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1 **[The R.M.C. 803 session was called to order at 0908, 21 April 2026.]**

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

3 All parties present before the last recess are again
4 present. Mr. Nashiri, who attended from the alternate site, is in
5 the courtroom today.

6 Good morning, Mr. Nashiri.

7 It appears the parties are ready to proceed. I don't
8 remember who you said was arguing first. Lieutenant Shaver? Are you
9 ready to proceed?

10 He gave me a thumbs up. I presume ----

11 DC [LT SHAVER]: Yes, sir ----

12 MJ [COL FITZGERALD]: ---- for the record that means you are.

13 DC [LT SHAVER]: ---- I am.

14 MJ [COL FITZGERALD]: Thank you.

15 DC [LT SHAVER]: Good morning, sir.

16 MJ [COL FITZGERALD]: Good morning.

17 DC [LT SHAVER]: In advance, I'm just going to ask for some
18 latitude here. There's going to be a lot of papers shuffling around
19 because we're dealing with several different transcripts, and I do
20 intend to use the ELMO. I'm going to be displaying portions of an
21 unclassified transcript that are FOUO, just for the court's
22 information.

23 I've -- there won't be any highlights in any of them. It

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1 will just be the documents. I believe it's 685F. It's the
2 government's redacted FBI transcript.

3 To make it easy for the court reporters, I have no
4 highlights. I have some stickies on there that I'll take off as I
5 put it on the ELMO. Those are just so I know what and where I'm
6 talking about.

7 So for this one, this is obviously related to the CSRT. The
8 defense has two different motions related to the CSRT. We divided it
9 up that way because we were under a tight timeline, and there's two
10 large sets of issues related to the CSRT. We basically did
11 everything that related primarily to the translation from Arabic to
12 English or vice versa I handled, and then the nonlinguistic-related
13 issues Ms. Manuele will be arguing later today in 680. That's also
14 why we wanted to do 685 first, because in order to discuss the CSRT,
15 it makes a lot of sense to start with kind of a shared understanding
16 of what's actually in the transcripts, what actually was said at the
17 time.

18 Because there is a discrepancy between what was said at the
19 time and what is reflected in the transcripts, particularly the
20 original DoD-produced transcript that was made shortly after the
21 original tribunal hearing, we've run into a lot of security issues.
22 And I want to start by talking about those because they do have
23 bearing on several aspects of the motion and some of the arguments

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1 that are raised by the government in their response.

2 So we now, having gone through all of this process, and the
3 government produced their transcript and was able to get it through
4 security review in about a month, and were able to look at those
5 redactions and understand what is actually classified in the CSRT,
6 and so this is the only way that we actually get any classification
7 guidance on the defense. We have to reverse engineer it from the
8 redactions or things that the government tells us. We can't go to
9 the OCAs and say what's still classified here that would allow us to
10 kind of do our jobs. We have to reverse engineer it.

11 Looking at what the government says is still classified in
12 the CSRT has evolved over the course of writing this motion. So over
13 the last six months, it has changed significantly. When we -- got
14 it. Thank you, interpreters.

15 When we first started writing this motion, the audio and the
16 unclass -- or the unredacted transcript were both TS. And obviously,
17 that imposes a lot of limits on how we write the motion, the
18 witnesses that we can use, the different systems that we're able to
19 create things on. And obviously, we don't have JWICS access. We
20 have this sort of bootleg TS system that has some limitations and
21 crashes a lot, but it imposes a lot of limitations on us.

22 Now what we know is that there is nothing in the CSRT that
23 is classified higher than Secret. And so that is a purely

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1 superficial obstacle that could have been resolved by better
2 classification guidance.

3 We also now know that there are two things, there are two
4 relatively discrete things in the CSRT that are classified. I
5 won't -- you know, I don't need to talk about any of them today, but
6 if we were in a closed session, I could tell you what those things
7 are in about 15 seconds.

8 You know, I timed myself in the office doing this. So it
9 would have taken someone from the intelligence community 15 seconds
10 to tell us six months ago what was classified in the CSRT.
11 Obviously, we can't have that because it would be very helpful to the
12 defense to know what that information is.

13 But what we have to do in the absence of that, and this
14 relates to the filing process that we went through and why this is
15 685C, not the original number when we thought it was filed or even
16 685, because we had to file a motion for leave to file this out of
17 time even though we thought we had already filed it.

18 We went through and, you know, certainly my initial listen
19 of the CSRT, and then when we produced the transcript with the
20 linguist that we had in-house, we realized pretty quickly that there
21 are things in the audio that are not in the transcript, the original
22 DoD-produced transcript. And I'll give you a good example that
23 raised some concerns for us.

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1 So there is a portion in there where Mr. al Nashiri talks
2 about having a ----

3 MJ [COL FITZGERALD]: Counsel, are these facts in your brief?

4 DC [LT SHAVER]: They are. They are in the transcripts.

5 MJ [COL FITZGERALD]: This example, because it seems like
6 you're telling me this is your translation and you're making yourself
7 a witness.

8 DC [LT SHAVER]: So they are in -- this is in both versions of
9 the transcript. Both the defense-produced transcript and the
10 FBI-produced transcript, the portion that I'm going to talk about.

11 And so I don't think that there is a factual dispute at this
12 point about the things that I'm going to talk about that are in this
13 transcript ----

14 MJ [COL FITZGERALD]: Very well.

15 DC [LT SHAVER]: ---- that are in the audio.

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

17 DC [LT SHAVER]: And so I'm referencing the audio
18 particularly.

19 This is also something that you would be able to hear if you
20 listened to it not knowing Arabic. It would be somewhat confusing
21 but you would hear the name that I'm about to talk about and you
22 would realize that there was an issue with the DoD transcript.

23 MJ [COL FITZGERALD]: Very well.

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1 DC [LT SHAVER]: Make sense?

2 So the example is that there is -- Mr. al Nashiri is
3 relaying a conversation that he had with Mukhtar, who is Khalid
4 Shaikh Mohammad, and says that Khalid Shaikh Mohammad had made some
5 sort of comment that appears to have been, you know, maybe joking
6 about killing Pervez, who we know from context is Pervez Musharraf,
7 the president at the time of Pakistan. And so, obviously, this is
8 something that I think the government would be very interesting.

9 The name Pervez does not appear anywhere in the DoD
10 transcript. And so when we're creating a more accurate transcript
11 and writing this motion, we realized that there are problems here,
12 but we don't know whether and how we can talk about them because
13 there's new information and we don't know, you know, necessarily the
14 classification of it.

15 Certainly, we can guess based on other things that we know.
16 We can try and reverse engineer portion markings for our own
17 documents so we, you know, have an opportunity to move forward. And
18 we always try and write things publically, available to the public in
19 an unclassified form whenever we can.

20 So what we did is we went through and, based on the
21 information that we had, we created portion markings for our
22 document. And there was -- out of an abundance of caution, we went
23 through and we had to try and figure out, without classification

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1 guidance, what the appropriate classification headings would be for
2 the different things that we were dealing with here.

3 And in so doing, we did make one mistake that created a
4 security issue in the filing of the original motion. We rectified
5 that mistake once it was caught, I believe, by the commission or the
6 CISOs. And then we sent in a new version without -- with that small
7 issue removed.

8 And we thought at that time, based on the e-mail traffic
9 that we had had, that the motion was filed in October on the original
10 due date.

11 We later found out -- or we were sort of told at the time
12 that the motion was filed, but that it was going to be reviewed in
13 walled-off review so we would be able to find out, you know, what the
14 actual classification was of everything in our motion and in our
15 attached transcript so we would be able to, you know, move forward
16 and litigate those issues.

17 We still have not gotten any response from walled-off
18 review. And so this was filed in October 20 -- or on October 20th, I
19 believe, or, you know, give or take a few days. And it has been at
20 walled-off review, and we haven't received anything back.

21 We have had conversations with the government now. They
22 proposed taking it out of walled-off review and putting it through
23 the normal review process, the process that they have access to,

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1 because everybody knows that their version of the process is much
2 quicker.

3 And so it sounds like we are now very close to having a
4 version of that available to us. But the fundamental issue that this
5 reveals is that -- we filed this in October. We still do not have
6 any kind of guidance on classification from the walled-off review
7 process. The government ----

8 MJ [COL FITZGERALD]: Based on something you submitted?

9 DC [LT SHAVER]: Yes, sir. So our original submission in
10 October.

11 The government was able to produce their transcript, which
12 they argue moots part of our arguments. They produced that
13 transcript in February and got classification review, and they were
14 able to send it over to us about a month later.

15 So, clearly, we are not on an equal playing field, and it
16 really creates consequences for the defense. It makes everything
17 that we do more difficult. And we end up in these situations where
18 we are waiting in a way that the government never has to.

19 So this is particularly significant in this argument. It's
20 always an obstacle for the defense, but here one of the key arguments
21 that the government makes in their response is the issues with the
22 transcript, that original DoD transcript that was produced in 2007,
23 there are numerous issues there.

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1 The government, you know, notified us that they intended to
2 present that transcript as evidence at trial, and so we identified
3 those problems. The government now argues that they have mooted our
4 arguments about the accuracy of the transcript by producing a more
5 accurate transcript.

6 And certainly I can imagine a universe in which we had filed
7 the motion, it was accepted on October 20th, and those deadlines
8 start ticking, where the government says, "Look, we can't give you a
9 response in two weeks. We need to time to check this transcript, to
10 go to the FBI, to have someone produce our own transcript." And I
11 imagine the commission very well may have granted that extension.

12 What actually happened here is the government used the
13 security review process, whether intentionally or not, to buy a
14 significant amount of additional time to respond to a complex motion.

15 And we are now here today -- and we have filed 685C as a TS
16 motion. We believe that there is nothing classified in that motion.
17 And I don't think the government can identify anything that's
18 classified in that motion. But it has been held up in security
19 review and it is -- now remains classified and not available to the
20 public, and there does not appear to be any classified information in
21 that motion, and it has given the government a tactical advantage.

22 So I think that is a problem. I'm not necessarily asking
23 for anything here. But it's important for the record ----

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1 MJ [COL FITZGERALD]: It sounds like you are. Otherwise, why
2 are you arguing it?

3 DC [LT SHAVER]: I think it's important for it to be on the
4 record, sir.

5 MJ [COL FITZGERALD]: Okay.

6 DC [LT SHAVER]: And the other issue with this is we have
7 been, I think, you know, fairly gently reprimanded for how we've
8 handled this. And we've had to file the Motion for Leave Out of
9 Time.

10 And from my perspective, the defense has been incredibly
11 diligent in handling classified information. We haven't done
12 anything wrong, and we are often told to use the walled-off review
13 process. And we know that it doesn't work. The government knows
14 that it doesn't work, because they're coming to us and they're
15 saying, "We know our process works better. Why don't you use our
16 process, because we know we're never going to get it out of
17 walled-off review."

18 We also -- while I was preparing for this argument, we got
19 an e-mail from one of the commission's court reporters asking if we
20 could submit some of our CMCR pleadings.

21 MJ [COL FITZGERALD]: So here's the thing: I think you're
22 making argument that there's no facts in the record. It's not in
23 your brief. So you can move to your brief.

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1 This isn't a complaint process. If you want to file for
2 relief, you should file for relief based on what you're attempting to
3 argue now so the government can respond to it. But now you're
4 talking about the court reporters, and I don't believe there's
5 anything in your brief about court reporters.

6 DC [LT SHAVER]: Understood, sir. I'll move on.

7 All right. So I will start talking about the CSRT and the
8 translation issues.

9 MJ [COL FITZGERALD]: Thank you.

10 DC [LT SHAVER]: I will narrow it there. Apologies, sir.

11 So getting into the substance of the motion, I will
12 certainly talk about the law, all of the details of the translation,
13 the specific language that is in the audio, that is in the various
14 transcripts that are available. But I think it's
15 important -- sometimes in this commission we get so focused on the
16 technicalities, we forget kind of about the big picture about some of
17 the things that happened here.

18 And particularly when you're talking about translation and
19 an accused's relationships with translators and whether or not those
20 translators are or are not engaged in an agency relationship with the
21 accused, it's important to go back and look at the experiences that
22 the accused has had, and I will be brief about this, but within U.S.
23 custody, and what role translators played over the course of that

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1 U.S. custody.

2 And so I would ask you, sir, to consider the position that
3 Mr. Al Nashiri was in, to put yourself in that position. I would ask
4 you to imagine that you've been captured by a foreign intelligence
5 service that has designated you as an enemy. They drag you around
6 the world for several years from dungeon to dungeon, torturing you in
7 various brutal ways.

8 Early on, you tell them pretty much everything you know.
9 You start making up new stuff. Based on hints that they are giving
10 you, you tell them things that you think they might be interested in.

11 Throughout this entire process, your torturers, many of whom
12 do not speak the same language as you. So they are relying on
13 translators throughout this process. These are translators that are
14 provided by that foreign government. They're there when you're
15 drowned on a waterboard. They're there when you're violated by
16 medical personnel. They are often participating in the worst things
17 that have ever happened to you. They are an integral part of the
18 process of torture.

19 And, obviously, throughout this process, you have no
20 meaningful choice about anything, certainly not the opportunity to
21 have the translator of your choice. You take whatever happens to you
22 because you have no alternative. That is the nature of the situation
23 that you're in.

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1 And then suddenly, after years of this, you're taken back to
2 what you knew as a black site on an island that you've been to
3 before, and you are told that this is somehow different. It is not
4 really apparent to you how. Some things are obviously different, but
5 you don't have any opportunity to talk to a lawyer or anyone you
6 trust or anyone that can explain to you how the black site is now
7 different, how circumstances have changed.

8 They start having you participate in interviews with
9 different people. And, obviously, you know when you go to these
10 interviews that these appear to be the same sort of people that have
11 been interrogating you for the last five years, and you know what you
12 have told these sorts of people before. That information is
13 certainly in the background.

14 And, again, as has been the case throughout your entire
15 experience, you are interacting with government translators who are
16 translating your words. You go -- you're told that you're going to
17 go in front of a military tribunal that will determine whether or not
18 you are an enemy combatant. You're provided with a representative
19 who is a military officer of the country that is detaining you.
20 You're told that that person is going to represent you.

21 You're given a translator. You are provided a translator by
22 the government that is detaining you. And this translator appears to
23 be the same or similar as all of the other translators that you have

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1 interacted with in U.S. custody. There is no obvious difference.
2 And, again, you have no meaningful choice about your personal
3 representative or the translator that you have been provided with.

4 You participate in this hearing, because it is the first
5 opportunity that you've had, after five years of custody, to be in
6 anything like a court, to pursue any sort of due process, to make any
7 sort of steps, you know, towards being released, towards freedom, or
8 to being able to present your side of events in front of a
9 potentially neutral arbiter.

10 Of course, you have no idea at this point this very well
11 could still be an intelligence operation. You don't know that this
12 is a legitimate thing. You've never talked to a lawyer. You don't
13 understand what's happening here, but you take what you can get
14 because it is the only thing that is available to you.

15 Now I'm going to start going to portions of the transcript.
16 And as I mentioned initially, I'll be using the government-produced
17 FBI transcript that they created in response to 685C, or the original
18 version of it. Obviously, we can't use our version because it still
19 hasn't come out of security review, but certainly we can all use the
20 FBI transcripts to have a common starting point.

21 And so going back to that example, I'm going to show you
22 some of the things that you might say if you were in that situation
23 where this was your first opportunity, after five years of being

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1 tortured and making statements under duress, where you think you may
2 have some sort of due process.

3 So first, I'm going to be going to page 16 of AE 685F.

4 MJ [COL FITZGERALD]: You're telling me the transcript is
5 AE 685F?

6 DC [LT SHAVER]: Yes, sir.

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

8 DC [LT SHAVER]: And so much of this is going to be covered,
9 the relationship of these statements -- are you ready, sir? Sorry.

10 MJ [COL FITZGERALD]: Stand by. I think you're fine.

11 DC [LT SHAVER]: Yes, sir.

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

13 MJ [COL FITZGERALD]: When you refer to the page number, can
14 you help me? Is it the document page number, the PDF page number?

15 DC [LT SHAVER]: Yes, sir. It's the document page number.

16 MJ [COL FITZGERALD]: Okay.

17 DC [LT SHAVER]: This was an attachment, so if it's the
18 AE page number, it's advanced a couple. But, yes, this is the
19 numbers that are marked on the page ----

20 MJ [COL FITZGERALD]: All right.

21 DC [LT SHAVER]: ---- that are from the document itself, sir.

22 MJ [COL FITZGERALD]: Thank you. You may continue. I
23 apologize for that.

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1 DC [LT SHAVER]: So one of the issues -- and this will mainly
2 be Ms. Manuele's to argue -- is that there are portions of
3 this -- and based on the ruling that we have in the footnote of 319,
4 I believe it's MMMM, the commission understood that there were
5 portions of the CSRT that are unavoidably derived from torture and
6 spontaneously made a ruling in a footnote suppressing portions of the
7 CSRT.

8 There are other portions that the defense believes should
9 also be suppressed under the same logic of that footnote in 319MMMM.
10 The problem as it relates to translation is that the commission,
11 necessarily, was relying on the DoD transcript that was produced of
12 the CSRT, which is not, from the defense's perspective and, I would
13 say, based on the government's transcript from the FBI's perspective,
14 a particularly accurate translation.

15 That muddles some of the issues because there are places
16 where Mr. al Nashiri or the members of the tribunal are referring to
17 statements that are -- that are clearly coming out of the black
18 sites, and Mr. al Nashiri's recitation of what he said in the black
19 sites.

20 A clearer translation makes this more apparent, and so I'm
21 just going to highlight some of those issues mainly from the
22 translation perspective, but obviously I do have to talk a little bit
23 about, you know, the substance and how it relates to torture.

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1 So going back to sort of the example and this premise of
2 what happens to Mr. al Nashiri, this is his first time to talk to any
3 sort of thing that looks like a court of law to him. And he knows
4 that he has confessed to all sorts of things, many of which are not
5 real. And he thinks at that point that this tribunal is going to be
6 considering those tortured statements.

7 And so he has to start there. The very first thing he says
8 is that he was tortured in confession and that he confessed to these
9 things and that they were not true. And so this is not suppressed in
10 the 319MMMM statement.

11 And this is not necessarily -- this is in English. This is
12 not necessarily an issue from a translation perspective, but it's
13 important to understand that this is where we're starting from. This
14 is the very first thing, real substantive thing that happens in the
15 CSRT from Mr. al Nashiri's position. And this is through the
16 personal representative.

17 There is a problem here, though, in that the CSRT sort of
18 proceeds from -- there's, you know, sort of the convening, there is
19 the president and the recorder explains some rights to Mr. al Nashiri
20 and what he is accused of. And then it goes into a portion where the
21 personal representative is presenting information on Mr. al Nashiri's
22 behalf.

23 And we know from the testimony of the personal

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1 representative, who was here last session and from other documents
2 that we've submitted in 685 and 680, that the personal representative
3 met with Mr. al Nashiri prior to the tribunal.

4 During those meetings, because the personal representative
5 speaks no Arabic and because Mr. al Nashiri speaks very limited
6 English, the two -- the personal representative and Mr. al Nashiri
7 are almost entirely reliant on the translator that is provided by the
8 government in generating the statements that the personal
9 representative is reading at the CSRT.

10 And we know it's the same translator that provides the
11 contemporaneous translation during the CSRT.

12 And I will get into, you know, details about the flaws in
13 that translator's translation, but all of those flaws are presumably
14 also present in the meetings with the personal representatives -- or
15 personal representative and Mr. al Nashiri.

16 So when the personal representative comes in and reads this
17 statement in English, it bears the signature ultimately of that
18 translator. And you can look at it. You could certainly read the
19 English portions. And there's nothing that is obviously egregiously
20 wrong. Some of the English is a little bit -- it's a little bit
21 wonky. It doesn't sound like a native speaker.

22 But ultimately the defense position would be that if the
23 translator is not capable of functioning at an adequate level during

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1 the hearing, he presumably was not also capable of functioning at an
2 adequate level in those meetings.

3 Certainly we don't have ----

4 MJ [COL FITZGERALD]: Where would I find a definition for
5 "adequate level"?

6 DC [LT SHAVER]: Yes, sir. So I can get into that, too, in
7 the law portion. But we have cited in our -- in the brief in 685,
8 there is a case Bihani. And this is the D.C. District Court. And
9 the ruling, which the defense is not relying on, was overturned for a
10 different reason.

11 What we used Bihani for is there is robust fact-finding on
12 what the qualifications for a translator would be in this sort of
13 hearing. It's a habeas case related to Guantanamo. So it's
14 operating on a lower standard probably than, you know, we would apply
15 here in a court. But it goes into the qualifications of linguists
16 that the FBI is sending to Guantanamo Bay.

17 And there is also some language from several other federal
18 cases, including Charles that's in the brief, that talks about why
19 accurate translation matters and some of the nuances of that. So
20 that's all in there, and I will certainly get there.

21 I want to move to another example now, sir.

22 **[Pause.]**

23 DC [LT SHAVER]: So this is later on. This is page 33 of that

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1 document, of that FBI transcript. This is later on. This is another
2 portion that has not been suppressed.

3 But what's happening here is Mr. al Nashiri is referring
4 back to his initial statement about things that he said while he was
5 being tortured. And so one of those is relating to the Limburg.

6 And, again, he is still -- he specifically goes back. And
7 in the middle of this page you can see, again he is referring to that
8 initial statement about the seven things he confessed to under
9 torture. And he says: I mean, these seven things are not only the
10 seven. There are many other things I said in the investigations.

11 And so there are sort of different problems in translation
12 that can exist that you see in these different documents. And this
13 is one thing in particular that is briefed specifically in our
14 motion, this word, "investigation" versus "interrogation."

15 In Arabic you can use the same word [**Speaking Arabic, no**
16 **translation.**] for either. And you have to know from the context
17 which you are talking about.

18 When it is translated, as it is here, as "investigations,"
19 we know from the facts of the case that Mr. al Nashiri never
20 participated in an investigation. He was in black sites. It's not
21 as if a law enforcement officer came and asked him questions until
22 2007.

23 And so when he's referring back to things that happened in

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1 black sites, that can only mean interrogation and it can only mean
2 black site detention. And so those are statements that would be
3 precluded by 949r.

4 The translation choice to translate that as "investigation"
5 instead of "interrogation," which our linguist did in the defense
6 version of this transcript, we have "interrogation" because it is
7 more accurate, that is a decision that ----

8 MJ [COL FITZGERALD]: More accurate by whose standards? It
9 seems we're getting a subjective here. Isn't an interrogation part
10 of an investigation? When you say he wasn't participating in
11 investigation -- if you're being questioned related to things that
12 have happened, isn't that an investigation which you're being
13 interrogated about? I'm worried we're going to get into a battle of
14 semantics.

15 DC [LT SHAVER]: Yes, sir. And I think ultimately that's ----

16 MJ [COL FITZGERALD]: And I'm not -- just to be clear, I'm not
17 saying you can't engage in a battle of semantics with the government,
18 but that would be a matter for the fact-finder ----

19 DC [LT SHAVER]: Yes, sir.

20 MJ [COL FITZGERALD]: ---- not a matter for the commission.

21 DC [LT SHAVER]: Agreed. And I think that the point that I'm
22 trying to make here is this is an example of a semantic difference
23 where the government has proposed -- there's a case called Apodaca

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1 that I can talk in more detail later, where it's proposed essentially
2 that the ideal solution is obviously that the two sides stipulate.

3 An alternative would be that the government presents a
4 transcript and the defense presents a transcript and the fact-finder
5 interprets that information. In Apodaca, the fundamental question is
6 whether a series of text messages that are sent between
7 co-conspirators in Spanish, sort of what the boundaries of presenting
8 that evidence to the government -- or I mean, to the jury should be.
9 And the dispute surrounds -- I think one of the examples is whether
10 or not the word that is -- literally means parakeet is a euphemism
11 for cocaine.

12 And so, you know, the defense will say that it means
13 parakeet. The government will say that it means cocaine. And the
14 government has a witness who is a Spanish professor from a university
15 who is providing their translations and is providing, I think,
16 affidavits about the translation issues there.

17 And so this is a case -- the translation of "interrogation"
18 versus "investigation," I think technically "interrogation" is more
19 accurate, but that is that kind of semantic issue where you might
20 have testimony from experts or present different versions of the
21 translation to the panel members and let the fact-finder decide.

22 That is a semantic distinction where there is -- you know,
23 there's some wiggle room. There's room for argument. There's room

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1 for both sides to present their version of things and let the
2 fact-finder decide.

3 There are other things here -- and I'm going to continue to
4 go through examples -- that are not mere semantic differences. And
5 that's why -- and, you know, one of the reasons I'm happy to use the
6 FBI version is the FBI version is very similar to the version that
7 the MCDO linguist produced. There are many things that we agree on
8 where the translator has made misrepresentations about what
9 Mr. al Nashiri said. And so there are those two categories of
10 translation sort of disputes.

11 So there is, you know, this sort of Apodaca case or this
12 interrogation versus investigation situation where there is a
13 reasonable dispute and the government can say, you know, at least in
14 good faith that they think that that's what is being said here.

15 There is another category -- because the government says in
16 their motion that they think that the problems in translation that
17 have been identified by the defense are merely semantic. I will get
18 to the examples, because it's really something that I can only show
19 you and present the evidence. But there are many cases where it is
20 not mere semantics. And so I'm just highlighting that interrogation
21 versus investigation thing as a baseline because that is sort of a
22 gray area. I will get to the things that I think are more black and
23 white, sir.

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1 MJ [COL FITZGERALD]: Thank you.

2 **[Pause.]**

3 DC [LT SHAVER]: So I'm going to talk about a couple examples
4 here. And these are statements from the translator to Mr. al Nashiri
5 that are reflected in this FBI transcript that are very difficult to
6 understand. And so I'll show you exactly what I'm talking about
7 here, sir.

8 So I'm talking specifically here about this statement from
9 the president where the president of the tribunal says: Al Nashiri,
10 there are a few things I would like to speak to you about now
11 regarding your allegations of torture.

12 What that gets translated as is: Al Nashiri, now I would
13 like to speak to you about a few things
14 to -- regarding -- in -- you -- the -- your torture -- yours.

15 That's said in Arabic, but this is the translation provided
16 by the government of what the translator said at the time.

17 I don't really know what the translator is saying there.
18 It's just sort of nonsense. Obviously, from the context people are
19 sort of able to figure out what's going on and respond to these
20 questions. But these are the sorts of issues that, one, indicate the
21 level that the translator is functioning at, but also the
22 irresolvable problem that is included in this transcript in the audio
23 that a new translation cannot fix.

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1 To the extent that the CSRT reflects translations -- or I
2 mean, reflects communication between the members and Mr. al Nashiri,
3 you know, the law talks about a translator in some cases as a mere
4 conduit. This is the conduit. What is going through that conduit is
5 you have a completely coherent sentence going in in English and then
6 a completely incoherent sentence coming out in Arabic.

7 MJ [COL FITZGERALD]: That example, that question just seems
8 to be a headline question, right? It's not a question that
9 Mr. Nashiri needed to respond to.

10 DC [LT SHAVER]: Yes, sir. There will be ----

11 MJ [COL FITZGERALD]: The next question further contextualizes
12 it, and then Mr. Nashiri answers the second question. So it appears
13 from that response that Mr. Nashiri understood both the headline and
14 the question, or at least had the right frame of mind to be able to
15 answer the second question.

16 DC [LT SHAVER]: Yes, sir. In that case, I would agree with
17 that assessment.

18 MJ [COL FITZGERALD]: So, again, it seems like semantics
19 again, or not a mistranslation of importance. Because there was no
20 question asked of -- in that. I would perhaps agree if there was a
21 question to Mr. Nashiri, so now we don't know what -- if he responded
22 accurately to the question because he didn't hear the question
23 accurately.

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1 But that doesn't seem to be an example of anything more than
2 difficulties in translation. But how does that go to adequacy?
3 Because the conversation seems to be understood by both parties
4 through the translator.

5 DC [LT SHAVER]: Yes, sir. I think it's certainly evidence of
6 the struggles that the translator is having in performing his task.
7 The next example that I will show you right now is more
8 consequential.

9 MJ [COL FITZGERALD]: Okay.

10 DC [LT SHAVER]: I think that one is -- frankly, it's useful
11 because it shows that it's not a particularly complex or lengthy
12 statement that the translator is translating and he still is very
13 clearly struggling to render it in the target language there. But
14 I'll show you another example, sir.

15 MJ [COL FITZGERALD]: Thank you.

16 **[Pause.]**

17 DC [LT SHAVER]: All right. So now going down to the middle
18 of this page 32 from that transcript, the president says to
19 Mr. al Nashiri: Is what you said following the treatment you said
20 you received incomplete or untrue in any way?

21 The translator asked for a clarification. He says: Uh,
22 please, uh, if you can repeat what you just said, please.

23 The president repeats: Certainly. The seven things that

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1 you said following the treatment, are they incomplete or untrue in
2 any way?

3 The translator then says: The things that you said after
4 number 7, this? Are they complete, I mean? And things -- uh, or
5 would you like, uh, that they are -- they are incomplete.

6 Mr. al Nashiri responds to that very confusing question:
7 These are the things that -- I mean, um, in brief -- I mean, if you
8 have anything you want me to explain, I'm willing to do so.

9 The translator renders that as: In summary, that's, uh,
10 that's what happened. But if you have any questions for him, he can
11 answer them and, uh, in more detail.

12 And so, again, as in the last example, you see a relatively
13 simple question that the president repeats to make sure that the
14 translator understands it, rendered in ultimately an -- into an
15 unintelligible question in Arabic.

16 Abd al Rahim appears to be confused because it is a very
17 confusing question. It's very difficult to tell what the translator
18 is asking on behalf of the president there. And so Mr. al Nashiri
19 provides a somewhat confusing response. And then the translator
20 appears to clean up some of that confusion in translating it back
21 into English.

22 And so this is not necessarily -- again, is not, you
23 know -- this particular translation is not enormously consequential,

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1 but it is somewhat confusing. And it's confusing from the
2 perspective of the commission, because if we are going to go through
3 and try and figure out exactly which statements are related to
4 torture and which ones aren't, the situations like this where they
5 are having a conversation about the relationship of statements to
6 torture when that -- when that conversation is muddled in translation
7 and then is produced in a transcript in a way that hides that
8 confusion, it makes it difficult for the commission to make
9 appropriate decisions about what is and isn't derived from torture.

10 And like I said, I will continue going through more and more
11 substantive translation errors, but this is a perfect example of
12 where that communication between the members of the tribunal and
13 Mr. al Nashiri breaks down.

14 And so I'm going to continue on through more examples.

15 And so this is really -- what I've done so far is mostly
16 introductory in terms of setting the terms of what's happens here and
17 giving you some examples of what this faulty translation looks like.
18 But, obviously, the reason why we are here is because the government
19 is seeking to admit or present at trial some version of the CSRT as
20 substantive evidence. They believe that it is relevant because it
21 will help the fact-finder in making a determination about some sort
22 of fact that is at issue before the tribunal.

23 They haven't necessarily advanced that argument, but I want

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1 to go through now some of the things that I think make this document
2 relevant from the perspective of the government, why they think that
3 it should be admitted and why they're seeking to present it to the
4 members.

5 And so I'll get into the examples next. But these -- some
6 of the issues that I think the government is interested in is there's
7 significant discussion in this document or during the CSRT about
8 whether or not Mr. al Nashiri was trying to engage in some sort of
9 legitimate business relating to the fishing industry. And I will
10 show you translations that present that in a light that is less
11 favorable to Mr. al Nashiri than what his words actually were at the
12 time.

13 There is also a range of things that would potentially bear
14 on whether or not Mr. al Nashiri sort of -- what he did and did not
15 know about what some of his associates were doing, whether or not,
16 you know, potentially he thought he was engaging in some sort of
17 hostilities. And so I will certainly talk about those things as I go
18 through here.

19 There is mention of the Sagger missile smuggling plot in
20 Saudi Arabia. There is a discussion of that, again, with substantive
21 translation errors.

22 There is this question of whether or not Mr. al Nashiri
23 carried a weapon in Afghanistan. And the translation, again, is, you

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1 know, certainly favorable to the government and not accurate.

2 There is a significant discussion of what relationship
3 Mr. al Nashiri had with Usama bin Laden and who was saying what to
4 who at certain times. And there are mistranslations that present
5 that in a light that is prejudicial to Mr. al Nashiri.

6 There is also a dialogue where Mr. al Nashiri is discussing
7 the torture that he was subjected to in the black sites. And there
8 is a pattern, a very discernible pattern of mistranslation where the
9 translator, in a quantifiable way, is mistranslating in a way that
10 diminishes the severity of the torture. And I think that's very much
11 something that is going to be a live issue at trial that the
12 government is going to want to make arguments about.

13 And then the last issue that I'll highlight in a couple of
14 places is there are several places that I haven't even talked about
15 yet where there are parts of the transcript that have not been
16 suppressed by the commission where there are questions that are being
17 asked that are referring back to the portion of the transcript that
18 has been suppressed. And it's somewhat confusing because of just the
19 general confusing nature of the CSRT transcript. But I will
20 highlight those as well. So I'm going to go through those things in
21 order and show you those examples.

22 That first category I mentioned is, you know, whether or not
23 Mr. al Nashiri was engaged in a legitimate fishing business or some

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1 kind of other legitimate commercial operation. And so we'll just
2 look at a few of those translations. I've got four examples that I
3 want to use here.

4 **[Pause.]**

5 DC [LT SHAVER]: And I will admit up front that this
6 is -- this is -- you know, I think that there are potentially
7 arguments about this being a semantic distinction in this particular
8 example, but I'll explain that in a second. We'll start with the
9 example.

10 So what Mr. al Nashiri actually says -- and this is down
11 towards the bottom -- is: I stayed in Yemen with the intention of
12 starting a business, but...

13 What the translator renders that as is: Okay. I was in
14 Yemen to -- uh -- to -- to-- uh -- to be involved in a project.

15 And certainly that is a semantic difference, but when we
16 read those sentences side by side, the first one sounds like someone
17 saying exactly what is written there.

18 The version rendered by the translator, switching "starting
19 a business" to be "involved in a project," makes that sound much more
20 suspicious. And when you add that to all of the pauses -- I mean,
21 certainly all of us certainly as attorneys are used to, you know,
22 interacting with witnesses or clients, you know, and are familiar
23 with the ways of the world. And I think it makes our antenna perk up

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1 a little bit when we see someone who is stuttering and when they're,
2 you know, providing answers in language that is ambiguous and
3 evasive.

4 So what you see coming out of Mr. al Nashiri's mouth is
5 fairly straightforward. What you see coming out of the translator's
6 mouth presented to the members of the tribunal and, if the government
7 were to have its way, to the panel members in this commission at
8 trial, certainly the version rendered by the translator is much more
9 suspicious.

10 And I'm going to go through more examples of this sort of
11 problem, but this is a government agent ----

12 MJ [COL FITZGERALD]: Help me envision the way you think the
13 government could use it for that purpose. I mean, wouldn't they see
14 the translation that we're talking about?

15 DC [LT SHAVER]: So they may. The problem is is that there
16 are various ways that this could plausibly be presented to the member
17 panel.

18 MJ [COL FITZGERALD]: Do you think the government's going to
19 just simply say, "We want you to pay attention where Mr. Nashiri said
20 he was there in Yemen to start a project," and use it to create some
21 nefarious mode of or intent where you don't get, under rule of
22 completeness or something else, an opportunity to exposure that even
23 if they tried it?

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1 DC [LT SHAVER]: Well, I think the broader problem here, sir,
2 is that the government is going to present information that is
3 inaccurate. I think that this is a somewhat misleading response.

4 MJ [COL FITZGERALD]: But they're going to get the whole
5 translation, correct? I mean, they're going to see this, what you're
6 showing me. They're not going to get the "project" statement.
7 They're going to get the question asked, the answer given, all that.
8 So I guess I don't understand the challenge here.

9 DC [LT SHAVER]: I ----

10 MJ [COL FITZGERALD]: That warrants suppression, that warrants
11 you can't use this. I mean, this is going to -- a lot of things are
12 going to get lost in translation or mistranslated. So how is this
13 not something that just -- the fact-finder has to sort out through
14 the adversarial process?

15 DC [LT SHAVER]: Yes, sir. And I think the distinction
16 is -- so we go back to that Apodaca example or the distinction
17 between "interrogation" and "investigation."

18 In that case, I think the fact-finders, you know, they can
19 look at the context. They can say, okay, well, you know, he's
20 talking about conversations with intelligence officers, so that's
21 interrogation. It's not law enforcement. It's not -- you know,
22 there are sort of facts that we can argue here.

23 There is no good-faith argument here that what the

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1 translator is saying is a reasonable substitute for what Mr. Nashiri
2 is saying, that it has the same -- that it would have the same weight
3 in front of a panel.

4 The problem is is that in any way that the government
5 presents this information -- so we imagine maybe they play the audio
6 for the members. And they may have contemporaneous translation. But
7 what is actually being said at the time is sort of hidden behind this
8 veil of Arabic. They will hear potentially what the translator is
9 saying. They will hear the translations, the translation that is
10 being provided at the time. And then the government -- the
11 government will have that out there.

12 The defense is then in the position of rebutting what is
13 essentially a falsehood. And so it's not a question of offering
14 good-faith translations ----

15 MJ [COL FITZGERALD]: What's the falsehood?

16 DC [LT SHAVER]: Essentially that this is what Mr. al Nashiri
17 said.

18 MJ [COL FITZGERALD]: But what's the falsity of that?

19 DC [LT SHAVER]: The falsity of that is that it's -- I mean,
20 this is the FBI's own translation. Those are different sentences
21 with different weight.

22 MJ [COL FITZGERALD]: And, again, this seems like semantic,
23 right? A business can't be a project? A project can't be a

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1 business? What's the -- what makes it false?

2 DC [LT SHAVER]: I suppose in this case, misleading is a
3 better description. It is certainly a more suspicious statement.

4 MJ [COL FITZGERALD]: It can be inferred as that, but you're
5 saying it should be implied as that, right? Do we believe the
6 interpreter is doing this with malice or bad intent or recklessness?
7 Or is this just a matter of translating words?

8 DC [LT SHAVER]: I think, sir, that if any of us were in the
9 position that Mr. al Nashiri was in, we would have problems with
10 being -- with having our words translated this way. It certainly
11 gives a different impression of what was happening here, particularly
12 in light of the other facts that are going to be revealed at trial.

13 Certainly, we know that this trial is about the COLE
14 bombing, which certainly could be included within the interpretation
15 of, "I was in Yemen to be involved in a project," whereas the
16 intention of starting a business is a very different statement.

17 MJ [COL FITZGERALD]: Thank you.

18 **[Pause.]**

19 DC [LT SHAVER]: And, sir, this is a sort of similar
20 situation. And so I will understand if this feels like another
21 semantic difference. I'll talk about it and then I'll move on
22 quickly to the next example.

23 The part that I want to talk about here is down towards the

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1 bottom where Mr. al Nashiri says: And Rub'i is a fisherman
2 originally.

3 The translator renders that as Rub'i is
4 basic -- is -- is -- is -- is basically a fisherman.

5 And certainly, so if we are talking about someone who is an
6 alleged co-conspirator in some sort of crime, and the panel members
7 are looking at that with some skepticism, those are two very
8 different things.

9 Again, this may be viewed as a merely semantic difference,
10 but I don't think any of us would be satisfied with being translated
11 in this particular way. And I don't think that we can seriously say
12 the panel members would view those two statements equally in terms of
13 their credibility or in terms of whether or not, you know, this is
14 actually about fishing. It's just a very suspicious response in the
15 way that it's translated.

16 **[Pause.]**

17 DC [LT SHAVER]: Here's another example. This is starting
18 from sort of the middle of the page where Mr. al Nashiri says: I
19 wanted, um, my friend whose name was Badr in Pakistan, translated as:
20 I had a friend named Badr in Pakistan.

21 Mr. al Nashiri then says: So I mean, I -- we had a fishing
22 business in Pakistan. We wanted to start fishing and get married and
23 so on and to sort out our affairs.

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1 That is translated as: So we had a fishing project in
2 Pakistan.

3 Those last two statements, Mr. al Nashiri's statement and
4 then what the translator says, I want to focus in on those. So,
5 obviously, there is a substantive difference. There is significantly
6 more information in what Mr. al Nashiri says than what is actually
7 rendered in translation. That context is critically important.

8 I would say, you know, when you read the CSRT in the
9 original DoD transcript, it is -- frankly, it's reasonable to think
10 that fishing is some sort of cover for some sort of other activities
11 because it is consistently rendered in these ways. And when you take
12 away the context, you know, taking these things together, when you
13 take things out like this broader plan that I was trying to start a
14 fishing business because I wanted to, you know, get my life together,
15 I wanted to get married, and you render that as just "so we had a
16 fishing project in Pakistan," I think that the government's position
17 may be that fishing is always a cover. And that may be a product of
18 mistranslation as we see in this case.

19 It just lends it a very different light when you look at how
20 the translator represents it and you compare it to what
21 Mr. al Nashiri actually said.

22 And so as I started with here, the fact that is in dispute
23 here is what is the potential legitimacy of that business? And this

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1 is another example where it is subtle, but this is now the fourth
2 example where there is a difference in the statement -- I think the
3 third example in this series -- where there's a difference between
4 what is said and what is translated. And they certainly build on
5 each other, sir.

6 I have one more related to fishing, and then I'll move on to
7 the next, kind of, subheading here, sir.

8 **[Pause.]**

9 DC [LT SHAVER]: So this is page 107 of that same transcript.
10 And I'm just going here to the last two lines. There's more kind of
11 about the fishing here. And there's part of it that I'll come back
12 to as well.

13 But these bottom two lines where Mr. al Nashiri says: There
14 was no business. I mean, the business was completely ruined.
15 Commercially it was no longer viable, I mean.

16 That is rendered by the translator as: The project
17 dissolved.

18 And so, again, if we -- you know, if we put ourselves in the
19 position of the panel members and we are wondering whether or not
20 Mr. al Nashiri is engaged in a legitimate fishing business, those two
21 things read very, very differently. What Mr. al Nashiri says sounds
22 like someone who might be engaged in a legitimate fishing business
23 who's thinking about whether or not things are commercially viable.

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1 The translation that is rendered contains none of that
2 nuance and adds to this kind of air of suspicion around the idea of a
3 fishing business.

4 The next set of issues I want to talk about are sort of, you
5 know, whether or not Mr. al Nashiri was engaged in some sort of
6 hostilities. And certainly this doesn't map, you know, exactly on
7 the elements that are in the charge sheet, but I think that these are
8 all things that would be relevant to at least some of the panel
9 members' determination.

10 The first example I'm going to talk about is on page 98.

11 **[Pause.]**

12 DC [LT SHAVER]: And so I'm going here to the middle of this
13 page where the member asks: Were you aware of Usama bin Laden's
14 declaration of war against the United States when you first met with
15 him?

16 That is translated not quite accurately, but it's translated
17 as: Were you aware of Usama bin Laden's declaration of war?

18 So the translator removes the context, the timing of -- that
19 the member is qualifying that statement with. That never gets
20 translated, which is a problem.

21 I'm certainly more concerned about the next part where
22 Mr. al Nashiri says: What declaration? What is the declaration?

23 That is translated as: Uh, wh -- uh -- which one are you

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1 talking about? Usama bin Laden -- uh -- a declaration -- uh -- of
2 war? Which one are you talking about?

3 And so I want to explain this a little bit because it is a
4 word in Arabic that can be translated as either "what" or "which."

5 Here, because of the context, the accurate translation as
6 identified by this FBI linguist is "what declaration?" Particularly
7 with the sort of illuminating following clause.

8 That is consequential given the facts that we know will be
9 presented at trial. There are, I believe, two fatwas that were
10 issued, so these declarations by Usama bin Laden of a war against the
11 United States. There is, as the member says, I think there's one in
12 1993 and one in 1996. I'm not sure that's exactly right, but there's
13 a finite number of these declarations of war that are issued by Usama
14 bin Laden.

15 And so I'm going to give you an example, sir. So we are,
16 you know, mostly military lawyers in this room. I think most of us
17 are familiar with the two authorizations for the use of military
18 force that the Congress passed during the GWOT. There's the 2001
19 AUMF, the 2002 AUMF.

20 And so if I ask someone a question, I say, you know, "Are
21 you aware of the AUMF? Or do you know about the AUMF?" And they
22 say, "Which AUMF?" That tells me something.

23 I take that to mean that they are asking -- that they know

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1 about both the 2001 and the 2002 AUMF. They have more information
2 about that and they know exactly what I'm asking. And so I take that
3 as ultimately yes. Yes, they are aware of that.

4 We have the same sort of problem here where the members will
5 know that there are these two declarations that exist. And so it's
6 the same sort of problem. If you translate that as "which," that
7 suggests that Mr. al Nashiri does know about not just the '93
8 declaration, but the '96. Or that there is a level of specificity
9 and knowledge that is not there in his original response.

10 And so it is semantic, certainly, that distinction between
11 what and which, but it is hugely consequential and it will
12 potentially make a difference in front of the members.

13 And this -- the translation of "which," you can see that
14 from the FBI linguist's perspective, because they have translated as
15 "What declaration? What is the declaration?" that that is an
16 inaccurate translation.

17 The next section, I've got a couple examples where there are
18 portions of the CSRT where the panel members are broadly asking
19 Mr. al Nashiri about his sort of political perspective. And so I
20 want to highlight some of the mistranslations there.

21 **[Pause.]**

22 DC [LT SHAVER]: And this is a relatively minor one. I'll be
23 quick here. It is substantive. But down there at the bottom,

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1 Mr. al Nashiri says: Because we -- I think you should not intervene.
2 Why do you interfere using your weapons and your troops in the Gulf?

3 That's translated as: Why do you -- uh -- interfere in the
4 Gulf with all your weapons?

5 And certainly there is a substantive difference in those
6 translations because one of those is, you know, interfering in the
7 Gulf with all your weapons. I'm not entirely sure what that means,
8 but troops in the Gulf is a very different situation. It's talking
9 about the stationing of U.S. troops in Saudi Arabia. That nuance is
10 completely lost in the translation.

11 And I think, again, if any of us were in this position, if
12 we were talking about, you know, some foreign nation that we thought
13 was, you know, inappropriately occupying, you know, our homeland or
14 something like that -- you know, if China was stationing troops in
15 California and I was upset about that, I would want that to be, you
16 know, translated actually. But, again, this is a minor example, sir.
17 I'll keep moving.

18 **[Pause.]**

19 DC [LT SHAVER]: So this one -- I'm going to start, this is
20 the very top line in the translation where Mr. al Nashiri says:
21 People strongly demand that you get out of -- of -- of -- of their
22 lands.

23 And so this, you know, relates back to the prior

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1 translation.

2 But then the translator translates that as: The people are
3 asking by force for the people to leave their land.

4 And so, obviously, we are in a terrorism trial. We are
5 talking about using violence for political ends. And when a
6 translator has taken what is a fairly legitimate political demand,
7 and then added to that, changing "strongly demand" to "by force,"
8 that certainly suggests something different than is in the original
9 statement.

10 **[Pause.]**

11 DC [LT SHAVER]: This is somewhat similar. There is -- at
12 several points in the CSRT there is references to Saddam Hussein as
13 sort of a stand-in for an authoritarian government. I would say here
14 this is one of the things that is most worth comparing or, at least
15 to me, most amusing about comparing the DoD version to what is
16 actually said, because this comes out as sort of gibberish in the DoD
17 transcript.

18 But the part that I want to focus on for the purposes here
19 is the middle of the page where Mr. al Nashiri says -- and he's
20 talking about -- well, I'll -- what he's saying is that we don't just
21 have one Saddam in the Gulf, that there's not just one dictator in
22 Saudi Arabia, that there are many dictators is what he's attempting
23 to convey.

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1 But what he says in the middle there is: There are many
2 ones like Saddam here in the Gulf. We want to get rid of them and
3 establish -- um -- a government which would guarantee people their
4 rights.

5 I think that's something that a lot of us would be
6 sympathetic with.

7 What the translator says is: We need to get rid of people
8 who are like Saddam in the Gulf and -- and let the people live, live
9 their lives.

10 And it's a minor difference, certainly, but when, you know,
11 the panel members are deciding whether or not someone should live and
12 die, the coherence of their political beliefs may be an issue.

13 Moving on now, sir. I mentioned -- and I'll talk now about
14 the question of the Sagger missiles that the government has sought to
15 admit as evidence, sort of a report based on the Sagger missiles.
16 But there is some discussion of it in the CSRT as well that I want to
17 talk about now.

18 **[Pause.]**

19 DC [LT SHAVER]: And so to clarify the issue here, there is
20 this incident of someone, not Mr. al Nashiri, being accused by the
21 Saudi government of smuggling missiles into Saudi Arabia. The Saudi
22 government seems to think that Mr. al Nashiri is involved in that.

23 And so he is explaining here that that's why he left

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1 Saudi Arabia and why he was, you know, functionally sort of stateless
2 at the time. But the part that I want to zoom in on is down in the
3 bottom half of the page. So I'll just kind of read through this.

4 Mr. al Nashiri, starting from the middle, says: That was
5 the problem that made me travel and never come back. I wanted ----

6 "UI" is unintelligible here.

7 And then he says: I had many business ideas, I mean.

8 The translator says: That's the incident. That's the
9 incident. That's the incident that made me leave and -- uh -- never
10 go back.

11 Mr. al Nashiri says: It made me go to Afghanistan to look
12 for a place.

13 Then unintelligible.

14 The translator says: Uh -- that incident made me go to
15 Afghanistan to look -- or and look for -- uh -- things.

16 Mr. al Nashiri then says: I didn't want to be imprisoned in
17 Saudi or Yemen ----

18 The translator says: I don't want to go.

19 Mr. al Nashiri says: ---- for 20 years without any
20 investigation.

21 Translator says: I don't want to go to Saudi Arabia and
22 Yemen and be in prison for 20 years.

23 The distinction between those last two lines that I want to

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1 highlight is it's one thing if you are guilty of something, which I
2 suspect the panel members may think that he is, it's one thing to say
3 that I don't want to be imprisoned in Saudi or Yemen for 20 years,
4 right? That may suggest that you did what you're accused of and that
5 what you're concerned about is avoiding punishment.

6 It's very different to say I don't want to go to
7 Saudi Arabia and Yemen and be in prison for 20 years without any
8 investigation.

9 The fundamental difference is that the objection is to being
10 imprisoned without any sort of due process. And it's a critique of
11 the regime in Saudi Arabia. And that's completely lost in the
12 translation rendered by the government's translator.

13 **[Pause.]**

14 DC [LT SHAVER]: And so this example here on 106, I suspect
15 that this is a question asked by the president that goes towards
16 establishing, you know, whether or not Mr. al Nashiri was a
17 combatant.

18 But what the president asks is: Were you -- uh -- did you
19 have a weapon when you were in Afghanistan?

20 Translator says: You had a weapon when you were in
21 Afghanistan?

22 Mr. al Nashiri says: In Afghanistan, yes. All people are
23 armed. They walk while carrying arms.

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1 The translator says: In Afghanistan, everybody had weapons.

2 Mr. al Nashiri says: A weapon is a must because I rented a
3 house.

4 The translator says: I -- you -- I -- I -- I rented
5 how -- because I was renting a house and I was sitting there.

6 I think, again, you know, knowing our ways of the world,
7 Mr. al Nashiri is saying that Afghanistan is a dangerous country and
8 I carried a weapon to defend myself and to defend my belongings
9 because I was renting a house.

10 I don't know that that's really conveyed by what the
11 translator is saying here, or it's certainly not conveyed as clearly
12 as it ought to be.

13 Now I'm going to move on to a series of examples related to
14 Mr. al Nashiri's relationship to Usama bin Laden and some of the
15 other, you know, militant figures in this case.

16 So I'm going to go first to page 82.

17 **[Pause.]**

18 DC [LT SHAVER]: And so this is -- this is about the question
19 of bayat or pledging allegiance to bin Laden, which I know will be an
20 issue in this commission and has already been an issue in some
21 pretrial motions. So I'm going to go through this.

22 Starting from near the top where the member asks: When you
23 met Usama bin Laden, did you swear allegiance to him or al Qaeda?

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1 That is rendered by the translator as: When you were
2 in -- when you -- uh -- met Usama bin Laden, did
3 you -- uh -- uh -- take the -- uh -- uh -- the oath that you would
4 help him and help al Qaeda?

5 So, one, that's not very clear. It's not really the same
6 question, although that's not my primary focus here.

7 What follows is actually a short conversation between
8 Mr. al Nashiri and the translator clarifying some things.

9 Mr. al Nashiri says: Ha, they call it "allegiance." And he
10 uses the particular word in Arabic.

11 The translator repeats that word, "allegiance."

12 Mr. al Nashiri says: Do you understand?

13 The translator says: Yeah.

14 And then the detainee says -- or Mr. al Nashiri says: No,
15 no, no.

16 And, I guess, makes a lip smack.

17 And so, you know, none of that is rendered in the original
18 transcript because all of this is kind of behind the veil of Arabic.
19 But there is a conversation there.

20 The next part is what I'm really interested in, where the
21 translator says: No, no, he didn't. He didn't -- uh -- allege -- he
22 didn't take the pledge of allegiance to Usama bin Laden.

23 And this is the critical line here.

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1 Mr. al Nashiri says: I was against this matter in the first
2 place, I mean.

3 The translator says: I rejected
4 this -- uh -- this -- uh -- this subject in the beginning.

5 The reason I want to highlight this is those are two
6 fundamentally different answers that will lead to very different
7 conclusions on the part of someone that's paying close -- paying
8 close attention to the language here.

9 So, for example, if someone asked me if I am part of a
10 terrorist organization, I -- and I respond, you know, "I was against
11 this matter in the first place. You know, I don't -- I don't support
12 that organization," and someone translates that as, "Oh, well, he was
13 against it in the beginning," that leads to certainly a different
14 conclusion. One is a rejection, and the other one is I rejected it
15 initially, which implies that at some point I accepted it.

16 So there is a real fundamental difference there, and I think
17 that this is an issue that will be very important at trial and is a
18 contested issue. And the government translator's representation of
19 it leads to a wildly different conclusion than what was actually
20 said.

21 MJ [COL FITZGERALD]: Lieutenant Shaver, would you mind if we
22 took a recess? We've been going about an hour and a half. Maybe you
23 don't need it but other folks might, so -- and give you a chance to

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1 reset.

2 DC [LT SHAVER]: Yes, sir. You know how it is when you get up
3 here, you just kind of plow ahead.

4 MJ [COL FITZGERALD]: You're doing fine. I appreciate it
5 but ----

6 DC [LT SHAVER]: Yes, sir.

7 MJ [COL FITZGERALD]: ---- I hate to interrupt your flow.

8 DC [LT SHAVER]: No, no, no. No, I'm ready.

9 MJ [COL FITZGERALD]: Commission is in recess until 1040.

10 **[The R.M.C. 803 session recessed at 1027, 21 April 2026.]**

11 **[The R.M.C. 803 session was called to order at 1043, 21 April 2026.]**

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

13 All parties present before the last recess are again
14 present. Mr. Nashiri has left the courtroom and is attending from
15 the alternate site. Is that accurate, Ms. Miller?

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

17 MJ [COL FITZGERALD]: Thank you.

18 Lieutenant Shaver, you may proceed.

19 DC [LT SHAVER]: Thank you, sir. And anytime anybody needs a
20 break, I will never be offended ----

21 MJ [COL FITZGERALD]: No, you're fine.

22 DC [LT SHAVER]: ---- to be interrupted for that. I know this
23 first morning session's always tough, too.

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1 Okay. So I ended talking on the idea of whether or not
2 Mr. al Nashiri had pled allegiance to al Qaeda or to bin Laden, that
3 bayat issue on page 82.

4 I'm going to move now to what is, you know, maybe the most
5 significant sort of issue that's in this CSRT, which are
6 conversations between Mr. al Nashiri and Usama bin Laden and kind of
7 who said what.

8 And so I'm going to go first to pages 50 to 51.

9 **[Pause.]**

10 DC [LT SHAVER]: And so this comes from a portion of the
11 transcript that I believe is in the portion that's already been
12 suppressed, but this comes up, this sort of same issue, again later
13 in a question for the members. So I think it remains relevant even
14 if this is suppressed.

15 But I'm going to the bottom line here and then on to the
16 next page. And so this is relaying a discussion about
17 Mr. al Nashiri's business project in Dubai and whether or not it
18 could be used for some sort of military operation.

19 What Mr. al Nashiri says -- and this is the bottom
20 line -- he says: And -- um -- then -- uh -- in the end -- in the
21 end -- uh -- Usama bin Laden told me we might use these things
22 militarily, I mean.

23 So moving on to that next page, what the translator

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1 says -- and so remember on that last page, this is something -- he's
2 referring to something that Usama bin Laden says to Mr. al Nashiri.

3 What the translator says is: And -- uh -- at the end, Usama
4 bin Laden asked him if I can -- uh -- if I -- if -- if he
5 can -- uh -- use those things in uh -- in uh -- in a military
6 actions.

7 And so what is concerning to the defense here is we're
8 talking about a statement from Usama bin Laden. And when you look at
9 the DoD-produced transcript, it ends up being attributed to
10 Mr. al Nashiri. Where it shows up as Mr. al Nashiri in that DoD
11 transcript suggesting to Usama bin Laden that they use the ship in a
12 military operation.

13 And that's a result, really, of what the translator is
14 saying here. The translator, you know, struggles with identifying
15 the correct subject pronoun and subject verb agreement throughout the
16 recording, but here is a place where it's quite consequential.

17 It really does matter, I think, from the perspective of the
18 ultimate fact-finder, you know, whether this idea comes
19 from -- whether it's proposed, you know, from Usama bin Laden that
20 there is this legitimate business that Mr. al Nashiri is trying to
21 engage in and Usama bin Laden says, "Hey, can we use, you know, the
22 boat that you're using for your business for a military attack?"
23 Versus Mr. al Nashiri having this boat and going to Usama bin Laden

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1 and say, "Hey, we could use this in a military attack."

2 I think that's something that would certainly be relevant at
3 trial. And the translation provided by the government here by that
4 government translator is substantively very different than what is
5 actually said at the time.

6 Now I'm going to be moving on to pages 78 and 79 for sort of
7 more of the same.

8 **[Pause.]**

9 DC [LT SHAVER]: And so this is from the portion that hasn't
10 been suppressed -- suppressed so far, but it is in response to a
11 member question that is presumably based on the portion that is
12 suppressed. But, again, this is at the bottom of the page, a
13 very -- a similar subject, or similar conversation where
14 Mr. al Nashiri says: I realized I met Usama bin Laden in Kabul.

15 That's accurately translated.

16 Mr. al Nashiri says: I understood from him that we could
17 use that ship to hit -- uh -- an American ship.

18 And so moving on to that next page, Mr. al Nashiri says: He
19 used to tell me, I mean.

20 The translator says: And -- and I talked to -- to Usama
21 bin Laden about using that ship or that boat to hit an American ship.

22 And so, again, we have the same sort of problem as in the
23 last one where Mr. al Nashiri is describing a conversation that is

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1 driven by Usama bin Laden, that this idea to use a ship in a military
2 fashion is driven by Usama bin Laden. What you see reflected in the
3 translation is very different. You see -- or you see Mr. al Nashiri
4 driving that conversation and suggesting using that ship.

5 And so this is now in two places where you have a very
6 different version of events than actually occurred.

7 And I don't think that there's any serious argument that
8 this wouldn't be consequential at trial, that that distinction
9 doesn't matter.

10 It also has consequences if you go down and you read the
11 rest of this sort of dialogue -- and I'll just kind of summarize it
12 here for the sake of time. What happens is -- and, you know, it's
13 not necessarily a clear causal link, but Mr. al Nashiri explains that
14 after he finds out that Usama bin Laden wants to use this ship in a
15 military fashion, he goes to Dubai. He sells the ship. He sends
16 everyone home. And he gives the money away to people.

17 And that makes sense if you don't want to use the ship in a
18 military operation, right? That's the sort of thing that you would
19 do if, say, you have a boat that you're using and you go out fishing
20 and a terrorist comes to you and says, "Can we use that in a military
21 attack?" You know, and then you go and you sell your boat because
22 you don't want to do it.

23 This passage in the way that it's translated becomes

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1 incoherent because if Mr. al Nashiri had gone to Usama bin Laden and
2 say "I would like to use my ship in an attack against the Americans,"
3 it doesn't make sense for him to go then and sell it and send
4 everybody home. It's a pretty consequential mistranslation that
5 obviously, you know, would have an impact on the members' decisions
6 on the merits, but also it makes the CSRT, the transcript as a whole,
7 very confusing. Because with the mistranslation, some of these
8 things become non sequitur.

9 Now I want to talk about -- there's a couple more questions
10 in this vein from the members. And so one of the issues from the
11 defense's perspective is that these are problems that cannot be cured
12 because it's not just the statements that Mr. al Nashiri says that,
13 you know, in theory could be accurately translated at this point.
14 There are also questions from the members that are mistranslated in
15 substantive ways that elicit responses where there is not effective
16 communication.

17 And I'll just -- I'll show you those examples now, and these
18 are on pages 85 and 86.

19 **[Pause.]**

20 DC [LT SHAVER]: So there's actually two things I want to
21 highlight on this page. The first one is up there at the top. The
22 member asks this question: How do you explain how you have so many
23 relationships with business associates in Yemen, Dubai, and

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1 Saudi Arabia who have been involved in some form of terrorism?

2 The translator renders that question to Mr. al Nashiri as:
3 How do you explain your relationships with people who have been
4 involved in bombings -- not some form of terrorism. And just
5 relationships, not business associates -- in Yemen, Saudi, and
6 Afghanistan?

7 And so one of the things that should jump out there is those
8 are not the same countries. Two of the three are the same. But
9 there is, I think, a significant difference, we would all agree,
10 between Dubai and Afghanistan, particularly when you're talking about
11 militant activities in, you know, the '90s and 2000s. It's a
12 fundamentally different question.

13 And so then when you read the answer, some of those things,
14 you know, are certainly impacted. What Mr. al Nashiri says is
15 impacted because he thinks he's answering a question that relates to
16 Afghanistan, and the members think that he's answering a question
17 that relates to Dubai.

18 One of the other things that I wanted to highlight here is
19 down near the bottom, Mr. al Nashiri says: Places of combat
20 events -- he's describing his travels.

21 And he says: I used to go to see how people lived.

22 And that, you know, makes some sense. It's a little odd.
23 You know, I certainly traveled to combat zones to see how people

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1 live. I guess that makes sense.

2 What's translated is: He used to -- uh -- I used to go to
3 the battlefields and witness how -- uh -- the fights
4 were -- uh -- taking place.

5 And so, again, we're talking about two different things. I
6 think places of combat events, that can be, you know, going to
7 countries that are in conflict. But when the issue is whether or not
8 Mr. al Nashiri is some sort of active militant, when the translator
9 takes what he says and places him instead of, you know, maybe the
10 country or however we interpret places of combat events to
11 battlefields and then changes "I used to see how people lived" to "I
12 used to witness how the fights were taking place," that certainly
13 gives credence to the government's assertion that Mr. al Nashiri was
14 actually involved in the fighting in some capacity, and he was some
15 sort of militant. And that's a feature of the translation, not
16 necessarily his original statement.

17 So this is a similar kind of question. This one is a little
18 bit longer, so I can see why there might be confusion. I believe
19 it's this one. One of these two questions, when you listen to the
20 audio -- and I've highlighted this in the written motion. If you
21 listen to the audio, you can actually hear, even if you don't speak
22 Arabic, the moment where the translator realizes that he no longer
23 remembers the details of the question and he's just going to start

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1 riffing. And I'll show you how that plays out here now.

2 So what the member asks: How -- how does -- uh -- I'm just
3 wondering. How does a fisherman travel to so many countries in the
4 Middle East? You said you've been to Yemen, UAE, Saudi Arabia,
5 Dubai, Afghanistan, Pakistan, Chechnya. Who funded these trips? Was
6 it funded from your business?

7 What that comes out is, from the translator:
8 You -- you -- so how a fisherman was able to travel to many countries
9 such as the -- the -- the UAE, Dubai, and Afghanistan? And how did
10 you get the money to travel to those areas?

11 And so certainly I understand the challenge that's inherent
12 there. You know, I would certainly struggle to translate that. It's
13 a long, complicated question. But we know in other places that where
14 the translator, you know, is starting to struggle, he can ask the
15 member or the president to clarify what they said. He has all the
16 time in the world, you know, to ask the question right. And he
17 doesn't do it here.

18 And I think that when we're talking about these situations
19 where countries -- one country is substituted for another, that's not
20 a merely semantic difference, particularly when we consider the
21 events that are happening in these different countries.

22 The translator throughout also has a tendency to just remove
23 these kind of qualifying clauses like: Was it funded from your

1 business?

2 And so you end up with questions that are fundamentally
3 different. And if we are presenting this as some sort of
4 conversation, it matters that there is a failure to communicate that
5 is contemporaneous.

6 **[Pause.]**

7 DC [LT SHAVER]: Move now to page 88 for a brief portion on
8 Khallad.

9 **[Pause.]**

10 DC [LT SHAVER]: And so I'm referring here to the middle of
11 this page. The members are asking him questions about his knowledge
12 of Khallad Bin'Attash. And they -- you know, they ask him, you know,
13 if he knows him, where he met him.

14 The part that I'm concerned about is right below the middle
15 where Mr. al Nashiri says: The man -- I mean, was a mujahid.

16 Or the article is left out there, but it's implied in
17 Arabic.

18 The translator translates that statement as: He's
19 the -- he's the -- he's the -- is the -- is the -- is -- is a regular
20 guy. He was the jihadist.

21 And so when we're talking about, you know, this sort of
22 issue that will be there throughout the trial of what did Abd al
23 Rahim know about his associates, what did he think that they were up

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1 to, did he know that they were engaged in, you know, terrorist
2 attacks? It is subtle, but there is certainly a pattern that emerges
3 where, you know, if you're talking about a mujahid, that's a -- even
4 in the United States, I think that we would know that there are
5 people, you know, that we would have been sympathetic to at the time
6 that were fighting, say, the Soviets in Afghanistan or fighting the
7 Russians in Chechnya. There are different options there.

8 That word, which also exists in English -- you know, they're
9 both -- mujahid and jihadist are both fundamentally Arabic words that
10 we use in English, but they do have very different meanings. And I
11 don't even know what it means to say that someone is a regular guy
12 who is a jihadist, but it suggests something very different than what
13 is originally said in Arabic.

14 Next, I'm going to move on to a section where I'll discuss
15 some translation errors that relate to the severity and the impact of
16 torture on Mr. al Nashiri. And this is going to be pages 25 to 27.

17 **[Pause.]**

18 DC [LT SHAVER]: And so this is a relatively lengthy passage,
19 but I really want to just home in on the particular issue that I want
20 to highlight there. This is also -- there's a lengthy portion on
21 this in our written motion.

22 But the critical thing is there are three examples within
23 the space of three pages. It's within a paragraph in the original

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1 DoD transcript where the translator mistranslates the amount of time
2 that Mr. al Nashiri was subjected to certain torture techniques.

3 And I think that this is important because this is -- I
4 mean, it's certainly going to be an issue if we're talking about the
5 credibility of Mr. al Nashiri's statements, you know, how voluntary
6 they were, in front of the members if we're arguing that. But it's
7 also a sentencing issue. The severity of the torture is going to be,
8 I think, central in some of the members' minds to what sort of
9 sentence is -- would ultimately be appropriate were Mr. al Nashiri
10 found guilty at trial.

11 And so the first example -- this is towards the middle of
12 the page, where Mr. al Nashiri says: I don't know. For more than a
13 month I was hung like this.

14 The translator says: Hung for almost about a month.

15 There's also an issue here, aside from the timing, where
16 Mr. al Nashiri says about while he was hanging: You defecate while
17 you're hanging. You defecate.

18 What the translator translates that as is: You were doing
19 your things basically and you were hung upside down.

20 I can certainly see "doing your things" being a euphemism
21 for "defecate," but it's very confusing in the context and it gives a
22 different description of what's happening here.

23 I'm going to move on to the next page for the next timing

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1 example.

2 **[Pause.]**

3 DC [LT SHAVER]: So this is now page 26. And this is down
4 towards the middle of the page where -- let's see -- Mr. al Nashiri
5 says: Uh -- of course, without clothes, without anything for one
6 month, two months, sleeping on the floor in the cold.

7 The translator renders that as: He was without clothes. He
8 was sleeping on the floor for about a month.

9 So about half the time Mr. al Nashiri has actually said.

10 **[Pause.]**

11 DC [LT SHAVER]: So this is now page 27. And we will see
12 that -- the same problem.

13 Mr. al Nashiri says: I was standing in that box for
14 about -- um ----

15 Or let's see. Okay. Sorry. I'll start over here.

16 Mr. al Nashiri says: I think I stood inside it for about
17 two weeks. I couldn't sit, day or night.

18 Translator says: I was standing in that box for
19 about -- um ----

20 Mr. al Nashiri's says: My feet -- my feet -- my feet.

21 Translator says: A week and I couldn't do anything.

22 And so, again, two weeks becomes a week. The reason why I
23 want to harp on this example in particular is there are many of these

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1 things that individually are not necessarily a major problem, you
2 know, that may be merely semantic.

3 But eventually one of the things that we're going to talk
4 about under the law is whether or not, you know -- and it bears on
5 this agency question -- whether or not the translator has some sort
6 of bias against the person that they're translating for.

7 And so when you take all of these little examples, one of
8 them maybe does not indicate bias, but when you have three discrete
9 examples where the translator is changing two months to a month or
10 two weeks to a week within the course of a couple pages, that becomes
11 a pattern that tells us something different than a single example.

12 And there are examples like this littered throughout the
13 transcript, that this is -- this is place -- oh, excuse me,
14 interpreters.

15 This is the place where it is very clear that there is
16 something going on here that is consistent and that represents a
17 pattern. That doesn't necessarily explain why someone is doing it,
18 but it does show that they are doing something.

19 TC [CAPT STINSON]: Your Honor, I apologize for interrupting.
20 I think there may be an issue with the translation coming through.
21 We're getting a report of that from our back row. So I don't know
22 if...

23 **[Counsel conferred.]**

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1 TC [CAPT STINSON]: Your Honor, I apologize, Your Honor. I
2 hear there was a mistake just in the mechanics of it and everything's
3 back up and going. Sorry about that.

4 Apologize to Lieutenant Shaver.

5 DC [LT SHAVER]: No worries. I'm good.

6 That's pretty much it, sir. I have a couple more things
7 where I'll just -- I'd point to places in the transcript. I can do
8 that quick and then just get straight into the law and the
9 conclusion.

10 So the sort of -- in my notes, the subject heading of this
11 kind of section is "Issues That Are of Consequence," you know, where
12 this piece of evidence would have bearing on those facts. The last
13 kind of subheading there is the way that the CSRT has been used for a
14 range of pretrial issues.

15 And so the reason we have the 319 ruling in the footnote
16 that we do, suppressing portions of this, is because the government
17 used the CSRT transcript, the DoD transcript, that is littered with
18 inaccuracies as a transcript, but also all of these translation
19 errors, the government presented that as evidence in a pretrial
20 motion about the admissibility of other statements.

21 So in many places, the commission and the parties have
22 relied on not just the mistranslations, but also the
23 mis-transcription that is included in the DoD transcript to make

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1 decisions about the admissibility of other evidence.

2 And I don't need to go into them because I think Ms. Manuele
3 will cover them when she's up here, but there are several places that
4 when you look at this, you read this document in its entirety, there
5 are questions asked by the members. And when you look at the
6 responses, you know, accurately translated, you realize what the
7 conversation -- the conversation that's happening is about black site
8 statements. And so, you know, to the extent that the commission, you
9 know, would engage in the kind of ruling that it did in 319, I think
10 that there are different rulings that come out of that impulse if you
11 read an accurate transcript versus if you read the DoD transcript.

12 I just wanted to note those here.

13 Now, as I mentioned, I can move on to the law and kind of
14 wrap this up. This shouldn't take too long.

15 So in our motion, which I expect the commission has read and
16 will read, you know, probably again before making a ruling, we raised
17 a lot of different objections to the CSRT. None of them are
18 frivolous. Certainly we have issues with, you know, one of them is
19 the authenticity of the transcript, if it is what it purports to be.

20 I think at this point the government may have conceded that
21 the original transcript has some problems. And they say that they
22 have mooted that argument by producing a new transcript.

23 To the extent that we are using this, you know, for pretrial

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1 issues and it's are the words what were said? I think that the new
2 transcript, this FBI transcript, largely solves that problem. It
3 doesn't solve the contemporaneous translation problems, but it
4 does -- certainly our issues with the DoD transcript being presented
5 would be resolved just purely as a sort of documentary matter by a
6 better transcript. So I'm not going to elaborate on that here.

7 But as I've said throughout here, corrected transcripts do
8 not moot the incorrect contemporaneous translations that were
9 provided during the CSRT and presumably during all of the meetings
10 with the personal representative, because it's the same translator.
11 And we can see his work when he's doing it live and it is presumably
12 the same quality of work in those meetings.

13 There is nothing that a new transcript can do to correct the
14 confusion that existed at the time between the different people that
15 are participating in the CSRT.

16 Really the crux of the defense's arguments on why
17 this -- the entire CSRT needs to be suppressed are under 403 and, you
18 know, the 803 hearsay rule with respect to the Sixth Amendment and
19 then Fifth Amendment due process. And so that's really what I want
20 to focus on.

21 So if we talk about Rule 403, which, again, is that, you
22 know, the commission can exclude evidence on grounds of prejudice,
23 confusion, or waste of time. We're really talking about, you know,

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1 prejudice and confusion here. The rule goes on to say, you know,
2 talking about the danger of unfair prejudice, confusion of the
3 issues.

4 Understood interpreters, thank you.

5 So when we are talking about the danger of unfair prejudice,
6 I think I've shown by these examples -- and if the commission looks
7 at the written pleadings and the various transcripts that are
8 available, the actions of the translator, a government agent, have
9 created a piece of evidence that is prejudicial to the defendant in
10 many ways. It presents things he said in a way that he did not say
11 them. And it is meaningful given the issues that are contested or
12 would be contested at trial.

13 So there is certainly evidence of prejudice in that
14 transcript that would, you know -- that would -- or things that would
15 be prejudicial to Mr. al Nashiri at trial.

16 There are also many things in there that are confusing as a
17 result of that translation, again, by a government agent.

18 And so we've talked a lot about confusion in the last couple
19 weeks. And I think, you know, the government has made arguments that
20 we want to put on witnesses that would contradict their narrative and
21 that that would be confusing to the members. To me that sounds like
22 reasonable doubt. That's a different situation.

23 The confusion that we are talking about here is the

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1 government will be presenting -- if they were allowed to present this
2 to the members, they would be presenting a piece of evidence that has
3 been modified fundamentally by the government in a way that confuses
4 the issues. The government knows that.

5 If you look at their FBI transcript as I've outlined here,
6 they clearly understand that there are flaws in the work that their
7 translator did during the CSRT. They know that portions of that are,
8 in fact, wrong. Not merely, you know, semantic or misleading. There
9 are parts of it that are just incorrect.

10 And allowing them to present that information to the members
11 is misleading and this is fundamentally distinct, as I said at the
12 beginning when we were talking about Apodaca, that case, where both
13 sides are presenting different interpretations, you know, of
14 contested words and text messages. In the Apodaca case, the
15 government is not trying to present anything that they know is
16 untrue. They're trying to present what they believe to be the truth.

17 Here, I don't think that the government is saying that the
18 translator accurately translated everything that Mr. al Nashiri said.
19 I think that they would have to concede, based on their own evidence,
20 that there are parts that are translated incorrectly and in a
21 prejudicial way. So that's -- that's confusion of a different sort.

22 Yes, sir?

23 MJ [COL FITZGERALD]: I apologize. Wouldn't the members, if

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1 they were given that transcript, actually see Mr. Nashiri's words
2 next to that translator's words and they could weigh it however they
3 want, which is their responsibility?

4 DC [LT SHAVER]: Yes, they could. But I think that the -- the
5 fundamental difference here is -- so let's say that the translator
6 were a witness, right? I can't put on a witness that I know is going
7 to tell the commission or the members something that I know is false,
8 right? Because ----

9 MJ [COL FITZGERALD]: What was false?

10 DC [LT SHAVER]: Many of those translations. I think one in
11 particular, so the idea that Mr. al Nashiri suggested using the boat
12 in a military attack. Who makes that suggestion, I think, is of
13 critical importance for the sake of the trial. I think that that is
14 a false representation of what he said.

15 MJ [COL FITZGERALD]: Thank you.

16 DC [LT SHAVER]: And so something like that -- I mean, to
17 follow on in that example, that puts the defense in the position of
18 rebutting a falsehood. And so certainly the members can look through
19 this. And there are some advantages certainly for the defense to
20 say, like, look at the quality of the government's translation.
21 They've been relying on this for years.

22 But the issue is is we can't be in the position of refuting
23 evidence that is inadmissible because it is so confusing and when the

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1 government knows that ahead of time. It's a very different sort of
2 confusion and I think that it is misleading and confusing in the way
3 that 403 contemplates it.

4 MJ [COL FITZGERALD]: Wouldn't the better remedy be if there
5 are specific and discrete examples of falsity, to extend your
6 argument, just to excise those things which there appears to be
7 falsity? I mean, 403 is one side of the balancing test. There seems
8 to be some probative value to the statement as a whole. That's the
9 only way they get to bring it in, right? It's got to have some
10 probative value. You're saying it substantially outweighs that
11 probative value.

12 DC [LT SHAVER]: Yes, sir.

13 MJ [COL FITZGERALD]: Falsity would. Differences in
14 translation, semantics wouldn't seem to be a 403 concern.

15 DC [LT SHAVER]: Absolutely, sir. I think that this
16 is -- there is maybe a broader problem with this document that the
17 commission will have to confront. And I don't necessarily know the
18 right answer here because we already have a portion of it that is
19 redacted. There will likely be -- I think that there are, you
20 know -- if we take just the sort of -- the obvious problems, there
21 are many more things that would have to be redacted.

22 And we're going to do this in a lot of places in the course
23 of this trial. We're going to present a piece of evidence to the

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1 panel members that looks like Swiss cheese. And I think at a certain
2 point that in and of itself -- if we have -- if every other line is
3 redacted -- so say we say that the translator is such a problem that
4 we just -- we just redact all of the translator's -- everything the
5 translator says.

6 One, you can't do that because some of the things that he
7 says are mistranslations of the members' questions that if you don't
8 have the mistranslation, it's very difficult to understand what's
9 happening.

10 But so say you just redact the translations of
11 Mr. al Nashiri's responses and you substitute accurate translations
12 for them. It cures some of the issues, but then you end up with what
13 is a fairly extraordinary document. And I don't really even know
14 what that would look like if we're just going line by line, and we're
15 saying this line is admissible, this line is inadmissible, and we're
16 going to ultimately present that to the members.

17 I think that that is a possible solution. I don't really
18 know if it's workable. The defense's position is that if you have
19 something that is so riddled with errors, you just can't present that
20 to the members because it is going to be confusing at that point,
21 that they're going to have to puzzle all this together based on
22 disparate pieces of a complete document.

23 MJ [COL FITZGERALD]: Thank you.

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1 DC [LT SHAVER]: Yes, sir.

2 So the next kind of broad block of the defense's argument
3 here relates to the kind of question of hearsay. And this is
4 certainly a disputed issue. I understand the government does not
5 think that they are hearsay.

6 And to be perfectly frank, part of including this in this
7 argument is there is this broad problem throughout the case where
8 there are these hearsay statements that are relayed through
9 translators. And I thought it was important to have on the record,
10 you know, some of the issues that come through that.

11 But I do still think that these are hearsay statements,
12 because you have an agent of the government ----

13 MJ [COL FITZGERALD]: Do you have case law to support that?

14 DC [LT SHAVER]: Yes, sir.

15 MJ [COL FITZGERALD]: Okay.

16 DC [LT SHAVER]: Yes, sir. And I'll -- I can go straight into
17 the case law. But the sort of principal standards that are
18 applied -- so, one, this is a little bit murky across -- across
19 federal courts. I would say the dominant standard comes out of
20 Martinez-Gaytan. And this is cited in the written brief. But that's
21 what -- the government often references the idea that a translator is
22 a mere conduit for the person that is speaking.

23 And, of course, in order to be a mere conduit, sort of as

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1 we're already discussed, it might be like what we have here in this
2 courtroom. And I think that we've seen this in some cases. We have
3 extraordinarily talented interpreters in this courtroom.

4 The commission has dedicated a lot of resources to making
5 sure we get this right. You know, they rotate in and out. They've
6 been thoroughly vetted. They are all very good at what they're
7 doing. They've been doing it for a long time, and they work very
8 hard to get it right.

9 Certainly, we've seen, when Mr. Bahlul was here, that there
10 can still be hiccups. That nobody's going to get it right 100
11 percent of the time. But that's close to where we would be talking
12 about a mere conduit.

13 And so then we move on to Nazemian, U.S. v. Nazemian, which
14 has been cited favorably in the D.C. Circuit and in other circuits,
15 which says -- it provides essentially this test for how you can
16 determine whether or not an interpreter should be treated as a mere
17 conduit.

18 And so the four factors that are outlined in Nazemian are,
19 one, which party supplied the interpreter; two, whether the
20 interpreter had a motive to mislead or distort; three, the
21 interpreter's qualifications and language skills; and, four, whether
22 actions taken subsequent to the conversation were consistent with the
23 statements translated.

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1 Of those four, three weigh against treating this translation
2 as mere conduit, which would make it hearsay under federal law. The
3 first one, the government supplied the interpreter. I don't think
4 that there's any meaningful dispute about that.

5 The second one is interesting because it is whether the
6 interpreter had a motive to mislead or distort. And I don't -- I
7 don't know that we even need to conduct that inquiry, because we
8 don't need to know what the interpreter's motives are because we know
9 that he is distorting. He is misleading and is distorting. And
10 there is a consistent pattern in several places. So I think that
11 that would weigh against the government here.

12 Third is the interpreter's qualifications and language
13 skills. And so this -- there is a lengthy portion of the written
14 brief, and this is why I mentioned, you know, citing to al Bihani.

15 The fact-finding that the court conducts in
16 al Bihani -- they did, you know, ultimately what I would have liked
17 to have done here but didn't really feel like I could, given the
18 classification issues, is they called several witnesses. They had a
19 witness who was an FBI interpreter, who I think was the chief of the
20 interpreters down here in Guantanamo at the time.

21 They called a professor from Georgetown from the Arabic
22 department there who could lay out, you know, some of the issues.
23 And that is included in the lower court -- the district court Bihani

1 decision, and I've cited to it there.

2 And so one of the critical standards that we use throughout
3 the Defense Department but that was in place at the time and that is
4 discussed in Bihani is the ILR, you know, language proficiency
5 ratings, which are standardized across the military and the
6 Department of Defense.

7 And so there are these difference -- it's a scale of one to
8 five. It's cited -- you know, it's in the written brief. I've cited
9 it elsewhere, too, but that is kind of the guidepost for what sort of
10 proficiency someone has. And there are lengthy descriptions
11 available from the ILR, the International Language Roundtable that
12 produces these proficiency ratings that you can certainly go and look
13 at.

14 And I don't know -- you know, we have not been provided, you
15 know, with any sort of discovery on what the linguists'
16 qualifications are. But it ultimately is not particularly material
17 because we can look at the quality of the language that he is
18 producing.

19 And so what comes out in the court's fact-finding in Bihani
20 is the standard that they think is appropriate for a habeas hearing.
21 You know, something similar to the CSRT, as I believe it's, like, a
22 three-plus in the target language and then a three in English, which
23 is a professional proficiency.

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1 And one of the things that's highlighted in the motion is
2 there's a real substantive difference between a three and a two-plus,
3 which is, I think, you know, maybe limited working proficiency or
4 something. I don't remember the exact description.

5 But when you fall off from that three or three-plus zone,
6 you start having trouble communicating. And when you read the
7 description of what a two or a two-plus performs as, it sounds a lot
8 like what the government's translator is doing in this hearing.

9 Some of the issues with, you know, just the translator's
10 mastery of English is a little bit loose and that's often the problem
11 here. Like, I don't -- I don't think that the translator, who
12 appears to be a native Arabic speaker, has much trouble understanding
13 Mr. al Nashiri. The problem is translating those things into
14 coherent English or translating from English into Arabic. And so I
15 think his English skills are particularly suspect. And that's
16 something that the commission, I think, is equipped to evaluate, to
17 look at what those standards are and to see the quality of the
18 English language that's being rendered by the translator.

19 And so that's, you know -- I think that -- I've tried to
20 keep this presentation contained to the extent that I can. And so I
21 haven't gone through and identified all of the examples where the
22 translator seems to be struggling in English, but they are certainly
23 there in the transcript. And I would direct the commission to that.

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1 And so really the last block of things is really this
2 broader due process question of whether or not an accused is entitled
3 to accurate translation. And I've cited in the written motion to
4 several immigration cases, because that's the closest analog that we
5 really get to something that is applicable to, you know, factually
6 what we're talking about here where you have a government agent
7 translating inaccurately for someone who the government is later, you
8 know, seeking to take some action against.

9 There is, unfortunately, not a lot of great case law on this
10 issue because we have a relatively novel fact pattern that is
11 not -- you know, we are not generally in a position where you have a
12 translator who is operating at the level of this translator
13 generating evidence that the government is seeking to introduce in
14 court. So we're a little bit out on our own here.

15 But the immigration cases are kind of the closest you get.
16 There's also a case called Charles that is not -- has not been
17 adopted across the circuits. I believe it's Eleventh Circuit. It's
18 certainly an interesting case. That is one option available to the
19 commission.

20 And that is the problem is that we don't have really clear
21 binding law on what the answer is here. But the immigration cases,
22 to go back to those, I think are instructive, because we're talking
23 about immigration hearings which are certainly not, you know, on the

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1 same level of, you know, burdens and procedures that you have in a
2 capital trial. But in that context, judges have held that, you know,
3 parties in front of an immigration court have a right to accurate
4 translation under the Fifth Amendment.

5 And this is certainly an issue that is persistent in this
6 commission, is whether or not the Fifth and Sixth Amendments apply,
7 and if so, how.

8 The D.C. Circuit's position that they have repeated, you
9 know, throughout the last, you know, 20 years is that they have
10 assumed without deciding that the Constitution applies, particularly
11 the Fifth Amendment, to issues in this commission and in Guantanamo
12 Bay, generally.

13 And so if that does apply -- and this is a situation where
14 we're -- you know, there is federal case law to support this but
15 ultimately it is common sense that if your life is on the line and
16 the translation of your words is central to that, I think that you do
17 have a right to accurate translation. And if the government is
18 presenting evidence that violates that, I think that's a real
19 problem.

20 And, you know, really, I'll see if my colleagues have
21 anything to add, but from my perspective, I think that
22 that's -- that's really the important thing.

23 And this is -- this is a live issue. I think that many

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1 times in this commission in Guantanamo there is the sense that we are
2 on this sort of jurisprudential dead branch, that what we are doing
3 here is not necessarily going to be repeated, that we're not going to
4 be subjected to any of these laws. But we are -- we are making, you
5 know, some version of customary international law every day here and
6 it is possible that someone could point to what we have done here and
7 use it against us.

8 And this is certainly the case now. We have just had
9 incidents where aviators were shot down over Iran and had to be
10 recovered. And so we can certainly imagine a scenario -- and, you
11 know, to be fair, I don't think Iran is going to observe, you know,
12 what we would recognize as due process anyways if they were to
13 capture those aviators and put them on trial.

14 But the sort of process that we would want them to be due, I
15 think at a bare minimum, is that if the Iranian government were to
16 put these aviators on trial for something that they were accused of
17 doing and they were going to interview them or take statements for
18 them, we would want those aviators to have a qualified translator.
19 And this is not merely speculative.

20 We do know that the U.S. Government has at times had a
21 position on that. You know, we go back to the predecessors of a lot
22 of these military commissions. And we're talking about Quirin and
23 we're talking about Yamashita, these old cases that nobody thought

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1 about for 50 years.

2 There are also -- there were also U.S. military commissions
3 in Japan and we put people on trial for not giving our aviators
4 sufficient due process. This was an issue that we prosecuted people
5 for in Japan at the end of World War II. There were Japanese
6 officers who had conducted a military commission for the Doolittle
7 Raiders, the first American pilots to bomb the Japanese homeland
8 after Pearl Harbor. They were put on trial. Some of them were
9 executed. And one of the things that we prosecuted those Japanese
10 for, those Japanese officers for, was that they had not complied with
11 due process including having, you know, inaccurate or insufficient
12 translation for purported confessions that those airmen ultimately
13 signed.

14 And so there is a historical precedent, but certainly it's
15 just common sense, sir. I think when you read these -- when you read
16 the translation and you look closely at it, it is clear that it
17 doesn't meet the standard. It doesn't meet the standard that we
18 would want applied to us. It certainly doesn't meet the standard in
19 a capital trial.

20 And that -- with that, I think I can ultimately rest on the
21 written brief, but I want to ask my colleagues if there's anything I
22 missed if you'd give me a moment, sir.

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

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1 **[Counsel conferred.]**

2 DC [LT SHAVER]: All right, sir. I am reminded that my ask is
3 often a little bit too implicit. So I want to be clear that this is
4 why all of these reasons that I've laid out here, you know, the 403,
5 the confusion, the misleading nature of these -- of these
6 translations, the due process problem of having inaccurate
7 translation, everything that I've laid out here, for those reasons,
8 that is why the defense thinks that the entire CSRT, both the
9 recordings and the transcript, need to be suppressed and they cannot
10 be put in front of the members.

11 And with that, any questions you may have, sir.

12 MJ [COL FITZGERALD]: Do you know if the translators in that
13 tribunal were required to be under oath?

14 DC [LT SHAVER]: I do not know off the top of my head, sir. I
15 can take a look at that. That may be in the transcript. That might
16 be -- we can certainly get back to that during Ms. Manuele's portion
17 if you want -- or if you want a later answer. I don't have it right
18 now.

19 MJ [COL FITZGERALD]: If you don't know right off the top of
20 your head, I'm just curious what that oath would be.

21 DC [LT SHAVER]: Yes, sir.

22 MJ [COL FITZGERALD]: The oath that we have in the M.C.R.E. is
23 that the translator will testify truthfully.

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1 DC [LT SHAVER]: Right. And that's the only rule that we
2 have, interestingly enough, in the M.C.R.E. that discusses
3 translation in any substantive way and that's for the qualifications
4 of the in-court interpreters. But there's no real discussion of
5 translated evidence.

6 MJ [COL FITZGERALD]: And I know I've touched upon it a little
7 bit but would you like to address -- I think I've told you it seems
8 like a lot of this should just be resolved through the fact-finder,
9 not necessarily by the commission. And it seems the rules do
10 contemplate that. There exists two rules of completeness, right? So
11 the government wouldn't be able to pick and choose which words they
12 wanted to use. You could invoke either of those rules of
13 completeness.

14 So do you have an argument why the court should -- and this
15 probably goes to the 401/403 analysis, right? If we're doing the
16 balancing test, and there seems to be some probative value, but
17 you're saying it's just outweighed by the stain of unfair prejudice.
18 But, again, considering curative instructions are available, the
19 members make credibility determinations. The members seem to -- will
20 have access to a lot of the transcript to contextualize it
21 themselves.

22 Understanding all those at a practical level, why the
23 balancing test favors your position other than what you've already

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1 stated.

2 DC [LT SHAVER]: Yes, sir. I mean, as I said, on the
3 practical level I think we get into a different 403 analysis. I
4 mean, we get these incredibly redacted documents and they are very
5 confusing to read. So I think that that's there.

6 I think the other issue -- and this relates, you know, back
7 to sort of the question of the commissions being this sort of
8 jurisprudential dead branch. You know, the suppression rule as it
9 exists is not necessarily for, you know, the most just outcome in an
10 individual trial. You know, certainly we have all sorts of
11 situations in which evidence is suppressed and someone who is
12 probably guilty may end up being released.

13 The reason why we have the suppression rule is because it's
14 prophylactic. It forces the government, who is the only agent ----

15 MJ [COL FITZGERALD]: What suppression rule are you referring
16 to?

17 DC [LT SHAVER]: So suppressing evidence just generally. You
18 know, the classic example would be Fourth Amendment, you know,
19 searches and seizures.

20 MJ [COL FITZGERALD]: I'm not sure you've -- you've invoked
21 that suppression rule, that's why I'm ----

22 DC [LT SHAVER]: Right, I think it will become clear ----

23 MJ [COL FITZGERALD]: But I'll certainly hear you out. I just

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1 want to make sure I understood where you were coming from.

2 DC [LT SHAVER]: Yes, sir.

3 So the fundamental issue here is that the government made a
4 choice. They sent this translator to do this thing. And I think now
5 that we're here, we're looking at that, we can say they should have
6 done what we do here. We've solved sort of this problem. We know
7 how to have accurate translation in a hearing. The government didn't
8 do it at the time. And I think that it is important when we're
9 talking about creating what is fundamentally customary international
10 law or sort of the standards for an international criminal trial, I
11 think that it is also important in addition to, you know, all the
12 other more discrete, you know, rules-based reasons why we should
13 suppress this information is to send a message that for the future
14 that if you want to use this kind of stuff, you need to do it right.
15 You need to take it seriously.

16 If this is going to be admissible, you need to provide a
17 qualified translator and you need to do it well.

18 MJ [COL FITZGERALD]: Thank you.

19 DC [LT SHAVER]: Anything else, sir?

20 **[Counsel conferred.]**

21 DC [LT SHAVER]: Sir, I do have an answer for you on that
22 translator question.

23 So this is on page 3 of the FBI transcript here, that 685F,

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1 I believe. And this is at the bottom of the page -- or I
2 can -- well, I've got notes on here, so I can't.

3 But the president says: The recorder, reporter, and
4 translator have previously been sworn.

5 So we know that it happened but we don't have any of the
6 substance of it, sir.

7 MJ [COL FITZGERALD]: Thank you.

8 **[Pause.]**

9 MJ [COL FITZGERALD]: Who has this for the government? Is
10 this you, Commander Roman?

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

12 MJ [COL FITZGERALD]: It's 1135. I don't know how long you'll
13 take. Do you know how long you'll take?

14 Let me ask you this: Would you like to take a lunch break
15 now for an hour and come back and start rather than interrupt you
16 with a lunch?

17 ATC [CDR ROMAN]: I think that would be the best course, Your
18 Honor.

19 MJ [COL FITZGERALD]: Okay. Court is in recess until 1245.

20 **[The R.M.C. 803 session recessed at 1134, 21 April 2026.]**

21 **[END OF PAGE]**

22

23

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1 **[The R.M.C. 803 session was called to order at 1249, 21 April 2026.]**

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

3 All parties present before the last recess are again
4 present. Mr. Nashiri continues to attend this session from the
5 alternate location.

6 Commander Roman, you may proceed.

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

8 Good afternoon, Your Honor.

9 MJ [COL FITZGERALD]: Good afternoon.

10 ATC [CDR ROMAN]: Regarding the motion and the relief sought,
11 the government does not concede that the audio and the transcripts
12 are unreliable. The audio is the government's evidence. It is the
13 best evidence. It's the recording of the actual statements by the
14 accused at the CSRT.

15 The translated transcripts, they aid to the fact-finder's
16 understanding of those statements made before the CSRT.

17 Now, the transcript that first was made is a DoD transcript
18 that transcribes the English that was uttered at the CSRT, much like
19 the military commission's court transcriptionists do in these cases.

20 The FBI, however, is different. It is not more accurate.
21 It is just a different purpose where it looks at the word-for-word
22 translation of all words, Arabic or English, that were uttered at
23 the -- at the CSRT and are on, again, the audio recording.

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1 Differences in interpretations, even flaws, if that is how
2 it is being alleged or if that's the theory of the defense, those go
3 to weight and not admissibility and are perfectly within the purview
4 of the fact-finder to decide for themselves.

5 I think defense counsel had properly understood that on
6 page 3 of the FBI transcript, it is indicated that the interpreter
7 was previously sworn along with the recorder, I believe the personal
8 representative. It's not an issue in dispute.

9 So the sworn interpreter provided live translation focused
10 on context and concepts that do not render the interpreter's semantic
11 word choices as inaccurate to foster misunderstanding among the
12 speakers.

13 In the defense brief at pages 52 and 53, citing
14 United States v. Charles, the government understands that
15 interpretation is the oral form of transferring meaning from one
16 language known as the source language into another language known as
17 the target language. Language interpretation, however, does not
18 provide for a one-for-one -- sorry, one-to-one correspondence between
19 words or concepts in different languages. Rather than word for word,
20 then, interpreters render meaning by reproducing the full content of
21 the ideas being expressed. Interpreters do not interpret words, they
22 interpret concepts.

23 As the defense counsel pointed out, we experienced that

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1 semantic word choice versus concept idea in a recent session during
2 the testimony of Mr. al Bahlul. That concept, that misunderstanding
3 or that oral live interpretation was also pointed out in testimony by
4 Special Agent Soufan and Special Agent McFadden in explaining, as
5 Arabic speakers, how that theory or that concept, the exchange of
6 ideas and understanding, is achieved.

7 Semantic differences and examples of differing opinions
8 about the interpretation do not rise to the level of purposeful
9 misrepresentation or bias by the sworn interpreter, especially if the
10 fact-finder is presented with the FBI transcript that the defense
11 used during their presentation and that has been admitted -- I'm
12 sorry, that has been submitted to the court for consideration
13 and -- which allows the defense to present its theory of why the
14 evidence is either unreliable, flawed, or should be given little
15 weight. Weight, not admissibility, is the purview of the
16 fact-finder.

17 The Apodaca case provides the process for which a court can
18 remedy any dispute with translations and transcripts. The
19 government, in light of the defense's presentation, would agree that
20 the FBI transcript may be the best tool to aid the fact-finder. The
21 government is interested in presenting the accused's statements that
22 were made at the CSRT.

23 Many of the interpreter examples cited by the defense

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1 counsel, upon further examination in and around the context of the
2 entire interchange, can shed light on the clarity that was obtained
3 throughout the CSRT hearing.

4 On page 23, the president asks of the FBI translation and
5 transcript, the president asks about treatment and repeats the
6 question after there was dialogue back and forth to ensure that
7 everyone was understanding about what he was asking.

8 And it's worth noting that the voluntariness of the
9 accused's statements at the CSRT has been settled in AE 467 and by
10 the commission in AE 319MMMM, where in a footnote, talked -- the
11 commission talked about keeping certain and suppressing certain
12 portions of the CSRT.

13 On page 32, there's a -- there is a question about whether
14 the accused wants to elaborate on any of the answers that
15 they -- that the personal representative had previously given
16 regarding, and starting with, the MV Limburg.

17 If we keep -- if we keep looking at page 33, the next page,
18 it is clear that the accused understands that those statements and
19 elaborations that are being requested are now being agreed to and
20 conducted from the first -- the number one, the first statement that
21 the personal representative presented to the tribunal earlier on in
22 the transcript.

23 On page 66, there was much discussion about a fishing

1 business versus a project. And I will point out to the commission on
2 page -- two pages earlier, on page 66 it's clear we are talking about
3 a business.

4 Further, on page 18, the personal representative makes the
5 statement, the prepared statement regarding a fishing business. It
6 is, therefore, not unsurprising that the member who asked the
7 question understood that what was being -- what was being discussed
8 was a fishing business.

9 On page 78 and 79, that was the discussion about whether
10 Mr. Nashiri understood from Usama bin Laden or talked to Usama
11 bin Laden about using the boat for a military operation.

12 We go one page later, on page 80, it's clear that the
13 accused is understanding and goes on to explain that when he knew
14 Usama bin Laden was articulating a military use for the boat, that he
15 sold the boat and dissolved his business.

16 The government stands on its legal analysis in our brief
17 regarding the case cited about due process and hearsay, but it's
18 important to note that, unlike those cases, we do have the audio
19 recording here. The interpreter is a conduit agent of the accused,
20 so M.C.R.E. 803(a), Non-Hearsay By a Party Opponent, is what
21 controls.

22 The record is replete with -- that the accused was
23 voluntary, making his statements at a tribunal he chose to attend

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1 with a personal representative he chose to meet with prior and chose
2 to have represent him at the tribunal. And he made these statements
3 under an oath he chose to take.

4 Again, in the -- on AE 685C at 49, Wigmore is quoted by the
5 defense that: If, A, whose utterances are to be testified to, is a
6 party opponent, then he may be regarded as having made M his agent to
7 translate, and thus M's translations are admissible, usable against
8 A.

9 Throughout the presentation, the defense mentioned that
10 these examples are not of consequence or inconsequential. Some were
11 explained as more significant than others. But for the members to
12 weigh credibility of the evidence as explained and presented by the
13 parties at trial, that is their purpose.

14 And they are afforded that opportunity with this transcript
15 from the FBI. It was created for the particular purpose of shedding
16 light on any and allowing for the parties to present their theory of
17 credibility and weight for the members to decide.

18 For those reasons and pending your questions, Your Honor,
19 the government advised -- the government seeks for the motion to be
20 denied.

21 MJ [COL FITZGERALD]: So is it government's position that you
22 don't intend to use the transcript at trial? You're going to use the
23 audio of the proceedings at the CSRT?

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1 ATC [CDR ROMAN]: No, Your Honor. We want to present the
2 audio as well as the transcript, because that is what aids in
3 the -- in the members' scrutiny of the audio.

4 MJ [COL FITZGERALD]: And so which transcript?

5 ATC [CDR ROMAN]: The government would stipulate and agree,
6 under Apodaca, for the FBI transcript. We think that that's been at
7 least utilized by the defense in their -- in making their argument
8 before the commission. There seems to be a degree of agreeability.

9 But the government also understands that if we present our
10 transcript under Apodaca, if the commission would -- if the
11 commission allows, the defense is free to offer their version of the
12 transcript, or the commission can weigh the differences of the
13 transcript and of each of the transcripts and present the
14 commission's version of the transcript, ultimately with instructions
15 to the members about whether or not one has validity over the other
16 because of -- if we were to present both of them.

17 MJ [COL FITZGERALD]: And perhaps that's just a matter for
18 another day, to determine the ruling on this particular motion, what
19 transcript should be used if the evidence were to come in.

20 The defense averred at some point -- and, Lieutenant Shaver,
21 certainly correct me if I'm wrong, from what I took you said it was
22 your understanding -- or at least your assertion that nothing in the
23 FBI transcript was classified?

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1 Am I -- if I'm misstating it, please correct me.

2 DC [LT SHAVER]: Yes, sir. There are two very small things.
3 I think it ends up being, you know, maybe a half dozen to a dozen
4 redactions there. I don't know how much I can say about that. There
5 are portions that are redacted. They're very minor. They're not
6 particularly substantive for this argument.

7 MJ [COL FITZGERALD]: And I guess my question is: Would
8 Mr. Nashiri be allowed to see this transcript?

9 ATC [CDR ROMAN]: Yes, Your Honor. The transcript I'm looking
10 for is UNCLASSIFIED//FOUO, releasable to ISN 10015.

11 MJ [COL FITZGERALD]: Is that your understanding as well,
12 Lieutenant Shaver?

13 DC [LT SHAVER]: Yes, sir. Although we would -- we would also
14 ask, because our -- the defense version has the Arabic, and it -- I
15 mean, this is a bear of a thing to translate because it's, like, 100
16 pages. If we could get some version of that -- of our version that
17 has it in Arabic, that would be extraordinarily helpful in client
18 meetings.

19 MJ [COL FITZGERALD]: Would the government be amenable to
20 that, if their understanding that Mr. Nashiri would need something he
21 could read?

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

23 MJ [COL FITZGERALD]: I'm not suggesting anything. I just

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1 wanted to see where the parties are at on things like that. It seems
2 the government would be in agreement.

3 ATC [CDR ROMAN]: Yes, Your Honor. My only pause would be
4 that I don't believe that it would be helpful to the members. But
5 definitely ----

6 MJ [COL FITZGERALD]: No, no. This is just asking the
7 question of -- starting from my original point, Lieutenant Shaver
8 asserted to the court that he believed there's nothing classified in
9 it. If that's the case, then Mr. Nashiri -- it might be beneficial
10 for him to see that, because there seems to be a lot about
11 translation and words that were said and words that -- meanings that
12 were conveyed. So it would be ----

13 **[Counsel conferred.]**

14 ATC [CDR ROMAN]: Excuse me, Your Honor. I'm sorry.

15 MJ [COL FITZGERALD]: So to the next point, then, if he can
16 read it, it needs to be in a language he can read. So that's how I
17 got to that point.

18 ATC [CDR ROMAN]: Absolutely, Your Honor. Yes, understand.

19 MJ [COL FITZGERALD]: Okay. Okay.

20 **[Pause.]**

21 MJ [COL FITZGERALD]: I have no further questions at this
22 point on that matter.

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

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1 MJ [COL FITZGERALD]: But their burden, so do you have a
2 response to the government's?

3 DC [LT SHAVER]: Yes, sir, I do.

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

5 Thank you, Commander Roman.

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

7 DC [LT SHAVER]: Afternoon, sir.

8 MJ [COL FITZGERALD]: Afternoon.

9 DC [LT SHAVER]: Sir, I want to start -- one of the things
10 that the government raises that is sort of interesting, there is this
11 idea of what is the best evidence. And there is a body of law,
12 federal case law, that discusses that issue, how you would apply the
13 best evidence rule towards a situation where you have recordings and
14 transcripts.

15 It's complicated and there's a circuit split and there are
16 different rules depending on where you are. There's, I think, three
17 or four different solutions about what you might do in a federal
18 court with something like this.

19 I didn't brief it extensively in my motion because, funnily
20 enough, the best evidence rule has been removed from the
21 M.C.R.E. You know, in the Manual for Courts-Martial, that would be
22 in the thousand series or, you know, Section 10. And it
23 doesn't -- it's just reserved in the M.C.R.E. So I don't know really

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1 where that leaves us.

2 I'm not sure I totally understand the government's position
3 at this point with respect to the 2007 DoD version of the transcript.
4 And we addressed that at length in our written motion, frankly,
5 because it's fairly easy to attack. There are -- you know, some of
6 the big issues, there are portions of it that are from the script
7 that appear to never have happened during the actual CSRT that are
8 included in the transcript.

9 There are things in there that are -- I mean, there's a
10 couple sentences that are just -- that are gibberish. I mean,
11 there's some real problems with that. And I think the government
12 maybe backed away from that.

13 But to the extent that that's still a live issue, I just
14 don't think that we can put that -- the DoD transcript in front of
15 the members without, you know, risking some real prejudice. So I
16 won't go into too much more detail about that.

17 I also don't totally understand when the government says
18 that the transcript that was created by the FBI was created for a
19 different purpose. I mean, I certainly understand what they're
20 saying, but I don't know how that interacts with, you know,
21 presenting that -- presenting that to the members.

22 And part of my confusion sort of throughout here is, you
23 know, my understanding of this as an attorney is that if the

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1 government raises an issue and they support it with evidence, you
2 know, generally that would shift the burden to the other side to
3 rebut and to present their own evidence.

4 The government's evidence in this case, or in this motion
5 series, is that FBI transcript which is in most substantive ways the
6 same as the defense's evidence. And it confirms the issues that we
7 have highlighted.

8 So if the government is making representations based on
9 that, that these issues are just semantic, I don't think that they
10 have met their burden, and I don't think that that evidence can do
11 that. And I don't know that it matters that it was constructed for
12 some sort of different purpose if it -- if the purpose was to rebut
13 the defense's evidence, it's almost the same as our transcript. So I
14 don't know that it has achieved that purpose.

15 There is this question of -- raised by the government in
16 their response about the translator's potential bias. And I
17 certainly don't have the -- you know, the evidence, you know, other
18 statements from the translator where I can come up here and make a
19 good-faith argument that he -- that I know that he's biased against
20 the accused because he said this, this, and this after the CSRT or
21 something like that. We've never heard from him.

22 The point that I made in my initial argument is that if you
23 look at the entire document and you look at the repeated examples

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1 where what comes out of the translator's mouth is worse for
2 Mr. al Nashiri than what Mr. al Nashiri actually said, to the extent
3 that we can draw bias from what we have in front of us, that pattern
4 shows bias.

5 And so it -- you know, certainly I would like to be able to
6 make an argument that we know that the translator was trying. But at
7 the end of the day, if we see the effect of the thing that we are
8 looking for, we know that it's there or that the problem that the
9 bias creates is there. So we don't actually -- you know, I don't
10 know how relevant it is whether or not we can prove that the
11 translator was trying to do it, because he did do it. There is a
12 biased outcome.

13 MJ [COL FITZGERALD]: How does that reconcile with the -- you
14 gave me the test with four factors and the bias seems to go to the
15 second factor. But that one was a little more explicit. It was the
16 translator's motive to mislead or distract. That bias could be
17 unconscious. Could be based on something we have no cognizance of.
18 Not necessarily bias against Mr. Nashiri as to -- as a criminal
19 subject or a terrorist or anything like that. It might have been
20 bias for a lot of different reasons.

21 But how do you reconcile, if you're asking me to give weight
22 to the factor of "did he have a motive to mislead or distract"?

23 And I presume that means motive to mislead or distract the

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1 recipients of that information from Mr. Nashiri, meaning the three
2 members of the CSRT. Am I right, it's three members?

3 DC [LT SHAVER]: Yes, sir ----

4 MJ [COL FITZGERALD]: Okay.

5 DC [LT SHAVER]: ---- I believe that's correct of the actual
6 panel.

7 MJ [COL FITZGERALD]: Where would I -- how would I see that if
8 you're trying to couple bias to that motive under that factors
9 analysis?

10 DC [LT SHAVER]: Right. I think I understand the question.

11 In this -- there's versions of this in other parts of the
12 law around here that the law tells you to look for the disease, so to
13 speak. And we have the symptoms in front of us. And so, you know,
14 one type of evidence would be -- or we could imagine a situation in
15 which the translation was perfect, right? There's no problem in the
16 translation. And then after the CSRT, we have some sort of statement
17 from the translator talking about how biased he is against the
18 accused.

19 I would say that's ultimately immaterial. Like, I would
20 concede that because, like, at the end of the day, what matters is
21 the product that comes out of it. And insofar as the bias of the
22 translator matters, it's because of how it affects the translation
23 that is provided.

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1 And so it's certainly possible that the translator is
2 biased. I just can't make, you know, a good-faith argument based on
3 anything other than the text where we see the symptoms, we see the
4 patterns. That's how bias reveals itself.

5 And so if the law is concerned ultimately about the
6 reliability of evidence, we look back to these more general purposes,
7 I think it matters more, even though, you know, it's not explicitly
8 written into the Nazemian factors. If you're looking for evidence of
9 bias, the fact of the bias, the impact is what you're ultimately
10 concerned about -- about keeping from the members. That would be my
11 interpretation, sir.

12 MJ [COL FITZGERALD]: Thank you.

13 DC [LT SHAVER]: I think -- I touched on this a little bit,
14 but I want to go back to this, this Apodaca kind of problem, and
15 really go back to the facts.

16 As I mentioned, Apodaca is solving a much narrower problem
17 where there is no dispute about what the words are in Spanish. You
18 know, the words themselves. There is some dispute about the
19 translation, but it is a good-faith dispute where both sides can
20 articulate why they want to, you know, present the translation in the
21 way that they are.

22 And so when we have here -- again, the FBI transcript is the
23 government's evidence that they have introduced in this motion

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1 series. And if there is no dispute between the MCDO linguists and
2 the FBI linguists, you know, sort of the representatives for
3 translation of each party, that's a very different situation than
4 Apodaca.

5 Those are not -- those are not good-faith distinctions that
6 we're talking about that we can argue in front of the members. I
7 won't harp on that but I think that's -- it's important to draw that
8 line.

9 In general, I think that the government seems to have
10 adopted this position of, like, we don't have to be particularly
11 concerned about the quality of the evidence and any bias that it may
12 contain because we can trust the members to sort it out. They're
13 going to be able to see through it. The defense will be able to
14 rebut any of these things that are misleading, and the members will
15 figure it out.

16 I think that that is a curious position for us all to be in,
17 that -- I don't know of another situation where we would present
18 evidence that we know is misleading to the members or at least is
19 somewhat misleading. We can certainly disagree about the degree of
20 that, but then trust that they're going to be able to sniff it out,
21 even though we know that it's not true. We're going to trust that
22 they come to that same conclusion even though we know that that's
23 what the truth is. I think that's a strange position for us all to

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1 be in.

2 MJ [COL FITZGERALD]: I'm not sure they're going to sniff it
3 out. I think through the adversarial process, they would hear
4 argument and evidence brought forward just like you did in this
5 hearing. So that seems different than you saying they're going to
6 use intuition.

7 DC [LT SHAVER]: Right. I think it is different if the
8 government genuinely believes and puts on evidence that what they're
9 presenting to the members is true. I don't think that that's where
10 we are if you look at that FBI transcript. They have acknowledged
11 that there are these discrepancies. And those words that are coming
12 from the translator are not accurate translations.

13 And so then we've shifted the burden ----

14 MJ [COL FITZGERALD]: That's not uncommon for any recording
15 played to the fact-finder. You can have multiple people involved who
16 all tell various shades of the same story. And we trust fact-finders
17 in their ultimate role to do that generally.

18 So how would this be different, if you're given a chance to
19 challenge the government's evidence?

20 DC [LT SHAVER]: Yes, sir. So I think I go back to what I say
21 if we're talking about sort of competing testimony. If that were the
22 case, I can't put on a witness that I know is going to get up there
23 and lie to the commission or attempt to mislead the commission.

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1 That's a different sort of evidence than -- and that's really the
2 distinction and that's the Apodaca problem, too, of like, what
3 is -- what is actually there and are we making arguments on what is
4 actually there or are we making arguments that we know are wrong, are
5 presenting evidence that we know is wrong and expecting the defense,
6 shifting that burden to the defense, to prove that the evidence that
7 everybody already knows is flawed, is flawed.

8 MJ [COL FITZGERALD]: Thank you.

9 DC [LT SHAVER]: I don't want to tread too much on
10 Ms. Manuele's territory and the argument that she'll be making later.
11 But throughout this, you know, the government has made
12 representations about the voluntariness of these statements and
13 whether or not, you know, the translator is Mr. al Nashiri's agent
14 for legal purposes.

15 And I think those sorts of problems are very difficult to
16 resolve at this point. I think, you know, from my perspective,
17 certainly, intuitively it is common sense to me that someone who has
18 been through the experiences that Mr. al Nashiri had been through, up
19 until this point, particularly with respect to the many linguists,
20 translators, et cetera, that he has experienced in, you know,
21 U.S. Government custody, that he doesn't feel like anything really is
22 voluntary. And this is covered in 467 and we don't need to retread
23 that ground.

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1 But I would say that this is -- you know, a lot of these
2 problems would have gone away if you had a lawyer or a representative
3 that was there with Mr. al Nashiri who was able to explain these
4 things to him. You might be able to intervene and say, like, you
5 know, this is not the translator that we want.

6 And the government deprived him of the opportunity to
7 meaningfully interrogate or understand the processes that he is
8 engaging in. There's really no record. You know, we certainly have
9 some limited testimony from the personal representative, but it's
10 very difficult for the government to say now having deprived him of
11 the opportunity to really engage with this process the way that we
12 would generally expect someone to, to then have them benefit from
13 that and say we have no record that he didn't want the translator or
14 that he didn't want the personal representative. You know, that's
15 why we have the lawyer there, to read them those rights.

16 And this is intuitive, I think, from the military
17 perspective as well because we don't have precisely the Miranda rule.
18 We have 31(b) rights which are in some ways more restrictive on the
19 government because we accept the argument, I think, implicitly that
20 servicemembers are sort of already in custody. They're in the
21 military. They know they're not going anywhere.

22 And I think Mr. al Nashiri was in a similar situation. And
23 so when we talk about, you know, forming or not forming those agency

1 relationships, I think that's very different.

2 The last thing I think I want to touch on here -- and then
3 I'll be done, so this will be quick. There are several rules here,
4 you know. And one good example is that prong of the Nazemian test
5 where we're talking about whether it's the evidence of bias or the
6 presence of the bias that we're talking about where I think generally
7 the law should sharpen our analysis instead of dull it, right?

8 And so some of these questions -- and, you know, and the
9 government cites to the rule or the hearsay exception that
10 Mr. al Nashiri is a party opponent, and under the, you know,
11 certainly mixed law on whether or not translations are hearsay or
12 not, that if he makes an utterance that is against his interests and
13 someone repeats it, that that person has become his agent for the
14 purposes of hearsay.

15 That is certainly what is said. There is more in the text
16 about that. It's a little bit more complicated. But if we were to
17 apply that rule, we end up with a solution that is nonsensical. That
18 would say that if you -- if you say something and you're a party
19 opponent and someone overhears it and then represents it as something
20 other than it was, that now there is no way to test the reliability
21 of that statement under the hearsay rule.

22 I think that we would still get backstopped by, you know,
23 Fifth Amendment and other sort of issues there. But that

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1 interpretation of the rule results in a -- in an outcome that
2 ultimately makes no sense.

3 So I certainly hear the government's argument about party
4 opponent, but the way that they are seeking the commission to apply
5 the rule here results in an outcome that would not be just, I don't
6 think.

7 I think that's all I've got, sir. Any more questions from
8 you, sir?

9 MJ [COL FITZGERALD]: No. I appreciate it.

10 DC [LT SHAVER]: Thank you, sir. Oh, there is one more
11 thing -- sorry, I forgot about this -- the issue with the oath, the
12 oath that the translator takes. I made a small error in presenting
13 it earlier. We were kind of fumbling to get it together.

14 So there is -- in the DoD transcript -- and, sir, I hope at
15 some point you'll have a chance to wade in here and it's -- dealing
16 with all these transcripts is a nightmare. But the DoD transcript
17 has the president of the tribunal administering the oath. It is
18 slightly different than the oath that's in the -- I believe in the
19 script. Ms. Manuele will cover it. I just want to make sure that
20 I'm on the record.

21 MJ [COL FITZGERALD]: What script? The tribunal script?

22 DC [LT SHAVER]: There's a tribunal script that has a slightly
23 different oath. The oath -- I would have to double-check in the

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1 recording, if it's in the recording, because there are parts of the
2 transcript that aren't in the recording either because they didn't
3 happen or they weren't recorded. It's not in the FBI transcript
4 because that's not when they started translating, which is all to say
5 it's sort of a mess. I know that's not particularly helpful, but
6 that's closer to the ----

7 MJ [COL FITZGERALD]: No, thank you. I appreciate you
8 informing me.

9 DC [LT SHAVER]: Thank you, sir.

10 MJ [COL FITZGERALD]: Thank you.

11 Is Ms. Manuele next? Or Ms. Carmon?

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

13 MJ [COL FITZGERALD]: Ms. Carmon, are you ready to proceed?

14 SDC [MS. CARMON]: I am, sir.

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

16 SDC [MS. CARMON]: Thank you. Good afternoon.

17 MJ [COL FITZGERALD]: Good afternoon.

18 SDC [MS. CARMON]: In 2013, the government made a disclosure
19 wherein they produced to the defense a statement made by former
20 PSO -- that's the Political Security Organization in Yemen -- former
21 PSO Colonel Abdul Salam Al Hilah who was, when the disclosure was
22 made, then a detainee in Guantanamo Bay.

23 And in that disclosure, in that statement, the facts of

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1 which remain classified but, in general terms, Mr. al Hilah takes
2 responsibility for a large role in the bombing of the USS COLE and,
3 in fact, admits to essentially being the but-for cause of the boat in
4 the harbor, which ultimately detonated itself beside the USS COLE and
5 resulted in the death of 17 sailors.

6 And it is not until 29 January 2026 that the government
7 discloses the where and the how of when that statement was taken.
8 And I should clarify that in 2013, we do not get a date for that
9 statement. We do not get a location of where it is taken from. And
10 we do not get an interrogator name or agency or affiliation as to
11 whom elicited the statement from Mr. al Hilah.

12 But on 29 January 2026, the government discloses that on 9
13 October 2002, that Mr. al Hilah is being interrogated by CIA officers
14 at Location Number 2.

15 And Your Honor has heard plenty about Location Number 2.
16 CIA officers call it an inherent -- an enhanced interrogation
17 technique itself. It's been described as deplorable, medieval.
18 Dr. Mitchell said the cells looked like horse stalls.

19 And it is about the same time that low-value detainee
20 Gul Rahman is frozen to death in Location Number 2 after being water
21 doused, given just a sweatshirt, and left in a freezing cell to die.

22 And so I say that the disclosure tells us more about the
23 2013 statement. The 2013 statement is ultimately revealed to us that

1 it was made on 10 October 2002. And so we can surmise that where
2 Mr. al Hilah was on the day before, he remains on the day after.

3 And that disclosure by the government, for the first time,
4 informs the defense that this critical mitigating exculpatory
5 statement is statutorily inadmissible by either party. And so there
6 are multiple harms here.

7 But for the government's destruction of the centerpiece of
8 Mr. al Nashiri's merits defense and his case in extenuation and
9 mitigation for misleading the commission when asked directly, and
10 letting that misleading dodge go uncorrected for years.

11 And for this eleventh-hour disclosure of information that
12 bars the admissibility of this evidence, the only remedy that
13 acknowledges the severity of the government's misconduct and the
14 gravity of this situation and what Mr. al Nashiri's defense is left
15 with is dismissal of the case, which is exactly what we've asked for.

16 Precedent exists in military justice case law when discovery
17 violations are so severe and they're -- at least in this case,
18 Stellato was bad faith, that resulted in a dismissal with prejudice
19 pretrial.

20 There is precedent in federal and constitutional case law
21 where the government's actions violate a defendant's right to present
22 a complete defense, violated defendant's due process rights, and I'm
23 thinking of Youngblood, Trombetta, Valenzuela-Bernal, that progeny of

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1 cases, and a Napue violation, which required the government to
2 correct false testimony elicited by one of its prosecutors. And when
3 it did not, resulted in vacating of a conviction and overturning of a
4 case. Precedent exists to remedy harms just like this with
5 dismissal, with severe sanctions.

6 And so we've asked for the dismissal in total. If the
7 commission believes that the case should proceed, it cannot proceed
8 capitally. It cannot proceed with death as a possible punishment.
9 And I'll refer to our supplemental filing based on the commission's
10 questions to the parties, supplemented AE 670G, where we go through
11 some of that precedent.

12 So I think it bears walking through the timeline of every
13 opportunity the government had to disclose this information to us.
14 And every time this particular statement -- and I'm talking
15 specifically about the 10 October 2002 statement where Mr. al Hilah
16 basically admits what he did in the bombing of the USS COLE, admits
17 his guilt, that statement has come up no less than 15 times in
18 litigation over the last 13 years. And each time, the government
19 remains silent.

20 And so in its 2013 disclosure, its original disclosure, we
21 do not get a date. We do not get a place. And we do not get an
22 interrogator. The government remains silent as to those facts.

23 In December 2014, when the defense requested Mr. al Hilah be

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1 produced as a witness in litigation before the commission, the
2 government says nothing about this statement and the potential
3 inadmissibility of the statement itself.

4 And I should clarify that the request for Mr. al Hilah as a
5 witness and the subsequent requests for immunity rely on the
6 production of the statement and what it means for the defense.

7 In early 2015, when the defense, after speaking with
8 Mr. al Hilah's lawyer and discovering that Mr. al Hilah intended to
9 invoke his right not to incriminate himself, the defense went to the
10 convening authority to request immunity for Mr. al Hilah based on
11 this exculpatory statement.

12 The government says nothing.

13 After that denial, we requested that the military judge
14 compel the convening authority to grant Mr. al Hilah immunity, and
15 still the government stays silent.

16 In 2017, when the commission ultimately denied the defense
17 motion to compel immunity, the government did not then disclose
18 anything about the circumstances surrounding the taking of this
19 statement.

20 In November 2020, the defense requested discovery from the
21 government, which included discovery that was used in Mr. al Hilah's
22 habeas case. So in their pursuit of keeping Mr. al Hilah detained in
23 the D.C. -- in the District Court of the District of Columbia, when

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1 we make that request, the government in response does not turn over
2 and does not produce any information about the statement and the
3 circumstances surrounding its taking.

4 And in between November 2020 and March of 2021, the defense
5 specifically requests the circumstances surrounding the taking of the
6 statements of Mr. al Hilah to include that 10 October 2002 statement,
7 specifically asking for information regarding how that statement was
8 procured, where from, who by. When we request of the government,
9 that is denied by the government. And they do not at any time
10 produce the possibility that this statement is statutorily barred.

11 And in September 2021, when ultimately the defense moves for
12 a deposition of Mr. al Hilah, the government stays silent.

13 On 9 November 2021, at AE 429H, the commission orders the
14 government to, quote, produce any information currently in the
15 possession of trial counsel or of which trial counsel is currently
16 aware that provides context to the statements made by Mr. al Hilah.

17 Upon that order, the government does nothing.

18 In March of 2022, the government reproduces the statement at
19 issue. And in that reproduction, it contains the date. And so in
20 March of 2022, which is nine years after the original production, we
21 find out that the date of that statement is 10 October 2002.

22 We still don't find out where he is. We still don't find
23 out from whom -- or excuse me, who was actually eliciting the

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1 statement.

2 In April of 2022, just a month later, we have an
3 M.C.R.E. 505(h) hearing in preparation for the deposition of
4 Mr. al Hilah where a disclosure was made to the defense.

5 And I'm going to place the transcript page of that
6 disclosure as that disclosure remains classified.

7 And if I may have use of the ELMO just for the parties?

8 And so this is transcript page 16180 to 16181 of the
9 still-classified transcript.

10 When that disclosure is made by managing assistant trial
11 counsel, it does not also come with any disclosure about the
12 circumstances surrounding the taking of the statement that we now
13 know was taken 10 October 2002.

14 And I'll remove the transcript.

15 The defense attempts a deposition in May of 2022.

16 Ultimately, Mr. al Hilah invokes.

17 Again, the government remains silent as to the statement.

18 And when the defense filed AE 478, we requested pretrial
19 admissibility of the statement at issue, of that exculpatory and
20 mitigating statement we now know was given on 10 October 2002. And
21 we filed that motion based upon the commission's finding that
22 Mr. al Hilah was unavailable due to his invocation at the time of the
23 deposition.

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1 And it's on 5 August 2022 that the commission has a direct
2 colloquy about the admissibility of this statement. And the
3 commission has that colloquy with both defense counsel and trial
4 counsel.

5 And this is where the commission asks direct questions
6 about, and I quote, "Do I have a 304 problem?" And what the
7 commission meant by that is, obviously, 304 mirrors the language of
8 948r, which is that no statement shall be admissible, and then it
9 gives the language obtained by the use of torture or cruel, inhuman,
10 and degrading treatment.

11 And so first the commission asked defense counsel. And
12 defense counsel says there's nothing in the statement itself that
13 would lead me to believe that we have a 304 problem. But, again,
14 this is a summary. And so Captain Mizer at the time, acknowledged
15 that we don't have all the information.

16 And so the commission asked trial counsel directly: "Do I
17 have a 304 issue?"

18 And the assistant trial counsel responds that the defense
19 didn't raise one.

20 And there is back and forth where the assistant trial
21 counsel never answers the question. The answer to the question is
22 always "I'm not raising one and neither is the defense."

23 And Judge Acosta at that time notes it, and says: "You keep

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1 saying a different phrase at the end there. And it doesn't
2 completely eliminate from the commission's mind the concern that this
3 was a statement obtained by torture."

4 And he gets a commitment from the assistant trial counsel
5 that if it was, he cannot consider the statement.

6 And at the end of the colloquy, assistant trial counsel
7 says: "You would have an issue of 304 if it was a statement obtained
8 under torture, but that is not an issue that either the defense or
9 the government is raising with regard to these statements."

10 Not that we have knowledge that may impact that decision.
11 Not that you might have one and we need to have a hearing about it.
12 Not that the government has information that the defense might need
13 in its pursuit of the admissibility of this statement, but simply
14 that no one is raising it.

15 And I'll recall Your Honor's attention to, at that time the
16 information that we knew -- and I think Captain Mizer says something
17 to the effect of, "Judge, at that point, Mr. al Hilah could have been
18 at a resort somewhere." That is the information that we had.

19 And so we had no reason at that point to suspect that on 10
20 October 2002, that Mr. Al Hilah is somewhere where that statement
21 could be potentially barred by 948r.

22 And even when the commission ruled in AE 478H, the
23 commission at the end of the ruling drops a footnote, noting the

1 reliance on the colloquy with the government in ruling that the
2 statement, at least for pretrial purposes, was admissible as a
3 statement against interests. And so all other things remaining
4 equal, would be admissible at a trial were the defense to enter the
5 statement.

6 And the government still says nothing. And the government
7 says nothing between August of 2022, up until the point where Mr. Al
8 Hilah is resettled in Oman in January of 2025.

9 And I go through all of those instances because all of these
10 points of litigation about this very statement occurred while Mr. Al
11 Hilah remained in United States custody. And it is not until a year
12 later after his resettlement when he is unavailable in an
13 uncooperative third country, as we know because this is the same
14 place where Mr. Sharqawi and Mr. Kazimi were resettled, and we know
15 from attempting to schedule depositions with those gentlemen that
16 Oman is not cooperating with that, it is not until a year later that
17 we get this disclosure.

18 And so I think what's important to note about this is the
19 myriad of harms that the defense has suffered because of the
20 government's actions here. Not only has the defense been deprived of
21 a critical piece of evidence, but it is being deprived of the right
22 to present a complete defense. And I don't think it's any secret to
23 anyone in this courtroom or anyone who has followed these proceedings

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1 that Mr. Al Hilah is a central character in the defense's merits
2 phase presentation.

3 He forms the basis of multiple relationships. He forms the
4 basis of a cell that is unrelated to Mr. al Nashiri. He forms the
5 basis of an alternate suspect theory that is viable.

6 With the government's destruction of that evidence, making
7 it inadmissible pursuant to 948r, the government has not only
8 inhibited the defense's right to present that complete defense, but
9 also the right -- the constitutional right to access evidence.

10 We've also been deprived of critical mitigation evidence.
11 And in a capital case where the defense only has to convince one
12 person that some piece of evidence or something about Mr. al Nashiri
13 is worth the weight of life, is worth a sentence less than death.

14 In thinking about Mr. Al Hilah and the actions that he took
15 credit for in that statement, when the jurors, when the panel members
16 are in the back deliberating over what sentence to give and they're
17 thinking about, well, there is this man who took credit for
18 essentially the but-for cause of the bombing of the USS COLE and he's
19 walking around in Oman free, never been charged. And when they are
20 thinking about the proportionality of that, when the panel members
21 are thinking about whether or not Mr. al Nashiri's relative
22 culpability or diminished role is worth the weight of life, there is
23 a very reasonable possibility that at least one person of those 12

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1 will decide that that evidence, as it relates to the themes that we
2 have talked about over and over in the last two sessions, that that
3 evidence is worth the weight of a sentence less than death. And we
4 are deprived of presenting that.

5 And what's so critical about it is that it's not
6 just -- because we do have other evidence of al Hilah being a bad guy
7 and al Hilah having relationships with members of high-ranking Yemeni
8 government agencies. We have other information about that. And we
9 can say he was involved with these guys that we think were complicit
10 in the bombing of the USS COLE.

11 But the critical information that remains classified are the
12 details to which Mr. Al Hilah admits. That is where you have the
13 relative culpability and the proportionality analysis. The panel has
14 to know those details in order to correctly make that assessment.
15 And I think there's a very real possibility that those details equal
16 a sentence less than death.

17 There's also the issue of the Napue violation, which is that
18 the government has let the 5 August 2022 non-answers go uncorrected
19 for four years. They have never come back to the commission and
20 said: When you asked did I have a 304 problem, well, here is where
21 he was at that time and who was interrogating him. And then, I
22 guess, we can argue about what that means. But they don't even give
23 the commission the opportunity to have that information along with

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1 the defense.

2 And so the Napue violation that has occurred, the misleading
3 information given to the commission that has been uncorrected, in
4 Napue itself, that's vacating of a conviction and a sentence.

5 There's also the issue of classification and the sort of
6 Reynolds problem that we talk about. Because presumably -- and we
7 discussed this in our brief. Presumably the commission saw the
8 original cable, which would have had the dates and the interrogators
9 and the agencies and the location of those that were involved in
10 taking of the 10 October 2002 statement, presumably one of the
11 military judges who served on the commission.

12 As it went through the 505 process, the government chose to
13 hide many of those details from the defense. And they classified, at
14 first, everything coming out of the black sites. And we know, as
15 time went on and the SSCI Report was made public in 2014, that
16 details have been declassified.

17 And so now, whereas Mr. Rick Kammen back in 2010, 2013, was
18 fighting to get any details about where his client had been, now we
19 have location numbers. The EITs are declassified. We know of the
20 involvement of Dr. Mitchell and Dr. Jessen.

21 But what we have never been told, still, is where Mr. Al
22 Hilah was on 10 October 2002. Now, we are surmising that he hasn't
23 moved to a different place from the day before. But the government

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1 has still never disclosed that fact to us. And clearly, we have not
2 been put in substantially the same position as if we would -- as if
3 we would be had we had that information. Because if we had that
4 information, we would have raised an issue.

5 And I've got to tell you, an immunity request to the CA or
6 the military judge, either one, looks very different when the defense
7 knows that the statement that they are relying on and they want to
8 get out of the witness is otherwise inadmissible. It looks very
9 different. And so that request for immunity contained none of that
10 information.

11 And, you know, Reynolds is -- government, you've got
12 choices. You can disclose or dismiss. In the brief, we go through
13 the fact that the government still refuses to disclose. And I think
14 it's on the commission at this point to dismiss.

15 And the last harm that I'll go through is just the
16 eleventh-hour disclosure of it all, the discovery violation of it
17 all, and the fact that this information has been revealed at a time
18 when the defense is unable to do anything about it.

19 And the commission, I am sure, is familiar with the military
20 justice case law of Stellato and the language of the right and the
21 ability of the military judge to fashion an appropriate remedy that
22 is just under all the circumstances. That is the language that
23 Stellato interprets, as does Vargas.

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1 And I have a courtesy copy for Your Honor. I already gave a
2 copy to Captain Stinson.

3 MJ [COL FITZGERALD]: Of Stellato?

4 SDC [MS. CARMON]: This is United States v. Vargas.

5 MJ [COL FITZGERALD]: Vargas. Okay.

6 SDC [MS. CARMON]: Yes. This is 83 M.J. 150. It is a 2023
7 decision. If I can approach?

8 MJ [COL FITZGERALD]: You may.

9 **[Pause.]**

10 SDC [MS. CARMON]: And, Judge, quite frankly, what Vargas says
11 and the analysis that the Vargas court undertakes, ultimately they
12 send it back to the trial judge because the trial judge did not
13 consider the wide breadth of alternatives that was available to him
14 or her.

15 But the language is the "just under the circumstances"
16 language in crafting a remedy. And what Vargas makes clear
17 commenting on Stellato and its holding is that the court's
18 consideration is not narrow. It is not do I have to consider the
19 least drastic alternative that fixes the problem, that cures the
20 violation or that cures the prejudice. No. It is -- you can
21 consider what is just under the circumstances, which includes a wider
22 aperture of alternatives. And you must consider the least drastic
23 alternative. But it's not that cures because you're able to consider

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1 bad faith as the Stellato court did. You're able to consider a
2 pattern of behavior as the Stellato court did.

3 And so when you are looking at remedies, you are not
4 confined to remedies that might cure the prejudice. You can look
5 wider at remedies, still the least drastic one after you've gone
6 through the alternatives and decided that this is the most just, but
7 you can consider many other things other than what might cure the
8 harm at issue.

9 And so the government, in its response to our motion, never
10 addresses two things. One, they don't address at all whether the 10
11 October 2002 statement of Mr. al Hilah was obtained via torture or
12 cruel, inhuman, and degrading treatment. And if my supposition is
13 correct that because he was there 9 October 2002, that he remains at
14 Location Number 2 the very next day. What we know about Location 2
15 and the deplorable conditions and even the standard sort of
16 techniques being used, as has been testified to in this commission,
17 as the SSCI Report found, as the government has previously stipulated
18 in Stipulations of Fact, those conditions are cruel, inhuman, and
19 degrading treatment.

20 And so if Mr. al Hilah was there, that statement was
21 obtained by at least cruel, inhuman, and degrading treatment. But
22 the government does not address that in their response.

23 The government also never addresses what they knew when they

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1 were asked directly on 5 August 2022. They never say, "You're right,
2 probably should have disclosed that information at some point. But
3 here's what we'll give you as a remedy." Just never addresses it.

4 And instead, they attempt to sort of institute a "defense
5 should have known" standard of classified information, which goes
6 against every directive that we've ever had from the government as it
7 relates to how we handle classified information.

8 Because there are two government disclosures that are
9 pertinent here. And when I say "government disclosure," I mean
10 information that is still classified that has passed and produced in
11 discovery directly from the government either through the 505 process
12 or sent directly to the defense, but that comes through that official
13 channel.

14 The two disclosures are that, one, on January 2003, the FBI
15 wants to interview Mr. al Hilah at Location Number 2.

16 And second, that on 9 October 2002, Mr. al Hilah is being
17 interrogated by the CIA at Location Number 2.

18 Those are the two government disclosures about Mr. al Hilah
19 and where he is.

20 As I said, the government has still not disclosed where he
21 was on 10 October 2002. And they point to statements made by
22 Mr. al Hilah himself. They point to proffers made by his lawyer as
23 some sort of, "You should have done some investigation and figured it

1 out."

2 And we have certainly been chided in the past when we have
3 used open-source information to try to make some connections or
4 figure out identities. We have been told that that is dangerous and
5 that we are to use the information that comes through official
6 channels.

7 And so Mr. al Hilah's suppositions about where he might be
8 and his lawyer's proffers about what he's been told about what
9 Mr. al Hilah suffered and where he might be, that is not a government
10 disclosure, unless I am wrong and Mr. al Hilah or his lawyer now
11 speak for the government. But that is not a government disclosure of
12 where Mr. al Hilah was on 10 October 2002.

13 And, you know, I say -- and I don't mean this derogatory
14 towards Mr. al Hilah, but his supposition about where he was is just
15 that, because the CIA's RDI Program was designed to destabilize and
16 to keep the participant's location from the participant. I mean, I
17 think we've heard testimony about how the guards would remove the
18 wrapping from water bottles so that the detainees would have no idea
19 where they were.

20 And I would just point the commission to AE 120AA. That is
21 Judge Pohl's finding that the government owed the defense discovery
22 on the CIA's torture program because the point of it was to keep
23 Mr. al Nashiri unaware of where he was when he was there and other

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1 aspects of his detention.

2 And Judge Pohl says you cannot turn to Mr. al Nashiri -- or
3 turn to the defense, rather, and say, "Just ask Mr. al Nashiri."
4 Because he recognized that the point of the program was that these
5 people did not know where they were.

6 And so when I say Mr. al Hilah's supposition, that's what I
7 mean. The program was designed to keep him from knowing where he
8 was.

9 And, again, anything he says is not a government disclosure.

10 And so the government's suggested remedy is that they just
11 stipulate in a stipulation of expected testimony that Mr. al Hilah,
12 if called to the stand tomorrow, would testify in conformity
13 therewith or testify to these classified details regarding his
14 involvement in the COLE that come from his 10 October 2002 statement.

15 I think the first thing is that I am unaware of any
16 authority to stipulate around a constitutional violation and around a
17 statutory bar on the admissibility of evidence.

18 And the second is that that's not how stipulations of
19 expected testimony work. There have been two in this commission that
20 I've personally been involved with. One was at AE 482Q, which was
21 the Stipulation of Expected Testimony of Detective Parola in the
22 defense's motion about Mr. al Owhali's statement and the
23 admissibility of it.

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1 And as attached to that Stipulation of Expected Testimony,
2 those details came from the government's interview of Detective
3 Parola wherein they shared the raw notes with me and we worked
4 together to craft that stipulation. And it was based in fact and
5 reality because the government had recently discussed with Mr. Parola
6 what he would testify to and what he remembered.

7 So that's one.

8 The second that I was involved with is AE 569GG. That is
9 the Stipulation of Expected Testimony of Dr. 1. And to craft that
10 Stipulation of Expected Testimony, the government and the defense
11 spent hours interviewing Dr. 1 about what she would testify to were
12 she called to the stand.

13 And so the facts that came into that Stipulation of Expected
14 Testimony were grounded in fact and reality, because that is what she
15 would have testified to. I don't think I can ethically agree to a
16 stipulation of expected testimony because the truth is I don't know
17 that's what he would say if called to the stand. I don't have any
18 facts or, frankly, reality to say that that's true.

19 And the other part of it is, because these details remain
20 classified, even if I were to enter into a stipulation of expected
21 testimony, I could not review that stipulation with Mr. al Nashiri.
22 And then we're in a problem, kind of like we had with Dr. 1, where he
23 needs to agree that this is at least in his best interest and he's

1 been told at least the wavetops of what it says, which I could give
2 him because I just spent hours with Dr. 1 about what she would say.

3 I could not go over the details here with Mr. al Nashiri
4 about Mr. al Hilah's statements. And the truth is, neither of us
5 know what he would say. And so that is not a remedy that is
6 available at all.

7 The remedies that are available -- and I think -- and
8 sometimes the answer just is the most drastic remedy is the right
9 one. Stellato decided that. In AE 670G, there are myriad examples
10 of courts that have decided that, based on what happened before then,
11 be it discovery violations or prosectorial misconduct, that the
12 dismissal of a capital referral pretrial was the appropriate remedy.

13 And so Your Honor has precedent and authority. And Your
14 Honor always has the authority as the sitting military judge in this
15 commission to right the wrongs before it, to issue sanctions for late
16 discovery or misbehavior or name your misconduct here. You always
17 have that authority.

18 And what we are asking, recognizing it is a drastic remedy,
19 we are asking for because of the incredible deficit we are now placed
20 in. And we would not have come before Your Honor with this
21 information did we not -- if we didn't believe we had to.

22 We owe a duty of candor to the court. And part of that is
23 correcting a record that is misleading or untrue. Part of that is,

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1 quite frankly, being honest about the things that we know and
2 disclosing information that, although is not helpful to our client,
3 that is binding on the commission, which 948r is.

4 And so we felt, in support of our duty of candor to the
5 tribunal, that we had to bring this information. That is not helpful
6 to Mr. al Nashiri, because the fact of the matter is, the very
7 statement that we have crafted our defense and extenuation and
8 mitigating themes around is statutorily inadmissible for either
9 party.

10 And so it cannot be used by me. It cannot be used by the
11 government. It will never reach the panel. And that was not
12 disclosed to us until the end of January of 2026, 13 years after its
13 first disclosure, and 11 years after the first piece of litigation
14 surrounding that statement.

15 And so there are multiple issues that require a remedy.
16 There is a remedy available to the commission for the constitutional
17 violations, the destruction -- the rendering unusable of critical
18 exculpatory and mitigating evidence, which inhibits the defense's
19 constitutional mandate and right to present a complete defense, to
20 have access to the evidence that it needs.

21 There is the misleading information given to the commission
22 in 2022 that has never once been corrected on the record. That
23 deserves a sanction as well.

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1 The fact that what we believe to be the most valuable and
2 impactful piece of information that the panel needs in a
3 determination about whether Mr. al Nashiri lives or dies has been
4 rendered unusable by the government. And the fact they didn't give
5 us the pertinent information until it was too late to do anything
6 about it deserves a sanction.

7 And, quite frankly -- I mean, here's where the rubber meets
8 the road. Mr. al Hilah is the only source of these details and this
9 information. This statement given by Mr. al Hilah on 10
10 October 2002, that Judge Acosta had originally found was admissible
11 as a statement against interest, that is the sole source of these
12 details surrounding his involvement in the bombing of the USS COLE.

13 He is unavailable in an unfriendly third country, and he
14 will never take the stand, and he will never sit for a deposition.

15 The government had 13 years -- or 12, at least, while he was
16 in custody to get us the information we needed to ask for a remedy
17 then. We could have renewed our request for immunity. We could have
18 done multiple things. But we never had the information and never
19 knew we needed to, not until he was completely unavailable and the
20 information that we so desperately need and spent years building our
21 defense and our mitigation and extenuation case around is completely
22 unusable.

23 And so for those reasons the sanction of dismissal is not

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1 only available to the commission but it's appropriate. In Stellato,
2 some of the considerations were a pattern, were the government's bad
3 faith, were the fact that the government repeatedly ignored orders of
4 the commission.

5 And so you've got precedent under military justice case law,
6 in constitutional and federal case law, for this drastic remedy, and
7 it is the right one. It is not only available to the commission, but
8 it is the right remedy based on the abject harm Mr. al Nashiri's
9 defense has suffered from the government's actions that have rendered
10 this evidence inadmissible and their inaction in giving us the
11 information we needed to remedy the situation while we had a chance
12 to.

13 And if I can just have one moment, sir?

14 MJ [COL FITZGERALD]: You may.

15 **[Counsel conferred.]**

16 SDC [MS. CARMON]: And, sir, pending any questions, that would
17 be the end of my presentation.

18 MJ [COL FITZGERALD]: Thank you. I have no questions at this
19 time, but I may. I'm certain you will respond to the government's
20 arguments.

21 Can we take a recess first?

22 SDC [MS. CARMON]: Yes, sir.

23 MJ [COL FITZGERALD]: I think it's been a while.

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

2 MJ [COL FITZGERALD]: Very well.

3 The commission is in recess until 1425.

4 **[The R.M.C. 803 session recessed at 1409, 21 April 2026.]**

5 **[The R.M.C. 803 session was called to order at 1427, 21 April 2026.]**

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

7 All parties present before the last recess are again
8 present. Mr. Nashiri is still attending from the alternate site.

9 Government, are you prepared?

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

11 MJ [COL FITZGERALD]: You may proceed.

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

13 The government respectfully requests that the commission
14 deny the defense motion to dismiss the charges or to dismiss the
15 capital referral for several related but independent reasons.

16 But first, there is one point that the government agrees
17 with Ms. Carmon. The al Hilah statements have been litigated about
18 extensively. And the government would point the commission
19 initially, before we get into the reasons, to AE 478H. And that was
20 Judge Acosta's careful and well-reasoned opinion in which he notes
21 that the statement that was noticed by the defense was a statement
22 against interest in its preliminary admissibility and also
23 effectively notes that the government has forfeited the right to

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1 later argue that those statements were obtained by torture, cruel,
2 inhuman, or degrading treatment. That was the right remedy then, and
3 it is the right remedy now.

4 The government did turn over the statements of Mr. al Hilah
5 in 2013, pursuant to this commission's process. We've cited in our
6 response the underlying information. It's in footnote 2 of our
7 response. It's at AE 441 Attachment D, Tab 178, page 2764 of 3767.

8 But we turned over that initial statement in 2013. The
9 Senate Select Committee on Intelligence Report, the executive
10 summary, lists Mr. al Hilah as an individual who was in CIA custody.
11 That was released in December of 2014 as publicly available.

12 In short, the information related to Mr. al Hilah was not
13 hidden from the defense. The government did produce discovery prior
14 to hearings in AE 478 regarding Mr. al Hilah and his locations at the
15 time the statements were being offered.

16 It is accurate that in January of this year, pursuant to
17 this commission's directive, additional information for a particular
18 summary that had been previously reviewed and approved by the
19 commission was provided, but that does not mean it was the only time
20 the information was provided and we detail that in our response, Your
21 Honor.

22 Second, the defense mistakenly equates the government's
23 concession to not affirmatively use statements obtained by the

1 accused during the RDI Program as precluding the defense from using
2 those statements at trial. That is a misreading of the statute, the
3 Military Commissions Rules of Evidence, and the government's
4 prophylactic policy decision to not use affirmatively any evidence
5 obtained during the RDI Program as evidence at any stage in the
6 proceeding.

7 And you'll notice, again, in AE 478H in the colloquy that
8 Ms. Carmon cited between the judge, Judge Acosta, and assistant trial
9 counsel, the judge asked, "Do we have an M.C.R.E. 304 issue here?"

10 And if we look at M.C.R.E. 304, we are at
11 M.C.R.E. 304(a)(3), which is statements from persons other than the
12 accused allegedly produced by coercion. And you'll note that in the
13 discussion at AE -- or M.C.R.E. 304(c)(3), they talk about a party
14 has to raise an objection to that statement. And if a party raises
15 an objection to a third party statement, the judge can order -- can
16 require some specificity as why they're objecting to that statement.

17 So Judge Acosta's colloquy with assistant trial counsel,
18 when read in the context of the rule, was a colloquy about whether or
19 not the government was going to contest the admissibility of those
20 statements under M.C.R.E. 304(a)(3). And the assistant trial counsel
21 responded, "We are not raising that issue."

22 And Judge Acosta in the ruling, in 478H, took it a step
23 further and said, "You have now forfeited your ability. I've already

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1 ruled a statement against interest, and, Government, you may
2 not -- you've forfeited the right to contest the admissibility of
3 that statement as a statement obtained by torture, cruel, inhuman, or
4 degrading treatment."

5 Ms. Carmon indicated that the offered stipulation is not
6 really a remedy. But the government offered the stipulation really
7 to show that this is a manufactured crisis by the defense.

8 They've noticed three statements of al Hilah. Those three
9 statements are already in the record. The summaries are at AE 689
10 Attachments B and C. And there's a statement from law enforcement at
11 AE 342 Attachment G.

12 And those statements are not exculpatory for Mr. Nashiri.
13 In fact, in the law enforcement statement, Mr. al Hilah recounts how
14 he and his brother, Nabil, had hosted a mujahideen luncheon in 1997,
15 at which the defendant, Mr. Nashiri, attended with the two suicide
16 bombers, Nibras, Ibrahim al Thawr and his son, al Khamri.

17 This is not an independent organization or an independent
18 cell that was totally unrelated to Mr. Nashiri. This was individuals
19 in Yemen who were taking steps to help facilitate some of these
20 attacks. That part may be true, but it is not exculpatory or -- it
21 may be a proportionality analysis, but it's not exculpatory for
22 Mr. Nashiri.

23 Obviously, the government can't force the defense to

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1 stipulate to the testimony. They're free not to. We just point that
2 out. The government's not only abiding by Judge Acosta's ruling that
3 we forfeited the ability to contest whether or not the statement at
4 AE 478H was obtained by torture, cruel, inhumane, or degrading
5 treatment. We're willing to stipulate to all of the statements,
6 stipulate to the expected testimony.

7 The defense is right that they did move for a deposition of
8 Mr. al Hilah. The government didn't oppose that deposition. That
9 deposition was here. Mr. al Hilah came in and he invoked. He
10 refused to testify.

11 The defense indicated that as early as, I guess, 2017 or so,
12 they had conversations with Mr. al Hilah's attorneys. They were
13 pursuing this angle. This was not news to the defense.

14 So from the government's perspective, this has been reviewed
15 on numerous occasions. This commission reviewed it carefully. It
16 had a colloquy to confirm whether or not the government would raise
17 an objection to the statements being offered by the defense. And the
18 assistant trial counsel confirmed the government will not be raising
19 an objection on that basis. They did argue, hey, we don't think it
20 meets the criteria for a statement against interest, but they were
21 not objecting to the admissibility of Mr. al Hilah's statement as a
22 statement obtained by torture, cruel, inhuman, or degrading
23 treatment.

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1 So that statement is, under 478H, preliminarily admissible.
2 In fact, in AE 703, Your Honor, in -- I'm just trying to find the
3 page -- 2(a), this commission also ruled in regards to the 505
4 hearing that that statement was relevant to a legally cognizable
5 defense and directed the government to work with the relevant
6 original classification authorities to declassify the information in
7 that statement. And the government is pursuing that as we speak, you
8 know, with the May 15th deadline.

9 So the remedies that the defense asks for and asks for very
10 impassionately, either a dismissal of the case entirely or a
11 dismissal of the capital referral, are entirely inappropriate here.

12 There is no bar to the defense from using Mr. al Hilah's
13 statement. And we note that if we were to read 10 U.S.C. 948r as
14 precluding exculpatory information from the defense, that would be
15 contrary to almost any other exclusionary rule.

16 And you go back to the purposes of the exclusionary rule.
17 The exclusionary rule was created initially by the Supreme Court in
18 Weeks v. United States, that's 232 U.S. 383, later extended to state
19 courts in Mapp v. Ohio, 367 U.S. 643. And that is intended to deter
20 government misconduct. That's the purpose of the exclusionary rule.
21 It's intended to deter police misconduct.

22 The societal cost of excluding evidence has led to
23 well-known exceptions to the exclusionary rule, including inevitable

1 discovery, independent source, attenuation, good faith, and the like.

2 But both the rule itself and the exceptions deal with the
3 government's use of evidence affirmatively. They do not speak to a
4 defendant's right to use evidence. And this is borne out -- if we
5 look at the statute, so moving away from Rule 304 for a minute and
6 looking exclusively at 10 U.S.C. 948r, Section (a) is the
7 exclusionary rule, No statements obtained by torture, cruel, inhuman,
8 or degrading treatment are admissible in a military commission
9 proceeding.

10 Section (b) is self-incrimination is prohibited. Nobody can
11 compel a defendant to testify in a proceeding against himself.

12 Section (c) is other statements of the accused. So not
13 torture, CID, not self-incrimination, but other statements of the
14 accused.

15 And then (d) is how do we determine voluntariness of the
16 accused's statements.

17 So this is analogous to a codification of the exclusionary
18 rule. And I would just point the commission to two canons of
19 statutory interpretation. The first is *eiusdem generis*, which is of
20 the same kind or class. And the second is *noscitur a sociis*, you are
21 known by the company you keep.

22 So the statute itself is really affording the exclusionary
23 rule protections in a military commission proceedings.

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1 Rule 304 implements some of those statutory bars. But those
2 statutory bars are really focused on protections of the accused. And
3 that makes sense.

4 And I'd point the court to an analogous context. We talked
5 about this earlier in the sessions in both the United States v.
6 Moussaoui case and in United States v. Paracha, the defendant wanted
7 to use statements of some high-value detainees that happened to be in
8 CIA custody at the time. So Khalid Shaikh Mohammad, Ramzi
9 Binalshibh, and others.

10 And if you recall from that, we talked about the instruction
11 and the -- you know, the stipulations that were provided to the
12 members about what those individuals said and the tailored
13 instruction that went along when they read those statements in.

14 But nobody argued -- the government certainly didn't get up
15 and say, oh, you can't use those statements, it's a violation of
16 Miranda. That was a violation of the Fifth Amendment. That would be
17 an absurd result.

18 The government's ability in that context to prohibit a
19 defendant from using favorable information because of the
20 exclusionary rule would simply not make sense. So we -- and that's,
21 in the government's view, why Judge Acosta was careful. And he
22 didn't talk about 10 U.S.C. 948r. He talked about Rule 304.

23 Hey, Government, are we going to have a 304 problem? Are

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1 you going to object to this at trial? Either party. Whoever is
2 proposing it, the other party under that rule can raise an objection,
3 and then you would have to have the determination. And the assistant
4 trial counsel said no, the government is not intending to raise that
5 issue.

6 Judge Acosta very carefully in his ruling said, "Okay, you
7 forfeited that right. I heard you. You're not raising it here. But
8 you can't raise it later on either. So you are not allowed to later
9 on try to block the use of that statement at trial."

10 So there is nothing that precludes the defense from using
11 that statement, from putting that statement before the members. And,
12 indeed, Your Honor, in the 505 context, has already instructed the
13 government to move to declassify the information in that statement.

14 So ----

15 MJ [COL FITZGERALD]: It's another way of reading
16 Rule 304(a)(3). It seems whether that statement is in violation of a
17 prohibition against statements under coercion may be in dispute. So
18 when do I take that up? How do I take that up? I know the
19 government is barred from doing so, but defense seems to be putting
20 that statement in dispute.

21 TC [CAPT STINSON]: Yes, Your Honor. So, again, I would point
22 to 304(c)(3) now, the discussion. And 304(a)(3) is unusual. If you
23 look at the Military Rules of Evidence, M.C.R.E. 304 almost exactly

1 models that. So if you look at the burden of proof and the
2 procedures, it's almost entirely defense motions. The defense raises
3 it. The burden of proof switches to the government. So (a) (3) is
4 the only sort of outlier. The rest of it mirrors M.R.E. 304, which
5 is exclusively exclusionary rule by the defense against the
6 government.

7 But (a) (3) is a weird one. It's a new one where it says,
8 hey, either party can contest it.

9 And if you look at (c) (3), the discussion, it says: When a
10 party moves to suppress or object to evidence under Section (a) (3) on
11 the ground that the degree of coercion is disputed, the military
12 judge may require the parties to state with grounds specificity for
13 the motion or objection, and cites to United States v. Jones,
14 14 M.J. 700, a Navy and Marine Corps military review case of 1982.

15 So it would be a motion by the opposing party. They're
16 proffering the statement. The opposing party has the opportunity to
17 put that at issue and say, hey, we have an issue. That should not
18 come in. And then we litigate that.

19 And that's exactly why Judge Acosta was careful. He said,
20 hey, is that what's going to happen here, government? Are you going
21 to sort of sandbag and then later on say that statement can't come
22 in?

23 They said no, we're not raising that issue. He said, well,

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1 not only are you not raising that issue now, you forfeited the right
2 to raise that issue at trial. That's the remedy. I'm not going to
3 let you raise that issue at trial. You had an opportunity here. You
4 know, we've gone through some of the discovery, the colloquy, and I'm
5 going to prohibit you from raising that issue at trial.

6 MJ [COL FITZGERALD]: Thank you.

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

8 So from the government's perspective, there is no prejudice
9 to the accused. The accused is in the same position. Judge Acosta
10 was right at 478H. No need to relitigate this. There was some
11 additional information the commission directed us to expand on a
12 number of summaries in January. That's what's led to the
13 supplemental 505, that's true.

14 But there's nothing in that discovery that prejudices the
15 accused. They're in that same position. They're more than welcome.
16 We're going to declassify that information. They can put it in front
17 of the members.

18 I know I can't force them to stipulate to it but they
19 noticed three al Hilah statements in their discovery, their hearsay
20 notice. And my point on that is it's a manufactured crisis. I'll
21 stipulate to all three of those as if Mr. al Hilah didn't invoke.

22 If he didn't invoke, this is what we would have expected him
23 to say. I can't force the defense to do that, I understand that.

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1 But this -- the government's not contesting any of that. We're not
2 in a position where we're objecting to any of al Hilah's statements.
3 And, again, if we look at the statements, it's because they're not
4 exculpatory for Mr. Nashiri.

5 Mr. al Hilah and Mr. Nashiri were acquaintances. He was
6 hosting him at a mujahideen lunch in 1997 with the two suicide
7 bombers.

8 The government's view is there's no remedy at all required
9 here. We have litigated this. Judge Acosta's ruling in 478H was
10 correct then and it's correct now. The government is precluded from
11 challenging that statement as obtained by torture, cruel, inhuman, or
12 degrading treatment. That's very consistent with the purposes of the
13 exclusionary rule.

14 And there's no prejudice to the defense, let alone a
15 prejudice that would require the dismissal of all the charges or the
16 dismissal of the capital referral.

17 And pending any questions, Your Honor.

18 May I have a moment?

19 **[Counsel conferred.]**

20 TC [CAPT STINSON]: May I have just one moment, Your Honor?

21 MJ [COL FITZGERALD]: You may.

22 **[Counsel conferred.]**

23 TC [CAPT STINSON]: May I have the use of the ELMO, Your

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1 Honor?

2 MJ [COL FITZGERALD]: You may.

3 TC [CAPT STINSON]: This would just be for the commission and
4 the parties.

5 **[Pause.]**

6 TC [CAPT STINSON]: And, again, Your Honor, this is from
7 Appendix 2 of the Senate Select Committee on Intelligence Report and
8 identifies Mr. al Hilah and the number of days in Agency custody.
9 And it also, as highlighted, indicates that he had not been subject
10 to any type of enhanced interrogation techniques.

11 And because I'm showing the ELMO, Your Honor, we likely
12 should have this marked, I guess, as the next appellate exhibit.

13 MJ [COL FITZGERALD]: Including -- you have one without the
14 highlights, or do you want the highlights on the marked?

15 TC [CAPT STINSON]: I think you can go with the highlights on
16 the marked one. Yes, Your Honor.

17 **[Counsel conferred.]**

18 TC [CAPT STINSON]: Ms. Carmon's indicating that this is
19 already in her brief, Your Honor. So we may not have to mark it.

20 MJ [COL FITZGERALD]: So it's not a different one?

21 TC [CAPT STINSON]: I think it's the same one. Yes, Your
22 Honor. I apologize.

23 MJ [COL FITZGERALD]: Can you verify that, Ms. Carmon?

1 **[Microphone button not pushed; no audio.]**

2 MJ [COL FITZGERALD]: I understand that's what you're doing.
3 Thank you.

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

5 TC [CAPT STINSON]: And while we're in that, Your Honor, just
6 one last point is in this motion series, in the government's view,
7 the defense is attempting to take on the role of the commission and
8 prophylactically saying, hey, we are barred from using this, where
9 Judge Acosta went through the hearing, issued a very careful ruling,
10 and expressed a direction to the government about their inability to
11 later make arguments regarding the statement. And the government
12 thinks that's improper, Your Honor.

13 MJ [COL FITZGERALD]: Thank you.

14 **[Counsel conferred.]**

15 TC [CAPT STINSON]: Your Honor, Ms. Carmon looks like there's
16 just one line from the brief, and because there's more context in
17 here, I would ask that it be marked.

18 I'm messing up. I don't want to mess up.

19 MJ [COL FITZGERALD]: So I don't know what the contrast
20 between the two, but I'll certainly let Ms. Carmon speak to it if she
21 desires. But we'll mark that as Appellate Exhibit 689D.

22 TC [CAPT STINSON]: Thank you, Your Honor. May I approach?

23 MJ [COL FITZGERALD]: You may.

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1 **[Pause.]**

2 TC [CAPT STINSON]: That's all I have, Your Honor.

3 MJ [COL FITZGERALD]: Government, you have completed what you
4 should have completed discovery generally, but let me ask very
5 specifically: Have you completed all discovery in relation to
6 al Hilah?

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

8 MJ [COL FITZGERALD]: Understanding -- and when I say that,
9 you understand you have an ongoing discovery obligation, but you
10 affirmatively believe you've met all your discovery obligations,
11 considering we had a -- up until yesterday a trial date of 1 June
12 2026?

13 TC [CAPT STINSON]: Yeah. I believe we've affirmatively
14 completed all the discovery obligations. The reason I was looking
15 around is, you know, we have been trying to work with some of our
16 foreign partners regarding requesting some of these individuals.
17 We -- I understand Ms. Carmon's view probably unlikely. There's a
18 lot of unrest over in the Middle East right now.

19 I don't have anything in relation to that regarding
20 Mr. al Hilah. So that was one reason I was turning around.

21 MJ [COL FITZGERALD]: Thank you.

22 TC [CAPT STINSON]: Thank you.

23 MJ [COL FITZGERALD]: Ms. Carmon, I have a couple questions

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1 for you, but I'll certainly let you respond first.

2 SDC [MS. CARMON]: I think I'll pick up where -- with the
3 question that the commission asked, which was the completion of
4 discovery as it related to Mr. al Hilah.

5 And I'll, again, direct the commission to AE 429H. And this
6 is the 9 November 2021 order from the commission that the government
7 produce any information of which is either in their possession or
8 they are aware that provides context to the statements made by
9 Mr. al Hilah.

10 And this order is in direct relation to at least one of
11 those statements, which is the 10 October 2002 statement, which we
12 still have never received a government disclosure about where
13 Mr. al Hilah was when he made that statement.

14 Again, we have the disclosure of the day before, but as it
15 relates to that order, we do not have where Mr. al Hilah was held 10
16 October 2002.

17 And I would just direct Your Honor to R.M.C. 701(1)(3),
18 which is the rules regarding violation of a discovery order. And
19 that is where the language that I was referencing with Stellato and
20 Vargas, because the sort of catchall at sub (D) is one of the
21 remedies available is to enter such an order as is just under the
22 circumstances.

23 And with what we have, the government has never complied

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1 with that 9 November 2021 order.

2 And the commission was clear in its 5 August 2022 about what
3 question it was asking. It was asking about M.C.R.E. 304 and 948r,
4 because the actual question that was asked and the language invoked,
5 Colonel -- Judge Acosta says: Here's the issue. The rule is clear.
6 Statements made under torture can't come in. I am trying to make
7 sure that I don't consider evidence that was gained under torture.

8 Not coercion. Not coercive circumstances. Torture. That
9 word appears in 948r and the mirrored language in M.C.R.E. 304, which
10 is the no statements are admissible, period. There is no exceptions
11 for the defense, for the government. If we read the text as plainly
12 as it is, it is a complete bar to any statement that was made under
13 torture, or cruel, inhuman, and degrading treatment.

14 And for good reason. And we briefed this. I recognize that
15 in federal jurisprudence, and I'm sure some of the military case law
16 as well, when it talks about search and seizure violations or warrant
17 application violations or Miranda violations, the exclusionary rule
18 operates to tell the government, no, no, this is not the way you do
19 it, and to deter future bad behavior.

20 This particular statutory bar speaks to something completely
21 different. It speaks to the notion that this evidence was obtained
22 in a manner that is so noxious to the sense of American justice that
23 it can never come in. And it has a period at the end.

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1 These statements were obtained in a way that is completely
2 violative of the American justice system and its ideas of due process
3 and fundamental fairness.

4 And it exists to protect the defendant as well. We briefed
5 this extensively in our brief at AE 623. This language also appears
6 in Judge Acosta's order at AE 335N, but this is the La France v.
7 Bohlinger line of cases, that using the admission of statements that
8 were coerced from a witness may well violate the defense's due
9 process rights.

10 And because this treatment happened to a witness is no less
11 offensive than if it had happened to the defendant himself.

12 And so not only does that statutory bar exist to prevent
13 that type of evidence from ever seeing the light of an American
14 courtroom, it also exists to protect the defendant's due process
15 rights, because admission of that kind of evidence is fundamentally
16 unreliable and may well violate his due process rights as that line
17 of cases suggests.

18 And so it's not a mere Miranda violation. And there is no
19 exception listed in the statute. And when the government suggests
20 that Judge Acosta was simply asking a different question, he chose
21 the language, "torture." And that appears in two places, 948r and
22 M.C.R.E. 304(a). We're not talking about mere coercion.

23 And just because Mr. al Hilah was not subjected to the

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1 enhanced interrogation techniques that some high-value detainees were
2 does not mean that that statement was not obtained at the very least
3 through cruel, inhuman, and degrading treatment based on what we know
4 about Location 2 and what was happening there at that time.

5 MJ [COL FITZGERALD]: And let me ask you this. And I think
6 I've asked the government as well. It seems more of a supposition
7 that he was tortured based on location and what happened at a
8 particular location with other people. But 304(a)(3) talks about
9 if -- and that's where I probably used the word "coercion," because
10 it talks about "If the degree of coercion in the production of a
11 statement is disputed, such statements may only be admitted if the
12 military judge makes particular findings."

13 It seems like we've skipped that step. It seems like we're
14 at the step where it's in dispute, what I'm hearing from the
15 government and what I'm hearing from you. And I start from the
16 proposition or -- if I start from the law of the case. Judge Acosta
17 has ruled that statement is admissible. So it's admissible.

18 So if the matter of how that statement is obtained is in
19 dispute, don't I need another hearing first before I start talking
20 about remedies? If I were to find in that hearing for the defense,
21 then maybe I would be talking about remedies but don't I need to
22 first have that hearing about the matter that's in dispute?

23 SDC [MS. CARMON]: I think there are two points there. Judge

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1 Acosta's ruling was based on misleading information from the
2 government. Judge Acosta's ruling relied on the government's
3 affirmative, we're not raising this issue as a there is no issue, and
4 there was no discussion about the where and the who of the statement.

5 And so Judge Acosta's ruling was based on misleading and
6 incomplete information. And the other part of that is that ----

7 MJ [COL FITZGERALD]: So setting that aside, I still am left
8 with only a supposition that because he was at a location at a
9 particular time, it may have occurred. It's still a bit attenuated
10 to say it did occur and you're barred from using it.

11 That's what I'm asking. Don't I first need to do an inquiry
12 into that ----

13 SDC [MS. CARMON]: So I think it's in dispute.

14 MJ [COL FITZGERALD]: ---- to potentially overrule the 478H
15 ruling as far as admissibility? Because now you have more
16 information subsequent to that ruling.

17 SDC [MS. CARMON]: Yes, sir. And if it is in dispute, in the
18 brief I believe it's in our reply brief -- or actually I think it's
19 in AE 689, we requested witnesses to resolve this issue if it was
20 going to be in dispute. We requested CIA chief of base Z2C, and we
21 requested LY9, who at least according to the 9 October 2002 summary
22 is the interrogator at Location Number 2.

23 And so if this was going to be in dispute, we requested

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1 witnesses to resolve that issue as Your Honor is asking for. The
2 government never addresses that in its brief. And so we've had this
3 discussion before. Arguments that go unaddressed should be taken as
4 conceded. And so if the government doesn't dispute that in its
5 brief, I think that is a concession about that fact, which is the
6 treatment of Mr. al Hilah at that location.

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

8 SDC [MS. CARMON]: Let me check with my colleagues, sir.

9 MJ [COL FITZGERALD]: You may.

10 SDC [MS. CARMON]: One moment.

11 **[Counsel conferred.]**

12 SDC [MS. CARMON]: Thank you, sir. Nothing further.

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

14 Government, I should have asked you this before because
15 Ms. Carmon did raise it in her initial argument about the
16 government's failed to disclose the location of Mr. al Hilah on 10
17 October 2002. Would you like to respond to that?

18 TC [CAPT STINSON]: So the ----

19 MJ [COL FITZGERALD]: Especially in light of the fact that
20 apparently there was also an order for you to do so.

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

22 So the government has disclosed the information in its
23 possession. It's gone through the 505 process and it's turned over

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1 the information through that process to the defense. And we cite
2 that in our footnote 2 so the commission knows where the underlying
3 cable is.

4 So I do believe we've turned over that information even
5 prior to this January, but certainly in this ----

6 MJ [COL FITZGERALD]: The location information.

7 TC [CAPT STINSON]: I think so, yes, Your Honor.

8 MJ [COL FITZGERALD]: Okay.

9 TC [CAPT STINSON]: Yeah.

10 MJ [COL FITZGERALD]: And you did so where? I'm sorry. When
11 did you do that?

12 TC [CAPT STINSON]: May I have a moment, Your Honor?

13 MJ [COL FITZGERALD]: You may.

14 **[Counsel conferred.]**

15 TC [CAPT STINSON]: Apologies for that, Your Honor.

16 So we did go through the 505 process, so you have the
17 underlying cable and the approved summary. I'm not -- I'd have
18 to -- my understanding is that underlying cable may not have, because
19 it's a disseminated cable, a ton of specifics about those things.
20 But it's what the government had received as a result of our -- you
21 know, our prudential request and gone through the 505 process with
22 that, Your Honor.

23 MJ [COL FITZGERALD]: Thank you. I know in 703 I granted I

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1 believe ten documents related to al Hilah.

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

3 MJ [COL FITZGERALD]: And that's still going through the 505
4 process as well.

5 TC [CAPT STINSON]: That's correct. There's a whole al Hilah
6 section in 703 that we're working through, yes, Your Honor.

7 MJ [COL FITZGERALD]: Do you know if that has location
8 information in it?

9 TC [CAPT STINSON]: I ----

10 MJ [COL FITZGERALD]: I don't want to know what it is right
11 now ----

12 TC [CAPT STINSON]: Yeah, I know ----

13 MJ [COL FITZGERALD]: ---- I just want to know if it does.

14 TC [CAPT STINSON]: ---- understood. Understood. Yes, Your
15 Honor. I'm not certain, so I don't want to shoot from the hip on
16 that.

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

18 TC [CAPT STINSON]: Thank you.

19 MJ [COL FITZGERALD]: Anything else from the parties on
20 Appellate Exhibit 689?

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

22 MJ [COL FITZGERALD]: Thank you.

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

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1 MJ [COL FITZGERALD]: Thank you.

2 Are we ready to proceed with what would be 680?

3 LDC [MS. MILLER]: Could we take a brief restroom comfort
4 break?

5 MJ [COL FITZGERALD]: This is not to sound like a scold.
6 Didn't we just take one? I don't mind taking one, but I don't
7 remember. I didn't write it down for once.

8 LDC [MS. MILLER]: That was a scold.

9 MJ [COL FITZGERALD]: What's that?

10 LDC [MS. MILLER]: That was a scold, sir.

11 MJ [COL FITZGERALD]: Well, I'm -- I don't remember when we
12 came back, but if you need a recess, but it will be a short one.
13 Please be back in 10 minutes.

14 The commission's in recess.

15 **[The R.M.C. 803 session recessed at 1506, 21 April 2026.]**

16 **[The R.M.C. 803 session was called to order at 1519, 21 April 2026.]**

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

18 All parties present before the last recess are again
19 present.

20 680. Defense, are you prepared? Is this you, Ms. Manuele?

21 DC [MS. MANUELE]: Yes, Judge. And yes, I'm prepared.

22 MJ [COL FITZGERALD]: You may proceed.

23 DC [MS. MANUELE]: Good afternoon.

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1 MJ [COL FITZGERALD]: Good afternoon.

2 DC [MS. MANUELE]: So at AE 680, the defense moved to exclude
3 the CSRT and evidence surrounding that tribunal hearing, specifically
4 all of the evidence that was collected through the personal
5 representative, the audio and the transcript, the unclassified
6 summary of evidence, the responses that were alleged to be made
7 through the personal representative, and the summary of tribunal
8 findings.

9 All of those items of evidence were specifically included on
10 the government's evidence list of items of evidence they intended to
11 introduce at trial.

12 And so first, I'd like to start with the -- the argument
13 under 304(a)(5)(B) that these statements are derivative of torture.
14 And specifically, this is related to the commission's findings
15 already at 319MMMM. 319MMMM -- and I apologize. I don't have the
16 footnote number, but it was as to the exclusion of pages 18 through
17 22 of AE 467C Attachment M.

18 And that specific portion was excluded by the commission
19 as -- because they were mere recitations, essentially, of torture.
20 And the transcript that we now have before us -- and if I may, that
21 transcript that was used in making that determination was not only
22 not verbatim as it was purported to be and we have now discussed at
23 length this morning, but it was also highly redacted. It didn't even

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1 include large chunks of statements that -- regarding what
2 Mr. al Nashiri said as far as the torture that he experienced.

3 Looking at the -- using the FBI transcript that the
4 government has provided that was used in this morning's arguments at
5 AE 685F, pages 18 through 22 of 467 correspond with pages 34 through
6 64 of the -- of that FBI transcript we now have.

7 And so pursuant to M.C.R.E. 304: Evidence derived from a
8 statement that would be excluded under (a)(2) of this rule may not be
9 received in evidence against an accused who made the statement if the
10 accused makes a timely motion to suppress or an objection unless the
11 military judge determines by a preponderance of the evidence that,
12 one, the totality of the circumstances renders the evidence reliable
13 in possessing sufficient probative value and that use of the evidence
14 would be consistent with the interests of justice.

15 And so as to the first prong that the totality of the
16 circumstances renders the evidence reliable, I base most of that
17 argument upon the logic that Lieutenant Shaver outlined this morning
18 and that is detailed in AE 685C.

19 The issue we have is the actual statements of the tribunal
20 hearing, the tribunal that took place on March 14th, has a number of
21 pieces to it. The first piece is where they read into the record the
22 summary of unclassified evidence. And the summary of unclassified
23 evidence is a conclusory statement of allegations; however, they are

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1 not phrased as allegations. It is actually worded -- I
2 apologize -- I'm always losing something -- as this is at -- this is
3 Attachment G of AE 680.

4 And this is the piece of evidence, also, that the government
5 has indicated they intend to introduce. So I am going to address why
6 it should not be introduced as an actual exhibit, but additionally
7 why any portion of the CSRT transcript that encompasses the reading
8 of this material should not be admitted.

9 So as to the actual document being admitted, number 3
10 indicates: The following facts support the determination that the
11 detainee is an enemy combatant.

12 And so this is a -- this document is certainly hearsay.
13 These are offered for the truth of the matter asserted. They are
14 out-of-court statements.

15 And so absent some hearsay exception, that information
16 should not be admitted. Nor should a transcript be presented or an
17 audio recording be presented to the member panel that just recites
18 the same information.

19 So as the initial part of the hearing contains a reading of
20 that document, and then there is a reading of what they called the
21 response that was also submitted by the personal representative at
22 the tribunal hearing.

23 And the responses are also out-of-court statements. As

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1 discussed, those responses were created through the use of an
2 interpreter.

3 We heard from the personal representative, I believe it was
4 in December -- February? -- and he speaks no Arabic. He indicated he
5 didn't even know how to say "yes" in Arabic. He did not know how to
6 say -- or would not understand "yes." Did not know or understand
7 "admit" or "deny," and indicated that he would have a really hard
8 time trying to figure out if the interpreter was interpreting
9 everything accurately. What we know is that the audio recording
10 captures many misinterpretations, mistranslations, improper
11 translations.

12 We have no audio recording of the three meetings that the
13 personal representative held with Mr. al Nashiri prior to the
14 March 14th hearing. The only information we have are the personal
15 representative's notes. And I believe I didn't include that in my
16 initial -- the government has, I believe, listed those, also. We'd
17 be seeking that those don't come in as well. Additionally, those are
18 hearsay. The government hasn't noticed those statements as hearsay
19 documents, and they -- certainly the defense's position is that they
20 are not reliable.

21 But the -- none of those meetings -- we have to assume, and
22 I think rightfully so, we know that the same interpreter was being
23 used for those three personal representative meetings, that -- the

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1 same one that was interpreting when we had the benefit of an audio
2 recording.

3 And so I will get into those statements more as to why those
4 specific statements should not be admitted. But so the transcript,
5 the hearing, we have the summary of unclassified evidence. We then
6 have the response that is read. And then we have Mr. al Nashiri
7 begin to talk about the statements and how those statements were made
8 while he was being tortured.

9 And so that -- essentially those two documents, and the
10 reading of the transcript then takes us up to what the commission had
11 previously excluded at page 18 of 467C, which is page 34 of -- I'm
12 sorry. And it's 34 marked at the bottom. It is stamped 41 of 120.

13 If okay with the commission, I would like to refer to the
14 PDF page number just because that's how I had gone through it
15 previously.

16 MJ [COL FITZGERALD]: That's fine.

17 DC [MS. MANUELE]: And so at page 34 is where the personal
18 representative indicates that -- or Mr. al Nashiri indicates that he
19 needs to explain these items of torture. And technically before we
20 even get there, the response statement begins with: I made these
21 statements while being tortured.

22 But I want to address that one separately. So just starting
23 at the page 18 or page 34 of the FBI transcript.

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1 That portion that has already been excluded ends on page 64
2 of the FBI transcripts.

3 And then there are a series of questions and answers. All
4 of the questions either relate directly to the statement that has
5 already been excluded of Mr. al Nashiri explaining this is what I
6 said while I was being tortured, or the response that was submitted
7 with the personal representative.

8 And so the first question we have is on page 66. It is
9 asked of Mr. al Nashiri: You said that you had a business
10 relationship with whom?

11 And this information is specifically addressed in the pages
12 that have already been excluded on page 40 and 41.

13 If I may use the ELMO?

14 **[Pause.]**

15 DC [MS. MANUELE]: He begins talking about the business for
16 fishing at the bottom of 40 and continuing on to 41. He continues
17 talking about this fishing business.

18 So the defense's position is that when that question comes
19 regarding that initial question of "You said you had a business
20 relationship with whom," it is directly derivative of the statements
21 he indicated he had just made while being tortured.

22 And tying it in, specifically, he repeats the same info. He
23 says that he wanted to start a fishing business. He indicates that

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1 the people involved died in an accident, that he dropped the matter,
2 and that they did -- ended up doing those things.

3 That is specifically in the original -- the 32 through 64
4 pages that have previously been excluded and are repeated following
5 the -- this question, the question being asked on page 66.

6 He is then asked -- there's a -- on 68: Why did you go to
7 Yemen, leave Yemen to go to Afghanistan and Pakistan?

8 The original question that the member asked was: Why did
9 you leave in August of 2000?

10 The question that is relayed to Mr. al Nashiri is: Why did
11 you leave in 2002?

12 And that's at page 68.

13 The member says: Why did you leave Yemen to go to Pakistan
14 and Afghanistan in August of 2000?

15 Which was asked: Why did you go to Yemen, leave Yemen to go
16 to Afghanistan and Pakistan in the month of August of 2002?

17 And so this is an example of why recreating the transcript
18 doesn't fix the problem. They are having different conversations in
19 real time when it's happening. It's not as though Mr. al Nashiri can
20 go back and say, oh, well, now my lawyers have brought to my
21 attention that they were asking me about a different time and say
22 this would have been my actual answer. We can't just recreate the
23 audio. In real time questions are being translated and

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1 answered -- they're crossing paths. They're not having the same
2 conversation.

3 Then moving to the next question that is asked of
4 Mr. al Nashiri is on page 69, and that is: Why was the Yemeni
5 government looking for you?

6 And in response to that question -- now, one, that is
7 number 3 on the responses where he says these are things I said while
8 being tortured. And there's a list of seven items.

9 Number 3 is the rockets in Saudi Arabia. And additionally,
10 so not only does that information come from the response where he
11 says I was being tortured when I gave this information, but also that
12 information is on page 48, which falls in the range of pages that
13 have already been excluded where Mr. al Nashiri says: I mean, for
14 example ----

15 In regards to things he said while being tortured: I mean,
16 for example, the rockets in Saudi Arabia.

17 And so this is a direct overlap of the same information that
18 Mr. al Nashiri has just indicated. These are statements that he made
19 because he was being tortured.

20 On page 71, the next question is: When did you
21 ask al Badawi to videotape the boat?

22 And this question is an assertion of fact from -- so I
23 believe in the government's response, part of the response was

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1 questions aren't hearsay. And questions can be hearsay when they
2 assert facts as part of the question.

3 And so this question specifically asserts the fact from the
4 hearsay document. And I do have a case for Your Honor.

5 **[Pause.]**

6 DC [MS. MANUELE]: It's U.S. v. Torres, 794 F.3d 1053. It is
7 a Ninth Circuit Court of Appeals case from 2015.

8 If I may approach?

9 MJ [COL FITZGERALD]: You may.

10 DC [MS. MANUELE]: And in this particular case, it was the
11 defense that sought to introduce questions that were asked of him.
12 He was stopped with a large quantity of drugs in his car. He
13 testified -- there was actually two trials. The first one, it was a
14 hung jury.

15 He testified that a friend had borrowed his truck on a
16 number of occasions and that after borrowing the truck the friend had
17 asked him a series of questions, trying to get him to go different
18 places with them. Was asking him to take a friend to the DMV. And
19 so he was testifying that my friend asked me these -- asked me to run
20 these errands for him.

21 And the trial court initially allowed it because they
22 believed where they were headed was a situation with effect on the
23 listener. Once the court realized that it wasn't an effect on the

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1 listener, that the defendant had actually not taken the person to
2 these places, that they were just offering it essentially for the
3 truth that this friend was trying to keep him preoccupied, presumably
4 so he could get all of the drugs out of his car that he had
5 used -- that he had had him act as a knowing mule for.

6 And so in this case, they cite to a holding in Lewis, that
7 it is widely recognized that the grammatical form of a verbal
8 utterance does not govern whether it fits within the definition of
9 hearsay.

10 The term -- it goes on to say that for the purposes of the
11 hearsay doctrine, the term "assertion" or "statement" includes
12 questions and imperatives that express or communicate facts or
13 information about acts, events, or conditions in the world.

14 And then later, that a matter asserted includes both matters
15 directly expressed and matters the declarant necessarily implicitly
16 intended to assert in the question.

17 And so there are additional questions where I will point out
18 that, absent some hearsay exception, these questions of the members
19 should also be considered hearsay and be excluded absent some
20 exception.

21 And that one specifically, as I indicated, contains the
22 assertion of fact from the unclassified summary and the responses.
23 As does the next question, which is on page 73, when the member

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1 asked: Why did you ask for forged passports in Dubai?

2 The translator said -- relayed to Mr. al Nashiri: Why did
3 you ask about forged passports in Dubai?

4 That information comes directly from the unclassified
5 summary, also, of evidence that he had requested or obtained forged
6 passports in Dubai.

7 And then as he -- the next question and, actually, the next
8 multiple questions -- if we could -- I can just show you. So the
9 unclassified summary of evidence is at 680 Attachment G. And that
10 unclassified summary of evidence does not include -- never mentions
11 Usama bin Laden at all. It does not mention him.

12 The response that was submitted as Exhibit D-b in the actual
13 CSRT hearing also -- and I'm sorry -- that is at 680
14 Attachment E -- or Echo -- also never mentions Usama bin Laden.

15 And so the only information that the members have when
16 they're asking these questions are the statements that Mr. al Nashiri
17 has made on pages 34 through 62 about statements he made while being
18 tortured.

19 And there are questions on pages -- specifically regarding
20 Usama bin Laden on -- or I'm sorry -- statements that Mr. al Nashiri
21 makes specifically about Usama bin Laden on the pages that have been
22 excluded, specifically page 42, 43, 44, 46, 50, 59, 60.

23 So all of those questions and necessarily the answers to

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1 those questions, then, but for those questions being asked about the
2 statements Mr. al Nashiri just said while being tortured, the answers
3 are necessarily derivative of -- or derivative of torture.

4 And so there are questions on page 74: How were you able to
5 meet with him?

6 On -- oh, I'm sorry -- how many -- on 75: How many times
7 did you meet with him? And did you take money from him every time?

8 76, asking about the amount of money that he received from
9 him.

10 And 82: When you met Usama bin Laden, did you take an oath
11 that you would help him and help al Qaeda?

12 Then moving through that transcript, there are the next line
13 of questions on page 83. The translator asked of Mr. Al Nashiri:
14 You said that you -- uh -- you said ----

15 Being -- initially just to start that: That you obtained
16 explosives. Can you explain to the committee what is the connection
17 between explosives and fishing?

18 And prior to that question, the only time explosives had
19 been mentioned are on pages 45, 46, 47, and 41 of the transcript,
20 which all already fall -- or all fall within that page range of
21 statements that were already excluded as Mr. al Nashiri reciting
22 statements he made while being tortured.

23 And then on page 88, Mr. al Nashiri is asked about Khallad:

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1 Do you know Khallad Bin'Attash? And so how? And if so, how? Which
2 is translated as: Khallad Bin'Attash? As a question. How did you
3 know him?

4 And Mr. Bin'Attash was another topic that was not included
5 in the summary of evidence, the unclassified summary, or the
6 responses. Mr. Bin'Attash is mentioned on page 39 and page 56, which
7 falls within the range of the pages that have already been excluded.

8 Mr. al Nashiri mentions Khallad Bin'Attash as being
9 something that he was repeatedly -- or someone he was repeatedly
10 asked about while he was being tortured.

11 And so we would argue that all of those statements are
12 necessarily derivative of torture. Mr. al Nashiri says: I said
13 these things while I was being tortured. They asked me about these
14 things while I was being tortured.

15 It's not a situation where it's, you know, merely the same
16 topic that they are discussing. But that information is provided to
17 the member panels because Mr. al Nashiri is explaining the statements
18 that were made while he was being tortured, and what he was asked
19 about while he was being tortured.

20 And so all of those questions and answers under that logic,
21 we believe, should be excluded. And the only -- the only way they
22 shouldn't be is if Your Honor makes a determination by a
23 preponderance of the evidence that the totality renders the evidence

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1 reliable and possessing sufficient probative value, and that the use
2 of the evidence would be consistent with the interests of justice.

3 And that is a burden that the government has in order to
4 show.

5 The -- they are not reliable because we know they're
6 inaccurate translations. And why I say that is because we have an
7 audio recording. We have no idea what is being said during those
8 statements.

9 Additionally, as I will elaborate on in closed session, the
10 circumstances of the taking of those statements. The physical
11 condition that Mr. al Nashiri was in during those meetings that
12 occurred on February 13th, February 14th, and February 20th of 2007
13 with the personal representative, his physical state at that time and
14 what he had been experiencing suggest that those statements are
15 unreliable.

16 Additionally, the personal representative essentially said a
17 lot of these -- he didn't say the statements are unreliable. What he
18 said was: The last day I met with him on February 20th, I left with
19 notes.

20 And this is at 680J. And obviously -- and this was -- he
21 indicated -- these are dated from his February 20th notes. He said:
22 Oh, yeah there's a lot of stuff that's crossed off and changed. I
23 can't imagine I wouldn't have gone back and shown him the final

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1 version before it was introduced as evidence in the hearing.

2 But the reality is there is no record of him ever going
3 back. The notes as detailed in the -- throughout the CSRT process is
4 that on February 9th, the personal representative attempted to meet
5 with Mr. al Nashiri to read the instruction form and explain the
6 process, and he refused.

7 That on February 12th, he was scheduled to meet with
8 Mr. al Nashiri, but Mr. al Nashiri was medically unable to attend.

9 That he did meet with him, then, on the 13th, the 14th, and
10 the 20th, which is corroborated with the records that he was taken to
11 an off-site appointment on those dates.

12 And so the personal representative himself said:
13 I -- that's a lot of changes. I can't imagine that I wouldn't have
14 met with him.

15 But there is no evidence. And the burden is on the
16 government to show that these statements are his or meet some other
17 hearsay exception.

18 There is never a time where Mr. al Nashiri initials these
19 paragraphs, where he signs off as making those statements, where it
20 is even shown that he was provided an Arabic copy of these
21 statements. In fact, there's only one document -- and the records
22 show that he came back to his cell once with four pages of Arabic
23 writing. And that is attached at 685C Attachment G, or golf. And

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1 those are -- that is the unclassified summary of evidence.

2 So there is no evidence that this information was ever even
3 transcribed to him for him to read prior to this information being
4 read into the record at the -- at the tribunal hearing.

5 One of the problems, certainly, that we are dealing with now
6 is that the government relied on a faulty transcript for 19 years.
7 They portrayed this transcript as a verbatim transcript. And we know
8 that they knew as early as -- at the latest 2022 when they called the
9 president to testify because they asked the president in that -- in
10 that -- during his testimony, there was a statement where Owhali and
11 Badawi's name were switched out.

12 And so they had the president clarify on the stand.
13 But -- and that was so clear because it was a name that was
14 different. But yet they never corrected with the commission,
15 anywhere, that this is not, in fact, a verbatim transcript. They
16 never produced a verbatim transcript until the defense
17 filed -- attempted to file what is now AE 685 and attached the MCDO
18 transcript with it.

19 They were certainly on notice because they had pointed out a
20 very obvious inconsistency, but that was not corrected by the
21 government.

22 So the -- in the -- during Lieutenant Shaver's argument
23 earlier, the -- it was discussed that the interpreter essentially is

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1 cleaning up his answers. So he is summarizing, and usually not
2 favorably towards Mr. al Nashiri. Usually in a light more negative
3 or that makes Mr. al Nashiri look worse.

4 And those statements, that same person is who was
5 responsible for creating the responses. Because we know the personal
6 representative. I think we went through that at length, that he does
7 not understand Arabic. He was relying solely on what the interpreter
8 told him.

9 And he did mention a couple times, you know, it was weird
10 because he had -- I had been told just last time I saw him that this
11 paragraph was fine. And then when I saw him the very next time,
12 there was a whole paragraph that was crossed out or there were large
13 changes made.

14 So that goes to the reliability. There is a -- that makes
15 it likely that there was some, whether intentional or unintentional,
16 miscommunication; however, those circumstances -- the circumstances
17 render those statements unreliable.

18 So as far as what Mr. al Nashiri was instructed in meeting
19 with the personal representative, an additional bases for why the
20 responses to the questions -- or I'm sorry, the
21 attachment -- Attachment E of AE 680 and any questions, the reading
22 of that into the transcript, and any questions that stem from that
23 document, additional reasons they should be excluded.

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1 Mr. al Nashiri is told that he cannot be compelled to
2 testify at the hearing. He is never told that he doesn't have to
3 speak with the personal representative. We know what he was
4 instructed from the personal representative because the personal
5 representative indicated he would have read him exactly what was on
6 his instructions, which is at Attachment D of AE 680.

7 And first -- or one of the first things it says on that
8 instruction is that: You should introduce yourself to the detainee
9 as his personal representative for the Combatant Status Review
10 Tribunal. You should identify yourself as a military -- a United
11 States military officer. Do not give your name, even if asked. Have
12 translator ask them their name and ensure they understand the
13 translator.

14 And we know there is no way for him to ensure that he
15 understands the translator based on his testimony -- based on the
16 personal representative's testimony.

17 Then he is advised that he is to read the enemy combatant
18 definition and, again, make sure he understands.

19 He is also told that this tribunal will be his opportunity
20 to challenge the allegation that he is an enemy combatant.

21 Importantly, he is also told on page 2 of those instructions
22 that if the tribunal decides that he is not an enemy combatant -- and
23 this is from paragraph G., on page 2 -- you will be released as soon

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1 as arrangements can be arranged. If the tribunal determines that you
2 are an enemy combatant, you will continue to be detained. Your
3 detention could result in an annual review before the Administrative
4 Review Board.

5 And then says the Administrative Review Board will determine
6 if he still poses a threat. But then even more importantly: The
7 Board will look at the facts prior to your detention as well as your
8 cooperation and behavior while here at Guantanamo Bay.

9 So he is still being told that his ultimate release,
10 consistent with what he has been told for about five years now, that
11 his ultimate release is based on him being cooperative and whether he
12 can prove that he is not an enemy combatant.

13 And further -- I'm sorry. I shouldn't have removed that
14 yet. Same page, G.5.: As an enemy combatant, you could be
15 considered for criminal prosecution at a later date.

16 Now, we know that he was certainly already being considered.
17 That's why they had taken this LHM statement was for the purposes of
18 evidence to use in criminal prosecution.

19 I don't believe the CSRT statement was ever intended to be
20 used in criminal prosecution. And I'm unaware -- and I'm sure the
21 government will correct me -- if any CSRT statement has been used in
22 a criminal trial.

23 And so the rights are necessarily different. While the

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1 rights afforded Mr. al Nashiri to obtain his statement for the
2 purposes of continuing to detain him were sufficient, they are
3 certainly not sufficient to be used against him in a capital criminal
4 trial.

5 And so not only is Mr. al Nashiri misled that he, in fact,
6 is being considered for criminal prosecution, not just that he could
7 be if they make a determination that he's an enemy combatant -- that
8 paragraph, as an enemy combatant you could be considered for criminal
9 prosecution at a later date, also would suggest that if you're not
10 found to be a criminal -- an enemy combatant, you won't be
11 prosecuted.

12 What is missing from that information is that anything you
13 say now to me or in your hearing on March 14th of 2007 can be used
14 against you in that criminal prosecution. He is never advised of
15 that.

16 He is told you can't be compelled to testify. And certainly
17 we would argue that "compel" means something very different to an
18 individual who's just experienced the last -- the preceding four and
19 a half years that Mr. al Nashiri had. But he is told that he can't
20 be compelled to testify, but he is never told, but if you do, we're
21 going to use that against you.

22 He is told on page 4 of those instructions that...

23 **[Pause.]**

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1 DC [MS. MANUELE]: I'm sorry. Not page 4. I apologize.

2 So the -- what he is told at the hearing versus what he has
3 told to the PR. At the hearing he is instructed that he may be
4 present at the open session. However, if he becomes disorderly, he
5 will be removed from the hearing. And that certainly the defense
6 would argue that "disorderly" even has a different approach because
7 of the -- he has been conditioned that if he doesn't cooperate or say
8 the right things, that's wrong. That's acting -- acting out, acting
9 inappropriately. And he loses items or he is put back in the box or
10 he is walled. But there are actual consequences to being disorderly.

11 Certainly nobody thinks that the personal -- the president
12 is trying to make threats against Mr. al Nashiri, but we have to view
13 it through his lens.

14 He is also told that he may not be compelled to testify.
15 However, if he wishes to testify, it can be under oath or unsworn;
16 that he has the assistance of the personal representative; that he
17 may present evidence or call witnesses; and that he has the right to
18 question witnesses testifying and to examine the unclassified
19 evidence.

20 He is never instructed, either by the president or at
21 the -- by the personal representative in advance, that if he elects
22 to participate, he is agreeing to have questions asked of him. He is
23 never told that if you elect to participate or if you speak with me

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1 now or if you make a statement at your hearing, we get to ask you
2 questions and then we get to use those answers against you at a
3 criminal proceeding.

4 He is also never told that he has the right to remain
5 silent. He said he can't be compelled to answer questions, which,
6 given the history, I would suggest is much different than being you
7 can say nothing at all and everything will be fine. He is never told
8 that if he remains silent, that silence cannot used against you.

9 The personal representative, when they go in to craft their
10 statement, he never says: You have a right to remain silent with me.

11 In fact, what he says is: I'm here to assist you. He says:
12 I'm not your lawyer.

13 But it gets even more confusing because he says: I'm not
14 your lawyer and there is no confidential relationship. But he is
15 also advising -- he also advises Mr. al Nashiri that: If you choose
16 not to appear, I will be at the hearing, and I will represent you.

17 And so certainly that would give one the impression that
18 this person is here to act on my behalf. And I think a reasonable
19 inference, then, is to act with my best interests at heart, which we
20 know was certainly not the intention of the crafters of the process
21 or the personal representative because that wasn't his role.

22 The -- Mr. al Nashiri is also told by the personal
23 representative that the only way to be released, essentially -- and

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1 I'm paraphrasing, but the only way to be released is if you were
2 determined -- if you were not found to be an enemy combatant and that
3 the tribunal is going to make that decision -- and this comes from,
4 again, the instruction form ----

5 **[Pause.]**

6 DC [MS. MANUELE]: ---- on page 2 that the tribunal determines
7 whether you should be classified as an enemy combatant based upon,
8 one, the classified and unclassified evidence before the tribunal, of
9 which the only material piece of evidence was the summary of
10 unclassified evidence. Any other substantive evidence was all
11 classified, so Mr. al Nashiri was not privy to that.

12 Any substantive evidence is -- I can show you the other
13 piece of evidence.

14 And this is at 680G and was introduced as R-3 at the
15 hearing. And it is essentially a news release, it appears, regarding
16 him being arrested. No witness statements, nothing about this
17 document -- there's two pages -- suggests that -- where any of the
18 information came from, whether there are any statements by other
19 persons that would be used against him. It is a -- essentially like
20 a press release, it appears.

21 Those are the only unclassified pieces of evidence that
22 Mr. al Nashiri was presented.

23 And so he is told that the decision, the determination of

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1 whether he is an enemy combatant and, therefore, whether he will be
2 released is that evidence, his testimony, and any evidence he wishes
3 to present on his behalf that is determined to be relevant.

4 It's unclear how somebody says, "Well, they have just a
5 broad summary of facts saying that I did all of these things. And
6 it's on me to dispute it," how one makes the decision not to speak or
7 to dispute it. You were told that that decision is based on three
8 things, two of which you carry the burden for.

9 Again, he is told that he can't be compelled to testify at
10 the hearing, not you can't be compelled to testify with me today or
11 to talk to me today as your personal representative.

12 And so for all of those reasons, the statements that were
13 obtained by the interpreter at the hearings -- or, I'm sorry, at the
14 meetings on February 13th, February 14th, February 20th, and that are
15 read into the record on March 14th, should be excluded.

16 As to additional reason that his statements at the actual
17 hearing, once they read this statement into the record, the rest of
18 the hearing that is involved in the question and answer portion,
19 those statements should also be excluded so that the transcript and
20 audio as a whole should be excluded.

21 The -- again, he is advised he won't -- he can't be
22 compelled to testify, but he is also not told that he has the right
23 to remain silent at the hearing or that his silence can't be used

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1 against him. Nor is he told that statements he makes at the hearing
2 could be used against him in a criminal prosecution.

3 He is encouraged by this personal representative who,
4 although says I'm not a lawyer, says but if you don't come to court,
5 I will represent you, which I think to the average person, if you are
6 being represented by somebody in court, that person is acting in the
7 capacity of an attorney.

8 But he is -- said that when you provide -- if you provide
9 information, you should provide complete information. So this person
10 that -- although is saying I'm not your lawyer but is doing things
11 that certainly sound like a counselor, a legal counselor and offering
12 advice, suggests to him that you should provide as much information
13 as you can because the determination is going to be based -- two of
14 the three things are based on what you present.

15 And he is instructed -- looking at page 3 of those
16 instructions, Mr. al Nashiri's told by the personal representative
17 that any information you can provide to the tribunal regarding your
18 activities prior to your capture is very important in answering the
19 question being whether you are an enemy combatant.

20 So he encourages him to provide as much information -- or I
21 would frame that as encouraging if somebody's told me this is
22 important information that I can present as the only means to be
23 released, but you can only present information as to -- all

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1 information you present should be focused on answering the question
2 as to whether you're an enemy combatant.

3 And there is no indication -- I think the personal
4 representative, as far as he knew, described him as being
5 cooperative.

6 And so towards the end of the transcript, there is some
7 conversation on whether he's an enemy combatant, how he feels about
8 Americans, if he is an enemy of America. And I would suggest that,
9 absent evidence to the contrary, all of the other statements are
10 recitations of the statements he said he made while being tortured.

11 There's nothing to suggest that he said I'm not going to
12 follow those rules or I'm not going to abide by what you've told me I
13 have to talk about. He's only answering questions.

14 And so if any of the transcript or hearing should come in, I
15 would submit that it's only those questions related to whether he is
16 an enemy combatant as phrased to him.

17 **[Pause.]**

18 DC [MS. MANUELE]: To introduce these statements against him
19 in a capital trial, defense submits, does violate Mr. al Nashiri's
20 due process rights. And it's under a -- essentially a fundamental
21 fairness argument.

22 The appellate courts, again, as far as habeas proceedings
23 go, have assumed without deciding that Guantanamo detainees are

1 afforded -- or are entitled to a level of due process. And they have
2 based -- they've used that assumption in determining what specific
3 rights are due.

4 And certainly in a capital trial where the government seeks
5 to kill somebody, the defense's position is the highest
6 possible -- the most process is due. And so while these statements
7 may be perfectly legitimate, admissible for the purposes of
8 determining whether he's an enemy combatant, that does not mean that
9 they meet the higher standard of due process to be introduced as
10 criminal -- as criminal evidence.

11 And I believe I cited in the motion, but if not,
12 Morrissey v. Brewer at 408 U.S. 471, U.S. Supreme Court case from
13 1972, and this was regarding the process due in a parole revocation.
14 And the court explains whether any procedural protections are due
15 depends on the extent to which an individual will be, quote,
16 "condemned to suffer grievous loss," end quote.

17 And going on down, it says: Once it is determined that due
18 process applies, the question remains, what process is due? Due
19 process is flexible and calls for such procedural protections as the
20 particular situation demands.

21 And then citing to another case is: Considerations of what
22 procedures due process may require under any given set of
23 circumstances must begin with a determination of the precise nature

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1 of the government function involved, as well as of the private
2 interests that has been affected by the government action.

3 And it doesn't get any more serious than execution. And
4 so ----

5 MJ [COL FITZGERALD]: Aren't you conflating the two tribunals,
6 the commissions and the Combatant Status Review Tribunal?

7 DC [MS. MANUELE]: Right.

8 MJ [COL FITZGERALD]: I get your point, but what is the
9 function of the CSRT? What are they trying to determine?

10 DC [MS. MANUELE]: Whether he will be released, essentially.
11 Because if he's a combatant ----

12 MJ [COL FITZGERALD]: Not necessarily released.
13 They -- whether he's a combatant, an enemy combatant.

14 DC [MS. MANUELE]: Correct.

15 MJ [COL FITZGERALD]: Which affords him what?

16 DC [MS. MANUELE]: Release, according to what he is told.

17 MJ [COL FITZGERALD]: Rights -- right? -- under the Common
18 Article 3, correct ----

19 DC [MS. MANUELE]: Well, what he is ----

20 MJ [COL FITZGERALD]: ---- Geneva Conventions, right?

21 DC [MS. MANUELE]: I would agree, yes.

22 MJ [COL FITZGERALD]: So it seems that's a very different type
23 of review than a review to revoke parole, because a result of that is

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1 to determine if you return to incarceration, correct?

2 DC [MS. MANUELE]: Correct.

3 MJ [COL FITZGERALD]: So one is going the other direction.

4 This seems to be a tribunal that's trying to determine if you should
5 receive Common Article 3 treatment, protections under the
6 Geneva Conventions, and that's why it exists. Versus a parole,
7 they're going to take away your liberties, right? They -- you are
8 extended some liberties under parole. And if they're going to revoke
9 it that -- tell me if I'm wrong, but we don't have that in the
10 Uniform Code of Military Justice. If your parole is revoked, it
11 means you're returning to incarceration to finish your term of
12 confinement.

13 DC [MS. MANUELE]: Absolutely.

14 MJ [COL FITZGERALD]: Those seem to not be the same types of
15 due process tribunals is, I guess, my point. One is you're going to
16 lose a fundamental liberty, which the parole granted you on
17 conditions. The other one is we need to determine if you have some
18 protections that right now we're not giving you. So we're going to
19 do this review to determine if you can meet that status. That seems
20 like a positive determination versus a loss of liberty, negative
21 determination.

22 DC [MS. MANUELE]: Absolutely.

23 MJ [COL FITZGERALD]: I'm just asking you a question because

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1 you -- asking you this question because the case law you cited to
2 says due process is based on what your circumstances are.

3 DC [MS. MANUELE]: Uh-hmm.

4 MJ [COL FITZGERALD]: So it seems like we have very different
5 circumstances than the case you're citing to about parole revocation.

6 DC [MS. MANUELE]: And I think perhaps I wasn't clear enough,
7 but what you were saying is exactly the point I'm trying to make.

8 MJ [COL FITZGERALD]: Which is?

9 DC [MS. MANUELE]: The purpose for what information is to be
10 used, the purpose of what rights you are afforded or the determining
11 factor of what rights you are afforded is what the court or the
12 tribunal is trying to determine at that point.

13 And so while these statements that were acquired for the
14 purposes of determining whether he was an enemy combatant are
15 sufficient. That that has gone up, the appellate courts have said
16 these rights are sufficient when determining whether somebody should
17 be determined an enemy combatant.

18 And what I'm trying to say is, based on what the Supreme
19 Court has said is that, you know, the -- which rights are ultimately
20 at stake determine what rights you're afforded.

21 Now the government is not trying to just use this statement
22 to say he's an enemy combatant. If we were here saying he should be
23 released because he's not an enemy combatant because these are the

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1 processes that were followed, then I agree we don't have a leg to
2 stand on.

3 But what I'm saying is that those processes were sufficient
4 for that determination. But now the government wants to use
5 statements that were obtained under that lesser process that was due,
6 and rightfully so due, to have a state-sanctioned execution.

7 In a capital prosecution, if you want to use this as
8 evidence in a capital prosecution, more process is due. And so
9 certainly if at the time of this Combatant Status Review Tribunal
10 they gave him an attorney, they said you have a right to remain
11 silent, you have a right to not have your silence used against you.
12 If you do choose to speak, these statements will be admissible as
13 evidence against you, then I don't think we'd have such a strong
14 argument that these statements, whether it might have been above and
15 beyond for the determination of whether he's an enemy combatant, it
16 would also be the appropriate process that's required when you want
17 to use evidence against somebody in a capital punish -- in a capital
18 criminal trial.

19 And so Morrissey I was citing specifically for the
20 proposition that the use is what determines what process is due.

21 And I do have a case for the commission. This is Wood v.
22 U.S. at 128 F.2d, 265. And this is a 1942 case from the U.S. Court
23 of Appeals for the District of Columbia. If I may approach?

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1 MJ [COL FITZGERALD]: Is that -- that's Morrissey or that's a
2 different case? I apologize.

3 DC [MS. MANUELE]: No. I'm sorry. This is Wood.

4 MJ [COL FITZGERALD]: Wood. Okay, thank you.

5 DC [MS. MANUELE]: May I approach?

6 MJ [COL FITZGERALD]: You may.

7 **[Pause.]**

8 DC [MS. MANUELE]: And so Wood -- I present this case
9 with -- because it has a lot of helpful language. And Wood is
10 regarding a preliminary hearing that was -- and, again, we're talking
11 1942 here, I understand that. But I would suggest that the
12 principles are the same still.

13 And so in Wood, the issue is what, if any, process is due in
14 a preliminary hearing where the preliminary hearing purpose is to
15 make a determination of whether an individual can continue to be
16 detained? It is done by a magistrate at this time, not the
17 prosecution. Analogous to the CSRT, I would suggest. Because
18 although you -- I understand and don't disagree with Your Honor's
19 position that the determination of enemy combatant is to determine
20 what rights they have, it is also to determine whether they -- he
21 will be released or not, as specifically stated to him.

22 If you're found not to be an enemy combatant, we will work
23 to release you as soon as that is possible.

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1 If you are found to be an enemy combatant ----

2 MJ [COL FITZGERALD]: But that's just release from detention
3 at Guantanamo Bay because your status is not as an enemy combatant.

4 DC [MS. MANUELE]: Correct, right.

5 MJ [COL FITZGERALD]: It may be released to some
6 other -- another authority as an EPW, correct?

7 DC [MS. MANUELE]: Yeah.

8 MJ [COL FITZGERALD]: I mean, it still has to be determined.
9 So it's not a release and you're free and everything is all done.

10 DC [MS. MANUELE]: Well, I mean ----

11 MJ [COL FITZGERALD]: It's we're going to start a process to
12 release you from detention here at Guantanamo Bay as a nonlawful
13 enemy combatant.

14 DC [MS. MANUELE]: And I would suggest that if that's the
15 truth, that's an additional basis why these statements shouldn't be
16 used against Mr. al Nashiri. Because that is not what he is told
17 when they get his consent to participate in this process.

18 What he is told is if the tribunal decides that you are not
19 an enemy combatant, you will be released as soon as arrangements can
20 be made.

21 MJ [COL FITZGERALD]: Can you show me where that's at? I'm
22 sorry.

23 DC [MS. MANUELE]: That is at paragraph G.1. in the middle of

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1 the page.

2 And then number 2, if the tribunal determines that you are
3 an enemy combatant, you will continue to be detained in U.S. custody.

4 MJ [COL FITZGERALD]: Thank you.

5 DC [MS. MANUELE]: And then going even further, it says,
6 number 5: As an enemy combatant, you could be considered for
7 criminal prosecution at a later date. Which suggests that if you're
8 not found to be an enemy combatant, you can't even be considered for
9 prosecution at a later date.

10 MJ [COL FITZGERALD]: Thank you.

11 DC [MS. MANUELE]: And so at Wood -- or in Wood, some of the
12 factors that the court looked at -- because, again, this was a
13 preliminary hearing, not with the prosecutors that would ultimately
14 be prosecuting an individual for a criminal offense, but whether they
15 would be entitled to release.

16 Looking at page 6 as printed: The inquiry is essentially
17 judicial. The subject matter is temporary restraint of the accused
18 person's liberty. The function is to determine whether there is
19 sufficient evidence to justify this. Commitment without evidence or
20 insufficient evidence would be arbitrary. The hearing, though
21 informal, is in open court. The court has the power to examine the
22 accused and others. The decision requires the exercise of discretion
23 on both facts and law. While it does not have finality for deciding

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1 guilt or innocence, it has that quality for the immediate purpose.

2 And the decision is reviewable, which sounds very similar to
3 the Combatant Status Review Tribunal process.

4 And then it goes on to say that: All of these are qualities
5 of a judicial proceeding, not a prosecutor's inquisition. Its
6 purpose is not to convict, nor is it to procure evidence for
7 conviction. In subject matter and function, the hearing is judicial.

8 And going further, it says that: The power of examination,
9 therefore, goes no further than is constitutionally permissible in a
10 judicial proceeding. Nor should the hearing -- and I'm sorry I'm at
11 the top of page 7 as printed now -- nor should the hearing be made a
12 trap for luring the unwary into confession or admission which is
13 fatal or prejudicial. So to use it would pervert its function and
14 make of the court not an arbiter but an arm of the prosecution.

15 And I would suggest that by allowing this evidence -- this
16 evidence to be used in a capital criminal prosecution, that the CSRT
17 tribunal would be made an arm of the prosecution.

18 And going further down -- well, actually, I guess, the next
19 line is pretty good: This would bring back the very evil, the
20 privilege, being against self-incrimination, was created to destroy.

21 And the -- further down to headnote 8 on the same page as
22 printed: The protection was not intended to be elusory. It would be
23 so if confined to the actual trial.

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1 Meaning, if you only had a right to remain silent in your
2 actual trial, then it would be an elusory protection.

3 The privilege would be worth little or nothing if the
4 magistrate could force the accused on preliminary examination to
5 speak his own conviction. And this could be used against him on the
6 final issue.

7 And based on this reasoning, ultimately the court determined
8 that that's why the individual at the preliminary hearing should have
9 an attorney present and the plea made at that time should not be used
10 against them.

11 And I'm not sure exactly what they mean, "plea," just based
12 on the language in here. It sounds -- because it's a detention
13 proceeding and they go on to state that if it was a plea of
14 guilty -- or if it was a plea of not guilty and it was withdrawn -- I
15 digress.

16 But so this is if the -- looking further down ----

17 MJ [COL FITZGERALD]: Well, it says here, page 4, they were
18 asked the question: How do you plead, guilty or not guilty?

19 DC [MS. MANUELE]: Right.

20 MJ [COL FITZGERALD]: So they were -- how is that similar to
21 this case? He wasn't asked to plead. I mean, there were no charges
22 before him. The CSRT is not a preliminary hearing for the purposes
23 of the commission. So it's not an Article 32 hearing.

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1 DC [MS. MANUELE]: Right. And so this -- and certainly I'm
2 not saying that this is exactly analogous. What I'm saying is that
3 for these reasons, we are arguing it should be treated similarly.

4 MJ [COL FITZGERALD]: Okay.

5 DC [MS. MANUELE]: Because the purpose is to -- at least as
6 expressed to Mr. al Nashiri, is to be determined if you're an enemy
7 combatant and released or held and potentially prosecuted for
8 criminal charges.

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

10 DC [MS. MANUELE]: And going further, it says: The objection
11 is not to elicitation of the plea. It is to abuse of its function by
12 treating that as evidence of guilt.

13 And then further: The fairer practice, and we think the
14 only one consistent with the court's position, would be advise the
15 accused in all cases before permitting him to speak, even as a
16 volunteer, of his right to counsel and warn him that he need not
17 speak. And if he does, it is at his peril.

18 This would assure fairness to the accused.

19 And one last -- it goes on to say that: This court, the
20 magistrate making this determination, cannot be part and parcel with
21 the prosecution, which I would submit the tribunal is becoming part
22 and parcel with the prosecution if this evidence is admitted. But
23 specifically cannot be partner or partisan with the prosecutor,

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1 subtly or otherwise, and retain the confidence of the accused and the
2 public or its own self-respect.

3 And I'm sorry. I skipped over, next column over, also on
4 page 12 as printed that: The plea could not be used as substantive
5 evidence against him.

6 It says: Any other rule would make of the hearing a trap
7 and an inquisition with consequences for the accused and for the
8 judicial system not tolerable under the Constitution.

9 And so applying that logic and those arguments, that is why
10 we believe none of this evidence should come in as substantive
11 evidence of guilt against Mr. al Nashiri in his capital case.

12 Additionally, some additional points on why this would be
13 unfair to be admitted as substantive evidence. Looking to
14 M.C.R.E. 304(f)(2) -- I'm sorry -- M.R.E. -- before I get there,
15 M.R.E. 304(a)(2). I think this should be certainly the Rules of
16 Evidence in courts-martial and Military Commission Rules of Evidence
17 if viewed in the light most favorable, which in a capital case if
18 there is any ambiguity, they should be viewed in favor of the
19 accused.

20 M.R.E. 304(a)(2): Failure to deny an accusation of
21 wrongdoing is not an admission of the truth of the accusation if at
22 the time of the alleged failure the person was under investigation or
23 in confinement -- of which Mr. al Nashiri was both -- arrest, or

1 custody for the alleged wrongdoing.

2 And we know he was at a minimum under investigation because
3 that's why the LHM was conducted just a couple weeks prior to this.

4 Additionally, under M.C.R.E. 304(f)(2) under the Rule of
5 Completeness: If only part of an alleged confession or admission is
6 introduced against the accused, the defense, by cross-examination or
7 otherwise, may introduce the remaining portions of the statement
8 consistent with the provisions.

9 And so certainly part of this statement has already been
10 excluded. None of it specifically because it is prohibited under
11 948r. And so it would be improper to say, well, part of the
12 statement is excluded under 948r, but the rest of it can come in.
13 And otherwise, the Rule of Completeness, then, is a nullity in this
14 particular circumstance.

15 Additionally, additional reasons of why the statement should
16 be deemed unreliable and excluded -- the commission had a question
17 during the AE 685 argument earlier, and I wanted to just provide some
18 answers as to the oath that was provided.

19 And why does it matter if the interpreter -- and I'm not
20 saying these are your questions. I'm saying this is my -- you know,
21 why does it matter what qualifications the interpreter has or lack
22 thereof?

23 And specifically, Rule 502(e)(1) directs that the

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1 qualifications of interpreters and reporters may be prescribed by the
2 Secretary of Defense. And that was done here.

3 Looking at M.C.R.E. Rule 604: An interpreter is subject to
4 the provisions of these rules relating to qualifications as an expert
5 and the administration of an oath or affirmation that the interpreter
6 will make a true translation.

7 And we have no information about the interpreter's
8 qualifications, which, again, may be perfectly fine in the CSRT
9 tribunal. There's no -- if there's no special requirements or they
10 don't need to make that criteria. But the defense's position is if
11 you then want to use that evidence as substantive evidence of guilt,
12 these rules should apply. Because now you're using evidence ----

13 MJ [COL FITZGERALD]: Do you have any authority for that
14 conclusion that one body should make another body, a previous body
15 apply its rules of procedure? It seems unworkable and untenable to
16 tell some other body in a preexisting state that they have to comply
17 with another body's rules of procedure. How does that work?

18 DC [MS. MANUELE]: Well, certainly no because it's the same
19 body. The people that created this MCA ----

20 MJ [COL FITZGERALD]: No, when I mean body, I mean a tribunal,
21 some type of arbiter. If they wanted to do that they could have done
22 that with the CSRT. They could have said apply the Military Rules of
23 Evidence or Rules of Criminal Procedure but they didn't do that.

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1 DC [MS. MANUELE]: And I believe that is because the CSRT was
2 never intended to be used as substantive evidence of guilt in
3 subsequent cases. The CSRT had a very specific purpose, to make a
4 determination whether they're an enemy combatant.

5 Certainly if the -- if the plan or if anybody believed that
6 these were going to be used as admissible -- as substantive evidence
7 of guilt in subsequent trial, I believe that would have been altered.
8 But -- and, again, I believe the government will correct me -- I
9 don't know that a CSRT statement has ever been introduced as
10 substantive evidence of guilt in the trial, the criminal trial.

11 And so that is our position, that if it was intended to be
12 used as substantive evidence of guilt, then presumably the same rules
13 would apply. Because it doesn't make sense if we're going to
14 say -- if we get a statement from you in trial, the interpreter has
15 to have these same requirements. However, we can do it in another
16 proceeding under the guise of a -- with you having a representative,
17 with there being members asking you questions, with there being a
18 reporter. All of the roles are the same.

19 And so under the guise of this pseudo hearing, we would
20 argue similar to the Wood case, it's the judicial proceeding. It
21 gives the appearance of a judicial proceeding.

22 And so the interpreters, at least according to the M.C.R.E.,
23 are also supposed to be -- meet the qualifications as an expert. And

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1 under 702: If scientific, technical or other specialized
2 knowledge -- certainly which translation is -- will assist the trier
3 of fact to determine a fact in issue, a witness qualified as an
4 expert by knowledge, skill, experience, training, or education may
5 testify.

6 We haven't -- we are 19 years later. We have been provided
7 no information about the qualifications of this individual, the
8 translator.

9 MJ [COL FITZGERALD]: Because it's not required to. I don't
10 know -- I keep going back to that. I don't know what the CSRT had as
11 a rules of procedure, but if they didn't have this criteria, then how
12 could they provide you something of which they didn't do or didn't
13 create or didn't have to adhere to? How would that exist?

14 DC [MS. MANUELE]: If they intended to use it later as
15 substantive evidence of guilt. And, again, it may be -- it's -- no
16 one is saying that it is inadmissible for the purpose that it was
17 taken. But once you want to use it for a different purpose, due
18 process is determined by the use.

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

20 DC [MS. MANUELE]: And as to Your Honor's question about
21 whether an oath was administered ----

22 MJ [COL FITZGERALD]: I think I was informed there was. But
23 if you have anything different or more to add.

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1 DC [MS. MANUELE]: So just briefly. The oath given the
2 translator was: Do you swear or affirm that you will faithfully
3 perform the duties of translator in the case now in hearing.

4 And pursuant to Rule 807 -- R.M.C. 807, I apologize, oath
5 for interpreter down at the bottom: The trial counsel shall
6 administer the following oath to every interpreter in the trial of
7 any case before a military commission.

8 If the interpreter's statements are coming in as this
9 evidence, then I would submit that interpreter is offering -- is
10 before the commission, because his statements from a previous -- from
11 March of '07 would be introduced before this commission in trial.

12 And that oath that says -- and it's a "shall": Do you swear
13 or affirm that in the case now in hearings you will interpret truly
14 the testimony you are called upon to interpret?

15 Which is different than what was asked of this interpreter:
16 Do you affirm that you will faithfully perform the duties of
17 translator?

18 And the -- and I will hit on more in closed session
19 under -- as to why we believe additional bases that we believe the
20 response should be excluded based on the circumstances of taking
21 those three days of statements of Mr. al Nashiri. Again, we do not
22 have an audio recording, so we are unable there, in the instances
23 that Lieutenant Shaver went through this morning, where there is

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1 a -- it appears a bias is coming through. We don't have that benefit
2 in those three days of meetings either. We are just left with the
3 interpreter's final version as was put on a -- relayed to the
4 personal representative and typed up into a -- I'm sorry -- into the
5 evidence that was ultimately submitted, and examples of the
6 interpreter bias, like he said, the investigation versus
7 interrogation.

8 And Your Honor did have a good question about isn't
9 the -- couldn't an interrogation also be part of an investigation?
10 And I submit no, not in this particular instance. Certainly there
11 are cases where an interrogation is part of the investigation.
12 However, these weren't interrogations done by law enforcement
13 officers or investigating officers.

14 The interrogations were done by the intelligence agencies,
15 not the same persons or same entities that are investigating crime.
16 They are trying to gather intelligence.

17 And so under these particular circumstances, I would submit
18 no, that it would not make sense to use "investigation" versus
19 "interrogation" because Mr. al Nashiri was never involved in the
20 investigation. He was interrogated and he was interrogated a lot,
21 but he was never questioned, other than the LHM, by law enforcement
22 or interrogated by law enforcement.

23 So all of the statements that he is talking about were

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1 intelligence gathering interrogations.

2 And finally, as to the summary, the summary of findings that
3 the government has indicated they want to introduce, it's titled
4 "Unclassified Summary of Basis for Tribunal Decision." That's at
5 Attachment F of 6 -- of AE 680. And this is -- just to show Your
6 Honor the first page, this is a synopsis of the proceedings. This is
7 absolutely a hearsay document. It invades the province of the member
8 panel in that it basically says we already reviewed this evidence.
9 We found certain evidence credible. Specifically, we found
10 Mr. al Nashiri's statements that he made not credible.

11 That would be improper opinion evidence before the
12 commission. And so as hearsay, improper evidence, that exhibit
13 should not be admitted before the commission.

14 It is certainly not relevant whether Mr. al Nashiri was
15 determined to be an enemy combatant, especially in light of the
16 definition that was used for enemy combatant in '07 is different than
17 Mr. al Nashiri being -- now in order for him to be prosecuted as an
18 enemy -- belligerent enemy combatant is different than the definition
19 and criteria that the tribunal members were instructed in making
20 their decision.

21 Which leads me, essentially, overall, to a 403 argument that
22 even if the commission and the defense, for all of the reasons
23 stated, do not believe this evidence has any probative value, but any

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1 minimal probative value -- again, this isn't a situation where we can
2 recreate it. It's not as though we have recordings of the PR
3 meetings and because they were asking different questions in real
4 time, we can't just fix it with a new transcript. So it should be
5 excluded altogether.

6 But if the commission were to find or believe that there is
7 some probative value, then certainly a 403 analysis weighs against
8 admitting this evidence.

9 And the government has repeatedly used the phrase "a trial
10 within a trial" in some of the last two sessions regarding witnesses
11 or evidence that the defense wants to rebut certain evidence, largely
12 this evidence here before us. And they say we're getting into a
13 trial within a trial. And the defense doesn't disagree. But the
14 remedy, if rebutting or refuting the evidence that is admitted
15 becomes too cumbersome or too confusing or begins to mislead the jury
16 or goes too far astray, then the evidence shouldn't come in.

17 The remedy is not to limit the challenging of the evidence.
18 The remedy is to say you're right, 403 analysis, it is going to
19 confuse the heck out of these jurors in trying to determine what's
20 what. And we have an extra layer here where we would have to, you
21 know, be battling out, well, this was said at the time, but this is
22 what the member said, but this is what was relayed to Mr. al Nashiri.

23 Additionally, as I indicated, the different definition of

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1 enemy combatant. And the evidence of a summary of fact being read in
2 certainly suggests that there's additional evidence or material that
3 somebody knew and that is being relayed to the member panel by
4 reading this summary into evidence or allowing the piece of paper to
5 be admitted into evidence, the summary of unclassified evidence that
6 indicates these facts are what make Mr. al Nashiri an enemy
7 combatant.

8 And so if I may have one brief moment, I believe that is it.
9 But if I could just have one moment to confer?

10 MJ [COL FITZGERALD]: You may.

11 **[Counsel conferred.]**

12 DC [MS. MANUELE]: Just two brief points, Your Honor.

13 When the commission questioned whether, I guess, using
14 statements or evidence that's obtained in one hearing for a
15 subsequent purpose, my understanding is that that wouldn't be all
16 that uncommon, specifically in an administrative separation hearing.
17 That if somebody is starting to be questioned about something that
18 could implicate them criminally, that there would be a break and that
19 individual would be advised about the implications of those
20 statements being used against them criminally.

21 And so while certainly there can be some overlap, the
22 defense's position is that Mr. al Nashiri should have been advised if
23 this testimony or questioning was going to be used or could

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1 potentially be used against him at a criminal proceeding, then those
2 admonitions should have been given. And additionally, in a capital
3 case, heightened reliability is required.

4 And so these statements may be absolutely sufficient for
5 that purpose, but the Supreme Court has consistently held that when
6 capital punishment is on the table, there should be a heightened
7 level of reliability of the evidence that's introduced. And so they
8 should be excluded. All of the evidence discussed should be excluded
9 as substantive evidence in Mr. al Nashiri's case.

10 Subject to any questions.

11 MJ [COL FITZGERALD]: One, thank you for that example and
12 circling back to it, and thank you. I have no questions at this
13 point.

14 DC [MS. MANUELE]: Thank you, sir.

15 MJ [COL FITZGERALD]: So I'll put on the record that I'm
16 getting acoustic information that it appears to be raining outside.
17 So I'm curious, Government, would you like to proceed without a
18 recess since I don't want to put people out in the rain?

19 ATC [Maj KRZEMIEN]: Yes, sir. That's fine. Sorry. That's
20 fine.

21 LDC [MS. MILLER]: Is there a restroom indoors?

22 MJ [COL FITZGERALD]: To answer that question, I'm not aware
23 of one and I believe the answer is no.

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1 So we're going to -- we're going to attempt it. If I hear
2 the rain cease, then certainly raise to my attention if you'd like a
3 comfort break, but I'd like the government to be able to present
4 their response.

5 You're free to proceed. Thank you.

6 ATC [Maj KRZEMIEN]: Yes, sir. Thank you.

7 MJ [COL FITZGERALD]: And, Major Krzemien, I'll probably
8 encourage you to speak up. I think you're probably the most soft
9 spoken of your team. So...

10 ATC [Maj KRZEMIEN]: Good afternoon, sir.

11 MJ [COL FITZGERALD]: Good afternoon.

12 ATC [Maj KRZEMIEN]: So the government respectfully requests
13 that the commission deny the defense's motion to exclude all the
14 evidence in and around the CSRT. The government stands on its brief
15 for the most part on this motion, but I would like to bring the
16 commission's attention to three main points.

17 The first point is that the issue of voluntariness in 948r
18 has already been litigated and decided by the commission in
19 AE 467CCC.

20 Second point, that Mr. Nashiri voluntarily met with his
21 assigned personal representative for the CSRT.

22 And third, that the statements Mr. Nashiri made, along with
23 the documents prepared by he and his personal representative,

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1 Mr. Palmerino, should not be excluded because of hearsay.

2 So first, Your Honor, this issue has already been litigated
3 and decided in AE 467CCC. Here, the commission found that
4 Mr. Nashiri's presence and the statements made during the CSRT were
5 voluntary and were not suppressed.

6 Specifically on page 46, the commission stated: By the time
7 of the CSRT hearing, the accused knew for sure that he did not suffer
8 any consequences for terminating the interview in early February,
9 which was, of course, a reference to the accused ending an interview
10 during the LHM previously.

11 The commission continued: In other words, the accused would
12 have known after the LHM interviews that he had an actual choice
13 whether or not he would speak. When the proceedings began, the
14 president clearly explained the purpose of the hearing and advised
15 the accused that he could not be compelled to testify at the
16 tribunal, but instead, he had the choice to either testify or not to
17 testify.

18 And that's on page 47 of AE 467CCC.

19 So here, sir, the commission took into consideration the
20 totality of the circumstances. They took into consideration the
21 accused's knowledge that he could end interviews at any time; that he
22 knew he could not be compelled to testify; his actual presence at the
23 CSRT, which, of course, was an option he had.

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1 Judge DeLury in a previous -- in his testimony during 467,
2 stated -- this is on the transcript for 28 July 2022, page 17566. He
3 stated: Some showed up and participated like al Nashiri did. Some
4 chose not to show up. And as I recall, some might have shown up but
5 didn't make a statement and were just there.

6 So this shows Mr. Nashiri knew he had the right not to
7 attend the tribunal.

8 The commission also took into consideration his
9 understanding of the rights that were provided to him, his
10 willingness to create and provide a personal statement at the CSRT.
11 And so they used all of the totality of these circumstances to show
12 that these statements were made voluntarily and that Mr. Nashiri
13 voluntarily appeared at the CSRT.

14 The ruling also stated on page 49: Considering the totality
15 of the circumstances, it is clear that the accused understood by 14
16 March 2007 that he had rights which included the rights not to
17 incriminate himself further.

18 Then, in AE 319MMMM: The commission examined the CSRT
19 further and excluded portions of the transcript that were thought to
20 be made under 948r, which the commission ruled were statements from
21 Mr. Nashiri telling the board what he had said during the
22 RDI Program.

23 So in this ruling, the commission excluded four pages of the

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1 transcript, pages 18 through 22, which is in AE 315A.

2 So for further clarification, Mr. Nashiri was read his
3 rights that he was not compelled to testify twice. First, during his
4 initial meeting with Mr. Palmerino and at the beginning of the CSRT.

5 The president of the CSRT, Judge DeLury, at the beginning
6 stated: You may not be compelled to testify at this tribunal.
7 However, you may testify if you wish to do so.

8 Judge DeLury then went on to explain the process of the
9 tribunal, how it was going to go. And then he asks: Do you have any
10 questions concerning the process? To which Mr. Nashiri responds:
11 No.

12 So in their motion, the defense states that this ruling or
13 this motion 467 is different than the current motion, 680, because in
14 467, they were purely arguing the voluntariness of Mr. Nashiri's
15 presence and statements at the CSRT.

16 Here what they're arguing is that there's no clear
17 delineation from what Mr. Nashiri was recounting from what he said
18 during the RDI Program and what he was saying now to the members in
19 real time.

20 As defense counsel mentioned, at the beginning of the CSRT,
21 the recorder read the list of unclassified evidence, which is on
22 page 5 -- sorry, 6 to 7 of 315A, which was a list of the allegations
23 that Mr. Nashiri was supposed to be involved in or suspected to be

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1 involved in.

2 When Mr. Palmerino begins his opening remarks, which is the
3 statement that he crafted with Mr. Nashiri, it starts with: The
4 detainee states that he was tortured into confession and once he made
5 a confession, his captors were happy and they stopped torturing him.

6 And then the statement goes on to list the seven things and
7 the items that he was suspected of doing.

8 But then after each point is a statement from Mr. Nashiri
9 explaining that allegation, explaining that confession, defending
10 himself, explaining the nuances, why he said those things. For
11 example, item A from the list of unclassified evidence was: The
12 detainee was experienced in military and explosives training.

13 And in response to that point, Mr. Palmerino reads from
14 Mr. Nashiri's personal statement: In response to item A the detainee
15 states that he has never visited Bosnia or been trained in
16 explosives.

17 These statements show that Mr. Nashiri was not simply
18 recounting what he said during the RDI Program. He is making -- he
19 is defending himself and explaining why he made those admissions and
20 what the truth actually is. It is clear from these statements that
21 Mr. Nashiri knows that he's not just recounting what he said during
22 the RDI Program.

23 This point is also recognized by the commission in AE 467CCC

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1 where the commission states: Perhaps one of the most significant
2 considerations in determining that the accused believed by the time
3 of the CSRT that he faced no further danger from his former
4 interrogators came during the accused's sworn statements when he
5 denied much of what he previously told interrogators and
6 investigators.

7 So in this ruling, the commission has already recognized
8 that Mr. Nashiri knew the difference between the statements he made
9 during the RDI Program and the statements he was making during the
10 CSRT tribunal. And the commission ruled that these statements were
11 voluntary and not obtained by or derivative of torture.

12 Further, after Mr. Palmerino read the entire personal
13 statement, Judge DeLury asks Mr. al Nashiri: Would you like to add
14 anything to the statement your personal representative just made for
15 you?

16 Mr. Nashiri responds: No.

17 He then asks: And what he read, is that what you wanted him
18 to read to you -- for you?

19 Mr. Nashiri responds: Yes.

20 Finally, the judge asks: So that was your statement?

21 To which Mr. Nashiri responded: Yes.

22 And this is on page 14 of 315A.

23 So here, again, it's obvious that Mr. Nashiri is using his

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1 personal statement to explain his admissions to the RDI Program. He
2 is not simply recounting the statements or the admissions he made
3 while he was in the program.

4 Then after the statement, Judge DeLury asks Mr. Nashiri:
5 Are you under any pressure or duress today?

6 And Mr. Nashiri responds: No, not today.

7 In their motion, the defense also argues that there's no
8 clear pivot from when Judge DeLury is discussing Mr. Nashiri's
9 admissions during the RDI Program and the questions from the members.

10 There is, however, a very clear pivot. Once Judge DeLury
11 concludes his questions about the RDI Program, he asked Mr. Nashiri:
12 Is there anything else you would like to add or tell the tribunal
13 about your treatment?

14 Mr. Nashiri responds: No, I have nothing else to say. That
15 is enough.

16 The judge then goes on -- or the president then goes on to
17 explain the remainder of the tribunal and how the process will work.
18 He explains what's next, how his statements may be used, how the
19 investigation -- any further investigation may be used. And then he
20 gives the members the opportunity to ask questions.

21 This exchange that the judge has -- that Judge DeLury has
22 with Mr. Nashiri is a clear pivot from the questions he was asking
23 him to recount -- or the statements he was asking him to recount from

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1 the RDI Program.

2 It's very clear that President DeLury is saying, okay, we've
3 discussed the RDI Program. Now we're moving on to a different
4 portion of the tribunal and you may now answer questions from the
5 members.

6 Mr. Nashiri's responses to the members are also evidence
7 that he knew the conversation had pivoted. When he was discussing
8 with Judge DeLury about the RDI Program, he often used phrases -- the
9 phrase, "I told them."

10 So on page 21 of the CSRT, a few examples, he says: Then
11 after that, I told them. He has no bomb. After a month of playing
12 games and doing this and that, I understood and I told him we had
13 nuclear missiles or bombs.

14 On page 22: I told them one time that I was in the office
15 with Usama bin Laden and I went to the bathroom of Usama bin Laden.

16 A few lines down from that: After that, I told them it was
17 just basically a story.

18 So contrasting that to Mr. Nashiri's responses to the
19 members' questions where he doesn't say, "I told them," a single time
20 in his responses. He's simply recounting -- or he's answering the
21 questions from the members in real time. And this is true in both
22 the DoD transcript and the FBI transcript.

23 So this example is further evidence that Mr. Nashiri also

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1 knew that there was a pivot in the conversation. That he was no
2 longer talking about the RDI Program. He was simply now answering
3 questions from the members.

4 So for these reasons, it's clear that Mr. Nashiri understood
5 that these were two separate parts of the tribunal and that these
6 statements do not fall under 948r and they should not be excluded.

7 Next in their motion, the defense implies that Mr. Nashiri
8 did not voluntarily meet with Mr. Palmerino; however ----

9 LDC [MS. MILLER]: Judge, I apologize for the interruption.
10 I'm so sorry. I am being told there are members on my team that will
11 brave the rain that desperately need a restroom break.

12 MJ [COL FITZGERALD]: Very well. Do you mind if I interrupt
13 you at that point or do you want to finish that point?

14 LDC [MS. MILLER]: I tried to wait until she was about to
15 begin point 2.

16 ATC [Maj KRZEMIEN]: I can wait. Yes, sir.

17 MJ [COL FITZGERALD]: Very well. The commission's in recess
18 for 10 minutes.

19 **[The R.M.C. 803 session recessed at 1721, 21 April 2026.]**

20 **[The R.M.C. 803 session was called to order at 1732, 21 April 2026.]**

21 MJ [COL FITZGERALD]: This commission is called to order.

22 All parties present before the last recess are again
23 present.

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1 Government, sorry to interrupt you previously, but you may
2 continue.

3 ATC [Maj KRZEMIEN]: Yes, sir.

4 My second point: In their motion, the defense implies that
5 Mr. Nashiri did not voluntarily meet with his personal
6 representative, Mr. Palmerino. However, there is no -- there is no
7 evidence of that. There is no evidence that Mr. Nashiri was forced
8 to meet with Mr. Palmerino on the three days that he did.

9 In fact, as the defense mentioned previously, Mr. Palmerino
10 was originally scheduled to meet with Mr. Nashiri on 9 February 2007,
11 but Mr. Nashiri declined to meet with him.

12 He was again scheduled to meet with him on 12 February 2007,
13 and Mr. Nashiri was sick or unable to meet with him on that date as
14 well.

15 So he did meet with him on three occasions: 13, 14, and 20
16 February of 2007.

17 And during Mr. Palmerino's testimony here in February, he
18 stated that Mr. Nashiri was cordial with him. And that's in the 25
19 February '26 transcript, page 33380.

20 He also stated that it appeared as though he elected to be
21 there. Also, Mr. Palmerino explained that this process was an
22 hours- and days-long process, that they went through every line of
23 the summary of evidence to make sure that the statements that were

1 being recorded onto Mr. Nashiri's personal statements were exactly
2 what he wanted to say.

3 In his testimony, Mr. Palmerino said: My job was to make
4 sure I collected his responses and provided, you know, his words, not
5 mine, or anybody else's. And that's on page 33381 of the transcript.

6 He also was clear to say that while he does not speak
7 Arabic, and while Mr. Nashiri did not speak English, with the help of
8 the interpreter they went back and forth on this document, again, to
9 make sure it was exactly what Mr. Nashiri wanted to say to the
10 tribunal.

11 On page 33376 of the transcript, he stated: One of those
12 changes results in a lot of back-and-forth discussion to make sure I
13 understood exactly what he was saying.

14 He continues to say: So it would have been repeating it
15 back and forth, kind of like, you know, the dialogue that we're
16 having here. I would ask the questions many times until I understood
17 what the answer was. We would painstakingly go through each one of
18 those at every point in the meeting when we were trying to finalize
19 them. And that's on page 33338.

20 So from this testimony, while Mr. Palmerino did not speak
21 the same language as Mr. al Nashiri, it's clear that he took a
22 substantial amount of time to make sure that the statement that they
23 were going to produce -- that the two of them were crafting together

1 was exactly what Mr. Nashiri wanted to provide to the tribunal.

2 Mr. Nashiri wanted to attend these meetings with
3 Mr. Palmerino because he wanted to get his story out there. He
4 wanted to make sure that the tribunal heard his statement.

5 So for these reasons, it's clear that Mr. Nashiri did
6 voluntarily meet with Mr. Palmerino.

7 Finally, my third point, the documents and notes created by
8 Mr. Palmerino and Mr. Nashiri in these meetings, and presented at the
9 CSRT, should not be excluded because of hearsay. So depending on how
10 the trial goes, they may be used for refreshing recollection, past
11 recollection recorded, or present sense impression. But it's the
12 government's position that even if we were to admit any of these
13 documents affirmatively, not every portion of every document is
14 hearsay. And if the government is able to -- is unable to lay the
15 proper foundation, then at that point the defense can object.

16 May I have a moment, Your Honor?

17 MJ [COL FITZGERALD]: You may.

18 **[Counsel conferred.]**

19 ATC [Maj KRZEMIEN]: Your Honor, for the reasons stated, the
20 commission should deny the defense's motion to exclude all evidence
21 related to or derived from the CSRT process or hearing.

22 So pending any questions, sir, that's all I have.

23 MJ [COL FITZGERALD]: So you heard defense's position that the

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1 due -- and I'm paraphrasing so, Ms. Manuele, please feel to correct
2 me if I get it correct me if I get it wrong. But essentially,
3 looking backwards, the tribunal has some nexus to this commission,
4 therefore they -- the due process rights should have been heightened
5 at the CSRT because the government wants to use information from the
6 CSRT in these commissions.

7 Do you have a response to that?

8 ATC [Maj KRZEMIEN]: Yes, sir. So it's the government's
9 position that that tribunal was ----

10 MJ [COL FITZGERALD]: Wait. Hold on a second.

11 Ms. Manuele, did I paraphrase your position accurately?

12 DC [MS. MANUELE]: Yes, that if ----

13 MJ [COL FITZGERALD]: Okay.

14 DC [MS. MANUELE]: ---- to be used at the capital proceeding,
15 heightened standards should have been used if they want to use them
16 at a later standard -- or at a later proceeding, yes, sir.

17 MJ [COL FITZGERALD]: So more importantly, what she argued,
18 I'd like you to respond to that if it sounded different than how I
19 paraphrased it. But I think you understand what I'm asking.

20 ATC [Maj KRZEMIEN]: Yes, sir.

21 MJ [COL FITZGERALD]: Okay.

22 ATC [Maj KRZEMIEN]: So it's the government's position that
23 the CSRT was a stand-alone tribunal and that Mr. Nashiri was provided

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1 the rights he was -- he was due for that process.

2 And then in AE 571I, the commission ruled on Mr. Nashiri's
3 right to counsel and how that didn't apply until the charges were
4 sworn on 30 June 2008.

5 So it's the government's position that he was granted all
6 the rights that were due to him for that specific tribunal.

7 MJ [COL FITZGERALD]: Okay. Thank you. I don't have any
8 further questions at this time.

9 ATC [Maj KRZEMIEN]: Yes, sir. Thank you.

10 MJ [COL FITZGERALD]: Defense, briefly would you like to
11 respond to the arguments of government counsel?

12 DC [MS. MANUELE]: Very briefly.

13 So the issue is that the -- the government indicates that we
14 may want to use this to refresh recollection or as a prior
15 recollection recorded, and there was one another I can't recall.
16 But ----

17 MJ [COL FITZGERALD]: Present sense impression?

18 DC [MS. MANUELE]: Present sense impression.

19 So all of the statements are going through an interpreter.
20 And so all -- those arguments are based on the -- in large part,
21 based on the premise that, because of the interpreter, that was not
22 a...

23 MJ [COL FITZGERALD]: If you want to confer, you may.

1 **[Counsel conferred.]**

2 DC [MS. MANUELE]: Sorry.

3 MJ [COL FITZGERALD]: It's okay.

4 DC [MS. MANUELE]: Because these statements are all coming
5 from an interpreter, who's not qualified and was not acting as an
6 agent of Mr. Nashiri, when viewed through that lens they are not the
7 statements of Mr. al Nashiri. They are the statements of the
8 interpreter.

9 And so those statements as hearsay should not be used for
10 any purpose absent some -- they're not refreshing anybody's
11 recollection. It refreshes my recollection as to what the
12 interpreter told me, but that seems not relevant. It would be
13 relevant if you're trying to introduce statements of
14 Mr. al Nashiri's. But the first hurdle would be for the government
15 to prove that those are, in fact, statements of Mr. al Nashiri's
16 before we get into any of the other reasons that we have argued those
17 statements should be excluded.

18 And so certainly the hearsay of the interpreter -- our
19 position is that all of these are statements of his with the
20 exception of the classified summary of evidence and the summary of
21 findings that are also hearsay, just of a different person.

22 467, again specifically as to the CSRT, only addressed the
23 March 14th. And so I do believe there's additional argument to be

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1 made regarding the voluntariness of meeting with the personal
2 representative on February 12, 13 -- or I'm sorry -- 13 -- on
3 February 13th, 14th, and 20th. However, that will need to be made in
4 closed session.

5 But those dates weren't addressed in 467. And further, the
6 analysis in AE 467 was based on the attenuation of -- was an
7 attenuation analysis. And, specifically, Judge Acosta indicated on
8 page 48: One of the most significant considerations in determining
9 that the accused believed by the time of the CSRT that he faced no
10 further danger from his former interrogators, and then goes on.

11 And then on page -- on page 49, QQ: The accused's
12 statements to the CSRT were made voluntarily and were not obtained
13 through or derived from torture or any other form of coercion or
14 abuse he was subjected to at the hands of his former captors and
15 interrogators.

16 And so 467 was specifically limited to -- as an attenuation
17 from the torture, which is not the argument that we are making now.
18 However, certainly, I think the defense's position would at least
19 be to any extent that there is overlap and if new evidence would be
20 required. Because we do have a holding from this commission -- this
21 is at 120AA, and this was regarding a government's -- the court had
22 granted a defense motion regarding discovery. And this is page 3.
23 And the defense opposes reconsideration. Looking at paragraph b.,

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1 alleges that the prosecution failed to follow the procedural rules of
2 reconsideration because the prosecution's -- sorry, slowing
3 down -- because the prosecution has cited no error of law or new
4 evidence to justify reconsideration.

5 The commission goes on to highlight that the request by any
6 party or sua sponte military judge may, prior to authentication,
7 reconsider any ruling.

8 And then going down to d., the defense's procedural
9 objection to the motion is misplaced.

10 Going further down, a motion for reconsideration regarding
11 that the new facts or new evidence is specifically attributable to a
12 supplemental pleading and that a motion for reconsideration may be
13 filed by any party or sua sponte.

14 And so that was the previous holding of this commission,
15 rule of the case. Even if the commission wanted new facts, I think
16 it has been very clear that at 467 the court was provided a highly
17 redacted and incorrect transcript. The government agrees that the
18 transcript was wrong by having the FBI create a new transcript.

19 And so certainly at a bare minimum, there is new evidence
20 that -- I believe the analysis is different, but even if there is
21 some overlap, that there is new evidence, if the commission would
22 require new evidence for a reconsideration.

23 MJ [COL FITZGERALD]: But you expressly stated in your motion

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1 that it was not a request for reconsideration. So now ----

2 DC [MS. MANUELE]: Correct.

3 MJ [COL FITZGERALD]: ---- you seem to be telling me, as an
4 alternative argument, that it is reconsideration?

5 DC [MS. MANUELE]: I don't think it's reconsideration.

6 MJ [COL FITZGERALD]: Okay.

7 DC [MS. MANUELE]: I'm trying to be clear that the arguments
8 are very separate. But the government keeps saying that that's what
9 I'm asking for. And so to any extent -- if the commission agrees
10 that there is overlap in the positions, I would submit that there
11 would be a basis. I am trying to argue two separate bases.

12 MJ [COL FITZGERALD]: Okay.

13 DC [MS. MANUELE]: I am not trying to argue ----

14 MJ [COL FITZGERALD]: You don't have to argue that.

15 DC [MS. MANUELE]: Okay.

16 MJ [COL FITZGERALD]: I didn't take up argument on whether or
17 not it was reconsideration. But even if -- even your argument now is
18 lacking because I don't know what the new evidence is. Just because
19 there are new statements doesn't mean there's new evidence that would
20 have been a basis for reconsideration.

21 DC [MS. MANUELE]: Only ----

22 MJ [COL FITZGERALD]: Because you didn't brief it. And so the
23 government couldn't respond to it, nor could I. So...

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1 DC [MS. MANUELE]: So not consideration. Reconsideration.

2 MJ [COL FITZGERALD]: It does not appear so.

3 DC [MS. MANUELE]: Okay.

4 MJ [COL FITZGERALD]: Because you expressly told me it was not
5 a motion for reconsideration.

6 DC [MS. MANUELE]: Certainly. And my position is that these
7 are separate and distinct issues.

8 MJ [COL FITZGERALD]: Okay. And so you're just responding to
9 the government's position.

10 DC [MS. MANUELE]: Yes, sir.

11 MJ [COL FITZGERALD]: Okay.

12 DC [MS. MANUELE]: Yes, sir. That's why I certainly -- I
13 didn't address that on the front. And I was just responding to ----

14 MJ [COL FITZGERALD]: Sure.

15 DC [MS. MANUELE]: ---- their argument.

16 MJ [COL FITZGERALD]: Okay.

17 DC [MS. MANUELE]: And I believe, lastly, the only thing that
18 I wanted to respond to, the government indicated that, based on the
19 president's testimony, that he believed some people showed up, some
20 people didn't show up, some people showed up and maybe didn't
21 participate, that that somehow was evidence of Mr. al Nashiri
22 understanding what rights were afforded to him, or how his statements
23 could be used at some later date. I believe that is a stretch.

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1 Certainly I don't know how actions of a third party could be
2 attributed to Mr. al Nashiri. If there was some evidence that it was
3 the same interpreter who was explaining the rights or who was
4 obtaining those statements, then that could be a -- a argument,
5 albeit I would suggest still weak argument, but certainly I don't
6 believe that creates any knowledge upon Mr. al Nashiri as to his
7 rights at the time.

8 MJ [COL FITZGERALD]: Thank you.

9 DC [MS. MANUELE]: Thank you, sir.

10 MJ [COL FITZGERALD]: Anything else on Appellate
11 Exhibit 68 -- 680? I think I've heard all arguments, correct?
12 Defense?

13 DC [MS. MANUELE]: For open session, yes, sir.

14 MJ [COL FITZGERALD]: For open session. I apologize. Yes.
15 So -- and there's some information you want to present in closed
16 session.

17 Government, do you have any evidence you want to present in
18 closed session? I know you're going to respond in closed session,
19 but do you have any affirmative evidence that ----

20 ATC [Maj KRZEMIEN]: No, sir. Just response.

21 MJ [COL FITZGERALD]: As I understand it,
22 Ms. Escallier -- tomorrow is the 22nd, so Ms. Escallier was directed
23 to be called as a witness?

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1 TC [CAPT STINSON]: That's correct, Your Honor. And we
2 directed at 0900 tomorrow morning for Ms. Escallier, yes, sir.

3 MJ [COL FITZGERALD]: So because that's a witness, I'd like to
4 stick to that schedule and then we will decide where we want to go
5 from there.

6 Defense, your motion to -- did you think you needed -- I
7 don't think there's anything that you could take up in closed session
8 related to 690 or 690C, is there?

9 LDC [MS. MILLER]: No. And I did speak **[microphone button not**
10 **pushed; no audio]** about it. It's under seal, just because we have
11 about a 5,000-page attachment with the personal identifying
12 information related to the -- both panel members and the alternate
13 members. I don't think either party intends do disclose ----

14 MJ [COL FITZGERALD]: Names or PII?

15 LDC [MS. MILLER]: Correct.

16 MJ [COL FITZGERALD]: Okay.

17 LDC [MS. MILLER]: And so I think we're in agreement that it
18 can be addressed in an open session despite the pleading being under
19 seal.

20 MJ [COL FITZGERALD]: Okay. You can certainly refer to the
21 documents if you need me to, but I greatly appreciate it. I think
22 the parties are well aware, no one refer to any prospective panel
23 members.

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

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

3 MJ [COL FITZGERALD]: In any way, by name or identifying data.
4 And I presume you're going to speak in generalities, right?

5 LDC [MS. MILLER]: I am going to refer to the ORBs, but just
6 for parties and the commission.

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

8 So 0900 we'll take that up. And then after all that is
9 concluded, we'll come back to 680 closed session. And that's all we
10 have on the agenda tomorrow: 690 ----

11 TC [CAPT STINSON]: You honor ----

12 MJ [COL FITZGERALD]: ---- 690C, and 680.

13 LDC [MS. MILLER]: At one point yesterday a member of your
14 staff told me that perhaps AE 599L was tentatively scheduled for
15 tomorrow.

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

17 MJ [COL FITZGERALD]: And it's just a discussion, the 599L,
18 right? So is that you, Commander Bartholomaeus? And I think I said
19 your rank right this time.

20 DC [CDR BARTHOLOMAUS]: Yes, sir, you did, on both counts.

21 MJ [COL FITZGERALD]: So that's you? So you'd be prepared to
22 have that discussion?

23 DC [CDR BARTHOLOMAUS]: Yes, sir. Prepared to go whenever.

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1 MJ [COL FITZGERALD]: Who has 599L for the government?

2 Mr. Wells?

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

4 MJ [COL FITZGERALD]: Okay. Just be prepared tomorrow if we
5 can get to it. I'm trying to keep us on schedule and I appreciate
6 the parties' endeavors. I know it's only Tuesday and it's already
7 been two long days, so we will keep charging forward.

8 Please go home safely between rains -- raindrops. And I
9 will see everyone tomorrow on the record at 0900.

10 The commission's in recess.

11 **[The R.M.C. 803 session recessed at 1754, 21 April 2026.]**

12 **[END OF PAGE]**