
18 of that document.

19 And I would -- I would like to mark this document. I don't
20 have copies for everyone at this point in time, but I will get them
21 to the court reporter. I would like to mark this as the next
22 appellate exhibit in the 588 series. I believe that's Y.

23 MJ [COL FITZGERALD]: Is that accurate?

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1 **[The Military Judge conferred with courtroom personnel.]**

2 MJ [COL FITZGERALD]: The document you're speaking to will be
3 marked as 588X.

4 DDC [Lt Col NETTINGA]: X. Thank you, sir.

5 All right. So this is page 8 of that same memo. And lest
6 you think maybe there was a typo in the first paragraph, it is clear
7 that what the administration is saying here, the OLC, at least, is
8 that: As we've advised elsewhere, the September 11th, 2001 attacks
9 on the World Trade Center and the Pentagon began an international
10 armed conflict between the United States and the al Qaeda terrorist
11 organization.

12 **[Pause.]**

13 MJ [COL FITZGERALD]: Thank you.

14 DDC [Lt Col NETTINGA]: Yes, sir. I'm retrieving that from
15 the ELMO.

16 MJ [COL FITZGERALD]: And that was just the second page of
17 588X?

18 DDC [Lt Col NETTINGA]: This is page 8, sir.

19 MJ [COL FITZGERALD]: I'm sorry. Page 8 of 588X?

20 DDC [Lt Col NETTINGA]: That's correct. Yes, sir.

21 MJ [COL FITZGERALD]: Okay.

22 DDC [Lt Col NETTINGA]: And so, again, these are different
23 legal opinions from the same government, from the same organization,

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1 from the same office within a period of three to four months. This
2 is difficult stuff. This was new stuff that was being confronted,
3 new situations, new adversaries.

4 And I think everyone was struggling with how to classify
5 this, how to classify the combatants, how to classify what was
6 happening in terms of an armed conflict. And I think that's what you
7 see reflected here.

8 And so when it is -- and I do not know if this was done
9 intentionally or not, right? But when it is convenient to the United
10 States to argue that it was an international armed conflict as it is
11 in the memo that I just put up there for you, 588X, they argue it's
12 an international armed conflict. And perhaps when it is not
13 convenient, they argue something else.

14 I think there's a lot of places that this plays out, but the
15 next place I want to take you to is the case of Hamdan. So that's
16 the case that ends up before the Supreme Court in 2006.

17 And I think, again, just to underscore or highlight the
18 confusion and the doubt that is all over this process in this novel
19 engagement, in this novel system, is that when you look at the
20 procedural history of Hamdan, the district court in the D.C. Circuit
21 said that he was entitled to POW status. Then the Circuit Court said
22 that he wasn't entitled to any Geneva protections at all.

23 And then, of course, by the time it reached the Supreme

1 Court, they said, well, we don't need to answer the question about
2 the POW status because at least one portion of the Geneva Conventions
3 apply, and that was Common Article 3.

4 So they don't make a determination as to whether or not this
5 is an international armed conflict or a noninternational armed
6 conflict. They specifically say we don't have to decide that
7 because, at the very least, this common article applies. And what
8 this common article says is that the way that you're doing it cannot
9 stand, the way that you're doing a military commission. And that was
10 under the Military Commission Order 1, that was not based on an act
11 of Congress.

12 Interestingly, in that opinion, you see yet another
13 articulation by the United States in terms of the legal position that
14 they brought through the course of these pleadings and that
15 ultimately proved successful in front of the D.C. Circuit but did not
16 prove successful in front of the Supreme Court.

17 And what the United States argued in that legal case is that
18 what was going on between the United States and al Qaeda was not
19 international in scope. And that comes from 548 U.S. 557, page 630.
20 That's from the Hamdan opinion and it's citing to the previous
21 pleadings.

22 But they said it is not international in scope. And while
23 that may sound at first blush like they were making an argument that

1 it was a NIAC, a noninternational armed conflict, what they were
2 actually making in terms of that argument, was -- their position was
3 that it was neither a noninternational armed conflict nor an
4 international armed conflict and, thus, no Geneva protection should
5 apply at all.

6 And so we have at least three different positions from the
7 United States being reflected in these various forms about what is
8 actually going on in this situation. And so certainly that creates
9 doubt. That creates a lot of confusion and consternation about how
10 to apply international law, domestic law. And that filters down
11 ultimately to the military commission system.

12 One other case I want to talk about, and I realize this is
13 out of order, but in Hamdi v. Rumsfeld, and that's a 2004 case, one
14 of the few other cases that deals with this question of prisoner of
15 war status, and the Supreme Court has not definitively answered that
16 question. They've given some hints and some tidbits but nothing that
17 squarely answers the question, which is why we're here.

18 But from Justice Souter's concurrence, it was a plurality
19 opinion in Hamdi. Justice Souter's concurrence, which was joined by
20 Justice Ginsburg, concurring in part, dissenting in part, but
21 concurring in the judgment, they talked about some of the confusion
22 and the ways in which the United States had been holding Mr. Hamdi as
23 not complying with the law. And so I'd like to -- I have a brief

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1 passage here from that portion of the opinion.

2 By holding him incommunicado, however, the government has
3 obviously not been treating him as a prisoner of war. And, in fact,
4 the government claims at that time that no Taliban detainee is
5 entitled to prisoner-of-war status. This treatment appears to be a
6 violation of the Geneva Conventions provision that even in cases of
7 doubt, captives are to be -- are entitled to be treated as prisoners
8 of war, quote, until such time as their status has been determined by
9 a competent tribunal.

10 The government answers that the President's
11 determination -- so the 2002 pronouncement that we talked about
12 earlier -- that Taliban detainees do not qualify as prisoners of war
13 is conclusive as to Hamdi's status and removes any doubt that would
14 trigger application of the Convention's tribunal requirement.

15 But reliance on this categorical pronouncement to settle
16 doubt is apparently at odds with the military regulation. And that's
17 Army Regulation 190-8, which was adopted to implement the Geneva
18 Conventions and set out a detailed procedure for a military tribunal
19 to determine an individual's status.

20 So that is, again, two justices of the Supreme Court signed
21 onto that, that the way that they were holding Mr. Hamdi was
22 not -- the fact that he was not treated as a prisoner of war was not
23 correct, and that the proper place to look for as to how to handle

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1 these individuals was something that was already on the books to
2 handle these, and that was 190-8.

3 And, again, the court recognizes, and I think it's clear,
4 that 190-8 is the United States' incorporation of the Third Geneva
5 Convention to the -- in terms of Article 4 and Article 5, which is
6 that determination, that status determination, that privileged or
7 unprivileged determination.

8 And so, again, that's already on the books. That is not
9 something that has to be done on the fly during this novel situation.
10 It is there.

11 And it is, as you'll see, because we're going to talk about
12 this in a minute, it is overprotective. It provides more protection
13 than the Third Geneva Convention.

14 And that's done purposely for a reason. First, because
15 that's the kind of country that the United States is; and second,
16 because that's what we would want for any of our servicemembers who
17 fell into the enemy's hands, that a broad application is given to the
18 reading of the Third Geneva Convention to the treatment of prisoners
19 of war, to be able to ensure that the protections that they are
20 entitled to are given.

21 And the historical record, again, is replete with situations
22 in Korea, in Vietnam where U.S. servicemembers who were captured were
23 not given these protections because the detaining power said, "Well,

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1 you guys are committing war crimes, so therefore you are not entitled
2 to these protections." Again, that's not the way that we wrote the
3 regulations to incorporate this international treaty.

4 And so I want to talk about AR 190-8. And so I'm, again,
5 asking for access to the ELMO.

6 And I want to start first by talking about 1-5, the general
7 protection policy. So all this discussion we've had about whether
8 it's a NIAC, whether it's an IAC, whether it's something in between
9 that no one has created yet and is not subject to any protections,
10 what the U.S. policy says is very clear: All persons taken into
11 custody by U.S. forces will be provided with the protections of the
12 GPW -- and that's Geneva -- Geneva protections for the prisoners of
13 war, which is the Third -- until some other legal status is
14 determined by competent authority.

15 And then you go over to 1-6, and there's two ways in which a
16 tribunal under 1-6 is triggered. Again, according to United States
17 regulation. So it certainly references the Third Geneva Convention
18 there: If doubt arises -- and that's 1-6A -- then such person shall
19 enjoy the protection of the Convention until their time -- until
20 their status has been determined by a competent tribunal.

21 But there's another way as well, and we'll talk about that a
22 minute -- in a minute. That's 1-6 ----

23 MJ [COL FITZGERALD]: Can you tell me the ----

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1 DDC [Lt Col NETTINGA]: ---- paragraph B.

2 MJ [COL FITZGERALD]: Can you tell me the date of this
3 regulation ----

4 DDC [Lt Col NETTINGA]: Yes, sir. Excuse me.

5 MJ [COL FITZGERALD]: ---- at the bottom of that page?

6 DDC [Lt Col NETTINGA]: The date of that is 1997. So this is
7 the one that certainly was active at the time. I actually don't
8 believe it's been overcome, but...

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

10 DDC [Lt Col NETTINGA]: Yes, sir. So we'll come back to B in
11 a minute.

12 But when it came to the military commissions and the
13 individuals who were detained at Guantanamo Bay and the determination
14 of the United States as to how these individuals were going to be
15 prosecuted, whether military commissions were going to be the way,
16 they recognized, in part, the fact that this was a threshold
17 determination that needed to be made, that this status had to be
18 determined. And so the way that they tried to do it in the 2006
19 Military Commissions Act is through the CSRT.

20 And so what I'd like to do now -- and this is page 20
21 of ----

22 MJ [COL FITZGERALD]: Before you go on ----

23 DDC [Lt Col NETTINGA]: ---- Appellate Exhibit 588N.

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1 MJ [COL FITZGERALD]: Colonel Nettinga, before you go on ----

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

3 MJ [COL FITZGERALD]: ---- I don't think I heard a -- the
4 appellate exhibit for Army Regulation 190-5, the pages you showed,
5 paragraph 1-5.

6 DDC [Lt Col NETTINGA]: Yes, sir. I ----

7 MJ [COL FITZGERALD]: Is it already marked as an appellate
8 exhibit?

9 DDC [Lt Col NETTINGA]: It is not marked as an appellate
10 exhibit. I'm happy to do that. It is referenced -- every section I
11 talked about is referenced in the pleadings, but I'm certainly happy
12 to mark that as -- and I think we're at Y.

13 MJ [COL FITZGERALD]: This should be correct. 588Y.

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

15 MJ [COL FITZGERALD]: Thank you.

16 DDC [Lt Col NETTINGA]: And so just for clarity, I think that
17 would be on page 4 of that attachment, the sections that I am -- I
18 identified them by number, but I think that would be on page 4 of
19 that, and I'll get that to the court.

20 So the way that they -- the way the United States tried to
21 deal with this with respect to the military commissions and ensuring
22 that only unprivileged belligerents were the individuals who were
23 going to be prosecuted under the military commissions, because that

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1 is the only type of individual military commissions have the ability
2 to prosecute.

3 A POW could be prosecuted in a court-martial. Certainly a
4 POW could be prosecuted in a federal court if that's what it came to.
5 But it can -- but a POW cannot be prosecuted in a military
6 commission. And so they have to deal with this issue of privilege,
7 and they haven't done a status determination per 190-8 1.1-6. They
8 have not treated these people as individuals subject to the
9 protections of the GPW, again, as Army Regulation and the
10 Geneva Conventions command.

11 So when it comes to the Military Commissions Act of
12 2006 -- again, this is page 20 of 588N, and it's a -- it's a chart
13 that I had created to kind of talk about the differences between the
14 two Acts because I think there is some important language there.

15 But what the Military Commissions Act of 2006 talked about
16 was that the CSRT could actually qualify as that tribunal and could
17 actually make that determination for jurisdiction that was necessary
18 to fall under the 2006 MCA and the jurisdiction of those military
19 commissions.

20 So that was -- that was the hope. That was the thought,
21 that -- that -- as to how that could be done.

22 But that idea was rejected, both in military commissions and
23 by the CMCR, that -- who found that a CSRT cannot act as the status

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1 determination hearing, which is required under the Geneva Conventions
2 and under Army Regulation 190-8.

3 And the reason why that can't qualify is because they do not
4 make a status determination in that hearing as to privileged or
5 unprivileged. The only status is whether or not the individual is an
6 enemy combatant.

7 And so that was the rationale in the Khadr case. Again,
8 that's cited in the materials. But that was a CMC decision that
9 said you cannot use the military -- excuse me. You cannot use the
10 CSRT as a binding thing which establishes jurisdiction. But that's
11 exactly what the Act was attempting to do.

12 So in 2006, if you -- or 2007, if you went to a CSRT and the
13 CSRT determined that you were an enemy combatant, the law on the
14 books at that time said that jurisdiction for you before a military
15 commission had already been established. But once the courts
16 rejected that, we turn to the MCA of 2009 and the next determination.

17 And I know this -- again, this is cited in -- I think it's
18 page 10 of 588N, and it's footnote 31. It's a statement from
19 then-Representative Schiff, Adam Schiff of California, talking about
20 the formulation of the 2009 Act.

21 And he said -- in terms of the status determination and the
22 requirements, as to how do you show that somebody is an unprivileged
23 individual who is subject to military commissions, he said, "I view

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1 it as a threshold question. Because unless you determine, through a
2 lawful process, they're unprivileged combatant, they're not subject
3 to prosecution, again, in a military commission. They are a POW.

4 And so this is something that Congress was aware of.
5 Obviously, it had been struck down by the CMC. And so they step
6 away from the CSRT in the 2009 Act, and you see that on the right
7 side there. And we get into this determination of an unprivileged
8 enemy belligerent and what is necessary to establish jurisdiction
9 before the Military Commissions Act of 2009. And that's the
10 situation that we find ourselves in.

11 And so what this determination makes clear is that the
12 government has to prove that this is an unprivileged -- that
13 Mr. al Nashiri is an unprivileged enemy belligerent. And, again,
14 there's not a lot of helpful information in this in terms of, like,
15 well, what exactly does that mean?

16 But you do have some categories, right? And it's A, B, and
17 C. And I know you talked about it with the prosecutor.

18 But that parenthetical is important. And when you apply
19 that parenthetical to paragraph C, which -- and you must as this list
20 goes on -- what that contemplates is that there is a possibility
21 under the law here that a person can be a member of al Qaeda and
22 still be a privileged belligerent.

23 Now, I am not making any concession. The government said

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1 that it appears the defense concedes that Mr. al Nashiri was a member
2 of al Qaeda. I am not conceding that. We are not conceding that.

3 I don't believe that that matters for your determination
4 because the question is whether or not they have established that he
5 is unprivileged. And that is something that they have not done and
6 did not do through the process.

7 That goes back to the beginning of his detention, certainly
8 the beginning of his detention by the DoD. He was never afforded
9 what is required under the Geneva Conventions and under regulation to
10 have that status determination.

11 And so for that reason, he must be presumptively a
12 privileged belligerent, which means he cannot be charged. He cannot
13 be subject to the jurisdiction of this commission.

14 So really, it -- you know, the prosecutor talks about the
15 fact, well, we've been doing this for a long time and this court has
16 been going on for 15 years or darn near that. None of that matters
17 if they didn't do it right to begin with.

18 And that's the argument here, is that they didn't do it
19 right, the United States generally with the Military Commissions Act
20 or Order 1 that started this military commission experiment. They
21 didn't do it right in the MCA 2006. And then with the MCA 2009, it
22 remains to be seen on the way that that is written.

23 But it wasn't done right in this case because that

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1 determination was never made. They didn't follow the law. They
2 didn't follow the rules. And it's unfortunate that that's only being
3 brought up now, but it does not change the fact.

4 So I understand that it can be difficult to go back and say,
5 hey, you know what? We screwed this up. But this is not something
6 that can be ignored. This is not something where the shifting legal
7 justifications can support what the government did here because of
8 the presumption in the law and in the regulation.

9 And I know we talked a lot about this question of doubt.
10 And there's doubt into whether or not this was an international armed
11 conflict or a noninternational armed conflict. There's doubt as to
12 the extent to which al Qaeda and the Taliban were co-actors such that
13 al Qaeda became a militia or volunteer forces accompanying the
14 Taliban.

15 There is doubt with all of that, right? And that
16 necessitates a hearing for all prisoners captured by the Department
17 of Defense.

18 But there's another way, too, sir. And I know we talked
19 about that and I said I'd come back to it. So I believe this
20 is -- we've marked this now as 588Y. And I'll go back to 190-8,
21 because I think that's what controls here.

22 And it says: In addition to this idea of doubt and whether
23 doubt arises, there's another way that an individual may be entitled

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1 to a tribunal, and that is if that individual asserts that he or she
2 is entitled to treatment as a prisoner of war, that that also
3 triggers the requirement that this tribunal be conducted to determine
4 whether or not that person is privileged.

5 Now, unfortunately, as this court is well aware, for the
6 first four years of captivity Mr. al Nashiri was held incommunicado
7 in a series of black sites. He was tortured. He was repeatedly
8 interrogated. There were videos of that. They were destroyed. We
9 do not have verbatim transcripts. We don't have anywhere near a full
10 or complete record as to what actually occurred.

11 But we do have little pockets, right? And that's all that
12 we can really go on here, is these little pockets. And we talked
13 about it in the closed session with respect to discovery and
14 redactions and the fact that we only get to see just a little bit of
15 what is actually going on.

16 But I do want to direct you to a little bit of what was
17 going on and what we know about what Mr. al Nashiri was saying during
18 his sojourn through the black sites in terms of his rights.

19 And so I'm going to display page 9 of Appellate
20 Exhibit 588N. And so I'm looking at footnote 27, and that cites to
21 AE 466. That is a classified pleading, and I think that there is
22 some worth in perhaps looking at that. But the portion I want to
23 direct you to is what we -- is we know at least enough in these

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1 little pockets to know that Mr. al Nashiri was talking about the fact
2 that he had rights and he was entitled to rights.

3 And it's summarized thusly, outburst, that he felt he should
4 be allowed some rights. If not human rights, how about animal
5 rights? That's one example.

6 And that's all we know, right? That's all that's written.
7 That is a summary. We don't know what he said with any fidelity.

8 For another account, this is what is reported: When
9 interviewer asked what subject thought about during his solitary
10 time, he said he thought about his future legal process. Interviewer
11 told him his future would never improve and would, in fact, only get
12 worse unless he provided the information we had requested over and
13 over.

14 So what you see, sir, is that he is asserting the fact that
15 he has rights. Now, I don't have anything in these very tiny, little
16 windows into what was going on that summarizes that he said the words
17 "POW." But I think based on the lack of information that we have and
18 the information that we can see there, that that -- any doubt about
19 that needs to be resolved against the government; that he did, in
20 fact, request treatment as a POW, or got close enough to that to
21 trigger the requirements of AR 190-8.

22 And so he was certainly entitled to a hearing and he still
23 is. The government has never overcome that and they can't, frankly,

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1 at this point. But they can't charge him if he's not an unprivileged
2 belligerent. And they didn't do what they were supposed to to make
3 that determination.

4 Sir, if I could have one moment, I think that's my general
5 argument, but if I can consult or if -- I'm happy to take your
6 questions now as well.

7 MJ [COL FITZGERALD]: Take your moment to confer with ----

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

9 MJ [COL FITZGERALD]: ---- counsel.

10 **[Counsel conferred.]**

11 DDC [Lt Col NETTINGA]: Sir, I think I may have concluded
12 saying something along the lines of the government can't charge him.
13 I want to be clear what we're talking about here. They cannot charge
14 him in a military commission without that determination. They can
15 certainly charge him elsewhere.

16 But in order to take advantage of the military commission as
17 a court of limited jurisdiction, they need to comply with the rules,
18 and they need to show, prior to that, that he is an unprivileged
19 belligerent. That's a threshold matter that wasn't done.

20 Sir, I'm happy to take your questions.

21 MJ [COL FITZGERALD]: Thank you, Counsel. I think that that
22 was well presented. I have no questions at this time. I may come
23 back to you.

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

2 MJ [COL FITZGERALD]: I think, the Government --

3 Government, you're going to take the opportunity for
4 rebuttal?

5 ATC [CDR ROMAN]: Yes, Your Honor.

6 MJ [COL FITZGERALD]: Thank you. I may come back to you.

7 DDC [Lt Col NETTINGA]: Yes, sir. No worries.

8 MJ [COL FITZGERALD]: And, Government, you may proceed when
9 you're ready.

10 ATC [CDR ROMAN]: Thank you, Your Honor.

11 **[Pause.]**

12 ATC [CDR ROMAN]: Good afternoon, Your Honor.

13 MJ [COL FITZGERALD]: Good afternoon.

14 ATC [CDR ROMAN]: Some of the documents -- just a quick
15 housekeeping. Some of the documents I made reference to were
16 attached to 588U. Specifically, those were the OLC memo, President
17 Bush's statement, as well as a information paper on the background
18 of, you know, the Taliban forces.

19 Okay. At the crux, the -- the defense argument is that
20 there's a threshold matter that is not -- not included and is being
21 read into Military Commissions Act and that Article 5, at all times,
22 has to be utilized for all captured belligerents in the course of a
23 hostile conflict. And that's just simply not the case, Your Honor.

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1 The government understands, and would repeat, that once you
2 go through the Article 2 determination if there is a high signatory
3 state, both high signatory states involved, Article 2 applies.

4 When there isn't and it is a NIAC, Article 3 applies. To
5 inform and as -- ask as a gatekeeper to understand whether there is
6 doubt, that is when Article -- that is when Article 4 is involved.

7 Your Honor, I asked for a rendition of Article 4's criteria.
8 And the defense postulates that under Article 4A.1., the accused was
9 a member of an armed force of a party to the conflict.

10 For context, the accused was arrested in October of 2002.
11 By December of 2001, Kabul had fallen and the Taliban were no longer
12 the government of Afghanistan.

13 In the ICRC letter, which I know that we've referenced in
14 taking Your Honor's lead or direction on this, I'd like to offer that
15 as the next appellate exhibit. This is the ICRC letter that I
16 referenced and that we've cited.

17 But in particular, I'd like to attach it because it
18 contemplates this transition of government. And under the ICRC, in
19 their legal opinion given to the Parliament of Britain, they
20 determined that a NIAC existed as of June of 2002.

21 So member of an armed force of a party to the conflict, as
22 well as member of militia and volunteer corps forming such an armed
23 force, no, he fails. Because I -- like we talked about the

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1 construction with the idea of an armed force, or a regular armed
2 force in Article 4A.3., the criteria in Article 4A.2. applies to all
3 of them.

4 It is -- there is no -- there is no doubt, and there is no
5 evidence to the contrary, that the Taliban and al Qaeda could not
6 meet the criteria under Article 4A.2.

7 Going to, again, Attachment B to 588U, this is a information
8 paper from the J2 talking about the Taliban lacking the criteria as
9 defined; specifically, the Taliban has never claimed to be the armed
10 force of Afghanistan. The Taliban armed groups regularly refer to
11 themselves as a religious movement. It's better conceived as a
12 militia. They don't fight for their country; they fight for their
13 tribe or their group; not organized in military units, loosely
14 structured groups, local -- with their own local and personal
15 interests.

16 Quote/unquote, Taliban commanders were similar to feudal
17 lords. No permanent centralized communication infrastructure that
18 would be expected in a military organization.

19 It talks about the melding of al Qaeda and Taliban forces.
20 So many of these same criteria cascade into a determination of
21 al Qaeda, but -- I'll run through the criteria for al Qaeda in
22 a -- in a minute.

23 The Taliban militia is not structured as a military unit.

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1 They recruit members from other military units through defections and
2 bribery. They wear no distinctive signs or insignia, symbols or
3 uniforms. They fight in the same clothes as they were when they were
4 doing daily functions as civilians.

5 Some say that the Taliban militia wore black turbans. This
6 may have been true, but there's no indication these were intended as
7 an identifying feature. The closest analog is that there is a tribal
8 flag, but there's no indication individual fighters distinguished
9 themselves as combatants. Again, carrying arms openly, that does not
10 distinguish themselves, in that area of the world, from an individual
11 as a civilian noncombatant or a belligerent.

12 This is where it gets real salient. The complications with
13 the law of war, the Taliban has never claimed to be bound by the
14 Geneva Conventions. They do not recognize or demonstrate any
15 awareness of the relevant Hague or Geneva norms regarding the laws
16 and customs of armed conflict.

17 Milicias follow Sharia law. In respect to prisoners who had
18 stolen, they might receive summary amputations of a limb. Milicias
19 made no attempt to distinguish between combatants and noncombatants
20 in fighting. They killed for racial or religious purposes.
21 Widespread reports of massacres of civilians, rapes, pillaging
22 of -- and other atrocities.

23 This is from Rear Admiral Jacoby, U.S. Navy.

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1 So failing under the Article A.1., 2, 3, they also -- under
2 Article -- Article A.4., persons accompany the armed force. There's
3 no evidence that the accused was accompanying the force.

4 Under 5, subsection 5, members of a crew of a merchant
5 marine and civil aircraft, that doesn't apply, Your Honor.
6 Inhabitants of a non-occupied territory who, on the approach of an
7 enemy, he's -- the accused is a Saudi citizen who went to the -- to
8 Afghanistan, to the battlefield. He was not an indigenous person
9 that was invaded, so that doesn't apply.

10 Under subsection B.1., this is where we have an
11 unacceptable -- unsuccessful attempt to rejoin the armed forces.
12 That has not occurred. So it does not apply.

13 Belonging to one of the categories enumerated in the present
14 article? No. And we have no diplomatic relations with a
15 third -- with a third country to have an agreement between the powers
16 for the internment under international law of said person.

17 So under all of Article 4, Taliban or otherwise -- and I'll
18 be specific to the al Qaeda issue with -- and the reason I'm running
19 through this is because the only way we have justified as an
20 Article 5 tribunal is whether there is any doubt after going through
21 the criteria in Article 4.

22 It is not a threshold to a certain jurisdiction. It is a
23 gatekeeper to determine whether or not there is doubt as to a status.

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1 So al Qaeda, although the defense counsel was talking about
2 how al Qaeda may be misconstrued as a -- as a -- under a conflict
3 that would allow a privileged status, for that to be true, under the
4 construction of the Geneva Conventions, they would have to have been
5 a contracting party or a power that accepts and applies the
6 Convention, neither of which are true. They are not a state or a
7 nation; hence, it cannot engage in a international conflict.

8 Al Qaeda actually is an organization with members from many
9 nations with operations and attacks throughout various different
10 areas of -- or regions of the world. Therefore, prisoner of war
11 protections or privileged under the parenthetical does not -- of the
12 MCA does not apply to al Qaeda.

13 President Bush did make a determination in 2002, and I
14 believe that's in our attachments to 588U. I would like to cite and
15 remind the -- bring the court's attention to our response in 588K
16 where we talk about the deference that should be given to a leader.
17 Although not conclusitory, it is to be given wide deference because
18 the drafters of the Geneva Conventions for prisoners of war intended
19 through this operation of Article 4 gatekeeping correct criteria, and
20 that leads to an Article 5 determination, was to avoid arbitrary
21 decisions by a local commander who may be of low rank.

22 The example given by the statement of representative of
23 Netherlands -- and this is on page 11 of our brief in 588K, which is

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1 the final record of the Diplomatic Conference of Geneva in 1949 at
2 270 -- he may be -- to continue, "He may be a corporal and we do not
3 want a corporal deciding on life or death of any human being."

4 Here the decision of al Qaeda status is not based on an
5 arbitrary opinion by an individual commander but it was -- it
6 was -- in fact, it was intended to prevent -- which -- sorry.

7 The Article 5 is to prevent arbitrary low-level
8 discrepancies between how individual detainees are treated. Here,
9 the President himself, after careful consideration and analysis
10 involved most of his senior advisors, determined that al Qaeda
11 terrorist organization failed to satisfy the eligibility requirements
12 for its members to receive POW status under Article 4 of the
13 Convention.

14 It is an international terrorist organization. It does not
15 constitute the armed forces of a member state. It does not fall
16 within the criterias of Article 4A.1. or A.3. as it applies to the
17 criterias of A.2.

18 Al Qaeda routinely demonstrated its unwillingness to abide
19 by or even recognize the rules of war. They don't wear distinctive
20 uniforms or conduct their attacks, the purpose of which is to
21 distinguish them from civilians, but they refuse to in order to get
22 closer to their targets.

23 In fact, al Qaeda repeatedly has called for attacking

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1 civilians. In 1998, they attacked civilians when al Qaeda bombed
2 U.S. embassies in Nairobi and Kenya, killing over 200 people and
3 injuring thousands.

4 Also in 99 -- 1998, Usama bin Laden issued a fatwa calling
5 for Muslims to kill Americans saying we do not differentiate between
6 those dressed in military uniforms and civilians. They are all
7 targets.

8 The charged offenses in 2000 and 2002, al Qaeda attackers
9 disguised themselves as civilians to blend in and enable themselves
10 to get close to their targets. And, in fact, the attacks on 9/11,
11 hijackers took control of civilian airplanes and killing nearly 3000
12 people, most of whom are civilians, in New York, Washington, and in
13 Shanksville, Pennsylvania. There can be no doubt that al Qaeda does
14 not follow the rules of law -- of war.

15 So the leaps that we're talking about here is that prisoner
16 of war protections and presumptions must be applied to Taliban and
17 al Qaeda members and that the accused is presumed to be a privileged
18 belligerent.

19 The status of the conflict, the defense was talking about
20 between al Qaeda and the U.S. coalition, doesn't -- it's a threshold
21 matter to say that when the Taliban was fighting in its internal
22 conflict with the Northern Alliance, when the U.S. came in
23 September -- in October of 2001, Taliban was not anywhere -- it was

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1 not in control of any of the areas of power in Afghanistan after
2 November, or at least until -- I'm sorry -- December of 2001.

3 Then comes the -- so order of events. Then comes the
4 determination from -- that I just read from Rear Admiral as well as
5 in the OLC memo. And then in February 2002, President Bush's -- his
6 decision on how to treat Taliban and al Qaeda members. And then
7 there's the ICRC letter in June of 2002. Mr. Nashiri was arrested in
8 October of 2002.

9 If there is a threshold matter when there is no doubt, that
10 goes against the fair reading -- the four corners of the Article 5 of
11 the Geneva Convention because there's no doubt. And that's not just
12 a offhand remark or a thought -- an afterthought. It doesn't meet
13 the -- the accused does not, through his own actions and even in any
14 membership of any of the -- be it al Qaeda or Taliban, does not meet
15 the criteria in Article 4.

16 A minor point about Mr. Padilla. That idea is a little bit
17 of apples to oranges. Mr. Padilla was a U.S. citizen. That has its
18 own legal questions involved that aren't really -- don't really
19 translate well into the factual situation that we're talking about
20 today.

21 And it's not that it's convenient that the government seeks
22 to show that the accused does not meet and there is no doubt any of
23 the criteria for privileged belligerency. It's that it's just

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1 unfounded that al Qaeda, while an international organization, cannot
2 be involved in an international armed conflict.

3 And the Taliban, after losing control in 2000 -- late 2001,
4 cannot be in an international armed conflict after that point, which
5 is reflected in both -- in all of the different authorities that I've
6 already cited.

7 Assertion of rights and a presumption of status, again, is
8 only as good as the facts that -- that exist to provide that
9 Article 5 tribunal. The government is satisfied that, and has been
10 for many years, that there is absolutely no -- no criteria that is
11 satisfied under the Geneva Conventions that would afford any doubt
12 that the accused was a unprivileged enemy belligerent and, therefore,
13 subject to the Military Commissions Act.

14 If I could just have a minute to confer with my co-counsel,
15 Your Honor?

16 MJ [COL FITZGERALD]: You may.

17 **[Counsel conferred.]**

18 ATC [CDR ROMAN]: That concludes my presentation, Your Honor,
19 pending your questions.

20 MJ [COL FITZGERALD]: You made reference to the ICRC letter.
21 Is that already an attachment to one of your ----

22 ATC [CDR ROMAN]: No. I believe we've referenced it and cited
23 to it, but I would like to make that the next appellate exhibit and

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1 present it to the court unless -----

2 MJ [COL FITZGERALD]: Very well. We will mark the ICRC letter
3 that counsel referenced as Appellate Exhibit 588Z.

4 ATC [CDR ROMAN]: Thank you, Your Honor.

5 MJ [COL FITZGERALD]: But no further questions beyond that.

6 ATC [CDR ROMAN]: Thank you, Your Honor.

7 MJ [COL FITZGERALD]: I believe that concludes Appellate
8 Exhibit 588 for the purposes of this hearing.

9 Is that accurate, Defense, from your vantage point?

10 You ----

11 DDC [Lt Col NETTINGA]: It does, sir. I have one other
12 administrative matter related to 588 that I think we might as well
13 take up now. I have an additional piece, if I can explain, a piece
14 of evidence to ----

15 MJ [COL FITZGERALD]: You may.

16 DDC [Lt Col NETTINGA]: So as we -- I'm going to be careful
17 about my words here, but as we talked about in the closed session,
18 there was a document, U.S. Department of State document, that we
19 discussed in the closed session. It was a FOIA document. And there
20 was some confusion as to what we could talk about in open.

21 I have been provided another document along the same lines.
22 I'd like that marked in the record just to be able to show
23 discrepancies.

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1 TC [CAPT STINSON]: And, Your Honor, the document that Colonel
2 Nettinga is referring to is available on the State Department reading
3 room, so we did confirm. It's just a slightly different version of
4 the document that he had this morning.

5 So this document, the Government doesn't have any objection
6 to that being included in the record. This is an official release
7 from the State Department. We're going to try to run down the other
8 version.

9 MJ [COL FITZGERALD]: Okay.

10 TC [CAPT STINSON]: This version is the official version on
11 the reading room. So no objection to that being presented in the
12 record as the next appellate exhibit.

13 MJ [COL FITZGERALD]: So we'll mark this as 588AA.

14 DDC [Lt Col NETTINGA]: Yes, sir. And we'll get that as well.
15 The original one -- or the other one we were talking about was the W,
16 588W, I believe, sir. Thank you, sir.

17 MJ [COL FITZGERALD]: Thank you.

18 Having concluded 588, now would probably be an appropriate
19 time to take a recess, or is there something we need to discuss
20 before we take a recess?

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

22 MJ [COL FITZGERALD]: And I believe we're coming back to
23 AE 624; is that correct, Ms. Miller?

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

2 MJ [COL FITZGERALD]: All right. And sometime today we
3 probably need to take up -- I know there's been some communications
4 regarding purported counsel for Mr. Bahlul. And I say "purported"
5 based on the government's response.

6 TC [CAPT STINSON]: Yes, Your Honor. We actually do have some
7 further information. We have to provide it to defense counsel and
8 his detailed MCDO counsel, at least, and also Mr. Paradis. But we
9 have information that Mr. Bahlul has indicated he represents himself,
10 does not have counsel. So that ----

11 MJ [COL FITZGERALD]: We'll take all that up.

12 TC [CAPT STINSON]: ---- will be forthcoming.

13 MJ [COL FITZGERALD]: All right. We'll take all that up. I
14 want to make sure we leave space for that today, if we can. As I
15 understand it, Mr. Paradis is somehow wanting to come to the RHR, so
16 he needs some type of definitive answer of whether he'll be invited
17 to the RHR. So we should resolve that today. Does that sound
18 accurate?

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

20 MJ [COL FITZGERALD]: He's not been disinvited, nor has he
21 been invited. We need to take that matter up. So I hope Mr. Paradis
22 understands that we'll get to that matter after we take up AE 624.

23 TC [CAPT STINSON]: Understood. Yes, Your Honor.

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1 MJ [COL FITZGERALD]: I don't know who communicates that to
2 him or how it gets communicated to him, but I'll let the government
3 sort that out.

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

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

6 TC [CAPT STINSON]: Can we ask for 15 minutes, Your Honor?

7 MJ [COL FITZGERALD]: That's perfect.

8 Commission's in recess for 15 minutes.

9 **[The R.M.C. 803 session recessed at 1415, 19 November 2025.]**

10 **[The R.M.C. 803 session was called to order at 1437,**
11 **19 November 2025.]**

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

13 All parties present before the last recess are again
14 present.

15 Mr. al Nashiri, by election, is attending these proceedings
16 from the alternate site.

17 Just to summarize briefly an 802 for a matter we're taking
18 up with respect to AE 627 tomorrow regarding Mr. Bahlul, there's a
19 third-party motion from a Mr. Paradis. There's some unresolved
20 issues regarding that representation and some other unresolved issues
21 as to Mr. Bahlul appearing before the commission as scheduled.

22 So my instruction to this point is we're going to take up
23 the matters with the attorney in the morning. And there is no

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1 requirement by the commission to move Mr. Bahlul until they receive
2 an express directive or order from the commission to move him.

3 And that is in light of concern of a forcible extraction or
4 an involuntary extraction to bring him here. So to alleviate those
5 concerns, Mr. Bahlul should not be moved without further express
6 order of this court, which has not happened yet.

7 Does that summarize what we've discussed so far?

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

9 MJ [COL FITZGERALD]: Okay.

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

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

12 And with that, then, we are ready to begin AE 624. And I
13 believe what was decided is Ms. Miller would begin, correct?

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

15 MJ [COL FITZGERALD]: Okay. The podium is yours.

16 LDC [MS. MILLER]: Thank you, sir. And my colleague was
17 gracious enough to correct me that the deadline for filing motions
18 objecting to hearsay testimony was well before the 6 October 2025
19 date. And so the motion that's before Your Honor in AE 624 was filed
20 14 May 2025.

21 And in it, frankly, sir, I don't want to make light of the
22 merit of any of the arguments, but it's sort of a kitchen-sink
23 approach to all of the reasons why the direct examination -- the

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1 deposition of the direct examination of Mr. al Darbi should be
2 excluded in the trial against Mr. al Nashiri.

3 There are two arguments for which the defense bears the
4 burden. And so I intend to address those. I don't believe my
5 argument will be substantial in length. And I would ask the
6 commission, for clarity's sake of the record, to direct the
7 government to respond to the arguments for which I bear the burden
8 before the government commences with its arguments for which it bears
9 the burden. Again, I think that makes the appellate record a little
10 bit clearer.

11 MJ [COL FITZGERALD]: Mr. Wells, I believe this is your
12 response.

13 MATC [MR. WELLS]: Yes, Your Honor.

14 MJ [COL FITZGERALD]: Is that how you intend to move forward?

15 MATC [MR. WELLS]: Yes, sir.

16 MJ [COL FITZGERALD]: Okay. Then it appears that's how we are
17 moving forward, Ms. Miller. Thank you for the reminder.

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

19 The D.C. Circuit is binding on this court. It was binding
20 on the commission in 2019, and it remains binding on Your Honor today
21 in 2025.

22 A writ of mandamus is exactly that. It is an order from a
23 higher court directing this commission to follow the higher court's

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1 instructions.

2 In Re: Al Nashiri, found at 921 F.3d 224, from 2019, decided
3 16 April 2019, the D.C. Circuit vacated every opinion -- or excuse
4 me -- every order issued by the commission at the time, Colonel Vance
5 Spath, from 15 -- excuse me -- 19 November 2015 to present.

6 And I want to be really clear. The defense's request of the
7 D.C. Circuit in that petition for writ of mandamus was dismissal.
8 And in reading the opinion issued by the D.C. Circuit, it is very
9 clear that the D.C. Circuit contemplated just that.

10 And so I harken back to the commission speaking to
11 Ms. Manuele yesterday and saying, is there no remedy short of
12 exclusion for the documents, which she was referring to in AE 650?

13 And so I want to refer to the D.C. Circuit opinion paginated
14 at 240. If I may have access to the ELMO in the Remote Hearing Room?

15 Can you see that, sir?

16 MJ [COL FITZGERALD]: I cannot yet.

17 LDC [MS. MILLER]: You said to use the ELMO ----

18 MJ [COL FITZGERALD]: We're good.

19 LDC [MS. MILLER]: Okay. I've highlighted the portion that I
20 want to draw this commission's attention to: Recognizing the
21 powerful case for dissolving the current military commission
22 entirely -- and so that's why I say it is quite clear that the
23 D.C. Circuit considered the petition for writ of mandamus which

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1 requested dismissal.

2 The D.C. Circuit goes on to say: Al Nashiri's preferred
3 relief, we are ultimately satisfied that a writ of mandamus directing
4 vacatur of all orders entered by Spath after November 19th, 2015, the
5 date of his application -- and I'm going to insert in
6 brackets -- when he applied to be an immigration judge with the
7 Department of Justice, will sufficiently scrub the case of judicial
8 bias without imposing an unnecessarily draconian remedy.

9 And so the D.C. Circuit considered vacating all the orders
10 that Judge Spath had issued from 2015 until his departure to be not a
11 draconian remedy, the alternative to the draconian remedy that the
12 defense was seeking.

13 It cites another case.

14 The D.C. Circuit goes on to read: Additionally, because
15 ordinary appellate review on the merits cannot, in quote, detect all
16 of the ways that bias can influence a proceeding, citing al Nashiri
17 I, we shall vacate any CMCR orders that reviewed now-vacated Spath
18 orders, including the CMCR's October 11th, 2018 opinion affirming
19 Spath's rulings regarding Mr. Al Nashiri's defense counsel. So I've
20 bracketed, detected all of the ways a bias can influence a proceeding
21 because that's going to become relevant as I continue my argument.

22 I'll remove this from the ELMO, sir, unless you're still
23 reading. I'm sorry.

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1 MJ [COL FITZGERALD]: Are you going to ask this to be marked?

2 LDC [MS. MILLER]: No, sir. It's referred to in the pleading
3 extensively. I just wanted to draw specific attention to that aspect
4 of the D.C. Circuit's opinion and direction to the commission at the
5 time. I certainly can mark it as an appellate exhibit, if that's
6 the ----

7 MJ [COL FITZGERALD]: My concern is I've either got to
8 have -- you or I will have to read in your bracketing, since you
9 mentioned that you had bracketed. Would you mind if we mark this so
10 that your bracketing ----

11 LDC [MS. MILLER]: Not at all.

12 MJ [COL FITZGERALD]: ---- can be included in the record?

13 LDC [MS. MILLER]: Not at all, sir.

14 MJ [COL FITZGERALD]: I appreciate that. Thank you. And is
15 it just one page?

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

17 MJ [COL FITZGERALD]: We'll mark that page as AE 624G.

18 LDC [MS. MILLER]: Removing AE 624G.

19 MJ [COL FITZGERALD]: Thank you.

20 LDC [MS. MILLER]: And so I think as I was preparing for this
21 argument and reading the government's response, it really provided
22 the clarity that I needed to articulate to this commission why
23 Mr. al Darbi's deposition, or the direct examination done by the

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1 government contained in his deposition, should be excluded.

2 And so the order that allowed for his deposition to be
3 taken, the government was the movant, asking the commission to allow
4 for Mr. al Darbi to be deposed, given a possible repatriation to
5 Saudi Arabia. The defense objected.

6 Over the defense's objection, Judge Spath granted the
7 government's request to depose Mr. al Darbi. That order has been
8 vacated.

9 I'm not going to refer to my bracketing on this. The
10 government, in its response, I'm going to say devotes 99 percent of
11 it to either explaining why Mr. al Darbi's statement should not be
12 excluded as a product of torture or cruel, inhuman, and degrading
13 treatment, and a vast majority of it providing corroborating
14 material, I presume, is to argue that Mr. al Darbi's direct
15 examination in deposition is reliable.

16 The entire response to the fact that the order granting the
17 government's request to depose Mr. al Darbi is contained in a single
18 paragraph on page 14, which I am going to read. A claim -- and I'm
19 going to come back to the quote that the government relies on: A
20 claim is not moot when the issues presented are no longer live or the
21 parties lack a legally cognizable interest in the outcome, citing
22 Vanda Pharmaceuticals Inc. v. U.S. FDA with the citation.

23 Here, the commission ordered -- excuse me: Here, the

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1 commission order authorizing the deposition of Mr. al Darbi was
2 subject to the D.C. Circuit vacatur of commission orders issued on
3 and after 19 November 2015, citing In Re: Nashiri 921 F.3d 224 from
4 2019.

5 As the deposition of Mr. al Darbi had taken place nearly two
6 years ----

7 TC [CAPT STINSON]: Your Honor, I don't mean to interrupt
8 Ms. Miller. I've just been informed that there's an issue with the
9 interpreter feed right now. So we're going to check, if that's okay,
10 Your Honor, just because I think that's an ----

11 MJ [COL FITZGERALD]: Thank you. Let's ----

12 TC [CAPT STINSON]: ---- important thing. Yes, Your Honor.

13 MJ [COL FITZGERALD]: Let's get that resolved.

14 And, Ms. Miller, while we're resolving that, I didn't want
15 to interrupt you, but can you identify which AE you're referring to?
16 Is that 624C?

17 LDC [MS. MILLER]: Let me see here, sir. No, I -- hold on.

18 TC [CAPT STINSON]: Your Honor, while Ms. Miller is working on
19 that, it does seem like, again, that was a very short interruption,
20 and the interpreter feed is back up.

21 **[Pause.]**

22 LDC [MS. MILLER]: It is AE 624C. I'm sorry, sir.

23 MJ [COL FITZGERALD]: Thank you. Helpful. You may proceed.

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1 LDC [MS. MILLER]: Okay.

2 MJ [COL FITZGERALD]: And I don't know if you heard while you
3 were looking, but the tech issue is resolved, so you may proceed.

4 LDC [MS. MILLER]: Yeah, I did hear. Thank you. That doesn't
5 count into my 15 minutes.

6 MJ [COL FITZGERALD]: It does not.

7 LDC [MS. MILLER]: As the deposition of Mr. al Darbi had taken
8 place nearly two years before the vacatur, the prosecution requested
9 that the commission, then at the time Judge Acosta, reaffirm the
10 order. That was at AE 400G.

11 The commission declined to reaffirm the orders regarding
12 Mr. al Darbi's deposition, quote: Given that the deposition has
13 already taken place, denying the motion as moot, and declining to
14 opine on the validity and admissibility of the deposition itself,
15 found at AE 400Q at 3-4, footnote 3.

16 The commission has never referred to the deposition as
17 partial or otherwise suggested it was not completed. And I make
18 reference to it being the government's direct examination. There was
19 no cross-examination conducted by any representative of
20 Mr. al Nashiri.

21 But I would describe the government's response in that
22 Section B as a factual recitation, not legal argument and analysis as
23 it is professed to be.

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1 Because a motion -- so we're clear, the D.C. Circuit vacated
2 the order authorizing Mr. al Darbi's deposition. The government was
3 permitted to seek reaffirmation of some of those orders. It
4 felt -- the government felt it prudent to do so in the case of the
5 deposition of Mr. al Darbi.

6 The government sought reaffirmation of the order previously
7 issued by Judge Spath to the commission at the time, Judge Acosta.
8 And Judge Acosta denied the government's request.

9 Because the government's request was denied as moot has no
10 moment here. Because the issue was moot doesn't somehow renew or
11 reaffirm the order. And I would cite to the government sentence,
12 initial sentence in B: A claim is moot when the issues presented are
13 no longer live or the parties lack a legally -- a legally cognizable
14 interest in the outcome.

15 And so there was no legally cognizable interest in the
16 outcome at the time that the government was seeking the -- I'm
17 frankly not sure if it's reaffirmation or reaffirmance of the order
18 permitting the deposition of Mr. al Darbi. Mr. al Darbi had, in
19 fact, been repatriated to Saudi Arabia and the government's direct
20 examination had been concluded.

21 But the government offers you no path to legitimacy. And so
22 that's what -- if I knew the government's response was going to be:
23 Here are the facts; the order was vacated; we asked to have it

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1 reaffirmed; Judge Acosta denied it; end scene; I wouldn't have
2 included all of the other arguments because the government cannot
3 provide this commission a path to legitimacy, which is demonstrated
4 by their response.

5 And to be clear, should this commission consider the
6 deposition as a stand-alone exhibit, I think the commission needs to
7 be fully aware of the extensive taint of the ethically conflicted
8 judge.

9 So not only did Judge Spath grant this request for the
10 deposition over the defense's objection, the defense requested the
11 deposition not be conducted on 1 August 2017, because it was still
12 owed discovery by the government. That was denied.

13 Several motions to compel discovery were filed by the
14 defense which were granted. And the first one was granted, the
15 second one was granted in part, denied in part, and discovery was
16 ordered to be provided to the defense no later than October 2017.

17 And the direct examination of Mr. al Darbi was scheduled for
18 1 August 2017. And the cross-examination was scheduled for
19 September 2017. And for a bevy of reasons, the cross-examination did
20 not take place. But the commission granted the -- Judge Spath, the
21 ethically conflicted judge, granted the government's order and then
22 also overruled the defense's objection to proceeding with the
23 government's direct with the government still owing discovery to the

1 defense.

2 Then Judge Spath, the ethically conflicted judge, appointed
3 himself the deposition officer, which Your Honor wisely had a similar
4 opportunity with the gentlemen who have been resettled to Oman and
5 chose, again, I think wisely, to not act as the deposition officer.

6 In the course of the government's direct examination in the
7 deposition of Mr. al Darbi, the defense launched 188 objections. And
8 Judge Spath ruled on more than a dozen of those objections as the
9 deposition officer during the deposition of Mr. al Darbi.

10 And so, one, the order authorizing the deposition has been
11 vacated. The government has no response to that.

12 Two, if this commission were to consider the deposition as a
13 stand-alone exhibit, you still are not able to eradicate the taint of
14 the ethically conflicted Judge Spath because he chose to
15 preside -- because he overruled the defense objection to proceeding
16 without the requisite discovery, because he chose to exercise his
17 authority and act as the deposition officer, because he ruled on
18 objections in the course of a deposition to perpetuate -- excuse
19 me -- to perpetuate testimony, there is no way for this commission to
20 extract the taint from this judicially -- this judicially conflicted
21 officer.

22 And so the government certainly shouldn't get to profit from
23 the deposition. I have appeared in front of this commission for just

1 under a year. I believe my first appearance was December of 2024
2 before Your Honor. And since I have appeared in this commission
3 before Your Honor, the government has repeatedly represented that it
4 intended to bring Mr. al Darbi back from Saudi Arabia to testify
5 live.

6 It now seems like that may be more problematic than perhaps
7 the government anticipated. That's why I say the government should
8 not get the benefit or get to profit from an ethically conflicted
9 judge and the taint that he has infused.

10 The intent of the D.C. Circuit was to remove -- short of
11 dismissal, the D.C. Circuit said I'm not going to take the
12 draconian -- we are not going to take the draconian remedy of
13 dismissal. Short of that, we are going to try to excise the taint of
14 Judge Spath from these proceedings by vacating every order he issued.

15 But there is no way to excise the taint in this deposition.
16 Again, if we consider it a stand-alone exhibit, which I don't even
17 know that we need to get there because there is no valid order
18 authorizing the deposition's taking. But if we consider it as a
19 stand-alone exhibit, Judge Spath continued to exercise his authority
20 as the commission judge while he was the deposition officer and made
21 rulings adverse to Mr. al Nashiri.

22 Sort of concurrently to while this was all happening -- and
23 this goes into the other argument for which I bear the burden or the

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1 defense bears the burden that the defense did not have the
2 opportunity to cross-examine Mr. al Nashiri, it's already been stated
3 that it was previously contemplated that the defense would not
4 depose -- I think I said "Mr. al Nashiri." Mr. al Darbi. It was
5 already contemplated when Mr. al Darbi was deposed on 1 August 2017,
6 that the defense would not participate in cross-examination on that
7 date because the government still owed discovery to the defense.

8 In the meantime, the chief defense counsel, General John
9 Baker, was made aware that the attorney-client space, or
10 attorney-client conversations may no longer be protected. And
11 subsequently a legacy microphone was found in the attorney-client
12 space where the attorneys were visiting with Mr. al Nashiri.

13 General Baker, acting as the chief defense counsel, excused
14 civilian counsel, Rick Kammen, Mary Spears, and Rosa Eliades and
15 ultimately was held in contempt by Judge Spath for not ordering them
16 to return to their post as Mr. al Nashiri's lawyers.

17 That was ultimately vacated. But kind of encompassed in
18 this al Nashiri opinion that I've made reference to is while they
19 were separate issues, they became intertwined. So at the end of this
20 opinion in al Nashiri -- In Re: al Nashiri from 2019, the
21 D.C. Circuit also dismisses as moot Ms. Eliades' and Ms. Spears'
22 petitions for writ of mandamus, asking that the orders that Judge
23 Spath had issued requiring them to return to the commission be

1 stricken.

2 And so because the D.C. Circuit was vacating all orders
3 issued by Judge Spath from 15 -- excuse me, 19 November 2015 on, the
4 orders that he'd issued regarding Ms. Spears and Ms. Eliades also
5 were vacated and thus their petition became moot.

6 And so the government, again, in its less-than-a-page
7 response, talks about the defense being entitled to an opportunity to
8 cross-examine, but also includes a quote about the opportunity for
9 meaningful cross-examination.

10 The quote also says it's not in -- I'm paraphrasing -- it's
11 not in any manner in which the defense so chooses that the
12 cross-examination be conducted, but in the meantime, while discovery
13 was continuing to be provided to the defense, which is I think
14 thoroughly laid out in AE 624, civilian counsel was relieved from
15 their representation of Mr. al Nashiri by the chief defense counsel.
16 Judge Spath ordered them to return, and those orders were vacated.

17 And so Mr. al Nashiri was left with one very green Alaric
18 Piette left to defend him absent the discovery that he would have
19 needed even if he were qualified to conduct that deposition.

20 But those are the two arguments for which I bear the burden.
21 I don't know how we get into anything about 948r or M.C.R.E. 340 or
22 even whether or not the defense had the opportunity to depose
23 Mr. al Darbi until the government can explain to Your Honor how a

1 vacated order has been revived and allows for this deposition.

2 And so that's when I said I had very brief argument. And I
3 think -- based on the information I've been provided from the
4 government as to their argument, I think they intend to prove why
5 Mr. al Darbi -- or they intend to attempt to prove while -- why
6 Mr. al Darbi was not subject to torture or cruel, inhuman, and
7 degrading treatment as it relates to his August -- or 1 August 2017
8 deposition and provide corroboration that they believe establishes
9 that his statement is reliable.

10 I understand the court's ruled that you're going to hear all
11 of that today. But, again, I would beseech the commission. If they
12 can't tell you why an order that was vacated by the D.C. Circuit
13 should somehow apply, all of the other arguments, frankly, become
14 irrelevant, sir.

15 If I could have just a moment to consult with counsel, sir?

16 MJ [COL FITZGERALD]: You may.

17 **[Counsel conferred.]**

18 LDC [MS. MILLER]: I think I've made these points, but my
19 colleagues want to make sure they're abundantly clear.

20 It is not just the ruling that Judge Spath issued to allow
21 for the deposition of Mr. al Darbi. It is all of the rulings and
22 decisions that he made as an ethically conflicted judge, to appoint
23 himself the deposition officer, and to rule on objections in a

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1 deposition perpetuation.

2 Mr. Kammen was learned counsel at the time for
3 Mr. al Nashiri. He was present 1 August 2017 with civilian counsel.
4 But again, as already stated, it was contemplated before the
5 deposition began that the defense would not be cross-examining
6 Mr. al Darbi at that time because it was still owed discovery from
7 the government.

8 And so the deposition proceeded. Mr. Kammen launched -- I
9 don't want to be hyperbolic, but probably 10 objections at the
10 beginning of that deposition to the deposition proceeding, all of
11 which were overruled by the ethically conflicted Judge Spath.

12 Ultimately, when civilian counsel left, Mr. Kammen,
13 Ms. Eliades, and Ms. Spears -- and then this opinion was issued in
14 2019 vacating the ethically conflicted Judge Spath's orders for
15 Ms. Eliades and Ms. Spears to return. Mr. Kammen had also withdrawn
16 from the case with the blessing of the chief defense counsel.

17 And so there were times where Judge -- at that point it
18 would have been Acosta -- said that he would make Mr. al Darbi
19 available for deposition to -- I believe he was Lieutenant Colonel
20 Piette at the time -- Lieutenant Commander, excuse me, Lieutenant
21 Commander Piette.

22 And so there were opportunities -- not opportunities. There
23 were times when Judge Acosta would say, "I'll bring him over if

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1 you're going to question him." And Lieutenant Commander Piette would
2 say, "I'm not qualified to do so."

3 There was no learned counsel on the case. There was no
4 additional civilian counsel. And Lieutenant Commander Piette simply
5 did not have the qualifications in a capital case to undertake the
6 cross-examination of Mr. al Darbi.

7 But, again, I ----

8 MJ [COL FITZGERALD]: Ms. Miller, I hate to interrupt you, but
9 it's my understanding in reviewing the record that those
10 conversations, those were with Judge Spath, not with Judge Acosta.

11 LDC [MS. MILLER]: Oh, excuse me.

12 MJ [COL FITZGERALD]: But you can tell me if I'm wrong.

13 LDC [MS. MILLER]: No, I honestly don't have them in front of
14 me. And one of the questions was: Was there learned counsel
15 available when the commission subsequently made Mr. al Darbi
16 available for deposition? The answer to that is affirmatively no.
17 Mr. Kammen had left.

18 I wasn't certain who the commission was at that point. If
19 Your Honor's representing it's Judge Spath, I think that even further
20 compounds the defense's argument that, of course, we've cited it a
21 number of times, they were practicable, learned counsel is to
22 represent Mr. al Nashiri in a capital case.

23 MJ [COL FITZGERALD]: And to be clear, Ms. Miller, my

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1 understanding was those conversations happened in 2018, is why I
2 believe it would have been Judge Spath.

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

4 MJ [COL FITZGERALD]: Okay.

5 LDC [MS. MILLER]: And so -- that is correct. And so, Judge
6 Spath -- I apologize for the misstatement. Judge Spath would
7 occasionally say, "I'll bring him over if you're going to question
8 him." And Lieutenant Commander Piette would say, "I don't have the
9 qualifications to do so."

10 And when those conversations were taking place, so the
11 record is clear, Lieutenant Commander Piette was the only lawyer
12 representing Mr. al Nashiri, and certainly there was no learned
13 counsel.

14 But, again, those are the two arguments for which I bear the
15 burden and so I wanted to address both of them while I have this
16 opportunity. But I want to be clear is I don't think we get any
17 further of there was an order authorizing, it was vacated, there is
18 no deposition.

19 If the commission wants to consider the deposition as a
20 stand-alone exhibit, you still have to look at the taint from the
21 ethically conflicted judge and the rulings that he made throughout
22 the course of the deposition which consists only of the direct
23 examination of Mr. al Darbi.

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1 May I have just one more moment, sir?

2 MJ [COL FITZGERALD]: You may.

3 **[Counsel conferred.]**

4 LDC [MS. MILLER]: Since we're correcting things, at the time
5 in 2018, Alaric Piette was a lieutenant.

6 MJ [COL FITZGERALD]: A Navy lieutenant, so an O-3. Is that
7 accurate?

8 LDC [MS. MILLER]: I'm looking at Commander Bartholomaus.
9 Yes, thumbs up. Yes, sir.

10 MJ [COL FITZGERALD]: Thank you.

11 LDC [MS. MILLER]: Nothing further, subject to the court's
12 questions.

13 MJ [COL FITZGERALD]: No, I don't. And, again, I appreciate
14 the parties bifurcating the issue, but again what I'll continue to
15 ask for, and I think Mr. Wells will respond in kind to the matters in
16 which the defense had the burden and then we'll go forward assuming
17 arguendo if I were to disagree and rule against the defense. I'm not
18 saying I will.

19 But in terms of judicial economy and economy for the counsel
20 as well, I think it's best we take it up in an assuming arguendo
21 posture.

22 Is that understood, Ms. Miller?

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

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

2 And so, Mr. Wells, I just would ask since she has the burden
3 is when you are concluded your response to this portion, let me know
4 you're done so that Ms. Miller is entitled to the final word on the
5 matter she has the burden on. Then we'll know we're shifting to the
6 other matter that you have the burden on.

7 Fair enough?

8 MATC [MR. WELLS]: Yes, Your Honor. Thank you.

9 MJ [COL FITZGERALD]: Thank you. You may proceed. Thank you,
10 Ms. Miller.

11 LDC [MS. MILLER]: Is there someone here that I provide the
12 appellate exhibit to? Yes? Got it.

13 MJ [COL FITZGERALD]: Thank you. You may proceed when you're
14 ready, Mr. Wells.

15 MATC [MR. WELLS]: Sir, thank you.

16 Sir, as we begin and end with the government's case for the
17 people of the United States on this important evidentiary matter and
18 on the functioning of this commission and the important powers of a
19 military judge to direct and order counsel to be responsive to his
20 orders, I want to make sure that if anything I say up here is
21 inconsistent with our briefings, that we rest on our briefings before
22 the commission in 624.

23 And I would like to respond to the question of whether or

1 not the deposition was validly ordered.

2 I think Judge Acosta properly characterized the order as a
3 then-valid order from all appearance of the parties, both the defense
4 and the prosecution, that the request from the government was lawful,
5 and Judge Spath had the authority to direct the deposition.

6 The defense did respond to the request for a deposition.
7 And although my colleague today says that the defense objected and
8 opposed the deposition, it was a qualified objection.

9 In 369C, in the overview and the requested relief, the
10 language from the defense communicated this thought: We ask that you
11 deny, as the government has failed to provide complete discovery to
12 the defense.

13 Then if you read just the first three pages of that
14 objection to the deposition, the defense then request additional time
15 to review discovery before the deposition concur -- occurs.

16 So it is not that the defense wholeheartedly, absolutely
17 objected to the deposition ever occurring. That's one correction
18 that I would have.

19 There's no doubt, and the government does not contest the
20 ruling of the D.C. Circuit that orders of the commission during that
21 time should be vacated, but it's important to keep it in proper
22 prospective. The D.C. Circuit made a ruling, not on an actual bias,
23 not on actual conduct that affected, but on the appearance standard,

1 appearance alone.

2 So as an advocate for the evidence in this case, the
3 people's evidence of the deposition of Mr. Darbi, I would argue that
4 the vacation of the order does not mean that the deposition never
5 occurred, that it does not exist, that it should not have some
6 practical and legal effect in this commission for the finding of
7 guilt or innocence as it relates to the charges against Mr. Nashiri.

8 And I would bring this point: First of all, it was placed
9 on the record by order of Judge Spath, and it was placed under seal
10 in 369FF. Subsequently, Judge Acosta reviewed that sealing order,
11 and he chose to keep it in place, to renew it. So he validated that
12 action of Judge Spath.

13 To the extent -- in our recent filing in AE 383C, and I
14 believe B, since I was the author of these notices, I explained that
15 there may be some dispute and concern whether or not the deposition,
16 which includes the curriculum vitae of the linguist who participated
17 and also a transcript, which is 383A of the deposition, is not under
18 seal, I want to make clear that upon subsequent review here, I do see
19 that Judge Acosta did renew, specifically, 369FF under seal.

20 So contrary, perhaps, to my filing that indicated that there
21 was some confusion or dispute whether or not it remains under seal,
22 it is clear that Judge Acosta did renew that order to keep the
23 deposition under seal.

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1 To assist the commission in reviewing the quality of the
2 deposition, the reliability of the deposition, the corroboration, and
3 its usefulness, the government has placed on the record in the 383
4 series both the exhibits that were used during the deposition and
5 also a videotape made of five videos, one for each day of the actual
6 video.

7 I realize that is secondary and perhaps more useful for
8 argument whether or not that's the product of torture, cruel,
9 inhuman, degrading treatment, and that's a separate argument that
10 we'll make today.

11 However, I want to emphasize today what makes that
12 deposition valid and why it should stand. The government isn't
13 asking to revive a vacated order or to overrule the D.C. Circuit.
14 That seems to be what the defense is postulating here, but that is
15 not our position.

16 Our position is that it still exists as a statement of a
17 witness under oath in front of Mr. Nashiri with his counsel present,
18 both Mr. Nashiri's counsel and Mr. Darbi's counsel present. That
19 statement is unique and it is valuable evidence. Regardless if this
20 commission today or in the future determines that it's a valid
21 deposition or an invalid deposition, it is useful information and
22 valuable evidence for the people.

23 Now, the defense has argued that if the court finds that the

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1 deposition should be a stand-alone piece of evidence that should be
2 considered that it is somehow tainted by Judge Spath. But I want to
3 explore that with the commission.

4 First of all, the commission, Judge Spath, directed and
5 ordered the deposition pursuant to the Rules for Military Commission
6 at the request of the government. So at that time he followed the
7 proper procedures.

8 The government requested that he serve as the deposition
9 officer. R.M.C. 702 does not prohibit him from serving as the
10 deposition officer. That is not an unlawful act. That is not an
11 indication of a bias or a prejudice, but it seems to be more
12 efficient.

13 Secondly, the deposition was conducted pursuant and
14 consistent with R.M.C. 702. Time and place was arranged. Parties
15 were present, including the accused, with the counsel. The witness
16 took the stand under oath, provided statements under oath. Judge
17 Spath caused the proceedings to be recorded, both in writing and by
18 video.

19 Because the defense did not participate in the
20 cross-examination, which the prosecution on behalf of the government
21 would argue was voluntary, regardless of the cause or their
22 motivation, the cynical mind of this litigant is that they knew that
23 Mr. Darbi would not be available under a timeline. That was the

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1 reason for the deposition in the first place.

2 The reasons for their removal and excusal were something
3 that had already been addressed previously by Judge Pohl in this case
4 and also in the 9/11 case.

5 In 133, I think, in the 9/11 case, and in 149 by Judge Spath
6 in our case -- and that is the existence of an alleged microphone in
7 attorney-client meeting spaces -- Judge Acosta, after the vacated
8 order and the commission was reconstituted and new learned counsel
9 was finally arrived and appointed, he, in the AE 399 and 419
10 litigation, heard over 60 witnesses that conclusively indicated that
11 the microphone was never used.

12 Judge Spath, in his ruling, determined even if the
13 microphone existed and possibly could have been used by a third
14 party, the representations of the prosecution that such information
15 never arrived and never went to the prosecution meant that there was
16 no prejudice ever to the accused and it could never be used against
17 the accused.

18 But that is all fiction, but good legal reasoning. That's
19 not indication of bias, misconduct by the judge. That is sound
20 judgeship.

21 What is unfortunate in this case is that -- and unique here,
22 is that counsel do not have to appear again in front of this
23 commission in another case, meaning that they -- their inhibitions

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1 are a little bit unreleased in this case.

2 I would draw the attention of the commission that previously
3 Ms. Miller, who argues this case today, put on the record that she
4 recognized that this commission does not have contempt authority to
5 compel defense counsel or other counsel to honor the commission's
6 orders.

7 I'm arguing today that Mr. Kammen, Ms. Eliades, and
8 Ms. Spears knew that they could violate the commission's orders under
9 the guise of finding a microphone. And the truth is in 2015, they
10 already knew how their attorney-client area was configured.

11 That evidence was classified and it was presented in 399 and
12 419 and was pursued in the ----

13 LDC [MS. MILLER]: Judge, I'm going to object that this is
14 speculative and not a reasonable inference of the evidence that's
15 appropriate for him to argue about counsel's intentions, being
16 intentional or unintentional or otherwise. There's no evidence to
17 support this argument.

18 MJ [COL FITZGERALD]: Your objection is noted.

19 Overruled. This is argument and I'll give it the weight
20 it's due.

21 MATC [MR. WELLS]: What I would draw the commission's
22 attention to is the examination of then an attorney, Lieutenant
23 Commander Pollio, where this counsel asked her specifically about

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1 that information and her responses to that.

2 The point here is that when Judge Spath attempted to make an
3 inquiry to counsel to stay on the case, to conduct the
4 cross-examination of Mr. al Darbi, they declined. They refused.
5 They relied on their release from practicing here and appearing and
6 being detailed by their chief defense counsel.

7 I think through the litigation it's interesting that the
8 language granted the chief defense counsel was the same language that
9 existed in the Rules for Courts-Martial and had been practiced
10 before, that it's the responsibility of the military judge to either
11 grant excusal and put the basis of the information on the record.
12 Never in the practice of the military does the detailing authority
13 have independent responsibility and authority to release counsel
14 without the approval of the military judge.

15 That is what Judge Spath was dealing with when he was trying
16 to complete this deposition.

17 I do want to correct counsel's statement that Judge Spath
18 held learned counsel and two civilian counsel in contempt. He did
19 not do that. He articulated and he reasoned that that might create a
20 conflict of interest, which would prejudice and harm the accused. So
21 he did not do that.

22 However, he requested the chief defense counsel to provide
23 information to explain in his written release of those counsel what

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1 unclassified and classified information he relied on so that Judge
2 Spath could put that on the record.

3 He also asked the chief defense counsel to appear if he
4 refused to do that and explain either at the lectern or on the
5 witness stand what that information was. The chief defense counsel
6 declined to do that and Judge Spath did hold the chief defense
7 counsel in contempt.

8 Subsequent to that, a habeas action was brought in the D.C.
9 District Court with Judge Lamberth, and Judge Lamberth reasoned,
10 because of the structure of the Military Commissions Act, a punitive
11 article of contempt required convening of members of the commission
12 and a determination by the members whether or not contempt occurred.
13 So he vacated the contempt order.

14 That leads to today counsel asserting to this judge, "I know
15 you don't have contempt authority over me." This prosecution in this
16 case is bracing for the day that these defense counsel and this
17 learned counsel will find a reason to walk off the case and not be
18 here on 1 June.

19 So with that understanding of this litigant in front of you,
20 I want to bring the court's attention to: Did Judge Spath taint
21 Mr. Darbi's deposition?

22 First of all, Judge Spath presided over the deposition.
23 Consistent with the rule, he made sure that any objections were noted

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1 on the record.

2 The rule does authorize, and the military judge has the
3 inherent authority if not explicit authority, to resolve ministerial
4 objections and objections that don't go to the evidence.

5 The transcript is available to you to review to see the
6 nature of those objections and how Judge Spath ruled on those
7 objections. But what is presented today and in the defense's
8 response -- or reply, excuse me -- on page 4, defense counsel,
9 Mr. Nashiri's counsel, lodged 188 objections during the course of
10 Mr. al Darbi's direct testimony. Of those, apparently 12 were ruled
11 on by Judge Spath. But the balance of this case and the balance of
12 the defense participating and objecting to Mr. Darbi's testimony did
13 not come from the judge, but was allowed to be recorded on the record
14 by Judge Spath.

15 Judge Spath did not participate in any questioning of
16 Mr. al Darbi. He did not seek to develop the testimony in any way.
17 He did not direct the prosecution how to conduct its direct
18 examination or anything of the sort.

19 So when the defense says it's impossible to remove the taint
20 from the deposition, I don't think that that rings true. It was
21 conducted consistent with the rule. It exists on the record under
22 seal and should be available only if, however, Mr. al Darbi is
23 unavailable at trial. And at that point the prosecution seeks to use

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1 it as an exhibit. At that point this commission will have the
2 opportunity to make a determination whether or not to permit the
3 statement to be used in front of the members.

4 The commission should not at this time be forced to
5 determine if this is a valid deposition or an invalid deposition.
6 The circumstances are, even though we argue and we rest on our
7 papers, that defense counsel had an opportunity to cross-examine and
8 they forewent that opportunity voluntarily.

9 Judge Spath was unsuccessful in attempting to recall them to
10 participate in the process. New counsel, learned counsel, came onto
11 the case after Mr. Darbi had been repatriated.

12 This is just the facts and circumstances of where we are
13 today. I would argue I'm not certain that you have to find that this
14 is a valid deposition or an invalid deposition at this point. I
15 think you have ample factual information of the circumstances and
16 legal basis to conclude that it was conducted consistent with the
17 rule and it was properly ordered at the time. That doesn't make all
18 that follows, because the D.C. Circuit vacated that order, invalid, a
19 nullity.

20 In the 400 series, this commission, Judge Acosta, directed
21 the parties to list out what orders they thought needed to be
22 re-reviewed by the commission and either renewed and pursued or could
23 be considered moot because they've been overcome by events.

1 Judge Acosta made the right ruling to say, "I can't reorder
2 the deposition at this point. There's no need to do that.
3 Mr. al Darbi is not immediately available. The direct examination
4 occurred. Nevertheless, I am going to seal the deposition and keep
5 it in the record and make it available." That's where we stand
6 today.

7 As a technical point, the prosecution has not moved for the
8 deposition to be admitted and to be used at trial. We are responding
9 to a defense motion to declare it not a valid deposition and,
10 alternatively, that the statements that Mr. Darbi made, which can be
11 viewed on that video, are the product of torture, cruel, inhuman,
12 degrading treatment.

13 Your Honor, that is our position at this point, but I would
14 like to talk with co-counsel, and also subject to your questions,
15 sir.

16 MJ [COL FITZGERALD]: You may.

17 **[Counsel conferred.]**

18 MATC [MR. WELLS]: Your Honor, counsel and a paralegal
19 reminded me, there was a point whether or not -- and it's in the
20 papers -- whether or not discovery was still needed, and therefore,
21 the defense, even if learned counsel was present, was prevented or
22 could not conduct an effective cross-examination.

23 I would point this out. I've gone through each one of the

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1 points in the papers for discovery. If there was discovery that was
2 material that would have been used to question Mr. al Darbi, I think
3 that they would have presented it to the commission here and attached
4 it and shown it to you.

5 However, the description of the discovery, as you go down
6 each one, seems to be regular and routine discovery that relates to
7 DIMS records -- medical records of the sort -- other statements that
8 he made to police officers after the direct examination when he was
9 being interviewed on another topic that related to the Oklahoma
10 bombing -- City bombing. That was processed and produced.

11 But Judge Spath properly managed the deposition to give the
12 defense an opportunity to cross-examination. First, bifurcating it
13 from August to September, and then also granting to the defense,
14 because of the health issue with the spouse of the learned counsel,
15 an additional time until November. That again, I think, in managing
16 discovery, does not demonstrate a bias of the judge, not an actual
17 bias of the judge, but careful consideration to the defense in
18 holding the government to its requirements and its standards.

19 So, Your Honor, this is where we stand. Do you have any
20 specific questions for me?

21 MJ [COL FITZGERALD]: Let me ask you this: Is it -- as a
22 cure, can this commission, meaning me, Judge Fitzgerald, just
23 reaffirm it now? Would that cure the issue?

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1 MATC [MR. WELLS]: Sir, you could take that approach. I
2 think, under Rule 702, there are some further responsibilities of the
3 military judge. If the prosecution presents adequate evidence that
4 Mr. Darbi is no longer available to testify, how do we use this
5 deposition? And in that context, it has to be authenticated. You
6 perhaps have to rule on the objections of the deposition.

7 So I do think you could re-review those rulings sua sponte
8 and reaffirm the order of the deposition and -- like the sealing
9 order.

10 MJ [COL FITZGERALD]: Thank you, Mr. Wells.

11 MATC [MR. WELLS]: Thank you, sir.

12 MJ [COL FITZGERALD]: I don't believe I have any questions at
13 this point.

14 Ms. Miller, do you -- your burden on this portion. Do you
15 have a response?

16 LDC [MS. MILLER]: You betcha.

17 I, with all due respect to opposing counsel, don't know what
18 much of that had to do with the order vacating this deposition. I
19 don't know what much of what opposing counsel had to say had to do
20 with that issue at all other than impugning the integrity of the
21 counsel that sit before this commission. And I object, and I think
22 it's wildly inappropriate.

23 I said -- I just want to make a couple corrections -- that

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1 General Baker was held in contempt which was later vacated. If that
2 was somehow interpreted as I represented that Ms. Eliades,
3 Ms. Spears, and Mr. Kammen were held in contempt, that was not my
4 intent. And my recollection is that I indicated the chief defense
5 counsel, General Baker, was held in contempt, so I would agree with
6 Mr. Wells on that.

7 I don't want to have any conversation or confuse any of the
8 issues, which was my concern, talking about the availability of
9 Mr. al Nashiri's counsel on 1 August 2017, or subsequent to that,
10 before Mr. al Darbi was repatriated.

11 There was an order that was -- the government was the moving
12 party that authorized the taking of this deposition. It was vacated.

13 I didn't hear Mr. Wells address anything about that other
14 than when the commission inquired as to whether Your Honor could
15 reaffirm the deposition, which I would disagree, you could not. It
16 would be a sua sponte reconsideration of Judge Acosta's denial of the
17 government's request to reaffirm that -- or excuse me -- that order
18 authorizing the deposition of Mr. al Darbi. There have been no
19 changes in circumstance that would allow the commission to sua sponte
20 reconsider Judge Acosta's ruling.

21 I think it's really interesting that Mr. Wells ----

22 MJ [COL FITZGERALD]: Are you saying the commission cannot sua
23 sponte reconsider its rulings?

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1 LDC [MS. MILLER]: If it was based on legal error or
2 inaccuracy. So I think the commission would have to articulate
3 why -- I don't think the commission is -- I don't think you have the
4 latitude to just say I just disagree with Judge Acosta in his ruling.

5 I think if Your Honor said, "There's been some new
6 development in law, or I understand the law differently, or the
7 factual scenario has changed" -- and the only factual scenario is
8 that it doesn't appear that the government's actually going to be
9 successful in getting Mr. al Darbi back here from Saudi Arabia.

10 And I would say that's not -- but I think that the idea of
11 stare decisis and precedent, is that the parties are supposed to be
12 able to rely upon the previous orders of the judges they both appear
13 in front of and the judges of higher appellate court.

14 MJ [COL FITZGERALD]: Well, let me ask you this, because I'm
15 looking at our Rule 905F, reconsideration. It says: On request of
16 any party or sua sponte, the military judge may, prior to
17 authentication of the record, reconsider any ruling, other than one
18 amounting to a finding of not guilty made by the military judge.

19 It doesn't require me to apply the -- I guess what you're
20 citing to is the law of the case standard for counsel. But it says
21 here I can do it sua sponte.

22 LDC [MS. MILLER]: And Your Honor is wont to anytime we're
23 discussing reconsideration or a motion edging near being one of

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1 reconsideration, Your Honor is the one that cites the case law about
2 the standard for reconsideration.

3 And so absolutely I think the commission can sua sponte
4 correct an incorrect previous ruling. And so if Your Honor has
5 reason to believe that a judge has improperly or illegally decided
6 something, I think the commission -- it's incumbent upon the
7 commission to correct that.

8 But frankly, sir, it just seems like it's an impediment for
9 the government to admit this deposition because there's no valid
10 order authorizing it because it was vacated by the D.C. Circuit. And
11 so now Your Honor, on its own -- on your own is saying, "I'm going to
12 reconsider Judge Acosta's decision"? Judge Acosta was more primed to
13 hear this issue.

14 And, again, the only thing that seems to have changed
15 between Judge Acosta's ruling is now this seems to be an impediment
16 to the admission of this deposition for the government.

17 And so certainly it leaves me concerned that the
18 commission's first response was, "Well, can I just reaffirm it so you
19 guys can get it in?" I mean, that's how it sounds.

20 MJ [COL FITZGERALD]: I'm going to stop you there. That's a
21 mischaracterization of what I asked. I asked him for an opinion as
22 to whether I could. I didn't suggest or intimate that I would.

23 What I was really addressing was when you said I could not

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1 reconsider and I cited to you the rule that says I can.

2 So don't take it that I'm going to disagree with you when
3 there's finality on this ruling. I was addressing the fact that you
4 told me I couldn't do something which the rule says I can, and I was
5 seeking your clarity on that. That is -- we were talking about the
6 rule, not where I was directing my intended ruling. That's what I
7 want to be clear on.

8 LDC [MS. MILLER]: Okay.

9 MJ [COL FITZGERALD]: Because you're using language that
10 suggests that I was up here deciding on how I was going to rule on
11 this matter when I've already said previously I'm taking this first
12 part, and assuming arguendo I rule against the defense, I want to
13 take up the second piece, the second issue.

14 And, again, all I was addressing was does the rule allow me
15 to do that. I gave both parties an opportunity to be heard on that.
16 And I corrected you with the specific rule that says -- appears to
17 say something different than what you told me in your argument.
18 That's my only point.

19 LDC [MS. MILLER]: I understand what the commission is saying.
20 I don't believe I made any representation in my initial ----

21 MJ [COL FITZGERALD]: It certainly sounded like that to me.

22 LDC [MS. MILLER]: Excuse me. In my initial case in chief, I
23 don't believe the commission questioned me about reconsideration.

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1 MJ [COL FITZGERALD]: No, no.

2 LDC [MS. MILLER]: It was only after you asked ----

3 MJ [COL FITZGERALD]: Correct.

4 LDC [MS. MILLER]: ----- Mr. Wells, okay. And so I want to
5 be clear.

6 MJ [COL FITZGERALD]: You didn't. But your response to
7 Mr. Wells' response was that I could not reconsider.

8 LDC [MS. MILLER]: I think there is decisional law that
9 further interprets the rule that Your Honor is wont to cite anytime
10 reconsideration comes up. And so I'm not saying that the commission
11 doesn't have legal authority in certain circumstances to reconsider.

12 What it had sounded like to me was that the commission was
13 considering reaffirming the order that has been vacated by the
14 D.C. Circuit that Judge Acosta declined to reaffirm now sua sponte,
15 and the only thing I can see is that it appears that this is an
16 impediment to the government's ability to introduce this piece of
17 evidence. And so the commission is saying, can I sua sponte
18 reconsider Judge Acosta's denial of the reaffirmance.

19 And I do not believe the commission can do that
20 simply -- again, from my perspective, it appears to assist the
21 government in the introduction of this evidence.

22 MJ [COL FITZGERALD]: I understand your point. And if you
23 find that there's dispositive case law on that point directing the

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1 guardrails of the court's sua sponte authority to do so under R.C.M.
2 905, you're certainly welcome to submit that to the commission.

3 LDC [MS. MILLER]: Okay.

4 MJ [COL FITZGERALD]: We can move on.

5 LDC [MS. MILLER]: Okay. I think the commission would agree
6 that the commission is wont to cite the case law that there need to
7 be a change in factual circumstance or the law or manifest injustice
8 and I don't know that those -- and the commission seems to be
9 distinguishing those as only applicable to counsel.

10 And I -- I don't know that that's the case. I will
11 certainly research it further and let the commission know. But I'm
12 quoting what the commission usually cites to us in its orders ----

13 MJ [COL FITZGERALD]: Right.

14 LDC [MS. MILLER]: ----- as it relates to reconsideration.

15 MJ [COL FITZGERALD]: I understand. And the rule is clear
16 that the parties may request it or the court can do it sua sponte.
17 So I think there may be different standards but, again, if you can
18 find dispositive case law on that, you're more than welcome to
19 consider it.

20 I haven't decided anything. I was asking questions in aid
21 of understanding it from both parties' perspective.

22 LDC [MS. MILLER]: Okay. Well, I don't know that

23 Mr. -- excuse me. I don't know that the government responded at all

1 to the vacatur of the order authorizing the deposition.

2 Mr. Wells seemed to suggest that it would be some injustice
3 to the people if this deposition wasn't admitted. And he referred to
4 the then-valid orders of Judge Spath and also tried to minimize the
5 ethical conflict that Judge Spath was operating under from when he
6 applied to be an immigration judge with the Department of Justice
7 November 15th of two-thousand -- excuse me, I keep doing the numbers
8 backwards -- November 19th of 2015.

9 And so, again, I want to stay very focused on the fact that
10 there is no valid order authorizing this. And then what I referred
11 to as even if this commission were to consider this deposition as a
12 stand-alone piece of evidence, it cannot remove the taint of an
13 ethically conflicted judge.

14 So the government's quote was -- not today, in their
15 pleading before the D.C. Circuit chose, referring to Ms. Eliades and
16 Ms. Spears, that they chose to ignore then valid court orders to
17 appear to continue representing the accused.

18 The D.C. Circuit weighed in on Judge Spath's ability to
19 issue those rulings related to Ms. Spears' and Ms. Eliades'
20 appearance before the commission calling them orders of a judge
21 ethically disqualified from issuing them. So when I continuously
22 refer to Judge Spath as an ethically conflicted judge, the
23 D.C. Circuit called Judge Spath a judge ethically disqualified from

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1 issuing orders regarding Ms. Eliades' and Ms. Spears' appearance
2 before the commission.

3 In the sentence directly following the quote about
4 then-valid orders, which isn't a thing, Judge Acosta recognized that
5 the orders had since been vacated and that the withdrawal of defense
6 counsel was valid. Both Judge Acosta and the Circuit recognized that
7 then-valid, in quotes, is synonymous in this context with invalid or
8 unlawful.

9 And the defense, it's my position, would argue cannot have a
10 true opportunity for cross-examination when there was no valid order
11 establishing such an order.

12 And so, again, I want to focus on just two things, and I
13 don't want to go down this road where we're talking about Kammen,
14 Eliades, and Spears leaving and Mr. Wells' speculation that they knew
15 of the legacy microphone and were waiting to use it as an opportunity
16 to leave this case and that the government is sitting on pins and
17 needles today waiting for counsel before Your Honor to withdraw, that
18 was the government's argument in response to there is not a valid
19 order authorizing this deposition. It was vacated by the
20 D.C. Circuit and this commission is bound by that order.

21 But Mr. Wells also represented that it was just an objection
22 by technicality by Mr. Kammen. And so I want to direct counsel and
23 the commission to the deposition.

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1 Does Your Honor have that or would you benefit from the

2 ELMO, sir?

3 MJ [COL FITZGERALD]: I would benefit from the ELMO. Thank
4 you.

5 LDC [MS. MILLER]: This is the direct examination in
6 deposition of Mr. al Darbi from 1 August 2017.

7 MATC [MR. WELLS]: Your Honor, I would indicate that if we're
8 going to read it aloud, it is still under seal from the public, sir.

9 LDC [MS. MILLER]: I thought he just said it wasn't under seal
10 in his soliloquy.

11 MATC [MR. WELLS]: No, sir.

12 MJ [COL FITZGERALD]: It was at least twice that he said it
13 was under seal.

14 MATC [MR. WELLS]: Yeah.

15 MJ [COL FITZGERALD]: But if we can not show it to the public
16 and I can certainly just read it.

17 LDC [MS. MILLER]: Okay.

18 MJ [COL FITZGERALD]: I won't need you to read it for me. Are
19 we talking about the highlighted ----

20 LDC [MS. MILLER]: Yes, sir. And I can certainly submit this
21 as an appellate exhibit under seal if that's the posture we're at.

22 MJ [COL FITZGERALD]: Can you tell me what page of the
23 transcript this is?

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1 LDC [MS. MILLER]: Sure. I'm sorry. This is page 6. And I
2 was going to refer to page 7.

3 I don't know how to continue this argument without making
4 reference to it.

5 But when Mr. -- excuse me -- the government made
6 representations about Mr. Kammen's objections being more kind of
7 status based or timing based, the deposition transcript would reflect
8 otherwise. There's a whole litany of objections that Mr. Kammen
9 made. And you can -- I mean, even for ----

10 MJ [COL FITZGERALD]: If you would just give me a moment to
11 read it?

12 LDC [MS. MILLER]: Sure.

13 MJ [COL FITZGERALD]: I think that's our best way of handling
14 it.

15 LDC [MS. MILLER]: How do I zoom out?

16 MJ [COL FITZGERALD]: It slid down on me. It was the perfect
17 size, but it slid down. So if you could put the portion you want me
18 to read in the center.

19 LDC [MS. MILLER]: Starting with line 12.

20 MJ [COL FITZGERALD]: Through line 20?

21 LDC [MS. MILLER]: Yes, sir. Oh, through line 22, the end of
22 the page, sir.

23 MJ [COL FITZGERALD]: Okay.

1 **[Pause.]**

2 MJ [COL FITZGERALD]: I have finished reading it. Thank you.

3 LDC [MS. MILLER]: And then page 7, it continues, lines 1
4 through the end of line 8, sir.

5 MJ [COL FITZGERALD]: Thank you.

6 LDC [MS. MILLER]: Removing from the ELMO, sir.

7 And so I just wanted to point out that Mr. Kammen objected
8 before the deposition. He exercised motion practice on behalf of
9 Mr. al Nashiri to preclude the deposition. He objected
10 contemporaneous during the deposition. He requested an alternative
11 to the deposition being conducted 1 August 2017.

12 All of those requests were denied by Judge Spath, who
13 the -- and so those would be rulings issued by a judge ethically
14 disqualified from issuing them.

15 And so in addition, Mr. Wells is correct, there are 188
16 objections launched by the defense and approximately a dozen that the
17 commission actually ruled on throughout the course of this. But,
18 again, those are rulings issued by a judge ethically disqualified
19 from issuing them.

20 MJ [COL FITZGERALD]: Ms. Miller, if I can interrupt.

21 LDC [MS. MILLER]: Yes, sir. Yes, sir, of course.

22 MJ [COL FITZGERALD]: And this is my failure. I referred to
23 the deposition, but I didn't refer to it by its appellate exhibit

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1 number. It's my understanding the deposition -- and you referred to
2 pages 6 and 7 of the deposition that is sealed. That is found in the
3 record at Appellate Exhibit 383A. Is that your understanding?

4 LDC [MS. MILLER]: It is, sir. Yes.

5 MJ [COL FITZGERALD]: Thank you.

6 LDC [MS. MILLER]: I apologize.

7 MJ [COL FITZGERALD]: Nope. I apologize for interrupting you.

8 LDC [MS. MILLER]: No, sir. You can always -- always
9 interrupt me. But I have lost my train of thought.

10 MJ [COL FITZGERALD]: Yes.

11 LDC [MS. MILLER]: The D.C. Circuit, which again I don't think
12 they -- I haven't heard any argument to the contrary that this
13 commission is bound by, and orders of the D.C. Circuit, in lieu of
14 dismissing the charges, because they found the behavior of Judge
15 Spath so egregious, he failed to disclose that he was trying to work
16 for the Department of Justice, which is obviously at beck and call
17 for the government -- and I mean the prosecution -- when needed. And
18 so Judge Spath failed to disclose that he was trying to work for the
19 Department of Justice while he was presiding over this commission.

20 And so the D.C. Circuit took that so seriously, it said, in
21 lieu of taking the draconian remedy of dismissing charges, we're
22 going to vacate every order since Judge Spath applied to be an
23 immigration judge for the Department of Justice. And his application

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1 was submitted November 19th of 2015.

2 And so every ruling or order he issued after that related to
3 counsel's presence, related to this deposition being taken, related
4 to the rulings within the deposition itself, were rulings from a
5 judge ethically disqualified from issuing them.

6 And, again, I heard no response from the government as to
7 the legality of anything I'm arguing other than to speculate about
8 the rationale of why Mr. Kammen, Ms. Eliades, and Ms. Spears left,
9 and to impugn the integrity of counsel that stand before this
10 commission.

11 And so, respectfully -- again, I don't know what any of that
12 has to do with anything when we are talking about a vacated order
13 that a judge had the opportunity to consider reaffirming and said, "I
14 can't reaffirm it. It's moot. There's no legally cognizable issue
15 for me to mediate."

16 And so there is no path to legitimacy for this commission to
17 introduce this deposition. And the government did notice
18 their -- apparently there's some confusion on the government's end
19 between discovery obligations and notice of evidence for trial. But
20 they did notice that they intended to use this deposition, which is
21 why this motion was filed.

22 If I can have just a moment, sir?

23 MJ [COL FITZGERALD]: You may.

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1 **[Counsel conferred.]**

2 LDC [MS. MILLER]: Minor points, sir -- I don't think they're
3 minor. Just two brief points.

4 I've been made aware that Mr. al Darbi also offered a
5 deposition in Nashwan al-Tamir's case. And that deposition was also
6 bifurcated due to the government's failure to provide discovery.

7 And also, one of my colleagues wanted me to note that
8 failing to rule on an objection is also a ruling of sort. So there
9 were 188 objections. Judge Spath ruled on 12 of them. I can only
10 speculate as to why he stopped ruling, but that was also a decision
11 that a judge ethically disqualified from issuing those rulings made.

12 And so no valid order authorizing this deposition, and there
13 is no way for this as a stand-alone exhibit, this deposition, for the
14 taint of the judicially disqualified judge, for that taint to be
15 removed.

16 And that's all I have, sir.

17 MJ [COL FITZGERALD]: I have something since you ----

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

19 MJ [COL FITZGERALD]: ----- you so graciously provided me an
20 opportunity to look at 383 up on the screen.

21 As I oriented myself, I noticed it said "DO" for deposition
22 officer. So was Colonel Spath serving as a judge or a deposition
23 officer, and is that a matter of consequence for this commission in

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1 perhaps having to make this decision at a later date?

2 LDC [MS. MILLER]: He was serving as the deposition officer,
3 which he appointed himself at the request of the government. I
4 can -- if I can refer to that same appellate exhibit, if I can use
5 the ELMO, sir.

6 On page 1, where it refers to "DO," which obviously we now
7 understand means "deposition officer," you can read the portion,
8 lines 5 through 8, where he discusses his role in this.

9 MJ [COL FITZGERALD]: Okay. Thank you. And you said that was
10 page 1 of 383A?

11 LDC [MS. MILLER]: Yes. That's the -- yes, sir. That is the
12 very beginning. I mean, you can see at the top it refers to the
13 deposition of Mr. al Darbi was commenced at ----

14 MJ [COL FITZGERALD]: Do you think it's a matter of
15 consequence in ultimately maybe having to rule on this matter?

16 LDC [MS. MILLER]: I do, because I think I mentioned this in
17 my case in chief, in the argument in case in chief, that he didn't
18 have to make himself the deposition officer. Whether the government
19 believes it's more efficient to do it that way or not -- Your Honor
20 had the same circumstances and chose not to operate as the deposition
21 officer for two gentlemen who have since been repatriate -- or excuse
22 me -- resettled to Oman -- that -- him appointing himself, Judge
23 Spath, as the deposition officer, my understanding was at the behest

1 of the government.

2 And so it seems to me -- again, referring to what the
3 D.C. Circuit referred to him as -- a judge ethically disqualified
4 from issuing rulings, that he appointed himself the deposition
5 officer and then he made rulings in the course of the deposition.

6 And so that's where I have heard no response from the
7 government as to how this commission would remove the taint from the
8 judicially disqualified judge who issued these -- I mean, these are
9 all a form of rulings, appointing yourself the deposition officer,
10 ruling on objections.

11 And to be clear, he overruled every objection that was made
12 by the defense that he actually did rule on. But they're all
13 rulings. And all of them, every order that was issued by Judge Spath
14 post his application to be an immigration judge for DoJ, was vacated
15 post-November 19th, 2015.

16 And so that's where I -- I think it's the same argument, but
17 kind of two pieces. One, there's no valid order authorizing this
18 even if this commission were to reaffirm it, which I think would be
19 inappropriate given the circumstances, but even if that were to
20 occur, there is no way to remove the taint from the judicially
21 disqualified judge, Judge Spath, from the deposition itself because
22 he acted as the deposition officer, because he appointed himself the
23 deposition officer, because he made these rulings, et cetera, et

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1 cetera, et cetera.

2 So, yes, I absolutely think that's of consequence that he
3 elected to be the deposition officer at the government's behest and
4 made rulings subsequent to that. Again, in my experience with
5 perpetuated depositions, the deposition officer typically just sits
6 there.

7 And so it seems almost like he was acting in a hybrid
8 fashion. Because he also had the benefit of being the commission
9 judge, he issued rulings. And so at some point I don't know if he
10 thought, well, I probably shouldn't do this and stopped. That's my
11 speculation, but it is but only speculation, sir.

12 MJ [COL FITZGERALD]: Thank you.

13 And I believe we bifurcated the issue on 624. That
14 concludes the first part for which the defense had the burden. How
15 about we take a short recess?

16 Ten minutes sufficient for the parties?

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

18 MJ [COL FITZGERALD]: Very well. The commission is in recess
19 for 10 minutes.

20 **[The R.M.C. 803 session recessed at 1607, 19 November 2025.]**

21 **[The R.M.C. 803 session was called to order at 1623,**

22 **19 November 2025.]**

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

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1 All parties present before the last recess are again
2 present. Mr. Nashiri is attending from the alternate site by
3 election.

4 In a brief 802, we just discussed, in a summary fashion, how
5 we're going to proceed. And it looks like to conclude with 624, the
6 argument, the bifurcated argument, I've advised the government
7 without -- that I -- other than questions of clarification, I don't
8 intend to impede in their argument because the parties have well
9 briefed the issue still remaining, that it -- but I think it's
10 important that the defense get their opportunity for a roll-up with
11 Mr. al Nashiri prior to him returning back to the facility roughly
12 around 1700, 1800 -- or around 1800 as I understand it, but an hour
13 after we conclude.

14 So with that -- and then, with that, Ms. Miller would likely
15 provide her response to this portion tomorrow. So with that,
16 Mr. Wells, you may proceed.

17 MATC [MR. WELLS]: Yes, sir. Thank you.

18 This argument addresses the defense request to suppress
19 Mr. Darbi's statements in the deposition that he made under oath in
20 front of the accused, again with Mr. Nashiri's counsel present, also
21 with Mr. Darbi's counsel present. The statements were made, recorded
22 in transcript, and also videotaped. Those are available to the
23 commission in the AE 383 series.

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1 And as a point of departure, again, as taking the cue from
2 the commission, you've read our briefs. You have the information in
3 front of you. We do want to maintain the position that we do not
4 think a valid objection, as it relates to torture, cruel, inhuman,
5 degrading treatment, has been lodged by the defense.

6 Based on the passage of time, which gives sufficient
7 attenuation from the events in August of 2002, where admittedly this
8 commission has found that Mr. Darbi was abused at Bagram Air Base in
9 August of 2002. Of course, his statements in this courtroom, under
10 oath, were made in August of 2017. That's 15 years.

11 And I would bring to the attention -- looking closely at the
12 commission's recent ruling in 569LL where it reviewed extensively the
13 type of conditions at Guantanamo Bay were not abusive, were not
14 cruel, and not degrading at all.

15 I would point out that the commission, Judge Acosta, in
16 ruling in his 335 ruling about the abuse that Mr. Darbi suffered at
17 Bagram Air Base in August of 2002, indicated that none of that
18 occurred by the law enforcement officers who interviewed Mr. Darbi,
19 but it was a collateral conduct by a guard member who was abusing
20 Mr. Darbi. And, of course, that guard member was court-martialed by
21 the government, the United States, for his misconduct.

22 Nevertheless, because it occurred contemporaneously with the
23 interviews of the FBI, this commission determined that, from

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1 Mr. Darbi's perspective, he might think that he had to provide
2 certain information and his will was overborne.

3 But here in 2017, in August, Mr. Darbi presented his
4 testimony pursuant to a negotiated plea arrangement where he agreed
5 to provide the testimony. He provided the testimony in the Nashiri
6 case. He also provided testimony in -- under oath in the Hadi case.
7 He also provided proffers and providency inquiry. Also signed a stip
8 of fact in his own case to plead guilty. So all of that context
9 should be considered.

10 And as the court determined, even in 569LL, there's been
11 some question which has been raised by the defense papers whether or
12 not 948r, and Military Commission Rule of Evidence 304(a)(3), says
13 "by or through torture." This commission, I think, has ruled that
14 there really is no meaningful distinction, that it's the same.

15 But the point is this commission has determined that you
16 need proximate cause to the abuse, that there's still an opportunity,
17 given sufficient attenuation or distance from the abusive treatment,
18 for those coercive effects to dissipate. And then the individual,
19 who was the subject of that abusive conduct, provide testimony and
20 provide those statements again.

21 Those statements may still be the same. It is not
22 necessarily so or true that information obtained from coercive
23 circumstances that are unlawful are inherently false. I want to

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1 explore that just a little bit.

2 I know that we've made the decision that it might be
3 unreliable, if you're relying on those statements that you had
4 proximate cause coercion. If that is all the information that you
5 had just from that person, just from that subject of that
6 questioning, we know that with an accused for a confession, his
7 statements must be corroborated.

8 That's an extra level of due-process procedure that we
9 follow. We just don't take the statements from the individual, the
10 accused or a witness wrote and believe that they're true. You have
11 to compare them to what you know.

12 And it's interesting, the defense has presented their own
13 expert, Mr. Kleinman. And in his testimony before the commission on
14 16 June 2023, at pages 25386 to 25387, counsel asked Mr. Kleinman,
15 "As an interrogator, how do you try to establish ground truth?"

16 And he responded, "There are structures. There are
17 structures and affiliations and connections and networking and
18 financing of personnel and training with -- where you have to make
19 sense of that information.

20 "What is important when you have a person that appears in
21 front of you that might have been abused, you have to do is get the
22 information. You then have to try to either compare it against
23 vetted information or you need to go explore. You need to test that

1 in real world by further collection."

2 He talked about cross-cueing in the world of interrogation.
3 He explained that as an example, "If I had a subject who said I have
4 a training camp in this part of the world, it's at this wadi in the
5 middle of Yemen, he said, you know, just hypothetically, we could go
6 to imagery" -- and I'm interjecting here -- to confirm that that's
7 true.

8 What Kleinman was expressing as an interrogator -- and he
9 was speaking from his experience as an intelligence collector in
10 doing human intelligence, is that you don't know how the person was
11 treated when they came to you. They might have been abused at the
12 point of collection or through time. But the information they
13 provide you, you just don't rely on it completely as ground truth.
14 You always believe that he's going to provide you false information
15 because he's an enemy. He's going to provide you information that
16 might influence you because he's an enemy. So you have to take that
17 information and go compare it.

18 The rules before this commission in M.C.R.E. 304 explain
19 that before you take this information, and if the subject has been
20 abusive -- been abused, then you compare it for reliability and
21 determine if it's corroborated.

22 Our filings within this commission in this series in 624
23 laid out a chart of corroboration where we think the statements of

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1 Mr. Darbi are supported by independent evidence.

2 Another factor of reliability that the rules dictate and
3 instruct us to look at is, is the statement internally consistent and
4 also reliable?

5 You have available to you in the 383 series the exhibits
6 that were used during the statement and the deposition where
7 Mr. Darbi authenticates each piece of evidence and explains the
8 significance of that evidence. That's important to consider to
9 whether or not the statement has internal coherence.

10 I would last bring to the attention here, no question that
11 the statement that he provided in this environment, it was this type
12 of a context.

13 May I have the ELMO, please, just to show the military judge
14 and the parties.

15 I've provided a copy of this today to counsel, both at the
16 Remote Hearing Room and also here in the court. But it's also
17 available to the commission in 383C.

18 This is a still shot of the video of Mr. Darbi sitting for
19 his deposition in this witness stand ready to be examined by direct
20 and also available for cross-examination.

21 Clear that there's no proximate abuse or unlawful
22 circumstances in this situation. The commission has available both
23 the transcript and the video.

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1 That's all from the ELMO. Thank you.

2 One last point about what we are using today, and to
3 springboard off of is this a completed deposition or is this just a
4 statement that might be subject to some other rule for admissibility.
5 I think what we were discussing in the first argument was if it's a
6 completed deposition, under Rule 801, it qualifies as non-hearsay.
7 This is 801(d)(1).

8 The requirements there, though, are the declarant testifies
9 and is subject to cross-examination concerning the statement. That's
10 the key issue here that the defense has pointed out was missing in
11 Mr. Darbi's direct examination.

12 But that doesn't end the analysis, because it's still a
13 statement that exists and would be available and potentially
14 admissible as hearsay under 803, but only if Mr. Darbi is unavailable
15 and also subject to the commission's review to determine if portions
16 or the whole deposition were appropriate evidence to be admitted and
17 go before the panel.

18 The government did notice the whole deposition because
19 Mr. Darbi's testimony in the transcript and the video was presented
20 exactly how the trial counsel would have presented that testimony to
21 the members. Again, though, we are still pursuing with the Kingdom
22 of Saudi Arabia, the Department of State, the Department of Justice,
23 and the FBI, which is also Department of Justice, the availability of

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1 Mr. Darbi. But until the court makes that determination, this
2 statement is not evidence at this point, although we've noticed it.

3 Sir, do you have any questions for me?

4 MJ [COL FITZGERALD]: I do not.

5 MATC [MR. WELLS]: All right. That's all, sir. Thank you.

6 MJ [COL FITZGERALD]: Thank you.

7 Ms. Miller, I note the time is 1637.

8 LDC [MS. MILLER]: I'm used to them being live mics, not that
9 you have to push them to make them live mics.

10 MJ [COL FITZGERALD]: I understand.

11 LDC [MS. MILLER]: I would ask to recess for the evening. I'd
12 like to consult with Lieutenant Colonel Nettinga before proceeding
13 with my response, and so that's obviously going to take some time and
14 I know counsel on island would like to meet with Mr. al Nashiri.

15 And so respectfully, sir, I'd ask if we could return
16 tomorrow. I expect my argument to be very brief.

17 MJ [COL FITZGERALD]: I'll allow that. I think we've had a
18 long day today and I commend the parties. I think we moved a lot of
19 material today, so why don't we recess for the night.

20 **[The military judge conferred with courtroom personnel.]**

21 MJ [COL FITZGERALD]: Before we recess, one thing. I think
22 there was a request to rule on motions for enlargement of time with
23 respect to 659, 661, and 670 to 5 December.

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1 That request is granted -- or those motions for enlargement
2 of time are granted.

3 Ms. Miller, so we're going to take that recess, but I'm
4 concerned because what we're doing at 0900 and then some movement of
5 people and we've invited a third party.

6 Are you okay with it taking place after we take up the
7 matter regarding Mr. Bahlul?

8 LDC [MS. MILLER]: Of course.

9 MJ [COL FITZGERALD]: Okay. I just don't want to interfere
10 with -- because I believe we agreed we're going to call him at 0900
11 and he knows to arrive at 0900?

12 TC [CAPT STINSON]: That's correct. My understanding is
13 Mr. Paradis will be there at 0900 tomorrow.

14 MJ [COL FITZGERALD]: Okay. So we'll take that up, then we'll
15 come back to you, Ms. Miller. Sorry to put something between your
16 response to Mr. Wells' argument.

17 LDC [MS. MILLER]: It's no problem whatsoever, sir.

18 MJ [COL FITZGERALD]: Okay. And with that, so you can have
19 your time with Mr. al Nashiri.

20 Anything else from the parties while on the record?

21 TC [CAPT STINSON]: Yes, Your Honor. I had mentioned
22 declaration in the series regarding the motion to quash. I do have
23 that here. I provided it both to defense counsel and to Mr. Paradis

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1 electronically. I would like to offer it for the commission's
2 consideration. I think it's relevant for the matter tomorrow
3 morning.

4 MJ [COL FITZGERALD]: Okay. You have it -- a hard copy right
5 now?

6 TC [CAPT STINSON]: I do have a hard copy.

7 MJ [COL FITZGERALD]: It looks like your staff has something.

8 LDC [MS. MILLER]: Captain Stinson, could we ask that you also
9 electronically -- oh, Lieutenant Colonel Garrett got it.

10 TC [CAPT STINSON]: And, Ms. Miller, I did send it
11 electronically as well at last break.

12 LDC [MS. MILLER]: Lieutenant Colonel Garrett was way ahead of
13 you, but thank you, sir.

14 MJ [COL FITZGERALD]: All right. And so we need to mark that.
15 If everybody stand by, we'll get you the next number.

16 **[Pause.]**

17 MJ [COL FITZGERALD]: The declaration we've been speaking of
18 is marked as Appellate Exhibit 627T. 627T.

19 TC [CAPT STINSON]: Thank you, Your Honor. Nothing else from
20 the government, Your Honor.

21 MJ [COL FITZGERALD]: Very well.

22 Seeing nothing else, the commission is in recess until 0900
23 tomorrow morning.

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1 [The R.M.C. 803 session recessed at 1642, 19 November 2025.]

2 [END OF PAGE]